

violated NFA Compliance Rule 2-5 by failing to cooperate in an NFA examination and failing to produce records; that JAL violated NFA Compliance Rule 2-13(a) by failing to maintain books and records and failing to provide a current, accurate disclosure document to pool participants; that JAL violated NFA Compliance Rule 2-4 by investing pool funds in an instrument not authorized by the disclosure document and by failing to obtain participant approval before making the investment; and that JAL and Jordan violated NFA Compliance Rule 2-9(a) by failing to supervise JAL's operations.

JAL and Jordan filed a joint Answer on July 24, 2007. In their Answer, they denied the material allegations in the Complaint.

The Hearing Panel issued its Decision on March 12, 2008, after a hearing. The Panel found that JAL and Jordan had violated NFA Compliance Rules 2-5 and 2-9(a) and that JAL had also violated NFA Compliance Rules 2-4 and 2-13(a). The Panel suspended JAL from NFA membership for ten years, suspended Jordan from associate membership and from acting as principal of any NFA Member for ten years, and imposed a \$10,000 fine on JAL and Jordan jointly and severally.

JAL and Jordan filed a Notice of Appeal on March 25, 2008. The Notice appealed both the liability findings and the sanctions.

II

PRELIMINARY MATTERS

NFA Compliance Rule 3-13(f) provides that the Appeals Committee shall issue a decision based on the weight of the evidence. In those instances where the Hearing Panel has a better opportunity to evaluate the evidence, however, as where witness credibility is a material issue in the case, the Committee's practice is to defer to

the Hearing Panel and review those factual findings using a “clearly erroneous” standard.¹

This clearly erroneous standard does not, however, apply where the Appeals Committee has an equally good opportunity to evaluate the evidence underlying particular factual determinations.² For example, some of the factual findings in this case are based on the Panel’s interpretation of JAL’s disclosure document. That document is in the record, and this Committee can read it for itself. The Committee reviews these types of factual findings *de novo*. The Committee also reviews the Panel’s interpretation of NFA rules and other legal issues *de novo*.³

III

DISCUSSION

Although JAL and Jordan are the only Respondents, this case involves several entities either controlled or influenced by Jordan. These entities are described below.

Gundaker Jordan American Holdings, f/k/a Jordan American Holdings, (Gundaker) is a publicly-held holding company. Jordan is the largest stockholder and controlled Gundaker for most of the period involved in this case.⁴

¹ See, e.g., In the Matter of The Siegel Trading Company, Inc., NFA Case No. 01-BCC-11 (App. Comm. Oct. 6, 2003). Cf. Anderson v. City of Bessmer, 470 U.S. 564, 573 (1985).

² See In the Matter of Benjamin Kerpe, NFA Case No. 06-BCC-23 (App. Comm. Dec. 31, 2007).

³ Cf. First Options of Chicago, Inc. v. Kaplin, 514 U.S. 938, 947-948 (1995).

⁴ See November 26, 2007 Hearing Transcript (Transcript) at page 87, lines 12-19; page 191, lines 5-8.

JAL is a registered commodity pool operator and Member of NFA, and various documents state that Jordan is JAL's president and sole shareholder.⁵ However, Jordan testified that JAL was simply a conduit for funneling management fees from the Jordan Index Fund (Fund) to "the parent company," Gundaker.⁶

The Fund is a commodity pool operated by JAL. Jordan makes all of the trading decisions for the Fund.⁷

Boston Restaurant Associates (Boston) is apparently not affiliated with Jordan or any of his entities. Jordan did, however, work with Boston to structure and sell the subordinated debentures at issue in this case.⁸

A. The Panel's Liability Findings Are Supported by the Evidence

Credibility is not an issue in this appeal. Although Jordan did not agree with all of NFA's conclusions, there was little dispute over the facts themselves.⁹ Furthermore, the documentary evidence and the text of the applicable rules and regulations corroborate the relevant testimony.

Jordan argues that NFA did not meet its evidentiary burden because it did not present sufficient evidence to prove several of the Panel's crucial findings. For

⁵ See NFA Exhibit 3, page A-9; NFA Exhibit 4, page 20. See *also* Transcript at page 29, lines 20-21; page 85, lines 12-16; page 127, lines 15-19.

⁶ See Transcript at page 89, line 21 through page 90, line 8.

