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GREGORY PAUL VIOLETTE, Complainant v. LFG, L.L.C., and REBECCA JILL PALM, Respondents	)	CFTC Docket No. 98-R188

ORDER CORRECTING AMOUNT OF REPARATION AWARD

The Initial Decision issued June 11, 1999, did not assess the discovery costs imposed in the Protective Order dated January 13, 1999. The respondents filed a bill of costs associated with filing for that Order, seeing reimbursement for 2.1 hours of attorney time (billed at the rate of $110.00 per hour), plus $11.55 in copying costs. The total sought by respondents is $242.55.

The itemized bill shows "Review of Complainant's Discovery Requests and Applicable Regulations relating to Grounds for Motion for Protective Order; Preparation and filing of Respondents['] Motion for Protective Order." A review of the motion reveals that it consists of 14 numbered paragraphs (all but one with a single sentence) in two pages of text, plus half a page of the prayer for relief. Several of the numbered paragraphs recount procedural events in the case unrelated to the motion (¶¶ 1, 2, 4, and 5). The remaining paragraphs, while presenting the respondents' objections in a convincing and polished fashion, essentially restate in several rephrasings two basic argument that the discovery request was overly broad and unnecessary, and that he sought protected or confidential materials. No cases are cited, and no specific questions are subjected in the motion to extensive analysis.

Under the circumstances, a single hour of attorney time should have been more than sufficient. Accordingly, the amount of the reparation award on page 5 in the June 11 Initial Decision is hereby AMENDED to include the following sentence prior to the final sentence: The *total* amount due to complainant from respondents, *after the interest has been calculated,* may be reduced in the amount of $121.55, as respondents' costs in seeking the Protective Order dated January 13, 1999.

Dated: June 14, 1999

Joel R. Maillie
JOEL R. MAILLIE
Judgment Officer

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GREGORY PAUL VIOLETTE, Complainant v. LFG, L.L.C., and REBECCA JILL PALM, Respondents	)	CFTC Docket No. 98-R188

INITIAL DECISION AND REPARATION AWARD

The complaint charges that on April 14, 1997, respondent Jill Palm promised, but failed, to execute an order to liquidate complainant Gregory Violette's short position in a call option on the S & P futures contract at a one-point loss while Violette was on vacation. Both sides agree that when Violette returned from his vacation two weeks later, he discovered that his options had fallen some 18 points and ordered the position liquidated. Violette seeks the additional losses accruing in his account beyond the amount he would have incurred had the order been executed.

Respondents deny that Violette placed a stop-loss order, and contend that Palm specifically told Violette when he placed his entry order both that the order desk was not accepting stop-loss orders in that particular instrument and that he did not have any stop-loss order on his position. Respondents further contend that Palm tried in vain to contact Violette when the market moved against him, but she had no authority to liquidate the position on her own and could only watch helplessly as the equity in Violette's account was eroded.[1]

Because Violette and Palm differed in their versions of events in certain particulars that could only be resolved by a credibility determination, an oral hearing was convened by telephone conference call on April 29, 1999. During the hearing, both Violette and Palm testified with regard to the circumstances of the call option position, as well as their prior trading relationship. Although

[1] Respondents Palm and LFG, L.L.C., have filed a counterclaim in which they seek their attorney fees for the cost of defending this suit in the event they prevail. This counterclaim is based on a provision in the customer agreement that specifically provides for indemnification of costs incurred in defending customer-initiated litigation. In view of the result reached herein, that issue is moot.

I find Violette's delay in filing the complaint questionable,[2] in general Violette's testimony was more credible than was Palm's testimony, which was vague, hesitant, selective, and self-serving.

The complaint itself (page 2 of narrative) and the testimony adduced during the hearing (Tr. at 9-11) establish that Violette knew that Palm was not able actually to transmit a stop-loss order to the floor while talking with him. He admitted knowing on April 14 that Palm did not take an actual order because the order department was not accepting stop-loss orders in S & P options (Tr. at 11).

Violette's version of events was that Palm agreed to keep the order "in her hand" and to put it in to the order desk if the one-point loss figure was hit (Tr. at 9-10).[3] He also testified that he specifically informed Palm about the fact that he was leaving on vacation for Mexico the next day (Tr. at 97), and that his expectation that she would hold the order and put it in at an appropriate time was based on their prior practice (Tr. at 39). Violette contended that Palm had twice before (in February 1997) executed one-point stop-loss orders taken in hand in S & P options he had owned even when the order desk was not accepting orders, and those orders resulted in losses of the amount he was willing to accept, *i.e.*, in the $1,000 to $1,500 range (Verified Statement at 1-2; Tr. at 35-36, 56-57, and 83-84). Although he knew he could lose on the order, he felt protected because she would be able to get him out--as he put it, he "had no worriment" on the trade (Tr. at 56). Thus, he did not pay any attention to the S & P during his vacation (Tr. at 73-74).

