U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

MIGUEL ANGEL MEDEL, Complainant v. CRAIG WILLIAM ERDMANN, Respondent	)	CFTC Docket No. 00-R098 Served by Federal Express

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INITIAL DECISION AND ORDER DISMISSING COMPLAINT

This case presents a credibility dispute between Medel and Erdmann involving two matters: whether Erdmann solicited Medel's account in July 1999 by promising profits, and whether Erdmann refused to execute orders to sell or otherwise committed any wrongdoing during the period of time when Medel's option position continued to erode in value.

Erdmann worked for Concorde Trading Group, Inc., which was also named as a respondent and which eventually defaulted in this case.[1] Medel's Concorde account was actually the second options account Medel opened during the summer of 1999. In June, he had opened an account at First Investor's Group of the Palm Beaches ("FIG"), handled by a broker named Bryan Tierney. A few weeks later, after a few profitable trades in oil and natural gas, Erdmann contacted him as a follow up to Medel's response to an infomercial aired before Medel opened

[1] The default order against Concorde has become final and remains unaffected by the disposition of the case here. The results are not inconsistent, however, because Concorde was alleged by complainant to have used a fraudulent televised infomercial in soliciting his account. That allegation, found true in the default, does not carry forward to Erdmann, who was not shown to be responsible for the contents of the infomercial. Another individual named in the complaint, Ricardo Padron, settled with Medel and was dismissed. Through discovery and until the

the FIG account (complaint at 2). Erdmann warned Medel to check with regulators about FIG's and Tierney's disciplinary history. Medel did so and decided to transfer after discovering FIG's checkered history (May 21, 2003, oral hearing transcript at 27).[2]

Medel's opening-account value at Concorde was $20,702 on August 4, 1999, and by the next day his two options positions had risen by another $1,000. This represented a net profit for Medel of $3,950. On August 6, at Erdmann's recommendation, Medel sold his natural gas and crude oil options (which had fallen in value by some $2,000) and bought twenty November 99 soybean call options. This was the only transaction made by Erdmann in Medel's account, and the total loss of these options when they expired at the end of October is the basis for Medel's damage claim of $16,801.80.[3]

Medel has consistently alleged that starting when he received his end-of-month statement for August (showing a drop in value to $4,538), and continuing until early October, Erdmann refused to accept Medel's order to sell to avoid additional losses (*see, e.g.*, complaint at 13-16;

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summer of 2002, Concorde, Padron, and Erdmann were jointly represented and therefore "respondents" is used in this Initial Decision to describe actions taken during that time.

[2] A year after filing the claim in this case, Medel filed a complaint against FIG and Tierney, seeking the same damages as he sought here based on his admission that he was confused about which company had lost his money because both had sent him tax statements showing the total loss. Eventually, while this cased was stayed, that complaint was dismissed on Summary Disposition based on a finding that FIG's tax form ostensibly showing losses actually reflected only the transfer of all of Medel's deposits and two options positions to Concorde. At the time of the transfer, Medel's account (to which he deposited a total of $17,750 over two weeks) actually showed a profit despite his having paid almost $8,900 in commissions and additional commissions disguised as fees. Medel did not raise a churning allegation in that case, focusing all of his allegations on alleged misrepresentation. Because he had no losses from any alleged misrepresentation, the complaint was dismissed. *See* Record and Initial Decision in CFTC Docket No. 01-R078.

[3] Medel wanted Erdmann to send him some of the cash generated by selling his FIG positions, and has complained about Erdmann's failure to return $5,000 to him after the transaction. He charged in his complaint that Erdmann simply decided to reduce the amount on his own (complaint at 13) and testified in the hearing that Erdmann "refused" to send him more than the $2,400 that was sent (May 15 at 34). In fact, as discussed in the hearing, a tape of the phone call where Erdmann told Medel about the lower amount reveals that Erdmann actually explained that the market had dropped, that the $2,400 was the excess after the soybean purchase, and that he wished he could send more (May 15 at 34-36).

Medel discovery production handwritten notes; May 15 at 37-40). Erdmann admitted that Medel was interested in selling his soybean calls, but claimed that Medel only wanted to sell if he could do so with a full recovery of his losses (May 15 at 72).

Experience in cases including allegations of refusal to accept an order reveals that three possibilities can occur. An actual refusal seems to be very rare but would be a clear violation of the law. Seen more often in the Judgment Officer's experience are situations in which a customer who intend to sell discusses the matter with their brokers and, instead of selling, accepts a broker's advice to retain declining positions. In the latter situation, a broker might be engaging in illegal "lulling conduct" or that broker might simply be expressing an innocent opinion that the customer finds persuasive despite an initial determination to sell. If the broker uses false statements to distort a customer's awareness of the true financial picture, or to engender unrealistic expectations of future performance, the conduct is illegal.[4]

Here, the Judgment Officer explored whether Medel might actually have been victimized by such "lulling conduct" designed to dissuade him from selling or to keep him from closing his account. But Medel's testimony left no room for that possibility, closing the door on any inquiry as to whether the decision not to sell was caused by misrepresentation or distortion. Medel absolutely insisted that Erdmann never merely dissuaded him to keep the position; instead, he was adamant that Erdmann flatly refused to take every order Medel placed for some six weeks. According to Medel, when he refused these orders Erdmann told Medel he had to wait for the next crop report, and to give him "more time" (May 15 at 46). At no point did Medel ever

[4] Why a broker would do such a thing obviously is not readily admitted by such wrongdoers. However, a clear incentive can be seen in the broker's interest in keeping the customer in the market with a chance for enough of a recovery so as to avoid a complaint about the losing recommendation. Although the broker could not expect future trading if, as here, the position expires worthless, it must be remembered that the broker's strategy in such a situation allows the broker to retain a chance to claim success with all risk of failure resting with the customer.

contact a supervisor at Concorde about Erdmann or ask for another broker; he claimed he did not know he could do anything because he did not have control of his money during the entire time (May 15 at 33).

