

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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CHARLES G. MICKELS,
Complainant,

v.

MAN FINANCIAL, INCORPORATED,
Respondent.

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OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

* CFTC Docket No. 05-R011

INITIAL DECISION

On June 15, 2004, eighteen minutes after the open, Charles Mickels placed a stop order to sell two November Frozen Concentrated Orange Juice futures. Mickels' stop price, 59.50, was the same as the open price and the previous close, and just two ticks below the last reported trade. Twenty seconds after Mickels placed the order, the market traded at 59.50, electing the order, which was filled at 59.40. The market toggled between 59.40 and 59.50 for the next 21 minutes, before rebounding upward. Mickels was displeased to learn that his fill price happened to be the daily low.

This sort of sequence, on its face, is not peculiar. It plays out every day in every active market. Markets move up and down. Stop orders are elected. Someone buys at the high, and someone sells at the low. Traders learn from their mistakes. Or they don't.

Here, Mickels has not pondered whether he simply may have mistimed or mispriced his order. Rather, based on the bare facts that he is a black man and that the market quickly dipped to trigger his stop order and boot him from the market, Mickels has theorized a conspiracy that was organized to cause financial harm to black traders

like him.¹ According to Mickels, an unidentified Man Financial order desk employee defrauded Mickels by improperly disclosing confidential information about Mickels' order to an unidentified trader. In turn, Mickels alleges, this trader possessed the requisite trading power to move the market at will on a moment's notice, and the trader used that power to force the market down to trigger Mickels' stop order and boot him from the market at an artificially low price.

Man Financial denies any violations, and asserts that Mickels' allegations are unfounded and absurd.

As explained below, after a careful review of the documentary record,² it has been concluded that Mickels has not produced a scintilla of reliable evidence to support a *prima facie* showing of racial animus by respondent or its employees or agents; improper disclosure of his order; or manipulation in the frozen concentrated orange juice futures market.

Findings of Fact

Charles Mickels is a resident of Florissant, Missouri. Mickels' account applications indicate: that, as of June 2004, he was 61 years old and retired; that he had worked in real estate sales before retirement; and that he had completed two years of college. Mickels has traded commodity futures since 1978.

¹ Mickels' explication of his conspiracy theory is described in the Order dated September 2, 2005. Put succinctly, Mickels' theory is based on the perceived interplay between two given truths: one, Mickels is a black man trying to survive and succeed in a society with ingrained racial bias; and two, the market quickly dipped to trigger Mickels' sell stop order at the lowest price for the day.

² In addition to the parties' affidavits and statements, significant documentary evidence includes: the New York Board of Trade price data for the November Frozen Concentrated Orange Juice futures contract from May 3 to June 15, 2005; the NYBOT time and sales report for the November FCOJ on June 15, 2005; and the office execution copies (*i.e.*, the electronic equivalent of office tickets) and the floor tickets for Mickels' various FCOJ trades.

Mickels opened his account with Man Financial's predecessor in 1987. In 2002, Mickels converted the account to a self-directed discount account. Mickels placed his orders through order clerks assigned to Man Financial's discount order desk. Mickels' submissions indicate that he never directly experienced any overt or subtle racial bias in his dealings with Man Financial.³ In 2002, Mickels made four futures trades and realized an overall net profit of \$27. In 2003, Mickels made five futures trades and realized an overall net profit of \$2,710.

Beginning on December 1, 2003, Mickels made a series of trades in the Frozen Concentrated Orange Juice futures contract ("FCOJ"). Mickels initially traded in the nearby contract months. On December 1, 2003, Mickels bought two March FCOJ. On February 20, 2004, Mickels rolled over his FCOJ position -- selling the two March FCOJ for a \$3,420 loss, and buying two May FCOJ. On May 3, he sold the two May FCOJ for a \$1,875 loss.

Also on May 3, Mickels switched to trading a back contract month, buying two November FCOJ. On June 15, he sold the two November FCOJ for a \$1,530 loss. This June 15th transaction was the first FCOJ trade where Mickels used a stop order, and is the subject of Mickels' complaint.

