

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:

ALAN STEVEN FLEISHMAN
and
FIRST FUTURES GROUP, INC.,

Respondents.

CFTC Docket No. SD 98-1

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

Appearances:

On behalf of the Division of Enforcement:

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On behalf of the Respondents:

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Before: George H. Painter, Administrative Law Judge

PROCEDURAL HISTORY

On November 19, 1997, the Commodity Futures Trading Commission (“Commission”) commenced this statutory disqualification proceeding with the issuance of a Notice of Intent to Condition, Suspend, Revoke or Restrict Registrations (“Notice”) of respondent Alan Steven Fleishman (“Fleishman”) and respondent First Futures Group, Inc. (“FFG”). The Notice, issued in accordance with Rule 3.60(a), 17 C.F.R. § 3.60(a), alleges that respondent Fleishman is subject to statutory disqualification pursuant to Section 8a(3)(M) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 12a(3)(M), and that respondent FFG is subject to statutory disqualification pursuant to Section 8a(3)(N) of the Act, 7 U.S.C. § 12a(3)(N).

On December 29, 1997, respondent Fleishman and respondent FFG timely filed with this Court their joint Response to the Notice (“Response”), in accordance with Rule 3.60(b), 17 C.F.R. § 3.60(b). On February 27, 1998, the Division of Enforcement (“Division”) timely filed with this Court its Reply, in accordance with Rule 3.60(c), 17 C.F.R. § 3.60(c).¹ The Division’s Reply, composed of a Motion for Summary Disposition (“Motion”), Memorandum in Support of the Motion (“Memorandum”), and Declarations and Materials in Support of the Motion (“Exhibits”), requests that the registrations of respondent Fleishman and respondent FFG be revoked on summary disposition since respondents have not raised any genuine issues of material fact and have failed to show that their continued registration will not pose a substantial risk to the public.² Motion at 2-3. This Court now rules on the Division’s Motion.

¹ The Reply was due on February 27, 1998, after this Court granted filing time extensions to the Division.

² On March 6, 1998, the Division filed a Motion for Leave to Supplement and Amend Record (“Motion to Supplement”) in order to submit documentation relating to allegations of deceptive advertising contained in the Notice. The Division felt it necessary to include additional evidence since respondents denied in their Response engaging in the alleged misconduct. Motion to Supplement at 2. The Motion to Supplement is moot since this Court is not considering the allegation of deceptive advertising in making its ruling.

DISCUSSION

The Commission is authorized, pursuant to Section 8a(4) of the Act, 7 U.S.C. § 12a(4), to suspend, revoke or restrict the registration of any person if cause exists under Section 8a(3) of the Act to warrant refusal of registration. In the case at bar, the Notice alleges the Commission may refuse registration to respondent Fleishman as an associated person for “other good cause,” pursuant to Section 8a(3)(M) of the Act. Notice at ¶ 23. This is premised on two disciplinary actions by self-regulatory organizations in 1990 and 1994, respondent’s failure to complete mandated ethics training in 1994, respondent’s use of deceptive advertising, and respondent’s demonstrated financial irresponsibility. As for respondent FFG, the Notice alleges its registration as an introducing broker and commodity pool operator may be refused pursuant to Section 8a(3)(N) of the Act as a result of the statutory disqualification of its principal, respondent Fleishman. Notice at ¶¶ 24, 25.

Statutory Disqualification of Respondent Fleishman

The Division’s burden in a Section 8a(3)(M) statutory disqualification case is to establish by a preponderance of the evidence that the registrant is subject to statutory disqualification for “other good cause.”³ Rule 3.60(e), 17 C.F.R. § 3.60(e). The Division has the initial burden of proving, by a preponderance, that the alleged events did in fact occur and do constitute “other good cause.” In the Matter of Clark, [Present Transfer Binder] Comm. Fut. L. Rep. (CCH)

³ Preponderance of the evidence is defined as “evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weights heavier, then plaintiff has not met his or her burden of proof.” In the Matter of Scheck, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,072, at 45,123 n.8 (CFTC June 4, 1997) (quoting Smith v. United States, 726 F.2d 428, 430 (8th Cir. 1984) (citation omitted)).

