UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	
	CFTC Docket No. [illegible]-4
STEVEN G. SOULE, KYLER F. LUNMAN II, ROBERT C. ROSSI, and HOLD-TRADE, INC. a.k.a. HOLD TRADE, LIMITED	OPINION AND [illegible]ER

The Division of Enforcement ("Division") appeals from an Administrative Law Judge's ("ALJ") refusal to impose a $900,000 civil money penalty on respondent Robert C. Rossi ("Rossi").[1] The ALJ noted that imposing such a large civil money penalty would serve "no good purpose" because it was unlikely that it would be collected. *In re Soule*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,061 at 53,633 (June 17, 2002) (Order Granting Summary Disposition). The Division argues that this emphasis on collectibility ignores the broad deterrent purpose for imposing a civil penalty. Rossi has not responded to the Division's appeal.

For the reasons that follow, we conclude that the collectibility of a civil money penalty is not a relevant factor in calculating an appropriate civil money penalty. Based upon our *de novo* review of the record, we impose a civil money penalty of $400,000.

[1] Steven G. Soule ("Soule"), Kyler F. Lunman ("Lunman") and Hold-Trade, Inc. ("Hold-Trade") settled with the Commission in February 2004. Soule agreed to the imposition of a cease and desist order; permanent trading prohibition; payment of $276,557 in restitution pursuant to a ten-year payment plan; and payment of a contingent civil money penalty of up to $276,000, pursuant to a payment plan. Lunman and Hold-Trade agreed to the imposition of a cease and desist order; payment of $276,557 in restitution pursuant to a ten-year payment plan; and payment of a contingent civil money penalty of up to $250,000, pursuant to a payment plan. Lunman also agreed to the imposition of a 10-year trading prohibition. Hold-Trade agreed to a permanent trading prohibition. Liability for restitution was joint and several among respondents.

BACKGROUND

The Criminal Proceeding

The investigation of the conduct at issue here led to both a criminal indictment and an administrative complaint. A grand jury issued the criminal indictment on February 4, 1999. It named Rossi, Soule, and Lunman as defendants, and raised allegations of conspiracy, wire fraud, money laundering, commodity fraud, and aiding and abetting. The indictment listed thirteen days on which profits were allegedly diverted from an account of Coastal States Trading Corporation, a division of Coastal Corporation (collectively "Coastal")[2] to an account controlled by Lunman.

As Coastal's manager of futures trading, Soule frequently entered orders with NYMEX floor brokers. Two of the floor brokers he did business with were Refined Energy Executions, Inc. and Refined Executions, Inc. (collectively "Refined"). Rossi was the owner of Refined and employed Thomas DeMarco ("DeMarco") as a telephone clerk for Refined in the crude oil and unleaded gas booth on the NYMEX floor. Soule had previously worked for Rossi. Rossi and Lunman were business partners in an office building.

In April 2000, Rossi, Soule, and Lunman resolved the criminal case by pleading guilty to one count of wire fraud. Rossi was sentenced to 27 months imprisonment and two years supervised release. The district court also imposed a $50 assessment, $6,000 fine, and a $276,557 restitution obligation. Liability for the restitution award was joint and several among Rossi, Soule and Lunman.[3]

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[2] Coastal was a Texas-based $12-billion energy conglomerate that frequently traded energy futures on the floor of the New York Mercantile Exchange ("NYMEX").

[3] Soule was also sentenced to 30 months imprisonment with two years supervised release and ordered to pay a $50 assessment. Lunman was sentenced to 15 months imprisonment with two years supervised release and ordered to pay a $50 assessment. Lunman and Soule were not fined.

As part of his plea agreement, Rossi acknowledged that he, Soule and Lunman entered into an allocation scheme under which Soule would shift positions belonging to Coastal into futures accounts controlled by Lunman. Coastal's trades were allocated through DeMarco with Rossi's knowledge, participation and consent. To conceal the misappropriation of the trades, Soule substituted less profitable trades in the Coastal account. The plea agreement also acknowledged that Rossi, Soule and Lunman worked together to identify the misappropriated Coastal trades and to distribute the profits among the participants in the scheme.

The plea agreement specified 13 days between November 1993 and November 1994 when fraudulent allocations took place. It specifically acknowledged that as a result of trading on the specified days, the defendants, as a group, earned $276,557.

The Commission Proceeding

The Commission initiated this administrative proceeding in December 1998 by issuing a Complaint against Soule, Lunman, and Hold-Trade. The Complaint alleged that Soule undertook a scheme to fraudulently allocate Coastal's trades and that Lunman and Hold-Trade aided and abetted the scheme. The Complaint also alleged that Lunman was responsible for Hold-Trade's wrongdoing as its controlling person.

