

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 86-4136

PHILIP R. STONE,

Petitioner,

v.

FIRST COMMODITY CORP. OF BOSTON,
HARRY R. HUGHES and COMMODITY
FUTURES TRADING COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE COMMODITY FUTURES TRADING COMMISSION

BRIEF OF RESPONDENT, COMMODITY FUTURES
TRADING COMMISSION

COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE WEIGHT OF EVIDENCE SUPPORTS THE COMMISSION'S CONCLUSION THAT ALL OF PETITIONER'S CLAIMS ARE BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS ON REPARATION CLAIMS, BECAUSE PETITIONER FAILED TO ESTABLISH THAT HE EXERCISED DUE DILIGENCE AND THUS TO JUSTIFY TOLLING THE LIMITATIONS PERIOD.

PRELIMINARY STATEMENT

The Commodity Futures Trading Commission ("Commission" or "CFTC") had subject matter jurisdiction over the reparation proceeding below pursuant to section 14(a) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 18(a) (1982). Petitioner Philip R. Stone, complainant below, had appealed to the Commission from a June 19, 1985 order issued by Administrative Law Judge ("ALJ") George H. Painter dismissing his complaint on statute of limitations

grounds. In an August 28, 1986 opinion and order, the Commission affirmed the ALJ's dismissal of the complaint, ruling that all of Petitioner's causes of action accrued more than two years before he filed his reparation complaint, and therefore, all claims were barred by section 14(a) of the Act. The August 28, 1986 order from which this appeal is taken finally disposes of all claims.

Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982), vests jurisdiction in this Court to review Commission reparation orders. On September 15, Stone filed a petition for review with this Court seeking an order that would vacate the Commission's August 28 order and remand this proceeding to afford him an opportunity for discovery and a hearing on the merits. Stone's petition for review was timely filed with this Court in accordance with the requirements of section 14(e) of the Act, as it incorporates by reference section 6(b) of the Act, 7 U.S.C. § 9 (1982).

COUNTERSTATEMENT OF THE CASE

A. The Proceeding Below.

This petition arises from an order of the Commission issued on August 28, 1986 in the reparation proceeding, Stone v. First Commodity Corp. of Boston and Harry R. Hughes, CFTC Docket No. 84-R204. A reparation proceeding is an administrative action commenced by a customer under section 14(a) of the Act to recover monetary damages sustained as a result of a registered commodity professional's alleged violations of the Act, or of any Commission rule or order. See CFTC v. Schor, 106 S. Ct. 3245 (1986). Section 14(a) of the Act

permits such a claim "at any time within two years after the cause of action accrues."^{1/}

Petitioner Stone filed his reparations complaint (C.R. 1)^{2/} against First Commodity Corporation of Boston ("FCCB"), a registered futures commission merchant ("FCM") or commodity broker,^{3/} on January 25, 1984, two years and eight months after his account with FCCB had closed (C.R. 1 at 7). He alleged that respondents FCCB and its employee Harry Hughes: (1) in February 1980, made false and misleading statements to induce him to give them discretionary authority to trade his account;^{4/} (2) in June 1980, misrepresented that Stone could not withdraw funds from his futures account at FCCB without purchasing additional futures contracts; (3) would not permit Stone to take short futures positions;^{5/} and (4) would not permit Stone to place market orders or stop

1/ After a proper reparation complaint is filed, and after the named respondents are permitted to answer the complaint, the matter is assigned to an ALJ for a hearing. See 17 C.F.R. § 12.26 (1984). After receiving evidence, the ALJ will render an initial decision setting forth findings and conclusions with respect to liability and damages, if any. 17 C.F.R. § 12.314 (1984). Parties who sustain an adverse initial decision are entitled to appeal to the Commission, 17 C.F.R. § 12.401 (1984), and ultimately to a United States Court of Appeals. Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982). On appeal, the Commission's findings are conclusive if supported by the weight of the evidence. Id. (incorporating 7 U.S.C. § 9).

2/ All references herein to the Certified Record, abbreviated "C.R.", are followed by the document number, and thereafter, by the page number in the Record where the cited material may be found. For example, a citation to page three of the complaint would be referenced as "C.R. 1, at 3."

3/ In section 2(a)(1)(A) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 2 (1982), the term "futures commission merchant" is defined to include any person or firm that solicits or accepts orders for transactions in futures contracts traded on a futures exchange and accepts money or other property to margin or guarantee such transactions.

