UNITED STATES OF AMERICA Before the COMMODITY FUTURES TRADING COMMISSION

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OFFICE OF PROCEEDINGS PROCEEDINGS CLERK

KAREN HOLLANDER

v.

CFTC Docket No. 05-R017

COLIN FERN, KEN WOLF COMMODITIES d/b/a KJW, LLC, and KENNETH J. WOLF

OPINION AND ORDER

Karen Hollander ("Hollander") appeals from an Administrative Law Judge's ("ALJ") refusal to enforce the terms of the settlement agreement she reached with respondents Colin Fern ("Fern"), Ken Wolf Commodities d/b/a KJW, LLC ("KJW") and Kenneth J. Wolf ("Wolf"). The ALJ held that respondents in good faith had substantially complied with the settlement agreement. Hollander claims that respondents did not act in good faith and that in any case the result of the ALJ's analysis is contrary to the language of the settlement agreement. Respondents defend the finding of good faith and urge affirmance of the ALJ's decision.

For the reasons explained below, we conclude that the ALJ lacked jurisdiction to consider the dispute over the settlement agreement. We therefore vacate the ALJ's decision and dismiss the proceeding.

BACKGROUND

Hollander filed her initial Complaint in December 2004. Appearing *pro se*, she alleged solicitation fraud and sought damages of \$100,000. After retaining counsel, Hollander filed an amended Complaint in August 2005. This Complaint alleged solicitation fraud and churning and sought damages of \$118,462.72. Respondents denied all allegations of wrongdoing in the two-Complaints. The parties exchanged documents during the discovery period and the ALJ

scheduled a hearing in the matter for December 15, 2005.

On December 13, 2005, the ALJ issued an order indefinitely postponing the hearing. The order indicates that this action was taken upon the joint motion of the parties. On December 20, 2005, the ALJ issued an order dismissing the proceeding with prejudice. The order stated that the parties had resolved all issues and jointly requested that the Complaint be dismissed.

On December 21, 2005, the Office of Proceedings received a Stipulation of Dismissal signed by counsel for all the parties. The Stipulation specifically provided that the reparations tribunal would retain jurisdiction to resolve all matters relating to the agreement to settle the dispute.¹ The settlement agreement was not included with the Stipulation.

On February 6, 2006, the Office of Proceedings received a Notice of Breach of Settlement Agreement from Hollander's counsel. The Notice requested the ALJ to enter judgment for the full amount of the claim in the Amended Complaint along with legal fees and costs, plus interest. The settlement agreement, which was attached to the Notice, provided:

All time and good funds requirements of this Agreement are material and a breach of any shall have no forgiveness period unless agreed to by the opposing Party. Should a breach of this Agreement occur the offended Party shall notify the Reparations Tribunal to which the above referenced litigation is assigned and without further proceedings said Tribunal shall enter judgment in the proceeding for the full extent of the claim in the Amended Complaint along with legal fees and costs in prosecuting the claims.

On February 7, 2006 the ALJ ordered respondents to show cause why his order of dismissal should not be vacated and judgment granted to Hollander for the full amount of her claim plus costs and legal fees. In the order, the ALJ noted that the settlement agreement called for three payments to Hollander from respondents. He directed respondents to show the amount and date of payments made to Hollander in connection with the settlement agreement.

¹ The document specifically referred to compliance with the agreement, interpretation of the agreement, and the resolution of any disputes concerning the agreement.

On February 8, 2006, respondents filed their Verified Response to the Order to Show Cause. They claimed that KJW made the first payment of \$40,000 on December 20, 2005. They admitted that KJW failed to make the second payment on the due date of January 31, 2006. They claimed that this was an unintentional oversight that was the result of disruption that Hurricane Wilma caused to KJW's office. They noted that KJW's office was crowded, busy, and often chaotic and emphasized that KJW and its employees were doing the best they could under difficult conditions. Finally, they stated that on February 7, 2006 they had sent a cashier's check to Hollander for \$20,019.07 representing the original \$20,000 due on January 31, 2006 plus interest at the rate of 4.35% for eight days. In addition, they had provided a company check for the final \$20,000 payment, dated four days before the due date.

