Commodity Futures Trading Commission
CEA CASES

**NAME:** AMERICAN COMMODITY BROKERS, INC., PHYLLIS C. DEMPSTER, AND JOHN WHELAN

**CITATION:** 32 Agric. Dec. 1765

**DOCKET NUMBER:** 185

**DATE:** NOVEMBER 19, 1973

**DOCUMENT TYPE:** DECISION AND ORDER

(No. 15,538)

*In re* AMERICAN COMMODITY BROKERS, INC., PHYLLIS C. DEMPSTER, AND JOHN WHELAN. CEA Docket No. 185. Decided November 19, 1973, with respect to respondent *John Wehlan.*

**Failure to meet financial requirements -- Filing of false financial reports -- Undersegregation of customers' funds -- Failure to pay money due and owing to customers -- Failure to keep accounts and records as required under the regulations -- Responsibility for functions of corporation -- Aiding and abetting in violations -- Denial of trading privileges**

Where respondent John Whelan, as Vice President of respondent corporation, aided and abetted respondent Phyllis C. Dempster, President of said corporation, in the wilful violations of the Act and regulations by the respondent corporation, and acted in combination or in concert with respondent Dempster as to such violations, respondent Whelan is punishable as a principal. Respondent John Whelan is ordered to cease and desist from the violations found herein, and is denied all trading privileges on all contract markets for three years, as stated in the order herein. The sanction is to deter.

*Richard W. Davis,* for complainant.

*Richard L. Schmidt, Jr.,* Detroit, Mich., for respondent John Whelan.

*Decision by Donald A. Campbell, Judicial Officer.*

**DECISION AND ORDER**

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1), hereafter sometimes referred to

as the Act, instituted by a complaint and notice of hearing issued by the Under Secretary of Agriculture and filed on September 13, 1971. The respondents are the American Commodity Brokers, Inc., and two officers of the corporation, Phyllis C. Dempster, President, and John Whelan, Vice-President.

The complaint alleges that the respondent corporation was managed, directed and controlled by the individual respondents; that the corporation operated as a registered futures commission merchant without meeting the minimum financial requirements of the Act and the regulations thereunder; that it filed with the Commodity Exchange Authority a false financial report; that it failed to properly segregate the funds of its customers; that it failed to compute and record daily the amount of customers' funds which should have been segregated; and that it failed and refused to pay to some of its customers money due and owing to them.

Respondent John Whelan filed an answer on November 1, 1971, generally denying the allegations of the complaint and stating that he was not responsible for making final decisions regarding management, direction and control. Respondents American Commodity Brokers and Phyllis C. Dempster filed an answer on December 6, 1971, generally admitting the jurisdictional allegations and denying the substantive allegations.

As a result of the first pre-hearing conference in this proceeding, complainant, the respondent corporation, and the respondent Dempster agreed to settle the matter by stipulation and consent to an order. The respondent corporation and the respondent Dempster admitted for the purposes of the administrative proceeding that they had violated the Act and regulations, as alleged in the complaint, and consented to a cease and desist order and an order suspending their trading privileges on contract markets for five years. The respondent Whelan refused to accept the same consent terms agreed to at the pre-hearing conference by the respondent corporation and Mrs. Dempster.

Respondent Whelan was not represented by counsel at the pre-hearing conference and was granted a postponement of the hearing in order to obtain counsel and file a substitute answer, which he did. In his answer, he generally admitted the allegations of the complaint as to the respondent corporation but denied his responsibility for the corporation's actions.

At another pre-hearing conference preceding the rescheduled hearing, the complainant and respondent Whelan agreed and stipulated

to most of the factual allegations of the complaint, and that the sole issue involved was respondent Whelan's contention that his authority and responsibility were such that he should not be held responsible for any wrongdoing of the respondent corporation.

Respondent Whelan was represented at the oral hearing held in Detroit, Michigan, on June 15, 1972, by Richard L. Schmidt, Jr., Esq., Detroit, Michigan. Richard W. Davis, Jr., Esq., Office of the General Counsel, United States Department of Agriculture, appeared as counsel for the complainant. Both sides offered oral testimony; and complainant introduced documentary evidence. The record contains 88 pages of oral testimony and 10 exhibits, some of which are multi-page documents. Briefs were filed by both parties; the final brief being filed on August 2, 1972.

Harry S. McAlpin, Chief Administrative Law Judge, filed an initial Decision and Order on September 17, 1973, in which he found that the complainant failed to carry its burden of proof, and he proposed that the complaint be dismissed.

An appeal was filed by the complainant on October 16, 1973, and respondent Whelan's response was filed on October 30, 1973. Oral argument was heard before the Judicial Officer on November 8, 1973, in the Detroit, Michigan, area. The Judicial Officer has final administrative authority to decide cases under the Commodity Exchange act. n1

n1. The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The Department's first Judicial Officer held the office from 1942 to 1972. The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

**FINDINGS OF FACT**

1 Respondent American Commodity Brokers, Inc., a corporation organized and existing under the laws of the State of Michigan, with offices at 415 South

Monroe, Monroe, Michigan, was at all times material herein, a registered futures commission merchant under the Commodity Exchange Act, engaged in trading in commodities for future delivery for the accounts of customers and holding for such customers sums of money, representing deposits

of margin by and trading profits accruing to such customers. At all such times, the respondent corporation was subject to the minimum financial requirements specified in § 1.17 of the regulations under the Commodity Exchange Act (17 CFR 1.17).

2. Respondent Phyllis C. Dempster, an individual whose business address is the same as that of the respondent corporation, is now, and was at all times material herein, President of the respondent corporation and responsible for the management, direction and control of its activities. Respondent John Whelan was, at all times material herein, the Vice-President of the respondent corporation.

3. The transactions in commodities for future delivery, referred to herein, could have been used for hedging transactions in interstate commerce in such commodities or the products or by-products thereof, or for determining the price basis of transactions in interstate commerce in such commodities, or for delivering such commodities sold, shipped or received in interstate commerce.

4. On March 31, 1970, the respondent corporation engaged as a registered futures commission merchant under the Commodity Exchange Act, notwithstanding that at that time it failed to meet the minimum financial requirements prescribed by § 1.17 of the regulations issued by the Secretary of Agriculture under the Act (17 CFR 1.17). As of March 31, 1970, the respondent corporation lacked approximately $ 84,000 of having enough working capital to meet such minimum financial requirements.

5. During the period from March 5 to August 6, 1970, the respondent corporation, in the regular course of its business as a futures commission merchant, carried accounts of customers who traded in commodity futures on contract markets subject to the provisions of the Commodity Exchange Act and the regulations thereunder. Such accounts, the trading therein, and the handling and disposition of funds in connection therewith, were subject to the provisions of the Act and regulations. At all such times, the respondent corporation had to its credit with banks or other depositories, money in varying amounts, held in segregated accounts and identified as customers' funds representing deposits of margin by and trading profits accruing to such customers.

6. During the period between March 5 and April 9, 1970, both inclusive, the respondent corporation was undersegregated, that

is, during the period mentioned the total amount of customers' funds held in segregation as above described in Finding 5 was less than the amount necessary to pay all credits and equities due to such customers. As of March 5, March 31 and April 9, 1970, such deficits amounted to approximately $ 10,000, $ 18,000 and $ 20,000 respectively.

7. During the period from April 10 through August 6, 1970, the respondent corporation failed to make any computation or permanent record, as of the close of the market on each business day, of the amount of money, securities, and property required to be held in segregated account in order to pay all credits and equities due to its customers, as provided in § 1.32 of the regulations (17 CFR 1.32).

8. On May 7, 1970, the respondent corporation submitted to the Commodity Exchange Authority a financial report (Form 1-FR) as of March 31, 1970, assigned by respondent Phyllis C. Dempster. The report contained material false statements in that: (1) it stated the firm had an excess of adjusted working

capital in the amount of $ 22,971.94, when actually it had an insufficiency of adjusted working capital in the amount of approximately $ 84,000; (2) it stated the firm had current assets of approximately $ 56,000, when it actually had current assets of approximately $ 20,000; and (3) it stated the firm had current liabilities of approximately $ 22,000, when it actually had current liabilities of approximately $ 94,000.

9. As of April 21, 1970, the respondent corporation had failed and refused to remit to its customers $ 2,606.95 due and owing by it to such customers in connection with transactions in commodities for future delivery which the respondent corporation had made for the account and benefit of such customers. During March 1970, the respondent corporation issued checks to four customers in purported payment of $ 2,518.95 of the aforesaid sum, but such checks were returned by the bank upon which they were drawn because of insufficient funds in the corporate respondent's account.

