

FILED

**NATIONAL FUTURES ASSOCIATION
BEFORE THE
APPEALS COMMITTEE**

DEC 31 2007

**NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING**

In the Matter of:)

BENJAMIN KERPE)
(NFA ID #325466),)

and)

ARTHUR VIERA)
(NFA ID #340309),)

Appellants.)

NFA Case No. 06-BCC-023

DECISION

On July 30, 2007, an NFA Hearing Panel found that Benjamin Kerpe and Arthur Viera had violated NFA Compliance Rules 2-2(a) and 2-29(a)(1). Kerpe and Viera each filed a timely Notice of Appeal regarding the sanctions imposed, and the Appeals Committee granted their subsequent requests to review the liability findings as well. After considering the record below and the arguments raised by the parties on appeal, the Appeals Committee affirms the Hearing Panel's Decision in full.

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PROCEDURAL BACKGROUND

On August 30, 2006, NFA's Business Conduct Committee issued a four-count Complaint against Mercer Capital Management; Mercer Capital, Inc.; Kerpe; Viera; and two other respondents. The Complaint alleged that Kerpe violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) by making misleading sales solicitations while

he was an associated person (AP) of the Mercer entities (individually and jointly referred to as Mercer). It also alleged that Viera violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) by making misleading sales solicitations and violated NFA Compliance Rule 2-29(a)(2) by engaging in high-pressure sales solicitations while he was a Mercer AP.

Kerpe and Viera filed separate Answers on September 28, 2006. Both Answers denied the material allegations in the Complaint.

The Hearing Panel issued its Decision on July 30, 2007, after a hearing.¹ The Panel found that Kerpe and Viera had each violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) but dismissed the Compliance Rule 2-29(a)(2) charge against Viera. The Panel suspended Kerpe (who was currently registered) for three months, barred Viera (who was not currently registered) for three months, fined each of them \$5,000, and required that their sales solicitations be tape-recorded for one year.

Kerpe filed a Notice of Appeal on August 7, 2007, and Viera filed a Notice of Appeal on August 8, 2007. Although their initial Notices appealed only the sanctions, they each filed subsequent motions with the Appeals Committee asking that they be allowed to appeal the liability findings as well. The Appeals Committee granted both requests.

¹ The Hearing Panel Decision summarizes the evidence presented at the hearing and provides examples of the statements it found to be misleading. The Committee incorporates that Decision by reference.

PRELIMINARY MATTERS

In his Notice of Appeal, Viera requested oral argument before the Appeals Committee. The Committee has determined that the issues are sufficiently well defined in the briefs so that oral argument will not add to the Committee's understanding of those issues or of the evidence in the record. Therefore, the Committee denies the request for oral argument.

Kerpe's initial brief included a number of documents that were *not part of the record below*. NFA Compliance Rule 3-13(d) states, "Except for good cause shown, the appeal or review shall be conducted solely on the record before the Hearing Panel, the written exceptions filed under paragraph (a) above, and such written or oral arguments of the parties as the Appeals Committee may authorize."

Exhibit A to Kerpe's brief contains letters from clients that are all dated after the Hearing Panel rendered its decision. Although these particular letters did not exist during the hearing, Kerpe could have sought to obtain and introduce similar letters at that time.² Therefore, he has not shown good cause for supplementing the record with them now.

Some of the documents in Exhibit B were in the record below. In particular, the signature page from the customer agreement, the pages from the hearing transcript, and the Hearing Panel's Decision are all part of the record on review. Therefore, the Committee has considered the arguments Kerpe based on these

² This is not to say that the Hearing Panel would have been required to accept them or any of the other materials Kerpe is now trying to add to the record. The Appeals Committee has not considered the admissibility of any of those documents.

documents. On the other hand, the NFA interview with Shah, Shah's check to Mercer, and Mercer's check request were not in the record, nor did Kerpe attempt to introduce them into evidence. These documents all predated the hearing, and Kerpe has not shown that he did not have access to them.³

Exhibit C contains documents on anti-money-laundering and ethics training. Two of these documents predate the April 25, 2007 hearing and would have been available at the time. All of them relate to Kerpe's actions at his current firm, however—actions that took place several years after the conduct involved in the Complaint. At most, they are relevant only to the sanctions. Nonetheless, evidence that could mitigate or aggravate the sanctions—just like evidence offered to prove or disprove liability—should be presented to the Hearing Panel before it reaches its decision. Kerpe did not do so.

