

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

**CTS FINANCIAL PUBLISHING, INC., formerly
COMMODITY TREND SERVICE, INC.,**

DEARBORN FINANCIAL PUBLISHING, INC.,

DENNIS BLITZ, and

NICK VAN NICE,

Respondents.

CFTC Docket No. 00-34

**ORDER MAKING FINDINGS
AND IMPOSING REMEDIAL
SANCTIONS**

I.

On September 28, 2000, the Commodity Futures Trading Commission ("Commission") filed a Complaint and Notice of Hearing ("Complaint") against CTS Financial Publishing, Inc., formerly Commodity Trend Service, Inc. ("CTS"), Dearborn Financial Publishing, Inc. ("Dearborn"), Dennis Blitz ("Blitz") and Nick Van Nice ("Van Nice") (collectively, "Respondents"). The three-count Complaint charged that Respondents violated the antifraud provisions of Sections 4b(a)(i) and (iii), 4c(b) and 4o(1) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 6b(a)(i) and (iii), 6c(b), 6o(1) (1994), and Sections 4.41(a) and (b) and 33.10 of the Commission's Regulations, 17 C.F.R. §§ 4.41(a) and (b), 33.10 (2000).

II.

CTS, Dearborn, Blitz and Van Nice each has submitted an Offer of Settlement ("Offer" or "Offers") which the Commission has determined to accept. Without admitting or denying the findings herein, Respondents acknowledge service of this Order Making Findings and Imposing Remedial Sanctions ("Order"). Respondents consent to the use of the findings contained in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Respondents do not consent to the use of the Offers, the findings consented to in the Offers, or this Order, as the sole basis for any other proceeding brought by the Commission other than in a proceeding to enforce the terms of this Order. Nor do Respondents consent to the use of the Offers, the findings consented to in the Offers, or this Order, by any other party in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

CTS develops and markets charts and trading products for the commodity futures and option markets. From at least 1994 through 1996, while a subsidiary of Dearborn, CTS marketed its products to the public through the mailing of 1.4 million direct-mail advertisements. The advertisements fraudulently touted the potential for large profits in the futures and option markets by using CTS products. They also provided inadequate risk disclosure. In addition, for some period in 2000, CTS had an internet website that falsely presented hypothetical trading results as actual, and failed to provide a hypothetical disclaimer that conformed to Commission Regulation 4.41(b). During all relevant time periods, Blitz, formerly a vice president of Dearborn and the president of CTS, and/or Van Nice, formerly an editor or manager and now CTS's president, reviewed and approved all CTS advertisements. As a result, Respondents violated the antifraud provisions of Sections 4o(1) and 4c(b) of the Act and Sections 4.41 and 33.10 of the Regulations.

B. RESPONDENTS

CTS Financial Publishing, Inc. is a Florida corporation located at 1201 U.S. Highway 1, Suite 350, North Palm Beach, FL 33408. Dearborn owned CTS from 1991 through July 24, 1998. At that time, CTS was called Commodity Trend Service, Inc. Currently, Van Nice is CTS's president, and Blitz is chairman of its board of directors. CTS has never been registered with the Commission in any capacity.

Dearborn Financial Publishing, Inc. is an Illinois corporation located at 155 N. Wacker Dr., Chicago, IL 60606. Dearborn has never been registered with the Commission in any capacity.

Dennis Blitz lives at 1000 North Lake Shore Plaza, Apt. 36-C, Chicago, IL 60611. From 1991 through 1998, he was a vice president of Dearborn and the president of CTS. Blitz is currently the chairman of CTS's board of directors. In the early 1970s, Blitz worked as a salesman for Michigan Commodities Corporation, a commodity broker, but he has never been registered with the Commission in any capacity.

Nick Van Nice lives at 6054 Hollywood St., Jupiter, FL 33458. He is the president of CTS. From 1991 through 1995, Van Nice was an editor at CTS and served as its technical analyst for futures products. In January 1996, he became the business manager of CTS, and from that time forward he ran CTS on a daily basis. In 1990 and 1991, he was registered as an associated person ("AP") of a commodity pool operator ("CPO") and of CTS, Inc., a commodity trading advisor.² He has not been registered with the Commission in any capacity since 1991.

