U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

MARCUS JOHNSON, Complainant, v. DROR NIV, alias DREW NIV, and FOREX CAPITAL MARKETS, LLC, d/b/a FXCM, Respondents.	*	CFTC Docket No. 17-R010 **Served electronically**

INITIAL DECISION &
ORDER DISMISSING THE COMPLAINT

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

Appearances: Marcus Johnson, *self-represented litigant*
Baltimore, MD
For Complainant

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

Marcus Johnson, appearing in this forum as a self-represented litigant and by way of a summary proceeding, seeks $2,987.44 in trading losses and commissions over the life of his account. He alleges these losses were caused by Respondents' representation to its clients that trading on Forex Capital Markets LLC's (FXCM)

No-Dealing Desk platform, which uses third-party liquidity providers, did not create a conflict of interest between FXCM and its customers. Compl. He further alleges his damages are a result of Respondents' misrepresentations, execution slippage, and unauthorized trading between February 14, 2017 and February 17, 2017. *Id.*; Complainant Response to Disc. Order (May 15, 2018).

To substantiate these allegations, Johnson attaches screenshots of: (1) $7,995 in tuition he paid to Market Traders Institute, Inc.; (2) FXCM's client login portal; (3) an excerpt from FXCM's website detailing, among other things, a statement on "What is Forex" and FXCM's statement on "Fair and Transparent Execution"; (4) an excerpt from FXCM's website with a graph detailing Johnson's profits and losses for his account from June 27, 2016 through February 17, 2017 (from the account's inception to its closing); and (5) an excerpt from FXCM's website describing the performance for Johnson's account from June 27, 2016 through February 16, 2017.

In its defense, Respondents produced FXCM's 10-K for the fiscal year ending December 31, 2014 (FXCM 2014 10-K); an FXCM client agreement, dated October 26, 2012 (FXCM Client Agreement); the Commodity Futures Trading Commission's (CFTC) *Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act (CEA), Making Findings, and Imposing Remedial Sanctions*, CFTC Dkt. No. 17-09 (Feb. 6, 2017) (CFTC Consent Order); and a declaration by Evan Milazzo, Chief Technology Officer of FXCM from 2002 through December 2016, dated October 11, 2017, attesting that Johnson received the best

bid or offer prices available from FXCM's eligible liquidity providers, including trades in which HFT Co. (HFT) served as the liquidity provider, and attesting to the trades at issue from February 14, 2017 to February 17, 2017.[1]

After carefully considering the record, I am dismissing the Complaint.

I. Summary of Parties and Proceedings

A. The Parties

Complainant Marcus Johnson (Johnson) is a resident of Baltimore, Maryland. Johnson opened a non-discretionary forex trading account with FXCM on June 27, 2016. Compl.; Compl. Addendum; Resp. Motion to Dismiss at ¶¶ 27-28 and 34. He closed his account on February 17, 2017. *Id.*

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* National Futures Association (NFA) Basic Research, *available at* https://www.nfa.futures.org/basicnet/Details.aspx?entityid=uy8vi7mVysc%3d&r n=N. On February 6, 2017, the Commission entered the CFTC Consent Order with FXCM finding, among other things, a conflict of interest existed from its "pay-for-flow" agreement with HFT. *See infra* at 5-6. 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.*

[1] Exhibits 1-4 are attached to Respondents' Motion to Dismiss (Oct. 11, 2017).

Respondent Dror Niv, alias Drew Niv (Niv) formerly served as FXCM's Chief Executive Officer and Chairman of FXCM's parent company's Board of Directors. Motion to Dismiss at 4.

