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MAGDY ABOELGHAR, Complainant, v. RICHARD LEYTON MULCAHY, R.J. O'BRIEN ASSOCIATES, INC., and RM TRADING, LLC, Respondents.	*	CFTC Docket No. 06-R043

JOHN Y. ABOULGHAR, Complainant, v. RICHARD LEYTON MULCAHY, R.J. O'BRIEN ASSOCIATES, INC., and RM TRADING, LLC, Respondents.	*	CFTC Docket No. 06-R044

ORDER DISMISSING COMPLAINTS WITH PREJUDICE

Introduction

John Aboulghar and Magdy Aboelghar are brothers. They act in tandem. Together, they speculated in the commodities markets. Together, they lost

money. And together, they abused the judicial process. With this dismissal, they can move on to some other fraternal activity.

Procedural History

These cases were initially before Administrative Law Judge George H. Painter.[1] Judge Painter's rulings were appealed,[2] and some years later[3] the Commission remanded the cases for further fact-finding on various issues.[4] By that time, Judge Painter was unavailable, and the cases were reassigned to me.[5] The following is a brief description of the events that have transpired since we received the cases.

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[1] Notice and Order, dated September 21, 2006 at 1 (CFTC Docket No. 06-R044); Notice and Order, dated September 20, 2006 at 1 (CFTC Docket No. 06-R043).

[2] Notice of Appeal, filed April 25, 2007 (CFTC Docket No. 06-R044); Notice of Appeal, filed September 27, 2007 (CFTC Docket No. 06-R043).

[3] *See Connolly v. Cotter*, CFTC Docket No. 09-R027, 2011 WL 2524045 at *15 nn.159-61 (CFTC June 23, 2011).

[4] *Aboulghar v. Mulcahy*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,932 (CFTC Sept. 2, 2010); *Aboelghar v. R.J. O'Brien Assoc., Inc.*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,571 (CFTC May 17, 2010).

[5] *3 Sands LP v. MF Global, Inc.*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,644 at 64,711 (CFTC Oct. 25, 2010) (*reassigning* the six Reparations cases on Judge Painter's docket).

It all started on December 27, 2010, when we set these matters for hearing.[6] In doing so, we ordered the parties to take certain routine, preliminary steps.[7] This included a direction for the parties to cooperate in filing a joint stipulation of agreed facts and an agreed witness schedule by February 8, 2011.[8] At our request – and in deference to the complainants' *pro se* status – the respondents' attorney did the legwork. By late January, the respondents had drafted and sent to the complainants a series of facts and a witness schedule to which they thought all parties could agree.[9] Yet, in defiance of our order, the

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[6] Order and Notice of Hearing, dated December 27, 2010 (CFTC Docket No. 06-R044); Order and Notice of Hearing, dated December 27, 2010 (CFTC Docket No. 06-R043).

[7] *Id.*

[8] *Id.* at 2. The Order and Notice of Hearing also informed the parties of the consequences of non-compliance:

> A party's failure to attend the oral hearing will be deemed a waiver of its opportunity for an oral hearing in this proceeding. Failure to attend the hearing or comply with this order may also subject a party to other consequences such as dismissal of the complaint or issuance of a default award as appropriate.

Id. at 4 (citation omitted). The order also provided my attorney advisor's direct telephone number and invited the parties to call with any specific procedural questions. *Id.*

[9] *See* Notice of Status on the Parties' Compliance with Pre-Hearing Order, received February 18, 2011 (CFTC Docket No. 06-R044) ("Respondents' Notice of Status Regarding J. Aboulghar") at Exhibits H and I; Notice of Status on the Parties' Compliance with Pre-Hearing Order, received February 23, 2011 (CFTC Docket No. 06-R043) ("Respondents' Notice of Status Regarding M. Aboelghar") at Exhibit G and H.

two complainants refused to work with the respondents' attorney to finalize the required joint submissions.

In mid February of 2011, we held two status conferences – one for each complainant.[10] At these conferences, we discussed our pre-hearing order – particularly the complainants' respective failures to comply.[11]

Magdy Aboelghar announced at his conference that he had been deleting all emails sent by the respondents, and had received but not opened the express mail package.[12] Aboelghar agreed orally to call the respondents a few days later and comply with the Court's order.[13] Instead, a few days later he sent the respondents a short statement stating in relevant part that he disputed each and every one of the respondent's forty-two proposed facts[14] – including, apparently, such seemingly indisputable facts as Aboelghar's name, age, and address.[15] Aboelghar did not propose alternative facts, and he never did contact the respondents to comply with our order.

