UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. 99-15
MAX E. WALTERS	:	OPINION AND ORDER

Respondent Max E. Walters ("Walters") appeals from decisions of an Administrative Law Judge ("ALJ") concluding that he violated Sections 4b(a) and 4c(b) of the Commodity Exchange Act ("Act") and Commission Rule 33.10 and imposing a cease and desist order, permanent trading prohibition, civil money penalty of $2.4 million and restitution of more than $1.64 million.[1] He argues that procedural and substantive flaws in the ALJ's decision imposing monetary sanctions ("Order Granting Summary Disposition II") require, at a minimum, a remand to the ALJ for reconsideration. The Division of Enforcement ("Division") acknowledges that the Order Granting Summary Disposition II was issued prematurely. Consequently, it does not object to a remand of the matter to the ALJ for reconsideration of its motion to impose monetary sanctions.

For the reasons explained below, we conclude that a hearing is necessary to a reliable determination of factual issues material to the imposition of monetary sanctions. Accordingly, we vacate the Order Granting Summary Disposition II and remand for further proceedings consistent with this opinion and order.

[1] The ALJ granted summary disposition on liability and non-monetary sanctions in April 1999. *In re Walters*, CFTC Docket No. 99-15 (ALJ April 7, 1999) ("Order Granting Summary Disposition I"). He granted summary disposition on monetary sanctions in February 2001. *In re Walters*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,459 (ALJ Feb. 9, 2001) ("Order Granting Summary Disposition II"). Taken together, these orders amount to a "final disposition" appealable pursuant to Commission Rule 10.102(a). Walters, who is proceeding *pro se*, focuses his appeal solely on the monetary sanctions imposed in the Order of Summary Disposition II.

BACKGROUND

This proceeding focuses on a limited partnership named Chaparral Investments, L.P. ("Chapparal") that Walters formed in August 1993. Walters's partner in the venture was a long-time friend, Leland T. Brewer ("Brewer"). Between August 1993 and August 1996, Brewer contributed $1,150,000 to Chapparal and loaned $500,000 directly to Walters.[2] In October 1996, Brewer learned that Chapparal had lost most of the funds he had contributed.[3]

As a consequence of Brewer's loss, Walters's conduct came under scrutiny. Eventually Walters faced federal criminal charges in addition to the charges included in the Commission's August 1999 Complaint. Because the criminal and administrative proceedings were conducted contemporaneously, events occurring in the context of the criminal case influenced the parties' conduct in this administrative proceeding. Consequently, our review of the procedural history of this proceeding must, of necessity, consider portions of the criminal proceeding's procedural history.

I.

The Commission's August 1999 Complaint alleged that between August 1993 and October 1996 Walters committed multiple violations of Sections 4b(a) and 4c(b) of the Act and Commission Rule 33.10. According to the Complaint, Walters fraudulently induced Brewer to form Chapparal by falsely claiming that he had a system of trading futures that produced an annual return of 600 percent. The Complaint also claimed that Walters falsely assured Brewer that he would trade conservatively and neither trade option contracts nor trade futures contracts overnight.

[2] It is undisputed that Brewer contributed the following amounts on the dates specified: (1) $100,000 on 8/3/93, (2) $200,000 on 1/21/94, (3) $300,000 on 8/31/94, (4) $200,000 on 3/2/95, (5) $300,000 on 8/19/96, and (6) $50,000 on 8/20/96.

[3] It is undisputed that Chapparal only returned $8,994.14 to Brewer.

The Complaint alleged that Walters perpetuated his initial fraud by (1) making false oral statements and providing false written information about the results of the partnership's trading; (2) making false statements about a bond allegedly required by the Kansas City Board of Trade;[4] and (3) failing to disclose that he earned commissions for the partnership's trades. The Complaint also claimed that Walters misappropriated partnership funds to pay for personal expenses.

In October 1999, Walters filed an answer that generally denied the Complaint's allegations of wrongdoing but conceded such basic facts as his registration history and the existence of a $500,000 loan from Brewer.

II.

