U.S. COMMODITY FUTURES TRADING COMMISSION



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

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JOHN M. KRAMP, Complainant v.	—)))	CFTC Docket No. 00-R041		23 PM 3 21).F.T.O.
FOX INVESTMENT DIVISION (d.b.a. "ROSENTHAL COLLINS GROUP, L.L.C."), and STEPHEN MARK II, Respondents)))		Q.		
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FINAL DECISION

Complainant initiated this reparations case selecting a voluntary decisional proceeding, a choice concurred in by the respondents. In a voluntary proceeding, the parties submit their dispute on the papers only, waiving their right to present oral testimony. In addition, the judge is not authorized to conduct discovery on his own motion (see Rule 12.34), leaving the parties solely responsible for the development of the record. When the record is closed, the judge issues a Final Decision containing only a conclusion whether any violations of the Commodity Exchange Act have been proven, and, if so, a reparation award for any damages caused by such violations (see Rule 12.106(b)). The decision does not contain findings of fact or other evidentiary evaluations by the judge. The Final Decision is not appealable to the Commission or to any court.

In this matter, respondents sought discovery from complainant. A motion to compel discovery submitted by respondents was granted in view of complainant's minimal production of materials sought in the discovery requests (*see* Order Granting Motion to Compel, dated August 18, 2000). Attorney's fees were awarded under Rule 12.30(c) for respondents' costs in filing the motion, although complainant was provided a chance to include with his verified statement any reasons why his discovery actions should not result in assessment of such fees (*see id.*, note 2). By subsequent order, it was determined that complainant had persisted in not producing the materials sought in discovery and thus had not complied with the August 18 Order (*see* Order Denying Motion to Dismiss and Order Imposing Sanctions for Failure to Comply with Discovery Order, dated September 20, 2000). Pursuant to Rule 12.35, sanctions were imposed in the form of (1) adverse inferences to be drawn from the materials not produced (provided the inferences were not inconsistent with complainant's previous submissions), and (2) a prohibition against complainant's filing anything with his verified statement that should have been filed in reply to the discovery requests.

Both sides have now submitted final statements. Accordingly, the record as made by the parties – consisting of the complaint, the answer, complainant's minimal discovery responses and the adverse inferences based thereon, and the parties' respective verified statements – is complete and the case is ready for decision.

Upon careful consideration of the record, it is concluded that complainant has failed to prove that any violations of the Act occurred, or if they did, that such violations proximately caused any damages. Therefore, the complaint is DISMISSED.

Respondents submitted, as ordered, their attorney's bill of costs associated with filing the motion to compel (Attachment D to Respondents' Verified Statement). That document, attached to its verified statement, states that in fact no attorney time was billed to respondents for preparing and filing the motion (id. at ¶ 2). Copying and mailing costs were incurred in the amount of \$12.98 (id. at ¶ 3). Therefore, an award is made to respondents for that amount.

Reparation Award

Based upon the prior determination that complainant without substantial justification necessitated the filing by respondents of a motion to compel, complainant IS ORDERED to pay costs to respondents in the amount of \$12.98.²

Dated: October 23, 2000

JOEL R. MAILLIE
Judgment Officer

Respondents' attorney included with the Bill of Costs an itemization of charges assessed respondents "for other time associated with the motion," this being one quarter-hour spent drafting a letter to complainant reminding him of the need to answer discovery, and one quarter-hour spent reviewing the Order granting the motion (*id.* at ¶ 2). Although counsel's attempt to secure complainant's compliance with discovery without the need for a motion to compel is appreciated, the Rule does not authorize assessment of costs for informal reminders provided to the opposing side. Nor does the Rule authorize assessment of costs for time spent reading the court order granting a party's motion to compel. Accordingly, the request for fees beyond those specified in the Order in the text is DENIED.

² As provided in Rule 12.106(e), payment of the reparation award must be made within 45 days following service of this Final Order by the Proceedings Clerk, unless the Commission takes review of the case or otherwise suspends the duty of satisfaction. Failure to satisfy the award will result in prohibition of the non-paying party's right to trade on all contract markets. *See* Rule 12.407(c).