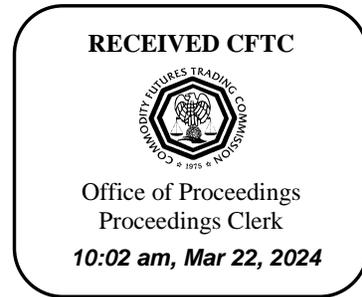




U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings



Himanshu Shah,

Complainant,

v.

GAIN Capital Group, LLC,
d/b/a Forex.com,

Respondent.

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CFTC Docket No. 23-R001
Served electronically

**INITIAL DECISION AND
ORDER GRANTING RESPONDENT’S
MOTION TO DISMISS AND
DISMISSING THE COMPLAINT**

Before: Kavita Kumar Puri, Administrative Judge
Commodity Futures Trading Commission
Washington, D.C.

Appearances: Himanshu Shah, *self-represented litigant*
Farmers Branch, TX
For Complainant

Charles Camack, Esq.
Legal Counsel
Warren, NJ
For Respondent

On December 28, 2022, Complainant Himanshu Shah filed his Complaint and requested a Formal Proceeding. Shah alleges that Respondent Gain Capital Group, LLC, d/b/a Forex.com (Gain Capital) wrongfully liquidated the open

USD/JPY position in his self-directed forex account, resulting in \$95,686.50 in trading losses and an additional \$45,000 in profits Shah expected to earn. On March 20, 2023, Gain Capital filed its Answer and Additional Defenses to The Statement of Claim (Answer). The Answer claims that Shah's liquidation was legal under the Customer Agreement and pursuant to Commission law because Shah's account was under-margined at the time of liquidation.

On June 23, 2023, Gain Capital filed a Motion to Dismiss, restating the arguments set forth in its Answer. Shah filed his Opposition to Respondent's Motion to Dismiss on August 15, 2023, arguing that he did not consent to the liquidation, which should have been limited to the number of contracts required to cover the margin deficiency. Gain Capital filed its Response in Support of its Motion to Dismiss on August 30, 2023.

For the reasons discussed below, Gain Capital's Motion to Dismiss is **granted** and the Complaint is **dismissed**.

I. Relevant Procedural History

1. Shah filed his Complaint on December 28, 2022.
2. Gain Capital timely filed its Answer on March 20, 2023.
3. On March 24, 2023, Shah filed a supplement to the Complaint titled Additional Information Related to the Claim. In his supplement, Shah responded to and commented on responses in the Answer, and included additional information and screenshots in support of his claim.

4. Gain Capital filed its Objection to Amendments and Supplemental Pleadings on March 31, 2023 pursuant to Commission Rule 12.104, objecting because Shah failed to obtain its consent prior to his filing.¹

5. This Office sent the parties a letter on May 2, 2023 informing them that Shah’s filing and Gain Capital’s objection were not required at that point in the proceeding, and that those documents should be directed to the presiding officer assigned to this matter. *See* Pugh Letter to Parties (May 2, 2023).

6. This case was forwarded to my docket on May 3, 2023.

7. Shah sent this Office an email on May 7, 2023, requesting to file a supplement to his Complaint to provide “additional [i]nformation [r]elated to [his] [c]laim”. *See* Shah Email to OP (May 7, 2023).

8. By way of email, I granted Shah’s request and directed him to file his supplement and title it “Complaint Supplement.” *See* OP Email to Parties (May 8, 2023).

9. On May 10, 2023, Shah filed his Complaint Supplement, and his Request For Interrogatories.

10. Gain Capital filed its Objection to Complainant’s Supplement and alleged that Shah’s Complaint Supplement failed to plead “any new facts related to

¹ Gain Capital cites the incorrect rule in its objection. Commission rule 12.104 governs Voluntary Proceedings. This case is a Formal Proceeding, and Commission Rule 12.307 dictates the proper procedure for amended and supplemental pleadings. Shah’s request to file a supplement to his Complaint was proper **after** this case was forwarded to my docket pursuant to Commission Rule 12.307(b).

transactions, occurrences, or events that happened since the date of the pleadings sought to be supplemented. Resp. Objection to Compl. Supp. at 1-2. (Jun. 7, 2023).