In October 1999, the ALJ assigned to preside over this matter issued an order establishing a schedule for discovery and submission of a prehearing memorandum. Consistent with the ALJ's order, the Division made information available to Walters pursuant to Commission Rule 10.42(b) and its duty to produce documents that included exculpatory information material to liability or sanctions. Prior to the commencement of the period for undertaking discovery, however, the ALJ granted the Division's motion to amend his scheduling order to delete the deadlines for initiating discovery and submitting prehearing memorandum.

On January 20, 2000, the Division submitted a motion seeking summary disposition as to both liability and sanctions. As to liability, the Division claimed that the undisputed facts established that Walters deceived Brewer by: (1) providing false written statements regarding trading profits and losses; (2) making false oral claims about the need to post a bond with the

[4] During the period at issue in the Complaint, Walters was registered as a floor broker and maintained a membership at the Kansas City Board of Trade. The Complaint alleged that Brewer loaned Walters $500,000 in light of his false claim that the Kansas City Board of Trade required him to post a bond in that amount, and that Walters failed to repay the loan.

Kansas City Board of Trade; (3) failing to disclose the existence of trading losses; (4) failing to disclose that he was receiving commission payments for Chaparral's trades; and (5) misappropriating funds from Chaparral's trading and bank accounts.[5] Division Memorandum in Support of Motion at 15. The motion argued that these facts established that Walters violated Sections 4b and 4c(b) of the Act and Commission Rule 33.10. Division Motion at 1.

As to sanctions, the Division claimed that in light of the undisputed facts, the appropriate sanctions included: (1) an order requiring Walters to pay Brewer restitution of $1,641,005.86; (2) a civil money penalty of "up to $2.61 million;" (3) a cease and desist order; and (4) a permanent trading prohibition.

The Division argued that it was undisputed that Brewer made contributions to Chaparral on August 3, 1993 ($100,000), January 21, 1994 ($200,000), August 31, 1994 ($300,000), March 2, 1995 ($200,000), August 19, 1996 ($300,000), and August 20, 1996 ($50,000). The Division also argued that it was undisputed that Brewer loaned Walters $500,000 in August 1995. Finally, the Division claimed that it was undisputed Walters returned $8,994.14 to Brewer on October 16, 1996.

The Division argued that it was undisputed that Brewer's contributions between August 1994 and October 1996 were the result of his reliance on false written statements that Walters provided between January 1994 and August 1996.[6] The Division claimed that it was also undisputed that Brewer loaned Walters $500,000 in August 1995 because he believed Walters's false claim that he needed the funds to pay for a bond at the Kansas City Board of Trade.

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[5] The Division's Statement of Undisputed Facts did not refer to Walters's allegedly false assurances that he would trade conservatively and neither trade option contracts nor trade futures contracts overnight.

[6] A note appended to the statement for the period January 1 to January 31, 1994 suggests that Walters provided the statement to Brewer on or about March 3, 1994. The Division relied on Brewer's investigatory deposition to establish that he relied on the deceptive written statements in making contributions.

The Division's motion was less clear about the link between Walters's alleged wrongdoing and Brewer's contributions on August 3, 1993 and January 21, 1994. As to the former, the Division focused on Brewer's investigatory testimony indicating that Walters told him that for four years he had about $10,000 to trade and was making about $60,000 a year. The motion also noted that Walters had invoked his Fifth Amendment privilege during his investigatory deposition when questioned about this representation. As evidence that this claim was undisputedly false, the Division's motion cited to a declaration prepared by Division of Trading and Markets auditor Thomas Bloom (the "Bloom Declaration"). The declaration indicated that Walters lost $46,393.50 trading a personal account between January 1993 and July 1993. The motion did not cite to any evidence that Brewer relied on Walters's claim when he made his August 3, 1993 contribution.

As for the January 21, 1994 contribution, the Division's motion made alternative claims. First, it argued that it was undisputed that Brewer would not have made this contribution if he knew "the true trading losses suffered by Chaparral." Statement of Undisputed Facts at 14. In the alternative, the motion claimed it was undisputed that Brewer would not have made this contribution if he knew "that Chaparral had made only $6,000 in trading gains in the first four months of its operation." *Id.* In both instances, the Division relied on Brewer's investigatory testimony to establish that these facts were undisputed.

