

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MIGUEL ANGEL RUBINI VARGAS and
GISELLA L. SALINAS

v.

FX SOLUTIONS, LLC

CFTC Docket No. 07-25
OPINION AND ORDER

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Complainants appeal from the Administrative Law Judge's ("ALJ") July 31, 2007 order dismissing their complaint without prejudice for failure to file the bond required of non-resident complainants or to demonstrate grounds for waiving the bond. *Rubini Vargas v. FX Solutions, LLC*, 2007 WL 2212884 (CFTC July 31, 2007). Respondent filed no answering brief. Upon *de novo* review, we waive the bond requirement, vacate the order of dismissal, and remand this case for proceedings on the merits.

BACKGROUND

Complainants Miguel Angel Rubini Vargas ("Rubini")¹ and Gisella L. Salinas ("Salinas") filed a reparations complaint against FX Solutions, LLC ("FX Solutions") in February 2007, alleging fraud, unauthorized trading and failure to supervise and claiming \$82,093 in damages. As nonresidents of the United States, they were required either (i) to pay a bond in double the amount of their claim; or (ii) to seek a waiver of the bond requirement by showing that they were residents of a country that permits a U.S. resident to file a complaint without furnishing a bond. *See* Section 14(c) of the Commodity Exchange Act ("Act"). Complainants requested a waiver, providing in support thereof arguments resting principally on Articles 63 and 71 of the Peruvian Constitution. The complaint was forwarded to respondent FX

¹ Complainant's appeal brief refers to him as "Rubini".

Solutions to answer. The answer was received on May 11, 2007 and the case was forwarded to the ALJ.

On June 25, 2007, the ALJ issued a Show Cause Order tentatively concluding that complainants had failed to show an adequate basis for waiving the bond and directing complainants to show cause why their complaint should not be dismissed, either by posting a bond or submitting a more persuasive request. Complainants responded, citing additional provisions of Peruvian law. The ALJ rejected this further showing as lacking sufficient specificity and dismissed the complaint without prejudice. This appeal followed.

DISCUSSION

Subject matter jurisdiction is an issue of law subject to *de novo* review. *Tootle v. Secretary of Navy*, 446 F.3d 167, 173 (D.C. Cir. 2006); *Frey v. Environmental Protection Agency*, 270 F.3d 1129, 1131(7th Cir 2001). The double bond requirement is a jurisdictional prerequisite subject to such review:

“[T]he double bond requirement of § 12.13(b)(4) is imposed by Section 14(c) of the Act, and therefore, not subject to waiver by the Commission unless the ‘reciprocity’ exception of Section 14(c) applies. Accordingly, to the extent that Section 14(c) requires the filing of a bond in given reparation case, the Commission regards a non-resident complainant's compliance with such a requirement to be “jurisdictional.”

Adham v. Drexel Burnham Lambert, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,156 at 32,389 (CFTC July 9, 1986), *quoting* Final Rules Relating to Reparations, 49 Fed.Reg. 6602, 6607-08 (Feb. 22, 1984) (footnotes omitted); *cf. Kessenich v. CFTC*, 684 F.2d 88, 93 (D.C. Cir. 1982) (timely filing of appeal bond is jurisdictional and unalterable). The bond issue “may be raised at any stage of the proceeding,” and may be raised *sua sponte* “even if the issue is overlooked or abandoned by the parties.” *Haekal v. Refco, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,162 at 45,542 (CFTC Sept. 26, 1997) (citing

precedent). Section 14(c) of the Act allows nonresident complainants to seek a waiver of the bond requirement, but is silent regarding the nature of the showing required to establish waiver, stating only that “the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.”² Regulation 12.13(b)(4), which implements Section 14(c), provides little more guidance, requiring only that a request for waiver be in writing and be accompanied by “sufficient proof” of reciprocity.³

The bond requirement has been addressed in a handful of Commission precedents, beginning with *Adham, supra*, in which the Commission emphasized the bond’s jurisdictional nature without addressing the showing required for a waiver.⁴ The Commission noted that *Adham* “presented evidence that the French courts would not demand such a bond from an

² Section 14(c) provides in its entirety:

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney’s fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided*, That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

³ Regulation 12.13(b) provides in relevant part:

(4) *Bond required if complainant is nonresident; filing date of nonresident’s complaint.*

(i) If a complaint in reparations is filed by a nonresident of the United States, the complaint shall not be considered duly filed in proper form unless it is accompanied by:

(B) A written request that the bond requirement be waived in accordance with section 14(c) of the Commodity Exchange Act, accompanied by sufficient proof that the country of which the complainant is a resident permits the filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

⁴ The Commission dismissed the complaint on grounds unrelated to the bond, but “[took] this opportunity to provide guidance for the future regarding the statutory double bond required of non-resident complainants and the relationship between timely filing of that bond and tolling the two-year statute of limitations on reparation complaints.” *Adham*, ¶ 23,156 at 32,389.

