

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

ANDY SABERI

:
: CFTC Docket No. 01-11
:
: ORDER DENYING STAY
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:

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Respondent Andy Saberi has applied for a limited stay of the sanctions imposed in our March 2, 2005 Opinion and Order pending the resolution of his appeal to the United States Court of Appeals for the Ninth Circuit.¹ In our decision, we imposed a \$110,000 civil monetary penalty, a 30-day trading prohibition, and a cease and desist order as sanctions for Saberi's violation of Section 4a(e) of the Commodity Exchange Act. *In re Saberi*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,331 (CFTC March 2, 2005).² Saberi has limited his request to a stay of his obligation to make payment of the civil monetary penalty; he has not asked for any delay in the imposition of the trading prohibition or the cease and desist order. For the reasons stated below, we deny his request.

Our consideration of this matter is governed by the three-part standard for the issuance of stays pending judicial review set forth in Rule 10.106(b)(2).³ With regard to his claim of a likelihood of success on the merits of his appeal, Saberi essentially repeats the arguments that

¹ Respondent's counsel represents that a timely petition for review has been filed with the court of appeals simultaneously with the filing of the stay petition with us.

² Saberi violated Section 4a(e) by holding 93 August frozen pork belly contracts at the opening of trading at the Chicago Mercantile Exchange ("CME") on August 15, 2000. A CME rule established the 50-contract limit on trading in the August 2000 frozen pork belly futures contract that is at issue in this proceeding. Section 4a(e) prohibits trading in violation of a Commission-approved exchange rule fixing a limit on the number of contracts that a trader may hold.

³ Under this rule, in order to obtain a stay, an applicant must show that (1) he is likely to succeed on the merits of the appeal, (2) denial of the stay would cause irreparable harm to the applicant, and (3) neither the public interest nor the interest of any other party will be adversely affected if the stay is granted.

have been twice considered (by the Administrative Law Judge and by us) and twice rejected. Our reasons for rejecting his arguments are fully explained in our March 2 decision and need not be repeated here. We find nothing in Saberi's application that approaches a showing of a likelihood of success on the merits of his case in the court of appeals.

We have carefully considered Saberi's claim that he will suffer irreparable harm if we deny his request. In his affidavit, Saberi states that he owns several independent gas stations and that his business already has been severely impacted by recent increases in crude oil prices. He states that payment of the civil monetary penalty at this critical time will seriously jeopardize his business by adversely impacting his working capital and liquidity. As a consequence, he states that he may have to reduce operations or employment levels.

We have observed in connection with similar claims in past cases that payment of a civil monetary penalty is insufficient to show irreparable harm. *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,743 (CFTC 1999); *In re Reddy*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,272 (CFTC 1998). Such a payment cannot be irreparable since it may be refunded. *In re Grossfeld*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,961 (CFTC 1997); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,399 (CFTC1992). Moreover, the Commission's regulations provide for the possibility of posting a bond pending appeal in lieu of making full payment. *See* Rule 10.106(b)(3).⁴ While we are mindful of Saberi's circumstances, we believe


⁴ Rule 10.106(b)(3) provides that, as long as neither the public interest nor the interest of any other party is adversely affected, the Commission shall grant any application to stay the effect of a civil monetary penalty once the applicant has filed an appropriate surety bond with the Commission's Proceedings Clerk. Under this rule, if a respondent seeks

that any claim of imminent financial ruin is speculative. *See Grossfeld, supra.* We conclude that Saberi has failed to make an adequate showing of irreparable harm.

A stay pending judicial review of an agency order is a rare event. Applicants for such unusual relief must affirmatively show that the administrative process has fundamentally misfired. Saberi has failed to make the requisite showings under Rule 10.106(b)(2). Accordingly, we deny his stay request.

IT IS SO ORDERED.⁵

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


Catherine D. Daniels
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: April 26, 2005

to stay the imposition of a civil monetary penalty, he must file an appropriate surety bond at the time he applies for relief and demonstrate that neither the public interest nor the interest of any other party will be harmed by the stay.

⁵ The effective date of the civil monetary penalty was stayed through April 15, 2004, pursuant to delegated authority, pending our consideration of this petition. Saberi advised in a separate pleading that were we to deny his stay petition, he intended to proceed under Regulation 10.106(b)(3). He requested an extension of time to arrange a surety bond, should one be necessary, to run from the date of any order we issued denying a stay. The time for addressing the contingency he raised has arrived. The effective date of the civil monetary penalty shall be further stayed from and after April 15, 2005, *nunc pro tunc*, through 15 days after the date of this order.