UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	CFTC Docket No. 03-11
BRIAN W. RAY	OPINION AND ORDER

Brian W. Ray ("Ray") appeals from the decision of the Administrative Law Judge ("ALJ") that he executed fraudulent trades and violated a Commission order prohibiting him from trading for his personal account. The ALJ revoked Ray's registration and imposed a cease and desist order, a permanent trading ban and a civil monetary penalty of $860,250. Ray makes evidentiary challenges to the liability findings and asks us to vacate or reduce the civil monetary penalty. The Division of Enforcement ("Division") cross-appeals for a restitution award to the General Mills Pension Fund.

We affirm the ALJ's liability findings. However, we modify the sanctions, reducing the civil monetary penalty to $593,250 and granting the Division's request for restitution of $82,500.

Background

Ray was a high-volume independent floor broker in the Standard & Poor's 500 Stock Index Futures ("S&P") pit at the Chicago Mercantile Exchange ("CME"), where he filled orders mostly for futures commission merchant Carr Futures, Inc. ("Carr").

In 2003, the Division issued a two-count administrative complaint against Ray. Tab 1 (Complaint ["Compl."]).[1] In count 1, the Division charged Ray with repeatedly executing fraudulent trades to the detriment of customers, in violation of sections 4b(a)(2)(A) and (C) of

[1] "Tab [number]" refers to the numbered docket entries in the record. "Tr. ___" refers to the hearing transcript. "Div. Ex. [number]" to the Division's exhibits. "R. Ex. [number]" refers to Ray's exhibits.

the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. §§ 6b (a)(2)(A) and (C) (2009).[2] Tab 1 (Compl. ¶¶ 9, 13-15); Tab 17 (Division Prehearing Memorandum at 3-6 ("Div. Prehrg. Mem."). In count 2, the Division charged Ray with violating a Commission order stemming from very similar misconduct. The order prohibited Ray from personal trading for two years. The Division contended that Ray nevertheless continued to trade for himself during the period of the ban by placing many trades in his error account that he claimed were errors, but were not, and which disproportionately resulted in profits for him and not the customers. The Division alleged that this conduct violated CEA section 6(c), 7 U.S.C. § 9 (2009), which prohibits violations of Commission orders. Tab 1 (Compl. ¶¶ 10, 23); Tab 17 (Div. Prehrg. Mem. at 7).

The ALJ's Decision

The ALJ conducted a hearing on the charges in July and September 2004. The Division introduced audit trail documents, a surveillance video, and other documentary evidence. It also called as witnesses CFTC investigators William Heitner ("Heitner") and Thomas Koprowski ("Koprowski"); David Van Benschoten ("Van Benschoten"), a vice president and treasurer of General Mills and manager of futures trading for its pension fund; broker Anita Domashovetz ("Domashovetz"); CME compliance employee Connie Burnet ("Burnet"); and expert witness Suzanne Aref ("Aref"), a statistician. Ray testified, introduced documentary evidence, and also called as witnesses his clerk, Rory Dolin ("Dolin"), CME trade checker Thomas Evans ("Evans"); Robert Ray, Ray's brother and senior vice-president of the Chicago Board of Trade; and traders Ed McCartin and Randolph Scheffel.

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[2] These sections were previously codified as 4b(a)(1)(i) and (iii), 7 U.S.C. §§ 6b(a)(2)(i) and (iii).

Following the hearing, the ALJ found Ray liable on both counts. *In re Ray*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,120 (CFTC Aug. 25, 2005) ("ID").

Count 1: Fraudulent Trades

The ALJ found that on May 12, 1999, Ray executed a customer order on behalf of Carr for the General Mills Pension Fund, assigned it to his error account, leaving the customer order unfilled, and then sold the contracts for a $56,250 profit that should have gone to the customer and not him. The ALJ found that as the market fell to the prices of the customer's limit orders, Ray bought 10 contracts each at 1341, 1338 and 1335, which were assigned to their respective customer orders. Ten contracts bought at 1329 were assigned to the order to buy 10 at 1332. Ten contracts bought at 1332 were assigned to Ray's error account with the notation that Ray had erroneously filled the order twice. Ray sold those 10 contracts from his error account as the market rose steeply at a significant profit to himself. The ALJ concluded that Ray "intentionally and wrongfully" kept the contracts and "subsequent profits" for himself. ID at 57,450-51, 57,452-53.

The ALJ rejected Ray's claim of error regarding the contracts as implausible and contradicted by other evidence. In particular, the ALJ rejected Ray's contention that he submitted the execution at 1332 to the Carr customer desk, but the staff could not find a matching customer order and returned the trade to him. ID at 57,452. In finding Ray's conduct intentional, the ALJ also rejected Ray's assertion that the day's unusually hectic conditions inevitably resulted in mistakes, citing Commission precedent holding that such conditions "'are a fact of life in the futures markets.'" *Id.* at 57,453 (internal citation omitted).

The ALJ further found that later that same day Ray "helped himself to a second General Mills Trade ... worth $50,000." ID at 57,453; 57,451, 57,453-55. Ray held customer orders for

the General Mills Pension Fund to sell a quantity of contracts at a fixed price. He sold some of them by open outcry. Improperly invoking CME Rule 527, which allows brokers to trade opposite a customer to rectify an out-trade when an error is not discovered until after a trade has been confirmed to the customer, Ray then bought the remaining contracts for his error account. He offset his error account position at a higher price for a $50,000 profit that belonged to the customer.

The ALJ found that Ray received two orders to sell a total of 30 contracts at 1343, sold 20 through open outcry – 9 opposite broker Anita Domashovetz and 11 opposite Scott Wallach – and improperly bought the rest for himself. He rejected Ray's defense that he and Domashovetz had a misunderstanding as to whether she was buying 9 or 19 contracts from him, observing that "[t]he striking part about the documentary evidence is that there is no discrepancy between [Ray's and Domashovetz's] pit cards" to support the alleged miscommunication. *Id.* at 57,454. The ALJ gave no weight to Ray's error cards for this trade, dismissing them as Ray's "self-serving, post-facto out-trade cards," which he held "add nothing to Ray's defense" and "in fact … are evidence of the violation here at issue." *Id.*

The ALJ rejected as implausible Ray's claim that he recorded the sale of an additional 10 contracts to Domashovetz on a separate, missing card, noting that neither a pit card of the transaction nor any other documentation was produced to corroborate the claim. *Id.* He found "nothing in the documentary evidence to suggest that she bought anything other than 9 contracts from Ray." *Id.* He also found Ray's contention of a misunderstanding unpersuasive in light of the fact that Domashovetz's card showed two separate purchases from Ray, for 8 contracts and 1 contract, rather than a single purchase of 9 contracts, and dismissed the 9-versus-19 dispute as "nothing more than a smokescreen." *Id.*

Based on his finding that Ray sold Domashovetz only 20 contracts, the ALJ held that Ray could not rely on CME Rule 527 to trade opposite his customer for the remaining 10 contracts because the circumstances under which the rule may be invoked were not present:

> If the broker simply fails to fill the order, Rule 527 does not apply, and the broker is required to go into the market and fill the customer order at the prevailing price. If the price is disadvantageous to the customer, the broker must compensate the customer by issuing him a check for the difference. If the price is advantageous to the customer, it is just that: advantageous to the CUSTOMER, not to the broker.