4/ The Commission, throughout its opinion, referred to "discretionary trading authority" as what Mr. Stone refers to as a "power of attorney." The two terms have identical meaning for the purposes of this appeal, and are used interchangeably throughout this brief.

5/ A "short" futures position is a futures contract to sell a fixed quantity

orders.^{6/} Stone opened his FCCB account in October 1979, and was apparently satisfied with his account executive and the handling of his account during the first three months. (C.R. 31, at 296.) Between October 1979 and February 1980, Stone made four deposits into his account totaling \$22,000. At the end of January 1980, when the equity in Stone's account had increased to \$54,980.55, respondent Hughes was assigned to handle Stone's account. (C.R. 1, at 4.)

According to the complaint, when Hughes took over the account in February 1980 he informed Stone that FCCB required that Stone execute a power of attorney giving Hughes authorization to trade Stone's account "so that positions could be closed out rapidly if necessary" (C.R. 1, at 5), and that until the form was executed, no more trades would be allowed. Stone signed the form, and thereafter Hughes placed orders for Stone's account at Hughes' discretion, notifying Stone about the trades only after transactions were effected. Id. By the end of May 1980, after some fluctuation, Stone's account equity increased to \$75,719.37. At that time, Stone was permitted to withdraw \$10,000 from his account with no restrictions. Id.

Stone's complaint further alleged that by mid-June 1980, his equity had increased to more than \$100,000, and he wanted to make another cash withdrawal from his account. This time, Hughes informed Stone that FCCB would not permit him to withdraw any more funds unless Stone purchased additional futures con-

of a given commodity at a fixed price in some specified delivery month in the future. A trader who takes a short futures position may profit from a decline in the price of the underlying commodity by purchasing a futures contract to buy the commodity in the same delivery month at the lower price, and offsetting his previous short position with this "long" position. See generally Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 357-60 (1982).

^{6/} A "market order" is an order to "buy or sell a futures contract at whatever price is obtainable at the time it is entered in the ring or pit" on the exchange floor. 1985 CFTC Ann. Rep. 144. A "stop order" is "an order that becomes a market order when a particular price level is reached. A sell stop is placed below the market, a buy stop is placed above the market." Id. at 152.

tracts, and paid a non-refundable management fee of \$1,800 per contract. (C.R. 1, at 6.) When Stone agreed to purchase six additional contracts, paying management fees of \$10,800, Hughes permitted Stone to withdraw an additional \$4,000. Thereafter, due to unprofitable trading, Stone's account equity steadily decreased to \$3,501.12 by the end of April 1981, when Hughes departed FCCB. As early as May 7, 1981 (Petitioner's Brief ["Pet. Br."] at 6), Hughes became employed as an account executive at E.F. Hutton and Co., Inc.

Upon Hughes' departure, a new unidentified FCCB account executive took over Stone's account. Because the new account executive did not have a power of attorney, he needed Stone's authorization before executing trades for Stone's account. (C.R. 1, at 7.) When Stone refused several trade recommendations, this salesman told Stone that he was too busy to work with Stone. Stone's FCCB account was closed on May 14, 1981, and a check for \$3,501.12, the remaining balance in his account, was sent to him. Id.

Shortly after he had closed his FCCB account, Stone opened an E.F. Hutton account with Hughes. Later, in early 1982, Hughes allegedly told Stone that, contrary to his previous representations in 1980, FCCB's obtaining powers of attorney from its customers had been a "strongly promoted" policy and not a prerequisite for the customers' doing business with FCCB. Hughes also allegedly stated that FCCB would have permitted Stone to withdraw the funds he requested in mid-June 1980 without requiring him to purchase additional contracts, if Stone had hired an attorney. (C.R. 1, at 9.)

Stone alleged that this conversation took place on January 26, 1982, coincidentally one year and 364 days before he filed his reparations com-

plaint.^{7/} Mr. Stone claimed damages "in excess of \$100,000." (C.R. 1, at 2.) Considering the \$14,000 in withdrawals and the \$3,501.12 returned to him when his FCCB account was closed, Stone's out-of-pocket losses were \$4,498.88. (C.R. 32, at 325.)