² In 1993, CTS Inc. was dissolved.

C. FACTS

CTS develops and markets charts and trading products for the futures markets. CTS marketed its products through an aggressive advertising campaign that fraudulently touted potential profits in the futures markets using CTS products. This proceeding principally concerns CTS's fraudulent direct-mail advertisements, which CTS sent to current or former subscribers of its own or other futures publications.³

1. Direct-Mail Advertising

a. Futures Traders Profit Guide

From 1994 through 1996, CTS's primary product was "Futures Charts," a set of two weekly booklets that charted the prices of, respectively, agricultural and financial futures contracts. To market this product, CTS sent to the public a direct-mail advertising piece called the "Futures Traders Profit Guide" ("FTPG"), a 20-page, typewritten promotional brochure on colored, glossy paper. CTS mailed approximately 1 million FTPG advertisements from 1994 through 1996 in bulk-mailings, with each mailing occurring approximately three times per year.

Throughout FTPG, CTS hyped the potential profits available in the futures markets and led prospective customers to believe that CTS subscribers were trading successfully. For example, CTS made these statements in FTPG:

- Make a fortune trading futures with amazing profits like 224%, 350%, even 500% or more.
- In a recent issue of *Futures Charts*, we indicated a trend-following stage for coffee. Many of our subscribers invested \$3,000 in a September contract. . . . The result? They turned that \$3,000 into approximately \$66,000 in just 3 months.

CTS had no basis for these or similar claims because neither it nor any of its principals ever have traded profitably a futures account and because CTS had no knowledge of the overall track record of its subscribers.

Although a fine-print risk disclosure statement appeared three times within each issue of FTPG, the profit misrepresentations in FTPG overwhelmed the risk disclosure statement in both frequency and prominence and thereby vitiated any effect of the risk disclosure statement.⁴

³ In addition to the direct-mail pieces discussed below, CTS advertised its charts and products in financial publications. The overwhelming majority of this advertising was in Investor's Business Daily ("IBD"). The IBD ads were similar to the direct-mail pieces, but condensed. The advertisements also contained fraudulent misrepresentations about profits.

⁴ Similar to FTPG, "Futures Traders, Special Options Issue," "New Wealth," and the "Million Dollar Trading Adventure," the other direct-mail advertising pieces discussed below, contained nominal risk disclosure statements.

b. Futures Traders, Special Options Issue

Another main CTS product marketed and sold from 1994 through 1996 was "Futures Options Weekly," a chartbook for commodity option prices. CTS marketed this product through a direct-mail advertising piece entitled "Futures Traders, Special Options Issue" ("FTSOI"), which had essentially the same format as FTPG. CTS mailed approximately 200,000 FTSOI advertisements in three bulk-mailings during 1996. Throughout FTSOI, which was written in the first person and contained statements by Van Nice, CTS used false and misleading statements to lead prospective customers to believe that Van Nice was actively and successfully trading commodity options. For example, CTS made these statements in FTSOI: "Now you can see why options are a favorite trading strategy of professional traders like me," and "I must admit when I first heard about this trading secret, I was skeptical. Then I tried it out and couldn't believe how good it actually is." In fact, Van Nice did not actively trade, had not traded since 1993, and had never made any profits trading futures or option contracts.

CTS also misrepresented the potential profits available in purchasing options on commodities that exhibit seasonal tendencies. For example, CTS made this statement:

Over the last 20 years, heating [sic] and unleaded gas prices have risen 80% of the time during these months as dealers bid up prices. Based on this simple trading secret--and the proprietary safety filters Nick Van Nice has developed--you could have purchased an unleaded gas call option for only \$336. As the seasonal tendency unfolded and gas prices rose, traders who did just that made a quick \$798 profit.

CTS did not disclose anywhere that the seasonal tendencies of underlying commodities are typically factored into the option prices of those commodities.

