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In the Matter of

DANIEL P. RILEY,

Applicant.

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CFTC Docket No. SD 98-4

INITIAL DECISION

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Before:

Bruce C. Levine, Administrative Law Judge

Contents

<u>Overview</u>	3
<u>Procedural History</u>	4
<u>The Law Of Statutory Disqualification</u>	11
<u>Riley's Fraudulent Conduct In Prearranging A Trade Constitutes "Other Good Cause" For Disqualification Under Section 8a(3) (M)</u>	18
<u>Riley's Conduct In Willfully Misrepresenting And Omitting Material Information On His Floor Broker Application Constitutes Cause For Disqualification Under Section 8a(3) (G)</u>	39
<u>Riley's Rehabilitation Evidence Fails To Rebut The Division's Prima Facie Case Of Statutory Disqualification Under Section 8a(3) (G) And (M)</u>	58
Riley's Five Character Witnesses	61
<u>Douglas O. Kitchen</u>	63
<u>Salvatore Caputo</u>	71
<u>Michael P. Dowd</u>	75
<u>Horace Payne</u>	77
<u>Michael O. Nance</u>	80
Riley's Expert Witness	84
<u>The Concept Of The Rehabilitation Expert</u>	84
<u>Eric Ostrov, J.D., Ph.D., ABPP</u>	85
<u>Conclusion And Order</u>	99

Overview

Daniel P. Riley ("Riley") is a Chicago Mercantile Exchange ("CME") telephone clerk who applied for registration as a floor broker in July of 1990. His application apparently languished until the Spring of 1998, when the Commodity Futures Trading Commission ("Commission") initiated this proceeding to consider it. The Division of Enforcement ("Division") has argued that Riley is unfit for Commission registration. The Court agrees.

Riley falsely completed his 1990 registration application. The registration form asked whether he had ever been charged with any felony. Riley answered, "no," when, in fact, he had been previously charged with three felonies and convicted of one. It also asked whether he was subject to any pending exchange disciplinary proceedings. At the time, Riley had two such proceedings pending against him, yet he said "no" to that question too. The Division has proved, by overwhelming evidence, that Riley willfully falsified his application.

Additionally, the Court finds that, in 1994, Riley knowingly fixed a trade on the floor of the CME for the purpose of benefiting one of his firm's customers at the expense of the customer on the other side of the transaction.

Under the Commodity Exchange Act, Riley's history of lying (on his application) and cheating (on the trading floor) raises a presumption that he is unfit for Commission registration. Riley's showings of mitigation regarding his disqualifying conduct and of his rehabilitation fell far too short of rebutting this presumption. Accordingly, Riley's floor broker application is **DENIED.**

Procedural History

On September 10, 1998, the Commodity Futures Trading Commission filed an amended notice of intent to condition or refuse the application of Daniel P. Riley for registration as a floor broker.¹ In the Amended Notice, the Division of Enforcement

¹ Amended Notice of Intent to Condition or Refuse Registration Pursuant to Section 8a(3) of the Commodity Exchange Act, dated September 10, 1998 ("Amended Notice"). See Order Lifting Stay and Granting Motion to Amend the Notice, dated October 6, 1998. The Amended Notice supercedes the Commission's Notice of Intent to Condition or Refuse Registration Pursuant to Section 8a(3) of the Commodity Exchange Act and to Suspend, Revoke or Restrict Registration Pursuant to Section 8a(2) of the Commodity Exchange Act, dated May 1, 1998. For reasons that are not reflected in the record, Riley's application for registration as a floor broker has been pending since July 31, 1990. Amended Notice, ¶2; NFA Exhibit at 3-8.

(continued..)

alleges that Riley is subject to disqualification from registration under four different provisions of Section 8a(3) of the Commodity Exchange Act ("Act"), 7 U.S.C. §12a(3).

Specifically, the Division alleges that Riley was convicted of larceny in a building, a felony theft, in 1977.² On this basis, the Division alleges that Riley is subject to refusal or conditioning of his application under Section 8a(3)(D), 7 U.S.C. §12a(3)(D).³ The Division also alleges that Riley pleaded guilty

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Riley is a 41-year-old native of the Chicago area. Amended Notice, ¶1; Transcript of Oral Hearing, dated February 8-10, 1999 ("Tr."), at 26-27. In April 1989, he became a member of the Chicago Mercantile Exchange and currently works there as a telephone clerk. Amended Notice, ¶3. At various times, between 1984 and 1989, he worked as a phone clerk at the Chicago Board of Trade ("CBOT"). Id.

Riley currently works for Chicago Execution Corporation, a firm that specializes in the execution of trades in Standard & Poor's 500 Stock Price Index futures contracts for large and sophisticated customers. Tr. at 29, 33 ("mostly banks, institutions, and hedge funds"). Riley's "main function is to try [to] give an accurate bid for the S&P and make sure the order is executed correctly with that." Tr. at 35. Although his title may appear modest and his work description simple, Riley's job is demanding and he is a master of it. Tr. at 289-93, 323-26, 398-401.

² Amended Notice, ¶26.

³ Amended Notice, ¶27. Section 8a(3)(D) provides,

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to misdemeanor theft, a fact independently disqualifying under Section 8a(3)(E), 7 U.S.C. §12a(3)(E).⁴ Furthermore, the Division alleges that Riley has an additional history of criminal arrests and convictions,⁵ and a history of exchange disciplinary actions.⁶ It contends that these arrests, convictions, disciplinary actions,

(..continued)

"The Commission is authorized--

.
(3) to refuse to register or to register conditionally any person, if it is found, after opportunity for hearing, that--

.
(D) such person . . . was convicted of a felony of the type specified in paragraph (2)(D) of this section more than ten years preceding the filing of the application[.]"

7 U.S.C. §12a(3)(D). Theft is among the felonies listed in Section 8a(2)(D). 7 U.S.C. §12a(2)(D)

⁴ Amended Notice, ¶¶28-29. Section 8a(3)(E) permits the Commission to refuse or condition the registration of any person found to have "pleaded guilty to . . . any misdemeanor which involves . . . theft"

⁵ Amended Notice, ¶¶21-24.

⁶ Amended Notice, ¶¶5-6, 8-9, 11-13, 15-16, 18-19.

and Riley's exchange-related misconduct,⁷ constitute "other good cause" for Riley's disqualification under Section 8a(3)(M) of the Act, 7 U.S.C. §12a(3)(M).⁸ As a fourth ground for the refusal or conditioning of his floor broker registration, the Division alleges that Riley willfully failed to disclose certain criminal arrests and convictions and exchange disciplinary matters on his application for registration under the Act.⁹ This, according to the Division, constitutes disqualifying conduct under Section 8a(3)(G) of the Act, 7 U.S.C. §12a(3)(G).¹⁰

⁷ Amended Notice, ¶¶4, 7, 10, 14, 17, 20.

⁸ Amended Notice, ¶25. The list of circumstances warranting a refusal of registration under Section 8a(3) includes a catchall provision, Section 8a(3)(M). It provides that, in addition to the specifically enumerated circumstances in Section 8a(3), the Commission may refuse to register a person for "other good cause." 7 U.S.C. §12a(3)(M).

⁹ Amended Notice, ¶¶30, 32.

¹⁰ Amended Notice, ¶¶31, 33. Section 8a(3)(G) provides for refusal or conditioning of a person's application for registration if it is found that,

"such person willfully made any materially false or misleading statement or willfully omitted to state any material fact in such person's application or any update thereon, in any report required to be filed with the Commission by this Act or the regulations thereunder, in any proceeding before the

(continued..)

In response to the Amended Notice, Riley admits that his floor broker application is subject to refusal or conditioning, under Section 8a(3)(D) and (E), as a result of his conviction for felony theft and guilty plea to misdemeanor theft.¹¹ He disputes, however, that he has engaged in conduct that is disqualifying under Section 8a(3)(G) and (M).¹² In addition, the Amended Response stated Riley's intent to show that his registration as a floor broker would not pose a substantial risk to the public despite the existence of his disqualifying conduct under Section

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Commission or in any registration
disqualification proceeding [.]"

7 U.S.C. §12a(3)(G).

¹¹ Response of Applicant Daniel P. Riley to Amended Notice of Intent to Condition or Refuse Registration Pursuant to Section 8a(3) of the Commodity Exchange Act, filed October 16, 1998, ("Amended Response"), ¶¶26-29. With his Amended Response, Riley submitted an affidavit as well as an agreement signed by his employer to sign a Supplemental Sponsor Certification Statement and supervise compliance with any conditions or restrictions that may be imposed on Riley as a result of this proceeding. Affidavit of Daniel P. Riley, dated October 15, 1998 ("Riley Affidavit"); Agreement to Sign Supplemental Sponsor Certification Statement, dated October 15, 1998 ("Sponsor Agreement"). See 17 C.F.R. §§3.60(b)(2)(i).

¹² Amended Response, ¶¶4-25, 30-33.

8a(3)(D) and (E),¹³ or under Section 8a(G) and (M), if it is found that he engaged in disqualifying conduct under those latter two provisions.¹⁴ Thereafter, Riley filed a submission in support of his intended showing and requested an oral hearing.¹⁵

Subsequently, the Division moved for rejection of Riley's application by summary disposition.¹⁶ Concluding that Riley's submission, at the very least, "plainly mad[e] an ample, concrete

¹³ Amended Response, ¶¶27, 29.

¹⁴ Amended Response at ¶¶25, 31, 33.

¹⁵ Statement of Applicant Daniel P. Riley Pursuant to Regulation 3.60(b)(2)(ii), filed November 3, 1998 ("Amended Statement"), with Daniel P. Riley's Appendix to Statement of Applicant Pursuant to Regulation 3.60(b)(2)(ii); Supplemental Statement of Daniel P. Riley Pursuant to Regulation 3.60(b)(2)(ii), filed November 3, 1998, ("Supplemental Statement"), with Daniel P. Riley's Appendix to Supplemental Statement of Applicant Pursuant to Regulation 3.60(b)(2)(ii) ("Supplemental Appendix"). See 17 C.F.R. §3.60(b)(2)(ii). At Riley's request, the Supplemental Statement and Supplemental Appendix are retained non-publicly. See Order Denying Motion for Summary Disposition and Setting Matter for Oral Hearing, dated December 18, 1998 ("Order Denying Summary Disposition"), at 2 n.2.

¹⁶ Division of Enforcement's Amended Motion for Summary Disposition, dated December 2, 1998 ("Amended Motion"), with Exhibit Volume III; Division of Enforcement's Amended Memorandum in Support of its Motion for Summary Disposition, dated December 2, 1998. See 17 C.F.R. §3.60(c)(1). By leave of the Court, Riley filed a response to the Amended Motion. Daniel Riley's Response to the Division of Enforcement's Amended Motion for Summary Disposition, filed December 10, 1998. See Order Denying Summary Disposition at 3 n.3.

evidentiary showing on the issue of rehabilitation,"¹⁷ the Court denied the Division's motion and set this matter for oral hearing.¹⁸

Beginning on February 8, 1999, the Court conducted a three-day oral hearing at the Illinois Circuit Court in Chicago, Illinois.¹⁹ Riley has filed his post-hearing brief,²⁰ and this case is now ripe for decision.

¹⁷ Id. at 9.

¹⁸ Id. at 11-16.

¹⁹ See Transcript of Oral Hearing, dated February 8-10, 1999; Notice of Change of Hearing Site, dated January 19, 1999.

²⁰ Post-Hearing Brief of Applicant Daniel P. Riley, filed March 17, 1999 ("Riley Brief"). The Division also filed a brief, five days after it was due. It subsequently filed a motion to file its brief late. Having failed to establish good cause for its tardiness, the motion was denied and the Division's brief was stricken. See Order Striking the Division of Enforcement's Post-Hearing Brief, dated June 7, 1999.

The Law Of Statutory Disqualification

The 1982 Amendments to the Act²¹ created the existing structure for statutory disqualification.²² Once the Division demonstrates grounds for disqualification under Section 8a of the Act,²³ a prima facie case of unfitness is established.²⁴ The burden then shifts to the applicant to overcome the presumption of unfitness by producing evidence demonstrating that, despite his disqualifying conduct, his registration would pose no substantial risk to the public.²⁵

²¹ Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2294 (1983).

²² In re Clark, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,032 at 44,928 (CFTC Apr. 22, 1997) (citing In re Walter, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,215 at 35,010 (CFTC Apr. 14, 1988)) ("The legislative history of the 1982 Act demonstrates that one of Congress's purposes in revising the Act's registration provisions was to streamline and simplify the registration procedures so that those who were fit could be registered expeditiously and those who were unfit could be removed from the industry promptly.").

²³ The Division has the burden of proving the applicant's disqualifying conduct by a preponderance of the evidence. 17 C.F.R. §3.60(e).

²⁴ In re Walter, ¶24,215 at 35,010.

²⁵ In re Walter, ¶24,215 at 35,1010. The "preponderance of the evidence" standard is likewise employed in assessing whether the

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To overcome the presumption that registration would raise a substantial risk to the public, the applicant generally presents two types of evidence: mitigation and/or rehabilitation.²⁶ The Commission has defined both categories narrowly.

Mitigation and rehabilitation evidence both sharply focus on the nature and circumstances of the disqualifying act but for different reasons. A mitigation showing consists of "evidence that the wrongdoing at issue arose from a good faith error or some type of exigent circumstance unlikely to be repeated in the future."²⁷ Rehabilitation evidence looks to the applicant's "changed direction in his activities" since the time of his

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applicant has overcome the presumption of unfitness arising from a Section 8a(3) disqualification. 17 C.F.R. §3.60(e)(2).

²⁶ In re Horn, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. ¶23,731 at 33,889 (CFTC July 21, 1987) ("Although the Commission has not limited the factors that may be considered in order to meet the 'public interest' standard, mitigating circumstances relating to the wrongful conduct underlying the statutory disqualification and evidence of rehabilitation since the time of the wrongful conduct have traditionally been the key considerations."); In re Akar, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,927 at 31,708 (CFTC Feb. 24, 1986). See also 17 C.F.R. §§3.60(b)(2)(ii)(A)-(B), (f)(1)-(2).

²⁷ In re Horn, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,836 at 36,940 n.16 (CFTC Apr. 18, 1990).

violation.²⁸ An applicant seeking to counter a prima facie case by showing rehabilitation must produce evidence that directly relates to the wrongful conduct at issue and shows that conduct of that nature will not be repeated.²⁹

Statutory disqualification case law reads as a litany of what mitigation and rehabilitation are not. Evidence of conduct prior to the disqualifying act is "essentially irrelevant."³⁰ In addition, evidence of civic achievement or charitable associations does not mitigate a disqualification that arose despite the existence of this evidence of "good character,"³¹ nor does it indicate rehabilitation.³² Likewise, expressions of remorse,³³

²⁸ In re Walter, ¶24,215 at 35,013, quoting In re Tipton, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,673 at 22,752 (CFTC Sept. 22, 1978).

²⁹ In re Akar, ¶22,927 at 31,709-10.

³⁰ In re Horn, ¶23,731 at 33,889-90.

³¹ In re Walter, ¶24,215 at 35,014 n.19.

³² In re Horn, ¶24,836 at 36,941.

³³ In re Ashman, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,336 at 46,548 (CFTC Apr. 22, 1998); In re Scheck, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,072 at 45,125 (CFTC June 4, 1997); In re Horn, ¶24,836 at 36,940.

professional accomplishments,³⁴ or favorable opinions expressed by friends, family and colleagues³⁵ are normally given no significant weight. Although the absence of further, wrongful conduct since the time of the underlying disqualifying act may support a potential showing of rehabilitation, such a showing is insufficient standing alone.³⁶ Moreover, "neither sympathy for

³⁴ In re Horn, ¶23,731 at 33,890; In re Anderson, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,085 at 32,209 (CFTC May 30, 1986).

