

**FILED**

**NATIONAL FUTURES ASSOCIATION  
BEFORE THE  
APPEALS COMMITTEE**

**MAR 19 2009**

**NATIONAL FUTURES ASSOCIATION  
LEGAL DOCKETING**

In the Matter of: )  
)  
AMERICAN ATLANTIC FINANCIAL CORP. )  
(NFA ID #318055), )  
)  
JOHN MENOUTIS )  
(NFA ID #198369), ) NFA Case No. 07-BCC-012  
)  
and )  
)  
THADDEUS H. NATHANIEL )  
(NFA ID #341998), )  
)  
Appellants. )

**DECISION**

On July 23, 2008, an NFA Hearing Panel issued a Decision against American Atlantic Financial Corp. (American Atlantic), its principal John Menoutis (Menoutis), associated person (AP) Thaddeus H. Nathaniel (Nathaniel) (collectively Appellants) and six other APs.<sup>1</sup> The Hearing Panel found that American Atlantic violated NFA Compliance Rules 2-2(a), 2-29(a)(1), 2-29(a)(2) and 2-9. The Panel also found that Menoutis violated NFA Compliance Rule 2-9 and that Nathaniel violated NFA Compliance Rules 2-2(a) and 2-29(a)(1).

Appellants filed a Notice of Appeal challenging the Hearing Panel's sanctions. Appellants' brief, however, also challenged the fairness of the Hearing and the Hearing Panel's liability findings. After considering the record below and the arguments raised by the parties on appeal, the Appeals Committee affirms the Hearing

---

<sup>1</sup> The remaining six APs are not parties to this Appeal.

Panel's liability findings and the sanctions imposed upon each Appellant. The Appeals Committee also finds that the Appellants were provided a fair and impartial hearing.

I

**PROCEDURAL BACKGROUND**

On April 27, 2007, NFA's Business Conduct Committee issued a three-count Complaint against American Atlantic, its principal, Menoutis, and seven of its APs including Nathaniel. The Complaint alleged that American Atlantic and Nathaniel violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) by using misleading sales solicitations. The Complaint also alleged that American Atlantic violated NFA Compliance Rule 2-29(a)(2) by using high-pressured sales tactics. Finally, the Complaint alleged that American Atlantic and Menoutis violated NFA Compliance Rule 2-9(a) by failing to diligently supervise their APs. On June 11, 2007, the Appellants filed a joint Answer in which they denied the material allegations of the Complaint.

The Hearing Panel issued its Decision on July 23, 2008, after a hearing.

In that Decision, the Hearing Panel:

- Found that American Atlantic violated NFA Compliance Rules 2-2(a), 2-29(a)(1), 2-29(a)(2) and 2-9; fined it \$100,000; and permanently barred it from NFA membership.
- Found that Menoutis violated NFA Compliance Rule 2-9(a); fined him \$100,000; and permanently barred him from association with and from acting as a principal of any NFA Member.
- Found that Nathaniel violated NFA Compliance Rule 2-2(a) and 2-29(a)(1). The Hearing Panel fined Nathaniel \$5,000 and barred him from association with and from acting as a principal of any NFA Member for a period of six months. The Hearing Panel also ordered that for a period of one year, Nathaniel cannot be associated with an NFA Member unless Nathaniel's sponsor agrees in writing to tape record all conversations that occur between Nathaniel 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 Hearing Panel also ordered that during the one year period, Nathaniel could 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 Nathaniel 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.

The Appellants filed a Notice of Appeal indicating that they took exception with the sanctions imposed upon each of them. In their written briefs, however, Appellants ask the Appeals Committee to review the fairness of the hearing, the liability findings against each of them and the sanctions.

