UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	
ALFRED R. PIASIO and DONALD W. WILSON	:	CFTC Docket No. 97-9
	:	OPINION AND ORDER

Summary

Respondents Alfred R. Piasio ("Piasio") and Donald W. Wilson ("Wilson") appeal from the Initial Decision on Remand, in which the Administrative Law Judge ("ALJ") determined that the civil monetary penalties imposed tentatively by the Commission were appropriate in light of respondents' financial circumstances. The ALJ also held that the cease and desist order imposed by the Commission on Piasio was appropriate.

Respondents argue on appeal that the ALJ erred in restricting the scope of the remand to their ability to pay the tentative penalties. They argue that we intended for the ALJ to determine the propriety of the penalties in light of the gravity of their violations, as well as their finances. Piasio also argues that he should not be subject to a cease and desist order, since he is no longer active in the industry.

We affirm the Initial Decision on Remand in all respects.

Background

This case, instituted in June 1997, charged respondents with offering to enter, entering or confirming wash sales in violation of Section 4c(a)(A) of the Commodity

Exchange Act ("CEA" or "Act"). Respondents filed answers denying any wrongdoing, and the case was heard in February 1999.

The ALJ issued an Initial Decision on July 21, 1999, dismissing the case in its entirety. *In re Piasio,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,714 (ALJ July 21, 1999) ("I.D."). In reaching his decision, the ALJ relied on the Commission's decision in *In re Three Eight Corporation,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 (CFTC June 16, 1993).

On appeal by the Division of Enforcement ("Division"), we vacated the ALJ's decision and found Piasio and Wilson liable as charged in the complaint. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 (CFTC Sept. 20, 2000) ("Remand Order"). After a *de novo* evaluation of the "documentary evidence and reliable testimony," we concluded that "the transactions were intended to achieve wash results in a manner that negated risk." *Id*. at 50,679. The Remand Order distinguished *Three Eight*, rejecting the ALJ's analysis of that case and its application to this one.

We imposed as sanctions cease and desist orders, six-month registration suspensions and tentative civil monetary penalties—$40,000 for Piasio and $25,000 for Wilson. Remand Order, ¶ 28,276 at 50,693. We then remanded the case to the ALJ with instructions to develop the record with respect to respondents' financial circumstances, and to determine whether the tentative civil monetary penalties were appropriate in light of those circumstances.[1] We also granted Piasio an opportunity to demonstrate on

[1]The transactions at issue took place in August and September of 1992 and in February 1993. On October 28, 1992, Congress enacted the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 ("FTPA"), which among other amendments to the Act, repealed the requirement that the Commission consider a respondent's financial circumstances when imposing a civil monetary penalty in an administrative enforcement action brought under the Act. Former

remand that no cease and desist order should be imposed as to him. Piasio contended that his poor health restricted his level of activity to an extent that made it unlikely he would engage in future misconduct. *Id.* at n.55.

On remand, the ALJ issued an order, apparently on his own motion, that directed the parties to include in their filings "a statement commenting on or reconciling any discrepant standards applied in the Commission's decision in *In re Three Eight Corporation* . . . and the case at bar." *In re Piasio*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,409 at 51,030-31(ALJ Nov. 1, 2000) ("Notice and Order").

The Division argued in response that the Remand Order had a limited scope, and that "only the non-gravity elements of 6(d) [i.e., respondents' finances] should be addressed." Division's Prehearing Memorandum on Remand at 1-2 (Jan. 1, 2001). Respondents argued that gravity remained an issue. *See, e.g.,* Piasio's Supplementary Proceeding Prehearing Memorandum (Jan. 15, 2001).

The ALJ thereafter issued an order in which he reversed the position taken in his Notice and Order. He ruled that "[o]n reviewing the record in this case, this court agrees with the Division of Enforcement that the Commission's Order of Remand does not authorize the ALJ to consider the issue of gravity as that issue has been resolved by the Commission." Order at 2 (Jan. 17, 2001). The order stated that "[i]n sum, the Commission determined the fact of the violations, and the gravity of those violations." *Id.* at 1.