Kerpe has not shown good cause why the Appeals Committee should accept any of the new evidence in Exhibits A, B, or C. Therefore, the Committee has not considered these documents in reaching its decision.

III

DISCUSSION

Viera's Notice of Appeal and subsequent filings asked this Committee to consider his appeal separately from Kerpe's appeal. The Committee always considers the case against each person on its own facts, and it has done so here. Some of the

³ In fact, NFA's brief represents that Kerpe received them during discovery.

arguments raised by Appellants are similar, however, and we will address them together.

A. The Appeals Committee Is Not Bound by *Anderson v. City of Bessemer* but Has Chosen to Follow It for Credibility Determinations

The parties argue over the applicability of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). In that case, the U.S. Supreme Court was asked to interpret Federal Rule of Civil Procedure 52(a), which governed proceedings in Federal Court. That rule stated, “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.” (See 470 U.S. 564, 573.)

In contrast, NFA Compliance Rule 3-13(f) states, “Promptly after reviewing the matter, the Appeals Committee shall issue a written and dated decision, based on the weight of the evidence.” (Emphasis added.) This is a different standard than applies in Federal Court proceedings—a standard that, in fact, does not require the Appeals Committee to give the Hearing Panel any deference at all.

Nonetheless, the Appeals Committee recognizes that sensory information does not come through in a hearing transcript. Unlike the Panel, we do not see a witness’s body language, hear his tone of voice, or know when he paused before answering a question. Although some of these sensory images may be missing when a witness is on the telephone, many vital ones still remain. Therefore, regardless of whether a witness testifies in person or via teleconference, we choose to defer to the Panel’s better opportunity to judge a witness’s credibility, and we will not overturn the Panel’s credibility findings unless they are clearly erroneous.

The Court stated in *Anderson*, “when a trial judge’s finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.” (470 U.S. 564, 575) Based on this language, Kerpe and Viera argue that deference is due only if there is more than one witness against each of them. They misunderstand what the Supreme Court was saying, however. When it refers to the testimony of one of two witnesses, it is referring to the fact finder’s decision to credit the testimony of a witness who contradicts the second witness—it does not require the presence of two witnesses who corroborate each other’s testimony. In this case, the Hearing Panel credited Saurabh Shah’s testimony over Kerpe’s and John Rice’s testimony over Viera’s, and *Anderson* supports this result.

1. *The Panel Was Not Clearly Erroneous when It Found Shah More Credible than Kerpe*

Kerpe argues that the Panel erred in finding that Shah was a credible witness and Kerpe was an evasive one. Since Shah and Kerpe told conflicting stories, the Hearing Panel was required to decide which witness was more likely to be telling the truth. The Panel found Shah to be the more credible witness, and, as noted earlier, the Appeals Committee defers to the Panel’s credibility findings unless they are clearly erroneous. After reviewing the record, the Committee has determined that the record contains adequate support for the Hearing Panel’s findings and, therefore, they were not clearly erroneous.

The Decision below was very explicit about why the Hearing Panel believed Shah over Kerpe.

The Panel found Shah to be a very credible witness. He was very forthright in his testimony and recalled specific details of his conversations with Kerpe. When Kerpe's counsel questioned him on whether he could have been confusing Kerpe with Flickinger, Shah was adamant that he was not because Kerpe always talked in terms of percentages (200 to 300 percent), whereas Flickinger talked in terms of making two, three or four times his investment. Shah also had a clear recollection of the events surrounding Flickinger contacting him immediately after placing his first trade with Kerpe. Although Kerpe denied that he knew that Flickinger would be contacting Shah, Shah stated that he was not willing to do business with Flickinger unless Kerpe told him it was okay. As a result, Shah told Flickinger to have Kerpe call him and confirm it was okay for Shah to do business with Flickinger. Shah stated that Kerpe did contact him and told him that Flickinger was his supervisor.

On the other hand, the Panel did not find Kerpe to be a very credible witness. Kerpe was very evasive when answering questions about his current employment. Kerpe also spent a great deal of his testimony trying to blame Flickinger and Mercer for any problems in Shah's account.⁴

Kerpe contends that the Panel should believe him because he testified in person while Shah testified over the telephone. As noted earlier, while telephonic testimony eliminates verbal observation from the credibility determination, other sensory images still exist. Therefore, we will not discount the Panel's credibility determination simply because it chooses to believe the person on the telephone.

Kerpe also argues that there were a number of contradictions in Shah's testimony. Some of these claimed contradictions are between Shah's testimony at the hearing and the notes from an NFA staff interview that—as mentioned above—were not in the record. We will not second-guess the Hearing Panel based on evidence that was not before it.

