

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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COPERNIC, INC.

v.

FOREX CAPITAL MARKETS, LLC  
\_\_\_\_\_

CFTC Docket No 07-1024  
ORDER DENYING  
RECONSIDERATION

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Complainant Copernic, Inc. (“Copernic”) petitions for reconsideration of a November 30, 2007 staff order issued pursuant to delegated authority that dismissed its appeal as unperfected because it filed an out-of-time appeal brief. Copernic is a British Virgin Islands company with offices in Peru. Respondent Forex Capital Markets, LLC (“Forex”) opposes the motion. For the reasons that follow, the motion for reconsideration is denied.

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On September 20, 2007, an Administrative Law Judge (“ALJ”) issued an initial decision dismissing Copernic’s reparation complaint on the grounds that it was filed beyond the applicable two-year statute of limitations and also was barred by principles of *res judicata*. *Copernic, Inc. v. Forex Capital Markets, L.L.C.*, 2007 WL 2751883. The ALJ found that the allegations involved transactions that occurred in 2002 and 2003, and that Copernic had pursued its claims unsuccessfully in a U.S. district court and a New York state court before seeking relief before the Commission. The ALJ held that “Copernic’s pursuit of this matter under a variety of theories in a number of other courts . . . does not relieve Complainant of the burden of filing within the two year statutory period for reparations claims.” *Id.* at \*2. The ALJ held further that “[r]ather than tolling the Statute [of limitations], the prior claims operate as a bar to the present action.” *Id.*

October 10, 2007 was the deadline for Copernic to file a notice of appeal. Pursuant to Commission Regulation 12.10(a)(2), “a document shall be filed by delivering it in person or by mailing it” to the Commission’s Proceedings Clerk “within the time prescribed for filing.” Proof of filing and service is made by attaching a certificate to the document to be filed. *Id.*

On October 10, Copernic faxed a letter to the Commission, stating: “Please take notice that Copernic, Inc. will appeal . . . the Order of Dismissal . . . .” Copernic stated further: “In addition, we respectfully request an extension of 20 days to adequately submit the filing fee along with the notice of appeal to the order of dismissal of our complaint.” Copernic represented in support of its request that it had received the initial decision just that day, at 1:00 p.m Lima time, “making it impossible for us to do everything in one day or the very same day.” *Id.* The following day, after the close of business at Commission headquarters, Copernic faxed a notice of appeal on the form provided (but not required) by the Commission, accompanied by copies of postal records showing delivery of the initial decision to its local post office in Milaflores on October 6, a Saturday. These documents were not served on Forex.

On October 12, Copernic filed and served another notice of appeal and submitted the filing fee by expedited delivery service. This submission was received on October 16. Copernic submitted with its notice and fee a letter, with supporting documentation, including a letter from the Peruvian post office, explaining that the initial decision was delivered to the main Lima post office on October 5 and dispatched to Milaflores that day.

Forex opposed the motion, suggesting that Copernic may have contributed to its delayed receipt of the initial decision after the decision reached Milaflores on October 6, asserting that “Copernic does not explain why that envelope was delayed in reaching Copernic until 4 days later.” Letter in Opposition at 2 (Oct. 24, 2007). Forex contended that Copernic could have filed

and served a notice of appeal with the required fee on time if it had really tried. *Id.*

Copernic submitted a reply, in which it contended, with supporting documentation, that Monday and Tuesday, October 8-9, were public holidays with no mail delivery. Copernic explained further that it needed at least a day to obtain an international check. Copernic's reply, received October 31, 2007, was accompanied by a certificate dated August 29, 2007, attesting to service of a request for extension of time.

To perfect its appeal, Copernic was required to file and serve an appeal brief within 30 days after filing its notice. Regulation 12.401(b). In Copernic's case, this meant that its brief had to be mailed or delivered to the Commission and to Forex on or before November 10 (30 days after its faxed notice), and in any event no later than November 12 (30 days after Copernic mailed its second notice and tendered the filing fee).

