

**BEFORE THE BUSINESS CONDUCT COMMITTEE HEARING PANEL
OF THE CBOE FUTURES EXCHANGE, LLC**

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| _____) | |
| In the Matter of:) | |
| Frank Cerisano) | |
| Respondent.) | File No. CFE 18-0003 |
| _____) | ENF USF1 80 |
| | INV USFI 18 |

BCC HEARING PANEL: Robert C. Errico, Hearing Panel Chairman
David T. DeArmey, Hearing Panel Member
John P. Miller, Hearing Panel Member

COUNSEL:

For the Exchange: Greg D. Hoogasian, CFE Chief Regulatory Officer
Margaret Blade, CFE Director of Enforcement

For the Respondent: Samuel Lieberman
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For the Hearing Panel: Jeff Eberhard
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DECISION AND ORDER

I. PROCEDURAL BACKGROUND

This proceeding was instituted by a Panel of the Business Conduct Committee (“BCC”) of the Cboe Futures Exchange, LLC (“CFE” or the “Exchange”) pursuant to Chapter 7 of the Exchange’s Rules. On June 13, 2018, CFE Enforcement issued a Statement of Charges in File No. CFE 18-0003 against Respondent Frank Cerisano, Jr., alleging violations of CFE Rule 608 – Acts Detrimental to the Exchange; Acts Inconsistent with Just and Equitable Principles of Trade; Abusive Practices. The Respondent filed an Answer to the Statement of Charges on July 13, 2018. Pursuant to a Stipulation dated August 6, 2019 signed by Respondent’s counsel and agreed to and accepted by Respondent pursuant to a sworn and notarized Affidavit dated August 13, 2019 signed by Respondent, Respondent withdrew his Answer and stipulated and acquiesced to the allegations in the Statement of Charges as supported by the documentary evidence tendered by CFE Enforcement and to a finding of a violation of CFE Rule 608.

Pursuant to CFE Rule 706, a hearing (the “Hearing”) was held in Chicago, Illinois on August 6, 2019 on the issue of the appropriate sanction for Respondent’s violation of CFE Rule 608 before the Hearing Panel consisting of three members of the BCC. The Hearing was initially set to occur on July 23-24, 2019, but Respondent requested to postpone the Hearing. Pursuant to a Pre-Hearing Order issued by the Hearing Panel dated July 15, 2019, the Hearing Panel granted Respondent and his counsel leave to attend the Hearing via videoconference and set the Hearing for 9:00 a.m. on August 6, 2019. On July 24, 2019, to accommodate an additional request from Respondent’s counsel, the Hearing Panel set the Hearing to commence at 1:00 p.m. on August 6, 2019. On the morning of August 6, 2019, Respondent’s counsel informed the Hearing Panel that “[d]ue to a sudden conflict,” Respondent would not be appearing at the Hearing via videoconference. Respondent’s counsel was unable to secure Respondent’s attendance at the

Hearing despite CFE Rule 706(c)'s requirement that "Respondent shall appear personally at the hearing."

The Hearing in this matter proceeded as scheduled on August 6, 2019. CFE Enforcement counsel appeared in person. Counsel to Respondent appeared via videoconference. Both CFE Enforcement and Respondent's counsel were given a full opportunity to present evidence and argument regarding the appropriate sanction for Respondent's violation of CFE Rule 608. The Hearing record consists of fifty-two (52) pages of transcript, as well as thirteen (13) exhibits submitted by CFE Enforcement, six (6) exhibits submitted by Respondent, and the Stipulation and Affidavit regarding Respondent's violation of CFE Rule 608.¹ In addition, both CFE Enforcement and Respondent's counsel submitted precedent and presented argument supporting their respective views regarding the appropriate sanction to be imposed in this matter.

