UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	
	:	CFTC Docket No. 01-18
GLOBAL TELECOM INC., CAMERON OWNBEY, and RB&H FINANCIAL SERVICES LP	:	OPINION AND ORDER

RB&H Financial Services LP ("RB&H") seeks interlocutory review of an Administrative Law Judge's ("ALJ") refusal to disqualify himself for bias under Commission Rule 10.8(b)(2). RB&H contends that the ALJ's rulings and comments in two reparations cases support its claim that the ALJ has a disqualifying bias. The Division of Enforcement ("Division") contends that RB&H's application fails to establish the type of extraordinary circumstances that warrant immediate review of the ALJ's ruling.

As explained below, we find that RB&H has not established that there are extraordinary circumstances that warrant immediate consideration of its application. Consequently, we deny review.

BACKGROUND

I

RB&H's bias claim rests on the presiding ALJ's participation in two reparations cases where the ALJ awarded damages against RB&H and, on appeal, the Commission vacated the award and dismissed the complaint. In the first case, the ALJ concluded that respondents were liable for fraudulent inducement, unauthorized trading, and failure to supervise. *Fijolek v. Margil Capital Management, et al.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶

28,125 (ALJ April 19, 2000).[1] In addition to holding RB&H liable under its guarantee agreement, the ALJ found it directly liable under Section 4b(a) of the Commodity Exchange Act ("Act") on the ground that it altered a power of attorney Fijolek had executed.[2]

Respondents appealed, and among other things, RB&H argued that the ALJ erred when he found that RB&H altered the power of attorney. In support, it sought to supplement the record with documents suggesting that the power of attorney was changed prior to its receipt by RB&H. The Commission found that it was unnecessary to resolve the issue because the record did not support the ALJ's conclusion that the person initially named in the power of attorney failed to actually trade Fijolek's account. *Fijolek v. Salimian, et al.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,652 at 52,545 (CFTC Sept. 26, 2001).[3] The Commission also held that the ALJ based his liability findings on unreliable evidence. *Id*. at 52,544. Finally, the Commission concluded that complainant had been denied a fair opportunity to develop the record on a churning claim raised in her complaint. On this basis, it remanded the case to the ALJ for further proceedings. *Id*. at 52,545-46.

On remand, the ALJ commented on the Commission's handling of respondents' appeal. He stated that:

> The [C]ommission's order is remarkable in that it faults the *pro se* complainant for inconsistencies in her pleadings; faults the Office of Proceedings for presumed errors in processing the complaint; faults the trial judge for relying on the testimony of the complainant; faults the trial judge for his finding that RB&H unilaterally altered and falsified complainant's power-of-attorney by deleting the person designated to control the account, and unlawfully vested such authority in [the IB and the IB's president]; and faults the judge for finding as a matter of law

[1] In addition to RB&H, Fijolek's complaint named an introducing broker guaranteed by RB&H and two associated persons of the introducing broker.

[2] Specifically, the ALJ found that RB&H altered the power of attorney to change the identity of the trader authorized to exercise discretion and did not inform its customer of the change. *Id*. at 49,867.

[3] The Commission also noted that the record did not support the ALJ's inference that the power of attorney was altered by RB&H. *Id.*

> that every trade on the account was in contravention of complainant's grant of discretionary trading authority and therefore unauthorized. Respondents are faulted for nothing. Not for falsification of documents. Not for misrepresentations of Saliman's track record. Not for anything.
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> * * *
>
> Because the [C]ommission has declined to consider the issues of whether [RB&H] failed to supervise the handling of an account on its books . . . by permitting unauthorized trading of the account and falsification of documents without the knowledge or consent of Fijolek, complainant may wish to consult with an attorney as to whether she should pursue any claims against RB&H in a more neutral forum such as state or federal court.

Fijolek v. Margil Capital Management, et al., CFTC Docket No. 99-115 (Notice and Order Oct. 5, 2001) at 1-2.[4]

In the second case, the ALJ concluded that respondents, including RB&H, were liable for fraudulent inducement and deceiving the two complainant-trusts about the ongoing value of their accounts. *McDaniel v. Amerivest Brokers Services, et al.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,407 (ALJ Aug. 13, 1998).[5] Although the ALJ acknowledged that a churning analysis was unnecessary in the circumstances presented, his decision included several findings that were solely material to excessive trading. *Id.* at 46,912-14.

Respondents appealed and, among other things, RB&H challenged the ALJ's churning-related findings. The Commission held that the ALJ had abused his discretion by including these findings in his decision and ordered them stricken because the amended complaints did not charge the respondents with churning and the parties had not litigated any churning claims. In this context, the Commission remarked that "in other circumstances we might view such conduct as evidence of the type of deep seated favoritism or antagonism that requires disqualification."

[4] The ALJ eventually dismissed the proceeding after complainant decided not to pursue a churning claim.

[5] In addition to RB&H, the *McDaniel* complaints named an introducing broker guaranteed by RB&H and two associated persons of the introducing broker as respondents.

