



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

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Office of
Proceedings
Proceedings Clerk

CFTC Docket No. SD 09-01

In the Matter of

DAVID G. SKLENA,

Registrant.

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ORDER SUSPENDING FLOOR BROKER REGISTRATION

On August 7, 2009, the Commission issued a notice of intent to suspend or modify the floor broker registration of David G. Sklena.¹ Among other things, the Notice represents that on or about March 31, 2009, the United States Attorney for the Northern District of Illinois filed an indictment charging Sklena with 11 felonies, including violations of 18 U.S.C. §1343 (wire fraud), 7 U.S.C §§6b(a)(1)(i), 13(a)(2) (commodity fraud) and 7 U.S.C. §13(a)(5) (noncompetitive futures contract trading).² By virtue of this indictment, the

¹ Notice of Intent to Suspend or Modify Registration Pursuant to Section 8a(11) of the Commodity Exchange Act, as Amended, dated August 7, 2009 ("Notice"). Sklena has been registered as a floor broker since October 1, 1987. Certification of Sandra A. Jung, dated September 23, 2009, ¶5 (attached to Division of Enforcement's Filing of Supplemental Registration Certification for David G. Sklena, dated September 28, 2009); Certification of Sandra A. Guard, dated August 3, 2007, ¶5 (attached as Exhibit A to Division of Enforcement's Proof of Service of the Notice of Intent to Suspend or Modify the Registration of David G. Sklena, dated September 21, 2009 ("Division's Proof of Service")).

² Notice, ¶7.

Division of Enforcement asserts that Sklena is subject to having his floor broker registration suspended or modified under Section 8a(11) of the Act.³

When the time for the registrant's response passed without word from Sklena,⁴ we directed the Division of Enforcement to submit evidence and other papers in support of the Notice.⁵ The Division has made the required filings⁶ and this proceeding is ripe for disposition.

³ *Id.* ¶¶8-9. See 7 U.S.C. §12a(11).

⁴ Sklena had 20 days after the date of service within which to respond. 17 C.F.R. §3.56(b)(3). See Notice, Part III; Letter from Proceedings Clerk to David G. Sklena, dated August 7, 2009. On August 7, 2009, the Proceedings Clerk sent the Notice to Sklena by certified mail addressed to 9237 Keeler Avenue, Skokie, Illinois 60076. Division's Proof of Service, Exhibit B. Sklena signed the return receipt, thereby proving service. *Id.* Consequently, service was proper and completed on August 7th, and Sklena's response was due by August 30, 2009. 17 C.F.R. §§3.50(a), 3.56(b)(3); *In re Buckwalter*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,609 at 39,893 n.2 (CFTC Dec. 10, 1992).

The careful reader might find it odd that the deadline for Sklena's response was a Sunday (August 30th) – a day when the Office of Proceedings is closed. 17 C.F.R. §10.4. We do. However, in contrast to registration proceedings governed by 17 C.F.R. §3.60, Rule 3.56 does not incorporate the provisions of Rule 10.5, 17 C.F.R. §10.5, providing that deadlines that would otherwise fall on a Sunday are extended to Monday. See 17 C.F.R. §3.60(k) (omitting Section 8a(11) proceedings from the list of statutory registration proceedings which are subject to Rule 10.5). And “[a]n ALJ, of course, is bound by Commission rules” – except of course when he isn't. Compare *In re Laken*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,458 at 51,493 n.37 (CFTC Feb. 8, 2001), with *infra* note 10.

⁵ Order, dated September 23, 2009, at 2; Order, dated September 4, 2009; Order, dated September 1, 2009, at 2-3. See 17 C.F.R. §3.56(e)(1).

⁶ Division of Enforcement's Filing of Supplemental Registration Certification for David G. Sklena, dated September 28, 2009; Division of Enforcement's Proof of Service of the Notice of Intent to Suspend or Modify the Registration of David G. Sklena, dated September 21, 2009; Division of Enforcement's Proposed Findings
(continued..)

Once the Commission issues a notice, the rules implementing Section 8(a)(11) require the Division to make the following showings.⁷ First, the registrant must have been charged in a criminal proceeding that (a) involves either a violation of the Commodity Exchange Act or a violation of federal or state law “that would reflect on the honesty or the fitness of the person to act as a fiduciary”⁸ and (b) is punishable by imprisonment for a term exceeding one year.⁹ And second, the continued registration of the person “does, or is likely to, pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission.”¹⁰ If the Division makes these

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of Fact and Conclusions of Law, dated September 21, 2009 (“Division’s Proposed Findings”); Proposed Opinion and Order, filed September 22, 2009; Division of Enforcement’s Notice of Filing Criminal Indictment, dated September 8, 2009 (“Division’s Notice of Indictment”).

