



U.S. COMMODITY FUTURES TRADING COMMISSION

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**OFFICE OF
PROCEEDINGS**

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SAMUEL G. WEAH,
Complainant,

v.

FIRST CAPITOL AG, INCORPORATED,
Respondent.

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CFTC Docket No. 98-R206

INITIAL DECISION

Weah's principal complaint is that he sustained excessive losses due to alleged problems in First Capitol's electronic order entry system.¹ According to Weah, certain unspecified errors in the electronic order entry system resulted in an order to buy seven pork belly futures contracts, rather than a smaller quantity intended by Weah. Soon afterwards Weah failed to wire funds to satisfy a margin call, and First Capitol liquidated Weah's account, which resulted in a debit balance of \$27,401. Weah seeks to recover \$9,306, based on the account balance before the forced liquidation.

¹ See initial complaint (filed August 26, 1998); first addendum to complaint (October 5, 1998); second addendum to complaint (February 27, 1999); Weah's reply to request for admission number 5 (July 7, 1999); and Weah's "Closing Words" (September 8, 1999).

First Capitol denies that any problems existed with its electronic order entry system, denies any violations in connection with the liquidation of the account, and seeks dismissal of the complaint and an award of attorneys fees and costs.²

The findings and conclusions below are based on the parties' documentary submissions

Factual Findings

The parties

1. Samuel Weah, originally from Liberia, now resides in San Francisco, California where he owns Jan-King, a janitorial service. Weah's highest level of education is the eighth grade. On Weah's account application, Weah indicated that his annual income was between \$25,000 and \$100,000, and that his net worth was \$55,000. [See Weah's reply to interrogatory 1; account application (First Capitol's reply to discovery Order); and Weah's request for filing extension dated December 14, 1998.] The grammatical and syntactical errors in Weah's submissions support his assertion that English is his second language. However, Weah's submissions, and tape recordings of three conversations with a First Capitol agent, indicate that he is fundamentally literate and conversant in English.

On his account application, Weah stated that he had no previous experience with commodity futures or options. Weah also stated that he had open securities accounts with E-Trade and Ameritrade. However, according to Weah, both

² On September 30, 1998, First Capitol filed a law suit in the Circuit Court of Cook County, Illinois seeking to recover the debit balance. On March 18, 1999, the Circuit Court entered a default award for \$27,401.

accounts had been lightly traded and both had become "dormant" when he had opened his First Capitol account. [See Weah's response to interrogatory 3, and ¶ 5 of Weah's "Closing Words."]

2. First Capitol A.G., Incorporated is an independent introducing broker, located in Platteville, Wisconsin. During the relevant time, First Capitol offered prospective customers the opportunity to enter their orders via an electronic order system over the internet. Such accounts, including Weah's, were carried by ING (U.S.) Securities, Futures & Options, Incorporated ("ING"), a registered futures commission merchant.³

The account-opening

3. On June 2, 1998, Weah contacted First Capitol via electronic mail and requested that First Capitol send him account-opening forms so that he could use its electronic order system. First Capitol sent a 15-page ING account-opening package for a non-discretionary account that charged about \$20 per round-turn trade. On June 8, 1998, Weah filled out and signed the various account-opening forms, including an account-application, customer contract, and standard risk disclosure

³ First Capitol also offered a flash-fill service – "Futures Express" – to customers who preferred direct telephonic access to the order desk on the exchange floor. These accounts were introduced to ADM Investor Services, Incorporated, another registered futures commission merchant. [Paragraph 5 of First Capitol's verified statement.] In late February 1998 – three months before Weah would actually open the account with First Capitol and ING – Weah had asked First Capitol to forward a set of ADM account-opening documents for a Futures Express account. However, Weah did not open an account at this time, and when he did open an account, it was an on-line trading account introduced to ING, rather than a Futures Express account introduced to ADM. Nonetheless, Weah also alleged that First Capitol had misrepresented the capabilities of Futures Express, but has failed to show any nexus between these allegations and his financial losses. [See Weah's reply to interrogatory 8 and ¶4 of Weah's "Final Comments.]

