U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

NATHAN CROSSETT,
Complainant,

v.

FOREX CAPITAL MARKETS LLC,
d/b/a FXCM,
Respondent.

CFTC Docket No. 17-R007
Served electronically

ORDER DISMISSING THE COMPLAINT

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

Appearances: Nathan Crossett, *pro se*
New York, NY
For Complainant

William Johnson, Esq.
Israel Dahan, Esq.
King & Spalding LLP
New York, NY
For Respondent

Nathan Crossett, appearing in this forum *pro se* and by way of a formal proceeding, seeks $166,061.95 in damages for his trading losses, commissions and fees, covering the life of his forex account.[1] He alleges these losses were caused by

[1] *See* Compl. at 1; Answer at ¶ 28; and Declaration of Evan Milazzo at ¶ 8 (attached as Ex. 6 to Answer).

the failure of Forex Capital Markets LLC (FXCM) to disclose a "pay-for-flow" affiliate relationship with one of its liquidity providers, Effex or HFT Co. (HFT), which served as a market maker for FXCM's clients on its "No-Dealing Desk" model.[2] Compl. at 1; FXCM Motion to Dismiss at 1 (Aug. 7, 2017). Crossett further alleges that the failure to disclose this relationship amounts to fraud, without which he would not have opened an account with FXCM. Compl. Crossett thus alleges that his damages amount to $166,061.95, or the entire amount of his account losses plus fees and commissions. *Id.*

For the reasons that follow, I am dismissing the Complaint.

I. Summary of Parties and Proceedings

A. The Parties

Complainant Nathan Crossett (Crossett) a resident of New York, NY, has been trading with FXCM since April 2009. Motion to Dismiss at ¶ 27. The account at issue, Account No. XXXX0456, was opened on February 17, 2012 and actively traded and maintained until its closing on February 9, 2017. *Id.*, *see also* Compl. at 1.

Respondent Forex Capital Markets d/b/a/ FXCM (FXCM) was registered with the Commission as a Futures Commission Merchant (FCM) and Retail Foreign Exchange Dealer (RFED), until March 10, 2017. *See* NFA Basic Research, *available at* https://www.nfa.futures.org/basicnet/Details.aspx?entityid=uy8vi7mVysc%3d&r

[2] *See* Commission Consent Order, styled *In the Matter of Forex Capital Markets, LLC, FXCM Holdings, LLC, Dror Niv, and William Ahdout,* CFTC Dkt. No. 17-09 (Feb. 6, 2017) (CFTC Consent Order).

n=N. On February 6, 2017, the Commission entered a Consent Order and Settlement Agreement with FXCM finding, among other things, a conflict of interest existed from its "pay-for-flow" agreement with HFT. *See infra* at 4-5. In accordance with the settlement and Consent Order, FXCM has been permanently barred from registering with the Commission and NFA since March 10, 2017. *Id.*

B. Procedural History

Crossett filed his Complaint on February 8, 2017, and Respondent filed its Answer and Affirmative Defenses along with a Motion to Dismiss on May 19, 2017. The Director of the Office of Proceedings denied the motion "because the criteria for forwarding this complaint and for initiating a reparations proceeding [had] been met." *See* Letter from Director to Respondent (June 22, 2017). Respondent re-filed its Motion to Dismiss on August 7, 2017, once the proceeding was formally assigned to my docket.[3] Discovery began thereafter, and concluded on September 11, 2017, once Crossett filed his Summary Argument. During discovery, FXCM filed a Motion to Exclude Immaterial Evidence on August 17, 2017,[4] and Crossett responded on

[3] Respondent's Answer & Affirmative Defenses is identical to its Motion to Dismiss. Therefore, all citations throughout this Order reference the Motion to Dismiss, but also act as a parallel citation to the Answer.

