U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

LOREN DAVID, Complainant,	CFTC Docket No. 15-R009 **Served electronically**
v.	
JAMES MICHAEL GARASZ, TRANSWORLD FUTURES LLC, and IRONBEAM, INC., Respondents.	

INITIAL DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

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

Appearances: Loren G. David, *pro se*
Lidgerwood, ND
For Complainant

Henry K. Becker, Esq.
Oak Park, IL
For Respondents

I. Introduction

Loren David, appearing in this forum *pro se* and by way of a formal proceeding,[1] filed his reparations complaint on May 21, 2015, seeking $56,119.90[2] in damages purportedly caused by Respondents: Ironbeam, Inc. (Ironbeam) (the Introducing Broker), Transworld Futures LLC (Transworld) (the Futures Commission Merchant), and James Michael Garasz (an associated person of Ironbeam and David's main point of contact). Reparations Complaint Form (May 11, 2015); Complaint at 1 (May 11, 2015). David alleges his losses stemmed from four basic misrepresentations and omissions by Garasz: that David (1) could not place both calls and puts on the May 2015 corn option contracts; (2) should aggressively place calls on the May 2015 corn contract; (3) had plenty of time remaining before the expiration of his May 2015 corn call option contracts; and (4) should not enter the crude oil market during the relevant time. David additionally alleges that Ironbeam failed to provide him any account statements. Compl. (May 11, 2015); First Compl. Addendum (July 16, 2015).

Respondents filed a Motion for Summary Disposition on April 29, 2016 seeking dismissal of the Complaint in its entirety. In response, David filed his opposition to Respondents Motion for Summary Disposition and simultaneously

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[1] David filed his Complaint and elected the Voluntary Decisional Procedure to resolve this matter, but Respondents raised this case to a Formal Decisional Procedure by attaching a check to cover the necessary filing fee with the Answer.

[2] Respondents' calculations for David's total damages came out to $56,021.90, as opposed to David's calculation of $56,119.90. The difference amounts to $98, which I find is immaterial.

filed a Cross-Motion for Summary Disposition on July 22, 2016. After unsuccessfully trying to hold a hearing on the parties' competing motions several times,[3] I ordered additional briefing on December 11, 2018 regarding one factual matter. That briefing was complete on January 28, 2019, and the matter is now ready for disposition.

For the reasons discussed below, David's Cross-Motion for Summary Disposition is denied, and Respondents' Motion for Summary Disposition is granted. However, Respondents' request for attorney's fees and costs is denied.

II. Summary of Parties and Proceedings

A. The Parties

Complainant Loren David resides in Lidgerwood, North Dakota, and opened a non-discretionary commodity trading account with Transworld, through Ironbeam, on January 8, 2014, seeded with $50,000. Rep. Compl. Form (May 11, 2015); RESP 54. David is a farmer with an annual income of $250,000, a net worth of $25,000,000, at least 30 years of futures trading experience, and at least 30 years of options trading experience. RESP 15, 67; Resp. Motion for Summ. Disp. at 1.

Respondent Ironbeam, Inc. (Ironbeam) has been a registered FCM since September 2010. NFA Basic Search, available at https://www.nfa.futures.org/basicnet/Details.aspx?entityid=mDnB09DOBUk%3d&rn=Y. Ironbeam was the FCM that held David's commodity trading account during the relevant time. Answer at 1.

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[3] *See* Hearing Order (May 14, 2018); Hearing Order (September 6, 2018); Hearing Order (September 28, 2018); Hearing Order (October 12, 2018); Hearing Order (December 3, 2018).

Respondent Transworld Futures LLC (Transworld) was a registered IB from January 2007 through January 2017. NFA Basic Search, *available at* https://www.nfa.futures.org/basicnet/Details.aspx?entityid=4X%2fEN3huEFs%3d&rn=Y. Transworld was the IB that introduced David's commodity trading account to Ironbeam. Answer at1.

Respondent James Michael Garasz was registered as an Associated Person and Principal of Transworld during the relevant time. NFA Basic Search, *available at* https://www.nfa.futures.org/basicnet/Details.aspx?entityid=7GfJWmdtG2o%3d&rn=Y. Garasz was David's broker and main point of contact from on or about March 2015 through the end of April 2015. Resp. Motion for Summ. Disp 2-4; Affidavit of James Garasz (attached as exhibit to Resp. Motion for Summ. Disp.).

