# UNITED STATES OF AMERICA
## *Before the*
## COMMODITY FUTURES TRADING COMMISSION

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| In the Matter of: | CFTC Docket Number 01-18 |
| GLOBAL TELECOM, INC.,<br>CAMERON S. OWNBEY,<br>and<br>RB&H FINANCIAL SERVICES LP | |
| Respondents. | |

## INITIAL DECISION

Appearances:

*Ms. Susan J. Gradman*, Esq., and
*Ms. Rocell Winters*, Esq., on behalf of the Division of Enforcement;

*Mr. Henry K. Becker*, Esq., of Henry K. Becker, P.C., on behalf of Respondents Global Telecom, Inc., and Cameron S. Ownbey; and

*Mr. William J. Nissen*, Esq., of Sidley, Austin, Brown & Wood, on behalf of Respondent RB&H Financial Services LP

Before:

*Painter*, ALJ

## PROCEDURAL HISTORY

The Commodity Futures Trading Commission (Commission) filed the instant five-count Complaint against Respondents Global Telecom, Inc. (Global), Cameron S. Ownbey (Ownbey), and RB&H Financial Services LP, (RB&H) on July 18, 2001. The gravamen of the Complaint lies in the Commission's challenge to the veracity of various Global promotional items issued primarily in the latter half of 1998, and who shares in responsibility for supervising Global's business practices.

Count One[1] alleges fraudulent sales practices by Global and Ownbey, in violation of Sections 4b(a)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(i) and (iii) (1994); *respondeat superior* liability, pursuant to Section 2a(1)(B), 7 U.S.C. § 4 (1994), against RB&H and Global for Ownbey and others' violations of Section 4b; and controlling person liability, pursuant to Section 13(b), 7 U.S.C. § 13c(b) (1994), against Ownbey for Global's violations of Section 4b.

Count Two of the Complaint alleges fraudulent sales practices by a Commodity Trading Advisor and its Associated Persons against Global and Ownbey, in violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (1994); and 13(b) controlling person liability against Ownbey for Global's violations of Section 4o.

Count Three alleges fraudulent advertising by Global and Ownbey, in violation of Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a) (2000); and 13(b) controlling person liability against Ownbey for Global's violations of Regulation 4.41(a).

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[1] Commodity Exchange Act (CEA) and U.S.C. section numbers are both given here; future references are to the CEA only.

Count Four alleges false reporting against Global, in violation of Section 6(c) of the Act, 7 U.S.C. § 9 (1994); and 13(b) controlling person liability against Ownbey for Global's violations of Section 6(c).

Finally, Count Five of the Complaint alleges failure to supervise against RB&H, in violation of Commission Regulation 166.3, 17 C.F.R. § 166.3 (2000).

Respondents Global, Ownbey, and RB&H denied wrong-doing via Answers received on or about August 21, 2001 (RB&H) and September 25, 2001 (Global and Ownbey). The trial on the merits was held in Chicago, Illinois, in March and April of 2002. Post-hearing briefs have been filed, and the matter is ready for decision.

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The Findings set forth below are based on the Court's first-hand assessment and evaluation of the testimony and the exhibits of record.

## FINDINGS OF FACT[2]

A. In General

1. Respondent RB&H Financial Services LP, is a Chicago-based Futures Commission Merchant (FCM)[3] with past ties to Respondents Global Telecom, Inc., and Cameron S. Ownbey. Respondent Global was, throughout the relevant time period, a registered Commodity Trading Advisor (CTA). Respondent Ownbey was at various times a shareholder, principal, president, and associated person (AP) of Global, as well as an AP of RB&H. (GO Ans. @ 3, 4).

2. Mark A. Pennings (Pennings) and Clayton Caulkins (Caulkins), who were not charged in the Complaint, were officers, shareholders, and APs of Global, as well as APs of RB&H. (DOE Ex. 1, 1F, 1G; TT @ 104-105, 107-108).

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[2] Record references are indicated as follows:
-Trial Transcript = TT @ Page Number.
-Respondents Global and Ownbey's Answer to the Complaint = GO Ans. @ Paragraph Number.
-Respondents Global and Ownbey's Admissions = GO Adm. @ Paragraph Number.
-Respondent Ownbey Exhibits = RO Ex. Number.
-Respondent RB&H Answer to the Complaint = RB&H Ans. @ Paragraph Number.
-Respondent RB&H Admissions = RB&H Adm. @ Paragraph Number.
-Respondent RB&H Exhibits = RB&H Ex. Number.
-Division of Enforcement Exhibits = DOE Ex. Number.
-Division Witness Exhibits = DOE Witness Name Ex. Number.

[3] RB&H has been registered with the Commission as a FCM since at least January 1993. (RB&H Ans. @ 5).

3. In late 1997 or early 1998, Ownbey, together with Pennings and Caulkins, devised a plan for a CTA that would deliver to the public trading recommendations generated by other CTAs they would select. It was Ownbey who approached Pennings and Caulkins with the idea. (TT @ 97, 197; GO Adm. 7).

4. Global Telecom, Inc., a then dormant Washington-state entity owned by Respondent Ownbey and his father, Duane Ownbey (primary owner), was chosen as the corporate vehicle for the enterprise. Ownbey, Pennings, and Caulkins became company shareholders and officers. (DOE Ex. 1; TT @ 850).

5. Ownership of the reconstituted Global was allocated as follows: Respondent Ownbey approximately: 40%; Caulkins and Pennings: approximately 24% each (TT @ 104-105, 850); and Respondent Ownbey's father, Duane Ownbey: approximately 11%. Duane Ownbey was not charged in the Complaint. (TT @104-105).

6. Throughout the relevant time-period, Global offered a single product to the public, the "Pro-Managed" trading system (Pro-Managed). The system was to provide trading signals for one year, and a paging service for their delivery.[4] (GO Ans. @ 10; TT @ 99).

7. Ownbey selected David E. Noyes (DEN), a registered CTA, to generate Pro-Managed's trading signals. (TT @ 98; 198). Pro-Managed provided signals only for the pork belly market. (GO Ans. @ 10).

8. Global contracted some seventy-four (74) clients to Pro-Managed (TT @ 292); the system sold for $4,500, payable to Global. (TT @ 99). A portion of the fee went to DEN, and the remainder to Global and its principals. (TT @ 105-106).

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[4] Global provided both a pager and a service agreement for it. The delivery of signals was to take place primarily through this nationwide paging system. (TT @ 234-235).

B. Global, Ownbey, and Registration

9. Global applied for registration as a CTA in January 1998 and became a registered CTA in March 1998, remaining so throughout the relevant time-period. Registration documents (Form 7-R)[5] dated January 7, 1998, establish that Ownbey served as Global's president, Pennings as vice-president, and Caulkins as treasurer. (DOE Ex. 1; GO Adm. 2). In addition, Global's Disclosure Document dated March 17, 1998, stated: "Mr. [Cameron] Ownbey is currently the president, a principal, and registered associated person of [Global]." (DOE Ex. 2A).

10. Registration documents (Form 3-R)[6] dated March 10, 1998, establish that Ownbey, Pennings, and Caulkins were registered simultaneously as APs of both Global and RB&H. Ownbey signed the 3-Rs as president of Global. (DOE Ex. 1D, 1F, and 1G); (RB&H Adm. 1).

11. Ownbey's own testimony, that of Pennings (TT @ 97)[7] and Caulkins (TT @ 197),[8] and the documentary evidence establish Ownbey's central role in conceptualizing Global, establishing it, and leading it at its incipiency. (TT @ 846-847).

12. Felony charges pending in Utah complicated Ownbey's official position at Global. More specifically, the charges were an impediment to Global's successful registration as a CTA, and to the start of its business activities. (TT @ 201-203).

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[5] "Application for registration as Futures Commission Merchant, Introducing Broker, Commodity Trading Advisor, Commodity Pool Operator, Leverage Transaction Merchant and Application for NFA Membership." CFTC/NFA Form 7-R.

[6] "Supplemental statement to application for registration and reporting of additional sponsoring firms for the multiple association of an Associated Person." CFTC/NFA Form 3-R.

[7] Q (Division): And how did you first find out about Global Telecom or the idea?
A (Pennings): Through Cameron Ownbey.
*et seq.*

[8] Q (Division): And who first introduced you to the idea of Global Telecom?
A (Caulkins): I believe it was Cameron Ownbey.
*et seq.*

13. Via a Form 8-T dated March 18, 1998, Global indicated that Ownbey was voluntarily terminating his status as a company principal. (DOE Ex. 1B; GO Adm. 37); and TT @ 870-871).

14. In November 1998, after Ownbey resolved the Utah matter, Global submitted a Form 3-R by which it indicated that Ownbey had resumed the company's presidency in June 1998, and that he was again a principal with greater than ten percent (10%) ownership. Ownbey memorialized this change with his own signature, underneath which he affixed the title 'president.' The 3-R also purported to demote Caulkins back to treasurer. (DOE Ex. 1C (Form 3-R)).

