Commodity Futures Trading Commission
CEA CASES

NAME: SY B. GAIBER & CO., SY B. GAIBER, AND MICHAEL R. HEMPEL

CITATION: 31 Agric. Dec. 474

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(No. 14,515)

In re SY B. GAIBER & CO., SY B. GAIBER, and MICHAEL R. HEMPEL. CEA Docket No. 165. Decided April 12, 1972.

Financial requirements -- False reports -- Denial of trading privileges for two years

Respondents are prohibited from trading on all the contract markets for a period of two years for violations of the act and the regulations in failing to meet minimum financial requirements and making false reports, etc.

Earl L. Saunders for Commodity Exchange Authority.

Emanuel Gordon, Chicago, Ill., for respondents.

Dorothea A. Baker, Hearing Examiner.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

This is a proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1, 1970 ed.). The respondents did not except to the Recommended Decision, and the complainant excepted only as to the recommended sanction. In these circumstances, and after consideration of the entire record, the first 36 pages of the Recommended Decision are adopted as the final decision herein, followed by the Judicial Officer's additional conclusions and order.

HEARING EXAMINER'S RECOMMENDED DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1, 1970 ed.), hereinafter sometimes

referred to as the Act, instituted by a complaint and notice of hearing issued by the Assistant Secretary of Agriculture and filed herein on February 12, 1970. The Respondents are Sy B. Gaiber & Co., a partnership, and the two partners in the firm, Sy B. Gaiber and Michael R. Hempel.

The complaint charges the Respondents with having willfully violated Sections 4f and 6(b) of the Act and Sections 1.17 and 1.35 of the Regulations issued thereunder (17 CFR §§ 1.17 and 1.35). It is alleged that Respondents lacked approximately $ 9,000 on March 31, 1969, $ 28,000 on June 30, 1969, and $ 55,000 on August 4, 1969, of having enough funds to meet the minimum financial requirements and it is further alleged that in response to inquiries of the Commodity Exchange Authority as to the Respondent partnership's financial condition, the Respondents knowingly made false and misleading statements and submitted false and misleading reports to the Authority with respect to the

source of $ 27,000 that had been deposited during June 1969, in the general funds bank account of the Respondent partnership.

On March 24, 1970, the respondents filed an answer in response to the complaint wherein they denied any willful or intentional violation of the Act or the Regulations by reason of the matters alleged. Specifically, paragraph I n1 of the complaint was admitted and, by way of further answer, the Respondents stated:

"* * * that the individuals named and the partnership are not now nor have they been since October 31, 1969, acting in the capacity of a futures commission merchant under or subject to the Commodity Exchange Act, nor are said individuals or the partnership presently engaged, or have they been so engaged since October 31, 1969, in trading in commodities for future delivery, for the accounts of customers, holding for such customers sums of money, representing the deposits

of margin buy [sic] and trading profits accruing to such customers."

n1 The admissions contained in paragraph I of the complaint are to the effect:

"Respondents Sy B. Gaiber and Michael R. Hempel, individuals, are now, and were at all times material to this complaint, the sole partners in an Illinois partnership doing business under the firm name of Sy B. Gaiber & Co., with offices at 343 South Dearborn Street, Chicago, Illinois 60604. At all times material herein up to November 4, 1969, the said partnership, acting in the capacity of futures commission merchant under the Commodity Exchange Act, was 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. During the year 1969, the said partnership was registered as a futures commission merchant under the Commodity Exchange Act. In accordance with the provisions of section 4f of the said Act (7 U.S.C. 6f, Supp. IV, 1969) and section 1.16 of the Regulations thereunder (17 CFR 1.16), such registration expired on December 31, 1969, and the said partnership is not now so registered."

With respect to paragraph II of the complaint a denial was made and it was averred, among other things, that the Respondent, Sy B. Gaiber & Co.,

"* * * will affirmatively state that as of October 31, 1969, it had ceased all activities as a registered futures commission merchant and, further, does specifically state that on or about March 31, 1969, it was advised by representatives of the Commodity Exchange Authority that it had fallen below the minimum financial requirements commonly called 'safety factor', but that on or about April 1, 1969, it deposited sufficient funds to meet said minimum financial requirements; said Respondent further states that representatives of the Commodity Exchange Authority advised it during August of 1969, that the Respondent failed to meet certain minimum financial requirements as of June 30, 1969, however, at the time of said advice, Respondent did, in fact, meet the minimum financial requirements and, therefore, there was nothing which Respondent was required to do with respect to such failure. * * *"

The allegations of false statements and false reports set forth in paragraph III of the complaint were denied and a response was made that "if the statements and reports as alleged in said paragraph 3 were in fact made, they were made based upon the advice and counsel of the representatives, agents or officials of the Commodity Exchange Authority," and that Respondents acted in reliance thereon; that "at the request of the representatives, agents or officials of the Commodity Exchange Authority, Respondents have obtained and previously submitted or caused to be submitted, to the Commodity Exchange Authority statements from various persons relating to the $ 21,000.00 [sic] n2 in question, which

statements show that said funds were given to the individual Respondents as contributions or gifts with no expectation of any consideration therefor or of the repayment of said funds."

n2 This is obviously a typographical error. Should be $ 27,000.00.

It is further alleged in the answer that the matters set forth in the complaint were moot and of no effect since Respondents had "ceased to act in capacity of futures commission merchants as of October 31, 1969, and are, therefore, not trading on or subject to the Rules of any Commodity market nor are they engaged

in any acts or commodities which could constitute a violation of the Commodity Exchange Act or the regulations pertaining thereto in any manner."

As pointed out by Complainant, the provisions of section 4f(2) of the Act set forth certain conditions under which the minimum financial requirements will be considered met where the registrant is a member of a contract market and conforms to minimum financial standards and related reporting requirements set by such contract market in its bylaws, rules, regulations or resolutions and approved by the Secretary of Agriculture as adequate to effectuate the purposes of the Act. In this case the Respondents were members only of the Chicago Open Board of Trade, which has submitted no minimum financial standards to the Secretary of Agriculture for approval. Testimony at the hearing indicates that the Chicago Open Board of Trade had not established minimum financial requirements which had been approved by Secretary of Agriculture as adequate to effectuate the purposes of section 4f of the Act. No reliance or claim has been made by Respondents on such provisions and, indeed, none properly could be made.

An oral hearing was held at Chicago, Illinois, on April 22, 23, 24, 28 and 29, 1970, before Dorothea A. Baker, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture. The Respondents were represented by Emanuel Gordon, Esquire, Chicago, Illinois. Earl L. Saunders, Esquire, Office of the General Counsel, United States Department of Agriculture, appeared as counsel for the Complainant. Both sides offered oral and documentary evidence. The record contains 902 pages of oral testimony and 39 exhibits, n3 many of which consist of multiple documents. In due course the parties filed briefs.

n3 Exhibits R-B, RC-1 and RC-2 (the originals of which were introduced at the hearing) were withdrawn by Respondents' counsel for the purpose of substituting photostatic copies thereof; no such photostatic copies were ever received. Although the absence of these exhibits had no consequence on this decision, the failure of Respondent to honor his agreement, whereby he withdrew the original exhibits for the purpose of substituting true and accurate copies thereof, should preclude the reliance on, or use of, by Respondents of these exhibits in any further administrative or Judicial review of this proceeding.

PROPOSED FINDINGS OF FACT

1. As is herein pertinent and material, the Respondent, Sy B. Gaiber & Co., was an Illinois partnership composed solely of the individual Respondents Sy B. Gaiber and Michael R. Hempel. At all times material herein up to on or about October 24, 1969, the

individual Respondents were members of the Chicago Open Board of Trade, and up to on or about October 31, 1969, the Respondent partnership, acting in the capacity of futures commission merchant under the Commodity Exchange Act, was 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. Throughout the year 1969, the Respondent partnership was registered as a futures commission merchant under the Commodity Exchange Act. In accordance with the provisions of section 4f of the Act and the applicable regulations thereunder, such registration expired on December 31, 1969, and the Respondent partnership is no longer a registrant under the Act.

2. The Secretary of Agriculture, pursuant to statutory authority, has issued regulations under the Act prescribing minimum financial requirements which must be met by registered futures commission merchants (Title 17, Chap. I, Sec. 1.17, Code of Federal Regulations).

