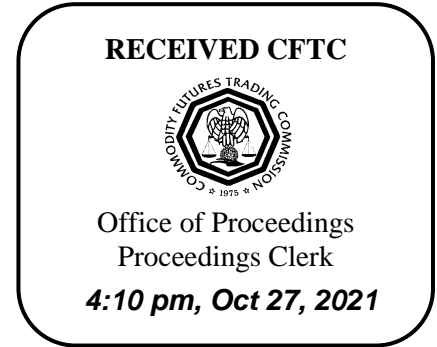




U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings



Baruch Marcus,

Complainant,

v.

Gregory Ian Wasserman,

Respondent.

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CFTC Docket Nos. 21-R001
Served electronically

**INITIAL DECISION &
DEFAULT JUDGMENT ORDER**

Respondent Gregory Ian Wasserman has missed discovery deadlines at least four times and has done so knowingly and without adequate explanation. Because of this, I issued an Order to Show Cause why a default judgment should not be issued against Wasserman in Marcus’s favor unless Wasserman produced the outstanding discovery and an explanation of its tardiness no later than October 20, 2021. He has not done so, and this Default Judgment Order is the result.

I find that Complainant Baruch Marcus has established that Respondent Wasserman violated Commission Rule 180.1, 17 C.F.R. § 180.1, and Section 4(b) of the Commodity Exchange Act, 7 U.S.C. § 6(b) by virtue of his default, and that these violations resulted in damages to Marcus totaling \$45,000. Accordingly, Wasserman is ordered to pay Marcus reparations of \$45,000, plus post-judgment

interest on that amount at .08 % compounded annually from the date of this award to the date of payment, plus \$250 in costs for the filing fee.

I. Procedural History and Findings of Fact

1. On October 20, 2020, Complainant Baruch Marcus filed a claim alleging that Wasserman, a registered introducing broker, fraudulently converted the funds Complainant entrusted to him for Wasserman's own use instead of funding two commodity trading accounts (or maintaining those funds to provide margin for those accounts), as Wasserman informed Marcus he would. The Complaint seeks \$45,000 in damages, consisting of those funds that were improperly used by Wasserman.

2. Wasserman, in his Answer filed February 16, 2021, contended that he was simply the Introducing Broker and could not be blamed for Marcus's trading losses. He also, confusingly, brought up a second customer who Marcus may or may not have been advising and who has nothing to do with the facts of Marcus's claims against Wasserman.

3. Wasserman, importantly, did not deny taking \$45,000 from Marcus, nor did he represent that he invested that money as per Marcus's understanding or directions.

4. To the contrary, Wasserman did state in his Answer that he is "responsible" for \$18,416.95 of the \$45,000 in damages to Marcus.

5. On April 7, 2021, I issued an Initial Scheduling Order requiring the parties to serve their discovery requests by May 7, 2021 and then their responses to

those requests by June 7, 2021. In that Initial Scheduling Order, I warned the parties that failure to comply with these deadlines could result in the imposition of default judgment against them.

6. Marcus filed his discovery requests on time.

7. Wasserman, however, let both the discovery request and responsive deadline pass with no comment on when or if he would be producing his discovery responses.

8. On June 8, 2021, Marcus followed up the day after the responses were due with an email to Wasserman inquiring about the missing responses. Instead of providing a reasonable explanation for his failure to comply with this Office's Order, Wasserman responded in a belligerent manner, stating that he was "preparing to counter-sue" in a different forum, mistakenly asserting that this forum "caps damages." Compl. Motion To Compel (Jul 2, 2021), Ex. B.

9. On June 16, 2021, I attempted to referee the discovery dialogue and asked the parties to inform me no later than Friday, June 18, 2021 whether they had resolved their discovery disputes.

10. That same day, Wasserman sent two responsive documents by email to Marcus without copying this Office, as he was ordered to do in the Notice of Proceeding and the Initial Scheduling Order.

11. Again that same day on June 16, 2021, Wasserman sent this Office a non-responsive, irrelevant email stating "I can't send documents I don't have access to." He identified neither the documents to which he did not have access, nor the

discovery requests associated with those documents. He reiterated his assertion in a second email sent to this Office that same day.

12. Wasserman's apparent search for documents took no longer than 17 minutes. *See* Email Exchanges on June 16, 2021 and the times sent.

13. Because of the plainly inadequate response, I informed Marcus's counsel that same day, again on June 16, 2021, that he was free to file a Motion to Compel Discovery, which he did on July 2, 2021.

14. In that Motion to Compel, Marcus argued that the two documents produced by Wasserman were not responsive to Marcus's document requests, interrogatories, or requests for admission, making all of his discovery requests outstanding.

15. He also argued that Wasserman had acted in bad faith with respect to his discovery obligations by threatening to counter-sue in another forum that he deemed more to his liking; taking only 17 minutes to consider the discovery requests; and falsely representing that he had produced all relevant and responsive documents.

16. On August 26, 2021, I held a discovery hearing in which I granted Marcus's motion to compel with narrowed discovery requests.

17. During that hearing Wasserman stated he would not be countersuing Marcus because, as we discussed at the hearing, he did not suffer any damages from any conduct (misconduct or otherwise) of Marcus.

18. Wasserman also made clear that he had not fully read the discovery requests. *See, e.g.*, August 26, 2021 Tr. at 21 (“What are the interrogatories?”), 23 (asking Marcus’s counsel to re-send the interrogatories).

19. Also during that hearing, I warned Wasserman that failure to produce certain documents such as account statements could be subject to an adverse inference. August 26, 2021 Tr. at 10. Wasserman gave every indication on that hearing that he would comply with any discovery orders in good faith.

