UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. SD 05-01
LESLIE JEAN WNUKOWSKI	:	OPINION AND ORDER

Leslie Jean Wnukowski ("Wnukowski") appeals from a decision revoking her registrations as a commodity trading advisor ("CTA"), commodity pool operator ("CPO"), and associated person ("AP"). *In re Wnukowski*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,045 (Initial Decision March 29, 2005) ("I.D."). The presiding Administrative Law Judge ("ALJ") issued the I.D. in the context of a default proceeding resulting from Wnukowski's untimely submission of an Answer to the Commission's Complaint.

On appeal, Wnukowski claims that the ALJ abused his discretion by conducting a default proceeding. She also insists that she has a meritorious defense to the allegations of the Commission's Complaint. In this regard, she relies on facts set forth in a Declaration she submitted with a motion for reconsideration of the I.D. The Division of Enforcement ("Division") defends the ALJ's conduct in the proceeding and argues that the Commission should not consider Wnukowski's Declaration because it was not filed until two weeks after the I.D. was issued and the record was closed.

For the reasons that follow, we conclude that Wnukowski has not justified reopening the record to introduce her Declaration. We also conclude that the ALJ did not

abuse his discretion in conducting a default proceeding. Finally, we affirm his conclusion that the record supports revoking Wnukowski's registrations.

BACKGROUND

On December 30, 2004, the Commission issued a Complaint alleging that Wnukowski was statutorily disqualified from registration under Sections 8a(3)(G) and (M) of the Commodity Exchange Act ("Act").[1] According to the Complaint, in February 2002 Wnukowski became registered as a sole proprietor CTA and CPO, and as an associated person ("AP") of both registrants. The Division alleged that in applying for registration in December 2001, Wnukowski willfully failed to disclose that she had been employed by Unique Strategies, Inc. ("Unique") since June 2000. Complaint at ¶¶ 3, 7.[2]

Applicants seeking registration as APs must complete Form 8-R, which requires disclosure of "[p]resent and past employment for the past 10 years" and provides that "[a]ll time must be accounted for, including self-employment, part-time employment, unemployment, military service and school." The Division claimed that Wnukowski's failure to disclose violated Section 6(c) of the Act and Rule 3.12(c)(1)(iii), and raised a statutory disqualification under Section 8a(3)(G).

The Complaint raised multiple grounds in support of its allegation that other good cause existed under Section 8a(3)(M) for revoking Wnukowski's registration. The ALJ,

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[1] Section 8a(3)(G) disqualifies those who willfully make any materially false or misleading statement or willfully omit to state any material fact in such person's application or any update thereto. Section 8a(3)(M) disqualifies those subject to "other good cause."

[2] The Complaint claimed that the firm was incorporated in the state of Nevada in June 2000, and originally was named Commodity Futures, Inc. The Division produced a document showing that the corporation named Commodity Futures, Inc. changed its name to Unique in September 2000. *See* Exhibit 12 to the Division's Motion for Entry of a Default Judgment Order (Mar. 11, 2005). The articles of incorporation name Wnukowski as the sole director. Division Exhibit 11. Unique's original name notwithstanding, we have found nothing in the record or elsewhere indicating that the corporation ever was registered with the Commission in any capacity, or was required to be registered.

however, based his decision solely on the Section 8a(3)(G) allegation and expressly declined to reach the Division's Section 8a(3)(M) claims. Accordingly, there are no findings under Section 8a(3)(M) before us to review.[3]

The record shows that the Commission's Proceedings Clerk served the Complaint on Wnukowski on December 30, 2004 in accordance with Commission Rule 3.50(a). This section provides that service involves mailing by registered or certified mail to the address shown on the individual's registration application. It specifically states that service "will be complete upon mailing." The rule also provides that when service is effected by mail, "the time within which the person served may respond thereto shall be increased by three days." As explained in the Proceedings Clerk's letter that accompanied the Complaint, Rule 3.60(b) requires an applicant to file a response "[w]ithin 30 days after service." Accordingly, Wnukowski's response should have been received by the Office of Proceedings on or before Tuesday, February 1, 2005.

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[3] Because Wnukowski referenced her proposed defenses to the Section 8a(3)(M) allegations in her appeal brief, we provide the following summary of the Division's 8a(3)(M) claims. First, the Division alleged that Wnukowski was financially irresponsible. In this regard, the Complaint noted that Wnukowski had been named as a relief defendant in an injunctive action filed in April 1999 against Joseph P. McGivney, Sr. ("McGivney"). In a July 2000 consent order settling the action, Wnukowski was ordered to disgorge $169,920.48 plus post-judgment interest to persons owed restitution by McGivney. The Commission deferred Wnukowski's disgorgement obligation based on her sworn representation that she was unemployed, had no source of income, and few assets. (As noted, though, the Division alleged that Wnukowski was employed by Unique beginning in June 2000.) When the deferral expired on July 17, 2003, the Commission sent Wnukowski a demand letter, which she ignored, despite having available income to pay disgorgement. *See* Complaint at ¶¶ 5-10.