## II

### PRELIMINARY MATTERS

NFA Compliance Rule 3-13(a) provides a Respondent in a Business Conduct Committee matter with a right to appeal any adverse decision of the Hearing Panel. The Rule requires a Respondent to file a written Notice of Appeal with NFA which **"describes those aspects of the disciplinary action to which exception is taken"** (emphasis added). Appellants in this matter filed a timely Notice of Appeal that stated that they took exception to:

- The fine and permanent bar imposed by the Panel on American Atlantic;
- The fine and permanent bar imposed by the Panel on Menoutis; and
- The fine, suspension and taping requirements imposed by the Panel on Nathaniel.

Nowhere in Appellants' Notice of Appeal did they indicate that they took exception to any other part of the Hearing Panel's decision. After reviewing Appellants' Notice of Appeal, the Appeals Committee issued an Order setting the schedule for submitting briefs **"on the sanctions imposed against the Appellants"** (emphasis added).

Appellants, however, filed an initial brief that also took issue with the fairness of the hearing and the liability findings against each of the Appellants. Although the Appellants' brief was clearly beyond its Notice of Appeal and this Committee's order, NFA did not object to the Committee considering the additional issues. Given that all parties have fully briefed the additional issues, and NFA has not objected to their consideration, the Appeals Committee has decided to consider all the issues raised in Appellants' brief.

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 generally defers to the Hearing Panel and reviews those factual findings using a "clearly erroneous" standard.<sup>2</sup> The Committee reviews the Panel's interpretation of NFA rules and other legal issues *de novo*.<sup>3</sup>

### III

#### DISCUSSION

This appeal involves the following issues: 1) whether the Appellants were denied a fair and equitable hearing because the Hearing Panel issued a last-minute order permitting witnesses to testify telephonically; 2) whether the Hearing Panel was prejudiced against Appellants based on a remark made by an NFA attorney; 3) whether the Hearing Panel's liability findings are supported by the weight of the evidence; and 4)

---

<sup>2</sup> In re Gary V. Valletta, NFA Case Nos. 99-APP-3 and 99-APP-4 (Nov. 2, 2000); In re 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).

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

whether the sanctions imposed by the Hearing Panel on Appellants were excessive. We will discuss each of these issues separately.

**A. The Appellants Received a Fair and Equitable Hearing**

Appellants argue that they were denied a fair and equitable hearing because they were prejudiced by the Hearing Panel's decision to permit certain witnesses to testify by telephone. In particular, Appellants claim that because the Hearing Panel had previously denied a request by NFA that certain witnesses be permitted to testify by telephone, they "rightly" assumed that those witnesses would not testify, and therefore, they did not have time to prepare and defend against these "surprise" witnesses. Appellants also argue that they "rightly" believed that they would not be able to offer witnesses by telephone and by the time the Hearing Panel issued the order permitting NFA witnesses to testify telephonically, it was too late for Appellants to arrange and prepare their own telephonic witnesses. Appellants also claim that if they had had more notice, they could have arranged for video conferencing so that the Panel could see the witnesses. Finally, Appellants argued that the witnesses were able to hide behind the telephone and that if the witnesses appeared in person they would be less likely to testify falsely.

The Appeals Committee does not find any of these arguments persuasive. NFA Compliance Rule 3-9 clearly provides that telephonic testimony is permissible, and since it has been previously ordered by numerous other Hearing Panels, it should come as no surprise to any party that it is permitted.<sup>4</sup> Furthermore, this is not the first NFA case where telephonic testimony was permitted after it was originally denied.<sup>5</sup>

---

<sup>4</sup> See In the Matter of Benjamin Kerpe and Arthur Viera, NFA Case No. 06-BCC-023 (App. Comm. Dec. 31, 2007); In the Matter of Ryan S. Cubiotti, NFA Case No. 05-BCC-019 (September 26, 2006); In the Matter of Mizner Financial Trading Corp., NFA

Moreover, this Committee believes that telephonic testimony should be permitted liberally whenever a witness who is essential to the matter, either to prove or defend against an allegation, is unable or unwilling to travel to the hearing and the parties are unable to force the appearance. In NFA cases involving allegations of sales practice violations, much of NFA's case depends upon the testimony of customer witnesses, who oftentimes have already lost substantial sums of money. Neither NFA nor the Member respondents have authority to compel these witnesses to take time away from their employment and personal lives to travel to an NFA hearing. That was clearly the situation in this matter.<sup>6</sup> Each of the witnesses who testified by telephone was essential to NFA proving allegations in the Complaint. Given the seriousness of this matter, it would have been an untenable situation if NFA could not present its evidence supporting the allegations merely because a witness was unable or unwilling to appear in person in Chicago.