B. Procedural History

Johnson filed his Complaint originally seeking to recoup $10,982.44 in damages ($2,987.44 in trading losses and $7,995 for tuition he paid to the Market Traders Institute for Education) asserting claims of fraud and unauthorized trading by Respondents regarding FXCM's trading arrangements and agreements with its liquidity providers. Compl. (received May 9, 2017).[2] On May 31, 2017, Belinda Pugh, the Complaint Specialist for the Office of Proceedings, sent Johnson a Deficiency Letter informing Johnson that his damages could not include losses unless they were proximately caused by Respondents' violation of the CEA. Pugh Deficiency Letter to Johnson (May 31, 2017). In that same letter, Johnson was further informed that William Adhout was unregistered and therefore could not be a Respondent in this reparations matter. *Id.*

Johnson filed his Complaint Addendum decreasing his damages claim to $2,987.44 in trading losses, and naming Dror Niv and FXCM as Respondents. Compl. Addendum (June 10, 2017). Respondents filed their Answer, denying each

[2] Johnson filed his reparations complaint as a Voluntary Proceeding, attaching the requisite $50 check with his Complaint. Respondents raised this case to a Summary Proceeding by attaching a $75 check with their Answer.

and every allegation, on August 22, 2017.[3] This case was forwarded to my docket on October 10, 2017, and discovery commenced shortly thereafter.

Respondents filed their Motion to Dismiss on October 11, 2017. On October 13, 2017, by way of Order, the parties were informed that Respondents' Motion would not stay discovery. Order (Oct. 13, 2017). However, discovery in this case was nonexistent as neither side filed discovery requests. In the absence of any discovery by the parties, I ordered Johnson to file his response to Respondents' Motion, and to identify: (1) the specific trades he believes were subjected to slippage or other misconduct, including the execution prices of each trade and what the price range he believes the trades should have been executed at; and (2) which type of fraud (false statements, unauthorized trades, and/or execution errors) were associated with each specific trade. Order (Apr. 4, 2018).

Johnson timely filed his responses to Respondents' Motion and my April 4 Order on May 18, 2018. However, instead of providing any evidence, Johnson simply stated that all his trades were subjected to misconduct, without providing any evidence or even a reason for his statement. He then asked this Office to "subpoena" 1,714 trades "as evidence of racketeering, and misconduct in this case."[4]

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[3] Respondents' original Answer did not include their address and contact information during business hours. *See* Pugh Deficiency Letter to Respondents (Sept. 13, 2017); Commission Rule12.18(a)(1). That deficiency was cured with Respondents' amendment to their Answer filed September 13, 2017.

[4] To the extent this is even a valid request for subpoena, it is denied here. First, as a party in the case, Johnson could have requested any evidence he needed to support his claims from Respondents themselves. Despite being given the opportunity, he failed to do so. Second, it is not at all clear what the content of the subpoena was supposed to be; in other words, what information was Johnson looking for with respect to these trades. What is

Respondents' Motion to Dismiss has been fully briefed. After carefully reviewing the parties' discovery submissions and pleadings, I am dismissing the Complaint.

II. Background Regarding the Commission's Settlement with FXCM

Johnson cites the CFTC Consent Order in his Complaint and Complaint Addendum, and relies heavily (if not exclusively) on the Consent Order as evidence of Respondents' purported fraud. That CFTC Consent Order was entered into on February 6, 2017 upon an Offer of Settlement made by FXCM, among others. FXCM neither admitted nor denied the following findings or conclusions set forth in the CFTC Consent Order.

According to 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.[5] 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

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clear is that Johnson sought to impermissibly convert this Office from an impartial adjudication forum into an independent investigative and enforcement office carrying out his instructions. That effort cannot be sustained here.

[5] 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)(Consent Order).

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 (FXCM 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 sometime in 2014, though the precise time is not specified in the record. Motion to Dismiss at 9; CFTC Consent Order at 2.

III. Findings of Fact

Johnson opened his account with FXCM on June 27, 2016 and closed it on February 17, 2017. Compl.; Compl. Addendum; Motion to Dismiss at ¶¶ 27-28. From June 27, 2016 to December 12, 2016, Johnson traded solely on FXCM's Dealing Desk platform. Motion to Dismiss Ex. 4 at ¶6 (Milazzo Declaration). The Dealing Desk platform is not at issue in this Complaint, since FXCM expressly

acted as the sole liquidity provider and took positions opposite its customers on its Dealing Desk platform. Motion to Dismiss at 7. Johnson incurred $668.57 in net trading losses, commissions, and rollover fees while using the Dealing Desk platform. *Id.* at 9. These losses have no connection with FXCM's No-Dealing Desk platform with HFT as the liquidity provider.