11. On June 23, 2023, Gain Capital filed a Motion to Dismiss, and a Motion to Stay Discovery pending my decision on its Motion to Dismiss.

12. Shah filed a document on June 30, 2023, which I construed as a general objection to Respondent's Motion to Dismiss, but that submission did not include a detailed response or opposition to the Motion.

13. On July 3, 2023, Gain Capital filed its Response to Interrogatories.

14. On August 2, 2023, I granted Gain Capital's Motion to Stay and stayed the case pending my decision on its Motion to Dismiss. In that same Order, I set forth a briefing schedule for the Motion to Dismiss. *See Order Staying Proceedings* at 1 (Aug. 2, 2023).

15. On August 15, 2023, Shah filed his Opposition to the Motion to Dismiss, and included an objection to Gain Capital's interrogatory responses.

16. Gain Capital filed its reply on August 30, 2023.

17. Gain Capital's Motion to Dismiss has been fully briefed, and this case is ready for disposition.

II. Factual Findings

A. *The Parties*

1. Complainant Himanshu Shah is a resident of Farmers Branch, TX. Shah opened the account at issue, account *****000 (Account), with Gain Capital on

November 11, 2020.² Motion to Dismiss at 2. The Account was self-directed and Shah used it to trade spot forex. *Id.*

2. Gain Capital Group, LLC, d/b/a Forex.com (Gain Capital) has been registered with the Commission as a Futures Commission Merchant (FCM) and Retail Foreign Exchange Dealer (RFED) since 2001. *See* NFA Basic research available at <https://www.nfa.futures.org/BasicNet/basic-profile.aspx?nfaid=8xWTPnTVRTw%3D>. Gain Capital was Shah's RFED, and liquidated his open USD/JPY position on October 21, 2022, when Shah's account fell below 120% of the required margin. Motion to Dismiss at 5.

B. *The Customer Agreement And Trade At Issue*

3. Shah opened a self-directed forex account with Gain Capital on November 11, 2020. Motion to Dismiss at 2.

4. During the account opening process, Shah was given risk disclosure documents and the Customer Agreement, all of which he signed. *Id., see also* MTD Ex. A.

5. Paragraph 9 of the Customer Agreement indicated:

In the event of: (a) an Event of Default; **(b) insufficient Margin**, or FOREX.com's determination that any Collateral deposited to protect Customer's Account is inadequate, regardless of current market quotations, to secure Customer's Account; or (c) any other circumstances or developments that FOREX.com, in its sole discretion, deems appropriate for its protection, **FOREX.com may, in its sole discretion, take one or more, or any portion, of the following actions:** (1) satisfy any obligation Customer may have to FOREX.com (either directly or by way of guarantee or suretyship) out of any of Customer's

² The original account number was assigned an eight-digit numerical identifier, but I am obfuscating the original account number and renaming it "Account."

funds or property in the custody or control of FOREX.com; **(2) sell or purchase any or all Contracts and any securities or other property held or carried for Customer**; and (3) cancel any or all outstanding Orders or Contracts or other transactions or commitments made by or on behalf of Customer. **Any of the above actions may be taken without demand for Margin or additional Margin, without prior notice of sale or purchase or other notice to Customer**, Customer's legal representatives, heirs, executor, administrator, trustee, legatee, successors or assigns and regardless of whether the ownership interest is held individually or jointly with others.

MTD Ex. A (Customer Agreement ¶ 9 (emphasis added)).

6. Additionally, in the FAQ section on its website Gain Capital publishes the procedures taken to liquidate positions should a customer's account become under-margined:

If at any point, the equity available drops below 100% of the margin required you will be subject to auto liquidation of the position incurring the largest loss. The liquidation process for FOREX.com proprietary platforms is as follows: the net aggregated open position with the greatest unrealized loss is closed first, followed by the next largest losing net position and so on, until the maintenance margin requirement is satisfied or exceeded. **Depending on the size and unrealized P&L of the open position, all open positions may be liquidated in order to meet the margin requirement.**

MTD Exhibit B (emphasis added).

7. From January to March 2022, Shah placed several trades purchasing short positions of the USD/JPY forex pair and accumulated a net short position of 419,000 USD/JPY. Motion to Dismiss at 4; *see generally* Compl.; Compl. Supp.; and Opposition to Mot. to Dismiss.