⁷ The Division must make these showings “by a preponderance of the evidence.” 17 C.F.R. §3.56(e)(1). Preponderance of the evidence is defined as “evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then plaintiff has not met his or her burden of proof.” *In re Scheck*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,072, at 45,123 n.8 (CFTC June 4, 1997) (quoting *Smith v. United States*, 726 F.2d 428, 430 (8th Cir. 1984) (citation omitted)).

⁸ 17 C.F.R. §3.56(a)(1)(i).

⁹ *Id.*

¹⁰ The published rule actually provides that the Division show that the continued registration of the person “*may pose a threat* to the public interest or *may threaten* to impair public confidence in any market regulated by the Commission....” 17 C.F.R. §3.56(e)(1)(i) (emphasis added). The Commission, however, has effectively re-written the standard contained in Rule 3.56(e)(1)(i) (continued..)

showings, we are required to suspend or modify the person's registration until the criminal charges against him are resolved.¹¹

The Division has met its burden. It produced the indictment referenced in the Notice.¹² The core of the charges is that, in 1994, Sklena schemed with another floor broker, Edward C. Sarvey, to cheat Sarvey's customers.¹³ According to the indictment, the plan involved an arrangement on the floor of the Chicago Board of Trade whereby Sarvey sold 2,274 of his customers' Five Year Treasury Note futures contracts to Sklena noncompetitively at a price that

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through case law. In 2001, it held that the Division's proof is not to be evaluated by the "may pose a threat . . . or may threaten" standard expressly set forth in the rule, but rather by the higher "does, or is likely to pose a threat . . . or threaten" standard contained in 7 U.S.C. §12a(11)(B). *Laken*, [2000-2002 Transfer Binder] ¶28,458 at 51,493. Yet, nearly nine years later, the Commission has not amended Rule 3.56 – even though it no longer follows it in an important respect. *Id.* (stating "that the distinction between the two standards is material"). This is but another example of the Commission's fractured jurisprudence that does not take its published rules of adjudication seriously. See, e.g., *Vargas v. FX Solutions, LLC*, [Current Transfer Binder] Comm. Fut., L. Rep. (CCH) ¶31,360 at 62,885 & n.151 (CFTC June 1, 2009). This indolence concerning the law sows confusion and error. In this case, for example, the Commission confused itself – pleading the wrong standard. See Notice, ¶9.

¹¹ 17 C.F.R. §3.56(f) ("Any order of suspension or modification issued under this section shall remain in effect until such information, indictment, or complaint is disposed of or until terminated by the Commission."); 7 U.S.C. §12a(11)(C). See *In re Anixter*, CFTC Docket No. SD 04-03, 2005 WL 3526521 at *4 (CFTC Dec. 23, 2005).

¹² Indictment, *United States v. Sarvey*, (N.D. Ill. 2009) (09 CR 302) (attached to Division's Notice of Indictment).

¹³ *Id.* Count One, ¶¶1-11.

was lower than the then prevailing market price.¹⁴ It is further alleged that Sklena then noncompetitively resold a portion of the underpriced contracts to Sarvey so that both were unjustly enriched at the expense of Sarvey's defrauded customers.¹⁵

It belabors the obvious to state that the indictment's charges, if proven, would "reflect on the honesty or the fitness" of Sklena "to act as a fiduciary."¹⁶

¹⁴ *Id.* Count One, ¶¶3, 6.

¹⁵ The indictment charges that shortly after purchasing the contracts, Sarvey and Sklena liquidated their fraudulently obtained positions at prevailing market prices, realizing personal gains of \$357,000 and \$1,650,000, respectively. *Id.* Count One, ¶¶7-11.

¹⁶ 17 C.F.R. §3.56(a)(1)(i). Indeed, the indictment meets this standard as a matter of law. If Sklena is convicted, he will be deemed presumptively unfit for registration under Section 8a(2)(D) of the Act, 7 U.S.C. §12a(2)(D). *In re Horn*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,836 at 36,939 (CFTC Apr. 18, 1990). As relevant, that section provides that the Commission may revoke the registration of any person:

if such person has been convicted . . . of any felony that (i) involves any transactions or advice concerning any contract of sale of a commodity for future delivery, or any activity subject to Commission regulation under section 6c or 23 of this title . . . , (ii) arises out of the conduct of the business of a . . . floor broker, floor trader . . . (iii) involves . . . fraud . . . or (iv) involves the violation of section . . . 1343 . . . of Title 18, United States Code....

