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XIAOPING YAO, Complainant, v. GLOBAL FUTURES EXCHANGE & TRADING COMPANY, INCORPORATED, and PATRIZIA SOWINSKI, Respondents.	*	CFTC Docket No. 09-R46

INITIAL DECISION

Xiaoping Yao seeks to recover losses on five NASDAQ Mini 100 futures trades on four dates: August 26 and 28, and September 2 and 4, 2008. On these four dates, cancel orders were disregarded, and the resulting un-cancelled working orders were filled. In turn, these fills were not reported by Yao's electronic trading platform, which had been provided by a third party, Strategy Runner. In subsequent conversations with respondents, Yao would learn: one, that Strategy Runner had placed the cancel orders after 4:30 p.m. CDT when Globex was in "maintenance mode" -- during which time Globex will not accept new orders or modifications to orders -- which resulted in the un-cancelled orders getting filled when the maintenance period ended; and two, that his Strategy Runner electronic trading platform was not designed to recognize fill reports on trades that it "expected" to be cancelled.

Yao claims that respondents, who acted as his introducing broker should be liable for the unwanted fills: "Even [if] the loss was caused by platform malfunction, it is [negligence], and

Global Futures is responsible for my loss, or they have to go after whoever is responsible since I am Global Futures' customer."[1] Yao seeks $14,920 in damages.

In response, respondents deny any violations or any liability. Respondents argue that they cannot be held liable for Yao's losses, because they were not responsible for the timing of the cancel orders and not responsible for any failures of the third-party platform, and because their own reports had accurately reported the fills. Respondents also calculate that Yao's losses on the five disputed trades should not exceed $640.

As explained below, after carefully reviewing the parties' documentary submissions, it has been concluded that Yao has failed to establish any violations by respondents.

Factual Findings

The parties

1. Xiaoping Yao, a resident of Las Vegas, Nevada, indicated on his account application that he had been born in 1962, that he was a self-employed engineer, and that he had experience trading securities, but no experience trading futures or options.

2. Penson GHCO, a registered futures commission merchant, located in Chicago, Illinois, carried Yao's non-discretionary, discount account.

3. Global Futures Exchange & Trading, a registered independent introducing broker, located in Encino, California, introduced Yao's account. Patrizia Sowinski, a registered associated person with Global, acted as Yao's primary contact at Global.

4. Strategy Runner is a third-party electronic trading platform provider.

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[1] Third page of factual description to complaint.

Account-opening Documents

5. Yao signed the Customer Agreement and signed an acknowledgment that he had read all disclosures. Provisions in these documents warned of the risk of disruption or breakdown in electronic trading systems, and provided that Global Futures and Penson were not responsible for problems with trading platforms provided by third parties. Paragraph 11 of the Risk Disclosure Statement provided, in pertinent part:

> If you undertake transactions on an electronic trading system, you will be exposed to risk associated with the system including the failure of hardware and software. <u>The result of any system failure may be that your order is either not executed according to your instructions or is not executed at all.</u>

[Underlining added for emphasis. Page 7, Penson Customer Account Documents, Exhibit 1, Joint Answer.] Paragraph 12 of the Customer Agreement provided, in pertinent part:

> Broker shall not be liable for delays in the transmission or execution of orders due to breakdown or failure of transmission or communication facilities, or for any other cause beyond Broker's control. With respect to electronic order entry Customer agrees that Broker's liability shall be limited to gross negligence or willful misconduct. Customer agrees that Broker shall not be liable for any losses, damages, costs or expense (including, but not limited to, loss of profits, loss of use, direct, indirect, incidental or consequential damages) arising from (a) any failure or malfunction, including but not limited to any inability, for any reason, to enter or cancel electronic orders . . . . Customer understands that while accessing an electronic order entry system ("ORS") through the Internet or otherwise generally is dependable, technical problems or other conditions may delay or prevent Customer from entering or canceling an order on the ORS, or likewise may delay or prevent an order transmitted through the ORS from being executed. Broker shall not be liable for, and Customer agrees not to hold or seek to hold Broker liable for, any technical problems, ORS failures and malfunctions, ORS access issues, ORS capacity issues, high Internet traffic demand, security breaches and unauthorized access beyond the reasonable control of Broker, and other similar computer problems and defects. Broker does not represent, warrant or guarantee that Customer will be able to access or use any ORS at times or locations of Customer's choosing, or that Broker will have adequate capacity for the ORS as a whole or in any geographic location. <u>Broker does not represent, warrant or guarantee that the ORS will provide uninterrupted and error free service.</u> Broker does not make any warranties or guarantees, express or implied, with respect to the ORS or its content, including without limitation, warranties of merchantability or fitness for a particular purpose. Broker shall not be liable to Customer for any loss, cost, damage or other injury,

> whether in contract or tort, arising out of or caused in whole or in part by Customer's use of or reliance on the ORS or its content. . . .

