UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

RECEIVED
C.F.T.C.
2005 OCT -4 P 12: 21
OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

In the Matter of

GLOBAL TELECOM, INC.,
CAMERON S. OWNBEY and
RB&H FINANCIAL SERVICES LP

CFTC Docket No. 01-18

OPINION AND ORDER

Respondent RB&H Financial Services LP ("RB&H"), a futures commission merchant ("FCM"), appeals from an initial decision finding it liable for misleading advertising created and used by three of its associated persons. It argues that the advertising was used outside the scope of their employment with RB&H, and was disseminated exclusively for the benefit of another respondent, Global Telecom, Inc. ("GTI"), a registered commodity trading advisor ("CTA") owned by the employees.

RB&H also argues that as a matter of law, the advertising cannot violate Section 4b of the Commodity Exchange Act ("CEA" or "Act"), because it was not used "in or in connection with" a futures transaction executed "for or on behalf of" another person. RB&H further challenges the initial decision's finding that it violated Commission Regulation 166.3 by failing to diligently supervise the employees, contending that it had no duty to supervise advertising created for another company. Finally, RB&H argues that the sanctions imposed are excessive.

The Division of Enforcement ("Division") urges us to affirm the decision below. It has filed a cross-appeal for the limited purpose of seeking a civil monetary penalty against respondents GTI and Cameron S. Ownbey ("Ownbey"). GTI and Ownbey neither appealed the decision below nor answered the Division's appeal for increased sanctions. For the reasons that follow, the initial decision is affirmed in part, and vacated and modified in part.

BACKGROUND

Before turning to the facts, we note that none of the three individuals whose conduct caused the case to be brought is involved in the appeal. RB&H, the only party seeking review, was charged based on its status as their employer.

This appeal stems from an enforcement proceeding brought against RB&H; GTI, a closely-held CTA that operated from RB&H's Chicago offices; and Ownbey, a co-owner of GTI who was dually registered as an associated person of both firms. The case also involves the conduct of two nonparties—Mark Pennings ("Pennings") and Clayton Caulkins ("Caulkins")—who, like Ownbey, owned interests in GTI and were registered with both corporate respondents. Pennings and Caulkins reached settlements with the Division before this case was filed, pursuant to which they cooperated with the Commission in this proceeding.[1] The complaint refers to them as "two other individuals" associated with both firms, and alleges that the conduct of Ownbey and the unnamed individuals violated Section 4b and other provisions of the Act.

RB&H was charged with liability for the violations of Section 4b alleged against all three, pursuant to Section 2a(1)(B) of the Act. If the Administrative Law Judge ("ALJ") erred in holding that the actions of the three individuals violated Section 4b, the finding of derivative liability against RB&H cannot stand. Therefore, although the actual actors are not before us to point out any errors, RB&H has supplemented its primary arguments, noted above, with all conceivable factual and legal challenges that a respondent facing direct liability under Section 4b might have asserted.

* * *

---

[1] *See In re Pennings and Caulkins*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,600 (CFTC July 18, 2001).

The following facts are undisputed and supported by the record below. Between late 1997 and early 1998, Ownbey, who had been an associated person with several FCMs, approached colleagues Pennings and Caulkins about going into business for themselves as trading advisors, while continuing to work as account brokers for an FCM.[2] Rather than generating their own strategies, Ownbey proposed that he and his colleagues act as middlemen, obtaining advice from a trader with a good track record, and reselling it to persons whom they would solicit. In their dual roles as advisors and brokers, they proposed to offer trading advice and trade execution services at the same time.

The trio reviewed industry listings of registered CTAs, and through this process identified David E. Noyes ("Noyes"), who had traded pork belly futures profitably through a proprietary account since mid-1996. He also traded a range of other commodities, with less success. Noyes agreed to provide recommendations on when to buy and sell pork belly futures, based on his market analysis.

Ownbey and his associates bought shares in a dormant corporation, GTI, from Ownbey's father, registered it as a CTA in March 1998, and registered themselves as GTI's associated persons.[3] GTI and RB&H entered into an agreement under which GTI was given free work space, telephones, and other amenities at RB&H's offices, and RB&H received shared commissions from trades executed for accounts advised by GTI. Ownbey, Pennings and Caulkins transferred their broker registrations to RB&H, and GTI and RB&H filed sponsorship documents with the National Futures Association ("NFA") acknowledging joint responsibility

[2] All had worked at a number of futures industry firms in various capacities. When Ownbey conceived of his trading advice plan, the three were employed as associated persons at the LIT Division of First Options, where they solicited customer accounts.

[3] Duane Ownbey had incorporated GTI in the state of Washington in 1995. While it had engaged in several lines of business, it was inactive when Ownbey, Pennings and Caulkins assumed control.

for supervising them.[4] Jill Ecklund, the chief financial officer of RB&H during the term of the agreement, later testified that the arrangement between the companies came about in the normal course of business at RB&H: "I had people that make deals and bring them to the president of the company." Tr. at 823.

GTI offered a year's worth of trading recommendations for pork belly futures for a one-time fee of $4500, a contract sold as the "Pro-Managed" system.[5] Whenever Noyes's market analysis indicated that a purchase or sale should be made, he advised GTI, which in turn contacted its clients. GTI clients were issued pagers to enable them to be contacted immediately, and when these did not work, as frequently occurred, trading recommendations were telephoned to them, or trades were executed pursuant to discretionary authority.

GTI promoted its services through telephone solicitations, a direct mail flier, advertisements in two futures magazines, and a series of sales seminars in Florida. It also developed a website. The language used most frequently in GTI's promotional material stated, in a bold-faced headline—"Over $48,000 in real time profits over the last 12 months!"—and stated that these gains were made from "April 1997 to April 1998." The claim appeared in magazine advertisements published in the fall of 1998, and in a direct mail flier.[6] A later magazine advertisement published in December 1998 claimed, "Over $66,000 in real time profits

---

[4] *See* Div. Exhs. 1D through 1G, executed copies of Commodity Futures Trading Commission/National Futures Association Forms 3-R. Form 3-R is the "Supplemental statement to application for registration and reporting of the multiple association of an Associated Person."

[5] Of this sales price, Noyes received $600; GTI and its principals received the remainder.

[6] This language was used in advertisements in various issues of *Futures* and *Stock and Commodities* magazines published between August and November 1998, *see* Div. Exh. 3 (*Futures* magazine advertisements); Div. Exh. 4 (*Stocks and Commodities* advertisements); and a direct mail flier, Div. Exh. 6. The promotional items using this language exhibited minor variations in typeface and layout.

in the last 23 months!"[7] The advertisements "suggested" that traders make a $10,000 initial investment. GTI's website and the promotions for its Florida seminars featured different but equally extravagant statements regarding profits.[8] RB&H was not mentioned in any GTI's advertising; neither was Noyes, although most claims were based on his trading.

Noyes had developed an analytic model he called "Domestic Fundamentals," and begun trading it through a proprietary account as a registered CTA in 1996. He capitalized his account with $200,000, of which $20,000 was allocated to pork belly futures. He also traded grains, metals, energy products and other physical commodities. Noyes's overall trading resulted in a 10.70 percent gain for the six months his account was active in 1996, and a 15.77 percent gain for all of 1997. His pork belly trades, when extracted from his overall trading, yielded substantially higher profits: 29.40 percent in 1996 and 179 percent in 1997. These were the results that led GTI to choose him as its source of trading advice.

GTI sold Pro-Managed contracts to 74 persons, 59 of whom traded through accounts at RB&H.[9] Purchasers began trading with varying amounts of initial equity, including $10,000, $8,000, $5,000, and $12,000. Trading results varied depending on when purchasers entered the market. Noyes's pork belly trades for 1998 yielded a 43.7 percent profit, with the gains peaking in August. His trades lost money through December, saw an upturn in 1999, with substantial

---

[7] *See* Div. Exhs. 3E, 4C. The $66,000 profit claim was published in the December issues of *Futures* and *Stocks and Commodities* magazines.

