

## [Commodity Futures Releases, Decisions and Interpretations, Emily v. Gleichmann, et al., ¶34,042, \(May 23, 2017\)](#)

CFTC Materials

CFTC Docket No. 14-R007

Commodity Futures Releases, Decisions and Interpretations - All materials ¶34,042

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Emily v. Gleichmann, et al.

¶34,042. Commodity Futures Trading Commission. CFTC Docket No. 14-R007. May 23, 2017. Initial Decision in full text.

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### Headnote

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#### **CFTC: Liabilities and Prohibitions: Churning: Statute of Limitations.—**

Claimant brought a CFTC reparation complaint alleging that the respondent broker had churned his discretionary account, disregarded instructions to close the account, and also questioned certain trades the respondent made in the account. During the 13 month period most relevant to the conduct in question, the respondent's trading generated \$6,961 in commissions in commissions and fees. The judgement order found that the \$100 per-contract and fees charged the claimant were well above industry norms, and that the respondent was not able to offer any justification for the size of commissions or frequent day trades that generated the bulk of the commissions. The claimant was awarded \$1,121 in damages, an amount representing the commissions that were incurred in the claimant's account during the last two months the respondent managed the account. Damages sustained prior to that time period were deemed to be non-recoverable by virtue of the applicable statute of limitations which bars recovery for any damages incurred more than two years before the claimant filed his reparation complaint.

See [¶12,685.5231](#), "Liabilities—Prohibitions" division, Volume 2.

Opinion of McGuire, Judgment Officer.

## INITIAL DECISION

### Introduction

Daniel Emily claims that Guy Gleichmann churned his discretionary account and disregarded his instructions to close his account. Emily also questions the wisdom of certain option spreads. Gleichmann denies the allegations. As explained below, after reviewing both parties' documentary evidence and evaluating their oral testimony, I have concluded that Emily has established by a preponderance of the evidence that Gleichmann churned his account and that Emily is entitled to an award of \$1,121.

### Factual Findings

1. Daniel Emily, a resident of Kansas City, Missouri, has a bachelor's degree in chemical engineering. He owned a construction business, Atlas Steel, for over two decades. After Atlas ceased operations in 2008, he worked part-time at FedEx and as a census worker during 2008-2012. Emily has traded futures and options since 1997 with a variety of firms, including the boiler room Commonwealth Financial, since 1990. In addition, during the relevant time, Emily read various financial publications and listened to radio shows that discussed the market and trading strategies. [ See Emily testimony at pp. 6-7, 13, and 24-25, hearing transcript; and Emily statement produced as Exhibit 2.]

Emily's testimony revealed that he is generally intelligent and sincere. He could remember broad details, such as that by December 2011 he had become concerned by mounting commission charges. However, he gave vague and uncertain testimony about when and how he instructed Gleichmann to cease trading. [ See Emily testimony at pp. 25-33, hearing transcript.]

2. Guy Gleichmann, a resident of Pompano Beach, Florida, was registered with the National Futures Association (“NFA”) from 1985 to 2013. From 1985 to 2001, Gleichmann was a registered associated person with a string of firms that were disciplined by the CFTC or the NFA for fraudulent sales practices: Multivest Options, Bachus & Stratton, Futures Trading Group, FSG International, Barkley Financial and Trinity Financial Group. Subsequently, Gleichmann was a registered associated person and listed principal with U.S. Investment Group from 2001 to 2004, and United Strategic Investors Group (“USIG”) from 2004 to 2013. USIG was a registered introducing broker from 2004 to 2008, and a registered commodity trading advisor from 2008 to 2013. [NFA records; see Gleichmann testimony at pp. 18-19, hearing transcript.]

3. From 2004 to October 2008, Emily maintained a non-discretionary USIG account. During this time, Emily relied on Gleichmann's trading advice in selecting trades and the results were mixed, but Emily was generally satisfied with Gleichmann's advice. [ See Emily testimony at pp. 10, 12 and 23, and Gleichmann testimony at pp. 20-22, hearing transcript.]

4. In October 2008, Gleichmann decided to switch from doing business as an introducing broker to a commodity trading advisor (“CTA”), and began doing business as Wavelength CTA. On October 24, 2008, Emily signed a Wavelength CTA disclosure document, and a power of attorney granting Gleichmann discretionary trading authority. Emily initially committed a total of \$7,500 to the Wavelength account with two deposits: the first for \$3,500 in December 2008; and the second for \$4,000 in March 2009, when trading began. On January 13, 2012, Emily signed an updated Wavelength CTA disclosure document. [ See Emily testimony at pp. 23, and Gleichmann testimony at pp. 21-22, hearing transcript.]

5. Emily realized net profits the first three years in the Wavelength account: \$5,284<sup>in</sup> 2009, 4,104 in 2010, and \$2,074 in 2011. Emily realized a \$2,000 loss in 2012. Emily was charged 6,038 in commissions and fees in 2011, and \$1,164 in 2012.

During the time most relevant to the churning charge - March 2011 to February 2012 — Gleichmann's trading generated \$6,961 in commissions and fees. Most of these trades were a mixture of single-lot or small-lot futures day trades, and short-term options trades, in a variety of commodities. In seven out of the seventeen months—*i.e.*, March, April, August, September, November and December 2011, and February 2012—a substantial portion of the futures trades involved frequent day trades in various energy products. Not coincidentally these were the months when most of the commissions were generated. [ See monthly account statements produced by Gain Capital.]

