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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

Daniel J. Emily,
Complainant,
v.

Guy K. Gleichmann and United Strategic Investors Group, LLC,
Respondents.

CFTC Docket No. 14-R007

OPINION AND ORDER

Daniel Emily, an individual trader, appeals from the dismissal of his reparations complaint against United Strategic Investors Group, LLC ("USIG") and Guy Gleichmann. During the relevant period, USIG was a registered commodity trading advisor ("CTA"), and Gleichmann was its Principal and Associated Person. On appeal, Emily argues that Respondents breached their fiduciary duty in January and February 2012 by making a handful of trades that Emily asserts are irrational.

We affirm. Breach of fiduciary duty is not actionable under the Commodity Exchange Act ("CEA") or Commission regulations, and is therefore not actionable in reparations.

BACKGROUND

The facts are uncontested. Petitioner Daniel Emily traded futures and options with Respondent USIG from 2004 to 2013. (Initial Dec. on Remand at 8-9.) Emily stated that his "strategy included both buying and selling of options/futures" and "selling out-of-the-money options with the intention of collecting the premium." (*Id*. (citing Emily Produc. Ex. 2 (Jan. 6, 2016)).) His trading activity focused on NYMEX energy contracts. (*Id*. (citing Mar. 24, 2016

Hearing Tr. at 10:1-11:2).) Emily testified that he was hoping to "make some quick profit . . . if it worked out" and understood the "high risk" nature of this kind of trading. (*Id*. at 9 (citing Mar. 24, 2016 Hearing Tr. at 8:24-9:17).) Some years were more profitable than others. In 2008 he experienced a *loss* of $20,951.07; in 2009, he realized a profit of $5,283.64; in 2010 realized a profit of $4,103.80; and in 2011, realized a profit of $2,072.67. (Reply to Dec. 17, 2015 Order, Ex. Nos. 1-3 at pdf. pp. 3-6.) The record shows no evidence that Emily complained about the quantity or quality of trading prior to 2012.

With respect to the trading at issue, monthly commission-to-equity ratios were 15% in January 2012 and 13% in February 2012. (Initial Dec. on Remand at 5-6.) Overall trading volume was relatively low, as it had been dating back to March 2011. For example, in January 2012, there were six trades. In February 2012, there were 27. (*Id*. at 7.) Trading records show that in January 2012, USIG charged a total of $332 in commissions, and in February 2012, it charged a total of $496.48 in commissions.

Emily's reparations complaint alleged that USIG and Gleichmann engaged in serious misconduct, including fraud, unauthorized trading, failure to disclose, churning, and breach of fiduciary duty. Faced with documentary evidence contradicting these claims, Emily continued to press only the claim of churning.

After an evidentiary hearing, the Judgment Officer issued an Initial Decision finding that Gleichman had churned Emily's account and was therefore liable for damages of $1,121 plus pre- and post-judgment interest, and the $125 CFTC reparations filing fee. (Initial Dec. on Remand at 1-2 (citing Initial Dec. at 1, 6).) Gleichman appealed and the Commission remanded, directing the Judgment Officer to specify how each element of churning had been met. *See Ferriola v. Kearse-McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172,

CFTC Dkt. No. 98-R114, 2000 WL 873653, at *9 (CFTC June 30, 2000). On remand, a new Judgment Officer allowed the parties to submit additional evidence. She then issued a new Initial Decision holding that the claim of churning was not supported by a preponderance of the evidence, because the commission-to-equity ratio was not high, the trading volume was too low to support a finding of excessive trading, there was no evidence the trading strategy differed from Emily's previous 7 years of trading, and Emily was an informed and sophisticated investor. Consequently, the Judgment Officer reversed the finding and damages award.

Emily now appeals that second Initial Decision. In his brief, Emily concedes churning did not occur. Instead, he argues that Respondents breached their fiduciary duty in January and February 2012. He supports that assertion with a handful of examples of trades that Emily claims were irrational. Respondents chose not to file a brief in response, so we evaluate Emily's appeal independently. *See* 17 C.F.R. § 12.401(c) (providing that the appellee "may" file an answering brief).

DISCUSSION

I. Standard of Review.

The Commission reviews an order of dismissal *de novo*. *Vargas v. FX Sols., LLC*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,319, at 62,667, No. 07-R025, 2009 WL 465217, at *1 (CFTC Feb. 24, 2009). "On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision . . . ." 17 C.F.R. § 12.406(a).

