



U.S. COMMODITY FUTURES TRADING COMMISSION

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JOHN T. STONE,
Complainant

v.

FIRST PACIFIC TRADING GROUP,
SHAHIN MALEKI and VISION L.P.,
Respondents

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CFTC Docket No. 98-R134

INITIAL DECISION

Complainant alleges that respondents churned his account and defrauded him by "encouraging" him to continue trading throughout 1994, 1995 and early 1996.

Respondents deny the allegations and raise the statute of limitations affirmative defense.

For the reasons set out below, it has been concluded that the complaint is barred by the statute of limitations.

Factual Findings

1. Before opening his account with respondents, Stone had maintained commodity accounts at Jack Carl Futures and Chicago Grain (later Refco), and had traded commodities since the early 1980s. According to respondents, Stone said that he had taken the Dave Caplan Course in commodity trading and wanted to execute trading ideas from that course. Stone reported on his account application an annual salary of \$75,000 to \$100,000, as a

state employee; with \$20,000 available in risk capital. He would lose a total of \$10,000.

[Account Application attached as Exhibit A to Answer.]

2. In August of 1994, Stone opened this account after seeing a small FPTG advertisement in Futures Magazine promoting selling options instead of buying options. [Exhibit B to answer.] Stone called Respondents and negotiated a commission rate of \$42 per round-turn, which is lower than FPTG's standard rate. According to respondents, they agreed to this lower rate because Stone wanted to trade his own account using his own ideas. Stone received and signed all required risk disclosure statements. [Exhibit A to answer.] Stone received and signed an additional non-required risk disclosure statement. [Exhibit C to answer.] Also, Stone admitted he was "well aware that commodities trading may result in loss." [Page 3, complaint.]

3. Trading activity took place in Stone's account from August 17, 1994, to April 10, 1996. Stone was in regular and "frequent" phone contact with respondents, and routinely received – without any alleged delay – account statements reporting the trading activity. In 1994, losses totaled \$1,745 and commissions totaled \$4,140; in 1995, losses totaled \$4,607 and commissions totaled \$5,906; and in 1996, losses totaled \$1,739 and commissions totaled \$420. [Paragraphs 2-3, complaint.]

4. The last trade in the account was initiated on March 7, 1996, and was offset at a predetermined loss point on April 10, 1996, leaving a small debit. Respondents "ate" the \$153 loss by making a commission adjustment to the account on April 30, 1996. The confirmation statement dated September 19, 1996, reflected a key-punch error, not an actual trade for Stone's account. [See account statements attached to complaint.]

5. Stone filed the complaint April 24, 1998. Stone has produced no explanation for why he waited until that date to file the complaint. According to Stone, he never complained to respondents about the handling of his account, and otherwise never spoke to respondents after March 1996. [See page 3 of complaint.]

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 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.^{1/} Here, the record establishes that well before April 10, 1996, when the last open position was liquidated for a loss, Stone was well-aware of his trading losses and of the commissions paid; and thus was well-aware of any deficiencies, discrepancies or deceptions in respondents' conduct and statements. Upon receipt of the April 10, 1996 confirmation statement, Stone knew that he had lost over \$8,000 and paid over \$10,000 in commissions. Therefore, by April 10, 1996, at the absolute latest, Stone had enough information to form reasonable suspicions about respondents' purported words of encouragement and about their handling of the account.

^{1/} See, e.g., *Cook v. Money International, LTD.*, [1984-1986 Transfer Binder] Comm. Feud. 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. Feud. L. Rep. (CCH) ¶23,354 (CFTC 1986); and *Marraccini v. Conti-Commodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Feud. L. Rep. (CCH) ¶23,793 (CFTC 1986).

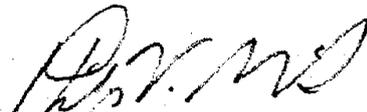
The date that Stone filed his complaint, April 24, 1998, is clearly past the two-year statute of limitations deadline, and Stone's claim will be time-barred unless he can invoke equitable estoppel or equitable tolling. Equitable estoppel focuses on any misleading actions by a respondent. To show that respondents should be estopped from raising the statute of limitations, Stone must prove that he reasonably relied on an action or representation by them that forestalled him from filing a claim. Stone has produced no evidence that respondents made any false promises or otherwise dissuaded or delayed him from initiating legal action, and has thus 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. Stone has produced no evidence to support a conclusion that he acted diligently or otherwise excuse his late filing. Therefore, Stone's claim is barred by the statute of limitations.

ORDER

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

Dated December 17, 1998.


Philip V. McGuire,
Judgment Officer