UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	CFTC Docket No. 96-1
GARY K. BIELFELDT, CARLOTTA BIELFELDT, and BIELFELDT & CO.	OPINION AND ORDER

This is an appeal from an Initial Decision of an Administrative Law Judge ("ALJ"), *In re Bielfeldt*, [1998-1999] Comm. Fut. L. Rep. (CCH) ¶ 27,566 (Feb. 12, 1999) ("I.D."), holding respondent Gary K. Bielfeldt ("Bielfeldt") liable for exceeding speculative position limits. The ALJ found that Bielfeldt controlled the trading in his wife Carlotta's ("Mrs. Bielfeldt's") accounts during a corn bull market in 1993, and thus was required to aggregate her positions with others he owned or managed for purposes of Section 4a(a) of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 6a(a) (1988 & Supp. V 1993), governing speculative limits.[1] The ALJ also held Bielfeldt, Mrs. Bielfeldt, and Bielfeldt's futures brokerage firm, Bielfeldt & Co., liable for related reporting violations.

Respondents challenge the ALJ's liability findings and imposition of sanctions. The Division of Enforcement ("Division") has filed a cross-appeal, arguing that the ALJ erred in limiting the scope of his liability findings to the trading in Mrs. Bielfeldt's accounts. The Division contends that trading by seven additional persons, all Bielfeldt family members, friends, or business associates, should also have been aggregated with Bielfeldt's positions in determining the extent of his speculative limit violations. In addition, the Division seeks

[1] All references to the CEA are to the version in effect at the time of the alleged violative conduct.

increased sanctions. Based on our independent review of the record, we reverse the ALJ's liability findings, vacate the sanctions imposed, and dismiss the complaint for a failure of proof.

I. BACKGROUND

The following facts are undisputed. Bielfeldt, a resident of Peoria, Illinois, has been registered with the Commission as a floor broker since January 1, 1982, and has been a full member of the Chicago Board of Trade ("CBOT") since 1967. Bielfeldt is a ninety-five percent owner and the managing partner of Bielfeldt & Co., a registered futures commission merchant ("FCM"), with offices in Peoria and Chicago.

Bielfeldt and his wife have three adult children, David Bielfeldt, Linda Bielfeldt, and Karen Gray, who are all professional futures traders.[2] In 1993, Bielfeldt & Co. was a small FCM that primarily handled managed customer accounts, including accounts for Mrs. Bielfeldt, the two Bielfeldt daughters, and a number of Bielfeldt's friends and business associates. Bielfeldt also maintained personal accounts at the firm.

During the 1993 growing season, widespread flooding occurred in the Midwest. Corn and soybean crops in some areas were adversely affected, while crops elsewhere were largely unharmed. In these circumstances, the extent of the overall damage was uncertain. The agricultural community paid close attention to market analysts' reports, particularly the periodic crop production estimates issued by the U.S. Department of Agriculture ("USDA"), generally considered to be the most authoritative source of information.

After exhaustive fundamental research and analysis, Bielfeldt began buying corn. From August 13 through August 24, 1993, he purchased futures contracts covering over ten million

[2] The Bielfeldt children were exposed by their father to trading at an early age. Both Linda and Karen graduated from the University of Illinois with degrees in agricultural industries. After graduating, both traded at the CBOT, where they were members. From 1983 to 1989, both were also partners at Bielfeldt & Co. (Tr. at 481-84, 791-95). David has a degree in agricultural economics, is a full member of the CBOT, and is a five percent partner in Bielfeldt & Co. (Tr. at 423-25).

bushels for various accounts.[3] By October 1, 1993, the amount of corn in Bielfeldt's special account was one corn futures contract shy of the overall fifteen million bushel speculative position limit imposed by Commission Rule 150.2, 17 C.F.R. § 150.2 (1994).[4] His aggressive purchases were based on his belief that the USDA and other analysts were underestimating substantially the extent of crop damage, and that yield forecasts should be adjusted downward. He believed that when the harvest began and the true size of the crop became known, prices would rise sharply.

Corn prices had drifted lower during September, however, and Bielfeldt became concerned that his market view was wrong and that he had overestimated the damage.[5] At that point, Bielfeldt decided to take a firsthand look at the areas where flooding had been reported. During the first week in October 1993, Bielfeldt took an automobile trip and chartered an airplane to view the corn and soybean crops in Iowa, Illinois, and southern Minnesota. He was accompanied by James Bielenberg ("Bielenberg"), a retired insurance adjuster and longtime friend and customer. They witnessed water standing in the fields and widespread crop devastation. Bielfeldt's survey confirmed his belief that USDA production estimates were too high.

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[3] A position of this magnitude had to be reported to the Commission, which monitors the activity of large traders on a daily basis. In the fall of 1993, the threshold level for a reportable position in corn was 750,000 bushels. Commission Rule 15.03, 17 C.F.R. § 15.03 (1993).

[4] Any account holding a reportable position is deemed a "special account" with respect to that commodity. Commission Rule 15.00(c), 17 C.F.R.§15.00(c) (1993). As a corollary, a group of accounts under common control that in the aggregate have a reportable position in a commodity is treated as a single special account. Commission Rule 17.00(b), 17 C.F.R. § 17.00(b) (1993). Bielfeldt's special account included his personal accounts and accounts he managed for customers. At all times relevant to this action, the position limits for corn futures on the CBOT were three million bushels in the spot month, six million bushels in any other month, and fifteen million bushels for all delivery months combined. Commission Rule 150.2, 17 C.F.R. § 150.2 (1994).

[5] He testified on this point: "I wanted to be bullish on corn and soybeans, but the price had been going down for nearly two months." (Tr. at 340).