[4] In its Motion to Exclude, FXCM argued the following evidence presented by Complainant is inadmissible—the CFTC Consent Order, NFA Complaint, and NFA Decision. Resp. Motion to Exclude (August 17, 2017). These documents are defined and discussed in further detail below. Although the substance of this Motion is addressed in this Initial Decision, the Motion to Exclude itself is denied as moot, since the Complaint is dismissed by way of this decision. Respondent further filed a motion for the confidential treatment of its discovery responses because they contain trade secrets, information protected by other litigation proceedings, or information from third parties. Respondent's Response and Objections to Complainant's Discovery Requests at 3-6 (Aug. 31, 2017). Respondent's request for confidential treatment of its discovery responses is granted in part and denied in part, as discussed below. *See infra* at 14-15.

September 11, 2017. After carefully reviewing the parties' discovery submissions and pleadings, I am converting Respondent's Motion to Dismiss into a Motion for Summary Disposition, *see* Commission Rule 12.310, and dismissing the Complaint.

II. Factual Background

A. Commission Order and Settlement with FXCM

In order to allege and prove FXCM's purported fraud, Crossett relies principally on a consent order entered between FXCM and the Commission as evidence of the misconduct that lies at the heart of his Complaint. That CFTC Consent Order was entered into on February 6, 2017 upon an Offer of Settlement made by FXCM, among others. *See supra* n.1. FXCM neither admitted nor denied the following findings or conclusions set forth in the CFTC Consent Order.

From September 4, 2009 through at least 2014, FXCM represented to its customers that if they traded through FXCM's No-Dealing Desk platform, FXCM's role in the transaction would pose no conflict of interest because the risk of those trades would be borne by independent liquidity providers. CFTC Consent Order at 2. In other words, contrary to FXCM's traditional model in which FXCM took positions opposite its customers' trades (in essence betting against their trades), FXCM's No-Dealing Desk model claimed to eliminate the inherent conflict of interest between it as the forex broker and its customer by using third-party market makers (or liquidity providers). *Id.* at 3. In this No-Dealing Desk model, therefore, FXCM's role would be reduced to an impartial credit intermediary with no stake in the outcome of the trade. *See, e.g.*, Motion to Dismiss Ex. 1 (2014 10K) at 73.

However, one of those "independent" third-party market-makers—HFT—was launched by FXCM. Not only was HFT started by FXCM, but it remitted monthly payments to FXCM totaling about 70% of the profits HFT generated trading through FXCM's retail trading platform. CFTC Consent Order at 2-4. In other words, according to the CFTC Consent Order, HFT was sharing most of the profits it earned on FXCM's platform with FXCM itself. These "pay-for-flow" arrangements between HFT and FXCM allowed HFT to capture the largest share of FXCM's trading volume. *Id.* at 6. The Commission found that this relationship between HFT and FXCM meant that FXCM did have a conflict of interest when customers were trading through its No-Dealing Desk platform, contrary to its customer disclosures. *Id.* at 6-8. The agreements between FXCM and HFT were discontinued on August 1, 2014. Motion to Dismiss ¶ 12.

B. The NFA Complaint and NFA Decision

Crossett further relies on a complaint filed by NFA (NFA Complaint) on February 6, 2017—the same day the Commission Order was issued—that alleged substantially the same facts, as well as the settlement agreement FXCM entered into with NFA on the same day (NFA Decision). As in the Commission Order, FXCM settled NFA's charges without admitting them. *See* NFA Decision at 3.

C. Crossett's Account and Trading Relationship with FXCM

On February 17, 2012, Crossett opened Account No. XXXX0456 and actively traded the account through February 9, 2017. Motion to Dismiss at ¶ 27. Crossett traded on both FXCM's Dealing Desk and No-Dealing Desk trading platforms, *id.* at

¶ 31; and Ex. 6 at ¶ 8, and made a total of 7,648 total trades during this time. Complainant lost $166,062 during the life of his account in both trading losses and fees and commissions.

