UNITED STATES OF AMERICA
Before the
U.S. COMMODITY FUTURES TRADING COMMISSION

MEHMOOD AKHTAR QURESHI and ADEEL MEHMOOD QURESHI, Complainants, v. MARC NAGEL and DORMAN TRADING LLC, Respondents.	CFTC Docket No. 12-R013 OPINION & ORDER

Introducing Broker ("IB") Well & Will Financial Management Services Company ("W&W") of Pakistan stole customer funds from a trading account at Dorman Trading LLC, a futures commission merchant ("FCM") (together with Respondent Associated Person Marc Nagel, collectively "Dorman") that served as clearing broker for the customers' trades.[1] Based on instructions from W&W, Dorman wired the customers' money to a bank account in Pakistan, from which W&W was able to steal it without detection. The customers, Complainants Mehmood Akhtar Qureshi and his son Adeel Mehmood Qureshi ("Qureshis"), also of Pakistan, seek damages from Dorman. The Judgment Officer denied their claim on summary disposition, holding that Dorman reasonably followed W&W's instructions and was not otherwise responsible for the IB's actions. We affirm.

For its part, Dorman has lodged a counterclaim for fees and costs, arguing that the Qureshis brought this case and litigated it in bad faith and, separately, that the Qureshis are liable

[1] Well & Will has never been registered with the Commission in any capacity.

for fees pursuant to a contractual fee-shifting agreement. The Judgment Officer denied Dorman's counterclaim, and we again affirm.

BACKGROUND

The material facts are undisputed.

When the Qureshis opened their Dorman account, W&W supplied the FCM with false customer contact information. The Qureshis had initially completed the required account opening documents by hand and given them to W&W. R.42 (Initial Decision) at 12, ¶ 12. W&W then prepared and submitted a typed version containing a fictitious email address substituted for the Qureshis' real one. *Id.* In place of the Qureshis' physical mailing address, W&W supplied Dorman its own, falsely explaining to the FCM that "mail delivery in Pakistan is not really sophisticated enough" for the Qureshis to receive mail directly. *Id.* at 12-13, ¶ 13.

The Qureshis used Dorman's internet system to access CME's Globex exchange. *Id.* at 13, ¶ 15. Dorman's role was limited to clearing trades and sending account statements to the email address given on the Qureshis' customer application. *Id.* at 8-11, ¶¶ 6-10. At some point, W&W gave the Qureshis a hardcopy account statement showing their initial deposit. *Id.* at 13, ¶ 14. This would be the only account statement they would see. *Id.*; R.1 App. B at 9, ¶ 19. However, they received some indication of the account's activity in the form of quarterly "remittances," payments from W&W based on the trading account's supposed profits. R.42 at 7, ¶ 5 & 14, ¶ 16.

In June 2009, W&W sent Dorman a request to close the Qureshis' trading account and to transfer the funds to an account at a Pakistani bank in the Qureshis' name. R.6 at 2. Unbeknownst to Dorman, however, the account did not belong to the Qureshis. *Id.* Dorman made the wire transfer on July 3. R.42 at 14, ¶ 17. The Qureshis had no notice of this and, in

fact, W&W paid them remittances the following September and January, perhaps to avoid suspicion. *Id.* at 14, ¶¶ 16-17.

In March 2010, the Qureshis tried to contact W&W about their next anticipated remittance. They discovered, however, that W&W had closed up shop and vanished. *Id.* at 14, ¶ 16. The Qureshis contacted Dorman on about March 12, 2010, and learned that W&W had closed their trading account months before and directed their money to the bank in Pakistan. *Id.* at 15, ¶ 18. The Qureshis later learned that the funds were subsequently moved to yet another account, this time in W&W's name. R.1 Annex P at 2. W&W then drained that account, at which point the trail runs cold. The Qureshis filed suit in Pakistan to recoup the stolen money from the bank, but they were unsuccessful. The Pakistani tribunal stated that the Qureshis should seek redress against W&W, the "real fraudster." R.1 Annex S at 2-3, ¶¶ 2, 6.

