UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:	:	CFTC Docket No. 83-4
FRANK H. McGHEE, et al.,	:	OPINION AND ORDER
Respondents.	:	

Respondent Frank H. McGhee ("McGhee") petitions the Commission to modify a consent Order of Settlement with Remedial Sanctions re Frank H. McGhee ("Consent Order"), issued by the Commission on May 30, 1986. In the Consent Order, McGhee agreed never to reapply for registration with the Commission in any capacity. McGhee's petition seeks to modify the Consent Order to remove this undertaking, thus permitting him to reapply for registration.

For the reasons below, the Commission holds that McGhee has failed to meet the established standard for modifying a Commission order.

BACKGROUND

On December 29, 2010, McGhee petitioned the Commission to modify the Consent Order. The Consent Order arose out of an administrative complaint filed on October 25, 1982, against Chicago Discount Commodity Brokers, Inc. ("CDCB"), a registered futures commission merchant ("FCM"), and its principals, including McGhee. McGhee was the President, Director, chief operating officer, and Shareholder of CDCB.

During 1980, McGhee experienced large losses in his personal trading accounts. Those losses were covered by transfers of funds from customer segregated accounts to McGhee's

personal accounts. This led to the collapse of CDCB. In the aftermath of the FCM's collapse, McGhee was prosecuted for both civil and criminal violations of core customer protection provisions of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. §§ 1-27f, including violations of Commission Regulations protecting customer segregated funds.

The Commission Complaint charged McGhee with fraud, converting customer funds, improperly using segregated funds and property, falsifying and maintaining false records, and failing to maintain and allow inspection of required books and records.

In addition to the Commission action, McGhee was indicted by a grand jury in the Northern District of Illinois on related criminal charges that he stole, embezzled, and converted approximately $3.5 million in customer funds received by CDCB to margin, guarantee and secure trades and contracts of customers to cover his own trading debts in violation of the Act. He pleaded guilty to three counts in the indictment and was sentenced to three years in prison.

After his release from prison in 1986, McGhee made an offer of settlement in the Commission enforcement action, which the Commission accepted. In the Consent Order, McGhee consented to findings that he violated the Act and regulations, including Regulations 1.20(a) and 1.32 regarding segregation of customer funds. The Consent Order included a cease and desist order, a position liquidation order, an eight-year trading ban and an undertaking never to apply for registration with the Commission.

Twenty-four years later, on December 29, 2010, McGhee filed a Petition to Modify Consent Order of Settlement ("Petition"), with a supporting memorandum and Declarations by McGhee and two of McGhee's current supervisors, John Ayres and Angelo J. Catuara. In the Petition, McGhee requests that the Commission modify the existing Consent Order in order to allow him to apply for registration.

McGhee makes a number of arguments in support of his petition. First and foremost, the petition focuses on McGhee's activities since his release from prison. McGhee represents, through Declarations and his Petition that he has worked in an unregistered capacity for registered firms since 1987. He submitted declarations stating that he is currently risk manager and administrative back office operations manager for Integrated Brokerage Services, LLC ("IBS Futures"), a registered FCM. He also performs the same roles for Alliance Financial, LLC ("Alliance"), a registered introducing broker and cash metals dealer. Angelo Catuara, a managing member of IBS and principal of Alliance, and John Ayres, a managing member of Alliance, signed Declarations detailing McGhee's work at these firms. McGhee also asserts that he has been the subject of numerous print and broadcast interviews, and that he has been consulted by staff of the CFTC's Division of Enforcement regarding the cash metals markets.

McGhee argues that he is entitled to modification of the Consent Order due to significant changes in both the facts and the law. McGhee presents as material changes the facts that he has worked for registrants in unregistered capacities as described above, and also that he has given interviews. He also states as a change in the facts that he has complied with the terms of the Consent Order.

McGhee further argues that the law has changed in two material respects. First, at the time that McGhee entered into the settlement, an individual could become a floor trader without registration. McGee states that, when he entered into the settlement, he expected to seek exchange membership to become a local floor trader at the end of the Consent Order's eight year trading ban. However, in 1992, the CEA was amended to require floor traders to register. Futures Trading Practices Act of 1992, § 207, amending the Commodity Exchange Act, § 4e, 7

U.S.C. § 6e. Therefore, upon the conclusion of his eight year trading ban, McGhee was no longer able to become a floor trader. McGhee argues that he has been "unfairly deprived of one of the rights he retained when he agreed to the Consent Order, and which was a material consideration to . . . entering into the settlement." Memorandum in Support of Petition at 9.