Further, FTSOI was replete with profit misrepresentations such as the following: "The Floor Trader's Amazing Secret to 80%-90% Winners in Commodity Options," and "GAIN AN 'UNFAIR' TRADING ADVANTAGE: Hit the jackpot 80% - 90% of the time with a 5-to-1 or better risk/reward return..." Finally, CTS told prospective customers in FTSOI that the risk of loss in trading commodity options was limited to the "exact penny," and also advocated a trading strategy that included selling options. CTS, however, did not disclose anywhere in FTSOI that, in selling options, the risk of loss is limitless.

c. New Wealth

"New Wealth" was a direct-mail advertising piece used to market "The Million Dollar No-Risk Trading Course," one of CTS's trading products. New Wealth again had the same essential format as FTPG, and approximately 200,000 New Wealth advertisements were mailed in three bulk-mailings during late 1995 and the first half of 1996. New Wealth was written in the

However, the profit misrepresentations in those advertisements overwhelmed the risk disclosure statements in both frequency and prominence and thereby vitiated their effect. Moreover, none of CTS's direct-mail advertising pieces contained the disclaimer required by Section 4.41(b).

first person and featured Tom Triggs ("Triggs"), a Dearborn employee, on the front cover. Statements in New Wealth led prospective customers to believe that Triggs had been actively trading at the time that CTS sent out New Wealth. In fact, Triggs had not been actively trading at any time near the time of the distribution of New Wealth in 1995 and 1996. He traded futures personally at some period prior to 1990, but the trading was not profitable, and he did not trade again.

New Wealth also included testimonials containing profit claims of CTS subscribers. However, at the time CTS sent New Wealth to the public, "The Million Dollar No-Risk Trading Course" was a new product. No one had ever bought the course. CTS used testimonials from other products to promote the course. For example, the cover of New Wealth included the testimonial of a California doctor who supposedly had made a \$124,576 profit trading futures. However, CTS featured the same doctor in FTPG, claiming that the doctor used Futures Charts to make his \$124,576 profit. CTS's use of such testimonials misled prospective customers into believing that there were purchasers of the "Million Dollar No-Risk Trading Course" who had made money by following the course. In fact, CTS did not know whether any of its customers, including the doctor, generally made money with its products.

Finally, New Wealth was replete with profit misrepresentations such as the following: "If There's One Way To Quickly Make a Bundle, This is It!" and "10 Reasons Why You Can Easily Double, Triple, Even Quadruple Your Income With This Remarkable Course."

d. Million Dollar Trading Adventure

In 1996, CTS developed "The Million Dollar Trading Adventure" ("MDTA"), another trading product. CTS promoted this product through a direct-mail advertising piece of the same name. In October 1996, CTS mailed approximately 50,000 MDTA advertisements. The format of the advertising piece was similar to its other direct-mail advertising pieces and also contained profit misrepresentations. MDTA was a new product, and, as it did in the New Wealth ads, CTS used testimonials from other existing products to promote it.

e. Summary

Respondents knew that the statements in FTPG, FTSOI, New Wealth and MDTA were false or had no basis. CTS never traded a futures account. Van Nice once traded an account in late 1992 and early 1993, but the account value was minimal, and he sustained aggregate net losses. Blitz never traded a futures account. Therefore, Respondents had no personal experience upon which to ground their claims of extravagant profits in the futures and option markets.

Moreover, CTS never had any company policies or procedures to monitor the trading performance of its customers. Although CTS received testimonials from some subscribers, neither Blitz nor Van Nice had any knowledge as to whether (1) CTS's other subscribers were achieving similar results or (2) testimonial customers continued to earn profits subsequent to providing their testimonials. Accordingly, CTS falsely and fraudulently represented that individuals easily could make money in the futures and option markets using CTS products.

Finally, Respondents (1) had no knowledge of Triggs's trading record or current trading activity at the time that CTS sent out New Wealth; (2) understood that seasonal tendencies of an underlying commodity are typically factored into a commodity option's price, despite the statements in FTSOI that such seasonal tendencies could lead to easy profits; and (3) knew that CTS used testimonials from existing products to promote the new products described in New Wealth and MDTA.

