

UNITED STATES OF AMERICA
Before the
U.S. COMMODITY FUTURES TRADING COMMISSION



In the Matter of:)
)
)
Phy Capital Investments,)
LLC and Fabio Bretas de) CFTC Docket No. SD 20-01
Freitas,)
)
Registrants.)

INITIAL DECISION ON DEFAULT

Before: Kavita Kumar Puri, Judgment Officer
Commodity Futures Trading Commission
Washington, D.C.

Appearances: Elizabeth M. Streit, Esq., Chief Trial Attorney
Division of Enforcement
Commodity Futures Trading Commission
525 W. Madison St., Suite 1100
Chicago, IL 60661

I. Introduction

This is a proceeding to revoke the registrations of Phy Capital Investments, LLC (PCI) and Fabio Bretas de Freitas (Bretas) pursuant to Section 8a(2) of the Commodity Exchange Act (the Act, or CEA), 7 U.S.C. § 8a(2), and Commission rules 3.60(g) and 10.93, 17 C.F.R. §§ 3.60(g) and 10.93. PCI is a registered commodity pool operator (CPO) and Commodity Trading Advisor (CTA); and Bretas is a registered associated person (AP) of PCI.

By motion dated August 13, 2020, the Commission's Division of Enforcement (Division) has moved for entry of a default judgment (Motion for Default Judgment)

against registrants PCI and Bretas based on their failures to answer, or otherwise appear or respond to, the Commission's Notice of Intent to Revoke the Registration of Phy Capital Investments, LLC and Fabio Bretas de Freitas (Notice). In this connection, on May 7, 2020 and June 19, 2020, the Office of Proceedings served the Notice on PCI and Bretas at their last registered address.¹ Thus PCI and Bretas were properly served pursuant to CFTC rule 3.50.²

The Commission's Notice alleges that PCI and Bretas are subject to statutory disqualification from Commission registration based on: (1) an Order and Judgment by Default entered on October 2, 2019 by the Honorable Jesse M.

¹ Hard copies of the Notice of Intent to Revoke Registration were mailed by UPS to PCI and Bretas on May 7, 2020 to their last known address (included on the NFA Basic website): Fabio Bretas de Freitas, Phy Capital Investments, LLC, 999 Brickell Avenue, Suite 940, Miami, FL 33131, and Phy Capital Investments LLC, 999 Brickell Avenue, Suite 940, Miami, FL 33131 that were "delivered" on May 8, 2020. The Notice was also sent that same day to Fabio Bretas de Freitas, Bergen County Jail, 160 S. River Street, Hackensack, NJ 07601 because Bretas is currently incarcerated. This mailing was returned to the Commission because "receiver refused delivery".

In addition to sending hard copies, the Office of Proceedings sent the Notice on May 7, 2020 by email to Fabio.Bretas@Phycapital.com and fabiobretasdefreitas@gmail.com. The email to Fabio.Breta@Phycapital received a Mail Delivery System-Bounce message, and the Commission did not receive either a confirmation that the email was read or a delivery failure message for the email to fabiobretasdefreitas@gmail.com.

Because the UPS mailings should have instead been certified or registered mail, I had the Notice of Intent re-served on June 19, 2020 by email and certified mail. The Office of Proceedings received similar delivery failures for the June 19, 2020 Notice.

² Pursuant to CFTC Rule 3.30(a), 17 C.F.R. § 3.30(a), 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 an communications from the Commission, including any summons complaint, notice or 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), provides that each registrant, while registered and for two years after the termination of registration, must notify 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, 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.

Furman of the U.S. District Court of the Southern District of New York in *CFTC v. Bretas de Freitas*, Case No. 1:19-CV-4238 (Default Judgment Order); and (2) the judgment in a parallel criminal case reflecting that Bretas pled and was adjudicated guilty, entered on February 28, 2020 by the Honorable Laura Taylor Swain of the U.S. District Court for the Southern District of New York in *United States v. Bretas de Freitas*, Case No. 1:19-CR-257 (Criminal Judgment).

PCI and Bretas did not respond to the Commission’s Notice, and on July 22, 2020, I issued a Default Notice finding that PCI and Bretas were in default and setting deadlines for the Division to file a motion for entry of a default judgment and for PCI and Bretas to file any opposition to the Division’s motion.³ PCI and Bretas have not responded to the Default Notice or to the Division’s entry of a default judgment motion. The matter is thus ready for entry of a default judgment.

