U.S. COMMODITY FUTURES TRADING COMMISSION
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OFFICE OF
PROCEEDINGS

JAY ROSA, Complainant, v. IOWA GRAIN COMPANY, CERES TRADING GROUP, INCORPORATED, PAUL JAMES BROUSSEAU, DARRYL McKENNON OSLER, and MIKE AARON SMALL, Respondents.	*	CFTC Docket No. 00-R020

ORDER ON SUMMARY DISPOSITION

Rosa alleges: one, that respondent Small made various material misrepresentations and omissions in connection with the solicitation and trading of his account; two, that respondents Osler and Brousseau perpetuated and facilitated Small's fraud by making material misrepresentations and omissions in connection with certain trade recommendations; three, that Ceres Trading is liable for the fraud of its agents Small, Osler and Brousseau; and four, that Iowa Grain is jointly liable as the guarantor of its guaranteed introducing broker, Ceres Trading. In response, Mike Small filed an answer; Darryl Osler and Paul Brousseau filed a joint answer; and Iowa Grain and Ceres Trading filed a joint answer. All of the respondents

generally deny any violations or liability,[1] and raise the statute of limitations affirmative defense.[2] Osler and Brousseau also counter-claim for the $692 debit balance. In response to the counter-claim, Rosa asserts that Brousseau fraudulently induced him to authorize the trade that generated the debit balance.

Pursuant to CFTC rules 12.207(c) and 12.204(c), by Order dated June 15, 2000, Rosa, and Brousseau and Osler, were ordered to show cause why the complaint, and the counterclaim, respectively, should not be dismissed as barred by the two-year statute of limitations set out in Section 14 of the Commodity Exchange Act, because there are no genuine issues of material facts to be determined. Rosa filed a reply;[3] Brousseau and Osler did not file a reply.[4] After reviewing the parties'

[1] Rather than produce affidavits by Small, Brousseau and Osler which described their first-hand knowledge of the relevant conversations and events, respondents relied on the written risk warnings and Ceres' perfunctory account-opening compliance review to support their contention that they provided a balanced disclosure of the relative risks and rewards of trading options with Ceres. In response to a *sua sponte* discovery order, Osler produced an affidavit that set out in some detail his version of two conversations with Rosa in August 1997; and Brousseau produced an affidavit in which he stated that he and Osler discussed in August 1997 the debit balance in Rosa's account, and in which he conceded that he could not recall any of his conversations with Rosa.

[2] Since Rosa clearly set out a claim for fraud in connection with the solicitation and trading of his account (e.g., that Small, Brousseau and Osler had, several times, essentially guaranteed that recommended trades would generate large profits), Iowa Grain's and Ceres Trading's second and third affirmative defenses – failure to state a claim upon which relief can be granted, and failure to allege with specificity any acts or omissions which constitute a violation of the Act or CFTC rules, respectively – are, at best, baseless, and, at worst, absurd and frivolous. *See Levi-Zeligman v. Merrill Lynch Futures*, [1992-94 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,236 (CFTC 1994); and *Hall v. Diversified Trading Sys.*, [1992-94 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 (CFTC 1994).

[3] In addition, Rosa addressed the statute of limitations issue in his reply to a *sua sponte* discovery order (filed April 20, 2000).

[4] Osler and Brousseau had been directed essentially to provide any factual information in support of equitable tolling or equitable estoppel.

documentary submissions,[5] it has been concluded that there are no genuine issues of material facts to be determined and thus that the complaint and the counterclaim are both barred by the statute of limitations, and thus that both must be dismissed.

Factual Findings[6]

The parties:

1. Rosa, a resident of Feeding Hills, Massachusetts, represented on his account-opening documents that he was 30 years old, that he owned a used car dealership, that he had an annual income between $25,000 and $50,000, that he had a net worth between $50,000 and $100,000, and that he had no investment experience of any kind. [Exhibit 1, Ceres/Iowa Grain production in response to *sua sponte* discovery order (filed April 25, 2000).]

2. Iowa Grain Company is a registered futures commission merchant ("FCM"), with its principal place of business in Chicago, Illinois. Ceres Trading Group was a registered introducing broker ("IB") guaranteed by Iowa Grain, with its principal place of business in Atlanta, Georgia. Ceres Trading described itself in its promotional brochure as a "Guaranteed Introducing Broker for Iowa Grain."

