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MARY P. KARNISH, and EDWIN A. KARNISH, Complainants, v. ALBERT MICHAEL GREENHOUSE, Respondent.	* * * * * * * * *	CFTC Docket No. 98-R011

INITIAL DECISION

For the reasons set out below, it has been concluded that the complaint in this proceeding ("*Karnish II*") must be dismissed because it is barred by the settlement agreement in a related reparations proceeding, *Mary P. Karnish, and Edwin A Karnish v. Cromwell Financial Services, Inc., Arthur Robert Rosansky, Joseph Loish, and Philip Mark Tuccelli*, CFTC Docket No. 97-R12 ("*Karnish I*").

Factual Findings

1. In December of 1995, the Karnishes heard a series of Cromwell Financial Services radio commercials that claimed that Cromwell customers had been reaping tremendous profits trading options on energy futures. In response, the Karnishes called Cromwell's toll-free number, and spoke to Arthur Rosansky. [See Attachment J, Notice dated February 25, 1998; and pages 6-7 of hearing transcript.]

Rosansky solicited the account and acted as the Karnishes' account executive from January 22, 1996, when the Karnishes opened their account, to mid-May 1996, when the last of the option purchases recommended by Rosansky expired. [Attachment E to Notice dated February 25, 1998.] The Karnishes lost $10,020 of the $10,056 that they had invested during Rosansky's tenure as their account executive. [*See* account statements for January 22 through May 31, 1996 (Attachment A to February 25 Notice); and the Karnishes' damage calculation in *Karnish I* (Attachment C to February 25 Notice).] In *Karnish I*, the Kanishes alleged that Rosansky had used high-pressure sales tactics, misrepresented the relative risks and rewards of trading options with Cromwell, churned the account, and fraudulently promised to monitor closely the account. [*See* Attachment A to February 25 Notice; and pages 7-17 of hearing transcript.]

2.. In mid-May, Greenhouse called the Karnishes. According to the Karnishes, after they complained to Greenhouse that Rosansky had not spent enough time with them, Greenhouse convinced them to continue trading with him by asking them to "give him one percent of their trust;" promising to consult regularly with them; promising to "get out" if the market dropped; and assuring them that making profits would "be a piece of cake." At this time, the Karnishes' principal objective was to recoup the $10,020 lost with Rosansky. [*Karnish II* complaint; *Karnish I* complaint (Attachment A to February 25 Notice); and pages 18-25, and 62-65 of hearing transcript.]

3. Two of the first three trades recommended by Greenhouse were very profitable, realizing an aggregate net profit of about $19,000 by July 12. On July 17, the Karnishes accepted Greenhouse's suggestion that they enjoy the fruits of their speculative efforts and withdrew the account cash balance of $11,973. However, the next day, Greenhouse

recommended a new option purchase, which required that the Karnishes redeposit additional funds. [*See* pages 28-30, and 65-70 of hearing transcript.]

Between July 15 and August 30, the Karnishes would accept Greenhouse's recommendations to initiate four more long option positions. Unfortunately, all of these trades realized losses. The Karnishes have made inconsistent assertions about their experience with Greenhouse. For example, they asserted in the *Karnish I* complaint that "everything [had been] fine" with Greenhouse until early September. In contrast, in the November 25 addendum to the *Karnish I* complaint (Attachment C to February 25 Notice) and in the *Karnish II* complaint, the Karnishes alleged that Greenhouse had essentially guaranteed profits and "pressured" them into buying more contacts than they had originally intended. [*See* pages 30-40 of hearing transcript.]

4. On September 6, the account had a liquidating value of $11,625. On September 12, Greenhouse's supervisor Philip Tuccelli called the Karnishes. Tuccelli told the Karnishes that Cromwell had "a little problem with Al [Greenhouse]," and he was taking two weeks off. [Transcript of tape-recorded conversation produced in *Karnish I* (Attachment H to February 25 Notice).] More specifically, Cromwell had suspended Greenhouse for disregarding house instructions to recommend the use of stop-loss orders. [*See* August 19, 1996 Tuccelli memorandum (Attachment K to February 25 Notice).] The Karnishes also rejected Tuccelli's recommendation to put stops on any of their open positions because they preferred Greenhouse's advice not to use stops, and the Karnishes acknowledged that the options could expire worthless without stops. [*See* pages 40-44 of hearing transcript.]

On September 16, Cromwell fired Greenhouse. [*See* September 16, 1996 Tuccelli memorandum (Attachment L to February 25 Notice).] When Tuccelli informed Mrs. Karnish of Greenhouse's termination, she complained for the first time that Rosansky had "mishandled" and churned the account, but did not complain about Greenhouse. The Karnishes subsequently transferred the account to Alpine Financial, which had hired Greenhouse soon after the Cromwell firing. [*See* pages 44-52 of hearing transcript.]

