U.S. COMMODITY FUTURES TRADING COMMISSION
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Office of Proceedings

Eric Thompson, Jonathan Morse, Jack Vogel, Sheri Herlihy, Ron Frey, Harald Sandstrom, Suetsugu Kawamura, Echo Bay, LLC, Complainants, v. GAIN Capital Group, LLC, Respondent.	*	CFTC Docket Nos. 20-R007; 20-R008; 20-R009; 20-R010; 20-R011; 20-R012; 20-R015; and 20-R025 **Served electronically**

INITIAL DECISION AND ORDER GRANTING RESPONDENT'S MOTIONS TO DISMISS

On December 13, 2019 and January 15, 2020, Complainants Eric Thompson, Jonathan Morse, Jack Vogel, Sheri Herlihy, Ron Frey, Harald Sandstrom, Suetsugu Kawamura, and Echo Bay, LLC (collectively, the Complainants), separately filed their reparations complaints against Respondent GAIN Capital Group, LLC (GAIN Capital), a futures commission merchant that held futures trading accounts for two of the eight complainants.[1] Complainants experienced trading losses on February 5

[1] Eric Thompson v. GAIN Capital Group, LLC (20-R007); Jonathan Morse v. GAIN Capital Group, LLC (20-R008); Jack Vogel v. GAIN Capital Group, LLC (20-R009);

and 6, 2018 and claim that those losses were caused by GAIN Capital's culpable inability to execute their trades on those days.

On October 9, 2020, GAIN Capital filed its Motions For Reconsideration Of Determination To Forward The Complaint And, In The Alternative, Answer And Additional Defenses (Motions for Reconsideration and Answers) in each of these eight cases. On December 16, 2020, the Director of the Office of Proceedings denied GAIN Capital's Motions for Reconsideration, and these cases were forwarded to my docket shortly thereafter.

On February 16, 2021, I informed the parties that although GAIN Capital's Motions for Reconsideration were denied, the motions raised issues that could dispose of these cases before the commencement of discovery, and ordered the parties to file any motions to dismiss and responses to fully brief the issues raised in Respondent's motion. *See* Omnibus Order (Feb. 16, 2021). GAIN Capital filed its Motions to Dismiss in each of the eight cases, and those motions were fully briefed on April 29, 2021.

For the reasons discussed below, and pursuant to Commission Rules 12.201(e) & (j), 12.205(c)(2), 12.340(h) & (m); and 12.308(c)(2), I am consolidating

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Sheri Herlihy v. GAIN Capital Group, LLC (20-R010); Ron Frey v. GAIN Capital Group, LLC (20-R011); Harald Sandstrom v. GAIN Capital Group, LLC (20-R012); Suetsugu Kawamura v. GAIN Capital Group, LLC (20-R015); and Echo Bay, LLC v. GAIN Capital Group, LLC (20-R025). Vogel's and Frey's proceedings are summary proceedings, and the remaining six are formal proceedings. Throughout this Initial Decision, the individual complaints and complaint addenda will be referred to as "Thompson Complaint," or "Kawamura Complaint," but generally and collectively simply as the "Complaints."

these cases for the purpose of this Initial Decision and Order and dismissing each of these Complaints for failure to state a claim cognizable in reparations.

I. Summary of Parties and Relevant Procedural History

A. The Parties

Complainant Eric Thompson (Thompson) is a resident of Tallahassee, FL. Thompson did not have a trading account at GAIN Capital during the relevant time. Thompson was registered as an Associated Person (AP) and Principal of Rincon Capital LLC (Rincon) and Institutional Advisory Services Group LLC (IASG). Thompson's account at issue was a discretionary account, and was introduced by IASG; held at INTL FCStone Financial, Inc. (FCStone), a registered Futures Commission Merchant (FCM); and managed by Intex Capital (Intex), a registered Commodity Trading Advisor (CTA). Ruben Zagagi—an AP and Principal of Intex—managed and traded Thompson's account during the relevant time. Thompson Compl. at 2-3. Thompson claims $50,000 in damages. *Id.*

Complainant Echo Bay LLC (Echo Bay) is a limited liability company registered in Tallahassee, FL. Echo Bay did not have a trading account at GAIN Capital during the relevant time. Echo Bay's trading account at issue was a discretionary account, and was held at FCStone; maintained by Intex; and managed and traded by Ruben Zagagi. Echo Bay Compl. at 2-3. Echo Bay claims $50,000 in damages. *Id.*

Complainant Jonathan Morse (Morse) is a resident of Tallahassee, FL. Morse did not have a trading account at GAIN Capital during the relevant time.