ID at 57,454 (emphasis in original). By the time Ray and Domashovetz identified the discrepancy and Ray assigned the trade to himself, the price had risen from the 1343 to 1362. The ALJ held that the profit belonged to General Mills, and not Ray. *Id.* at 57,453-54.

The ALJ further found that on a third occasion some two and one-half months later, Ray noncompetitively executed an order to buy contracts after the customer attempted to cancel it and traded indirectly against the customer who placed the order, creating a $2,500 profit for himself and a $625 profit for his former clerk. ID at 57,451-52, 57,455 -57. At 9:52 a.m. on August 31, Ray received a limit order from Carr to buy 5 S&P contracts at 1331. Because the market was trading below 1331, Ray could have filled the order immediately at a better than requested price. The ALJ found that the Carr desk almost immediately tried to cancel the order and was informed erroneously by Dolin that the order already was filled. The ALJ held that any miscommunication in that regard "does not address the question of why the order was not subsequently filled for the next eight or nine minutes," while the market was trading at or below the requested price. *Id.* at 57,455. The ALJ found that at 9:53:10 a.m., Ray received a second, unrelated order to sell 10 S&P contracts at 1328.50. The ALJ found that the market was trading

above that price and again, Ray could have filled a customer limit order at a better price. *Id.* at 57,455.

Instead, the ALJ found, Ray filled the sell order opposite trader Glenn Laken at its limit price about two minutes after receiving it, and at the same time bought 5 contracts from Laken for his error account at the same price, 1328.50. The ALJ rejected Ray's explanation that an order to sell 5 contracts at 1329.50 was mis-communicated to him as a buy order, observing that the record contained no order "that might correspond to the five Ray claimed he was 'supposed to sell.'" ID at 57,456.[3] Relying on the floor surveillance videotapes and CME compliance employee Connie Burnet's testimony, the ALJ found that Ray took no steps to submit the 5-contract purchase at 1328.50 to the Carr desk according to his normal procedure, but instead pocketed the pit card on which he recorded it. *Id.* at 57,451-52; *see also id.* at 57,456. The ALJ inferred that "Ray intended the trade for his personal account all along." *Id.* at 57,456.

The ALJ found that about six minutes later, Ray filled the Carr order, buying 5 contracts at 1331 from Vaughn Smith, his former clerk, and at the same time selling Smith 5 contracts from his error account at 1330.50, trading indirectly against his customer at a $2,500 profit to himself. ID at 57,451 (FF 42-43). The ALJ also found that Ray filled the Carr order at a noncompetitive price – time and sales data revealed contemporaneous lower prices – and that

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[3] The ALJ reasoned:

> The CME videotape discloses two pieces of information that cast further suspicion on this transaction. First, the purchase of five contracts at 1328.50 was not signaled back to the Carr desk to satisfy a customer order. Second, at 9:55:43 a.m., Ray put the trading card on which he had recorded the purchase straight into his jacket pocket rather than passing it back to his clerk, which would have been normal practice. (Tr. 53-54). The act of pocketing the trading card, although not dispositive, suggests that Ray intended the trade for his personal account all along.

ID at 57,456.

Ray intentionally targeted Smith to trade with, instead of bidding competitively to the pit at large. *Id.* at 57,452 (FF 47-49). The ALJ held that "this trade sequence served no purpose other than to enhance Ray's bottom line," *id.* at 57,457, and "had the net effect of misappropriating benefits that rightly belonged to Ray's customers." *Id.* at 57,455.

Count 2: Violation of a Commission Order

During the two year time period from 1998 to 2000 examined by the Division, Ray earned aggregate profits of $366,000 from trading his error account, with $178,000 gained on 112 customer-declined trades. ID at 57,452, 57,457. The ALJ found that the customer-declined trades were "not errors," but "intentional trades that Ray initiated for his personal account and gain, and that is why the trades were so overwhelmingly profitable." *Id.* at 57,458. These trades, the ALJ determined, violated a Commission order that prohibited Ray from trading for his own personal account.

The order had its genesis in a 1997 CME disciplinary committee proceeding against Ray for cheating his customers. The CME fined him $500,000, ordered him to pay $61,175 in restitution and suspended his membership for six months. Div. Ex. 2 (CME Notice of Decision in 96-4188 SH (Dec. 17, 1997)). After Ray returned to the floor in 1998 upon completing his suspension, the National Futures Association ("NFA") brought a registration action against him based on the same facts as the CME proceeding. Div. Ex. 4 (Final Order Restricting Registration in *In the Matter of Brian Ray*, NFA Case No. 98-REG-008 (Apr. 13, 1999)). The NFA case resulted in a settlement under which restrictions were placed on Ray's registration for two years, including a provision that "Ray may not trade for his own personal account." *Id.* at 2. NFA orders are reviewable by the Commission. When 30 days passed without the Commission's

taking *sua sponte* review of the settlement, NFA's order became a final order of the Commission on May 13, 1999. CEA Section 17(o)(2), 7 U.S.C. § 21(o)(2) (2009).

In order to determine whether Ray was violating the order by placing many trades in his error account that were not errors, the Division compared Ray's overall error account results with results achieved by a random sample of other top-step S&P brokers. It ascertained that his account was the third most profitable during the period July 1998 to January 2000, and the second most profitable between May 1999 and January 2000. Tr. at 141-43 (Koprowski). Ray's error account profits from May 1999 to February 14, 2000 totaled $366,650, of which about one-half, $178,000, represented profits gained on customer-declined errors. *Id.* at 155; R. Ex. 61. Division investigators reviewed all trades executed for Ray's error account from May 1999 through February 14, 2000, and sorted them by category of error according to Ray's handwritten notes on his error cards. Tr. at 143, 151-56. Ray had 433 error trades during this period. Of these, 112 were customer-declined trades. Of the 433 trades, 214 overall were offset at a profit; 94 of the customer-declined trades were profitable. *Id.* at 196 (Heitner).

Time and sales reports showed that in 10 of the 112 instances when Ray assigned a customer-declined trade to his error account, the original execution price had been cancelled by exchange personnel. Tr. at 192, 194 (Heitner). Carr customer orders (including cancelled and unable orders where these were available) showed that "about half the time, [Ray] did receive an order at the price at which he said he had originally traded." *Id.* at 194. Ray's pit cards for customer-declined trades and the opposing trader's pit cards and customer orders showed that "there were 48 instances in which either Mr. Ray or the opposite broker's cards indicated that there was a price change." *Id.* at 194-95.

