

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

RECEIVED
C.F.T.C.
FEB 12 A 11:33
OFFICE OF PROCEEDINGS
CLERK

C.I.M. INVESTMENTS

v.

HAMMER TRADING, INC. LFG, L.L.C.,
STEPHEN GREGORY SCHULER, TRADE
CENTER, INC. and MICHAEL STEVEN
WALKER

CFTC Docket No. 98-R034

OPINION AND ORDER

Complainant C.I.M. Investments, Inc. ("CIM") appeals from an April 23, 1998 order of an Administrative Law Judge ("ALJ") dismissing this case because he found that the complainant was not a resident of the United States and neither had posted the bond required of nonresident complainants to gain access to the reparations forum nor adequately had demonstrated that the bond requirement did not apply to it. C.I.M. Investments, Inc. v. Hammer Trading, Inc., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,308 (ALJ Apr. 23, 1998). CIM makes three arguments: (1) that the evidence submitted establishes that it is a United States resident for the purposes of Commission Rule 12.13(b)(4); (2) that CIM's claim that it is a United States resident is not defeated by the fact that CIM previously claimed that it is exempt from United States taxes because it is not a United States resident; and (3) that waiver of the bond requirement is supported sufficiently by an affidavit from a solicitor from the foreign country in question stating that under most circumstances the foreign country does not

require a United States citizen to furnish a bond in order to file a complaint against a citizen of that country.

The determination by the ALJ below that CIM was not a resident of the United States is not supported by the record. Thus, we vacate the ALJ's order dismissing this case and remand for further proceedings consistent with this order.

CIM filed a reparation complaint against the respondents alleging that respondents violated Section 4b of the Commodity Exchange Act ("CEA") by withholding CIM's profits from an order it placed on August 15, 1997. The Office of Proceedings ("Proceedings") informed CIM that, as it was organized under the laws of a foreign country, CIM was required to prove that it was a United States resident, furnish a non-resident bond, or provide sufficient proof that a bond should be waived, under the criteria set out in Rendita Global Investment, A.G. v. Mercate Clearing, Inc., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,958 (CFTC Feb. 20, 1997). CIM responded that the nonresident bond requirement did not apply to it because, although it was organized under the laws of Nevis, West Indies, it is a resident of the United States.¹ Proceedings notified CIM that it would forward the complaint without requiring a bond based "solely on the evidence [CIM] ha[d] offered regarding CIM's alleged residency in the United States."

¹ Alternatively, CIM contended that the bond requirement should be waived because Nevis permits a United States resident to file a complaint against a Nevis citizen without furnishing a bond.

The respondents moved for reconsideration of Proceedings' determination to forward the complaint. The respondents explained that CIM repeatedly had represented to them that it was a foreign corporation organized pursuant to the laws of Nevis.

Proceedings granted respondents' request for reconsideration of its determination to forward the complaint and determined that CIM had not carried its burden to establish U.S. residency.² Thus, Proceedings returned the complaint to CIM without further processing and advised CIM that it could resubmit the complaint if it filed the required bond.

CIM requested that Proceedings reconsider its decision not to forward the complaint. CIM argued that its claims of non-residency and presence in the United States in its account opening documents were true when made, but because "subsequently all the corporate activities occurred at a fixed place of business in the U.S.A.," its prior claims were irrelevant. Proceedings vacated its dismissal of the complaint and denied respondents' request for reconsideration, explaining that the residency and bond waiver issues should be determined by an ALJ.

Proceedings forwarded this case to the ALJ, who dismissed the case because he found that CIM was not a resident of the United States.³ C.I.M. Investments, ¶

² Concerning CIM's claim that it met the requirements for a bond waiver, Proceedings stated that complainant's evidence concerning waiver of the bond requirement was insufficient to justify a waiver.

³ The ALJ also found that complainant's evidence concerning waiver of the bond requirement was insufficient to establish that Nevis does not require United States citizens to post a bond in order to file a complaint there. C.I.M. Investments, ¶ 27,308 at 46,391.

27,308 at 46,391. This appeal followed.

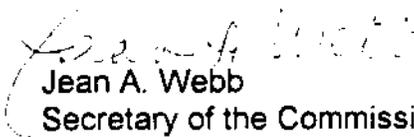
Section 14(c) of the CEA, 7 U.S.C. 18(c) (1994), and Commission Rule 12.13(b)(4), 17 C.F.R. § 12.13(b)(4) (1997), require that, if a reparation complaint is filed by a nonresident of the United States, the complaint must be accompanied either by a bond in double the amount of the claim or by a written request that the bond requirement be waived because the complainant is a resident of a country which permits the filing of a complaint by a United States resident without furnishing a bond. We have adopted the "total activity" test to determine corporate residence. Rendita, ¶ 26,958 at 44,648. Under this test, a corporation's principal place of business, and thus its residence, is determined by considering its business activities, including the location of the corporation's executive headquarters, administrative offices and employees. Id. (citing Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 914-15 (10th Cir. 1993)).

The evidence in this case establishes that CIM conducted its business primarily in the United States and that, therefore, CIM is a United States resident. The affidavit of CIM's president, Carlos Menendez ("Menendez") stated that: (1) neither he nor the co-owner of CIM, his sister Monica Menendez, had ever been in Nevis; (2) CIM's contact with Nevis was limited to a letter box through which all mail was forwarded, unopened, to CIM's office in Miami and a bank account through which all transactions were handled by wire transfer; (3) CIM records are kept in Miami, Florida; (4) all CIM business is conducted from Florida; (5) no CIM activities have originated from or occurred in Nevis; (6) although two Nevis residents originally were CIM directors, they

resigned when CIM opened a commodity trading account and began to do business; and (7) all CIM trade orders have been placed by telephone from Miami.⁴ While CIM's account opening documents stated that CIM was not a United States resident and did not have an office in or intend to conduct business in the United States, CIM in fact conducted its business primarily in the United States. Because we hold that CIM is a United States resident and therefore is not required to file a bond under CEA § 14(c) and Commission Rule 12.13(b)(4), we need not consider whether CIM has carried its burden to establish that a waiver of such requirement should be granted. Accordingly, we vacate the ALJ's order dismissing this case and remand for further proceedings consistent with this order.

IT IS SO ORDERED.

By the Commission (Chairperson BORN and Commissioners TULL, HOLUM, SPEARS and NEWSOME).


Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 12, 1999

⁴ A July 1997 phone bill was attached to the affidavit in support of this assertion.