

NATIONAL FUTURES ASSOCIATION
BEFORE THE
APPEALS COMMITTEE

FILED

JUL - 6 2007

NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING

In the Matter of:)
)
Barkley Financial Corporation)
(NFA ID #257547),)
)
David J. Aguirre)
(NFA ID #291587),)
)
Charles Warren) NFA Case No. 05-BCC-20
(NFA ID #284549),)
)
Ernie N. Blazeff)
(NFA ID #307066),)
)
and)
)
David J. Rodin)
(NFA ID #79966),)
)
Appellees.)

DECISION

On January 18, 2007, an NFA Hearing Panel issued a Decision against Barkley Financial Corporation (Barkley), David J. Aguirre (Aguirre) and Heriberto Franqui (Franqui).¹ The Hearing Panel found that Barkley, Aguire and Franqui violated NFA Compliance Rules 2-2(a) and 2-29(a). In addition, the Hearing Panel found that Barkley violated NFA Compliance Rule 2-9(a). The Hearing Panel, however, exonerated Barkley with regard to alleged violations of Compliance Rule 2-2(a) and 2-29(a) by other associated persons (APs), including Ursula Nostra (Nostra) and Donald

¹ Neither Franqui nor NFA challenged the findings or the sanctions against Franqui, and he is not a party to this Appeal.

Lansdown (Lansdown).² The Hearing Panel dismissed the allegations against Charles Warren (Warren), Ernie N. Blazeff (Blazeff) and David J. Rodin (Rodin).

NFA filed a timely request for the Appeals Committee to review the sanctions imposed upon Barkley and Aguirre and the Hearing Panel's findings that the sales solicitations of Barkley APs Blazeff, Rodin, Warren, Nostra and Lansdown were not misleading; and the Committee granted that request. After considering the record below, and the arguments raised by the parties on appeal, the Appeals Committee has determined to affirm, in part, and reverse, in part, the Decision issued by the Panel and to modify the sanctions imposed upon Barkley and Aguirre.

I

PROCEDURAL BACKGROUND

On September 23, 2005, NFA's Business Conduct Committee issued a three-count Complaint against Barkley and fourteen of its APs, including Aguirre, Blazeff, Rodin, Warren, Nostra and Lansdown. The Complaint alleged that Barkley and each of the named APs violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) by using deceptive and misleading sales solicitations. The Complaint also alleged that Barkley violated NFA Compliance Rule 2-9(a) by failing to diligently supervise its APs and violated NFA Bylaw 301(b) by allowing an individual to act in a registered capacity without registration.

The Hearing Panel issued its Decision on January 18, 2007, after a hearing. In that Decision, the Hearing Panel:

² Nostra and Lansdown settled the charges against them prior to the hearing. Neither is a party to this appeal, and their individual liability for these sales solicitations is not an issue.

- Found that Barkley violated NFA Compliance Rules 2-2(a), 2-9(a) and 2-29(a). The Hearing Panel dismissed the charges related to NFA Bylaw 301(b),³ sanctioned Barkley by fining it \$300,000, and barring it from membership for two years (retroactive to April 14, 2006 – the date it withdrew from NFA membership). The Hearing Panel also imposed several conditions should Barkley become a Member after the bar is up. Under the Hearing Panel's decision, Barkley must tape record all conversations that occur between any of its APs and both existing and potential customers; refrain from employing any branch office managers, APs or compliance personnel who have been employed by a firm that has been barred from the industry for sales practice fraud (except Barkley may employ Stuart or Ronald Rubin), employ a compliance officer who is Series 30 registered and has at least 5 years of futures industry experience as a compliance officer and/or branch office manager and refrain from maintaining an office in Florida. The Panel found that Barkley was liable for misleading sales solicitations of seven APs. The Panel also found that NFA had not met its burden in establishing that the sales solicitations of Nostra and Lansdown were misleading. Therefore, the Panel did not find that Barkley violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) with respect to those solicitations.
- Found that Aguirre violated NFA Compliance Rules 2-2(a) and 2-29(a)(1). The Hearing Panel sanctioned Aguirre by fining him \$2,500 and barring him from association with and from acting as a principal of any NFA Member for 3 months (retroactive to August 25, 2005 – the date he withdrew his registration). The Hearing Panel also prohibited Aguirre from being associated with an NFA Member after the suspension unless Aguirre's sponsor agrees in writing to tape record all conversations that occur between Aguirre and both existing and potential customers for a period of six months and to comply with certain recordkeeping requirements. The Hearing Panel also ordered that during this six-month period, Aguirre may not be an NFA Member or a principal of an NFA Member unless that Member is guaranteed by another NFA Member and the guarantor agrees in writing to tape record all conversations that occur between Aguirre and both existing and potential customers and to comply with certain recordkeeping requirements.
- Found that NFA had not met its burden to establish that Blazeff, Rodin, and Warren violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) by engaging in misleading sales solicitations. Since the Panel dismissed these counts against these APs, Barkley did not violate NFA Compliance Rules 2-2(a) and 2-29(a)(1) with respect to these solicitations.