McDaniel v. Amerivest Brokerage Services, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,264 at 50,591 (CFTC Sept. 26, 2000).[6]

II.

In July 2001, the Commission commenced this enforcement proceeding by issuing a Complaint alleging solicitation fraud.[7] The Complaint claimed that RB&H directly violated Commission Rule 166.3 by failing to diligently supervise the associated persons who perpetrated the alleged fraud. It also charged that RB&H was derivatively liable for the associated persons' allegedly fraudulent conduct pursuant to Section 2a(1)(B) of the Act. RB&H filed its motion to disqualify the ALJ on October 31, 2001. While the ALJ considered several motions between the date the Complaint was served and the date RB&H requested disqualification, none of his rulings adversely affected RB&H.[8]

According to RB&H's motion, the ALJ's comments in the *Fijolek* case demonstrated that his antagonism toward RB&H was "undeserved and excessive in degree." Motion to Disqualify at 2. RB&H focused on the reference to "falsification of documents" in the ALJ's order on remand, and emphasized that the Commission had concluded, "there was no evidence to support that conclusion." *Id.* It also noted that the ALJ encouraged Fijolek to pursue claims against

[6] Once again, the Commission concluded that the ALJ based his liability findings on unreliable evidence. *Id*. at 50,590. In addition, the Commission found that the ALJ abused his discretion in resolving discovery issues and erred in evaluating material documentary evidence. *Id*. at 50,587-88.

[7] According to the Complaint, associated persons sponsored by both RB&H and a registered commodity trading advisor (Global Telecom, Inc. ("Global")) conducted the fraudulent solicitations. The affected customers were solicited to open accounts at RB&H and use a trading system developed by Global. In addition to RB&H and Global, the Complaint named Cameron S. Ownbey ("Ownbey") as a respondent.

[8] The ALJ did deny RB&H's July 31, 2001 motion for a more definite statement, but only after the Division agreed to produce the information RB&H sought -- the identities of the customers allegedly defrauded. In August 2001, the ALJ *sua sponte* extended RB&H's deadline for submitting an answer, apparently because RB&H's counsel claimed he had not received timely service of the ALJ's order denying the motion for a more definite statement. In September 2001, the ALJ denied the Division's motion to hold respondents Global and Ownbey in default, and, in October 2001, he granted RB&H's motion to extend its deadline for complying with a Division subpoena.

RB&H in another forum despite the Commission's ruling that the evidence in the record did not support those claims.

RB&H claimed that the ALJ's comments in his order on remand in *Fijolek* were particularly egregious because the Commission's decision in *McDaniel* had instructed the ALJ not to make findings unsupported by the record. Finally, it noted that the United States Court of Appeals had concluded that disqualification was appropriate when a trial judge criticized a defendant on remand because he had appealed the trial judge's decision to the Court of Appeals and won a reversal. *Id.* at 4 (citing *United States v. Holland*, 655 F.2d 44 (5th Cir. 1981)).[9]

On November 1, 2001, the ALJ denied RB&H's motion for disqualification without explanation.[10]

III.

RB&H filed its application for interlocutory review of the ALJ's ruling on November 8, 2001.[11] As for the merits of its request for disqualification, RB&H essentially reiterates the points it raised before the ALJ. Specifically, RB&H contends that the ALJ's "deep-seated antagonism" is evidenced by the Commission's two prior reversals of the ALJ for denying RB&H a fair trial and because, after the reversal in *Fijolek*, the ALJ "refused to accept the Commission's ruling, continued to adhere to his discredited findings as to RB&H, and advised

[9] RB&H also filed a motion to stay the proceeding or, in the alternative, to extend its deadline for submitting a prehearing memorandum for 60 days.

[10] The ALJ also denied RB&H's motion for a stay but extended its deadline for submitting a prehearing memorandum to November 19, 2001.

[11] RB&H also filed a motion to stay the proceeding pending consideration of its application, and renewed its stay request in February 2002.

the complainant to consider suing RB&H in court." Application at 8. RB&H also argues that extraordinary circumstances exist warranting the Commission's immediate review.[12]

The Division opposes the application because, in its view, the "extraordinary circumstances" RB&H cites are not significantly different from those demonstrated in cases where the Commission has denied interlocutory review. The Division also contends that the ALJ's conduct in the two reparations cases cited by RB&H is insufficient to establish a deep-seated favoritism or antagonism that makes a fair judgment impossible.

DISCUSSION

The Commission has consistently refused to consider disputes over the disqualification of a presiding officer on an interlocutory basis in the absence of extraordinary circumstances that warrant immediate intervention. *See, e.g., Nixon v. Lind Waldock & Co.,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,935 (CFTC Jan. 17, 1997). A persuasive showing that the presiding officer will be unable to conduct a fair hearing would be sufficient to establish such circumstances.[13] Here, however, RB&H does not base its claim that the ALJ will be unable to conduct a fair hearing on alleged misconduct during this proceeding. Instead, it draws an unduly broad inference from the ALJ's errors in two unrelated reparations cases.