While in Iowa, Bielfeldt met Eugene Black ("Black"), a farmer, grain-elevator operator, and registered introducing broker, who held similar views on the corn market. Black had traded corn in anticipation of rising prices, but had been forced out of the market during a price lull.

During the week between the aerial survey and the scheduled release of the next USDA crop production report on October 12, Bielfeldt freely discussed the profit opportunity he saw in corn. He anticipated that the USDA would realize its error and issue a report on October 12 that lowered crop estimates, causing prices to rise in response. Bielfeldt shared these views with his family, friends, and clients, urging them all to consider corn.

Some persons he advised already held corn futures in managed accounts he traded for them, including his wife. Mrs. Bielfeldt decided that she wanted to invest a substantial amount of money in the market, but in order to limit her risk, wanted to trade options rather than futures. On October 7, she opened a nondiscretionary account at Cargill Investor Services, Inc. ("CIS"), where options could be traded more cheaply than at her husband's firm, and within two days established positions valued at $1.9 million.[6] Options trading, however, proved illiquid, and Mrs. Bielfeldt shifted quickly to futures. She opened a second nondiscretionary account at Bielfeldt & Co. on October 15, and traded both the CIS account and the Bielfeldt & Co. account during the period relevant to the complaint.

Five other persons in Bielfeldt's immediate circle opened nondiscretionary accounts at Bielfeldt & Co. (or reactivated dormant nondiscretionary accounts) and purchased substantial quantities of corn futures on October 12. This group included his daughters, Linda and Karen; Bielenberg; Steven Beier ("Beier"), the manager of Bielfeldt & Co.'s Chicago office; and Robert Klaus ("Klaus"), a longtime friend and client (collectively, "daughters and friends"). Also, on

[6] On October 8, Bielfeldt liquidated the corn in her managed futures account and began buying corn for other managed accounts he controlled.

October 12, Black, the Iowa elevator operator, bought March 94 corn through a newly opened nondiscretionary account at Bielfeldt & Co. using $30,000 he borrowed from Mrs. Bielfeldt.[7]

The USDA report of October 12, issued after trading closed, reduced crop estimates by about 200 million bushels, a decrease that resulted in higher next-day prices. Bielfeldt thought the estimate was still too high and believed prices would continue rising as yield estimates shrank further. On October 14, he liquidated all of the corn futures in his daughters' and friends' managed accounts and bought corn for other managed accounts.

Some of the group of daughters and friends bought additional corn for their nondiscretionary accounts between October 14 and 25, and all five added to their positions on the latter date. Some increased their positions again during early November. Most purchases involved December 93 corn, the nearest delivery month. Lesser amounts of March 94 and May 94 corn were bought. While the daughters and friends all reached reportable levels, none approached speculative limits. In contrast, Mrs. Bielfeldt's accounts quickly reached speculative position limits for December and for all months combined.

Within a week of liquidating his daughters' and friends' managed accounts and making new purchases for other customers, Bielfeldt again reached speculative limits. He had held no corn in his personal accounts since mid-October, having used all his speculative capacity to carry corn for customers. On November 1, 1993, attorney Edward Sutkowski ("Sutkowski"), Bielfeldt's lawyer, customer, and friend, opened two nondiscretionary accounts to trade corn. The following day, Bielfeldt liquidated the corn in Sutkowski's managed accounts and bought corn for himself.

[7] The loan was to have been made by Bielfeldt himself. After being advised that exchange rules prohibited him from lending money to a customer, he arranged for his wife to lend the funds.

The USDA report issued on November 9 reduced its crop estimate by about 700 million bushels, the big downward move Bielfeldt had been looking for. The market traded limit up through the next day. Immediately thereafter, Mrs. Bielfeldt, the Bielfeldt daughters, Bielenberg, Beier, and Klaus, began liquidating their positions, exiting the corn market at various times between November 12 and November 23. Sutkowski and Black stayed in through early 1994.

Meanwhile, the level of trading at Bielfeldt & Co. drew the attention of Commission staff members and CBOT officials, alerted by the sudden appearance of several reportable traders at one small firm trading the same commodity. The CBOT conducted an investigation of the corn futures positions traded through Bielfeldt & Co. and concluded that there were no speculative limit violations. (Tr. at 479).

In a verified written statement, Donald F. Sternard ("Sternard"), the Managing Director of Surveillance at the CBOT, stated that he knew Bielfeldt as an active trader at the CBOT and had first discussed speculative position limits with him in 1985 or 1986, when Bielfeldt asked Sternard to explain the position limit rules with respect to Treasury bond futures. Sternard stated that Bielfeldt expressed his desire at that time to understand the restrictions so that he could conform his trading accordingly. (Verified Written Statement of Donald F. Sternard at 1). According to Sternard, during the summer of 1993 Bielfeldt came to him again to inquire about the speculative limits in agricultural contracts because Bielfeldt had begun trading those contracts and like before, wanted to make sure that he understood how to conform his trading to comport with the speculative limit requirements. (*Id.* at 1-2).

