

PROCEDURAL HISTORY

On August 14, 2012, the Agency served Respondent with a subpoena seeking the following:

1. All trading cards and order tickets used in the trading of silver or gold futures or silver or gold options on futures [from January 1, 2008 to the present].
2. All communications (including but not limited to emails, instant messages, text messages, faxes, and hardcopy communications) during the Relevant Period with Dominique Cognata, Ron Barba and/or any COMEX floor members and/or their clerks or personnel who work or have worked on the COMEX floor relating to:
 - a. the trading of silver or gold futures or silver or gold options on futures, or
 - b. any other type of financial transaction.

3. All documents relating to any bank accounts for which you were an authorized signer, over which you have had direct or indirect control, or in which you have had any direct or indirect beneficial interest, during the Relevant Period ...

See Exhibit 12 to Declaration of K. Brent Tomer dated April 24, 2014.

On September 30, 2013, the Agency filed its Complaint alleging Respondent violated the CEA and Commission Regulations by failing to respond to the subpoena. It served the Complaint upon Respondent pursuant to the regulations by sending it via certified mail, return receipt requested, to the address of record contained in the Respondent's registrations with the Commission. See 17 C.F.R. § 3.50. After receiving the case the undersigned granted several extensions of time for the parties to either negotiate settlement or for Respondent to file a response to the Complaint.¹ The parties'

¹ See Order Granting Extension of Time to Answer dated December 23, 2013; Order Granting Extension of Time to Answer dated January 10, 2014; and, Order Granting Third Extension of Time to Answer dated February 28, 2014.

attempts to settle the case failed and Respondent ultimately did not file an Answer or otherwise respond to the Complaint.²

Because Respondent did not file an Answer or other responsive pleading, the Agency moved to find Respondent in default. I granted the motion finding Respondent in default and deemed the allegations in the Complaint admitted. The Agency subsequently moved for an Entry of Default Order giving rise to this Initial Decision. Respondent's counsel filed a Declaration in Opposition and the Agency filed a Reply. This case is now ripe for decision.

FACTS OF THE CASE³

Respondent is a New York State resident and resides in New York County. Complaint at ¶ 2. He has been a registered floor broker and a member of the Commodity Exchange, Inc. ("COMEX") since 2005. Id. The Commission has designated COMEX as a contract market. Id. Respondent has been the subject of two COMEX disciplinary actions involving noncompetitive, pre-arranged trading violations. Id.

On August 14, 2012, as part of an ongoing investigation, the Agency served Respondent with a subpoena for the production of various documents, including "trading cards and order tickets used in the trading of silver or gold futures or silver or gold options on futures" from January 1, 2008 to the receipt of the subpoena and all communications, including emails and instant messages with certain individuals relating to his trading of silver or gold futures or silver or gold options on futures. Id. at ¶ 3.

² Respondent's email communication does not serve as an Answer or other responsive pleading to the Complaint even though Respondent asked that the email "be considered to avoid a default." The email communication did not contain specific admissions or denials of each allegation as required by 17 C.F.R. § 10.23(b).

³ Because this was a default case, the facts are derived from the allegations deemed admitted in the Complaint. The allegations containing statements of law and regulation are not deemed admitted; the statutes and regulations speak for themselves.

Respondent, through his counsel, informed the Agency he would invoke his privilege under the Fifth Amendment to the United States Constitution, thus refusing to produce any documents in response to the subpoena. Id. at ¶ 4. In a subsequent phone conversation Respondent's counsel reiterated Mr. Cognata was invoking his Fifth Amendment privilege in response to the subpoena. Id. at ¶ 5. On January 31, 2013, the Agency sent a letter to Respondent's counsel confirming its understanding that Respondent "d[id] not intend to produce any responsive documents called for by the CFTC's August 14, 2012 subpoena, nor make responsive documents available for inspection by CFTC staff, pursuant to Section 4g(a) of the Act and Commission Regulations 1.31 and 1.35." Id. at ¶ 6. Respondent did not respond to the letter. Id.

On July 26, 2013, the Agency sent a letter to Respondent's counsel stating "Mr. Cognata has not provided a valid basis for his failure to produce documents in response to the August 14 Subpoena" and that the "Fifth Amendment privilege against self-incrimination does not protect against the production of records that are required to be kept in connection with the voluntary participation in a regulated activity." Id. at ¶ 7. Also on July 26, 2013, the Agency issued a subpoena for Respondent to testify in connection with the Agency's investigation. On August 19, 2013, Respondent appeared to testify but refused to answer questions relating to his trading activities or his failure to comply with the Agency's subpoena. Id. at ¶ 9. Respondent testified that on the advice of counsel, he was asserting his Fifth Amendment privilege against self-incrimination. Id. Respondent did testify he received the Agency's August 14th subpoena. Id. at ¶ 10.

