



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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ROBERT B. DICKTEN,  
Complainant,

v.

FOREX CAPITAL MARKETS, LLC,  
d/b/a FXCM,  
Respondent.

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HUACHING, Ltd.  
Complainant,

v.

FOREX CAPITAL MARKETS, LLC,  
d/b/a FXCM,  
Respondent.

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\* CFTC Docket No. 06-R050  
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\* CFTC Docket No. 07-R015  
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**INITIAL DECISION**

***Introduction***

In these closely related cases, Robert Dickten, a resident of Wisconsin, and Huaching, Ltd., a Nevada company formed by Dickten to import manufactured goods from China, allege a variety of violations, most of which arise from the fact that respondent FXCM, a futures commission merchant and forex dealer located in New York, set the bid-ask spread and acted as the counterparty to the trades in complainants' two self-directed forex accounts. Dickten's principal allegations are that, as he traded over a nine-month stretch, he gradually became aware

that FXCM enriched itself: by arbitrarily setting prices without any correlation to the prevailing spot prices on the interbank market; by setting arbitrary and unreasonably wide bid-ask spreads;<sup>1</sup> by arbitrarily “spiking” prices to trigger stop orders and margin calls; and by filling market orders that routinely suffered from substantial and unjustifiable slippage. Dickten further asserts that FXCM and an unregistered introducing sales agent hired by FXCM to solicit new accounts: created the false impression that Dickten would be directly trading on the interbank market, when in fact FXCM essentially “bucketed” trades one; and that FXCM and its agent used a bogus “contest” that was “won” by Dickten to create the false impression that it would be relatively easy to enjoy significant profits with less risk, less slippage, and smaller bid-ask spreads than those actually experienced by FXCM customers. Dickten seeks to recover his total out-of-pocket losses in both accounts: \$17,014. FXCM denies any violations and asserts that the CFTC lacks jurisdiction to resolve this dispute.

As explained below, it has been concluded that FXCM, and its sales agent, defrauded Dickten during the solicitation of the first, personal, account, and that he is entitled to recover \$2,425.<sup>2</sup>

### ***Findings***

1. FXCM is a registered futures commission merchant and forex dealer located in New York, New York. Its principal business is the handling of retail customer accounts trading in off-exchange foreign currency futures and foreign currency options transactions (“forex”). FXCM

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<sup>1</sup> For example, Dickten alleges that FXCM “manually manipulated trade parameters via its trading desk.”

<sup>2</sup> This amount reflects the conclusion that by the time that Dickten had received what he considered to be unsatisfactory explanations for the December forced liquidations in the individual account, Dickten knew enough to suspect that FXCM’s claims about reliability, profitability, and slippage-free trading were false and deceptive. At this point, he had not deposited any funds in the corporate account, he had deposited a total of \$7,900 in the individual account, the account balance stood at \$5,275, and thus his out-of-pocket losses were \$2,425. This amount also reflects the conclusion that, although the bulk of Dickten’s other allegations may appear to be plausible, he has failed to substantiate these other allegations with a preponderance of the evidence.

was affiliated with Refco until Refco declared bankruptcy in October 2005. Thereafter, FXCM was affiliated with Man Financial.

FXCM has been named in two NFA disciplinary actions which concluded with consent orders in which FXCM agreed to substantial fines. In both actions, the NFA asserted that FXCM and its unregistered solicitors, distributed false and deceptive promotional materials with baseless claims: that guaranteed “slippage-free” fills; that guaranteed fills on stop-loss, limit and entry orders; and that promised that trading was “commission-free” without clearly disclosing that FXCM made money on each trade by setting the bid-ask spread. NFA simultaneously issued the complaint and consent order in the first case around the time that Dickten opened the second account, and issued the second complaint not long after he had closed both accounts.<sup>3</sup>

FXCM produced an affidavit by an employee who reviewed FXCM records and documents, but has not produced any written or oral testimony by any employee or agent with first-hand knowledge of verbal conversations between Dickten and FXCM agents and employees during the solicitation and trading of the two accounts.

2. Robert Dickten was 65 years old and semi-retired when he opened the first account with FXCM. Dickten had no previous experience trading forex contracts, or any other type of high risk derivative. Dickten’s testimony revealed him to be sincere, serious, reasonable, assertive, articulate, and intelligent. Due to the passage of time between the account opening and the hearing, Dickten forthrightly conceded that he could only remember certain highlights about the solicitation. Also, since Dickten created few notes of telephone conversations, he could not recall exactly when he had various conversations with agents of FXCM. Nonetheless, I found

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<sup>3</sup> 05-BCC-025, and 06-BCC-046. NFA has not brought any subsequent disciplinary actions against. Hopefully, this indicates that FXCM has revised its promotional materials since Dickten closed his account.