statement.⁴ Under paragraph 8 of the ING customer contact, Weah agreed that in the event he failed to meet a margin call, First Capitol had “sole and absolute discretion . . . to liquidate the position(s) in my account, hedge and/or offset those positions in the cash market or otherwise.” Weah deposited \$5,000 on June 19, \$1,300 on July 7, and \$2,628 on July 9, for a total investment of \$9,928. [See account application produced by First Capitol on June 1, 1999; and ¶¶ 6-9 of First Capitol’s Verified Statement.]

Trading activity before the disputed trade

4. First Capitol’s internet web site – “efutures.com” – included a web page titled “General Help,” which generally described how to use the on-line electronic trading system. Basically, after a customer logged in and selected “Commodity Order” on the main menu, the customer filled out an order form, and pressed the “Preview” button which verified the information on the order form. The system would tell the customer at this point if “there are any problems” with the order, and “tell you specifically what is wrong.” If there were no problems with the order, the system then permitted the customer to press the “Submit” button. At this point the order was “accepted” by the trading system, but not “approved” by a broker. The system also had a “Help” button. The page concluded: “As this is an interactive

⁴ Weah did not sign the “Electronic Trading Authorization” that permitted him to place trades on exchange-sponsored electronic trading systems such as Globex, Access, Project A. As a result, Brian Wagner, an associated person with First Capitol, faxed a copy of the authorization to Weah who then signed it. However, this particular authorization did not pertain to First Capitol’s on-line trading system or to any of Weah’s trades, all of which Weah made via First Capitol’s on-line trading system.

system, you may wish to [use the "View Account" button] to keep a close eye on the market orders." [Weah's discovery production.]

5. Weah closely monitored the latest market prices on his computer screen, and actively traded the account, engaging in day-trading and position trading in a variety of currency and agricultural futures contracts. Eight times before August 12, the account had become under-margined. Weah met the resulting margin calls either by wiring additional funds or by liquidating certain positions. [See pages 9-12 of transcript of the three conversations on August 13; ¶¶ 4 and 6 of Answer; ¶¶ 10-13 of First Capitol's Verified Statement; confirmation statements (First Capitol's reply to discovery Order); and Weah's reply to interrogatory 6.]

First Capitol has not rebutted Weah's assertions that he regularly spoke with First Capital agent Mark Klein about matters such as meeting margin calls and numerous problems he had using the on-line trading system. [Complaint; and page 1 of Weah's "Reply to the Answer."]

6. At the close on August 11, the account value at market was \$6,076, and the account was short six October sugar futures, long two August lean hog futures, and short two August pork belly futures.

7. On August 12, Weah would make the following trades in addition to the disputed pork belly trade: the liquidation of the long lean hog position and the short sugar position; a day trade in the Australian Dollar; and the initiation of a long sugar position.

The disputed pork belly trade

8. Weah placed the disputed order at 11:09 a.m. EDT, on August 12.⁵ The on-line system accepted the order as an order to sell seven August pork belly futures at the market. The order was filled at 64.60, which was just under the 64.65 price of the two other short August pork belly futures already in his account. At 12:16 p.m. EDT, Weah placed an order to buy five August pork belly futures, at 63.30. Thus, if this order had been elected and filled, he would have liquidated the two pork belly futures that he had sold the previous day and day-traded three of the seven pork belly futures sold earlier in the day, and as a result would have been short four pork belly futures. However this order would not be filled, because the market moved-up – closing at 65.92 – and never traded at or through the order price. Thus, at the close on August 12, Weah had nine short August Pork Belly futures, six short October sugar futures, and a margin deficit of \$14,173.