When the corn trading at Bielfeldt & Co. came to Sternard's attention during the fall of 1993, the CBOT coincidentally had staff auditors at Bielfeldt & Co.'s offices. They reviewed order tickets to determine whether or not the pattern of entering orders indicated any common

control over the various accounts. (*Id.* at 2). In addition, Sternard spoke with Bielfeldt on several occasions. In order to ensure that there was no confusion or concern regarding the propriety of how the corn accounts were trading, Bielfeldt offered to meet with Sternard in Chicago. (*Id.*). Bielfeldt met with Sternard and Mary Beth Rooney, also of the CBOT, on November 18, 1993, along with Beier and Sutkowski. According to Sternard:

> We expressly discussed the identities of the individual account traders. Specifically, it was known to me and our department that Karen Gray and Linda Bielfeldt had been active traders previously to this time and had independent personal net worths of significant amounts. Similarly, we discussed that Carlotta Bielfeldt had a significant net worth independent of Gary Bielfeldt and that she previously had experience trading in reportable positions in United States Treasury Bonds.
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> We expressly quizzed Mr. Bielfeldt regarding any overlapping financial relationship and determined that there appeared to be none. For example, we were told that Carlotta Bielfeldt and Gary Bielfeldt filed separate tax returns and that Carlotta's net worth was a net worth independent of any assets mutually owned by Gary Bielfeldt.
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> As a result of our investigations and discussions with Gary Bielfeldt, Steve Beier and Ed Sutkowski, we continued to monitor the positions in the market. We particularly noted that the positions were liquidated in an orderly fashion and we expressly observed that the accounts liquidated in an individual and differentiated fashion.
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> As a result of our investigation, we concluded that there was [an] insufficient basis to require any aggregation of the accounts trading for Bielfeldt & Company. We neither recommended, nor as an Exchange, took any action regarding speculative limit aggregations with respect to these accounts.

(*Id.* at 3).

Commission surveillance staff also met with Bielfeldt, Beier, and Sutkowski on November 18, but ultimately arrived at a very different conclusion. Following the meeting, the Commission's Division of Economic Analysis issued letters to Bielfeldt and a number of Bielfeldt & Co. account holders advising that their trading was under review for possible violations of speculative limit rules.

As noted earlier, prior to the November 18 meetings, Mrs. Bielfeldt, the Bielfeldt daughters, Bielenberg, Beier, and Klaus had begun liquidating their positions. After the meetings, Mrs. Bielfeldt, the daughters, and Klaus continued liquidating their positions and Sutkowski transferred his positions to another FCM. Beier and Bielenberg were already out of the market. Black maintained his corn position at Bielfeldt & Co. until January. Bielfeldt continued trading corn actively for some time thereafter.

Mrs. Bielfeldt's corn trading through November resulted in profits exceeding $4.3 million. The daughters and friends, together with Sutkowski, earned profits in various amounts that in the aggregate exceeded $4.5 million. Black earned about $54,000. After the corn boom, Bielfeldt's family and friends resumed trading on a smaller scale, chiefly through managed accounts.

II. PROCEEDINGS BELOW

On October 31, 1995, approximately two years after these events, the Commission filed an administrative complaint charging Bielfeldt with violating speculative limits. The Act contemplates that speculative limits may be violated either when one person controls another's trading, directly or indirectly, or when two or more persons trade "pursuant to an express or implied agreement or understanding." Section 4a(a) of the Act, 7 U.S.C. § 6a(a). The complaint relied on both theories.

Count I alleged that an express or implied agreement existed between, on the one hand, Bielfeldt, and on the other, the daughters and friends, Sutkowski, and Black. The Division alleged that, from October 13 through November 19, when all corn positions were aggregated, Bielfeldt exceeded the six million bushel limit for December. Count II alleged that, from October 8 through November 19, Bielfeldt violated speculative position limits for December and

for all months combined by controlling the trading in his wife's accounts. The conduct in both counts was alleged to violate CEA Section 4a(a), 7 U.S.C. § 6a(a), and Commission Rule 150.2, 17 C.F.R. § 150.2 (1994). Counts III through VI alleged reporting violations arising from the speculative limit allegations involving Mrs. Bielfeldt's accounts.[8] Respondents filed a joint answer admitting the trading described in the complaint, as well as the allegations concerning their backgrounds and familial and social relationships, but denying, without elaboration, liability.

After discovery and other prehearing proceedings, a hearing was held in Chicago from November 17 through November 21, 1997. The Division presented the testimony of two experts, Supervisory Economist David A. Kass ("Kass") and Supervisory Futures Trading Specialist Hugh J. Rooney ("Rooney").

Kass testified that, based on his personal observation of events during the fall of 1993, he became concerned that Bielfeldt's family and a number of his customers "were under []

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[8] Count III alleged that Bielfeldt & Co. willfully filed a false and misleading Form 102 report that identified Mrs. Bielfeldt as a reportable trader without revealing that the trading in her accounts at Bielfeldt & Co. and CIS was controlled by her husband, in violation of Sections 4g(a) and 6(c) of the Act, 7 U.S.C. §§ 6g(a) and 9, and Commission Rule 17.01(b)(7), 17 C.F.R. § 17.01(b)(7) (1993), and also charged Bielfeldt with liability as a controlling person under Section 13(b) of the Act, 7 U.S. C. § 13c(b).

Count IV alleged that, in filing Series 01 reports with the Commission daily from October 7 through December 31, 1993, Bielfeldt & Co. failed to aggregate the corn positions in Mrs. Bielfeldt's nondiscretionary account at the firm with the corn positions owned or controlled by her husband, in violation of Sections 4g(a) and 6(c) of the Act, 7 U.S.C. §§ 6g(a) and 9, and Commission Rule 17.00(b), 17 C.F.R. § 17.00(b) (1993), and again charged Bielfeldt as a controlling person under Section 13(b) of the Act, 7 U.S.C. § 13c(b).

Count V charged Mrs. Bielfeldt with filing a false Form 40 report on November 12, 1993, in which she identified herself as a reportable trader, but failed to disclose that her husband controlled her nondiscretionary accounts at Bielfeldt and Co. and CIS, in violation of Sections 4i and 6(c) of the Act, 7 U.S.C. §§ 6i and 9, and Commission Rule 18.04(a)(6), 17 C.F.R. § 18.04(a)(6) (1993).

