UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 86-1533

ZICKIE Z. MALOLEY,

Petitioner,

v.

R.J. O'BRIEN & ASSOCIATES, INC., ROBERT GOTTSCH, CLIFFORD SPENCER ROBERTS, and COMMODITY FUTURES TRADING COMMISSION,

Respondents.

PRELIMINARY STATEMENT

The Commission had subject matter jurisdiction over the reparation proceeding below pursuant to Section 14(a) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 18(a) (1976). Respondents R.J. O'Brien and Associates, Inc., Robert Gottsch, and Clifford Spencer Roberts, also respondents below, had appealed to the Commission from an initial decision filed September 24, 1984, by a Commission Administrative Law Judge ("ALJ") awarding Petitioner Zickie Z. Maloley, the complainant below, $197,700, plus postjudgment interest and costs. Maloley had cross-appealed the initial decision to the Commission insofar as the ALJ declined to grant prejudgment interest on the award. In an April 21, 1986, opinion and order, the Commission ruled that Maloley's claims were barred by Section 14(a) of the Act, the two-year statute of limitations for reparation claims, reversed the initial decision, and dismissed the complaint against the respondents. The April 21, 1986 order, from which this appeal is taken, finally disposes of all claims with respect to all parties.

Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982) vests jurisdiction in this Court to review Commission reparation orders. On May 6, 1986, Maloley filed a petition for review with this Court pursuant to Section 14(e) of the Act seeking reversal of the Commission's April 21, 1986, opinion and order in this proceeding. The petition for review of that order was timely filed with this Court in accordance with the requirements of Section 14(e) of the Act, as it incorporates by reference Section 6(b) of the Act, 7 U.S.C. § 9.

COUNTERSTATEMENT OF THE ISSUE

WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT PETITIONER'S CLAIMS FOR FRAUDULENT INDUCEMENT AND FRAUDULENT ASSURANCES ARE BARRED BY THE STATUTE OF LIMITATIONS BECAUSE PETITIONER FAILED TO EXERCISE DUE DILIGENCE IN DISCOVERING THESE CAUSES OF ACTION.

Authorities:

Myron v. Hauser, 673 F.2d 994 (8th Cir. 1962)

Kansas City, Mo. v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1982)

Bruno v. United States, 547 F.2d 71 (8th Cir. 1976)

Koke v. Stifel, Nicolaus & Co., Inc., 620 F.2d 1340 (8th Cir. 1980)

COUNTERSTATEMENT OF THE CASE

A. The Commission's Reparations Procedure.

This petition arises from an order of the Commodity Futures Trading Commission ("Commission" or "CFTC") issued on April 21, 1986 in the reparation proceeding, Maloley v. R.J. O'Brien & Associates, Inc., et al., CFTC Docket No. R81-752-82-112. A reparation proceeding is essentially an administrative action commenced by a customer to recover monetary damages sustained as a result of a registered commodity professional's violations of the Com-

modity Exchange Act (the "Act"), or any rule or order promulgated thereunder. See CFTC v. Schor, 106 S. Ct. 3245 (1986). At all times relevant to this appeal, Section 14(a) of the Act, 7 U.S.C. § 18(a),[1/] has provided that

> [a]ny person complaining of any violation of any provision of this Act or any rule, regulation, or order thereunder by any person who is registered . . . may, at any time within two years after the cause of action accrued, apply to the Commission . . . [for a reparation award]. (Emphasis added.)

After a reparation complaint stating a cognizable claim under the Act is filed, and after the respondents named therein are afforded an opportunity to answer the complaint, the matter is assigned to a Commission Administrative Law Judge ("ALJ") for a hearing. See 17 C.F.R. § 12.31 (1981). After receiving evidence, the ALJ is required to render an initial decision setting forth his findings and conclusions with respect to liability and damages, if any. 17 C.F.R. § 12.84 (1981). Parties who sustain an adverse initial decision are entitled to appeal to the Commission, 17 C.F.R. § 12.401 (1984),[2/] and ultimately to a United States Court of Appeals "for any circuit in which a hearing was held." Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982). On

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1/ Section 14(a) of the Act was amended on January 11, 1983, generally to limit the class of persons amenable to suit in reparations to persons registered with the Commission. See Futures Trading Act of 1982, Pub. L. No. 97-444, § 231, 96 Stat. 2294, 2319 (1983). This amendment did not alter the language prescribing the two-year statute of limitations for reparation claims, and has no bearing on this appeal.

2/ Pursuant to legislative changes in 1982 to Section 14(b) of the Act, which substantially broadened the Commission's rulemaking authority for the reparations program, the Commission, during the pendency of the proceeding below, amended its reparation rules effective April 23, 1984. Because the complaint was filed prior to April 23, 1984, the proceeding below was governed by the Commission's former reparation rules, 17 C.F.R. Part 12 (1981), until the initial decision was rendered. See 17 C.F.R. § 12.1(c) (1984). Because the initial decision was rendered after April 23, 1984, the parties' appeal thereof to the Commission was governed by the Commission's current reparation rules, 17 C.F.R. §§ 12.401-12.408 (1986). None of the rule changes are germane to any issue presented in this appeal.

appeal, the Commission's findings are conclusive if supported by the weight of the evidence, 7 U.S.C. § 18(e) (1982) (incorporating 7 U.S.C. § 9).