Set out below is the month-end net liquidating value, and commissions and fees charged, for the Emily account, from January 2011 to May 2012:

<b>Month</b>	<b>NLV<sup>1</sup></b>	<b>Commissions and fees</b>
Jan.'11	\$11,264	\$ 198
Feb.'11	21,999	0
Mar.'11	12,432	1,386
Apr.'11	11,312	990
May'11	9,491	396
Jun.'11	7,382	99
Jul.'11	8,079	198
Aug.'11	8,541	198

Sept.'11	7,348	742
Oct.'11	5,057	445
Nov.'11	4,343	594
Dec.'11	1,851	792
Jan.'12	3,395	445
Feb.'12	2,438	676
Mar.'12	2,166	16
Apr.'12	2,092	19
May'12	145	8

<sup>1</sup> In March 2011, Emily withdrew \$10,000. In August 2011, Emily wired \$2,525 to his account, and another \$1,000 in May 2012. In July 2012, he withdrew the closing account balance of \$90.

In 2011, Emily noticed that Gleichmann had modified his trading style and had begun generating greater commissions, and by December 2011 Emily had become concerned by losses and mounting commissions. Nonetheless, he decided to let Gleichmann continue trading and signed the updated CTA disclosure document in mid-January 2012. [ See Emily's Exhibit 3, produced January 6, 2016; and Emily testimony at pp. 23-33, 36-38 and Gleichmann testimony at pp. 33-34, hearing transcript.]

The depleted account was closed out in July 2012. Emily filed his reparations complaint on January 2, 2014.

## Conclusions

The approximately \$100 per-contract commissions and fees charged by Gleichmann in 2011 and 2012 for trading Emily's discretionary account were well above the industry norm as determined by the National Futures Association in 2007, and thus were sufficiently dissociated from recouping costs and making a reasonable profit to be deemed a red flag of questionable trading practices. See NFA Interpretive Notice #9021 *Compliance Rule 2-9: Enhanced Supervisory Requirements* (Nov. 1, 2007). See also *Hinch v. Commonwealth Financial Group*, Comm. Fut. L. Rep. ¶27,056 (CFTC May 13, 1997); *Ferriola v. Kearsse-McNeill*, Comm. Fut. L. Rep. ¶28,172 (CFTC June 30, 2000); and *Darrah v. First American Investment*, Comm. Fut. L. Rep. ¶31,923 (CFTC December 10, 2010). Accordingly, the \$100 per-contract commissions and fees that Gleichmann charged Emily to trade his discretionary account were presumptively excessive.

Here, Gleichmann has offered no justification for the size of the commissions or for the frequent day trades that generated the bulk of the commissions, and Gleichmann has offered no proof that he ever gave Emily, at any point in time in 2011 or 2012, accurate information regarding the adverse impact of those expenses on profitability. Accordingly, Emily has proven by a preponderance of the evidence that Gleichmann controlled the trading activity and generated excessive commissions, and thus churned Emily's account, in violation of Sections 4b(a)(1)(A) and 4c(b) of the Commodity Exchange Act and CFTC rule 33.10(a). The proper measure of damages for these violations is the commissions charged during the period of churning. However, the statute of limitations set out in Section 14(a)(1) of the Act bars recovery of any damages incurred more than two years before Emily filed his reparations complaint on January 2, 2014. Therefore, the damage award must be limited to the \$1,121 commissions incurred in the last two months that Gleichmann churned the account, January and February 2012.

The Commission generally does not second-guess the trading strategy employed or recommended by an advisor. The fact that a strategy proves unprofitable does not, by itself, create an inference of violations. Here, Emily has not produced any evidence beyond trading losses to shift the burden to Gleichmann to articulate the basis for the options spreads the wisdom of which Emily has generally second-guessed. See *Syndicate Systems v. Merrill Lynch, Pierce, Fenner & Smith*, Comm. Fut. L. Rep. ¶23,289 (CFTC 1986); and *Yrag Traders v. Liberty Trading Group*, Comm. Fut. L. Rep. ¶33,363 (CFTC 2014). Accordingly, Emily has failed to establish any violations on top of churning in connection with Gleichmann's options trades.

Finally, Emily has failed to establish a date certain when he gave any unambiguous instruction to cease trading.

### ORDER

Daniel J. Emily has established by a preponderance of the evidence that Guy K. Gleichmann churned his account in violation of Sections 4b(a)(1)(A) and 4c(b) of the Commodity Exchange Act and CFTC rule 33.10(a), and that these violations proximately caused 1,121 in damages, and that United Strategic Investors Group LLC is liable for Gleichmann's violations pursuant to Section 2(a)(1)(B) of the Act and CFTC rule 1.2.

Accordingly, Guy K. Gleichmann and United Strategic Investors Group LLC are ordered to pay to Daniel J. Emily reparations of 1,121, plus pre-judgment and post-interest on that amount at 1.10% compounded annually from February 29, 2012, to the date of payment, plus \$125 in costs for the filing fee. Liability shall be joint and several.

Dated this 23rd day of May 2017.

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Philip V. McGuire,  
Judgment Officer