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| THOMAS COST,<br>Complainant,<br><br>v.<br><br>MARK GOSCENSKI,<br>TRENTON JAMES KIMMINAU, and<br>GLOBAL FUTURES EXCHANGE &<br>TRADING COMPANY, INCORPORATED,<br>Respondents. | CFTC Docket No. 07-R059<br>Served via Federal Express |

## NOTICE OF CORRECTIONS

The Initial Decision contains a number of minor errors. Thus, the following corrections are hereby made to the Initial Decision:

Page 1: In the seventh line in the paragraph, change "five months" to "ten months".

Page 2: In the fourth line of the first full paragraph, change "sufficiently margined" to "sufficient margin".

Page 5: In the fourth line of the first full paragraph, change "wired" to "wire".

Page 10: In footnote 2, insert "the" before "CFTC".

Page 11: In the fourth line of the finding 13, change "was" to "would be"; and in the first line of finding 14, change "CDT" to "PDT".

Page 12: In the fourth line of the finding 15, change "CDT" to "PDT".

Page 13: In the last line of the first paragraph in finding 16, change "45 minutes" to "40 minutes".

For the parties' convenience, a corrected version of the Initial Decision is attached to this Notice.

This Notice does not change the deadline for any party to file a Notice of Appeal.

Dated March 5, 2009.

Philip V. McGuire,
Judgement Officer

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# INITIAL DECISION

[Corrected Version]

***Introduction***

This dispute arises from a combination of rookie trading mistakes and a mutual "breakdown in communications," before and after the liquidation of an under-margined September CBOT silver futures position. Thomas Cost, a resident of Los Angeles, California, was a first-time futures trader who had opened a self-directed, discount account with Global Futures Exchange & Trading Company, an introducing broker located in nearby Encino, California. Before the disputed liquidation, Cost had successfully traded the account for about ten months without generating a margin deficit. The mistakes and miscommunications stretched over approximately 20 hours: from the early afternoon of Wednesday August 15, 2007, after the September CBOT silver market had closed sharply down with Cost's silver contract narrowly margined, but before Cost's local bank had closed; to mid-morning on

Thursday August 16, when Global Futures' margin department sent Cost a courtesy e-mail which stated that Global Futures was liquidating Cost's under-margined silver position.

When the CBOT September silver futures had closed on Wednesday August 15, Cost's account held only $200 in excess margin. Cost had intended to hold the position for several more days, and was willing and able to add more funds to maintain adequate margin. However, either Cost too optimistically concluded that this amount was sufficient margin to sustain further price drops or Cost simply miscalculated the amount of margin. Whatever his specific mistake, Cost decided not to deposit additional funds before his local bank closed that day.

The next day, Thursday August 16, at 6:25 PDT (8:25 CDT), the September CBOT silver future opened 22 points lower. At this point, Cost's silver future was under-margined. Although Cost mistakenly concluded that he was adequately margined, he became concerned that he was on the brink of a margin call. Thus, at 7:15 a.m. PDT, Cost e-mailed his account executive, Mark Goscenski, that he would be hand-delivering a cashier's check for $7,000, around 10:00 a.m., which was about an hour after his local bank would open. In his e-mail, Cost did not offer any explanation for why he was depositing the additional funds, did not mention the silver position or the silver market, and did not express any urgency. In any event, Goscenski, who normally arrived in the office at 6:45 a.m., was busy speaking to clients who were dealing with fast market conditions in various precious metals and stock index markets, and would not check his e-mail until well after the disputed liquidation. Cost would not attempt to contact Global Futures again until 9:20 a.m.

Cost had initially funded the account by a bank wire sent directly to the clearing broker in Chicago. Subsequently, Cost switched to hand-delivering cashier's checks to Goscenski at Global Futures' Encino office. Cost made the decision, on August 16, to deposit the additional funds via a hand-delivered cashier's check without consulting Goscenski. Cost's decision to forgo wiring the funds directly to the Chicago clearing broker at 9:00 a.m. PDT, and rather hand-deliver a cashier's check to his California introducing broker at 10:00 a.m., would prove to be fateful.