Mickels bought the two November FCOJ, on May 3, at 64.50. On May 6, the November FCOJ dropped below Mickels' purchase price, but for the next few weeks did not discernibly trend up or down. During the week before the disputed sale (*i.e.*, from June 7 to 14): the November FCOJ traded between 59.20 and 61.40; the average daily

³ In his first protest letter to Man Financial, Mickels stated: "Man Financial is one of the highest rated brokerage firms in the commodities business and my dealings over the years have been first class. My account executive . . . has always been extremely helpful; he exemplifies the professionalism of Man Financial." [Letter dated July 19, 2004.]

range between the high and low price was 13 ticks (.65 cents);⁴ and the daily volume ranged from 98 to 2,851 contracts and averaged about 770 contracts. On June 14, the November FCOJ closed at 59.50, with trading volume of 98 contracts.

On June 15, the November FCOJ market opened at 59.50. Before Mickels placed his order, the market had traded at 59.50 at 10:02, and at 59.60 at 10:07. At 10:18:18, Mickels placed an order to sell two November FCOJ, at a 59.50 stop -- two ticks below the last reported price.⁵ Twenty seconds later, at 10:18:38, the market traded at 59.50, electing the stop order. Mickels' order was filled at 59.40, which to his dismay would be the low price for the day.⁶ The market toggled between 59.40 and 59.50 until 10:41, before rebounding sharply, hitting a high of 61.40, and closing at 61.25. On June 15, trading volume for the November FCOJ was 276 contracts.

Discussion and conclusions

Mickels alleges that an unidentified Man Financial order desk employee improperly disclosed confidential information about Mickels' order to an unidentified trader.⁷ In turn, Mickels asserts, this unidentified trader -- with sufficient trading power to move the market at will -- then drove the market down to an artificial price in order to force Mickels from the market. CFTC rule 155.3(b)(1) prohibits the improper disclosure of customer orders. The principle provisions prohibiting manipulation are Sections 4c(a)(2)(B) and 9(a)(2) of the Commodity Exchange Act.

⁴ The minimum price fluctuation, or tick, for the FCOJ is five one-hundredths of a cent per pound.

⁵ By Notice dated August 10, 2005, and Order dated September 2, 2005, Mickels was encouraged to explain his trading strategy behind the disputed stop order. In his response to the August 10th Notice, Mickels did not address his trading strategy or selection of the stop order. Mickels did not file a reply to the September 2nd Order.

⁶ Mickels relates that the "order was filled almost before I got off the phone." [First page of Mickels' motion dated April 18, 2005.]

⁷ Mickels does not allege any violation, impropriety or animosity by any of the Man Financial employees with whom he regularly dealt.

Manipulation is not defined in the Act or in CFTC regulations. However, manipulation has been generally defined in court decisions, CFTC orders, and various treatises as trading that is conducted with the purpose of creating an “artificial” price. Since half the market will be short and half the market will be long, a manipulated market will benefit half the traders and harm the other half. Thus, a classic market manipulator cares little or nothing about the identity of the market participants, and is primarily interested in reaping a financial windfall by driving the market in his or her favor.

Here, Mickels has alleged a different breed of manipulator who is principally motivated, not by old-fashioned greed, but by old-fashioned, irrational and virulent antipathy toward Mickels and others of his race. In any event, for Mickels to recover financial damages from the sale of the two futures contracts, Mickels must prove by a preponderance of the evidence the existence of an actual manipulation. In order to establish manipulation, Mickels must prove all of the following four elements: one, that the trader had the ability to affect price levels or trends in the November FCOJ market; two, that the trader had the specific intent to exercise that power; three, that “artificial” prices existed in the November FCOJ market at the relevant time; and four, that the trader used his market power to cause the artificial prices. *See e.g., Frey v. CFTC*, 931 F.2d 1171 (7th Cir. 1991); *CFTC v. Enron Corp.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,714, at 56,017-56,018 (S.D. Tex 2004); *In re Avista Energy, et al.*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,623 (CFTC 2001); and *In re Abrams*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,479 (CFTC 1995).

