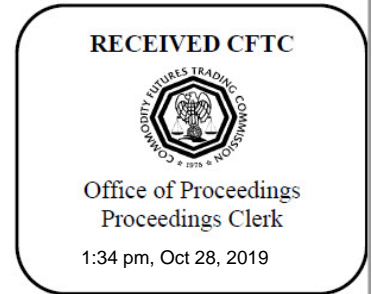




U.S. COMMODITY FUTURES TRADING COMMISSION

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

Office of Proceedings



Derby LLC, Managing Partner alias
Scott Mitchell, Managing Member

Complainant,

v.

Interactive Brokers LLC,

Respondent.

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CFTC Dkt. No. 15-R007

Served electronically

**INITIAL DECISION AND
ORDER DISMISSING THE COMPLAINT**

Before: Kavita Kumar Puri, Judgment Officer
Commodity Futures Trading Commission
Washington, D.C.

Appearances: Derby LLC,
Managing Partner alias Scott Mitchell, Managing Member, *self-*
represented litigant
Shelbyville, KY
For Complainant

Daniel A. Spector, Esq.
Interactive Brokers LLC
Washington, D.C.
For Respondent

Derby LLC, through its Managing Partner, Scott Mitchell, appears in this summary proceeding as a self-represented litigant, seeking \$10,817.69 in damages

for his trading losses over the life of his futures trading account.¹ Complaint at 2. Respondent Interactive Brokers LLC (IB) purportedly caused these losses by employing a different accounting method than the industry standard, specifically by using monthly mark-to-market valuation. *Id.* at 1-2; Answer & Affirmative Defenses at 3.

For the reasons that follow, I am dismissing the Complaint.

I. Summary of Parties and Proceedings

A. The Parties

Complainant Mitchell is a resident of Shelbyville, KY. He opened a self-directed futures trading account with IB on November 18, 2013, initially investing \$19,975. Ans. & Aff. Defenses at 2; IB Activity Statement Nov. 19, 2013-Nov. 29, 2013 (attached as an Exhibit to the Complaint). Mitchell traded his account using Nico Partners as his commodity trading advisor (CTA). Mitchell closed his account on December 23, 2014, and withdrew his remaining balance of \$30,078.69 that same day. Ans. & Aff. Defenses at 2; IB Activity Statement Nov. 18, 2013-Dec. 23, 2014 (attached to Ans. & Aff. Defenses).

Respondent Interactive Brokers LLC (IB) is the CFTC-registered futures commission merchant (FCM) with which Mitchell opened his futures trading account. *See* NFA Basic research, *available at* <https://www.nfa.futures.org/basicnet/Details.aspx?entityid=QHPcC3ptg%2fI%3d>. IB serves as an online broker, enabling its clients to trade products on various markets and exchanges throughout the

¹ For brevity and clarity, I refer to Complainant as Mitchell throughout this Initial Decision.

world. IB submits these trades electronically through its proprietary software, Trader Workstations, which gives clients access to market quotes and order management capabilities. Mitchell (and/or Mitchell's CTA) traded his account through this program. Compl. at 1; Ans. & Aff. Defenses at 2.

B. Procedural History

Mitchell filed his Complaint on April 4, 2015, and his Complaint Addendum on June 28, 2016. IB filed its Answer and Affirmative Defenses along with a Motion for Reconsideration of Determination to Forward the Complaint (Motion for Reconsideration) on September 7, 2016. The Director of the Office of Proceedings denied the Motion for Reconsideration "because the criteria for forwarding this complaint and for initiating a reparations proceeding has been met." *See* Letter from Director Smith to IB (Oct. 13, 2016). This case was forwarded to Judgment Officer (JO) McGuire on October 17, 2016, and discovery began shortly thereafter.

Mitchell made no discovery requests, and JO McGuire held that he waived his right to discovery. *See* Email from JO McGuire to Mitchell (Dec. 21, 2016). Moreover, Mitchell failed to respond to IB's discovery requests, which prompted IB to file a Motion to Compel Discovery on January 10, 2017. JO McGuire granted that Motion the following day and gave Mitchell until January 31, 2017 to respond to IB's discovery requests. *See* Order Compelling Production by Scott Mitchell (Jan. 11, 2017).

Mitchell failed to meet that deadline. JO McGuire issued an Order to Show Cause why his Complaint should not be dismissed. *See* Order to Show Cause (Feb.

2, 2017). Mitchell timely filed his response to that Order, stating that he “submitted [all] the information [he] had.” Email from Mitchell to Office of Proceedings (Feb. 21, 2017).

In his January 11, 2017 Order, JO McGuire also determined that this proceeding could be decided without oral argument. In that same Order, he set the deadline for any final submissions as February 21, 2017, which he later extended to March 22, 2017. *See* Email from JO McGuire to the parties (March 1, 2017). Neither party objected to the determination that a hearing is unnecessary, and neither party submitted any final submissions.