The Commission received Copernic's appeal brief on November 21. The brief and a cover letter were dated November 16. These were accompanied by a certificate of service that, as above, attested to the filing and service of a request for extension of time on August 29, 2007. Copernic offered no reason for its late brief. On November 30, 2007, staff issued a delegated authority order stating that while Copernic's notice of appeal would be accepted, its tardy appeal brief nevertheless warranted dismissal of its appeal as unperfected. *Copernic*, 2007 WL 4295864.<sup>1</sup>

Pursuant to Regulation 12.408(c), Copernic sought reconsideration of the delegated authority order by the Commission, arguing that the flexibility the Commission had shown in accepting its late notice of appeal should be shown as well with respect to its appeal brief. Copernic states that it waited to file its appeal brief until the Commission ruled on whether to

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<sup>1</sup> Also on November 30, Forex filed a motion to dismiss Copernic's appeal as unperfected, which the Commission received on December 3.

accept its out-of-time appellate filing fee. We note that Copernic represented that it had filed its brief on November 19, *see* Petition at 3 n.3, not on November 16 as staff had inferred from the date on the brief. Respondent Forex opposed the petition for reconsideration, arguing that Copernic's pending request regarding its appeal fee did not stay its obligation to comply with other deadlines.

We accept Copernic's representations regarding its delayed receipt of the initial decision and the inconvenience of getting an international check. Copernic's October 10 faxed notice—submitted within the deadline—advised the Commission, although not the respondent, that Copernic intended to exercise its right of appeal. Copernic then acted with reasonable promptness to serve respondent and to submit the fee. Thus, we find that Copernic established excusable neglect under *Pioneer Insurance Service Co. v. Brunswick Association, Ltd.*, 507 U.S. 380, 395 (1993). *Pioneer* established a four-factor test for excusable neglect: (1) the risk of prejudice to the nonmoving party; (2) the length of delay and its potential prejudice upon the judicial proceeding; (3) the reasons for the delay; and (4) whether the movant acted in good faith. The reasons for the delay were beyond Copernic's control; Copernic acted in good faith by promptly faxing a notice of its intent to appeal and taking the other necessary steps within two days; the length of the delay was minimal, and therefore did not prejudice the proceeding or the respondent.

The late appeal brief, however, does not satisfy all *Pioneer* factors. Copernic filed the brief on November 19, a week after it was due, but not so long a delay as to prejudice materially the proceeding or the respondent. Copernic, however, offered no reason for its late filing at the time it submitted its brief. It simply filed out of time, continuing a pattern of casual compliance with deadlines and other forum rules, *e.g.*, rules governing proof of filing and service.

Copernic offered an explanation only upon seeking reconsideration after its appeal was dismissed, which calls its good faith into question, and its explanation does not support the relief it seeks. Its pending request for relief from its late appeal fee did not stay its obligation to comply with other deadlines. *Cf. Gutch v. Northcott*, 1985 WL 55329 (CFTC Dec. 4, 1985) at \*1 (holding that a party who believes a motion for relief is pending is “not excused from doing anything about the case”); *Almond v. Investor Metals Services, Inc.*, 1984 WL 48176 (CFTC Apr. 19, 1984) at \*1 (holding that “nothing in the [reparation] rules of procedure gives a party the right to assume that once he has filed a motion for relief . . . he may then act as if the request has been granted unless and until he is informed it has been denied”).<sup>2</sup>

Because excusable neglect has not been shown, Copernic’s petition for reconsideration is denied and its appeal is dismissed. Pursuant to Regulation 12.408(c), the filing of Copernic’s petition shall operate *nunc pro tunc* to stay the effective date of the delegated authority order. Copernic’s appeal is finally dismissed as of the date of this order.

IT IS SO ORDERED.<sup>3</sup>

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



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

Dated: April 23, 2008

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<sup>2</sup> If Copernic wanted to avoid expending resources on a brief until it knew whether its fee would be accepted and its appeal considered, it could have requested an extension of the briefing schedule pending a ruling on its motion. The Commission routinely extends briefing periods upon timely motions by parties and their counsel for good cause.

<sup>3</sup> 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.