This Committee also finds unpersuasive Appellants' argument that they "rightly" assumed that certain witnesses would not be testifying. First, the Panel's initial denial to permit telephonic testimony did not preclude NFA from presenting the witnesses in person, and in fact, two of the witnesses identified in the original motion did appear at the hearing. Second, Appellants were not justified in believing that the second motion would be denied, and they were ill advised not to prepare for their

---

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

<sup>5</sup> See, e.g., In the Matter of Barkley Financial Corporation, NFA Case No. 05-BCC-020 (App. Comm. July 6, 2007).

<sup>6</sup> NFA also had no authority to compel the presence of a former NFA employee who was concerned about taking time away from a rigorous graduate class schedule.

testimony (if they did not). NFA's second motion for telephonic testimony<sup>7</sup> provided significantly more detail regarding why the witnesses would not be willing or able to testify in person and made the request on behalf of fewer witnesses. Since NFA's rules clearly permit telephonic testimony, Appellants should have recognized that different circumstances could result in a different ruling – exactly what happened here.

Moreover, the only document Appellants should have relied upon to determine what witnesses would appear at the hearing was the list of witnesses that NFA was required to provide Appellants<sup>8</sup> in advance of the hearing. Appellants have not made any argument that these witnesses did not appear on that list. Appellants proceeded at their own risk when they determined (if they did) not to prepare for witnesses that were clearly identified by NFA as witnesses that would testify at the hearing. It is unconvincing for Appellants to now argue that they were prejudiced and blame NFA for their own litigation tactics in not preparing for these witnesses.

This Committee also finds no merit in Appellants' argument that they did not seek permission to present witnesses by telephone because they assumed, based on the Hearing Panel's previous order denying telephonic testimony, that their own request would not be granted. Again, Appellants cannot claim prejudice based on their faulty assumptions. NFA rules clearly permit telephonic testimony, and Appellants should have made a request for telephonic testimony if they had witnesses essential to

---

<sup>7</sup> NFA's motion followed a November 1, 2007 Order issued by the Chairman of the Hearing Panel that postponed the hearing in this matter scheduled for November 5-9, 2007. The Chairman issued this Order after Appellants requested a continuance because their attorney of record withdrew from representing them. By Order dated January 22, 2008, the Chairman rescheduled the hearing to begin March 11, 2008.

<sup>8</sup> In an order dated July 17, 2007, the Chairperson of the Hearing Panel ordered the parties to exchange a witness and exhibit list by October 18, 2007.

their case who were unwilling or unable to attend the hearing. Appellants were ill advised to assume the outcome of a motion they chose not to file based upon the outcome of their opposing party's motion.

Appellants also have no basis for claiming that they were prejudiced because they did not have time to arrange for videoconference testimony for these witnesses. The Hearing Panel's Order clearly permitted these witnesses to testify by telephone. Even if the Appellants would have had time to arrange or were willing to pay for videoconferencing, they had no authority to require the witnesses to appear by videoconference. NFA requested that the witnesses be able to appear by telephone because they were unable to take time away from school or their employment. Requiring the witness to travel to a videoconferencing facility, if one was even available locally, raises some of the same issues as having to travel to a hearing, although on a smaller scale.

