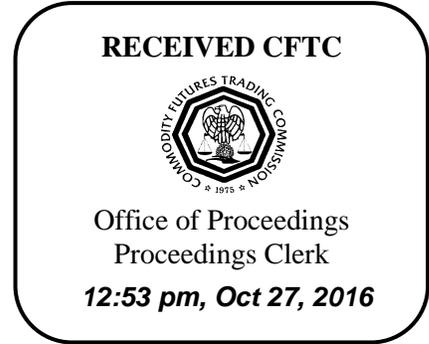




U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of Proceedings

MARK JOHNSON and ENTRUST CO., LLC
f/b/o MARK S. JOHNSON,
Complainants,

v.

R.J. O'BRIEN & ASSOCIATES LLC,
BRYAN LEVIN AND
JORDAN LUCKEY,
Respondents.

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* CFTC Docket No. 12-R18
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INITIAL DECISION

Before

Philip V. McGuire,
Judgment Officer
Commodity Futures Trading Commission
Washington, D.C.

Appearances

Marion Little, Esq.,
Kris Banvard, Esq.,
Zeiger, Tiegs & Little LLP
Columbus, Ohio
For complainants Mark Johnson and Entrust Company LLC

Lloyd Kadish, Esq.,
Lloyd Kadish & Associates Ltd.
Chicago, Illinois
For respondent R. J. O'Brien & Associates

John J. Muldoon, Esq.,
Muldoon & Muldoon, Ltd.
Chicago, Illinois
For respondents Jordan Luckey and Bryan Levin

Introduction

Complainant, a successful business executive and sophisticated trader, claims that he was improperly forced to liquidate a large short crude oil put position because during early morning consultations respondents provided false and misleading information about the value and margin status of his three accounts, two of which were IRA accounts. Complainant seeks over \$500,000 in damages.

In reply, respondents assert that they reasonably exercised their good faith business judgment in concluding that complainant's accounts were significantly undermargined and in danger of going into debit, and advising him to liquidate his puts. Respondents otherwise deny any violations, and seek dismissal of the complaint, plus an award of attorney's fees.

As explained below, after reviewing the parties' documentary submissions and considering their oral testimony, I have concluded that complainant has failed to establish any violations causing damages and I have determined that respondents are not entitled to attorney's fees. This conclusion reflects my determination: one, that complainant failed to establish that adverse inferences should be imposed for respondents' non-production of recordings of certain relevant phone conversations; and two, that the testimony of respondents and their witnesses was generally more plausible, reliable and convincing than the testimony of complainant when viewed in light of the surrounding circumstances.

Findings of fact

The parties

1. Mark Johnson, a resident of Mesa, Arizona since 2003, has been Vice President, Strategic Alliances, for Kern, Incorporated in Grove City, Ohio, a manufacturer of high-speed mail handling systems. Before that, he had served as an executive for a series of firms. Johnson first became interested in trading futures and options so that he could leverage his understanding of the news, world events, politics, etc. Before he opened his RJO accounts in 2010, Johnson had traded futures and options for about six months with another firm, but quickly closed that account after his broker made an unauthorized trade. [¶¶ A1 and B11, complaint; hearing transcript (“Tr.”) pp. 23-40.] Johnson’s testimony revealed him to be confident, measured, sophisticated and intelligent. However, by failing to produce any reliable documentary evidence showing that he actually could have quickly wired the necessary funds he undermined the credibility of his testimony that he had not told Levin in the early hours of May 6 that he could not immediately wire funds. [Tr. 75-76.]

2. Respondent R. J. O’Brien & Associates LLC (RJO) is a registered futures commission merchant headquartered in Chicago, Illinois. [NFA records.]

3. Respondents Jordan Luckey and Bryan Levin at the relevant time were registered associated persons with RJO. [NFA records.] Luckey and Levin worked as a team with Kevin Craney, a senior trading consultant at the relevant time, and also a registered associated person with RJO. [NFA records; Tr. 377-79, 436-446, 501-02, 700-04, 732.] I found the testimony of Luckey [Tr. 438-500; 657-699], Levin [Tr. 501-616] and Craney [Tr. 700-759] to be generally plausible and believable.

4. Eric Larkin is a trade desk manager at RJO. Larkin principally testified, credibly, about RJO's after-action review of the liquidation that is the subject of this case. [Tr. 404-37.]