10. The respondent Phyllis C. Dempster, President of respondent corporation, met the respondent John Whelan when she was a customer at the Trenton State Bank, where he was Assistant Vice-President. She hired him in 1969 as Assistant to the President to be an "overseer" of all of her various corporations, including the respondent corporation. After being employed for about

a month as Assistant to the President, respondent Whelan went to Chicago to manage the Chicago office of the respondent corporation. He held that position for about five or six weeks when he returned to Detroit to be the "overseer" of the respondent corporation. He became Vice-President of the respondent corporation in September of 1969.

11. Although the respondent corporation had several branch offices which were franchise operations, respondent John Whelan, as Vice-President of the respondent corporation, was responsible for the following functions with respect to all of the corporation's offices: the execution of the customers' orders; the recording of the orders in the customers' contract ledgers; seeing that the customers' accounts were properly maintained and accounted for; making sure that the customers' funds were properly deposited in segregated accounts; making payment to the customers; and reconciling the checking accounts of the four branch offices of the respondent corporation and the home office.

12. Respondent John Whelan was in charge of preparing the financial report as of March 31, 1970, involved in this case. The report was prepared by Mr. Whelan, together with Mr. James F. Thorne, Director of Corporate Planning of Dempster Investment Company, the parent company of the respondent corporation. Mr. Brand, the Comptroller of both the parent company and the respondent corporation, who was next in command of the respondent corporation after the respondent Whelan, also participated in preparing the March 31, 1970, financial report. Mrs. Dempster signed the March 31, 1970, financial report without making any changes in it.

13. The respondent John Whelan knew that the respondent corporation was operating while seriously underfinanced, as charged in the complaint; that the financial report as of March 31, 1970, was materially false; that the respondent corporation did not maintain customers' funds properly segregated on the dates involved in this case; that the segregation records were not kept during the period involved in this case; and that the customers involved in this case were not paid.

14. The respondent John Whelan wilfully aided and abetted the respondent Phyllis C. Dempster in the violations by the respondent corporation involved in this case and acted in combination or concert with her as to such violations.

**CONCLUSIONS**

It is admitted in this proceeding that the respondent corporation violated the Act and regulations as set forth in the findings of fact. The violations

are of two types -- (1) violations relating to the minimum financial requirements, *i.e.,* operating while underfinanced and filing a false report as to the firm's financial condition; and (2) violations relating to customers' funds, *i.e.,* failing to properly segregate such funds, keep proper records, and remit amounts due to customers.

Specifically, it is admitted (1) that the corporation lacked approximately $ 84,000 on March 31, 1970, of having the required working capital; (2) that the corporation filed a false financial report with the Commodity Exchange Authority as of March 31, 1970, stating (i) that the firm had $ 22,971.94 excess adjusted working capital, when actually it had an $ 84,000 insufficiency; (ii) that the firm had current assets of approximately $ 56,000, when it actually had current assets of approximately $ 20,000; and (iii) that the firm had current liabilities of approximately $ 22,000, when it actually had current liabilities of approximately $ 94,000; (3) that the corporation failed to properly segregate customers' funds from March 5 to April 9, 1970, having deficits ranging from $ 10,000 to $ 20,000 in the customers' segregated accounts; (4) that during the period from April 10 through August 6, 1970, the corporation failed to make any computation or permanent record as of the close of each business day of the amount of money, securities, and property required to be held in segregated accounts; and (5) that as of April 21, 1970, the respondent corporation had failed and refused to remit to customers $ 2,606.95 (four checks in purported payment of $ 2,518.95 of such sum were returned because of insufficient funds).

The only issue in this proceeding relates to whether the respondent John Whelan, Vice-President of respondent corporation, may be held responsible as a principal for such violations.

The Chief Administrative Law Judge found and concluded that the respondent John Whelan "was a vice president of the respondent corporation in name and title only, and was not responsible for the management, direction and control of the activities of the respondent corporation in any manner as would impute to him responsibility for any wrongdoing admitted by and attributable to the respondent corporation and its President, respondent Dempster" (Finding 16).

It is my practice, required by reason as well as by many clear-cut judicial precedents, to give great weight to the findings by the Administrative Law Judges, who have the advantage of seeing and hearing the witnesses testify (see, *e.g., In re Sy B. Gaiber & Co.,* 31 Agriculture Decisions 474, 498 (1972); *In re Louis Rom-off,* 31 Agriculture Decisions 158, 172 (1972); *In re Cardwell Dishmon,* 31 Agriculture Decisions 1002, 1004 (1972); *In re Arthur N. Economou,* 32 Agriculture Decisions 14, 36-37 (1973), appeal pending.

However, it is recognized that the weight to be given to an Administrative Law Judge's findings reaches its maximum when it turns on credibility (see *Ward* v. *N.L.R.B.,* 462 F.2d 8, 11-13 (C.A. 5, 1972); *Fairbank* v. *Hardin,* 429 F.2d 264, 268 (C.A. 9, 1970); *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 859 (C.A. 2, 1966); *Cella* v. *United States,* 208 F.2d 783, 788 (C.A. 7, 1953), certiorari denied, 347 U.S. 1016; *National Labor Relations Board* v. *Swinerton,* 202 F.2d 511, 514 (C.A. 9, 1953), certiorari denied, 346 U.S. 814; *National Labor Relations Board* v. *Dinion Coil Co.,* 201 F.2d 484, 490 (C.A. 2, 1952)). In this case, the Administrative Law Judge seems to base his ultimate finding and conclusion on the weight to be given to the evidence, rather than on his view as to the veracity of the witnesses. Hence this case does not turn on the credibility of the witnesses.

Inasmuch as I believe that the Administrative Law Judge's ultimate finding and conclusion is contrary to the overwhelming weight of the evidence in the record, and is contrary to the admissions made by the respondent John Whelan at the hearing, I am compelled to differ with the Chief Administrative Law Judge's ultimate finding and conclusion (see, *e.g., F.C.C.* v. *Allentown Broadcasting Co.,* 349 U.S. 358, 364-365 (1955); *Universal Camera Corp.* v. *Labor Bd.,* 340 U.S. 474, 492-497 (1951); *Radio Comm'n* v. *Nelson Bros. Co.,* 289 U.S. 266, 285-286 (1933); *Southern Nat. Mfg. Co., Inc.* v. *Environmental Pro. Agcy.,* 470 F.2d 194, 197 (C.A. 8, 1972); *Retail, Wholesale and Department Store U.* v. *N.L.R.B.,* 466

F.2d 380, 387 (C.A.D.C., 1972); *OKC Corp.* v. *F.T.C.*, 455 F.2d 1159, 1162-1163 (C.A. 10, 1972); *Nix* v. *N.L.R.B.*, 418 F.2d 1001, 1008 (C.A. 5, 1969); *Joy Silk Mills* v. *National Labor Relations Board,* 185 F.2d 732, 742 (C.A.D.C., 1959), certiorari denied, 341 U.S. 914; *Canteen Corp.*, 32 AdL 2d 768, 769-773 (NLRB, 1973); Davis, *Administrative Law Treatise* (1958 and 1970 Supp.) § 10.04)).

I. *The Respondent Whelan Aided and Abetted in the Respondent Corporation's Violations, and Acted in Combination or Concert with Respondent Dempster in Such Violations.*

Section 13 (a) of the Commodity Exchange Act, as added February 19, 1968, provides (7 U.S.C. 13c(a)): n2

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

n2. The legislative history with respect to this and other amendments enacted in 1968 states (H. Rep. No. 743, 90th Cong., 1st Sess., pp. 1, 7 (1967):

The 28-to-1 vote by which the committee has approved this bill reflects the overwhelming support that this legislation enjoys from the various segments of agriculture and the general public that have either an interest in or a responsibility for the maintenance of sound and honest futures markets.

* * *

With these three changes, the committee is of the opinion that the bill contains such additional regulatory authority as is clearly indicated as being desirable and feasible at the present time and under existing conditions. The committee believes that this extension of authority will provide a useful tool for the Commodity Exchange Authority in its regulation of the commodity futures markets, will add to the usefulness of the markets, and will in no way interfere with any legitimate activity.

Under § 13(a) of the Act, it is only necessary to show that the respondent John Whelan wilfully aided or abetted in the respondent corporation's violations, or acted in combination or concert with the respondent Phyllis C. Dempster in such violations; it is not necessary to show that he had the power to compel Mrs. Dempster, President of respondent corporation, to stop engaging in such violations.

