

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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THE CONWAY FAMILY TRUST,
MICHAEL H. CONWAY, III, Co-Trustee, and
PHYLLIS W. CONWAY, Co-Trustee,

Complainants,

v.

DORMAN TRADING, LLC,

Respondent.

CFTC Docket No. 12-R002

OPINION AND ORDER

Michael H. Conway, III, and Phyllis W. Conway, co-trustees of The Conway Family Trust (“Conways” or “Conway Trust”), appeal from the Judgment Officer’s May 9, 2014 Order on Summary Disposition (Record No. [R.] 65a) (“Order”) dismissing their reparations claim as time-barred under the applicable statute of limitations. We affirm the Order.¹

A person who seeks money damages through the Commission’s reparations program must ordinarily file a reparations claim within two years of when the claim accrues. 7 U.S.C. § 18(a)(1)(A). The Conways filed their claim in October 2011 for losses they allegedly suffered three years earlier, in October 2008. They assert that their claim is nevertheless timely because the two-year limitations period should be tolled during a thirteen-month period in which they pursued the same claim in arbitration before the National Futures Association (“NFA”). We find

¹ We also deny the Conways’ request for oral argument, finding the facts and law to be clear from the record. 17 C.F.R. § 12.401(e) (giving Commission discretion to grant or deny oral argument).

that tolling does not apply under the circumstances and the Conways' claim is therefore untimely.

BACKGROUND

NFA Proceedings

The Conway Trust is a sophisticated investor and Eligible Contract Participant that, at the time of the relevant events, had a net worth of more than \$50 million. R.22, Tab 4 (pdf p.43); R.65a, Order at 3, ¶ 1; *see* 17 C.F.R. § 166.5(g).

On October 6, 2010, the Conways submitted to the NFA a notice of intent to arbitrate a claim against futures commission merchant Dorman Trading, LLC, and others. R.19, Ex. 4. When the Conways filed their arbitration claim with the NFA, they agreed to the NFA's Code of Arbitration. As relevant here, in the agreement they acknowledged that bringing an NFA arbitration claim might relinquish their right to pursue a CFTC reparations claim. R.49b, Ex. 9.

The Conways alleged that John Logan, a commodity trading advisor with Trade Angle Advisors whom they had selected to trade their Dorman account, deviated from his pledged trading strategy while trading in the account and made unauthorized trades through Dorman. They also asserted that Dorman issued erroneous account value statements. R.49b, Ex. 8 at 2-3 (Nov. 9, 2010 Claim). The Conways further alleged that Logan was not licensed to trade and had a prior criminal history, and that Dorman should have taken steps to learn that the accounts were "solicited under false pretenses and being traded unlawfully" by Logan. *Id.* at 3. According to the Conways, Logan's actions resulted in "catastrophic losses," for which they sought \$3,687,134.69 in damages based on trading losses occurring between October 13 and 22, 2008. *Id.* at 2.

Dorman filed a motion to dismiss the Conways' claim as untimely. The NFA arbitration panel issued an order on September 1, 2011, stating that it was provisionally granting Dorman's motion on the grounds that a one-year limitations period set forth in the Dorman Customer Agreement applied to the Conways' NFA arbitration and had expired some two years earlier. R.19, Ex. 5, *The Conway Family Trust v. Dorman Trading, LLC, et al.*, NFA Case No. 10-ARB-120 (Order of Sept. 1, 2011). The NFA panel informed the Conways that dismissal would be granted "unless The Conway Family Trust files a Motion to Amend along with a re-pled Claim no later than thirty days from the date of service of this Order." *Id.*

The Conways did not seek to amend or re-plead their arbitration claim. Instead, on September 30, 2011, almost three years after the events of October 2008 giving rise to the claim, they informed NFA that they would "pursue their claims against Dorman by filing a CFTC Reparations Complaint." R.49b, Ex. 10 at 1.

On October 18, 2011, the NFA arbitration panel dismissed the Conways' claim with prejudice. R.49b, Ex. 11, *The Conway Family Trust v. Dorman Trading, LLC, et al.*, NFA Case No. 10-ARB-120 (Order of Oct. 18, 2011).²

The CFTC Reparations Claim

Almost three years after their trading losses in October 2008, the Conways filed a reparations claim with the Commission. R.1 (Oct. 4, 2011); R.19 (June 8, 2012 Amendment). On May 9, 2014, the Judgment Officer issued an Order on Summary Disposition, dismissing the case on the basis of the two-year statute of limitations in Commodity Exchange Act (CEA)

² NFA thereafter granted the Conways a partial default judgment of \$572,600 against other NFA respondents who are not parties to these reparation proceedings. (R.49b, Ex. 12, *The Conway Family Trust v. Dorman Trading, LLC, et al.*, NFA Case No. 10-ARB-120 (NFA Final Award of Dec. 5, 2012 against Trade Angle Advisors, LLC, Keith Doolittle, and John Dolan).

section 14(a)(1)(A), 7 U.S.C. § 18(a)(1)(A). The Conways timely appealed to the Commission. R.66.

