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AMBIT ME DMCC, Complainant, v. Cunningham Commodities, LLC, and Patrick Pinkerton, Respondents.	*	CFTC Dkt. No. 20-R016 **Served electronically**

OPINION AND ORDER DENYING MOTION FOR SUMMARY DISPOSITION, CLARIFYING ISSUES & SETTING FOR HEARING

This case arises out of a simple dispute. Complainant AMBIT ME DMCC (AMBIT) alleges that Respondents Cunningham Commodities, LLC (Cunningham Commodities) and Patrick Pinkerton wrongfully wired a total of $500,000 from AMBIT's account to accounts held at JP Morgan Chase Bank in Miami, Fl and HSBC in Birmingham, United Kingdom on three separate occasions: February 11, 2020, February 18, 2020, and February 20, 2020. Cunningham Commodities transferred these funds to JP Morgan Chase Bank and HSBC in response to emails, sent by someone claiming to be an authorized designee of AMBIT, requesting the withdrawals. However, AMBIT contends that Cunningham Commodities should

have known these emails were scams because AMBIT had never identified these banks as authorized institutions to receive withdrawals from its account, and the emails contained numerous red flags making clear they were imposter emails.

Respondents Cunningham Commodities and Pinkerton counter that they acted in a reasonable manner in fulfilling what they believed were AMBIT's withdrawal requests, and that AMBIT was checking its account daily and never questioned those transactions. Respondents further contend that there is still a question of where the money went and whether it was in fact requested by a designee of AMBIT. Respondents finally contend that AMBIT's claims are precluded by law.

AMBIT filed for summary disposition, which it mistakenly filed as a Motion for Summary Judgment, on January 12, 2021. Respondents filed their Opposition to the Motion for Summary Disposition on February 1, 2021. After reviewing the parties' motions, I ordered, among other things, further briefing on the issue of whether the affirmative defenses or ratification or estoppel preclude recovery of the damages stemming from the second and third transfers. *See* Briefing Order (Oct. 12, 2021). The parties filed their timely responses and briefing was complete by December 7, 2021.

In reviewing the record, our Office learned it could not access certain recordings of telephone conversation on which AMBIT relied in making its motion. On May 10, I ordered AMBIT to produce those .wav files. On May 11, Counsel for AMBIT emailed our Office stating that the link to those files "is no longer active due

to the time which has passed." *See* Email from Nelis to OP (May 11, 2022). No additional productions have yet been made to our Office since that time, though AMBIT is attempting to procure the missing conversations. *See* Email from Nelis to OP (May 20, 2022). Because of these missing telephone conversations, the non-testimonial record—though voluminous—is not yet complete.

However, even assuming these missing recordings contain evidence helpful to AMBIT, testimony is needed to evaluate the issue of Respondents' scienter and AMBIT's Motion for Summary Disposition is denied.

I. Factual Findings

The following facts have been established by the current record.

1. AMBIT is a foreign corporation with its principal place of business in Dubai, United Arab Emirates (UAE).

2. Respondent Cunningham Commodities is an Illinois limited liability corporation, with its principal place of business in Chicago, Illinois. It has been registered with the National Futures Association (NFA) as a Futures Commission Merchant (FCM) since at least 1982, including during the time of the events discussed throughout this Opinion and Order.

3. Respondent Pinkerton resides in Illinois, and during the relevant time period through the present has been registered with the NFA as an Associated Person (AP) of Cunningham Commodities. During the relevant period, Pinkerton was an employee of Cunningham Commodities and acted as AMBIT's account manager.

4. On August 8, 2018, AMBIT opened an account at Cunningham Commodities, and executed the required Account Agreement to do so. Compl. Ex. 1 (Account Agreement).

5. The Account Agreement states, in bolded capitalized letters, that: "INFORMATION COLLECTED IN THIS APPLICATION WILL BE USED TO VERIFY YOUR IDENTITY, AS REQUIRED UNDER FEDERAL LAW." Compl. Ex. 1 (Account Agreement).

6. As part of that Account Agreement, AMBIT provided its banking information as follows: RAKBANK, GOLD SOUQ, DEIRA, Dubai, UAE, Account # XXXXXXXXXXXXXXXXXXXXX02 (the RAK Bank Account).[1] Compl. at 2; and Compl. Ex. 1 at CC 4. AMBIT also provided its email address as AMBITDMCC11@gmail.com. *Id.*

7. The Account Agreement provided for AMBIT's use of fax or electronic signature to authorize, acknowledge or consent to transactions. Compl. Ex. 1 ¶¶ 27-28.

