



U.S. COM. DITY FUTURES TRADING COMMIS JN

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581

MAI SYMON,

Complainant,

v.

DON M. D'AGOSTINO,  
JAMES WESLEY KOZINSKI, and  
LIND-WALDOCK & COMPANY,

Respondents.

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CFTC Docket No. 97-R023

INITIAL DECISION

Appearances: Mai Symon  
109 Newport Street  
Bayport, New York 11705  
Pro se

Martin Doyle, Esq.  
Joseph Pucci, Esq.  
Attorneys for Respondents  
1030 West Van Buren Street  
Chicago, Illinois 60607  
Don M. D'Agostino,  
James Wesley Kozinski,  
and Lind-Waldock & Company

Before: Bruce C. Levine, Administrative Law Judge

Overview

With discovery completed, oral hearing in this matter was set for August 15, 1997.<sup>1</sup> By notice dated July 15, 1997, complainant

<sup>1</sup> Order Setting Time And Place Of Oral Hearing, dated June 18, 1997.

FILED

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OFFICE OF PROCEEDINGS  
PROCEEDINGS DIVISION

Mai Symon informed the Court that she would not attend or otherwise participate.<sup>2</sup> Subsequently, respondents Lind-Waldock & Company, Don M. D'Agostino and James Wesley Kozinski, through their counsel, filed a motion to dismiss the Complaint.<sup>3</sup>

For just cause, the Complaint is hereby **DISMISSED**. Dismissal is warranted for two reasons. First, since Symon's case turns wholly on her credibility, respondents correctly argue that they are prejudiced by Symon's refusal to submit to cross-examination.<sup>4</sup> Additionally, Symon's contentions are implausible, contradictory, and unsupported by her written submissions. Without more, her pleadings and evidence fail to sustain any charge of wrongdoing or support any claim in reparation. This second reason for dismissal is discussed below.

### Discussion

#### **Background**

Mai Symon commenced this proceeding by filing a reparation claim with the Office of Proceedings on December 24, 1996. When filing the Complaint, Symon elected that the case be adjudicated as

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<sup>2</sup> Notice Of Intent [Not] To Participate In The Oral Hearing; and Complainant's Second Demand For Production Of Documents, dated July 15, 1997. Based on Symon's refusal to attend, the Court canceled the scheduled hearing. Order Canceling Oral Hearing, dated July 22, 1997.

<sup>3</sup> Motion To Dismiss, dated July 28, 1997.

<sup>4</sup> Id. at ¶1.

a formal decisional proceeding.<sup>5</sup> The Complaint alleges that respondents Lind-Waldock, D'Agostino and Kozinski violated the Commodity Exchange Act by engaging in unauthorized trading and other improper activity. On the reparation complaint form, Symon lists her out-of-pocket losses as \$160,000.00.<sup>6</sup>

Respondent Lind-Waldock is a futures commission merchant with its principal place of business in Chicago, Illinois.<sup>7</sup> During all relevant periods, respondents D'Agostino and Kozinski were registered associated persons ("APs") with Lind-Waldock. Both D'Agostino and Kozinski reside in the Chicago suburbs.<sup>8</sup> Respondents' joint Answer denies Symon's allegations of wrongdoing and raises the affirmative defenses of ratification, estoppel, mitigation, and that the statute of limitations ran on several claims.<sup>9</sup>

Complainant Mai Symon is 67 years of age, is a graduate of Hunter College, and lives in Bayport, New York. She is a former "office temporary," who has been retired for 15 years.<sup>10</sup>

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<sup>5</sup> 17 C.F.R. §§12.25(a)(3), 12.26(c), and 12.300-315. The formal decisional proceeding provides for an in-person hearing. 17 C.F.R. §12.312.

<sup>6</sup> Complaint Form at ¶5.

<sup>7</sup> Answer And Affirmative Defenses Of Respondents Lind-Waldock & Company, Don D'Agostino And James W. Kozinski ("Answer"), dated February 21, 1997 at ¶1.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Complainant's Responses To Lind-Waldock & Co.'s First Request For Production of Documents ("Complainant's Responses To Request For Documents"), dated May 15, 1997 at ¶8; Answer, Attached Exhibit A, Account Application ("Account Application").

