

UNITED STATES OF AMERICAN
before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. SD-98-4
	:	
DANIEL P. RILEY	:	OPINION and ORDER
	:	

Daniel P. Riley appeals from the Initial Decision of the Administrative Law Judge ("ALJ") denying his application to become registered as a floor broker. The ALJ found Riley statutorily disqualified under Sections 8a(3)(G) and 8a(3)(M) of the Commodity Exchange Act ("CEA" or "Act"). As explained below, the Initial Decision is affirmed.

Background

Riley has been continuously employed in the futures industry since the mid-1980s. He is a telephone clerk and a member of the Index and Options (IOM) Division of the Chicago Mercantile Exchange (CME).¹ He applied to become registered as a floor broker in 1990. For reasons only partially explained on the record, Riley's application languished without dispositive action until 1998, when the Commission instituted this action to deny it.²

¹At the hearing in this matter Riley testified that he worked for the Chicago Execution Corporation, an unregistered company owned by a CME floor broker. The company executes give-up business in the S&P 500 futures pit for institutional customers.

²During the intervening period, Congress enacted the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 ("FTPA"), which amended the CEA to require for the first time that floor traders be registered. With FTPA's passage, the Commission and the National Futures Association ("NFA") were required to register and regulate several thousand persons who held trading privileges at futures exchanges. To allow these persons to maintain their accustomed livelihood without interruption, the Commission granted them "no action" status. "No action" floor traders had to file applications to register, but could continue trading until such time as the Commission took further action on their applications. Riley, who held trading privileges by virtue of his exchange membership, was among those granted no-action status.

The Commission's Amended Notice of Intent to Condition or Refuse Registration, filed on September 10, 1998 (the "Amended Notice"), alleged multiple instances of misconduct under various provisions of CEA Section 8a(3), 7 U.S.C. § 12a(3).³ The ALJ based his decision to deny on only two, which constitute the grounds of this appeal. The first is Riley's alleged willful failure to disclose on his 1990 application his history of criminal theft and two then-pending exchange disciplinary proceedings, in violation of Section 8a(3)(G), 7 U.S.C. § 12a(3)(G). The other is Riley's involvement in a CME disciplinary action in which he was charged with inducing two traders to prearrange a trade after the pit closed. Riley settled the case in 1995 without admitting or denying the charges, on terms requiring him to pay a \$10,000 fine and serve a five-day suspension. The Amended Notice alleged that this incident constituted "other good cause" to deny registration under Section 8a(3)(M), 7 U.S.C. § 12a(3)(M).⁴

In responding to the Notice, Riley asserted that any omissions from his floor broker application resulted from error and confusion, not willfulness, and thus did not amount to a presumptive disqualification under Section 8a(3)(G). He admitted participating in the prearranged trade, but claimed that he acted in good faith, did not harm customers, and neither "attempt[ed] to defraud his customers or to achieve illicit personal gain." Riley's Amended

³The Act's registration provisions were amended by the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294, which increased the categories of causes establishing a *prima facie* case of unfitness. Section 8a(3) sets forth 14 bases on which the Commission may take adverse registration action against a person after a hearing. Of these, 13 address specific circumstances, *e.g.*, failure to meet minimum financial requirements or a felony conviction. Section 8a(3)(M), a catchall provision, allows adverse registration action for "other good cause."

⁴ The Amended Notice also charged Riley with failing to make required amendments to his floor broker application disclosing the prearranged trade and other, lesser, disciplinary actions taken against him during the years his application was pending. The Amended Notice alleged that Riley's failure to amend his application constituted a separate basis to deny his application under Section 8a(3)(M) for other good cause.

Response at 7. The incident did not rise to other good cause for disqualification under Section 8a(3)(M), he contended.

Riley asserted in the alternative that, should the Commission find him presumptively disqualified under any provision of Section 8a(3), he could show mitigating circumstances and proof of rehabilitation sufficient to defeat the presumption. In subsequent pleadings, he stated his intention of contesting the charges at a hearing and outlined the evidence he planned to present.

