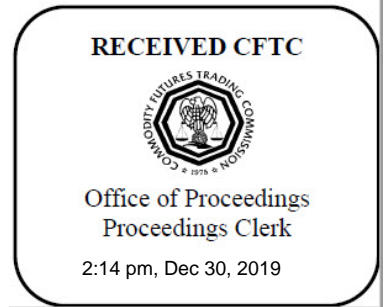




U.S. COMMODITY FUTURES TRADING COMMISSION

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



SCOTT L. SIEPKA,
Complainant,

v.

ALEXANDER BEROV,
FARR FINANCIAL, INC., d/b/a
GO FUTURES, and EMAUDE TAYEBI,
alias ALEX TAYEBI
Respondents.

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CFTC Docket No. 16-R012
Served electronically

INITIAL DECISION

Complainant Scott Siepka brings this reparations proceeding against Respondents Alexander Berov, GO Futures (also doing business as Farr Financial, Inc.), and Alex Tayebi (also known as Emaude Tayebi) by way of a complaint filed March 3, 2016. That Complaint was amended on May 9, 2016.

Siepka complains, for various reasons, about four options trades placed on September 22, September 25, October 7 and October 8, 2015. He alleges that the September options trades were done with his consent but without informing him of the trading commissions he would be charged. Complaint Addendum at 1-2. He alleges that the October 2015 options trades were made without his knowledge or consent. *Id.* Siepka further alleges when he complained about these trades to Alex Tayebi, Tayebi threatened him with expensive litigation. *Id.* He finally alleges that

he was wrongfully charged \$49 per month for the use of Firetip Pro. Complainant's Rebuttal to Answer at 3 (Aug. 10, 2016). For the reasons that follow, this Complaint is dismissed with prejudice.

I. Relevant Procedural History

Siepka filed his Complaint on March 3, 2016, and his Complaint Addendum on May 9, 2016. Respondents filed their Answer on July 22, 2016. This case was forwarded to then-Judgment Officer McGuire on October 6, 2016, and discovery began at that time.¹

Respondents filed a Motion for Summary Disposition on February 28, 2017, which was fully briefed by March 6, 2017. I denied Respondents' Motion (Order (Aug. 27, 2019)), and held a prehearing conference on October 11, 2019. The merits hearing occurred on November 21, 2019, and there were two witnesses: Complainant Siepka, and Respondent Alexander Berov. The record is complete and the case is ready for disposition.

II. Findings of Fact

Siepka opened his account at Ironbeam, a registered Futures Commission Merchant, through Respondent Farr Financial, a registered Introducing Broker (IB), first in 2010. He closed that account in 2011 because "it was getting a little confusing to [him] and [he] wasn't really making money." Hearing Tr. at 8-9. However, Siepka reopened his account either in 2014 or 2015; he could not be

¹ The case was assigned to me on July 27, 2017, and I was formally appointed by the Commission on April 9, 2018. Order (April 19, 2018).

certain of the year he reopened his account.² Hearing Tr. at 9. He primarily intended to trade S&P E-mini futures as a means of “offset[ing] . . . potential stock losses and for profits.” Hearing Tr. at 9-10.

Siepka is financially literate. He graduated from high school and eventually founded his own insurance agency. Hearing Tr. at 7. Siepka has at least several years of experience trading S&P E-mini futures, Hearing Tr. at 7-10, but has no experience trading futures options, *id.* at 10-11, which are the subject of this reparations proceeding.

At some point in or before 2015, Ironbeam began using the Firetip trading platform, and customer requests for help using the software were forwarded to the customer’s IB. Answer ¶ 1. Siepka wanted assistance using Firetip, and on September 22, 2015 he called Farr Financial seeking help. Respondent Alexander Berov, an Associated Person of Farr Financial, took the call. *Id.* Berov connected remotely to Siepka’s Firetip platform. At no point did Berov see his username and password, nor was he able to see other applications that may have been running on Siepka’s computer. Hearing Tr. at 22-23, 26-27, 30-31. Berov’s access was limited to sharing Siepka’s Firetip screen. *Id.*

² Respondents provided Siepka’s account opening documents for the first account he opened with them in 2010. *See* Respondents’ Motion for Summary Disposition at Ex. B (2010 Account Documents). The account opening documents for Siepka’s second account opened sometime between 2014 and 2015 were not provided. *See* Hearing Tr. at 9. However, the account opening documents are not necessary to make my decision. The crux of this litigation stems from trades Siepka contends occurred without his permission, regardless of which documents controlled the contractual obligations of his account. *See* Hearing Tr. at 8-9.

