



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings

2013 JUN -2 09 1:58
RECEIVED
COMMERCIAL
COURT

_____)	
In the Matter of)	
PRESTIGE CAPITAL ADVISORS, LLC,)	CFTC Docket Number: SD 13-05
Registrant.)	
_____)	

INITIAL DECISION ON DEFAULT

Before: Philip V. McGuire,
Commodity Futures Trading Commission

Appearances: Eugenia Vroustouris, Esq., Senior Trial Attorney
Division of Enforcement, Commodity Futures Trading Commission
1155 21st Street, N.W., Washington, DC 20581

Introduction

This is a proceeding to revoke the registration of Prestige Capital Advisors, LLC ("Prestige"), pursuant to Section 8a(2) of the Commodity Exchange Act ("Act"), 7 U.S.C. §8a(2)(2012), and Commission rules 3.60(g) and 10.93, 17 C.F.R. §§ 3.60(g) and 10.93 (2013). Prestige, a Delaware limited liability corporation located in Charlotte, North Carolina, is registered with the Commission as a commodity trading advisor ("CTA").

By motion dated October 24, 2013, the Commission's Division of Enforcement ("Division") has moved for entry of a default judgment against registrant Prestige, based on the failure of Prestige to answer, or otherwise to appear or respond to, the Notice of Intent to Revoke the Registration of Prestige Capital Advisors, LLC ("Notice") issued by the Commission on August 22, 2013. The Notice alleges that Prestige is subject to

statutory disqualification from Commission registration based on two orders entered, on January 25, 2013 and February 22, 2013 ("Default Orders"), by Judge Max O. Cogburn, Jr. of the United States District Court for the Western District of North Carolina, in *Commodity Futures Trading Commission v. Prestige Capital Advisors, LLC, D2W Capital Management, and Toby D. Hunter*, Case No. 3:11-CV-431 (W.D.N.C.) ("*CFTC v. Prestige*"). Judge Cogburn's January 25, 2013 Order, granting the Commission's motion for default judgment: one, found, *inter alia*, that Prestige fraudulently misappropriated pool participant funds, fraudulently solicited prospective pool participants by misrepresenting past performance, and made material false statements to pool participants including account statements reflecting false information regarding trading profits and account values, in violation of anti-fraud provisions of the Commodity Exchange Act ("Act") and the Commission's rules; two, permanently enjoined Prestige from directly or indirectly further violating these anti-fraud provisions of the Act and the Commission's rules; and three, ordered Prestige to pay a \$6.949 million civil monetary penalty. Judge Cogburn's February 22, 2013 Order directed Prestige to pay an additional \$4.1579 million in restitution.

On August 23, 2013, the Commission's Proceedings Clerk served the Commission's Notice on Prestige at its last registered address.¹ Thus, Prestige was properly served pursuant to CFTC rule 3.50.²

¹ The CFTC Proceedings Clerk served the Notice on Prestige at two addresses: one, Prestige's registered address with the Commission, at 112 South Tryon Street, Suite 900, Charlotte, North Carolina 28227; and two, in the care of Toby D. Hunter, a Prestige managing partner and Prestige's designated contact for registration, compliance and enforcement matters, at Hunter's home address at 177 Bromley Village Drive, Unit #303, Fort Mill, South Carolina 29708. The Post Office returned the first package addressed to Prestige's North Carolina address as undeliverable, but reported that Hunter had signed for the package delivered to Prestige in care of Hunter at his South Carolina address.

² Pursuant to CFTC rule 3.30(a), 17 C.F.R. § 3.30(a) (2013), the address of each registrant as submitted on its application for registration or as submitted on the biographical supplement shall be deemed to be the address for delivery to the registrant for any communications from the Commission, including any

Prestige did not respond to the Commission's Notice. Therefore, on September 27, 2013, I issued a Default Notice finding that Prestige was in default, and setting deadlines for the Division to file a motion for entry of a default judgment and for Prestige to file any opposition to the Division's motion.³ Subsequently, the Division timely filed a motion for entry of a default judgment, and Prestige failed to file a response to the Default Notice or to the Division's motion. Accordingly, this matter is ripe for entry of a default judgment.