In May 1994, Symon became interested in commodities when she received a newsletter that suggested investing in soybeans.<sup>11</sup> Her involvement grew rapidly. On June 10, 1994, she opened a non-discretionary account at Lind-Waldock by transferring \$35,000 in funds from her stock account.<sup>12</sup> About that time, Symon also began to subscribe to several newsletters that provided advice for commodity speculation.<sup>13</sup> In December 1994, Symon opened a second futures account at Star Commodities.<sup>14</sup>

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<sup>11</sup> Complainant's Response To Respondent Lind-Waldock & Company's Deposition On Written Interrogatories, ("Complainant's Response To Interrogatories"), dated May 15, 1997 at ¶6. After receiving the newsletter, Symon sought out a firm to trade commodities. Symon found E.F. Hutton in the telephone book. A broker there recommended that she deal instead with Lind-Waldock, "where [she] would get better commissions than what his company charged." *Id.*

<sup>12</sup> At that time, she indicated that she had an annual income of \$25,000-\$50,000 and a net worth (exclusive of the equity in her home) of \$100,000-\$249,999. Account Application.

<sup>13</sup> As part of discovery, Symon provided examples of her investment newsletters. These include: Dr. Kurt Richebächer, "Yen Must Rise," Currencies and Credit Markets, November 1994 (predicting the yen would strengthen against the dollar); "Gold & Silver," Carolan's Spiral Calendar Research, October 13, 1994 at 4 (predicting that metals would decline in October and November, 1994); "Gold & Silver," Carolan's Spiral Calendar Research, November 14, 1994 at 1-2 ("move to 100% long February gold and May silver futures on any new post-September 27 low between December 2 through 9 in either metal.") (emphasis in original); *Id.* at "Foreign Exchange" at 6 (predicting "a substantial rally in the dollar versus the yen sometime in 1995"); "On Track," Calendar Research's Fax-on-Time, February 23, 1995, (predicting a decline in the dollar against the mark from February 15 into the third week of March).

The newsletters' wisdom comes from a variety of sources. The Richebächer publication purports to rely on historical trends and patterns of financial activity to predict future price movements. The Carolan publications appear to apply a mathematical function to historical trading data to predict future trends. The Carolan newsletters are published "once per moon" for "[t]hose who know when the luna ticks aren't lunatics." Carolan's Spiral Calendar Research, November 14, 1994 at 8.

(continued...)

Unfortunately, Symon's brief foray into futures trading was not a happy experience, as her accounts at both firms lost heavily. At Lind-Waldock, Symon claims that she lost \$160,000 due to respondents' wrongdoing before closing her account in October 1995.<sup>15</sup> At Star Commodities, she claims to have lost another

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(...continued)

Symon claims that she read and understood these newsletters, and that they were a source for her trading decisions. Complaint at 1-3.

<sup>14</sup> Complainant's Responses To Request For Documents at ¶1.

<sup>15</sup> Complaint Form at ¶5. Symon, however, does not explain her calculation. In the Complaint, Symon alleges that she lost \$35,674 in October and November 1994, and \$95,600 after December 5, 1994. Complaint at 7. In her response to a request for an accounting, Symon claims that her Complaint "represents only some of the more obvious misguided losses which resulted from Mr. D'Agostino's and Mr. Kozinski's recommendations." Complainant's Responses To Request For Documents at ¶11.

The Court calculates her damages from the alleged unauthorized and otherwise improper trades to be almost \$145,000:

Realized Losses

October 17, 1994	10,321.60
October 20, 1994	8,821.60
October 26, 1994*	10,464.80*
December 1, 1994	15,643.20
December 2, 1994	491.60
December 22, 1994	24,326.60
December 30, 1994	4,975.80
February 24, 1995	7,105.56
March 6, 1995	27,020.84
March 24, 1995	1,920.28
May 1, 1995	2,800.56
May 11, 1995	11,652.78
May 18, 1995	6,982.64
May 31, 1995	9,388.89
June 2, 1995	2,732.64
Total	<u>\$144,649.39</u>

\*Although not mentioned in the Complaint, this transaction involved the liquidation of a challenged position.

\$120,000, this loss being the subject of a separate reparation Complaint.<sup>16</sup>

It is against this backdrop that the Court considers Symon's Complaint. In general, Symon's claims can be broken down into two broad categories: 1) trades that she alleges were unauthorized; and 2) trades that respondents "recommended" and/or "insisted" that she make.

### **The Unauthorized Trading Claims**

Symon first alleges that several Lind-Waldock trades were unauthorized. Respondents, of course, deny that any orders were placed differently than Symon instructed.<sup>17</sup>

Symon's allegations are undermined by both the circumstances of her trading and the incredulity of her testimony. As such, the record much more strongly supports the contrary conclusion, that the challenged trades -- albeit ultimately unprofitable -- were in fact executed in accordance with her instructions.

