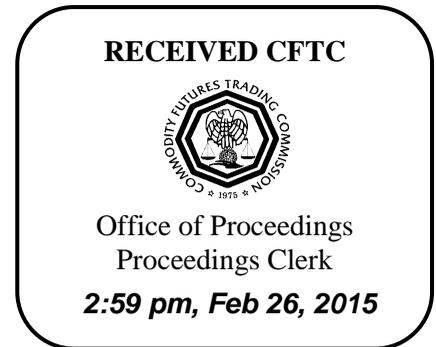




U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
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Office of Proceedings



HENRI GUERIN,
Complainant,

v.

OANDA CORPORATION,
Respondent,

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CFTC Docket No. 12-R017

INITIAL DECISION

Before: Philip V. McGuire, Judgment Officer
Office of Proceedings
Commodity Futures Trading Commission
Washington, D.C.

Appearances: Henri Guerin, Complainant, *pro se*
Hollywood, Florida

Kenneth F. Berg, Ulmer Berne LLC, for Respondent
Chicago, Illinois

Introduction

Henri Guerin's complaint arises from the liquidation of all open forex contracts in his account by Oanda Corporation ("Oanda"). The principal allegations raised by Guerin in his initial complaint are: one, that Oanda did not disclose that it "acted as a dealer's desk," that is, that Oanda was the materially conflicted counterparty in his forex trades; two, that Oanda did not disclose that it quoted forex prices which could significantly deviate from actual market prices, which deviation in turn would create an

unreasonable undervaluation of the account that triggered the automatic liquidation;¹ three, that Oanda did not “abide” by its stated margin policy;² and four, that Oanda’s trading platform software hindered and prevented the timely placement of orders which would have staved off the liquidation.³ Guerin seeks \$22,639 in damages. In its answer, Oanda: denies any wrongdoing, unfair practices or violations; asserts that Oanda properly liquidated Guerin’s open positions “at prevailing Oanda rates;” and asserts that it disclosed its pricing policies and the conflicts arising from its role as counter party through four documents provided to all customers during the on-line account-opening process: an electronic business agreement, a customer agreement, a risk disclosure statement, and a disclaimer that disclosed Oanda’s pricing practices and conflicts arising from its status as counterparty.

In addition, during discovery Guerin has noted that Oanda had failed to produce signed and dated versions of the risk disclosure statement, disclaimer and customer and electronic business agreements relied on by Oanda in its defense, and in that connection has asserted that he could “not recall” reviewing and electronically signing these account-opening documents.⁴ Consequently, I issued a rule 12.204(c) notice that the following allegation would be treated as if it had been raised in the pleadings: that Oanda’s failure to retain and produce the risk disclosure statement, the disclaimer and

¹ Guerin characterized this allegation as “price manipulation.” In his complaint, Guerin alleged: “[T]he market prices of the traded currencies and the spread used by [Oanda] didn’t reflect the market’s true price and were biased if not adjusted to benefit [Oanda].”

² See Guerin’s reply to Requests for Admission 7 and 9. In his revised complaint, Guerin’s asserted:

I understand that foreign exchange transactions carry a high degree of risk, but nearly 2 years after the fact I am still convinced that a very subtle and obscure accounting method to calculate the Net Asset Value (NAV) used by Oanda Corporation didn’t justify the margin call. According to Oanda Corporation my NAV fell short by a mere \$55.91. A very fine and arguable line indeed!

Guerin’s Revised and Amended Complaint, p. 1.

³ See Guerin’s reply to Requests for Admission 8 and 9.

⁴ See Guerin’s reply to Requests for Admission 3, 4 and 5.

the agreements purportedly signed by Guerin supported a presumption that Oanda had in fact failed to deliver to Guerin those documents, which disclosed Oanda's pricing practices and which disclosed Oanda's role, and resultant conflicts of interest, as a counterparty in its customers' forex trades.⁵ Oanda responded that Guerin, as a practical matter, could not have successfully opened his forex account without accessing and electronically acknowledging receipt of the agreements, the risk disclosure statement and the disclaimer which collectively disclosed the material facts that Guerin claims Oanda failed to disclose.⁶ As explained below, after reviewing the parties' documentary submissions,⁷ I have concluded that Guerin has failed to establish any violations causing damages, and thus I have dismissed the complaint.

