UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

INDIA MOSS-THOMAS v. EAST COAST COMMODITIES, KEVIN ALAN ROSENBERG, SOUTH COAST COMMODITIES, INC., and ALICE GORDON WELTON	CFTC Docket No. 07-R007 OPINION AND ORDER

By Order issued on February 14, 2008, and pursuant to Commission Rule 12.403, we took *sua sponte* review of the above matter to determine whether the Administrative Law Judge's ("ALJ") conduct was warranted in his application of Rule 12.22 governing default proceedings. In this case, respondents South Coast Commodities, Inc. ("South Coast"), Kevin Rosenberg ("Rosenberg"), and East Coast Commodities ("East Coast") were deemed to be in default by the ALJ. ALJ Orders dated June 6, October 29 and December 5, 2007. Despite these respondents' default status, the ALJ declined to apply the built-in solutions contained in Rules 12.22 and 12.35, which are intended to facilitate the disposition of matters on the merits without imposing undue burdens on the non-defaulting party. Instead, the ALJ required the complainant India Moss-Thomas ("Moss-Thomas") to file a complex motion for summary disposition or to proceed to a hearing, either or both of which may have been avoidable. When complainant failed to do either, he dismissed the complaint. By this Order and in accordance with Rule 12.22, we take the complaint's well-pled allegations to be true and sufficient. We hereby issue

default judgments against respondents South Coast, Rosenberg, and East Coast, and award Moss-Thomas out-of-pocket damages for their liability for fraudulent inducement and lulling.

In addition, we hold that the ALJ's grant of partial summary disposition in favor of respondent Alice Welton ("Welton") was an abuse of discretion because it was not based on a balancing test between fairness and efficiency or an independent review of the record, but on complainant's deemed admissions as a result of her untimely response to Welton's discovery requests. We vacate the ALJ's order of summary disposition and remand the case for a hearing in so far as it relates to claims against Welton.

BACKGROUND

Moss-Thomas's complaint, received by the Commission on November 20, 2006 and amended on December 12, 2006, alleged fraudulent solicitation (*i.e.*, high pressure sale tactics, willful misrepresentation of the profit potential of options trading and failure to express the specific risks of trading options), and lulling by the following respondents: (1) South Coast, an independent introducing broker ("IB"); (2) Welton, an associated person ("AP") at South Coast; (3) East Coast, an IB which handled the complainant's account after it was transferred from South Coast; and (4) Rosenberg, an AP at East Coast. The complaint also alleged churning on the part of respondent Rosenberg.

According to the amended complaint, Moss-Thomas, a resident of Winnsboro, Texas, gave her father, Sammy Moss, a limited power-of-attorney to trade futures and options on her behalf. In delegating the trading to her father, complainant had no direct contact with respondents. She adopted her father's statement of facts as the essence of the complaint. According to his statement, Sammy Moss contacted South Coast in September 2005 after seeing an advertisement on television. He stated that he had no knowledge of futures or options but

wanted to find out if he could "make money for his daughter and to help my medical problems." Mr. Moss stated that he spoke with respondents a number of times over several weeks and that respondents steadily increased their sales pressure once they saw that he was interested by the promise of profits. According to Mr. Moss, he was introduced to Welton, who told him that he "would more than double his money" and that if he didn't send in money, he would lose out on a profit opportunity. He also stated that Welton and other APs whom she put on the phone pressured him to buy certain positions, saying that weather conditions would affect the market.

The account remained open at South Coast for about five months, during which Mr. Moss made several deposits and received a single disbursement in the amount of $35,000. The account had open positions in May 2006 silver options when it was transferred to East Coast at the end of February 2006. Mr. Moss was contacted by Rosenberg at East Coast, and agreed to let him handle the account there. Mr. Moss was not apprised of South Coast's legal and financial troubles that prompted the transfer.

Mr. Moss told Rosenberg that he was "in depression because of his chronic pain" and needed to make a lot of money "to have another back surgery." Rosenberg advised Mr. Moss to sell the silver options and reinvest the proceeds in unleaded fuel, citing the weather and the war in Iraq as factors. According to Mr. Moss, Rosenberg told him that he could invest in energy futures and/or options and receive up to $550,000 in profit. Rosenberg "never mentioned the risk of loss," Mr. Moss asserted, but repeated the "same script" used by Welton at South Coast, stating that if Mr. Moss decided not to invest, he would miss out on "[a windfall] that would double [complainant's] money." Mr. Moss also asserted that Rosenberg could have sold the silver options at a later date for a profit, but urged a premature liquidation simply because he

wanted to receive commissions. The March 3, 2006 sale resulted in a loss. He stated that later losses stemmed from Rosenberg's failure "to put in the stops that we talked about."