⁴ Hearing Panel Decision at 13-14.

The Panel found that Kerpe told Shah that he had fifteen years of experience in the industry. Kerpe claims that this statement may have been made by Robert Flickinger, another Mercer AP, and that Shah was confused about its source. Shah testified during direct that Kerpe made the representation during their initial telephone conversation.⁵ During cross-examination, however, Shah appeared to attribute it to Flickinger, instead.

Q. Okay. Is it possible that Mr. Flickinger may have told you that he had 15 years experience in the business?

A. Yes. He told me that in the beginning in the very first call.⁶

It is not unusual for someone to “hear” what he expects to hear in a question rather than registering what the person actually says. Furthermore, the end of the answer suggests that Shah was indeed referring to Kerpe, not Flickinger, since all the evidence indicates that Kerpe, not Flickinger, was the AP on the very first call. Shah also reiterated his original testimony on redirect examination.⁷

Kerpe also claims that he could not have made this statement because it would have made him nine years old when he started in the industry. But even assuming that Kerpe was 24 when he solicited Shah, his actual age does not help him. By definition, a misrepresentation is untrue, either literally or by what it implies. Furthermore, there is no evidence that Shah ever met him face to face or had any other

⁵ April 24, 2007 Hearing Transcript (Transcript), pg. 128, line 12 through pg. 129, line 1.

⁶ Transcript, pg. 145, lines 9-13.

⁷ Transcript, pg. 144, lines 2-19.

reason to know how young he was. Therefore, Kerpe could easily have misrepresented his experience knowing it was unlikely that Shah would catch him in his lie.

The Panel also found that Kerpe told Shah he could make a 200 to 300 percent return, as Shah testified on direct.⁸ Then the following exchange occurred on cross.

- Q. Okay. Was Flickinger making these promises to you too that, you know, you would have a 200 percent return?
- A. Well, at times he made more than that.
- Q. And what was Mr. Flickinger alleging that you could make from his trades?
- A. Well, Mr. Flickinger is Robert, right?
- Q. Yes.
- A. Okay. Robert, when he took over after we had a dispute with Mr. Kerpe, after I am not happy with Mr. Kerpe's performance, he took over and at that time he promised that within six month time frame I should have all my money back plus two, three times in return.
- Q. And Rob told you that?
- A. Robert, yes.
- Q. Did Rob ever promise you a 200 percent return?
- A. This is what Robert promised me as I told you that.
- Q. Okay. Did he –
- A. 200, 300, 500 percentage all were made by Mr. Kerpe.
- Q. Well, were they made by Mr. Kerpe or Mr. Flickinger or both?
- A. Mr. Kerpe used to make promises in terms of percentage return, and Mr. Robert used to make promises like 3, 4, 2, 4, that kind of promises. He put percentages on it.

⁸ Transcript, pg. 130, lines 13-17.

Q. Okay. Are you aware that NFA's alleged that Rob Flickinger assured you that his customers were making money, some as much as 200 percent; are you aware that they've alleged that?

A. That was Robert and Mr. Ben, everybody telling me that.

Q. Okay.

A. That all their clients were making money.

Q. Okay.

A. Some of them making 200 percent, 300 percent, but to me personally, when they make the promises, they say that – Kerpe used to say percentage-wise, and Mr. Robert used to tell me like three times, four, four, like that, those kind of terms he used to use.⁹

Kerpe claims that this exchange shows that Shah was confused about who represented that he could make 200% or 300%. But terms like “200%” and “2 times” mean the same thing, and it is not unusual for someone to use them interchangeably as Shah appears to have done. When asked about Kerpe's actual words, however, Shah's testimony was consistent, and his explanation about why he was sure Kerpe had made the statements was reasonable.

The other inconsistencies that Kerpe points to relate to dates and other ancillary matters. Shah's testimony about Kerpe's misrepresentations was clear, however. The Panel had a better opportunity to evaluate Shah's credibility, and there is nothing in the record that shows the Panel's decision to believe Shah's testimony was “clearly erroneous.”