[Underlining added for emphasis. Page 9, Penson Customer Account Documents, Exhibit 1, Joint Answer.]

In addition, Paragraph 7 of Global Futures' "Additional Risk Disclosure" statement advised its customers to "check its daily equity runs daily to determine its accuracy and to report any errors." [Exhibit 1, Joint Answer.]

Globex Maintenance Period

6. Each CME Globex trading session rotates through five "market states": one, *Market Enabled/Pre-opening*; two, *Pre-Opening/No Cancel*; three, *Continuous Trading*; four, *Surveillance Intervention*; and five, *Maintenance*.

For the CME Group equity products such as the NASDAQ 100 Mini future, the maintenance period is 4:30 to 5:00 p.m. Central Time. During this maintenance period, there is no order functionality or availability. That is, the market is closed and customers cannot enter, modify, view or cancel orders, and all remaining day, session and expired Good 'til Date ("GTD") orders are purged during this time. [*See* CME Globex Reference Guide.]

Strategy Runner

7. At the relevant time, the Strategy Runner did not accept good 'til cancel ("GTC") orders. Therefore, normally after 4:00 p.m. CT each day, Strategy Runner sent an order to cancel all orders, to assure that the server would not keep any orders in an active mode. [*See* September 10, 2008 e-mail from Strategy Runner to Yao (Exhibit 3, Joint Answer).] In order to avoid placing any cancel orders during the Globex maintenance period, Strategy Runner needed to do this before 4:30 p.m. CT.

Unfortunately, on August 26 and 28, and September 2 and 4, 2008, Strategy Runner sent the cancel orders to Globex at 4:39 p.m. CT, in the middle of the maintenance period.

Disputed trades

8. Five NASDAQ Mini 100 futures orders on four dates are in dispute. On August 26 (order #100254), August 28 (orders # 100260 and #10061), September 3 (order #11210) and September 4, 2008 (0rder #11243), Strategy Runner placed cancel orders at 4:39 p.m. Since Globex was down during maintenance period, each cancel order was rejected. As a result, when the maintenance period ended, Yao's working orders were filled.

9. According to respondents, on these four days, Yao's third party provider, Strategy Runner, transferred the cancel orders to Globex via a routing machine provided by a firm named Trading Technologies. Strategy Runner sent the cancel requests to Trading Technologies, which in turn attempted to send the requests to Globex. Since Globex was in maintenance mode, it would not accept any new orders or amendments to working orders. As a result, the cancel requests had "timed out," and when the maintenance period ended, Yao's orders were filled.

Meanwhile, since the Strategy Runner platform was designed to "expect" the orders to be cancelled, it did not "expect" the fill reports back from Trading Technologies. As a result the fills could not be reported on the platform. Thus, the "electronic failure" or "platform failure" to which the parties refer was the platform's inability to report fills on certain orders that had been unsuccessfully canceled. The other failure was Strategy Runner's decision to send the cancel orders during the Globex maintenance period.

However, each fill was accurately reported in the daily equity runs that respondents e-mailed to Yao each day. Unfortunately, Yao primarily relied not on these reports, but on his trading platform to monitor the account. As a result, he would not immediately catch the problem, until after the third un-wanted fill on September 2, and he would not receive an explanation from respondents until after the fourth unexpected fill. In the meantime, he continued active trading.

10. Yao's problems with Strategy Runner sending the cancel orders after 4:30 p.m. were isolated. No other customers using Strategy Runner reported to respondents the same problems experienced by Yao.

11. After a round of phone calls and e-mails, involving complainant, respondents and Strategy Runner, respondents advised complainant that they would not adjust his account.

Conclusions

Yao maintained a non-discretionary discount account, made independent trading decisions, and selected the electronic trading platform. Thus, it was his responsibility to know the status of his cancel orders. Respondents' principal duties were to follow Yao's instructions and to execute his orders in a diligent manner, and to provide timely and accurate reports. The weight of the evidence supports the conclusion that respondents did not violate these duties. The evidence also supports the conclusion that had Yao more closely monitored respondents' reports, he could have avoided his loses after the first unwanted fill caused by Strategy Runner's transmission of the cancel orders during Globex's maintenance period, when the cancel orders would not be accepted.

Yao has produced no evidence that respondents guaranteed the performance of Strategy Runner's electronic trading platform, or otherwise agreed to act as insurer for any negligent or reckless act by Strategy Runner. Similarly, Yao has produced no evidence that he ever informed respondents that he was expecting such extraordinary services in exchange for payment of discounted commissions. In these circumstances, respondents cannot be held liable for Yao's losses. *See Grist v. Shearson, Lehman Bros., Inc.*, Comm. Fut. L. Rep., ¶ 24,962 (CFTC 1990).

ORDER

Complainant has failed to show any violations by respondents. Accordingly, the complaint in this matter is dismissed.

Dated June 28, 2010.

Philip V. McGuire,
Judgment Officer