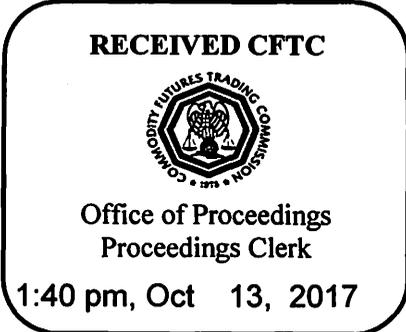




U.S. COMMODITY FUTURES TRADING COMMISSION

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

ALEX LEMU,
Complainant,

v.

OANDA CORP.
Respondent.

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CFTC Docket No. 13-R017
Served electronically

INITIAL DECISION

Before: Kavita Kumar Puri
Judgment Officer
Commodity Futures Trading Commission
Washington, D.C.

Introduction

Reading Complainant’s reparations complaint broadly,¹ Alex Lemu alleges that OANDA Corporation fraudulently solicited his business by failing to disclose the risks associated with forex trading, and committed fraud by failing to disclose his trading losses. Lemu seeks the full amount of his trading losses, \$55,620, in damages as a result of the alleged fraud. After carefully considering the parties’

¹ See *Tkac v. Rosenthal & Co., et al.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,812 (CFTC Apr. 23, 1979) (dismissing complaint by Initial Decision after “construing the complaint broadly”).

written submissions,² I have concluded that Lemu has failed to establish, by a preponderance of the evidence, any of the alleged violations.

The Parties

1. Complainant, Alex Lemu, resides in Washington, D.C., and opened an account with OANDA Corporation in February 2008 to trade retail foreign exchange contracts (“forex”).

2. Respondent, OANDA Corporation, has a place of business in New York, New York, and has been registered as a Retail Foreign Exchange Dealer with the Commission since 2010, and has been a Forex Dealer Member of the NFA since March 2003.

The Facts

1. Lemu applied for an account to trade forex with OANDA Corporation on January 25, 2008.

2. His account was opened on February 15, 2008, and in that same month, he invested \$7,000.

3. Between February 2008 and May 2013, Lemu invested \$84,700 and withdrew \$29,080. Compl. Add. This \$29,080 in withdrawals includes the \$2,060 he received on May 20, 2013, when he closed out the remaining value of his account.

Answer Ex. F (Account Statements).

² By Order dated February 27, 2014, Judgment Officer McGuire ruled that based on his review, oral hearing was not required to resolve any of the factual issues. Neither party objected to that ruling. Further, the parties waived discovery in this reparations matter, and neither party availed themselves of the opportunity they were granted in that same Order to present additional proof or closing arguments. Accordingly, proof in support of the Complaint and the Answer are to be found in the Complaint, Complaint Addendum, Answer, and Supporting Exhibits to that Answer.

4. As of May 20, 2013, when he closed out his account, he had lost \$55,620 of his total investment (\$84,700 minus \$29,080).

5. On May 25, 2013, he filed this reparations complaint, seeking \$55,620 in damages.

Analysis and Conclusions

Lemu alleges that OANDA engaged in fraudulent solicitation by failing to disclose the risks associated with forex trading; and committed fraud by failing to keep him apprised of his account status. To prevail on any of these allegations, Lemu must establish that they occurred by a preponderance of the evidence. *See, e.g., In re Flaxman*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,364 at 25,713 n.6 (CFTC Feb. 22, 1982), *affd.*, 697 F.2d 782 (7th Cir. 1983); *In re Lincolnwood Commodities, Inc. of California*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,986 at 28,224 n.70 (CFTC Jan. 31, 1984). Because Lemu has not done so, his reparations Complaint must be dismissed.

“To prove fraudulent solicitation of prospective or actual customers,” a complainant “must establish three elements: (1) a misrepresentation or omission of information occurred; (2) that was material; and (3) made with scienter.” *In the Matter of Forex Global Solutions Inc.*, [2012-2013 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 32,593 (CFTC 2013) (citing *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1043 (2004)). Lemu has not established any misrepresentation or omission by OANDA.

As an initial matter, Lemu claims that he “was contacted by Oanda Corporation in January 2008, and was told the opportunity of investment in foreign exchange.” Compl. at 1. He even claims that he “never knew the existence of investing in foreign exchange before [he] was contacted by Oanda Corporation.” *Id.* But this claim—which itself does not identify any actionable misstatement or omission—is refuted by specific evidence that Lemu was in fact actively searching for forex dealers. OANDA introduced evidence that sixteen days before Lemu applied for an account with OANDA, he posted a message on a forex message board that stated “I am just a demo trader and was confused as to where to get authentic information on the brokers before I put real money at risk. I am very pleased to find that there is a real army out there . . . to help me make the right choice.” Answer ¶ 2 & Ex. A. Lemu did not dispute this evidence or otherwise challenge its credibility, making it difficult to believe that OANDA cold-called him before he knew anything about forex. Additionally, OANDA asserts that it “did not have any employees in Customer Service, Marketing or Sales functions at the relevant time that spoke to individuals in order to solicit them as clients or encourage trading in any fashion.” Answer ¶ 1. Lemu never introduced any evidence to the contrary, and his allegation that his business was actively, and fraudulently, solicited is unconvincing.

