

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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JOHN PICCOLO	:	
	:	
v.	:	CFTC Docket No. 04-E-1
	:	
COFFEE, SUGAR, & COCOA	:	ORDER DENYING STAY
EXCHANGE	:	
_____	:	

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On December 16, 2003, the Coffee, Sugar, & Cocoa Exchange (“CSCE”) imposed sanctions on John Piccolo (“Piccolo”) in light of its conclusion that he violated CSCE Membership Rule 1.29(e) by engaging in conduct that was both inconsistent with just and equitable principles of trade and detrimental to the best interests of the Exchange. More specifically, a Hearing Panel of the Exchange’s Business Conduct Committee (“BCC”) found that Piccolo participated in two types of related misconduct on September 10, 2002: (1) during a price dispute with another trader on the trading floor, he forced his way across the ring, bumped chests with the other trader, then exchanged obscenities which escalated into threats; and (2) after the close of trading, participated in a melee with the other trader just outside the Exchange building. BCC Decision at 3-5. The BCC fined Piccolo \$20,000, ordered him to attend a course on anger management, and suspended his membership privileges for 59 days. *Id.* at 5.

Piccolo seeks a stay of these sanctions pending Commission consideration of his appeal from the BCC’s decision. He raises both substantive and procedural challenges in support of his claim that he is likely to succeed on the merits of his appeal. He also submits an affidavit to bolster his claim that the failure to grant a stay will cause him

immediate and irreparable harm. In opposition, the CSCE notes that Piccolo's stay request is untimely,<sup>1</sup> and contends that his position on the merits is insubstantial and his affidavit addressing irreparable harm is, at best, speculative.

## DISCUSSION

In determining whether to grant a stay, the Commission considers, among other things, whether the petitioner has established that: (1) there is a likelihood of success on the merits; (2) denial of the stay would cause the petitioner irreparable harm; (3) granting the stay would not endanger orderly trading or otherwise cause substantial harm to the market or market participants; and (4) granting the stay would not be contrary to the Act, and the rules, regulations and orders of the Commission, or otherwise be contrary to the public interest. Commission Rule 9.24(d).

"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*, [1990-1992 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, 75 (7th Cir.1987)). The alleged errors that Piccolo relies upon are too general and conclusory to satisfy this exacting standard.

Piccolo argues that CSCE Rule 1.29's prohibition on engaging in conduct detrimental to the best interests of the Exchange is "obvious[ly]" facially vague and denied him fair notice. Affirmation in Support of Pet. at ¶ 6. We disagree. The rule was approved by the Commission and provides adequate notice when read and interpreted in

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<sup>1</sup> Commission Rule 9.24 requires that a petition for stay be filed within ten days of the delivery of a notice of an exchange disciplinary action. Piccolo does not challenge CSCE's claim that it delivered a notice of its final disciplinary action to him on December 16, 2003. The Office of Proceedings did not receive Piccolo's petition, however, until January 5, 2004.

context. *See Todd and Company, Inc. v. SEC*, 557 F.2d 1008, 1013 (3<sup>rd</sup> Cir. 1977) (rejecting a vagueness challenge to the regulations of a self-regulatory organization that contained language similar to the language challenged by Piccolo). Piccolo had specific notice that conduct that includes crossing the ring and bumping chests, exchanging obscenities, and making threats, is considered detrimental to the CSCE.<sup>2</sup>

Piccolo also argues that the CSCE denied him a fair hearing. In this regard, he notes that the CSCE did not bring charges against other members who participated in the incident.<sup>3</sup> Affirmation in Support of Pet. at ¶ 8. Even if others could be properly viewed as blameworthy, the CSCE acted within its discretion in holding Piccolo responsible for his role in the misconduct.

