U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

OFFICE OF PROCEEDINGS

MICHAEL C. SULLIVAN, Complainant	)	
v.	)	CFTC Docket No. 98-R164
VANCE GERALD HAHN, SUMMIT COMMODITY BROKERAGE, and IOWA GRAIN COMPANY, Respondents	)	

INITIAL DECISION AND REPARATION AWARD[1]

Background: In this hotly contested reparations proceeding, complainant Michael Sullivan alleges a broad variety of misdeeds by respondent Vance Hahn that can be sorted into two general categories: first, that Hahn failed to place trades properly (and made unauthorized trades) in Sullivan's account during the week of trading prior to the account's liquidation, and second, that Hahn failed to disclose material facts to Sullivan in connection with the events leading to the liquidation itself. Respondents denied all allegations of wrongdoing.[2]

The following decision is based primarily on the oral testimony of the parties during the day-long oral hearing. The written submissions of the parties, almost all of which has been submitted by complainant Sullivan, fill four volumes of the record and contains encyclopedic

[1] Extensive efforts to mediate a settlement between the parties ultimately proved fruitless. None of the conversations associated with the settlement negotiations, or the reasons stated by each side in support of its respective position, has played any role in evaluating the evidence in the case.

[2] Sullivan originally named only Hahn and introducing brokerage Summit as respondents, and chose not to name Iowa Grain, Summit's guarantor, because he had signed the customer agreement that included a clause absolving Iowa Grain of liability for any wrongdoing other than its own in executing orders (Addendum to complaint July 1, 1998; *see* ¶ 19 of Customer Agreement attached thereto). Some eight months after he made this decision, however, the CFTC issued two cases ruling that such "hold harmless" clauses are contrary to public policy and therefore void and unenforceable. *See Clemons v. McCabe*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,537 (CFTC Jan. 29, 1999), *and Violette v. First American Discount Corporation*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,563 (CFTC Feb. 24, 1999). The parties were notified of these decisions, and Sullivan was given an opportunity to amend his complaint to name Iowa Grain (Notice dated March 18, 1999). He did so on March 24, 1999 (including a new charge, an alleged "invalid fill" of one of his orders; *see* discussion in text at pages {{{{{{{{{j}. The complaint was served on Iowa Grain, which filed its answer on July 1, 1999.

amounts of information, but little of this material is as probative of wrongdoing as Sullivan believes. He has expended great amounts of time and energy annotating scores of written records from trading tickets to telephone records, all in a passionate effort to show either that respondents deceived him or that they are attempting to deceive the Judgment Officer. In general, no detail of any transaction, letter, or document has been too small to escape Sullivan's scrutiny and forceful argumentation. However, Sullivan's righteous indignation aside, the documents in this case in fact fail to provide a Rosetta Stone that would unravel the mystery of which side is correct. The documentary evidence has meaning only in the context of whose testimony is to be believed about the conversations associated with each trade.

The central issue determined herein, therefore, is whether Sullivan or Hahn is telling the truth regarding whether, and if so why, the trading in this account deviated from Sullivan's trading instructions. In most respects, it has been determined that Sullivan's testimony is too internally contradictory and unreliable to have credibility regarding his allegations of trading improprieties. However, it is also concluded that Sullivan's testimony is more credible than Hahn's with regard to the allegation that Hahn omitted disclosing material facts in connection with the trade that occurred when Sullivan's account was under a margin call.

Sullivan's "scalping" strategy: The gravamen of Sullivan's complaint is that Hahn failed to follow Sullivan's instructions in placing trades in the account (26, 29-30).[3] Sullivan opened his account with Hahn in order to engage in day-trading in futures only.[4] According to Sullivan (46, 48-51; *see also* June 17, 1998 complaint narrative at page 3), he was interested in opening an account following a strategy by which he would take advantage of intra-day market moves through the use of 3-point trailing stops: if the market moved favorably, he would be protecting his profits. Moreover, Sullivan planned to use "reverse stops" that were intended to take a position the opposite direction if his stop was hit (56-58). Allegedly, he would never be holding positions overnight (61). Sullivan contends that Hahn agreed to provide the trading services necessary to implement this strategy and portrayed himself as able to protect Sullivan's account from losses (49, 55), but Hahn improperly carried it out and disregarded Sullivan's instructions.

