

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



Carlo Scevola,

v.

National Futures Association.

CFTC Docket No. CRAA 19-01

OPINION AND ORDER

Carlo Scevola appeals a decision of the National Futures Association (“NFA”) denying his petition to remove a membership bar (the “Petition”) to which he agreed in a settlement of an NFA disciplinary. Scevola challenges the fundamental fairness of the NFA’s proceedings, and argues that the NFA’s decision to deny the Petition is not supported by the weight of the evidence.

For the reasons below, the Commission dismisses Scevola’s appeal for lack of jurisdiction.

BACKGROUND

A. NFA Proceedings.

In November 2009, the NFA Business Conduct Committee issued a complaint in a disciplinary action against Carlo Scevola, alleging violations of NFA Compliance Rules 2-5, 2-36(b)(1) and (5), and 2-36(c). R.1 (Disciplinary Complaint). At the time, Scevola was a registered Commodity Trading Advisor (“CTA”) with the NFA. The alleged violations related to Scevola’s operation of commodity pools through Resolute Capital Growth Fund Ltd. (“Resolute Capital”), a company registered in the British Virgin Islands (“BVI”), and to Scevola’s lack of cooperation in the NFA’s investigation of Resolute Capital’s operations. The

complaint alleged that Scevola: (1) violated Rule 2-5 by refusing to produce certain records requested by the NFA in relation to its investigation; (2) violated Rule 2-36(b)(1) by providing false and misleading information to an investor regarding the cause of Resolute Capital's losses; and (3) violated Rule 2-36(b)(5) by providing false and misleading information to the NFA. *Id.* at 3-9.

Scevola answered the complaint through counsel and denied the charges. As most relevant here, Scevola asserted that he could not produce the requested records because they were not in his possession, custody, or control. R. 2 (Answer ¶ 4). Ultimately, Scevola sought a settlement with the NFA and offered, among other things, to withdraw his NFA membership, to be permanently barred from both membership and acting as a principal of an NFA member, and to waive all post-hearing procedures and appellate review of a settlement decision. R. 5 (Settlement Offer ¶¶ C, E). On May 17, 2010, the NFA issued a decision accepting Scevola's settlement offer (the "Settlement Decision"). R. 6 (Settlement Decision). Scevola did not appeal the Settlement Decision.

Nearly eight years later, Scevola filed the Petition with the NFA Hearing Panel to modify the Settlement Decision to lift the membership bar. The Petition sought review of the Settlement Decision under a Federal Rule of Civil Procedure 60(b)(5) standard for modifying forward-looking sanctions. Citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), Scevola argued that modification is appropriate where: (1) there has been a significant change in factual conditions, and (2) the proposed modification is suitably tailored to the changed circumstances. R.7 (Petition at 6-11). Scevola's argument went as follows: Scevola could not provide the NFA with requested records in the earlier inquiry because he was subject to BVI privacy laws that prohibited him from doing so, and he settled the disciplinary action because he could not

challenge the allegations without the records. He argued that there were changed factual circumstances warranting modification of the Settlement Decision—specifically that Resolute Capital has shuttered and Scevola is no longer restrained by BVI privacy law from producing the records. The records, Scevola claimed, undermine the NFA’s allegations regarding false and misleading information. He argued that removal of the membership bar is appropriate given what he contends were questionable allegations against him, and that he had suffered and would continue to suffer personally and professionally because of the membership bar. *Id.*

The NFA opposed the Petition on the ground that the Settlement Decision had become final and binding 15 days after it was issued and NFA rules do not authorize petitions to modify final settlements. R. 9 (NFA’s Resp. to Petition at 5). The NFA argued that Fed. R. Civ. P. 60(b) is not applicable to the Petition proceedings, and that anyway, Scevola did not demonstrate a significant change in conditions. *Id.* at 8. The NFA challenged Scevola’s assertion that BVI law previously prohibited production of records as unsubstantiated, and noted both that Scevola never claimed such prohibition during the investigation or in response to the disciplinary complaint, and that Scevola’s previous NFA filings and voluntary productions of records contradicted the assertion. R. 11 (NFA’s Sur-Reply at 2-3). The NFA Hearing Panel summarily denied Scevola’s Petition. R. 12 (Hearing Panel Order). Scevola then appealed to the NFA Appeals Committee and asserted that the denial was improper in light of evidence he presented, and that the Hearing Panel failed to provide a statement of findings and conclusions in violation of Rule 3-10. R. 13 (Notice of Appeal). The Appeals Committee affirmed on the grounds that Rule 3-11 does not allow modification of final settlements, and that under Rule 3-11 the Settlement Decision had become final 15 days after it was issued on May 17, 2010. R. 15 (Appeals Committee Decision at 4). The Appeals Committee also held that because the Hearing

Panel had no authority under NFA rules to consider Scevola's petition on its merits, any error in not providing factual findings and conclusions was harmless. *Id.* at 4-6.