³⁵ In this regard, the Commission has observed,

"Almost every respondent can not only claim that his underlying wrongdoing is less serious than it might have been but also produce testimony by a friend or colleague attesting to the witness' trust in respondent and belief that he will not repeat his violative conduct."

In re LeClaire, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,282 at 42,428 (CFTC Dec. 12, 1994).

Issues of partiality aside, these individuals are not regarded as experts on questions relevant to the risk of recidivism. In re Horn, ¶24,836 at 36,941. "[T]here may be situations in which the opinion of a lay witness may significantly aid the decisionmaker" in determining issues of rehabilitation, "depending on the particular facts of the case." In re Zuccarelli, [Current transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,597 at 47,834 n.19 (CFTC Apr. 15, 1999). However, such situations are rarely found in the case law.

³⁶ In re Rousso, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,133 at 45,310 (CFTC Aug. 20, 1997) ("Clean records after (continued..)

[the applicant's] position or a showing that he had 'suffered enough' is a sufficient basis for [granting] his registration."³⁷ It is within this framework that the Court assesses the evidence of Riley's disqualifying conduct, and the evidence material to determining whether Riley's continued registration would raise a substantial risk to the public.³⁸

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the fact, without more, are not sufficient to rebut the presumption of unfitness for registration."); In re Castellano, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,920 at 44,457 (CFTC Dec. 10, 1996); In re Bryant, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,847 at 36,999 (CFTC Apr. 18, 1990); In re Horn, ¶24,836 at 36,941.

³⁷ In re Horn, ¶24,836 at 36,941.

³⁸ Riley posits that the Court's inquiry should be more wide-ranging. More specifically, he contends that, "[i]n determining whether Riley's registration would pose a substantial risk to the public, it is appropriate to consider [] settled cases." Riley Brief at 3 n.1 (citing In re Walter, ¶24,215 at 35,012). Riley then proceeds to argue that, in accepting offers of settlements in other cases, "[t]he Commission had routinely allowed individuals to become or remain conditionally registered even when they have been sanctioned for conduct that is by any reasonable measure far more serious and injurious to customers and to the functioning of markets than is Riley's conduct." Id. at 3. While Riley's observations as to as to the outcome of certain settlements may be entirely correct, this fact provides cold comfort in the adjudicatory context.

Settled cases are not precedential in any "ordinary sense." In re Walter, ¶24,215 at 35,012; see In re Global Link Miami Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH)
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¶27,391 at 46,785 n.83 (ALJ June 26, 1998), rev'd on other grounds, CFTC Docket No. 98-1, 1999 WL 325329 (CFTC May 24, 1999). As this Court explained in Global Link,

"The Commission generates controlling legal authority by two methods: public (or policy) rulemaking, generating general rules, and adjudicatory rulemaking, generating fact specific rules on an ad hoc basis. First National Monetary Corp. v. CFTC, 677 F.2d 522, 526-27 (6th Cir. 1982); In re First National Monetary Corp., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,698 at 30,971 (CFTC Aug. 7, 1985). Adjudicatory rulemaking results from the actual litigation of a matter before an authority acting in a judicial capacity that makes legal determinations. Two fundamental aspects of such rulemaking are a decision maker acting in an adjudicatory capacity and a conclusive determination, resolving the issues."

Id.

Although a settlement, unlike the issuance of a complaint, results in a resolution of the matters addressed, the Commission both issues complaints and accepts settlements in its prosecutorial, not adjudicatory, role. In re Grain Land Coop., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,144 at 45,377 (CFTC Sept. 12, 1997) (finding that when the Division, in its prosecutorial role, advises the Commission regarding the issuance of the complaint and the acceptance of offers of settlement ex parte, it does not "influence the Commission's performance of its role as [adjudicatory] decision maker"); In re Yeh [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,367 at 42,708 n.9 (CFTC Apr. 7, 1995) (holding that the Commission and the Division may discuss ex parte prosecutorial matters affecting a pending case, but not the Commission's adjudication of that case); see 17 C.F.R §10.108. Accordingly, the Court looks to case
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law, not settlements, for principles to guide its assessment of an applicant's fitness for registration. In re Trillion Japan Co., Ltd., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,082 at 41,589 (CFTC May 23, 1994). Walter, relied on by Riley, is not to the contrary. It only stands for the self-evident proposition that the Commission's settlement policy stands as "some indication" of the measure of discretion that the Commission exercises in the statutory disqualification area. In re Walter, ¶24,215 at 35,012 ("While we agree with the Division that settlements are not precedential in the ordinary sense, they are some indication of the Commission's rejection of a mechanistic approach to the application of [Sections 8a(2)-8a(4)]."); see 17 C.F.R pt. 3 app. A ("At this time, the Commission cannot anticipate all the circumstances under which it may elect not to exercise its authority under sections 8a(2)-(4).").

There is another compelling reason why settlements provide no guidance in the Court's registration determination. The factors which determine settlements are not always a matter of public record and, consequently, are frequently unknowable. For example, a settlement order may reflect the Commission's assessment of the weakness of the Division's disqualification case or the strength of the applicant's mitigation or rehabilitation evidence. Moreover, savings attributable to the Commission's reduced cost of prosecution or an applicant's aid and cooperation with Commission investigations of others may also affect the settlement. In re Newman, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,356 at 39,191 n.8 (CFTC Aug. 6, 1992). These factors, and the roles that they play, are impossible for the Court to assess in any individual settlement and impossible to compare across cases. Indeed, the Commission has "cautioned against the use of settlements as a guide to the imposition of sanctions in the absence of evidence that the violations at issue are of comparable gravity and without giving due consideration to the special circumstances that may affect the sanctions imposed in the settlement context." In re Schneider, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,842 at 40,764 (CFTC Aug. 13, 1993); accord In re LaCrosse, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,840 at 40,754 (CFTC Aug. 13, 1993); In re Vercillo,
(continued..)

Since Riley concedes that he engaged in disqualifying conduct under Section 8a(3)(D) and (E),³⁹ the Court begins by examining whether Riley engaged in conduct that is additionally disqualifying under the provisions of subsections (3)(M) and (3)(G). The Court then considers whether Riley has made a sufficient showing of mitigation and/or rehabilitation in relation to his proven wrongdoing to overcome the presumption that he is unfit for Commission registration.

**Riley's Fraudulent Conduct In Prearranging
A Trade Constitutes "Other Good Cause" For
Disqualification Under Section 8a(3)(M)**

In the absence of any statutory definition for "other good cause," the Commission has developed a model from which to evaluate misconduct not otherwise covered in Section 8a(3). The Commission's Interpretative Statement With Respect to Section 8a(3)(M) of the Act explains that this provision

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[1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,836 at 40,738 (CFTC Aug. 13, 1993); In re Scheck, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,834 at 40,731 (CFTC Aug. 13, 1993).

³⁹ See supra note 11.

"authorize[s] the Commission to affect the registration of any person if, as a result of any act or pattern of conduct attributable to such person, although never the subject of formal action or proceeding before either a court or governmental agency, such person's potential disregard of or inability to comply with the requirements of the Act or the rules, regulations or order[s] thereunder, or such person's moral turpitude, or lack of honesty or financial responsibility is demonstrated to the Commission.

Any inability to deal fairly with the public and consistent with just and equitable principles of trade may render an applicant or registrant unfit for registration, given the high ethical standards which must prevail in the industry."⁴⁰

As mentioned above, the Division contends that Riley possesses a history of criminal arrests and convictions,⁴¹ and exchange misconduct and disciplinary actions,⁴² sufficient to

⁴⁰ 17 C.F.R. pt. 3 app. A, quoted in In re Clark, ¶27,032 at 44,928.

⁴¹ Amended Notice, ¶21 (Riley arrested for, charged with, and convicted of misdemeanor battery resulting from a fight in 1982); Amended Notice, ¶22 (Riley arrested for, charged with, and pleaded guilty to misdemeanor possession of marijuana in 1982); Amended Notice, ¶23 (Riley arrested for and charged with battery resulting from a fight in 1983; charges later dismissed); Amended Notice, ¶24 (Riley arrested for and charged with battery resulting from a fight in 1986; charges later dismissed).

⁴² Amended Notice, ¶¶4-6 (alleging that, in 1989, Riley acted beyond the scope of his clerical capacity as a telephone clerk by providing trading advice to customers, and pursuant to an offer of settlement with the CBOT in which Riley neither admitted nor
(continued..)

warrant refusal of his floor broker application for "other good cause." The Court, however, need not sort through the Division's miscellany of alleged facts and acts to determine whether each, individually, or the collection, in whole or in part, constitutes an "act or pattern" of conduct anathematic to the industry standards set forth in Section 8a(3)(M). This is because Riley's acknowledged inducement of a prearranged trade on the floor of the

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denied the conduct, was fined \$10,000, and ordered to cease and desist such conduct); Amended Notice, ¶¶7-9 (alleging that, in 1990, Riley engaged in a fight on the floor of the CME, and pursuant to an offer of settlement with the CME in which Riley neither admitted nor denied the conduct, was fined \$1,500); Amended Notice, ¶¶10-12 (alleging that, in 1994, Riley induced two traders to prearrange a trade, and, in 1995, pursuant to an offer of settlement with the CME in which Riley neither admitted nor denied the conduct, was fined \$10,000 and suspended from floor access privileges for five days); Amended Notice, ¶13 (alleging that, in 1994, CME found that Riley used profane, obscene and unbusinesslike language on the exchange floor, and imposed a \$250 fine); Amended Notice, ¶¶14-16 (alleging that, in 1995, Riley used inappropriate and offensive language in referring to a CME member, and pursuant to an offer of settlement with the CME in which Riley neither admitted nor denied the conduct, was fined \$1,000 and ordered to cease and desist from such conduct); Amended Notice, ¶¶17-19 (alleging that, in 1996, Riley made derogatory statements about and struck a CME member, and pursuant to an offer of settlement with the CME in which Riley neither admitted nor denied the conduct, was fined \$2,500 and ordered to cease and desist from such conduct); Amended Notice, ¶20 (alleging that Riley willfully failed to file supplements to his application for floor broker registration to include the disciplinary matters set forth in Amended Notice, ¶¶10-19).

CME is sufficiently egregious, standing alone, to render Riley presumptively unfit for Commission registration.⁴³

On June 15, 1995, a panel of the CME's Floor Practices Committee, Financial Division found that, on March 31, 1994, Riley induced two floor brokers to execute a 5-lot Standard & Poor's 500 Stock Price Index ("SPM") futures trade for two customers other than by open outcry.⁴⁴ These findings were entered pursuant to an offer of settlement without any formal admission by Riley of the allegations against him.⁴⁵ However, Riley admitted to having engaged in the charged conduct both in this proceeding⁴⁶ and in interview statements to the CME Compliance Department.⁴⁷

⁴³ In light of the evidence of mitigation and rehabilitation discussed below, it is also dispositive of his application. Accordingly, the Court's consideration of Section 8a(3)(M) grounds need go no farther. See In re Interstate Securities Corp., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,295 at 38,954-55 (CFTC June 1, 1992).

⁴⁴ Amended Notice, ¶¶10 and 12; CME Exhibit B at 34.

⁴⁵ Amended Notice, ¶¶10 and 12; CME Exhibit B at 34.

⁴⁶ Amended Response, ¶10; Riley Affidavit, ¶4; Tr. at 103-05, 194-201, 212. See Riley Brief at 18.

⁴⁷ CME Exhibit B at 41-42.

Riley was charged with a violation of CME Rule 432.g ("To commit an act which is substantially detrimental to the interest and welfare of the Exchange"), a major offense, and a violation of
(continued..)

At the oral hearing, Riley explained the incident in the following colloquy.

Mr. Gill: "Were you also at some point in time charged with, by an Exchange, completing a trade after the close of trade off?"

Mr. Riley: "Yes, I was."

Mr. Gill: "All right. And do you recall when that occurred?"

Mr. Riley: "That occurred in 1995, '94, '95."

Mr. Gill: "Can you describe what it was that you were charged with in that case?"

Mr. Riley: "Soliciting two brokers to fill an order by other means than open outcry."

Mr. Gill: "I didn't hear the last of it."

Mr. Riley: "Soliciting two brokers to fill an order by other means, other than open outcry."

Mr. Gill: "And what was the disposition of that charge?"

(..continued)

CME Rule 433.c ("To be guilty of any conduct which has a manifest tendency to impair the dignity or good name of the Exchange"), a minor offense. Amended Notice, ¶11; CME Exhibit B at 36. Pursuant to the offer of settlement, the Floor Practices Committee found that Riley violated CME Rule 433.c, dismissed the CME Rule 433.q charge, fined Riley \$10,000, and suspended his floor access privileges for five business days. Amended Notice, ¶12; CME Exhibit B at 34.

Mr. Riley: "I was found guilty."

Mr. Gill: "And were you fined?"

Mr. Riley: "Yes, I was."

Mr. Gill: "All right. Can you tell us what the circumstances were, how this came about and what occurred on this occasion?"

Mr. Riley: "Sure. It was, the market was closed on a Friday because of Good Friday, and it was Thursday afternoon and the market was closing. And I was working with a Belgium fund manager on apparently, either he or I lost his count going into the close. He asked me to buy 100 contracts and it should've been 200 contracts. Well, at the same time another clerk at the end of the desk was working an order to sell 5 with a stop tied to it and an MOC. And that order fell on the floor, physically dropped on the floor and after we had figured out that the Belgium fund manager needed to purchase another 100 S & P's that we had miscounted, I walked into the pit and asked two brokers to buy and sell 5. And it was toward the end, either at the end of post-settlement or after post-settlement, I'm not quite sure. I did ask them to buy and sell 5 and the Merc sanctioned me for that."

Mr. Gill: "Were the brokers also sanctioned?"

Mr. Riley: "Yes, they were."

Mr. Gill: "Did you understand that the closing of the sale after the closing trade and after the post-closing session was improper?"

Mr. Riley: "Yes."⁴⁸

⁴⁸ Tr. at 102-04.

Riley not only arranged the noncompetitive trade, he fixed the price.⁴⁹ Moreover, he fixed it in such a manner as to benefit his buying customer -- that placed a relatively large order --

⁴⁹ The following excerpt of the transcribed conversation, between Riley and his customer, reveals this aspect of the noncompetitive trade.

Customer: "Danny?"

Mr. Riley: "Yeah, Luc. Listen, not that this is going to help anything, but we can, we can sell you five, five-lots. It will reduce your position to 95."

Customer: "Okay, it's something."

Mr. Riley: "Okay, the price will be, the settlement is 446.75, we'll make you, you bought 'em at 446.60."

Customer: "446.60, I bought them"

Mr. Riley: "Yes."

Customer: "Okay."

Mr. Riley; "Okay, bye."

CME Exhibit B at 67.

Riley acknowledged that the transcript is accurate. CME Exhibit B at 41; see Tr. at 198-200.

It appears that the two floor brokers who Riley induced to undertake this prearranged trade, Mark D. Erwin and Brian P. Cooley, both altered and falsified their order tickets and trading cards in an attempt to conceal this fictitious transaction. CME Exhibit B at 39.

(and derivatively himself) at the expense of the seller with the smaller order.⁵⁰

Although Riley admits to having induced the 1994 prearranged trade, he denies that it was a fraud and challenges its sufficiency as "good cause" for disqualification.⁵¹ In his prehearing submissions, he asserted that "[n]either customer suffered any pecuniary loss as a result of the" prearranged trade⁵² and that he had "no intent to harm customers."⁵³

⁵⁰ The March 31, 1994, SPM settlement price was 446.75. CME Exhibit B at 39. The post-settlement session reflects trades from 446.65 through 446.85. Id. The following testimony touched on these facts.

