UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. SD 00-05
GLENN B. LAKEN	:	OPINION AND ORDER

Glenn B. Laken ("Laken") appeals from an Administrative Law Judge's ("ALJ") conclusion that his floor broker registration should be suspended while a federal court conducts proceedings to resolve criminal charges pending against him. Laken challenges the judge's legal analysis and factual assessments and contends that his post-indictment agreement to substantial restrictions on his role in the markets regulated by the Commission is sufficient to protect the public interest. The Division of Enforcement ("Division") urges us to affirm the ALJ's decision in all respects.

As explained more fully below, the record shows that Laken's continued registration in a capacity that involves trading on the floor of a futures exchange poses a threat to the public interest. Consequently, we affirm the ALJ's imposition of a temporary suspension of Laken's floor broker registration.

BACKGROUND

I.

The Commission initiated this proceeding in June 2000 pursuant to authority Congress granted in Section 8a(11) of the Commodity Exchange Act ("CEA" or "Act"). The Commission directed that the proceeding be conducted in accordance with Commission Rule 3.56. Because these provisions play a prominent role in Laken's appeal and the Commission has not previously

had occasion to discuss them in the context of a contested case, we begin with a brief review of their material elements.

Subparagraph (A) of Section 8a(11) authorizes the Commission to suspend or modify the registration of Commission registrants who are involved in a specified class of criminal proceeding.[1] The criminal proceeding must involve either a violation of the 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."[2] The violation must also be punishable by imprisonment for a term exceeding one year. Finally, the Commission must determine that the continued registration of the affected registrant either "may pose a threat to the public interest" or "may threaten to impair public confidence in any market regulated by the Commission."

Subparagraph (B) requires that the Commission afford the registrant an "opportunity for a hearing" prior to suspending or modifying his registration.[3] It specifies that at the hearing, the Commission has the burden of showing that the continued registration of the registrant "does, or is likely to" either "pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission."

Subparagraph (C) provides that any suspension imposed pursuant to Section 8a(11) terminates when the registrant's criminal proceeding is resolved.[4] Subparagraphs (D) and (E)

---

[1] Subparagraph (A) requires that the registrant be charged in an "information, indictment, or complaint authorized by a United States attorney or an appropriate official of any State."

[2] Subparagraph (A) indicates that the latter class of violations includes those specified in subparagraphs (D) and (E) of Section 8a(2) of the Act. The violations described in those subparagraphs include felonies involving transactions in securities as well as those involving embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling.

[3] Subparagraph (B) does not specify the nature of the hearing to be afforded the affected registrant. Subparagraph (A), however, generally authorizes the Commission to adopt "rules, regulations, and orders" governing proceedings under Section 8a(11).

[4] That subparagraph also authorizes the Commission to terminate the suspension prior to the disposition of the criminal charges.

describe steps the Commission may take to protect the public interest following the resolution of the registrant's criminal proceeding.[5] Finally, subparagraph (F) describes an aggrieved registrant's appeal rights from a Commission decision under Section 8a(11).

The Commission exercised its rulemaking authority under Section 8a(11) by adopting Commission Rule 3.56 in April 1993. Under that provision, the Commission commences a proceeding by issuing a notice that includes a description of the relevant criminal charges and a determination that the affected registrant's continued registration may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission. The registrant is then permitted to submit a written response, to which the Division may reply.[6]

Rule 3.56 provides that the presiding ALJ will conduct an oral hearing pursuant to the Commission's Part 10 Rules after the parties have made their written submissions. In addition, it authorizes the ALJ to require or permit additional written submissions. Within thirty days of the date that the oral hearing is completed or the date he establishes for filing the last written submission, the ALJ must issue an order determining whether the Division has made its "required showings." According to subparagraph (e)(1), the two required showings are: (1) that the registrant "is charged with the commission of or participation in a crime as set forth in [the notice commencing the proceeding]," and (2) that the continued registration of the registrant "may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission." The rule requires that the Division make these showings "by a preponderance of the evidence."

[5] These include commencing an independent proceeding pursuant to Sections 8a(2) or (4) of the Act.

[6] Subparagraph (b) contemplates that the registrant's response will include information relating to the substantive allegations raised in the notice. In addition, if the registrant believes that an oral hearing is appropriate, he is required to provide information about the issues he intends to raise, the witnesses that he intends to present, and the documentary evidence that he intends to submit. Subparagraph (c) authorizes but does not describe the nature of the Division's reply.

Pursuant to subparagraph (e)(2), the ALJ's order assessing the Division's showings becomes final in the absence of a timely appeal by the registrant or the Division. That subparagraph incorporates six provisions from the Commission's Part 10 Rules to govern parties' appeals.[7] The remaining portions of Rule 3.56 parallel subparagraphs (D), (E), and (F) of Section 8a(11).

II.

The Commission issued its notice to Laken on June 19, 2000. The notice alleged that Laken was charged with criminal offenses in two federal indictments issued on June 12, 2000.[8] It alleged that these indictments involved violations of federal law that reflected on Laken's honesty or fitness to act as a fiduciary and were punishable by imprisonment for a term exceeding one year. In view of the indictment's allegations that Laken participated in illegal pension kickbacks, racketeering, wire fraud, securities fraud, and stock promotion fraud, the notice included a Commission determination that Laken's continued registration "[might] pose a threat to the public interest or [might] threaten to impair public confidence in markets regulated by the Commission."

Laken filed his response on July 10, 2000. With regard to the notice's factual allegations, Laken acknowledged that he was named in the specified indictments and that they alleged violations that were punishable by imprisonment for a term exceeding one year. He denied both

[7] The specified provisions are Commission Rules 10.102, 10.103, 10.104, 10.106, 10.107, and 10.109.

[8] The notice indicated that the indictments, entitled *United States v. Lino, et. al.* ("Lino indictment") and *United States v. Laken, et. al.* ("Laken indictment") charged Laken with participation in at least eleven felonies.

It is undisputed that at the time the indictments were issued, Laken was registered with the Commission as a floor broker and was the (1) manager of an entity registered with the Commission as a commodity trading advisor ("CTA") and commodity pool operator ("CPO") – Lake Trading LLC ("Lake Trading"); (2) president of another entity registered with the Commission as a CTA – Lake Futures Ltd. ("Lake Futures"); and (3) treasurer, director, and owner of an entity registered with the Commission as an introducing broker ("IB") – D&G Futures, Inc. ("D&G Futures").

that the violations described in the indictments reflected on his honesty or on his fitness to act as a fiduciary and that his continued registration might pose a threat to the public interest or might threaten to impair public confidence in markets regulated by the Commission.

Laken's response also raised two legal issues. He challenged Commission Rule 3.56 as contrary to both Section 8a(11) of the Act and the Administrative Procedure Act. In addition, he contended that Section 8a(11) was unconstitutionally vague because it did not provide sufficient notice of the conduct that would justify a registration suspension.

Finally, Laken's response requested an oral hearing and provided the required information about the issues he intended to raise, the witnesses that he intended to present, and the documentary evidence that he intended to submit. In this regard, Laken focused on evidence that he had restricted his futures-related activity after the indictments were issued and that the Chicago Mercantile Exchange ("CME") had concluded that these restrictions were sufficient to protect its interests.[9] In addition, Laken indicated that he intended to present 14 witnesses who would testify about his character, reputation, and conduct as a trader, as well as their opinion about the risk posed by his continued registration.[10]

[9] One of the documents attached to Laken's response was a June 27, 2000 letter from CME's Assistant General Counsel indicating that a special board hearing committee had decided to allow Laken to continue to have access to the CME trading floor under specified conditions. The conditions included: (1) limiting his trading to orders for his own account; (2) terminating a variety of business relationships; (3) providing information requested by CME's Market Regulation Department; and (4) agreement that his trading floor access would be suspended, subject to review by a special board hearing committee, if Laken were charged with any exchange rule violation. Other documents attached to Laken's response indicated that he had: (1) divested himself of his ownership interest in D&G Futures; (2) filed requests to withdraw the registrations and National Futures Association ("NFA") memberships of Lake Trading and Lake Futures; (3) terminated investments in, loans to, or financial backing of CME members or member firms; and (4) terminated all business relationships or associations with CME members or member firms.