Morse's account at issue was a discretionary one and was introduced by IASG; held at FCStone; maintained by Intex; and managed and traded by Zagagi. Morse Compl. at 3. Morse claims $50,000 in damages. *Id.*

Complainant Jack Vogel (Vogel) is a resident of Anthem, AZ. Vogel's discretionary account was introduced by Foremost Trading LLC, a registered IB, and was held at GAIN Capital. Vogel's account was maintained by Intex, and managed and traded by Zagagi. Vogel Compl. at 2-3. Vogel claims $25,000 in damages. *Id.*

Complainant Sheri Herlihy (Herlihy) is a resident of Chittenango, NY. Herlihy did not have a trading account at GAIN Capital during the relevant time. Herlihy's discretionary account was introduced by IASG; held at FCStone; maintained by Intex; and managed and traded by Zagagi. Herlihy Compl. at 2-3. Herlihy claims $50,000 in damages. *Id.*

Complainant Ron Frey (Frey) is a resident of El Dorado, IA. Frey's discretionary account was introduced by Foremost Trading; held at GAIN Capital; maintained by Intex; and managed and traded by Zagagi. Frey Compl. at 2-3. Frey claims $25,000 in damages. *Id.*

Complainant Harald Sandstrom (Sandstrom) is a resident of Bloomfield, CT. Sandstrom did not have a trading account at GAIN Capital during the relevant time. Sandstrom's discretionary account was introduced by GCC Asset Management, Inc., a registered IB; held at ADM Investor Services, Inc., a registered

FCM; maintained by Intex; and managed and traded by Zagagi. Sandstrom Compl. at 2-3. Sandstrom claims $100,000 in damages. *Id.*

Complainant Suetsugu Kawamura (Kawamura) is a resident of Koto-Ku Tokyo. Kawamura did not have a trading account at GAIN Capital during the relevant time. Kawamura's discretionary account was introduced by IASG; held at FCStone; maintained by Intex; and managed and traded by Zagagi. Kawamura Compl. at 2-3. Kawamura claims $50,000 in damages. *Id.*

Respondent GAIN Capital Group, LLC (GAIN Capital) is an FCM that has been registered with the Commission since July 2004. *See* NFA Basic Research at https://www.nfa.futures.org/BasicNet/basic-profile.aspx?nfaid=8xWTPnTVRTw%3D. It held futures trading accounts for two of the eight Complainants—Frey and Vogel. Non-party Zagagi used GAIN Capital's platforms to trade Complainants' discretionary accounts.

Non-party Ruben Zagagi (Zagagi) was registered with the Commission from May 2008 to September 2022 as an AP and Principal of Intex, a CTA registered with the Commission from May 2008 through September 2022. Zagagi had discretionary trading authority over each of the eight Complainants' accounts at issue during the relevant time.

Non-party Intex Capital (Intex) was a CTA registered with the Commission from May 2008 through September 2022. Intex was the CTA that maintained and managed all of the Complainants accounts at issue during the relevant time.

B. Relevant Procedural History

On December 13, 2019, Complainants Thompson, Morse, Vogel, Herlihy, Frey, Kawamura and Echo Bay filed separate and individual reparations complaints against Respondent GAIN Capital. On January 15, 2020, Harald Sandstrom filed his reparations complaint against GAIN Capital as well. Each of the Complainants is represented by the same counsel. This Office informed Complainants that they must provide an exact amount of damages and a detailed calculation for the amount of damages claimed. *See* OP Letter to Complainants (Feb. 14, 2020). In response, Complainants filed separate complaint addenda with their respective daily account statements during the relevant time reflecting their trading losses. They argued the trading losses incurred February 5 and 6, 2018 were caused by the break down of GAIN Capital's automated trading system due to high market volatility.