Artificial price is the critical element that must be proven to establish manipulation. If artificial price can be established, it may give rise to permissible inferences on the issues of intent and causation. Conversely, if an artificial price is not established, the plausible existence of a manipulation cannot be readily inferred. Generally, the following matters are considered proof that market prices were artificial: one, the futures market price did not reflect known supply and demand factors; two, the futures market price was abnormal in comparison with cash prices; three, the futures market price was abnormal in light of past and subsequent prices; and four, the price relationship between the allegedly manipulated futures contract and the futures contract in the same commodity but different delivery month was abnormal. *See e.g., Indiana Farms Bureau Cooperative Association*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796 (CFTC 1982). Mickels has not directly addressed any of the four factors listed above. Rather, Mickels' claim hinges on his assertion that a suspicious or abnormal price is indicated solely by the perceived confluence of two given facts: one, that he is a black speculator in a society bedeviled with persistent racial bias; and two, that the market quickly dropped two ticks to hit his stop order and then rebounded (after trading at the stop price or the fill price for an additional twenty-two minutes).

As the complainant, Mickels has the burden to produce evidence in support of his allegation of a racially motivated fraud and manipulation. The fact that Mickels is black and that racial bias persists, by itself, does not shift the burden to respondent to prove the absence of racial bias in the handling of Mickels' order. Here, Mickels has not produced an iota of evidence showing subtle or overt racial animus by respondent or respondent's employees or agents. Similarly, Mickels has not produced any evidence in support of his

allegation that confidential information about his stop order had been improperly disclosed.

As to the circumstances around the swift fill of his order, Mickels virtually assured that the two contracts would be quickly sold when he selected a stop price that was just two ticks below the last trade. This price was attractive to bargain-hunting buyers and thus well within range of any reasonably foreseeable short-term market gyrations. In these circumstances, the mere fact that the market quickly hit Mickels' tight stop price, bottomed at his fill price and then eventually rebounded cannot reasonably support an inference that the market traded at an artificial price. Mickels otherwise has not offered any plausible explanation, expert opinion, or objective proof that, on June 15, 2004, the November FCOJ futures price had been distorted or artificial.

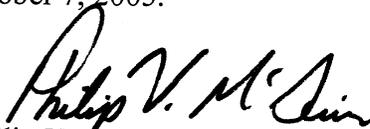
All that Mickels has offered is a scenario of a dreadful conspiracy that can be neither readily proved nor disproved.⁸ Therefore, absent any plausible or reliable objective proof of a manipulation, or of an improper disclosure of his order, it must be concluded that Mickels has failed to establish by a preponderance of the evidence any violations of the Commodity Exchange Act, or any rule, regulation or order of the Commission, in connection with the execution of his order on June 15, 2004.

⁸ Because Mickels has offered no more than pure suspicion of manipulation, his requests and suggestions to move and sift a mountain of records have been rejected. By Order dated September 2, 2005, Mickels' motion for an order to compel Man Financial to produce all the order tickets for all contract months of the actively traded FCOJ contract over seven and a half months -- approximately 30,000 responsive records -- was denied. In that Order, it was ruled that the information sought was not likely to lead to the discovery of relevant information, and that the cost and burden of producing the requested information would be excessive and disproportionate to the nature of the case and the amount involved. In that Order, it was noted that Mickels' suspicion, by itself, was insufficient to justify burdening "respondent or any third parties" with the production sought by Mickels. [Underlining added here for emphasis.] Thus, for the same reasons it has been determined not to compel Man Financial to produce the documents requested by Mickels, it has been determined not to issue *sua sponte* subpoenas compelling similar production from any third parties, such as FCOJ floor traders and the NYBOT.

ORDER

Complainant has failed to establish any violations of the Commodity Exchange Act, or any rule, regulation or order of the Commission. Accordingly, the complaint in this matter is DISMISSED.

Dated October 7, 2005.


Philip V. McGuire,
Judgment Officer