B. Procedural History

On May 21, 2015 and July 28, 2015, David filed a complaint and complaint addendum with this Office. On September 28, 2015 Respondents filed their Answer, in which they made a counterclaim for attorney's fees and costs to be paid by David "upon successful defense of this claim," citing to the Ironbeam Customer Agreement. Answer at 5-6 & Ex. A. This Office denied that counterclaim on October 23, 2015 because it failed to meet the definition of a counterclaim set forth in Commission Rule 12.19.[4] Letter to Respondents Denying Counterclaim (Oct. 23, 2015).

[4] Commission rule 12.19 reads as follows: "A registrant may, at the time of filing an answer to a complaint, set forth as a counterclaim: (a) Facts alleging a violation and a request for a

During the course of discovery, David filed a Motion to Compel Respondents to supplement their discovery responses. Complainant's Discovery Motion at 1, 3 (March 14, 2016). He also asked for certain costs. *Id.* Judgment Officer (JO) McGuire denied this Motion on March 31, 2016. Order (March 31, 2016). In that same Order, JO McGuire, among other things, set a deadline of April 29, 2016 for the parties to submit any motions to resolve this matter without oral hearing, pursuant to Commission Rules 12.310 or 12.311. Respondents filed their Motion for Summary Disposition on April 29, 2016, and David filed his Rule 12.311 Motion on May 4, 2016, requesting that this matter be resolved without holding an oral hearing. Briefing on these competing dispositive motions was complete by July 22, 2016. Since that date, David has twice requested this Office grant him "immediate relief" by granting his Motion for Summary Disposition. Motions Requesting Immediate Relief (filed Aug. 18, 2016 & Feb. 5, 2018).[5]

This case was assigned to me on July 27, 2017, and on May 14, 2018, I issued an Order directing the parties to inform me of their availability for a hearing on their competing motions. Order (May 14, 2018). Neither party was available at a mutually acceptable time during the time frame I provided them. I again attempted to schedule a hearing by way of an Order issued September 6, 2018, and Complainant informed this Office again that a hearing was not necessary.

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reparation award that would be a proper subject for a complaint under §12.13 of these rules; or (b) any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint."

[5] The first such motion was denied on August 18, 2016, and the second has become moot by way of this Initial Decision.

Complainant's Response to Sept. 6, 2018 Order (Sept. 9, 2018). I therefore issued an Order on September 12, 2018 finding, based on the parties' repeated assertions that a hearing was unnecessary, that the case was ready for disposition.

However, Complainant reached out to this Office one week after that Order stating that he was available for a hearing in December 2018. I twice scheduled a hearing in December, and Complainant twice canceled the hearing, admitting that he suffered from "a real health issue over even the thought of hearing [Respondent Garasz's] voice and questioning him." Compl. Pleading (Dec. 6, 2018). I thereafter issued an Order finding that the parties waived their ability to participate in a hearing, but allowed further briefing on the issue of whether Complainant was told he could place only calls on the May 2015 corn contract, and not both calls and puts. Order at 2-3 (Dec. 11, 2018). Complainant submitted two briefs on December 17, 2018 and January 26, 2019, and Respondent submitted its brief on December 21, 2018. With that, this case is fully ready for disposition.

III. Factual Background

On December 20, 2013, Complainant David sent an email to Robert Rutger, a Senior Broker at Transworld, about "purchasing 400 contracts of 6 dollar December corn calls," and "what [his] commissions would be, and what . . . should be the timely purchase of them (*sic*)." Resp. Motion for Summ. Disp. at 3; RESP 48 (Mar. 31, 2016). Following that email, on January 8, 2014, David opened a non-discretionary commodity trading account through Transworld, held at Ironbeam,

and seeded with $50,000.[6] RESP 54-55 (March 31, 2016); Answer at 1. From January 8, 2014 through January 2015, David worked primarily with Rutger as his broker. Resp. Response to Complainant's Motion for Summ. Disp. Ex. A (Aug. 15, 2016). As of January 5, 2015, David had $147,572.36 in his account, the result of trading profits. On January 5, 2015, David purchased two January 2015 crude oil call options; and on January 13, 2015, David placed six January 2015 crude oil puts. RESP 1 (Mar. 31, 2016). After the expiration of the crude oil options on January 20, 2015, David realized a loss of $54,000, leaving a net balance in his account of $93,486.68. *Id.* On January 21, 2015, David withdrew $93,486.68 from his account via check, leaving a zero balance. *Id.*