As described by Sullivan, Hahn's authority did not include discretion to trade the account by initiating any position without advance approval from Sullivan (30, 44). On the other hand, Sullivan stated that he placed the three-point stop orders at the same time that he placed the orders to initiate a position (51-52).[5] Hahn thus was authorized in advance to "automatically" make the trades necessary to lock in any profits (52). Sullivan was "very clear on" market volatility and the

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[3] Numerical references within parentheses are to page numbers of the transcript of the telephonic oral hearing held September 24, 1999.

[4] Sullivan was leery of options trading. He testified he believed he had more protection, and more ability to lock in profits, through futures because of the markets used for futures trading (45-46). He did not appear to know that options are exchange-traded in the same manner, and, apparently thinking of dealer-granted options, believed he would be subject to unfair pricing practices by an option grantor (46-48).

[5] Each point in the wheat and soybean contracts traded by Sullivan is worth $50.00 per contract (216). Thus, a three-point stop was intended to protect against more than a $150.00 loss per contract.

risks of futures trading (55), and he knew that a three-point stop order did not guarantee that a loss would be limited to that amount (56). When it was pointed out to Sullivan that his strategy could have required Hahn to reverse positions many times in one day if the market kept going up and down and up and down, stopping him out and triggering repeated reversals, Sullivan said, "That was the strategy" (58), and said it was to occur "as many times" as the market reversed (58-59). All of those orders were to have been based on just a single conversation in the morning between Sullivan and Hahn (57-58).

According to Hahn, he spoke with Sullivan several times before the account was opened about the "scalping" strategy Sullivan was proposing (Answer page 3). He testified that in each conversation he warned Sullivan "many times" that a retail customer was unlikely to be successful trying to scalp the market (119-120). Sullivan, however, insisted on that strategy, disregarding Hahn's strong warnings that scalping was seldom profitable for a retail trader (124).[6] Hahn testified that Sullivan did not follow his own trading strategy and issued conflicting trading orders with virtual disregard of the original day-trade/three-point strategy (120, 124-125). He contends that he placed all orders as instructed by Sullivan and that Sullivan made all the decisions to hold positions overnight (125). According to Hahn, Sullivan never voiced dissatisfaction with any trading until the day of the liquidation (136).

Trading results: In a series of trades, Sullivan's trading lost money on every single transaction over six trading days.[7] The account statements attached to the complaint (Exhibits 4A through 9A contain the daily confirmation statements for April 14, April 15, April 16, April 17, April 20, and April 21, respectively) show that Sullivan's account never followed his planned strict trading guidelines. The account was opened on April 13, 1998, with $5,000 and trading began on April 14 with a two-contract short position in soybeans. That position was held overnight, despite the original plan not to hold any positions overnight (Exhibit 4A).

Sullivan's testimony about the first day of trading illustrates the types of inconsistencies and illogic that characterized his testimony in general, leading to the conclusion that as a general matter his testimony about the trading is not convincing or credible. The trading confirmation statement attached to the complaint (Exhibit 4A) contains Sullivan's notations that he was in soybeans overnight and that Hahn disregarded an order to close. Sullivan was asked to explain any dissatisfaction with Hahn's performance in carrying out instructions (60*ff.*). He said initially that Hahn did the first trade properly (60), but when on to state that Hahn had disregarded the order to exit the position on the close (61). As evidence, he read his own notation from Exhibit 4A (62). Pressed as to why he was satisfied with the first transaction if he believed Hahn had disobeyed his

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[6] When asked if he was comfortable with an account opened to scalp the market despite Sullivan's flagrant disregard for the disclosed bleak prospects for success, Hahn claimed that from the beginning he "opened the account with the realization that it would be an account that the I's would have to be dotted and the T's would have to be crossed. And I believe that is what I've done" (121). Asked immediately thereafter whether he had made any notes at the time the account was opened about how Sullivan was ignoring his "many" warnings, Hahn admitted that he did not make even a single note in his broker file or send a confirmatory letter to Sullivan (122-223).