The Commission amended the Complaint on February 4, 1999 (the day the indictment was issued) to name Rossi as a respondent. The amended Complaint alleged that Rossi aided and abetted Soule's fraudulent scheme. In addition, it alleged that Rossi was responsible for Refined's wrongdoing as its controlling person. Both the initial Complaint and the amended Complaint alleged that the scheme was undertaken between September 1993 and December 1994

and affected at least 35 trades on 30 different days.[4]

In November 2000, the Division filed a motion for partial summary disposition on liability issues. In essence, it argued that the factual stipulations included in the plea agreements that Rossi, Soule, and Lunman had entered into during the criminal proceeding were sufficient to establish respondents' liability. None of the respondents filed a response to the Division's motion. On January 9, 2001, the ALJ granted the Division's motion, finding that the record established that Soule violated Section 4b(a)(i)-(iii) of the Act, Rossi and Lunman willfully aided and abetted Soule's fraud under Section 13(a) of the Act, and that Hold-Trade was derivatively liable for Lunman's violations pursuant to Section 2(a)(1)(A)(iii) of the Act.[5]

At this point, Rossi, Soule, and Lunman were incarcerated. This complicated the prospect of their attending any hearing on sanctions. Rossi's circumstances were particularly difficult because he was representing himself. After some procedural skirmishing, the ALJ scheduled a hearing on sanctions. Rossi, however, contacted the Division and informed it that he did not wish to appear at the hearing. With the assistance of the Division, Rossi submitted a declaration indicating that he waived his right to an oral hearing on sanctions. The ALJ cancelled the hearing but invited the parties to file recommended findings of fact and conclusions of law concerning sanctions.

The Initial Decision

As noted above, the ALJ issued his decision imposing sanctions on Rossi in June 2002.

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[4] Paragraph 28 of the amended Complaint specified that fraudulent allocations took place on 12/22/93 (2 trades); 12/27/93; 12/29/93 (2 trades); 1/3/94; 1/6/94; 1/11/94; 1/13/94; 1/14/94; 1/17/94; 1/19/94 (2 trades); 1/21/94; 1/24/94; 1/28/94 (2 trades); 2/1/94 (2 trades); 2/2/94; 2/3/94; 2/4/94; 2/9/94; 2/10/94; 2/14/94; 2/15/94; 2/16/94; 2/17/94; 2/24/94; 3/1/94; 5/26/94; 5/31/94; 10/5/94; 10/28/94; and 11/4/94.

[5] After the ALJ issued this order, the Division took steps to moot the remaining liability issues. In February 2001, the Commission issued an order dismissing the controlling person allegations raised in the amended Complaint. Then, in its February 12, 2001 Prehearing Memorandum, the Division acknowledged that it did not intend to present evidence of fraudulent allocation beyond the nine trading days specified in the amended Complaint that overlapped with the 13 trading days specified in respondents' plea agreements.

He acknowledged that Rossi's actions repeatedly damaged Coastal and the integrity of the futures markets as a whole. He also conceded that Rossi received gains from the misappropriation scheme and helped distribute profits to himself and the other scheme participants. Order Granting Summary Disposition, ¶ 29,061 at 53,633. He noted, however, that in the context of his criminal case, Rossi had already been ordered to pay a $50 assessment, a $6,000 fine, and $276,557 in restitution. *Id.* Finally, he observed that:

> Monetary penalties imposed by this Commission are not always paid voluntarily, and are often written off the books of the Commission if the Department of Justice advises that they are not collectible. Imposing such a massive penalty, when it is unlikely that it will be collected, serves no good purpose. Thus, the $900,000 civil monetary penalty requested by the Division is denied.

Id. In light of this analysis of collectibility,[6] the ALJ limited Rossi's sanctions to a cease and desist order, permanent trading prohibition, and $276,557 restitution obligation. *Id.* The ALJ ordered that the restitution award "be offset by any amount paid to satisfy the restitution order" issued in the criminal case. *Id.* at 53,633-34.

DISCUSSION

Collectibility

Commission precedent identifies collectibility as a material factor in determining an appropriate civil money penalty. Nevertheless, the role that evidence of collectibility plays has never been clearly defined. The Commission initially discussed the need to develop the record on collectibility in *In re Nelson Ghun & Assoc., Inc.,* [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,255A (CFTC July 5, 1984) ("*Nelson Ghun I*"), and *In re Nelson Ghun &*

[6] Commission Instruction 604-1 governs the post-judgment collection of civil money penalties. In general, the instruction establishes a process under which a respondent who fails to pay a civil money penalty promptly is initially provided a warning. If respondent fails to achieve compliance after the warning, the matter is generally referred to the Department of the Treasury, which undertakes collection action. In some circumstances, the matter is referred to the Department of Justice for collection. As the ALJ notes, the instruction includes a process for writing off debts as uncollectible when available collection efforts are exhausted.