As a result of their defaults, PCI and Bretas have waived a hearing on all of the issues and are precluded from introducing evidence of mitigation and rehabilitation to rebut the strong presumption of unfitness for registration created by the finding of fact, conclusions of law, and sanctions in the Default Judgment Order. Thus, the well-plead allegations in the Commission’s Notice—as augmented by the evidence in proposed findings and conclusions of law in the Division’s Motion for Default Judgment—are deemed true and conclusive for purposes of finding that

³ The Office of Proceedings served that Default Notice in the same manner it served the June 19, 2020 Notice. The Default Notice was “delivered” to an individual at the Miami address, specified in footnote 1 above, on August 3, 2020 according to the United States Postal Service tracking information. However, the Default Notice sent to PCI at the Miami address was returned on August 10, 2020, and the Default Notice sent to Bretas in New Jersey was returned on August 24, 2020. In addition, the email to Fabio.Bretas@phycapital.com received a Mail Delivery System Bounce message, and the Commission did not receive either a confirmation that the email was read or a delivery failure message for the email to fabiobretasdefreitas@gmail.com.

PCI and Breitas are both statutorily disqualified from registration under Sections 8a(2)(C), (E), and (H) of the Act, 7 U.S.C. §§ 12a(2)(C), (E), and (H). Accordingly, as explained below, the Division's Motion for Default Judgment is granted, PCI and Breitas have been found to be unfit for registration and statutorily disqualified from registration, and their registrations have been revoked.

II. Findings of Fact

1. PCI is a Delaware limited liability company.
2. The address it listed with the Commission is 999 Brickell Ave., Suite 940, Miami, Florida 33131.
3. PCI has been registered with the Commission as a CPO and a CTA since September 10, 2014, pursuant to Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2018). In addition, it previously was registered with the Commission in those capacities between April 15, 2010 and November 14, 2013.
4. Bretas has resided in Miami, Florida and has been registered as an AP of PCI since September 10, 2014 through the present pursuant to Section 4k(2) and (3) of the Act, 7 U.S.C. §§ 6k(2),(3). Bretas also previously was registered as an AP of PCI from January 19, 2010 through November 14, 2013. In addition, at all relevant times, Bretas was Chief Executive Officer CEO of PCI.
5. On May 9, 2019, the Commission filed a civil injunctive action against PCI and Bretas. The Commission's complaint alleged, inter alia, that PCI and Bretas engaged in multiple acts of misappropriation of commodity pool and client funds and the issuance of materially false account statements to clients, all in violation of

certain anti-fraud provisions of the Act.

6. On October 3, 2019, U.S. District Judge Furman entered a Default Judgment Order which contained findings of fact and conclusions of law which confirmed, as alleged in the Complaint, that PCI and Bretas committed fraud in violation of Sections 4b(a)(1) and 4c(1) of the Act, 7 U.S.C. §§ 6b(a)(1), 6o(1), by misappropriating client funds and by delivering false account statements to clients. The Default Judgment Order also, in relevant part, permanently restrains PCI and Bretas from:

a. directly or indirectly committing fraud in violation of Sections 4b(a)(1) and 4c(1) of the Act;

b. trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40));

c. entering into any transaction involving “commodity interests” (as that term is defined in Regulation 1.3, 17 C.F.R. § 1.3) for their own personal accounts or for any account in which they have a direct or indirect interest;

d. having any commodity interests traded on their behalf;

e. controlling or directing trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;

f. soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;

g. acting as a principal (as that term is defined in Regulation 3.1(a), 17

C.F.R. § 3.1(a)), agent, or any other officer or employee of any person registered, exempted from registration, or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and

h. engaging in any business activities related to commodity interests.

7. On February 28, 2020, following a plea in a related criminal action, a federal district court adjudged Bretas guilty of a felony, namely, conspiracy to commit wire fraud and commodities fraud under 18 U.S.C. 1349. Bretas's conviction was based on his conduct as an owner and AP of PCI and it involved transactions or advice concerning contracts of sale of a commodity for future delivery, as well as fraud and misappropriation of commodity pool funds. Judgment in a Criminal Case, *United States v. Bretas de Freitas*, No. 1:19-cr-257 (S.D.N.Y. Feb. 28, 2020), ECF No. 30.

8. The Commission filed a Notice of Intent to Revoke the Registrations of PCI and Bretas on May 7, 2020.

9. On May 7, 2020 the Commission's Office of Proceedings served PCI and Bretas with a copy of the Notice by UPS and email, which was accompanied by a cover letter and links to the Commission's Part 3 and 10 Rules. The Notice and a cover letter with links to the Commission's Part 3 and 10 Rules were re-served by certified mail and email on June 19, 2020 to PCI's and Bretas' listed address with the Commission: 999 Brickell Avenue Suite 940 Miami, Florida 33131. The Notice and letter were also emailed to Fabio.Bretas@Phycapital.com and fabio Bretas defreitas@gmail.com and sent by certified mail to Fabio Bretas de

Freitas at Bergen County Jail, 160 S. River Street, Hackensack, NJ 07601.