[8] An advertisement for a series of seminars offered at Florida resorts in December 1998 stated, "341%** Learn how our trader earned over $34,000 in 12 months on a $10,000 investment. You could have made 700% with our trading system." Div. Exh. 5. A page from GTI's website stated: "Learn how we can make you over 300% profit per year on a 'small investment'" Div. Exh. 12A.

[9] The record indicates that Ownbey, Pennings and Caulkins had clients at RB&H other than those who traded the Pro-Managed system, and that some Pro-Managed customers also traded outside the system. The extent of this activity is unclear.

profits between January and April 1999, declined somewhat in May, and suffered catastrophic losses in June.

Thus, Steven Jones, who began trading in September 1998, lost money through December, and reaped substantial profits the following spring. Anthony Reed's first trade was executed in December 1998, at or near Noyes's low point for 1998, and liquidated one month later at a nearly $8,000 profit, as Noyes's trading began an upswing. Reed's open positions had more than $21,000 in unrealized gains in April 1999, when profits peaked. In contrast, Christy Shutt began trading in April, and steadily lost money.

GTI's owners were sufficiently impressed with Noyes's acumen that in August 1998, they invested $10,000 of their own funds in a Pro-Managed account. Like others who entered the market in the second half of 1998, the owners lost money through December, earned profits the following spring of 1999, and saw their account collapse in June. GTI's ending account balance was less than $400.

The last open pork belly positions for all Pro-Managed accounts were offset in August 1999; Noyes ceased functioning as a CTA the month before. Purchasers whose year-long contracts for trading advice had not expired received no refunds, and were advised that this was one of the risks they had assumed upon purchase. In October 1999, Pennings and Caulkins sold their GTI shares to Ownbey for $1.00 apiece, and left RB&H. Ownbey relocated GTI to Seattle, retaining its CTA registration and his dual registration with GTI and RB&H. GTI became registered as an independent introducing broker in January 2000, and Ownbey's association with RB&H ended in March 2000.

PROCEEDINGS BELOW

In July 2001, the Commission issued a five-count complaint against GTI, Ownbey and RB&H, alleging misconduct based on the above-described advertising claims. Count I charged Ownbey and "two other individuals" with violating Sections 4b(a)(i) and (iii) of the Act, and alleged that RB&H and GTI were liable as their employers under Section 2(a)(1)(B).[10] Count V charged RB&H with violating Commission Regulation 166.3 by failing to diligently supervise its employees.[11]

RB&H filed an answer that drew a sharp line between the conduct of Ownbey, Pennings and Caulkins in their capacity as associated persons of GTI, and their conduct as associated persons of RB&H. Throughout its answer, RB&H denied that "APs [associated persons] of RB&H" committed any of the misconduct alleged in the complaint, denied any knowledge GTI's activities, and denied any duty to supervise Ownbey and anyone else in the performance of work for GTI.

During prehearing proceedings, RB&H moved to have the ALJ disqualified, asserting that his treatment of the firm in other cases demonstrated bias. This relief was denied, before the ALJ and on interlocutory review by the Commission. After discovery, a hearing was held in Chicago over four days in March and April 2002.

---

[10] In addition, GTI was charged with direct liability under Section 4b and Ownbey was charged with liability for GTI's fraud as its controlling person.

[11] RB&H was not charged under other counts of the complaint. Count II alleged misleading sales practices by a commodity trading advisor and its associated persons against GTI and Ownbey, in violation of Section 4o(1) of the Act; and Count III alleged misleading advertising by a CTA and its principals against GTI and Ownbey, in violation of Commission Regulation 4.41(a). Counts I, II and III were based on the same conduct, the use of "false and misleading advertising." *See* Complaint at ¶ 28. Count IV alleged false reporting against GTI in violation of Section 6(c), based on its failure to identify Ownbey as a principal in certain regulatory filings, when he was acting as such. Ownbey was charged with controlling person liability under Counts II, III and IV of the complaint.

Commission futures trading investigator Thomas Koprowski testified that he conducted a review of Noyes's trading results, assuming a starting account size of $10,000, as GTI's advertisements suggested, and was unable to substantiate either the claim that a $48,000 profit had been earned from April 1997-April 1998, or that $66,000 had been earned over 23 months. Tr. at 282-88. Koprowski also testified that the statement on GTI's website advertising a 300 percent annual return on a "small investment" had no basis in fact. *Id.* at 286.

Joseph Mazza, a compliance consultant retained by GTI, corroborated Koprowski's testimony, stating that he told GTI its profit claims were overstated. Tr. at 28-37. The Division introduced a letter from Mazza dated May 10, 1999, making extensive suggestions on how to revise the website. Div. Exh. 19. Nevertheless, the 300 percent annual return continued to be posted through October 1999. The nature of GTI's magazine advertisements, however, changed substantially after December 1998.[12]

Pennings testified that he helped write some of GTI's advertising material, including calculating the advertised profit claims, and personally authorized *Futures* magazine to run one version of an advertisement announcing $48,000 in profits. Tr. at 126, 128-30. Pennings said that he had about 12 Pro-Managed accounts. He estimated that two-thirds of them learned about GTI through magazine advertisements, and that three-fourths traded through RB&H. Tr. at 118.

Caulkins testified that Ownbey was responsible for preparing GTI's promotional materials, Tr. at 221, and that he had obtained several clients through the advertisements in *Futures* magazine. Tr. at 264. Caulkins had no hand in advertising the Florida seminars or developing the website. *Id.* at 221-22.

---

[12] Advertisements than ran in the February and March 1999 issues of *Futures* magazine were headlined simply "Commodity trading information for speculators," and asserted only that GTI had an average gain per trade on 44 trades of $1516. Div. Exhs. 3F, 3G.

The Division also called nine individuals who had purchased Pro-Managed contracts. They described the varying ways in which they had been solicited, the factors that prompted their decisions to become GTI clients and to open accounts at RB&H, and their degree of success in trading the Pro-Managed system. Some had learned of GTI through magazine advertisements or direct mail fliers; others had traded with Ownbey before.[13]

The witnesses testified uniformly that they were steered to RB&H.[14] The Division also introduced several GTI disclosure documents, two of which stated that purchasers were required to trade through RB&H, a later version that advised purchasers they could trade through the FCM of their choice, and a still later version stating that while brokerage choice was available, GTI had a "special relationship" with RB&H. At least one witness had received GTI and RB&H material in the same package. Tr. at 641 (Test. of Kristin Stroda).

In addition to its fraudulent advertising case, the Division presented testimony from three of its witnesses that Pennings and Caulkins had made oral misrepresentations to them during

---

[13] Steven Jones, Tr. at 513, and Anthony Reed, Tr. at 467, testified that they learned of GTI through a *Futures* magazine advertisement, but at the hearing identified the direct mail flier as the advertisement they had seen. Christy Shutt, Tr. at 579; Eric Mitchell, Tr. at 404; and James Watkins, Tr. at 671, 682, were former Ownbey customers and learned of GTI when he called them. Kristin Stroda, Tr. at 633, and Laurie Grivel, Tr. at 696-97, learned of GTI through the direct mail flier. Vincent Furtkevic, Tr. at 728, was referred to Caulkins by a friend.

[14] Kristin Stroda chose RB&H because "[t]he packet of information that I received from Global Telecom contained the [RB&H] account application," and "nobody told me that I could go elsewhere." Tr. at 641. Laurie Grivel opened her account at RB&H on Caulkins' recommendation because "[h]e said that they had a good working relationship with them and they understood the program and the system and they could execute the orders more effectively." Tr. at 703. She said that while she "knew there were other brokerages" and that Caulkins "said you could go anywhere," she chose RB&H because Caulkins said "it would be best if I went there because they had such a good working relationship." *Id.* James Watkins opened an account at RB&H because "[t]hat's where I was recommended to open it" by Ownbey. Tr. at 677.