Finally, Appellants argue that they were prejudiced because they did not have an opportunity to face their accusers. Appellants suggest that witnesses would be more likely to testify falsely if they can "hide behind the telephone." As the Hearing Panel noted in their decision, the Panel was still able to assess the credibility of the witnesses over the telephone, and the Respondents had a full opportunity to cross-examine them.<sup>9</sup>

Appellants received a fair and equitable hearing regarding the charges against them. The Hearing Panel's decision to permit certain witnesses to testify by

---

<sup>9</sup> As this Committee has previously noted, "while telephonic testimony eliminates verbal observation from the credibility determination, other sensory images still exist." In the Matter of Benjamin Kerpe and Arthur Viera, NFA Case No. 06-BCC-023 (App. Comm. Dec. 31, 2007).

telephone was in keeping with NFA's rules and nothing about this decision prejudiced the Appellants.

**B. NFA's Attorney's Remark in Closing Argument Was Not Prejudicial**

At the very end of NFA's closing argument, its attorney, while referring to the two telephone calls Menoutis had with Guerrero and Radford, stated that Menoutis "sounds like Tony Soprano in a cheap suit." Appellants argue that the Hearing Panel was unduly prejudiced by this remark.

This Committee does not agree. As discussed below, the evidence overwhelmingly supports the Hearing Panel's findings. The quoted remark was unfortunate, but in the Committee's opinion would not have affected the Panel's judgment in the case.

**C. The Hearing Panel's Liability Findings Were Supported by the Evidence**

Appellants' argument that the Panel's liability findings were not supported by the evidence is based primarily on the fact that the Hearing Panel found NFA's witnesses more credible than Appellants' written and taped evidence regarding risk disclosure and commissions. In addition, Appellants argue that they were not required to inform customers of the overall performance of American Atlantic's customers. Appellants also argue that the Hearing Panel erred when it found customer witness Lake more credible than Godnick and that former NFA employee Jesus Birikorang (Birikorang) was more credible than Nathaniel. This Committee accepts the Hearing Panel's credibility findings and believes that the record contains more than ample evidence to support the Panel's liability findings.

1. **Appellants' Compliance Procedures Do Not Undercut Customer Witness Credibility**

Appellants argue that the evidence at the hearing does not support the Hearing Panel's credibility findings with respect to NFA's witnesses because Appellants presented written and taped evidence that was contrary to the customer's claims regarding risk disclosure and profit discussions. The Hearing Panel, however, squarely addressed this issue in its Decision, where it concluded that the Appellants' "compliance system was designed to create an illusion of protecting innocent customers from rogue brokers while its actual purpose was to protect brokers and the firm from innocent customers."<sup>10</sup> This Committee believes that the Panel's determination is fully supported by the record.

Appellants focus primarily on a "compliance call" that Menoutis made to each customer prior to placing the first trade. The Hearing Panel, which had the opportunity to listen to several of these calls, concluded that these calls were not in any way intended to uncover improper sales solicitations. The Hearing Panel noted that if Menoutis intended to provide any protection to customers, he would have asked the customer open-ended questions to elicit information from the customers rather than leading ones that only required a "yes" or "no" response. The Hearing Panel also cited instances where Menoutis failed to probe on answers where he didn't initially get the yes or no answer he was seeking. In particular, the Hearing Panel noted:

- When Acevedo responded to a question about borrowing money with "that's my savings, though, for," Menoutis rushed in and repeated the question before Acevedo could finish the sentence. When Menoutis didn't get the response he wanted to a question about whether the broker guaranteed profits, he kept repeating the

---

<sup>10</sup> Hearing Panel Decision, page 3.

question rather than asking what the broker did say. In fact, Menoutis jumped in whenever Acevedo started to provide that information. (Hearing Panel Decision, page 80.)

- When Lake's first answer to the question about high pressure was "not really" Menoutis did not want to know the real answer. His follow up was merely to repeat the same question, not to rephrase it or probe further. (Hearing Panel Decision, page 81.)

