U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

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 ON REMAND

Introduction

The Commission vacated the initial dismissal on grounds that I had erroneously denied Complainant an opportunity for discovery to test Respondents' contention that they had not recorded the crucial August 16, [2007] 11:30 p.m. conversation, during which Witter contends, and Skelton disputes, that Witter instructed Skelton to cancel all open S&P orders.[1] The Commission remanded this matter with the direction "to permit discovery sufficient to determine whether, more likely than not, the August 16, [2007] 11:30 PM call between Dirk Witter and Robert Skelton was recorded and thus to determine whether an adverse inference is warranted, based on the criteria set out [in *Smith v. Napolitano*, 626 F. Supp. 2d 81 (D.D.C. 2009)]." Slip opinion, page 8.

[1] The reader's familiarity with the procedural summary set out in part 2 (pages 3 to 5) of the "Background" section of the Commission's remand order is presumed. In this summary, the Commission noted: "On appeal, Witter states that 'this case is centered on one thing, did I tell Skelton, as I assert, to put in a stop loss and remove all other orders.' We confine our review to that issue." Slip opinion, at footnote 3, page 3.

In addition, the Commission observed:

> Further discovery may obviate the need for the Judgment Officer to rely on [the initial credibility determination favoring respondents], or it may cause him to revise his view. On the other hand, if further discovery proves fruitless, we would find no clear error on the existing record and would defer to the Judgment Officer's determination.

Slip opinion, page 9. Pursuant to the Commission's order, Complainant conducted additional discovery[2] and produced new evidence,[3] and both sides submitted closing arguments.[4]

As discussed below, after reviewing the Respondents' discovery replies, Complainant's new evidence, and both sides closing arguments, I have concluded that the additional round of discovery has not yielded sufficient information to cast additional doubt on TransAct's explanation for the lack of a recording available for production, and thus I have decided: one, to leave undisturbed the initial determination to not impose an adverse inference sanction based on Skelton's and TransAct Futures' non-production of the recording; and two, to leave undisturbed the initial assessment of Witter's and Skelton's relative credibility.[5] Accordingly, the complaint in this matter has been dismissed.

Conclusions

1. Whether an Adverse Inference is Justified

In connection with respondents' non-production of a recording of the pivotal call, the Commission noted that "evidence of bad faith could conceivably justify [an adverse]

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[2] *See Order* dated July 5, 2013; Complainant's discovery requests titled *Motion for Discovery*, filed July 23, 2013; Respondents' *Responses to [Complainant's] Motion for Discovery*, filed July 30, 2013; *Notice* dated August 30, 2013; and Thompson e-mail to Complainant, dated September 25, 2013.
[3] *See* Complainant's *Request to Submit Evidence*, and the seven sets of documents attached thereto; and Respondents' *Response to [Complainant's] Request to Submit Evidence.*
[4] *See* Respondents' *Evidentiary Summaries and Closing Arguments*; and Complainant's *Evidentiary Summary and Closing Arguments.*
[5] *See* last paragraph (pages 8 to 9) of the *Discussion* section in the Commission's remand order.

inference against the non-producing party, and might have been revealed through reasonable discovery." Slip opinion, page 7.[6] The Commission further stated that when determining whether to draw an adverse inference, the Commission found instructive the criteria set out by the U.S. District Court for the District of Columbia in *Smith v. Napolitano,* 626 F. Supp. 2d 81, at 101:

> (1) The party having control over the evidence had an obligation to preserve it;
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> (2) the destruction or loss was accompanied by a culpable state of mind; and
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> (3) the evidence that was destroyed or altered was relevant to the claims or defenses of the party seeking the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

Slip opinion, pages 7 to 8.

