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In the Matter of	*	
	*	
FX FIRST, INC.,	*	CFTC Docket No. SD 04-01
	*	
Registrant.	*	
	*	

INITIAL DECISION

Statutory disqualification proceedings are speedy by design[1] and, this time, speedy in practice. Registrant FX First, Inc.[2]

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[1] The Futures Trading Act of 1982 §224, Pub. L. 97-444, 96 Stat. 2294 (1983), and the Commission's subsequent rulemaking combined to create the procedural structure that was intended to expedite the registration of those who were fit and the deregistration of those who were not. Temporary Licenses; Statutory Disqualification From Registration; Statutory Disqualification and Other Regulatory Requirements, 49 Fed. Reg. 8208, 8214 (1984). See In re Clark, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,032 at 44,928 (CFTC Apr. 22, 1997); In re Walter, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,215 at 35,010 (CFTC Apr. 14, 1988). To that end, Congress listed a number of grounds -- many of which are unlikely to be subject to a genuine dispute if they exist -- upon which the Commission may terminate a person's registration. These include but are not limited to having been: (1) found to have violated the Act or Commission regulations, (2) found to have violated securities laws, (3) convicted of certain types of misdemeanors or felonies and (4) debarred from contracting with the United States. 7 U.S.C. §12a(3)(A)-(F). The Commission, in turn, completed the procedural structure of statutory disqualification proceedings through regulations and case law. See infra note 7.

[2] FX First is a registered futures commission merchant ("FCM") and was, prior to the suspension discussed below, a member of the National Futures Association ("NFA"). Amended Notice of Intent to Revoke Registration Pursuant to Sections 8a(3)(J) and 8a(4) of the Commodity Exchange Act, as Amended, dated April 8, 2004 ("Amended Notice"), ¶¶1-2, 10.

chose not to answer the Commission's notice of intent to revoke its registration. For this reason and because the Proceedings Clerk served the notice in a sufficient manner,[3] the FCM fell into default.[4] This default and the Division of Enforcement's motion for a default judgment[5] leave us with only one more issue

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[3] Rule 3.50 governs service in Rule 3.60 proceedings. 17 C.F.R. §3.50(a). It permits service by a number of methods but lists only one method as per se sufficient by stating, "service upon an applicant or registrant will be sufficient if mailed by registered mail or certified mail return receipt requested properly addressed to the applicant or registrant at the address shown on his application or any amendment thereto, and will be complete upon mailing." Id. The Proceedings Clerk sent the Amended Notice by certified mail to 5000 Birch Street, Suite 9600, Newport Beach, California 92660. Letter from Proceedings Clerk to FX First, Inc., dated April 9, 2004. As part of its original motion, the Division included a photocopy of FX First's NFA application. The address for FX First reported in that document matched the one to which the Proceedings Clerk sent the Amended Notice. National Futures Association Firm Application Filed (7R), dated October 8, 2002, at 5 (included in Division of Enforcement's Memorandum of Law in Support of Motion for Entry of Order of Default, Findings of Fact, Conclusions of Law and Revocation of the Registration of FX First, Inc., filed March 30, 2004 ("Division Memorandum"), Exhibit 1, att. G).

[4] 17 C.F.R. §3.60(a)(4); Amended Notice at 6.

[5] Division of Enforcement's First Amended Motion for Entry of Order of Default, Findings of Fact, Conclusions of Law and Revocation of the Registration of FX First Inc., filed April 22, 2004. The Division's submission included a supporting memorandum as well as proposed findings of fact and conclusions of law. Division of Enforcement's First Amended Memorandum of Law in Support of Renewed Motion for Entry of Order of Default, Findings of Fact, Conclusions of Law and Revocation of the Registration of FX First Inc., filed April 22, 2004 ("Amended Division Memorandum"); Division of Enforcement's Proposed Findings of Fact and Conclusions of Law, filed April 22, 2004 ("Amended Proposed Findings").

to resolve, whether the Division made an adequate showing that FX First is statutorily disqualified pursuant to Sections 8a(3)(J) and 8(a)(4) of the Commodity Exchange Act.[6] If we answer that question affirmatively, then FX First will be found presumptively unfit for registration as an FCM and the presumption will not be disturbed.[7]

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[6] The Amended Notice charged us to consider whether FX First "is subject to statutory disqualification from registration under Section 8a(3)(J) and (4) of the Act" and, if so, whether the registration of [FX First] as a futures commission merchant should be revoked." Amended Notice, ¶¶13-14. For reasons discussed below, if the answer to the first question is "yes," the answer to the second is the same.

[7] Generally, the Division must establish the grounds for statutory disqualification by a preponderance of the evidence. 17 C.F.R. §3.60(e); In re Gath, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,751 at 44,111 (CFTC Aug. 2, 1996). Once the Division satisfies this requirement, a registrant is deemed presumptively unfit for registration and the burden of proof shifts. 17 C.F.R. §3.60(e); In re Moskowitz, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,656 at 40,141 (CFTC Feb. 5, 1993). To overcome the presumption of unfitness, the registrant must show, by a preponderance of the evidence (or, when 7 U.S.C. §12a(2) supplies the basis for disqualification, by clear and convincing evidence), that it does not pose a substantial threat to the public if permitted to remain registered. 17 C.F.R. §3.60(e); Gath, [1994-1996 Transfer Binder] ¶26,751 at 44,111. To make this showing, the registrant must present "[e]vidence mitigating the seriousness of the wrongdoing underlying the . . . disqualification" and/or evidence that the "registrant has undergone rehabilitation since the time of the wrongdoing underlying the statutory disqualification." 17 C.F.R. §3.60(f). See Gath, [1994-1996 Transfer Binder] ¶26,751 at 44,111. In this case, FX First has made no attempt to show mitigation or rehabilitation. Thus, if we find that the FCM is statutorily disqualified, the resulting presumption of unfitness will become conclusive.

