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COMMODITY FUTURES TRADING COMMISSION

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Magdy Aboelghar, *

Complainant, *

v. *

R.J. O'Brien Associates, Inc., *

R.M. Trading, L.L.C., and *

Richard Mulcahy, *

Respondents. *

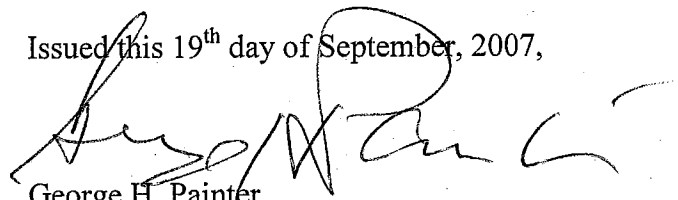
CFTC Docket No. 06-R043

NOTICE OF CORRECTION

The Order on the last page of the Initial Decision is corrected to read as follows:

Respondents Mulcahy, RM Trading L.L.C., and R.J. O'Brien Associates, Inc., are ordered to pay to Complainant Aboelghar \$32,966.57, the out-of-pocket losses sustained on his account, plus interest at the rate of 4.78% per annum from April 21, 2006 until this award is paid in full, and the \$250 filing fee. Respondents are jointly and severally liable for the payment of this judgment.

Issued this 19th day of September, 2007,



George H. Painter
Administrative Law Judge

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Respondents.

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INITIAL DECISION

Appearances:

On behalf of Complainant Magdy Aboelghar
Magdy Aboelghar, *pro se*

On behalf of Respondents Richard Mulcahy, R.M. Trading, L.L.C., and R.J. O'Brien Associates, Inc.

Jeffrey M. Henderson, Esq.
Henderson & Lyman
175 West Jackson Blvd., Suite 240
Chicago, Illinois 60604

Opinion of Painter, Administrative Law Judge

PROCEDURAL HISTORY

On May 25, 2006, Complainant Magdy Aboelghar filed a Complaint against Respondents Richard Mulcahy, R.M. Trading, L.L.C., and R.J. O'Brien, Associates, Inc. Complainant alleges that Respondents violated the Commodity Exchange Act and implementing regulations in connection with their handling of his account, resulting in monetary damages in the amount of \$32,966.57.^[1] More specifically, Complainant alleges that on April 19 through April 21, 2006, Respondents unlawfully allocated losing trades to his account.

Respondents filed timely answers and denied any wrongdoing, and requested that the Court enter an award in favor of Respondents. (Answer).

The trial of the matter took place on May 15, 2007, in Los Angeles, California. The parties submitted pre-hearing and post-hearing memoranda, and amended post-hearing memoranda. This matter is ready for decision.^[2]

FINDINGS OF FACT

The Parties

1. Complainant Magdy Aboelghar, a pharmacist by profession (Transcript ("Tr.," page 13 ("Tr. 13")), is an intelligent man for whom English is a second language. Aboelghar works at several pharmacies and must travel between them. (*Ibid.*). Prior to the opening of the discretionary account at issue, Complainant had never traded commodity futures or options.

^[1] Aboelghar computed the \$32,966.57 out-of-pocket loss based upon the closing value of his account on April 18, 2006 (\$38,517.01) less the ending balance after the final trade attributed to his account on April 21, 2006 (\$5,550.44). *See* Amended Complaint (Tab 7, Public Record).

^[2] The principal documents and items in the evidentiary record include, but are not limited to Aboelghar's Amended Complaint and its exhibits, Respondents' Amended Answers, the Transcript of the May 15, 2007 Hearing before this Court, the exhibits and records provided by the parties, including account statements, account opening documents and filed trading records, the NYMEX records provided to the Court by the NYMEX, and the additional filings requested by the Court during the proceeding.

(Complainant's Account Opening Statement, Ex R-2, Tab 26, Public Record). After opening the account, Aboelghar subscribed to trading information, but work and family obligations left him no time to gain the knowledge that would allow him to trade independently. (Tr. 8-10). Reliable evidence of record, including the credible testimony of Aboelghar, establishes that Complainant was an unsophisticated customer who relied on Mulcahy to select, place, and monitor trades on his account.

2. Respondent Richard Leyton Mulcahy is President, Owner, and registered Associated Person and Principal of the Introducing Broker RM Trading L.L.C. Mulcahy solicited and managed the discretionary Aboelghar account pursuant to the Power of Attorney Aboelghar executed in his favor.^[3] The Court finds that Mulcahy exercised discretion at all times, contrary to handwritten notes by Mulcahy that he rarely exercised discretion.^[4] Mulcahy traded proprietary accounts in the same gold and silver futures he allegedly traded for Complainant between April 19 and 21, 2006. (See Respondents' Response to Order issued May 15, 2007' Tab 51, Public Record). Mulcahy's testimony was far less convincing than Aboelghar's testimony as it suffered from internal inconsistencies as to fill times and prices, among other things, and was entirely inconsistent with reliable NYMEX records. *See* ¶ 11, *infra*.