Assoc., Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,584 (CFTC May 2, 1985) ("*Nelson Ghun II*"). Because the respondent in the *Nelson Ghun* cases had waived the opportunity to develop the record on net worth, there was no basis for the Commission to determine the likelihood that any monetary penalty it might assess could eventually be collected. Moreover, the Commission could not determine whether the collection of a Commission-imposed penalty would interfere with customers seeking to collect on outstanding reparation awards. In light of these limitations, the Commission held that the Division had a general obligation to "produce whatever information it may have concerning collectibility." *Nelson Ghun II* at 30,526. The Commission noted that this obligation was a reasonable addition to the Division's duty to make a "meaningful" recommendation concerning the size of a proposed civil money penalty. *Id.*[7]

The Commission held that the Division's obligation regarding collectibility related to the Act's policy concerning the referral of uncollected civil money penalties to the Department of Justice, as well as the policies underlying the Debt Collection Act of 1982, and 1984 revisions to the Federal Claims Collections Standards. *Id.* at 30,525. It noted in general, however, "that the timely collection of civil penalties is as much of a deterrent to misconduct as their imposition," *Nelson Ghun I* at 29,341, and that the imposition of a civil money penalty "should be considered with due regard for its collection." *Id.*[8]

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[7] In *Nelson Ghun I* at 29,341-42, the Commission noted its interest in the following types of information: (1) respondent's current address, (2) assets available to satisfy the penalty in the event district court collection litigation by the Attorney General becomes necessary, and (3) a list of unsatisfied final reparation judgments and pending reparations claims against the respondent.

[8] The Commission elaborated in *Nelson Ghun II* at 30,526:

> The Division should analyze the collection prospects before it recommends a civil penalty at a specific dollar level to an ALJ. Additionally, the Judge should evaluate the Division's efforts to develop the record on this issue before imposing a penalty. If the Division makes no effort or a minimal effort in this regard, then no civil penalty should be imposed. In contrast, if the Division

Despite the holdings in *Nelson Ghun I* and *II*, collectibility has played a minimal role in the Commission's imposition of civil money penalties. Two years after *Nelson Ghun II* was issued, the Commission held that, as long as the ALJ provided an explanation, a finding that a money penalty was uncollectible would not preclude its imposition. *In re Incomco*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,901 at 34,205 n.7 (CFTC July 16, 1987). This result is consistent with the fact that Section 6(e)(3) of the Act bifurcates the civil money penalty assessment and collection processes. Indeed, that provision mandates that the Commission defer collection litigation until after the "lapse of the period allowed for appeal" or "the affirmance of such penalty." At that juncture, the Commission may then "refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court." *Id.* In short, the statute contemplates that any issue of collectibility will be first pressed in the district court after issues relating to liability and sanctions are finally resolved by the Commission or an appropriate court of appeals.

Issues related to collectibility have at times been confused with issues relating to a respondent's net worth. In *In re Murlas Commodities, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440 (CFTC Apr. 24, 1989) the Commission sought to resolve this confusion by noting several distinctions between the net worth inquiry and the collectibility inquiry. In particular, it held that the collectibility inquiry did not involve "the direct interests of respondents" and that "respondents have no standing to raise issues relating to collectibility." *Id.* at 35,931-32. This clarification was partly in reaction to a decision by the United States Court of

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> makes a good faith effort to establish collectability, the Judge is free to impose a penalty commensurate with the criteria of [then] Section 6(d) even if the Division was unable to find any assets. In such cases, the Judge should articulate his reasons for imposing a penalty the record shows may well be uncollectable. Respondents cannot evade imposition of civil [money] penalties by fleeing, residing abroad, or concealing property and rendering the Division unable -- despite its best efforts -- to show evidence of assets.

Appeals for the Seventh Circuit in *Gimbel v. CFTC,* 872 F.2d 196 (7th Cir. 1989). The court vacated a civil money penalty on the grounds that the Division had failed to meet its burden of establishing the collectibility of the penalty. As noted in *In re Nikkhah,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,275 (CFTC Sept. 26, 2000) the court's opinion was based on a misinterpretation of *Nelson Ghun I* and *II.* The Seventh Circuit recently held that, in light of changes Congress made to the Act in 1992 (repealing net worth provisions), the *Gimbel* case's holding regarding collectibility was no longer good law. *Brenner v. CFTC,* 338 F.3d 713, 723 (7th Cir. 2003).

