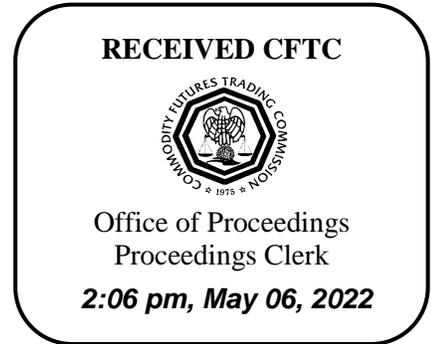




U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings



Mark Robbins,

Complainant,

v.

Charles Schwab Futures, Inc.,

Respondent.

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CFTC Docket Nos. 20-R023
Served electronically

INITIAL DECISION
AND ORDER GRANTING
RESPONDENT’S MOTION FOR SUMMARY DISPOSITION

Mark Robbins, appearing in this forum as a self-represented complainant and by way of formal proceeding, seeks \$1,607,210 in damages. Robbins’ complaint stems from the liquidation, triggered by a margin deficit, of 22 silver contracts in his futures account held by Respondent Charles Schwab Futures, Inc. (Schwab Futures) on March 16, 2020. Robbins filed his Complaint on August 24, 2020.

Following the completion of discovery, Respondent Charles Schwab Futures, Inc. (Schwab Futures) filed its Motion for Summary Disposition on August 23, 2021, arguing that both by contract and by law it was entitled to liquidate Robbins’ entire position to cover margin deficit with the minimal notice it provided. Robbins filed his opposition on September 12, 2021, arguing that despite the wide latitude afforded to Schwab Futures in liquidating under-margined accounts, Schwab

Futures misled him as to the margin policy by using confusing terms and assuring Robbins that he would have one business day to meet margin calls. Schwab Futures filed its reply in support of its Motion on October 4, 2021, and briefing for the motion is complete. This case is now ready for decision.

I. Summary of Parties and Proceedings

A. The Parties

1. Complainant Mark J. Robbins resides in Illinois and maintained a futures account during the relevant period with Respondent, Schwab Futures. He opened his account with optionsExpress, the predecessor of Schwab Futures, in 2011. In March 2020, he had 22 silver contracts in his futures account that were liquidated by Schwab Futures with little to no notice on the morning of March 16, 2022 due to insufficient margin.

2. Respondent Schwab Futures was an NFA- and Commission-registered futures commission merchant (FCM) from 2005 through September 2020. Robbins' former futures account at optionsExpress was transferred to Schwab Futures in 2017.

B. Procedural History

Robbins filed his Complaint on August 24, 2020. Schwab Futures filed its Answer and Affirmative Defenses on October 26, 2020. Discovery commenced on February 3, 2021, and on June 11, 2021 I issued an Order directing the production of additional information. Discovery in this case was robust and completed by August 9, 2021. The record produced through discovery includes telephone call

transcripts and recordings, account opening documents, responses to interrogatories and requests for admission, account statements, and other similar documents.

At the close of discovery, Schwab Futures then filed a Motion for Summary Disposition (MSD) on August 23, 2021, which was fully briefed on October 4, 2021, with an Opposition from Robbins and a Reply in Support from Schwab Futures. Given the robust record, the MSD is ready for decision and the Complaint is dismissed.

II. Fact Findings

The following facts are undisputed. Robbins opened an account in 2011 with optionsExpress (a former Schwab affiliate), Answer at 3, which was transferred to Schwab Futures in 2017 when optionsExpress changed its name. At the time of the account opening, in 2011, Robbins signed the Schwab Futures Agreement. Compl. Attachment 4 (Schwab Futures Agreement). By doing so, Robbins agreed to the following terms with respect to forced liquidation in the event of margin deficiency:

Whenever it is necessary for [Schwab Futures'] protection or to satisfy a margin deficiency, . . . we may . . . sell . . . all or any part of the commodity interests or other property securing your obligations, or close any or all transactions in your Account. It is our policy **to attempt to contact you, when practicable, before liquidating any positions in your Account; however, we reserve the right to take any such action without prior notice or demand for additional collateral and free of any right of redemption. Any prior demand, call or notice will not be considered a waiver of our right to sell or buy without demand.**

Schwab Futures Agreement ¶ 8 (emphasis added). The Schwab Futures Agreement goes on to state:

Notwithstanding any oral communications between you and us, we reserve the right to liquidate anytime if the equity in your Account falls below our

minimum requirements or whenever, in our sole discretion, we feel uncomfortable with the adequacy or nature of the collateral in your Account.