8. On July 18, 2019, AMBIT changed the email address on its account from AMBITDMCC11@gmail.com to hbs8522@gmail.com. Compl. Ex. 7 (Change of Email Form (July 18, 2019)).

9. From August 2018 through February 2020, AMBIT made forty-seven (47) transfers to and from its account at Cunningham Commodities. Compl. Ex. 2.

[1] The account number has been obscured in this Opinion & Order for privacy reasons.

Thirty-eight (38) of these transfers were to the RAK Bank Account, but the remaining nine (9) were to AMBIT's account at Noor Bank in the UAE. *Id.*

10. Originally, on November 5, 2019, Cunningham Commodities refused to wire funds to AMBIT's Account at Noor Bank because the funds did not "originate" there. Compl. Ex. 5 (Email from Cunningham Commodities to AMBIT (Nov. 5, 2019)). AMBIT cured this issue by providing additional documentation authorizing transfers to and from its Noor Bank Account to Cunningham Commodities on November 14, 2019. Compl. Ex. 3.

11. Then, on February 11, 2020, Pinkerton received an email from a Harsh Soni, purporting to be an employee of AMBIT, requesting that Cunningham Commodities wire $100,000 from AMBIT's Cunningham Commodities account to an account at JP Morgan Chase Bank in Miami, Florida. Compl. Ex. 4.

12. There were several curious things about this request.

a. AMBIT had never identified either JP Morgan Chase Bank or any other U.S. bank as either an authorized originating or depositing account.

b. The routing number listed for the JP Morgan Chase Bank account, which Harsh Soni identified as being in Miami, Florida was in fact tied to a bank account listed in Tampa, Florida. Compl. ¶ 15.

c. Although the email request had a JP Morgan Chase bank statement attached, that statement had various contents and columns misaligned. Compl. Ex. 6 (JP Morgan Bank Statement).

d. The February 11, 2020 email was sent from hbs85221@gmail.com, not hbs8522@gmail.com. In other words, the numerical ID has an additional digit—the "1" at the end.

13. Despite the anomalies associated with the February 11, 2020 email request, Respondents Cunningham and Pinkerton transferred $100,000 from AMBIT's Cunningham Commodities account to the JP Morgan Chase account. Compl. Ex. 8 (Feb. 2020 Statement).

14. One week later, on February 18, 2020, Respondents received, at Pinkerton's email address, another request for transfer of $100,000 from AMBIT's Cunningham Commodities account to the same JP Morgan Chase account in Florida as in the February 11, 2020 email. Compl. Ex. 9 (Feb. 18, 2020 Email) & 10 (JP Morgan Chase Bank Statement).

15. This February 18, 2020 email contained the same anomalies that the February 11, 2020 email did.

16. Respondents nonetheless transferred $100,000 from AMBIT's Cunningham Commodities account to the JP Morgan Chase Bank account on February 18, 2020. Compl. Ex. 8 (February 2020 Statement).

17. Two days later, on February 20, 2020, Respondents received a third transfer request at Pinkerton's email account, requesting that they wire $300,000 from AMBIT's Cunningham Commodities account to HSBC, a financial institution in Birmingham, United Kingdom. Compl. Ex. 11 (February 20, 2020 Email).

18. As with the February 11 and February 20 emails, this email was sent from a Harsh Soni at hsb85221@gmail.com.

19. AMBIT had never authorized HSBC or any bank located in the UK as an originating or depositing bank account.

20. And the Swift Code provided in the request for transfer in the February 20 email was for a bank with a completely different address; not HSBC at the address provided in the request for transfer. Compl. ¶ 8.

21. Respondents transferred $300,000 from AMBIT's Cunningham Commodities account to the HSBC account on February 20, 2020. Compl. Ex. 8 (February 2020 Statement).

22. On March 2, 2020—just 10 days after the last unauthorized transfer—AMBIT emailed Cunningham Commodities demanding that its account be credited the $500,000 that was transferred out of its account. Compl. Ex. 13 (March 12, 2020 Email).

23. Respondents refused to credit AMBIT's account.

II. Analysis and Legal Discussion of AMBIT's Claims

AMBIT brings three claims for relief in its Complaint under the Commodity Exchange Act, as well as claims for breach of fiduciary duty, negligence and conversion. This Office has jurisdiction over claims arising under the CEA or any rules promulgated thereunder, 7 U.S.C. § 18(a)(1), but only has jurisdiction over breaches of fiduciary duty if there is an underlying violation of the CEA or its rules. *See, Emily v. Gleichmann*, CFTC No. 14-R007, 2020 WL 3248253, at *2-3 &n.1.

