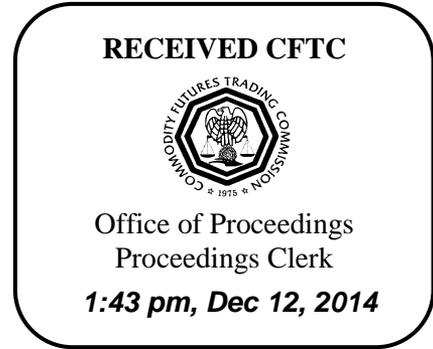




**U.S. COMMODITY FUTURES TRADING COMMISSION**

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



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SHERRY R. MIDDLETON, and  
MARK A. MIDDLETON,  
Complainants,  
  
v.  
  
INFINITY FUTURES LLC, and  
TRANSACT FUTURES LLC,  
Respondents.  
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CFTC Docket No. 11-R011  
Served electronically

**INITIAL DECISION ON REMAND**

**Introduction**

By *Order of Partial Vacatur and Remand* the Commission instructed that I should: one, "afford the complainants the opportunity to present evidence, if any, that would support a finding that TransAct [the futures commission merchant] was the agent of Infinity Futures, the introducing broker;" and two, "also determine whether the applicable statute of limitations would now bar a reparation action against TransAct or whether there is any equitable tolling of the statute of limitations to enable complainants to file a reparation claim against TransAct." The Commission's Order was dated January 2, 2014, but not forwarded by the Commission's Secretariat to be served on the parties until February 3, 2014. On February 13, 2014, complainants filed their motion to add TransAct Futures LLC, formerly known as York Business Associates LLC, as a respondent.

By order dated February 20, 2014, I granted complainants' motion to amend their complaint by adding TransAct as a respondent, and I tentatively concluded that a newly filed claim against TransAct for alleged violations of the Commodity Exchange Act would not be time-barred. On March 31, 2014, TransAct filed its answer. TransAct denies that it violated Section 4b of the Act, denies that it acted as agent for Infinity, and raises the ratification, failure to mitigate damages and statute of limitations affirmative defenses. In connection with the statute of limitations defense, TransAct argues that equitable tolling of the statute of limitations cannot be justified because the Middletons failed to pursue their rights diligently and no extraordinary circumstances stood in their way.

After reviewing the parties post-remand submissions, by notice and order dated November 4, 2014, I put the parties on notice: one, in connection with respondents' statute of limitations affirmative defense, that I also would be considering whether the doctrine of "relation-back" applies to the amended complaint adding Transact Futures as a respondent; and two, in connection with the disputed liquidations, I would be determining whether TransAct had violated Section 4d(a) of the Commodity Exchange Act and Commission rule 166.2. I gave both sides an opportunity to supplement their pleadings by producing arguments addressing these two issues, and also asked respondents to produce copies of the CME Time and Sales reports for May 20, and October 20, 2010, for the Euro FX futures contracts, the liquidations of which on those two dates are the subject of this dispute. In response, TransAct filed supplemental arguments denying that it had violated Section 4d(a) of the Act and Commission rule

166.2, and arguing that the Middletons' amended complaint adding TransAct as a respondent does not relate back to the filing date of their initial complaint.

As explained below, after reviewing the parties' submissions and considering their arguments,<sup>1</sup> I have concluded:

One, that the statute of limitations does not bar the Middletons' amendment to their original reparation complaint adding TransAct as a respondent: first, by operation of equitable tolling of the statute of limitations from December 8, 2010, the date that the Middletons filed their initial complaint, to February 3, 2014, the date that the Commission's Remand Order was served on the parties; and second, by operation of the "relation-back" doctrine.

Two, that TransAct violated Section 4d(a)(2) of the Act and Commission rule 166.2, but did not violate Section 4b of the Act, in connection with the October 20<sup>th</sup> liquidation, and that this violation of Section 4d and rule 166.2 proximately caused \$6,075 in damages.

Three, that TransAct did not violate any provision of the Act or any Commission rule in connection with the May 20<sup>th</sup> liquidation.