[10] In this regard, Laken attached written statements that these prospective witnesses had submitted to CME. Each statement included identical language indicating that the individual: (1) was a CME member; (2) was aware that Laken had been indicted for racketeering, payment of illegal kickbacks, wire fraud, theft of a broker's honest services, and securities fraud; and (3) believed that denying Laken access to the trading floor was not necessary to protect the best interest of the marketplace.

The Division's reply, submitted on July 21, 2000, focused on the serious nature of the criminal charges against Laken. The Division noted that the Lino indictment alleged that Laken was associated with a "criminal organization engaged in securities fraud, wire fraud, pension fund fraud, illegal kickbacks to union officials, extortion, money laundering, bribery, witness tampering and murder solicitation." Division Reply at 2 *quoting* Lino indictment at 2-3. It noted that the indictment claimed that this criminal organization devised two fraudulent investment schemes that targeted pension funds. One scheme involved the offering of interests in a hedge fund known as the "TradeVentureFund," which touted itself as using a proprietary trading strategy that would significantly outperform such market benchmarks as the Standard and Poor's 500 Index. The indictment alleged that Laken was the principal manager of the TradeVentureFund and that as part of this scheme, TradeVentureFund planned to generate excessive commissions on commodity transactions through churning. TradeVentureFund would then remit a portion of the excess commissions to the criminal organization, which, in turn, would use the funds to pay off corrupt union officials. The Lino indictment alleged that Laken took steps to further this scheme by recruiting co-defendant William M. Stephens, an associated person of a San Francisco CTA, and by agreeing to pay secret bribes to union officials funded through kickbacks from TradeVentureFund.[11]

As to the Laken indictment, the Division emphasized that it alleged that Laken conspired to commit securities fraud directed at artificially inflating the value of large blocks of stock he controlled in a publicly traded company, FinancialWeb.com, Inc. ("FWEB"). The indictment alleged that as part of this scheme Laken agreed to secretly transfer blocks of FWEB stock to co-conspirators. In return, the co-conspirators agreed to feature FWEB on websites they controlled

[11] The second scheme described in the Lino indictment involved the issuance of preferred stock. According to the indictment, as part of this scheme, the criminal organization would secretly receive $2 million for each $10 million

and to send e-mails to their website patrons promoting FWEB's stock. The co-conspirators agreed that they would not disclose their compensation arrangement, Laken's identity as the seller of large blocks of FWEB stock, or their plan to work in concert in artificially inflating FWEB's share price. In addition, the Laken indictment claimed that the co-conspirators agreed to pay bribes to retail stockbrokers in an effort to generate purchases of up to 2 million shares of FWEB stock.

The Division's reply also addressed Laken's post-indictment restriction of his futures-related activities to floor trading. In this regard, the Division argued that floor traders are presented with daily opportunities to engage in conduct that can defraud public customers and impair market integrity. In support, the Division cited to a recent decision by the United States Court of Appeals for the Seventh Circuit affirming the criminal conviction of floor traders who acted as "bagmen" for floor brokers.[12]

Finally, the Division's reply briefly addressed the different standards articulated in subparagraphs (A) and (B) of Section 8a(11). The Division acknowledged that subparagraph (A) indicates that the Commission's determination should address a "may pose a threat" standard while subparagraph (B) indicates that proof at the hearing should focus on a "does, or is likely to

---

in sales of the preferred stock, and would use a portion of the $2 million to pay off corrupt union officials.

[12] *United States v. Ashman*, 979 F.2d 469 (7th Cir. 1992). The court explained its reference to "bagmen" in the context of the overall trading scheme:

> The core of the charged crimes involved brokers surreptitiously avoiding the competitive nature of the pit to arrange trades with [floor traders] at selected prices. These arranged trades, determined without the usual open outcry bid or offer in the market, guaranteed profits to the [floor trader]. The [floor trader] would then do one of three things (or some combination) with these profits: he might keep the profits as repayment for a loss assumed by the [floor trader] from an out-trade with the broker; he might hold the profits from the arranged trade as a credit against future errors or out-trades, or he might pass the profits back to the broker who had arranged the trade in the first place (i.e. a kickback) or to another trader to whom the broker owed money from other out-trades. [Floor traders] who took losses and profits from brokers in this way were referred to in the pit as "bagmen."

979 F.2d at 476.

pose a threat" standard. Division Reply at 8 n.5. It contended that the Commission had resolved any "ambiguity" regarding the applicable standard, however, by adopting Commission Rule 3.56 which instructed the presiding ALJ to limit his determination to the "may pose a threat" standard. *Id.* On this basis, the Division argued that the ALJ should suspend Laken's registration if the preponderance of the evidence showed that his continued registration "may pose a threat to the public interest or to public confidence in the commodities markets." *Id.*

In early August, the ALJ issued an order scheduling an oral hearing for August 28, 2000 and permitting the parties to submit prehearing memoranda by August 16, 2000. Both Laken and the Division responded with memoranda that largely reiterated the points made in their prior written submissions. The Division's memorandum raised a new relevancy challenge to one of the documents that Laken planned to introduce at the hearing and also urged the ALJ to limit the number of witnesses Laken was permitted to present in view of the cumulative nature of their testimony. The Division also emphasized its view that the indictments, standing alone, were sufficient to fulfill its evidentiary burden. In this regard, the Division noted that the Supreme Court had twice affirmed temporary suspensions based solely on the existence of indictments and specifically recognized that "the return of [an] indictment itself is an objective fact that will in most cases raise public concern" about the fitness of the affected individual to continue his duties. Division's Supplemental Memorandum at 3 *quoting FDIC v. Mallen*, 486 U.S. 230, 244-45 (1988).[13]

Laken's memorandum primarily raised legal arguments. For example, Laken challenged the Division's contention that the language of subparagraph (B) of Section 8a(11) was ambiguous and insisted that it clearly required the Division to justify its request for a registration suspension with a showing that continued registration "does, or is likely to" either pose a threat

to the public interest or threaten to impair public confidence in a market regulated by the Commission. In this regard, Laken argued that the Commission had exceeded its statutory authority by adopting the less restrictive "may pose a threat" standard in Commission Rule 3.56.[14]

Laken also argued that the ALJ should focus his analysis of the threat continued registration posed solely on the possibility that Laken would abuse the orders of public customers. In this regard, Laken argued that Section 8a(11)'s references to the "public interest" or "public confidence" were ambiguous, but that the legislative history indicated that Congress' specific concern was potential abuse of the orders of public customers. In support, he noted that language in the Senate Report accompanying the legislation that created Section 8a(11) twice referred to preventing registrants from handling customer orders as appropriate modifications to protect the public. In addition, he pointed out that the Senate Report indicated that the case for tighter regulation had been made most dramatically by fraud indictments that involved traders who abused their registration to defraud public customers.[15]

In light of these arguments, Laken claimed that the Division could not prevail unless the preponderance of the evidence showed that Laken was likely to pose a threat to the public by mishandling customer orders. He acknowledged that the indictments had some probative value in resolving this issue, but emphasized that neither indictment included allegations that Laken had (1) actually engaged in any improper futures trading; (2) participated in fraud on the floor of a futures exchange; or (3) received any funds from the public. Laken noted that the post-

---

[13] The second case the Division referenced was *Gilbert v. Homar*, 520 U.S. 924 (1997).

