UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

KELLY L. BRESELOW, Complainant, v. ED&F MAN, INCORPORATED d/b/a/ MAN FINANCIAL GROUP, INC.; MADISON FINANCIAL GROUP, LLC.; and PHIL ANTHONY OWENS, Respondent.	* * * * * * * * * * * *	CFTC Docket No. 02-R71

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INITIAL DECISION

Kelly Breselow's principal allegation is that Phil Owens fraudulently induced him to open a nondiscretionary options account with Madison Financial Group with false statements that customers of Madison Financial had consistently enjoyed profits. Breselow further alleges that Owens fraudulently guaranteed profits to induce him to deposit additional funds and to approve high-risk trading strategies that were designed to generate excessive commissions.

In reply, Owen denies any violations and raises the statute of limitations affirmative defense. Man Financial also raises the statute of limitations affirmative defense. After filing its answer, Man Financial entered into a settlement agreement with Breselow and paid him $5,000.[1] Madison Financial, which is no longer in business, did not file an answer.[2]

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[1] Mann Financial filed a stipulation of dismissal signed by Breselow, but did not file a copy of the agreement or otherwise describe the terms of the settlement.

[2] By failing to file an answer, Madison Financial Group is in default. Madison's default constitutes an admission of Breselow's allegations and a waiver of any affirmative defenses, including the affirmative defense that Breselow's claim is barred by the statute of limitations. Thus, it is concluded that Madison Financial Group churned Breselow's account in violation of CFTC rule 33.10 and Section 4c(b) of the Commodity Exchange Act and that this violation proximately caused $13,464 in damages. The amount of the default award against Madison

Breselow is a Wisconsin resident with a high-school education, who at the relevant time ran his own auto repair business and who had little meaningful investment experience.

Over a nineteen-month period, Owens convinced Breselow to make nine separate deposits totaling $17,500. Breselow received back $4,000 in the first week after the very first trade had realized a quick and substantial profit.[3] Breselow also received back $36 dollars after he had closed his account. Thus, his out-of-pocket losses totaled $13,464. Owens recommended a total of seventeen trades, of which only two realized net profits. The trades recommended by Owens generated approximately $10,525 in commission and fees.

The last trade recommended by Owens was the purchase of three September cocoa put options, on April 19, 2000. These options steadily lost value. The June monthly account statement reported that the cocoa options had a $120 liquidation value, which represented a 90% loss. The July monthly account statement reported that the cocoa options had declined to their minimal "shelf" value of $30, which represented a near total loss. As expected, the three Cocoa options expired worthless for a loss of $1,450, on August 4, 2000,[4] which was two years and three days before Breselow would file his reparations complaint. Breselow could not recall what Owens said when he recommended this trade. And as to subsequent conversations during the spring and summer while the Cocoa options steadily declined, Breselow did not assert that Owens ever

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Financial will reflect that these damages have been reduced by the $5,000 paid by Man Financial under the settlement agreement. Accordingly, Madison Financial Group, LLC is ORDERED to pay to Kelly Breselow reparations of $8,464, plus $50 in costs for the filing fee. Breselow should note that this default award does not establish the liability of Phil Owens, who filed an answer and participated in the hearing. Breselow should also note that Madison Financial is out of business and has defaulted in several other cases. In these circumstances, Madison Financial's indifference to the outcome of this case indicates that unfortunately Breselow may not be able to collect this default award from Madison Financial.

[3] Owens testified that his supervisors admonished him when he returned the amount of Breselow's initial investment, which represented less than half of the profits from the first trade.

[4] The August 4th expiration was reported in the confirmation statement dated August 7.

misrepresented the liquidation value or that Owens predicted that the options would rebound. Breselow otherwise could not recall the substance of any of his conversations with Owens concerning this trade.

In addition, in mid-June, when Owens was on vacation, a second and unidentified Madison Financial broker recommended what would be the last trade in Breselow's account. This trade involved the liquidation of an unleaded gas spread for a $2,100 net profit, the liquidation of eleven long light crude oil calls for a $4,660 net loss, and the purchase of 14 deep-out-of-the-money March sugar options. Breselow could not remember any substance of his conversations with the second broker, or with Owens, concerning this sugar trade. The sugar trade cost $2,038 in premiums and an additional $1,450 in commissions and fees. Initially, the sugar options appreciated in value, but by June began to decline and by the end of July had a liquidation value of $784, which represented a loss of about 65%. The sugar options would steadily continue to lose value, so that by the end of October they would hit and remain at the minimal "shelf" price until expiration.