To begin with, Symon's only protest concerning these trades has come in the form of the instant reparation Complaint, which was

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<sup>16</sup> See Symon v. Fullet, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,728 (CFTC June 25, 1996), affirmed in part and remanded, slip op. (CFTC Docket No. 95-R110), dated August 7, 1997 at 2 ("Symon's [Star Commodities] account statements show that she invested \$70,000 in late December 1994 and another \$50,000 in January 1995 .... Her account traded actively for the next four months and closed with a small debit balance in May 1995. More than 150 trades were executed during that time, and Symon alleges that a substantial portion of these trades were either unauthorized or intentionally designed to make her lose money.").

<sup>17</sup> Answer at ¶5.

filed over two years after all but one of these trades were liquidated. In contrast, Symon filed her reparation Complaint against Star Commodities almost immediately upon incurring her losses in that account.<sup>18</sup> In fact, it was not until after she had received a partially favorable Initial Decision on her claims of unauthorized trading in her Star Commodities account<sup>19</sup> that Symon turned her attention to drafting a Complaint against Lind-Waldock.<sup>20</sup>

How does Symon explain this long delay in discovering Lind-Waldock's allegedly unauthorized trades? Not very plausibly. She admits to receiving daily and monthly account statements and to understanding them when read.<sup>21</sup> While Symon concedes that she initially read her statements, she claims to have stopped doing so. Why? Symon says that she stopped examining the statements because she had little interest in tracking the results of her individual trades as long as she knew that her overall account balance was

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<sup>18</sup> Symon filed her Complaint against Star Commodities in June 1995, only one month after closing her account with the firm. Slip op. (CFTC Docket No. 95-R110) at 1.

<sup>19</sup> Symon v. Fullet, ¶26,728, affirmed in part and remanded, slip op. (CFTC Docket No. 95-R110) dated August 7, 1997.

<sup>20</sup> Transcript of Prehearing Conference ("Tr."), dated June 18, 1997 at 7.

<sup>21</sup> Complaint at 1-2 ("Upon looking at my October 1994 statements I am shocked to find that I am holding long 30 contracts of silver from October 10 and 11, 1994 .... Then my statement shows I bought 10 contracts of silver on October 18, when I'm still stuck with 20 silvers long from October 10 and 11.") (emphasis added).

The account statements detail the price at which the contracts were purchased, the commission and fees charged, and the profit or loss realized when the contracts were liquidated.

positive.<sup>22</sup> Yet, at other times, she appears to contradict herself on this point.<sup>23</sup> Although Symon asserts that she was not aware of the "full extent" of her damages until she prepared her Complaint in December 1996,<sup>24</sup> it is difficult to believe that a woman so

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<sup>22</sup> Claimant's Replies To Respondent Lind-Waldock & Company's Request For Admission Of Facts And Genuineness Of Documents, ("Claimant's Replies To Request For Admissions"), dated May 15, 1997 at ¶9 ("In the beginning I did open the mail upon its receipt, but as time went on I fell behind and I did not examine the statements at all. I relied on my account balance and as long as it didn't shrink unexpectedly I believed my orders had been filled to my benefit."); Tr. at 9-11 ("As long as I would ask the person who answered the ... desk how much money is available, and as long as it looked like I had money, I was satisfied. ... [T]hat was my main concern is I wasn't looking at the nitty gritty of these things.").

<sup>23</sup> Tr. at 11 ("I would write it down, what I'm ordering, and a few minutes later they would call me that the order went through the way I ordered it, I took it for granted that it was so, and then, later on, whatever, weeks, days later, I would close out that same order when I would see there was a few pennies profit.") (emphasis added).

Symon's claim that she failed to promptly notice the allegedly unauthorized trades is also belied by her competing statements that she in fact authorized their liquidation. For example, Symon alleges that on October 10, 1994, respondents bought 25 silver contracts when in fact she had requested a short sale of the same. She then complains that her instructions on October 18 to partially liquidate this unauthorized position were not properly followed. Complaint at 2 ("Then my statement shows I bought 10 contracts of silver on October 18, when I'm still stuck with 20 silvers long from October 10 and 11. Obviously, the October 18 order was to liquidate the October 10 and 11 contracts which should have been short sales."); see also Complaint at 5 ("Mr. Kozinski recommended that I sell short the Canadian dollar which had made a new low that day and was going up. He placed the order in his characteristic fashion and I wasn't aware of it until I had lost \$2,100 on March 21, 1995, and it was liquidated.") (emphasis added). When questioned about this apparent inconsistency at the prehearing conference, Symon's response was muddled and evasive. Tr. at 12-15.