[14] In a related argument, Laken claimed that the Division could not fulfill its burden of proof merely by proving the existence of the indictment. According to Laken, the permissive nature of the statutory language and Congress' determination that a hearing was necessary prior to imposing a suspension compel the conclusion that the Division's evidentiary burden extends beyond the information reflected on the face of the indictment.

[15] Registrant's Hearing Brief at 5-6 *citing* S. Rep. No 102-22 at 2, 55 (1991).

indictment restrictions that he had imposed on his futures-related activity stripped him of the ability to advise customers, hold their funds, or receive and execute public orders. He also indicated that he had a sponsor who was willing to supervise his trading under conditions similar to those the Commission had previously imposed when it conditioned the registration of floor brokers and floor traders.[16] Finally, Laken highlighted CME's conclusion that his continued access to the trading floor did not threaten its best interests and the support for his continued registration voiced by certain CME traders who were familiar with his character, reputation, and conduct as a trader.

The ALJ conducted an unrecorded telephone conference with counsel for the parties on August 24, 2000.[17] At some point during the conference, the ALJ referred counsel to a decision he had issued several years earlier in a reparations proceeding in which Laken was one of the respondents.[18] On August 25, 2000, Laken's counsel filed a letter requesting that the ALJ recuse himself because "[i]n the context in which it was raised" the ALJ's decision in the reparations case was evidence of a disqualifying bias. Later that day, the ALJ issued an order that denied Laken's motion.

---

[16] Laken attached a Supplemental Sponsor Certification Statement ("Sponsor Statement") signed by Michael Dowd to his prehearing memorandum. In the Sponsor Statement, Dowd generally agreed to take primary responsibility for supervision of Laken's floor trading activities and specifically agreed to undertake the following steps: (1) familiarize himself with any Commission orders issued in this proceeding; (2) review Laken's trading cards and trading records on at least a weekly basis; (3) make random observations of Laken's conduct on the trading floor on at least a weekly basis; (4) keep a log of his review of trading records and observations of Laken's conduct on the trading floor and make the log immediately available in response to a request from specified regulatory authorities; (5) promptly investigate any of Laken's acts or failures to act that might violate the Act or related regulatory requirements; (6) bring to Laken's attention any of his acts or failures to act that might violate the Act or related regulatory requirements; (7) keep a record of all communications with Laken involving his acts or failures to act that might violate the Act or related regulatory requirements and make the record immediately available in response to a request from specified regulatory authorities; and (8) cooperate with any investigation or inquiry relating to Laken conducted by specified regulatory authorities.

[17] According to a letter Laken's counsel filed the following day, the conference focused on issues relating to questions the Division might ask Laken at the hearing and subpoenas Laken wanted the ALJ to issue prior to the hearing. The record does not establish how these issues were resolved.

[18] *BAS Investment Inc. v. First Commercial Financial Group, Inc.*, 1991 WL 99061 (Initial Decision May 8, 1991).

II.

The ALJ conducted an oral hearing in Chicago, Illinois on August 28, 2000. The Division rested its case after introducing the Lino and Laken indictments into evidence and noting that Laken acknowledged that he was registered as a floor broker and that the indictments alleged violations that reflected on his honesty and fitness to act as a fiduciary and were punishable by a term of imprisonment in excess of one year.

Laken presented the testimony of six witnesses in support of his rebuttal to the Division's showing. In addition, Laken introduced into evidence documents that he had previously submitted with his response to the Commission's notice or his prehearing memorandum.[19] Among these documents was an agreement by Laken to conditions on his floor broker registration.[20]

Tom Wangersheim testified that he had been a member of the CME for 15 years and had traded with Laken in the S&P 500 Index pit for 12 years. Transcript ("Tr.") at 9-10. He described his relationship with Laken as a business and social friendship and said that his interactions with Laken over the 12-year period were characterized by "utmost respect and ethics

[19] These documents included: (1) an article from the Wall Street Journal discussing difficulties that prosecutors have had winning criminal cases alleging securities fraud; (2) an October 9, 1996 indictment for securities fraud against Allen Wolfson and others that was dismissed without prejudice as to Wolfson on August 15, 1997; (3) CME's June 27, 2000 Notice of Conditional Trading Floor Access relating to Laken; (4) CME Rule 513(B) describing the exchange president's authority to deny a member access to the trading floor when he has a reasonable belief that such action is necessary to protect the best interests of CME; and (5) a January 26, 1999 memorandum from the Chairman of CME's Regulatory Oversight Committee regarding use of a video trade resolution system for dispute resolution and self-regulatory purposes.

[20] The conditions Laken endorsed included: (1) he would not either directly or indirectly act as a principal, partner, officer, or branch manager of any entity registered or required to register with the Commission; (2) he would not either directly or indirectly act in any supervisory capacity over anyone required to register with the Commission; (3) he would not either directly or indirectly exercise discretionary authority over any customer account; (4) he would not act as a floor broker; (5) he will only act as a floor trader when his activities are supervised in the manner reflected in the Supplemental Sponsor Certification Statement signed by Michael Dowd; (6) he would not serve on any disciplinary committee, arbitration panel, oversight panel or governing board of any self-regulatory organization regulated by the Commission; and (7) his registration would be automatically suspended for up to six months if he were charged with specified disciplinary offenses.

together." Tr. at 10. Wangersheim testified that he was aware that federal criminal charges had been brought against Laken, had observed his behavior after learning of the charges, and did not believe that Laken posed a threat to the integrity of the markets or to public customers. Tr. at 10-11.

On cross-examination, Wangersheim testified that he had not read the indictments, Tr. at 14,[21] and was not aware either that (1) in 1990, Laken had agreed to a $30,000 fine and twenty-business-day suspension of his trading privileges to settle CME allegations that he had participated in a prearranged trade (the "1990 CME settlement"), [22] Tr. at 12, or (2) in a 1992 reparations decision, the Commission found that Laken engaged in fraudulent conduct (the "*BAS Investments* finding"). Tr. at 17. Wangersheim said that knowledge of these matters did not affect his opinion of Laken. Tr. at 18. During questioning about what he would consider a threat to the market, Wangersheim testified that prearranged trading "could be a threat." Tr. at 12. When questioned about the threat posed by churning, Wangersheim said that he did not know anything about churning. Tr. at 17.

Martin Venit testified that he had been a floor trader at the CME for 17 years and traded with Laken in the S&P pit for 15 years. Tr. at 19. He indicated that Laken was a proprietor of his clearing firm and characterized his relationship with Laken's family as "close." Tr. at 20, 22. He stated that Laken was one of the most "honest and honorable traders" he had come across. Tr. at 21. Venit testified that he was aware that the indictments alleged that Laken had engaged in various forms of fraud and conspiracy, had observed Laken trading in the pit after learning of the indictments, and still believed that he was an honest and honorable trader. *Id.*

[21] Wangersheim said that the evening news was his only source of information about the nature of the indictments. Tr. at 14-15.

[22] The Division introduced the CME Notice describing the settlement of this action as Division Exhibit 7.