Complainant's claim for damages equals the entire amount of his trading losses plus commissions and rollover fees. However, roughly $106,000 of these damages have no connection to the underlying alleged misconduct, because they are associated with either the Dealing Desk model or did not use HFT as the liquidity provider on the No-Dealing Desk model. Motion to Dismiss at 11 & Ex. 6, Attachment A. Of the roughly $60,000 in remaining damages, approximately $15,000 were incurred after the relationship between HFT and FXCM ceased on August 1, 2014. *Id.* That leaves roughly $45,000 in trading losses and fees incurred using HFT as the liquidity provider on the No-Dealing Desk model. Crossett, however, contends that the full amount of his trading losses constitutes the true measure of his damages because he would not have entered a relationship with FXCM had they disclosed their conflict of interest with HFT. Crossett Summary Argument at 1 (Sept. 11, 2017).

C. The General Release and Confidentiality Agreement

Crossett and FXCM entered into a General Release and Settlement on July 16, 2015 related to the following set of facts. Motion to Dismiss at Ex. 5 (Release). On June 10, 2015, Complainant placed a GBP/NZD trade following an interest rate decision from the New Zealand central bank. Crossett Summary Argument at 2. Prior to placing the trade, Crossett had $27,411.69 in his account, and immediately

following, the trade, he had ($42,093.81) in his account. Believing that FXCM executed the trade at the wrong price, he notified FXCM of his complaint and FXCM adjusted his balance to $4,428.21 on June 18, 2015. Resp. to RFA 10; Crossett Summary Argument, Exhibit 5 (Account Balance Adjustment Emails). After further email discussion, the two parties agreed that FXCM would further adjust his account balance by restoring the full $69,505.50 that was lost from his account. Respondent's Document Production, FXCM Document 5 (filed August 31, 2017).

Crossett admits he signed the Release, which released FXCM from

> all manner of action(s), cause(s) of action, suits, debts, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which [Crossett] ever had, now has, or . . . shall or may have, against [FXCM], by reason of any matter, cause or thing whatsoever, from the beginning of time to the date of this instrument.

Settlement Agreement (July 16, 2015) (emphasis added).

III. Legal Analysis and Conclusions

Respondent argues that this case should be dismissed because Crossett cannot demonstrate the elements of fraud, namely that his losses stemmed from FXCM's alleged nondisclosure of its relationship with HFT, and that in any case he released all claims that accrued before July 16, 2015. Crossett contends that he should be awarded the full amount of his account losses—$166,061.95—because he would have never opened an account with FXCM had he known about the relationship between FXCM and HFT. Crossett Summary Argument at 1. Crossett also objects to FXCM's argument regarding the General Release and Confidentiality

Agreement he signed, stating that FXCM "took advantage of the situation by only agreeing to make my account whole . . . if I signed an overly broad general release with language that absolved them from all prior and future misconduct[];" and that he believes the Agreement should only be enforceable as to the particular trade that was the subject of his complaint. *Id.* at 2.

I find that Crossett's evidence of misconduct is not admissible to prove that misconduct, and that Crossett therefore has not proven, by a preponderance of the evidence, misconduct by FXCM that proximately caused any or all of his account losses. Alternatively, I find that Crossett released any claims he had against FXCM, which precludes his recovery here. Accordingly, any further litigation of Crossett's reparations Complaint would waste this Office's and the parties' resources, warranting dismissal here.

A. Because Respondent's Consent Orders Do Not Constitute Evidence of Misconduct in This Reparations Matter, Crossett Has Not Proved, by a Preponderance of the Evidence, Any Violation of the CEA that Proximately Caused Him Damages.

