

ADMINISTRATIVE PROCEEDING
FILE NO. 3-10007

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 12, 2001

DEC 15 2001

CTFD. NO. _____

In the Matter of	:	
	:	
MICHAEL J. ROTHMEIER,	:	
CLARK T. BLIZZARD,	:	ORDER DENYING IN PART
RUDOLPH ABEL,	:	AND GRANTING IN PART
DONALD C. BERRY,	:	DIVISION'S MOTIONS
CHRISTOPHER P. ROACH,	:	TO STRIKE AND TO COMPEL
CRAIG JANUTOL, and	:	
EAST WEST INSTITUTIONAL SERVICES, INC.	:	

The hearing in this proceeding is scheduled to commence January 28, 2002, in Boston, Massachusetts.¹ Under consideration are (1) the Division of Enforcement's (Division) November 28, 2001, Motions to Strike and to Compel Compliance with the Commission's Rules of Practice Against Respondent Abel; (2) Abel's December 4 Opposition; and (3) the Division's December 7 Reply. The Division asks that Abel's witness and exhibit lists be struck and that he be compelled to file and serve proper witness and exhibit lists and to respond to the Division's proposed stipulations. Abel requests that the undersigned impose sanctions on the Division for making a frivolous motion.

As authorized by 17 C.F.R. § 201.222(a) and with the agreement of counsel, the undersigned set procedural dates at the May 30, 2001, prehearing conference and reiterated them at the August 16 prehearing conference. See Michael J. Rothmeier, Prehearing Order (May 30, 2001); Michael J. Rothmeier, Prehearing Order (Aug. 16, 2001). The dates included October 1 for exchange of Respondents' witness and exhibit lists and copies of exhibits not previously exchanged. The dates also included November 1 and 15 and December 3 for proposing stipulations, conferring on them, and filing any agreed stipulations.

The Division noted that Abel did not file any exhibit or witness list on October 1 and communicated with Abel's counsel. In response, Abel adopted the Division's exhibit and witness lists. Additionally he listed several securities firms as possible witnesses and indicated possible additional exhibits resulting from subpoenas he intends to seek for brokerage records. He reserved

¹ The proceeding has ended as to Respondents Rothmeier, Berry, and Janutol, who settled. The Securities and Exchange Commission issued Orders Making Findings and Imposing Sanctions as to each of them on April 13, 2000.

the right to supplement the lists because of last minute issues that may arise during the course of the hearing and to object to exhibits or testimony offered by the Division. The Division argues that its preparation for trial is prejudiced by Abel's failure to specify his witnesses, exhibits, and objections to the Division's proposed exhibits and witnesses. Additionally, it urges that Abel respond to its proposed stipulation to the authenticity and admissibility of its proposed exhibits.

In his Opposition, Abel argues that the Division cannot be unfamiliar with its own proposed exhibits and witnesses. Abel also argues that all parties must agree for a stipulation to be worthwhile. In its Reply, the Division argues that Abel has failed to provide the Division notice of the defense he plans to make at trial and is waging "trial by ambush." Concerning its attempt to negotiate stipulations bilaterally, the Division states that it expects Respondents Roach, East West Institutional Services, Inc., and Blizzard to default.

Cooperation on procedural matters, including stipulations, will shorten the hearing and reduce expenses for the Division and Respondents. It goes without saying, however, that a party cannot be compelled to agree to a stipulation. It also goes without saying that the Division has the burden of going forward and the burden of proving its case against Abel. Concerning Abel's witness and exhibit lists, Abel's adoption of the Division's witness and exhibit lists is unexceptional. However, Abel's reference to possible exhibits that may result from subpoenas that he may request in the future is insufficient. If Abel intends to request such subpoenas, he must do so by December 20, 2001. Any proposed exhibits resulting from the subpoenas must be provided to the Division by January 4, 2002. Also insufficient is his listing some securities firms as proposed witnesses. If Abel intends to call any witness from the securities firms, the witness must be identified and a brief summary of his or her expected testimony must be provided to the Division by January 4, as well. Finally, Abel's request for sanctions against the Division is denied.

IT IS SO ORDERED.



Carol Fox Foelak
Administrative Law Judge