During cross-examination, Venit acknowledged that he had not actually read the indictments[23] and that he was not aware of either the 1990 CME settlement or the *BAS Investments* finding. Tr. at 22, 23, 26. Venit said that knowledge of the *BAS Investments* finding did not affect his opinion of Laken. Tr. at 26. During questioning about what he would consider a threat to the market, Venit acknowledged that both prearranged trading and churning could pose a threat to the markets regulated by the Commission. Tr. at 23, 25. He noted, however, that in evaluating whether there was an actual threat, he would consider whether the wrongdoing at issue had been proven and whether there were the type of extenuating circumstances that those outside the futures business "might not fully comprehend or understand." Tr. at 24-25. In addition, he emphasized that his evaluation of Laken's integrity was based on his observations of Laken in the trading pit. Tr. at 27.

Douglas Young testified that he had been a floor broker at the CME since 1984 and had traded with Laken in the S&P pit for 16 years. Tr. at 29. He described Laken as a "straightforward person." Tr. at 30. Young testified that he was aware that the indictments alleged that Laken had engaged in various forms of fraud and conspiracy but that the return of the indictments had not changed his opinion about Laken's honesty and integrity. Tr. at 30-31.[24] He also said that he had observed Laken trading in the pit after learning of the indictments, had not noted any change in his behavior, and continued to fill his customer orders opposite Laken. Tr. at 31.

During cross-examination, Young indicated that he was not aware of either the 1990 CME settlement or the *BAS Investments* finding. Tr. at 32, 34. He said that knowledge of these

[23] Venit explained that he had learned of the indictments through word of mouth at the exchange, from Laken's family, and from the newspapers.

matters did not affect his opinion of Laken. Tr. at 33, 34. During questioning about what he would consider a threat to the market, Young acknowledged that both churning and fraudulent inducement could pose a threat to the markets regulated by the Commission, and said that prearranging a trade to someone's detriment would be a threat to the "integrity of the exchange." Tr. at 34. He noted, however, that "people make mistakes, and they can be corrected." *Id.*

Michael Rubinowicz testified that he was a CME member who traded in the S&P pit and had known Laken for about 15 years. Tr. at 35-36. He said that he had a business relationship with Laken as a trader and also considered Laken a friend. Tr. at 36. He described Laken as "a very honorable trader." *Id.* Rubinowicz testified that he was aware that the indictments alleged that Laken had engaged in fraudulent activity but that the return of the indictments had not changed his opinion about Laken's honesty and integrity. Tr. at 37.[25] He also said that he had observed Laken trading in the pit after learning of the indictments and that Laken's conduct had not caused a change in his opinion of Laken's honesty. Tr. at 37-38.

During cross-examination, Rubinowicz indicated that he was not aware of either the 1990 CME settlement or the *BAS Investments* finding. Tr. at 39-40. He said that knowledge of these matters did not affect his opinion of Laken. Tr. at 40. During questioning about what he would consider a threat to the market, Rubinowicz acknowledged that prearranged trading, churning and fraudulent inducement to invest $250,000 could pose a threat to the markets regulated by the Commission. Tr. at 38-39, 41.

James Schultz testified that he was a floor trader at the CME in the S&P pit and had known Laken for 12 years. Tr. at 43-44. He said that he had come to know Laken "very well"

---

[24] Young acknowledged that he learned of the indictments through the news and had not actually read them. Tr. at 30.

[25] Rubinowicz acknowledged that he learned of the criminal charges by watching television or reading the newspaper and had not actually read the indictments. Tr. at 37.

and considered him a friend. He indicated that he found Laken to be "honest and very fair." Tr. at 44. Schultz testified that he was aware that the indictments alleged that Laken had engaged in fraudulent activity but that the return of the indictments had not changed his opinion of Laken. Tr. at 45. He also said that he had observed Laken trading in the pit after learning of the indictments and that Laken's conduct had not changed in any way. *Id.*

During cross-examination, Schultz said that he learned of the indictments in the newspaper and acknowledged that he was not aware of either the 1990 CME settlement or the *BAS Investments* finding. Tr. at 48-49. Schultz said that knowledge of the *BAS Investments* finding did not affect his opinion of Laken. Tr. at 49. During questioning about what he would consider a threat to the market, Schultz acknowledged that fraudulent inducement could pose a threat to the markets regulated by the Commission and that in some cases prearranged trading could pose a threat. Tr. at 49. Counsel for the Division also questioned Schultz about the opportunity for floor brokers and floor traders to commit fraud. Schultz denied that a person on the floor was in a position to commit fraud if he wanted to. Tr. at 50. He acknowledged, however, that floor brokers and floor traders are "in the same positions" to participate in prearranged trading and "trading ahead." Tr. at 50-51.

Michael Dowd testified that he was a director with First Options of Chicago ("First Options") and had responsibility for 600 traders at the CME and 500 traders at the Chicago Board of Trade ("CBOT"). Tr. at 52-53. He noted that he had served (1) two terms on CME's board of directors, (2) an unspecified period of time on CME's regulatory oversight committee, and (3) six years on CME's arbitration committee, with four of the six years as the committee's chairman. Tr. at 54, 82.

Dowd testified that he has worked with Laken for eight years. He explained that Laken was a client of First Options and a former partner at D&G Futures Inc., which Dowd described as a "subfirm" under the "First Options domain." Tr. at 54-55. He said that Laken had been "very honorable, very trustworthy" in their dealings together and described him as a "responsible trader" and a "very good client" who had introduced "a lot of business" to First Options.[26] Tr. at 55. Dowd testified that he was aware that the indictments alleged serious charges that included a claim that Laken churned a commodities account. Tr. at 56. He also said that he was "fully aware of the circumstances" in the indictments when he signed the Sponsor Statement. Tr. at 57. In addition, he testified that he did not regard Laken as a threat to the integrity of the market or public customers. Tr. at 59.

On cross-examination, Dowd was questioned about a conversation with Laken relating to the indictments. He said that Laken had told him that the indictments involved racketeering charges, some stock manipulation charges, and taking advantage of customer orders. Tr. at 61. Dowd acknowledged that he did not check on Laken's description by reading the indictments. Tr. at 62.

Counsel for the Division also questioned Dowd about the new account form that First Options provided to customers who wished to open an account. Dowd agreed that it was important that customers provide information that was truthful and complete. Tr. at 63. Counsel then showed Dowd a copy of a First Options new account form that Laken had signed and submitted to open an account for Lake Futures Ltd.[27] Initially, Dowd indicated that he did not notice anything missing from the form. After additional questions, however, he agreed that

[26] On cross-examination, Dowd estimated that First Options earned about $250,000 a year due to its relationship with D&G Futures, Inc.

[27] The Division introduced the form into evidence as Division Exhibit 5.

Laken had not completed the question relating to the disciplinary history of participants in the account. Tr. at 67.[28] On redirect, he said that the new account form played "zero" role in his evaluation of the risk Laken posed to First Options. Tr. at 79.

Finally, counsel for the Division questioned Dowd about the supervisory safeguards described in his Sponsorship Statement. Dowd indicated that he would personally supervise Laken except for a brief period when he would be on vacation. Tr. at 71. He explained that he would review Laken's trading cards on a weekly basis, but did not plan to review CME videotapes of the pit where Laken trades.[29] Tr. at 73. Dowd acknowledged that a review of trading cards would not be able to detect some types of fraud. Tr. at 74.

III.

Following the parties' submission of proposed findings of fact,[30] the ALJ issued an Initial Decision ("I.D."). *In re Laken*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,285 (October 17, 2000). After reviewing the procedural history, the ALJ made several findings of fact that focused on the nature of the charges raised in the Lino and Laken indictments. In this regard, the judge found that the indictments' charges: (1) included securities fraud, wire fraud, commercial bribery, illegal pension kickbacks, racketeering, and stock

[28] Dowd also acknowledged that he was unaware of either the 1990 CME settlement or the *BAS Investments* finding. Tr. at 87-88. Dowd testified that his knowledge of these matters did not change his opinion about the threat Laken's continued registration posed to the markets regulated by the Commission. Tr. at 91.