Ms. Arnold: "The selling customer got the price of 446.60, correct?"

Mr. Riley: "Correct."

Ms. Arnold: Which means that he sold at a lower price than what he was entitled to, correct?"

Mr. Riley: "Correct."

Tr. at 200.

⁵¹ Amended Response, ¶10.

⁵² Riley Affidavit, ¶4(d)

⁵³ Amended Statement at 5. See also Tr. at 156. Riley and his counsel provided the following exchange.

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On the issue of customer harm, however, Riley impeached himself during his cross-examination by the Division.⁵⁴ Moreover, the injury to the selling customer in Riley's prearranged trade is clearly explained in case law. "By picking customer prices and opposing traders, [Riley] removed their customers from the pit's competitive marketplace and forced [the selling] customer[] to accept the results [he] selected, guaranteeing profits to [his buying customer] and denying the [selling] customer [] a better

(..continued)

Mr. Gill: "Have you ever defrauded a customer?"

Mr. Riley: "No."

Mr. Gill: "Have you ever been involved in trades to a customer's detriment?"

Mr. Riley: "No."

Tr. at 156.

⁵⁴ See supra note 50.

price."⁵⁵ Indeed, in his post-hearing brief, Riley appears to now concede that he injured the selling customer.⁵⁶

Although the customer harm that he caused is objectively verifiable and now conceded, Riley persists in arguing that "it is by no means clear that he intentionally harmed this customer."⁵⁷ Riley's intent to cause such harm "is a subjective question," requiring the Court to assess his credibility.⁵⁸ As discussed

⁵⁵ United States v. Ashman, 979 F.2d 469, 477-78 (7th Cir. 1992). Cf. In re Rousso, ¶27,133 at 45,310 ("Failure to pursue the best price possible can, without more, constitute fraud." (citations omitted)).

⁵⁶ Riley Brief at 20 & n.5 ("Riley has acknowledged that one of the customers received a price fifteen ticks lower than he would have received in the post-settlement session.") (admitting that the selling customer was entitled to the "slightly higher post-settlement-session price").

⁵⁷ Id. at 20.

⁵⁸ In re Staryk, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 at 45,811 (CFTC Dec. 18, 1997). In considering whether Riley possessed a wrongful intent (scienter), the Court is required to evaluate Riley's credibility in light of the record viewed in its entirety. Secrest v. Madda Trading Co., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,627 at 36,696-97 (CFTC Sept. 14, 1989). This task requires the Court to make both "testimonial" and "derivative" inferences. The former are made from direct observations of the demeanor of the witness, while the latter are drawn from the substance of the evidence. Ryan v. CFTC, 145 F.3d 910, 918 (7th Cir. 1998); see In re Staryk, ¶27,206 at 45,811 (deference accorded to the Court's demeanor-based determinations regarding a party's state of mind); In re JCC, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,080 (continued..)

more fully below, Riley's testimony was generally incredible as it related to disputed facts critical to establishing his case for registration. His statement and testimony to the effect that he had no fraudulent intent in prearranging the 1994 SPM trade was no exception. Riley's testimony was internally inconsistent and implausible. In addition, Riley's demeanor did not bolster his credibility.

To begin with, Riley conceded that he knew that the selling customer was entitled to a higher price, under CME rules, than he received under Riley's prearrangement.⁵⁹ Given such knowledge, it follows almost as a logical imperative that Riley intended to cheat him. To have the Court avoid this nearly inescapable

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at 41,579 (CFTC May 12, 1994) (finding inferences from circumstantial evidence can be an acceptable basis for a finding of culpable knowledge); In re Miller, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,440 at 42,914 (CFTC June 16, 1995) (making an inference-based finding of intent); In re Kolter, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,262 at 42,198 (CFTC Nov. 8, 1994) (making an inference-based finding of scienter). Thus, although "intent and knowledge are particularly with [a party's] personal comprehension," CFTC v. Savage 611 F.2d 270, 282 (9th Cir. 1979), the trier of fact is not required to accept self-serving but implausible denials of culpable knowledge. The Court declines to do so in this case.

⁵⁹ Tr. at 200.

conclusion, Riley could only waffle, obfuscate and evade questioning from the bench.

Riley reversed course from his admission, first made on direct examination, that he "understood that the closing of the sale after the closing trade and after the post-closing session was improper."⁶⁰ He undertook this retreat by providing alternative explanations of his mindset (in the apparent hope that Court might look favorably on one of them). The following colloquy illustrates Riley's progress from his admission of culpable knowledge -- to the statement that he (a long time member of the CME) did not know at the time that prearranged trading was wrong -- and then, to the statement that he simply had not thought of the subject and its implications at all -- and then, back to the earlier explanation that he was unaware, at the time, that prearranged trading was wrong -- and then, finally, to the statement that he does not remember "what [his] mindset was at that point."

The Court: "So, are you telling me now that when you facilitated or prompted this trade, you thought that what you were doing was perfectly permissible within

⁶⁰ Tr. at 104.

the rules of the Exchange, is that what you're telling me?"

Mr. Riley: "No."

The Court: "If that's the case--"

Mr. Riley: "No, that's not. I didn't really know what else to do."

The Court: "So you knew you were violating the rules, is that correct?"

Mr. Riley: "No, no. At the time I didn't. I knew that we had a buy and a sell order that were unfilled. And I didn't know what to do."

The Court: "But you knew that the way you had it filled violated CME rules. Isn't that correct?"

Mr. Riley: "By entering two orders in either on or after post settlement to buy or sell, I know now that it's wrong."

The Court: "Did you know then?"

Mr. Riley: "I don't think I thought of the consequences."

The Court: "That's not a responsive answer. I'm not asking whether you thought of the consequences. Did you know that what you were doing at that time was a violation of the CME rules or did you think it was perfectly permissible?"

Mr. Riley: "I didn't think at the time that I was doing something wrong."

The Court: "You did not think it was a violation of the rules, is that your testimony?"

Mr. Riley: "That's my testimony."

.....
Ms. Arnold: "So in the post settlement period, if you were going to fill that order, he would've been entitled to the post settlement price, correct?"

Mr. Riley: "That's correct."

Ms. Arnold: "And that price was 446.75?"

Mr. Riley: "Correct."

Ms. Arnold: "Instead the selling customer got the price of 446.60."

Mr. Riley: "Correct."

Ms. Arnold: "The selling customer got the price of 446.60, correct?"

Mr. Riley: "Correct."

Ms. Arnold: "Which means he sold at a lower price than what he was entitled to, correct?"

Mr. Riley: "That's correct."

The Court: "So you didn't help the other customer, did you?"

Mr. Riley: "I really don't know what my mindset was at that point. It was in front of an unemployment figure on Good Friday, when the market was closed. And it's not like I had a lot of time to think about the decisions, they were made pretty spur of the moment."⁶¹

⁶¹ Tr. at 197-200 (emphasis added).

The Court finds Riley's vacillating testimony as to his knowledge and mindset in inducing the prearranged trade incredible. It further finds that, in inducing this trade, Riley did so with the specific intent of defrauding the selling customer.⁶²

⁶² Riley would now have the Court don blinders and focus on Riley's last version of his mindset without regard to his earlier, competing accounts. Riley Brief at 20 ("Riley testified that he cannot now recall what his state of mind with respect to [the prearranged trade] was at the time."). He also argues, as set out below, that the circumstantial evidence supports an inference of an innocent mindset.

"[T]he evidence is consistent with Riley's having attempted to help this customer. Chicago Mercantile Exchange records show that this customer gave instructions to sell five contracts at '442.00 Stop OCO MOC' -- in other words, if the 442.00 stop order was not filled, it was to be cancelled ('OCO' or 'one cancel other') and replaced by an order to sell five contracts at the 'market on close.' See Div. of Enf. CME Exhibit B 39, 47. CME records also show that the price at which this customer's order was executed (446.60) fell within the closing range on the day in question. See Div. of Enf. CME Exhibit B at 71. Thus, this customer received a price within the range that he requested -- a price to which he would have been entitled had an order ticket not been dropped on the floor. This accidental dropping of the order ticket resulted in a windfall to this customer, since it entitled him to the slightly higher post-settlement-session-price. We do not make this point in order to excuse Riley's

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actions, but rather to shed light on Riley's likely mental state at the time: it is entirely plausible to believe that Riley was not even thinking about the post-settlement price but rather was attempting to balance his concern for the other customer (who had a much larger order and therefore faced more risk) with his recognition that he had a duty to fill both customer orders at a price within the closing range."

Riley Brief at 20 n.5 (emphasis added).

This argument, while creative, suffers from a fundamental flaw. Issues of Riley's credibility aside, the transcribed telephone conversation, relating to the fixed trade, contradicts it. That exchange clearly reveals that Riley was "thinking about the post-settlement price" and not the closing range. CME Exhibit B at 67 ("Okay, the price will be, the settlement is 446.75, we'll make you, you bought 'em at 446.60."). Moreover, the selling customer received no "windfall" under any view of this event. 446.60 was the worst price within the closing range. If the order had not been dropped, the seller customer might have done better than the settlement price (446.75) by selling at the close. CME Exhibit B p. 71 (closing range, 446.60-446.90). In sum, the Court remains persuaded that Riley knowingly sought to accommodate his customer by intentionally cheating the seller.

Riley's next argument is both equally imaginative and equally unavailing. He argues that, while the prearranged trade was "a serious offense," the Court is precluded from taking it too seriously because "the Division of Enforcement did not accuse Riley of fraud in the Amended Notice." Riley Brief at 19-20. Accordingly, it would be "unfair to characterize this violation as an instance of customer fraud." Id. at 19. In this particular argument, "unfair" is not used as a synonym for inaccurate. Rather, by "unfair," Riley means that a "new issue and legal theory" has been unfairly introduced because the Division did not provide sufficient notice. Id. at 20.

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Certainly, Riley is entitled to notice that is sufficient to advise him of "the legal and factual issues involved." Attorney General's Manual on the Administrative Procedure Act 47 (1947). However, he is not entitled to notice of "evidentiary facts [that the Division will seek to prove] or legal argument." Id. The Commission's rules provide for no additional notice on the part of the Division. 17 C.F.R. §3.60(a). In short, Riley is entitled to notice of the issues to be litigated and not to particular theories that the Division might put forth in an effort to resolve those issues in its favor.

The Amended Notice charges Riley with inducing a prearranged trade and states that this act constituted grounds for statutory disqualification from registration under Section 8a(3)(M). Amended Complaint, ¶¶10, 25. Thus, it set out the factual issue of the occurrence of an act and the legal issue of whether the act amounted to cause to deny Riley's application. The issue of whether certain activity amounts to "other good cause" necessarily includes the issue of the nature of the act in question, including its implications as to the actor's "moral turpitude, "lack of honesty," "inability to deal fairly with the public" and "inability to comply with the requirements of the Act or the rules, regulations, or order[s] thereunder." 17 C.F.R. pt. 3 app. A.

Riley's responsive pleadings clearly reveal his understanding that the Amended Notice raised the issue of his mindset, relating to the arrangement of the noncompetitive trade, and the trade's effects on the customers involved. Riley Affidavit, ¶4(a) (characterizing the prearranged trade as an "honest but imprudent effort"); Id., ¶4(d) ("[n]either customer suffered any pecuniary loss as a result of the transaction"); Amended Statement at 5 ("[this] incident[] involved no intent to harm customers"). In other words, he understood that the Amended Notice placed the fraudulent intent and effect of the prearranged trade at issue. Thus, contrary to Riley's contention, the Division can hardly be said to have introduced "a new issue and legal theory in the middle of a hearing." Riley Brief at 20.

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Lastly, Riley makes a related, estoppel-type argument. He contends that the Division, at the oral hearing, disclaimed (if only for a while) that customer fraud was at issue and, in so doing, became estopped from proving the facts of or basing arguments on such misconduct. Id. at 19-20.

There is no need to address the legal merits of this argument because the record demonstrates its lack of a factual predicate. Riley directs the Court's attention to pages 155 and 156 of the oral hearing transcript. These pages record part of Riley's direct examination and the following, more generous excerpt places the Division's "disclaimer" in clearer context.

Mr. Gill: "In your 20 to 21 years on the Exchanges, whatever the number may be, have you ever been accused of theft of customers funds?"

Mr. Riley: "Never."

Mr. Gill: "Have you ever been accused of participating in any trade to the detriment of a customer?"

Mr. Riley: "No."

Mr. Gill: "And have you ever been accused of defrauding any investors?"

Mr. Riley: "No I have not."

Mr. Gill: "All right. I ask that in terms of whether you've ever been accused of any of those. Have you ever stolen customer funds?"

Tr. at 155.

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At this point, the Division did not seem to appreciate Riley's testimony and, by raising a relevance objection, prompted the following exchange.

Ms. Romaniuk: "Judge, we'd have to object. This is all self-serving. There is no charge of any of this stuff. If those particular types of actions were, he was being charged with, they would be in the complaint, they're not. And therefore, all this is just self serving."

Mr. Gill: "It's certainly self serving, Judge, but that's why we're here. Is to serve ourself."

Ms. Romaniuk: "But the, I mean, you know, we know that's not the case. It's not charged, it's not alleged, and it's not relevant to this cause of action."

Tr. at 155-56.

Riley seems to argue that, at this point, the Division has taken the issues of fraud and customer detriment off the table and is, therefore, estopped from litigating them. Even if this argument was sound, the next set of questions doom it. The Court denied the Division's objection and Riley's counsel proceeded.

Mr. Gill: "Have you ever stolen customer funds?"

Mr. Riley: "No."

Mr. Gill: "Have you ever defrauded a customer?"

Mr. Riley: "No."

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Riley's fraudulent undertaking on the floor of the CME is an "act"⁶³ that plainly demonstrates a "lack of honesty" and an "inability to deal fairly with the public."⁶⁴ It also illustrates Riley's "potential disregard of or inability to comply with the requirements of the Act" or the Commission's regulations. Indeed, it does more than that. Riley's wrongdoing also demonstrates an

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Mr. Gill: "Have you ever been involved in trades to a customer's detriment?"

Mr. Riley; "No."

Tr. at 156.

Thus, even if the Division's momentary misapprehension served to remove the issues of customer fraud and detriment from the proceeding, Riley's direct testimony reintroduced them and both parties proceeded with that understanding. See, e.g. Tr. at 301-03.

⁶³ Riley stresses that the 1994 prearranged trade is his "only act that can even arguably be construed as willful harm to a customer." Riley Brief at 20. Even if true, this point does not help Riley. Section 8a(3)(M) "speaks simply of 'good cause' [A]n 'act' itself, as distinct from a 'pattern,' is sufficient" to trigger this disqualifying provision. In re Anderson, ¶23,085 at 32,208.

⁶⁴ See generally In re Clark, ¶27,032; In re Castellano, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,360 (CFTC Nov. 23, 1988), summarily aff'd, CFTC Docket No. SD 88-1 (CFTC May 29, 1990), aff'd sub nom., Castellano v. CFTC, No. 90-2298, 1991 WL 243215 (7th Cir. Nov. 20, 1991) (Unpublished Disposition).

actual disregard for the Act since his participation in prearranged trading violates the antifraud provisions of Sections 4b and 4c(a), 7 U.S.C. §§6b, 6c(a).⁶⁵ The Court thus concludes that Riley's misconduct renders him presumptively unfit under the "other good cause" provision of Section 8a(3) (M).

