U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

PON LEE,

Complainant,

v.

THOMAS JOHN LEE, THOMAS J. LEE d/b/a LEE CAPITAL MANAGEMENT and VISION LIMITED PARTNERSHIP,

Respondents.

CFTC Docket No. 06-R054

ORDER OF SUMMARY DISPOSITION

The respondents have filed a motion for summary disposition that rests, in large part, on the theory that the statute of limitations barred the churning and fiduciary duty violation claims of complainant Pon Lee ("Pon"). As discussed below, the respondents succeeded in establishing, as a matter of law, that Pon filed his complaint more than two years after all but one of his causes of action accrued. Consequently, most of Pon's complaint was untimely. In addition, Pon cannot proceed on the fiduciary duty claim that has not been proven to be time barred because it is not cognizable in this forum. Thus, the respondents are entitled to the relief they seek, a summary disposition that resolves the entire case in their favor.

Background

The following facts are not genuinely disputed. In February of 2002, Pon opened a nondiscretionary trading account with Vision Limited Partnership

that was introduced by Lee Capital Management, a sole proprietorship that Thomas Lee ("Thomas") owned and operated.[1] Over the course of his trading, Pon deposited $466,000 into the account, traded futures and options, and sustained losses of $382,057.80.[2] Although his last open position expired on November 25, 2002, Pon kept the account open until April of 2004 by maintaining a balance of just over $942.[3]

In February 2003, Pon first contacted attorney James Seltzer because the complainant "believed that [he] might have a dispute with the [r]espondents to this case."[4] On December 8, 2005, Seltzer filed a demand for arbitration on Pon's behalf with the National Futures Association.[5] In it, Pon charged the respondents with "negligence, failure to supervise, breach of fiduciary duty, breach of contract and mismanagement of [Pon's] account," wrongdoing that included: "[a]llowing any option trading by [Pon]," "[p]ermitting the acquisition

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[1] Complaint, dated August 4, 2006 ("Complaint"), at 4; Respondents' Exhibits in Support of Their Motion for Summary Disposition, received November 24, 2006, Exhibits J, K, N. "Respondents' Exhibit" will hereinafter be used to designate exhibits contained in the Respondents' Exhibits in Support of Their Motion for Summary Disposition, received November 24, 2006.

[2] Respondents Exhibit K at RESP000081-RESP000090, RESP000104.

[3] Complaint at 7-8; Respondents' Exhibit K at RESP000100-RESP000102, RESP000119.

[4] Declaration of Pon Lee in Opposition to Respondents' Motion for Summary Disposition, dated January 17, 2007 ("Complainant's Exhibit A"), at 1 (attached to Complainant's Memorandum of Law in Opposition to the Respondents' Motion for Summary Disposition, dated January 17, 2007).

[5] Complaint at 8; Respondents' Exhibit T at 1, 24; Complainant's Exhibit A at 2.

of over concentrated positions within single sector holdings" and "[p]ermitting excessive futures and options trading predicated on underlying unsuitable and overconcentrated selections."[6] He also charged them with fraud by omission and misrepresentation.[7] In response, Vision and Thomas went before the Circuit Court of Cook County, Illinois and obtained an injunction mandating the arbitration's dismissal.[8]

In accordance with the state court directive, Pon withdrew his demand for arbitration on July 31, 2006.[9] One week later, the Office of Proceedings received his complaint, organized in two counts. In Count I, Pon charges the respondents with churning and Count II contains allegations that the respondents breached certain fiduciary duties.[10] The respondents answered by denying wrongdoing and raising the statute of limitations as an affirmative defense.[11] The Office of Proceedings forwarded this case to us on September 20, 2006.[12] After discovery but before we set a hearing,[13] the respondents filed

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[6] Respondents' Exhibit T at 3-4 (emphasis omitted).

[7] Respondents' Exhibit T at 5-6, 9.

[8] Respondents' Exhibit X. Pon claims that the state court enforced a one-year contractual limitation period. Complainant's Exhibit A at 2.

[9] Respondents' Exhibit X.

[10] Respondents' Exhibit B at 8-10.

[11] Untitled document, dated September 11, 2006, at 6-16.

[12] Notice and Order, dated September 20, 2006, at 1.

[13] See, e.g., Respondents' Exhibit C.

a motion for summary disposition.[14] Pon opposes the request and we now turn to it.[15]

Summary Disposition Is Appropriate When The Record, As Developed, Shows The Movant To Be Entitled To A Judgment In Its Favor And We Harbor No Substantial Doubt That Additional Fact Finding Would Amount To A Futile Exercise

Summary disposition is proper (and required) only if "the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that:" (1) there is no genuinely disputed issue of material fact,[16] (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.[17] "[A]ny significant doubt that the parties' dispute can be reliably resolved without a

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[14] Order, dated December 5, 2006; Letter from Kenneth F. Berg to the Court, dated December 4, 2006; Respondents' Motion for Summary Disposition, dated November 22, 2006 ("Motion").

