



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

In the Matter of *
*
NEW YORK CURRENCY * CFTC Docket No. 98-3
RESEARCH CORPORATION, *
*
Respondent. *
*

INITIAL DECISION

FILED

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OFFICE OF PROCEEDINGS
PROCEEDINGS

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Before: Bruce C. Levine, Administrative Law Judge

Overview

"Your Honor, our position here is that the underlying activity is not at issue here. What's at issue is whether or not there was a recordkeeping requirement, . . . whether the Division requested production of documents, books, records, and whether they refused to produce.

. . . .

There is no way for us to know what it was Respondent was engaging in until we see their records, and we believe we have a statutory and regulatory right to see the records."¹

The Division of Enforcement ("Division") is correct. It did have a "statutory and regulatory right" to see respondent's records. It could have subpoenaed them at the investigational stage of this case.² It could have subpoenaed them for the hearing.³ What it could not do, however, is simply request the documents and demand production from persons such as the respondent in this case.

The respondent repeatedly told the Division that it was not a commodity pool operator or a commodity trading advisor, although it had obtained registration in both capacities. Without first looking into these assertions, the Division leaped. It assumed that the respondent's registration, alone, was sufficient to trigger recordkeeping and production requirements under the portions of the Act and Commission regulations discussed below. On

¹ Transcript December 29, 1997 Oral Hearing ("Trans.") at 50-51 (statement of the Division of Enforcement's counsel).

² 17 C.F.R. §11.4.

³ 17 C.F.R. §10.68.

the strength of that assumption, the Division brought this enforcement action without exercising its unquestioned subpoena authority to obtain testimony or documents revealing the nature of the respondent's activity. As a matter of law, the Division's assumption was incorrect. Having placed the cart before the horse, the Division is unable to establish its case.

Background

The respondent, New York Currency Research Corporation ("NYCR"), engaged exclusively in foreign currency trading through banks.⁴ It introduced clients to banks for the purpose of trading in the foreign currency markets and guaranteed the trades of its customers, and traded on its own account.⁵ Believing "that if you traded [in] foreign currency that you had to be registered,"⁶ NYCR held registration status as a commodity pool operator ("CPO") and a commodity trading advisor ("CTA") from January 16, 1996 until April 3, 1997.⁷ It allowed the registrations to lapse in the wake of the Supreme Court's decision in Dunn v. CFTC.⁸ Subsequently, NYCR

⁴ Trans. at 99, 136-40.

⁵ Trans. at 136-55.

⁶ Trans. at 106.

⁷ Complaint and Notice of Hearing Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act as Amended ("Complaint"), dated December 17, 1997, at ¶2; Division Exhibit A ("Div. Ex. A") at 1-2.

⁸ U.S. , 117 S. Ct. 913 (1997) (holding that Treasury Amendment to the Commodity Exchange Act exempts foreign currency options from Commission jurisdiction).

ceased doing business.⁹ There is no evidence that NYCR was ever required to register.¹⁰

On July 25, 1997, as part of an investigation, the Division sent a letter to the respondent.¹¹ In the letter, the Division requested that NYCR produce the following: (1) the name, address and telephone number of each client, subscriber, or participant; (2) samples or copies of all reports, letters, circulars, memoranda, publications, writings, or other literature or advice distributed to clients, subscribers, or participants, or prospective clients, subscribers or participants; (3) any and all opening account documents, powers of attorney, financial and credit records, commission or fee agreements and any other documents accompanying or related thereto for each client, subscriber, or participant; (4) any and all trading records, confirmations, daily and monthly account statements for each client, subscriber, or participant; and (5) any and all records, notes, correspondence, taped conversations relating to NYCR, including but not limited to customer complaints, communications between NYCR, Michael Matejka,¹² their agents, employees or representatives and any third parties or any governmental agencies, bodies, or entities.¹³ The

⁹ Trans. at 127-28.

¹⁰ However, NYCR's registration was deliberate. Trans. at 70.

¹¹ Complaint at ¶8; Answer of Respondent New York Currency Research Corporation ("Answer"), dated December 26, 1997, at ¶1.

¹² Mr. Matejka is the President of NYCR. Trans. at 96.

¹³ Division Exhibit B ("Div. Ex. B"). In the Complaint, the Commission stated that the request covered only that period during which NYCR was registered. Complaint at ¶8. However, the
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letter was returned by the postal service and stamped "Moved, unable to forward."¹⁴ The Division tried again on August 5, 1997, this time sending the same request to the respondent's current address.¹⁵ The respondent, through counsel, refused to produce the requested documents based on the assertion that the Commission lacked jurisdiction over NYCR's activities.¹⁶ The Division sent a letter to the respondent's counsel on September 5, 1997, explaining the Division's asserted statutory right to inspect books and records that the respondent was required to keep while registered and intimating that a refusal to produce the requested records would result in an enforcement action against NYCR.¹⁷

The Division followed this letter with another production

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request itself contained no such limitation. Indeed the August 5, 1997 request involved documents over the period of "September 1995 to the present." Division Exhibit C ("Div. Ex. C").

