UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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DANIEL BARDMAN, and DEBUT, INCORPORATED, Complainants, v. GLOBAL FUTURES AND FOREX, LTD, d/b/a GLOBAL FOREX TRADING, Respondent.	*	CFTC Docket No. 05-R37

INITIAL DECISION

Appearances

Daniel Bardman, Brooklyn, New York, p*ro se*

Dmitry Bardman, Brooklyn, New York, for Debut, Inc., *pro se*

William Nissen, Esq., Sidley Austin Brown & Wood, Chicago, Illinois, for Global Futures and Forex, Ltd d/b/a Global Forex Trading

Introduction

This case involves off-exchange retail foreign currency ("forex") contracts. However, this is not a typical forex case. Here, complainants -- Daniel Bardman and Debut, Incorporated, of Brooklyn, New York -- do not allege run-of-the-mill fraud. Rather, complainants allege a series of disclosure and fiduciary violations by Global Forex Trading that preceded and followed a purported trading mistake by Dmitry Bardman – who was the authorized trader for complainants' three aggregated accounts, and who is a relatively experienced forex trader, a co-owner of Debut, and Daniel's brother.

According to complainants, Dmitry Bardman made a "fat-finger" mistake when he entered three Euro/Dollar orders for $3,000,000, instead of the intended $300,000. Dmitry entered two of the orders just before, and one order just after, the release of the Department of Labor's non-farm payroll report. Seeking to profit from expected market volatility, up or down, upon release of the report, Dmitry had entered a buy-stop above the current market price, and a sell-stop below that price. The buy-stop and sell-stop also included contingent stops.

Upon release of the report, the Euro/Dollar gapped down, and triggered Dmitry's sell price. Almost simultaneously, Dmitry doubled-up, entering a market sell order, with a contingent buy-stop. About seven minutes after the open, the fills on the market sell and sell-stop orders were reported. When the two sell orders were filled, the accounts became under-margined. Global e-mailed a margin deficit notice and liquidated the short positions.

About six-and-a-half minutes after the open, Dmitry had cancelled the parent buy-stop and contingent buy-stop orders that he had placed before the open. Dmitry also had modified the buy-stop order that he had placed soon after the open. About an hour later, the market bounced back up, and the buy-stop order was filled. The accounts again became under-margined. Global e-mailed a margin deficit notice and closed out the long position. At the end of the day, complainants' aggregate net losses totaled $24,240.

Complainants' principal allegations are: one, that, contrary to implied promises in its demonstration system, Global's fund management software accepted Dmitry's oversized orders without generating a warning message that the account lacked sufficient

instructions by failing to automatically cancel a buy-stop order after Global had liquidated the position that had been initiated by the buy-stop's "parent" order; and three,

instructions by failing to automatically cancel a buy-stop order after Global had liquidated the position that had been initiated by the buy-stop's "parent" order; and three, that Global failed to act diligently by filling one of the orders outside of the prevailing price range. Complainants seek to recover $28,665 in damages.

In response, Global denies any violations, raises a variety of jurisdictional defenses, and counterclaims to recover the $3,020 debit balance. Global contends that Dmitry Bardman had placed the orders exactly as he had intended in an effort to profit from volatility around the release of the federal non-farm payroll report. Global asserts that Dmitry's purported fat-finger mistake is in reality an implausible *ex post facto* excuse to disavow complainant's losses. According to Global, two factors underscore the implausibility of the fat-finger excuse: one, Dmitry had to enter, and then repeatedly confirm, the trade size for each of the three parent orders and each contingent order; and two, Dmitry had successfully made similarly sized trades around the release of several previous non-farm payroll reports. Global also contends that complainants' accounts were not under-margined when the orders were pending; that the accounts only became under-margined after the pending orders had been filled; that Global properly unwound the under-margined positions; that Global was not obligated to cancel the working stop order upon liquidation of an under-margined position; and that all orders were filled at prevailing market prices.

As explained below, after carefully reviewing the parties' oral testimony and documentary submissions, I have concluded: one, that jurisdiction is proper in this matter; two, that Bardman and Debut have failed to establish that they are entitled to a

favorable judgment; and three, that Global has established that it is entitled to recover the debit balance.

Factual Findings[1]

The parties and the FX contracts

1. Debut, Incorporated, a small New York corporation located in Brooklyn, was set up by Daniel and Dmitry Bardman to trade foreign currencies. Daniel and Dmitry Bardman are brothers and residents of Brooklyn New York. Complainants' submissions identify Daniel as a "client" of Debut, and identify Dmitry as a co-owner, a member of the board of directors, and a vice president, for Debut. Dmitry had previously traded forex contracts with a variety of firms, including Refco and FX Solutions.

