

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

ROBERT W. KAPS and DONNA C. KAPS

v.

MARK JEFFERY DYM, EXECUTIVE
COMMODITY CORPORATION and
THOMAS COURTLAND KENNEDY

CFTC Docket No. 06-0946

ORDER

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Pursuant to Commission Regulation 12.403, we take *sua sponte* review of this matter to determine whether the Administrative Law Judge (“ALJ”) abused his discretion in applying Regulation 12.22 governing default proceedings. Upon the failure of respondents Mark Jeffery Dym, Thomas Courtland Kennedy and Executive Commodity Corporation to answer the complaint filed by Robert W. and Donna C. Kaps (“Kaps”), the ALJ elected not to resort to the steps provided in Regulation 12.22(b), which are aimed at facilitating a resolution on the merits of a case. Instead, the ALJ required complainants to file a complex motion for summary disposition or to proceed to a hearing, either or both of which may have been avoidable.

The Kaps’s complaint, received on June 26, 2006, alleged fraudulent solicitation and other violations by Executive Commodity Corporation (“ECC”), an independent introducing broker; Craig G. Nilsen (“Nilsen”) and Alberto Jimenez (“Jimenez”), associated persons of ECC; Mark Dym (“Dym”) and Thomas C. Kennedy (“Kennedy”), ECC directors who supervised Nilsen and Jimenez; and International Commodity Clearing, LLC (“ICC”), the non-guarantor clearing futures commission merchant that carried their account. Complainants alleged that during several months in 2005, they lost \$117,656.

The Commission's Office of Proceedings served the complaint on all respondents on August 11, 2006. The docket sheet indicates that as of October 11, no answer had been received from ECC, Kennedy or Dym.¹ ICC, Jimenez and Nilsen filed separate answers and on October 27, the case was assigned to an ALJ and the parties engaged in discovery. On February 13, 2007, the ALJ issued a prehearing order that as relevant here stated that "[s]ince [ECC, Kennedy and Dym] did not file answers to the complaint, they are in default. Consequently, they cannot introduce evidence or otherwise participate in the hearing as parties." Order and Notice of Hearing at 1 n.1, citing Regulation 12.22(a). The order otherwise instructed the parties as to the deadline and required content for prehearing memoranda and scheduled a hearing for April 10, subsequently rescheduled to July 17.

The non-defaulting parties filed a joint motion on July 11 to continue the hearing indefinitely, which the ALJ granted the following day. The Kaps subsequently reached settlements with ICC, Nilsen and Jimenez.²

¹ A September 6, 2006 memorandum to the record by Office of Proceedings staff notes that the complaint served on ECC was returned as undeliverable. A similar memorandum of September 12 notes that the complaint served on Kennedy was returned as unclaimed. Postal records show that the complaint served on Dym was received and signed for by a third person on August 15.

² On July 23, the Kaps and Nilsen executed a Stipulation of Partial Voluntary Dismissal with Prejudice pursuant to Regulation 12.21, which stated that the Kaps had received an undisclosed settlement amount and that the parties stipulated to the dismissal with prejudice of their complaint against Nilsen. The Kaps and Jimenez filed a separate Joint Stipulation of Partial Voluntary Dismissal with Prejudice and Motion to Stay Proceeding, stipulating to the dismissal of Jimenez contingent upon his payment of an undisclosed settlement amount on or before August 15. The parties requested a stay of proceedings to August 31, with dismissal to occur on that date unless the Kaps filed an objection before August 31. The Kaps and ECC submitted a similar stipulation, with payment to occur by August 10. The ALJ entered an order on July 26 dismissing Nilsen and staying the proceeding as to ICC and Jimenez.

