

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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<p>In the Matter of:</p> <p>TENCO, INC.,</p> <p style="text-align: center;">Respondent.</p>	<p>) CFTC Docket No 11-20</p> <p>) Office of</p> <p>) Proceedings</p> <p>) Proceedings Clerk</p> <p>) ORDER INSTITUTING PROCEEDINGS</p> <p>) PURSUANT TO SECTIONS 6(c) and 6(d),</p> <p>) OF THE COMMODITY EXCHANGE ACT,</p> <p>) AS AMENDED, MAKING FINDINGS AND</p> <p>) IMPOSING REMEDIAL SANCTIONS</p> <p>)</p> <p>)</p> <p>)</p>
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I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Tenco, Inc. ("Tenco" or "Respondent"), directly or through its employees, violated Commission Regulations ("Regulation") 166.2 and 166.3, 17 C.F.R. §§ 166.2 and 166.3 (2010). Accordingly, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Respondent engaged in the violations set forth herein, and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Respondent submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, and Making Findings and Imposing Remedial Sanctions ("Order").¹

¹ Respondent consents to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Respondent does not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor does Respondent consent to the use of the Offer or this Order, or the findings or conclusions consented to in the Offer or this Order, by any other party in any other proceeding.

III.

The Commission finds the following:

A. Summary

From approximately February 2008 to February 2010 (the “relevant period”), two Tenco telephone clerks exercised actual trading authority over two trading accounts without holding limited powers of attorney over those accounts. One telephone clerk (“Clerk A”) placed numerous trades in a personal account held by a floor broker (the “Floor Broker”) who cleared trades at Tenco, with the Floor Broker’s permission.

The second telephone clerk (“Clerk B”) placed trades in an account in the name of his brother-in-law (“brother-in-law account”), with the Floor Broker holding limited power of attorney (“LPOA”) to trade the account. However, Clerk B exercised trading discretion over the account. Tenco’s new accounts department had initially declined the Floor Broker’s request to open the brother-in-law account on the grounds that Tenco did not ordinarily carry retail accounts and that the account did not fit the company’s business profile. The Floor Broker appealed this decision to Thomas Neal (“Neal”), Tenco’s president. Neal ultimately permitted the Floor Broker to open the account despite knowing that the account was in the name of Clerk B’s brother-in-law and that the account did not fit the company’s business profile.

A third telephone clerk (“Clerk C”) left the company in February 2010 and informed Neal that Clerk A and Clerk B were trading personal accounts, a violation of Chicago Board of Trade (“CBOT”) rules. Afterwards, Neal told the telephone clerks to “stop doing anything in violation” of CBOT rules, but failed to take any affirmative steps to determine the validity of the third telephone clerk’s allegations.

Through the acts of Clerk B, Tenco effected transactions without proper customer authorization. Further, Tenco failed to diligently supervise or have compliance programs in place to detect or prevent the acts of Clerk A and Clerk B, or take affirmative steps to investigate Clerk C’s allegations regarding Clerk A and Clerk B’s trading.

B. Respondent

Tenco, Inc. is a registered futures commission merchant (“FCM”), located in Chicago, Illinois. Tenco primarily serves a customer base of larger corporate accounts and does not generally carry retail accounts.

During the relevant period, Tenco had less than twenty employees, including five telephone clerks. Tenco has clearing agreements with registered floor brokers, each of whom clears trades through Tenco on behalf of Tenco’s customers and the floor brokers’ personal customers.

C. Facts

1. Trading in Floor Broker's Personal Account

The Floor Broker supervised four telephone clerks during the relevant time period who were employed directly by Tenco. The Floor Broker permitted Clerk A to place trades in the Floor Broker's personal trading account. Clerk A traded small lot outright and spread positions in the Floor Broker's personal account on a nearly daily basis between 2008 and 2010. Clerk A's trading resulted in a small profit in 2008, which the Floor Broker gave to him. In 2009, Clerk A lost a small amount of money, which the Floor Broker absorbed. After the Commission became involved and this trading came to light, Clerk A repaid the Floor Broker a portion of those losses.

Clerk A's trading in the Floor Broker's account occurred during the trading day, while Clerk A was also taking customer orders. Clerk A traded primarily in the grain markets, which were the same products for which he was entering customer orders. Clerk A entered all of his personal trades through the electronic trading platform on his Tenco terminal.

During the relevant period, Tenco had a policy prohibiting telephone clerks from trading on their own behalf. However, Tenco did not provide the telephone clerks with any formal training and did not instruct the telephone clerks on Tenco's policy against personal trading.

2. The Brother-In-Law Account

In June 2009, Clerk B asked the Floor Broker to accept discretionary authority over an account in the name of Clerk B's brother-in-law at Tenco that Clerk B would trade. Although Clerk B's brother-in-law was aware that Clerk B would actually be trading the account, the Floor Broker was given the LPOA over the account and authorized to trade it. Clerk B was never identified in the account opening documents as the person who would actually be trading the account and was never given LPOA over the account.