15. Global's Disclosure Document dated September 15, 1998, also indicated a June resumption of Ownbey's status as principal: "In June 1998, Mr. Ownbey became the president, a principal, and registered associated person of [Global]." (DOE Ex. 2D @ pg. 4). Similar statements were made in other editions of Global's Disclosure Documents, including those of December 1998 and November 1999. (DOE Ex. 2E and 2F).

16. The Court accords great weight to DOE Ex. 1C, whereby Ownbey, by his own hand, indicates that he was a Global principal as of June 15, 1998. Accordingly, Ownbey's status is only in question for approximately three months, from March 18 to June 15, 1998.

17. Taken together, Global's 8-T, (DOE Ex. 1B), 3-R, (DOE Ex. 1C), and Disclosure Documents assert that Ownbey was not a principal between March 18 and June 15, 1998, while at the same time establishing that he was a principal prior to March 18 and from June 15 onwards.

18. In response to a Division request to admit *"Ownbey's role in directing the operations of GTI did not change significantly from March 18, 1998, through November 1998,"* Global and Ownbey answered *"Admit."* (GO Adm. 39).

19. The admission that Ownbey's status did not change from March to November 1998, is inconsistent with those documents asserting that Ownbey was a Global principal from June 15, 1998, onwards. (Compare GO Adm. 39 with Global Form 3-R, (DOE Ex. 1C), and Disclosure Documents cited supra). The inconsistency indicts Global and Ownbey's credibility.

20. Ownbey testified that, upon withdrawing as a Global principal in March 1998, he "got rid of" his stock. At approximately 40% of the total, Ownbey's holdings constituted the single largest block of Global shares. However, Ownbey could not "recall exactly" how the stock was disposed of, or who the purchaser was. (TT @871). The Court concludes that Ownbey owned the stock at all relevant times.

21. Pennings' trial testimony indicated that Ownbey was "primarily the overseer of the program" and "responsible for day to day as well." Pennings also testified that Ownbey was his superior at Global, and that this was the case throughout the entire time Pennings was employed there. (TT @ 102 and 167-168).

22. In response to the Division's query "Was there ever a time when he [Ownbey] wasn't directing what was going on in the company?" Caulkins answered "Well, I think the input was generally there at the time." (TT @ 207).

23. Joseph Mazza (Mazza), president of Compliance Supervisors, Inc., (CSI), a firm retained by Global to aid with registration and compliance matters, indicated at trial that his contacts with Global were primarily through Ownbey, and that this did not change at any point during the relevant time period. (TT @ 41).

24. Respondents offered several documents purporting to demonstrate Ownbey's actual separation from Global (in addition to his own testimony). These include an undated Designation Letter filed with The First National Bank of Chicago that empowers Pennings, Caulkins, and Duane Ownbey as persons "authorized to act on behalf of the Corporation;" Respondent Ownbey was not mentioned. (RO Ex. 11). They also provided Global Disclosure Documents dated March 31 and May 1, 1998, which omit Respondent Ownbey's name, and identify Caulkins as company president. (RO Ex. 1 and 2). And, they offered Global's application for an account at RB&H, wherein Caulkins appears to sign, in August 1998, as Global's president. (RO Ex. 13).

25. Global's RB&H application contradicts its Disclosure Documents and Registration Forms which, as noted supra, name Ownbey as president and Caulkins as treasurer from June 1998 onwards.

26. The Court does not find the aforementioned Global and Ownbey exhibits convincing. Inconsistencies in Respondents' Disclosure and Registration materials; admissions; and deposition testimony trial testimony[9] impeach their credibility to too great an extent.

27. The Court notes that Respondents benefited from Ownbey's formal termination as principal, as it facilitated Global's registration and the commencement of its business activities. It is also instructive that business associates, including Pennings, Caulkins, and Mazza testified as to Ownbey's continued influence and importance throughout the relevant time period. (Supra).

28. In light of the Findings supra, the Court finds that Ownbey, Global's central figure from conception to March 18, 1998, and again from June 15 onwards, did

[9] During cross-examination, for example, Respondent Ownbey contradicted his deposition testimony. Inconsistencies included Ownbey's control over Global, his involvement with Global's advertising, and RB&H's knowledge of Global's activities. (See generally, TT @ 912-918).

not separate himself from the company in the March to June interval, and that he exercised a controlling influence during that time period. Accordingly, the Court finds that Respondent Ownbey was a Global principal throughout the relevant time period, and that the Form 8-T filed March 18, 1998, by Respondent Global was false.

C. The Relationship Between Global and RB&H.

29. Respondent RB&H Financial Services, L.P., located at 30 South Wacker Drive, Chicago, Illinois, was a CFTC-registered Futures Commission Merchant throughout the relevant time period. (RB&H Ans. @ 3).

30. Global's offices were located within those of RB&H from March 1998 through at least October 1999. (GO Adm. 3; TT @ 106 and 212). RB&H provided Global's office space free of charge, and paid other overhead expenses, including electricity and telephone. (TT @ 215).

31. Ownbey, Pennings, and Caulkins were APs of both RB&H and Global. (RB&H Adm. 1; DOE Ex. 1D, 1F, 1G). As such, they profited from the Pro-Managed system in two ways: direct compensation through Global and commission payments through RB&H. (GO Ans. @ 13; TT @ 790; RB&H Ans. @ 13).

32. Likewise, RB&H also benefited from its relationship with Global. Global and Ownbey conceded that Global solicited customers "for opening an account and trading pursuant to the [Pro-Managed] system through RB&H, from March 1998 until October 1999." (GO Ans. @ 8).

33. Global clients were not required to place their trades through RB&H; however, they were strongly encouraged to do so. Examples adduced at trial include: Pennings recommended that Reed open his account at RB&H because "[Global's]

brokerage license rests with RB&H...and they [RB&H] were well aware of the [pork bellies] program..., and could exercise the orders much quicker...if the account was with them." (TT @ 476). Caulkins recommended that Grivel open her account at RB&H because "[Global] had a good working relationship with them and they understood the program and the system and they could execute the orders more effectively." (TT @ 703). Ownbey also advised clients to open their accounts with RB&H. (TT @ 584-585 and 677).

34. Global's "Questions & Answers About GTI" pamphlet stated "GTI [Global] recommends that you establish your account at RB&H Financial, because this is where GTI has their registry as brokers. RB&H has a great working relationship with it's [sic] floor brokers and they have clerks directly set up to handle your account." (DOE Grivel Ex. 2 @ page 3). And, Global included RB&H account-opening documents in the materials it sent to potential clients. (TT @ 641).

35. Some Global clients were not even aware of the fact that they could open an account at an FCM other than RB&H. Duryea (TT @ 343) and Stroda (TT @ 641) both testified to that effect.

36. As a result of Global's efforts on behalf of RB&H, fifty-nine (59) of its seventy-four (74) Pro-Managed subscribers opened accounts with RB&H, yielding the FCM new customers, trades, and commissions.[10] (TT @ 291 and 292).

37. Numerous clients solicited by Global, and who also opened accounts at RB&H, gave RB&H discretionary authority over their accounts via limited powers of

[10] The Parties were unable to establish RB&H's commission profits conclusively. The Division offered testimony by a CFTC Futures Trading Investigator who indicated that RB&H "earned" "approximately $34,000" in commissions. Respondent RB&H offered testimony indicating that its profits were less than $25,000. Its proposed Findings of Facts and Conclusions of Law state, "the total net commissions received by RB&H, after payment of salespeople and before deduction of overhead...was $21,845.50." The Court notes only the undisputed fact that, through commissions on Pro-Managed trading and new clients, RB&H did indeed profit from its relationship with Global. (TT @ 291; 824-826). See also RB&H Ex. 18.

attorney granted to Kevin Fuchs, an AP of RB&H only. Global clients Mitchell and Reed testified that they gave discretionary authority to Fuchs, and the Division produced copies of at least six other agreements granting him discretionary authority. (TT @ 437-438 and 478; DOE Ex. 15B, 15C, 15E, 15H, and 15I; DOE Shutt Ex. 5F).

38. Mitchell further testified that he was never told for whom Fuchs worked, nor was he told why the power of attorney was necessary. (TT @ 438, 456). Reed also testified that he was not told why it was necessary to give a power of attorney to Fuchs, nor was he told that Fuchs was an employee of RB&H, not Global. (TT @ 477-78).

39. Global client Shutt testified that she signed a power of attorney at Ownbey's suggestion. Shutt also testified that she believed Ownbey would be making the trading decisions in her account. The document signed by Shutt actually gives discretionary authority to RB&H AP Fuchs. (TT @ 587-588; DOE Shutt Ex. 5F).

40. RB&H was aware of the fact that Fuchs, a firm employee and AP, had discretionary authority over some of the accounts solicited by Global. (TT @ 821-822).

41. Other Global clients granted discretionary authority to the dual-registered APs. Watkins testified that he gave discretionary authority to Ownbey; Furtkevic gave discretionary authority to Caulkins; and DOE Ex. 15D demonstrates discretionary authority granted to Pennings. (TT @ 681, 739; DOE Ex. 15D).

42. RB&H was aware of Global and the dual-registered APs' marketing of the Pro-Managed system. (TT @ 832). RB&H's Compliance Officer saw at least some of Global's advertisements in Futures Magazine, and RB&H's CFO knew of Global's promotional seminars. (RB&H Adm. @ 8; TT @ 840).

