

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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Office of Proceedings
Proceedings Clerk

2:27 pm, Oct 18, 2013

JOYCE A. SCHWEICKART and
JAMES B. SCHWEICKART

v.

OTTO GERDT FEDDERN

CFTC Docket No. 10-R018

OPINION AND ORDER

Complainants Joyce and James Schweickart (collectively, the “Schweickarts”) and respondent Otto Feddern both appeal from a Judgment Officer’s initial decision, which held that Feddern aided and abetted: (a) Victor Lyons and Aramis Capital Management, LLC in defrauding the Schweickarts; and (b) Aramis Capital in its violation of Commodity Futures Trading Commission (“CFTC” or “Commission”) disclosure rules.¹ The Judgment Officer also found that Feddern proximately caused \$34,420 in out-of-pocket losses to the Schweickarts, but limited the award to the amount that the Schweickarts requested in their complaint – \$2000. In their appeal, the Schweickarts request that the Commission increase the award to the full amount of their loss – \$34,420. In his appeal, Feddern requests that the Commission reverse the Judgment Officer’s decision. For the reasons discussed below, we deny both appeals, and affirm both the Judgment Officer’s conclusion that Feddern violated the Commodity Exchange Act (“CEA”), and his award of damages.²

¹ *Joyce A. Schweickart and James B. Schweickart v. Otto Gerdt Feddern*, [2011-2012 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 32,047 at 67,379 (Oct. 5, 2011) (“Initial Decision”).

² Neither Feddern nor the Schweickarts appeal the liability determinations against the primary wrongdoers, Lyons and Aramis Capital. The Judgment Officer entered a default order against them before he issued his initial decision against Feddern. Default Order dated March 16, 2011. The Judgment Officer found Lyons guilty of fraud in violation of CEA Section 4b(a), 7 U.S.C. § 6b(a); that his conduct proximately caused damages totaling \$2,000; and that Aramis Capital

BACKGROUND

Trade Losses

The Schweickarts attended investment meetings hosted by Feddern between the fall of 2007 and July 2008. Transcript of Telephonic Recording (May 17, 2011) (“Tr.”) at 7-8, 24, 25; Initial Decision at 67,387. Mr. Schweickart possessed about ten years of stock- and bond-trading experience, but no futures or options trading experience, and Mrs. Schweickart possessed no trading experience. Tr. 7-8, 25; Initial Decision at 67,381. Feddern – who was not registered in any capacity with the Commission during the relevant period – introduced the Schweickarts to Lyons, touting the latter’s trading strategy. Tr. at 9, 10, 13, 25, 31; Initial Decision at 67,381.

Lured by pronouncements of positive trading results and minimal losses, the Schweickarts met with Feddern on July 11, 2008, to open a discretionary trading account. Tr. at 12-13, 14, 24, 40-41; Initial Decision at 67,383-84. The account was to be managed by Lyons. Tr. at 14; Initial Decision at 67,348. Feddern instructed the Schweickarts to sign two documents: an account opening document, and Aramis Capital’s CTA disclosure document. Feddern also induced the Schweickarts to backdate both documents to July 3, 2008. Initial Decision at 67,384. A notice on the cover page of Aramis’ CTA disclosure document warned that the document expired on July 3.³ (Schweickart Letter dated July 1, 2010; Initial Decision at 67,383, 67,384). Although the Schweickarts had backdated the two documents, they used the correct

was liable as a principal for Lyons’ fraud under CEA Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B). *Id.* After Feddern produced a copy of Lyons’ Notice of Chapter 7 Bankruptcy, the Judgment Officer vacated the default order against Lyons and dismissed the complaint against him without prejudice. Order of Dismissal. Because the bankruptcy case did not apply to Aramis Capital, the Default Order against Aramis Capital remained in effect and became a Commission final order. *Id.* n.2.