This Committee agrees with the Hearing Panel's assessment of the compliance call. It is apparent from the timing and the format of the questioning that the compliance call was not intended to uncover fraudulent sales practices. First, the call occurred immediately after the customer had received misleading information about their likelihood of profiting in the futures markets, and as several customers testified, after their broker told them the call was a legal formality. Second, as the tapes show, Menoutis spoke very quickly and only sought a "yes" or "no" answer from the customers. As the Hearing Panel noted, if customers attempted to provide any additional information, Menoutis would cut them off. This Committee fully agrees that if Menoutis wanted to know what the brokers told the customers, he should have asked the customer open-ended questions, rather than rifling off a series of "yes/no" questions. Finally, it is clear from the taped conversations with Guerrero and Radford (see NFA Exhibit 28), which occurred just before NFA's hearing, that Menoutis' real reason for making these tapes was to use them as tool to stop customers from later going forward with any complaints against American Atlantic or its brokers.

This Committee does not believe that these taped compliance calls undermine the credibility of NFA's witnesses in any way. It is clear from the context of the calls that the customers were not focused on the questions being asked, and that is just the way American Atlantic and Menoutis wanted it. American Atlantic and Menoutis

set up a compliance system to collect meaningless answers from customers, and they cannot now use those meaningless answers to undermine the credibility of the customer witnesses.

The Hearing Panel also concluded that the compliance letter that Appellants required before accepting additional funds from a customer was another step in American Atlantic's illusory "compliance system." We agree with the Hearing Panel. It is clear from the letters that the content is not the independent thought of each customer. Each letter contains almost identical language, and Menoutis admitted that the customer's broker dictated the language to the customer.

More importantly, in terms of the credibility of the customers who testified at this hearing, Appellants only provided one of these letters from customer witness John Snead (Snead). This letter did not in any way raise issues with respect to Snead's credibility. Snead readily admitted that he signed the letter, but was adamant that he did so because his broker told him that it was required. Snead testified that the broker dictated the letter and he signed it because he felt he had to in order to have any chance of protecting the additional funds still with American Atlantic. The Hearing Panel clearly accepted this testimony, and this Committee accepts the Hearing Panel's determination.

The Hearing Panel's determination to accept the testimony of NFA's witnesses over Appellants' written and taped evidence is fully supported by the evidence presented at the hearing.

**2. Appellants Were Required to Disclose Trading Performance of American Atlantic Customers**

Appellants also argue that they were not required to inform customers that American Atlantic's customers ended up losing money approximately 90% of the time.

Appellants claim that there is no NFA requirement that an AP who discusses profits that are contrary to the firm's customers' trading performance must disclose the trading performance of the firm's customers. Appellants further argue that even if there was such a requirement, American Atlantic's APs did not tell customers that they would make money.

Contrary to Appellants' arguments, American Atlantic's and its APs' solicitations were fraudulent and misleading, in violation of NFA Compliance Rules 2-2(a) and 2-29(a)(1) and (2). This Committee finds it incredible that an NFA Member could argue that it is not misleading for an AP to disclose overall customer performance in situations where the AP discusses profit projections that are contrary to actual customer performance. Although this Committee has stated this before on several occasions, we wish to make it absolutely clear that, while there is no general duty to disclose customer performance, the duty arises when an AP discusses profits that are contradicted by actual customer performance.<sup>11</sup> Furthermore, it is no defense that the AP does not know the performance of his customers or of the firm's customers. If an AP discusses profit potential, the AP and the firm have a duty to ensure that the AP knows the performance of his customers and the firm's customers and to disclose this performance if it is contrary to the profit projections being discussed and touted. Finally, this Committee wishes to make clear that an AP is required to discuss the actual customer performance at the time he is discussing the potential profits. It is not

---

<sup>11</sup> See In the Matter of Barkley Financial Corp., NFA Case No. 05-BCC-20 (App. Comm. July 6, 2007) and In the Matter of Siegel Trading Co., Inc., NFA Case No. 01-BCC-011 (App. Comm. Oct. 6, 2003). See also, CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321 (11th Cir. 2002).

