UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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KEVIN M. CLARK, Complainant,	*	
v.	*	CFTC Docket No. 04-R079
GLOBAL FUTURES EXCHANGE & TRADING COMPANY, INCORPORATED, Respondent.	*	

INITIAL DECISION

Appearances:

Kevin Clark, Gainesville, Florida
Complainant, *pro se*

Jeffrey Schulman, Esq., Wolin & Rosen, Chicago, Illinois
Counsel for Respondent

Introduction

This dispute arises from Kevin Clark's frustrated effort to trade e-mini S&P futures while traveling from hotel lobby to airport boarding gate. For about ten weeks, Clark had been trading via an online platform. The trading platform offered a number of trading short-cuts -- such as synthetic OCO orders, brackets, and trailing stops -- that could not be used when placing orders directly with the order desk. Conversely, "offline" orders placed with the order desk could not be directly entered into the platform. Global Futures provided an on line tutorial and written guidelines for placing online orders, but not for placing "offline" orders with the order desk.

The evening before Clark's return home, the online system was beset with technical problems. As a result, Clark decided to place a series of verbal orders with the Global Futures order desk. Clark placed an order to sell seven September S&P e-mini futures, which was promptly filled. At the same time, Clark also placed two protective buy orders: a limit order and a stop order. Clark received sequential ticket numbers for the three orders.

The next morning, the online platform was working. However, since Clark had placed the sell, limit and stop orders with the order desk, the platform did not report the open position or the two working orders. As Clark was preparing to leave his hotel room, he instructed the Global Futures order desk to cancel-replace the stop order. This would be the last time that he would identify his working orders by ticket number or order type when speaking to the order desk. After his stop had been moved, Clark mentioned that the night before he had placed "other" orders with the order desk. The order desk suggested that if Clark wished to switch the open "offline" position and the other offline orders to the online system, Global Futures could execute an external fill on the short position, and cancel the other orders, and replace them with online orders. However, because he had never done that before and because he expected the market to hit his new stop price within twenty minutes, Clark rejected this suggestion.

Unfortunately, during the next hour while he was preparing to check out of his hotel, Clark lost track of the two working orders. As a result, in subsequent conversations with the order desk he did not identified the orders by ticket number or type. When he finished packing, Clark called the Global Futures order desk with the intention of eliminating all market risk while he was returning home. However, Clark did

not give an instruction to buy seven e-mini S&P's and also to cancel the stop and limit orders. Rather, Clark told the desk clerk that he wanted to "trade out an order." *Trade out* is a typical synthetic function of on-line trading systems that automatically closes out an open position and that cancels any related working orders. However, *trade out* is not a recognized type of exchange order. When the desk clerk asked Clark to clarify his *trade out* request, he explained that he wanted to "get out now," and instructed the desk clerk to close out the short position by placing a market buy order. The desk clerk immediately reported, and Clark repeated back, the fill price and the ticket number. Neither Clark nor the desk clerk brought up the topic of working orders before they terminated the call. Subsequently, the buy stop order was elected and filled.

About two hours later, as he was preparing to board the airplane, Clark called the order desk, ostensibly "to confirm the transaction was complete and flat."[1] However, since Clark had already acknowledged the fill price and the ticket number for the liquidation order, his call more plausibly reflected lingering uncertainty about the status of any offline working orders. Clark was not directly told that he held a new long position, but was told that he had <u>one</u> working order, the limit order. Clark told the desk clerk that he wanted the limit order cancelled so that he would be flat. Despite the fact that he had received no confirmation that the stop order had been cancelled, Clark did not ask the desk clerk to check the status of the stop order; did not inform the desk clerk that he may have lost track of his working orders; and otherwise did not ask for additional help to ascertain the status of his account. Thus, as he boarded the plane, Clark did not know with certainty that the stop order had been elected, resulting in a long e-mini

[1] *See* Clark e-mail sent to Global Futures on Thursday July 22, 2004, at 1:22 p.m. (Exhibit 3 to complaint); and page 2 of complaint.

position. Later that day, upon his return home, Clark liquidated the long position for a loss of about $7,250.

Clark complains that Global Futures should be liable for his loss, because, one, the Global Futures order desk should have construed his "trade out" instruction as an instruction to close out the open position and automatically cancel all related working orders; and two, the Global Futures trading desk should have informed him that his buy stop order had been elected when he instructed the desk to cancel the limit order because he wanted to be "flat." In reply, Global Future denies any violation. Global Futures asserts that Clark was primarily responsible for tracking his working orders, and that Clark simply did not instruct the desk to cancel all working orders. Therefore, Global Futures asserts, it cannot be held liable for Clark's losses from an order that Clark had failed to cancel. As explained below, it has been concluded that although the question of Global Future's liability may be closer than Global Futures acknowledges, Clark has nonetheless failed to establish by a preponderance of the evidence that he is entitled to an award.

