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Richard Hallberg, Complainant, v. R.J. O'Brien Associates, LLC, Respondent.	)	CFTC Docket No. 11-R015
William Sauve, Complainant, v. R.J. O'Brien Associates, LLC, Respondent.	)	CFTC Docket No. 11-R019
James Van Zee, Complainant, v. R.J. O'Brien Associates, LLC, Respondent.	)	CFTC Docket No. 11-R020

INITIAL DECISION

Introduction

The dispute in these consolidated matters arises from a trio of similar orders placed by Richard Hallberg, an experienced futures speculator who had discretionary authority to trade for the accounts of his friends James Van Zee and William Sauve. Since May 2007, Hallberg

typically had placed trades for his and his friends' accounts during the day through his introducing broker, Growth Futures, without any major problems.

However, on July 13, 2010, Hallberg deviated from his normal practice. Late on that date during the evening trading session, Hallberg contacted the after-hours trading desk of the futures commission merchant, R.J. O'Brien & Associates. Hallberg called with the intention to liquidate long E-mini (1,000 ounce) Silver futures positions in each account. Respondent produced a recording of this conversation. Throughout the approximately five minute conversation Hallberg never used the term "E-mini" or "mini" when discussing, placing and confirming his orders. Rather, Hallberg told the R.J. O'Brien order clerk that he wanted to "get out of our silver longs," or "sell Silver," or "sell Septembers." When the order clerk repeated the terms of each order, before placing each order, he clearly stated that he was treating Hallberg's orders as for the "COMEX Silver" futures contract: that is, the older and more heavily traded normal (5,000 ounce) contract. At the end of the conversation, when the order clerk and Hallberg reviewed the fill for each trade, the order clerk again clearly stated that he had placed orders for "COMEX Silver" contracts. Hallberg did not correct the order clerk, who had also had informed Hallberg that he could not view the status of complainants' accounts.

These trades left the three accounts with long E-mini Silver positions and short COMEX Silver positions. After the mistake was discovered later that day, the long mini Silver positions and the short normal Silver positions were liquidated. The losses on the normal Silver trades substantially outweighed the profits on the mini Silver trades.

Hallberg, Sauve and Van Zee assert that R.J O'Brien should be liable for their losses, because, before filling the orders, the R.J. O'Brien order clerk either should have known that Hallberg was trading E-mini contracts or should have explicitly asked Hallberg whether he

wanted to trade E-mini Silver or normal COMEX Silver. In contrast, R.J. O'Brien denies any liability. R.J. O'Brien asserts that its order clerk acted in good faith and reasonably interpreted Hallbergs' instructions to "sell Silver" contracts as instructions to sell normal COMEX silver contracts. R.J. O'Brien further asserts that complainants are responsible for their losses because it was Hallberg's responsibility to accurately articulate instructions to sell E-mini Silver contracts. As explained below, after carefully reviewing the parties' submissions,[1] I have concluded that complainants have failed to establish any violations by R.J. O'Brien, and thus are not entitled to awards.

Factual Findings

Richard Hallberg, a resident of Seattle, Washington, disclosed on his account application an annual income of $50,000 to $100,000 and net worth of $500,000 to $1,000,000, and noted that he had extensive investment experience in futures, and stocks and bonds. He also had worked as a commodity broker in the early 1970's. William Sauve, a resident of Enumclaw, Washington, and James Van Zee, a resident of Seattle, Washington, are friends of Hallberg.

At the relevant time, R.J. O'Brien Associates, LLC ("RJO"), a futures commission merchant located in Chicago, Illinois, cleared complainants' accounts. Growth Futures, an introducing broker located in Goodinville, Washington, introduced complaints' accounts to R.J. O'Brien. William James Symonds is registered as a principal and associated person with Growth Futures.

[1] The parties principal submissions include: R.J. O'Brien's three answers and a CD recording of the conversation between Hallberg and the R.J. O'Brien order clerk on July 13, 2010 (filed July 28, and August 22, 2011); Hallberg's complaint, with account statements attached (filed February 4, 2011), complaint addendum (filed March 14, 2011), and second complaint addendum (filed May, 10, 2011); Sauve's complaint with account statements attached (filed March 14, 2011), and second addendum (filed May, 2, 2011); and Van Zee's complaint (filed March 22, 2011), complaint addendum (filed May 2, 2011), and second complaint addendum (filed July 16, 2011).