¶ 27,032, at 44,928 (CFTC Apr. 22, 1997). The burden then shifts to the respondent, who must rebut the presumption of unfitness the Division has created with its *prima facie* case. In the Matter of LeClaire [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,282, at 42,428-29 (CFTC Dec. 12, 1994) (citations omitted). Respondent must establish by a preponderance that despite statutory disqualification his “registration would not pose a substantial risk to the public.” Rule 3.60(e)(2). The court’s findings on this matter are to include mitigation evidence⁴, rehabilitation evidence⁵, and evidence that the respondent’s registration would be subject to supervisory controls to detect future wrongdoing and to protect the public. Rule 3.60(f)(1-3), 17 C.F.R. § 3.60(f)(1-3).

Statutory disqualification cases may be disposed of on summary disposition, as authorized by Rule 3.60(c)(1), although there is “little express guidance about the procedures contemplated or the standards to be applied” contained in the rule itself. LeClaire, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,428. The Commission has directed the court to look at “[t]he provision’s apparent purpose - avoidance of the time and expense of unnecessary hearings - as a guide to the standards to be applied in resolving the Division’s motion” Id. As a result, to grant a motion for summary disposition the court must find that there is no genuine issue of material fact and that the respondent is subject to statutory disqualification as a matter of

⁴ This is evidence mitigating the seriousness of respondent’s wrongdoing. Rule 3.60(f)(1). This has been described as “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.” In the Matter of Horn, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,836, at 36,940 n.16 (CFTC Apr. 18, 1990).

⁵ This is evidence showing that the respondent has undergone rehabilitation since the wrongdoing. Rule 3.60(f)(2). Such evidence needs to “establish the type of significant change that would warrant an inference that he poses no substantial risk to market integrity.” Scheck, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) at 45,125. In order to assess rehabilitation, the court “look[s] for evidence that respondent has changed direction since the time of his wrongdoing and that, should the respondent be allowed continued access to the markets regulated by us, he would not repeat the type of conduct that threatens the integrity of those markets.” Id. at 45,125 n.12.

law. In the Matter of Schillaci, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,735, at 44,040 (CFTC July 11, 1996). The court must also determine that the registrant has failed to allege facts sufficient to warrant an oral hearing. Id. (citing LeClaire, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429). This Court grants the Motion for Summary Disposition since the Division has clearly met its burden while respondent Fleishman has painfully failed to meet his.

Findings of Fact

Upon review of the Notice, the Response, and the Division's Motion, Memorandum and Exhibits, this Court finds that the Division has successfully demonstrated that there is no genuine issue as to the following material facts:

1. The Notice alleges and respondents admit that Fleishman is a resident of Florida and has been registered with the Commission as an associated person ("AP") of respondent FFG, pursuant to Section 4k(1) of the Act, 7 U.S.C. § 6k(1), since March 30, 1994.⁶ (Notice at ¶ 1; Response at ¶ 1; Division Exhibit ("Div. Exh.") - ASF 96⁷, 98⁸). Fleishman is the president and sole principal of respondent FFG. (Notice at ¶ 1; Response at ¶ 1.)

2. The Notice alleges and respondents admit that FFG is a Florida corporation that has been registered with the Commission as an introducing broker ("IB"), pursuant to Section 4d of the Act, 7 U.S.C. § 6d, since March 30, 1994, and as a commodity pool operator ("CPO"),

⁶ Fleishman has been registered in the past with this Commission in other capacities which are not included here since they are not relevant to this Court's ruling. (Notice at ¶¶ 1, 3; Response at ¶¶ 1, 3.)

⁷ (NFA Certification, prepared by Deputy Record Custodian, dated February 29, 1996.)

⁸ (NFA Certification, prepared by Deputy Record Custodian, dated February 25, 1998.)

pursuant to Section 4m(1) of the Act, 7 U.S.C. § 6k(1), since June 1, 1995.⁹ (Notice at ¶ 2; Response at ¶ 2; Div. Exh. - FFG 96¹⁰, 98¹¹). FFG is not a member of any domestic exchange but is a guaranteed IB.¹² (Notice at ¶ 2; Response at ¶ 2.)