Factual Findings

The factual findings are based on Clark's oral testimony, and on the various affidavits, transcripts of relevant recorded conversations and other documentary evidence produced by the parties. The essential facts are not in dispute, unless otherwise noted.

The Parties

Kevin Clark, currently a resident of Gainesville, Florida, has masters' degrees in architecture and business administration. At the relevant time, Clark had been a self-

employed real estate investor for about a year. Before that, for several years he had managed a large portfolio for the real estate acquisitions and disposition group of a New York financial service. Clark had no previous experience trading futures or derivatives before he opened his account with respondents. Clark learned about Global Futures from a futures-trading course offered by Trader's International.

Global Futures Exchange & Trading Company, Incorporated is an independent introducing broker located in Encino, California. Global cleared its customer trades through Rosenthal Collins Group, LLC.

Annabel Agostino, Chadd Astronomo, and Aaron Capps man the Global Futures order desk. Agostino, Astronomo, and Capps also provide technical support to Global Futures customers who trade via on-line platforms. [*See* customer testimonials (exhibit B to complaint), and page 9 of hearing transcript.]

Trading Platform

Clark opened his non-discretionary account with Global Futures about two-and-a-half months before the disputed trade. Clark intended to direct his own trading via the Strategy Runner on-line trading platform.

The account-opening documents executed by Clark included an "End-User License Agreement" with Strategy Runner (Israel) Limited and a Global Futures "Additional Risk Disclosures" that provided in pertinent part:

> 11) When an online customer (self-directed account) places an order offline (through one of our order desks), that ORDER may not be entered into the Customer's online system and may not show up in their equity run until the next day. <u>Customers are responsible for keeping track of all orders, including offline orders, and for knowing their positions at all times.</u> . . .

> 13) For Self-Directed accounts, any orders placed offline (through an order desk as opposed to online) will not be reflected on your or our computer. It is the Customer's responsibility to keep track of offline orders and to know his or her position in the market at any time, and also to inform [Global Futures] when requesting position status the fact that orders have been placed offline.

[Exhibits to answer, underlining added for emphasis.]

Global Futures provided Clark a user manual for Strategy Runner, and an online tutorial for Strategy Runner. Although Global Futures invited Clark to place offline orders with the order desk in the event that his online system was down, Global Futures neither provided Clark any written or oral guides for placing "offline" orders with the order desk, nor warned Clark that orders placed with the order desk could not be synthetically linked as they could be on Strategy Runner. For example, Strategy Runner accepts synthetic OCO (Order Cancels Order) order, but the Global Futures order desk does not accept OCO orders for the e-mini S&P.

Strategy Runner has a *Trade Out* function, which features at the center of this dispute. *Trade out*, a typical function on "synthetic" electronic platforms, will automatically close out an open position and cancel any related working orders. However, *Trade Out* is not a term recognized by trading desks when accepting orders.

For the first ten weeks, Clark exclusively placed trades via Strategy Runner. Any time he had questions or problems with Strategy Runner, he received assistance from Global Futures technical support employees, who also manned its order desk. During these discussions, the employees reminded Clark that if Strategy Runner was down, he could place orders with the order desk.

Disputed Order

The disputed order took place on July 21, 2004, when Clark was departing Miami, Florida, to fly home to Charlotte, North Carolina. Clark had been in Miami since July 18.

The evening of July 20th would be the first time that Clark placed an order with the order desk. Clark called Astronomo, who confirmed that Strategy Runner was down and offered to take any orders over the phone. Clark placed an order to sell seven September e-mini S&P index futures, at 1113.50 (ticket *#2002*). Clark also placed two protective orders: a buy-limit order, at 1109.75 (*#2003*); and a buy-stop order, at 1134.75 (*#2004*). Later that evening, order *# 2002* was filled 1113.50. Thus, as he went to bed, Clark's account was short seven September e-mini S&P's at 1113.50, with two working orders that had been placed with the order desk: *#2003* and *#2004*.[2]

The next morning, July 21, Strategy Runner was working. As Clark was packing, around 8:15 a.m.,[3] he called the order desk and spoke to Capps. Clark instructed Capps to cancel-replaced order *# 2003,* with a buy-limit order, at 1111.50 (order *#2328*). This would be the last time that Clark would identify the sell, stop or limit orders by ticket number or order type when he spoke to the order desk, which would complicate the order desk's efforts to clarify Clark's instructions in subsequent conversations. Clark next told Capps that he had placed "some other trades" with the order desk because of problems with Strategy Runner. Capps advised Clark that if Clark wanted to load the open position and the working orders onto Strategy Runner, Clark should authorize an external fill on the open trade and cancel-replace the other offline orders with new online orders.

