

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

NUCCIA BIANCO

v.

CYTRADE FINANCIAL, LLC and
LUKE JOSEPH MORETTI

CFTC Docket No. 06-R015

OPINION and ORDER

Office of
Proceedings
Proceedings Clerk

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Respondents Cytrade Financial, LLC (“Cytrade”) and Luke Joseph Moretti (“Moretti”)¹

appear before us having appealed the Initial Decision of the Judgment Officer. *Bianco v. Cytrade Financial, LLC*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,549 (CFTC June 5, 2007) (“ID”). In that decision, the Judgment Officer ruled in favor of the respondents, holding that they were not liable for the account losses of the complainant here, Nuccia Bianco (“Bianco”). *Id.* at 60,173. The Judgment Officer, however, did not address the respondents’ counterclaim for reasonable attorney fees, which first had been raised on March 12, 2006 in the respondents’ Answer and Affirmative Defenses (“Answer”).

The respondents filed their appeal on June 25, 2007, stating that they did not contest the written findings of the Judgment Officer, and that their appeal was limited to the unaddressed request for reasonable attorney fees. *See* Notice of Appeal. The respondents supported their request for attorney fees on the bases that:

- (1) Bianco acted in bad faith and in an effort to harass the respondents,
- (2) Commission case law allows for the repayment of attorney fees when claimant acts in bad faith or files suit in an effort to harass the other party,
- (3) Commission Rules allow for attorney fees to be paid, and finally

¹ Moretti has been registered as an associated person with Cytrade Financial since September 2004. *In re Bianco*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,549 at 60,170 (CFTC June 5, 2007).

(4) Bianco was put on notice of her obligation to pay attorney fees in a matter such as this when she first signed the RCG [Rosenthal Collins Group, LLC] Customer Agreement.

Memorandum In Support of Appellants' Motion to Appeal Initial Decision of Judgment Officer at 6 ("Memorandum").² For the reasons stated below, we deny the respondents' claim for attorney fees.

DISCUSSION

Under the Commission's Rules Relating to Reparation Proceedings, 17 C.F.R. Part 12, parties may seek attorney fees; these fees are awarded at the discretion of the presiding officer. Specifically, Rules 12.210(c) and 12.314(c) provide for a fee award "if appropriate."³ In accordance with the common law "American rule," Commission precedent indicates that attorney fees should be awarded only when the record shows that the losing party acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Brooks v. Carr Investments, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,027 at 53,457 (CFTC May 9, 2002); *see also Sherwood v. Madda Trading Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728 at 23,023 n.26 (CFTC Jan. 5, 1979).

The Commission also has recognized that the American rule permits an award of fees "pursuant to an enforceable contract." *See Pal v. Reifler Trading Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,237 at 45,977 (CFTC Feb. 2, 1998), *citing Alyeska*

² Although respondents style the pleading containing their arguments in support of the relief they seek as a memorandum, it is in essence the appeal brief required pursuant to Commission Rule 12.401(b), 17 C.F.R. § 12.401(b).

³ Commission Rule 12.210(c) provides that the Judgment Officer "may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney fees) . . . to the party in whose favor a judgment is entered." 17 C.F.R. § 12.210(c); *see also* Rule 12.314(c), 17 C.F.R. § 12.314(c) (authorizing fee awards in formal proceedings conducted by an Administrative Law Judge).

Pipeline Service Company v. The Wilderness Society, 421 U.S. 240, 259 (1975).⁴ The Commission held in *Pal* that it would follow *Alyeska*'s guidance regarding contractual fee-shifting for the limited purpose of allowing "contractually based counterclaims for attorneys' fees." *Pal*, ¶ 27,237 at 45,977. Its decision was based on a congressional grant of jurisdiction to the Commission to adjudicate debit balance counterclaims arising under state law. *See Pal*, ¶ 27,237 at 45,977-78.

We now face a contractual claim for fees paid to defend complainant's claim, a situation not covered by *Pal*'s holding. We decline to enforce the contractual provision under which the demand is made, or even to make the threshold determination as to whether the contract is enforceable.⁵ The reparation forum is a creature of statute, governed by rules promulgated by the Commission under the authority of Section 14(b) of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* ("Act"), and by Commission precedent. If a complainant properly elects to use it, a respondent, as a condition of registration, must defend it there and accept the rules of that forum.