Respondent's counsel further stated for the record that he and Respondent previously discussed the Division's July 26 Letter. Id. During Respondent's testimony,

Agency staff showed and read the July 26 Letter which stated the Fifth Amendment privilege against self-incrimination does not apply to records made and maintained pursuant to a valid regulatory regime such as the documents required to be kept, maintained, and produced under Section 4g of the Act and Commission Regulations 1.31 and 1.35. Id. at ¶ 11. The Agency further advised Respondent during his testimony that violations of the Act and Commission Regulations could subject him to certain sanctions, disqualifications, and/or penalties. Id.

To date Respondent has failed to produce any documents responsive to the subpoena and/or the January 31 or July 26 Letters. Id. at ¶ 12.

ANALYSIS

Respondent's Fifth Amendment Claim

In pertinent part, the Fifth Amendment of the United States Constitution states “No person. . .shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V. Respondent claims this constitutional privilege as a defense for failing to respond to the Agency’s subpoena and cites United States v. Hubbell, 530 U.S. 27 (2000) in support of his “act of production” 5th Amendment privilege. See Declaration of Michael Rosen in Opposition to the Division of Enforcement’s Motion for Entry of Orders of Default, Findings of Fact, Conclusions of Law, Sanctions and Revocation of the Registration of Dominick Anthony Cognata (“Respondent’s Opposition”) dated May 2, 2014. Respondent further states that in Hubbell the Supreme Court “held, among other things that the 5th Amendment privilege against compelled self-incrimination protects a witness from being compelled to disclose the existence of incriminating documents.” See Respondent’s Opposition at ¶ 7.

Agency's Response

The Agency argues the Fifth Amendment does not apply to records required to be created and maintained by law and are part of a valid regulatory scheme. See Division of Enforcement's Combined Memorandum of Law in Support of Its Motion for Entry of Orders of Default, Findings of Fact, Conclusions of Law, Sanctions and Revocation of the Registration of Dominick Anthony Cognata, dated April 24, 2014, at p. 13. The undersigned agrees.

Principles of Law

The Fifth Amendment privilege against self-incrimination “which exists as to private papers, cannot be maintained in relation to records required to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established.” Shapiro v. United States, 335 U.S. 1, 33 (1948) (quoting Davis v. United States, 328 U.S. 582, 589-90 (1946))(internal quotations omitted). “Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator.” Shapiro, 335 U.S. at 7. Essentially, these records kept under requirement of law were “public documents” which a person “was required to keep, not for his private uses, but for the benefit of the public, and for public inspection.” Id. at 17-18.

Under section 4g of the Act, 7 U.S.C. § 6g (2012), Respondent, as a Commission-registered COMEX floor broker, must (1) make such reports as required by the Commission regarding, among other things, his own transactions and transactions for

customers; (2) keep books and records pertaining to such transactions in the form and manner required by the Commission; and, (3) keep such books and records “open to inspection” by Commission representatives.⁴

Further, Commission Regulation 1.31(a), 17 C.F.R. § 1.31 (a), mandates in relevant part all books and records required to be kept by the Act or Commission Regulations be “open to inspection” by any representative of the Commission and provided to such representative “upon the representative’s request.”

Title 17 C.F.R. § 1.31(a)(2) provides that when requested by a Commission representative, either the originals or copies of such records shall be provided promptly. Title 17 C.F.R. § 1.35(d) requires members of a contract market to prepare trading cards or similar records documenting their trades.

Finally, 17 C.F.R. § 1.35(a) mandates that a member of a contract market must maintain and produce for inspection required records such as trading cards and order tickets, and furnish true and correct information and reports when and as requested by an authorized representative of the Commission.

Applying the Law to the Facts

The above cited statute and regulations create a valid regulatory scheme which Respondent was required to follow. His assertion of the Fifth Amendment is misplaced and is not a defense for his violations of the Act and Commission Regulations. Respondent is correct that Hubbell stands for the proposition that an “act of production” is protected by the Fifth Amendment; however, Hubbell recognized this protection does not extend to “required records.” United States v. Hubbell, 530 U.S. 27, 35 (2000) (“...the fact that incriminating evidence may be the byproduct of obedience to a regulatory

⁴ Section 4g of the Act is codified at 7 U.S.C. § 6g.

requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.”)(internal citations omitted).

The records requested in the subpoena were “required records” mandated by law and regulation for Respondent to create, maintain, and produce to the Commission. Respondent failed to do so. He therefore violated 7 U.S.C. § 6g (2012) and 17 C.F.R. §§ 1.31 and 1.35.