Palm, on the other hand, denied that Violette had actually placed an order on April 14 (Tr. at 61) and noted that she never filled out any order tickets (Tr. at 62). That testimony was suspect, however, because it was what might be termed a Watergate-style denial, where an inability to remember something is carefully phrased to imply that it may have happened ("As far as I recall, there was no order....", Tr. at 61; "I don't believe there was ever any order", Tr. at 62). Furthermore, Palm's testimony on this issue was hesitant and seemed to take refuge in the respondents' filed answer rather than being the foundation of it ("I believe the way we left it, which is reflected in the answer also....", Tr. at 61).[4] Her inability or unwillingness to testify strongly with regard to their conversations -- where one would expect she would know whether she took an order or not when the result was a catastrophic effect on a customer's account -- stood in marked contrast to her flat

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[2] Violette claimed that he was "devastated" when he found out about the loss (Tr. at 59 and 67). However, he failed to complain about Palm's actions for over a year despite that asserted devastation. Violette first wrote to LFG, L.L.C., in late May 1998, and filed his complaint with the CFTC in July of 1998 (Tr. at 65-68). As a result of this delay, LFG, L.L.C., did not retain any tapes of Violette's conversations with Palm (Tr. at 64, 69). Although Violette's delay has led to the inability to obtain tape recordings, there is, of course, no doctrine of laches in reparations, only the two-year statute of limitations which was easily met by Violette. Finally, there is no evidence that Violette was aware of the tape-retention policy at LFG, or that he planned to wait to file his complaint until tapes were unavailable.

[3] Palm's practice of taking an oral order from Violette and then holding it for later transmittal will be referred to in this decision as taking an order "in hand."

[4] Later, Palm's initially hesitant testimony regarding whether she specifically told Violette he had no stop on his S & P position became stronger after the wording of the answer (where the statement was affirmatively set out) was read to her (Tr. at 104-105).

denial that she ever filled out an order ticket (Tr. at 62). It was also unconvincing when contrasted with Violette's testimony.

As to Violette's contention that Palm previously had taken one-point stop-loss orders in S & P positions in hand when the floor was not accepting stop-loss orders in that market, Palm's testimony again appeared to be based more on her inability to recall rather than on firm knowledge that the event never occurred: "Honestly, I don't remember that. You know, I would have to -- even if I went back and looked at the statements, I don't know that, you know, on those particular days whether the floor was accepting those types of orders or not." (Tr. at 84.) Asked if she *ever* had taken such orders in hand, she stated, "Not that I recall in the S & Ps, no." (Tr. at 84.) Palm later more forcefully simply answered "No" when asked the same question a second time (Tr. at 85), but that testimony in general was not as credible or reliable as Violette's repeated and specific recall of the two times it had happened before, as noted above.

Palm's recollection may have been fogged because, as it turns out, she *did* engage in an order-holding practice with regard to grain trades in Violette's account. Two grain trades that were executed for Violette while he was gone (Tr. at 36-44; *see* account statements for April 15, 17 and 23, 1997, found at Exhibit 8 to respondents' answer) were the result of trades initiated by Palm based on general oral orders taken in hand for later execution. According to both witnesses (Tr. at 38, 44-45, and 85-86), Violette throughout the life of the account (some six months) relied on Palm to place trades recommended by the LFG, L.L.C., grain-trading program. Palm testified that the practice involved getting oral authority from Violette to place orders in the future when the in-house analyst made actual trade recommendations. She would timestamp a ticket when talking to Violette, and then later fill it out when the specific trade was recommended by the analyst (Tr. at 84-86).[5]

Conceivably the two years between the events of April 1997 and the April 1999 hearing may have led to Palm's initial hesitancy in testifying, and perhaps her technical wording merely reflected a genuine desire for precision. Further, it is possible that Palm's practice of taking orders in hand in grains confused her regarding whether she had taken such orders in S & P contracts as well. On the other hand, she could have simply have been unwilling to admit that she made a major mistake on Violette's account. In fact, there are a myriad of possible reasons why she might have testified unconvincingly compared to Violette. Even so, in evaluating credibility, it is not necessary to engage in such speculation or to pinpoint precisely why a particular witness might have been confused or otherwise unreliable. It is sufficient to find that here, Violette's specific testimony both about April 14 and the prior S & P trades was much more credible than Palm's both because of its factual reliability and because of the more convincing demeanor with which it was presented.