A hearing was held in Chicago in February 1999, at which Riley appeared with counsel. He testified on his own behalf and as a hostile witness for the Division. His five character witnesses and one expert witness testified and were cross-examined. Those elements of the hearing testimony that bear on the issues on appeal are discussed hereafter. The ALJ issued his Initial Decision in the Division's favor on June 8, 1999, concluding that Riley was subject to statutory disqualifications under Sections 8a(3)(G) and (M); that Riley was not credible; and that Riley had failed to show mitigation or rehabilitation. *In re Riley*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,672 (CFTC June 8, 1999) (“I.D.”).

The ALJ held that the omissions from Riley’s floor broker application were willful and thus a violation of Section 8a(3)(G). He held that the prearranged trade involved intentional customer harm and thus constituted other good cause under Section 8a(3)(M). He also characterized the prearranged trade as conduct that “violates the antifraud provisions of Sections 4b, 7 U.S.C. § 6b and 4c(a), 7 U.S.C. §§ 6b, 6c(a)” of the Act, although violations of those provisions had not been charged in the Amended Notice. *See I.D.*, ¶ 27,672 at 48,181.⁵ Accordingly, the ALJ denied Riley’s application to register as a floor broker.

⁵Because the ALJ found that this incident supported a statutory disqualification under Section 8a(3)(M), he expressly declined to reach the rest of the conduct charged under that provision of the Act, holding that

In arriving at his decision, the ALJ gave little weight to Riley's character witnesses, finding that they lacked sufficient knowledge of his conduct to form reliable views on his alleged rehabilitation. The ALJ also stated that the good opinions of three customers whom Riley called as character witnesses were based on their satisfactory business dealings with him rather than on any searching analysis of his conduct or intimate knowledge of his character. The ALJ found that Riley's expert witness testified credibly and reliably that Riley was rehabilitated from various episodes of youthful delinquent behavior, but was uninformed as to the prearranged trade and the incomplete application.⁶ The ALJ found that Riley failed to give a full account of the latter incidents to his expert, a circumstance that the ALJ cited as further evidence of Riley's lack of rehabilitation.

Discussion

Riley has not challenged the ALJ's finding that he subject to a statutory disqualification under Section 8a(3)(G). His principal argument on appeal is that the ALJ erred in characterizing his conduct in the prearranged trading incident as fraud under Section 4b. Riley argues that the ALJ unexpectedly raised the issue of fraud in the middle of the hearing, and that Riley, consequently, "had no notice that he would be required to defend himself against an uncharged

he "need not sort through the Division's miscellany of alleged facts and acts to determine whether each, individually, or the collection, in whole or in part, constitutes an 'act or pattern' of conduct anathemic to the industry standards set forth in Section 8a(3)(M)." I.D., ¶ 27,672 at 48,177.

⁶As a teenager in the late 1970s, Riley was convicted of the felony theft of a radio from a gas station and the misdemeanor theft of car tires. The tire theft originally was charged as a felony. Both incidents rendered Riley presumptively unfit to be registered: the felony conviction under Section 8a(3)(D), 7 U.S.C. §12a(3)(D), and the misdemeanor under 8a(3)(E), 7 U.S.C. §12a(3)(E). The Notice alleged those incidents as independent reasons for denying Riley's application. The ALJ did not reach those allegations and made no findings under Sections 8a(3)(D) and (E). I.D., ¶ 27,672 at 48,196 n.199. He strongly suggested that had he reached the allegations stemming from Riley's juvenile delinquency, he would have found him rehabilitated with respect to those incidents. *Id.* The Division requested in its answering brief that the Commission find Riley disqualified under Sections 8a(3)(D) and (E) as well as under Sections 8a(3)(G) and (M). Div. Ans. Br. at 17, 19 n.4, 30, 45. Like the ALJ, we find it unnecessary to reach those allegations of the Amended Notice.

fraud.” App. Br. at 11. He also argues that the ALJ erred in failing to find him rehabilitated, and asks the Commission to reweigh the evidence in his favor.

Failure to Disclose. A statutory disqualification under Section 8a(3)(G) for failure to disclose material information requires that the failure be willful, *i.e.*, intentional or reckless.⁷ *In re Squadrito*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,262 at 38,828 (CFTC Mar. 27, 1992).

It is undisputed that Riley’s application failed to disclose either his felony conviction for the theft of a radio or his felony charge for the theft of tires, *see* note 6 *supra*.⁸ Nor did he disclose two exchange disciplinary actions then pending against him.⁹ These matters, along with a 1982 misdemeanor arrest for marijuana possession, surfaced during routine processing of his application by registration staff at the NFA. At the NFA’s prompting, Riley amended his Form 8-R several times. In January 1991, the NFA apprised Riley that it was forwarding his application to the Commission for further handling.