[7] Occasional contracts may have shown a profit while still held, but in all cases Sullivan's positions netted out at a loss.

order to liquidate, Sullivan finally admitted that he agreed to keep it open because Hahn was "convincing me" to do so (63). He claimed that Hahn acted with "undue influence" but he did not elaborate upon that term (*id.*). Immediately thereafter, however, Sullivan reverted to a simple claim that Hahn did fail to execute the order to close (64).

Thereafter, Sullivan continued to insist that he had never agreed to leave his contracts on overnight (64-67), although this was pointed out as inconsistent with the notion of having been satisfied with Hahn as a broker (67). Asked why he kept trading with a broker who violated his very first instruction to liquidate a position, Sullivan vaguely stated that the reason was "very obvious" because he was "in the market to make money" and it was just his first day (*id.*). Asked to explain his comment, Sullivan stated that since his open position had been profitable at the close on April 14 (*see* Exhibit 4A), he felt good about the strategy of keeping the position open to make money (68). To pinpoint whether an order had been placed and disregarded, or whether Sullivan had changed his mind for whatever reason, Sullivan was asked if he thought when he went to bed on the 14th that he was in or out of the market (69). Sullivan replied, "Oh, I thought that I was in profit, sir, and in the market I believe at that time when I was--" (*id.*). He was specifically asked if he thought Hahn was "right" and Sullivan said, "In a sense, yeah, in a sense, yeah" (*id.*). Sullivan then stated that he and Hahn had "conversed" and that Hahn "was convincing [him]" to stay in the market, but Sullivan remained insecure about doing so and told Hahn that he "wouldn't be able to sleep if [he] was in the market" (69-70). Sullivan then denied that Hahn had convinced him to stay in the market because Sullivan was "insecure" and, in an example of Sullivan's many *non sequiturs*, resorted to trying to demonstrate how the conversation was very short (71).

In view of the continued vacillation between testimony that there was a definite order that was disregarded and the testimony indicating that perhaps Sullivan had reluctantly changed his mind at Hahn's urging, Sullivan was asked to "unequivocally" state whether he placed an order to close out the beans (72-73). He first commented again on the short conversation where Hahn "was convincing [Sullivan] to hold the position" but thereafter stated that at the end of the conversation his very last comment to Hahn was an order to close the beans in pursuit of the original strategy (73-74).

Once Sullivan's story was finalized as establishing his view that he gave a definite order, he was examined with regard to what his reactions were when he found out the next morning that Hahn had blatantly disregarded that order by keeping him in the market (74-75). Again, obtaining a straight answer was akin to pulling teeth. Sullivan was asked several times if he was upset that Hahn had disregarded his instructions (74, 77, 79), and he said that he had not been upset – "nothing" Hahn had done had upset him at that point (80). Asked to elaborate, Sullivan explained that he had developed a "confidence" in Hahn (81).

Although profitable at the time of the close on the 14th, during trading on April 15 the 2 short soybean contracts lost value as the price rose over 4 points, and they were offset at a loss of $462.50 (Exhibit 5A). Sullivan stop/reverse order actually was to go long 4 contracts, resulting in a two-contract long position as dictated by his "reversal" strategy (83-84; Exhibit 3A). The long position itself was offset later that day after the market rose, resulting in a profit of 3½ points, or

$350 (81). Because of commissions ($35 per contract on each side) and fees, the final result of the soybean trading on April 14 and 15 was a net loss of $395.22 (Exhibit 3A).