The Division also requested that NYCR "state in writing to this office, if you are unable to produce any particular documents requested and the reasons therefor." Div. Ex. B at 2. While this type of directive may help resolve questions regarding the response to a production request, neither the Act nor Commission regulations mandate compliance.

¹⁴ Complaint at ¶8; Div. Ex. B at 3.

¹⁵ Complaint at ¶9; Answer at ¶5; Div. Ex. C.

¹⁶ Complaint at ¶10; Answer at ¶6; Division Exhibit D. ("Div. Ex. D") (referring to Dunn, 117 S. Ct. 913).

¹⁷ Complaint at ¶11; Answer at ¶7; Division Exhibit E ("Div. Ex. E").

request on September 15, 1997.¹⁸ This request included the Commission's Statement to Registered Persons Directed to Provide Information or Access to Books and Records Other Than Pursuant to Commission Subpoena, provided for NYCR's information.¹⁹ By letter dated September 22, 1997, the respondent again refused to produce the requested documents on the basis of jurisdiction and has not done so to date.²⁰ Finding NYCR's response to be "so brazen and so shocking,"²¹ the Division made no more efforts to obtain the

¹⁸ Complaint at ¶12; Answer at ¶8; Division Exhibit F ("Div. Ex. F").

¹⁹ Div. Ex. F. The statement set out the Commission's authority to request production of "records and reports of transactions and positions in commodities for future delivery on any board of trade in the United States or elsewhere." Statement to Registered Persons Directed to Provide Information or Access to Books and Records Other Than Pursuant to Commission Subpoena ("Commission Statement"), dated June 25, 1996, at 1.

²⁰ Complaint at ¶13; Answer at ¶9; Division Exhibit G ("Div. Ex. G").

NYCR, by counsel and having received the Commission Statement, see supra note 19, explained its position as follows:

"NYCR trading is done over the spot market which is not an exchange. I refer you to 7 U.S.C. §2 and the United States Supreme Court ruling in Dunn v. Commodity Future[s] Trading Commission which expressly exclude[s] the off-exchange trading of foreign currency from the ambit of CFTC authority.

. . . .

If you are aware of authority that may prove otherwise, we are willing to revisit our position. If you feel that a meeting is in order, I am available to meet with you this coming week."

Div. Ex. G. at 1-2.

²¹ Trans. at 33.

records. Nearly three months later, the Commission initiated these proceedings against the respondent and prescribed expedited procedures.

The Complaint charges that the respondent's failure to produce the requested records violates Section 4n(3)(A) of the Commodity Exchange Act ("Act"), 7 U.S.C. §6n(3)(A), and Rules 1.31(a)(2), 4.23, and 4.33, 17 C.F.R. §§1.31(a)(2), 4.23, 4.33.²² In addition, the Commission selectively waived its Rules of Practice and set out an expedited schedule that required that pleadings be filed, discovery completed, and the oral hearing convened within the period of eleven calendar days.²³ Service, by registered mail, occurred on December 18, 1997. The respondent filed a timely answer on December 29, 1997 and the Court conducted an oral hearing that day.²⁴ Pursuant to the Commission's expedited procedures, both parties filed their initial post-hearing submissions on

²² Complaint at ¶¶15-16.

²³ Complaint at 7-8.

²⁴ Answer.

NYCR also made several prehearing motions. Most notably, it moved for summary disposition, pursuant to Rule 10.91, 17 C.F.R. §10.91, and for a return of the procedural rules waived in the Complaint pursuant to Rule 10.26, 17 C.F.R. §10.26. Motion of Respondent New York Currency Research Corporation for Dismiss (sic) of the Complaint, for Summary Judgment, and for Entitlement to the Rights Accorded by 17 C.F.R. §§10.1 Through 10.108, Including a Reasonable Time for the Hearing, dated December 26, 1997. The Court denied the motions on the threshold ground that the Commission's Complaint stripped the Court of the authority to grant the requested relief. Trans. at 59-62; see Complaint at 7-8.

January 5, 1998.²⁵ Parties filed reply briefs on January 8, 1998.²⁶ Pursuant to the timetable in the Complaint, the Court was directed to issue its Initial Decision no later than January 15, 1998. Meeting this deadline, the Court concurrently serves this Initial Decision on the parties by facsimile transmission.²⁷ Accordingly, the parties have until January 15, 1998 to file exceptions.²⁸ Finally, the Commission has directed that it will review this Initial Decision and issue a final order no later than February 6, 1998.²⁹ The Court now turns to the merits of this case.