⁷ See NFA Exhibit 3, page A-9; NFA Exhibit 4, pages 20-22; Transcript at page 15, lines 2-11.

⁸ See Transcript at page 23, line 17 through page 25, line 24; page 86, lines 11 through 19.

⁹ In most instances, references to "Jordan" in this Appeals Decision include JAL. Where the context relates only to JAL, it uses "JAL."

example, he claims that NFA presented no evidence to support Joseph Patrick's assertion during his testimony that the Boston debenture (Debenture) did not meet the requirements in CFTC Regulation 1.25. He also argues that NFA did not prove which unproduced records were required by the Act or CFTC Regulation 1.31(a)(1).

This argument ignores both the Hearing Panel's self-regulatory nature and the materials it can rely on in reaching its conclusions. The Panel can consider relevant statutes and regulations without having them formally entered into evidence. The same is true for this Committee.

Furthermore, there was no need for NFA to walk the Panel through those regulations. All three of the Hearing Panelists are experienced in the industry and knowledgeable about CFTC requirements, and two are also attorneys trained to interpret federal regulations.

1. *JAL Failed to Maintain Required Books and Records, and JAL and Jordan Did Not Cooperate with NFA*

Count I of the Complaint charged that JAL and Jordan violated NFA Compliance Rule 2-5 by failing to produce books and records requested by NFA in connection with an NFA audit. Count II charged that JAL violated NFA Compliance Rule 2-13 by failing to maintain books and records required by the Commodity Exchange Act and Commission regulations.

On April 6, 2006, NFA sent Jordan a request for documents. The letter gave Jordan two deadlines for producing those documents. NFA gave Jordan an April 7, 2006, deadline for producing contact information and the current net asset value for each person who was a participant during 2004 or 2005; the most current account statement issued to participants; the Fund's most recent disclosure document; contact

information for the Fund's record-keeper; and a listing, with identifying details, of all Fund assets. By April 17, 2006, when an NFA audit team was scheduled to appear at JAL's offices, Jordan was to provide additional documents. That list included monthly balance sheets, bank statements, pool statements, broker statements, corporate records, compliance procedures, and subscription agreements.¹⁰

Jordan argues that NFA gave him an unreasonably short period to respond to its request. In this connection, Jordan notes that civil discovery rules generally allow a minimum of thirty days to respond to discovery requests and that these deadlines are often extended by the courts. Although acknowledging that court rules of civil procedure are not directly applicable to NFA audits and investigations, Jordan argues that those rules provide guidance on a reasonable time to comply with a records request.

What Jordan fails to recognize is that discovery rules and NFA's compliance responsibilities have vastly different purposes. As a result, civil discovery rules provide no guidance at all. In most civil cases, the harm (or alleged harm) has already occurred. NFA's primary concern, however, is protecting investors against harm that may be on going or imminent. In that situation, one day or even less may well be reasonable, especially where, as here, the Member should have the requested documents at its fingertips. With the exception of information on participants who owned participations in 2004 or 2005 but had since liquidated them, all of the information NFA requested JAL to produce on April 7, 2006 is information that a

¹⁰ See NFA Exhibit 5.

commodity pool operator must have on-site and readily accessible in order to operate its business and fulfill its responsibility to its participants.

CFTC Regulation 4.23 provides that the pool operator must make these documents available to participants for inspection and copying during normal business hours and must send copies to participants within five business days (when requested). Foreign pool operators must provide the documents to the CFTC upon 72 hours notice, implying that domestic pool operators have even less time. These requirements provide more guidance regarding a “reasonable” time for complying than the civil discovery rules do.

Although Jordan had already produced some of the documents, a significant number were still outstanding on May 5, 2006—almost a full month after NFA made its request. Among these unproduced documents were many that were less than two years old and were therefore required by CFTC Regulation 1.31 to be readily accessible. For example, on May 5, 2006 Jordan had not yet produced the Fund’s monthly balance sheets for July 2004, August 2004, October 2004, November 2004, February 2005, and April 2005 and the monthly broker statements for January 2006.¹¹ While Jordan did eventually provide these particular documents to NFA staff, a month is not “readily accessible” by anyone’s calculation.

A year and a half after the initial request, Jordan still had not produced pool statements for early 2003; most of the monthly carrying broker statements from 2003; most of the 2003 bank statements; and some of the 2004 bank statements.¹²

¹¹ See NFA Exhibit 7.