Factual Findings

The parties

1. Henri Guerin, a resident of Hollywood, Florida, indicated on his account application that he was retired and that he had no previous experience trading forex contracts. Guerin has maintained a self-directed forex account with Oanda from October 2008 to at least 2012.

2. Oanda Corporation, located in Toronto, Ontario, is a registered futures commission merchant ("FCM") and retail foreign exchange dealer ("RFED"). Oanda acts as a market maker and counter-party to its customers' forex transactions, and

⁵ Guerin stated that he was "aware of the margin rules" from Oanda's website. Guerin's reply to Request for Admission #7.

⁶ See Oanda's Response to Order to Show Cause, and Adam Prime affidavit.

⁷ The submissions considered include: Guerin's Complaint (with Exhibits A-D), Revised and Amended Complaint (with Exhibits E-G), replies to Oanda's requests for admissions and requests for production of documents, Evidentiary Summary, and Response to Oanda's Response To Order To Show Cause; and Oanda's Answer (with Appendices A-E), Response to Order to Show Cause, Adam Prime affidavit (with Exhibits 1-9), and Response to December 11, 2014 *sua sponte* discovery Order.

establishes its own prices, which it claims “typically correspond closely to interbank rates.” [Answer, p. 3.]

3. Adam Prime has been employed by Oanda since 2008 as a software engineer. Oanda produced an affidavit by Prime, which: one, describes the procedural steps Guerin had to take to open his Oanda account on-line; two, authenticates the agreements and disclosures electronically delivered to Guerin during the account opening in 2008; and three, establishes the nexus between these documents and the Guerin account.

Oanda’s Written Disclosures and Agreements

4. In connection with Oanda’s role as market maker and counter-party, the Oanda risk disclosure statement⁸ stated:

When you enter into a foreign currency contract with OANDA, you will be entering into a privately negotiated contract with OANDA, as principal. OANDA may, in turn, enter into "back-to-back" transactions with others. OANDA includes its mark-up in the price it quotes to you. These foreign currency contracts are not executed on an exchange and are not cleared on a central clearing organization. They are obligations of OANDA and you will not be afforded the regulatory and financial protections offered by exchange-traded contracts. Both you and OANDA are obliged to perform their respective obligations under each transaction in accordance with its terms. The terms of each foreign currency contract are set out in OANDA's Customer Agreement, which applies to every transaction you enter into with OANDA.

In entering into foreign currency transactions you should understand that OANDA is acting solely in the capacity of an arm's length contractual counterparty to you in connection with the transaction and not in the capacity of your financial advisor or fiduciary. . . .

[Underlining added for emphasis. All caps in original. Third and fourth paragraphs on first page of risk disclosure statement, Appendix B, Answer.]

⁸ See Oanda’s Response to Order to Show Cause, at fn. 2 and accompanying text.

5. The Oanda/FX Trade “Disclaimer” similarly provided, in pertinent part:

THE FOREIGN CURRENCY TRADING YOU ARE ENTERING INTO IS NOT CONDUCTED ON AN EXCHANGE. OANDA IS ACTING AS A COUNTERPARTY IN THESE TRANSACTIONS AND THEREFORE ACTS AS THE BUYER WHEN YOU SELL AND THE SELLER WHEN YOU BUY. AS A RESULT, OANDA'S INTERESTS MAY BE IN CONFLICT WITH YOURS. UNLESS OTHERWISE SPECIFIED IN YOUR WRITTEN AGREEMENT OR OTHER WRITTEN OTHER DOCUMENTS OANDA ESTABLISHES THE PRICES AT WHICH IT OFFERS TO TRADE WITH YOU. THE PRICES OANDA OFFERS MIGHT NOT BE THE BEST PRICES AVAILABLE.