The Qureshis' Claims in Reparations

The Qureshis filed this CFTC reparations claim against Dorman in February 2012. They claimed that W&W defrauded them of $71,650, and that Dorman is liable for this loss notwithstanding that it was unaware of the fraud. *See* R.1. The Qureshis' main theory of liability is that Dorman's execution of W&W's wire request and closing the Qureshis' account were "willful breaches of fiduciary duty," R.1 App. B at 10-11, ¶ 23 (emphasis omitted), and negligence, *id.* at 3, ¶ 6. They also claim that Dorman facilitated W&W's fraud by violating anti-money-laundering regulations. *Id.* at 4, ¶ 9 & 8, ¶ 16.

Dorman does not dispute that the Qureshis lost $71,650 due to the fraud, but argues that it acted reasonably and in good faith in receiving and responding to instructions from W&W, and that it did not breach any duty owed the Qureshis. *See* R.6 at 3-5. Dorman also argues that W&W was an agent of the Qureshis, not of Dorman, and so Dorman had no duty to supervise it.

Id. at 5-7. Dorman emphasizes that it did not have any basis to conclude that the requests to change account data and transfer money were untoward. *Id.* at 4.

Dorman's Counterclaim for Fees and Costs

Dorman filed a counterclaim, arguing that it is entitled to attorneys' fees and costs because the Qureshis brought and litigated the case in bad faith, and because of a provision in the Qureshis' customer agreement providing that:

> 21. INDEMNIFICATION. Customer agrees to indemnify Dorman and hold Dorman harmless from and against any and all liabilities, losses, damages, costs and expenses, including attorneys' fees, incurred by Dorman *because any of the Customer's representations and warranties shall not be true and correct* or the agreements made herein by Customer shall not be fully and timely performed. ***

R.48 at 5, quoting Customer Agreement, R.6 Ex. D at 7, ¶ 21 (pdf page no. 42) (emphasis added).

The Judgment Officer's Decision

The Judgment Officer granted summary disposition to Dorman on the Qureshis' claims and to the Qureshis on Dorman's counterclaim. R.42 at 20. The Judgment Officer held that Dorman was not responsible for supervising W&W, because when an FCM does not "guarantee" the liabilities of an IB, there is a presumption that the IB is not an agent of the FCM and the claimant has the burden to show that the IB acted as a *de facto* branch office. *Id.* at 18 (*citing First American Disc. Corp. v. CFTC*, 222 F.3d 1008, 1010 (D.C. Cir. 2000); *Reed v. Sage Grp., Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943, No. 85R-312, 1987 WL 1539628 (CFTC Oct. 14, 1987) (complainant must show that the relationship between an IB and an FCM was not one of "independent business entities")). The Judgment Officer found none of

the sorts of interrelationship necessary to show a *de facto* branch office and held that Dorman was therefore not liable for W&W's wrongdoing. R.42 at 18-19.

The Judgment Officer also denied the Qureshis' damages claim on the basis of the Commission's anti-money laundering regulation, 17 C.F.R. § 42.2. He held that this regulation "does not create a private right of action in reparations." R.42 at 20.

As to Dorman's counterclaim for attorneys' fees and costs, the Judgment Officer stated only that Respondents had not "established that the complaint was filed or litigated in bad faith." *Id.*

Both parties filed timely appeals.

DISCUSSION

I. 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).

II. Dorman Is Not Liable for the Qureshis' Loss.

A. Dorman Did Not Have a Duty to Supervise W&W.

The Qureshis' claim of failure to supervise turns on whether W&W was acting as Dorman's agent. *Taylor v. Vista Futures, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,165, at 38,430, Nos. 87-R194, 87-R382, 1991 WL 255249, at *5 (CFTC Nov. 20,

1991). An IB is not an agent of an FCM unless there is an explicit agreement between them or the IB is a *de facto* branch office of the FCM. *First American Disc. Corp.*, 222 F.3d at 1010; *see also Reed*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,302, 1987 WL 1539628. Dorman and W&W had no guarantee agreement, so the Commission considers whether W&W was a *de facto* branch office.