The general thrust of Riley’s defense to the Section 8a(3)(G) allegations was that he found the application form confusing. For instance, in direct testimony, Riley said that he

⁷Section 8a(3)(G) authorizes the Commission to take adverse registration action after a hearing against any person who “willfully made any materially false or misleading statement or willfully omitted to state any material fact in such person’s application or any update thereto, in any report required to be filed with the Commission by this Act or the regulations thereunder, in any proceeding before the Commission or in any registration disqualification proceeding.”

⁸Riley voluntarily revealed the felony conviction in a letter hand-delivered to the NFA on August 17, 1990, after receiving an inquiry from the staff asking him to amplify his employment history and residence history. Riley testified that he had become concerned about his “no” answer and wanted to correct his application on that point. Tr. at 54-56.

⁹Riley was charged by the Chicago Board of Trade (“CBOT”) in 1990 with advising customers and exercising trading discretion, actions beyond the scope of his clerk’s status. The case was settled with the payment of a \$10,000 fine. While that action was pending before the CBOT, Riley changed jobs and began working at the CME. There, he was charged with fighting on the exchange floor and paid a \$1,500 fine to settle the case.

believed his 1990 application to be accurate when he filed it on July 31. Tr. at 51. He stated that a question asking whether the applicant had “ever” been convicted of a felony confused him, since the CME membership application he had recently completed required applicants to go back only ten years. Tr. at 52. He further explained that he answered “no” to the felony conviction question because “I was under the understanding that my conviction there had been expunged. We had paid an attorney to take care of it” Tr. at 53. The application states plainly, however, that expunged convictions must be listed. Nor, he testified, did he understand the form to require disclosure of the pending exchange charges: “You know, when I read it, I thought again, that it had something to do with misappropriation of customer funds and I just, really, even today, I don’t have a good handle on it.” Tr. at 64.

Riley’s assertions of confusion are unavailing. The application form unambiguously asks in question 14B whether an applicant has “**ever**”—emphasis in original—“been charged with, been convicted or found guilty of, or pleaded guilty or nolo contendere to, any felony in a federal state or foreign court?” Question 14A(ii) asks whether an applicant has ever been subject to any “sanction or disciplinary action . . . in an action or proceeding brought by or before any commodity, option or securities exchange . . . ?” Question 16 asks the applicant whether he is “a party to any action, or is there any charge pending, or have you been informed of any action or charge” which could result in a “yes” answer to any part of Question 14.

Given these instructions, Riley clearly was on notice to list his felony conviction, which he belatedly revealed 17 days later, and his pending exchange actions. Charges were filed against him on June 18, 1990 by the CME and on July 18, 1990 by the CBOT. The only possible point of confusion could have been Riley’s obligation to disclose that he was charged with

felony theft for stealing tires given that he subsequently was convicted of a misdemeanor.¹⁰

Riley, however, blanketly asserted that the form was incomprehensible in its entirety, and that it continued to baffle him up to the time of his hearing, although he had had nearly a decade to familiarize himself with its terms.

Because Riley's explanation is not credible, we find that he intentionally failed to make required disclosures in violation of Section 8a(3)(G) of the Act. The presumptive statutory disqualification under Section 8a(3)(G) is established.

Riley has been the subject of several exchange disciplinary actions since he filed his deficient application. He should have filed amendments to his application disclosing those actions also, but failed to do so.¹¹ The Amended Notice charged Riley's failures to amend his application as additional instances of other good cause to deny registration under Section 8a(3)(M). The ALJ declined to base his denial of registration on those charges and we see no need to disturb that decision. We do, however, find that Riley's failures to make required amendments aggravate the original act of filing a materially deficient application. Riley's inability to deal candidly with the Commission is a sufficient flaw, standing alone, to disqualify him from registration.

¹⁰ Riley was not required to disclose his misdemeanor conviction because it occurred more than ten years before he filed his application. Felony convictions or charges of any age must be disclosed. The Division alleged that Riley failed to disclose his arrest and charges in this incident, not his conviction. *See* Amended Notice at ¶¶ 28-29, 32-33.

