

III.

The Commission finds the following:

A. SUMMARY

Between February 2000 and May 2003, Berg was listed as a principal of Royal Berg, a commodity trading advisor ("CTA") registered in that capacity with the Commission between April 2000 and October 2003.

In its Disclosure Document, and in its promotional material, Royal Berg described its trading program as "an interest rate sensitive options trading program," conceived to exploit "relative instability in bond markets," whose preferred trading strategy was options spreads.

Contrary to those representations, Berg never used options spreads in trading for Royal Berg. Royal Berg traded only uncovered, or "naked" options, and predominantly, naked short options. Berg's trading strategy therefore came down to collecting premiums on the sale of out-of-the-money options in almost any commodity – including interest rates, currencies, stock indices, and energy commodities.

Berg admitted that he knew or should have known that his February 2002 Disclosure Document's representations about Royal Berg's trading program were materially inaccurate, but failed to correct the defect until January 2003. Moreover, when he did finally correct the defective February 2002 Disclosure Document, Berg failed to distribute the correction to his customers, in violation of Regulation 4.36(c), 17 C.F.R. § 4.36(c). Between December 2002 and February 2003, Berg also continued to use the February 2002 Disclosure Document, dated more than nine months earlier than its date of use, in violation of Commission Regulation 4.36(b), 17 C.F.R. § 4.36(b).

B. RESPONDENTS

Gary Berg resides in Princeton, New Jersey. In April 2000 Berg became chief executive officer, associated person and trading principal of **Royal Berg Inc.**, a registered CTA. Berg's and Royal Berg's registrations were withdrawn in October 2003, and the company's operations ceased.

C. FACTS

Between February 2000 and May 2003, Berg was Royal Berg's chief strategist, associated person, trading principal and chief executive officer. During that time, Berg was solely responsible for trading accounts under management by Royal Berg.

Royal Berg's Disclosure Documents and Promotional Material

In its first two Disclosure Documents, dated September 6, 2001 and February 14, 2002, and in its promotional material, Royal Berg described its trading program as "an interest rate sensitive options trading program." Its primary strategic objective, the Document continued, was

to exploit “relative instability in bond markets,” and its “preferred” trading strategy was the options spread.

In fact, the Respondents never used options spreads, and there was no sense in which options spreads ever represented their “preferred” trading strategy.

In a third Disclosure Document, dated January 24, 2003, Royal Berg amended its description of both its trading program and its “preferred” strategy. Where the February 14, 2002 Disclosure Document states that Royal Berg “trades a variety of interest rate sensitive futures and options on futures contracts,” the January 24, 2003 Disclosure Document states simply that Royal Berg “trades a variety of options on futures contracts.” Significantly, the January 24, 2003 Disclosure Document omits the earlier description of options spreads, and the claim that such spreads are Royal Berg’s “preferred” trading strategy, replacing those statements with the following:

Selling of options contracts that are out-of-the-money were selected as the preferred trading instrument for execution of the Program strategies. The Advisor primarily sells options on and receives premium for financial futures (for example, Eurodollar futures, S&P futures, treasury notes, etc.). However, the Advisor at times sees opportunity in other markets such as the Energy Markets and sells options on crude oil, gasoline, etc. In certain other instances, the Advisor may trade in any market and sell options on any commodity futures contract that demonstrates an opportunity based upon current research and analysis.

Berg failed to amend the inaccurate description of Royal Berg’s “preferred” trading strategy contained in the September 2001 and February 2002 Disclosure Documents until January 2003, more than a year after he began trading funds invested by customers. Berg also failed to distribute the amended Disclosure Document to his customers in any form. Rather, Berg continued to distribute the February 14, 2002 Disclosure Document to customers who opened Royal Berg accounts during the period between its expiration as of November 14, 2002 and the spike in March 2003 natural gas (after which Royal Berg stopped adding new accounts).

D. LEGAL DISCUSSION

A. The Respondents Violated Regulations Governing Disclosure

1. The Respondents Violated Regulation 4.36(c)

The Respondents have violated the Commission's disclosure Regulations in various ways. By early in 2002, Berg was or should have been aware that the February 14, 2002 Disclosure Document’s statement that options spreads were Royal Berg’s “preferred trading instruments” was inaccurate, because in actuality, Royal Berg’s preferred strategy involved trading naked options. Inaccurate or incomplete descriptions of a CTA’s trading program are material. *See Dohmen-Ramirez v. CFTC*, 837 F.2d 847 (9th Cir. 1988) (CTA's failure to trade customer's

account in the manner described in the CTA disclosure document provided one basis for fraud finding against CTA, which required proof of materiality).

Berg failed to amend the Disclosure Document's description of the trading strategy until January 2003, and then failed to distribute that amended document to any of his customers.

Commission Regulation 4.36 provides, in part:

(1) If the commodity trading advisor knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to: (i) All existing clients in the trading program within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect; and (ii) Each previously solicited prospective client for the trading program prior to entering into an agreement to direct or to guide such prospective client's commodity interest account pursuant to the program. The trading advisor may furnish the correction by way of an amended Disclosure Document, a sticker on the Document, or other similar means. (2) The trading advisor may not use the Disclosure Document until such correction is made.