The ALJ issued an Initial Decision on Remand as to Wilson finding that the tentative penalty conformed with former Section 6(d). *In re Piasio*, [Current Transfer

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Section 6(d), which contained the repealed requirement, remained applicable to transactions that took place before the FTPA became law.

Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,480 (CFTC Mar. 14, 2001) ("Wilson I.D.R."). The decision reiterated the limited scope of remand and found that Wilson had stipulated through his attorneys that he had the ability to pay the tentative penalty and remain in business. The ALJ therefore found that the amount of the penalty tentatively imposed by the Commission was appropriate in light of the relevant Section 6(d) factors, and ordered Wilson to pay it.

An Initial Decision on Remand as to Piasio was issued on May 9, 2001 *In re Piasio*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,540 (CFTC May 9, 2001) ("Piasio I.D.R."). Therein, the ALJ confirmed the Commission's tentative civil penalty, finding, based on a stipulation between Piasio and the Division, that Piasio had sufficient net worth to pay it.

At the time of the hearing, Piasio was associated with Brookville Investments, a commodity trading advisor. He worked about five hours a month, performing mostly clerical duties. While the case was pending on remand, Brookville Investments ceased doing business, resulting in the termination of Piasio's registration. Finding that "respondent Piasio is no longer registered and that he is not engaging in any activity requiring registration," the ALJ concluded that the suspension imposed by our Remand Order effectively was moot, because "it is not possible to suspend a lapsed registration." Piasio I.D.R. at 51,939. The ALJ declined to relieve Piasio from the cease and desist order, ruling that the medical records he submitted did not demonstrate that he would be unable to resume participating in the futures industry in at least the limited capacity in which he had worked at Brookville.

Both respondents appealed. Piasio argues that the ALJ erred by failing to allow him to address "gravity," as he says was contemplated by the Remand Order. He contends that the Commission's findings that he violated the Act are "inconsistent with its prior decision in *Three Eight*, thereby creating an inequitable result." Piasio App Br. at 1. He asserts that the sanctions imposed were unwarranted in his particular circumstances, *i.e.*, his illness and his future plans not to participate in the industry. He urges the Commission to vacate its liability findings against him. In the alternative, he asks that sanctions imposed against him be eliminated, or at a minimum, that the civil monetary penalty be reduced substantially.

Wilson, like Piasio, argues that gravity remains an open issue and that the ALJ erred by concluding that the Commission had foreclosed it. He also argues that the ALJ erred in finding that the tentative civil penalty was appropriate "merely because [he] has the ability to pay it." Wilson App. Br. at 4. Finally, he argues that the ALJ should have considered that a suspension of registration would put him out of business permanently.

The Division counters both respondents' arguments, contending that "the Commission remanded the case to the ALJ for limited factual determinations required by former Section 6(d) regarding Respondents' financial capacity to pay the tentative penalties assessed." Ans. Br. at 2. "On remand the ALJ correctly determined that there was no basis for modifying the tentative penalties imposed by the Commission." *Id.*

Discussion

Civil Monetary Penalties. The issue of gravity entered these proceedings through the ALJ's error, contained in his Notice and Order of November 1, 2000, inviting the

parties to address it. Although he corrected the error quickly, at the prompting of the Division, respondents have not let the issue die.

Former Section 6(d) provided in pertinent part:

> In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market—the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market—the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation.

