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JUD WALTON, Complainant, v. BARKLEY FINANCIAL CORP., ANGELO EMANUEL CASTELLO, GEORGE ALLEN GRIFFIN, JR., MELVIN PAUL KANOWITZ and STUART RUBIN, Respondents.	CFTC Docket No. 04-R024

ORDER OF DISMISSAL

The respondents have submitted a motion to dismiss that requires us to determine whether Jud Walton has waited too long to file his complaint. For the reasons set forth below, we believe that Walton's complaint is untimely.

Walton's Complaint

On January 27, 2004, Walton filed a reparations complaint against respondents Barkley Financial Corp., Angelo Emanuel Castello, George Allen Griffin, Jr., Melvin Paul Kanowitz and Stuart Rubin.[1] In his pleading, Walton alleged the following.

[1] FedEx USA Airbill, dated January 27, 2004; Commodity Futures Trading Commission Reparations Complaint Form, dated January 8, 2004, at 1-3.

In March or April of 2001, Walton viewed a Barkley infomercial in which the "spokesman claimed that investors could profit from seasonal price fluctuations in the price of commodities."[2] He subsequently called the 800-number provided in the infomercial and, as a result, received a videotape.[3] Walton also received a telephone call, on behalf of Barkley, from Griffin.[4] Griffin touted options on gasoline futures, representing that there were "large profits to be made in the commodity options market" and some Barkley customers had "doubled, tripled and even quadrupled their investments by buying commodity options."[5]

This conversation was followed by two weeks of daily phone calls from Griffin and his branch manager, Castello.[6] Walton eventually decided to open an account and, on April 20, 2001, deposited $10,000 with the futures commission merchant to which

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[2] Description of Complaint, dated January 8, 2004 ("Complaint"), at 1.

[3] Id.

[4] Id.

[5] Id. The central theme of Griffin's sales pitch was that gasoline prices were due to climb because of a rise in demand resulting from a seasonal increase in vacation travel and crude oil prices would also rise due to the growth in demand for gasoline coupled with low inventories. Id.

[6] Id.

Barkley introduced accounts, TechNet Trading.[7] Soon thereafter, Griffin and Castello recommended that he purchase options on crude oil futures and claimed that "investors were selling their heating oil contracts and putting that money into crude oil options and that [he] needed to act immediately as options that day were going up."[8] On April 24, 2001, Walton purchased 40 July 2001 calls on crude oil futures.[9] Three days later, he received a confirmation statement memorializing his trade and, upon reading the document, he was surprised to learn that his account had been assessed $9,000 in commissions and other fees.[10] Walton complained about these charges to Griffin and received a commission adjustment in his favor of $50 per contract.[11] In the meantime, he deposited an additional $24,603.60 to cover his purchase.[12]

Walton "followed the crude oil options market from April 21 until June 15, 2001 . . . expecting to see [his] investment at

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[7] Id.

[8] Id.

[9] Id. at 1-2.

[10] Id. at 2.

[11] Id.; see Letter from Mel Kanowitz to Jud Walton, dated May 7, 2001 (attached to Complaint).

[12] Complaint at 2.

least double as Griffin and Castello had represented."[13] Instead, the contracts expired worthless "on June 15, 2001" and he "suffered a loss of $34,603.60 as reflected in the TechNet statements dated June 18, 2001 and June 29, 2001."[14]

The Complaint then picks up in early 2002. Walton alleges that, on January 10th, he received a letter from an attorney from the Division of Enforcement concerning his experience with Barkley.[15] After speaking to her, Walton began to investigate "options trading practices" and reached the conclusion that Barkley was "guilty of nondisclosure, misrepresentation and violation of fiduciary duty."[16]

The Statute Of Limitations Issue Is Raised Three Times

The Office of Proceedings raised the statute of limitations issue with Walton before it forwarded the Complaint to the respondents.[17] In a supplement to his pleading, Walton responded,

> At the time my account with Barkley . . . was closed in June 2001, I did not know of any wrongdoing by Barkley. Specifically, I did not know "of a

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[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Letter from Jud Walton to Director of the Office of Proceedings, dated February 2, 2004 ("Walton Letter"). See 7 U.S.C. §18(a)(1).