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[2] Global Futures produced recordings of the three calls from the hotel. Global Futures did not produce a recording of the later call from the airport.

[3] Times are approximate and are Central Standard Time.

However, Clark declined:

> You know what -- because I'm hoping that I'll meet my target -- probably, within the next twenty-five minutes -- so, you know what -- we can just keep it as is.

[*See* pages 13-15 of hearing transcript.] Thus, after this conversation, Clark's account was short seven September e-mini S&P's, with two offline working orders: the buy limit order *(#2004), and the buy stop order (#2328).*

About two hours later, at around 9:55 a.m. on July 21, as Clark was preparing to check out, he called the order desk and spoke to Agostino. At this point, Clark intended to be "flat." In order to be completely flat, Clark needed to liquidate his open short position and to cancel the two related working orders. However, when Clark initiated the conversation, he neither explicitly instructed Agostino to place a buy order and cancel the working orders nor explicitly informed Agostino that his intention was to be "flat." Rather, Clark stated that he had "an order" that he wanted "to trade out."

As the transcript below shows, when Agostino sought clarification by asking Clark if he meant that he wanted to place a buy order to liquidate the seven short e-mini S&P's, he explained that he wanted to "get out now" with a market order. Agostino immediately placed a market order, and confirmed the fill price and ticket number, which Clark repeated back. Agostino and Clark then terminated the conversation. Thus, the focus of the conversation remained on a single order, and neither Agostino nor Clark raised the topic of working orders:

Clark:	I have an order I would like to trade out.
Agostino:	You need to place an order?
Clark:	No. I want to trade out. Yeah.

Agostino: OK. What platform are you using?

Clark: Strategy Runner.

Agostino: OK.

Clark: Is this the order already called in?

Agostino: You called an order already in?

Clark: Yeah. I did.

Agostino: OK. Which one do you want to get out? The seven contracts?

Clark: Yeah. I need to get out now at 1275. I need to get out right now.

Agostino: Do you want it market, or do you want it at that price?

Clark: Just get out at market right now.

Agostino: OK. Ticket is 2993. And you got filled at 1112.75.

Clark: 1112.75?

Agostino: Correct.

Clark: OK.

Agostino: OK, and you got your ticket number, 2993?

Clark: 2993. . . . And I got filled at 1112.75?

Agostino: Correct.

Clark: OK. Thank you.

Agostino: OK. No problem. Bye.

[Underlining added for emphasis.][4]

[4] Clark and Global Futures each produced a set of transcripts of the three recorded calls from the hotel.

At the conclusion of this conversation, Clark was momentarily out of the market. However, orders *#2004* and *#2328* remained working. Immediately after concluding this conversation, Clark checked out and left for the airport. Around the same time, order *#2328* was filled. As a result, Clark's account was long seven September e-mini S&P's at 1111.50, with order *#2004* still working.

About two hours later, around 11:45 a.m., as he was preparing to board his flight, Clark called Global Futures. Clark asserts that he called with the intention "to confirm that the transaction was complete and all positions were flat."[5] Since Agostino and Clark had already confirmed the fill price and ticket number for the buy market order, but not confirmed the cancellation of protective orders, it is reasonable to conclude that Clark was actually motivated by lingering doubts about the status of the working orders. Clark's version of this conversation is terse, and does not describe what the order desk clerk said beyond reporting that order *#2004* was still working. Based on Clark's limited description of the conversation, Clark told the desk to cancel #2004 because he wanted to "be flat." However, Clark did not ask the order desk clerk to check the status of order *#2328*, and did not inform the clerk that he was possibly confused or uncertain about the status of other orders.

After Clark had returned home, at around 4:30 p.m., he called Global Futures, in order to upload the trade results into Strategy Runner. At this point, Clark was surprised to learn that order *#2328* had been filled. Soon afterwards, he exited the market for a loss of about $7,250.

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[5] Clark's e-mail to Global Futures on Thursday, July 22, 2004, at 1:22 p.m. (Exhibit 3 to complaint.)

