

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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ROBERT W. KAPS and DONNA C. KAPS

v.

EXECUTIVE COMMODITY CORP.,
INTERNATIONAL COMMODITY
CLEARING LLC, MARK JEFFREY DYM,
THOMAS COURTLAND KENNEDY,
ALBERTO JESUS JIMENEZ and CRAIG
GORDON NILSEN

CFTC Docket No. 06-1046

ORDER GRANTING
INTERLOCUTORY REVIEW

Complainants Robert and Donna Kaps (“Kaps”) seek interlocutory review of the Administrative Law Judge’s (“ALJ”) order denying complainants’ motion for change of the hearing location to a location other than Miami, Florida. For the reasons that follow, we take review, vacate the order setting the hearing location in Miami, and order the ALJ to determine a hearing location in accordance with the requirements of Commission Rule 12.312.

BACKGROUND

Complainants, who live in St. Louis, Missouri, filed a reparations complaint in June 2006, alleging various violations of the Commodity Exchange Act (“Act”) by respondents Executive Commodity Corporation (“ECC”), International Commodity Clearing, LLC (“ICC”), Craig G. Nilsen (“Nilsen”), Alberto Jimenez (“Jimenez”), Mark Dym (“Dym”) and Thomas Kennedy (“Kennedy”), all of Florida. The Kaps elected the formal decisional procedure before an ALJ, and requested that the hearing be held in the St. Louis, Missouri area, their hometown. Only respondents Nilsen, ICC and Jimenez answered the complaint, and none designated a

hearing location or opposed venue in St. Louis. Respondents Dym, Kennedy and ECC did not answer the complaint, and were subsequently found in default.

Notwithstanding complainants' request, the ALJ *sua sponte* set the hearing location as Miami in his February 13, 2007 Order and Notice of Hearing, issued at the close of discovery. Complainants filed a March 7, 2007 motion requesting a change of location, arguing that the ALJ failed to give "due regard for the convenience of the parties" when selecting the site, as provided by Commission Rule 12.312(a). Complainants' Motion at 1. Complainants argued further that Miami is not one of the designated hearing locations prescribed by Commission Rule 12.312(b). They also contended that, under Rule 12.312(b), an ALJ can depart from the designated list of hearing locations only upon an affidavit of a party asserting that none of the listed cities is located within 300 miles of the party's principal residence—a prerequisite lacking in this case. Complainants' Motion at 2.

Nilsen, the only respondent who replied to complainants' motion, objected to a change in hearing location, essentially arguing that Miami is appropriate because it is where the majority of respondents reside. Nilsen Reply at 2.

The ALJ denied the motion without explanation on March 8, 2007, and complainants filed a timely application to the Commission for interlocutory review, reiterating that the ALJ failed to give "due regard for the convenience of the parties" in selecting a hearing location. Interlocutory Appeal at 1, 3. They contend that they will face "burdensome" expenses if required to travel to Miami. Interlocutory Appeal at 2. Only ICC responded to the appeal, claiming that the Kaps failed to demonstrate extraordinary circumstances warranting interlocutory review, and maintaining that the ALJ properly exercised his discretionary powers

in designating a hearing location. ICC also argues that the Kaps have adequate financial resources to travel, as indicated by their account opening documents. ICC Response at 1-2.

DISCUSSION

Commission Rule 12.309 provides for interlocutory review in a narrow set of circumstances. Under Rule 12.309(a)(3), the Commission may review a ruling when the ALJ certifies that (i) the ruling presents a controlling issue of law or policy; (ii) an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and (iii) subsequent reversal of the ruling would cause unnecessary delay or expense to the parties. The Commission may review an uncertified ruling under Rule 12.309(a)(4) when the conditions of Rule 12.309(a)(3) have been satisfied and extraordinary circumstances are shown to exist. *Cf. In re Slusser*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,330 (CFTC Mar. 8, 1995)(the Commission reviews rulings before a final decision on the merits only under extraordinary circumstances). The Kaps are proceeding under Rule 12.309(a)(4).

In determining whether extraordinary circumstances exist, we balance the benefits of immediate intervention against those flowing from our policy of discouraging piecemeal appeals, including the conservation of Commission resources and the preservation of the orderly conduct of Commission proceedings. *FDIC v. Shearson Lehman Hutton, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,731 at 44,015 (CFTC July 1, 1996). The party seeking review bears the burden of establishing extraordinary circumstances. To meet that burden, the petitioning party must demonstrate that a compelling need exists to act prior to the presiding officer's completion of the initial decision. *Id.*

Complainants argue that the ALJ misapplied Rule 12.312, which controls the selection of a hearing location. They urge that were the rule correctly applied, the hearing location would be

changed. The circumstances of an oral hearing—including its time, manner and place—self-evidently bear materially on the ultimate resolution of a case. It is equally clear that a post-hearing determination regarding the propriety of a hearing location may determine that expenses were incurred unnecessarily. Thus, we find that the requirements of Rule 12.309(a)(3) have been met. Because the Commission has rarely been called upon to address the contours of Rule 12.312, and because where a hearing is held may be a moot issue by the time a case is ripe for appellate review, we find that the fourth prong of Rule 12.309(a)(4)—extraordinary circumstances—has been satisfied as well.

Commission Rule 12.312(a) states in relevant part that “[i]f and when the proceeding has reached the stage of an oral hearing, the [ALJ], *giving due regard for the convenience of the parties*, shall set a time for hearing, as well as a location *prescribed by paragraph (b) of this section . . .*” (Emphasis added.) Section 12.312(b) states in relevant part that “except as provided in this subparagraph, the location of an oral hearing *shall be* in one of the following cities.” (Emphasis added.) There follows an alphabetical list of 20 cities within the continental United States, which includes neither St. Louis nor Miami. The rule then states precisely when another location may be chosen: “The [ALJ] may, in any case where a party avers, in an affidavit, that none of the [listed] cities is located within 300 miles of his principal residence, waive this subparagraph and, upon giving due regard for the convenience of all of the parties, order that the hearing be held in a more convenient locale.” Subparagraph (b) of Rule 12.312 operates as a limit on the discretion generally enjoyed by a presiding officer in the conduct of a proceeding.

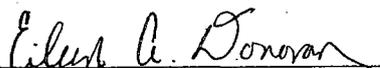
In this case, no party averred that none of the listed hearing locations was within 300 miles of the party’s principal residence. It does not appear that any of the parties could have

done so, inasmuch as all parties live within 300 miles of at least one listed city.¹ Therefore, no basis exists for departing from the list. *Compare Cooper v. Amato, et al.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,111 at 38,175-76 (CFTC Aug. 20, 1991)(where complainant resided in Huntsville, Alabama and respondent lived in Pembroke Pines, Florida, hearing was scheduled for Florence, Alabama).

Accordingly, the order setting the hearing location in Miami is vacated. The ALJ shall reschedule the hearing in accordance with Rule 12.312. We note that the rule does not create a preference regarding hearing location depending upon whether a litigant is a complainant or respondent. Rule 12.309(a) calls upon the ALJ to consider the convenience of "parties," subject to the prescription of 12.309(b).

IT IS SO ORDERED.

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



Eileen A. Donovan
Acting Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 19, 2007

¹ We take notice of the fact that Miami, where respondents reside, is within 300 miles of at least one listed city, St. Petersburg. Similarly, complainants' home, St. Louis, is within 300 miles of at least one listed city, Kansas City, Missouri. *See, e.g.,* www.mapquest.com.