To illustrate that point, which is at the heart of this case, if the Vice-President in charge of managing a corporation dealing in stocks and bonds learned that the firm was selling stolen stocks

and bonds, and so advised the President of the firm, who refused to end the practice, the Vice-President could not continue to deal in the stolen securities for the firm, selling some stolen securities himself and supervising the sale of stolen securities by other employees of the firm, without being subject to a criminal prosecution.

It is well established that an official of a firm having a responsible share in the furtherance of an unlawful transaction is criminally responsible for the violation. *United States* v. *Dotterweich,* 320 U.S. 277, 281-285 (1943); *United States* v. *Eskow,* 422 F.2d 1060, 1068-1069 (C.A. 2, 1970), certiorari denied, 398

U.S. 959; *Carolene Products Co.* v. *United States,* 140 F.2d 61, 65-66 (C.A. 4, 1944), affirmed on other grounds, 323 U.S. 18; *Wood* v. *United States,* 204 F.55, 58 (C.A. 4, 1913), certiorari denied *sub nom. Rhea* v. *United States,* 229 U.S. 617. See, also, *Restatement of the Law, Agency 2d,* § 359A.

The common law principle, in this respect, is codified in 18 U.S.C. 2 (formerly 18 U.S.C. 550). It is provided in 18 U.S.C. 2:

§ 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 13(a) of the Commodity Exchange Act, quoted above, was drafted by the Department to make applicable in the administrative proceedings under the Act the same type of responsibility applicable in criminal proceedings under 18 U.S.C. 2 (formerly 18 U.S.C. 550). This was explained by the Department's attorney as follows: n3

Mrs. Prokop. What we are trying to accomplish here is to make applicable to administrative proceedings, the same type of responsibility that applies in criminal proceedings under the provisions of title 18 U.S.C., section 2. Now, title 18 U.S.C., section 2, does not have the word "willfully" in it. It is perhaps inherent under the decisions in regard to offenses

like abetting and I think it would be implied with respect to counseling, commanding, inducing, procuring, and so forth. It is not so clear that it is inherent in the word "aiding." We did not tend to hold someone responsible for an unintentional aiding of someone's improper actions in an administrative proceeding. So we put in the word "willfully" in conjunction with "aiding," feeling that this would solve the problem from the standpoint of the trade who were concerned.

Mr. Dole. In other words, you mean one can commit a violation unknowingly or unwillfully and be punished under section 27 [which added § 13(a) to the Act]?

Mrs. Prokop. No.

You see, we put the word "willfully" ahead of "aiding," because the word "aid" under some of the decisions was not clearly limited to situations in which there was a knowing participation. It did not seem to be necessary to add that word with respect to the rest of the activities in that series, because inherently, they include some element of knowledge.

What we are trying to do in this section is to make applicable to administrative proceedings the same standard that would apply under 18 U.S.C. 2.

n3. Hearings before the Committee on Agriculture, House of Representatives, 90th Cong., 1st Sess., on H.R. 11930 and H.R. 12317, p. 66 (1967).

The criminal law provisions of 18 U.S.C. 550 (now 18 U.S.C. 2) were applied in *United States* v. *Dotterweich,* 320 U.S. 277 (1943), in holding the President, who was also General Manager, of a corporation liable for the firm's violations under the Federal [Food, Drug, and Cosmetic Act] The Court explained the applicability of 18 U.S.C. 550 as follows (320 U.S. at 281):

The statute makes "any person" who violates § 301 (a) guilty of a "misdemeanor." It specifically defines "person" to include "corporation." § 201(e). But the only way in which a corporation can act is through the individuals who act on its behalf. *New York Central & H. R.R. Co.* v. *United*

*States,* 212 U.S. 481. And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty, *United States* v. *Mills,* 7 Pet. 138, 141, a doctrine given general application in § 332 of the Penal Code (18 U.S.C. § 550).

Under the Federal Food, Drug, and Cosmetic Act and the aiding and abetting provisions of 18 U.S.C. 550, the defendant was held liable for the corporation's violations even though he did not

have personal knowledge of the specific violations involved in the case. The Court held (320 U.S. at 284-285):

To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission -- assuming the evidence warrants it -- to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ulimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers," *Nash* v. *United States,* 229 U.S. 373, 378, even when the consequences are far more drastic than they are under the provisions of law before us. See *United States* v. *Balint, supra* (involving a maximum sentence of five years). For present purpose it suffices to say that in what the defense characterized as "a very fair charge" the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict.

Similarly, the President and Vice-President, who were the directing heads, of a corporation were held liable, under 18 U.S.C. 550, for violating the Federal Filled Milk Act in *Carolene Products Co.* v. *United States,* 140 F.2d 61 (C.A. 4, 1944), affirmed on other grounds, 323 U.S. 18. The Court recognized that there was no evidence that the defendants knew of the specific violations involved in the case, stating (140 F.2d at 65):

In this connection, the Government expressly admits that there is no evidence in the record to show that either of the individual defendants personally made, or even had any personal knowledge of, the eight specific shipments set out in the indictment.

In holding the defendants liable under 18 U.S.C. 550, the Court held (140 F.2d at 66):

There is ample authority in support of the principle that the directing heads of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business,

regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts.

Moreover, "[t]o be guilty of the crime of 'aiding and abetting' one does not have to have an active stake in the outcome of the crime but merely participate therein." *Wyatt* v. *United States,* 388 F.2d 395, 400 (C.A. 10, 1968).

In view of the fact that the aiding and abetting provisions in § 13(a) of the Commodity Exchange Act were based on the provisions in 18 U.S.C. 2 (formerly 18 U.S.C. 550), it is clear that under § 13 (a) of the Act, the Vice-President of a firm who managed the firm is liable as a principle for the firm's violations if he wilfully n4 aided and abetted in the firm's violations, or acted in concert with others in the violations. Moreover, as to his area of responsibility, he is also liable as a principal for the acts of subordinates done in the normal course of business if, in the exercise of reasonable care, he should have known of the violations.

n4. The issue as to wilfulness is discussed in the following section of this decision.

Turning to the facts of this case, although there are some situations in which the Vice-President of a firm is a mere figurehead (*e.g.,* because of nepotism or a State statute requiring a certain

number of officers), this was admittedly not the case with respect to the respondent John Whelan. He was hired on merit. Mrs. Dempster, President of the respondent corporation, met respondent Whelan when she was a customer at Trenton State Bank, where he was Assistant Vice-President (Tr. 61). Mr. Whelan testified that he was "hired in as Assistant to the President which supposedly would have been an overseer of all of the various corporations she had working at the time" (Tr. 61).

Mr. Whelan testified that he worked as Assistant to the President for about a month, when "[e]arly in June of 1969 the two people that were running the Chicago Office [of respondent corporation] had decided to leave the organization, and there was no one prepared to take over as office manager for taking care of the segregation" (Tr. 61). Mr. Whelan testified that he went to Chicago for five or six weeks "to take that job" (Tr. 61), and then went back to Detroit as "[k]ind of an overseer of the [respondent corporation] American Commodity Brokers" (Tr. 62). He got the title of Vice-President of respondent corporation in September 1969 (Tr. 62).

The respondent Whelan admitted that, as Vice-President, he was responsible (Tr. 73-74) --

as far as having the customer's orders executed in commodity exchanges, as far as handling the execution of those orders recorded in the customer's contract ledgers, as far as having the financial records of those accounts recorded in the customer's financial ledger accounts, as far as seeing that those accounts were properly maintained and accounted for, [and] as far as making sure the customer funds were properly deposited in segregated accounts.

The foregoing admissions by the respondent Whelan are sufficient by themselves to be decisive with respect to all of the violations involved in this case. The Act and regulations require any person performing such functions to meet minimum financial requirements, file correct financial reports, handle customers' funds properly, remit money owing to customers, and keep adequate segregation records. And § 13(a) of the Act makes a Vice-President in charge of such activities liable as a principal for any violations with respect thereto.

The respondent Whelan further testified as to his duties involving the segregation of customers' funds, record keeping as to the segregated funds, and making payment to customers, as follows:

In handling the customers' accounts when a commodity customer would want his money, I would write him a check, things of that sort, without approval (Tr. 64-65).

* * *

Q What were your duties in regard to the segregation audit, the funds in segregation?

A Primarily to write checks to the customers and transfer the funds to the Chicago Office when it was needed there for marginals, when customers wanted out of the market. I would send them their checks (Tr. 66).

* * *

HEARING EXAMINER MC ALPIN: Anytime you became aware of any under segregation, whether as a result of seeing it on Daily Reports or writing a check and finding out that the account was insufficient or about to write a check, whatever might have happened, what was your responsibility to do about it?

