UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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BRADLEY FAWCETT, Complainant, v. LIND-WALDOCK & COMPANY, and PAUL JASON ZIMMERMAN, Respondents.	* * * * * * * * * * *	CFTC Docket No. 01-R104

INITIAL DECISION

Bradley Fawcett seeks to recover $11,950 in damages caused when respondents allegedly mishandled two orders. Fawcett alleges that respondents failed to execute a market order that he gave to Paul Zimmerman to be executed on Globex. Fawcett also alleges that respondents took too long to fill the second order. In reply, respondents assert that Zimmerman never worked the Globex desk and deny that Fawcettt actually placed the Globex order. Respondents also deny that they were responsible for any delay in filling the second order.

The findings and conclusions below are based on the parties' pleadings, discovery replies and oral testimony. As explained below, Fawcett failed to establish by a preponderance of the evidence any violations causing damages in connection with either disputed order.

The Parties

Lind-Waldock is a registered futures commission merchant with its principal place of business in Chicago, Illinois. Paul Zimmerman has been a registered associated person with Lind-Waldock since 1994. Respondents assert that during most of that time Zimmerman exclusively worked at Lind-Waldock's "G" day-desk, which handled orders only during open outcry sessions. [NFA records; ¶ 1 of joint answer; and pages 18-21 of hearing transcript.]

Bradley Fawcett works as a contractor who provides mortgage underwriting and lending services for a local bank. He describes himself as an "advanced mathematics scholastic scholar." [Reply to interrogatory 2.] On his account application, filled out in 1993, he stated that he had an annual income between $25,000 and $50,000, with a net worth between $50,000 and $99,999, and that he had 25 years experience trading stocks and bonds, and 15 years trading commodities. [*See* account application (produced by Lind-Waldock on August 23, 2002); replies to interrogatories 2 through 8; and pages through 8 of hearing transcript.] According to Fawcett:

> I am not an error-prone customer. And, I am not a day-trader. I have been trading the S&P 500 futures as a position trader for many years and . . . know what I am doing when it comes to the S&P 500 contract. [Typically, I exclusively made] S & P 500 futures trades via telephone call to Lind-Waldock ["G"] day desk for open outcry, and Globex desk for evening and electronic trading on a separate 800 line. . . . As a general rule, I attempt to prevent any loss from going beyond two to three thousand dollars. . . . I also attempt to cut my losses short unless I have good cause.

[Pages 2-3 of factual description to complaint.]

The First Disputed Order

On October 18, 1999, Fawcett had sold short one December IMM S & P 500 futures contract. According to Fawcett, about thirty minutes before the open of outcry trading the next day, October 19, he called Lind-Waldock's Globex desk to cover that position. Fawcett's version of this conversation has evolved over the course of the litigation. First, in his complaint, Fawcett alleged that:

> [Before the open of outcry trading] I phoned Lind-Waldock's Globex desk . . . and gave them an order 'to buy to cover at the market' one big Dec99 IMM S&P 500 futures contract. [And about 45 minutes later] I telephoned my G desk [and the] G desk manager told me there was no fill.

Second, in reply to a request by the CFTC to identify the Globex desk and G desk personnel who allegedly handled the order, Zimmerman filed an addendum to the complaint, in which he stated: "Paul Zimmerman was the Globex order taker." In their joint answer, respondents asserted that Zimmerman had never worked at the Globex desk. Next, when respondents asked Fawcett to identify the "order specialist" at the Globex desk, he tersely stated: "See complaint." [Reply to interrogatory 6.] Finally, at the hearing, Fawcett testified that he placed his order with Zimmerman at the G desk, after his call was transferred from the Globex desk to the G desk. In sharp contrast, respondents consistently asserted that, although Zimmerman only vaguely remembered his conversation with Fawcett that day, he could not have not taken a Globex order before the open because he had never worked at the Globex desk.

The parties do not dispute what happened when Fawcett called the G desk about an hour after the market had opened. Fawcett asked whether his Globex order had been filled, but could neither provide the order number nor identify who had taken his order. Respondents then told Fawcett that they could not find a record of any order by Fawcett,

and that they would investigate further. About an hour later, respondents told Fawcett that they had reviewed the recordings of all calls to their order desks in the time frame provided by Fawcett, but had not found any order from Fawcett. Respondents then advised Fawcett to place a market order, but he declined and demanded a fill at the market price when he had placed the order at the Globex desk. Later than day, Lind-Waldock gave Fawcett a $200 adjustment, and Fawcett covered the short position with a buy-stop order that was filled at 1286 points.

Fawcett bears the burden to show, by a preponderance of the evidence, first that he placed the Globex order, and second that respondents recklessly or intentionally mishandled the order. Fawcett failed to carry this burden because his description of the alleged order was simply too inconsistent to be found reliable. Thus, adverse inferences cannot be imposed on respondents for their failure to produce corroborative tape recordings or phone bills.

The Second Disputed Order

Fawcett credibly testified that on December 21, 1999, he called Lind-Waldock's G desk to place an order to buy one NASDAQ index futures contract, in order to cover a short position. However, over 15 minutes passed as he dealt with a series of busy signals, unanswered calls, and holds before he successfully spoke to a person at the G desk. While speaking to the G desk, Fawcett learned that the market had "moved up and beyond my out price of +/-3469." According to the CME time and sales summary, this happened at about 11:10 a.m. At this point, Fawcett placed an order "to buy at 35037

stop or 34197 limit." Thus, his order would become a market order if the market rose to 35097 or above, or would be filled at 34197 if the market declined.[1]

Lind-Waldock was unable to explain why the order ticket was time stamped 1:10 p.m. However, this particular delay would prove to be immaterial, since, between 11:10 a.m. and 1:10 p.m., the market traded between 34700 and 34960, and thus had not hit Fawcett's stop price.

At 1:14:03 p.m., the market entered fast market conditions. At 1:14:15, Fawcett's stop order was elected when a trade occurred at 35060. And at 1:15:18, Fawcett's order was filled at 35280.[2] Due to the hectic trading conditions, the fill was not transmitted from the trading floor until 2:24 p.m. When he received the fill report, Fawcett expressed his displeasure with the delays and the fill price, and stopped trading with Lind-Waldock.

Fawcett has not shown any damages from the initial 15-minute delay caused by respondents' apparently overwhelmed phone system, because he once he did reach the G desk, he chose to place a stop order rather than a market order. Fawcett also has not shown any damages from the two-hour time-stamp delay because his stop price was not hit during that two-hour delay. Finally, Fawcett has not shown that a one-minute fill in fast market conditions is presumptively grossly negligent.

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[1] Between 11:10 and 11:13 a.m., the market traded between 3470 and 3473. Thus, if Fawcett had placed a market order he could have covered close to his initial "out price" of 3469.

[2] Other than assert the existence of fast market conditions, respondents did not produce any evidence about the handling of Fawcett's order by its floor broker agent in the pit.

ORDER

No violations causing damages having been found, the complaint in this matter is hereby DISMISSED.

Dated March 7, 2003.

Philip V. McGuire,
Judgment Officer