This decision represents the unanimous decision of the members of the Hearing Panel pursuant to CFE Rule 709. The factual findings and legal conclusions herein are based solely on the record, including the parties' submissions, established during the Hearing held in this matter. Where applicable, the Hearing Panel has applied "preponderance of the evidence" as the applicable standard of proof. With respect to the sanction imposed herein, the Hearing Panel considered the factors set forth in CFE Rule 711(b), the precedent submitted by the parties, and the arguments the parties or their counsel presented during the Hearing. If an argument made by the parties is not specifically discussed in this Decision, the argument has been accepted to the extent that it is consistent with this Decision and rejected to the extent that it is not.

¹ CFE Enforcement's Exhibits shall be referred to herein as CX ____, Respondent's Exhibits as RX ____, and the Stipulation together with the Affidavit as Joint Exhibit ("JX") 1.

II. DISCIPLINARY JURISDICTION OF THE EXCHANGE

CFE Rule 308(c) provides in relevant part:

Any Person initiating or executing a transaction on or subject to the Rules of the Exchange directly or through an intermediary, and any Person for whose benefit such a transaction has been initiated or executed, expressly consents to the jurisdiction of the Exchange and agrees to be bound by and comply with the Rules of the Exchange in relation to such transactions, including but not limited to, rules requiring cooperation and participation in investigatory and disciplinary processes.²

Respondent was alleged to have initiated and executed transactions on the Exchange, and he stipulated to the allegations set forth in the Statement of Charges, and thus was subject to the disciplinary jurisdiction of the Exchange.

III. THE CHARGES

The Statement of Charges alleges that Respondent violated CFE Rule 608 – Acts Detrimental to the Exchange; Acts Inconsistent with Just and Equitable Principles of Trade; Abusive Practices, which provides:

It shall be an offense to engage in any act detrimental to the Exchange, in conduct inconsistent with just and equitable principles of trade or in abusive practices, including without limitation, fraudulent, noncompetitive or unfair actions.³

In particular, Respondent had a prior disciplinary matter with the Exchange (Case No. 16-0002), in which it was alleged that in conjunction with a pending CFE investigation (ICT No. 107310), Respondent failed to comply with three interview requests made by CFE Regulation.⁴ That disciplinary matter was resolved pursuant to a Letter of Consent, which was accepted by the BCC of the Exchange on June 28, 2016.

² CFE Rule 308(b).

³ CFE Rule 608.

⁴ CX 1 at p. 4.

Pursuant to the Letter of Consent, Respondent agreed to the following sanction:

A suspension from direct or indirect access to CFE. The suspension shall begin July 1, 2016, and **continue indefinitely**, until such time as [Respondent] appears for an interview concerning ICT No. 107310, as scheduled by CFE Regulation (emphasis added).⁵

The Statement of Charges alleges that while that suspension was effective, Respondent accessed CFE, entered orders, and executed trades at various times between February 14, 2018 and April 4, 2018.⁶

IV. THE HEARING

Prior to the Hearing, CFE Enforcement submitted an Exhibit List containing fourteen (14) proposed exhibits, and Respondent submitted six (6) proposed exhibits. The day before the Hearing, the parties submitted a Stipulation signed by counsel to both parties that provided that the parties stipulated as follows:

1. All document[s] offered into evidence by either Respondent or CFE shall be deemed authentic for the purposes of this disciplinary action only.
2. The need to establish a foundation for any of the documents offered into evidence by either Respondent or CFE is hereby waived by the parties.
3. CFE's Exhibit 7 is to be removed from documentary evidence, and instead, Respondent stipulates that Respondent's electronic mail address is [xxxxxxx].
4. Respondent withdraws his Answer dated July 18, 2019, and, solely for the purposes of this action, does not deny the allegations set forth in the Statement of Charges, supported by the documentary evidence tendered to the BCC. In light of that, Respondent acquiesces to a finding of a Rule 608 violation. Accordingly, the hearing should proceed on the Sanction portion only.⁷

The hearing proceeded on the afternoon of August 6, 2019. Respondent did not appear at the Hearing. Therefore, the Panel provisionally accepted the Stipulation conditioned on receiving

⁵ CX 3 at p. 11.