43. Ownbey's deposition testimony indicated, "RB&H was aware of all of [Global's] ads that were running." (TT @ 916). Ownbey's trial testimony indicated that RB&H was also aware of Global's promotional seminars. (TT @ 916-917).

44. As cited in Finding of Fact 33 and 34, in encouraging its clients to open their accounts with RB&H, Global cited the closeness of its working relationship with RB&H and RB&H's knowledge and understanding of Pro-Managed.

45. In March 1998, through its then CFO and vice-president (Jill Ecklund, CFO March 1998-October 1999, (TT @ 821)), RB&H approved Forms 3-R for Ownbey, Pennings, and Caulkins, thereby acknowledging "that in addition to each sponsor's responsibility to supervise the associated person listed above, each sponsor is jointly and severally responsible for the conduct of associated person listed above with respect to" *inter alia,* "solicitation or acceptance of customers' orders" and "solicitation of a client's or prospective client's discretionary account." (DOE Ex. 1D, 1F, 1G).

46. RB&H's policies then in force required its Compliance Department's review and written approval of advertising and promotional materials used by its APs. (RB&H Adm. 11; DOE Ex. 32; TT @ 831-832). Likewise, RB&H's policies required that requests for discretionary accounts be made in writing to the Compliance Department, and that trading in such accounts be reviewed regularly. (DOE Ex. 32).

47. It is undisputed that RB&H failed to review any of Global's promotional materials—print, seminar, or website, including, by extension, those used in solicitations that yielded discretionary accounts. (TT @ 917, 817-818, 833; RB&H Adm. 12).

D. Global's Promotional Materials.

48. Global's marketing activities included promotion of a series of public seminars on Pro-Managed. Eight such seminars were planned for December 1998 in Ft. Lauderdale and Palm Beach Gardens, Florida. They were announced via ads placed in local newspapers. (DOE Ex. 5; TT @ 898; GO Adm. 29).

49. The Florida seminar ad made false statements, the most egregious of which was "You could have made 700% with our trading system." Respondents Global and Ownbey admit that the 700% claim is false. (DOE Ex. 5; GO Adm. 29-30).

50. Ownbey testified that a "professional seminar person" hired by Global prepared the Florida seminar ad. Ownbey did not review the ad before it ran. He testified that the ad's preparer was fired as a result of the ad. (TT @ 898-99).

51. Global maintained a website at http://www.4gti.com. It too contained false statements, including "Learn how we can make you over 300% profit per year on a 'small investment'." (DOE Ex. 12A and 12B).

52. The aforementioned 300% per year performance claim is unsupported by DEN's actual results. In his deposition testimony, Ownbey admitted that none of his clients made over 300% in a year. (TT @ 924). Mazza's trial testimony indicated "...in no year was there ever a 300% return for the year." (TT @ 36). Koprowski also testified that the claim of 300% profit in one year was false by any measure. (TT @ 286).

53. Ownbey testified that the website was "a compilation of all of the promotional materials that had been used previously" and that he "put it together." However, Ownbey disclaimed responsibility for the performance numbers on the website. (TT @ 897-898).

54. Via letter dated May 10, 1999, addressed to Caulkins, Mazza recommended that Global remove its 300% per year performance claim, as it might be construed as "high pressure and misleading." He also made fourteen (14) other suggestions for improving disclosure, transparency, and truthfulness on the website. (DOE Ex. 19).

55. Mazza shared his analysis of the website with Ownbey. (TT @ 36-37). Pennings testified that Ownbey was responsible for creating the website, and Caulkins testified that Ownbey and his father were responsible. (TT @ 121, 222).

56. As of October 25, 1999, Global continued to make the false "300% profit per year" claim on its website, despite Mazza's warning. (DOE Ex. 12B).

57. Global ran a series of advertisements promoting Pro-Managed in the August, September, October, November, and December, 1998, issues of Futures Magazine and the October, November, and December, 1998, issues of Stocks and Commodities Magazine.[11] (DOE Ex. 3A-3E (Futures), 4A-4C (Stocks and Commodities)).

58. Pennings testified that Ownbey was "primarily responsible" for creating Global's magazine advertisements, (TT @ 117); that Ownbey was "primarily" responsible for updating the advertisements, (TT @ 118); and that Ownbey prepared the information folder sent to prospective clients, (TT @ 122-123).

59. The ads were of two types: (1) those claiming "OVER $48,000 IN REAL TIME PROFITS OVER THE LAST 12 MONTHS!" (August, September, October, and November, 1998, issues of Futures and October and November, 1998, issues of Stocks and Commodities) (the 48K ads); (2) those claiming "OVER $66,000 IN REAL TIME

[11] Ads also ran in the February and March, 1999, issues of Futures Magazine; these are not treated in this Opinion. (DOE Ex. 3F, 3G).

PROFITS IN THE LAST 23 MONTHS" (December 1998 issues of Futures and Stocks and Commodities) (the 66K ads).

60. The 48K ad also existed in the form of a promotional flyer. The flyer's format was not identical to that of the magazine ads, but the substantive content, particularly the financial performance claims, was similar. (DOE Ex. 6).[12] The Court treats the 48K flyer and ad's financial performance claims as one for purposes of discussion.

61. Numerous Global clients testified to receiving the 48K flyer or seeing the ad and being attracted to Pro-Managed by them. Ownbey solicited Watkins via telephone and then sent him the 48K flyer; Stroda[13] received a 48K flyer in July 1998, and called the number provided; Grivel[14] received a 48K flyer in late June or early July 1998 and was enticed; Duryea saw the 48K ad in February 1999, in an old magazine, and called the number provided; Reed saw the 48K ad in the October 1998 issue of Futures Magazine, contacted Global, and received materials which included another copy of the ad; Jones also saw the 48K ad in Futures Magazine and contacted Global. (TT @ 671-672; 633-634; 697; 338-339; 468, 513-514).

62. Some of Global's 48K and 66K ads[15] posed the question "Why go with GTI [Global]," and answered, "We are a registered CTA with an outstanding track record."[16] (DOE Ex. 3B, 3C, 3D, 4B, 4C). The claim is misleading in several respects:

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[12] Refer to footnote 16 for comments on a version of the 48K flyer different from DOE Ex. 6.

[13] Refer to footnote 16 for comments on the 48K flyer received by Stroda.

[14] Refer to footnote 16 for comments on the 48K flyer received Grivel.

[15] The 48K flyer marked as DOE Ex. 6 posed the same question and offered the same answer. Of the magazine ads, only those cited in the body of Finding 62 contain the statement in question.

63. Global began operating as a CTA in March 1998; the flyer was first distributed no later than July 1998, and the ad was published by September 1998. (Supra). Therefore, Global claimed "an outstanding track record" when it had been in business for only four to six months.

64. If "outstanding track record" refers to the business of selecting CTAs and distributing their trading recommendations, then Global was claiming an "outstanding track record" when it had only worked with a single CTA, DEN. (Supra).

65. If "outstanding track record" refers to Global's own trading account, then, it was making the claim at a time when its account was performing poorly. During the second half of 1998 (August-December), when eight of the ten magazine ads in evidence were published, Global's proprietary account lost consistently: over $1,200 in August; over $1,800 in September; and smaller losses in October, November, and December. The $10,000 account was down to approximately $5,600 by the end of December. Although it was profitable for a period of time in 1999, by August 31, 1999, approximately one year after opening, the account was down to $398.42. (RO Ex. 12; GO Adm. @ 28).

66. If "outstanding track record" refers to Global or its principals' experience in directing trading for customer accounts, then the claim conflicts with the admission that "neither [Global] nor any of its principals had a previous track record for directing trading for any customer accounts...." (GO Adm. @ 27).

67. Some of Global's 48K ads state "The best of the best," telling the reader "you receive your signals from one of the top [CTAs]...in the world." (DOE Ex. 3A, 3B, 3C, 4A, 4B). If the CTA in question is Global, then findings similar to those of 63-67

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[16] DOE Stroda Ex. 1 and DOE Grivel Ex. 1, representing a different version of the 48K flyer, answer the question with "Not only do we make huge profits for our customers, but we will prove it." In this respect, it is distinct from the magazine ads and the 48K flyer labeled as DOE Ex. 6. The performance data is the same, however.

apply. If the referenced CTA is DEN, then such a broad characterization of DEN as CTA invites consideration of his entire trading record, not just his pork belly trades.[17]

68. In 1998, when the magazine ads referenced in FF 67 were published, DEN's Domestic Fundamentals Program registered a loss of over thirty-five percent, including losses in seven out of twelve months. And, the Domestic Fundamentals Program suffered losses during three of the four months in which these ads were published (-Aug., -Sept., +Oct., -Nov.), as well as losses in the month preceding publication (July). (DOE Ex. 10B).

69. The most prominent feature of both the 48K and 66K ads is their performance claims and data. The top of the 48K ad/flyer reads:[18]

OVER $48,000
IN REAL TIME PROFITS
OVER THE LAST 12 MONTHS!

