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MIGUEL ANGEL RUBINI VARGAS and GISELLA LUCIA T. SALINAS, Complainants v. FX SOLUTIONS, LLC, Respondent.	*	CFTC Docket No. 07-R025

OPINION AND ORDER OF DISMISSAL

Introduction

This is an exceptionally flawed case. It is before us on remand from the Commission,[1] which vacated our order[2] dismissing the complaint of Miguel Vargas and Gisella Salinas.[3] We had held that Vargas failed to file the bond required of non-resident complainants or alternatively to demonstrate grounds for waiving the bond.[4] In this opinion we address a panoply of errors – ethics

[1] *Vargas v. FX Solutions, LLC,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,319 at 62,671 (CFTC Feb. 24, 2009). The Commission's decision was unanimous. *Id.*

[2] *Vargas v. FX Solutions, LLC,* [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,586 at 60,725 (CFTC July 31, 2007).

[3] For simplicity we will refer only to "Vargas."

[4] *See* 7 U.S.C. §18(c); 17 C.F.R. §12.13(b)(4).

and rules violations, a rule read out of existence, and multiple substantive and procedural flaws – at least one of which requires us to dismiss this case again without prejudice. We briefly introduce each of them here.

First, this proceeding raises serious issues of ethics and rules violations.[5] Despite the fact that the complaint was obviously written by one or more attorneys,[6] there is no attorney of record.[7] Indeed, there was no attorney of record on appeal before the Commission either, although a unanimous Commission accepted without question an unauthorized attorney's advocacy on Vargas's behalf – even going so far as to rely on it as evidence in resolving the bond issue.[8]

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[5] The American Bar Association's Model Code of Judicial Conduct has been recognized as an appropriate authority for guiding the conduct of federal administrative law judges. *See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522* at 1 n.1 (1986); *In re Chocallo*, 2 M.S.P.B. 23, 27, 38, 62-3 (1978), *aff'd*, 2 M.S.P.B 20 (1980). Under Canon 2 of the Code, "[t]aking action to address known misconduct is a judge's obligation." *ABA Model Code of Judicial Conduct*, Rule 2.15, Comment [1]. "[A]ctions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to . . . reporting the suspected violation to the appropriate authority or other agency or body." *Id.*, Comment [2]. Our obligation is fulfilled in this case by publication of this opinion. *See Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226, 1231-1232 (D. Colo. 1994).

[6] Certainly the complainants did not write it – they apparently do not speak English. *See* Docket Entry Tab Order 2, Note to File, dated March 2, 2007.

[7] Vargas's submissions are not signed by an attorney. *See, e.g.*, Complaint, received February 12, 2007 ("Complaint").

[8] *Vargas*, [Current Transfer Binder] ¶31,319 at 62,670-71.

Second, we turn to the Commission's opinion on appeal.[9] The complainants are residents of Peru.[10] Our rules state that a nonresident of the United States must post a bond of twice the amount of his claim – unless he provides "*sufficient proof*" that the country of which he is a resident permits residents of the United States to file complaints against citizens of that country without posting a bond.[11] Vargas did not furnish a bond or any evidence – much less "proof" – that no bond was required of residents of the United States suing in Peru other than the palpably unreliable opinion of his own unauthorized attorney advocate. Worse, the Commission's reasoning in granting a waiver in this case eviscerates the bond rule. This is a serious error since the bond rule is statutory[12] and jurisdictional.[13] Therefore, we urge the Commission to review its ruling on the bond matter *sua sponte*.

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[9] We are of course bound by the Commission's rulings and "the guidance contained in Commission decisions." *In re Trillion Japan Company, Ltd.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,082 at 41,589 (CFTC May 23, 1994). Nonetheless, the legal process benefits from the fact that judges are not silenced from giving reasoned criticism. *See In re Gorski*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,726 at 56,080-81 (CFTC March 24, 2004); *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (Kozinski, J.).

[10] *See* Complaint at 2.

[11] 17 C.F.R. §12.13(b)(4)(i)(A)-(B) (emphasis added).

[12] 7 U.S.C. §18(c).

[13] *Vargas*, [Current Transfer Binder] ¶31,319 at 62,667; *Haekal v. Refco, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,162 at 45,542 (CFTC Sept. 26, 1997).

Third, the statute of limitations in reparations is two years.[14] Vargas's last trading occurred in May of 2003.[15] He did not file his complaint until February of 2007 – nearly four years later.[16] Thus, his suit appears to be time-barred.

Fourth, Vargas has twice before sued in other forums under the same facts presented here. In one of Vargas's prior suits, the United States District Court for the Southern District of New York dismissed a related defendant (FXCM) on the grounds that it was exempt from jurisdiction under the Commodity Exchange Act – holding that the underlying contracts were for off-exchange foreign currency.[17] Although the District Court's ruling does not bind us in this case, its reasoning is persuasive and, if adopted, might serve to bar Vargas's claim against FX Solutions in reparations (if, as we suspect, the contracts at issue are of the same type as those traded through FXCM).

And fifth, (as if all the rest were not enough), we note yet another jurisdictional hurdle for Vargas's reparations complaint. One of his prior cases

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[14] "Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter . . . may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding . . . ." 7 U.S.C. §18(a)(1). *See also* 17 C.F.R. §12.13(a).

[15] Complaint at 8.

[16] *Id.* at 1.

[17] *Krause v. Forex Exchange Market, Inc.*, 356 F.Supp. 2d 332, 335 (S.D.N.Y. 2005).

was pending at the time that he decided to sue yet again in reparations.[18] Because Rule 12.24 requires dismissal without prejudice of a reparations complaint when a "parallel proceeding" exists,[19] we must dismiss the complaint without prejudice.

Before returning to these issues in greater detail, we first discuss the factual and procedural history of Vargas's dispute with FX Solutions.

Factual and Procedural History

Miguel Vargas and Gisella Salinas are married and reside in Peru.[20] In December of 2002, Vargas opened an account with FXCM with the assistance of Andres Prevoo and Prevoo's company, FXEM.[21] Prevoo is originally from Peru, but had been living and working in the United States for some time.[22] Vargas deposited approximately $30,000 and gave Prevoo and FXEM a power of attorney to trade his accounts.[23] Over the next few months, the account balance decreased to approximately $13,000.[24]

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[18] Complaint at 14-16; Answer and Verification of Respondent FX Solutions, LLC, dated May 11, 2007 ("Answer"), at 5-8.

[19] 17 C.F.R. §12.24.

[20] Complaint at 2.

[21] *Id.* at 5.

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.* at 6.

In February of 2003, Prevoo transferred the remaining balance from FXCM to the respondent, FX Solutions, as well as an additional $108,000 from a different source.[25] Prevoo proceeded to trade the account and assigned himself high fees.[26] The account lost value until the first of April, when the bulk of the money was withdrawn, leaving only $186.[27]

A second account was opened by Prevoo at FX Solutions in March of 2003.[28] This account was funded by Vargas for $70,000.[29] It was traded for two months, until $72,000 was lost in a single day.[30] The present balance remains just under $1,000.[31]

Vargas accuses Prevoo of defrauding him in many ways – everything from providing false account statements to forging his signature.[32] Vargas accuses FX Solutions of "recklessly open[ing] the account and permit[ing] unauthorized trading."[33] Vargas's claims against FXCM and FXEM are less defined. Despite

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[25] This source is apparently unknown. *Id.* at 7.

[26] *Id.*

[27] *Id.* at 8.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 5-8.

[33] *Id.* at 9.

the fact that the bulk of his claims are directed against Prevoo, only FX Solutions has been sued... here.

In August of 2004, Vargas and others sued FX Solutions, FXCM, Prevoo, and others in the Southern District of New York. The case was dismissed as it pertained to FXCM.[34] Vargas did not appeal that dismissal and voluntarily withdrew the complaint against FX Solutions in early 2005.[35]

In May of 2005, Vargas and others refiled in state court, again in New York, against FX Solutions, FXCM, Prevoo and others.[36] FXCM was again dismissed.[37] In July, FX Solutions and two related defendants moved to enforce an arbitration clause.[38] The state court referred the decision to a special master and stayed the case pending that decision.[39]

Vargas sued in reparations in February of 2007.[40] Two months later, in April of 2007, the special master issued his decision recommending that the state court compel arbitration.[41] Thus far, there appears to be no further

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[34] *Id.* at 15.

[35] Answer at 6.

[36] *See Id.;* Response to the Oredr [sic] Dated February, [sic] 25, 2009 ("Response to Order"), received March 5, 2009, at 1.

[37] Answer at 6.

[38] *Id.*

[39] *See* Id. at 6-7; Response to Order at 2.

[40] *See* Complaint at 1.

[41] Answer at 6; Response to Order at 2.

ruling by the state court.[42] However, the case remains active, and the last order on the electronic record was the one staying the case.[43]

Vargas and His Attorneys' Rules and Ethics Violations

No attorney has ever filed a notice of appearance for Vargas. Nevertheless, his pleadings are clearly written by an attorney, albeit one not completely fluent in English.[44] But we need not infer from the pleadings alone that Vargas has pervasively (maybe even entirely) relied on a lawyer (or lawyers) in pursuing his claim in reparations. He has made no effort to hide the fact.

