



U.S. COMMODITY FUTURES TRADING COMMISSION

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

OFFICE OF
PROCEEDINGS

HOWARD L. DISTELMAN,
Complainant,

v.

SHATKIN ARBOR KARLOV & COMPANY,
STERLING INVESTMENTS OF AMERICA,
JOHN FREDERICK ACKERMAN, and
JOHN RANDALL GLADDEN,
Respondents.

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CFTC Docket No. 96-R129

OFFICE OF PROCEEDINGS
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INITIAL DECISION

By complaint filed July 3, 1996, Howard Distelman claims that in November and December of 1993 John Randall Gladden and John Frederick Ackerman fraudulently induced him to open a discretionary account with Sterling Investments of America ("Sterling") in February of 1994, and that in February and March of 1994 Gladden directed the trading in his account in violation of a power of attorney agreement which authorized only Ackerman to direct the trades in Distelman's account. Shatkin Arbor Karlov & Company ("Shatkin"), the clearing broker for Distelman's account, filed an answer denying any liability and raising several affirmative defenses, including the two-year statute of limitations. In response to the statute of limitations defense, Distelman asserts that Ackerman's attorney, Gary Sinclair, lulled him into delaying the filing of his reparations complaint by entering and then breaching a settlement agreement on behalf of Ackerman, Gladden and Sterling.

Gladden filed a reply to the complaint in which he asserted that Sinclair had told him that Ackerman would satisfy a \$3,000 debt to Gladden by settling Distelman's complaint on behalf of Gladden.

Ackerman submitted a notice that he had filed a petition under Chapter 13 of the Bankruptcy Code.^{1/} Sterling Investments failed to file an answer and is in default.

The findings and conclusions below are based on the parties' documentary submissions. For the reasons set out below, it is concluded: that the complaint against Shatkin is barred by the two-year statute of limitations; that the complaint against Gladden and Sterling is not barred by the two-year statute of limitations; and that Distelman has established that Gladden fraudulently induced Distelman to open his Sterling account in violation of Sections 4b and 4c(b) of the Commodity Exchange Act ("the Act"), and CFTC rule 33.10, that Gladden made unauthorized trades in violation of Section 4c(b) of the Act, and CFTC rule 33.10, that the unauthorized trading violations caused \$6,540 in damages and that the fraudulent solicitation damages caused \$10,020 in damages, and that Sterling is liable for Gladden's violations pursuant to Section 2(a)(1)(A) of the Act.

Factual Findings

1. Distelman is a physician located in Branford, Connecticut. According to Distelman, in late 1993, Gladden, a branch office manager, and Ackerman, the firm owner, convinced him to open a

^{1/} Rex K. Daines letter dated February 11, 1997.

discretionary account with Sterling Investments of America by essentially guaranteeing profits and by falsely promising that Ackerman would be selecting the trades for the account.^{2/}

On January 11, 1994, Distelman signed the various account-opening documents, including a limited power of attorney giving discretionary trading authority to Ackerman. On February 15, 1994, Distelman deposited \$11,000, and on February 24, 1994, trading began. The trading activity from February 24 to April 5, 1994, exclusively involved options trades, and realized an aggregate net loss of about \$6,540. The trading activity from April 28 to May 20, 1994, featured a mix of options and futures, with futures trades predominating.

Distelman would receive confirmation statements and monthly account statements which accurately reported the trading activity throughout the life of his account.

2. The trading was not successful, and by March 31, 1994, the account value had dwindled to \$3,786. Between March 31 and April 5, 1994, Distelman informed Gladden that he was "alarmed by the extent of the trading losses." [Page one of Complaint.] Gladden replied that he had been making the trading decisions rather than Ackerman, but that Ackerman would be making the trading decisions thereafter. [See page 1 of Complaint; Distelman's letter to Ackerman dated July 15, 1996 (Exhibit D to Shatkin's final verified

^{2/} Neither of the respondents with first-hand knowledge of the solicitation and trading of the Distelman account -- i.e., Ackerman and Gladden -- have produced any evidence rebutting Distelman's factual description of their conduct during the solicitation and trading of his account.

statement; and Liautaud Affidavit (Exhibit E to Shatkin's final verified statement).]

Trading ceased on May 20, 1994, leaving a \$980 account balance.