3. Respondent RM Trading L.L.C., is a registered IB that is guaranteed by R.J. O'Brien, Associates, Inc. Mulcahy represented RMT in his handling and management of Aboelghar's account. (NFA Basic Records).

4. R.J. O'Brien Associates, Inc., is a registered Futures Commission Merchant ("FCM") and broker-dealer that handled trading for RMT.

^[3] Mulcahy conceded that Aboelghar never revoked the Power of Attorney. (Tr. 87).

^[4] Mulcahy's notes disavowing discretion are superimposed on trade tickets without any indication of the time of notation. The trade tickets are otherwise suspect based on all of the factors set forth in ¶ 11, *infra*, and the Discussion, *infra*.

Course of Dealing between Aboelghar and the Respondents

5. Complainant opened his account with Respondents on January 26, 2006. (Account Opening Documents, Ex. R1 and R2). Aboelghar testified that he became concerned about Respondents' direction of his account after April 18, 2006. (Amended Complaint; Tr. 95-96). Between April 19 and 21, 2006, Respondents traded gold and silver futures for Aboelghar and for proprietary accounts, and allocated several losing trades on the NYMEX/COMEX to Complainant's account. (Complaint; Account Statements; Tab 51, Public Record; Ex. R 4, 5, 6, and 7).

6. During the relevant time period, Aboelghar noticed news reports that the gold and silver futures markets were highly volatile, resulting in market closures and margin calls. (Amended Complaint). Complainant testified that he made numerous calls attempting to talk with Mulcahy on April 19 and 20. Despite his calls, Complainant testified that he was unable to have a conversation with Mulcahy concerning trades Mulcahy had ostensibly placed in his account. (Tr. 9-10, 31, 95-96). On April 20, 2006, Complainant contacted the NYMEX, which confirmed that the volatile performance of the gold and silver futures markets was engendering margin calls. NYMEX's information was inconsistent with Mulcahy's previous assurances. (Tr. 28, 95-96, 98). Aboelghar contacted and received no cooperation from RM Trading. (*Ibid*, Complaint).

7. The parties agree that Aboelghar's losses occurred between April 18 and April 21, 2006, as a result of the gold and silver futures trades entered into Complainant's account. (Tr. 21). Mulcahy made the last trade attributed to Aboelghar's account on April 21, 2006, and Aboelghar immediately disputed the handling of the account via emails to Respondents.

(Amended Complaint). Mulcahy, specifically, and Respondents, generally, never made a substantive response to Aboelghar's timely complaints. (Amended Complaint; Tr. 96).

Respondents Production

8. In response to a series of Court Orders, Respondents produced records that on their face suffered from inconsistencies and alterations as to customer identification, trade dates and fill times, prices, and exchanges, among other things.^[5] Respondents failed to justify the assignment of the losing gold and silver trades to Aboelghar's account. *See generally* ¶ 11, *infra*.

9. Because of Respondents' production of suspect evidence, the Court selected four illustrative trades and sought external clarification. Respondents tried to establish the existence of the four gold and silver futures "trades" by producing trade tickets that were problematic on their face, containing altered customer and transaction numbers, time inconsistencies, and implausible exchange identifications. Using the summary and details of the four trades repeatedly provided by Respondents' Counsel,^[6] the Court made an inquiry of the New York Mercantile Exchange Compliance Department and Counsel's Office. (*See* Order to Show Cause issued May 31, 2007; Tab 52, Public Record).

10. In two subsequent responses, the NYMEX concluded that the four gold and silver futures trades that appeared on Complainant's account statement had never taken place. (Tabs

^[5] The Court's Production Orders include the December 4, 2006 Order for Production (Tab 23, Public Record); the January 31, 2007 Order for Production (Tab 32, Public Record); the April 27, 2007 Order for Production (Tab 38, Public Record); the May 15, 2007 Order for Production issued during the hearing in this matter (Transcript pages 103-104 (Tab 53, Public Record)); the May 31, 2007 Order to Show Cause based upon the flawed evidentiary record and upon information from the New York Mercantile Exchange (Tab 52, Public Record); and the June 19, 2007 Order re-opening the record to determine the accuracy of the reported trades, and granting Respondents the opportunity to correct the record by amending their Post-Hearing Memorandum. (Tab 60, Public Record).

^[6] Respondents' Counsel identified the four trades as IB ticket numbers 7084-7087. (Tabs 33-35, Public Record).

52 and 61, Public Record). The NYMEX's conclusion was based on its presumptively reliable, regularly maintained business records.

