

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:

William S. Scott v. National Futures Association

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**CFTC Docket No. CRAA-12-02
OPINION and ORDER**

William S. Scott appeals a National Futures Association (the “NFA”) Membership Committee (the “Committee”) order (the “NFA Order”) revoking his registrations as a commodity trading advisor (“CTA”) and associated person (“AP”). The Committee revoked Scott’s registrations under Section 8a(3)(M) of the Commodity Exchange Act (“CEA” or “Act”), 7 U.S.C. § 12a(3)(M), for “good cause” because the Florida Supreme Court suspended Scott from practicing law for three years. *See The Florida Bar v. William Sumner Scott*, Case No. SC05-1145 (June 10, 2010).

Scott appeals the NFA’s order by challenging the validity of the findings by the Florida Supreme Court. Throughout the hearing before the NFA, Scott repeatedly questioned the decision of the Florida Supreme Court, providing facts intended to demonstrate that the decision to suspend his law license was incorrect. The NFA applied collateral estoppel principles and did not look behind the Florida decision in revoking Scott’s registrations.

For the reasons below, the Commission affirms the NFA Order revoking Scott’s registrations as an AP and CTA.

BACKGROUND

Scott was registered as an AP and CTA from July 8, 2005, until the NFA revoked his registration on October 5, 2011. On June 10, 2010, the Florida Supreme Court suspended Scott from the practice of law for three years. *See The Florida Bar v. William Sumner Scott*, Case No. SC05-1145 (June 10, 2010) (the “Florida Order”). The Florida Supreme Court suspended Scott because he violated professional conduct rules by representing the interests of a number of individuals and entities whose interests were all directly adverse to one another. The Florida Supreme Court’s factual determinations underpinning the decision are summarized below.

Beginning in 1995, Scott represented Private Research, Inc. (“PRI”), a company owned by Richard Maseri, in an injunctive action filed with the United States District Court for the Southern District of Florida by the Commission. The Commission’s Complaint charged Maseri with fraud, conversion of customer funds, and registration violations. In 1997, the district court permanently enjoined Maseri and PRI from engaging in fraud. Florida Order at 2.

In 1998, Maseri issued advertisements soliciting investors in a commodities brokerage venture. Steven Frankel responded to the advertisement. *Id.* In July 1998, Maseri hired Scott to represent him in negotiations with Frankel aimed at establishing a forex brokerage company. *Id.* at 3. Frankel, Maseri, and Scott met on August 4, 1998, to sign a stockholders’ agreement for the venture, called the International Currency Exchange Corporation (“ICEC”). Before Maseri arrived, Frankel questioned Scott about Maseri. Scott did not tell Frankel of the Commission’s suit against Maseri, the court order against him, or Maseri’s criminal history. *Id.* Instead, Scott made statements that he admitted were intended to indicate to Frankel that Maseri was “an honest man” so as to preserve the agreement. *Id.* at 3, 11.

In November 1998, the district court entered a monetary judgment in favor of the Commission against Maseri in the PRI case. Due to Maseri's ownership interest in ICEC, the court froze ICEC's funds. Maseri, as ICEC's president and chief operating officer, hired Scott as ICEC's counsel to unfreeze ICEC's assets. *Id.* at 4.

On January 15, 1999, the district court placed ICEC's assets in receivership. The receiver was able to distribute ICEC's assets to customers, although it would not make them whole. Scott filed a motion on behalf of ICEC to contest the distribution.

Meanwhile, however, Scott represented at least three ICEC customers in related litigation over the next three years, claiming that Maseri and ICEC had acted illegally. *Id.* at 5-6. Scott also filed a separate action against Maseri and Frankel on behalf of an ICEC customer claiming that the customer had the right to a full distribution. *Id.* at 6-7.

Based on these factual findings, the Florida Supreme Court determined that Scott violated professional conduct rules by representing the interests of ICEC, Maseri, Frankel, and ICEC's customers. *Id.* at 10-16. Each of these parties had claims to the same pool of money, and their interests were all directly adverse to one another. *Id.* at 15. The Florida Supreme Court also ruled that Scott made a misrepresentation to Frankel when he indicated to Frankel that Maseri was an honest man. *Id.* at 16. The Florida Supreme Court further ruled that Scott's failure to tell Frankel about the CFTC suit against Maseri, the subsequent court order, or Maseri's criminal history constituted a misrepresentation. *Id.* at 17.

On the basis of the suspension, the NFA's President issued a Notice of Intent to Revoke Registrations (the "Notice of Intent") to Scott on December 21, 2010. The Notice of Intent alleged that the Florida Supreme Court's suspension of Scott from practicing law constituted "good cause" to disqualify Scott from registration under Section 8a(3)(M) of the Act. In his

Response to the NFA's Notice of Intent and at the subsequent hearing, Scott admitted that the Florida Supreme Court had suspended his law license for three years. However, he argued that the suspension did not constitute "good cause," and he attempted repeatedly to challenge the basis of the Florida Supreme Court's decision.