Around 9:00 a.m. PDT, when Cost's bank opened, Cost obtained the cashier's check, and hopped into his car to drive toward Global Futures' office. Meanwhile, at 9:18 a.m., Trenton Kimminau, a margin analyst with Global Futures' margin department, liquidated Cost's deteriorating silver position, which resulted in a $2,293 account deficit. Consistent with Global Futures' practice, the liquidation was promptly reported electronically to Global Futures' on-line trading platform.

Cost, who apparently did not have a cellular phone, realized that he had not called Goscenski from the bank to say that he was on his way with the check. Thus, at 9:20 a.m., he stopped at his house, which was on the way from the bank to Global Futures' office, to call Goscenski. Cost did not turn his computer back on to check his account, and thus missed the liquidation report. Cost called Goscenski, and in an extremely short conversation simply stated that he had the check in hand and would be arriving at the Encino office around 10:00 a.m. with the check. During this quick exchange, Cost did not mention his earlier e-mail, and again did not explain that he was depositing additional funds to cover an open position and did not mention his silver position or the silver market.

Around 10:00 a.m. PDT, Cost arrived at Global Futures' office and delivered the check to Goscenski, who promptly handed the check to Global Futures' accounting department. Cost simply assumed that Goscenski was aware of the conditions in the silver market and aware of the status of Cost's account. Thus, Cost merely stated that the check was to "cover my account" --

rather than "to cover an open position." Cost did not convey any sense of urgency, and "joked" that Goscenski need not worry about the margin in Cost's account. Cost prompted Goscenski to report that the September silver was "up," but did not ask Goscenski for the current price, and did not ask about the status of his silver position or his account. As a result, when Cost next asked to speak to the technical support employee who had previously helped him over the phone, Goscenski assumed that his business with Cost was done and did not check the status of Cost's account at his terminal, and would not learn about the liquidation until after Cost had left the office.

At 10:41 a.m. PDT, Kimminau e-mailed Cost a courtesy message reporting the liquidation: "[Because] your account has fallen on margin call [and your account] does not currently have sufficient funds to meet the exchange initial margin requirements. . . I have no choice but to liquidate the position." About twenty minutes later, Cost returned home and read the message. Since Kimminau had phrased his message in the present tense, Cost reasonably, but mistakenly, concluded that the liquidation had been executed around the same time as the e-mail, which would have been 45 minutes after he had personally delivered the check to Global Futures.

Understandably, Cost was upset, since he believed that Global Futures had recklessly disregarded what he considered to be a diligent, hands-on effort to keep his account adequately margined. Cost sent a series of e-mails to Kimminau which coupled a request that Global Futures buy back the position with a demand that Global Futures credit his account $1,000. By this time the CBOT floor trading session had closed, but Globex and Cost's bank were still open. In response, Kimminau and Goscenski sent separate e-mails. Since Cost's message contained a demand for an adjustment, Kimminau treated it as a compliance issue, rather than an instruction to place an order. In his e-mail, Kimminau apologized "for the confusion," and reported that he had to liquidate the position "prior to your check arriving." In his e-mail, Goscenski stated that he was sorry to learn that Cost's position had been liquidated before "you were able to drop off the check," acknowledged that "this breakdown in communications was unfortunate," and advised that next time a similar situation arose Cost should specifically instruct Global Futures margin department that he was depositing funds "to cover an open position." Goscenski did not specifically address Cost's demand that Global Futures buy back the position and adjust his account.

The next day, Friday August 17, Cost attempted to re-enter the market. However, Cost's order was rejected, because his account was in deficit and his cashier's check had not yet cleared the clearing broker's bank in Chicago. Global Futures advised Cost that, if he wanted to trade immediately, he should wire funds directly to the clearing firm, otherwise he could resume trading on Monday, by which time the cashier's check would have cleared. A frustrated Cost decided to wait until Monday to resume trading the September silver.

Cost's principal allegation is that Global Futures improperly liquidated the under-margined position, because he had timely promised to hand-deliver a cashier's check for adequate additional funds, and had diligently made good on that promise. Cost seeks to recover the $9,170 loss on the trade, plus an additional $1,615 in purportedly lost profits. In response, respondents assert that Global's determination to liquidate the silver position was reasonable and in good faith, and otherwise deny any violations.