> violation of any provision of the . . . Act or a rule, regulation or order of the Commission . . . I did not suspect wrongdoing until some time after I received the letter dated January 10, 2002 from . . . an attorney with the Enforcement Division of the . . . Commission. . . . It was only after reading this letter that I began to investigate possible wrongdoing . . . .
>
> I did not know of any wrongdoing or violation until some time after January 10, 2002 and therefore my cause of action "accrued" some time after that date.[18]

This response must have been satisfactory[19] because, on March 4, 2004, the Office of Proceedings forwarded the Complaint to the respondents who, in turn, moved to dismiss the Complaint on statute of limitations grounds.[20] The Office of Proceedings denied the request[21] and the case was forwarded to us.[22] On September 24, 2004, we received the respondents' renewed motion to dismiss, again resting on the argument that the Complaint was

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[18] Walton Letter.

[19] Although the Office of Proceedings screens complaints, our rules contemplate instances in which it will forward complaints that ultimately merit dismissal because they are legally insufficient or set out a complete affirmative defense. Cf. 17 C.F.R. §12.308(c).

[20] Respondents' Motion to Dismiss, or, Alternatively Answer to Reparations Complaint, received April 16, 2004, at 1-3.

[21] Letter from Director of the Office of Proceedings to R. Lawrence Bonner, dated April 29, 2004.

[22] Notice and Order, dated April 29, 2004, at 1.

time-barred.[23] Walton filed a timely response and, naturally, opposed the motion.[24]

Discussion

Rule 12.308(c) authorizes us to dismiss complaints upon motion of respondents if "grounds exist."[25] Although motions to dismiss generally test the sufficiency of complaints and not the validity of defenses, dismissal of a complaint that states a cognizable cause of action with sufficiency is appropriate when, on its face, that complaint clearly reveals the defense to be meritorious.[26] As for the statute of limitations defense,

> Section 14(a) of the Commodity Exchange Act . . . bars all claims which are not filed "within two years after the cause of action accrues." Claims for fraud accrue when the complainant discovers, or, in the

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[23] Respondents' Renewed Motion to Dismiss Reparations Complaint, received September 24, 2004 ("Renewed Motion"), at 8.

[24] Response to Respondents' Renewed Motion to Dismiss, received October 8, 2004 ("Response"), at 9. Walton asked us to extend the deadline for responding to the Renewed Motion. Agreed Motion for Extension of Time, received October 8, 2004, at 2. However, the respondents did not personally serve the Renewed Motion and service occurred on September 23, 2004. Renewed Motion at 9. Consequently, Walton had until October 8, 2004 to respond, he met this deadline and, for these reasons, the motion for an extension is **DISMISSED** as moot. 17 C.F.R. §§12.10(b), 12.308(b).

[25] 17 C.F.R. §12.308(c)(2).

[26] Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996). The parties devoted considerable energy to debating the merits of the respondents' factual defenses relating to whether the alleged wrongdoing occurred. See, e.g., Response at 4; Renewed Motion at 2-3. Because respondents' motion fixes our attention upon the Complaint's allegations as they relate to an affirmative defense, those efforts were wasted.

> exercise of reasonable diligence should have discovered the alleged misconduct. Complainant need not discover all elements of the fraud but only such facts as enable him to detect a general fraudulent scheme.[27]

Because Walton filed his complaint on January 27, 2004, it is time-barred if his cause of action accrued prior to January 27, 2002.[28]

As noted above, Walton claims that he did not first gain actual knowledge of the respondents' malfeasance until "some time" after he received the Division's "letter dated January 10, 2002" and conducted a subsequent inquiry. Such representations suggest that Walton did not gain actual knowledge of the respondents' wrongdoing until after January 27, 2002 and, more to the point, do not clearly indicate that his actual awareness predated January 27th.[29] Thus, Walton's claims are time barred only if a hypothetical person of ordinary intelligence who

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[27] Martin v. Shearson Lehman/American Express, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,354 at 32,981-82 (CFTC Nov. 12, 1986) (citations, quotations and ellipses omitted). Accord 7 U.S.C. §18(a).