sufficient to include a generalized statement regarding customer performance in the firm's account documentation.<sup>12</sup>

Appellants argue that American Atlantic's APs never told customers that they would make money, but this is contrary to the credible evidence at the hearing. For example, Godnick told Lake that he could expect to triple his investment and that he had clients making \$20,000 to \$30,000 on their positions and some who were making \$50,000 to \$100,000.<sup>13</sup> Similarly, Nathaniel told Birikorang that he had clients who made a lot of money, including one who made an 80% profit.<sup>14</sup> These are just a few examples of the Hearing Panel's findings of American Atlantic's APs stating or implying that the customers would make money. More importantly, these are just the type of statements that give rise to the AP's duty to disclose, and American Atlantic's duty to ensure that its APs disclose, actual customer performance that is contrary to the performance being discussed. These statements state or imply significant profit projections and are completely contrary to the overall experience of American Atlantic's customers. Any reasonable investor being told about these types of profits would find it material that almost 90% of American Atlantic's customers lost money in the preceding two years. It was a material omission on the part of American Atlantic and its APs not to disclose actual customer performance.

---

<sup>12</sup> Appellants also argue that once they learned of this requirement, they included this information in their account opening documents. Clearly, this is no defense to prior instances of not providing this information. Moreover, this type of generalized statement is not sufficient disclosure.

<sup>13</sup> Hearing Panel Decision, page 65.

<sup>14</sup> Hearing Panel Decision, page 72.

**3. Hearing Panel's Credibility Determinations With Respect to Lake and Birikorang Were Not Clearly Erroneous**

Appellants also argue that the Hearing Panel erred in finding that Lake was a more credible witness than Godnick and that Birikorang was a more credible witness than Walker. Since Godnick and Lake, as well as Walker and Birikorang, told conflicting stories, the Hearing Panel was required to decide which witnesses were more likely to be telling the truth. The Hearing Panel found Lake and Birikorang to be more credible. In order for this Committee to overturn the Hearing Panel's credibility findings, the Committee must find that the Hearing Panel's findings were clearly erroneous.<sup>15</sup> 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 Hearing Panel provided detailed reasons why they found Lake to be more credible than Godnick. In particular, the Hearing Panel found:

Godnick, on the other hand, simply was not credible. For example, he testified that he rolled Lake's positions in order to lock in profits and buy Lake more time. This testimony is disingenuous for three reasons. First, Godnick had Lake immediately put the proceeds into another open position and, therefore, his profit was no more protected than if the original position had remained open. Second, the first two spread positions had significant time value remaining when Godnick recommended that Lake liquidate them, and by purchasing farther out options at that time rather than waiting, Lake paid twice for the same time value from that overlapping period. Third, the transactions actually turned Lake's profit into a loss when the additional commissions he paid for the roll-over are added. American Atlantic and Godnick were the only ones who stood to benefit from the latter two trades.

Godnick's testimony lacks credibility for other reasons, as well. When Menoutis was asked during the audit and as an

---

<sup>15</sup> See In the Matter of Benjamin Kerpe and Arthur Viera, NFA Case No. 06-BCC-023 (App. Comm. Dec. 31, 2007).

adverse witness how he monitored sales solicitations, he mentioned barging and walking the sales floor but said that he did not tape sales solicitations. When Godnick took the stand, he testified that Menoutis required all new brokers to tape. When pressed, however, he changed his testimony to say that Menoutis suggested – but did not require – that brokers tape.<sup>16</sup>

Appellants argue that Lake's testimony was not credible because NFA did not prove that Lake's position was losing at the time Lake instructed Godnick to liquidate his position. Appellants also claim that they established that Lake's position was profitable at the time Lake claimed to have delivered this instruction. The Hearing Panel, however, made it clear in the Decision that Appellants had not shown the position was profitable at the time that Lake instructed Godnick to liquidate – only that it was profitable at the end of the month. Moreover, this Committee does not believe that the profit/loss status of Lake's position is material to determining his credibility. Lake never testified that his position was not profitable at the time he instructed Godnick to liquidate it. Lake only testified that if Godnick had liquidated at the time he told him to, then he would have made money and recovered all of his losses. This Committee reads that testimony to be that he would not have suffered the losses he eventually suffered because the position was not liquidated when he requested.