2. CTS's Website

For at least some period in January 2000, CTS, on its website, promoted a product called "SwingTrader." The website cited examples of profits that could be obtained on a daily basis by using the product, and claimed that it had realized "100% winners and \$1,826 in profits with only a \$2,400 margin requirement." Although the website contained a fine print disclaimer as to the limitations of hypothetical trading at the very bottom of the page, it did not conform to Regulation 4.41(b) and did not disclose which profit claims were based on hypothetical results and which ones were based on actual results. As a result, the reader had no way of knowing that the cited trading results were hypothetical.

3. Roles of Blitz, Van Nice, and Dearborn

As president of CTS from 1991 through 1998, Blitz had the power to hire and fire employees and to make capital expenditures. He ran the business on a daily basis until January 1996. Although he worked from Chicago, he visited CTS's office in Florida regularly. After January 1996, Van Nice managed CTS's daily affairs, but Van Nice reported to Blitz, and Blitz had the authority to fire him. Currently, Blitz is CTS's chairman, and CTS cannot make any major capital expenditures or take any major policy actions without his approval. Blitz reviewed and approved all the direct-mail pieces described above, and exercised final review authority of all of CTS's advertising through August 1996. After August 1996, Blitz still could cause CTS to withdraw any advertisement of which he did not approve. Finally, he was and has been ultimately responsible for the representations contained in CTS's advertising at all relevant times.

Van Nice has worked at CTS since 1991. He became the editor of Futures Charts in January 1993, before becoming CTS's business manager in January 1996. In January 1996, he acquired the authority to hire and fire CTS employees, to allocate its budgeted costs to various uses, and to run the business on a daily basis. Since August 1996, Van Nice has exercised final review authority over all of CTS's advertising. In addition, from 1992 through the present, Van Nice was the senior technical analyst at CTS for futures products. In that capacity, he reviewed all profit examples used by CTS in its advertisements, and usually generated and provided the profit examples himself. Van Nice often made changes to the work of others, and coordinated most of CTS's advertising projects contracted to third parties.

Dearborn owned CTS from 1991 through July 24, 1998 and operated it as one of its business units. CTS maintained an address at Dearborn's offices in Chicago, and CTS's budget and payroll functions were intertwined with those of Dearborn. As noted above, Blitz served as CTS's president at the same time that he served as a vice president of Dearborn. Therefore,

Dearborn had knowledge of CTS's activities. Despite this knowledge, Dearborn never took any remedial steps to ensure that CTS's advertising was free of fraudulent misrepresentations.⁵

D. LEGAL DISCUSSION

1. Respondents Committed Fraud in Violation of Section 4o(1) and Regulation 4.41

Section 4o(1) of the Act prohibits a commodity trading advisor ("CTA") from (1) employing any device, scheme, or artifice to defraud a client or prospective client or (2) engaging in a transaction, practice, or course of business that operates as a fraud or deceit upon clients or prospective clients. Similarly, Section 4.41(a) of the Regulations prohibits a CTA from advertising in a fraudulent or misleading manner. Section 4.41(b) of the Regulations makes it unlawful for a CTA to fail to include the required warnings about the limitations of trading performance numbers based upon hypothetical or simulated data. While Section 4o(1)(A) of the Act and Regulation 4.41(a)(1) require proof of scienter, Section 4o(1)(B) and Regulation 4.41(a)(2) do not. *Commodity Trend Service, Inc. v. CFTC*, 233 F.3d at 993. See also *In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 at 42.198 (CFTC Nov. 8, 1994) (citing *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988)).

In order to establish a violation of Section 4o of the Act and Section 4.41 of the Regulations, it must be proven that the respondent was (1) a CTA or, with respect to Section 4.41 of the Regulations, a principal thereof, and (2) either employed any device, scheme, or artifice to defraud any client or prospective client, *or* engaged in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. Section 4o(1) of the Act, which also requires the use of the mails or any means or instrumentality of interstate commerce, prohibits both registered and unregistered CTAs from defrauding clients. See *CFTC v. Savage*, 611 F.2d 270, 281 (9th Cir. 1979). Section 4.41 of the Regulations also applies to all CTAs, regardless of whether those CTAs are required to be registered.