¹¹In addition to the prearranged trade that is the basis for Riley's disqualification under Section 8a(3)(M), Riley was fined \$1,000 in 1995 for using racially offensive language in referring to a floor broker, and \$2,500 in 1996 for striking and making derogatory comments about another exchange member. The Notice of Final Action issued to Riley in all of these cases stated: "This disciplinary action is reportable on your registration . . . with the NFA. You should report it by filing a Form 3-R with the NFA indicating a change to item 14 on your registration form." In addition, the application form itself states in two places that registration information must be kept current.

The prearranged trade and Section 8a(3)(M). The undisputed facts¹² are that, on March 31, 1994, immediately after the close of trading, Riley approached two exchange members who traded the S&P 500 contract and asked one to buy, and the other to sell, five S&P 500 contracts at 446.60, the lowest price in the closing range and below the settlement price of 446.75. This was discovered and all three were punished. The incident occurred on the Thursday before Good Friday, when the market would be closed. Riley testified:

I was working with a Belgium [sic] fund manager . . . either he or I lost his count going into the close. He asked me to buy 100 contracts and it should've been 200 contracts. Well at the same time another clerk at the end of the desk was working an order to sell 5 with a stop tied to it and an MOC.

Tr. at 103.¹³ Riley explained further:

And that order fell on the floor, physically dropped on the floor and after we had figured out that the Belgium [sic] fund manager needed to purchase another 100 S&Ps that we had miscounted, I walked into the pit and asked two brokers to buy and sell 5. And it was toward the end, either at the end of the post-settlement or after post-settlement, I'm not quite sure. I did ask them to buy and sell 5 and the Merc sanctioned me for that.

Tr. at 103-04. Asked why he engaged in this behavior, he testified:

[W]e wanted to make sure the customers got, you know, both got . . . fills. One, they had a lot of exposure We just wanted to square up the positions and I take responsibility for that. I made a mistake on that. There was probably another way to go about doing it. You know, I think as a registered floor broker, you can take, after the market's closed, you can card up both sides of those trades and put them in an error account. But at the time, I didn't think about it. I used bad judgment.

Tr. at 104-05.

¹²In a Joint Prehearing Statement, Riley stipulated to the accuracy and admissibility of CME documents pertaining to its disciplinary action in the matter of the prearranged trade settlement. Riley also testified freely regarding his role in arranging the trade.

¹³The five-lot order instructed that the contracts were to be sold at "442.00 stop OCO MOC." The order was to be held and executed when and if the market traded at 442—hence, "442 stop." If that price had not been reached by the time the market was about to close, the stop order was to be cancelled and replaced with another order—"OCO" or "order cancels order." The replacement order required the broker to sell five contracts at the market's closing price, or "MOC."

The following conversation took place between Riley and his Belgian customer as Riley sought to address the situation:

Customer: Danny?

Riley: Yeah, Luc. Listen, not that this is going to help anything, but we can, we can sell you five, five-lots. It will reduce your position to 95.

Customer: Okay, it's something.

Riley: Okay, the price will be, the settlement is 446.75. We'll make you, you bought 'em at 446.60.

Customer: 446.60, I bought them."

Riley: Yes.

Customer: Okay.

Riley: Okay, bye.

I.D., ¶ 27,672 at 48,178 n.49 (quoting Div. Exh. Vol. 1, CME Exh. B at 67). *See also* Tr. at 198-200.

The closing range was 446.60 to 446.90. The five-lot seller thus got a price higher than the point at which the stop became effective, but which was also the lowest price of the closing range and 15 points below the settlement price. The ALJ found correctly that "Riley not only arranged the noncompetitive trade, he fixed the price. Moreover, he fixed it in such a manner as to benefit his buying customer—that placed a relatively large order—(and derivatively himself) at the expense of the seller with the smaller order." I.D., ¶ 27,672 at 48,178 (footnotes omitted).

Throughout the course of this proceeding, Riley gave conflicting accounts of his state of mind and the nature and degree of his culpability in this incident. In his response to the Amended Notice, he admitted the Division's allegation that he "induced two traders to prearrange a 5-lot June S&P 500 futures trade," but denied that the conduct constituted good

cause under Section 8a(3)(M). *See* Riley’s Amended Response at ¶ 10. In an affidavit accompanying his Amended Response, he stated that the trade “resulted from an honest but imprudent error to rectify a clerk’s error that resulted in a customer’s order not being executed at the close of trading. . . . Neither customer suffered any pecuniary loss as a result of the transaction.” Affidavit at ¶ 4. He reiterated in a subsequent prehearing submission that he had “established that those incidents involved no intent to harm customers.” Statement of Applicant Daniel P. Riley Pursuant to Regulation 3.60(b)(2)(ii) at 5. He gave similar direct testimony at the hearing. Tr. at 156.

