UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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ANDY NAREN CHANEY, Complainant, v. GEORGE WILLIAM GRECO, JONATHAN WILLIAM LUBOW, and TRADERS EDGE, Respondents.	*	CFTC Docket No. 05-R050

ORDER OF DISMISSAL

As explained below, respondents' motion for summary disposition has been granted, and the complaint has been dismissed on grounds that it is barred by the statue of limitations in Section 14(a)(1) of the Commodity Exchange Act.

Factual background[1]

Andy Naren Chaney, a resident of Houston, Texas, has an MBA in general business from Auburn University. He has worked as a programmer-analyst in software design and support for a variety of manufacturing companies. Before contacting respondents, in April 2002, Chaney had traded commodity futures and options for about five years. In early 2002, Chaney had registered on the Optionsnerd website which featured options and futures trading strategies discussed by Jonathan Lubow.

Traders Edge is a registered introducing broker, located in Madison, New Jersey. George Greco and Jonathan Lubow are registered associated persons with Traders Edge.

[1] Except where noted, the facts are not in dispute.

In April 2002, Chaney contacted Traders Edge about opening an account. He would open the non-discretionary account in mid-July 2002, when he signed various account-opening documents -- including futures and options risk disclosure statements -- and deposited $15,330.[2]

Trading in Chaney's account started on August 9, 2002, and ended on January 24, 2003. During this time, respondents recommended -- and Chaney authorized -- eight trades.

- The first trade, a December Gold ratio trade, was placed on August 9, 2002, and closed-out on October 23, 2002, for a net loss of $776.
- The second trade, a March Sugar option strangle, was placed on September 24, 2002. The call leg was closed out on November 8, 2002, for a $3,868 loss, and put leg was closed out on January 24, 2003, for a $1,452 profit. Thus, this trade realized a net loss of $2,416.
- The third trade, a January Soybean ratio trade, was placed on October 31, 2002, and closed out on November 13, 2002, for a net loss of $425.
- The fourth trade, the purchase of four January Soybean puts on November 5, 2002, and sale on November 13, 2002, realized a net loss of $233.
- The fifth trade, the sale of five March Sugar calls on November 6, 2002, and liquidation on January 24, 2003, realized a net profit of $892.
- The sixth trade, an April Gold ratio trade, was placed on November 20, 2002, and closed-out on December 19, 2002, for a net loss of $6,717.
- The seventh trade, a March Euro call spread, was placed on December 6, 2002, and closed out on January 23, 2003, for a net loss of $8,917.

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[2] Chaney alleges that, in a series of conversations before he approved the first trade, he had informed respondents that he expected them to manage the account in a "prudent and conservative" manner – *i.e.*, avoid margin calls and large losses. Chaney also alleges that respondents promised to diligently monitor the account, use stop-loss orders, and not risk more than 20% of the account value on a single trade. In contrast, respondents assert that Chaney never indicated that he was risk averse, and never articulated any trading objective such as capital preservation. Respondents assert that, at most, they informed Chaney that they would follow the same sort of trading strategies discussed in Lubow's e-mails, and in Lubow's book, a copy of which they had provided to Chaney.

- The eighth trade, an April Gold put spread, was placed on December 10, 2002, and closed out on January 24, 2004, for a net loss of $449.

Brokers' notes indicate that during the five months that Chaney was trading, he spoke with respondents once or twice a month. During these conversations, Chaney and respondents discussed, among other things, the status and liquidation value of open positions, and the overall performance and liquidation value of the account.[3]

Chaney received, and understood, the confirmation and monthly account statements:

- The August 2002 monthly account statement reported: that $3,933 in option premiums had been collected; that the account balance had increased from $15,330 to $19,263; and that the account liquidation value at month's end was $15,963.

- The September 2002 monthly account statement reported: that, for the month, $3,422 in option premiums had been collected that month; that, for the first two months, a cumulative $7,355 in option premiums had been collected; that the account balance had increased to $22,685; and that the account liquidation value had slightly declined to $15,397.

- The October 2002 monthly account statement reported: that futures trading had realized a loss of $706; that, for the month, $2,351 in net options premiums had been collected; that, for the first three months, a cumulative $9,706 in net option premiums had been collected; that the account balance had increased to $24,260; and that the account liquidation value had slightly increased to $15,702.

- The November 2002 monthly account statement reported: that, for the month, futures trading had realized a loss of $908; that futures trading had realized a cumulative net loss of $1,685; that, for the month, $973 in net option premiums had been paid; that, for the first four months, a cumulative $8,732 in net option premiums had been collected; that the account balance had decreased slightly to $22,378; and that the account liquidation value had slightly increased to $16,026.