[29] Dowd testified that CME's use of video cameras "acts as some deterrent to traders," but would not be an effective deterrent "all the time." Tr. at 90.

[30] In essence, Laken urged the ALJ to credit the testimony of his witnesses; find that the restrictions imposed on his futures-related activity, together with CME enforcement procedures and the supplemental supervision of Michael Dowd, would be an effective deterrent to misconduct; and conclude that it was not likely that his continued registration would either pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission. The Division urged the ALJ to determine that the testimony of Laken's witnesses merited little or no weight; find that the nature of the violations alleged in the indictments established that Laken's continued registration posed a threat to the public interest and to public confidence in markets regulated by the Commission; and conclude that the restrictions imposed on Laken's futures-related activity and proposed

promotion fraud; (2) involved violations that reflect on Laken's honesty and ability to act as a fiduciary; and (3) included crimes punishable by imprisonment for a term exceeding one year. I.D. at 50,751.[31]

The ALJ turned next to the testimony offered by Laken's witnesses. Overall, the judge found that the testimony was neither "credible nor persuasive." *Id*. In support of this evaluation, he noted that four of the six witnesses were "potentially biased" because they were personal friends of Laken and that the witnesses had offered their judgments without either reading the indictments to determine their exact nature and extent or investigating Laken's prior disciplinary history.[32] As to the latter point, the judge noted that none of the witnesses were aware of either the 1990 CME settlement or the *BAS Investments* finding, and that none of the witnesses altered his opinion of Laken after being informed of these matters. *Id*.[33]

The ALJ did not expressly address the parties' legal dispute about the type of showing necessary to sustain a suspension of Laken's registration. He did conclude that the Commission acted within its authority when it determined that Laken's continued registration "may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission," I.D. at 50,752, but also noted that Section 8a(11) provided that at the hearing, the Division had the burden of showing that Laken's " 'continued registration . . . does, or is likely to, pose a threat to the public interest or threaten to impair public confidence in any

---

supervisory controls were not adequate to protect the public interest because Laken could engage in various forms of fraud on the trading floor without detection.

[31] The ALJ also made general findings relating to the *BAS Investments* finding and the 1990 CME settlement. *Id.*

[32] The judge contrasted the limited knowledge of the nature of the indictments evident from the testimony with the written statements that the witnesses had submitted to CME claiming awareness that the indictments included allegations of racketeering, payment of illegal kickbacks, wire fraud, theft of a broker's services and securities fraud. *Id.*

market regulated by the Commission.'" *Id*. In reviewing the evidence, he began one paragraph by stating that Laken could be suspended if his continued registration "threaten[ed] to impair the public's confidence in any market . . . regulated by the Commission," but ended the paragraph with a conclusion that "[t]he notoriety associated with the indictments *may* impair the public's confidence in the CME." *Id*. (emphasis supplied).[34] Finally, the ALJ's conclusion included a reference to both the "may pose a threat" and the "does, or is likely to pose a threat" standard:

> This court has carefully reviewed the indictments, pleadings and oral arguments of the parties and finds that the continued registration of the registrant constitutes a threat to the public interest, and may threaten to impair public confidence in a market regulated by the Commission.

I.D. at 50,753.

In reaching this conclusion, the judge acknowledged Laken's self-imposed restrictions on his futures-related activity as well as CME's decision to allow him to trade for his own account. I.D. at 50,752-53. He specifically found that in light of the gravity of the offenses charged in the indictments, CME's "prophylactic measures" were "insufficient." I.D. at 50,753.

IV.

Because Laken filed a timely notice of appeal pursuant to Commission Rule 3.56(e)(2) on November 1, 2000, the registration suspension imposed by the ALJ was stayed pending resolution of his appeal.[35] Laken's appeal brief raises both legal and factual challenges to the ALJ's decision. Laken argues that the ALJ erred by applying the "may pose a threat" standard

---

[33] Later in his decision, the ALJ elaborated on his rationale for discrediting Michael Dowd's testimony, noting that First Options' lucrative business relationship with Laken "raise[d] questions concerning Dowd's motivation for testifying, and his fitness to serve as a supplemental supervisor." I.D. at 50,752-53.

[34] The ALJ later referred to the need to protect the CME from the "potential" loss of public confidence. I.D. at 50,753.

[35] On November 3, 2000, the Division submitted a motion to waive the applicable rules and make the suspension immediately effective. In the alternative, the Division requested that we expedite the resolution of Laken's appeal. Laken submitted a memorandum opposing both requests on November 16, 2000. In view of our expedited resolution of this matter, we deny the Division's motion to waive the applicable rules as moot.

articulated in both subparagraph (A) of Section 8a(11) and Commission Rule 3.56 rather than the "does, or is likely to pose a threat" standard articulated in subparagraph (B) of Section 8a(11). In addition, he argues that the ALJ erred by considering threats posed by his continued registration that did not relate to the danger of mishandling public orders. In this regard, Laken contends that the legislative history of Section 8a(11) establishes that Congress believed that the potential harm an indicted registrant posed to the public came solely from the possibility that the affected registrant would abuse the orders of public customers.

As to the judge's factual evaluations, Laken argues that the ALJ overemphasized the testimony of his witnesses and "strain[ed] to dispute their credibility" by focusing on their relationship with Laken and ignorance of both the details of the indictment and the 1990 CME settlement and *BAS Investments* finding. Laken contends that the ALJ's skeptical treatment of his credible witnesses is but one indication that the ALJ harbored an improper bias against him.

Finally, Laken argues that a fair evaluation of the comparative weight due the allegations raised in the indictments, the rigorous constraints he has placed on his trading, the watchful supervision of CME, and the scrutiny of his supplemental sponsor establishes that his continued access to CME's trading floor poses a minimal threat to the public interest. In this regard, Laken emphasizes that the allegations in the indictments have not been proven, and neither indictment alleges that he either accepted public customer funds or entered a trade on an exchange regulated by the Commission. He also notes that the supervisory procedures in Michael Dowd's Sponsor Statement are similar to those the Commission has relied upon when conditioning the registration of floor traders subject to statutory disqualifications, and argues that CME is in the best position to judge the risk Laken's continued access to its trading floor poses to either its customers or its reputation.

The Division's answering brief argues that the ALJ did apply the "does, or is likely to pose a threat" standard, but also contends that there is no substantial difference between that standard and the "may pose a threat" standard articulated in subparagraph (A) of Section 8a(11). The Division also disputes Laken's claim that Congress only intended that Section 8a(11) proceedings address threats relating to the danger of mishandling public orders. It contends that such an interpretation is flatly inconsistent with Congress' adoption of language authorizing the Commission to suspend the registration of floor traders. The Division also emphasizes that the Seventh Circuit's *Ashman* decision clearly demonstrates the substantial role that floor traders can play in schemes that defraud public customers.

The Division defends the ALJ's rejection of the testimony of Laken's witnesses as consistent with Commission precedent recognizing that the testimony of unqualified character witnesses should not be credited. In addition, it notes that Laken concedes that the testimony of his witnesses was not directly relevant to determining the risk that his continued registration poses to the public.