Sometime in or around March 2015, Rutger began to cutback in his involvement in the futures business, *id.*, and David began working with a different broker—Garasz. Then on March 26, 2015, David deposited $60,000 into his trading account, which had been at a zero balance since January that same year. Resp. Motion for Summ. Disp. at 4; Affidavit of James Garasz (attached as exhibit to Resp. Motion for Summ. Disp.); RESP 2-4. Using those newly deposited funds, on March 30, 2015, David purchased seventy (70) May 2015 corn calls—50 at a price of $15.50 and 20 at a price of $10.12 and 1/2. Ans. at 5; RESP 3-10. On March 31, 2015, David purchased twenty (20) more May 2015 corn calls at a price of $6.00 for a total of ninety (90) May 2015 corn calls. Ans. at 6; RESP 3-11. David reportedly

[6] In the Complaint, David refers to his account number as XXX-XX5368. However, based on the account statements furnished by Respondents during discovery and attached to Respondents' Motion for Summary Disposition, this account number appears to be incorrect. *See* RESP 1-13, 46, 85.

bought these call options based on two alleged representations by Garasz: that (1) David could not purchase both calls and puts; and (2) the price of corn would rise upon the issuance of the Department of Agriculture's report on grain stocks,[7] just like what happened with an "orange juice trade" (undertaken in an unrelated context) some years prior. Compl. (May 11, 2015).

On April 24, 2015, David's call options in May 2015 corn expired worthless, resulting in a $54,250 loss, excluding fees and commissions. RESP 3-11. On February 1, 2016 (sent Jan. 30, 2016), Ironbeam received a written request sent via U.S. Certified Mail from David to close his account and for the withdrawal of his remaining balance of $3,684.10, which occurred shortly thereafter. Resp. Response to Req. for Admissions at 3; RESP 53.

This reparations proceeding is David's third litigation proceeding regarding his trading activity—a fact that is relevant only for the limited purpose of determining how long David has been trading in these markets. The first, brought in the state courts of North Dakota, concerned a commodity trading account David opened with Merrill Lynch in 1981. *See David v. Merrill Lynch, et al.,* 440 N.W.2d 269 (ND 1989) (the North Dakota Supreme Court's decision of David's appeal in his 1981 case against Merrill Lynch and other respondents). The second, brought in this reparations forum, concerned sixty December 1998 wheat call options David purchased, claiming Respondent had fraudulently guaranteed him that the price of

[7] Complainant appears to be referring to the United States Department of Agriculture's (USDA) March 31, 2015 National Agricultural Statistics Service (NASS) report on grain stocks. *See* https://www.nass.usda.gov/Publications/Calendar/reports_by_date.php?month=03&year=2015.

wheat would spike on the issuance of the relevant Department of Agriculture Report. *See David v. Zimney*, CFTC Dkt. No. 98-R172, 1999 WL 770697 (CFTC Sept. 29, 1999). Thus David has been in and out of these markets since 1981.

IV. Findings of Fact and Legal Analysis

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.*, 2012 WL 6087468 at *6, CFTC Dkt. No. 11-R004 (CFTC Dec. 5, 2012); *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, 1994 WL 506234 at *6, CFTC Dkt. No. 92-R125 (CFTC Sept. 15, 1994). The purpose of summary disposition "is to avoid the empty ritual of an oral hearing." *Elliot*, 2012 WL 6087468 at *6 (internal citation omitted).

Discovery in this case was closed on February 10, 2016. *See* January 19, 2016 email from JO McGuire to the parties. The record contains, among other submissions, the relevant email communications, account opening documents, and account statements for the trades at issue.

Further, this case is unusual in that although I gave the parties the opportunity to offer testimony, both parties stated oral argument was not necessary and otherwise waived their ability to participate in a hearing. *See* Order (December 11, 2018). In addition, I have given the parties the opportunity to submit supplemental statements on the issue of whether Garasz told David he could not place both puts and calls on the May 2015 corn contract, which they did. *Id; supra* at 6. Thus, this Initial Decision is made not on just a summary disposition posture,

but with a complete record, including signed written testimony. Upon careful review of the parties' submissions, I have determined that David's Complaint should be dismissed.

