



U.S. COMMODITY FUTURES TRADING COMMISSION

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OFFICE OF PROCEEDINGS

In the Matter of *
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*
MICHAEL F. STARYK, * CFTC DOCKET NO. 95-5
*
*
Respondent. *
*
*

INITIAL DECISION ON REMAND

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Before: Bruce C. Levine, Administrative Law Judge

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Overview

"I'm not like a lot of brokers that have to go out and cold call and knock on doors where maybe some of these accusations might be more valid. I have a busy group of customers, I try to do the best for them, and I certainly wouldn't be intending to go on a nationwide rampage, as I think [the Initial Decision] allude[s] that I'm on a campaign as an individual to defraud the population of the United States."¹

On February 7, 1995, the Commodity Futures Trading Commission ("Commission") issued a one count complaint against Michael F. Staryk ("Staryk"), a retail options broker. In the complaint, the Division of Enforcement ("Division") alleges that, from August 1991 to the time of the complaint's filing, Staryk engaged in options fraud by misrepresenting the likelihood of profits and the nature of the trading risk in his customer solicitations. On June 5, 1996, the Court granted summary disposition in the Division's favor. It sanctioned Staryk by ordering him to cease and desist from further violations of Section 4c(b) of the Commodity Exchange Act, revoking his registration as an associated person, imposing a

¹ Testimony of Michael F: Staryk, Transcript of Oral Hearing, July 24, 1998 at 660.

permanent trading ban, and ordering him to pay a \$1,770,000 civil monetary penalty.

On December 18, 1997, the Commission remanded the case for further proceedings. It affirmed the Court's findings that Saryk materially misled customers, but concluded that Saryk's intent in so doing could not be determined without an oral hearing. In the event that the Court found that Saryk possessed the requisite scienter to establish fraud, the Commission also directed further consideration of appropriate sanctions. It provided specific guidance for the Court in considering whether restitution would be warranted, and in determining the scope of Saryk's misconduct for purposes of assessing a civil monetary penalty.

Guided by the Commission's remand order, the Court has implemented further procedures and conducted an oral hearing. It once again **CONCLUDES** that Saryk knowingly misled customers as to the profit potential and risk of the gasoline and heating oil options that he peddled.

Accordingly, the Court has considered anew the issue of sanctions in light of the evidence adduced on remand and in keeping with the Commission's instructions. It once again **ORDERS** Michael F. Saryk to **CEASE AND DESIST** from violating Section 4c(b) of the Commodity Exchange Act, **REVOKES** Saryk's registration as an associated person, and **PERMANENTLY PROHIBITS** him from **TRADING** on

any contract market. The Court once again imposes a civil monetary penalty, but reduces the \$1,770,000 penalty previously assessed by 25 percent. Accordingly, the Court ORDERS Staryk to PAY a civil monetary penalty of \$1,327,500. Lastly, it again rejects restitution as an appropriate remedy in this case.

Procedural History

On June 5, 1996, the Court granted summary disposition in favor of the Division of Enforcement in this proceeding.² In its Initial Decision, the Court found respondent Michael F. Staryk liable for options fraud in violation of Section 4c(b) of the Commodity Exchange Act ("Act"), 7 U.S.C. §6c(b), and Regulation 33.10, 17 C.F.R. §33.10.³ It did so on the basis of its examination of undisputed transcripts of Staryk's taped telephone solicitations.⁴ The Court found that Staryk, an options broker, employed a standard sales pitch that represented that widely-known information on seasonal pricing patterns in the physical gasoline

² In re Staryk, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,701 (CFTC June 5, 1996).

³ Id. at 43,928-36.

⁴ Id. at 43,918 n.20.

and heating oil markets could be exploited to increase the profit potential (and correspondingly, reduce the risk) of speculating in the options on futures contracts for these commodities.⁵ If this was so, we might all be rich. But, alas, contrary to Saryk's representations, the knowledge that Saryk imparted about the simple fact that gasoline prices usually rise in the summer, and that heating oil prices generally go up in the winter, offered no trading advantage to his retail customers.⁶

⁵ Id. at 43,928-32.

This case addresses Saryk's customer solicitations between August 1991 and February 1995. Complaint and Notice of Hearing, Pursuant to Sections 6(c), 6(d), 8a(3), and 8a(4) of the Commodity Exchange Act, filed February 7, 1995 ("Complaint"). During the relevant time period, Saryk first brokered at Commonwealth Financial Group, Inc. ("Commonwealth"), and then, beginning in June 1993, worked at First Investors Group of the Palm Beaches, Inc. ("First Investors"), where he remained employed as of the date of the hearing. In re Saryk, ¶26,701 at 43,918; Transcript of Oral Hearing, July 21-24, 1998 ("Tr.") at 19. Saryk's customers, for the most part, heard about gasoline and heating oil options in radio or television commercials, urging them to call a 1-800 number for more details. Saryk was among a group of brokers who would perform the follow-up telephone solicitation. In re Saryk, ¶26,701 at 43,916.

⁶ The Court explained,

"It is indisputable that the seasonal shifts in demand (and the corresponding price changes) that generally characterize the physical markets for gasoline and heating oil, do not reduce the risks involved in trading energy options. No advantage is

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gained from knowledge of these seasonal patterns.

Participants in the heating oil and gasoline markets, be they in the commodity itself or their derivatives, know that the price of gasoline has historically increased in the summer and will continue to increase annually in the summer, and that the price of heating oil has and will do the same in the winter. The market anticipates the increase in demand as well as the corresponding increase in price. Therefore, the expected price fluctuations in gasoline and heating oil will be and are reflected in their futures prices. In fact, the futures price of any given commodity is the market's best estimate of the future spot price of that commodity. If the market anticipates a seasonal price increase, it will price the futures and options contracts accordingly. .

For these reasons, Staryk's subsidiary claim -- that the prudent speculator can determine which side of the energy options market to initiate a position by mere reference to the season -- is wholly deceptive. . . . [T]he downside risk for purchasers of all call options is that the future spot price will not be more than what is expected. Conversely, the risk for purchasers of all put options is that the future spot price will not be less than what is expected. Typical seasonal shifts in commodity prices, which are already accounted for in the futures prices, options prices, and strike prices, simply do not have any bearing on whether the value of an option will increase or decrease prior to its expiration. . . . In short, reference to the

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With liability findings in hand, the Court sanctioned Staryk by revoking his registration as an associated person, imposing a permanent trading ban, ordering him to cease and desist from further violations of Section 4c(b) of the Act, and ordering him to pay a \$1,770,000 civil monetary penalty.⁷ The Court, however, denied the Division's request for an order of restitution.⁸

Staryk filed a timely appeal of the Court's decision to the Commission. On December 18, 1997, the Commission issued an Opinion and Order in which it affirmed in part and vacated in part the Initial Decision, and remanded the case for further proceedings.⁹ The Commission affirmed the Court's findings that

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season provides no predictive power to permit the speculator in energy options to pick one side of the market or the other. Moreover, it provides the energy option speculator with no other advantage over the speculator in any other options market."

Id. at 43,930-32 (emphasis in original, notes omitted).

⁷ Id. at 43,937-40.

⁸ Id. at 43,941-42.

⁹ In re Staryk, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 (CFTC Dec. 18, 1997).

Staryk has not created a genuine issue of fact with regard to the misleading nature of his solicitations for energy options.¹⁰

"We disagree with Staryk and hold, as did the ALJ, that the reasonable listener could not fail to understand Staryk's message to be that energy options trading presented opportunities for substantial and near-certain profits at very little risk."¹¹

It held, however, that an oral hearing should be held on the issue of whether Staryk's possessed the requisite scienter to establish fraud.¹² In the event that scienter were established, the Commission also directed further proceedings on the "scope of Staryk's activity to be considered for the purpose of assessing sanctions,"¹³ and instructed the Court to consider the appropriateness of restitution in light of a number of specified factors.¹⁴ Lastly, the Commission further directed that Staryk be

¹⁰ Id. at 45,810.

¹¹ Id. at 45,808.

¹² Id. at 45,811.

¹³ Id. at 45,811-12.

¹⁴ Id. at 45,812. The Division had attempted to file a late notice of appeal limited to the Court's refusal to include restitution among the sanctions imposed on Staryk. The Division's attempt was "denied" by the Commission for failure to show excusable neglect for the late filing. Id. at 45,807 n.9.

given a full opportunity on remand to litigate any sanctions that the Court may consider imposing.¹⁵

From July 21 through July 24, 1998, the Court conducted an oral hearing at the United States District Court for the Southern District of Florida in Fort Lauderdale, Florida.¹⁶ All post-hearing submissions having been received,¹⁷ this case on remand is now ripe for decision.

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Nonetheless, on appeal, the Commission considered the issue sua sponte.

¹⁵ Id. at 45,812.

¹⁶ The Court limited the scope of the oral hearing to issues material to: (1) Staryk's scienter, (2) the scope of Staryk's activity for the purpose of assessing sanctions; and (3) sanctions more generally. Order, dated May 5, 1998, at 2. Issues pertinent only to restitution were excluded from the scope of the oral hearing, and were considered under separate procedures. See Order Establishing Procedures on Remand, dated February 25, 1998, at 4 (directing the Division to state whether it continued to seek restitution against Staryk, and, if so, requiring it to make a threshold showing that restitution is appropriate in light of the applicable factors identified by the Commission in its December 18, 1997, Opinion and Order); Transcript of Post-Hearing Conference, dated August 31, 1998 (describing additional procedures undertaken to examine Staryk's resources for determining the appropriateness of restitution).

¹⁷ Post-Hearing Brief of the Division of Enforcement, dated September 2, 1998 ("Division's Posthearing Brief"); Respondent's Limited Post Hearing Brief and Motion, dated September 16, 1998 ("Respondent's Posthearing Brief"); Memorandum of the Division of Enforcement Regarding the Appropriateness of the Restitution Sanction in This Action, dated October 15, 1998 ("Division's
(continued..)

Discussion

Scienter

The Issues On Remand

In order for Staryk to be found liable for his now-proven sales misrepresentations, the Division must establish, by a preponderance of the evidence,¹⁸ that "he was intentionally deceptive or reckless in his solicitations."¹⁹ Lawyers term this state of culpability "scienter."²⁰

In its Initial Decision, the Court determined that

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Restitution Memorandum"); Addendum to Division of Enforcement's Memorandum Regarding the Appropriateness of Restitution and Notice of In Camera Filing, dated October 30, 1998 ("Division's Restitution Addendum").

¹⁸ In re Citadel Trading Co., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,082 at 32,190 (CFTC May 12, 1986).

¹⁹ In re Staryk, ¶27,206 at 45,811. 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 v. Lind-Waldock & Co., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,516 at 43,321 (CFTC Sept. 27, 1995) (quoting with approval Drexel Burnham Lambert, Inc. v. CFTC, 850 F.2d 742, 748 (D.C. Cir. 1988)).

²⁰ Mere negligence, mistake, or inadvertence fail to meet the scienter requirement. See CFTC v. Noble Metals International, Inc., 67 F.3d 766, 774 (9th Cir. 1995) and cases cited therein.

"The record before the Court leaves no reasonable doubt as to Staryk's intent. Staryk knowingly misled customers as to the risk and profit potential of the options that he peddled."²¹

In reaching this conclusion, the Court started with the proposition that a finding of an intentional wrongdoing may be supported by inferences from circumstantial evidence.²² Accordingly, in considering scienter, the Court concluded that "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."²³

The Court found the evidence of Staryk's fraudulent intent to be overwhelming. The Court reasoned that Staryk's "emphatic promotion of what purported to be objective principles favoring energy options was not pointless. It could only have been intended to convey some market advantage."²⁴ But Staryk knew that

²¹ In re Staryk, ¶26,701 at 43,932.

²² Id. at 43,928 (citing In re JCC, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,080 at 41,579 (CFTC May 12, 1994), aff'd sub nom., JCC, Inc. v. CFTC, 63 F.3d 1557 (11th Cir. 1995) and In re Miller, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,440 at 42,914 (CFTC June 16, 1995)).

²³ Id.