Steven Jones opened his account at RB&H, despite having an existing account at Linnco, "[b]ecause after talking to Mark Pennings, we discussed the alternatives, and he – Mark kind of recommended RB&H because they worked with RB&H and it would be a convenient way to execute the program." Tr. at 516. Anthony Reed opened an account with RB&H because Pennings told him "their broker license rests with RB&H," that RB&H was "well aware of the program, the pork bellies program, and that they could exercise the orders much quicker for me if the account was with them." Tr. at 476. Similarly, Christy Shutt, who had traded through Ownbey at another firm, opened a Pro-Managed account at RB&H because "[w]e were advised to by Cameron," and did not understand that an account could be opened at any futures brokerage. Tr. at 584-85.

telephone conversations incident to soliciting their business. Tr. at 472, 477 (Test. of Anthony Reed); *id.* at 342, 357, 395 (Test. of Craig Duryea); *id.* at 722 (Test. of Laurie Grivel). Pennings and Caulkins disputed this testimony. Tr. at 777-82 (Caulkins Test.) and Tr. at 155-57 (Pennings Test.).

Ownbey, testifying for himself and GTI, contended that no fraud occurred and that "all" promotional materials prepared by GTI were "100 percent accurate." Tr. at 900. He said that the advertised profits had been accurately calculated by Pennings from data contained in Noyes's disclosure documents. Tr. at 878-79. He testified that "it was mentioned" to RB&H that GTI would be advertising, but that no promotional material was submitted to RB&H for review or approval, and RB&H never asked to see any. He said the GTI website was not shown to RB&H because it never was completed. Tr. at 914-17.

In a separate defense, RB&H contended that any misconduct that occurred was done by or on behalf of GTI, and that it had no duty or authority to supervise or approve its advertising or other activities. Tr. at 801-02, 818, 833 (Test. of Jill Eklund). RB&H also sought to establish through cross-examination that Pro-Managed purchasers received disclosure about Noyes's track record, and about trading risk generally, that should have counteracted any false impression that may have been created by GTI's advertising. *See, e.g.*, Tr. at 385-95 (Test. of Craig Duryea); *id.* at 717-18 (Test. of Laurie Grivel).

RB&H also contended that under Section 4b, the Division was required to prove a connection between the fraudulent advertising alleged in the complaint, and trades executed for account holders who saw and relied on the advertising. In its post-hearing brief, RB&H argued that, with one exception, the Division's customer witnesses could not identify correctly which of several GTI magazine advertisements they had seen and responded to, and that none of the

witnesses had seen GTI's website or advertisements for the Florida seminars. RB&H Post-Hearing Br. *passim* (July 19, 2002). RB&H argued that testimony from customers who said they first saw GTI's profit claims in direct mail fliers (or who identified the flier at the hearing as the advertising they had seen) was inadmissible, because the fliers were not mentioned in the complaint. *Id.* at 1-2, 11, 13-14, 19.

The ALJ issued an Initial Decision in which he found all respondents liable as charged. *In re Global Telecom, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,274 (Initial Decision Jan. 17, 2003) ("I.D."). The ALJ found that GTI's advertisements selectively highlighted Noyes's best 12-month period for pork belly trading, and that such cherry-picking, removed from the context of his total pork belly trading, was materially misleading. I.D., ¶ 29,274 at 54,539-43. The misleading nature of the statement was magnified by the advertisements' suggestion that subscribers start trading with $10,000, while Noyes had achieved his results starting with $20,000, the ALJ found. *Id.* at 54,539-40, 54542. In addition, he found that GTI's advertising implied that it was an established concern, rather than a startup operation. He admitted the direct mail fliers containing this claim, finding it immaterial that they were not mentioned specifically in the complaint. He also held that GTI's subsequent advertisement claiming $66,000 in profits over 23 months, and its website and seminar advertisements, were similarly misleading. *See generally id.* at 54,538-40.

The ALJ held that GTI and Ownbey acted recklessly in using misleading advertising. *Id.* at 54,543. He found that GTI's "selective reporting of past performance [was] so carefully calibrated to yield the best returns" that it went beyond "mere coincidence," and that statements relating to GTI's track record were "so unsubstantiated that, if not intentionally misleading, then they were certainly reckless." *Id.*

Relying on Commission and federal court precedent, the ALJ held that misleading advertising used to sell a trading advisory system that recommended specific trades constituted fraud "in connection with" a futures transaction to be made "for or on behalf of" another. *Id.* at 54,543-44. He also held that Commission precedent does not require proof of customer reliance to prove a violation of Section 4b in an enforcement case. *Id.* at 54,541. Therefore, the Division did not need to show that Pro-Managed purchasers saw, relied on and remembered specific items of advertising.

In addition to finding Section 4b liability based on fraudulent advertising, the ALJ found that fraudulent statements were made by Pennings and Caulkins on at least three occasions in telephone conversations with prospective customers.[15]

The ALJ then turned to the issue of whether RB&H was liable for the fraudulent advertising, and for failing to supervise Ownbey and his colleagues. He found that RB&H provided GTI with office space, electricity, telephone service, etcetera, in the expectation that persons who became customers of GTI would open accounts at RB&H, which in fact happened in four out of five cases. He stated:

---

[15] The ALJ found with regard to the oral misrepresentations:

- In soliciting Craig Duryea, Caulkins downplayed the risk of trading the Pro-Managed system, did not explain disclosure documents sent to Duryea, and dismissed other documents in a package that included the RB&H account application as "a bunch of mumbo jumbo." .

- Caulkins downplayed mandatory risk disclosure in soliciting Laurie Grivel, telling her, as she testified, "just because they say that [past performance may not be indicative of future results] and they have to put that on every form doesn't mean that we are not going to be profitable. There was money to be made."

- Pennings told Anthony Reed that the advertised $48,000 profit was based on a $10,000 investment, and did not explain disclosure documents to him.

I.D., ¶ 29,274 at 54,540 (citations to transcript omitted). *Compare* contrary testimony by Caulkins, Tr. at 777-82, and Pennings, Tr. at 155-57.

> It is reasonable to conclude that Global's free use of RB&H resources was premised on the business it would bring to the FCM, and not kindness of heart. . . . [T]he dual-registered APs were "person[s] acting for" RB&H "within the scope of [their] employment" when they solicited business for it, solicitations for which they received commission payments from RB&H. . . . Global, RB&H, and the dual-registered APs were all aware of the arrangement, aware of the services they were performing for their counterparts, and aware of the benefits they were receiving.

I.D., ¶ 29,274 at 54,546. The ALJ did not discuss, and apparently deemed irrelevant, the fact that RB&H was not mentioned in GTI's advertisements, since RB&H was an intended beneficiary of responses to the advertisements. He deemed it "immaterial" whether RB&H had "specific knowledge of each misleading promotion." *Id.*

The ALJ emphasized that in order to hire Ownbey, Pennings and Caulkins, RB&H had to execute a 3-R Form for each, pursuant to which it acknowledged the expectation that there would be customers common to both firms. He noted that in signing the forms, RB&H assumed a joint duty to supervise the dually registered associated persons, as well as joint and several liability for their conduct in the "solicitation or acceptance of customers' orders" and the handling of discretionary accounts. *Id.* at 54,538.[16]

In light of these circumstances the ALJ held that RB&H could not distance itself from GTI's advertising. He held that the advertising was created and used within the scope of the associated persons' employment with RB&H, making it liable under Section 2a(1)(B). *Id.* at 54,546. Since RB&H admitted that it exercised no supervision of the advertising, the ALJ necessarily found it in violation of Regulation 166.3 as well. *Id.* at 54,547.