The Division Did Not Establish Liability Because, By the Plain Meaning of the Codes Involved, They Apply to CPOs and CTAs, Not Persons Who Merely Register as CPOs and CTAs

This case involves no disputed question of fact, only disputed questions of law.³⁰ The Division alleges that the respondent's

²⁵ Division of Enforcement's Proposed Findings of Fact and Conclusions of Law, dated January 5, 1998; Division of Enforcement's Post Hearing Brief, dated January 5, 1998 ("Division Brief"); Respondent New York Currency Research Corporation's Proposed Findings of Fact and Conclusions of Law, dated January 5, 1998.

²⁶ Division of Enforcement's Post-Hearing Reply Brief, dated January 8, 1998; Reply Brief of Respondent New York Currency Research, dated January 8, 1998.

²⁷ Complaint at 8.

²⁸ Complaint at 8-9. The Commission's expedited procedures do not contemplate answers to exceptions.

²⁹ Complaint at 9.

³⁰ See Division Brief at 1 ("The facts here are not complex, nor are they in dispute.")

failure to comply with the its production requests amounts to a violation of Section 4n(3)(A) of the Act and Commission Regulations 1.31(a)(2), 4.23 and 4.33. There is no dispute that the Division made a request for the respondent's records and that the respondent refused to comply.³¹ However, in order to prevail on each of its theories of the case, the Division must prove that NYCR was obligated to keep and produce records.³²

In support of its argument that NYCR was obligated to keep and, therefore, produce the requested records, the Division established only the undisputed fact that NYCR was registered as a CPO and CTA. This was so, because the Division posits that registration was sufficient to trigger the recordkeeping duties, prescribed in Section 4n(3)(A) and Rules 4.23 and 4.33, and the production obligations set out in Section 4n(3)(A) and Rule 1.31(a)(2). The Division's singular reliance on the mere occurrence of NYCR's registration is misplaced.³³ Accordingly, in

³¹ Complaint at ¶¶ 9-12; Answer at ¶¶5-8; Div. Ex.'s C, D, E, F, G.

³² The Division neatly summarized the issues when it stated:

"The issue before this Court at this hearing is regarding whether or not they[, NYCR,] were registered, and whether as a result of that registration as CTA's and CPO's there was a recordkeeping requirement, whether they produced the records as a result of that recordkeeping requirement, and whether they refused to"

Trans. at 48.

³³ As discussed in detail below, the section of the Act and regulations relied upon in this case present the Court with threshold requirements set out in plain language. Threshold requirements that the Division's case-in-chief generally ignored.
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Had the coverage of Section 4n(3)(A) and Rules 4.23 and 4.33 been expressed in ambiguous terms, the Division's reliance on registration alone would also have been ill-advised since this section and these rules implement the Commission's jurisdiction over transactions.

The Commission's jurisdiction is defined in terms of two independent dimensions. The first is transactional. Section 2(a)(1)(A)(i)'s grant of jurisdiction and the Treasury Amendment's exclusion of jurisdiction, in Section 2(a)(1)(A)(ii), are expressed in terms of transactions. 7 U.S.C. §2(a). Indeed, the Act expressly reaches those who engage in transactions falling under it even though they may not be registered. See e.g., 7 U.S.C. §6b. Likewise, registrants may engage in activity that falls outside the reach of the Act and that activity is, in general, outside of the CFTC's regulatory jurisdiction as prescribed in Section 2(a).

The Commission's transactional jurisdiction is to be distinguished from its jurisdiction over registrants. In Premex, the Commission considered whether a registered futures commission merchant ("FCM") that never engaged in transactions covered by the Act was required to maintain minimum capital requirements. In re Premex, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,992 at 28,354-55 (CFTC Feb. 1, 1984). The respondent argued that until it engaged in transactions that fall under the coverage of the Act, it had no such obligation. Id. The Commission disagreed, holding that the minimum capital requirement was an "obligation[] that necessarily flowed from the registration status that the company itself had chosen." Id. at 28,357. On that basis, the registrant had to comply with it regardless of the necessity of registration. Id.

Just what distinguishes obligations that "necessarily flow" from registration? Quite simply, it is the "terms of the statute." Id. at 28,356. In Premex, the Court deemed the capital requirements of Section 4f(2), now Section 4f(b), and Rule 1.18 to necessarily flow from registration. Section 4f(b) prescribes that "each person so registered[, as an FCM,] shall at all times continue to meet such prescribed minimum financial requirements." 7 U.S.C. §6f(b). By its plain language, it does not apply to nonregistered FCMs. Nor is it limited to registrants who meet the definition of FCM, as opposed to those that do not. The terms of this statute plainly apply to any person registered as an FCM regardless of whether the person engages in any business whatsoever. The regulation was similarly worded, imposing the obligation upon "each person registered as a futures commission merchant." 17 C.F.R. §1.17(a)(1)(i). Accordingly, the Commission found that the minimum capital requirement was triggered by
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the absence of any evidence that NYCR was otherwise obligated to comply with production requests under the Act or Rule 1.31(a)(2), NYCR must prevail as a matter of law, and the Complaint must be **DISMISSED.**

Liability Under Section 4n(3)(A) of the Act Depends on Fitting the Act's Definitions of CPO or CTA and Being Registered

The Division argues that the respondent's failure to comply with the Division's request for production violated Section 4n(3)(A). In order to establish such a violation, the Division must prove: (1) the respondent was under a duty to produce the records set out in Section 4n(3)(A) when the Division issued its request, (2) the Division requested those enumerated records,³⁴ and

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registration alone. In other words, it is part of the consideration for a government-granted license.