Mr. Moss said he did not suspect that he was being defrauded until the FBI called him in October 2006, informing him of South Coast's financial problems and pending legal action, and of a relationship between South Coast and East Coast. When Mr. Moss contacted Rosenberg to ask him about the connection between South Coast and East Coast, Rosenberg became evasive and ceased all contact with him. The complainant and Mr. Moss immediately filed a reparations complaint with the CFTC.

The Commission's Office of Proceedings served the complaint on all respondents on December 12, 2006. The docket sheet indicates that as of February 26, 2007, no answer had been received from South Coast or Rosenberg. East Coast and Welton filed separate answers.

East Coast filed its answer on February 20, 2007, denying that it was affiliated with South Coast or its business operations. East Coast stated that, like South Coast, it cleared its trades through Comtrust and was made aware of "South Coast's withdrawal from NFA Registration [as] an IB," after which it simply contacted complainant's father to offer its services. East Coast asserted that Comtrust transferred complainant's account to East Coast only after Mr. Moss had given consent. Thus, East Coast contended that "it broke no law." In addition, East Coast argued that Rosenberg made "no promises of profit and had no script in his possession nor did he appear to be reciting one." East Coast also asserted that complainant's father made a "188% profit" from the original principal transferred from South Coast, and instead of liquidating the account and applying the proceeds toward his back surgery, Mr. Moss continually reinvested his profits. East Coast asked to be dismissed from the proceeding.

Welton also filed her answer on February 20, 2007, denying the substantive allegations of misrepresentation and fraud. She stated that at South Coast, the account was traded by Mr. Moss pursuant to a properly executed power-of-attorney from his daughter. According to Welton, while the customer account agreement had no information as to Mr. Moss's experience in futures and options trading, complainant chose to trust her father with the handling of her account, without any solicitation or input from respondent.

Welton asserted further that Mr. Moss informed her that he had decided to transfer all of his income to his daughter to avoid losing disability benefits. Welton also denied that complainant was defrauded, arguing that after trading at South Coast for nearly six months--a period during which Moss-Thomas's account experienced both gains and losses--complainant continued to trade. Although complainant alleged that she received a disbursement check for $35,000, Welton contended that a substantially larger amount--$265,000--was disbursed from South Coast. Welton Answer at 4. Welton also pled affirmative defenses, *i.e.*, that she provided complainant with the required risk disclosure and options disclosure statements, a fee disclosure, and South Coast's additional risk disclosure statement.

On March 6, 2007, the case was assigned to an ALJ and the parties engaged in discovery. Moss-Thomas made further revisions to her complaint, submitting $57,680 as the corrected amount of out-of-pocket damages she sought against South Coast and Welton; and $46,946 as the correct amount of out-of-pocket damages she sought against East Coast and Rosenberg. *See* Motion to Amend Complaint (received March 13, 2007) ("Motion to Amend") (recalculating her damages and providing supporting documents; *see also* complainant's letter dated April 3, 2007 (correcting procedural defects in her Motion to Amend and reiterating her recalculated damages).

The Motion to Amend provided additional detail on the course of trading. It reflected seven deposits that Mr. Moss made with South Coast totaling $190,000 between September 2005 and January 2006. It clarified the results of the trade offsetting the silver options transferred from South Coast to East Coast: the offset yielded $97,850, substantially less than the premium paid to establish the position. Through East Coast, Mr. Moss traded options on commodities including gold, corn, heating oil and financial instruments. Trades initially were funded with proceeds from the liquidation of the silver options. Mr. Moss deposited $75,000 in June and another $100,000 in July. He also received five disbursements from East Coast totaling $225,904. No new positions were established after July. Overall, the account experienced a mix of profits and losses through July. Thereafter, the account's value steadily eroded and all positions open at the end of July expired worthless between September and December.

