UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

PETER STIMSON BROOKS	:	
v.	:	CFTC DOCKET NO. 96-R100
CARR INVESTMENTS, INC., EDWARD F. CARR, JR., and JONATHAN WILLIAM LUBOW	:	OPINION AND ORDER

Respondents Carr Investments, Inc. ("Carr Investments"), Edward F. Carr, Jr. ("Carr"), and Jonathan William Lubow ("Lubow") appeal from an Administrative Law Judge's ("ALJ") denial of their motion seeking $52,316.34 in attorney fees from complainant Peter Stimson Brooks ("Brooks").[1] The ALJ held that an award of attorney fees was barred under the unclean hands doctrine applied by the United States Court of Appeals for the Seventh Circuit in *Packers Trading Co. v. CFTC*, 972 F.2d 144 (7th Cir. 1992). Respondents challenge his holding and argue that such an award is appropriate because the record shows that Brooks admitted that he filed a frivolous claim.[2] Brooks opposes the appeal and urges us to affirm the ALJ's analysis in all respects.

As explained below, we reverse the ALJ on the application of the unclean hands doctrine but conclude that respondents have not established the circumstances necessary to justify an award of attorney fees under applicable Commission precedent.

[1] In an earlier decision, we vacated the ALJ's denial of respondents' request for an award of attorney fees and remanded for further proceedings. *Brooks v. Carr Investments, Inc.*, CFTC Docket No. 96-R100, slip op. (CFTC Aug. 19, 1999). That decision affirmed the ALJ's grant of Brooks's motion to dismiss his complaint against respondents.

[2] On appeal, respondents also request an additional $13,690.75 to cover attorney fees and costs incurred since they filed their initial request for attorney fees in September 1999.

BACKGROUND

This proceeding commenced in July 1996 when Brooks filed his initial complaint against respondents. The complaint sought recovery of $453,000 in losses sustained by an individual trading account that Brooks opened at Carr Investments in May 1992.[3] In addition to Carr, Lubow, and Carr Investments, Brooks named Rodman & Renshaw, Inc. ("Rodman & Renshaw"), the futures commission merchant that carried his account, as a respondent.

Brooks's wife, Sharon Dawson ("Dawson"), also commenced a reparations proceeding in July 1996 by filing a complaint against these same respondents. Dawson sought to recover $627,400 in losses sustained by a joint account that she and Brooks opened at Carr Investments in March 1993. *Dawson v. Carr Investments, Inc., et al.*, CFTC Docket No. 96-R101. Except for the amount of damages sought, the complaints were identical, both alleging fraudulent inducement, unauthorized trading, and churning as principal theories of liability.[4]

---

[3] At all relevant times, Carr Investments was registered as an independent introducing broker. Carr and Lubow were registered as associated persons of Carr Investments. Carr Investments ceased doing business and withdrew from registration with the National Futures Association two years after the complaint in this proceeding was filed.

[4] Regarding damages, Brooks's complaint stated that his $453,000 in claimed losses represented the equity in his individual account "during April and May 1994." Likewise, Dawson's complaint indicated that the $627,400 in damages she was seeking equaled the equity in her and Brooks's joint account during the same two months. Both complaints alleged that in May 1994, Brooks instructed the respondents to cease trading. Rather than comply with Brooks's directive, respondents purportedly "engaged in a pattern of excessive and aggressive trading" of futures and options contracts in coffee and other commodities. According to the two complaints, this unauthorized trading brought about the "financial ruin" of Brooks and Dawson.

In support of their claims, Brooks and Dawson each included, among the exhibits attached to their respective complaints, several letters from Brooks to Carr. Relevant to respondents' motion for attorney fees, one of those letters, dated March 12, 1994, expressed Brooks's concern over "excessive trading activity" and asked Carr to "tell [Lubow] to slow down." A second letter, dated June 12, 1994, accused Carr of "hav[ing] refused to comply with [Brooks's] request to stop all trading activity and not take on any new positions."

In October 1996, Carr Investments, Carr, and Lubow filed a joint answer to Brooks's complaint.[5] Denying any wrongdoing, the answer asserted that Brooks was routinely consulted about proposed trades, often suggested trades himself, and was kept informed of his account's status.