Under the analysis set out in Premex, an obligation prescribed by the Act or regulations is triggered by registration alone, only when its terms expressly indicate so. This case does not involve such duties. Section 4n(3)(A), by its plain terms, applies to those who meet the definition of CPO or CTA and who are registered, rather than persons who are merely registered as a CPO or CTA. Therefore, Section 4n(3)(A) does not reach beyond the boundaries of Section 2.

Rules 4.23 and 4.33 apply to those meeting the definition of CPO and CTA who are also registered (or should be). In other words, the rules in question apply to those meeting the definition of CPO or CTA regardless of registration. While the obligations under Section 4n(3)(a) do not "flow from registration," those prescribed in these rules are disconnected from registration altogether.

³⁴ Unlike Section 4n(3)(A)'s recordkeeping and inspection duties, that refer to the Commission's regulations generally, the production requirement covers only the information and documents enumerated therein. 7 U.S.C. §6n(3)(A).

(3) the respondent failed to produce the records within a reasonable time. In this case, the Division has not established that the respondent was under a duty to keep and produce records under the section and, therefore, has failed to establish any violation of Section 4n(3)(A).

The Division argues that mere registration brings one under Section 4n(3)(A).³⁵ This theory fails to come to terms with the plain meaning of the section.³⁶ "The [Court's] analysis begins, as with the interpretation of any legislative enactment, with the language of the Act"³⁷ The Court must presume that

³⁵ Division Brief at 12-14. In the alternative, the Division argues that registration as a CTA or CPO should raise a rebuttable presumption that the respondent was, in fact, a CTA or CPO. Division Brief at 14 n.5. The Court declines to employ such a presumption under the circumstances of this case. Even if it were to do so, NYCR presented highly credible, affirmative testimony sufficient to rebut it. Trans. at 99, 136-55.

³⁶ The Court notes that the Division subscribes to a plain-meaning approach, albeit selectively. For example, in interpreting the lead sentence of Section 4n(3)(A), the Division parses the verbs with excruciating care:

"The verb 'maintain' is modified by the auxiliary verb 'must,' whose plain meaning is defined as 'to be required or obliged by law, morality, or custom.' Webster's II New Riverside University Dictionary 779 (1994)."

Division Brief at 15.

The Division, however, does not extend this careful analysis to the preceding nouns. As the Division acknowledges, the subject of the sentence is "every CTA and CPO registered," whose "plain meaning is defined" in the Act and discussed below. Id.

³⁷ Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 975 (4th Cir. 1993), cited in In re Collins, CFTC Docket No. 94-13, 13-14 (CFTC Dec. 10, 1997); International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) ("The starting point in every case involving the construction of a statute is the language (continued...)

Congress meant what it said.³⁸ This presumption finds support in the Act itself. For example, when Congress intended to impose a duty on a person who was registered as an FCM, even if registration was unnecessary because the registrant did not engage in transactions meeting the definition of that status, it chose words that clearly reflected that intent.³⁹ Section 4n(3)(A), by its express terms, applies not to every registered "person," but to "[e]very commodity trading advisor and commodity pool operator registered under this Act."⁴⁰ Therefore, the Division must prove:

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itself."); T.S. v. Board of Education, 10 F.3d 87, 89 (2d Cir. 1993) ("Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term."); Grandview Holding Corp. v. NFA, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,996 at 44,809 (CFTC Mar. 18, 1997).

³⁸ See Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Salomon Forex, 8 F.3d at 975 ("We assume that the legislature used words that meant what it intended; that all words had a purpose and were meant to read consistently; and that the statute's true meaning provides a rational response to the relevant situation."); Zimmerman v. North American Signal Co., 704 F.2d 347, 353 (7th Cir. 1983); United States v. Wooten, 688 F.2d 941, 950 (4th Cir. 1982) ("[A] judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation."); United States v. Kim Wong Bo, 472 F.2d 720, 722 (4th Cir. 1989).

³⁹ See e.g., 7 U.S.C. §6f(b) ("E]ach person so registered[, as a futures commission merchant,] shall at all times continue to meet such prescribed minimum financial requirements" (emphasis added)); 7 U.S.C. §6g(a) ("Every person registered hereunder as a futures commission merchant, introducing broker, floor broker, or floor trader shall make such reports as required" (emphasis added)); Premex, ¶21,992 at 28,357 (applying 7 U.S.C. §6f(2), now 7 U.S.C. §6f(b)).