As a result of its default, Prestige has waived a hearing on all of the issues, and has precluded itself from introducing evidence of mitigation and rehabilitation which is necessary to rebut the strong presumption of unfitness for registration created by the findings of fact, conclusions of law, and sanctions in Judge Cogburn's Default Orders. As a result, the well-plead allegations in the Notice, as augmented by the evidence produced by the Division, and as supplemented by the proposed findings and conclusions in the Division's motion, are deemed true and conclusive for purposes of finding that Prestige is statutorily disqualified from registration under Sections 8a(2)(C) and (E) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 8a(2) (C) and (E) (2012). Thus, as set out below, the Division's motion has been granted, Prestige has been found

summons, complaint, notice and other written documents or correspondence, unless the registrant specifies another address for this purpose. CFTC rule 3.30(b), 17 C.F.R. § 3.30(b) (2013), provides that each registrant, while registered and for two years after the termination of registration, must notify the National Futures Association ("NFA") of any change of address, and that failure to do so may result in an order of default in any Commission or NFA proceedings. Moreover, pursuant to CFTC rule 3.50, 17 C.F.R. § 3.50 (2013), for purposes of an action for the denial, suspension or revocation of registration, service upon a registrant will be sufficient if mailed by registered mail or certified mail return receipt requested properly addressed to the registrant at the address shown on his application or any amendment thereto, and will be complete upon mailing.

³ This Default Notice was served on Prestige, in care of Hunter at his South Carolina address. The Post Office confirmed delivery of the Default Notice. Accordingly, this Initial Decision will be served on Prestige at Prestige's registered address in North Carolina, and in the care of Hunter at his South Carolina address.

to be conclusively unfit for registration and statutorily disqualified from registration, and the CTA registration of Prestige has been revoked.

Findings of Fact

1. Prestige Capital Advisors, LLC ("Prestige") is a Delaware Limited Liability Company with its principal place of business at 112 South Tryon Street, Suite 900, Charlotte, North Carolina 28227. Prestige has been registered with the Commission as a commodity trading advisor since July 2, 2010.⁴

2. On September 6, 2011, the Commission filed a federal civil injunctive action against Prestige and others. *Commodity Futures Trading Commission v. Prestige Capital Advisors LLC, D2W Capital Management, and Toby D. Hunter*, Case No. 3:11-CV-431 (W.D.N.C.) ("*CFTC v. Prestige*"). The CFTC's complaint alleged, *inter alia*, that Prestige, a registered CTA, fraudulently operated a commodity pool and engaged in multiple acts of fraudulent solicitation, misappropriation, and the making of material false statements to pool participants, all in violation of various anti-fraud provisions of the Act and the Commission's rules. The CFTC complaint further alleged that during the period from April 2010 through September 2011, Prestige fraudulently solicited over \$4.686 million in pool participant funds, from which over \$3 million remains unaccounted.

3. On January 25, 2013 and February 22, 2013, in *CFTC v. Prestige*, Judge Max O. Cogburn, Jr., for the U.S. District Court for the Western District of North Carolina, entered Orders granting the Commission's motion for a default judgment,⁵ in which he

⁴ NFA records, attachment to Jung Affidavit and Certification, Exhibit 3, Division's motion.

⁵ Judge Cogburn's Default Orders incorporated by reference the findings and conclusions in the Commission's proposed default order, filed in *CFTC v. Prestige* on November 30, 2012. For Prestige's

one, found that Prestige fraudulently misappropriated pool participant funds, fraudulently solicited prospective pool participants by misrepresenting past performance, and made material false statements to pool participants including account statements reflecting false information regarding trading profits and account values; and two, concluded that by engaging in this fraudulent conduct, Prestige, violated Sections 4b(a)(1)(A)-(C) of the Act, 7 U.S.C. §§ 6b(a)(1)(A)-(C) (Supp. Ill 2009); Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006); Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2006); and Commission rules 4.20(b)-(c) and 33.10, 17 C.F.R. §§ 4.20(b)-(c) and 33.10 (2011). Judge Cogburn's first Default Order permanently enjoined Prestige from directly or indirectly committing any further fraud in violation of Sections 4b(a)(1)(A)-(C), 4c(b), and 4o(1) of the Act, and Commission rules 4.20(b)-(c) and 33.10; and ordered Prestige to pay a \$6.949 million civil monetary penalty.⁶ Judge Cogburn's second Default Order directed Prestige to pay \$4.1579 million in restitution.

Discussion and Conclusions of Law

Section 8a(2) presumption of unfitness

Section 8a(2) of the Act, 7 U.S.C. § 12a(2) (2012), sets out eight grounds for denial, suspension or revocation of registration, known customarily as “statutory disqualifications.” According to the relevant House Agriculture Committee Report, each

convenience, a copy of the Commission's proposed default order in *CFTC v. Prestige* will be attached to its copy of this initial decision.