Daniel Bardman opened three accounts with Global Forex Trading: one in his name (#44012), and two in Debut's name, "Debut I" (#31865) and "Debut II" (#31832). Dmitry Bardman was the "account manager" for the three accounts. In that capacity, he traded the accounts pursuant to a managed account agreement and a power of attorney executed by Daniel, and a corporate resolution signed by Dmitry, and by Elvira Lev, Debut's other owner and board member.

On the account application, Daniel Bardman indicated that complainants' trading objective was speculation. Daniel also indicated that their "purpose in opening an account with Global" was "Guaranteed fills on stop-loss and limit orders, and no slippage." However, Daniel Bardman testified that respondents had never promised to limit losses to a set size. [*See* Addenda to complaint; Daniel and Dmitry Bardman's

[1] Unless otherwise noted, the essential facts in this case are not in dispute.

replies to interrogatories 1-5; and Dmitry Bardman testimony, at pages 4-5 and 18, and Daniel Bardman testimony at page 21, of hearing transcript.[2]]

2. Global Futures & Forex, Ltd, doing business as Global Forex Trading ("Global"), is a registered futures commission merchant, located in Ada, Michigan.

Global Forex Trading is a primary forex market maker, and acts as the counter party to all customer trades. Global operates a 24-hour trading desk that serves institutional and retail customers.[3] Global provides liquidity for smaller volume forex trades that could not be readily done in the interbank market. In its role as counter-party, Global takes the equal and opposite trading position on customer trades and adjusts the value of accounts daily based on changes in the relative prices of foreign currency. [*See* Kurt Hoeksema testimony at pages 45-46, and Muhammad Rasoul testimony at pages 71-72, and 90-91, of hearing transcript.] This form of trading is a zero-sum game: when a Global customer wins, Global loses, and vice-versa.

3. The forex contracts in question involve the purchase and sale of foreign currency for future delivery. The price is determined at the time that the parties enter into the contract. The customer primarily uses the forex contracts to speculate on fluctuations in the value of currencies. The forex contracts permit customers to roll-over trades, to close positions through offset, and to trade on margin. Delivery of the underlying currencies is not anticipated. [*See* Global's "Trading Regulations," produced by complainants.]

4. Global had the authority to liquidate all open positions in the event that the account became under-margined. [Page 2 of Global's "Trading Regulations."]

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[2] Daniel Bardman translated Dmitry Bardman's Russian testimony.
[3] The record is silent on the relative percentage of Global's retail and institutional customers.

Global's "Fund Manager" trading application software

5. Global's Fund Manager DealBook FX2 ("Fund Manager") software allows traders to manage more than one account without having to submit multiple orders, by pre-setting the allocation among the accounts before submitting a block order. [*See* pages 2 to 21, Dealbook FX2 User Guide; and Hoeksema testimony at pages 32-33, and Rasoul testimony at pages 73-79, and 87-88, of hearing transcript.]

6. The Fund Manager User Guide warns that Fund Manager will not automatically prevent the fill of an order that results in a margin deficit:

> If any [one of multiple] accounts do not have enough money at the time the order is being submitted, the order will not be sent, and a warning message will be displayed. Later on, if an account will not have enough equity at the time to fill an order, the order will be filled anyway, which will result in margin call almost immediately. Fund managers should be careful to avoid such situations.

[Underlining added for emphasis, addendum to complaint.] Thus, the onus was on the customer to assure that an account had an adequate margin cushion. [*See* Hoeksma testimony at pages 64-66 of hearing transcript.]

7. When allocating trades in Fund Manager, the customer first configures the allocation by setting the volume requirement for each account, then saving and labeling that block of information. The customer has to type the volume information once for each parent order. The customer does not have to subsequently re-type the volume for contingent orders, but must highlight that block of information and click a drop-down box with that information when imputing and selecting, modifying, and cancelling and replacing, individual trades. In addition, the trade volume is displayed in different windows on the customer's screen as orders are entered, as orders go from working to

pending status, as orders are filled, and as orders are cancelled and replaced. Thus, if Dmitry had made a fat-finger mistake when entering the volume for each of the three parent trades, he would have had repeated opportunities – in an admittedly short period of time -- to notice and correct the errors. [*See* Hoeksema testimony at pages 34-36, and Rasoul testimony at pages 73-74, and 80-82, of hearing transcript.]