11. This Court finds that Respondents provided incorrect and unreliable records in a deliberate effort to discredit or undermine overwhelming evidence that the gold and silver transactions attributed to Complainant's account were fictitious. First, Respondents produced trade tickets with inaccurate fill times. All four trade tickets wrongly confirmed trade execution on "April 19, 2006." For example, IB ticket no. 7097, a ticket attributed to "customer 733,"^[7] was stamped 3:02 p.m. on April 19, 2006, 7:49 p.m. on April 19, 2006, and 4:51 a.m. on April 20, 2006. In their Counsel's analyses, as well as on the trade tickets, Respondents repeatedly alleged that the four sample trades were electronically transmitted to the FCM at 3:02 p.m. on April 19, 2006, filled on April 19, 2006, at 6:43, 6:57, 7:28, and 7:49 p.m., and belatedly registered by Mulcahy at 4:51 a.m. on April 20, 2006, upon his return to the office the next morning. (Tabs 34 and 35, pages 8-10, Public Record).^[8] Respondents denied that the trades were bunched or allocated. (Tabs 33-35, Public Record). In sharp contrast, the NYMEX declared that no trading within the alleged prices had occurred at any time on April 19, 2006 -- not in the evening, after the close of trading, or at any other time. (Tab 52 and Tab 61, Public Record).

Respondents ultimately provided portions of a NYMEX Daily Sheet containing trades at the reported prices only on the evening of April 20, 2006, between the hours of 7:30 and 11 p.m. (Tab 54, Public Record, Respondents' Response filed June 8, 2007). Respondents merely

^[7] Aboelghar was not Customer "733." Instead of using the customer's actual identification number, Respondents allege that they used the customer ticket line on the order ticket to provide a handwritten number that is supposed to correspond to the FCM ticket number. (Tabs 33-35, Public Record). Respondents' practice of recording alternative numbers in lieu of the customer number does not comply with the recordkeeping requirements imposed on IBs and FCMs and interferes with maintenance of an audit trail. *See* Discussion, *infra*.

^[8] Respondents evidently hoped that their narrative of Mulcahy's 4:51 a.m., April 20, 2006 entry of the trades purportedly executed on April 19, 2006 would justify the contradictions between the trade tickets containing an April 19, 2006 execution time, and the account statements that exhibited similarly priced trades only on the evening of April 20, 2006. That hope was not realized.

asserted that the NYMEX was “mistaken” (Tab 54, Public Record, pgs.2-3), but were unable to explain the wide time gap between the purported fills and the actual trade executions. The only trade executions documented by the NYMEX at the identified prices occurred more than thirty hours after the purported order receipt. The relevant NYMEX trades were executed more than twenty four hours after the FCM’s purported fills, and more than fourteen hours after Respondent Mulcahy’s tardy time stamp entries improperly registering the purported trade executions on the previous evening.

12. Respondents’ trade tickets erroneously identified the prices of the trades they attributed to Complainant’s Account. As evidenced by the NYMEX research cited above (Tabs 54 and 61, Public Record), there were no trades at the cited prices underlying the April 19, 2006 fill dates and the purported fill times recorded on Respondents’ trade tickets. The only trades at the identified prices occurred at least a full day later, on the evening of April 20, 2006.

13. Respondents offered no basis for differentiating the trades that the NYMEX investigated and the other gold and silver futures trades they allocated to Aboelghar’s account between April 19 and 21, 2006. The Court makes the inference that the remainder of the gold and silver futures trades^[9] that Respondents allocated to Complainant’s account during the relevant time period were fictitious.^[10]

14. In response to several Court Orders, Respondents provided evidence of Mulcahy’s proprietary accounts. The statements reveal that Mulcahy made proprietary trades in the same gold and silver futures contracts attributed to Complainant’s account. (Tab 51, Public

^[9] There appear to have been approximately twenty five gold and silver futures trades allocated to Aboelghar’s account during the relevant time period. As explained in ¶ 11, *supra*, the actual trade dates and prices of the trades properly allocated to Aboelghar’s account are not ascertainable

^[10] See Discussion, *infra*, concerning other erroneous and false records presented to the Court by Respondents’ counsel.

Record, Respondents' Response to May 15, 2007) Mulcahy made profits on his gold trading on April 19 and 20, 2006. (*Ibid.*) Mulcahy alleged that on the same date he made unprofitable gold trades for Complainant's account.

15. While Respondents' production of altered, incorrect and unreliable records precludes an accurate reconstruction of trading activity, it manifestly excludes a finding that the losing gold and silver futures trades were legitimately allocated to Aboelghar's account. Based on Respondents' suspect records relating to the purported trades for Aboelghar's account, and Mulcahy's suspect trading of the same gold and silver futures for proprietary accounts, the Court finds that the losing gold and silver futures trades made during the relevant time period were unlawfully allocated to Aboelghar's account.

