UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

THE SIEGEL TRADING COMPANY, INC., FRANK L. MAZZA, ROBERT R. BENEDETTO, JAMES A. LANE, MORTON REINMAN, FRANK J. ROBBINS and JOHN J. ALFONSO a/k/a JOHN DOUGLAS	:	CFTC Docket No. CRAA 04-01
v.	:	ORDER DENYING STAY
NATIONAL FUTURES ASSOCIATION	:	

The Siegel Trading Company, Inc. ("Siegel"), company president Frank L. Mazza ("Mazza"), and five Siegel supervisors ask the Commission to stay sanctions imposed by the National Futures Association ("NFA") in this sales practice case pending their appeal to the Commission.

Siegel, a futures commission merchant, was ordered expelled from NFA membership and Mazza was ordered barred permanently from association with any NFA member. The other petitioners were barred from association with any NFA member for periods ranging from two to four years, and barred permanently from acting as principals or branch office managers of NFA members. The sanctions were imposed for violations of NFA Compliance Rules 2-2(a) and 2-29(a)(i), prohibiting misleading sales solicitations; and 2-9 (failure to supervise associated persons). NFA found that "Siegel's sales solicitations created a false impression that profits were virtually assured." *In re The Siegel Trading Company, Inc.*, slip op. at 11, NFA Case No. 01-BCC-011 (Oct. 6, 2003).

Under Commission Rule 171.22, the Commission evaluates petitions for a stay pending appeal in terms of four factors: (1) whether petitioner is likely to prevail on the merits; (2)

whether petitioner will be irreparably harmed without a stay; (3) the effect that the issuance of a stay will have on the opposing party; and (4) the effect that either the issuance or denial of a stay will have on the public interest. *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

NFA found that Siegel's sales force made inflated profit projections in soliciting customers without disclosing that most of its customers lost money. It found also that Siegel's supervisors were aware that misrepresentations were being made on a systematic basis, but took no effective steps to stop the misconduct.

Petitioners set forth a number of reasons as to why they expect to prevail on appeal, including the contention that NFA's principal evidence against them does not demonstrate fraud reliably. NFA introduced records of numerous conversations between Siegel brokers and customers or prospective customers. Petitioners argue that the aspects of these conversations found to be misleading are not facially fraudulent, and contend that NFA's analysis of the conversations relies on "subjective inferences." *See* Motion to Stay at 6-7. They assert that reliance on such inferential evidence "raises serious due process concerns." *Id.* at 6. Petitioners have appended to their motion an alternative analysis of broker-customer conversations purporting to show that the conversations may be understood fairly in a non-fraudulent way.

Petitioners also argue that NFA failed to take into account the total mix of information their customers received. They contend that customers received substantial risk disclosure that would have counteracted any tendency to mislead contained in its sales presentations.

Petitioners suggest further that the nature and quantity of disclosure that must be made to customers—especially disclosure regarding the use of profit projections and the degree of

success enjoyed by other customers of a firm—are legally uncertain issues. They have identified authority that they claim supports their view that "profit projections, offset by risk disclosures . . . do not amount to fraud." *Id.* at 16-17.

In addition, petitioners urge the Commission not to require it to show a "likelihood of success on the merits," and to allow them to show instead that there are "fair grounds for litigation." *Id.* at 22. They argue that the more lenient standard is appropriate when proof of irreparable injury is strong. *Id.* at 21-23. Absent a stay, Siegel must cease doing business, Mazza must leave the futures industry permanently, and the other petitioners must leave the industry while the appeal is pending. Petitioners assert that neither NFA nor the public interest will be harmed if a stay is granted.

NFA argues in opposition that longstanding precedents, recent authority, and actual notice to Siegel and its employees left no room for doubt that the company's sales practices were likely to mislead customers. It states: "Siegel's argument ignores years of regulatory alerts and case law condemning the use of dramatic profit projections that inflate the profit potential and downplay the risk of loss of trading futures and options." Opp. at 9. Petitioners therefore are unlikely to succeed on the merits, NFA contends. *See also id.* at 11-18. NFA distinguishes the cases relied on by petitioners on factual and other grounds. *Id*. at 18-20.

NFA asks the Commission not to depart from its customary standard requiring a "likelihood of success," rather than "fair ground for litigation." It acknowledges the severity of the sanctions, but asserts that they are appropriate to the misconduct, and consistent with prior sales practice cases of similar magnitude. NFA argues, moreover, that the public interest outweighs the harm to individual respondents.

Our review of the parties' submissions leads us to conclude that petitioners do not meet the requirements of Rule 171.22, having failed to show that they are likely to prevail on the merits. "A stay pending judicial review of an agency order is a rare event. The proponent of such unusual relief must demonstrate that the administrative process has fundamentally misfired." *In re Castellano,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,870 at 37,143 (CFTC June 26, 1990), *citing Busboom Grain Co. v. Interstate Commerce Commission*, 830 F.2d 74 (7th Cir.1987), *cited with approval in In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,399 at 39,363 (CFTC Sept. 25, 1992). Petitioners have not identified either a readily apparent misapplication of law, a blatant error of material fact, or a fundamental procedural flaw.