3. The Notice alleges and respondents admit that Fleishman was involved in business dealings, relating to commodity trading, with Allan L. Hoffman (“Hoffman”). (Notice at ¶¶ 4, 5; Response at ¶¶ 4, 5.) In 1987, Hoffman invested money with Fleishman as part of a limited partnership engaged in commodity trading. (Id.) After this venture ceased in December of 1987, Hoffman again invested money with Fleishman in 1992 to finance a discretionary commodity trading account on Hoffman’s behalf.¹³ (Id.)

4. The Notice alleges and respondents admit that Fleishman was subject to a disciplinary proceeding brought by the Chicago Mercantile Exchange (“CME”) in 1994.¹⁴ (Notice at ¶ 11; Response at ¶ 11; Div. Exh. - Donohue 4¹⁵.) On September 19, 1994, the CME Probable Cause Committee charged Fleishman with violations of CME Rule 432.i, which provides that it is “a major offense . . . [t]o make a material misstatement to the . . . Exchange or to its officials”;¹⁶ CME Rule 432.c, which states that it is “a major offense . . . [t]o be guilty of

⁹ FFG has been registered in the past with this Commission in another capacity which is not included here since it is not relevant to this Court’s ruling. (Notice at ¶ 2; Response at ¶ 2.)

¹⁰ (NFA Certification, prepared by Deputy Record Custodian, dated December 4, 1996.)

¹¹ (NFA Certification, prepared by Deputy Record Custodian, dated February 25, 1998.)

¹² FFG is guaranteed by US Securities & Futures Corp. Id.

¹³ This Court does not find that further details involving this relationship constitute material facts in this ruling and, as such, will not be addressed. (See Notice at ¶¶ 4-10; Response at ¶¶ 4-10.)

¹⁴ File number 93-1764-BC.

¹⁵ (CME Notice of Charges, dated September 26, 1994.)

¹⁶ The basis for this charge was that Fleishman allegedly failed to disclose his indebtedness to Hoffman either in his

any dishonest conduct;”¹⁷ and CME Rule 432.b, which makes it “a major offense . . . [t]o be guilty of fraud or any act of bad faith.”¹⁸ (Id.)

5. The Notice alleges and respondents admit that the CME Business Conduct Committee, Financial Division, conducted a hearing on April 19, 1995, which Fleishman attended with counsel. (Notice at ¶ 11; Response at ¶ 11; Div. Exh. - Donohue 5¹⁹.) Fleishman was no longer a member of the CME at the time.²⁰ (Notice at ¶ 3; Response at ¶ 3; Div. Exh. - Donohue 5.)

6. The Notice alleges and respondents admit that Fleishman was found guilty by the CME Business Conduct Committee, Financial Division, on May 2, 1995, of violating CME Rule 432.b and CME Rule 432.c.²¹ (Notice at ¶ 12; Response at ¶ 12; Div. Exh. - Donohue 6²², 8²³.)

July 28, 1992, membership application to the CME Index and Options Market Division or at his September 1, 1992, appearance before the CME Membership Committee. (Div. Exh. - Donohue 5.)

¹⁷ The basis for this charge was that Fleishman allegedly failed to disclose to Keystone Financial Corporation (“Keystone”) that Hoffman had an ownership interest in the accounts in Fleishman’s name, which caused Keystone to mischaracterize the accounts to the CME for clearing fee charges. (Div. Exh. - Donohue 5.)

¹⁸ The basis for this charge was that Fleishman allegedly deceived Keystone and Hoffman by entering into an agreement with Keystone which would wrongly deprive Hoffman of the profits. (Div. Exh. - Donohue 5.)

¹⁹ (CME meeting minutes of Business Conduct Committee, dated April 19, 1995.)

²⁰ (Fleishman was most recently a CME member from September 2, 1992, to February 4, 1993.)

²¹ This Court, in making its ruling on summary disposition, will not pass judgment on any substantive misconduct underlying the CME disciplinary action in light of the fact Fleishman still denies any wrongdoing and asserts alleged due process errors in the CME’s proceeding since he did not have the opportunity to confront or cross-examine Hoffman, who declined to appear at the hearing. (Notice at ¶¶ 6, 10, 12; Response at ¶¶ 6, 10, 12.) This Court notes that in a 8a(3)(M) statutory disqualification proceeding the existence of disciplinary actions has been distinguished from the underlying substantive misconduct. See In the Matter of Clark, [Present Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032 (CFTC Apr. 22, 1997) (The Commission distinguished between using the existence of disciplinary actions and using collateral estoppel to establish that the registrant engaged in the underlying substantive misconduct.) Since this Court is relying on the mere existence of the CME disciplinary action as the basis for statutory disqualification pursuant to “other good cause,” and not the underlying substantive conduct, Fleishman’s argument lacks significance.

