

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

ERNEST L. WADE

v.

MARCUS CHEVALIER, JOSEPH
GEORGE DURDACK, and KJW, LLC d/b/a
KEN WOLF COMMODITIES

CFTC Docket No. 06-

ORDER

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We stayed the effective date of the initial decision and took *sua sponte* review of two orders issued in this case. 2007 WL 788371 (CFTC Mar. 15, 2007). We took review of the Administrative Law Judge's ("ALJ") January 23, 2007 order to determine whether dismissal of respondent Joseph Durdack ("Durdack") and the preclusion of respondent Marcus Chevalier's ("Chevalier") evidence were warranted as sanctions for various parties' noncompliance with the ALJ's procedural orders. We also took review of the ALJ's February 13, 2007 order to determine whether he acted properly in dismissing the complaint of Ernest L. Wade ("Wade") "with prejudice to Wade's right to seek redress in *any* forum." *Id.* (Emphasis added.) We subsequently lifted the stay and established a schedule to allow any party wishing to address the issues under review to file a brief. 2007 WL 1029040 (CFTC Apr. 2, 2007). No briefs were received. This case is therefore decided on the record below.

For the reasons that follow, we find that the ALJ abused his discretion in imposing sanctions. Accordingly, we vacate the order issued below dismissing this case and afford the parties a further opportunity to be heard.

BACKGROUND

On March 27, 2006, Wade filed a complaint against KJW, LLC (“KJW”), a futures commission merchant, Chevalier and Durdack. The complaint alleged “high pressure sales, false promises—unrealistic statements, not explaining the high commission rates, not following up with me during the process to keep from losing all my money.” Complaint at 1. Wade’s complaint included a one-and-one-half page narrative, in which he set forth the alleged facts in chronological order. He attached a short letter from a Pamela Groves, which indicated that she had a similar experience with respondents. Wade also attached copies of his account statements.

KJW responded that it was no longer in business and would not be participating.¹ Chevalier filed a one-and-one-half page answer denying wrongdoing. His answer included a statement that he had left KJW after soliciting Wade, but before Wade opened an account. Durdack filed a 13-page response also denying wrongdoing, to which he attached testimonials. The parties, all of whom appeared *pro se*, did not engage in discovery.

On October 10, the ALJ issued a prehearing order directing the parties to submit “the direct testimony of each witness (other than hostile witnesses and party-opponents) . . . set forth in documentary form by affidavit, interrogatory, or other form.” Oct. 10 order at 2. The ALJ limited the scope of the hearing, stating that “parties will not be permitted to present the direct testimony of witnesses (other than hostile witnesses and party-opponents) orally except for purposes of rebuttal.” *Id.* at 4. The ALJ also ordered the parties to submit “a prehearing memorandum setting forth a detailed discussion of all issues of fact and law that are material to the hearing.” *Id.* at 2-3 (footnotes omitted).

¹ KJW withdrew its registration in 2006. Under Commission regulations, however, the firm remained subject to the Commission’s reparation jurisdiction. See 17 C.F.R.1§ 12.2 (defining “registrant” to include, *inter alia*, any person who “[w]as registered under the Act at the time of the alleged violation”).

On October 17, Wade filed a one-paragraph response stating that he planned to participate in the hearing and present himself and Pamela Groves as witnesses regarding their conversations with respondents. He included their addresses.

On October 24, the ALJ issued an "Order and Notice of Noncompliance" with his previous order, striking Wade's submission because it did not include a certificate of service and was defective otherwise. In addition, the ALJ reiterated his requirement that parties set forth complete direct testimony in writing and directed the parties to file a prehearing memorandum with a detailed discussion of facts and law.

On October 30, Wade filed a one-and-one-half-page prehearing response. He stated that he intended to attend the hearing, and that his "claim will be based on conversations" with Chevalier and Durdack. Wade set forth a description of his interactions with Chevalier and Durdack and stated: "I read Mr. Durdack's answer to the court and I can not believe he would be so despicable as to lose someone's money and totally misrepresent everything that happened." Oct. 30 response at 1. Wade stated that he planned on supplying telephone records "to show that he did call me and that it is not as he said that I called him for the purchase." *Id.* at 1-2. He gave the name and address of a witness, Pamela Groves, summarized her testimony, and submitted a letter written by her that also summarized her testimony. On the same day, Durdack filed a 13-page prehearing response denying wrongdoing. He attached, *inter alia*, testimonials and a copy of pertinent account-opening documents.

On November 3, the ALJ issued two orders. In one, he noted that there may have been a problem with Chevalier's address and postponed the November 28 hearing date to allow for proper service. In the second order, the ALJ faulted Wade for implying in his October 30 prehearing response that he did not submit his witness's entire direct testimony. He also faulted

Wade for failing to submit a detailed discussion of the facts and law at issue. The ALJ gave Wade until November 27 to comply.

On December 19, the ALJ issued two show cause orders. Since Chevalier had not filed any prehearing submissions, the ALJ ordered him to show cause as to why he should not be barred from presenting evidence at the hearing. Also, since Wade had not cured the defects identified in the ALJ's November 3 order, the ALJ ordered Wade to show cause as to why he should not be barred from presenting evidence.

Wade did not respond to the December 19 show cause order. On December 28, Chevalier sent a letter to the ALJ, in which he apologized and explained that he had misread the ALJ's prehearing order. Chevalier stated that he had no witnesses and that relevant documentary evidence was retained by KJW. He asked permission to participate.