On April 5, 2007, Welton served discovery requests, which included a request for documents, interrogatories, and requests for admissions. Specifically, Welton asked complainant to submit the following documents: information pertaining to exchanged-traded futures and options accounts, stocks, trusts, IRA accounts, real estate holdings, audited personal and joint financial statements, and business arrangements made between Sammy Moss and complainant in the last 10 years. In her interrogatories, Welton asked for names of witnesses and expert witnesses who would appear at the hearing; information regarding the opening of the account at South Coast; additional factual and legal details regarding each violation cited in the complaint, and/or the damages amount(s); complainant's annual income since 1997; complainant's criminal history and her marital information.

For admissions, Welton demanded that complainant either admit or deny that Welton did nothing wrong, that complainant received account-opening documents, risk disclosure and

options disclosure statements, and that she ratified all trades and assumed all risks when she gave her father the power-of-attorney to trade her account.

On May 3, 2007, three days after the deadline, complainant submitted her discovery responses.[1] In her response to Welton's document requests, complainant stated that "the Court has all the copies I have," and did not submit any documents pertaining to Welton's request. In her response to Welton's interrogatories, complainant indicated that she did not know yet if she would present any witness at the hearing. Complainant reiterated the claims made in the complaint, that she and her father were defrauded by South Coast and Welton, but did not know of this fact until they were contacted by the FBI. Complainant also disputed Welton's assertion that she received a check for $265,000 from South Coast, characterizing the assertion "as the biggest fraud." As to Welton's requests for admissions, complainant indicated that her father would have to testify since he, not complainant, had direct contact with Welton.

On June 6, 2007, the ALJ issued a prehearing order, stating, "[s]ince Rosenberg and South Coast 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. The order otherwise instructed the parties as to the deadlines and required contents for hearing memoranda and scheduled a hearing.

Welton filed a motion for summary disposition on September 21, 2007, asserting that she was entitled to a judgment in her favor because no genuine issue of material fact existed. Welton also argued that the documentary evidence, *i.e.*, account opening statements, risk disclosure documents, and taped conversations between Welton and Mr. Moss, was sufficient to "defeat the

[1]Pursuant to Commission Rules 12.10 (service) and 12.31 (production of documents and other tangible items), complainant's responses to respondent's discovery requests were due no later than April 30, 2007, *i.e.*, 20 days for the response plus five days for mailing.

complaint without complainant's admissions." Welton's Motion for Summary Disposition at 3-4, 6-7.

On October 11, 2007, the ALJ granted Welton summary disposition, stating, "[b]y failing to deny and/or object to admission requests within the prescribed time, the complainant automatically admitted and conclusively established that Welton 'did nothing wrong.'" *Moss-Thomas v. East Coast Commodities*, 2007 WL 2981920 at *1 (C.F.T.C. Oct. 11, 2007) (Order of Partial Dismissal). Based on this holding, the ALJ granted Welton summary judgment and concluded that "additional fact finding would not produce a contrary outcome." *Id.*

East Coast did not respond to the prehearing order or to the ALJ's October 10, 2007 Show Cause Order asking it to explain its non-response. On October 29, 2007, the ALJ found East Coast to be in default. He ordered Moss-Thomas to file a motion for default judgment against South Coast, East Coast and Rosenberg, or to proceed to a hearing against them. Moss-Thomas filed a motion to change the hearing's time and date, which the ALJ denied, *see* order dated December 13, 2007. On January 17, 2008, Moss-Thomas faxed a letter to the ALJ, asking him to "please cancel this case" because "[m]y family and I cannot handle the stress any longer . . . and I feel like we have worked so hard for nothing." The ALJ did so promptly. *See* Order of Dismissal (Jan. 17, 2008). Our order taking sua sponte review followed. *Moss-Thomas*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,764 (CFTC Feb. 14, 2008).

DISCUSSION

I. Default Judgment Against Respondents South Coast, Rosenberg and East Coast [2]

Commission Rule 12.22 provides that when considering whether a default judgment is supported by the record, the Commission should treat a respondent's default "as an admission of

[2]South Coast's and Rosenberg's failure to answer the complaint triggered a default proceeding under Commission Rule 12.22. With regard to East Coast's failure to comply with the ALJ's discovery order, the default order was issued pursuant to Commission Rule 12.35(f), which incorporates the provisions of Rule 12.22.