3. In mid-July, Distelman consulted with his investment counselor, who opined that Gladden and Ackerman had conducted a fraudulent solicitation and that Gladden had traded the account without proper authorization.^{3/}

On July 15, 1994, Distelman mailed a letter to Ackerman in which he protested Gladden's unauthorized trading and demanded complete restitution within two weeks before he "pursued this matter with the CFTC, the NFA and the appropriate state agencies."

In response, Gary Sinclair, Ackerman's attorney during ensuing settlement negotiations, responded to Distelman's letter. Sinclair conceded Gladden's unauthorized trading and Ackerman's responsibility for it. However, Sinclair and Distelman could not agree on a dollar amount for a settlement, and "many months passed without resolution," and without any communications between Distelman and Sinclair. Distelman has produced no explanation for why he failed to act on his threat to initiate legal action when "complete restitution" obviously was not forthcoming. [Page 2 of Complaint; and Distelman letter dated August 6, 1995 (Exhibit C to Shatkin's final verified statement).]

^{3/} Distelman did not indicate whether he had consulted his investment counselor before he decided to open his Sterling account.

4. On August 6, 1995, Distelman wrote a letter to Ackerman proposing settlement. In response, Sinclair called Distelman. Sinclair represented that Ackerman was no longer trading and virtually bankrupt, but that Sinclair "could obtain \$5,000 from the involved parties to settle this dispute." [Distelman's reply to Shatkin's interrogatory 5.] Distelman agreed not to initiate any legal action in exchange for the payment of \$5,000.

Sinclair sent a settlement agreement and general release, which was signed by Distelman on October 25, 1995. The recitation in the release stated: "Whereas, Dr. Howard L. Distelman . . . had a futures account with RB&H Financial Services, L.P and his brokers were John Ackerman and Randall Gladden." [Emphasis added, exhibit to Distelman's final verified statement.] By the terms of the release, Distelman agreed to release RB&H, Sterling, Ackerman and Gladden in exchange for payment of \$5,000 by RB&H. The release did not set out a payment deadline and did not refer to Shatkin.

Distelman never received a payment from RB&H. According to Distelman, Sinclair made a series of "numerous" promises on unspecified dates "that the funds would be forthcoming." However, during a conversation initiated by Distelman on July 3, 1996, Sinclair informed Distelman that he was "not eligible" for the payment by RB&H, because his account had not been cleared or carried by RB&H. [Distelman's final verified statement.]

5. Shatkin produced an affidavit by Sinclair that set forth his version of the settlement negotiations. [Exhibit A to Shatkin's final verified statement.] Sinclair's affidavit, short

on detail, merely asserts: (1) that Distelman, "on many occasions . . . , stated that he was ready to file a reparations complaint;" (2) that he "never mislead [sic] Distelman regarding his right to file a reparations complaint"; and (3) that he never did "forestall Distelman from filing a reparations complaint." Sinclair's affidavit does not specifically dispute Distelman's essential allegations concerning the settlement negotiations: i.e., that Sinclair had agreed on behalf of Ackerman, Gladden and Sterling to pay Distelman \$5,000 to settle the dispute; that Sinclair had held out the RB&H settlement agreement and general release as the legitimate embodiment of this agreement; that Sinclair had repeatedly promised that RB&H would be honoring the contract; and that Sinclair waited eight months to inform Distelman that RB&H would not be honoring the agreement. Sinclair's affidavit also provides no explanation for his apparently ultra vires use of the RB&H release form, or for his assurances that payment from RB&H was forthcoming.

6. On July 3, 1996, Distelman mailed his reparations complaint.

Conclusions

The statute of limitations set out in Section 14(a) of the Commodity Exchange Act requires that a reparations complaint be filed within two years after the cause of action "accrues." A cause of action accrues when a complainant knows, or should have known in the exercise of due diligence, that wrongful conduct has likely occurred resulting in monetary damages. The determination

of when the cause of action accrues turns on when a customer discovers those facts enabling him to detect the general outlines of any violations, rather than when the customer grasps the full details of the violations or determines the precise causes of action for the violations.^{4/} Since respondents have raised the statute of limitations defense, Distelman has the burden to show either that the complaint was timely filed or that the untimely filing should be excused under the principles of equitable tolling or equitable estoppel.^{5/} Here, the record shows that Distelman knew, or should have known, by the end of March 1994 that he had lost over half of his \$11,000, and knew by May 20, 1994 that he had lost almost all of his investment. Therefore, by the time that trading had stopped on May 20, 1994, Distelman knew enough to suspect the truthfulness of any alleged profit guarantees by Gladden and Ackerman. This conclusion is supported by the fact that he had informed Gladden and Ackerman no later than April 5, 1994 that he was "alarmed" by his losses. Moreover, in his complaint Distelman admits that he knew, by April 5, 1994, that Gladden had been making trading decisions for his account in violation of the terms of the power of attorney. The date that

^{4/} See, e.g., *Cook v. Money International, LTD.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. ¶22,532 (CFTC 1985), reconsideration denied [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,078 (CFTC 1986); *Martin v. Shearson Lehman Brothers/American Express*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,354 (CFTC 1986); and *Marraccini v. Conti-Commodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,793 (CFTC 1986).