The ALJ imposed cease and desist orders against all respondents, and ordered RB&H to pay a civil monetary penalty of $220,000, the amount requested by the Division. He imposed

---

[16] The ALJ found it significant that RB&H employee Kevin Fuchs, who had no connection to GTI, had discretionary authority to trade several Pro-Managed accounts. I.D., ¶ 29,274 at 54,537, 54,546. The circumstance underscores the close relationship between RB&H and GTI, and further demonstrates that when GTI's advertising attracted customers, both companies benefited.

three-year trading bans against Ownbey and GTI and revoked their registrations, but refused the Division's request for civil monetary penalties. *Id.*

The ALJ also imposed a tentative order of restitution for the benefit of persons who purchased the Pro-Managed system, to allow them to recover the $4,500 paid for trading advice. Noting that he lacked "sufficient information to make individual determinations for all 74 Global clients . . . potentially eligible" for this relief, *id.* at 54,548, he directed the Division to petition the Commission for an order leading to the implementation of restitution through NFA. As the ALJ noted, restitution requires proof of reliance and resultant damages. He ordered a tentative maximum restitution award of $330,000, the amount payable if approximately all 74 Pro-Managed purchasers established eligibility, with GTI liable for the entire amount and RB&H jointly and severally liable for up to $265,500 ($4,500 for each of the 59 purchasers who opened accounts there). *Id.*

DISCUSSION

On appeal, RB&H renews its argument below that GTI's advertising was outside the scope of Ownbey's and his colleagues' employment with RB&H. It also raises numerous legal and factual arguments asserting Section 4b fraud was not proved against Ownbey and the other dual registrants. RB&H contends that the sanctions are excessive, especially in light of the limited benefits gained from its association with GTI, and that the proposed restitution procedure is unworkably cumbersome. Finally, it argues that the ALJ was biased against it from the start of this case, and improperly curtailed its cross-examination of two witnesses.

The Division responds that all elements of Section 4b were satisfied, and that RB&H cannot escape liability for its employees' conduct, because the roles of Ownbey and his colleagues "at both firms were so enmeshed that their solicitations seamlessly blended pitches

for [GTI's] product and RB&H's services." Div. Ans. Br. at 21. It seeks affirmance of the decision below in all respects except its denial of civil monetary penalties against Ownbey and GTI. Its cross-appeal asks the Commission to impose substantial civil monetary penalties against these respondents.

A. Ownbey and the Other Dually Registered Associated Persons Committed Fraud in Violation of Section 4b.

To prevail under Section 4b, the Division must prove that material misrepresentations or omissions were made with scienter, in connection with a futures transaction executed for or on behalf of another. *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,311 (CFTC July 19, 1999) (*subsequent history omitted*); *Saxe v. E.F. Hutton & Co., Inc.*, 789 F.2d 105, 109-112 (2nd Cir. 1986). Section 4b reaches statements that are literally true but misleading in the context in which they are used. *Swickard v. A.G. Edwards & Sons*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,522 at 30,275 (CFTC Mar. 7, 1985).

Our review of the record and the parties' appellate submissions establishes that the findings and conclusions of the ALJ respecting the materially misleading nature of GTI's advertising, and the recklessness of its statements and omissions, are supported by the weight of the evidence. We therefore adopt them (with one exception noted below).[17] In particular, GTI's claim that its advisory system yielded "over $48,000 in real time profits" over a 12-month period is an example of how a half-truth "'may obviously amount to a lie if understood to be the

[17] We find insufficient persuasive evidence to affirm the ALJ's liability findings with respect to advertising for the Florida seminars. Ownbey testified that it was prepared without his knowledge or permission by Robert Schmidts, a "professional seminar person" who organized the seminars. Ownbey said he fired the organizer upon arriving in Florida. Tr. at 899. Without finding Ownbey credible overall, we note that the flier's statements, especially the reference to profiting from a Y2K disaster, are different from those contained in other GTI materials. We find that the Division failed to carry its burden of proof with respect to the Florida advertising, and have not considered it in affirming the ALJ's liability findings under Section 4b.

whole.'" *Swickard*, ¶ 22,522 at 30,275 (internal citation omitted).[18] *See also CFTC v. R.J. Fitzgerald Co., Inc.*, 310 F.3d 1321, 1330 (11th Cir. 2002) (finding it "too obvious for debate that a reasonable [person's] choice-making process would be substantially affected by emphatic statements on profit potential"); *accord*, *CFTC v. Commonwealth Financial Group*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994); *In re JCC, Inc.* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 (CFTC May 12, 1994).

RB&H contends that the "in or in connection with" element of Section 4b has not been satisfied because GTI's advertising had nothing to do with the execution of futures transactions. It argues that a link must be shown "between the fraud and the defrauded individual's futures trading," RB&H App. Br. at 17, and that "the misrepresentations must have some connection to futures trading *actually done* by a person." RB&H App. Br. at 16 (emphasis added).

---

[18] GTI derived this statement from Noyes's results as follows. Noyes began trading pork belly futures through his Domestic Fundamentals program in July 1996, with $20,000 in capital. He incurred an unrealized loss of $360 that month. In August 1996, he enjoyed realized profits of $994 and unrealized profits of $7,300. The following month he realized profits of $9,411 and suffered unrealized losses. Noyes began November with an account balance of $37;020, but suffered significant losses that month and a smaller loss in December to end 1996 with $25,880. That amount represents a 29.4 percent return on his initial $20,000 investment. There were no withdrawals and no additional investments of capital during 1996.

In January 1997, Noyes withdrew his profits and began trading for the year with his original stake of $20,000. His account went up in January, down in February and up in March, to begin April with a balance of $35,493. He suffered catastrophic realized and unrealized losses during April, ending the month with account equity of $15,303. It is from this point that GTI begins measuring its claim of "$48,000 profits in 12 months." Noyes' pork belly trading rebounded dramatically. His account balance rose throughout the rest of the year, and he ended December with account equity of $55,908, after expenses, a 179 percent return on the $20,000 with which he began trading that year. At the end of 1997 the account was up by $40,766 over its low point ($15,303) at the end of April.

In January 1998, Noyes withdrew $35,000 profits and began trading with his customary stake of $20,000. The account had ups and downs during the first four months of 1998, ending April with equity of $27,954. The $40,766 profits for the last eight months of 1997, plus the $7,954 profits earned during the first four months of 1998, are the basis for GTI's much-advertised claim.

Month-by-month statistics showing gains and losses stated in percentages, not dollars, are included in disclosure documents furnished to GTI customers. *See* Pork Belly Extracted Pro-Forma Proprietary Performance Capsule, versions of which (covering different time periods) are set forth in GTI's disclosure documents. *E.g.*, RO Exh. 3 (Disclosure Document Eff. Sept. 15, 1998); RO Exh. 4 (Disclosure Document Eff. Dec. 1, 1998).

Respondent reads the "in connection with" element too narrowly, and without regard for recent precedent. On facts similar to these, the Commission has held that Section 4b was violated when false advertising was used to sell an advisory service that picked specific trades. *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 (CFTC Mar. 16, 1999), *aff'd in part, rev'd in part and remanded sub nom. R&W Technical Services, Ltd. v. CFTC*, 205 F.3d 165 (5th Cir. 2000). In addressing the "in connection with" element of 4b, the Commission held that the element embraces more than trade execution:

> [C]ourts have found violations of Section 4b(a) to exist where futures trading has not yet occurred; where the actors are neither members of a contract market nor directly involved in the sale or purchase of the futures contracts; and where misrepresentations were made not about the underlying contracts to be traded, but about the quality of the source of the trading decisions.