the allegations of the complaint." While Rule 12.22 does not directly state what the burden of proof is for establishing a sufficient basis for issuing a default judgment, the Commission has defined a well-pled complaint as one that provides "intelligible notice" of the complained-of conduct. Final Rules Relating to Reparations, 49 Fed. Reg. 6602, 6607 (Feb. 22, 1984). This does not require "a catalogue of the statutory or regulatory violations at issue." *Hall v. Diversified Trading Systems*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 at 41,751 (CFTC July 7, 1994). The record must, however, contain a sufficient factual description of the conduct underlying a claim—taken as true by the respondent's failure to oppose the description—to enable the trier of fact to find an intentional violation of the Act and to accurately calculate the damages resulting therefrom. *See id.* at 41,750-51 (discussing the sufficiency of allegations necessary to state a claim for relief in the context of the requirements of Commission Rule 12.13(b) (form of complaint)); *Dunmire v. Hoffman*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,201 at 57,826 (CFTC Mar. 2, 2006) (to recover in reparations complainant must establish *scienter*).

In this case, complainant's sworn adoption of her father's allegations regarding respondents' misrepresentations means we construe these allegations as her own statement of facts. While the complaint is hardly a model of legal draftsmanship, taken as a whole, it alleges with sufficient clarity that complainant's account was opened based on South Coast's fraudulent inducements to Mr. Moss and continued being traded after its transfer to East Coast based on Rosenberg's fraudulent inducements. The complaint alleges boiler-room tactics by South Coast (*e.g.*, repeated calls; high-pressured sales pitches, such as "you will lose out if you don't make a move;" and downplaying of trading risks). In addition, the complaint includes other blatant misrepresentations, such as weather-based promises of high returns ("[if you follow seasonal

trends] you can double your money; you can make as much as $550,000"). The Commission has held that such weather-based claims are fraudulent when made without the disclosure that the market already has factored seasonal demand into the price of a futures or an option contract. *E.g.*, *Bishop v. First Investors Group, Inc.*, [1996-1997 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,004 (CFTC Mar. 26, 1997).

Further, the answers that East Coast and Welton filed suggest that respondents had adequate notice of both the general nature of the wrongdoing underlying Moss-Thomas's claim and particular aspects of respondents' conduct. Finally, nothing in the record suggests that Moss-Thomas lacked a facially valid basis for proceeding against the respondents she named or that she acted in bad faith by deliberately withholding information about the nature of her complaint. *See Hall*, ¶ 26,131 at 41,751.

We have emphasized that a presiding officer's exercise of his authority under the reparation rules must "be guided by his general responsibility for the 'fair and orderly conduct of a formal decisional proceeding.'" *Jenne v. PaineWebber, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,329 at 35,424 (CFTC Aug. 31, 1988) (*quoting* Commission Regulation 12.304(a)). We held in *Jenne*:

> [T]he judge must exercise his authority with due regard for the general procedures established by the Commission. Rule 12.304 [outlining the functions and responsibilities of an Administrative Law Judge] does not authorize the judge to waive or amend the procedural requirements or impose novel conditions on a party's exercise of the rights conferred by the reparation rules.

Id. The principles of fairness and orderliness must be understood in light of Congress's intent that our procedures provide an "inexpensive and expeditious" alternative to the courts and arbitration. *Anderson v. Beach*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,763 at 61,607 (CFTC Feb. 14, 2008). In the October 29 Order directing complainant to file a motion

for default judgment or to proceed to a hearing, the ALJ stated, "to be well-pled, an allegation must be sufficiently clear and specific." The facts stated in Moss-Thomas's complaint, however, when taken as true, are manifestly clear and specific enough to establish a *prima facie* case for a violation of the antifraud provisions of the Commodity Exchange Act ("CEA"), because they show a correlation between the alleged misrepresentations and complainant's detrimental reliance. *See, e.g.*, *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 at 50,607 (CFTC Sept. 28, 2000); *Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,657 CFTC Mar. 1, 1990); *In re JCC*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,568 (CFTC May 12, 1994), *aff'd sub nom. JCC v. CFTC*, 63 F.3d 1557 (11th Cir. 1995); *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004).