IF OANDA ELECTS NOT TO COVER ITS OWN TRADING EXPOSURE, THEN YOU SHOULD BE AWARE THAT OANDA MAY MAKE MORE MONEY IF THE MARKET GOES AGAINST YOU. ADDITIONALLY, SINCE OANDA ACTS AS THE BUYER OR SELLER IN THE TRANSACTION, YOU SHOULD CAREFULLY EVALUATE ANY TRADE RECOMMENDATIONS YOU RECEIVE FROM OANDA OR ANY OF ITS SOLICITORS.

[Underlining added for emphasis. All caps in original. Oanda/FX Trade Disclaimer, Exhibit 6 to Prime affidavit.]

6. In connection with pricing, the Oanda/FX Trade customer agreement provided that “Oanda makes no warranty, express or implied, that the Exchange Rates [i.e., the rates that Oanda quotes to its customers] represent exchange rates available elsewhere in the market.” [Paragraph 9(a) of the Oanda/FX Trade customer agreement, Appendix C, Answer.]

7. Similarly, the Oanda risk disclosure statement provided:

Moreover, any market or quote that OANDA makes for you may be based solely on markets or quotes that are made or quoted to OANDA by the counterparties with which it does business. Such quotes or markets may not represent the best quotes or markets available to you or OANDA from other sources and OANDA undertakes no obligation to obtain competitive quotes or markets from other counterparties.

[Underlining added for emphasis. All caps in original. Fourth paragraph on first page of risk disclosure statement, Appendix B, Answer.]

Oanda's account-opening process

8. On or about October 19, 2008, Guerin opened his Oanda account. In January 2009, he would fund the account with a deposit totaling \$90,000.

Guerin's submissions indicate that he remembers little or nothing about opening the account. For example, during discovery, Guerin asserted that:

Guerin vaguely recalls that he may have succinctly read the Customer's agreement dated July 26, 2005, on-line via Internet, but doesn't recall at all reading the Risk Disclosure Statement in the form that Oanda submitted as evidence. . . . Oanda's document may be a new or updated version of the Risk Disclosure Statement [dated July 2012], but more or likely not the document Oanda says Guerin originally received in the registration process [in 2008].

Furthermore, Guerin affirms that he never received and signed a hard copy of [the Risk Disclosure Statement and the Customer Agreement] nor has he received in return a hard copy signed by Oanda or any subsequent updated evolutions of Oanda's policies, be it by mail or internet. Oanda acknowledges that there are no physically signed documents.

[Underlining added for emphasis. Third-person in the original. Guerin's response to Oanda's request #2 for production of documents.]

Later in this proceeding, Guerin asserted that he "has absolutely no recollection of the [account-opening] process" described in the Prime affidavit. [Underlining added for emphasis. Guerin's Response to Oanda's Response to Order to Show Cause, page 6.] Guerin also surmised that the exhibits to the Prime affidavit consist of recent screen captures, and thus are not authentically representative of Oanda's account-opening process in 2008. [See Guerin's Response to Oanda's Response to Order to Show Cause, pages 6-8.] However, Guerin has neither produced any detailed description based on his recollection of the account-opening process, nor produced any compelling evidence that he could have opened the account without completing the steps described in the Prime affidavit.

9. According to Prime, in order to open an Oanda account, Guerin first had to enter into Oanda's on-line system his profile, including: routine personal and financial information; his user name and answers to security questions; the primary currency pairs and leverage for his anticipated trading; and his trading objectives. Guerin also had to elect to enable the FX Global transfer service. After entering this information, Guerin was prompted to review it, and proceed to the next step. A copy of Guerin's profile was recorded on October 14, 2008, and was saved on Oanda's client relationship management portal. [See Prime affidavit, ¶¶ 3 to 5, and Exhibit 1.]

