



U.S. COMMODITY FUTURES TRADING COMMISSION

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NICHOLAS SARWARK,
Complainant,

v.

CHARLES PHILIP BOHM, and
MAN FINANCIAL INC.,
d/b/a MF GLOBAL, INC.,
Respondents.

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* CFTC Docket No. 08-R022
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INITIAL DECISION

Before: Philip V. McGuire

Appearances: Nicholas Sarwark, *pro se*, Takoma Park, Maryland,

Philip Tanzer, Esq., MF Global, Inc., Chicago, Illinois,
for Respondents

Introduction

This dispute arises from a series of mishaps -- multiple late fill reports from the Madrid derivatives exchange, trader errors, and back office errors -- which culminated in a loss of over \$11,000. In early August 2006, Nicholas Sarwark, a resident of Takoma Park, Maryland, had designated his friend Max Burns, a sophisticated and experienced trader based on Turkey's Turquoise Coast, to trade for his account with Man Financial. Burns followed a momentum strategy which used trailing stops and buys and accumulated ever larger positions.

Burns placed trades and monitored the account via M-Trade Pro, a third-party electronic trading platform privately labeled for Man Financial customers. M-Trade Pro reported the status of orders on its “Working Orders,” “Filled Orders,” and “Dead [*i.e.*, completed] Orders” screens, even if a trade was incorrectly keypunched into a different account. The default setting for these screens was for orders to be reported for 24 hours, and then be deleted automatically.

In early September, Burns began trading IBEX and MIB/S&P index futures on the Madrid and Milan derivatives exchanges respectively. For these trades, Burns experienced persistent reporting problems that particularly frustrated his momentum trading strategy: that is, the fills for these index trades were repeatedly reported several hours late on Burns’ electronic trading platform and reported several days late on Man Financial written daily confirmation statements. This on-going problem would be the primary subject of Burns’ pivotal phone conversation with Charles Bohm on Monday, September 18.

On Friday September 15, Burns entered multiple IBEX orders, including the disputed order: a stop order to sell one October IBEX. About a minute later, Burns entered a cancel request to try to cancel the order, but received a too-late-to-cancel (“TLTC” or “TLC”) report. After an additional two-and-a-half minutes, the confirmation for the fill of the sell stop order was reported on Burns’ “Filled Orders” and “Dead Orders” screens. Around the same time, Man Financial complicated matters by keypunching the transaction with an incorrect account number.

Consequently, the transaction would not be posted to Sarwark’s account, not be reported on Burns’ “Net Positions” screen, and not be reported on any account statement. Concurrently, Burns lost track of this order. As a result, when the IBEX positions in the account would not match up as Burns expected, he would assume that it was due to delayed fill reports, and he would never mention this missing order in his subsequent communications with Man Financial,

which in turn would not discover its keypunch error for another month. At the beginning of the next week, the missing short position would briefly be profitable, but would ultimately tank.

Meanwhile, over the weekend Burns advised Sarwark that the reporting delays had been complicating his trading strategy with the Spanish and Italian index futures, and they discussed closing out all open positions and switching to a different firm. They decided to defer that decision until after Burns spoke to Bohm on Monday.

On Monday September 18, Burns spoke to Bohm about the delayed reports. Bohm cannot recall this conversation, and Burns has provided little detail. Afterwards, Burns and Sarwark decided to continue trading with Man Financial. Over the next three weeks, Burns continued actively trading a variety of futures, including the October IBEX. The fill reports for IBEX trades continued to be delayed, and on October 10th Burns closed out what he thought was the last IBEX trade with Man Financial. By the time that Man Financial discovered its key punch error, on Friday October 13, the market had moved sharply against the missing short IBEX position, for a loss of \$11,090.

Sarwark seeks to recover his entire loss based on his principal allegation that, on Monday September 18, Burns also had told Bohn that he wanted to “liquidate all positions.” Sarwark asserts that Man Financial’s failure to discover and correct its keypunch error in a more timely fashion violated its duty to report trades in a diligent and accurate manner, and violated its duty to follow Burns’ instruction to liquidate all positions. In other words, as Sarwark told Burns in a pair of e-mails after learning about the \$11,090 loss: “I’m not sure how to resolve it when Man is basically saying [after the fact] that I can’t rely on their statements. . . . It shocks me that a trade can come out of nowhere after nearly a month.”