In previous reparations cases where a default judgment has been found by the Commission to be unsupportable, it has been typically because something in the record irreparably undermines the claim or the claim is not cognizable under the Act.[3] Neither situation exists here. Thus, the ALJ has abused his discretion by requiring complainant to file a complex motion for a default judgment when the complaint, on its face, is deemed by our rules and legal precedents to be sufficiently specific. In light of the foregoing, the ALJ's alternative offer to Moss-Thomas to proceed to a hearing to establish her case against the defaulting respondents was equally unnecessary and therefore equally an abuse of discretion because we find the record sufficient to support entry of default judgment against respondents South Coast, Rosenberg and East Coast on claims of fraudulent solicitation and lulling. As such, we hereby enter default

[3] *See, e.g.*, *Hess v. Mount*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,039 (CFTC Apr. 17, 1991), where complainant provided no evidence or tangible claim that the respondent had actually caused or been responsible for her injury.

judgment against respondents South Coast, Rosenberg and East Coast on claims of fraudulent solicitation and lulling and award Moss-Thomas damages of $57,680 against South Coast, and $46,946 jointly against East Coast and Rosenberg, as these amounts are supported by the record. *See* Motion to Amend.

We decline to award damages on the churning claim against Rosenberg. Complainant calculated that commissions totaling $113,409.02 were paid to East Coast while Rosenberg brokered the account, an amount greatly exceeding her out-of-pocket losses.[4] *See generally* Motion to Amend. This circumstance alone creates a suspicion of churning. The suspicion is heightened by the taken-as-true allegation that Rosenberg proposed liquidating the silver position transferred to East Coast from South Coast--as to which a commission already had been paid--in order to establish new positions which would generate new commissions. To establish churning, Moss-Thomas must make a threshold showing that Rosenberg controlled the level and frequency of trading. Since Rosenberg did not trade pursuant to a power of attorney, Moss-Thomas must show that he exercised *de facto* control.[5] While we find some indicia of *de facto* control, particularly the fraudulent inducements Rosenberg resorted to (*e.g.*, he used the "same script" as Welton), we find that Moss-Thomas through her father ultimately controlled the level of trading in the account through withdrawals and deposits. A disbursement of $125,000 was made in May 2006 and $75,000 was reinvested in June. Another disbursement of $95,000 was made in July, followed less than two weeks later by a $100,000 deposit. Three minor disbursements also took

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[4] Complainant also calculated that commissions totaling $86,728.30 were paid to South Coast.

[5] Evidence of the following factors will establish *de facto* control: (1) the customer lacks sophistication; (2) the customer lacks prior commodity option trading experience and devotes a minimum of time to trading the account; (3) the customer reposes a high degree of trust and confidence in respondents; (4) a large percentage of the transactions are based on respondents' recommendations; (5) the customer does not approve transactions in advance; and (6) the respondents did not provide full, truthful and accurate information prior to obtaining customer approval for transactions. *Ferriola v. Kearse-McNeill,* Comm. Fut. L. Rep. ¶ 28,172, at 50,154 (CFTC 2000).

place. We have no doubt that Rosenberg's inducements proximately led to the decisions to add money to the account. Nevertheless, the disbursements, which significantly reduced for a time the amount of trading that could take place, indicate that neither Moss-Thomas nor her father were sufficiently controlled by Rosenberg to support a churning claim. Other evidence militates against churning. *See, e.g.*, Mr. Moss's assertion that in "[e]arly May [of 2006] Kevin wanted me to sell my unleaded fuel for about one-half profit so he could make more commissions but I refused and held out till May 25 and sold it for $194,040." First Amended Complaint (received Dec. 12, 2006) (Statement of Sammy Moss).

Finally, we note that neither complainant's Motion to Amend nor her follow-up letter of April 3, 2007, both of which restate her damages, mentions churning or commissions paid. Consequently, the churning claim has not been alleged sufficiently to give Rosenberg and East Coast notice of it, notwithstanding the calculation of commissions contained in the Motion to Amend.

II. Grant of Partial Summary Disposition is Vacated

We turn now to Moss-Thomas's case against Welton. In the Order of Partial Dismissal, the ALJ concluded that Moss-Thomas's responses to admissions, sent three days after the deadline, were untimely and therefore "automatically admitted" and "conclusively established" that Welton: (a) "did nothing wrong"; (b) "did not violate any section of the Commodity Exchange Act"; and (c) "did not violate any rule or Regulation of the Commission." Order at *1 (footnotes omitted). The ALJ also noted that Moss-Thomas did not request an extension of time to file her discovery responses or a motion to withdraw automatic admissions. *Id.* at n.4.