5. The Karnishes would lose $16,885 of the $28,911 that they invested during Greehnouse's tenure as their account executive.[1]

6. The Karnishes' combined out-of-pocket losses with Rosansky and Greenhouse were $26,905.

7. On November 5, 1996, the Karnishes filed the complaint in *Karnish I*, seeking to recover $28,000 in actual damages, alleging high-pressure and fraudulent sales tactics, churning, and failure to supervise, and naming Rosansky, Loish, Tuccelli and Cromwell as respondents. According to the Kanishes, Greenhouse had advised them that they should file the reparations complaint because Cromwell, Rosansky, Tuccelli and Loish had "wronged" them, but begged them not to mention that he had encouraged them to sue his former employer because he feared retribution from other potential employers. However, the Karnishes do not allege that Greenhouse made any false promises in exchange for their decision not to name him as a respondent in *Karnish I*. The Karnishes also testified that when they informed Tucelli that had just filed the *Karnish I* complaint against Cromwell, he offered as part of a proposed settlement to help them "go after" Greenhouse, who, he

[1] The Karnishes made deposits on May 22; June 10; July 11, 23 and 25; August 5 and 14; and September 6. The Karnishes received a $11,993 refund on July 17, and received the $33 account balance after the account was closed.

claimed, had bragged to other Cromwell brokers that he had the Karnishes "eating out his hand." At about the same time, the Karnishes concluded that they had also been cheated by Greenhouse, but decided against amending the complaint by adding Greenhouse as a respondent because it would cause a slight delay in the pending proceeding. [Pages 52-58 of hearing transcript.]

8. On or about August 4, 1997, the Karnishes and Cromwell, Tuccelli, Rosansky, and Loish entered into a Settlement Agreement in *Karnish I*. [Exhibit B to Greenhouse's Answer.]

Paragraphs 2 and 4a of the *Karnish I* Settlement Agreement provided as follows:

> This Agreement is intended to settle and fully resolve all claims and disputes which were or which could have been, lodged against Respondents, their agents and attorneys, as well as predecessor corporations, officers, directors, employees and shareholders by Karnish or any person/entity asserting claims, directly, indirectly or beneficially, on Carnet's behalf.
>
> . . . .
>
> As full consideration for the undertakings in this settlement, the parties agree to perform the following acts: In full settlement of all claims and disputes which were or could have been brought against Respondents, its predecessor corporations, successor corporations, affiliated corporations, officers, directors, employees, shareholders, agents and attorneys by Karnish, Respondents agree to pay Karnish at total of $12,500.00 (twelve thousand and five hundred dollars).

The settlement agreement did not expressly exclude Greenhouse from as an "employee" or "agent" of Cromwell. Also, the settlement amount exceeded the $10,020 losses suffered by the Karnishes while Rosansky was their account executive. [*See* pages 58-59 of hearing transcript.]

9. On October 9, 1997, the Karnishes filed the *Karnish II* complaint, in which they alleged that Greenhouse had used high-pressure tactics and misrepresented the relative risks and rewards in connection with his trading advice.

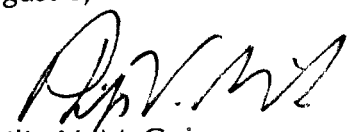
Conclusion

The subject matter of *Karnish I* and *II* involves the identical commodity options account and factual circumstances, which is underscored by the fact that the Karnishes sought in *Karnish I* to recover their entire losses from their Cromwell account and that the Karnishes had considered adding Greenhouse as a respondent near the beginning of *Karnish I*. The settlement agreement in *Karnish I* provides that the agreement was "intended to settle and fully resolve all claims and disputes which were or which could have been, lodged [by the Karnishes] against Respondents, their agents and . . . employees." Because Greenhouse was an employee of Cromwell at the time of the events, he is clearly an expressed third-party beneficiary of the settlement agreement. Accordingly, the Karnishes are estopped as a matter of law from proceeding against Greenhouse.

ORDER

The complaint in this proceeding is barred by the settlement agreement in a related reparations proceeding, *Mary P. Karnish, and Edwin A Karnish v. Cromwell Financial Services, Inc., Arthur Robert Rosansky, Joseph Loish, and Philip Mark Tuccelli*, CFTC Docket No. 97-R12, and accordingly must be, and is hereby, DISMISSED.

Dated August 6, 1998.



Philip V. McGuire,
Judgment Officer