¶ 27,582 at 47,743-44 (internal citations and footnotes omitted).[19]

In affirming this aspect of *R&W* on review, the U.S. Court of Appeals for the Fifth Circuit upheld the Commission's view that "fraud in the sale of investment advice" satisfies the "in connection with" requirement" of Section 4b "if the fraud relates to the risk of the trading and the primary purpose of purchasing the advice is to execute trades." 205 F.3d at 172-73. The *R&W* facts fell within that interpretation, the Court stated, because the software in question "had no purpose except as a device for choosing which trades to make. . . . [N]o one spends

---

[19] *Accord, CFTC v. Vartuli*, 228 F.3d 94 (2nd Cir. 2000), another case involving fraudulent advertising used to sell a computerized trading program that picked specific trades. The U.S. Court of Appeals for the Second Circuit held, "[t]he intended and direct link between the advertisements and the currency trading rendered any misrepresentations in the advertising 'in connection with' the suggested futures transactions." *Id.* at 101. *See also Saxe*, 789 F.2d at 110-11 (misrepresentations concerning the profitability and risks of a trading system, and the performance history of accounts traded pursuant to it, were "in connection with" the purchase or sale of futures contracts); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-04 (7th Cir.1977) ("[b]y its terms, Section 4b is not restricted . . . to instances of fraud or deceit 'in' orders to make or the making of contracts").

several thousand dollars on a sophisticated software package without seriously intending to execute trades." *Id.* at 172.

Purchasers of the Pro-Managed system received specific trading recommendations and nothing more—no software, no informational material, nothing that conceivably might have an independent purpose. The only possible way to obtain any use or benefit from its $4,500 price, or to have any opportunity of recouping its cost, was to trade in accordance with signals generated by Noyes's trading system. There was an "intended and direct link," *see Vartuli*, *supra* note 19, between advertisements and the trading signals, satisfying the "in or in connection with" requirement.

The foregoing analysis requires only a slight extension to encompass the final, "for or on behalf of" element of Section 4b. The intended and direct link between GTI's advertising and specific trades was accompanied by a corollary intent that the trades would be executed *for* customer accounts *by* the dually registered associated persons, which in fact happened.

RB&H's reliance on *Commodity Trend Service, Inc. v. CFTC*, 233 F.3d 981 (7th Cir. 2000), is unavailing, given the substantially different facts of that case. The U.S. Court of Appeals for the Seventh Circuit held in *Commodity Trend Service* that the "for or on behalf of" clause of Section 4b "unambiguously . . . applies only to brokers or others who have an agency relationship with their clients," *id.* at 992 (footnote omitted), and rejected the suggestion that the "phrase only specifies that the contract must be made on behalf of someone other than the party committing fraud." *Id.* The plaintiff in *Commodity Trend Service*, however, provided impersonal commodity advice and teaching materials that did not involve a customer-broker relationship, as was the case with Ownbey and his colleagues. *Cf. R&W*, 205 F.3d at 173, and *Vartuli*, 228 F.3d at 102, which resulted in findings that Section 4b had been violated without

expressly addressing the "for or on behalf of" clause. The instant case falls more squarely within the four corners of Section 4b than do *R&W* and *Vartuli*, because here, the same individuals who sold trading advice through misleading advertising also executed trades for the customers who bought the advice; software purchasers in *R&W* and *Vartuli* generally opened and traded accounts on their own.

RB&H's other challenges under Section 4b also lack merit. Its contention that customer reliance on GTI's advertising must be proved cannot withstand unambiguous contrary authority. *See, e.g., Slusser*, ¶ 27,701 at 48,311 (neither reliance nor actual damages is an element of a Section 4b violation in the enforcement context); *accord, In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC Aug. 11, 1992), *aff'd in part and rev'd in part on other grounds sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993).[20]

The ALJ did not err in admitting documentary and testimonial evidence regarding GTI's direct mail advertising—identical to the magazine advertisement claiming a $48,000 profits in 12 months—even though this advertising vehicle was not specifically named in the complaint. In addition to its specific allegations of fraudulent advertising, *see* ¶¶ 17-20, the complaint alleges: "Each material misrepresentation or omission and each willful deception . . . *including but not limited to those specifically alleged herein*, is alleged as a separate and distinct violation of Section 4b(a)(i) and (iii) of the Act. Complaint at ¶ 32 (emphasis added).

The complaint could not state more clearly that it intended to capture the range of misconduct by GTI, Ownbey and his associates, including—but expressly not limited to—the

[20] Absent the need to show customer reliance to prove a 4b violation, it is immaterial whether witnesses were able to identify correctly which of several virtually identical forms of print advertising they had seen.

particular promotional items described in paragraphs 17-20. The content of GTI's statements is at issue, not the manner of their presentation.

We also affirm the ALJ's findings that Pennings and Caulkins made fraudulent statements directly to prospective customers in the course of telephone conversations. RB&H argues that these statements are inadmissible because (like the direct mail advertising) they were not alleged in the complaint, and that the ALJ's credibility findings are flawed.

We reject these arguments. As stated above, we read the complaint broadly and find that it reaches these oral misrepresentations. We apply a deferential standard of review to a presiding officer's findings regarding witness credibility based on observations of witness demeanor. *Dawson v. Carr,* [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,983 at 53,315 (CFTC Apr. 10, 2002); *see also Secrest v. Madda Trading Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,627 (CFTC Sept. 14, 1989). While Pennings and Caulkins gave testimony denying the statements attributed to them and asserting that they fairly presented risk, their statements were not compelling evidence that contravened that of their clients. Moreover, resolving conflicting recollections of distant conversations is a task that lies particularly within the province of the ALJ.

B. Ownbey and His Associates Acted Within the Scope of Their Employment for RB&H While Engaging in Violative Conduct and RB&H Failed to Supervise Its Employees.

We affirm the ALJ's conclusion that GTI's advertising fell within the scope of Ownbey's and his associates' employment with RB&H. The advertising was used with the intent of attracting brokerage business to RB&H, even if that was not its sole purpose. RB&H meant to benefit from its employees' status as dual registrants of a CTA, as evidenced by the agreement between the two firms; statements in GTI's disclosure documents, and oral statements to clients,

instructing or encouraging them to trade through RB&H; and the inclusion of RB&H account applications in GTI mailings.

As an intended beneficiary of advertising created by its associated persons, RB&H cannot cloak itself in the argument that "[a]s a registered CTA, [GTI] was independently responsible to the Commission for its own advertising. There was no reference in the advertisements to RB&H, and therefore RB&H had no duty to review them." RB&H App. Br. at 11. Its professed ignorance of what its employees were doing under the auspices of GTI does not absolve it of responsibility, demonstrating instead both a misunderstanding of its role as a dual sponsor and its failure to supervise its workforce. The absence of its name from advertising copy means that RB&H was an undisclosed principal with respect to prospective customers, but in no way affects its employer-employee relationship with its associated persons.

We affirm the finding below that RB&H violated Regulation 166.3. The rule requires FCMs and others to "diligently supervise" its employees' handling of "all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its . . . employees and agents . . . relating to its business as a Commission registrant." Since the advertising was used by Ownbey and his colleagues in their capacity as RB&H employees, and RB&H admittedly exercised no oversight of it, liability follows as a matter of course.[21] RB&H clearly bore responsibility for supervising the associated persons' oral solicitations. Fraudulent statements were made on at least three occasions during telephone conversations with individuals who were being solicited to open accounts at RB&H, and at least two of those statements dealt

---

[21] The "basic purpose of [Regulation 166.3] is to protect customers by ensuring that their dealings with employees of Commission registrants will be reviewed by other officials in the firm." Adoption of Customer Protection Rules, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,642 at 22,624 (CFTC July 24, 1978). Section 166.3 imposes on an FCM an affirmative duty to supervise its employees by establishing an adequate supervisory structure and compliance programs and to diligently carry out such programs RB&H had internal policies, set forth in its compliance manual, requiring associated persons to submit for approval any advertising used in soliciting customers, but RB&H did not apply these procedures to Ownbey and his colleagues.

with trading risk generally, not with the particulars of GTI or the Pro-Managed system. In addition, misleading items of direct mail advertising were sent to some prospective customers in the same envelope as RB&H account opening documents. RB&H concededly imposed no oversight on any part of GTI's solicitation process.

