U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

THE CONWAY FAMILY TRUST, Complainant, v. DORMAN TRADING LLC, Respondent.	*	CFTC Docket No. 12-R002

Order on Summary Disposition

Before: Philip V. McGuire,
Commodity Futures Trading Commission
Washington, DC

Appearances: G. Patrick Connors, III, Esq.
Connors & Associates, Encinitas, California,
for the Conway Family Trust, Complainant

Mitchell B. Goldberg, Esq. and John D. Ruark, Esq.
Lawrence, Kamin, Saunders & Uhlenhop, LLC, Chicago, Illinois,
for Dorman Trading LLC, Respondent.

Introduction

The Conway Family Trust seeks to recover approximately $3.687 million in trading losses, most of which were realized between October 13 and 15, 2008, in the midst of the global financial meltdown. The principal claim of Phyllis and Michael Conway, Co-Trustees of the Conway Family Trust (referred to collectively as the "Complainants") is that Dorman Trading LLC, a futures commission merchant is liable for the alleged fraudulent guarantees and fiduciary breaches of an unregistered agent of the commodity trading advisor ("CTA") that they had approved to trade their

discretionary Dorman account. Complainants also assert that the two-year statute of limitations set in Section 14(a)(1) of the Commodity Exchange Act ("Act") should be tolled for the period that their claim against Dorman and others arising from the same set of factual circumstances was pending in the NFA arbitration forum. In that matter, the NFA ultimately disregarded, without explanation, Complainants' request to dismiss the claim against Dorman without prejudice, and dismissed with prejudice Complainants' arbitration claim against Dorman, based on the one-year contractual limitations period in the Dorman customer contract. By doing so, the NFA highlighted a significant distinction between the NFA arbitration dispute resolution forum and the CFTC reparations dispute resolution forum: in the CFTC reparations forum, such one-year contractual limitations provisions as found in the Dorman customer contract are deemed null and void, and unenforceable. *McGough v. Bradford*, Comm. Fut. L. Rep. ¶ 28,265, 2000 WL 33675749 (CFTC 2000) ("[T]he Commission has always viewed the reparations forum as an important supplement to the alternative forums offered by courts and arbitration and believe[s] that contractual agreements waiving a customer's right to submit claims to the reparations forums [are]void.").

In reply, Dorman: denies liability for the unregistered agent of the CTA on a variety of theories; asserts that Complainants waived their CFTC reparations complaint by first bringing an NFA claim; asserts that Complainants' reparations complaint is barred by the one-year contractual limitations period in the Dorman customer contract; and further asserts that the two-year statute of limitations should not be tolled for the period that Complainants' NFA arbitration claim against Dorman was pending in the

NFA arbitration, and thus that Complainants' reparations complaint is barred by the statute of limitations.

As explained below, after carefully reviewing the parties' evidence and arguments, it has been concluded that the complaint is barred by the statute of limitations and that Dorman is entitled to summary disposition in its favor.

Factual Findings

The parties

1. Phyllis W. Conway and Michael H. Conway III, residents of Rancho Santa Fe, California, are Co-Trustees of the Conway Family Trust (referred to collectively as the "Complainants"). When they opened their discretionary account with Dorman Trading LLC in February 2008, the Conways executed a Client Information form in which they indicated that their net worth exceeded $50 million. Thus, Complainants qualified as an Eligible Contract Participant ("ECP") within the definition of 7 U.S.C. § la and 17 C.F.R. § 166.5(g).

2. Dorman Trading LLC ("Dorman"), located in Chicago, Illinois, is registered as a futures commission merchant ("FCM"). Complainant's account with Dorman is the account at issue.

3. Trade Angle Advisors LLC ("TAA"), located in Raleigh, North Carolina, was a registered commodity trading advisor ("CTA") from August 2006 to March 2009. Complainants' selected TAA to act as the CTA for their Dorman account.

4. Keith Doolittle, during the relevant time, was the listed Principal of TAA. The TAA Disclosure Document dated June 30, 2008 disclosed Doolittle's background as a

software engineer/analyst whose previous work had been in the design and implementation of algorithms in exchange traded products.

5. John Logan was president of TA Strategies, an unregistered affiliate of TAA. According to Complainants, Logan was their principal contact at TAA, and unidentified third parties advised them, after the fact, that Logan had placed trades for their account that were inconsistent with TAA's trading system. As discussed in more detail below, Logan has never been registered.

