

**NATIONAL FUTURES ASSOCIATION
BEFORE THE
MEMBERSHIP COMMITTEE**

MAR - 2 2010

NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING

In the Matter of:)

NICHOLAS P. PAYNE)
(NFA ID #399018),)

NFA Case No. 09-REG-018

) Registrant.
)

FINAL ORDER REVOKING REGISTRATION

A designated Subcommittee of the Membership Committee held a hearing to determine whether to revoke Nicholas P. Payne's (Payne) registration as an associated person (AP) under the Commodity Exchange Act (the Act).¹ After considering all the evidence submitted by the parties in light of the appropriate standards, the Subcommittee determines to revoke Payne's registration as an AP.

I

PROCEDURAL BACKGROUND

Payne was registered as an AP of Pioneer Commodities LLC (Pioneer) from May 27, 2008 until June 5, 2008. Payne was an AP of Windsor Wealth Management LLC (Windsor) from May 29, 2008 until December 3, 2009. On July 22, 2009, National Futures Association (NFA) issued a Notice of Intent to Revoke Registration (the Notice) to Payne. The Notice alleged that on April 23, 2008, Payne requested that he be granted an extra hour to complete the Series 3 examination based

¹ This matter was heard as part of a consolidated hearing in the matters of Teresia A. Bactawar, NFA docket number 09-REG-017; Nicholas P. Payne, NFA docket number 09-REG-018; Jeremy J. Grena, NFA docket number 09-REG-019; Alexander M. Silverman, NFA docket number 09-REG-020; Lusay A. Wooten, NFA docket number 09-REG-021; Nabil P. Niman, NFA docket number 09-REG-032; and William M. Rill, NFA docket number 09-REG-033.

upon his representation that English is not his primary language. NFA alleged in the Notice that this representation was false. NFA also alleged that the fact that he requested the additional hour based on this false representation disqualifies him from registration under Section 8a(3)(M) of the Act. On August 10, 2009, Payne filed a response to the Notice where he admitted that he requested an extra hour to complete the Series 3 examination based on his representation that English is not his primary language. Payne also admitted that English is the primary language he speaks during business hours and that he requested the extra time as "an accommodation and not with the intent to mislead NFA." Payne, however, denied that this conduct disqualifies him from registration. Payne also indicated that notwithstanding the allegations in the Notice, he intended to show that his registration does not pose a substantial risk to the public.

On December 3, 2009, subsequent to the hearing in this matter, Payne's AP registration was withdrawn. As the Notice was filed while Payne was registered, the Subcommittee may reach a decision on whether to revoke his registration. See *In re First Regal Commodities, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,600 at 30,370 (CFTC May 22, 1985); *In re Vesely*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,737 (CFTC Jan. 11, 1979) at 23,056 n.2; *In re Stovall*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941 (CFTC Dec. 6, 1979) at 23,784 n.36; *In re Mishrick*, CFTC Docket No. 83-55 (CFTC May 29, 1984).

II

EVIDENCE PRESENTED AT THE HEARING

NFA introduced, without objection, a certified copy of the publicly available portions of Payne's registration record, a May 12, 2009 letter to Windsor (Payne's sponsor at that time) from NFA that requested information from Payne on his background, and Payne's written response to the letter. Payne testified on his own behalf and introduced letters from three character witnesses.

NFA's May 12, 2009 letter directed Payne to identify certain information on his background, including his place of birth, his primary language and any other languages he speaks, and how long he has been fluent in those languages. In response, Payne represented that he was born in Albuquerque, New Mexico and that his primary language is English. Payne also indicated that he began learning French when he was thirteen, but that he did not consider himself fluent in that language.