5. Donna Heidkamp, currently President of RJO, was Executive Director of RJO at the relevant time. In that capacity, she supervised Larkin, Craney, Luckey and Levin. Heidkamp principally testified, credibly, about RJO's margin policy and after-action review of the liquidation that is the subject of this case, and about the termination of Luckey's and Levin's employment by RJO approximately five months after the liquidation in question. [Tr. 335-403, 760-855.]

The account opening

6. Over an extended period of time before he opened his RJO account, Johnson discussed options trading with Levin and Luckey, and sometimes Craney. Around this time, Johnson had gained at least a rudimentary understanding of the mechanics of trading options, including the concept of margin. [Tr. 137-148, 490-492.]

7. In March 2010, Johnson opened an account in his own name and an IRA account, and in August 2010 he opened a second IRA account. Johnson would allocate trades among these accounts. [RJO exhibits 19 and 20; and exhibit A, complaint.]

The disputed liquidation

8. During the relevant time, RJO electronically delivered daily confirmation statements which reported, among other things, the margin status of his three accounts. Johnson also actively and continuously monitored his account activity and status via RJO's on-line system which permitted him to monitor account balance, open trades and

margin status. [Tr. 135-36, 324, 337, 342, 361-63, 455, 536, 708-11, 746-47, 783-786; and RJO exhibits 1, 2.D, 3, 6 at pp. 6522, 6523 and 6525, 10, 11, 19, 20 at ¶ 12.]

9. In the first quarter of 2011,¹ Johnson believed that the price of oil would increase and began selling crude oil puts, with the goal of allowing puts to expire as the price of oil increased. Initially, this strategy was successful. [Tr. 47-49; RJO exhibits 2.A, 2.B, 2.C and 17.C at ¶¶ 5-21.]

10. On April 15, Johnson allowed his short May 2011 crude oil 9000 puts to expire. On April 18, Johnson sold sixty (60) June crude oil 9950 puts.

On May 4, Johnson discussed with Levin about doubling up and selling July crude puts before the June puts had expired. Levin warned Johnson that he would incur sizeable margin requirements. After Levin and Luckey left the office, Johnson placed with Craney an order to sell sixty (60) July crude oil 9700 puts. [Tr. 51-58, 54-56, 385, 403, 446-447, 489-497, 704-707, 719, 728-30, 804-808; RJO exhibits 2.A, 2.B, 2.C, 7, 17.B at ¶ 5.G, 17.C at ¶¶ 32-36.]

11. On May 5, the crude oil option market moved against Johnson, and Levin and Luckey four times consulted with Johnson, and discussed among other things his mounting margin deficit. At the close, at 1:30 p.m. CDT, Johnson's accounts had an aggregate positive value of about \$330,000, but a total margin deficit of over \$169,000. Johnson has produced "Position Inquiry" screen shots which reported the account balances totaling \$330,000 at the close on May 5. These screen shots are the primary evidence that Johnson has produced in support of his claim that Levin gave him inaccurate and misleading about his account value, over twelve hours after the close, in the early morning of May 6. However, the online system had not updated the balances

¹ Dates are in 2011, unless otherwise indicated.

after the close due to the illiquid and volatile markets. In this connection, the legend at the bottom of the screen read: “‘Open Trade Equity’ is based on real time last trade prices. For illiquid or settled markets, the last trade price may not be representative of current market levels.” [Tr. 52-53, 221-22, 259-60, 283-84, 307, 388-89, 424, 430, 432, 449-52, 527-28, 543, 551-52, 558-62, 606-07, 659-60, 684-688, 787-88; RJO exhibits 10, 11, 21, 22, 64.]

At 3:43 p.m. CDT, Johnson liquidated ten puts in one of the accounts, which was significantly less than what Levin and Luckey had been recommending. At about 9:49 p.m. CDT, RJO electronically delivered the daily confirmation statements for the three accounts which reported the status of the accounts at the close. [TR. 58-60, 66-67, 337-47, 447, 659, 780-83, 803; RJO exhibits 15, 17.C at ¶ 50.d, and 22.]

12. RJO’s risk report listed Johnson’s margin deficit. Larkin then alerted Heidkamp and informed her that Johnson had refused to liquidate as many positions as Levin and Luckey had recommended. [Tr. 292-95, 300, 320, 410, 414-18, 813-14, 839-40.]

