

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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MARIA ANGELICA BACLINI  
and HECTOR HUGO SANDIANO

CFTC Docket No. 07-R036

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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JORGE NELSON BATALLES

CFTC Docket No. 07-R037

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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JUAN BAUTISTA ALBERTENGO

CFTC Docket No. 07-R038

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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GERARDO JOSE TEDESCHI

CFTC Docket No. 07-R039

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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NORA ALICIA CANTONI and  
DAMIAN MARTINUCCI

CFTC Docket No. 07-R040

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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EDGARDO MAXIMO GEMINELLI

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

CFTC Docket No. 07-R041

PEDRO and MARIA MOGETTA

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

CFTC Docket No. 07-R042

GUSTAVO REMONDINO  
and CHRISTINE WAGNER

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

CFTC Docket No. 07-R043

MARIA and GABRIEL LAZZARINI

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

CFTC Docket No. 07-R044

GUILLERMO DE LA TORRE  
and ADRIANA SEBASTIANELLI

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

CFTC Docket No. 07-R045

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NORA and GEORGINA REMONDINO

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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DANIELA CORNET  
and JOSE LUIS GINTRINI

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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ALBERTO RAUL PESAOLA

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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CARLOS MARCELO FARRUGGIA

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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RAQUEL NORA ROTTI  
and ANTONIO GUSTAVO TRILLO

v.

CITIGROUP GLOBAL MARKETS, INC.  
and DALILA COSTA-LEROY

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CFTC Docket No. 07-R046

CFTC Docket No. 07-R047

CFTC Docket No. 07-R048

CFTC Docket No. 07-R049

CFTC Docket No. 07-R050

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## ORDER TO CONSOLIDATE

Complainants in the above-captioned related reparations cases filed a joint motion to consolidate their cases before a single Administrative Law Judge (“ALJ” or “Judge”). The cases were filed with the Commission at the same time and concern the same questions of law and fact, and were brought against the same respondents. In the interest of judicial economy and the absence of any showing that a party would be prejudiced or suffer significant delay, complainants’ motion is granted. The complainants’ October 21, 2008 motion for clarification should be addressed by the presiding ALJ.

### Background

The cases had their origin in a single complaint filed on September 27, 2006 by Carlos Ridao (“Ridao”), acting as attorney-in-fact for Argentine investors to whom he provided trading advice. The complaint charged account broker Dalila Costa Leroy (“Costa-Leroy”) and her employer, Citigroup Global Markets, Inc. (“Citigroup”), with churning, unauthorized trading and fraudulent reporting. *Ridao v. Citigroup*, CFTC Docket No. 06-R060 (“*Ridao*”). Ridao sued on behalf of the owners of 15 accounts; eight accounts were owned by individuals and seven were owned jointly by two persons. The case was forwarded to Judge Levine for disposition on November 30, 2006. On December 8, 2006, the ALJ issued a Show Cause Order questioning whether Ridao was a real party in interest with standing to sue, and asking him to demonstrate why he should be allowed to represent the entire group of accountholders. 2006 WL 3716827 (CFTC Dec. 8, 2006). In response to the Show Cause Order, Ridao asserted that he was a financial advisor to the accountholders and directed the accounts’ trading when the losses in question occurred. The ALJ found that Ridao lacked standing to bring the claims on behalf of

the account owners and dismissed the case without prejudice. *Ridao, supra*, Order of Dismissal, 2007 WL 88093 at \*2 (CFTC Jan. 12, 2007).

On June 8, 2007, the investors that Ridao advised filed 15 individual complaints with the Commission. The complainants all were represented by the same attorney who had represented Ridao when he filed on the account owners' behalf. The complainants also filed motions to waive the bond requirement of Section 14(c) of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 18(c). Respondents answered on September 11, 2007. On October 11, seven of the cases were forwarded for disposition to Judge Levine<sup>1</sup> and six to Judge Painter<sup>2</sup> to be heard as formal proceedings under Subpart E of the Commission's Rules Relating to Reparation Proceedings, 17 C.F.R. Part 12.<sup>3</sup> The cases were divided between the ALJs pursuant to the Office of Proceedings's practice of rotating case assignments. Claimants in two cases where damages were sought in amounts less than \$30,000 were assigned to Judgment Officer McGuire for summary disposition under Subpart D.<sup>4</sup>

Complainants whose cases were forwarded to Judge Levine promptly filed motions asking him to recuse himself, alleging that statements he made in the Show Cause Order and Order of Dismissal issued in *Ridao* showed bias against them and their claims. The ALJ denied the motions on October 19, 2007 and complainants sought interlocutory review of the ruling. While the interlocutory appeals were pending before the Commission, all 15 cases went forward

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<sup>1</sup> CFTC Docket Nos. 07-R036, 07-R037, 07-R038, 07-R039, 07-R041, 07-R042 and 07-R043.