Statistician Suzanne Aref determined that Ray's high profit rate on his customer-declined trades was statistically improbable to achieve without intentional effort. *See generally* Div. Ex. 38. Aref was given records for Ray's error account for the period May 3, 1999 through February 14, 2000. Ray had written the reason for the error trade on his trading card at the time of the trade. Ray's reasons were grouped into ten categories, including an "Unknown" category containing 34 trades for which no trading card was available or no reason was recorded on the card. Of the 433 trades, 98 had neither a profit nor a loss; these were ignored. *Id.* at 3. Of Ray's 112 customer-declined trades, nine had neither a profit nor loss. *Id.* at 5.

According to Aref, "if the errors are truly errors, then positive and negative net performance should occur in about the same proportion for each type of error trades. However[,] one could assume that a highly skilled broker would have a slight positive bias in his ability to offset the error trades in his account at a profit rather than a loss." *Id.* at 3-4.

Aref analyzed Ray's error trades using a statistical method called Bernoulli trials. She assumed first that each trade had a 50/50 chance of making or losing money, and then assumed that Ray had a 60, 70, or 80 percent chance of making money on each trade. Div. Ex. 38 at 4; *see also* Tr. at 290-93. Aref found that the category of customer-declined trades "has an overwhelmingly higher proportion of positive trades and the probability that this can happen at random is practically 0 if we assume positive and negative trades are equally likely to happen. The conclusion is that this did not happen at random." Div. Ex. 38 at 4. Aref also addressed the issue of whether some types of errors were more profitable in terms of size than others, *i.e.*, "[w]as the overall outcome of the size of the error trades positive, negative, or just averaged out at 0?" *Id.* at 2. The results of her statistical analysis were "significantly greater than 0" for

customer-declined and oversold or overbought errors, while the analytic results for the other categories "were not different from 0." *Id.* at 2; *see also id.* at 6.

To place Ray's trading in context, Aref compared his performance to that of a random sample of 34 other top-step brokers during the same period. She found that three brokers had no months of negative net error account performance and two others had a few negative months and many very profitable months. Ray fell into the latter category, with eight profitable and two losing months. *Id.* at 7. He had the second best performance of the group of 35 brokers, averaging a mean monthly profit of $41,496.78 over the ten months Aref examined. *Id.* at 7, 8. When Aref recalculated the data, removing the best and worst months for each broker, Ray's performance fell to third best, with mean monthly profits of $29,068.71. *Id.*

The ALJ rejected Ray's challenges to the Division's expert, finding Aref "eminently qualified" and her testimony "relevant, reliable, methodologically sound and [of] assistance to the Court in determining a fact at issue." ID at 57,458. Aref's testimony, he stated, "was offered to show that it is statistically improbable to make $178,000 on the 112 customer declined trades here at issue." *Id.* at 57,457. The ALJ also observed that Ray offered "no specific analysis" or expert testimony of his own to counter Aref. *Id.* at 57,457.

The ALJ held that even if he were to find Aref's testimony "somehow wanting," Ray's claim that he was able to offset 94 of 112 "random" error trades at a profit was "not believable and flies in the face of common sense and reason." ID at 57,458. The ALJ characterized as "outlandish" Ray's claim that his customer-declined trades were bona fide errors. He noted that Ray produced no customer orders, nor called "a single customer witness to verify his fictitious account of customers' declining to accept any of the trades in question." *Id.*

The ALJ accordingly found that Ray violated the Commission's order not to trade for his personal account "by executing at least 112 personal trades, using his error account as a personal trading account." ID at 47,459. Because the order also prohibited Ray from violating any provision of the CEA, the ALJ found that Ray's fraudulent trades charged in Count I constituted additional violations of the order. *Id.*

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Finding the charges proven, the ALJ revoked Ray's floor broker registration and imposed a permanent trading ban, a cease and desist order, and a civil monetary penalty of $860,250. ID at 57,459-61.

The Appeals

Ray claims that the ALJ failed to properly consider certain evidence, gave too much weight to other evidence, and erroneously shifted the burden of proof to him by considering that he failed to provide evidence to corroborate some of his explanations. Ray also claims that the ALJ improperly allowed CME compliance officer Burnet to testify as an undisclosed expert witness about the trades in the CME's August 31 surveillance video, improperly admitted and relied on expert Aref, and erroneously admitted and considered Ray's prior disciplinary history. Finally, Ray claims that the civil monetary penalty should be vacated or substantially reduced. The Division cross-appeals from the ALJ's failure to award restitution.

Discussion

We independently assess the factual record to determine whether the charges are supported by the weight of the evidence. *See, e.g, In re Mayer*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,129 (CFTC Feb. 25, 1998), *aff'd sub nom, Reddy v. CFTC*, 191 F.3d 109 (2d Cir. 1999). At the same time, we defer to the ALJ's credibility

determinations in the absence of clear error. *Mayer*, ¶ 27,259 at 46,129, 46,136 n.63. We find no error in the ALJ's credibility determinations. The ALJ properly admitted and considered the evidence, and the weight of the evidence supports the charges and the ALJ's findings.

I. The Weight of the Evidence Establishes that Ray Engaged in Fraudulent Trades on May 12, 1999 and August 31, 1999

In applying the weight or preponderance of the evidence standard to fraudulent trade practice cases like this where the Division's case may consist substantially of circumstantial evidence, liability may be established through an analysis of trading patterns and audit trail evidence and inferences drawn from such evidence. *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,684 n.34 (CFTC Jan. 25, 1991) ("[r]eliable circumstantial evidence is not only sufficient, it is the only evidence that is likely to exist in most cases"); *In re Rousso*, No. 91-3, 1997 WL 422859 at *10 (C.F.T.C. July 29, 1997) ("[t]o succeed in a circumstantial approach ... the Division must do more than present suspicious circumstances raising the possibility of knowing wrongdoing. It must establish that the existence of these factual elements is more probable than their nonexistence") (internal quotation and citation omitted).

With regard to the first May 12 trade, the weight of the evidence supports the ALJ's finding that Ray appropriated for himself the General Mills Pension Fund customer position on which he reasonably expected to turn a profit. The evidence indisputably shows that the Carr desk wrote consecutively numbered customer orders (Nos. 7753 to 7757) to purchase 10 S&P contracts at descending prices from a high of 1341 to 1329; that General Mills received fills on all its orders except No. 7753, to buy at 1329; and that No. 7754 was filled at 1329 instead of 1332. Div. Exs. 30-34, 37.

Ray's contention that the market fell to 1329 and rose again too quickly for Carr to give him the 1329 order is disproved by the evidence. First, it is undisputed that after the market fell nine points, from 1341 to 1332, within 48 seconds, its rate of descent slowed, and the market took 51 seconds to drop three additional points to 1329. Div. Ex. 24 at 16-17. Moreover, the market remained at 1329 for a full 14 seconds. *Id.* at 17. If the Carr desk was able to get the four preceding offers to the pit in a rapidly decelerating market, it strains credulity to conclude that it could not get the 1329 order to Ray, given the comparatively leisurely rate of decline after the market reached 1332.