13. Overnight into the early morning of May 6, crude oil options were extremely illiquid, and volatile with a wide bid-ask spread ranging from ten cents to ten dollars, but with a defined downward bias. Levin and Luckey looked to the futures market to estimate a theoretical value for Johnson’s options, but price volatility precluded an accurate estimate. In effect, the market for Johnson’s puts ranged from non-existent to significantly adverse. Levin and Luckey would determine that these market conditions, combined with the size of Johnson’s position and margin-to-equity ratios, enhanced the overall risk of Johnson’s accounts going into debit. [Tr. 96, 236-38, 347-50, 452-54,

559-75, 660-76, 799-804; Levin-Luckey exhibit 29.D; RJO exhibits 8, 9, 9.A, and 17.C at ¶ 50-54, 25 -28.]

14. Early the morning of May 6, Levin, Luckey and Craney hastened to the RJO offices to deal with the deteriorating status of the Johnson accounts. Between 4:18 a.m. and 6:56 a.m., Levin spoke to Johnson six times. [TR. 69-118, 151-155, 446-483, 515-86, 660-75, 709-13, 735-38.] RJO produced recordings of the last three recordings. These are also the same recordings that Larkin and Heidkamp would review in the aftermath of the liquidation. Levin's tone during these recorded conversations, as during his testimony, had a slightly wound-up quality. [RJO exhibits 9 and 9.A.]

15. During the first brief conversation at about 4:48 a.m., Levin woke up Johnson who confirmed that he had received the trade confirmation statements for May 5 which had reported the margin deficit totaling \$169,025 for the three accounts. Levin told Johnson that the market had further worsened since the close for Johnson, and consequently the margin deficit had increased. [TR. 69-71, 135-37, 685-88; RJO exhibits 2.D, 9 and 9.A.]

16. During the second, 15-minute, conversation at about 4:52 a.m., Levin explained that June crude futures were lower and had been lower two hours earlier, that Johnson's accounts were in jeopardy of going negative, and may have gone negative earlier, and that due to the volatility and illiquid conditions it was difficult to calculate accurately equity, account value or liquidation value. Nonetheless, Levin explained that he roughly estimated that Johnson's margin deficit was probably over \$500,000, most of which was in the IRA accounts. Levin also expressed concern that if Johnson did not cover any losses, Levin would be on the hook. Johnson stated that he could not promptly provide the funds to cover the margin deficit, and asked Levin "what's the

plan?” Levin advised Johnson that if he did not liquidate his puts, RJO would likely exercise its power under the customer contract to liquidate the puts. So, Johnson authorized the liquidation. [TR. 71-81, 164-187, 228, 375, 474-75, 529, 537-38, 661-52, 668-75, 789-99, 835-37; RJO exhibits 7, 9, 9.C, 17.C at ¶¶ 50.a to 50.d, 50.i to 50.o, 50.t to 50.aa; 25-28; Luckey and Levin exhibit 29D; Johnson affidavit at ¶¶ 4-9.]

17. In the aftermath, RJO would calculate that at the time of liquidation, Johnson’s accounts had an aggregate positive \$152,000 value, but an aggregate margin deficit of \$350,000. [Tr. 350-53.]

18. During the third, three minute, conversation, Levin updated Johnson on the liquidation. [RJO exhibits 9 and 17.C.]

19. During the fourth, two-minute, conversation, Levin updated Johnson on the liquidation and expressed concern that the liquidation might end with a negative \$100,000 value for Johnson’s accounts. Johnson reiterated that he could not wire any funds and did not raise any questions or concerns. [Tr. 361-62; Johnson exhibit 41; RJO exhibits 12 and 14.A.]

20. During the fifth, under four-minute, conversation, Levin reported that the liquidation had been completed, and that Johnson’s accounts had a positive value of about \$141,000. Levin stated that “he felt like a complete idiot” because “his math had been off” when he had estimated that the liquidation would result in a negative account value. However, he stated that “we had to get out anyway.” This apparently was reference to the substantial margin deficit. The conversation concluded with Levin twice asking Johnson if he was “OK” and “cool” with the liquidation, and Johnson answered in the affirmative. The second time, he stated: “Yeah. I’m cool. Thanks for

sticking with it. Sorry I put you guys through so much.” [RJO exhibit 14; Johnson exhibit 42.]

21. During the sixth conversation, initiated by Johnson, he again thanked Levin: “You did exactly what you were supposed to do. You were a pro. So, you handled it extremely well. So, thanks for that.” [RJO exhibit 14; Johnson exhibit 42.]

