

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

GERALD D. RUDE,
Complainant,

v.

CHARLES SCHWAB & CO., INC., *et al.*,
Respondent.

CFTC Docket No. 01-R101

Appearances at the Administrative Hearing:

On behalf of Complainant Gerald D. Rude:
Gerald D. Rude

On behalf of Respondent Charles Schwab & Co., Inc.:
Steve Murphy, Esq.
Charles Schwab & Co., Inc.

Before: George H. Painter, ALJ

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INITIAL DECISION

Preliminary Statement:

Complainant Gerald D. Rude ("Rude") filed a reparations complaint seeking to recover damages in excess of \$150,000 from seven respondents due to various violations of the Commodity Exchange Act. Rude settled his dispute with six of the parties for the sum of \$29,000. Charles Schwab & Co., Inc., ("Schwab") is the only remaining Respondent. Rude claims that Schwab, through its employee, violated the Commodity Exchange Act by making false or misleading statements that led Rude to believe that trading activity would cease in his

account at Independent Trust Corporation (“InTrust”) after requesting an account transfer.

Rude claims Schwab’s conduct resulted in damages in excess of \$95,000.

The trial of this matter took place on January 23, 2003, in Los Angeles, California. The parties have been afforded an opportunity to file post trial briefs, along with recommended findings of fact and conclusions of law. This matter is ready for decision. The findings of fact set out below are based on credible evidence of record.¹

Findings of Fact:

1. Gerald D. Rude (“Rude”), Complainant, is a medical doctor and resident of Claremont, California. (Tr. 8).
2. Charles Schwab & Co., Inc. (“Schwab”), Respondent, has been a registered introducing broker since March 1997. (Commission records).
3. In September 2001, Rude filed a *pro se* reparations complaint. In addition to Schwab, the original complaint named as respondents: ADM Investor Services, Inc. (“ADM”), Moez Ul-Haq Ansari (“Ansari”), Robert Thomas Duffy (“Duffy”), Compak Asset Management and Compak Trading Co. d/b/a Moez Ansari (collectively, “Compak”), and RB&H Financial Services, LP (“RB&H”). (Complaint). On or about September 13, 2002, Rude agreed to settle his claim against the other Respondents for the sum of \$29,000. On September 17, 2002, this Court dismissed, with prejudice, the Complaint

¹ The listed documents are referred to by denoting party surname when appropriate and abbreviations as follows:
“Ans.” for Answer
“Tr.” for Trial transcript
“Ex.” for Exhibit
“POSTHG” for Post-hearing memorandum
“FF” for Findings of fact

against ADM, Ansari, Compak, Duffy & RB&H. Schwab was not a party to the settlement or the dismissal, leaving Schwab the only respondent in this case. (Tr. 6; Order of Partial Dismissal on Settlement).

4. On or about January 24, 2000, Rude met with Thomas K. Carr (“Carr”), a Schwab employee, at Schwab’s branch office in Upland, California. On that day, Rude opened an IRA account with Schwab and signed two requests to transfer his commodity account with RB&H and corresponding IRA account with Independent Trust Corporation (“InTrust”) to Schwab. (Tr. 9, 40, 45; Rude Group Ex. 1; Schwab Ex. 3). According to Rude, Carr told him “no more trading could be done in my [sic] Compak account.” (Tr. 17; Complaint). Carr denies that he made this statement to Rude. (Tr. 47; Schwab Ans.).
5. On or about January 28, 2000, a letter was sent from Schwab to notify Rude that Schwab had initiated the transfer request. (Tr. 17, 21; Rude Group Ex. 1).
6. On or about January 31, 2000, Schwab sent the account transfer form by Federal Express to InTrust. (Tr. 56; Schwab Ex. 4).
7. Rude seeks to hold Schwab liable for losses incurred due to trading activity in his InTrust account after February 29, 2000. Rude believes “Schwab misrepresented their ability to obtain his funds” and “did not notify Rude of any difficulty they were having in obtaining Rude’s funds.” (Rude POSTHG).

