

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

HUI DONG AND HSUE TUNG

v.

CONCORDE TRADING GROUP, INC.
and GEORGE ANTHONY LEDO

CFTC Docket No. 01-R089

ORDER OF REMAND

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A Judgment Officer dismissed complainant Hui Dong's ("Dong") complaint finding that she abandoned the prosecution of her claims by failing either to participate in the discovery process or to advise the forum of her current address. He dismissed complainant Hsue Tung's ("Tung") complaint as a sanction for what the Judgment Officer termed "dilatatory, vexatious, and bad faith litigation tactics." Tung appeals, arguing that the Judgment Officer erred by denying him a hearing on the merits. Respondent George Ledo ("Ledo") did not respond.¹

For the reasons that follow, we remand the matter to the Judgment Officer for further proceedings.

¹ Ledo participated in the proceedings below through counsel. After the appeal was submitted, his counsel submitted a June 2003 motion to withdraw.

Respondent Concorde Trading Group, Inc. ("Concorde") has not participated in this proceeding since its counsel filed a motion to withdraw in April 2002. In June 2002, the Judgment Officer granted counsel's motion to withdraw and warned Concorde that if it did not file a notice of appearance and designation of representation by July 15, 2002, it would be defaulted. There is no record of either Concorde's filing or the judge's default order. While this case was pending, the National Futures Association ("NFA") instituted a disciplinary proceeding against Concorde for deceptive and misleading sales practices, which resulted in a settlement pursuant to which Concorde's NFA membership was terminated effective June 5, 2002. *In re Concorde Trading Group, Inc.*, NFA Docket No. 01BCC00014. Nothing in the record suggests that Concorde is subject to dismissal pursuant to Commission Regulations 12.24(a)(3), (d) (bankruptcy of a respondent). In these circumstances, despite its nonparticipation, Concorde remains a party to this case.

BACKGROUND

In January 2001, in response to a solicitation by Ledo, an account executive, Dong and Tung opened a joint account at Concorde. Complainants deposited \$3,000 in March 2001 in order to purchase three crude oil call options. In April, they deposited an additional \$900, liquidated the crude oil position, and purchased an S&P put option position. That position expired worthless in May, and about \$434 was returned to complainants.

In August 2001, an attorney submitted a reparations complaint on behalf of Tung. It alleged fraudulent inducement and fraud in the liquidation of the crude oil call position. The complaint sought damages that included an out-of-pocket loss of about \$3,500, \$1,200 in lost profits, and an unspecified amount of punitive damages.

Later that month, the Office of Proceedings ("Proceedings") advised Tung's attorney that his complaint did not raise the type of allegations necessary to support a punitive damages award. It also noted that Dong appeared to be a co-owner of the account at issue, and indicated that either Dong should sign the complaint as a co-complainant, or that Tung should supply an explanation for her absence as a complainant. In September 2001, the attorney indicated that Dong was out of the country, but noted that Dong and Tung had filed a verification of the complaint that both had signed on August 27, 2001 in the presence of a notary.

In October 2001, Concorde and Ledo filed a joint answer denying any wrongdoing. After the case was assigned to a Judgment Officer, he issued an order requiring all parties to submit information material to the complaint's lost profits claim. Shortly thereafter, Ledo filed a notice that he had obtained his own counsel to represent him.

During the discovery period, Concorde and Ledo sought extensive discovery from both Dong and Tung individually, including their high school diplomas, documentation of their

previous ten years of employment, and documents relating to their current place of residence. See Request for Documents December 20, 2001. In January 2002, Tung's attorney filed a notice withdrawing from representation of Tung due to an increased work schedule. The letter indicated that counsel had advised Tung about his responsibilities and the applicable deadlines. A few days later, Proceedings received a document signed by both Dong and Tung. The document provided information material to the complaint's lost profits claim. Complainants did not, however, file any responses to either Concorde's or Ledo's discovery requests.