¹² See NFA Exhibit 8.

These records were all less than five years old at the time of NFA's request, and CFTC Regulations required JAL to retain them. While JAL was not required to have them readily accessible, one-and-one half years is clearly unreasonable.

JAL also claims that NFA has not proven the missing documents were ones that it was required to maintain under CFTC Regulation 1.31(a)(1), which specifies the retention period for all books and records required to be kept under the CEA and the CFTC's regulations. The Panel can certainly rely on the language in that regulation and make the connection between it and the evidence. Since CFTC Regulation 4.23 requires commodity pool operators to maintain carrying broker statements (4.23(a)(7)), bank statements (4.23(a)(8)), monthly financial information (4.23(a)(10)) for the pool, and monthly statements sent to participants (4.23(a)(12)), these records must be kept for the periods required by CFTC Regulation 1.31.

Finally, Jordan claims that he should not be held liable for failing to produce documents that—he contends—disappeared during a hostile takeover. This argument has several flaws. First, the evidence indicates that JAL was not a Gundaker subsidiary (although Jordan may have treated it as one) but was wholly owned by Jordan, so loss of control over Gundaker should not have affected Jordan's control over JAL. Second, Jordan testified that he lost control of Gundaker for approximately one and one-half years and regained it in November 2002.¹³ However, many of the documents that are still missing are from 2003 and 2004. Third, Jordan did not timely produce even the documents he did have in his possession.

¹³ See November 26, 2007 Hearing Transcript, page 89, lines 9-15.

Based on the above, the Appeals Committee affirms the Hearing Panel's findings that JAL and Jordan violated NFA Compliance Rule 2-5 by failing to cooperate in an NFA examination and that JAL violated NFA Compliance Rule 2-13(a) by failing to maintain required books and records.

2. *JAL was Required to Disclose Past Disciplinary Actions and the Potential Conflict of Interest from Purchasing the Debenture*

Count III of the Complaint charged JAL with violating NFA Compliance Rule 2-13(a) by failing to update its Disclosure Document. It alleges that JAL failed to disclose two separate types of information: 1) disciplinary actions against Jordan and 2) JAL's related-party transaction purchasing the Debenture for the Fund.

In 1995, NASD fined Jordan \$2,500 for violating its free riding rule. In 2005, Jordan settled a Colorado action by agreeing to a seven-year ban from doing business that requires registration in that state. The parties agree that JAL did not amend the Fund's 1994 Disclosure Document to report either of these actions. The Hearing Panel found that these were material actions for which disclosure was required.

CFTC Regulation 4.24(l), which is incorporated into NFA Compliance Rule 2-13(a), provides that a disclosure document must describe "any material administrative, civil or criminal action" against any principal of the CPO. JAL does not deny that Jordan was a principal, but it does deny that the NASD and Colorado actions were material. In fact, Jordan classified them both as "of no consequence."¹⁴

¹⁴ See Transcript at page 138, lines 6-15; page 163, line 21 through page 164, line 9.

According to JAL, the Appeals Committee should look to CFTC Regulation 4.24(l)(2) for guidance on what is material. That section says an action against the pool's FCM or IB is material only if it would be required to be disclosed in the notes to the FCM or IB's financial statements under generally accepted accounting principles; was brought by the Commission (except that a CFTC action need not be disclosed if it did not result in a civil monetary penalty of over \$50,000 and did not involve allegations of fraud or other willful misconduct); or was brought by any other regulatory agency (including state agencies and SROs) and involved allegations of fraud or other willful misconduct.

This section is irrelevant to actions against Jordan. His role gave him a closer relationship with the Fund and a greater opportunity to control the Fund's assets than is generally the case with a pool's FCM or IB. Nothing in CFTC Regulation 4.24(l) suggests that what is "material" for a principal of the pool's CPO is the same as what is "material" for the pool's FCM or IB. In fact, by limiting the definition in section (l)(2) to actions against FCMs and IBs, that section implies that the universe of material actions is greater when applied to persons within the other listed categories, including CPO principals such as Jordan.

The Hearing Panel found that the Colorado and NASD actions "are the type of information a person investing in a pool would want to know about a principal of the pool."¹⁵ In other words, the Panel found that the actions were material. We agree.

¹⁵ Hearing Panel Decision, page 13.

