UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

LEONARD CARUSELLE v. NEW YORK MERCANTILE EXCHANGE	CFTC Docket No. 05-E-1 OPINION AND ORDER

Leonard Caruselle ("Caruselle"), a former clerk found liable for wrongful trading and committing acts that were substantially detrimental to the interests or welfare of the exchange, challenges the ten-year access denial imposed on him by the New York Mercantile Exchange ("NYMEX").[1] Caruselle defaulted before the NYMEX hearing panel and then argued to the NYMEX appeals panel primarily that the NYMEX was without jurisdiction; the appeals panel rejected Caruselle's arguments. The new arguments that Caruselle raises before the Commission lack merit.[2] Accordingly, we affirm.

NYMEX charged Simon Posen ("Posen"), an exchange member, and Caruselle with violating NYMEX rules when Caruselle engaged in unlawful trading in order to cover up a mistake he made in taking an order in a customer account. Posen, who guaranteed the customer account, settled separately. He paid a fine and restitution, but received no access denial. Caruselle took a different path. Although he had notice of it, Caruselle never answered the

[1] Caruselle is not contesting the cease and desist order imposed against him.

[2] Caruselle was represented by an attorney before the NYMEX appeals panel and on the stay petition in this proceeding. Although Caruselle is no longer represented by counsel, we have taken into consideration the arguments made by his former counsel both before the NYMEX appeals panel and the Commission in his stay application, as well as the arguments raised in this *pro se* appeal.

complaint. On April 9, 2002, the exchange's compliance counsel moved to default him and asked for a five-year access denial. Twenty-two months later, on February 3, 2004, the hearing panel granted the default motion and held that the default should result in finding that the allegations in the complaint were true. The hearing panel imposed a cease and desist order and a ten-year access denial.

Less than a week after the hearing panel's belated ruling on the default motion, Caruselle moved to vacate. The hearing panel denied this motion on May 7, 2004, but back-dated the commencement date of the access denial to June 11, 2002.[3] Caruselle appealed to the exchange's appeals panel, which, on November 21, 2004, rejected the arguments made by Caruselle's counsel and affirmed the hearing panel's decision, including its decision to set June 11, 2002 as the commencement date for the access denial. We note that, at no stage of this case, has Caruselle challenged the factual basis of the decision against him.

The question before the Commission is whether the NYMEX appeals panel erred by affirming the hearing panel's denial of Caruselle's motion to vacate the default judgment.[4] According to NYMEX Rule 8.11(G), a defaulted respondent may file a timely motion to vacate a default and show good cause for his failure to appear.[5] While Caruselle timely filed his motion

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[3] The panel also specified that the access denial applied to COMEX and other NYMEX affiliates. The record indicates, however, that Caruselle worked as a clerk at COMEX from January 2004 through January 2005.

[4] Our review is governed by Rule 9.33(c). In reviewing an exchange's final decision, the Commission determines whether: (1) the exchange's decision was taken in accordance with its rules; (2) fundamental fairness was observed in the conduct of the exchange's proceeding; (3) substantial evidence supports the exchange's final decision; and (4) the exchange's decision is in accordance with the Act and the rules, regulations and orders of the Commission.

[5] Similarly, under Commission Rule 10.94, a motion to set aside a default must meet three criteria: (1) it shall be made within a reasonable time; (2) state the reasons for failure to file or appear; and (3) specify the nature of the proposed defense. *In re Temple*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,097 at 41,628 (CFTC 1994). The Commission has refused to vacate a default judgment where a defaulted party fails in his burden both to show reasonable excuse for his failure to appear and to specify a meritorious defense. *See, e.g., In re Catalfo and Zimmerman*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,636 at 43,672-673 (CFTC 1996) (a general denial of any wrongdoing coupled with a failure to defend attributed to problems with counsel found

to vacate, he failed either to give an acceptable excuse for his failure to appear or to specify a meritorious defense. Before the hearing panel, Caruselle did not present any arguments or facts that could be used as a basis for making findings necessary for vacation of the default.

Before the NYMEX appeals panel, Caruselle challenged NYMEX's jurisdiction. The appeals panel rejected this argument reasoning that timely service of the NYMEX complaint, its jurisdictional notice, and its investigative report were sufficient under exchange rules to retain jurisdiction over an individual who was no longer working on the exchange floor. Overall on this point, it appears that NYMEX's decision is supported by the record, is worthy of deference, and was reached through a proceeding that was fundamentally fair.