3. Pursuant to special call of the Commodity Exchange Authority, the Respondent partnership submitted Form 1-FR, Statement of Financial Condition, as of March 31, 1969, which was marked received as of April 16, 1969, by Complainant's employees. The instructions for preparing the form, and which were incorporated therein, set forth, among other things,

"Note: Before completing the form it is suggested that the applicant or registrant review thoroughly sections 1.10 and 1.17 of the regulations under the Commodity Exchange Act. Section 1.10 pertains to reporting of financial data and other filing requirements. Section 1.17 contains the minimum financial requirements prescribed for applicants and registered futures commission merchants."

* * *

"Financial Statement -- The financial statement must be based upon the applicant's or registrant's accounting records. All accounting records, schedules and other memoranda which support amounts shown on the financial statement must be retained in accordance with section 1.31 of the regulations."

Pursuant to requirements of the regulations, Respondent partnership submitted Form 1-FR (received July 30, 1969), Statement

of Financial Condition, as of June 30, 1969. The instructions for preparing the form were similar to those set forth above.

4. In the ordinary course of their official duties of examining books and records of registered futures commission merchants, representatives of the Commodity Exchange Authority conducted two audits of Respondents' books and records as of March 31, 1969, and June 30, 1969 and one record examination as of August 4, 1969.

5. The audit investigation as of March 31, 1969 disclosed that the Respondent partnership failed to meet the minimum financial requirements in the amount of $ 8,927.62, and on June 13, 1969, such underfinanced condition of Respondent partnership was brought to the attention of Respondent Sy B. Gaiber. Respondent Gaiber indicated that under the circumstances he felt that he had no alternative but to deposit the necessary money so that Sy B. Gaiber & Co. (Respondent partnership) would meet the minimum financial requirements, and during a subsequent discussion with one of Complainant's representatives on June 16, 1969, indicated that by the end of June he would have more than enough money deposited into the partnership so that he would have no trouble whatsoever meeting the financial requirements.

6. The record evidence establishes that as of March 31, 1969, the Respondent partnership failed to meet the minimum financial requirements of section 1.17 of the regulations issued under the Act.

7. On June 26 and 30, 1969, a representative of the Commodity Exchange Authority visited the Chicago office of Respondent Sy B. Gaiber & Co. for the purpose of determining whether the firm had acquired sufficient funds to remedy its underfinanced condition. On June 26, 1969, Respondent Sy B. Gaiber told such representative that $ 6,000 had been deposited into the capital account of

the Respondent partnership on June 23, and on June 30, 1969 Respondent Gaiber further stated that an additional sum of $ 21,000 had been deposited into such account on the same day, June 30. Respondent Gaiber presented to the Commodity Exchange Authority's representative for his inspection, the Respondents' records of such deposits. These consisted of the entries of the amounts of the deposits in the Respondent partnership's general funds checkbook and two deposit slips -- one dated June 23, in the amount of $ 6,000, and the other dated June 30, in the amount of $ 21,000. With respect to the sources of the money

deposited, the two deposit slips contained notations such as "Continental $ 11,000," "Milwaukee $ 8,000," and "Money order $ 2,000." When the Commodity Exchange Authority's representative asked Respondent Gaiber to explain these sources, he replied that "they were from outside interests," and were "the personal contributions of both himself and Michael Hempel."

8. On July 1, 1969, the Commodity Exchange Authority's representatives met with Respondent Sy B. Gaiber in a further effort to determine the source of the $ 27,000 in question. During the meeting on July 1, Respondent Gaiber stated that the entire $ 27,000 had been contributed by Respondent Michael R. Hempel and his brother William, his sister and father, and that they were to receive in return for their money shares of stock in Sy B. Gaiber & Co., Inc., a new corporation. n4 On July 8, 1969, James J. McCarthy, Jr., Chief of the Registration and Audit Branch in the Chicago office of the Commodity Exchange Authority, told Respondent Sy B. Gaiber, with respect to the $ 27,000, that "if these funds were for shares of stock in a corporation, that they could not be considered as part of the capital of Sy B. Gaiber & Company." Respondent Gaiber replied that the $ 27,000 "would eventually be exchanged for shares of stock in a corporation but at the time that the funds were obtained in June 1969, they were for the capital of the partnership." Respondent Gaiber then asked "what proof is required by the Commodity Exchange Authority to show that these funds were part of the partnership's capital in June of 1969," and Mr. McCarthy replied that in his view the $ 27,000 "wolud have to be considered as a current liability of the partnership unless he (Respondent Gaiber) got written documentation from the people who had sent in these funds that the partnership of Gaiber & Company had no liabilities whatsoever to these individuals." It was understood by Respondent Gaiber that said $ 27,000 could not be subject to any liability on the part of the partnership to the depositor.

n4 During the hearing the Respondents abandoned their contention (as pled in the answer) that the $ 27,000 in question represented "contributions or gifts."

9. On or about July 10, 1969, the Respondents submitted three letters to the Commodity Exchange Authority signed by Respondent Michael R. Hempel, William Hempel and Jerome P. Chernoff, respectively. William Hempel is the brother of Respondent Michael R. Hempel and was employed during 1969 as a bookkeeper by Respondent Sy B. Gaiber & Co. Jerome P. Chernoff was employed during 1969 by the Respondent partnership as the

manager of its branch office in Milwaukee, Wisconsin. According to these letters, Respondent Michael R. Hempel, William Hempel and Jerome P. Chernoff deposited $ 11,000, $ 10,000, and $ 6,000, respectively, with the Respondent partnership "for their capital account." Each such letter was handwritten on the letterhead of "Sy B. Gaiber & Co." and except for the names of the signers and the amounts "deposited," the letters were identical. The letter signed by Respondent Michael R. Hempel is as follows:

"July 10th 1969

U.S. Department of Agriculture C.E.A.

141 Jackson

Chicago Illinois 60604

Gentlemen:

This letter will serve as my affidavit that I have deposited in Sy B. Gaiber & Co the amount of $ 11,000 for their capital account. Sy B. Gaiber & Co. has no obligation of repayment to me and I have no claim against Sy B. Gaiber & Co. now, or will ever make any claim against this money now or at any time in the future.

/s/ MICHAEL R. HEMPEL"

10. The Respondents' books and records, as of June 30, 1969, were the subject of an audit examination in July 1969, and in the course of said examination, on July 22, 1969, the Commodity Exchange Authority's representative learned from certain financial data of Respondents that the $ 27,000 in question had been received from the following nine different individuals:

Lawrence H. Hempel	$ 2,000
Anna Hempel	2,000
Orthwin Gallitz	2,000
William Hempel	3,000
Terry Zastrow	2,000
Jerome Chernoff	3,000
James Boening	4,000
Amy Boening	2,000
Bruno Bregantini	7,000

Michael Hempel, William Hempel and Lawrence A. Hempel are brothers and Anna Hempel is their mother. Orthwin Gallitz is William Hempel's brother-in-law. None of the remaining

persons in the group from whom the $ 27,000 was received are related to the Hempel family.

Such information as to the source of the $ 27,000 was contrary to the three signed statements (as set forth in Finding of Fact 9) previously submitted to the Commodity Exchange Authority that the $ 27,000 had been deposited by Respondent Michael R. Hempel, William Hempel, and Jerome P. Chernoff in the respective amounts of $ 11,000, $ 10,000, and $ 6,000, "for the capital account" of Respondent partnership. This contradiction was brought to the attention of Respondent Sy B. Gaiber on the same day by representatives of the Commodity Exchange Authority. When asked to explain these discrepancies, Respondent Gaiber said that "when he had obtained the three statements for [the Commodity Exchange Authority] he thought that it would be easier that way, since all of the other individuals were either related to Michael or William Hempel, or were friends of Jerome Chernoff." Respondent Gaiber said that "substatements would be obtained within a week" and asked "what should appear on these statements." He was advised that employees of the Commodity Exchange Authority could not tell him what should appear on the statements, and, that he should consult an attorney. Respondent Gaiber had been advised previously that the $ 27,000 would have to be considered as a current liability of the Respondent partnership unless documentation was received from the people who had sent in the funds that the Respondent partnership had no liabilities whatsoever to these individuals.

11. On or about July 27, 1969, the Respondents submitted four letters to the Commodity Exchange Authority. One letter was signed by Jessica Gallitz and Orthwin Gallitz and the other three letters were signed by Anna Hempel, Lawrence H. Hempel and William Hempel, respectively. According to these letters, Jessica Gallitz and Orthwin Gallitz had deposited $ 2,000, and Anna Hempel, Lawrence H. Hempel and William Hempel had deposited $ 2,000, $ 2,000, and $ 3,000, respectively, with Respondent Sy B. Gaiber & Co. "for their Capital Account."

