



Comm. Fut. L. Rep. (CCH) ¶ 26,108 at 41,665 (CFTC June 16, 1994), and *Graves v. Futures Investment Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,457 (CFTC 1982).

Applying this standard in various cases sometimes requires differentiating between the types of wrongdoing alleged. In cases where a customer is alleging that he was defrauded by trading promises made when the account was solicited, a cause of action might accrue even after the date on which an account is closed if the customer could not have reasonably discovered while trading was occurring that the broker deviated substantially from what was promised. See, e.g., *Reinhard v. Stotler & Company*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,375 (CFTC Dec. 23, 1988) (claim not barred because customer could not have known or suspected that the promise to have a certain broker making the trades was not being followed since losses alone would not have been enough to alert the customer of the actual trader's identity). On the other hand, the customer's time begins to run, even if he is not aware of *all* the facts underlying an alleged scheme, when he has sufficient facts available as would generally alert him or raise suspicion that he has been lied to or misled in some fashion. If so, then dismissal of the complaint is warranted. *Martin v. Shearson Lehman Brothers/American Express*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. ¶ 23,354 (CFTC 1986).

Summary disposition of a complaint based on the statute of limitations is only appropriate if the pleadings and papers submitted by the parties demonstrate that there are no factual issues in dispute that would require exploration during discovery or making a credibility determination of competing witnesses' testimony. The record in this case demonstrates that summary disposition is proper. Unless otherwise indicated, the following findings of fact are based on complainant's August 2, 2001, narrative attached to his complaint and to account statements attached to that narrative. No fact set out here is alleged by complainant to have been unknown to him at the time it happened. Amounts reflect rounding to the nearest dollar.

Complainant mailed his complaint to the CFTC on August 2, 2001. The complaint, therefore, was untimely if complainant's cause of action accrued more than two years previously, *i.e.*, prior to August 2, 1999. The only issue in this case that presents any type of dispute regarding the timeliness of the complaint is whether Neely, by his own admission, was aware, or should have been aware, before August 2, 1999, of facts sufficient to have alerted him to the wrongdoing about which he now complains.

#### **Summary of Evidence Regarding Complainant's Knowledge**

Whether complainant knew or should have known facts sufficient to alert him to the possibility of wrongdoing is clearly answered by the language of the complaint itself. After detailing how the results of his trading during the fall of 1998 did not comport with the representations made during the solicitation, complainant writes:

After the trade went into my account, Pryor would often tell me that my position was making money; however, I was following the heating oil market on a website and saw that the market was going down and I was actually losing money. My market observations contradicted Pryor's assurances that I was profiting, so I confronted her with

that. Pryor simply stated that her information was more current than mine. Pryor had me speak with Ron Scott, a principal of Madison. I spoke with Scott on at least three separate occasions. Scott assured me that my positions were profitable, when in fact they were not, and then he attempted to get me to purchase pork belly options and to send Madison more money. When I refused, Scott became abrupt and intimidating and tried to make me feel stupid for not buying pork belly options. My heating oil spread expired worthlessly on January 27, 1999. When I refused to send more money to Madison, Pryor stopped telephoning me. Madison sent me my remaining balance of \$585.50.

(Narrative attached to complaint.) The January 29, 1999, account statement attached to the complaint establishes that the \$585.50 was returned to complainant on that date.

Attached to the complaint as well is a copy of a June 6, 2001, CFTC news release in which the CFTC publicized an administrative enforcement action against Madison and its principals, alleging a wide variety of frauds in soliciting customers' funds for options on futures during the period from April 1998 to March 2001. The general allegations in the news release of how Madison's employees were trained to deceive prospective customers seem to track the allegations made by complainant as to Pryor's solicitations: misrepresented track record, downplaying of risk, assurances of profits, etc. Furthermore, the news release and complainant's complaint form both cite to the identical legal provisions allegedly violated: Commodity Exchange Act Section 4c(b) and CFTC regulations 33.10 and 166.3. Other than a reference to having filled out a CFTC "survey" complainant did not provide any explanation for including the news release with his complaint.

The Office of Proceedings Complaint's Section brought the statute of limitations issue to complainant's attention in a telephone call in order to alert him to the possibility that his case could be dismissed as untimely without any explanation (Note to File August 7, 2001). That call resulted in complainant's letter dated the following day, which is set out here:

This letter is in reference to the statute of limitation[s] for filing for reparations. I was not aware of, and had no way of knowing of, any unlawful activities of Madison Financial Group LLC until I was contacted by the [CFTC] Division of Enforcement . . . in February 2001. On March 12<sup>th</sup> I spoke with James R. Andreozzi of the Division of Enforcement and gave him a statement over the phone. It was not until July 2001 that I could actually prove that unlawful activities had taken place. I have enclosed the survey from the Division of Enforcement form the [CFTC] that shows the date they contacted me. The email from Mr. Andreozzi shows the date I gave him my statement.