[15] Complainant's Memorandum of Law in Opposition to the Respondents' Motion for Summary Disposition, dated January 17, 2007 ("Complainant's Memorandum"). The respondents also requested leave to file a reply. Respondents' Motion to (sic) for Leave to File Reply Brief in Support of Their Motion for Summary Determination (sic), dated January 24, 2007. That motion is **DENIED**.

[16] "The party opposing summary disposition may not rely on mere allegations or some metaphysical doubt as to the material facts but must come forward with sufficient evidence to demonstrate a genuine dispute of material fact." In re Staryk, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 at 45,808 (CFTC Dec. 18, 1997) (citations and quotation marks omitted).

[17] 17 C.F.R. §12.310(e); Levi-Zeligman v. Merrill Lynch Futures, Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,236 at 42,031 (CFTC Sept. 15, 1994).

hearing" precludes this relief.[18] Whether genuinely disputed facts are material and whether the record requires additional development both depend on the law surrounding the parties' claims and defenses. The first defense with which we concern ourselves is the statute of limitations.

A Two-Year Statute Of Limitations Governs Reparations And The Respondents' Statute Of Limitations Defense Turns On Constructive Discovery

The respondents' motion rests, in part, on the proposition that Pon did not file his complaint in a timely fashion.[19] Section 14(a) of the Commodity Exchange Act, 7 U.S.C. §18(a), governs this proceeding.[20] It "bars all claims which are not filed within two years after the cause of action accrues."[21] "In

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[18] Levi-Zeligman, [1994-1996 Transfer Binder] ¶26,236 at 42,031.

[19] Motion at 1. The respondents also maintain that we should summarily dispose of Count I, "because based on the undisputed facts Pon Lee controlled the trading in the account and because the account was not traded excessively as a matter of law," and dismiss Count II "because it is merely duplicative of Count I, or it only alleges a breach of common law which is not cognizable in a reparations proceeding." Id.

[20] See Martin v. Shearson Lehman/American Express, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,354 at 32,981-82 (CFTC Nov. 12, 1986).

[21] Id. (citations and quotation marks omitted). Section 14(a) states, in part, "Any person complaining of any violation of any provision of this Act, or any rule, regulation, or order issued pursuant to this Act, by any person who is registered . . . may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding . . . ." 7 U.S.C. §18(a)(1).

Fairness generally requires us to apply this time limit without regard for whether a complainant is sympathetic or whether he actually suffered harm. In Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) (citation and quotation marks omitted), the Supreme Court explained,

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the reparations forum, a customer's cause of action accrues, and the two-year limitations period begins to run, when a complainant discovers the wrongful activity underlying his claim or, in the exercise of reasonable diligence, should have discovered the wrongful activity."[22] Accrual does not wait for a complainant to flesh out the details of the malfeasance or determine the legal remedies that are available to him.[23]

In this case, the undisputed evidence conclusively shows that almost immediately after he ceased active trading, Pon explored the possibility of suing the respondents.[24] However, the statute of limitation inquiry proceeds on a claim-by-claim basis[25] and the evidence that he actually knew of particular types of wrongdoing is too far from conclusive to support summary

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> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. . . . [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

[22] Edwards v. Balfour Maclaine Futures, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,108 at 41,665 (CFTC June 16, 1994).

[23] It is enough to learn of (or be in a position where he should have discovered) the general wrongful course of conduct. Martin, [1986-1987 Transfer Binder] ¶23,354 at 32,982.

[24] See supra text accompanying notes 3-4.

[25] Fielder v. Varner, 379 F.3d 113, 118 (3rd Cir. 2004).

disposition.[26] Thus, we cannot find that, as a matter of law, Pon knew of the wrongdoing that forms the basis of his complaint more than two years before he filed for arbitration.[27] As a result, the respondents' statute of limitation case turns on constructive discovery.

Determining when constructive discovery occurred requires an objective inquiry and consideration of "factors such as: (1) the relationship of the parties[;] (2) the nature of the wrongful activity; (3) complainant's opportunity to discover the wrongful activity; and (4) the actions taken by the parties subsequent to the wrongful activity."[28] In this case, the factors present a compelling case for finding that Pon should have become aware of the wrongdoing that forms the basis of most of his complaint more than two years before he filed an arbitration demand. However, one of Pon's theories concerns an omission that is sufficiently obscure to have possibly escaped the attention of reasonable, similarly situated persons until later.