Aftermath

22. At about 6:30 a.m. CDT, Levin informed Larkin about the liquidation. Larkin then pulled the last three tapes per RJO policy. That is, Larkin pulled the tapes of the fourth, fifth and sixth conversations, and did not pull the tape of the second lengthy conversation where Levin obtained Johnson’s approval for the liquidation. Larkin reviewed the tapes and concluded that the liquidation had been proper and the situation appeared to be resolved. Larkin next discussed the liquidation with Heidkamp and forwarded the recordings to her which she reviewed and would retain in her personal files. The recordings that would be produced by RJO in this proceeding were these electronic files that Heidkamp had retained. [Tr. 303, 360, 391-92, 410, 414-18, 423, 503-15, 667-79, 713, 813-17; RJO exhibit 12.]

23. In the afternoon of May 6, Heidkamp met for two hours with Larkin, Luckey and Levin to discuss the liquidation. Heidkamp concluded that no further action was necessary. [Tr. 361, 387, 419, 422, 486, 509, 666, 713-21, 814; Johnson exhibits 72, 73.]

24. Pursuant to RJO established procedure, since Heidkamp had determined that no further review was warranted, no steps were taken to preserve the recordings and after about 30 days the recordings were “erased.” [Tr. 366-69, 373-74, 814-817, 824; Johnson exhibit 94.]

25. Following the May 6 liquidations, Johnson continued to trade with RJO until July 2012, but less aggressively. He dealt principally with Levin, and then with Craney after Levin's termination in October 2011. Johnson did once mention to Carney Levin's difficulty in calculating the account equity in the early hours of May 6, but never complained about Levin's or RJO's advice or handling of the liquidation. [Tr. 155-162; 721-28.]

Discussion and conclusions

The liquidation was proper

Johnson has failed to show by a preponderance of the evidence that Levin intentionally or recklessly gave Johnson false or misleading information about market conditions, about the liquidation value of his position, about his margin status, or about his account equity. Johnson's principal evidence is the screen shots showing positive account equity at the close in the early afternoon of May 5th. Thus, the screen shots have little, if any, probative value about market prices twelve hours later, in the early morning of May 6th. Moreover, Johnson has not produced any expert witness disproving or calling into question respondents' characterization of market conditions on May 6 as extremely volatile and illiquid and trending down, or showing that Levin acted unreasonably in determining that by that time Johnson's accounts had lost value and were in danger of losing more value, and thus remained substantially under-margined. Johnson similarly has not shown that Levin misrepresented RJO margin policy. Finally, Johnson testified that he understood that Levin was providing good-faith estimates. Thus, Johnson's claim that Levin misrepresented the value and margin status of his accounts must fail.

RJO's deletion of the May 5 recordings was in good faith

It is generally problematic whenever a firm states that it can only produce a partial set of recordings for relevant conversations. It is also problematic that before RJO supervisors determined that the liquidation was proper, they had not reviewed the recordings of Levin's first three conversations with Johnson on May 6. Nonetheless, here Johnson congratulated Levin on his handling of the liquidation and continued to trade with RJO for several more months without complaining about the liquidation, and thus gave RJO no reason to believe that he disputed the liquidation. In these circumstances, RJO acted in good faith when it deleted the May 6 recordings pursuant to its records-keeping policy, and adverse inferences cannot be justified for RJO's non-production of the recordings for the first three conversations in the pre-dawn hours of May 6.

Attorney's fees

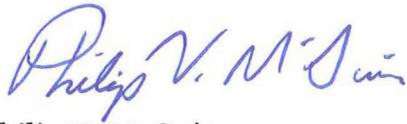
Respondents' request for an award of attorneys' fees is denied because a colorable basis existed for Johnson's claim and his claim does not appear to have been raised for an improper purpose. *See Brooks v. Carr Investments, Inc.*, Comm. Fut. L. Rep. ¶ 29,027, 2002 WL 927614 (CFTC 2002).

ORDER

Complainant has failed to show any violations proximately causing damages. Accordingly, the complaint is dismissed.²

² Johnson's other allegations set out in his complaint and pre-hearing memorandum, and raised at the hearing, have been considered and found to be without merit.

Dated October 27, 2016.

A handwritten signature in blue ink that reads "Philip V. McGuire". The signature is written in a cursive style with a large initial "P" and a long horizontal stroke at the end.

Philip V. McGuire,
Judgment Officer