Comm. Reg. 4.36(c). In failing for far more than 21 days after they knew or should have known about its defects to amend the Royal Berg Disclosure Document's description of the "preferred trading instrument," and then in failing to distribute the amended Disclosure Document to his customers, the Respondents violated Regulation 4.36(c).

2. The Respondents Violated Regulation 4.36(b)

Regulation 4.36 further provides:

No commodity trading advisor may use a Disclosure Document dated more than nine months prior to the date of its use.

Comm. Reg. 4.36(b). After Royal Berg's February 14, 2002 Disclosure Document expired as of November 14, 2002, Berg continued to use the Document, distributing it to seven Royal Berg customers who opened accounts between November 14, 2002 and January 28, 2003. The Respondents thereby violated Regulation 4.36(b).

B. Berg Was A Controlling Person Of Royal Berg

Liability as a controlling person under § 13(b) of the Act, 7 U.S.C. §13c(b), may be established by a respondent's (1) knowingly inducing, directly or indirectly, the acts constituting the violation; or (2) failing to act in good faith. *In the Matter of Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 38,794 (CFTC Mar. 11, 1992). Knowing inducement requires a showing that "the controlling person had knowledge of the core activities that constitute the violation at issue and allowed them to continue." *In the Matter of*

Guttman, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,337 at 46,561-4 (CFTC Apr. 27, 1998) (citing *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC Jan. 1988)).

Berg was the principal trader, chief strategist and chief executive officer of Royal Berg. He was integrally involved in the process of creating Royal Berg's Disclosure Documents. As a Commission registrant, Berg "is required to comply with Commission rules in conducting himself and his business and is deemed to know the contents of the Commission's rules." *In the Matter of Wuensch*, Comm. Fut. L. Rep. (CCH) ¶ 27,437 (October 7, 1998). Berg had the authority to control Royal Berg's compliance with Commission regulations governing disclosure, knew or had a duty to know that Royal Berg was in violation of those regulations, and allowed those violations to continue. Accordingly, Berg has controlling person liability for the acts of Royal Berg.

IV.

OFFER OF SETTLEMENT

The Respondents have submitted an Offer of Settlement in which, without admitting or denying the findings herein, and prior to any adjudication on the merits, they acknowledge service of the Order; admit jurisdiction of the Commission with respect to the matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based upon violations or for enforcement of the Order; waive service of a complaint and notice of hearing, a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, any claim of double jeopardy based on the institution of this proceeding or the entry of any order imposing a civil monetary penalty or other relief, and all claims which it may possess under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-30 (2004), relating to, or arising from, this action; stipulate that the record basis from which this order is entered consists solely of this Order, including the findings in this Order; and consent to the Commission's issuance of this Order, in which the Commission makes findings, including findings that the Respondents violated Commission Regulation 4.36 and orders that they cease and desist from violating the provision of the Regulations they have been found to have violated; that they pay a civil monetary penalty of ten thousand dollars (\$10,000) within ten (10) business days of the entry of this Order; and that they comply with the Order's undertakings as set forth below.

V.

FINDING OF VIOLATIONS

Based on the foregoing the Commission finds that the Respondents violated Commission Regulations 4.36, 17 C.F.R. § 4.36 (2004).

VI.

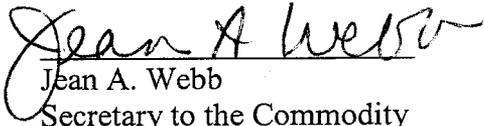
ORDER

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The Respondents shall cease and desist from violating Commission Regulation 4.36.
2. The Respondents shall pay a civil monetary penalty of ten thousand dollars (\$10,000) within ten (10) business days of this Order. The Respondents shall make such payment by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and addressed to Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581 under cover of a letter that identifies them and the name and docket number of the proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Gregory G. Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581, and to Stephen J. Obie, Regional Counsel, Commodity Futures Trading Commission, Division of Enforcement, Eastern Regional Office, 140 Broadway, New York, N.Y. 10005.
3. The Respondents shall comply with the following undertakings:
 - A. Neither the Respondents nor any of their agents or employees shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision affects the Respondents' (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. The Respondents shall take all steps necessary to ensure that their agents or employees understand and comply with this undertaking; and
 - B. The Respondents shall cooperate fully with the Division of Enforcement in this proceeding by, among other things: 1) responding promptly, completely, and truthfully to any inquiries or requests for information; 2) authenticating documents; and 3) testifying completely and truthfully.

Unless otherwise specified, the provisions of this Order shall be effective on this date. A copy of this Order shall be served on the Respondents at the address set forth in Section B herein, on all contract markets, and on the National Futures Association.

By the Commission.


Jean A. Webb
Secretary to the Commodity
Futures Trading Commission

Date: January 18, 2005