- The December 2002 monthly account statement reported: that futures trading, for the month, had realized a net profit of $5,564; that, for the year, futures trading had realized a cumulative net profit of $3,879; that, for the month, $14,178 in net option premiums had been paid; that, for the year, a cumulative $5,446 in net

[3] Chaney asserts, and respondents deny, that during these conversations Chaney repeatedly emphasized that he favored a conservative trading strategy that strictly limited losses and preserved capital.

> option premiums had been paid; that the account balance had dropped to $13,763; that the account liquidation value had dropped to $4,102; that the Euro spread had a negative liquidation value of $7,938; and that the account had a margin deficit of $419.

Thus, upon receipt of the December monthly account statement – sometime in early January 2003 – Chaney knew that he was losing, and not preserving, capital, because the loss on the gold trade on December 19th had wiped out all previous gains, and because the account had a margin deficit due chiefly to the deteriorating Euro spread.

Equity runs show that the Chaney account had a margin deficit on December 31, 2002, and from January 9 to 24, when the last positions were liquidated. From January 9th to 21st, the negative liquidation value for the Euro spread would deteriorate from $7,937 to $11,000, and the account liquidation value would further decline to $3,431.

On January 10, 2003, respondents communicated a margin call to Chaney by telephone.[4] Neither side has described this conversation. No action would be taken by either side until January 14, 2003, when Chaney faxed a letter to respondents in which he did not mention the margin call, but did complain about the losses and effectively instructed respondents to unwind all of his positions. Neither side has explained their inaction from January 10 to 14, 2003.[5]

In his letter, Chaney stated that he found the December monthly account statement to be "shocking," because he had expected his account to be handled "prudently and conservatively." Chaney next stated, apparently in reference to the

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[4] On January 10, the Euro spread had a negative liquidation value of $9,125, and the account liquidation value was $3,250.

[5] On January 14, the Euro spread had a negative liquidation value of $9,000, and the account liquidation value was $3,431.

margin call, that he would not be adding additional funds. Chaney concluded by advising respondents:

> You need to take whatever action is necessary in my best interest and resolve the open trades to minimize losses from any open positions. . . . Any risk of trading now will be all your risk.

Chaney did not instruct respondents to close the account and to return any balance.

No follow-up action would be taken by either side for another week, until January 21st, when Lubow called Chaney.[6] Again, neither side has explained their inaction during this time. On January 21, Lubow advised Chaney that he had to meet the margin call by adding more cash or liquidating positions. Chaney complained about the mounting losses, and stated that he would not meet the margin call by liquidating positions. Lubow denied that respondents had mishandled the account or had failed to follow Chaney's instructions, and informed Chaney that he would be liquidating all open positions. Chaney did not demand an adjustment for his losses, and did not specifically instruct Lubow to close the account and return any cash balance.

On January 23 and 24, 2003, Lubow liquidated all open positions in Chaney's account. Respondents have not explained why they waited two days before unwinding the account. In any event, upon receipt of the January 24, 2003 confirmation statement, Chaney knew that out of the $15,330 that he had invested, he had lost all but $926.

From January to September, 2003, Chaney received monthly account statements reporting a dormant account, with a cash balance of $926. Chaney, Lubow and Greco, in their affidavits, state that Chaney and respondents did not communicate for several

[6]On January 21, the Euro spread had a negative liquidation value of $10,937, and the account liquidation value was $1,494.

months after January 21, 2003,[7] until sometime in the late summer or early fall of 2003, when Chaney called respondents and instructed them to return the cash balance,[8] which they did on October 9, 2003.

Chaney filed his complaint on May 5, 2005 -- two years and four months after he learned that he had lost almost all of his investment. In his complaint, Chaney alleged a smorgasbord of violations relating to respondents' handling of his account.[9] However, Chaney's subsequent submissions indicate that the thrust of his complaint is that the trading losses -- particularly the $6,717 loss on the gold trade on December 19, 2002, and the $8,917 loss on the Euro trade on January 23, 2003 – show: one, that the respondents recommended trades that were inconsistent with his purported conservative trading objective; and two, that respondents failed to handle his account in a diligent manner, particularly in connection with the dramatic deterioration of the Euro spread during the first three weeks of January 2003.

Discussion and Conclusions

Under CFTC rule 12.207, summary disposition is only appropriate when three conditions are met: one, there is no genuine issue as to any material fact; two, there is no need for further factual development; and three, the moving party is entitled to a decision as a matter of law. *See Levi-Zeligman v. Merrill Lynch Futures, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 26,236, at 42,031 (CFTC 1994). In appropriate circumstances, statute of

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[7] However, respondents' brokers' notes tersely describe a conversation in April 2003, in which Chaney is reported to have said that "he was unhappy with the trading and we should have used better risk management."

[8] The parties' descriptions of exactly when Chaney specifically demanded return of the account balance are vague and inconsistent. Respondents do not deny Chaney's assertion that he had to call them at least one more time to prompt the return of his funds. Chaney indicates that he made the initial request either sometime in August 2003 or sometime after receipt of the August 2003 monthly account statement.