Second, the Complaint claimed that Wnukowski failed to make prompt production of required records. It alleged that on July 15, 2004 representatives of the Commission went to Wnukowski's office in Mokena, Illinois to inspect the books and records of her sole proprietorship CTA and CPO operations. Wnukowski was absent, and employees present at the office refused access to Commission personnel. The Commission did not gain access to any records for inspection until July 28, 2004. *See* Complaint at ¶ 11.

Finally, the Complaint alleged that Wnukowski intentionally sought to circumvent NFA oversight by failing to apply for NFA membership in connection with her registrations as a CTA, CPO, and AP, and trading for client accounts without being an NFA member. *See* Complaint at ¶¶ 12-13.

On February 10, 2005, the ALJ issued an order noting that Wnukowski had not filed an answer and therefore could be found in default.[4] The ALJ's order set a deadline of March 10, 2005 for the Division to file a motion for default judgment.[5] February 10, 2005 Order at 4. The ALJ required the Division to support its default motion and proposed findings with affidavits, transcripts, and other documentary evidence. *Id.* at 7.

On February 11, 2005, the Office of Proceedings received Wnukowski's motion seeking leave to file her response to the Complaint *instanter*. Wnukowski argued, through counsel, that her response should be accepted because it was only a few days late and that the press of other matters had made it impossible for counsel to file a timely response. The proffered Answer consisted of a series of bare admissions and denials that provided no basis to evaluate Wnukowski's claim that she was not subject to any statutory disqualifications. It did not include the "verified statement or affidavit" in support of the facts material to each challenge raised in the response, as required by Commission Rule 3.60(b)(1)(v). The Answer also failed to state whether Wnukowski intended to introduce evidence of mitigation or rehabilitation.

The ALJ analyzed Wnukowski's submission under the standards applicable to a motion for relief from default. He determined that Commission precedent established a three-part test for such relief: (1) whether the motion was filed within a reasonable time; (2) whether it demonstrated sufficient evidence of excusable neglect; and (3) whether the

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[4] Commission Rule 3.60(a)(4) states that an applicant or registrant who does not file a timely response to the Complaint will be deemed to have waived the right to a hearing on all issues and facts stated in the Complaint and that those issues and facts shall be deemed true for the purpose of the proceeding. It further states that the presiding officer may thereafter decide whether to issue an order of default in accordance with Commission Rule 3.60(g). That section states that the procedures for obtaining a default order and setting aside of a default order should follow the procedures set forth in Commission Rules 10.93 and 10.94.

[5] The order directed the Division to provide notice by February 24, 2005 if it did not intend to file a motion for default judgment.

moving party satisfied its burden of pleading a meritorious defense. February 16, 2005 Order at 3, *citing In re Thomas*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,461 at 47,207 n.32 (Initial Decision Nov. 10, 1998).

The ALJ determined that "Wnukowski filed her motion within a reasonable time." February 16, 2005 Order at 3. He found that the record did not establish that the late filing was the result of excusable neglect.[6] Finally, he found that the bare-bones response Wnukowski provided did not permit a determination that she could mount a meritorious defense if permitted to file late. In these circumstances, the ALJ concluded that Wnukowski had not established an appropriate basis for the relief she requested.

On March 11, 2005, the Division filed a detailed motion for a default judgment against Wnukowski. As required by the ALJ, the Division supplied affidavits and documentary evidence in support of its motion. To support its allegation that Wnukowski failed to disclose her employer at the time she filed her applications for registration in December 2001, the Division submitted a document headed "Employment Agreement" dated June 9, 2000. The document is signed by Wnukowski as president, secretary, and treasurer of Commodity Futures, Inc. (Unique's original name, *see supra* note 2), and by Joseph McGivney, Sr. as chief executive officer. The document states that "Wnukowski agrees to assume the positions of President, Secretary and Treasurer of Commodity Futures, Inc.," that she would report to McGivney and that her primary responsibility would be the development of proprietary stock, option, and commodity futures strategies. Division Exhibit 19.

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[6] In this regard, the ALJ noted that the attorney's claim that he was too busy with other matters did not establish excusable neglect. The judge also noted that there was no evidence that Wnukowski made a reasonable effort to supervise and assist her attorney. February 16 2005 Order at 4-5.

