U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings

RECEIVED CFTC

Office of Proceedings
Proceedings Clerk
11:30 am, Oct 10, 2014

Sergei S. Laube and Galina Laube, Complainants, v. Gain Capital Group LLC d/b/a Forex.com, Respondent.	* * * * * * * * * *	CFTC Docket No. 13-R006

INITIAL DECISION

Introduction

This dispute arises from the liquidation of a four-contract U.S. Dollar vs. Swiss Franc (USD/CHF) forex position in the joint account held by complainants Sergei and Galina Laube. The Laubes do not dispute that their account was under-margined by $1,080, but assert that respondent Gain Capital Group d/b/a Forex.com ("Gain") should have liquidated just one USD/CHF contract to cover the margin deficit, rather than all four contracts. They seek to recover the amount debited from their account on the disputed four-contract liquidation: $37,663.[1] The Laubes also seek $109,917 in purported lost profits. Finally, the Laubes allege that Gain engaged in deceptive and detrimental margin, liquidation and asymmetrical slippage practices of the sort alleged

[1] Gain's August 2011 monthly account statement (attached as an exhibit to the Laubes' complaint), and Gain's breakdown of the losses on the August 1, 2011 liquidation, confirm that $37,663 was debited for the disputed liquidation. The narrative in the Laubes' complaint erroneously states a slightly lower number. Amounts have been rounded to the nearest dollar.

in a National Futures Association ("NFA") business conduct committee complaint which was resolved with a consent order before the Laubes would open their account with Gain.

In reply, Gain has not challenged the Laubes' calculation that the margin shortfall could have been covered with the liquidation of just one USD/CHF contract and otherwise has not offered any insight into its decision to liquidate more than one contract. Rather, Gain has asserted that its standard customer contract, signed by the Laubes, gave Gain unfettered discretion to liquidate any or all open positions in the customer's account in the event the account reaches insufficient margin. In this connection, Gain asserts that the four contracts were properly liquidated due to insufficient account margin and that the liquidation was conducted in accordance with Gain's policies and procedures. Gain also denies that it engaged in deceptive and detrimental margin, liquidation and slippage practices of the sort set out in the NFA complaint, pointing out that the conduct that was the subject of the NFA complaint had occurred well before the Laubes opened their account and that the Laubes used a different trading platform than the one that was a subject of the NFA complaint.

As explained below, after reviewing the parties' submissions,[2] I have concluded that the Laubes have established that Gain's liquidation of all four contracts was not in good faith, and thus that they are entitled to recover $35,205 in damages.[3]

[2] The submissions considered are: the Laubes' complaint and exhibits, addendum to complaint, and closing argument; and Gain's answer and exhibits, and breakdown on the losses realized on the liquidation of each of the USD/CHF contracts.
[3] As explained below, the damage calculation is based on the losses realized on the first three of the four USD/CHF contracts bought by the Laubes.

Factual Findings

The parties

1. Sergei Simon Laube and Galina Laube are residents of Washington, DC. Neither side produced any evidence concerning their background or trading experience. The Laubes do not dispute Gain's assertion that Mr. Laube was the only person authorized to access, fund, withdraw and make all trading decisions regarding the account and that he "actively" traded their account from the time of account opening until August 1, 2011, the date of the disputed liquidation. Since Mr. Laube appears to have taken the lead in trading, references in this decision are to him, unless otherwise indicated.

2. Gain Capital Group LLC d/b/a Forex/com. ("Gain" or "Forex.com."), located in Bedminster, New Jersey, is a registered futures commission merchant and retail foreign exchange dealer. Gain acted as the counter party to the Laubes' trades.

Gain provided the proprietary platform, "ForexTrader," used by Laube during the lifetime of the account to access and place trades.

3. The NFA business conduct committee ("BCC") complaint referenced by the Laubes in their complaint is *In the matter of Gain Capital Group LLC and Glenn Harry Stevens* (NFA case number 10-BCC-15). On June 30, 2010, the NFA issued a Complaint against Gain and its owner that cited Gain for engaging in margin and liquidation practices that had a detrimental impact on certain of Gain's customers on certain slipped trades, failing to maintain records for certain unfilled orders that were placed on the Meta Trader trading platform prior to May 2009, failing to adequately review the activities and promotional material of Gain's unregulated solicitors, and failing to

respond promptly to certain inquiries and requests made by NFA during NFA's audit of Gain.

