



U.S. COMMODITY FUTURES TRADING COMMISSION

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

CHANG MING LI,

Complainant,

v.

GAIN CAPITAL GROUP, LLC, d/b/a
FOREX.COM

Respondent.

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CFTC Docket No. 1009R024

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ORDER OF DISMISSAL

By this order, we consider respondent Gain Capital Group, LLC's motion to dismiss the complaint.¹ In his complaint, Li seeks an award of \$121,332 for

¹ Motion for Summary Disposition, dated January 28, 2011 ("Respondent's Motion"). Complainant Chang Ming Li filed a response and countermotion. Opposition to Respondent's Motion for Summary Disposition and Complainant's Cross-Motion for Summary Judgment, received February 1, 2011 ("Complainant's Opposition"). Although Gain Capital Group styled its motion as one seeking "summary disposition," we will regard it as a Rule 308(c) motion to dismiss. See 17 C.F.R. §12.308(c) (*authorizing* motions to dismiss on the basis that "none of the matters alleged in the complaint state a claim that is cognizable in reparations"). As we have frequently explained, a 17 C.F.R. §12.308(c) motion to dismiss serves to test a complaint's adequacy, not the parties' evidence. See, e.g., *Saba v. Greco*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,676 at 65,218 n.26 (CFTC Nov. 9, 2010); *Hillpot v. Dorrity*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,931 at 62,323-24 (CFTC Oct. 10, 2008); *Yeager v. Jedlicki*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,935 at 56,841-42 (CFTC Dec. 16, 2004). In contrast, a 17 C.F.R. §12.310 motion for summary disposition tests the sufficiency of the evidence in support of a well-pleaded complaint or answer. *Saba*, [Current Transfer Binder] ¶31,676 at 65,218 n.27. Since Li's complaint

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trading losses from the alleged misrepresentation and nondisclosure of the risks in trading foreign currency (“forex”) and spot metal contracts.² However, as discussed below, the Commission does not have reparations jurisdiction over either of these types of contracts. Accordingly, we dismiss the complaint without prejudice to Li’s right to seek redress in such alternative forums as may be available for adjudication of his claims.³

We discuss forex first. Li’s trading post-dates (and is therefore governed by) the CFTC Reauthorization Act of 2008.⁴ We have recently discussed the

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standing alone reveals that we lack jurisdiction over his dispute, we need not evaluate his evidence.

² Complainant’s Opposition at 2; Respondent’s Motion at 1. Li’s complaint repeatedly states that his claims arise from trading forex and spot metals contracts off-exchange with respondent Gain Capital Group as the counterparty. *See generally* Complaint, dated July 6, 2010; *see also* Complaint, Exhibit 6 (account statements disclosing that “GAIN Capital Group, LLC (NFA ID: 0339826) acts as a counterparty to your trades.... Spot Gold and Silver contracts are not subject to regulation under the U.S. Commodity Exchange Act.”). We take notice of the fact that Gain Capital Group is a registered Futures Commission Merchant. National Futures Association Online Registration System, Status, NFA ID: 0339826, Gain Capital Group, LLC, as of July 7, 2010.

³ *See 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).

⁴ Pub. L. 110-246. Li’s complaint centers on trades that took place in April and May of 2010. Complaint at 4.

effects of those amendments to the Commodity Exchange Act (“CEA”) on the Commission’s jurisdiction over forex contracts,⁵ and we do so again here.

The Reauthorization Act of course post-dates the Commodity Futures Modernization Act of 2000 – a set of amendments to the CEA intended to “clarify” the Commission’s limited jurisdiction over off-exchange contracts for foreign currency.⁶ This authority over forex contracts was expanded by the Reauthorization Act. The focus of both Acts, however, appears to be on regulatory enforcement,⁷ leaving the Commission’s authority narrowly tailored to that purpose.

⁵ See generally *Hedayet v. Gain Capital Group, LLC*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,693 (CFTC Jan. 3, 2011).

⁶ Pub. L. 106-554. 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). We have previously held that under the Modernization Act, the Commission has no jurisdiction over private actions brought against FCMs trading foreign currency off-exchange. *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).

⁷ 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 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
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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.⁸ Although Section 2(c)(2)(B)-(C) extends the Commission's jurisdiction to off-exchange retail forex transactions,⁹ it limits this authority to certain enumerated substantive provisions of the CEA.¹⁰ Most importantly, however, for purposes

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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.

⁸ 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.

⁹ 7 U.S.C. §2(c)(2)(B)(i)(II), 2(c)(2)(C)(i)(I).

¹⁰ 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
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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),¹¹ 6d (authorizing states to sue in federal court on behalf of their residents),¹² 6(c) and 6(d) (authorizing the Commission to institute quasi-judicial enforcement actions)¹³ and 8a (authorizing the Commission to institute quasi-judicial statutory disqualification proceedings).¹⁴ Significantly, Sections 14¹⁵ and 22¹⁶ – the sections that provide for private rights of actions – are not among the procedural sections listed.¹⁷

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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 Li) 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).

¹¹ 7 U.S.C. §13a-1.

¹² 7 U.S.C. §13a-2.

¹³ 7 U.S.C. §§9, 15, 13b.

¹⁴ 7 U.S.C. §12a.

¹⁵ 7 U.S.C. §18 (addressing reparations).

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

¹⁷ 7 U.S.C. §§2(c)(2)(B)(iii), 2(c)(2)(C)(ii)(I).

