

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

DANNY L. SCHECK,

Petitioner.

92-11; SD 93-13

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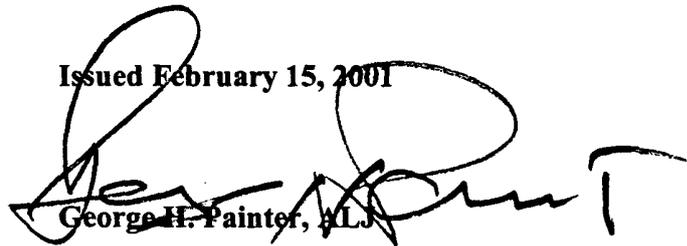
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CORRECTION OF TYPING ERROR

The citation "Section 4(b)" which appears at line 16, page 2 of the Initial Decision issued February 14, 2001 is corrected to read "Section 9(b)."

Issued February 15, 2001


George H. Painter, ALJ

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Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

DANNY L. SCHECK,
Petitioner.

92-11; SD 93-13

Appearances by:

On Behalf of Respondent, Danny L. Scheck:

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On Behalf of the Division of Enforcement:

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Commodity Futures Trading Commission
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Before: Painter, ALJ

INITIAL DECISION

Procedural History:

On July 9, 1990, a federal district court jury found respondent Danny L. Scheck ("Scheck") guilty of aiding and abetting a violation of Section 4b(A) of the Commodity Exchange Act. Scheck later pled guilty to two misdemeanor counts of violating Section 4c(a)(A). Sanctions imposed by the district court, including six months confinement in a community confinement program, five years probation and restitution, were based on trades that took place on March 8, April 4 and June

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6 of 1988. Scheck has met all obligations imposed on him by the federal court, including timely payment of restitution.

This Commission issued its complaint against Scheck on December 17, 1991, charging violations of Sections 4b(A) and 4c(a)(A) of the Commodity Exchange Act and Commission regulation 1.38(a). The alleged violations were based on the events that occurred on March 8, April 4, and June 6, 1988, as described in the criminal action. The 4(b) violation of March 8 cost a customer two ticks, or \$50.00. The two 4(c) violations were for curb trading, described in the Initial Decision as crimes of convenience, and did not involve customer money. By Initial Decision issued December 22, 1992, Scheck was ordered to cease and desist from violating the Act as charged in the complaint, and prohibited from trading on or subject to the rules of any designated exchange for a period of four months from the date the Initial Decision became final. By Opinion and Order dated August 13, 1993, the Commission held that the administrative law judge abused his discretion by not giving substantial weight to Congressional policy as set forth in the 1992 amendment to Section 4(b). Accordingly, the matter was remanded for further proceedings.

During the pendency of the remand order, Scheck filed an application for registration as a floor trader. On July 19, 1993 the Commission filed a Notice of Intent to Deny Scheck's application for registration as a floor trader, docket number SD 93-13. On motion, docket numbers 92-11 and SD 93-13 were consolidated. On May 17, 1994, some six years after the events that led up to the issuance of the two complaints, the administrative law judge issued a decision finding that Scheck's application for registration should be granted, and that there was no need to impose additional sanctions against Scheck. By Opinion and Order of the Commission dated issued June 4, 1997, more than nine years after the events that led up to the issuance of the complaints, Scheck's application for registration was denied, and he was prohibited from trading on or subject to the rules of a designated exchange for a period of five years from the date of the Opinion and Order.

On April 10, 2000 Scheck filed a petition to terminate the balance of the five-year trading ban. The Commission directed that a hearing take place to determine whether or not Scheck's petition should be granted. The hearing took place on November 15, 2000. The parties have filed recommended findings and conclusions, and this matter is ready for disposition.

DISCUSSION:

It is generally understood that futures trading is a zero-sum game. In short, new money is not created in futures trading. It merely changes hands. There is one winner for every loser, and vice versa. There are three categories of players in the futures game: 1) floor brokers, who trade for their own accounts and for the accounts of customers; 2) floor traders, who trade solely for their own accounts; and 3) the customers who are hedging or speculating in the market through registered entities. The customer category includes sophisticated and institutional traders not inclined to lose on a regular basis. The remainder constitutes the "retail" trade. Brokers and traders pay substantial sums to buy or rent a seat on the Chicago Mercantile Exchange in order to trade, and it is generally understood that, on balance, they make a profit in their personal trading accounts. In sum, floor brokers and floor traders make an overall profit in futures trading. Retail customers generally lose.