Four that TransAct was not acting as an agent for Infinity Futures.

Accordingly, I have awarded Transact to pay the Middletons \$6,075 in damages.

The factual findings in the Initial Decision dated February 3, 2012 are hereby incorporated by reference, and the reader's familiarity with that decision and the related procedural history is presumed.

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<sup>1</sup> The parties' post-remand submissions which were considered include: the Middletons' motion to add TransAct as respondent (February 13, 2014), reply to TransAct's answer (March 31, 2014), and reply to notice (November 17, 2014); and TransAct's answer (March 19, 2014), and supplemental arguments (November 25, 2014).

## **Discussion and Conclusions**

### ***Statute of limitations***

Section 14(a) of the Commodity Exchange Act requires that a reparation complaint be filed within two years of the accrual of the cause of action. Statutes of limitation are designed to foster the general societal interest in timely resolution of disputes and to protect respondents' rights by preventing prejudice that would often result if they were compelled to litigate stale claims. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). When an otherwise valid claim is rejected as untimely, it reflects a judgment that after a certain amount of delay, the individual's right to file a claim is outweighed by society's right to be free of unfiled claims. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

A cause of action accrues—and the statute of limitations begins to run—when the injured party discovers, or in the exercise of reasonable diligence should have discovered, the alleged wrongful conduct. The defense of the statute of limitations must be raised in the answer or it is waived. Once the defense is raised, however, complainant has the burden of proving that the complaint was timely. *Sommer v. ContiCommodity Services, Inc.*, Comm. Fut. L. Rep. ¶24,244 (CFTC 1988).

Here, the date that the Middleton's initially filed their reparations complaint, December 8, 2010, was five months and eight days after the accrual date most favorable to respondents, May 20, 2010, which is the date of the first disputed liquidation, and thus was well within the two year limitations period. However, because complainants did not add TransAct Futures as a respondent until February 13, 2014, three-and-three quarter years after they had filed their original complaint against Infinity Futures, and

its associated persons Anthony Giacomini and James Cagnina, TransAct contends that the two year statute of limitations bars any claim the Middletons may have against TransAct.

### *Equitable Tolling*

Generally, the Commission will toll the statute of limitations when there is a consonance in the goals of safeguarding respondents' rights and assuring the timeliness of claims and the goal of providing complainants with a forum to seek redress for wrongdoing. For example, in *Sommer, supra*, the Commission held that equitable tolling would apply to prevent an otherwise stale claim from being dismissed because respondent had litigated the same claim in an arbitration forum prior to the running of the limitations period. Thus in that case respondent had been aware of the complainant's cause of action within two years of its accrual and had been on notice that it should protect its interest by preserving evidence and maintaining contact with potential witnesses. *See Andreason v. Gray*, Comm. Fut. L. Rep. ¶25,819, at fn. 18 (CFTC 1993) (citing *Sommer* with approval).

TransAct argues that equitable tolling should not be applied in this case because the Middletons have failed to show: one, that they have pursued their rights diligently; two, that some extraordinary circumstance stood in their way; three, timely notice to TransAct in filing their initial claim against Infinity, Cagnina and Giacomini; four, lack of prejudice to TransAct in gathering evidence to defend against the second claim; and five, their good faith and reasonable conduct in filing the second claim. TransAct asserts that the Middletons were experienced traders who knew or should have known, from the account-opening documents and their dealings with Infinity and TransAct that

TransAct was a separate entity and was the exclusive arbiter of the risk assessment level, and thus that the Middletons “simply failed to exercise due diligence by not including TransAct in the initial complaint, and . . . should not be rewarded for unreasonably sleeping on their rights for nearly three years.”

However, TransAct’s anti-tolling arguments are not persuasive. Tolling the statute of limitations during the pendency of this reparations proceeding would be consistent with Congress’ intent that the reparations program provide a more flexible and informal forum than that available in court. *See, e.g., Wade v. Chevalier*, Comm. Fut. L. Rep. ¶ 30,781 at 61,680 (CFTC 2008); and *Cook v. Monex International, Ltd.*, Comm. Fut. L. Rep. ¶ 22,532 at 30,295 (CFTC 1985).