Count VI alleged that Bielfeldt failed to update his previously filed Form 40 report to include his wife's two accounts among the accounts he controlled, in violation of Sections 4g(a), 4i, and 6(c) of the Act, 7 U.S.C. §§ 6g(a), 6i, and 9, and Commission Rule 18.04(a)(5) and (d), 17 C.F.R. § 18.04(a)(5) and (d) (1993).

Bielfeldt's control or were trading pursuant to an agreement or understanding." (DOE Ex. 69 at 4). He stated that "their relationships with [] Bielfeldt and their trading activity were consistent with circumstances [he] had observed in the past whereby a trader who has a strong conviction concerning market direction, but is constrained by . . . speculative position limits, purposefully evades those limits by bringing into the market family, friends, and business associates." (*Id.*). He noted that Mrs. Bielfeldt and the other traders named in the complaint traded at "uncharacteristically large levels," and that Mrs. Bielfeldt lacked familiarity with basic option terms and could not explain her trading strategy. (*Id.* at 5-6).

Like Kass, the Division's other expert, Rooney, testified that Mrs. Bielfeldt could not explain her trading strategy in detail and was unfamiliar with trading terminology. (Tr. at 161; DOE Ex. 70 at 44-45). It was his opinion that Bielfeldt controlled the trading in her account. (DOE Ex. 70 at 48-49). He declined to express an opinion regarding the trading done by the other traders, but noted what he viewed as the anomaly of Bielfeldt's liquidating the corn in their managed accounts at a time when he was openly and aggressively bullish. (Tr. at 89, 149).

Bielfeldt testified that he was enthusiastic about profit opportunities in corn and supported the decisions of family members and friends to trade on their own to enhance profits. He said that some persons he talked to—customers and noncustomers—were persuaded by or shared his views, while others rejected them. (Tr. at 356-57). Bielfeldt testified that he was "at or near the [speculative] limit" in early October and could not buy additional futures for his wife's managed accounts. (Tr. at 190). She therefore decided to trade on her own. (Tr. at 190-92). Although he placed orders for her, he stated that he did so on her instructions, as any broker normally would do. (Tr. at 195).

Mrs. Bielfeldt testified that she had invested in commodities and securities accounts since the late 1970s and that in 1983, when her futures account manager, James Lauritsen, retired, her net worth was a little over $6 million. At that time, her husband Gary assumed control of her managed futures activity. (Tr. at 837-38).

In 1985, Mrs. Bielfeldt opened a nonmanaged account to trade Treasury bond futures. (Tr. at 839). She testified that she decided to enter the market based on advice from her broker, and after considering it felt capable of taking the risk, which resulted in substantial profits. (Tr. at 840).

According to Mrs. Bielfeldt, her other investments over the years included a 320-acre farm, which she sold for a $100,000 profit, a securities account, Black Hill Capital, in which she invested $1 million, a distressed loan portfolio offered by Cargill Asset Management, in which she invested $1 million, a $1 million investment in an entity called ECCO II, and a self-directed Investment Retirement Account. (Tr. at 841-44). In addition, she held shares in the Peoria Chiefs baseball team and bought a $1 million in a home in Green Lake, Wisconsin. (Tr. at 845-47). Mrs. Bielfeldt testified that her husband had no involvement in any of these investments and that they kept their finances separate. (Tr. at 844, 847).

With respect to the corn trading at issue, Mrs. Bielfeldt testified that she decided that the time was right for trading based on information from a variety of sources, including daily newsletters she received from Merrill Lynch, radio farm reports, and nightly calls to a commodities trading recording called the "Oracle," as well the firsthand reports she received from her husband after he personally toured the areas of the country where flooding had occurred and from others interested in the market whom she knew and trusted. (Tr. at 848-66). Mrs. Bielfeldt testified that, based on all of this information, her "opinion was that this market could

once again be exciting, and that it had a real potential to be a bullish market." (Tr. at 865). She decided that she would be willing to risk up to $2 million. (Tr. at 866).

Mrs. Bielfeldt stated that her initial strategy was to invest in options—contrary to her husband's advice, which was to invest in futures—because she "knew that options protected you on the downside." (Tr. at 257-58, 866). After a short period of time, however, she realized that she would not be able to achieve her aggressive objectives with options, largely because of their limited liquidity, and decided to "bite the bullet" and switch to futures. (Tr. at 866-67, 870-71). She stated that she decided to liquidate her positions in November for a variety of reasons, primarily because of the upcoming holidays and because she had "made good money." (Tr. at 877). She elaborated:

> [T]he markets were kind of—they were in a pretty even range. They weren't doing much then. The two crop reports had come out. The harvest was basically completed for the most part. Most of the information that was going to be known that would affect the harvest either had been printed or was seen by the harvest yields, so there wasn't a whole lot of news, and I didn't want to be in this kind of a position through Thanksgiving and the Christmas holidays.

(Tr. at 877-78).

The seven other persons whose trading the Division sought to aggregate with Bielfeldt's also testified. Generally, they acknowleged that Bielfeldt made them aware of his view of the profit opportunity in corn, but stated that they also relied on other sources of information and that they decided independently to trade on their own through nondiscretionary accounts. All insisted that they were competent to monitor the market and react as necessary.