Whether an IB is a *de facto* branch office depends "upon all of the facts of a particular situation, and will necessarily need to be determined on a case-by-case basis." *In re Big Red Commodity Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,623, at 30,667, No. 80-21, 1985 WL 56291, at *12 (CFTC June 7, 1985). Connections commonly present in an arm's-length relationship between an FCM and IB are not sufficient. *Webster v. Aiello*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,578, at 46,697, Nos. 98-R005, 98-R009, 98-R010, 98-R075, 1999 WL 41818, at *18 n.327 (CFTC ALJ Feb. 1, 1999). Here, there are no indications to support a finding of a *de facto* branch office. W&W was the IB chosen by the Qureshis, not by Dorman; W&W solicited accounts for FCMs other than Dorman; and there was no overlap between W&W and Dorman of owners or employees. *See generally* R.42 at 18-19. The record establishes that Dorman acted at arm's length from W&W, filling the role of a clearing firm for trades executed in the Qureshis' account. Accordingly, we agree with the Judgment Officer that Dorman had no duty to supervise W&W, and we reject the Qureshis' claims of negligence and breach of fiduciary duty.

B. The Qureshis' Money Laundering Claim Is Meritless.

The Qureshis next claim that Dorman violated the Commission's anti-money laundering rule, 17 C.F.R. § 42.2, which requires FCMs and IBs to comply with the "applicable provisions of the Bank Secrecy Act" and Treasury regulations promulgated thereunder. R.1 at App. A at 2,

¶¶ 4-5. Generally, those laws and regulations establish requirements that a financial institution (1) verify the identity of any person seeking to open an account; (2) maintain records of the information used to verify the person's identity; and (3) determine whether the person appears on any lists of known or suspected terrorists or terrorist organizations. *Customer Identification Programs for Futures Commission Merchants and Introducing Brokers*, 68 Fed. Reg. 25,149, 25,149 (May 9, 2003). The Qureshis argue that Dorman failed to properly verify their contact information and should have filed a "suspicious activity report" under the Bank Secrecy Act. *Id.* at 2 ¶ 4. The Judgment Officer rejected the claim on the ground that 17 C.F.R. § 42.2 "does not create a private right of action in reparations." *See* R.42 at 20. We likewise reject the claim, but on a different basis.

The Qureshis' claim is not well explained. They devote only a single sentence to it in their appeal brief, leaving us no basis to find there was a violation of 17 C.F.R. § 42.2. But even if there had been a violation, the Qureshis cannot recover from Dorman. As a threshold matter, we disagree with the Judgment Officer that the issue is one of whether there is a private right of action in reparations for violations of this provision. The CEA provides that damages are available in reparations for violations of "any" regulation. 7 U.S.C. § 18(a)(1). The statute requires, however, that such damages be "proximately caused" by the violation. *Id.* The Qureshis cannot meet this requirement.

In assessing proximate cause, "the Commission looks to whether . . . the loss was a reasonably probable consequence of respondent's conduct." *Steen v. Monex Int'l, Ltd.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,245, at 38,723, No. 84-R339, 1992 WL 41433, at *5 (CFTC Mar. 3, 1992). Proximate cause also requires that the alleged harm be one that the statute or regulation at issue "was meant to prevent." *Lerner v. Fleet Bank, N.A.*, 459

F.3d 273, 284 (2d Cir. 2006); *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 953 (8th Cir. 1999); *Bowman v. Redding & Co.*, 449 F.2d 956, 963 (D.C. Cir. 1971) (overruled on other grounds by *Belton v. WMATA*, 20 F.3d 1197 (D.C. Cir. 1994)). The Qureshis' money-laundering claim fails both tests even assuming a violation of the regulation occurred.