Section 6(d) contained two mandatory factors to be considered in the imposition of a civil monetary penalty on an individual respondent: for a person in the futures business, gravity and the impact of the penalty on the business; for anyone else, gravity and net worth. The Remand Order stated plainly that we had determined the gravity factor:

> [W]e vacate the ALJ's decision and conclude that Piasio knowingly participated in eight transactions that were wash sales within the meaning of Section 4c(a)(A) of the Act and three transactions that were offers to enter into wash sales within the meaning of Section 4c(a)(A), and that Wilson knowingly participated in eight transactions that were wash sales within the meaning of Section 4c(a)(A). *Based on the current record, we conclude that the sanctions described above are appropriate to the gravity of respondents' violations, but remand for further development of the record in accordance with this decision.*

Remand Order, ¶ 28,276 at 50,693 (emphasis supplied). Once we determined gravity, only the financial issues arising under former Section 6(d) remained for consideration on remand. Respondents' insistence to the contrary rests on the following statement in our remand order: "Because some of the violations at issue occurred prior to October 28, 1992 and there is no record concerning the mandatory factors in former Section 6(d) of

the Act, we remand this matter for additional proceedings consistent with our recent decision in *In re Nikkhah . . . .*" *Id.*

In relying on that instruction to support the contention that the Commission intended to keep gravity on the table on remand, respondents both overlook the Commission's explicit statement to the contrary and misread our opinion in *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,275 (Sept. 26, 2000). Respondents argue that the Remand Order's reference to Section 6(d) factors in the plural meant gravity and financial condition. The remand order, read in light of *Nikkhah*, as the Remand Order instructed, makes clear that the plural "factors" referred to the two different ways of measuring financial condition. Both apply here—net worth as to Piasio, and business size coupled with the ability to remain in business as to Wilson.

Nikkhah provides an exhaustive analysis of the process to be followed in imposing a monetary penalty when former Section 6(d) applies. *See generally id.* at 50,674-78. In particular, *Nikkhah* states:

> Under Commission precedent, the factors generally material to determining gravity under former Section 6(d) are closely aligned with facts and circumstances material to the determination of respondent's liability for the violations alleged in the Division's Complaint. Consequently, it has proved practical to conduct discovery related to those factors at the outset of a proceeding and to develop the record on those factors at an oral hearing more generally devoted to liability issues.

Id. at 50,674 (footnote omitted). Nikkhah thus makes plain that the gravity element of former Section 6(d) is determined as part of the liability phase of an enforcement proceeding. That was done here as part of the independent review of the record undertaken to resolve the Division's appeal. ¶ 28,276 at 50,691.

Gravity is no longer an issue in this case. It has been determined by the Commission, as have all issues related to liability. In arguing otherwise, respondents inappropriately seek to expand the scope of the remand order. *See In re Zuccarelli*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,637 at 52,431-32 and authority cited therein (CFTC Sept. 7, 2001) ("inferior tribunal's latitude in accepting additional evidence and legal theories on remand is determined by the scope of the remand order").

Respondents do not contest their ability to pay the tentative penalties under the terms of former Section 6(d). Piasio has stipulated that his penalty lies within his net worth.[2] Wilson has submitted deposition testimony and other evidence indicating that the amount will not affect his ability to remain in business.[3] Accordingly, the amounts

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[2]Pursuant to agreements between the Division and respondent Piasio, no further hearing was held on remand and the case was submitted for decision solely on documentary evidence. Piasio and the Division on January 9, 2001 filed a Stipulation as to Net Worth, in which the parties agreed that "to protect Piasio's interest in the privacy of his financial information and to avoid discovery, Piasio will not raise an argument in such additional proceedings based on his net worth and the Division will not and need not produce evidence as to his net worth."

[3]In a pleading on remand filed on November 20, 2000, Wilson's attorney stated that "Wilson has the ability to pay the tentative civil money penalty and remain in business, and it is insulting for anyone to think otherwise." The ALJ treated that statement as a stipulation that the Act's factors under former Section 6(d) relating to ability to pay had been met and that the amount of the penalty was appropriate. The ALJ denied Wilson's request for an oral hearing. In the circumstances of this case, that ruling was neither erroneous nor an abuse of discretion.