The Division also relied on investigative testimony Wnukowski offered in which she acknowledged receiving four to five thousand dollars a month from Unique. Division Exhibit 6 at 167-68. The Division submitted an analysis of Unique's bank records for the period December 2001 through December 2004, according to which it calculated that Wnukowski received payments averaging $4,805 a month during this period. Division Exhibit 7 at 3. In addition, the Division provided documents showing that Wnukowski had opened futures accounts in Unique's name in January 2002. Division Exhibits 13 and 14. Finally, the Division relied on evidence that Wnukowski had applied to the IRS for an employer identification number for Unique in December 2001. Division Exhibit 22. Wnukowski did not respond to the Division's motion.

In the I.D., the ALJ concluded that the Complaint's well-pled allegations showed that Wnukowski was "employed by Unique since June 2000." *Id.* at 57,190 n.10. He also found that the well-pled allegations showed that Wnukowski willfully failed to disclose this employment relationship in filing her AP registration application with NFA in December 2001. *Id.* at 57,190. Having concluded that the withheld information was material, the ALJ held that Wnukowski was statutorily disqualified from registration pursuant to Section 8a(3)(G) and presumptively unfit for registration. In the absence of evidence of mitigation or rehabilitation, the ALJ found Wnukowski unfit for registration. Accordingly, he revoked her registrations as a CTA, CPO, and AP. *Id* at 57,190-91. The ALJ specifically found that it was unnecessary to consider the Division's allegations under Section 8a(3)(M) of the Act. *Id.* at 57,190 n.14.

In response to the I.D., Wnukowski submitted a motion for reconsideration accompanied by the aforementioned Declaration. This motion claimed that

Wnukowski's response to the Complaint was filed within 31 days of the date Wnukowski actually received the Complaint. In the Declaration, Wnukowski explained that she did not disclose an employment relationship with Unique when she applied for registration, because at the time she did not believe that an employment relationship existed. In this regard, she claimed that she was not compensated by Unique until March 15, 2002.[7] The ALJ dismissed the motion on the same day Wnukowski filed it, on the ground that he lacked authority to consider it. In so ruling, he relied on Commission Rule 10.26(a).[8]

Wnukowski filed a timely notice of appeal and an appeal brief. In her brief, she criticizes the letter from the Proceedings Clerk that accompanied the Complaint because it did not state clearly that a response was due within 30 days of the date of the letter, not the date Wnukowski received it. She emphasizes that a response was filed within 31 days of her actual receipt of the Complaint on January 10, 2005.

She claims that her February 11, 2005 motion seeking leave to file her Answer out of time met the requirements of Rule 10.94 because it was filed promptly, set forth the reasons for the short delay and included an Answer to the Complaint. She claims that the cases the ALJ relied upon in denying the motion are distinguishable from the situation at issue.[9] She also argues that federal court precedent recognizes that decisions on the merits are favored over defaults. She also contends that her February 11, 2005 motion,

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[7] Wnukowski also offered explanations for the conduct underlying the Division's allegations that she was disqualified pursuant to Section 8a(3)(M). For example, she claimed that she was prepared to make payments to the government in accordance with the settlement terms but that she could not afford to make the large initial payment demanded by the government.

[8] This provision governs applications for relief not otherwise specifically provided for in the applicable rules. It states that motions filed *prior to* the filing of an initial decision shall be directed to the presiding ALJ.

[9] She notes that in *In re Catalfo*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,636 (CFTC Feb. 29, 1996) there was a pattern of dilatory conduct by respondent and that in *Thomas, supra* respondent had participated in the "Wells Notice" process prior to making an untimely response to the Complaint.

combined with her motion for reconsideration, establish that she has a meritorious defense to the Complaint's allegations.

In its answering brief, the Division urges the Commission to affirm the ALJ's decision. It asserts that under Commission Rule 3.50, service occurs when a Complaint is mailed, and that the Answer Wnukowski filed on February 11, 2005 was facially untimely. The Division also claims that the Answer fell far short of the requirements set forth in Rule 3.60(b). Finally, the Division contends that the well-pled allegations of the Complaint, as supplemented by the exhibits submitted with its motion for a default judgment, clearly establish that Wnukowski is statutorily disqualified under Section 8a(3)(G).

In her reply brief, Wnukowski reiterates that even if her Answer was late, entry of a default judgment was draconian in the circumstances of this case. Wnukowski also insists that she has a meritorious defense to the Complaint's allegations relating to financial responsibility and the production of records.