RB&H correctly notes that the Commission reversed a variety of the ALJ's rulings in the *Fijolek* and *McDaniel* matters. The Commission, however, has held that "standing alone, a judge's rulings almost never constitute a valid basis for a bias or partiality motion." *Id.* at

[12] RB&H argues that immediate intervention will advance the ultimate resolution of the matter by eliminating the risk of a remand for a new hearing after the parties have expended resources on a tainted hearing before the current ALJ.

[13] Immediate intervention would then be appropriate to conserve the resources of both the parties and the forum. The Commission has held that disqualification of a presiding officer under Rule 10.8 is appropriate when the record establishes that the presiding officer has either (1) a personal bias stemming from an extrajudicial source, or (2) a deep-seated favoritism or antagonism that makes a fair judgment impossible. *See, e.g., In re Nikkhah*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,635 at 43,671 (CFTC Mar. 1, 1996).

44,517.[14] Moreover, negative opinions about a party that arise from a presiding officer's participation in another adjudication are generally insufficient to establish a deep-seated antagonism that makes a fair judgment impossible. *In re Nikkah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,883 (CFTC May 12, 2000).[15] Finally, with regard to the ALJ's remarks on remand in *Fijolek*, the Commission has recognized that intemperate, impatient, or inappropriate remarks are generally insufficient to warrant disqualification. *Ferriola v. Kearse- McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172 at 50,153 (CFTC June 30, 2000).[16]

Given these principles, RB&H's argument essentially rests on its claim that the Commission provided guidance in its *McDaniel* opinion that the ALJ ignored in his order of remand in *Fijolek*, and that this recalcitrance is evidence of the ALJ's deep-seated antagonism. The Commission's comments in *McDaniel*, however, did not amount to a generic warning to the ALJ to limit his findings to those supported by the record. Rather, they were specifically directed at the ALJ's inclusion of prejudicial findings that were not material to the issues raised by the parties.[17] There is no evidence that the ALJ included such findings in either his *Fijolek*

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[14] As recognized by the United States Court of Appeals for the Seventh Circuit: "[a]dverse rulings should be appealed; they do not form the basis for a recusal motion." *In re Huntington Common Associates,* 21 F.3d 157, 158 (1994).

[15] In *Huntington Commons, supra*, the Seventh Circuit explained that:

> A large part of being a judge is disciplining oneself to conduct fair proceedings and make impartial rulings despite the opinions one inevitably forms during the proceeding. . . . [A]ll judges have such opinions, and all strive to (and generally do) rule impartially despite them.

Id. at 158 (citation omitted).

[16] As noted by the Supreme Court: "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

[17] As indicated above, in *McDaniel*, neither complainant formally raised a churning claim and the ALJ acknowledged that a churning analysis was unnecessary in the circumstances presented.

decision or his order on remand. The record in *Fijolek* clearly demonstrated that the power of attorney Fijolek executed was changed, and none of the respondents disputed Fijolek's claim that she was not informed of the change. The ALJ's error was not that he made findings on this issue, but that he made related findings without assessing the reliability of the underlying evidence.[18] Consequently, there is no reliable basis for concluding that the ALJ disregarded the Commission's guidance in *McDaniel*.

Finally, RB&H's reliance on *United States v. Holland*, 655 F.2d 44 (5th Cir. 1981) is misplaced. In that case, the trial judge made critical remarks about the theory underlying defendant's successful appeal of his jury conviction.[19] He followed up his remarks by imposing a longer jail sentence on defendant (4 years) than the sentence he had imposed after the initial conviction (3 years). Finally, the trial judge acknowledged on the record that he increased the sentence because the defendant had successfully appealed his initial conviction.

Here, in contrast, the ALJ's intemperate remarks were not specifically directed at either RB&H or its conduct. They primarily criticized the Commission, and only secondarily referred to the conduct of all the respondents. Most important, there is no suggestion that the ALJ followed up his remarks with any conduct that prejudiced RB&H's interests. Indeed, the record in this proceeding does not disclose any questionable conduct by the ALJ. In these circumstances, there is no reliable basis for concluding that extraordinary circumstances warrant immediate Commission intervention in this proceeding.

[18] Contrary to RB&H's argument, the Commission's *Fijolek* opinion did not conclude that the record did not support a finding that the power of attorney was changed in circumstances amounting to "falsification" of the document. The Commission concluded that there was insufficient evidence to support the ALJ's inferences that (1) RB&H (rather than one of the other respondents) made the change, and that (2) the person initially named on the power of attorney did not actually trade the account. *Fijolek*, ¶ 28,652 at 52,545.

[19] The theory involved an unrecorded conversation between the trial judge and the jury.

CONCLUSION

In light of our analysis, we deny RB&H's application for interlocutory review and dismiss its motion to stay the proceedings as moot.

IT IS SO ORDERED.

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

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

Dated: May 15, 2002