UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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JERRY MAURER, Complainant, v. KEVIN JOSEPH ARMSTRONG, and REFCO, LLC., d/b/a LIND-WALDOCK Division of Refco, LLC., Respondents.	*	CFTC Docket No. 05-R24

INITIAL DECISION

This dispute arises from a sequence of mistakes by Jerry Maurer and Lind-Waldock. Maurer is an experienced trader who used Lind-Waldock's on-line order entry and account status system. Near the close of the day-time trading session, Maurer decided to be flat – that is, no open positions and no working orders in his account. Maurer closed out both open positions in his account by selling four March S&P options and selling two March S&P futures. About an hour later, Lind-Waldock erroneously assigned to Maurer's account the purchase of three March S&P futures. After an additional hour passed, Maurer checked his account status on-line, and noticed that his account held a long March S&P futures position in a rising market.

Maurer called the Lind-Waldock after-market-hours order desk to discuss the recently reported trade. Maurer did not inform the desk that he had not placed an order to buy three S&P futures or that he suspected a key punch error. Rather,

Maurer merely asked if he was flat or long. In response to this open-ended question, the desk confirmed that he was "not held, long three March big S&P's." Maurer next asked the desk to confirm the fill price, which was below the prevailing market price. Maurer stated that he wanted to be "flat," and placed a market sell order, realizing a profit of about $1,900.

Early the next morning, during the pre-open out-trade procedure, Lind-Waldock discovered the key-punch error, busted the trade, and reassigned the buy order to its correct owner. As a result, Maurer's account was now short three S&P futures, in a rising market. Respondents left a voice-mail message with Maurer informing him that they had busted the trade, leaving him with a short position.

A little later, during a routine margin run, Armstrong noticed that Maurer's account was barely above margin call status, and again tried to reach Maurer by phone. Since he had been unable to speak to Maurer, Armstrong listened to the recording of the previous evening's conversation. After playing the tape, Armstrong, and other Lind-Waldock managers, concluded that Maurer had tried to take advantage of the keypunch error by disingenuously concealing the fact that he had not placed the buy order in the first place.

Next, about one hour after the open, Armstrong sent an e-mail message to Maurer stating he was short three S&P futures and under initial margin. Maurer did not respond to this message.

Over the next hour and a half, Armstrong tried several times to contact Maurer via phone. Finally, Armstrong, and another Lind-Waldock manager, decided that liquidation was warranted by their inability to contact Maurer, by

Maurer's recorded intention to be flat, and, to a lesser extent, by the deteriorating value of the under-margined short position. The liquidation resulted in a loss of about $8,775.

Maurer claims that respondents failed to act diligently by erroneously assigning a long futures position to his account, by reporting that he held a long position, and by unnecessarily exposing him to market risk when they did not liquidate the sell side at the same time they removed the buy side. Respondents deny any violations, and assert that they otherwise acted diligently and in good faith in unwinding Maurer's trade. Respondents also assert that Maurer's claim should be equitably estopped, because he acted in bad faith and hindered their ability to detect and rectify the key-punch error by failing to advise them in the first place that he had not placed the buy order. After a careful review of the parties' documentary evidence and oral testimony, I have concluded that -- although the question of whether respondents acted diligently by taking over two hours to unwind the disputed trade may be closer than respondents care to admit -- Maurer has failed to establish that he is entitled to an award.

Factual Findings

The parties

Jerry Maurer is a resident of Las Vegas, Nevada, and chief executive officer of a computer consulting firm. At the relevant time, Maurer was forty years old, with over twelve years of commodity futures trading experience. [*See* account application (Exhibit 1 to answer); Maurer's reply to interrogatory 3; and Maurer's testimony, pages 15-16 of hearing transcript.]

Refco, LLC was a registered futures commission merchant at the relevant time. On November 25, 2005, Refco filed a voluntary petition under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court of the Southern District of New York.[1] Lind-Waldock was a division of Refco, located in Chicago, Illinois. Kevin Joseph Armstrong was an associated person of Refco, and employed by Lind-Waldock as the trade desk supervisor. It was Armstrong, along with the Lind-Waldock office manager, who approved the unwinding of Maurer's trade and who first formed the opinion that Maurer had deliberately concealed the fact that he had not placed the order to buy three S&P futures. [*See* ¶¶ 1 and 2 of answer, and Armstrong's testimony at page 44 of hearing transcript.]

Liquidation clause

The Lind-Waldock customer agreement contained a standard liquidation clause that provided, in pertinent part: "Customer further agrees that . . . in the event that broker is unable to contact customer due to customer unavailability [or] whenever Broker deems it necessary or advisable for Broker's protection, Broker is authorized at its sole discretion and without prior notice to Customer, to liquidate any positions in the account . . . ." [Exhibit 1 to answer.]