First, proximate cause is absent here because it was a theft by a third party that directly caused the Qureshis' injury, bearing little or no relationship to any duties by an FCM under 17 C.F.R. § 42.2 to prevent money-laundering. Second, the purpose of 17 C.F.R. § 42.2 is "to facilitate the prevention, detection, and prosecution of international money laundering and the financing of terrorism." *Customer Identification Programs for Futures Commission Merchants and Introducing Brokers*, 68 Fed. Reg. 25,149, 25,149 (May 9, 2003). It is not a rule of customer protection, and W&W's theft is far afield from the anti-money laundering and anti-terrorism purposes of the customer identification requirements the Qureshis allege Dorman violated. Accordingly, we affirm dismissal of this claim.

III. Dorman Cannot Recover Attorneys' Fees.

A. Dorman Has Not Shown Bad Faith.

Commission regulations permit a judgment officer to award costs in reparations including, "if appropriate, reasonable attorneys' fees[.]" 17 C.F.R. § 12.210(c). We have said that litigation undertaken or conducted in bad faith constitutes an "appropriate" ground to award such fees. *See Sherwood v. Madda Trading Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728, at 23,023 n.26, No. 77-2, 1979 WL 11487, at *8 n.26 (CFTC Jan. 56, 1979). The Judgment Officer held that the Qureshis did not act in bad faith. We agree.

The Qureshis, like many reparations claimants, have not been represented by counsel. The Commission has explained that "[b]ecause the reparations forum was designed to permit

complainants to participate on a *pro se* basis," we will "carefully distinguish between *pro se* complaints that are carelessly drafted or poorly thought through, and those that are filed in bad faith." *Brooks v. Carr Investments, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,027, at 53,459, No. 96-R100, 2002 WL 927614, at *6 (CFTC May 9, 2002). Accordingly, in considering allegations of bad faith, we consider whether complainant had the benefit of counsel and then focus on "the allegations taken as a whole and the information available to complainant at the time the complaint was submitted." *Id.* We do not "infer bad faith simply because certain claims lack facial persuasiveness or a coherent explanation." *Id.* Instead we consider "(1) whether there is a colorable basis for the claims and (2) whether the record shows that the claims were raised for an improper purpose." *Id.*

Here, the Qureshis are both *pro se* claimants and foreign nationals.[2] Both Qureshis were inexperienced traders, R.42 at 4, which suggests they may not have been familiar with the relationship between an IB and an FCM. Thus, we cannot infer that the Qureshis had any more than a superficial understanding, if that, of the applicable laws. And there is no evidence that the claims were raised for an improper purpose. To the contrary, the parties agree that the Qureshis suffered a substantial loss. Their mistake here was proceeding against the wrong party. In context, this is forgivable.

As discussed, FCMs are at least *sometimes* liable for the actions of an IB. The test for whether an IB is a *de facto* branch office of an FCM is fact-specific. *See, e.g., Stotler & Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988) (affirming the Commission's finding that a commodity trading advisor was acting as agent for the FCM based on the "'overall assessment of the totality of the circumstances in each case,'" quoting *Berisko v. E. Capital Corp.*, [1984-1986

[2] One of the Qureshis was an attorney, but in Pakistan.

Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,772, at 31,223, No. R 81-35-82-43, 1985 WL 56342, at *1 (CFTC Oct. 1, 1985)). And, determining whether a fraud is "within the scope" of an agency relationship can be a "difficult question." *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 967 (7th Cir. 1986). Against that backdrop, it is not uncommon for claimants to sue an FCM in error, claiming that others are acting as agents for the FCM when, upon a weighing of the facts, no such agency relationship exists. *E.g.*, *Zizzo v. Vision Ltd. Partnership*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,089, at 41,612-13, No. 94-R022, 1994 WL 202760, at *2 (CFTC ALJ May 23, 1994). The Qureshis may not have had all the facts, given that the process by which W&W provided incorrect contact information to Dorman was opaque to them. And the Qureshis may not have understood the legal significance of agency law and its limitations as they pressed their claim against Dorman. But that does not amount to bad faith.