20. On August 27, 2021, I issued an Order compelling Wasserman to respond to the interrogatories and requests for admission, as well as produce certain documents, no later than September 23, 2021.

21. I warned him in that Order that failure to comply with those deadlines could result in the imposition of a default judgment order against him.

22. Wasserman did not comply with his discovery obligations under that Order. *See* Email from Marcus’s Counsel to OP (Sept.27, 2021).

23. On September 30, 2021 this Office emailed Wasserman, copying Marcus’s Counsel, and ordered him to produce his discovery responses no later than close of business Monday, October 4. He was again informed that failure to comply could result in the issuance of a default judgment order against him.

24. Wasserman, for a third time, failed to comply with that directive and with his discovery obligations.

25. On October 6, 2021, I issued an Order to Show Cause why a default judgment should not be issued in Marcus’s favor unless Wasserman produced the

outstanding discovery and an explanation of its tardiness no later than October 20, 2021. Wasserman missed that deadline and has never responded to that Order to Show Cause.

II. Legal Analysis and Discussion

Commission Rule 12.35 authorizes me to issue a variety of sanctions for failure to comply with a discovery order, ranging from inferring “that the documents or things not produced would have been adverse to the party,” to issuing a “default order” and rendering a “decision against” the non-complying party. 17 C.F.R. § 12.35. And although “generally a decision on the merits based on full participation by all parties is the preferred outcome of a reparations proceeding,” “[c]ourts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.” *Robinson v. Alternative Commodity Traders*, 2001 WL 741672, *6 (CFTC July 2, 2001), *aff’d* 2005 WL 2978171 (CFTC Nov. 4, 2005) (quoting *Fjelstad v. American Hondo Motor Corp.*, 762 F.2d 1334, 1337 (9th Cir. 1984)). Such dismissal should not be imposed unless: (1) there was advanced notice to the party; and (2) a specific finding is made on the issue of bad faith. *Marlow v. Oppenheimer Rouse Futures, Inc.*, 1987 WL 106915, *2 (CFTC Sept. 9, 1987). Both those preconditions are met here.

First, I warned the parties several times that they could be sanctioned for failure to comply with the deadlines: in the Initial Scheduling Order (Apr 7, 2021) (warning that the parties could be subject to default judgment for failure to comply

with the prescribed deadlines); the August 26, 2021 Hearing (warning that an adverse inference could ensue if documents continued to be missing); the Order issued on August 27, 2021 (warning of default judgment); my email dated September 30, 2021 (warning of default judgment); and the October 6, 2021 Order To Show Cause (noting a default judgment order would issue). Wasserman was thus on notice that this proceeding was serious and he was expected to comply with the ordered deadlines or risk having me rule against him for his failure to do so.

Second, Wasserman has plainly acted in bad faith. He completely ignored the discovery requests and instead threatened to countersue in another forum speciously and without any basis in fact. Wasserman did not produce a single document until this Office intervened and sent him an email on June 16, 2021, at which time he proceeded to produce two non-responsive documents. He spent a full seventeen minutes searching for documents and then baldly asserted he could not access the remainder of the responsive documents. This was clearly proven untrue at the August 26, 2021 hearing. Then at the hearing, I articulated what he had to produce and from what time frame at great length, and Wasserman indicated he understood and would be producing the documents. But despite being clearly apprised of his obligations, and knowing that a default judgment order would issue if he did not meet those obligations, he ignored them in what is a bad faith refusal to acknowledge the gravity of these proceedings and the claims against him.

In granting a dismissal or default based on a party's misconduct, the Commission has stated that it is "not unmindful of the fact that courts have

suggested that a default or dismissal should not be ordered as a sanction until other sanctions have proved unavailing.” *Dick*, 1986 WL 66156 at *2-*9 (affirming default judgment award for failure to comply with discovery orders). Such lesser sanctions could include ruling that certain documents not produced would have been adverse to the misbehaving party (*i.e.*, issuing an adverse inference); excluding evidence from consideration; or striking all or part of a pleading. *See, e.g.*, 17 C.F.R. § 12.35(a)-(d) (listing consequences short of dismissal or default for failure to comply with a discovery order). But imposing such lesser sanctions here would not change the outcome of this proceeding.

First, Wasserman has abandoned these proceedings and not reached out to this Office since our Discovery hearing on August 26, 2021. He has given no indication that he intends to participate in these proceedings.

Second, Wasserman has no path forward for prevailing on the merits even if I were to allow the proceeding to continue with the lesser sanction of striking a pleading or creating an adverse inference. The central question is what Wasserman did with \$45,000 entrusted to his care and whether he invested it as represented. If I were to rule that the missing documents, such as account statements, are adverse to Wasserman’s defense, it would result in a finding that Wasserman did not in fact invest Marcus’s money as he represented he would. It would be a waste of the parties’ time and resources, not to mention this Office’s time and resources, to issue an adverse inference ruling, require dispositive motions or indeed hold a hearing, only to hold that because of the adverse inference ruling, Complainant has

prevailed on his claims and damages amount. Because the factual dispute in this case is so limited, the only reasonable sanction for the repeated bad faith refusal to comply with Wasserman's discovery obligations is the issuance of a default judgment order against him.

CONCLUSION

For the reasons discussed above, I find Complainant Baruch Marcus has established that Respondent Gregory Ian Wasserman violated Commission Rule 180.1, 17 C.F.R. § 180.1, and Section 4(b) of the Commodity Exchange Act, 7 U.S.C. § 6(b), and that these violations resulted in damages to Marcus totaling \$45,000. Wasserman is ordered to pay Marcus reparations of \$45,000, plus post-judgment interest of .08 %, compounded annually from the date of this award to the date of payment, plus \$250 in costs for the filing fee.

Dated: October 27, 2021

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Judgment Officer