The uncontroverted evidence shows that in December 2004, the Fund purchased a \$200,000 subordinated debenture (Debenture) issued by Boston. The Fund purchased the Debenture from Jordan, who had purchased it from Gundaker.

The parties agree that JAL did not amend the Fund's Disclosure Document to include information relating to the Debenture purchase. The Panel found that the Disclosure Document should have been updated in two ways: 1) to allow the purchase (with approval of the participants), and 2) to disclose the conflict of interest inherent in the transaction.

JAL's primary argument for not disclosing the purchase is its claim that the transaction did not violate the Disclosure Document. The Hearing Panel found that it did, and we agree for the reasons discussed in the next section.

Even if the Debenture had been an authorized investment, however, JAL was required to disclose the inherent conflict in the transaction. JAL denies that a conflict exists.

As the Hearing Panel noted, however:

Jordan personally sold the Fund an investment vehicle that did not have a publicly disseminated market value. Jordan then received an interest payment due the Fund and at a later point "returned" the interest payment in the form of stock in a company in which Jordan has a controlling interest. It is untenable for Jordan to suggest that these were not material related party transactions.¹⁶

JAL appears to argue that there was no conflict because the transaction was fair to the Fund. While that may be the test for engaging in a related-party

¹⁶ Hearing Panel Decision, pages 13-14.

transaction (if the Disclosure Document had allowed it), it is not the test for disclosure to participants.

Furthermore, the evidence in the record does not show that the transaction was fair to the Fund when Jordan entered into it. According to Jordan, the fact that the Debenture carried a 14% interest rate—higher than most corporate debentures—made it a good investment. But high interest rates are generally the hook an issuer uses to get people to invest in high-risk instruments. Only in hindsight could Jordan know that Boston would meet its interest obligations and eventually retire the debentures at their face value. If Boston had defaulted on the debentures rather than retired them, would Jordan still claim that it was a good investment?

Given that the Fund was not authorized to purchase the debenture without participant approval (by approving a change in the Fund's trading policies), the Appeals Committee agrees with the Hearing Panel that JAL was required to obtain that approval and update the Disclosure Document accordingly. Because JAL did not do so, however, it should have amended the Fund's Disclosure Document to notify participants that the Fund had made an unauthorized investment.

In *In re Kolter*, ¶ 26,262 COMM. FUT. L. REP. (CCH) (Nov. 8, 1994), the Commission faced a situation that bore many similarities to the present case. The CFTC's Division of Enforcement brought an action against Thomas Kolter, who was the president and a director of Stotler Funds, Inc. (SFI). The principal allegation was that Kolter aided and abetted SFI's parent company in selling commercial paper issued by the parent company to two of the pools operated by SFI. The Disclosure Document for each pool provided that pool funds which were not used to trade commodity futures and

options would be invested in interest-bearing bank accounts. One of the documents also stated that the pool would not loan money to anyone, including SFI and its affiliates.

The Commission determined that SFI had committed fraud and that Kolter had aided and abetted that fraud. In this connection, the Commission stated:

SFI clearly had an obligation to inform pool participants promptly that it would no longer be using the pool funds as described in the disclosure documents. The Division's submissions clearly established that Kolter failed to inform the pool participants that the pool funds would be used in a manner contrary to that designated in the disclosure document. As president and CEO of SFI, Kolter was ultimately responsible for such disclosure. *Kolter*, ¶ 26,262 COMM. FUT. L. REP., 1994 WL 621595 at page 7 (CFTC Nov. 8, 1994) (citations omitted).

The Commission also noted that the pools' annual reports disclosed the existence of the commercial paper transaction in a footnote. But it went on to state, "The clash between the commercial paper investments and the disclosure documents was not revealed in footnotes to the annual report, however. Under Regulation 4.21(b)(1)(i), the CPO's duty to revise the disclosure document arose 21 days after the CPO first knew of the change." *Kolter*, ¶ 26,262 COMM. FUT. L. REP., 1994 WL 621595, at pg. 7 (CFTC, Nov. 8, 1994).

Similarly, JAL disclosed the transaction in the footnotes to the Fund's 2005 financial statements.¹⁷ As in *Kolter*, however, JAL failed to inform the Fund's participants that the purchase violated the term of the Fund's Disclosure Document.

