

NATIONAL FUTURES ASSOCIATION
BEFORE THE
BUSINESS CONDUCT COMMITTEE

FILED

DEC 22 2008

NATIONAL FUTURES ASSOCIATION
LEGAL DOCKETING

In the Matter of:)
)
MAGMA FUND ADVISORS LTD.)
(NFA ID #389473),)
)
and)
)
DESMOND M. MUTHEMBA)
(NFA ID #314480),)
)
Respondents.)

NFA Case No. 08-BCC-032

COMPLAINT

Having reviewed the investigative report submitted by the Compliance Department of National Futures Association ("NFA"), and having reason to believe that NFA Requirements are being, have been, or are about to be violated and that the matter should be adjudicated, NFA's Business Conduct Committee ("Committee") issues this Complaint against Magma Fund Advisors Ltd. ("Magma") and Desmond M. Muthemba ("Muthemba").

ALLEGATIONS

JURISDICTION

1. At all times relevant to this Complaint, Magma was a commodity pool operator ("CPO") NFA Member. As such, Magma was and is required to comply with NFA Requirements and is subject to disciplinary proceedings for violations thereof.
2. At all times relevant to this Complaint, Muthemba was a principal and associated person ("AP") of Magma and an Associate Member of NFA. As such, Muthemba was and is required to comply with NFA Requirements and is subject to

disciplinary proceedings for violations thereof. Magma is liable for violations of NFA Requirements committed by Muthemba during the course of his activities on behalf of Magma.

BACKGROUND

3. Magma has been a registered CPO and NFA Member since June 6, 2008. It lists George Town, Cayman Islands as its main business location and an Atlanta, Georgia address as the United States ("U.S.") location of its records. Muthemba is Magma's only AP. In addition to Muthemba, Magma lists Trulaw Corporate Services Ltd ("Trulaw") as a principal. Trulaw is an affiliate of a Cayman Islands law firm, and purports to provide management services to various clients.
4. Muthemba was formerly associated with Lake Dow Capital LLC ("Lake Dow"), which was a CPO that was the subject of a Member Responsibility Action in 2005 and that was permanently barred from NFA in 2006, pursuant to a Complaint issued by the Committee, for, among other things, distributing fraudulent pool statements, lying to NFA and converting investor funds. In a related case brought by the Commodity Futures Trading Commission ("CFTC"), Lake Dow was permanently enjoined from committing fraud. Muthemba was also an AP of Risk Capital Trading Group, Inc. ("Risk Capital"), which was an introducing broker NFA Member that NFA disciplined in 2003 for, among other things, sales practice and Registration Rule violations. In addition, a 2003 CFTC enforcement action against that firm resulted in a permanent injunction and fine of more than \$8 million.
5. Richard Clifford ("Clifford") was identified by Magma on NFA's online registration system ("ORS") as Magma's president and chief executive officer, as well as

Magma's contact person for all key business areas (e.g., accounting, compliance, membership) and as its ORS security manager. Clifford was first pending as an AP and principal of Magma between September 2007 and June 2008, when he was withdrawn, and became pending again beginning on September 29, 2008. As was the case with Muthemba, Clifford was a principal and AP of Lake Dow and an AP of Risk Capital.

6. NFA's investigation determined that Magma delisted Clifford as a principal while he continued to serve in that capacity and that Magma and Muthemba used misleading promotional material and failed in executing their duty of diligently supervising Magma's business.

APPLICABLE RULES

7. NFA Compliance Rule 2-2(a) provides that no Member or Associate shall cheat, defraud or deceive, or attempt to cheat, defraud or deceive, any commodity futures customer.
8. NFA Compliance Rule 2-2(f) provides that no Member or Associate shall willfully submit materially false or misleading information to NFA or its agents.
9. NFA Compliance Rule 2-4 provides that Members and Associates shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity futures business.
10. NFA Compliance Rule 2-9(a) provides that each Member shall diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the Member. Each Associate who has supervisory duties shall diligently exercise such duties in the conduct of that Associate's commodity futures activities on behalf of the Member.