Each such letter was typewritten on the letterhead of "Sy B. Gaiber & Co." and except for the names of the signers and the amounts "deposited," the letters were identical. The letter signed by William Hempel is as follows:

"July 25, 1969

Mr. J. McCarthy

c/o C.E.A.

U.S. Department of Agriculture

141 W. Jackson Boulevard

Chicago, Illinois

Dear Mr. McCarthy:

This letter will serve as my affidavit that I have deposited with Sy B. Gaiber & Co. the amount of $ 3,000.00 for their Capital Account.

Sy B. Gaiber & Co. (a partnership) has no obligations of repayment to me and I have no claims against Sy B. Gaiber & Co. This money is to be used as capital without any claims or liens from me.

/s/ William Hempel

If husband and wife, both sign."

12. On October 12, 1969, the Respondents submitted five additional letters to the Commodity Exchange Authority. One letter bore the signatures, Brunno Bregantini and Anna Bregantini, and the other four letters bore the following signatures, respectively, James Boening, Amy Boening, Terry Zastrow and Jerome Chernoff. According to these letters, Brunno Bregantini and Anna Bregantini had deposited $ 7,000 with the Respondent partnership, and James Boening, Amy Boening, Terry Zastrow and Jerome Chernoff had deposited $ 4,000, $ 2,000, $ 2,000, and $ 3,000, respectively, with the Respondent partnership. Except for the signatures and the amounts "deposited," the letters were identical. The letter bearing the signature of James Boening is as follows:

"October, 1969

Mr. James McCarthy

c/o Commodity Exchange Authority

United States Department of Agriculture

141 West Jackson Boulevard

Chicago, Illinois

Dear Mr. McCarthy:

The intent of this letter is to state to you that the undersigned has heretofore deposited with Sy B. Gaiber & Co., a partnership, the sum of four thousand ($ 4,000.00) dollars. The undersigned has no claim against Sy B. Gaiber & Co. by

reason of the deposit of said sum into the partnership of Sy B. Gaiber & Co., nor is Sy B. Gaiber & Co., a partnership, obligated to make a return of said sum to the undersigned in any manner whatsoever.

Very truly yours,

/s/ James Boening

JAMES BOENING

JB:epb"

13. Mr. Boening, an attorney, appeared as a witness at the hearing and testified in substance, among other things, that with respect to $ 6,000 put up by him and his wife (of the $ 27,000 in issue), such amount was for the purchase of 2,000 shares of stock on June 23, 1969 (for $ 4,000), and, on behalf of his wife, for the purchase of 1,000 shares (for $ 2,000) on the same date. The $ 6,000 was submitted with the belief and expectation that he was purchasing shares of stock in a corporation, to be newly formed (Sy B. Gaiber & Co., Inc.). He was unaware of the existence of any partnership. It was not until some time later that he may have become aware of the partnership and the witness was definitely under the impression that the investment he had made for himself and on behalf of his wife was for the purpose of purchasing stock in the corporation. Although Mr. Boening eventually recovered $ 5,250 of his investment, nevertheless, this was achieved only after he was "pressured" into signing a release to the partnership. The witness's testimony in this regard leaves us with no doubt that this witness had no intention of ever investing in the Respondent partnership and that he signed the release to the partnership in order to "protect" his investment. The witness Boening and his wife are not related in any way to the Respondents, Gaiber and Hempel, nor to Mr. Chernoff.

14. The evidence shows that as of June 30, 1969 and August 4, 1969, the Respondent partnership had overstated its current assets by including funds in the amounts of $ 27,000 and $ 17,000 (as of the August 4, 1969 examination $ 10,000 had been transferred back to the corporation) received from stockholders of Sy B. Gaiber Co., Inc., for the purchase of stocks in the corporation, Sy B. Gaiber Co., Inc., and that such amounts did not represent gifts, contributions, or funds for which the partnership had no liability.

15. The record evidence establishes that as of June 30, 1969, and as of August 4, 1969, the Respondent partnership failed to

meet the minimum financial requirements of section 1.17 of the regulations issued under the Act.

PROPOSED CONCLUSIONS

The Respondents are charged with having violated sections 4f n5 and 6(b) n6 of the Commodity Exchange Act (7 U.S.C. §§ 6f and 9) and the regulations promulgated thereunder.

> n5 Complainant is charging Respondents with having violated paragraph (2) of section 4f of the Act which relates to registration of commission merchants and brokers; and financial requirements of futures commission merchants, and provides in pertinent part:
>
> "(2) Notwithstanding any other provisions of this chapter, no person desiring to register as futures commission merchant shall be so registered unless he meets such minimum financial requirements as the Secretary of Agriculture may by regulation prescribe as necessary to insure his meeting his obligation as a registrant, *and each person so registered shall at all times continue to meet such prescribed minimum financial requirements:* PROVIDED, That such minimum financial requirements will be considered met if the applicant for registration or registrant is a member of a contract market and conforms to minimum financial standards and related reporting requirements set by such contract market in its by-laws, rules, regulations, or resolutions and approved (sic) by the Secretary of Agriculture as adequate to effectuate the purposes of this paragraph (2). * * *" (Initial emphasis added).

Paragraph 2 was added to the Act by Public Law 90-258 (90th Cong., 2d Sess. H.R. 13094).

The legislative history of this amendatory bill is found in H.R. No. 743 and S.R. No. 947 (90th Cong., 2d Sess.). Among other things, it gave the Secretary, for the first time, authority to set minimum financial requirements for persons who act as futures commission merchants. Under the law prior to amendment, the Secretary of Agriculture was required to register as a futures commission merchant any person who made application on the prescribed form regardless of any showing of adequate capital or financial responsibility. There were instances of persons registered with little or no capital. It was noted in the Senate Report that:

"That 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. * * *

"Applicants who are not members of contract markets with approved standards will be required to meet standards established by the Secretary of Agriculture * * *." (S.R. 947)

n6 "§ 9. *Exclusion of persons from privilege of 'contract markets'; procedure for exclusion; review by court of appeals.*

"If the Secretary of Agriculture has reason to believe that any person (other than a contract market) * * * has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Secretary of Agriculture under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, he may serve upon such person a complaint * * * requiring such person to show cause why an order *should not be made prohibiting him from trading on or subject to the rules of any contract market,* and directing that all contract markets refuse all trading privileges to such person, until further notice of the Secretary of Agriculture, and to show cause why the registration of such person, if registered as futures commission merchant, or as floor broker hereunder, *should not be suspended or revoked* * * *." (Emphasis added)

The regulatory provisions pertaining to the minimum financial requirements which were in effect during the times pertinent to this proceeding are set forth in section 1.17 which provides in pertinent part:

"§ 1.17 *Minimum financial requirements.*

"(a) Except as provided in paragraphs (b) and (c) of this section, no person applying for registration as futures commission merchant shall be so registered unless he has adjusted working capital equal to or in excess of whichever of the following is greater: (1) $ 10,000 or (2) the sum of the safety factors hereinafter prescribed in this section with respect to both proprietary accounts and customers' accounts plus 5 percent of the applicant's aggregate indebtedness; and each person registered as futures commisison merchant shall at times continue to meet such financial requirements."

Subsection (d) of section 1.17 defines the terminology used in said section. Respondents are also charged with having violated section 1.35 of the regulations which provides in pertinent part:

"§ 1.35 *Records of cash commodity and futures transactions.*

"(a) Futures commission merchants and members of contract markets: Each futures commission merchant and each member of a contract market shall keep

full, complete, and systematic records, together with all pertinent data and memoranda, of all transactions relating to his business of dealing in commodity futures and cash commodities. He shall retain the required records, data, and memoranda in accordance with the requirements of § 1.31, and *shall produce them for inspection and shall furnish true and correct information and reports as to the contents or the meaning thereof,* when and as requested by any authorized representative of the U. S. Department of Agriculture or the U. S. Department of Justice. * * *" (Emphasis added)

The Complainant maintains that (1) the Respondent partnership willfully operated as a registered futures commission merchant under the Act without meeting the minimum financial requirements of the Act and of the regulations, in violation of section 4f(2) of the Act and section 1.17 of the regulations; (2) the Respondents willfully made false and misleading statements of material facts in reports filed with the Secretary of Agriculture under the Act, in violation of section 6(b) of the Act; and (3) the Respondents willfully furnished false and misleading information and reports to authorized representatives of the United States

Department of Agriculture as to the meaning and contents of the Respondents' records of financial transactions relating to their business, in violation of section 1.35 of the regulations. On brief, the Complainant states, *inter alia,* "most of the material facts in this proceeding are not in dispute. The only real issue concerns the $ 27,000, * * *. The Respondents claim that the $ 27,000 was contributed to the Respondent partnership or deposited with it and was a part of its capital."