The Fund sold approximately \$11 million in participations in 1994 and then closed the offering to new participants. JAL argues that it was not required to disclose

¹⁷ See NFA Exhibit 1, note 3. Although that document misidentified the seller as GUN rather than Jordan, it did provide enough information on GUN for participants to realize that it was a related-party transaction.

either the regulatory actions against Jordan or the Debenture transaction because they occurred after the offering had closed. This argument ignores the plain language of CFTC Regulation 4.26(c)(1), which states in part:

If the commodity pool operator knows or should know that the Disclosure Document . . . is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to . . . all existing pool participants within 21 calendar days

JAL claims that it neither knew nor should have known that the Fund's Disclosure Document was materially inaccurate or incomplete. This argument strains credulity. Jordan, who was JAL, knew the relevant facts, and simply reading the regulations would have warned him that the Disclosure Document JAL was responsible for preparing and keeping current needed to disclose both the regulatory matters and the conflict involved in the Debenture purchase. Yet Jordan readily admitted he did not do so.¹⁸ Therefore, JAL should have known that CFTC regulations required it to amend its Disclosure Document to disclose those matters.

For all these reasons, the Appeals Committee affirms the Hearing Panel's findings that JAL violated NFA Compliance Rule 2-13(a) by failing to update the Fund's disclosure document.

3. *The Fund's Disclosure Document Did Not Authorize it to Purchase the Debenture*

Count IV of the Complaint alleged that JAL made an unauthorized investment for the Fund when it purchased the Debenture. The Complaint charged JAL with violating NFA Compliance Rule 2-4 by failing to observe high standards of

¹⁸ See Transcript at page 190, lines 1-16.

commercial honor and just and equitable principles of trade when it entered into this transaction.

The Hearing Panel found that there were three things wrong with the Debenture purchase. First, the transaction was inconsistent with the Fund's Disclosure Document. Second, JAL did not ask the participants to authorize the transaction. Third, as already discussed, JAL did not amend the Fund's Disclosure Document to disclose this related-party transaction or to discuss the potential conflicts arising from it.

JAL admits that it purchased the Debenture for the Fund, and the parties agree that the Debenture is a security. JAL claims that the Disclosure Document authorized the purchase because that document and the subscription agreement state in several places that the Fund may "possibly, on occasion," invest in securities. NFA argues, however, that these provisions are trumped by the "Trading Policies" section of the Disclosure Document. That section states in relevant part:

The following are the Fund's trading policies that will be applied by the Advisor in managing the Fund's portfolio:

1. The Fund will not purchase, sell or trade in securities other than securities in which "customer' funds" may be invested under the CEA.

.....

Material changes in the trading policies described above must be approved by a vote of a majority of the outstanding Units.¹⁹

NFA claims, and the Panel found, that this provision limits the Fund's securities investments to those instruments that are eligible for investing customer funds under CFTC Regulation 1.25. JAL disputes this finding.

¹⁹ NFA Exhibit 4, page 50.

As JAL and Jordan note in their brief, “the primary objective is to determine the intent of the parties from the express language used in the agreement.” However, they would have the Panel and this Committee concentrate on those clauses that say the Fund may invest in securities and ignore the “Trading Policies” section that limits those investments to securities in which customer funds may be invested under the CEA (i.e., securities that comply with CFTC Regulation 1.25). Both clauses are part of the Disclosure Document, and the Panel applied a “cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1994).

Citing *Air Line Stewards & Stewardesses Ass’n v. American Airlines, Inc.*, 763 F.2d 875 (7th Cir. 1985), JAL argues in the alternative (i.e., if the Committee does not agree with their interpretation of the “plain language” of the agreement) that the Hearing Panel found the language to be ambiguous and was required to consider parol evidence as to the parties intent. According to JAL, Jordan’s testimony about his understanding of the agreement is that parol evidence.

Clearly, however, the Panel’s Decision did not find that the Disclosure Document was ambiguous. To the contrary, the Panel found that the plain language of that document prohibited any investment in securities that did not meet the requirements in CFTC Regulation 1.25. If there is no ambiguity, the decision-maker must interpret the contract on its face without resort to parol evidence. *River East Plaza, LLC v. Variable Annuity Life Ins. Co.*, 498 F.3d 718, 725 (7th Cir. 2007); *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 993; *Davis v. G.N. Mortg Co.*, 396 F.3d

869, 878 (7th Cir. 2005); *Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc.*, 763 F.2d 875, 878 (7th Cir. 1985); see also, *Brown v. Wiley*, 61 U.S. 442, 448 (1857). Therefore, the Panel properly disregarded any parol evidence, including Jordan's testimony.