11. NFA Compliance Rule 2-29(b)(2) provides that no Member or Associate shall use any promotional material which contains any material misstatement of fact or which the Member or Associate knows omits a fact if the omission makes the promotional material misleading.
12. NFA Compliance Rule 2-29(b)(3) provides that no Member or Associate shall use any promotional material which mentions the possibility of profit unless accompanied by an equally prominent statement of the risk of loss.
13. NFA Compliance Rule 2-29(b)(4) provides that no Member or Associate shall use any promotional material which includes any reference to actual past trading profits without mentioning that past results are not necessarily indicative of future results.
14. NFA Registration Rule 208(a) provides, in pertinent part, that an applicant for registration as a CPO must list with NFA, at the time it files its application, all individuals that are principals of the applicant. Further, within twenty days after an individual becomes a principal of a CPO applicant or registrant, the CPO must list such individual with NFA as a principal.

COUNT I

VIOLATION OF NFA COMPLIANCE RULE 2-2(f) AND NFA REGISTRATION RULE 208(a): PROVIDING FALSE INFORMATION TO NFA AND FAILURE TO LIST A PRINCIPAL.

15. The allegations contained in paragraphs 1, 5, 6, 8 and 14 are realleged as paragraph 15.
16. On or about September 18, 2007, Magma applied to become an NFA Member CPO through ORS and, at the same time submitted filings identifying Clifford as

a principal of Magma and seeking his registration as an AP and an NFA Associate Member associated with Magma.

17. Shortly after September 18, 2007, NFA placed a hold on Clifford's pending registration and principal applications due to unresolved issues raised by his association with Lake Dow and informed Clifford's representative of the hold. As a consequence of the hold on Clifford, Magma's pending application to become an NFA Member CPO was not approved at that time.
18. On or about May 27, 2008, Magma applied through ORS seeking Muthemba's registration as an AP and NFA Associate sponsored by Magma and identifying him as a principal of Magma. Muthemba was approved as a principal of Magma on or about May 30, 2008 and as an AP and NFA Associate on or about June 6, 2008.
19. On or about June 6, 2008, Clifford's pending registration and principal applications with Magma were withdrawn by Magma.
20. On or about June 6, 2008, Magma's application to become an NFA Member CPO was approved.
21. Magma willfully submitted materially false or misleading information to NFA concerning Clifford's role as a principal of the firm in that, when Magma withdrew Clifford from pending principal and AP status on or about June 6, 2008, Clifford continued to act in a manner that required his disclosure as a principal of Magma in that Magma's organizational chart and offering memorandum continued to list Clifford as Magma's president, Clifford performed certain management functions for Magma and Clifford directly or indirectly owned more than 10% of Magma.

22. Beginning on or about June 6, 2008, Magma failed to list Clifford as a principal of Magma within twenty days of him becoming a principal.
23. By reason of the foregoing acts and omissions, Magma is charged with violations of NFA Compliance Rule 2-2(f) and NFA Registration Rule 208.

COUNT II

VIOLATION OF NFA COMPLIANCE RULE 2-4: FAILURE TO UPHOLD HIGH STANDARDS OF COMMERCIAL HONOR AND JUST AND EQUITABLE PRINCIPLES OF TRADE AND FAILURE TO LIST PRINCIPALS.

24. The allegations contained in paragraphs 1, 5, 6 and 9 are realleged as paragraph 24.
25. The observance of high standards of commercial honor and just and equitable principles of trade in the conduct of commodity futures business, in part, prohibits the delisting of an individual as a principal of an NFA Member or applicant when the delisted individual continued to act in a manner that required his disclosure as a principal of the firm after he was delisted, and when the Member or applicant knew or should have known that the continued listing of the individual as a principal would cause the Member or applicant to not obtain registration approval.
26. The allegations contained in paragraphs 16 through 22 are realleged as paragraph 26.
27. Magma delisted Clifford as a principal of Magma on ORS while, in fact, Clifford continued to act in a manner that required his disclosure as a principal of Magma at a time when Magma knew or should have known that the continued listing of Clifford as a principal would cause Magma to not obtain registration approval.