Asked if he objected to anything Hahn did on the 15th, Sullivan said he was unhappy with Hahn's failure to place a trailing reverse/stop on the long soybean contracts (83). Since he had ended up with a 3½ point profit, Sullivan was asked what was wrong with what Hahn did, and how exactly he was hurt (84). Sullivan contended that a trailing stop should have been placed, and, apparently confused, inexplicably said it should have been at 6.33½, or two points (85).[8] Since he took the long position at 635½, Sullivan was asked how he was harmed since he liquidated at *6.39* instead, and he corrected the point where the trailing stop was to have been to 6.37½ instead (86). Still, he made a profit greater than that, so he was again asked what he was objecting to (86-87). Sullivan then stated, in total contradiction of the fact that this entire line of questioning that stemmed from his assertion that this trading was what he *objected to* about Hahn on April 15, that he was "very satisfied" with the soybean trading result (87). Asked about that discrepancy, Sullivan stated that he was dissatisfied with Hahn's alleged failure to properly place the stop order, but that he was not hurt by the result (88).

On April 15, Sullivan also initiated a 4-contract long wheat position that would be held overnight to April 16 (Exhibits 5A and 6A). By the close, that position was up 1¾ points, or $350 (Exhibit 5A; 88). The long position was exited, and reversed, on Thursday, April 16, when 8 contracts were shorted at a price ½ point below his entry point on the 15th (Exhibit 6A). After commissions and fees, the net loss on the 4 long wheat contracts was $382.72 (*id.*). The new 4-contract short position was then held overnight, and was showing a 1¾ point loss by the close on the 16th (*id.*).

Unsurprisingly, Sullivan contends that he had ordered the long wheat position liquidated at a profit with a market order in the morning of April 15 (Exhibit 5A; 89-90). When he called after the closing, he found out that it was still open and he was unhappy (91). However, despite the fact that Hahn had now violated orders in all three series of transactions, Sullivan did not terminate their relationship because he had made money on the second reversed soybean trades (92). He could have ordered his positions liquidated after the close on April 15th (when the wheat was showing a profit) and closed his account with an overall loss of less than $200 if he was dissatisfied with Hahn (93), but he did not do so. Sullivan admitted, however, that by this time he was "starting to get upset" (93).

Also on April 16, Sullivan re-entered the soybean market, making a day trade of 2 contracts initiated as a short at 6.38 and liquidated at 6.40¾, resulting in a net loss of $416.36. According to Sullivan, the short soybeans at one point had fallen to 6.36 and should have been liquidated then, at a gross profit of $200, or a net profit of about $60 (Exhibit 6A).[9] An undue portion of the hearing

[8] This is the first time Sullivan's testimony explicitly admitted to a deviation from the three-point strategy he allegedly began with only the day before, and tends to confirm Hahn's testimony that Sullivan's stop orders varied all over the board from that strategy (120).

[9] As with the trading discussed in note 8, Sullivan's figures show a departure from the allegedly strict strategy with which he began.

was spent examining Sullivan's confused contentions regarding the trading that day (93-156). That testimony will not be separately reviewed here in detail because it was even more unconvincing and unreliable than his inconsistent testimony about the prior two days.[10] By that point in the hearing, it was becoming very clear that Sullivan's objections to that trading, as with all the others, stem more from having lost money due to his own whip-sawing trading strategy more than to Hahn's disregard for Sullivan's orders.[11] The same conclusion has been reached with regard to Sullivan's objections to the trading on April 17 and April 20.