In summary, respondents stated that their failure to make the second payment timely was unintentional and that they had paid interest to compensate Hollander for the delay. They requested that the ALJ exercise his discretion and deny Hollander's motion for entry of judgment.

On February 8, 2006, Hollander filed her reply to respondents' response. First, Hollander emphasized the settlement agreement's terms regarding late payments and the absence of any forgiveness period. She also emphasized that the settlement was entered seven weeks after Hurricane Wilma and it was then 14 weeks since the hurricane hit. Hollander stated that KJW was continuing its business as a futures commission merchant and should be held responsible for the proper keeping of its books and records. Finally, she noted that the ALJ did not have the discretion to rewrite the negotiated terms of the settlement agreement.

On February 9, 2006, the ALJ issued his ruling on Hollander's motion. He noted that he had not reviewed or approved the settlement agreement and explained that, as a general rule, he

was "not in the business of enforcing private contracts that [were] not a part of an evidentiary record." Order at 1. Finding that respondents had acted in good faith and substantially complied with the settlement agreement, the ALJ denied Hollander's motion.

On appeal, Hollander argues that the Commission has the authority to hear claims, such as contract disputes, that are incidental to its reparations authority. In support, Hollander cites to *CFTC v. Schor*, 478 U.S. 833 (1986) and *Pal v. Reifler*, *Inc.*, [1996-1998 Transfer Binder]

Comm. Fut. L. Rep. (CCH) ¶ 27,237 (CFTC Feb. 2, 1998). She also cites to *Jordan v. Chippas*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,341 (CFTC May 11, 1998) as an example of the Commission enforcing the terms of reparation parties' settlement agreement.

In addition, Hollander argues that respondents' good faith is irrelevant to the issue before the ALJ. Hollander contends that the focus must be on the words of the settlement agreement where there is no mention of a good faith standard. She complains that the ALJ erred by rewriting the terms of the parties' agreement and asks the Commission to grant judgment for the full extent of the claim with interest from the date of the settlement agreement, plus legal fees and costs.

Respondents emphasize that their failure to pay the second installment was the result of an unintentional oversight that was the result of KJW's chaotic working conditions at the end of January 2006. They also note that KJW withdrew its CFTC registration and membership with the National Futures Association on January 17, 2006. Finally, they note that they have paid Hollander the overdue amount plus interest as well as the last payment due under the settlement agreement. They contend that under the circumstances shown, the ALJ properly denied Hollander's Motion for Entry of Judgment.

DISCUSSION

Private parties cannot, by agreement between themselves, confer jurisdiction upon the Commission that Congress has not granted. The ALJ's dismissal of the Complaint was pursuant to Commission Rule 12.21, which governs "voluntary" dismissals. The rule does not mention settlement agreements. It simply states that a voluntary dismissal may be obtained by any party who files a stipulation of dismissal duly executed by all of the complainants and each respondent against whom the complaint has been forwarded. The rule explains that the dismissal shall be with prejudice for purposes of filing in the reparations forum but, unless otherwise stated in the stipulation, without prejudice to the parties' right to seek redress in such alternative forums as may be available for adjudication of their claims.

The rule provides that when a presiding officer receives a written stipulation of dismissal which satisfies the requirements of the rule, he "shall" issue an order of dismissal and serve a copy upon each of the parties. The rule does not require the filing of the underlying settlement agreement or grant any authority to the presiding officer to approve or disapprove the underlying settlement agreement. The rule also does not include any language dealing with a motion to vacate the dismissal due to a failure to comply with a settlement agreement or a motion to enforce a settlement.²

In Murphy v. Madsen, CFTC Docket No. 89-213, 1992 WL 88340 (CFTC Apr. 22, 1992) the Commission considered an appeal from an order defaulting a respondent for failure to comply with the terms of a settlement agreement. In vacating the default judgment, the Commission noted that Murphy's claim under the Commodity Exchange Act ("CEA") was