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[26] The gulf between the admissions that Pon suspected wrongdoing and a conclusion that, on a date certain, he discovered particular violations is wide enough to preclude a finding that no additional record development would be necessary on this point. Thus, we cannot award summary disposition based on accrual stemming from actual knowledge.

[27] As discussed below, the statute of limitations tolled during the pendency of the arbitration and very little time elapsed between dismissal of the arbitration and the submission of the Complaint. For simplicity sake and because it does not affect the outcome, we can disregard the passage of time between the end of the NFA proceeding and the beginning of this case.

[28] Horelick v. Murals Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,500 at 39,368 (CFTC Oct. 2, 1992).

By The Time Active Trading Ended, The Broker-Customer Relationship Was Adversarial

If we take the Complaint's allegations of wrongdoing to be true, Thomas was Pon's fiduciary while the complainant was trading through the Vision account.[29] However, there is no genuine dispute that, by November of 2002, the relationship cooled. Pon admitted that, in late 2002 and early 2003, Thomas solicited him to resume trading but was rebuffed, and, in February 2003, Pon consulted with a lawyer to determine whether he should litigate against the respondents.[30] Thus, if Pon was once in the thrall of Thomas, there is no substantial evidence that this condition lasted into 2003 and considerable evidence that the relationship had turned adversarial.

Pon Was An Experienced Businessman, Avid Securities Trader And He Had The Means to Consult With Experts Concerning His Suspicions Of Wrongdoing

Coming into his relationship with Thomas, Pon was an experienced and

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[29] Complaint at 9.

[30] Complainant's Exhibit A at 1; Complaint at 7-8.

apparently successful businessman.[31] He also has been an avid retail trader[32] and informal student of investing[33] who had been using a computer in

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[31] In his demand for arbitration, Pon stated, by counsel, that he had been "a successful businessman during his career as a supermarket operator and retailer." Respondents' Exhibit T at 4. Since 1996, Pon has been the General Partner of California Property Development West LP. Respondents' Exhibit C at 2. He oversaw real estate management operations and owned commercial real estate. Respondents' Exhibit C at 2, 6. At the end of 2005, Pon's commercial real estate holdings had an aggregate value of $9.2 million (subject to leases totaling $5 million). Respondents' Exhibit C at 6. In 1998, Pon held an 81-percent share in a shopping center that had been sold for $11.8 million. Respondents' Exhibit C at 6. Although he is officially retired, Pon maintains a business address. Respondents' Exhibit C at 2. At the time that Pon opened the Vision account, his net worth exceeded $4 million. Respondents' Exhibit M.

[32] Respondents' Exhibit M; Respondents' Exhibit C at 6-7. Pon traded equities as early as 1997. Respondents' Exhibit E at 1. On June 1, 1999, he and his wife owned an account at Fidelity Investments that had a market value of more than $1.5 million. Respondents' Exhibit E at 2; Respondents' Exhibit T at 2. During June of that year, they transferred the account's assets to a Fidelity account owned by the Pon Lee 1976 Trust, a trust that Pon and his wife established in 1976 of which they were trustees. Respondents' Exhibit E at 2-3; Respondents' Exhibit F at RESP000815. The trust invested in no less than nine mutual funds and the stocks of more than 15 individual corporations. Respondents' Exhibit E at 4, 6. By the end of December 1999, the value of the trust account exceeded $3.7 million. Respondents' Exhibit E at 5.

In January 2001, Pon and his wife transferred the trust's holdings in the Fidelity account to a Charles Schwab account. Respondents' Exhibit G at RESP001238. At Schwab, Pon and his wife primarily traded single stocks. Respondents' Exhibit G at RESP001193-RESP001198. This included short selling. Respondents' Exhibit G at RESP001198-RESP001204. As early as January of 2002, Pon and his wife opened an account for the trust at OptionsXpress. Respondents' Exhibit H at 1. For a few months, they traded stock options. Respondents' Exhibit H at 1-7.

[33] At various times, he subscribed to "Fortune, Forbes, [the] Wall Street Journal, Investors Business Daily . . . Futures Orientation . . . [and] Futures." Respondents' Exhibit C at 2-3. He also read a considerable number of trading-related books. Exhibit D at 2-3.

connection with his trading for more than three years before opening the Vision account.[34] Moreover, he had the means to consult with a variety of experts.[35] Thus, although Thomas had more expertise in futures and options trading, there is nothing in the record to suggest that Pon (or a hypothetical person situated like Pon) would look upon bad trading results uncritically or be incapable of investigating potential claims by early 2003. That is what he did.

