UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

ANDY NAREN CHANEY

v.

GEORGE WILLIAM GRECO,
JONATHAN WILLIAM LUBOW, and
TRADER'S EDGE, INC.

CFTC Docket No. 05-R050

OPINION AND ORDER

Andy Naren Chaney ("Chaney") appeals the Judgment Officer's summary dismissal of his reparations complaint against respondents George William Greco, Jonathan William Lubow, and Trader's Edge, Inc. ("Trader's Edge") because he did not file his complaint within the two-year statute of limitations. *Chaney v. Greco,* 2006 WL 3068495 (Initial Decision Oct. 30, 2006) ("ID"). For the reasons that follow, we affirm.

BACKGROUND

Chaney opened a nondiscretionary account with Trader's Edge, an introducing broker, in July, 2002, depositing $15,330. Over the next few months, a number of futures and options trades were executed for the account. Trading profits at one point increased the account's equity to more than $22,000, but by December 2002, the account was losing money. On January 10, 2003, Trader's Edge issued a margin call. On January 14, 2003, Chaney faxed a letter to Trader's Edge, stating that he would not meet the call and instructing Trader's Edge "not to take any more risk" and to "take whatever action is necessary in my best interest and resolve the open trades to minimize losses from any open positions." The letter stated also that "[t]he last account statement is very shocking" and noted that "my account is not being managed diligently as per my objectives." All open positions were liquidated on January 23-24, 2003, leaving Chaney

with an account balance of $926.38. No further trading took place. Chaney received monthly account statements thereafter until October 2003, when Trader's Edge returned his balance and closed his account.

Chaney filed a reparations complaint on May 4, 2005, alleging misrepresentation, churning and other causes of action. Respondents answered, denying any wrongdoing and asserting affirmative defenses, principally that the case should be dismissed as time-barred. On September 6, 2005, the Office of Proceedings issued a scheduling order establishing discovery deadlines and notifying the parties that the case had been assigned to a Judgment Officer. Two days later, respondents filed a motion for summary disposition, arguing that Chaney's complaint was filed outside the applicable two-year statute of limitations. Chaney's one-paragraph response asserted that the motion should be disregarded on procedural grounds and did not address the merits of the motion.

On October 3, 2005, before any party had served discovery requests, respondents moved to stay discovery pending a ruling on its summary disposition motion. The request was granted. In May 2006, the Judgment Officer issued a *sua sponte* discovery order pursuant to Commission Regulation 12.34, requiring both sides to produce documents and answer questions. As relevant here, the Judgment Officer asked all parties to describe and document contacts between complainant and respondents from January 2003, when trading ceased, until October 2003, when the account was closed. Among other documents, respondents produced Chaney's above-mentioned letter of January 14, 2003 and a transcription of broker notes showing a January 21, 2003 telephone call, which discussed "getting out of all trades, an April 30, 2003 call from Chaney to say "he was not happy with the trading we did and we should have used better risk management," and a July 29, 2003 call from Chaney asking "to close account and send him

copies of his account forms." Respondents stated that they could not find telephone records requested by the Judgment Officer.

Chaney filed a response stating in relevant part:

> ***Reminded Greco and Lubow why they did not act on Jan 14th letter to close*** [an undermargined] ***trade. They said they forgot and did not liquidate account until January 24, 2003.*** [Emphasis and bolding in original.] Their compliance department has never replied to Jan 14, 2003 complaint. Also complained to them of their negligence and extra risks by Lubow and Greco in not closing trades before Jan 24, 2003 even though they said margin call was in effect since about Jan 10, 2003. Also their compliance department never looked into anything even after my complaint filed, despite requests to close trades Jan 14 2003. Again I questioned on phone why in August 2003 and September 10, 2003 account still not closed. They forgot and account closed only after in Oct '03. All causes of action in complaint filed accrue after October 2003 for their compliance failing to ever respond on the complaint letter of January 14, 2003 and misrepresentations and failure to follow instructions.

Complainant's Response to Discovery Order at ¶ 11 (filed July 3, 2006).

