



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Received
C.F.T.C.

2010 MAR 26 PM 12: 56

Office of Proceedings

Office of
Proceedings
Proceedings Clerk

DIRK L. WITTER,
Complainant,

v.

ROBERT SEAN SKELTON, and
TRANSACT FUTURES
f/k/a YORK BUSINESS ASSOCIATES,
Respondents.

*
*
*
*
* CFTC Docket No. 08-R45
*
*
*
*
*

INITIAL DECISION

Introduction

Dirk Witter's core complaint is that respondents: first, disregarded his verbal instruction to cancel all working S&P orders with the exception of one stop order to close out his sole remaining open S&P position; and second, the next morning, falsely advised him that he was "flat" the S&P. Respondents deny any violations. Respondents assert that Witter did not give an instruction to cancel the working S&P order; assert that they merely advised Witter that his last S&P position had been successfully closed out by his stop order; and assert that Witter knew about the working S&P orders when he opened his on-line trading platform before the market opened.

The findings and conclusions below are based on the parties' documentary submissions and the oral testimony of Dirk Witter and Robert Sean Skelton, and reflect my credibility assessment of the witnesses. In this connection, I found the testimony of both Witter and Skelton

to be sincere, but leavened with a bit of self-interest. Overall, I found the testimony of Skelton to be more plausible. Thus, as explained below, I have concluded that Witter has failed to establish by a preponderance of the evidence any violations by respondents, and thus is not entitled to an award.

Factual Findings

The parties

Dirk Witter, a mortgage broker who resides in Columbus, Ohio, had traded securities on-line for three years, but had no previous commodities trading experience before opening the discount, non-discretionary account that is the subject of this dispute.

TransAct Futures, a division of York Business Associates, is a registered non-clearing futures commission merchant, located in Chicago, Illinois. Robert Skelton, a registered Associated person with TransAct, is a customer support representative. TransAct does not staff a regular order desk, but does staff a “Customer Support Desk” to handle orders for customers experiencing problems with their on-line trading platforms.

Wouter Kampschuur is an associated person and principal of Go Trade, an independent introducing broker located in Arcadia, California. After consulting a friend, Witter contacted GoTrade to open the account.¹

Trade Navigator is a third party front end application, provided by Genesis Financial Technologies, Incorporated. Genesis is not affiliated with respondents. Witter similarly selected Trade Navigator after consulting a friend.

Trading the Account

On July 5, 2007, Witter opened a discount, self-directed, on-line account with TransAct.

¹Neither side produced Kampschuur as a witness.

During the next six weeks, Witter actively traded T-bond, S&P index and Dow index futures, and racked up over \$32,000 in losses. Although Witter was not technically a day-trader, it appears that his principal strategy focused on trying to capture profits from intra-day price moves.

All of the trades during this time, with the exception of a few liquidations, were initiated by Witter. Witter made some of the usual novice mistakes, like confusing terminology. For example, he often conflated the terms “orders” and “trades,” and inaccurately described open positions as “active orders,” and working orders as not “active.”

In addition, Witter was hampered by multiple problems and glitches with the Genesis platform, some of which he now attributes to the fact that his personal computer lacked the necessary memory. Skelton testified that TransAct desk employees were generally aware that Witter was experiencing persistent problems with his electronic trading platform. In this connection, on August 1, Mark Gordy, the Risk Manager for TransAct, convinced Witter to download the TransAct platform as a “back-up.” However, Witter continued to experience problems with Genesis, and never shifted to the TransAct platform. As a result, Witter often had to call Genesis to resolve software issues and then call TransAct to resolve trade issues. Despite being hampered by this awkward arrangement and by balky software, Witter did not modify his high-frequency trading strategy.

Disputed Orders

On August 16, 2007, Skelton was working the Asia shift at TransAct. Around 9:00 p.m., Witter called Skelton. Skelton had a customer on his main line, so Witter’s call was shifted to a developer’s phone with no recording device. Witter and Skelton agree that Witter told Skelton that he could not access his account on-line, agree that Witter placed a stop order to liquidate an

open S&P mini position, and that Witter instructed Skelton to cancel all working orders for Dow Index and Treasury Bond contracts. Witter and Skelton also agree that in a subsequent conversation that evening, Witter instructed Skelton to modify the S&P stop order, which would be filled, leaving no open overnight positions in Witter's account.

However, Witter and Skelton disagree about whether Witter clearly instructed Skelton to cancel his other working S&P stop orders. Skelton claims that Witter indicated that he wanted to continue trading the S&P, and after telling Skelton to cancel the T-bond and Dow orders, told Skelton to "leave alone" the five-lot S&P orders, at five-point increments. In contrast, Witter claims that he told Skelton to cancel the S&P orders. Witter is understandably skeptical about TransAct's explanation for why it could produce recordings for all conversations except for this one crucial conversation, and essentially argues that adverse inferences should be taken for TransAct's non-production of a recording for this conversation. However, TransAct was not required to record its calls, and since the Commission has never sustained an adverse inference sanction against any similarly situated firm that failed to produce a recording of a pivotal conversation, I am constrained from imposing the sanction. Moreover, given Witter's propensity to confuse trading terms, I am crediting Skelton's version of this conversation.

According to Witter, the next morning, he tried unsuccessfully to log on to the Genesis and TransAct platforms, and thus could not access his account. However, when he called the TransAct desk before the open, he did not tell Tom Surico of this problem. TransAct produced a recording of this conversation:

Witter: Can you tell me what my current position is in the mini S&P's?

Surico: One minute please. Okay. That would be ESU7?

Witter: Think so.

Surico: Well, according to this, you're flat on this.

Witter: Okay.

Surico: I don't see a position here.

Witter: Okay. Can you tell me what the last transaction was, because I was talking -

Surico: Your last fill?

Witter: Yeah.

Surico: Okay. I have you, the last fill was buying a one lot at 142150.

Witter: Okay. Can you tell me what the P&L was for that? I had 12 at one time.

Surico: Well, I see \$962.50.

Witter: Okay.

Surico: Okay?

[Underlining added for emphasis.]

About twelve minutes later, the working S&P orders were filled. Soon afterwards, the account became under-margined, triggering an automatic liquidation.

Conclusion

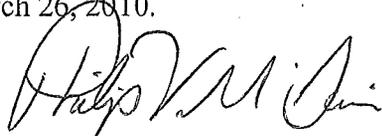
This case is close and turns, not on Witter's evening conversation with Skelton, but on his conversation the next morning with Surico. During that conversation, Witter asked about his S&P "position," and Surico told Witter that he was "flat on this." The meaning of the term "flat" can vary with its context. Generally, the term "flat" means that there is no market exposure in the form of open positions and in the form of working orders which could potentially result in a position. However, here, from the beginning to the end of the brief conversation, Witter had focused Surico's attention on the position that had been successfully liquidated. Witter, significantly, did not mention any other S&P orders, and did not tell Surico that he had been

unable to access his account on-line and thus unable to confirm independently that all working orders had been cancelled. In these circumstances, even though Witter believed in good faith that Skelton had cancelled all working orders the night before and even though TransAct desk personnel had a general knowledge of Witter's persistent problems with his on-line trading platform, Witter could not reasonably shift to TransAct the duty to independently confirm the status of his working orders, without specifically informing TransAct that he was relying on it to perform that special task. *See Grist v. Shearson, Lehman Bros.*, ¶ 24,962 (CFTC 1990). Thus, Witter has failed to show any violations by respondents.

ORDER

No violations having been shown, the complaint in this matter is DISMISSED.

Dated March 26, 2010.



Philip V. McGuire,
Judgment Officer