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[10] Respondents' Notice of Status Regarding J. Aboulghar at 5; Respondents' Notice of Status Regarding M. Aboelghar at 5.

[11] *Id.*

[12] Respondents' Notice of Status Regarding M. Aboelghar at 5.

[13] *Id.*

[14] Motion Plea for justice in my case, dated February 20, 2011, at 1.

[15] Respondents' Notice of Status Regarding M. Aboelghar at Exhibit G.

Meanwhile, at John Aboulghar's conference, he suggested for the first time that he could not retrieve any emails.[16] This representation was problematic given that he had signed an agreement to file and receive documents solely by email just a few months earlier, and had not previously informed either the Court or the respondents' counsel of any change in circumstances.[17] In any event, this was his excuse for having failed to reply to the respondents' numerous attempts to contact him.[18] So we gave him a second chance as well. We orally instructed the respondents to express mail Aboulghar the documents, and Aboulghar agreed to respond by the middle of the following week.[19] His response, like his brother's, stated that after "extensive study," he could not agree to any of the proposed facts.[20] Once again, many of these facts were in the vein of Aboulghar's name, age, and address.[21]

Despite the complainants' repeated willful misconduct in refusing to comply with our prehearing orders, the hearings remained set respectively for

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[16] Respondents' Notice of Status Regarding J. Aboulghar at 5.

[17] Order on E-Filing, dated November 15, 2010.

[18] Respondents' Notice of Status Regarding J. Aboulghar at 5.

[19] *Id.*

[20] Motion of Statement [sic] of Issue, received February 17, 2011.

[21] *Id.* at Exhibit H.

Tuesday, March 8, 2011, and Thursday, March 10, 2011, at the United States Courthouse in San Francisco.[22]

Having sabotaged the pre-hearing process, they now did the same to the hearing. On Sunday evening, March 6th (and approximately 36 hours before the first of the hearings was to occur on the other side of the country), the complainants faxed one page motions to the unattended Office of Proceedings and the unattended office of the respondents' counsel.[23] The complainants stated that they would not be appearing at their respective hearings.[24] Their explanation was that they had to fly to Egypt immediately because of an unspecified "catastrophic personal hardship."[25] They did not call or make any other effort to contact the Court or the respondents' counsel – either before or after the Sunday night faxes.

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[22] Order and Notice of Hearing at 1 (CFTC Docket No. 06-R044); Order and Notice of Hearing at 1 (CFTC Docket No. 06-R043). In response to these orders, the complainants had filed notices of their intent to participate. Untitled Document from John Y. Aboulghar, dated February 8, 2011, at 1; Untitled Document from Magdy Aboelghar, dated February 8, 2011, at 1.

[23] Motion for postponing the hearing of march [sic] 8th [sic] 2011, dated March 6, 2011 (CFTC Docket No. 06-R044); Motion for postponing the hearing of march [sic] 10th [sic] 2011, dated March 6, 2011 (CFTC Docket No. 06-R043). Collectively, these identical faxes will be called "Complainants' Motions to Postpone Hearing." Though styled "motions," the faxes were in fact exercises in self-help, as both complainants stated that they were leaving the United States "immediately." *Id.*

[24] *Id.*

[25] *Id.*

Because of its timing and manner, the complainants' notice was ineffectual in reaching the Court or the respondents before all were in transit to San Francisco on the morning of March 7th.[26] As a consequence, the taxpayers and the respondents needlessly incurred substantial costs to attend hearings which had been abandoned by the complainants.[27] Further, the circumstances surrounding the complainants' non-appearance suggested that their conduct was undertaken willfully and in bad faith. Supporting this conclusion (beyond their prior misconduct at the pre-hearing stage) were the facts that (1) the complainants made no effort beyond a Sunday night fax to contact the Court or the parties, and (2) the fax included no details, documentation, or other proofs supporting the purported emergency that required them to leave "immediately, today."[28]

Since we were already in San Francisco, we chose to hold a brief hearing to hear the respondents' view on the matter. The respondents argued that the

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[26] In order to be in San Francisco for the hearing Tuesday morning, the respondents and the Court had to travel substantial distances from other parts of the country on Monday.

