

written direct testimony will generally not be received unless the proponent makes the witness available for cross-examination at the oral hearing.

. . . .

. . . Any failure to comply with this order may also subject the non-complying party to other consequences such as dismissal of the complaint or issuance of a default award as appropriate.²

Despite these warnings, neither of the remaining parties³ filed the required prehearing documents.⁴ Consequently, we directed them to show cause why they should not be sanctioned.⁵ On December 21, 2004, we received complainant William M. Brown's response.⁶ For the reasons set forth below, we find it insufficient.

Brown Has Not Credibly Shown That His Failure To File A Timely Prehearing Memorandum And Related Documents Should Be Excused

While we expect parties to take our prehearing orders seriously,⁷ failures to submit prehearing memoranda and

² Order and Notice at 4-5 (citations omitted).

³ See Order of Partial Dismissal, dated December 16, 2004.

⁴ See Show Cause Order, dated December 16, 2004, at 2.

⁵ Id.

⁶ Response to "Show Cause" Order dated 12/16/04, dated December 20, 2004 ("Response"). It included Brown's purported attempt to comply with our prehearing filing requirements. Id. at 2.

⁷ The reparation process is meant to progress with relative dispatch. Thus, the pleading requirements are loose (even for fraud claims) and discovery is relatively limited in terms of time and methods. See 17 C.F.R. §§12.13(b)(iii), 12.30-12.33; Alexander v. First Sierra Commodity Corp., [1994-1996 Transfer
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associated documents as directed often merit nothing more than orders to fix the submissions' defects.⁸ Virtually dispositive sanctions (such as barring a party from presenting evidence at a hearing even if it must lead to the dismissal of the complaint) are reserved for those instances in which a party appears to have made no good faith effort to file timely, compliant prehearing documents, and offers no good and credible reasons for failing to do so.⁹ Here, the record supports a finding that Brown has not made a good faith effort to comply with the Order and Notice. He waited until nearly three weeks after the deadline passed, responded to the Order and Notice only after we issued a show cause order and, as explained below, did not comply with the Order and Notice in his untimely submission. In

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Binder] Comm. Fut. L. Rep. (CCH) ¶26,467 at 43,057-58 (CFTC July 27, 1995). Prehearing memoranda and the advance submission of certain evidence bring fairness to this process by forcing parties to clarify their cases-in-chief. In addition, the prehearing submission of documents reduces the frequency of hearing continuances and the associated costs, costs exacerbated by the fact that at least one party and (sometimes) their counsel usually must travel a considerable distance to participate in a reparations hearing. Consequently, failure to file prehearing memoranda or even failures to timely file such documents can unfairly prejudice other parties.

⁸ See Day v. Allabastro, CFTC Docket No. 03-R084, slip op. at 2-10 (CFTC June 15, 2004).

⁹ See Marr v. American Nat'l Trading Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,615 at 55,641-42 (CFTC Nov. 10, 2003).

addition, Brown did not credibly demonstrate that he had a good reason for not submitting timely prehearing documents.

Brown responded to our show cause order by stating,

I apologize for my failure to submit the required documents by the deadline of December 21, 2004 (sic). I had every intention to make a good faith effort to follow your procedures to the letter.

Due to an unexpected flurry of responsibility that developed at my business, coupled with the emotional trauma from the trading disaster, and (sic) the strain of filing the damage claim has been overwhelming.

I was distracted to a point where I was not fully focused during the reading of your order and notice of hearing, and just did not digest portions of the instructions that applied to me. Discussions about the California hearing location was (sic) a diversion, as well as settlement considerations.¹⁰

Obviously, this explanation lacks specifics. In addition, the relevant circumstances tend to undermine its credibility.

There is no serious doubt that Brown read the Order and Notice before the December 1st filing deadline passed¹¹ and that

¹⁰ Response at 1-2. The "settlement considerations" to which he refers appear to be those related to his settlement with those respondents other than Anthony David Brancieri. See Order of Partial Dismissal, dated December 16, 2004. The "[d]iscussions about the California hearing location" concerned the motion to move the hearing site from Los Angeles, California to Miami, Florida. See Order and Notice of Change of Hearing Site, dated November 15, 2004, at 1-2.

¹¹ See Motion Expressing my Position on Judge Levine's Order Setting Hearing Location, dated November 5, 2004, at 1 ("I have decided not to contest the location you chose to conduct the oral hearing in this matter (Los Angeles, CA)."). See supra text accompanying note 10.

he is educated and literate.¹² When he read the Order and Notice, it would have been nearly impossible for a literate, well-educated adult such as Brown to miss the prehearing document filing requirements. They began on the document's first page -- indeed, in the second sentence -- and were, by far, the most voluminous part of the order.¹³ Moreover, the filing deadline was emphasized with bold print and clearly directed to "each party."¹⁴ Finally, Brown's claim of having

¹² In his responses to discovery requests, Brown stated that he had earned a bachelor's degree in English, taken some graduate level courses, taught English at the secondary school level, and taught English Literature and French at a community college. Response to Request for Production of Documents, filed September 13, 2004, at 3-4.