A. Missing Account Statements

David alleges that the account statements associated with his trading account were never provided to him, even after several requests. According to David, "Transworld and Ironbeam refuse to give [him his] trades . . . ," Compl. Add. at 1, and he "requested account documents and they have refused," Compl. at 1. These allegations are contradicted by the record. First, David's account was configured upon its opening to automatically send account statements via email. *See* RESP 85; Affidavit of Michael Higgins (attached to Resp. Motion for Summ. Disp.). David does not dispute this fact. *See* Complainant's Opposition to Motion for Summary Disp. (July 22, 2016). Second, there are at least two emails in the record making clear that David received at least some account statements. On June 9, 2015 and July 2, 2015, David sent two emails to Ironbeam: the first to its client services, and the second to Michael Higgins. RESP 46, 52. Both emails forwarded an initial email from Ironbeam client services with a subject line that read "RE: 30920709 Daily Statement." *Id.* Not only does this show David was in receipt of his account statements, but in the email dated June 9, 2015, David's July 7, 2014 daily statement (one-year prior) is embedded in the body of the email. *Id.* David never explains or addresses this evidence. Thus the undisputed evidence contradicts David's allegations that he was not receiving account statements.

B. May 2015 Corn Call Options Expiration Date

Having found that David received his account statements, I cannot find that he was misled as to the expiration of his May 2015 call contracts. The account statements, and specifically those from March 2015 to April 2015, specify, in bold print, the expiration dates on the May 2015 corn contracts. RESP 3-5 (making notation "**EX- 24-APR-15**"). Moreover, David was and is an experienced investor, with at least 30 years trading futures and options.

C. May 2015 Calls and Puts

The bulk of David's claim involves the following allegations: "Prior to the government report (USDA Report) issued on March 31st, I wanted positions in both calls and puts. Garasz advised me that I can't put on that trade. He begin [*sic*] insisting to buy just calls, that inf [*sic*] he had the market was going higher. . . . The market would be up substantially after the report release, even demanding to put in orders to double the money explaining his orange juice trade." Compl. at 1. David alleges his losses occurred because Garasz would not allow him to place both put and call trades, and instead allowed him to only place May 2015 corn call trades. In essence, David contends that Garasz gave him bad trading advice. David "has the burden of establishing that [Garasz's] action deprived him of material market information and trading advice and that this violated the Commodity Exchange Act or a Commission rule." *Thomsen v. Monex Int'l Ltd.*, CFTC Dkt. No. 88-R266, 1989 WL 1794125, at *2 (July 17, 1989). Based on the evidence, it is clear that David has failed to meet this burden.

First, David is not a novice commodities trader. For example, although he claims he has 10-years of experience with futures trading and 5-years of experience trading options, RESP 15, he has twice before brought suit against different brokers: first, in the 1980s, *see David v. Merrill Lynch, et al.,* 440 N.W.2d 269 (ND 1989), and second in the 1990s in this forum, *see David v. Zimney, et al.,* CFTC Dkt. No. 98-R172, 1999 WL 770697 (CFTC Sept. 29, 1999). These cases illustrate that David has been in these markets for at least thirty years. It is hard to believe that with so much trading experience, David did not know that he could buy calls and puts. *Harness v. Gumpert-Hersh*, CFTC Dkt. No. 90-R012, 1990 WL 29317, at *1, n.1 (CFTC Sept. 13, 1990) ("Complainant's claim that he was misled about risks and options was rebutted by evidence of his substantial prior investment experience.").

Second, David has a history of aggressively placing calls in the corn futures market. On December 13, 2013, David sent an inquiry to Transworld about potentially placing 400 corn call options. RESP. 48. And David himself made the decision to purchase the 70 initial May 2015 corn calls on March 30, 2015, in anticipation of the USDA Report. The very next day, David purchased 20 more corn call options, the same day the USDA Report was to be published. RESP 3-4. This suggests that David had a single position strategy with respect to the corn market. Had he wanted to purchase both calls and puts, it is difficult to believe he would have added to his corn calls position the next day.