The Judgment Officer granted respondents' summary disposition motion and dismissed the case in October 2006, relying principally on Chaney's January 14, 2003 letter. The Judgment Officer found that the letter showed that by that date, Chaney had reason to believe respondents had disregarded his instructions. For further support, the Judgment Officer pointed to Chaney's December account statement that showed large unrealized losses, and his January account statement showing that after all trades had been liquidated, Chaney had lost almost all of his investment. The Judgment Officer thus concluded that, no later than the end of January 2003, Chaney had reason to believe that respondents had acted wrongfully. Since Chaney did not file his complaint until May 2005, the Judgment Officer determined that Chaney had not filed within the two-year statute of limitations. He found that there were no material facts in dispute as to this issue and that summary disposition accordingly was appropriate.

DISCUSSION

On appeal, Chaney argues that "equitable estoppel and tolling" principles apply to some or all of his claims, so that the statute of limitations did not begin to run until October 2003, when the account was closed. App. Br. at 4. He argues also that further discovery would have produced documents supporting his request for equitable estoppel and tolling relief. He contends particularly that the Judgment Officer erred in not pursuing respondents' failure to produce requested telephone records.

Chaney argues further that summary disposition was inappropriate because material facts regarding liability were at issue, requiring further development of the record. He states that "Respondents reneged on their promises to look into resolving the losses and it was discovered only around August 2003 [that] their compliance department never existed and account was not closed despite several requests from January 2003 to October 2003." App. Br. at 2.

Respondents defend the Judgment Officer's initial decision. They assert that Chaney's appeal relies on new allegations not raised below (*e.g.*, Chaney's assertion that he made "several requests" to close his account between January and October), and that the case was disposed of properly through summary disposition. Respondents also seek an award of legal fees and costs, arguing that Chaney's appeal "has been advanced in bad faith."

Section 14(a)(1) of the Commodity Exchange Act ("Act") states that a complaining party may "apply to the Commission for an order awarding" damages "at any time within two years after the cause of action accrues." We have held that a complainant applies to the Commission for an order awarding damages when the complaint is filed. *Gray v. LFG, LLC*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,235 at 50,458 (CFTC Sept. 12, 2000). Therefore, Chaney applied to the Commission in May 2005.

Under our precedent, a cause of action accrues and the two-year limitations period begins to run when a complainant discovers the wrongful activity underlying his or her claim, or, in the exercise of reasonable diligence, should have discovered the wrongful activity. *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 at 50,601 (CFTC Sept. 28, 2000) *citing Edwards v. Balfour Maclaine Futures, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,108 at 41,665 (CFTC June 16, 1994). In determining when wrongful activity should have been discovered, we look to the particular facts and circumstances of each case, including: (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. *Id.*

In deciding respondent's motion for summary disposition, the Judgment Officer was required to treat Chaney's well-pled allegations as true, and to draw all reasonable inferences in his favor. For purposes of ruling on the motion, only allegations and evidence respecting the limitations issue were relevant because, unless Chaney surmounted that barrier, the merits of his claims could not be reached.

Upon review of the record, we concur with the Judgment Officer's finding that Chaney's January 14, 2003 letter to respondents, and the December 2002 and January 2003 account statements, are dispositive on the issue of when Chaney knew or should have known he had a claim. The letter indicates that Chaney knew by then that respondents had not handled his account according to his expectations and may have acted wrongfully. Chaney does not dispute either that the letter expressed his awareness of respondents' departure from his expectations, or that the account statements notified him of his losses. Looking at the facts in a light most favorable to Chaney, and assuming that he did not know the finality of the losses until he

received his January account statement in February, the latest date by which he knew or should have known he had a claim was February 2003. Were we to start the clock in February, rather than January, Chaney's May 2005 filing still would be untimely.

Chaney attempts to invoke tolling and equitable estoppel principles to extend the filing deadline. As stated above, Chaney's discovery response in proceedings below stated that Trader's Edge "fail[ed] to ever respond on the complaint letter of January 14, 2003" and "forgot" to close his account until October 2003.

The Judgment Officer concluded that respondents' delay and inaction "cannot fairly be characterized as lulling conduct especially where Chaney has produced no evidence that respondents ever made any false promises to resolve the dispute or otherwise said anything that dissuaded or delayed Chaney from initiating legal action." ID at *5. Additionally, the Judgment Officer found that Chaney "failed to show a plausible causal connection between respondents' delay in returning the account balance and his delay in filing a reparations complaint." *Id.* at n.11. His holding is consistent with Commission precedent, which provides that "[e]quitable estoppel . . . is usually concerned with the misleading actions of the defendant" and "is addressed to 'the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.'" *Cook v. Monex International, Ltd.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,532 at 30,296 (CFTC Mar. 19, 1985); *cf. Kacem v. Castle Commodities Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,058 at 45,031 (CFTC May 20, 1997) (in unauthorized trading case, respondent lulled complainant into continued trading by making an illegal guarantee).