8. In Fund Manager, working orders can be cancelled, but pending orders – *i.e.*, orders "due to be filled" – cannot be cancelled. [*See* Bardman testimony at page 20, and Hoeksema testimony at pages 42-43, of hearing transcript.]

9. As a matter of practicality, Fund Manager checks margin at the time that an order is filled, not at the time that an order is submitted. [*See* Rasoul testimony at pages 63-65 of hearing transcript.]

Disputed Euro/Dollar trades

10. On four previous occasions -- June 4, July 2, August 6, and September 4 -- Dmitry had, with overall success, made trades designed to take advantage of the volatility around the issuance of the U.S. Department of Labor's non-farm payroll number. For these trades, Dmitry used a similar strategy -- a buy-stop above the market, and a sell stop below the market. Dmitry also traded similar lot sizes: the first three orders were for $2,000,000, and the fourth order was for $3,000,000. [*See* Bardman testimony at pages 18-19 of hearing transcript; Hoeksema testimony at pages 49-51 of hearing transcript; and Global's Hearing Exhibit 3.]

11. Soon before the release of the non-farm payroll report, Dmitry entered a buy-stop above the current market price, and a sell-stop below that price. The buy-stop and

sell-stop also included contingent stops. At the time that he placed the orders, the accounts had sufficient margin to support all open positions.

Upon release of the report, the Euro/Dollar gapped down, and triggered Dmitry's sell price. Almost simultaneously, Dmitry doubled-up, entering a market sell order, with a contingent buy-stop. About *seven* minutes after the open, the fills on the market sell and sell-stop orders were reported. When the two sell orders were filled, the accounts became under-margined. Global e-mailed a margin deficit notice and liquidated the short positions.

About *six-and-a-half* minutes after the open, Dmitry had cancelled the parent buy-stop and contingent buy-stop orders that he had placed before the open. Dmitry also had modified the buy-stop order that he had placed (with the "parent" market sell order) soon after the open. When the parent order had been filled, the contingent buy-stop became a working order. Thus, Global did not automatically cancel the buy-stop when Global liquidated the short position that had been initiated by the parent order. About an hour later, the market bounced back up, and the buy-stop order was filled. The accounts again became under-margined. Global e-mailed a margin deficit notice and closed out the long position. [*See* Bardman testimony at pages 5-12, and 22-27, and Hoeksema testimony at pages 33-44, 53-57, and 64-67, of hearing transcript; and Global's Hearing Exhibits 1 and 2.]

12. The aggregate net loss for the three accounts was $24,240: a $7,004 net loss for Daniel Bardman's account (#44012), a $11,042 net loss for the Debut I account (#31865), and a $6,194 net loss for the Debut II account (#31832). This loss resulted in a

$3,020 debit balance. [*See* Bardman testimony at 27-29, and Hoeksema testimony at pages 44-49, and 51-52, of hearing transcript; and Global's Hearing Exhibits 2 and 4.]

13. Over the next four months, in a series of phone conversations and e-mail exchanges, the Bardmans and Global unsuccessfully attempted to settle the dispute. [*See* Bardman testimony at pages 12-13 of hearing transcript; and the series of letters and e-mails produced by Global.]

Discussion and Conclusions

Jurisdiction

Global asserts two principal reasons why the Commission's reparations forum is not open to claims arising from retail forex trades: one, that the forex contracts are spot contracts, not futures contracts, and thus not subject to the Commodity Exchange Act; and two, that, even if they are futures contracts, they are not subject to the Commission's reparations jurisdiction, because Congress has not specified the statutory provision governing reparations actions as one of the provisions in the Act that applies to forex transactions.

Global's assertion that the forex contracts in question are spot contracts, not futures contracts, runs counter to the Commission's view of the law.[4] The forex contracts here exhibit what the Commission has considered to be essential characteristics

[4] *See Dubois v. Alaron Trading Corporation*, Com. Fut. L. Rep (CCH) ¶ 28,406, at 51,026-51,028 (CFTC 2000) (forex contract, with characteristics similar to the contract at issue here, was a futures contract). *See generally* recent Commission forex enforcement actions listed at CFTC website, http://www.cftc.gov/opa/opaenf2006.htm. The U.S. Court of Appeals for the Seventh Circuit has rejected the Commission's interpretation of the law regarding its jurisdiction over retail forex. *CFTC v. Zelener,* 373 F.3d 861, *rehearing and rehearing en banc denied*, 387 F.3d 624 (7th Cir. 2004). However, while *Zelener* remains the law in the Seventh Circuit, and has been followed by a number of other courts, it does not control in this case, where any eventual appeal will properly be to the U.S. Court of Appeals for the District of Columbia. *Dubois*, *id.*, fn. 16, at 51,026-51,027. The U.S. Court of Appeals for the District of Columbia has not addressed the Commission's jurisdiction over retail forex. Therefore the Commission's interpretation of the law controls in this case.