⁴⁰ 7 U.S.C. §6n(3)(A) (emphasis added).

(1) that NYCR was a CPO or CTA, and (2) that it was registered, in order to establish liability under this section of the Act.

The Court need look no further than Section 1a of the Act to determine what the Division must prove in order to establish the first necessary condition of liability under Section 4n(3)(A). The Act sets out the following definition of CPO:

"[A]ny person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market,"⁴¹ except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order."⁴²

The Division has presented no evidence that NYCR ever operated a pool in order to trade in contracts for future delivery, ever pooled funds, or that it did so for the purpose of trading on or subject to the rules of a Commission-designated contract market. To the contrary, the record contains uncontroverted evidence that NYCR introduced customers to banks for the purpose of trading in foreign currency in the over-the-counter market and, itself, traded in the

⁴¹ The Commission defines contract market as "a board of trade designated by the Commission as a contract market under the Commodity Exchange Act or in accordance with the provisions of Part 33 of this chapter." 17 C.F.R. §1.3(h) (emphasis added). Accordingly even if NYCR had participated in trading on a board of trade, as broadly defined, unless that board was a Commission-designated contract market, the outcome does not change.

⁴² 7 U.S.C. §1a(4) (emphasis added).

over-the-counter market through banks.⁴³ Therefore, the Division failed to prove that NYCR met the definition of CPO and, thereby, fell under the requirements of Section 4n(3)(A).

The Division fails no better under the theory that NYCR meets the definition of CTA. Section 1a(5) of the Act defines a CTA as

"[A]ny person who--

(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in--

(I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market;

(II) any commodity option authorized under section 4c; or

(III) any leverage transaction authorized under section 19; or

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i)."⁴⁴

The Division has presented no evidence that NYCR engaged in activity relating to either: (1) a contract for future delivery on or subject to the rules of a contract market, (2) a commodity option authorized under Section 4c, or (3) any leverage transaction authorized under Section 19. Since the Division did not meet its burden or proof on the issue of whether NYCR was, in fact, a CPO or

⁴³ Trans. at 136-41, 150.

⁴⁴ 7 U.S.C. §1a(5) (emphasis added).

CTA, the Court cannot conclude that this registrant was subject to the requirements of Section 4n(3)(A). Accordingly, a failure to comply with a Section 4n(3)(A)-based request for production cannot form the basis of liability. However, this does not end the Court's inquiry nor does the failure of this theory necessarily affect the level of sanctions should the Division succeed on other theories.⁴⁵

Liability for Failure to Comply with a Production Request Under Commission Rules 1.31(a)(2), 4.23, and 4.33 Depends on Fitting the Rules' Definitions of CPO and CTA

Even though a person does not have a duty to respond to Division production requests under Section 4n(3)(A), the person may have such a duty under Commission regulations and failure to meet that obligation would amount to a violation meriting sanctions. This is so, because the regulations are broader in reach than Section 4n(3)(A).⁴⁶

⁴⁵ In re Interstate Securities Corp., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,295 at 38,954-55 (CFTC June 1, 1992) ("[I]n determining sanctions our focus is on the overall nature of the wrongful conduct rather than the number of legal theories the Division can successfully plead and prove.").

⁴⁶ Compare 7 U.S.C. §6n(3)(A) (imposing a recordkeeping obligation upon "Every commodity trading advisor . . . registered under this Act"), with 17 C.F.R. §4.33 (imposing a recordkeeping duty on "Each commodity trading advisor registered or required to be registered under the Act"). Commodity Pool Operators and Commodity Trading Advisors; Final Rules 44 Fed. Reg. 1,918 (CFTC 1979), reprinted in Adoption of Rules Concerning Commodity Pool Operators and Commodity Trading Advisors, [1977-1979 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,725 at 22,975, 22,989 (CFTC Jan. 8, 1979) ("Adoption of Rules") ("Section 4.23 requires all CPOs that must register with the Commission to make and keep certain books and records" (emphasis added)) ("Section 4.23 [now 4.33] requires all CTAs who must register with the CFTC to make and keep certain books and records" (emphasis added)) (continued...)

The Commission set out a production requirement in Rule 1.31(a)(2). This rule does not enumerate who must keep records, what records must be kept or who is required to produce them upon request. Rather, it prescribes the manner in which records must be kept and imposes a general production obligation upon persons required to keep "any book or record" under the Act or Commission regulations.⁴⁷ In other words, a person who has a duty to keep a book or record also must comply with a production request "promptly" and the Court must look outside Rule 1.31(a)(2) in order to determine whether NYCR had a duty to keep the records requested by the Division.⁴⁸ In this case, the Division argues that NYCR had obligations under Rules 4.23 and 4.33 by virtue of its registration and presented a case dependent upon the correctness of that argument.⁴⁹ The Division's case again falls short, this time

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added)). See In re R & W Technical Servs., Ltd., CFTC Docket No. 96-3, at 52 n.94 (CFTC Dec. 1, 1997).