Shortly after the complaint was filed, the Office of Proceedings tried to discuss the case with Vargas, but was unsuccessful since "no one spoke English."[45] Several days later, however, that call was returned by a man who identified himself as Jose Cabrejo.[46] Cabrejo stated that the complainants were "his clients" and discussed the "statute of limitations and jurisdiction

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[42] Neither party indicates that further rulings exist from the state court, and our search of that court's docket indicates that no more have been issued since the special master submitted his report.

[43] *See Luis Alfonso Krause, et al., v. Forex Exchange Market, Inc., et al.*, N.Y. Sup. Ct., Index No: OS-601854, Untitled Order by Hon. Sherry Klein Heitler, dated March 1, 2006.

[44] We have never seen a *pro se* litigant – most of whom are at least fluent in English – prepare long complaints in legalese that address concepts like jurisdiction and waiver.

[45] Docket Entry Tab Order 2, Note to File, dated March 2, 2007.

[46] Docket Entry Tab Order 2, Memo of Telephone Conversation, dated March 5, 2007.

concerns" raised by the complaint.[47] After FX Solutions filed its answer, Cabrejo again contacted the Office of Proceedings to inform it that the complainants would be filing a reply.[48] Two weeks later, Cabrejo was again on the phone, stating that he would be seeking an extension of time to respond to an inquiry from that office questioning co-complainant Salinas's standing.[49]

During the six weeks between when the case was forwarded to us and our (now vacated) dismissal of the complaint for failure to post a bond or demonstrate grounds for waiver, Cabrejo remained submerged.[50] But after our dismissal, he resurfaced – informing the Office of Proceedings that he was "representing the complainants" and would be handling the filing of the notice of appeal and filing fee.[51] Then for the first time, Cabrejo's name appears in a

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[47] *Id.*

[48] Docket Entry Tab Order 6, Memo of Telephone Conversation, dated May 18, 2007. The Office of Proceedings "informed him to ensure that he includes a cert[ificate] of service." *Id.* *See* Reply, Amendment and Memorandum in Support of the Complaint, filed June 12, 2007. This pleading, like all the others, is signed only by the complainants. *Id.* at 13.

[49] Docket Entry Tab Order 7, Note to File, dated June 5, 2007. *See* Letter from Miguel Angel Rubini and Gisella L. Salinas to Belinda Pugh, received June 5, 2007; Deficiency Letter from Belinda Pugh, Futures Trading Specialist, Office of Proceedings, to Miguel Angel Rubini Vargas and Gisella L. Salinas, dated May 21, 2007.

[50] *See* Notice and Order, dated June 22, 2007; *Vargas,* [2007-2009 Transfer Binder] ¶30,586 at 60,725.

[51] Docket Entry Tab Order 26, Memo of Telephone Conversation, dated August 29, 2007.

submission. In his appeal brief, Vargas states that his "proof"[52] in support of waiver of the bond requirement is a "legal memorandum prepared by our local attorney, Mr. Jose del Carmen Cabrejo Villagarcia."[53] Subsequently, Cabrejo contacted the Office of Proceedings to inquire as to when he could expect a decision from the Commission on Vargas's appeal.[54]

Indeed, there is evidence to suggest that Cabrejo was not alone, and that Vargas's case in reparations has been supported by a team of attorneys. The appeal brief is written in fluent English – in contrast with earlier filings. And the styles of both the appeal brief and the complaint appear to differ from that of Exhibit A – the argument drafted expressly by Jose Cabrejo.[55] We are therefore faced with the very real likelihood that the attachment was written by one attorney, the body of the appeal by a second, and the earlier pleadings by still a third.[56]

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[52] 17 C.F.R. §12.13(b)(4)(i)(B).

[53] Appeal Brief, dated August 15, 2007 ("Appeal Brief"), at 2. Vargas attached the memorandum as Exhibit A. Memorandum to Client from Jose del Carmen Cabrejo Villagarcia, Esq., LLM, to Miguel Angel Rubini Vargas and Gisella L. Salinas, dated August 5, 2007, ("Cabrejo Memorandum") at 12 (concluding that "US [sic] investors are not obliged to the furnishing [sic] of a bond in civil or administrative lawsuits or proceedings in Peru").

[54] Docket Entry Tab Order 29, Note to File, dated December 20, 2007.

[55] *See supra* n.53.

[56] And one of these attorneys – or perhaps a fourth – also represented Vargas in contacting respondent's counsel. Letter from John M. Fedders to Miguel Angel Rubini and Gisella L. Salinas, dated August 24, 2007 at 2 ("At one time, even though you are identified in the CFTC proceeding as *pro se*, I did speak

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We are at a loss to understand why the Commission did not stop this attorney involvement,[57] since it involved a host of rules and ethics infractions. We begin with Rule 12.12(b).[58] The rule provides in relevant part:

> "(b) *Effect.* The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:
>
> (1) He has read the document subscribed and knows the contents thereof; . . .
>
> (3) To the best of his knowledge, information, and belief, every statement contained in the document is true and not misleading...."

It is implausible that Vargas himself read and understood "every statement" in the pleadings – all of which he signed – if he does not understand English.[59]

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with an individual who identified himself as your attorney. He telephoned me.").

[57] The Commission was, of course, keenly aware of this involvement. Although the Commission identifies the complainants as *pro se,* it also refers to "their (the complainants') attorney," *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670. The Commission also notes the similarity between the "arguments and analysis of the brief "submitted *pro se,*" and the "signed opinion of their legal counsel." Id. at 62,668-69. And yet the Commission itself has observed that while a complainant may proceed with or without an attorney, he may not proceed with *and* without an attorney. *Robinson v. Alternative Commodity Traders,* [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,155 at 57,603 (CFTC Nov. 4, 2005).

[58] 17 C.F.R. §12.12(b).

[59] Also, there is nothing in the record to suggest that Vargas's lawyer(s) sat with him and translated and explained the facts and technical legal concepts contained in the many and sometime lengthy submissions to which Vargas attested when signing his name.

"In signing [the pleadings], without full knowledge of the same, [Vargas] violated Rule 12.12 and undertook a fraud on the Commission."[60] But as we shall shortly see, this is not the only fraud.

Under Commission Rule 12.9, "an individual may appear *pro se* (on his own behalf)," or may be represented by an attorney "admitted to practice before the highest Court in any State or territory, or of the District of Columbia...."[61] A party, however, cannot have it both ways.[62] The Commission has held that this rule is breached when a person who has not entered a notice of appearance undertakes substantial involvement in the development of the legal theories, tactics and in the drafting of the "*pro se*" party's pleadings.[63] We can think of a no more flagrant breach than that which occurred in this proceeding.

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[60] *Robinson v. Alternative Commodity Traders*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,585 at 52,052 n.53 (CFTC July 2, 2001).

[61] 17 C.F.R. §12.9(a).

[62] *Robinson*, [2005-2007 Transfer Binder] ¶30,155 at 57,603 (Under Rule 12.9, "hybrid representation is not permitted, *i.e.*, there is no right to simultaneously proceed pro se *and* with a representative") (emphasis in original).

[63] *Id.* ("While we do not interpret the rule to foreclose a *pro se* litigant from obtaining help from others, Pratt's activity went well beyond any reasonable amount of assistance. The legal theories, tactics, and the distinctive, voluminous pleadings were palpably his handiwork...."). The Commission's test for this unauthorized practice of law is similar to that adopted by the courts. *See Ricotta v. California*, 4 F. Supp.2d 961, 987 (S.D. Cal. 1998) (holding that "virtually every attorney would be eligible for contempt proceedings" if all assistance an attorney gives to friends violated ethics rules. Attorneys "cross the line, however, when they gather and anonymously present legal arguments."). The developing test examines the attorney's contributions to see if they arise to more than "informal advice." *Id. See also Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) ("substantial part" test).

Cabrejo is apparently licensed in Peru but not in the United States.[64] Thus his participation as one of Vargas's attorneys in this case is precluded by our rules.[65] As for Vargas's other "ghost attorneys,"[66] we know not a thing.[67] Permitting this situation to occur seriously undermines the integrity of the reparations forum.

First, because the Commission (as well as most courts)[68] construes complaints by *pro se* litigants liberally and affords them greater latitude as a matter of discretion,[69] ghost attorneys can abuse this practice to the prejudice of an opposing party employing an attorney who follows the rules.[70]

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[64] Appeal Brief at 2 (listing his purported qualifications).

[65] For all the Commission knows, Cabrejo has been debarred from practice in the United States. After all, he purports to have received some of his legal education here. *Id.* (claiming that Cabrejo has a Masters of Law in Securities and Financial Regulation from Georgetown University).

[66] Ghost attorneys are those attorneys who prepare, in whole or in part, documents and other work product for otherwise *pro* se litigants. *See Ricotta* 4 F. Supp.2d at 985-88.

[67] For all we know, they may not be licensed at all.

[68] *See Johnson*, 868 F. Supp. at 1231.

