

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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11:32 am, Sep 15, 2014

NORD CAPITAL ADVISORS LLC

and

YAKOV SHLYAPOCHNIK

v.

NATIONAL FUTURES ASSOCIATION

CFTC Docket No. CRAA 14-01

OPINION AND ORDER

On August 15, 2014, Nord Capital Advisors LLC (“Nord Capital”) and Yakov Shlyapochnik, one of Nord Capital’s principals and its associated persons (collectively, “Petitioners”), filed a petition to stay the effective date of a Member Responsibility Action and Associate Responsibility Action (“MRA/ARA”) issued by the National Futures Association (“NFA”), pending a hearing by the NFA. In relevant part, the MRA/ARA prohibits Petitioners, and anyone acting on their behalf, from: (1) soliciting for or trading in accounts owned or controlled by them, except to liquidate or conduct risk reducing trades; and (2) disbursing funds from any customer accounts or accounts owned or controlled by them without prior NFA approval. MRA/ARA at 1. NFA issued the MRA/ARA because Petitioners did not turn over certain records relevant to an NFA investigation of two complaints involving possible fraudulent conduct by Shlyapochnik and other Nord Group entities.

The MRA/ARA was issued July 31, 2014, and was effective immediately. On August 13, 2014, Petitioners asked the NFA for a post-deprivation hearing to be held in September,

which hearing was granted and is now scheduled for September 15 and 16. Petitioners filed their petition for a stay on August 15, and the NFA filed its opposition on August 25. For the following reasons, we deny the petition for stay.

BACKGROUND

I.

Nord Capital is located in Stamford, Connecticut, and has a branch office in Moscow, Russia. Ahlfeld Aff. ¶ 2. It was founded by Shlyapochnik in order to bring a trading program developed and initially offered in Russia to U.S. investors, though to date its only customer has been Nord Capital Financial Services (“NCFS”), an entity organized under the laws of Bermuda. Shlyapochnik Decl. ¶¶ 2-3; Beninger Decl. ¶ 4. Nord Capital has been registered with the Commission as a Commodity Trading Advisor (“CTA”) and an NFA Member since July 14, 2011, and became a registered Commodity Pool Operator on October 5, 2012. Ahlfeld Aff. ¶ 2. Since June 20, 2014, Nord Capital has operated three commodity pools, none of which appear to have any assets. Ahlfeld Aff. ¶3. It has had four listed principals over time: (1) Shlyapochnik, who became an Associated Person (“AP”) of the firm in 2011, Ahlfeld Aff. ¶ 4, and is its Chief Investment Officer, Shlyapochnik Decl. ¶ 3; (2) Donald E. Worley, who also became an AP of the firm in 2013 and is its Chief Executive Officer, though he has no ownership interest, Ahlfeld Aff. ¶ 5; (3) Nord Capital Advisors Holdings LLC (owned solely by Shlyapochnik), Ahlfeld Aff. ¶ 6; and (4) NCFS, at least from July 13, 2011 through September 16, 2011, Opposition at 8.

Nord Capital had one account in its own name at a futures commission merchant (“FCM 1”) with a net liquidating equity of \$1,000, Ahlfeld Aff. ¶ 13, and NCFS had three accounts between FCM 1 and a second FCM (“FCM 2”). Nord Capital acts as the CTA for NCFS’s first account at FCM 1. Ahlfeld Aff. ¶ 14. Since 2011, there has been recurrent and significant

activity in this account, with deposits totaling about \$48 million and withdrawals around \$49 million. *Id.* Shlyapochnik was listed as an employee for this account at FCM 1. NCFS's second account at FCM 1 had similar activity, with deposits amounting to \$19 million and withdrawals totaling approximately \$9 million over the life of the account. *Id.* Shlyapochnik was listed as a signatory, owner and trader for this account. *Id.* NCFS had its third account, for which Nord Capital also acts as CTA, at FCM 2. Ahlfeld Aff. ¶ 15. Since inception, deposits in that account exceeded \$30 million and withdrawals amounted to approximately \$25 million. *Id.* Shlyapochnik signed certain of these account documents as the "attorney" for NCFS. *Id.*

The relationship between Nord Capital and NCFS is mainly undisputed. NCFS was one of its principals for a time (and may still be), and has been its sole customer. In addition, Nord Capital regularly received deposits from NCFS presently totaling \$1.8 million, and entered into a loan agreement with NCFS that allowed Nord Capital to borrow up to \$200,000 from NCFS. Ahlfeld Aff. ¶ 16. The precise relationship between Shlyapochnik and NCFS, however, is a matter of some dispute. FCMs 1 and 2 provided NFA with documents indicating variously that Shlyapochnik may be the attorney, employee, or owner of NCFS. Further documents provided by FCM 2 indicate that NCFS is 100% owned—via a holding company—by an entity called Lxor Foundation, and these documents list Shlyapochnik as the primary beneficiary and the "Ultimate Beneficial Holder" of Lxor. Ahlfeld Aff. ¶ 15. On the other hand, Shlyapochnik submitted a declaration from Victoria Beninger, a board member of Lxor, who states that Shlyapochnik only trades on NCFS's behalf in the United States, Beninger Decl. ¶ 5, and that he has been "entirely excluded from the circle of beneficiaries" of Lxor, which was founded by his father, because "recent events have impaired [its] value." Beninger Decl. ¶ 2; *see also* Shlyapochnik Decl. ¶ 4 (noting he was removed "[a]fter the NFA's action").

