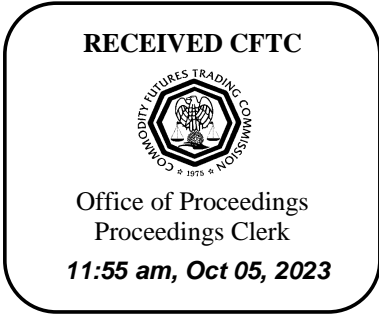




U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings



Steven E. Susanin IRA
Steven E. and Maria A. Susanin,

Complainants,

v.

ProShares d/b/a ProShare Capital
Management LLC,

Respondent.

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CFTC Docket Nos. 22-R011 & R013
Served electronically

INITIAL DECISION
& DISMISSAL ORDER

This case arises out of a complaint brought by Steven and Maria Susanin, both on behalf of themselves (22-R011) and Steven Susanin IRA (22-R013) against ProShare Capital Management LLC (ProShares) for failures to (1) adequately disclose the liquidation of a ProShares-sponsored fund and (2) manage the fund in a way that mitigated their losses. The Susanins claim these wrongdoings caused them \$382,834.22 in losses and the IRA \$88,606 in losses.¹ ProShares counters that it disclosed the possibility of the fund’s liquidation, the actuality of its liquidation, and the future wind down plan before and during the Susanins’ investments.

¹ Unless otherwise stated, all allegations and investment amounts used refer to those collectively of Complainants in both 22-R011 and 22-R013.

ProShares filed a Motion to Dismiss the Susanins' complaints pursuant to Commission Rule 12.308(c)(2) for failure to state a claim based on facts in the public record. After carefully considering the arguments and the current record, I find that the Susanins have failed to state a claim for any misconduct and that further discovery is unwarranted. I hereby dismiss their claims with prejudice.

I. Relevant Procedural History

1. Steven and Maria Susanin filed a single complaint both on behalf of the IRA and themselves on February 25, 2022.² The complaints concerned investments in ProShares UltraPro3x Crude Oil ETF (OILU or the Fund), which was registered with the Securities & Exchange Commission (SEC) and traded on the New York Stock Exchange (NYSE). OILU was sponsored by Respondent ProShares, a commodity pool operator (CPO).

2. Because it was not clear whether there were any actions under the jurisdiction of the Commodity Exchange Act (CEA) or its regulations, and because it appeared that two different accounts (the Susanins' personal account and Steven Susanin's IRA account) were at issue, this Office sent deficiency letters on April 15 and June 7, 2022. Complainants responded by way of a complaint addendum on May 2, 2022. They also filed a separate complaint on behalf of the IRA account on June 20, 2022 (CFTC Dkt. No. 22-R013).

3. The Complaints were served on Respondent ProShares on July 8, 2022.

² The Susanins previously filed a similar complaint against ProShares with the National Futures Association (NFA). The NFA did not forward their complaint to ProShares, and because there is no active litigation pending before the NFA I do not find that filing germane to the resolution of these cases before me.

4. ProShares filed its Answer and Motion for Reconsideration of the decision to forward the Complaints along for adjudication on August 30, 2022. The Susanins filed their response the next day.

5. On October 6, 2022, this Office's Director denied the Reconsideration Motion, finding that the elements for forwarding the Complaints had been met.

6. The Complaints were forwarded to my docket for adjudication, and on October 13, 2022, I filed an Order consolidating these cases.

7. On October 20, 2022, ProShares filed a Motion to Stay these proceedings, which I granted on October 21, 2022. I also set forth a schedule for filing a motion to dismiss, if any.

8. ProShares did file a Motion to Dismiss, which was opposed by the Susanins. That Motion to Dismiss was fully briefed by December 23, 2022 and is now ready for decision.

II. Factual Findings

1. Complainants Steven and Maria Susanin are residents of Wethersfield, Connecticut. They purchased shares of OILU, not directly from ProShares but through and/or from a brokerage account held at TD Ameritrade, throughout the month of March 2020. Those shares ultimately resulted in \$382,834.22 in losses to them personally during that same month.

2. Complainant Steven Susanin IRA is in Wethersfield, Connecticut. The IRA also purchased shares of OILU throughout March 2020 from and/or through a

brokerage account held at TD Ameritrade, which purchase resulted in \$88,606 in losses to the IRA during that same month.

