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Received
C.F.T.C.
2011 JAN -3 PM 1:18
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MEDHAT HEDAYET, Complainant, v. GAIN CAPITAL GROUP, LLC, d/b/a FOREX.COM Respondent.	*	CFTC Docket No. 09-R044

ORDER OF DISMISSAL

This case raises the issue of whether the Commission has reparations jurisdiction over off-exchange foreign currency contracts. Having provided notice and the opportunity for comment,[1] we conclude that it does not. Accordingly, we dismiss the complaint without prejudice to Medhat Hedayet's right to seek redress in such alternative forums as may be available for adjudication of his claims.

Rule 12.308(c)(1) permits us to dismiss a complaint on our own motion when we find that none of the matters alleged in the complaint state a claim

[1] Order, dated November 29, 2010. A challenge to a court's subject matter-jurisdiction may be made at any stage and the court should raise it *sua sponte*. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") (citations omitted); Fed. Rule Civ. Proc. 12(h)(3). *Cf. Haekal v. Refco, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,162 at 45,542 (CFTC Sept. 26, 1997).

that is cognizable in reparations.[2] Generally, a motion to dismiss serves to test the complaint[3] (and those extrinsic materials that are attached thereto).[4] In addition, dismissal is warranted when the complaint states a cognizable claim but also sets forth facts establishing an affirmative defense that would relieve the respondent of liability.[5] The account statements attached to Hedayet's complaint indicate that he traded foreign currency ("forex") contracts off-exchange with respondent Gain Capital Group.[6] We have previously held that under the Commodity Futures Modernization Act of 2000,[7] the Commission has no jurisdiction over private actions brought against FCMs trading foreign

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[2] 17 C.F.R. §12.308(c)(1).

[3] *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 n.1 (7th Cir. 1996).

[4] *See International Audiotext Network, Inc. v. American Te. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (*per curiam*).

[5] *See Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 181 (4th Cir. 1996) ("[D]ismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense.").

[6] Commodity Futures Trading Commission Reparations Complaint Form, received June 11, 2009 ("Complaint"), attachment. We note that this conclusion is supported by the answer. In it, Gain Capital Group avers that it is a registered Futures Commission Merchant and Forex Dealer Member, and that Hedayet engaged in self-directed forex trading to which it was the counterparty. Answer, received October 14, 2009, at 1-2. *See also*, Letter from Gain Capital Group to the Court, dated December 20, 2010.

[7] Pub. L. 106-554.

currency off-exchange.[8] However, Hedayet's trading post-dates (and is therefore governed by) the CFTC Reauthorization Act of 2008.[9] This requires us to consider the effect of those more recent amendments on the viability of Hedayet's claim.

This exercise nets the same result as before. The Commodity Exchange Act ("CEA") was amended by the Commodity Futures Modernization Act of 2000 to "clarify" the Commission's limited jurisdiction over off-exchange contracts for foreign currency.[10] This authority over forex contracts was expanded by the CFTC Reauthorization Act of 2008.[11] The focus of both Acts, however, appears to be on regulatory enforcement,[12] leaving the Commission's authority narrowly tailored to that purpose.

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[8] *Vargas v. FX Solutions, LLC,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,360 at 62,887-88 (CFTC June 1, 2009). *See Krause v. Forex Exchange Market, Inc.*, 356 F.Supp. 2d 332, 336 (S.D.N.Y. 2005).

[9] Pub. L. 110-246. Hedayet's complaint centers on trades that took place in March 2009. Complaint at 1, attachment.

[10] The Modernization Act was intended, among other things, "to clarify the jurisdiction of the Commodity Futures Trading Commission over certain retail foreign exchange transactions and bucket shops that may not be otherwise regulated." Pub. L. 106-554, §2(5).

[11] Pub. L. 110-246.

[12] *See supra* note 10. The Reauthorization Act adds a new section to the CEA that covers off-exchange retail transactions in foreign exchange and more specifically "any agreement, contract or transaction" that is offered to retail customers "on a leveraged or margined basis." 7 U.S.C. §2(c)(2)(C). This new authority did away with the so-called futures test underlying the Commission's jurisdiction with respect to forex, bestowing the Commission with limited

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To this end, the resulting statutory scheme is carefully structured to circumscribe the Commission's jurisdiction over forex transactions. Section 2(c)(1) imposes strict limits on the Commission's jurisdiction.[13] Although Section 2(c)(2)(B)-(C) extends the Commission jurisdiction to off-exchange retail forex transactions,[14] it limits this authority to certain enumerated substantive

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authority over most retail foreign currency transactions without regard to whether such transactions are futures contracts. One of the principal objectives of the Reauthorization Act was to clarify that the Commission has the authority to bring fraud actions based on off-exchange "principal-to-principal" forex transactions. H.R. Rep. No. 110—627, at 981 (2008) (Conf. Rep.). *See* Robert Zwirb, "The CFTC and Foreign Currency – From A to Zelener," *Futures & Derivatives Law Report*, Feb. 2009 Vol. 29, Issue 2 at 1 ("In the aftermath of twin judicial defeats suffered by the Commodity Futures Trading Commission . . . in matters involving the sale of foreign currency to retail investors, Congress has provided the agency with new authority to ensure that it has adequate enforcement authority over such transactions going forward.").

