



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

OFFICE OF PROCEEDINGS
PROGRAMS CLERK

00 APR 12 AM 8 45

RECEIVED
C.F.T.C.

In the Matter of

CARL DEAN DIXON,

Respondent.

*
*
*
*
*
*
*

CFTC Docket No. 00-03

Appearance: Magdalena Z. Wegner, Esq.
Trial Attorney
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Attorney for the Division of Enforcement
Commodity Futures Trading Commission

Before: Bruce C. Levine, Administrative Law Judge

**DEFAULT ORDER MAKING FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND IMPOSING SANCTIONS AGAINST
RESPONDENT CARL DEAN DIXON**

Overview

"Upon information and belief, defendant Dixon is a con artist who has defrauded multiple individuals over his career, and continues to defraud people today."¹

¹ Tygar v. Dixon, Complaint, filed September 10, 1998, ¶22, (Circuit Court of the 17th Judicial Circuit, Broward County, Florida) (set forth in Attachment O of the Division of Enforcement's Attachments to Memorandum in Support of Motion for Entry of Default Order, Findings of Fact and Conclusions of Law and Imposition of Sanctions Against Carl Dean Dixon, filed March 24, 2000).

Procedural History

On December 16, 1999, the Commodity Futures Trading Commission ("Commission") issued a three-count complaint against Carl Dean Dixon ("Dixon").² In the Complaint, the Division of Enforcement ("Division") alleges that between January and December 1998, Dixon committed customer fraud while acting as an unregistered commodity trading advisor ("CTA") in violation of Sections 4b(a), 4m(1) and 4o(1) of the Commodity Exchange Act, 7 U.S.C. §§6b(a), 6m(1) and 6o(1).³

On January 31, 2000, the Court found Dixon to be in default,⁴ and subsequently issued a Scheduling Order permitting

² Complaint and Notice of Hearing Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, dated December 16, 1999 ("Complaint").

³ Id. at ¶¶1-36. According to the Division, Dixon's violations occurred in the course of marketing himself as a "tutor" in futures trading techniques. Id.

⁴ Notice of Default, dated January 31, 2000. Dixon, who has failed to answer the Complaint, was properly served by certified mail at his last known address in Davie, Florida. Id. at 2-3; see 17 C.F.R. §10.22(b). Moreover, since at the time of the issuance of the Complaint, Dixon's whereabouts were unknown, see Complaint at ¶2, the Commission chose to provide Dixon with additional service by publication in the Broward Daily Business Review and by posting on the Commission's web site. Notice of Default at 3; see 17 C.F.R. §10.22(b)(1)-(2). While there is no proof of Dixon's actual receipt of the Complaint or knowledge of its filing, such proof is not required, and service was effected by these efforts. See In re Shackett, [1977-1980 Transfer Binder] (continued..)

the Division to file a motion for a default order, along with supporting papers and any supplemental evidence by March 24, 2000.⁵

(..continued)

Comm. Fut. L. Rep. (CCH) ¶20,753 at 23,090 (CFTC Jan. 26, 1979); Katzson Bros., Inc. v. EPA, 839 F.2d 1396, 1399-1400 (10th Cir. 1988).

⁵ Scheduling Order, dated February 7, 2000.

Rule 10.23(c) of the Commission's Rules of Practice provides that if a party fails to file an answer within 20 days following service of a complaint as set forth in Rule 10.22, the party shall be in default and, pursuant to procedures set forth in Rule 10.93, the proceeding may be determined against such party by the Court upon its consideration of the complaint, "the allegations of which shall then be deemed to be true." 17 C.F.R. §§10.22, 10.23(c), 10.93.

The conciseness with which the default standard is stated has the capacity to mislead. In fact, in a default proceeding, not every allegation is deemed true without regard to formulation. Only "well-plead allegations of fact" stand as uncontested. See In re Global Link Miami Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,391 at 46,778 n.2 (CFTC June 26, 1998), rev'd on other grounds, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,669 (CFTC June 21, 1999). Allegations are not well-pled merely because they are intelligible. Allegations that are not well-pled would include: (1) allegations made indefinite by other allegations in the same complaint, (2) allegations that are made erroneous by the same complaint, (3) allegations that are contrary to facts of which the Court will take judicial notice, (4) alleged facts that are not susceptible of proof by legitimate evidence, or (5) alleged facts that are contrary to the uncontroverted material in the file of the case. Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 63 (2d Cir. 1971). Accordingly, the Court's fact-finding role in default proceedings is substantive, not ministerial. See Fed. R. Civ. P. 55(b)(2). ("If, in order to enable the court to

(continued..)

On March 24, 2000, the Division filed a default motion requesting that the Court enter an order finding Dixon liable for violations under all three counts of the Complaint, directing him to cease and desist from further violating the relevant provisions of the Act, and assessing a civil monetary penalty of \$28,500 against him.⁶ Dixon has not responded to the Default Motion.

(..continued)

enter judgment [by default] or to carry it into effect, it is necessary to take an account or determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may conduct such hearings . . . as it deems necessary"). Moreover, the Court draws its own legal conclusions. Global Link Miami, ¶27,391 at 46,783-85; Global Link Miami, ¶27,669 at 48,164 ("[T]he ALJ has the inherent authority prior to entering a default order to consider issues of law posed by the complaint").