²² (CME Notice of Decision, dated May 2, 1995.)

²³ (CME Notice of Disciplinary Action.)

The sanction imposed was a \$50,000 fine.²⁴ (*Id.*) This decision became final on May 15, 1995, and effective on June 5, 1995.²⁵ (Notice at ¶ 13; Response at ¶ 13; Div. Exh. - Donohue 7²⁶, 8.) This Court also finds that Fleishman was required to pay the fine before the close of business on June 5, 1995. (Div. Exh. - Donohue 6, 7.)

7. The Notice alleges and respondents admit that Fleishman was named as a respondent in a disciplinary action brought by the National Futures Association (“NFA”), Central Regional Business Conduct Committee, on March 7, 1990, alleging that Fleishman violated NFA Compliance Rule 2-26, which prohibits “Making Guarantees to Commodities Customers Against Loss or Promising to Limit Losses,” by guaranteeing to protect a customer’s account for losses below the balance of \$10,000 in September of 1987.²⁷ (Notice at ¶ 14; Response at ¶ 15; Div. Exh. - ASF 96²⁸.) On March 20, 1991, the NFA accepted Fleishman’s Offer of Settlement, in which he neither admitted nor denied the allegations. (Notice at ¶ 15; Response at ¶ 15; Div. Exh. - ASF 96²⁹.) The NFA suspended Fleishman’s registration for two years but granted Fleishman the right to petition for reduction of the suspension after one year. (*Id.*) Fleishman successfully petitioned for that reduction after one year and the membership bar was lifted on

²⁴ Since Fleishman was not a member of the CME at the time of the hearing, he was not subject to expulsion as a disciplinary action pursuant to CME Rule 131. (Notice at ¶ 1; Response at ¶ 1; Div. Exh. - Donohue 5.)

²⁵ This Court finds worth noting that although respondent Fleishman challenges the evidentiary basis for the charges, based on a professed glaring due process deficiency, he did not appeal the decision to the Panel’s Board of Directors, as he was permitted to do pursuant to CME Rule 417 (Div. Exh. - Donohue 6), and did not appeal the decision to the CFTC, as he was permitted to do pursuant to Part 9 of the Rules (Div. Exh. - Donohue 7; 17 C.F.R. §§ 9.1 - 9.33).

²⁶ (CME Notice of Final Decision, dated May 16, 1995.)

²⁷ In the Matter of International Futures Strategists, Inc., et al., NFA Case No. 90-BBC-004.

²⁸ (NFA Complaint, Count IV, dated March 7, 1990.)

²⁹ (NFA Decision, dated March 20, 1991.)

April 28, 1992. (Notice at ¶ 15; Response at ¶ 15; Div. Exh. - ASF 96³⁰.)

8. The Notice alleges and the Division has established that Fleishman failed to complete his initial four-hour ethics training session, as mandated by Rule 3.34, 17 C.F.R. § 3.34, which was required to be completed by September 30, 1994.³¹ (Notice at ¶¶ 16, 17; Response at ¶¶ 16, 17; Div. Exh. - NFA Ethics³².) Respondent neither admits nor denies this allegation, stating instead that he “does not have and is unable to obtain sufficient information” to answer. (Notice at ¶17; Response at ¶17.) In light of the evidence submitted this Court does not find that such a response rises to the level of a genuine issue.

9. The Notice alleges and respondents admit that Fleishman has failed to pay the \$50,000 fined levied by the CME in 1995, in addition to current unpaid debts to Keystone Trading Corporation (“Keystone”), Hoffman, and others. (Notice at ¶¶ 13, 21; Response at ¶¶ 13, 21.)