Credibility discussion: Because of his great inconsistencies and vague generalities, it is simply not possible to find Sullivan credible with regard to any of his testimony about alleged trading violations. In general, Sullivan contends that each day of trading ended with trading by Hahn that was in some fashion different from, and sometimes exactly the opposite of, the instructions Sullivan had given him. It just so happens that the result of each trade was negative, too, so a sidelight of Sullivan's charges is that if Hahn had followed Sullivan's wishes as expressed in this trading-by-hindsight, all the trades would have been significantly profitable. Sullivan acknowledged throughout the hearing that he knew the results of the trades, and he claims that he instructed Hahn each day not to disregard his instructions again, but Hahn allegedly defied those orders. The undersigned expressed substantial doubt about whether it was likely that Sullivan would have continued trading with Hahn if he had lied and caused losses, but Sullivan insisted that he trusted Hahn because of their continued discussions and Hahn's apparent understanding of Sullivan's trading goals.

Therefore, it is concluded that Sullivan has not provided sufficient credible evidence to carry his burden to demonstrate that Hahn repeatedly disregarded trading instructions and that Sullivan continued to trade with him despite broken promises to follow instructions. Among other things, such a docile approach by Sullivan would appear to be so out of character as to be almost unimaginable: Sullivan's reactions in this proceeding suggest that passive acceptance is not likely to be among his reactions to the type of stress that Hahn's alleged lying and gross neglect would have created.[12] Although it is conceivable that Sullivan has changed his personality from when he

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[10] Difficulties with the testimony's reliability were expressed throughout the hearing and further review has not found the evidence any more probative.

[11] This conclusion is based in part on the extensive reliance Sullivan placed on exchange records for April 16, arguing that time and sales reports demonstrated that Hahn should have placed reverse stops at various prices. *See, e.g.,* 108-112. Had Sullivan opened a discretionary account, he could perhaps challenge Hahn's failure to repeat orders as many times as envisioned by Sullivan, but it was simply unrealistic for Sullivan to expect Hahn to execute order after order after order, initiating trades every time the market moved by an amount Sullivan later discovered minimally would have triggered his stops. Since Sullivan was changing his stop levels constantly, Hahn was not under a duty to perform under some overriding 3-point rule.

[12] During one early telephone call with complainant, he became so agitated in talking about respondents' attorney arguments that he was literally screaming so hard as to cause distortion in the telephone (tape recording in docket tab 16). A protective order forbidding contact among the parties was issued when it was determined that complainant had called respondents' offices and, among other things, made abusive comments accusing one of respondents' attorneys of engaging in some form of goddess-worship, apparently the result of complainant's Internet research that discovered a poem written by someone with a similar name. Respondents acknowledged

was trading with Hahn, such a drastic change seems highly unlikely here, especially since Sullivan's own testimony about challenging authority demonstrates that he is an independent and strong-willed man who has spent a lifetime rebelling against any injustices he might perceive (*cf.* 314*ff.*). The continued relationship between Sullivan and the broker who allegedly violated instructions is suggestive that Sullivan did not at the time believe Hahn was acting in total disregard as now charged. Furthermore, although Sullivan's approach to the case was labyrinthine and tedious, there is no question but that it demonstrates that he was fully capable of evaluating adverse trading results and taking corrective action at the time if his broker actually was lying to him and causing trading losses.

Although not crucial, it is also significant that Sullivan essentially refused to provide information regarding both his education and his litigation history, obstructing clearly relevant areas of inquiry that would help evaluate his claims of reliance (310-330). In a mysterious turnabout, Sullivan (who described himself as self-employed in marketing and business, 313) claimed first to have experience in litigation and eagerly offered to discuss cases he had been involved in since the age of 19 (256-257), but then he refused to answer the question when later asked (314). Directed to answer the question, Sullivan hedged and reluctantly vaguely referred to claims he had pressed, but failed to provide details (315-317). Credible witnesses do not generally display that level of suspicion regarding ordinary background questions.[13]