Finally, Kerpe claims that the Panel was mistaken when it concluded he was evasive. The transcript contains twelve pages of colloquy during which NFA's

⁹ Transcript, pg.147, line 2 through pg. 148, line 21.

attorney and various members of the Hearing Panel attempted to find out exactly where Kerpe was currently working and why he had recently changed horses midstream.¹⁰ According to Kerpe, he opened his own IB, Quantum International Funds (Quantum), after leaving Mercer in 2004. Although his testimony becomes hazy here, it appears that in late 2006 he de-registered Quantum, registered QCM—a separate legal entity—as an IB, and transferred his individual registration and his futures business from Quantum to QCM. NFA's attorney asked a number of questions about the reason for this corporate "restructuring," but all Kerpe would say is that he intended to do some real estate investing and wanted to use Quantum for that business because Quantum had the longer history—a response that raises more questions than it answers. Therefore, the Panel's conclusion that he was evasive is not clearly erroneous.¹¹

2. *The Panel Was Not Clearly Erroneous when It Found Rice More Credible than Viera*

Like Kerpe, Viera challenges the Panel's credibility findings. The Panel found that Rice was the more credible witness and accepted his testimony. After reviewing the record, the Committee has determined that it contains adequate support for the Hearing Panel's findings and, therefore, they were not clearly erroneous.

The Panel explained its conclusion as follows:

Again, the Panel was struck by the sincerity of the customer witness. Rice testified in a matter-of-fact manner regarding his dealings

¹⁰ Transcript, pg. 198, line 24 through pg. 210, line 10.

¹¹ We also note that Kerpe did not provide direct answers when asked if his current customers were making or losing money. Transcript, pg. 213, line 11 through pg. 217, line 19. The Panel did not cite this exchange as evasive, but it may have factored into the Panel's overall impression of Kerpe's testimony.

with Viera. It was clear to the Panel that Rice had absolutely no idea what he was investing in and was merely following Viera's lead. It was also clear to the Panel that the primary reason Rice agreed to invest with Viera was that Viera told him that he could limit his losses.¹²

Unlike Kerpe, the Hearing Panel did not list any reasons for discounting Viera's testimony. But that does not change the result. Assuming, without deciding, that Rice and Viera each told "a coherent and facially plausible story," *Anderson* holds that the credibility determination made by the finder of fact "can virtually never be clear error." (470 U.S. 564, 575)

B. The Panel Did Not Err in Finding That Kerpe's and Viera's Statements Were Misleading

Kerpe and Viera were both unrepresented during the appeals process, and it was not always easy to identify their exact arguments. For the sake of completeness, the Committee has considered other issues they may have been trying to raise regarding the Panel's liability findings.

We reject any arguments that rely on Kerpe's or Viera's versions of the facts. The Panel rejected those versions and, as noted above, the Panel's credibility findings were not clearly erroneous.

Both Kerpe and Viera make references to the risk disclosure documents that the customers received. The cases are clear, however, that providing written risk disclosure is not sufficient to "cure" misrepresentations that contradict the risk disclosure documents.¹³

¹² Hearing Panel Decision at 15.

¹³ See, e.g., *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1330 (11th Cir. 2002); *CFTC v. Sidoti*, 178 F.3d 1132, 1136 (11th Cir. 1999); *McAnally v. Gildersleeve*, 16 F.3d 1493, 1499-1500 (8th Cir. 1994); *Clayton Brokerage Co. of St. Louis, Inc. v. CFTC*, 794

Similarly, Kerpe observes that Shah continued to trade after losing money, and Viera points to Rice's experience trading stocks and his earlier foray into the silver futures markets. Whether the customers relied on the APs' misrepresentations is not the point, however, since reliance is not a necessary element of a disciplinary action.¹⁴ If the statements are misleading, then all NFA has to prove is that Kerpe and Viera made them. It accomplished that through the customers' testimony.

Finally, we note that the Appeals Committee has consistently held that painting an unreasonable picture of potential profits and claiming or implying that known events will change the price of options in the future are misleading under NFA Compliance Rules 2-2(a) and 2-29(a)(1).¹⁵ The customers' testimony shows that Kerpe and Viera each made these types of statements.

F.2d 573, 580-581 (11th Cir. 1986); Chicoine v. Rosenthal & Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,075 (CFTC July 2, 1980); In re The Siegel Trading Company, Inc., NFA Case No. 01-BCC-11 (App. Comm. Oct. 6, 2003), *aff'd* The Siegel Trading Company, Inc. v. NFA, No. CRAA 04-01 (CFTC Apr. 1, 2005); In re Market Watch, Inc., NFA Case No. 95-APP-001 (May 29, 1996), *aff'd*, No. CRAA-96-2 (CFTC Mar. 3, 1997).