10. The Notice alleges and respondents admit that Fleishman disclosed on his February 1994 NFA application for registration as an AP of FFG that the Internal Revenue Service held liens against him totaling \$14,707.60, for tax years 1987-1990. (Notice at ¶ 21; Response at ¶ 21; Div. Exh. - ASF 96³³.)

11. The Notice alleges and respondents admit that Fleishman disclosed on his July

³⁰ (NFA meeting minutes, dated April 28, 1992.)

³¹ This rule was is in accordance with Section 4p(b) of the Act, 7 U.S.C. § 6p(b), which states that initial and periodic ethics training is “to ensure that registrants understand their responsibilities to the public under this Act, including responsibilities to observe just and equitable principles of trade, any rule or regulation of the Commission, any rule of any appropriate contract market . . . or other self-regulatory organization.”

³² (NFA Certification, prepared by Deputy Record Custodian, dated February 25, 1998.)

³³ (NFA Form 8-R, dated February 7, 1994, and documents evidencing tax liens submitted to NFA by respondent Fleishman, dated February 22, 1994.)

1992 CME application for membership in the Index and Option Market Division that he had a net worth of approximately negative \$280,000. (Notice at ¶ 22, Response at ¶ 22; Div. Exh. - Donohue 2³⁴). This amount included commodity-related debts in excess of \$150,000 to eighteen³⁵ persons and two outstanding loans totaling \$100,000. (Id.) In addition, Fleishman had nonitemized commodity-related debts of unspecified amounts to seven unidentified persons; debts which Fleishman claimed had been forgiven and therefore unnecessary to include. (Id.)

This Court will not consider the remaining allegations set forth in the Notice concerning deceptive advertising as they are unnecessary to this ruling.³⁶

Judgment as a Matter of Law

This Court must also determine that respondent Fleishman's conduct, as established above, renders him subject to statutory disqualification for "other good cause," pursuant to 8a(3)(M), as a matter of law. Although the meaning of "other good cause" is not defined by statute, the Commission has issued an Interpretative Statement to provide some guidance:

[T]he Commission interprets [Section 8a(3)(M)] to authorize 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 thereunder, or such person's moral turpitude,

³⁴ (Application form.)

³⁵ Although the Notice states "seventeen persons," this Court reviewed the application form submitted by respondent Fleishman and counted eighteen individuals. (Div. Exh. - Donohue 2.)

³⁶ The remaining allegations in the Notice, which Fleishman has denied, concern respondent's use of false and deceptive advertising in the Bell South Yellow Pages. (Notice at ¶¶ 18-20; Response at ¶¶ 18-20.)

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.

Interpretative Statement With Respect to Section 8a(2)(C) and (E) and Section 8a(3)(J) and (M) of the Commodity Exchange Act, 17 C.F.R. Part 3 (1996), App. A (emphasis added) (quoted in In the Matter of Clark, [Present Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032, at 44,928 (CFTC Apr. 22, 1997)). As a result, “other good cause” is a somewhat expansive, if not amorphous, concept.

Past Disciplinary Actions

The Division may rely upon the existence of exchange disciplinary proceedings in fulfilling its burden. Clark, [Present Transfer Binder] Comm. Fut. L. Rep. (CCH) at 44,928. The Commission has noted that “a statutory disqualification under Section 8a(3)(M) may arise on the basis of a pattern of exchange disciplinary actions alleging serious rule violations that result in significant sanctions.” Id. (emphasis added.) The rationale is that this type of pattern “supports an inference that respondent is unable to deal with the public in a just and equitable manner.” Id. at 44,928-29. The Commission has relied on “a pattern” of disciplinary actions by self-regulatory organizations alone, as distinguished from the respondent’s underlying conduct, to constitute “other good cause.” Id. at 44,928-30.

The Division states in its Motion that each of the two self-regulatory disciplinary actions brought by the CME and NFA against respondent Fleishman alleged serious violations and

resulted in significant sanctions. Memorandum at 9. This Court is in full agreement with the Division's characterization of respondent Fleishman's disciplinary actions.