As a threshold matter, we decline to apply the lenient, "fair ground for litigation" standard requested by petitioners. We have addressed this standard before, and always refused to apply it, believing that where "'the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, [decisionmakers] should not apply the less rigorous fair ground for litigation standard.'" *In re GNP, supra,* ¶ 25,399 at 39,363 n.4 (internal citation omitted), *citing In re Gilchrist,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,024 (CFTC Mar. 27, 1991); *accord, In re Buckwalter,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,016 at 37,767 (CFTC Mar. 8, 1991) [1]

As to their argument regarding the broker-customer conversations, petitioners' claim of likely success rests on the assumption that we will reweigh in their favor the factual record developed before NFA.

[1] *Accord, Bronx Household of Faith v. Board of Educ. of New York*, 331 F.3d 342 (2d Cir. 2003) (granting relief on the higher standard); *Charette v. Town of Oyster Bay***,** 159 F.3d 749 (2d Cir. 1998) (denying relief); *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir.1989).

As a body of review, the Commission "shall affirm the order of the NFA, unless it finds, *inter alia*, that "[t]he weight of the evidence does not support the findings . . . concerning the relevant acts or practices engaged in or omitted . . . ." 17 C.F.R. 171.34((a)(3). Under this standard, the Commission "focuses its inquiry on whether the fact finder acted reasonably in reaching material findings in light of the evidence . . . the reasonable inferences drawn therefrom, and other pertinent circumstances." *MBH Commodity Advisors, Inc. v. CFTC*, 250 F.3d 1052, 1060 (7th Cir. 2001), *citing* Commission Review of National Futures Association Decisions in Disciplinary, Membership Denial, Registration, and Membership Responsibility Actions, 55 Fed. Reg. 24,254 at 24,256 (June 15, 1990).

In reviewing the lengthy excerpts from broker-customer conversations submitted with petitioners' motion, we cannot find that petitioners are likely to succeed in demonstrating that NFA's findings with respect thereto are inherently unreasonable; nor does petitioners' alternative analysis strike us as significantly more plausible or persuasive. In these circumstances, it would be premature to disturb NFA's factual determinations. *Cf. Butler v. New York Cotton Exchange*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,081 (CFTC July 22, 1991) (premature to disturb exchange's factual findings in the context of a stay petition). Moreover, despite petitioners' argument otherwise, inferential evidence is not innately less acceptable or reliable than direct evidence.

In addition, on the issue of what constitutes adequate disclosure to customers, petitioners' stay petition has not identified either binding authority that runs contrary to NFA's decision, or nonbinding persuasive authority that casts doubt upon NFA's exercise of legal judgment in reaching its decision.

Pursuant to Commission precedent, having failed to establish a likelihood of success on the merits, petitioners are not entitled to a stay pending appeal.

Also under our precedent, Siegel and Mazza concededly will suffer irreparable injury if no stay is granted. *Grandview Holding Corporation v. NFA*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,651 (CFTC Mar. 22, 1996) (expulsion from NFA membership fulfills the irreparable harm requirement of a stay). We nevertheless decline to grant the stay, given the history of disciplinary proceedings against this company by the Commission and NFA.[2]

In addition, Siegel's disciplinary history is relevant to our consideration of the impact a stay would have upon the public interest. In this regard, NFA persuasively argues:

> [P]revious sales practice abuses, including the abuses cited in the present case, occurred during periods when Siegel had an expectation that its business would go on for the foreseeable future. It is fair to infer from its past actions that, now that Siegel has been expelled from NFA, it has little or no incentive to employ ethical and honest sales practices should a stay be granted. The firm's history suggests that this is a situation that it may aggressively exploit to the detriment of the public.

Opp. at 35. We agree with NFA, and find that the larger public interest in the integrity of the futures markets outweighs the individual interests of Siegel, Mazza and the other petitioners in remaining in business and employed while an appeal is pending. As to the other petitioners, compliance officer Robert J. Benedetto, and New York branch office supervisors James A. Lane, Morton Reinman, Frank J. Robbins and John J. Alfonso, we have held that the temporary loss of income does not constitute irreparable harm. *Global Futures Holdings, Inc. v. NFA*, [1998-1999

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[2] *See CFTC v. The Siegel Trading Company, Inc.*, Civ. No. 89-5364JMI) (C.D. Cal. May 8, 1991) (Order of Permanent Injunction); *In re The Siegel Trading Company, Inc.* Docket No. 91-6 (CFTC May 10, 1991) (Opinion and Order settling companion administrative enforcement case). Among other sanctions, Siegel agreed to pay a $350,000 civil monetary penalty and undertook to tape its brokers' sales solicitations for five years. NFA notes that it has brought three disciplinary cases against Siegel, including this one.

Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,467 at 47,241 (CFTC Nov. 24, 1998).

For the reasons stated herein, the stay is DENIED.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners HOLUM, LUKKEN and BROWN-HRUSKA).

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

Dated: November 4, 2003