As we shall see, no revisions were made by the Reauthorization Act to expand the Commission's jurisdiction over private rights of action in reparations. Also, there does not appear to be any suggestion in the legislative history that Congress intended such an enlargement.

[13] 7 U.S.C. §2(c)(1) ("In general – Except as provided in paragraph (2), nothing in this chapter (other than section 7a (to the extent provided in section 7a(g) of this title), 7a–1, 7a–3, or 16(e)(2)(B) of this title) governs or applies to an agreement, contract, or transaction in — (A) foreign currency....") (emphasis added). The specific exceptions to Section 2(c)(1)'s limitation refer to aspects of the statutory scheme relating to registered derivatives transaction execution facilities, derivative clearing organizations, exempt boards of trade and matters of federal preemption. 7 U.S.C. §§7a, 7a(g), 7a–1, 7a–3, 16(e)(2)(B). None of these provisions are implicated in our discussion of off-exchange retail forex trading.

[14] 7 U.S.C. §2(c)(2)(B)(i)(II), 2(c)(2)(C)(i)(I).

provisions of the CEA.[15] Most importantly, however, for purposes of the issue before us, Congress also limited the procedural provisions available to implement this substantive grant of authority. In addition to the substantive sections, Congress listed procedural Sections 6c (authorizing the Commission to sue in federal court),[16] 6d (authorizing states to sue in federal court on behalf of their residents),[17] 6(c) and 6(d) (authorizing the Commission to institute quasi-judicial enforcement actions)[18] and 8a (authorizing the Commission to institute quasi-judicial statutory disqualification proceedings).[19] Significantly, Sections 14[20] and 22[21] – the sections that provide for private rights of actions – are not among the procedural sections listed.[22]

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[15] 7 U.S.C. §2(c)(2)(B)(iii), 2(c)(2)(C)(ii)(I). Sections 4b and 4c(b) are the major substantive sections listed. Section 4b prohibits fraudulent futures transactions and section 4c(b) prohibits unauthorized options trading. 7 U.S.C. §6b and 7 U.S.C. §6c(b). Sections 6(c) and 6(d) are also included, "except to the extent that sections 6(c) and 6(d) prohibit manipulation of the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any market...." 7 U.S.C. §2(c)(2)(B)(iii), 2(c)(2)(C)(ii)(I). *See* 7 U.S.C. §§9, 15,13b. Certain counterparties are excluded from even this limited grant of authority, but retail customers (such as Hedayet) and FCMs (such as Gain Capital Group) are not among them. 7 U.S.C. §§1a(12), 2(c)(2)(B)(i)(II)(aa)- (bb), (dd)-(ff), 2(c)(2)(B)(iii), 2(c)(2)(C)(i)(I)(aa).

[16] 7 U.S.C. §13a-1.

[17] 7 U.S.C. §13a-2.

[18] 7 U.S.C. §§9, 15, 13b.

[19] 7 U.S.C. §12a.

[20] 7 U.S.C. §18 (addressing reparations)

Therefore, assuming that Congress drafts with care (as of course we must), it must have purposefully excluded Sections 14 and 22 from the Commission's jurisdiction.[23] The statute's plain meaning couldn't be better expressed.[24] Section 2(c)(1) unequivocally states that the Commission's jurisdiction over forex transactions is not to be presumed to extend to any or all other sections of the CEA. To the contrary, **"[e]xcept as provided in paragraph (2), nothing in this chapter** . . . **governs** or applies to an

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[21] 7 U.S.C. §25 (addressing private suits brought in United States district courts).

[22] 7 U.S.C. §§2(c)(2)(B)(iii), 2(c)(2)(C)(ii)(I).

[23] *Russello v. United States,* 464 U.S. 16, 23 (1983) (*holding* that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion) (citation omitted); *New York Currency Research Corp. v. Commodity Futures Trading Com'n,* 180 F.3d 83, 90 (2d Cir. 1999) (*holding* that "[t]he fact that Congress uses different language in defining violations in a statute indicates that Congress intentionally sought to create distinct offenses.") (citation omitted). *Cf. Grandview Holding Corp. v. National Futures Association,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,996 at 44,809 (CFTC Mar. 18, 1997) (*applying* the basic principles of rule construction, which is to start by interpreting the plain meaning of the rule).