Id. Robbins admits he signed this Agreement.

Schwab Futures provided another document entitled Additional Risk Disclosures at this time. That document warned that:

The leveraged nature of futures trading means that any market movement will have a disproportional effect on your deposited funds. Leverage may work for you or against you, magnifying any trading gains or amplifying any trading losses. **You could sustain a total loss of initial margin funds and be required to deposit additional funds to maintain your position. If your account is under-margined, or if we become insecure at any time with respect to the adequacy of the collateral on deposit in your account, we reserve the right, at any time and without prior notice, to cancel any or all outstanding orders and offset any or all open positions in your account.**

Additional Risk Disclosures (Answer Ex. 3) (emphasis added).

Despite the fact that the Futures Agreement and Risk Disclosures make very clear that Schwab Futures could unilaterally and in its sole discretion liquidate Robbins' position if his account became under-margined or if Schwab Futures otherwise felt insecure with the adequacy of account collateral, Robbins believed he had at least one day to fulfill any margin calls. His belief stems from an email exchange between himself and Scott Pettersen of Schwab Futures that took place between August 20 and 21 of 2018.

That email exchange between Robbins and Pettersen was prompted by an email Robbins received on Wednesday, August 15, 2018 with the subject line: "Futures Concentration Call—Due Thursday." MSD Ex. H (August Concentration Call). The concentration call email from Schwab Futures to Robbins stated, "Please meet concentration call to mitigate risk" and explained that "we determined that

the above account is currently concentrated in a **Silver (Comex)** position that presents increased risk.” *Id.* (emphasis in original). It noted in that Wednesday communication that “[i]f the call is not met by 3:00 p.m. ET on Thursday, August, 16, 2018 we may liquidate some or all of the concentrated position.” *Id.* In other words, the concentration call communication gave Robbins one business day to meet the concentration call.

Robbins forwarded this concentration call communication to Pettersen and asked: “When you issue a margin call (as with this one last week), what is the best way to efficiently transfer funds into the account? One day isn’t much. If you know a wire transfer is coming, is that sufficient?” *Id.* Pettersen replied, “You always get a minimum of 1 business day to meet a due concentration call.” *Id.*

In March 2020, Robbins held 22 silver futures contracts on margin (or using funds borrowed from Schwab Futures) that were set to expire at the end of December 2020. On Friday, March 13, 2020, Schwab Futures sent Robbins a “critical margin call” communication by email. MSD Ex. I. It advised Robbins that the “liquidating value” of his “account noted above has fallen to a critically low level.” *Id.* It further stated, “It’s imperative that you take immediate action to reduce your positions or wire transfer additional funds immediately.” *Id.* The critical margin call email warned: “If you do not act immediately, we may have no choice but to prevent further losses from accumulating by liquidating some or all of your positions without further notice.” *Id.*

In response to this critical margin call email, Robbins initiated a series of calls with Schwab Futures that same day. In the last call of the day, he spoke with Schwab Futures' employee Gregory Johnson. Johnson informed Robbins that his margin deficit was about \$93,000. MSD Ex. N (March 13, 2020 1:00 pm Call Transcript). Johnson and Robbins agreed Robbins would transfer \$100,000 into his account to cover the positions that same day. *Id.*; Compl. at 2. Johnson said that the \$100,000 “would just cover, or at least it’s definitely going to help now.” MSD Ex. N. Johnson further advised Robbins on that call: “you probably want to keep an eye” out because “silver’s having such a big move today. If things get worse, it could negatively impact the account again.” *Id.*