3. Respondent ProShares is a registered CPO and was the sponsor for OILU until its liquidation in March 2020. OILU was a leveraged exchange traded fund (ETF) that first began trading in secondary markets in 2017.

4. OILU sought to correspond to three times the Bloomberg WTI Crude Oil Subindex for a single day. ProShares Ex. 1 (ProShares Trust II Prospectus at 2, 57, 105 (March 29, 2019)) (ProShares Prospectus). The Bloomberg WTI Crude Oil Subindex tracked the price of certain oil futures contracts traded on the New York Mercantile Exchange. *Id.* at 57.

5. The ProShares Prospectus underscored that it sought to achieve this triplicate return of the Bloomberg benchmark for a single day, and not any other period. *Id.* at 2. Accordingly, OILU was rebalanced daily in order to meet its investment objective. *Id.* at 105, 115.

6. Investors were warned that OILU's benchmark was "not directly linked to the 'spot' price of crude oil" but was instead linked to the price of oil futures contracts, and that oil futures contracts "may perform very differently from the spot price of crude oil." *Id.* at 57, 105.

7. The ProShares Prospectus also warned that OILU, by virtue of its leverage, was "riskier than similarly benchmarked exchange-traded funds that do not use leverage." *Id.* at 16. The ProShares Prospectus also disclosed that investments in OILU may be "highly volatile," and investors "may experience

substantial gains or losses in value as a result of relatively small changes in the value or level of an underlying or related market factor.” *Id.* at 9, 16.

8. The ProShares Prospectus disclosed that a single-day decline in the benchmark approaching 33% could result in the total loss or almost total loss of an investment because OILU sought to triple the benchmark results. *Id.* at 25.

9. Crucially, investors were told repeatedly that ProShares had the power to liquidate OILU at any time. *Id.* at 21 (ProShares “may liquidate a Fund, at any time. . .”); *id.* at 72 (“The Sponsor also has the authority to liquidate a Fund at any time.”); *id.* at 217 (noting OILU “may be dissolved at any time and for any reason by the Sponsor with written notice to the shareholders.”).

10. The Susanins purchased roughly \$100,000 of OILU shares starting March 9, 2020, at the onset of the COVID-19 pandemic. In aggregate along with the IRA, the Susanins invested \$448,671.11 throughout the month of March until March 23, 2020. Compl. 4-5 & Attachment 1.

11. They did not purchase their shares directly through Respondent ProShares. Rather, they purchased these shares through their brokerage account at TD Ameritrade, either from an Authorized Participant or on the secondary market. *Id.*

12. The same day of the Susanins’ initial investment—March 9, 2020—ProShares filed an 8-K with the SEC as well as a Prospectus Supplement with updated information about OILU’s risks and investment strategies in light of

deteriorating market conditions. Resp. Ex. 2 (8-K); Resp. Ex. 3 (Prospectus Supp. (March 9, 2020)).

13. These documents disclosed that “[i]n the event that Fund’s intraday portfolio value (referred to as its ‘IOPV’ or ‘IIV’) decreased by 70% or more at any point during a Fund’s Business Day, the Sponsor, in its sole discretion, in order to maintain the integrity of the ongoing operation of the Fund or for other reasons, may cause such Fund to liquidate some or all of its positions and, in lieu of such positions, invest such assets in cash or money market instruments.” March 9 Form 8-K at 415; March 9 Supplement at 417. This partial or full liquidation could have been “taken without prior notification to shareholders and would be expected to cause the Fund not to perform consistent with its investment objective.” *Id.* They also stated that, under these circumstances, “the Sponsor may, but is not obligated to, cause the Fund to be terminated and dissolved.” *Id.* (emphasis added).

14. ProShares posted the March 9 Form 8-K on its website that same day. *See* ProShares Trust II Form 8-K dated March 9, 2020, *available at* https://www.proshares.com/globalassets/proshares/documents/8k/pstii_8k_03092020.pdf.

15. Two days after the March 9, 2020 Prospectus Supplement, on March 11, 2020, the IRA invested approximately \$100,000 in OILU.