⁶ Motion for Entry of Default Order, Findings of Fact and Conclusions of Law and Imposition of Sanctions Against Carl Dean Dixon and Memorandum of Law in Support, filed March 24, 2000 ("Default Motion"); Attachments to Memorandum in Support of Motion for Entry of Default Order, Findings of Fact and Conclusions of Law and Imposition of Sanctions Against Carl Dean Dixon, filed March 24, 2000 (Attachments A-U); Proposed Findings of Fact and Conclusions of Law, filed March 24, 2000.

Summary Of Findings

Since the service of the Complaint, Dixon has not filed an appearance, requested an extension of time within which to answer, filed an answer or otherwise pled to the Complaint, or filed a response to the Division's Default Motion. Accordingly, on consideration of the well-pleaded allegations of the Complaint and other uncontroverted material in the public file of this case, the Court **ENTERS** the Findings of Fact and Conclusions of Law attached hereto. A summary of the Court's findings and conclusions follows.

Between January and December 1998, Dixon offered a Treasury bond futures trading course through newspaper advertisements, broker referrals, internet and personal contacts, promising to teach a trading methodology that would yield high returns. He guaranteed his tutoring by offering a double-money-back guarantee, if students did not earn at least a certain weekly sum after 30-45 days. Dixon, however, failed to teach such a system or return the students' tuition. Dixon also solicited students by making other material misrepresentations, stating that he was an experienced and successful futures trader whose opulent lifestyle was the result of full-time, volume trading. Dixon, however, was neither experienced nor successful as a commodity

trader, and was verging on bankruptcy. Dixon further promoted his "course" by claiming to have taught students to become successful traders using his methods. This claim was false as well.

In short, Dixon's solicitations were fraudulent and in violation of Sections 4b(a) and 4q(1) of the Act. Dixon also failed to register as a CTA in violation of Section 4m(1) of the Act.

Accordingly, the Court **FINDS** and **CONCLUDES** that during the period of time covered by the Complaint:

1. Carl Dean Dixon cheated or defrauded or attempted to cheat or defraud customers and prospective customers, and willfully provided customers and prospective customers with false reports, in connection with transactions in futures contracts, in violation of Sections 4b(a) of the Act, 7 U.S.C. §6b(a);
2. Carl Dean Dixon employed a scheme to defraud customers and prospective customers and engaged in a course of business which operated as a fraud upon customers and prospective customers in violation of Section 4q(1) of the Act, 7 U.S.C §6q(1); and
3. Carl Dean Dixon acted as a commodity trading advisor without being registered as such, in violation of Section 4m(1) of the Act, 7 U.S.C. §6m(1).

Sanctions

Cease And Desist Order

The Division urges the Court to enter a cease and desist order against Dixon.⁷ A cease and desist order is appropriate where, as here, there is a reasonable likelihood of future violations by a respondent.⁸ One indicator of the likelihood of future violations is the existence of a pattern of past misconduct, as opposed to one time errors or good faith mistakes.⁹ The chances of recidivism are of course also increased where no rehabilitation is evidenced.¹⁰

This case merits a cease and desist order. Dixon engaged in a sophisticated scheme of fraud that spanned a year. Moreover, the record -- including Dixon's default and disappearance -- suggests no hint of rehabilitation or changed direction. There is

⁷ Default Motion at 18.

⁸ In re Fritts, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,255 at 42,132 (Nov. 2, 1994); In re Dillon-Gage, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,574 at 30,482 (CFTC June 20, 1984); In re GNP Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. (CCH) ¶25,360 at 39,223 (CFTC Aug. 11, 1992), rev'd on other grounds, sub nom., Monieson v. CFTC, 996 F.2d 852 (7th Cir. 1993).

⁹ Fritts, ¶26,255 at 42,132; Dillon-Gage, ¶22,574 at 30,483.

¹⁰ Id.

no reason to believe that Dixon's pattern of misconduct will change absent the deterring hand of appropriate sanctions, including a cease and desist order.

Civil Monetary Penalty

In addition to a cease and desist order, the Division also urges the Court to assess a civil monetary penalty of \$28,500 against Dixon.¹¹ In so doing, "[i]t is simply asking for the proven tuition losses for the four customers who provided declarations detailing those losses."¹² The Court notes that the requested penalty, seeking only the disgorgement of documented ill-gotten gains, is far too low to promote the goals of maximum or optimal deterrence. The Division does not argue otherwise, but only that Commission precedent locks it and the Court into the amount that it has recommended.¹³ The Division is right.

Deterrence theory dictates that any penalty include a premium to offset the benefit or cost of engaging in undetected illegal conduct.¹⁴ Penalties are set such that the amount of the penalty multiplied by the perceived probability of detection exceeds the

¹¹ Default Motion at 19-20.

¹² Id. at 20; see Attachments C-D, G-H.

¹³ Default Motion at 19-20.

¹⁴ See Fritts, ¶26,255 at 42,133.

expected gain of the violative act.¹⁵ Similarly, penalties based on customer loss include a premium to account for undetected acts.¹⁶

Beginning in 1992, the Commission began to embrace deterrence theory as its guiding principle in assessing civil monetary penalties. In GNP, the Commission explained,

"Civil monetary penalties serve a number of purposes. These penalties signify the importance of particular provisions of the Act and the Commission's rules, see e.g., In re Incomco, Inc. [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,198 at

¹⁵ Id.