Dickten's testimony to be generally truthful and plausible, and generally consistent with related documentary evidence. As noted above, FXCM offered no rebuttal witnesses.

3. Dickten would first open a self-directed trading account in his own name. For this personal account, Dickten would make a series of deposits totaling \$10,000, and would withdraw a total of \$1,859, for a total out-of-pocket loss of \$8,141. About five months after the first trade in the first account, Dickten would open the second account for Huaching Ltd. For this corporate account, Dickten would deposit a total of \$9,500, and would withdraw a total of \$992, for a total out-of-pocket loss of \$8,508.

4. Dickten was initially drawn to FXCM's website by an on-line promotion. FXCM's website touted that its affiliation with Refco "makes FXCM the single biggest counterparty in retail FX and thus the trading destination of choice for those seeking a larger, safer counterparty for FX transactions." The "FXCM Company Profile" prominently claimed:

**Superior Execution:**

- *Guaranteed fixed spreads in all market conditions.*
- *No slippage on stop-loss, limit or entry orders.*
- *Always making a market. No Pulling prices.*

**Safety of funds:**

- *Backed by billion dollar parent company.*
- *Most highly capitalized Forex Dealer Member FCM.*
- *Regulated in United States, United Kingdom, & Hong Kong.*

[Italics and boldface in original.] Contrary to FXCM's claim that customer funds were safe, forex dealers are lightly regulated. Thus, the funds of forex customers are not legally required to be subject to segregation and may be subject to claims by the creditors of a forex dealer.

Contrary to the claim of slippage-free trading and slippage-free execution, forex dealers, such as FXCM, have not proven the capability, during inevitable volatile market conditions, to consistently fill stop and limit orders at or near the stop or limit price. Finally, the website did not mention that FXCM principally made money on the mark-up or pip-spread on trades, and did not disclose the size of the mark-up or its detrimental effect on profitability.

5. A link on the website led Dickten to a seminar, at which he entered a hypothetical trading competition. Several individuals, including Dickten, consistently enjoyed hypothetical 500% profits. However, the dramatic discrepancy between the Dickten's hypothetical contest trading and Dickten's actual trading experience strongly suggests that the contest featured narrower bid-ask spreads than those imposed by FXCM, and thus distorted the relative risks and rewards of trading forex with FXCM.

6. FXCM's "disclosure statement" mentioned: "The firm with which you are dealing may be acting as your counterparty to the transaction." [Underlining added for emphasis.] However, this disclosure did not accurately reflect the reality that FXCM would definitely be acting as the counterparty to Dickten and Huaching.

Similarly, FXCM's "notice to traders" mentioned: "[OTC forex] business is not traded on an organized exchange and therefore does not require open outcry. Even though quotations or prices are afforded by many computer-based component systems, the quotations and prices may vary due to market volatility." [Underlining added for emphasis.] However, this disclosure was at best incomplete, because it did not reveal an additional, and more significant, reason for variances between interbank price quotes and FXCM's "aggregated" prices: FXCM's price "aggregation" quote system tended to widen the bid-ask spreads. In this connection, none of FXCM's disclosures clearly disclosed FXCM's conflict of interest which arose from its dual

roles as counter-party and designer of the system that set the bid-ask system which established FXCM's rate of compensation.

7. Dickten actively traded the personal account for ten months, and actively traded the corporate account for two months, with gradually mounting losses. Dickten placed almost all of the trades via FXCM's on-line trading platform.

For the personal account, Dickten placed 239 out of 241 trades via the on-line platform, and placed just two orders via phone to FXCM's trading desk. For the corporate account, Dickten placed all of the 56 trades via the on-line platform. In lieu of paper statements, Dickten opted for internet access to view his account at any time.

8. After about five months, Dickten had deposited total of \$5,400 in the personal account. The majority of trades -- 12 out of 21 -- had generated losses. The account balance stood at \$4,000. Thus, Dickten had, at this point, lost \$1,400. During this time, Dickten noticed large discrepancies between inter-market prices and prices quoted by FXCM, slippage in fills, price spikes that regularly triggered stop loss orders, and unusually wide double and triple-digit bid-ask spreads. Dickten began asking FXCM employees questions about these matters, but consistently received evasive, incomplete and unsatisfactory replies. Despite his unresolved concerns, Dickten decided to continue trading, because he was assumed that eventually he would better understand forex trading, and because he was assured by FXCM's representations that it was "regulated."