Opening and Funding the Account

6. Complainants signed and executed the following account-opening documents and agreements:

(1) Dorman Discretionary Trading Account Authorization/Power of Attorney dated April 1, 2008;

(2) TAA Client Information sheet dated February 29, 2008;

(3) TAA Limited Power of Attorney dated February 29, 2008;

(4) TAA Managed Account Agreement dated February 29, 2008;

(5) TAA Managed Account Agreement dated June 13, 2008;

(6) TAA Managed Account Agreement dated September 26, 2008;

(7) TAA Acknowledgment of Receipt of Disclosure Document dated February 29, 2008;

(8) TAA Acknowledgment of Receipt of Disclosure Document dated September 26 2008;

(9) TAA Fee Payment Authorization dated February 29, 2008;

(10) TAA Fee Payment Authorization dated September 26, 2008;

(11) Disclosure Document of Trade Angle International LLC, which was received by the Complainants on or about February 29, 2008; and

(12) TAA Disclosure Document dated June 30, 2008.

The TAA agreements appointed TAA as Complainants' CTA with full power and authority to enter into contracts for the purchase, receipt, sale (including short sale) and delivery of commodity futures contracts, commodities, options on commodity futures contracts, physical commodities, securities, equity, debt and related investments on margin or otherwise, in their trading accounts with Dorman.

7. Complainants initially deposited $400,000 in March 2008, and then an additional $400,000 in May 2014. By September 25, 2008, their net liquidating equity was $1.275 million, representing a return of about 59.4%. On September 26, 2008, Complainants deposited an additional $4,000,000, bringing total deposits to $4,800,000.

8. In the TAA Managed Account Agreement dated September 26, 2008, Complainants indicated that $200,000, to be notionalized to $400,000, was to be traded in TAA's "Auto Trade Program," and that $4,600,000, to be notionalized to $9,200,000, was to be traded in TAA's "Auto Trade with Options Program."

9. At the same time that Complainants more than doubled down, in September and October 2008, the world-wide asset bubble was bursting: the U.S. bailed out Fannie Mae and Freddy Mac, Lehman Brothers headed into bankruptcy, the Fed rescued AIG, world markets plunged and were roiled with historic volatility, and the financial crises spread world-wide. By substantially increasing the funds at risk and increasing their leverage by nationalizing the amounts to be traded, Complainants

approved a high-risk, high-reward trading approach. The lion's share of Complainants' out-of-pocket losses would occur between October 13 and 15, 2008.

Trading System

10. At all relevant times, Dorman maintained an electronic trading platform (the "ET platform"). Trades entered into the ET platform were transmitted electronically for execution directly at the exchange.

11. Dorman granted TAA access to enter trading instructions through the ET platform for accounts on which TAA was acting as registered CTA. Before granting TAA access to enter trading instructions through the ET platform, Dorman determined that TAA was a registered CTA.

Pursuant to TAA's disclosures, transactions in the Complainants' account were entered as part of a block account controlled by TAA (the "Block"). Thus, trades made in the Block represented trades for Complainants' account as well as other account-holders' unrelated accounts. Trades made in the Block were allocated daily to TAA customers' accounts, including that of Complainants.

Dorman did not authorize anyone other than TAA to enter Block trades -- or any other trades affecting the Complainants' account -- into the ET platform for TAA customers.

12. All Block trades which affected the Complainants' account were entered into the ET platform remotely through the access granted by Dorman to TAA.

Algorithm trading system and allocation of trades

13. Doolittle had developed a system which created futures trading instructions based upon a computerized algorithm (the "algorithm system"). The algorithm system generated trading signals which TAA generally followed when trading futures in the Block, which included those futures trades in Complainants' account with Dorman.

14. Dorman states that it does not know: one, whether trades in addition to those based upon the Algorithm System were also entered manually into the Block by TAA; two, which individual employees were authorized by TAA to enter or which individual employees actually did enter any manual Block trades; or three, who at TAA gave the direction to enter any manual trades.

15. At the end of each trading day, TAA communicated to Dorman the allocation for Block trades among the various client accounts by emailing the information to Dorman's email address set up for that purpose. Upon receipt of the information, Dorman would enter the allocation information from the Block trade among the Dorman customer accounts, including the Complainants' Account.

16. After allocations from TAA were entered into the Dorman system, Dorman would generate an account statement for Complainants' account, which would be emailed back to TA Advisors and to Complainants. Complainants received the daily statements from Dorman.

Massive Trading Losses

17. At the close on October 2, 2008, Complainants' account was down about $460,000 from its balance on September 26, 2008. By October 7, the account was

down over $ 1 million. Then, on October 10, the account recovered all but $360,000 of those losses. This partial recovery would prove to be temporary.

