U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
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Office of Proceedings

SALVATORE DIMAURO,
Complainant,

v.

FUTURES & OPTIONS XECUTION LLC, and JACOB J. GULLICK,
Respondents.

CFTC Docket No. 16-R010
Served electronically

ORDER GRANTING SUMMARY DISPOSITION AND DISMISSING COMPLAINT

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

Appearances: Howard M. Rosenfield, Esq.
Law Office of Howard Rosenfield, Farmington, Connecticut,
for Salvatore DiMauro, Complainant

Robert B. Christie, Esq., Jeffry M. Henderson, Esq., and
Douglas M. Grom, Esq.
Greenberg Traurig, LLP, Chicago, Illinois,
for Futures & Options Xecution, LLC, Respondent.

Introduction

In September 2009 and March 2010, Salvatore DiMauro allegedly opened two commodity trading accounts through Options Investments, Inc. (OptVest), an introducing broker (IB). Both accounts allegedly were held at MF Global, Inc., a futures commission merchant (FCM), and opened through Jacob J. Gullick, an associated person (AP) of MF Global.

On June 1, 2011, Futures & Options Xecution LLC (FOX) became the new IB for the second account, Number XXX86 (Account No. XXX86), roughly fifteen months after it was first opened.[1] Then that account's FCM, MF Global, filed for bankruptcy on October 31, 2011, and it was transferred to a new FCM, R.J. O'Brien & Associates, LLC (R.J. O'Brien). FOX remained its IB. Account No. XXX86 was closed on June 29, 2012, and a check was sent to DiMauro in the amount of $7,003.70. (Compl. Attachment 2.)

DiMauro filed his reparations complaint on February 4, 2016. In his Complaint, and the First and Second Addendums to the Complaint, DiMauro alleges that Respondent: 1) breached its broker duties; 2) breached its contract; 3) failed to supervise; 4) aided and abetted commodities fraud; and 5) misrepresented, omitted, and manipulated devices, all in violation of various CFTC and NFA rules. Discovery closed on February 7, 2017. For the reasons that follow, after careful review and consideration of the parties' evidence and arguments, DiMauro's claims are barred by the two-year statute of limitations and the Complaint is dismissed.

Factual Findings

The Parties

1. **Salvatore DiMauro** resides in Plainville, Connecticut, and opened an account with, and held by, MF Global on March 3, 2010 with $49,000.

2. **Jacob J. Gullick** was an AP of MF Global in 2010, and he opened DiMauro's account. The CFTC Office of Proceedings was unable to serve Gullick at his last registered address, and by Order dated December 20, 2016, Judgment Officer McGuire informed Complainant that Gullick would be dismissed as a party unless Complainant could provide a proper address for him. Complainant did not do so, and Gullick is dismissed for that reason. In

[1] One of DiMauro's alleged accounts is purportedly an IRA. Because whether one of his accounts was an IRA or not is immaterial, I refer to the only account in evidence by its account number, modified to obscure the actual account number, as referenced above.

addition, Gullick is dismissed because the entirety of the Complaint is being dismissed on statute of limitations grounds.

3. **Options Investments, Inc. (d/b/a Investcore Partners)**, located in Irvine, California, was the original IB for DiMauro's account. Complainant sent this Office a letter voluntarily dismissing OpVest because Gullick was not an agent or associated person of OpVest, and OpVest was dismissed on October 26, 2016.

4. **Futures and Options Xecution LLC**, located in Chicago, Illinois, has been a registered IB since June 1, 2011. FOX became the IB for Account No. XXX86 on June 1, 2011. FOX is the only Respondent that has appeared, and has not yet been dismissed, in this matter.

DiMauro's Accounts

DiMauro alleges that he opened a commodity trading account through Gullick with MF Global in September 2009, and funded that account with $86,547. (Compl. Second Add.) He provides no account number associated with that account, nor does he provide monthly statements, account opening documents, or other documents tending to show the existence of this account. The evidence presented does not bear out the allegation that this account exists. However, for the reasons that follow I assume, without finding, that this account exists and its deposits were rolled into Account No. XXX86 as described below.

DiMauro did in fact open Account No. XXX86 on March 3, 2010, through Gullick with MF Global, which he funded with $49,000. (*Id.*) In contrast to his claims with regard to the earlier opened account, DiMauro does provide an account number for Account No. XXX86 and has produced some of its monthly statements.

There is a dispute as to how much money DiMauro deposited into Account No. XXX86. DiMauro claims he deposited $49,000 when he opened the account, and this is consistent with a

deposit document he submitted. Although the documents do not reflect any additional monies deposited by DiMauro, at least after June 1, 2011 at which time FOX became its new IB (Answer & Aff. Defenses at 2), DiMauro insists that he had deposited "[a]dditional monies" into Account No. XXX86 (Compl. First Add.), and claims that his damages may be as high as $92,000 (Compl. Second Add.). In order to substantiate this damages claim, DiMauro repeatedly conflates his apparently separate accounts. For example, he alleges that the account numbers for both accounts were the same at Millenium Trust Company, with which he deposited $49,000. (Compl. Second Add. at 1.) Alternatively, he alleges that MF Global confused the account numbers for the two accounts. (*Id.* at 2 & Attachment 4). DiMauro essentially treats the $86,547 he purportedly invested in September 2009 as if it belongs in Account No. XXX86, opened in March 2010, despite producing no evidence to substantiate this claim. Thus there is some question about whether he seeded Account No. XXX86 with $49,000 (as evidenced), or $135,547 (as alleged).