[69] *Taub v. Lind-Waldock & Co.*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,550 at 51,970 (CFTC May 30, 2001); *Gray v. LFG, LLC*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,235 at 50,459 n.7 (CFTC Sept. 12, 2000); *Hall v. Diversified Trading Sys., Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,131 at 41,751 (CFTC July 7, 1994); *Motzek v. Monex Int'l Ltd.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,095 at 41,625 (CFTC June 1, 1994).

[70] As one court has explained:

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Second, ghost representation is a deliberate evasion of the responsibilities imposed on counsel.[71] By not signing documents prepared for this forum, attorneys escape their duties to the Commission.[72]

Third, such behavior involves an attorney in his client's fraud.[73] In an ethics opinion, the American Bar Association has determined that "an undisclosed counsel who renders extensive assistance to a *pro se* litigant is involved in that litigant's misrepresentation to the Court in violation of ABA DR

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> When, however, complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding *pro se,* the indulgence extended to the *pro se* party has the perverse effect of skewing the playing field rather than leveling it. The *pro se* plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court.

Laremont-Lopez v. Southeast Tidewater Opportunity Center, 968 F. Supp. 1075, 1078 (E.D. Va. 1997).

[71] *See Johnson,* 868 F.Supp. at 1231.

[72] 17 C.F.R. §12.12(b). *Cf. Fed. R. Civ. Pro.* 11.

[73] *Johnson*, 868 F. Supp at 1232.

1-102(a)(4) [which states] 'a lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'"[74]

Fourth, Vargas's ghost attorneys avoid ethical rules designed to protect the attorney/client relationship.[75] For example, the Commission,[76] as well as all courts, has regulations on when and how an attorney can withdraw; however, a ghost attorney can avoid such regulations by never disclosing his existence.[77]

Indeed, these rules and ethics breaches likely prejudiced the respondent in this case. There is evidence that Vargas and his unauthorized attorneys – either as a result of carelessness or bad faith – never served FX Solution with the notice of appeal or appeal brief.[78] As a consequence, it appears that FX Solutions did not have notice of the appeal, and thus was effectively deprived of

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[74] ABA Comm. on Ethics and Professional Responsibility, *Informal Op.* 1414 (1978). *See also* Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 Fordham L. Rev. 2687, 2697 (1999) ("It is therefore likely that the failure to disclose ghostwriting assistance to courts and opposing parties amounts to a failure 'to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,' which is prohibited by [American Bar Association] Model Rule 3.3."); Cohen, *Afraid of Ghosts: Lawyers May Face Real Trouble When They 'Sort of' Represent Someone*, 80 ABA Journal (Dec. 1997).

[75] *See Laremont-Lopez*, 968 F. Supp. at 1079.

[76] 17 C.F.R. §12.9(c).

[77] *Laremont-Lopez*, 968 F. Supp. at 1079.

[78] 17 C.F.R. §12.401(a)-(b), (d).

its due process right to respond to the brief and new evidence that Vargas presented to the Commission.[79]

When Vargas filed his notice of appeal, the package containing it was purportedly misdirected by DHL to the respondent's counsel, John M. Fedders.[80] Fedders brought the misdelivery to Vargas's attention, returning the unopened package to him.[81] At the time that Vargas successfully re-sent the notice of appeal[82] to the Office of Proceedings, he was aware that Fedders had no knowledge of the complainants' appeal.[83] Yet there is nothing in the

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[79] 17 C.F.R. §12.401(c) (answering briefs).

[80] Letter from Miguel Angel Rubini and Gisella L. Salinas to Tempest S. Thomas, Proceedings Clerk, Office of Proceedings, dated August 29, 2007 ("Vargas August 29th Letter"), at 1.

[81] *Id.* at 1 ("Please, also note, that today, in the late afternoon, we received a letter from attorney John Fedders, sending us back all the originals including the $50 check that erroneously were delivered to him by DHL.")

[82] Notice of Appeal, dated August 15, 2007. The re-delivered package also contained Vargas's appeal brief.

[83] Attached to Vargas's cover letter to the Office of Proceedings for his notice of appeal and appeal brief was a letter from Fedders. Vargas August 29th Letter; Letter from John M. Fedders to Miguel Angel Rubini and Gisella L. Salinas, dated August 24, 2007 ("Fedders August 24th Letter"). Fedder's letter states:

> I have returned from holiday and there are two packages at my office which arrived from you in my absence. It is my view that the above-captioned reparations proceeding is no longer an active matter in view of the July 31, 2007 ORDER OF DISMISSAL signed by Administrative Law Judge Bruce C. Levine. Consequently, I intend to take no further action in this case.

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case file to establish that Fedders was subsequently served.[84]

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> You have sent me documents in response to my requests of you, and you have sent me document requests, etc. of FX Solutions. I do not intend to respond to your requests in view of the ORDER OF DISMISSAL.
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> In the first of the two packages received from you, there was an envelope addressed to the U.S. Commodity Futures Trading Commission and sealed by staples. Of course, my office does not accept filings on behalf of the CFTC. I have no idea what is in the envelope. As a courtesy, I am returning the envelope to you stapled and unopened. If there is something in the envelope that was intended for me, please send it back to me. If the entire envelope was intended for me and merely misaddressed, I respectfully request you send it back to me. I am simply trying to clear up whatever the confusion is or might be.
>
> Unless the Administrative Law Judge orders to the contrary, I consider this case to be concluded pursuant to the terms of the July 31, 2007 ORDER OF DISMISSAL.
>
> At one time, even though you are identified in the CFTC proceeding as *pro se*, I did speak with an individual who identified himself as your attorney. He telephoned me. It would be appropriate that I return the enclosed envelope to him, but I do not know his address or telephone number in Peru.

Fedders August 24th Letter.

[84] The package that was re-delivered to the Office of Proceedings contained an affidavit, dated August 15, 2009, stating that a copy of the notice of appeal had been served on the respondent. Affidavit of Service of Jenny Iben Johanson, dated August 15, 2009. However, Vargas (and/or his team of attorneys) were made aware by the Fedders August 24th Letter that the affidavit was in error. There is no affidavit – or anything else in the record – attesting to the service of

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Under these circumstances, if the Commission had adhered to its own rules, it would have dismissed Vargas's appeal.[85] Perhaps it did not do so because of the *pro se faux* nature of the complainants.[86] Nevertheless, when FX Solutions – a respondent who had actively litigated against Vargas for four years in three forums – failed to file an answering brief[87] or otherwise communicate with the Commission, the evidence was overwhelming that it had no actual knowledge that the case against it was ongoing.[88] Under such circumstances, the Commission – at the very least – should have acted to

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Vargas's brief. Vargas's cover letter to the Office of Proceedings does contain a "c.c." listing the respondent, and if the respondent had received the letter, it would have at least gained an awareness of the appeal. Vargas August 29th Letter at 2. However, a "c.c." does not carry the weight of reliability that an affidavit of service – required by the rules – does. *See* 17 C.F.R. §12.10(a)(2)(5) (requiring as proof of service an affidavit "executed by any person 18 years of age or older or a certificate of service executed by an attorney-at-law qualified to practice before the Commission"). Moreover, as discussed below, it is apparent from the record that Fedders never received notice that an appeal was pending.

[85] 17 C.F.R. §12.401(a) ("The failure of a party timely to . . . serve a notice of appeal . . . or to perfect the appeal . . . shall constitute a voluntary waiver of any objection to the initial decision or order disposing of the proceeding....").

[86] *See* nn.57-70 and accompanying text.

[87] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,667.

[88] This evidence is corroborated by subsequent events. After the Commission issued its order remanding this case, Fedders called the Office of Proceedings to inform it "that he did not know that this case was appealed to the Commission." Docket Entry Tab Order 31, Note to File, dated February 24, 2009.

ensure that the respondent's rights on appeal were safeguarded. This could have been accomplished by simply contacting the respondent to ensure that it had actual notice of the appeal. Shockingly, the Commission failed to take even this meager step in defense of due process. In the future, the Commission may want to take a lesson from the federal appellate courts where such a travesty could never happen.[89]

The Commission contributed in this manner[90] to making the appeal effectively an *ex parte* proceeding. We next discuss the result of that proceeding – a result that turned on the uncritical acceptance of Vargas's unauthorized attorney's presentation and analysis of Peruvian law.

The Bond Requirement

> [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.[91]

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[89] It is particularly important for the Commission to pay attention to proper service on appeal. Unlike federal courts of appeal, the Commission has no rules by which it routinely serves a notice of appeal on respondents. *See* F.R.A.P. Rule 3(d)(1) 28 U.S.C.A ("The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record – excluding the appellant's – or, if a party is proceeding *pro se*, to the party's last known address."). Thus, if a party fails to serve the other parties with an appeal – whether through negligence or fraud – the appellate court need not notice or care, because the other parties' basic rights of due process are upheld.

[90] And in other ways as well. See *infra* n.104.

[91] *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (Stevens, J.).

Our rules state that nonresidents of the United States must post a bond of twice the amount of their claim, unless they provide "*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."[92] The Commission has held that "[t]he reciprocity provision of the Part 12 Rules . . . asks only whether a United States citizen may proceed without furnishing 'a bond' *for any purpose.*"[93] This rule implements a statutory mandate[94] that "reflects at the least a strong congressional concern for either prompt payment of the reparation award or a guarantee that it will be paid,"[95] and "is a prerequisite to the Commission's jurisdiction."[96] 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."[97] Shortly after this case was forwarded, we raised it.[98]

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[92] 17 C.F.R. §12.13(b)(4)(i)(A)-(B) (emphasis added).