A I would report it to Mrs. Dempster.

HEARING EXAMINER MC ALPIN: Is that the only thing you could do about it?

A That is what I did. I don't knew if it was the only thing I could do, sir.

HEARING EXAMINER MC ALPIN: Did you have authority to do anything else?

A I don't knew if this is what you are asking me. Let me put it this way. If the funds were needed in Chicago, I had the authority to transfer the funds from other banks that we had accounts with, have Grand Rapids to transfer money for marginals, things such as that. I don't know if I have answered your question. That would be the authority that I had.

HEARING EXAMINER MC ALPIN: Let me clarify that point in my mind now. Were these also customer accounts ?

A Right, we would transfer the accounts, deposits to the branch cities to the regulated and non-regulated security

checking account and Continential and National in Chicago.

HEARING EXAMINER MC ALPIN: Now, when you say "transfer", you mean you would take out of one account and deposit it or have it deposited in another account?

A Right, sir. I would send checks to our manager in Chicago and he would deposit them in Chicago (Tr. 83-84).

The respondent Whelan also testified that his duties as Vice-President were --

to reconcile the checking accounts of the four offices for [respondent corporation] A.C.B. plus our own, plus somewhat on the new business end of it where I would try and contact people to try and get some customers in the commodity market, helping with seminars, things such as that (Tr. 62-63).

* * *

Q Did you have any other responsibilities other than those that you just mentioned to me? Did you have responsibility? Did you have brokers, customers men working in the Detroit Office?

A Yes, there were customers men working in the Detroit Office. We had, I would say -- yes, they would have been working. As far as working for someone, they would have been working for me.

Q You oversaw their activities?

A Yes, sir (Tr. 71).

The respondent Whelan admitted taking part in the preparation of the financial report, Form 1-F.R., which was involved in the respondent corporation's violations (Tr. 65):

Q Are you familiar with the 1F.R. Form which is filed?

A Yes, I am.

Q What role did you play, particularly, the report of March 31, 1970? Do you recall what your role in the representation of that report was?

A In all the reports I would analyze the customer's position, check the Wall Street Journal from the day that the C.E.A. wanted the report, get the prices, figures, the longs and shorts and where we were indebted and then make the last computations and summaries of that. Those were the duties I had.

Q Did you actually do the figuring yourself?

A As far as the customer's positions, yes.

Mr. Whelan admitted that he was aware of the minimum financial requirements and the segregation regulations (Tr. 75-76), and he knew of the previous administrative action against respondent corporation in 1969 for failing to meet the minimum financial requirements (Tr. 74).

Mr. Whelan further admitted that he knew of various violations by respondent corporation as to the segregation requirements and as to the failure to remit money to customers. He testified:

Q During the course of your employment did you ever become aware of the fact that there were shortages in the various segregation accounts?

A I would say, yes, I was aware of them.

Q Did you bring this to Mrs. Dempster's attention?

A Well, she knew it. In other words, I would be aware of it when she asked me to write a check and there weren't any funds there. I wouldn't ask her to write them if I had brought them to her attention. I would think she would know at the same time that I knew.

Q Did you actually ever refuse to write a check because you knew there was a shortage?

A Correct, yes, I did refuse to write checks.

Q What happened then?

A I would give her the checkbook and obviously she didn't write them (Tr. 67).

* * *

Q Except for the period which we alleged in our Complaint that the Daily Segregation Record was not maintained,

and except for some other specific dates, was the Daily Segregation Record normally maintained? Are you familiar with what the Daily Segregation Record is?

A Yes. I believe it was maintained to the point, it seemed to me the fellow that was working for us in Chicago left and then it went for several days without a pay maintained, and I am not really familiar with the date that happened. During that time we had supposedly discussed transferring the customer's positions to Woodstock.

Q The purpose of that Daily Segregation Record is to inform in the Futures Commission Merchant of how much money you should have in to meet the requirements of the Act, is it not?

A Yes, sir, I believe so (Tr. 79-80).

* * *

Q * * *. Do you recall, Mr. Whelan, that we agreed to a stipulation this morning with regards to the failure of American Commodity Brokers to pay four named customers the funds that were owed to them. When did you first become aware of that situation?

A At the time we transferred the customer's funds to Woodstock. I believe that is around the time that I wrote a letter to Washington asking for help to get this money from the Chicago Open Board of Trade.

Q You had not realized prior to the time then the accounts were transferred to Woodstock that these checks which were written and signed to those customers could not be met because of insufficient funds ?

A No, sir. In one instance I had a direct reply with one of the customers (Tr. 81-82).

Although Mr. Whelan denied that he was aware of the segregation and payment violations on the specific dates involved in this case when they occurred (Tr. 77, 82), his admissions establish that, as Vice-President, he was specifically responsible for this aspect of the firm's business. Although I infer that he knew of the specific violations when they occurred, based on the foregoing testimony, it is sufficient that he was responsible for this function

and, in the exercise of reasonable care, should have known of the specific violations.

Mr. Whelan admittedly was aware of the failure to keep the Daily Segregation Record when one of the firm's employees left (Tr. 79), and I infer that he was aware of the specific violations, in this respect, involved in this case.

In addition, I infer that respondent Whelan knew that the financial report prepared as of March 31, 1970, was false, notwithstanding his denial (Tr. 81). Complainant's Exhibit No. 5 shows that whereas the financial statement prepared by Mr. Whelan and his colleagues showed an adjusted working capital of almost $ 33,000, there actually was a deficiency of working capital of more than $ 74,000. That is a discrepancy of over $ 107,000.

The largest single discrepancy in a specific item of the statement was an overstatement of the general funds bank account by $ 40,000. A personal check for $ 40,000 from Mrs. Dempster, President of the firm, payable to the firm, was deposited on April 2, 1970, two days after the effective date of the financial statement. This check was not paid because of insufficient funds and was returned by the bank on April 7, 1970, eighteen days before the financial statement was completed and signed. See Item (2), page 2, Comp. Ex. No. 5 and Item (2) page 1, Comp. Ex. No. 7. That $ 40,000 accounted for practically all of the cash on hand and more than two-thirds of the claimed current assets (Comp. Ex. No. 7, p. 1).

Another major discrepancy in the March 31, 1970, financial report was in the amount of customers' funds in segregation, an area for which Mr. Whelan admittedly had complete responsibility. The financial statement showed an excess of funds in segregation of over $ 2,000 (Comp. Ex. No. 7, Item (1), p. 1; Comp. Ex. No. 5, p. 2), whereas there was actually a deficiency of funds in segregation of over $ 18,000, which should have been reported as a current liability (Comp. Ex. No. 5, p. 4). Moreover, on the same day, the segregated funds bank account was overdrawn by nearly $ 3,000 (Comp. Ex. No. 5, p. 4), which also should have been reported as a current liability.

The correction of the foregoing discrepancies alone would have more than wiped out the illusory excess of working capital. Although I infer that Mr. Whelan was aware of these specific discrepancies, even if Mr. Whelan was not aware of them, he should,

with the exercise of reasonable care, have known that substantial parts of the financial report were false.

In short, I would be compelled to find that the respondent Whelan is liable as a principal for the violations in this case based upon his own admissions. His admissions establish that he managed or supervised all of the activities of the respondent corporation subject to regulation under the Commodity Exchange Act.

But the record does not stop there. Other strong testimony supports Mr. Whelan's admissions.

Mr. James F. Thorne, Director of Corporate Planning for Dempster Investment Company, testified that the respondent corporation, American Commodity Brokers, Inc., was a subsidiary of Dempster Investment Company (Tr. 25). He testified that the two firms held joint weekly staff meetings which were attended by two persons from the respondent corporation, *viz.*, Mrs. Dempster and Mr. Whelan, two other persons and himself from the Dempster Investment Company, and Mr. Brand, who was Comptroller of both firms. Mr. Thorne testified that Mr. Whelan's duties as Vice-President of respondent corporation were to "run the company" (Tr. 37). Mr. Thorne explained, of course, that the "president always has the ultimate authority" (Tr. 39).

Mr. Thorne testified that the March 31, 1970, financial report was prepared by Mr. Whelan, Mr. Brand (the Comptroller for both corporations), and himself. He testified that "in this particular case it would be Mr. Whelan who would have been in charge" of preparing the March 31, 1970, report (Tr. 33). Although Mr. Whelan testified that he filled in only certain figures on the report (Tr. 65-66), he did not contradict Mr. Thorne's prior testimony that he, Mr. Whelan, was in charge of the preparation of the March 31, 1970, report. Mr. Thorne testified specifically that the whole report was "Mr. Whelan's duty to fill out" (Tr. 36). Mr. Whelan did not contradict that testimony.