⁶ CX 1 at p. 4.

⁷ JX 1.

a signed and sworn Affidavit from Respondent that he understood and accepted the Stipulation.⁸ The Hearing Panel set a deadline of August 12, 2019 for Respondent to submit that Affidavit. On the evening of August 12, 2019, Respondent's counsel requested a one-day extension of time to submit the Affidavit, which the Hearing Panel granted. Respondent provided the signed and sworn Affidavit on August 13, 2019.⁹

The Hearing proceeded on the issue of the appropriate sanction for Respondent's violation of CFE Rule 608. CFE Enforcement presented evidence and argument that Respondent's violation was egregious, willful, and warranted a severe sanction. In particular, in a prior disciplinary matter with CFE (Case No. 16-0002), Respondent had settled charges based on his failure to appear for three interviews requested by CFE Regulation as part of an investigation of his trading activity and agreed to an indefinite suspension from any direct or indirect access of the Exchange until he participated in an interview relating to his underlying trading activity.¹⁰ Respondent never appeared for an interview and still has not done so to-date, and the suspension was never lifted.¹¹ Despite that and while the suspension was in effect, Respondent filled out an account application and opened an online brokerage account with a firm called TradeStation.¹² On Respondent's TradeStation account application, he listed annual income of \$1 million and liquid net worth of \$1-to-\$5 million.¹³ Respondent's counsel contended that those figures included Respondent's father's money but presented no evidence to that

⁸ At the hearing, CFE Enforcement made a proffer of evidence supporting the violation of Rule 608 in the event Respondent did not submit the Affidavit. That proffer included the admission of the thirteen (13) CFE Enforcement documentary exhibits supporting the violation. Respondent's counsel did not object to the admission of the exhibits or contest liability in any way.

⁹ JX 1.

¹⁰ CX 1 at p. 4; CX 3 at pp. 10-11; Transcript ("Tr.") at pp. 13-14.

¹¹ CX 1 at p. 4; Tr. at p. 14.

¹² CX 5; Tr. at p. 14.

¹³ CX 5 at p. 17; Tr. at p. 24.

effect.¹⁴ Over \$200,000 was deposited in the TradeStation account, and between February 14, 2018 and April 4, 2018, Respondent entered over 1,200 orders and traded over 1,400 VIX futures contracts on the Exchange.¹⁵ Respondent's TradeStation account was liquidated on April 5, 2018.¹⁶ A CFTC Form 102A (Identifying and Reporting a Special Account) identifying Respondent as the account holder needed to be filed in the event Respondent's open positions exceeded a volume threshold level.¹⁷ In accordance with that requirement and because of the size of Respondent's positions, TradeStation filed a CFTC Form 102A, which alerted regulators to Respondent's access of and trading on the Exchange.¹⁸

At the Hearing, Respondent's counsel did not dispute any of those underlying facts. Counsel focused on Respondent's financial condition, arguing that Respondent was currently unemployed, had a debilitating medical condition, and lacked sufficient assets to pay a fine of the magnitude sought by CFE Enforcement.¹⁹ CFE Enforcement disputed the contention that Respondent lacked sufficient assets.²⁰ Respondent's 2018 tax return showed \$172,112 in interest income from a pass-through trust of which Respondent was the beneficiary and \$1.2 million in capital gains, for total taxable income of approximately \$1.4 million in 2018.²¹ Respondent's counsel argued that the source of that income was a family trust, the disposition of which Respondent did not control, and that Respondent relied on that trust to provide income to him for life.²²

¹⁴ Tr. at pp. 27, 29.

¹⁵ CX 10 (Exchange generated report); CX 11 (TradeStation account statements); Tr. at p. 15. Respondent also traded other futures products on a different futures exchange. CX 11.

¹⁶ CX 11 at p. 114; Tr. at pp. 32-33. CFE Enforcement did not present evidence regarding any profit or loss associated with Respondent's trading on the Exchange and did not seek any disgorgement.