Lemu also alleges that OANDA made the following omissions or misstatements in securing his business: that OANDA (1) “did not fully disclose the nature of its business;” (2) gave him the impression that this was a safe college investment; and (3) suggested that Lemu would always hold the alternate currency,

which he could either change back to the U.S. dollar or add to with additional investment. Compl. at 1. These allegations are also rebutted by specific, unchallenged evidence that OANDA disclosed both the risks and basic mechanics of forex trading.

With respect to the risks, Lemu admits that he signed the requisite paperwork, which contained the following risk disclosure language:

Trading in foreign currency contracts is not suitable for many members of the public. You should consider whether trading is appropriate for you in light of your experience, objectives, financial resources and other relevant circumstances. Most importantly, do not invest money that you are not in a position to lose.

Answer Ex. B (Risk Disclosure Statement) (emphasis added). Further, the Customer Agreement provides:

You acknowledge that FXTrade permits you to trade foreign currencies on a highly leveraged basis. You understand and acknowledge that depending on the amount of leverage you are using, even a small change in currency exchange rates could cause you to lose some or all of your entire investment. You acknowledge that you are aware of the risks of engaging in currency trading and that you have been given the opportunity, prior to trading currency using FXTrade, to first familiarize yourself with currency trading using FXGame. You acknowledge and agree that you shall use and access FXTrade at your own risk.

Answer Ex. C (Customer Agreement ¶ 14(a)) (emphasis added).³ I find that the risks to his investment were expressly stated in the account opening documents.

In addition to the risks of the business, Lemu was made aware of how the trades generally worked. He was given the opportunity to familiarize himself with

³ The Risk Disclosure similarly warned that “[t]ransactions in foreign currency contracts carry a high degree of risk” because the contracts are “leveraged,” which meant that “small market movement[s] will have a proportionally larger impact on your position.” Answer Ex. B (Risk Disclosure Statement).

currency trading using FXGame before trading real money. Answer Ex. C (Customer Agreement ¶ 14(a)). Further, OANDA disclosed that entering into foreign currency contracts meant that he would “be entering into a privately negotiated contract with OANDA, as principal,” which could then “enter into ‘back-to-back’ transactions with others.” Answer ¶4. OANDA further warned that its prices to him include OANDA’s mark-up, and that the transactions are uncleared and not exchange-traded, and therefore not subject to certain regulatory protections. *Id.*

Lemu does not dispute signing these documents. This alone rebuts his claims of misrepresentation or omission. Moreover, his suggestion that he was a naively duped investor rings hollow. Not only did he post on a forex message board before applying for an account with OANDA, but a January 24, 2011 call he made to OANDA’s customer service line makes clear that Lemu was familiar with these transactions and how they worked. The call was to dispute a margin close-out executed in his account, and Lemu stated on the call that:

- He has been trading forex for three years;
- The margin-call by OANDA was late because it occurred after his account has dropped below half the value of the margin used, instead of being executed at that time in real-time;
- He could not see why his margin call should not have been executed immediately at that time and function as his stop loss instruction; and
- “[He has] been watching, [he has] been on the screen.”

Answer Ex. E (Customer Service Call). These are not the observations and questions of a trader who does not understand how these transactions work. Indeed, according to the undisputed evidence, Lemu executed 10,589 trades during his 5-year trading relationship with OANDA, representing \$382,710,236.45 worth of currency (and \$84,700 of his own capital at risk). Answer ¶ 6 & Ex. D; Compl. Addendum. Lemu never explains or rebuts this evidence.

Finally, with respect to his allegation that OANDA fraudulently failed to disclose his losses, the fact that Lemu initiated a conversation about his margin call alone undermines any such allegation. But critically, Lemu never disputes that he received his account statements; received 187 margin close-out emails by OANDA since October 2010; or saw his account summary, including real-time profit and loss information, upon logging on to the trading platform. There is no evidence, beyond bare and vague allegations, that OANDA misrepresented, misled, or omitted information with respect to Lemu's account performance, and any claims in fraud with respect to this are dismissed. *See, e.g., Richardson v. First Commodity Corporation of Boston*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,661 (CFTC June 12, 1987) (dismissing complaint because complainant failed to provide evidence to substantiate his misrepresentation and fraud claims).⁴

⁴ Because Lemu has failed to show any fraudulent conduct, he necessarily fails to show that the violative conduct was the proximate cause of his damages. *See, e.g., Theriault v. Parker*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,211 (CFTC 1988); *Steen v. Monex Int'l, Ltd.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,245 (CFTC 1992).

ORDER

For the reasons discussed throughout this Opinion and Order, the Complaint is DISMISSED.

DATED: October 13, 2017


Kavita Kumar Puri,
Judgment Officer