NFA asked the Appeals Committee to take review of the sanctions imposed upon Barkley and Aguirre. NFA also asked that the Appeals Committee take

³ This charge is not an issue on appeal.

review of the Hearing Panel's findings that the sales solicitations of Blazeff, Rodin, Warren, Nostra and Lansdown were not misleading. The Appeals Committee accepted this review.

Blazeff and Warren have participated in the appeal process and filed responsive briefs in this matter. Barkley, Rodin and Aguirre were properly served with notice of this appeal and the briefing schedule, but none of these parties filed any responsive pleadings.

II

DISCUSSION

This appeal involves two primary issues: 1) whether the Hearing Panel erred in finding that sales solicitations by Rodin, Blazeff, Warren, Nostra and Lansdown were not deceptive and misleading (and therefore did not violate NFA Compliance Rules 2-2(a) and 2-29(a)(1)); and 2) whether the sanctions imposed upon Barkley and Aguirre were appropriate in light of the findings in the Decision. We will discuss each of these issues separately.

The Hearing Panel's Findings with Respect to the Sales Solicitations of Rodin, Blazeff, Warren, Nostra and Lansdown.

1. David Rodin

The evidence against Rodin was based entirely on the testimony of NFA Auditor Heather Johnson (Johnson). Johnson testified that she listened to a telephone conversation on a barge phone and heard Rodin make profit projections of 40, 50 and 60%. Johnson also stated that she listened to the entire conversation and she never heard Rodin tell the customer that 90% of Barkley's customers lost money in the preceding two years.

Although the Hearing Panel stated that they believed Johnson's testimony, they did not believe that NFA had established that Rodin violated NFA Rules. The Panel specifically stated that disclosing Barkley's loss rate was only one method of balancing profit projections with the probability of loss and, since Johnson had not provided testimony regarding the rest of the conversation, the Panel did not know whether Rodin made any other disclosures about the risk of loss that would have had the same effect.

This Committee disagrees with the Hearing Panel's analysis and finds that it is contrary to the holding in In the Matter of Siegel Trading Company, Inc., NFA Case No. 01-BCC-011 (App. Comm., Oct. 6, 2003). In Siegel, this Committee specifically held that it was misleading for Siegel APs to imply that profits were almost inevitable without also disclosing that most of Siegel's customers lost money. Although this Committee emphasized that there is no general duty to disclose customer performance, such a duty arises when a firm's APs make profit projections that are contradicted by actual customer performance. That is exactly the situation in this case. Johnson testified that Rodin talked of profits ranging from 40-60%. These are significant profit projections and completely contrary to the overall experience of Barkley customers. Clearly, any reasonable investor being told about profits of 40-60% would find it material that almost 90% of the firm's customers in the preceding two years had actually lost money trading with the firm. It was a material omission on Rodin's part not to disclose the dismal performance of Barkley customers.

The Committee also finds that Rodin acted with intent or recklessness. The recklessness standard can be met "when Defendant's conduct involves highly

unreasonable omissions or misrepresentations ... that present a danger of misleading [customers] which is either known to Defendant or so obvious that Defendant must have been aware of it." CFTC v. R.J. Fitzgerald & Co., Inc., 310 F.3d 1321 at 1328 (11th Cir. 2002) (quoting Ziamba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001).