II.

On July 17, 2014, NFA received a complaint from a company in Cyprus (“Cyprus Company”) regarding Shlyapochnik and various Nord Group entities, including NCFS and Nord Capital Advisory Services (“Nord Advisory”). Ahlfeld Aff. ¶ 7. Cyprus Company states the belief that Shlyapochnik was the “ultimate beneficiary owner” of Nord Advisory and NCFS. *Id.* According to the complaint, Cyprus Company invested \$1.5 million with Nord Advisory in September 2010, and that although it received positive investment reports for about three years thereafter, when it attempted to close its account in late 2013, it was told that Nord Advisory could not liquidate Cyprus Company’s assets because of the effect of quantitative easing by the Federal Reserve on the financial markets. Ahlfeld Aff. ¶¶ 7-8.

NFA thus began its investigation of Petitioners on July 21, 2014. Ahlfeld Aff. ¶ 10; Worley Decl. ¶ 4. After the NFA commenced its investigation, it received a second complaint of fraud from an individual regarding Nord Capital Group, for which Shlyapochnik serves as founder and chairman of the board. Ahlfeld Aff. ¶ 22. The investigation reached an impasse when NFA requested the bank records of NCFS. Petitioners claimed they have no ownership, custody or control over the bank records, and that because NCFS is a Bermuda-based entity, providing these documents might violate foreign privacy, secrecy and contract law. Beninger Decl. ¶¶ 3-7, 10; Shlyapochnik Decl. ¶¶ 5, 8. But NFA claims these bank records are critical to its investigation, and on July 31, 2014, issued the MRA/ARA, explaining:

NFA has been unable to complete its exam and investigation to whether Shlyapochnik is fit to be an NFA Associate and whether he and [NCFS] are fit to be listed as principals of Nord Capital; to determine the ultimate source of funds that have been contributed by [NCFS] as capital for Nord Capital; and to ensure that Nord Capital has properly disclosed all persons who contributed 10% or more of its capital.

MRA/ARA at 8 ¶ 26.

DISCUSSION

I.

Petitioners bring this petition pursuant to Commission Regulation § 171.41, which requires the Commission to consider:

- (1) Whether, in the circumstances presented, the notice and opportunity for a hearing provided by the National Futures Association are consistent with principles of fundamental fairness; and
- (2) The likelihood that the denial of the petition would result in irreparable harm to petitioner; and
- (3) The effect a grant of the petition would have on the interests of the National Futures Association; and
- (4) The effect a grant or denial of the petition would have on the public interest.

17 C.F.R. § 171.41(d). Each of these factors weighs in favor of maintaining the status quo pending the hearing, to be held starting September 15, 2014.

1. Fundamental Fairness. Petitioners' argument that they were deprived of fair process has essentially two parts. First, Petitioners assert that the MRA/ARA was issued without justification because Shlyapochnik does not own or control NCFS and there is no requirement that an NFA member or associated person maintain records "of unrelated business activities." Petition at 8-11. But NFA Compliance Rule 3-15(a) permits the NFA to take summary action, or pre-hearing action, "where the President, with the concurrence of the NFA Board of Directors or Executive Committee, *has reason to believe* that the summary action is necessary to protect the commodity futures markets, customers, or other Members or Associates." *Id.* (emphasis added). And while the Petitioners believe that NFA's "reason[s] to believe" are erroneous, the standard is a threshold one, *Weinberg v. NFA*, CFTC Docket Nos. CRAA 86-1, 86-2, 1986 WL 66179, *7

(1986),¹ which we find has been met at this stage in the proceedings. Petitioners concede that “it is understandable why NFA may have been confused by the varying descriptions of Mr. Shlyapochnik’s connection to NCFS in account applications” provided to NFA by FCMs 1 and 2. Petition at 10. And their own evidence attempting to clarify this asserted confusion is conclusory and vague.

For example, in an effort to emphasize the distance between himself and the Foundation that purportedly controls NCFS, Shlyapochnik states that “[u]ntil the NFA’s action, I was one of the beneficiaries of the Ledor Foundation,” but that “[a]fter the NFA’s action, I was excluded from the beneficiaries.” Shlyapochnik Decl. ¶ 4. The timing of such exclusion—apparently occurring in the days immediately following the investigation—would seem to support the NFA and there is no evidence as to precisely why he was so excluded. Further, Beninger’s Declaration seems inconsistent with Shlyapochnik’s declaration on the issue of whether Shlyapochnik in fact traded on behalf of NCFS. *Compare* Beninger Decl. ¶ 5 (noting he was authorized to trade), *with* Shlyapochnik Decl. ¶ 6 (stating he “never personally traded on these accounts”). Finally, Petitioners assert that the account records of FCMs 1 and 2, which alternately described Shlyapochnik as an employee, owner, trader or attorney for NCFS, were flawed because they were completed by non-lawyers and non-native English speakers. Petition at 9-10. Even assuming the veracity of those assertions, Petitioners’ claim does not establish that NFA deprived them of fair process in finding reason to believe, based in part on this evidence, that summary action was necessary.