DISCUSSION

The Record on Review

Preliminarily, we must determine whether the Declaration attached to Wnukowski's motion for reconsideration is part of the record before us. The ALJ did not consider the facts included in the Declaration because Wnukowski filed it on April 14, 2005—16 days after the I.D. was issued. Commission Rule 10.107 sets forth the circumstances under which the Commission will reopen the evidentiary record to consider matters not raised before an ALJ. That rule contemplates a showing of materiality and reasonable grounds for failure to produce the evidence before the ALJ.

Wnukowski did not address either standard in presenting the Declaration. Our review establishes that the Declaration does include material information. We see no basis, however, for inferring reasonable grounds for her failure to produce the material to the ALJ before he issued his I.D. Wnukowski could have submitted the Declaration with a motion to reconsider the ALJ's February 16, 2005 order denying her request to respond to the Complaint instanter or in a response to the Division's March 11, 2005 motion for a default judgment. Having passed up these filing opportunities, Wnukowski has waived any potential right to have her Declaration considered in this proceeding. Accordingly, we do not weigh the Declaration in resolving this appeal.

The Propriety of a Default Proceeding

Wnukowski's Answer to the Complaint was filed in an untimely manner, accompanied by a motion asking permission to submit the Answer *instanter*. As noted above, the ALJ analyzed the submission under the standards applicable to a motion to vacate a default and denied it. Wnukowski argues that the ALJ abused his discretion in denying the motion.

The ALJ properly stated the three factors material to determining a motion to vacate a default, namely, whether: (1) the motion is filed within a reasonable time; (2) there is sufficient evidence of excusable neglect; and (3) the moving party pleads a meritorious defense. *See generally In re Catalfo*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 26,636 (CFTC Feb. 29, 1996). The ALJ denied the motion because Wnukowski failed to satisfy the latter two factors.

As to excusable neglect, Wnukowski argues that the 30-day period for filing an Answer should have begun to run when she received the Commission's Complaint. As

noted by the Division, however, Commission Rule 3.50(a) clearly provides that service of the Complaint is complete upon mailing. Wnukowski also criticizes the letter that accompanied the Complaint for stating that the Answer was due within 30 days of service rather than 30 days of the date on the letter. When read in the context of Rule 3.50, however, the letter provided fair notice of Wnukowski's filing obligation, and a copy of the rule was provided with the letter.[10] If she had any question about the date the Complaint was mailed, Wnukowski could have made an inquiry to the Proceedings Clerk. Finally, we agree with the ALJ that counsel's busy schedule does not justify a finding of excusable neglect and that Wnukowski has not shown that she took reasonable steps to supervise or assist her attorney.

The ALJ found that Wnukowski's Answer was so general that it did not permit him to determine whether she could mount a meritorious defense. Review of the Answer shows that it amounts to the type of "general denial of wrongdoing" that we found inadequate in *Catalfo*, ¶ 26,636 at 43,673. As noted above, the Answer is unaccompanied by the type of "verified statement or affidavit" specifically required by Commission Rule 3.60(b)(1)(v). Given these circumstances, the ALJ did not abuse his discretion by denying Wnukowski's motion and resolving this matter through a default proceeding.

The Statutory Disqualification

Wnukowski's default did not make the Division an automatic winner; it still faced the burden of proving her disqualification. The ALJ found that, taken together, the Complaint and the exhibits submitted with the Division's motion for a default judgment

[10] The last paragraph of the half-page letter states: "Enclosed for your convenience are copies of 17 C.F.R. Part 3 and 10. If you have any questions regarding this matter, you may contact me at (202) 418-5508." Wnukowski submitted a copy of the letter as Exhibit A to her appeal brief.

established that Wnukowski was subject to a statutory disqualification pursuant to Section 8a(3)(G) because she willfully failed to disclose her employment by Unique when she applied for registration.

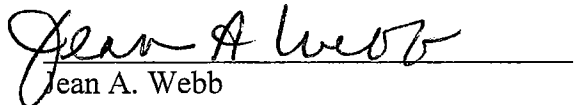
Our review of the record confirms the ALJ's analysis. The June 2000 employment contract is compelling evidence that Wnukowski worked for Unique. Wnukowski's above-described activities on Unique's behalf in December 2001 and January 2002 remove any doubt that an employment relationship existed when she sought registration as a CPO and CTA. Because the record contains no evidence of mitigation or rehabilitation, the presumption of unfitness arising from this disqualification is conclusive. Accordingly, the ALJ acted properly in revoking Wnukowski's registrations as a CTA, CPO, and AP.

CONCLUSION

The decision below is affirmed. The revocation of Wnukowski's registrations shall become effective 30 days after the date this Opinion and Order is served.

IT IS SO ORDERED.[11]

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



Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: May 3, 2006

[11] A motion to stay the effective date of this Opinion and Order pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. *See* Commission Rule 10.106.