Following the filing of respondents' answer, this proceeding and the *Dawson* matter were assigned to the same ALJ. Treating the proceedings as related, the ALJ scheduled back-to-back evidentiary hearings in California. Two weeks before the hearings were to begin, he issued an order canceling them. The order explained that the ALJ had reviewed a transcript of tape-recorded telephone conversations that Brooks and Dawson had with Carr in December 1995. Because he believed these conversations suggested a "serious conflict of interest" between Dawson and Brooks, the ALJ ordered the attorney who then was representing Brooks and Dawson in their respective cases to consider whether he could continue acting as counsel to both complainants.

In response to the ALJ's concerns, the attorney withdrew as Dawson's counsel but continued representing Brooks in this proceeding. Dawson retained a new attorney, who was allowed to file an amended complaint on her behalf. Although the amended complaint was similar to Dawson's July 1996 complaint, it raised two new theories of liability, both of which were based on Carr's alleged involvement in a scheme with

[5] The fourth respondent, Rodman & Renshaw, filed a separate answer denying that it engaged in any wrongdoing. Rodman & Renshaw was subsequently dismissed from both this proceeding and the Dawson proceeding after becoming the subject of a bankruptcy action.

Brooks to unlawfully convert funds belonging to Dawson.[6] At the same time, the amended complaint omitted Dawson's prior allegation that the losses in the joint account were caused by respondents' failure to comply with Brooks's May 1994 instruction to cease trading.

In April 1998, the ALJ issued an order rescheduling back-to-back hearings in the *Brooks* and *Dawson* proceedings, to commence on June 8, 1998. Shortly thereafter, Brooks's counsel asked for, and received, a continuance due to Brooks's incarceration for spousal abuse. Over respondents' objections, the hearing in the *Dawson* case was held as scheduled. None of the parties to that proceeding subpoenaed Brooks to testify at the hearing.

On August 17, 1998, Brooks telephoned the ALJ to report that he would be withdrawing his complaint. On September 15, 1998, Brooks's attorney wrote to the ALJ, stating that he had been "authorized by [his] client Peter S. Brooks to withdraw his reparations complaint." Attached to the letter was an affidavit signed by Brooks on September 11, 1998, acknowledging that from March 1993 to July 1995, all funds deposited into Brooks's individual trading account had come from Dawson. The affidavit stated that Brooks was withdrawing his complaint because he "d[id] not have a right to claim money that belongs to Sharon Dawson."

Upon receipt of Brooks's affidavit, the ALJ issued an order directing respondents to show cause why Brooks should not be allowed to withdraw his complaint and why the

---

[6] Dawson's amended complaint, filed on January 5, 1998, alleged that Carr breached a fiduciary duty by failing to inform her about his concern over the authenticity of Dawson's signature on a May 27, 1993 letter authorizing the transfer of $100,000 from her and Brooks's joint account at Rodman & Renshaw into Brooks's individual trading account. The amended complaint also charged Carr with violating a fiduciary duty by ignoring telephone instructions from Dawson to deposit three $100,000 checks that she was sending him into the joint account. Instead, according to Dawson's amended complaint, Carr stood silently by while Brooks surreptitiously diverted the checks into his own trading account.

case should not be decided by summary disposition under Commission Rule 12.310. In reply, respondents objected to Brooks's request to withdraw on two grounds. First, they asserted that Brooks's letter to the ALJ failed to satisfy the procedural requirements of Rule 12.310. Second, they argued that the issue of whether Brooks should pay them attorney fees and costs under Commission Rule 12.314(c) remained in dispute.

On October 21, 1998, the ALJ issued an order dismissing this proceeding with prejudice. In his order, the ALJ reasoned that Brooks had not suffered any actual damages as a result of respondents' alleged wrongdoing because Dawson provided Brooks with the funds lost from his individual account. Turning to respondents' argument that they should be permitted to recover attorney fees and costs from Brooks, the ALJ summarily found that their "conduct in the instant case" precluded any such award.