¹⁶ Id. The literature stresses that penalty levels should be based on respondent gain if the goal is to maximize deterrence, and on customer loss if the goal is to maximize economic efficiency or to optimize deterrence. See e.g., R. Posner, Economic Analysis of Law at 223-31 (Fourth Ed. 1992); M. Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U. L. Rev. 395 (1991); U.S. Sentencing Commission, Offenses Involving Fraud or Deceit, (1990); M. Cohen, Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 26 Am. Crim. L. Rev. 605 (1989); J. Parker, Criminal Sentencing Policy for Organizations: The Unifying Approach to Optimal Penalties, 26 Am. Crim. L. Rev. 573 (1989); F. Easterbrook and D. Fishel, Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611 (1985); M. Polinsky and S. Shavell, The Optimal Use of Fines and Imprisonment, J. Pub. Econ. 89 (1984); W. Landes, Optimal Sanctions for Antitrust Violations, 50 U. Chi. L. Rev. 652 (1983); M. Polinsky and S. Shavell, The Optimal Tradeoff Between the Possibility and Magnitude of Fines, 69 Am. Econ. Rev. 880 (1979); G. Becker and G. Stigler, Law Enforcement, Malfesance, and Compensation of Enforcers, 3 J. Legal Stud. 13 (1974); G. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

38,535-36, and act to vindicate these provisions in individual cases, particularly where the respondent has committed the violations intentionally. Id. Civil monetary penalties are also exemplary; they remind both the recipient of the penalty and other persons subject to the Act that noncompliance carries a cost. To effect this exemplary purpose, that cost must not be too low or potential violators may be encouraged to engage in illegal conduct.

Civil monetary penalties cannot be calculated with precision. Even so, such penalties may be rationally devised in accordance with the purposes we have outlined. We begin with the proposition that potential violators will be discouraged from illegal conduct if they know they are unlikely to profit from it. Thus, in any individual case, our focus turns initially to the gain realized by the particular wrongdoers from their conduct. . . .

. . . In addition we recognize that some individuals will engage in these types of violations without detection. The exemplary purpose of the penalty will be served only if its amount reflects a premium to offset the benefit of engaging in these undetected violations."

GNP, ¶25,360 at 39,222-23 (emphasis added).¹⁷

More recently, however, the Commission has abandoned the approach articulated in GNP, and has omitted any discussion or

¹⁷ See also Fritts, ¶26,255 at 42,132-34; In re Cantillano-Estrada, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,284 at 42,438-39 (CFTC Jan. 9, 1995); In re Grossfeld, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,975 at 41,118 (CFTC Feb. 9, 1994) (in the past, "rather than directing the Court to engage in a specific assessment grounded in the gains to wrongdoers or the losses to victims, the Commission has generally invited the Court to consider a catalog of more subjective factors.").

application of economic method in its consideration of civil monetary penalties.¹⁸ In this regard, the Commission's opinion in In re R&W Technical Services, Ltd., [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) Comm. Fut. L. Rep. (CCH) ¶27,582 (CFTC March 16, 1999) is particularly instructive. Like the instant case, the respondents in R&W were unregistered CTAs who systematically misrepresented their own trading experience and the track record of their trading system, and made corresponding "false promises of easy profits."¹⁹ Finding that the R&W respondents had received a minimum of \$2,375,000 in revenues from customers who had purchased the R&W system, this Court adopted the Division's recommendation to treble that amount and thereby assess a civil monetary penalty of \$7,125,000.²⁰ In so doing, the Court explained that the trebling "adjusts respondent's ill-gotten gains by a premium to account for the general likelihood

¹⁸ See In re R&W Technical Services, Ltd., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,193 at 45,734 (CFTC Dec. 1, 1997) (this Court commenting that although recent cases "appear to offer no coherent alternative to the economic method traditionally employed by this Court in the penalty determination, their net effect is to raise some doubt on the propriety of this Court's deterrence-based approach to assessing sanctions.").

¹⁹ R&W, ¶27,582 at 47,741.

²⁰ R&W, ¶27,193 at 45,732, 45,735.

of detection and prosecution under the Act. Given the gravity of respondents' fraud, a lesser civil monetary penalty would not adequately serve to generally deter such conduct."²¹

On appeal, the Commission accepted the Court's findings of fraud,²² and adopted the Court's computation of \$2,375,000 as a reasonable estimate of the monetary gain to the respondents from the sale of the R&W trading systems.²³ However, the Commission reduced the penalty by two-thirds to equal the \$2,375,000 in wrongly-obtained revenues. In so doing, it eschewed the Court's "specific formula" for assessing penalties, in favor of a generalized inquiry into a range of factors without assigning specific weight to any of them, or to adhering to any other principles of quantification.²⁴ The result was that the Commission expressly declined to impose any premium in its

²¹ Id. at 45,735.

²² R&W, ¶27,582 at 47,745.

²³ Id. at 47,749.

²⁴ Id. at 47,748. Compare In re Horn, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,836 at 36,938 (CFTC Apr. 18, 1990) ("While we recognize that neither absolute consistency nor perfect symmetry can be expected, we have also rejected the talismanic invocation of 'the unique factual circumstances of each individual case' as a justification for differential treatment.") (citation omitted).

assessment of the gains-based penalty in the absence of evidence of additional aggravating circumstances.²⁵

Accordingly, in light of R&W, and in recognition that there cannot be one rule for Monday and another rule for Tuesday,²⁶ the Division has limited its request for a civil monetary penalty against Dixon to only \$28,500.²⁷ Since this Court is bound to

²⁵ Without record evidence of the customer trading losses resulting from the use of R&W's system, the Commission rejected the use of a multiplier. R&W, ¶27,582 at 47,749. The Court notes that since the markets are reasonably efficient in pricing futures contracts, a fraudulently-peddled trading system is likely, ex ante, to perform as well (or as badly) as another that is promoted honestly. See R&W, ¶27,193 at 45,727 n.75.