⁶⁵ If the Commission had successfully brought an administrative enforcement action against him for this misconduct, Riley would have been subject to the specific statutory disqualification set forth under Section 8a(2) (E), 7 U.S.C. §12a(2) (E). Indeed, Riley's misconduct is a "core" violation of the Act that is subject to criminal prosecution. Ashman, 979 F.2d at 469; In re Glass, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,337 at 46,561-9 (CFTC Apr. 27, 1998). "When the violations at issue involve criminal conduct committed on the trading floor of an exchange, the threat a repetition of that conduct poses to market integrity is clear and unequivocal." In re Schneider, ¶25,842 at 40,766; accord In re Mosky, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,841 at 40,760 (CFTC Aug. 13, 1993); In re LaCrosse, ¶25,840 at 40,756; In re Kenney, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,839 at 40,750 (CFTC Aug. 13, 1993); In re Fetchenhier, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,838 at 40,746 (CFTC Aug. 13, 1993); In re Vercillo, ¶25,836 at 40,739; In re Scheck, ¶25,834 at 40,732; In re Ryan, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,832 at 40,725 (CFTC Aug. 13, 1993).

Riley's Conduct In Willfully Misrepresenting And
Omitting Material Information On His Floor Broker
Application Constitutes Cause For Disqualification
Under Section 8a(3)(G)

By the time that Riley completed his floor broker application on July 31, 1990, he had been charged with three felony thefts and had been convicted of one.⁶⁶ He was also subject to two pending disciplinary proceedings, one at the CBOT⁶⁷ and the other at the

⁶⁶ In 1976, Riley was arrested and charged with one count of felony theft for stealing tires. He pleaded guilty to misdemeanor theft and was sentenced to one year of probation. Amended Notice, ¶28; Amended Response, ¶28; Amended Statement at 1; Crim. Exhibit 3-8. In 1977, Riley was arrested and charged with two felony counts of larceny for stealing a radio and cassette player. For this crime, he was convicted of one felony count, and was sentenced to six months in jail and four years probation. Amended Notice, ¶26; Amended Response, ¶26; Amended Statement at 1; Crim. Exhibit 1-2.

⁶⁷ On July 18, 1990, the CBOT's Floor Governors Committee issued charges against Riley alleging that he acted beyond the scope of his clerical capacity in violation of CBOT Regulation 301.05, and engaged in acts detrimental to the interest and welfare of the exchange in violation of CBOT Rule 504.00. Amended Notice, ¶5; Amended Response, ¶5; CBOT Exhibit at 40-41. A letter, dated July 18, 1990, notified Riley of these charges. CBOT Exhibit at 41; Tr. at 162. These charges were resolved pursuant to Riley's offer of settlement, accepted on November 15, 1990, to be effective on December 4, 1990. Pursuant to the settlement, the Floor Governors Committee found that there was reason to believe that Riley violated CBOT Regulation 301.05, dismissed the CBOT Rule 504.00 charge, and fined Riley \$10,000. CBOT Exhibit at 41-43.

CME.⁶⁸ The floor broker application form, that Riley completed and certified as accurate,⁶⁹ required him to disclose each of these events.⁷⁰

⁶⁸ On June 18, 1990, the CME's Probable Cause Committee charged Riley with fighting with a floor broker on the floor of the CME in violation of CME Rules 432.q. and 433.c. Amended Notice, ¶8; Amended Response, ¶8; CME Exhibit A at 2-3. By letter, dated June 22, 1990, Riley was notified of these charges. CME Exhibit A at 3-4. These charges were resolved pursuant to Riley's offer of settlement, accepted on October 22, 1990, to be effective on October 26, 1990. CME Exhibit A at 1. Pursuant to the settlement, Riley was found to have violated CME Rule 433.c, the CME Rule 432.q. charge was dismissed and Riley was fined \$1,500. Amended Notice, ¶9; Amended Response, ¶9.

⁶⁹ NFA Exhibit at 3-8. In the certification, Riley, among other things, acknowledged that "I understand that I am subject to the imposition of criminal penalties under section 9(b) of the Commodity Exchange Act and 18 U.S.C. 1001 for any false statements or omissions made in this application." Id. at 8. Additionally, in type that is larger than any other, the certification states,

"WILLFUL FALSIFICATION, MISREPRESENTATION, OR OMISSION OF ANY MATERIAL FACT REQUIRED TO BE STATED ON THIS FORM CONSTITUTES CAUSE FOR DENIAL, SUSPENSION, OR REVOCATION OF REGISTRATION AND PROSECUTION UNDER CRIMINAL STATUTES OF THE INDIVIDUAL AND FIRM MAKING THE ABOVE CERTIFICATION."

Id. (capitalization in original).

⁷⁰ Item 14.B asks,

"Have you or any firm, corporation or other organization which you control or have controlled ever:

. . . .

(continued..)

(..continued)

B. Been charged with, been convicted or found guilty of, or pleaded guilty or nolo contendere to, any felony in a federal, state or foreign court?"

Id. at 6 (emphasis in original).

Item 16 asks,

"Are you or any firm, corporation, or other organization which you control or have controlled, a party to any action, or is there any charge pending, or have you been informed of any action or charge, the resolution of which could result in a 'YES' answer to any of the above questions (items 14 and 15)?"

Id. at 7 (capitalization in original).

Item 14.A (ii), in turn, asks,

"Have you or any firm, corporation or other organization which you control or have controlled ever:

A. Been subject to an expulsion, bar, fine or civil monetary penalty, censure, denial (including withdrawal of an application for cause), suspension, restriction or revocation of membership or registration, permanent or temporary injunction, cease and desist order, denial of trading privileges or other sanction or disciplinary action through an adverse determination, voluntary settlement or otherwise in an action or proceeding brought by or before:

(continued..)

Riley not only failed to properly disclose his criminal history and pending exchange proceedings,⁷¹ but by answering "NO"

(..continued)

.
(ii) Any commodity, option or security exchange, clearing organization, contract market, National Futures Association or other association registered with the Commission under section 17 of the Commodity Exchange Act, or the National Association of Securities Dealers, Inc. [?]"

Id. at 6 (emphasis in original).

⁷¹ The application form directs,

"For any of items 14 through 23 answered 'YES', supply the following information:

1. What the circumstances were in your own words;
2. Who was involved (e.g. the parties to any proceeding);
3. When the event or conduct requiring a 'YES' answer happened;
4. What the final determination was, if any, and the date on which the determination was made;
5. A certified copy of any applicable documents, such as any complaint, plea, order, agreement of settlement, verdict or other findings made, and sanctions or sentences imposed. (Court orders should be certified.) If documents are not attached, an explanation stating why documents are not obtainable must be furnished."

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to the applicable questions, he affirmatively misrepresented that he had never "[b]een charged with [or] been convicted or found guilty of, or pleaded guilty . . . to . . . any felony,"⁷² and that he was not subject to "any charge pending" before "any commodity . . . exchange."⁷³

The Division charges that these false statements and omissions were "willfully" made by Riley and, therefore, render him presumptively unfit under Section 8a(3)(G).⁷⁴ While Riley admits to "error" in answering the applicable questions,⁷⁵ he denies that these misstatements and omissions were willful and therefore disqualifying under the Act.⁷⁶ Thus, once again, the

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Id. (capitalization and emphasis in original).

⁷² Id. (Item 14.B).

⁷³ Id. at 6-7 (Items 16 and 14.A (ii)).

⁷⁴ Amended Notice, ¶¶30-33. See supra note 10.

⁷⁵ Riley Affidavit, ¶¶11-12.

⁷⁶ Amended Respond, ¶¶30-33; Riley Affidavit, ¶¶11-12.

In order to be disqualifying under Section 8a(3)(G), an person's misstatements and omissions on his registration application must be "material" as well as "willful[]." 7 U.S.C. §12a(3)(G). Riley does not dispute that the materiality
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Court is required to resolve the issue of Riley's state of mind.⁷⁷

Like the testimony as to his mindset in inducing the 1994

(..continued)

requirement of the section is met in this case nor could he have reasonably done so. In re Flaxman, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,364 at 25,714 (CFTC Feb. 22, 1982) ("Mandatory disclosure of past disciplinary actions brought against applicants by commodity and securities exchanges called for on Commission applications is a necessary regulatory mechanism to alert the Commission that an applicant's fitness for registration may be suspect."); In re Trueba, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,818 at 23,329 (CFTC May. 4, 1979) (finding the omission of a felony conviction from application material); In re Tipton, ¶20,673 at 22,750 (finding the omission of a misdemeanor conviction from application material). Indeed, "one may generally surmise" that any information specifically requested on a Commission registration application is material to the Commission's fitness assessment. In re Auster, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,274 at 25,344 (CFTC Oct. 4, 1981).

⁷⁷ See supra notes 58-62 and accompanying text.

The "willfulness" standard incorporated in Section 8a(3)(G) requires that the applicant made the materially misleading statement, or omission, knowingly or recklessly. In re Squadrito, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,262 at 38,827-28 (CFTC Mar. 27, 1992). In Squadrito, the Commission held that recklessness (like knowledge) is a state of mind. Id. at 38,828 ("a finding of good faith bars a finding of recklessness"). The Commission may have overturned this holding in Do v. Lind-Waldock & Co., when it held that recklessness was an objective standard of conduct. [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,516 at 43,321 (CFTC Sept. 27, 1995) ("What Lind-Waldock's employee actually believed is irrelevant; what matters is whether the employee was in a position to inquire into the actual status of the complainant's order, or to take other suitable actions, and failed to do so."). Later case law has only
(continued..)

prearranged trade, Riley's testimony as to his good faith in completing his floor broker application is unbelievable.

Riley offers an amalgamation of innocent reasons for his "error" in failing to report his felony arrests and resulting convictions on his application. In his prehearing affidavit, Riley stated that: (1) he "had been advised previously that the CME application for membership required the reporting of events within the last ten years and mistakenly completed the [floor broker application] in the same manner,"⁷⁸ (2) he did not believe that he was required to report his felony conviction "because it was in the process of being expunged,"⁷⁹ and (3) he believed that he was only required to report felony information "related to the

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added further confusion. Compare In re R&W Technical Servs., Ltd., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,743 (CFTC Mar. 16, 1999) with In re Staryk, ¶27,206 at 45,810-11. For reasons discussed below, the Court finds that Riley knowingly made the misstatements and omissions on his registration application. Therefore, there is no need to determine whether a failure to meet an objective standard of care is conclusive proof of recklessness or merely a basis from which to infer a reckless state of mind. Accordingly, the Court declines to do so.

⁷⁸ Riley Affidavit, ¶12(a).

⁷⁹ Id.

futures industry."⁸⁰ At the oral hearing, Riley repeated these explanations as to his good faith belief in the accuracy of his application at the time he submitted it.⁸¹ The Court, however, finds Riley's explanations to be untruthful.

To begin with, Riley's testimony, as to his belief that the floor broker application only required disclosure of felony information for the prior ten years, is undermined by the clarity of the application's instructions to the contrary. The application leaves little room for confusion. It states, in bold, that the time period for the information sought is "ever."⁸² In view of this plain command, it is implausible that Riley was confused over any differences on this score that may have existed between his floor broker application and his application for CME membership.⁸³

⁸⁰ Id.

⁸¹ Tr. at 52-53, 183-187.

⁸² See supra note 70.

⁸³ Riley's oral testimony went beyond the explanations in his affidavit by suggesting that a CME investigator specifically advised him that he need not report his criminal or disciplinary history beyond the last ten years on his floor broker application. Tr. at 52-53, 188-89. Significantly, this self-serving testimony stands uncorroborated and the Court does not credit it. In re R&W Technical Servs., ¶27,582 at 47,743; In re Castellano, ¶26,920 at (continued..)

Similarly, Riley's purported belief that he need not report his 1997 felony conviction "because it was in the process of being expunged"⁸⁴ falls victim to, among other things,⁸⁵ the plain

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44,457. When questioned, Riley could only identify the person who supposedly provided him with the "bad information," as a woman "that was doing the investigation on my [CME] membership." Tr. at 188-89. Although he has generally mounted a vigorous defense to the Amended Notice, Riley did not seek to identify the purported investigator through discovery or present any other witnesses from the CME as to their understanding of the requirements of the registration application which Riley completed. Moreover, even if Riley had received the advice in completing his registration application which he attributes to CME staff, it is unlikely that he would have relied on it in light of the application's clear instructions to the contrary.

⁸⁴ Riley Affidavit, ¶12(a) (emphasis added). Compare id. with Tr. at 53 ("Well, I had been in trouble in Michigan and at the time that the application was being written up for the NFA, I was under the understanding that my conviction there had been expunged. We had paid an attorney to take care of it" (emphasis added)); Tr. at 186 ("my felony conviction in Michigan, which I thought was expunged" (emphasis added)). See Letter from Daniel P. Riley to Whom It My [sic] Concern, dated August 17, 1990, NFA Exhibit at 9 ("I have since then tried to get documentation of the expungement and under MICHIGAN LAW no information can be given about the case." (capitalization in original)).

⁸⁵ In the absence of corroborative evidence (such as correspondence, affidavits, or testimony from the unidentified attorney who purportedly handled the matter), the Court finds Riley's testimony, as to his attempt to obtain as well as the fact of expungement, incredible.

English of the application form⁸⁶ -- as does his explanation that he need only report "things that were related to the trading floor, not outside."⁸⁷

⁸⁶ The application provides the following instruction as to the felony charges and convictions.

"[R]egardless of whether: the record was expunged, set aside or sealed; there was a conditional discharge or post-conviction dismissal; a state certificate or relief from disabilities or similar document was issued which relieves the holder of forfeitures, disabilities or bars that result from a conviction; or a pardon was granted. You must also include information as to the foregoing matters."

NFA Exhibit at 6 (emphasis added).

⁸⁷ Tr. at 185. See also Letter from of Daniel P. Riley to Peter Moag, dated December 4, 1990 ("Riley Letter"), at 2; NFA Exhibit at 30.

Item 14.B asks, in relevant part, if the applicant has ever "[b]een charged with, been convicted or found guilty of, or pleaded guilty or nolo contendere to, any felony in a federal, state or foreign court?" NFA Exhibit at 6 (emphasis added). Moreover, from perusal of the list of other reportable events in Item 14, it is abundantly clear that the scope of the application's inquiry is not limited to "fraud or embezzlement which had to do with the commodities industry." Riley Letter at 2. For example, Item 14.A(iii) asks about the applicant's disciplinary history in the fields of accounting, banking, finance, insurance, law, real estate and securities, as well as commodities. NFA Exhibit at 6 Item 14.C(i) requires the applicant, among other things, to report violations of the Foreign Corrupt Practices Act of 1977. *Id.* Item 14.C(ii) requires the disclosure of the violation of "any statute or rule, regulation or (continued..)

The Court now turns to the reason that Riley provided, in his prehearing affidavit, for failing to disclose the then-pending CBOT and CME disciplinary proceedings. That reason is more than implausible -- it is simply nonsensical. Riley states that he "erroneously believed that I was not required to report these disciplinary proceedings because both matters had been resolved without any admission that there had been a violation of the rules."⁸⁸ This explanation suffers from an obvious flaw. At the time the Riley completed his application, the exchange proceedings in question were pending, not settled.⁸⁹ How Riley's purported

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order thereunder which involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery or gambling." Id. (emphasis added). Also, Item 14.C(iii) asks if the applicant has "[b]een debarred by any agency of the United States from contracting with the United States." Id.

⁸⁸ Riley Affidavit, ¶11(a) (emphasis added). Riley's belief, if he held it, that exchange settlements need not be disclosed would indeed have been "erroneous." It is, like all his other errors in failing to disclose information, contradicted by the plain language of the application form. See NFA Exhibit p. 6 (Item 14.A, asking the applicant, among other thing, if he has ever been subject to a bar or fine through "adverse determination, voluntary settlement or otherwise").