9. Weah has asserted that he experienced a problem or a series of problems trying to place the disputed order, and then trying to cancel or to reverse the order. Unfortunately, Weah's various descriptions of his experiences have been inconsistent, incomplete and vague. For example, he has not described the specific terms of the order or orders he was trying to place – *i.e.*, the number of contracts and the type of order – and he has not described his precise steps in trying to respond to the error messages generated by the on-line system. Based on Weah's descriptions, it appears that while he was unsure about the exact size of his

⁵ Weah's varying descriptions of the problems he experienced placing the order are separately set out in finding 9.

position, he realized that he was overexposed in a deteriorating market, and made several attempts to reduce that exposure either by trying to cancel the pending sell order or by trying to place an order buying back at least some of the short positions.

For example, in the second addendum to the complaint Weah asserted that:

On August 12, something went wrong with the internet trading [system] resulting in a loss to me. [T] he warning message "Orders Subject to Errors" was repeatedly flash[ed] across my computer [screen, which] ultimately resulted in my order [being] misplaced. I placed [orders] to cancel all my positions in [the] August pork bellies contract.

In the first addendum to the complaint, Weah asserted that he had also tried to liquidate the sugar positions. [See also Weah's reply to request for admission number 10 ("My instructions were not followed correctly due to order entry system malfunctioning.").] And, in his "Closing Words," Weah asserted that:

Electronic order entry system malfunctioned, and failed to perform, [and] did not execute complainant's commodity orders as he had wished. System put out such messages as "Orders Subject To errors," "Try Again," "Order Not Accepted," or "Multiple Orders Subject To Errors, etc." I wanted and instructed that all outstanding [sic] be reversed. That did not happen.

As shown below in finding 10, Weah indicated during a conversation on August 13 with First Capitol that he had lost track of the size of his short position. However, despite Weah's purported confusion and problems placing the order or orders, he did not contact Klein or any other First Capitol agent before the close on August 12 to discuss and rectify his problems, in sharp contrast to his previous conversations with Klein where he had readily complained several times about difficulties placing orders through the on-line trading system.

10. The next day, August 13, at about 9:20 a.m. EDT, Darin Diller, First Capitol's risk manager informed Weah that he was short nine pork bellies and undermargined. Weah then told First Capitol for the first time about the purported problems with the on-line system during the previous day:

Diller: Sam, you're short nine bellies in your account here.

Weah: What!?

Diller: You're short nine bellies in your account here.

Weah: Oh. Yeah. I don't know. My computer yesterday. I'm going to take it as this morning. But my computer yesterday. Orders would be mistaken. So, I guess that's what happened. I didn't mean to order that nine pork bellies. You know.

Diller: So. What happened?

Weah: Well. That's what I didn't. You know. On my computer screen, that's what kept coming up. You know. There was a mistake, multiple order. It may be a mistake. You know. So, I don't know what I meant. So. In any case.

Diller: So. You didn't put in an order to sell seven bellies? Is that what you're telling me?

Weah: I. My records. I have five. So. I don't know. But, I'm going to, you know, just send it in this morning. Okay?

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Diller: I'm looking at the order here. . . . You placed it to sell at the market. Seven of them.

Weah: Okay. Yeah. How come there are nine?

Diller: Well. You're short two from the sixth [of August.]

Weah: Okay.

As can be seen, Weah did not mention any attempts to cancel any order or to liquidate any open positions, but rather, by replying "I have five," Weah seemed to indicate either that he had wanted to sell just five contracts – which would have still left him short four contracts – or that he wanted to be short five contracts. Whatever Weah meant, just half a day later, he clearly indicated to Diller that he had intended to be short in the market. In any event, whether he was short four or five contracts, Weah still would have faced a significant margin call on his deteriorating pork bellies.