From December 14, 2016 to February 17, 2017, Johnson traded solely on FXCM's No-Dealing Desk platform. Motion to Dismiss Ex. 4 at ¶6 (Milazzo Declaration). A total of 526 trades were made on this platform during this time—394 trades without HFT as the liquidity provider, which resulted in $1,357.58 in losses. *Id.* at 10-11 and Ex. 4 at Attachment A (Milazzo Declaration). In total, $2,026.15 of Johnson's trading losses had no connection with HFT as the liquidity provider, leaving $961.29 in trading losses in dispute with respect to the facts alleged in the CFTC Consent Order. *Id.*

The February 2017 trades at issue, specifically February 14 and 17, were placed from Johnson's IP address and using his login credentials. Motion to Dismiss at 19-21. The trades made by Johnson throughout the life of his self-directed account, from June 27, 2016 through February 17, 2017, all occurred well after the Commission found the pay-for-flow agreement between FXCM and HFT ceased to exist sometime in 2014. Motion to Dismiss at 1, 8-9; CFTC Consent Order at 2.

IV. Legal Analysis and Conclusions

In the Complaint, Johnson argues that FXCM caused his losses by: 1) misrepresenting its business relationship and pay-for-flow agreement with one of its

liquidity providers, HFT; 2) failing to fill his orders at the Best Bid Offer (BBO); and 3) placing unauthorized trades in his account. Compl.; Compl. Addendum.[6] Respondent counters that this case should be dismissed because Johnson cannot demonstrate the elements of fraud, and moreover that he opened his account over two years after the Commission found that FXCM's and HFT's pay-for-flow agreement had ceased to exist.

I find that Johnson's evidence of misconduct—that is the CFTC Consent Order—is not admissible. Even if it were admissible, the record shows that the pay-for-flow agreements between FXCM and HFT were discontinued some time in 2014, and the trades at issue in this case occurred well after that time period. Thus Johnson has not proven, by a preponderance of the evidence, misconduct by FXCM that proximately caused any or all of his account losses.

A. Because the CFTC Consent Order Does Not Constitute Evidence of Misconduct in This Reparations Matter, Johnson 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 that respondent "willfully deceive[d] or attempt[ed] to deceive the other person by any means whatsoever." CEA § 4b(a)(2); 7 U.S.C. § 6b(a)(2)). This deceit must be

[6] In his response to my April 14, 2018, Discovery Order, Johnson also argues that FXCM executed "all of [his] trades," including those on the Dealing Desk platform, at prices that caused negative slippage. Compl. Response to Disc. Order (May 15, 2018). He provides no supporting evidence for his claim beyond the bare assertion of the claim, and thus fails to substantiate this claim by a preponderance of the evidence. It therefore must be dismissed. *See, e.g., Scobey v. Hornblower & Weeks-Hemphill, Noyes, Inc.,* 1985 WL 55141, CFTC Dkt. No. R78-390-79-31 (CFTC Jun. 12, 1985) (rejecting churning claim because of insufficient documentary evidence); *Lissberger v. Jayne, Anderson & Company, Inc., et al.,* 1991 WL 280427, CFTC Dkt. No. 89-R274 (CFTC Jun. 21, 1991) (same).

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, Johnson does not provide any supporting evidence for his claims of fraud and nondisclosure other than citing to the CFTC Consent Order and producing screenshots from FXCM's website. *See supra* at 2. But 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.").[7]

[7] This analysis does not address situations in which a settling party in fact admits the facts set forth in a Consent Order, which could constitute a public admission of wrongdoing.

In other words, no facts have been proven by the CFTC Consent Order where the settling party neither admitted nor denied the allegations. They therefore cannot be treated as proven facts in subsequent litigation.