The Division's motion claimed that Walters's civil money penalty should be triple his monetary gain. The motion argued that Walters's gain should be calculated by adding (1) the amount of commissions Walters was paid for trading the Chaparral account, (2) the amount of funds Walters diverted from Chaparral's bank account or trading account to bank accounts or trading accounts that Walters controlled, and (3) the amount of funds paid out of Chaparral's

bank account that the Division was unable to trace. The Division relied on the Bloom Declaration as well as another affidavit and various business records to support its claim that the size of these amounts was undisputed.[7] The Bloom Declaration acknowledged that there was one $180,000 check payable to Mark Twain Bank that was untraceable, but the Division's motion emphasized that the check was written after Walters's fraud was discovered. Finally, the Division's motion acknowledged that Walters transferred $53,000 from his personal accounts to Chaparral during the period at issue.

The Division's motion argued that Walters's gain should not be offset by expenses he may have paid while trading the Chaparral account or by the value of a business interest (that the parties generally referred to as "Plaza West") that Walters transferred to Brewer after Brewer discovered his wrongdoing. As to the expenses, the Division contended that documents it obtained from Walters did not reliably establish that the payments were made for expenses solely attributable to Chaparral.[8] Its motion also emphasized Brewer's investigatory testimony indicating that Walters said that he would pay Chaparral's "minimal" expenses.[9]

The Division's motion acknowledged that Walters transferred his Plaza West interest to Brewer after Brewer discovered his wrongdoing. Nevertheless, in light of the investigatory testimony offered by Brewer and Brewer's counsel, as well as Walters's invocation of his Fifth Amendment privilege when questioned about this topic during his investigatory deposition, the

[7] The Division relied on an affidavit from a manager at the futures commission merchant where Chaparral maintained its account to establish that Walters earned $111,819 in commissions during the period at issue. The Division relied on the Bloom Declaration to establish that Walters transferred: (1) $327,000 from Chaparral trading accounts to bank or trading accounts he controlled; (2) $306,310.19 from Chaparral bank accounts to bank or trading accounts he controlled; and (3) $180,000 from a Chaparral bank account to an unknown person.

[8] In this regard, the Division noted that many of the payments were made from Walters's personal accounts, many of the invoices did not refer to Chaparral, and Walters invoked his Fifth Amendment privilege when questioned about expenses at his investigatory deposition.

[9] The Division's motion acknowledged, however, that the Chaparral partnership agreement provided that expenses would be paid out of partnership funds.

Division claimed that it was undisputed that the Plaza West transfer was not intended to compensate Brewer for his Chaparral losses.

III.

On February 8, 2000, Walters filed a motion to stay the proceeding pending the completion of the sanctioning phase of the parallel criminal case.[10] Walters acknowledged he had recently pled guilty to mail fraud[11] and argued that a stay would serve the interests of fairness and judicial economy. The motion stated that the presiding United States district court judge would conduct a sentencing hearing on March 6, 2000, and noted that Walters was in settlement negotiations with the Division. In this regard, the motion indicated that the only point of disagreement between the parties was the financial sanctions to be imposed on Walters, and claimed that the sentencing hearing before the district court would help resolve disputes concerning Walters's financial resources.

In light of these arguments, Walters requested a stay pending completion of the criminal proceeding. He noted, however, that:

> To the extent the Commission may later determine that a response is appropriate at this time, [r]espondent Walters denies all assertedly undisputed facts except

[10] Walters's motion indicated that during a December 6, 1999 telephone conference, the ALJ agreed that respondent could submit a motion for stay in lieu of an answer to the Division's motion for summary disposition. Because the December 6, 1999 telephone conversation was not recorded, the Commission has no basis for evaluating the validity of this claim. In this regard, we remind the ALJ that such conferences must be recorded in accordance with the Commission policy announced in *McDaniel v. Amervest Brokerage Services*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,264 at 50,581 n.21 (CFTC Sept. 26, 2000).

[11] In the plea agreement he attached to his motion, Walters admitted that from at least January 1994 through October 11, 1996, he undertook a scheme to defraud Brewer, which included the diversion of Chaparral funds and the mailing of false account statements that indicated Chaparral's trading was profitable. In addition, the plea stated that Walters's misconduct caused Brewer to invest an additional $550,000 with Chaparral between January 1994 and August 31, 1996.