Pon's Claims Range From The Obvious To The Obscure

Pon rests his damage claims on allegations that Thomas churned his account and that he violated fiduciary duties by: (1) "Purposefully execut[ing] many trades on Pon['s] . . . account that had virtually no chance of resulting in a profit and that Thomas . . . effectuated solely for the purpose of garnering large commissions.;" (2) "[taking] over $223,000 in commissions over a six month period on Pon['s] . . . account;" and (3) failing to inform Pon that certain open options contracts were in the money and failing to recommend that they be sold or exercised.[36] Pon also charges Thomas with failing to disclose: (a) the commissions he would pay, (b) the risks inherent in the trading that occurred, (c) the differences between futures and options and (d) that some of Thomas' customers lost money while trading in accordance with his advice.[37]

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[34] Respondents' Exhibit C at 3.

[35] Complainant's Exhibit A at 1-2; Respondents' Exhibit R at 2-3.

[36] Complaint at 8-10.

[37] Complaint at 3.

However, he does not mention these allegations in either of the two counts and, thus, does not rest his claim for reparations on them. Thus, Pon seems to have excluded some of the most obvious alleged wrongs as the grounds for his complaint because a statute of limitations or contractual limitations defense was likely.[38] However, even less obvious torts emerge into view if a complainant has the necessary information and especially if he has the advice of counsel.

Pon Received Information That Would Tend To Reveal Most Of His Claims, Including The Quick Input Of An Attorney

Pon's account was non-discretionary and there is no evidence of unauthorized trading.[39] In addition, he received account statements that reported his trades, the commissions and fees charged,[40] the results when positions were liquidated, the value of open positions and the liquidating value of the account.[41] Moreover, early in his trading, Pon signed a letter to Vision in which he stated, "I am aware that a large number of commissions have been

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[38] See supra note 8. However, the fiduciary duty violation claim that simply concerns the amount of commissions charged to Pon made it into the complaint as an alleged basis for recovery even though, factually, it is one of the more obvious torts from a customer's perspective. See infra note 40.

[39] Respondents' Exhibit C at 5; Respondents' Exhibit M; Complainant's Exhibit A at 1.

[40] The account confirmation statements that Vision sent to Pon listed the commissions paid for each transaction with an entry entitled "COMM" and the total commissions and fees paid in a day was indicated by the entry "COMMISSIONS AND FEES ON CONFIRMATIONS." See, e.g., Respondents' Exhibit L at RESP000121.

[41] Respondents' Exhibit C at 5; Respondents' Exhibit L at RESP000121.

charged in this account due to the aggressive manner I have traded the account thus far."[42]

As the account became inactive and cash became its only asset, Pon's prior knowledge of the "large number of commissions" and aggressive trading became combined with at least the constructive knowledge that he had lost more than 80 percent of his $466,000 in deposits and, of his $382,057.80 in losses, more than $223,000 resulted from commissions.[43] By that time, he also knew (or reasonably should have known) that Thomas did not disclose the risks inherent in trading, the commissions that were charged and the substantial possibility that following Thomas' advice may make a customer poorer instead of richer. Thus, Pon should have at least been aware that he had been treated wrongly,[44] his account had been traded "aggressively," he had been charged a "large number of commissions," and, given the size of his losses and the percentage of losses that resulted from the payment of commissions and fees, his trading had been unprofitable for him and financially rewarding for Thomas. In addition, Pon soon thereafter had the advice of an attorney.

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[42] Respondents' Exhibit M.

[43] Complaint at 9. See supra text accompanying notes 2-3.

[44] Even if the more obvious wrongs done to Pon do not form the basis of the complaint in this proceeding, they are part of the prism through which he viewed information more closely related to his current theories of liability.

Absent Tolling, The Fiduciary Duty Claim Based On The Amount Of Commissions Charged Is Time-Barred As A Matter of Law

Given the record before us, the undisputed evidence tends to show that Pon should have known that Thomas controlled the trading in his account and that Pon had been charged "over $223,000 in commissions over a six month period" when his last open position expired (and two months after he last paid commissions and fees), November 25, 2002.[45] These are the core facts of the claim that Thomas violated fiduciary duties owed to Pon by charging such a large amount of commissions. There is no evidence that would support reasonable inferences contrary to those of constructive awareness and no apparent need for additional fact finding. Accordingly, the respondents have established, as a matter of law, that Thomas' fiduciary duty violation based on causing Pon to be charged "$223,000 in commissions over a six month period" accrued no later than November 25, 2002. As a result, the statutory period for filing a reparations complaint based on this claim ended more than one year before Pon sought arbitration.