⁴⁷ 17 C.F.R. §1.31(a)(2).

⁴⁸ Id. In general, a person may have a duty to keep records based on a current duty to keep records or having incurred a duty to keep records for a period of time that has not yet elapsed. A formerly registered CPO or CTA that fell into the latter category would, therefore, have a duty to produce documents under Commission regulation even if there was no duty under Section 4n(3)(A).

⁴⁹ See Tr. at 48. In its brief, the Division supports this argument by confusing cases where a person actually fits the definition of CTA, but is exempt from registration, with the case in which a person never met the definition of CPO or CTA to begin with. Division Brief at 13-14. In doing so, the Division ignores the plain language of the rule it analogizes to, Rule 4.31, 17 C.F.R. §4.31, and the facts of the case upon which it relies. Rule 4.31(a) states:

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"No commodity trading advisor registered or required to be registered under the Act may solicit a prospective client, or enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading by means of a systematic program . . . unless the commodity trading advisor . . . delivers . . . a Disclosure Document"

17 C.F.R. §4.31(a) (emphasis added).

The Division cites Wichman v. Hewitt, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,613 (CFTC Mar. 7, 1990) ("Wichman II"), for the notion that registration is sufficient to bring a person under Rule 4.31. Division Brief at 12 ("Similarly, in interpreting the requirements of Regulation 4.31 the Commission rejected the position that in applying the language 'commodity trading advisor registered or required to be registered under the Act,' a court should examine the registrant's activities to determine if the registrant in fact acts in such a way that it would be required to register under the Act." (emphasis in original) (citing Wichman II)). The Division's discussion of Wichman overlooks the fact that the respondent's status as a CTA was never in question and that he fell under Rule 4.31's plain language.

In Wichman, the respondent did not claim that he was not a CTA. There is no dispute that the respondent's activity fell under the definition of CTA. Wichman v. Hewitt, CFTC Docket No. 86-R296, 1988 WL 232396 at *3 (JO McGuire Sept. 2, 1988) ("Wichman I"). Indeed, the reparations action arose from a CTA transaction. Wichman II, ¶24,613 at 36,630. Rather, the respondent argued that he was a CTA, but was not required to be registered under Section 4m(1) of the Act. Wichman I, 1988 WL 232396 at *3. To recap, the respondent was a CTA as defined by Section 1a(5) and Rule 1.3(bb), he was registered, and he engaged in a transaction covered under Rule 4.31(a). Wichman II, ¶24,613 at 36,630 (citing Section 2(a)(1)(A) of the Act, now Section 1a(5)); Wichman I, 1988 WL 232396 at *3. Therefore, it is not surprising to find that the Judgment Officer and the Commission found him covered under the plain language of Rule 4.31, since it contains no express exceptions for those who fit the definition of CTA, are registered, and engage in the covered transactions, but were exempt from registration.

The Division's reliance upon Rules 4.13 and 4.14, 17 C.F.R. §§4.13, 4.14, is similarly misplaced. These rules exempt certain CPOs and CTAs from having to register, but impose upon them the
(continued...)

because of a failure to satisfy the plain language of Commission regulations rather than that of the Act.⁵⁰

The Division argues that NYCR had a recordkeeping obligation under Rule 4.23, resulting from its registration as a CPO. The plain terms of the rule do not fit this theory. Section 4.23 applies to "[e]ach commodity pool operator registered or required

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requirements of Part 4 of the Commission's Regulations. Rules 4.13 and 4.14 contemplate that exemption applies to those who actually operate commodity pools or provide commodity trading advice. See 17 C.F.R. §4.13(a) ("(1)(i) It does not receive any compensation . . . for operating the pool . . . (ii) It operates only one commodity pool at any time. (iv) neither person . . . involved with the pool does any advertising . . . (2)(i) the total gross capital contributions it receives . . . do not . . . exceed \$200,000 . . . (ii) None of the pools operated has more than 15 participants"); 17 C.F.R. §4.14(a) ("(1) . . . the persons commodity trading advice is solely incidental to the conduct of its business . . . (2) . . . the person's commodity trading advice is solely incidental . . . (3) . . . the person's commodity trading advice . . . (4) . . . the person's commodity trading advice is directed solely . . . (5) . . . the person's commodity trading advice is directed solely to . . . (6) . . . the person's trading advice"); Adoption of Rules, ¶20,725 at 22,969-70 ("Section 4.13 establishes exemptions from registration for certain CPOs and CTAs."). These rules do not modify Rules 1.3, 4.23, or 4.33, nor do they change the plain meaning of those terms. Rather, Rules 4.13(d) and 4.14(c) merely command registrants, that are exempt, to comply with Part 4 of the Commission's regulations as if they "were not exempt." 17 C.F.R. §§4.13(d), 4.14(c). In other words, registration nullifies an exemption otherwise available to a CPO or CTA. Registration does not make a CPO or a CTA out of a person who is not.