With the benefit of hindsight, it is obvious that liquidation of Cost's silver position could have been avoided or delayed if both sides had modified their actions and communications. However, this does not compel the conclusion that respondents violated any fiduciary or disclosure duties to Cost or that Cost is entitled to compensation from respondents. After carefully reviewing the documentary evidence and the oral testimony of the parties' witnesses, I have concluded that Cost has failed to establish by a preponderance of the evidence any violations causing damages by respondents.

**Factual Findings.**

*The parties*

1. Global Futures Exchange & Trading Company, Incorporated ("Global") is a registered introducing broker and notice broker dealer, located in Encino, California. Global introduced the Cost account to Rosenthal Collins Group ("RCG"), a futures commission merchant headquartered in Chicago, Illinois. [*See* NFA records and respondents' joint answer.]

2. Trenton Kimminau, also registered as an associated person with Global, was employed as a margin analyst, and in that capacity would make the determination to liquidate Cost's silver futures position on August 16, 2007. I found the testimony of Kimminau to be generally plausible and believable. [*See* NFA records; respondents' replies to Costs' interrogatories 14 and 16; and Kimminau's testimony at pages 83-92 of hearing transcript.]

3. Mark Goscenski, registered as an associated person with Global, was responsible for Global's "German" trading desk, and acted as Cost's principal contact at Global. In that capacity: Goscenski would assist Cost during the account opening; would occasionally speak to Cost; and would receive Cost's hand-delivered check on August 16. Most of Goscenski's clients had self-directed accounts. Although Goscenski has forgotten the specific details of his conversations with Cost, I found his testimony to be generally plausible and truthful. [*See* NFA records; respondents' replies to Costs' interrogatory 18; and Goscenski's testimony at pages 66, and 71-83, of hearing transcript.]

4. Thomas Cost, a resident of Los Angeles, California, at the relevant time, was a retired teacher of English as a second language. Cost had no previous investment experience. I found the testimony of Cost to be generally sincere. [*See* account-application "Questionnaire" (Exhibit A, joint Answer); and Cost's testimony at pages 8-13 of hearing transcript.]

*Opening the account, and trading before the disputed liquidation*

5. On or about September 29, 2006, Cost opened, on-line, a discount, non-discretionary account with Global Futures. Cost had been referred to Global Futures by an Austrian friend, which is how Goscenski, who manned Global Future's German language trading desk, ended up as Cost's account executive.

6. Global Future's "Booklet A" contained various disclosure and information statements. Page 3 of the booklet, titled "Funding Your Account," provided that the account could be funded three ways, two of which are relevant here, and gave specific instructions for forwarding funds to RCG. For bank wires, the instructions stated: "Bank wires are cleared funds and allow you to <u>begin trading</u> your account <u>immediately</u>." For checks, the instructions stated: "Certified checks and cashier's checks made payable to RCG are <u>in most instances</u> considered cleared funds and <u>in most instances</u> you may begin to trade your account immediately." [Underlining added for emphasis; Exhibit A, joint Answer.]

Cost would learn -- the day after his silver position had been liquidated and he had hand-delivered the cashier's check -- that a notable instance when RCG would <u>not</u> permit its customers to immediately resume trading upon delivering a cashier's check to an introducing broker would be when a debit balance existed at the time that the check was delivered. [*See* Cost's testimony at pages 43-44, and Kimminau's testimony at pages 89-90, of hearing transcript.]

Cost made his initial deposit of funds, $10,000 on September 29, 2006, by wire to RCG's bank in Chicago. Cost would make one or two additional deposits, before August 16, 2007, by cashier's checks which he personally delivered to Global Futures office in Encino. Cost had made one of these hand-delivered deposits after Global Futures had advised him that, although his account had a positive balance, the account lacked sufficient margin to support an order that Cost had been trying to place. [*See* September 29, 2007 confirmation statement (attachment to complaint); Cost's testimony at pages 24-25, and Kimminau's testimony at pages 88-91, of hearing transcript.]