²⁴ Id. at 43,933 (emphasis in original).

no such advantage was gained from knowledge of historic seasonal pricing patterns in physical energy markets. The Court found that in an investigational deposition, he had admitted as much.²⁵ Moreover, the Court reasoned that the inefficacy of Staryk's energy options strategies was also self-revealing in the remarkably unsuccessful track record of Staryk's own customers.²⁶ Accordingly, the Court "infer[red] that Staryk had knowledge that his representations were false or that a minimum they were made with reckless disregard for the truth."²⁷

Determining that Staryk sought to meet the Division's persuasive evidence of his evil intent with nothing but general denials,²⁸ the Court found his submission on the issue

²⁵ Id.

²⁶ The Division's motion for summary disposition was supported by uncontested evidence that during the period covered by the Complaint, Staryk had 388 customer accounts, of which 381 (98.2%) experienced net losses. Id. at 43,933 n.106: Subsequently, in preparing for these remanded proceedings, the Division discovered that in fact 368 of Staryk's accounts (94.8%) were losers. Division's Posthearing Brief at 30 n.39; Testimony of Maura McHugh, Investigator, Division of Enforcement, Tr. at 492-93.

²⁷ In re Staryk, ¶26,701 at 43,933.

²⁸ Staryk submitted a 17-page affidavit that addresses the issue of scienter by rote. It begins with the prefatory statement, "I have always acted and communicated properly, with the interest of my clients at heart." Respondent's Exhibit M, Affidavit of Michael F. Staryk, dated November 20, 1995, ¶4. He then proceeds to list thirty-two allegedly false representations charged in the
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insufficient to raise a genuine issue of material fact for hearing.²⁹ Accordingly, it determined that the Division was

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Complaint, each time employing identical language to deny having "intentionally defrauded or misled clients or prospective clients" by making the enumerated statement. Id., ¶5(b)-(c), (e)-(o), (q)-(t), (v)-(ee), (gg)-(kk), and (nn). Thirty-two times he also concludes with the same refrain: "If I made such a statement, I did so in good faith and not in the context alleged by the Division." Id. Staryk then concludes by broadly professing that

"During my conversations with clients and prospective clients, I have not misrepresented or omitted material facts, and have not known material facts made by me to be false or without reasonable basis and have never intended that any material misrepresentation be relied upon by clients or prospective clients. I have never told anyone that they can expect profits from trading options on commodity futures. In fact, I have never promised or represented to any client or potential client that they are assured or guaranteed profits. I have never intentionally misrepresented the risk of loss, but have given balanced presentations. I have never intentionally misrepresented the expertise of myself or my firm. I have never intentionally misrepresented any commissions charged by my firm or FIG and have not violated my fiduciary duty to my clients."

Id., ¶9.

²⁹ In re Staryk, ¶26,701 at 43,933.

entitled to a determination that Staryk's misrepresentations were made with scienter as a matter of law.³⁰

The Commission disagreed. Although it did not question the probity of the Division's evidence tending to support a finding of scienter, the Commission determined that Staryk's protestations of good faith were "detail[ed]"³¹ and, under the circumstances, sufficiently plausible³² to potentially defeat the other evidence and tip the scales in Staryk's favor.³³ Thus, the Court's

³⁰ Id.

³¹ In re Staryk, ¶27,206 at 45,811.

³² The Commission explained,

"The mandate to draw inferences in Staryk's favor do not compel the ALJ to credit implausible suppositions. The summary judgment rule would be rendered ineffective if the requirement to construe evidence in a nonmovant's favor compelled a decisionmaker to embrace unsupported makeweight arguments."

Id. at 45,809.

³³ As authority for its determination that the Court had erred in granting the Division's motion for summary disposition on the issue of Staryk's scienter, the Commission relied on the standard set forth in CFTC v. Savage, 611 F.2d 270,282 (9th Cir. 1979) ("[g]enerally, when intent is at issue, a jury should be allowed to draw its own inferences from the undisputed facts, unless all reasonable inferences defeat appellant's claim.") (internal quotation marks and citation omitted); and SEC v. Johnston, 1992 WL 180130 (10th Cir. 1995) (summary judgment is not appropriate when mental state is at issue, unless no reasonable inference supports the adverse party's claim). Id. at 45,811.

assessment of Staryk's credibility was flawed to the extent it rejected Staryk's denials on a simple reading of his affidavit; in doing so, the Commission reasoned that the Court had ignored "the traditional deference accorded to demeanor-based determinations regarding a party's state of mind."³⁴

"[Staryk's] affidavit, setting forth in detail his state of mind, is sufficient to create an issue of fact. Staryk will be prejudiced if his state of mind is determined against him without an opportunity for him to appear in person before a trier of fact. Allowing him such an opportunity secures his right to a full and fair process and recognizes the traditional deference accorded to demeanor-based determinations regarding a party's state of mind, a deference rooted in the efficacy of oral testimony as a fact finding tool. See In re Abrams, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,684 at 40,225 (CFTC Apr. 29, 1993) (a hearing is 'best tool for reliably assessing . . . credibility')."³⁵

³⁴ Id.

³⁵ Id. "Demeanor" is defined:

"As respects a witness or other person, relates to physical appearance; outward bearing or behavior. It embraces such facts as the tone of voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity."

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Accordingly, the Commission remanded for an oral hearing on the issue of Staryk's scienter.³⁶

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Black's Law Dictionary 387 (5th ed. 1979) (citations omitted).

"Demeanor evidence" is:

"Species of real evidence consisting of behavior of witness on the witness stand and which may be considered by trier of fact on issue of credibility."

Id.

³⁶ In re Staryk, ¶27,206 at 45,811.

The scope of the Commission's remand, with respect to scienter, is extremely puzzling. As noted above, in its Initial Decision, the Court made two scienter findings. It found not only intent, but also recklessness. In re Staryk, ¶26,701 at 43,933. The first depended on Staryk's state of mind but, as to the second, the previous case law had indicated that subjective belief is irrelevant.

Prior to the Commission's Opinion and Order, recklessness had encompassed an objective standard. See e.g., Do, ¶26,516 at 43,321 ("What Lind-Waldock's employee actually believed is irrelevant; what matters is whether the employee was in a position to inquire into the actual status of the complainant's order, or to take other suitable actions, and failed to do so."). In other words, no amount of a respondent's subjective belief in the truth of his statements would, standing alone, preclude a finding of scienter in a fraud case. At best, such evidence would be probative on the issue of what degree of scienter was present. Proof of a good faith belief would go not to liability, but to sanctions.

Yet, in its remand order, the Commission vacated both the Court's intent and recklessness findings on the basis of Staryk's
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The Evidence On Remand

On remand, Staryk testified for nearly two full days. He testified on his own behalf,³⁷ and was separately called as a hostile witness by the Division.³⁸ Although his far-ranging testimony addressed in detail his options training, marketing and solicitation, and his firms' internal compliance practices, little of his testimony on these subjects is materially disputed, much of it was already evidenced in the record prior to remand, and most

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testimony of his subjective state of mind. On appeal, the Commission considered whether Staryk "had failed to demonstrate a genuine issue of fact as to whether he was intentionally deceptive or reckless in his solicitations." In re Staryk, ¶27,206 at 45,811. The Commission's analysis centered on Staryk's affidavit. As discussed above, that affidavit presented denials and general affirmative statements on the topic of Staryk's intent and beliefs. However, the affidavit provides no evidence that Staryk had a reasonable basis in fact for his misleading solicitations. It neither asserts the fact generally or provides specific facts from which the fact could be inferred. Nonetheless, the Commission found the affidavit to be a sufficient basis upon which to vacate both of the Court's scienter findings.

In effect, the Commission, in the Opinion and Order, does not treat recklessness as an ultimate fact, sufficient to establish scienter. Accordingly, it appears that credible testimony, on the part of Staryk, that he possessed a good faith belief that he was not misleading customers (no matter how rash he was in its formulation) would preclude a finding of fraud.

³⁷ Tr. at 513-712 (July 24, 1998).

³⁸ Tr. at 18-153 (July 21, 1998).

is at best tangential to assessing his state of mind in making his misleading sales pitches for gasoline and heating oil options.³⁹

What testimony he did give, however, that is directly pertinent to the issue of scienter did little if anything to assist his cause.

Given that the Commission has held: (1) "that the reasonable listener could not fail to understand Staryk's message to be that

³⁹ He also provided extensive testimony on his personal, educational, and employment background that borders on being irrelevant to any of the issues in this case. For example, Staryk's counsel elicited a lengthy narrative on Staryk's personal and professional history dating back to his birth 55 years ago in Hamtramck, Michigan. Tr. at 513. The record now clearly reflects such facts as that Staryk has three children by two different marriages. Tr. at 514 (one with his present wife, Lynn, two with his first wife, Bonnie). He also has another child from a "marriage that didn't occur" who is a criminal court judge "currently running for the Michigan Court of Appeals." Tr. at 514-15. He went to college in Florida to complement his avocation as an internationally accomplished water skier. Tr. at 518. He was a junior high school teacher in Michigan and then in Vermont who taught "government, civics, history, world history, those kinds of courses." Tr. at 518-521. In 1974, he moved to Florida to be near his parents. Tr. at 521-22. He then ran a gift shop, that led to running a mail order handbag business, that led to owning a handbag factory. Tr. 522-26. After his divorce from his first wife in 1986, he left the handbag business and worked as a sale manager for a firm that manufactured and distributed public telephones; then he owned a sports memorabilia store; then he taught as a substitute teacher; and finally, he sold wholesale drilling equipment before becoming a commodities broker in 1989. Tr. at 527-43.

On cross-examination, the Division elicited testimony that the ages of Staryk's four children are 36, 32, 27 and 10 years; that the legal name of Staryk's first wife, Bonnie, is "Charlene Staryk;" and that the maiden name of Staryk's current wife, Lynn, is "Belliveau." Tr. at 663-65.

energy options trading presented opportunities for substantial and near-certain profits at very little risk;"⁴⁰ and (2) that Staryk's message is misleading,⁴¹ Staryk's task on remand may not be easy, but it is simple. Staryk, by credible testimony, may escape liability for his misrepresentations in one of two ways. First, he may establish that he did not understand what every "reasonable listener" understood: that his sales presentation promised his seasonal energy options trading customers "substantial and near-certain profits at very little risk." Alternatively, he may establish that he genuinely believed his messages of "near-certain profit" were true. In his two days of

⁴⁰ In re Staryk, ¶27,206 at 45,808. In another passage, the Commission states:

"We endorse the ALJ's holding that:

"Although Staryk does not explicitly state that the predictable nature of the seasonal price trends in gasoline and heating oil decreases the risk or increases the likelihood of profits in options tied to these commodities, no reasonable customer could fail to take this message away from Staryk's sales presentation."

Id. at 45,809 (citation omitted).

⁴¹ Id. at 45,810.

testimony, Staryk made no significant attempt to establish either exonerating state of mind. Indeed, his most probative testimony was corroborative of the evidence relied on by the Court in finding scienter at the summary disposition stage of this case.

Staryk Understood What He Was Saying

At the summary disposition stage, Staryk, through counsel, had argued to this Court that his solicitations did not convey a message of decreased risk and increased profitability.⁴² This Court rejected his contention as "utterly unpersuasive."⁴³ Staryk raised the same argument again to the Commission on appeal.⁴⁴ The

⁴² In re Staryk, ¶26,701 at 43,932.

"[T]he Division charges that Respondent Staryk stated, the '. . . likelihood of loss in heating oil options . . .' is not likely. In fact, that is an inaccurate description of what was being communicated in the citations. Respondent Staryk was talking about the likelihood of the seasonal trend not occurring, not the likelihood of not losing money in the investment."

Response in Opposition to the Division of Enforcement's Motion for Summary Disposition, dated November 21, 1995, at 132.

⁴³ In re Staryk, ¶26,701 at 43,929.

⁴⁴ In his brief to the Commission, Staryk argued

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Commission also dismissed Staryk's interpretation of his own words as "strained" and "noncontextual."⁴⁵ Both the Court and Commission, however, undertook their assessments of Staryk's solicitations in the context of considering what they meant to his customers. Thus, the focus of this inquiry was on the "common understanding of the information conveyed."⁴⁶ In contrast, "[w]hile the nature of Staryk's solicitations was determined according to an objective standard, his intent in making those representations is a subjective one."⁴⁷ Accordingly,

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"Respondent did not describe that seasonality provides an advantage, but that it merely provides a potential investor with more information that is easily understood, *i.e.*, that the futures market has a tendency to make a specific trending act during a designated time frame, and that such trending provides the investor with more lay information than they would have with other markets upon which to fashion his or her considerations."