The plea agreement also indicated that the government would acknowledge the propriety of a three-level reduction under the criminal sentencing guidelines due to Walters's timely provision of information, admission of guilt and acceptance of responsibility for his actions.

> those specifically admitted in his plea agreement and reserves all rights to dispute the Division's [m]otion.

Motion for Stay at 3.

On February 9, 2000, the Division filed its opposition to the stay request. It did not deny that there were ongoing settlement negotiations, but did note that Walters's characterization of the negotiations was "not accurate." Finally, the Division argued that the amount of restitution sought in the criminal case might not be the same as the amount of restitution it sought in its motion for summary disposition.

On February 10, 2000, the ALJ denied the motion to stay but granted Walters 21 days to respond to the Division's motion for summary disposition. Walters did not make a submission by this deadline.

IV.

On April 7, 2000, the ALJ issued his order granting summary disposition as to liability and non-monetary sanctions ("Order Granting Summary Disposition I"). The ALJ noted that Walters had entered a plea agreement in his criminal case and found that it appeared there was "no genuine issue of material fact as to liability." He concluded that Walters had violated Sections 4b and 4c(a) of the Act as well as Commission Rule 33.10, and imposed a cease and desist order and permanent trading prohibition.

As to the remaining sanctions, the ALJ denied the Division's motion for summary disposition, noted that Walters could contest "any fact as it relates to monetary sanctions," and indicated that the Division could renew its motion for summary disposition on monetary sanctions after August 14, 2000. The ALJ's order required both parties to report on the status of the criminal proceeding by that date.

V.

On July 5, 2000, the parties filed a joint status report indicating that Walters had been sentenced to 27 months' imprisonment and ordered to pay $1,415,000 in restitution to Brewer. The parties attached to the status report the district court's judgment and a transcript of the sentencing hearing. The transcript included testimony by Brewer and Walters, as well as findings material to monetary sanctions made by the district court.

Apparently the ALJ conducted an unrecorded telephone conference with counsel on August 14, 2000. According to the Division's September 11, 2000 motion for entry of an order imposing monetary sanctions, during this conference "Walters stipulated that, absent a settlement, the issues of monetary sanctions could be decided on the existing record," and the ALJ "directed the parties to submit proposed orders on or before September 11, 2000."[12]

On September 11, 2000, the Division filed a motion for entry of an order imposing monetary sanctions. As to restitution, the Division argued that the existing record demonstrated that: (1) Brewer invested $1,150,000 into Chaparral; (2) in making these investments, Brewer relied on Walters's false representations that his personal trading was successful and his trading for Chaparral was profitable; (3) Brewer loaned Walters $500,000 in reliance on Walters's false representation that he needed the money to post a bond with the Kansas City Board of Trade; and (4) Walters returned only $8,994.14. In light of these facts, the Division claimed that Brewer's out-of-pocket loss was $1,641,005.86. It acknowledged that this figure exceeded the $1,415,000 restitution ordered by the United States district court, but claimed that the higher amount was

[12] Because there is no record of this conference, there is no basis to evaluate the validity of the Division's recollection of counsel's remarks.

justified by its "unrefuted evidence of Brewer's reliance, which was not presented at the criminal sentencing hearing." Motion at 2 n.1.[13]

As to the civil money penalty, the Division argued that the record undisputedly showed that Walters diverted $872,129.16 from Chaparral to himself. In light of this fact, the Division argued that the ALJ should impose a civil money penalty of $2.4 million.

On October 23, 2000, the ALJ directed both parties to file a status report on or before November 3, 2000.[14] The Division's response, filed November 2, 2000, indicated that counsel had reached an "agreement in principle" on settlement but that Walters's counsel had been unable to reach him in prison. The Division indicated that it would provide a copy of the proposed settlement agreement to Walters's counsel and would be able to present the settlement agreement to the Commission within 45 days of receiving a copy executed by Walters.

On November 3, 2000, Walters's counsel filed a letter concurring in the Division's report but noting that he had yet to receive the proposed settlement agreement from the Division. Counsel also indicated that he planned to seek permission to withdraw as respondent's counsel if he remained unable to reach Walters in prison.