Finally, the Division argues that Laken's restriction of his futures-related role to supervised floor trading is insufficient to protect the public. It points out that the indictments allege that Laken participated in a comprehensive and wide-ranging scheme to defraud investors and customers in both the commodities and securities industries. In addition, it contends that in enacting Section 8a(11), Congress recognized that the integrity of the futures and options markets was sufficiently important to warrant the same protection as public functions such as banking and police work. As for Laken's proposed supervisory arrangement, the Division points to Dowd's testimony acknowledging that despite the proposed supervisory techniques, a person could commit some types of fraud without being detected. The Division also argues that the

distinction between the threat posed by a floor broker and a floor trader is "too subtle to assuage a lay public, especially given the number and gravity of the federal crimes . . . for which Laken has been indicted." Division's Answering Brief at 16-17.[36]

DISCUSSION

I.

As noted above, Laken raises two legal challenges to the ALJ's determination that the record supports the imposition of a temporary suspension on his floor broker registration. He contends that the language of subparagraph (B) of Section 8a(11) mandates the application of the "does, or is likely to pose a threat" standard and that the judge failed to afford him the protection of this more-demanding standard. The Division notes that the ALJ specifically concluded that Laken's continued registration "constitutes a threat to the public interest" and argues that the legislative history makes it clear that Congress did not draw a particular distinction between subparagraph (A)'s "may pose a threat" standard and subparagraph (B)'s "does, or is likely to pose a threat" standard.

The language of the I.D. indicates that the ALJ evaluated the record in light of both the "may pose a threat" standard and the "does, or is likely to pose a threat" standard. While the judge did not provide an explanation for adopting this approach, it has the obvious virtue of

[36] The Division actually filed two answering briefs. One of the briefs included new evidence of an allegedly confidential nature as well as a discussion of the signifigance of the new evidence. The Division sought leave to file the confidential portion of this brief under seal. Laken then filed two reply briefs. One of the reply briefs included new evidence of an allegedly confidential nature as well as a discussion of the signifigance of both the new evidence Laken submitted and the new evidence that the Division submitted. Laken also sought leave to file the confidential portion of his brief under seal.

Because Commission proceedings are presumptively resolved in a public manner, parties bear a heavy burden in justifying a request that evidence be considered but remain confidential. The parties in this matter have neither explained the bases for their confidentiality requests nor demonstrated that their case would be substantially prejudiced if the allegedly confidential evidence was not considered. In these circumstances, both motions to file a portion of the relevant briefs under seal are denied. The briefs the parties submitted that include the allegedly confidential information are striken from the record.

permitting the ALJ to resolve all material issues while bypassing the confusion caused by the facial conflict between the standard described in subparagraph (B) of Section 8a(11) and the standard mandated by Commission Rule 3.56.[37] There is no basis to infer that the ALJ's failure to explain his approach deprived Laken of the protection of the "does, or is likely to pose a threat" standard.

We agree with Laken, however, that the distinction between the two standards is material. The "may pose a threat" standard establishes a relatively low hurdle that would be satisfied by almost any indictment meeting the criteria established in subparagraph (A). *See Mallen*, 486 U.S. at 245 (describing the standard as "easily satisfied" in the case of a bank official charged with crimes involving dishonesty.) The "does, or is likely to pose a threat" standard requires more careful scrutiny of the particular allegations in the indictment.[38] Given this distinction, we must determine which of the two standards Congress intended to ultimately guide our evaluation of the record.

Congress provided mixed signals on this issue. The Division correctly notes that the Senate Report accompanying the legislation that became Section 8a(11) contains language clearly indicating that the less burdensome "may pose a threat" standard would apply at the affected registrant's hearing.[39] The intent evidenced by subparagraph (B)'s clear language requiring proof that meets the "does, or is likely to pose a threat" standard, however, is to the

[37] An ALJ, of course, is bound by Commission rules even if he views them as contrary to the Act. Consequently, the ALJ was required to include an evaluation of the record under the "may pose a threat" standard.

[38] The pertinent Senate Report suggests that the inquiry focuses on whether the offenses charged in the indictment have a direct relationship to markets regulated by the Commission. S. Rep. No. 102-22 at 55.

[39] The Report states that "[a]t a hearing requested by a registrant, the Commission would have the burden of showing that the continued or unmodified registration of the registrant *may* pose a threat to the public interest or *may* threaten to impair public confidence in any market regulated by the Commission." S. Rep. No. 102-22 at 55 (emphasis supplied). The Commission apparently focused on this legislative history when it adopted the "may pose a threat" standard in Rule 3.56.

contrary. Given the fundamental nature of the conflict, we must invoke the rule of interpretation that gives precedence to the plain meaning of the statutory language and conclude that the Division's proof must be evaluated against the "does, or is likely to pose a threat" standard.

Laken relies on the language of the Senate Report to support his claim that the only "threats" pertinent to the evaluation mandated by subparagraph (B) are those amounting to an abuse of public customers' orders. He emphasizes comments indicating that the proposed legislation would permit the Commission to "prevent indicted registrants from handling customer orders during the pendency of an indictment" by requiring them "to trade solely for their own account and not execute orders for customers." Laken argues that these comments provide the only "meaningful description" of the threat that Congress believed indicted registrants posed to the public interest or public confidence in the market. Laken Appeal Brief at 7-8 *quoting* S. Rep. No. 102-22 at 55. The Division argues that Laken's interpretation ignores both the statutory language and the reality of the marketplace.

As the Division notes, Congress could easily have limited the class of indicted registrants subject to Section 8a(11) proceedings to those handling customer orders but clearly did not do so. Moreover, in describing the threats that the Commission could address in such a proceeding, Congress chose broad language that encompassed both conduct that threatens the "public interest" and conduct that threatens, "to impair public confidence in any market regulated by the Commission." Because conduct amounting to an abuse of public customers' orders quite clearly threatens the public interest, *see, e.g., In re Ryan*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,049 (CFTC April 25, 1997), it is unlikely that Congress would have authorized the Commission to address the second category of threats if it only intended Section 8a(11) proceedings to address potential abuses of public customer orders. Indeed, nothing in the Senate

Report suggests that the language that Laken quotes was intended as a description of anything more than one example of the threats the Commission could properly address.

In the context of this case, however, we need not determine the precise scope of the threats Congress intended the Commission to address in a Section 8a(11) proceeding. As discussed more fully below, floor traders' access to the trading floor provides ample opportunities for participation in abusive practices that affect public customers. Indeed, one of Laken's own witnesses acknowledged that floor brokers and floor traders have similar opportunities to participate in abusive practices such as prearranged trading and trading ahead of a customer's order. Consequently, even if we adopted Laken's strained interpretation of the type of threat Congress intended the Commission to address in a Section 8a(11) proceeding, the record would support the registration suspension the ALJ imposed.[40]

II.

Laken argues that the ALJ overemphasized the testimony of his witnesses and strained to dispute their credibility. He contends that the judge's skeptical treatment of his witnesses is but one indication that the ALJ harbored a disqualifying bias against him.

