

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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PETER IOCOLANO and JASON ORZILLO

v.

CME GROUP, MARKET REGULATION
DEPARTMENT

CFTC Docket No. 11-E-01

ORDER OF DISMISSAL

SUMMARY

Respondents Peter Iocolano and Jason Orzillo (collectively, “respondents”) seek review of a decision by an Appellate Panel of the board of directors of the CME Group (“NYMEX”).¹ In that decision, the Appellate Panel vacated settlement offers that respondents had made and that had been accepted by the exchange’s Business Conduct Committee panel (“BCC”). The Appellate Panel then remanded the matter for further proceedings.

The decision that respondents have appealed is not among those made reviewable pursuant to Commission Rule 9.1(a). Because Commission rules make no provision for review of the order that respondents have challenged, their appeal is dismissed. In conjunction with their notice of appeal, respondents also filed a petition for a stay pending resolution of this appeal. Because we are dismissing this appeal, the petition for a stay is also dismissed as moot.

BACKGROUND

In November 2009, the exchange Probable Cause Committee charged that, from May through July 2008, respondents had violated various NYMEX rules in an alleged scheme to allocate crude oil options and evade margin requirements. Respondents’ separate answers to the

¹ We refer to the exchange as “NYMEX” as a matter of convenience because NYMEX is the unit of what is now the CME Group at which the charges originated.

charges included the affirmative defense that the procedural rules employed in the proceeding (*i.e.*, the rules that were in effect at the time the charges were brought against respondents) differed from the NYMEX procedural rules in effect at the time of the challenged transactions. *In re CME Group v. Iocolano and Orzillo*, NYMEX 09-12 (June 2, 2011) at 2 (“Appellate Panel Decision”).² In early 2010, in an attempt to conclude the proceedings against them, respondents submitted settlement offers to the BCC. Those settlement offers were not supported by the Market Regulation Department (“Market Regulation”) of the exchange. Nonetheless, the BCC accepted the offers and issued a decision to that effect on August 6, 2010. Market Regulation appealed the BCC’s decision to the Appellate Panel. *See generally id.* at 2-4. On June 2, 2011, the Appellate Panel reversed the BCC decision, vacated the settlements, and remanded the case for further proceedings in accordance with Chapter 4.

In reaching its decision, the Appellate Panel rejected respondents’ affirmative defense – that applying Chapter 4 rules to their case would violate the presumption against retroactive legislation.³ *Id.* at 4. The Appellate Panel ruled that an “*ex post facto* inquiry” is limited to whether a new law alters the definition of unlawful conduct, increases the penalty, or alters the legal rules of evidence. The Appellate Panel determined that the procedural rules of Chapter 4 did none of those things. *Id.* at 5.

² NYMEX became part of CME Group in August 2008 through a merger of the two exchanges. In December 2008, as part of an effort to harmonize the exchanges’ rules, the NYMEX rule book was amended to add new Chapter 4, which established procedures for investigations and enforcement cases that differed from the “legacy” NYMEX rules. *See generally* Appellate Panel Decision at 1-2.

³ As part of their affirmative defense, respondents argued that the Chapter 4 rules deprived them of certain rights they enjoyed under the NYMEX legacy rules, *e.g.*, the right to receive and respond to investigative reports, and the right to challenge, for cause, the inclusion of various members on the Probable Cause Committee and the BCC. Appellate Panel Decision at 4. Respondents have reasserted these arguments in their brief to the Commission. Before the Appellate Panel, they also argued that the Panel lacked authority to hear the case because, under NYMEX legacy rules, exchange compliance officials had no right to appeal adverse decisions by the BCC. Respondents have not made this argument in their brief to the Commission.

The Appellate Panel then held that the BCC committed reversible error and abused its discretion. The Panel faulted the BCC because, instead of merely determining whether the settlements offered by respondents would be an appropriate resolution of the charges against them, the BCC improperly considered new evidence offered by respondents' counsel and evaluated the merits of the charges in light of that new evidence. The Appellate Panel held that, if the BCC receives information suggesting that key allegations in a Charging Memorandum may be incorrect while the BCC is considering a settlement offer, "the BCC panel should direct that the matter proceed to an evidentiary hearing ... rather than *sua sponte* holding a contested hearing with [evidentiary] standards drawn from the whole cloth, as the BCC Panel did here." *Id.* at 10. *See generally id.* at 3, 9-10. The Appellate Panel remanded the matter for further proceedings pursuant to Chapter 4 of the procedural rules. *Id.* at 10.