Basically the parties agree as to the issues in the case, namely, whether Respondents failed to meet prescribed minimum financial requirements; whether Respondents furnished true and correct information and reports; and, whether Respondents willfully made false and misleading statements to representatives of the Commodity Exchange Authority. On brief, Respondents further state, "It is obvious that the $ 27,000.00 referred to in the Complaint is, in fact, the main point in issue." Among the defenses of the Respondents to the charges are that with respect to the alleged financial deficiencies on the three specified dates, the Respondents were not notified of same until a "substantial period of time subsequent to said dates;" that such requirements were of recent origin and Respondents, like others affected, encountered "technical and bookkeeping problems" in conforming to the prescribed minimum financial requirements; that there was no willful or fraudulent intent by Respondents in the documentation submitted to the representatives of the Commodity Exchange Authority; and, that the Complainant's charges are ill founded and, "If anything, there has been indicated irresponsible, inept and indecisiveness of direction by representatives of the Commodity Exchange Authority."

There is a rather voluminous record in this case consisting of hundreds of pages of testimony and multitudinous exhibits which we have reviewed and considered. Without attempting to reiterate the same in detail the following observations are made concerning what the record shows in our opinion.

The record clearly shows that Respondents' books and records were the subject of careful, thorough, and complete audit examinations as of March 31, 1969, and June 30, 1969, and of a record examination as of August 4, 1969.

These examinations were done in the ordinary course of the Commodity Exchange Authority's representatives' authorities and duties in carrying out their responsibility to see that the provisions of the Act are complied with. To a substantial extent, the

provisions of the Act, of which Respondents have been charged with violating, are designed for the protection of the customers of futures commission merchants. At the hearing, there was some suggestion on the part of Respondents

that there may have been some plan or conspiracy on the part of the Commodity Exchange authorities to drive Respondents out of business, n7 that the audit examinations were irregular, etc. We find no basis of fact in the record for such suggestion.

n7 On October 24, 1969, the Respondent partnership was suspended as a clearing member of the Chicago Open Board of Trade (Tr. 134).

As a result of the aforementioned three examinations (as of March 31, 1969, June 30, 1969, and August 4, 1969) it was determined that the Respondents failed to meet the minimum financial requirements, as follows:

As of:	Amount by which minimum financial requirements not met:
March 31, 1969	$ 8,927.62
June 30, 1969	27,789.22
August 4, 1969	55,209.40

The Respondents deny that they were underfinanced by the above stated amounts, and, as a basis therefor, set forth that $ 27,000 which was deposited to the Respondent partnership's general funds account ($ 6,000 on June 23, 1969 and $ 21,000 on June 30, 1969), should for the purposes herein, be considered capital of the partnership, and, that with respect to the $ 55,209.40 deficiency (as of August 4, 1969), not only should $ 17,000 (of the $ 27,000 in issue) be considered partnership capital, but, also, that it was improper to compute the proprietary safety factor because, among other things, the figure pertaining to one's "proprietary safety factor" can be immediately reduced at any given time by reducing one's "open position" on the market, and that the Respondents, subsequently, to August 4, 1969, reduced their "open position" after it was ascertained that such position was very substantial.

We have given careful consideration to these contentions of Respondents. But, the overwhelming evidence of record necessitates the conclusion that the Respondents have advanced no possible defenses nor explanations for its underfinanced position as of March 31, 1969. No claim was made, nor could it be, that the $ 27,000 in issue pertains to any time prior to June 23 (and 30), 1969. Also, although not set forth by Respondents in brief, the argument relating to the "proprietary safety factor" could not

relieve the Respondents from their March 31, 1969, failure to meet the minimum financial requirements by $ 8,927.62. n8 We have no alternative but to find and conclude that as of March 31, 1969, the Respondents failed to comply with the applicable provisions of the Act and regulations pertaining to minimum financial requirements.

n8 See Ex. C-2, Tr. 32, showing adjustment to proprietary safety factor in amount of $ 4,554.

With respect to its financial condition on June 30, 1969, the basic contention of Respondents is that the $ 27,000 deposited on June 23 and 30th, 1969 in the respective amounts of $ 6,000 and $ 21,000, should be considered capital of the partnership. In support of their position the Respondents rely upon various documentation submitted to the Commodity Exchange Act authorities, the first of which consisted of three letters signed by Michael R. Hempel, William Hempel and Jerome P. Chernoff, to the effect that the respective amounts deposited by each was for the "capital account" of the Respondent partnership which "has no obligation of repayment to me and I have no claim against [the Respondent partnership] now, or will ever make any claim against this money now or at any time in the future." As a matter of fact, only $ 6,000 of the $ 27,000 was received from William Hempel and Jerome P. Chernoff. The remaining $ 21,000 was paid by seven different persons solely in payment of stock issued [or to be issued] to them by a newly formed corporation, Sy B. Gaiber & Co., Inc. n9 The

Respondents then proceeded to obtain unsworn written statements from the nine stockholders to the effect that the respective amounts deposited for stock purchases were for the capital account of the partnership which had no obligations of repayment and against which the stockholder had no claim.

n9 The Sy B. Gaiber & Co., Inc., an Illinois corporation, was organized and incorporated the early part of July 1969, and an application for registration under the Commodity Exchange Act was received by Complainant on or about July 7, 1969.

In its answer, and at one time during the hearing, the Respondents maintained that the $ 27,000 represented gifts or contributions. However, this contention apparently was abandoned, and Respondents admitted that the $ 27,000 represented deposits by individuals for stock in the corporation.

Respondents would have us accept these statements of the nine shareholders because:

"It is difficult to believe that the said depositors would execute a document to the effect that the Respondent partnership

had no liability to them by reason of such deposits if, in fact, such was not the case. It should be noted that the depositors were all mature persons, and, as a matter of fact, one of the depositors was an attorney."

However, we do not find it difficult to understand why the depositor-stockholders would sign the statements they did. A reading of the testimony of Mr. Boening clearly shows why he, after much reluctance, agreed to do so: he was apprehensive with respect to his investment and agreed to sign the statement with the hope that it would benefit the corporation.

Moreover, the Respondents admit that the $ 27,000 was for the purchase of stock in the corporation.

The only witness called by Respondents was Sy B. Gaiber whose explanation of the situation was:

"A. The relationship between Sy B. Gaiber & Company, a partnership, and Sy B. Gaiber & Company, Incorporated, prior to its incorporation, was for the sole purpose of assuming all of the assets, all of the liabilities of the partnership, and adding additional capital to the partnership, applying for a license as a future commissions merchant under the corporation, thus absorbing the partnership into the corporation, and no longer having a corporation -- a partnership, and only a corporation, and people who purchased stock, purchased it on that premise."

We have noted, however, that although Mr. Gaiber later testified that as of July 1969 in excess of $ 100,000 n10 had been received "from people that were going to purchase stock in the corporation," only the $ 27,000 (representing "first commitments") was deposited into the Respondent's partnership's general fund account.

n10 Subsequent testimony by the witness indicated that as of July 31, 1969, individuals had contributed $ 52,000 and subsequently another $ 50,000 was invested.

We cannot agree that the attempted utilization of corporate funds by the partnership made such funds an asset of the partnership. Nor can we permit the Respondents' reliance upon dictated statements to the then corporate stockholders to be used as a subtsitute for a reflection of the actual facts. The individuals who advanced money for the purchase of stock certainly had claims and rights that the money be utilized for the purpose for which it was given. We do not find Respondent's argument, that the assets of the Respondent partnership were merged into the

corporation to be supported by the evidence of record, nor, in fact tenable with respect to the periods of time involved. Exhibits C-12 through C-14, inclusive, represent the Applications for Registration as Futures Commission Merchant (and financial data in support thereof), submitted by the corporation as of July 1, 1969 and July 9, 1969, and show as "capital" the amounts of $ 10,000 and $ 10,970, respectively. Had there been, in fact, a merger with the partnership, certainly the balance sheet would have reflected certain assets and liabilities of the alleged predecessor partnership.

We thus find and conclude that as of June 30, 1969, and August 4, 1969, none, nor any part thereof, of the $ 27,000 in issue properly could be considered as capital of the partnership and that under the circumstances the Complainant is correct in excluding such corporate funds from the partnership's capital.

