

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of :
: CFTC Docket No. 01-11
: :
ANDY SABERI :
: OPINION AND ORDER
:

In October 2002, an Administrative Law Judge (“ALJ”) concluded that respondent Andy Saberi (“Saberi”) violated Section 4a(e) of the Commodity Exchange Act (“Act”)¹ by holding 93 August frozen pork belly contracts at the opening of trading on August 15, 2000. The ALJ imposed sanctions that included a cease and desist order, a prohibition from trading on the Chicago Mercantile Exchange (“CME”) for 180 days, and a civil monetary penalty of \$110,000. *In re Saberi*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,196 (ALJ Oct. 23, 2002) (“I.D.”).

Saberi raises procedural and legal challenges to the ALJ’s liability analysis, and the Division of Enforcement (“Division”) joins him in challenging the ALJ’s sanctions analysis. Saberi focuses his sanctions challenges on alleged flaws in the ALJ’s finding that he intentionally violated the applicable position limit. The Division defends that finding, but contends that the ALJ erred by limiting the trading prohibition he imposed to a single exchange.

As explained below, we conclude that the ALJ erred by failing to permit the post-hearing submissions described in Commission Rule 10.82, but that the record fails to establish that this error prejudiced Saberi. We uphold the ALJ’s legal interpretations as well as his conclusion that the record shows that Saberi violated the applicable position limit. In light of our independent review of the record, we affirm the imposition of a cease and desist order and civil money

¹ Section 4a(e) prohibits trading in violation of a Commission-approved exchange rule fixing a limit on the number of contracts that a trader may hold. Chicago Mercantile Exchange (“CME”) Rule 8302.E established the 50-contract limit on trading in the August 2000 frozen pork belly futures contract that is at issue in this proceeding.

penalty of \$110,000. Instead of the trading ban imposed by the ALJ, we prohibit Saberi from trading on any market we regulate for a period of 30 days.

BACKGROUND

I.

The facts material to our liability analysis are undisputed. During August 2000, CME Rule 8302.E established the position limit for August CME frozen pork belly futures contracts applicable to speculative traders such as Saberi. The applicable limit substantially declined between Monday, August 14 and Tuesday, August 15, 2000.² As trading opened on the morning of August 14, Saberi was short 83 contracts and, during the course of the trading session, he sold an additional ten contracts. Consequently, when trading closed on August 14, 2000, his August CME frozen pork belly futures position was 43 contracts in excess of the 50-contract position limit. By the close of trading on August 15, 2000, Saberi had liquidated sufficient contracts to meet the 50-contract limit.

II.

While Saberi concedes that his August CME frozen pork belly futures position exceeded 50 contracts at the close of trading on August 14, 2000, he claims that he did not knowingly exceed the CME's position limit. In this regard, he offers an innocent explanation that rests on two assertions of ignorance: (1) that he was unaware that the applicable limit was 50 contracts; and (2) that he was unaware that the applicable limit applied on a per customer basis rather than a per account basis. The latter is important because it is undisputed that Saberi divided his 93-contract August CME frozen pork belly futures position between accounts he maintained at two

² The Commission approved CME Rule 8302.E in May 1998. Under that rule, the position limit applicable during a contract's delivery month varies with deliverable supply. For example, during the period August 7 through 14, 2000, the rule permitted speculators to hold 150 August CME frozen pork belly futures contracts. During the period August 15 through 23, 2000, however, the rule permitted speculators to hold only 50 contracts. Thereafter, the rule limited speculators to only 25 contracts.

different futures commission merchants (“FCMs”), Dean Witter Reynolds, Inc. (“Dean Witter”) and ED&F Man International, Inc. (“Man”).

The Division argues that Saberi’s innocent explanation is implausible. Some of the facts material to assessing this question are undisputed. For example, the parties agree that during the period at issue, Saberi was an experienced futures trader. He had speculated for more than a decade, trading several different futures contracts on a variety of commodity exchanges.⁴ In addition to the two accounts noted above, Saberi controlled the trading in two other Dean Witter accounts.⁵ From time to time, Saberi had controlled futures positions of sufficient size to trigger an obligation to file large trader reports with the Commission.

The parties also agree that on August 14, 2000, CME personnel took indirect steps to inform Saberi both that the position limit for August CME frozen pork belly futures would soon be 50 contracts and that the limit applied on a per customer rather than a per account basis. During the period at issue, Thomas Sandy was the CME’s agricultural surveillance manager. On the morning of August 14, 2000, he was aware that, as of the close of trading on Friday, August 11, 2000, three speculators held positions in the August CME frozen pork belly futures contract that were larger than 50 contracts. Two were on the long side of the market, while Saberi was on the short side of the market. Sandy contacted the FCMs that carried accounts holding these traders’ frozen pork belly futures contracts. He confirmed the number of contracts held by each

⁴ Saberi traded contracts in silver, gold, orange juice, platinum, copper, cotton, cocoa, cattle, lean hogs, and frozen pork bellies at the New York Mercantile Exchange, the Coffee Sugar and Cocoa Exchange, the Cotton Exchange, the New York Board of Trade, and the CME.