In its November 1994 Policy Statement on its authority to impose civil money penalties, the Commission included collectibility "under the federal Debt Collection Act of 1982" as one of the relevant considerations. [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 at 42,247 (Nov. 1994). The Policy Statement did not elaborate on how collectibility impacted on the calculation of a civil money penalty, but did note that the inquiry involved respondent's "assets, liabilities, and overall financial condition." *Id.*

More recently, the Commission rejected a respondent's claim that an ALJ had erred by imposing a civil money penalty without considering collectibility. *In re Slusser,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,701 at 48,317 (CFTC July 19, 1999) *partially reversed sub nom. Slusser v. CFTC,* 210 F.3d 783 (7th Cir. 2000). There, the Commission noted that neither the Debt Collection Act of 1982 nor the Federal Claims Collection Standards require government agencies to consider ability to pay when imposing a civil money penalty. It also emphasized that respondents failed to introduce evidence showing that the proposed penalty would be uncollectible and that the record established that respondents reaped enormous profits from their fraudulent scheme. *Id.*

Slusser's holding undermines the reasoning of *Nelson Ghun I and II*, but did not clearly overturn these cases. Having reviewed our precedent in this area, we have decided to specifically overrule *Nelson Ghun I and II* and hold that collectibility is not a relevant factor in calculating a civil money penalty. We believe this is particularly appropriate in light of the Congressional intent evident in the adoption of the Futures Trading Practices Act of 1992 ("FTPA"), Pub L. No. 102-546, § 209, 106 Stat. 3606. By simplifying the relevant provision to make the gravity of a respondent's violations the sole touchstone for calculating a civil money penalty, Congress sought to eliminate the complications that previously arose when a respondent's net worth was a necessary factor in imposing penalties. Since the collectibility inquiry raises similar complications, we do not believe it would be consistent with Congressional intent to continue to make it a factor in our calculation of penalties. *Compare In re Staryk*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,826 at 56,456 (CFTC July 23, 2004).

Accordingly, we find that the ALJ erred in refusing to impose a civil money penalty on Rossi simply because it may not be collectible.

The Gravity of the Violations

Section 6(e) of the Act instructs the Commission to impose a money penalty that is appropriate to the gravity of the violation at issue. Here, as the Division emphasizes, the general gravity of Rossi's violations is high because they involve fraud, and fraudulent conduct violates core provisions of the Act and Commission Regulations. *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,892 (CFTC May 12, 2000).

The $900,000 penalty sought by the Division represents the statutory maximum for the nine proven violations, however, and does not reflect a fair consideration of the record as a

whole.[9] On the one hand, the record shows that Rossi acted knowingly and willfully in assisting Soule's scheme, and that the scheme was neither limited nor isolated. Rossi and his confederates were responsible for fraudulently allocating trades on nine days over the course of nearly a year. Apart from his guilty plea to the criminal charge, there is no evidence of post-violation cooperation with governmental authorities.

The record regarding the consequences flowing from Rossi's misconduct, however, is fairly limited. There is no reliable basis for estimating Coastal's overall loss. We do know that it was deprived of $276,557 in profits from the 13 trading days specified in Rossi's criminal plea agreement, but the Commission's amended Complaint only covered nine of these days. In any case, we do not know how much of the $276,557 in profits was distributed to Rossi. Moreover, we do not know what losses arose from the substitute positions placed in the company's account.

The calculation of civil money penalties does not lend itself to simple formulaic solutions. *Reddy v. CFTC*, 191 F.3d 109, 128 (2d Cir. 1999). We are charged with maintaining a rational relationship between the penalty imposed and the offenses committed. *Id.* Here the violations were intentional, continuous, and abusive of both Coastal and the market mechanism. The civil penalty we impose must be sufficient to deter the betrayal of the public interest inherent in respondent's conduct. In light of the available evidence, we find that a $400,000 penalty is appropriate to deter further violations by Rossi and those who may find themselves in a similar position to commit fraud. This figure is roughly comparable to penalties we have recently imposed on respondents liable for significant fraudulent conduct. *See In re Miller*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,825 (CFTC July 23, 2004) (imposing a penalty

[9] Under Section 6(c) of the Act, the Commission may look to either the product of up to $100,000 times the number of respondent's proven violations or up to three times a respondent's monetary gain from proven violations. The $100,000 maximum per violation applies to acts committed before November 27, 1996. The maximum is subject to periodic adjustment for inflation. *See* Commission Regulation 143.8.

of $350,000 for fraudulent solicitation); *Staryk, supra,* (imposing a penalty of $450,000 for fraudulent solicitation).

Accordingly, we order Rossi to pay a civil money penalty of $400,000. This penalty, as well as the other sanctions the ALJ imposed on Rossi, shall become effective on the 30th day following the date this order is served.[10]

IT IS SO ORDERED.

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: August 17, 2005

[10] A motion to stay the effect of these sanctions pending reconsideration by the Commission or review by a court must be filed within 15 days from the date this order is served.