Because its charts and trading products provide advice about commodity futures and option trading and because CTS provides these items to the public as part of a business for compensation or profit, CTS is a CTA and two courts have so held with respect to CTS.⁶

⁵ Dearborn, but not CTS, was acquired by Kaplan, Inc. on July 24, 1998. Neither the present owner nor any of the present management personnel of Dearborn was involved in or in any way connected with the conduct alleged in the Complaint; Dearborn has no business, employment or other relationships with the other Respondents; and Dearborn, upon its acquisition by Kaplan, Inc., no longer had an ownership interest in CTS.

⁶ Under Section 1a(5) of the Act, a CTA is a person who (i) advises another about the value or advisability of trading in futures contracts, (ii) "either directly or through publications, writings or electronic media," (iii) for compensation or profit, unless that person is "the publisher or producer of any print or electronic data of general and regular dissemination, including its employees" if such publisher's or producer's provision of commodity futures trading advice is "solely incidental to the conduct of [its] business or profession." Section 4o(1) and Regulation 4.41 thus do not apply to a CTA who is "the publisher or producer of any print or electronic data of general and regular dissemination, including its employees: whose "furnishing of [advice] ... is solely incidental to the conduct of their business or profession." This exclusion is designed to protect incidental publishers of advice, such as general magazines and newspapers, not publishers who specifically concentrate on commodities advice. *R&W Technical Services, Ltd. v. CFTC*, 205 F.3d 165, 172-173 (5th Cir. 2000).

Commodity Trend Service, Inc. v. CFTC, 149 F.3d 679 at 689 (7th Cir. 1998) ("CTS plainly falls within the definition of a 'commodity trading advisor' as a publisher of advice regarding the 'value of or the advisability of trading in' commodity options. 7 U.S.C. § 1a(5)(A)(i)"); *Commodity Trend Service, Inc. v. CFTC*, 1999 WL 965962 at *5 (N.D. Ill. 1999) ("There is no dispute that CTS falls within the definition of a commodity trading advisor. It engages in the business of advising others through publications, writings, or electronic media as to the value or the advisability of trading in the futures market and does so for compensation or profit."). Moreover, no exception under Section 1a(5)(B) of the Act applies because CTS's charts and products for the futures industry are its primary business (*i.e.*, its futures activities are not "solely incidental" to its other activities).

As is evident from the above factual discussion, CTS engaged in a fraudulent advertising campaign from at least 1994 through 1996. CTS's advertisements repeatedly conveyed to prospective purchasers the false and misleading message that through the purchase and use of CTS products, significant profits would be easily and immediately realized, and the risk of loss virtually eliminated or significantly minimized. In conveying that message, CTS (1) made extravagant claims of profit, accompanied by inadequate risk disclosure; (2) used testimonials from one product to promote other products; (3) falsely represented that Van Nice and Triggs were actively and successfully trading; (4) falsely misrepresented the potential profits attainable in purchasing options on commodities that exhibit seasonal tendencies; (5) omitted to disclose that the seasonal tendencies of underlying commodities are already factored into the respective commodity option prices; (6) omitted to disclose that selling options involves unlimited risk; (7) omitted to disclose that performance claims were based on hypothetical, not actual, trading; and (8) while representing that Van Nice was actively and successfully trading, omitted to disclose the limited nature of his trading and the fact that he sustained aggregate net losses trading commodity futures or option contracts for his own account. Moreover, although Section 4.41(b) of the Regulations requires a CTA to provide a specific disclaimer where the CTA presents performance results that are based on hypothetical trading, none of CTS's advertisements contained the required disclaimer. All of those misrepresentations and omissions were fraudulent because they lacked sufficient or justifiable factual bases, and failed to disclose material information.

CTS never had a trading account nor ever monitored its customers' trading. Therefore, it had to rely on its customers' reports of their trading results to support profit claims, many of which were not adequate to support such claims. CTS also used testimonials from one product to promote another product. As a result, those testimonials did not support the profit or trading success representations made for the products. These were material facts which CTS misrepresented and/or failed to disclose.