The Commission received respondents' notice of appeal on June 13, 2011. At the same time, respondents filed a petition for a stay pending review. Both parties have filed appeal briefs. Respondents ask us to vacate the Appellate Panel's decision and sustain the BCC's decision accepting their settlement offers. Alternatively, respondents ask us to vacate the Appellate Panel's decision and remand this matter either to the BCC for further proceedings under the legacy NYMEX rules, or to the Appellate Panel for redetermination. App. Br. at 33. Appellee exchange asks us summarily to affirm the Appellate Panel's decision. Ans. Br. at 32. Neither brief discusses whether this matter is ripe for review. The exchange does, however, mention the issue in passing in connection with its discussion of the standard of review: it notes that "the only potential 'adverse action' taken against [respondents] is the Appellate Panel's decision to reverse the BCC's ruling and remand for further proceedings," *id.* at 14, and notes that "NYMEX has not yet taken any disciplinary action against Respondents." *Id.* at n.10.

DISCUSSION

Under the Commission's Part 9 Regulations, the Commission may review "any suspension, expulsion, disciplinary or access denial action, or other adverse action by an exchange." Rule 9.1(a). The order that respondents have appealed fits into none of these categories. The order is not a disciplinary order – in defining appealable disciplinary actions, "the Commission focused on the end product of a final decision – the imposition of a penalty." *Ferruzzi Finanziaria, S.p.A v. CBOT*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,110 at 38,173 (CFTC Aug. 13, 1991) (dismissing as premature an appeal from an order denying a motion to dismiss a pending exchange disciplinary action based on the forum's alleged lack of fundamental fairness). *See also* Rule 9.2(b) ("disciplinary action' means any suspension, expulsion or other penalty ... imposed on a member of an exchange"). The exchange has not imposed any penalty on respondents – they have not been suspended, expelled or otherwise penalized. They are involved in a pending disciplinary action, but the outcome of that action has not been determined. Accordingly, the Appellate Panel's decision remanding the matter for further proceedings is not a disciplinary action that is subject to review.

Nor is the Appellate Panel's decision an access denial action. *See* Rule 9.2(a) ("access denial action' means any proceeding *other than a disciplinary action* ... that denies or limits the privileges of membership") (emphasis supplied). Respondents have not been, and may never be, denied any of the privileges of membership. Although respondents assert that they were deprived of procedural protections to which they believe they are entitled, any wrongful deprivation occurred within the context of a disciplinary action. And even if respondents were denied certain procedural protections, such a denial would not constitute an access denial action.

Finally, the Appellate Panel's decision does not constitute the sort of adverse action that would entitle respondents to an immediate appeal. As the Commission explained in *Ferruzzi*, it would "decline to treat determinations made during disciplinary proceedings as a series of 'adverse actions' culminating in a 'disciplinary action.'" *Id.* at 38,173-74. Were it otherwise, "[b]oth the exchange disciplinary process and the Part 9 review process would soon grind to a halt if a member could obtain immediate Commission review of every arguably-prejudicial determination an exchange disciplinary committee made during the course of a proceeding simply by labeling the determination an 'adverse action.'" *Id.* The Appellate Panel's decision rejecting respondents' settlement offers is no more prejudicial than any number of other decisions that routinely occur during the course of disciplinary proceedings (*e.g.*, issuance of charges, denial of a motion to dismiss). Accordingly, the Appellate Panel's decision is not the sort of adverse action entitling respondents to immediate review.⁴

The decision that respondents have appealed does not come within any of the categories of orders that are reviewable pursuant to Rule 9.1(a). Accordingly, we dismiss respondents' appeal. Because we dismiss the appeal, we also dismiss as moot respondents' petition for a stay.⁵

⁴ The Commission has recognized that, if appellants were able to show that, as a result of procedural defects, an unfavorable outcome was inevitable, immediate Commission intervention might be appropriate. *Id.* Respondents have made no such showing.

⁵ Neither party raised any objection to the Commission's jurisdiction. In appellee exchange's response to respondents' petition for a stay, it stated that this appeal "implicates important issues of exchange governance," and that NYMEX anticipates that parties in exchange proceedings will continue to argue that the Chapter 4 rules cannot be applied retroactively "in this and other cases, until the Commission rules on these matters." Response at 2-3. Nonetheless, the Commission's jurisdiction to review actions by an exchange is limited by Rule 9.1, and jurisdiction may not be created merely by consent of the parties. Further, if the exchange were to take disciplinary action against respondents, such action would be subject to review by the Commission, and, at that time, respondents would be free to raise their objections to the procedures employed by the exchange.

CONCLUSION

The appeal is dismissed as premature. We therefore do not reach the petition to stay, which is dismissed as moot.

IT IS SO ORDERED.

By the Commission (Chairman GENSLER and Commissioners SOMMERS, CHILTON, O'MALIA, and WETJEN).



Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 11, 2013