**Performance from April 1997 to April 1998**

Number of trades: 35
Average gain per trade: $1,379.17
Most consecutive gaining months: 7
Most consecutive losing months: 1
Suggested starting account size: $10,000
Average monthly gain: $4,022.58

[17] This highlights an additional deficiency in all the magazine ads: they do not disclose that the touted performance results and data are those of DEN, not Global. Indeed, it is impossible to discern the referent—Global or DEN—in any of the ads cited in FF 67, whether the claims be quantitative or qualitative. The reasonable reader might assume that they refer to Global, as no other entity or person is mentioned. However, given that the touted period invokes much of 1997, but Global did not commence operations until 1998, the reasonable assumption is mistaken. Regardless of the referent, the claims in the ads noted in FF 67 are misleading for a variety of reasons, as set forth in FF 62-68.

[18] This is not an exact reproduction of the font sizes and types in the originals; however, it is a reasonable representation.

70. It is undisputed that the DEN results upon which Global based its '$48,000 in twelve months' claim were predicated on an initial investment of $20,000. (DOE Ex. 10A; TT @ 283). This is not stated anywhere in the ad or flyer.

71. The 48K ad/flyer, taken as a whole, creates the impression that the touted results (assuming, *arguendo*, their truth) were achieved with an initial investment of $10,000. Simple calculations, assuming *arguendo*, the truth of the data, demonstrate the point:

Number of trades: 35
Average gain per trade: $1,379.17
Most consecutive gaining months: 7
Most consecutive losing months: 1
Suggested starting account size: $10,000
Average monthly gain: $4,022.58

Fig. 1 (from the top portion of the ad)

(35 trades in 12 months) *X* ($1,379.17 Avg. gain per trade) =

**$48,270.95 gain over 12 months.**

(12 months) *X* ($4,022.58 Avg. gain per month) =

**$48,270.96 gain over 12 months.**

72. The performance history provided in the ad/flyer suggests $48,000 in twelve months, both directly and indirectly. The reader, considering the given history and the corresponding $48,000 profit claim, could easily conclude that the statement "Suggested starting account size: $10,000" represents the actual amount of investment which yielded a $48,000 profit in twelve months.

73. Reed, a client of both Global and RB&H, testified that upon reading the 48K ad, he concluded that the touted profit was based on an investment of $10,000. (TT @ 468). He also testified that Pennings specifically told him that the results were based on an investment of $10,000. (TT @ 472).

74. The Court finds that, as a question of fact, the 48K ad/flyer suggested an investment of $10,000 yielded over $48,000 in profits in a twelve- month period.

75. The performance claim and history of the 66K ad read as follows:[19]

OVER $66,000
IN REAL TIME PROFITS
IN THE LAST 23 MONTHS

Number of Winning trades: 34
Number of Losing Trades: 10
Suggested Starting Account Size: $10,000
Gross Realized Profit/(Loss): 66,719.00
Average Winning Trade: $2,756.03
Average Losing Trade: (2,698.60)
Percentage of Winning Trades: 77.27%
Percentage of Losing Trades: 22.73%

76. The performance history provided here is different from that of the 48K promotion, but the effect is the same. The reader, considering the given history and the corresponding $66,000 profit claim, could easily conclude that the statement "Suggested starting account size: $10,000" represents the actual amount of investment which yielded a $66,000 profit. Again, simple calculations, assuming, *arguendo*, the truth of the data, demonstrate the point:

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[19] Again, this is not an exact reproduction of the font sizes and types in the originals; however, it is a reasonable representation.

(34 Winning Trades) *X* ($2,756.03 Avg. Winning Trade) = *$93,705.02 in Profits*

(10 Losing Trades) *X* ($2,698.60 Avg. Losing Trade) = *$26,986 in Losses*

*$93,705.02 in Profits - $26,986 in Losses =*

**$66,719.02 Net Profit.**

77. The Court finds that the 66K ad suggests a $10,000 investment yielded over $66,000 in profits over twenty-three months.

78. Global provided its prospective clients with Disclosure documents which would permit them to discover, if sufficiently diligent and/or sophisticated, that the touted results were based on an investment of $20,000, not $10,000. However, as noted infra, these were often unexplained, downplayed, or contradicted to such an extent that they cannot compensate for the false impressions created by Global's promotions.

79. Global client Duryea testified that Caulkins downplayed the risk attendant to Pro-Managed, (TT @ 342), that no one explained the Disclosure Documents to him, (TT@ 357), and that Caulkins described other documents[20] as "a bunch of mumbo jumbo," saying, "just don't worry about it. Everything has been taken care of." (TT @ 395).

80. Global client Grivel testified that Caulkins told her, "just because they say that [past performance may not be indicative of future results] and they have to put that on every form doesn't mean that we are not going to be profitable. There was money to be made." (TT @ 722).

[20] The document in question here is RB&H Ex. 4, Duryea's RB&H Customer Application. (TT @ 393).

81. Global client Reed also testified that no one explained the Disclosure Documents to him, and as noted supra, Reed also testified that Pennings told him that the $48,000 result was based on a $10,000 investment. (TT @ 477, 472).

82. Suggested starting account size aside, the Division questions the veracity of the performance claims in other ways.

83. As explained infra and in the attachments, the claim of "OVER $48,000 IN...PROFITS OVER THE LAST 12 MONTHS!" is misleading because it makes selective use of the performance results and data available to Respondents.

84. In April 1997, DEN's pork belly trading suffered a loss of over $20,000, its largest monthly loss. (DOE Ex. 10A). Respondents chose to present in the 48K promotions the first twelve-month period (May 1997 to April 1998, both included)[21] from which they could exclude the April 1997 loss, thereby greatly boosting the profits they could claim. (Attachment 1).

85. Although they had numerous twelve and twenty-three month periods at their disposal for their 48K promotions, Respondents chose to present only the one twelve-month period that yielded the best results.

86. When the 48K flyer was compiled, Respondents had available to them data sufficient to report at least ten other twelve-month periods. Subsequent distributions of the 48K promotion, whether in the form of flyers or magazine ads, were not updated to make use of new data as it became available. Had Respondents utilized the other

[21] Respondents argue that the twelve months "from April 1997 to April 1998" touted in the promotions should be read to *exclude* the month of April 1997 but *include* April 1998. The most obvious result is that it permits Respondents to exclude April 1997's $20,000 loss from their calculations. For the sake of simplicity, the Court makes use of Respondents' convention, without necessarily accepting it. The genuine issue is this: even if there was some *single* twelve-month period with profits of approximately $48,000, that single period is not representative of the overall performance record. (FF 83-87).

reporting periods available to them, or updated their results, they would have been obligated to acknowledge substantially poorer performance. (Attachment 1).

87. The 48K promotions claimed a twelve-month result[22] that was approximately 79% better than the average of results for the ten other twelve-month periods available to Respondents[23] (average of twelve-month periods = $26,848). It was approximately 134% better than the poorest of the ten other available periods (worst twelve-month period = $20,505), and approximately 35% better than the next-best of the ten available periods (next-best twelve-month period = $35,664). (Attachment 1).

[22] Note that the twelve-month period touted by Respondents actually yielded $47,551, not "over $48,000." See Attachment 1.

[23] Available at the time the promotion was compiled. See Attachment 1.

## DISCUSSION

### Respondents Global and Ownbey Violated Sections 4b(a)(i) and 4b(a)(iii) of the Act.

Section 4b[24] of the Commodity Exchange Act (CEA) mandates a broad prohibition against fraudulent or deceitful conduct in futures transactions and their appurtenances. The range of proscribed behaviors is as expansive as the prohibitions are plain: it is unlawful to cheat, defraud, make false statements, or deceive by any means whatsoever in connection with futures transactions for or on behalf of any other person. Attempted fraud or deception is likewise prohibited.

The elements of a 4b violation in an administrative enforcement action are well established. "To prevail...the Division must prove only that the respondents made, in connection with commodities transactions, material misrepresentations or omissions of fact, and that they did so with scienter." In re Slusser, [1998-1999 Transfer Binder] Comm. Fut. L. Rep (CCH) CFTC ¶ 27,701 at 48,311 (CFTC July 19, 1999), aff'd in part and rev'd in part on other grounds, 210 F.3d 783 (7th Cir. 2000).

The aforementioned elements, although derived from those of fraud at common law, are not identical thereto. See Id. More specifically, Section 4b foregoes the

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[24] Section of 4b reads, in pertinent part:

(a) It shall be unlawful...
(2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made, or to be made, for or on behalf of any other person...
(i) to cheat or defraud or attempt to cheat or defraud such other person;
(iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract...

common law's requirements of reliance and damages. "The Commission has...held consistently that in an enforcement action, the elements of 4b fraud do not include either investor reliance or actual damages." Id. Respondents fail to accord these distinctions sufficient weight.

The Commission first held that reliance is not an element of Section 4b fraud some 10 years ago. What was first noted then remains true today:

> Congress intended...to forbid attempts to deceive or to defraud. Requiring proof of reliance would be at odds with the plain language of the statute, for attempted frauds by definition do not involve a completed act, and therefore reliance cannot be an element of a charge of attempted fraud. In re GNP Commodities, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC August 11, 1992), aff'd in part and rev'd in part on other grounds *sub nom.*, Monieson v. CFTC, 996 F.2d 852 (7th Cir. 1993).