⁸⁹ Riley completed his floor broker application on July 31, 1990. NFA Exhibit at 8. The CBOT and CME disciplinary proceedings then
(continued..)

belief as to the non-reportability of settlements informed his decision not to disclose these pending actions is inexplicable.⁹⁰

(..continued)

pending against him were not settled until the Fall of that year. See supra notes 67-68.

⁹⁰ Riley's affidavit also contained a second reason for failing to report the pending CME action, one that also suffers from a temporal disconnect. Quoting from a Federal Register notice in which the Commission announces "that contract market disciplinary actions pertaining to decorum and attire violations" will in general "no longer" be required to be reported on registration applications, Riley suggests that he was not required to report the CME action as a matter of law. Riley Affidavit, ¶¶11(b). See Registration of Floor Traders; Mandatory Ethics Training for Registrants; Suspension of Registrants Charged With Felonies, 58 Fed. Reg. 19575, 19579 (1993). The main problem with this argument is that the 1993 reporting change came nearly three years after Riley completed his application.

Riley's begrudging admission at the hearing that he was unfamiliar with the Federal Register notice in question, set out below, poses a second problem.

The Court: "Have you ever looked at Federal Register number 19575?"

Mr. Riley: "No, I have not."

Tr. at 192.

In doing so, he managed to impeach the following testimony, testimony that he had given on the subject only seconds earlier.

The Court: "[Y]ou cite to a Federal Register Release, correct?"

Mr. Riley: "That's correct, also."

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At the oral hearing, Riley did not even try to explain the reasoning of his affidavit. Instead, he appeared to abandon it, trying several new approaches. First, under examination from his own counsel, Riley testified that did not believe that he was required to disclose the pending CBOT and CME proceedings on his application.⁹¹ In doing so, however, he provided no explanation as to why he harbored such a belief⁹² in the face of the application's clear instructions on the topic.⁹³ Minutes later, when the subject was broached again, Riley repeated his testimony

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The Court: "Now, did you, are you saying by that that you relied on that Federal Register release, that's why you didn't reveal the charges?"

Mr. Riley: "I really can't remember."

Tr. at 191.

In his post-hearing brief, Riley evidently abandoned the argument that he "was not required to report the exchange proceeding in question as a matter of law," chalking up the affidavit's contrary argument to "an editing error that is solely the responsibility of Riley's attorneys." Riley Brief at 24 n.6.

⁹¹ Tr. at 59-60.

⁹² See Tr. at 59-60.

⁹³ See supra note 70.

that he did not believe that disclosure was required.⁹⁴ This time, however, he came up with a reason for the belief: he thought the reporting requirement was limited to matters "hav[ing] something to do with the misappropriation of customer funds."⁹⁵ Finally, when asked by the Court, Riley varied his explanation of the omissions and, in doing so, implicitly admitted the willfulness of his breach.

In response to questioning from the bench, Riley explicitly acknowledged that he knowingly made material misstatements and omissions on his application in an effort to conceal his disciplinary history.

The Court: "How come you didn't disclose the pending self-regulatory actions that you were involved in at the time?"

Mr. Riley: "Because at the time I knew that the Exchange forwarded them to the NFA and I thought that at that time it would suffice."

The Court: "Even though they ask you to list it on the --"

Mr. Riley: "Your Honor, I know I messed up."

⁹⁴ Tr. at 64.

⁹⁵ Tr. at 64.

The Court: "And that was all unintentional on your part?"

Mr. Riley: "I was pretty much worried about my livelihood and scared that if these things came out in the wrong light, I would be denied my application."

The Court: "So it was intentional and you're sorry for that, is that what you're telling me?"

Mr. Riley: "Some of it was intentional, some of it was not"⁹⁶

Like his earlier testimony, this moment of apparent candor was fleeting.⁹⁷

⁹⁶ Tr. at 187-88 (emphasis added).

The Court notes that even if it were to credit this particular version of Riley's mindset (which it does not), Riley's belief "that the Commission's staff may have possessed knowledge of the [pending] disciplinary action[s] from other sources does not serve to undercut the materiality of [Riley's] omission of the fact or excuse it in any equitable way Indeed, the whole point of the registration application process is to eliminate the need to consult other sources." In re Auster, ¶21,274 at 25,344; accord, In re Premex, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,992 at 28,363 (CFTC Feb. 1, 1984); In re Flaxman, ¶21,364 at 25,715 n.10.

⁹⁷ In a performance reminiscent of that which he gave in testifying as to his 1994 prearranged trade, Riley again reversed course after admitting knowledge of the misconduct. Perhaps sensing that his late admission might not assist his cause, Riley backpedaled into a denial.

Mr. Riley: "Some of it was intentional, some of it was not. I mean, I think from the

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beginning of this you've, maybe you've recognized that I have a hard time with the form. I've read it, I mean, I read it three times over the weekend and I'm still --"

The Court: "So you, it's true, is it not, that you intentionally failed to disclose these particular items on your application at that time because you were concerned that it would be a cause for rejecting your application? Isn't that true?"

Mr. Riley: No, I think I got some bad information from the Chicago Mercantile on what should be put into the application and it kind of went along with my thinking at the time."

Tr. at 188 (emphasis added).

When this testimonial approach seemed not to be working well, Riley switched again, and, in an attempt to land in the middle, testified as follows.

The Court: "Who at the Chicago Mercantile gave you this bad information?"

Mr. Riley: "The person that was doing the investigation on my membership."

The Court:: "Who was that?"

Mr. Riley: "I can't remember her name."

The Court: "And she told you you did not have to --"

Mr. Riley: "I wasn't required to list anything beyond the ten years."

(continued..)

In conclusion, the Court completely rejects Riley's inconsistent testimony and implausible explanations as to his good faith in completing the floor broker application.⁹⁸ It finds his

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The Court: "And you weren't required to list pending Exchange investigations against you?"

Mr. Riley: "I don't think she told me that, no."

The Court: "So at least with respect to the pending Exchange investigations--"

Mr. Riley: "Yeah."

The Court: "You didn't, you wanted to draw attention away from that, isn't that true?"

Mr. Riley: "I don't know what my mindset was at the moment, at that time."

Tr. at 188-89.

⁹⁸ At the oral hearing, Riley came up with another explanation for why his misstatements and omissions were only good faith errors. He claims that he simply was not (and is not) smart enough to understand what the application required. See Riley Brief at 25 (citing to hearing transcript where "Riley repeatedly expressed his confusion with respect to the application"). In his post-hearing brief, Riley argues that "it is easy to understand how an individual with only a high school education," such as Riley, "could fail to understand" the application's "complex language and structure." Id.

This contention is nonsense. Riley holds a highly skilled and responsible position on the trading floor. See supra note 1. The Court observed him to be both literate and intelligent. It
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testimony to that effect untruthful.⁹⁹ It further finds that Riley intentionally misrepresented and omitted material

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finds that neither the structure of the six-page form nor the language of its questions is such the Riley would have any difficulty in understanding the application's requirements. Accordingly, the Court discredits Riley's testimony to the contrary. See, e.g., Tr. at 64 ("I don't have a good handle on [the application]. I mean, over the weekend I read it probably five different times, still don't.").

⁹⁹ In his post-hearing brief, Riley acknowledges the obvious, that his testimony concerning his mental state in completing his floor broker application was contradictory. Riley Brief at 22-23. Again, acknowledging the obvious, Riley concedes that his "contradictory testimony could be interpreted as showing that he lied when he stated that he had not willfully omitted any relevant information from his application." Id. at 23. He posits that "[a] more plausible explanation, however, is that Riley simply does not now recall what he was thinking at the time he completed the application nine years ago." Id. Riley fails to recognize, however, these two proffered hypotheses are not mutually exclusive. If, in fact, Riley does not now recall his mental state, the Court may fairly infer that he lied when he testified that "he believed that he had completed it accurately." Riley Brief at 22; see Tr. at 51. To escape even this conclusion, Riley asks the Court to disregard his testimony entirely as "confused and confusing." Riley Brief at 23. The Court, however, finds Riley's testimony to have been mendacious rather than confusing or confused.

Lastly, Riley notes that he supplemented his application by disclosing his felony conviction only 17 days after completing his application and that such disclosure was voluntary and unprompted. NFA Exhibit at 9; Tr. at 51-54. From these facts, Riley would have the Court infer that the failure to initially disclose his felony conviction or otherwise voluntarily disclose his other

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information on his floor broker application, and that his conduct in so doing constitutes cause for disqualification under Section 8a(3)(G).¹⁰⁰

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felony arrests resulted from confusion and mistake, rather than an intent to conceal. Riley Brief at 24-25.

Standing alone, the fact of this unprompted, subsequent, albeit limited disclosure might be regarded as some evidence tending to support Riley's plea of good faith. But see Testimony of Eric Ostrov, J.D., Ph.D., ABPP, Tr. at 599 (Riley's expert witness, a forensic psychologist, opining that Riley's subsequent disclosure suggests that "that he's impulsive and acts hastily but then, upon reflection, he realized that that was not a wise thing to do"). However, it is woefully insufficient to support a determination of non-willfulness in the presence of Riley's alternatively incredible and inculpatory testimony as to his mental state. Similarly, it is insufficient to support a determination of good faith in the context of a record where Riley failed to voluntarily disclose the two pending exchange actions against him and failed to properly update his application to reflect additions to his disciplinary history on multiple occasions. See Amended Notice, ¶20; Tr. at 212-221.

¹⁰⁰ Indeed, if the Commission were to bring another administrative action, Riley's perjured testimony in this proceeding could be found to constitute an independent ground for statutory disqualification under Section 8a(3)(G). See supra note 10; In re Antonacci, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,835 at 36,934 (CFTC Apr. 18, 1990) ("reckless disregard for the truth of statements made under oath is not a risk to which futures customers ought to be exposed").

Riley's Rehabilitation Evidence Fails To Rebut
The Division's Prima Facie Case Of
Statutory Disqualification Under
Section 8a(3)(G) And (M)

Riley presented five character witnesses and an expert witness in support of his case of rehabilitation.¹⁰¹ As discussed

¹⁰¹ Riley also argues that his own testimony concerning his assistance to the Division supports his rehabilitation.

"Riley also testified that, starting in 1994, he provided the Division of Enforcement with information concerning possible violations of exchange rules and the Act by persons other than himself. See Transcript at 133-35. Riley's Exhibit 18 confirms that Riley provided such information. Exhibit 18 is an e-mail sent by Harvey Smith, an attorney with the Commission's Division of Enforcement, in which Smith discusses the information that Riley has provided. At the hearing, the Division of Enforcement also stipulated that Riley had provided information to the Division of Enforcement as recently as 1996. See Transcript at 429.

Riley testified that he provided the information for two reasons -- first, to improve his chances of being registered as a floor broker, and second, because 'what was going on at the time were big, illegal acts and I thought they should be brought to someone's attention.' Transcript at 211. Riley's willingness to cooperate with the Division supports his showing that he has been rehabilitated."

below, none of this testimony is entitled to significant weight in the Court's assessment of Riley's fitness for registration under Section 8a(3)(G) and (M). Accordingly, Riley has failed to rebut

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The record, as it relates to Riley's contributions as a Division informant, has been retained non-publicly. See Order Receiving and Retaining Redacted Transcript, dated March 15, 1999; Order Receiving and Retaining Documents Non-Publicly, dated March 2, 1999; Order Denying Summary Disposition at 2 n.2. This record clearly demonstrates that Riley provided valuable information to the Division in furtherance of its enforcement program. Applicant's Exhibit No. 18, ¶5, line 2. It is also clear to the Court, however, that Riley's assistance to the Division was entirely divorced from any sense of public-spiritedness. Rather, it was a hoped-for quid pro quo for Commission approval of his floor broker application. Applicant's Exhibit No. 18, ¶1, lines 4-5); Tr. at 136, 211-212, 223. This ordinary act of self-interest is immaterial to any reasoned assessment of Riley's likely, future "compl[iance] with the requirements of the Act." 17 C.F.R. pt 3 app. A. It is similarly not material to determining the likelihood that Riley will continue to willfully make false or misleading statements or omissions of material fact in Commission "application[s] or any update thereon, in any report to be filed with the Commission . . . , in any proceeding before the Commission or in any registration disqualification proceeding." 7 U.S.C. §12a(3)(G). Accordingly, it fails as significant evidence of his rehabilitation. Indeed, Riley's willfully false testimony in this proceeding stands as conclusive proof that he is not rehabilitated from engaging in conduct disqualifying under Section 8a(3)(G) and that he continues to possess those qualities of moral turpitude, dishonesty, and disrespect for the law that are the focus of Section 8a(3)(M).

the presumption that his application for registration as a floor broker should be denied.¹⁰²

¹⁰² As it relates to Section 8a(3)(G) and (M), Riley's defense primarily focuses on challenging the evidentiary bases of statutory disqualification under these two provisions and, in the alternative, demonstrating rehabilitation. He makes two arguments, however, that may be regarded as assertions that his disqualifying conduct under Section 8a(3)(G) and (M) is mitigated. Neither argument, however, merits extended discussion.

First, Riley can be viewed as asserting that his inducement of a prearranged trade in 1994 amounts to nothing more than a "good faith error" In re Horn, ¶24,836 at 36,940 n.16. This is so, since Riley contends that he had "no intent to harm customers" and contends (at least in one version) that "at the time [he] didn't" know he was "violating the rules." Amended Statement at 5; Tr. at 197. This can be viewed either as an argument by Riley that "good cause" does not exist for his disqualification, under Section 8a(3)(M), or as an argument that "good cause," if it exists, is mitigated. Having examined and rejected Riley's assertions of good faith in the former context, the Court likewise rejects them in the later. As discussed at length above, Riley's participation in prearranged trading was far from innocent. It was a fraud.

Second, Riley's voluntary disclosure of his felony conviction, only 17 days after he completed the registration application, may arguably be regarded as a mitigating factor in assessing the gravity of Riley's concealment of his criminal history. See supra note 99. This, however, does little to assist his cause since Riley's concealment of the pending exchange proceedings stands as a second, and wholly unmitigated, independent ground for statutory disqualification under Section 8a(3)(G). Id.

Riley's Five Character Witnesses

Riley presented the testimony of several business associates and friends in support of his fitness for registration. Riley does not represent that any of them are experts on rehabilitation.¹⁰³ Under existing Commission case law, this comes close to ending the matter. The Commission has consistently given little weight to the testimonials of colleagues and friends.¹⁰⁴ However, the Seventh Circuit has recently held that it is "an abuse of discretion for the Commission to discount the [rehabilitation] testimony of character witnesses solely for not being experts."¹⁰⁵ This pronouncement has prompted the Commission

¹⁰³ See Riley Brief at 9-11; Tr. at 287-88.

¹⁰⁴ See In re Ashman, ¶27,336 at 46,548 ("Our precedent recognizes the limited value of opinions of friends and business acquaintances about the likelihood that a respondent will repeat his misconduct." (citation omitted)); In re Crouch, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,114 at 45,250 (CFTC July 14, 1997) ("as a general rule, we do not accord significant weight to the character testimony of a witness unless that witness was qualified as an expert."); accord, In re Vercillo, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,071 at 45,115 (CFTC May 30, 1997); In re Fetchenhier, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,055 at 45,015 (CFTC May 8, 1997); In re Schneider, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,959 at 44,657 (CFTC February 13, 1997).

¹⁰⁵ Ryan, 145 F.3d at 921; accord, Vercillo v. CFTC, 147 F.3d 548, 556 (7th Cir. 1998).

to recently "clarify [its] position on the weight to be accorded opinion evidence relating to rehabilitation."¹⁰⁶ In so doing, the Commission emphasized that,

"[a]lthough we have stressed in the past that the opinion testimony of an expert witness is entitled to greater weight than that of a lay witness, the focus of our analysis has been and will continue to be on the basis for the witness's opinion. Lay testimony may establish rehabilitation and is considered along with all other evidence.