In addition, CTS falsely represented Van Nice and Triggs had been actively and successfully trading. Because CTS made bold profit predictions and misrepresented that Van Nice was a successful trader, its failure to disclose Van Nice's actual trading record was a material omission. *See Modlin v. Cane*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,059 at ¶ 49,549-50 n.16 (CFTC March 15, 2000).

Moreover, CTS failed to disclose material facts relating to options trading, namely that seasonal price moves in commodities are already factored into commodity option prices, and that

selling options involves unlimited risk. Such omissions are always material. *In re JCC*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 n.23 (CFTC May 12, 1994), *aff'd*, 63 F.3d 1557 (11th Cir. 1995); *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,206 at 45,808-10 (CFTC Dec. 18, 1997).

Finally, CTS failed to disclose that performance claims were based on hypothetical, not actual, trading. That performance claims are based on hypothetical, as opposed to actual, trading is a material fact. *In re R&W*, [1998-1999 Transfer Binder] ¶ 27,582 (CFTC March 16, 1999).

Although the CTS advertisements contained some risk disclosure statements, albeit scant, the profit misrepresentations in CTS's advertisements overwhelmed the risk disclosure statements in both frequency and prominence. Accordingly, the misrepresentations vitiated any effect of the risk disclosure statements in CTS's advertising. *Cf. In re R&W*, [1998-1999 Transfer Binder] ¶ 27,582, at ¶ 47,740 ("mild cautionary statements are insufficient to undo . . . false promise[s] of easy profits"); *CFTC v. Commonwealth Financial Group*, 874 F. Supp. 1345, 1352 (S.D. Fla. 1994) (compliance with CFTC risk disclosure regulations did not relieve defendants of liability for fraud).

Accordingly, Respondents violated Section 4o(1) and Section 4.41 of the Commission's Regulations.

2. Respondents Committed Fraud in Violation of Section 4c(b) and Regulation 33.10

Section 4c(b) of the Act and Section 33.10 of the Regulations, taken together, provide that it shall be unlawful, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, exchange-traded commodity option transactions, to cheat or defraud, or attempt to cheat or defraud, any other person. CTS's advertising promoting the sale of its futures and options charts fell within the scope of these provisions. *See R&W Technical Services, Ltd.*, 205 F.3d at 172-173 (fraudulent advertising of commodity trading system was "in connection with" commodity option transactions).

Liability requires proof that a person or entity made misleading statements of, or omitted to disclose facts with scienter, *i.e.*, proof that the respondent committed the alleged wrongful acts "intentionally or with reckless disregard for his duties under the Act." *Hammond v. Smith Barney, Harris Upham & Co., Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,657-59 (CFTC March 1, 1990). *See also In re Staryk, supra.*

The misrepresentations and omissions discussed above that violated Section 4o of the Act also constitute violations of Section 4c(b) of the Act and Section 33.10 of the Regulations. Accordingly, Respondents violated Section 4c(b) of the Act and Section 33.10 of the Regulations.

3. Van Nice Aided and Abetted CTS's Violations of Sections 4c(b) and 4o of the Act and Regulations 4.41 and 33.10

Under Section 13(a) of the Act, a person aids and abets another's violations if (1) the Act was violated, (2) the person had knowledge of the wrongdoing underlying the violation, and (3) the person intentionally assisted the primary wrongdoer. *In re Nikkhah*, [Current Transfer Binder] Comm. Fut. L. Rep. ¶ 28,129 at ¶ 49,888 n.28 (CFTC May 12, 2000); *In re R&W*, ¶ 27,582 at 47,746. In appropriate circumstances, passive conduct may amount to intentional assistance of the primary wrongdoer. See *In re Western Financial Management*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,814 at 31,401 (CFTC Nov. 14, 1985).

