UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

DIRK L. WITTER v. ROBERT SEAN SKELTON, and TRANSACT FUTURES f/k/a YORK BUSINESS ASSOCIATES	CFTC Docket No. 08-R045 OPINION AND ORDER

BACKGROUND

1. Claimant, Dirk L. Witter, was the account holder of a self-directed online trading account at Respondent TransAct Futures f/k/a York Business Associates ("TransAct"). Transcript of Telephonic Recording ("Tr.") at 11. At all relevant times, TransAct was a registered Futures Commission Merchant ("FCM") and Commodity Trading Advisor ("CTA").[1] TransAct describes itself as "a 100% electronic trading firm" focused on "self directed accounts," and offering no discretionary trading account services or trading advice. Respondents' Statement of the Case, Answer, & Affirmative Defenses ("Resps. Statement"). TransAct's customers can execute self-directed trades either through TransAct's own software or third-party software applications. *Id.* at 2-3. Although TransAct maintains no "order desk," its representatives will execute trades on behalf of customers experiencing technical problems. *Id.* at 7. Witter experienced "ongoing problems" with his third-party trading software. Tr. at 35. He therefore "called the [support] desk quite often" and placed orders by telephone. *Id.* 14, 35.

On August 16, 2007, Witter experienced difficulty with his software and, therefore, placed two calls to TransAct to manage his account – the first at approximately 11:30 PM EDT,

[1] TransAct remains registered as an FCM, but has since withdrawn its registration as a CTA.

and the second at approximately 11:40 PM EDT. Resps. Statement at 8-9; Objections & Responses to Complainant's Mot. to Compel ("Resps. Objections") at 4. He reached Respondent Robert Skelton, a TransAct customer support representative. The parties dispute who said what to whom.

At the time of the 11:30 PM call, Witter's account contained one open position (in E-Mini S&P contracts) and seven "working orders," or standing orders for additional positions: four orders for E-Mini S&P contracts and three orders for Treasury and Dow Index futures. Resps. Statement at 7-9, 15-17. Witter claims that, in the 11:30 PM call, he issued two instructions to Skelton: to place a stop-loss order on the open position and to cancel all seven working orders. He further claims that Skelton repeated these instructions back and that Witter confirmed his request for seven cancellations. *Id.* at 9. Skelton disputes this account. Skelton claims that Witter requested the stop-loss order and the cancellation of his three Treasury and Dow Index futures orders but did not request cancellation of the four orders for E-Mini S&P contracts. *Id.* at 2; Tr. at 49. Skelton entered the stop-loss order and cancellations with respect to the Treasury and Dow futures. Tr. at 49. The four working orders for E-Mini S&P contracts were not cancelled. Resps. Statement at 4. At approximately 11:40 PM, Witter called again, reaching Skelton, and requested a modification of the stop-loss order. *Id.* at 9. Witter, believing that "the crisis [was] averted," decided he "could go to bed." *Id.*

The next morning at approximately 8:00 AM EDT, Witter placed another call to TransAct, and reached Tom Surico, another TransAct customer support representative. *Id.* at 10. Witter asked Surico, "Can you tell me what my current position is in the mini S&P's?" Surico responded "you're flat on this. I don't see you with a position." Resps. Statement, Ex. 6, Audio Recording of Aug. 17, 2007 Call from D. Witter to TransAct. Witter interpreted "flat" to mean

that there were "no working orders," but did not separately ask Surico about open orders because, according to Witter, he "didn't feel [he] had any." Tr. at 23, 32. In fact, although Witter had no open *positions* at that time, his E-Mini S&P *orders* remained outstanding. Resps. Statement at 4.[2]

Minutes later, the exchange filled Witter's open E-Mini S&P orders, establishing a 20-lot short position. *Id.* at 4. The contract price quickly increased, sending the short position into a significant loss, triggering an automatic liquidation. *Id.* Witter's account value declined by approximately $24,000. *Id.* at 10; Complaint Ex. "Daily Statement" at 1. After learning of the loss, Witter made additional calls to TransAct between August 17 and 20. Resps. Statement at 10-14. Witter spoke at least twice to Brian Sass, Compliance Officer for TransAct, inquired whether TransAct recorded its customer calls, and requested that TransAct review such recordings to confirm the attempted cancellations. *Id.* at 12-13; Tr. at 25. Sass told Witter that TransAct did record customer calls and stated that he would attempt to locate the recording of the August 16, 11:30 PM call. Resps. Statement at 12; Tr. at 25. After at least two or three calls from Witter to Sass, Sass told Witter that "the call was picked up on an unrecorded phone since" Skelton "was currently on another line helping another customer." Resps. Statement at 13.