¹⁷ 17 C.F.R. 15.03.

¹⁸ CX 4 at p. 12; Tr. at pp. 16-18.

¹⁹ Tr. at pp. 23-24, 27, 34-35, 45-46.

²⁰ Tr. at pp. 24-25.

²¹ RX 6; Tr. at pp. 24-25.

²² Tr. at pp. 26, 49.

V. DISCUSSION AND FINDINGS AND CONCLUSIONS

Liability for Respondent's violation of CFE Rule 608 is established by virtue of the Stipulation and Affidavit, including the facts set forth in the documentary evidence to which Respondent stipulated.²³ The issue to be decided is the appropriate sanction to be imposed. In considering the appropriate sanction in this matter, the Hearing Panel is guided by the considerations set forth in CFE Rule 711(b), which provides, "All disciplinary sanctions imposed pursuant to this Chapter 7 shall be commensurate with the violations committed, clearly sufficient to deter recidivism or similar violations by other market participants and take into account the Respondent's disciplinary history."²⁴

CFE Enforcement seeks to permanently ban Respondent from directly or indirectly accessing the Exchange, and Respondent's counsel does not appear to object to such a ban.²⁵ The sole point of contention between the parties is the appropriate amount of the fine to be imposed. CFE Enforcement's position is that in relevant precedent, the Commodity Futures Trading Commission ("CFTC") has established a floor of \$100,000 for similar violations and that extenuating facts and circumstances regarding Respondent's violation here warrant an even higher sanction.²⁶ Respondent's position is that a "reduced amount, something in the neighborhood of more of a 15 to 25 thousand [dollar fine]" is warranted.²⁷ This Decision addresses each position, and the precedent and arguments provided by the parties, in turn.

A. CFE Enforcement's Precedent

In support of its position, CFE Enforcement provided two precedent cases involving the situation here—violation of a prior consent order imposing a trading suspension or restriction.

²³ JX 1; CX 1-13.

²⁴ CFE Rule 711(b).

²⁵ Tr. at pp. 22-24, 34, 36, 41, 45-46.

²⁶ Tr. at p. 44.

²⁷ Tr. at p. 46.

The first case is *Decision and Order, In the Matter of David C-H Ho* (File No. 04-0014), in which the respondent was charged with a violation of CBOE Rule 4.1-*Just and Equitable Principles of Trade* and other rules. In a prior disciplinary matter, the respondent had agreed to a settlement under which he was to serve an 8-week suspension from Exchange membership.²⁸ As part of that suspension, the respondent was allowed to “enter closing options orders only from off of the Exchange Floor within the limits of CBOE Rule 8.7.”²⁹ The order defined “closing options orders” to be “strictly limited to orders to purchase only those option series that Respondent was short immediately prior to the start of his suspension, and orders to sell only those options series that Respondent was long immediately prior to the start of his suspension, in total quantities for each series that are no greater than the total quantity that Respondent was short or long, respectively, in each series immediately prior to the start of his suspension.”³⁰

The respondent subsequently violated the suspension order by effecting fourteen (14) opening options transactions from his firm’s market-making account on eight (8) trade dates between January 20, 2004 and March 12, 2004.³¹ The respondent also engaged in 693 stock transactions from his firm’s market-making account during that period.³² Based on those facts, the BCC found that respondent had violated CBOE Rule 4.1-*Just and Equitable Principles of Trade*.³³

With respect to the sanction, the respondent in Ho testified that his violation was not intentional because he believed he could “balance” positions based on his conversations with Enforcement staff and advice from his formal counsel.³⁴ Specifically, the respondent testified

²⁸ *In the Matter of David C-H Ho* at p. 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at pp. 19-20.