In July 2007, Hallberg, Suave and Van Zee opened their commodity futures trading accounts with R.J. O'Brien. Suave and Van Zee gave Hallberg a power of attorney to trade their accounts. Hallberg typically placed his orders through Symonds, and experienced very few problems trading until the day of the disputed orders. During July 2010, Hallberg traded a variety of futures contracts: Corn, Canadian Dollar, Coffee, U.S. Dollar Index, E-mini Euro, E-mini S&P 500 Index, and E-mini NYMEX Silver.

Long before Hallberg had begun trading futures in the 1970s, the COMEX in New York City had been established as the preeminent exchange in the Americas for precious metals futures. When Hallberg began trading, the COMEX was an independent exchange. As Hallberg probably knows, since the 1970's, many futures exchanges consolidated. First, in 1994, the COMEX became a division of the New York Mercantile Exchange (NYMEX). Next, in 2008, NYMEX became a division of the Chicago Mercantile Exchange (CME) Group.

The COMEX lists the two types of Silver futures contract: the normal "COMEX Silver" futures contract, and the "E-mini Silver" contract. The COMEX Silver future contract controls 5,000 troy ounces, and the E-mini Silver future contract controls 1,000 troy ounces. Normal futures contracts are the traditional contracts that long pre-date the mini and e-mini futures contracts. Historically, trading volume in the COMEX Silver has far exceeded trading volume in the E-mini Silver. Thus, in a hold-over from the days before the E-mini contracts were introduced and as a reflection of the COMEX Silver's volume dominance over the E-mini Silver, traders and commentators may colloquially refer to the COMEX Silver futures contract, but never the E-mini Silver futures contract, simply as "the Silver" futures contract.

During the evening trading session on July 13, 2010, Hallberg deviated from his normal practice of placing trades through Symonds, and contacted the order entry desk at R.J. O'Brien,

with the intention to place orders to liquidate long E-mini Silver positions in the three accounts. As can be seen from the transcript of this conversation below: Hallberg told the order clerk that he wanted to "get out of our silver longs," or "sell Silver," or "sell Septembers," but never stated that he wanted to sell "mini" or "E-mini" Silver contracts; the R.J. O'Brien order clerk, before placing each of the three orders and at the end of the conversation when recapping each trade, clearly stated that he had placed orders for "September COMEX Silver" futures; and the R.J. O'Brien order clerk clearly confirmed that could not view the complainants' accounts, and as a result could not independently ascertain that the accounts had open mini Silver positions:

RJO: O'Brien. John.

Hallberg: Yeah, I've got three accounts and I want to get out of our silver longs and the first one will be Dick [*i.e.*, Hallberg] at and that's a 10170803.

RJO: 70803.

Hallberg: And just get out two silvers at the market.

RJO: You want to sell?

Hallberg: I want to, yeah, I want to sell two silvers at the market.

RJO: And what month?

Hallberg: Gosh whatever [indiscernible] month that is. I don't . . . I, I, I didn't know you can't look at my account. Can you?

RJO: No.

Hallberg: So, just go ahead, and sell September.

RJO: Okay.

Hallberg: Two Septembers.

RJO: Okay. We're going to sell two September Comex Silver at the market?

Hallberg: Right.

RJO: Okay. That's filled on ticket 1730. It will take September Silver at 1789 and a half.

Hallberg: Okay. And then we got another account 70709. That should be Bill Sauve.

RJO: Okay. And the first one was Richard, right?

Hallberg: Yeah, right.

RJO: Sauve, and then the 70709?

Hallberg: [Indiscernible.]

RJO: Bill?

Hallberg: Bill Sauve.

RJO: Okay.

Hallberg: And he's got three, just do three Septembers and we'll have to figure it out later on.

RJO: Okay.

Hallberg: He's got them different months.

RJO: Okay. So we're going to sell three September Comex Silver at the market?

Hallberg: Right.

RJO: Okay.

Hallberg: And then we've got one more, Jim [*i.e.*, Van Zee]. 70805.

RJO: 70805.

Hallberg: And he's got two silvers.

RJO: So we're going to sell two September.

Hallberg: At the market.

RJO: Okay. So two September Comex Silver at the market. Okay. That's filled. Let me get you your prices on everything here.

Hallberg: Yeah, let me write those prices down.

RJO: You have the prices for the first two lot, right?

Hallberg: Well, I don't because I didn't write them down.

RJO: Okay.

Hallberg: Hold on, let me get, I've got to get organized, I'm sorry

RJO: That's okay. Take your time.

Hallberg: Your phone is ringing off the hook?

RJO: No, it's not. Summer is quiet. Europe is quiet there in the summer.

Hallberg: Gosh oh mighty, talk about disorganized. Okay. Here we go. Dick.

RJO: The first one, let's see it was account 10170803.

Hallberg: Yeah.