On October 27, 2010, NFA's business conduct committee issued a Decision accepting an Offer of Settlement submitted by Gain and its owner, in which they neither admitted nor denied the allegations of the Complaint and agreed to settle the case. Gain agreed: one, to refund to customers the amount of negative slippage they experienced on the trades that were placed in their accounts between May 1 and July 31, 2009 and which were attributable to the Virtual Dealer Plug-in that Gain used on its institutional and retail servers; two, to refund to customers the losses they incurred as a result of Gain's practice of adjusting leverage and margin requirements on Fridays; three, to pay $459,000 to NFA as a monetary sanction; four, that in the future any and all slippage parameters that Gain uses in determining whether a customer's order will be executed or re-quoted, shall be symmetrical in nature and neither advantageous nor disadvantageous to the customer or to Gain; and five, not to reinstate its practice of adjusting leverage and margin requirements on Fridays, which it had discontinued.

The Forex.com customer agreement

4. The Laubes opened a joint self-directed rolling spot foreign currency trading account with Gain on or about January 4, 2010. In this connection, they signed the Forex.com Customer Agreement ("Agreement").

5. Section 6 of the Agreement, titled "Liquidation Level," states that Gain has the ability to liquidate any or all of a customer's open positions upon the customer's account reaching insufficient account margin:

> Subject to all additional rights of Forex.com under the Customer Agreement, in the event that, in the sole opinion of Forex.com and in

> accordance with Forex.com's reasonable best estimate of then prevailing obtainable market Spot Rates, and regardless of whether or not prior Margin Calls have been issued or met, if the Margin Balance should at any time equal or fall below the Minimum Margin Requirement for Customer's Account in the aggregate, Forex.com will have the right but not the obligation to liquidate any part of or all Open Position in Customer's Account. Clients are responsible for placing their own Stop Loss Orders to minimize losses.

[Underlining added for emphasis.]

Section 9 of the Agreement, titled "Liquidation of Accounts and Deficit Balances," provides:

> In the event of: (a) Default; (b) insufficient Margin, or Forex.com's determination that any Collateral deposited to protect Customer's Account is inadequate, regardless of current market quotations, to secure Customer's Account; or (c) any other circumstances or developments that Forex.com, in its sole discretion, deems appropriate for its protection, Forex.com may, in its sole discretion, take one or more, or any portion, of the following actions: (1) satisfy any obligations Customer may have to Forex.com (either directly or by way of guarantee or suretyship) out of any of Customer's funds or property in the custody or control of Forex.com; (2) sell or purchase any or all Contracts and any securities or other property held or carried for Customer; (3) cancel any or all outstanding Orders or Contracts or other transactions or commitments made by or on behalf of Customer. Any of the above actions may be taken without demand for Margin or additional Margin, without prior notice of sale or purchase or other notice to Customer, Customer's legal representatives, heirs, executor, administrator, trustee, legatee, successors or assigns and regardless of whether the ownership interest is held individually or jointly with others.

[Italics in original deleted.]

Gain's Trading Handbook, published at the Forex.com website, provided in pertinent part:

> The minimum margin requirement is 2% (or 50:1) on the majors, 5% of (20:1) for the minor currency pairs, and 100% (or 1:1) for spot gold and silver.
>
> Open positions are required to be fully margined at all times. There are no margin calls in forex trading. If a customer's account balance falls below required 100% maintenance margin, all open positions are subject to

> automatic liquidation. Liquidations are handled in the following manner: the net open position with the greatest unrealized loss is closed first, followed by the next largest losing position and so on, until the maintenance margin requirement is satisfied or exceeded. Depending on the size and unrealized P&L of the open positions, customers risk having ALL open positions liquidated in order to meet the minimum margin requirement and incurring losses greater than the initial required margin.

[Underlining added for emphasis.]

Gain's margin monitoring services

6. According to Gain, at the relevant time, Gain offered its customers a number of tools to help them stay abreast of their margin requirements. These included the "Margin & Pip calculator," the "Margin Monitor" on all Forex.com trading platforms, and 24-hour customer support. In addition, Gain allowed customers to set up free "rate alerts" through all Forex.com trading platforms, or the secure login site on the Forex.com home page, which consisted of emailed alerts that a specified rate has been reached or to monitoring the account and alerts to limit market exposure either by adding additional margin or by closing all or part of your open positions to avoid liquidation. However, on the record of this case, it cannot be determined: whether Gain charges for any of these various services, whether Gain specifically advised the Laubes to utilize any of these services, why the Laubes chose not to utilize any of these services, and whether or how utilization of any of these services would have avoided or minimized the Laubes' loss on the disputed liquidation.

The disputed liquidation

7. As noted above, the Laubes do not dispute Gain's assertion that Mr. Laube "actively" traded their account from the time of account opening until August 1, 2011, the date of the disputed liquidation. In this connection, neither side produced any

account statements, other than the August 2011 monthly account statement which reported: one, the $44,583 cash balance on July 29; two, that the four-contract USD/CHF position had been the only open position in the account; three, the $37,663 debit for the disputed liquidation on August 1; four, a $6,920 cash balance after the liquidation on August 1; five, an interest transfer credit of $12 on August 5; and six, a $6,932 cash balance on August 31.[4]

In addition, the monthly account statement reminded the Laubes that Gain acted as the counter-party to their trades.