Rodin, who had been employed at Barkley since 2002, should have known that the significant profits (40-60%) he discussed were totally inconsistent with the dismal performance of Barkley customers. As a professionally licensed broker, Rodin clearly should have known that discussing such significant profit scenarios without disclosing the poor performance of Barkley customers would mislead a potential customer with respect to the likelihood of profits. This Committee has previously found that these factors meet the *scienter* standard for violating Compliance Rules 2-2(a) and 2-29(a)(1). See In the Matter of Gregory M. Isaacs, NFA Case No. 01-BCC-11 (App. Comm., Oct. 22, 2004). Therefore, this Committee finds that Rodin's sales solicitation to Johnson was deceptive and misleading in violation of NFA Compliance Rule 2-2(a) and 2-29(a)(1).

Having found that Rodin violated NFA rules, the Committee imposes the following sanctions:

1. Rodin shall pay a \$10,000 fine within 30 days of the effective date of this Decision;
2. For a period of six months (exclusive of any period during which Rodin is not an NFA Member or an Associate of an NFA Member), Rodin may not be associated with an NFA Member unless Rodin and Rodin's sponsor agrees in writing to tape record all conversations that occur between Rodin and both existing and potential customers; to retain each tape for a period of two years from the date the tape is created; and to make the tapes available to NFA upon request. During this six month period, Rodin may not be an NFA Member or a principal of an NFA Member unless that Member is guaranteed by another NFA Member and the guarantor agrees

in writing to tape record all conversations that occur between Rodin and both existing and potential customers; to retain each tape for a period of two years from the date the tape is created; and to make the tapes available to NFA upon request. The sponsor or guarantor must also certify that it understands that any violation by the sponsor or guarantor of its obligations under this Decision may be grounds for disciplinary action against the sponsor or guarantor.

2. Charles Warren and Ernie Blazeff

NFA presented two customers who testified about their conversations with Warren. Among other things, Travis Brewer (Brewer) testified that Warren told him that:

- 35% was nothing to what he could do for Brewer (transcript, p. 111).
- Warren could turn \$50,000 into \$250,000 by the end of the year (transcript, p. 111).
- Everybody that's with Warren makes a lot of money (transcript, p. 115).
- Soybeans were going to skyrocket. If they got in right away they could make a ton of money (transcript, p 116).

James Hann (Hann) also testified regarding his conversations with Warren. Hann testified that among other things, Warren told him that he would double Hann's account by the end of the year (transcript, p. 197).

Warren denied making any of these statements. He did testify that he discussed the potential of profit. Warren also testified that he told Brewer that most people lose money trading commodities, that it is a highly leveraged market and that there is a lot of risk.

NFA also presented one customer who testified about his conversation with Blazeff. Kirk Bradach (Bradach) testified that Blazeff told him that a number of his customers had done very well in unleaded gas and that he could make 40-50% in

soybeans (transcript p. 373).

Blazeff denied telling Bradach that he had clients who had made money in unleaded gas or that Bradach could make 40-50% trading soybeans. Blazeff did testify that he told Bradach that he had some people who made money in unleaded gas but that more people actually lost money in unleaded gas.

The Hearing Panel found that NFA had not established that Warren and Blazeff engaged in deceptive and misleading sales solicitations because the Panel did not find the witnesses against Warren and Blazeff to be credible. NFA argued that the Panel's findings were clearly erroneous, against the weight of the evidence and contrary to the Appeals Committee's holding in Seigel. In support of its position, NFA maintains that the Panel's credibility determinations were erroneous and that the testimony of the three customer witnesses should be accepted as true. As a result, NFA argues that these customers established that Warren and Blazeff engaged in deceptive and misleading sales solicitations because they both made significant profit projections without also disclosing that nearly 90% of Barkley's customers lost money during the preceding two years.

If the Hearing Panel had found these customer witnesses credible, then the Hearing Panel should have found that Warren and Blazeff had a duty to disclose Barkley's dismal customer performance and nothing short of this disclosure would balance these sales presentations. This Committee, however, is not in the position to overturn the Hearing Panel's findings on credibility. The Hearing Panel was present during the hearing, was able to judge the tone and demeanor of the witnesses and, therefore, is in a much better position to judge the credibility of the customer witnesses.