Prior to January 1996, Van Nice aided and abetted CTS's violations because he supplied or reviewed all numerical profit examples for CTS's advertisements and served as CTS's "technical analyst" for futures products. In that role, he continually supplied content to CTS advertisements and reviewed that content for accuracy. Through his knowledge of CTS's fraudulent activity and his intentional assistance of that activity, he aided and abetted CTS's violations.

4. Blitz and Van Nice Are Liable as Controlling Persons for CTS's Violations of Sections 4c(b) and 4o of the Act and Regulations 4.41 and 33.10

Section 13(b) of the Act imposes liability upon "[a]ny person who, directly or indirectly, controls any person" who has violated any provision of the Act or the Regulations and who "did not act in good faith or knowingly induced, directly or indirectly," those violations. A defendant knowingly induces the violation of another when he "ha[s] actual or constructive knowledge of the core activities that constitute the violation at issue and allows them to continue." *JCC, Inc. v. CFTC*, 63 F.2d at 1569. A defendant fails to act in "good faith" if the defendant "did not maintain a reasonably adequate system of internal supervision and control . . . or did not enforce with any reasonable diligence such system." *Monieson v. CFTC*, 996 F.2d 852, 859-60 (7th Cir. 1993).

Blitz is liable under Section 13(b) for CTS's violations. As president of CTS through 1998, he had the authority to hire and fire employees and to make capital expenditures. He had direct review authority over all advertising through August 1996, and afterward had the power to retract or change any advertisement. Accordingly, he was a controlling person of CTS. Because he reviewed and approved all advertising prior to August 1996, and therefore had knowledge of the representations contained therein, he knowingly induced CTS's violations occurring prior to that date. In addition, after August 1996, he failed to put into place any system of internal control to detect and prevent violations of the Act and the Regulations. Accordingly, he is liable for CTS's violations occurring after August 1996, including, among other things, SwingTrader.

Van Nice also is liable as a controlling person of CTS's violations. From January 1996 forward, he was the day-to-day manager of CTS and had the authority to hire and fire employees and to assemble the marketing budget. From August 1996 forward, he exercised final review of

all of CTS's advertisements, including the SwingTrader, and therefore knowingly induced CTS's violations occurring after that date.

5. CTS and Dearborn, as Principals, Are Liable for The Violations of Sections 4c(b) and 4o of the Act and Regulations 4.41 and 33.10 By Their Agents

Section 2(a)(1)(A)(iii) of the Act states that "the act, omission, or failure of any . . . person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person." The conduct of Blitz and Van Nice that violated the Act and the Commissions Regulations occurred within the scope of their employment with CTS. From 1991 through 1998, Dearborn owned and operated CTS and, as described above, through Blitz had detailed knowledge of its activities. Accordingly, CTS is liable as a principal for its agents, Blitz and Van Nice, and Dearborn is liable as a principal for the violations of its agent, CTS, occurring within that time period.

IV.

OFFERS OF SETTLEMENT

All Respondents have each submitted an Offer of Settlement in which they:

- A. Acknowledge service of the Complaint;
- B. Admit the jurisdiction of the Commission with respect to all matters set forth in the Complaint and this Order;
- C. Waive:
 - 1. a hearing;
 - 2. all post-hearing procedures;
 - 3. judicial review by any court;
 - 4. any objection to the staff's participation in the Commission's consideration of the Offer;
 - 5. all claims which it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63 and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2000), relating to, or arising from, this action; and
 - 6. any claim of Double Jeopardy based upon the institution of this proceeding or the entry of any order imposing a civil penalty or any other relief;

- D. Stipulate that the record basis on which the Order accepting this Offer may be entered shall consist solely of the Complaint and the findings in the Order consented to in this Offer;
- E. Consent to the issuance of this Order, which makes findings and orders Respondents:
1. to cease and desist from violating Sections 4c(b) and 4o(1) of the Act, 7 U.S.C. §§ 6c(b), 6o(1) (1994), and Commission Regulations 4.41(a) and (b) and 33.10, 17 C.F.R. §§ 4.41(a) and (b), 33.10 (2000);
 2. to comply with their undertakings as set forth below; and
 3. to pay a civil monetary penalty of \$220,000 for which they shall be jointly and severally liable.