B. The Commission's Opinion and Order.

After FCCB filed an answer raising the defense of statute of limitations (C.R. 11), ALJ Painter issued a May 22, 1985 order directing Stone to show cause why the complaint should not be dismissed on the ground that he failed to file his complaint within two years after the cause of action accrued. (C.R. 26.) On June 15, 1985, Stone filed a response (C.R. 27) in which he argued that he failed to discover that FCCB did not require discretionary trading authority, and that FCCB did not impose restrictions on cash withdrawals, until his alleged telephone conversation with Hughes on January 26, 1982. Therefore, Stone argued, his reparation complaint filed on January 25, 1984 "would appear to have been filed within the two year [limitations] period." (C.R. 27, at 281.) By order dated June 19, 1985 (C.R. 28), ALJ Painter dismissed the complaint, ruling that all of Stone's claims were barred by section 14(a) of the Act because he had not shown that his causes of action accrued any time after 1980 (C.R. 28).

On Stone's appeal, the Commission affirmed. (C.R. 32.) Citing Commission precedent that relied upon authorities of this Court,^{8/} the Commission

^{7/} Stone alleged in his complaint (C.R. 1 at 3) that this conversation took place on or about February 1982, but in response to the ALJ's Order to Show Cause (see infra), and in his brief to this Court, he claimed that the conversation took place on the earlier date. (Pet. Br. at 2).

^{8/} The Commission cited Graves v. Futures Investment Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,457 (CFTC 1982), and Maloley v. R.J. O'Brien & Associates, Inc., [Current Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,012

explained that in cases where fraud is alleged, a cause of action accrues and the statute of limitations begins to run when the complainant discovers or, in the exercise of reasonable diligence, should have discovered the alleged misconduct. (C.R. 32, at 328.) The Commission also recognized that once a respondent raises the statute of limitations as a defense, the burden is on the complainant to show that his failure to discover his causes of action in a timely manner was not attributable to a lack of reasonable diligence. Id.

The Commission found that Stone's allegations that FCCB defrauded him by refusing to permit him to place market orders, stop orders, or orders for short futures positions, were known to Stone well before January 1982 and thus time-barred. As for Stone's other two allegations regarding the discretionary trading authority and withdrawal restrictions, the Commission found that Stone in the exercise of reasonable diligence should have discovered the alleged falsity of Hughes' representations before January 25, 1982. The Commission reasoned that because Hughes was the only salesman to represent that FCCB required discretionary trading authority, and two other FCCB salesmen had acted contrary to this representation in permitting Stone's account to trade without it, Stone, no later than May 1981, was put on notice of the potential falsity of Hughes' representation. The Commission rejected Stone's argument that it was reasonable for Stone to assume his first FCCB account executive, Kevin Mattoni, overlooked the power of attorney requirement given Stone's concession (C.R. 31, at 296) that Mattoni was in close contact with his FCCB supervisor (who would not likely have overlooked the alleged discretionary authority requirement). (C.R. 32, at 330 n.6.)

(CFTC 1986), appeal pending, No. 86-1533 (8th Cir.). These Commission cases relied upon, among other cases, Santos v. United Brotherhood of Carpenters and Joiners, 619 F.2d 963, 968-69 (2d Cir. 1980); Arneil v. Ramsey, 550 F.2d 774, 780 (2d Cir. 1977); and Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970).

The Commission also reasoned that because of the inconsistent treatment he received from Hughes regarding FCCB's policy about cash withdrawals, Stone was put on notice by mid-June 1980 of the possibility that something was amiss. The Commission found that in May 1980, when Stone's account equity exceeded \$75,000, FCCB permitted him to withdraw \$10,000 with no restrictions. Less than a month later, after account equity had increased to more than \$100,000, Stone was allegedly informed by Hughes that Stone could not withdraw funds without purchasing more contracts. The Commission concluded that

[t]he absence of such restrictions [in May 1980] should have alerted Stone to the possibility that Hughes was not accurately representing FCCB's position when Hughes told him less than one month later (when the account equity had actually increased) that he could not withdraw any more money without agreeing to trade additional contracts. (C.R. 32, at 329.)

With respect to both claims of misrepresentation, the Commission concluded that Stone had failed to show any extenuating circumstances justifying his failure to inquire:

the record does not establish that Stone's relationship with Hughes was such that he was incapable of exercising reasonable independent judgment in the face of evidence that Hughes might be misleading him. Information about FCCB's policies was readily available from the three account executives Stone dealt with. There is no evidence that Hughes prevented Stone from following up on his concern and there is nothing to suggest that anyone from FCCB, either before or after Hughes' tenure, did anything to suggest to Stone that Hughes had accurately stated FCCB's policies. (C.R. 32 at 330)

Thus, the Commission concluded, "[c]onsidering the information available to him, Stone failed to act diligently to discover Hughes' alleged misconduct." (C.R. 32, at 330.) Accordingly, the Commission concluded that his misrepresentation claims were likewise time-barred. Id. Stone now appeals to this Court.