³⁴ *Id.* at pp. 17, 21.

that, despite the suspension order, he initially believed he could neutralize the risk associated with open positions by entering additional options or stock transactions other than closing orders that offset his open positions.³⁵

The BCC rejected the respondent's argument, holding that the terms of the suspension were "explicit and clear as to what option or stock activity Mr. Ho would be permitted to engage in during his suspension time period" and that the respondent breached the suspension order "with willful disregard on the very first day of his suspension."³⁶ The BCC imposed a sanction of a three-year suspension and \$50,000 fine.³⁷

The second precedent case submitted by CFE Enforcement is *Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief Against Daniel Shak* in *CFTC v. Shak* (Case No. 14-C-1632 D.D.C. Mar. 26, 2015). In that case, Shak voluntarily consented to an Administrative Order in November 2013 "prohibiting him from engaging in certain commodity futures trading during the daily closing period."³⁸ Trading during the close meant trades executed between 1:29:00 to 1:30:00 p.m. eastern.³⁹ Six months later, Shak "violated the CFTC Order by trading two outright June 2014 gold futures contracts during the closing period on May 22, 2014."⁴⁰ Despite only involving a "one-time incident involved a 2-lot," the respondent was charged with violating the trading restriction in the Order and the Commodity Exchange Act.⁴¹ The parties settled those new charges pursuant to a Consent Order providing for a Civil Monetary Penalty of \$100,000, a permanent injunction against violating the

³⁵ *Id.*

³⁶ *Id.* at p. 22, 27.

³⁷ *Id.* at p. 28.

³⁸ *CFTC v. Shak* at p. 1.

³⁹ *Id.* at p. 6.

⁴⁰ *Id.* at p. 1.

⁴¹ *Id.* at pp. 6-7.

trading restriction in the prior Administrative Order, and a two (2)-year injunction against certain other trading activity.⁴²

As discussed further below, the Hearing Panel finds that the two precedent cases provided by CFE Enforcement are relevant, involve violations of prior trading restrictions, and support the sanction ordered herein.

B. Respondent's Precedent

None of Respondent's precedent cases involve violations of prior consent orders, trading restrictions, trading suspensions, or similar conduct. Accordingly, none of Respondent's precedent is directly relevant to the violation at issue in this matter or the appropriate sanction for such violation. Instead, Respondent's precedent cases fall within one of two categories: 1) cases in which the financial condition of the respondent had some bearing (or was sought to have some bearing) on the appropriate sanction to be imposed or 2) cases involving other types of violations in which an exchange and respondent agreed to a fine that was less than that sought to be imposed by CFE Enforcement on Respondent here.

In the first category, Respondent submits SEC v. Universal Express, Inc., 646 F.Supp.2d 552 (S.D.N.Y. 2009), in which the Court imposed a \$14.2 million monetary penalty against one of the defendants, comprised of \$9.8 million in disgorgement, \$3.4 million in pre-judgment interest, and a \$1 million civil monetary penalty.⁴³ The defendant sought a lower monetary award based on his claimed inability to pay, but the Court rejected that argument, holding, "Even if the Court were inclined to entertain his argument, [defendant] has provided no evidence of financial hardship other than his own self-serving and conclusory assertions."⁴⁴ The Hearing Panel concludes that Universal Express does not support Respondent's contention that he should

⁴² *Id.* at pp. 7-8.

⁴³ 646 F.Supp.2d at 556.

⁴⁴ *Id.* at 565.

be subject to a lesser fine than that sought by CFE Enforcement, and in fact supports CFE Enforcement's position given that the Court imposed a large fine and rejected the defendant's request for a reduction based on inability to pay.

In Respondent's next precedent case—SEC v. Svoboda, 409 F.Supp.2d 331 (S.D.N.Y. 2006)—the court did reduce the monetary penalties sought against the defendants based on their financial condition, but did so based on facts and circumstances not present here. First, both defendants in Svoboda had already paid substantial criminal fines and were ordered to pay over \$1.2 million in disgorgement.⁴⁵ Second, defendants had submitted extensive evidence demonstrating their inability to pay, including sworn financial statements, account statements, and bankruptcy filings.⁴⁶ Based on those factors, the court concluded that “imposing the maximum penalties, which would total over \$3 million for each defendant, would be inappropriate given each defendant's financial situation, especially considering the other sums already assessed by this opinion and by Judge Berman [in the criminal matters].”⁴⁷ Accordingly, the court imposed civil monetary penalties of \$150,000 against one defendant and \$250,000 against the other.⁴⁸ The Hearing Panel concludes that this case does not support Respondent's request for a reduced fine given that it did not involve the type of violation at issue here, involved proof of an inability to pay rather than just mere assertion, and involved factors not present here (such as significant criminal fines and disgorgement).