³ Although Lyons’ CTA disclosure document stated that it was valid until July 3, 2008, in March 2008, the National Futures Association had discovered multiple deficiencies in the document, and prohibited Lyons from soliciting any new clients until he had corrected those deficiencies. Initial Decision at 67,383. Those deficiencies had not been corrected when the Schweickarts signed the document. *Id.* The record does not indicate whether Feddern was aware of this prohibition.

date, July 11, on the two checks that they wrote to open the account (a \$40,000 check for their investment, and a \$4000 check for Lyons' management fee). (Checks attached to Order Compelling Production).

From August 2008 to July 2009, Lyons traded on the Schweickarts' behalf and lost most of their \$40,000 investment. Tr. at 15-16; Initial Decision at 67,384. By the end of August 2008, the Schweickarts' account balance had dropped to \$25,889. (Account Statements attached to Complaint). Sometime after August but before January 2009, Lyons met with the Schweickarts at Feddern's office, and announced that he had changed his trading system and hoped to recover losses with a different and more conservative options trading strategy. Tr. at 17-19; Initial Decision at 67,384. Lyons' hopes were in vain; the Schweickarts' account statements reflected the continuing decline of their account:

- January 2009 opening balance: \$13,772.
- February 2009 opening balance: \$9839.
- May 2009 opening balance: \$9809.

By July 2009, the Schweickart's account statement showed a balance of \$9,779.94, which was the amount that remained after trading losses and quarterly fees had been deducted. (Account Statements attached to Complaint).

Procedural History

Less than a year later, the Schweickarts filed a *pro se* reparations complaint against Lyons and Feddern. (Complaint dated May 28, 2010). They claimed that during the process of completing their complaint, they learned that Lyons possessed limited trading experience, and that Lyons had been suspended as a trader in September 2009. Complaint at 3. The Schweickarts sought \$2000 in damages.

By letter dated June 23, 2010 (“Proceedings Letter”), the Commission’s Office of Proceedings advised the Schweickarts that they could pursue \$30,220.06 in out-of-pocket losses because they “alleged misrepresentation, negligence, and breach of fiduciary duty,” and asked them to confirm that they only intended to seek \$2,000.⁴ The Schweickarts replied: “Although it was a hard lesson to learn we will accept [our] trading losses but still think we are due at least ½ of the \$4000.00 annual fee due the inaction of both [Mr.] Lyons and [Mr.] Feddern.” (Schweickart Letter dated July 1, 2010).

On January 4, 2011, the Commission’s Office of Proceedings served a Notice of Summary Proceeding identifying the reparations matter as one where the Schweickarts sought damages, exclusive of interest and costs, of less than \$30,000. On May 17, 2011, the Judgment Officer conducted a telephonic hearing. On May 18, 2011, Feddern, acting upon the Judgment Officer’s instruction, e-mailed to all parties fee charts and a version of the Aramis Capital disclosure document. (Feddern e-mail with two attachments). The introduction to this version of the disclosure document explained that Lyons was a party to a 2006 National Futures Association (“NFA”) arbitration action where he was found liable of misconduct, and was required (along with another party) to pay claimants \$286,000. (Aramis Capital disclosure document)). The disclosure document that the Schweickarts signed did not reveal Lyons’ misconduct.

In August 2011, the Judgment Officer instructed all parties to answer questions to help develop the evidentiary record concerning the aiding-and-abetting charge. (Order Compelling Production dated August 10, 2011). The Schweickarts filed an affidavit responding to the questions, and, in an accompanying cover letter, they requested to amend their complaint against

⁴ To arrive at \$30,220.06 in out-of-pocket losses, the Office of Proceedings subtracted the amount that remained in the Schweickarts’ trade account – that is, \$9779.94 – from their initial \$40,000 investment.