[27] The respondents estimate their costs in preparing for and attending the March 8th hearings to be $10,000. Transcript of Oral Hearing Regarding J. Aboulghar, dated March 8, 2011 ("J. Aboulghar Tr."), at 17; Transcript of Oral Hearing Regarding M. Aboelghar, dated March 8, 2011 at 11 ("M. Aboelghar Tr."). We estimate our own travel and transcript costs exceeded $3,000.

[28] Complainants' Motions to Postpone Hearing.

complainants had been and were acting in bad faith,[29] and moved to dismiss the complainants' claims.[30] In deference once again to the complainants' *pro se* status, we denied – at least temporarily – these reasonable motions.[31]

Instead, we gave the complainants yet another chance. In their faxes notifying the Court that they would not be attending the scheduled hearings, the complainants requested that the hearings be postponed for two months.[32] Correspondingly, we issued an order that required the complainants to show cause on or before May 13, 2011 – more than two months later – why their respective complaints should not be dismissed with prejudice.[33] Predictably, however, no response was forthcoming. The respondents have moved yet again

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[29] *See generally* J. Aboulghar Tr.; M. Aboelghar Tr.

[30] J. Aboulghar Tr. at 34; M. Aboelghar Tr. at 24.

[31] J. Aboulghar Tr. at 34-37; M. Aboelghar Tr. at 24-28.

[32] Complainants' Motions to Postpone Hearing.

[33] Order To Show Cause Why The Complaints In CFTC Docket Nos. 06-R043 and 06-R044 Should Not Be Dismissed With Prejudice, dated March 11, 2011 ("Order to Show Cause"). Therein, we instructed the complainants to present – at a minimum – reliable and persuasive evidence in support of the existence of their "catastrophic personal hardship" which (1) made their unavailability for the hearings as scheduled reasonably unavoidable, and (2) justified their failure to call the Court and respondents' counsel or otherwise give timely, effective, and actual notice of their non-appearance, or otherwise provide the Court with a reasonable opportunity to consider postponing their hearings. *Id.* at 3-4.

for dismissal with prejudice[34] – again with no response from the complainants. This time – four months after the complainants failed to attend the hearing – we **GRANT** the motions.

Conclusion

We summarize the events since remand as follows. The complainants: (1) failed to comply with our pre-hearing order; (2) failed to work in good faith with the respondents, refusing to return phone calls, deleting or ignoring emails, and ignoring express mail; (3) refused to attend the hearing, citing to a personal emergency while providing no details or proofs; (4) made no good faith effort to warn the Court or the respondents of their non-attendance, costing the respondents and the taxpayers thousands of dollars; (5) failed to respond to the order to show cause, though it provided more than the requested two months of delay; and (6) failed to respond to the respondents' subsequent motion to dismiss.

We conclude that the complainants are acting willfully in bad faith. They may well also be indefinitely out of the country – and without having provided the Court or the respondents a way to maintain contact.[35] Regardless, we now foreclose any further opportunity for the complainants to misuse this forum to

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[34] Respondents' Brief in Support of a Dismissal of this Action, filed June 3, 2011 (CFTC Docket No. 06-R044); Respondents' Brief in Support of a Dismissal of this Action, filed June 3, 2011 (CFTC Docket No. 06-R043).

[35] This is also in violation of our rules. *See* 17 C.F.R. §12.10(c).

the detriment of the justice system,[36] the taxpayers and the respondents. Though the Commission seeks to grant *pro se* complainants extraordinary procedural leniency[37] and has a strong policy preference for decisions on the

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[36] "Misconduct may exhibit such flagrant contempt for the court and its processes that to allow the offending party to continue to invoke the judicial mechanism for its own benefit would raise concerns about the integrity and credibility of the civil justice system that transcend the interests of the parties immediately before the court." *Abner v. Scott Memorial Hosp.,* 634 F.3d 962, 964 (7th Cir. 2011) (citation omitted).