Furthermore, even if the language is ambiguous, it must be construed against the drafter. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). See also, *Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc.*, 763 F.2d 875, 885 (7th Cir. 1985) ("Any particular interpretation that only one of the parties may have envisioned at the time the contract was executed is immaterial.") Since JAL was the drafter, the provisions of the Disclosure Document must be construed against it.

JAL also argues that NFA did not present any evidence to contradict Jordan's testimony that he intended and believed that the Disclosure Document authorized him to invest in securities similar to the Debenture. Since the agreement must be construed against JAL, however, there was no reason for NFA to present evidence on this point.²⁰

JAL also claims that the Debenture qualified as an investment for customer segregated funds, and, therefore, was consistent with the language in the "Trading Policies" section. As quoted above, that section limits the Fund's securities investments to those in which customer funds may be invested under the CEA. JAL

²⁰ The Committee also notes that the phrase relied on by JAL and Jordan, which states that the net proceeds of the offering may be used to trade "possibly on occasion, in securities," implies that securities will a small part of the Fund's investments. (Emphasis added.) At one point, however, 67% of the Fund's assets were invested in the Debenture. See Transcript at page 240, lines 23-24.

claims that the Debenture was a qualified investment for these purposes, making it an authorized purchase for the Fund.

CFTC Regulation 1.25 spells out the instruments that qualify for investment of customer funds. As relevant here, that regulation states:

(a) *Permitted investments.* (1) Subject to the terms and conditions set forth in this section, a futures commission merchant or a derivatives clearing organization may invest customer money in the following instruments (permitted investments):

* * *

(vi) Corporate notes or bonds;

* * *

(b) *General terms and conditions.* A futures commission merchant or a derivatives clearing organization is required to manage the permitted investments consistent with the objectives of preserving principal and maintaining liquidity and according to the following specific requirements:

(1) *Marketability.* Except for interests in money market mutual funds, investments must be "readily marketable" as defined in §240.15c3-1 of this title.

The parties agree that the Debenture is a corporate bond. Regulation 1.25 allows investments in corporate bonds only if certain conditions are met. One of those conditions is that the bond must be readily marketable as defined in SEC Rule 15c3-1. Section 11(i) of that SEC rule defines a ready market as "a recognized established securities market in which there exists independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined for a particular security almost instantaneously and where payment will be received in settlement of a sale at such price within a relatively short time conforming to trade custom."

The intent of the term is clear: there must be a large number of buyers and sellers competing for the securities in an easily accessible market place.²¹ That was clearly not the case with the Debenture. NFA Exhibit 9 shows that between December 17, 2003 and April 22, 2005 there was essentially ONE willing seller (two if you count Jordan as a separate seller), and most of the buyers were related to the seller.²² Furthermore, all of the transactions occurred at par. Jordan also admitted that there were few willing sellers.²³ These factors indicate that the Debenture was not traded in a liquid, competitive market.²⁴

JAL also argues that the Debenture benefited the Fund. Again, this is not the issue. The CEA and Commission regulations do not limit the types of investments a pool can make. They do, however, require that those investments be consistent with the pool's Disclosure Document. If JAL believed that purchasing the Debenture was in the Fund's best interest, it had a remedy—it could have asked the participants to amend the trading policies to authorize the purchase.

For the reasons discussed above, the Appeals Committee agrees with the Hearing Panel's findings that the Debenture was not a qualified investment under CFTC

²¹ The rule does provide another definition of "ready market" that is not relevant here. Furthermore, the quoted definition is preceded by the word "includes," and "includes" implies "not limited to." Even so, these provisions do not change the intent.

²² The record does not reveal the other purchaser's relationship, if any, to Gundaker and its related entities.

²³ See Transcript at page 90, line 10 through page 91, line 16.

²⁴ The Debentures may also fail the Regulation 1.25 test on another ground. Section (b)(2) of that regulation provides that corporate bonds must be rated by a nationally recognized statistical rating organization and must receive one of the highest ratings. However, neither party presented evidence on this issue.

Regulation 1.25 and, therefore, was not an authorized investment for the Fund under its Disclosure Document. Furthermore, regardless of whether JAL knew the purchase was unauthorized, simple due diligence would have revealed that fact.