16. Three days after that Prospectus Supplement, on March 12, 2020, the Susanins invested another \$50,000 in OILU.

17. That same day—March 12, 2020—ProShares issued another 8-K and Prospectus Supplement reiterating the March 9, 2020 disclosures. Resp. Ex. 4 at 419-22 (March 12, 2020 8-K); Resp. Ex. 5 at 423 (Prospectus Supplement (March 12, 2020)).

18. On March 15, 2020, ProShares announced a plan by press release to liquidate and terminate OILU by the end of the month. Compl. Attachment 2 (March 15, 2020 Press Release).

19. To that end, it filed a Form 8-K the very next day (March 16) containing the press release and a Prospectus supplement with the SEC making the same announcement. Resp. Ex. 6 (ProShares Trust II Form 8-K dated March 16, 2020 at 424–29); Resp. Ex. 7 (ProShares Trust II 424(b)(3) Supplement dated March 16, 2020 at 430–32). It also posted the March 16 Form 8-K on its website. *See* ProShares Trust II Form 8-K dated March 16, 2020, *available at* https://www.proshares.com/globalassets/proshares/documents/8k/pstii_8k_03162020.pdf.

20. Importantly, the documents filed that day outlined the OILU wind-down plan.

21. OILU would accept creation orders for shares from Authorized Participants through Friday, March 27. March 16 8-K at 426; March 16 Supp. at 430. Secondary market trading in OILU shares would be halted before the market open on Monday, March 30. *Id.* Fund holdings would be liquidated by March 30, or shortly thereafter. *Id.* And proceeds of the liquidation would be distributed to

shareholders on or about April 3. *Id.* Consistent with its disclosures, ProShares did not create any new shares, but rather issued previously registered shares at the request of Authorized Participants.

22. Despite clear and published notice that OILU would be winding down by the end of March 2020, the Susanins collectively invested another \$300,000 in OILU after March 15, 2020 (in other words after ProShares published notice of the wind-down plan). Compl. 4-5; IRA Compl. 4-5.

23. Complainants then suffered heavy losses when the Fund liquidated near the end of March, as ProShares had disclosed it would.

III. Discussion

Disposition of this proceeding is straightforward. Although the Susanins bring both fiduciary duty and fraud claims, the claims for fiduciary duty are not justiciable here unless there is some underlying violation of the Commodity Exchange Act or its regulations. *Emily v. Gleichmann, et al.*, CFTC No. 14-R007, 2020 WL 3248253, at *2 (CFTC Jun. 9, 2020)).³ Here, the CEA violation alleged is fraud. But that fraud claim does not pass go under the standards for evaluating motions to dismiss.

An Administrative Judge may grant a motion to dismiss when “none of the matters alleged in the complaint state a claim that is cognizable in reparations.” 17 C.F.R. § 12.308(c)(1)(i). In order to be cognizable in reparations, there must be an

³ Although the Susanins cite to 7 U.S.C. § 25 as conferring jurisdiction to hear non-reparations claims in this forum, this is not a court of general jurisdiction. This Office’s jurisdiction is circumscribed by 7 U.S.C. § 18.

alleged violation of the CEA and/or its regulations, which violation “proximately caused” a complainant’s losses. 7 U.S.C. § 18(a)(1).

Motions to dismiss test the adequacy of the complaint to go forward. *Saba v. Greco*, CFTC No. 09-R052, 2010 WL 4521449, at *1 n.26 (Nov. 9, 2010).

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* When testing the sufficiency of well-pleaded allegations, I can look to the facts set forward in the complaint, any documents attached thereto, and matters over which judicial notice is appropriate. *Hedayet v. Gain Cap. Grp.*, CFTC No. 09-R044, 2011 WL 17927, at *1 (Jan. 3, 2011). Public SEC filings constitute matters over which judicial notice is appropriate. *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