Mr. Thorne participated in preparing the March 31, 1970, report since the firm was late in getting the report in and had to get it done quickly (Tr. 36-37). The report is lengthy, consisting of 10 pages, and 143 entries of figures. Although the report was signed by Mr. Dempster, President of respondent corporation, there is nothing in the record to suggest that she changed the report in any respect, after it was prepared under Mr. Whelan's supervision.

Mr. Robert Piccirillo, an auditor for the Commodity Exchange Authority, testified that he dealt primarily with Mr. Whelan when he was conducting audits of the respondent corporation (Tr. 44-48). He testified that "Mr. Whelan appeared to have direction and control of the activities of American Commodity Brokers in the absence of Mrs. Dempster, and in certain situations in which I spoke with Mr. Whelan, he dealt with me on this basis and I asked him questions with regard to certain situations" (Tr. 45). Mr. Whelan signed letters to the Commodity Exchange Authority with respect to the respondent corporation's business activities (Comp. Exs. 9 and 10).

Mr. Piccirillo testified that in the case of serious instances of failures to comply with the Act, he spoke with Mrs. Dempster as the owner of the firm (Tr. 48), and that in some cases when he came across a question of policy or failing to comply with the Act he saw Mrs. Dempster and Mr. Whelan (Tr. 48-49). Specifically, Mr. Piccirillo testified (Tr. 48-49):

Q So actually what you did, correct me if I am wrong. If it was a matter that was, let us say, a procedural matter of examining the record or having

questions about the date of the operation, you saw Mr. Whelan, but if you came across a matter that appeared to be, let us say, a question of policy or failing to comply with the Act, you went to see Mrs. Dempster, is that correct?

A And Mr. Whelan.

The record as a whole compels the finding and conclusion that the respondent John Whelan is liable as a principal for the respondent corporation's violations.

The Chief Administrative Law Judge, I believe, gave insufficient weight to the foregoing evidence, which includes decisive admissions by the respondent Whelan. He relied, instead, on facts and circumstances which, in my view, are irrelevant to this case.

The Chief Administrative Law Judge states (Decision, pp. 9-10):

It is commonly accepted knowledge that the responsible corporate officers are elected or selected by the corporate Board of Directors. There was no evidence offered that respondent Whelan was ever elected to or selected for the office of Vice President by the respondent corporation's Board of Directors.

The uncontradicted evidence shows that the respondent Whelan was in fact the Vice-President of the corporation. This was admitted in his Answer, p. 1, paragraph II. It was admitted by Mr. Whelan in his testimony (Tr. 62). There is no evidence to the contrary. In these circumstances, it must be conclusively presumed that whatever corporate formalities were necessary to make Mr. Whelan Vice-President of respondent corporation were fulfilled.

The Chief Administrative Law Judge states (Decision, p. 10):

There was no showing on the record what were his responsibilities and duties as may have been or should have been delineated in the corporate by-laws or in the Board of Director's Minutes. Respondent Whelan maintained that he was given the title of vice president in September 1969 and that no one told him or discussed with him what were his duties or responsibilities.

The short answer to this is that the respondent Whelan testified at the hearing as to his duties. By his own admissions, set forth above, he was responsible for the activities involved in the respondent corporation's violations.

The Chief Administrative Law Judge states (Decision, p. 10):

He continued to perform the same duties he had been performing before given the title [of Vice-President].

True! But respondent Whelan admitted that his duties prior to becoming Vice-President were to act as "[k]ind of an overseer of the [respondent] American Commodity Brokers" (Tr. 62).

The Chief Administrative Law Judge states (Decision, pp. 10, 12):

There was no testimony from the corporation's president, respondent Dempster, as to respondent Whelan's authorization, responsibilities and duties in the management, direction and control of the corporation's activities. Respondent Dempster was not called as a witness and the only statement from her is a stipulation of record in which she asserts that she herself was responsible for the management, direction and control of the activities of the respondent corporation.

* * *

Not to be ignored is the stipulation of the respondent corporation and the respondent Dempster, made a part of the record

in this proceeding, that respondent Dempster herself was responsible for the management, direction and control of the corporation. In her stipulation she made no reference to any joint or shared control, she made no mention of any such responsibility of respondent Whelan, and she was not called and did not testify at the hearing.

The stipulation by the respondent Dempster that she was responsible for the management, direction and control of the activities of the respondent corporation sheds no light on the issue of whether the respondent Whelan aided, abetted, or participated in the violations within the meaning of § 13(a) of the Commodity Exchange Act. In the Decision and Order which I issued suspending the trading privileges of respondents American Commodity Brokers Inc., and Phyllis C. Dempster for five years, I found that respondent Dempster was "at all times material herein, president of the respondent corporation and responsible for the management, direction and control of its activities" (Findings of Fact, No. 2, p. 2). I knew at that time that the issue was being litigated as to whether the respondent Whelan's activities also made him responsible under § 13 (a) of the Act as a principal. That finding as to respondent Dempster is not inconsistent with a finding that respondent Whelan, as Vice-President, was also responsible for the management and direction of the firm with respect to the violations involved herein. *A fortiori* it sheds no light on the precise issue involved herein, *i.e.,* whether respondent Whelan wilfully aided or abetted the violations, or acted in combination or concert with respondent Dempster as to the violations.

In addition, if any inference were to be drawn from the failure of respondent Dempster to be called as a witness, there would be as much reason to draw such an inference against the respondent Whelan as there would be to draw such an inference against the complainant. The complainant was recommending that respondent Dempster's trading privileges be suspended for five years; so there is no basis for believing that she would have been a "friendly" witness for the complainant.

The Chief Administrative Law Judge states (Decision, p. 11):

Complainant points to respondent Whelan's testimony that he was responsible for having customers' orders executed on the Exchange, for having their trades and the results thereof properly recorded in their accounts, and for insuring that their funds were properly handled. These, however, were all

functional duties which could be performed by any competent employee, the performance of which, under all the circumstances, did not denote responsibility for the management, direction and control of the corporation's activities.

Here, in one sentence, the Chief Administrative Law Judge brushes aside all of the decisive admissions by respondent Whelan which prove conclusively his responsibility as a principal under § 13(a) of the Act for all of the violations. In other words, when Mr. Whelan admitted "that he was responsible for having customers' orders executed on the Exchange, for having their trades and the results thereof properly recorded in their accounts, and for insuring that their funds were properly handled," he conceded the whole case as to the violations involved herein.

These "functional duties which could be performed by any competent employee," according to the Chief Administrative Law Judge, were the primary duties of the corporation's commodity brokerage business. If they could have been satisfactorily performed by any of the corporation's employees, why did Mrs. Dempster go outside of the firm and hire the Assistant Vice-President of a bank to perform them? In any event, that is beside the point. The point is that the respondent Whelan was hired to perform these duties; and they are the duties directly involved in this case. Any person performing such functions is required by the Act and regulations to meet minimum financial requirements, file correct financial reports, handle customers' funds properly, remit money owing to customers, and keep adequate segregation records. Under § 13(a) of the Act,

a Vice-President in charge of such functions is liable as a principal for any violations with respect thereto.

The Chief Administrative Law Judge states (Decision, p. 11):

Complainant points to testimony of Mr. Thorne [Tr. 33] that respondent Whelan was in charge of preparation of the financial statements submitted March 31, 1970 to the Commodity Exchange Authority. But Mr. Thorne also testified that the figures used in that report would have come from whoever was in charge of Whelan -- whoever was Comptroller at that date.

First, when Mr. Thorne referred to where the figures came from, he was not referring to the March 31, 1970, report. He was referring to the financial reports in general. Specifically, he testified (Tr. 32-33);

Q You designated yourself, Mr. Whelan and Mr. Brand. Was any one of these people in charge of the preparation of that report or not, or was it just a collaborative effort?

A That report, prior to my coming to the company, evidently had been filled out numerous times, I would assume. The figures would have either come from whoever would be in charge of Mr. Whelan or the previous controller or the controller at that date.

Q But as far as you recall, in the preparation of this particular statement in which you participated, were you in charge? Was Mr. Whelan in charge? Was Mr. Brand in charge, or was it simply all three of you working together?

A I would say in this particular case it would be Mr. Whelan who would have been in charge.