As noted above, on appeal we affirmed the ALJ's dismissal of Brooks's complaint, but vacated his determination on attorney fees and remanded for further proceedings. On remand, respondents submitted a timely motion seeking $52,316.34 in attorney fees and related costs. Relying on Brooks's September 11, 1998 affidavit, the motion emphasized that Brooks litigated this case vigorously despite knowing that he was not entitled to the damages he claimed. The motion further argued that Brooks had lied in discovery responses[7] and had fabricated the March 12 and June 12, 1994 letters

[7] In a discovery response filed on January 23, 1997, Brooks indicated that none of the trades in his individual account or in his joint account with Dawson resulted from Brooks's own ideas or recommendations. In an addendum filed on April 4, 1997, Brooks modified his earlier response by acknowledging that "[o]n rare occasions, [he] might inquire about the wisdom of trading in a particular commodity." The modified response insisted, however, that Brooks relied on Carr and Lubow to select specific trades and to confirm that those trades represented minimal risk. Brooks's original response and the subsequent modification were included in the supporting documents attached as exhibits to respondents' motion for attorney fees.

attached to his complaint in an effort to bolster his unauthorized trading claim.[8]

The ALJ denied respondents' motion in September 1999. *Brooks v. Carr Investments, Inc.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,779 (Sept. 28, 1999) ("*Decision on Remand*"). His ruling focused on what the ALJ viewed as Carr's and Lubow's joint misconduct with Brooks in defrauding Dawson. Specifically, the ALJ found that respondents fraudulently induced Dawson into opening a commodity account and arranged to have Brooks named as a joint owner of the account "so that notice of the account's status would be given to Brooks, with no notice to Dawson." *Decision on Remand* at 48,719. He further found that respondents failed to inform Dawson when Brooks transferred funds from the joint account to his individual account and improperly diverted checks that Dawson had intended to deposit in the joint account. *Id*. at 48,720. In reaching these conclusions, the ALJ relied exclusively on the facts he adduced in the *Dawson* proceeding. *Id*. at 48,719.[9]

On appeal, respondents argue that the ALJ erred by basing his unclean hands analysis on evidence outside the record of this proceeding. They also claim that he misapplied the unclean hands doctrine by focusing on conduct that did not take place

---

[8] Respondents cited circumstantial evidence in support of their allegation that Brooks's letters had been fabricated. First, they noted that Carr had received laudatory letters and notes from Brooks both before and after his account suffered significant losses. Second, they pointed out that Brooks had dated the letter telling Carr to stop trading at a time when the joint account still contained substantial trading profits.

[9] The ALJ issued his Initial Decision in the *Dawson* case in April 1999. *Dawson v. Carr Investments, Inc*., [1998-1999 Transfer Binder] ¶ 27,616 (Apr. 27, 1999). In April 2002, we vacated the ALJ's decision because he had based material findings on Dawson's testimony without evaluating its reliability in the light of the record as a whole. *See Dawson v. Carr Investments, Inc*., CFTC Docket No. 96-R101, slip op. (CFTC Apr. 10, 2002). Based on our own *de novo* review of the record, we found that Carr and Carr Investments fraudulently induced Dawson to open a commodities account and awarded her approximately $42,500 in damages. We dismissed as unproven Dawson's other charges, including her allegations that respondents' breach of fiduciary duty caused her to lose the funds that she directed Rodman & Renshaw to transfer from the joint account to Brooks's individual trading account and the checks that she directed Rodman & Renshaw to deposit into Brooks's account.

during this proceeding and resulted in injury to a third party (Dawson), rather than to a party to in this proceeding (Brooks).

Respondents also argue that the current record establishes that Brooks commenced and litigated this proceeding in bad faith. They rely on the affidavit that Brooks filed when he sought to withdraw his complaint, arguing that it amounts to an admission that, at the time Brooks filed the complaint, he knew that he was not entitled to recover damages in reparations.[10]

In reply, Brooks argues that respondents' wrongdoing in the Dawson proceeding should preclude their receipt of an award of attorney fees in this proceeding. Brooks also denies that his complaint was frivolous and insists that he withdrew it only after the ALJ allowed Dawson to seek recovery of the funds lost in Brooks's individual account.

DISCUSSION

I.

Commission precedent indicates that, absent a particular type of fee-shifting agreement between the parties, attorney fees should be awarded only when the record shows that, during the course of a reparations proceeding, the losing party acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Sherwood v. Madda Trading Co.,* [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728 at 23,023 n.26

[10] Respondents' appeal brief specifically requests that any remand to the ALJ be limited to fact-finding relating to the computation of the amount of legal fees they incurred in litigating this matter.