ARGUMENT

THE COMMISSION'S CONCLUSION THAT ALL OF PETITIONER'S
CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS
IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

The proper scope of judicial review of CFTC reparation orders is narrow. Section 6(b) of the Act, 7 U.S.C. § 9 (1982), as incorporated by Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982), provides that "the findings of the Commission, as to the facts, if supported by the weight of evidence, shall . . . be conclusive." As this Court has recognized, in reviewing the Commission's orders under the "weight of evidence" standard:

the court's function 'is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of fact was justified, i.e., acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings.'

Haltmier v. CFTC, 554 F.2d 556, 560 (2d Cir. 1977), quoting Great Western Food Distributors, Inc. v. Brannan, 201 F.2d 476, 479-80 (7th Cir. 1953). Accord Schor v. CFTC, 740 F.2d 1262, 1272 (D.C. Cir. 1984), rev'd on other grounds, 106 S. Ct. 3245 (1986); Myron v. Hauser, 673 F.2d 994, 1005 n.17 (8th Cir. 1982).

On appeal, Stone's arguments are all in support of an assertion that the Commission erred in finding that he had notice of his potential reparation claims no later than May 1981. Thus, Stone is making purely factual arguments which must be reviewed under the weight of evidence standard; he is not contending that the Commission erred in its application of the law. Nor could he, as the Commission's legal analysis is entirely consistent with Second Circuit precedent.

This Court has long recognized that limitations periods in fraud cases do

not begin to run until the fraud is discovered, or upon reasonable inquiry, should have been discovered. E.g., Armstrong v. McAlpin, 699 F.2d 79, 87 (2d Cir. 1983) ("Armstrong"); Arneil v. Ramsey, 550 F.2d 774, 781 (2d Cir. 1977) ("Arneil"); Klein v. Shields & Co., 470 F.2d 1344, 1346 (2d Cir. 1972); Klein v. Bower, 421 F.2d 338, 343. This Court has also recognized that:

the time from which the statute of limitations begins to run is not the time at which a plaintiff becomes aware of all the various aspects of the alleged fraud, but rather the statute runs from the time at which plaintiff should have discovered the general fraudulent scheme.

Arneil, 550 F.2d at 780, quoting Klein v. Bower, 421 F.2d at 343. "The test as to when fraud should with reasonable diligence have been discovered is an objective one." Armstrong, 699 F.2d at 88. "[U]nawareness of facts or law, alone, does not justify suspending the operation of the statute [of limitations]." Arneil, 550 F.2d at 781. Rather, the inquiry is "[w]hat facts would alert reasonable person on to the possibility of wrongdoing?" Koke v. Stifel, Nicolaus & Co. Inc., 620 F.2d 1340, 1343 (8th Cir. 1980); see also Arneil, 550 F.2d at 781-81.

Once a respondent raises the statute of limitations as a defense, the burden is on the complainant to establish that he exercised reasonable diligence in seeking to learn facts that would uncover the fraud. E.g., Hoffman v. Estabrook & Co., Inc., 587 F.2d 509, 518 (1st Cir. 1978); Cook v. Avien, 573 F.2d 685, 695 (1st Cir. 1978). Applying these principles, the Commission reasonably concluded that Stone failed to sustain his burden of establishing that he exercised reasonable diligence in order to justify tolling the limitations period for any of his claims.

In his brief, Stone concedes that Mr. Hughes contacted him on or before May 7, 1981, and explained that the loss of Stone's equity was due to FCCB's refusal to allow spread trades, short sales or stop orders. (Pet. Br. 6.)

Because Stone has thus admitted that he had actual knowledge of FCCB's alleged refusal to permit short sales and stop orders as early as May 7, 1981, the record fully supports the Commission's finding that these claims, filed two years and eight months later, were barred by section 14(a) of the Act.