The ALJ's analysis of Laken's witnesses properly noted that the nature of the witnesses' relationships with Laken indicated that their evaluations of the threat Laken's continued registration posed were not entirely disinterested. Wangersheim, Venit, Rubinowicz, and Schultz acknowledged that they were friends of Laken. Venit also acknowledged that Laken was a proprietor at the firm that cleared his trades. Dowd denied that he felt any loyalty to Laken, but

[40] Laken also argues that as a matter of law, indictments alone cannot support a finding that continued registration does, or is likely to, pose a threat to the public interest or threaten to impair public confidence in the markets regulated by the Commission. Neither the statutory language nor the legislative history restricts the type of evidence that the Division may rely upon to meet its burden of proof. Nor do they include a restriction on the inferences the Commission may reasonably draw from the nature and scope of the criminal activity described in an indictment. In any case, because the record in this proceeding contains evidence of Laken's disciplinary history, we need not determine whether the Division could have met its burden based solely on the Lino and Laken indictments.

acknowledged that Laken generated significant business for the firm he directed. Given these circumstances, the ALJ properly concluded that Laken's character witnesses were not disinterested.[41]

The ALJ also considered evidence that at the time they reached their judgments about Laken, the witnesses were not fully informed of circumstances material to the judgments. Our precedent recognizes that a witness's knowledge and understanding of a registrant's prior misconduct is a factor material to the evaluation of the weight accorded character testimony. *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,597 at 47,835 (CFTC April 15, 1999). Here, the record establishes that prior to reaching their judgments, Laken's witnesses made, at best, a limited effort to determine the nature of the charges made in the Lino and Laken indictments. None of the witnesses made an effort to review the indictments' specific description of Laken's wrongful conduct. Moreover, none of the witnesses made an effort to determine whether Laken had a disciplinary record that warranted consideration prior to offering their judgments.

Our precedent also recognizes that witnesses' broad, conclusory statements about their evaluation of a registrant's character are not due significant weight. *Zuccarelli*, ¶ 27,597 at 47,835. Here, Laken's witnesses offered little or no explanation of the criteria they used in evaluating whether Laken posed a threat to the public interest.[42] Moreover, when informed of the 1990 CME settlement and the *BAS Investments* finding, Laken's witnesses provided no explanation for their conclusions that the new information did not undermine their previously

[41] It is unlikely that a person willing to testify as a character witness for a registrant will be completely disinterested in the registrant. Consequently, evidence of a relationship with the registrant is generally not a sufficient basis for rejecting testimony as unreliable. The nature of the interest is simply one factor in the overall evaluation of the quality of the judgment offered by the character witness.

expressed judgments about Laken's character. The absence of a reasoned explanation is especially troubling because *BAS Investments* involved fraudulent inducement and Young, Rubinowicz and Schultz acknowledged that fraudulent inducement could pose a threat to the markets regulated by the Commission.

Michael Dowd offered more extensive testimony about his evaluation of Laken's character than Laken's other witnesses. The flaws in his testimony, however, were quite similar. The record shows that he neither read the indictments nor obtained complete information about Laken's disciplinary history prior to either forming his judgment or agreeing to serve as Laken's sponsor. He offered no explanation for his conclusion that his initial judgment was not undermined by his knowledge of the 1990 CME settlement and the *BAS Investments* finding. Similarly, after agreeing that it was generally important that customers provide First Options with truthful and complete information in a new account form and acknowledging that Laken had submitted a form without disclosing his disciplinary history, Dowd offered no explanation for his conclusion that Laken's failure to disclose had "zero" significance in assessing the risk Laken posed to his firm.

Given these circumstances, the record as a whole supports the ALJ's conclusion that the testimony of Laken's witnesses merits little or no weight in evaluating the threat his continued registration poses. Moreover, none of the other bases that Laken cites in support of his bias argument evidence the necessary "deep-seated favoritism or antagonism that makes a fair judgment impossible" that warrants disqualification. *See In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,883 (CFTC May 12, 2000). We find nothing problematic about a presiding officer volunteering information about a case relevant to the

[42] Indeed, Wangersheim acknowledged that he did not know anything about churning. Such a lack of understanding of an obvious, common threat to the public interest seriously undermines the reliability of Wangersheim's

subject matter of a proceeding. As for the comments the ALJ made about Laken in his *BAS Investments* decision, we have repeatedly recognized that "negative opinions about a party that arise from a presiding officer's participation in another adjudication are generally insufficient to establish that the presiding officer has a deep-seated favoritism or antagonism that makes a fair judgment impossible." *Id.* In these circumstances, the ALJ did not err by declining to disqualify himself in this proceeding.

III.

Finally, Laken argues that a fair evaluation of the record as a whole establishes that his continued registration poses nothing more than a minimal threat to the public interest. He emphasizes that by their nature, allegations in an indictment have slim evidentiary value and argues that the allegations in the Lino and Laken indictments involve conduct "unconnected to the integrity of the futures markets." Laken Reply Brief at 5. He contends that the 1990 CME settlement merits little weight because there was no adjudication of the underlying allegations, and he agreed to the settlement "rather than face the cost and distraction of prolonged litigation." Laken Reply Brief at 7. He notes that the *BAS Investments* findings arose out of a "private, nine-year-old customer dispute," and emphasizes that the Division examined the dispute and decided not to bring charges. *Id.*

Laken's attempt to minimize the nature and seriousness of the allegations raised in the Lino and Laken indictments cannot be squared with their actual language. The Lino indictment alleges that Laken associated with a criminal organization engaged in securities fraud, wire fraud, pension fund fraud, illegal kickbacks to union officials, extortion, money laundering, bribery, witness tampering and murder solicitation. It describes two fraudulent investment schemes this criminal organization devised. One of the schemes involved the offering of

---

assessment of the threat posed by Laken's continued registration.

interests in a hedge fund that Laken managed. According to the indictment, the hedge fund planned to generate excessive commissions on commodity transactions through churning and remit a portion of the excess commissions to the criminal organization, which, in turn, would use the funds to pay off corrupt union officials. The indictment alleges that Laken took steps to further this scheme by recruiting an associated person of a San Francisco CTA and agreeing to pay secret bribes to union officials.

The Laken indictment alleges that Laken conspired to commit securities fraud directed at artificially inflating the value of large blocks of stock he controlled in a publicly traded company. According to the indictment, as part of this scheme Laken agreed to secretly transfer blocks of his stock to co-conspirators who, in return, agreed to feature the controlled company on their websites and send e-mails to their website patrons promoting the controlled company's stock. The indictment alleges that the co-conspirators agreed that they would not disclose their compensation arrangement, Laken's identity as the seller of large blocks of the controlled company's stock, or their plan to work in concert in artificially inflating the controlled company's share price. Finally, it alleges that the co-conspirators agreed to pay bribes to retail stockbrokers in an effort to generate purchases of up to 2 million shares of the controlled company's stock.

Laken emphasizes that the indictments involve agreements to do something in the future rather than actual conduct and that they do not allege that Laken accepted money from public customers or entered trades on an exchange regulated by the Commission. He also seeks to minimize his role in the criminal organization described in the Lino indictment by noting that his alleged overt acts are limited to the last weeks of a conspiracy that is alleged to have lasted years. As for the manipulative practices described in the Laken indictment, Laken asserts that "much of

the activity alleged in the indictment is entirely legal and common in the industry," and emphasizes that none of the allegations "relate, in any way, to the futures markets." Laken Reply Brief at 7.

The language of Section 8a(11) indicates that Congress' focus was not limited to criminal conduct that violated the Act, but extended to criminal conduct "that would reflect on the honesty or the fitness of a person to act as a fiduciary." This broad focus is consistent with other parts of Section 8a, such as Section 8a(2)(D), that treats certain felony convictions arising out of conduct of registrants in the securities industry as statutory disqualifications from registration in the futures industry.[43] Congress clearly recognized that wrongful conduct that did not involve receipt of funds from futures customers, actual trades on markets regulated by the Commission, or conduct with any direct affect on a futures transaction could be material to a person's fitness to act in a registered capacity. Consequently, Laken's emphasis on the lack of any allegation that customer funds were accepted and used for actual futures transactions is fundamentally misplaced.