Key punch error procedure

In the event that a customer stated he or she did not place an order that had been assigned to the customers' account, Lind-Waldock order desk clerk were trained to hand the matter to a manager, who in turn would review the trade log

[1] Pursuant to CFTC rule 12.24(d)(1), the complaint against Refco LLC d/b/a Lind-Waldock Division of Refco, LLC is dismissed. In addition, Maurer's post-hearing motions are denied.

and pull the floor ticket in order to determine why the order had been assigned to the account. [*See* Urban testimony at pages 36-39 of hearing transcript.]

Disputed trade

Maurer actively traded his Lind-Waldock account for two years before the disputed trade. Maurer used Lind-Waldock's on-line order entry and account status system. Maurer also used a live data feed to monitor current market prices. According to Maurer, on a variety of occasions over the two years, "phantom trades" had appeared in his account and then been removed by Lind-Waldock, sometimes without explanation, and always without any serious consequences. [*See* Maurer testimony at pages 17-18, and 33-34, of hearing transcript.]

On the day of the keypunch error, Maurer was long four March S&P options, and long two "big" March S&P futures contracts. Near the close of normal trading hours, Maurer decided to be flat, and offset the open positions, selling two "big" March S&P futures at 2:25 p.m.,[2] and selling four March S&P options at 2:37 p.m. At this point, Maurer's account was flat, with no open positions and no working orders.

Around 4:20 p.m., Maurer checked his account status on-line. He noted that Lind-Waldock had reported the sale of two March S&P futures at 2:25 p.m., and the sale of four March S&P options at 2:37 p.m. In addition, he noticed that the account was not flat, because Lind-Waldock had reported the purchase of three "big" March S&P futures contracts, at 90850, at 3:13 p.m. [*See* Urban testimony, at pages 36-43 of hearing transcript; and 5:06:46 p.m. screen printout, on page one of Maurer's letter to Lind-Waldock compliance department, Exhibit B to complaint.]

[2] Times are CST.

Around 4:23 p.m., Maurer called Lind-Waldock, and spoke to an order desk clerk. Lind-Waldock recorded this conversation. Despite the fact that less than an hour before, he had taken steps to assure that his account was flat – *i.e.*, with no open positions and no working orders -- Maurer did not "DK" the trade, that is he did not specifically state that he "did not know" the trade, or otherwise indicate that he suspected it might be another "phantom" trade:

Clerk: How can I help you?

Maurer: I need to know. Is my account flat? Or am I long three big S&P's, at [90]850?

Clerk: Not held. I show you are long three March big S&P's.[3]

Maurer: Currently?

Clerk: Yeah, currently.

Maurer: At what price? 850?

. . . .

Maurer: Okay. So, I'm long right now, though. Right?

Clerk: Right.

Maurer: Okay. Can you sell them?

Clerk: Sell three?

Maurer: Yeah. I want to be flat completely.

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[3] "Not held" is a standard term used for a variety of situations where a report is held out to be conditional, including the possibility that an outstanding order has been filled and orally confirmed, but not yet key-punched into a system, or the possibility that a trade has been erroneously assigned to the wrong account. At the hearing, Maurer testified that in a previous conversation an unidentified desk clerk, the clerk had advised him that that he was long, without the "not held" proviso. This testimony was not particularly plausible or convincing, since Maurer had not mentioned this purported precious conversation during the 4:23 conversation, during the recorded conversation the next day, in his written protest sent to Lind-Waldock the same day that the trade was busted, or in his reparations complaint. Maurer would not assert the existence of this second conversation until after he had received the recordings of the two conversations which had been produced with respondents' answer. [*See* Maurer testimony at pages 19, and 24-25, and Armstrong testimony at page 47, of hearing transcript.]

Clerk: At what price?

Maurer: Put it at the market.

Clerk: X3723 selling three March Globex big S&P, at the market. Is that correct?

Maurer: Correct.

Clerk: Your order number is 15315, and you sold three at 91110.

Maurer: Okay. Great.

Clerk: Alright.

Maurer: So, let me just make sure, and kind of round things up. I came in today long three, I sold those, right?

Clerk: No. You came in today long two, it looks like.

Maurer: Right. I came in two. I sold the two earlier. Then I bought three at 850. Right?

Clerk: Right.

Maurer: Okay. And now I just sold them at 11.

Clerk: Correct.

Maurer: Thanks.