18. At the market close on Monday, October 13, 2008, the net liquidating balance for the Complainants' account was $3,539,740, representing a $1,074,382 loss from the previous day, and resulting in a margin deficit of $1,359,546, and a margin call from Dorman.

19. The daily account statement sent to the Complainants on Monday, October 13, 2008 correctly reported the trading and balance of the Complainants' account.

20. At the market close on Tuesday October 14, 2008, Complainants' net liquidating balance was $2,453,105, representing a $1,086,635 loss from the previous day's statement. At the close that day, Doolittle emailed to Dorman the allocations for Block trades made that day, including the allocation of trades for the Complainants Account.

21. A clerical error at Dorman was made during the entry of the October 14, 2008 allocation of the Block trade. As a result of the clerical error, certain transactions in the Complainants' account were not reflected in the statement dated October 14, 2008.

Within hours, the clerical error was identified and Complainants were informed by email that a correction would be reflected on a statement the next day.

22. The statement dated October 15, 2008 reflected the missing allocations as trades made "as of October 14, 2008." The October 15, 2008 statement for Complainants' account accurately stated the net liquidating balance $941,780, representing a $1,511,325 loss from the prior day's statement.

23. On October 20, 2008, all positions in Complainants' account were liquidated.

November 25, 2008 Denial of John Logan's Registration Application

24. According to Complainants, John Logan was their principal contact at TAA.

25. On or about June 25, 2008, TAA filed an application for Logan to become registered as an associated person of TAA, which was subsequently withdrawn on or about September 23, 2008. On or about October 28, 2008, eight days after all positions in Complainants' account had been liquidated, TAA re-filed an application for Logan to become registered as an associated person of TAA.

26. On November 25, 2008, more than a month after all positions in Complainants' account had been liquidated, the National Futures Association issued a Notice of Intent to Deny Logan's application. In its notice, the NFA cited two criminal convictions of Logan in 1990 and 1996 respectively.

27. Before November 25, 2008, Dorman did not know whether or not Logan was registered, and did not know about Logan's 1990 and 1996 convictions. Dorman first learned of Logan's registration status after November 25, 2008 when Marc Nagel of Dorman read the NFA's notice of intent to deny on the NFA website.

NFA Arbitration Claim and CFTC Reparations Complaint

28. On October 6, 2010, Complainants filed a notice of intent to arbitrate a claim against Dorman. On November 9, 2010, Complainants electronically filed an arbitration statement of claim before the NFA ("NFA Statement of Claim"). Their NFA Statement of Claim asserted claims relating to the trading losses suffered in the

Complainants' Dorman account in mid-October 2008, and admitted that the Complainants first knew their dispute against Dorman existed on October 13, 2008, and that they were aware of their losses and closed their accounts on October 22, 2008.

29. On September 1, 2011, the NFA arbitration panel granted Dorman's motion to dismiss Complainants' arbitration claims against Dorman, based on the one-year contractual limitations period in the Dorman customer contract. That order gave Complainants 30 days to file a motion to amend their statement of claim. Complainants did not amend the NFA Statement of Claim against Dorman in the arbitration. Rather, on September 30, 2011, Complainants sent a letter to the NFA asking the NFA panel to voluntarily dismiss the arbitration without prejudice. By order dated October 18, 2011, but not served until November 1, 2011, the NFA panel dismissed Complainants' claims against Dorman "with prejudice" based on the one-year contractual limitations period in the Dorman customer contract. The dismissal was silent on Complainants' request for dismissal without prejudice. Complainants did not ask NFA to clarify whether the dismissal was intended to be with prejudice only to their right to bring an NFA arbitration claim.

30. On October 4, 2011, soon after asking the NFA to dismiss their arbitration claim against Dorman without prejudice and almost three years after all positions in their Dorman account had been liquidated, Complainants filed their reparations complaint.

Conclusions

Summary disposition is appropriate when three conditions are met: one, there is no genuine issue as to any material fact; two, there is no need for further factual development; and three, the moving party is entitled to a decision as a matter of law. *See Levi-Zeligman v. Merrill Lynch Futures, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 26,236, at 42,031 (CFTC 1994). In appropriate circumstances, statute of limitations issues may be resolved on a summary basis, as long as there is no significant doubt as to whether the evidentiary record is sufficiently developed for reliable resolution of limitations-related issues. *See Cheney v. Greco,* Comm. Fut. L. Rep. ¶ 30,761, at 61,594 (CFTC 2008), and *Stoffel v. Interstate/Johnson-Lane Corp.*, Comm. Fut. L. Rep. ¶ 26,267, at 42,252-42,253 (CFTC 1995).