In 1988 and 1989 the Federal Bureau of Investigation conducted a sting operation on the floor of the Chicago Mercantile Exchange. Two agents, wearing wires, posed as traders on the floor. The information obtained by these agents resulted in the filing of criminal charges against a number of brokers and traders who happened to stand within recording distance of the wired agents, including respondent Scheck. The offenses for which Scheck was criminally sanctioned would hardly have raised an eyebrow in an exchange action, and certainly sanctions would have been minimal. Scheck was criminally convicted and sentenced in federal court, and then was sanctioned by the exchange for the same misconduct. The same bad acts were charged again in the Commission's complaint in docket number 92-11. Because Scheck subsequently filed an application for registration as

a floor trader the Commission issued its complaint in docket number SD 93-13, once more charging Scheck for the same bad acts described in docket number 92-11 and in the criminal complaint. Litigation over Scheck's misconduct on March 8, April 4, and June 6 1988 now spans a dozen years.

The Futures Trading Practices Act of 1992 amended Section 9(b) to provide that a felony conviction should result in suspension of registration for five years or more, and that a trading ban of five years or more be imposed "...unless the Commission determines that ...(such sanctions are)... not required to protect the public interest." The 1992 amendment to Section 9(b) also provides that the Commission may, upon petition, review disqualification and market bar orders and for good cause reduce the period thereof.

This court found in its Initial Decision of May 17, 1994 that considering the gravity of the violations, the nexus between the wrongdoing and a threat to the market mechanism, any mitigating circumstances, and evidence of changed direction on the part of the petitioner, there was no cause to impose any sanctions other than a cease and desist order. As to the trading ban, it was noted that the Commission reduced a permanent trading ban against a respondent who had committed egregious violations of the Act, including conversion of \$500,000 in customer funds, to only two years. (*In re Incomco*, [1990-1992 Transfer Binder] Com. Fut. L. Rep. (CCH) paragraph 25,198). A dissent by Commissioner Bair, joined by Chairman Gramm, concludes with the following statement: "Given the egregious nature of Smith's violation, I believe that he should be subject to substantial sanctions. ...*However, the violations in this case are simply too slender a thread to support a sufficient nexus to market integrity.*" (Italics added) It is clear from the record that Smith's violations were far more egregious than the violations committed by Scheck. We are confronted here with this question: Does the gravity of the violation depend upon the violation itself, or does the violation become more egregious because of a discretionary provision added to Section 9(b) of the Act some four years after the violation occurred? Logic dictates that, once committed, the gravity of the offense remains constant. In the case at bar, Scheck's violations were far less serious than those described in *In re Incomco*.

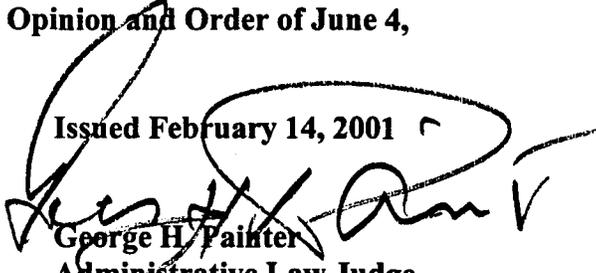
The only issue before this court is whether removing the trading ban would be a threat to the integrity of the market place. The answer is an emphatic no. The trade resulting in a felony conviction cost a customer \$50. The misdemeanor convictions were based on two incidents of curb trading. Scheck was in his mid-twenties when the violations occurred. He has paid dearly for the 1988 offenses, and has managed to support his family and remain free from legal difficulties in the interim. To paraphrase the dissent in *In re Incomco*, the violations that took place a dozen years ago are simply too slender a thread to support a sufficient nexus to market integrity. Scheck has successfully demonstrated over the years that he is fully rehabilitated, a good and decent citizen, and in no manner or form a threat to the integrity of the futures market.

ORDER

Petitioner Danny L. Scheck 's trading ban, set forth in the Commission's Opinion and Order of June 4, 1997, shall be modified as follows on the date this Initial Decision becomes final:

1. Respondent Scheck shall be allowed to trade off the floor of an exchange through a retail brokerage account solely for his own account.
2. Respondent Scheck's account will be monitored by the carrying futures commission merchant, and the futures commission merchant will make quarterly reports to the Commission concerning the trading of the account.
3. In all other respects the Commission's Opinion and Order of June 4, 1997 shall remain in full force and effect.

Issued February 14, 2001


George H. Painter
Administrative Law Judge