[93] *Haekal*, [1996-1998 Transfer Binder] ¶27,162 at 45,543 (emphasis added).

[94] 7 U.S.C. §18(c).

[95] *Kessenich v. CFTC*, 684 F.2d 88, 91 (D.C. Cir. 1982).

[96] *Haekal*, [1996-1998 Transfer Binder] ¶27,162 at 45,542.

[97] *Id.*

[98] Show Cause Order, dated June 25, 2007, at 1.

Vargas elected not to post a bond; instead he sought to demonstrate that he was entitled to a waiver.[99] In support of his waiver request, Vargas directed us to two Peruvian constitutional provisions and several legislative decrees.[100] None of these addressed the Peruvian courts – much less the salient issues of court procedures and access. Since this was hardly "sufficient proof," we dismissed the complaint without prejudice.[101] By his appeal, Vargas sought Commission review of this determination.

On appeal, the Commission did not quarrel with our conclusion that none of the provisions to which Vargas directed us "indicate what, if any, bond requirements a United States resident would face if he sued a Peruvian citizen in a Peruvian court."[102] Yet it vacated our order, holding that Vargas had demonstrated his entitlement to a waiver. We now examine the Commission's reasoning.

Before the Commission, Vargas offered new evidence: "[w]e will base our appeal in the legal memorandum prepared by our local attorney Mr. Jose del

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[99] Complaint at 4.

[100] *Id.*

[101] *Vargas,* [2007-2009 Transfer Binder] ¶30,586 at 60,725.

[102] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670 (*quoting Vargas,* [2007-2009 Transfer Binder] ¶30,586 at 60,724).

Carmen Cabrejo Villagarcia.[103] With no ado, the Commission received it[104] – and relied on it.

The Commission's analysis is excruciatingly simple. The Cabrejo Memorandum discusses "Peru's constitution, various statutes, and Peru's

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[103] Appeal Brief at 2. *See* Cabrejo Memorandum.

[104] Raising yet another irregularity in this most extraordinary of proceedings. First, Rule 12.405 quite sensibly permits the Commission to reopen the evidentiary record on appeal *only* after it has given "notice to the parties and an opportunity for them to present their views." 17 C.F.R. §12.405. The Commission, however, considered – indeed relied on – the freshly submitted memorandum by Vargas's unauthorized attorney while skipping these steps. This had the effect of continuing to keep FX Solutions in the dark as to the pendency of Vargas's appeal.

The Commission's slighting of the notice and comments requirements of the rule aside, Rule 12.405 permits the reopening of the evidentiary record on appeal under very limited circumstances. A party seeking to reopen the record must show that (1) the additional evidence is material, and (2) there were reasonable grounds for failing to adduce such evidence before the presiding officer. 17 C.F.R. §12.405. In this case, the Commission inexplicably ignored the second of these two limitations. Vargas did not make any showing as to why Cabrejo's memorandum – with its expanded legal analysis – could not have been prepared and presented when we were considering the issue. Under the rule and Commission case law, this should have been sufficient reason for striking it. *See, e.g., Shehee v. Epstein*, CFTC Docket No. 03-R021, 2005 WL 3068054 at *4 (CFTC Nov. 14, 2004) ("The evidence . . . if presented below may have affected the outcome. Respondents, however, have not shown that reasonable grounds existed for their failure to adduce this evidence at the hearing.... The evidence they seek to present was available to them, but they elected not to devote the resources necessary to collect and prepare it."); *McGough v. Bradford,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 at 50,600 (CFTC Sept. 28, 2000) (declining to reopen the record to consider an affidavit where there was no showing that "there were reasonable grounds for failing to adduce the evidence before the ALJ"); *Resolution Trust Corporation v. Gelderman, Inc.* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,621 at 43,644 n.1 (CFTC Feb. 14, 1996) ("[T]he RTC has failed to proffer any reason why the evidence it now wishes to submit on appeal was not made available to the ALJ.").

Administrative Procedure Code and implementing regulations."[105] The Commission emphasizes that although these sources do not state that a resident of the United States would not have to post a bond to sue in Peru, they also do not state the opposite.[106] The Commission next concludes that the scope of Cabrejo's search was "reasonable,"[107] and that his "expertise appears unexceptionable."[108] It further notes that Cabrejo "opines that no bond is required."[109] The foregoing forms the basis of the Commission's holding that Vargas submitted "compelling proof that no bond is required."[110] This conclusion, according to the Commission, flows from the principle that "our legal system rarely requires a party to prove a negative."[111] We now examine this treatment of the issue and its implications.

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[105] The memorandum discusses for the first time two Peruvian codes that at least address adjudicatory proceedings. *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670. Cabrejo also asserts that he has "examined the regulations promulgated by Peruvian banking and securities regulators and found no provisions for nonresident bonds." *Id.* at 62,669.

[106] *Id.* at 62,670.

[107] *Id.*. ("Complainants' reasonable search of the law has unearthed nothing expressly on point.") Elsewhere, the Commission calls Cabrejo's search "diligent." *Id.* at 62,671.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 62,671.

[111] *Id.* at 62,670 (*quoting Walther v. Secretary of Health and Human Services,* 485 F.3d 1146, 1150 (Fed. Cir. 2007)).

The linchpin to the Commission's analysis is of course the weight it gave to the unsworn Cabrejo Memorandum – finding that Cabrejo's search of the law was comprehensive enough for the Commission to reasonably conclude that "Peru *apparently* has no rule or statute *expressly* imposing a nonresident bond...."[112] As an analysis of foreign law, the Cabrejo Memorandum constitutes expert testimony,[113] which – like all evidence – must be evaluated for its reliability. Reliability is not to be presumed. As one commentator has put it, "t]he trustworthiness of nonscientific expert testimony is every bit as suspect as the reliability of scientific evidence. If anything, there is less assurance of the accuracy and truthfulness of nonscientific expert testimony."[114]

While the Commission has the responsibility to determine an expert's credibility, the party presenting the opinion has the burden of persuading the

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[112] *Id.* (emphasis added).

[113] *Access Telecom, Inc. v. MCI Telecommunications Corp.,* 197 F.3d 694, 713 (5th Cir. 1999) (stating that "expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined"). *See also* Charles E. Wagner, *Federal Rules of Evidence Case Law Commentary,* 733 (1999) (stating that where "in order to express an opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 [expert] opinion and not a Rule 701 lay opinion)."

[114] Edward J. Imwinkelried, *The Next Step After Daubert: Developing A Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony,* 15 Cardozo L. Rev. 2271, 2279 (1994).

Commission on the issue.[115] Even an uncontradicted expert may not be sufficiently credible;[116] his opinion depends on factors that are relevant to the testimony of any witness, such as bias.[117] In addition to generic credibility factors, the weight that a court grants to an opinion depends on the reliability of the methods by which an expert reached the opinion.[118] As the Commission has stated, "[e]ven where [an expert] is . . . qualified [by scientific, technical, or other specialized knowledge], the weight to be accorded to such a person's testimony will depend on what the expert says and what basis the expert has for saying it, and not solely on his or her credentials."[119]

The bias of an expert undermines the reliability of the witness's opinions just as it undermines the credibility of any other testimony.[120] Cabrejo's bias

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[115] *See Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1533 (D. Kan. 1990); *In re New England Elec. System*, File No. 59-102, 1964 WL 7220, at *6 (SEC Mar. 19, 1964). In other words, a party that presents an expert must develop the record in such a manner as to eliminate substantial doubts as to the basis for the expert's opinion and demonstrate that important factors that might "substantially impair the credibility [of the opinion] and [thereby] preclude . . . [its] acceptance" are accounted for. *Id.* at *5-6.

[116] *Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir. 1988).

[117] *Strickland v. Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984); *Brock v. United States*, 387 F.2d 254, 258 (5th Cir. 1967).

[118] Some commentators refer to this as the "internal validity of the research." Myron Roomkin & Roger I. Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 Harv. L. Rev. 1441, 1450 (1977).

[119] *In re Ashman,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,336 at 46,549 n.55 (CFTC Apr. 22, 1998).

[120] *Strickland*, 739 F.2d at 1552; *Brock*, 387 F.2d at 258.

jumps off the page. He was (and likely continues to be) Vargas's attorney-advocate[121] – albeit in violation of rules. This role makes his bias so inherent that it is *per se* disqualifying. The *ABA Code of Professional Responsibility* precludes attorneys from serving as a witness and counsel in the same proceeding.[122] Federal courts routinely enforce this rule,[123] and the Commission has recognized that it applies to attorneys practicing before it as well as other administrative agencies.[124] In this regard, the Commission has noted that "[t]he separation of functions . . . reduces the risk that a trier-of-fact

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[121] *Tyus v. Urban Search Management*, 102 F.2d 256, 263 (7th Cir. 1996) ("In all cases . . . the court must ensure that it is dealing with an expert, not just a hired gun.").