Second, when Mr. Thorne referred to figures supplied by "whoever would be in charge of Mr. Whelan," he was undoubtedly referring only to the President of the firm, Mrs. Dempster, Mr. Thorne testified categorically that Mr. Whelan's duties were to "run the company" (Tr. 37); that Mr. Whelan was second in the chain of command in the company (Tr. 39-40); and that the comptroller, Mr. Brand, was "next in command after the vice-president" (Tr. 40). Hence, the figures were either supplied by Mr. Whelan or by someone he was supervising, unless they were supplied to him by the President, Mrs. Dempster. As shown above, the inference is inescapable that Mr. Whelan knew the figures were false. Even if he prepared a false report using figures supplied by Mrs. Dempster, he aided, abetted, and participated in the violation within the meaning of § 13(a) of the Act.

The Chief Administrative Law Judge states (Decision, p. 11):

On the other hand, respondent Whelan testified and was unrefuted, that he was not a stockholder in the respondent corporation, that he was not on its Board of Directors, that he was on straight salary with no bonuses or profit sharing arrangements, that he had to have the President's approval of the hiring of his own secretary, that he signed no pay checks, that he reported any shortages or under-segregation to the President so she could do something about it, and he made no important decisions on corporation activities.

These circumstances do not detract in any manner from the decisive admissions by the respondent Whelan as to his responsibilities. Nothing in § 13(a) of the Act suggests that it applies only to stockholders, Directors, or officers on a profit sharing arrangement. n5 Contrariwise, it applies to *any* person who wilfully aids or abets a violation or who acts in combination or concert with another (7 U.S.C. 13c). The word "any" is a word of broad and comprehensive import. *Nigro* v. *United States,* 276 U.S. 332, 344-351 (1928); *Export Leaf Tobacco Co.* v. *American Insurance Co.,* 260 F.2d 839, 843-844 (C.A. 4, 1958).

n5. As shown above, "[t]o be guilty of the crime of 'aiding and abetting' one does not have to have an active stake in the outcome of the crime but merely participate therein." *Wyatt* v. *United States,* 388 F.2d 395, 400 (C.A. 10, 1968).

In addition, the record is silent as to the size of the respondent Whelan's salary. There is no basis for any inference that it was minuscule.

The evidence is conflicting as to whether the respondent Whelan had the authority to hire and fire employees. Mr. Thorne testified that Mr. Whelan had such authority (Tr. 37-38). But accepting the Chief Administrative Law Judge's finding that he did not, the violations in this case do not involve hiring or firing. Nor do they involve signing pay checks. The checks involved in the corporation's violations were customers' checks, which admittedly was in the area of Mr. Whelan's responsibility.

The record supports the Chief Administrative Law Judge's finding that the President of the respondent corporation, Mrs. Dempster, retained ultimate authority to make the important decisions for the firm. It is likely that the Chief Administrative Law Judge dismissed the case as to respondent Whelan because he felt that respondent Whelan had no power to compel Mrs. Dempster to deposit sufficient funds in the corporation to meet the requirements of the Act; to keep sufficient funds in the respondent corporation's customer accounts; to put sufficient money into the firm to pay the customers who were not paid; or to require the respondent Dempster to sign a correct financial report as of March 31, 1970, showing that the firm was grossly underfinanced. Nonetheless, this does not excuse respondent Whelan from being liable as a principal under § 13(a) of the Act.

I concur in the Chief Administrative Law Judge's view that the respondent Whelan was completely lacking in such power to

prevent these violations. n6 However, the amendment to the Act in 1968 which added § 13 (a) was designed precisely for this type of circumstance. The intention of Congress was to strengthen the enforcement of the regulatory requirements. If only the President of a firm who had ultimate authority were responsible for the firm's violations, there would be little or no incentive for the other officers to see that the requirements of the Act are complied with. Section 13(a) requires that the officers (or other responsible personnel) of a firm insure that the activities for which they are responsible are carried out in accordance with the requirements of the Act and regulations. If they do not have the power to compel the ultimate authority in the firm to comply with the Act and regulations, they must cease their affiliation with the firm, or be subject, as a principal, for the violations involving their field of responsibility.

n6. The complainant argues that the respondent Whelan did not have to participate in preparing the false financial report, but it is not reasonable to believe that Mrs. Dempster would have signed, or permitted him to prepare, a financial report showing that the firm would have to cease operating because it was under-financed. The only violation that he might have prevented was the firms's failure to keep proper records for four months.

As stated earlier, the Vice-President of a stockbrokerage firm in charge of handling the stocks bought and sold by the firm could not defend against a criminal action for aiding and abetting the handling of stolen securities by saying that he told the President of the firm that the securities were stolen, and the President refused to do anything about the matter.

Since the respondent Whelan was responsible for the execution of customers' orders and the handling of their funds, he was responsible for carrying out such activities in compliance with the Act and regulations. The Act and regulations

require that persons engaged in such functions meet minimum financial requirements, file accurate reports, handle customers' funds as trust funds, keep adequate records as to customers' funds in segregation, and pay customers the sums owing to them. The respondent Whelan aided and abetted in the violations involved in this case and acted in combination or concert with the respondent Dempster in such violations. He is, therefore, liable as a principal in this administrative action. 7 U.S.C. 13c.

The case of *Campbell* v. *Nixon,* 207 F. Supp. 826 (E.D. Mich., 1962), relied on by the Chief Administrative Law Judge (Decision,

pp. 8-9), is not in point. The case involves a tax statute, which did not contain aiding and abetting provisions similar to those at issue herein. The tax statute provided for a penalty if a person "required to collect, truthfully account for, and pay over any tax" failed to do so. The term "person" included an officer of a corporation "under a duty to perform the act in respect of which the violation occurs."

The facts in that case showed clearly that the plaintiff, who was Vice-President of the firm, was not under a duty to pay the withholding and social security taxes for the firm. The plaintiff had done accounting work for the firm, and when the Vice-President resigned, plaintiff was elected Vice-President. But he received only $ 100 per month from the firm, which was less than 10% of his income. He was a director of eight or nine other companies. His primary function was to "confer with and advise" the President of the firm with respect to the firm's business affairs and tax matters (207 F.Supp. at 828).

For the first five years after he was elected Vice-President of the firm, plaintiff visited the firm's offices "no more than two or three times a year" (207 F.Supp. at 828). However, from October 1955 to April 1956, plaintiff spent considerable time at the firm's offices, "principally to perform accounting services for the firm" (207 F.Supp. at 828). The plaintiff had on authority to sign checks without the President's approval, and the President refused to pay the taxes in question.

In these circumstances, the Court found and concluded that the plaintiff "was neither the disbursing officer for the corporation nor did he have the authority to direct the payment of tax obligations out of corporate funds against the wishes of the president." There is no similarity between that case and the present case either as to the statutory language or as to the factual circumstances involved. A person could not be liable under the tax statute unless he had the power to pay the tax involved, *i.e.,* unless he had power to prevent the violation from occurring. But a person may be liable as an aider or abettor even if he has no power to prevent the violation from occurring.

The present case is of great importance to the proper enforcement of the Commodity Exchange Act. It is not a case limited to the factual circumstances of the particular violations involved herein.

The respondent Whelan was admittedly the Vice-President of the firm whose area of responsibility covered the activities which were not carried out in compliance with the Act and regulations. Undoubtedly, he had no power to force the President of the firm to put sufficient funds into the firm to carry out the activities lawfully. But if that were a defense, § 13(a) of the Act would be sterile. The owner of a firm would be able to tell the firm's officers to continue to carry out their activities in violation of the Act and regulations because, in the event of an action by the Commodity Exchange Authority, he, the owner, would admit full responsibility and admit that the officers of the firm had no power to compel him to act lawfully. Since Congress has already acted to

prevent such a defense, if the respondent Whelan were to prevail in this case, under the admitted factual circumstances involved herein, it would be disastrous to the regulatory program.

II. *The Respondent Whelan's Violations Were Wilful.*

Section 13(a) of the Act holds a person liable as a principal if he "wilfully" aids or abets a violation of the Act or regulations. However, wilfulness is not a requirement to hold a person liable as a principal if he "acts in combination or concert" with another person. In this case, the respondent Whelan acted in combination or concert with the respondent Dempster and, therefore, it is not necessary to show wilfulness. Also, since the respondent Whelan is not a registrant under the Act, an order denying his trading privileges on contract markets is not a suspension of a license which would involve the wilfulness (or notice) requirement of the Administrative Procedure Act (see *In re Arthur N. Econo-mou,* 32 Agriculture Decisions 14, 131 (1973), appeal pending.