⁵⁰ Reno v. NTSB, 45 F.3d 1375, 1379 (9th Cir. 1995) ("The language of a regulation is the starting point for its interpretation . . . [T]he plain meaning of language governs unless that meaning would lead to absurd results."); T.S. v. Board of Education, 10 F.3d at 89 ("Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term." (citations omitted)); Grandview Holding Corp., ¶26,996 at 44,809 ("Applying the basic principles of rule construction, our starting point is the plain meaning of [the] . . . rule.").

to be registered under the Act."⁵¹ The Court must presume that the Commission meant what it said.⁵² Accordingly, the Division must establish that NYCR was a CPO in order to prove that it had a recordkeeping obligation under Rule 4.23.⁵³

⁵¹ 17 C.F.R. §4.23.

⁵² Grandview Holding Corp., ¶26,996 at 44,809.

When the Commission intended to impose a duty upon those who were registered, regardless of whether the registrants' activity necessitated registration, it had no problem finding the words. See 17 C.F.R. §1.17(a)(1)(i) ("Each person registered as a futures commission merchant"); 17 C.F.R. §1.18(a) ("No person shall be registered as a futures commission merchant or as an introducing broker under the Act unless"); Premex, ¶21,992 at 28,357 n.16.

⁵³ The Division reached a different conclusion by employing a yet another curiously selective, "plain meaning" interpretation of Rules 4.23 and 4.33 by arguing:

"Regulation 4.23 provides in pertinent part, that "each commodity pool operator registered or required to be registered under the Act must make and keep [books and records itemized under this section]

. . . .

The obvious and only plain meaning which can be ascribed to the disjunctive 'or' used in 4.23 is 'an alternative.' Webster's II at 826. If the Commission had intended a conjunctive meaning, i.e. a person must both be registered as a CPO (or CTA under the parallel language of 4.33) and act as a CPO (or CTA) it would have used a word such as 'and.'"

Division Brief at 20. This time rather than obsessing over the verbs and ignoring the subject, the Division obsesses over the conjunction and ignores the subject.

This argument rests on one of two assumptions. The first is that when the Commission employs terms defined in Rule 1.3 in other rules, Rule 1.3's definitions do not apply. Since the Commission obviously had something in mind when it enacted and amended Rule 1.3, this assumption seems to lack a basis.

(continued...)

The Commission, in Rule 1.3(cc), prescribed a definition of CPO that is identical to Section 1a(4) of the Act.⁵⁴ As noted above, the Division has presented no evidence that NYCR ever traded in contracts for future delivery, ever accepted and pooled customer funds, or that NYCR ever traded on or subject to the rules of a Commission-designated contract market. Therefore, the Division

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By its plain terms, the Division's argument might also assume that the Commission defined a CPO or CTA as merely a "person." This must be so, because the Division equates "commodity pool operator registered" and "commodity trading advisor registered" with a person "registered as a CPO" and "registered as a CTA." Division Brief at 20-21. Unfortunately, the Commission did not employ such a sweeping definition. See 17 C.F.R. §1.3(bb)-(cc). Where the Commission employs a term other than "person," especially one defined in Commission regulations, the Court must presume that the Commission intended a different meaning. Compare 17 C.F.R. §1.17(a)(1)(i), with 17 C.F.R. §§4.23, 4.33. See *Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each.").

⁵⁴ The Commission set out the following definition of CPO:

[A]ny person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery or commodity option on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order."

(continued...)

failed to establish that NYCR was a CPO and, thereby, subject to Rule 4.23.

For the identical reason, the Division's theory of the case does not fit Rule 4.33. Rule 4.33 applies to "[e]ach commodity trading advisor registered under the Act or required to registered under the Act."⁵⁵ Under the plain language of this rule, a person must be a CTA in order to be covered.⁵⁶ In order to determine what the Division must prove in order to bring NYCR under Rule 4.33, the Court looks to the Commission's definition of CTA, set out in Rule 1.3(bb).⁵⁷ Again, the Commission chose a definition that is identical to Congress's definition, in Section 1a(5) of the Act,⁵⁸

(continued...)

17 C.F.R. §1.3(cc) (emphasis added); 17 C.F.R. 1.3(h) (defining "contract market"); see 7 U.S.C. §1a(4).

⁵⁵ 17 C.F.R. §4.33.

⁵⁶ When the Commission intended to include those who were registered, but did not need to do so, it knew how to select words that clearly evidenced that intent. See supra note 52.

⁵⁷ 17 C.F.R. §1.3(bb).