Respondent's Appellate Brief, dated December 6, 1996, at 30.

⁴⁵ In re Staryk, ¶27,206 at 45,809.

⁴⁶ Id. at 45,808 (quoting Hammond v. Smith Barney, Harris Upham & Co., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 at 36,657 n.12 (CFTC Mar. 1, 1990)), aff'd sub nom., JCC, Inc. v. CFTC, 63 F.3d 1557 (11th Cir. 1995)); In re Staryk, ¶26,701 at 43,924 (same).

⁴⁷ In re Staryk, ¶27,206 at 45,811.

the Commission's remand order provided Staryk with an opportunity to testify as to any good faith - albeit "uncommon" -- belief he may have harbored as to the innocent meaning of his sales message.

At the oral hearing, Staryk quite readily explained the effectiveness of his technique and the customer appeal of his sales pitch for energy options.⁴⁸ He also generally professed

⁴⁸ Staryk's customer appeal is not disputed. Indeed, it has been proven in the marketplace.

Mr. Staryk: ". . . I was the number one broker in the firm doing the most business."

Mr. Feder: "Were you also the one staying the longest hours?"

Mr. Staryk: "Always."

Mr. Feder: "Always?"

Mr. Staryk: "Yeah."

Mr. Feder: "Is that throughout your career?"

Mr. Staryk: "Yes."

Tr. at 556-57. See also In re Staryk, ¶26,701 at 43,933 n.103 and accompanying text.

Staryk explained that he recommended and sold mostly call options to his customers, because "[b]uying low and selling high is an easier explanation to people that aren't familiar, but shorting the market is more difficult." Tr. at 551. Similarly, he analogized options on futures to the underlying physical
(continued..)

that his purpose was to inform, not mislead.⁴⁹

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commodities is order to simplify the technical aspects of trading.

". . . I'm sure the Division realizes and I'm sure Your Honor realizes, since you've listened to miles of my tape, being a teacher, sometimes it's easier to explain something to someone that is unfamiliar with a particular area by starting out with simpler analogies and moving into the direct discussion.

Rather than . . . immediately go into delta, in the money, at the money, out of the money, and essentially having [the customer] on an initial solicitation pull out a slide rule and start designing the Stealth bomber, that usually discourages people from trying to invest or even trying to learn, and they usually throw their hands up in disgust and say, 'Oh, this is too confusing for me.'"

Tr. at 598-599.

⁴⁹ In response to the question, "Are you using [] descriptions and analogies to mislead your prospective clients?," Staryk answered

"No. I learned as a teacher all my years, whether you're teaching high school students or even kindergarten students, that the simplest way to explain something is not to try to baffle them with the figures and numbers."

Tr. at 601. See also Tr. 620-21.

Significantly, however, Staryk declined to offer any benign explanation for having failed to grasp the false representations of profit and risk plainly evidenced by his own taped words. Staryk provided no explanation -- plausible or otherwise -- of how reasonable customers came to understand his solicitations to mean that the seasonal price trends in heating oil and unleaded gasoline significantly increased the likelihood of profits in options, while he, in contrast, understood his sales pitch to mean something else. Instead, his testimony merely relies on repeated generalized pleas of good faith,⁵⁰ and unconvincing protests that

⁵⁰ Some examples:

Mr. Feder: ". . . When you're communicating that type of information to a client, you said news events, et cetera, and certain predictions, do you believe the accuracy of the items that you're telling these customers? Do you honestly believe that what you're telling them is true?"

Mr. Staryk: "Yes."

Tr. at 611-12.

Mr. Feder: ". . . [Y]ou're explaining these issues which may have some complexity in simpler terms. Is that meant to deceive people?"

Mr. Staryk: "No."

Mr. Feder: "Is that meant to remove certain important aspects of the investment?"

(continued..)

he lacked any motive to defraud.⁵¹ Unsupported by circumstances, logic or reasoning, these self-serving protestations of the

(..continued)

Mr. Staryk: "Not at all."

Tr. at 620.

Mr. Feder: "So you're not trying to attempt -- you don't intend to have your prospective clients or your present clients have completely unrealistic expectations through the use of these analogies and examples?"

Mr. Staryk: "No."

Tr. at 623.

Mr. Feder: "Have you intended on using a heating oil or unleaded gas pitch as a tool to deceive the public?"

Mr. Staryk: "No."

Tr. at 646-47.

Mr. Feder: "And do you have a good faith belief that these predictions, these recommendations, have rational support and a potential to profit?"

Mr. Staryk: "Yes."

Tr. at 648.

⁵¹ Staryk explains

"If I were bringing my own son into the business, who's a compliance officer, he teaches a Series 3 course; I have another son

(continued..)

(..continued)

who's a judge; why would I want to embarrass my family and relatives knowingly doing something that was wrong, knowingly doing something that was a fraud? To me, I wouldn't understand why I would want to do something like that."

Tr. at 660.

Staryk, however, had one obvious incentive to defraud: money. Staryk earned nearly \$600,000 during the three-and-a-half year period covered by the Complaint. In re Staryk, ¶26,701 at 43,933 n.103. Moreover, Staryk likely regarded the disincentive that he suggests that he faced (the risk on an enforcement action) as small. At the hearing, Staryk complained that he was unfairly singled-out by the Division of Enforcement.

". . . [M]y impression from the onset is that there may have been complaints against certain companies and in that situation other brokers may have been involved, but what seems so striking to me is that Commonwealth Financial Group had a problem, the government had a problem with Commonwealth Financial Group apparently from the day it became Commonwealth Financial Group. I just happened to have a business card on my desk that day that was printed Commonwealth Financial Group.

But with all of the problems that the Division had with Commonwealth Financial Group and the brokers that were all mentioned and brought into all those depositions during the years of that case, I wasn't -- I wasn't called upon.

Later Commonwealth Financial Group has a National Futures Association problem. Of all of the brokers that are brought in on that thing, I'm not mentioned.

(continued..)

innocence of his utterances are facially incredible⁵² and deserve no weight in the Court's assessment of Staryk's scienter. Accordingly, the Court finds that Staryk meant to tell his customers what the tapes plainly evidence, that "energy options trading presented opportunities for substantial and near-certain profits at very little risk."⁵³

(..continued)

It only seems to me that the frustrated Division in those actions decided to look after other -- come after other brokers that were successful after I had left that company. "

Tr. at 660-61.

⁵² Nor are they bolstered by the Court's observations of demeanor, although Staryk's bearing throughout the hearing was calm, steady, courteous and pleasant enough.

⁵³ In re Staryk, ¶26,701 at 43,932.

Staryk Knew That What He Was Saying Was False

"But in no way would I tell a client, I'm going to make you a millionaire next week, or next year or ever or, I turn people into millionaires. This would be a ridiculous lie. It's not needed."⁵⁴

Staryk of course knew that his representations of near-certain profits and little risk were false.⁵⁵ Indeed, Staryk does not seriously dispute that he understood the true riskiness of gasoline and heating oil options. In fact, Staryk's testimony merely corroborates the evidence on this subject relied on by the Court in favorably ruling on the Division's motion for summary disposition.

In testifying, Staryk demonstrated a firmly grounded understanding of derivative markets in general, and energy derivatives in particular. Staryk, a Commission registered broker, had passed the Longsmans Financial Institution course on futures and options and the Series 3 examination.⁵⁶ Staryk's education, however, did not end there. He takes great pride in

⁵⁴ Testimony of Michael F. Staryk, Tr. at 580.

⁵⁵ If they were true, he could have indeed "turn[ed] people into millionaires."

⁵⁶ Tr. at 544; In re Staryk, ¶26,701 at 43,918.

the expertise that he has developed, especially concerning the energy markets.⁵⁷

⁵⁷ See Tr. at 557 (" . . . I subscribe to Fuel Oil News and have had heating oil distributors as clients."); see also In re Staryk, ¶26,701 at 43,932, n.102 ("I deal in [the] energy area with maybe 3,000 positions a year. . . . We have to know what we're talking about.") ("I have gasoline industry people that work for gasoline companies use me for advice.") (citations omitted).

Mr. Shakabpa: "Did [First Investors or Commonwealth] have any special inside information to the marketplace that other introducing brokers or other sales brokers would not have?"

Mr. Staryk: "Maybe by choice. There are many other firms that focused more on grains or metals or currency markets that don't choose to pursue a lot of research in energy, but it would be available to them.

And then again, even myself personally, I was the only broker I knew that subscribed to Fuel Oil News. Fuel Oil News is not a market research, it's an industry research because I had clients from time to time that were actually in the fuel oil business, in the heating oil business. They either were part owners or worked for heating oil companies and investing in heating oil at the same time. They would send me magazines and I eventually would subscribe -- I became a subscriber to -- Fuel Oil News is a fuel oil magazine for the heating oil industry. But it has articles in it many times that refer to the NYMEX and hedging positions."

Mr. Shakabpa: "Okay. So would you agree that you did not have any special expertise in the heating oil and unleaded gas market -- options market, I should say?"

(continued..)

Certainly, Staryk understood markets well enough to know that the study of historical price trends will not lead to superior gains. Indeed, Staryk has a good theoretical grasp of how market prices efficiently reflect all historically available information (including historical supply and demand patterns).⁵⁸

(..continued)

Mr. Staryk: "That we did not have?"

Mr. Shakabpa: "That you did not have any special expertise?"

Mr. Staryk: "I wouldn't say that I didn't -- that I didn't have special expertise. I knew more about it than most brokers. I mean, comparing me to other brokers at other firms."

Tr. at 85-86. See also Tr. at 119-20.

⁵⁸ See In re Staryk, ¶26,701 at 43,931 n.96 and accompanying text (discussing efficient market model); In re R&W Technical Services, Ltd., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,193 at 45,727 n.75 (CFTC Dec. 1, 1997) (same).

Staryk explains,

". . . [T]hings that are currently occurring in the market or what happened yesterday in the news is most likely in the market already. It doesn't take the market long to react to something, a matter of seconds, in fact. But what's happening tomorrow or the next day or what could possibly happen can affect that market."

(continued..)

Not only did Staryk know that market theory debunked the representations he made to clients,⁵⁹ he was well aware, from a

(..continued)

Tr. at 588; see also. Tr. at 651 ("If something happened yesterday, that's read into the market.").

For this reason, Staryk recognizes that there are always competing opinions among the experts as to the likely movement of a particular market at any given point in time.

". . . [W]e go through a checklist of those things that are out there and, of course, in The Wall Street Journal, Investors Daily, both sides are always published every day.

You will very rarely see an article in any of those publications where both sides are not printed, the pro of the -- even if it's a story about a rally, there's always a paragraph at the end that says but it can go down because of this reason."

Tr. at 685.

⁵⁹ Nonetheless, Staryk artfully dodged providing any clear and direct answers to Division questions intended to elicit an admission that all options are equally risky (testimony that would most transparently assail the basis for his seasonal "trend" energy recommendations).

Mr. Shakabpa: "You were also aware that options on seasonal commodities are not less risky than options on nonseasonal commodities?"

Mr. Staryk: "Well, an option is an option, whether it's corn or gold or heating oil or gasoline. It's made up of two things. Its intrinsic value and its time value, and that's the option.

(continued..)

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The price of that option, whether using Black-Shoules mathematics or whether using just the volatility that's built in by the options trader on the floor of the exchange, is the option. That option's got time value and intrinsic value.

So whether it's a seasonal market or whether it's, as you're referring to - if it's a seasonal demand market like heating oil, we would express to them that in any kind of investing, and it's common knowledge, a trend -- if there is a trend in a market, whether that market is gold or whether it's poultry, to follow the trend. Don't try to go in the opposite direction on a one-way street.

If you're following a trend, purchasing an option in a trend market, your -- your chances of success should be higher, rather than throwing a dart at a market that -- that is sitting flat and doing nothing.

So when you say the option is less risky, no, it's the market. If the market shows that it's in a trend and you're optioning it, which is a limited risk to start out with, your chances towards success are more favorable."

Mr. Shakabpa: "Okay. So -"

Mr. Staryk: "And if the person's calling us about gasoline and heating oil, we're explaining it to them in that context."