Absent Tolling, Pon's Churning And Churning-Like Fiduciary Duty Violation Claims Are Time-Barred As A Matter of Law

Pon's churning allegation and his claim of a fiduciary duty violation resulting from Thomas placing him in no-win trades for the purpose of generating commissions nearly are identical.[46] Had the record before us

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[45] Respondents' Exhibit K at RESP000100-RESP000102.

[46] The difference is the excessive trading element of a churning claim. The choice to treat the fiduciary duty claim as something other than an obviously (continued..)

resulted from a hearing, we would have found -- given lack of genuine dispute concerning Pon's wealth, his business experience, his prior and contemporaneous experience in equities trading, the quick evolution of his relationship with Thomas from fiduciary to adversary, the information that he had on hand during the course of his active trading and his ability to call on experts to explore the possibility of claims against Thomas -- that the respondents made a prima facie showing that a person standing in Pon's shoes and exercising reasonable diligence would have discovered the general outlines of the churning and churning-like fiduciary duty violations within one year after November 25, 2002.[47] However, because it is a motion for summary

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defective churning claim necessitates consideration of whether the willful provision of bad trading advice is a violation of the Act (or a Commission regulation of order) when the complainant has not anchored it to a claim that the respondents committed fraud by omission or affirmative misrepresentation. This fiduciary duty claim could be deconstructed into a more traditional theory. If we recognize that, when a broker gives trading advice rather than passively accepting customer orders, he implies that there is a reasonable basis for the suggestions, trading recommendations that are geared to generate commissions and provided without regard for whether they will result in profit lack that good faith basis and their proffer constitutes a fraud. See Syndicate Sys., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,289 at 32,788 (CFTC Sept. 30, 1986). Recast this way, the fiduciary duty violation claim based on bogus advice accrued as soon as a reasonable person in Pon's shoes knew or should have known that Thomas' trading advice lacked a good faith basis. Given the evidence of Pon's actual (or, at least constructive) awareness that his trading was generally unsuccessful (even if no commissions had been charged), a reasonable person would have discovered sufficient facts for a fraud claim to accrue before active trading ceased, before November 25, 2002.

[47] See supra text accompanying note 45.

disposition before us, we must draw all reasonable (and we stress reasonable) inferences in Pon's favor, an exercise that could lead to a different conclusion.[48] Having confined his statute of limitations arguments to the assertion of equitable tolling, Pon does not direct our attention to evidence that would preclude a finding that the accrual occurred by November 25, 2003.[49] However, there is one fact upon which he may have been able to hang the argument that accrual occurred much later.

The evidence that would most likely spoil the respondents' position at this stage concerns the timing of Pon's arbitration demand. Ignoring the limits of reason for a moment, the passage of time between Pon's first meeting with Seltzer and the initiation of his NFA proceeding has a range of potential causes. They range from the complexity of the potential claims to Seltzer's intentional scuttling of Pon's case. Thus, to varying degrees of strength, Seltzer's performance supports inferences that each cause existed. The potential cause and inference that most concerns us is this: Thomas' churning and churning-like violation of his duty to Pon were so difficult to detect that Seltzer was unable to do so until just a few months before he demanded arbitration even though he acted with reasonable diligence. Pon's background could then support the inference that neither he nor a similarly-situated hypothetical person would have been any more capable of discovering the wrongful trading

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[48] Trust & Inv. AG v. Stotler & Co., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,504 at 30,226 (CFTC Mar. 7, 1985).

[49] See Complainant's Memorandum at 5-6.

and lead to the conclusion that the churning claim did not accrue until several years after active trading ceased.

We have tried to imagine circumstances in which an attorney who was presented with Pon's story could have looked into his case, exercised reasonable diligence and taken more than a few months to discover the presence of churning and/or wrongful trade recommendations. Absent some intervening catastrophe befalling counsel (such as a natural disaster or debilitating illness), active obstruction by the respondents or a non-party, or the fraudulent concealment of information, we could not conjure a scenario in which reasonable diligence could result in Seltzer's belated performance. Consequently, Seltzer's delay does not reasonably support an inferential chain that leads to an expansion of the one-year accrual window. Accordingly, we find that the respondents have established, as a matter of law, that Pon's claims of churning and recommending trades that had no chance of resulting in profit accrued no later than November 25, 2003. Thus, the Section 14(a) period for filing these claims ended before the NFA proceeding began unless we toll the statute of limitations before the arbitration started.

Even Though We Cannot Yet Find That The Claim Based On A Failure To Recommend The Liquidation Or Exercise Of In-The-Money Contracts Is Time-Barred, It Merits Dismissal

There is one last fiduciary duty claim to consider, that concerning Thomas' failures to advise Pon to liquidate or exercise open options that were temporarily in the money. The record does not include adequate evidence of a red flag that would compel a finding that, as a matter of law, Pon knew or

should have known about the missed liquidation opportunities with respect to a small number of trades. Thus, we cannot yet conclude that this cause of action accrued early enough to be time barred. However, that does not mean that the theory survives summary disposition.