9. After about five and a half months, for the first time, Dickten's personal account was hit with margin calls and forced liquidations that resulted in his largest trading loss so far: \$640. After a series of communications, Dickten similarly failed to receive straightforward answers to his questions about the margin calls. Dickten's recollection about these communications was

borne out by the notes of the FXCM employees, which confirmed that they were expected to “pitch” precious metals every time they spoke to a customer.

By the time that Dickten had his last conversation with FXCM about the forced liquidation, he had deposited a total of \$7,900 in the individual account. A majority of the trades – 35 out of 55 -- had generated losses, and the account balance stood at \$5,275. Thus, at this point, he had lost a total of \$2,625 since beginning trading. Nonetheless, without any prompting by FXCM, Dickten funded the second account for his firm Huaching, and continued trading and adding more funds in both accounts.

10. Sometime afterwards, Dickten began reading blogs that were critical of the sales and trading practices of forex dealers, particularly abuses that could arise from the fact that forex dealers simultaneously acted as counter-parties to their retail customers, set the bid-ask spread and, and profited from the bid-ask spread. When asked why he continued to trade with FXCM despite growing losses, growing doubts, and growing disenchantment with inadequate advice from FXCM personnel, Dickten testified that “I wanted to let the leash out, and let’s see how far they would go with this, and it finally went far enough where I had, to me, convincing data that I could make a complaint.”

11. After about two months of trading in the corporate account, Dickten placed three trades in the corporate account that resulted in the account falling below the one percent margin level. FXCM quickly liquidated the positions for a total loss of \$5,083. This loss represented the bulk of the \$8,508 total losses in the corporate account, which Dickten closed shortly afterwards, along with the personal account.

## ***Conclusions***

### *Jurisdiction*

FXCM asserts two principal reasons why the Commission's reparations forum is not open to claims arising from retail forex trades: one, that the forex contracts are spot contracts, not futures contracts, and thus not subject to the Commodity Exchange Act; and two, that, even if they are futures contracts, they are not subject to the Commission's reparations jurisdiction, because Congress has not specified the statutory provision governing reparations actions as one of the provisions in the Act that applies to forex transactions.

FXCM's assertion that the forex contracts in question are spot contracts, not futures contracts, runs counter to the Commission's view of the law.<sup>4</sup> The forex contracts here exhibit what the Commission has considered to be essential characteristics of futures contracts. The contracts involve the purchase and sale of foreign currency for future delivery. The price is determined at the time that the parties enter into the contract. The customer primarily uses the forex contracts to speculate on fluctuations in the value of currencies. In this connection, the forex contracts permit customers to roll-over trades, to close positions through offset, and to trade on margin; and delivery of the underlying currencies is not anticipated. Thus, the forex contracts here are not spot contracts, but rather are futures contracts subject to the Commodity Exchange Act.

FXCM asserts that the forex contracts here are exempt under Section 2(c) of the Commodity Exchange Act, because Section 2(c) does not specifically include Section 14 of the

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<sup>4</sup> See *Dubois v. Alaron Trading Corporation*, Com. Fut. L. Rep (CCH) ¶ 28,406, at 51,026-51,028 (CFTC 2000) (forex contract, with characteristics similar to the contract at issue here, was a futures contract). The U.S. Court of Appeals for the Seventh Circuit has rejected the Commission's interpretation of the law regarding its jurisdiction over retail forex. *CFTC v. Zelener*, 373 F.3d 861, rehearing and rehearing en banc denied, 387 F.3d 624 (7<sup>th</sup> Cir. 2004). However, while *Zelener* remains the law in the Seventh Circuit, and has been followed by a number of other courts, it does not control in this case, where any eventual appeal will properly be to the U.S. Court of Appeals for the District of Columbia. *Dubois*, *id.*, fn. 16, at 51,026-51,027. The U.S. Court of Appeals for the District of Columbia has not addressed the Commission's jurisdiction over retail forex. Therefore the Commission's interpretation of the law controls in this case.



Act in the list of statutory authorities applicable to retail foreign currency transactions. Section 2(c), passed by Congress in 2000 to protect the investing public in the face of burgeoning fraud in the lightly regulated retail forex market, purports to clarify the Commission's jurisdiction over retail forex contracts. Section 2(c) specifies that the principal anti-fraud and anti-manipulation authorities in the Act that apply to exchange-traded futures and options contracts also apply to legal off-exchange retail foreign currency transactions. Specifically, Section 2(c)(1) provides, in pertinent part, that: "Except as provided in paragraph (2), nothing in this Act . . . governs or applies to an agreement, contract, or transaction in . . . foreign currency." Paragraph (2) of Section 2(c), in turn, states that forex contracts are subject to Sections 4b, 4c(b), 6(c), 6(d), 6c, 6d, and 8(a). Thus, Section 2(c)(2) does not expressly include in the list of statutory authorities applicable to retail forex transactions Section 14 of the Act, which authorizes the reparations forum and establishes reparations jurisdiction over individuals and firms registered with the Commission, such as FXCM.