During the hearing, Payne testified that he became temporarily homeless the weekend before he began his Series 3 review class because the home he had been subleasing was foreclosed. Payne said that because of this situation, he needed to quickly start earning an income so he asked Anthony Bobba (Bobba), Pioneer's chief executive officer, and Rocky Disillo (Disillo), the person teaching the examination review course, if there was anything he needed to know that might help him. Bobba and Disillo told Payne that he could get extra time to complete the Series 3 examination if he said English is not his primary language. Payne testified he knew that English is his primary language. He also told Bobba that it was not true to state that English is not his primary language, but Bobba assured him that this type of request was common and the only

way for Payne to get an extra hour. Payne said he now understands that this was not appropriate.

III

FINDINGS AND CONCLUSIONS

For the reasons discussed below, the Subcommittee finds that when Payne requested an extra hour to complete the Series 3 examination he misrepresented that English is not his primary language. The Subcommittee also finds that this conduct is other good cause to disqualify Payne from registration under Section 8a(3)(M) of the Act because the conduct reflects a lack of honesty and an inability to comply with regulatory requirements, and therefore the Subcommittee may revoke his registration under Section 8a(4) of the Act. Finally, the Subcommittee finds that Payne has not met his burden of showing, by a preponderance of the evidence, that his registration would not pose a substantial risk to the public.

Section 8a(4) of the Act authorizes NFA to revoke the registration of a person if cause exists under Section 8a(3) of the Act that would warrant a refusal of registration of such person. Section 8a(3)(M) of the Act provides that a person may be refused registration for other good cause. NFA alleges that Payne misrepresented that English is not his primary language when he requested an extra hour to complete the Series 3 examination, and Payne admitted both in his response to NFA's May 12, 2009 letter and his testimony at the hearing that English is his primary language. NFA alleges that this conduct reflects a lack of honesty and an inability by Payne to comply with regulatory requirements and thus disqualifies him from registration under Section 8a(3)(M) of the Act.

Although Section 8a(3)(M) does not specify the conduct that constitutes "other good cause," the Commodity Futures Trading Commission (the Commission) has said that other good cause under Section 8a(3)(M) exists "if, as a result of any act or pattern of conduct attributable to such person, although never the subject of formal action . . . such person's moral turpitude, **or lack of honesty** or financial responsibility is demonstrated to the Commission." (emphasis added) *Interpretive Statement with Respect to Section 8a(2)(C) and (E) and Section 8a(3)(J) and (M) of the Commodity Exchange Act*, Appendix A to Part 3 of CFTC Regulations, 1 Comm. Fut. L. Rep. (CCH) ¶ 2220L.

The Subcommittee finds that Payne clearly demonstrated a lack of honesty when he falsely claimed that English is not his primary language in order to receive additional time to complete the Series 3 examination. Accordingly, the Subcommittee finds that Payne is disqualified from registration under Section 8a(3)(M) of the Act.

Proof of the existence of a statutory disqualification raises a rebuttable presumption that the applicant or registrant is unfit for registration. The burden then shifts to the registrant to show that, notwithstanding his statutory disqualification, his registration will not pose a substantial risk to the public. *In re Antonacci*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,835 at 36,930 (CFTC Apr. 18, 1990); *In re Horn*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,836 at 36,939 (CFTC Apr. 18, 1990) (Horn II); *In re Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,215 at 35,010 (CFTC Apr. 14, 1988); *In re Akar*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,927 at 31,708 (CFTC Feb. 24, 1986). As

Payne is subject to disqualification under Section 8a(3) of the Act, he must make this showing by a preponderance of the evidence. Commission Regulation 3.60(e)(2) ((17) C.F.R. §3.60(e)(2)); *In re Riley*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶¶26,239 at 42,048 (CFTC Sep. 29, 1994); *In re Bryant*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶¶ 24,847 at 36,997 (CFTC Apr. 18, 1990).

There are two types of evidence that Payne can present to prove that his registration would not pose a substantial risk to the public: evidence of mitigating circumstances relating to the wrongful conduct underlying the statutory disqualification and evidence of rehabilitation since the time of the wrongful conduct. *Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 35,013; *In re Horn*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶¶ 23,731 at 33,889 (CFTC July 21, 1987) (*Horn I*). Having considered Payne's evidence, the Subcommittee concludes that Payne has not met his burden.

