



U.S. COMMODITY FUTURES TRADING COMMISSION

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STUART A. BRISCOE, III,

Complainant,

v.

CA-NI INDUSTRIES, LTD.,
NICHOLAS JAMES NICKOLAOU and
AUDREY MARIE LOMBARDI NICKOLAOU,

Respondents.

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CFTC Docket No. 00-R070

FINAL DECISION

Pursuant to 17 C.F.R. §12.300, the parties have elected to have all issues in the captioned proceeding decided pursuant to the voluntary decisional procedure set forth in 17 C.F.R. subpart C.¹ The election of the voluntary decisional procedure constitutes, among other things, a waiver of the following: the opportunity to request an oral hearing; the right to receive a written statement of the findings of fact upon which this Final Decision is based; and, the right to appeal this Final Decision to

¹ See Election of Voluntary Decisional Proceeding, filed August 14, 2000.

the Commodity Futures Trading Commission ("Commission") and/or the United States Court of Appeals.²

On consideration of the complaint, answers, other pleadings and verified statements, and all other papers of record in the case file, the Court concludes that complainant Stuart A. Briscoe, III ("Briscoe") has proved facts sufficient to establish³ that respondents Ca-Ni Industries, Ltd. ("Ca-Ni") and Nicholas James Nickolaou ("N. Nickolaou") defrauded Briscoe in the sale of a computerized trading program and methodology called "Wisdom of the Ages" ("WOTA"). They did so by materially misrepresenting: (1) WOTA's alleged performance record; (2) the likelihood of profit; (3) N. Nickolaou's personal background, trading experience and alleged use of the program in active trading; and (4) the authenticity of alleged customer testimonials. Ca-Ni's and N. Nickolaou's misrepresentations

² See 17 C.F.R. §§12.100(b), 12.106(b)(1) and 12.106(d); see also Scheduling Order, dated November 29, 2000.

³ For Briscoe to prevail, he must establish his version of the truth by the "preponderance of the evidence." See In re Citadel Trading Co., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,082 at 32,190 (CFTC May 12, 1986) ("[T]he judge must carefully review the record in an effort to separate appearance from reality. The issue is not what could have happened, rather it is what the preponderance of the evidence shows most likely did happen."); see also King v. First London Commodity, Ltd., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,201 at 29,102 (CFTC May 25, 1984).

violated Sections 4b(a)(i), 4b(a)(iii) and 4o(1) of the Commodity Exchange Act, 7 U.S.C. §§6b(a)(i), 6b(a)(iii) and 6o(1), and Commission Regulation 4.41, 17 C.F.R. §4.41, and resulted in actual damages to Briscoe proximately caused by such violations in the amount of \$38,229.40.⁴

The Court further concludes that Briscoe has not proved, by the preponderance of the evidence, facts sufficient to establish that respondent Audrey Marie Lombardi Nickolaou ("A. Nickolaou") violated any provision of the Commodity Exchange Act or any regulation thereunder.⁵

⁴ Briscoe's damages include: (1) the purchase price of a trial version of the WOTA program (\$209.00); (2) the purchase price of the complete WOTA program (\$10,000.00); and (3) trading losses, including commissions and fees, which he incurred on December 1, 1997 in a discretionary futures account controlled by N. Nickolaou (\$28,020.40).

⁵ A. Nickolaou is the wife of N. Nickolaou, and along with him, co-owns Ca-Ni. Briscoe's claims against N. Nickolaou are heavily supported by documentary evidence (Ca-Ni's advertisements and other promotional material as published in Futures magazine and on Ca-Ni's website). They are additionally buttressed by N. Nickolaou's admissions against interest made in a deposition taken by the Commission and in his submissions to this Court. See, e.g., Letter from Nicholas J. Nickolaou to the Court, filed December 29, 2000, at 4 (N. Nickolaou told Ca-Ni's customers "that if they used a disciplined approach to the market and followed the method taught they would be consistent winners."). Briscoe's evidence in support of A. Nickolaou's liability, however, is considerably thinner.

There is no dispute that Briscoe's dealings were almost exclusively with N. Nickolaou, and that A. Nickolaou's ostensible
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role at Ca-Ni was limited to providing clerical and other back office support for N. Nickolaou. Nonetheless, Briscoe claims that A. Nickolaou was complicit in Ca-Ni's and N. Nickolaou's scheme to swindle him. In this regard, he makes a generalized allegation that A. Nickolaou vouched for some of N. Nickolaou's fraudulent claims (although Briscoe does not adequately identify precisely which) in "several conversations," and that Briscoe relied on her corroboration in crediting those claims. See Briscoe's Final Brief, dated December 22, 2000, at 2-3.