RB&H's supervisory duties with respect to the dual registrants are defined further by Regulation 3.12(f), which provides that *each* sponsor of a person with dual or multiple registrations shall be "jointly and severally liable for the conduct of the associated person" with respect to the "solicitation or acceptance of customers' orders," and the "solicitation of a client's or prospective client's discretionary account." Commission Regulations 3.12(f)(1)(i), (iii).[22] The joint responsibility applies to "common customers." *Id.* at § 3.12(f)(v). RB&H argues that the rule "did not expand [its] duty to review the GTI advertising," because "the magazine advertisements did not solicit either [customer orders or discretionary accounts]; they solicited customers for GTI's trading system." RB&H App. Br. at 37.

The Commission promulgated Regulation 3.12(f) in substantially its current form in 1992, to remove a prohibition against dual and multiple sponsorships. *See* Adverse Registration Actions and Other Registration Matters (Final Rules), 57 Fed. Reg. 23136 (June 2, 1992). The old rule prohibited an individual from being associated simultaneously with a CTA and an FCM unless (1) all of the associated person's CTA customers had their accounts cleared through the FCM, in which case the associated person was deemed to be solely associated with the FCM; or (2) none of the associated person's CTA customers cleared through the FCM, in which case the associated person was required to maintain dual, non-overlapping registrations.

[22] Regulation 3.12(f) was amended and renumbered while this case was pending below. Our opinion refers to the rule as it stood when the case was brought. The amendments "facilitate[d] the change from the current paper-based registration system to online registration," 67 Fed. Reg. 38869-01 (June 6, 2002), and do not affect our resolution of this matter.

The all-or-none rule was aimed at "situations where each sponsor might try to disclaim responsibility for supervision or liability for the [associated person] with dual or multiple associations." Adverse Registration Actions and Other Registration Matters (Proposed Rules), 56 Fed. Reg. 37026, 37,033 (Aug. 2, 1991). In removing the prohibition, the Commission determined that its concerns could be met by providing for joint and several liability and oversight with respect to common customers.

Accepting RB&H's arguments that Regulation 3.12 does not apply would bring about the very situation the rule is aimed at preventing—one in which a futures customer who contracts with two entities to receive two products or services is left with nobody minding the store. In imposing joint liability for common customers, the rule anticipated circumstances where a dual registrant might serve the interests of two sponsors in what the ALJ characterized as a "seamless" course of action. RB&H is not being held liable for the misconduct of GTI's employees or GTI itself. The FCM is answerable for its associated persons, who committed violations of the Act in furtherance of RB&H's interests. *See* Adverse Registration Actions and Other Registration Matters (Final Rules), 57 Fed. Reg. 23136, 23141 (June 2, 1992).[23]

C. The Record Below Shows No Evidence of Bias.

RB&H's bias argument is based on the ALJ's adverse decisions against it in two prior cases and on his curtailment of RB&H's cross-examination of two witnesses in this case. Early in this proceeding, RB&H asked the ALJ to disqualify himself under Regulation 10.8(b)(2), on the ground that his rulings and comments in two reparations cases demonstrated his bias against the firm. When we addressed this issue earlier in this proceeding, we found no basis to

---

[23] In promulgating Regulation 3.12, the Commission noted that one commenter had suggested that the rule "could be interpreted as imposing liability upon each sponsoring firm for all acts of an AP in his capacity as an agent and even, potentially, for acts of other sponsoring firms." 57 Fed. Reg. at 23141. The Commission rejected that interpretation, stating, "the sponsor would acknowledge joint and several liability for a dually registered AP only as to the activities 'with respect to any customers common to it and another sponsor of the AP.'" *Id.* (internal citation omitted)

disqualify the ALJ, and find no reason to alter our view at this juncture. *See* Order Denying Interlocutory Review (May 15, 2002). We have nothing to add on that score and incorporate the reasoning of our May 15, 2002 order.

Nor do we find that the ALJ improperly forestalled cross-examination of either Craig Duryea, a customer witness, *see* Tr. at 396-97, or Koprowski, the Commission's investigator, Tr. at 323-25. Duryea was the only witness who both testified that he learned of GTI through a magazine advertisement, and correctly identified the advertisements from a group of exhibits he was shown at the hearing. RB&H attempted to show that Duryea had read and understood GTI's disclosure documents, and thus was not misled by the advertisement. The ALJ cut off cross-examination after RB&H's counsel read several passages verbatim from acknowledgement of receipt of risk disclosure statement Duryea had executed, and asked Duryea if he had seen them. Tr. at 397. The right to cross-examine a witness is not unlimited, and is subject to the discretion of the presiding officer. *E.g., In re Rousso*, CFTC Docket No. 91-3, 1997 WL 422859 (CFTC July 29, 1997). RB&H was afforded ample opportunity to ask Duryea about the disclosure he received before the ALJ halted this line of questioning. *Modlin v. Cane*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,059 at 49,552 n.22 (CFTC Mar. 15, 2000) (an ALJ has discretion to curtail inefficient questioning).

Koprowski testified that he conducted a review of Noyes's trading results, and was unable to substantiate the claims in GTI's advertisements. Koprowski's review was based on the advertisements' inference that the profits had been earned on a $10,000 investment. RB&H repeatedly asked Koprowski to analyze Noyes's trading results using respondents' methodology. After issuing admonitions that the line of questioning was inappropriate, the ALJ halted cross-examination. Tr. at 319-25. We find no abuse of discretion. While respondents' were entitled

to try to undermine the validity of Koprowski's analysis, they could not require him to accept their assumptions as the basis for his answers.

D. Sanctions.

RB&H argues that the $220,000 civil monetary penalty imposed by the ALJ is excessive, given that it earned less than $22,000 in commissions from its 59 Pro-Managed accounts.[24] It argues that no restitution order should be imposed, because it received no funds from the sale of the Pro-Managed system, and because the distribution procedure envisioned by the ALJ is cumbersome. It opposes the cease and desist order because "RB&H's relationship with Global Telecom's APs was a unique and isolated event." *Id.* at 12. The Division urges us to affirm the ALJ's sanctions. Div. Ans. Br. at 32-41.

The Commission reviews sanctions *de novo* with the aim of deterring unlawful behavior. The appropriate balance of sanctions reflects the general gravity of the violation at issue and the particular facts and circumstances established on the record. As we review the record, we keep in mind that sanctions are imposed to carry out the Act's remedial purpose and to deter others from engaging in misconduct. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,691 (CFTC Sept. 29, 2000).

The cease and desist order stands. This sanction is appropriate when there is a "reasonable probability" that a respondent will repeat illegal activities in the future. *In re Elliott*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 at 46,008 (CFTC Feb. 3, 1998), *aff'd, Elliott v. CFTC*, 202 F.3d 926 (7th Cir. 2000); *see also In re Collins*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,418 at 46,973 (CFTC Sept. 4, 1998). RB&H's

---

[24] RB&H argues that its maximum exposure to a monetary penalty ought to be as low as $3,100. This amount represents a percentage of the penalty imposed that is roughly analogous to the percentage of Pro-Managed customers who appeared and testified. RB&H App. Br. at 38-41. The Division asserts that RB&H may have earned as much as $34,000.

contention that the relationship here was "unique and isolated" is undermined by the testimony of its own officer, Jill Eklund, that in the regular course of business "deals" for cooperative relationships were presented to her for approval. The precise details of the various deals may have differed from the RB&H-GTI contract, but Eklund's testimony indicated it was not at all out of the ordinary for RB&H to enter into such arrangements. Moreover, RB&H's willful blind eye toward the activities of the dual registrants, as long as they were acting under GTI's name, indicates a misunderstanding of its obligations that may lead to future violations.

As we have stated on numerous occasions in addressing civil monetary penalties, violations of core provisions of the CEA, such as Section 4b, are inherently serious and should be penalized accordingly. Section 6(c) of the CEA provides for a maximum civil monetary penalty of $110,000 per violation, or triple the monetary gain to a respondent, whichever is higher.[25] The ALJ penalized RB&H under the first alternative, assessing $110,000 for its employees' violations of Section 4b and $110,000 for its own violation of Regulation 166.3.