^{5/} *Meyers v. E.F. Hutton & Co.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,603 (CFTC 1992).

Distelman filed his complaint, July 3, 1996, is clearly past the April 5, 1996 statute of limitations filing deadline for the unauthorized trading allegation and past the May 20, 1996 statute of limitations filing deadline for the fraudulent solicitation allegation, and Distelman's claim will be time-barred unless he can invoke equitable estoppel or equitable tolling.

To show that respondents should be estopped from raising the statute of limitations, Distelman must establish at a minimum that he actually and reasonably relied on an action or representation by a respondent. Distelman has met this burden by showing that Sinclair's conduct -- i.e., offering to settle the dispute for payment of \$5,000 from an "involved party," in response to Distelman's threat to file a complaint, and then repeatedly promising that payment was forthcoming -- had its patently predictable effect of dissuading Distelman from filing a reparations complaint until Sinclair told him months later that his clients were breaching the settlement agreement. In these circumstances, the statute of limitations must be tolled during the eight-month period (October 25, 1995 to July 3, 1996) that Sinclair had held out the settlement agreement as valid, as to those respondents specifically represented by Sinclair during the settlement negotiations (Ackerman, Gladden and Sterling), and thus Distelman's claim against those respondents is not time barred. However, Distelman has not shown that Shatkin should be estopped from raising the statute of limitations, because Shatkin had no knowledge of the dispute, no knowledge of the settlement agreement,

and no knowledge of Sinclair's questionable conduct surrounding the settlement agreement. Therefore, Distelman's claim against Shatkin is barred by the statute of limitations.

Distelman has made an un rebutted prima facie showing that Gladden fraudulently induced him to open an options and futures account with Sterling by essentially guaranteeing profits and falsely promising that Ackerman would be directing the trading activity, in violation of Sections 4b and 4c(b) of the Commodity Exchange Act, and CFTC rule 33.10; and that Gladden directed the trading activity in his account without proper authorization in violation of Section 4c(b) of the Commodity Exchange Act, and CFTC rule 33.10. The proper measure of damages for the unauthorized trading violations is \$6,540, based the aggregate net losses for the trades made by Gladden; and the proper measure of damages for the fraudulent solicitation violations is \$10,020, based on Distelman's total out-of-pocket losses. Because cumulative reparations awards are not permitted, Distelman's award will be based on the greater amount, \$10,020.

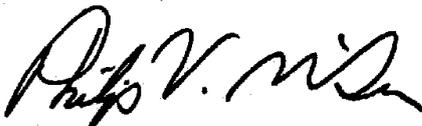
Sterling Investments of America has failed to file an answer and thus is in default. This default constitutes an admission of the allegations in the complaint and a waiver of any affirmative defenses. Accordingly, it is concluded that Sterling Investments of America is liable for Gladden's violations pursuant to Section 2(a)(1)(A) of the Act.

ORDER

The complaint against Shatkin Arbor Karlov & Company is barred by the statute of limitations. Accordingly, the complaint against Shatkin Arbor Karlov & Company is DISMISSED. Pursuant to CFTC rule 12.24(d)(1), based on the petition filed under Chapter 13 of the Bankruptcy Code, the complaint against John Frederick Ackerman must be and is hereby DISMISSED WITHOUT PREJUDICE.

John Randall Gladden and Sterling Investments of America are ORDERED to pay to Howard L. Distelman reparations of \$10,020, plus interest on that amount at 5.56% compounded annually from February 15, 1994, to the date of payment, plus \$50 in costs for the filing fee. Liability is joint and several. Distelman should note that the possibility of collecting all or part of this award from Sterling or Gladden is most likely extremely remote, because Sterling and Gladden have not been registered with the National Futures Association for over three years and because Gladden has been barred from re-registration based on his failure to pay a \$1,000 reparations award.

Dated July 23, 1997.


Philip V. McGuire,
Judgment Officer