Several motions were filed before the Director of the Office of Proceedings, before this case was officially docketed for jurisdiction. First, GAIN Capital filed its Motions for Reconsideration and Answers in each of these eight cases, arguing that all eight Complaints should be dismissed because Complainants have failed to state claims cognizable in reparations. Second, GAIN Capital filed its Motion to Stay Discovery in these eight cases pending disposition of the Motions for Reconsideration. Finally, Complainants filed a motion to consolidated these eight reparations cases citing a common set of facts central to each Complainant.

Each of the parties' motions were opposed by the adversarial party or parties. On December 16, 2020, the Director of the Office of Proceedings denied each of the

pending motions as premature, and these cases were forwarded to my docket shortly thereafter.

On February 16, 2021, I ordered the parties to file any motions to dismiss and responses to fully brief the issues raised in GAIN Capital's original Motion for Reconsideration. *See* Omnibus Order (Feb. 16, 2021). GAIN Capital filed its Motions to Dismiss and the motions were fully briefed on April 29, 2021. These motions are ready for disposition.[2]

II. Factual Findings

1. The eight Complainants opened accounts, at various different times and with various FCMs and IBs. These accounts were discretionary and were maintained by Intex, a then-registered CTA. Eight Compls. at 2-3.

2. These accounts were traded and managed by Zagagi, an AP and Principal of Intex. *Id.*

[2] With respect to Complainants' consolidation motion, GAIN Capital opposed consolidation because the Complainants opened their accounts through different IBs at different times and at different FCMs. GAIN Capital also argued that the Commission's reparations rules do not allow for consolidation. However, the Commission has accepted the practice of consolidation, and because these cases concern the same Respondent, and substantially similar (if not in many relevant cases identical) facts, merits, and claims, I am consolidating these cases solely for the purpose of this Opinion and Order. *See Ferrugia v. Tempus, Inc., et al.,* 1991 WL 88197 (CFTC Apr. 15, 1991); *see also*, *Myers v. Saul Stone & Co.,* 1992 WL 201159 (CFTC Aug. 11, 1992) (granting respondents' motion to consolidate the appeals). If this case proceeds further, I can revisit the benefits and demerits of consolidation at that time.

3. During that time, Zagagi managed numerous segregated customer accounts on behalf of about eighty (80) individual account holders. Eight Compls. at 3.

4. The positions of Zagagi's customers, including those of all eight Complainants, were equally allocated within the portfolio in E-Mini S&P futures. *Id.*

5. All trades under Zagagi's control were traded using GAIN Capital's platform. *Id.*

6. Although Zagagi, a non-party to this case, placed his customers' trades through GAIN Capital, only two of the Complainants had accounts and contractual relationships with GAIN Capital—Frey and Vogel. *See* Frey Account Statement Feb. 5-7, 2018; Vogel Account Statement Feb. 5-6, 2018; *see also* Frey & Vogel Mot. for Reconsideration Exs. A, B, C, and D.

7. The remaining six Complainants did not have any accounts with GAIN Capital; nor did they sign any contracts, customer agreements, or risk disclosure statements with GAIN Capital. *See generally* Eight Complaints; Eight Motions for Reconsideration and Answers.

8. The six Complainants proffer a "Give-Up Agreement" between Intex and GAIN Capital as proof of a nexus between them and GAIN Capital. *See* Compl. Opp. Mot. Dismiss Ex. 2 (Give-Up Agreement (July 8, 2016)). However, that Give-Up Agreement is an agreement used by GAIN Capital as the "order passing broker" to clear trades through R.J. O'Brien as a "Clearing Broker" and Advantage Futures

as the "Executing Broker." The Give-Up Agreement thus only covered accounts held at one of three FCMs that were party to the Agreement: GAIN Capital, R.J. O'Brien, and Advantage Futures.

9. None of the six non-GAIN Capital customers were customers at either of the other two FCMs covered by the Give-Up Agreement, R.J. O'Brien or Advantage Futures. And the two GAIN Capital customers' relationships were governed by customer agreements, not the Give-Up Agreement.

10. As of February 5, 2018, the value of the eight Complainants' accounts was collectively about $100,000 and their portfolio consisted mainly of puts in the March 8, 2018 E-Mini. Eight Compls. at 3-4.