²⁶ As the Fifth Circuit has stated,

"Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry impossible. And the law makes good sense by not exacting it [But] [t]here may not be a rule for Monday, another for Tuesday, a rule of general application, but denied outright in the specific case."

Frozen Food Express, Inc. v. U.S., 535 F.2d 877, 880 (5th Cir. 1976) (internal quotation marks and citation omitted).

²⁷ As the Division explained,

"In In re R & W Technical Services, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,748 (CFTC March 16, 1999), the Commission said:

'We do not rely on a specific formula in assessing de novo the appropriate level of civil monetary

(continued..)

(..continued)

penalties; rather, we focus on the relative gravity of respondents' misconduct in light of the following factors:

(1) The relationship of the violation at issue to the regulatory purposes of the Act; (2) respondent's state of mind; (3) the consequences flowing from the violative conduct; and (4) respondent's post-violation conduct. In addition, [the Commission] consider[s] any mitigating or aggravating circumstances presented by the facts.'

citing In re Grossfeld, ¶26,921 at 44,467-68.

On facts similar to those in the Dixon case, using the Grossfeld factors cited above, the Commission held in R&W that, although the gravity of the R&W respondents' offenses was 'significant,' went 'to the core provisions of the Act,' wrongful intent was present, and 'post violative conduct added to the conduct's gravity,' it still did not warrant tripling the respondents' gains. Dixon intentionally committed the same type of retail sales fraud as the R&W respondents, except over a shorter period of time and with fewer victims. Therefore, the Division, in conformity with the Commission's decision in R&W, seeks only Dixon's fraudulent gross gains as a civil monetary penalty. Those gains equal \$28,500, the sum of the tuition losses cited in the declarations of Dixon's customers that are attached hereto."

(continued..)

follow the guidance contained in Commission decisions until they are reversed or otherwise refined by the Commission itself,²⁸ it

(..continued)

Default Motion at 19-20 (footnotes omitted).

²⁸ See In re Trillion Japan Co., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,082 at 41,589 (CFTC May 23, 1994).

It is little wonder that the Commission has abandoned adherence to principles derived from the economics of sanctions in its assessment of civil monetary penalties. It has hardly found any encouragement to such an undertaking in the courts of appeals, which in turn may reflect a populist tendency to reject these teachings.

In GNP, the Commission's application of economic method was unfavorably received by the Seventh Circuit. On appeal, the Court of Appeals took note of the Commission's departure from its traditional approach and reduced the fine for respondent Monieson from \$500,000 to \$200,000. Monieson v. CFTC, 996 F.2d 852, 863-65 (7th Cir. 1993). The Seventh Circuit had difficulty accepting that a penalty "far greater than the total harm [\$300,000] caused" could bear any "rational relationship to the offense or the need for deterrence." Id. at 865. The Court of Appeals did observe that the Commission had in part "based its decision on the exemplary purpose of penalties and the need to inflate the fine in order to compensate for undetected violations." Id. at 864. It called such principles of general deterrence, however, "a slim justification" for the size of the penalty that the Commission had imposed on Monieson. Id.

More recently, the Fifth Circuit has found fault with the size of the penalty imposed by the Commission in the very case that this Court finds controlling in this default proceeding. In R&W, the Fifth Circuit affirmed the Commission's liability findings, but reversed and remanded the case for reconsideration of the civil monetary penalty. R&W Technical Services, Ltd. v. CFTC, 2000 WL 217498 (5th Cir. 2000). Although the \$2,375,000 penalty assessed by the Commission was already stripped of the multiplier that this Court had imposed, the Fifth Circuit

(continued..)

(..continued)

directed the Commission to reduce the penalty still further. Finding that "the proper measure of gain to the defendant is net profits, not gross revenues," the Court of Appeals remanded the case for "a new assessment of the penalty [to] begin with the petitioner's net profits, which then should be adjusted lower based upon any mitigating evidence the petitioners present with regard to customer satisfaction." Id. at *10-11. Leaving the Commission without the discretion to employ a multiplier, the Fifth Circuit's instruction could conceivably result in the assessment of no penalty at all -- even in the absence of mitigating evidence. This is because the respondents' "net profits" may have been little or nothing.

In another recent fraudulent solicitation case where the Commission declined to apply a multiplier in assessing the penalty, the Ninth Circuit affirmed the Commission's liability findings, but likewise rejected the Commission's civil monetary penalty as too high. Miller v. CFTC, 197 F.3d 1227 (9th Cir. 1999). Like the Fifth Circuit in R&W, the Ninth Circuit in Miller remanded the case for reconsideration of the penalty under a formula for determining gains and losses that could also result in the assessment of little or no penalty. Id. at 1235-36.

Lastly, a recent academic study suggests that, for better or worse, there may be a popular antipathy to promoting optimal deterrence in law enforcement. See C. Sunstein, D. Schkade and D. Kahnman, Do People Want Optimal Deterrence?, John M. Olin Law & Economics Working Paper No. 77 (2d Series) (June 1999) (on file with the University of Chicago Law School). The authors conclude,

"People do not spontaneously think in terms of optimal deterrence and indeed they would be reluctant to accept an effort to build the law on a foundation of optimal deterrence theory. Their proposed punishments do not differ depending on the probability of deterrence, even when this factor is specifically drawn to their attention. In addition, people reject law enforcement policies that increase or

(continued..)

grants the Division's request.²⁹

(..continued)

decrease penalties because of the probability of detection."