Mitigation evidence focuses on the facts and circumstances surrounding the underlying conduct and tends to show that the weight that would ordinarily be accorded the presumption of unfitness should be lessened. *Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 35,013; *Horn I*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 33,889. Payne's mitigation evidence consisted of his testimony regarding his personal situation and the fact that Bobba and Disillo told him he could make the request for extra time by representing that English is not his primary language. In particular, Payne testified that because of his personal situation he needed to pass the Series 3 examination so he could start earning an income. The Subcommittee, however, does not find that this testimony mitigated Payne's conduct in

any way. In fact, the Subcommittee believes that this testimony supports the Subcommittee's conclusion that Payne is not fit to be registered because it shows that Payne is willing to violate regulatory requirements for his personal gain. The Subcommittee also does not believe that Payne's conduct was mitigated by the fact that Bobba and Disillo advised him it was okay to make the request. Payne clearly testified that he knew it was a misrepresentation to claim that English is not his primary language. The Subcommittee has grave concerns regarding a registrant who knowingly lies because a person in a more senior position tells him it is okay to do so.

Payne's rehabilitation evidence is equally lacking. The purpose of rehabilitation evidence is to prove a change in direction in an applicant's or registrant's activities since the time of his disqualification. *Antonacci*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 36,933. Payne's rehabilitation evidence consisted of three letters from Payne's friends commenting on his character. None of these letters, however, provide any evidence of rehabilitation. In addition to being unsworn statements, not one of the writers indicates that he is aware of Payne's disqualifying conduct or discusses how Payne has changed since the disqualifying conduct. In order to provide evidence of rehabilitation, character witnesses "must offer insight into changes in character or business practices since the wrongdoing, rather than just proffer a list of compliments," *In re Lowrance*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,054 at 41,376, 41,382 (CFTC Apr. 15, 1994) (citing *Antonacci*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 36,933) and be "fully aware of the applicant's disqualifying conduct." *In re Marzano* [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,163 at 57,638, 57,641 (CFTC Jan. 4, 2006) (citing

Bryant, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 36,998-36,999.

Clearly the letters submitted by Payne do not contain any of the detail needed to be considered evidence of rehabilitation.

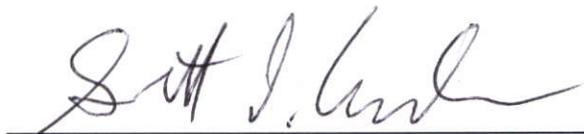
Based upon the entire record before it, the Subcommittee finds that Payne has not shown by the preponderance of the evidence that his registration will not pose a substantial risk to the public. Therefore, the Subcommittee revokes Payne's registration.

IV

APPEAL

This Final Order shall be effective thirty days after it is served on Payne as prescribed by Commission Regulation 171.9. Payne may appeal this Final Order to the Commission under Commission Regulation 171.23 by filing a Notice of Appeal with the Commission within thirty-five days after this Final Order is mailed. Under Commission Regulation 171.22, Payne may petition the Commission to stay the effective date of this Final Order by filing a petition with the Commission within fifteen days after this Final Order is mailed.

Date: 03/02/10

By: 

Scott A. Cordes
Chairman of the Subcommittee

AFFIDAVIT OF SERVICE

I, Nancy Miskovich-Paschen, on oath state that on March 2, 2010, I served copies of the attached Final Order Revoking Registration, by sending such copies in the United States mail, postage prepaid, certified mail, return receipt requested, and by regular mail, first-class delivery, in envelopes addressed as follows:

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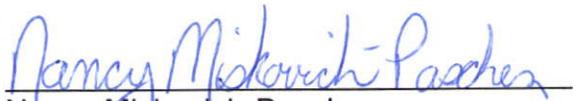
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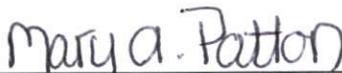
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Nancy Miskovich-Paschen

Subscribed and sworn to before me
on this 2nd day of March 2010.



Notary Public