8. Over the course of 14 days—between October 7 through October 20, 2022—Gain Capital sent Shah nine “Account Margin and Liquidation reminder emails” informing him that if his “account equity fell below 100% of the margin

requirement, his trades may be liquidated, and any losses would be realized.” Motion to Dismiss at 4; MTD Exs. C, D, E, F, G, H, I, J, and K (Nine Account Margin and Liquidation Emails from Gain Capital to Shah).

9. From October 7 through October 20, 2022, Shah opened and closed several USD/JPY positions, among others, in an attempt to manage his margin. Compl. Supp. at 2-5.

10. On October 21, 2022 at 4:15 am ET, Shah’s Account fell below 120% of the required margin threshold and Gain Capital liquidated his entire USD/JPY position. *See* Compl. at 1-2; Answer at 2; Motion to Dismiss at 4-5.

11. The liquidation of Shah’s Account resulted in a realized loss of \$95,686.50. *Id.*

12. Shah reached out to Gain Capital nearly two months after the October 21 liquidation—on December 6, 2022—to dispute it. Motion to Dismiss at 5.

13. Unable to resolve his claims directly with Gain Capital, Shah brought his Complaint here.

III. Legal Discussion

A. Legal Standard

This Office may grant a motion to dismiss when “none of the matters alleged in the complaint state a claim that is cognizable in reparations.” 17 C.F.R. § 12.308(c)(1)(i). Claims that are cognizable in reparations are defined by statute as those that involve violations of the Commodity Exchange Act (CEA) or its regulations. CEA § 14(a)(1), 7 U.S.C. § 18(a)(1). Further, those violations of the

CEA or its rules must have “proximately caused” “actual damages” in order to be justiciable here.

Motions to dismiss test whether the claims made in a complaint are sufficiently adequate to advance in the adjudication process. *Saba v. Greco*, CFTC No. 09-R052, 2010 WL 4521449 (Nov. 9, 2010). When considering motions to dismiss, all well-pleaded factual allegations are taken as true, but “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to defeat dismissal.” *Id.* at *1 n.26. Dismissal is also appropriate when a complaint pleads facts or relies on documents that would relieve a respondent of liability for the allegations. *See generally Hedayet v. GAIN Cap. Corp.*, CFTC No. 09-R044, 2011 WL 17927, at *1 (Jan. 3, 2011).

B. Discussion

Shah contends that on October 21, 2022, at 4:15 am ET, Gain Capital wrongfully liquidated his forex account by closing his net open position of 419,000 USD/JPY “without his prior consent/authorization.” Compl. at 1; *see also* Opp. to Motion to Dismiss at 1-2. Additionally, Shah claims that instead of closing “smaller lot positions” Gain “closed off the whole total lot of [USD/JPY] pair of 419000.” *Id.* Gain Capital argues that Shah’s Complaint should be dismissed because the Customer Agreement allowed Gain Capital to liquidate Shah’s entire USD/JPY position, and the liquidation does not constitute a violation of the Commodity Exchange Act (CEA). Motion to Dismiss at 1-2; *see also* Answer at 6-8. Having

carefully reviewed the parties' positions and the applicable law, I find that Shah's contentions, even assuming they are true, cannot sustain a claim under the law.

The legal landscape with regard to liquidating under-margined accounts is clear. The Commission has long held that a broker may liquidate under-margined accounts pursuant to customer agreements to protect its own financial interest and that of its other customers. *Lee v. Lind-Waldock & Co.*, CFTC Dkt. No. 99-R018, 2000 WL 862615 at *4 (CFTC Jun. 26, 2017); *Baker v. Edward D. Jones & Co.*, CFTC Dkt. No. R 76-4, 1981WL 26078 at *3-4 (CFTC Jan. 27, 1981). That authority of brokers is so necessary to the functioning of these fast-moving markets that it "can supersede any duties the [broker] owes to the under-margined customer. *Lee v. Lind-Waldock & Co.*, 2000 WL 862615 at *5.

Shah's only recourse to prevail in this case—where it is undisputed that his account was under-margined—is to prove by a preponderance of the evidence that Gain Capital either misled him about its margin policy or that it acted in bad faith. *Baker v. Edward D. Jones & Co.*, 1981WL 26078 at *4. He has failed to prove either.