<sup>2</sup> CFTC Docket Nos. 07-R044, 07-R045, 07-R046, 07-R048, 07-R049 and 07-R050.

<sup>3</sup> See Regulation 12.26(b)-(c) (amount of damages claimed determines the nature of the proceeding applicable to the case).

<sup>4</sup> *Id.* Those cases are CFTC Docket Nos. 07-R040 and 07-R047.

before the three presiding officers. Complainants and respondents filed substantially identical motions and responsive pleadings and discovery documents in each case.

On March 4, 2008, Judge Painter issued an order denying complainants' motion for summary disposition and established a hearing date of May 5, 2008. On March 11, 2008, the complainants whose cases were assigned to Judge Painter filed motions to consolidate. On the same day, Judge Levine issued a *sua sponte* Show Cause Order questioning whether the cases on his docket were properly before the Commission because the complainants had not filed the bond required of non-U.S. residents seeking reparations or demonstrated to his satisfaction that they were entitled to have the bond waived. CEA Section 14(c) requires a complainant who does not reside in the United States to post a bond as a condition of access to the reparation forum, unless the complainant's country of residence "permits the filing of a complaint by a resident of the United States without the furnishing of a bond." The complainants in all 15 cases asked to have the bond waived when they filed their complaints, relying on an opinion of Argentine counsel,<sup>5</sup> but Judge Levine found the waiver arguments "unpersuasive." March 11 Show Cause Order at 7.<sup>6</sup> He ordered complainants to show cause why their complaints should not be dismissed without prejudice. *Id.* at 11.

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<sup>5</sup> Complainants asserted that (1) under Argentina's constitution and federal procedural law, the status of foreigner or nonresident does not subject a prospective litigant to a bond requirement before gaining access to Argentina's courts; and (2) a bond requirement for United States citizens is prohibited by a bilateral treaty between the United States and Argentina in force since 1853.

<sup>6</sup> The ALJ held that arguments based on Argentina's constitution and federal procedural law "left open the possibility that United States residents may be required to post bond for some reason other than (or in addition to) their domicile." March 11 Show Cause Order at 7. He held that the reciprocity provisions of the Treaty of Friendship, Commerce and Navigation between the United States and the Argentine Confederation, 10 Stat. 1005, July 27, 1853 ("1853 Treaty") apply only to United States citizens, while Section 14(c) states that reciprocity provisions apply to United States "residents." *Id.* at 10. The ALJ held also that the opinion confined itself to federal law, and failed to address Argentina's "provincial law." *Id.* at 7.

Respondents promptly filed motions on March 14, 2008 in the cases assigned to Judgment Officer McGuire and Judge Painter, challenging the waiver claims made by the complainants in those cases based on Judge Levine's March 11 Show Cause Order. Judge Painter issued an order on March 18, 2008 finding complainants' arguments regarding posting bonds persuasive and held that they were entitled to a waiver. He also consolidated his six assigned cases to be heard as one.

Thereafter, on March 31, 2008, complainants in all cases submitted a joint response to Judge Levine's March 11 Show Cause Order, and motions seeking permission to file an amicus curiae comment by an Argentine expert supporting their waiver claims.<sup>7</sup> Complainants also filed an Emergency Motion to the Commission to consolidate all cases for trial before Judge Painter.

By delegated authority, we stayed proceedings in all cases to consider the motion to consolidate, the impact of the non-resident bond issue on all of the proceedings, and the interlocutory motion to disqualify Judge Levine. 2008 WL 1754018 (CFTC Apr. 14, 2008).<sup>8</sup>

### **Discussion**

The Commission's reparation rules are silent on whether cases may be consolidated after filing. Notwithstanding this silence, the Commission has accepted (though not specifically endorsed) the practice of consolidation.<sup>9</sup> In instances where the rules are silent, the Commission

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<sup>7</sup> On April 1, 2008, Judge Levine granted the motion and, at complainants' request, set a date of April 22, 2008 for submission of the amicus brief.