As noted above, the respondents also argue that the fiduciary duty claim that rests on the failure to provide timely advice fails because it is not cognizable in this forum. In this regard, they have a point. The only torts that can result in a reparations award are those wrongs that also constitute violations of the Act or the Commission's rules, regulations or orders.[50] Neither

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[50] 7 U.S.C. §18(a); Tysdal v. Jack Carl/312 Futures, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,242 at 38,712 & nn. 4-5 (CFTC Feb. 27, 1992) (holding that negligence and breach of contract claims were not cognizable in reparations); Phacelli v. Conticommodity Servs., Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,250 at 32,672-75 (CFTC Sept. 5, 1986) (reversing an initial decision that rested on suitability). In Graves v. Shearson Hayden Stone, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,301 at 25,521-22 (CFTC Oct. 14, 1981) (citations, quotation marks and footnotes omitted), the Commission explained,

> Congress established the reparations forum as a separate remedy designed to supplement the informal settlement procedures contemplated of the contract markets and registered future associations which are required under other sections of the legislation . . . . In determining whether a violation of a contract market rule can be the basis for a claim in reparations, we first look to the language of Section 14 of the Act.
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> Section 14(a) grants jurisdiction to the Commission to adjudicate claims against commodity professionals based only upon violation of any provision of this Act or any rule, regulation, or order thereunder. . . . Further, there is nothing in the legislative history of Section 14 to reveal that Congress

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the Act nor Commission regulations establish the type of broad fiduciary duties

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> intended that the Commission provide a forum for claims based solely upon contract market rule transgressions that are not also violations of the Act. Thus, we have no basis to conclude that Congress intended to encompass within the scope of the Commission's reparations jurisdiction claims based solely upon a violation of exchange rules. Accordingly, in our view conduct by a registrant in violation of a contract market rule which does not independently violate any provision of the Act, or a Commission rule, regulation or order thereunder is not actionable under Section 14 of the Act. . . .
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> The Administrative Law Judge reasoned that a contract market rule designed for the protection of customers creates a duty of a fiduciary nature, the breach of which is cognizable as fraud and violative of Section 4b(A). To be sure, Section 4b(A) reaches the breach of fiduciary duties. However, not all breaches of duties owed to customers constitute fraud, and this is especially true where the conduct at issue is of a ministerial nature in connection with the execution of a customer order. Further, contract market rules, even if intended for customer protection, may impose duties in addition to and distinct from those imposed by Congress or the Commission. Moreover, as this case demonstrates, these exchange rules may vary from market to market. In short, while exchange rules are an integral part of the federal regulatory scheme, they are not always coextensive with federal law and thus capable of universal application. Therefore, when a duty arises only as the result of such a supplementary contract market rule, as opposed to a Commission or congressional policy determination, conduct violative of such a duty falls outside of the Commission's reparations jurisdiction. Of course, in some cases exchange and federal duties will coincide, but ultimately the proper frame of reference in setting the standard of conduct to be applied in reparations will be the Act or Commission regulation.

found in state common and statutory law.[51] In this case, Pon severed this fiduciary duty violation claim from his allegations of fraud.[52] Taking his last fiduciary duty violation claim as pled and assuming its truth, we agree with the respondents that the alleged failure to provide liquidation advice is not actionable in this forum. Consequently, it should be dismissed.

Pon Has Not Presented Sufficient Evidence To Support A Finding That Equitable Tolling, Prior To The NFA Arbitration, Is Appropriate

As noted above, Pon rested his entire statute of limitations case on arguments that we should equitably toll it. Like the courts and the Commission, we reserve this relief for extraordinary circumstances.[53] Commission precedent clearly requires us to toll the statute of limitations while

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[51] For example, the associated person of an introducing broker who has no supervisory duties cannot be sued in reparations for providing negligent trading advice. See Hammond v. Smith Barney, Harris Upham & Co., Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 at 36,657-59 (CFTC March 1, 1990).

[52] As discussed above, he declined to include fraudulent misrepresentation allegations in either of the Complaint's two counts. See supra text accompanying notes 36-37.

[53] Irwin v. DVA, 498 U.S. 89, 95-96 (1990) ("the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect"); Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 560-61 (6th Cir. 2000) ("The federal courts sparingly bestow equitable tolling. Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control. Absent compelling equitable considerations, a court should not extend limitations by even a single day."); Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000); In re Buckwalter, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,609 at 39,893 (CFTC Dec. 10, 1992).