Id. at 16.

²⁹ Although the Fifth Circuit's opinion in R&W (as opposed to that of the Commission) is not controlling in the instant case, Division's recommended penalty of \$28,500 squares with it. While the \$28,500 penalty derives from a computation of the gross revenues received from the four customer declarants, not "net profits," Dixon's default fairly gives rise to an adverse inference that his associated operating expenses were zero. Simply stated, the adverse inference rule provides that when a party has relevant evidence within its control which he fails to produce that failure gives rise to an inference that the evidence was unfavorable to him. See International Union (U.A.W.) v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972). It is Dixon, by his default, that has effectively precluded the Division from discovering and introducing evidence as to his expenses. Indeed, the Commission has applied the adverse inference rule in similar circumstances where the respondent's net worth has been an issue. See In re Miller, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,297 at 46,350 (CFTC Mar. 12, 1998) ("The burden of production for [purposes of establishing respondent's net worth] rests with the respondent because he generally controls the information and records directly probative of his financial condition."). Accord In re Grossfeld, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,921 at 44,466 (CFTC Dec. 10, 1996); In re Murlas Commodities, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,440 at 35,930 (CFTC Apr. 24, 1989); In re Rothlin, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,851 at 27,573 (CFTC Dec. 21, 1981). Cf. Fed. R. Civ. P. 37(b)(2)(A) ("If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make . . . [a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.").

Other Sanctions

In addition to considering the issuance of a cease and desist order and the assessment of civil monetary penalties, the Commission has directed this Court to consider whether Dixon should be subject to an order prohibiting him from trading on contract markets and a requirement that he make restitution to customers of damages proximately caused by his violations of the Act.³⁰ The Division seeks neither sanction, and neither is warranted.³¹

³⁰ Complaint at V.

³¹ As the Court has previously noted "as with its assessment of civil monetary penalties, the Commission's trading ban case law continues to reflect disparate results which do not appear bounded by sensible principles." R&W, ¶27,193 at 45,736 n.130; see also In re Miller, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,440 at 42,914-15 (CFTC June 16, 1995) (Schapiro, Chairman and Bair, Commissioner, dissenting in part). The current law, however, seems to be that where, as here, the respondent has engaged in the fraudulent marketing of advisory services -- but has not provided execution services or sought to manipulate prices -- no trading prohibition is warranted. See R&W, ¶27,582 at 47,747-48.

The Division states that it is not seeking restitution because "it knows of no assets Dixon owns, and does not know his whereabouts." Default Motion at 18 n.48. Under such circumstances, the Division is correct in regarding restitution as an inappropriate "empty gesture." See In re Lexus Financial Group [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,713 at 48,381 (CFTC July 20, 1999) ("the decision whether to commit public and private resources to restitution is one grounded in cold, hard reality"); R&W, ¶27,582 at 47,750 ("restitution should not be ordered as an empty gesture of
(continued..)

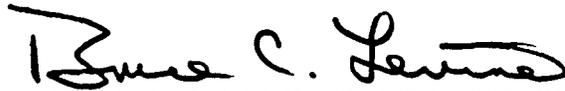
Order

Accordingly, It is hereby ORDERED that:

1. Carl Dean Dixon CEASE AND DESIST from further violations of the provisions of the Sections 4b, 4q and 4m of the Act; and
2. Carl Dean Dixon PAY a civil monetary penalty of \$28,500.

IT IS SO ORDERED.

On this 12th day of April, 2000



Bruce C. Levine
Bruce C. Levine
Administrative Law Judge

(..continued)

goodwill.") (internal quotation marks and citation omitted); In re Staryk, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 at 45,812 (CFTC Dec. 18, 1997) ("[W]e remain mindful that restitution fulfills its purpose only when it tends to make whole those persons harmed by violations of the Act or Commission rules or at least pays a meaningful portion of the damages they suffered.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings Of Fact

Dixon And His Tutoring Business

1. Carl Dean Dixon is an individual whose last known address is 4755 SW 73rd Avenue, Davie FL 33314. He has never been registered with the Commission in any capacity. Complaint at ¶21; Attachments B, I-K, O, S, T, U.

2. Between at least January and December 1998, Dixon engaged in the business of tutoring students in techniques of day trading 30-year Treasury bond ("T-bond") front month futures contracts. As part of that business, Dixon solicited members of the general public to purchase his tutoring services by means of newspaper advertisements, personal contacts, broker referrals and internet chat rooms. Complaint at ¶3; Attachments A, C-H, O, S.

3. In his solicitations, Dixon promised to give students one-on-one tutoring tailored to the students' individual needs and interests, and to trade side by side with students in real time for the first 30 days of trading. Complaint at ¶4; Attachments C, D, G-H, O, S.

4. Dixon's newspaper advertisements made representations about the likelihood of earning profits under his tutelage. For example, one advertisement stated: "Earn \$5-7 K PER WEEK -- Tutor you on Daytrading US Tbond Future Contracts." Complaint at ¶5; Attachment A.

5. Dixon told prospective students in a letter, and orally, that he had a success rate of teaching nine out of ten students to day trade successfully, which students understood to mean "profitably." Complaint at ¶6; Attachment G-H, L, O.

6. As part of his solicitations, Dixon represented to prospective students that he was a full-time, highly-experienced and successful commodity futures trader. Complaint at ¶7; Attachments C-E, G-H, O.