[28] Walton represented that he intends to explore, if necessary, equitable tolling, estoppel and fraudulent concealment. Response at 8. However, he included no such arguments in the Response and neither the initial complaint nor the supplement included any allegations that the respondents acted in such a manner as to impede any investigation of possible wrongdoing on Walton's part after his options position expired.

[29] There is one possible exception discussed below.

exercised reasonable diligence should have known of the respondents' alleged wrongdoing before January 27, 2002.[30]

"In determining when wrongful activity should have been discovered, [the Commission] consider[s] factors such as: (1) the relationship of the parties; (2) the nature of the wrongful activity; (3) complainant's opportunity to discover the wrongful activity; and (4) the action taken by the parties subsequent to the wrongful activity."[31] Although there was a limited fiduciary relationship between Barkley and Walton, as there is between any introducing broker and its customers, the Complaint reveals that it was not terribly cozy. Walton's account was open for a short time and he claims that receipt of the confirmation statement for his one and only trade left him unpleasantly "surprised" with respect to the commissions and fees he was charged. This alleged shock seemed to leave Walton feeling misled or cheated because he complained to the firm.

The primary alleged wrongdoing at issue here seems to be fraud by affirmative representation and omission. The gestalt of the alleged misrepresentations was that Walton was certain (or, at least, highly likely) to earn a large profit in his account by

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[30] In re NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1325-26 (3rd Cir. 2002).

[31] Horelick v. Murals Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,500 at 39,368 (CFTC Oct. 2, 1992).

following the respondents' advice.[32] The alleged omissions apparently relate to the commissions he would be charged or the representations of virtually certain profit (so as to render literally true statements misleading). Assuming the truth of the Complaint, any omission concerning the amount of commissions and fees to be charged was known in April or May of 2001 when Walton received his confirmation statement and read it, and before he complained to Barkley and received a Commission adjustment in early May 2001.[33] As for representations and/or omissions that led Walton to believe that his trade was certain (or virtually certain) to double the value of his account, the trading outcome was made known to him through trading statements. The result was as contrary to the general message of the alleged representations

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[32] See Complaint at 2 ("I followed the crude oil options market from April 21 until June 15, 2001 . . . expecting to see my investment at least double as Griffin and Castello had represented."). In his response to the Renewed Motion, Walton announced an intent to amend his complaint to add greater detail. Response at 6. He argued that each of the specific representations and omissions of which he does and will complain constituted separate wrongs that accrued independently. Id. at 1. In other words, Walton takes the position if he was defrauded by having been subjected to three specific misrepresentations to induce a single trade and should have discovered that one of the representations was false three years before he filed a complaint, his cause of action for fraud did not accrue with respect to the other two misrepresentations until he knew or should have known that they were false. Martin teaches that fraud claims do not accrue in this piecemeal fashion. See supra text accompanying note 27.

[33] See supra text accompanying notes 10-11.

as an options purchase could have been, a total loss of premiums and transaction costs. This contradiction triggered a duty to inquire[34] and a reasonably diligent customer who received the same information as Walton would have initiated an inquiry shortly after the calls expired in mid-June 2001 if not sooner. Finally, there is no allegation in the Complaint or in the Response of intervening acts or circumstances that would have substantially impeded a reasonably diligent investigation. Given these circumstances, had Walton been harmed in the manner alleged and had he read the confirmation statements that he received, Walton should have discovered the general fraudulent scheme of which he complains within six months after his options expired worthless.

Conclusion

For the reasons discussed above, we **FIND** that the Complaint's factual allegations, even when combined with the supplement concerning Walton's alleged actual knowledge of wrongdoing, clearly show that Walton's cause of action accrued no later than December 15, 2001. Thus, his complaint is untimely.

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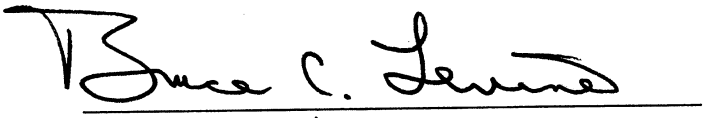
[34] See Martin, [1986-1987 Transfer Binder] ¶23,354 at 32,982.

For this reason, we **GRANT** the respondents' motion and **DISMISS** Walton's complaint with prejudice.

IT IS SO ORDERED.

On this 12th day of October, 2004



Bruce C. Levine
Administrative Law Judge