But in any event, a violation is wilful, within the meaning of the term in a regulatory statute, if the violator "1) intentionally does an act which is prohibited, -- irrespective of evil motive or reliance on erroneous advice or 2) acts with careless disregard of statutory requirements" ( *Goodman* v. *Benson,* 286 F.2d 896, 900 (C.A. 7, 1961)). Accord: *United States* v. *Illinois Cent. R. Co.,* 303 U.S. 239, 242-244 (1938); *Gearhart & Otis, Inc.* v. *Securities & Exch. Com'n.,* 348 F.2d 798, 802-803 (C.A.D.C., 1965); *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 609 (C.A. 3, 1960); *Riss & Company* v. *United States,* 262 F.2d 245, 247-251 (C.A. 8, 1958); *United States* v. *Gris,* 247 F.2d 860, 864 (C.A. 2, 1957); *Trenton Chemical Co.* v. *United States,* 201 F.2d 776, 777-780 (C.A. 6, 1953), certiorari denied, 345 U.S. 994; *Dennis* v. *United States,*, 171 F.2d 986, 990-991 (C.A.D.C. 1948), affirmed on other grounds, 339 U.S. 162 (1950); *American Surety Co.* v. *Sullivan,* 7 F.2d 605, 606 (C.A. 2, 1925); *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 162 F. 835, 840-842 (C.A. 8, 1908), certiorari denied, 212 U.S. 579; *Schwebel* v. *Orrick,* 153 F.Supp. 701, 705 (D.C.D.C., 1957), affirmed on other grounds, 251 F.2d 919 (C.A. D.C., 1958), certiorari denied, 356 U.S. 927; *In re David G. Henner,* 30 Agriculture Decisions 1151, 1260-1263 (1971); *In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542, 1587 (1971). See, also, *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476, 484 (C.A. 7, 1953), certiorari denied, 345 U.S. 997.

Wilfulness means "no more than that the person charged with the duty knows what he is doing," and it "does mean that, in addition, he must suppose that he is breaking the law." *Townsend* v. *United States,* 95 F.2d 352, 358 (C.A.D.C., 1938), certiorari denied, 303 U.S. 664; *Fields* v. *United States,* 164 F.2d 97, 100 (C.A.D.C., 1947), certiorari denied, 332 U.S. 851. It is only in statutes involving turpitude that "wilful" includes evil purpose, criminal intent, or the like. *Spies* v. *United States,* 317 U.S. 492, 497-499 (1943).

In *Trenton Chemical Co.* v. *United States,* 201 F.2d 776, 777-780 (C.A. 6, 1953), certiorari denied, 345 U.S. 994, the Court held that a company which exceeded its quota, under a regulatory order establishing quotas as to grain used by distillers, "willfully" violated the quota restriction, subjecting it to criminal prosecution. The defendant contended that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F.2d at 778, 779). In sustaining the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not proscribe acts "in themselves wrong," evidence of "bad faith or evil purpose on the part of the defendant was not necessary to constitute a violation of the act, but it was sufficient if the prohibited act was intentional or voluntary" (201 F.2d at 780).

Similarly, in *Chicago, St. P., M. & Co. Ry. Co.* v. *United States,* 162 F. 835, 840-842 (C.A. 8, 1908), certiorari denied, 212 U.S. 579, the Court upheld the conviction of the defendants under the

Elkins Act on the ground that they "willfully" granted rebates to a shipper, notwithstanding the reliance by the defendants on decisions by the Interstate Commerce Commission which, according to the Court, "might well have afforded ground for belief by defendants that their act * * * was justifiable and lawful" (162 F. at 840-841). The Court said that to "hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous doctrine. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them" ( *id.,* at 842). See, also, *Sinclair* v. *United States,* 279 U.S. 263, 299 (1929); *Armour Packing Co.* v. *United States,* 209 U.S. 56, 70-71, 85-86 (1908); *United States* v. *Union Pac. R. Co.,* 169 F. 65, 67 (C.A. 8, 1909).

It was held in *Dennis* v. *United States,* 171 F.2d 986, 990-991 (C.A.D.C., 1948), affirmed on other grounds, 339 U.S. 162 (1950), that in order to prove a wilful failure to appear before a Congressional Committee, it is not necessary to show that the act of refusal was done from a bad purpose or an evil motive. The Court held that the mere fact that the defendant claimed to have followed the advice of counsel "is no defense," and that "[i]f it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do" (171 F.2d at 991).

In *Capitol Packing Company* v. *United States,* 350 F.2d 67, 78-79 (C.A. 10, 1965), the Court interpreted wilfully more narrowly, requiring a showing of "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." The court stated (350 F.2d at 79):

This interpretation receives support from the legislative history of the Administrative Procedure Act. As stated in the House Report on the Act, in discussing § 9 (b):

"The exceptions to the second sentence, regarding revocations, apply only when the demonstrable facts fully and fairly warrant their application. Wilfulness must be manifest." H.R.Rep.No. 1980, 79th Cong., 2d Sess. 41 (1946).

See also, S.Rep.No. 752, 79th Cong., 1st Sess. 25 (1945), 92 Cong.Rec. 5654 (remarks of Congressman Walter).

I do not find the support for the meaning of wilfulness in the legislative history that the Court found. For the legislative history to show that "[w]ilfulness must be manifest" does not help me in defining wilfulness. Once I know the definition of wilfulness, then I know from the legislative history that it must be manifest, but I find nothing in the legislative history to shed light on the definition of wilfulness.

I believe that the many cases set forth above correctly interpret the Congressional intent as to wilfulness, as used in the Administrative Procedure Act. In view of the legislative history relied on by the Court in the *Capitol Packing Company* case, *supra,* a finding of wilfulness should be made if it is manifest from the record that a person has intentionally done an act which is prohibited -- irrespective of evil motive or reliance on erroneous advice, or acted with careless disregard of statutory requirements.

In this case, however, the conduct of the respondent Whelan was wilful under the most narrow meaning of the term. It is manifest from the record that the respondent Whelan knew of the requirements of the Act and regulations, and knew that the respondent corporation was not complying with them in his area of

responsibility. The most that can be said on his behalf is that he told the President of the firm about the violations, and she refused to correct the matter. This is not enough to preclude a finding of wilfulness. It was his duty to see that violations in his area of responsibility did not occur. Lacking power to prevent the violations in this case, his only lawful alternative was to leave the firm.

Mr. Whelan may not have known that he was personally liable as a principal under 7 U.S.C. 13c for the firm's violations, but even if he didn't, that would not preclude a finding of wilfulness under the foregoing authorities.

Mr. Whelan left the respondent corporation on December 31, 1970 (Tr. 66), which was prior to the administrative complaint filed on September 13, 1971. But it was not soon enough to escape liability as a principal for the firm's violations involved in this case.

III. *The Sanction.*

The Deputy Director of the Compliance Division of the Commodity Exchange Authority testified as to the serious nature of the violations by the respondent corporation (Tr. 51-52), for

which respondent Whelan is liable as a principal. He emphasized the importance of the preventive nature of the minimum financial requirements of 7 U.S.C. 6f. The minimum financial requirements are designed to prevent underfinanced firms, which are more likely to engage in illegal practices, from operating.

Futures commission merchants handle large sums of money belonging to customers. The value of all of the futures contracts regulated under the Commodity Exchange Act in fiscal 1973 was $ 268 billion. n7 Brokerage firms on the New York Stock Exchange have been failing financially in record numbers recently. n8 The Congressional Record for March 15, 1972, refers to several brokerage firms handling customers' accounts in non-regulated commodity futures that failed owing customers large sums of money (118 Cong. Rec. S3995). The Congressional hearings preceding the enactment of the financial protection provisions in 1968 refer to the dangers of underfinanced firms. n9 In discussing the proposed amendment of the Act to add minimum financial requirements (H.R. 13094, 90th Congress), the Report of the Senate Committee on Agriculture and Forestry states: "The danger to the public from such financial irresponsibility is obvious. The underfinanced brokerage firms have been found to be most likely to dip into customers' funds or resort to sharp trading practices to

bolster their money needs" (Sen. Rep. No. 947, 90th Cong., 2d Sess. (1968)).

n7. USDA Press Release No. 2219-73 dated July 19, 1973. Futures commission merchants, of course, handle only a fraction of that amount.

n8. The Evening Star, Washington, D. C., February 24, 1972, p. A-19, reports as follows:

The New York Stock Exchange, continuing to foot a huge bill for the collapse of member firms in the securities industry's financial crisis of recent years, incurred a $ 16.7 million loss in 1971, the exchange disclosed in its annual report.

* * *

Ironically, the exchange last year chalked up a record $ 18.7 million operating profit, but this was offset by $ 35.4 million of charge for assistance to customers at financially distressed members houses.