In addition, Wilson produced tax returns and other financial documents indicating that his gross commodity-related revenue for 1998 exceeded $400,000 and for 1999 exceeded $450,000. In a deposition taken on remand, the transcript of which constituted part of the evidence submitted to the ALJ, Wilson testified that he was employed in the futures industry, conducting floor brokerage as an associated person of Prudential Securities, Inc. ("Prudential"). (Wilson was an independent floor broker at MGE at the time of the violations.) He testified that in 2000 he had commission income of at least $100,000 and a draw of $96,000 from Prudential, plus between $50,000 and $60,000 in floor brokerage fees from futures commission merchants other than Prudential. He stated that the amount of the penalty would not affect his ability to stay in business or to meet his personal financial obligations.

tentatively imposed in the Remand Order, and found appropriate by the ALJ, are affirmed.

Piasio's Other Arguments. Piasio argues that all his sanctions are inappropriate, given that he is retired and has no plans to return to the futures industry. This argument is inapposite to the civil monetary penalty. With regard to the cease and desist order, the Commission has held that this sanction is appropriate when there is "a reasonable probability that a respondent will again engage in unlawful conduct"). *In re Elliott*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 at 46,008 (CFTC Feb. 3, 1998), *aff'd, Elliott v. CFTC*, 202 F.3d 926 (7th Cir. 2000).

On remand, Piasio supplemented the record with letters from doctors and medical reports, which establish that Piasio suffers from a variety of ailments and that he receives ongoing monitoring as a recovering cancer patient. The evidence, however, does not provide a basis on which the Commission may conclude that he is so ill that he will be unable to return to the industry in any capacity, whether or not registered. Although Piasio recently worked only part-time, as the ALJ points out, he left his position because his firm closed, not because of his health. Given Piasio's past determination to work despite age and infirmity, we cannot accept his contention that a cease and desist order is unwarranted. Accordingly, this sanction will not be lifted.

A statutory disqualification gives rise to the presumption that an individual is unfit for continued registration. Although neither Piasio nor Wilson successfully rebutted the presumption, the passage of time since the wrongdoing, coupled with the lack of direct customer harm, led us to suspend respondents' registrations for six months rather than revoking them. Based on Piasio's loss of registration while the case was pending on

remand, the ALJ declared the suspension moot as to him. This ruling is consistent with our precedent and is affirmed.[4]

Wilson's Other Arguments. In addition to arguing gravity, Wilson contends that the ALJ erred in finding that the tentative civil penalty was appropriate "merely because [he] has to ability to pay it." Wilson App. Br. at 4. This contention is another attempt to reargue the merits of this case and does not warrant discussion.

Wilson also argues that the ALJ should have considered that a suspension of registration would put him out of business permanently. This argument fails. First, it is outside the scope of the Remand Order, which directed the ALJ to take further action only with respect to the civil monetary penalty. Also, even if the ALJ could have addressed Wilson's arguments concerning the registration penalty, they necessarily would have been rejected because the ability to stay in business is not a factor to be considered in the imposition of registration sanctions. Indeed, the ultimate registration sanction—revocation—is intended to put respondents out of the futures business.

Conclusion

Based on the foregoing:

* Respondents Wilson and Piasio shall cease and desist from further violations of Section 4c(a)(A) of the Act;

* Respondent Wilson's registration is suspended for six months; and

[4]*See, e.g., In re Armstrong*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657 at 40,154 (CFTC Feb. 8, 1993) (subsequent history omitted); *In re Rosenthal & Co.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,221 at 29,189-90 (CFTC June 6, 1984). (declining to revoke a registration that lapsed while a proceeding was pending, finding revocation unnecessary to protect the public interest, since the respondent was gone from the industry and could not return to a registered capacity without demonstrating rehabilitation).

* Respondent Wilson shall pay a civil monetary penalty of $25,000 and Respondent Piasio shall pay a civil monetary penalty of $40,000.

IT IS SO ORDERED.[5]

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By the Commission (Chairman NEWSOME and Commissioners HOLUM and ERICKSON).

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

Dated: January 23, 2002

[5]Respondents' sanctions shall become effective 30 days after the date this order is served on the parties. A motion to stay any portion of this order pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. *See* Commission Rule 10.106, 17 C.F.R. § 10.106.