Thus, two years and five weeks before the date that Breselow filed his reparations complaint, Breselow already knew that he had invested a total of $17,500; knew that he had paid almost $12,000 in commissions; knew that his account had a $36 cash balance; and knew that -- other than the $4,000 that he had received back during the first week of trading -- he had received no refunds from respondents. At this point, he also knew that the last option trade recommended by Owens had lost 90% of its value and was on the way to expiring worthless; and knew that only two of the seventeen trades recommended by Owens had realized net profits.

Two years and one week before the date that Breselow filed his reparations complaint, the July monthly account statement reported that the last option trade recommended by Owens had declined to the minimum shelf value of $30, and would expire on August 4. Also, the sugar trade

recommended by the second unidentified broker had liquidation value of $784, which represented a two-thirds loss. Thus, a little more than two years before he filed his reparations complaint, Breselow knew that substantial commissions combined with net trading losses had almost completely consumed his net investment of $13,500.

Breselow recalled that he spoke infrequently with Owens after August 7, 2000, but could not remember the substance of these conversations. In April of 2001, Breselow received two letters from Madison. The first letter stated that a group of brokers, including Owens, had been let go "on good terms." The second letter stated that Madison had decided to terminate its business. Neither letter mentioned that Madison was the subject of a CFTC enforcement investigation into purported fraudulent sales and trading practices. Shortly afterward, Man Financial refunded the $36 cash balance. On June 6, 2001, the CFTC issued its administrative complaint against Madison Financial. The CFTC alleged that between May 1998 and February 2001, that 97% of Madison's customer accounts had suffered losses, that customer net losses had totaled over $17 million, and that commissions collected had totaled over $9 million. The complaint alleged that Madison principals directed Madison account executives to use a variety of misrepresentations including false claims about Madison's track record. On September 4, 2002, the CFTC issued a consent order with several sanctions against Madison Financial and its owners, including an order to make customer restitution in the amount of $810,000, and to pay a contingent fine of $110,000, both pursuant to a 10-year payment plan.

In the meantime, Breselow was "busy" at work and thus deferred exploring legal remedies to recover his losses. Eventually, at some undetermined time, an Internet search by Breselow led to the June 2001 announcement of the CFTC's enforcement complaint against Madison, which in turn prompted Breselow to file his reparations complaint on August 7, 2002.

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 likely has 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.[5/] The record establishes that well before August 4, 2000, when the last options recommended by Owens expired, Breslow knew that he had lost almost all of his $13,500 net investment; knew that only two of the seventeen trades recommended by Owens had realized net profits; and knew that he had paid almost $12,000 in commissions. Thus, Breselow knew that commissions and trading losses had combined to consume almost all of his net investment. From this dismal performance, Breselow possessed sufficient knowledge to conclude that any profit guarantees or any representations about a successful trading record by Owens had probably been false and deceptive. Breselow also possessed sufficient information to conclude that respondents had recommended high-risk trading strategies designed to generate excessive commissions. Therefore, before August 7, 2000, Breselow had enough information to form reasonable suspicions about Owen's representations and trade recommendations.

The date that Breselow filed his complaint, August 7, 2002, is past the two-year statute of limitations deadline, and Breslow's claim will be time-barred unless he can successfully invoke

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[5/] *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).

equitable estoppel or equitable tolling. Equitable estoppel focuses on any misleading actions by Owens. To show that Owens should be estopped from raising the statue of limitations, Breselow must prove that he reasonably relied on an action or representation by Owens that forestalled him from filing a claim. Here, Breselow has produced no evidence that Owens, during the several months before or after the August 4th expiration, made any false promises or withheld any material information that would have precluded or obscured the obvious conclusions to be drawn from the disastrous performance of Breselow's account. Breselow has also produced no evidence that Owens otherwise dissuaded or delayed him from initiating legal action, and thus has failed to show that Owens is 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. The fact that Breselow deferred seeking legal redress because he was busy at work, and the fact that the letters from Madison did not mention Madison's looming legal problems, do not support a conclusion that Breselow acted diligently or otherwise excuse his late filing. Therefore, Breselow's claim against Owens for the losses on the seventeen trades recommended by Owens is barred by the statute of limitations.

Finally, Breselow has failed to show any material representation or omission by Owens that proximately caused his losses on the last trade recommend by the other Madison broker.

ORDER

Based on the stipulation of dismissal, Kelly Breselow's complaint against Man Financial Group, Incorporated is DISMISSED.

Kelly Breselow's claim against Phil Owens for the losses on the trades recommended by Owens is barred by the statute of limitations. Kelly Breselow also has failed to show any violations by Phil Owens in connection with the last trade in his account. Accordingly, Kelly Breselow's complaint against Phil Owens is DISMISSED.

Dated March 30, 2004.

Philip V. McGuire,
Judgment Officer