The Floor Broker submitted the account opening documents to Tenco's new accounts department, which declined to open the account on the grounds that it did not fit the company's business model. The Floor Broker elevated the request to the chief financial officer, who again declined to open the account. Finally, the Floor Broker brought his request to Neal, Tenco's president. After discussing the account, including the fact that it was for Clerk B's brother-in-law, Neal allowed the Floor Broker to open the account. Neal allowed this exception for the Floor Broker because of the amount of business the Floor Broker produced.

Once the account was opened and funded with \$10,000 provided by his brother-in-law, Clerk B placed small lot trades in the account on a regular basis. By February 2010, when Clerk B stopped trading the account, it had earned a small profit. Clerk B entered all trades in the brother-in-law account through the electronic trading platform on his Tenco terminal.

3. Failure to Supervise Telephone Clerks or Conduct Investigation

Tenco failed to have adequate compliance policies in place during the relevant period and failed to train its employees, including the telephone clerks, in those policies. The telephone

clerks did not receive any compliance training from Tenco; rather they only received on-the-job training for procedures relating to taking customer orders. Tenco's failure to train its employees in Commission Regulations and exchange rules was a contributing factor in the subsequent violations by Clerk A and Clerk B.

Further, Tenco failed to take any affirmative steps regarding the allegations made by Clerk C in February 2010. Clerk C told Neal specifically that Clerk A was trading the Floor Broker's personal account and that Clerk B was trading the brother-in-law account. Rather than investigating Clerk C's allegations, Neal went to the telephone clerks and told them to stop doing anything that might violate any rules. Tenco did not conduct any investigation into their clerks' misconduct until after the Commission became involved.

D. Legal Discussion

1. Clerk B Traded Without Proper Authority Over the Brother-in-Law Account

Regulation 166.2, 17 C.F.R. § 166.2 (2010) makes it unlawful for an FCM, introducing broker or any of their associated persons to effect a transaction in a customer's commodity interest account unless (a) the customer has specifically authorized the transaction in advance, or (b) the customer has executed a written authorization (e.g., an LPOA) for the FCM, introducing broker, or their associated person to effect transactions without the customer's specific authorization. A transaction cannot be "specifically authorized" within the meaning of Regulation 166.2(a), 17 C.F.R. § 166.2(a) (2010) "unless the customer selects the type of transaction (purchase or sale), the commodity interest, and the exact amount of the commodity interest, in advance of the transaction." *In re Heitschmidt*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,263 at 43,204 (CFTC Nov. 9, 1994).

Clerk B did not have specific oral authority to make the various trades in question, and therefore he cannot seek refuge in subsection (a) of Regulation 166.2, 17 C.F.R. § 166.2(a) (2010). Further, because Clerk B's brother-in-law did not execute a written power of attorney authorizing Clerk B to trade the account on a discretionary basis, Clerk B's trading violated Regulation 166.2(b), 17 C.F.R. § 166.2(b) (2010). The LPOA only provided such authorization to the Floor Broker. Notwithstanding that the brother-in-law knew that Clerk B would be exercising discretion over the account, the failure to have a written authorization in place means that Clerk B's trading violated Regulation 166.2(b). Accordingly, Clerk B violated Regulation 166.2, 17 C.F.R. § 166.2 (2010).

2. Tenco Had Inadequate Systems and Procedures to Supervise Its Business as a Registrant

Regulation 166.3, 17 C.F.R. § 166.3 (2010), requires that every Commission registrant (except APs who have no supervisory duties) diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all of its commodity interest accounts and activities relating to its business as a registrant. In order to prove a violation of Regulation 166.3, 17 C.F.R. § 166.3 (2010), it must be demonstrated that either: (1) the registrant's supervisory system was generally inadequate; or (2)

the registrant failed to perform its supervisory duties diligently. *See In re Murlas Commodities*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485 at 43,161 (CFTC Sept. 1, 1995); *In re Paragon Futures Ass'n*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850 (CFTC Apr. 1, 1992); *Bunch v. First Commodity Corp. of Boston*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,352 at 39,168-69 (CFTC Aug. 5, 1992).

Under Regulation 166.3, 17 C.F.R. § 166.3 (2010), a registrant has a “duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents.” *Samson Refining Co. v. Drexel Burnham Lambert, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,596 at 36,566 (CFTC Feb. 16, 1990) (quoting *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,444 (CFTC Dec. 14, 1989)). “A showing that the registrant lacks an adequate supervisory system can be sufficient” to establish a breach of duty under Regulation 166.3, 17 C.F.R. § 166.3 (2010). *In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 at 45,744 (CFTC Dec. 10, 1997). The lack of an adequate supervisory system can be established by showing that the registrant failed to develop proper procedures for the detection of wrongdoing. *See CFTC v. Trinity Fin. Group Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,179 at 45,635 (S.D. Fla. Sept. 29, 1997), *aff'd in relevant part, vacated in part and remanded sub nom. Sidoti v. CFTC*, 178 F.3d 1132 (11th Cir. 1999). The existence of violations that should have been detected by a diligent system of supervision is independent proof of a failure to supervise. *See Paragon Futures Ass'n*, ¶ 25,266 at 38,850.