In response, respondents deny that Burns actually gave Bohm an instruction to close all positions. Respondents assert that Sarwark's allegation is implausible because Bohm was not responsible for handling orders, and thus, even if Burns had made such a request, Bohm would have transferred Burns to a designated Man Financial agent with the responsibility for handling orders. In addition, respondents have produced an order audit that shows that the September 18th orders had been placed electronically by Burns, and not by a Man Financial broker.

Respondents admit their key-punch error, but assert that they nonetheless adequately discharged their duty to provide accurate and timely reports, by promptly generating the TLC report and by promptly reporting the fill of the stop sell order on the "Dead Orders" and "Filled Orders" screens through at least Saturday September 16. Respondents further assert that, because Sarwark's agent Burns had received accurate information about the status of his order, and because previously, in connection with other trades, he had caught a key-punch error and had also received a TLC report, he had good reason to believe that the disputed order had been quickly filled, but not properly assigned to Sarwark's account. Thus, respondents assert, once the trade failed to show up on his "Net Positions" screen or on any written statements, Burns should have promptly reported the missing trade. By not doing so, they argue, Burns violated Sarwark's contractual duty to immediately report to Man Financial any errors or differences in his account statements and Burns contributed to the delay in Man Financial's detection of the keypunch error, and thus it is Sarwark, not respondents, who is responsible for the loss.

As explained below, after carefully reviewing the parties' documentary submissions and oral testimony, I have determined that Sarwark has failed to establish any violations causing damages, and thus is not entitled to an award.

Factual Findings

1. Nicholas Sarwark, a resident of Takoma Park, Maryland who works as a computer systems developer, had 10 years experience with securities, but no experience with futures or options, when he opened his account with Man Financial in August 2006. [Customer Account Application; and Sarwark's testimony at pages 28-29 of hearing transcript.]

Sarwark authorized Max Burns to trade the account pursuant to a "Discretionary Trading Authorization/Power of Attorney." Burns, a resident of Marmaris, Turkey, is a friend of Sarwark. Burns has extensive experience working for investment banks, structuring exotic currency options, trading futures, and operating his own hedge fund. As described in more detail below, Burns almost exclusively placed orders via an electronic trading platform. [Burns' testimony at pages 4-6 of hearing transcript; and ticket audit (exhibit H to Joint Answer).]

2. MF Global, Incorporated, doing business as Man Financial, Incorporated during the relevant time, is a registered futures commission merchant, located in Chicago, Illinois. [¶ 1 of Joint Answer; NFA records.]

Charles Philip Bohm is a registered associated person with MF Global. Bohm's principal responsibilities are to open and establish new accounts, and to provide customer support. Bohm was Sarwark's and Burns' principal contact at Man Financial for service-related matters. [¶ 2 of Joint Answer; e-mail exchanges from August 28, 2006 to September 15, 2007; Bohm's testimony at pages 64-65 and 69-70 of hearing transcript; and NFA records.]

David Ripes and Robert Shaw were the Man Financial brokers assigned to handle phone orders for the Sarwark account, and are still registered associated persons with MF Global, which did not call them as witnesses. Since Burns almost exclusively placed orders via the electronic trading platform, Ripes and Shaw only placed isolated orders for the Sarwark account. In

addition, around October 18, 2006, Burns told Sarwark that he had called Shaw to discuss his purported instruction on September 18th to Bohm to “liquidate all positions.” [Page 5 of Joint Answer; Sep. 11, 2006, 11:33:59 a.m. entry on second page of ticket audit trail (exhibit H to Joint Answer); Burns’ Oct. 18, 2006 e-mail to Sarwark; and Burns’ testimony at pages 10 and 19-20, and Sarwark’s testimony at page 33, of hearing transcript; and NFA records.]

3. Sarwark signed a standard Man Financial Customer Agreement, in which he agreed, in pertinent part:

[If] after you have placed an order with us and have not received a written or verbal confirmation thereof in accordance with our practice, you immediately shall notify us thereof. If you fail to notify us as set forth in this section, you agree that you shall be deemed estopped to object and to have waived any objection to our execution of failure to execute any transaction. Nothing contained in this section, however, shall . . . prevent us, upon discovery of any error or omission, from correcting the error or omission, and putting the account in the same position it would have been in if the error or omission not occurred.

[¶ 9 of Customer Agreement.]

