

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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MAGDY ABOELGHAR

v.

R.J.O'BRIEN ASSOCIATES, INC., R.M.
TRADING, LLC, and RICHARD MULCAHY

CFTC Docket No. 06-R043

ORDER PURSUANT TO
DELEGATED AUTHORITY

Respondent R.J. O'Brien Associates, Inc. ("RJO") filed a motion before the Commission seeking a copy of New York Mercantile Exchange ("NYMEX") "streetbook" information filed in the record of this case under a request for confidential treatment.¹ RJO contends that it needs the information to support its pending appeal of the ALJ's decision finding it liable to complainant Magdy Aboelghar ("Aboelghar"). Aboelghar did not reply to the motion. For the reasons that follow, the motion is denied. The parties' access to the streetbook information is restricted to the *in camera* review authorized by the Administrative Law Judge ("ALJ") in his June 20, 2007 order.

* * *

Aboelghar's complaint alleged that respondents unlawfully allocated losing gold and silver trades to his account in April 2006. Seeking clarification on the trades, the ALJ made two requests for information to NYMEX under Commission Regulation 12.34, which authorizes *sua*

¹ The CFTC Glossary defines "Street Book" as "[a] daily record kept by futures commission merchants and clearing members showing details of each futures and option transaction, including date, price, quantity, market, commodity, future, strike price, option type, and the person for whom the trade was made." See www.cftc.gov.

sponte discovery by a presiding officer.² On May 11, 2007, the ALJ made an email request to NYMEX for information on four specific trades, to which NYMEX replied by return email the same day. In a subsequent email to NYMEX on June 15, the ALJ requested further clarification concerning three of the four trades. The June 15 email also contained the ALJ's request for streetbook information. NYMEX replied by return email on June 19, with a response that answered the questions posed by the ALJ on June 15 and also reiterated, in an email "chain," the May 11 exchange of emails. NYMEX's email also stated that it was mailing the streetbook information under separate cover.

The ALJ issued an Order on June 20, 2007 in which he "admit[ted] the May 11 and June 19, 2007 NYMEX Responses concerning the four specific trades to the evidentiary record," Order at 3, and reproduced those responses verbatim in his Order, *id* at 2. The order also advised the parties that "NYMEX will provide the Court with its daily record of trading in silver and gold futures by [RJO] on April 19 and 20, 2006, *id*. at 3, and that the ALJ would retain the documents for *in camera* review upon motion of an interested party because they "may contain confidential information involving customers that are not parties to this proceeding." *Id*. The same day, the Commission received the streetbook information from NYMEX. Pursuant to Section 8(a) of the Commodity Exchange Act ("Act") and Commission Regulation 145.9(d), NYMEX requested confidential treatment of the documents, on the grounds that they contained commercial and financial information, disclosure of which is restricted. *See* June 19, 2007 NYMEX Letter.

The ALJ subsequently issued an initial decision finding respondents liable to Aboelghar for violating Sections 4b(a) and 4g of the Act and implementing regulations, resulting in an

² The ALJ also issued four Orders for Production to respondents, which the ALJ described as "unsuccessful." June 20, 2007 Order at 1.

award to Aboelghar of \$32,966.57 in out-of-pocket losses. *Aboelghar v. R.J. O'Brien & Associates, Inc.*, 2007 WL 2688747 (CFTC Sept.10, 2007). Respondents appealed and RJO subsequently filed the instant motion.

RJO asserts that it had not sought access to the streetbook before the ALJ because it had been under the mistaken impression that the NYMEX responses incorporated into the ALJ's June 20 order constituted the entirety of the exchange's response to the ALJ's June 15 discovery request. RJO states further that while preparing its appeal, "upon a thorough review of the Record as a whole, it has come to the Respondents' attention that the NYMEX's June 20th Response was . . . much broader." Motion at 3, ¶ 13; *see also id.* at ¶ 12.

RJO argues that because it would "ordinarily have access on a day-to-day basis" to the customer information it seeks, it would be "inequitable" to require it to travel to Commission headquarters to view the documents.³ It offers to provide Aboelghar and the other respondents with redacted copies of the streetbook containing only information pertaining to Aboelghar's account. *Id.* at 4, ¶¶ 14-15.

Respondent's motion rests on the notion that the ALJ exceeded his discretion by unduly restricting access to the discovery documents submitted in this case. To the contrary, the ALJ was bound by Section 8(a) of the Act, which states that as a general rule, "the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." Apart from the prohibitions of Section 8(a), RJO's proposal to receive and redact the streetbook is unavailing. The Commission, as a neutral forum, cannot treat one party more favorably than another by

³ Indeed, the ALJ himself noted that "Respondents consistently have access to the entire NYMEX record of their trading." June 20, 2007 Order at 3 n.3.

releasing portions of the record selectively.⁴ Accordingly, RJO's motion to receive a copy of the confidential portion of the record is denied.

IT IS SO ORDERED.⁵



Laura M. Richards
Deputy General Counsel
Commodity Futures Trading Commission

Dated: February 29, 2008

⁴ While the parties should have been served with copies of the ALJ's discovery requests to NYMEX, *see* Regulation 12.10(a), no party has been prejudiced, inasmuch as the ALJ provided the full text of NYMEX's email responses in his June 20 Order, stated explicitly that he had requested portions of the streetbook, and advised the parties as to how it would be made available to them. Counsel must bear responsibility if it gave the order less than close scrutiny.

⁵ By the Commission pursuant to delegated authority. 17 C.F.R. § 12.408(a)(6). A party may petition for reconsideration of this order by filing a petition with the Commission within seven days of its issuance. *Id.* at § 12.408(c).