⁵ Saberi controlled trading over accounts maintained in the name of his son and in the name of his company, Sabek, Inc. Trading in these accounts is not at issue in this proceeding.

trader and advised the firms to inform their customers that: (1) the position limit at the end of the trading day was 50 contracts; and (2) the limit applied per customer rather than per account.⁶

At the time of this call, Saberi's August CME frozen pork belly futures position stood at 83 contracts. His Dean Witter account included 50 contracts and his Man account included 33 contracts. During Monday's trading session, he sold an additional ten contracts in his Man account. No one from Man called him that day to pass on the information Sandy had communicated.

The parties' versions of events diverge at this point. The Division claims that Saberi's Dean Witter account executive, Craig Kirkham ("Kirkham"), telephoned him on August 14, 2000 and informed him both that 50 contracts would be the limit applicable after the close of trading, and that the limit applied on a per customer rather than a per account basis. In his investigatory deposition,⁷ Kirkham testified that he passed this information to Saberi during a telephone conversation that took place sometime between 10:00 and 10:30 a.m. Central time.⁸ Kirkham created records documenting aspects of this alleged conversation on August 15, 17, and 23, 2000.

In his investigatory deposition, Saberi recalled receiving calls from Kirkham on two consecutive days, but was uncertain about the date of the initial call. He testified, however, that during the initial conversation, Kirkham advised him that he had to "get out of some" contracts

⁶ As to the latter point, Sandy's Declaration states that he told Dean Witter to advise its customer that for purposes of complying with CME Rule 8302.E, "the positions of all accounts directly or indirectly owned or controlled by a person would be cumulated whether at one firm or more than one firm." Declaration of Thomas Sandy at ¶ 26 (May 30, 2002). The Declaration states that he told Man to advise its customer that "all of his positions, whether at one firm or more than one firm, would be cumulated for the purpose of ascertaining compliance with the position limit." *Id.* at ¶ 27.

⁷ As discussed below, the parties agreed to resolve their factual disputes under the shortened procedures described in Commission Rule 10.92. In essence, the parties agreed to have the bulk of their factual disputes resolved on the paper record without the benefit of demeanor-based evidence.

⁸ Kirkham and Saberi were in the Pacific Time Zone and the CME was located in the Central Time Zone.

to reduce his position to 50 contracts. Saberi denied that Kirkham spoke to him about having accounts at different firms.

The parties agree that Saberi achieved compliance with CME Rule 8302.E on Tuesday, August 15, 2000. That morning, Sandy contacted Dean Witter and Man and advised them that Saberi held a position that was 43 contracts beyond the applicable 50-contract limit. During this conversation, he advised the FCMs that Saberi's position was split between accounts at Dean Witter and Man. After Kirkham learned of Sandy's call, he telephoned Saberi and advised him that he needed to reduce his position to 50 contracts by the end of the day. Man personnel conveyed a similar message to Saberi. Saberi reduced his position to 50 contracts by liquidating 23 contracts through Dean Witter and 20 contracts through Man.

Between the close of trading on August 14, 2000 and the time that Saberi liquidated them on August 15, 2000, Saberi's excess contracts increased in value by nearly \$55,000. The steep market decline at least partially reflected the trading activity of the two long traders that Sandy had identified as holding positions in excess of 50 contracts when trading opened on August 14, 2000. Both not only liquidated dozens of contracts that day, but also placed unfilled orders to liquidate additional contracts. Due to inadequate liquidity, these traders were unable to reduce their positions to the applicable limit by the close of trading.

III.

The Commission issued the Complaint in this proceeding in June 2001, and Saberi filed his Answer in July 2001. During the pre-hearing period, the parties agreed to resolve this matter under the shortened procedures set forth in Commission Rule 10.92. After the evidentiary record was completed, the ALJ issued his I.D. without permitting the parties to submit proposed findings and conclusions or briefs as contemplated by Commission Rule 10.82.

The ALJ found that Saberi intentionally failed to comply with the position limits in CME Rule 8302.E. In reaching this conclusion, he found that on the morning of August 14, 2000, Kirkham telephoned Saberi and advised him that: (1) he would be in violation of the 50-contract position limit at the end of the day if he did not reduce his position; and (2) that all his positions at different FCMs would be aggregated to determine whether he was in violation of the limit. I.D. at 54,186. The ALJ found that following this conversation, Saberi increased his position by selling an additional ten contracts. *Id.* According to the ALJ, Saberi's intentional violation of CME Rule 8302.E amounted to an intentional violation of Section 4a(e) of the Act. The ALJ did not provide any explanation for his choice of sanctions.