This factual question need not be decided, because regardless of how much DiMauro deposited into his account and what his actual damages would be, DiMauro missed the deadline for filing his reparations Complaint and nothing tolled his deadline.

The Timeline of Relevant Events and Account Losses

As discussed above, DiMauro opened Account No. XXX86 on March 3, 2010 with $49,000. On June 1, 2011, FOX took over as IB from OptVest. At this time, his account had a net liquidating value of $47,462.14. (Answer & Aff. Defenses at 2.) On October 31, 2011, MF Global filed for bankruptcy, and in November 2011, Account No. XXX86 was transferred to a new FCM, R.J. O'Brien. As of November 30, 2011, DiMauro's account had a net liquidating value of $6,048.49. (Answer Ex. C (IRA Monthly Account Statement November 2011)).

Assuming his account was funded with $49,000, he lost $42,952, or 88%, of his initial investment, in roughly eighteen months. Assuming DiMauro in fact invested $135,547, he lost $129,499, or 96%, of his initial investment. Under either calculation, his account suffered a serious diminution in value, as reflected in the November 30, 2011 monthly statement. On June 29, 2012, Account No. XXX86 was closed and DiMauro was sent the cash balance of $7,003.70. (Answer Ex. F.)

In the interim, DiMauro must have filed a claim with MF Global's SIPA Trustee, because on March 30, 2012, the Trustee sent a letter saying his claim had been allowed in the amount of $33,498.72, of which $24,119.08 had already been paid. He was directed to oppose the determination within 30 days. (Compl. Second Add. Attachment 3). DiMauro failed to object within the 30-day period. Then, some six months later on September 14, 2012, instead of following the objections procedure described in the claims notice, his attorney sent an email to Hughes Hubbard, counsel for the SIPA Trustee, requesting DiMauro's monthly statements on the belief that he thought his "balance on November 3, 2011 was higher." (Compl. Second Add. Attachment 4). On April 3, 2014, the SIPA Trustee for MF Global issued a press release noting that all claims had been disposed of. DiMauro filed this reparations Complaint on February 4, 2016.[2]

Conclusions

Under Commission Rule 12.310(e), summary disposition is appropriate when each of three conditions has been met: (1) there is no genuine issue of material fact; (2) there is no need for further factual development; and (3) the moving party is entitled to a decision as a matter of law. *Elliot v. Jay De Bradley et al.*, Comm. Fut. L. Rep. (CCH) ¶ 32,462, at 71,717 (CFTC 2012); *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 26,236, at

[2] Under the reparations rules, mailing constitutes filing. *See* Commission Rule 12.10(a)(4).

42,031 (CFTC 1994). The purpose of summary disposition "is to avoid the empty ritual of an oral hearing," *Elliot*, Comm. Fut. L. Rep. at 71,717 (internal citation omitted), and at this stage:

> [T]he judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. All reasonable doubts about the facts should be resolved in favor of the non-moving party. If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.

Id.

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. *Id.; Cheney v. Greco*, Comm. Fut. L. Rep. ¶ 30,761, at 61,594 (CFTC 2008); *Stoffel v. Interstate/Johnson-Lane Corp.*, Comm. Fut. L. Rep. ¶ 26,267, at 42,252-42,253 (CFTC 1995). In this instance, discovery closed on February 7, 2017, and the monthly statements and other produced materials regarding communications with the SIPA Trustee sufficiently set forth the facts relevant to the statute of limitations analysis. After carefully reviewing the parties' submissions, I have determined that additional discovery and written testimony, and any oral testimony, is unlikely to clarify the factual circumstances that are material to the statute of limitations defense.[3]

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, when a complainant discovers wrongful conduct resulting in monetary losses, or in the exercise of reasonable diligence, should have discovered the wrongful activity. *McGough v. Bradford, et al.*, Comm. Fut. L. Rep.¶ 28,265, at 4252-4253 (CFTC 1995). A determination of when wrongful activity should have been

[3] On April 6, 2017, Complainant filed a Motion to Compel Document Production, particularly with respect to account documents such as new account forms and agreements. As an initial matter, this motion came two months after discovery was closed in this case. Moreover, because such account-related documents do not alter the statute of limitations analysis, I deny that motion as moot by separate order dated today.

discovered is based on the particular facts and circumstances of the case, including the: (1) relationship of the parties; (2) nature of the wrongful activity; (3) complainant's opportunity to discover the wrongful activity; and (4) actions taken by the parties subsequent to the wrongful activity. *Id.* The determination of when a cause of action accrues turns 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); *Marracinni v. ContiCommodity Services, Inc.*, Comm. Fut. L. Rep. ¶23,793 (CFTC 1986).