This news item accurately reflects the *New York Stock Exchange, Inc., Annual Report 1971,* p. 30. Official notice is taken of the Annual Report under 17 CFR 0.11(e) (7). See *Parker* v. *Brown,* 317 U.S. 341, 363 (1943); *Colonial Airlines* v. *Janas,* 202 F.2d 914, 919, fn. 1 (C.A. 2, 1953); *United States* v. *Rice,* 176 F.2d 373, 374, fn. 3 (C.A. 3, 1949). Opportunity to contest such official notice is available through a petition to reconsider. 17 CFR atives, 90th Cong., 1st Sess., on H.R. 11930 and H.R. 12317, pp. 45-46, 56-57, 84-85 (1967).

n9. Hearings before the Committee on Agriculture, House of Represent- 0.21(3).

It has been the duty of the Commodity Exchange Authority, since the Act was amended in 1968 (7 U.S.C. 6f), to prevent financial collapses of firms handling regulated futures contracts. This duty cannot be met unless regulated firms are deterred from deliberately operating while underfinanced. See *In re Sy B. Gaiber & Co.,* 31 Agriculture Decisions 474, 502 (1972); *In re Arthur N. Economou,* 32 Agriculture Decisions 14, 126-127 (1973), appeal pending.

The minimum financial requirements at issue here are similar in purpose to those under the Securities and Exchange Act, under which it has been held that the financial requirements are not "merely to protect investors against 'continuing' injury at the hands of those guilty of misconduct. This interpretation is far too narrow: the Act is also designed to protect the investing public against undue financial risks and future violations" ( *Blaise D'Antoni & Associates, Inc.* v. *Securities & Exchange Com'n.,* 290 F.2d 688, 689 (C.A. 5, 1961)). The financial requirements are "to assure confidence and safety to the investing public. The question is not whether actual injuries or losses were suffered by anyone." *Blaise D'Antoni & Associates, Inc.* v. *Securities & Exch. Com'n.,* 289 F.2d 276, 277 (C.A. 5, 1961), certiorari denied, 268 U.S. 899.

The Deputy Director, Compliance Division, Commodity Exchange Authority, also testified as to the seriousness of failing to comply with the segregation requirements of 7 U.S.C. 6d and the regulations issued thereunder (Tr. 52-52). The segregation requirements insure that customers' funds are treated as trust funds.

In addition, record keeping and reporting requirements are customary features of Federal regulatory programs. See, *e.g., United States* v. *Ruzicka,* 329 U.S. 287, 288-289, 293 (1946); *United States* v. *Darby,* 312 U.S. 100, 125 (1941); *Electric Bond Co.* v. *Comm'n.,* 303 U.S. 419, 439 (1938); *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U.S. 194, 204-216 (1912); *Baltimore & Ohio R.R.* v. *Interstate Com.,* 221 U.S. 612, 620-623 (1911); *Hyatt* v. *United States,* 276 F.2d 308, 312 (C.A. 10, 1960); *Panno* v. *United States,* 203 F.2d 504, 510 (C.A. 9, 1953); *United States* v. *Turner Dairy Co.,* 166 F.2d 1 (C.A. 7, 1948), certiorari denied, 335 U.S. 813; *United States* v. *Turner Dairy Co.,* 162 F.2d 425, 425-428 (C.A. 7, 1947), certiorari denied,

332 U.S. 836; *Bartlett Frazier Co.* v. *Hyde,* 65 F.2d 350 (C.A. 7, 1933), certiorari denied, 290 U.S. 654. Failure to keep adequate records interferes with the enforcement of a regulatory program. And the deliberate filing of a false report or otherwise furnishing false information to the Commodity Exchange Authority deserves a substantial sanction. *In re Sy B. Gaiber & Co.,* 31 Agriculture Decisions 474, 503 (1972).

Although there may be no need to impose a sanction against respondent Whelan to prevent him from committing, or being responsible for, future violations of the Act, n10 it is important to impose a sanction to serve as a deterrent to others. In the case of *In re Sy B. Gailber & Co.,* 31 Agriculture Decisions 474 (1972), a case which is to some extent factually similar to this one, the Judicial Officer concluded that an appropriate sanction was a cease and desist order and denial of trading privileges for two years. In *Gaiber,* the only allegations were failing to meet minimum financial requirements and making false

reports. There was no showing that customers' funds were not properly handled as trust funds, or that customers' funds were not remitted to them. Moreover, the *Gaiber* case was decided before the new, and much more severe, sanction policy -- to be applied in pending and future cases -- was announced in *In re George Rex Andrews,* 32 Agriculture Decisions 553 (1973). My views with respect to the need for severe sanctions to serve as an effective deterrent to the respondent and to others are set forth in sections III, IV, and V of the decision in the *Andrews* case (32 Agriculture Decisions 553, 563-583), which are incorporated herein by reference.

n10. The respondent Whelan is now working as Assistant Cashier of a bank (which is similar to his prior position of Assistant Vice-President of another bank). He is not now involved in futures trading, either for himself or for the bank. His attorney states that he has no future intention of engaging in futures trading.

Considering the serious nature of the violations involved in this case, the cease and desist order and the suspension of trading privileges for three years recommended by the complainant seems reasonable and will be imposed. The trading privileges of the respondent corporation and Mrs. Dempster were suspended for five years. However, the three-year suspension imposed in this case against the respondent Whelan is not three-fifths as severe as that imposed against the respondent corporation and Mrs. Dempster. The respondent corporation was engaged in business as a futures commission merchant, trading for itself and for

others. Hence, even a short period of suspension would have a substantial impact on its business activities. But the respondent Whelan is not now engaged in futures trading and does not intend to engage in futures trading in the future; so the three-year suspension of trading privileges will have no direct effect on him whatever.

The respondent Whelan's attorney states that Mr. Whelan's only reason for contesting this matter is to protect his reputation and to avoid any indirect prejudice with respect to his future banking activities. In these circumstances, it is appropriate to point out that, with the exception of a failure to keep adequate records, the record in this case indicates that the respondent Whelan had no power whatever to prevent the violations from occurring. The record also indicates that Mr. Whelan called various violations of the corporation to the attention of Mrs. Dempster, but she did not put sufficient money into the firm to solve the firm's financial problems, which were at the root of the violations. Mr. Whelan was not on a profit sharing arrangement with the firm, and there is every reason to believe that he preferred to have the firm operate lawfully and tried to get the President of the firm to do so. Also, there is no indication that Mr. Whelan knew that he was personally liable for the firm's violations. Mr. Whelan left the respondent corporation before the administrative complaint was issued in this case.

In these circumstances, there is no basis from this record or this decision to draw any adverse inference with respect to the respondent Whelan's fitness to assume responsible positions in the banking industry. Nonetheless, in order to serve as a deterrent to other officers or responsible personnel of futures commission firms, it is necessary to impose a sanction suspending the respondent Whelan's trading privileges and requiring him to cease and desist from future violations.

**ORDER**

1. Effective on the date of service of this order upon respondent John Whelan, he shall cease and desist from engaging in and from aiding, abetting, or acting in combination or concert with any other person to cause American Commodity Brokers, Inc., or any other futures commission merchant to engage in the activities set forth below.

a. Engaging as futures commission merchant without meeting the minimum financial requirements prescribed by § 1.17 of the regulations issued under the Commodity Exchange Act (17 CFR 1.17).

b. Failing to maintain in segregation sufficient funds to pay all credits and equities due to its customers trading in commodity futures subject to the provisions of the Commodity Exchange Act.

c. Failing to make a computation and permanent record, as of the close of the market on each business day, of the amount of money, securities and property required to be held in segregated account as provided in § 1.32 of the regulations (17 CFR 1.32).

d. Making material false statements in financial reports submitted to the Commodity Exchange Authority.

e. Failing and refusing to remit to customers money due and owing to such customers in connection with transactions in commodities for future delivery which were made for the account and benefit of such customers.

2. Effective on the thirtieth day after the date this Order is issued, respondent John Whelan is prohibited from trading in any commodity on any contract market subject to the provisions of the Commodity Exchange Act for three years and all contract markets shall deny trading privileges to the respondent for that period. Such prohibition and denial shall apply to all trading done and positions held directly by the said respondent, either for his own account or as the agent or representative of any other person or firm, and also to all trading done and positions held indirectly through persons or firms owned or controlled by the said respondent, or otherwise.

3. A copy of this Decision and Order shall be served on each of the parties and on each contract market.

**LOAD-DATE:** June 9, 2008