Berov showed Siepka how to use Firetip while they were connected. Siepka and Berov also discussed futures options. Berov began explaining how and under what circumstances he himself trades S&P E-mini options. Sept. 22, 2015 Tr. at 9-10. When Siepka informed Berov that he never traded these options and he was unfamiliar with them, Berov started giving him examples of how to trade S&P E-mini and crude oil options and how to enter those transactions. *Id.* at 10-29. Berov then explained how Siepka might add three S&P E-mini call options expiring in October 2015, and the time frames Siepka could and should exit those options. *Id.* at 29-32. Berov specifically asked Siepka if he wanted to buy those three S&P E-mini options, informing him that it would deduct the option value from Siepka's trading power. *Id.* at 32-33. Berov did not disclose the commissions for those transactions. Siepka authorized Berov to place those options trades without knowing a commission would be charged. *Id.* at 33-36.

Berov did not enter those trades through Siepka's account or Siepka's Firetip platform; rather Berov entered the trades on Siepka's behalf through his own platform, as was his standard practice when entering trades on behalf of a customer. Hearing Tr. at 29. He did not inform Siepka that there was a \$249 commission associated with these S&P E-mini options. September 22, 2015 Call Tr. *passim*; Hearing Tr. at 11. Although the commission was not disclosed to Siepka, Respondents credited the \$249 commission to Siepka's account before Siepka filed this reparations proceeding. Complainant Rebuttal to Answers at 1 (August 10, 2016); Hearing Tr. at 11.

Siepka called Berov again on September 25, 2015 because he was uncomfortable with his option positions. Answer ¶ 5. Berov recommended that Siepka exit the options. *Id.* Siepka agreed, and Berov liquidated the positions on his behalf for a total net profit of \$170.91. *Id.* As of September 26, 2015, Siepka held no options positions. Answer Ex. B (monthly activity statements).

On November 4, 2015, Respondent Alex Tayebi, also an associated person of Farr Financial and Berov's supervisor, called to inform Siepka that there was a margin call on his account and that he had to exit certain trades placed in October 2015. Tayebi was referring to two October 2015 S&P E-mini options sold on October 7 and 8, 2015. Answer Ex. D. These trades were placed electronically using Siepka's Tag50 ID number of XXXX6691 on October 7 and October 8, 2015. Resp. Motion for Summ. Disp. Ex. E (Higgins Decl. ¶ 3 (Feb. 28, 2017)). Because they were made using his Tag50 ID and account number, the options trades could only have been made by logging into Siepka's account with his username and password. *Id.* Siepka actively traded S&P E-mini futures during this same month (October 2015). Answer Ex. B and D (monthly activity statements).

Siepka cannot recall how these October S&P E-mini options trades were placed. Hearing Tr. at 12.³ But only someone with Siepka's login credentials could have entered these trades. And Respondents Berov and Tayebi did not have access to Siepka's password, Hearing Tr. at 22-23, 26-27, 30-31, nor did they place these

³ There is no dispute that Siepka himself traded S&P E-mini futures in October.

trades, Resp. Motion for Summ. Disp. Ex. F (Berov Decl. ¶ 4 (Feb. 28, 2017)); Hearing Tr. at 14-16, 29. Moreover, there is no discernible motive for Respondents to have placed these options trades using Siepka's login information. Berov would not have made any money for placing a trade through a customer's account; his commissions were paid out only if Berov placed them through his own login on a customer's behalf. Hearing Tr. at 26-28. But these options trades were made from Siepka's login.