Feddern “for the full amount of [their] loss as stated in the enclosed affidavit.” (Schweickart Letter dated August 22, 2011). They explained that they were unaware of Lyons’ transgressions – in particular the misconduct that led to the 2006 NFA arbitration – and therefore wanted to increase their damages request. *Id.* In their affidavit, the Schweickarts commented that neither Feddern nor Lyons ever revealed the 2006 NFA arbitration to them, and that, if they had known about Lyons’ past, they would not have invested with him in 2008. (Schweickart Affidavit at Question 6).

In his affidavit, Feddern admitted that he had not reported the 2006 NFA arbitration to the Schweickarts, and added, “[t]his was Lyons’ responsibility NOT mine.” (Feddern Affidavit dated August 29, 2011 at Question 8). Feddern also explained that he was unaware of the 2008 NFA cease-solicitation order against Lyons so he did not reveal it to the Schweickarts. *Id.* In response to a question asking whether and why Feddern instructed the Schweickarts to backdate documents, Feddern replied, “IF this happened, it was at the behest of Lyons...not me.” *Id.* at Question 5.

Initial Decision

On October 5, 2011, the Judgment Officer entered his initial decision in favor of the Schweickarts; however, he denied the request to increase their damages claim, limiting the amount to \$2,000. The Judgment Officer concluded that the Schweickarts’ request to enlarge their damages claim came too late, given that nothing factually material had changed since they filed their reparations claim. *Id.* The Judgment Officer also observed that Feddern had presumably made litigation choices, including his choice to proceed without counsel, based on the dollar amount of the Schweickarts’ claim. *Id.* The Judgment Officer also rejected Feddern’s argument that he could not be the subject of a Commission reparations proceeding because he was not registered during the relevant period. The Judgment Officer relied on Commission

precedent, which holds that jurisdiction is appropriate because, even though Feddern was not registered at the time of the events challenged by the Schweickarts, he subsequently became registered. Initial Decision at 67,385.

The Judgment Officer found that the record supported the conclusion that Lyons and Aramis Capital had defrauded the Schweickarts and had breached the Commission's disclosure rules. *Id.* at 67,385-86. Lyons and Aramis Capital, through Feddern, delivered to the Schweickarts an out-to-date and materially deficient disclosure document. *Id.* at 67,387. Furthermore, the Judgment Officer found that the evidence supported the conclusion that Feddern "knowingly committed a series of overt acts on July 11, 2008 that advanced Lyons' and Aramis' fraud on the Schweickarts" by, among other things, encouraging the Schweickarts to backdate their signatures, and "downplaying" the significance of the backdating. *Id.* The Judgment Officer concluded that Feddern aided and abetted Lyons and Aramis Capital in deceiving the Schweickarts. *Id.* at 67,386-87.

The Appeals

On appeal, Feddern objects to the Judgment Officer's finding that he aided and abetted Lyons and Aramis Capital by defrauding the Schweickarts, and by breaching the Commission's disclosure rules. Feddern suggests that the Commission lacks jurisdiction over him because he was not a Commission registrant during the relevant time, and was, therefore, unfamiliar with applicable Commission rules. (Feddern's Notice of Appeal at 3, 4). Feddern also maintains that he was never Lyons' or Aramis' agent but merely enjoyed a referral relationship with Aramis Capital. (Feddern's Notice of Appeal at 2).

The Schweickarts' appeal focuses on damages. (Schweickarts' Notice of Appeal dated October 21, 2011). They argue that they are entitled to recoup all of their losses because after they filed their reparations complaint they discovered two facts. First, they learned that Lyons

had been subject to a cease-solicitation directive during the time the Schweickarts let Lyons trade their account. (Schweickarts' Appeal Affidavit dated November 18, 2011). Second, they learned of the 2006 NFA arbitration penalizing Lyons for misconduct. (*Id.*; Schweickarts' Notice of Appeal dated October 21, 2011).

DISCUSSION

We agree with the Judgment Officer's determination that Feddern is subject to the Commission's reparations jurisdiction, and that he aided and abetted Lyons and Aramis Capital in violating the CEA. We also affirm the award of damages.