In order to show fraud under the CEA, a complainant must show "(1) a material misrepresentation, (2) scienter, (3) reliance [on that misrepresentation] and (4) damages." *Chenli Chu v. Peregrine Fin. Group, Inc.*, CFTC No. 07-R029, 2013 WL 4785177, at *6 (CFTC Sept. 5, 2013) (discussing elements of fraud under CEA § 4b(a)(2); 7 U.S.C. § 6b(a)(2)). Each of these elements must be proved by a preponderance of the evidence. *In re Citadel Trading Co.*, CFTC Nos. 77-8, 80-11, 1986 WL 66170, *9 (CFTC May 12, 1986) (noting judge must determine "what the preponderance of the evidence shows most likely did happen").

Here, however, Crossett does not provide any supporting evidence for his claims of fraud and non-disclosure other than the CFTC and NFA Orders previously detailed, except for a copy of his combined account statements. *See* Complainant's Ex. 4 (filed Aug. 18, 2017).[5] Courts, including the Commission, have held that consent orders cannot be used as evidence in subsequent litigation because the consenting party has agreed to certain terms in exchange for the cessation of litigation—no court or adjudicatory forum has actually made any findings of fact as a result of litigation and the defendants neither admit nor deny the facts contained in those orders. *See e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971) (holding courts cannot read consent decrees as if "plaintiff established factual claims and theories in litigation"); *In the Matter of Mates*, CFTC Dkt. No. 79-10, 1980 WL 15665 at *3 (CFTC Dec. 2, 1980) (finding that because respondent "consented . . . to a statement of finding and . . . certain sanctions solely for purposes of terminating the SEC action and without admitting any allegation of wrongdoing, [Commission] may not rely upon the order as evidence."); *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) ("[A] consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues [cannot] be used as evidence in subsequent litigation between that corporation and another party.").

[5] Although FXCM did produce a copy of its trading agreement with HFT as well as a spreadsheet of fees remitted to HFT, these documents alone do not independently corroborate the fraud without additional information. Moreover, Crossett never cites to them in his Summary Argument, relying solely on the fact of FXCM's settlement with the Commission.

Even assuming Crossett had shown by a preponderance of the evidence that a material misrepresentation had occurred, he has not shown that he relied on this misrepresentation. Simply stating that he would have not have engaged in any relationship with FXCM is insufficient, particularly when most of his losses were incurred without using HFT as a liquidity provider, and some were incurred through the Dealing Desk model, which had nothing to do with the purported fraud at issue. On the other hand, FXCM submitted evidence showing that Crossett in fact received the best price available from FXCM's liquidity providers eligible to fill his trade orders, including those trades in which HFT served as the liquidity provider. *See* Resp. Motion to Dismiss, Exhibit 6 (Decl. of Evan Milazzo ¶¶ 15-16 & Attachments B-C (May 17, 2017)). Crossett never produces or refers to any admissible facts to rebut this defense.

For the same reasons Crossett has not shown that he relied on the purported misrepresentation, he cannot prove that any damages were "proximately caused" by the conduct at issue. *See* 7 U.S.C. § 18 (requiring that reparations complainants show that their damages were "proximately caused" by violations of the CEA or rules promulgated thereunder to recover). "In determining whether proximate cause exists, the Commission looks . . . to whether the loss was a reasonably probable consequence of respondents' conduct." *Muniz v. Lassila*, CFTC No. 87-R395, 1992 WL 10629, *7 (CFTC Jan. 17, 1992) (internal quotation marks and citations omitted). Simply put, there is no evidence that Crossett's losses were caused by HFT's services and not his own trading decisions. And FXCM submitted

evidence that in fact Crossett received the best price with respect to his trades even when HFT was the liquidity provider. Crossett provides no rebuttal to this evidence, and he has not proved damages by a preponderance of the evidence.

Crossett's evidence of fraud is inadmissible and he has not proven a violation of the Commodity Exchange Act by a preponderance of the evidence. Even if he had, he has certainly not shown reliance on the fraud, or any nexus between that purported fraud and his damages by a preponderance of the evidence and his case is therefore dismissed.