In addition, McGhee argues that the law has changed to preclude the Commission from restricting the right of a person to apply for registration in the future. *See In the Matter of Hirschberg*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,573 at 43,523 (CFTC Dec. 27, 1995). In *Hirschberg*, the Commission ruled that an administrative law judge ("ALJ") could not, in a decision on a litigated matter, revoke a defendant's registration and also prohibit him from reapplying for registration. McGhee argues that he agreed to accept the permanent ban on applying for registration because he reasonably believed that such a sanction could be imposed on him if he did not agree to it. McGhee thus argues that, because the law has changed to preclude such a permanent ban, the Commission should modify his agreement to allow him to reapply for registration.

The Commission's Division of Enforcement ("DOE") submitted a 16-page Opposition to McGhee's Petition to Modify the Consent Order of Settlement ("Enforcement Opposition"). The Enforcement Opposition provides a stark contrast to McGhee's efforts to portray himself as a rehabilitated individual who is assisting DOE in understanding the metals markets. The Enforcement Opposition focuses on the fact that McGhee's violations involved the taking of customer segregated funds for his own personal use, leading to the collapse of an FCM. The Enforcement Opposition further states that the alleged changes in the facts and law presented by McGhee do not make compliance with the agreed upon Consent Order more onerous, unworkable, detrimental to the public interest, or legally impermissible. The Enforcement

Opposition emphasizes that McGhee agreed to the restrictions placed upon him by the Consent Order, and that the mere passage of time and compliance with the terms of the Consent Order over time do not justify the extraordinary relief of altering the Consent Order.

The Enforcement Opposition points out that McGhee's Petition does not describe McGhee's role in the collapse of CDCB or the shortage in segregated funds, suggesting that McGhee has not taken responsibility for his actions. While the Consent Order itself does not contain detailed findings of fact regarding McGhee's actions, the Enforcement Opposition attaches the findings of an ALJ in a separate, but related, CFTC action against the lawyer for CDCB. The ALJ found that "McGhee used segregated customer funds to pay for losses sustained by CDCB house accounts . . . . McGhee confirmed [at the hearing] that he experienced large losses in his personal trading accounts in 1980 and that the losses were covered by a transfer of funds from customer segregated accounts to his own." *In re Weintraub*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,789 at 31,312 (CFTC Jan. 7, 1985) (Initial Decision), *aff'd*, *In re* Weintraub, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,311 (CFTC Oct. 8, 1986) (Order of Summary Affirmance). The ALJ's finding was based on McGhee's own sworn statements. As part of that proceeding, McGhee himself signed an Affidavit stating "that during 1980 I experienced large losses in my personal trading accounts. Those losses were covered by transfers of funds from customer segregated accounts to my accounts." Affidavit of Frank H. McGhee, p. 3. Ultimately, CDCB was under-segregated by more than $3.1 million at the time it went out of business. *Weintraub*, ¶ 22,789 at 31,313.

McGhee submitted a Reply Memorandum in Support of Petition to Modify Consent Order of Settlement ("McGhee Reply"), arguing that the *Weintraub* decision is not evidence

admissible against McGhee because it is unreliable hearsay, as he was not a party to the *Weintraub* case.

DOE filed a Sur-Reply in Support of its Opposition to McGhee's Petition to Modify the Consent Order of Settlement ("Enforcement Sur-Reply"). The Enforcement Sur-Reply argues that the *Weintraub* decision is not hearsay at all, as it is not an out of court statement. Furthermore, DOE argues that hearsay is admissible in enforcement proceedings. DOE also provides further evidence of McGhee's actions at CDCB. DOE attached the signed deposition upon written interrogatories of Frank H. McGhee in the *Weintraub* matter.