In addition, the respondents presented their own expert, finance professor Robert J. Mackay ("Mackay"). He testified that the relevant facts and circumstances were consistent with independent action and did not support an inference that the accounts were being traded pursuant to an express or implied agreement, or that Mrs. Bielfeldt's accounts were controlled by her

husband. He emphasized that each of the individuals who received information and recommendations from Bielfeldt was either an experienced trader or a sophisticated investor. Each, in his opinion, was capable of evaluating Bielfeldt's recommendations and reaching independent trading decisions, taking into account their individual finances and risk tolerance. (Resp. Ex. 18 at 6). Although the daughters and friends entered similar trades on the same day, Mackay testified that such parallel movements were consistent with independent action and could be explained by market developments rather than collusion. (*Id.* at 5-10). He also noted a number of variations in the group members' trading, including among others that: (1) positions were expanded in different ways—some were quickly established at desired levels while others were built up more slowly; (2) positions were different in size; and (3) positions differed in composition—some included only the December futures contract, others included the March and May contracts. (*Id.* at 7). He emphasized that each of the traders bore the economic risks and rewards of their own positions. (*Id.* at 6).

III. INITIAL DECISION

Following the hearing, the ALJ issued the I.D. finding liability on Counts II through VI, and dismissing Count I. In analyzing the evidence material to determining whether the trading done by Bielfeldt and the seven individuals named in Count I of the complaint was pursuant to an express or implied agreement, the ALJ observed:

> Mr. Bielfeldt saw a great opportunity to profit from the flooding that had taken place in corn country. However, the accounts under his control brought him to the trading limit. In order to avoid trading limit problems, Mr. Bielfeldt liquidated the corn positions in the accounts he held for the other traders in order to purchase more corn for the accounts he controlled. He then advised the other traders with respect to the conditions of the expected corn harvest and the USDA crop report. The other traders followed Mr. Bielfeldt's advice and used a similar corn strategy. Although this may raise an eyebrow, it cannot be said by a preponderance of the evidence that some understanding was in place. From the record as it stands, the Court can only say that Mr. Bielfeldt, acting as a broker,

> gave trading advice to the other traders, and the other traders, on the whole, had enough knowledge of the futures market to execute their own plans based on that advice. Therefore, the positions of those involved here need not be aggregated and the speculative limit in place at the time was not surpassed.

I.D. at 47,587.

With respect to whether Bielfeldt controlled the trading in Mrs. Bielfeldt's accounts, the ALJ stated that Commission and federal court precedent did not "lend itself very well to the case at bar."[9] I.D. at 47,583. The ALJ observed that:

> In [those] cases, the persons charged with controlling others' accounts or trading in concert had either exercised direct personal control over other people's accounts or had traded in virtually identical ways, sharing brokers, funding, and trades. In order to dispose of the case *sub judice* it is helpful to make an analogy to the account-churning context.
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> The present case is unlike the above-cited authority in that the control exerted by Mr. Bielfeldt over Mrs. Bielfeldt's commodity futures trading accounts was neither direct nor necessarily overt. The current situation is more of a case of indirect de facto control, similar to that found in the churning context.

I.D. at 47,583-84 (citations omitted).

Citing *Lehman v. Madda Trading Co.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,417 (CFTC Nov. 13, 1984), a churning case, the ALJ listed various factors that tend to demonstrate the existence of de facto control, including: (1) the customer's lack of sophistication; (2) the customer's lack of prior commodity trading experience and a minimum amount of time devoted by the customer to his account; (3) a high degree of trust on the part of the customer towards the person giving advice; (4) a large percentage of transactions entered into based upon the advice given; (5) the absence of prior customer approval for transactions entered into on his behalf; and (6) customer approval of recommended transactions where approval is not based on full, truthful, and accurate information. I.D. at 47,584.

[9] The cases cited by the ALJ included *In re Volume* Investors, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 (CFTC Feb. 10, 1992); *CFTC v. Hunt*, 591 F.2d 1211 (7th Cir. 1979); and *U.S. v. Cohen*, 448 F.2d 1224 (2d Cir. 1971).

According to the ALJ, four of the six factors were present here. In particular, he found that Mrs. Bielfeldt was not a sophisticated commodity futures trader; that she had very little prior trading experience and devoted very little time to her accounts; that she placed a great deal of trust and confidence in her husband; and that the futures transactions entered into were based on his recommendations. The ALJ acknowledged that the fifth and sixth factors were not present, stating that it was not clear whether Mrs. Bielfeldt gave prior consent for the activity that took place in her accounts, and that the record demonstrated that Bielfeldt did not act in a dishonest or deceptive fashion when giving advice. He noted that all of the *Lehman* factors need not be present to find control, however, and stated that he was "persuaded by a preponderance of the evidence that Gary Bielfeldt controlled, *at least* indirectly, the commodity futures trading accounts of Carlotta Bielfeldt." *Id.* (emphasis in the original).

In light of the evidence of Bielfeldt's control, the ALJ concluded that the corn contracts held in Mrs. Bielfeldt's accounts should have been aggregated with the corn contracts held in the other accounts Bielfeldt controlled. Accordingly, he found Bielfeldt liable for the speculative limit violations alleged in Count II of the complaint. He also found Bielfeldt, Mrs. Bielfeldt, and Bielfeldt & Co. liable for the reporting violations alleged in Counts III through VI. I.D. at 47,587. As sanctions, the ALJ imposed a cease and desist order against all three respondents, and civil monetary penalties of $100,000 each against Bielfeldt and Bielfeldt & Co. I.D. at 47,588.

IV. ARGUMENTS ON APPEAL

On appeal, respondents argue that the ALJ erred in finding that Bielfeldt controlled his wife's trading. They contend that the ALJ deviated from precedent concerning the issue of "control" under Section 4a(a) of the CEA, and improperly created a new legal standard by

drawing upon churning law. Respondents argue that churning and speculative limit violations are different causes of action that promote different policy objectives and implicate different kinds of evidence. In any event, respondents continue, Bielfeldt did not control Mrs. Bielfeldt's trading. They assert that both were bullish and both took limit positions, showing only that they correctly read the market and that both had the financial wherewithal to exploit the opportunity they saw.