10. According to Prime, in order to submit an account application and open an account, Guerin next had to go through a four-step process, in which he agreed to each of the following documents: one, the Electronic Business Agreement; two, the Risk Disclosure Statement; three, the Customer Agreement; and four, the Disclaimer. Each agreement, the disclosure statement and the disclaimer were presented in a scroll-down format. In this connection, Oanda produced a screen shot to show how the documents would have appeared to Guerin. The screen shots show that Guerin had the option of printing a copy of each agreement and disclosure statement.

Per Prime, in order to activate the account, Guerin would have had to click on a button prominently labeled "Agree" for each of the four documents. After agreeing to the four documents, Guerin would have then been prompted to proceed to the next step. [Prime affidavit, ¶¶ 7 to 9, and Exhibits 2 to 6. See also first paragraph on first page of Oanda's Answer.]

11. According to Prime, Oanda next sent an e-mail to Guerin with an embedded link. Although Oanda did not maintain a copy of this e-mail sent to Guerin, it did produce the e-mail template, which indicated that Guerin would have had to click on the

link embedded in the e-mail, or in a follow up communication sent to him, in order to complete the application process to open an account. [Prime affidavit, ¶¶ 10 and 11, and Exhibits 7 and 8.]

12. According to Prime, the e-mail directed Guerin to submit documents verifying his identity. Guerin clicked on another embedded link in the e-mail and downloaded a form that he then completed and returned to Oanda along with a copy of a utility bill and driver's license to verify his identity and address. This process also verified the authenticity of Guerin's e-mail address. Guerin had to re-submit these documents, copies of which Oanda has produced, since at least one of the documents initially submitted was illegible. Finally, on October 19, 2008, Oanda approved opening an account for Guerin. [Prime affidavit, ¶¶ 12 to 16, and Exhibits 9.]

The disputed liquidation

13. Oanda's website explains that an automatic margin call will occur when the net asset value ("NAV") of an account declines to 50% or less of the Margin Used. Oanda's FX Trade trading platform is designed to provide automatic pop-up alerts to customers who are logged into the platform when the net asset value falls within 5% of a margin call, and again when the NAV falls within 2.5% of a margin call. The website further advises: "Please note: in a fast moving market, there may be little time between warnings, or there may not be sufficient time to warn you at all." [See last paragraph on page 4 of Oanda's answer.]

14. On May 6, 2010, Guerin had a \$29,261 account balance, with two active positions: one Canadian Dollar/Japanese Yen (CAD/JPY) and one Australian Dollar/Japanese Yen (AUD/JPY). When Oanda determined that the CAD/JPY was trading at a

\$19,762 loss, and that the AUD/JPY was trading at a \$2,877 loss, it sent a margin warning to Guerin, and almost immediately afterward liquidated both positions.

15. Shortly afterward, Guerin complained to Oanda via e-mail that the account actually had been under-margined by only \$55, that he had been given inadequate warning, and that the software on Oanda's trading platform – *i.e.*, pop-ups blocking buttons -- had prevented him from readily accessing the account to place trades. Guerin did not specify the type of trades that he was trying to place when he was stymied by the pop-ups.

16. On May 11, the "Oanda FX Trade Team" e-mailed a reply to Guerin with its calculations showing that the NAV had fallen below 50% of the margin used, and informing Guerin that Oanda had determined that the margin call and liquidation had been proper, and thus had decided not to offer any compensation.⁹

17. Five months later, Guerin would deposit an additional \$5,000, and continue trading.

Conclusions

Guerin's complaint has touched on many aspects highlighting the problematic nature of retail forex trading, where: no matter how empowering retail traders' websites, widely available software and dealer trading platforms may appear, the individual retail trader is profoundly out-gunned and disadvantaged in a volatile market dominated by big banks; the trader's principal is placed at severe risk by leverage permitted to be as high as 50-1; the lion's share of retail traders inevitably lose money;

⁹ In the May 11th e-mail, Oanda used the terms "margin call warning," "margin call will be executed," and "margin called." [Guerin's complaint, Exhibit A.] In this connection, the Oanda FX Trade customer agreement defined "margin call" as the automatic closing of all open positions if the account equity falls below the margin requirement set by Oanda. Given this context, it appears that the second and third terms used in the e-mail refer to the automatic liquidation of all of the open positions in Guerin's account.