II. A Claim for Breach of Fiduciary Duty is Not Cognizable in Reparations.

The CEA provides that "[a]ny person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action

accrues, apply to the Commission for an order awarding" damages. 7 U.S.C. § 18(a)(1). CFTC Rule 12.13(a) similarly provides that the complaint must state "a violation of any provision of the Act or a rule, regulation or order of the Commission . . . ." 17 C.F.R. § 12.13(a).

It is true that a relationship between a CTA and his or her customer can give rise to a fiduciary duty. *Klatt v. Int'l Trading Grp., Ltd.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,636, at 22,598, CFTC Dkt. No. R 77-114, 1978 WL 10813, at *3 (CFTC June 21, 1978) ("The fiduciary nature of the relationship between a commodity trading advisor and his customer is beyond question."); *Weinberg v. NFA*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,087, at 32,219, CFTC Dkt. Nos. CRAA 86-1 & CRAA 86-2, 1986 WL 66179, at *7 (CFTC June 6, 1986) (stating that CTA and commodity pool operators "held fiduciary relationships in soliciting and advising commodity clients and in handling the money of commodity pool participants"). But "[t]he 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." *Lee v. Lee*, CFTC Dkt. No. 06-R054, 2007 WL 776613, at *5 (CFTC ALJ Mar. 13, 2007). A breach of fiduciary duty therefore does not, by itself, violate the CEA. *Cf. Tysdal v. Jack Carl/312 Futures, Inc.*, CFTC Dkt. No. 88-R225, 1992 WL 45534, at *3 & n.4 (CFTC Feb. 27, 1992) (holding that the "mere existence of a fiduciary relationship . . . does not transform a breach of contract into a violation of Section 4b of the Act"). Rather, a CTA's obligations to its customers under the CEA are set forth in part 4 of the Commission's rules. 17 C.F.R. §§ 4.1-4.41. The usual prohibitions against fraud apply, but there is no claim of fraud before us on appeal.

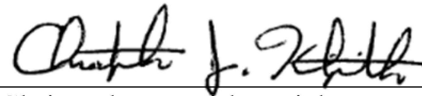
Because breach of fiduciary duty without a corresponding violation of the CEA or CFTC rule, regulation, or order, is not cognizable in reparations,[*] this appeal has no merit and dismissal of the complaint was proper.

CONCLUSION

For the foregoing reasons, the Commission affirms the Initial Decision.

IT IS SO ORDERED.

By the Commission (Chairman TARBERT and Commissioners QUINTENZ, BEHNAM, STUMP, and BERKOVITZ).



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 9, 2020

[*] Though we have never held otherwise, we recognize that the Commission has not always been clear on this point. *Dawson v. Carr Invs., Inc.*, CFTC Dkt. No. 96-R101, 2002 WL 535159, at *20 (CFTC Apr. 10, 2002) (dismissing a breach of fiduciary duty claim "for a failure of proof"). To the extent that any previous decisions are inconsistent with our decision today, they are superseded.

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Concurring Statement of Commissioner Dan M. Berkovitz

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I concur with the Commission's Opinion and Order ("Order") affirming the Judgment Officer's decision that Daniel Emily cannot recover in reparations for a breach of fiduciary duty.

Absent fraud, a breach of fiduciary duty, by itself, does not violate the CEA or Commission Regulations, and therefore is not cognizable in reparations.[1] A remedy for breach of fiduciary duty may exist under state law where the common law imposes fiduciary duties upon persons, such as commodity trading advisors ("CTAs"), who make decisions regarding the assets of others.[2] These laws vary by jurisdiction, however, and customers could benefit from a uniform standard of conduct.

As the Order notes, Commission precedent also states that in certain circumstances, CTAs and other Commission registrants who manage the assets of customers have fiduciary obligations to their customers.[3] These cases do not specify the standards of conduct for such fiduciaries. The Commission should consider clarifying the scope of fiduciary duties that CTAs and other asset managers owe to their customers.

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[1] Order at Sect. II (citing *Klatt v. Int'l Trading Grp., Ltd.*, CFTC No. R 77-114, 1978 WL 10813, at *3 (June 21, 1978); *Weinberg v. NFA*, CFTC Nos. CRAA 86-1& CRAA 86-2, 1986 WL 66179, at *7 (June 6, 1986)).

[2] Joint Report of the SEC and the CFTC on Harmonization of Regulation (Oct. 16, 2009), available at https://www.sec.gov/news/press/2009/cftcjointreport101609.pdf.

[3] Order at Sect. II.