(CFTC June 9, 2020). It does not have jurisdiction over the claims for negligence or conversion.[2] Thus the questions here are simple: (1) Whether there is any provision requiring an FCM to safeguard its customers' funds against unauthorized transfers; (2) If such a duty exists, whether Respondents violated that duty by transferring AMBIT's funds to unauthorized bank accounts; and (3) If so, whether AMBIT nonetheless ratified these transfers?

A. Standards of Analysis for Motions for Summary Disposition

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.*, CFTC No. 11-R004, 2012 WL 6087468 at *6 (CFTC Dec. 5, 2012); *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, CFTC No. 92-R125, 1994 WL 506234 at *6 (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), and at this stage:

> [T]he judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. All reasonable doubts about the facts should be resolved in favor of the non-moving party. If reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.

[2] For this reason, Respondent's arguments that this case is governed by Illinois law is irrelevant. Respondents are registered under the CEA, and are therefore subject to the CEA and its rules. Those are the laws that govern disposition of these claims.

Id. Because I find there are genuine issues of material fact with respect to Respondents' scienter, this motion for summary disposition is denied.

B. Questions of Fact Remain as to Whether Respondents Cunningham Commodities and Pinkerton Violated the Commodity Exchange Act and its Rules Intentionally or Recklessly When They Transferred AMBIT's Funds to a Person Other Than AMBIT in Response to Fraudulent Email Requests

Complainants cite a variety of rules and regulations for the proposition that an FCM is required to treat a customer's money as if it belongs to the customer. *See* Compl. citing "7 U.S.C. § 6(d)(b)"; and CFTC Regulations §§1.73 and 1.74.[3] This is true. The Commission has stated that there is a "statutory mandate to segregate customer funds—to treat them as belonging to the customer. . ." Final Rule: *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, 78 Fed. Reg. 68505, at 68509 (codified at 17 C.F.R. §§ 1, 3, 22, 30, and 140) (November 14, 2013). This mandate is reiterated in a variety of statutes and regulations. *See e.g.*, CEA § 4d(a)(2), 7 U.S.C. § 6d(a)(2) (FCMs must deal with "treat and deal with all money securities, and property [of the customer] . . . as belonging to such customer."); 17 C.F.R. § 1.20(a) ("A futures commission merchant must separately account for all futures customer funds and segregate such funds as belonging to its futures customers."; 17 C.F.R. § 1.22(a) ("No futures commission merchant shall use, or permit the use of, the futures customer funds of one futures customer to purchase,

[3] The statute AMBIT cites, 7 U.S.C. § 6(d), does not exist. Presumably AMBIT intended to cite 7 U.S.C. 6d, which is discussed throughout this Opinion & Order.

margin, or settle the trades, contracts, or commodity options of, or to secure or extend the credit of, any person other than such futures customer.").

But this does not mean that these statutes can be violated by negligent or mistaken conduct. The requisite conduct must have scienter.

In a case presenting similar facts to this one, both the Commission and the D.C. Circuit found that Respondents had committed fraud under the CEA's anti-fraud provision, CEA § 4b, 7 U.S.C. § 6b, by failing to verify the scope of the customer's identity. *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 746 (D.C. Cir. 1988) (citing *Sansom Refining Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, 1987 WL 106873 (July 20, 1987) (Commission Op.)). In *Drexel*, an employee at Sansom Refining Company made a series of speculative trades on behalf of Sansom through a Drexel agent, even though that employee was not authorized to trade the Sansom account. At no time did the agent at Drexel ask whether this employee was authorized to place trades on behalf of Sansom. That failure of care amounted to fraud.

But the Commission went one step further to hold that Drexel and its agent also violated then-CEA § 4d(2), 7 U.S.C. § 6d(2) (1987), or the CEA's segregation provisions that require FCMs to treat customer funds as belonging to the customer. The D.C. Circuit reversed this reading of the statute. 850 F.2d at 752-753. The D.C. Circuit held CEA Section 4d(2) could not apply for two reasons—because (1) that statute was intended "to prevent an unscrupulous broker from commingling

clients' funds," and (2) the Commission's reading of Section 4d(2), 7 U.S.C. § 6d(2), would nullify the scienter requirement of CEA Section 4b, 7 U.S.C. § 6b. *Id.*

In other words, some intentionality finding must be made in order to hold the Respondents' conduct actionable under the Commission's statute governing fraudulent transactions—CEA Section 4b, 7 U.S.C. § 6b. The statute makes it illegal for any person in connection with regulated transactions "(A) to cheat or defraud or attempt to cheat or defraud the other person; (B) willfully to make or cause to be made to the other person any false report . . . [or] false record; (C) willfully to deceive or attempt to deceive the other person. . . ." CEA § 4b(a)(2); 7 U.S.C. § 6b(a)(2). *See also* 17 C.F.R. § 33.10.