Second, Ray's notations on the corners of his pit cards, and Ray's initial explanation of the notations, contradict his later claim that he never received the 1329 order. The cards contain the notations 10/4100, 10/3800, 10/3500 and 10/2900 on the upper left corners. Div. Exs. 30, p.2; 31, p.2; 32, p.2, 33, p. 2; *see also* Tr. at 179-82 (Heitner). These numbers correspond to Carr desk orders (10 contracts each at 1341, 1338, 1335 and 1329, with the first two digits of the price omitted). Ray's initial explanation – that he made the notations to keep track of limit orders that were not executable when he received them and arranged them in the order of the market's direction – is consistent with these notations and with the market's downward movement following the opening. Tr. at 179-81 (Heitner). Contrary to his hearing testimony, then, Ray had to have received the order to buy at 1329.

Ray's hearing testimony that he rewrote his executions neatly in the upper left corner after he filled orders to make it easier for the Carr desk staff to read and match his trades to customer orders is inconsistent with his earlier explanation and improbable. Tr. at 732-33; Div. Ans. Br. at 31-32. Ray had a powerful incentive to pocket a customer order placed near the bottom of the market and the market facilitated his doing so, inasmuch as the General Mills

Pension Fund could not demand a fill at 1329 if the market touched but did not penetrate that price before rising. Tr. at 273-74 (Van Benschoten).

The weight of the evidence also supports the ALJ's findings as to the second May 12 trade. In challenging the ALJ's findings, Ray insists that he properly invoked CME Rule 527 to resolve the out-trade with Domashovetz and that the ALJ should have credited his version of events. He also contends that the absence of pit cards reflecting his entire transaction with Domashovetz is reasonable under the circumstances. He argues that he recorded his trades opposite Wallach and Domashovetz on two pit cards because he was selling for two customers, and in submitting his pit cards to the Carr desk, "someplace between the desk, my clerk, my trade checker, and the desk, one card [the original pit card showing the sale of 10 contracts to Domashovetz] disappeared, which is not unusual at all." Tr. at 343. Ray contends that he used his carbon copy of the original pit card in trying to resolve his out-trade with Domashovetz, and discarded it after the trade cleared through his error account. *Id.* at 336-39; R. Ex. 52.3.

Ray's assertions are not plausible when considered in light of all the evidence. Domashovetz's pit cards are particularly damaging. Domashovetz held a market order to buy 14 contracts, which was increased to 15 contracts. She submitted two pit cards for this trade. One shows a purchase of 14 contracts, 6 from a third trader at 1342 and 8 contracts from Ray at 1343. The other shows a separate purchase of one contract from Ray at 1343. Div. Ex. 26, p.2.

The two separate purchases undercut Ray's contention that there was a single transaction with Domashovetz for one amount – 19 according to him, 9 according to her. Tr. at 335. He contends that when he offered 30 contracts, Wallach and Domashovetz accepted simultaneously, or almost simultaneously, whereupon he sold Wallach 11 and Domashovetz shouted that she would take the "balance." *Id.* at 347. Domashovetz's pit cards also refute Ray's testimony that

she may have misread his hand signal for "19" as the hand signal for "9." At the hearing, with no independent recollection of the day's events, Domashovetz surmised from reviewing her pit cards that she went back to Ray to buy one additional contract after buying 8. *Id.* at 856-57, 859-60, 865. Purported confusion regarding hand signals for "19" or "9" is irrelevant to transactions for "8" and "1."

Ray's testimony that he sold 30 contracts in the pit is also undermined by the inexplicable disappearance of the original pit card reflecting the 10-contract sale to Domashovetz. Without questioning Ray's assertion that missing cards are not unusual, we do find it unusual, and disturbingly convenient, that this particular card disappeared and that its duplicate was not retained.

The weight of the evidence likewise supports the ALJ's findings as to the August 31 trades. Ray argues that the evidence shows that his purchase of 5 contracts for his error account at 1328.50 was a bona fide mistake. He contends that owing to confusion between himself and his clerk, Dolin, order No. 7706 to sell 5 contracts at 1330, later changed to 1329.50, was communicated to him as an order to buy at 1329.50, which he filled at 1328.50. R. App. Br. at 16-17. Ray said confusion arose in part because Dolin gave him two orders at the same time – Carr order No. 7706 and an unrelated order to sell 10 contracts at 1328.50.

Ray's simultaneous receipt of these two orders is unlikely. The unrelated sell order was time-stamped at 9:53 a.m. Div. Ex. 9. The price of Carr order No. 7706 was lowered from 1330 to 1329.50 at 9:55 a.m., fully two minutes later. R. Ex. 54.2a.

As to the other trade on that day, Ray maintains that he properly executed a customer order to sell 5 contracts at 1331, and in doing so, neither improperly traded opposite his customer nor filled his customer at a noncompetitive price. We also find no error in the ALJ's contrary

conclusion that Ray intentionally offset his error position against the Carr order that he had been holding to buy at 1331. Ray has no consistent explanation for the delay in filling the Carr order. Ray testified that the Carr desk staff approached his clerk, Evans, looking for the trade, which Dolin had told them Ray executed, whereupon Ray filled the order at the limit price. Tr. at 770. Ray now argues that Dolin told him at 9:59 a.m. that the order had been cancelled in error by Carr and subsequently re-entered, whereupon Ray executed it. R. App. Br. at 18. The fill, however, occurred almost two minutes later. The repeated delays in filling an order that could have been executed immediately, and Ray's shifting explanations, persuade us that Ray exploited a customer order for his own benefit and waited to do so until he could maximize that benefit.

II. The ALJ Did Not Err in Admitting CME Compliance Employee Burnet's Testimony as to the August 31 Trades

Ray argues that the ALJ impermissibly allowed CME compliance officer Burnet to testify as an undisclosed expert opinion witness in connection with the August 31 trade sequence when the Division had designated her as a fact witness. R. App. Br. at 33-34. Ray points out that Burnet did not personally observe the trades, is not a broker, and, therefore, her testimony "could only be characterized as undisclosed expert testimony." *Id.* at 33. Even if Burnet had been disclosed as an expert, Ray claims, her testimony still should have been barred because it was unduly prejudicial owing to her "prosecutorial" position with CME. Ray claims that these errors were harmful given the ALJ's heavy reliance on her testimony in his findings. R. App. Br. at 5.

Burnet testified regarding the placement and operations of surveillance cameras on the trading floor. She authenticated the surveillance tapes and identified individuals shown on the film. She identified certain actions – *e.g.*, "I saw [Carr desk clerk] Bart Brown pick up the telephone and hold the receiver to his ear." Tr. at 46. This was fact testimony, verifiable by the

ALJ, who could view the film and make his own findings as to the accuracy and import of Burnet's observations.