In reply, the Division argues that the Commission should defer to the ALJ's finding that Mrs. Bielfeldt was an inexperienced and unsophisticated trader who necessarily ceded control to her spouse.

In its cross-appeal, the Division argues that, in dismissing Count I, the ALJ improperly limited his focus to the issue of whether Bielfeldt's daughters and friends, Sutkowski, and Black had the capacity to trade independently of Bielfeldt, not whether they actually did so. The Division urges the Commission to examine the entire course of conduct followed by Bielfeldt and the others, particularly the fact that the level of trading was wholly out-of-character for anyone other than Bielfeldt. The Division also argues that the ALJ's sanctions were far too lenient in view of the gravity of Bielfeldt's violations and the need to deter future misconduct. The Division argues that the ALJ should have imposed a six-month trading ban and a $4.3 million civil monetary penalty.

Respondents argue in reply that, under applicable precedent, an express or implied agreement must be proven by more than the fact that Bielfeldt and his family and friends all traded on the same side of the market. They contend that the Division must show that an agreement in the nature of a conspiracy existed. Respondents contend also that the sanctions requested by the Division are unwarranted and excessive.

V. DISCUSSION

On appeal, the Commission's powers of review are broad. The Commission may review both the facts and the law de novo. *Vercillo v. CFTC*, 147 F.3d 548, 553 (7th Cir. 1998); *Ryan v. CFTC*, 145 F.3d 910, 917 (7th Cir. 1998). It may modify or set aside the ALJ's initial decision, in whole or in part, and may "make any findings or conclusions which in its judgment are proper based on the record in the proceeding." Commission Rule 10.104(b), 17 C.F.R. § 10.104(b) (1993); *In re Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. CCH ¶ 25,317 at 39,032 (CFTC June 22, 1992).

The Division must prove the allegations of a complaint by a preponderance of the evidence. *In re Fisher*, [Current Transfer Binder] Comm. Fut. L. Rep. ¶ 29,725 at 56,065 (CFTC Mar. 24, 2004). This requires that the Division establish more than a suspicious set of circumstances. *Id.*; *In re Buckwalter,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,684 (CFTC Jan. 25, 1991). In a case such as this one, which requires the trier of fact to draw inferences from conduct arising out of complex economic relationships, the Division must present evidence that is sufficiently unambiguous and reliable to form a persuasive basis for drawing the inferences necessary to find liability. *Buckwalter*, ¶ 24,995 at 37,684.

A. Bielfeldt's Daughters and Friends, Sutkowski, and Black

As discussed earlier, the complaint charged that the trading by Bielfeldt's daughters and friends, Sutkowski, and Black was done "pursuant to an express or implied agreement or understanding" with Bielfeldt and thus, required aggregation. The ALJ found that the preponderance of the evidence failed to show such an agreement or understanding and instead revealed only that Bielfeldt, acting as a broker, gave trading advice and that these traders had the

ability to and did execute their own plans based on that advice. After independently reviewing the record, we agree.

The Division urges us to find that the factors listed by the Commission in *In re Volume Investors*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 (CFTC Feb. 10, 1992), as relevant to determining whether an improper agreement was in place are all present here and compel reversal. *See id.* at 38,677 (relevant factors include common trading patterns or strategies; common business, financial, and social relationships; common access to account and trading information; common financing such as money transfers and low interest loans; common brokerage firms; common record keeping; relative inexperience of one or more traders; and family relationships). Although the record clearly shows common business, social or family relationships, common trading patterns or strategies, and a common brokerage firm, other factors tending to show an illegal evasion of speculative positions limits are absent.

In *Volume Investors*, in addition to common relationships, common trading patterns, and a common brokerage firm, the three respondents in question made numerous transfers of cash and securities between each of their commodity and bank accounts and assisted each other financially in the form of interest free loans and in other ways. One of the respondents made daily calls to their common clearing firm and received information about all three accounts, including individual account balances, positions held, current value, T-bills held, and margin updates. The respondents engaged in at least fifty-six block trades, which were later shared or allocated among the three accounts prior to clearing, and on at least eleven occasions, respondents made post-clearing allocations, shifting transactions from one another's accounts after clearing. *Id.* at 38,675, 38,677-78. Those and similar factors, relating directly to the mechanics of trading, are not present here.

The evidence in other cases in which speculative limit violations have been found demonstrated control by a single account holder, an agreement to trade in concert by two or more account holders, or both. Those cases are also factually distinct from the instant circumstances.

In *In re Cohen*, 26 A.D. 801 (Aug. 28, 1967) ("*Cohen I*"), the trading at issue was done by respondent Samuel Cohen ("Cohen") through F. J. Reardon, Inc. ("Reardon"), an FCM. *See also U.S. v. Cohen*, 448 F.2d 1224 (2d Cir. 1971) ("*Cohen II*") (upholding Cohen's criminal conviction for violating speculative position limits). Cohen, his two sons, Alan and Joel, and a business associate, Ivan Blacker ("Blacker"), were involved in a variety of common business ventures, including hotel operations, labor relations, and commodity futures trading. *Cohen I*, 26 A.D. at 811. With respect to futures trading, Cohen placed orders for his own account and for accounts opened, on his instructions, in the names of his two sons and Blacker. *Id.* at 810. All of the orders bore the markings "S," "SC," "Sam," or "Sam Cohen," indicating to Reardon that the orders were in fact for Cohen. *Cohen II*, 448 F.2d at 1226.