[122] *ABA Code of Prof. Resp.,* Rule DR5-102(A). "Combining the role of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client." *ABA Model Rules of Professional Conduct,* Rule 3.7, Comment [1].

[123] *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F.Supp. 1319, 1322-23 (D.Del. 1985); *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983) (stating that appellant's attorney's continued representation in this case and appearance as her witness implicates an ethical consideration underlying the disciplinary rule: the appellant's case would be presented through the testimony of an obviously interested witness.); *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1209 (S.D.N.Y. 1981). *See also* Michael S. Frisch, *Lawyer as Witness*, The Washington Lawyer, January/February 1998, at 8.

[124] "In these circumstances, we are surprised to find Mr. Grossman's law firm appearing as Bell's appellate counsel. Attorneys practicing before administrative agencies are bound by the Code of Professional Responsibility, including DR5-102(A), which sets forth the rule that attorneys are precluded from serving as a fact witness and counsel in the same proceeding." *In re JCC, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,080 at 41,583 n.48 (CFTC May 12, 1994). *Cf. Marzano v. National Futures Association*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,163 at 57,641 (CFTC Jan. 4, 2006).

will confuse the roles of advocate and witness and erroneously grant testimonial weight to an attorney's arguments."[125] Well, that error occurred here.

The substantive merit of an expert's opinion depends on the expert's methods and underlying premises.[126] This is true when examining the reliability of Cabrejo's opinions concerning Peruvian law.[127] By labeling

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[125] *Marzano,* [2005-2007 Transfer Binder] ¶30,163 at 57,641. *See also MacArthur,* 524 F.Supp. at 1208 (stating that "the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively").

[126] *W. Horace Williams Co. v. Serpas,* 261 F.2d 857, 860 (5th Cir. 1959). ("[T]he value of the opinion of an expert witness is dependent on and is no stronger than the facts upon which it is predicated, and it has no probative force unless the premises upon which it is based are shown to be true....") *Accord Compton v. Subaru of America, Inc.,* 82 F.3d 1513, 1518 (10th Cir. 1996) ("[W]eaknesses in the underpinnings of the opinion[] go to the weight . . . of the testimony." (*quoting Jones v. Otis Elevator Co.,* 861 F.2d 655, 663 (11th Cir. 1988))); *McCullock v. H.B. Fuller Co.,* 61 F.3d 1038, 1044 (2d Cir. 1995); *Mid-State Fertilizer, Co. v. Exchange Nat'l Bank,* 877 F.2d 1333, 1340 (7th Cir. 1989) ("Judges should not be buffaloed by unreasoned expert opinions."); *Strickland,* 738 F.2d at 1552; *Brock,* 387 F.2d at 258; *Carter v. United States,* 252 F.2d 608, 617 (D.C. Cir. 1957) ("The chief value of an expert's testimony . . . in all . . . fields . . . rests upon the material from which the opinion is fashioned and the reasoning by which he progresses from his material to his conclusion.... The ultimate inferences *vel non* of relationship, of cause and effect, are for the trier of facts."); *Bohnert v. Maryland,* 539 A.2d 657, 661 (Md. 1988) ("[A]n expert's judgment has no probative force unless there is a sufficient basis upon which to support [the] conclusions."); *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank,* 170 N.E. 479, 483 (N.Y. 1930); John Henry Wigmore, *Evidence in Trials at Common Law* §2569 (1970), *Wigmore on Evidence,* §680 (stating that "it follows . . . that if the premises are ultimately rejected . . . the testimonial conclusion based on them must also be disregarded").

[127] Or as Chief Judge Cardozo put it:

(continued...)

Cabrejo's search of foreign law as "reasonable" and "diligent,"[128] the Commission presumably determined that it was exhaustive enough to reasonably conclude that Peru is "a jurisdiction that imposes no bond but has not said so in those specific words."[129] However, the Commission provides no justification for this conclusion,[130] and it would seem that none is possible.

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> [A] finding of foreign law is a finding of fact, to be reviewed in subjection to the same restraints that apply to the review of findings of fact generally. True, of course, it is that there is no judicial notice of the law of foreign lands. This does not mean, however, that the mere opinion of a witness will control the judgment of a judge, except to the extent that it is a reasonable inference from statute or from precedent or from the implications of a legal concept, such as contract or testament or juristic personality.... This is as true upon appeal as it is upon a trial. At such times and for such inquiries, *opinion has a significance proportioned to the sources that sustain it.*

Petrogradsky Mejdunarodny Kommerchesky Bank, 170 N.E. at 483 (emphasis added).

[128] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,671.

[129] *Id.* at 62,670.

[130] Another – and most astonishing – example of Commission *ipse dixit* is its finding that Cabrejo's expertise "appears *un*exception*able.*" *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670 (emphasis added). "Exceptionable" means "liable to exception or objection." The Random House College Dictionary 460 (1973). It is hard to believe, however, that the Commission viewed Cabrejo's expertise as beyond challenge. Perhaps, it meant to say that his expertise was "unexception*al.*"

Cabrejo provides no basis for believing that his search of Peruvian law was exhaustive or objective. He makes no representation as to the scope of his search nor does he provide any description of the methods and tools employed in undertaking it. Indeed, his memorandum cites to only a handful of constitutional provisions, civil and administrative codes, legislative decrees, and administrative resolutions – none of which address bond requirements[131] – to support his conclusion that "US [sic] investors are not obliged to the furnishing [sic] of a bond in civil or administrative lawsuits or proceedings in Peru."[132] There is not a single citation in Cabrejo's memorandum to any case, learned treatise, hornbook, law journal, practitioner's guide, or any of myriad other legal materials where one might reasonably expect the bond issue to be addressed – nor is there any explanation as to why these sources are omitted from his analysis. Under these circumstances, one can only reasonably conclude that Cabrejo's use of legal materials was selective and the conclusions that he draws from them are biased – precisely what one would expect from an attorney engaged in zealous advocacy. How the Commission could conclude otherwise is more than puzzling.[133]

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[131] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670.

[132] Cabrejo Memorandum at 12.

[133] The Commission's evaluation of the Cabrejo Memorandum was limited to checking his cited sources and confirming that he "unearthed nothing expressly on point." *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670-71. It also undertook some limited research of its own, finding "nothing to add." *Id.* at 62,671 (stating that it "also examined a number of treaties").

This is particularly so, given the substance and manner of Cabrejo's testimony. In drawing absurd inferences and squeezing patently frivolous conclusions from his limited legal sources, Cabrejo eases his path to the outcome that Vargas desires. [134] Two examples will suffice.

Although he must surely know the difference between court fees and litigation bonds,[135] Cabrejo disingenuously conflates the two: arguing that if court fees must be non-discriminatory, there can be no discriminatory bond requirements.[136] Cabrejo also divines the lack of a bond requirement from the

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[134] Expert testimony that "has fallen below professional standards" can serve as a basis for concluding that the expert is merely "a shill" for the party that the expert's testimony was offered in support of. *Mid-State Fertilizer, Co.*, 877 F.2d at 1340.

[135] A litigation bond of course is not a fee, but a form of security to ensure satisfaction of a judgment. *Black's Law Dictionary* 163 (5th ed. 1979) (liability bond). *See Moussavian v. China Ocean Shipping Co. Americas Inc.*, 2007 WL 4165334 at *4 (D. N.J. Nov. 19. 2007) (distinguishing filing fees from litigation bonds).

[136] Thus, he makes much of the irrelevant limitations placed on court fees both in Peru's Administrative Procedure Code and Civil Procedure Code:

> [A]rticle 45.2 of the [Administrative Procedure Code] . . . establishes the fees charged in administrative proceedings cannot discriminate nor differentiate among proceedings of the same kind or among the persons following the proceeding. Consequently, if Peruvian residents or nationals are solely obliged to the payment of a fee, limited to certain circumstances, then, foreign nationals or residents are solely obliged to the payment of such fee. Conversely, if a Peruvian national or residents [sic] are not obliged to the furnishing of a bond, then, foreign nationals or residents are not obliged to do so.

(continued...)

general and aspirational language found in the Peruvian Constitution (similar language is found in many constitutions), which according to Cabrejo, "states all persons are equal before the law, without regards of their origin, race, religion, opinion or economic condition *'or any other reason.'*"[137] From this provision, cobbled together with another constitutional principle mandating that all investors "share the same rights and obligations" in investing,[138] Cabrejo deduces a prohibition on nonresident bonds.[139] This is – of course – a leap too far.

We have an Equal Protection Clause in the United States Constitution that says that no State shall deny "any person within its jurisdiction the equal protection of the laws."[140] Like the Peruvian Constitution, it too makes no explicit distinction between residents and nonresidents. Nonetheless, the Supreme Court long ago held that real differences in a litigant's situation based

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Cabrejo Memorandum at 4-5 (footnote omitted). *See also id.* at 2-3 (discussing filing fees under the Civil Procedure Code).

[137] *Id.* at 6 (footnotes omitted, emphasis in the original.)

[138] *Id.*

[139] He explains: "Rephrasing this Constitutional principle for our case . . . if in a specific case, a US investor wants to file a complaint, she will be in the same conditions as any other Peruvian." *Id.* at 7 (footnote omitted).