Burnet arguably crossed into the realm of expert testimony when she interpreted the hand signals used by traders and other floor personnel to enter orders and otherwise communicate with each other. The arcane hand signaling system required specialized knowledge, and it appears that the ALJ considered Burnet's testimony as such. Tr. at 32, 92-93. Thus, we find that the ALJ did allow limited expert testimony from Burnet concerning the hand signals. However, ALJs enjoy broad discretion in evidentiary matters. Strict rules of evidence do not apply in administrative hearings, and the mere admission of improper evidence does not necessarily constitute reversible error. *See, e.g., In re Glass*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,337 at 46,561-62 (CFTC Apr. 27, 1998) (decision whether to allow testimony of witnesses not in pretrial order will not be disturbed absent abuse of discretion). Ray, an experienced trader, possessed at least as much knowledge of hand signals as Burnet, as did a number of his witnesses. Ray's counsel even stated at one point that there would be "plenty of people testifying here who can interpret hand signals on these tapes." Tr. at 33. In explaining the meaning of hand signals to the ALJ, Burnet merely acted as one interpreter of a language that Ray used fluently and could also explain. In any event, there was no harm, as Ray did not dispute Burnet's testimony regarding the meaning of specific hand signals.

Burnet also testified regarding certain actions by Ray and others from which the Division argued that Ray was trading noncompetitively. For example, Burnet testified that the tape showed Ray putting a card in his pocket at one point, and at another, leaning over in the pit to single out Smith. To the very limited extent that she drew inferences from and expressed opinions about those actions, she testified as an expert. Again, however, Ray was equally or

more competent to rebut Burnet's opinions and inferences, which he did. Indeed, the ALJ often also cited Ray's testimony when he cited to Burnet's. *See, e.g.*, ID, ¶ 30,120 at 57.

In any event, error, if any, was harmless. The hearing was held before a Commission ALJ, not a potentially impressionable jury. The ALJ is presumed by experience, training and agency expertise to be beyond improper influence by factors such as a witness's professional status.[4]

III. The Weight of the Evidence Establishes that Ray Violated a Commission Order by Using His Error Account for Personal Trading

In challenging the ALJ's findings on count 2, Ray principally asserts that the ALJ erred in admitting the Division's expert, Aref, and in giving her testimony great weight. We find no error, and find that the evidence supports the findings on this count.

A. The ALJ Properly Admitted the Division's Statistical Expert

According to Ray, statistician Aref should not have been qualified as an expert because she lacked a background in the futures and securities industry in general and "trade error patterns in S&P futures" in particular. *Id.* at 30.[5] Ray also argues that, for additional reasons, Aref's

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[4] We find meritless Ray's contention that that the ALJ's allowing Burnet's testimony was especially prejudicial in light of the ALJ's limitations on the testimony of his clerk, Dolin. Dolin's testimony, in part, addressed what transpired on the surveillance video of the August 31 trades. Tr. at 897-919. That testimony, allowed over the Division's objection, was offered specifically to refute Burnet's explanation of what the tapes showed and was based solely on the tapes, and not on what Dolin independently did, saw or heard on August 31. *Id.* at 908. The ALJ eventually stopped Dolin from testifying regarding activity going on in the pit at times when Dolin plainly was looking the other way, but allowed him to continue to describe taped activity that he actually witnessed or participated in. *Id.* at 912-19. There was no error under these circumstances.

[5] Ray does not challenge Aref's general qualifications, acknowledging that she "is no doubt a fine statistician." R. App. Br. at 31. At the time of the hearing, Aref was a Research Scientist in the Department of Statistics at Virginia Polytechnic Institute and State University, where she taught and consulted. Prior to that, Aref was Manager of Statistical Consulting Services in the Department of Statistics at the University of Illinois at Urbana-Champaign, and consulted for clients within and without the university. Previously, Aref taught applied statistics and design of experiment [sic] in the Department of Crop Sciences at the same university. She studied mathematics at the University of Copenhagen and has a Ph.D. in statistics from Cornell University. Div. Ex. 38 at 1.

testimony is neither reliable nor relevant and therefore fails to meet the test for expert admissibility under the Federal Rules of Evidence in federal court proceedings.

The Commission permits expert witnesses to testify regarding "scientific, technical or other specialized knowledge." *In re Ashman*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,336 at 46,549, n.55 (CFTC Apr. 22, 1998) (citing Fed. R. Evid. 702 (expert witness testimony is permitted when it "will assist the trier of fact to understand the evidence or to determine a fact in issue")). Commission ALJs have "broad discretion to determine the scope of expert testimony." *Reddy*, ¶ 27,271 at 46,209. As an administrative agency, the Commission is not bound by the Federal Rules of Evidence as to the admissibility of expert witnesses. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001). Nevertheless, the Commission has considered those rules for guidance in determining whether certain evidence is admissible. *In re DiPlacido*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,970 at 62,477 (CFTC Nov. 5, 2008), *aff'd, DiPlacido v. CFTC*, 364 Fed. Appx. 657, No. 08-5559-ag, 2009 WL 3326624 (2d Cir. Oct. 16, 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 1883 (2010). Under those rules, expert testimony must be both reliable and relevant. To be reliable, " the reasoning or methodology underlying the testimony [must be] scientifically valid." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). To be relevant, the evidence must be applicable "to the facts in issue." *Id.* at 593.

1. The Expert's Testimony Was Reliable

Ray contends that Aref's testimony is unreliable for several reasons. R. App. Br. at 22-23. The first is that Aref purportedly failed either to show that her methodology has been subjected to independent validation by the scientific community or to provide data supporting her assumptions. R. App. Br. at 27-28. Ray attacks her testimony as "guesswork" because she

has not identified "any objective studies, surveys or publications that utilize her methodology to determine whether a top-step broker for the S&P 500 pit has impermissibly profited on his error accounts." *Id.*

In determining reliability, the court assesses the scientific validity of the expert's testimony, focusing "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Pertinent factors include but are not limited to: (1) whether the expert's theory or technique can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) a technique's known or potential rate of error; and (4) whether the theory or technique finds general acceptance within the relevant scientific community. *Id.* at 593-94.

Aref's testimony relied principally on a series of Bernoulli trials (based on the binomial distribution theory) and regression analysis (a statistical tool for examining the relationship between two events or variables). Both are staples of the discipline of statistics and are widely used in numerous contexts. The Supreme Court discussed and applied evidence based on the binomial distribution theory more than 30 years ago. *See Castaneda v. Partida*, 430 U.S. 482 (1977) (involving alleged discrimination in a supposedly random jury selection process).[6]

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[6] The Supreme Court explained the applicability of binomial distribution in *Castaneda*:

> If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial distribution. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338, 353-356 (1966). *See generally* P. Hoel, *Introduction to Mathematical Statistics* 58-61, 79-86 (4th ed. 1971); F. Mosteller, R. Rourke, & G. Thomas, *Probability with Statistical Applications* 130-146, 270-291 (2d ed. 1970). Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339....