7. To substantiate his oral representations regarding his personal trading successes, Dixon sent to at least one

prospective student, and showed to another student in person, two brokers' statements which evidenced successful, high-volume day trading that Dixon identified as his own. Complaint at ¶8; Attachments G-I, O.

8. Dixon also claimed to have substantial personal wealth that derived from his futures trading, which enabled him to lead a luxurious lifestyle that included a 100-foot yacht named "The T-Bond." Complaint at ¶9; Attachments G-H, O.

9. Dixon signed up approximately 12 students for his course. He entered into a written agreement with some of those students that contained provisions in which Dixon agreed to "teach [students] to successfully day trade the 30 year Treasury Bond front month Futures [sic] contract within a 30 to 45 day time period . . ." and guaranteed to pay students back double their money if he could not teach them successful day trading. In return for those services and guarantees, the students agreed to pay Dixon tuition of between \$5,000 and \$10,000, plus seven percent of their net profits for a period of two years from the commencement of trading. Complaint at ¶10; Attachments C-F, H, O, S.

10. In February 1998, Dixon represented himself to at least one prospective student as having recently received from one satisfied former student a \$50,000 check that represented Dixon's seven percent share of the student's trading profits as owed to Dixon under the terms of the student's contract. Complaint at ¶11; Attachments G, O.

Dixon's Misrepresentations

11. Contrary to his representations, Dixon did not trade alongside students during the first 30 days of trading, Complaint at ¶13; Attachments C, G-H, O, never earned "\$5-7 K PER WEEK" himself by day trading T-bond futures, Complaint at ¶13; Declaration of Patricia Tierney Schiller, dated March 23, 2000, at ¶¶1, 4-6 ("Schiller Declaration" set forth in Attachment T), and never taught any students to be successful traders. Complaint at ¶13; Attachments C-D, G-H, O.

12. Contrary to Dixon's representations, Dixon was not a highly successful or full-time trader, and indeed traded virtually no futures during the relevant period. Complaint at ¶14, Attachment N; Schiller Declaration at ¶¶1, 4-6. One futures

commission merchant ("FCM") through whom he claimed to trade had never heard of him. Attachment M. At another FCM through whom he claimed to trade, Dixon opened an account that remained entirely inactive. Attachment N. Dixon's accounts at four other FCMs reflected almost no trading activity. Complaint at ¶14; Schiller Declaration at ¶¶1, 4-6 (11 trades resulting in net loss of \$139,847.72).

13. Dixon fabricated the account statements he used to solicit students, the trades reflected in those statements were a sham. Complaint at ¶15; Attachment I; Schiller Declaration at ¶¶2-3.

14. On the dates of the purported trading reflected on the phony account statements, Dixon either had no account open with the FCM named on the top of the statement, or had not entered into transactions resembling those reflected on the account statements that he showed to students. Complaint at ¶15; Schiller Declaration at ¶¶2-3.

15. Contrary to Dixon's representations, he was not wealthy and did not live a wealthy lifestyle. Instead, during the relevant period, he was nearly bankrupt, owned no yacht, lived in a house surrounded by trailer parks, and owed large debts. Complaint at ¶16. During 1999, his home was sold at a sheriff's auction. Id.; Schiller Declaration at ¶7; Attachment U.

16. Dixon did not teach students how to trade successfully, and although at least three students asked Dixon to return their tuition, he failed to honor the contractual guarantee and refused to refund any tuition. Complaint at ¶17; Attachments C-D, F-H, L, O, R-S.

Dixon's Failure To Register As A Commodity Trading Advisor

17. The manner and extent of Dixon's contact with his students differed according to the students' geographic locations and trading backgrounds. Complaint at ¶19; Attachments C-D, G-H, O. Dixon lived in Florida, and his Florida customers met with Dixon for one-on-one tutoring, augmented by telephone instructions. Complaint at ¶19; Attachments D, G, O. For out-of-state customers, Dixon relied more heavily on e-mail tutoring and telephone contact, Complaint at ¶19; Attachments C, H, R, but still promising one-on-one instruction. Attachment S. Each student, regardless of location, participated in internet "chat

room" teaching sessions, and received from Dixon a type of instructional videotape called "CAMS" that is computer readable by the recipient only. Complaint at ¶19, Attachments C, H.

18. Dixon inquired into students' financial resources and trading experience, and tailored his lesson content to the ability levels of his students. Complaint at ¶20; Attachments C-D, G-H, R. Dixon promised students with trading experience that his lessons would focus on their specific trading concerns. Complaint at ¶20.

19. Dixon has never been registered with the Commission as a commodity trading advisor ("CTA") or in any other capacity, and has not sought any exemption from registration. Complaint at ¶21; Attachment F.

Conclusions Of Law

Count One: Fraud, Deceptive Statements And False Reports In Violation Of Section 4b(a) Of The Commodity Exchange Act, 7 U.S.C. §6b(a)

20. Sections 4b(a)(i)-(iii) of the Act make it unlawful, "for any person in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery . . . (i) to cheat or defraud or attempt to cheat or defraud such other person," (ii) willfully to make false reports or statements to another, or (iii) willfully deceive or attempt to deceive any person by any means whatsoever. 7 U.S.C. §6b(a)(i)-(iii).