Discussion:

Although the Complaint against Schwab lacks clarity, it can be divined that Rude claims Schwab, through its employee, Carr, violated §4(b) of the Commodity Exchange Act by making misleading or false statements.² Section 4(b) provides, in relevant part, that it shall be unlawful for any person directly or indirectly to willfully make or cause any false report or statement to be made to another person in connection with a commodity or future transaction. 7 U.S.C. §6(b). Based on the credibility of the parties, the persuasiveness of their assertions and the evidence presented at hearing, this Court is convinced that Schwab's conduct did not constitute a violation of §4(b).

Rude claims that Carr misrepresented Schwab's ability to obtain Rude's funds from InTrust by assuring him that "no more trading could be done." (FF 4). Furthermore, he asserts, "according to the forms that I read...I was assured that I would have the money, that they would take appropriate action." (Tr. 17). This Court was presented with conflicting evidence as to whether Carr made any representation to that effect, which consisted solely of Rude's assertion and Carr's denial. (FF 4). This Court finds Carr to be a credible witness and believes that he made no such statements to Rude.

Even if this Court assumes, *arguendo*, that Carr assured Rude that no trading could be done, a finding of this fact alone would not make Schwab liable for losses due to a failed transfer of Rude's commodity account. For Schwab to be liable under §4(b), this Court also needs to find that Carr willfully made the false or misleading statement in connection with a commodity

² Rude does not specify a violation of any provision of the Act in his Complaint. However, the Commission has "favor[ed] the holistic interpretation of parties' submissions over more technical interpretations." *Levi Zeligman v. Merrill Lynch Futures, Inc.* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,236 at 42,030 (CFTC Sep. 15, 1994). In order to further the Commission's goal to "encourage efficiency without unduly prejudicing parties to appear *pro se*," the Commission has "recognized that allowances must be made for *pro se* status in interpreting and applying procedural requirements." *Human v. Alaron Trading Corp.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,806 at 44,291 (CFTC Oct. 18, 1996).

or futures transaction. Rude presented no evidence either by exhibit or testimony that could reasonably support an inference that Carr willfully made this statement. Moreover, Rude's account transfer request was not made in connection with any commodity or futures transaction. That aside, Carr testified at hearing that Rude was made aware that a delay was possible since he informed Rude "Schwab can not handle commodities." (Tr. 47).

In addition to Carr's alleged statement, Rude also argues that Schwab misrepresented their ability to transfer the account as evidenced by the "Agree to Terms" section of the account transfer form. (Tr. 17, 60). However, the plain language of the "Agree to Terms" section of the document authorizes the "delivering firm" to transfer all assets to Schwab and instructs the "delivering firm" to perform all necessary actions in order to effectuate the transfer subject to any limitations as indicated by the customer. (Rude Group Ex. 1; Schwab Ex. 3). Thus, by signing this form, Rude authorized and instructed the delivering firm, InTrust, to transfer his account to Schwab. In fact, Schwab dutifully fulfilled Rude's request to forward the account transfer documentation to InTrust, and did so within a reasonable time period. (FF 6). Rude may have construed that he would get "out of the market," by executing an account transfer form. (Tr. 17). However, this Court finds that the language of the form clearly contains no misrepresentations concerning Schwab's ability to transfer assets. Thus, this Court finds that Rude failed to prove that Schwab willfully, through its employee or its account transfer form, made false or misleading statements in connection with a commodity or futures transaction thereby violating §4(b).

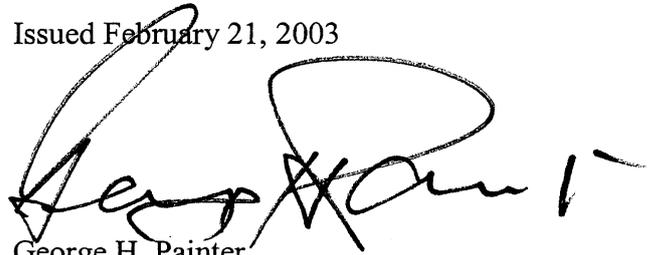
ORDER

Complainant has failed to establish by a preponderance of the evidence that he sustained monetary loss by reason of unlawful conduct on the part of Charles Schwab & Co, Inc.

Accordingly, the Complaint is DISMISSED with prejudice.

So ordered.

Issued February 21, 2003

A handwritten signature in black ink, appearing to read "George H. Painter", written over the typed name.

George H. Painter
Administrative Law Judge

Rolaine Soril Bancroft
Law Student Extern