The record also shows that even assuming *arguendo* that it was accepted that the $ 27,000 in question was given to the Respondent partnership as a gift or contribution, and the facts show such was not the case, the Respondent would still have been below the prescribed minimum financial requirements as of June 30, 1969, by an amount of $ 789.22. As of June 30, 1969, the Respondent failed to meet the minimum financial requirements of the Act and regulations.

With respect to the charge that the Respondent partnership lacked $ 55,209.40 as of August 4, 1969, of having enough funds to meet the prescribed minimum financial requirements, the Respondents argue on brief that such deficiency was caused by a combination of two factors. One of such factors involved whether $ 17,000 of the $ 27,000 in question should be deemed, as of August 4, 1969, part of the current assets of the Respondent partnership. As set above, we are of the view that the $ 17,000 (of the $ 27,000 in issue) was not capital of the partnership. Nevertheless, even assuming *arguendo,* that the Respondent partnership were given credit for such sum of money as of August 4, 1969, it would still have been considerably below the minimum financial requirements as of such date. The other factor mentioned by the Respondents related to the amount computed, as of August 4, 1969, as the Respondent partnership's "proprietary safety factor." n11 As regards such factor, the Respondents contend,

among other things, that the figure pertaining to one's "proprietary safety factor" can be immediately reduced at any given time by reducing one's "open position" on the market, and that the Respondents sometime after August 4, 1969, reduced their "open position" on the market after it was ascertained that such "open position" was very substantial. This is no defense to failure to operate within the minimum financial requirements of the Act and regulations which require *that a registrant shall at all times continue to meet such prescribed minimum financial equirements.*

> n11 The "proprietary safety factor" is computed in accordance with the provisions of § 1.17 of the Regulations. The elements entering into the computation of Respondent's proprietary safety factor of $ 50,954.50 are set forth in the transcript, pages 654-662.

Also, Respondents maintain that they were unable to compute on any given day or time their required current safety factor. Such arguments overlook one of the purposes of requiring minimum financial requirements, namely, to assure that a registered futures commission merchant could pay all its customers that day if the former were forced into liquidation. In addition, if one were to agree with Respondent Gaiber that he traded all day without knowing his financial position, the inherent dangers of such practice are self-evidence as well as the fact that one must know his position in trades to prevent going over the speculative limit. In addition, the record evidence in this case negates such a contention.

A witness versed and knowledgeable in these matters testified, among other things:

"Q In your opinion as an accountant, familiar with the books and records maintained by futures commission merchants, do you believe, from an examination of the Respondent's books and records as of August 4, 1969, that they could have determined the number of trades and positions in their proprietary account, and have brought those trades to the market, and have determined the safety factor in connection therewith pursuant to the regulations issued under the Commodity Exchange Act?

"A Yes, sir.

"Q And what is the basis for that opinion ?

"A The basis is that there are approximately five or six accounts. The only information that is obtained from the tab machine on the following day would be the open position. This is the only part of the computation that would be available from the tab record, would be the open position.

"This means that the open trades going into the computer to arrive at the open trades totals on the following day would

have to be knowledgeable to the firm on the previous day, so therefore, they have the open trades as of the previous day, they have the trades made on the current day, and it would be nothing more than a matter of adding these two numbers together, and then making the computations." (Tr. 872-873)

We are unable to agree with Respondents' postulate that traders do so without knowledge of the extent of their trading and their particular financial status. Indeed, if this were so, the fundamental purpose of the Act would be thwarted and customers of futures commission merchants would be in peril. The awareness by a registered futures commissoin merchant at all times of his financial condition as relating to the minimum financial requirements prescribed by the Act and the regulations is anticipated and required by the applicable provisions, and, such awareness must, at the very least, be considered as a necessary concomitance to such prescriptions. It is incumbent upon the futures commission merchant that he remain continually cognizant of his financial condition so that any deficiencies thereof can be immediately corrected.

We find and conclude that as of August 4, 1969, the Respondents failed to meet the minimum financial requirements of the Act and regulations.

This brings us now to the allegations in this proceeding that the Respondents furnished false and misleading statements and reports to the Commodity Exchange Authority which allegations relate to the source of the $ 27,000 in question which was deposited June 23 and 30, 1969, into the Respondent partnership's general funds bank account. The Respondents contend, in substance, that they had no willful or fraudulent intent with respect to the documentation submitted by them to the Commodity Exchange Authority and that they were giving the Commodity Exchange Authority representatives what they asked for. The Respondents prepared and submitted to the Commodity Exchange Authority on or about July 10, 1969, July 27, 1969, and October 27, 1969, letters signed by various persons which stated, in essence, that the $ 27,000 in question had been deposited with the Respondent partnership for its capital account and that the partnership had no liabilities whatsoever to such persons, yet the evidence in this case convincingly establishes that the $ 27,000 in question was made available to the Respondents by nine different persons as payment of stock issued to them by Sy B. Gaiber & Co., Inc., a new corporation, and that these persons did not intend that such

money should become part of the capital of the Respondent partnership (Comp. Ex. 6, 7, 11, 15, 16, 17 and 25; Tr. 121-131, 142-144, 306-318, 421, 429-430, 436,

443, 453-455). We have already commented heretofore on the testimony of James E. Boening, an attorney-at-law in Milwaukee, Wisconsin, which testimony clearly disproves any claims to the effect that he deposited monies for use as partnership capital.

Mr. Boening testified that he and his wife, Amy Boening, purchased, on June 23, 1969, a total of 3,000 shares of stock in Sy B. Gaiber & Co., Inc., for a total purchase price of $ 6,000, and that the payment for such stock was made via two checks signed by Mr. Boening which contained the following notations, respectively: "For James E. Boening, 2,000 shares" and "For Amy Boening, 1,000 shares." Mr. Boening further testified that at the time of his purchase of the stock in Sy B. Gaiber & Co., Inc., he had no knowledge of the existence of the Respondent partnership (Tr. 315, 400) and, indeed, had never heard of the term "partnership" used in connection with Sy B. Gaiber (Tr. 361). He also stated that the $ 6,000 payment on June 23, 1969, was neither a gift nor a contribution (Tr. 443), but instead was definitely for the purchase of shares of stock (Tr. 436), and that he had no reason whatsoever to give anything to Sy B, Gaiber & Co. (Tr.443).

The denial by Mr. Boening that he had any knowledge of the existence of the Respondent partnership at the time of his purchase of stock in Sy B. Gaiber & Co., Inc., is relevant for several reasons, but it is particularly noteworthy in view of the Respondent's statement at page 6 of this brief that "all of the subscribers and stockholders of said corporation were cognizant of the fact that the Respondents herein were merging the assets of the Respondent partnership into said corporation." Such statement fails to mention at what period of time such subscribers and stockholders became cognizant of the merger. Admittedly, all of the subscribers and stockholders of the corporation eventually gained such cognizance. However, the record is clear that at the time the $ 27,000 in question was made available to the Respondents, all of them were, in fact, not aware of such merger for the simple but crucial reason that, at such time, all of them did not even know that the Respondent partnership was in existence, and that Sy B. Gaiber was involved in a partnership.

With respect to the fact that Mr. and Mrs. Boening signed letters dated October 1969, which stated that they had no claim

against the Respondent partnership by reason of the deposit of $ 6,000 into the partnership, Mr. Boening noted that he and his wife had refused to sign similarly drafted documents sent to them from the Respondents in the latter part of July 1969 for the reasons mentioned above, and even wrote a letter on August 5, 1969 to the Respondents' attorney informing him of the reasons for such refusal. Mr. Boening further noted that, during a telephone conversation with Respondents' attorney in August of 1969, he stated that the content of the letters "really was not what the transaction was really about" (Tr. 342), and therefore, when two more identically drafted documents were received by Mr. and Mrs. Boening on August 12, 1969, they likewise refused to sign such documents. As Mr. Boening explained at the hearing, the only reason that he eventually did sign the aforementioned letter dated October 1969, was "so that Sy B. Gaiber and Company could get out of trouble, because they had evidently taken some money, which was our stock money, and put it in the wrong account." He further explained that it was his impression that, absent the signed document, Sy B. Gaiber and Company would not be able to clear itself with the Commodity Exchange Authority, and that "our corporation, which I was going to be one of the stockholders, would not be able to get duly qualified and get into business," which "was a technicality that had to be overcome." Finally, he remarked that "I didn't think it was right, but I would do it anyway to help out the welfare of these shareholders."