the retail dealer's pricing is opaque and provides no meaningful price discovery function; and the retail dealer sets the price and wins when the customer loses. Over the past decade or so, these issues have at least twice been brought to the attention of Congress which, for reasons not discussed here, has chosen not to ban retail forex, but rather has opted to corral retail forex, gradually, into a regulatory regime that provides a modicum of protection to retail forex traders. For example, the National Futures Association just recently banned RFEDs from the longstanding abusive practice of allowing forex customers to fund their trading with credit cards.¹⁰

In any event, Guerin concedes that he has understood from the beginning that retail forex transactions carry a high degree of risk, and that he has been aware of Oanda's margin policies. Guerin's primary allegations are: one, that Oanda failed to provide any written disclosure about its pricing practices and about its role, and related conflicts of interest, as the counterparty in its customers' forex trades; and two, that the liquidation deviated from Oanda's stated margin policy. As discussed below, Guerin has failed to establish by a preponderance of the evidence that Oanda failed to provide him the various written disclosures which provided general disclosure of material facts concerning Oanda's pricing practices and concerning Oanda's conflicts of interest arising from its status as counter-party. Guerin also has failed to establish that Oanda's automatic liquidation of all open forex positions in his account deviated from Oanda's published margin policy.

¹⁰ NFA Interpretive Notice 9068 (effective date January 31, 2015) (Given that credit cards permit easy access to borrowed funds and given the highly volatile nature of forex markets, the substantial risk of loss, and the possibility of total loss that can occur in a very short period of time, permitting customers to use credit cards to fund forex trading accounts is inconsistent with NFA Member's obligation to observe high standards of commercial honor and just and equitable principles of trade.).

Electronic Signature and Disclosures

Generally, the Commission's view is that electronic signatures ("e-signatures") may be used to acknowledge receipt of a required risk disclosure statement as long as the delivery and acceptance process complies with applicable Federal law and other Commission regulations. In 2000, Congress passed the *E-signature Act*, 15 U.S.C. § 7001 et seq., making valid and enforceable those contracts in interstate commerce that are formed by an e-signature, and delivered or maintained in electronic media. The courts have given broad effect to the E-signature Act favoring enforcement of electronic contracts. For example, in *Appliance Zone v. Nextag*, 2009 WL 5200572 (S.D. Ind. 2009), the court held that clicking on a box labeled "I Agree" creates a valid and enforceable agreement, even though defendant testified he did not actually read it. In *Morelli v. Hertz Corporation*, 2014 WL 1410432 (N.D. Cal. 2014), Hotwire submitted an affidavit demonstrating that an individual cannot complete a car rental booking via its website without checking an "Acceptance Box" acknowledging acceptance of the terms of the contract. The court held that to negate the affidavit a customer must present "clear evidence" that he could have completed his car reservation without agreeing to the terms of the contract and the customer must "affirmatively deny" that he checked the acceptance box.

Consistent with federal law, the Commission generally accepts e-signatures the same as manual signatures, and electronic media the same as paper documents. The Commission's policy generally is that e-signatures should not be "treated as qualitatively different from handwritten signatures,"¹¹ and that its regulations should be "medium

¹¹ See 62 FR 39104, at 39105 (Aug. 21, 1997).

neutral,"¹² as long as the customer gives "informed consent" to do business via electronic delivery of required documents.¹³

Commission rule 1.4, 17 CFR §1.4 (2014), permits a retail foreign exchange dealer ("RFED") to use e-signatures for acknowledgments or verifications in lieu of manually signed paper documents, provided the RFED adopts "reasonable safeguards" to ensure the identity of the customer and "to prevent alteration of the electronic record with which the electronic signature is associated" In this connection, the Commission has declined to impose a requirement that a RFED provide specific e-signature disclosures or utilize specific customer identification measures such as use of a customer-unique PIN.¹⁴