However, both expert and lay testimony should be carefully analyzed in determining the weight it is to be accorded."¹⁰⁷

According, the Court considers the testimony of Riley's five lay witnesses in some detail. Upon such consideration, as discussed below, there are "valid reason[s] to accord the testimony of [Riley's character] witnesses limited weight."¹⁰⁸

¹⁰⁶ In re Zuccarelli, ¶27,597 at 47,833.

¹⁰⁷ Id. ¶27,834 at 47,834-35 (note omitted).

¹⁰⁸ Vercillo, 147 F.3d at 556-57.

Douglas O. Kitchen

In support of his claim of rehabilitation, Riley presented the testimony of Douglas O. Kitchen ("Kitchen").¹⁰⁹ Kitchen is the Executive Vice-President of Bradford and Coe, Inc., a non-clearing Futures Commission Merchant ("FCM") and subsidiary of J.C. Bradford, Inc.¹¹⁰ He has served on the Board of Directors and on the Membership Committee of the National Futures Association ("NFA") since 1984.¹¹¹ In the later capacity, he "sit[s] as a judge in cases involving the registration of people in the futures industry."¹¹² Over the years, he has participated in "maybe 40 or 50 cases."¹¹³ He claims that his track record in those cases earned him the nickname "the hanging judge."¹¹⁴

¹⁰⁹ Tr. at 280-318.

¹¹⁰ Tr. at 281-82. See Tr. at 283 ("I'm responsible for all facets of futures business at J.C. Bradford from sales to recruiting to back office compliance. Anything that says futures on it at Bradford is my responsibility.").

¹¹¹ Tr. at 284.

¹¹² Tr. at 286.

¹¹³ Tr. at 287.

¹¹⁴ Tr. at 289 ("Yes. I am known as the hanging judge. I probably voted to revoke more licenses than anyone on the Membership Committee and they, they tease me about that.").

Kitchen has known Riley "[s]ince approximately 1994 and maybe prior to that."¹¹⁵ He employs Riley to execute both his firm's customer orders¹¹⁶ and his own personal trades.¹¹⁷ He does so, "because [Riley] does a better job."¹¹⁸

Kitchen is convinced of Riley's "honesty" based both on his personal experience¹¹⁹ and his knowledge of Riley's reputation.¹²⁰

¹¹⁵ Tr. at 289.

¹¹⁶ Tr. at 289-91

¹¹⁷ Tr. at 293 ("I'm an S&P junkie.")

¹¹⁸ Kitchen explained,

"Well, we moved to Danny, frankly because he does a better job. He's very prompt and his fills are at the market. When you go to the market with orders, through Danny, you get filled where you can look at your screen and that'll be approximately what your fill is, barring extraordinary circumstances. The market collapse, the market collapse, there isn't anything you can do about that. But Danny provides a higher level, higher quality service than [] most S&P facilitators on the floor."

Tr. at 290-91.

¹¹⁹ Tr. at 293 ("I don't trust anybody else. Better quality fill. Danny does a good job of filling S&P orders on the floor and he's an honest person.").

¹²⁰ Tr. at 293-94 ("Danny has a, a good reputation in the industry as being an honest and forthright floor clerk that does his best
(continued..)

In Kitchen's opinion, Riley "doesn't pose a substantial risk to the futures industry."¹²¹ While this type of testimony may, in appropriate circumstances, be entitled to some weight,¹²² here it is not.

Kitchen's casually-drawn opinion as to Riley's fitness for registration is both incredible and unreliable. His testimony vouching for Riley appears to have been shamelessly colored by his self-interest in protecting and advancing their mutually-advantageous business relationship.¹²³ When pressed on the

(..continued)

to execute his customer orders and service his customer. That's pretty straight forward and that's a consensus that's fairly widely held. I know a lot of people in the industry.").

¹²¹ Tr. at 297.

¹²² In re Walter, ¶24,215 at 35,015.

¹²³ Interest in the outcome of litigation may, of course, motivate a witness to testify falsely or color a witness's impressions of events. John Henry Wigmore, Evidence in Trials at Common Law §§945, 948-49, 966 (1970). Interest takes many forms, pecuniary and non-pecuniary. See United States v. Cole, 41 F.3d 303, 309 (7th Cir. 1994); United States v. Dees, 34 F.3d 838, 844 (9th Cir. 1994). Kitchen revealed an obvious stake in the outcome of this litigation sufficient to bias or color his testimony. Simply put, he and his firm have profited from their relationship with Riley. Tr. at 291-92 ("Riley has done [] an exceptional job of executing for us."); Tr. at 292 (Riley's service "is noticeably better."); Tr. at 293 (Kitchen "pay[s] a premium for [Riley's] quality of execution of market orders"); Tr. at 296 ("[H]e does a good job in
(continued..)

implications to be drawn from Riley's disqualifying conduct in inducing a prearranged trade, Kitchen was evasive.¹²⁴ When

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the S&P bids. The industry's better served with Danny Riley's services on the floor."); Tr. at 305 ("I can represent to you that it is, that Danny is well thought of in the industry for his abilities to execute on the Mercantile floor and the S&P pits."). Indeed, if Riley's application came before Kitchen in his capacity as a member of the Membership Committee of the NFA, Kitchen would have to recuse himself. Tr. at 308-09.

¹²⁴ On direct examination, Kitchen testified that he had no knowledge of Riley having ever defrauded a customer. Tr. at 296. When asked, on cross-examination, about Riley's sanctioning for the 1994 prearranged trading incident, Kitchen suggested he did not know whether Riley was involved or not.

Ms. Arnold: "Are you aware that in, that Daniel Riley was sanctioned for using two floor brokers to pre-arrange trades?"

Mr. Kitchen: "Yes, I've read that. I've read that the, the Exchange's rulings. The testimony and the rulings. I, I've read those documents. I believe he was accused of crossing a, a five lot in the S&P."

Ms. Arnold: "Okay."

Mr. Kitchen: "I, I think he also submitted a settlement where he neither admitted or denied but agreed to a fine and in one case a suspension, a five-day suspension."

The Court: "Are you aware he's admitted to inducing the, crossing that order in this proceeding? Are you aware of that?"

(continued..)

(..continued)

Mr. Kitchen: "I, I'm not aware of, of what has taken place in this proceeding. I don't know if he subsequently admitted or not."

Tr. at 300-01.

When asked to assume that Riley did, in fact, admit to inducing the prearranged trade, Kitchen first evaded a question from the Division as to whether such conduct would constitute customer fraud.

Ms. Arnold: "Would you consider this an incident in which the selling customer who's not on the telephone at the time and was entitled to a higher price, would you consider that incident where the customer was defrauded?"

Mr. Kitchen: "I guess if I considered every 15 tick bad fill the customer was being defrauded, there's very few fills that don't come back that one way or another somebody's now defrauded. And I don't think that is fraudulent activity. So does it rise to the level of, of a customer being defrauded, the Exchange found that he, that it should have been filled that, as I recall, that higher level. So it's inappropriate activity, it's not good. I'm, I, I'm not defending or justifying that activity. It isn't as egregious as the 50 cent[,] dollar, two dollar bad fills that you see come out of the S&P pits from time to time. Where there's no apparent justification for it. But I, I don't condone or rationalize a, a, an inappropriate fill to either side of any customer order."

Tr. at 302.

(continued..)

questioned was about Riley's intentional omissions from his registration application, he appeared to minimize the gravity of

(..continued)

When the Court then stepped in to ask basically the same question, Kitchen begrudgingly admitted that it "probably" was fraud.

The Court: "You don't consider them, I guess I'd like to ask the question again, you don't consider an instance of fraud where a customer receives a fill which is lower than he should pursuant to open outcry or otherwise by, or to which he's otherwise entitled, pursuant to Exchange rules, as a consequence of a pre-arranged and illicit trade?"

Mr. Kitchen: "It's inappropriate activity and does -"

The Court: "It's not fraud?"

Mr. Kitchen: "That may be fraud. That, that may well rise to the level of fraud."

The Court:: "So if Mr. Riley did, in fact, engage in this particular instance of pre-arranged trading as the Exchange charged, that would be an instance of fraud, isn't that correct?"

Mr. Kitchen: "Probably so."

such misconduct.¹²⁵ In sum, at least in this case, "the hanging judge" unfortunately showed "limited appreciation for the interest of the public."¹²⁶ Kitchen's testimony offers no insight to

¹²⁵ Kitchen testified,

"We have heard a number of cases before the membership committee where there's been incorrect information on Form 8Rs where they admitted they just didn't want to put it down. They just didn't want to, to reveal something in their past that was embarrassing. I have weighed, I've thought some about this, if this were a membership hearing, would I, would I register Danny over these incidences. I believe that I in good faith today can say that I would."

Tr. at 309.

¹²⁶ Vercillo, 147 F.3d at 557 ("the testimony of Vercillo's witnesses was 'not persuasive' because it only showed 'at best a perfunctory concern with the customers harmed by Vercillo's wrongdoing,' and therefore showed that they had a limited appreciation of the interest of the public" (quoting In re Vercillo, ¶27,071 at 45,116)).

support a finding that Riley's disqualifying conduct will not be repeated.¹²⁷ Accordingly, the Court gives it no weight.¹²⁸

¹²⁷ As the following colloquy reveals, Kitchen generally has not been, and is not now, in a position to observe Riley's conduct.

Ms. Arnold: "Now, when those orders get executed, your customers pay you a fee, correct?"

Mr. Kitchen: "That's correct."

Ms. Arnold: "So you're not in a position to observe how Mr. Riley executes those orders, are you?"

Mr. Kitchen: "I see the most important part of the execution and that's the end result."

Ms. Arnold: "But you don't observe his, you don't observe how he's executing those orders?"

Mr. Kitchen: "Well, not on a regular basis. I've been on the floor a number of times and stood beside Danny while he is executing orders but on a regular basis I'm not on the floor. I'm, I'm, my business is in Tennessee."

Ms. Arnold: "Your main concern is that he gets the orders executed?"

Mr. Kitchen: "Correct."

Tr. at 299. See In re Fetchenhier, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,175 at 45,588 (CFTC Oct. 31, 1997).

¹²⁸ Riley would have the Court place great weight on Kitchen's testimony that he "trust[s] Riley in dealing with customers" and
(continued..)

Salvatore Caputo

Salvatore Caputo ("Caputo") also testified for Riley.¹²⁹ Like Kitchen, Caputo is a prominent executive in the futures industry. He is currently the President of the Investor Services Division of E.D. & F Man, a clearing FCM.¹³⁰ Caputo has known Riley since the "mid to late 1970s."¹³¹ During that time he has referred his "brokers and/or customers" to Riley for his "specialized kind of a

(..continued)

"with orders for his personal account" Riley Brief at 10. The Court has no doubt that "Danny's willing to fight for his customers and fight for [a] good fill." Tr. at 307. However, Riley was engaging in precisely this type of conduct when, in 1994, he prearranged a trade to cheat the customer on the other side. See In re Horn, ¶23,731 at 33,890 ("The Commission has . . . rejected the argument that prospective contributions to the futures industry is a relevant factor under the public interest standard. . . . For purposes of the public interest determination, the focus should be on [whether] the risk to the public is substantial, not [whether] potential benefits outweigh potential harm." (citation omitted)); In re Anderson, ¶23,085 at 32,209 ("A showing that the individual violator otherwise conducts a useful commodities business does not necessarily shed light on the likelihood of another violation.").

¹²⁹ Tr. at 318-349.

¹³⁰ Tr. at 319-20.

¹³¹ Tr. at 323.

boutique service on the floor" and they have twice previously been employed at the same company.¹³²

Although considerably more frank and direct than Kitchen in offering his opinions, Caputo's testimony was no more helpful. First, Caputo provided the following, categorical opinion.

Mr. Gill: "Based on your, sounds like probably 20, approximately 20 years experience with Danny Riley [in the] industry, in your opinion, would licensing Mr. Riley as a floor broker present a risk to the public?"

Mr. Caputo: "I've never seen that problem."¹³³

Later, in questioning from the bench, Caputo expounded on the basis of this "judgment."¹³⁴ He made clear that he did not intend to vouch for Riley's "character" in any ethical sense nor did he pretend to weigh Riley's risk to the public. Quite simply, the straight-talking Caputo made clear that his testimony was nothing more than an application of his business creed: that Caputo had

¹³² Tr. at 323-24.

¹³³ Tr. 332.

¹³⁴ Riley Brief at 8 ("Caputo testified that, in his judgment, Riley's registration would not pose a substantial risk to the public. See [Tr.] at 332.").

always been satisfied with Riley's service and as long as that remained the case he will "continue to deal with [him]."¹³⁵ Caputo explained,

"In this business, a lot, a lot of people have been either fined or disciplined or whatever and I've been dealing with them yet, until they do something that I'm intimately involved. So, I think he's a good character right now."¹³⁶

¹³⁵ Tr. at 346.

¹³⁶ Prior to this explanation, Caputo testified,

"Okay. As a people business, you know, and people's word, very important in this business. I've dealt with him, or with anybody I've dealt with for 20 years, it has not presented a problem with me, I will continue to deal with [him]. They can only do something to me once but to me that I know of, I'm involved in, or do something to my customer, or worse yet do something to my firm, he has never damaged me, my customers or my firm. Notwithstanding those hearings, all I'm saying is he has not violated the trust I have had in telling him here's a client of mine, please take care of him."

Tr. at 346 (emphasis added).

Caputo had no knowledge of (or, for that matter, apparent interest in) Riley's proven disqualifying conduct under Section 8a(3)(M)¹³⁷ or Section 8a(3)(G).¹³⁸ He did not venture a guess as to whether the disqualifying conduct would be repeated nor did he suggest any "changed direction" in Riley's conduct indicating that it would not be. In short, Caputo's testimony stands as a naked business endorsement and not as evidence of rehabilitation. Accordingly, it too deserves no weight in the Court's assessment of Riley's fitness for registration.¹³⁹

¹³⁷ Tr. at 344-45.

¹³⁸ Tr. at 339-40.

¹³⁹ As the Commission has stated,

"A respondent seeking to counter a prima facie case by showing rehabilitation must do more than show . . . that certain witnesses find him trustworthy. He or she must produce evidence that directly relates to the wrongful conduct at issue and shows that conduct of that nature will not be repeated, and that the person would not otherwise be a risk to the public."

In re Akar, ¶22,927 at 31,709-10.

Michael P. Dowd

The third and last industry executive to testify on Riley's behalf is Michael P. Dowd ("Dowd").¹⁴⁰ Dowd is Senior Vice President of First Options of Chicago, the largest clearing and execution firm for professional traders of futures and options in the world.¹⁴¹ Dowd heads the futures division of the firm and just recently finished his second two-year term on the CME Board of Directors.¹⁴² He has done business with Riley for approximately ten years.¹⁴³ Like Kitchen and Caputo, Dowd refers customers to Riley and shares their high regard for the quality of service which Riley provides.¹⁴⁴ Also like the other two, he was willing,

¹⁴⁰ Tr. at 392-424.

¹⁴¹ Tr. at 393-94.

¹⁴² Tr. at 393, 396-97.

¹⁴³ Tr. at 398.

¹⁴⁴ Dowd stated,

"Well, the reason that we've had an ongoing relationship over, spanning ten years, is because I think Dan is one of the best in the industry at what he does. And my customers are very satisfied with, you know, the services that he provides and, you know, I've had nothing but, you know, positive feedback from, from customers over the years."