The S&P E-mini options trades placed in October cost Siepka a net loss of \$8,875.30, Answer ¶ 17, and Siepka and Tayebi had a series of conversations in November and December 2015 regarding these trades. In a December 2015 call, for which there is no transcript, Tayebi informed Siepka that litigation would get expensive for Siepka. Siepka perceived this as a threat, and it prompted him to complain to the NFA in December 2015, and file a reparations complaint against Respondents before the Commission in March 2016.

On August 23, 2016, Tayebi sent Siepka a message noting that \$441 was credited to his account for the \$49 per month Firetip fee. Email from Tayebi to Siepka re Firetip Pro (Aug. 23, 2016). The next day, Tayebi sent an email to Siepka containing the following language: "given the outstanding reparations complaint we will be returning your account balance and closing your account. We will waive the wire fee in this particular circumstance." Email from Tayebi to Siepka re Firetip Pro (Aug. 24, 2016).

On November 17, 2016, Siepka sent Tayebi an email stating: “I was organizing my desk and discovered a check from Ironbeam dated 8-30-2016 for \$9,273.37. Since I didn’t close my account, I’m perplexed why Ironbeam sent me a check. Please advise. . . .” Email from Siepka to Tayebi re Siepka Check (Nov. 17, 2016). Tayebi reminded him by way of an email sent a few days later that he told him in August his account would be closed. *Id.* Having closed his account, Siepka’s relationship with Respondents has ended but for this reparations proceeding.

III. Legal Discussion and Analysis

A. Complainant’s Allegations

Three of the four grievances Siepka has against Respondents can be easily resolved. First, the undisclosed \$249 commission was credited to Siepka’s account, and so even assuming without finding that the conduct violated the Commodity Exchange Act (CEA) and its regulations, it caused no damages to Siepka and is not redressable here. CEA § 14(a)(1); 7 U.S.C. § 18(a)(1). Second, the same analysis applies to the \$49 monthly charge for use of Firetip Pro; even if it was charged to Siepka in error, those charges were eventually credited to his account and so there are no damages to be recovered here. Third, Tayebi’s representation to Siepka that litigation could get very expensive for him—even if it was a threat—spurred Siepka to take action against the Respondents by complaining to the NFA and filing a

formal reparations complaint against them before the Commission. In other words, Tayebi's conduct did not dissuade Siepka from pursuing his rights.⁴

Siepka dispensed of the fourth grievance against Respondents himself by way of his testimony. Siepka alleged in his complaint and pleadings that Respondents placed S&P E-mini options trades in his account on October 7 and October 8, of which he was unaware. Siepka stated repeatedly that he could not have placed these trades because he did not understand options and only had literacy in trading S&P E-mini futures. Hearing Tr. at 14-16. However, he admitted at hearing that he had no proof that Respondents actually placed the options trades, or even a theory of how and why they would have done so. *See, e.g.*, Hearing Tr. at 14-16. He stated "I can't say Mr. Berov did it, I can't say Mr. Tayebi did it, I can't, I can't accuse anyone because I don't exactly know." Hearing Tr. at 14. He also testified:

I don't know how I could have placed it if, I mean I know I did try to trade an S&P trade that day or the next day, I know that. But I wouldn't even know how to trade an options [trade] because I understand options a little bit with you know, the, the regular stock market, but [I have] zero knowledge in the options market. . . . So that's why, that's why I'm suspect about it because I don't know how I could have ever made that trade because I, . . . you know, I don't even know I could have stumbled through it.

Hearing Tr. at 14.

When I reminded him at the hearing that he had to show that it was more likely than not the Respondents violated the CEA or its regulations, Siepka testified that his suspicions regarding these trades were aroused by the undisclosed

⁴ This Initial Decision does not address the issue of whether such a threat would even constitute a violation of the CEA or any regulations thereunder, since it plainly did not cause Siepka any damages.

commissions on the September options trades and Tayebi's treatment of him. Hearing Tr. at 16-17, 21. But he specifically replied, "My opinion on this is that I can't prove" that Respondents effectuated the complained-of trades. Hearing Tr. at 16. This admission that he had no proof that Respondents were responsible for his chief allegation falls far short of proving his claims against Respondents by a preponderance of the evidence standard. *O'Brien v. Forex Capital Markets, LLC*, CFTC Dkt. No. 17-R006, 2019 WL 5861955 at *4 (CFTC Oct. 16, 2019); *In re Citadel Trading Co.*, CFTC Dkt. Nos. 77-8, 80-11, 1986 WL 66170 at *9 (CFTC May 12, 1986).⁵

Because none of his allegations are sustainable under the evidence, Siepka's case is dismissed.