8. On April 8, 2011, Mr. Laube bought the first of four 100,000 USD/CHF forex contracts, at the rate of 0.9099, with a margin requirement of $2,000.

On April 14, Laube bought the second 100,000 USD/CHF forex contract, at the rate of 0.88997, increasing the aggregate margin requirement to $4,000.

On June 3, Laube placed a limit order to buy what would be the third 100,000 USD/CHF forex contract, at the rate of 0.82033. This order would be executed on July 13, increasing the aggregate margin requirement to $6,000.

The day before, on June 2, Laube placed a limit order to buy what would be the fourth 100,000 USD/CHF forex contract, at the rate of 0.80088. This order would be executed on July 25, increasing the aggregate margin requirement to $8,000.

On July 13 and 25, Laube had been on vacation and away from his computer, and had forgotten about his pending orders. On this record, it cannot be determined when his vacation began and ended.

9. On August 1, 2011, Gain determined that the margin balance in the Laubes' account had decreased to $6,920, which was $1,080 under the $8,000 that Gain

[4] The cash balance would eventually be returned to the Laubes when they closed the account.

required for the Laubes to hold the four USD/CHF contracts. Gain determined to close out all four contracts, selling at a rate of 0.78167, and Gain debited the Laubes' account $37,663.

The USD/CHF contract that had been bought on April 4, at 0.9099, realized a loss of $16,405. The USD/CHF contract that had been bought on April 14, at 0.88997, realized a loss of $13,855. The USD/CHF contract that had been bought on July 13, at 0.82033, realized a loss of $4,946. The USD/CHF contract that had been bought on July 25, at 0.80088, realized a loss of $2,458.

10. Gain does not dispute the Laubes' assertion that the USD/CHF rebounded after the liquidation.

11. On September 11, Mr. Laube called Gain's client services department to protest the liquidation. On September 26, Laube followed up with a letter seeking a refund of $35,363.

On October 16, Gain's legal department responded that Gain would not be making any adjustment, because "the August 1st liquidation was performed correctly in accordance with [Gain's] stated policies and procedures."

Conclusions

Gain argues that its customer agreement gave it discretion to liquidate all open contracts in the Laubes' account, regardless of whether liquidation of a smaller number of contracts would have adequately closed the margin deficit. However, while the existence of a contractual provision authorizing liquidation of one or all open positions to meet a margin deficit is one of the facts and circumstances that should be considered in determining whether a margin-deficit liquidation was executed in good faith, it should not be assumed that the rights given to customers by Section 4d of the Act have been absolutely waived by such an agreement.[5] *See, e.g., Mills v. Smith Barney*, Comm. Fut. L. Rep. ¶ 22,762 (CFTC 1985). In other words, Gain's discretion was not unfettered, particularly in light of the fact that Gain acted as the counterparty to the Laubes' trades. Here, the Laubes have produced compelling evidence that the $1,080 margin deficit could have been met with the liquidation of just one forex contract, and thus have shifted the burden to Gain to show that its determination to liquidate all four contracts was in good faith. In contrast, Gain has produced no evidence justifying the liquidation of more than one contract in these circumstances, and thus has failed to show that the total liquidation was in good faith.

Gain's bad faith liquidation of all four contracts violated its duty under Section 4d(a)(2) of the Act to treat the Laubes' funds only for their benefit and in accordance with their instructions. The proper measure of damages for this violation is the Laubes' aggregate losses realized on the unnecessary August 1, 2011 liquidation of the first three contracts bought on April 4 and 14, and July 13, 2011: $35,205.[6]

Finally, the Laubes have failed to produce any reliable evidence in support of their claim for lost profits, and otherwise have failed to establish any other violations alleged in their complaint.

[5] Section 4d(a)(2) of the Act, 7 U.S.C § 6d(a)(2) (2011), provides in pertinent part: "It shall be unlawful for any person to be a futures commission merchant unless – (2) such person shall, whether a member or nonmember of a contract market or derivatives transaction execution facility, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer."

[6] This damage calculation has been based on the deducting, from $37,663 aggregate loss realized on the liquidation of all four contracts, the $2,458 loss realized on the liquidation of the fourth contract, which had been bought about a week before the liquidation.

ORDER

Sergei and Galina Laube have established by a preponderance of the evidence that Gain Capital Group d/b/a Forex.com violated Section 4d(a)(2) of the Act and that this violation proximately caused $35,205 in damages. Accordingly, Gain Capital Group d/b/a Forex.com is ordered to pay to Sergei Laube and Galina Laube reparations of $35,205, plus pre-judgment interest on that amount at 0.11%, compounded annually from August 1, 2011, to the date of payment, plus $250 in costs for the filing fee.

Dated October 10, 2014.

Philip V. McGuire

Philip V. McGuire,
Judgment Officer