[Exhibit 2 to Answer.] A person listening to the recording of this conversation could give Maurer the benefit of the doubt and conclude that he had lost track of his orders and fortuitously blundered into a profitable trade. Conversely, that person could also reasonably conclude that – given the modest size of Maurer's trades and the passage of less than two hours time – Maurer could not plausibly have lost track of his orders and believed in good faith that the order was his. When respondents would listen to the tape the next morning, they operated on the assumption that it

would have been highly implausible for Maurer to have lost track of his orders. Thus, respondents would conclude that Maurer had focused the clerk's attention on the long price, rather than the authenticity of the order, as part of a disingenuous effort to reconstruct reality and make a quick killing on an obvious mistake by Lind-Waldock. [*See* Maurer testimony at pages 47-48 of hearing transcript.]

In any event, when Maurer went out that evening, he thought that he had made a quick, unanticipated, profit of a about $1,875, and that his account was flat. Maurer would not check his phone messages and e-mail messages until mid-morning the next day. [*See* Maurer testimony at pages 6-7, 12-13, and 18-19, of hearing transcript.]

The next morning, before the open, Lind-Waldock discovered the key-punch error. At 7:16 a.m., Lind-Waldock busted the trade and reassigned the buy order to its correct owner. As a result, Maurer's account was now short three S&P futures, in a rising market. Respondents left Maurer voice message advising him that they had busted his trade, that he was short the market, and asking for further instructions.

Later in the morning, Armstrong noticed that although Maurer's account was not on margin call, it was below initial margin and losing value, and again tried to reach Maurer by phone. In an effort to ascertain Maurer's intentions, Armstrong listened to the recording of the previous evening's conversation with Maurer. Armstrong and other Lind-Waldock managers who listened to the tape concluded that Armstrong had disingenuously concealed the fact that he had not placed the buy order when he told the desk that he wanted to be flat.

At 9:03 a.m., almost two hours after busting the trade, Armstrong e-mailed Maurer to remind him that was short three S&P futures and to advise him that he was close to a margin call. Maurer did not immediately respond to Armstrong's message. Eventually, in light of Maurer's unavailability, Maurer's stated intention to be "flat," and Maurer's mounting losses, Armstrong decided to liquidate Maurer's open short position. This trade, realizing a loss of about $8,775, was executed at 10:47 a.m. [*See* 12:28:38 a.m. screen printout on page two of Maurer's letter to Ingraham, Exhibit 3 to answer; Urban's testimony at pages 36-41 of hearing transcript; and Armstrong's testimony at pages 45-51 of hearing transcript.]

Soon afterward, Maurer checked his account on-line, and called Lind-Waldock. Maurer complained to Armstrong that he had relied on the on-line and verbal reports that he had a long position, and that he had placed the sell order because he wanted to be flat.

Conclusions

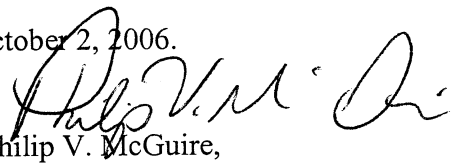
Respondents' conduct is properly evaluated under Sections 4b and 4d of the Commodity Exchange Act. Under Section 4b of the Act, respondents are obligated to disclose all material facts to a customer, and under Section 4d of the Act, respondents are obligated to follow a customer's instructions. Here, upon receiving notice that the purchase of three S&P futures had been assigned to his account, Maurer did not inform Lind-Waldock: that he had not placed an order to buy three S&P futures contracts; or that he suspected the trade had been erroneously assigned to his account; or that he may simply have lost track of his orders.

Rather, Maurer merely asked the desk clerk to confirm the status of account and the fill price of the buy order. As a result, Maurer, intentionally or inadvertently, deprived respondents of crucial information in his exclusive possession – that is, that he knew that the trade was not his because he had not placed an order to buy S&P's; or that he suspected that the trade was not his because he had previously closed out all open positions and had no working orders; or that he was not sure that the order was his because he may have lost track of his orders. In these circumstances, respondents cannot fairly be held to a special duty to immediately detect, disclose and cure the key-punch error. Had Maurer been more forthcoming and accurate when he first contacted the desk, respondents could have taken the necessary steps to assure that he be flat the market without placing the sell order. Once, respondents did discover the key punch error and bust the trade, respondents diligently tried to contact Maurer for further instructions. When Maurer was unavailable over an extended period to provide specific instructions, respondents exercised their right under the customer contract and made a good faith decision to liquidate his position, consistent with his general intention to be flat.

ORDER

Maurer has failed to establish any violations causing damages. According, the complaint in this matter is dismissed.

Dated October 2, 2006.



Philip V. McGuire,
Judgment Officer