On November 16, 2000, Walters's counsel sought permission to withdraw due to his inability to contact his client. Counsel indicated that counsel for the Division would not object to the requested relief. The ALJ promptly issued an order granting the request. On November 20, 2000, counsel for the Division filed an opposition to the request because the record did not clearly establish that Walters's counsel had served his motion to withdraw on Walters.[15] On

[13] The Division acknowledged that any payments Walters made under the district court's restitution order should be credited against the restitution order issued by the ALJ.

[14] The Division's September 11, 2000 motion had acknowledged that the parties were conducting settlement negotiations.

[15] Division counsel also claimed that they had not advised Walters' counsel that they would not object to his motion.

November 21, 2000, the ALJ issued an order reaffirming his decision to grant counsel leave to withdraw.

VI.

On February 8, 2001, the Division filed a renewed motion for entry of an order imposing monetary sanctions. In that motion, the Division notified the ALJ that settlement discussions had broken down because Walters refused to respond to the Division's correspondence. The Division characterized its September 11, 2000 motion as one "renewing" the motion for summary disposition it had filed in January 2000 and requested the ALJ to impose an order of restitution for $1,641,005.86 and a civil money penalty of $2.4 million. In the alternative, the Division asked the ALJ to schedule a hearing on monetary sanctions.

On February 9, 2001, the ALJ issued the Order Granting Summary Disposition II that directed Walters to pay restitution of $1,641,005.86 to Brewer and a civil money penalty of $2.4 million. The order provided that amounts Walters paid Brewer under the restitution order entered in his criminal case should be "credited" against the amount due under the ALJ's restitution order.

The order indicated that the ALJ imposed monetary sanctions without a hearing because Walters failed to make timely submissions in October and November 2000. Specifically, the ALJ found that Walters failed to make a timely response to: (1) his October 23, 2000 order requiring a status report, and (2) the Division's September 11, 2000 motion for entry of an order imposing monetary sanctions. In light of Walters's inaction, the ALJ inferred that Walters consented to the Division's motion for summary disposition on monetary sanctions.

VII.

Walters filed a timely notice of appeal and on February 28, 2001 the Office of

Proceedings received his arguments in support of his appeal.[16] This document noted that the ALJ did not provide Walters a fair opportunity to respond to the Division's February 8, 2001 motion and claimed that Walters was not aware of either the Division's September 11, 2000 motion or the ALJ's October 23, 2000 order requiring a status report. Walters also challenged the Division's claim that settlement discussions had broken down as well as the ALJ's finding that his wrongdoing resulted in monetary gain of $800,000. On March 5, 2001, Walters filed a motion to stay his appeal and remand to the ALJ for reconsideration. This motion essentially reiterated the points Walters made in his February 28, 2001 filing.

DISCUSSION

All parties agree that the ALJ's Order Granting Summary Disposition II was issued prematurely. Moreover, Commission precedent clearly holds that a party's failure to respond to a motion for summary disposition, standing alone, is not a sufficient basis for granting the motion. *In re Bentley*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,620 (CFTC May 22, 1985). These errors provide adequate grounds to vacate the Order Granting Summary Disposition II and remand for additional proceedings.

In many circumstances, we would direct the ALJ to give Walters an opportunity to respond to the Division's motion for summary disposition on monetary sanctions and then permit the ALJ to reconsider the merits of the Division's motion. As discussed below, however, the record before us does not establish the circumstances necessary to a reliable determination of

[16] The Office of Proceedings received Walters's response to the Division's February 8, 2001 motion on February 21, 2001. Walters indicated he was having difficulty retaining counsel because he had no assets or resources. He also claimed that he had attempted to contact counsel for the Division by telephone "repeatedly." Finally, Walters stated that he would oppose paying any monetary penalty beyond the amount of restitution ordered by the district court.