<sup>8</sup> We note that while the motion states at several points that consolidation of "all" 15 cases is desired, it asks specifically at one point only that the cases assigned to the two ALJs be consolidated, with no mention of the cases before the Judgment Officer. Motion at 2.

<sup>9</sup> See, e.g., *Ferrugia v. Tempus, Inc.*, CFTC Docket No. 91-R27, 1991 WL 88197 (CFTC Apr. 25, 1991) (citing *Sharp v. FGL Commodity Services, Inc., et al.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) 24,970 (Dec. 12, 1990)); see also *Myers v. Saul Stone & Co.*, 1992 WL 201159 (CFTC Aug. 11, 1992) (granting respondents' motion to consolidate the appeals).

from time to time seeks guidance from federal statutes and rules of procedure,<sup>10</sup> in this instance from Fed. R. Civ. P. 42(a).

Under Rule 42(a), if actions before a court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay. “Consolidation” as a term of legal procedure is generally used in three different contexts:

(1) when several actions are stayed while one is tried, and the judgment in the case tried will be conclusive as to the others; (2) when several actions are combined and lose their separate identities, becoming a single action with a single judgment entered; and (3) when several actions are tried together, but each suit retains its separate character, with separate judgments entered.

*Schnabel v. Lui*, 302 F.3d 1023, 1035 (9th Cir. 2002) (citing 9 Wright & Miller, Fed. Practice & Procedure: Civil 2d § 2382 (1995)), *quoted with approval* in *Fortunet, Inc. v. Melange Computer Services*, 2007 WL 173863 (D. Nev. Jan. 17, 2007).

In this case, consolidation in the third context is sought. While the same respondents have been sued in each case, the complainants are different in each case and each seeks a separate judgment with respect to losses suffered in a particular account.

A court has broad discretion to order consolidation under Rule 42(a) when there is commonality of factual or legal issues. *See, e.g., In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987). Consolidation under the rule is favored where it will eliminate the risk of inconsistent adjudications of common factual and legal issues, reduce the burden on all parties, and substantially reduce the expense to all concerned of the single-trial, multiple trial alternatives. *See Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990); *see also*

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<sup>10</sup> *Loftin v. E.F. Hutton & Co.*, [1990-1992 Transfer Binder] Comm. Law. Rep. (CCH) ¶ 24854 at 37,025-26 (CFTC June 6, 1990).

*Fisher v. Donbar Devel. Corp.*, 42 F.R.D. 655 (E.D.N.Y. 1967) (when common question of law or fact exist, consolidation is favored as a matter of convenience and economy).

Consolidation is appropriate so long as any confusion or prejudice does not outweigh efficiency concerns. See *Elite Limousine Plus, Inc. v. Int'l Ass'n of Machinists*, No. 05 Civ. 0010, 2006 WL 2434473 (S.D.N.Y. Aug. 22, 2006); *Jamroz v. Blum*, 509 F. Supp. 953, 956 (N.D.N.Y. 1981). However, consolidation is improper notwithstanding the existence of common questions of law or fact among separate actions if it aligns parties having conflicting positions. *State Mut. Life Assur. Co. v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202 (S.D.N.Y. 1969). Lastly, there is no time limit on when a matter may be consolidated. See *Magnavox Co. v. APF Electronics, Inc.*, 496 F. Supp. 29, 32 (N.D. Ill. 1980) (Rule 42(a) contemplates not only consolidation for trial but for purposes of particular segments of litigation, including pre-trial proceedings) (citing *Fritsch v. Distr. Council No. 9*, 335 F. Supp. 854, 856 (S.D.N.Y. 1971) (delay in seeking consolidation does not warrant the exercise of the court's discretion to deny consolidation where the delay is accounted for and has not been excessive)). The decision to consolidate is left to the discretion of the court and should be upheld unless there has been a clear abuse of discretion. *EEOC v. HBE Corp.*, 135 F.3d 543, 550 (8th Cir. 1998) (citing *EPA v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1402 (8th Cir. 1990)).