10. Commission Regulation 3.30(a), 17 C.F.R. § 3.30(a), provides, in relevant part, that the address of each registrant as identified on its application for registration (Form 7-R or Form 8-R) or as submitted on its biographical supplement (Form 8-R) shall be deemed to be the address for delivery to the registrant for any communications from the Commission, including any summons, complaint, notice, or other written documents or correspondence, unless the registrant specifies another address for this purpose.

11. To date, neither PCI nor Bretas have responded to the Notice.

III. Discussion and Conclusions of Law

Section 8(a)(2) of the Act, 7 U.S.C. § 12a(2), sets out eight grounds for denial, suspension or revocation of registration, known customarily as “statutory disqualifications.” According to the relevant House Agricultural Commission Report, each 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 is the case here with PCI and Bretas, 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 Feb. 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). By defaulting, PCI and Bretas have precluded themselves from presenting such rebuttal evidence.

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

Section 8a(2)(C) of the Act, 7 U.S.C. § 12a (2)(C), provides that the Commission may revoke the registration of any person who has been permanently enjoined by order of a court of competent jurisdiction from certain enumerated activities, including but not limited to (i) acting as a futures commission merchant, introducing broker, floor broker, floor trader, CTA, CPO, or an AP of any registrant under the Act, or (ii) engaging in or continuing any activity involving fraud or any

transaction in or advice concerning contracts of sale of a commodity for future delivery or concerning matters subject to Commission regulation under Section 4c or 19 of the Act, 7 U.S.C. §§ 6c or 23.

B. Section 8a(2)(D) of the Act

Section 8a(2)(D) of the Act, 7 U.S.C. § 12(a)(2)(D) provides that the Commission may revoke the registration of any person who has been convicted within ten years preceding the filing of the application for registration or at any time thereafter of any felony that, among other things, (i) involves any transactions or advice concerning any contract of sale of a commodity for future delivery; (ii) arises out of the conduct of the business of, among others, a CTA, AP of a CTA, a CPO or an AP of a CPO, or (iii) involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, forgery, counterfeiting, false pretenses, bribery or gambling.

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

Section 8a(2)(E) of the Act, 7 U.S.C. § 12(a)(2)(E), provides that the Commission may revoke the registration of any person who has been found, in a proceeding brought by the Commission, to have violated the Act by committing fraud or misappropriation of funds within ten years preceding the filing of the registration application or any time thereafter.

D. Section 8a(2)(H) of the Act

Section 8a(2)(H) of the Act, 7 U.S.C. § 12(a)(2)(H), provides that the Commission may revoke the registration of any person if revocation of the

registration of any principal of such person is warranted pursuant to Section 8a(2) of the Act. Section 8a(2)(H) of the Act further provides that “principal,” as used in Section 8a(2) of the Act, includes a general partner of a partnership or a person who owns more than 10% of the voting shares of a corporation. Additionally, pursuant to Regulation 3.1(a)(1), 17 C.F.R. § 3.1(a)(1) (2019), if an entity is organized as a limited liability company, “principal” includes any director, president, chief executive officer, manager, managing member or members vested with the management authority for the entity, any person in charge of a principal business unit, division or function subject to regulation by the Commission, and any person occupying a similar status or performing similar functions, having the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over the entity’s activities that are subject to regulation by the Commission.

The facts set forth above constitute a valid basis for the Commission to revoke PCI’s registration as a CPO and CTA pursuant to Sections 8a(2)(C), 8a(2)(E) and 8a(2)(H) and Bretas’ registration as an AP of PCI pursuant to Sections 8a(2)(C), 8a(2)(D) and 8a(2)(E) of the Act.

ORDER

PCI is statutorily disqualified from registration under Sections 8a(2)(C), 8a(2)(E) and 8a(2)(H) of the Act, and Bretas is statutorily disqualified from registration under Sections 8a(2)(C), 8a(2)(D) and 8a(2)(E) of the Act. Accordingly:

(1) The Division’s Motion for Entry of Default Judgment is granted; (2) PCI and

Bretas are found conclusively unfit for registration; and (3) the registrations of PCI and Bretas are revoked.

Dated: August 31, 2020

/s/ Kavita Kumar Puri
Kavita Kumar Puri
Judgment Officer