3. Pursuant to a guarantee agreement between Iowa Grain and Ceres Trading, Iowa Grain agreed that it would be jointly and severally liable for all obligations of Ceres Trading under the Commodity Exchange Act with respect to the solicitation of,

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[5] The parties' principal submissions consist of Rosa's complaint, with exhibits and addenda; Rosa's replies to *sua sponte* discovery order (filed April 22, 2000); Rosa's reply to the Order To Show Cause (filed June 26, 2000); the respondents' answers, with exhibits; Small's replies to *sua sponte* discovery order (filed April 24, 2000); Osler's and Rousseau's joint replies to *sua sponte* discovery order (filed April 24, 2000); and Iowa Grain's and Ceres Trading's joint replies to *sua sponte* discovery order (filed April 24, 2000).

and transactions involving commodity customers of, Ceres Trading. [Ceres/Iowa Grain production in response to *sua sponte* discovery order (filed April 25, 2000).]

Iowa Grain and Ceres Trading also executed an introducing broker ("IB") agreement. Under the IB agreement, Iowa Grain and Ceres Trading agreed, among other things: that Ceres Trading would clear and execute all customer trades through Iowa Grain; that Ceres Trading would be responsible for opening and establishing customer accounts; and that Ceres Trading would indemnify and hold-harmless Iowa Grain from and against all losses, liabilities, damages, expenses and costs suffered by Iowa Grain and that result from or relate to any violations by Ceres Trading of the Commodity Exchange Act.

4. By Order dated November 7, 1999, the National Futures Association ordered Ceres to withdraw from NFA membership and never reapply, and fined Ceres and two Ceres principals (Scott and Robert Parker) $75,000. The NFA complaint had alleged that Ceres used television and radio advertisements that were deceptive, misleading and unbalanced in the presentation of the possibility of profit and the risk of loss. *In re Ceres Trading Group, Inc., Warren Scott Parker and Robert E. Parker, Jr.*, NFA Case No. 99-BCC-5. In a related case, on August 9, 1999, the NFA issued a Decision based on a settlement offer by Iowa Grain to pay a fine of $30,000. The NFA complaint had alleged that Iowa Grain was liable under NFA Compliance Rule 2-23 for promotional material violations by its guaranteed introducing broker, Ceres, and that Iowa Grain had failed to diligently supervise the promotional activities of Ceres. *In re Iowa Grain Trading Group, Inc.*, NFA Case No. 99-BCC-6.

5. The Iowa Grain customer agreement contained a waiver clause that provided in pertinent part that:

> Customer acknowledges and agrees that Iowa Grain shall not be responsible to Customer for any losses resulting from conduct or advice on the part of [Ceres Trading]. Customer specifically agrees that Iowa Grain shall have no obligation to supervise the activities of [Ceres Trading] and Customer will indemnify Iowa Grain and hold Iowa Grain harmless from and against all losses, liabilities, and damages (including attorneys fees) incurred by Iowa Grain as a result of actions taken or not taken by [Ceres Trading].

The agreement also included an indemnification clause that imposed on the customer any costs, including attorneys fees, that Iowa Grain might incur as the result of any dispute. However, the United States Court of Appeals for the District of Columbia has recently upheld the CFTC's conclusion that such contractual waivers are void and unenforceable, because the liability of an FCM under a guarantee agreement cannot be waived in a standardized customer agreement without violating Congressional intent and public policy. *First American Discount Corp. v. CFTC*, 2000 WL 1099978 (D.C. Cir. August 18, 2000) ("[The FCM] had no obligation to make the guarantee, but did so in exchange for the financial benefits both [it and the IB] expected to reap from their joint arrangement. Having received those benefits, [the FCM] will not now be heard to attack the regulation [*i.e.*, avoid or abuse its obligations as guarantor] that was their source."), *affirming Violette v. First American Discount Corporation*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,537 (CFTC 1999); *see Clemons v. Iowa Grain*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,537 (CFTC 1999).

6. Darryl McKennon Osler was a principal of Ceres and a branch office manager of the Ceres branch office in Delray Beach, Florida. In that capacity, Osler: one, spoke to Rosa when he complained about the handling of his account Mike Small and Paul Brousseau; two, recommended the last trade in Rosa's account, a broker-guaranteed trade the resulted in a debit balance; and three, demanded that Rosa pay the debit balance soon after the last trade on August 21, 1997. The trade recommended by Osler generated $792 in commissions and fees. Osler was a registered associated person with American Futures Group from July 1994 to May 1995, with Ceres Trading from January 1996 to May 1999; and with Atlantic Capital Group from May 1999 to the present.

Paul James Brousseau was also a branch office manager of the Delray Beach branch office. In that capacity, Brousseau recommended a gas call spread that generated $3,400 in commissions and fees. Brousseau was a registered associated person with American Futures Group from September 1994 to February 1995; with Ceres Trading from January 1996 to May 1999; and with Atlantic Capital Group from May 1999 to the present.