IV.

On appeal, Saberi claims that the ALJ deprived him of a fair hearing by failing to provide an opportunity to make the post-hearing submissions contemplated by Commission Rule 10.82. The Division contends that the ALJ acted within the discretion granted in Rule 10.82(b). It notes that even if the ALJ did err, Saberi has not established that the error prejudiced his opportunity for a fair hearing.

Saberi also raises substantive challenges to the ALJ's liability analysis. First, he contends that the ALJ erred by concluding that *scienter* is not a necessary element in the Division's proof of a violation of Section 4a(e) of the Act. He also claims that the ALJ misinterpreted the requirements for proving a violation of the position limits established in CME Rule 8302.E. In particular, he contends that CME Rule 443 must be consulted in determining whether he committed a rule violation for purposes of Section 4a(e) of the Act.

The Division counters that there is no logical basis for holding that proof of a violation of Section 4a(e) involves elements materially different from those that the United States Court of

Appeals for the Seventh Circuit found adequate in the context of a violation of Section 4a(1) of the Act in *CFTC v. Hunt*, 591 F.2d 1211 (7th Cir. 1979). As for the interpretation of CME Rule 8302.E, the Division contends that the sanction-related policies reflected in CME Rule 443 are immaterial to determining whether a rule violation has occurred for purposes of Section 4a(e) of the Act.

As to sanctions, the parties reargue their positions regarding the plausibility of Saberi's innocent explanation for his failure to comply with the CME's 50-contract position limit. In effect, Saberi argues that Kirkham's testimony is insufficiently reliable to support findings under the weight of the evidence standard. The Division contends that the apparent discrepancies Saberi emphasizes are insufficient to undermine the reliability of Kirkham's version of the events at issue.

As to the limited trading prohibition imposed by the ALJ, the Division argues that such a limit is not contemplated by the Act and is, in any case, inappropriate in the particular circumstances of this case. Saberi insists that the ALJ had the discretion to mold the scope of any trading prohibition to the gravity of the violation established on the particular record before him.

DISCUSSION

I.

The record confirms that the ALJ erred by issuing his I.D. prematurely. Commission Rule 10.92 permits parties to agree to a set of shortened procedures in lieu of those generally applicable in the context of an oral hearing. Subsection (h) of the rule specifically provides that post-hearing procedures "shall be the same as those in proceedings in which the shortened procedures have not been followed." Quite clearly, the Commission intended that parties

agreeing to shortened procedures retain the right to make the post-hearing submissions specified in Commission Rule 10.82. The ALJ is not authorized to abrogate this right.⁹

Saberi, however, has not established that the error was prejudicial. Prior to issuing his I.D., the ALJ permitted Saberi to submit written arguments outlining his theories of defense and explaining how he believed the record supported them. Moreover, the three briefs Saberi filed with the Commission on appeal cover all aspects of his theory of the case. Because we are determining all issues on a *de novo* basis, the errors in the ALJ's decision arguably traceable to his failure to follow Commission Rule 10.82¹⁰ will not influence the outcome of this proceeding. In these circumstances, there is no basis to infer that the ALJ's procedural error was prejudicial.

II.

Saberi's substantive challenges to the ALJ's liability analysis are unpersuasive. As to the elements of a Section 4a(e) violation, Saberi insists that the Division must show that he acted with *scienter*. As the Division notes, however, the Seventh Circuit held in *CFTC v. Hunt*, 591 F. 2d 1211, 1218 (7th Cir. 1979), *cert. denied*, 442 U.S. 921 (1979), that *scienter* is not an element of proof in the context of a violation of Section 4a(1). Moreover, we have recognized that Congress intended Sections 4a(1) and 4a(5) of the Act (the predecessors to current Sections 4a(a) and 4a(e)) to have a shared meaning and interpretation. *In re Volume Investors Corp.*, [1990 -1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 at 38,676-77 (CFTC Feb. 10, 1992). Saberi offers no persuasive rationale for inferring that Congress intended the elements of proof for a violation of Section 4a(e) to be materially different from the elements of proof for a violation of Section 4a(a).

⁹ The discretion granted to ALJs under Subsection (b) of Rule 10.82 is limited to the procedures applicable to making the authorized submissions. Subsection (b) does not authorize procedures that simply dispense with the submissions.

¹⁰ For example, the ALJ erred in finding that on August 14, 2000, Saberi increased his position by 10 contracts after Kirkham advised him both that the applicable limit at the close of trading would be 50 contracts and that the limit applied on a per customer rather than a per account basis. The record indicates that the order at issue was entered at approximately 9:49 a.m. Central time – at least ten minutes prior to Kirkham's telephone conversation with Saberi.