Tenco did not have a system in place to train employees in Commission Regulations, exchange rules or corporate policies. As a result, Tenco’s employees violated Commission Regulations and exchange rules. Tenco was unaware that Clerk A was trading in the Floor Broker’s personal account. Tenco also did not have adequate compliance programs regarding new accounts. Tenco’s president was able to override the decision of Tenco’s new accounts department and open the brother-in-law account as an accommodation to the Floor Broker. Further, Tenco did not have adequate compliance programs in place to investigate allegations of impropriety by its employees. By these failures, Tenco violated Regulation 166.3, 17 C.F.R. § 166.3 (2010).

3. Tenco is Liable for the Acts of its Employees

Clerk B was, during the relevant period, a Tenco employee. Section 2(a)(1)(B) of the Commodity Exchange Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008) (the “Act”), to be codified at 7 U.S.C. § 2(a)(1)(B) provides that the act, omission, or failure of any person acting for a corporation within the scope of his employment, shall be deemed to be the act, omission or failure of the corporation itself. Therefore, Clerk B’s violation of Regulation 166.2 is deemed to be Tenco’s violation under Section 2(a)(1)(B) of the Act, as amended, to be codified at 7 U.S.C. § 2(a)(1)(B).

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Tenco, directly or through its employees, violated Regulations 166.2 and 166.3, 17 C.F.R. §§ 166.2 and 166.3 (2010).

V.

OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it, without admitting or denying the findings herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any and all claims that it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2010), relating to, or arising from, this proceeding; any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 2006, Pub. L. No. 104-121 §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this proceeding; and any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;
- D. Stipulates that the record upon which this Order is entered shall consist solely of the findings contained in this Order to which the Respondent has consented; and
- E. Consents, solely on the basis of the Offer, to entry of this Order that:
 1. makes findings by the Commission that Tenco, directly or through its employees, violated Regulations 166.2 and 166.3, 17 C.F.R. §§ 166.2 and 166.3 (2010);
 2. orders Respondent to cease and desist from violating Regulations 166.2 and 166.3, 17 C.F.R. §§ 166.2 and 166.3 (2010);
 3. orders Respondent to pay a civil monetary penalty in the amount of one hundred forty thousand dollars (\$140,000) within ten (10) days of the date of the entry of this Order; and

4. orders Respondent to comply with the undertakings consented to in the Offer and set forth below in Section VI of this Order.

Upon consideration, the Commission has determined to accept Respondent's Offer.

VI.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall cease and desist from violating Regulations 166.2 and 166.3, 17 C.F.R. §§ 166.2 and 166.3 (2010).
2. Respondent shall pay a civil monetary penalty in the amount of \$140,000, plus post-judgment interest, within ten (10) days of the date of the entry of this Order (the "CMP Obligation"). If the CMP Obligation is not paid within ten (10) days of the date of the entry of this Order, then post-judgment interest shall accrue commencing on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. Respondent shall pay its civil monetary penalty by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Linda Zurhorst – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone 405-954-5644

If payment by electronic transfer is chosen, Respondent shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the penalty with a cover letter that identifies Respondent and the name and docket number of this proceeding. Respondent shall simultaneously submit a copy of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581; and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address. In accordance with Section 6(e)(2) of the Act, as amended, to be codified at 7 U.S.C. § 9a(2), if this amount is not paid in full within fifteen (15) days of the due date, Respondent shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has

shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made.

3. Respondent and its successors and assigns shall comply with the following conditions and undertakings as specified:

A. Enhanced Compliance

Respondent represents that it has already undertaken and is implementing certain compliance enhancements.

- i. Respondent shall (to the extent, if any, that it has not already done so) implement and maintain a compliance program designed to detect and prevent violations of the Act, as amended, to be codified at 7 U.S.C. §§ 1 *et seq.*, and Commission Regulations, 17 C.F.R. §§ 1.1 *et seq.* (2010), by any Tenco officer, director, employee or agent.
- ii. Respondent shall distribute a copy of this Order to all current and future employees, principals and officers.

B. Actions or Public Statements

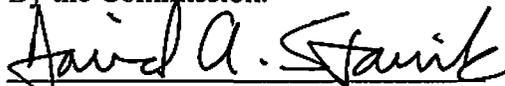
Respondent agrees that neither it nor any of its successors or assigns, nor any of its agents or employees under its authority or control shall take any action or make any public statement denying, directly or indirectly, any finding or conclusion in this Order, or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent and its successors and assigns shall undertake all steps necessary to ensure that all of its agents and employees under its authority or control understand and comply with this undertaking.

C. Miscellaneous Provisions

Respondent agrees that this Order shall inure to the benefit and be binding on successors, assigns, beneficiaries and administrators of Respondent.

The provisions of this Order shall be effective as of this date.

By the Commission.

A handwritten signature in black ink that reads "David A. Stawick". The signature is written in a cursive style with a horizontal line underneath it.

David A. Stawick

Secretary of the Commission

Commodity Futures Trading Commission

Dated: August 25, 2011