

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

_____ :
In the Matter of :
: CFTC Docket No. 01-23

ANTHONY J. DIPLACIDO :
: ORDER GRANTING STAY
: _____ :
: :

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Respondent Anthony J. DiPlacido (“DiPlacido”) has filed an application for stay of the effective date of the Commission’s November 5, 2008 Opinion and Order in this case pending judicial review by the U.S. Court of Appeals for the Second Circuit.¹ The Division of Enforcement filed an Opposition to DiPlacido’s Application (“Opposition”) on December 12, 2008.² We believe that in the unique circumstances of this case involving a matter of first impression, DiPlacido’s Application should be granted, and accordingly we grant the stay.

Our consideration of stay applications pending judicial review is governed by the three-part test in Commission Regulation 10.106(b)(2), 17 C.F.R. § 10.106(b)(2). Under this regulation, 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. We have noted that these requirements, which are a codification of the D.C. Circuit’s decision in *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*, 259 F.2d 291 (D.C.

¹ DiPlacido filed his petition for review with the U.S. Court of Appeals for the Second Circuit on November 18, 2008. See Application of Respondent Anthony J. DiPlacido for a Stay Pending Appeal (“Application”), Exhibit 1.

² Sanctions imposed in the Opinion and Order were to have become effective December 5, 2008, see *In re DiPlacido*, slip op. at 79 n. 55 (CFTC Nov. 5. 2008). Pursuant to delegated authority in Commission Regulation 10.109(a)(7), 17 C.F.R. § 10.109(a)(7), the Deputy General Counsel for Opinions and Review stayed the effective date of the sanctions until December 19, 2008 in order to afford the Division of Enforcement an opportunity to respond to DiPlacido’s Application in accordance with Commission Regulation 10.106(c), 17 C.F.R. § 10.106(c).

Cir. 1958), may be applied “flexibly according to the unique circumstances of each case,” *In re First Commodity Corporation of Boston*, 1987 WL 106853 at *2 (CFTC June 19, 1987).

Although the grant of a stay is a rare event, we believe that the balance of equities favors a stay of our Opinion and Order. With regard to the likelihood of success on the merits, as has already been noted, this case presented a matter of first impression for the Commission, a manipulation case based on manipulative trading floor practices. *DiPlacido*, slip. op. at 1. In imposing liability on DiPlacido, we relied on *In re Henner*, 30 Agric. Dec. 1151 (1971), a final decision of the U.S. Department of Agriculture in a case brought by the Commission’s predecessor agency, the Commodity Exchange Authority, and on valid, well-reasoned precedent interpreting the longstanding anti-manipulation provisions of the Commodity Exchange Act. We note that the *Henner* decision was not itself tested in a court of appeals.

District courts that have stayed their decisions pending appeal have recognized that matters of first impression weigh in favor of granting a stay. *See, e.g., Goldstein v. Miller*, 488 F.Supp. 156, 174 (D. Md. 1980). That is because there is no precedent from a higher court that would mandate the outcome of the case on appeal. *United States v. Fourteen Various Firearms*, 897 F.Supp. 271, 273 (E.D. Va. 1995). The Commission also has recognized that a matter of first impression is a circumstance weighing in favor of a stay. *See First Commodity Corporation of Boston*, 1987 WL 106853 at *2. While we reject DiPlacido’s contentions in his Application that he is likely to succeed because he lacked notice that his actions could be found illegal and that the Commission applied the incorrect standard for establishing manipulation,³ we believe

³ For the reasons discussed in our Opinion and Order, we believe that DiPlacido was on notice that he could be punished for manipulation for his misconduct, *see DiPlacido*, slip op. at 58-61, and that we applied the correct standard for manipulation, *id.* at 41-58.

that he has met his burden under this factor because the case involves a matter of first impression.⁴

The third prong of the stay standard also provides a degree of support for granting a stay. While we believe that the sanctions we imposed serve the public interest in light of the gravity of DiPlacido's misconduct, we do not believe that the public interest or the interest of any other party would be adversely affected if a stay were granted while the court of appeals considers DiPlacido's appeal. We note that under our rules of practice, the effect of the ALJ's Initial Decision was stayed pending our consideration of the appeal from that decision. *See* Commission Regulation 10.84(c)(1), 17 C.F.R. § 10.84(c)(1) (initial decision does not become final as to any party who files a notice of appeal with the Commission). A further delay in the imposition of sanctions pending appellate consideration of a case of first impression would not appear to prejudice the public interest or undermine the Commission's enforcement program.

We do not find persuasive DiPlacido's arguments that he will suffer irreparable harm. We need not address those arguments in detail, however, because we have determined that DiPlacido's showing under the first and third elements of the standard are sufficient to carry his burden in the particular circumstances of this case and the flexibility with which the standards for a stay may be applied.

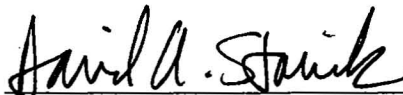
Accordingly, we grant DiPlacido's Application for a stay of our Opinion and Order pending his appeal before the U.S. Court of Appeals for the Second Circuit. In the event that the

⁴ Although the Division contends that the case is not exactly a matter of first impression, given that the *Henner* case decided a trade-based manipulation and has been cited favorably by the Commission and at least one court, Opposition at 7, nonetheless, this case is the first time the Commission has decided a manipulation case based on manipulative trading floor practices and examined the *Henner* case at length in an adjudicatory context.

Commission's Opinion and Order is affirmed on appeal, this order shall be deemed rescinded upon the issuance of the mandate of the Court of Appeals.

IT IS SO ORDERED.

By the Commission (Acting Chairman LUKKEN and Commissioners SOMMERS and CHILTON; Commissioner DUNN not participating).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: December 19, 2008