



U.S. COMMODITY FUTURES TRADING COMMISSION

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MERAT M. SABA,

Complainant,

v.

GEORGE WILLIAM GRECO and
TRADERS EDGE,

Respondents.

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CFTC Docket No. 09-R052

INITIAL DECISION

Background

In May of 2006, complainant Merat M. Saba opened an account with Traders Edge¹ by transferring three open silver positions from Express Trade, his predecessor brokerage firm.² Although initially opened as a non-discretionary account, in October of 2006, Saba executed a power of attorney

¹ Traders Edge is a registered Introducing Broker. NFA Online Registration System, Status, NFA ID 0284329. George Greco is the Associated Person of Traders Edge who handled Saba's account. NFA Online Registration System, Status, NFA ID 0277953; Transcript of Oral Hearing, dated February 23, 2011 ("Tr.") at 113-118.

² Joint Submission of Undisputed Facts in Chronological Order, dated February 1, 2011 ("Joint Stipulations"), at ¶¶1-3, 8-9. The Joint Stipulations were received into evidence. Tr. at 6-7. Saba chose to leave Express Trade because he had difficulty trading electronically and was "look[ing] for a trader to do the trading for me." Tr. at 54. Before that he had an account with Monex. Tr. at 73; Joint Stipulations at ¶6.

authorizing Greco to trade on his behalf.³ Through the end of 2006, Saba traded silver and gold futures.⁴ Thereafter, he traded a variety of contracts, including sugar, the Japanese yen, the Canadian dollar, the S&P, natural gas, NY crude oil, and soybeans.⁵ The last transaction in Saba's Traders Edge account occurred in January of 2008, leaving a debit balance of \$5.27.⁶ Over the life of the account, Saba experienced out-of-pocket trading losses of over \$86,000.⁷

Saba claims that Greco and Traders Edge engaged in unauthorized trading and also refused (in one instance) to follow trading instructions. We address his unauthorized trading claim first.

³ Joint Stipulations at ¶¶8, 10; JX-3-1. The "JX" series of exhibits were jointly moved into evidence by Saba and the respondents. Tr. at 6.

⁴ JX-4-1 through JX-4-8.

⁵ JX-4-9 through JX-4-27.

⁶ JX-5-123.

⁷ JX-4-1 through JX-4-27, JX-5-1 through JX-5-123; see Letter from the Office of Proceedings to Merat M. Saba, dated January 6, 2010, at 2. Saba's losses include nearly \$42,000, resulting from Saba's June 2006 liquidation of the three silver positions that he transferred from Express Trade. JX-4-1 through JX-4-2. Saba does not allege any wrongdoing in conjunction with this liquidation. Tr. at 55. See also *Saba v. Greco*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,676 at 65,219 n.34 (CFTC Nov. 9, 2010) (*rejecting* Saba's fraud claim with regard to an alleged \$10,000 investment in a silver mine on jurisdictional grounds).

Unauthorized Trading

In his amended complaint, Saba claims as unauthorized over 70 transactions occurring between April and October of 2007.⁸ This requires us to evaluate Saba's trading for compliance with Commission Rule 166.2.⁹

Rule 166.2 states in relevant part:

No futures commission merchant, introducing broker or any of their associated persons may directly or indirectly effect a transaction in a commodity interest for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account –

- (a) Specifically authorized the futures commission merchant, introducing broker or any of their associated persons to effect the transaction....

or

⁸ Complainant Amendment to Interrogatories, Unauthorized [sic] Trade, received December 14, 2010 ("Complaint Amendment"), at 1-3. This is Saba's amendment to the complaint. Saba's *pro se* status accounts for the confusing title of the pleading.

⁹ An unauthorized trading charge can be viewed as one (or more) of three interrelated but distinct claims: fraud, misuse of customer funds in violation of Section 4d(a)(2) of the Act (7 U.S.C. §6d(a)(2)), and a violation of 17 C.F.R. §166.2. *Slone v. Dean Witter Reynolds, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,283 at 42,433 (CFTC Dec. 16, 1994); *In re Interstate Sec. Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,295 at 38,955 (CFTC June 1, 1992). However, Section 4d(a)(2) would not apply here since Traders Edge is not a Futures Commission Merchant. 7 U.S.C. §6d(a)(2). In addition, while most instances of fraudulent unauthorized trading also qualify as Rule 166.2 violations, there is no requirement to prove *scienter* to establish that the regulation was violated. *Filipour v. Goldberg*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,530 at 60,116-17 (April 19, 2007). Consequently, unless a complainant alleges that a respondent met the technical requirements of Rule 166.2 but nevertheless somehow engaged in unauthorized trading (and Saba does not), we can confine our analysis to the rule itself.