As has been pointed out by Complainant on brief, Mr. Boening's statements stand uncontradicted and unimpeached. Such statements were supplemented at the hearing by testimony that, in an interview of Jermoe P. Chernoff conducted by two representatives of the Commodity Exchange Authority on July 30, 1969, Mr.

Chernoff, the manager of the Respondent partnership's branch office in Milwaukee, Wisconsin, during 1969, stated that "he made a check payable to Sy B. Gaiber & Company for $ 3,000 for the purchase of 1,500 shares of stock in the corporation, Sy B. Gaiber & Company, Incorporated;" that he made the following notation on the face of such check: "For purpose of 1,500 shares at $ 2 per share;" and that "he intended his money to be used for the sole purpose of purchasing 1,500 shares of stock in the corporation, Sy B. Gaiber & Company, Incorporated."

Our consideration of the entire record evidence leaves us with the opinion that the statements set forth in Complainant's

Exhibits C-8, C-9, C-10, C-18, C-19, C-29, C-30, C-31, C-32, C-34, C-35, and C-36, were both false and misleading as to material facts affecting Respondents' right to continued registration as a futures commission merchant under the Act. Certainly the Respondents were aware that such statements were inaccurate as to the source of the $ 27,000 in issue, and one can only conclude that they were submitted for the purpose of showing proper financial status when, in fact, the Respondents were operating below the minimum financial requirements of the Act. Thus, Respondents, having full knowledge of the true facts intended, and did, in fact perform those acts which constitute the violation of the Act. *Goodman* V. *United States,* 286 F.2d 896 (7th Cir.), 1961; *Great Western Food Distributors, Inc.* V. *Brannan,* 201 F.2d 476 (7th Cir., 1953), cert denied, 345 U.S. 997 (1953).

Among the Respondents' other defenses and explanations are those of alleged "reliance" upon what they were told to obtain by way of documentation by the Commodity Exchange Authority representatives; that the newly formed corporation, Sy B. Gaiber Co., Inc., was to purchase the assets and assume the liabilities of the Respondent partnership; that the corporation and partnership were one and the same, that there is a difference between insolvency and failure to meet the minimum financial requirements of the Act; that there has been no "dipping into customer's funds;" and that representatives of the Commodity Exchange Authority have displayed irresponsible, inept, and indecisiveness of direction. We have considered these and all contentions advanced by Respondents, but our careful study and review of the entire record compel us to conclude, as set forth above, that the Respondents operated as a registered futures commission merchant under the Commodity Exchange Act while failing to meet prescribed minimum financial requirements, in violation of section 4f(2) of the Act and section 1.17 of the regulations, and that with a view to furtherance of such violation willfully made false and misleading statements of material facts in reports filed with the Secretary of Agriculture in violation of section 6(b) of the Act, and willfully furnished false and misleading information and reports as to the meaning and contents of the Respondents' records of financial transactions relating to their business, in violation of section 1.35 of the regulations.

All contentions of the parties presented for the record have

been considered whether or not specifically mentioned herein and any motions, requests, suggestions, etc., not specifically mentioned or ruled upon or which are inconsistent with this decision are denied.

With respect to the imposition of sanctions, the Complainant seeks a cease and desist order under section 6(c) of the Act, n12 (7 U.S.C. § 13b), and, a denial to the Respondents of all trading privileges on all contract markets for a period of two years whether for their own account or for the account of others. n13 The Respondents state that, "* * * the penalties requested by the Complainant appear to be punitive in nature and appears [sic] to have no relationship to the alleged deficiencies." The Respondents also maintain that the matter is moot inasmuch as they are no longer registered under the Act and

since October 1969, have not been operating as a futures commission merchant under or subject to the Commodity Exchange Act.

n12 "§ 13b. *Manipulations or other violations; cease and desist orders against persons other than contract markets; punishment; misdemeanor or felony; separate offenses.*

"If any person (other than a contract market) * * * is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the Secretary may, upon notice and hearing, and subject to the appeal as in other cases provided for in section 9 of this title, make and enter an order directing that such person shall cease and desist therefrom * * *."

n13 7 U.S.C. § 9 provides, among other things, for exclusion of persons from privilege of contract markets and,

"* * * Upon evidence received, the Secretary of Agreculture may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets."

In this regard, we note that the Respondent partnership, during the period herein pertinent, was composed solely of the individual Respondents, Sy B. Gaiber and Michael R. Hempel. The fact that Respondents are no longer registrants under the Act does not render the violations moot n14 nor constitute a deterrent to Complainant's requested sanctions.

n14 It is noted, however, that a revocation or suspension of registeration under the Act would be of no import in view of the lapse of Respondents' registration.

JUDICIAL OFFICER'S CONCLUSIONS AND ORDER

The Hearing Examiner, who saw and heard the witnesses testify, did not believe the respondent Gaiber's testimony that the nine persons who advanced the $ 27,000 in question authorized

the respondents to use the money to add capital to the respondent partnership (Tr. 692). The weight to be given to a Hearing Examiner's findings reaches its maximum when it turns on credibility (see *NLRB* V. *Majestic Weaving Co.,* 355 F.2d 854, 859 (C.A. 2); *Cella* V. *United States,* 208 F.2d 783, 788 (C. A. 7), certiorari denied, 347 U.S. 1016; *National Labor Relations Board* V. *Swinerton,* 202 F.2d 511, 514 (C. A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board* V. *Dinion Coil Co.,* 201 F.2d 484, 490 (C. A. 2)). A review of the entire record compels me to reach the same conclusion as that of the Hearing Examiner.

Mr. and Mrs. James Boening contributed $ 6,000 of the $ 27,000 in question. Mr. Boening's testimony, which is contrary to the respondent Gaiber's testimony, is set forth at length above.

Mr. Boening and five of the other persons who contributed $ 22,000 of the $ 27,000 in question were interviewed by two of the complainant's employees. Each of them told the complainant's employees that they advanced the money for the purchase of stock in the new corporation that was to be formed, and that they intended their money to be used "solely" for the purpose of purchasing shares of stock in the new corporation (Comp. Ex. 7). Two of these persons were Mrs. Anna

Hempel, mother of the respondent Michael Hempel, and Orthwin Gallitz, the brother-in-law of the respondent Michael Hempel.

Mr. Jerome Chernoff, manager of the Minwaukee Branch of the respondent partnership, advanced $ 3,000 of the $ 27,000. Mr. Chernoff stated that he was "told that the money he invested in the corporation would be held in an escrow account until the corporation was formed," and "that his money should have been used as capital for the corporation only and should not have been deposited as capital for the partnership, Sy B. Gaiber & Co." (Comp. Ex. 7, pp. 1-2). Mr. Chernoff solicited three of the persons who contributed about half of the $ 27,000, and they, of course, had the same understanding as Mr. Chernoff as to the money (Comp. Ex. 7, pp. 2-3).

It is significant that the respondents did not call one of the nine persons who contributed the $ 27,000 in question to testify. Four of the nine persons who contributed the $ 27,000 were related to the respondent Michael Hempel, *viz.*, his mother, two brothers and a brother-in-law. These relatives were not called as witnesses. In fact, the respondent Michael Hempel did not testify in this proceeding.

If there were any truth to the respondent Gaiber's testimony that the persons who advanced the $ 27,000 knew that it was to be deposited in the respondent partnership account or authorized such use, the respondents undoubtedly would have called at least some of the nine persons as witnesses.

The failure of the respondents to call as witnesses any of the nine persons who contributed the $ 27,000 gives rise to the inference that their testimony would have been adverse to the respondents. See Wigmore, *Evidence* (3rd ed. 1940), §§ 285-291; *United States* V. *Di RE,* 332 U.S. 581, 593; *Interstate Circuit* V. *United States,* 306 U.S. 208, 225-227; *Vajtauer* V. *Comm'r of Immigration,* 273 U.S. 103, 111; *Bilokumsky* v. *Tod,* 263 U.S. 149, 153-155; *Kirby* v. *Tallmadge,* 160 U.S. 379, 383; *International Union* v. *N.L.R.B.,* -- F.2d -- (C.A.D.C.), opinion dated January 25, 1972, 30 Pike & Fisher Administrative Law (2d Series) 358, 365-382; *Hoffman* V. *C. I. R.,* 298 F.2d 784, 788 (C. A. 3); *Neidhoefer* V. *Automobile Ins. Co. of Hartford, Conn.,* 182 F.2d 269, 270-271 (C. A. 7); *Mid-Continent Petroleum Corporation* V. *Keen,* 157 F.2d 310, 315 (C. A. 8); *Bowles* V. *Lentin,* 151 F.2d 615, 619 (C. A. 7), certiorari denied, 327 U. S. 805; *National Labor Relations Board* V. *Remington Rand, Inc.,* 94 F.2d 862, 867-868 (C. A. 2), certiorari denied, 304 U.S. 576. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch* V. *Archer,* Cowp. 66, quoted with approval in Wigmore, *Evidence* (3rd ed. 1940), § 285.