21. To prove a violation of Section 4b(a), the Division of Enforcement ("Division") must establish that a respondent knowingly or recklessly defrauded or attempted to defraud customers. Hammond v. Smith Barney, Harris Upham & Co., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 at 36,658-59 (CFTC Mar. 1, 1990); Knight v. First Commodity Fin. Group, Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,942 at 44,556 (CFTC Jan. 14, 1997); see also First Commodity Corp. v. CFTC, 676 F.2d 1, 6-7 (1st Cir. 1982). A respondent is not required to have knowledge of the falsity of a representation in order to possess the requisite scienter. Moreover, "a good faith belief is not necessarily inconsistent with a finding of

scienter." Hammond, ¶24,617 at 36,659; accord Haltmier v. CFTC, 554 F.2d 556, 562 (2d Cir. 1977) (intent to injure customer not required); Do v. Lind-Waldock & Co., [1994-1996 Transfer Binder] Comm. Fut., L. Rep. (CCH) ¶26,516 at 43,322 (CFTC Sept. 27, 1995) ("[T]he absence of a specific intent to injure" does not excuse the broker's failure to fulfill a customer's cancellation instruction.). Statements that are not intentionally false may also meet the scienter requirement if they are made recklessly. Statements are reckless if made with so little care that it is "very difficult to believe the [actor] was not aware of what he was doing." Do, ¶26,516 at 43,321 (quoting with approval Drexel Burnham Lambert, Inc. v. CFTC, 850 F.2d 742, 748 (D.C. Cir. 1988)) (brackets in original). A finding of intentional wrongdoing may be supported by inferences from circumstantial evidence. In re JCC, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,080 at 41,579 (CFTC May 12, 1994) and cases cited therein; see also In re Miller, [1994-1996 Transfer Binder] Comm. Fut., L. Rep. (CCH) ¶26,440 at 42,914 (CFTC June 16, 1995) ("[Respondent] guaranteed profits and promised wildly exaggerated returns. He compared the risk of trading options to investments such as savings accounts and mutual funds. Given the nature of these representations, we have no difficulty inferring that [respondent's] false statements were intentional rather than reckless."). Thus, in considering scienter, the trier of fact is not called upon to read the respondent's mind, or to accept self-serving, but implausible, denials of culpable knowledge. In re Staryk, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,701 at 43,928 (CFTC June 5, 1996).

22. The circumstantial evidence of Dixon's scienter is so overwhelming and obvious as to merit little discussion. After all, all but the most disturbed and delusional are grounded enough to know whether they are wealthy or nearly bankrupt, or whether they are successful full-time commodity traders or something else. Dixon is simply a con artist who lied to students and prospective students about his financial circumstances, his trading skills and experience, his teaching successes and the success of his methodology. There is nothing in the record to support a finding that any of his misrepresentations were the result of negligence or inadvertence. In addition, Dixon knowingly falsified documents in order to induce his prospects to pay for his teaching services, and made guarantees of refunds with no intention of honoring them. Thus, there is ample evidence that Dixon's false statements were made deliberately to attract students and their substantial fees.

23. To prove a violation of Section 4b(a), the Division must establish that the misrepresentations made by a respondent were material. Whether a statement or omitted fact is material depends on an objective standard: whether "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." Sudol v. Shearson Loeb Rhoades Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,748, at 31,119 (CFTC Sept. 30, 1985) (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). As explained by the Commission, "[t]he function of the materiality requirement is to weed out actions based on trivial or tangentially related representations." Sudol, ¶22,748 at 31,118. In essence, a finding of materiality is a finding that the misrepresentation, deceptive sales practice or marketing technique is likely to cause economic injury to customers. This is true because economic injury occurs whenever customers would have chosen differently but for the deception. But for the material misrepresentation, customers would be willing to pay less for the product or service offered and/or would have used their money for alternative products, services or investments which they would have valued more highly. In re R&W Technical Services, Ltd., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,193 at 45,726 (CFTC Dec. 1, 1997). Proof of actual injury is not required. The Division need not show that customers actually relied to their financial detriment on respondent's misrepresentations. Staryk, ¶26,701 at 43,928 n.84; JCC, Inc. v. CFTC, 63 F.3d 1557, 1565 n.23 (11th Cir. 1995); In re GNP Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. (CCH) ¶25,360 at 39,218 (CFTC Aug. 11, 1992). Contra CFTC v. American Metals Exchange Corp., 775 F. Supp. 767, 775 (D.N.J. 1991), aff'd. in part, rev'd. in part, and remanded on other grounds, 991 F.2d 71 (3d Cir. 1993).

24. The Division established that Dixon deliberately made false and deceptive material representations about, among other things, the following: (1) his professional background and experience, including his purported financial success, trading success, trading experience and teaching success, when in fact he was virtually bankrupt, had no successful trading track record, had little trading experience, and had no record of teaching students to trade successfully using his methods; and (2) his guarantee that students would either make profits or receive a refund equal to double their tuition if they failed to achieve specific profit levels, when in fact Dixon refused to refund any

student's course tuition once students failed to make those profits. All of these misrepresentations are material.