11. On February 5, 2018, after trading opened, Zagagi noticed that the market was becoming highly volatile. *Id.* at 3-4.

12. That day—February 5, 2018—the markets experienced extreme volatility and the S&P 500 Index, upon which Complainants' investments were based, had its worst day since 2011 and fell 4.1% by the close of February 5, 2018. *See* https://www.bloomberg.com/news/articles/2019-02-06/the-day-the-vix-doubled-tales-of-volmag.

13. Additionally, on February 5, 2018, the CBOE volatility index jumped by a record 20 points—indicating extreme market volatility. *Id.*

14. On the evening of February 5, 2018, at around 6:03 pm, Zagagi began entering orders to liquidate the Complainants' positions on GAIN Capital's trading platform. Eight Compl at 3-4.

15. The system generated an "error" message and the orders did not go through.

16. Zagagi called the help desk—averring he did so at 5:54 before he entered the liquidation trades and was told GAIN Capital would investigate. *Id.*

17. He called again at 6:03 and 6:27 pm, and was informed that GAIN Capital would try and execute the orders as soon as possible. *Id.*

18. Zagagi repeatedly tried to liquidate these positions while they were declining in value until approximately 1:00 am on February 6, 2018, but was unable to do so to the detriment of the Complainants' account values. *Id.* at 5.

III. Analysis and Legal Discussion

A. Legal Standard

This Office may grant a motion to dismiss when "none of the matters alleged in the complaint state a claim that is cognizable in reparations." 17 C.F.R. § 12.308(c)(1)(i).[3] Claims that are cognizable in reparations are defined by statute as those that involve violations of the Commodity Exchange Act (CEA) or its regulations. CEA § 14(a)(1), 7 U.S.C. § 18(a)(1). Further, those violations of the CEA or its rules must have "proximately caused" "actual damages" in order to be justiciable here.

[3] The standard for granting a motion to dismiss is the same for summary proceedings as for formal ones. *Compare* 17 C.F.R. §§ 12.205(c)(2) and (3) (summary proceeding standard), *with* 17 C.F.R. §§ 12.308(c)(2) and (3) (formal proceeding standard).

Motions to dismiss test whether the claims made in a complaint are sufficiently adequate to advance in the adjudication process. *Saba v. Greco*, CFTC No. 09-R052, 2010 WL 4521449 (Nov. 9, 2010). When considering motions to dismiss, all well-pleaded factual allegations are taken as true, but "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to defeat dismissal." *Id.* at *1 n.26. Dismissal is also appropriate when a complaint pleads facts or relies on documents that would relieve a respondent of liability for the allegations. *See generally Hedayet v. GAIN Cap. Corp.*, CFTC No. 09-R044, 2011 WL 17927, at *1 (Jan. 3, 2011).

B. Discussion

The Complainants allege the same six claims in each of their Complaints: (1) breach of contract; (2) violations of CEA Sections 6(b) and 6(o) (breach of fiduciary duty); (3) negligence; (4) common law fraud and deceit; (5) violations of CEA Section 6(b) (fraud); and (6) breach of the duty of good faith and fair dealing. *See* Eight Complaints at 6-12. Additionally, Complainants plead, for the first time, that Respondent violated Commission regulation 1.38 in their Opposition to Respondent's Motion to Dismiss. *See* Compl. Opp. at 2-3. GAIN Capital argues none of these claims as stated are judiciable here. For the reasons that follow, each of these claims is dismissed because they are supported by facts that, even if true, do not state claims cognizable in reparations.

a. *The five claims for breaches of contract, negligence, common law fraud, and breach of fiduciary duties and of good faith and fair dealing fail because this Office has no jurisdiction over those claims without some violation of the CEA or its rules.*