The complaint charged "[e]ach material misrepresentation or omission and each willful deception" as a separate and distinct violation of Section 4b, complaint at ¶ 32. This characterization allows us to calculate the total in a number of different ways. Without attempting the various permutations available to us, we note that misleading statements appeared in six issues of special interest magazines (of unknown circulation), in an unknown number of direct mailings, and on GTI's website. These occurrences more than justify the amount of the

---

[25] The $110,000 maximum penalty per violation applies to acts committed between November 27, 1996 and October 22, 2000. The maximum is subject to periodic adjustment for inflation. *See* Commission Regulation 143.8.

penalty.[26] In addition, the misleading advertising was accompanied by three proven oral misrepresentations, one of which echoed a claim made in the advertising.

RB&H's argument that the penalty far exceeds its gains misses the mark. Effective deterrence at times requires a penalty greater than a respondent's gain derived from its wrongdoing. RB&H's culpability for its employees' misconduct is not lessened because of the comparatively small benefit it gained from misconduct that lasted more than a year.

We also affirm the $110,000 penalty assessed for the failure to supervise violation, which allowed three associated persons to act without oversight; was intentional and unreasonable in light of the express requirements of Regulation 3.12(f) and the sponsorship documents RB&H executed; and persisted from March 1998 though October 1999.

The Division asks us to penalize Ownbey and GTI each $440,000. Div. App. Br. at 19. It argues that this sanction is appropriate, given that respondents violated core antifraud provisions of our regulatory structure and filed a registration form that misrepresented Ownbey's status within GTI.[27] The Division asserts that "[t]his sum is entirely reasonable given the scope of the fraud, the number of customers affected, and the continuing nature of the scheme." *Id.* We agree that a significant penalty is warranted. Ownbey was the unrepentant architect of an undertaking perpetrated by and through GTI that breached prohibitions on futures fraud, CTA

---

[26] Commission precedent generally has focused on the overall gravity of respondents' violations rather than their number, and our case law provides little guidance on the appropriate method for counting violations. We have endorsed what might be characterized as a broad approach, tempered by common sense. *See, e.g, In re Carr*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,933 at 37,397 n.3 (CFTC Oct. 2, 1990) (each day of noncompliance with a Commission rule may constitute a separate violation"); *In re Rosenthal & Co.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,221 at 29,191 (CFTC June 6, 1984) (a nationwide solicitation fraud scheme involving 25 offices and a sales force of 500 entailed "multiple" violations, not a single violation, as respondents claimed). We normally do not "equate the number of violations at issue in an enforcement proceeding with the number of Counts included in a Complaint." *In re Slusser*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,411 at 54,745 (CFTC Feb. 28, 2003), *citing In re JCC Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,571, 41,583 (CFTC May 12, 1994).

[27] The Division's penalty request seeks $110,000 for each respondent's conduct under Sections 4b, 4o and 6(c) of the Act, and Regulation 4.41.

fraud and misleading advertising. "[C]ustomer fraud [is] a violation going to the core provisions of the Act. As a general rule, such conduct is considered to be among the most serious of violations for purposes of initially determining the severity of the sanctions to be imposed . . . ." *In re Grossfeld*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,468 (CFTC Dec 10, 1996) (internal citation omitted).

Nevertheless, we find that while the Division's penalty request captures the gravity of respondents' conduct, the request overstates its scope. First, in considering penalties, the Commission may concentrate on the overall gravity of the conduct. *See In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,023 at 37,083 (CFTC Mar. 26, 1991) (Order Denying Petition for Reconsideration) (basing sanctions on "the overall gravity" of a course of conduct rather than the number of statutory provisions the conduct violated).[28] In this case, the charges under Sections 4b and 4o of the Act, and Regulation 4.41, involve the same course of conduct.

Also, despite repeated magazine advertisements, direct mail fliers and other outreach efforts, GTI sold its Pro-Managed system to only 74 customers. The comparatively limited impact of the wrongdoing does not lessen the degree of respondents' liability, but may be considered in determining the level of sanctions. Similarly, we take into account that respondents—albeit reckless to the extreme in marketing their service—did not, on this record, embark upon a scheme of intentional fraud. Ownbey and his associates invested in the Pro-

---

[28] In *Gilchrist, supra,* the administrative law judge found that a single course of conduct violated two statutory provisions and a Commission regulation. On Gilchrist's appeal, the Commission vacated the liability finding under one statutory provision and left the sanctions imposed below undisturbed. Upon seeking reconsideration, Gilchrist asserted that a reduction in grounds of liability warranted lesser sanctions. In refusing this relief, the Commission stated that it "concentrated on the overall gravity of the conduct itself," and that "[v]iewed from that perspective . . . the sanctions [were] reasonable to remedy the violations found here." ¶ 25.023 at 37,083.

Managed system they sold to their customers, and lost money with them. In these circumstances, a downward variation from the amount sought by the Division is appropriate.

We turn to the reporting violation based on GTI's failure to identify Ownbey as a principal in certain regulatory filings. For several months in 1998, Ownbey was ineligible under Commission regulations to be a principal of GTI, because of legal problems unrelated to this case. These surfaced in early 1998, as GTI was getting organized and applying for registration, and were later resolved. When the problems surfaced, Ownbey nominally ceased serving as a principal and officer, and so informed NFA. The Division proved that Ownbey nevertheless acted as a *de facto* principal during his period of incapacity, and even represented himself as a GTI officer in some of the firm's disclosure documents.

Had Owbey remained a principal of record, GTI could not have become registered as a CTA. Conversely, had Ownbey ceased to be a principal in fact, as well as in name, it is possible that the plan would have collapsed, since he was the moving force behind the scheme. Given this "but for" relationship between the reporting violation and the scheme he set in motion, a substantial penalty is warranted. Also, as a general rule, the Commission, the industry and the public must be able to rely on the integrity of registration documents. The penalty we impose must deter respondents and others from falling short of that goal. Deterrence may be achieved, however, with a lesser amount than a reflexive imposition of the statutory maximum.

Based on the foregoing considerations, we conclude that the remedial purposes of the Act will be satisfied by imposing a civil monetary penalty $220,000 against Ownbey, and a separate penalty, also in the amount of $220,000, against GTI.

Restitution. Our authority to order restitution derives from Section 6(c) of the Act, which states that in an administrative enforcement proceeding, we may require "restitution to customers

of damages proximately caused by the violations" proven by the Division. Our experience with this authority in adjudicated cases is limited. In an early decision, we stated that customer reliance and proximate cause are statutory requirements of restitution. *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,812 (CFTC Dec. 18, 1997). In addition to these statutory prerequisites, *Staryk* identified other factors to be considered in a decision on whether to award restitution, including the practicality of this sanction in the circumstances of a particular case. *Id.* at 45,812 and n.15.

Staryk involved the Division's appeal from the administrative law judge's denial of restitution on the ground that no implementing rules had been issued. The Commission remanded with instructions to reconsider the issue in light of its guidance. On remand, it was determined that respondent's financial condition and the likely complexity of establishing individual claims made restitution infeasible. *In re Staryk*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,515 at 47,391-92 (Initial Decision on Remand Dec. 4, 1998).

In a subsequent case, we affirmed the ALJ's denial of restitution, stating, "determining the amount or appropriateness of restitution would be complex" because "[d]ue to the statutory requirement of proximate cause, we would need to determine whether as many as 950 individual customers benefited or lost on the basis of their use of the R&W trading system, placing a substantial burden on our adjudicatory resources." *R&W, supra,* ¶ 27,582 at 47,750.

In this case, as relevant to RB&H's appeal, the ALJ stated that the 59 persons who bought the Pro-Managed system and opened accounts at RB&H constituted the class of persons potentially eligible for restitution from this respondent and fixed the damages in the amount of the purchase price paid for the system, an amount totaling $265,000. *Staryk* and *R&W* were

issued without reliance on the Commission's restitution rules.[29] This case involves an award made under those regulations. RB&H argues that the ALJ failed to comply with them.

