

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

COMMODITY FUTURES TRADING)
COMMISSION,)
)
Plaintiff,)
)
v.) NO. 3:04-0898
)
FOREIGN FUND, et al.,) Judge Echols/Bryant
)
Defendant.)

TO: The Honorable Robert L. Echols

REPORT AND RECOMMENDATION

Pending before the Court is plaintiff's Motion For Sanctions Against Wolfgang J. Fastian For Failure To Comply With Court's Discovery Order (Docket Entry No. 116). For the reasons stated below, the undersigned Magistrate Judge **RECOMMENDS** that this motion be **GRANTED**, and that the facts regarding Mr. Fastian's involvement in this matter as stated on pages 2 and 3 of plaintiff's Motion For Partial Summary Judgment Against Defendant Wolfgang J. Fastian (Docket Entry No. 103-1) shall be taken to be established for the purposes of this action.

The Commodity Futures Trading Commission ("CFTC"), in its amended complaint, alleges that Wolfgang J. Fastian engaged in misappropriation fraud in violation of Sections 4b(a)(2)(i) and (iii) of the Commodity Exchange Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2002), and regulations promulgated thereunder. The amended complaint seeks injunctive relief, equitable relief of restitution

and disgorgement in the amount invested by customers, and civil money penalties.

Mr. Fastian is not represented by counsel.

Despite being notified by telephone and formally served with notice in May 2006, Mr. Fastian failed to appear for his deposition, scheduled for June 29, 2006, in Harrisburg, Pennsylvania. Shortly after Mr. Fastian failed to appear, he mailed the CFTC's lawyer a document entitled "Request to Delay of the Deposition of Wolfgang J. Fastian", which eventually was filed with the Court on July 6, 2006 (Docket Entry No. 91). In this document Mr. Fastian stated that he had been in Europe since June 1, 2006, and that he had encountered "a small problem here with my passport and new restrictions with the American consulate, so I will have to stay here till this problem is resolved." In view of this development, the Court granted the CFTC an extension of time to and including August 31, 2006, within which to take Mr. Fastian's deposition (Docket Entry No. 90). The Court further ordered Mr. Fastian to appear for his deposition on August 25, 2006 in Harrisburg, Pennsylvania (Docket Entry No. 93).

On August 15, 2006, Mr. Fastian filed his "Request to Delay of the Deposition of Wolfgang J. Fastian" (Docket Entry No. 94), in which Mr. Fastian asserted, in part, that: "After I resolved the small problem with my passport, I ran into a problem

with my visa to the USA." This request further stated that Mr. Fastian had "no idea" when he would be traveling back to the United States. In response to this request, the Court granted Mr. Fastian an additional thirty days within which to return to the United States and schedule his deposition by counsel for the CFTC (Docket Entry No. 96).

On October 23, 2006, the CFTC filed its motion for partial summary judgment against Wolfgang J. Fastian (Docket Entry No. 103).

On November 6, 2006, Mr. Fastian filed a notice stating that he was "still working on my visa and am hoping it will be cleared up soon." He included a temporary address in Voitsberg, Austria, and stated that he was hoping to be back in the United States "after the holidays." (Docket Entry No. 111)

On January 31, 2007, the CFTC filed its Motion for Sanctions against Wolfgang Fastian for failure to comply with the Court's discovery order (Docket Entry No. 116).

On February 16, 2007, the Court received a document entitled "Update on Wolfgang Fastian," submitted by Terry Swain-Fastian, Mr. Fastian's wife (Docket Entry No. 117). In this update, Mrs. Fastian stated that Mr. Fastian was continuing to have an "immigration problem," and that he "remains in Austria waiting for the decision of his K-3 visa." Mrs. Fastian further stated that Mr. Fastian's return to the United States "is still unknown at this

point because no one can give us a time frame as to how long this will take." Mrs. Fastian included in this update her address in Troy, Pennsylvania and Mr. Fastian's contact information at his "temporary address" in Voitsberg, Austria. This "update" is the most recent communication from Mr. or Mrs. Fastian.

RECOMMENDATION

From this record, the Court finds that Mr. Fastian has failed to appear for a deposition in this case for a period exceeding one year from the date when his deposition was initially noticed - June 29, 2006 - despite two orders of this Court that he appear for this deposition. The Court acknowledges that Mr. Fastian and his wife have asserted that Mr. Fastian is stranded in Austria due to an unspecified "immigration problem." Nevertheless, Mr. Fastian has failed to substantiate this claim with any official government notice or other communication. The Court further finds that Mr. Fastian's failure to appear for his discovery deposition has prejudiced the CFTC in the prosecution of its case.

For the foregoing reasons, the Magistrate Judge **RECOMMENDS** that the CFTC's motion for sanctions against Wolfgang J. Fastian be **GRANTED**, and that, pursuant to Rule 37(b)(2)(A), Federal Rules of Civil Procedure, the factual statements concerning Mr. Fastian's involvement in this matter stated on pages 2 and 3 of the CFTC's Motion for Partial Summary Judgment Against Defendant Wolfgang J. Fastian (Docket Entry No. 103-1), should be taken as

established for the purposes of this action.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed in this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986).

ENTERED this 17th day of August 2007.

s/ John S. Bryant
JOHN S. BRYANT
United States Magistrate Judge