Here, the Susanins allege fraud. In order to prevail on a fraud claim under the CEA, a complainant must show “(1) a material misrepresentation, (2) scienter, (3) reliance [on that misrepresentation] and (4) damages.” *Chenli Chu v. Peregrine Fin. Group, Inc.*, CFTC No. 07-R029, 2013 WL 4785177, at *6 (CFTC Sept. 5, 2013) (discussing elements of fraud under CEA § 4b(a)(2); 7 U.S.C. § 6b(a)(2)). Similarly, to establish “fraud by omission” a complainant must show that the respondent (1) failed to disclose certain information 2) despite knowing that the disclosure failure would mislead the investor and that (3) a reasonable investor would consider the omitted information material. *West v. Gain Cap. Grp.*, CFTC No. 10-R017, 2013 WL 1398996, at *5 (CFTC Apr. 4, 2013). Each of these elements

must be proved by a preponderance of the evidence. *In re Citadel Trading Co.*, CFTC Nos. 77-8, 80-11, 1986 WL 66170, *9 (CFTC May 12, 1986) (noting judge must determine “what the preponderance of the evidence shows most likely did happen”).

The Susanins’ claims fail here because they identify no actionable misstatements or omissions. In their Opposition to the Motion to Dismiss, they contend that the inclusion in the March 6, 2020 Prospectus of the historic rate of return was misleading. Compl. Opp. at 5-6; *see also* Compl. at 3. Even if the disclosure of an accurate historic rate of return could be deemed misleading, the historic rate of return had nothing to do with why the Susanins’ investment fared poorly. That poor performance was caused by deteriorating market conditions amid the COVID-19 pandemic and the possibility of the Fund’s liquidation.

And ProShares plainly did not hide these facts. ProShares issued a Prospectus Supplement the very day the Susanins made their initial investment—March 9, 2020—underscoring concerns regarding OILU given deteriorating market conditions and noted that they could liquidate the fund at any time. ProShares then followed the March 9 disclosure with multiple additional disclosures that became increasingly alarming with respect to the overall health of the Fund. And then on March 15, 2020, ProShares informed the public and its investors that it would be liquidating OILU. If the Susanins had just read the mix of information available they would have been aware of the warning signs around the health and longevity of OILU.

The Susanins in their Opposition also argue that the liquidation disclosures were made so late that they were misleading. Opposition at 6-8. However, the facts of the case make clear that the disclosures were timely with respect to the Susanins' investments. Although the Susanins and their IRA made a total investment of \$448,671.11, the first investment came the very day ProShares issued warning disclosures about the Fund (March 9, 2020). Then the majority of their investment—\$300,000—came **after** Respondents disclosed the Fund would be winding down and liquidated before the end of the month. This is a situation where the Susanins' investments came late; not the disclosures.

Finally, the Susanins admit they were not aware that ProShares had filed a Form 8-K on March 9, 2020 amending the OILU Prospectus. Compl. at 5-6. They seem to think that their failure to review the public disclosures is ProShares's fault, but that admission sinks their fraud claims. They allege fraud but never read the disclosures that would have informed them of the very information they argue was missing.

The Susanins make a hodgepodge of other arguments that do not save their complaints from dismissal. For example, the Susanins object to the fact that they were allowed to purchase additional shares after March 15, 2020. But the disclosures made clear that Authorized Participants were allowed to make such purchases until March 27, 2020. March 16 Form 8-K at 426; March 16 Supplement at 430. And **ProShares** did not allow the Susanins to do anything one way or

another because they did not purchase their additional shares from ProShares as Authorized Participants or otherwise.

They also allege that multiple Commission regulations were violated, but these regulations are related to their fraud allegations or the supposed lack of clarity around ProShares's disclosures. For the same reasons the fraud claims fail, these claims fail as well. Further, many of these regulations are not applicable to CPOs such as ProShares. *See, e.g.*, 17 C.F.R. § 1.55 (applying to futures commission merchants (FCMs)); § 33.7 (applicable to introducing brokers (IBs)); § 166 (applicable to FCMs, IBs, and registered foreign exchange dealers).

Finally, they allege that ProShares opened up a second OILU-like fund immediately after terminating and liquidating OILU to their detriment. But, putting aside the fact that there is no evidence in either the case record or the public record that such a successor fund exists, it is not clear why opening up a second fund would amount to some misconduct with regard to the Fund at issue here.

CONCLUSION

For the reasons stated above, the Complaints set forth in docket numbers 22-R011 and R-013 are dismissed with prejudice.

Dated: October 5, 2023

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Administrative Judge