American complainant”—notarized English-language translations of passages from the French Civil Code—but did not rule explicitly on whether these established reciprocity. Subsequently, in *Trust & Investment AG v. Stotler & Company*, 1987 WL 106876 (CFTC July 15, 1987), the Commission found a letter from the Swiss Consul General to be “sufficient proof.”

In *Myers v. E. F. Hutton & Company*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,603 at 39,877 (Nov. 17, 1992), the complainant submitted an untranslated letter from the German Department of Justice, which, Myers argued, “confirms the fact that an American is not required to post a bond when filing a claim against a German citizen or company.” Commission staff advised Myers to submit an official translation, which he did. Staff subsequently advised Myers that no waiver would be granted, because, according to the translated letter, Germany excused U.S. citizens from posting a bond only if they either maintained a permanent place of abode in Germany or owned “sufficient” property there. Myers posted the bond.

In *Martaglafonso, SA v. Merrill Lynch Futures, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,685 (CFTC May 4, 1993), the Commission noted without discussion that “Martaglafonso filed a certificate from the Panamanian consulate certifying that a United States citizen can file suit in Panama without posting a bond” and proceeded to the merits of complainant’s appeal. *Id.* at 40,259 n.1. In the same case, the Commission dismissed *sua sponte* a Colombian plaintiff for failure to post a bond or prove an exemption. *Id.* at 40,262.

The Commission next addressed this issue in *Rendita Global Investment, A.G. v. Mercate Clearing, Inc.*, 1997 WL 71486 (CFTC Feb. 20, 1997). The Commission determined that the corporate complainant resided in the Republic of the Marshall Islands, not Switzerland, as the ALJ had found. The Commission gave Rendita an opportunity to pay the bond or establish

reciprocity by the Marshall Islands. When Rendita failed to do so, the Commission vacated the initial decision and dismissed the complaint. 1997 WL 351254 (June 24, 1997).

In *Haekal, supra*, the Commission held that Haekal's evidentiary showing, consisting of an opinion of counsel and portions of the German Civil Code, were superseded by a German-American treaty that accorded reciprocity only to American nationals with a permanent residence or property in Germany. *Haekal*, ¶ 27,162 at 45,543. The Commission vacated the waiver granted below and gave Haekal an opportunity to post a bond. The Commission dismissed the case after Haekal posted the bond after missing deadlines established by the Commission. 1998 WL 390811 (CFTC July 13, 1998).⁵ In its most recent case involving the bond, *CIM Investments v. Hammer Trading, Inc.*, 1999 WL 68638 (CFTC Feb. 12, 1999), the Commission found that the complainant, although organized under the laws of Nevis, West Indies, was a resident of the United States and did not have to post a bond.

In the instant appeal, complainants support their waiver claim by relying on Peru's constitution, various statutes, and Peru's Administrative Procedure Code and implementing regulations. Their appeal brief is submitted *pro se*. The brief's arguments and analysis, however, echo a signed opinion of legal counsel submitted with the brief as Exhibit A. Complainants submitted certified translations of the laws they rely on.

Complainants argue first that the Civil Procedure Code of Peru ("CPCP"), Legislative Decree 768, contains no provision for bonds to be posted by nonresident litigants.⁶ *See generally*

⁵ On Haekal's appeal, the U.S. Court of Appeals for the Second Circuit held that the limitations period for his reparations claim was equitably tolled upon the Commission's acceptance of Haekal's complaint without the bond, and that after the tolling condition ended, he had the entire remaining limitations period to satisfy the bond requirement. Accordingly, Haekal's bond was timely filed. The case settled. *Haekal v. Refco, Inc.*, 198 F.3d 37 (2d Cir. 1999).

⁶ CPCP Section 1, (Congressional Order 768, April 22, 1993), provides: "Effective right to Protection of the Law. Any person has the effective right to protection of the law for the exercise or defense of his/her rights or interests, subject to a due process." *See* Exh. B to App. Br. at 1 (certified translation).

App. Br. at 2-4; *accord*, Exh. A at 1. They argue further that the CPCP is the sole source of authority governing lawsuits, that its stated provisions must be complied with strictly, and that no burden may be imposed on any litigant that is not set forth expressly in the CPCP. App. Br. at 3-4; Exh. A at 3.

Complainants point to specific provisions of the CPCP where a bond requirement logically might be found, and is not, *e.g.*, CPCP Article 410, which imposes fees to cover the costs of the procedure without regard to litigants' residency, App. Br. at 3; Exh. B at 1; and CPCP Article 424, which enumerates 11 "requirements applicable to complaints," none of which mentions a bond.⁷ App. Br. at 2-3, Exh. A at 2.