[140] U.S.C.A. Const. Amend. XIV §2.

on residency may justify differentiated treatment prescribed by statute.[141] Similarly, the First Amendment of the United States Constitution says in part that "Congress shall make no law . . . abridging the freedom of speech...."[142] Under Cabrejo's reasoning, we should conclude that Americans may say anything they want, whenever they want, to whomever they want. And yet, this is quite clearly not the case. One cannot yell "fire" in a theater anymore than one can make oral threats of violence.[143] This illustrates the obvious flaw in trying to conjure the stuff of the law from generally-stated and frequently vague constitutional standards. Cabrejo surely must know that such lofty principles provide no insight in answering a question of unexceptional working law: whether residents of the United States must post a bond when suing in any Peruvian court "for any purpose."[144]

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[141] *Central Loan & Trust Co. v. Campbell Com'n Co.*, 173 U.S. 84, 97-99 (1899) (holding that a statute which requires plaintiff to give a bond as a prerequisite to the issuance of an attachment against a resident, but requires no bond where the attachment is against property of a nonresident, is not a denial of the equal protection of the law).

There is of course an overriding reason why Cabrejo's attempt to demonstrate equality of treatment between residents and nonresidents fails to support a waiver of the bond requirement in reparations. Equality of treatment simply is not a sufficient condition for waiver. If *both* residents and nonresidents alike are required to post a bond in any Peruvian forum, a bond in reparations still must be posted. 17 C.F.R. §12.13(b)(4)(i)(B).

[142] U.S.C.A. Const. Amend. I.

[143] *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.).

[144] *Haekal*, [1996-1998 Transfer Binder] ¶27,162 at 45,543.

Thus the Commission's conclusion that Vargas submitted "compelling proof that no bond is required,"[145] is not sustainable. Indeed, Cabrejo's analysis is so inherently unreliable as to constitute no proof at all.[146] Perhaps sensing this, the Commission tries to lighten the complainants' load. It explains that "[g]iven the inherent difficulty that may attend establishing a waiver claim,"[147] that it will "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.'"[148] Therefore, the Commission explains, "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."[149] This new standard of course does little to rehabilitate the Cabrejo Memorandum – Cabrejo's search has none of the indicia of "diligence."[150] More disturbing still, however, is that it explicitly nullifies the complainants' burden of proof as set forth in the Commission's published rules of agency.[151]

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[145] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,671.

[146] Like those of virtually all other judicial forums, the reparation rules call for the exclusion of unreliable evidence. 17 C.F.R. §12.312(e).

[147] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670.

[148] *Id.* (*quoting Walther v. Secretary of Health and Human Services*, 485 F.3d 1146, 1150 (Fed. Cir. 2007)).

[149] *Id.* at 62,671.

[150] *See supra* nn.130-133 and accompanying text.

[151] *See* 17 C.F.R. §12.13(b)(4)(i)(B). Unfortunately, re-writing its published rules through the case law is a persistent Commission habit. *See, e.g., Hillpot*

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Contrary to the Commission's new rule, when a party bears the burden of proof and comes forth with nothing relevant, he loses – whether his search was diligent or not. And it matters not that proof of the relevant fact may be impossible. As the Supreme Court has stated: "The impossibility of proving a material fact upon which the right to relief depends simply leaves the claimant upon whom the burden rests with an unenforceable claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof."[152]

Moreover, this shift in burden is all the more remarkable because it appears to have no warrant in policy. After all, a complainant's failure to meet his burden in justification of a waiver of the bond requirement does not extinguish his reparation claim; it merely requires him to post security to

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v. Dorrity, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,955 at 62,385 nn. 7-8 (CFTC Dec. 3, 2008) (discussing the Commission's nullification of various reparations rules governing pleadings and the submission of written direct testimony); *In re Arnold*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,519 at 51,811-13 (CFTC April 16, 2001) (discussing the Commission's *sub silentio* repeal of its enforcement rule authorizing the Administrative Law Judge to debar attorneys for willfully filing sham documents).

[152] *Burnet v. Houston*, 283 U.S. 223, 228 (1931). *See Coca-Cola Bottling Co. v. Wood*, 123 S.W.2d 514, 516 (Ark. 1939) ("The verdict was possible only by permitting surmise and conjecture to supply facts incapable of proof. This was error."); Richard A. Posner, *The Problems of Jurisprudence* 204 (paperback ed. 1993) ("There are nevertheless a large number of legal cases in which the question of what happened is indeterminate, and must be resolved by a decision on who shall bear the burden of producing evidence or persuading the trier of fact; bluntly, who shall lose in cases of doubt.").

safeguard a judgment against him.[153] Moreover, proving the state of foreign law on the question of litigation bonds would not appear to be of "inherent difficulty" nor does it require a proof of the non-existent.[154] It is proof of a

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[153] *Kessenich* 684 F.2d at 91. *See Carr Investments Inc. v. CFTC*, 87 F.3d 9, 14 (1st Cir. 1998) (stating that "CFTC precedent and Regulation §12.314(c) provide that where a losing party to a formal decisional proceeding acts in bad faith, the ALJ may require him to pay his opponent's attorneys fees and costs").

[154] The Commission seeks to validate its approach by reference to philosophy: "Although we are in something of an epistemological quandary – it is always difficult to prove a negative...." *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670, (*quoting In re Bank of New England Corp.*, 364 F.3d 355, 365 (lst Cir. 2004)). However, this is a fig leaf; as we explain, proof of Peru's law on bonds is not a "negative." And even if it were, none of the cases cited by the Commission, which speak of this "epistemological quandary" use it – as the Commission does – to nullify an affirmative evidentiary burden placed on a party.

The case principally relied upon by the Commission, *Bank of New England,* addresses neither evidentiary standards nor burdens. Rather it addresses a pure matter of substantive law – the legal standards by which subordination agreements are to be judged in bankruptcy. *In re Bank of New England Corp.*, 364 F.3d at 364. Moreover, the court's legal analysis suggests no issue of indeterminacy. The court holds that subordination agreements in bankruptcy are to be judged by generally applicable state law (in this case, New York). *Id.* In that context, the court holds that New York does not follow the interpretative doctrine known as the Rule of Explicitness. *Id.* In support of its conclusion it cites to several positive sources, *as well as* the "near-total absence" of a mention of the rule in the reported decisions of New York. *Id.* at 364-65.

In a similar vein, *Ains, Inc. v. U.S.*, 365 F.3d 1333 (Fed. Cir. 2004) – another case cited by the Commission – involves a pure question of statutory interpretation: whether the United States Mint is a "non-appropriated funds instrumentality" ("NAFI") and thus is not subject to suit under the Tucker Act. *Id.* at 1335. Among other factors, an agency can only qualify as a NAFI "if there is no mechanism whereby [it] could receive appropriated funds without a statutory amendment." *Id.* at 1343. Although the court comments "that it is always difficult to prove a negative," it expressly does so in this case – by examining the entire body of relevant law necessary to resolve the issue (the

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matter of positive law, something that lawyers do every day. It is simply implausible to think that when an American resident sues in Peruvian courts no one has a clue as to whether a bond must be posted. And the facts

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(...continued)

Mint's authorizing charter) and determining that there was no authority therein to receive appropriations. *Id.* at 1344.

Unlike *Bank of New England* and *Ains*, a third case cited by the Commission does address evidentiary burdens. *See Walther*, 485 F.3d at 1146. But it does not support the Commission's new rule. Quite the contrary. It holds that compensation for injury under the National Childhood Vaccine Injury Act of 1986 requires the petitioner to bear the burden of providing evidence of causation "sufficient to establish a prime facie case." *Id.* at 1150. It does not *additionally* bear the burden of eliminating alternative causes. *Id.* "On the other hand, a petitioner is certainly permitted to use evidence eliminating other potential causes to help carry the burden on causation *and may find it necessary to do so when the other evidence on causation is insufficient to make out a prima facie case....*" *Id.* at 1151 (emphasis added).

The Commission also points to an Eleventh Circuit case for a disembodied statement of scientific method – while at the same time employing an injudicious use of ellipses: "[u]nder some circumstances . . . the lack of positive evidence can prove a negative – the absence of evidence can be conclusive." *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670 (*quoting Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 at 1257-58 (11th Cir. 2007)). The uncensored quote, however, reads: "[u]nder some circumstances, *such as where scientific inquiry produces a complete knowledge base or where an experiment is certain to reveal a fact if the fact exists and fails to do so,* the lack of positive evidence can prove a negative – the absence of evidence can be conclusive." *Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1257-59. Now who can argue with that?

The last two cases cited by the Commission are *In re Madison Guar. Sav. & Loan (Cabe Fee Application)*, 439 F.3d 718 (D.C. Cir. 2006) and *Martinez v. E.J. Korvette*, Inc., 477 F.2d 1014 (3rd Cir. 1973). *Vargas,* [Current Transfer Binder] ¶31,319 at 62,670. The Commission concedes that these cases require proof of a negative but dismisses them simply as "promoting public policies concerns not present here." *Id.* at 62,670.

necessary to resolve this issue may be established by evidence that – unlike the Cabrejo Memorandum – comes from an expert whose (1) competence or legal specialty relevant to the subject matter is demonstrated,[155] (2) objectivity is subject to at least modest checks,[156] and (3) methods are probing and analysis is logical.[157] There is no reason to believe that there are not scores of Peruvian practitioners, judges and law professors capable of providing such evidence.