[37] In *Hall,* the judge dismissed a complaint when the complainant failed to comply with (or even respond to) a court order, and failed to respond to the respondent's discovery requests and the respondent's motion to dismiss. *See Hall v. Diversified Trading Systems, Inc.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,870 at 40,837 (CFTC Oct. 8, 1993). The Commission reversed, stressing its strong policy preference for a decision on the merits. *Hall v. Diversified Trading Systems, Inc.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,131 at 41,751-52 (CFTC July 7, 1994). It cautioned, however, that "[i]f Hall is unwilling or unable to fulfill her obligations to this forum, she should seek to voluntarily dismiss this proceeding.... The ALJ may impose sanctions (including dismissal) if complainant fails to offer an appropriate response." *Id.* The case was predictably dismissed once again by the judge when the complainant continued to refuse to respond to discovery requests. *Hall v. Diversified Trading Systems, Inc.,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,217 at 41,972-73 (CFTC Aug. 19, 1994).

More recently in *Jhong,* the judge dismissed the case when the complainant failed "to comply with a clear and explicit order to apprise the court of his intention to appear and participate" in a scheduled hearing. *Jhong v. Castle Trading,* [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,739 at 61,509 (CFTC Jan. 28, 2008). The judge went on to hold that the complainant's conduct resulted in "unwarranted delays" and that "all parties incurred substantial costs" as a consequence. *Id.* Nevertheless, the Commission reversed, reiterating its oft-expressed policy preference for a decision on the merits. In so doing, it excused as "reasonable" Jhong's failure to check with his counsel to determine whether the required notice had been filed prior to that counsel's termination, and disregarded the costs imposed on the other parties by Jhong's procedural lapses. *Jhong v. Castle Trading, Inc.,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,913 at 66,033 (CFTC

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merits,[38] the complainants have fallen below even the Commission's unusually forgiving standards.[39] After all, "[a] trial court is entitled to say, under proper

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Feb. 18, 2011). In reversing the judge, the Commission also noted that Jhong had provided "assurances that he would be present" for any re-scheduled hearing. *Id.* In evidence of a pattern, this case was also dismissed again after remand, when the complainant could not be found by the Court, the respondents, or his own attorney (his fourth – having terminated the previously three). *See Jhong v. Castle Trading, Inc.,* CFTC Docket No. 06-R051, 2011 WL 2433209 at *1 (CFTC June 15, 2011).

[38] *E.g., Alexander v. First Sierra Commodity Corp.,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. ¶26,467 at 43,057 (CFTC July 27, 1995); *Jenne v. Painewebber, Inc.,* [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,329 at 35,425 (CFTC Aug. 31, 1988).

[39] "Sanctions that amount to a deprivation of a decision on the merits should be reserved for flagrant abuses where a party has acted in bad faith. As a general rule, such a severe sanction should not be imposed without advance notice to the party. In imposing such a sanction, the presiding officer should make a specific finding on the issue of bad faith." *Marlow v. Oppenheimer Rouse Futures,* Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. ¶23,904 at 34,212 (CFTC Sept. 9, 1987). Here, of course, we have made a specific finding of bad faith, and we provided advance notice to the parties of the impending dismissal via our Order to Show Cause. The complainants received still further notice as a result of the respondents' motion to dismiss.

Robinson is the most recent major case in which the Commission has affirmed an initial decision to dismiss for procedural violations. *See Robinson v. Alternative Commodity Traders,* [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,155 (CFTC Nov. 4, 2005). Though the complainant had willfully behaved badly throughout the proceeding, the Commission's primary holding in that case was limited: "...we conclude that complainant's refusal to attend conferences is a sufficient reason to warrant dismissal of the complaint, and we affirm the result reached below on that basis." *Id.* at 57,601. This holding is directly applicable to the case at bar. Here, even setting aside the complainants' other misconduct, they refused to attend an oral hearing – a substantially more important (and more costly) procedural step than a pre-hearing teleconference. And despite their request to reschedule the hearing for

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circumstances, that enough is enough...."[40] These are such circumstances. Consequently, we **DISMISS** with **PREJUDICE** the complaints of John Aboulghar and Magdy Aboelghar.

IT IS SO ORDERED.

On this 6th day of July, 2011

Bruce C. Levine
Administrative Law Judge

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two months later, that date has come and gone without any further word from the complainants – or a response to the Order to Show Cause, or the respondents' motion to dismiss. It is therefore clearly appropriate to dismiss these cases under the Commission's precedent set forth in *Robinson.*

[40] *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.,* 869 F.2d 1058, 1062 (7th Cir. 1989).