The ALJ issued an order on January 23, 2007, in which he found Chevalier's explanation for his failure to respond to the earlier order "far-fetched" and concluded that a "literate adult like Chevalier" would not have misread the ALJ's instructions in the November 3 prehearing order. Jan. 23 order at 4-5 n.15. As a sanction, the ALJ precluded him from presenting any evidence at the hearing. *Id.* at 6. The ALJ also found that respondent KJW had defaulted and precluded it from introducing evidence. *Id.*

In the same order, the ALJ sanctioned Wade for his "defiance" by failing to comply with various orders. The ALJ limited Wade's case to the written testimony he had submitted, and questions from the bench. *Id.* at 6 n.17. As a sanction against Wade, the ALJ dismissed Durdack as a respondent. *Id.* at 5. The ALJ stated:

Wade's defiance of our orders merits a serious sanction. Had all of the respondents substantially complied with our orders (and not been in default for failing to answer the complaint), we would have punished Wade with an order that precluded him from presenting evidence at the hearing. The consequence of

such an order is generally the dismissal of a complaint. We decline to wield such a broad brush here because two of the respondents failed to meet their procedural obligations. Respondent KJW, LLC is in default while respondent Marcus Chevalier filed no prehearing documents and, in response to a show cause order, provided an inadequate excuse for his misbehavior. Thus, we must impose sanctions that strike a balance based on each of the parties' relative misbehavior. To that end we order the following.

We **DISMISS** the complaint in this matter with respect to the charges against respondent Joseph George Durdack, the one party who substantially complied with the prehearing requirements.

Id. at 3-5 (footnotes omitted, emphasis in original).

Wade then attempted to withdraw from this proceeding. *See* Wade letter dated Feb. 12.

The ALJ dismissed Wade's complaint the following day, "with prejudice to Wade's right to seek redress in any forum." 2007 WL 490164 (CFTC Feb. 13, 2007).

DISCUSSION

Congress created the reparation forum as an informal venue and decreed that parties are not to be subjected to strict rules found in the courts. *Sommer v. Conticommodity Services, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,244 at 35,106 (CFTC May 20, 1988) ("Congress[] inten[ded] that the reparations program provide a more flexible and informal forum than that available in court . . ."). The Commission stated in another case:

Congress designed the reparation procedure to provide a forum through which persons could seek relief in the event they had been wronged by conduct of industry professionals, often analogous to the forum provided by a small claims court. As remedial legislation, the reparations procedure should be liberally interpreted to effectuate that congressional purpose.

Cook v. Monex International, Ltd., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,532 at 30,295 (CFTC Mar. 19, 1985) (citations to legislative history omitted). The

Commission elsewhere stated that the complexities and formalities of district court litigation are not involved in the reparation program:

Congress enacted the reparations provisions to provide a forum analogous to a small claims court for resolution of a private party's claim against an industry professional "[T]hese informal procedures were intended to supplement [rather] than supplant the implied judicial remedy." House and Senate leaders described reparations as "new customer protection features" which were "not intended to interfere with the courts."

Nelson v. Chilcott Commodities Corp., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,934 at 28,033 (CFTC Dec. 12, 1983) (internal citations omitted).

Moreover, "[t]o remain inexpensive, the reparations forum must, at a minimum, remain hospitable to the participation of *pro se* parties." *Hall v. Diversified Trading Systems, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 at 41,751 (CFTC July 7, 1994). "As a result, we have recognized that allowances must be made for *pro se* status in interpreting and applying procedural requirements." *Id.* As we pointed out in *Hall*, "[t]he practical issue . . . is how we can encourage efficiency without unduly prejudicing parties who choose to appear *pro se*." *Id.*

The ALJ conducted this proceeding in a manner contrary to Congress's intent and Commission precedent. He failed to accord the parties a meaningful oral hearing and to apply the reparation rules flexibly so as to facilitate the parties' participation. *Pro se* parties are not attorneys. The ALJ abused his discretion when he sanctioned them harshly for failing to meet his exacting legal standards, by precluding the submission of evidence and dismissing Durdack as a party.

CONCLUSION AND ORDER

The manner in which the ALJ conducted this proceeding means that the parties have not yet had their day in court—neither Wade to pursue his claim nor respondents to defend.

Accordingly, we vacate the February 13 order issued below dismissing this case. In doing so, we note the ALJ's error in his manner of dismissal. Apart from whether dismissal was warranted, the ALJ should not have dismissed Wade "with prejudice to Wade's right to seek redress in *any* forum." 2007 WL 490164 at *1 (emphasis added). We have identified nothing in the Act or Commission regulations that authorizes a presiding officer to foreclose a complainant from trying his or her luck elsewhere by dismissing a complaint with prejudice as to all forums.

Meanwhile, we afford Wade a further opportunity to press his claim here. Wade shall have 30 days from the date this order is issued to file a notice with the Commission stating whether or not he desires to pursue his claim and proceed to a hearing, at which both sides to this dispute shall be heard. Wade shall serve a copy of the notice on all respondents. If Wade elects to proceed to a hearing, we will remand this case and reassign it to the Commission's other administrative law judge.² If Wade does not elect to go forward, an order finally dismissing this case shall issue.

IT IS SO ORDERED.

By the Commission (Acting Chairman LUKKEN and Commissioners DUNN, SOMMERS and CHILTON).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 27, 2008

² *In re Siegel Trading Company, Inc.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,527 at 22,184 (CFTC Dec. 16, 1977)(remanding and reassigning); cf. *In re Nikkhah*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,044 (CFTC Mar. 25, 2005)(when an ALJ did not comply with instructions on two prior remands, Commission declined to remand again and ordered the parties to submit evidence directly to the Commission).