In a motion filed on February 4, 2002, after submission of respondents' appeal brief, Thomas J. Muth, an attorney with the law firm representing respondents in this proceeding, asked leave to withdraw as counsel, noting that he recently left the firm. Mr. Muth's motion, which complainant has not opposed, is granted.

(CFTC Jan. 5, 1979); *Pal v. Reifler Trading Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,237 (CFTC Feb. 2, 1998).[11]

The ALJ, however, found it unnecessary to consider whether respondents showed that Brooks's conduct during the course of the proceeding met this standard because, in his view, an award of attorney fees was barred by the unclean hands doctrine recognized in *Packers Trading*. In this regard, the ALJ concluded that the record in the *Dawson* proceeding showed that (1) respondents Carr and Lubow had joined in a scheme with Brooks to swindle his wife; (2) Carr's and Lubow's unlawful conduct precipitated Brooks's filing of his complaint; and (3) Brooks's wrongdoing "pale[d] in comparison" with Carr's and Lubow's wrongdoing. *Decision on Remand* at 48,719.[12]

In *Packers Trading*, the Seventh Circuit interpreted arguments made in the Commission's brief on appeal as a concession that the unclean hands doctrine applied in reparations cases as long as the wrongful conduct was directly associated with the

---

[11] In *Pal*, the Commission awarded attorney fees in the context of a written agreement requiring the customer to pay such fees when they were incidental to a successful debit balance counterclaim. *Id*. at 45,978. Because this case does not involve such a counterclaim, the standard described in *Sherwood* is controlling.

[12] The ALJ reasoned that:

> Respondents Carr, Lubow, and Carr Investments, Inc., do not come into this forum with clean hands. It was their unlawful conduct, aided by Peter Brooks, that precipitated the filing of this complaint as well as the *Dawson* complaint. The money Brooks initially claimed in his reparations complaint was derived from funds owned by Dawson, a fact well known by Carr and Lubow. Checks from Dawson's bank were improperly deposited in Brooks'[s] account, and funds from Dawson's commodity account were improperly transferred to Brooks'[s] account. These registered respondents have very dirty hands, and any wrongdoing by Brooks pales in comparison. Certainly the wrongdoing of Brooks does not serve to clean the muck from the hands of Carr and Lubow.

Decision on Remand at 48,719.

particular transaction at issue in the proceeding. *Packers Trading*, 972 F.2d at 148.[13] Since then, we have not had occasion to address this interpretation of our position because no party has established circumstances that would justify the application of this equitable defense.[14] Because complainant's showing in this case also falls short, we need not resolve issues relating to whether (and, if so, how) the doctrine of unclean hands applies in the context of a reparations case.

Assuming, for purposes of decision, that the doctrine applies in the context of a request for attorney fees, it should be approached in a manner consistent with other equitable defenses we recognize in reparations proceedings. First, as a general rule, equitable defenses should be raised by the affected party, not the presiding officer. This is especially so when, as here, the affected party is represented by counsel. The ALJ raised the defense in this instance on his own motion, without offering any explanation

---

[13] As the Seventh Circuit's decision in *Packers Trading* noted, the Supreme Court has explained that the unclean hands doctrine requires that "parties shall have acted fairly and without fraud or deceit in the controversy at issue" and bars recovery by "one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Id*. at 148 (citing *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945)).

[14] The application of this type of broad equitable defense is not without problems. Indeed, in *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307 (1985), the Supreme Court addressed these problems in the context of the *in pari materia* defense, an equitable defense that closely tracks the unclean hands doctrine. The Court noted it had held such "broad common-law barriers to relief" are inappropriate when a private suit serves "important public purposes," such as enforcement of antitrust laws. In the specific context of *Bateman Eichler*, a private right of action brought under federal securities laws, the Court held that recovery could be barred only due to complainant's own culpability when:

> (1) as a direct result of his own actions, the [complainant] bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

Id. at 310.

for his action.[15] As we have noted in comparable circumstances, when both parties are adequately represented by counsel, it is generally an abuse of discretion to consider legal issues "that were either never raised or were raised and subsequently dropped." *Morris v. Stotler & Co.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,080 at 38,047 (CFTC June 27, 1991).