Likewise, it is well settled that damages suffered are irrelevant to Section 4b. "Since the concern of enforcement [actions] is curtailing wrongful conduct, the fact that someone was not actually injured does not negate the fact that fraudulent conduct was engaged in." PHILLIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, COMMODITIES REGULATION § 5.08[17] n.821 (3rd ed. 2001).

Accordingly, in evaluating the instant allegations of 4b fraud, the Court considers only whether the Respondents made (1) material misrepresentations, omissions or false statements, (2) with scienter, and (3) in connection with the making of a contract for the sale of any commodity for future delivery for or on behalf of any other person. We are unconcerned with whether customers' investments proved profitable or ruinous; whether they were enticed by a single promotional item or a confluence of representations; or

whether customers, if sufficiently diligent and/or sophisticated, could have discovered on their own that which Respondents should have made clear from the outset.[25]

1) Material Misrepresentation or Omission

This first prong of our inquiry is a "mixed question of law and fact." Sudol v. Shearson Loeb Rhoades Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119 (CFTC September 30, 1985). The Court, as trier of fact, is "uniquely competent to make the materiality determination, as it requires a delicate assessment of inferences a reasonable [investor] would draw from a given set of facts and the significance of those inferences to him." Id. (citations omitted). The materiality determination is independent of any investor specific to the instant case. "[T]he appropriate perspective," then, is "that of a reasonable potential investor." Hammond v. Smith Barney, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,657 (CFTC March 1, 1990) (citations omitted) (emphasis added).

The Court looks to the overall impression imparted to the reader. As a consequence, we are concerned not only with false or misleading statements, which may generally be easier to identify, but also with omissions. These may serve to perpetrate a fraud just as effectively as a straightforward lie. Half-truths "may obviously amount to a lie if [they are] understood to be the whole." Swickard v. A.G. Edwards and Sons, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,522 at 30,725 (CFTC March 7, 1985). Likewise, half-truths may amount to a lie if they result in an inaccurate portrayal of the whole.

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[25] Although reliance is not relevant in determining whether a Section 4b violation took place, it is relevant when considering sanctions, particularly restitution.

Materiality, be it in a misrepresentation or an omission, hinges upon whether the proverbial reasonable potential investor (RPI) "would have considered the information important in making a decision to invest." In re R&W Technical Services, Ltd., [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,741 (CFTC March 16, 1999) (citations omitted), aff'd in part rev'd in part, 205 F.3d 165 (5th Cir. 2000), cert. denied 531 U.S. 817 (2000). In turn, information qualifies as 'important' if the RPI "would regard the fact as significantly altering the total mix of information available" to him. Sudol at 31,119 (citations omitted).

In the instant case, it is obvious that Global's promotional materials contained misleading statements. These are articulated in the Findings of Fact (FF), and need not be repeated in their entirety here; however, a few of the more egregious do deserve mention. For example, the Florida seminar promotion touted a 700% return; although they attempt to disclaim responsibility, even Respondents admit that this extravagant claim was untrue. (FF 49). Global's website, in turn, claimed '300% profit per year.' It is clear that Pro-Managed never achieved a 300% return in a single year. (FF 52). Likewise, Global could not credibly claim an 'outstanding track record' when it had been in business only a matter of months, had worked with only a single CTA, had a proprietary account that lost almost its entire value in a single year, and no one associated with the company had previously directed trading for customer accounts. (FF 62-66).

Global's omissions are as glaring as its misleading statements. Clearly, reporting only one's best result, and ignoring numerous others, is misleading to the extent that the best result is an anomaly. Yet, that is exactly what Respondents did in their 48K promotion. (FF 83-87).

Likewise, one cannot proclaim in large, bold print "OVER $48,000 IN REAL TIME PROFIT OVER THE LAST 12 MONTHS!" and beneath that state "Suggested starting account size: $10,000," and then dump upon prospective clients the responsibility of investigating a voluminous collection of disclosure and other documents to discover that the $48,000 profit actually required $20,000 to start, not the "suggested" $10,000. If Respondents were responsible for creating this confusion—and they were—then they also bore responsibility for its clarification. (FF 69-74 for 48K; 75-77 for 66K).

Should there be any question as to whether this confusion was real, the trial testimony of Anthony Reed, a client of both Global and RB&H, proves instructive:[26]

Q: Could you tell me what this document is?
A: This is an advertisement that I saw in Futures Magazine that was sent to me in the mail free of charge.
Q: Okay. And when did you see this document?
A: It was October of 1998.
**Q: And what is it about this ad that made you take an interest in Global?**
**A: ...The second thing that caught my attention was that they made a profit of $48,000 on a $10,000 account over twelve months. And I thought that was pretty good. That was over 500 percent return of money.**

On cross-examination, the same witness testified:

Q: ...And you said that one thing you noticed on that was—that impressed you was the ability to make $48,000 on a $10,000 account, correct?
A: Correct.
**Q: And it is true, isn't it, that this Exhibit 6 never says that the $48,000 was made on a $10,000 account, does it?**
**A: It sure suggested it.**

Indeed, Reed's experience evinces many of the faults present in this case. He saw the 48K ad in Futures Magazine and believed the results were based on an initial

[26] Reed invested in Pro-Managed and opened an account with RB&H in November 1998 with a $10,000 investment.

investment of $10,000, (FF 73);[27] furthermore, his belief was confirmed directly by Pennings, a Global AP, (FF 73); then, he was encouraged to open an account with RB&H, was told that Global was registered with RB&H, that the FCM was aware of the Pro-Managed program, and that it could execute orders more quickly, (FF 33); and, he granted discretionary trading authority to an AP of RB&H only, without being given an explanation as to the document or told that the AP worked for RB&H, not Global. (FF 38).

It is true, as Respondents argue, that documents provided to potential clients disclosed that the DEN results were premised on an initial investment of $20,000. (FF 78). However, this Court does not believe that industry participants may claim to cure misleading statements and omissions such as those in the 48K and 66K promotions, made in large, prominent print, with disclosures that may be buried in lengthy documents or easily overlooked. See Hammond at 36,657 ("The Judgment Officer's holistic approach to the analysis of [the] solicitation is consistent with Commission precedent."). A potential investor will not be required to correct, by his own efforts, the omissions, untruths and half-truths told by those looking to profit from him.

Furthermore, there is evidence that the disclosure documents and warnings were, on more than one occasion, dismissed entirely by a dual-registered AP, and that the potential of Pro-Managed was oversold. (FF 78-81). This Court shares the 11th Circuit's "seriou[s] doubt" as to "whether boilerplate risk disclosure language could ever render an earlier material misrepresentation immaterial...," particularly where there is evidence that the "APs intentionally diluted the effectiveness of any such risk disclosures." CFTC v. Sidoti, 178 F.3d 1132, 1136, (11th Cir. 1999).

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[27] Of course, the initial investment size is only *one* of the ad's shortcomings in complete candor. As discussed in the Findings of Fact, the claim of $48,000 in profits is itself misleading.

The only remaining question is whether Respondents' misleading statements and omissions were material. Numerous DOE witnesses testified that they were drawn to Pro-Managed and invested because of Global's misleading promotions. (FF 61, 73, 79-81). Extensive discussion is not needed to conclude that proclaiming investment returns that were never achieved, (FF 49, 51-52); downplaying risk, (FF 78-81); misleading the potential investor as to the starting capital required to achieve a particular return, (FF 73, 74, 77, *etc.*); mischaracterizing prior industry experience and track record, (FF 62-68); and selectively reporting performance results, (see generally, FF 70-87), are all material items.

Accordingly, the Court finds that Global's promotional activities were rife with material misrepresentations and omissions.

2) With Scienter

Having already found that Respondents' marketing materials contained materially misleading statements and omissions, we now turn to the second element of the offense, scienter.

"Scienter is established by showing that the respondents' acts were committed intentionally or with reckless disregard for their duties under the Act." Slusser (CFTC) at 48,314 (citations omitted). 'Intentional' requires no explanation; 'recklessness' "departs so far from the standards of ordinary care that it is very difficult to believe that the [actor] was not aware of what he was doing." R&W Technical Services (CFTC) at 47,743 (citations omitted). Regardless of whether the behavior is intentional or reckless, neither "evil motive [nor] specific intent to injure...are required to establish the requisite scienter." Id.

In the instant case, the Court finds that Respondents' possessed the requisite scienter "based on inferences drawn from circumstantial evidence." Slusser (CFTC) at 38,314.

As detailed in the Findings of Fact, (FF 82-87; Attachment 1), Respondents' selective reporting of past performance is so carefully calibrated to yield the best returns that the Court cannot believe it was mere coincidence. An intentional effort by Respondents to exclude less flattering results is the most logical explanation for the clear pattern that emerges upon careful examination of the data.

For example, when confronted by the Division with one of their more obvious manipulations, Respondents turn to semantics and argue that the twelve months "from April 1997 to April 1998" should be read as excluding results for April 1997, *i.e.*, starting the count in May 1997, and counting through April 1998. This counting method's legitimacy aside, the benefit is clear: it permitted Respondents to purge a loss of over $20,000 (suffered in April 1997) from the returns they promoted. (FF 84, Attachment 1).