On cross-examination, however, when asked if the selling customer "sold at a lower price than what he was entitled to," Riley answered, "[t]hat’s correct." Tr. at 200. On appeal, Riley acknowledges that the selling customer received a price 15 ticks lower than he would have received in the post-settlement session, but continues to argue that “it is by no means clear that he intentionally harmed this customer." App. Br. at 20 n.5 and accompanying text.

Because Riley admitted prearranging the trade, his evidence regarding his state of mind and the trade’s lack of impact on customers was offered to establish that the admitted conduct lacked sufficient gravity to constitute “good cause.” This effort fails because, as the record shows and as Riley ultimately conceded, the selling five-lot customer did suffer pecuniary harm, albeit minor, and Riley knew it at the time of the transaction. Given Riley's shifting story and self-serving excuses, which are palpable even on a paper record, the ALJ reasonably found Riley not to be a credible witness on the subject of his good faith, his lack of intent to harm any customer, his confusion and uncertainty about other courses of action available to him to resolve these errors, and his alleged failure to appreciate at the time the injurious nature of his misconduct. *See* I.D., ¶ 27,672 at 48,179-80.

In interpreting Section 8a(3)(M), the Commission has stated that "[a]ny inability to deal fairly with the public and consistent with just and equitable principles of trade may render an applicant or registrant unfit for registration, given the high ethical standards which must prevail in the industry." 17 CFR Part 3 Appendix A (*Interpretive Statement with respect to Section 8a(2)(C) and (E) and Section 8a(3)(J) and (M) of the Commodity Exchange Act*). Riley's conduct easily meets this standard.

There remain Riley's argument that the ALJ introduced the issue of fraud in mid-hearing, without notice, and then based much of the Initial Decision on this surprise issue. Riley argues that, in fairness, he should be allowed to present additional evidence on this issue "because he was ambushed by it." App. Br. at 12.

The ALJ questioned Riley and other witnesses extensively on the issue of fraud. The ALJ found that Riley's "participation in prearranged trading violates the antifraud provisions of Sections 4b and 4c(a)" of the Act. I.D., ¶ 27,672 at 48,181. He also observed that, "[i]f the Commission had successfully brought an administrative enforcement action against him for this misconduct, Riley would have been subject to the specific statutory disqualification set forth under Section 8a(2)(E)" *Id.* at n.65. Finally, the ALJ noted, "Riley's misconduct is a 'core' violation of the Act that is subject to criminal prosecution." *Id.*

The allegations of the Amended Notice regarding the prearranged trade do not mention fraud, deceit, customer harm, or anything similar. The CME charged Riley with "engag[ing] in conduct which was substantially detrimental to the interest or welfare of the exchange" and with "engag[ing] in conduct which impaired the dignity and good name of the exchange." The settlement it reached with Riley was limited to the latter.

Once the CME disciplinary action was charged as a basis for denying registration, Riley reasonably should have expected the Commission's proceeding to explore the circumstances and impact of the prearranged trade, including its impact on customers. He did anticipate this issue by asserting in his response to the Amended Notice that no customer harm occurred. The record establishes, however, that one customer was harmed in Riley's effort to aid another.

We do not view the ALJ's statements that Riley's conduct violated Sections 4b and 4c(a) as findings of violations under the CEA, because those provisions of the CEA were not charged. We view his comments as descriptive of his view of the nature of Riley's conduct. The incident of prearranged trading renders Riley disqualified under Section 8a(3)(M)—nothing more.

*Rehabilitation.*¹⁴ *Character witnesses.* Riley presented five character witnesses: three customers—Douglass Kitchen, Salvatore Caputo and Michael Patrick Dowd—all futures industry executives who had done business with him for periods ranging from four to 20 years; a longtime colleague, Horace Payne; and Michael Nance, an individual to whom Riley rendered charitable assistance.