Robbins admitted he was on notice additional cash could be required to meet future margin deficits. Robbins told Schwab Futures “that should [his] futures account need more cash on Monday (the next business day), [he] would have a wire transfer ready to go.” Compl. at 2. Robbins represented that he “had plenty of cash available outside Schwab should silver plunge again and more margin was required.” *Id.*

That same night on Friday, March 13, 2020, Robbins became ill with COVID-19. Although he states that his illness “made things much more difficult for [him, it] really had nothing to do with the wrongful liquidation[, because he] still had the ability to respond to emails and phone calls within the same day.” *Id.*; *see also* Letter from Thomas F. Burke to Schwab (May 18, 2020) (Compl. Attachment 7). In fact, at 12:30 am on Monday, March 16, 2020, Robbins sent an email to the CFO of

his company, “asking him to set up a wire transfer template from [the] company account to [his] Schwab Futures brokerage account.” *Id.*

When Robbins woke up later on the morning of March 16, he checked the silver market “at around 10 am” and his email. At this time, he became aware that a margin call was sent by email at 7:41 am CT and that he had received a voice message saying the same from Scott Pettersen. By 8:01 am, Schwab Futures had liquidated all 22 of Robbins silver contracts, at a loss to Robbins. *Id.*¹

Robbins immediately called Pettersen regarding what he believed was the improper liquidation of his positions, but did not receive a call back from him that same day. Compl. at 3. After this time, Robbins corresponded with the Schwab Client Advocacy Team but did not achieve the result he desired. On May 18, 2020, Robbins’ then-attorney, Thomas Burke, sent a letter to Schwab Futures attempting to resolve this dispute. That attempt by counsel was unsuccessful.

Robbins ultimately filed a Complaint seeking damages from the silver contracts’ liquidation on August 24, 2020 with this Office as a self-represented litigant. For the reasons discussed below, Complainant cannot show any violation of the Commodity Exchange Act (CEA) or its regulations by a preponderance of the evidence, and this case is dismissed.

III. Legal Analysis and Conclusions

Pursuant to the statute, reparations complainants must prove a violation of the CEA or any rule, regulation or order issued pursuant to the CEA that

¹ The precise amount of the loss was not litigated, but is not at issue because, as discussed below, there is no underlying violation of the Commodity Exchange Act or its regulations.

“proximately caused” the complainants’ losses. CEA § 14(a)(1), 7 U.S.C. § 18(a)(1). Further, complainants must prove that violation by a preponderance of the evidence. *Webster v. Refco, et al.*, CFTC Dkt. Nos. 98-R005, R009, R010, R075, 1999 WL 41818, at *16 n.303 (CFTC Feb. 1, 1999).

The question of whether the complainant has, or can, meet this burden can in some instances be resolved by summary disposition. Under Commission Rule 12.310(e), summary disposition is warranted when each of three conditions has been met: (1) there is no genuine issue of material fact; (2) there is no need for further factual development; and (3) the moving party is entitled to a decision as a matter of law. *Elliot v. Jay De Bradley et al.*, CFTC No. 11-R004, 2012 WL 6087468 at *6 (CFTC Dec. 5, 2012); *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, CFTC No. 92-R125, 1994 WL 506234 at *6 (CFTC Sept. 15, 1994). The purpose of summary disposition “is to avoid the empty ritual of an oral hearing,” *Elliot*, 2012 WL 6087468 at *6 (internal citation omitted), and at this stage:

[T]he judge’s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. All reasonable doubts about the facts should be resolved in favor of the non-moving party. If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.

Id.

The law governing liquidations such as the one involved in this case is, and there is no need for further fact development because Robbins’ claims cannot be sustained.

