

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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| In the Matter of | : | |
| | : | |
| | : | DOCKET NO. 97-9 |
| ALFRED PIASIO and | : | |
| DONALD W. WILSON | : | ORDER DENYING STAY |
| | : | |

Respondent Donald Wilson has moved for a stay of the cease and desist order, six-month registration suspension, and \$25,000 civil money penalty imposed in our January 23, 2002 Opinion and Order.¹ He argues that the Commission failed to apply the doctrine of *stare decisis* and displayed a cavalier disregard for its well-established policy of deferring to ALJ credibility determinations, and that these actions support an inference that there is a “strong likelihood” he will prevail in his pending appeal before the United States Court of Appeals for the Eighth Circuit. He also claims that a six-month suspension of his registration will result in irreparable harm by destroying his floor broker business. In support of the latter point, Wilson submits an affidavit that asserts “any kind of prolonged separation from [his] customers would be a very serious matter” and offers a “guess” that “a suspension of six months would be sufficient to put [him] out of business all together.” Wilson Affidavit, ¶ 6. The Division of Enforcement (“Division”) argues that Wilson’s showings on likelihood of success on the merits and

¹ *In re Piasio*, CFTC Docket No. 97-9 (CFTC January 23, 2002) (the “Sanctions Decision”). The Commission resolved liability issues and some sanctions issues in an earlier decision that reversed an Administrative Law Judge’s (“ALJ”) decision dismissing the Complaint for a failure of proof. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 (Sept. 29, 2000) (the “Liability Decision”).

irreparable harm do not justify subjecting the public to continuing risk while the Eighth Circuit reviews the Commission's decisions.

We evaluate petitions for stays pending review under standards comparable to those applied by federal courts. *See* Commission Rule 10.106(b)(2).² In this instance, Wilson's presentations on both likelihood of success on the merits and irreparable harm fall well short of the required showings.

The record flatly contradicts Wilson's claim that the Commission cavalierly disregarded its policy of deferring to ALJ credibility determinations.³ As explained in our Liability Decision, we generally defer to a presiding officer's credibility determinations "in the absence of clear error." Liability Decision at 50,685. In this instance, we noted that the ALJ committed clear error by offering general, conclusory findings, failing to evaluate Wilson's explanation for his conduct in light of the uncontested documentary record, and assessing key testimony in light of an improper legal standard. *Id.* at 50,685. Moreover, we carefully explained our *de novo* evaluation of Wilson's credibility, highlighting Wilson's conduct in executing the orders underlying the challenged transaction and his own statements acknowledging (1) that he executed the

² Consistent with that rule, we look to whether Wilson has shown that: (1) he is likely to succeed on the merits; (2) denial of the stay will cause him irreparable harm; and (3) neither the public interest nor the interest of any other party will be adversely affected if the stay is granted.

Our precedent recognizes that the proponent of a stay must generally show both that it is likely the administrative process "fundamentally misfired," *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,399 at 39, 363 (CFTC Sept. 25, 1992), and that the resulting harm will be "both certain and great." *Global Futures Holdings, Inc. v. National Futures Association*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,467 at 47,241 (CFTC Nov. 24, 1998).

³ As noted in our Liability Decision, the ALJ did not specifically address either Wilson's demeanor or overall credibility. In particular, he did not specifically credit Wilson's testimony that he relied on a futures commission merchant involved in the challenged transactions to tell him whether the orders were in compliance with the applicable rules. At best, Wilson can cite the ALJ's general finding that he and Piasio were "honest and honorable individuals." Liability Decision at 50,864.

orders simultaneously because he would otherwise “expose himself to ‘financial risk,’” and (2) did not think that “there would be any risk” in the challenged transaction because he bid and offered the orders “within seconds of each other.” Liability Decision at 50,690. In similar circumstances, the United States Court of Appeals for the Seventh Circuit recognized that the Commission had offered a “good reason” for making an exception to its deference policy and affirmed the result of the Commission’s independent analysis of the factual record. *Elliott v. CFTC*, 202 F.3d 926, 937-38 (7th Cir.), *cert. denied*, 531 U.S. 1010 (2000).⁴

Wilson’s presentation on irreparable harm is incompatible with the relief he requests. Since he presents no evidence that either a cease and desist order or a \$25,000 civil money penalty would result in irreparable harm, there is no basis for staying the effective date of these sanctions. As for the registration suspension, we have no basis to dispute Wilson’s assertion that he will suffer the loss of some customer business while serving the suspension. The size of the loss and its permanence, however, are largely a matter of conjecture. Indeed, Wilson essentially acknowledges that the extent of his loss is speculative by articulating his claim that the suspension would be sufficient to put him out of business all together in terms of a “guess.” Such speculation is insufficient to establish the certain and great harm required by our precedent.

Finally, Wilson’s analysis of the risk to the public interest rings especially hollow in the context of this case. In effect, Wilson argues that protecting his customer relationships is more important than protecting the public from the improper trade

⁴ Wilson’s reference to an alleged failure to follow the doctrine of *stare decisis* is too cryptic to permit detailed analysis. Our Liability Decision discusses relevant Commission precedent and clearly explains how the outcome in this proceeding is consistent with that precedent.

practice demonstrated on the record. Of course, this is exactly the attitude that led to Wilson's misconduct – he chose to accept and act on unlawful instructions from his customer rather than protect the public interest by refusing to participate in a transaction clearly structured to negate market risk. In these circumstances, granting a stay would undermine the message central to this proceeding – sometimes a registrant's duties to the marketplace and the public interest trump any duty he may have to a particular customer.

Accordingly, Wilson's motion for a stay pending judicial review is denied.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioner HOLUM)
(Commissioner ERICKSON, not participating).

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

Dated: February 21, 2002