⁶ On June 13, 2013, in *CFTC v. Prestige*, Judge Cogburn issued a “Consent Order of Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief Against Toby Hunter” stemming from the same violations of the Act and Commission rules. That Order adopted the findings and conclusions in the Commission's proposed default order which had been incorporated by reference in Judge Cogburn's previous two Default Orders against Prestige. As previously noted, Hunter was a Prestige managing partner and Prestige's designated contact for registration, compliance and enforcement matters. In addition, Hunter was indicted by the U.S. Attorney's office for the Western District of North Carolina for alleged criminal activity in connection with his operation of Prestige. According to the Division of Enforcement, Hunter has entered into a plea bargain, with sentencing not yet set as of the date of this Initial Decision.

Section 8a(2) disqualification involves a previous formal determination by a court, or the Commission or other government agency, that a person or firm has engaged in conduct involving “especially grave offenses that are clearly related to a person’s [or firm’s] fitness for registration with the Commission.” H.R. report No. 97-565, Part I at 50 (May 17, 1982). The report further explained that, since each Section 8a(2) disqualification is based upon a previous finding or order by a court, or the Commission or other governmental body, “whether or not a person is subject to such a disqualification generally is readily ascertainable by checking officially maintained records.” *Id.*

In conjunction with the Commission’s Part 3 rules, a Section 8a(2) disqualification generally operates as a strong presumption that a person or firm is conclusively unfit to do business in a relevant registered capacity. The Commission has noted that the strong presumption of unfitness for registration under Section 8a(2) of the Act rests on the common-sense inference that once an individual or firm has undertaken serious wrongdoing – as it has been amply demonstrated here that Prestige has done – a substantial risk exists that the individual or firm will undertake similar wrongdoing in the future. *See In re Akar*, Comm. Fut. L. Rep. ¶ 22, 297 (CFTC February 24, 1986). The strong presumption of unfitness can be rebutted by a convincing showing that allowing a person or firm to become or remain registered will not pose a risk to the public, including, for example, mitigating circumstances, rehabilitation, or close supervision by another registrant. *See* Commission rules 3.60(b)(2)(i) and 3.60(b)(2)(ii)(A)-(C), 17 C.F.R. §§ 3.60(b)(2)(i) and 3.60(b)(2)(ii)(A)-(C) (2013). By defaulting, Prestige has precluded itself from presenting such rebuttal evidence.

Section 8a(2)(C) of the Act

Section 8a(2)(C) of the Act, 7 U.S.C. § 12a(2)(C) (2012), in relevant part, authorizes the Commission to revoke the registration of any person "if such person is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . including an order entered pursuant to an agreement of settlement to which the Commission ... is a party, from . . . (i) acting as a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, [or] associated person of any registrant under this Act . . . or (ii) engaging in or continuing any activity when such activity involves ... fraud" Here, cause exists for statutory disqualification of Prestige pursuant to Section 8a(2)(C) because the Default Orders in *CFTC v. Prestige*, which were entered by the United States District Court for the Western District of North Carolina, a court of competent jurisdiction, permanently enjoin Prestige from committing fraud in violation of the Act and Commission rules.

Section 8a(2)(E) of the Act

Section 8a(2)(E) of the Act, 7 U.S.C. § 12a(2)(E) (2012), in relevant part, authorizes the Commission to revoke the registration of any person "if such person, within ten years preceding the filing of the application [for registration] or any time thereafter, has been found in a proceeding brought by the Commission... (i) to have violated any provision of [the] Act... where such violation involves ... fraud [or] misappropriation of funds..." Here, cause exists pursuant to Section 8a(2)(E), because the Default Orders in *CFTC v. Prestige* found Prestige to have violated various

provisions of the Act and various Commission rules for conduct involving fraud and misappropriation.

ORDER

Prestige Capital Advisors, LLC is statutorily disqualified from registration under Sections 8a(2)(C) and (E) of the Commodity Exchange Act. Accordingly: one, the Division's motion for entry of a default judgment is hereby granted; two, Prestige Capital Advisors, LLC is found conclusively unfit for registration; and three, the registration of Prestige Capital Advisors, LLC is hereby revoked.

Dated January 2, 2014.

A handwritten signature in black ink, appearing to read "Philip V. McGuire". The signature is written in a cursive, somewhat stylized font.

Philip V. McGuire,
Judgment Officer