RJO: Sold two September Comex Silver at 1789 and a half.

Hallberg: Okay.

RJO: The second one was a sale, it was account 10170709,

Hallberg: Now Bill.

RJO: Sold three September Comex Silver, you sold two at 1789 half, and one at 1789.

Hallberg: Okay. And Jim?

RJO: And the last sale, the last sale of two, let's see here, it was account 10170805.

Hallberg: Yeah, is that Jim Van Zee

RJO: Let's see, 70805 that's Jim. Yeah.

Hallberg: Okay.

RJO: And I sold one at 1790.

Hallberg: No kidding?

RJO: And sold one at 1789 half.

Hallberg: Huh, so it's coming back?

RJO: Yeah.

Hallberg: There you go, see. [The market] got spooked down. Okay. That will teach me. I've done this before.

RJO: No problem.

Hallberg: It doesn't pay me. I should go to bed.

RJO: And get a good night's sleep.

Hallberg: Okay.

RJO: All right then.

Hallberg: Thanks.

RJO: Take care.

[Underlining added for emphasis. CD recording, exhibit to R.J. O'Brien's answers.]

Conclusions

Complainants have the burden to show by a preponderance of the evidence that R.J. O'Brien failed to execute Hallberg's orders in a diligent manner. Here, while R.J. O'Brien had a duty to follow Hallberg's instructions and to execute his orders diligently, Hallberg had the responsibility to give clear and accurate instructions.

On July 13, 2010, Hallberg contacted the R.J. O'Brien order entry desk with the intention to place orders to liquidate long E-mini Silver positions in the three accounts. This was a deviation from his normal practice of placing orders with his introducing broker, who presumably was familiar with Hallberg's trading. In addition, the R.J. O'Brien order clerk also clearly confirmed that could not view the complainants' accounts. Thus, Hallberg was on notice

that the order clerk could not independently ascertain that the accounts had open E-mini Silver positions. This underscored how important it was for Hallberg to correctly and accurately describe the specific E-mini Silver contract, in order to reduce the possibility of error.

Unfortunately, Hallberg did not tell the order clerk that he wanted to sell "mini" or "E-mini" Silver contracts, and otherwise did not mention the term "mini" or "E-mini." Rather, Hallberg told the desk clerk that he wanted to "get out of our silver longs," or "sell Silver," or "sell Septembers." Hallberg also did not correct the order desk clerk when the clerk, before each of the three trades, carefully repeated back to Hallberg that he would be placing an order to sell normal "COMEX Silver" contracts. Hallberg again did not correct the order desk clerk at the end of the conversation when the clerk recapped the COMEX Silver trades.

Complainants have not produced any evidence of an industry custom or practice where an ambiguous order to "sell Silver" should reasonably be construed presumptively as an order to sell the newer and more lightly traded 1,000 ounce E-mini Silver future. Here, the R.J. O'Brien order desk clerk made a reasonable, good faith and efficient interpretation that Hallberg's instructions to "sell Silver" were actually orders to sell the more heavily traded, normal 5,000 ounce COMEX Silver futures, and before placing each order the clerk used the proper terminology which clearly informed Hallberg of this interpretation. The order clerk thus gave Hallberg a fair and reasonable opportunity to correct each order before it was filled. The order clerk also gave Hallberg a fair and reasonable opportunity to correct the errors promptly when the order clerk recapped the COMEX silver trades at the end of the conversation. However, Hallberg missed these multiple opportunities to tell the order clerk that he had meant to sell the smaller E-mini Silver contracts.

Nothing in the record shows that Hallberg ever informed the R.J. O'Brien order desk clerk that he expected him to be familiar with Hallberg's E-mini Silver trading strategy or to provide special assistance beyond executing his orders, and nothing in the record shows that R.J. O'Brien otherwise should have been aware of these expectations. Thus, Hallberg was merely imputing his own expectations to respondents, and could not reasonably shift to respondents his responsibility to use correct and accurate terminology when placing orders. *See Grist v. Shearson Lehman Brothers, Inc.*, Comm. Fut. L. Rep. ¶ 24,962 (CFTC 1990); and *Avis v. Shearson Hayden Stone, Inc.*, Comm. Fut. L. Rep. ¶ 21,379 at page 25,831 n.8 (CFTC 1982). In these circumstances, complainants' claim that R.J. O'Brien failed to diligently execute and report Hallberg's orders must fail.

ORDER

Complainants have failed to establish any violations by respondent. Accordingly, the complaints in these consolidated matters are dismissed.

Dated February 17, 2012.

Philip V. McGuire,
Judgment Officer