STANDARD OF REVIEW

Commission Rule 12.310 provides that summary disposition shall be granted if there exists no genuine issue as to any material fact; there is no necessity for further facts to be developed; and the moving party is entitled to a decision as a matter of law. 17 C.F.R. § 12.310(e). Because the material facts here are not in dispute, it was appropriate for the Judgment Officer to decide this case on summary disposition. We review the decision *de novo*. *Aboulghar v. Mulcahy*, [2011-2012 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,932, at 66,121, No. 06-R044, 2010 WL 4278911, at *2-3 (CFTC Sept. 2, 2010).

DISCUSSION

The Conways' Claim Is Untimely and Tolling Does Not Apply

The Conways' reparations claim is time-barred, falling well outside the CEA's two-year statute of limitations. 7 U.S.C. § 18(a)(1)(A) (two-year statute of limitations in reparations complaints). We agree with the Judgment Officer that the statute of limitations should not be tolled in this situation.

Under Commission precedent, equitable tolling of a statute of limitations is generally permitted only where a person is prevented from timely filing by extraordinary circumstances outside his or her control and through no fault of his or her own. *In re Buckwalter*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,609, at 39,893-94, No. 80-28, 1992 WL 372188, at *3-4 (CFTC Dec. 10, 1992); *see also Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51, 58 (D.C. Cir. 2014); *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006). "The circumstance that stood in a litigant's way cannot be a product of that litigant's own

misunderstanding of the law or tactical mistakes in litigation.” *Menominee Indian Tribe of Wis.*, 764 F.3d at 58; *accord Arrieta*, 461 F.3d at 867. The facts here do not support equitable tolling.

The Conways do not contest that they were notified at the outset of arbitration proceedings that pursuing a remedy through the NFA might interfere with future participation in the CFTC reparations program. The Conways also agreed to abide by any award rendered in the NFA arbitration proceeding. R.71 at 17-18, *citing* R.49b, Ex. 9. Only after NFA issued the initial adverse order did the Conways file their reparations claim. The arbitration panel gave the Conways the opportunity to re-file, and the Conways chose not to do so, or to advance any reason why the one-year contractual limitations period should not be enforced by the NFA.³ We find that these circumstances are not analogous to the typical case in which tolling is granted. At best, this is a case of mistake or ignorance of law or excusable neglect, which do not justify tolling. *Buckwalter, supra* at 39,893, 1992 WL 372188, at *3 (garden-variety claims of excusable neglect are insufficient to justify equitable tolling); *Arrieta*, 461 F.3d at 867.⁴

³ See R.65a, Order at 13 (observing that the Conways “never sought clarification or reconsideration of the NFA award”). Because the Conways did not raise this issue with the NFA, we do not reach it.

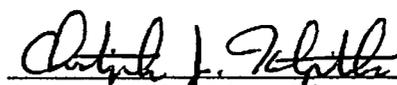
⁴ In a case not cited by the Conways, *Sommer v. ContiCommodity Servs., Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,244, at 35,106, No. 87-R126, 1988 WL 228628, at *5 (CFTC May 20, 1988), we tolled the statute of limitations for a short period in which the claimants pursued arbitration. *Sommer* is distinguishable, mainly because terminating the arbitration there served the purpose of reparations to provide “a more flexible and informal forum than that available in court[.]” *Id.* In *Sommer*, early in the arbitration proceedings, the claimants withdrew because the respondent filed a motion to dismiss on the basis that the dispute was not arbitrable, the resolution of which motion would be time consuming. *Id.* The Conways, by contrast, waited until the case was decided against them. This also raises the concern of unfair prejudice to Dorman. See 17 C.F.R. § 12.4(b) (permitting the Commission to waive a procedural rule providing that “no party will be prejudiced thereby”).

CONCLUSION

For the reasons stated above, we affirm the Judgment Officer's Order dismissing the complaint as untimely.

IT IS SO ORDERED.⁵

By the Commission (Chairman MASSAD and Commissioners BOWEN and GIANCARLO).



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: July 8, 2016

⁵ A party may petition for review of a CFTC reparation order to the United States Court of Appeals for the circuit in which a hearing was held, if any; if no hearing was held, the petition may be filed in any circuit in which the appellee is located. 7 U.S.C. §§ 9(11)(B), 18(e). Such a petition for review must be filed within 15 days after notice of the order; any such petition is not effective unless, within 30 days of the date of the Commission order, the petitioning party files with the court a bond equal to double the amount of any reparation award. *Id.* § 18(e).