In February 2002, Ledo filed a motion to compel responses to his discovery requests. Both complainants filed and signed an objection to the motion later that month. They claimed that all information necessary to decide the case had already been provided to both the Judgment Officer and respondents. They also emphasized that Dong was merely a "beneficiary" of the joint account.

In June 2002, the Judgment Officer granted Ledo's motion to compel, noting that complainants' opposition did not address why any particular question should not be answered. At the end of the order, the Judgment Officer discussed Dong's status in the proceeding. He acknowledged Tung's claim that Dong was merely a beneficiary with little direct information about matters in dispute, but noted that because she was a complainant, she was required to respond to Ledo's discovery requests. The Judgment Officer indicated that Dong could ratify Tung's answers as long as she signed and swore to all submissions.

In response, on July 18, 2002, complainants submitted a motion to withdraw Dong as a complainant, reduce the number of discovery requests, and relax the deadline for responses. The motion reiterated that Dong had no knowledge about the disputes at issue and claimed that Dong felt pressured and harassed. It also claimed that the large number of discovery requests had

unduly burdened Tung and scared away his attorney. Finally, it requested that the Judgment Officer intervene to convince respondents to reinstate an earlier offer to settle for \$4,000.

In August 2002, Ledo's counsel wrote a letter to the Judgment Officer. It indicated that, in an off-the-record settlement conference that included the Judgment Officer, Tung had agreed to settle the dispute for \$1,750. Counsel stated that Tung had failed to sign and return the stipulation of dismissal.

On September 9, 2002, the Judgment Officer issued an order establishing a September 20 deadline for complainants either to return the signed stipulation or offer a written explanation for their failure to do so. The Judgment Officer warned that he would dismiss the complaint for failure to participate if complainants did not offer a timely response.

In his September 17, 2002 response, Tung said that Dong refused to sign the stipulation because she had not been consulted about the \$1,750 settlement amount. He urged that the settlement amount be increased to \$4,000. Finally, he signed the response "for" Dong and indicated that she could no longer be located because the tactics used by Ledo's attorney scared her.

In an immediate response, Ledo's counsel claimed that during the July 26, 2002 telephone conference, Tung advised the Judgment Officer that he represented Dong in agreeing to the settlement. According to counsel, this statement amounted to a fraud on the forum warranting sanctions. He also opposed complainants' motion to permit Dong to withdraw, arguing that Dong's alleged agitation was not an appropriate basis for the requested relief. In addition, counsel argued that permitting withdrawal would expose Ledo to another potential action on the same claim. Finally, the response requested that the Judgment Officer issue a decision on the merits based on the current documentary record.

On September 20, 2002, the Judgment Officer issued an order that essentially restarted the discovery process in this case. He ordered Tung to cease acting on Dong's behalf during the proceeding. He directed Dong to submit documents that were both signed and notarized. In a footnote, the Judgment Officer ruled on Dong's July 18 motion to withdraw stating:

Ms. Dong's previously submitted request to be dismissed from this case will not be considered unless it is re-filed with a notarized signature demonstrating that an ID was provided to the notary. If it is re-filed, she will be dismissed, but that dismissal will be with prejudice to her right to bring any action elsewhere on these same facts.

September 20, 2002 Order at 3 n.4.

In another footnote to the order, the Judgment Officer commented indirectly on respondent Ledo's claim that Tung had committed fraud on the forum by offering assurances that he represented Dong in agreeing to the settlement. He noted that Tung's conduct was not sanctionable because "[the Judgment Officer] incorrectly allowed him to negotiate the settlement without his co-complainant's participation. Even though Mr. Tung assured the [Judgment Officer] that she would agree with any decision he made, it was still improper to rely on that incorrect assurance." September 20, 2002 Order at 1 n.1.

In October 2002, Ledo served both Dong and Tung with new discovery requests. Tung responded with a motion seeking lie detector tests and an investigation by the National Futures Association. In an order dated October 10, 2002, the Judgment Officer denied Tung's motion. Later that month, Tung filed responses to Ledo's discovery requests. Dong did not file any responses.