of futures contracts. The contracts involve the purchase and sale of foreign currency for future delivery. The price is determined at the time that the parties enter into the contract. The customer primarily uses the forex contracts to speculate on fluctuations in the value of currencies. In this connection, the forex contracts permit customers to roll-over trades, to close positions through offset, and to trade on margin; and delivery of the underlying currencies is not anticipated. Thus, the forex contracts here are not spot contracts, but rather are futures contracts subject to the Commodity Exchange Act.

Global asserts that the forex contracts here are exempt under Section 2(c) of the Commodity Exchange Act, because Section 2(c) of the Act does not specifically include Section 14 of the Act in the list of statutory authorities applicable to retail foreign currency transactions. Section 2(c), passed by Congress in 2000 to protect the investing public in the face of burgeoning fraud in the lightly regulated retail forex market, purports to clarify the Commission's jurisdiction over retail forex contracts. Section 2(c) specifies that the principal anti-fraud and anti-manipulation authorities in the Act that apply to exchange-traded futures and options contracts also apply to legal off-exchange retail foreign currency transactions. Specifically, Section 2(c)(1) provides, in pertinent part, that: "Except as provided in paragraph (2), nothing in this Act . . . governs or apples to an agreement, contract, or transaction in . . . foreign currency." Paragraph (2) of Section 2, in turn, states that forex contracts are subject to Sections 4b, 4c(b), 6(c), 6(d)m 6c, 6d, and 8(a). Thus, Section 2(c)(2) does not expressly include in the list of statutory authorities applicable to retail forex transactions Section 14 of the Act, which authorizes the reparations forum and establishes reparations jurisdiction over individuals and firms registered with the Commission, such as Global.

According to Global, Section 2(c) should be read to preclude reparations claims arising from retail forex transactions. However, Global's suggested interpretation runs counter to the rule of statutory construction that a general grant of statutory authority should not negate the specific, express language of a provision elsewhere in the same statute. In other words, jurisdictional provisions need not cross-reference each and every procedural, remedial and definitional provision in an organic statute that is necessarily incident to the exercise of conferred jurisdiction. Section 14 of the Act is one such procedural provision, intended to protect the retail public by establishing a specialized dispute resolution forum with jurisdiction over registrants. Section 14 provides that "any person" may seek redress -- *i.e.*, file a reparations complaint -- for a violation of the Act or of any Commission rule or order, "by any person who is registered under this Act." Global's suggested interpretation would result in one provision, which Congress intended to protect the retail public by an express grant of jurisdiction, barring the retail public from access to a dispute resolution forum statutorily conferred by another provision, which Congress similarly intended to protect the retail public. This would render the express language of Section 14 meaningless with regard to a significant subset of retail transactions offered by registrants, a result not in accord with the rules of statutory construction. Therefore, claims arising from retail forex transactions are cognizable in reparations.

Fat-finger mistake

Complainants have the burden to establish by a preponderance of the evidence that their losses were caused by a violation, or violations, by respondent. The core of complainants' case – that Dmitry Bardman's three million dollar orders were the product

of a fat-finger mistake – was sufficiently implausible to preclude finding that Dmitrri Bardman's testimony was reliable. The implausibility of Dmitry's fat-finger excuse was underscored by the fact that Dmitry had to enter, and then repeatedly confirm, the trade size for each of the three parent orders and each contingent order, plus the fact that Dmitry had made similarly sized trades around the release of four previous non-farm payroll reports. It was complainants who decided to enter a volatile market with large trades that exceeded margin requirements, and it is complainants who are responsible for the resulting losses. Complainants otherwise have shown no disclosure or fiduciary violations by respondent.

ORDER

Complainants have failed to show any violations causing damages. Respondent has shown that it is entitled to recover the debit balance. Accordingly: the complaint against Global Forex Trading is dismissed; and Daniel Bardman and Debut, Incorporated are ordered to pay to Global Forex Trading the debit balance of $3,020. Complainants' liability is joint and several.

Dated November 30, 2006.

Philip V. McGuire,
Judgment Officer