7. Cost acknowledged that he had received and signed various account-opening documents, including Global's "Additional Risk Disclosure," and RCG's "Commodity Futures Customer Agreement." Both documents provided that Cost agreed:

- To maintain adequate margin, which Global or RCG could establish or increase at their "sole or absolute discretion."
- To deposit additional margin upon a request by Global or RCG "within a reasonable time."
- That one hour would be considered a reasonable time, but that Global or RCG had "sole and absolute discretion" to demand payment in a lesser time.
- That Cost would provide "any information deemed reasonable and prudent for immediate verification of wire transfers."
- That Global or RCG had "sole and absolute discretion" to liquidate an under-margined position in Costs' account if he failed to deposit sufficient funds, or to liquidate an under-margined position "without prior demand or notice."

[¶¶ 17 and 18 of Global Additional Risk Disclosure, and ¶¶ 7 and 8 of RCG Additional Risk Disclosure (Exhibit A, joint Answer).]

8. Cost briefly spoke with Goscenski during the account opening process. Goscenski gave Cost the phone numbers and e-mail addresses for technical support and the margin

department. In this connection, Global's website also provided the phone numbers and e-mail links for technical support and the margin department. Goscenski and Cost did not discuss specific protocols or procedures for meeting margin calls or covering margin deficits. [*See* Cost's testimony at page 20, and Goscenski's testimony at page 74, of hearing transcript.]

9. For the next ten months, Cost traded the account without any significant problem and without triggering a margin call or generating an account deficit. Cost placed most, if not all, orders via an on-line trading platform. Cost exclusively traded CBOT silver futures or Comex mini silver futures, predominately in one-lot trades. Cost placed orders that were executed via floor-trading on the CBOT and COMEX, and electronically executed on Globex. Cost's silver trades were mixture of short-term (*i.e.*, day trades and overnight trades) and longer term trades (*i.e.*, several days or more). Cost never traded on the last trading day, and never rolled over a position. [*See* Cost's testimony at pages 17-27 of hearing transcript.]

*Disputed liquidation*

10. At the relevant time, the Chicago Board of Trade silver futures contract was floor-traded between 8:25 a.m. CDT (6:25 a.m. PDT), and 1:25 p.m. CDT (11:25 a.m. PDT), Monday through Friday; and electronically traded on the Globex between 6:00 p.m. CDT (4:00 p.m. PDT) on Sunday, to 5:15 p.m. CDT (3:15 p.m. PDT) on Friday.

11. On August 8, 2007, Cost bought one September silver future contract, at 1321.9.[1] This is the futures contract that would be the subject of the disputed liquidation on August 16. From August 8 to 16, Cost had no other positions in his account, and Cost maintained $6,880 in cash in his account.

---

[1] The CBOT silver future traded in a minimum price fluctuation, "tick," of 0.5 cents, or $0.005, per troy ounce.

Set out below is the price and margin history of Cost's September CBOT silver contract, leading up to the liquidation on August 16th:

| *Date ('07)* | *Closing price Sep. silver* | *Liquidation value* | *Margin excess* |
|---|---|---|---|
| Aug. 8 | 1318.2 | ($ 185) | $3,320 |
| Aug. 9 | 1270.5 | (2,570) | 935 |
| Aug. 10 | 1286.2 | (1,785) | 1,720 |
| Aug. 13 | 1285.5 | (1,830) | 1,830 |
| Aug. 14 | 1274.7 | (2,360) | 2,360 |
| Aug. 15 | 1255.8 | (3,305) | 200 |

[*See* equity runs produced by respondents.] As can be seen, the September silver trended downwards, and by Wednesday August 15, Cost's silver future was barely adequately margined.

As a result, during these days, Cost found that he "couldn't sleep." [Cost's testimony, at page 27 of hearing transcript.] Notwithstanding his concern, Cost concluded, without consulting Goscenski, that he had sufficient margin, and decided not to deposit additional funds before his bank closed the afternoon of Wednesday August 15. [*See* Cost's testimony at pages 27-30 of hearing transcript.]

12. The next morning, Thursday August 16, at 6:25 a.m. PDT, the September silver opened lower, between 1233.0 and 1235.0. At this point, Cost's silver position was under-margined. During the first hour of trading, the September silver would trend downward until it hit the daily low of 1106.0. The September silver would then partially rebound, closing between 1145.0 and 1154.0, and settling at 1149.5.[2]

[2] A copy of CBOT price data, provided by the CFTC Office of the Chief Economist, is attached to this decision.