<sup>24</sup> Complaint at 6; Complainant's Responses To Request For Documents at ¶2 ("When I went to prepare my complaint to the CFTC in December 1996 was the first time that I noticed the series of  
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absorbed in attempting to devise successful trading strategies<sup>25</sup> would be so disinterested in the results as to fail to notice \$47,663.08 in losses due to unauthorized trades.<sup>26</sup>

Indeed, there are other factors that reveal Symon's claims of unauthorized trading to be entirely frivolous. She has no independent recollection of whether or not she ordered the challenged trades.<sup>27</sup> Instead, she purports to rely on her

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\$10,000.00 losses in silver during October and November 1994 trading.").

<sup>25</sup> When asked, at the June 18, 1997 prehearing conference, whether she was "concerned about the trading in [her] account," Symon responded "Yes, I was concerned. That -- I mean, that's what it took all my energy to try to place orders that would be profitable and I just have just so much -- I don't know. I was putting all my energy into trying to find profitable trades...." Tr. at 10.

<sup>26</sup> Symon's alleged unauthorized trading losses include 10 long silver contracts liquidated for a loss of \$10,321.60 on October 17, 1994; 10 more long silver contracts sold on October 20, 1994 for a loss of \$8,821.60; another 10 long silver contracts (\$10,464.80 loss realized on October 26, 1994); 20 long silver contracts (\$15,643.20 loss realized on December 1, 1994); 10 short gold contracts (\$491.60 loss realized on December 2, 1994); 2 short Canadian dollar contracts (\$1920.28 loss realized on March 24, 1995).

<sup>27</sup> At the prehearing conference, Symon claimed to specifically remember placing only one trade, which she confidently identifies as occurring on December 2, 1994. Tr. at 35-36. On that day, she contends that she attempted to place an order to sell short 20 contracts of silver. Complaint at 1. She further alleges that a Lind-Waldock employee informed her that she bought 20 silver contracts and Symon immediately requested that those contracts be closed out. Neither transaction, however, is reflected on her account statements. Symon adds to the questionable nature of her recollections by stating that she remembers listening at that time to a Lind-Waldock tape recording of her voice confirming the trade that she alleges she did not make. Complaint at 1. In any case, this unverified event resulted in no demonstrable injury to Symon.

investment newsletters and her contemporaneous trading notes to identify the unauthorized trades. Neither source supports her claims.

Symon alleges that five long silver positions in October and November, 1994, were unauthorized because newsletters she adhered to recommended exactly-opposite short positions.<sup>28</sup> But Symon does not claim as unauthorized a different set of four profitable silver trades executed against the advice of the newsletters.<sup>29</sup> Since Symon's trading pattern does not systematically conform to the newsletters' recommended trading strategy, the newsletters do not adequately document the manner in which Symon intended to trade.<sup>30</sup>

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<sup>28</sup> Complaint at 1-3. "I was guiding myself with Mr. Carollan's [sic] newsletter, which was projecting in May 1994, that metals were going to be down from September 17, 1994 until December 7, 1994 and his October and November newsletters were very clear about it." Complaint at 2. See also "Gold & Silver," Carolan's Spiral Calendar Research, October. 13, 1994 at 4; and Combined Commodity Statements, dated October 10, 1994, October 11, 1994, October 18, 1994, October 21, 1994, and October 30, 1994. Symon no longer has any notes for this period of trading.

<sup>29</sup> Combined Commodity Statements, dated October 14, 1994, October 19, 1994, November 17, 1994, and November 28, 1994.

<sup>30</sup> Once again, when questioned about this matter at the prehearing conference, Symon's responses were inconsistent. When first asked whether during the period in question she always followed the advice of her newsletters, Symon unequivocally responded "yes." Tr. at 17. When later asked whether the profitable trades made counter to the newsletter were unauthorized, she responded "[y]ou see, I really cannot -- two and a half years ago. I really don't -- I don't recall what I had last night...." Tr. at 18. When pressed further, she became testy. Tr. at 19-21.

Moreover, both her account statements and notes demonstrate the pursuit of many types of contracts outside the scope of her newsletter advice. For example, on November 23, 1994, Symon opened a sub-account devoted to trading in Hong Kong dollars.