The Judgment Officer then provided both sides with an opportunity to make final written submissions. In December 2002, Ledo made a submission that included two affidavits. Neither complainant made a submission.

On April 29, 2003, the Judgment Officer issued an order scheduling a telephonic hearing for May 20, 2003. It warned that "if either [Dong or Tung failed] to appear, the hearing will be cancelled and the complaint will be dismissed." April 29, 2003 Order at n.2.

On May 6, 2003, Proceedings received a letter from Tung indicating that he would participate in the hearing, but that Dong would not. The letter noted that Dong did not want to participate in the case due to "lack of English and understanding of complicated proceedings," referred to the Judgment Officer's "agreement," and claimed that Dong "no longer [could] be reached." Under his signature, Tung designated himself "Sole Complainant."

On May 8, 2003, the Judgment Officer issued a Dismissal Order ("Dismissal Order"), in which he found that complainant Dong had abandoned the prosecution of her complaint. In this regard, he noted that by signing the complaint under oath, she "obligated herself to participate in this litigation that she helped initiate," but never answered respondent Ledo's discovery requests and never contacted Proceedings to inform it of her alleged change of address. Dismissal Order at 2.

As for complainant Tung, the Judgment Officer found that dismissal was warranted because he engaged in "dilatatory, vexatious, and bad-faith litigation tactics." *Id.* In this regard, the Judgment Officer emphasized that by Tung's own admission, Dong took a very passive role in this litigation both prior to and after July 2002. Nevertheless, the Judgment Officer noted, Tung claimed that after the July 2002 settlement conference, Dong felt so strongly that she refused to sign a settlement agreement for less than \$4,000. Given the lack of any cogent explanation for this abrupt change of position, the Judgment Officer inferred that Tung had used Dong's alleged objection as "a subterfuge" disguising his independent decision to renege on the agreement to settle for \$1,750. *Id.*

In addition to Tung's conduct in the context of the settlement process, the Judgment Officer noted several other instances of alleged bad faith litigation tactics: (1) Tung's loss of Ledo's discovery requests after he had filed objections to them; (2) his refusal to provide information about Dong or her whereabouts; and (3) his claim to be the only complainant in the face of the Judgment Officer's order requiring that both participate in the telephonic hearing.

DISCUSSION

On appeal, Tung claims that the Judgment Officer's decision is the result of bias. He reiterates his previous claim that he made a good faith effort to convince Dong to sign the settlement agreement for \$1,750, but that she refused to cooperate.

As an initial matter, we agree with the Judgment Officer that the practical effect of Dong's refusal, inability, or reluctance to participate in these proceedings is that she abandoned her complaint. She made it clear that she wished to do so on July 18, 2002 when she submitted a motion to withdraw because she had no knowledge of the disputes at issue and felt "pressured" and "harassed" by the proceedings. For reasons unknown, the Judgment Officer refused to consider the request unless she resubmitted it notarized form. While we cannot say that the Judgment Officer abused his discretion in this respect, his subsequent refusal to permit Tung to prosecute his complaint unless Dong appeared at the hearing was an abuse of discretion.²

Although it has been the practice of the Office of Proceedings to require both owners of a joint account to sign a complaint, Commission precedent does not require all co-owners to remain in a proceeding. The need for a person to be a party and the degree of participation

² When a judge considers all relevant factors and commits a clear error of judgment, he abuses his discretion. *Malato v. Chicago Board of Trade*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,448 at 35,963 n.13 (CFTC May 2, 1989), quoting *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987). It is also an abuse of discretion to unduly interfere with a party's right to a hearing. *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,275 at 50,676 (CFTC Sept. 26, 2000), quoting *In re Murlas Commodities, Inc.* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440 at 35,931 (CFTC Apr. 24, 1989).