Tolling also would not result in prejudice to TransAct. As a result of the fact that TransAct had conferred with Infinity in the immediate aftermath of the disputed liquidations, and the fact that TransAct shares principals<sup>2</sup> and representative<sup>3</sup> with Infinity and exercises at least partial control over Infinity, TransAct knew that the Middletons had initiated a formal proceeding to recover money lost in connection with a pair of disputed liquidations of trades carried and liquidated by TransAct and introduced by its subsidiary introducing broker, and TransAct was able to monitor the progress of the proceeding, including Infinity’s answer and responses to the *sua sponte* discovery requests.<sup>4</sup> Thus, TransAct was on notice well within the limitations period that it should protect its interest by preserving evidence and maintaining contact with

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<sup>2</sup> Gordy, Mooney, Sabatello and Sass are listed principals with both firms.

<sup>3</sup> Sass initially represented Infinity, and after the remand has represented TransAct.

<sup>4</sup> *See* factual findings 2-6, pp. 5-8, and 19-24, pp. 14-18, Initial Decision.

potential witnesses. In these circumstances, Transact cannot claim prejudice from the delay in filing an amended reparations complaint adding TransAct as a respondent.

Two additional equitable factors support tolling. First, during the life of the Middletons' account, after consulting with TransAct, its subsidiary Infinity would never disclose to the Middletons that Transact had made a key punch error in August and as a result had incorrectly adjusted the risk setting in their account, which in turn would lead directly to the disputed October liquidation that would not have happened had the risk setting not been erroneously adjusted. Second, Infinity, which has been represented in this proceeding by a principal of both firms, did not disclose TransAct's keypunch error in the joint answer,<sup>5</sup> and would not disclose TransAct's keypunch error in this proceeding until prompted by a *sua sponte* discovery request.

Accordingly, it is concluded that the statute of limitations should be equitably tolled from December 8, 2010 (when the initial complaint was perfected) to February 3, 2014 (when the Commission's remand order was served). *See Haekel v. Refco, Inc.*, 198 F.3d 37, Comm. Fut. L. Rep. ¶27,938 (2<sup>nd</sup> Cir. 1999) (The tolling of the statute of limitations began on the date that the Commission accepted Haekel's complaint and ended on the date that the Commission ordered Haekal to file a bond.). As a result, the Middleton's amended complaint adding TransAct as a respondent, filed just ten days after the tolling period had ended, was timely filed and is not time barred.

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<sup>5</sup> In the joint answer, Infinity and its co-respondents did not mention TransAct's key punch error in connection with the second disputed liquidation, but rather asserted opaquely: "On October 20, 2010, the Claimant was liquidated as the daily losses in the account surpassed the predetermined risk assessment amount." [Page 2, joint answer.]

### *Relation back*

Under the relation-back doctrine, when a complaint containing formal or technical defects is corrected, the amended filing ordinarily relates back to the date of the original filing of the complaint for purposes of the statute of limitations. In order to amend a timely filed complaint more than two years after the cause of action has accrued, a complainant must demonstrate that the amendments “relate back” to the time of the original complaint. In applying the relation-back doctrine, the Commission has looked for guidance to Rule 15(c) of the Federal Rules of Civil Procedure. *Dawson v. Carr Investments*, Comm. Fut. L. Rep. ¶28,983, n.2 (CFTC 2002). That rule provides that an amended complaint relates back to the date of the original complaint when the claims asserted in it arise “out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Permitting an amended complaint to relate back to claims that have been asserted before the limitations period has run does not offend the principal purpose of a statute of limitations, which is to prevent the assertion of stale claims. *Adams v. Jappell*, Comm. Fut. L. Rep. ¶27,293 (CFTC 1998). In this connection, the Commission has noted that “In close cases, where there is some doubt as to whether a new claim should be barred, relation back should be liberally permitted, ‘especially if no disadvantage will accrue to the opposing party.’” *Dawson* (citation deleted).

