U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

JEAN TAFOHO,
Complainant,

v.

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

CFTC Docket No. 17-R008
Served electronically

INITIAL DECISION & ORDER DISMISSING THE COMPLAINT

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

Appearances: Jean Tafoho, *self-represented litigant*
Jersey City, NJ
For Complainant

Alexander Dick, Esq.
Senior Associate Counsel
Forex Capital Markets, LLC
New York, NY
For Respondent

Complainant, Jean Tafoho, appearing in this forum as a self-represented litigant and by way of a formal proceeding, seeks $37,950 in trading losses and commissions over the life of his account.[1] He alleges these losses were caused by

[1] A review of Complainant's Combined Account Statements put his actual trading losses at $10,604.56, and not the $37,950 he claims in his Complaint Addendum. *See* Compl.

two forms of misconduct by Respondent, FXCM: its (1) fraudulent increase of spreads on his limit and stop orders; and (2) use of a third party liquidity provider, HFT Co. (HFT), with which FXCM purportedly had an undisclosed financial relationship, on its No-Dealing Desk model of forex trading. Compl.; Compl. Addendum; Answer & Aff. Def. at 3-4.

To substantiate these allegations, Tafoho attaches: (1) emails between himself and numerous FXCM employees; (2) screenshots of FXCM client newsletters and its website; (3) a December 20, 2016 letter from FXCM to Jacob Shargal (an employee of the Financial Frauds & Consumer Protection departments at the New York Department of Financial Services); and (4) an audit trail labeled "Tafoho Jean spreads.xls" depicting the spread for GBP/UDS Forex pair on October 22, 2015.

In its defense, Respondent produced: (1) an FXCM client agreement, dated October 26, 2012 (FXCM Client Agreement); (2) screenshot from FXCM's website titled "Execution Risks," "Forex Pricing," and "How Orders Execute"; (3) FXCM's 10-K for the fiscal year ending December 31, 2014 (FXCM 2014 10-K); (4) Tafoho's account statements from June 23, 2015 through August 18, 2017; (5) the FXCM audit ticket and trail for a GBP/USD limit/stop order Tafoho placed on October 22, 2015; (6) a screenshot of a chart depicting the GBP/USD pair price on October 22, 2015; (7) an email from FXCM to Tafoho responding to a complaint he filed regarding his October 22, 2015 GBP/USD stop order (dated Feb. 24, 2016); and (8)

Addendum at 1-2 (May 30, 2017); Answer & Aff. Def. at 4 and Ex. 5. I have not endeavored to correct his damages claim here, since, as discussed throughout this Initial Decision, Tafoho has not shown that FXCM is liable for any misconduct.

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).

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

I. Summary of Parties and Proceedings

A. The Parties

Complainant Jean Tafoho (Tafoho) is a resident of Jersey City, New Jersey. Tafoho transferred his self-directed Forex account from CitiFX Pro to FXCM on June 23, 2015. Answer & Aff. Def. at 13. He traded his account between June 27, 2015 and February 3, 2016. *Id.* All of his trades were made using FXCM's No-Dealing Desk model. *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.*

B. Procedural History

Tafoho filed his Complaint on February 24, 2017 and several complainant addenda clarifying his allegations.[2] Respondent filed its Answer & Affirmative Defenses on August 25, 2017. Respondent titled its Answer to include a Motion to Dismiss. However, that Motion was never attached, and would never be filed, even after this Office reached out to Respondent to inform it of the missing Motion. *See* Letter from Pugh to Clegg (Oct. 11, 2017); and Email from Clegg to Pugh (Oct. 23, 2017) (stating Motion to Dismiss would be filed after a Judgment Officer was assigned to this case).