ULTIMATE FACTS AND CONCLUSIONS OF LAW

1. At all relevant times Respondent was subject to the provisions in 7 U.S.C. § 6g and 17 C.F.R. §§ 1.31 and 1.35.
2. By failing to file an Answer or other responsive pleading in accordance with 17 C.F.R. § 10.23, Respondent is in default.
3. The records sought in the Commission’s August 14th Subpoena were required to be kept and maintained as part of a valid regulatory scheme.
4. The Fifth Amendment does not apply to the disclosure of required records such as those sought in the August 14 Subpoena.
5. Respondent violated Section 4g of the Act (7 U.S.C. § 6g) and Commission Regulations 1.31(a) and 1.35(a) (17 C.F.R. §§ 1.31(a) and 1.35(a)) by failing to comply with its August 14, 2012 subpoena.
6. Good cause exists to enter an Order of Default against Respondent directing him to cease and desist violating the Act and Commission Regulations and to impose a civil monetary penalty.

SANCTIONS

Cease and Desist Order

The Agency’s requested sanction for a cease and desist order is appropriate under the circumstances of this case. Respondent’s violations have been continuous and ongoing for approximately two years. His past conduct is an indicator for potential future

violations and there is a strong likelihood that the conduct in violation of the Act and Commission Regulations will either continue or be repeated. Therefore, a cease and desist order is appropriate.

Civil Monetary Penalty

Pursuant to 7 U.S.C. § 9 and 17 C.F.R. § 143.8, Respondent is subject to a civil penalty equal to the greater of \$140,000 or triple the monetary gain to such person for each such violation. Here, the Agency requests the maximum civil penalty in the amount of \$140,000. To justify this request, the Agency states it imposes sanctions in an enforcement action to further the Act's remedial policies and to deter others from committing similar violations. See 17 C.F.R. § 1.31(a). The Agency further states it has articulated the following factors to be considered for determining an appropriate civil monetary penalty:

Our approach to the calculation of civil monetary penalties does not lend itself to simple formulaic solutions. Instead, we have looked to the total "facts and circumstance" of each case and focused on the relative gravity of the respondent's particular misconduct. Factors we have considered relevant to the gravity of particular misconduct include: (1) the relationship of the violation at issue to the regulatory purposes of the Act; (2) respondent's state of mind; (3) the consequences flowing from the violative conduct; and (4) respondent's post violation conduct. The level of sanctions should reflect both the "abstract or general seriousness of each violation" and "the particular mitigating or aggravating circumstances presented by the unique facts of individual conduct at issue. We have also held that civil money penalties should be sufficiently high to deter future violations, that is, to "make it beneficial financially [for a respondent] to comply with the requirements of the Act and the Commission regulations rather than risk violations.

In re Grossfeld, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,921 at 44,468 (CFTC Dec. 10, 1996).

The Agency argues Respondent's violation is continuous and ongoing because he has still failed to comply with the subpoena. Further, the Agency states the provisions

Respondent violated are intended to preserve the integrity of the market and protect the public from fraudulent sales and trading practices. It further argues that because Respondent refused to produce records related to his trading activity, its efforts to investigate fraud and abuse were, and continue to be, frustrated by his improper invocation of the Fifth Amendment privilege. Therefore, the Agency states the imposition of the maximum civil monetary penalty of \$140,000 is appropriate. The undersigned agrees.

Respondent's violations strike at the core purpose of the record keeping requirements of the Act and its Regulations. Further, Respondent's violation was continuous and ongoing over an extensive period of time, including after Respondent was made aware of the Agency's statements that the records requested were not protected by his Fifth Amendment privilege. Respondent provided no mitigating information other than a general statement that he could not pay because he had already paid approximately \$150,000 for his COMEX settlements. See Respondent's Opposition dated May 4, 2014 at p. 5, ¶ 8. These statements are insufficient to warrant a lesser civil monetary penalty in light of the seriousness of Respondent's violations.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that upon thorough review and consideration of the entire record, an **ENTRY OF DEFAULT** is entered against Dominick Anthony Cognata.

IT IS FURTHER ORDERED that Respondent will immediately cease and desist from engaging, directly or indirectly in conduct in violation of Section 4g of the Commodity Exchange Act, 7 U.S.C. §6g, Commission Regulation 1.31(a), 17 C.F.R. § 1.31(a), and Commission Regulation 1.35(a), 17 C.F.R. § 1.35(a).

IT IS FURTHER ORDERED that as of this date, Respondent shall pay civil monetary penalties in the amount of \$140,000 (one hundred and forty thousand dollars), plus post-Order interest. Post-Order interest shall accrue beginning on the date of entry of this Order and will be calculated using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. The civil monetary penalty is payable by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables – AMZ340
Email Box: 9-AMC-AMZ-AR-CFTC-
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-5644

If payment by electronic funds transfer is chosen, Linda Zurhorst or her successor should be contacted for instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to: (1) Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581; (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581; and (3) Deputy Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 140 Broadway, 19th Floor, New York, NY 10005.

Done and dated October 22, 2014
Washington, D.C.



HON. WALTER J. BRUDZINSKI
CHIEF ADMINISTRATIVE LAW JUDGE