The CME's allegations against Fleishman of misconduct were CME self-described "major offenses" and involved fraud, dishonesty, and material misstatements. As the Commission has pointed out, "charges of fraud, customer abuse or other illicit trading practices constitute allegations of serious violations of exchange rules." Clark, [Present Transfer Binder] Comm. Fut. L. Rep. (CCH) at 44,928. As for the sanctions that resulted, Fleishman was fined \$50,000 which this Court considers to be a "significant sanction." The fact that respondent Fleishman did not receive a trading sanction does not affect this Court's determination since Fleishman was no longer registered with the CME at the time the hearing was conducted.³⁷

The allegation of Fleishman's misconduct set forth by the NFA, guaranteeing a customer's account, is also encompassed in "allegations of serious violations" since it involved fraud, if not also customer abuse.³⁸ The sanction levied by the NFA was a two-year registration suspension. The Commission has noted that it is "immaterial whether the sanctions were imposed in a fully adjudicated disciplinary action or an action that resulted in a settlement." Id. The fact that this sanction was later reduced to a one-year membership ban does not change the significance of the sanction. In sum, each of the two self-regulatory disciplinary actions alleged serious violations and resulted in significant sanctions.

This Court is not aware of Commission case law addressing the issue of whether two disciplinary actions alleging serious rule violations and resulting in significant sanctions rises to the level of "a pattern." The Division contends that pursuant to Clark, two such disciplinary

³⁷ See supra note 24.

³⁸ In the Matter of International Futures Strategists, Inc., et al., NFA Case No. 90-BBC-004.

actions constitute “a pattern.” Memorandum at 9 n.3. In Clark, however, the Commission found three disciplinary actions, two by NYMEX in 1989 and 1991 and a third by COMEX in 1992, constitute “a pattern.” Clark, [Present Transfer Binder] Comm. Fut. L. Rep. (CCH) at 44,928-29. As a result, based on this Court’s reading of Commission case law it does not agree with the Division’s characterization.³⁹

Although not rising to the level of “a pattern,” Fleishman’s disciplinary actions, in 1990 and again in 1994, are relevant in determining “whether the member is unable to comply with the requirements of the Act or to deal with the public in a manner consistent with just and equitable principles of trade.” Id. at 44,928. This Court finds that two disciplinary actions by self-regulatory organizations, each alleging serious violations and resulting in significant sanctions, forcefully demonstrates, at a minimum, a clear inability by respondent Fleishman to comply with the requirements of the Act and regulations thereunder, if not also an inability to deal with the public in a just and equitable manner.

Ethics Training

This Court finds that respondent Fleishman's failure to complete long overdue mandatory ethics training in 1994 demonstrates more than a mere “potential disregard” of his duties as an AP, but an actual disregard of Rule 3.34, as promulgated under the Act.⁴⁰ Moreover, this actual disregard is also an ongoing disregard of the requirements - three and one half years to date - demonstrating respondent’s clear inability to comply with the rules. This Court is also puzzled as to respondent Fleishman’s alleged obliviousness as to whether he has, in fact, complied with

³⁹ See supra note 23.

⁴⁰ See In the Matter of Clark, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,305, at 42,508 (Initial

this requirement. Although Fleishman acknowledges this training requirement exists, he is “unable to obtain sufficient information” to answer whether he ever attended such a training.⁴¹

Financial Irresponsibility

In addition, this Court finds respondent Fleishman’s substantial past and ongoing indebtedness demonstrates a “lack of . . . financial responsibility.” To date, Fleishman has not paid any portion of his \$50,000 fine by the CME which was due in full on June 5, 1995. Fleishman has also acknowledged current unpaid debts to Keystone and Hoffman, as well as others. In February of 1994, Fleishman’s outstanding liens to the Internal Revenue Service totaled \$14,707.60, and dated back to tax years 1987-1990, up to six years delinquent at that time.⁴² In July of 1992, Fleishman had a net worth of approximately negative \$280,000, including commodity-related debts in excess of \$150,000 to eighteen persons and two outstanding loans totaling \$100,000. These sizeable debts have demonstrated respondent’s consistent ineptitude, spanning over years, in handling his own finances which has impacted numerous individuals, private organizations, and a federal agency.

Respondent's Showing

Even though the Division has established its *prima facie* case, respondent Fleishman could have defeated the Division’s Motion by demonstrating “a significant likelihood respondent will prevail on the merits.” In the Matter of LeClaire [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,282, at 42,429 (CFTC Dec. 12, 1994). Respondent’s burden is to establish,

Decision Feb. 3, 1995).