This case was forwarded to my docket on December 11, 2017, and discovery commenced shortly thereafter on December 22. Neither party filed discovery requests, and on November 4, 2019, I ordered the parties to file any additional discovery or final arguments no later than November 18, 2019. Neither party filed any additional documents or arguments, and waived discovery. *See* Order (Nov. 4, 2019). In that same Order I found that this case could be decided on the current record and without an oral hearing. *Id.* The parties were given an opportunity to object, and did not. *Id.*

[2] Tafoho filed his Complaint Addenda on: March 21, 2017; March 30, 2017; March 31, 2017; April 26, 2017; and May 30, 2017. These addenda were in part related to the question of whether Tafoho was litigating these claims in other forums, which would be prohibited under Commission Rule 12.24, 17 C.F.R. §12.24. For example, Tafoho asked by email whether he could combine his case with a pending class action lawsuit against FXCM on April 26, 2018. This Office informed him that we could not advise him about if and whether he could do so, but that if he decided to join the class action, he might have to dismiss his claim or claims here. That email was sent from this Office on May 1, 2018. Tafoho never responded, and this Office is unclear whether the reparations case before us is now an impermissible parallel proceeding.

II. Background Regarding the Commission's Settlement with FXCM

Tafoho cites the CFTC Consent Order in his Complaint Addendum (Apr. 26, 2017), and relies on the Consent Order in part 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.[3] 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.*, Answer & Aff. Def, at Ex. 4 (FXCM 2014 10K) at 73.

[3] 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).

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. *Id.* at 2.

III. Findings of Fact

Tafoho's account was transferred from CitiFX Pro to FXCM on June 23, 2015, at which time he subsequently agreed to FXCM's Trader Agreement and Risk Disclosure Statement. Ans. & Aff. Def. at 13; Ex 1. Tafoho traded his account between June 27, 2015 and February 3, 2016. *Id.* All of his trades were made using FXCM's No-Dealing Desk platform. *Id.*; Ex. 5. Under the No-Dealing Desk, FXCM acted as a credit intermediary between its customers and independent financial institutions, or third-party liquidity providers such as HFT. *Id.* at 10.

Facts Involving Negative Slippage

Tafoho used limit entry and stop entry orders as part of his trading strategy. A limit entry order allows a trader to enter the market at some point in the future. Once the market reaches the entry price set by the customer, the trade executes. Limit entry orders execute at the client's price or better. Similarly, stop entry orders do not execute immediately, but are used to exit the market in the future if the market reaches the stated price. However, while the stop price triggers the trade, the actual transaction may execute after the market has left the stop price. This difference between the stop price and the trade's execution price is referred to as slippage. Tafoho traded GPB/USD forex pairs, for which the average slippage was .7 pip. Answer & Aff. Def. at 6-7; Ex. 3.

On October 13, 2015, Complainant placed a GBP/USD limit entry order at 1.53729. Answer & Aff. Def. at 12; Ex. 6. It was executed the next day at 1.53737. *Id.* On October 15, Tafoho placed a GBP/USD stop entry order at 1.55144, which was executed on October 22 at 1.55154; in other words, there was 1.0 pips of negative slippage and this resulted in a $708.50 loss to Tafoho. *Id.* At the time his stop order was executed, the European Central Bank announced it was considering further rate cuts as a stimulus measure, triggering some volatility in the markets.

With respect to slippage, FXCM disclosed in its Customer Agreement that traders "may experience widened spreads and slippage under certain market conditions." Ans. & Aff. Defenses, Ex. 1 (Customer Agreement) at 3. It reiterated this disclosure on its website, and further disclosed that while "FXCM aims to provide clients with the best execution available and to get all orders filled at the

requested rate[,] there are times when, due to an increase in volatility or volume, orders may be subject to slippage." Answer & Aff. Defenses, Ex. 2 (Website Disclosures) at 2. And with regard to stop orders, the website disclosed that "when triggered, stop orders become a market order available for execution at the next available market price. Stop orders guarantee execution but do not guarantee a particular price." *Id.*[4]

Facts Involving HFT and No-Dealing Desk Platform

Tafoho's trades occurred between June 27, 2015 and February 3, 2016. The Commission found the pay-for-flow agreement between FXCM and HFT ceased to exist sometime in 2014. CFTC Consent Order at 2.