Chaney alleges no statement or action by respondents that led to his filing delay, and relies instead on respondents' silence and inaction. The Judgment Officer properly rejected these circumstances as a basis for extending the deadline. We affirm his finding that there is no evidence that respondents lulled Chaney into foregoing his legal remedies. Therefore, as the Judgment Officer found, the statute of limitations began to run in January 2003. We thus have no authority under Section 14 of the Act to hear his case.

Chaney contends that summary disposition was inappropriate because material facts remained in dispute. Under Commission Rule 12.207, summary disposition is appropriate when three conditions are met: (1) there is no genuine issue as to any 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. *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,236 at 42,031 (CFTC June 16, 1994).

Statute of limitations issues may be resolved on a summary basis in appropriate circumstances. *Stoffel v. Interstate/John Lane Corp.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,267 at 42,252 (CFTC Dec. 1, 1994); *Stone v. First Commodity Corporation of Boston*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,240 (CFTC Aug. 28, 1986). The Commission recognizes, however, "the importance of a well-developed factual record to the reliable resolution of limitations-related issues." *Stoffel, id., citing Jenne v. Painewebber, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,329 at 35,423 (CFTC Aug. 31, 1988). "When there are factual disputes at issue . . . an ALJ abuses his discretion if he denies a complainant the right to develop the record through discovery prior to consideration of any dispositive motion." *Stoffel, id., citing Jenne* at 35,424-25.

The Judgment Officer's broad discovery order afforded Chaney the opportunity to create a triable issue of fact as to whether equitable estoppel should be applied. As discussed above, Chaney's own account of what respondents did and said from and after January 2003, fails to allege facts or circumstances that might warrant such relief. Moreover, his account of respondents' conduct throughout 2003 is essentially the same as respondents' version of events: the parties agree that respondents essentially did nothing, and that sporadic contacts with Chaney were initiated by Chaney. In these circumstances, we find no abuse of discretion and no need for further development of the record. Because all requirements of Regulation 12.207 were met, summary disposition was appropriate.

Respondents seek "reasonable legal fees and costs incurred on appeal," arguing that "Chaney knew or should have known that he had no factual or legal basis upon which to appeal the Order." Ans. Br. at 19. Respondents ask us to sanction Chaney for raising what they characterize as "bad faith, baseless" appellate arguments. Ans. Br. at 15. Chaney filed a reply brief, a pleading not authorized by Commission regulations, but did not address the request for sanctions.

Fees may be awarded to a prevailing party only when the opponent acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Sherwood v. Madda Trading Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728 at 23,023 n.26 (CFTC Jan. 5, 1979); *see also Brooks v. Carr Investments, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,027 at 53,457 (CFTC May 9, 2002)(denying fees).

"[A]n examination of the purposes and policies underlying the reparation procedure created in the Commodity Exchange Act supports the view that equitable modification of the two-year statute of limitations is consonant with legislative intent." *Cook*, ¶ 22,532 at 30,295

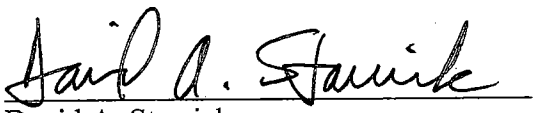
(citing the legislative history of the statutory reparations program). Chaney thus brought an action under circumstances expressly envisioned by the Commission. When he did not prevail below, he exercised his right to appeal provided by our regulations. The various issues he raised on appeal had varying degrees of merit. The Commission deals leniently with *pro se* litigants. Accordingly, Chaney's limited grasp of the elements of equitable estoppel shall not be treated as vexatious.

We have considered all other arguments raised by complainant and find that they do not establish error by the presiding officer material to the outcome of the proceeding, or raise questions of law or policy meriting extended discussion.

Based on the foregoing, the initial decision is affirmed.

IT IS SO ORDERED.[1]

By the Commission (Acting Chairman LUKKEN and Commissioners DUNN, SOMMERS and CHILTON).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 12, 2008

[1] Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e) (2000), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing was held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the court a bond equal to double the amount of any reparation award.