To sum up: the only pleadings on appeal were drafted by one or more Peruvian attorneys who have never filed a notice of appearance and who are likely not licensed to practice in the United States. The pleadings were attested to only by the Vargas's, despite the fact that neither of them apparently speaks

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[155] Carl B. Meyer, *Science and Law: The Quest for the Neutral Expert Witness; A View from the Trenches*, 12 J. Nat. Resources & Envtl. L. 35, 54 (1997) ("[E]xperts testify beyond their specialty or competence.") In this regard, all we know about Cabrejo is that he is Vargas's "local attorney," is a member of the "Lima bar since 1993," and has advance legal degrees in international economic law and securities and financial regulation. Appeal Brief at 2. Except for his unauthorized participation in this case, we know nothing of his legal experience or court practice.

[156] A history of not only testifying for parties on one side of type of conflict makes an expert witness more credible. *Gwathmey v. United States*, 215 F.2d 148, 159 (5th Cir. 1954); *Estate of Halas v. Commissioner*, 94 T.C. 570, 577 (1990) ("[E]xperts may lose their usefulness and credibility when they merely become advocates for one side."). Another is the absence of an ongoing employment relationship with the party. *E.g. Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, No. 94 CIV. 8003 (KTD), 1994 WL 698214, at *3 (S.D.N.Y. Dec. 13, 1994), *aff'd*, 58 F.3d 27 (2d Cir. 1998); *See also Board of Educ. of S. Sanpete Sch. Dist. v. Barton*, 617 P.2d 347, 350 (Utah 1980) ("[H]is employment bore directly on the all-important issue of his objectivity or bias."); *See generally Wigmore on Evidence* §§761, 949.

[157] *See supra* nn.126-127 and accompanying text.

English. Relying on those pleadings as well as inappropriately proffered new evidence from an openly-biased expert witness who doubled as Vargas's ghost attorney, the Commission concluded that a lack of evidence constitutes compelling proof of an affirmative burden. In support, it cited misleading portions of inapposite cases for the proposition that courts rarely require parties to "prove a negative," without ever explaining what negative existed in need of proof here. And throughout the eighteen months this matter was before the Commission, it never bothered to inform the respondent that the case had been appealed – despite multiple indications that the respondent had received no notice – until after it had ruled.

The Statute of Limitations

Section 14(a) of the Commodity Exchange Act governs this proceeding.[158] It "bars all claims which are not filed within two years after the cause of action accrues."[159] "In the reparations forum, a customer's cause of action accrues, and the two-year limitations period begins to run, when a complainant discovers the wrongful activity underlying his claim or, in the exercise of

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[158] Section 14(a) states, in part: "Any person complaining of any violation of any provision of this Act, or any rule, regulation, or order issued pursuant to this Act, by any person who is registered . . . may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding...." 7 U.S.C. §18(a)(1). *See also* 17 C.F.R. §12.13(a).

[159] *See Martin v. Shearson Lehman/American Express, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,354 at 32,981-82 (CFTC Nov. 12, 1986) (citations and quotation marks omitted).

reasonable diligence, should have discovered the wrongful activity."[160] Accrual does not wait for a complainant to flesh out the details of the malfeasance or determine the legal remedies that are available to him.[161]

Vargas's last trading occurred in May of 2003.[162] He did not file his complaint until February of 2007 – nearly four years later.[163] Therefore, his claim would appear to fall well outside of the limitations period.[164]

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[160] *Edwards v. Balfour Maclaine Futures, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,108 at 41,665 (CFTC June 16, 1994). The Commission further observed that "[l]imitations are applied even in the absence of prejudice to respondents, however, because they also serve a general societal interest by encouraging the timely resolution of disputes." Id. at 41,666 n.7.

[161] It is enough to learn of (or be in a position where he should have discovered) the general wrongful course of conduct. *Martin*, [1986-1987 Transfer Binder] ¶23,354 at 32,982.

[162] Complaint at 8.

[163] *Id.* at 1.

[164] The limitations problem did not escape the attention of the Office of Proceedings. Docket Entry Tab Order 2, Note to File, dated March 2, 2007. It discussed its concerns with Vargas's attorney, Cabrejo, when it first received the complaint. Docket Entry Tab Order 2, Memo of Telephone Conversation, dated March 5, 2007. Apparently, this discussion convinced the office to forward the case. *Id.* ("We discussed that there appeared to be a statute of limitations and jurisdiction concerns. [We] [a]sked Mr. Cabrejo if his clients (in Peru) wanted to proceed. He stated yes."). This, however, does not necessarily end the matter. The Office of Proceedings is responsible for determining whether a complaint merits being forwarded for adjudication. 17 C.F.R. §12.15. However, the office is charged with performing a "cursory review" rather than one that is "difficult and probing." *Final Rules Relating to Reparations* [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,006 at 28,467 (CFTC Feb. 22, 1984). It evidently regarded the determination of Vargas's equitable tolling claim to be outside of its purview. *See infra* nn. 165-171 and accompanying text.

Vargas's claim that his complaint is not time-barred rests entirely on the bare assertion that the limitations period should be equitably tolled for the period that his suit against FX Solutions was pending in federal district court.[165]

Both the courts and the Commission reserve equitable relief from the limitations period for extraordinary circumstances.[166] As the Third Circuit has explained: "The federal courts sparingly bestow equitable tolling. Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control. Absent compelling equitable considerations, a court should not extend limitations by even a single day."[167]

Equity is not advanced by encouraging complainants like Vargas to shop and hop around forums, dragging respondents with them. For this reason, federal courts routinely hold that tolling does not occur when a case is

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[165] Complaint at 16. *Haekal v. Refco*, Inc., 198 F.3d 37, 43 (2nd Cir. 1999.) ("When equitable tolling is applied, the limitations period is deemed interrupted; when the tolling condition or event has ended, the claimant is allowed the remainder of the limitations period in which to file his action.").

[166] *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *In re Buckwalter*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,609 at 39,893 (CFTC Dec. 10, 1992).

[167] *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000).

voluntarily dismissed[168] – as was the case with Vargas's federal suit.[169] Similarly, there appears no justification for tolling the statutory period during the succeeding time in which he has pursued FX Solutions in the pending New York state court action.[170] Thus, the limitations period would likely raise a

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[168] *Brown v. Hartshorne Pub. Sch. Dist.*, 926 F.2d 959, 961 (10th Cir. 1991) (holding that a voluntary dismissal without prejudice leaves the parties as though the action had never been brought); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) (holding that dismissal without prejudice for failure to prosecute does not toll the statute of limitations); *Goff v. United States*, 659 F.2d 560, 562 (5th Cir. 1981) (emphasizing that voluntary dismissals for unknown reasons do not toll the statute of limitations); *Bomer v. Ribicoff*, 304 F.2d 427, 428 (6th Cir. 1962) (holding that "an action dismissed without prejudice leaves the situation the same as if the suit had never been brought").

[169] "[Issues were] not addressed in the process since the complaint was later withdrawn...." See Complaint at 15; "[T]he plaintiffs voluntarily dismissed the federal case without prejudice against the remaining defendants." Answer at 6.

[170] The Commission has rejected the argument that "tolling of the statute of limitations applicable to one remedy should never be available for the time that a party pursues an alternative or permissive remedy." *Sommer v. Conticommodity Services, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,244 at 35,106 (CFTC May 20, 1988). In *Sommer*, the Commission tolled the limitation period where a complainant sought to move his claim from arbitrations to reparations. However, it did so on the ground that the respondent was thwarting the complainants' effort to timely resolve their dispute. *Id.* at 35,106 ("In this case, Sommer sought to settle the dispute with Conti through resort to arbitration. In light of Conti's contention that the arbitration forum lacked jurisdiction, a quick resolution of the dispute through arbitration was, at best, problematic. In these circumstances, complainants' interest in bypassing this jurisdictional dispute by filing a claim in reparations is understandable."). In contrast, the record here contains no suggestion that Vargas's delay in resolving his claim has been induced in any manner by FX Solutions. The Commission has identified the two general types of circumstances where application of equitable tolling is appropriate: where the claimant has pursued his judicial remedies by filing a defective pleading during the statutory period, and where the claimant has been induced or tricked by his adversary's misconduct into allowing the statutory period to pass.

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serious hurdle for Vargas if this case were to proceed.[171]

Forex and Jurisdiction

When this case was in the Southern District of New York, that court dismissed a related defendant (FXCM) on the grounds that it was exempt from jurisdiction under the Commodity Exchange Act – holding that the underlying contracts were for off-exchange foreign currency.[172] Anticipating a similar jurisdictional problem here, Vargas sought to distinguish his federal law claim

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Buckwalter, [1992-1994 Transfer Binder] ¶25,609 at 39,893 n.4. (CFTC Dec. 10, 1992). Neither of these circumstances appears to be present in Vargas's case.