The Panel clearly articulated its reasons for not finding the customer witnesses credible.

In situations where the Hearing Panel has a better opportunity to evaluate the weight of the evidence, such as in the case where witness credibility is a material issue, this Committee's practice is to defer to the Hearing Panel and review those factual findings using a "clearly erroneous" standard.⁴ After reviewing the findings of the Hearing Panel, this Committee cannot conclude that the Hearing Panel's determinations with respect to credibility were clearly erroneous.

NFA also maintains that credibility determinations are not necessary to conclude that Warren and Blazeff engaged in deceptive and misleading sales solicitations. NFA argues that Warren's and Blazeff's sales solicitations were deceptive and misleading as a matter of law because they hyped profit potential but did not disclose that the vast majority of Barkley's customers lost money.

The Committee disagrees that credibility and legal conclusions can be so easily separated in this case and, as noted, accepts the Hearing Panel's credibility determinations. Therefore, this Committee affirms the Hearing Panel's findings with respect to Warren and Blazeff.

3. Ursula Nostra and Donald Lansdown

Nostra and Lansdown settled the charges against them prior to the hearing and the evidence presented regarding their sales solicitations was presented for the sole purpose of establishing Barkley's liability for these sales solicitations. The

⁴ In the Matter of The Siegel Trading Company, Inc., NFA Case No. 01-BCC-11 (App. Comm. Oct. 6, 2003); In the Matter of Gary V. Valletta, NFA Case No. 99-APP-3 and 99-APP-4 (Nov. 2, 2000); In the Matter of International Futures Brokerage Corp., NFA Case No. 00-APP-1 (July 19, 2000). Cf. Anderson v. City of Bessmer, 470 U.S. 564, 573 (1985).

Hearing Panel concluded that NFA had not proven that either of the sales solicitations were misleading and dismissed the charges against Barkley with respect to these solicitations. NFA argues that the Hearing Panel erred in these conclusions and requests that this Committee reverse the Hearing Panel's findings and conclusions of law with respect to the solicitations made by these two individuals.

This Committee, however, has determined that it is not necessary to further review the Hearing Panel's findings and conclusions of law with respect to Nostra and Lansdown. Since both these individuals settled the charges against them prior to the hearing, any liability findings would apply only to Barkley. As discussed below, this Committee is imposing significant sanctions on Barkley and any additional finding of liability for Nostra's and Lansdown's solicitations would not alter the sanctions imposed.

B. The Sanctions Imposed Upon Barkley and Aguirre were not Sufficient Given the Violations Found by the Hearing Panel.

1. Aguirre

The Hearing Panel found that Aguirre made several misleading statements to NFA Auditor Johnson, who was posing as a prospective customer.

Specifically, the Panel found that Aguirre told Johnson that:

- He anticipated a 70 point move in Eurodollars and that the move would result in a profit of \$15,000 to \$17,000 on ten contracts;
- Sugar production was down 30% because of recent hurricanes and the approaching high demand season for sugar and gave Johnson a profit projection of \$2,000 per sugar option;
- She could make \$10,000 for every dollar movement in natural gas.

The Panel properly found that these statements were misleading and that

Aguirre knew or should have known that the representation he made to Johnson violated NFA requirements. The Panel also found that Aguirre acted in reckless disregard of NFA requirements when he made those statements to Johnson.

After finding that Aguirre made several misleading statements regarding profits, the Panel imposed a relatively light sanction on Aguirre. The Panel ordered Aguirre to pay a \$2,500 fine, barred him from association with or acting as a principal of any NFA Member for three months⁵ and ordered him to tape record all conversations between customers and potential customers for a period of six months. The only mitigating evidence cited by the Hearing Panel to justify this light sanction was that Aguirre did not appear to have any prior disciplinary history.