7 U.S.C. §12a(2)(D).

Section 8a(11)(A) specifies that Section 8a(2)(D) offenses are the type of conduct "that would reflect on the honesty or fitness of the person to act as a fiduciary." 7 U.S.C. §12a(11)(A). See *Laken*, [2000-2002 Transfer Binder] ¶28,458 at 51,495 n.43.

Similarly, the indictment standing alone is *prima facie* proof¹⁷ that Sklena's continued registration "does, or is likely to, pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission."¹⁸ Lastly, the crimes charged in the indictment are also punishable by imprisonment for a term exceeding one year.¹⁹

For these reasons, we **SUSPEND** Sklena's floor broker registration.²⁰

¹⁷ Therefore, there is no need to consider the Division's other evidence. See Division's Proposed Findings, Exhibits F through H.

¹⁸ 7 U.S.C. §12a(11)(B). See *Anixter*, 2005 WL 3526521 at *3 (holding that "[c]harges of fraud and other dishonesty, even if arising from markets that are not directly regulated by the Commission, clearly impact both a registrant's general fitness to participate in" and the "public perception of" markets regulated by the Commission) (emphasis added); *Laken*, [2000-2002 Transfer Binder] ¶28,458 at 51,496 ("To be sure, the indictments are not based on the level of proof required for convictions. Nevertheless, the grand jury's conclusion that there is probable cause to believe Laken committed the alleged felonies is sufficient to support the type of temporary suspension at issue in this proceeding."). In both *Anixter* and *Laken*, the Commission cites *FDIC v. Mallen*, 486 U.S. 230, 245 (1988). *Anixter*, 2005 WL 3526521 at *3, n.4; *Laken*, [2000-2002 Transfer Binder] ¶28,458 at 51,496. In *Mallen*, the Supreme Court affirmed a temporary suspension against a bank official based solely on the existence of an indictment charging him with fraud, recognizing that "the return of [an] indictment itself is an objective fact that will in most cases raise serious public concern" about the fitness of the affected individual to do his duties. 486 U.S. at 244-45. See *Gilbert v. Homar*, 520 U.S. 924, 934 (1997).

¹⁹ Each alleged violation of the Commodity Exchange Act is punishable by "imprisonment for not more than 10 years." 7 U.S.C. §13(a)(2), (5). Violators of the wire fraud statute can be imprisoned up to 20 years. 18 U.S.C. §1343. See 17 C.F.R. §3.56(a)(1)(i).

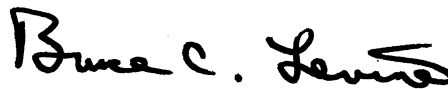
²⁰ The burden rests with the registrant to justify modification of his registration as an alternative to suspension. 17 C.F.R. §§3.56(b)(1)(iv), 3.60(b)(2)(i). Thus, Sklena's failure to participate in this proceeding leaves our consideration of this option stillborn. We note, however, a registrant's burden in this respect is heavy.

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This order shall remain in effect until the disposition of the indictment.²¹

IT IS SO ORDERED.²²

On this 30th day of September, 2009



Bruce C. Levine
Administrative Law Judge

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In order to maintain registration but on a conditioned or restricted basis, the registrant must submit evidence that his registration would be subject to supervisory controls likely both to detect future wrongdoing and protect the public from any harm arising from future wrongdoing. *In re Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,215 at 35,015 (CFTC Apr. 14, 1988) (stating that the “*sin qua non* of every registration decision is evidence that the applicant or registrant will not pose a significant risk to the public”). See 17 C.F.R. §3.60(b)(2)(ii)(C), (f)(3). In the case of a floor broker or trader, the fashioning of supervisory controls that fully protect the public is a daunting enterprise. *Anixter*, 2005 WL 3526521 at *4 (rejecting floor broker’s suggestions for restrictions on his registration falling short of suspension and noting that “access to the trading floor provides numerous opportunities for abusive practices that affect public customers”) (citation and internal quotation marks omitted); *Laken*, [2000-2002 Transfer Binder] ¶28,458 at 51,496-97 (discussing the inadequacy of the registrant’s proposed supervisory mechanisms to detect unlawful agreements between floor brokers and floor traders). Moreover, supervisory controls are never sufficient in themselves, but must be buttressed with evidence of mitigation or rehabilitation. *Horn*, [1990-1992 Transfer Binder] ¶24,836 at 36,942 n.23.

²¹ 17 C.F.R. §3.56(f).

²² Under 17 C.F.R. §§3.56(e)(2), 10.102, any party may appeal this order to the Commission by filing with the Proceedings Clerk a notice of appeal within 18 days of the date upon which this order is served. If no party files a notice of appeal by that time, this order will become effective immediately as a final order of the Commission.