13. When Cost checked the market soon after the open, he did not conclude that he was under-margined, but he was concerned that he was on the brink of a margin call. Thus, at 7:15 a.m. PDT, Cost e-mailed Goscenski that he would be hand-delivering a cashier's check for $7,000, around 10:00 a.m., which would be about an hour after his local bank would open:

> Mark:
>
> I will be in around 10 AM to give you a cashier's check for $7,000.
>
> Thomas Cost

[Attachment to Complaint.] As can be seen, Cost did not explain why he was depositing the additional funds, did not mention the silver position or the silver market, and did not convey any urgency. In any event, since Goscenski was busy speaking to clients who were dealing with fast market conditions in several markets, he would not check his e-mail until after the disputed liquidation. Cost would not attempt to contact Goscenski, or anyone else at Global Futures, for another two hours: until 9:20 a.m. [*See* Cost's testimony at pages 20-33, and Goscenski's testimony at pages 74-75, of hearing transcript.]

14. Around 9:00 a.m. PDT, when Cost's bank opened, Cost obtained the cashier's check, and hopped into his car to drive toward Global Futures' office. Meanwhile, at 9:18 a.m., Kimminau liquidated Cost's silver position, at 1138.5, which generated a $9,170 loss[3] and a $2,293 debit balance. Consistent with Global Futures' practice, the liquidation was promptly reported electronically to Global Futures' on-line trading platform.

Cost, who apparently did not have a cellular phone, realized that he had not called Goscenski from the bank to say that he was on his way with the check. Thus, at 9:20 a.m. PDT, he stopped at his house, which was on the way from the bank to the Global Futures office, to call

[3] The silver future was bought at 1321.9, and sold at 1138.5, for a 183.4 point loss.

Goscenski. Cost did not turn his computer back on to check his account, and thus missed the liquidation report. Cost called Goscenski, and in an extremely short conversation simply stated that he had the check in hand and would be arriving around 10:00 with the check. During this quick exchange, Cost did not mention his earlier e-mail, and again did not explain that he was depositing additional funds to cover an open position and did not mention his silver position or the silver market. [*See* Cost's testimony at pages 32-34, Goscenski's testimony at pages 75-76, and Kimminau's testimony at pages 83-85, of hearing transcript.]

15. Around 10:00 a.m. PDT, Cost arrived at Global Futures' office and delivered the check to Goscenski, who promptly handed the check to Global Futures' accounting department. Cost simply assumed that Goscenski was aware of the status of Cost's account. Thus, Cost merely stated that the check was to "cover my account" -- rather than "to cover an open position" -- and "joked" that Goscenski need not worry about the margin in Cost's account. When Cost asked Goscenski about the September silver futures market, Goscenski told him that it was "up" at that point. However, Cost did not press for the specific price, and did not ask about the status of his silver position. As a result, when Cost next asked to speak to the technical support employee who had previously helped him over the phone, Goscenski assumed that his business with Cost was done, and thus did not check the status of Cost's account at his terminal. As a result, he would not learn about the liquidation until well after Cost had left the office. [*See* Cost's testimony at pages 34-39, Goscenski's testimony at pages 76-78, and Kimminau's testimony at page 85, of hearing transcript.]

16. Cost would arrive back at his house after 11:00 a.m. PDT. Meanwhile, at 10:41 a.m., Kimminau e-mailed Cost a courtesy message reporting the liquidation:

Dear Client:

I am writing to remind you that your account has fallen on margin call. Due to the fact that your account does not currently have sufficient funds to meet the exchange initial margin requirements for the contracts you have left open in your account, I have no choice but to liquidate the position. Please contact the Global Futures Margin Department should you have any questions.

Best regards,
Trenton Kimminau

[Underlining added for emphasis, attachment to complaint.] Since Kimminau had written the message in the present and present perfect tenses, Cost reasonably, but mistakenly, concluded that the liquidation had been executed about the same time as the e-mail, which would have been about 40 minutes after he had personally delivered the check.

Cost was particularly upset, because Kimminau's message intimated that Global Futures had cavalierly disregarded the fact that he had hand delivered the $7,000 check forty minutes before the liquidation. Cost sent a series of e-mails to Kimminau at 11:09 a.m., 11:33 a.m., and 12:22 p.m. CDT:

Trenton:

I e-mailed Mark this morning to inform him that I would have a $7,000 cashier's check in his hands before 10:00 this morning. I was closed out while I was en route [returning home]. In fact, he has the check in his hands at this moment. I will forward said e-mail and you should check with Mark.