Kitchen said Riley “has a good reputation in the industry as being an honest and forthright floor clerk that does his best to execute his customer orders and service his customers. That's pretty straightforward and that's a consensus that's fairly widely held.” Tr. at 293. Kitchen did not believe Riley posed a risk of defrauding customers, although he was aware of the prearranged trade. He said the incident was less egregious than much pit conduct he had seen, and concluded that “a single incident in a long career is not disqualifying.” Tr. at 308.

¹⁴Riley presented no mitigation evidence separate from his defense under 8a(3)(G) that his failures to disclose were not willful or his defense under 8a(3)(M) that he used bad judgment and lacked intent to harm customers.

Caputo had heard about various disciplinary actions involving Riley, but knew the details of none. He said that in 20 years of dealing with Riley, "he has never damaged me, my customers or my firm." Tr. at 346. Dowd said he had known and done business with Riley for over ten years, and that the very few errors that had occurred had been handled equitably. He said that as a CME board member, he knew generally about the prearranged trade, and did not consider it disqualifying.

Riley's colleague Horace Payne, a broker in the Eurodollar pit, testified that he had known Riley since they were runners at the CBOT more than 20 years ago. He was well-acquainted with Riley's various difficulties, but testified that "[u]nderneath it all, Danny's a good person." Tr. at 365. He said that of all his associates, only Riley had been supportive during the serious illness of Payne's child. Tr. at 366. He also said that Riley had visibly calmed down since his own daughter was born. Tr. at 368. "[T]here was always something buzzing around about Danny and I would say it's been a long time since I've had a phone call saying guess what Danny's done now or what Danny's saying. Not one, it's died down a lot." *Id.*

Riley met Nance in a snowstorm and hired him as a runner. He assisted Nance financially, met his family, and stayed in touch when Nance left the exchange for better employment. Nance, however, had no real knowledge of Riley's misconduct.

"Lay testimony may establish rehabilitation and is considered along with all other evidence." *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,597 at 47,834 (CFTC Apr. 15, 1999). The ALJ gave little weight to the views of Riley's customers, finding that their testimony did no more than reflect satisfactory business arrangements with Riley that they wished to preserve. He called Kitchen's testimony "shamelessly colored by his self-interest in protecting and advancing their mutually advantageous business relationship" and

dismissed Caputo's testimony as "a naked business endorsement." He said that Payne's testimony provided evidence of Riley's "personal maturation," but was "too general" to apply to the issue of Riley's trading integrity, and that Nance's testimony evidenced Riley's charitable impulses, but was not relevant to the issue of Riley's potential risk if allowed to trade.

The ALJ's assessment of the weaknesses in Payne's and Nance's testimony are apt. We have reevaluated his analysis of the testimony of Kitchen, Caputo and Dowd, however, in light of our recent decision in *In re Laken*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,458 (CFTC Feb. 8, 2001). *Laken* holds that a character witness's business or personal relationship with a respondent will not render his opinion unreliable simply on that account.¹⁵ The proper focus is not the relationship, but whether the witness was fully informed of the circumstances material to his judgment; explained the criteria he used in evaluating the respondent; and offered a reasoned explanation for maintaining his opinion in the face of new material information.

Rehabilitation begins with a change in direction. *Zuccarelli*, ¶ 27,597 at 47,833 ("to prove rehabilitation, the respondent must demonstrate that he has changed since the time of his violation"); *accord*, *In re Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,215 at 35,013 (CFTC Apr. 14, 1988); *In re Tipton*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,673 at 22,752 (CFTC Sept. 22, 1978). Riley needed to demonstrate—

¹⁵The Commission acknowledged in *Laken*:

It is unlikely that a person willing to testify as a character witness for a registrant will be completely disinterested in the registrant. Consequently, evidence of a relationship with the registrant is generally not a sufficient basis for rejecting testimony as unreliable. The nature of the interest is simply one factor in the overall evaluation of the quality of the judgment offered by the character witness.

¶ 28,458 at 51,494 n.41.

through character witnesses, his own testimony, or otherwise—a fundamental shift in perspective dating from and after the conclusion of his CME prearranged trading case in 1995, the later of the two incidents underpinning his disqualification.