Respondent also submitted four enforcement matters—(i) *Decision Accepting Letter of Consent* in In the Matter of David Lambert and DBF GP LLC (CFE 17-0006); (ii) *Decision Accepting Letter of Consent* in In the Matter of Vicko Perasovic (CFE 18-0005); (iii) *Notice of*

⁴⁵ 409 F.Supp.2d at 338, 344-45.

⁴⁶ *Id.* at 348.

⁴⁷ *Id.*

⁴⁸ *Id.* at 349.

Disciplinary Action against Phil Ferguson (CME-17-0827); and (iv) *Notice of Disciplinary Action against Michael Vukmir* (CME-17-0802-BC)—in which agreed-upon sanctions as part of settlements were levied in amounts commensurate with the respondent’s ability to pay. In each of those matters, however, the BCC of the exchanges agreed that respondent lacked sufficient funds, and the matters were settled without the expense associated with contested hearings, a factor which the CFTC has noted may result in a lesser sanction.⁴⁹

As discussed more fully below, here, Respondent has not furnished evidence supporting, and CFE Enforcement disputes, his claimed inability to pay a substantial fine. Moreover, contrary to the procedural context of those cases, here, Respondent did not agree to a settlement with CFE Enforcement, but instead proceeded to Hearing (only to fail to appear at the Hearing, despite extensive accommodations having been afforded him).⁵⁰ Finally, as discussed below, a fine in the range sought by CFE Enforcement is in-line with Respondent’s ability to pay, and thus if anything these four matters support CFE Enforcement’s and not Respondent’s position.

The precedent cases in Respondent’s second category—cases imposing fines smaller than that sought by CFE Enforcement here—similarly do not support Respondent’s position.⁵¹ Critically, none of those cases involve violation of a prior consent order, and thus they are simply irrelevant. Nor do those decisions contain detailed findings sufficient to evaluate the egregiousness of the conduct at issue. Finally, in each of those cases, the Business Conduct

⁴⁹ *Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals*, Release No. 7518-17 (Jan. 19, 2017).

⁵⁰ In his Affidavit affirming and accepting the Stipulation, Respondent added the statement that he was agreeing to the Stipulation “to ease the burden on both parties and move the matter forward.” JX 1. The Hearing Panel rejects this self-serving statement. Respondent’s actions, including failing to appear at the Hearing and only submitting the Stipulation the day before the Hearing was scheduled (and not submitting the Affidavit until one week after the Hearing), did not ease any burdens or lead to any efficiencies.

⁵¹ Those cases include: *Decision Accepting Letter of Consent in In the Matter of Raiffeisen Bank International AG* (CFE 15-0012); *Decision Accepting Letter of Consent in In the Matter of Banco Santander SA* (CFE 15-0006); *Decision Accepting Letter of Consent in In the Matter of Citigroup Derivatives Markets Inc.* (STAR No. 20170546075); *Decision Accepting Letter of Consent in In the Matter of Clear Capital Group LLC* (CFE 18-0001); *Decision Accepting Offer of Settlement in In the Matter of Edward Thomas Jung and ETJ Partners Ltd.* (CBOE File No. 00-0013); and *Notice of Disciplinary Action against Thomas R. Stewart* (CME 09-05834-BC).

Committees and the respondent agreed to the sanction, and no contested Hearing was necessary, thereby mitigating the amount of the fines at issue.