DISCUSSION

I. The Standard for Modification of a Consent Order

As discussed above, McGhee seeks modification of the Consent Order to which he agreed in order to settle a Commission action against him. The standard for modifying a Commission order with forward-looking sanctions such as those agreed to in the Consent Order was established by the Commission in *In re ADM Investor Services, Inc.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,236 (CFTC Sept. 13, 2000). Like McGhee, ADM sought to amend a settlement order. The ADM settlement order prohibited ADM's introducing broker ("IB") subsidiaries from seeking registration for a period of five years. ADM sought a modification of the order that would allow is IBs to seek registration nine months earlier than the date required by the order.

In *ADM*, the Commission adopted the portion of Rule 60(b)(5) of the Federal Rules of Civil Procedure for modifying a consent judgment. Rule 60(b)(5) states that a court "may relieve a party . . . from a final judgment, order or proceeding" in instances where applying the order "prospectively is no longer equitable."

Courts have developed a two-part test for meeting the Rule 60(b)(5) standard. First, the party seeking modification must show that the modification is warranted by "a significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). Second, if the party seeking modification meets the first test, the party must then show that the proposed modification is suitably tailored to the changed circumstances. *Id.* at 393.

An alteration of an existing consent order "may be warranted when changed factual conditions make compliance with the decree substantially more onerous." *Id.* Modification may also be appropriate where "the decree proves to be unworkable because of unforeseen obstacles, or when enforcement of the decree without modification would be detrimental to the public interest." *Id.* (citations omitted). These are instances where a court *may* modify a Consent Order; a Court *must* modify a consent order when compliance with the consent order becomes legally impermissible due to a change in the law. *Id.* at 388. There are also instances where a court *should not* grant relief, such as where "it is no longer convenient to live with the terms" of a Consent Order. *Id.* at 383.

Rule 60(b)(5) is "a mechanism for extraordinary judicial relief [available] only if the moving party demonstrates exceptional circumstances." *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (affirming denial of post-judgment relief from enforcement of monetary award and injunction against shareholders of Turkish telecommunications company found to have committed fraud exceeding $2 billion) (internal quotation marks and citation omitted; alteration in original).

In Commission cases applying the *Rufo* standard, the interest of the public is paramount.

> [I]f a petitioner makes a reliable showing that it no longer poses a substantial risk to the public, there is no persuasive rationale for continuing a registration restriction. Absent such a showing, however, there are few, if any, circumstances that would make it "no longer equitable" to continue to restrict a petitioner's

> registration. This is especially true when the petitioner has negotiated a particular term for the restrictions imposed and cannot show that an unforeseeable change in circumstances has undermined the basis for the bargain it struck in agreeing to settle with the Commission.

ADM, ¶ 28,236 at 50,462. Applying the *Rufo* standard, the Commission in *ADM* held that ADM did not cite an unforeseeable change in circumstances that would undermine the basis for the bargain it reached with the Commission.

In the context of trading prohibitions, an example of more stringent forward-looking relief, the Commission has focused on whether the change in circumstances amounts to a reliable showing that a petitioner's trading no longer poses a substantial risk to market integrity. *In re Rousso*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,242 (CFTC Sep. 13, 2000) (that respondent did not trade for eight years prior to his challenge of the trading ban and volunteered in community activities since the entry of the order did not meet the burden of showing that the ten-year prohibition on trading on the regulated markets was no longer equitable).

II. McGhee's Request for Modification

A. McGhee's alleged changes in factual circumstances do not warrant modification.

McGhee's petition sets forth three factual changes in circumstances that he argues warrant modification of the Consent Order. The Commission does not believe that any of these alleged changes, considered separately or together, justify modification of the Consent Order. First, McGhee points out that he has complied with the terms of the Consent Order. Second, he states that he has worked in the metals markets in an unregulated capacity over the past 24 years and has become respected in the industry. In support of this contention, McGhee provides Declarations stating that he has worked for registrants in unregistered capacities as a risk manager, administrative back office operations manager, cash metals broker, and proprietary

trader. Third, during his time in the industry, McGhee allegedly has provided numerous interviews to television, radio and print media as a market analyst and commentator.