Based on the above, the Appeals Committee affirms the Hearing Panel's findings that JAL violated NFA Compliance Rule 2-4 by making an unauthorized investment for the Fund.

4. JAL and Jordan Failed to Supervise JAL's CPO Operations

The final count of the Complaint (Count V) charged that JAL and Jordan violated NFA Compliance Rule 2-9(a) by failing to supervise JAL's CPO operations. JAL's failure to maintain and promptly produce documents was wide-spread, covering several different types of documents (including pool statements, monthly carrying broker statements, and bank statements) over a period of several years. Its failure to update its Disclosure Document was not an isolated incident but involved two separate regulatory actions (ten years apart) and the unauthorized Debenture transaction. As the Hearing Panel noted, "The evidence at the hearing demonstrated that Jordan and JAL had little or no understanding of the regulatory framework in the futures industry that governs the operation of the Fund. Moreover, they made no attempt to understand the requirements or to hire someone who did."

The evidence supports the Hearing Panel's findings that JAL and Jordan, its sole AP and principal, failed to supervise JAL's operations for compliance with its regulatory requirements as a CPO. Therefore, the Appeals Committee affirms the Hearing Panel's findings that JAL and Jordan violated NFA Compliance Rule 2-9(a).

B. The Panel's Sanctions Are Not Excessive

JAL and Jordan's conduct involves serious violations of NFA rules.

Section 17(b) of the CEA and CFTC Regulation 170.5 require NFA to adopt, maintain, and enforce rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, in general, to protect the public interest, and to remove impediments to and perfect the mechanism of free and open futures trading."²⁵ To meet this requirement, NFA must be able to conduct efficient and effective audits and investigations of its Members, and that, in turn, makes it crucial that Members maintain adequate books and records and cooperate in these audits and investigations by providing those documents promptly upon request. When a Member fails to do so, it puts both the regulatory structure and the public at risk.

The CFTC's Disclosure Document requirements are designed to ensure that pool participants have the information necessary to make an informed decision before investing in a pool and to give them an adequate opportunity to get out if the factors they relied on change. Furthermore, participants must be able to rely on the Disclosure Document's description of the instruments the pool will invest in. When JAL violated the disclosure requirements and when it made an unauthorized purchase of the Debenture for the Fund, it broke faith with its participants.

For purposes of the sanctions, we will assume that Jordan was a poor businessman rather than an unethical one. We will also give him the benefit of the doubt and assume that he did not intend to harm the Fund's participants by any of his

²⁵ 7 U.S.C. § 21(b)(7). See also 17 C.F.R. § 170.5.

actions. We will even assume that he thought he was acting in the participants' best interests when JAL purchased the Debenture for the Fund. Furthermore, there is no evidence showing actual harm to the participants. These factors might mitigate the penalty in the right situation. But this is not that situation.

The best intentions do not give someone the right to ignore the law. Jordan not only did not know what the CFTC and NFA requirements were, he did not care. He also felt the same way about SEC and NASD (n/k/a/ FINRA) requirements. To make matters worse, he refused to take responsibility for his actions, classifying various violations as of no consequence or blaming his problems on others, including NFA.²⁶

JAL and Jordan's attitude turned their commodity licenses into licenses to commit anarchy. This simply cannot be tolerated. Therefore, the Appeals Committee affirms the ten-year suspensions and the \$10,000 fine imposed by the Hearing Panel.

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 JAL and Jordan as prescribed by CFTC Regulation 171.9. [JAL and Jordan 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, JAL and Jordan may petition the Commission

²⁶ See, for example, Transcript at page 11, line 5 through page 12, line 10; page 29, line 24 through page 30, line 15; page 103, lines 10-17; page 124, line 1 through page 125, line 13; page 138, line 6 through page 139, line 23; page 163, line 21 through page 164, line 9; page 166, line 21 through page 167, line 13; page 189, line 7 through page 190, line 6; and page 236, lines 3-19.

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.

Under the provisions of CFTC Regulation 1.63, the sanctions imposed by the Hearing Panel and affirmed herein render Jordan ineligible to serve on a 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 and conditions imposed on that individual have been fulfilled, whichever is later.

APPEALS COMMITTEE

Dated: October 10, 2008

By: 
George E. Crapple
Chairman

(kpc/Appeals/Jordan Decision)