With that submission complainant included the Enforcement Questionnaire he had filled out and his correspondence referenced in his letter. The email correspondence sent by Mr. Andreozzi included a summary of complainant's statement: the wording in that email is almost identical to the narrative attached to the complaint.

In response to discovery initiated by respondents, complainant filed a number of documents, including additional emails between him and Mr. Andreozzi. That correspondence

shows that on July 12, 2001, Mr. Andreozzi sent complainant a copy of the above-referenced news release and, at least for the first time in the written materials included in this record, informed complainant of the possibility of filing a reparations claim. Complainant sent an email to Mr. Andreozzi the same day in which he requested the forms and instructions for filing a reparations claim. In a subsequent email on July 30, 2001, complainant wanted to know if his reparations claim would affect the Enforcement action; Mr. Andreozzi assured him in a reply a few minutes later that the two proceedings would have no affect on each other.

The final piece of evidence to be considered is complainant's reply to the motion for summary disposition. Complainant wrote in the two paragraphs relevant to this matter:

(1) Madison's defense is that my reparations claim was not submitted in the required amount of time. they state that I [k]new well in advance of the expiration date of the statu[t]e of limitations. This is not true. My claim was accepted by the reparations board.

(2) I knew I was losing money, this is true, however as stated in my complaint, it was not until the CFTC contacted me, and the CFTC filed a complaint that charges Madison with committing fraud that I realized I was mislead [sic] and cheated out of my funds. Madison's attorneys have also stated that I had the ability to follow the heating oil market on a web site all day, as well as check other sources for information on heating oil. This is not true, I had the opportunity once a day at most to check the market [because] I work out in the field most of the day.

The submission also reiterates the manner in which complainant believed he had been misled.

### Discussion

The undisputed evidence in this matter discussed above, consisting entirely of complainant's own submissions, establishes at a minimum that complainant: was aware of his losses as they were occurring; had independent access to information regarding the performance of the markets in which he was invested; recognized the falsity of Pryor's and Scott's alleged misrepresentations regarding his account performance; and refused to provide more funds to continue trading when he had lost most of his money. That complainant "refused" to send in the money is quite telling and paints an entirely different picture than would a decision not to invest because of a lack of funds or any other less purposeful reason. Instead, complainant's choice of words in his narration strongly suggests a recognition that the people soliciting his funds were undeserving of such trust. Furthermore, the fact that complainant did not receive any further calls and had his funds returned to him in January 1999 demonstrates that the relationship between him and his brokers had broken down irretrievably. He suggests no reason for closing his account other than his obvious recognition that the account had not performed as promised.

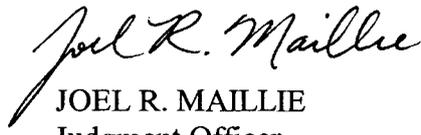
In sum, unless other evidence mandates a different conclusion, it is certain that complainant was aware by the time he closed his account that the account solicitations were fraudulent (assuming the truthfulness of the complaint and subsequent materials). His subsequent statements in his reply to the motion for summary disposition (i.e., that he did not

know until contacted by the CFTC Enforcement Division that he had been lied to) do not change this conclusion. A review of what he told the Enforcement investigator, contained in the investigator's March 13, 2001, email summary to complainant, shows that the statement contains only the exact same information as was submitted by complainant five months later in his complaint narrative. Not a single fact is set out there or anywhere else regarding his contacts with respondents that is alleged to have come new to him as a result of his contacts with Enforcement. The March email summary sets out precisely the pattern of misbehavior, pressurized sales tactics, and false predictions of profitability that complainant later included in his August complaint. Accordingly, it is determined that before he even spoke with the Enforcement investigator there were no *facts* about respondents' alleged improper behavior that he did not know.

There were three things complainant did learn from the Division of Enforcement: (1) that it was considering filing a case, (2) that, by August, it had indeed filed a case, and (3) that the CFTC had a reparations program. But the statute is not tolled as a result of complainant's lack of knowledge either that the regulatory agency considered the conduct unlawful, or that he could file in a particular forum. It began for complainant when he had enough information about the wrongdoing that, with sufficient inquiry, would have resulted in his learning his litigation options in time to file a timely complaint. *See, e.g., Cook v. Monex 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).

For the reasons stated, the complaint in this matter is DISMISSED ON SUMMARY DISPOSITION.

Dated: September 20, 2002

  
JOEL R. MAILLIE  
Judgment Officer