Complainants also cite CPCP Titles I and V in support of their waiver claim. The former, they assert, "mandates [that] all persons shall have the right of access to justice to fend for their rights." App. Br. at 4. They explain that "[t]he word justice" in this context means "access to institute legal actions before the Peruvian jurisdiction," and does not connote only abstract notions of fairness. *Id.* at 4, n.14. Title V, they assert, guarantees that "all persons shall be equally treated as to the institution, development and outcome of the proceeding without regards of their sex, race, religion, language, or their social, political and economic status." *Id.* at 4. They infer that "Title V's prohibition against discriminating among classes of persons "includ[es] by extension any foreign person, such as a U.S. resident" *Id. See generally* Exh. A at 3.

⁷ Under CPCP Article 424, the 11 required elements of a complaint include: (1) the name of the judge; (2) the name and address of the complainant; (2) the name and address of the complainant's representative, if any; (4) the name and address of the defendant; (5) the content of the claim; (6) the facts and circumstances surrounding the claim; (7) the authority that sustains the case; (8) the amount sought; (9) the type of procedure to be followed; (10) the proof to be offered; and (11) the complainant's signature. *See* App. Br. at 3-4.

In addition to the CPCP, complainants rely on Articles 44 and 45 of the Administrative Procedure Code (“ACP”), Legislative Decree 27444, under which an administrative proceeding is subject to fees only when the proceeding generates costs to the state agency where the proceeding is instituted, and only to the extent that the fees reflect the actual costs incurred. Any fees charged must be promulgated and published in the agency’s internal administrative regulations. App. Br. at 6. Moreover, they note, Article 45.2 of the ACP states that any administrative fees charged “cannot discriminate or differentiate” among various classes of persons participating in such proceedings. Complainants argue that this provision operates to bar a nonresident bond. App. Br. at 5-6. Complainants also assert that they have examined the regulations promulgated by Peruvian banking and securities regulators and found no provisions for nonresident bonds. *See generally* Exh. A at 4.

Complainants also rest their waiver claim argument on the principle of national treatment for noncitizens and nonresidents with respect to economic activity conducted in Peru, as provided for in Articles 2 and 63 of Peru’s Constitution and in Legislative Decrees 662 and 757. *See generally* App. Br. at 7-12; Exh. A at 8. Article 2 of the Constitution guarantees legal equality of all persons without regard to race, religion, opinion, economic condition, “or any other reason,” a catchall that complainants contend necessarily includes nonresidents. They read Article 2 in conjunction with Article 63’s provision that national and foreign investments will be subject to the same conditions. *Id.* at 7. Legislative Decrees 662 and 757 implement the broad constitutional guarantee of national treatment by prohibiting specific forms of conduct that would operate to the detriment of foreign investors. *Id.* at 10.

Complainants also identify specific provisions in Peruvian banking laws prohibiting discriminatory treatment of foreign investments and investors, *id.* at 11, and banking regulations

authorizing “free access to any person” to file a claim against a regulated bank or insurance company. *Id.* at 12.

Complainants acknowledge that the authority they have marshaled does not expressly state that a nonresident U.S. citizen would not have to post a bond to file suit in a judicial or administrative forum in Peru. They argue nevertheless that such an inference necessarily follows from the absence of an express provision imposing a bond, coupled with the breadth of legal authority mandating equal treatment of all persons under the law and laws encouraging foreign investment. Their opinion of counsel, relying on the same authority, states affirmatively that “[n]either civil nor administrative proceedings require U.S. investors to furnish a bond to file a complaint before the Peruvian forum[,] [n]or any other type of court or proceedings in Peru demands such conditions, requisite or prerequisite.” Exh. A at 1.

Many of these arguments are not new. Complainants raised some of them before the ALJ, who rejected them as beside the point, ruling as follows on the constitutional articles:

[Articles 63 and 71] neither . . . mention the right to sue nor the presence or absence of a bond requirement for Peruvians or foreign nationals who appear before Peruvian courts. They do not facially indicate that “a United States citizen may proceed without furnishing a bond for any purpose.” Rather, they express a preference for free trade and state the limited property rights of foreign nationals. Moreover, the complainants did not try to show that the constitutional articles in question have been authoritatively interpreted to eliminate bond requirements.

Order of Dismissal at 2 n.4, *quoting* Show Cause Order at 4-5.