Each of the first two changes in factual circumstances asserted by McGhee relates to compliance with the Consent Order. However, compliance with the terms of a consent order does not generally provide justification for modifying an order. "Compliance is just what the law expects." *SEC v. Advance Growth Capital Corp.*, 539 F.2d 649, 652 (7th Cir. 1976), *quoting Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957); *NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 36 (D.C. Cir. 2000) ("compliance over an extended period of time is not in and of itself sufficient to warrant relief").

Generally, "the mere passage of time . . . does not constitute a . . . reason why prospective application of a judgment is no longer equitable." *SEC v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996) (affirming denial of relief where defendant had been subject to injunction for 21 years and had presented evidence of compliance with federal securities laws during that time). *See also SEC v. Coldicutt*, 258 F.3d 939 (9th Cir. 2001) (denying petition to terminate injunction where defendant had complied with the injunction for nine years, left the industry, and promised never to regain her licenses).

McGhee's statements that he has provided numerous television, radio, and print media interviews as a market analyst and commentator, while perhaps commendable, are not indicative of the "extraordinary" circumstances necessary to justify dissolving an injunction. *Advance Growth Capital Corp.*, 539 F.2d at 652, *quoting Klapprott v. United States*, 335 U.S. 601, 613, 69 S.Ct. 384, 93 L.Ed. 266 (1949).

The Southern District of New York dealt with a similar request in *CFTC v. Kelly*, No. 98 CIV 5270, 2010 WL 3553127 (S.D.N.Y. 2010). *Kelly* involved a trader who pleaded guilty to

conspiracy to commit wire fraud and violate the CEA. A consent order of permanent injunction was issued. The trader moved to dissolve the injunction under Rule 60(b)(5), providing evidence of his exemplary conduct since the injunction in 1998. The court did not dissolve the injunction, which included permanent bans on registration and participation in the futures industry, despite commending the trader's conduct. The court explained that the permanent bar on his participation in the futures industry was an implicit premise underlying the consensual resolution of the CFTC action against him.

The Commission finds that McGhee has failed to demonstrate a significant change in the factual conditions surrounding the Consent Order. The mere fact that McGhee has complied with the Consent Order is not sufficient evidence of a material change in fact. This is especially true where, as here, a prior Commission has issued a Consent Order containing McGhee's agreement never to apply for registration. In so doing, the Commission has already determined, based upon McGhee's agreement, that McGhee engaged in egregious conduct and thus should not be permitted to apply for registration during his lifetime. Under such circumstances, McGhee must, as a matter of law, show more than compliance over the passage of time and exemplary conduct to justify modification.

B. McGhee's alleged changes in the law do not warrant modification.

1. Changes in the law regarding registration of floor traders

In addition to his claims regarding changes in factual circumstances, McGhee also states that material changes in the law support modification of the Consent Order. McGhee points out that, at the time he entered into his settlement with the Commission, an individual could become a floor trader on an exchange without registration. McGhee states in his Declaration that, when he entered into the settlement, he justifiably expected that he could seek exchange membership to become a floor trader upon the completion of his eight-year trading ban. In 1992, the Act was amended to require registration of floor traders. Futures Trading Practices Act of 1992, § 207, Pub. L. No. 102-546, 106 Stat. 3590, amending the Commodity Exchange Act, § 4e, 7 U.S.C. § 6e. Thus, when McGhee's eight-year trading ban ended in 1994, McGhee was no longer able to become a local floor trader.

McGhee concludes that, "[a]s a result of this material change in the law, Mr. McGhee was unfairly deprived of one of the rights he retained when he agreed to the Consent Order, and which was a material consideration to [sic] in entering into the settlement." Memorandum in Support of Petition at 9.

Under the *Rufo* standard, "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388. The Futures Trading Practices Act of 1992 does not make legal an action that the Consent Order in this case was designed to prevent. The Futures Trading Practices Act of 1992 does not affect the legality of McGhee's misuse of customer funds. If anything, subsequent changes in the law have *increased* the sanctity and protection of customer funds.

Thus, McGhee has not demonstrated a material change in the law related to what the Consent Order was designed to prevent.