430 U.S. at 496 n.17. *See also Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981); *State v. Langley*, 813 So.2d 356 (La. 2002) (testing the randomness of jury selection). *Guice* described Bernoulli trials as "[c]ontinuous tosses of a

Courts frequently admit and rely on evidence based on regression analysis, which is "generally considered [a] reliable discipline[]." *Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1252 (S.D. Ohio 1996).[7] Aref also relied on additional established statistical tests and methodologies, such as the Bonferroni adjustment and Kruskal-Wallis Test. Div. Ex. 38 at 12. Her testimony identified each test used and defined each data set to which she applied the tests. Her results were verifiable and replicable. Accordingly, Aref's methodologies meet the "widely-accepted" criteria for scientific testimony.[8] The ALJ properly rejected Ray's contention that her testimony was unreliable because her methodology lacked scientific validity.[9]

Ray also contends that Aref's testimony was unreliable because she made insufficient comparisons and failed to take into account certain variables. R. App. Br. at 22-29. Ray argues that in comparing his error trade outcomes to that of a random sample of other top-step brokers, Aref failed to compare his percentage of winning trades for each type of error to similar

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coin .... The chance of either a head or a tail on any toss is constant. No result on a prior toss affects a subsequent toss. Outcomes of heads or tails occur at random." 661 F.2d at 510 (footnote omitted).

[7] *See also Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (regression analysis applied in an employment discrimination under Title VII of the Civil Rights Act of 1964); *McClesky v. Kemp*, 481 U.S. 279 (1987) (used as evidence of racial bias in death penalty litigation); *Cotton Bros. Baking Co. v. Indus. Risk Insurers*, 941 F.2d 380 (5th Cir. 1991) (damages in contract actions); *Thornburg v. Gingles*, 478 U.S. 30 (1986).(violations of the Voting Rights Act); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982) (antitrust damages).

[8] Ray also challenged Aref's testimony on the ground that it was not specifically applicable to the futures industry. R. App. Br. at 23. But, as explained above, statistical analysis gains its authority from the fact that it is broadly applicable in varying circumstances. For the same reason, Ray's challenge to Aref's general qualifications based on her lack of futures industry experience fails. R. App. Br. at 30-31.

[9] Ray's argument that Aref failed to provide scientific support for the assumptions she made in conducting her analysis is similarly misplaced. R. App. Br. at 27-28. Assumptions and hypotheses are elements of statistical analyses. The extent to which Aref's assumptions are apposite and persuasive determine the weight of her evidence, not its admissibility. *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000), cited by Ray, is inapposite. R. App. Br. at 27. It involved a vocational rehabilitation expert who determined the plaintiff's level of vocational disability using an admittedly novel assessment methodology based on a hybrid of two widely accepted methodologies. Aref's testimony applied tried-and-true statistical methodologies to an activity that apparently has not been examined previously in this way. We have examined the other authorities that Ray cites to support this argument and find them similarly distinguishable.

percentages of comparably skilled S&P top-step brokers. *Id.* at 22, 23-25. Aref compared Ray's overall error account results to that of other top-step brokers, but did not compare Ray's results category by category. Ray also challenges the random selection of top-step brokers to which Aref compared him, and argues that she did not demonstrate that the traders in the sample traded for similar customers or in similar volume, or stood in his area of the pit, etc.[10] R. App. Br. at 28-30. Ray also argues that Aref's testimony was unreliable because she failed to consider all relevant variables in comparing top-step brokers' trading outcomes, such as differences in number of errors made, and in the way brokers resolve errors. *Id.* at 24-26. And, he argues that Aref's analysis fails to consider that certain types of error trades, notably customer-declined trades, are more likely to be profitable than others, because of customer trading strategies. *Id.*

That a different set of variables and assumptions might have been considered and may have produced different results does not bear on the admissibility of Aref's testimony. Problems in selection of a sample bear "on the weight to be given the testimony, not its admissibility." *Berry v. City of Detroit*, 25 F.3d 1342, 1353 n.11 and accompanying text (6th Cir. 1994) (declining to exclude testimony because the plaintiff's attorney chose 187 incidents of police shootings for his expert to examine out of a possible 636 incidents); *Bazemore*, 478 U.S. at 400 (reversing exclusion of statistical study that failed to include all relevant variables because "[n]ormally, failure to include variables will affect the analysis' probativeness, not its

[10] In the case Ray cites for the importance of having a statistically valid test group, the court held that an analysis of hair in a criminal case should not have been admitted because, among other reasons, hair samples used in comparison tests admittedly "were gathered in no particular manner and [the expert witnesses] were not seeking to obtain a random sample of the general population or of a relevant sub-group." *U.S. v. Brown*, 557 F.2d 541, 548 (6th Cir. 1973); *see also* R. App. Br. at 30. The deficiencies of the sample group were identified by the court and are self-evident to a lay audience. Ray has identified differences existing within the much smaller universe of top-step S&P brokers, but, with one exception, has not explained why these differences affect Aref's conclusions. The exception – that certain subgroups of top-step brokers have little intent to manage error accounts profitably – is discussed elsewhere in this opinion.

admissibility"); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 425 (7th Cir. 2000) ("Statisticians might have good reasons to look at data in different ways.... We thus evaluate here what [complainant's expert] did, rather than hypothetical tests that he or another expert might have done.").[11] We have no doubt that Aref's testimony was scientifically reliable.[12]

2. Aref's Testimony Was Relevant

Ray asserts that Aref's testimony lacks relevance under the second prong of the admissibility test for the same reasons that it is purportedly unreliable. R. App. Br. at 2. Aref's testimony is purportedly irrelevant because the statistical methods she used have no particular relationship to the futures markets and S&P trading in particular, and no apparent history of being applied in connection with either. The Division responds that trade practice violations are commonly proven through circumstantial evidence, beginning with trading patterns, and Aref's testimony established that a facially unusual pattern of profitable customer-declined error trades

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[11] Ray cites *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940 (7th Cir. 1997) for the proposition that a statistical analysis "must take into account all relevant variables." R. App. Br. at 25. There, the court ruled that a statistical analysis produced to establish age discrimination was inadmissible because it failed to consider variables other than age that may have played a role in the decision to discharge plaintiff and others. The court held that "[t]he listing of birth dates cannot without more be thought evidence of age discrimination," *id.* at 941, and cautioned more generally against "equating a simple statistical correlation to a causal relation." *Id.* at 942. The Division and its expert, however, did not present such an oversimplified correlation as proof of causation. Rather, they presented a statistical anomaly (doing so with much more rigor than the *Sheehan* plaintiff), and specifically did not ask Aref to opine as to ultimate causation. The Division presented other evidence to establish the cause of the suspect statistical pattern.