The record also fully supports the Commission's conclusion with respect to Mr. Stone's two misrepresentation claims that Stone was aware of sufficient facts by May 1981 to have put him reasonably on notice of the possibility that Hughes had misrepresented FCCB's discretionary authority and cash withdrawal policies. By May 1981, Stone had dealt with different FCCB account executives before and after Hughes serviced his FCCB account, and was aware that Hughes was the only salesman of the three who represented that FCCB required a power of attorney as a condition of doing business. Moreover, according to Stone (C.R. 1, at 5), Hughes represented that FCCB required the discretionary authority from Stone "so that positions could be closed out rapidly if necessary." Yet, Stone became aware that Hughes' use of this authority went well beyond "closing out positions rapidly" as soon as he recognized that Hughes began "making trades at his discretion and notifying [Stone] after the transactions." (C.R. 1, at 5.)

Finally, the FCCB customer agreement Stone executed contained express language that ran counter to Hughes' alleged representations about a discretionary authority policy. In paragraph 16 of this agreement (C.R. 11, at 63), immediately above Stone's signature, is a clause that reads as follows:

In consideration for your carrying my account, I agree that I will in no way hold First Commodity Corporation of Boston responsible for losses incurred through its trading recommendations or suggestions since I must make all final decisions in my account. (Emphasis added.)

Thus, Stone had notice of: 1) the inconsistent treatment of powers of attorney by the three FCCB account executives; 2) Hughes' departure from the

stated purpose of FCCB's requirement for a power of attorney, and 3) the language in his customer agreement tending to negate a mandatory discretionary authority policy. With this information, a reasonable person in Stone's position would have been alerted to the possibility that Hughes had misrepresented FCCB's policy at least as early as May 1981, and would have made inquiries regarding Hughes' representations. Stone has failed to allege that he made any such inquiries, and thus has failed to show that he exercised reasonable diligence in seeking to discover this cause of action before January 1982. Accordingly, the record fully supports the Commission's conclusion that there was no basis for tolling the statute of limitations for this claim.

Stone argues (Pet. Br. 9) that it was reasonable for him to assume that Kevin Mattoni, his first FCCB account executive, overlooked the power of attorney requirement because Mattoni was inexperienced. The Commission considered and rejected this same argument, reasoning that because, under Stone's version of the facts (C.R. 31, at 296), Mattoni maintained "close contact" with his FCCB supervisor "it is unlikely that the supervisor would have overlooked the power of attorney requirement, and it was unreasonable for Stone to assume otherwise." (C.R. 32, at 6 n.2.) Stone also argues that the treatment he received from his third account executive should not be deemed to have alerted him to the possibility that Hughes misrepresented the policy because the third account executive displayed a "don't care" attitude, was "too busy," and closed Stone's account "after ten days and a few short telephone calls." (Pet. Br. 17.) Yet, Stone has also argued that this salesman did not want to deal with Stone because Stone would not accept his trade recommendations. (Pet. Br. 6.) The very fact that this third salesman was making trade recommendations and did not demand discretionary authority to

make the trades without consulting with Stone put Stone reasonably on notice that Hughes may have lied to him about the power of attorney requirement.

Stone also argues that "[a]dditional promotional material received from FCCB subsequent to the granting of the power of attorney to Mr. Hughes contained power of attorney forms and appeared to support Mr. Hughes in the power of attorney requirement." (Pet. Br. 9.) (Emphasis added.) Stone has not filed any such material in this proceeding, and thus the Commission has never had the opportunity to consider it. In any event, Stone does not allege that this material represented that FCCB had a mandatory discretionary authority policy. Certainly, the mere inclusion of a blank power of attorney form in a mailing with promotional material does not suggest to a reasonable person that he must sign it.

The record also fully supports the Commission's finding that Stone had notice of Hughes' alleged misrepresentation about FCCB's cash withdrawal policy as early as mid-June 1980 as soon as Hughes represented that FCCB would not permit him to withdraw funds from his account without purchasing additional contracts. As the Commission concluded (C.R. 32, at 329), any reasonable person would have suspected that FCCB did not have such a policy: only three weeks earlier, Hughes had permitted Stone to withdraw \$10,000 from his account with no restrictions when Stone had less equity. Moreover, the customer agreement that Stone had signed contained no language conditioning a customer's right to make withdrawals on his agreement to purchase additional contracts. (C.R. 11, at 60-64.) Under these circumstances, a reasonable person would have inquired as early as mid-June 1980 about Hughes' alleged misrepresentation. Stone now alleges for the first time that:

[t]he \$10,000 total withdrawn from the account in May 1980 was issued in two checks, one for \$4,000 and one for \$6,000. At least one of these checks was requested and issued through Hughes' assistant

while he [Hughes] was out of town. When complainant requested additional funds in June, Hughes mentioned that his assistant should not have authorized the withdrawals in May. (Pet. Br. 18.)