Specifically, Scott stated at the hearing that he had never represented Frankel, and thus there was no basis for the Florida action. Transcript of Hearing before the Committee *In the Matter of William Sumner Scott*, NFA Case No. 10-REG-026 (April 20, 2011) at 25. He described the Florida Supreme Court decision as "nonsense," and "absurd," and argued that the suspension had no relation to his duty to serve the public as a registrant. *Id.* at 25, 31. Scott testified that he believed that ICEC had enough funds to pay customers back in full, and that it was unable to do so because of fees generated by the receiver. *Id.* at 52. When Scott realized that the customers would not receive all of their money back, he took it upon himself to return their money. *Id.* 52.

On October 5, 2011, the Committee issued the NFA Order revoking Scott's registrations as a CTA and AP. The Committee found that the fact that Scott was subject to an outstanding order from the Florida Supreme Court suspending his license to practice law in Florida constituted good cause to disqualify him under Section 8a(3)(M) of the Act. NFA Order at 13. In reaching this conclusion, the Committee followed "collateral estoppel principles" to reject Scott's challenges to the Florida Supreme Court decision itself. The Committee further found that Scott's conduct as described by the Florida Supreme Court and in evidence before the Committee demonstrated "a lack of honesty and an inability to comply with regulatory requirements, which constitute[d] additional grounds to disqualify him from registration for other good cause" *Id.*

In his appeal, Scott continues to challenge the Florida Supreme Court decision. He argues that his obligations as a Series 3 holder required him “to take all actions available to achieve 100% restitution, plus interest, for the public customers.” Scott Appeal Brief at 16. Scott further argues that “[t]he Florida Supreme Court ruled that Florida Bar Rules supersede a lawyer’s obligation to protect public brokerage customers from loss. Nothing could be further from the truth.” *Id.* at 17.

Scott has also filed a number of motions related to the instant appeal. On October 13, 2011, he filed a Motion for Stay of Revocation of Registrations. The NFA filed a response on October 24, 2011. On November 1, 2011, Scott filed a Motion to Strike NFA Response to Scott Motion for Stay. On December 11, 2012, Scott filed a Motion to Re-instate Series Three Designation. On September 12, 2013, Scott filed a Petition for Reinstatement of Series Three Designation.

DISCUSSION

I. The Committee’s Application of Collateral Estoppel Principles to the Florida Supreme Court decision

In his appeal, Scott argues that the NFA erred in not allowing him to “challenge the validity of the findings” by the Florida Supreme Court. *Id.* at 1-2. The NFA, conversely, argues that the Committee “properly refused to allow Scott to re-litigate the Florida Supreme Court case. Brief of National Futures Association (the “NFA Brief”) at 7-9.

The NFA argues that CFTC case law is clear that the NFA’s Membership Committee is not the proper forum to consider the validity of a court order like the one at issue. *See In re*

Bryant, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,847 at 36,995 (CFTC Apr. 18, 1990). The NFA further states that any challenges to the Florida Supreme Court decision are better left to the Florida Supreme Court itself. NFA Brief at 7; *Bryant* at 36,995.

The NFA argues that the Committee properly applied collateral estoppel principles to prevent Scott from re-litigating the issues decided by the Florida Supreme Court. *In re Lama*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,294 at 35,287 (CFTC Aug. 2, 1988); *see also In re Clark*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032 at 44,929-44,930 (CFTC Apr. 22, 1997). We agree. In *Clark*, the Commission described four factors to be considered in determining whether to apply collateral estoppel:

(1) . . . [W]hether the forum resolving the issue in the first case was a “judicial-like” decision-maker that was acting within its jurisdiction; (2) whether the issue was actually litigated; (3) whether the issue was actually and necessarily resolved; and (4) whether the issue that was resolved in the first case is in substance the same as the issue in the second case.

As NFA argues, the Committee correctly determined that all four factors were met here. The Florida Supreme Court is obviously a judicial decision-maker. The hearing in Florida was an adversarial proceeding conducted like a trial and actively litigated by the parties. Scott defended himself aggressively. The Florida Supreme Court resolved the matter by finding that Scott had violated professional conduct rules and issuing an order suspending him from practicing law in Florida for three years. Finally, it was Scott’s suspension from the practice of law, resulting directly from his conduct with Maseri, Frankel, and ICEC investors, which formed the basis of his disqualification proceeding at NFA. For these reasons, NFA did not err in applying collateral estoppel principles and not considering evidence that the Florida Supreme Court’s suspension of Scott was wrongly decided. Neither the NFA nor the CFTC is the proper forum to consider the validity of the Florida Supreme Court’s order, as neither the NFA nor the

CFTC has jurisdiction over the practice of law in Florida. *Bryant* at 36,995. The NFA properly refused to disregard that court's resolution of these issues, as do we.

Similarly, we reject Scott's argument that NFA ought to have admitted evidence that Scott offered in support of his argument that the Florida Supreme Court erred. Moreover, as NFA also points out, during the course of the NFA hearing, Scott admitted many of the facts which led to the Florida Supreme Court's decision. For example, Scott admitted that he led Frankel to believe that Maseri was an honest man and failed to disclose to Frankel various public facts about Maseri's legal and criminal history. There is, accordingly, no basis to overturn the Committee's decision.