(continued..)

Section 8a(4) allows us revoke the registration of a firm such as FX First if there are grounds under Section 8a(3) to refuse its registration.[8] Section 8a(3)(J) permits the Commission to withhold registration from any person who is "subject to an outstanding order denying, suspending, or expelling such person from membership in a . . . registered futures association."[9] By its plain terms, this provision refers to persons who are "subject to an outstanding order" of suspension, and not those who were but are no longer suspended.

(..continued)

The Division's burden in this case is eased by the registrant's default but success is not guaranteed. Rule 10.93, 17 C.F.R. §10.93, governs the disposition of Rule 3.60 default judgment motions. 17 C.F.R. §3.60(g). In determining whether it is appropriate to issue a default judgment under this regulation, we take as true a notice of intent to revoke's well-pled allegations of fact, as augmented by any evidence the Division may submit in support of the motion, and draw our own legal conclusions. In re Collins, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,607 at 55,621 (CFTC Nov. 4, 2003); In re Global Link Miami Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,391 at 46,778 n.2 (CFTC June 26, 1998), rev'd on other grounds, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,669 (CFTC June 21, 1999). To be well-pled, an allegation must be sufficiently clear and specific. In addition, it must not be: (1) made indefinite by other allegations in the same pleading, (2) made erroneous by the same pleading, (3) contrary to facts of which we will take judicial notice, (4) insusceptible of proof by legitimate evidence, or (5) contrary to the uncontroverted material in the file of the case. Global Link, [1996-1998 Transfer Binder] ¶27,391 at 46,778 n.2.

[8] 7 U.S.C. §12a(4).

[9] 7 U.S.C. §12a(3)(J).

In addition, the Commission has held that the grounds for disqualification under Section 8a(3)(J) "last only as long as the underlying [self-regulatory organization] membership suspension."[10] Thus, it is not enough to show that a registrant has been suspended. The Division must also establish that the suspension remains effective. Although it did not think such a showing was necessary,[11] the Division made it in this proceeding.

The Amended Notice includes well-pled allegations that, in September of 2003, FX First was suspended from NFA membership because the NFA determined that FX First was in violation of its net capital requirement.[12] In addition, the Division supported its default judgment motion with documents confirming that the FCM remains suspended.[13] Thus, the Division has met its burden of showing that there is a statutory ground for revoking FX

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[10] In re Schillaci, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,735 at 44,041 (CFTC July 11, 1996).

[11] The Division seemed to believe that it only had to prove that FX First had been suspended but not that the suspension remained in effect. Amended Division Memorandum at 9-10; Amended Proposed Findings at 7-8.

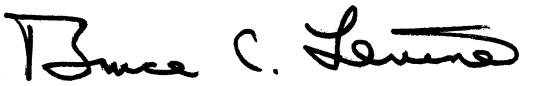
[12] The relevant, well-pled factual allegations included a claim that "[o]n September 23, 2003, the NFA issued an Amended Member Responsibility Action . . . and suspended Registrant from NFA membership until it came into complete compliance with all NFA requirements, effective as of the close of business on September 26, 2003." Amended Notice, ¶10.

[13] Exhibit 1 of the Division Memorandum included an NFA "Notice" that reports no change in FX First's membership status since its suspension.

First's registration. Accordingly, we find that the FX First is unfit for FCM registration. For the above-stated reasons and because there is no prudential basis to rule otherwise, we **GRANT** the Division's motion for a default judgment and **REVOKE** FX First, Inc.'s registration as an FCM.

IT IS SO ORDERED.[14]

On this 4th day of May, 2004



Bruce C. Levine
Administrative Law Judge

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[14] The Amended Notice set forth an accelerated procedural schedule. This schedule included a provision that "[a]ppeals pursuant to Section 8a(4) and 6(c) of the Act, 7 U.S.C. §§12a(4), 9 and 15 (2001), must be initiated through the filing of a Notice of Appeal within seven (7) days of the service of the Initial Decision." Amended Notice at 7. Neither Section 6(c) nor Section 8a(4) mention appeals of initial decisions to the Commission. Rather, Section 8a(4) refers to Section 6(c)'s procedures and Section 6(c) provides for the right to appeal Commission decisions to a United States court of appeals. 7 U.S.C. §§9, 15. However, the Commission's reference to "service of the Initial Decision" as the starting point for the time to file the above-mentioned notice of appeal and a reference, in a subsequent paragraph, to the Commission's issuance of an opinion and order lead us to conclude that the seven-day deadline in question governs appeals of our initial decision to the Commission. See Amended Notice at 7. Accordingly, if there is no notice of appeal filed within seven days after service of this initial decision and if the Commission does not place the case on its docket for review sua sponte, this order shall, without further order, become the final decision of the Commission within 30 days after service of our initial decision. 17 C.F.R. §3.60(i).