The Office of Proceedings is not a court of general jurisdiction. Rather, its jurisdiction is set forth in the CEA, which limits this Office to adjudicating claims arising under the CEA or any rules promulgated thereunder. 7 U.S.C. § 18(a)(1). Cases alleging misconduct that does not violate the CEA or its rules must be dismissed. There are no CEA statutory or regulatory provisions covering Complainants' claims for breach of contract, breach of fiduciary duty, breach of a duty of good faith and fair dealing, common law fraud, and negligence. These claims thus cannot be heard here, where there is no underlying misconduct covered by the CEA or its rules. *See, e.g., Emily v. Gleichmann*, CFTC No. 14-R007, 2020 WL 3248253, at *2-3 & n.1 (CFTC Jun. 9, 2020) (holding no jurisdiction over breach of fiduciary duty without a violation of CEA or regulation); *Wills v. First Financial Corp. of America, et al.,* CFTC No. 82-R857, 1985 WL 56288, at *2 (CFTC May 31, 1985) (same with respect to breach of contract, and breach of duty of good faith and fair dealing).

Although Complainants cite CEA Sections 6(b) and 6(o) in support of their fiduciary duties claims, these provisions are inapplicable for that purpose. As an initial matter, Complainants (represented by counsel) are confused—there are no CEA Sections 6(o) or 6(b).[4] Instead, I assume Complainants intended to cite CEA

[4] Complainants **could** be referring to CEA provisions codified at either 7 U.S.C. § 10a(b) (CEA Section 6a(b)) or 7 U.S.C. § 13a (CEA Section 6b), but neither of these is applicable to the facts at hand.

Sections 4b and 4*o*, codified at 7 U.S.C. §§ 6b and 6*o*. However, even those sections are irrelevant to the fiduciary duties claim for two reasons. First, CEA Section 4*o* concerns fraud by CTAs and commodity pool operators. GAIN Capital is neither. And second, Section 4b plainly governs **fraud** claims, which will be discussed below—not claims for breach of fiduciary duty.

Counts I, II, III, IV and VI are dismissed here as outside this Office's jurisdiction.

b. *Commission Regulation 1.38 does not apply to the facts at issue in these cases.*

Complainants argue that GAIN Capital violated Commission Rule 1.38, 17 C.F.R. § 1.38. Compl. Opp. at 2. Regulation 1.38 requires that "[a]ll purchases and sales of any commodity" futures "be executed openly and competitively" with certain exceptions for non-competitive trades. In other words, all actual trades must be publicly placed in the appropriate forum to allow for competitive price determination. The case law makes clear that this regulation applies to situations in which trades are placed in ways to avoid price competition. *See e.g.*, *In re Khorrami and Cayley Investments Mgmt., LLC,* 2020 WL 2404801, at *3 (CFTC May 7, 2020) (structuring and entering offsetting orders with the intent to offset original bids or offers and negate risk violated Regulation 1.38(a)); *In re Copersucar Trading A.V.V.,* 2017 WL 3588915, at *3-4 (CFTC Aug. 15, 2017) (structuring and transferring positions between proprietary accounts constituted violations of Regulation 1.38(a)); *In re Scotia Capital, Inc.,* 2010 WL 332380, at *1-2 (CFTC Jan.

28, 2010) (knowingly prearranging the execution of orders to buy and sell natural gas futures violated Regulation 1.38 (a)).

Based on its plain text and a review of the case law, Regulation 1.38 does not cover the facts at issue because there were no actual purchases or sales made. Rather, orders were placed that were not executed either due to a system failure by GAIN Capital or because the extreme volatility of the period did not allow execution. Because there are no allegations that sales or purchases were actually made and in a way that was non-competitive, Complainants claims for violations of Commission Regulation 1.38, 17 C.F.R. § 1.38, are dismissed.

c. *Complainants have neither pled nor can plead given the facts at hand fraud under the CEA or its rules.*

To establish fraud under the CEA, Complainants must prove by a preponderance of the evidence that Respondent made (1) a misrepresentation or misleading statement (2) with scienter that was (3) material. *See, e.g.*, *In the Matter of Forex Global Solutions Inc.*, CFTC No. 13-20, 2013 WL 1496931, at *4 (CFTC April 9, 2013); *In re Staryk*, 1997 WL 778236 (CFTC Dec. 18, 1997). Determining whether a misrepresentation occurred requires "the Court to focus on 'the common understanding of the information conveyed.'" *Modlin v. Cane*, CFTC No. 97-R083, 1998 WL 429622, at *8 (July 30, 1998) (internal citations omitted). A statement or omission is material if "there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest." *R&W Technical Serv. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000). Finally, scienter exists where a person knew his representations were false or made

them with a reckless disregard for their truth or falsity. *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988); *see also CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 774 (9th Cir. 1995) (stating that the CFTC may establish scienter under Section 4b of the Act by showing a person intentionally violated the Act or acted with "careless disregard" of whether he violated the Act (quoting *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985))).