In addition, the Federal Rules of Civil Procedure require that a motion under Rule 60(b)(5) "be made within a reasonable time." More than eighteen years passed between the Futures Trading Practices Act of 1992 and McGhee's petition requesting modification. Sixteen years passed between the end of McGhee's trading prohibition, which would have enabled him to seek exchange membership under the regulations in place at the time of the Consent Order, and McGhee's petition requesting modification. While there is no Commission case law regarding what constitutes a "reasonable time" for purposes of modification of a Consent Order, federal courts have refused to grant relief based on a failure to move for modification within a reasonable time for periods far shorter than eighteen years. *See Thompson v. Workman*, 372 Fed. Appx. 858, 861 (10th Cir. 2010) (delay of eight years between judgment and motion was unreasonable under Rule 60(b)(5)); *United States v. Taylor*, 295 Fed. Appx. 268, 270 (10th Cir. 2008) (ten-year delay unreasonable). Accordingly, the Commission finds that McGhee, by waiting at least sixteen years before filing a motion under Rule 60(b)(5), has failed to act "within a reasonable time," as would be required for such a motion under the Federal Rules of Civil Procedure.

2. The *Hirschberg* Decision

McGhee also claims that modification of the Consent Order is required because of the Commission's ruling in *Hirschberg* that an ALJ cannot restrict the right of a person whose registration has been revoked in an enforcement action to reapply for registration in the future. The Commission in *Hirschberg* stated that the Act "does not establish any time limit on an individual's ability to reapply for registration after being revoked. Revoked registrants may

reapply at any time." *See In the Matter of Hirschberg*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,573 at 43,523 (CFTC Dec. 27, 1995). McGhee argues that *Hirschberg* represents a change in the law making it "manifestly inequitable and contrary to public policy, in view of this change in law, for Mr. McGhee to be precluded from seeking registration." Memorandum in Support of Petition at 10.

The Enforcement Opposition argues that there is nothing in the *Hirschberg* decision that precludes parties to a Commission action from agreeing not to apply for registration or precludes the Commission from entering such a consent order. The Enforcement Opposition suggests that the *Hirschberg* holding is limited to litigated cases, where the litigation results in a registration revocation, and the trier of fact lacks the authority to order a respondent not to apply for registration for a period of time.

The Enforcement Opposition supports this argument by presenting multiple instances where parties have agreed to remedies beyond the scope of a tribunal's authority as part of a settlement. *See In re Prudential Securities Inc.*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,617 (CFTC Nov. 18, 2003) (Commission issued a consent order including an agreement never to seek registration after the *Hirschberg* decision); *In re Moore Capital Management LP*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,567 (CFTC Apr. 29, 2010) (consent order includes undertakings to implement certain policies and procedures and cooperate with the Commission and other government agencies in future investigations); *In re MF Global, Inc.*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,500 (CFTC Dec. 17, 2009) (consent order includes undertakings to retain a consultant to perform independent compliance review, cooperation agreement, etc.). Similarly, federal courts in the Commission's enforcement actions often include registration sanctions in injunctive orders when the parties

agree to them. *See, e.g., CFTC v. Mady*, 2003 U.S. Dist. Lexis 24336 (E.D. Mich. 2003); *CFTC v. Foley*, 2006 U.S. Dist. Lexis 70437 (S.D. Ohio 2006); *CFTC v. Cook*, 2010 U.S. Dist. Lexis 43926 (D. Minn. 2010).

In addition, the cases cited by McGhee to support modification seem to contradict his argument that *Hirschberg* requires modification of the Consent Order as a matter of public policy. McGhee argues that the Commission cannot, under any circumstances (whether "litigated" or in the form of a settlement or Consent Order), impose a restriction on anyone's ability to apply or reapply for registration. However, *ADM*, which McGhee relies upon for the standard the Commission must follow in determining whether to modify a Consent Order, contradicts this argument. In *ADM*, the Commission *denied* a petition that sought to reduce a five-year registration ban. Thus, the Commission has not interpreted *Hirschberg* in the manner urged by McGhee. Accordingly, the Commission finds that McGhee has not demonstrated a material change in the law that would warrant modification of the Consent Order.

CONCLUSION

For the foregoing reasons, McGhee's Petition to Modify Consent Order of Settlement is denied.

IT IS SO ORDERED.

By the Commission (Chairman GENSLER and Commissioners CHILTON, O'MALIA and WETJEN).

Christopher J. Kirkpatrick
Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: August 20, 2013