First, Shah was notified of Gain Capital's margin policy on several different occasions, including when: (1) he received, agreed to, and signed the Customer Agreement in November 2020; (2) Gain Capital published its margin policy to the FAQ section of its website; and (3) he received nine emails over a 14-day period alerting him that his account was 100% below the margin requirement and he must take action or his account would be liquidated.

Second, with regard to bad faith Shah argues that Gain Capital’s liquidation was done (1) without his consent, and (2) not in a manner that would have preserved a portion of his account. As for the consent issue, Shah plainly signed the Customer Agreement, which clearly set forth the applicable margin policies. As for Shah’s second contention that Gain Capital should have liquidated only the positions necessary to cover margin, there is “no Commission authority establishing that it violates the CEA or Commission regulations if [an RFED] foregoes less drastic alternatives and completely liquidates a retail forex customer’s account in the event of a margin default, particularly where a contractual provision authorizes a total liquidation without notice.” *Laube v. Gain Capital Group, LLC*, CFTC Dkt. No. 13-R006, 2017 WL 132927 at *7 (Jan. 6, 2017 CFTC); *see also Capital Options Inv. v. Goldberg Bros. Commodities*, 958 F.2d 186 (7th Cir. 1992) (holding FCM does not breach duty of good faith by liquidating all open positions, instead of a less drastic alternative, when parties have contractually agreed to total liquidation to meet margin deficit).

Importantly, the Gain Capital Customer Agreement allowed for the total liquidation of a customer’s under-margined account. *See* MTD Ex. A (Customer Agreement ¶ 9) (“In the event of: . . . (b) insufficient Margin [Gain Capital] may. . . (2) sell or purchase any or all Contracts. . . without demand for Margin or additional Margin, without prior notice of sale or purchase. . .”). And the Commission has summarily affirmed cases in which a broker has completely liquidated a customer’s

positions under an agreement that authorizes total liquidation without any notice when that customer's account has become under-margined.³

The applicable law forecloses Shah's contentions. But in addition, Gain Capital gave Shah notice over a 14-day period before liquidating his under-margined account, despite the fact that Gain Capital was entitled to liquidate the entirety of his position without providing Shah any notice or time to cure the deficiency. Shah has thus failed to prove that Gain Capital misled him about its margin policy, or that Gain Capital acted in bad faith concerning its margin policy.⁴ Because this is true, Shah's objection to Gain Capital's interrogatories (an objection I construe as a Motion to Compel) is denied as moot. There are no facts that can substantiate the claims here, which are foreclosed by law.

³ See, e.g., *Cost v. Goscenski*, CFTC Dkt. No. 07-R059, 2009 WL 613634 (CFTC Mar. 5, 2009) (emphasis added), *summarily aff'd*, 2013 WL 1398995 (CFTC Apr. 4, 2013); *Glass v. Rosenthal Collis Grp.*, CFTC Dkt. No. 98-R124, 1998 WL 770585 (CFTC Nov. 5, 1998), *summarily aff'd*, 1999 WL 343406 (CFTC May 28, 1999). Federal courts have recognized the same. *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 578 (8th Cir. 1975) (finding it enforceable for broker to liquidate customer's account without notice when account became under-margined and liquidation occurred pursuant to contractual agreement).

⁴ Shah tries to overcome Gain Capital's Motion to Dismiss by arguing that Gain Capital traded against their customers' interests because the price moved in Shah's favor after his account's liquidation. Opp. to Motion to Dismiss at 1. The fact that the price moved in Shah's favor after the liquidation has no probative value. First, these markets are off-exchange and fast-moving, and a certain amount of price volatility is to be expected. Second, Gain Capital could have liquidated Shah's account at any point during a 14-day period after he became under-margined. There is nothing in the record or allegations to suggest that the favorable price movement was something more than a serendipitous (or unfortunate) function of timing. Finally, Shah was aware that Gain Capital acted as his counterparty in these off-exchange contracts. Gain Capital Ex. A (Customer Agreement at 12-13). This conclusory statement is insufficiently robust to allow the claim against Gain Capital to proceed.

CONCLUSION

For the reasons discussed throughout this Initial Decision and Order, I am GRANTING Respondent's Motion to Dismiss, and DISMISSING the Complaint.

Dated: March 22, 2024

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Administrative Judge