Mr. Shakabpa: "So, are you saying that heating oil and unleaded gas options, because of their historical performance or their

(continued..)

practical standpoint, that seasonal price trends do not translate into a market advantage for investors.

During the period covered by the Complaint, 368 of Staryk's 388 customer accounts lost money.⁶⁰ By his own admission, Staryk kept detailed notes of his contacts with clients and of their trading.⁶¹ In addition, Staryk customarily reviewed his clients'

(..continued)

trend, are less risky in terms of likelihood of risk than other commodities, options in other commodities?"

Mr. Staryk: "If the trend is working. If the trend looks like it's going to repeat itself. We don't say less risky because all options have risk. The risk is the same in every option, you can lose it all."

But -- and in the middle of a year we would switch. If the recommendation was to get away from petroleum and go to grains or go to precious metals, we would explain options the same way: strike price, intrinsic value, time value."

Tr. at 56-57. See also Tr. at 123-25.

⁶⁰ See supra note 26.

⁶¹ Tr. at 74-75.

"Mr. Shakabpa: "You yourself, both at Commonwealth and First Investors, kept records for yourself which showed what happened in the past with you customer accounts?"

(continued..)

existing positions each trading day.⁶² As such, Staryk knew that his clients, following his strategy, systematically lost money throughout the time period relevant to the Complaint.⁶³ And, as

(..continued)

Mr. Staryk: "From the very first contact of a client, prospective client through the actual history of the account, what they bought, what they sold, how much they made, how much they lost, how much was sent home, that's kept on my client account card. . . .

Every client has a little booklet that we keep from the very start, a record of our initial conversation with that client which records our notes on what we're learning about that client, the dates when we send them literature, when we next contact them, if they decide to enter the market. . . .

[W]e make a complete file for them and it includes everything from telephone messages to trade tickets, and we put notes on trade tickets, we put notes on everything, to help us recollect the mood, the changes, the profitable trades versus the los[ing] trades."

Id.

⁶² Tr. at 72; Division's Exhibit 55, Deposition of Michael F. Staryk, dated February 7, 1995, at 29-30.

⁶³ Although Staryk had insinuated in his prehearing memorandum that he was ignorant of the overall lack of trading success of his customers, Prehearing Memorandum of Respondent, dated April 21, 1998 ("Respondent's Memorandum"), at 9, he freely admitted to such knowledge at the hearing.

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such, he also knew the message that he conveyed to prospective clients -- that the nature of the seasonal price trends in

(..continued)

Mr. Shakabpa: "Okay. So you knew how much they made or lost when they closed their positions?"

Mr. Staryk: "Every time they bought or sold, we'd go over that with the client."

Mr. Shakabpa: "Okay. So you knew how much they made or lost when they finally closed their accounts?"

Mr. Staryk: "I know that and they know that."

Tr. at 74.

Mr. Shakabpa: "Were you aware that the majority of your customers at Commonwealth overall had losses in their accounts?"

Mr. Staryk: "Yes."

. . . .

Mr. Shakabpa: "Your clients at First Investors Group for the time period we're talking about -- the majority of them closed their accounts with losses?"

Mr. Staryk: "The vast majority."

Tr. at 78.

heating oil and gasoline greatly increased the likelihood of profits in options associated with those markets -- was false.⁶⁴

⁶⁴ Since all of his accounts were non-discretionary, and his "clients had the responsibility over purchase and sale decisions, and when to cease trading," Staryk has argued that his knowledge of the one fact (the dismal track record of his customers) would not necessarily lead to his knowledge of the other fact (that his claims for his seasonal trending energy option strategy were false). Respondent's Memorandum at 9-10.

As a practical reality, this argument lacks merit. Staryk estimated that at least 80 percent of his solicitations and sales at Commonwealth, and at 70 percent at First Investors related to heating oil and gasoline options. Tr. at 673-74. In the sale of these options, he acknowledged employing his well-documented seasonal trending approach. See Tr. at 56-57 ("If you're following a trend . . . your chances of success should be higher"); Tr. at 123-24 ("trade in the direction of the trend"); Tr. at 598-99 ("I'm sure the Division realizes and I'm sure Your Honor realizes, since you've listened to miles of my tape"); Tr. at 681 (if you believe the price of heating oil is going to go up in December or January, "[y]ou buy a call"). His testimony also plainly indicates that most of his customers generally followed his trading advice.

Mr. Shakabpa: "Mr. Staryk, the majority of your clients, who ended up becoming your clients, who opened up accounts with Commonwealth and First Investors Group, they were relying on your recommendations about the options that they initially purchased; is that right?"

Mr. Staryk: "They were paying us."

Mr. Shakabpa: "I'm sorry. I didn't --"

Mr. Staryk: "They were paying us for that advice."

(continued..)

(..continued)

Mr. Shakabpa: "Okay. So you were aware that they were relying on your advice when they opened up their accounts?"

Mr. Staryk: "We would give them direction, not only for our advice but how to research themselves, too. But these were non-discretion[ary] accounts. We would give both sides on any purchase; what can happen this way or that way. They had the final decision. I had no discretionary accounts, even though I was a broker for more than the required years, all my clients made their own decisions."

Mr. Shakabpa: "After they opened up their accounts you did give them recommendations about trading; is that right?"

Mr. Staryk: "That's what they wanted me to do."

Mr. Shakabpa: "Okay. So you did do that?"

Mr. Staryk: "Yes."

Mr.. Shakabpa: "Okay."

Mr. Staryk: "I might add that some called up and placed their own orders with their own decisions, just using us as clearing their own trades."

Tr. at 107-08 (emphasis added). Tr. at 114 (" . . . [P]eople would call us sometimes with experience, day traders, people that have enormous access to charts and graphs, that do it as a hobby, and we would tell them outright, this is something you probably want to do on your own."); Tr. at 573 (" . . . [I]t was unusual for me to have a client that trades with a discount firm where the commissions are much less -- and these are

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In sum, Staryk offered no credible testimony to refute the overwhelming circumstantial evidence of his scienter, and indeed his testimony tended to corroborated that evidence. Accordingly, the Court concludes that Staryk possessed the requisite scienter necessary to establish his violation of the anti-fraud provisions of Section 4c(b) and Regulation 33.10.

Having found that Staryk possessed the requisite scienter to establish liability, the Court now turns to "the scope of Staryk's activity for the purpose of assessing sanctions."⁶⁵

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experienced people that like to call in their own trades.") (emphasis added).

Mr. Shakabpa: "So do you think you are successful in getting out as much profits as possible to your clients?"

Mr. Staryk: "As far as returning the money home to the client, yes."

Tr. at 668.

⁶⁵ In re Staryk, ¶27,206 at 45,811.

Scope Of The Fraudulent Activity

The Issues On Remand

In its Initial Decision, the Court imposed, among other things, a civil monetary penalty based upon the gains and losses resulting from all of Staryk's customers' trades during the period covered by the Complaint.⁶⁶ Although the Court recognized that Staryk solicited some options in markets other than heating oil and unleaded gasoline during the relevant period, it reasoned that the pervasive and ongoing nature of his fraudulent solicitations for these seasonal energy instruments generally "colored" all of his customer business,⁶⁷ and that it therefore would be "reasonable" to consider all of Staryk's trades in the penalty calculation.⁶⁸

⁶⁶ In re Staryk, ¶26,701 at 43,939.

⁶⁷ Id. at 43,918 n.20 and 43,939 n.150.

⁶⁸ Id. at 43,939 n.150. See In re Grossfeld, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,921 at 44,469 n.37 (Dec. 10, 1997). In Grossfeld, the Commission found that

"Given the pervasive and ongoing nature of the fraud, we may also infer [for purposes of the penalty assessment] that all the money [respondent's employer] paid to [respondent] was a product of his wrongdoing. While such an inference might be inappropriate when the scope of a respondent's wrongdoing is shown by the record to be limited or isolated to a particular period during his tenure at a

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firm, the record plainly indicates otherwise."

In supporting its findings as to the pervasiveness of Staryk's seasonal sales pitch during the time period of the Complaint, the Court relied on transcripts of telephone conversations of Staryk at First Investors, random evaluations by a firm hired to monitor sales solicitations at both Commonwealth and First Investors ("Parker, Maher Reports"), and Staryk's own self-described customary solicitation.

"The following discussion of Staryk's typical solicitation relies heavily on transcripts of telephone conversations recorded from June 1993 through March 1994, during Staryk's employment at First Investors. There is no dispute, however, that this solicitation was characteristic of Staryk's marketing efforts throughout his employment at Commonwealth, from August 1991 to June 1993, and his employment at First Investors, from June 1993 through the filing of the Complaint (February 1995). Staryk does not contest the accuracy of the transcripts, nor does he dispute that they are representative of his sales presentation. Moreover, the transcripts are amply corroborated by other evidence provided by both the Division and Staryk in this voluminous record.

Staryk admits that his marketing has always focused on the "contra-seasonal products": heating oil, gasoline, and crude oil options. As demonstrated in the First Investors transcripts, Staryk emphasized that gasoline prices nearly always increased in the summer and that heating oil prices nearly always increased in the winter. As illustrated by the October/November 1992 and January 1993 Parker, Maher Reports, he also

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On appeal, however, the Commission determined the Court's approach to be unjustifiably broad, and therefore vacated the Court's findings on "the scope of Staryk's deceptive sales solicitations."⁶⁹ Noting the evidence suggesting that Staryk did not invariably use the seasonal sales pitch,⁷⁰ the Commission

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stressed the predictable nature of the seasonal markets while at Commonwealth.

Indeed, nearly all of the Parker Reports, including reviews of Staryk while at both Commonwealth and First Investors, strongly indicate that the solicitation described in this Section was a standard sales pitch that Staryk employed during the entire time period at issue."

Id. at 43,918 n.20 (citations omitted).

⁶⁹ In re Staryk, ¶27,206 at 45,812.

⁷⁰ Id. at 45,811-12.

"[Staryk's] affidavit states in a typical initial solicitation, 'I . . . describe the nature of the relevant market, mostly concerning seasonal type moves' Res. Exh. M at 15 quoted in App. Br. at 6. On this issue, see also Res. Exh. A (Staryk's Deposition) at 18, 80, and Div. Ex. 15, Attachment 3, tending to show that from June 1993 to August 1994, when Staryk was employed at FIG, certain of his customers maintained positions in options involving underlying commodities other than heating oil and unleaded gas."

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directed the Court to undertake on remand "further factfinding on the scope of the misrepresentations in this case."⁷¹

The Evidence On Remand

Perhaps led astray by a misreading of Commission dicta, the Division, on remand, relied exclusively on the testimony of ten customer witnesses⁷² (all of whom had purchased heating oil or

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Id.

⁷¹ Id. at 45,812. In so doing, the Commission appears to be seeking a level of refinement and precision that is uncharacteristic of other elements of the Commission's approach to assessing civil monetary penalties. See In re R&W Technical Services, Ltd., ¶27,193 at 45,732-35; compare In re Kelly, CFTC Docket No. 97-6 (CFTC Nov. 19, 1998) (slip. op. at 22) (imposing \$10,000 penalty for record production violations of Section 4n(3)(A) of the Act, 7 U.S.C. §6n(3)(A), and Commission Rule 1.31, 17 C.F.R. §1.31, where respondent "purposely did not want to respond to the request," "discarded the letter from the Division," "did not read the sections of the Act or Commission Rules which set forth the requirements to provide records and did not know or care whether he had an obligation to do so") with In re New York Currency Research Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,223 (CFTC Feb. 6, 1998) (imposing \$110,000 penalty for single act in violation of Section 4n(3)(A) and Commission Rule 1.31, while leaving undisturbed the Administrative Law Judge's findings that respondents resisted a Division production demand in good faith under color of law).

⁷² This testimony consumed about half of the four-day hearing. See Testimony of Rex Johnson, Tr. at 154-80; Testimony of Patricia A. Schneider, Tr. at 180-218; Division's Exhibit 14, Declaration of Patricia Schneider Pursuant to 28 U.S.C. §1746, dated January 28, 1992 ("Schneider Declaration"); Testimony of L.