FXCM argues that Section 2(c) should be read to preclude reparations claims arising from retail forex transactions. However, FXCM's suggested interpretation runs counter to the rule of statutory construction that a general grant of statutory authority should not negate the specific, express language of a provision elsewhere in the same statute. In other words, jurisdictional provisions need not cross-reference each and every procedural, remedial and definitional provision in an organic statute that is necessarily incident to the exercise of conferred jurisdiction.

Section 14 of the Act is one such procedural provision, intended to protect the retail public by establishing a specialized dispute resolution forum with jurisdiction over registrants. Section 14 provides that "any person" may seek redress -- *i.e.*, file a reparations complaint -- for

a violation of the Act or of any Commission rule or order, “by any person who is registered under this Act.” FXCM’s suggested interpretation would result in one provision -- which Congress intended to protect the retail public by an express grant of jurisdiction -- barring the retail public from access to a dispute resolution forum statutorily conferred by another provision, which Congress similarly intended to protect the retail public. This would render the express language of Section 14 meaningless with regard to a significant subset of retail transactions offered by registrants, a result not in accord with the rules of statutory construction. Therefore, claims arising from retail forex transactions are cognizable in reparations.

### *Deceptive website*

Dickten has established that FXCM’s website misrepresented and omitted various material facts. FXCM’s claim that customer funds were “safe” because FXCM was “regulated” distorted the fact that forex dealers are lightly regulated. Thus, the funds of forex customers are not legally required to be subject to segregation and may be subject to claims by the creditors of a forex dealer. FXCM’s guarantee that trading was slippage-free was deceptive because forex dealers such as FXCM have not proven the capability, during inevitable volatile market conditions, to consistently fill stop and limit orders at or near the stop or limit price. More importantly, FXCM’s website did not clearly disclose the conflict that arose from the fact that FXCM made money on the mark-up or pip-spread on trades, and did not clearly disclose the size of the mark-up or its detrimental effect on profitability. Finally, the disclosures in FXCM’s account-opening package were sufficiently weak and misleading that they failed to correct the website deceptions. FXCM’s disclosures similarly failed to cure the misleading nature of the trading contest, which distorted the relative risks and rewards of trading forex with FXCM, because the contest featured narrower bid-ask spreads than those imposed by FXCM. The

recklessness of FXCM's various misrepresentations and omissions was underscored by their blatantly baseless and deceptive nature.

Dickten has shown that he reasonably relied on the deceptive disclosures in deciding to open the personal account, and that these deceptive disclosures played a substantial role in Dickten's decision to open the personal account and to make the initial series of deposits. However, after the December forced liquidations, Dickten had experienced over five months of mostly losing trades, a declining account balance, and a growing dissatisfaction with the advice that was provided by FXCM. In the absence of any lulling or prompting conduct by FXCM agents, Dickten has failed to show that -- after FXCM had failed to provide what he considered to be a satisfactory explanation for the forced liquidations in December -- he could have continued reasonably relying on the initial deceptions. Thus, the proper measure of damages is based on the losses that Dickten has realized after he received the last communication from FXCM that failed to resolve the forced liquidations to his satisfaction: \$2,425.

### **ORDER**

Robert B. Dickten has established by a preponderance of the evidence: that Forex Capital Markets, LLC, d/b/a FXCM, and unregistered agents of FXCM, violated Section 4(a)(2)(C)(i) of the Commodity Exchange Act; that FXCM is liable for the violations of its agents pursuant to Section 2(a)(1)(B) of the Act; and that these violations proximately caused \$2,425 in damages. Accordingly, Forex Capital Markets, LLC, d/b/a FXCM is ordered to pay to Robert Dickten reparations of \$2,425, plus interest on that amount at 0.43% compounded annually from July 11, 2005, to the date of payment, plus \$125 in costs for the filing fee. This

total award – that is, the damages, interest plus costs – shall be reduced by the \$311 in attorney’s fees awarded to FXCM, for costs incurred in compelling Dickten’s discovery replies.

Dickten and Huaching have failed to prove by a preponderance of the evidence any of the remaining alleged violations. Accordingly, Huaching’s complaint is dismissed.

Dated February 3, 2009.

A handwritten signature in cursive script, appearing to read "Philip V. McGuire".

Philip V. McGuire,  
Judgment Officer