(continued..)

on direct examination, to opine that, on the basis of his experience, Riley did not pose a risk to the public.¹⁴⁵

On cross-examination, however, Dowd, like Caputo, confessed to little or no knowledge of Riley's disqualifying conduct under Section 8a(3)(M)¹⁴⁶ or (G)¹⁴⁷. For this reason, Dowd's testimony suffers from the same shortcoming as that given by Caputo: it sheds no light on whether Riley's disqualifying conduct is likely to be repeated. It also suffers from one more infirmity. Unlike Caputo, Dowd indicated, in the following exchange, that actual knowledge of Riley's wrongdoing would have affected his opinion.

The Court: "Assume that, in fact, he was guilty of the pre-arranged, inducing the pre-arranged trade as charged. Would that change your opinion as to the, as to the level of risk he posed, poses to the public as a Commission registrant?"

Mr. Dowd: "Yes, it would."¹⁴⁸

(..continued)

Tr. at 401.

¹⁴⁵ Tr. at 407.

¹⁴⁶ Tr. at 417-18.

¹⁴⁷ Tr. 416-17.

¹⁴⁸ Tr. at 422-23.

Accordingly, the Court discredits Dowd's testimony on the issue of Riley's rehabilitation.

Horace Payne

Horace Payne ("Payne") also testified for Riley.¹⁴⁹ He is a floor broker at the CME¹⁵⁰ who has been as a colleague and friend of Riley for over 20 years.¹⁵¹ Payne has profited from both aspects of his relationship with Riley. As a colleague, Riley has served Payne as a mentor¹⁵² and refers business to him.¹⁵³ As a friend, Payne testified credibly as to some of Riley's fine personal qualities¹⁵⁴ and sincerely as to Payne's belief in Riley's

¹⁴⁹ Tr. at 349-92.

¹⁵⁰ Tr. at 350-51.

¹⁵¹ Tr. at 353-57, 365.

¹⁵² Tr. at 367 ("I've learned a lot from Danny myself over the years on how to maintain and develop my customer base.").

¹⁵³ Tr. at 362 ("I've always, you know, I've always backed Danny and Danny's always made sure that if there was an opportunity available, he pushed me into it.").

¹⁵⁴ When asked to relate an incident that would illustrate his relationship with Riley, Payne replied,

"Well, there's plenty of times. One being my son at, he was two months old and we took him for a checkup and they found a tumor that pretty much had consumed three-quarters of

(continued..)

basic "goodness."¹⁵⁵ Like Riley's other character witnesses, Payne gave the following, expected answer to the ultimate question.

Mr. Gill: "Do you, in, in your opinion, based on your experience with Danny Riley, would he pose a substantial risk to the futures industry if he were licensed as a floor broker?"

Mr. Payne: "I don't believe so."¹⁵⁶

Moreover, unlike Riley's other character witnesses, Payne elaborated, touching on the subject of rehabilitation. He

(..continued)

his liver. And pretty much, I left work totally after that because there was a good chance he was going to die. And I would have to say the only member and I worked very hard for the owners of that firm, the only person that called to find out if there was anything that he could do was Danny. . . ."

Tr. at 365-66.

¹⁵⁵ Tr. at 365 ("As a person, I mean, every individual is different and Danny's different in his ways. But underneath it all, the, Danny's a good person and I think that's the only reason my friendship has lasted this long and even after what occurred had happened. Because underneath it all, Danny's a good person.").

¹⁵⁶ Tr. at 367. Also, like the other character witness, Payne primarily based his opinion on the quality of Riley's service to his customers. Tr. at 367.

suggested that Riley's character and behavior have, in some general sense, undertaken a change for the better in "recent years."¹⁵⁷

¹⁵⁷ Tr. at 367-68. The following colloquy occurred during direct examination.

Mr. Gill: "Have you seen any change in Danny Riley in terms of his incidents in the Exchanges in recent years?"

Mr. Payne: "I would say, recent years, yes. It's changed a lot. It's not as many because of, I think, following when his daughter was born, I and probably some other individuals noticed a change in Danny."

Mr. Gill: "What would be the nature of the change in other words?"

Mr. Payne: "Well, you know, before I think Danny was, he was free. There was no responsibility. But for himself. And I think a child like, I know for myself, changes those things. And even for, you know, for Danny, it brought him down to earth a little bit more."

Mr. Gill: "All right. And how has that been reflected in his, in his behavior on the floor?"

Mr. Payne: "Well, Dan, like I said is not, once upon a time I would say there was always something buzzing around about Danny and I would say it's been a long time since I've had a phone call saying guess what Danny's done now or what Danny's saying. No one, it's, it's died down a lot."

(continued..)

While Payne's testimony stands as credible evidence of their friendship and, maybe to some extent, of Riley's personal maturation, it is not reliable evidence of Riley's rehabilitation. It did not address Riley's disqualifying conduct, cheating a customer by trade prearrangement, and was too general to provide any insight as to whether Riley's personal growth has made repetition of such misconduct unlikely. Similarly, Payne failed to address Riley's dishonesty in completing his floor broker application -- a quality that Riley continued to exhibit repeatedly in his false testimony before this Court.

Michael O. Nance

Michael O. Nance ("Nance") testified to his friendship with Riley and Riley's spirit of charity.¹⁵⁸ Nance, currently a security guard and stock person at Walgreens,¹⁵⁹ was homeless with a "a drug problem" when he met Riley in 1994.¹⁶⁰ In an act of

(..continued)

Tr. at 367-68.

¹⁵⁸ Tr. at 236-262.

¹⁵⁹ Tr. at 236, 260.

¹⁶⁰ Tr. at 237.

compassion, Riley hired him as a runner at the CME.¹⁶¹ Later,

¹⁶¹ Tr. at 240. In the following testimony, Nance told a compelling story of Riley's generosity.

Mr. Hunt: "And you said you met Mr. Riley in March or February of 1994?"

Mr. Nance: "Well, actually it was the end of February and I was working for a house that I used to just go by. In the summertime I would do the leaves, in the wintertime I would do the snow. And one night I was doing the snow and Danny walked past and it was kind of funny because he asked me what I was doing out there and I said, what does it look like? I'm shoveling snow."

Mr. Hunt: "And you had never met him before at that time?"

Mr. Nance: "No, no. That was the first time."

Mr. Hunt: "So you told him you were shoveling snow?"

Mr. Nance: "Right. And he says, you know, well, he asked me, he says, how much are you going to get paid for this? And I says, I don't know, 20, 30 bucks, whatever. He took my shovel and he says, don't do this no more. He says any guy that can stand out here in this weather and do this can work for me. So he kind of wrote down his office number and his name, told me to give him a call. . . ."

Tr. at 237-38.

Riley helped Nance get a second job¹⁶² and purportedly helped Nance solve his "drug problems."¹⁶³ Nance testified,

"[T]here's times when you're confused, you're on drugs, you're on alcohol, your immediate family is not there with you. There's all kind of elements out there and most people don't have time to do a personal thing with a person. It's, I mean, you know, you can drop a dollar in the Salvation Army and oh, well, you've done your thing. But it's a little more when you actually take a person and you kind of, what you call, throw them under your wing, and that's what Danny did for me."¹⁶⁴

Riley argues that, in giving "a homeless man a job, befriend[ing] him, and turn[ing] his life around," Riley engaged in "truly unusual conduct that shows a change in direction in Riley's life."¹⁶⁵ While the Court agrees that Nance's story

¹⁶² Tr. at 243.

¹⁶³ Tr. at 241-42. See also Tr. at 250 (Nance testifying to "keeping both feet on the ground basically"). But see Tr. at 245, 257-58 (Nance admitting that he was convicted of possession of drug paraphernalia in 1997 and, as recently as January 1999, was convicted of manufacturing and dealing cocaine).

¹⁶⁴ Tr. at 248-49.

¹⁶⁵ Riley Brief at 12.

evidences a "goodness" in Riley to which Payne also testified,¹⁶⁶ it disagrees that it evidences Riley's rehabilitation. Virtues and vices frequently co-exist in mortals of the normal sort. Riley's befriending of a homeless man evidences Riley's charitable spirit but no necessary "change in direction." Such compassion may have always been Riley's norm.¹⁶⁷ Moreover, there is no reason to believe that Riley's traits of personal kindness are incompatible with his repeating an act of fraud on a faceless customer or with continuing his habit of lying to regulators.

¹⁶⁶ See supra note 154. See also Tr. at 461 (Riley's expert witness stating that Riley's "is obviously a very empathic individual. He has a lot of feelings"); Tr. at 482.

¹⁶⁷ In an earlier case, the Commission noted,

"From the record, we cannot determine whether [registrant's] charitable activities increased, decreased or remained the same in the period following the wrongful conduct. Indeed, the fact that [registrant's wife] sat on the board of directors of one of the charities at issue is an indication that fundraising and other charitable endeavors were part of the Horn household's normal round of activities."

Riley's Expert Witness

The Concept Of The Rehabilitation Expert

Riley's last hope of establishing rehabilitation rests with the expert testimony that he presented. Indeed, the rehabilitation testimony that the Commission values most has generally comes from "experts."¹⁶⁸ The Court notes, however, that the Commission's reliance on expert testimony to establish rehabilitation has troubled the Seventh Circuit. Although it has yet to overrule or modify Commission case law on this point, that court has questioned whether "experts" play a useful role in Commission registration proceedings and, indeed, whether rehabilitation, by its nature, is incapable of proof. In LaCrosse v. CFTC, the Seventh Circuit wrote,

"The concept of a 'rehabilitation expert' is novel. Predicting future crimes is a roll of the dice: there are no genuine 'experts' about who is likely to commit which offenses tomorrow, or even what classes of persons pose genuine risk. Therefore it remains unclear who qualifies as a 'rehabilitation expert,' such that the Commission would accord his or her testimony substantial weight."¹⁶⁹

¹⁶⁸ See supra note 104.

¹⁶⁹ 137 F.3d 925, 934 n.5 (7th Cir. 1998); accord Ryan, 145 F.3d at 921.

In the instant case, the Court need not broach the larger, epistemological issue of whether, in determining rehabilitation, this Court enters into an area where even state-of-the-art "expertise . . . is fausse and [the best-available] science . . . junky."¹⁷⁰ Here, the Court assumes (as the Commission plainly does)¹⁷¹ that reliable expertise exists on the subject of an applicant's rehabilitation. Similarly, the Court assumes that Riley's expert witness generally possesses such specialized experience and knowledge. Even with these two assumptions, Riley's expert witness's opinion is entitled to little weight due to a failure to apply whatever expertise he possessed to all of the material facts.

Eric Ostrov, J.D., Ph.D., ABPP

Riley presented the expert testimony of Eric Ostrov, J.D., Ph.D., ABPP ("Dr. Ostrov").¹⁷² The Commission has explained,

¹⁷⁰ Kumho Tire Co., Ltd. V. Carmichael, 119 S. Ct. 1167, 1179 (1999) (Scalia, J., concurring).

¹⁷¹ In re Zuccarelli, ¶27,597 at 47,833-34; In re Ashman, ¶27,336 at 46,549-51.

¹⁷² Tr. at 430-603.

"[E]xpert witnesses [on rehabilitation] ha[ve] formal training and professional experience to support a claim of 'scientific, technical, or other specialized knowledge' concerning whether [the applicant] poses a future threat to the markets. Cf. Fed. R. Evid. 702. Where such formal training and experience in a field of behavioral study is present, whether as a probation officer, a social worker, a psychologist, or otherwise, a suitably trained and experienced person may qualify as an 'expert' with respect to questions of rehabilitation. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993) ('[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.'). Even where a witness is so qualified, however, the weight to be accorded to such a person's testimony will depend on what the expert says and what basis the expert has for saying it, and not solely on his or her credentials."¹⁷³

Dr. Ostrov certainly would seem to be well-credentialed by the Commission's standards.¹⁷⁴ He holds both a law degree and a doctorate in clinical psychology, from the University of Chicago, and is board certified in forensic psychology by the American Board of Professional Psychology.¹⁷⁵ Moreover, his training is

¹⁷³ In re Ashman, ¶27,336 at 46,549 n.55.

¹⁷⁴ See In re Zuccarelli, ¶27,597 at 47,833-34; In re Ashman, ¶27,336 at 46,549-51.

¹⁷⁵ Applicant's Exhibit 19 at 3. Forensic psychology "deals with the interface of psychology and the law. It's really law related psychology." Tr. at 431.

backed by extensive experience. He has done "two or three" forensic evaluations a week since 1982.¹⁷⁶ Among other things, Dr. Ostrov has worked with juveniles at the Illinois State Psychiatric Institute,¹⁷⁷ consulted with the Illinois state courts,¹⁷⁸ "evaluated police officers for fitness of duty" for the Chicago Police Department,¹⁷⁹ and worked with the Federal Bureau of Investigation, Secret Service, Postal Inspection Service and various corporations.¹⁸⁰ Much of this work involves predicting antisocial or criminal behavior.¹⁸¹ He has provided expert

¹⁷⁶ Tr. at 442.

¹⁷⁷ Tr. at 440-41.

¹⁷⁸ Tr. at 441 ("[Dr. Ostrov] help[s] the judges decide whether [juvenile delinquents] should be confined in the youth home or sent home or what kind of treatment plan would be appropriate").

¹⁷⁹ Tr. at 433.

¹⁸⁰ Tr. at 433-37.

¹⁸¹ See, e.g., Tr. at 437, 439-40.

Dr. Ostrov explained that many of his forensic evaluations involve issues similar to the rehabilitation issues raised in this proceeding. Tr. at 514 ("I do this kind of work all the time. So, when I'm making an assessment, let's say for the Chicago Police Department or for Intel, they're in effect asking me, is this person a substantial risk were they to be returned to work. . . . Either for work place violence or in the case of a police officer, the risk to the public.").

testimony in a variety of legal proceedings, including before police boards,¹⁸² the Drug Enforcement Administration,¹⁸³ the Securities and Exchange Commission,¹⁸⁴ and the Commodity Futures Trading Commission.¹⁸⁵

Dr. Ostrov described the evaluation process which he undertook in order to make an assessment of Riley's rehabilitation.

"Well, I was given records to read. Initially, I was given the complaint. And then I was given a large stack of records which I understand are called the CFTC Exhibits, Volumes 1 and 2. And I read those. I also interviewed him on several occasions for a total of about three and a quarter hours. I visited the Mercantile Exchange with him and walked around to get a sense of his milieu and what he deals with down there. I talked to [quite] a few people down there, too. Not in, I wouldn't call them collaterals because I didn't do a formal interview with them. But I chatted with quite a few people down in the Exchange. I also did a home visit. I went to his home. I met his daughter.

¹⁸² Tr. at 436.

¹⁸³ Tr. at 438.

¹⁸⁴ Tr. at 439.

¹⁸⁵ Tr. at 439. Dr. Ostrov was a Division rebuttal witness on the issue of the respondent's rehabilitation in Ashman. In re Ashman, ¶27,336 at 46,550. In that case, the Commission spoke approvingly of Dr. Ostrov's "qualifications and extensive experience" and generally credited his testimony. Id.

Talked to his girlfriend for an hour. I gave him psychological tests, five in total. And that's pretty much it. That's the data gathering process, as I recall."¹⁸⁶

On the basis of this process, Dr. Ostrov concluded that Riley does not "present[] a substantial risk to public."¹⁸⁷ That is, Riley presents no greater risk than the typical Commission registrant¹⁸⁸

¹⁸⁶ Tr. at 444-45. The five tests were: (1) Personal History Checklist for Adults, Tr. at 445; Div. Exhibit No. 3, (2) Symptom Checklist-90-R, Tr. at 445-46; Div. Exhibit No. 2, (3) Minnesota Multiphasic Personality Inventory-2, Tr. at 446; Applicant's Exhibit 22, (4) Millon Clinical Multiaxial Inventory - III, Tr. at 446; Applicant's Exhibit No. 20, and (5) Revised Neuroticism Extraversion Openness to Experience Personality Inventory, Tr. at 447; Applicant's Exhibit No. 21. Dr. Ostrov also gave Riley a Hare Interview. Tr. at 446-47 ("an interview form which was made up by Bob Hare in Canada who's an expert on psychopathy").