[171] Generally, if the statute of limitations "defense is not raised in a party's answer, a waiver may be inferred." *Loftin v. E.F. Hutton & Co.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,854 at 37,025 (CFTC June 6, 1990) However, "waiver is not the inevitable result of a failure to raise an affirmative defense in the initial pleading." *Id.* at 37,026. Here, the limitations issue is raised in the complaint but not in the answer. Complaint at 16; *See* Answer. As Vargas's complaint makes clear, he has notice of the issue and he would suffer no prejudice if it were to be raised at a later time. Under such circumstances, FX Solution would be free to raise it as this proceeding progressed. *Loftin*, [1990-1992 Transfer Binder] ¶24,854 at 37,024 (holding that the Administrative Law Judge did not abuse his discretion in adjudicating a statute of limitations defense raised after the answer had been filed, where "Complainants had ample opportunity to explore factors relevant to this issue through the discovery process and to prepare testimony on factual issues relating to the accrual of their cause of action and relevant tolling and estoppel principles."). *See also Kacem* v. *Castle Commodities Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,058 at 45,032-33 (CFTC May 20, 1997) (considering a statute of limitations defense not raised in an answer but raised prior to trial).

[172] *Krause,* 356 F.Supp. 2d at 335.

from the one filed in reparations.[173] At base, however, it appears that the same type of retail off-exchange foreign currency trading was done by FX Solutions.[174]

As the district court discussed, the Commodity Futures Modernization Act of 2000 established the Commission's limited jurisdiction over off-exchange contracts for foreign currency.[175] Though FCMs are generally exempt from even that limited jurisdiction,[176] *unregistered* FCMs[177] are subject to certain, specifically enumerated, substantive provisions of the Act.[178] FX Solutions is a

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[173] For instance, Vargas writes that "The district judge granted FXCM the motion holding that, in effect, principal to agent and vicarious liability, were not among the sections of the Act applicable to foreign exchange transactions." Complaint at 15. He then notes that, unlike the federal court proceeding, his allegations in reparations involve unauthorized trading. *Id.*

[174] FX Solutions "is a professionally managed foreign currency trading firm and Futures Commission Merchant.... It is on the other side of customers' trades and lays-off its positions on money center banks." Answer at 1.

[175] 7 U.S.C. § 2(c)(1) (providing that with limited exceptions, "nothing in the Act . . . governs or applies to an agreement, contract, or transaction in . . . foreign currency").

[176] 7 U.S.C. § 2c(2)(B)(ii)(II).

[177] "...[C]ontracts . . . described in subparagraph (B) shall be subject to [certain sections] . . . if they are entered into by a futures commission merchant . . . that is not also an entity described in subparagraph (B)(ii)...." 7 U.S.C. § 2(c)(2)(C). That subparagraph includes "futures commission merchant[s] registered under the Act." 7 U.S.C. § 2c(2)(B)(ii)(II). Thus, unregistered FCMs are subject to the enumerated provisions, but registered FCMs are not.

[178] 7 U.S.C. § 2(c)(2)(C). Sections 4b and 4c(b) are the major substantive sections listed. Section 4b prohibits fraudulent transactions and section 4c(b) prohibits unauthorized options trading. 7 U.S.C. § 6b and 7 U.S.C. § 6c(b). Sections 6(c) and 6(d) are also included, but they are limited "to the extent that

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registered FCM.[179] Thus, the Commission likely does not have jurisdiction over FX Solutions with respect to the enumerated substantive provisions.

However, even if the Commission had jurisdiction over FX Solutions under the substantive provisions, it would still lack jurisdiction to enforce them in reparations. In addition to the substantive sections, Congress listed procedural sections 6c (authorizing the Commission to sue in federal court),[180] 6d (authorizing states to sue in federal court on behalf of their residents),[181] and 8a (authorizing the Commission to institute quasi-judicial statutory disqualification proceedings).[182] Sections 14[183] and 22[184] – the sections that provide for private rights of actions – are not among the procedural sections listed.[185] Assuming that Congress drafts with care (as of course we must), it must have purposefully excluded those sections from the Commission's

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sections 6(c) and 6(d) prohibit manipulation of the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any market...." 7 U.S.C. § 2(c)(2)(C).

[179] National Futures Association BASIC, http://www.nfa.futures.org/BasicNet.

[180] 7 U.S.C. § 13a-1.

[181] 7 U.S.C. § 13a-2.

[182] 7 U.S.C. § 12a(1).

[183] 7 U.S.C. §18 (addressing reparations)

[184] 7 U.S.C. §25 (addressing private suits brought in United States district courts).

[185] 7 U.S.C. § 2(c)(2)(C).

jurisdiction.[186] Thus, under the Commodity Futures Modernization Act, the Commission has no jurisdiction over private actions brought against registered *or* unregistered FCMs trading foreign currency off-exchange.

Although the evidentiary record on this issue has not been developed, we do know that Vargas brought a private action in reparations, against a registered FCM, trading what appear to be off-exchange contracts for foreign currency. If this is the case, then under either analysis – substantive or procedural – the Commission lacks (and lacked on appeal) jurisdiction over FX Solutions. This qualifies as yet another serious potential flaw with this case.

Parallel Proceedings

A parallel proceeding is one that is based on the same set of facts as a proceeding pending in another court at the time the reparations complaint is filed.[187] Vargas admits that he filed here while his New York state court case

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[186] *Russello v. United States,* 464 U.S. 16, 23 (1983) (holding that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion); *New York Currency Research Corp. v. Commodity Futures Trading Com'n,* 180 F.3d 83, 90 (2d Cir. 1999) (holding that "[t]he fact that Congress uses different language in defining violations in a statute indicates that Congress intentionally sought to create distinct offenses."). *Cf. Grandview v. National Futures Association,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,996 at 44,809 (CFTC Mar. 18, 1997) (applying the basic principles of rule construction, which is to start by interpreting the plain meaning of the rule).

[187] The precise definition is:

> (1) An arbitration proceeding or civil court proceeding, involving one or more of the respondents as a party, which is pending at the time the

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was pending; his complaint says that "FX moved . . . to compel arbitration, which is pending for decision."[188]

Our rules clearly mandate that "The . . . Office of Proceedings shall refuse to institute a . . . reparations complaint . . . in which there is a parallel proceeding . . . and shall return the complaint to the complaining person."[189] Inexplicably, this was not done.

The rules also mandate that a complaint be dismissed without prejudice, if notice of the parallel proceeding is received by the Administrative Law Judge.[190] We have such notice.[191] The New York state case based on the same

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> reparations complaint is filed and involves claims or counterclaims that are based on the same set of facts which serve as a basis for all of the claims in the reparations complaint, and which . . .:
>
> (i) Was commenced at the instance of the complainant in reparations....

17 C.F.R. §12.24(a)(1)(i).

[188] Complaint at 16.

[189] 17 C.F.R. §12.24(c)(1).

[190] 17 C.F.R. §12.24(c)(2). *See Plank v. Chesapeake Investment Services, Inc.*, CFTC Docket No. 02-R066, 2004 WL 1632017 at *1, n.4. (CFTC July 22, 2004).

[191] Response to Order at 1-3; Answer at 6-7; Complaint at 16. Vargas attempts to confuse the issue. He writes that "...the civil procedure instituted before the SCNY will not cause any effect on the decision of the present complaint, since that court has lost jurisdiction over the case." Response to Order at 2. This is false. Perhaps in an attempt to be clever, he includes a footnote: "Or is proximate to son loose [sic] jurisdiction." *Id.* at 2 n.1. The fact remains that

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set of facts was commenced before Vargas filed in reparations and remains active.[192] Therefore, we dismiss this case without prejudice. There is no right of appeal to the Commission.[193]

Order

Pursuant to 17 C.F.R. §12.24(c)(2), (e), we **DISMISS** the complaint without prejudice. The parties have no right of appeal.[194] However, for the reasons set forth in this opinion, we urge the Commission to undertake *sua*

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the state court currently retains jurisdiction. Even if the parties proceed with arbitration proceedings, the court might retain its jurisdiction for the purpose of enforcing any award. And regardless, arbitration also constitutes a parallel proceeding, again preventing access to reparations. 17 C.F.R. §12.24(a)(1).

[192] *See supra* nn.36-43 and accompanying text. The online docket for the state court says that the case remains active. The index number is 601854-2005; it may be used in the following link to access the state court's online docket: http://iapps.courts.state.ny.us/webcivil/FCASDocumentSearch?county_code=pdOxM_PLUS_oja64Q6YhAUT_PLUS_CxA%3D%3D&txtIndexNo=W_PLUS_Dn0%2Fmhe4OXDaKVRHJJAw%3D%3D&showMenu=no&isPreRji=undefined.

[193] 17 C.F.R. §12.24(f). *See Plank*, 2004 WL 1632017 at *1-2, n.4.

[194] 17 C.F.R. §12.24(f). *See Plank*, 2004 WL 1632017 at *1-2, n.4.

sponte review[195] of its decision waiving the bond requirement in this case.[196]

IT IS SO ORDERED.

On this 1st day of June, 2009

Bruce C. Levine
Administrative Law Judge

[195] 17 C.F.R. §12.403(a).

[196] *Vargas,* [Current Transfer Binder] ¶31,319 at 62,671.