Second, Petitioners contend that “the opportunity for a post-deprivation hearing is little consolation” and violates fundamental fairness when an MRA/ARA is issued without “solid

¹ This Order was affirmed by *Weinberg v. CFTC*, 699 F. Supp. 808 (C.D. Cal. 1988), *aff’d* 884 F.2d 1396 (9th Cir. 1989).

legal basis.” Petition at 12. But it is well established that sufficient post-deprivation procedures foreclose these types of procedural due process claims, *see, e.g., Sloan v. Dep’t of Housing & Urban Development*, 231 F.3d 10, 18-19 (D.C. Cir. 2000); *Weinberg*, 1986 WL 66179 at *6, and Petitioners do not dispute that they received notice of their rights to petition the Commission for a stay of the MRA/ARA and request a hearing by the NFA. When Petitioners requested that hearing, NFA scheduled it promptly on dates Petitioners stated they were available.² Accordingly, Petitioners are not deprived of fundamental fairness.

2. ***Irreparable Harm.*** Petitioners identify four alleged injuries they argue constitute “irreparable harm,” none of which rise to that level. First, they contend that their plans to offer Nord Capital’s trading program to U.S. investors have been halted by their inability to solicit clients or conduct trading activity, but the loss of income from such a U.S. offering does not amount to irreparable harm. *In re Gilchrist, et al.*, CFTC Docket No. 83-58, 1991 WL 88482, *2 (1991) (loss of income and impaired ability to earn a future living insufficient). Second, they allege that Nord Capital cannot pay its ordinary business expenses such as payroll and rent, but subsequent to Petitioners’ petition to the Commission, NFA has apparently provided Nord Capital with the authorization to pay certain of its current business expenses. Opposition at 18-19. Third, they allege that NCFS can no longer rely on trading profits from its three frozen accounts at FCMs 1 and 2 to pay its operational expenses, but even assuming harm to a purported principal were tantamount to direct injury to the Petitioners, they provide no evidence of what those NCFS expenses are and how they may have been funded out of the frozen accounts in particular, without which the Commission has no basis to evaluate whether such injuries exist and are irreparable. *See, e.g., Stephen Bronte Advisors, LLC v. NFA*, CFTC Docket

² Mr. Shlyapochnik has indicated to the NFA that he does not intend to attend the hearing.

No. CRAA 02-02, 2001 WL 1734943, *1 & n.3 (2001) (finding affidavit purporting to link the financial loss to an inability to receive treatment for a life threatening illness too vague). Further, inasmuch as Petitioners characterize NCFS as a customer of Nord Capital, the alleged harm would be insufficient because the loss of trading profits to customers does not constitute irreparable harm. *Jordan Assets Ltd. v. NFA*, CFTC Docket No. CRAA 06-04, 2006 WL 2818823, *2 (2006). Fourth, Petitioners contend that affiliated investment companies that are part of the Nord Capital Group have lost Russian investors following a Forbes Russia article on the NFA's action, but to the extent that alleged harm has already happened, it cannot be redressed by a stay; and to the extent this is cast as evidencing a reputational injury, that cannot sustain a claim of irreparable harm. *In re Mayer*, CFTC Docket No. 92-21, 1998 WL 135827, *1 (1998).

3. Effect of Stay on NFA. NFA Compliance Rule 2-5 broadly requires Members and Associates to cooperate with NFA in its investigations of them, and such cooperation is key to effective self-regulation. As the district court noted in *Weinberg*, 699 F. Supp. at 812-13, “[w]ith the public interest in mind NFA was left no alternative other than to summarily issue” an MRA when the target of the investigation refused to provide NFA with his banking records. This may be the same situation we face here (Petitioners will have their opportunity to argue otherwise in one week), and staying the NFA's MRA/ARA might impair NFA's ability to elicit cooperation to conduct its investigations.

4. Effect of Stay on Public. Petitioners contend that because Nord Capital currently has no U.S. customers, staying the MRA/ARA cannot impact the U.S. investing public. Petition at 13-14. But they concede that they intended to solicit and trade funds from U.S. investors, Shlyapochnik Decl. ¶ 3, and so the public clearly may be at risk if the fraud allegations made to

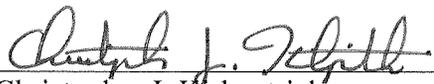
the NFA are true. Given the seriousness of these concerns and NFA's reasoned basis for its action we find that the public interest does not favor our restraining NFA from securing cooperation with its investigation.

CONCLUSION

Based on the foregoing, we deny this petition for a stay.

IT IS SO ORDERED.

By the Commission (Chairman MASSAD and Commissioners WETJEN, BOWEN, and GIANCARLO).



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 15, 2014