Here, there are no significant factual differences among the allegations of wrongdoing in the 15 complaints. These cases all allege that on December 12, 2005, respondent Costa-Leroy, who was the account executive for all of these accounts, allocated to complainants' accounts losing trades executed for other accounts without complainants' knowledge or authorization. Because the cases allege that the transactions adversely affecting them were executed on the same day by the same person, there are common questions of law and fact.

As these cases have proceeded, the parties' pleadings on the merits issues have been identical, and substantially similar pleadings have been filed in all cases. *Sua sponte* discovery orders issued by the Judgment Officer have resulted in more specific claims by all complainants as to precisely how they were injured and led all complainants to move to amend their pleadings to add an additional respondent.<sup>11</sup> Consolidation is clearly warranted in this case because the complainants do not have conflicting positions. In these circumstances, there is little likelihood that consolidation would cause confusion or prejudice.

Significantly, considerable time and resources will be saved by consolidating the cases at this time. Neither Judge Levine nor Judgment Officer McGuire addressed the merits of the bond issue or scheduled hearings before we stayed these cases. However, Judge Painter has already ruled in complainants' favor on the nonresident bond issue, scheduled a hearing and consolidated the claims before him.<sup>12</sup> Consolidation now will increase judicial economy as the cases that are closest to resolution will govern the pace for the rest and free up judicial resources for other matters.<sup>13</sup> Moreover, consolidation at this time will ensure consistent adjudication. Importantly, respondents do not object to complainants' motion to consolidate and it will be economically beneficial and non-prejudicial for them to defend one consolidated case based on the same factual and legal questions before a single trier of fact.

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<sup>11</sup> These motions were pending before all presiding officers when these cases were stayed.

<sup>12</sup> Judge Painter's decision to consolidate is in accord with *Miller v. United States Postal Service*, 729 F.2d 1033, 1036 (5<sup>th</sup> Cir. 1984), in which the court stated "the proper solution to the problems created by the existence of two or more cases involving the same parties and issues, simultaneously pending in the same court would be to consolidate them under Rule 42(a)."

<sup>13</sup> *Cf. Scott v. Newsday, Inc.*, 1989 WL 20598 (E.D.N.Y. Mar. 3, 1989) (unpublished) (denying a joint motion to consolidate where the actions did not share common questions of law and consolidation would cause confusion and delay because discovery was complete and a trial date had been set in one case, but discovery had not been started in the other).

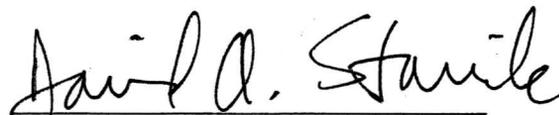
In sum, the circumstances of these cases warrant consolidation. *In re Fuwei Films Securities Litigation*, 247 F.R.D. 432, 433 (S.D.N.Y. 2008) (consolidating two securities class action suits upon the motion of plaintiffs in both actions); *Kaplan v. Gelfond*, 240 F.R.D. 88, 91 (S.D.N.Y. 2007) (holding that minor differences between cases do not outweigh the interests of judicial economy in consolidation if the cases present sufficiently common questions of law and fact); accord, *In re Worldcom, Inc. Securities Litigation*, 2003 WL 21219037 (S.D.N.Y. May 22, 2003).

Given our decision to consolidate, the pending interlocutory motion to disqualify is dismissed as moot, as are respondents' motions pending before Judge Levine and Judgment Officer McGuire regarding the non-resident bond issue. As Judge Painter has ruled on the non-resident bond issue, respondents may raise the issue on appeal at the conclusion of the proceedings before the ALJ.

Accordingly, the order staying the 15 above-captioned cases is lifted and the cases shall be consolidated on Judge Painter's docket.<sup>14</sup>

IT IS SO ORDERED.

By the Commission (Acting Chairman LUKKEN and Commissioners SOMMERS and CHILTON).



David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: November 18, 2008

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<sup>14</sup> Based on the pleadings before us, which purport to be filed on behalf of "all" complainants, we assume that complainants in the two cases assigned to Judgment Officer McGuire join the motion and agree to sacrifice the benefits of the simpler procedure to which they are entitled.