Scevola now appeals to the Commission pursuant to 17 C.F.R. § 171.23.

B. Scevola's Appeal to the Commission.

On appeal Scevola challenges the fundamental fairness of the Petition proceedings and argues that the NFA's denial of his Petition is not supported by the weight of the evidence. *See* 17 C.F.R. § 171.34. With respect to fundamental fairness, Scevola argues that the NFA did not provide a fair procedure for discipline or denial of membership as required by Commodity Exchange Act ("CEA") Section 17(b)(9), 7 U.S.C. § 21(b)(9), because the NFA's application of Rule 3-11 forecloses subsequent modification of a final settlement decision under any circumstances. *See Scevola Br.* at 17-20. Scevola contends that the NFA should apply a Federal Rule of Civil Procedure 60(b)(5)-type standard for modification of forward-looking sanctions. *Id.* at 20-22.

With regard to weight of the evidence, Scevola argues that the NFA's decision could not be supported by the weight of the evidence because the NFA did not issue a written statement of findings and conclusions as contemplated by NFA Compliance Rule 3-10.¹ *Id.* at 24-27.

DISCUSSION

The Commission's appellate authority with respect to NFA decisions is set forth in CEA Sections 17(h), (i) and (o) and Part 171 Regulations. *Am. Fin. Trading Corp. v. NFA*, CFTC No. CRAA 06-01, 2006 WL 3770772, at *3 (CFTC Dec. 21, 2006). As relevant here, Section 17(h)

¹ NFA Compliance Rule 3-10(d) requires that after considering a matter, the Hearing Panel shall render a written decision "based upon the weight of the evidence," containing "a statement of findings and conclusions as to each allegation, including a statement setting forth: each act or practice the Respondent was found to have committed or omitted, is committing or omitting, or is about to commit or omit; each NFA requirement that such act or practice violated, is violating, or is about to violate; and whether the act or practice is deemed to constitute conduct inconsistent with just and equitable principles of trade."

provides for appellate review where a “registered futures association” such as NFA “takes any final disciplinary action” against a member or associated person, “denies admission” to any person, or “bars any person from being associated” with a member. 7 U.S.C. § 21(h)(1).

Similarly, CFTC Rule 171.1(a) provides for review of final disciplinary actions, membership denial actions, registration actions or membership responsibility actions. 17 C.F.R. § 171.1(a); *Am. Fin. Trading Corp.*, 2006 WL 3770772, at *3. Scevola’s brief proceeds on the assumption that the NFA’s denial of the Petition is reviewable as a disciplinary action. *See Scevola Br.* at 17-18 & 23 (discussing fair procedure for disciplinary actions, requirements for settling disciplinary actions, and Commission’s role in reviewing NFA disciplinary actions).

Rule 171.2(b) defines a disciplinary action as “any proceeding brought by the National Futures Association to enforce its rules that may result in expulsion, suspension, censure, bar from association with a member, fine in excess of \$100 or any comparable sanction being imposed on a member or a person associated with a member.” 17 C.F.R. § 171.2(b). Scevola’s Petition does not meet this definition. The Petition was not brought by the NFA to enforce its rules, and could not have resulted in additional sanctions.² Accordingly, the NFA’s denial of the Petition is not a disciplinary action subject to the Commission’s appellate review under Regulation 171.1(a). Scevola does not contend that the NFA’s decision is a membership denial action, registration action or membership responsibility action, nor does the Petition proceeding fit within any of these categories. *See id.* § 171.2(g), (h), and (l) (defining membership responsibility action, membership denial action, and registration action, respectively). Accordingly, there is no statutory or regulatory basis for his appeal.

² In the accepted Settlement Offer, Scevola explicitly waived his right to seek appellate review of the Settlement Decision, and in any event, such appeal would be time-barred. *See* 17 C.F.R. § 171.23(a) (allowing 30 days to file a notice of appeal of NFA disciplinary action).

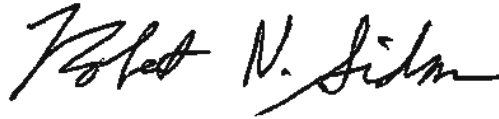
Because Scevola has not appealed a final disciplinary action, a membership denial action, a registration action or membership responsibility action taken by the NFA, we hold that the Commission does not have jurisdiction over Scevola's appeal.

CONCLUSION

For the foregoing reasons, we dismiss Scevola's appeal.

IT IS SO ORDERED.

By the Commission (Chairman TARBERT and Commissioners QUINTENZ, BEHNAM, STUMP, and BERKOVITZ).



Robert N. Sidman
Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 9, 2020