2. Witter brought this action on August 25, 2008, for a Summary Decisional Procedure against TransAct, alleging, *inter alia*, failure to perform an order execution.[3] With respect to the

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[2] To the extent Witter's appeal asserts that the Judgment Officer erred in finding no violation of CEA Section 4b in connection with the Surico call (Complainant's Br. on Appeal ("Comp. App. Br.") at 7-8), the decision is affirmed because Witter asked only about "positions." However, that does not resolve the case, because, as Witter points out, if he believed the working orders were cancelled (as he claims was his belief), he likely would not have inquired about them. *Id.* at 8.

[3] Witter also alleged failure to "perform reasonable Fiduciary responsibilities"; "Misrepresentation of their business procedures"; failure to "negotiate in good faith"; an attempt to "mislead [Witter] about how [he] could dispute the argu[]ment"; and failure "to share evidence." (Complaint (Aug. 25, 2008).) 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." Comp. App. Br. at 23. We confine our review, therefore, to that issue.

August 16, 11:30 PM call at issue in that regard, Respondents assert that the 11:30 PM call was not recorded because "Skelton, who was on another call at the time" Witter called, "told his current call to hold and answered [Witter's] call on a non-recorded telephone. This phone was on a non-customer support phone that was closely located to Skelton's night support desk." Resps. Statement at 3. Thus, TransAct produced "recordings for all conversations except for this one." *Witter v. Skelton*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,546 at 63,984, 2010 WL 1225394, at *2 (CFTC Mar. 26, 2010) ("Initial Decision").

In discovery, Witter sought *inter alia*, "[a] complete record of all phone lines, their configuration, the number of phones in the office manned by Robert Skelton" on August 16, "telephone company records of all calls received by those numbers from 15 July 2007 to 31 August 2007," the name of the company that installed the recording software or system, the name of the software or system, the installation company's phone number, the date of installation and the cost." Respondents objected to each of these requests as irrelevant. Response to Request for Info. & for the Production of Documents at 2. Witter also sought discovery of the "[r]ecording[s] of all calls made by Dirk L Witter" between July 15 and August 31, 2007. *Id.* Respondents stated that they had "previously provided recorded calls" and had "no other such materials in [their] possession, custody, or control." *Id.*

Witter filed a motion to compel, asserting the right to probe "the type of system, installer, maintenance records and all other information about" TransAct's phone system, the "configuration of the phone system, the software of the recording system and the phone logs for that evening," and Respondents' contention that "Mr. Skelton was on another call."

Although Witter continues to assert "Misrepresentation" on the ground that TransAct's Customer Agreement states "that they recorded telephone calls" (*id.* at 6), the Customer Agreement states only that calls "may" be recorded. Resps. Statement, Ex. "Customer Agreement" at 7. Thus, there was no misrepresentation as alleged by Witter.

Complainant's Mot to Compel at 1. By Order, dated March 20, 2009 ("March 20 Order"), the Judgment Officer denied Witter's motion to compel "on the grounds that the information sought is not relevant or not likely to lead to the discovery of relevant evidence." Witter filed a motion to reconsider (Mot. for Reconsideration of Mot. to Compel), which the Judgment Officer also denied, by Order dated April 27, 2009. The Judgment Officer held two telephonic hearings: the first in the ordinary course, and a second because "staff accidentally erased the recording of the initial hearing." Tr. at 3.

The Judgment Officer found that Witter was "understandably skeptical about TransAct's explanation for why it could produce recordings for all conversations except for this one critical conversation." Initial Decision, ¶ 31,546 at 63,985. However, the Judgment Officer refused to draw an adverse inference from TransAct's non-production because the "Commission has never sustained an adverse inference sanction against any similarly situated firm that failed to produce a recording of a pivotal conversation." *Id.* Rather, citing "Witter's propensity to confuse trading terms," the Judgment Officer credited Skelton's account. *Id.*

The Judgment Officer stated, however, that the case "turns, not on Witter's [August 16, 11:30PM] conversation with Skelton, but on his conversation the next morning with Surico." *Id.* The Judgment Officer agreed with Witter's interpretation that "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." *Id.* "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." *Id.* Thus, the Judgment Officer found no violations on the basis of Witter's conversation with Surico. *Id.* Witter appealed.

DISCUSSION

CEA Section 4b renders it unlawful "to cheat or defraud" or "willfully to deceive" any person in regard to any commodity contract in interstate commerce. 7 U.S.C. § 6b(a)(2)(A)&(C). We have previously held that an intermediary has a duty under Section 4b to follow a customer's trading instructions, including a "duty to make a good faith effort to act upon the customer's cancellation instruction." *Do v. Lind-Waldock & Company*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,516 at 43,322, 1995 WL 581223, at *3 (CFTC Sept. 27, 1995). We so held because an intermediary's failure to execute a cancellation "forces the customer to undertake market risk that he or she does not wish to assume." *Id.* While the intermediary is not required to guarantee the successful execution of such instructions, reckless failure to execute is sufficient to violate Section 4b. *See Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988). An action is reckless if it "departs so far from the standards of ordinary care that it is very difficult to believe the actor was not aware of what he was doing." *Id.* (internal quotation marks, alteration omitted).