required depends on individual facts and circumstances. *See Parciasepe v. Shearson Hayden Stone*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,464 at 30,070 (CFTC Jan. 2, 1985). That case involved a joint account owned by a husband and wife. Although the complaint was brought in both names, the Commission allowed it to be signed and verified by the husband only. Because the wife was not involved in trading the account and did not participate in any stage of the proceeding, the Commission dismissed her as a complainant. *See also Dunn v. Murlas Commodities, Inc.* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,357 (CFTC Nov. 12, 1986) (concluding that a father could pursue an action solely in his own name as he was the real party in interest, his co-account owner, a minor son, did not have to be named as a complainant); *Dawson v. Carr Investments, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,983 (CFTC Apr. 10, 2002), and *Brooks v. Carr Investments, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,027 (CFTC May 9, 2002) (co-owners of a joint account filed separate complaints; their interests conflicted); *Chapman v. E.F. Hutton & Co., Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,938 at 34,288 n.1 (CFTC Sept. 21, 1987) (declining to discuss the presiding officer's action in compelling the joinder of an "indispensable party" because none of the parties objected); and *Violette v. First Options of Chicago, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,951 (CFTC Feb. 20, 1997) (dismissing co-owners of a joint account because they settled separately).

Dong signed a motion asking to be dismissed from this proceeding in July 2002.³ Instead of granting the motion, the Judgment Officer insisted that Dong resubmit it with a notarized signature, required her to participate in the hearing, and dismissed the complaint upon

³ Rule 12.205 authorizes a presiding official to dismiss a party. Dismissal with prejudice would have addressed respondent's concern that he could be exposed to another potential action on the same claim.

notification that she would not participate. He thereby made Tung's ability to adjudicate contingent upon Dong's participation, which assumed that Tung possessed a degree of control over Dong that is not supported by the record. Moreover, there is no allegation that respondents interacted with Dong in any way or that she had any knowledge of trading in the account.⁴ There is nothing in the record to indicate that Dong could contribute in any way to the Judgment Officer's deliberation or that she was an indispensable party to the litigation. In this circumstance, we can discern no compelling reason for the Judgment Officer's insistence that Dong participate in the hearing.

Although the Judgment Officer recited other reasons for concluding that Tung engaged in "dilatory, vexatious, and bad-faith litigation tactics," warranting dismissal of his complaint, they cannot be separated from the struggle over Dong's continued participation in the case. The primary reason recited by the Judgment Officer—that Tung used Dong's alleged objection to the \$1,750 settlement amount as a "subterfuge" disguising his independent decision to renege on the agreement—is an insufficient basis in itself upon which to find against Tung. Plainly, whatever agreement was discussed never matured to the point when it was consummated in writing. Parties are allowed to change their minds before signing an agreement. Moreover, it is clear that the Judgment Officer did not view this as a sufficient reason to dismiss the complaint until he learned that Dong would not attend the scheduled hearing.

⁴ Additionally, we are troubled by the Judgment Officer's failure to issue a protective order just because Tung and Dong did not articulate, to the Judgment Officer's satisfaction, the specific discovery requests to which they objected. Commission Rule 12.30 limits discovery to information that is relevant to subject matter of the case. The discovery requests sought, *inter alia*, copies of Dong's and Tung's high school diplomas, documentation of ten years of employment for both Dong and Tung, and documents relating to Tung's and Dong's residence, which were not relevant to the question of Ledo's alleged fraud. The requirement to produce these and other equally irrelevant documents, as well as to force complainants to respond to numerous irrelevant interrogatories and admissions was abusive. We also note that Rule 12.30 provides for sanctions against parties that have abused discovery by making unreasonable requests.

Given these circumstances, we remand this matter to the Judgment Officer with instructions to dismiss Dong and to hold a telephonic hearing on Tung's complaint.

IT IS SO ORDERED.

By the Commission (Chairman JEFFERY and Commissioners LUKKEN, BROWN-HRUSKA, HATFIELD and DUNN).



Catherine D. Daniels
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 14, 2005