Pon's NFA arbitration was pending.[54] However, the complainant demanded arbitration more than two years after his nominally time-barred claims accrued.[55] Thus, unless we find sufficient reason to suspect that Pon could establish adequate grounds for stopping the clock between November 25, 2002 and December 8, 2005, we can conclude, as a matter of law, that the Complaint was tardy. Pon argues the statute of limitations should be tolled because (1) he was ignorant of the reparations program's existence and the applicable statute of limitations until just before he filed in this forum and (2) Seltzer provided "erroneous advice" by not informing him of the reparations statute of limitations.[56]

An equitable tolling inquiry centers on a complainant's excusable ignorance (though, as noted above, not ordinary excusable neglect).[57] However, in most contexts, ignorance of the law is no excuse and "[i]t is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling."[58] In

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[54] Sommer v. ContiCommodity Servs., Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,244 at 30,106-07 (CFTC May 20, 1988).

[55] By "nominally time-barred" we mean out of time in the absence of adequate pre-arbitration tolling.

[56] Complainant's Memorandum at 5.

[57] Griffin v. Rogers, 399 F.3d 626, 636-37 (6th Cir. 2005)

[58] Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir. 1991). Accord Arrieta v. Battaglia, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling."); Griffin, 399 F.3d at 637; United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) ("even in the case of an unrepresented prisoner, ignorance of the law is not a basis for equitable

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addition, while the provision of incorrect information can affect the outcome of a tolling inquiry, the source of the erroneous data matters greatly.[59] When a complainant's own counsel gives him bad advice that delays his filing, that mistake can weigh in favor of tolling.[60] However, garden variety malpractice (i.e., attorney negligence) is insufficient to toll the statute of limitations.[61]

(..continued)

tolling"); Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 478 (5th Cir. 1991). Allowing ordinary ignorance to toll the statute of limitations would undermine the protections that Congress provided in Section 14(a) by permitting complainants to sit on their claims beyond the point of staleness so long as they did not stumble across notice of Section 14(a)'s requirements.

[59] See Harris v. Potter, CIVIL ACTION NO. H-04-4779, 2005 U.S. Dist. LEXIS 32427, at *19 (S.D. Tx. Sept. 9, 2005) ("the Fifth Circuit has held that equitable tolling may be appropriate if the defendant misled the claimant about the administrative prerequisites to a claim, but not if it is a third party who has done so").

[60] Cook v. Monex Int'l Ltd., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,532 at 30,296 (CFTC Mar. 19, 1985).

[61] Arrieta, 461 F.3d at 867 ("permitting equitable tolling of a statute of limitation for every procedural or strategic mistake made by a litigant (or his attorney) would render such statutes of no value at all to persons or institutions sued by people who don't have good, or perhaps any, lawyers" (quotation marks omitted)); Hall v. United Parcel Serv., Inc., No. 03-7077, 2004 U.S. App. LEXIS 10272, at **6 (10th Cir. May 25, 2004); Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001); Smaldone v. Senkowski, 273 F.3d 133, 138 (2d Cir. 2001); Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000); Harris, 209 F.3d at 330; Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) ("forcing the defendant to defend against the plaintiff's stale claim is not a proper remedy for negligence by the plaintiff's lawyer") Buckalew v. EBI Cos., CIVIL ACTION NO. 01-3232, 2002 U.S. Dist. LEXIS 10843, at *13 (E.D. Pa. June 5, 2002); Hay v. Wells Cargo, Inc., 596 F. Supp. 635, 642 (D. Nev. 1984) ("We are aware that courts are sometimes reluctant to punish a client for the action of his attorney. However, where it is possible that such a plaintiff may obtain relief from his attorney, it (continued..)

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is inappropriate to deprive a defendant of his right to the dismissal of a stale claim." (citations omitted)).

In the context of determining whether there were grounds for equitable estoppel in a case where the statute of limitations would otherwise bar the complaint, the Commission described the effect of hiring a lawyer by stating,

> The [complainants], however, promptly retained an attorney. They described their dispute to the attorney and asked him to file a demand for arbitration. Normally, a party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged against the attorney. Counsel are presumptively aware of whatever legal recourse may be available to their client. The [complainants'] attorney, in other words, is charged with knowledge of the reparations program without regard to his actual knowledge. Moreover, this knowledge may be imputed to the [complainants].