Alleged "bad fill": Sullivan makes an additional allegation against Iowa Grain that is separate from the issues associated with Hahn's alleged failures to follow Sullivan's orders (*see* Sullivan's March 24, 1999 submission and documents attached thereto as Exhibit A11). The issue consumed nearly thirty pages of the oral hearing transcript (*see* 162-191) as Sullivan attempted to prove that Iowa Grain gave him a "bad fill" on a trade executed on April 20 as shown by the clearing corporation trading register he had subpoenaed (Exhibit A11 at page 9; *see also* 162, 166, 169, 175, 180). The issue arose because of an time-bracket letter designation on the trading register that did not appear to match the time on the trading ticket (181-182), although the time and sales report was found to show that the trade was executed at the prevailing price when the ticket was stamped (180) and the register itself had the correct time of the trade in the very next column (183). Sullivan argued that it must be a "make-up" trade to create a false order trail (184), and that the

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during the hearing that once the protective order was issued, no improper conduct occurred (*see* 11-13). However, Sullivan has pressed several times for sanctions against respondents and their attorneys for alleged bad faith in the case and for other undefined improprieties (submissions of June 3, 1999; March 24, 1999;

Unless dissolved by the Commission, the order forbidding contact remains in effect. Thus, the parties should continue to conduct themselves as subject to the terms of the order. Any future settlement initiatives, or eventual efforts to coordinate payment of the reparation award made herein, assuming the decision withstands appellate review, should be accomplished in writing or messages exchanged through the assistance of the Commission's Proceedings Clerk.

[13] Sullivan also was suspicious of the Judgment Officer, and made a number of suggestions that he was being subjected to bias, but he was unwilling to formally move to disqualify despite being informed that the consequences of not raising the issue might include a conclusion he had waived it (*e.g.*, 257). Another point tending to undercut Sullivan's credibility was his claim that even though Hahn began to act catatonic and to demonstrate "dementia" (192), Sullivan still continued to trade with him (193-196).

trade was out of sequence (185), but he never could show anything other than a discrepancy in record-keeping that was "never reported" to him (*id.*). Although Sullivan argued that the exchange itself considered the trade a "bad fill" it became clear that was only his inference from reading exchange rules and that he had no evidence the exchange had ever done so (186-188, 190). Ultimately, after a ruling that the issue was without merit in light of the lack of any damages flowing from the alleged discrepancy (183), Sullivan was directed to drop the issue – and, when he continued to interject numerous comments to further argue the matter, finally was warned that his participation in the hearing would be terminated if he failed to drop it (186, 187, 188, and 190).[14]

Upon review of the record since the hearing and further consideration of the transcript, it is found that there is no reason to disturb the conclusion reached during the hearing that the alleged "bad fill" allegation is entirely without merit for the reasons reviewed above.

Failure to disclose margin call: It is a different story entirely with regard to the final day of trading. The charge of failing to disclose material facts stems from the circumstances surrounding a trade Sullivan made on April 21, 1998. Both sides agree that Sullivan and Hahn had arranged to talk about the account on the afternoon of April 20, when Sullivan's account had fallen in value to $1,878.22 and he had open a position in 2 short soybean contracts showing losses of $350 (Sullivan testimony at 336-337; Hahn's Answer Time Log for April 20 @ 1:10 p.m.; Exhibit 8A). That open position led to a margin deficit in Sullivan's account of $821.78 even though his account value was still positive (Exhibit 8A). A margin call issued by Iowa Grain and mailed to Sullivan (received six days later) called upon him to deposit $475 in additional margin to continue trading (213).

According to Sullivan, he waited for Hahn to call him that afternoon, but Hahn did not do so (157, 159, 191*ff.*). Sullivan claimed to be very confused about the status of his positions in the account at this time (160), and he was relying on Hahn to give him information because he did not have Internet access to current prices (Complaint narrative at page 3; transcript at 160). When he called the next morning at 9:21 a.m., Hahn was not available, so Sullivan spoke with Hahn's wife and placed an order to take an additonal short soybean contract (341). That order left Sullivan three short soybeans (Exhibit 9A).[15] Sullivan testified credibly that he never knew the margin status of his account until after he was liquidated (*e.g.*, 343) and contends that Hahn violated his fiduciary duty by failing to keep him informed of his account status.