The principal flaw in the testimony of Kitchen, Caputo and Dowd is not that their good opinions of Riley are based on mutually beneficial business relationships; it is the absence of any suggestion that Riley has changed his direction in life since the prearranged trade. Given their uniform view that the incident was not particularly serious, they hardly would be expected to treat that event as a point of departure for change, nor would they necessarily be purposely watchful for signs of change. If Riley nonetheless had changed, their testimony might have described him in terms that would allow a decisionmaker to infer that change had occurred.

According to Riley's customers, he has been the same man throughout the years of their intercourse: efficient, aggressively attentive to their needs, and according to their lights, scrupulously honest. From their perspective, no change would appear necessary or desirable. Unfortunately, this package of estimable attributes co-exists in Riley with the capacity to cut corners or shade the truth in situations where complying with the applicable rules or telling the truth would be inconvenient or embarrassing. The record demonstrates that this pattern of behavior has persisted for at least the past ten years. We must conclude that Riley's character witnesses could not testify about a material change in Riley because none has taken place.

Riley's Rehabilitation Expert. Riley's expert, forensic psychologist Eric Ostrov, testified that Riley is "action oriented, impulsive, and somewhat rebellious," in addition to being "outgoing and gregarious," and "open to new experiences." Tr. at 473, 481. This personality style leads Riley to make quick decisions without thinking things through, Ostrov said. Tr. at 482. He testified emphatically and extensively that Riley is thoroughly rehabilitated from his

youthful brushes with the law. Of the prearranged trade, Ostrov said that Riley realized in retrospect that it was the wrong thing to do, but emphasized that Riley was not wholly self-serving. According to Ostrov, "there's also an ethical issue for him that he doesn't want his customers to be harmed. . . . If he was just self-serving, he would always be waiting for an opportunity to take advantage." Tr. at 500. Ostrov said that, with counseling, Riley could learn to redirect his instinct to serve his customers aggressively without breaking rules.

"[Y]ou have a man who's been doing this kind of work for 20 years. And sure, if you telescope every error he's made and put them all in a row, it can look pretty bad," Ostrov testified. "If you unfold it and put it in context over huge reams of that time, he was not doing anything bad. He was doing the right thing, he was being successful, working hard for his family." Tr. at 508-09.

Despite Ostrov's expertise, the ALJ properly gave his favorable opinion little weight because Ostrov, while quite familiar with Riley's youthful crimes and the general contours of his personality, displayed an incomplete grasp of both the prearranged trading incident and Riley's failure to make required disclosures. He knew that Riley had broken an exchange rule, but not that one customer had received a disadvantageous price. As Ostrov understood the incident, Riley "saw a way to solve the problem by taking a certain action that would complete the trade without harm to either and maybe to the favor of one." Tr. at 590. Ostrov also did not know that Riley had failed to amend his application to disclose the prearranged trade. When cross-examined on this point, Ostrov could say only, "I must say that for him to omit on an application to the very agency [that] gave him sanctions, in some kind of Machiavellian, manipulative way seems very strange to me . . . but I would want to talk to him about it." Tr. at 594.

Ostrov's limited information stemmed from, once again, Riley's lack of candor. The psychologist worked from the information Riley provided. Riley's conduct with Ostrov mirrored his behavior in completing his application form nine years earlier—he omitted unfavorable information, put the most favorable spin on his actions, even if this required shading the truth, and, consistent with Ostrov's view of his impulsivity, hoped for the best.

Riley filed his deficient application more than ten years ago. As time passes without additional wrongdoing, the weight accorded the presumption of unfitness may lessen. *In re LaCrosse*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,229 at 50,430 n.7 (CFTC Aug. 28, 2000). That cannot be the case here. The prearranged trade, the aggravating circumstances of Riley's repeated failures to amend his application, and finally, Riley's less than candid conduct at his hearing, form a pattern of conduct that require us to conclude that Riley remains unchanged.

Conclusion

Based on our independent review of the record, we find that Riley is subject to statutory disqualifications under Section 8a(3)(G) and Section 8a(3)(M) of the CEA, and that he has failed

to rebut the presumption that he is unfit for registration. His application to become registered as a floor broker is **DENIED**. The Initial Decision's finding of statutory fraud is **VACATED**.

IT IS SO ORDERED.¹⁶

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

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

Dated: August 9, 2001

¹⁶Riley's status as a no-action floor trader, *see* note 2 *supra*, shall be revoked on the date this order is served on the parties. A motion to stay the revocation 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.