Rule 10.110(a) states:

> In any proceeding in which an order requiring restitution may be entered, the Administrative Law Judge shall, as part of his or her initial decision, determine whether restitution is appropriate. In deciding whether restitution is appropriate, the [ALJ], in his or her discretion, may consider the degree of complexity likely to be involved in establishing claims, the likelihood that claimants can obtain compensation through their own efforts, the ability of the respondent to pay claimants damages that his or her violations have caused, the availability of resources to administer restitution and any other matters that justice may require.

The factors identified in Rule 10.110(a) largely mirror those discussed in *Staryk.* Rule 110.10(b) states that if restitution is determined to be appropriate, the ALJ shall then:

> [I]ssue an order specifying the following:
>
> (1) All violations that form the basis for restitution;
> (2) The particular persons, or class or classes or persons, who suffered damages proximately caused by each such violation;
> (3) The method of calculating the amount of damages to be paid as restitution; and
> (4) If then determinable, the amount of restitution the respondent shall be required to pay.

In contesting restitution, RB&H contends among other arguments that the ALJ erred by awarding restitution without resolving whether potential claimants actually suffered damages proximately caused by its associated persons, as it asserts is required by Rule 110.10(b)(2). Resp. App. Br. at 41. Furthermore, RB&H argues that the ALJ understated the complexity involved in establishing claims. *Id.* at 42. RB&H contends that the process of establishing claims will present "a high degree of complexity" involving "59 separate inquiries, each of

[29] The restitution regulations were promulgated in late 1998. *See* Rules of Practice, 63 Fed. Reg. 55784 (Oct. 19, 1998) (eff. Nov. 18, 1998). Our decision in *Staryk, supra,* was issued on December 18, 1997, and the initial decision on remand was issued on December 4, 1998, less than a month after the rules became effective. The initial decision in *R&W* was issued on December 1, 1997. Accordingly, our decision on review, although issued after the rules were effective, did not apply them.

which would involve individual factual development, and each of which could generate an appeal by the losing party." *Id.*

The Division responds that the ALJ "seems to have followed the Part 10 rules to the letter in drafting the restitution order." Div. Ans. Br. at 39. In endorsing the procedure outlined by the ALJ, the Division suggests that individual determinations of proximate cause may be deferred until after a final decision on liability and other sanctions. The Division also states that the procedure entailed in establishing proximate cause "will only be as cumbersome as the Regulations dictate and as RB&H makes it. The ALJ found liability, awarded restitution, and defined the parameters of a process that will identify the deserving recipients." *Id.* at 39-40.

The Division advises that it "will propose to the Commission an approach that will further refine the procedure" when "this decision is final, and assuming it is favorable." *Id.* at 40. The Division suggests that establishing reliance "might be achieved by affidavit," and states that if "more is required—or insisted upon by RB&H—the Division will do what it must to effectuate the remedy and RB&H will do what it feels is appropriate to limit its scope." *Id.* (footnote omitted).

The ALJ's order identified a class of persons potentially entitled to restitution, subject to further factfinding. The restitution rules, however, anticipate that issues of proximate cause relating to restitution will be resolved concurrently with the initial decision. Our restitution rules require the ALJ to determine in the first instance "[t]he particular persons, or class or classes of persons, who suffered damages proximately caused" by respondents. It is not enough to identify those who *may* have been so injured.

When the Division seeks restitution as an administrative sanction, it incurs an added burden of proof it would not otherwise have to assume in an enforcement proceeding. While the

Division does not seek to avoid this burden, it seeks to defer it until after a final decision on the merits of the case. This burden should be met as part of the Division's case in chief before the ALJ. When an initial decision is rendered without resolving the statutory prerequisites of a statutory remedy, the decision is rendered interlocutory.

The suggested approach to restitution in this case is similar to the approach we rejected in *R&W*, another case involving the fraudulent sale of a trading system. There, the Division proposed creating a restitution fund calculated as the maximum price of the system ($3,995) multiplied by the number of purchasers, estimated at 950. We concluded that awarding restitution in a case requiring more than 950 individualized determinations of proximate cause was facially overburdensome, without reaching the mechanics or timing of how that might be accomplished.

The number of potentially eligible claimants here is much smaller than was the case in *R&W*. We cannot tell, and do not speculate, whether the number is sufficiently manageable to make restitution "appropriate," as required by Rule 110.10. The Division has indicated that it *may* proceed by affidavit and will otherwise "do what it must." Without deciding the degree of complexity entailed in establishing individual claims, we note that the task will not become easier by deferring it while customer recollections grow dim and relevant documents are misplaced or discarded.

This interpretation of Rule 10.110(b) does not render Rules 10.111 and 10.112 surplusage. Rule 10.111 provides that after a restitution order becomes final, the Division "shall petition the Commission for an order directing the Division to recommend to the Commission or, in the Commission's discretion, the Administrative Law Judge a procedure for implementing restitution." Regulation 10.112 states in relevant part that the Commission or the ALJ "shall

establish in writing a procedure for identifying and notifying individual persons who may be entitled to restitution, receiving and evaluating claims, obtaining funds . . . and distributing funds to qualified claimants." These rules envision an administrative procedure and assume that the statutory prerequisites for restitution will have been satisfied. The identification of qualified recipients at that stage ought to depend upon readily ascertainable objective factors, such as whether a claimant had an account at a particular time, not subjective legal determinations.

The rules anticipate that not all cases will require individualized determinations of proximate cause. Among other situations, Regulations 10.111 and 10.112 address cases where a restitution award defines a class of proximately injured persons whose identities must be ascertained. In other cases, proof of proximate cause will require individual determinations. In such cases, proving causation necessarily results in the identification of the particular persons entitled to relief, obviating the need for some or all of the procedures outlined in Regulations 10.111 and 10.112. In such cases, Regulation 10.114 provides that the procedures for implementing restitution under those rules may be combined with the hearing.

The limited role that restitution has played in adjudicated cases attests to the practical difficulties of using this remedy in that context. The difficulties arise from statutory requirements, which cannot be avoided or deferred until the rest of the case has become final. The requirements, however, assure that the remedy will be meaningful when used. *See Staryk*, ¶ 27, 206 at 45,812 ("restitution should not be ordered as an empty gesture of goodwill").

Given the ALJ's determination that he lacked sufficient information to make individual determinations, we conclude that the Division failed to carry its burden and accordingly we vacate the restitution order as to all respondents.

CONCLUSION

We have considered all other arguments raised by the parties and find that they lack merit and do not warrant extended discussion. For the foregoing reasons, the initial decision is affirmed in part, and vacated and modified in part. Except as expressly stated in this Opinion and Order, the initial decision is affirmed.

RB&H shall pay a civil monetary penalty of $220,000, the amount imposed by the ALJ. The cease and desist order imposed by the ALJ also is affirmed.

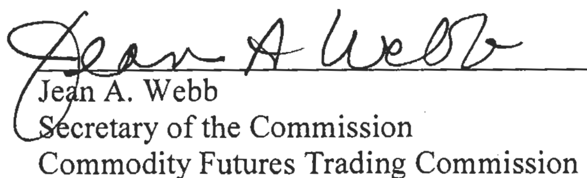
Ownbey shall pay a civil monetary penalty of $220,000. The revocation of Ownbey's registration, a three-year trading ban, and a cease and desist order—sanctions imposed by the ALJ and not appealed by Ownbey—shall stand.

GTI shall pay a civil monetary penalty of $220,000. The revocation of the company's registration, a three-year trading ban, and a cease and desist order—sanctions imposed by the ALJ and not appealed—shall stand.

The restitution award is vacated as to all respondents.

IT IS SO ORDERED.[31]

By the Commission (Chairman JEFFERY and Commissioners LUKKEN, BROWN-HRUSKA, HATFIELD and DUNN).



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

Dated: October 4, 2005

[31] Sanctions shall become effective 30 days after the date this order is served. A motion to stay any portion of this order 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.