This Committee finds this sanction to be wholly inadequate given the misrepresentations made by Aguirre in his solicitation. Aguirre's statements are classic examples of statements that are used to convince novice investors that making money trading in the futures market is easy. Fortunately, in this case, Aguirre was speaking to an experienced NFA auditor who had no intention of investing rather than to an inexperienced member of the retail public. This fact, however, does not minimize the gravity of Aguirre's offense. The Appeals Committee believes that Aguirre's sanction should be such that it not only punishes him for the statements he made, but discourages him and other brokers from engaging in similar conduct. As a result, the Appeals Committee imposes the following sanctions on Aguirre:

1. Aguirre shall pay a \$25,000 fine within 30 days from the effective date of this Decision;

⁵ This sanction had no real punitive effect on Aguirre since it was imposed retroactively to the time Aguirre withdrew from membership and deemed to have already been served.

2. Aguirre is barred from association with and from acting as a principal of any NFA Member for a period of six months from the date of this Decision;
3. For a period of two years (exclusive of any period during which Aguirre is not an NFA Member or an Associate of an NFA Member), Aguirre may not be associated with an NFA Member unless Aguirre's sponsor agrees in writing to tape record all conversations that occur between Aguirre and both existing and potential customers; to retain each tape for a period of two years from the date the tape is created; and to make the tapes available to NFA upon request. During this two-year period, Aguirre may not be an NFA Member or a principal of an NFA Member unless that Member is guaranteed by another NFA Member and the guarantor agrees in writing to tape record all conversations that occur between Aguirre and both existing and potential customers; to retain each tape for a period of two years from the date the tape is created; and to make the tapes available to NFA upon request. The sponsor or guarantor must also certify that it understands that any violation by the sponsor or guarantor of its obligations under this Decision may be grounds for disciplinary action against the sponsor or guarantor.

2. Barkley

The Hearing Panel found that seven Barkley APs made deceptive and misleading sales solicitations and that Barkley was liable for those misrepresentations. As a result, the Hearing Panel concluded that Barkley violated NFA Compliance Rules 2-2(a) and 2-29(a). The Panel also found that Barkley violated NFA Compliance Rule 2-9(a) because its supervisory practices were not adequate to deter sales practice violations. In reaching its conclusion regarding Barkley's failure to supervise, the Panel noted that approximately 15% of Barkley's APs engaged in sales practice violations. Based on these findings, the Panel sanctioned Barkley by imposing a \$300,000 fine and barring it from membership for two years (retroactive to April 14, 2006). The Panel also prohibited Barkley from becoming or remaining an NFA Member unless it tape recorded all conversations that occur between any of its APs and both existing and potential

customers (and comply with specific recordkeeping requirements with respect to those tapes); prohibited it from employing any branch office managers, APs or compliance personnel who have formerly been employed by a firm that has been barred from the industry for sales practice fraud; required it to employ a compliance officer who is Series 30 registered and has at least 5 years of futures industry experience as a compliance officer and/or branch office manager; and prohibited it from maintaining an office in Florida.

NFA argues that Barkley's conduct warrants a permanent bar, which would send a strong message to both the membership and the public that sales practice fraud will not be tolerated by NFA. This Committee agrees. The Hearing Panel found widespread sales practice fraud at Barkley and also found that Barkley had failed to establish any type of meaningful supervisory regime to guard against this type of sales practice fraud. In particular, the Hearing Panel found:

- A significant number of Barkley APs and compliance personnel came from firms that were closed for sales practice fraud, which increased Barkley's need for vigorous training, supervision and enforcement regarding compliance with sales practice requirements.
- Barkley's procedures for assessing potential customers were inconsistent with their stated purpose.
- Barkley's compliance director was self-taught, with no outside training and no previous compliance experience except for having observed sales practices at firms closed for sales practice fraud.
- Barkley's discipline for sales practice violations were inadequate.
- Barkley's compliance director did not appreciate, or possibly ignored the importance of adequate compliance.
- Barkley specifically refused to tape record sales solicitations, which is the most effective method of monitoring sales practices and deterring sales practice fraud.

- Approximately 15% of Barkley's APs engaged in sales practice violations.