Similarly, the bottom of each Man Financial confirmation statement featured a “Please report any differences immediately to your broker or Customer Service” warning with similar language. In this connection, Man Financial sent PDF versions of the account statements to Sarwark and Burns via e-mail. [See page 3, Joint Answer; Consent to Electronic Transmission of Account Statements; and Sarwark’s testimony at pages 29-30 and 34-38, and Bohm’s testimony at pages 71 and 73-74, of hearing transcript.]

4. Burns entered orders on two separate electronic trading platforms via his web browser: initially, M-Trade, a proprietary system; and later, M-Trade Pro, a third-party system privately labeled for Man Financial customers. Sarwark and Burns also had access to e-Midas, a proprietary system that provides real-time access to account status and other clearing information relating to customer accounts.

M-Trade and M-Trade Pro reported the status of orders on its “Working Orders,” “Filled Orders,” and “Dead [*i.e.*, completed] Orders” screens, even if a trade was incorrectly keypunched into a different account. The default setting for these screens was for orders to be reported for 24 hours, and then be deleted automatically. M-Trade and M-Trade Pro users could expand this retention period. Also, M-Trade and M-Trade Pro users had to hit the “refresh” button to update these screens. Burns has not indicated whether he expanded the reporting setting beyond 24 hours or whether he refreshed the screens at the relevant time. [Electronic Order Entry & Account Access Agreement; pages 3-4 of Joint Answer; Burns’ Oct. 18, 2006 e-mail to Sarwark, dated; Tanzar’s Jan. 5, 2007 letter to Sarwark; and Tresa Gaspich’s testimony at pages 39-44 and 52-63 of hearing transcript.]

5. Burns typically followed a momentum strategy which used trailing stops and buys and which accumulated ever larger positions. [Sarwark’s testimony at page 30, and Burns’ testimony at pages 6-7, 10-13 and 25-27, of hearing transcript.]

6. In connection with other trades, at least once before the keypunch error on September 15, Burns had discovered a reporting error by Man Financial, and at least once before September 15, Burns had received a TLC report. [Burns’ Aug. 28, 2006 e-mail to Bohm; Burns’ Sep. 15, 2007 e-mail to Sarwark; order ticket audit trail for Sarwark account from Sep. 11 to 29 (exhibit H, Joint Answer); and Burns’ testimony at pages 9-13, Bohm’s testimony at pages 67-68 and 74-75, and Gaspich’s testimony at pages 48-49, of hearing transcript.]

7. In early September, Burns began trading IBEX and S&P/MIB index futures on the Madrid (“MEFF”) and Milan (“IDEM”) derivatives exchanges respectively. For these trades, Burns experienced persistent reporting problems that were particularly frustrating for his style of trading: the fills for these trades were frequently reported several hours late on the electronic

trading platform and consistently reported one or more days late in Man Financial's written daily confirmation statements. Respondents have not offered an explanation for these reporting delays, and have not disputed Sarwark's and Burns' assertion that they learned that the delay could be attributed to the fact that Man Financial was not a member of the Madrid or Milan exchanges. [Account statements dated Sep. 14 and 15; Burns' Oct. 13, 2006 e-mail to Bohm; Burns' Oct. 18, 2006 e-mail to Sarwark; and Sarwark's testimony at pages 29-32, Burns' testimony at pages 7-9 and 23-25, and Bohm's testimony at pages 66-67, of hearing transcript.]

8. On Friday September 15, Burns entered multiple IBEX orders, including the disputed order: a stop order to sell one October IBEX. About a minute later, Burns tried to cancel this sell stop order by entering a cancel-replace order. However, a minute after that, Man Financial sent him a too-late-to-cancel report. After an additional two-and-a-half minutes, the fill report for the sell stop order was reported on Burns' "Filled Orders" and "Dead Orders" screens. [See account statements dated September 15, 18, 19 and 20; ticket activity report (exhibit E, Joint Answer); order ticket audit report for Sarwark's account from Sep. 11 to 29, 2006 (exhibit H, Joint Answer); Tanzar's Jan. 5, 2007 letter to Sarwark; page 4 of Joint Answer; Burns' testimony at pages 13-16, and Gaspich's testimony at pages 44-46, 48-51 and 54-55, of hearing transcript.]

Around the same time on September 15, Man Financial keypunched the transaction with an incorrect account number. Consequently, the transaction was not posted to Sarwark's account, not reported on Burns' "Net Positions" screen, and not reported in any written statement. At the close, the account was short one October IBEX, not counting the missing short

October IBEX.¹ [See page 4 of Joint Answer; page 1 of Sarwark's factual description to Complaint; Sarwark's Oct. 16, 2006 e-mail to Burns; page 2 of Tazar's Jan. 5, 2007 letter to Sarwark; account statements dated Sep. 15, 18, 19 and 20; and Gaspich's testimony at pages 58-61 of hearing transcript.]