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gasoline options from Staryk) to cure "the ambiguity of the record" on the proper scope of Staryk's seasonality solicitations.⁷³ In its Opinion and Order, the Commission stated

"As a matter of guidance to resolve [the scope] issue, we advise the ALJ and the parties that the Division need not introduce evidence in respect of each of Staryk's approximately 350 customer accounts during the relevant period. For example, reliable evidence that a properly selected sample of those account holders were solicited in a particular manner would be sufficient."⁷⁴

Here the Commission seems to be suggesting that statistically-valid expert examination of Staryk's accounts -- not customer testimony -- might provide a reliable basis for

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Lamar Faulkner, Tr. 238-60; Testimony of Joann Krygowski, Tr. at 261-84; Division's Exhibit 14, Declaration of Joann V. Krygowski Pursuant to 28 U.S.C. §1746, August 9, 1994; Testimony of Frank T. Simmons, Tr. at 284-320; Testimony of Carlos Enrique Galliano, Tr. at 321-40; Division's Exhibit 14, Declaration of Carlos Galliano Pursuant to 28 U.S.C. §1746, dated July 29, 1994; Testimony of Baldwin W. Hurns, Tr. at 346-62; Testimony of Elizabeth Guardiola-Simmons, Tr. at 408-40; Testimony of Orval Obadiah Oliver, Tr. at 441-57; Testimony of Roseanne Palladino, Tr. at 457-88.

⁷³ In re Staryk, ¶27,206 at 45,812.

⁷⁴ Id.

inferring the extent of Staryk's seasonality solicitations.⁷⁵ Indeed, the dicta would seem to positively discourage the type unreliable customer testimony which the Division proffered.

⁷⁵ Curiously, the Division chose to ignore the most reliable and dispositive piece of extrinsic evidence of the scope of Staryk's solicitations. In its motion for summary disposition, the Division attached as Exhibit 15 a document titled the "Closed Option Detail File", produced by Vision LP for the period June 23, 1993 through August 30, 1994 ("Closed Option File"). In the Closed Option File, Vision LP, a clearing futures commission merchant for First Investors, reproduced all data pertaining to every option trade executed by Staryk on behalf of customers during the period covered by the report, including: the customer account numbers, the date each order was placed, the commodity, quantity, month, and price of each order, as well as the commissions and fees. Division's Exhibit 15. By matching these data to account opening documents, the Division could have readily established who traded what contracts after their initial contact with Staryk.

Thus, the Division could also have easily and conclusively demonstrated the extent to which Staryk's clients initially executed orders for heating oil or unleaded gasoline options upon opening their account. This would have provided the most reliable evidence of the scope of Staryk's solicitations, since the record fully supports the inference that virtually all opening transactions in heating oil and gasoline options were undertaken in conjunction with Staryk's fraudulent seasonality sales pitch.

Mr. Shakabpa: "You testified that you did talk about the historical performance of heating oil and unleaded gas options when you were soliciting your clients, your prospective clients, but you're not required to talk about that; is that right?"

Mr. Staryk: "If a client is calling us, yes, we are required. If a client is calling us and requesting information, research

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pertaining to the unleaded gasoline market -- and again, the people that called me . . . were the call-ins that were company based on the company's advertising and the promotions that were published -- if people were calling in 90 percent of the time about energy-related commodities, the company was publishing an energy-related commodity, I was required not to try to take this prospective call-in and convince that client that the Japanese yen was the best thing for him right now that day, and it completely disregard what he had called in for because that -- we didn't feel that was right.

If a client called in about energy, we gave him an energy report. We sent them the futures charts and the data which showed the market going up and down, both directions. As I state to all my clients, the charts you will receive will show the futures market in this particular, over the last several years, going up and down."

Tr. at 147-48. See also Tr. at 602 ("If a person is calling - if the company that I work for is advertising pertaining to the unleaded market, why would I describe options in gold? I'm going to move immediately to the market that they're talking about, the market that our company has published literature on, and I'll explain it to him"); In re Staryk, ¶26,701 at 43,918-19.

Instead of supplementing the record on remand with the closed option files, or "a properly selected sample" of Staryk's customer accounts for the remainder of the period covered by the Complaint, the Division paraded ten hand-picked customers to the witness stand who conclusively established little more than the obvious: that at least ten out of Staryk's hundreds of customers were solicited by him to speculate in heating oil and/or unleaded gasoline options. Indeed, without the help of Staryk's own largely incriminating testimony on the issue, discussed infra, (and first solicited in questioning by the Court, see Tr. 136-
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From a statistical standpoint, "[t]here is no indication how these customers were selected -- no claim that they represent any kind of a proper sampling of [Staryk's] thousands of [actual and potential] customers."⁷⁶ Furthermore, not only is this testimony

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42), the record on remand would have remained insufficient to determine the scope of Staryk's misrepresentations.

⁷⁶ In re National-Porges Co., 63 F.T.C. 163, ¶27 (1963). Indeed, Staryk, himself, noted that which the Division does not even attempt to dispute: that the witnesses proffered by the Division did not properly represent his client base.

Mr. Feder: "Sir, you've heard ten different customer witnesses brought in by the Division that range from I think August of '91 to maybe January of '95.

Do you believe that to be a representative sample or group of your clientele?"

Mr. Staryk: "No."

Mr. Feder: "And why not?"

Mr. Staryk: "Because this is a period of time from '91 to whatever the other date was, between two different companies, where it appears to me that the Division has tried to cut and paste clients to fill over that time period. But there's been gaping holes in there because these clients are only clients that opened their accounts in heating oil or gasoline.

And there's clients for a good period of time in there where solicitations were made by my company because we made the

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solicitations the company did and published
in other markets, gold."

Tr. at 645-46.

Moreover, where the challenged solicitations reach so many actual and potential clients, Tr. at 70-71 (Staryk estimates that, since 1990, there have been "5000 people he has solicited orally"), customer testimony - particularly beclouded by stale recollection -- is unlikely to provide reliable evidence as to the nature and extent of any standardized sales solicitation. Here the Division could learn from the Federal Trade Commission ("FTC"), the federal agency of general jurisdiction over fraudulent marketing acts and practices. In the context of discussing how it determines the nature of the message conveyed to reasonable customers in print advertising, the FTC has explained

"Ads of that sort are directed at so large an audience that it is too costly to obtain the statements of enough individual consumers in another manner (e.g., by way of affidavits) to be reasonably confident that the consumers' views on the record of the proceeding were representative of the entire group to which the ad was addressed. Where we use surveys in lieu of individual testimony, the surveys are methodologically sound; they draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly."

In re Thompson Medical Research Co., Inc., 104 F.T.C. 648, 789-90 (1984) (citation omitted, emphasis added). In implementing its responsibilities to prevent fraud under the Act, the Commission has sought guidance where appropriate from the FTC's experience. Morris v. Stotler & Co., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,080 at 38,047 n.22 (CFTC June 27, 1991); Hammond v. Smith Barney, Harris Upham & Co., ¶24,617 at 36,657 n.12.

tainted by the customers' participation in the Division's ongoing investigation," it is founded upon severely-diminished

" For example, Mr. Galliano testified that

"[E]arly in 1994, I received a telephone call from the [Division], I believe it was Ms. Monaco [,the Division's former counsel]. And the impression I got -- I don't think she said it in so many words -- but the impression I got was that my account had somehow raised a flag and they were calling to see if there was anything that I wanted to report to them. And I said, yes, and that's when I described to her my story and was also sent the [investigatory] questionnaire."

Tr. at 335 (emphasis added).

Ms. Krygowski testified,

"Mr. Feder: "Is it fair to say that when you received documentation from the [Division] that -- in December of '92, that, at that time, you thought maybe there was something wrong in [your] account?"

Ms. Krygowski: "It is fair to say that."

Mr. Feder: "And then you received this literature from Investment Litigation Arbitration Service. Does that begin to reinforce the thought a little bit?"

Ms. Krygowski: "It would have."

Mr. Feder: "Is that fair to say that?"

Ms. Krygowski: "That's fair to say."

Mr. Feder: "So then by the time August '94 rolls around and Ms. Monaco calls you back

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recollections of conversations occurring anywhere from three-and-a-half to seven years ago.⁷⁸ In short, without digressing into what

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[to go over her declaration], you have further reinforcement that there must be something wrong with what happened in [your] account?"

Ms. Krygowski: "I believed that to be true in December of '92 when I looked at the materials that the [Division] had sent. . . ."

Tr. at 279-80.

And a third witness, Mr. Johnson, testified,

"Mr. Feder: "And have you been told that by testifying here today that you may be entitled to money back on your account?"

Mr. Johnson: "I haven't been told that, no. No. I was told that that was probably an option, but not a likelihood."

Tr. at 179.

⁷⁸ As Staryk aptly commented, "I think there is a lot lost in the translation between what a customer may recall." Tr. at 621. For example, in response to the Court's inquiry as to whether he had any specific recollection as to how Staryk explained the relationship between the price movements of an option and its underlying futures contract, Mr. Johnson responded: "It's been quite a - quite a long time since that was all explained to me. I don't remember the specifics of just how it all came together." Tr. at 159. He also confused the "strike price" of a option with "commissions" charged. Tr. at 160. Ms. Palladino agreed that "it's really hard to remember all of the details" of her conversations with Staryk, as they occurred "over three-and-a-half years ago." Tr. at 482-83. Mr. Hurns testified that after
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constitutes a "properly selected sample," the Court concludes that the Division's sample, standing alone, is deficient. As such, the Court finds the testimony of the ten customer witnesses to be utterly unreliable⁷⁹ as evidence of the specific nature,

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four-and-a-half years, he could not recall whether he purchased options that were in-the-money or out-of-the-money." Tr. at 356. Ms. Guardiola-Simmons testified that she did not remember whether Staryk had mentioned the term "risk capital" to her, Tr. at 417 ("[H]e could have mentioned a lot of terms."), or whether he had discussed gold options, Tr. at 434 ("We had a lot of conversations. They were short."). Mr. Galliano could not recall how he determined the amount of his initial investment with Staryk. Tr. at 326 ("I don't recall how I came to invest 5,000 [dollars] with him.").

⁷⁹ And, occasionally, simply incredible.

For example, Ms. Schneider testified that she lost nearly \$15,000 as a result of Staryk's misrepresentations, even though her declaration under penalty of perjury states that she lost \$5,274. Compare Tr. at 215-16, with Schneider Declaration at ¶16. She sought to explain the discrepancy by now blaming Staryk for losses in her accounts at both Commonwealth and Lind-Waldock. Tr. at 216-17. It suffices to note that the record contains absolutely no evidence that Staryk was ever affiliated in any manner with Lind-Waldock, and that Ms. Schneider stands alone among the customer witnesses in accusing Staryk of "suggest[ing] that he could facilitate us doing business through [a] Lind-Waldock account, which I did." Tr. at 216. As Staryk, an AP of Commonwealth, quite credibly testified, "We don't recommend to any of our clients going to another firm." Tr. at 576.

Ms. Guardiola-Simmons is alone among the witnesses in testifying that Staryk misled her into believing that she could write-off, dollar-for-dollar, all trading losses against her taxes. Tr. at 412; Tr. at 414 (Guardiola-Simmons not concerned about the mounting losses in her account because "I was just
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much less the scope, of Staryk's misrepresentations. Accordingly, it is entitled to and given no weight.

However, where customer testimony failed to establish the scope of Staryk's misrepresentations, Staryk did not. Staryk credibly testified that each of his employers decided what markets to solicit to clientele,⁸⁰ and that he, as a broker, was obligated to discuss those markets with prospective clients during the initial solicitation.⁸¹ He then testified, without any contrary showing by the Division, that

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going to wait until tax time and get my money back."); Tr. at 416 ("I got audited and that was pretty much a nightmare. Just a lot of things that I didn't know and I couldn't claim my money back."); Tr. at 436-37. She also incredibly testified that Staryk had led her to believe that the commissions reflected on her statements were payments to her. Tr. at 430 ("I thought the commissions were mine. . . . And I saw those numbers were large and I was pretty happy.").

Mr. Oliver is singular in testifying that Staryk never discussed "anything about risks." Tr. at 444. Compare, e.g., Testimony of Roseanne Palladino, Tr. at 464 ("[H]e did cover the fact that, you know, there is a possibility of losing your money, but it was always again, geared toward the positive side, that there's always a risk in anything you do. It's just not very likely it seemed because gasoline and oil always seem to rise at this time of year."). Mr. Oliver's testimony is also at odds with the many transcripts of Staryk's solicitations contained in the record. In re Staryk, ¶26,701 at 43,929.