Finally, Symon's purported reliance on her trading notes as support for three of her unauthorized trading claims is outrageous.<sup>31</sup> For example, Symon alleges that a December 2, 1994 short sale of gold contracts was unauthorized because the trade is not reflected in her notes.<sup>32</sup> However, subsequent to the prehearing conference, Symon admitted that her notes for December 2 were incomplete.<sup>33</sup>

Worse yet, Symon's notes for other trading days unequivocally contradict the Complaint and confirm that Symon authorized the trades of which she complains. On November 30, 1994, Symon alleges that she wanted to sell short 20 contracts of silver, but instead, 20 contracts were bought.<sup>34</sup> The notebooks, however, indicate: "M Sil 512 X 20 1956."<sup>35</sup> There is no "S" preceding the entry and

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<sup>31</sup> Symon's retained notebook entries do not start until November 28, 1994. For this reason, only three alleged unauthorized trades have corresponding notes. The trades that she claims were not authorized and fall within the period included in her notes are the November 30, 1994 (purchase of silver contracts), December 2, 1994 (sale of gold contracts), and March 7, 1995, (sale of Canadian dollar contracts).

<sup>32</sup> Complaint at 1. ("In my notebook I have no notes on having ordered gold that day..."). But compare Complainant's Responses To Request For Documents at ¶4 (stating with regard to December 2 that she had an entry in her notebook to sell short 40 contracts of gold).

<sup>33</sup> See Notice Of Prohibited Ex Parte Communication From Complainant, dated July 9, 1997 (attaching a letter to the Court, dated July 1, 1997, in which Symon states that "I wanted to tell you that I don't have all the orders that I have placed at Lind-Waldock on [December 2, 1994]. I was so intent, concentrating on how to make a profitable trade, that my notes are not that complete.").

<sup>34</sup> Complaint at 3.

<sup>35</sup> Notebook Page, dated November 30, 1994. Symon explains the key to deciphering her notes by providing an example: "the  
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indeed, 20 contracts of March silver were purchased at 512.<sup>36</sup> The 20 contracts purchased on November 30 were then liquidated on December 1 for a loss. The entry for that date is: "S 20 X M Sil 497 1379."<sup>37</sup> This entry also confirms the account statements for a short sale at 497.<sup>38</sup>

Similarly, Symon's own hand belies her contention that respondents improperly sold two Canadian dollar contracts short on March 7, 1995. Her notes for March 7 indicate within a list of trades that were made: "S C\$ 6994 X 2."<sup>39</sup> The daily statement indicates that two contracts for the Canadian dollar were sold short at .6994.<sup>40</sup> When asked, Symon could not explain why she thought her notes provided support for her case.<sup>41</sup>

In any event (as if the above were not enough), all but one of Symon's unauthorized trading claims -- as well as one of her other

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notation 'S 20 X M Sil 4.99 3551' ... means sell short 20 contracts March silver 4.99 order # 3551." Complainant's Responses To Request For Documents at ¶4.

<sup>36</sup> Combined Commodity Statement, dated November 30, 1994.

<sup>37</sup> Notebook Page, dated December 1, 1994.

<sup>38</sup> Combined Commodity Statement, dated December 1, 1994.

<sup>39</sup> Notebook Page, dated March 7, 1995.

<sup>40</sup> Combined Commodity Statement, dated March 7, 1995. The companion entry for March 24 in her notebooks records the price at which she liquidated the position as that on the account statements. Notebook Page, dated March 24, 1995.

<sup>41</sup> Tr. at 26-33.

trading claims<sup>42</sup> -- are barred by the relevant two year statute of limitations.<sup>43</sup> Indeed, she even concedes as much in her later filings.<sup>44</sup>

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<sup>42</sup> Symon's 10 long Japanese yen position was opened on November 29, 1994 and liquidated on December 22, 1994 for a net loss of \$24,326.60.

<sup>43</sup> Commodity Exchange Act §14(a), 7 U.S.C. §18(a); 17 C.F.R. §12.13.

A complainant's cause of action accrues, and the two year limitations period begins to run, when the complainant discovers the wrongful activity underlying her claim or, in the exercise of reasonable diligence, should have discovered the wrongful activity. Horelick v. Murlas Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,500 (CFTC Oct. 2, 1992); Reinhard v. Ace American, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,375 (CFTC Dec. 23, 1988); Graves v. Futures Investment Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,457 (CFTC June 3, 1982).