The six non-GAIN Capital Complainants never get past the first prong of the inquiry, because no statements—misleading or otherwise—were ever made to them at all. Thus only the Vogel and Frey Complaints, which involved accounts at GAIN Capital, could possibly proceed on this claim. But even Vogel's and Frey's claims fail because GAIN Capital's account agreements plainly disclose the risks about which Complainants aver were misled.[5]

For example, Complainants claim they were misled about GAIN Capital's ability to execute trades during periods of high market volatility. Compl. Opp. at 3. But Frey and Vogel both signed agreements with GAIN Capital that clearly stated the risks associated with using an electronic trading system, including the possibility that system failure might preclude the placement or execution of orders:

> Trading through an electronic trading or order routing system exposes you to risks associated with system or component failure. **In the event of system or component failure, it is possible that, for a certain time period, you may not be able to enter new orders, execute existing**

[5] Even if I held that the six non-GAIN Capital customers could proceed under some transference of misleading communications theory (i.e., Zagagi was misled and so they were passively misled), their fraud claims would fail for the same reasons Frey's and Vogel's fail.

> orders, or modify or cancel orders that were previously entered. System or component failure may also result in loss of orders or order priority.

Frey and Vogel Mots. To Reconsider Ex D (GAIN Capital Electronic and Order Routing System Disclosure Statement) at 1 (emphasis added). This warning was reiterated in GAIN Customer Agreement they signed, in which they agreed to hold GAIN Capital harmless in the event of any failure of the electronic order system. Frey & Vogel Mots. To Consider Ex. A (GAIN Customer Agreement) ¶ 6. And in fact, Frey and Vogel also agreed to indemnify GAIN Capital for events beyond GAIN Capital's control—and extreme market volatility fits squarely within that kind of event—that might cause limitations, delays or inaccuracies in the transmission of orders. *Id.* GAIN Customer Agreement ¶ 5.

Because the very order placement risks Complainants claim were not disclosed were in fact set forth plainly and reiteratively in the customer agreements, Complainants fraud claims fail to qualify for further adjudication and must be dismissed.[6]

d. *No party is entitled to attorneys' fees.*

Complainants and Frey have made claims for attorneys' fees. Attorneys' fees are awarded in this forum when the opposing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See, e.g., Sherwood v. Madda Trading Co.,* 1979 WL 11487, at *1 n.26 (CFCT Jan. 5, 1979); *Bianco v. Cytrade Financial, LLC*,

[6] Complainants filed a copy of GAIN's Answer in an NFA Arbitration dated June 7, 2019 with their Opposition to Respondent's Motion to Dismiss. However, those NFA cases are completely separate and different than the cases before me. I find no reason to further discuss the NFA Arbitration pleading here.

2008 WL 4449365, at *2 (CFTC Sep. 30, 2008). Neither party has acted in such manner here, making the award of attorneys' fees unjustified. Further, although GAIN Capital asks for costs and fees against Frey because of the indemnification provided in his customer agreement, the Commission has declined to award such fees in the absence of either the bad faith conduct described above, or a counterclaim for collection of a balance. *See Bianco*, 2008 WL 4449365, at *2; *Sherwood*, 1979 WL 11487, at *n.26; *see also Pal* v. *Reifler Trading Corp.,* CFTC No. 95-R 151, 1998 WL 39420, at *1-2 (CFTC Feb. 2, 1998) (finding the Commission has jurisdiction over and ability to grant reasonable fees and costs incurred in connection with the collection of a delinquent debit balance in the customer's account and under the customer account agreement.). All claims for attorneys' fees are denied.

IV. Conclusion

I find that each of the Eight Complaints fails to state claims cognizable in reparations for the reasons discussed above. Accordingly, all of the Eight Complaints and any counterclaims are **DISMISSED**.

Dated: February 21, 2023

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Administrative Judge