Moreover, Appellants' argument that Godnick would have been prohibited from following Lake's instruction because it would have been a discretionary order is completely disingenuous. According to Lake's testimony, he instructed Godnick to get him out of his positions on the following Thursday. There is nothing improper about a customer giving a broker an instruction to close out a position at a specific date in the future. The fact that Godnick may not have followed American Atlantic's procedures and taped the instruction is not Lake's fault.

---

<sup>16</sup> Hearing Panel Decision, pages 63-64.

The Hearing Panel also provided specific details on why they found Birikorang more credible than Nathaniel.<sup>17</sup> First, the Hearing Panel noted that memory lapses with respect to his undercover profile did not call into question his memory with respect to his conversations with Nathaniel because those conversations were captured in contemporaneous notes. While Nathaniel's testimony contradicted Birikorang's, the Hearing Panel found Nathaniel's testimony to be internally inconsistent. Specifically, the Hearing Panel noted that Nathaniel testified that he did not use the "profit" but rather spoke about "how the client can benefit financially." The Hearing Panel identified this as a prime example of how American Atlantic and its APs play with words to deceive customers. In addition, the Hearing Panel noted that Nathaniel went on to contradict himself by using the term profit several times in his testimony when describing how he explained a spread to a customer.

The Hearing Panel had a better opportunity to evaluate the credibility of these four witnesses, and there is nothing in the record that shows the Hearing Panel's decision to believe Lake and Birikorang over Godnick and Nathaniel was "clearly erroneous."

**D. The Hearing Panel's Sanctions Were Not Excessive**

The Hearing Panel found that American Atlantic violated NFA Compliance Rules 2-2(a), 2-29(a)(1) and 2-29(a)(2) based on the conduct of its brokers. The Hearing Panel also found that American Atlantic and Menoutis violated NFA Compliance Rule 2-9 for failing to supervise. After making these findings, the Hearing Panel permanently barred Menoutis from association with and from acting as principal of an NFA Member and permanently barred American Atlantic from NFA membership.

---

<sup>17</sup> Hearing Panel's Decision, pages 71-72.

The Hearing Panel also fined both Menoutis and American Atlantic \$100,000. After finding that Nathaniel violated NFA Compliance Rules 2-2(a) and 2-29(a)(1), the Hearing Panel fined Nathaniel \$5,000, barred him from association with and from acting as a principal of any NFA Member for six months and required that his sales solicitations be taped for one year. Appellants claim that these sanctions are excessive. We have reviewed the sanctions based on the Commodity Futures Trading Commission (CFTC) guidelines.<sup>18</sup>

Appellants do not provide any basis for their argument that Nathaniel's sanctions are excessive. In fact, in their brief, Appellants acknowledge that, except for Menoutis, the sanctions imposed on the individuals in this matter were mild.

In determining the appropriate sanction for Nathaniel, the Hearing Panel acknowledged that Nathaniel had no prior disciplinary history and that he was a relatively new broker when he solicited Birikorang. Given these factors, the Hearing Panel crafted a sanction that imposed a fine, temporary bar from associate membership and a taping requirement. This Committee believes that these sanctions are appropriate given the Panel's findings.

The sanctions imposed on Nathaniel are in keeping with the sanctions imposed on the other individual APs in this case (both those that settled and those that adjudicated the matter). For those APs without any prior disciplinary history, the Hearing Panel imposed \$5,000 fines, membership bars ranging from six months to one year and taping requirements ranging from six months to one year. The sanction imposed on Nathaniel is also consistent with sanctions imposed in cases adjudicated by

---

<sup>18</sup> 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).