C. Hearing Panel's Sanctions Determination

The Hearing Panel concludes that the Shak and Ho cases provide guidance on appropriate sanctions for violations of trading restrictions or suspensions in consent orders, and that Respondent's cases are inapposite. In the Shak case, the CFTC set the floor for such violations as a fine of \$100,000.⁵² In addition, there are several aggravating circumstances present in this case that warrant an even higher fine than that imposed in the Shak case.

First, in Shak, the defendant and the CFTC settled the case and agreed to a Consent Order in lieu of proceeding to trial. The CFTC has "long given credit to individuals who cooperate in the Commission's investigations and enforcements actions."⁵³ Such cooperation includes agreeing to settlements that conserve resources.⁵⁴ Here, Respondent did stipulate to liability but not in a manner that conserved resources or avoided costs. Rather, the Respondent, through counsel, stipulated to liability the day before the Hearing, which had already been re-scheduled at the request of Respondent and his counsel and for which the Hearing Panel had already granted Respondent an accommodation to appear via videoconference. Then, on only a few hours' notice, Respondent failed to appear at the Hearing. That failure precluded the Hearing Panel from questioning Respondent to ensure that he agreed to the Stipulation and knowingly and voluntarily acquiesced to a violation of CFE Rule 608. As a result, given that the Hearing Panel's acceptance of the Stipulation was conditioned on receiving a sworn Affidavit from Respondent, at the Hearing, CFE Enforcement was required to present a proffer of the evidence that supported a finding of a violation of CFE Rule 608.

⁵² CFTC v. Shak at p. 8. This is also commensurate with the \$50,000 fine imposed in Ho 15 years ago.

⁵³ Release 7518-17.

⁵⁴ *Id.*

Second, and more substantively, the violation that warranted a \$100,000 fine in Shak was “a one-time incident involving a 2-lot trade.”⁵⁵ Here, Respondent entered over 1,200 orders on over a dozen trading days and traded over 1,400 contracts on the Exchange.⁵⁶ He did so in a manner that avoided detection until a CFTC Form 102A was filed by his broker.⁵⁷

Finally, the nature of the trading restriction in Shak was different and less restrictive than that involved here. In Shak, the defendant was only precluded from executing trades during a one-minute closing period.⁵⁸ In contrast, Respondent here was barred from accessing the Exchange in any manner whatsoever.⁵⁹ The suspension was indefinite, but the duration of his suspension was up to Respondent—all he had to do to have the suspension lifted was appear for an investigative interview.⁶⁰ But Respondent did not do so; instead, he blatantly violated the Consent Order and repeatedly accessed and entered orders on the Exchange on numerous occasions over a six-week period.

In light of the egregiousness of Respondent’s conduct, the factors set forth in CFE Rule 711(b), and the relevant precedent presented by CFE Enforcement, the Hearing Panel imposes a fine of \$150,000.

The Hearing Panel further rejects Respondent’s contention that his financial condition warrants a lesser fine. As an initial matter, the Hearing Panel notes that CFE Rule 711(b) does not require it to consider the Respondent’s financial condition in imposing sanctions for his violation of CFE Rule 608. Indeed, CFE Rule 711(b) requires the Hearing Panel to impose sanctions “sufficient to deter recidivism or similar violations by other market participants,”⁶¹ and

⁵⁵ CFTC v. Shak at p. 6.

⁵⁶ Tr. at p. 16; CX 10-11.

⁵⁷ CX 4; Tr. at pp. 17-18.

⁵⁸ CFTC v. Shak at p. 5.

⁵⁹ CX 3.

⁶⁰ CX 3; Tr. at p. 37.

⁶¹ CFE Rule 711(b).

this purpose is best served by the imposition of a significant fine. At the Hearing, Respondent's counsel pointed to CBOE Rule 17.11, which provides that the Hearing Panel "may consider a party's inability to pay in connection with the imposition of monetary sanctions."⁶² However, there is no such language in the CFE Rules, and the consideration outlined in CBOE Rule 17.11 is permissive and not mandatory.