⁴¹ See Findings of Fact #8.

by a preponderance of the evidence, that despite the existence of the statutory disqualification he would not pose a substantial risk to the public. Id.; Rule 3.60(e)(2). This requires “evidence which, at a minimum, shows that he is no longer likely to commit the same or a similar violation again [T]hat despite his past transgressions, he now has sufficient integrity, candor and respect for the Act to handle the public’s money.” In the Matter of Akar, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,927, at 31,708-09 (CFTC Feb. 24, 1986). This Court declines to provide respondent Fleishman with an oral hearing since he has patently failed to meet his “burden of alleging facts sufficient to warrant an oral hearing.” LeClaire [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429.

Respondent Fleishman's Response is overwhelmingly deficient in many aspects. The Response fails to conform to requirements set out in Rule 3.60(b)(2)(i). Fleishman, as an AP,

shall . . . state whether he intends to show that full, conditioned or restricted registration would not pose a substantial risk to the public despite the existence of the disqualification set forth in the Notice. If the person is an associated person . . . and intends to make such a showing, he must also submit a letter signed by an officer or general partner authorized to bind the sponsor whereby the sponsor agrees to sign a Supplemental Sponsor Certification Statement and supervise compliance with any conditions or restrictions that may be imposed on the . . . registrant as a result of a statutory disqualification proceeding under this section.

Rule 3.60(b)(2)(i). Respondent states he “intend[s] to show that full registration has not posed and will not pose a substantial risk to the public, despite the existence of any alleged disqualifications set forth in the Commission Notice” but does not submit the required sponsor letter. Response at 5. This is clearly insufficient.

The Response also fails to conform to requirements set out in Rule 3.60(b)(2)(ii). Since

⁴² This amount includes interest and penalties as of February 15, 1994.

respondent Fleishman intends to show that his continued registration would not pose a substantial risk to the public, he was required to file with this Court, within 15 days after the filing of his Response, “a submission which includes a statement . . . identifying and summarizing the testimony of each witness whom the . . . registrant intends to have testify in support of facts material to his showing, and copies of all documents which the . . . registrant intends to introduce to support facts material to his showing.” Rule 3.60(b)(2)(ii). In this submission, the respondent “should clearly describe both the facts he believes are material to his claim of mitigation and rehabilitation and how the testimony he intends to offer and documents he submits will establish these facts.” LeClaire, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429. No such submission was ever filed by respondent.

This Court can only conclude from these deficiencies that respondent Fleishman has no sponsor, no intended witnesses, and no documentation to support his assertion that he does not pose a substantial risk to the public.

In addition, this Court has examined Fleishman's Response, fruitlessly, for evidence of mitigation, “evidence which tends to show that the weight that would ordinarily be accorded the presumption arising from proof of a particular disqualification should be lessened.” In the Matter of Schillaci, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,735, at 44,042 (CFTC July 11, 1996) (citing Horn, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 36,939). The only thing contained in the Response that may be construed as mitigation evidence is respondent’s self-styled “affirmative response” to the Division’s characterization of his finances as evidence of “financial irresponsibility.” Memorandum at 13. Respondent asserts that “his financial history has been well-known to regulators, customers and firms for many years,

during which time he has consistently sought to settle and resolve each debt, in good faith.”

Response at ¶¶ 21, 22. Fleishman evidently wants credit for declining to deal with his finances in a dishonest manner. Needless to say, this Court does not find much merit to this argument.

This Court has also searched the Response for evidence of rehabilitation, addressing the respondent’s “changed direction in his activities” since the misconduct in question. In the Matter of Walter, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,215, at 35,013 (CFTC Apr. 14, 1988) (quoting In the Matter of Tipton, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,673, at 35,013 (CFTC Sept. 22, 1978)). First off, it is quite apparent to this Court that respondent Fleishman does not believe he has engaged in any misconduct. Having said that, respondent’s only assertion even remotely concerning rehabilitation (which he has labeled as an “affirmative response”) is that “since March 1994 [Fleishman and FFG] have conducted their business in conformance with their statutory and regulatory obligations and have coordinated closely with the CME and the National Futures Association in a good faith effort to meet and to maintain all requirements for the conduct of their regulated business.” Response at 5. Respondent obviously does not think that his failure to pay his outstanding \$50,000 CME fine (over two and one-half years delinquent) or his ongoing failure to attend mandatory ethics training (three and one-half years overdue) as nonconforming behavior - additional proof to this Court of respondent’s unfitness. Even if this assertion by respondent Fleishman was true, it falls woefully short of any colorable claim of rehabilitation. As the Commission has stated, “[t]he passage of time, by itself, is insufficient to establish rehabilitation.” In the Matter of Schillaci, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,735, at 44,042 (CFTC July 11, 1996) (citing Horn, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 36,941).