The ALJ also rejected reciprocity arguments based on Legislative Decrees 662 and 757, stating that the former “merely establishes a qualified preference for unencumbered investment by foreigners,” Order of Dismissal at 3, and that the latter implements this preference by “banning ‘discriminatory’ or ‘differentiated’ treatment between foreign and local residents in the establishment of ‘currency exchange, prices, tariffs or non-tariff fees among investors and the

companies.” *Id.* The ALJ concluded that “[n]one of these provisions indicate what, if any, bond requirements a United States resident would face if he sued a Peruvian citizen in a Peruvian court.” *Id.* at 4.

We read the showing required under Section 14(c) in light of the principle that “our legal system rarely requires a party to prove a negative.” *Walther v. Secretary of Health and Human Services*, 485 F.3d 1146, 1150 (Fed. Cir. 2007); *accord, Ains, Inc. v. U.S.*, 365 F.3d 1333, 1344 (Fed. Cir. 2004) (recognizing that “[i]t is always difficult to prove a negative—here, the unavailability of appropriated funds absent a statutory amendment”). Cases requiring proof of a negative frequently promote public policy concerns not present here. *See, e.g., In re Madison Guar. Sav. & Loan (Cabe Fee Application)*, 439 F.3d 718, 721 (D.C. Cir. 2006) (attorney fees are difficult to recover by unindicted subjects of independent counsel investigations because petitioners must prove the negative proposition that the fees would not have been incurred “but for” the requirements of the Ethics in Government Act, and also “because the law contemplates that it should be difficult and that such fees will not be a common thing”); *Martinez v. E.J. Korvette, Inc.*, 477 F.2d 1014, 1016 (3rd Cir. 1973) (holding that under Pennsylvania law, a plaintiff alleging malicious prosecution “has the burden of proving lack of probable cause and despite the difficulty of establishing a negative, the requirement is rigidly enforced”).

Given the inherent difficulty that may attend establishing a waiver claim, we believe the showing required by Section 14(c) should be guided by the reasoning of the U.S. Court of Appeals for the First Circuit in *In re Bank of New England Corp.*, 364 F.3d 355 (1st Cir. 2004), which held that a proposition (that a particular rule of construction did not apply in New York) was established not by affirmative proofs, but by the “near-total absence” of contrary authority. Specifically, the court held: “Although we are in something of an epistemological quandary—it

is always difficult to prove a negative—the near-total absence of authority is compelling proof that the Rule of Explicitness is not part of New York's general contract law.”). *Id.* at 365 (emphasis added); *cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1257-58 (11th Cir. 2007) (holding, in a case involving scientific evidence, that “[u]nder some circumstances . . . the lack of positive evidence can prove a negative—the absence of evidence can be conclusive”).

Complainants could not provide an affirmative statement of Peruvian law that specifically says U.S. citizens do not have to file a bond in Peruvian courts. Such statements may be found in the laws of some countries, or in bilateral or multilateral treaties to which the United States and a complainant’s country are parties. On the other hand, Peru apparently has no statute or rule expressly imposing a nonresident bond, which would settle the waiver question the other way. Peru appears to fall into a third category—a jurisdiction that imposes no bond but has not said so in those specific words. Complainants’ reasonable search of the law has unearthed nothing expressly on point. Their counsel, whose expertise appears unexceptionable, opines that no bond is required. The attorney’s representation that the “norms and regulations” of Peruvian civil procedure are strictly applied according to their terms, *see* Exh. A at 3, encourages reliance on the plain meaning of the statutes and rules cited. Pursuant to our *de novo* review, we have retraced complainants’ steps and also examined a number of treaties between Peru and the United States, and found nothing to add to what complainants have produced.⁸

⁸ We take notice of a U.S. Department of State report, “2008 Investment Climate Statement - Peru,” at <http://www.state.gov/e/eeb/ifd/2008/100999.htm>, which states with respect to Peru’s openness to foreign investment that the government seeks to attract investment and notes complainants’ point that the 1993 constitution “guarantees national treatment for foreign investors and permits foreign investment in almost all economic sectors.” Report at 1. The report contains an extensive discussion of dispute resolution with no mention of distinctions drawn between U.S. and Peruvian residents regarding access to court or other forums. We also take notice of the United States – Peru Trade Promotion Agreement, signed December 14, 2007 (with an earlier version signed April 12, 2006), which contains neutral dispute resolution provisions. *See also* Office of the U.S. Trade Representative, Trade Facts (June

In these circumstances, where a diligent search has been made and no relevant authority has been found, we treat the absence of authority as compelling proof that no bond is required. We decline to deny the waiver to these reparations claimants because their country of origin has not phrased its laws with regard to how they will apply to U.S. citizens. Accordingly, we hold that complainants have made a sufficient showing under Section 14(c) to establish their entitlement to a waiver. We vacate the order of dismissal and remand this case to the ALJ.

IT IS SO ORDERED.

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



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

Dated: February 24, 2009