Trading in the accounts followed a "'very set pattern'" whereby trades were executed as a group and then distributed among the accounts to avoid going over the permissible limits in any one account. *Cohen I*, 26 A.D. at 809. Cohen paid the margin for his own trades and a substantial portion of the margin for the trades in the other accounts, and Reardon sent all confirmations prepared in connection with the accounts to Cohen. *Id.* There was also evidence that the group decided collectively whether they would buy or sell a particular futures contract, and that if Cohen had an opinion that was contrary to the group, "'the others would let Mr. Cohen go his way and they would not take any position, rather than trade against him.'" *Id.* at 811. When confronted with this evidence, Alan Cohen could not explain any market factor that influenced him in his trading. *Id.* at 813.

In *In re Kent*, 28 A.D. 656 (June 6, 1969), shortly after the futures trading account of respondent The Kent Company ("the partnership") reached the speculative position limit for wheat, Edward C. Epperson ("Epperson"), the son-in-law of the partnership's managing partner, J. H. Kent ("Kent"), entered the market to the maximum extent allowable. *Id.* at 665. The same pattern of trading, *i.e.,* trading to the limit in the Epperson account when the maximum trading limit was reached in the partnership account, followed in soybeans. *Id.* There was also evidence that an order placed for the partnership account on the same day, but after an order that had been placed for the Epperson account, was given preferential treatment so that the partnership received a complete fill, while the Epperson account received only a partial fill. This "strongly suggest[ed] that the broker had received instructions as to the sequence in which the orders should be filled, a circumstance which [could] only mean that the trading in these accounts was under unified control." *Id.* at 666-67.

There was other evidence of common trading between the partnership and Epperson in pork bellies, and later, between the partnership, Epperson, and other family members in potatoes. *Id.* at 667-68. The record also showed that the trading done by Epperson, who had no prior experience in the markets and earned only $14,000 per year, was financed by Kent. *Id.* at 665, 672. A conclusion that Kent, who was a successful trader aware of the volatile nature of the futures markets and the risks involved, would advance "more than one and one-quarter million dollars without security, to be used for speculative trading in maximum quantities by one with a minimum of experience and knowledge, and left to such a trader the determination as to when, how, to what extent and under what circumstances the trades were to be made, [was] not . . . reasonable . . . from the evidence." *Id.* at 670.

In *CFTC v. Hunt*, 591 F.2d 1211 (7th Cir. 1979), *cert. denied,* 442 U.S. 921 (1979), the record showed, among other things, that Nelson Bunker ("N.B.") and William Herbert ("W.H.") Hunt, brothers and the chief officers of the Hunt Energy Corp., each placed futures orders in accounts opened in their children's names after they had reached their personal position limits. N.B. Hunt placed one order for the account of his son and another order to be allocated equally among accounts opened for his three daughters. The record showed that the children did not participate in the initial transactions made in their names and had nothing to do with opening the accounts, placing the first orders, or arranging the financing for their purchases. In addition, once they had entered the market, their transactions were added to a composite report sent to their father. A similar pattern was evident between W. H. Hunt and his son. *Id.* at 1219.

In contrast to the foregoing cases, there is no evidence that Bielfeldt directed the trading in the accounts of his daughters and friends, Sutkowski, or Black, each of whom was an experienced or professional trader and had the ability to, and did (with the exception of the $30,000 loan to Black), independently finance the trading in their accounts.[10] The Division argues that Bielfeldt nevertheless managed their accounts, pointing to Bielfeldt's superior trading knowledge and the fact that he had access to all of their account information. The Division also contends that the trading done by the daughters and friends, Sutkowski, and Black "was vastly different from anything any of them had done before," and reflected Bielfeldt's views rather than their own. Division's Appeal Brief at 42-43.

While it is true that Bielfeldt had access to all of the traders' account information, there is nothing suspicious about that fact given that Bielfeldt was their broker. He was required to have access to their account information. There is no evidence that he used this information to create

[10] We view the loan to Black as insignificant in the context of the record as a whole. We also note that Black signed a promissory note for the loan, pledging his vacation home as collateral, and repaid the loan in two installments with interest. (Tr. at 748-50, 875-77; Resp. Ex. 14).

the false appearance of remaining within position limits by allocating trades among various accounts, as was done in *Volume Investors*, or so that he would know which accounts to place orders for, as was done in *Cohen*. Likewise, Bielfeldt's superior trading knowledge is irrelevant. "[T]he fact that a customer is less sophisticated about futures trading than his broker does not support an inference that the customer has surrendered control. The proper focus is whether the customer 'possessed sufficient financial acumen' to independently assess his broker's recommendations." *Morris v. Stotler & Co.* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,080 at 38,048 (CFTC June 27, 1991) (quoting *Lehman*, ¶ 22,417 at 29,867).[11] In short, as the ALJ found, there is no evidence that Bielfeldt acted as anything other than their broker. The fact that they had business, social, or family relationships with Bielfeldt and engaged in common trading patterns or strategies, without more, is not enough to demonstrate an express or implied agreement or understanding requiring aggregation.[12]

B. Mrs. Bielfeldt

As noted above, the ALJ looked to the Commission's precedent regarding de facto control in churning cases to determine that Bielfeldt controlled the trading in Mrs. Bielfeldt's accounts. Countering the respondents' contention that this was error, the Division argues that,

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[11] A contrary rule would require that brokers aggregate the positions of every nondiscretionary account holder who is not also a professional trader.