9. Over the weekend, Burns advised Sarwark that the reporting delays had been complicating his momentum trading strategy with the Spanish and Italian index futures, and they discussed closing the account and switching brokers, but decided to defer that decision until after Burns spoke to Bohm on Monday the 18th. [See Sarwark's testimony at pages 31-32, and Burns' testimony at page 17, of hearing transcript.]

10. On Monday September 18, Burns called Bohm, who has no specific recollection of the conversation. Burns would report to Sarwark that he had complained to Bohm about the delayed fill reports on the Madrid and Milan index trades. He also told Sarwark that he had informed Bohm that he wanted to close out all of his positions, and had identified each of the positions that he wanted liquidated: "Max described his positions and told Chuck how many futures lots to either buy or sell in order to be flat." [Sarwark's Nov. 13, 2006 e-mail to Man Financial.] Burns has neither offered any more description of what he said, nor offered any description of what Bohm specifically said, during this conversation. Contrary to Burns' report to Sarwark, the orders on September 18th were placed by him, not by Bohm, via his electronic platform. Also, not all positions were liquidated: at the close, the account was still short the same October IBEX that had been opened on Friday September 15.² Moreover, Burns opened a new S&P/MIB trade. In any event, after this conversation Sarwark and Burns decided to

¹ On the 15th, Burns also day-traded one December silver, closed out a short September S&P/MIB, closed out a long September IBEX, closed out one short October IBEX that had been opened on the 14th, and day-traded one October IBEX.

² On Monday the 18th, Burns did close out two IPE petroleum trades. On Thursday the 21st, Burns would close out the short October IBEX that had been opened on Friday the 15th.

continue trading with Man Financial. Sarwark's testimony indicates that this decision was based less on anything that Bohm might have said than Burns' belief that his strategy could still be successful. [See page 5 of Answer; Sarwark's factual summary to Complaint;³ confirmation statements dated Sep. 18, 19, 20, 21, 22 and 25; Burns' Oct. 6, 2006 e-mail to Sarwark; Tanzer's July 25, 2007 letter to Sarwark; and Sarwark's testimony at pages 31-32, Burns' testimony at pages 17-19, and Bohm's testimony at pages 65-66, and 68-70, of hearing transcript.]

11. Sarwark does not dispute respondents' assertion that, after September 18, the missing trade was briefly profitable before it tanked.

Meanwhile, for the next three weeks, Burns continued to actively buy and sell various contracts, including the IBEX and S&P/MIB indices. Burns bought and sold the October IBEX on September 21, 22, 25, 28 and 29. For all of these trades, the fill report was delayed. In addition, one particular October IBEX trade – open from September 22 to 29, and which was confusingly reported after various cancellations and reversals as being alternately bought or sold at 12440 – became the focus of Burns' efforts to reconcile his IBEX orders and fills. [Account statements dated September 19, 20, 21, 25, 27, 28 and 29, and October 2; and Burns' testimony at pages 18-19, and Sarwark's testimony at pages 31-32, of hearing transcript.]

Near the end of this three-week stretch, Burns advised Sarwark that he was still having a hard time reconciling his orders with the fill reports:

As of the 19th's statement, I'm long 2 IBEX at 12281. That is correct. From there on, it all goes a bit [haywire].

[Burns' Oct. 6, 2006 e-mail to Sarwark.]

³ In his complaint, Sarwark mistakenly described the conversation as taking place on the 15th.

Around the same time, Burns had an unsatisfactory conversation with Shaw and Bohm about these problems. Sarwark asserts that he complained multiple times to Man Financial about the delayed fill reports, but did not specify when, to whom he spoke, or what exactly was said. [Sarwark's Nov. 13, 2006 letter to Man Financial; and Sarwark's testimony at pages 36-37 of hearing transcript.]

12. On Tuesday October 10, Burns closed out what he believed were the remaining open positions in the account: one December S&P/MIB and one October IBEX. [See account statements dated October 5 and 12.]

13. On Friday October 13, Man Financial assigned the missing short October IBEX trade to Sarwark's account, at a fill price of 12338. Man Financial e-mailed Sarwark and Burns to call Bohm. In a conference call that included Ripes and Shaw, Bohm informed Sarwark about the key punch error. That day, the October IBEX closed at 13451, which left Sarwark's newly found contract down \$11,135.