(b) Authorized in writing the futures commission merchant, introducing broker or any of their associated persons to effect transactions in commodity interests for the account without the customer's specific authorization....¹⁰

Saba contends that he did not specifically authorize the 70-plus transactions¹¹ – thereby alleging that the respondents failed to meet the standard of subsection (a).¹² The respondents point, however, to the existence of a signed power of attorney authorizing Greco to trade the account on Saba's behalf¹³ – thereby meeting the alternative standard set forth in subsection (b).¹⁴ Saba counters by arguing that the power of attorney was limited by an oral agreement.¹⁵ Greco denies this, stating the power of attorney was executed to provide Greco with the flexibility to execute agreed-upon trading strategies when

¹⁰ 17 C.F.R. §166.2.

¹¹ Tr. at 25 (“He didn’t ask me when he went to activate the trade. He didn’t ask me when he activated, got rid of the trade.”). Later, however, Saba concedes that some of the 70-plus trades may have been specifically authorized, but is unsure as to which. Tr. at 109-10. There’s no need to address the lethal effect of this admission, given our disposition of Saba’s unauthorized trading charge on alternative grounds.

¹² 17 C.F.R. §166.2(a).

¹³ JX-3-1.

¹⁴ 17 C.F.R. §166.2(b).

¹⁵ Tr. at 57-59. Saba testified that he visits the Philippines every year in early April, and that the power of attorney was only to be used when he was abroad. *Id.*

Saba was inaccessible during the work day.¹⁶ However, we need not pick between these conflicting versions of the parties' understandings, since the parol evidence rule exists precisely to foreclose such *ex-post* contractual disputes.¹⁷

Like other courts, the Commission enforces the parol evidence rule, which "holds that extrinsic evidence is not admissible to add to, detract from, or vary unambiguous terms of a written agreement."¹⁸ For instance, in *Violette*, the

¹⁶ Tr. at 116. Greco explained:

The way it actually works is, we would discuss a trade with him, he would discuss a trade with me. The trades that we'd get were markets he was talking about, other than a few, very few in there.... We'd discuss the trade. I would put the trade on at my discretion. He would say, When [sic] you get to work today look at the S&P, I think it's going to go up. And I would still call him. But if he wasn't available, he would tell me a general area where we should get in and where we should get out. And that's how the power of attorney was used. It was markets he [was] aware of and he knew every one.

Tr. at 117-18.

¹⁷ For this reason, we do make any express credibility determinations on this point. We note, however, that Saba readily admitted that he closely followed all of the trading in his account on a daily basis throughout the period in question. Tr. at 25-28, 63. He also acknowledged that he consented to Greco's trading and urged him to exercise discretion in liquidating positions. Tr. at 28-31. In fact, he was "frustrated" that Greco wasn't trading enough. Tr. at 61; JX-9-30. Moreover, after Saba had stopped trading with Traders Edge, he had two meetings with Greco and his supervisor, Edward Carr, where they discussed Saba's grievances - unauthorized trading was never mentioned. Tr. at 86; Joint Stipulations at ¶¶20-21; JX-8-1 through JX-8-45; JX-9-1 through JX-9-47.

¹⁸ *In re Stovall*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,941 at 23,782 n.30 (CFTC Dec. 6, 1979) (emphasis omitted).

(continued..)

Commission examined whether it should look outside the four corners of the document to determine the terms of a settlement agreement.¹⁹ It held that “when the parties’ intent is clearly and unambiguously expressed in a written agreement, the agreement stands on its own.”²⁰ Conversely, “[w]hen the parties’ intent is ambiguously expressed in the agreement, parol evidence must be considered to make a reliable determination of what the parties intended.”²¹

(..continued)

Judge Posner explains the purpose of the rule:

Drafters of contracts worry lest in the event of a dispute one of the parties ask the court to depart from the terms of the written contract on the ground that it is not the parties’ entire agreement – there are additional terms to which they had agreed during the negotiations leading up to the making of the contract. If such a claim enabled the party making it to obtain a jury trial on the meaning of the contract, the contractual process would be riven by uncertainty. The law’s response to this problem is the parol evidence rule, which, so far as bears on this case, forbids the introduction of evidence (whether oral or written) of what was said in the process of negotiating a contract to vary the terms of the contract that resulted from the negotiation, provided the contract seems clear and complete.

Extra Equipamentos E Exportacao Ltda. v. Case Corp., 541 F.3d 719, 723 (7th Cir. 2008).

¹⁹ *Violette v. First Options of Chicago, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,951 at 44,623 (CFTC Feb. 20, 1997).

²⁰ *Id.* (citing *Air Line Stewards, Etc. v. American Airlines, Inc.*, 763 F.2d 875, 878 (7th Cir. 1985), cert. denied, 474 U.S. 1059 (1986)).

²¹ *Id.* See also *Faro v. Interlink Trading, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,537 at 43,373 n.18 (CFTC Nov. 16, 1995);
(continued..)

The terms of the power of attorney that Saba gave to Greco are not ambiguous. They expressly apply to “all” purchases and “in every respect,”²² and were in effect during the entire period of the disputed trading.²³ We hold that the unambiguous terms of the power of attorney are enforceable and that Greco had every right to trade Saba’s account without a need to obtain Saba’s express permission for particular trades. For this reason, Saba’s claim for unauthorized trading fails.