[12] As the court observed in *CFTC v. Hunt*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,496 (N.D. Ill. Sept. 28, 1977):

> People with the same investment philosophies will find themselves on the same side of the market. People who are friends and who discuss their investment philosophies with one another may find themselves getting in and out of the market at the same time, as a result of the application of their common philosophies to facts which, by mutual discussion, they have come to accept as true. Investors who rely on the advice of the same investment counsellor may find themselves getting into and out of commodity positions at the same time. None of these circumstances are *necessary indicia* of action in concert. All of these circumstances can be compatible with independent action.

Id. at 22,010 (emphasis added).

while the ALJ's reliance on churning cases was not necessary, it did not constitute reversible error. Division's Answering Brief at 38. The Division asks us to review the record de novo and find control by applying the factors cited in *Volume Investors* and the cases cited therein to the trading in Mrs. Bielfeldt's accounts. *Id.* at 22-23.

We agree with respondents that the de facto control analysis set forth in our churning cases is inapposite to the determination of whether an account was controlled for purposes of speculative position limits. The Commission's churning cases center on whether a broker has breached his fiduciary duty to his client by recommending trades for the purpose of earning commissions rather than to further the client's trading objectives. Those cases naturally focus on the client's inexperience and trust in the broker.

The policy behind aggregating positions where control exists in the speculative position limit context is to prevent excessive speculation, which may cause "sudden or unreasonable fluctuations or unwarranted changes in the price" of the commodity. Section 4a(a) of the Act, 7 U.S.C. § 6a(a). Although the inexperience or lack of sophistication of a particular trader may be circumstantial evidence tending to show that the trader did not have the ability to make decisions regarding the trading in his account, the other churning factors, such as a high degree of trust in the broker and a high percentage of transactions entered into based on the advice given, are largely irrelevant in this context.[13] We agree with the Division that to determine whether Bielfeldt controlled the trading in Mrs. Bielfeldt's accounts, the proper focus of our analysis should be on the factors cited in *Volume Investors*, and the cases outlined above. After

[13] Moreover, in concluding that Bielfeldt exercised de facto control over Mrs. Bielfeldt's accounts under *Lehman*, the ALJ found that Mrs. Bielfeldt was "not a sophisticated *commodity futures trader*." I.D. at 47,584 (emphasis added). The *Lehman* list of de facto control indicia refers, however, to "a lack of customer sophistication." *Lehman*, ¶ 22,417 at 29,866. The ALJ held Mrs. Bielfeldt to a standard not envisioned by the Commission—a standard that few customers could meet, and one which would obviate the need for brokerage services. Mrs. Bielfeldt clearly does not fit the profile of the typical customer in the Commission's churning cases, *i.e.*, someone who is too naïve to undertake a meaningful evaluation of her broker's advice.

reviewing the record de novo and applying those factors to the trading in her accounts, we conclude that the Division failed to carry its burden of proof to establish Bielfeldt's control.[14]

Mrs. Bielfeldt testified at length regarding her independent financial resources accumulated through a series of successful investments over the years, including commodity futures trading. She stated that she decided to enter the corn market and risk up to $2 million of her own money based on advice from her husband and numerous other sources, and followed the market avidly after establishing her positions. Contrary to her husband's advice, she initially traded options and switched to futures when she determined that she could not achieve her trading objectives through options. She explained that she exited the market on her own schedule, after reaching her trading objectives and in time to enjoy the holidays.

Based on his ultimate conclusion, the ALJ must have rejected some or all of Mrs. Bielfeldt's testimony. He did not, however, make any express credibility findings. As a general rule, the Commission defers to a presiding officer's credibility determinations in the absence of clear error. *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,886 (CFTC May 12, 2000); *In re Mayer*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. ¶ 27, 259 at 46,136 n.63 (CFTC Feb. 3, 1998), *amended*, 1998 WL 80513 (CFTC Feb. 15, 1998), *aff'd sub nom. Reddy v. CFTC*, 191 F.3d 109 (2d Cir. 1999). Deference is not appropriate, however, when, as here, the record reveals that the presiding officer may have evaluated the testimony in light of an incorrect legal standard, or limits the credibility analysis to general or conclusory fact finding. *Cf. In re First National Trading Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. ¶ 26,142 at 41,785-86 (CFTC July 20, 1994).

[14] Nor do we find that an express or implied agreement requiring aggregation existed between Bielfeldt and his wife. In view of the fact that the Division failed to prove that the positions in Mrs. Bielfeldt's accounts should have been aggregated with the positions in the accounts that Bielfeldt controlled, the reporting violations found by the ALJ as alleged in Counts III through VI must also be set aside.

Having reviewed the record de novo, we find no reason to discredit Mrs. Bielfeldt's unrebutted testimony regarding her independent financial resources and the various sources of information she consulted prior to entering the corn market. As to her capacity to reach an independent decision, the record contains ample evidence, also unrebutted, that she has for years held positions of trust calling for the exercise of discretion and judgment, has engaged in decisionmaking regarding large sums of money, and possesses the acumen to evaluate a financial advisor's recommendations. That she acted on her own in this case is also shown by, among other factors, her decision to take her profits in November and exit the market, while Bielfeldt continued trading. That she sought and valued her husband's recommendations is undisputed, but the aggregation provisions of the speculative limit rules do not prohibit the tendering or receipt of advice. Although she is not a professional trader and may not have previously traded on the scale that led to her corn profits, she—like the other traders in this case—had the ability to, and did, independently assess Bielfeldt's advice and make her own decisions.

IV. CONCLUSION

In light of the foregoing, we reverse the ALJ's liability findings, vacate the sanctions imposed, and dismiss the complaint for a failure of proof.

IT IS SO ORDERED.

By the Commission (Acting Chairman BROWN-HRUSKA and Commissioner LUKKEN).

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

Dated: December 2, 2004