Symon has demonstrated no reasonable diligence or other special circumstances justifying her long delay in filing her Complaint. Myers v. E.F. Hutton & Company Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,603 (CFTC Nov. 17, 1992); Reinhard, at 35,617; Jenne v. Painewebber, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,329 (CFTC Aug. 31, 1988); Cook v. Monex International, Ltd., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,532 (CFTC Mar. 19, 1985).

<sup>44</sup> Complainant's Opposition To Respondents' Demand To Dismiss, dated August 8, 1997; Notice Of Intent [Not] To Participate In The Oral Hearing; Complainant's Second Demand For Production Of Documents at 3.

Claims For Other Losing Trades

Symon seeks her money back for a second category of transactions. These are losing trades that, according to Symon, respondents "recommended" and/or "insisted" that she make.<sup>45</sup>

From December 1994 through June 1995, Symon suffered losing trades in an account operated in conjunction with the Lind Plus program.<sup>46</sup> The Lind Plus program provided more comprehensive service than the discount program in which she was previously enrolled. Although the Lind Plus agreement states that a customer

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<sup>45</sup> Complaint at 3-6. At one point she states that "he made me sell" and "urged me to sell." Id. at 6.

<sup>46</sup> On November 29, 1994, Symon placed an order to buy 10 contracts of Japanese yen based on advice from one of her futures newsletters that the yen would rise. Complaint at 3; Complainant's Response To Request For Documents at ¶6. Symon alleges that a Lind-Waldock AP suggested she liquidate these contracts and sell short five more. These transactions resulted in account losses. The 10 contracts of Japanese yen were closed out on December 22, 1994, for a net loss of \$24,326.60. The five contracts of yen (three from December 22 and two from December 27) were closed out on December 30, 1994 for a net loss of \$4,975.80.

On February 15, 1995, Symon alleges that the APs at Lind Plus "insisted" that she sell short 10 contracts of British pound, when her newsletters recommended that she buy the German mark. Complaint at 5. All the contracts were liquidated at a loss. Four of those contracts were closed out on February 24, 1995, at a loss of \$7,105.56, and the remaining six on March 6, 1995, at a loss of \$27,020.84. Symon attributes these losses to the fact that she was advised by respondent D'Agostino to hold on to the contracts. Complaint at 5.

Symon alleges this pattern of activity continued through March and into June, 1995. She claims that Lind-Waldock employees colluded to have her buy treasury bonds only when they would lose money. Complaint at 6 ("Mr. D'Agostino had me buying the T-Bonds [and selling them] losing me money, but he wouldn't tell me when to buy them if there was a chance to make a profit.").

will make all trading decisions, the program provides personal assistance "such as aiding with order placement, providing feedback on market news or trading strategies, or explaining government and economic reports."<sup>47</sup>

Unlike her claims of unauthorized trading, Symon concedes that she in fact ordered the positions as placed. Examination of Symon's notebooks for the trades at issue illustrates that she tracked the prices of these contracts prior to entering the orders directly through to their liquidation. Symon was fully aware of these trades and she never complained about them to respondents during this period.<sup>48</sup>

Symon's loose rhetoric aside, her main -- if not sole -- grievance appears to be that these trades were recommended by respondents and turned out to be losers.<sup>49</sup> Symon, however, was

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<sup>47</sup> Answer, Attached Exhibit D, Lind Plus Customer Agreement.

<sup>48</sup> See Claimant's Replies To Request For Admissions at ¶12.

<sup>49</sup> Symon's assumption is that the Lind-Waldock APs "simply wanted to wipe [her] out financially." Complaint at 6. "I was losing money so fast, it seemed uncanny how any experienced broker with the advantage of being where the action was could accomplish it...." Id. See also Complainant's Second Demand For The Production Of Documents at 2 (contending that respondent Kozinski "maliciously set me up ... just to make me lose money.").

Symon suggests no reason to believe that respondents would seek to ruin her. See Lehoczky v. Gerald, Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,649 at 43,717-43,718 and n.36 (CFTC Apr. 2, 1996) (discussing "absence of motive" to "gratuitously antagonize [] good customers"). Nor does she suggest how respondents would set about effectively to accomplish such an evil objective. See In re Staryk, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,701 at 43,931 n.96 (CFTC June 5, 1996) ("outcome of speculative investment is unlikely to significantly outperform [or underperform!] chance").

clearly on notice that futures and options speculation is risky,<sup>50</sup> and could not identify any coercive conduct or false promises by

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<sup>50</sup> Symon signed a customer agreement acknowledging that she read and understood the futures and options risk disclosure statements provided. Answer at ¶3 and Attached Exhibit B, Customer Agreement. She also signed a letter that emphasized the risks involved in futures trading. Answer at ¶3; and Attached Exhibit C, Letter From Richard Almada, Lind-Waldock Compliance Officer, To Mai Symon, dated June 16, 1994 ("[T]his is to remind you that the risk of loss in commodity futures and options trading can be substantial. In addition this is to confirm that speculation is your trading objective and that the money you sent Lind-Waldock to open your account as well as any additional funds you may send is true risk capital that you can afford to lose.").