Having said that, it is apparent to this Court that Fleishman is unable to overcome the presumption of unfitness. As the Commission has noted, “[i]t would be difficult, if not impossible, to establish that registration would not pose a substantial risk to the public without a showing of either mitigation or rehabilitation, as evidence of mitigation and rehabilitation are key to such a showing.” In the Matter of Schillaci, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 44,042 (citing In the Matter of Horn, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,721, at 33,889 (CFTC July 14, 1987)). As is the case at bar, when “the allegations raised by [respondent] are facially insufficient to establish [his burden], neither the parties nor the judge should be compelled to waste the time and resources attendant on an oral hearing.” LeClaire, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429. Therefore, this Court finds no need to conduct a hearing.⁴³

Statutory Disqualification of Respondent FFG

The Notice alleges that Respondent FFG is subject to statutory disqualification pursuant to Section 8a(3)(N) of the Act as a direct result of the “principal . . . of such person” having its registration revoked. This section results in making a respondent, such as FFG, “vicariously subject to the same statutory disqualifications as its principals.” In the Matter of Antonacci, et al., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,835, at 36,928 n.1 (CFTC Apr. 18, 1990). The Division has moved for summary disposition on this matter. Memorandum

⁴³ In addition, this Court decided not to issue an order requesting respondent to submit a response to the Division’s Motion after proper consideration of the goals of fairness, reliability and efficiency that the Commission has set out as determining factors. LeClaire [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429. Specifically, this Court declined such an order since the Division’s Motion for Summary Disposition was not composed of responses to Fleishman’s submissions regarding rehabilitation or mitigation (as they were non-existent) but merely a restatement of the allegations, having been established by respondent Fleishman as true, which were originally contained in the Notice. Id. at 42,430 n.11. This Court would have requested a response from Fleishman before

at 1. This Court finds that the Division is entitled to judgment as a matter of law, having established that Respondent Fleishman is the principal of FFG⁴⁴ and having succeeded in the statutory disqualification of respondent Fleishman. In addition, although respondent FFG stated its intention to show that continued registration would not pose a substantial risk to the public⁴⁵, based upon its Response and failure to make its Rule 3.60(b)(2)(ii) submission, FFG has not alleged facts sufficient to warrant an oral hearing.

CONCLUSION

This Court has undertaken careful consideration of the allegations set forth in the Notice, the joint Response of respondent Fleishman and respondent FFG, respondents' failure to submit a 3.60(b)(2)(ii) submission, and the Division's Motion for Summary Disposition, Memorandum in Support of the Motion, and Exhibits. In both statutory disqualification proceedings, this Court has determined that the Division has clearly fulfilled "its burden of establishing that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed on the record; and (3) it is entitled to a decision as a matter of law." LeClaire [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429. Neither of the respondents has alleged facts sufficient to warrant an oral hearing. Therefore, this Court grants the Division's Motion and revokes the registrations of respondent Fleishman as an AP and respondent FFG as an IB and CPO on summary disposition.

ruling on allegations concerning deceptive advertising since Fleishman has denied them.

⁴⁴ See Findings of Fact #2.

⁴⁵ Response at 5.

ORDER

Respondent Fleishman's registration as an associated person is hereby **REVOKED** pursuant to **Section 8a(3)(M)** of the Act.

Respondent FFG's registration as an introducing broker and commodity pool operator is hereby **REVOKED** pursuant to **Section 8a(3)(N)** of the Act.

Issued this 7th of April, 1998


George H. Painter
Administrative Law Judge

Attorney-Advisor:
Martha A. Mensoian