The Commission has set out three criteria for enabling the relation back of an amended pleading:

Although our reparations procedure contains no specific rules governing the amendment of a timely complaint to add a respondent after the statute of limitations has expired, we have often looked to the Federal Rules of Civil Procedure for analogous guidance in situations not covered

by the reparations rules. *See e.g., Southerton v. Bache Halsey Stuart Shields* Comm. Fut. L. Rep. ¶22,248 (CFTC 1984); and *Reho v. Dean Witter Reynolds* Comm. Fut. L. Rep. ¶21,943 at 28,373 (CFTC 1981). The most relevant provision here is 15(c).

In order to be timely under this rule, an amendment filed outside the limitations period must relate back to the earlier date that the complaint was filed. Under [Fed. R. Civ. P.] 15(c) three criteria are considered in determining whether an amendment adding a party relates back to the time the complaint was filed: (1) does the claim or defense asserted in the amended pleading arise out of the conduct, transaction or occurrence set forth in the original pleading; (2) has the party to be added received such notice of the institution of the action that it will not be prejudiced in maintaining a defense on the merits; and (3) did the party to be added know, or should it have known, within the period of limitations, that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. *See Kirk v. Cronwich*, 629 F.2d 404, 407 (5th Cir. 1980), citing *Marks v. Pratt Co.*, 607 F.2d 1133, 1156 (5th Cir. 1979), 3 J. Moore's *Federal Practice* ¶15.15[4]; 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §1498.

*Oram v. National Monetary Fund*, Comm. Fut. L. Rep. ¶23,670 (CFTC 1987). If the Middletons can meet these three criteria, their amended complaint will be deemed to have been filed within the statutory limitation.

The first two criteria clearly support relation-back in this case. As for the first criterion, it is uncontroverted that the Middleton's claim against TransAct seeks the same relief and incorporates the same core set of facts as the original complaint, that is, the two disputed liquidations, the second of which would not have occurred but for TransAct's keypunch error. As for the second criterion, from the beginning of this proceeding, and well within the limitations period, TransAct -- through a representative and principals shared with Infinity -- has had knowledge of a possible claim that it should protect its interest by preserving evidence and maintaining contact with potential witnesses. Thus, TransAct has not been prejudiced in presenting a defense on the merits.

The third criterion is a closer call. According to TransAct, the Middletons are experienced traders who should have gleaned the nature of its FCM-IB relationship with Infinity, including TransAct's presumptive role in any liquidation, by the time they had filed their original complaint. Thus, according to TransAct, the Middletons' failure to name TransAct in the initial complaint was not an excusable mistake. Nonetheless, the word "mistake" in Rule 15(c) should be read liberally. *See, e.g., Taliferro v. Costello*, 467 F. Supp. 33, 36 (E.D. Pa. 1979). In this connection, any knowledge that the Middletons had about the relationship between TransAct and Infinity was materially undermined by the significantly delayed disclosure of TransAct's key punch error. Under these circumstances, it would not be reasonable to conclude that the Middleton's showed inexcusable neglect in failing to name TransAct in their original complaint.

Furthermore, in examining the third criterion, courts have focused on whether the original defendant and the substituted or added defendant have sufficient identity of interests. *See, e.g., Raynor Bros. v. American Cynamid Co.*, 695 F.2d 382 (9th Cir. 1972); *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983). Here, TransAct's interests are sufficiently identical to Infinity's that TransAct should have known that the Middleton's would have named them in the complaint, but for their ignorance of the existence of TransAct's keypunch error and the essential role that the key punch error played in the October forced liquidation. Furthermore, the record establishes common ownership and control and closely coordinated operations between Transact and Infinity. Most significantly, Infinity sought guidance from TransAct on how to handle the dispute over the October liquidation, which effectively was to tell the Middletons nothing about the key punch error that led to the liquidation.