Commission rule 1.3(tt), 17 CFR §1.3(tt) (2014) requires only that an RFED's risk disclosure delivery and account-opening process "logically associate" the e-signature with the record and the person who intended to sign the record. With respect to commodity trading advisor's or commodity pool operator's obligation to deliver a disclosure document, the Commission has indicated that an e-mail from a customer will suffice to show that "he received and understood the risk disclosure statement. . . ." ¹⁵ The Commission has recognized that "greater flexibility may be appropriate where a signature merely evidences receipt of a document rather than validation of its contents."¹⁶ In this connection, the Commission similarly noted that the "validity of an electronic signature. . . is unlikely to become an issue except as between the Commission and the registrant because the signature generally does no more than confirm that the

¹² See 65 FR 12466, at 12468 (Mar. 9, 2000).

¹³ 62 FR at 39106.

¹⁴ 62 FR at 39110.

¹⁵ 65 FR at 12467.

¹⁶ 62 FR at 39110.

registrant has met its disclosure or other obligations under the rules." Thus, the Commission considers the delivery process adequate even if it does not require the prospective customer to scroll through the entire CTA/CPO disclosure document"¹⁷

Here, the process described in the Prime affidavit "logically associates" with Guerin's account opening, and shows that Oanda had "reasonable safeguards" to ensure that it was Guerin who completed the account opening process. Oanda's client relationship management portal captured, recorded and maintained the profile information regarding the net worth, income, occupation, and other factors that Guerin had in-putted to Oanda's system. During the account-opening process, Guerin acknowledged and agreed to each of the agreements and disclosure statements by clicking "Agree."

Guerin also acknowledged and agreed by clicking on the links embedded in the e-mail that he received. Guerin further manifested his consent by downloading, completing and returning to Oanda the identification confirmation form, and providing documentation that verified his identity. Guerin clicked on "Agree" after viewing the electronic business agreement, and thus gave "informed consent" to do business with Oanda via electronic transmission of required documents and e-signature acknowledgments.

The Prime affidavit supports the conclusion that an account could not be opened with Oanda in 2008 without separately completing several separate steps, including agreeing to both of the agreements, the risk disclosure statement and the disclaimer. In this connection, Guerin admits he opened his account via Oanda's website, admits that he may have read or at least perused the customer agreement and risk disclosure

¹⁷ 62 FR at 39107.

statement, and admits that he was aware of Oanda's margin rules posted on its website. Guerin has offered no evidence showing that he could have opened an Oanda account without clicking on "Agree" to both of the agreements, the risk disclosure statement and the disclaimer. Moreover, Guerin has not affirmatively denied that he clicked "Agree." Finally, Guerin's assertion that he does not distinctly remember "signing" any agreement or disclosure statement is not sufficient to rebut Prime's plausible testimony.

As a result, Guerin has not established by a preponderance of the evidence that he could have opened his forex account without affirmatively taking the actions described in the Prime affidavit, and thus has failed to show that Oanda did not provide any of the written disclosures about of its pricing practices and about its conflicts of interest arising from its status as counter-party status.

Disputed liquidation

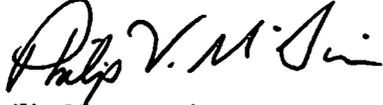
Oanda's calculation of his account's value may well have been opaque and disadvantageous to Guerin, as Guerin asserts; and Oanda's liquidation may well have been hair-triggered, as Guerin also asserts. However, Guerin has failed to establish by a preponderance of the evidence that Oanda deviated from its published margin policy in connection with the automatic liquidation of all open positions on Guerin's account.

Finally, Guerin's allegation regarding the balky operation of Oanda's trading platform is not cognizable in reparations because he at best has alleged a breach of contract.

ORDER

Henri Guerin has failed to establish any violations by Oanda Corporation causing damages. Accordingly, the complaint is dismissed.

February 26, 2015.

A handwritten signature in black ink, appearing to read "Philip V. McGuire". The signature is written in a cursive style with a large initial "P".

Philip V. McGuire,
Judgment Officer