On appeal to the Commission, Caruselle again fails to address his failure to appear initially and instead focuses on the fairness of the access denial. Caruselle raises collateral issues before the Commission that do not address the default. Nevertheless, we have considered these issues. Because Caruselle is *pro se,* we have examined all of the arguments that Caruselle presented before each of the forums and find them to be without merit.

At the hearing on his motion to vacate, Caruselle stated that he did not respond to NYMEX's complaint because he did not think that he would be coming back to work at the exchange.[6] *Decision and Order Regarding Respondent's Motion to Vacate* at 5-6 (May 7, 2004). Notably, on appeal, Caruselle does not contest the length of the access denial. With an unexpected change in his career path in 2004, Caruselle seeks an unencumbered return to the futures industry by demanding to be freed from any access denial. With his immediate prospects

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inadequate), *aff'd sub nom., Catalfo v. CFTC*, No. 96-1780, 1997 WL 413575 (7th Cir. July 7, 1997) (unpublished disposition).

[6] Caruselle was employed at State Street Bank from November 2000 until January 2004, when he returned to the futures industry to become a registered clerk at COMEX, an affiliate of NYMEX.

in the futures industry threatened, Caruselle confines his Commission appeal to the access denial against him, but fails to offer any excuse that would justify his complete non-participation in the NYMEX proceeding until early 2004.[7] Caruselle admits that he violated the prohibition against clerk trading and that his wrongdoing resulted in substantial customer losses; he does not challenge the cease and desist order against him. Nonetheless, Caruselle maintains that the access denial is unsupportable on the premise that "equal justice" requires the same sanctions to be imposed upon him as were imposed upon his co-respondent Posen. Because Posen received no access denial, Caruselle reasons, fairness dictates that the Commission must set aside his access denial.

The Commission rejected similar arguments in the past when a non-cooperating respondent charged favoritism in the form of lenient settlements for cooperating respondents. *See In re Briggs*, CFTC Docket No. 98-E-2, slip op. at 23, (CFTC Dec. 4, 2001) (available at www.cftc.gov). Perfect symmetry in sanctioning among respondents is not required. *In re Malato*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,084 (CFTC 1987). Moreover, in contrast to Posen's payment of a fine and securing restitution for the customer losses caused by Caruselle, Caruselle's selective focus on his access denial overlooks both the role he played in the wrongdoing and his failure to make (or offer to make) any restitution.

There has been some concern expressed as to whether NYMEX erred by imposing a lengthier access denial than what was recommended by its compliance counsel. The complaint charged Caruselle with violating NYMEX Rule 8.62(E)(4), which prohibits a clerk from trading in NYMEX contracts. NYMEX Rule 8.65 provides that the possible penalties resulting from a

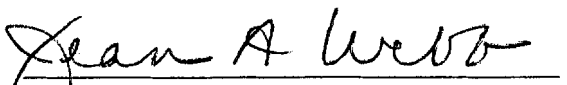
[7] One of Caruselle's belated explanations for his failure to appear was an alleged inability to retain counsel. Even if true, that fact would not justify his complete failure to defend in any way throughout the first two years of this proceeding. *Cf. In re Temple*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,097 (CFTC 1994) (an inability to retain counsel does not excuse a complete failure to appear or participate in a proceeding).

formal proceeding, which occurred in this case, include suspension or permanent revocation of clerk privileges. The complaint also alleged that Caruselle violated NYMEX Rule 8.55(A)(18) by committing acts substantially detrimental to the interests or welfare of the exchange, which is classified as a "major" offense. Under NYMEX Rule 8.55, a major offense is punishable by, *inter alia,* expulsion or suspension. Consequently, Caruselle had notice of the possible penalties. Analogously, the Commission has ruled that its ALJs are not bound to impose a suspension only for the amount of time requested by the Division of Enforcement. *In re Gimbel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,005-06 (CFTC 1988) (no modification required where length of registration suspension imposed tripled what the Division of Enforcement requested), *rev'd and remanded on other grounds, Gimbel v. CFTC*, 872 F.2d 196 (7th Cir. 1989); *cf. Reddy v CFTC*, 191 F.3d 109, 116, 128-9 (2nd Cir. 1999) (upholding Commission's *sua sponte* increase in trading bans over what the ALJ imposed and what the Division of Enforcement sought). The increased length of the access denial, therefore, is not contrary to law.

Based upon the foregoing, we conclude that the final decision of NYMEX is in accordance with the policies of the Act. Accordingly, we affirm.

IT IS SO ORDERED.

By the Commission (Acting Chairman BROWN-HRUSKA, and Commissioners LUKKEN, HATFIELD and DUNN).



Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: June 21, 2005