On the whole, Medel's version seems too unlikely to be accurate. Most telling of all is the fact that Medel had already closed a commodity account with another broker in order to open the Concorde account with Erdmann. If he truly was frustrated at every turn when he attempted to direct Erdmann to liquidate the positions, he certainly could have gone to another broker and secured a transfer of the positions to a more accommodating broker. Although it is easily imaginable that a broker might disagree with a customer about the wisdom of liquidating, and that a broker might even take such a strong stance as to appear to be refusing an order to sell, it is not likely that Medel encountered such vehement opposition for so long a period of time without taking stronger action to protect himself.

Medel's personal history reflects the Judgment Officer's assessment of him throughout this proceeding: articulate, intelligent, capable, and – most importantly – persistent (*see* May 15 at 66-70). In 1987, when he was 27, he immigrated from Mexico, and worked as a gardener and at other odd jobs for several years until becoming a custodian at the University of Santa Barbara. He tried to take some accounting classes in community college to continue a course of education he had begun in Mexico City. However, the classes were not very productive because English presented a language barrier for Medel, and he felt he was not improving while living with his Spanish-speaking brother. After suffering an injury in 1998 that required surgery and extensive rehabilitation (and involved a Workers' Compensation settlement that provided the funds for the trading here), he decided to relocate to Salt Lake City because of the lower cost of living and so that he could take classes while living where he would be forced to speak English.

By the time he filed the complaint, Medel had clearly overcome any language difficulties he previously experienced – that complaint is thoughtful, organized, thorough, and highly detailed. The same is true of Medel's discovery answers, his request for a subpoena, his nine-page submission opposing Erdmann's motion to vacate a procedural default, and his testimony. It is by no means impossible for intelligent and strong-willed customers to fall victim to frauds perpetrated by unscrupulous brokers. Here, however, Medel had closed another account due to concerns about Tierney's record – in other words, for reasons unrelated to Medel's own experience. Having thus proven he exercise final authority over that account, Medel is not convincing in claiming he had no idea how to close the Concorde account when, as he contends, he knew for six long weeks that he was being victimized directly.[5]

Medel has contended throughout the proceeding that he made it very clear when he opened his account, and while trading with Erdmann, that because he was injured and unemployed, he needed the money for his living expenses (May 15 at 97). He said in his complaint that he repeatedly reminded Erdmann that the account forms incorrectly showed him to be have an income and net worth much higher than he really had (complaint at 9). In his discovery answers, Medel alleged that he originally returned the forms unsigned because he did not meet Concorde's minimum requirements (discussed in the infomercial) of a $50,000 net worth and "really high amount as minimum net income" (Answer to interrogatory 22). Medel stated that Erdmann then returned the forms to him with assurances that he would make that much money and urged Medel to sign the forms, indicating that he was sure Medel had lots of personal possessions even though Medel told him that was not true (*id.*; complaint at 10).

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[5] Medel has included a churning claim against Erdmann. That claim, based on a single transaction that did indeed have large fees, is not sustainable on this record since Medel has not shown that his acceptance of Erdmann's single trading recommendation amounted to Erdmann's control of the account.

Because of Erdmann's constant pressure and promises of profit, Medel claims, he signed and returned the forms (May 15 at 97-98).

The version of the account solicitation given by Medel in the complaint and thereafter does not reconcile with his answers to the compliance interviewer (tape attached to complaint). During that interview, he stated that he understood all of the disclosures of risk, denied that any assurances of profit had been made, denied that Erdmann pressured him, acknowledged the correctness of the information on the forms, agreed that he was the person responsible for decision making in the account, and generally appeared eager to open an account.

Most importantly, Medel has admitted that he was not told to lie during the compliance interview, and furthermore that the interviewer informed him of the need to report any comments by Erdmann that minimized the importance of answering questions honestly (May 15 at 40-42, 97). He claims he simply did not understand the significance of the interview even though the interviewer asked if he understood its significance and he said "Yes" (May 15 at 50-52). He finally said that he ignored it, basically because his trading would be with Erdmann and not the interviewer (May 15 at 53). He testified that no one else filled out the incorrect information – he did it because, he said, Erdmann said that information needed to be on the form or the account would not be accepted.

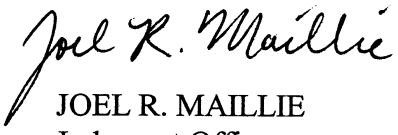
Sometimes customers' own eagerness to get into these risky markets makes it impossible for regulators to protect them from losses they cannot afford to suffer – and results in their assistance in the creation of substantial evidence that serves to defeat later claims of solicitation fraud. This is such a case. Medel's own testimony establishes that he ignored virtually every

protection built into the account-opening process. Furthermore, if he was indeed in such dire financial straits, he may well have done the exact same thing when he opened the FIG account.[6]

For the reasons stated, it is concluded that complainant Medel has not proven by reliable, credible evidence that respondent Erdmann committed any violations in connection with Medel's options on futures account.

Accordingly, the complaint against Erdmann is DISMISSED.

Dated: July 25, 2003



JOEL R. MAILLIE
Judgment Officer

[6] The FIG account-opening forms were not submitted. Presumably, Medel had to put some financial information on those forms to have an account be accepted there, and it is certain that Erdmann could not have been involved in that process.