Thomas Cost

Trenton:

How do we make this right? I will forward another e-mail I recently sent to Mark based on your e-mail. Mark should have informed someone. I saw the problem at 7:15 this morning and immediately made arrangement to cover myself.

Thomas Cost

> Trenton:
>
> I had my losses covered with today's cashier's check and informed Mark Goscenski at 7:15 a.m. this morning of such. Why Mark did not inform accounting that I was prepared to protect my margin is beyond me. You and Mark have the e-mail [where] I informed Mark I was coming in, and [I] did, prior to 10 a.m.
>
> I would like Global to buy back my position, plus $1,000 damages.
>
> Should there be a problem with this, please inform me.
>
> Thomas Cost

[Attachments to complaint.]

When Kimminau discussed the e-mail exchange with Goscenski, they realized that Kimminau had liquidated the silver position before Cost had delivered the check to Global Futures. At 12:55 p.m. EDT, Kimminau sent another e-mail:

> Dear Mr. Cost:
>
> Thank you for your e-mail. I apologize for the confusion. We had to liquidate the position prior to your check arriving. I closed one contract of September silver. Sold one at 113.85. This left your account about -$2,300. Please let me know if you have any questions.
>
> Best regards,
> Trenton

And at 1:34 p.m. EDT, Goscenski sent an e-mail:

> Hello Mr. Cost:
>
> I'm sorry to hear that your position was liquidated earlier this morning before you were able before to drop off the check. This breakdown in communications is most unfortunate. In the future, please notify me immediately that you are depositing funds to cover an OPEN position. To make sure this is executed, if I am not in the office, please make sure to speak directly with either Trent or Alex from our margin department. Let me know if you have any questions.
>
> Most sincerely,
> Mark Wiley Goscenski

[Attachments to complaint.] As can be seen, neither Kimminau nor Goscenski specifically addressed Cost's demand that Global Futures buy back the position and adjust his account. Thus, before his bank closed on Thursday August 16, Cost knew that Global had not agreed to buy back the position or to credit his account any sum of money. [*See* Cost's testimony at pages 39-43, Goscenski's testimony at pages 78-81, and Kimminau's testimony at pages 85-88 and 91-92, of hearing transcript.]

17. The next day, Friday August 17, Cost attempted to re-enter the market, by placing an order to buy a silver future. However, this order was rejected, because the account was in deficit and the cashier's check had not yet cleared the clearing broker's bank in Chicago. Global Futures told Cost that, if he wanted to trade immediately, he should wire funds directly to the clearing firm's bank in Chicago; otherwise he could resume trading on Monday, by which time the cashier's check would have cleared. A frustrated Cost decided to wait until Monday to resume trading the September silver. [*See* Cost's testimony at pages 43-45 and 51-67, and Kimminau's testimony at pages 88-91, of hearing transcript.]

18. Set out below is the price history of the September CBOT silver future, from Thursday August 16, to Monday August 20, 2007:

| *Date* | *Low* | *High* | *Open Low* | *Open High* | *Close Low* | *Close High* |
|---|---|---|---|---|---|---|
| 16th | 1106 | 1256 | 1233 | 1235 | 1255 | 1256 |
| 17th | 1149 | 1201.5 | 1171 | 1175 | 1180 | 1180 |
| 20th | 1162 | 1197.5 | 1192 | 1193 | 1172 | 1175 |

On Friday August 24, the September CBOT silver future would hit an interim high of 1200.5, which was well below Cost's purchase price of 1321.9, on August 8. [CBOT price data.]

Thus, even if Cost had successfully avoided liquidation on August 16, and then sold his September silver future at the optimal price, his silver trade would have suffered a loss of at least $6,700.[4] Accordingly, the loss that can fairly be directly attributed to the liquidation must be limited to no more than $2,470.[5]

Furthermore – consistent with his testimony that he had intended to hold the silver position for an extended period and had the means to add more funds -- Cost, after learning that Global Futures had not agreed to adjust his account or to buy back the silver future for his account, could have expeditiously wired funds to the clearing broker on the afternoon of Thursday August 16, and then promptly bought back the September silver future at the open on Friday August 17. In this circumstance, Cost could have realized a profit of $1,275,[6] which further reduces the loss directly attributable to the August 16th liquidation to a maximum of $1,195.