We disagree with the Judgment Officer's statement, without elaboration, that the case "turns, not on Witter's evening conversation with Skelton, but on his conversation the next morning with Surico." Initial Decision, ¶ 31,546 at 63,985. If Witter instructed Skelton to cancel all open S&P orders, but Skelton failed to do so under circumstances constituting recklessness, Respondents have violated Section 4b and thereby damaged Witter. Of course, Skelton's non-cancellation of Witter's orders may have been entirely innocent or merely negligent. For example, if Witter did not instruct Skelton to cancel, or if his instruction was not sufficiently clear, then Skelton acted properly. If Skelton honestly misunderstood a valid instruction from Witter, such conduct might amount to negligence, insufficient to establish a

violation of Section 4b. If, however, Skelton did understand Witter to be requesting a cancellation, but failed to execute the instruction, the Judgment Officer might properly have found his conduct reckless.

The best evidence of what transpired would have been a recording of this conversation. While TransAct claims that this conversation, unlike the others, was unrecorded, the Judgment Officer denied Witter the opportunity for discovery to probe that contention, ruling, without elaboration, that the information sought was "not relevant or not likely to lead to the discovery of relevant information." March 20 Order at 1. We disagree. If the requested discovery had yielded information casting doubt on TransAct's explanation of the lack of a recording available for production, such information might discredit Respondents' account of that conversation.

The Judgment Officer correctly notes that the Commission has not sustained an adverse inference based on the mere failure to record or to produce a recording of a conversation. We agree that, on this record, there is an insufficient basis to support an adverse inference. However, evidence of bad faith could conceivably justify such an inference against the non-producing party and might have been revealed through reasonable discovery. In determining whether to draw an adverse inference, we find instructive the following criteria applicable in the U.S. District Court for the District of Columbia:

> An adverse inference is warranted if the following three elements are satisfied: (1) The party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind"; and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought 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 defense of the party that sought it.

Smith v. Napolitano, 626 F. Supp. 2d 81, 101 (D.D.C. 2009) (internal quotation marks, alteration omitted).

The obligation to preserve evidence "begins when the party receives notice of current or future litigation as to which evidence is relevant." *In re Global Minerals & Metals Corp.*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. ¶ 29,529 at 55,285, 2003 WL 21448869, at *2 (CFTC June 24, 2003) (citing *Byrnie v. Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001)). As the Judgment Officer noted, Witter is "understandably skeptical about TransAct's explanation for why it could produce all recordings for all conversations except for this one critical conversation." Initial Decision, ¶ 31,546 at 63,985. While the record before us is insufficient to determine whether any evidence was spoliated or whether any such spoliation was the result of bad faith, further inquiry is warranted.

Witter's discovery requests pertaining to TransAct's phone system were broad, and we do not hold that, or reach the issue of whether, the Judgment Officer was required to grant them in their entirety. Rather, we remand and direct the Judgment Officer to permit discovery sufficient to determine whether, more likely than not, the August 16, 11:30 PM call between Witter and Skelton was recorded, and to determine whether an adverse inference is warranted, based on the criteria discussed above. In ordering such discovery, the Judgment Officer is to be mindful, as always, to protect the parties against "undue burden or expense" or other abuse. 17 C.F.R. § 12.30(2).

Finally, we note that the Judgment Officer made a credibility assessment of both Witter and Skelton and found each of them "sincere, but leavened with a bit of self-interest." Initial Decision, ¶ 31,545 at 63,984. He credited Skelton's account because be found it "more plausible" and due to Witter's "propensity to confuse trading terms." *Id.* at 63,985. As a general rule, we defer to the presiding officer's credibility determinations in the absence of clear error. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685, 2000

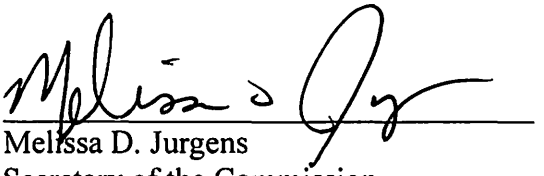
WL 1466069, at *8 (CFTC Sept. 29, 2000). Further discovery may obviate the need for the Judgment Officer to rely on such a determination, or it may cause him to revise his view. On the other hand, if further discovery proves fruitless, we would find no clear error on the existing record and would defer to the Judgment Officer's determination.

CONCLUSION

Based on the foregoing, we vacate the Judgment Officer's dismissal and remand for further proceedings.

IT IS SO ORDERED.

By the Commission (Chairman GENSLER and Commissioners SOMMERS, CHILTON, O'MALIA and WETJEN).



Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission

Dated: July 1, 2013