⁸⁰ Tr. at 646.

⁸¹ Tr. 147-48, 602. Staryk explained,

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"at Commonwealth I'm figuring maybe 80 or 90 percent of [the] time . . . the company was soliciting heating oil and gasoline; whereas, at First Investors Group it may be 70 percent of the time [was] gasoline [and heating oil] solicitation."⁸²

Therefore, in reliance on Staryk's unchallenged testimony, the Court concludes that Staryk's fraudulent solicitations spanned, at a minimum, 80 percent of the accounts opened at Commonwealth and 70 percent of the accounts opened at First Investors. It further finds "the scope of [] respondent's wrongdoing is shown by the record to be limited" to these

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"[W]hat would be done is after the owner of the company would state that he had just spent X amount of dollars on a television promotional program or a radio interview that was going to be broadcast coast-to-coast, he would -- he would stop us all, or in our morning research meeting or any meeting would say, 'I want you all to listen to this program because you're going to be receiving calls from people and I want you to be aware of what they're calling about.'"

Tr. at 30-31.

⁸² Tr. at 674. Staryk estimated the percentage of his sales volume accounted for by unleaded gasoline and heating oil was similar (80-90 percent at Commonwealth and 70 percent at First Investors). Tr. at 136-42, 672-74.

percentages of Staryk's activity over the time period of the Complaint for the purpose of assessing sanctions.⁸³

Restitution

The Issues On Remand

Almost as an afterthought, the Division's motion for summary disposition contained a blanket request for a remedial order requiring Staryk to make restitution for all customer losses for the accounts that he brokered during the time period of the Complaint.⁸⁴ In denying this request, the Court reasoned,

"In 1992, Congress empowered the Commission to seek restitution in administrative enforcement proceedings. At the time, the Commission objected to this new authority, and neither the Commission nor any Administrative Law Judge has ordered restitution since the provision's enactment. Indeed, the Commission has not even proposed -- much less promulgated -- implementing regulations to instruct this Court as to the procedures to be used in granting and administering restitution.

Against this backdrop, the Division's position urging the Court to order restitution seems peculiar. Restitution usually requires the appointment of a receiver to obtain, value, maintain, administer, and distribute the property or funds it receives. The

⁸³ In re Grossfeld, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,921 at 44,469 n.37 (CFTC Dec. 10, 1996).

⁸⁴ Division of Enforcement's Motion for Summary Disposition, dated July 6, 1995, at 23.

receiver, however, normally has such powers only when conferred upon him by statute, rule, or decree of the court appointing him. The Division offers no suggestion as to how restitution -- in the absence of implementing regulations -- is a workable remedy in this case. Thus, the Division's request for restitution is denied."⁸⁵

⁸⁵ In re Staryk, ¶26,701 at 43,942 (notes omitted).

In opposing authority to grant restitution in administrative enforcement cases, the 1991 Commission reasoned,

"The Act already affords customers three separate remedies to seek redress -- private rights of action in federal court, the Commission's reparations program, and exchange and futures association arbitration. In addition, the Commission can and does seek disgorgement where appropriate in federal district court. The Commission believes that customers would be better advised to move promptly to use one of the broad range of existing remedies that the Act provides to seek damages at the outset of their claim rather than await the outcome of a Commission investigation and administrative trial. The Commission believes that this provision heightens consumer expectations for restitution which very likely may not be met because often there are not funds available to restore to aggrieved customers in many administrative cases brought by the Commission."

Futures Trading Practices Act of 1992, S. Rep. No. 102-22 102nd Cong., 2nd Sess. (1992), Letter from Wendy L. Gramm, Chairman, Commodity Futures Trading Commission, to Hon. Patrick J. Leahy, Chairman, Committee on Agriculture, Nutrition, and Forestry, United States Senate, dated March 11, 1991, reprinted in 1992 U.S.C.C.A.N. 3103, 3171.

The Court also noted that, unlike the Commission's other sanctions, restitution can only be ordered upon the finding of individual customer reliance.⁸⁶

In its Opinion and Order, the Commission directed that on remand "in any consideration of sanctions that [the Court] may undertake, restitution shall not be omitted on the basis that no rules have been promulgated to govern its implementation."⁸⁷ It then proceeded to provide the Court with the substantive guidance necessary to the task.⁸⁸

⁸⁶ In re Staryk, ¶26,701 at 43,942 n.162.

⁸⁷ In re Staryk, ¶27,206 at 45,812.

⁸⁸ It also provided procedural guidance.

"Should the ALJ determine that an award of restitution is warranted, in the interest of decisional efficiency he may certify as final and appealable all issues determined by him pertaining to liability and sanctions other than restitution. He may then retain jurisdiction over the issues of restitution and its implementation, including how a class of claimants eligible for restitution shall be identified and notified, the amount of restitution to be awarded to each claimant and the time and manner of distribution. The ALJ may ask the Division to submit a proposed restitution plan, subject to review and comment by respondent."

Id. (note omitted).

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The Commission set out a framework for determining whether restitution should be awarded in an enforcement case.⁸⁹ The factors to be considered can be divided into three general categories: (1) whether the respondent's customers are entitled to restitution,⁹⁰ (2) whether the respondent has the ability to

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On October 19, 1998, the Commission adopted new Rules of Practice that took effect on November 19, 1998 but do not apply to cases initiated prior to that date. Rules of Practice; Final Rules, 63 Fed. Reg. 55,784 (CFTC 1998) (to be codified 17 C.F.R. pt. 10). The new rules set out the basis for awarding restitution. Id. at 55,796 (to be codified at 17 C.F.R. §10.110). The new Rule 10.110 essentially codifies the analytic and procedural framework set out in the Commission's remand order.

⁸⁹ In re Staryk, ¶27,206 at 45,812.

⁹⁰ Id.

"We recognize that any restitution that may be ordered depends on the number of injured persons and the amount of their damages. While customer reliance on the deceptive misrepresentations need not be proved in an administrative enforcement action alleging fraud, reliance is a statutory requirement of restitution. Compare In re JCC, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,080 at 41,574 n.17 (CFTC May 12, 1994) (no reliance need be proved in an administrative enforcement case) with Section 6(c)'s proviso that restitution is available for damages 'proximately caused' by violations of the Act, 7 U.S.C. §9 (1994). Cf. Muniz v. Lassila, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,225

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pay restitution⁹¹ and (3) whether restitution proceedings are a proper application of public and private resources.⁹²

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(CFTC Jan. 7, 1992) (reliance on deceptive statements must be proved by claimants in the Commission's reparations forum)."

Id.

⁹¹ Id.

"[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. Because restitution should not be ordered as an empty gesture of goodwill, we instruct the ALJ, before finally imposing any order of restitution, to scrutinize respondent's ability to repay customers the damages the ALJ may find he has caused. Should the ALJ find that respondent's resources are too limited to make restitution feasible, he should consider imposing an appropriate civil monetary penalty."

Id.

⁹² Id.

"Factors to be considered in determining the propriety of a restitution award may include the equities weighing in favor of or against an order of restitution, the degree of complexity likely to be involved in establishing the claims of individual customers, the likelihood that individual customers will obtain compensation through their own efforts, the availability of

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Consideration On Remand

Burden Of Proving Customer Reliance

On remand, the Court directed the Division, in its prehearing memorandum, to state whether it continued to seek restitution against Saryk, and if so, to make a threshold showing that restitution is appropriate in light of the applicable factors identified by the Commission in its Opinion and Order.⁹³ In this regard, the Court expressed particular concern that the degree of complexity involved in establishing reliance on Saryk's misrepresentations for any or all of the heating oil and gasoline options trading in Saryk's 368 losing accounts may make this an inappropriate case for restitution.⁹⁴ Accordingly, the Court specifically directed the Division to address that issue.⁹⁵

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resources to administer restitution, and any other matters that justice may require."

Id. at 45,812 n.15.

⁹³ Order Establishing Procedures on Remand, at 4.

⁹⁴ Id.

⁹⁵ Id.

In its prehearing memorandum, the Division announced that it "continue[d] to seek restitution for Staryk's injured customers."⁹⁶ Its proposal for resolving issues of reliance, however, was notably unsatisfactory, thus confirming the Court's concern that restitution in this case is entirely impracticable.

At the outset, the Court feels compelled to note that the Division's zeal in advocating one of its favorite policies⁹⁷ overcame its ethics in litigating the restitution issue. In its Order Establishing Procedures on Remand, the Court specifically directed the Division to reconcile any position favoring restitution in this case with the position it has taken in another enforcement action, In re R&W Technical Services, Ltd., CFTC Docket No. 96-3.⁹⁸ Perhaps finding the task of reconciliation too

⁹⁶ Prehearing Memorandum of the Division of Enforcement, dated April 10, 1998 ("Division's Memorandum"), at 25.

⁹⁷ See In re Staryk, ¶26,701 at 43,942 n.165.

⁹⁸ The Court stated,

"The Division has acknowledged 'that an award of restitution may not always be an appropriate remedy.' Division of Enforcement's Appeal Brief, In re R&W Technical Services, Ltd., CFTC Docket No. 96-3 ('Division's R&W Appeal Brief'), dated January 15, 1998, at 12. Among the factors to be considering in determining the propriety of a restitution award is 'the degree of complexity likely to be involved in

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establishing the claims of individual customers.' Staryk, ¶27,206 at 45,812 n.15. In circumstances analogous to those present here, the Division has suggested that this factor precludes a restitution award for trading losses.

'The Division [does] not seek restitution for any trading losses suffered by customers who may have followed the signals generated by R&W's computerized trading systems. To do so, particularly in a case of this size, would [] increase[] significantly the degree of complexity in establishing the claims of individual customers. See e.g. Muniz v. Lassila, ¶25,225 at 38,651 (noting, as a reason for denying recovery of plaintiff's trading losses, that '[t]he sharp contrast between the result [plaintiff] was told to expect and the results he actually experienced raise[d] substantial doubts about the plausibility of [plaintiff's] claim that he continued to be influenced by [defendant's] false claim that his trading approach had been tested and proven successful').'

Division's R&W Appeal Brief at 16 n.6 (brackets in the original within internal quotation marks).

If the Division continues to believe that restitution is warranted in the instant case, it should provide the Court with an explanation reconciling this view with its position in R&W."

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difficult or (just maybe) impossible, the Division chose a course of contempt over candor. It simply ignored the Court's directive.⁹⁹

Issues of contemptuous conduct aside, the Division insinuates, in its prehearing memorandum, that customer reliance can be presumed.¹⁰⁰ It then more directly argues that "the Court could adopt simplified procedures that would adequately address

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Order Establishing Procedures on Remand, at 4 n.13 (emphasis added).

⁹⁹ The Division's attorneys are cautioned that such conduct in the future may result in severe sanctions. See 17 C.F.R. §10.11(b) (debarment of counsel for contemptuous conduct); In re Arnold, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,174 (CFTC Oct. 17, 1997).

¹⁰⁰ Division's Memorandum at 31. As authority, the Division appeals to FTC v. Figgie In't, Inc., 994 F.2d 595 (9th Cir. 1993). In Figgie, the Ninth Circuit held, that unlike common law fraud actions, where "[p]roof of reliance by the consumer upon the defendant's misrepresentations is a traditional element of recovery," under Section 13 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §53, "proof of individual reliance by each purchasing customer is not needed." Id. at 605. Figgie, however, is inapposite. Section 13 of the FTC Act gives the district courts broad powers to order equitable relief in a suit brought by the FTC for violations of any provision of law which it enforces. Id. In so doing, it makes no specific reference to restitution and contains no express reliance requirement. In marked contrast, Section 6(c) of the Commodity Exchange Act specifically authorizes the Commission in administrative proceedings "to require restitution to customers of damages proximately caused by violations of such persons." 7 U.S.C. §9 (emphasis added.)

the need of proof of customer reliance to obtain restitution, while avoiding lengthy hearings or complex offers of proof that would strain the Court's resources."¹⁰¹

The Division's wishful thinking aside, the Commission's Opinion and Order could not be clearer: that Staryk's misrepresentations proximately caused his customer's trading losses must be proven, and not presumed, as a condition for restitution. The Commission stated that "[w]hile customer reliance on the deceptive misrepresentations need not be proved in an administrative enforcement action alleging fraud, reliance is a statutory requirement of restitution."¹⁰² In addition, in making the restitution determination, it adopted the reliance principles of Muniz v. Lassila¹⁰³ applicable to reparations claimants.¹⁰⁴ Thus, the Commission indicated that the Division must prove actual,

¹⁰¹ Division's Restitution Memorandum at unnumbered p. 5. See Division's Memorandum at 30-31.