[12] Ray further challenges Aref's reliability on the ground that the categories of trading errors that Aref examined were "compiled and created by the Division without her help or oversight" and therefore are unreliable. R. App. Br. at 20-21. *See also id.* at 23-24. The cards were sorted into categories according to Ray's notations as to the type of errors made. Aref applied her expertise to that evidence. Div. App. Br. at 14; Tr. at 143, 677. *Adams*, 231 F.3d at 424 (finding "no problem" with plaintiff's expert relying on information generated by defendants). The reliability of Aref's evidence is not compromised because Division staff members performed the ministerial task of sorting the data according to Ray's notes. An expert may rely on assistants. *McReynolds v. Sodexho Marriott Serv., Inc.*, 349 F. Supp.2d 30, 36-37 (D.D.C. 2004). Ray cannot quarrel with purported misclassifications of his own making. *Mister v. Ill. Cent. Gulf R.R. Co.*, 832 F.2d 1427 (7th Cir. 1987).

was statistically improbable, which is certainly relevant to the determination of a violation. Div. App. Br. at 18-19 (citing Commission precedents).[13]

In addressing relevance, the court must assess "'whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the [factfinder] in resolving a factual dispute.'" *Id.* at 591 (citation omitted).

Ray's contention that Aref's methodologies are not relevant because they are not keyed to the futures markets misses the point of Aref's analysis. Aref was asked to determine whether Ray's rate of profitably resolved error trades was statistically improbable. She used a context-neutral methodology to do so. Having found such a statistical improbability with regard to one category of error trades, Aref inferred only that the results reflected an affirmative effort, rather than the operation of chance, to achieve a win instead of a loss. It was up to the Division to tie that inference to the violations charged. *Montgomery*, 925 F. Supp. at 1253 (statistical analysis of defendant's business practices is admissible circumstantial evidence and whether evidence is sufficient to meet the burden of proof is not pertinent to discussion of admissibility); *U.S. v. Porter*, 881 F.2d 878, 887 (10th Cir. 1989) ("An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered.... It is enough if the item could reasonably show that a fact is slightly more probable than it would appear

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[13] *See In re Gorski*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,726 at 56,088 (CFTC Mar. 24, 2004) (Brown-Hruska, concurring in part and dissenting in part):

> Merely finding an unusual trading pattern, even one shown to be statistically significant using formal scientific methods, does not, in and of itself, constitute a *prima facie* case for a violation. In cases that allege non-competitive trading ... additional evidence, such as audit trail irregularities or incredibility of respondents, can provide necessary corroboration to prove that a trade practice is violative. In my view, subjective evidence using so called common sense principles and more objective approaches derived from scientific methods are both crucial to establishing wrongdoing in trade practice cases.

without that evidence.... A brick is not a wall.") (citation omitted). A statistician working with data supplied by the party who retained the expert does not need an understanding of the activity from which the data was derived. *McReynolds v. Sodexho Marriott Serv., Inc.*, 349 F. Supp. 2d 30, 38 (D.D.C. 2004).

In sum, we find Aref's testimony relevant as well as reliable and hold that the ALJ did not abuse his authority in admitting it. *See Ambrosini v. LaBarraque*, 101 F.3d 129, 134 (D.C. Cir. 1996) (holding that "once an expert has explained his or her methodology, and has withstood cross-examination or evidence suggesting that the methodology is not derived from the scientific method, the expert's testimony, so long as it 'fits' an issue in the case, is admissible").

3. Aref's Testimony Did Not Unduly Prejudice Ray

Nor do we find, as Ray claims, that the ALJ erred in admitting Aref's testimony because "its probative value was substantially outweighed by its prejudicial effect." R. App. Br. at 32-33. Because expert testimony can be difficult to evaluate, it has the capacity to mislead. Accordingly, courts are urged to balance Fed. R. Evid. 702 (admitting expert evidence) with Fed. R. Evid. 403 (avoiding prejudice). However, the need to resolve the tension between the principles embodied in those rules is reduced, if indeed it is present at all, in the Commission's administrative forum, where the presiding official is also the factfinder. Ray's contention that the Division sought to "improperly prejudice [the ALJ] with misleading and skewed statistics" restates his above-discussed objections to her methodologies; the assertion needs no further discussion here. R. App. Br. at 32.

Aref expressed no opinion on the ultimate question of Ray's liability or what he may have done to achieve his trading outcomes. Her testimony was consistent with the kind of

evidence on which the Commission historically has relied to prove trade practice violations: an analysis of circumstantial evidence subject to competing inferences. *U.S. v. Sdoulam*, 398 F.3d 981, 991 (8th Cir. 2005) (admitting government's evidence that substance used to manufacture methamphetamine was sold in defendant's store in statistically significant higher quantities than in comparable stores because it did not reduce ultimate question of guilt or innocence to mathematical probabilities and jury was left to draw own conclusions). We find no error in the ALJ's admission of Aref's testimony.

B. Ray's Other Challenges too Are Meritless

Ray argues that even if the ALJ properly admitted Aref's testimony, he erred in giving it so much weight. In particular, Ray challenges certain assumptions Aref made and certain variables she did not consider. According to Ray, Aref's analysis does not reflect that certain customer trading strategies, particularly those of General Mills, increased the potential profitability of customer-declined error trades committed by a broker while executing these strategies without any wrongdoing by the broker. R. App. Br. at 24. For example, according to Ray, General Mills Pension Fund's Van Benschoten always declined to accept a trade executed at or near the market low if the execution was slightly worse than his limit price, even if the fill could be profitable. As a result, the odds were extremely high that a trader would profit from the error. Tr. at 704-09. Van Benschoten, however, testified that he would take a fill slightly worse than his limit price if he determined that the trade was profitable or was likely to be profitable, providing such a trade was offered to him. Tr. at 257. Further, Aref ran her probability calculations assuming a likelihood of profit on each trade at 50, 60, 70 and 80 percent. Div. Ex. 38 at 3-4; *see also* Tr. at 290-93. Her analysis thus captured any natural built-in bias toward profit that Ray enjoyed on customer-declined trades.

Ray argues also that "the Division attempted to rely solely upon the fundamentally flawed expert testimony and the opinion of those Division staffers who created the data for Aref's testimony" to find him liable for abusing his error account. R. App. Br. At 49. But Division investigators Koprowski and Heitner addressed their examination of the audit trail evidence for Ray's customer-declined error trades, giving testimony that contradicts Ray's explanation that his customer-declined trades invariably resulted from a price change. Tr. at 190-92 (Heitner); Tr. at 418-23 (Ray); Div. Ans. Br. at 44-45. The investigators' testimony regarding their examination of Ray's pit cards, the opposite broker's pit cards and the time and sales data for Ray's customer-declined trades revealed that for about half the trades, no available documentation supports Ray's contention that he received and executed a customer order at a price that afterwards was invalidated. This circumstantial evidence suggesting that half of Ray's customer-declined trades were not bona fide errors, and Aref's expert opinion that Ray's customer-declined trade profits were statistically improbable, amply support the ALJ's finding that Ray used his error account for personal trading.[14]

We agree that Ray used his error account for personal trading, but do not conclude that every profitable customer-declined trade resulted from Ray's abuse of the account. The trades for which evidence of a price change exists are subject to competing inferences. In the face of equally plausible inferences regarding this group of trades, the Division, as the party with the burden of proof, cannot prevail. Because we disagree with the ALJ regarding only the extent of Ray's misuse of his error account, while agreeing that he misused it, we affirm the ALJ's holding that Ray is liable under Count 2, but modify the civil monetary penalty.