On February 22, 2001, Walters filed a letter seeking guidance about the correct format for filing his appeal. The Division's response indicated that Walters should file a motion seeking a stay of his appeal with the Commission and a remand for reconsideration by the ALJ.

monetary sanctions without an oral hearing. Consequently, in order to speed the final resolution of this matter and avoid a waste of both the parties' and the ALJ's resources, we direct the ALJ to permit the parties to undertake discovery prior to conducting an oral hearing on factual issues material to the calculation of appropriate monetary penalties.

Commission Rule 10.91 establishes an exception to the general rule that enforcement cases are only resolved after an oral hearing.[17] It provides that summary disposition may only be granted when three criteria are met: (1) there is no genuine issue of material fact in dispute; (2) there is no need to develop more facts on the record; and (3) the moving party is entitled to a decision as a matter of law. In interpreting these criteria, the Commission has held that summary disposition is not appropriate when there is "any significant doubt that the parties' dispute can be reliably resolved without a hearing." *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,597 at 47,833 n.12 (CFTC April 15, 1999).

Review of the record in this proceeding shows that facts material to the monetary sanctions the Division seeks are either disputed or insufficiently clear to support reliable fact-finding.[18] For instance, the Division argues that it is undisputed that Brewer's contribution to the partnership in August 1993 was the result of a false oral claim that Walters had traded with $10,000 and earned $60,000. The Division, however, relies solely on the Bloom Declaration to show that the claim was false, and the relevant portions of the declaration only address Walters's

[17] Section 6(c) of the Act grants respondents a right to a hearing "before the Commission or an Administrative Law Judge appointed by the Commission." Commission Rule 10.66(b) recognizes that a respondent's right to a hearing generally includes the right to be represented by counsel, to present oral and documentary evidence, and to cross-examine witnesses. Commission precedent recognizes that a party's right to an oral hearing extends to issues of sanctions. *In re Dempsey*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,827 at 40,715 (CFTC Aug. 13, 1993).

[18] Some facts material to the monetary sanctions the Division seeks do appear to be undisputed. For instance, it seems clear that Brewer's contributions from August 1994 until August 1996 stemmed from his receipt of the false account statements prepared by Walters. Likewise, the amount of commissions paid to Walters is well supported, as is the fact that Walters diverted a significant amount of money from Chaparral for his personal use.

trading in a single account during six months in 1993. The Division did not provide either the documents evidencing Walters's trading or a basis for inferring that the account at issue was the only account that Walters traded during the period at issue.

Similarly, the Division relies on Brewer's deposition testimony to establish that it is undisputed that he made his initial investment in Chaparral because he believed Walters's false claim about trading with $10,000 and earning $60,000. In his testimony before the district court, however, Brewer specifically testified that Walters "never held out that he could make 600 percent." Brewer also indicated that when he questioned Walters about making a lesser profit, Walters only said that he thought he could do that. District Court Transcript at 9.

The record also does not establish that Brewer's January 1994 contribution was the result of Walters's deception. As noted above, the record suggests that Brewer received the false account statement relating to January 1994 trading in March 1994. Indeed, the district court found that Brewer made this contribution prior to receiving false account statements from Walters. District Court Transcript at 64. Brewer did testify that Walters falsely advised him that Chaparral had earned a $26,000 profit during 1993, but, as noted by the district court, he did not specify when the relevant telephone conversation took place.[19] Absent evidence that the oral misrepresentation preceded the January 1994 contribution, there is no basis to find that the contribution was a product of Walters's deception.

As for Walters's gain, the Division primarily relies on the Bloom Declaration to establish that the amount Walters diverted from Chaparral is undisputed. Bloom acknowledged, however, that he was unable to trace a check for $180,000 payable to Mark Twain bank. Nevertheless, the

[19] Even Brewer's deposition testimony is ambiguous on how he would have reacted if he knew the truth – that Chaparral earned about $6,000 in 1993. When questioned about whether he would have made his January 1994 investment if he knew this fact, Brewer said "[p]robably not, but I would not have pulled the plug on the investment of the original $100,000." Division Exhibit 2 at 72.

Division attributes this money to Walters without any explanation of the efforts Bloom made to obtain the check from the bank or trace the funds. On this record, there is little other than suspicious circumstances to support an inference that Walters actually received the $180,000 from the Mark Twain bank.