11. Weah then expressly agreed to liquidate the pork belly contracts as well as the sugar contracts, and expressly assured Diller that he would wire \$8,000. First Capitol immediately liquidated the sugar contracts for a net loss of \$1,277. However, First Capitol could not immediately buy back the pork belly contracts, because the August pork belly contract market had opened lock-limit-up, and would remain so into the afternoon. After Diller determined that Weah had not wired the funds as promised, and after he had unsuccessfully tried to reach Weah by phone, Diller faxed Weah a notice that gave him one more hour to wire the funds or First Capitol would "liquidate your account, in the futures market if possible." He also warned Weah that he would be "responsible for any balance." [First Capitol's reply to discovery Order.] Weah did not respond within an hour, and First Capitol decided that since the August contract market remained lock-limit-up, it would liquidate the short position by placing an August/February spread order. [See Streich, Diller and Gold affidavits.] The resulting liquidation of the short August position realized a net loss of \$15,530, and the round-turn trade on the long

February leg realized a net loss of \$19,170. At the end of this disastrous day, Weah's account had a debit balance of \$27,104. First Capitol later would pay this debit to ING.

12. Weah filed his reparations complaint on August 26, 1998, and after a series of numerous requests for more time, filed addenda to the complaint on October 5, 1998, and February 27, 1999.

After a series of failed attempts to settle the matter, First Capitol filed a lawsuit in Illinois Circuit Court on September 30, 1998, and obtained a default award for \$27,401 on March 18, 1999. [See ¶¶ 19-20 of First Capitol's Verified Statement; First Capitol's reply to Interrogatory 8; Weah's reply to requests for admissions 15, 16 and 17; and Barclay letters to Weah dated August 17 and 28, and September 10, 1998; Barclay letters to Sullivan dated February 25, 1999; and Sullivan letters to Barclay dated December 11, 1998, and January 28, 1999 (Weah's discovery production).]

Conclusions

Weah has failed to show that he is entitled to any recovery on the basis that First Capitol's on-line trading system did not properly accept his order or orders. First, Weah has not shown that the error signals generated by the system in response to his attempt to enter orders were caused by a system malfunction rather than a mistake by him in placing the order. Second, Weah cannot shift to First Capitol responsibility for his failure to contact First Capitol before the close on August 12 to discuss and rectify his problems, especially where he had intended to be in the

market, where he had most likely been monitoring his deteriorating position and where he had readily complained several times before about difficulties placing orders through the on-line trading system.

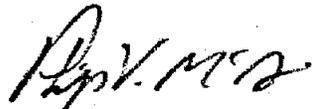
Weah has also failed to show that First Capitol acted unreasonably in handling his order. First Capitol was under no obligation on August 12, 1998 to refuse to approve the order once it had been accepted by the on-line trading system, where Weah had failed to notify promptly First Capitol of any problems placing orders through the on-line system, where the size of the order was consistent with the size of previous orders, where Weah had been actively trading the account, engaging in day-trading and position trading in a variety of currency and agricultural futures contracts, and where Weah had met several margin calls either by wiring additional funds or by liquidating certain positions. First Capitol acted reasonably when it informed Weah before the open on August 13, 1998 that his account would become under-margined at the open, and obtained Weah's authorization to liquidate the sugar and pork belly positions and his assurances that he would wire money. Also, First Capitol acted reasonably, and in accordance with its rights under the customer contract, when it decided to liquidate the short soybean position by placing an August/February spread order, once it determined that the August contract market remained lock-limit-up and that Weah had not honored his promise to wire funds, had made himself unavailable and had refused to respond to First Capitol's fax. In these circumstances, Weah has failed to show violations by First Capitol, and his complaint must be dismissed.

Finally, First Capitol has not shown either that Weah's complaint was frivolous or that Weah engaged in bad faith conduct during the course of this proceeding. Therefore, First Capitol's request for attorneys fees and cost must be denied.

ORDER

No violations having been shown, the complaint is DISMISSED.

Dated October 22, 1999.



Philip V. McGuire,
Judgment Officer