[9] The bulk of the complaint appears to be based on a boiler-plate securities complaint.

limitations issues may be resolved on a summary basis, as long as there is no significant doubt as to whether the evidentiary record is sufficiently developed for reliable resolution of limitations-related issues. *Stoffel v. Interstate/Johnson-Lane Corp.*, Comm. Fut. L. Rep. (CCH) ¶ 26,267, at 42,252-42,253 (CFTC 1995). In this instance, the parties have produced statements describing the factual matters underlying the limitations-related issues, *i.e.*, when Chaney discovered the alleged violations and the parties' subsequent conduct. After carefully reviewing the parties' submissions, I have determined that additional discovery and written testimony, and any oral testimony, is unlikely to flesh out, or clarify, the factual circumstances that are material to the statute of limitations defense. From this, the record supports the conclusion that there is no genuine issue as to any fact material to the statute of limitations defense, and that respondents are entitled to dismissal as a matter of law.

A cause of action accrues, and the two-year limitations period under Section 14(a)(1) of the Act begins to run, when a complainant discovers the wrongful conduct underlying his claim, or in the exercise of reasonable diligence, should have discovered the wrongful activity. *McGough v. Bradford, et al.*, Comm. Fut. L. Rep. (CCH) ¶ 28,265, at 50,601-50,603 (CFTC 2000). A determination of when wrongful activity should have been discovered is based on the particular facts and circumstances of the case, including: one, the relationship of the parties; two, the nature of the wrongful activity; three, the complainant's opportunity to discover the wrongful activity; and four, the actions taken by the parties subsequent to the wrongful activity. *Id.* Here, Chaney, a well educated and sophisticated individual, fully comprehended the trading results and account status reported by the account statements. Thus, Chaney knew in early January 2003, upon

receipt of the December monthly account statement, that the trades recommended by respondents had lost, not preserved, capital, because the loss realized on the gold trade on December 19th had wiped out all previous realized gains, and because unrealized losses on open positions threatened to wipe out the account balance. Chaney further knew in late January 2003, upon receipt of the January 24th account statement, that he had lost almost all of his investment. Since this financial loss went directly to the heart of Chaney's claim that respondents disregarded his instructions to trade conservatively and preserve capital, Chaney's cause of action against respondents for any violations in connection with the trading and handling of his account accrued no later than January 31, 2003, when he had learned that he had lost almost all of his investment.[10] This conclusion is supported by Chaney's letter dated January 14, 2003, in which he stated he was "shocked" by the December trading losses, and in which he accused respondents of failing to handle his account in a conservative and prudent manner.

The date that Chaney filed his complaint, May 5, 2005, is clearly four months past the two-year deadline. Chaney's claim that respondents' delay in returning the account balance tolled the statue of limitations, or dissuaded him from filing a complaint sooner, is without merit. Here, the lion's share of the delay in returning the balance was caused by Chaney's decision to wait several months before actually advising respondents to return the balance. Respondents' decision to await Chaney's instruction for the disposition of his account balance was not unreasonable and cannot fairly be characterized as lulling conduct, especially where Chaney has produced no evidence that respondents ever made any false promises to resolve the dispute, or otherwise said

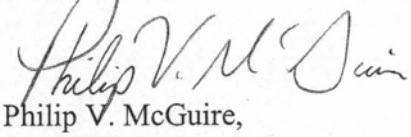
[10] This conclusion could not be altered even if Chaney were to successfully establish violations by respondents in connection with respondents' problematic inaction and serial delays during the steady deterioration and protracted unwinding of the account in January 2003.

anything that dissuaded or delayed Chaney from initiating legal action.[11] Therefore, Chaney's complaint is barred by the statute of limitations.

ORDER

Respondents have established that complainant did not timely file his complaint and that there is no basis for application of principals of equitable tolling or estoppel. Thus, it is concluded that the complaint is barred by the statute of limitations, and the complaint is hereby dismissed.

Dated October 30, 2006.



Philip V. McGuire,
Judgment Officer

[11] Even if Chaney had established a specific date when he had instructed respondents to return the account balance and had established that respondents had unjustifiably disregarded this instruction for a few weeks, he still would not have established that the limitations period should have been tolled for his claim to recover the trading losses that had all been realized by January 24, 2003, because he has failed to show a plausible causal connection between respondents' delay in returning the account balance and his delay in filing a reparations complaint. For what it's worth, if Chaney had reliably proven a specific date for his demand and proven that respondents' delay was unjustified, he would have established a violation of Section 4d of the Act. Here, the measure of damages for that violation would have been very modest: approximately 5% interest on the $926, for the two to eight weeks that respondents had failed to honor his instructions.