Complainants filed an objection on August 30 to dismissal of ICC, alleging nonperformance of their settlement agreement. On September 24, the ALJ ordered the parties to show cause why the stay should not be lifted as to ICC, and dismissed the complaint as to Jimenez. In response, ICC submitted a copy of its settlement agreement with the Kaps, under which it agreed to pay them \$3,500; a check in that amount dated July 17 and drawn on the account of Nations Investments LLC ("Nation"); and a pleading asserting that the Kaps's lawyer received the check on July 19 but did not attempt to cash it until sometime in August. Meanwhile, ICC asserted, the Commission's Division of Enforcement obtained an ex parte judicial asset freeze against Nations on July 30. *See Ex Parte Statutory Restraining Order Concerning Assets and Documents and Expedited Discovery entered in CFTC v. Nations*

On November 29, the ALJ issued an order as to ECC, Dym and Kennedy, the respondents in default, stating in part:

If complainants . . . want us to employ default procedures in disposing of their complaint, they must file a motion for default judgment” with “proposed findings and conclusions concerning any violations of the Commodity Exchange Act . . . committed by each respondent and the actual damages proximately caused by such violations for which each respondent is liable. The proposed findings and violations must be thorough, detailed and supported by citations to the documentary record.

Order at 1-2. After providing “guidance” on the legal standards applicable to default judgment motions, the ALJ added: “Should we determine that a default judgment is not merited on the present record but that further fact-finding may help resolve the matter, we will establish appropriate procedures” [as provided in Regulation 12.22(b)]. *Id.* at 3-4. The Kaps did not file a motion by the ALJ’s December 31 deadline. Accordingly, on January 7, 2008, the ALJ scheduled a hearing for March 4, and ordered the Kaps to submit a notice of intent to participate and a prehearing memorandum that complied with his February 13, 2007 prehearing order. He stated that if the Kaps failed to file a notice of participation, “we will dismiss the complaint with prejudice to their rights to re-file or to seek redress in any alternative forum otherwise available for adjudication of their claims.” *Id.* at 4. The Kaps did not respond, whereupon the ALJ on January 28, 2007, dismissed the complaint “with prejudice,” but with no mention of other forums.

Investments, LLC et al., 07-61058 (S.D. Fla. July 30, 2007), submitted in this case as Exhibit D to ICC’s Response to Order to Show Cause (Oct. 9, 2007).

ICC explained that the check was drawn on Nations because ICC had ceased operating in June 2005. Resp. to Show Cause Order at 2. It sought dismissal of the complaint, arguing that it had performed, the check being good when issued, or alternatively, that judgment against it be entered for the settlement amount. *Id.* at 2-3.

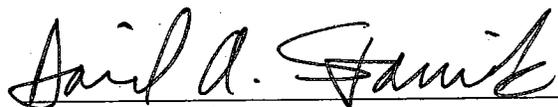
The ALJ on October 15 instituted summary disposition procedures and asked the parties to brief the jurisdictional issues raised by ICC’s response. ICC filed a motion for summary disposition, to which the Kaps did not respond. The ALJ granted summary disposition in ICC’s favor on November 29, holding that he lacked jurisdiction in light of the waivers contained in the parties’ settlement agreement.

We take review to determine whether the ALJ abused his discretion by requiring the Kaps to file a default motion as a precondition to his using the procedural shortcuts contained in Regulation 12.22. Upon a party's default, a presiding officer may on his or her own initiative enter findings and conclusions regarding the alleged violations, and, if warranted, award damages. Moreover, if the record is insufficient to support the alleged violations or award the damages sought, a presiding officer may order production of supplementary evidence from the non-defaulting party "and may enter a default order and an award based thereon." Regulation 12.22(b). The reparation rules do not require non-defaulting parties to assume the burden of filing a motion for default judgment, with elaborate findings and conclusions, as a precondition to judicial scrutiny of the record.

In light of our action, this case is not final as to the Kaps, ECC, Dym or Kennedy. Because the Kaps have settled with the remaining respondents, this case is final as to ICC, Nilsen and Jimenez as of the date of this order.

IT IS SO ORDERED.

By the Commission (Acting Chairman LUKKEN and Commissioners DUNN, SOMMERS and CHILTON).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 26, 2008