This allegation, made outside the record on which the Commission based its decision, is not a proper subject of this appeal. Myron v. Chicoine, 678 F.2d 727, 731-32 (7th Cir. 1982); see also United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); cf. Terkildsen v. Waters, 481 F.2d 201, 204-05 (2d Cir. 1973). Even if considered and found to be true, this allegation would not justify Stone's failure to inquire about the FCCB customer agreement, signed by Stone (C.R. 11, at 60-64), placing no restrictions on withdrawals on equity in excess of margin requirements. And any person who is told that he cannot withdraw his own funds without paying the broker substantially more money would be reasonably alarmed about the possibility that the broker's representation may be false.

Stone has not alleged that, once put on notice that Hughes may have misrepresented FCCB's policies concerning powers of attorney and cash withdrawals, he did anything to discover whether they were untrue. This clearly does not sustain Stone's burden of establishing that he exercised reasonable diligence in discovering the fraud. And, as this Court has recognized, "[t]he statutory [limitations] period does not await appellant's leisurely discovery of the full details of the alleged scheme." Arneil v. Ramsey, 550 F.2d 774, 780 (2d Cir. 1977).

CONCLUSION

Accordingly, the Commission's August 28, 1986 order should be affirmed in all respects.

Respectfully Submitted,

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Dated: December 18, 1986

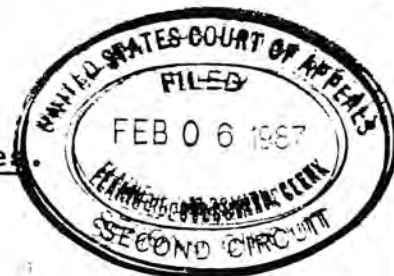
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and eighty-seven.

PRESENT:

HON. J. EDWARD LUMBARD,
HON. LAWRENCE W. PIERCE,
HON. FRANK X. ALTIMARI,

Circuit Judge.



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PHILIP R. STONE,

Petitioner,

-v-

FIRST COMMODITY CORP. OF BOSTON,
HARRY R. HUGHES, and
COMMODITY FUTURES TRADING COMMISSION,

Respondents.

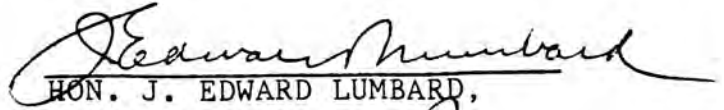
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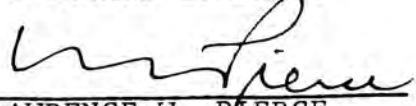
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Appeal by Philip Stone, pro se, from an order of the Commodity Futures Trading Commission ("CFTC"), entered August 28, 1986, which affirmed the June 19, 1985 order of an administrative law judge dismissing petitioner's complaint on statute of limitations grounds. This court has jurisdiction to review CFTC orders under 7 U.S.C. § 18(e).

Appellant filed a reparations complaint on January 25, 1984. Reparation actions are timely under the Commodity Exchange Act if commenced "within two years after the cause of action accrues." 7 U.S.C. § 18(a). In cases such as this one, where fraud is alleged, a cause of action accrues and the statute of limitations begins to run when the complainant discovers or, with the exercise of reasonable diligence, should have discovered the alleged misconduct. Armstrong v. McAlpin, 699 F.2d 79, 87 (2d Cir. 1983). Appellant's argument that the statute of limitations should have been tolled until January 1982 because he did not discover the alleged fraud until that time is without merit. In our view, the record supports the CFTC's finding that appellant knew of or with reasonable diligence should have discovered the alleged misconduct more than two years before he filed his complaint. Accordingly, because appellant's cause of action accrued before January 25, 1982, the CFTC properly affirmed the dismissal of the complaint as time-barred.

Affirmed.

Stone v. First Commod. Corp. of Boston
Docket No. 86-4136
Page 2


HON. J. EDWARD LUMBARD,


HON. LAWRENCE W. PIERCE,


HON. FRANK X. ALTIMARI,

Circuit Judges.

N.B. Since this statement does not
constitute a formal opinion of this
court and it is not uniformly
available to all parties, it shall
not be reported, cited or otherwise
used in unrelated cases before this
or any other court.