Mike Aaron Small was also a branch office manager of the Delray Beach branch office. Small solicited Rosa's account and acted as Rosa's account executive. In that capacity, Small recommended six soybean call option spreads, three short option trades, and three long option trades involving heating oil, wheat and soybean option. The trades recommended by Small generated $6,450 in commissions and fees. Small was a registered associated person with American Futures Group from

February 1994 to June 1995; with Ceres Trading from June 1995 to May 1999; and with Atlantic Capital Group from May 1999 to the present.

Osler, Brousseau and Small were principally compensated by a share of the commissions and fees generated by their trade recommendations.

The account solicitation and the account-opening:

7. In December of 1996, Rosa responded to a series of radio commercials and contacted Ceres Trading. Rosa alleges that Small convinced him to open an account and invest $10,500 by making numerous material misrepresentations and omissions concerning the relative risks and rewards of trading options on futures with Ceres. For example, Rosa alleges that Small represented that he could readily triple $7,000 to $21,000 in just 30 days, if Rosa bought heating oil options recommended by Ceres. On December 16, 1996, Rosa signed the Iowa Grain account-opening documents, including a customer agreement. Rosa would invest a total of $10,500 by early January 1997.

Trading activity recommended by Small, Brousseau and Osler:

8. Trading began on December 23, 1996, and would cease on August 21, 1997. As noted above, Small and Brousseau recommended most of the trades, and Osler recommended the last trade. The bulk of the trades involved option spreads, which generated a far greater amount of commissions than would have the straight purchase of the same options. The trades recommended by Small, Brousseau and Osler generated $10,640 in commissions – mostly in the first ten weeks of trading – which resulted in a 101% commission-to-investment ratio, and a 27% commission-

to-premium-paid ratio. Options must consistently generate tremendous profits to overcome this sort of heavy cost burden; as a result, such options trades will rarely break even, let alone realize profits.

9. The Iowa Grain account statements clearly reported: one, credits for deposits and for premiums collected when options were sold; two, debits for commission and fees, and for premiums paid when options were bought; and three, the account balance (available cash) and the account liquidation value (account balance, plus aggregate net liquidation value of open positions). The account statements reported gross profits (net premiums collected) and gross losses (net premiums paid), but did not report the net profits or losses, and did not report the aggregate net profits or losses for spreads. Thus, while the written statements adequately reported the general status of the account – that is, that Rosa was paying more and more in commissions and fees, while the account balance and liquidating value steadily declined each month – the account statements did not concisely or conveniently report the net results of individual trades, and as a result Rosa was forced to rely Ceres' agents to provide fair and accurate reports of the trading results. In this connection, Rosa alleges that Brousseau, on February 28, 1997, informed him that he had made a $7,560 profit on a heating oil trade. However, that figure represented the gross profit, rather than the actual net profit, which was $5,860.

10. By July 31, 1997, the account balance was $1,091, and the account liquidation value was $816. Rosa knew that he had lost most of his investment, and had reason to believe that any promises of profit by Small and Brousseau were not

true or accurate; and in mid-August Rosa left several messages with Ceres in which he "threatened to contact my lawyer," if his calls were not returned.

In response, Osler called Rosa. According to Rosa, after he told Osler that he was "furious" because he "had lost all my money," and "threatened to sue," Osler mollified him by suggesting that he place a broker-guaranteed trade that Osler guaranteed would make money. Rosa agreed. But on August 21, 1997, the trade was closed out at a loss, resulting in a debit balance.

Aftermath

11. On or about August 28, 1997, Rosa called Osler who informed him that he owed Ceres $900. According to Rosa, Osler was "very rude" and hung up on him. Rosa has made inconsistent statements concerning whether he spoke with Osler again. He initially asserted in the complaint that after the late August conversation, "to this day I have yet to hear from anyone." In contrast, he subsequently asserted that on October 16, 1997, he spoke to Osler:

> After discussing the account he stated that if the opportunity came up to make money without a lot of out-of-pocket money he would call. . . . So I waited. In the meantime I called CFTC.

[Rosa's unsworn statement in response to Order dated June 15, 2000 (filed June 23, 2000); *see* Exhibit B, Rosa's reply to Order dated March 23, 2000 (filed April 22, 2000).]

On or about October 2, 1997, Rosa contacted the NFA information center. However, Rosa has not described that contact. [*See* letter dated October 2, 1997, from NFA to Rosa, exhibit to complaint.]