V.

FINDINGS OF VIOLATIONS

Solely on the basis of Respondents' consents, as evidenced by their Offers, the Commission finds that Respondents violated Sections 4c(b) and 4o(1) of the Act, 7 U.S.C. §§ 6c(b), 6o(1) (1994), and Commission Regulations 4.41(a) and (b) and 33.10, 17 C.F.R. §§ 4.41(a) and (b), 33.10 (2000).

VI.

ORDER

Accordingly, it is hereby ordered that:

- A. Respondents cease and desist from violating Sections 4c(b) and 4o(1) of the Act, 7 U.S.C. §§ 6c(b), 6o(1) (1994), and Commission Regulations 4.41(a) and (b) and 33.10, 17 C.F.R. §§ 4.41(a) and (b), 33.10 (2000);
- B. Respondents shall pay a civil monetary penalty of \$220,000, for which they shall be jointly and severally liable, within five (5) business days of the date of this Order and make such payment by United States postal money order, certified check, or bank money order, made payable to the Commodity Futures Trading Commission, and addressed to Dennese Posey, or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Respondents and the name and docket number of the proceeding. A copy of the cover letter and the form of payment shall be simultaneously transmitted to the Director of the Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. In accordance

with Section 6(e)(2) of the Act, 7 U.S.C. § 9(e)(2) (1994), if Respondents fail to pay the full amount of this penalty within fifteen (15) days of the due date, it shall be automatically prohibited from trading on all contract markets until it shows to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of payment has been made; and

- C. Respondent CTS shall immediately comply with the following undertakings:
1. Prior to the public dissemination of any advertisement, promotion, or solicitation, including the placement of any advertisement, promotion, or solicitation on radio, television, or the Internet or in any print medium, CTS shall have all such materials reviewed by its legal counsel for compliance with the Commodity Exchange Act, as amended, and the Commission's Regulations. Only after such review by legal counsel shall CTS publicly disseminate any such materials. In connection with this review process, CTS shall keep and maintain and, upon legal counsel's request, provide to it all information and materials supporting and substantiating all representations and claims in advertisements, promotions or solicitations relating to (a) trading in commodity futures and/or option contracts, including those concerning the potential for profit and the risk of loss, (b) the past performance of any person or entity whose trading is discussed, or (c) any matters similar or comparable to those that are the subject of this order. CTS shall keep and maintain for a period of five (5) years a record of all materials and information provided to legal counsel for review, and CTS shall make all such records immediately available to the Division of Enforcement for inspection and copying upon request.
 2. CTS shall not misrepresent, expressly or by implication:
 - a. the performance, profits or results achieved by, or the results that can be achieved by, users, including itself, of any commodity futures or options trading system or advisory service; and
 - b. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service, and
 3. CTS shall not represent, expressly or by implication:
 - a. the performance, profits or results achieved by, or the results that can be achieved by, users, including itself, of any commodity futures or options trading system or advisory service;
 - b. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service; and

- c. that the experience represented by any user, testimonial or endorsement of the commodity futures or options trading system or advisory service represents the typical or ordinary experience of members of the public who use the system or advisory service;

unless: CTS possesses and relies upon a reasonable basis substantiating the representation at the time it is made; and for five (5) years after the last date of the dissemination of any such representation, CTS shall maintain all advertisements and promotional materials containing such representation and all materials that were relied upon or that otherwise substantiated such representation at the time it was made, and makes such materials immediately available to the Division of Enforcement for inspection and copying upon request;

- D. Respondents Blitz and Van Nice shall immediately comply with their undertakings that, while acting as an officer, director and/or principal of CTS, they shall implement procedures reasonably designed to ensure that CTS complies with each of its undertakings set forth in Section VI, C. above; and
- E. Respondents agree that neither they nor any of their agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or finding in the Order or creating, or tending to create, the impression that the Complaint or Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondents': (1) testimonial obligations; or (2) right to take legal positions in other proceedings to which the Commission is not party.

Unless otherwise specified, the provisions of this Order shall be effective on this date.

By the Commission

Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: July 5, 2001