Commission Rule 12.33(b) deals with requests for admissions in a reparations proceeding, providing, in part:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within twenty (20) days after service of the request, the party upon whom the request is directed files and serves upon the party requesting the admission a verified written answer or objection to the matter.

Once a matter is admitted, Commission Rule 12.33(d) states:

> Any matter admitted under this rule is conclusively established and may be used as proof against the party who made the admission.

But the same rule permits the ALJ discretion to deny admissions after considering a two-part test:

> However, the discovery or decision-making official may permit withdrawal or amendment when the presentation of the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy such official that withdrawal or amendments will prejudice him in maintaining his action or defense on the merits.

17 C.F.R. § 12.33(d).[6]

In this case, the ALJ did not exercise the discretion granted in Rule 12.33(d), but chose to sanction complainant by applying strictly the mandate against late responses in Rule 12.33(b). Reviewing discovery sanctions rulings under an abuse of discretion standard, *Wichman v. Hewitt*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,613 at 36,628 (CFTC March 7, 1990), we perceive two aspects in the ALJ's approach that amount to abuse. First, the ALJ failed to apply the standard we established in *Marlow v. Oppenheimer Rouse Futures,* Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. ¶ 23,904 (CFTC) (Sept. 9, 1987). There we held that:

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[6]Commission Rule §12.33 mirrors Rule 36 of the Federal Rules of Civil Procedure, which provides in part:

> A matter is admitted, unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 [Stipulations Regarding Discovery] or be ordered by the court.

Fed. R. Civ. P. 36(a)(3).

> Sanctions that amount to a deprivation of a decision on the merits should be reserved for flagrant abuses where a party has acted in bad faith. As a general rule, such a severe sanction should not be imposed without advance notice to the party. In imposing such a sanction, the presiding officer should make a specific finding on the issue of bad faith.

Id. at 34,212. While the judge, citing Commission Rule 12.6(b) (extensions of time), did notify all parties in the March 7, 2007 Order for Discovery that "absent extraordinary circumstances, requests for extension of time shall be filed at least five (5) days prior to the expiration of the time limit," he did not cite Rule 12.33(b), mention the deadline for filing discovery responses or discuss the issue of what may constitute bad faith in his order. Order at 2. In our view, the ALJ's reference to Moss-Thomas's untimely discovery responses in his Order of Partial Dismissal cannot be equated with the required finding of bad faith. While Moss-Thomas did not file a motion for extension to file out of time, or a motion to withdraw automatic admissions after submitting her late responses, there is nothing in the record to suggest that Moss-Thomas was acting in bad faith. She was only three days late in responding. Given the Commission's policy of making the reparations process accessible to *pro se* litigants as set forth in *Anderson v. Beach*, *supra*, Moss-Thomas's plea to the ALJ—in opposing the partial summary disposition—that she and her father "worked so hard on things and spent many hours on [the pleadings] [and] are not attorneys and do not understand everything" should be sufficient to negate the presumption of bad faith. Moss-Thomas's November 14, 2007 letter to the ALJ.

We have a separate basis for not affirming the judge's partial dismissal of the complaint in Welton's favor. Commission Rule 12.35 sets forth the "[c]onsequences of a party's failure to comply with a discovery order," and generally authorizes presiding officers to take such action "as is just." Both dismissal of the complaint and issuance of a default judgment are listed as possible consequences under the rule. The list, however, also includes more focused sanctions

that do not deprive parties of their right to a decision on the merits. Given the broad options available to a presiding officer, we will not deem a choice of sanctions "just" simply because it is authorized by Rule 12.35. At a minimum, the presiding officer must consider whether the sanction he imposes is commensurate with the level of the party's presumed procedural abuse.

When it is likely that the imposition of a more focused sanction will be sufficient to deter future abuse, a presiding officer's resort to dismissal simply cannot be justified. *Radden v. Futures Trading Group*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,281 at 42,425 (CFTC December 12, 1994). In the case before us, the ALJ did not discuss the impact of complainant's automatic admissions or whether Welton would be prejudiced had complainant's admissions been withdrawn, or whether such withdrawal and simultaneous acceptance of complainant's late response would have resulted in any significant delay of the proceedings as a whole. *Cf. Palomares v. Bradshaw*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,717 at 61,295 (CFTC Dec. 7, 2007) (in denying complainant's untimely motion to compel, presiding officer did not address whether granting the motion would have prejudiced respondent or the potential prejudice to complainant from respondent's failure to respond to discovery requests). At the very least, given Moss-Thomas's intelligible allegations concerning Welton's exaggerated claims of profit, the ALJ should have allowed complainant to submit her discovery responses and proceed with the discovery process to further develop the record. Failing to do so severely prejudiced complainant. *See id.* (finding prejudice to Palomares).