In preparing the 48K promotion, Respondents could have reported numerous other twelve-month periods, but they chose to use only one. They could also have reported on a single longer cumulative period. Either of these options would have forced Respondents to acknowledge markedly inferior results. (FF 84-87). Indeed, the $48,000 claim was approximately 79% better than the average of the all the twelve-month periods available to Respondents (FF 87, Attachment 1).

Other misleading statements, including the flyer promoting a 700% return and the website promoting a profit of 300% per year are so far removed from the truth that they could not have been accidental. (FF 49-56). Statements relating to Global's track record

are so unsubstantiated that, if not intentionally misleading, then they were certainly reckless. (FF 62-66).

Accordingly, the record fully supports the conclusion that Respondents' misrepresentations and omissions were made with scienter.

3. In or In Connection With / For or on Behalf Of

This prong of the analysis is disposed of easily. The Court is guided by a "legislative history indicat[ing] a progressive trend toward broader application of the CEA," and mindful that "Congress recognized that fraudulent conduct may occur during the solicitation of potential customers, and intended the CEA to protect investors in this regard." Saxe v. E.F. Hutton & Co., et al., 789 F.2d 105, 111 (2nd Cir. 1986). See also R&W Technical Services (CFTC) at 47,743.

Through its APs—who were also company principals and officers—Respondent Global promoted a system for trading in what is perhaps one of the quintessential commodity markets—pork bellies. It solicited business for itself and RB&H, the FCM with which it had a special relationship; it secured trading signals for clients; relayed these to them; secured discretionary accounts for RB&H; downplayed the risk of loss; overplayed the probability and quantity of gain; and more. Respondent Global undoubtedly satisfies this last element of the Section 4b inquiry.

Respondent Ownbey is as implicated in the behavior offensive to Section 4b as is the company he led. Ownbey's business associates testified that he was responsible for creating Global's website, and Ownbey at least admitted to "putting it together." (FF 55, 53). Likewise, Ownbey's associates testified that he was primarily responsible for creating and maintaining the magazine ads, and for preparing the packets sent to potential

clients. (FF 58). It is clear that Ownbey spoke with and solicited clients, (FF 33, 61); recommended that they open accounts at RB&H, (FF 33); and suggested a discretionary account which, unbeknownst to the client, rested with an AP of RB&H, (FF 39).

In sum, the Court finds that Respondents Global and Ownbey made material misrepresentations and omissions, with scienter, and in connection with commodities transactions for and on behalf of others. Accordingly, Respondents Global and Ownbey are hereby found to have violated Sections 4b(a)(i) and 4b(a)(iii) of the Commodity Exchange Act.

**Respondents Global and Ownbey Violated Section 4o(1)(A) of the Act and Commission Regulation 4.41(a).**

Section 4o of the Commodity Exchange Act expressly subjects commodity trading advisors (CTAs) to many of Section 4b's general prohibitions. Simply stated, "fraudulent transactions [are] prohibited." § 4o (Title). More specifically, it is "unlawful" for a commodity trading advisor, "directly or indirectly," (A) "to employ any device, scheme, or artifice to defraud any client...or prospective client." Reg. 4o(1)(A).

The aforementioned language has been interpreted in a most straightforward manner: "[i]f the trading advisor...intended to do what was done and its consequence is to defraud the client or prospective client, that is enough to constitute a violation of Section 4o." Slusser (CFTC) at 48,315 (citations omitted) (emphasis added).

The same conduct that violates Section 4b may also violate Section 4o(1). See CFTC v. Skorupskas, 605 F.Supp 923, 932-33 (E.D. Mich. 1985). "The analysis for determining a violation of Section 4o is essentially the same as that for establishing a violation of Section 4b," with the exception that Section 4o contains no explicit 'in

connection with' requirement," thereby relaxing the legal standard. Slusser (CFTC) at 48,315.

Accordingly, the Court's consideration of Counts Two and Three is necessarily straightforward: "where the record establishes that the respondents engaged in fraudulent conduct in violation of section 4b," as in the instant case, "the Division has...surpassed its burden of proof with respect to section 4o." Skorupskas at 932-933.

Regulation 4.41(a), as it applies to CTAs or any principal thereof, proscribes advertisements that "employ any device, scheme, or artifice to defraud any...client or prospective... client...or involves any transaction, practice, or course of business which operates as a fraud or deceit upon any...client or prospective...client." Reg. 4.41(a) (emphasis added).

Where the Court finds that Respondents "violated Section 4o of the Act, it [may also] find that they violated...4.41(a)." R&W Technical Services, (CFTC) at 47,745. "The conduct...that violates...4.41(a) is the same conduct that violates Sections 4b and 4o of the Act: making fraudulent misrepresentations in...advertising." Id.

Accordingly, having found that Respondent Global violated Section 4b(a) of the Act, and because Global is by its own admission a CTA, "further analysis is not needed" to find that Global also violated Section 4o(1) of the Commodity Exchange Act and Commission Regulation 4.41(a). Id.

**Respondent Global Violated Section 6(c) of the Act.**

Where a "person...has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission," the Commission "may serve upon such person a complaint stating its charges in that respect."[28] § 6(c).[29] Knowingly false representations constitute a violation of Section 6(c). See In re Paragon Futures Ass'n, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,851 (CFTC April 1, 1992).

The Parties debate Ownbey's status during an approximately eight-month period, from March 18, 1998, when Global filed a Form 8-T purportedly terminating Ownbey as a principal, to November 9, 1998, the date on which Ownbey filed a Form 3-R reinstating himself as principal. However, as set forth in the Findings of Fact, Ownbey's status is in question only from March 18 to June 15, 1998. Throughout the rest of the relevant time period, Ownbey was, *de jure*, a Global principal.[30] (FF 14-17).

Global and Ownbey claim that the latter's termination as principal was *bona fide*, but they are utterly lacking in credibility. They offer so many different versions of events that they can no longer keep them straight. At different times and in different documents, it is asserted that Ownbey:

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[28] "The term 'person'...includes...corporations." § 1a(28).

[29] Paragon Futures Ass'n makes reference to Section 6(b); Sec. 209(a), P.L., 102-546, 106 Stat. 3590, 3606 amended Section 6(b) by designating it as the current 6(c). See Comm. Fut. L. Rep. (CCH), Vol. 1, ¶ 7955.001 at 7622 (October 1994).

[30] Commission Regulations 3.1(a) and 3.1(a)(1) define principal, "with respect to...a registrant" as "any person...having the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over [the registrant's] activities which are subject to regulation by the Commission." Titles matter not; only Ownbey's continued controlling influence is relevant to this determination.

(a) was not a principal from March 18 to June 15 1998,
(DOE Ex. 1B together with 1C);
(b) was a principal from June 15 to Nov., 1998,
(DOE Ex. 1C; page 4, last ¶ of DOE Exs. 2D, 2E, 2F); and
(c) did not change in status from March 18 to Nov., 1998,
(GO Adm. 39).

Clearly, these three claims cannot all be true.

The language of DOE Exhibits 2D, 2E, and 2F is instructive: "In June 1998, Mr. Ownbey became the president, a principal, and registered associated person of ...[Global]" (emphasis added). This is in accord with DOE Ex. 1C, (Form 3-R) whereby Ownbey reinstates himself as a Global principal (and president)—although the document is signed November 18, 1998, the effective date is June 15, 1998. (FF 14).

Also damaging to Ownbey's credibility is the fact that he cannot recall what he did with his Global stock, some 40% of the outstanding shares, after his supposed termination as principal. (FF 20).

Moving on to Ownbey's *de facto* status during the brief period from March 18 to June 15, 1998, the Court notes Ownbey's extensive and leading role in Global prior to his supposed termination. It was Ownbey that devised the Pro-Managed concept and approached Pennings and Caulkins with the plan. (FF 3). He used his father's dormant corporation as the vehicle and became the single largest shareholder of the reconstituted Global. (FF 4, 5). It was Ownbey who selected DEN as the CTA to generate Pro-Managed's trading signals, (FF 7), and it was Ownbey who contracted Mazza to perform Global's registration and compliance work. The Court is hard-pressed to believe that Ownbey at any time truly walked away from his company and ceased to exercise a controlling influence. However, it is the case that Global benefited from the *appearance* of termination, since felony charges pending against Ownbey were delaying the firm's registration and the start of its business. (FF 12).

Furthermore, the testimony of his associates makes it clear that Ownbey retained a controlling influence over Global throughout the relevant time period. Pennings, Caulkins, and Mazza all testified to Ownbey's continued authority or unchanged role throughout, *de jure* termination as principal not withstanding. (FF 21-23).

Accordingly, the Court concludes that Ownbey was a Global principal throughout the relevant time period, and that Global violated § 6(c) of the Act by filing a Form 8-T to the contrary.

**Respondent Global is Liable for Respondent Ownbey's Violations of Sections 4b(a)(i) and 4b(a)(iii) of the Act.**

Section 2(a)(1)(B) of the Act reads, in pertinent part:

> the act, omission, or failure of any official, agent, or other person acting for any...corporation...within the scope of his employment or office shall be deemed the act, omission, or failure of such...corporation....