In any event, the Hearing Panel has considered all of the evidence in the record, as well as counsel's arguments, regarding Respondent's financial condition in imposing its fine. Throughout the Hearing, Respondent's counsel contended that Respondent lacked sufficient resources to pay a significant fine.⁶³ However, Respondent refused to appear at the Hearing to testify and did not submit a sworn financial statement, account statements, or other documentary evidence setting forth his financial condition. The Hearing Panel concludes that counsel's argument regarding Respondent's inability to pay is based on mere assertion and is not supported by any evidence. In fact, the evidence that was adduced at the hearing supports the conclusion that Respondent does have the ability to pay the imposed fine. Respondent's 2018 tax return shows that he received \$172,112 in dividend income and over \$1.2 million in capital gains in 2018, for total taxable income of \$1.4 million.⁶⁴ Respondent's taxable income was lower in 2016 and 2017, but those tax returns still indicate that there is a significant investment-base that provides or has the ability to provide Respondent with significant income.⁶⁵

It appears that Respondent is the sole beneficiary of a significant trust for which his father is or was Trustee.⁶⁶ In a 2003 account application, Respondent indicated his estimated net

⁶² CBOE Rule 17.11, *Principal Considerations In Determining Sanctions #8*.

⁶³ Tr. at pp. 23-24, 29, 34, 45-46. Respondent's counsel appears to concede that Respondent has the means to pay a fine in the range of \$15,000 to \$25,000. Tr. at p. 46.

⁶⁴ RX 6; Tr. at p. 25.

⁶⁵ RX 4-5.

⁶⁶ RX 3; Tr. at pp. 26, 49.

worth was \$47 million and his estimated liquid net worth was \$40 million.⁶⁷ There is no evidence in the record regarding the current value of the trust assets, but in his 2018 TradeStation account application, Respondent indicated that his annual income was over \$1,000,000 and his approximate liquid net worth was \$1-to-\$5 million.⁶⁸ Counsel for Respondent argued that Respondent told him this included Respondent's father's money,⁶⁹ but there is no evidence supporting this assertion, and the information on the account application is consistent with the information in Respondent's personal tax return for 2018.⁷⁰ Moreover, in 2018, Respondent was able to deposit over \$200,000 in the TradeStation account and use that money to trade on the Exchange.⁷¹ Taken together, all of that evidence undercuts the contention that Respondent lacks sufficient resources to pay a significant fine, and, in fact, supports the appropriateness of the fine imposed in this Hearing Decision.

Finally, at the Hearing, Respondent's counsel presented argument regarding a medical condition with which Respondent is afflicted and submitted a 2016 letter from Respondent's former doctor.⁷² The Hearing Panel does not doubt the information provided regarding Respondent's medical condition, but deems this factor to neither aggravate nor mitigate the sanctions determination. Respondent's violative conduct was well-supported by documentary evidence and was stipulated to by Respondent via a signed and notarized Affidavit.

⁶⁷ CX 8 at p. 55.

⁶⁸ CX 5 at p. 17.

⁶⁹ Tr. at p. 29.

⁷⁰ RX 8; Tr. at pp. 25-26.

⁷¹ CX 11; Tr. at p. 31.

⁷² RX 1.

VI. CONCLUSION AND ORDER

In conclusion, based on the record in this case and for the reasons stated herein, the Hearing Panel unanimously finds that Respondent has violated CFE Rule 608 by accessing the Exchange during which an indefinite suspension set forth in a prior Consent Order was effective.

Accordingly, in view of all of the foregoing findings and conclusions, IT IS ORDERED THAT Respondent receive the following sanction:

1. A censure;
2. A permanent ban from directly or indirectly accessing the Exchange; and
3. A fine in the amount of \$150,000.

**SO ORDERED FOR THE HEARING PANEL OF THE
CFE BUSINESS CONDUCT COMMITTEE**

Robert Errico
Robert Errico, Chairman

Dated: September 17, 2019