The Court notes that these risk disclosures alone may have barred Symon from bringing an action for fraudulent misrepresentation (much less "recommending" trades that lose) in at least some federal circuits. See Carr v. Cigna Securities, Inc., 95 F.3d 544 (7th Cir. 1996) (Posner, C.J.) (documents warning investors that commercial real estate limited partnerships were risky investments precluded plaintiff's federal securities and common law fraud claims based on alleged oral statements that investment was safe and conservative). Chief Judge Posner explains:

"The claims are barred by a very simple, very basic, very sensible principle of the law of fraud, both the law of securities fraud and the common law of fraud. If a literate, competent adult is given a document that in readable and comprehensible prose says X (X might be, 'this is a risky investment'), and the person who hands it to him tells him, orally, not X ('this is a safe investment'), our literate, competent adult cannot maintain an action for fraud against the issuer of the document. This principle is necessary to provide sellers of goods and services, including investments, with a safe harbor against groundless, or at least indeterminate, claims of fraud by their customers. Without such a principle, sellers would have no protection against implausible liars and gullible jurors. The sale of risky investments would be itself a very legally risky enterprise. Risky investments by definition often fizzle and an investor who loses money is a prime candidate for a suit to recover it. If the documents he was

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respondents to support any finding of fraud.<sup>51</sup> Even if respondents expressly advised Symon to place the ultimately unprofitable

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given, warning him in capitals and bold face that it was a **RISKY** investment, do not preclude the suit, it will simply be his word against the seller's concerning the content of the unrecorded conversation."

Id. at 547 (citations omitted, emphasis in original). Contra Levine v. Refco, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,488 at 36,115-36,116 (CFTC July 11, 1989).

<sup>51</sup> Tr. at 40-43. Indeed, when asked, she became belligerent.

The Court: "Okay, so, Mr. D'Agostino recommended that you make some trades that ended up losing, is that correct?"

Symon: "Yes."

The Court: "Is there anything -- do you have any other complaints beyond that?"

Symon: "I'm -- I don't know. I have a headache right now. I don't know. I don't know. It seems that it's very peculiar. I'm sure that he didn't invest his own money in such manner as he recommended me to do with mine. I don't know. I can't answer anything. If they want anything down, I'll answer it in writing. I don't have anyone to tell me anything here.

I'm -- you know, I'm talking and I don't know what they're going to make of it, so I would rather not go into [it] any further. Obviously, there were big losses and that's it."

The Court: "Okay, well, we'll rest for a moment, Ms. Symon."

Symon: "I'd rather not because --"

The Court: "I'd like to go to --"

Symon: "If I take my pill, I may never wake up, or I mean, not wake up this afternoon.

(continued...)

trades,<sup>52</sup> "the rendering of imperfect trading advice does not, standing alone, violate the Act."<sup>53</sup>

**Post Script: Symon's Conduct In This Forum**

Finally, it is unfortunately necessary to discuss Symon's conduct in this forum. Symon, intent on forcing her will on the Court (as she would with the markets), refused to attend the oral hearing. Symon was fully informed by the Court, both in oral

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(...continued)

Can we just -- if they want anything answered, I'll answer it in writing, because --"

The Court: "Well --"

Symon: "I really should talk to some lawyer, somebody -- really nobody's interested because they know how these things go, so nobody really wants to help me with this."

Tr. at 41-43.

<sup>52</sup> Respondents state that they offered assistance to Symon in placing trades and advised her to reduce the number of contracts she traded. Respondents deny, however, that they ever provided any unsolicited advice. Respondents also contend that Symon made all the trading decisions for her account. Answer at ¶6.