Piccolo claims that the CSCE improperly influenced witness testimony by “providing its version of the facts immediately prior to his testimony,” and that the alleged improper influence on a witness denied him his right to effective counsel. Affirmation in Support of Pet. at ¶ 9-10. These claims are, at best, conclusory, and lack supporting evidence. Similarly, Piccolo charges that the CSCE withheld portions of taped interviews that were exculpatory and therefore denied him due process. Affirmation in Support of Pet. at ¶ 12. Piccolo, however, did not submit or describe the alleged exculpatory evidence, or describe in sufficient detail how his defense was affected by the alleged omission. Consequently, we cannot conclude that the alleged withholding of this evidence amounted to a denial of due process.

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<sup>2</sup> CSCE Disciplinary Rule 26.25(b)(i)A lists twenty types of decorum-related conduct that may result in a summary disciplinary action. The prohibited conduct specifically includes: “[t]he use of profane, vulgar or indecorous language”; “[l]eaving a spot in a Trading Ring in a disruptive manner”; and “[a]ny threatening, abusive, harassing or intimidating speech or conduct.” CSCE Disciplinary Rule 26.25(b)(i)A2, 18, and 20.

<sup>3</sup> In this regard, Piccolo focuses on both general conduct that contributed to the events at issue and specific conduct involving the altering of trading cards.

Piccolo insists that the CSCE relied on the testimony of two witnesses, who were “incredible as a matter of law.” Affirmation in Support of Pet. at ¶ 13. In this regard, we note that the CSCE based its determinations on the testimony of several witnesses and that Piccolo does not deny his participation in the incidents on the trading floor and outside the building. Indeed, Piccolo does not even point to specific testimony by the two witnesses, which, if disregarded as incredible, would materially change the outcome.

Piccolo also contends that the CSCE did not have jurisdiction over one of the two underlying incidents because it took place outside the exchange building. Affirmation in Support of Pet. at ¶ 14. As we have noted before, however, there is no presumption that an exchange’s regulatory jurisdiction is co-extensive with its physical grounds.<sup>4</sup>

Piccolo also claims that CSCE found him liable for fair trade violations that were not contained in the notice of charges. Affirmation in Support of Pet. at ¶ 15. Although the BCC’s decision contains a description of trading by the protagonists by way of background for the discussion of the violations charged in the notice, the CSCE did not find Piccolo liable for any fair trade violations.

Piccolo’s showing on irreparable harm also falls short of Commission Rule 9.24’s requirement. He conjectures that his missing of a single trading session “could be potentially catastrophic” because the consequent increased workload on his employees could result in errors, loss of customers, and a shortfall in his budget. A party seeking a stay must demonstrate that the injury claimed is “both certain and great.” *Global Futures*

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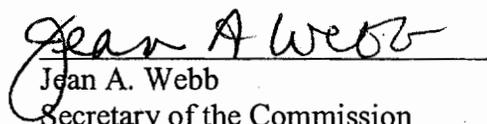
<sup>4</sup> See *Stephen Piccolo v. CSCE*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,553 at 55,380 n.4 (CFTC July 31, 2003) (noting that CSCE Floor Trading Rule 3.21(b) denying clerical registration to anyone who “has been convicted of any felony involving or arising from fraud or moral turpitude” is not limited to those involving conduct on the CSCE).

*Holdings, Inc. v. National Futures Association*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,467 at 47,241 (CFTC Nov. 24, 1998) (citing *Cuomo v. U.S. Nuclear Regulatory Commission*, 772 F.2d 972, 976 (D.C. Cir. 1985)); *Grandview Holding Corp. v. NFA*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,708 at 43,954 (CFTC May 30, 1996). A guess as to customer reaction to possible errors by employees of his firm is not a certain injury. Moreover, monetary loss alone generally does not rise to the level of irreparable harm. *Global*, ¶ 27,467 at 47,241 (citing *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,024 (CFTC Mar. 27, 1991)). Consequently, Piccolo has not established that he is likely to suffer irreparable harm in the circumstances presented.

Piccolo's petition for stay is procedurally defective and substantively unsupported by the record. Accordingly, it is denied.

IT IS SO ORDERED.

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

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

Dated: March 15, 2004