B. The General Settlement and Release Agreement Relieves FXCM From Liability in Connection With Crossett's Claims From February 27, 2012 Through July 16, 2015

In addition, Crossett has released the claims at issue here.[6] Although this Office typically requires respondents to move for summary disposition to establish affirmative defenses, like proof of prior settlement, "dismissal is nonetheless appropriate when the complaint clearly reveals a meritorious defense." *Hillpot v. Dorrity*, CFTC Dkt. No. 08-R031, 2008 WL 4553068, at *1 (CFTC Oct. 10, 2008). Here, the Complaint itself did not reference the General Settlement and Release Agreement, but for purposes of judicial efficiency, I convert this Motion to Dismiss to a Motion for Summary Disposition, pursuant to Commission Rule 12.310. "Summary disposition is proper (and required) if the undisputed pleaded facts, affidavits, other

[6] Crossett also cites an NFA decision, which details alleged findings by NFA that "customers trading the New Zealand Dollar (NZD) related currency pairs had orders executed at off-market prices, due to bad prices FXCM received from [HFT]." *Id.* But even if that NFA decision were admissible as evidence, that FXCM may have committed wrongdoing does not invalidate the Release.

verified statements, admissions, stipulations, and matters of official notice, show that: (1) there is no genuinely disputed issue of material fact, (2) we need not further develop facts in the record and (3) the moving party is entitled to a decision as a matter of law." *Id.* at *2. In deciding whether these standards are met, all justifiable inferences are to be drawn in the non-movant's favor, and any "significant doubt" as to the facts preclude summary disposition. *Id.*

Here, there is substantial evidence in the record as to Respondent's affirmative defense that Complainant already settled these claims, and summary disposition on the issue is warranted here. Although Complainant never filed a response to Respondent's Motion to Dismiss, he did file a Summary Argument that specifically addressed Respondent's various Motion to Dismiss arguments. With regard to the Release, Crossett "argue[s] that FXCM took advantage of the situation by only agreeing to make my account whole on the trade if I signed an overly broad general release with language that absolved them from all prior and future misconduct." Crossett Summary Argument at 2 (emphasis in original). He further contends that the settlement agreement "should only have covered [the GBP/NZD]" trade that was the subject of his complaint. *Id.*

By way of his arguments, Complainant does several things. First, he admits he signed the Release. Second, he confirms that he understands that the Release was a broad one and that it absolved FXCM "from all prior and

future misconduct." Having admitted that he signed (and in fact understood) the Release, the only remaining issue is whether it is enforceable.

New York law governs this contractual question. Resp. Motion to Dismiss Ex. 2 (Client Agreement, Trading Agreement ¶ 22 (noting that "This Client Agreement, and the rights and obligations of the parties hereto, shall be governed by, construed and enforced in all respects by the laws of the State of New York.")). New York "recognizes that 'a clear and unambiguous release . . . should be enforced according to its terms.'" *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 189 (2008) (quoting *Booth v. 3669 Delaware, Inc.*, 92 N.Y.2d 934, 935 (1998)). And "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Centro Empresarial Cempresa S.A. v. Americal Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (N.Y. 2011). "Notably, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made." *Id.* (quotation marks and citation omitted). The contract is voidable only if it is the product of "fraud, duress or undue influence." *Consorcio Prodipe, S.A. de C.V.*, 544 F. Supp. 2d at 189; *see also Hillpot*, 2008 WL 5146713 at *2 (voiding agreements "[i]f a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").

Thus in construing the scope of the release at issue, two questions must be answered: (1) Is the Release unambiguous as to the broad scope of the claims encompassed within it; and, if so (2) Was Crossett somehow tricked or lied to in signing it. The first question is easily answered. The Release covered "all manner of action(s), cause(s) of action, . . . in law or in equity, which [Crossett] ever had, now has, or . . . shall or may have, against [FXCM], by reason of any matter, cause or thing whatsoever, from the beginning of time to the date of this instrument." Settlement Agreement (July 16, 2015) (emphasis added). There is no manner of trickery or obfuscation in this Release language—it is plainly worded, unambiguous on its face, and so extreme in the breadth that it covers that the Releasor—here Crossett—would be hard-pressed to argue that he neither saw nor understood it. *See Centro Empresarial Cempresa S.A.*, 17 N.Y.3d at 277 (finding that similar language encompassed unknown claims). In relevant part, it plainly covers all claims accruing prior to July 16, 2015.