¹⁸⁷ Tr. at 483-84.

¹⁸⁸ In the jargon of his profession, Dr. Ostrov explained,

Dr. Ostrov: " . . . Is he more of a risk than other people are? Maybe that's the better way to do it rather than trying to quantify the degree of risk that he, and if you say, if you took a bell curve of persons who are out there and you said, what is within one standard of deviation of the mean of those persons who are out there in terms of their risk, does he fall within one standard deviation? In other words, is he within the middle 66 percent? I would say he is. I would say that given his experiences here, what he's gone through, given his

(continued..)

of "repeating any conduct that would be violative of his legal

(..continued)

potential for remediation, given his character structure, I would say he's within the normal range of risk of persons who are in this field."

The Court: "In the field of Commission, of persons occupying occupations which require registration within the commodities?"

Dr. Ostrov: "Thank you. Exactly right."

The Court:: You feel he's within that normal range?"

Dr. Ostrov: "He's within the normal range of risk. Therefore, if that is an acceptable definition of substantial, lack of substantial risk, which I think it must be otherwise than most people would be a substantial risk."

The Court: "But you can't quantify this level of risk . . . ?"

Dr. Ostrov: "I cannot, I cannot. I don't think it would be within the realm of the state of science in my field to be able to do something like that."

Tr. at 518-20.

obligations which were specific or tied to his registered capacity."¹⁸⁹

Regardless of the strengths or weakness of Dr. Ostrov's general techniques and methods, his expert opinion is concededly

¹⁸⁹ Tr. at 520. Dr. Ostrov testified,

"And I think you're looking at a guy who not only is older but he is a father. I think having a child has changed him. And I think we could all understand that, that you put in a new role. You have a new responsibility, new sensibility about the world. It's not just you anymore. It's your kid and I don't think he is the same person that he was before.

.....

Well, I talked to him for three and a quarter hours. Went down with him for an hour, visited his home. I have a, have the test results. He is trying to control his anger, as we saw with the MMPI. He's trying to control himself. I listened to him about his feelings about all of that. I think he realizes now that it's not appropriate behavior in these settings. And I think he would think more than once or twice or three times. It doesn't come naturally to him to think through things like that. But he can control himself. And I think at this point he, I believe he will control himself."

Tr. at 489-90.

only as good as the data he reviewed.¹⁹⁰ It is apparent that Dr. Ostrov's interviews with Riley suffered from a critical flaw. Riley was just as disingenuous in the "three and a quarter hours" that he spent with Dr. Ostrov as he was in his testimony before the Court. Riley plainly misled Dr. Ostrov into the favorable opinions that he rendered on Riley's behalf.

In the following exchange, Dr. Ostrov explains why he believes that Riley is unlikely to again participate in the prearrangement of a trade.

The Court: "--in your view, you don't think he's going to, you think it's unlikely he'd repeat. And that is, for instance, fixing a trade in violation of the rules. . . . Is that correct?"

Dr. Ostrov: "Absolutely."

The Court: "Okay."

Dr. Ostrov: "Absolutely right. . . . And I'm saying that from his subjective point of view, looking at it from through his eyes, which is what psychologists in part try to do, the way he saw it was as a problem to be solved which he solved for the benefit of his client. Not for his own personal benefit. He felt it

¹⁹⁰ When asked what fact-gathering techniques he used, other than the tests described above, Dr. Ostrov testified, "The interview, the observations of the interview, the record review. Even the collateral information. Those are all important. The Milieu." Tr. at 483.

to be the right thing to do. In retrospect, it was the wrong to do because it did violate the rules. I think once he learns that is the wrong thing to do, he doesn't repeat it. It wasn't done to break the rules."

Mr. Gill: "Does he, based on your analysis or your assessment, does he, what is Mr. Riley's view now of that activity?"

Dr. Ostrov: "He realizes in retrospect, he understands that it was not the right thing to do. It was breaking the rules. It was a short circuit of something that felt like it might be a solution. But in retrospect, obviously, was not the right thing to do."

The Court: "Your understanding that at the time that Mr. Riley engaged in this activity, he didn't believe he was breaking the rules? Is that your understanding?"

Dr. Ostrov: "I, I'm not understanding that. I think that in his mind, the, he may have understood that there was a rule against after hour trading. But he may have thought, at that moment, that the larger good would be to make this right. And there was not going to be any particular harm in doing so.¹⁹¹

Here it is clear that Dr. Ostrov's opinion as to Riley's rehabilitation is predicated on a misunderstanding of Riley's motivation in prearranging the 1994 trade. Dr. Ostrov understood Riley's motivation to be beneficent because Riley misled him as to

¹⁹¹ Tr. at 493-95 (emphasis added).

the consequences of the prearranged trade.¹⁹² By his own standards, this misperception of Riley's motivation for undertaking the prearranged trade rendered Dr. Ostrov's opinion as to Riley's rehabilitation unreliable.¹⁹³

¹⁹² He explained what Riley told him in the following exchange.

The Court: ". . . . [Riley] did talk to you about this one instance where . . . he fixed a trade for a customer in violation of the rule?"

Dr. Ostrov: "Yes, yes, he did."

The Court: "Okay. What did he tell you about that?"

Dr. Ostrov: "That he understood that there were two human beings that wanted to complete a trade. And that he saw a way to solve the problem by taking a certain action that would complete the trade without harm to either and maybe to the favor of one. And he went and did it. That's my understanding of what happened."

Tr. at 589-90 (emphasis added). See Tr. at 593 ("Now maybe I'm wrong but that's my understanding."). As discussed at length above, the selling customer was in fact entitled to a higher price than the one fixed by Riley. Also as discussed above, the Court has found that Riley's motivation was far from benign: he cheated the selling customer in order to benefit his own client, the buyer.

¹⁹³ When asked whether Riley's motivation, in setting up the prearranged trade, was something that he "needed to resolve" in the process of forming his opinion, Dr. Ostrov replied, "Absolutely." Tr. at 502-03.

A similar problem plagues Dr. Ostrov's opinion of Riley's rehabilitation as it relates to Riley's material misrepresentations in, and omissions from, his floor broker registration application. Dr. Ostrov's opinion is predicated on an incomplete understanding of the conduct at issue and a misunderstanding as to the innocence of Riley's motive. As the psychologist explained,

"Yeah, well, the application, as I understood it, I did ask him about that in quite some detail. And his understanding was that the youthful indiscretions, the felony and so forth, were going to be expunged and he had been actually advised that they were not to be put down. So from his point of view, those were not, they shouldn't have been on the application. That's why he didn't include them. The others he felt were not relevant because they weren't relevant specifically to the Board of Trade. I mean, I look at that application and it does qualify the misdemeanors that you're supposed to list. And it, to me, if I were reading it, I would also, I would see it as it should be relevant to the Mercantile Exchange, not necessarily any misdemeanor that you ever had.

My understanding is that when he thought more about it, he then put, voluntarily submitted information about the felony. Now, how does it fit in? Again, I think that when he's filling this, these forms out, does he think about it carefully? It fits for me that two weeks later he comes to a conclusion, well, maybe I should have done it differently.

Now, he's a pretty impulsive guy. He does things impulsively."¹⁹⁴

Dr. Ostrov's discussion is conspicuous in addressing only Riley's mindset in failing to properly disclose his criminal history in his 1990 registration application. It makes no mention of Riley's failure to disclose the exchange disciplinary proceedings that were pending against him at the time.

The record is unclear as to whether this resulted from Riley's failure to inform Dr. Ostrov of that particular misconduct or Dr. Ostrov's failure to note and, later, consider it.¹⁹⁵ In either case, the failure to account for this conduct once again

¹⁹⁴ Tr. at 503-04.

¹⁹⁵ The following exchange illustrates the uncertainty.

The Court: "Did he discuss with you his failure to disclose on the form the pendency of certain disciplinary actions at the time he filled out the form? The pendency of certain exchange disciplinary actions against him?"

Dr. Ostrov: "Now, he may have and let the, if you don't mind, I would, I'm not sure I can find it real quick, but. I'm not finding it and I'm not sure if we discussed that particular point."

Tr. at 504. See also Tr. at 576-77.

undermines the reliability of Dr. Ostrov's opinion as to Riley's rehabilitation.¹⁹⁶

Finally, in the following response to a hypothetical question, reflecting the Court's actual findings as to Riley's conduct and state of mind, Dr. Ostrov again revealed how facts not known to him might undermine his conclusions.

The Court: "Okay, thank you. Let me ask you at this point a hypothetical question."

Dr. Ostrov: "Yes."

The Court: "Assume, hypothetically that as a fact--"

¹⁹⁶ Dr. Ostrov was not always helpful in determining the strengths and weaknesses of his opinion. As illustrated below, when pressed on issues related to the substance of his opinion, he was sometimes evasive.

Ms. Romaniuk: "Now, if you were evaluating an individual for rehabilitation purposes and you discovered that the individual had failed to mention prior misconduct on the floor of the Exchange, on a registration application for a Floor Brokerage Registration, that would indicate that the person wasn't rehabilitated. Wouldn't it?"

Dr. Ostrov: "Well, in this case it would indicate that I, unfortunately, missed something because I should have talked with him about it. And that's my fault."

Tr. at 579.

Dr. Ostrov: "Okay."

The Court: "--under a degree of certainty that Mr. Riley willfully and intentionally failed to disclose material on his NFA application form which he believed was required to be disclosed."

Dr. Ostrov: "Yes."

The Court: "And assume hypothetically that Mr. Riley willfully testified untruthfully in this proceeding with respect to that matter."

Dr. Ostrov: "Yes."

The Court: "Would that change your opinion as to whether Mr. Riley posed a substantial risk to the public as, in whatever manner you've defined it for purposes of your testimony?"

Dr. Ostrov: "Well, the later would worry me more than the former because he knows he's under scrutiny. I think that he has plenty, he's had plenty of time to think about all these things so that would worry me more, the later than the former. The, would it change my mind? Naturally, I'd want to have an opportunity to hear his point of view about it. And ask him, it's very hard for me to draw a conclusion even if I hypothesize the truth of that. I'd still want to know why the truth of that, why would he do that? Why would he come in here and lie about it when he knows, purposely lie about it when he knows that this is under scrutiny and the lie would be so easily revealed. I'd want to hear about that from him before I would draw a conclusion."¹⁹⁷

¹⁹⁷ Tr. at 504-506.

In sum, the Court finds that, in discussing his disqualifying conduct under Section 8a(3)(G) and (M) with Dr. Ostrov, Riley misrepresented and omitted certain facts. These facts were material to Dr. Ostrov's rehabilitation analysis. Riley's lack of candor rendered Dr. Ostrov's opinion, as to the risk of Riley's repetition of conduct disqualifying under Section 8a(G) and (M), unreliable. Therefore, the Court accords it no weight.

Conclusion And Order

For all the foregoing reasons, the Court **CONCLUDES** that applicant Daniel P. Riley is subject to statutory disqualification under Section 8a(3)(G) and (M) of the Act. The Court further **CONCLUDES** that Daniel P. Riley has failed to submit evidence of mitigation or rehabilitation, or other evidence¹⁹⁸ sufficient to

¹⁹⁸ Riley seeks unconditioned approval of his application for registration. Riley Brief at 2. In the event, however, that the Court denies unconditioned registration, Riley alternatively requests conditioned registration. Id. Under this alternative request, Riley would accept registration subject to prohibitions on: (1) executing customer orders and (2) trading for his own account. Id. Moreover, pursuant to 17 C.F.R. §3.60(b)(2)(i) and in further support of this alternative request, Riley has submitted his employer's agreement to sign a Supplemental Sponsor Certification Statement, and supervise compliance with these proposed restrictions as well as any conditions that the Court may impose on Riley's registration. Sponsor Agreement. Riley argues
(continued..)

rebut the presumption that his registration as a floor broker would raise a substantial risk to the public despite the existence of Riley's statutory disqualification under Section 8a(3)(G) and (M).¹⁹⁹ Accordingly, the application of Daniel P. Riley to be

(..continued)

that, with these conditions, "the scope of his activity would be so restricted that his registration could not reasonably be said to pose a substantial risk to the public." Riley Brief at 2. The Court disagrees.

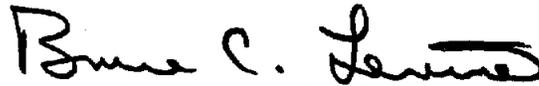
"[T]he quantum of a showing necessary to be registered may be less where a satisfactory supervisory arrangement exists." In re Walter, ¶24,215 at 35,015; see 17 C.F.R. §3.60(b)(2)(ii)(C) and f(3). It cannot, however, substitute for Riley's failure to present persuasive evidence of mitigation or rehabilitation relating to his disqualifying conduct. In re Horn, ¶24,836 at 36,942 n.23 ("While a suitable supervisory arrangement may complement persuasive evidence of mitigation and rehabilitation, it cannot serve as a substitute for such evidence."). Likewise, Riley's agreement to restrict the scope of his activities cannot serve as such a substitute. In re Fetchenhier, ¶25,838 at 40,747 & n.6. Moreover, it is difficult to see how the restrictions that Riley proposes would make reoccurrence of his disqualifying misconduct substantially less probable. After all, Riley managed to orchestrate the prearrangement of a trade and lie on his registration application (as well as before this Court) at times when he was not executing trades at all and lacked authority to execute trades for customers.

¹⁹⁹ In light of this conclusion, it is unnecessary to determine whether Daniel P. Riley successfully rebutted the presumption that his registration as a floor broker would raise a substantial risk to the public despite the existence of Riley's admitted statutory disqualification under Section 8a(3)(D) and (E). See In re Interstate Securities Corp., ¶25,295 at 38,954-55. The Court notes, however, that Riley's disqualifying criminal convictions
(continued..)

registered as a floor broker with the Commission, submitted on July 31, 1990, is hereby DENIED.

IT IS SO ORDERED.²⁰⁰

On this 8th day of June, 1999



Bruce C. Levine
Administrative Law Judge

(..continued)

for theft occurred when he was 18 and 19 years old. In the circumstances of this case, Riley's youth at the time might be considered a mitigating factor. In re Clark, ¶27,032 at 44,927; In re Tipton, ¶20,673 at 22,750. Moreover, nearly 22 years have passed without any indication that Riley has engaged in any further criminal acts of that particular nature. "As wrongful conduct recedes further into the past the scales may begin to tip in favor of rehabilitation." In re Horn, ¶24,836 at 36,941 (internal quotation marks and citation omitted). Although the passage of time, without more, is insufficient to rebut the statutory presumption of unfitness, id., Riley did present other evidence of rehabilitation as it related to his youthful thievery. Dr. Ostrov's expert opinion on the subject, at the very least, appeared better informed than his opinion as to Riley's likely future compliance with exchange and Commission requirements. See Tr. at 484-88.

²⁰⁰ Under 17 C.F.R. §§3.60(i) and 10.102 and 10.105, any party may appeal this Initial Decision to the Commission by serving upon all parties and filing with the Proceedings Clerk a notice of appeal within 15 days of the date of the Initial Decision. If the party does not properly perfect an appeal -- and the Commission does not place the case on its docket for review -- the Initial Decision shall become the final decision of the Commission, without further order by the Commission, within 30 days after service of the Initial Decision.