This is a simple determination. The Court has already found that, throughout the relevant time period, Ownbey was a *de facto* Global principal, and for much of it, he was a *de jure,* principal and president as well. (Supra). Furthermore, Ownbey's work with Pro-Managed was central to his role at the company, involving everything from conceiving the idea, to advertising it, to soliciting clients. (Supra). The Court has also found that Ownbey violated Section 4b. No more is required to find Global liable, pursuant to Section 2(a)(1)(B), for Ownbey's violations Sections 4b(a)(i) and 4b(a)(iii) of the Act.

**Respondent Ownbey is Liable for Respondent Global's Violations of Sections 4b(a)(i), 4b(a)(iii), 4o, and 6(c) of the Act, and Commission Regulation 4.41(a).**

Section 13(b) of the CEA goes beyond the corporate entity, reaching to those who, although in control of its actions, seek to disclaim responsibility. 13(b) reads, in pertinent part:

> Any person who, directly or indirectly controls any person who has violated any provision of this Act or any of the...regulations...issued pursuant to this Act may be held liable for such violation...to the same extent as such controlled person. [Provided] the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.

The Commission has found that "a fundamental purpose of Section 13(b) is to allow [it] to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals...." In re Apache Trading Corp., [1990-1992 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 25,251 at 38,794 (CFTC March 11, 1992).

This inquiry is as straightforward as the last. As already noted, supra, Global violated Sections 4b(a)(i), 4b(a)(iii), 4o, and 6(c), of the Act, and Commission Regulation 4.41(a). The Court has also found that, at all relevant times, Ownbey was a *de facto* principal of Global, retaining a controlling influence over the firm. (Supra).

Accordingly, pursuant to Section 13(b), Ownbey is liable, as a controlling person, for Global's violations of Sections 4b(a)(i), 4b(a)(iii), 4o, and 6(c) of the Act, and Commission Regulation 4.41(a).

**Respondent RB&H Violated Commission Regulation 166.3, and is Liable for Respondent Ownbey and Others' Violations of Sections 4b(a)(i) and 4b(a)(iii) of the Act.**

On March 10, 1998, via Forms 3-R signed by its vice-president, RB&H reported the 'multiple association' of Ownbey, Pennings, and Caulkins as APs of both it and Global. (FF 45). In doing so, RB&H accepted "that in addition to each sponsor's responsibility to supervise the associated person...each sponsor is jointly and severally responsible for the conduct of the associated person with respect to: (a) the solicitation or acceptance of customers' orders...(c) *the solicitation of a client's or prospective client's discretionary account*...(f) the associated person's supervision of any person or persons engaged in any of the foregoing solicitations or acceptances...with respect to any customers...common to it an any other...commodity trading advisor...with which the associated person is associated." DOE Ex. 1D, 1F, 1G. This conforms to the language of Commission Regulation 3.12(f), which governs the 'reporting of dual and multiple associations,' and imposes the aforementioned joint and several responsibility.

As noted in the Findings of Fact, at least nine customers solicited by Global opened discretionary accounts with RB&H. Most of these accounts were in the hands of an AP of RB&H only. (FF 37-39). A few others rested with the dual-registered APs. (FF 41). RB&H was aware of these discretionary accounts, (FF 40), just as it was aware of Pro-Managed and at least some of Global's promotional activities and magazine ads, (FF 42-43). Furthermore, it is undisputed that RB&H failed to review any of Global's promotional materials, including, by extension, those used in connection with the discretionary accounts. (FF 47).

The Findings also point to the special relationship between Global, RB&H, and the two firms' dual-registered APs. Global's offices were located within those of RB&H, and this space was provided free of charge, as were overhead expenses. (FF 30). The dual-registered APs profited from Pro-Managed both through direct compensation from Global and through commissions from RB&H. (FF 31). RB&H benefited as well. The dual-registered APs solicited accounts for RB&H, strongly encouraging their Pro-Managed clients to open accounts with the FCM, touting the close working relationship between Global and RB&H, and claiming that it would be to the clients' benefit. (FF 32-34). Fifty-nine of Global's seventy-four Pro-Managed clients did indeed open accounts with RB&H, yielding the FCM new clients, trades, and commissions. (FF 36). Some of these clients granted discretionary authority to the dual-registered APs, and others granted such authority to an AP of RB&H only. (37, 41).

In short, there is ample evidence to support the conclusion that RB&H is liable for the dual-registered APs' violations of Section 4b, pursuant to 2(a)(1)(B), cited supra. The Commission's case law accepts that "an agent may serve two principals, particularly where the two work in tandem." Ho v. Dohmen Ramirez, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,391 at 33,053 (CFTC November 21, 1986). It is reasonable to conclude that Global's free use of RB&H resources was premised on the business it would bring to the FCM, and not kindness of heart. Furthermore, it is clear that the dual-registered APs were "person[s] acting for" RB&H "within the scope of [their] employment" when they solicited business for it, solicitations for which they received commission payments from RB&H. See Reg. 2(a)(1)(B). These solicitations were "within the scope of [their] employment," and as such Section 2(a)(1)(B) requires that they "shall be deemed the act" of RB&H. (See FF 45). Global, RB&H, and the

dual-registered APs were all aware of the arrangement, aware of the services they were performing for their counterparts, and aware of the benefits they were receiving. (Supra). RB&H's specific knowledge of each misleading promotion is immaterial, since there is no requirement that a principal have particular knowledge of his agent's wrongs to be held responsible for them." Dohmen Ramirez at 33,053.

Accordingly, the Court finds that, pursuant to Section 2a(1)(B) of the Act, Respondent RB&H is responsible for Ownbey, Pennings, and Caulkins' violations of Sections 4b(a)(i) and 4b(a)(iii) of the Act.

Commission Regulation 166.3 imposes upon RB&H a duty to "diligently supervise the handling by its...employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its...employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant."

As noted supra, on March 10, 1998, RB&H reported the 'multiple association' of Ownbey, Pennings, and Caulkins as APs of both it and Global. In doing so, it undertook a "responsibility to supervise the associated person" and agreed to be "jointly and severally responsible for the conduct of the associated person with respect to: (a) the solicitation or acceptance of customers' orders...(c) the solicitation of a client's or prospective client's discretionary account," in conformity with Commission Regulation 3.12(f). (FF 45)

RB&H's admitted failure to supervise the dual-registered APs solicitation of discretionary accounts for RB&H, (FF 47), is a clear abrogation of the responsibility it

undertook in accepting Ownbey, Pennings, and Caulkins' dual registration, as well as an abrogation of its responsibility to "diligently supervise" "all other activities of its...employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant." Reg. 166.3.

Accordingly, the Court hereby finds that Respondent RB&H violated Commission Regulation 166.3 by failing to supervise Ownbey, Pennings, and Caulkins' solicitation of customer accounts for RB&H, including discretionary accounts.

## CONCLUSIONS OF LAW

1. Respondents Global and Ownbey violated, through fraudulent sales practices in connection with the Pro-Managed system, Sections 4b(a)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(i) and (iii) (1994). Respondents RB&H and Global are liable for Ownbey and others' violations of Section 4b, pursuant to Section 2a(1)(B) of the Act, 7 U.S.C. § 4 (1994). Ownbey is liable, as a controlling person, for Global's violations of Section 4b, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (1994).

2. Respondents Global and Ownbey violated of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (1994), as set forth above. Pursuant to Section 13(b) of the Act, Ownbey is liable for Global's violations of Section 4o.

3. Respondents Global and Ownbey, through fraudulent advertising in connection with the Pro-Managed system, violated Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a) (2000). Pursuant to Section 13(b) of the Act, Ownbey is liable for Global's violations of Regulation 4.41(a).

4. Respondent Global, by filing a false report as to Ownbey's status with the firm, violated Section 6(c) of the Act, 7 U.S.C. § 9 (1994). Pursuant to Section 13(b) of the Act, Ownbey is liable for Global's violations of Section 6(c).

5. RB&H violated Commission Regulation 166.3, 17 C.F.R. § 166.3 (2000), by failing to supervise its APs.

## SANCTIONS

Having found Respondents guilty of numerous violations of the CEA and the Commission's Regulations, it is necessary to consider the sanctions appropriate to Respondents' conduct. These should, of course, be "commensurate with the gravity of the violations." GNP Commodities Inc. (CFTC) at 39,221. The Division seeks the following sanctions:

1. Cease and Desist Orders

The Division first seeks Cease and Desist Orders against all three Respondents. This sanction is appropriate where there is "reasonable likelihood the conduct will be repeated," as suggested, *inter alia*, by a pattern of past conduct. Id. at 39,223. These circumstances are most certainly present in the instant case.

Respondents' violations were not isolated incidents, but rather an established pattern of conduct and business practice lasting well over a year. Furthermore, Respondents demonstrate a singular lack of appreciation for the nature of their violations. Throughout this proceeding they have appeared interested only in defending narrow, hyper-technical, or semantic positions, while ignoring their broader obligation to treat actual and potential investors with candor, forthrightness, and honesty. Accordingly, Cease and Desist Orders against all Respondents are fully warranted.