DISCUSSION

Respondents Violated the CEA by Fraudulently Managing and Improperly Allocating Losing Trades to Complainant's Account

I. Respondents Failed to Maintain Authentic or Accurate Records of Trades for Aboelghar's Account

Respondents produced inauthentic and inaccurate records to support their several histories of trading Aboelghar's account. Respondents' unreliable statements were not limited to the four specific false trades documented by the NYMEX. Respondents' records were misleading in several other respects:

- A. Respondents' records of customer account numbers precluded the establishment of an audit trail.

In response to the Court's Order of January 31, 2007, Respondents made the following representations:

The account numbers on each of the trade tickets were identical, and represented the trading account number of the Complainants (sic) 154 42060. However, and as further explanation on a matter that may lend to confusion, the IB would use the "CUSTOMER" line on the IB's order tickets to record the ticket number used by the FCM.....The FCM ticket number was different for every IB order.....

(Tabs 33-35, Respondents' Response and Amended Responses to the Court's Order for Production dated January 31, 2007, filed February 14, 2007, February 22, 2007, and February 23, 2007, Public Record, p. 2). The blatant misidentification of the customer by the ostensible FCM ticket number enabled Respondents to arbitrarily allocate executed trades. The record also reflects that numbers were routinely overwritten on the tickets,^[11] with no indication of the actual time of account designation.

B. Respondents produced conflicting identifications of the brokers effecting the silver and gold futures trades for Complainant's Account.

Initially, Respondents produced a chart in which the same broker was on both sides of twelve of fourteen trades. Respondents identified seven brokers in total. (Tab 30, Public Record). In their second analysis, Counsel produced a similar table, substituting the name of an additional broker. (Tab 33, Public Record). In Respondents' Counsel's third revision of the broker chart, the table displayed in most instances the label "Electronically Traded/No Floor Broker" in lieu of the previously identified brokers. (Tab 34, Public Record). Regarding these changes, Respondents' Counsel averred as follows in a pleading filed February 23, 2007:

Respondents' prior submission indicate (sic), in error, that all of the trades executed on the COMEX ACCESS electronic order entry system (a total of 6 separate trades) were assigned executing and opposing brokers. That error

^[11] See e.g., the trade ticket for "customer 733," where a number in the upper left hand corner was changed from 7437 to 7431. Respondents allege the change was merely to the Comex reference number and reflected a mistake (Tab 35, p.2; Tab 34, p. 8), but in some instances the change in reference number suggested an entirely different trading result. The change in what is alleged to be the Comex reference number coincides with fill times that were consistently misrepresented by Respondent. This particular gold futures trade is suspect for other reasons as well, since the NYMEX indicated that "There were no GCM06 (June 2006 Gold Futures) trades at 640.40 on 4/19/06." (Tab 52, Public Record). There were several gold trades on the evening of 4/20/06, with widely varying trading results. To add insult to injury, the same suspect ticket carried the false written notation "Globex."

occurred, notwithstanding that there are no executing or opposing brokers in the execution of a customer's order on the COMEX electronic order entry system. The error occurred when the FCM's New York Office provide one (*sic*) of RJO's staff persons the names of the brokers who executed Complainants' order that were executed one (*sic*) the floor of the exchange, and that staff person, incorrectly thinking that all of the orders were executed on the floor, associated executing and opposing brokers with the trades executed on COMEX access.

(Amended response to Court order issued January 31 2007).

Contrary to Counsel's third assertion concerning the absence of broker identification in electronic trading, on June 8, 2007, Respondents provided the NYMEX Daily Report (Tab 54, Public Record) containing identifying numbers for brokers on both sides of each COMEX Access transaction. Nor did Respondents ever reply to the Court Order requiring identification of the source for their broker identifications.^[12]

C. Respondents Declined to Identify the Relevant Clearing Firm(s)

In its original December 4, 2006 Order for Production (Tab 23, Public Record), the Court ordered Respondents to produce on or before December 18, 2006, "the identity of the clearing firm for each related trade." Respondents never identified the relevant clearing firm(s).

D. Respondents Produced Incorrect Exchange Identifications

Respondents produced misleading identifications of the exchanges used to execute the gold and silver futures trades that they attributed to Aboelghar's Account. Respondents produced office trading tickets hand-marked "Globex," suggesting that the trades had been executed on the Globex electronic market. In response to the Court's repeated inquiries, Respondents maintained that no trades were executed on the Globex Exchange, but that Respondent Mulcahy added handwritten "Globex" designators as his shorthand for night trades entered on any trading

^[12] See April 27, 2007 Order (Tab 38, Public Record).