(..continued)

Giarritano v. Chicago Mercantile Exchange, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,132 at 38,251 n.17 (CFTC Sept. 25, 1991).

²² The power of attorney, in relevant part, states:

In *all* such purchases, sales or trades you are authorized to follow the instructions of my agent and attorney-in-fact [George Greco] *in every respect* concerning my account with you and (s)he is authorized to act for me and in my behalf in the same manner and with the same force and effect as I might or could do with respect to such purchases, sales or trades....”

JX-3-1 (emphasis added).

²³ The power of attorney additionally states that “[t]his authorization and indemnity is a continuing one and shall remain in full force and effect until revoked by me by a written notice....” *Id.* Saba admitted that he never revoked or modified the power of attorney by written notice. Tr. at 59-60. Nor did he ever attempt to do so orally. Tr. 60 (“[The power of attorney is] in effect right now, because I never said anything about this power of attorney.”). *Cf. Clarke v. Shearson Lehman/American Express, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,746 at 31,111-12 (CFTC Sept. 16, 1985).

Failure to Follow Instructions

Saba makes one other allegation. He claims that at the very end of the trading in his account, Greco failed to follow his instruction to purchase one short S&P contract.²⁴

On December 20, 2007, Greco purchased one long March 2008 S&P contract for Saba's account.²⁵ This contract began to decline in value and was offset on January 9, 2009, by purchasing a corresponding short contract, resulting in a loss of \$20,932, including commissions and fees.²⁶ This liquidation was undertaken with Saba's knowledge and consent, and is not disputed.²⁷ Saba, however, wanted not to simply exit his position but to reverse it – go from long to short – by purchasing a second short S&P contract at the same time.²⁸ Greco declined to place the trade.²⁹

²⁴ Untitled Pleading, dated March 14, 2011 (“Saba’s Post-Hearing Submission”) at 2; Complaint Amendment at 4.

²⁵ JX-5-121.

²⁶ JX-5-123.

²⁷ Saba’s testimony on this point was somewhat confusing. Tr. at 13-16, 66-71. However, it is clarified by a post-hearing admission as well as by Greco’s unchallenged testimony on the same subject. Saba’s Post-Hearing Submission at 2; Tr. at 121-22.

²⁸ Tr. at 15-16, 68, 122-23.

²⁹ *Id.*

As a general rule, of course, “a broker is required to execute its customer’s instructions.”³⁰ However, “[a] broker may refuse an order when an account is undermargined.”³¹ This was what happened here.³² After the liquidation of the long S&P contract, Saba’s account was left with a debit balance of \$5.27.³³ Saba therefore had no margin with which to enter into his desired short S&P trade.

Moreover, even if Saba’s account had been adequately margined, his claim would fail. For liability to attach under the Commodity Exchange Act, a broker’s failure to place an otherwise proper order must be conditioned on more than a mistake or a simple misunderstanding. The refusal must have been wrongfully undertaken with *scienter*.³⁴ That is, it must have been carried out with “a mental state embracing intent to deceive, manipulate, or defraud”³⁵ or undertaken with a *knowing* disregard of any wrongful consequences³⁶ –

³⁰ *Do v. Lind-Waldock & Co.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,910 at 40,965 (CFTC Dec. 15, 1993).

³¹ *Id.*

³² Tr. at 122.

³³ JX-5-123.

³⁴ *Do v. Lind-Waldock & Co.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,516 at 43,321 (CFTC Sept. 27, 1995).

³⁵ *In re McMahan*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,662 at 64,866 n.97 (CFTC Nov. 5, 2010) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)).

³⁶ *Id.* “Negligence is insufficient.” *Dunmire v. Hoffman*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,201 at 57,826 (CFTC Mar. 2, 2006).

“injurious action by the wrongdoer is not enough.”³⁷ We find no fraud here; there is no suggestion in the record that Greco dealt with Saba in anything other than good faith.

For the reasons set forth above, we **DISMISS** the complaint with **PREJUDICE**.³⁸

IT IS SO ORDERED.

On this 29th day of June, 2011



Bruce C. Levine
Administrative Law Judge

³⁷ *Dunmire*, [2005-2007 Transfer Binder] ¶30,201 at 57,826.

³⁸ The respondents have filed a motion requesting that we reopen the evidentiary record to receive equity runs for January 8 and 9, 2008, as (additional) proof that Saba’s account was undermargined. Respondents’ Request for Leave to Introduce and Admit Additional Evidence, dated April 14, 2011, at 2. Given our dismissal of Saba’s complaint on the record before us, the additional evidence is unnecessary. Accordingly, the motion is **DENIED**. *Cf.* 17 C.F.R. §12.405; *In re U.S. Securities Corp.*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,494 at 63,570-71 (CFTC Oct. 7, 2009).