Finally, Welton's motion for summary disposition does not provide a persuasive justification for resorting to dismissal in respondent's favor. As Commission Rule 12.310 indicates, any party may move for summary disposition in its favor if it believes that its case is sufficiently meritorious so as to render an oral hearing unnecessary. Thus, summary disposition

is appropriate only when three conditions are met: (1) there is no genuine issue as to any material fact; (2) there is no need for further factual development; and (3) the moving party is entitled to a decision as a matter of law. *Levi-Zeligman v. Merrill Lynch Futures, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,236 at 42,031 (CFTC Sept. 15, 1994). In this case, the ALJ should have made a determination whether, on the existing record, Welton was entitled to summary disposition, independent of Moss-Thomas's failure to file a timely response. He did not make this independent inquiry but instead prematurely "sacrificed the reliability of the outcome to achieve [the Commission's] goal of decisional efficiency." *Id.* Apart from the automatic admissions, Welton's evidence—consisting of account-opening documents, risk disclosure documents and taped conversations between Welton and complainant's father—did not obviate the need for further factual development. Thus, given our continual emphasis on resolving issues on the merits, the obvious disparity between the nature of complainant's procedural lapse and the level of sanction imposed, we vacate the ALJ's order of dismissal and remand for further proceedings. Should Moss-Thomas wish to pursue a churning claim against Welton, she may petition the ALJ to further amend her complaint.[7]

* * *

[7]In remanding for further proceedings, and assuming that complainant wishes to continue with the case, the ALJ shall grant complainant's request for Dallas, Texas as the hearing site. Pursuant to Commission Rule 12.4, the Commission can grant a waiver, based on hardship or "for other good cause," from any Commission Rules under Part 12 (Reparation Proceedings). We exercise our waiver authority to relieve complainant from the strict application of Rule 12.312 (location of hearing) as recently addressed in *Kaps v. ECC, et al.*, [Current Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 30,550 (CFTC June 19, 2007) (interlocutory order) (*i.e.*, absent a party's averment that a listed venue is more than 300 miles from his or her residence, a venue must be one of the sites listed in Rule 12.312). While Houston is one of the cities enumerated in Rule 12.312, and also within 300 miles of complainant's residence, Moss-Thomas had stated that her father's medical condition would make the 5½ -hour drive to Houston "hard on him," whereas Dallas, which is not listed in the rule, is a 90-minute drive from her home. Since complainant's father is her principal witness, without whose testimony her ability to establish her claim will be prejudiced severely, we deem that she has met the hardship test.

The award of $46,946 jointly against East Coast and Rosenberg and the award of $57,680 against South Coast are FINAL as of the date this opinion and order is issued. An additional award of damages may be ordered against South Coast on remand in the event Moss-Thomas pursues and prevails on claims against Welton for which South Coast is also found liable.[8]

IT IS SO ORDERED.

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

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

Dated: March 3, 2009

[8] This footnote applies only to respondents East Coast and Rosenberg, as to whom this decision is final and appealable:

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.

A party who receives a reparation award may sue to enforce the award if payment is not made within 15 days of the date the order is served by the Proceedings Clerk. Pursuant to Section 14(d) of the Act (7 U.S.C. § 18(d) (2000)), such an action must be filed in the United States District Court. *See* also 17 C.F.R. § 12.407.

Pursuant to Section 14(f) of the Act (7 U.S.C. § 18(f) (2000)), a party against whom a reparation award has been made must provide to the Commission, within 15 days of the expiration of the period for compliance with the award, satisfactory evidence that (1) an appeal has been taken to the United States Court of Appeals pursuant to Sections 6(c) and 14(e) of the Act or (2) payment has been made of the full amount of the award (or any agreed settlement thereof). If the Commission does not receive satisfactory evidence within the appropriate period, such party shall be suspended automatically. Such prohibition and suspension shall remain in effect until such party provides the Commission with satisfactory evidence that payment has been made of the full amount of the award plus interest thereon to the date of payment.