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[14] The trade also was one that Sullivan challenged as having been unauthorized by him (189), but as noted above, the allegations of unauthorized trading have been rejected.

[15] During the hearing, when it was determined that a liquidation of one existing short position would have taken care of the outstanding margin call (217), it was determined that the damages associated with the alleged failure to disclose would consist of any losses suffered in one existing contract that would have been liquidated, and all losses in the new contract that increased complainant's losing position. The losses from these contracts were approximately $1,121 and the parties were informed that this would be the measure of damages if failure to disclose was found (215-217). Respondents, as noted in the text, attempted to rebut the presumption of reliance, but they did not provide a different calculation for damages if the reliance issue went against them.

According to Hahn, he called Sullivan at the time of their appointment on the 20th but Sullivan said he was leaving and would not be able to talk that afternoon so he would call back in the morning (Time Log for April 20 @2:27 p.m.). Hahn testified that he did not inform Sullivan of the margin deficit at that time (201). The following morning, he claimed, he did tell Sullivan about the call in the 9:26 a.m. conversation (205), but his initially assertive testimony on these points was undermined severely when he was forced to admit he did not recall the particulars of what he told Sullivan. For this, and more disturbing, reasons, Hahn's testimony is rejected as unreliable.[16]

Much of respondents' defense on the issue of margin has focused on the issue of reliance, with attention to two arguments: first, that Sullivan already must have known his margin status and therefore the nondisclosure did not keep information from Sullivan (369*ff.*), and second, that Sullivan would not have changed his trading had he known the true margin status. As to the first, the argument by respondents is belied by their own inability to figure out what Sullivan's margin status was – despite several attempts, respondents themselves were confused why he had a margin call of $475 in an account undermargined by over $800 (369-373). Moreover, Hahn himself finally admitted he would not have known the actual margin status until he arrived at the office on the morning of April 21 and received a printout from Iowa Grain (357); contrary to respondents' view, Sullivan – without access to ongoing prices and closing trading results – was not under a greater obligation than they were to update his margin status in his head. Finally, of course, the fact is that

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[16] Hahn and his counsel may have improperly invited the Court to draw inferences that they knew were unfounded by presenting misleading testimony during the oral hearing. The answer filed by respondents stated only that Sullivan was sent the computer-generated margin call (attached to the complaint) but did not address whether Hahn himself personally informed Sullivan of the deficit prior to the afternoon demand for funds that led to the account liquidation (Answer at 4-5; *see* transcript at 197). Asked if indeed he had done so, Hahn testified that he would have told Sullivan of the margin deficit on April 20 in the afternoon conversation if Sullivan had kept their appointment to talk (198-199). He then affirmatively testified that he told Sullivan of the margin call, but not the exact amount, on April 21 during their 9:26 a.m. conversation (199). When the Judgment Officer pointed out that Hahn's otherwise detailed notes about the telephone call did not include any notes about a margin deficit, Hahn changed his testimony to a claim only that he told Sullivan that his *new* positions would result in having to post margin or liquidate by the end of the day (200).

At the end of the hearing, Hahn's attorney sought to have Hahn clarify whether he discussed margin with Sullivan on the afternoon of April 20 (357-367 generally). Referring to his testimony that on April 20 he had *not* informed Sullivan of the margin deficit (*see* 199, 201), Hahn now claimed that his prior testimony was based on incomplete recall (362). A review of his notes (presumably with the help of counsel in the intervening two hours or so) now helped him recall that yes, indeed, he discussed "margin risk" with Sullivan (363-365). His attorney immediately changed the wording by asking whether that meant he had "to a certain degree" discussed "the issue of margin" with Sullivan, and Hahn answered, "Yes" (366). Again, however, questioning by the undersigned elicited an admission from Hahn that he could not say whether he had discussed the actual undermargined status of the account (366).