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.¹⁸ The statute's plain meaning couldn't be better expressed.¹⁹ 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 agreement, contract, or transaction in — (A) foreign currency...**"²⁰ 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

¹⁸ *Russello v. U.S.*, 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. CFTC*, 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).

¹⁹ *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).

²⁰ 7 U.S.C. §2(c)(1) (emphasis added).

ones (including reparations).²¹ 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.²²

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.²³

²¹ 7 U.S.C. §§2(c)(2)(B)(iii) and 2(c)(2)(C)(ii)(I).

²² *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, that Congress was concerned with anything other than matters of public enforcement. See *supra* note 7; *National R.R. Passenger Corp.*, 414 U.S. at 458.

²³ 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);

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Now we turn to spot metals contracts. Although Li, who is appearing *pro se*, neither disputes nor endorses our analysis of the Commission's forex

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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 3. 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 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*, 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.

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jurisdiction, he emphasizes that his claimed losses are tied to a trade in spot gold – not forex.²⁴ He further observes that his gold trades were highly leveraged.²⁵ Turning to the CEA, he then concludes that the Commission has jurisdiction over these trades because they are “leverage” or “margin” contracts for the delivery of “gold bullion” under Section 19 of the CEA.²⁶ This is not a bad try for a *pro se* litigant parsing through the statute to try to make sense of it. However, it is also a perfect example of how a dauntingly complex, esoteric field of statutory law can be inaccessible to the public (and even to lawyers who are not specialists).²⁷

Although not readily apparent from its language, it suffices to note that Section 19’s regulatory jurisdiction is limited to a narrowly defined set of specifically conditioned contracts of ten years or longer.²⁸ There is no

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Bardman, 2006 WL 3478984 at *6. See *Vargas*, [Current Transfer Binder] ¶31,360 at 62,887 n.175.

²⁴ Complainant’s Opposition at 2-3.

²⁵ *Id.* at 4 (“1% margin and 100:1 Leverage ratio”).

²⁶ Complainant’s Opposition at 4. See 7 U.S.C. §23.

²⁷ *U.S. v. Norwood*, 602 F.3d 830, 839 (7th Cir. 2010) (Posner, J.) (“[Norwood’s] *pro se* status has put him at a serious disadvantage in dealing with a complex body of law . . . ; yet given the modest size of his claim, it is hardly likely that he could have found a lawyer to represent him.”).

²⁸ 17 C.F.R §31.4(w). As the Commission has explained:

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suggestion in Li's complaint that the "spot" gold contracts that he traded met these conditions. To the contrary, "spot" transactions are "transactions for the

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[T]he Commission has exercised its authority to specify the standardized contracts that Congress expected to be regulated under Section 19 of the Act. H. Rep. No. 964, 97th Cong. 2d Sess. 51 (1982). As a result, any transaction involving a leverage contract as defined in Rule 31.4(w) for the delivery of a commodity registered under Rule 31.6 is subject to the comprehensive regulation governing the offer and sale of such contracts in Part 31.... In contrast, those transactions that do not meet the Commission's definition of a leverage contract are not within the Commission's regulatory jurisdiction under Section 19 of the Act and are not subject to Commission registration and regulation pursuant to Part 31. This "bright line" distinction between transactions subject to exclusive Commission jurisdiction under Section 19 and those not subject to Commission regulation thereunder is one of the salutary effects of the comprehensive definition adopted by the Commission. Those transactions not subject to exclusive Commission jurisdiction under Section 19 are open to regulation and enforcement by the states. See Section 12(e)(2)(C) of the Act.

49 Fed.Reg. 5498-99 (Feb. 3, 1984).

immediate sale and delivery of a commodity”²⁹ and lie outside the Commission’s jurisdiction.³⁰

For these reasons, we **DISMISS** the complaint **WITHOUT PREJUDICE** to Li’s right to seek redress in such alternative forums as may be available for adjudication of his claims.³¹

IT IS SO ORDERED.

On this 8th day of February, 2011



Bruce C. Levine
Administrative Law Judge

²⁹ *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970 (4th Cir. 1993). “Immediate delivery” can entail several days and the contract can be “rolled over” into a new spot contract. *CFTC v. Zelener*, 373 F.3d 861, 869 (7th Cir. 2004) (Easterbrook, J.).

³⁰ *Salomon Forex, Inc.*, 8 F.3d at 970 (“Congress never purported to regulate ‘spot’ transactions.”); *CFTC v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 578 n.6 (9th Cir. 1982). “Futures contracts” are governed by the CEA and concomitantly, subject to Commission regulations. See 7 U.S.C. §2(a)(1)(A). Futures contracts are “contracts of sale of a commodity for future delivery.” *Id.*; see also *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 318 (6th Cir. 1998). In addition to “spot” contracts, the term “future delivery,” does not include “any sale of any cash commodity for deferred shipment or delivery.” 7 U.S.C.A. §1a(19); see also 17 C.F.R. § 1.3(o). Contracts falling under this latter definition are typically referred to as “cash forward” contracts. See *Co Petro Marketing Group, Inc.*, 680 F.2d at 577 (citing H.R.Rep. No. 93-975, 93d Cong., 2d Sess. 129-30 (1974)). The distinction between contracts for “future delivery” and sales “for deferred shipment and delivery” is not readily apparent and has been the source of much litigation as well as regulatory angst. See generally *Zwirb*, *supra* note 7.

³¹ Li’s countermotion for summary disposition is **DENIED**.