As for the first element of the Smith test – *i.e.*, the obligation to preserve any recording if it existed -- when viewed separately and collectively, Respondents' discovery replies and Complainant's new evidence fail to show that Witter's August 16, 2007 11:30 p.m. call with Skelton was more likely than not recorded. According to Respondents, at the relevant time, TransAct Futures' multi-handset telephone system provided intra-office and inter-office communication via standard copper wire technology. Individual handsets were assigned to agents who handled calls with clients. Calls on these handsets were recorded, using handset adaptors to capture the call for storage on a central server and replication offsite. For better or for worse, the phone system was configured so that if a TransAct agent's recorded line was busy the Merlin Legend PBX system would automatically bounce any new incoming call to a second line. This second

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[6] The factual summary set out in part 1 (pages 1 to 3) of the "Background" section of the Commission's remand order is hereby incorporated by reference, and the reader's familiarity with that summary is presumed.

line was connected to the Merlin Legend PBX system, but was not connected to an XTR Universal Adaptor, and thus any calls on this line would not be recorded.

Respondents do not dispute Witter's principal evidence which shows that a single phone using Merlin Legend PBX and XTR Universal Adapter technologies is capable of recording multiple lines.[7] However, although not disputed, this evidence is not relevant since it pertains to technology in which one phone line has the capability to record multiple calls, which is not the type of multi-handset system used by Skelton and TransAct. This evidence also does not show that Skelton and TransAct were confined to a single-handset phone system. Therefore, Witter has failed to show by a preponderance of the evidence that his August 16, 2007 11:30 p.m. call with Skelton more likely than not was recorded.[8]

As for the second element of the *Smith* test, no new evidence produced in discovery or sought for admission by Witter shows that nonproduction of the recording was accompanied by a culpable state of mind. Similarly, no evidence shows that Witter was singled out, that an unrecorded line was slyly configured for particular calls, or that

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[7] *See* Complainant's *Request to Submit Evidence*, and *List of Evidence*, pages 19-20 of Complainant's *Evidentiary Summary and Closing Arguments*. For example, Witter's e-mail exchange with Don Clark and the question posed to "Just Answer" were based on hypothetical factual scenarios not related to this case. Also, the reply by Just Answer confirms that the Just Answer employee is "utterly without knowledge or reference sources" on matters pertaining to configuring a Merlin Legend PRI/ISDN line.

[8] The Commission, in its procedural summary, further noted:

> Although Witter continues to assert "Misrepresentation" on the ground that TransAct's Customer Agreement states "that they recorded [all] telephone calls," the Customer Agreement states only that [the customer agrees that all] customer calls "may" be recorded. Thus, there was no misrepresentation as alleged by Witter.

Slip opinion, at footnote 3, page 4 (bracketing added for clarification). In his closing arguments, Witter has tried to re-cast his misrepresentation claim as a breach of contract claim. Witter's claim is based on the same tortured and unconvincing reading of a clause which in fact clearly does not promise that all conversations will be recorded. Rather, the term "may" in this contractual clause can reasonably only be interpreted to be a modal verb indicating possibility, but not certainty, that any conversation out of all conversations potentially will be recorded. Accordingly, there was no contractual obligation to record all conversations as alleged belatedly by Witter.

any actions were taken to erase a recording after the call with Witter. As a result, the new evidence does not justify modifying or disturbing the initial determination not to impose adverse inferences.

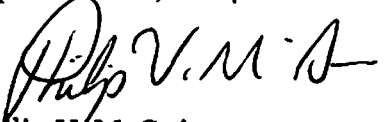
2. Whether a revision in the initial credibility assessment should be revised

The expanded evidentiary record neither reduced the credibility of Skelton and TransAct nor increased the credibility of Witter. In this connection, Witter has produced no new evidence showing that Witter in fact offered clear instructions to Skelton to cancel all working orders or that Skelton knowingly or negligently disregarded such instructions. As a result, Complainant has not shown that the initial assessment finding that Skelton's testimony was relatively more reliable than Witter's testimony should be revised.

ORDER

The new evidence discovered and produced by Complainant does not compel revising the initial credibility assessment and does not compel disturbing the initial determination not to impose an adverse inference sanction for the non-production of a recording of the August 16, 2007 11:30 p.m. conversation between Witter and Skelton. Accordingly, the complaint is hereby dismissed.

Dated September 10, 2014.



Philip V. McGuire,
Judgment Officer