In this regard, the Division argues that an adverse inference should be drawn against Walters because he invoked his Fifth Amendment privilege and declined to answer questions about the $180,000 check during his investigatory deposition. Commission precedent recognizes that a respondent's invocation of his Fifth Amendment privilege can justify an adverse inference in appropriate circumstances. *See In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,687 (CFTC Jan. 25, 1981). In those cases, however, respondent's conduct – refusing to testify at a hearing on the merits of the complaint -- essentially thwarted the Division's efforts to fulfill its burden of proof in a conventional manner. Here, however, the Division has by-passed its opportunity to develop the record by taking discovery and examining Walters at a hearing. Because the criminal charges against Walters have been resolved, we have no basis to infer that it would be futile for the Division to attempt to develop the record on the material issues. Consequently, we conclude that there is an insufficient basis for drawing an adverse inference in the circumstances presented.

Because the Division seeks a civil money penalty based on Walters's financial gain, the record must be sufficiently developed to permit a reliable calculation of respondent's net financial benefit. *See R&W Technical Service, Ltd. v. CFTC*, 205 F.3d 165, 178 (5th Cir. 2000). While the Division has raised several theories to support its claim that Chapparal's expenses should not play a role in the calculation of Walters's net financial benefit, none are based on

undisputed facts.[20] The documents that Walters supplied to the Division may be insufficiently detailed to establish the amount of legitimate expenses Walters paid from Chapparal funds. Walters may provide testimony, however, that fills in the gaps in the information reflected in the documents.[21]

The Division takes a similar tack in arguing that Walters's gain (and Brewer's loss) should not be reduced based on the value of the share in Plaza West that Walters transferred to Brewer after the Chaparral losses were discovered. The hearing before the district court clearly indicates that this issue was disputed and resolved based on the judge's assessment of Brewer's and Walters's credibility. Commission precedent suggests that such credibility disputes are not to be resolved through the summary disposition process. *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,811 (CFTC Dec. 18, 1997).

CONCLUSION

In light of this analysis, we vacate the ALJ's Order Granting Summary Disposition II, deny the Division's motion for summary disposition on monetary sanctions, and remand to the ALJ for further proceedings consistent with this order. In light of the substantial amount of restitution ordered in Walters's criminal proceeding, we conclude that additional proceedings on issues related to restitution are not warranted. Because the Division's motion for summary disposition interrupted the discovery process, the ALJ shall grant both sides an opportunity to seek discovery pursuant to Commission Rule 10.42(c), (e) and (f) on issues material to the

[20] For example, the Division asserted that it was undisputed that under an oral agreement with Brewer, Walters was supposed to pay Chaparral's expenses himself. Chaparral's written partnership agreement, however, explicitly provides that Chaparral funds may be used to pay Chaparral expenses. Furthermore, in his deposition testimony, Brewer conceded that even under the oral agreement, Walters was allowed to pay at least some expenses from Chaparral funds.

[21] Indeed, the Bloom Declaration concedes that at least some bills Walters produced were addressed to Chaparral directly and that at least some of the expenses were paid from Chaparral funds.

imposition of a civil money penalty. The ALJ may also require the parties to submit a prehearing memorandum consistent with the requirements of Commission Rule 10.41. In establishing the time and place of hearing pursuant to Commission Rule 10.61, the ALJ shall give due regard to the fact that Walters's imprisonment may require that special arrangements be made. In this regard, as long as both parties agree, the ALJ is authorized to conduct a telephonic hearing rather than an in-person hearing.

We note that Walters's submissions on appeal have requested that the Commission assist him due to his *pro se* status, imprisonment, allegedly limited financial resources, and inability to obtain relevant files and records. While we have traditionally given *pro se* parties some leeway in complying with procedural requirements in enforcement matters, Walters is ultimately responsible for the circumstances in which he finds himself. If he is unable to retain counsel and obtain relevant files and records, he must proceed as best he can to defend his own interests.[22] Any willful failure to comply with applicable procedural requirements or orders issued by the

[22] We direct the Office of Proceedings to mail Walters a copy of the Commission's rules of practice so that he may familiarize himself with the applicable requirements.

ALJ may result in serious sanctions.

IT IS SO ORDERED.

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

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

Dated: October 3, 2001