⁵⁸ Rule 1.3(bb) defines CTA as

[A]ny person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market, any commodity option authorized under Section 4c of the Act, or any leverage transaction authorized under Section 19 of the Act . . .

."

Id. (emphasis added).

and, again, the Division presented no evidence that NYCR engaged in activities listed in Section 1a(5) or Rule 1.3(bb). Therefore, the Court has no basis upon which to conclude that NYCR met the definition of CTA and was, therefore, subject to its recordkeeping requirements.⁵⁹

Accordingly, the Division did not establish that NYCR had a recordkeeping obligation under either Rule 4.23 or 4.33. Therefore, it also failed to establish that the respondent had a duty to produce records under Rule 1.31(a)(2). Since there was no operative production duty, a failure to comply with the Division's request cannot form the basis of liability under Rule 1.31(a)(2).⁶⁰

Conclusion

The Division failed to establish that respondent NYCR was subject to the recordkeeping requirements prescribed in Section

⁵⁹ The Court's plain-meaning analysis would be inappropriate only if it would "frustrate" the Commission's "clear intention or yield patent absurdity." Dunn, 117 S. Ct. at 916 (quoting Hubbard v. United States, 514 U.S. 695 (1995)). In this case, the Court's plain-language reading of Rules 4.23 and 4.33 frustrates no Commission policy. As a general rule, the records of persons who are registered as CPOs and CTAs, but never engaged in transactions covered by the Act, are of no more use than the records of those who are not CPOs or CTAs and did not register. In any event, the Commission has broad investigational authority to subpoena the records of these persons (as well as any other person).

⁶⁰ Likewise, the Court need not consider whether the failure to meet the production requirement prescribed in Rule 1.31(a)(2) also amounts to independent violations of Rules 4.23 and 4.33.

4n(3)(A) of the Act and Commission Rules 4.23 and 4.33.⁶¹ As a result, the Division failed to establish that NYCR was obligated to comply with production requests under Section 4n(3)(A) and Rule 1.31. Accordingly, the Complaint is **DISMISSED**.

⁶¹ The Division insinuates that, if it loses, the hearing should be reopened to give it a second chance. Division Brief at 14 n.5. Suspecting that it failed once, the Division claims that the Court prevented it from making a case under the analysis set out above. *Id.* Problems of notice to the respondent aside, the Division had every opportunity to make its case. However, the Division chose to press ahead without regard to the nature of the respondent's business or its relevance. It made no indication that it intended to present evidence of NYCR's activities. Indeed, unprepared to prove anything other than registration, the request, and the refusal to comply, it virtually disclaimed an intention to do so. Trans. at 49, 53, 55. Accordingly, the Division made no effort in its case-in-chief to characterize NYCR's activity, even declining the Court's suggestion that it directly examine Mr. Matejka as a hostile witness. Trans. at 91.

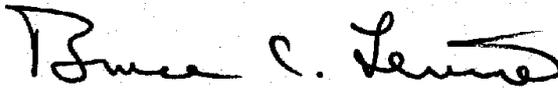
The Division did attempt to characterize NYCR's activity through cross-examination of Mr. Matejka on his five pages of direct testimony. *See* Trans. at 95-99. In a cross-examination that spanned eighty pages, the Division elicited: no testimony that NYCR's activity involved contracts for deferred delivery; no testimony that NYCR participated in or subject to the rules of a Commission-designated contract market; no evidence that NYCR traded in contracts made on or subject to the rules of a Commission-designated contract market; no evidence that NYCR operated an investment trust, syndicate or the like; no evidence that NYCR traded in option contracts authorized under 7 U.S.C. §6(c); and no evidence that NYCR traded in leverage contracts authorized under 7 U.S.C. §23. *See* Trans. at 99-180. In short, the Division never came close to proving that NYCR fit the definition of CPO or CTA, in roughly two hours of cross-examination, nor did it make any express or implied showing that it could have done so given more time. *See* 7 U.S.C. §1a(4)-(5).

Indeed, even the gloss the Division places on its efforts indicates that it was not heading toward proving what it needed to in order to make a case under Section 4n(3)(A) and Rules 4.23 and 4.33. *See* Division Brief at 14 n.5 ("The Division should have been allowed to explore whether the transactions were in fact, futures transactions conducted on a board of trade"). Not even its assertions of what it might prove, given unlimited time, come close to satisfying the definitions of CPO or CTA as prescribed by Congress and the Commission. *See supra* note 41.

Parties are reminded that, under the expedited procedures set out in the Complaint, they have until January 15, 1998 to file exceptions with the Court. Immediately thereafter, the Court must certify the case and forward the record for appeal before the Commission. The Commission will issue a final order in this matter on or before February 6, 1998.

IT IS SO ORDERED.

On this 12th day of January, 1998

A handwritten signature in cursive script that reads "Bruce C. Levine". The signature is written in dark ink and is positioned above a horizontal line.

Bruce C. Levine
Administrative Law Judge