2. Trading Prohibitions

The Division next seeks Trading Prohibitions against Respondents Global and Ownbey. A trading prohibition is appropriate where "a nexus exists between respondents['] violations and the integrity of the futures market." In re Incomco, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,537 (CFTC December 30, 1991). Such a nexus is likely to exist where the wrongdoing is detrimental to the public's perception of the market. And, "public perception, protection, and confidence in our markets is more important to the CFTC's mission than the mechanical application of a technical nexus requirement." In re Miller, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 at 42,914 (CFTC June 16, 1995).

In the instant case, there is ample evidence that Respondents Global and Ownbey's false and misleading promotional materials were widely disseminated and formed the basis of many customers' decision to enter the futures markets. Accordingly, it is appropriate to prohibit Respondents Global and Ownbey from trading on or subject to the rules of any registered entity for a period of three (3) years.

3. Revocation of Current Registrations

The Division also seeks revocations of Respondents' Global and Ownbey's current registration. The findings of fraud made herein raise the presumption that Respondents are unfit for continued registration. See In re Gordon, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,181 (CFTC March 16, 1993). Respondents have not rebutted this presumption by "submitting evidence that continued registration will not pose a substantial risk to the public." Id. The Division is fully

justified in requesting the revocation of Respondent Global and Ownbey's current registration.

4. Restitution

In determining whether restitution is appropriate, the Court is to consider (1) the degree of complexity likely to be involved in establishing claims; (2) the likelihood that claimants can obtain compensation through their own efforts; (3) the ability of the respondent to pay claimants; and (4) the availability of resources to administer restitution. See Reg. 10.110. In the instant matter, these elements do not present a serious obstacle.

The Division seeks $303,000 in restitution from Respondents Global and Ownbey, with RB&H jointly and severally liable for $265,500 of the total. It avers that these amounts are based on the cost to Global's seventy-four (74) clients of purchasing the Pro-Managed system, and that RB&H's liability stems from the fifty-nine (59) customers who both purchased Pro-Managed from Global and opened accounts with RB&H. The Division suggests that the National Futures Association (NFA) administer any restitution award.

In light of Global and Ownbey's egregious violations of the Commodity Exchange Act and implementing regulations, as set forth above, and RB&H's liability for violations of Sections 4b(a)(i) and 4b(a)(iii) of the Act, the Court finds it probable that many Global customers are indeed entitled to restitution, with RB&H jointly and severally liable for awards made to Global clients who also opened accounts with RB&H.

The Court does not have sufficient information to make individual restitution determinations for all seventy-four Global clients who are potentially eligible, and does not believe it would be appropriate to single-out for payment those who are distinguished

only by the good fortune of having been called to testify by the Division. Accordingly, the Division shall, pursuant to Regulation 10.111, "petition the Commission for an order directing the Division to recommend to the Commission...a procedure for implementing restitution" through the NFA. Whatever form the procedure may take, it must require recipients to demonstrate purchase of the Pro-Managed system, reliance on Global and its APs' misleading promotions, and damages resulting therefrom.

Restitution awards, if any, shall be in the amount of $4,500 per Global client, and shall not exceed $330,000[31] in total. RB&H shall be jointly and severally liable with Global and Ownbey for awards made to Global clients who also opened accounts at RB&H. RB&H's liability shall not exceed $265,500.[32]

5. Civil Monetary Penalties

The Division requests that a Civil Monetary penalty totaling $220,000 be assessed against Respondent RB&H. This represents $110,000 for RB&H's violations of Commission Regulation 166.3 and $110,000 for its violations of Sections 4b(a)(i) and 4b(a)(iii) of the Act. Civil monetary penalties are intended to "further the Act's remedial policies and deter others in the industry from committing similar violations." R&W Technical Services, Ltd. (CFTC) at 47,718.

It would indeed be progress if violations of the type brought to light in these proceedings were eliminated from the industry. It must become clear to industry participants that candor is of the utmost importance in all interactions with the investing public, and that this obligation cannot be avoided. The Court believes the civil monetary

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[31] 74 Global clients (TT @ 292) multiplied by the $4,500 per client fee.

[32] 59 Global clients who opened accounts at RB&H (TT @ 292) multiplied by the $4,500 per client fee.

penalty of $220,000 requested by the Division against Respondent RB&H is fully warranted.

The Division also seeks civil monetary penalties, in the amount of $440,000 each, against Global and Ownbey. These Respondents are liable for restitution awards potentially totaling $330,000. Furthermore, their registrations have been revoked, they are under cease and desist orders, and under a three-year trading prohibition. The Court believes this is sufficient sanction. Accordingly, the Division's requests for civil monetary penalties against Respondents Global and Ownbey are denied.

## ORDER

Respondents Global Telecom, Inc., RB&H Financial Services LP and Cameron S. Ownbey are ordered to **CEASE AND DESIST** from violating the Commodity Exchange Act and implementing regulations in the manner described in the findings set forth above.

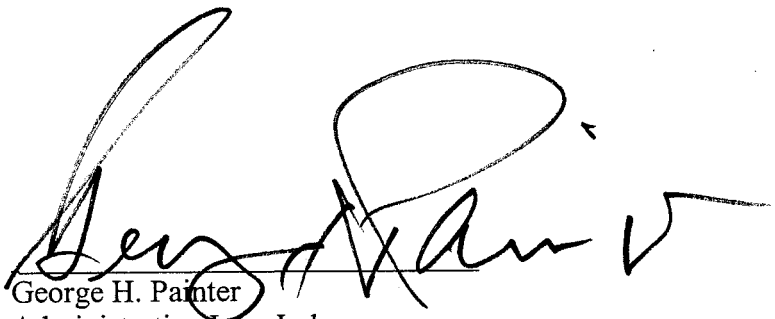
Respondents Global Telecom, Inc., and Cameron S. Ownbey are prohibited from trading on or subject to the rules of any designated futures exchange for a period of three (3) years from the date this decision becomes final.

The registrations of Global Telecom, Inc., and Cameron S. Ownbey are **REVOKED** effective the date this decision becomes final.

RB&H Financial Services LP is **ORDERED** to pay a civil monetary penalty of $220,000 within thirty (30) days after this decision becomes final.

***So Ordered.***

Issued this 17th day of January, 2003



George H. Painter
Administrative Law Judge

# THE $48,000 PROMOTIONS

| Month-Year | Pro-Forma Adjusted Net Performance (monthly) $ | Rolling 12-Month Results (12-months ending) $ | |
|---|---|---|---|
| *Jul-96* | -765 | | |
| *Aug-96* | 7,854 | | |
| *Sep-96* | 3,501 | | |
| *Oct-96* | 6,431 | | |
| *Nov-96* | -9,605 | | |
| *Dec-96* | -1,535 | | |
| *Jan-97* | 9,995 | | |
| *Feb-97* | -6066 | | |
| *Mar-97* | 11,510 | | |
| *Apr-97* | -20,136 | | |
| May-97 | 15,089 | | |
| Jun-97 | 7,414 | **23,687** | 1 |
| Jul-97 | 444 | **24,896** | 2 |
| Aug-97 | 11,829 | **28,871** | 3 |
| Sep-97 | 2,985 | **28,355** | 4 |
| Oct-97 | 470 | **22,394** | 5 |
| Nov-97 | 3,665 | **35,664** | 6 |
| Dec-97 | -1,940 | **35,259** | 7 |
| Jan-98 | 960 | **26,224** | 8 |
| Feb-98 | -11,785 | **20,505** | 9 |
| Mar-98 | 13,625 | **22,620** | 10 |
| Apr-98 | 4,795 | 47,551 | |
| *May-98* | -2,270 | **30,192** | |
| *Jun-98* | 6,500 | **29,278** | |
| *Jul-98* | 2,797 | **31,631** | |
| *Aug-98* | -1,610 | **18,192** | |
| *Sep-98* | -2,175 | **13,032** | |
| *Oct-98* | -470 | **12,092** | |
| *Nov-98* | -805 | **7,622** | |
| *Dec-98* | -820 | **8,742** | |

These reflect other 12-month periods available to Respondents.

May 1998 and subsequent months are included for illustration only. They demonstrate the extent to which the advertised period was an anomaly, relative not only to prior results, but also to those subsequent.

| | |
|---|---|
| Average of ten prior 12-month results | 26,848 |
| Performance from May 1997 to April 1998, "the last twelve months" as defined by Respondents | 47,551 (Period denoted by Roman type) |

1. Based on DOE Ex. 10A, "David Noyes Pork Belly Extracted Pro-Forma Prorprietary Performance Record for the Period July 1, 1996-January 31, 1999. "-" indicates loss.
2. Results are based on $20,000 to start.
3. Entries have been rounded to the nearest whole number.
4. Calculated using Pro-Forma Adusted Net Performance, column 11 of DOE Ex. 10A.
5. Respondents' 48K promotions identified their data as covering "Performance from April 1997 to April 1998." They argue that this should be read as beginning with with May 1997 and running through April 1998. The Court follows that reading for simplicity only. Note the result: a $20,136 loss in April 1997 is excluded from the reported period.

Attachment 1