Clark and Global Futures exchanged e-mails in an effort to settle the dispute. Set out below is the pertinent portion of Global Futures last e-mail in which it explained why it would not adjust Clark's account:

> No one is denying the fact that when you placed your Buy Limit and Buy stop during the same conversation that you placed your initial sell order. However, all orders placed with the order desk are individual orders. Orders placed with the order desk have no impact on one another, and one order being filled does not automatically cancel another order placed at the same time. The only order type where when one order is filled the other order is canceled is known as an OCO order (Order Cancels Order). At this time the CME does not accept OCO orders for the E-Mini S&P. All orders placed for the E-Mini S&P are individual orders and any action taken on one order has no impact on any other orders. If you would like to place OCO orders for the E-Mini S&P over the phone you need to contact your Broker about opening a full service account. The Global Futures Order Desk will NOT accept any OCO order for the E-Mini S&P at this time.
>
> It is important that you understand the difference between Strategy Runner and the Order Desk. Strategy Runner is a trading platform that you as a client use for order entry. It offers a number of features to traders such a Synthetic OCO orders for the E-Mini S&P, Synthetic Brackets and Trailing Stops. Those are all features of the Strategy Runner platform, and are not actual exchange order types which means that unless you place your orders on Strategy Runner your order WILL NOT be placed as an OCO Bracket, or Trailing Stop. When you place orders with the Order Desk you are not placing orders on Strategy Runner, and as such you cannot apply any of the rules used on Strategy Runner to orders placed with the Order Desk. All orders placed with the Order Desk for the E-Mini S&P are individual orders and they have no relation to one another. You CANNOT place OCO orders, Brackets, or Trailing Stops with the Order Desk. You also make mention to the idea of "Trade Out". Trade Out is a feature available on select electronic order entry platforms. It is not an order type, nor is it something that the Order Desk can act on. When you called the Order Desk you said that you would like to "Trade Out" and the clerk asked you if you meant you would like to place an order. You then said yes and placed an order with the Order Desk clerk. You have to remember that there is a very big difference between the electronic order entry platform you use and calling in orders to an order desk. That being said, as the trader it is your responsibility to be aware of your account status at all times. When trading with Strategy Runner it is your responsibility to ensure that the platform has canceled the orders for you and has executed the orders properly. When you place trades through the Order Desk it is your responsibility to ensure that you are aware of the status

> of your orders at all times, and if you would like your working orders canceled to call the Order Desk and instruct the clerk to cancel your order.

[July 29, 2004 e-mail from Linda Freeman (Exhibit 5 to complaint); underlining added for emphasis.]

This was the first time that Global Futures would explain that online and offline order placement required different terminology. The timing of this explanation was but one of several factors that contributed to the dispute between Clark and Global Futures.

Discussion and Conclusions

Clark maintained a discount, non-discretionary account and made independent trading decisions. Thus, it was Clark's responsibility to know the status of his orders. Conversely, it was Global Futures' duty to execute and report his orders in a diligent manner. Global Futures complicated the tasks of its online customers like Clark and of its order desk personnel by not explaining to its online customers the different protocols for placing offline orders with the order desk. When Clark told Agostino that he wanted to "trade out an order," she was aware that Clark had routinely been placing trades on line, but had little or no experience placing orders with the order desk. She also was familiar with the *trade out* function, and acted diligently by readily gleaning that Clark wanted to close out the open position. Arguably, she also should have asked Clark if he had any related working orders to be cancelled, since Global Futures had neither provided Clark guidance for placing trades with the order desk, nor warned Clark that the order desk would not accept synthetic orders. Nonetheless, Clark has not established that he would have successfully cancelled the two working orders and avoided his loss, even if Agostino had inquired about working orders. By the time that he spoke to Agostino,

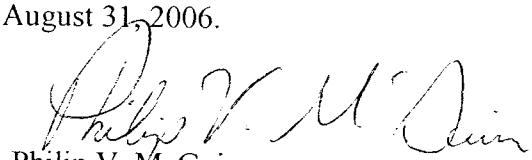
Clark had rejected Global Futures' advice to take the necessary steps to enter the trade and the orders into his online platform; Clark had already lost track of his orders; and Clark had shown no inclination to acknowledge that he was confused and needed help. Thus, because Clark did not clearly inform Global Atlantic that he needed extra assistance, Global Futures was not required to conduct further inquiry into the status of his account when he told Agostino that he wanted to *trade out,* and when he subsequently told the unidentified clerk that he wanted to be *flat*.

Clark's experience was understandably frustrating, but he compounded his confusion by juggling the distractions of travel and the demands of placing and tracking offline orders for the first time. In this connection, a significant portion of order disputes filed in reparations seem to involve orders placed by traders on their departure dates. This suggests that trading while traveling, at least for some traders, is a hazardous form of multi-tasking akin to operating a motor vehicle while using a cell phone.

ORDER

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

Dated August 31, 2006.



Philip V. McGuire,
Judgment Officer