The Lino indictment alleges that Laken agreed to undertake conduct – churning – that is a clear threat to the public interest. By its nature, churning involves a fiduciary placing his own interests ahead of his customers in a manner that disguises the nature of the breach of duty. Agreeing to undertake such conduct is significant in itself since we have no basis for inferring that Laken would not have carried out his agreement if the issuances of the indictments had not intervened. Moreover, the dishonest and manipulative practices that the Laken indictment alleges Laken agreed to undertake in the securities market would certainly be a threat to the public interest if carried out in the context of futures transactions. We have no reason to believe

either that Laken would not have carried out his agreement or would be reluctant to undertake similar conduct because the market he was undermining was a futures market rather than a securities market. As for Laken's claim that the activity alleged in the Laken indictment is both common and legal, he had ample opportunity to prove this claim at the hearing but failed to proffer any material evidence.

Laken's role in the criminal organization described in the Lino indictment was substantial. The indictment alleges that he committed three overt acts in furtherance of the conspiracy, including the solicitation of a Commission registrant to join the unlawful venture. Moreover, Laken's alleged overt acts did not occur in the last weeks of a conspiracy that lasted years as he claims. Laken's Reply Brief at 6. The indictment alleges that the conspiracy began in October of 1999 and that Laken undertook his initial overt act in February 2000.

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. As the Supreme Court explained in its *Mallen* decision:

> [A]n *ex parte* finding of probable cause provides a sufficient basis for an arrest, which of course constitutes a temporary deprivation of liberty. It should certainly be sufficient, when coupled with the congressional finding that a prompt suspension is important to the integrity of our banking institutions, to support [an order temporarily suspending a bank president from participating in the affairs of the bank].

486 U.S. at 241 (citation omitted).

The evidence relating to Laken's disciplinary history provides a useful context for evaluating the indictments' charges. While there was no adjudication of CME's allegation that

[43] Indeed, Congress in Section 8a(11)(A) specifically mentioned that offenses specified in Section 8a(2)(D) would be included within the type of conduct "that would reflect on the honesty or fitness of the person to act as a fiduciary."

Laken participated in prearranged trading, we have recognized that settlements alleging serious rule violations and resulting in the imposition of significant sanctions play a legitimate role in assessing a registrant's fitness. *See In re Clark*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032 at 44,928 (CFTC April 22, 1997). Similarly, we have indicated that findings made in reparation cases such as the *BAS Investments* matter may demonstrate that there is "other good cause" for revoking a registration. Interpretive Statement With Respect to Section 8a(3)(M), Commission Part 3 Rules, Appendix A. The facts Laken proffers to undermine the significance of these matters – his motive for settling CME's charges and the Division's alleged decision not to pursue the allegations underlying the *BAS Investments* finding – were not raised or proven at the hearing. Consequently, we need not determine the weight properly accorded them in determining the significance of Laken's disciplinary history.

Laken's documentary submissions reliably demonstrate that he has taken substantial steps since the time of the indictments to limit his role in the futures industry. As noted above, it is undisputed that at the time the indictments were issued, Laken was the (1) manager of an entity registered with the Commission as a CTA and CPO; (2) president of another entity registered with the Commission as a CTA; and (3) treasurer, director, and owner of an entity registered with the Commission as an IB. The record establishes that in order to retain his access to the CME trading floor, Laken agreed to end his relationship with these entities and limit his floor trading to orders for his own account.[44]

Laken has also agreed to be subject to the special supervisory mechanisms described in Michael Dowd's Sponsor Statement. He emphasizes that the Commission frequently relies on these supervisory mechanisms when it conditions the registrations of floor brokers and floor

[44] *See* n. 9, *supra*.

traders. In support of this contention, Laken cites to the orders of settlement in *In re Gravitt*, CFTC Docket No. SD 98-7 (CFTC June 2, 1999); *In re Varner*, CFTC Docket No. SD 99-1 (CFTC June 4, 1999); and *In re Mitsopoulos*, CFTC Docket No. 99-17 (Sept. 26, 2000).

The efficacy of special supervisory mechanisms in addressing threats to the public interest is largely dependent on the nature and level of the threat continued registration poses to the public. Nevertheless, Laken has made no attempt to show that the threat his continued registration poses is comparable to the threat posed by the registrants in the cases he cites. The *Gravitt* case involved allegations that the registrant had been sanctioned by the National Association of Securities Dealers ("NASD") for conduct that had occurred at least five years earlier and the settlement granting conditional registration followed an ALJ's determination that the registrant had successfully rebutted the statutory presumption that he was unfit for registration. The *Varner* case involved a series of charges brought against the registrant by a futures exchange that resulted in settlements. At least six years had passed since the time the exchange settled its most serious charges against the registrant. The *Mitsopoulos* case involved allegations that the registrant had violated recordkeeping requirements in transactions executed at least four years earlier. None of these decisions establish that the Commission has used the type of special supervisory mechanisms that Laken proposes to address the level of threat to the public interest posed by Laken's continued registration.

Floor traders play a vital role in the open outcry process that is central to the legitimacy of futures exchanges. As the Seventh Circuit's description of the scheme at issue in its *Ashman* decision illustrates, there are incentives for floor traders and floor brokers to make private agreements that not only undermine the legitimacy of the open outcry process but also deprive public customers of their right to the best available prices for their orders. Because floor traders

and floor brokers interact on a daily basis, they have numerous opportunities to not only negotiate such agreements but also devise joint strategies to disguise their unlawful conduct. Consequently, unlawful agreements that undermine the legitimacy of the open outcry process are easy to make but difficult to detect.

The special supervisory mechanisms that Laken proposes are unlikely to detect such agreements. Moreover, if the two traders cooperate to disguise their agreement by using the pretense of an open outcry execution, the CME video surveillance that Laken relies on would be unlikely to reveal anything noteworthy about the transaction. Indeed, even Laken's sponsor acknowledged that neither his review of Laken's trading records nor CME's video surveillance would be effective at deterring all fraudulent conduct. Tr. at 74, 90.

Given the difficulty of detecting such agreements, the honesty of those who trade in futures pits plays a necessary role in controlling the threat such agreements pose to the public interest. The allegations made in the indictments and Laken's disciplinary record raise substantial questions about his honesty. Indeed, they suggest that Laken has a proclivity for acting in concert to commit crimes, conduct that clearly poses a substantial threat to Commission-regulated markets.

Laken argues that we should defer to CME's assessment of the risk his continued access to the trading floor poses. CME's decision to permit Laken to retain his access to the trading floor does not contain any reasoning that explains its conclusion. Under the applicable rule, CME is only required to consider the best interests of the exchange.[45] Without further explanation, we cannot determine whether the public interest and CME's conception of its own interests are even remotely related. Moreover, our precedent shows that CME's evaluation of the risk a registrant poses to the public can sharply diverge from our own. *See In re Scheck*, [1996-

1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,072 (CFTC June 4, 1997) (concluding that the registrant failed to make a showing that his continued registration as a floor trader would pose no substantial risk to the public despite the CME's Executive Vice President for legal, regulatory and financial affairs' testimony that the registrant would not pose a risk either to the public or the integrity of the futures markets.)

CONCLUSION

The record shows that permitting Laken to remain registered in a capacity that involves trading on the floor of an exchange poses a threat to the public interest. Accordingly, we affirm the ALJ's imposition of a temporary suspension on Laken's floor broker registration.

IT IS SO ORDERED.[46]

By the Commission (Acting Chairman NEWSOME, and Commissioners HOLUM, SPEARS and ERICKSON).

_____
Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 8, 2001

[45] *See* CME Rule 513(B), which Laken submitted with his prehearing memorandum.
[46] Laken's suspension shall be effective on the date this order is served on the parties. A motion to stay the suspension pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. *See* Commission Rule 10.106, 17 C.F.R. § 10.106 (2000).