NFA Hearing Panels in recent years. The final sanctions in those cases for APs with no prior disciplinary actions ranged from a \$5,000 fine with no suspension and six months of taping<sup>19</sup> to a \$10,000 fine with a six-month suspension and six months of taping.<sup>20</sup> The sanctions against Nathaniel (\$5,000 fine, six-month membership bar and six months of taping) fall well within the range of sanctions imposed in this matter and in similar cases. Therefore, the Panel's sanctions are not excessive.

Appellants also argue that the sanctions imposed on Menoutis and American Atlantic are excessive because the violations were first offenses for both. Disciplinary history, however, is only one factor that the Hearing Panel considers in determining sanctions. Other relevant factors include the nature and severity of the violations and the frequency, duration and number of transactions involved in the activity. Given the severe nature of the violations committed by Appellants and their frequency, the sanctions imposed by the Hearing Panel are appropriate.

The Hearing Panel found widespread sales practice fraud at American Atlantic and also found that Menoutis and American Atlantic had failed to establish any type of meaningful supervisory regime to guard against this type of sales practice fraud. In this case, this Committee agrees with the Hearing Panel, which found that not only was there no meaningful supervision, but as a further aggravating factor, American Atlantic's compliance procedures were really an anti-compliance scheme designed to protect the firm rather than customers.

The breadth of the fraud at American Atlantic far outweighs the fact that this is the first disciplinary matter involving Menoutis and American Atlantic. In fact, NFA

---

<sup>19</sup> In re Garwood, NFA Case No. 02-BCC-01 (App. Comm. Oct. 6, 2003).

<sup>20</sup> In re Barkley Financial Corp., NFA Case No. 05-BCC-20 ( App. Comm. July 6, 2007).

has permanently barred other first time offenders with similar fraudulent sales practices.<sup>21</sup> More importantly, In re Barkley Financial Corp., this Committee stated that a permanent bar from membership is the only acceptable sanction in cases with widespread sales practice fraud and no meaningful supervisory procedures, even in cases where it is the first disciplinary matter. Therefore, the Panel's sanctions were not excessive.

#### 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 Appellants as prescribed in CFTC Regulation 171.9. Appellants 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, Appellants may each petition the Commission to stay the effective date of the sanction 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 Nathaniel 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

---

<sup>21</sup> See, In the Matter of Diversified Trading Systems, Inc., NFA Case No. 92-APP-009, on appeal from 92-BCC-014; and In the Matter of Mizner Financial Trading Corp., NFA Case No. 05-BCC-007 (Sept. 27, 2006).

imposed on him have been fulfilled, whichever is later, and render Menoutis permanently ineligible for such service.

**NATIONAL FUTURES ASSOCIATION  
APPEALS COMMITTEE**

Dated: 03-19-09

By: George E. Croyle

/nam(Decision:American Atlantic Financial Corp. (Appeals).caw)

**AFFIDAVIT OF SERVICE**

I, Nancy Miskovich-Paschen, on oath state that on March 19, 2009, 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:

David Stawick  
Office of the Secretariat  
Commodity Futures Trading  
Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

William Penner  
Deputy Director  
Compliance & Registration, DCIO  
Commodity Futures Trading  
Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Gary M. Sinclair, Esq.  
2043 North Mohawk Street  
Chicago, IL 60614

and by hand delivery to:

Ronald V. Hirst, Esq.  
National Futures Association  
300 South Riverside Plaza  
Suite 1800  
Chicago, IL 60606

Richard Foelber  
Deputy Chief  
Division of Enforcement  
Commodity Futures Trading  
Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Tempest Thomas  
Proceedings Clerk  
Office of Proceedings  
Commodity Futures Trading  
Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Robert L. Byman, Esq.  
Jenner & Block LLP  
330 North Wabash  
Chicago, IL 60611

Subscribed and sworn to before me  
on this 19th day of March 2009.

Mary A. Patton  
Notary Public

Nancy Miskovich-Paschen  
Nancy Miskovich-Paschen