The respondent Gaiber testified that at a meeting of the Board of Directors and shareholders of the newly formed corporation held on July 31, 1969, the partnership was merged into the corporation from a bookkeeping standpoint, and the profits and assets of the partnership were shown as those of the corporation (Tr. 698-699, 712-717, 805-807, 839-840). He stated that this "definitely" was reflected in the minute books of the corporation (Tr. 699). The respondents' counsel later admitted that the minute book did not show any transfer from the partnership to the corporation because his office was working on this matter in the latter part of August 1969, and when the respondent company was suspended by the Chicago Open Board of Trade, he stopped working on the matter (Tr. 831-834). The respondent Gaiber then admitted that the only transfer of which he was aware was the authorization of the stockholders and the Board of Directors

at the July 31, 1969, meeting to issue stock to the respondent Gaiber in return for the assets of the partnership (Tr. 834-835).

The respondents introduced the corporate minute book and it was received in evidence as Respondents' Exhibit B, but the respondents' counsel withdrew the

minute book for the purpose of making copies and did not return the original or the copies to the Hearing Examiner, as he agreed to do (Tr. 689-690, 701-709, 866-868). Accordingly, the Hearing Examiner properly ruled that the respondent may not rely on the minute book. Under the authorities set forth above, this gives rise to the inference that the minute book would have been unfavorable to the respondents.

Even if the minute book would have shown that at the July 31 meeting the stockholders and the Board of Directors agreed that the respondent Gaiber was to be issued stock for the assets of the partnership, this does not in any way support the respondents' claim that the stockholders who deposited the $ 27,000 for the purchase of stock authorized the respondents to place the money in their partnership account. In other words, even if the stockholders were willing on July 31 to issue stock to the respondent Gaiber for the assets of the partnership, including the customer accounts of the partnership, they still intended for their $ 27,000 to be held in escrow then deposited into the corporate account.

The evidence shows clearly that the respondents deliberately operated with substantially less than the minimum financial requirements required by the Act and the regulations, and that they deliberately submitted false documents and gave false explanations to the Commodity Exchange Authority in an effort to conceal their inadequate financing. These are very serious offenses.

With respect to the financial audit as of August 4, 1969, the greatest part of the respondent company's underfinancing resulted from its failure to have capital equal to "10 percent of the market value of the greater of either the total long or total short futures contracts in each commodity (regulated, nonregulated and foreign)" in proprietary, or "house", accounts carried by the respondent company (17 CFR 1.17(a) and (f)). This safety factor has been imposed by the Commodity Exchange Authority because of the great risk to the financial stability of registered futures commission merchants resulting from trading in commodity futures for the "house" accounts. For example, the Congressional Record for March 15, 1972, refers to several

brokerage firms handling customers' accounts in nonregulated commodity futures that went broke owing customers large sums of money. The customers of one firm lost $ 1,200,000 when the firm failed because of its futures trading losses in its "house" account (118 Cong. Rec. S3995).

The New York Stock Exchange, in determining whether its members are adequately financed (*New York Stock Exchange, Constitution and Rules* (January 31, 1969, pp. 3525-3527), and the Securities and Exchange Commission, in determining minimum financial requirements of dealers and brokers (17 CFR 240.15c3-1(c)(2)(iv)), reduce the net capital of firms by 30 percent of the market value of all long *and* all short commodity futures contracts (other than spreads, straddles, and hedges) in proprietary accounts. n15

n15 However, the New York Stock Exchange and the Securities and Exchange Commission define the term "proprietary accounts" more narrowly than the Commodity Exchange Authority (compare *New York Stock Exchange, Constitution and Rules* (January 31, 1969), p. 3525, and 17 CFR 240.15c 8-1(c)(2)(iv) and 17 CFR 240.15c 8-1(c)(4) with 17 CFR 1.17(f)). Under the more narrow definitions, trading by a partner for his individual account would not generally be included in the proprietary account.

At the public hearing preceding the promulgation of the financial regulations, the safety factor to be applied to futures trading in the futures commission merchants' "house" accounts was explained as follows (Transcript of Hearing In the Matter of General Regulations Under Commodity Exchange Act, December 19, 1968, p. 15): n16

We have made the safety factor on proprietary positions greater than the safety factor on customers' positions since the greater risk in proprietary speculation is recognized not only by the Commodity Exchange Authority but also by most of the brokerage industry. Both the Securities Exchange Commission and the New York Stock Exchange have a very conservative safety factor, on such positions, of 30 percent of the market value of the total long *and* total short futures contracts.

When we first started testing our capital requirements plan we set our proprietary safety factor at 15 percent of market value, but reduced it to 10 percent after extensive interviews with knowledgeable people of the

commodity trade. After these interviews, we initiated a series of tests of the formula as it applied to approximately 10 percent of the futures commission merchants that carried commodity customers' accounts. It is interesting to note that three of the firms tested, which were adversely affected by our 10 percent proprietary safety factor at the time of testing, have subsequently been in financial difficulty.

n16 Official notice is taken of this official Department record (17 CFR 0.11(e)(7)). See *Parker* V. *Brown,* 317 U.S. 341, 363; *Colonial Airlines* V. *Janas,* 202 F. 2d 914, 919, fn. 1 (C. A. 2); *United States* V. *Rice,* 176 F. 2d 373, 374, fn. 3 (C. A. 8). Opportunity to "show that such facts are erroneously noticed" (17 CFR 0.11(e)(7)) is available through a petition for reconsideration (17 CFR 0.21).

The respondents argue in their brief, p. 9, that there is no evidence of "dipping into customer's funds." But the 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 & Exch. Com'n.,* 290 F.2d 688, 689 (C. A. 5)). 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), certiorari denied, 368 U.S. 899.

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 1971 was $ 123.7 billion. n17 Brokerage firms on the New York Stock Exchange have been going broke in record numbers, recently. n18 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.

n17 USDA Press Release No. 4297-71 dated December 29, 1971.

n18 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 member houses.
>
> This news item accurately reflects the *New York Stock Exchange, Inc. Annual Report 1971,* p. 30.

In addition, the Commodity Exchange Authority cannot fulfill its regulatory responsibilities unless regulated firms are deterred from furnishing false written or oral information to the Commodity Exchange Authority.

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; *United States* V. *Darby,* 312 U.S. 100, 125; *Electric Bond Co.* V. *Comm'n.,* 303 U.S. 419, 439; *Interstate Commerce Commission* V. *Goodrich Transit Co.,* 224 U.S. 194, 204-216; *Baltimore & Ohio RR.* V. *Interstate Com.,* 221 U.S. 612, 620-623; *Hyatt* V. *United States,* 276 F.2d 308, 312 (C. A. 10); *Panno* V. *United States,* 203 F.2d 504, 510 (C. A. 9); *United States* V. *Turner Dairy Co.,* 166 F.2d 1 (C. A. 7), certiorari denied, 335 U.S. 813; *United States* V. *Turner Dairy Co.,* 162 F.2d 425, 425-428 (C. A. 7), certiorari denied, 332 U.S. 836; *Bartlett Frazier Co.* v. *Hyde,* 65 F.2d 350 (C. A. 7), certiorari denied, 290 U.S. 654.

Failure to report properly under the Act is a serious offense. In *In re Louis Romoff,* CEA Docket No. 166, 31 Agriculture Decisions 158 (Decision dated February 11, 1972; appeal pending), the respondent's trading privileges were suspended for three years because he wilfully failed to file reports after many repeated requests from the Commodity Exchange Authority. Similarly, the deliberate filing of a false report or otherwise furnishing false information to the Commodity Exchange Authority deserves a substantial sanction.

In the case of *In re Dunbeath-Hagen Corp., et al.,* 26 Agriculture Decisions 465, a futures commission merchant knowingly submitted a false financial statement on a single occasion in connection with its application for registration as a futures commission merchant. The Judicial Officer suspended all of the firm's trading privileges for one year, *i.e.,* whether for its own account or for the account of others. n19 No warning was given to the respondent prior to the institution of the complaint. The Judicial Officer stated that the violation was "serious" and justified a "substantial" sanction (26 Agriculture Decisions at p. 467).