These supervisory failures occurred despite the fact that the firm had already been subject to two NFA enforcement actions for deceptive sales practices. In the first matter, Barkley was fined \$75,000 and required to hire an outside consultant to monitor the sales solicitations of its sales force for two years. In the second matter, Barkley was fined \$445,000 and required to participate for one year in NFA's Enhanced Surveillance Program. Clearly, neither of these sanctions worked as a deterrent since Barkley continued to engage in the same type of sales practice fraud.

Given the non-isolated nature of the sales practice fraud at Barkley and the fact that no meaningful supervisory efforts were made to curtail this fraud, the Appeals Committee strongly believes that a permanent bar from membership is the only acceptable sanction. The Appeals Committee is further troubled by the fact that this case is NFA's third disciplinary case against Barkley and believes that these types of findings should warrant a permanent bar in the first instance. Any other sanction is contrary to NFA's customer protection mission and sends a message that NFA is soft on fraud. Barkley has proven that it is incapable of or has no intention of following NFA sales practice rules, and a permanent bar is the only way to ensure that Barkley will never again engage in sales practice fraud. Moreover, a permanent bar is completely consistent with other NFA cases involving similar fraudulent activity. (See In the Matter of JCC, Inc., NFA Case Nos. 92-APP-002 through 008, on appeal from 90-BCC-030 (App. Comm., July 7, 1993); In the Matter of Commonwealth Financial Group, Inc., NFA Case No. 96-APP-003, on appeal from 94-BCC-013 (App. Comm., April 14, 1997); In

the Matter of Siegel Trading Company, Inc., NFA Case No. 01-BCC-011 (App. Comm., Oct. 6, 2003) and In the Matter of Mizner Financial Trading Corp., NFA Case No. 05-BCC-007 (Sep. 27, 2006)).

This Committee also finds the fine imposed by the Hearing Panel is wholly inadequate. Evidence presented at the hearing established that Barkley made \$5.8 million dollars in gross commissions in 2004 and \$8.3 million in gross commissions in 2003. Barkley profited handsomely at the expense of their customers, whose significant losses may not have occurred but for Barkley's misrepresentations. Yet the Hearing Panel imposed a fine that was less than half the amount of the fine in the previous disciplinary matter.

As a result, the Appeals Committee imposes the following sanctions on Barkley:

1. Barkley is permanently barred from NFA Membership.
2. Barkley shall pay a fine of \$1,000,000 within 30 days from the date of this Decision.

III

CONCLUSION

As discussed above, the Appeals Committee reverses the Hearing Panel's Decision in part, affirms the Decision in part, and increases the sanctions imposed upon Barkley and Aguirre. This Decision shall be effective thirty days after it is served on Appellees as prescribed by Commodity Futures Trading Commission Regulation 171.9. Appellees may appeal this Decision to the Commission under CFTC Regulation 171.23 by filing a Notice of Appeal and the required filing fees with the Commission within thirty-five days after the Decision is mailed. Under CFTC Regulation 171.22, Appellees

may petition the Commission to stay the effective date of this Decision by filing a petition, a Notice of Appeal, and the required filing fees with the Commission within fifteen days after the Decision is mailed.

Under the provisions of CFTC Regulation 1.63, the sanctions imposed by the Hearing Panel Decision, as modified by this Decision, and the sanctions imposed in this Decision herein, render Aguirre and Rodin ineligible to serve on a governing board, disciplinary committee, arbitration panel, oversight panel, or governing board of any self-regulatory organization, as that term is defined in CFTC Regulation 1.63, until three years after the effective date of this Decision or until all of the sanctions imposed and conditions imposed on them have been fulfilled, whichever is later.

APPEALS COMMITTEE

Dated: 07/06/07

By: George E Crapple
George Crapple
Chairperson

/nam(Decision:Barkley Financial Corporation – Appeals Decision.caw)

AFFIDAVIT OF SERVICE

I, Nancy Miskovich-Paschen, on oath state that on July 6, 2007, I served copies of the attached Decision, by sending such copies in the United States Mail, postage prepaid, certified mail, return receipt requested, and by regular mail, in envelopes addressed as follows:

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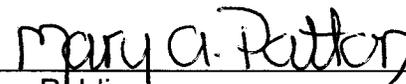
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Nancy Miskovich-Paschen

Subscribed and sworn to before me
on this 6th day of July 2007.



Notary Public