⁵ Moreover, it is entirely possible, as Siepka himself suggested, that he accidentally placed the options trades. Although I find Siepka to be earnest in his testimony and I find that he told the truth to the best of his recollection, his general ability to recall events regarding his account or accounts with Farr Financial was less than stellar. By way of a few examples—Siepka was inconsistent on when Tayebi informed him that litigation could get expensive for him. He alternately said that conversation took place in November and that Respondents' November call transcripts omitting that conversation must have been doctored, to saying that conversation must have taken place in December and there must be no transcript for it. Second, although Respondents produced his account opening documents from 2010, Respondents' Motion for Summary Disposition at Exs. A & B, Siepka never asserted that those documents were associated with a prior account which he in fact closed. It did not come out until the hearing that he in fact had two accounts with Farr Financial. Hearing Tr. at 8-10. Third, Respondent Tayebi emailed Siepka in August 2016 that he would be receiving a check for the remaining balance in his account. Presumably he knew that amount would be sizable. But in November 2016 he came upon the check—apparently randomly—and asked Tayebi what it was for. *See* Nov. 22, 2016 email from Tayebi to Siepka. A roughly \$9,200 check is not typically the amount of money a person on high alert for fraud misplaces, particularly when that person is in litigation over the account from which that check was issued.

B. Attorney's Fees

Respondents request an award for attorney's fees under Commission Rule 12.314(c)⁶ on two bases: 1) Paragraph 31 of the Customer Agreement, which sets forth the prevailing party's right to request attorney's fees;⁷ or alternatively 2) the bad faith nature of Complainant's actions litigating this matter in conjunction with his previous litigation history. Resp. Motion for Summ. Disp. at 7-9. Neither of these grounds provides a basis to award attorney's fees here today.

Attorney's fees have not been awarded in this forum pursuant to a contract. *Bianco v. Cytrade Financial, LLC, et al.*, CFTC Dkt. No. 06-R015, 2008 WL 4449365 at *2 (CFTC Sept. 30, 2008) (noting that the rules of this forum supersede any dispute resolution provisions in the contract). I elect not to start doing so here.

Respondents argue that Siepka filed his Complaint in bad faith because of the sparse factual record supporting Siepka's claims. Resp. Mot. for Summ. Disp. at 8. This conduct is insufficiently "vexatiou[s], wanto[n] or oppressive" to warrant paying the prevailing party's attorney's fees. *See Sherwood*, 1979 WL 11487 at *8-9 n.26 (denying attorney's fees); *Brooks v. Carr Investments, Inc.*, CFTC Dkt. No. 96-

⁶ Commission Rule 12.314(c) states in pertinent part "the [JO] may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney's fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest, to the party in whose favor a judgment is entered."

⁷ Paragraph 31 of the Customer Agreement reads in relevant part "Customer agrees to pay all expenses, including attorney's fees, incurred by Ironbeam: a) to successfully defend any claim Customer brings against Ironbeam or; b) to collect any debit balances in Customer account(s)." It is not clear if this paragraph remained effective for Siepka's second account, but even if it did, I find it does not result in the payment of attorney's fees.

R100, 2002 WL 927614 at *4 (CFTC May 9, 2002) (same); *Lee v. Peregrine Financial Group, Inc.*, CFTC Dkt. No. 98-R127, 2005 WL 2171408 at *2 (CFTC Sept. 7, 2005) (same).

The request for attorney's fees is therefore DENIED.

CONCLUSION

For the reasons discussed above, this case is DISMISSED with prejudice and the request for repayment of Respondents' attorney's fees is DENIED.

Dated: December 30, 2019

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Judgment Officer