> n19 The Judicial Officer also suspended the trading privileges of the president and principal stockholder of the corporation for a period of 30 days. The Commodity Exchange Authority advises that in that case it recommended a suspension of his trading privileges for only 30 days because he did not actively participate in the management and operations of the corporation.

In the present case, after the financial audit as of March 31, 1969, the respondents were told that they were in violation of the financial requirements of the Act and were accorded an opportunity to achieve compliance (Tr. 99-102, 180-183, 245-246, 680-682). Instead of taking advantage of this opportunity, the respondents replied by submitting false statements and gave false information to the Commodity Exchange Authority in an attempt to continue to operate while underfinanced. In fact, their under-financing increased from $ 9000 on March 31, 1969, to $ 28,000 on June 30, 1969, and to $ 55,000 on August 4, 1969. Hence the respondents' violations in this case are much more flagrant and serious than in the *Dunbeath-Hagen* case.

In the case of *In re Douglas Steen,* 21 Agriculture Decisions 1076, the respondent, a futures commission merchant, continued to trade in the commodity account of a deceased customer after having been notified by the widow to

liquidate the account. The Judicial Officer suspended all of the respondent's trading privileges on contract markets for a period of three years. In the *Steen* case, as in the present case, the respondent was not registered as a broker or futures commission merchant when the final order was issued and, therefore, in order to have an effective order, the respondent's personal trading privileges were suspended as well as his trading privileges for the account of others. The Judicial Officer stated (21 Agriculture Decisions at p. 1095):

The respondent is not registered as a floor trader or as a futures commission merchant and, therefore, it is not possible to suspend or revoke any license as a result of the respondent's violation. Also, the respondent testified that he is not presently engaged in handling commodity futures accounts for others and that he does not intend to handle such accounts in the future (Tr. 144). However, in order to have an effective sanction in this case, it is necessary to deny to the respondent all trading privileges for a specified period of time whether for the respondent's own account or for the account of other persons.

Considering all of the circumstances in this case, I believe that it is necessary to suspend the respondents' trading privileges on all contract markets for their own account and for the account of others for a period of two years in order to deter the respondents

and others from engaging in similar violations in the future. n20

n20 It has not been the general practice in administrative disciplinary cases to introduce evidence in support of the sanction recommended by the complainant. I believe that such evidence would aid the Hearing Examiners and the Judicial Officer in determining the sanction to be imposed. Such evidence could explain, *e.g.,* the nature of the regulations or administrative program involved in the case, the administrative reasons for the regulation or program, the flagrancy or seriousness of the violation, and the effect of a particular sanction on the respondent in view of the nature and extent of his business activities. It may be appropriate to introduce such evidence at the conclusion of the case so that appropriate consideration can be given to the respondent's defense. The respondent should also be permitted to introduce evidence as to the appropriate sanction to be issued, assuming that the complainant prevails in the case.

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting the respondents to trade on the commodity markets, the Government has, in effect, granted them a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." *Nichols & Co.* V. *Secretary of Agriculture,* 131 F.2d 651, 659 (C. A. 1). Accord: *Kent* V. *Hardin,* 425 F.2d 1346, 1349 (C. A. 5); *Blaise D'Antoni & Associates, Inc.* V. *Securities & Exchange Com'n.,* 289 F.2d 276, 277 (C. A. 5), certiorari denied, 368 U.S. 899; *Eastern Produce Co.* V. *Benson,* 278 F.2d 606, 610 (C. A. 3); *Cella* V. *United States,* 208 F.2d 783, 789 (C. A. 7), certiorari denied, 347 U.S. 1016; *Irving Weis & Co.* V. *Brannan,* 171 F.2d 232, 235 (C. A. 2); *Helvering* V. *Mitchell,* 303 U.S. 391, 399; *Nelson* V. *Secretary of Agriculture,* 133 F.2d 453, 456 (C. A. 7); *Board of Trade of City of Chicago* V. *Wallace,* 67 F.2d 402, 407 (C. A. 7), certiorari denied, 291 U.S. 680; and *Farmers' Live Stock Commission Co.* V. *United States,* 54 F.2d 375, 378 (E.D.Ill.). See, also, *Ex Parte Wall,* 107 U.S. 265, 287-290; *Hawker* V. *New York,* 170 U.S. 189, 190-200; *Stewart & Bro.* V. *Bowles,* 322 U.S. 398, 406-407; *Brown* V. *Wilemon,* 139 F.2d 730, 731-732 (C. A. 5); Chamberlain, Dowl-ing, and Hays, *The Judicial Function in Federal Administrative Agencies* (1942), pp. 93-95.

The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, "The Administrative Crime, Its Creation and Punishment By Administrative Agencies," 42 *Mich. L. Rev.* (1943) 51, 85).

Under the foregoing authorities, the sanction should, *inter alia,* be adequate to deter the respondents from future violations.

In *Beck* V. *Securities and Exchange Commission,* 430 F.2d 673, 675 (C. A. 6), the court questioned, without deciding, whether

a suspension order may also be used to deter others in the regulated industry from committing similar violations. However, anyone intimately acquainted with the administration of a regulatory program knows that it is necessary to at least consider, as one of many relevant circumstances, the effect of the sanction in a particular case on others in the regulated industry. See, *e.g., American Air Transport and Flight School, Inc., Enforcement Proceeding,* 2 Pike & Fisher Ad. L. 2d 213, 215 (C.A.B.). See, also, the dissenting opinion in *Beck* V. *Securities and Exchange Commission,* 413 F.2d 832, 834 (C. A. 6).

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of a sanction only on the respondent and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings, and the actions of potential violators could be significantly affected by the sanctions imposed against other persons.

If administrative sanctions are too lenient, rather than being a deterrent, they will be a stimulant to violations by others. Since, as stated above, the purpose of a suspension order is to "assure a proper adherence to the provisions of the Act," the deterrent effect on the respondents and on other persons subject to the regulatory program must be considered.

The Hearing Examiner's proposed order in the present case would suspend the respondents' trading privileges for 60 days and only "for the account of others." Since the respondents are no longer trading for the account of others, such an order would have no effect whatever on the respondents' present activities. In other words, notwithstanding their deliberate, serious and flagrant violations, they would not feel the effect of any sanction.

Such a sanction, rather than acting as a deterrent to future violations, would encourage future violations, particularly by firms that were thinking of going out of the business of trading for the account of others. If such firms knew that any suspension order would affect only their trading for the account of others, they might be willing to run the risk of engaging in serious violations knowing that if detected, they could continue to engage in futures trading for their own account.

In the present case, the respondents traded as much for themselves as for all of their customers combined (Tr. 671), and they are no longer trading for others at the present time. Unless their

personal trading privileges are suspended for a substantial period, the sanction will not be a deterrent to future violations of a similar nature by the respondents or by other registrants. See *In re Louis Romoff,* 31 Agriculture Decisions 158 (decided February 11, 1972; appeal pending).

Based on all of the facts in this case, it is concluded that a cease and desist order and an order denying all trading privileges to the respondents for two years should be issued to effectuate the purposes of the Act.

ORDER

The respondents, Sy B. Gaiber & Co., Sy B. Gaiber and Michael R. Hempel, are prohibited from trading on or subject to the rules of any contract market for a

period of two years and all contract markets shall refuse all trading privileges to the said respondents during this period. Such prohibition and refusal shall apply to all trading done and positions held directly by the said respondents or any of them, either for their own accounts or as the agents or representatives 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 respondents or any of them, or otherwise.

The respondents, individually and collectively, shall cease and desist from:

(1) Engaging as futures commission merchant within the meaning of the Commodity Exchange Act without meeting the minimum financial requirements of the Act and the regulations thereunder;

(2) Willfully making any material, false or misleading statement in any report or application filed under the Commodity Exchange Act;

(3) Willfully omitting to state any material fact in connection with any such application or report;

(4) Willfully failing or refusing to furnish true and correct information and reports as to the contents and meaning of records of transactions, as required under section 1.35 of the regulations issued under the Commodity Exchange Act (17 CFR 1.35); and

(5) Willfully causing, aiding, counseling, commanding or inducing any person to engage in any act or practice from which the respondents are directed to cease and desist by this Order.

The period of the denial of trading privileges to the respondents, specified in the first paragraph of this Order, shall become

effective on the thirtieth day after the date of this Order. The cease and desist provisions of this Order, set forth in the second paragraph of this Order, shall become effective upon the date of service of this Order upon the respondents.

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