1. Feddern's claim that he was unregistered at the time of the fraud and the delivery of misleading disclosure documents is of no consequence because Feddern became registered with the Commission within the two-year statute of limitations that applied to the Schweickarts' cause of action. *Nelson Inc. Ret. Trust v. Diversified Inv. Group, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. ¶ 22,627 at 30,679 (CFTC June 5, 1985) (a person may seek a reparations award against anyone who becomes registered at any time within two years after the cause of action accrues); *see also* Initial Decision at 67,381 (Feddern registered as an AP in September 2009).

2. We also agree with the Judgment Officer's determination that Feddern is liable for aiding and abetting the misconduct of Lyons and Aramis Capital. Initial Decision at 67,386-87. As the Judgment Officer correctly noted, there are three elements to aiding and abetting. *Id.* The Commission must find that the wrongdoer 1) knowingly associates himself with an unlawful venture; 2) participated in that venture as something that he wishes to bring about; and 3) seeks by his actions to make it succeed. *In re Richardson Securities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,145 at 24,646 (CFTC Jan. 27, 1981); *see* 17 U.S.C. § 13c(a) (aiding and abetting is unlawful). In his appeal, Feddern claims that he was nothing

more than an unknowing liaison between Lyons and the Schweickarts. (Fedderm Notice of Appeal dated Nov. 17, 2011). Yet, the record shows otherwise. Fedderm delivered an outdated disclosure document to the Schweickarts. Initial Decision at 67,387. And then Fedderm knowingly encouraged the Schweickarts to backdate that document – a fact that Fedderm does not deny. Initial Decision at 67,387. (*See also* Fedderm Affidavit dated August 29, 2011, at Question 5). As the Judgment Officer correctly concluded, these facts satisfy all three elements of aiding and abetting, and establish that Fedderm aided and abetted Lyons and Aramis Capital in their misconduct. Initial Decision at 67,387. *See also Sanchez v. Crown*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. ¶ 30,183 at 57,725 (CFTC Jan. 18, 2006) (Commission found respondent liable of aiding and abetting where respondent failed to provide disclosure documents to customer before account was opened).

3. Finally, we affirm the Judgment Officer's denial of the Schweickarts' request to increase their damages claim from \$2,000 to their full out-of-pocket losses, an amount in excess of \$30,000.⁵ (Schweickart cover letter dated August 22, 2011). As described above, because the Schweickarts only requested \$2000 in damages, the Office of Proceedings designated the case for summary proceeding. As a result, pursuant to the Commission's rules, the maximum amount of damages that the Schweickarts could recover was limited to \$30,000. 17 C.F.R. § 12.26(b). Further, the Judgment Officer's authority to amend the damages claim was controlled by Commission rule 12.204(a), which provides that, "before the parties have concluded their submission of proof, the Judgment Officer may allow amendments of the pleadings either upon written consent of the parties, or for good cause shown, provided however, that any pleading as

⁵ The Schweickarts did not cite a specific amount. Therefore, we are guided by the initial decision, in which the Judgment Officer calculated the Schweickarts' out-of-pocket losses as \$34,420 – the sum of \$30,420 in trading losses and Lyons' \$4,000 annual fee. Initial Decision at 67,384. (We note that, based on the account statements in the record, it appears that the Schweickarts actually lost \$34,220.06 – an amount that is \$200 less than the amount cited by the Judgment Officer. The \$200 difference does not alter the outcome of our decision.).

amended shall not contain an allegation of damages in excess of \$30,000.” 17 C.F.R.

§ 12.204(a). Here, the Schweickarts sought an amount that was in excess of \$30,000. For that reason, the Judgment Officer was without the authority to grant the amendment, and, therefore, his refusal to increase the Schweickarts’ damage request is affirmed.