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[14] Moreoever, the ALJ said that, while he found Aref's testimony persuasive in determining Ray's liability under Count II, he would have reached the same conclusion without it, deeming Ray's claim of reaping his customer-declined trade profits solely through chance and skill to be patently incredible. ID at 57,458.

IV. The Civil Monetary Penalty Imposed by the ALJ is Reduced; the Other Sanctions Are Affirmed; and Restitution is Ordered

Ray argues that the permanent trading ban and the civil monetary penalty imposed by the ALJ are excessive. R. App. Br. at 57-58. In seeking a reduction of the length of the trading ban, Ray complains about its duration without offering arguments as to why it should be less than permanent. He makes no specific mention of either the cease and desist order or the revocation of his registration. Pursuant to Regulation 10.102(d)(3), §17 C.F.R. 10.102(d)(3), we deem any objection to the trading ban, cease and desist order and registration revocation waived.[15] We find persuasive the reasoning employed by the ALJ in imposing these sanctions, and we adopt it.

Ray is more forthcoming on the issue of the civil monetary penalty, arguing that the imposition of treble damages would amount to over-deterrence. R. App. Br. at 58. The two cases Ray cites in support of this contention, however, were decided under the Act as it stood prior to its amendment by the Futures Trading Practices Act of 1992 ("FTPA"), Pub. L. No. 102-546, 106 Stat. 3590 (1992).[16] The FTPA substantially amended the Act, including provisions regarding the Commission's sanctioning authority; it is the source of the Commission's power to impose treble damages. The decisions are therefore irrelevant.

We nevertheless find that the record supports a reduction of the penalty. The CEA provides for alternative means of calculating the maximum amount of a civil monetary penalty: the greater of $100,000 per violation (adjusted periodically for inflation pursuant to Regulation 143.8, 17 C.F.R. §143.8), or triple the monetary gain to a respondent. CEA Section 6(c), 7 U.S.C. § 9. The ALJ used the triple-the-gains alternative to impose a monetary penalty,

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[15] Rule 10.102(d)(3), 17 C.F.R. § 10.102(d)(3) ("[a]ny matter not briefed shall be deemed waived").

[16] *Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) and *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 (CFTC Aug. 11, 1992).

calculating Ray's gains as follows: $56,250 for the first May 12, 1999 trade; $50,000 for the second May 12, 1999 trade; $2,500 for the August 13, 1999 trade; and $178,000 earned on Ray's "customer-declined" trades, for a total of $286,750. The ALJ tripled this amount and set the penalty at $860,250. ID at 57,460.

In imposing this penalty, the ALJ treated all the profits earned on Ray's customer-declined trades, totaling $178,000, as wrongful gains. ID at 57,460. However, as discussed above, the preponderant evidence of record establishes that approximately half the customer-declined trades were not bona fide errors. The record does not contain specific data for each customer-declined trade that would permit us to analyze each of the non-bona fide error trades. Accordingly, consistent with the factual record concerning Ray's customer-declined trades, the portion of the civil monetary penalty attributable to Ray's error account profits shall be halved, *from* $178,000 tripled to $534,000 *to* $89,000 tripled to $267,000. Ray's total civil monetary penalty is reduced from $860,250 to $593,250.

Finally, the Division cross-appeals for a restitution award of $82,500, arguing that the ALJ erred in not awarding this relief "despite having made explicit findings that Ray intentionally cheated and defrauded his customer and that the customer was proximately damaged." Div. App. Br. at 2.

The Division calculated its restitution request based on the $31,250 gain that would have accrued to General Mills if it had received a fill of 10 S&P contracts at 1332 and sold them at the same time it sold the other contracts constituting the May 12, 1999 scaled order; plus $51,250 General Mills would have earned on the second May 12 trade if Ray had filled its 10-contract order competitively in the market when the out-trade with Domashovetz came to light. The Division asserts that "the order would have received a price between 1350 and 1363.50 during

the window of time when Ray realized he needed to fill the Pension Plan." Div. App. Br. at 16. In seeking restitution, the Division "[gives] the Pension Plan the benefit of the doubt" and assumes a sale at 1363.50. *Id.* The Division notes that the discretionary factors that may be considered in weighing an award of restitution include "the likelihood that complainants can obtain compensation through their own efforts." Regulation 10.110(a), 17 C.F.R. § 10.110(a). It argues that "[s]elf-help is impractical" because neither the ultimate victims – the individual employees vested in the Pension Fund – nor the fund itself knew or could have known of Ray's fraud until the Division filed its case. Div. App. Br. at 16. Moreover, the Division argues, the cost of litigation could significantly diminish the amount sought in restitution. *Id.*

The Commission's 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. 7 U.S.C. § 9. 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* identifies other factors to be considered, principally the practicality of this sanction in the circumstances of a particular case. *Id.* at 45,812 and n.15. *In re R&W Technical Services,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,750 (CFTC Mar. 16, 1999) (affirming denial of restitution where it would require determination whether almost 1000 individual customers benefited or lost from use of R&W trading system); *see also In re Global Telecom*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,143 (CFTC Oct. 4, 2005) (vacating order tentatively awarding restitution to a class of 59 potentially eligible claimants).

Here, by contrast, the burden of awarding restitution to a class of potential claimants is absent. The Division seeks restitution for only one injured customer, the General Mills Pension Fund. The record, particular the testimony of Van Benschoten and the evidence and findings regarding the May 12 trades, amply establish the statutory requirements of proximate cause and reliance, and the amount of damages to the Fund, amounting to $82,500, caused by Ray's appropriation of customer orders. In these circumstances, separate litigation by General Mills, as Ray suggests, would be needlessly duplicative. This case is eminently suited for restitution and we award it, with the prejudgment interest requested by the Division. Div. App. Br. at 17.

CONCLUSION

Based on the foregoing, we affirm the ALJ's findings of liability and the sanctions he imposed, with the exception that the civil monetary penalty is reduced to $593,250. We grant the Division's appeal and order Ray to pay restitution to the General Mills Pension Fund of $82,500, plus prejudgment interest at the Treasury bill rate prevailing on the date this order is issued pursuant to 28 U.S.C. § 1961, from May 12, 1999 until paid. Any other arguments raised

by the respondent that have not been discussed are rejected as lacking merit and not warranting discussion.

IT IS SO ORDERED.[17]

By the Commission (Chairman GENSLER and Commissioners CHILTON and O'MALIA) (Commissioners DUNN and SOMMERS not participating).

David A. Stawick

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 18, 2011

[17] 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 that this order is served. *See* Commission Regulation 10.106, 17 C.F.R. § 10.106.