In this case there are several possible dates to begin the statute of limitations, and they are considered in light of DiMauro's opportunity to detect the wrongful activity and his actions taken thereafter.

November 30, 2011. As of this date, Account No. XXX86 had a net liquidating value of $6,048.49 (Answer Ex. C), and it lost either 88% of DiMauro's initial investment (assuming he started with $49,000), or 96% of that investment (assuming he started with $135,547). The precise loss calculation is immaterial because under either result, DiMauro should have known that his account suffered large losses in a relatively short time frame. The Commission has routinely held that monthly account statements reflecting large losses are sufficient to put the complainant on notice that misconduct has occurred. *See, e.g.*, *Elliot v. Jay De Bradley et al.*, Comm. Fut. L. Rep. (CCH) ¶ 32,462, at 71,718 (CFTC 2012); *Cavallaro v. Jackson et al.*,

Comm. Fut. L. Rep. (CCH) ¶ 30,845, at 61,951 (CFTC 2008); *Rosa v. Iowa Grain Co. et al.*, Comm. Fut. L. Rep. (CCH) ¶ 28,270, at 50,641 (CFTC 2000).

March 30, 2012. The MF Global SIPA Trustee sent DiMauro a letter notifying him that his claim had been allowed in the amount of $33,498.72, $24,119.08 of which had already been paid. As of this date, DiMauro thus knew or should have known that his recovery was a fraction of what he believed he invested in Account No. XXX86.

June 29, 2012. As of this date, DiMauro's account was closed and he was sent the cash balance of $7,003.70. (Answer Ex. F.) Again, this closing amount reflects large losses that should have put DiMauro on notice of possible misconduct.

September 14, 2012. DiMauro's attorney sent an email to counsel for the SIPA Trustee requesting DiMauro's monthly statements on the belief that "[a]dditional capital contributions were made through the [months after the account was opened on March 3, 2010]," and that "the balance on November 3, 2011 was higher." (Compl. Second Add., Attachment 4.) This makes plain a crucial fact: DiMauro was sufficiently concerned about recouping his investment that he hired outside counsel, who represented him at least by this date.

April 3, 2014. The SIPA Trustee announced "the final, 100 percent distribution to fully satisfy all claims of former [MF Global] customers." (Compl. First Add. Attachment 2.)

Drawing all reasonable inferences in favor of the Complainant, the absolute latest date the statute of limitations could have started is September 14, 2012, the day of the communication from DiMauro's outside attorney to the SIPA Trustee advancing the theory that DiMauro had been shortchanged. This communication came after DiMauro had notice of (1) the large losses Account No. XXX86 sustained as of the November 30, 2011 monthly statement and the June 29, 2012 account closing, and (2) the fact that the MF Global SIPA Trustee limited his claim to

$33,498.72. In addition, this inquiry was made by an attorney, which demonstrates that DiMauro's suspicions of wrongdoing were strong enough to hire outside counsel. The solicitation of legal advice starts the clock on the limitations period in this case. *See, e.g.*, *Marraccini v. ContiCommodity Svcs., Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 23,793, at 34,093 (CFTC 1987) ("Counsel are presumptively aware of whatever legal recourse may be available to their client" (internal quotation marks and citation omitted)); *Lee v. Lee*, Comm. Fut. L. Rep. (CCH) ¶ 30,478, at 59,352-353 (CFTC 2007). Therefore, DiMauro had until September 14, 2014 to timely file his reparations Complaint; instead he filed it on February 4, 2016—almost one-and-a-half years after his deadline expired.

DiMauro contends that he was not "on notice that the amounts lost in his accounts through [Respondents] were not going to be part of the MF Global restitution" until the April 3, 2014 press release by the SIPA Trustee. This is unreasonable and untenable. DiMauro knew in late 2011 and mid-2012 that his account value had dwindled considerably, and by March 30, 2012, DiMauro knew what recovery he would obtain from MF Global. That MF Global had not disposed of *claims for persons other than Complainant* until April 3, 2014 says nothing about the resolution of DiMauro's claim, which happened on March 30, 2012.

DiMauro's tolling arguments are similarly unavailing. First, DiMauro argues that Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, automatically stayed any claims he had against Respondent. However, by the terms of its own language, Section 362 stays only an "action or proceeding against *the debtor*." 11 U.S.C. § 362(a)(1) (emphasis added). But MF Global, the debtor at issue, is not a respondent in this case. FOX is, and because Complainant has not cited to any legal authority staying actions as to non-debtors by virtue of 11 U.S.C. Section 362, this tolling argument fails. Second, DiMauro contends that the filing of class

actions against MF Global by its customers tolls the claims of all class members. (Compl. First Add. at 2 (citing *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983)). But this suffers from the same defect of his first tolling argument—MF Global, the defendant in the purported class actions described, is not the respondent; FOX is. There is no reason to toll the claims as to FOX.

ORDER

DiMauro's statute of limitations expired on September 14, 2014, and his Complaint filed on February 4, 2016 is untimely. FOX's Motion for Summary Disposition is hereby GRANTED, and the Complaint is DISMISSED.

DATED: August 11, 2017

Kavita Kumar Puri,
Judgment Officer