¹⁴ See JCC, Inc. v. CFTC, 63 F.3d 1557, 1565 fn. 23 (11th Cir. 1995); In re GNP Commodities, Inc. [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC 1992), *aff'd in part and modified sub nom.*, Monieson v. CFTC, 996 F.2d 852 (7th Cir. 1993). See also Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) (holding that proof of actual injury to clients was not necessary to a finding that the failure to disclose material facts "operates as a fraud or deceit" in an injunctive proceeding brought by the SEC under the Investment Advisors Act of 1940).

¹⁵ See, e.g., In re The Siegel Trading Company, Inc., NFA Case No. 01-BCC-11 (App. Comm. Oct. 6, 2003), *aff'd* The Siegel Trading Company, Inc. v. NFA, No. CRAA 04-01 (CFTC Apr. 1, 2005); In re Commonwealth Financial Group, Inc., NFA Case No. 94-BCC-013 (HP Aug. 26, 1996), *aff'd*, NFA Case No. 96-APP-003 (Apr. 4, 1997), *aff'd*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,299 (CFTC, Mar. 18, 1998), *aff'd*, No. 97-4506 (11th Cir. 1999); In re First Sierra Corporation, NFA Case No. 92-BCC-005 (HP Aug. 19, 1993), *aff'd* In re Burt, NFA Case No. 93-APP-004 (Aug. 2,

For the reasons discussed above, the Appeals Committee affirms the Hearing Panel's findings that Kerpe and Viera violated NFA Compliance Rules 2-2(a) and 2-29(a)(1).

C. The Panel's Sanctions Were Not Excessive

After finding that Kerpe and Viera had violated NFA Compliance Rules 2-2(a) and 2-29(a), the Panel suspended Kerpe from membership or associate membership for three months, barred Viera from membership or associate membership for three months, fined each of them \$5,000, and required that their sales solicitations be tape-recorded for one year. Kerpe and Viera claim that these sanctions are excessive. We have reviewed the sanctions based on the CFTC's guidelines.¹⁶

The Appeals Committee has considered the sanctions against Kerpe and Viera separately. We will discuss them together, however, since the two APs have the same penalty profile. The Panel found that both men violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) and that each made several misrepresentations to a single customer. Both were relatively new to the futures industry when the violations occurred. Additionally, neither has a prior disciplinary history.

During the last five years, NFA hearing panels issued adjudicated decisions against several APs who meet a similar penalty profile. The final sanctions in

1994), *aff'd*, Burt v. NFA, No. CRAA 94-5 (CFTC Mar. 8, 1995); In re JCC, Inc., NFA Case No. 90-BCC-030, *aff'd*, NFA Case No. 92-APP-008 (July 7, 1993), *aff'd*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,126 (CFTC June 29, 1994).

¹⁶ See CFTC Policy Statement Relating to the Commission's Authority to Impose Civil Money Penalties and Futures Self-Regulatory Organizations Authority to Impose Sanctions; Penalty Guidelines, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (CFTC Nov. 1994). See also In re Grossfeld, [1996-1998 Transfer Binder]

those cases ranged from a \$5,000 fine with no suspension and six months of taping¹⁷ to a \$10,000 fine with a six-month suspension and six months of taping.¹⁸ While there is no magic formula, an increase in any of these three elements can offset a decrease in another one. The sanctions against Kerpe and Viera (a \$5,000 fine coupled with a three-month suspension and a year of taping) fall within the range of sanctions imposed in similar cases. Therefore, the Panel's sanctions are not excessive.¹⁹

IV

CONCLUSION

The Appeals Committee affirms the Hearing Panel's Decision in full. This Appeals Decision shall be effective thirty days after it is served on Kerpe and Viera as prescribed by CFTC Regulation 171.9. Kerpe and Viera may each 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, Kerpe and Viera may each petition the Commission to stay the effective date of the sanctions against them by filing a petition, a Notice of Appeal, and the required filing fees with the Commission within fifteen days after the Decision is mailed.

Comm. Fut. L. Rep. (CCH) ¶ 26,921 (CFTC Dec. 10, 1996), *aff'd*, Grossfeld v. CFTC, 137 F.3d 1300 (11th Cir. 1998).

¹⁷ In re Garwood, NFA Case No. 02-BCC-01 (HP Mar. 19, 2003), *aff'd*, App. Comm. Oct. 6, 2003).

¹⁸ In re Barkley Financial Corp., NFA Case No. 05-BCC-20 (App. Comm. Jul. 6, 2007).

¹⁹ In his brief, Kerpe proposed an alternate sanction that would have eliminated the suspension and the fine. He did not characterize it as a settlement offer or include the information required by NFA Compliance Rule 3-11. Since the Panel's sanctions were not excessive, the Committee has not considered Kerpe's proposal.