On or about November 19, 1997, Rosa contacted the CFTC: "Where I inquired about my rights and any pending complaints." [¶ 4 and Exhibit C, Rosa's reply to Order dated March 23, 2000, filed April 22, 2000).] The CFTC Office of Proceedings routinely replies to such inquiries by promptly mailing a package of information concerning the CFTC reparations and the NFA arbitration programs, including a brochure "Resolving Customer/Broker Disputes" that prominently explained, on the first page, that an aggrieved customer must file a "complaint within two years after the violation occurred or within two years of the date you should have known of the date."[7] However, Rosa took no further action until October 28, 1999, when he filed his reparations complaint. When asked to explain this delay, Rosa replied:

> The reason for waiting until October 19, 1999 to file an appeal is that I was under the impression that I had 2 years to file. Which I took to be from the date I originally opened the account. As well as having the daily life stresses, my wife was diagnosed with a cardiac problem in December 1997. To whom I was and am taking care of personally, as well as two young children.

[¶ 6, Rosa's reply to Order dated March 23, 2000, filed April 22, 2000); *see* ¶ A, Rosa's reply to Order to Show Cause (filed June 26, 2000).]

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

[7] Rosa received a follow-up questionnaire from the CFTC to which he replied and indicated that he would be filing a complaint. [See¶ 5, Rosa's reply to Order dated March 23, 2000 (filed April 22, 2000).]

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 available legal remedies.[8/] Here, throughout the life of his account, Rosa routinely received account statements that reported the declining fortunes of his account, and on August 12, 1997, Rosa told Ceres that he was furious that he had lost all of his money. At this point, Rosa obviously was fully aware of his trading losses and of the commissions paid; and thus had good reason to suspect any deficiencies, discrepancies or deceptions in respondents' conduct and statements. Upon receipt of he confirmation statement dated August 21, 1997, Rosa knew that the last trade, recommended by Osler, had realized a loss, and had similar reason to suspect Osler's conduct and statements. Thus, by August 21, 1997, at the absolute latest, Rosa had enough information to form reasonable suspicions about respondents' purported misrepresentations and about their handling of the account.

The date that Rosa filed his complaint, October 10,, 1999, is clearly past the two-year statute of limitations deadline, and Rosa's claim will be time-barred unless he

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[8/] *See Gray v. LFG, LLC*, et al., slip opinion, at pp. 5-7 (CFTC September 12, 2000); *Adams v. Japell*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. ¶27,293 (CFTC 1998); *Edwards v. Balfour Mclaine Futures, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. ¶26,108 (CFTC 1994); *Cook v. Monex International, LTD.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. ¶22,532 (CFTC 1985), *reconsideration denied* [1986-1987 Transfer Binder] Comm. Feud. 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 *Marricinni v. Conte-Commodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,793 (CFTC 1986).

can invoke equitable estoppel or equitable tolling. Equitable estoppel focuses on any misleading actions by a respondent. To show that respondents should be estopped from raising the statue of limitations, Rosa must prove that he reasonably relied on an action or representation by them that forestalled him from filing a claim. Here, Rosa's assertion that Osler promised sometime in October 1997 to call if a money making opportunity arose, is insufficient to show reasonable reliance, especially where Osler had already purportedly made a similar unfulfilled promise. Thus, Rosa has failed to show that respondents are estopped from asserting the statute of limitations defense.

Equitable tolling focuses on the reasonableness of the complainant's action or inaction. The factors considered in determining whether a late filing is excused by principles of equitable tolling include the reasonableness of a complainant's continuing ignorance of the filing requirement and his diligence in pursuing his rights. Rosa asserts that he has been burdened with a sickly wife, a young family and a heavy workload. As demanding and important as such responsibilities may be, they do not support a conclusion that Rosa acted diligently, or otherwise excuse his late filing, especially where in October of 1997 he had obtained information about his right to bring a reparations action – including unambiguous information about the two-year statute of limitations – and then did nothing. Therefore, Rosa's claim is barred by the statute of limitations. *See Horelick v. Murlas Commodities*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. ¶25,500 (CFTC 1992).

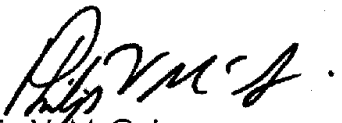
Similarly, the date that Osler and Brousseau filed the counterclaim – February 9, 2000 – is more than two years past the date when respondents liquidated Rosa's account and demanded that Rosa satisfy the debit balance: August

21, 1997. Osler and Brousseau have neither alleged, nor produced any evidence, that any statement or action by Rosa induced them to wait more than two years to initiate a legal action to recover the debit balance, or that during this time they made any reasonable effort to pursue the available legal remedies to recover the debit balance. Thus, the counterclaim is also barred by the statute of limitations.

ORDER

The complaint is barred by the statute of limitations, and thus must be DISMISSED. The counterclaim is also barred by the statute of limitations, and thus also must be DISMISSED.

Dated September 29, 2000.



Philip V. McGuire,
Judgment Officer