¹⁰² In re Staryk, ¶27,206 at 45,812.

¹⁰³ [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,225 (CFTC Jan. 7, 1992).

¹⁰⁴ In re Staryk, ¶27,206 at 45,812.

individual reliance before customers are entitled to restitution.¹⁰⁵

The Court turns now to the Division's plan for determining the reliance of Staryk's hundreds of customers on his misrepresentations. The plan may indeed be "simplified."¹⁰⁶ Unfortunately, it is also ineffective, unfair and illegal. The plan's simplicity results from the elimination of oral hearings.¹⁰⁷

¹⁰⁵ Id. at 45,812 n.15 ("Factors to be considered in determining the propriety of restitution may include . . . the degree of complexity likely to be involved in establishing the claims of individual customers." (emphasis added)); Muniz, ¶25,225 at 38,650 ("It is self-evident that every customer loss does not result from injurious conduct It is also evident that . . . not all violations of the Act cause harm to customers. Even when a statutory violation and customer losses are present in the same set of circumstances, a cause-and-effect relationship is not automatically presumed."); Steen v. Monex Int'l, Ltd., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,245 at 38,726 (CFTC Mar. 3, 1992) (Gramm, Chairman, concurring) ("[I]n order to prevail in a case involving deception or misrepresentation, the customer must . . . prove that he relied on any misrepresentation to his detriment, and that such reliance was justified." (emphasis in original)) (citing Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014, 1025 (5th Cir. 1990) and Royal American Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1016 (2nd Cir. 1989)).

¹⁰⁶ See Division's Memorandum at 30-31.

¹⁰⁷ See id.

"The Division . . . anticipates that affirmative proof of proximate causation might appropriately be offered at different levels for customers in different categories, either in mini-trials or in documentary

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fashion, depending on the category of customer.

For example, as to inexperienced customers who have never traded options and who opened accounts with Staryk after hearing his sales pitch, the Division may need to offer only limited proof of proximate causation, in the form of a sworn statement that the customer was an inexperienced trader, was contacted by Staryk, and started trading options based on his representations. Such a showing could be rebutted. . . . Another category of customers might include customers who had some prior trading experience but had not traded heating oil or unleaded gas prior to hearing Staryk's pitch. That category might be required to provide a higher level of proof, by means of affidavits or sworn responses to questionnaires (perhaps jointly developed by Division and respondent's counsel, with the Court's oversight). Still another category might include customers who had previously traded gas options before hearing Staryk's misrepresentations, or who had been Staryk's customers for more than insignificant periods of time prior to hearing his deceptive statements. Given the many possible intervening or supervening causes of such customers' options trading and/or losses, the Division would expect that the hurdle of proving reliance would be highest for this category. Such customers might need to appear at a mini-hearing and be cross examined as to their experience, reliance and losses."

Id.

In so doing, it would deprive Staryk of "full and fair process,"¹⁰⁸ in part by stripping him of his right to cross-examine hostile,

¹⁰⁸ In re Staryk, ¶27,206 at 45,811. See In re Fetchenhier, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,838 at 40,745 (CFTC Aug. 13, 1993).

"The ALJ abused his discretion by denying the parties an opportunity to develop the record on these issues through an oral hearing. Section 6(b) [now Section 6(c)] of the Act contemplates a hearing at which evidence bearing on the issues of liability and sanctions may be presented. Disposition without full hearing is permissible under Subpart G of the Commission's Rules of Practice in three circumstances: (1) when there has been a default (Commission Rule 10.93); (2) when the parties agree to a special shortened procedure (Commission Rule 10.92); or (3) when there is no genuine issue as to any material fact, no need for further factual development, and one party is entitled to a decision as a matter of law (Commission Rule 10.91). None of these circumstances is presented in this case and the rules themselves do not draw distinctions between liability issues and sanctions issues. Thus, the ALJ had no authority to limit the parties' right to an oral hearing on disputed issues of material fact merely because the issues related to sanctions."

Id. (citation omitted); accord In re Scheck, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,834 at 40,733 (CFTC Aug. 13, 1993); In re Vercillo, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,836 at 40,740 (CFTC Aug. 13, 1993); In re Kenney, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,839 at 40,751 (CFTC Aug. 13, 1993); In re Mosky, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,841 at 40,761 (CFTC Aug. 13, 1993); In re Schneider, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,842 at 40,765 (CFTC Aug. 13, 1993).

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self-interested witnesses. In addition, it would deprive the Court of the "best tool for reliably assessing . . . credibility."¹⁰⁹

In fact, the task of establishing the necessary causal link between Staryk's misrepresentations and his customers' losses would be fact-specific, highly individualized -- and "in a case

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The Division's plan would not only violate the Commission's Rules of Practice, it would also run afoul of the Administrative Procedure Act ("APA"). Under 5 U.S.C. §556(d), parties are entitled to hearings in which they may present their case or defense by "oral or documentary evidence" and conduct "cross-examination as may be required for a full and true disclosure of the facts." Accord Attorney General's Manual on the Administrative Procedure Act ("Attorney General's Manual") at 43 (1946). The Court may receive written evidence as opposed to oral testimony only in circumstances where those documents "would tend to be reliable and probative and the admission of which would not prejudicially deprive other parties . . . of opportunity for cross-examination." Id.

The Division's plan would run afoul of the APA in a second way. The Division suggests that "the Commission's Judgment Officers and other [unidentified] hearing officers" could "hear and decide . . . restitutionary issues." Division's Memorandum at 32. The APA, however, requires that the Commission (or any number of Commissioners) or an Administrative Law Judge "shall preside at the taking of evidence." 5 U.S.C. §556(b); accord Attorney General's Manual at 137.

¹⁰⁹ In re Staryk, ¶27,206 at 45,811 (quoting In re Abrams, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,684 at 40,225 (CFTC Apr. 29, 1993)).

of this size"¹¹⁰ -- unsuitably complex and costly. In considering whether each of Staryk's customers relied on his misrepresentations in undertaking all (or part) of each of their options trading, the Court, would have to consider factors that include, among other things (1) the sophistication and expertise of each of Staryk's customers in trading-related matters, (2) the existence of any long-standing business or personal relationship between Staryk and each of his customers, (3) access of each of the customers to relevant information, (4) the existence of a fiduciary relationship between Staryk and his customers, (5) Staryk's concealment of his fraud, (6) the opportunity of each customer to detect fraud, (7) whether, and to what extent, Staryk's customers initiated some or all of their trades, and (8) the generality or specificity of specific misrepresentations to each customer.¹¹¹

Moreover, any prediction that the evidence on these factors would invariably support a finding of reliance is undermined by even a casual glance at the testimony that the Court has already

¹¹⁰ Division's R&W Appeal Brief at 16 n.6.

¹¹¹ Schreider v. Rouse Woodstock, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,196 at 32,514 (CFTC July 31, 1986).

heard.¹¹² Staryk credibly testified that his customers possessed varying degrees of sophistication,¹¹³ and that many of them did not blindly rely on his advice or follow his recommendations.¹¹⁴

In this regard, Staryk's testimony is even corroborated by some of the Division's hand-picked customer witnesses. From the outset, Ms. Palladino was skeptical of Staryk's solicitations and advice, regarding them partially as a "sales pitch."¹¹⁵ She did not always follow his trading recommendations.¹¹⁶ Neither did Ms. Schneider.¹¹⁷ And Ms. Krygowski came to reject Staryk's recommendations as to the placement of stop-loss orders.¹¹⁸ Mr. Hurns testified that he quickly became aware that heating oil options were "certainly a risky market."¹¹⁹ Yet, he continued to

¹¹² Albeit for other purposes. See supra note 16.

¹¹³ See, e.g., Tr. at 86 ("I had clients from time to time that were actually in the fuel oil business, in the heating oil business. They either were part owners or worked for heating oil companies and investing in heating oil at the same time.").

¹¹⁴ See, e.g., Tr. at 616.

¹¹⁵ Tr. at 471.

¹¹⁶ Tr. at 483-85.

¹¹⁷ Tr. at 190; see also Tr. at 578.

¹¹⁸ Tr. at 274.

¹¹⁹ Tr. at 359.

trade, never complained, and did not blame Staryk for his losses.¹²⁰ Ms. Guardiola-Simmons testified that even after losing \$35,000, she would have continued to trade with Staryk if she had not run out of money.¹²¹

In sum, the complexity of establishing individual reliance for the large number of possible claimants militates heavily against awarding restitution in this case.¹²² Moreover, when Staryk's limited resources are considered even the Division is constrained to concede¹²³ that restitution is unwarranted.

¹²⁰ Tr. at 359-61.

¹²¹ Tr. at 416, 437.

¹²² Conversely, all other things being equal, the benefits of restitution are more likely to outweigh its costs in cases where the ease of proving reliance is greater. For example, proof of reliance is likely to pose little difficulty in cases where the wrongful activity goes beyond misrepresenting investment value, and reflects an even harder core fraud, such as a Ponzi scheme. See, e.g., In re Cantillano-Estrada, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,284 at 42,438 (CFTC Jan. 9, 1995)); In re Fritts, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,255 at 42,132 (CFTC Nov. 2, 1994). For it is a relatively simple matter to prove that no reasonable customer would entrust his capital to a person or firm that he knew would convert or steal it -- or where the purchase or investment itself is inherently worthless. However, in the more typical case (such as this one) of broker overreaching in the solicitation of otherwise legitimate financial products, restitution is likely to be an efficient remedy only where the average potential award to each individual claimant is extremely large.

¹²³ See Division's Restitution Memorandum.

Staryk's Limited Resources

In addition to individual customer reliance, the Court must also consider the respondent's ability to pay restitution before it issues an order directing him to do so. The Commission recognized that "restitution fulfills its purpose only when it tends to make whole those persons harmed by violations."¹²⁴ For that reason, it stated that "restitution should not be ordered as an empty gesture," and directed the Court to "scrutinize respondent's ability to repay customers the damages the ALJ may find he has caused."¹²⁵

In the present case, the Court established separate procedures to consider Staryk's financial resources.¹²⁶ Staryk submitted, under oath, a CFTC Form 177, a Financial Disclosure

¹²⁴ In re Staryk, ¶27,206 at 45,812.

¹²⁵ Id. ("Should the ALJ find that respondent's resources are too limited to make restitution feasibility, he should consider imposing an appropriate civil monetary penalty").

¹²⁶ See Transcript of Post-Hearing Conference, dated August 31, 1998.

Form,¹²⁷ and provided supporting financial documentation.¹²⁸ Upon review of this materials, the Division concludes that

". . . Saryk's net worth, including the value of the equity in his home, does not exceed \$75,000. His tax returns substantially support his Statement. Currently, Saryk's estimated gross monthly income exceeds his estimated monthly expenses by approximately \$5,000. However, if this Court finds Saryk liable for the violations charged and bars him from the business, then his current income will cease, and the positive spread between income and expense is nullified, at least until he becomes re-employed, and possibly thereafter."¹²⁹

Accordingly, the Division further concludes that

"Balancing Saryk's limited resources, which consist of his relatively low present net worth and future income potential, against a potentially sizeable class of potential claimants and aggregate restitutionary sum, the Division believes that restitution is not a

¹²⁷ This form is attached to Respondent's Posthearing Brief; see Division's Restitution Addendum.

¹²⁸ These documents, which were provided to the Division and filed in camera with the Court, are retained as a non-public portion of the record in this proceeding. Id. at 2. They include: Saryk's federal income tax returns for calendar years 1995 through 1997, pay slips, credit card statements, a mortgage payment coupon, bank statements, loan obligation statements, insurance statements, and a letter from Saryk's counsel explaining certain items listed in Saryk's Financial Disclosure Form. Id.