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[5] Since these orders clearly were placed without prior specific approval from Violette of time *or* price, and since the existence of any actual trade order depended on the discretionary recommendations of someone other than the customer, it was noted during the hearing that Palm's use of advance general trading approval violated Rule 166.2 (Tr. 44-47). The parties were expressly informed that since Violette did not charge unauthorized trading in this case, no award would be based on any of the grain trades (Tr. at 48). Consideration of Palm's use of this practice has been limited in this decision to examining reasons why her testimony may have been hesitant or selective.

Violette did not attempt to contact Palm about his account while on his two-week vacation to Mexico City and Acapulco (Tr. at 56 and 72) or provide Palm with a telephone number where he could be reached while on vacation (Tr. at 97). He was questioned extensively about the reasonableness of not checking on his account while he was gone, and he explained that he believed Palm, in whom he had great confidence, would execute the order he had placed if his positions declined and that she would protect him at a minimal loss (Tr. at 96).

Palm testified that she tried to contact Violette "several times" while the positions declined because she was aware that the losses were exceeding the one-point risk she knew he wished to take, but she did not know he was gone (Tr. at 45 and 78). She assumed he was receiving the trading statements from the grain trades (Tr. at 91). Palm was specifically asked if she spoke to her "supervisors" about the Violette problem, and she said only that she spoke to "two other individuals" who informed her she could not do anything without specific permission (Tr. at 79).[6] Palm stated that the situation was a "unique experience" for her (Tr. at 116), and even agreed that it would be fair to characterize her reaction as close to having a "nervous breakdown" because of being unable to contact Violette (Tr. at 113). That reaction and desperation, however, oddly did not result in any extraordinary effort to contact Violette, such as phone calls to his home during non-business hours (Tr. at 113-114), or written notification to him regarding this virtual emergency in his account (Tr. at 91)--or asking the LFG night desk to contact him (because, she said, it was not set up for customer service) (Tr. at 114). Violette testified that his high school-age son was home and would have been able to receive a phone call by late afternoon or so (Tr. at 89-91); he also testified that his son had his number in Mexico (Tr. at 98).

No violations regarding the adequacy of Palm's efforts to contact Violette have been alleged or found. It is simply noted that Palm's actions while the position was declining were not exactly in keeping with a broker energetically seeking to contact a client whom she knew to be suffering a financial loss far beyond his targeted risk -- it is highly suspicious that Palm made no written notes whatsoever of her unsuccessful attempts to call Violette (Tr. at 115-116). On the whole, Palm's testimony regarding her efforts to contact Violette is found to have been thoroughly incredible, as it was self-serving, unconvincing, and uncorroborated by any other witness or even the slightest amount of documentary evidence. Any remaining belief in Palm's credibility when compared to Violette's was laid to rest upon consideration of Palm's testimony regarding the alleged efforts to contact him after she failed to execute the order.

Palm's failure to execute Violette's oral one-point stop-loss order recklessly left Violette exposed to market losses far beyond the level of loss to which he wished to be exposed. These reckless actions by Palm with regard to the execution of Violette's futures contract order defrauded

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[6] It cannot be ascertained from Ms. Palm's wording of her answer if these "individuals" were associated persons such as herself or supervisors. Having engaged in grain transactions without specific trading authorization during this period where she could not contact Violette, she might well have had an incentive to avoid bringing this account to the attention of a supervisor. Palm later testified that she "was very concerned" about Violette's account, and that was why she spoke "with two other people within the company, to see what else I could do with the situation, but basically they told me there was nothing I could do" (Tr. at 113). Again, the identities and positions of these "people" were not provided. Palm's affidavit attached to respondents' verified statement does not mention any attempt to seek supervisory assistance or any discussions with other LFG personnel.

Violette in violation of subsections (i) and (iii) of Section 4b(a)(2) of the Commodity Exchange Act, for which violations Palm is personally liable and her employer LFG, L.L.C., is liable by operation of Section 2(a)(1)(A)(iii) of the Commodity Exchange Act.

As to damages, the respondents have not contended that the one-point stop-loss order could not have been executed, nor have they asserted that it could only have been executed at a different level beyond a one-point loss. The damage calculation by complainant is incorrect, however. A one-point stop would have amounted to a loss of only $1,000. Complainant's damages will be limited to the difference between that and the $18,300 he lost (*see* respondents' verified statement at page 3), *i.e.*, $17,300.

Violations having been found, respondents Rebecca Jill Palm and LFG, L.L.C., are ORDERED to pay reparations to complainant Gregory Paul Violette in the amount of $17,300.00, plus prejudgment interest compounded annually at the rate of 4.879 % from April 16, 1997, to the date of payment, plus costs (filing fee) of $125.00. LIABILITY IS JOINT AND SEVERAL.

Dated: June 11, 1999

Joel R. Maillie

JOEL R. MAILLIE
Judgment Officer