<sup>53</sup> O'Brien v. First Commodity Corporation of Boston, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,402 at 35,768 (CFTC Feb. 8, 1989) (rejecting liability of respondent although "in hindsight, [respondent's] recommendation to hold the short position overnight was costly"). See also Syndicate Systems, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,289 at 32,788 (CFTC Sept. 30, 1986) ("[T]he Commission will [not] question the wisdom of any recommendation of a commodity professional that proves unprofitable. ... Complainant has the burden of establishing that the challenged recommendation lacked a reasonable basis. ... And this Commission does not generally sit to second-guess market prognoses or strategies....")

contacts and by written Order, of the adverse consequences of such conduct.<sup>54</sup> She seeks to justify her refusal to attend the hearing on the Court's denial of her request to compel production of floor order tickets.<sup>55</sup> Presumably, Symon would favor the Court with her appearance if it were only to reverse its ruling.

But it is this Court, of course, that regulates the course of the proceeding, not Symon.<sup>56</sup> Symon, who has another reparation Complaint pending, understands this well. Indeed, when faced with a similar adverse discovery ruling in her other case, she properly attended the oral hearing -- rather than engaging in self-help.<sup>57</sup> And she also knows how to properly appeal an adverse decision to the Commission and raise discovery issues at that level.<sup>58</sup> Here,

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<sup>54</sup> See Order Setting Time And Place Of Oral Hearing at 2 ("All parties and their witnesses must be present at the oral hearing. Failure to comply with this Order or failure to attend will be deemed a waiver by the non-complying or non-appearing party of the opportunity for an oral hearing in this proceeding, and may subject the non-complying or non-appearing party to other consequences, such as dismissal of the complaint or issuance of a default award as appropriate. See 17 C.F.R. §§12.312(b)(2) and 12.35.").

<sup>55</sup> Complainant's Opposition To Respondents' Demand To Dismiss, dated August 8, 1997; Notice Of Intent [Not] To Participate In The Oral Hearing; Complainant's Second Demand For Production Of Documents.

<sup>56</sup> 17 C.F.R. §12.304; accord Administrative Procedure Act, 5 U.S.C. §556(c).

<sup>57</sup> Slip op. (CFTC Docket No. 95-R110) at 4 n.3 (Court refused Symon's request for order tickets for approximately 52 trades).

<sup>58</sup> Id. at 14 n.9 (Symon filed motion to reopen the record to subpoena exchange records relating to her trading).

however, Symon has undertaken a course of vexatious conduct in the hopes of prolonging this frivolous litigation.<sup>59</sup>

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<sup>59</sup> To belabor the obvious, the Court lastly refers to Symon's discovery request, the denial of which leaves her so much aggrieved. Tr. at 6. Symon requested approximately 60 floor order tickets from the New York Mercantile Exchange, Chicago Mercantile Exchange and the Chicago Board of Trade. Complainant's Request For Production Of Documents, dated April 22, 1997; see also Letter From Mai Symon To The Court, dated June 24, 1997. Why? Respondents do not dispute executing the trades that Symon alleges are unauthorized; nor does Symon dispute placing the other trades of which she complains. In short, Symon simply provides no reason to believe that Lind-Waldock's account statements for Symon are false or its trading for her was fictitious. See 17 C.F.R. §12.13(b)(2) (Complaint to be based on facts complainant knows to be true or believes to be true "in which event the information upon which he formed the belief shall be set forth with particularity").

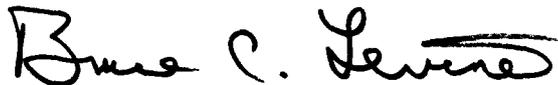
The mere filing of a reparation Complaint does not give a complainant the right to aimlessly roam the audit trail, at the respondents' expense, in search of a cause. Indeed, in the case at hand, over 30 of the order tickets that Symon requested relate to trades that are not even named in the Complaint.

Order

On this record, the Court concludes that complainant Mai Symon has not proved facts sufficient to establish that respondents have violated any provision of the Commodity Exchange Act or any regulation thereunder resulting in actual damages proximately caused by such violation. Accordingly, based on the findings of fact and conclusions of law discussed herein, the Complaint of Mai Symon against respondents Lind-Waldock & Company, Don M. D'Agostino and James Wesley Kozinski is hereby **DISMISSED** with prejudice.

**IT IS SO ORDERED.**<sup>60</sup>

On this 28th day of August, 1997



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Bruce C. Levine  
Administrative Law Judge

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<sup>60</sup> Under 17 C.F.R. §§12.10, 12.314 and 12.401(a), any party may appeal an Initial Decision to the Commission by serving upon all parties and filing with the Proceedings Clerk a notice of appeal within 20 days of the date of the Initial Decision. If the party does not properly perfect an appeal -- and the Commission does not place the case on its own docket for review -- the Initial Decision shall become the final decision of the Commission, without further order by the Commission, within 30 days after service of the Initial Decision.