In both cases, had follow-up questions not been asked by the undersigned, Hahn's initial statements suggesting that he informed Sullivan of the margin call or the account's margin status would have left unfounded inferences to be drawn from the record. In fact, Hahn was forced to admit when pressed that he had no memory of doing so in either instance that he had implied. Although Hahn's eventual candor helped to clarify the issue, testifying as if one's recall is certain about events that in fact *are not remembered* is different only to the slightest degree from affirmatively presenting false testimony. A party's – or attorney's – presentation should not require judicial intervention to avoid creating patently distorted impressions – in this case, that the witness remembered events when in fact he did not.

the account value on April 20 was still positive at $1,878 – over a third of Sullivan's initial margin deposit (Exhibit 8A). It seems unreasonable for respondents to attempt to place the burden on Sullivan to be able to calculate maintenance and initial margins for overnight and day trading when the formulas for doing so have never been made available and when Sullivan had been trading for a scant week. It also seems unlikely that April 21, when the account had lost money and there cannot be any doubt but that Sullivan was confused, would have been the only time in the history of the account when Sullivan would have increased his exposure in a losing position.

A finding of nondisclosure of a material fact carries with it a burden on respondents to rebut the presumption of reliance. Here, respondents' second argument – that Sullivan would not have changed his trading – is stronger than their first argument, but it finds evidentiary support only in his own testimony in which he stated that he probably would have posted the $475 margin if he had known about the margin call (351). That statement cannot stand in isolation, however, from his prior statement pointing out that he never had the chance to make the decision (350). Avoiding such speculation is, after all, why the presumption exists. Furthermore, the statement only was worded in general terms about keeping the account open in general. Although it is definitely a possibility that Sullivan would have posted the margin to keep on trading the account, there is insufficient evidence to find it more likely than not that he would have posted sufficient margin to keep his existing position and even *more* to initiate the new one.

Hahn did not seem too concerned about the fact that complainant initiated a new position while the account was on margin call (204-207). He contended that the Chicago Board of Trade Rules allows five days to post margin in an existing account (205*ff.; see also* 358-359). This argument is rejected for two simple reasons discussed in the oral hearing: first, the rule by its own terms does not relieve the broker from calling on the customer for margin, and second, the rule does not discuss putting new trades on in an account in which there is an existing unmet margin call. Respondents cannot relieve themselves of a duty to disclose an account's undermargined status by reliance on a rule that clearly addresses when a customer is obligated to take action on information that was never given to him.

Conclusions and Reparations Award

For the reasons stated above, it is determined that complainant Sullivan has failed to carry his burden of proving that respondents committed any violations with regard to the alleged improper trading in Sullivan's account. Therefore, those allegations and the amount of damages as are claimed for Sullivan's trading losses based on alleged improprieties are DISMISSED.

It is found that respondent Vance Hahn knowingly failed to disclose material facts to his customer Sullivan by failing to disclose to Sullivan that his account was on margin call and by accepting and executing additional trades from Sullivan while the account was in that status. That failure to disclose material facts constitutes a violation of Section 4(b) of the Commodity Exchange Act, prohibiting fraud in connection with the acceptance of an order to trade futures contracts, and resulted in Sullivan's losses on the two futures contracts he retained and entered into without

knowledge of the margin status. The following award is based on the amount of damages lost on those contracts (*see* 217).

Violations having been found, respondents Vance Gerald Hahn, Summit Commodity Brokerage, and Iowa Grain Company are ORDERED TO PAY REPARATIONS to complainant Michael C. Sullivan in the amount of $1,121.00, plus interest compounded annually at the rate of 6.197 % from April 21, 1998, to the date of payment, plus $50.00 in costs as the amount paid by complainant as a filing fee. LIABILITY IS JOINT AND SEVERAL.

Dated: March 3, 2000

Joel R. Maillie

JOEL R. MAILLIE
Judgment Officer