28. By reason of the foregoing acts and omissions, Magma is charged with violations of NFA Compliance Rule 2-4.

COUNT III

VIOLATION OF NFA COMPLIANCE RULES 2-2(a), 2-29(b)(2), 2-29(b)(3) AND 2-29(b)(4): USE OF DECEPTIVE AND UNBALANCED PROMOTIONAL MATERIAL.

29. The allegations contained in paragraphs 1, 2, 4, 7 and 11 through 13 are realleged as paragraph 29.
30. Magma and Muthemba were responsible for reviewing and approving Magma's promotional material.
31. Muthemba approved, and Magma used, promotional material that mentioned the possibility of profit without an accompanying equally prominent statement of the risk of loss. Specifically, a fact sheet available on the firm's website promoted "consistent, superior absolute returns" and at the same time minimized downside risk.
32. Muthemba approved, and Magma used, promotional material that included reference to actual past trading profits without mentioning that past results are not necessarily indicative of future results. Specifically, the fact sheet showed rates of return, but did not contain a comparably prominent disclaimer stating that past performance is not necessarily indicative of future results.
33. Muthemba approved, and Magma used, promotional material that contained material misstatements of fact or which Muthemba and Magma knew omitted facts, the omission of which made the promotional material misleading. Specifically, Magma's July 2008 offering memorandum included background information about Clifford, but failed to include the material information that he had been employed by Lake Dow and Risk Capital. The memorandum also

stated that Clifford is “a principal of the Investment Manager” although he had been previously delisted by Magma as a principal of the firm in ORS and was not disclosed as a principal in ORS in July. Furthermore, the memorandum referred to Merchant Capital SA (“Merchant”) as a firm that Clifford founded, but failed to disclose orders issued against Merchant in 2007 by several Canadian regulatory authorities. The offering memorandum also failed to disclose Muthemba’s prior employment with Lake Dow and Risk Capital.

34. By reason of the foregoing acts and omissions, Magma and Muthemba are charged with violations of NFA Compliance Rules 2-2(a), 2-29(b)(2), 2-29(b)(3) and 2-29(b)(4).

COUNT IV

VIOLATION OF NFA COMPLIANCE RULE 2-9(a): FAILURE TO SUPERVISE.

35. The allegations contained in paragraphs 1 through 4 and 10 are realleged as paragraph 35.
36. At all times relevant to this Complaint, Magma and Muthemba, as the sole Associate with supervisory duties at Magma, were required to diligently exercise their supervisory responsibilities, in part, so as to ensure that Magma complied with NFA Requirements concerning registration and the use and content of promotional material as well as to ensure that Magma did not willfully submit material false or misleading to NFA and that Magma observed high standards of commercial honor and just and equitable principles of trade in the conduct of its commodity futures business.
37. The allegations contained in paragraphs 16 through 22, paragraphs 25 through 27 and paragraphs 30 through 33 are realleged as paragraph 37.

38. The diligent supervision of Magma's employees and agents in the conduct of their commodity futures activities for or on behalf of Magma required, in part, that Muthemba, as the only principal of Magma who was also registered as an AP, be knowledgeable about material information related to Magma's business operations and its solicitation procedures.
39. Muthemba was not knowledgeable about material information related to Magma's business operations in that he could not provide substantive answers to several questions posed by NFA, such as inquiries related to Trulaw and its ownership structure and wire transfers in and out of Magma's bank account. He was also unable to promptly provide certain information to NFA regarding Magma's ownership records and underlying bank statements. Furthermore, while Muthemba identified some wire transfers that related to loans that Magma had received from certain individuals, he was unable to explain any details about those loans or to provide NFA with copies of related loan agreements.
40. Muthemba also provided inconsistent information to NFA concerning Magma's solicitation of U.S. individuals. Muthemba first indicated that U.S. investors did not have access to Magma's website and that Magma was not providing its current promotional material to U.S. individuals. However, during the course of NFA's investigation, an NFA staff member completed an electronic form on Magma's website requesting a login and password to access the site listing a Tennessee address as her location and received a login and password to enter Magma's website. Once on the website, the staff member was able to access additional information about Magma and its funds, such as performance

information from November 2007 through October 2008 and an offering memorandum for a pool named Vesuvius Investment Fund (“Vesuvius”).