25. The issue of materiality is "a mixed question of law and fact and the trier of fact is uniquely competent to make the materiality determination, requiring as it does 'delicate assessments of inferences a reasonable [investor] would draw from a given set of facts and the significance of those inferences to him.'" Sudol, ¶22,748 at 31,119 (quoting TSC Industries, Inc., 426 U.S. at 450) (brackets in original). Some assessments, however, are less delicate than others. Since futures speculation is little more than a pure exercise in financial risk-taking -- "a zero sum game . . . produc[ing] both winners and losers," JCC, ¶26,080 at 41,576 n.23, it is not surprising that the Commission has held that representations concerning the risk involved in trading and the likelihood of profits are material as a matter of law. Id. at 41,575; Sudol, ¶22,748 at 31,119; Gordon v. Shearson Hayden Stone, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,016 at 23,981-82 (CFTC Apr. 10, 1980);. Similarly, it follows as a matter of simple logic that claims intended to substantiate representations of increased profit and reduced risk are material as well. Levine v. Refco, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,488 at 36,115 (CFTC July 11, 1989); Muniz v. Lassila, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,225 at 38,650 (CFTC Jan. 17, 1992). This certainly includes misrepresentations made by Dixon as to his experience, expertise and historical trading success, as well as his undertaking to guarantee the success of the trading.

26. To prove a violation of Section 4b(a), the Division must also establish that the fraudulent activities occurred "in connection with" futures trading. Dixon's misrepresentations of his personal trading successes and those of his students using his trading methodology, of his personal wealth from trading, and of the lavish lifestyle that his trading enabled, were made in connection with commodity futures trading, as they involved the reliability of a trading methodology whose only intended use was as a means of selecting commodity futures contracts. Further, he actively assisted in the trading of one customer's account, assisting other students to open accounts, and encouraging students to emulate his trading. See In re R & W Technical Services, Ltd., [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,743-45 (CFTC Mar. 16, 1999) aff'd in relevant part, 2000 WL 217498 (5th Cir. 2000); Hirk v. Agri-Research Council, Inc., 561 F. 2d 96 (7th Cir. 1977).

27. Accordingly, Dixon's misrepresentations violated Section 4b(a)(i) and (iii). Dixon also violated Section 4b(a)(ii) by giving to students or prospective students at least two sham account statements that he knew to falsely represent that his trading accounts were actively and successfully traded.

Count Two: Fraud And Deceit In Violation Of Sections 4q(1) Of The Commodity Exchange Act, 7 U.S.C. §6q(1)

28. Section 4q(1) of the Act makes it unlawful for a CTA to use the mails or any means or instrumentality of interstate commerce, directly or indirectly, to employ any device, scheme or artifice to defraud any client or prospective client, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. 7 U.S.C. §6q(1).

29. Subject to exclusions not here applicable, see Section 1a(5)(B) the Act, Section 1a(5) of the Act defines a CTA as a person who, for compensation or profit, engages in the business of advising others on the value or advisability of trading in futures or options contracts. 7 U.S.C. §1a5. Dixon engaged in the business of advising others, for compensation and profit, about the value and advisability of trading futures by offering to tutor, and tutoring, members of the public to trade T-bond futures contracts, charging them tuition and arranging to collect a percentage of students' net profits for providing that advice, and tailoring lesson content to each individual. Accordingly, Dixon acted as a CTA.

30. Conduct that violates Section 4b also violates Section 4q(1) of the Act when committed by a person who was acting as a CTA. R&W, ¶27,582 at 47,745 ("Because we have found that [respondents] violated Section 4b(a) of the Act and that they acted as CTAs, further analysis is not needed to conclude that [respondents] also violated Section 4q(1) of the Act.").

31. In acting as a CTA in soliciting and tutoring students, Dixon, knowingly or with reckless disregard employed schemes and artifices to defraud students and prospective students by means of, among other things, his misrepresentations regarding his trading-related skills, experience and wealth, his teaching abilities, his bogus guarantees of tuition refunds, and the sham account statements he showed to students to reinforce his

assertions that he was a profitable, high-volume trader for his own account. In so doing, he violated Section 4q(1)(A) of the Act.

32. Through the same conduct described above, Dixon also engaged in transactions, practices or courses of business which operated as a fraud or deceit upon students and prospective students by means of, among other things, misrepresentations regarding his trading-related skills, experience and wealth, his teaching abilities, bogus guarantees of tuition refunds, and the use of sham account statements to reinforce his assertions that he was a profitable, high-volume trader for his own account. In so doing, he violated Section 4q(1)(B) of the Act.

Count Three: Failure To Register As A Commodity Trading Advisor In Violation Of Section 4m(1) Of The Commodity Exchange Act, 7 U.S.C. §6m(1)

33. In relevant part, Section 4m(1) of the Act prohibits an unregistered CTA from making use of the mails or any means or instrumentality of interstate commerce in connection with his business as a CTA unless he has both provided advice to no more than 15 persons during the last 12 months and has not held himself out generally to the public as a CTA. 7 U.S.C. §6m(1). Accordingly, it is not necessary to determine whether a respondent has advised more than 15 people within the last 12 month, when he held himself out "generally to the public" as a CTA. In re Armstrong, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,657 at 40,150-51 (CFTC Feb. 8, 1993). Holding oneself out as a CTA occurs through "such conduct as promoting advisory services through mailings, directory listings, and stationary, or otherwise initiating contacts with prospective clients. Thus, unless the CTA restricts his or her clients to family, friends, and existing business associates, a CTA will generally be viewed as holding himself or herself out to the public." CFTC Interpretative Letter No. 91-9 [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,189 (CFTC Dec. 30, 1991).

34. Dixon held himself out generally to the public as a CTA. He solicited students using advertisements in newspapers of general circulation, broker referrals and personal contacts. He did not restrict his clients to his family, friends or existing business associates.

35. In acting as a CTA without registering as such or qualifying for an exclusion from registration, Dixon violated Section 4m(1) of the Act.