The forum rules supersede dispute resolution provisions contained in the customer contract executed by the complainant. *Cf. McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 at 50,601 (Sept. 28, 2000) (refusing to enforce the one-year statute of limitations contained in the customer agreement and holding that the Act's two-year limitations period governed; the Commission held that registrants were not free to rewrite elements of the reparation program "through contracts with individual customers").

⁴ As relevant here, *Alyeska*'s comprehensive discussion of fee practices in England and America reaffirms "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees." 421 U.S. at 257, citing *F. D. Rich Co.*, 417 U.S. 116, 128-131 (1974); *Hall v. Cole*, 412 U.S. 1, 4 (1973).

⁵ Respondents' counterclaim is based on a clause in the Customer Agreement stating: "Should RCG become a party, without fault on RCG's part, to any action or proceeding arising out of your account(s) or orders given to RCG, you agree to indemnify and save RCG harmless therefrom and to pay RCG such attorneys' fees and costs incurred by RCG as the court or arbitration panel may determine." *See Answer, Exh. 2* ¶ 23. Rosenthal Collins Group, LLC has by agreement delegated its rights under the Customer Agreement to Cytrade. *See Answer, Exh. 3* ¶ 28 and Exh. 4.

As the current appeal does not involve a debit balance counterclaim, a fee award must rest on a showing of “bad faith” or “vexatious conduct.” *Lee v. Peregrine*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,131 (CFTC Sept. 7, 2005). Did Bianco act in “bad faith” or “vexatiously”? To determine the issue of “bad faith,” we must consider “(1) whether there is a colorable basis for the claims and (2) whether the record shows that the claims were raised for an improper purpose.” *Brooks*, ¶ 29,027 at 53,459 (citing *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980)). Further, we must keep in mind that, in the case of a *pro se* litigant, bad faith cannot be inferred simply on the basis of a carelessly drafted or poorly thought-through complaint. *Id.* It follows that Bianco, who *did* file her complaint *pro se*, cannot be found to have acted in bad faith simply because she did not sufficiently outline all the facts. *See* ID at 3 (describing the insufficiency of Bianco’s complaint).

Respondents allege that Bianco acted in bad faith because, prior to filing her complaint, she stated she had nothing to lose and that she would withdraw the complaint if they were able to reimburse her. *See* Answer at 9, Exh. 6. These facts, however, do not establish that Bianco acted in bad faith. Instead, they indicate that she tried to resolve the issue before commencing litigation. Accordingly, we hold that Bianco did not act in bad faith in filing her complaint.

To determine the issue of whether Bianco acted “vexatiously,” we turn to Commission precedent, which suggests that “vexatious” conduct implicates a range of actions, including “continu[ing] to file ridiculous pleadings in support of [one’s] bloated damage claim, refus[ing] to attend . . . conferences and hearings, [and] [bringing] discovery to a screeching halt.”

Robinson v. Alternative Commodity Traders, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,155 at 57,603 n.4 (CFTC Nov. 4, 2005).⁶

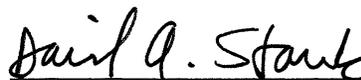
To support their claim of vexation, respondents allege that Bianco could not recall crucial details in her testimony and that she offered inconsistent versions of the events that transpired. See Memorandum at 3. Poor memory and inconsistent statements are relevant to determine the credibility, plausibility and ultimately the weight of testimony, not whether it is legally vexatious. Moreover, the Judgment Officer found that “both sides suffered from a variety of inconsistencies, and diminished recollection.” ID at 3. We note also that the record reveals that Bianco waived production of additional documents from respondents during discovery, conduct that plainly is inconsistent with the type of harassment necessary to show vexation as described in *Robinson*.

CONCLUSION

The record before us does not establish bad faith or vexatious conduct on the part of Bianco. Accordingly, we deny and dismiss respondents’ appeal for an award of attorney fees.

IT IS SO ORDERED.⁷

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



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

Dated: September 30, 2008

⁶ Indeed, Webster’s Dictionary defines “vexatious” as “intending to harass.” *Webster’s Ninth New Collegiate Dictionary* 1312 (1984).

⁷ Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e)) (2000), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.