On Monday October 16, the short October IBEX was covered at 13447, for a loss of \$11,090. This last trade in the account, as with all the other IBEX trades, would be reported two days later, on October 18. [See account statements dated October 13 and 18; and Burns' testimony at page 33, Sarwark's testimony at pages 21-23, and Bohm's testimony at pages 67-68, of hearing transcript.]

Conclusions

Sarwark maintained a discount, non-discretionary account, and his agent Burns, made independent trading decisions. Thus, it was Burns' responsibility to know the status of his orders. Conversely, it was Man Financial's responsibility to execute and report orders in a diligent manner. Burns' ability to track the disputed IBEX trade was understandably

complicated when fill reports from Madrid were repeatedly delayed, and further complicated by Man Financial's keypunch error. Similarly, Man Financial's ability to promptly discover its keypunch error was inadvertently impeded when Burns neither mentioned the missing order nor asked for help reconstructing his orders going back to Friday September 15.

Notwithstanding the key punch error, Man Financial did timely fill Burns' sell stop order, timely inform Burns that the sell stop order was too late to cancel, and timely confirm the fill. Thus, Burns had received sufficient information to conclude that that the disputed order had been filled, and when it was not reported on his net positions screen, he had sufficient information to suspect that it had not been properly assigned to Sarwark's account. However, when Burns called Bohm, he focused on his frustration with the persistently delayed fill reports, but did not tell Bohm about the missing order, did not tell Bohm that he may have actually lost track of his orders, and did not otherwise ask Bohm for help in reconstructing his orders and trades.

Burns may well have expressed a general intention to stand down for a brief unspecified time to allow the fill reports on the IBEX trades to catch up. However, the record does not support a conclusion that Burns specifically instructed Bohm to close all positions, let alone put Bohm on notice of the need to conduct an audit of his IBEX orders: one, Bohm was not authorized to take and to place orders; two, the orders that day were placed via Burns' electronic trading platform; and three, that day Burns opened a new Milan index position and left open a short IBEX position, and in the following days continued trading IBEX and other contracts without complaining about the non-liquidation of that particular short IBEX position. In these circumstances, Burns' complaint about the late IBEX fill reports cannot be conflated into a request for Man Financial to conduct an audit of Burns' IBEX orders which presumably would have discovered the misplaced short October IBEX before it became unprofitable. *See Avis v.*

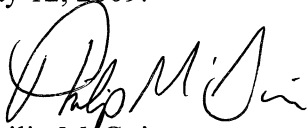
Shearson Hayden Stone, Inc., Comm. Fut. L. Rep. ¶ 21,379, at 25,831 n.8 (CFTC 1982) (A customer must make known to broker that he intends to rely on the broker to perform a special duty).

Although Sarwark can justifiably claim to have been aggravated by Man Financial's four-week delay in discovering its keypunch error, he cannot claim to have reasonably relied to his detriment on Man Financial's error or its delayed discovery and disclosure of the error. This is not a case where the broker recklessly or intentionally failed to disclose a material fact that was within its exclusive control. *See, e.g., Lee v. Lind-Waldock & Co.*, Comm. Fut. L. Rep. ¶ 28,173, at 50,159-50,160 (CFTC 2000); and *Precision Ratios, Inc., and Millenium Trust Co. v. Man Financial, Inc.*, Comm. Fut. L. Rep. ¶ 29,646, at 55,794-55,795 (Initial Decision December 11, 2003), summarily affirmed (CFTC July 23, 2004) (A customer's reliance on a reckless omission of a material fact was reasonable when the fact was within the exclusive possession and control of the broker). Rather, here, Man Financial's account statements highlighted the possibility of reporting errors by asking the customer to contact Man Financial about any error or discrepancies, and Sarwark and Burns had, in fact, previously detected and reported a similar key-punch error. More importantly, Man Financial had provided sufficiently accurate and timely information about the status of the sell stop order for Sarwark's agent Burns to realize that the order probably had been quickly filled and then incorrectly assigned to another account. Thus, it is Sarwark, not Man Financial and Bohm, who is responsible for his loss.

ORDER

Complainant has failed to establish any violations causing damages. Accordingly, the complaint is dismissed.

Dated May 12, 2009.


Philip McGuire,
Judgment Officer