41. In addition, Muthemba himself telephoned the NFA staff member and asked several questions about her interest in the fund and the potential investment amount. While he did inform her that Magma did not currently have any funds open for U.S. investors, he discussed Vesuvius and Magma’s plans for launching a U.S. fund in the near future. In addition, Muthemba solicited the NFA staff member to buy an equity position and become a part owner of Magma – claiming that being an equity owner was better than being an investor in the fund and that Magma only offered equity positions to its family, friends and associates.
42. By reason of the foregoing acts and omissions, Magma and Muthemba are charged with violations of NFA Compliance Rule 2-9(a).

PROCEDURAL REQUIREMENTS

ANSWER

You must file a written Answer to the Complaint with NFA within thirty (30) days of the date of the Complaint. The Answer shall respond to each allegation in the Complaint by admitting, denying or averring that you lack sufficient knowledge or information to admit or deny the allegation. An averment of insufficient knowledge or information may only be made after a diligent effort has been made to ascertain the relevant facts and shall be deemed to be a denial of the pertinent allegation.

NFA staff is authorized to grant such reasonable extensions of time in which an Answer may be filed as it deems appropriate. The place for filing an Answer shall be:

National Futures Association
300 South Riverside Plaza
Suite 1800
Chicago, Illinois 60606
Attn: Legal Department-Docketing

E-Mail: Docketing@nfa.futures.org
Facsimile: 312-781-1672

Failure to file an Answer as provided above shall be deemed an admission of the facts and legal conclusions contained in the Complaint. Failure to respond to any allegation shall be deemed an admission of that allegation. Failure to file an Answer as provided above shall be deemed a waiver of hearing.

POTENTIAL PENALTIES, DISQUALIFICATION AND INELIGIBILITY

At the conclusion of the proceedings conducted as a result of or in connection with the issuance of this Complaint, NFA may impose one or more of the following penalties:

- (a) expulsion or suspension for a specified period from NFA membership;
- (b) bar or suspension for a specified period from association with an NFA Member;
- (c) censure or reprimand;
- (d) a monetary fine not to exceed \$250,000 for each violation found; and
- (e) order to cease and desist or any other fitting penalty or remedial action not inconsistent with these penalties.

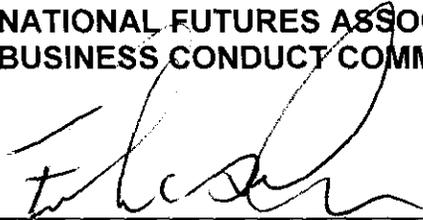
The allegations in this Complaint may constitute a statutory disqualification from registration under Section 8a(3)(M) of the Commodity Exchange Act.

Respondents in this matter who apply for registration in any new capacity, including as an AP with a new sponsor, may be denied registration based on the pendency of this proceeding.

Pursuant to the provisions of CFTC Regulation 1.63, penalties imposed in connection with this Complaint may temporarily or permanently render Respondents who are individuals ineligible to serve on disciplinary committees, arbitration panels and governing boards of a self-regulatory organization, as that term is defined in CFTC Regulation 1.63.

**NATIONAL FUTURES ASSOCIATION
BUSINESS CONDUCT COMMITTEE**

Dated: 12-22-08

By: 
Chairperson

AFFIDAVIT OF SERVICE

I, Nancy Miskovich-Paschen, on oath state that on December 22, 2008, I served copies of the attached Complaint, by sending such copies in the United States mail, first-class delivery, and by overnight mail, in envelopes addressed as follows:

Magma Fund Advisors Ltd.
Anderson Square Building
5th Floor
Shedden Road
George Town, KY1-1103
Cayman Islands
Attn: Richard Clifford
President

Desmond M. Muthemba
1037 Riverbend Club Drive
Atlanta, GA 30339


Nancy Miskovich-Paschen

Subscribed and sworn to before me
on this 22nd day of December 2008.


Notary Public