² In *Melton v. Pasqua*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,152 (CFTC Sept. 9, 2002), aff'd 339 F.3d 222 (4th Cir. 2003), the Commission considered whether the parties had entered into a valid stipulation of dismissal and reversed an ALJ's ruling that no valid stipulation of dismissal had been filed. We note that none of the parties to this proceeding have challenged the validity of their stipulation of dismissal.

extinguished when he accepted Madsen's offer of settlement and the ALJ issued his unconditional order of voluntary dismissal. Accordingly, the ALJ lacked jurisdiction to reopen the matter.³ The Commission noted that Murphy remained free to enforce his settlement agreement in an appropriate forum.⁴ Under *Murphy's* holding, the ALJ lacked jurisdiction to consider Hollander's motion to enforce her settlement.

Jordan, a case cited by Hollander, is not to the contrary. In that case, the issue was whether Jordan should be subject to the sanctions the CEA imposes on reparation parties who fail to satisfy an award made by a presiding officer, not whether the Commission should enforce settlements. Unlike the case presently before the Commission, Jordan involved a damage award based on a finding of a violation of the CEA. Failure to pay that award, not a failure to comply with a settlement agreement, was the basis for the Commission's imposition of

³ In some reparations proceedings, the parties have made their Stipulation of Dismissal effective upon performance of their settlement agreement. See, e.g., Fine v. Barkley Financial Corp., Docket No. 05-R068 (Notice of Settlement and Joint Stipulation of Dismissal with Prejudice)(July 6, 2006) stating, as relevant here:

[[]P]ursuant to § 12.21... the parties hereby stipulate to the dismissal with prejudice of the above-referenced matter upon full performance of the parties' obligations under the Settlement Agreement... [anticipated to be completed]... on or before September 7, 2006. Accordingly, unless the Court is informed otherwise by any of the parties to this action, the parties request that the Court dismiss this matter with prejudice on September 7, 2006.

The Judgment Officer issued an order dismissing the case on September 14, 2006. Parties who elect to proceed in this manner apparently have found an effective way of obtaining performance within the scope of the Commission's Regulations.

⁴ See also Shenkle v. Chillmark Commodities Corp., CFTC Docket No. 88-R10, 1989 WL 242150 (CFTC Sept. 14, 1989)(if a complaint is dismissed pursuant to Rule 12.21 based on a settlement, the Commission's jurisdictional interest in the parties' underlying dispute is eliminated).

⁵ A presiding officer ordered Chippas to pay complainant \$2,437.50 plus interest and costs. When Chippas failed to pay the entire amount, Jordan asked the Commission to impose statutory nonpayment sanctions (*i.e.*, a prohibition from trading and a registration suspension) as provided for in Section 14(f) of the CEA, 7 U.S.C. § 18(f) (2000). Consequently, the Commission held that Chippas should be subject to these nonpayment sanctions until he paid the entire amount awarded.

sanctions.⁶ Therefore, we do not believe that *Jordan* justifies a retreat from the holding in *Murphy*.

Hollander's reliance on *Schor* and *Pal* also is misplaced. *Schor* involved a debit balance counterclaim filed by the respondent in a reparations case. The Supreme Court upheld the Commission's authority to reach such counterclaims in the course of exercising its statutory reparations jurisdiction. *Pal* involved a counterclaim for attorney fees based on respondent's customer agreement with complainant. The Commission held that its Regulation 12.314(c) expressly stated that an ALJ may award reasonable attorney fees and costs when warranted. Neither case, therefore, involved enforcement of a settlement agreement as Hollander seeks here.

CONCLUSION

For the foregoing reasons, we vacate the ALJ's order and dismiss the proceeding.

IT IS SO ORDERED.⁷

By the Commission (Chairman JEFFERY and Commissioners LUKKEN, HATFIELD and DUNN).

Eileen A. Donovan

Acting Secretary of the Commission

Commodity Futures Trading Commission

Dated: October 30, 2006

⁶ Under Section 14(d) of the CEA, 17 U.S.C. § 18(d) (2000), reparation awards are enforceable in a U.S. district court.

⁷ Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e) (2000), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.