Therefore, although I find it highly plausible on the current record that Cunningham Commodities acted with the requisite scienter in failing to verify the authority of the requesting individual purporting to represent AMBIT, more evidence by way of testimony (and perhaps the missing phone conversations) is necessary to decide whether there was sufficient intentionality—either recklessness or willful behavior—to amount to fraud under CEA. *CFTC v. R.J. Fitzgerald & Co., Inc.,* 310 F.3d 1321, 1328-29 (11th Cir. 2002) (scienter is met "if Defendant's conduct represents an extreme departure from the standards of ordinary care."); *CFTC v. Kratville*, 796 F.3d 873, 893 (8th Cir. 2015) (same). If so, only then can I consider the question of whether Cunningham Commodities also breached its fiduciary duties.

C. Respondents Have Not Established the Affirmative Defenses of Ratification or Estoppel

Respondents allege that any damages here are barred by the doctrines of ratification or estoppel. Ratification bars a customer from "collecting the damages arising from a violation of Rule 166.2 if respondent establishes the elements of ratification or estoppel," which are required for respondents to "establish not only that the customer knew of the agent's wrongdoing, but also that . . . the customer[ ] knew he had a right to avoid financial responsibility for unauthorized trades." *Yrag Traders, LLC v. Liberty Trading Grp.,* CFTC No. 12-R033, 2014 WL 7028077, at *3 (CFTC Dec. 11, 2014) (internal quotation marks and citations omitted). "This is an affirmative defense requiring the respondent to carry the burden of proof that it is clear from all the circumstances presented that the intent of the customer was to adopt, as his own and for all time, the trade executed for his account without his authorization." *Id.* (internal quotation marks and citations omitted).

This requirement that the customer know she can avoid responsibility for the unauthorized trades stems from the fact that "a broker is under [a duty to know the regulations], violates the rules at its peril, and is in a position to seek ratification from the customer by informing the customer of his right to not accept a trade that the customer did not authorize in advance. Without this requirement, the right to avoid unauthorized trades would be undermined, and the ratification defense would be a frequent and easy out for brokers who fail to abide by Rule 166.2." *Id.*

Given the state of the case law, the bar is very high for Cunningham Commodities to establish the affirmative defense of either ratification or estoppel.

As an initial matter, it is not at all clear these defenses apply to anything other than unauthorized trading under Rule 166.2. In other words, a customer can look at her financial statements and decide—even if she did not authorize trading in certain financial products for example and knows she can undo them—to nonetheless accept and adopt those trades as her own. The same cannot be said of transferring monies from a customer's account to an account belonging to someone other than the customer and aiding a third parties' theft of those customer funds—whether intentionally or not.

Further, the cases Cunningham Commodities cites in support of its ratification defense do not apply to the facts of this case. *See e.g., Shefter v. Merrill, Lynch, Pierce & Smith, Inc.*, CFTC No. R81-1090-82-275, 1986 WL 65687 (April 23, 1986) (finding that the issue of whether that complainant consented to the transfers was moot because no damages arose from them); *Al-Adasani v. AML Futures, Inc.*, CFTC No. 86-R29, 1987 WL 106954 (May 15, 1987) (finding that eighteen months passed before customer made any inquiries about the transfer and that it was unreasonable for customer to believe his money was being used in a certain way without ever completing documentation for that purpose). And the Commission has made very clear that an FCM's "failure to take prudent steps to clarify [an individual's] apparent authority [is] unreasonable and precludes respondents from establishing an estoppel defense" in circumstances such as these. *Sansom Refining*

Co. v. Drexel Burnham Lambert, Inc., CFTC No. 82-R448, 1987 WL 106873, at *5 (July 20, 1987) (*aff'd in relevant part*, 850 850 F.2d 742 (D.C. Cir. 1988)).

Certainly on this record Respondents affirmative defenses of ratification and estoppel fail, and it may be that they will fail even under a more fulsome record including testimonial evidence. I nonetheless will allow Cunningham Commodities to present evidence and elicit testimony to substantiate its affirmative defenses if it chooses to do so.

ORDER

For the reasons discussed herein, AMBIT's motion for summary disposition is denied. The parties are ordered to inform this Office no later than Friday, May 27, 2022 whether they prefer to hold the merits hearing in July, September or October 2022. A prehearing conference will be held between two and three weeks before the merits hearing. I will issue a Prehearing Order once the hearing month is decided. This Office will also issue a Notice of Virtual Hearing establishing procedures and practices for holding the hearing via video conference if the parties consent to this remote format.

Dated: May 20, 2022

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Administrative Judge