For her part, A. Nickolaou adamantly denies making any representations to Briscoe concerning WOTA or N. Nickolaou's trading. She admits only that, when asked, she may have told Briscoe that she had overheard some of Ca-Ni's customers expressing satisfaction with WOTA (a fact not proven to be false), and that, in a similar context, she may have attested to N. Nickolaou's "years of experience" (in a manner that, for all we know, may have been accurate). See A. Nickolaou's Answer, received June 5, 2000, at 1 ("As far as commenting this is only hear say [sic] on hearing other clients telling how great the program was. So if I said something it was only in regards to this. I knew nothing on how the program worked and what it could produce and what kind of money it could make."); Letter from Audrey M. Nickolaou to the Court, filed December 29, 2000, at 2. ("As far as Mr. Nickolaou's years of experience this is a fact and anyone can say that.").

So how do we resolve this swearing contest between the self-serving written statements of Briscoe and A. Nickolaou? After all, both competing versions of the purported truth are internally consistent and in harmony with proven surrounding circumstances. With no observations of demeanor to tip the balance, see In re Staryk, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,515 at 47,378 (CFTC Dec. 4, 1998), both appear equally plausible. The answer is that we simply fall back on "using burden of proof as a placeholder for the missing knowledge." Richard A. Posner, The Problems of Jurisprudence 217 (1990).

As Chief Judge Posner has noted, "[t]he function of burden of proof in achieving formal [as opposed to substantive] accuracy
(continued..)

Accordingly, respondents Ca-Ni Industries, Ltd. and Nicholas James Nickolaou are hereby ORDERED TO PAY, within 50 days of the date of this order, to Stuart A. Briscoe, III actual damages in the amount of \$38,229.40 plus post-judgment interest on that amount at the rate of 6.025% compounded annually from February 3, 2001 to the date of payment, and filing costs of \$50.00.⁶ Ca-Ni and N. Nickolaou are jointly and severally liable for the payment of this award.

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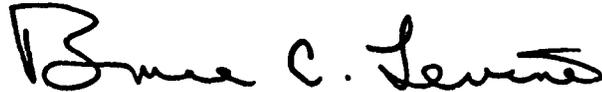
is to allow a court to reach a definitive result in a case where it may not have the faintest idea whether the defendant wronged the plaintiff, and if so how seriously." Id. at 216-17 (1990). In the case before us, it should be noted that the complainant's burden of proof extends to issues of credibility. See Webster v. Refco, Inc., [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,578 at 47,669 n.46 (CFTC Feb. 1, 1999); Guiberson v. United States, Case No. 76-34-C2, 1978 WL 1250, at *5 (D. Kan. Dec. 13, 1978) (unreported op.); Ackerman v. Medical College of Ohio Hosp., 680 N.E.2d 1309, 1311 (Ohio Ct. App. 1996). In addition, the Court is not obligated to find one side or the other to be more credible. Indeed, there are occasions (such as this one) when two witnesses are equally credible. Under those circumstances, the Court need only find that the complainant has failed to establish his version of the facts with requisite certainty. See Webster, ¶27,578 at 47,669 n.46 Guiberson, 1978 WL 1250, at *5; Ackerman, 680 N.E.2d at 1311. In other words, the tie in credibility goes against Briscoe and for A. Nickolaou.

⁶ Prejudgment interest and other costs in connection with a reparations award are not available using the voluntary procedure. See 17 C.F.R. §§12.100(b) and 12.106(c).

The complaint as to Audrey Marie Lombardi Nickolaou is hereby DISMISSED with prejudice.

IT IS SO ORDERED.⁷

Dated this 4th day of January, 2001



Bruce C. Levine
Administrative Law Judge

⁷ This Final Decision shall become effective 30 days after service, unless the Commission, pursuant to 17 C.F.R. §12.403(b), takes review of the decision on its own motion on or before the 30th day. See 17 C.F.R. §12.106(e). The reparation awards ordered in this Final Decision shall be satisfied in full within 50 days after service thereof. Id. (providing 45 days for satisfaction); 17 C.F.R. §12.10(b) (providing five additional days where -- as here -- service is effected by mail).