Dorman also contends that the Qureshis filed two frivolous motions, one challenging Dorman's discovery responses, and the other attempting to add an additional respondent after the statute of limitations had run. R.48 at 6-7. Although the motions may have lacked merit (a question not before us on appeal), there is no indication they were filed for any improper purpose. Accordingly, we likewise reject the claim that the Qureshis have acted in bad faith during the course of proceedings.

B. The Customer Agreement Does Not Entitle Dorman to Attorneys' Fees.

Finally, Dorman contends it is entitled to attorneys' fees on the basis of an indemnity provision in the Qureshis' customer agreement. The provision states that Dorman is entitled to recover fees "incurred by Dorman because any of the Customer's representations and warranties shall not be true and correct." *Id.* at 5. We hold that this provision does not apply to these facts.

Dorman claims that the Qureshis "breached their warranty that the first email address was true and correct." *Id.* at 16. Even if that were true (which we do not decide), Dorman has failed to establish that it incurred the fees "because" of any such breach of warranty.

The customer agreement provides that it is governed by Illinois law. *See* R.6 Ex. D at 7, ¶ 18 (pdf page no. 42). In Illinois, proof of "causation requires proof of both 'cause in fact' and 'legal cause.'" *Nolan v. Weil-McLain*, 910 N.E.2d 549, 557 (Ill. 2009) (quoting *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992)). Illinois courts refer to these two concepts collectively as "proximate cause." *Turcios v. DeBruler Co.*, 32 N.E.3d 1117, 1124 (Ill. 2015). "Proximate cause is established if an injury was foreseeable as the type of harm that a reasonable person would expect to see as a likely result of his or her conduct." *People v. Cook*, 957 N.E.2d 563, 568 (Ill. App. Ct. 2011) (internal quotation marks and citation omitted). On the other hand, "[t]he act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime." *Williams v. Wiewel*, 344 N.E.2d 34, 36-37 (Ill. App. Ct. 1976) (quoting Restatement (Second) of Torts § 448 (1965)).

Dorman fails to address these factors at all. It does not argue, for example, that the Qureshis reasonably should have expected that failing to ensure correct contact information would lead to W&W looting their account. Nor could they. Instead, Dorman rests its case on the passing and conclusory remark that "Respondents incurred these costs including attorney's fees solely because Complainants breached a warranty that the first email address was correct." R.48 at 7. That clearly is not so, because it leaves W&W's theft entirely out of the picture. Indeed, Dorman made virtually that same point in opposition to the Qureshis' claims for

damages. Dorman stated that it is not liable because "emailing of account statements to [the incorrect] email address in the Account Application was not a 'substantial factor' or the proximate cause of Complainants' alleged loss." R.49 at 15. Rather, Dorman argued, the Qureshis' damages "were proximately caused by . . . W&W's intervening criminal act of withdrawing the money" from the bank in Pakistan. *Id.* at 16. We agree. W&W's theft was "an intentional tort or crime," and therefore "a superseding cause" of the damages. *See Williams*, 344 N.E.2d at 36-37.[3] Accordingly, the customer agreement provides no basis for an award of attorneys' fees.

[3] In *Bianco v. Cytrade Financial, LLC*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,933, at 62,326-27, No. 06-R015, 2008 WL 4449365, at *1-2 (CFTC Sept. 30, 2008), the Commission held that contractual fee-shifting provisions cannot be enforced in reparations, except under limited circumstances not present here. Dorman argues that we should reverse that precedent. However, because Dorman's fee-shifting provision does not apply, we decline to revisit *Bianco* here.

CONCLUSION

For the foregoing reasons, the Judgment Officer's Initial Decision is AFFIRMED.

IT IS SO ORDERED.[4]

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

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

Dated: June 27, 2016

[4] 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).