As to the second question—whether Crossett signed the Release under some sort of trickery or duress—there is no evidence in the record to substantiate any such claim. In fact, the email communications produced by Crossett make clear that Crossett would have to release claims in exchange for restoring his balance, and that Crossett was eager to do so. On July 15, 2015, Marco Konte from FXCM wrote Crossett an email in response to his complaint about the GDP/NZD trade's execution stating that: "Due to the size of this adjustment, the account holder will have to sign a release form

which will be sent by the FXCM operations team within the next 2 to 3 days." Crossett Summary Argument Exhibit 5. Crossett responded the next day, asking "Do you think I'll get the document from operations today/tomorrow?" *Id.* That same day, Konte replied "My colleague has informed me that the release form was sent over to you." *Id.* And Crossett replied that he "[w]ould like to have the money in account by end of day if possible." *Id.* Nothing about this email exchange indicates trickery was involved.

There is also no evidence, or indeed argument by Crossett himself, that he was incapable of understanding the contract's terms or otherwise lacked the capacity to bind himself. Crossett is not an unsophisticated client. He is employed by Evercore Partners "a prestigious investment banking advisory firm in New York, New York [and] holds FINRA Series 7, 63, 86, and 87 [licenses]." Motion to Dismiss at 10.

The Release is plain and unambiguous as to its broad scope. Further, there is thus no evidence in the record that he was duped into signing the agreement or otherwise lacked the capacity to understand its terms. The Release therefore disposes of all claims in this reparations proceeding.

C. FXCM's Request For Confidential Treatment of Its Discovery Submissions

FXCM requested that its discovery submissions be treated as confidential under the Freedom of Information Act (FOIA). In connection with Complainant's discovery requests, Respondent filed the following:

- A Service Agreement between FXCM and HFT.

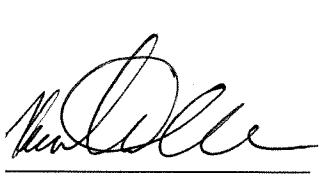
- An Excel spreadsheet detailing Complainant's trades in the account at issue from February 27, 2012 through January 4, 2017.
- A Prime Brokerage Customer-to-Customer Agreement between FXCM, HFT, and Citibank.
- A spreadsheet detailing payments made between FXCM and HFT.
- Documents detailing FXCM's investigation into Crossett's complaint regarding a GBP/NZD Forex trade that resulted in $69,505.50 in losses due to what appears to be a system malfunction; and emails between Complainant and Respondent detailing the agreement and signing of the General Release and Confidentiality Agreement.

The record does not reflect whether Respondent has requested confidential treatment of its submissions under FOIA with the FOIA Office. This Office will take reasonable steps to ensure that Respondent's confidential submissions are treated as such *by this Office.* However, this Office takes no position on any request already made or that will be made to the FOIA Office because it is not before this Office. *See* Commission Rule §145.9. Accordingly, Respondent's request for confidential treatment of the above-detailed submissions is GRANTED in-part, and DENIED in-part.

CONCLUSION

Crossett does not prove, by a preponderance of the evidence, that he either relied on or suffered damages proximately caused by, FXCM's purported fraud. Even if he had, Crossett agreed to release FXCM from any and all claims and damages prior to July 16, 2015 when he signed the General Release and Confidentiality Agreement. Respondent's Motion to Dismiss is hereby GRANTED, and the Complaint is DISMISSED with prejudice.

Dated: July 8, 2019



Kavita Kumar Puri
Judgment Officer