A. FCMs Can Carve Out Broad Authority To Liquidate Under-Margined Accounts To Protect Market Integrity

“When commodity futures accounts become undermargined, the FCM becomes exposed to risk.” *Comtrade, Inc. v. Cargill Inv. Servs. Inc.*, CFTC Dkt. No. 94-R188, 1996 WL 397219 at *6 (July 15, 1996). Because of this, “Commission and court precedent have long held that when an FCM determines that a customer is under-margined, the FCM’s duty to protect the financial position of the FCM’s other customers and right to protect the FCM’s own financial position can supersede any duties the FCM owes to the under-margined customer.” *Laube v. Gain Capital Grp., LLC*, CFTC Dkt. No. 13-R006, 2017 WL 132927, *5 (Jan. 6, 2017) (discussing futures precedent and applying it to forex case); *see also Cap. Options Inv. v. Goldberg Bros., Commodities*, 958 F.2d 186, 190 (7th Cir. 1992) (“Margins are accorded a special status in the regulatory scheme of the Commodity Exchange Act so that futures commission agents are able to assure their own financial integrity, which, in turn, contributes to the financial integrity of the entire marketplace.”).

No notice is required to liquidate a customer’s account upon the occurrence of a margin deficit. *Mohammed v. Jack Carl/312 Futures*, CFTC Dkt. No. 91-R102, 1992 WL 15686, at *3 (Jan. 27, 1992) (“Nothing in the Act or regulations requires a futures commission merchant to obtain the consent of a customer to liquidate positions on an undermargined account.”); *see also In re MF Global Inc.*, 531 B.R. 424, 433 (Bankr. S.D.N.Y. 2015) (“Additionally, neither Illinois nor federal law requires an FCM to provide a customer prior demand or notice before liquidating an undermargined account.”). Because no advance notice is required by the

Commodity Exchange Act or its regulations, contractual provisions authorizing an FCM to liquidate a customer's account, without prior notice, upon occurrence of a margin deficit are enforceable and not unconscionable. *Laube*, 2017 WL 132927 at *5. The legal framework squarely places “an unequivocal duty to monitor his own account, and to deposit additional margin money when a margin call arises” on the customer. *Mohammed*, 1992 WL 15686 at *3.

The discretion allowing FCMs to liquidate their customer positions in the event of margin deficit is so broad that there are only two narrow avenues of relief for futures customers from liquidation upon margin deficit. The futures customer must show that either the FCM (1) “misled him about its margin policy” or (2) “liquidated the positions in bad faith.” *Laube*, 2017 WL 132927 at *5.

B. Schwab Futures Did Not Mislead Robbins About Its Margin Policy

There is no dispute that the Schwab Futures Agreement applies, and it states its margin and liquidation policy very plainly. In the event of margin deficiency, Schwab Futures “reserve[d] the right to take any such action without prior notice or demand for additional collateral and free of any right of redemption.” Schwab Futures Agreement ¶ 8 (Compl. Attachment 4). The Agreement further stated that “[a]ny prior demand, call or notice will not be considered a waiver of [Schwab Futures’] right to sell or buy without demand” and further that Schwab Futures reserved the right, in its “sole discretion” to liquidate the account of under-margined “notwithstanding any oral communications” between Schwab Futures and Robbins. *Id.*

Robbins makes two arguments with regard to his being misled about the margin policy, neither of which can be proved by a preponderance of the evidence given the evidentiary record.

First, Robbins contends that he was told by Schwab Futures that he would have one day to make his margin calls. His contention is based on the August 2018 emails regarding concentration calls. The email communication Robbins forwarded to Pettersen specifically concerned a “concentration call” and explained that the concentration of silver positions in Robbins’ account had become too high. Although Robbins uses this email forward to ask Pettersen about “margin” calls, Pettersen replies back that he will always have one business day to meet “concentration” calls.

This August 2018 email exchange does not establish an agreement to provide Robbins one day to meet his margin calls. Reading it in the light most favorable to Robbins’ claims, the exchange establishes that Robbins confused the terms concentration call and margin call. But that Robbins may have been confused does not establish that Schwab Futures *misled* Robbins as to when his margin calls were due.