¹³ Our order began,

ORDER AND NOTICE OF HEARING

NOTICE is hereby given that an oral hearing in this matter will commence at **9:30 a.m.**, on **Wednesday, January 19, 2005**. The hearing will be held at:

National Labor Relations Board
Courtroom 901 (Ninth Floor)
888 South Figueroa Street
Los Angeles, California 90017.

The Court **DIRECTS** each party to submit, on or before **December 1, 2004**: (1) a notice of the party's intent to participate in the oral hearing; (2) a final list of witnesses .

. . . .

Order and Notice at 1 (emphasis in original).

¹⁴ See supra note 13.

intended to follow our orders "to the letter" is undermined by his late-filed prehearing memorandum.¹⁵ For these reasons,

¹⁵ The Order and Notice included the following directives:

Parties do not satisfy this obligation [to submit the written direct testimony of non-hostile witnesses] by providing lists of topics to which a witness will testify, summaries of prior testimony or summaries of expected testimony. Instead, they must submit first-person statements that a witness will adopt as his or her testimony without substantial revision, qualification or augmentation. Written testimony may incorporate by reference other statements that the witness has made and that have been reduced to writing. However, for each document incorporated by reference, such incorporation must be explicit and must either (1) state that the entire document is being incorporated by reference or (2) identify those portions that are being so incorporated with precision. Moreover, the incorporated statement(s) must be attached to the written testimony in which the incorporation by reference occurs.

. . . .

. . . The documentary submissions must be organized as marked exhibits. Each page of each exhibit shall be marked separately in a manner that indicates both the exhibit number and the page number within the exhibit. The complainant's exhibits shall be marked "CX-[exhibit number]-[page number]" and, thus, the first two pages of his first exhibit shall be numbered CX-1-1 and CX-1-2, respectively. Respondent Brancieri shall mark his exhibits "RX1-[exhibit number]-[page number]" and, thus, the first two pages of his first exhibit shall be numbered RX1-1-1 and RX1-1-2, respectively. The other three respondents, who are jointly represented, shall mark

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Brown's vaguely worded list of intentions, emotions, circumstances and events leave us unconvinced that his failure to timely file a prehearing memorandum and related documents was the result of excusable neglect, a simple mistake or circumstances beyond his control.

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their exhibits "RX2-[exhibit number]-[page number]" and, thus, the first two pages of their first exhibit shall be numbered RX2-1-1 and RX2-1-2, respectively.

Order and Notice at 2 nn.2-3. As part of his Response, Brown purported to comply with our prehearing directives by stating,

This is to confirm my intentions to participate in the oral hearing set for January 19, 2005.

However, I have no additional information to present with respect to witnesses or evidence beyond that which I previously submitted with my complaint.

Prehearing Memoranda

The issue at hand is that Mr. Anthony D. Brancieri did willfully misrepresent the validity and value of certain trades introduced on my behalf, causing a substantial loss of personal investment funds.

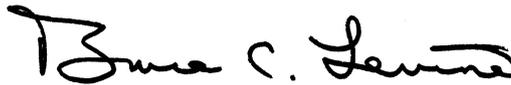
Response at 2 (footnote stating, "I will testify on my own behalf." omitted). Thus, he did not submit his hearing exhibits as instructed (i.e., marked in the manner required) nor did he follow our requirements concerning written direct testimony.

Conclusion

For the reasons set forth above, we do not accept Brown's late-filed statement of intent to participate at a hearing, prehearing memorandum, witness list and statement incorporating the complaint (and associated documents) by reference,¹⁶ and **STRIKE** them from the record. This leaves Brown with no evidence by which to satisfy his burden of proof. Accordingly, we also **DISMISS** the complaint in this proceeding **WITH PREJUDICE**.¹⁷

IT IS SO ORDERED.

On this 27th of December, 2004



Bruce C. Levine
Administrative Law Judge

¹⁶ See supra note 15.

¹⁷ We have yet to receive a response to the show cause order from Brancieri and the filing deadline has passed. Show Cause Order, dated December 16, 2004, at 2. Had we determined that Brancieri should be sanctioned, we would have barred him from presenting evidence at the oral hearing. This sanction would have been similar to the one Brown received but the parties are differently situated. Brown bears the burden of production with respect to his claims against Brancieri. Thus, Brancieri's inability to present evidence would, in most cases, only expose him to an increased risk of liability while Brown's preclusion is fatal to his case. Cf. Melton v. Pasqua, CFTC Docket No. 99-R061, 2002 CFTC LEXIS 118, at *15-31 (CFTC Sept. 9, 2002). Because the sanctions that we would have imposed on Brancieri do not affect the ultimate outcome, we need not consider them.