This case is now ready for decision on the documentary record. That record consists of the following submissions by Mitchell: (1) IB monthly activity statements from November 2013 to May 2014; (2) a document he drafted and labeled “Monthly Tally of Investment Difference”; (3) an email between Mitchell and his CTA from August 1, 2014; and (4) Mitchell’s May 2014 commodity statement from another trading account he held at RJ O’Brien. It also includes a single submission by IB: Mitchell’s account activity statement summary from November 18, 2013 through December 23, 2014. After carefully reviewing these documents and the pleadings, and under Commission rules 12.201(j) and 12.205(c)(1)(i), I am dismissing the Complaint.

II. Findings of Fact

A. Account Opening and Account Statements

Mitchell opened his futures trading account with IB on November 18, 2013 with \$19,975, which was traded by his CTA, Nico Partners, Inc. Ans. & Aff. Defenses at 2; Compl. at 1. IB provided Mitchell with daily trading statements on days he placed trades and monthly statements through its online proprietary software, Trader Workstation. Ans. & Aff. Defenses at 2.

IB's monthly statements reflected the value of his account in two ways relevant to this proceeding: using a monthly mark-to-market valuation and the unrealized and realized gains and losses. Marking investments to market means exactly what it sounds like—it sets forth the current market value of the positions, which may remain open until some point in the future and which may fluctuate in value considerably over time. And importantly, IB uses its mark-to-market valuation to reflect a position's change in value from the previous month.

Unrealized and realized gains and losses includes both the actual profits or losses on closed positions, as well as what the open positions are currently worth (in other words, the open positions' mark-to-market valuation). But unrealized and realized gains and losses compares profit and loss from the purchase of the position—not what the value of the position was in the previous month. Thus although IB's mark-to-market number for a given month can reflect a very different value than the realized and unrealized gains and losses number, both numbers are simply different ways of representing the position's value in time.

III. Legal Analysis and Conclusions

Complainant has shown no violations of the Commodity Exchange Act or any regulations promulgated thereunder. With regard to monthly statements, the Commission requires an FCM to promptly furnish written monthly statements that include: (1) open contracts with prices at which acquired; (2) the net unrealized profits or losses in all open contracts marked to market; and (3) any futures customer funds carried with the FCM. *See* Commission Rule 1.33(a), 17 C.F.R § 1.33(a). IB specifically adhered to these requirements.

Not only did IB comply with the requirements of Rule 1.33, IB's provision of monthly mark-to-market valuations did not prejudice Mitchell in any way. Mitchell alleges that the mark-to-market valuations caused him actual losses, and he uses a comparison of the mark-to-market valuations and realized and unrealized gains and losses from November 2013 through May 2014 to prove his point. In his monthly tally exhibit, he adds up the differences between the mark-to-market and realized and unrealized gains and losses to arrive at a \$10,818 for those seven months. He then argues that this difference amounts to his actual losses.

But IB provided a real-world example from a futures contract Complainant purchased to demonstrate the fallacy of Mitchell's argument. On December 9, 2013, Mitchell obtained a futures contract in FCJ4. On December 31, 2013, the value of the contract increased by \$1,047. Because his account was opened in December 2013, the mark-to-market valuation (which is month-over-month) and the realized and unrealized gains/losses (which is from purchase of position to month-end) were

the same—\$1,047. Between December 31, 2013 and January 7, 2014, the value of that position increased by \$210. Its mark-to-market value was \$210, reflecting its change in value since the last monthly statement. But its realized and unrealized gains and losses was \$1,257, reflecting the entire change in value from the time that position was opened (or \$210 + \$1,047). In other words, once a position is closed (the time when Mitchell actually realized or accrued any gains or losses), the monthly mark-to-market valuation sum and the realized gain or loss would be identical.


Thus the presence of open positions in Mitchell's account explains the difference between the two valuation figures between the months of November 2013 and May 2014. But adding the monthly mark-to-market numbers over the life of the account should result in a number that is identical to the realized and unrealized gains and losses of all closed positions. And in fact, here, the sum of the monthly mark-to-market figures is precisely the same as the realized and unrealized gains and losses: \$35,015.92. *See* Ans. & Aff. Defenses at 2; IB Activity Statement Nov. 19, 2013-December 23, 2014.

IB's inclusion of mark-to-market valuation neither violated the CEA or its regulations, nor caused Mitchell any actual loss. Mitchell fails to prove his claims by a preponderance of the evidence.

CONCLUSION

For the reasons discussed above, and pursuant to Commission rules 12.201(j) and 12.205(c)(1)(i), the Complaint is dismissed.

Dated: October 28, 2019


Kavita Kumar Puri
Judgment Officer