II. The Committee's Determination that Scott's Mitigation and Rehabilitation Evidence Failed to Overcome the Presumption of Unfitness for Registration

The NFA found that Scott did not carry his burden by mitigating his underlying disqualification or showing that he had been rehabilitated. NFA Order at 16. Scott argues that his efforts to return customer money mitigate his professional misconduct.

The NFA Order found that the Florida Supreme Court decision constituted "good cause" to statutorily disqualify Scott from registration under Section 8a(3)(M). The NFA went on to say that "[p]roof of a statutory disqualification raises a rebuttable presumption that the applicant is unfit for registration." *Id.* at 15. According to NFA, the burden then shifts to the applicant to show that, notwithstanding the statutory disqualification, his registration will not pose a substantial risk to the public. *In re Antonacci*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,835 (CFTC Apr. 18, 1990); *In re Horn* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,836 (CFTC Apr. 18, 1990); *In re Walter*, [1987-1990 Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶24,215 (CFTC Apr. 14, 1988); *In re Akar*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,927 (CFTC Feb. 24, 1986).

To demonstrate that he posed no risk to the public, Scott could provide evidence of mitigating circumstances relating to the wrongful conduct or evidence of rehabilitation. *Walter* at 35,013; *Horn* at 33,889; *Antonacci* at 36,933. NFA argues that Scott did not provide sufficient evidence of either. NFA points out that the “only potentially mitigating evidence Scott offered with respect to the suspension of his law license was that he was purportedly acting in the public interest when he ignored the attorney disciplinary rules prohibiting representations adverse to a former client.” NFA Brief at 11. The NFA gave little weight to Scott’s testimony in this regard due to his prior misrepresentations, and further rejected the argument as “another way of saying that the end justifies the means.” NFA Order at 17.

The Commission finds that the NFA did not err in finding that Scott had failed to provide sufficient evidence of mitigation or rehabilitation. The NFA reasonably found that Scott’s explanation of a higher duty to investors that would supersede his duties in regard to conflicts was not sufficient to show mitigation. Scott cites nothing that supports the existence of a countervailing duty to investors that would somehow supersede his duty to his clients; even if such a duty existed, the conflicting representations undertaken by Scott would appear to compromise his ability to adequately protect ICEC investors. In regard to this issue in particular, Scott’s conclusion that the NFA has failed to demonstrate that Scott is a threat to the public boils down to a claim that the NFA did not correctly weigh the evidence before it. Scott has not demonstrated that, as a matter of law, NFA could not find that Scott is subject to statutory disqualification from registration based upon the facts before it.

III. The Committee's Refusal to Consider Scott's Prior Regulatory History as Rehabilitation Evidence

Scott argues that he should have been permitted by the NFA to “offer evidence of his regulatory history both prior and after the disqualifying event in mitigation to prove he is not a threat to the public.” Scott Appeal Brief at 1. Specifically, Scott states that the Committee failed to take into account his forty years as a CTA and lawyer without any adverse regulatory issues. NFA responds that the Committee was correct in refusing to consider Scott pre-disqualification conduct, as such conduct does not qualify as rehabilitation. The NFA points out that the Commission only looks to rehabilitation evidence arising since the time of the wrongful conduct. *In re Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,215 at 35,010 (CFTC Apr. 14, 1988); *In re Horn*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,731 at 33,889 (CFTC July 21, 1987).

The Commission finds that NFA did not err in prohibiting Scott from presenting rehabilitation evidence occurring before the date of his unlawful conduct, as case law is clear that such evidence does not indicate rehabilitation.

IV. Scott's Pending Motions

As described above, Scott moved for a stay of the NFA's revocation of his CTA and AP registrations pursuant to Commission Regulation 171.22(c), 17 CFR 171.22(c). Scott has failed to establish that a stay is necessary here. This motion is moot in light of the Commission's conclusion that the NFA did not err in revoking his registrations. Accordingly, Scott's motion is denied. Scott's motion to strike the NFA's response to his motion for a stay is also denied, as Scott has provided no legal support for the contention that the NFA's response should be stricken.

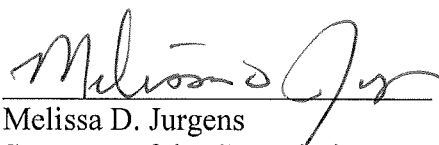
Finally, Scott has petitioned the Commission to reinstate his Series 3 designation. In support of his petition, Scott argues that he has completed his three-year suspension from practicing law in Florida and therefore is eligible for reinstatement. However, the NFA Order revokes Scott's registration for "good cause" under Section 8a(3)(M) of the Act. There is nothing in the Act or the NFA Order which limits the revocation to the time period of Scott's suspension from practicing law. Accordingly, Scott's petition to reinstate his Series 3 designation is denied.

CONCLUSION

For the foregoing reasons, the Commission affirms the NFA's order revoking the registration of William Scott. The Commission also denies Scott's various ancillary motions as described above.

IT IS SO ORDERED.

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



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

Date: November 22, 2013