## Conclusions

Initial and maintenance margins are instituted for the protection of futures commission merchants, and reflect the amount of risk a futures commission merchant is willing to accept for a customer's position. For this reason, it is well established that when an FCM, or its introducing broker, determines that a customer cannot pay a margin call, the FCM's and IB's duty to protect the financial position of the FCM's other customers, and right to protect the FCM's financial position, supersede any duties the FCM or IB owe to the under-margined customer. *Lee v. Lind-Waldock &*

[4] This calculation is based on the 121.4-point difference between the 1321.9 purchase price on August 8, and the 1200.5 interim high price on August 24.
[5] This calculation is based on the difference between the $9,170 (183.4 point) loss on the liquidation, and the minimum $6,700 (121.4 point) loss that Cost would have realized had the silver position not been liquidated on August 16.
[6] This calculation is based on the difference between a purchase at the open high price on August 17, 1175 points, and the most advantageous interim sale price, at 1200.5 points on August 24.

*Co.*, Comm. Fut. L. Rep. (CCH) ¶28,173 (CFTC 2000). Thus, an FCM and IB have considerable discretion to set and enforce margin policies, absent evidence of fraudulent or bad faith conduct. Therefore, in order to establish wrongdoing by respondents, Cost must show by a preponderance of the evidence either that respondents misled him about their margin policy or that they liquidated the silver contract in bad faith. *Baker v. Edward D. Jones & Company,* Comm. Fut. L. Rep. (CCH) ¶21,167 (CFTC 1981).

The evidentiary record shows that Cost made a concerted, labor-intensive effort to avoid the liquidation of his long silver position. However, the record also shows that Cost's energies were slightly misdirected and that he made a series of unforced errors that unfortunately ended in liquidation. More significantly, the record does not show any deception by respondents concerning their margin policy or any bad faith in their determination to liquidate without advance notice. The customer agreement signed by Cost authorized respondents to liquidate open positions without prior warning under certain conditions, including an under-margined futures position. Here, on the morning of August 16, 2007, Cost's silver contract was under-margined, and Cost's account was in deficit, and both were deteriorating. In these circumstances, Cost has failed to show that respondents acted in bad faith when they chose to liquidate without prior warning. This conclusion would not be altered even if Cost, at the crack of dawn in California but after the open in Chicago, had successfully delivered to Global Futures' margin department his message that he was on the way with a check. In this particular circumstance, Global Futures still would have had the discretion under the customer contract to liquidate the position as long the funds had not actually been deposited. Although in such circumstance, if Global Futures had actually received clear instructions that Cost wanted to deposit funds to cover a position, Global may have been obligated to advise Cost to deposit the funds via wire to the clearing broker in Chicago, rather than via cashier's check to the introducing broker in Encino.

With the benefit of hindsight, it is clear that Global Futures theoretically could have anticipated Cost's mistakes in dealing with his first margin deficit: one, not consulting with Goscenski after the close on Wednesday August 15; two, not accurately calculating or anticipating the necessary margin; three, not taking into account the time zone difference between California and Chicago; four, not adding more funds before his bank closed on Wednesday; five, not directing his initial communications Thursday morning to Global Futures' margin department; six, never clearly stating that the additional funds were intended to cover an open position; and seven, paying by cashier's check instead of direct bank wire. Global Futures could have helped Cost avoid this particular sequence of errors by custom bundling a combination of commonsensical facts and previously disclosed facts about maintaining margin and funding the account. However, since these facts were widely known or previously disclosed, and since Cost was not paying for advisory services, Global Futures was under no special fiduciary or contractual obligation to provide additional, more specific, advance instructions for avoiding or covering a margin deficit. Thus, Cost's claim must fail.

## ORDER

Thomas Cost has failed to establish any violations causing damages. Accordingly, the complaint against Mark Wiley Goscenski, Trenton James Kimminau, and Global Futures Exchange & Trading Company, Incorporated is dismissed.

Dated February 26, 2009.

Philip V. McGuire,
Judgment Officer