Finally, in connection with the May 2015 corn calls, David's trading account was non-discretionary; the only person allowed to authorize trades in the account was David—that's it. RESP 54. Ultimately David made the trading decisions, and these allegations do not show that Garasz was so influential that he could override David's own trading desires.

D. The Orange Juice Story

David alleges that Garasz used an "orange juice trade" story to convince him to purchase the corn futures before the USDA Report; and just like the orange juice trade, when the USDA Report came out David would make a profit. *Id.* Respondents state that Garasz did in fact bring up the orange juice trade to David, but that he used the "anecdote about [the] orange juice trade that resulted in a total loss specifically to demonstrate the danger of placing an order just prior to a crop report." Ans. & Aff. Defenses at 6 (emphasis in original). The orange juice trade story is of limited utility here. Aside from the fact that the orange juice trade anecdote does not rise to the level of "material market information," *Thomsen,* 1989 WL 1794125 at *2, it is difficult to believe that a farmer worth $25 million with at least 30 years of experience trading options would simply rely on the advice of Garasz without bringing his own experience to bear in his trading decisions. The fact that David continued to add to his call positions, even on the day of the report, further strains credulity to the breaking point. Given David's trading experience (and his experience as a farmer), even if Garasz had told him the orange juice story, it would not amount to fraud in this particular context.

E. Crude Oil Futures

In connection with the crude oil futures, David claims that he wanted to enter the crude oil market "several weeks prior" (though several weeks prior to what is never made clear), but because Garasz believed the price of crude oil would move to $36, David never did so. Compl. at 1. This subjective belief of Garasz's regarding the price of crude oil does not amount to depriving David of material market information, and thus does not provide the basis of an actionable claim.

F. Attorney's Fees

Respondents request an award for attorney's fees under Commission Rule 12.314(c)[8] on two bases: 1) Paragraph 31 of the Customer Agreement, which sets forth the prevailing party's right to request attorney's fees;[9] or alternatively 2) the bad faith nature of Complainant's actions litigating this matter in conjunction with his previous litigation history. Resp. Motion for Summ. Disp. at 7-8. Neither of these grounds provides a basis to award attorney's fees here today.

Attorney's fees have not been awarded in this forum pursuant to a contract. *Bianco v. Cytrade Financial, LLC, et al.*, CFTC Dkt. No. 06-R015, 2008 WL 4449365 at *2 (CFTC Sept. 30, 2008) (noting that the rules of this forum supersede any dispute resolution provisions in the contract). I elect not to start doing so here.

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[8] Commission Rule 12.314(c) states in pertinent part "the [JO] may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney's fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest, to the party in whose favor a judgment is entered."

[9] Paragraph 31 of the Customer Agreement reads in relevant part "Customer agrees to pay all expenses, including attorney's fees, incurred by Ironbeam: a) to successfully defend any claim Customer brings against Ironbeam or; b) to collect any debit balances in Customer account(s)."

Respondents argue that David filed his Complaint in bad faith because of the "nature of the allegations in the complaint," David's litigation history, and "offensive e-mails" David has sent to Respondents' Attorney during the course of the litigation. Resp. Motion for Summ. Disp. at 8 & n.4. Although David's previous litigation history suggests the same trading and litigation pattern—that is aggressively purchasing call options in advance of the relevant Agricultural Report and then suing to recover the ensuing losses—and although his use of profanity in the emails he sent to Respondents was certainly ill-advised, that conduct is insufficiently "vexatiou[s], wanto[n] or oppressive" to warrant paying the prevailing party's attorney's fees. *See Sherwood,* 1979 WL 11487 at *8-9 n.26 (denying attorney's fees); *Brooks v. Carr Investments, Inc.,* CFTC Dkt. No. 96-R100, 2002 WL 927614 at *4 (CFTC May 9, 2002) (same); *Lee v. Peregrine Financial Group, Inc.,* CFTC Dkt. No. 98-R127, 2005 WL 2171408 at *2 (CFTC Sept. 7, 2005) (same).

ORDER

For the reasons discussed above, David's Motion for Summary Disposition is DENIED; Respondents' Motion for Summary Disposition is GRANTED; and the Complaint is DISMISSED.

DATED: March 29, 2019

Kavita Kumar Puri
Judgment Officer