Moreover, we have recognized that parties to reparations proceedings have a right to both fair notice and an opportunity to contest disputed issues of material fact at a hearing. *See Hall v. Diversified Trading Systems, Inc.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 (CFTC July 7, 1994); *Marvin v. First National Monetary Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,046 (CFTC April 17, 1991). Here, respondents did not have notice of the wrongdoing that the ALJ viewed as material to the application of the unclean hands doctrine until after he issued the *Decision on Remand*. Moreover, the ALJ failed to grant respondents an opportunity to present evidence on material issues, such as whether Brooks's alleged wrongdoing "paled in comparison" to their own. If respondents had been on notice that the ALJ thought "relative blame" was a material factual issue, we expect that they would have made a stronger effort to develop the record on this point. In any case, the ALJ erred by failing to accord respondents either proper notice or a fair opportunity for a hearing on factual disputes material to the application of the unclean hands doctrine.

Finally, the ALJ's analysis is marked by at least two legal errors. First, he made findings on disputed issues of fact based on evidence outside the record of this

[15] For example, a presiding officer might justify raising the issue *sua sponte* because the record includes clear and convincing evidence of unclean hands and ignoring the evidence would undermine the fundamental integrity of the reparations process. Of course, as discussed below, even in these circumstances, the presiding officer would be required to provide the affected party with fair notice and an opportunity for a hearing on disputed issues of material fact.

proceeding. None of the parties to this proceeding agreed that issues raised in this case could be resolved based on the record developed in the *Dawson* case. Nor did Brooks, the complainant, establish the circumstances necessary to estop respondents from challenging the ALJ's factual findings in *Dawson*. *See In re Clark*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032 (CFTC Apr. 22, 1997) (courts apply a multi-factor test in assessing whether collateral estoppel may be properly invoked; the burden of proving these factors rests with the proponent of estoppel.)[16]

Second, the ALJ erred in his application of *Packers Trading*. While the court held that the proper interpretation of the Supreme Court's holding in *Precision Instruments* was broader than that applied by the Commission, it did not suggest that the proper interpretation considered the harm that the party seeking relief purportedly caused a third party such as Dawson. Indeed, by applying the unclean hands doctrine in the absence of any evidence that respondents' conduct toward Brooks was "tainted with inequitableness," the ALJ went well beyond the holding in *Packers Trading*.[17]

II.

Although the ALJ erred in his application of the unclean hands doctrine, his errors were harmless in the circumstances of this proceeding. This is because respondents have not demonstrated that Brooks litigated his claims in bad faith. In their motion before the ALJ, respondents offered several arguments in support of their claim that Brooks litigated against them in bad faith. Respondents' appeal brief, however, focuses solely on the

[16] Because the ALJ's *Dawson* decision was on appeal at the time of his *Decision on Remand*, it did not make "final" factual determinations that were binding for purposes of collateral estoppel. In any case, on appeal we vacated the findings in the *Dawson* decision that were material to the ALJ's application of the unclean hands doctrine in this proceeding.

[17] *See also Szucs v. L & D Scaffolding, Inc.*, No. 94-17222, 1996 WL 79485, *5 (9th Cir. 1996) (where complainant's misconduct is directed at a non-party, unclean hands will not ordinarily bar a claim).

affidavit that Brooks filed at the time he sought to withdraw his complaint. It argues that the affidavit includes an admission that, at the time he filed his complaint, Brooks knew that he was seeking to recover funds that actually belonged to Dawson.[18] As respondents see it, a party who knowingly files a claim for funds that he is not entitled to must necessarily be viewed as litigating in bad faith.

In his answering brief, Brooks denies that he knowingly filed a claim for funds that he was not entitled to. He claims that it was unclear whether he was entitled to the funds until the ALJ ruled that Dawson could make a valid claim to funds that were lost after being transferred to or deposited into Brooks's individual account. Brooks emphasizes that once the ALJ clarified the matter by granting Dawson's motion to amend her complaint, he moved to dismiss his claim. In essence, Brooks claims that his change in position reflected a good faith reaction to a change in the available information.