¹²⁹ Division's Restitution Memorandum at unnumbered p. 6 (note omitted).

feasible sanction against Staryk because it would amount to an empty gesture of goodwill.¹³⁰

Upon review of Staryk's documentation, the Court agrees with the Division. Accordingly, the Court finds that an order of restitution to be inappropriate in this case, given (1) the degree of complexity likely be involved in establishing the claims of individual customers and (2) Staryk's limited ability to repay to customers any damages he may have caused.¹³¹

¹³⁰ Id. at unnumbered p. 10.

¹³¹ The Division abandons its request for restitution on the basis of Staryk's limited resources alone. It persists in its prehearing position that proving customer reliance in this case should be sufficiently simple to militate in favor of an order of restitution. See Division's Restitution Memorandum at unnumbered p. 5.

Sanctions

Having once again found Saryk liable for violations of Section 4c(b) and Regulation 33.10, the Court must now consider what sanctions against Saryk are supported by the record. In its Opinion and Order, the Commission directed that "Saryk shall have a full opportunity to litigate any sanctions the ALJ may consider imposing, including the right to present mitigation and rehabilitation evidence in response to allegations that he is subject to a statutory disqualification and a trading ban."¹³² Despite this reprieve,¹³³ Saryk did not present any additional evidence or adduce additional testimony material to sanctions, save for his testimony as to the scope of his violations.¹³⁴

¹³² In re Saryk, ¶27,206 at 45,812.

¹³³ In its Initial Decision, the Court determined that Saryk had waived his right to present affirmative evidence on sanctions by expressly declining to address the issue in his response in opposition to the Division's motion for summary disposition. In re Saryk, ¶26,701 at 43,940-41 n.158. See 17 C.F.R. §10.91(b); In re Kolter, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,262 at 42,198 (CFTC Nov. 8, 1994) ("[T]he Commission's rules of practice do not permit an adverse party to rest upon mere allegations and arguments. Instead, any fact an adverse party wishes to contest must be put at issue through submission of affidavits or other verified documents."). The Commission did not explain its apparent reversal of the Court's waiver determination.

¹³⁴ On remand, Saryk's challenge to the Division's case continued to focus on liability (the absence of scienter), and not on
(continued..)

Staryk's Misconduct Warrants A Cease And Desist Order, A Registration Revocation, And A Permanent Trading Ban

In its Initial Decision, the Court concluded that Staryk's misconduct warranted the imposition of a cease and desist order and a permanent trading ban, and the revocation of Staryk's registration as an associated person.¹³⁵ On remand, Staryk has failed to present any evidence of rehabilitation and/or mitigation, or otherwise demonstrate that the imposition of these nonmonetary sanctions would be inappropriate. Accordingly, the

(..continued)

sanctions. Quite simply, Staryk's position is that he did not engage in any violation requiring mitigation, and had undertaken no course of misconduct in need of rehabilitation.

Mr. Feder: "I don't remember rehabilitation being brought up in [Staryk's prehearing] memo. Our position is that there was -"

The Court: "Nothing to be rehabilitated from."

Mr. Feder: "Exactly."

Tr. at 220.

Additionally, Staryk waived his right to present affirmative evidence of his own net worth in support of a lesser civil monetary by failing to request a net worth hearing or raising the issue on appeal. Tr. at 11-17. See In re Glass, CFTC Docket No. 93-4, 1998 WL 205134 at *25 n.45 (CFTC Apr. 27, 1998).

¹³⁵ In re Staryk, ¶26,701 at 43,937-38.

Court will not disturb its prior rulings as to nonmonetary sanctions.

The Civil Monetary Penalty Should Reflect The Court's Findings As To The Scope Of Staryk's Violations

This Court has consistently applied classic economic principles in assessing civil monetary penalties in cases where it has found systematic retail sales fraud in connection with transactions in Commission-regulated financial instruments.¹³⁶ Briefly and simply, in cases of retail sales fraud, this Court has sought to promote deterrence by basing civil monetary penalties, whenever possible, on respondent's wrongful gain,

¹³⁶ See In re R&W Technical Services, Ltd., ¶27,193 at 45,732-34; In re Cantillano-Estrada, ¶26,284 at 42,438; In re Fritts, ¶26,255 at 42,132; In re Grossfeld, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,975 at 41,120-22 (CFTC Feb. 9, 1994); accord In re Miller, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,440 at 42,913 (CFTC June 16, 1995); In re Gordon, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,667 at 40,182 (CFTC Mar. 16, 1993).

Although the "calculation of civil monetary penalties does not lend itself to formulaic solutions" and ultimately turns on the "total facts and circumstances of each case," In re Grossfeld, ¶26,921 at 44,467 (internal quotation marks omitted), to date, the Commission has generally accepted the results of the Court's approach to assessing civil monetary penalties in sale fraud cases. In re R&W Technical Services, Ltd., ¶27,193 at 45,733. The instant case appears as no exception. In seeking a more exact measure of the scope of Staryk's applicable gains and his customers' trading losses, the Commission appears to endorse the Court's basic penalty analysis.

while considering customer loss as an aggravating factor. To this calculus the Court adds a multiplier, so that the penalty is set at a level substantially above the wrongful gain. This premium is necessary to promote general deterrence in a world where much wrongdoing necessarily escapes the attention of enforcement authorities. Given these considerations, in the Initial Decision, the Court imposed a civil monetary penalty of three times Staryk's gains of \$590,000 during the time period of the Complaint, or \$1,770,000.¹³⁷

¹³⁷ For the Court's analysis of Staryk's gains and customer losses, and the calculation of the civil monetary penalty, see In re Staryk, ¶26,701 at 43,939-40. On remand, both the extent of Staryk's earnings and customer losses were not disputed. See Tr. at 112. Nonetheless, the Court's finding, in its Initial Decision, as to the customer losses requires minor modification.

In its Initial Decision, the Court had found Staryk's total net customer losses during the period covered by the Complaint to be \$3,260,404.99, relying on the expert account analysis of John R. Gardner, a Division investigator. In re Staryk, ¶26,701 at 43,940; see Division's Exhibit 2, Declaration of John R. Gardiner Pursuant to 28 U.S.C. §1746, dated June 20, 1995 ("Gardiner Declaration").

At the oral hearing, however, the Division proffered another investigator, Maura McHugh, who testified that her subsequent review of the Gardiner analysis disclosed his calculation of net customer losses to be overstated by approximately \$12,000. Tr. at 488-503. More specifically, McHugh testified that Gardiner's analysis underestimated the degree of profitable accounts at Commonwealth by approximately \$19,000. Tr. at 502. On the other hand, McHugh testified that Gardiner did not incorporate clearing fees of approximately \$7,000 in his calculation of customer losses for January and February of 1995. Compare Tr. at 500 with
(continued..)

Pursuant to the Commission's instruction's on remand, the Court has determined, supra, that the scope of Staryk's proven wrongdoing, for the purpose of assessing a civil monetary penalty, spanned 80 percent of Staryk's activity as a broker at Commonwealth and 70 percent of Staryk's activity at First Investors. Splitting the difference, the Court finds the scope of Staryk's wrongdoing to cover 75 percent of his activity within the timeframe of the Complaint.¹³⁸ Therefore, the Court adjusts the civil monetary penalty against Staryk accordingly, by reducing its

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Gardiner Declaration, ¶16. The fact, however, the Staryk's customers lost only \$3,248,000 -- not \$3,260,000 -- is not significant for purposes of the Court's penalty analysis. Losses of this magnitude remain a serious aggravating factor in the assessment of the civil monetary penalty. See In re Staryk, ¶26,701 at 43,940.

¹³⁸ In theory, a more exact computation of the overall scope of Staryk's wrongdoing would be achieved by calculating a weighted average of Staryk's gains (earnings) at Commonwealth and First Investors. This exercise, however, is restricted by the fact that the record does not entirely separate his earnings as between the two companies. Id. at 43,939 n.149. This limitation, however, is of little practical consequence, since both Staryk's earnings and his employment at the two companies are fairly equally distributed over the time period of the Complaint. Id.

previously-assessed amount of \$1,770,000 by 25 percent. This computes to a civil monetary penalty of \$1,327,500.¹³⁹

¹³⁹ Although the Division does not appear to dispute the Court's findings concerning the scope of Staryk's misrepresentations, it urges the Court to retain the original \$1,770,000 civil monetary penalty assessed in the Initial Decision. Division's Post-hearing Brief at 28-31. By arguing that the use of other approaches to assessing the civil monetary penalty could yield even larger results, the Division rationalizes a result that renders the Court's Commission-directed scope findings pointless. The Division argues that "[a]lthough a \$1.77 million civil monetary penalty may be higher than other previously assessed penalties, it is far less onerous than assessing a penalty based upon losses suffered by a reasonably-estimated universe of Staryk's customers." Id. at 31. That may be true. However, if the Commission wanted this Court on remand to assess a much higher penalty based primarily on customer losses rather than Staryk's gains, it could have easily said so. In its Opinion and Order, the Commission certainly showed no hesitation in providing guidance to the Court where it perceived it to be necessary.

Next, the Division notes that, under the applicable version of Section 6(d) of the Act, 7 U.S.C. §13b, the Court may assess a civil monetary penalty of penalties "not more than the higher of \$100,000 or triple the monetary gain to such person for each such violation." Doing the math, the Division suggests that its proposed penalty of \$1,770,000 is lenient, because a penalty as high as \$27,160,000 could be lawfully assessed. Id. ("Even if only 70% of Staryk's 388 customers were misled by Staryk into purchasing gasoline or heating oil options, the Court would have the authority to assess a civil monetary penalty of \$27,160,000 ([388 x .7] x \$100,000."). The Court leaves aside issues as whether Staryk's "violations" may be atomized this far, or even further. Compare United States v. Watchmaker, 701 F.2d 1459, 1475 (11th Cir. 1985) (acts which are part of the same scheme or transaction are distinct predicate acts to establish a Racketeer Influenced and Corrupt Organizations Act violation) with United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) (holding that a single course of conduct does not constitute more than one offense under Section 15 of the Fair Labor Standards (continued..)

Order

Having concluded on remand that Michael F. Staryk intentionally made material misrepresentations concerning the profitability and risk of speculating in options on futures contracts for unleaded gasoline and heating oil in violation of Section 4c(b) of the Act, 7 U.S.C. §6c(b), and Regulation 33.10, 17 C.F.R. §33.10, the Court **ORDERS** that:

1. Respondent Michael F. Staryk immediately **CEASE AND DESIST** from violating Section 4c(b) of the Act, 7 U.S.C. §6c(b), and all Regulations promulgated thereunder;
2. Respondent Michael F. Staryk's registration as an associated person is hereby **REVOKED**;

(..continued)

Act). While the Court will assume that the Division's calculations are correct, its reasoning plainly is not.

Section 6(d) imposes a ceiling on civil monetary penalties, not a decisional principle. Civil monetary penalties are "intended to reflect the gravity of the totality of respondents' violations." In re Commodities International Corp., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,943 at 44,567 (CFTC Jan. 14, 1997); see also In re Grossfeld, ¶26,921 at 44,467-68. While the number of "violations" may offer some insight as to the gravity of the misconduct, it does not dictate the end result. In re Interstate Securities Corp., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,295 at 38,954-55 (CFTC June 1, 1992) ("[I]n determining sanctions our focus is on the overall nature of the wrongful conduct rather than the number of legal theories the Division can successfully plead and prove.").

3. Respondent Michael F. Staryk be **PERMANENTLY PROHIBITED**, directly or indirectly from **TRADING** on any contract market, either for his own account or for the account of any person, interest, or entity, and all contract markets are **PERMANENTLY REQUIRED TO REFUSE** Michael F. Staryk any trading privileges; and,

4. Respondent Michael F. Staryk **PAY** a civil monetary penalty of \$1,327,500 within 30 days of the effective date of this Order.

IT IS SO ORDERED.¹⁴⁰

On this 4th day of December, 1998



Bruce C. Levine
Administrative Law Judge

¹⁴⁰ Under 17 C.F.R. §§10.12, 10.102 and 10.105, any party may appeal this Initial Decision on Remand to the Commission by serving upon all parties and filing with the Proceedings Clerk a notice of appeal within 15 days of the date of the Initial Decision on Remand. If the party does not properly perfect an appeal -- and the Commission does not place the case on its own docket for review -- the Initial Decision on Remand shall become the final decision of the Commission, without further order by the Commission, within 30 days after service of the Initial Decision on Remand.