Even assuming Johnson had shown by a preponderance of the evidence that FXCM had deceived him, he has not shown that such deceit proximately caused him damages, as he must under 7 U.S.C. Section 18. "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). But here there is no evidence that Johnson's losses were caused by FXCM's nondisclosure of its relationship with HFT. First, Johnson received the best price with respect to his trades even when HFT was the liquidity provider, suggesting that the purported conflict of interest between HFT and FXCM had no adverse impact on his account, including the February 14, 2017 trade. Motion to Dismiss at10-12; Exhibit 4 at 2-3 and Attachment B (Milazzo Declaration); *see also* Compl. Given there was no adverse impact on his account, it is difficult to believe Johnson would continue to place trades if he truly believed he was not receiving the BBO. Second, and more importantly, the purportedly inappropriate relationship between FXCM and HFT ceased some time in 2014, and all of Johnson's supposed damages were incurred in the period between June 27, 2016 and February 17, 2017. Without any evidence that the inappropriate

relationship existed at the time his damages were incurred, non-disclosure of that relationship could not have caused those damages.

Moreover, Johnson knew of CFTC Consent Order on February 10, 2017 and continued to trade his account for seven more days, placing trades he himself admits to on February 14 and February 17, 2017. This weakens Johnson's already unsupported contention that had he been informed of the relationship between FXCM and HFT, he would not have traded through FXCM. *See* Complaint.

Further, Johnson also failed to serve any discovery requests on FXCM, instead attempting to foist that responsibility on the Judgment Officer by attempting to subpoena "all 1,714 trades" (but apparently no information regarding the trades) he himself placed in his account. Complainant May 15, 2018 Response to Discovery Order; *supra* n.4. But Johnson never requested those records during discovery as he was both authorized and empowered to do. And he made no attempts to "prove any alleged violation proximately causing damages by a *preponderance of the evidence*" as this Office informed him he must. Notice of Summary Proceeding at 1 (October 10, 2017) (emphasis in original).

B. Johnson Has Failed to Show Unauthorized Trades Occurred in His Account, Including The February 17, 2017 Trade at Issue.

Johnson alleges in the Complaint that FXCM placed unauthorized trades in his account, and points to a February 17, 2017 instance where he placed a EUR/AUD Forex trade. Compl.; Compl. Addendum. This is the only instance Johnson cites to as proof of unauthorized trading, and he does not specify any other trades that were placed without his consent. He claims that he heard a chime,

through his earbuds, once he placed the trade. *Id.* He further states that he heard "three different chimes" afterwards that made him suspicious and caused him to close the trades "immediately." *Id.* Johnson states this suspicious chiming precipitated his decision to close his account with FXCM on February 17. *Id.* But Johnson admits that he himself opened and closed the purportedly unauthorized trade. *Id.;* Motion to Dismiss at 11. And FXCM's records indicate that all of Johnson's trades, including the February 17 trade, were placed using Johnson's IP address and his login credentials. Motion to Dismiss at 21.

Johnson never objects to this evidence, and he does not produce any rebuttal evidence. Without any evidence that someone other than him placed or closed the trades at issue, Johnson has failed to prove unauthorized trading by a preponderance of the evidence. *See Photakis v. Madda Trading Co., Comm. Fut. L. Rep.* (CCH) ¶ 20,504 (CFTC 1977) (Complainant bears the burden of alleging and proving unauthorized trades occurred); *Bahkosky v. A.G. Edwards & Sons, Inc.,* CFTC Dkt. No. 96-R23, 1997 WL 345637 (CFTC Initial Dec. 1997) (Complainant must specifically identify trades that are unauthorized or will be precluded from a finding that unauthorized trades were placed).

CONCLUSION

Johnson'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 failed to show any nexus between that purported fraud and his damages by a preponderance of the evidence. Moreover, the pay-for-flow agreement

between FXCM and HFT detailed in the CFTC Consent Order, the evidence Johnson leans on heavily as proof of misconduct, ceased to exist two years before Johnson opened his self-directed account with FXCM and was non-existent during the time at issue. Respondent's Motion to Dismiss is therefore GRANTED and Johnson's Complaint is DISMISSED.

Dated: April 16, 2020

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Judgment Officer