It also does not mean the terms were objectively or intentionally confusing. I find the confusion unwarranted given the following facts. First, the concentration call communication on which this email exchange was based clearly referred to the risk created by the high concentration of silver positions in Robbins’ account, not margin deficit. Second, the subject line of the email exchange referred to

concentration calls, not margin calls.² Third, Pettersen took care in his response to Robbins' question to refer to "concentration" calls and not margin calls. Fourth, Robbins admits in his opposition to the MSD that Schwab Futures employees orally gave him the "boilerplate caveat" that Schwab Futures reserved the right to liquidate under-margined accounts if necessary. Robbins Opp. To MSD at 6 (September 14, 2021). And finally, the margin provisions in the Schwab Futures Agreement are so plain. Therefore I do not find Schwab Futures either misled Robbins about the nature of its policy or agreed—contrary to the plain language of its Futures Agreement—to grant Robbins one business day to meet margin.

Second, Robbins argues in his Complaint that he did not know what kind of collateral could be used to sweep into his futures account in the event of margin deficiency. However, the Schwab Futures Agreement states that in order to open a futures account, the customer "must first establish a securities brokerage account" with its affiliated broker-dealer. Schwab Futures Agreement ¶ 5. And it specifically states that the "funding of transactions in your Account at Schwab Futures may be supplied from available funds or financing in your securities account." *Id.*

But more crucially, Robbins knew he had to manage and monitor the margin in his futures account and was prepared to supply cash to do so. Indeed, on

² "Concentration" is a very different word than "margin." According to Merriam-Webster's online dictionary, "concentration" in relevant part means a "concentrated mass or thing," or "the amount of a component in a given volume." In contrast, that same dictionary defines "margin," in relevant part, as "a spare amount or measure or degree allowed or given for contingencies in special situations," or "the limit below which economic activity cannot be continued under normal conditions." Thus even the lay meanings of these terms cannot be conflated. The only similarity they have here in this instance is that they both trigger the need for the customer to post additional funds or security to their futures account, and that alone is not enough to make the terms interchangeable.

Monday, March 16, 2020 at 12:30 am, Robbins set up a wire template in the event his futures account needed more cash. Compl. at 2. Robbins was prepared to pay cash to satisfy his margin call, and whether he could have opted to cover margin differently is insufficiently related to the March 16, 2020 liquidation.

C. Schwab Futures Did Not Liquidate Robbins' Silver Positions In Bad Faith

Robbins makes essentially two contentions that Schwab Futures acted in bad faith: by (1) liquidating his futures within twenty minutes of the margin call; and (2) liquidating all of his contracts when it could have liquidated fewer of his contracts. But under the prevailing case law and Robbins' own contract with Schwab Futures, Schwab Futures was entitled to liquidate Robbins' positions with *zero* notice. It necessarily follows that the twenty-minute notice Robbins was given was sufficient as a matter of law (particularly in this situation where Schwab Futures advised him to closely monitor his silver positions, and he himself was aware of the need to have cash on hand).

And with regard to whether Schwab Futures could have liquidated fewer than all of Robbins' positions, FCMs are not required to implement a "less drastic alternative" approach to reacting to margin deficiency. *Cap. Options Inv.*, 958 F.2d at 191. Thus the total liquidation of Robbins' silver contracts cannot amount to bad faith under the law.

ORDER

Robbins invested with money borrowed from the FCM. And he did so during an extremely volatile period for the financial markets—at the onset of the COVID-19 pandemic. When that borrowed money is at risk and unsecured, the FCM has to

cover the risks quickly in these markets to protect against systemic risk to itself and its other customers. This situation can be draconian and impose large losses on the customer in a short amount of time, which is why the disclosures around the liquidation policy must be plainly stated in the contract. And it is why Schwab Futures—according to Robbins own arguments—repeated the caveat that it could liquidate his position as necessary.

For these reasons and those discussed throughout this Initial Decision, Robbins cannot show by a preponderance of the evidence that his silver contracts were liquidated in violation of the CEA or any of its regulations. Accordingly, the Complaint is dismissed.

Dated: May 6, 2022

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Administrative Judge