Finally, TransAct places great weight on the statement near the end of the Middleton's original complaint about "the lack of follow-through or communications on this matter on the part of Jim Cagnina." TransAct essentially claims that this statement represents the gravamen of the Middleton's complaint, and thus that it could not reasonably have known that it could potentially be named as a proper party to such a complaint. However, a careful reading of the original complaint shows that TransAct's interpretation is highly selective, unduly constricted and otherwise plain erroneous. When read in the context of the entire complaint, the passage in question clearly does not relate to the Middleton's core complaint about the liquidations, but rather it merely sets out a factual description of the end of the two sides' efforts to resolve their dispute before going to litigation. Moreover, with the exception of the mitigation defense, the focus of Infinity's answer was on the liquidations, not on Cagnina's "follow-through" after the liquidations. Similarly, the focus of Infinity's responses to the *sua sponte* discovery requests was on the circumstances around the liquidations. Thus, in these circumstances, the Middleton's amended complaint against TransAct is timely because its filing relates back to the date that their original complaint was filed.

### ***Agency***

The weight of the evidence supports the conclusion that TransAct was not an agent for Infinity. Most significantly, Giacomini who was acting on behalf of Infinity, showed deference to TransAct when he asked Gordy who was acting on behalf of TransAct how to handle the Middletons' dispute over the October liquidation. Also, Infinity acted as agent for TransAct during the account opening, during the trading of

the account, and -- most relevant here -- when discussing with the Middletons matters like margin requirements and risk settings.

### ***Violations and Damages***

As noted in the first Initial Decision, TransAct's unanticipated reduction of the account risk setting from \$47,000 to \$6,000 constituted a *de facto* arbitrary adjustment of great magnitude. The fact that TransAct's keypunch error, a proximate cause of that adjustment, appeared inadvertent or negligent does not mitigate the arbitrary and unreasonable nature of the resultant adjustment. Moreover, the various exculpatory provisions and warnings in the customer agreement giving TransAct the discretion to adjust the account risk setting and margin requirements and to liquidate undermargined trades are not sufficient to overcome the duty to exercise that discretionary authority in a reasonable fashion. *See Lee v. Lind-Waldock & Co.*, Comm. Fut. L. Rep. ¶28,173, fn. 13 and accompanying text at 50,179-50,160 (CFTC 2000) (In resolving disputes under the Act, the Commission has traditionally focused on the obligations Sections 4d and 4b of the Act impose on FCMs rather than the waivers implicit in some provisions of standardized agreements between FCMs and their customers.). Since TransAct lacked a reasonable basis for the disputed liquidation on October 20, 2010, TransAct's unilateral liquidation on that date was unauthorized, and thus in violation of Section 4d(a)(2) of the Commodity Exchange Act and Commission rule 166.2.<sup>6</sup>

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<sup>6</sup> Section 4d(a)(2) of the Commodity Exchange Act provides, in pertinent part: "It shall be unlawful for any person to be a futures commission merchant unless . . . such person shall, whether a member or nonmember of a contract market or derivatives transaction execution facility, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer...." Commission rule 166.2 requires FCMs to obtain specific authorization to make any trade, in the absence of a written power of attorney

After considering TransAct's mitigation and ratification arguments, for the reasons stated in the Initial Decision, I have determined that the proper measure of damages is the loss realized on the liquidation on October 20, 2010: \$6,075.

Since the record is devoid of any evidence that TransAct acted recklessly or with intent to defraud in connection with the liquidation on October 20, 2010, the Middletons have failed to show that TransAct violated Section 4b of the Act.

For the same reasons that the Middletons failed to establish violations by Infinity in connection with the May 20, 2010 liquidation, they have failed to establish violations by TransAct in connection with that liquidation.

### **ORDER**

The Middletons have established that TransAct Futures LLC violated Section 4d(a)(2) of the Commodity Exchange Act and Commission rule 166.2, and that this violation proximately caused \$6,075 in damages. Accordingly, TransAct Futures LLC is ordered to pay to Sherry Middleton and Mark Middleton reparations of \$6,075, plus interest on that amount at 0.12% compounded annually from October 20, 2010, to the date of payment, plus \$125 in costs for the filing fee.

December 12, 2014.

  
Philip V. McGuire,  
Judgment Officer

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granting discretionary trading authority. Unlike Section 4b of the Act, Section 4d and rule 166.2 do not require a showing of recklessness or intent to support a violation.