[24] *New York Currency Research Corp.* 180 F.3d 83 at 89 ("When called upon to construe a statute, we begin analysis by examining the statutory language. The plain meaning of that language ordinarily informs our understanding of a statutory or regulatory term. It appears that the [Commodity Futures Trading] Commission – based on a reading of its prior decisions – acknowledges this basic principle of statutory construction.") (citations omitted).

agreement, contract, or transaction in — (A) foreign currency...."[25] As we have seen, Section 2(c)(2)(B)(iii) and 2(c)(2)(C)(ii)(I) lists certain public causes of actions over forex transactions as authorized, but fails to mention any private ones (including reparations).[26] As the Supreme Court has stated, in considering whether a private right of action exists under the Amtrak Act:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929). This principle of statutory construction reflects an ancient maxim – *expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in s 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.[27]

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[25] 7 U.S.C. §2(c)(1) (emphasis added).

[26] 7 U.S.C. §§2(c)(2)(B)(iii) and 2(c)(2)(C)(ii)(I).

[27] *National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974). Moreover, as we have discussed, there is no indication that in passing the forex provisions of the Modernization and Reauthorization Acts, Congress was concerned with anything other than matters of public enforcement. *See supra* note 12; *National R.R. Passenger Corp.*, 414 U.S. at 458.

Thus, the exclusion of Section 14 from the procedures listed in Section 2(c)(2)(B)(iii) and 2(c)(2)(C)(ii)(I) signals that the Commission's limited forex jurisdiction does not include presiding over reparations cases.[28]

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[28] We note that in two cases, the Commission has expressly avoided the issue of whether the Modernization Act extended reparations jurisdiction to forex transactions. In *Vargas*, the Commission affirmed the Administrative Law Judge's dismissal of a reparations complaint under the parallel proceeding rule, 17 C.F.R §12.24, but declined to address his conclusion that "under the Commodity Futures Modernization Act, the Commission has no jurisdiction over private actions brought against registered or unregistered FCMs trading foreign currency off-exchange." *Vargas v. FX Solutions, LLC,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,384 at 62,950 (CFTC July 6, 2009); *Vargas* [Current Transfer Binder] ¶31,360 at 62,888 (italics omitted). In an earlier case, a Judgment Officer reached a different result, holding that "retail forex transactions are cognizable in reparations." *Bardman v. Global Futures and Forex, Ltd.*, CFTC Docket No. 05-R037, 2006 WL 3478984 at *6 (CFTC Nov. 30, 2006). Three and a half years later, the Commission affirmed the Judgment Officer's dismissal of the complaint on other grounds, but did so summarily. *Bardman v. Global Futures and Forex, Ltd.*, CFTC Docket No. 05-R037, 2010 WL 1888703 at *1 (CFTC April 30, 2010). An order of summary affirmance "does not reflect a Commission determination to adopt the initial decision, including any rationale contained therein, as its opinion and order, and neither initial decision nor the Commission's order of summary affirmance shall serve as Commission precedent in other proceedings." 17 C.F.R §12.406(b).

It is odd that the Commission would seek to sidestep the clarification of its reparations jurisdiction when provided with two opportunities to do so. *See supra* note 1. After all, the inquiry is not fact-intensive; it merely involves a simple and straightforward issue of statutory interpretation. And in refusing to eliminate uncertainty as to the reach of its reparations jurisdiction, the Commission imposes unwarranted risks and other costs on all litigants to forex disputes.

Lastly, we observe that in *Bardman*, the Judgment Officer's conclusion (that the Modernization Act provided the Commission with reparations jurisdiction over forex transactions) was built on a faulty premise. Without citing to any legal support, the Judgment Officer concluded that "jurisdictional provisions

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For these reasons, we **DISMISS** the complaint **WITHOUT PREJUDICE** to Hedayet's right to seek redress in such alternative forums as may be available for adjudication of his claims.

IT IS SO ORDERED.

On this 3rd day of January, 2011

Bruce C. Levine
Administrative Law Judge

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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." *Bardman Forex, Ltd.*, 2006 WL 3478984 at *6. We struggle to interpret this rationally. Congress clearly stated that "nothing in this Act . . . governs or applies to an agreement . . . in foreign currency" – and then listed a few exceptions. The Judgment Officer's conclusion in *Bardman* was that sections of the Act not listed among the exceptions nevertheless still qualify as exceptions. This is curious logic, to say the least, and entirely unpersuasive. *Bardman Forex, Ltd.*, 2006 WL 3478984 at *6. *See Vargas*, [Current Transfer Binder] ¶31,360 at 62,887 n.175.