Because the reparations forum was designed to permit complainants to participate on a *pro se* basis, it is important that we carefully distinguish between *pro se* complaints that are carelessly drafted or poorly thought through, and those that are filed in bad faith.[19] Consequently, in analyzing whether a complaint was filed in good faith, we begin by considering whether complainant had the benefit of counsel. We then focus both on the allegations taken as a whole and the information available to complainant at the time the complaint was submitted. We do not infer bad faith simply because certain claims lack facial persuasiveness or a coherent explanation. Rather, we consider: (1) whether

---

[18] As mentioned, the pertinent portion of the affidavit explained that Brooks funded the trading in his individual account from 1991 through 1992, but acknowledged that from March 1993 through July 1995, Dawson provided "all of the funding" both for Brooks's individual account and for the couple's joint account.

[19] As the United States Court of Appeals for the Seventh Circuit has noted, "arguments that a lawyer should or would recognize as clearly groundless might not seem so to the pro se party." *Pryzina v. Ley*, 813 F.2d 821, 823-24 (7th Cir. 1987).

there is a colorable basis for the claims and (2) whether the record shows that the claims were raised for an improper purpose. *Compare Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (award of attorney fees should be reserved for the "rare and exceptional" case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (for fees to be awarded on grounds of bad faith, there must be "clear evidence" that party's claims "are entirely without color and made for reasons of harassment or delay or for other improper purposes.") In evaluating these factors, we keep in mind that an overly strict interpretation tends to "discourage all but the most airtight claims, for only seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978) (affirming denial of attorney fees to prevailing party in civil rights case).

Here, Brooks filed his complaint *pro se*, and many of his allegations could charitably be described as confusing. As to damages, Brooks claimed losses that occurred in his individual account, even though he knew that the funds he deposited into the account came from Dawson. Respondents suggest that this is facially improper, but fail to explain why. Apparently they believe that, for purposes of determining standing, the source of the funds lost is far more important than the location of the funds at the time the claimed losses occur.

This principle, however, is not supported by Commission precedent, which suggests that the named account holder normally has exclusive standing to claim losses caused by a registrant's fraudulent inducement or related violative conduct. The standing

of a third party, such as Dawson, turns on the nature of the injury to her individual interests. *Resolution Trust Corp. v. Geldermann, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,621 at 43,645 (CFTC Feb. 14, 1996). Given the special pleading requirements for third-party standing, Brooks had good reason to question whether the ALJ would recognize Dawson's standing to seek funds used to margin unsuccessful trading in his individual trading account. Consequently, his claim for those funds does not support an inference that Brooks filed his complaint in bad faith.[20]

We conclude that respondents waived their other arguments regarding Brooks's alleged bad faith by failing to raise them in their appeal brief. *See* Commission Rule 12.401(f). [21]

---

[20] In our experience, the source of funds lost from a futures account is, at best, an unreliable guide for determining an individual's standing to file a reparations complaint seeking to recover the lost funds. For example, suppose Brooks had borrowed funds from a bank, been fraudulently induced to invest the funds in a futures account, and lost the funds trading. Would even the respondents doubt that Brooks has standing to file a reparations complaint seeking the lost funds? Of course, he would still have to repay the loan to the bank, but this would neither undermine his standing to sue in reparations nor provide a basis for the bank to file a reparations complaint seeking the lost funds.

[21] Even if respondents had not waived these arguments, they would not change the result of our analysis. The type of modification that Brooks made in his discovery response regarding trading recommendations does not raise an inference of bad faith. *Cf. Byrne v. Nezhat*, 261 F.3d 1075, 1125 (11th Cir. 2001) ("[s]tanding alone, a false or inconsistent statement in a deposition does not compel the conclusion of bad faith.") Moreover, respondents' claim that Brooks fabricated letters to support his unauthorized trading claim is, at best, speculative. The record suggests that the relationship between Brooks and respondents was quite complex. In that context, the fact that Brooks claims he wrote some letters that criticized respondents and acknowledges writing other letters that praised them is hardly a reliable basis for inferring that the critical letters were fabricated. Nor is the credibility and reliability of respondents' claim that they never received the critical letters sufficiently self-evident to support a finding of fabrication.

CONCLUSION

In light of our analysis, we vacate the ALJ's *Decision on Remand* and deny respondents' request for an award of attorney fees.

IT IS SO ORDERED.[22]

By the Commission (Chairman NEWSOME and Commissioners HOLUM and ERICKSON).

_____

Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: May 9, 2002

[22] Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e)) (1994), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.