Marraccini v. ContiCommodity Servs., Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,793 at 34,093 (CFTC Aug. 20, 1987) (citation, quotation marks and footnote omitted). Analogizing to federal case law, the Commission ruled that, when the statute of limitations was tolled as a result of equitable estoppel, "Tolling of the limitations period ends once an attorney is consulted." Id. at 34,093 n.7. While there is an exception to the rule that a client is bound by an attorney's actions and constructive knowledge, it "is extremely narrow and will not be invoked merely because consequences are severe and the attorney's conduct is incompetent." Id. at 34,093. "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." Id. at 34,093 n.6 (internal quotation marks and citation omitted). The application of these principles is not limited to estoppel cases.

In Hay, 596 F. Supp. at 637-39, a federal age discrimination case brought against a private employer, the plaintiff argued that the statute of limitations should have been equitably tolled because "he may have been misled or confused as to how to protect his rights by virtue of the failure of the various agencies that he visited to respond to his grievance or to give him correct information as to how to proceed." In resolving the tolling dispute, the court noted that "The plaintiff's failure to act diligently in protecting his ADEA rights was unfortunately combined with a similar failure on the part of his

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attorney," and observed, "By late summer of 1982, plaintiff's attorney was apprised of the 'details' concerning plaintiff's age discrimination claim." Hay, 596 F. Supp. at 640. As for the effect of the ineffective legal services, the court explained, "Equitable tolling is inappropriate when plaintiff has consulted counsel during the statutory period. Counsel are presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is thereby imputed to an ADEA claimant." Id. Even though it was ruling on the defendant's motion for summary judgment, the court did not use the lawyer's apparent negligence as a springboard for drawing inferences of the type of attorney misconduct that might support an equitable tolling attack. See id. at 640-42.

As Marraccini and Hay demonstrate, the presumed knowledge of lawyers and the imputation of that knowledge to their clients produce a hostility (and we think an appropriate one) to equitable tolling claims when complaining parties had the aid of counsel before it was too late. See, e.g., Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 752 (1st Cir. 1988); Reifinger v. Nuclear Research Corp., C.A. NO. 92-5999, 1992 U.S. Dist. LEXIS 19952, at *7-8 (E.D. Pa. Dec, 7, 1992) ("While it may be inequitable to allow an employer to benefit from his own wrong, it would be equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe that he had any under the statute."); Leite v. Kennecott Copper Corp., 558 F. Supp. 1170, 1173-74 (D. Ma. 1983); Needham v. Beecham, Inc., 515 F. Supp. 460, 467 (D. Me. 1981) ("The courts have repeatedly held that equitable tolling is inappropriate when the plaintiff has consulted counsel during the statutory limitation period "); Downie v. Electric Boat Div., 504 F. Supp. 1082, 1086-87 (D. Conn. 1980). However, "[e]quitable tolling may be justified in extreme cases of attorney misbehavior such as outright abandonment of a client after undertaking representation or affirmatively representing to a client that a case is being prosecuted when it is not." Buckalew, 2002 U.S. Dist. LEXIS 10843, at *13. Absent claims or evidence that reasonably suggests Seltzer willfully misled Pon, we will neither presume bad faith nor find cause for a hearing to explore, among other things, if, how and why Seltzer committed malpractice. Pon has leveled no such charges against Seltzer and the evidence of Seltzer's misconduct is that he failed to provide advice that, in hindsight, would have been useful. It would have been easier to infer bad faith (although not much easier) if Seltzer and Pon had planned to file in reparations from the get go. However, their actions indicate that they had arbitration on the mind and planned to assert claims that are not cognizable in this forum. Thus, we find the evidence of Seltzer's error insufficient to reasonably support an inference of sufficient bad faith on his part.

Because an attorney's erroneous legal advice can only delay the filing of a client who does not know the law, it follows that ignorance of the law combined with misleading advice from one's own counsel does not justify tolling.

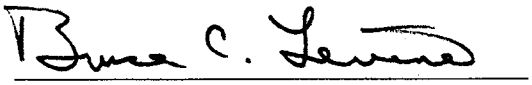
Because client unawareness and attorney error comprised the extent of his tolling argument[62] and, combined, they are legally insufficient, we need not determine whether Pon could establish their existence at a hearing. In other words, Pon's pre-arbitration equitable tolling argument fails as a matter of law. In addition, the complainant has given us no reason to believe that additional fact finding would yield a contrary result. Thus, all of Pon's claims, other than the non-cognizable fiduciary duty claim discussed above, were time-barred before Pon sought arbitration and a bit more tardy when he filed in this forum. Accordingly, they should be dismissed.

Conclusion

For the reasons discussed above, we find that the respondents are entitled to the summary disposition in their favor and we **DISMISS** the Complaint with prejudice.

IT IS SO ORDERED.

On this 13th day of March, 2007



Bruce C. Levine
Administrative Law Judge

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[62] See Complainant's Memorandum at 5-6.