IV. Legal Analysis and Conclusions

In the Complaint, and accompanying addenda, Tafoho argues that FXCM caused his losses by: 1) fraudulently and intentionally widening the spread of his orders, causing negative slippage; and 2) misrepresenting its business relationship and pay-for-flow agreement with one of its liquidity providers, HFT. Compl.; Compl. Addenda. Respondent counters that Tafoho has failed to provide sufficient evidence to prove any of his claims, and moreover that his account was transferred to FXCM roughly one year after the Commission found that FXCM's and HFT's pay-for-flow agreement had ceased to exist. Answer & Aff. Def. at 2-4.

[4] Tafoho also complains about unexecuted orders in June, August and September 2015, Compl., but he does not identify the specific trades or provide any information about the orders sufficient to allow me to evaluate them. The only trades that he provides sufficient information to consider are the October 2015 trades discussed in this Initial Decision.

I find that Thus Tafoho has not proven, by a preponderance of the evidence, misconduct by FXCM that proximately caused any of his account losses.

A. Tafoho has failed to show FXCM fraudulently widened his trading spreads.

Tafoho claims that FXCM fraudulently created negative slippage beyond its stated average slippage rates, causing him trading losses. FXCM counters that it (1) had no incentive to do so, since it could neither pocket nor be compensated for any portion of that spread on its No-Dealing Desk platform; and (2) the 1.0 pip of negative slippage was caused by an announcement from the European Central Bank. Tafoho never provides any rebuttal evidence, and FXCM's facts are therefore uncontested.

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 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").

But here, although there is evidence Tafoho experienced slippage with respect to his October 2015 GBP/USD positions, there is no evidence that FXCM engaged in any misconduct with respect to that slippage. In other words, evidence that there was slippage—even evidence that there was slippage beyond published market rates—alone is insufficient to prove that FXCM engaged in misconduct. This is especially true when there is unrebutted evidence: (1) that FXCM had no

incentive to engage in such misconduct;[5] and (2) of a news event that could have created the slippage. Tafoho also acknowledged the risks of negative slippage in signing the FXCM Client Agreement. *See* Answer & Aff. Def. at 5-6; Ex. 1; and Ex. 2 at 1-4.

Tafoho made no attempt to substantiate his claims beyond his own narrative. He never requested any documents or information, as he was both authorized and empowered to do, that may have helped him prosecute his case. And he thus has failed to "prove any alleged violation proximately causing damages by a preponderance of the evidence." Notice of Summary Proceeding at 1 (December 21, 2017).

B. Because the CFTC Consent Order does not constitute evidence of misconduct in this reparations matter, Tafoho has not proved fraud with respect to FXCM's use of HFT as a liquidity provider.

With regard to his claims regarding the undisclosed conflict of interest from using HFT as a liquidity provider, Tafoho does not provide supporting evidence for this claim of fraud other than citing to the CFTC Consent Order. 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*

[5] As will be dismissed below, the proof of a profit-sharing relationship between HFT and FXCM might rebut the non-incentive proffer, but Tafoho offered no such admissible proof of that in this proceeding. *See infra* subsection B. Moreover, it does not rebut evidence that a news event created the slippage.

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.").[6]

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 Tafoho 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 Tafoho's losses were caused by FXCM's nondisclosure of its relationship with HFT. First, there is

[6] 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.

evidence that Tafoho was provided with the best possible prices for his orders available at the times they were executed. *See* Answer & Aff. Def. at 5-6. Second, the purportedly inappropriate relationship between FXCM and HFT—by Tafoho's own allegations—ceased in 2014, and all of Tafoho's supposed damages were incurred in the period between June 27, 2015 and February 3, 2016. 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.

CONCLUSION

For the reasons discussed throughout this order, I am DISMISSING the complaint.

Dated: September 3, 2020

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Judgment Officer