U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

RECEIVED
C.F.T.C.
2006 MAY 16 A 11: 11
OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

EDNA D. ANDERSON,

Complainant,

v.

DAVID M. BEACH,

Respondent.

CFTC Docket No. 05-R058

ORDER OF DISMISSAL

Once again, we must determine what to do when parties violate our prehearing directives.[1] As explained below, both parties' misbehavior merits sanctions but, in this instance, identical sanctions have a one-sided effect.

Background

On March 17, 2006, we set this matter to be heard and directed the parties to file, no later than April 17, 2006, (1) statements of their intent to participate in the oral hearing, (2) prehearing memoranda, (3) witness lists, (4) the written testimony of non-hostile witnesses and (5) proposed hearing exhibits.[2] We also warned,

> Documentary proof and witness testimony must be submitted in accordance with the above-stated directives in order to be received

[1] See O'Connor v. Alaron Trading Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,211 at 57,911-13 (CFTC Feb. 7, 2006).

[2] Order and Notice of Hearing, dated March 17, 2006 ("Notice of Hearing"), at 1-3.

> in evidence at the oral hearing. Similarly, witnesses not listed will not be heard except in rebuttal. In addition, issues not set forth in a party's prehearing memorandum will be deemed to have been abandoned. Moreover, parties will not be permitted to present the direct testimony of witnesses (other than hostile witnesses and party-opponents) orally except for purposes of rebuttal. . . .
>
> . . . Failure to . . . comply with this order may also subject a party to other consequences such as dismissal of the complaint or issuance of a default award as appropriate. See 17 C.F.R. §§12.312(b)(2), 12.35; cf. Fed. R. Civ. P. 16(f).[3]

On April 17th, then-respondent Peregrine Financial Group, Inc. moved to stay its obligations to comply with the Notice of Hearing on the ground that it had reached a settlement in principle with complainant Edna D. Anderson.[4] We granted the motion and stayed the proceeding as it related to the claims against Peregrine.[5] Although they probably did not receive Peregrine's motion until after the 17th,[6] Anderson and respondent David M. Beach let the Notice of Hearing's filing deadline pass without submitting any of the required documents.

We responded by notifying Anderson and Beach that their apparent violations of our order raised the issue of whether and how they should be

---

[3] Id. at 3-4.

[4] Motion to Stay Compliance with Administrative Law Judge Levine's March 17, 2006 Order Due to an Oral Settlement Agreement Being Reached Between Complainant and Peregrine Financial Group, Inc., filed April 17, 2006.

[5] Order, dated April 18, 2006. Later, we dismissed that portion of Anderson's complaint. Order of Partial Dismissal, dated April 25, 2006.

[6] See Certificate of Service, dated April 17, 2006. In issuing the partial stay, we notified the parties that the Notice of Hearing remained in effect with respect to the remainder of the proceeding. Order, dated April 18, 2006.

sanctioned, and directing them to show cause, no later than May 5, 2006, why they should not barred from presenting evidence at (and otherwise participating in) the oral hearing.[7] Neither party responded to the show cause order.[8]

Willful Violations Of Our Prehearing Orders Usually Merit Sanctions

Reparations proceedings are designed to move quickly. Less procedure and more speed increase the likelihood that a party's (or, more likely, an attorney's) courtroom experience can tip the balance away from more epistemologically accurate outcomes. Our prehearing filing requirements protect against this to a small but substantial degree by requiring the disclosure of issues to be tried and much of the evidence relating to the parties' cases-in-chief. Parties that violate our prehearing orders by withholding the mandated information and documents unfairly prejudice their opponents. When willful, such misconduct merits heavy sanctions.[9]

---

[7] Show Cause Order, dated April 24, 2006, at 2-3. We also warned Anderson that an order precluding her from participating in the hearing would result in a dismissal of her complaint with respect to the claims against Beach. Id. at 2 n.6 (citing Brown v. Brancieri, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,931 at 56,838 (CFTC Dec. 27, 2004)).

[8] However, on May 1, 2006 and then on May 4th, Anderson filed her proposed written direct testimony. Direct Testimony of Edna D. Anderson, filed May 4, 2006 ("Amended Anderson Declaration"); Direct Testimony of Edna D. Anderson, filed May 1, 2006. We note that Anderson's belated prehearing submission fell a good deal short of our requirements even if she did not intend to introduce any documents other than her declaration at the hearing. Compare Amended Anderson Declaration at 1-2 with Notice of Hearing at 1-3.

[9] Robinson v. Alternative Commodity Traders, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,155 at 57,602 (CFTC Nov. 4, 2005), teaches that willful

(continued..)

The Parties Willfully Violated Our Prehearing Order

There is no reason to believe that either party failed to receive the Notice of Hearing or the Show Cause Order. In addition, neither party took advantage of the opportunity to make an excuse for or otherwise explain its misbehavior. Thus, we conclude that Anderson and Beach willfully violated the Notice of Hearing.

Conclusion

Because they both willfully failed to submit the documents required by the Notice of Hearing in a timely fashion, the parties are **PRECLUDED** from introducing testimonial or documentary evidence at the oral hearing in this matter. These sanctions effectively dispose of this proceeding because they make it impossible for Anderson to meet the burden of proving her entitlement

---

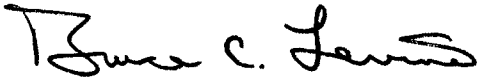
(..continued)

(i.e., reckless or knowing) misconduct can result in the imposition of severe sanctions despite the Commission's preference for merit-based decisions. When a party deliberately refuses to disclose the case it would present in a timely fashion, we have few options that would avoid prejudicing the other parties and deter those who misbehave. In O'Connor, we ruled that the respondent's willful failure to file timely prehearing documents merited an order barring the respondent from presenting evidence at the hearing. [Current Transfer Binder] ¶30,211 at 57,912 n.8. The burden of proof leaves complainants differently situated than respondents. However, in simple cases such as the one here, we can think of no burden short of barring the complainant from presenting her case-in-chief that provides (and, concerning the issue of general deterrence, threatens) an adequate sting. In the absence of counterclaims, there is no practical difference between barring the complainant from presenting evidence in support of her case-in-chief and simply prohibiting the complainant from participating in the hearing since the former would render any other part of a trial moot.

to an award of damages.[10] Accordingly, we also **DISMISS** the complaint **WITH PREJUDICE**.

IT IS SO ORDERED.

On this 16th day of May, 2006



Bruce C. Levine
Administrative Law Judge

[10] Brown, [2003-2004 Transfer Binder] ¶29,931 at 56,838.