Nor would it have been appropriate to grant the Schweickarts’ request even if it had been limited to \$30,000 – an amount within the Judgment Officer’s discretion. *See* Initial Decision at 67,385 (discussion of Schweickarts’ motion to increase damages). The Judgment Officer determined correctly that, when the Schweickarts decided to limit their damage request to \$2000, they were aware of the action that NFA took against Lyons in 2008. Initial Decision at 67,385. The Judgment Officer also concluded correctly that it was immaterial that it was not until later that the Schweickarts learned of the NFA’s 2006 determination that Lyons engaged in misconduct. In particular, even without knowledge of this fact, the Schweickarts already were aware of facts sufficient to support their allegations of aiding and abetting. (*See* Complaint at 3 (Schweickarts’ knowledge of Lyons’ suspension); Proceedings Letter dated June 23, 2010 (Schweickarts’ allegations listed); and Feddern e-mail dated May 18, 2011, with two attachments (2006 NFA arbitration disclosed)). Further, there is no indication that Feddern took any action to hide evidence of the earlier NFA action from the Schweickarts. Even if the Schweickarts had known of the earlier NFA action against Lyons, this would not have changed the conclusion that Feddern’s misconduct proximately caused the Schweickarts’ out-of-pocket losses. Initial Decision at 67,387.

We also agree with the Judgment Officer that a decision to increase damages would have been prejudicial to Feddern. *Id.* at 67,385. Under Commission reparations rule 12.1, all rules must be “construed liberally so as to secure the just, speedy, and inexpensive determination of the issues presented with full protection of the rights of *all* parties.” 17 C.F.R. § 12.1 (emphasis

added). Here, the Judgment Officer considered the effect that the Schweickarts' decision to limit their damage request to \$2,000 may have had on Feddern, in particular, his decision to represent himself. Initial Decision at 67,385. *Cf.* Rules Relating to Reparation Proceedings, 41 Fed. Reg. 3994 (Jan. 27, 1976 (final rule)) ("no party to a reparation proceeding should be prejudiced by a technical or inadvertent violation of these [reparations] rules which does not prejudice the interest of any other party"); *see generally* *Shea v. Clinton*, 288 F.R.D. 1, 4 (D.D.C. 2012) (a court must consider the prejudice an opposing party might suffer before permitting amendments to pleadings under Fed. R. Civ. Proc. 15(a)(2)).

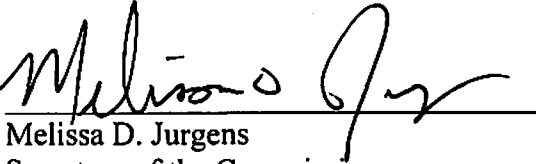
We agree with the Judgment Officer that, had Feddern known that the Schweickarts would seek damages substantially in excess of \$2000, this would have been likely to change his litigation strategy, including whether to retain legal counsel. Moreover, because the Schweickarts' request came so late in the process – that is, almost 15 months after the complaint's filing date, three months after the hearing, and simultaneous with the submission of post-hearing affidavits – the Judgment Officer would not have been able to protect Feddern from suffering undue prejudice. *Cf. Terekhina v. Capital Market Services, LLC*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,678 at 65,221 n.4 (Nov. 23, 2010) (Commission refused to strike a late filing given that a corrective measure such as offering the opposing party to time to respond avoided any prejudice suffered by the opposing party). *See generally* *Shea v. Clinton*, 288 F.R.D. at 4 (courts should consider the length of time between the last pleading and the amendment, as well as whether the amendment would affect discovery or cause delay). We, therefore, affirm the Judgment Officer's decision to grant the Schweickarts damages in the amount of \$2000, their original request.

CONCLUSION

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

IT IS SO ORDERED.⁶

By the Commission (Chairman GENSLER and Commissioners CHILTON, O'MALIA, AND WETJEN).


Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 18, 2013

⁶ Under CEA Sections 6(c) and 14(e), 7 U.S.C. §§ 9 and 18(e), a party may appeal a Commission's reparation order to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing was held; the appeal may be filed in any circuit in which the appellee is located. The CEA also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.