A cause of action for fraud accrues, and the two-year limitations period under Section 14(a)(1) of the Commodity Exchange Act begins to run,[1] when a complainant discovers wrongful conduct resulting in monetary losses, or in the exercise of reasonable diligence, should have discovered the wrongful activity. *McGough, supra.* A determination of when wrongful activity should have been discovered is based on the particular facts and circumstances of the case, including: one, the relationship of the parties; two, the nature of the wrongful activity; three, the complainant's opportunity to discover the wrongful activity; and four, the actions taken by the parties subsequent to the wrongful activity. *Id.* The determination of when a cause of action accrues turns

[1] Section 14(a)(1) of the Act provides: "Any person complaining of any violation of any provision of the Act or any rule, regulation, or order issued pursuant to this Act by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding [damages]."

on when a customer discovers those *facts* enabling him to detect a general fraudulent scheme, rather than when the customer grasps the full details of the scheme or determines the available legal remedies. *See, e.g., Edwards v. Balfour Maclaine Futures, Inc.*, Comm. Fut. L. Rep. ¶ 26,108 at 41,665 (CFTC 1994); *Cook v. Monex International, Ltd.*, Comm. Fut. L. Rep. ¶ 22,532 (CFTC 1985), *reconsideration denied* Comm. Fut. L. Rep. ¶ 23,078 (CFTC 1986); *Martin v. Shearson Lehman/American Express, Inc.*, Comm. Fut. L. Rep. ¶23,354 (CFTC 1986); and *Marracinni v. Conti-Commodity Services, Inc.*, Comm. Fut. L. Rep. ¶23,793 (CFTC 1986).

Here, on October 13, 2008, Complainants' had lost over a million dollars, and by October 20, 2008, all positions in Complainants' account had been liquidated at a massive loss. Since this substantial financial loss went directly to the heart of Complainants' allegation that Logan had falsely guaranteed to hedge their account against large losses and otherwise deviated from the approved trading strategy, it is reasonable to conclude that Complainants' cause of action for any violations of the Commodity Exchange Act in connection with the trading and handling of their account had accrued by October 20, 2008. Thus, the date that Complainants filed their reparations complaint, October 4, 2011, is well past the two-year deadline, and the complaint is time-barred, unless Complainants can show that the statute of limitations should be tolled for the one year and 26 day (October 6, 2010, to November 1, 2011) pendency of their NFA arbitration claim against Dorman.

Complainants argue that the NFA dismissal was wrongly decided, principally because it violated the NFA Code which provides: one, that an arbitration claim is

timely if received by the NFA within two years from the date the claimant knew, or should have known, of the act that is the subject of the dispute, and two, that the NFA Code shall supersede any provision in an agreement that contradicts or limits the Code. Complainants also point out the controlling nature of the NFA Code is consistent with the practice followed by FINRA, whose predecessors NASD and NYSE in 1995 had warned members not to include or seek to enforce provisions in customer agreements that shorten the applicable statute of limitation. Complainants further argue that the NFA dismissal is not *res judicata* and thus not binding because it reflected a determination that the claim against Dorman was not a proper subject for NFA arbitration. Consequently, Complainants argue, the statute of limitations should be tolled because their claim was mistakenly filed in an improper venue.

Complainants have raised a compelling argument that NFA's dismissal was wrongly decided. Although NFA arbitrators are not strictly bound by CFTC precedent, such as the Commission's *McGough* decision which voided contractual one-year limitations periods in reparations, the information that NFA provided prospective arbitration claimants in 2010 suggested that any one-year limitations period would not be enforced by an arbitration panel.

Conversely, the fact that Complainants never sought clarification or reconsideration of the NFA award, which simply dismissed their claim against Dorman "with prejudice," undermined their *res judicata* argument. Moreover, I found more convincing Dorman's arguments that tolling does not apply here because when Complainants submitted to NFA arbitration they expressly relinquished their right to

pursue a claim in CFTC reparations and agreed to be bound by any award by the NFA arbitration panel, that the NFA panel properly heard the claim against Dorman, and that the NFA panel did not dismiss the claim against Dorman on jurisdictional grounds.

ORDER

The complaint is barred by the statute of limitations, and accordingly is dismissed.

Dated May 9, 2014.

Philip V. McGuire,
Judgment Officer