B. The Proceeding Below.

1. Procedural History.

On May 5, 1981, Zickie Maloley filed a reparation complaint against R.J. O'Brien & Associates, Inc. ("RJOB"), Robert Gottsch, Clifford Spencer Roberts, and Robert Krempke ("respondents"), alleging, as relevant here,: (1) that respondents Roberts and Krempke solicited and accepted orders for commodity futures contracts without being registered, in violation of Section 4k of the Act, and that petitioner would not have traded with respondents "had he known that Respondents Roberts and Krempke were not registered with the CFTC," (Certified Record ["C.R."] Document No. 1 at p. 2)[3/] (hereinafter, the "Petitioner's fraudulent inducement claim"); and (2) that "[r]espondents repeatedly assured . . . [Petitioner] that he would not lose any money "so long as he maintained an account with respondents, and did what he was instructed." Id. at 3. These assurances were alleged to be fraudulent and resulted in substantial losses to Maloley (hereinafter, the "Petitioner's fraudulent assurances claim"). Petitioner's complaint requested $160,000 in damages.[4/]

3/ All references herein to the Certified Record, abbreviated "C.R.", are followed by the document number, and thereafter, by the page number within the document where the cited material may be found. For example, a citation to page three of the complaint would be referenced as "C.R. 1 at 3."

4/ Petitioner's complaint also sought damages for alleged unauthorized trading, churning, manipulative devices, improper order execution, and other office irregularities. In the initial decision, the Administrative Law Judge dismissed these claims as barred by the statute of limitations or as vague and speculative. Petitioner did not appeal the dismissal of these claims to the

(footnote continued)

In September 1981, respondents RJOB, Gottsch and Roberts separately answered the complaint, each generally denying Maloley's allegations of violative conduct, and raising as an affirmative defense the two-year statute of limitations prescribed by Section 14(a) of the Act, 7 U.S.C. § 18(a) (1976).[5/] In May 1982, this matter was assigned to Administrative Law Judge William G. Spruill who, on June 2, 1982, ordered Maloley to show cause why all of the claims stated in his reparation complaint were not barred by the two-year statute of limitations. (C.R. 17.) After the parties briefed this issue, the ALJ by order dated October 7, 1982 (C.R. 34), ruled that with respect to Petitioner's fraudulent inducement and fraudulent assurance claims, the statute of limitations would not begin to run until Petitioner "knew or should have known" of the fraud--a matter which could not be determined from the record without full development at a hearing. Accordingly, Judge Spruill determined to permit discovery and ordered a hearing on these issues. Hearings were held on April 27-29, 1983, in Omaha, Nebraska, and on September 12, 1983, in Chicago, Illinois.

Commission, and they are not relevant to this appeal.

5/ Roberts also counterclaimed for $15,293.50, an amount that Roberts allegedly paid RJOB in April 1979 to cover a deficit in Petitioner's personal account. (C.R. 10 at 7.) This counterclaim was ultimately rejected by the ALJ for lack of evidence and because it was barred by the statute of limitations. (C.R. 117 at 13.) Roberts did not appeal the ALJ's denial of his counterclaim to the Commission, and it is not relevant to this appeal.

Respondent Krempke, an account executive who worked with Roberts at RJOB's Lexington, Nebraska office, adopted RJOB's answer as his own. (C.R. 72). On April 1, 1983, the Petitioner voluntarily dismissed with prejudice his claims against Krempke. (C.R. 74.)

2. The ALJ's Initial Decision.

A. Fraud In The Inducement Claim.

On September 24, 1984, ALJ Spruill filed an initial decision in which he found that in April 1978, the Petitioner opened a non-discretionary commodity futures trading account with RJOB at its Lexington, Nebraska branch office, which was owned by respondent Gottsch and managed by respondent Roberts. In April 1978, Robert was not registered with the Commission as an associated person although he was required to be, see 7 U.S.C. § 6k (1976), and he did not become so registered until January 30, 1979. (C.R. 117 at 5.) The ALJ found that "shortly" after he started trading with Roberts, Maloley was warned that Roberts was not registered with the Commission. Karen Jeffrey, who handled Maloley's Peavey Company account before (and after) his opening his RJOB account, gave him this information. Id. The judge also found that when Maloley asked Roberts about his registration, Roberts told him that he was registered, but that a registration card had not yet been issued to him by the Commission. The ALJ credited Maloley's testimony that he did not actually discover that Roberts was unregistered until he spoke with a Linda Frazier (not further identified) in September 1979. (C.R. 83 at 405.)

The ALJ concluded that Maloley's claim for fraud in the inducement would thus be barred by the two-year statute of limitations if, in the exercise of due diligence, he could have discovered Roberts' non-registration before May 5, 1979. The judge found that Petitioner did not fail to exercise due diligence because, after receiving the warning from Jeffrey about Roberts' lack of registration, he asked Roberts about his registration, who told Petitioner he was registered. The judge ruled that Petitioner was entitled to rely on, what the ALJ believed to be, this deceptive statement from Roberts without checking

with any other source. Accordingly, the judge ruled that Maloley's cause of action for fraudulent inducement accrued in September 1979 when there was actual discovery of the nonregistration, and, therefore, Petitioner's inducement claim was not time-barred. Finding: (1) that Roberts' nondisclosure of his unregistered status and his subsequent misrepresentation with respect to that status were material; (2) that Petitioner could be presumed to have relied on Roberts' apparent registered status; and (3) that respondents had not shown that Petitioner would have invested with respondents even had he known about Roberts' lack of registration, the judge ruled that respondents fraudulently induced Petitioner to open his RJOB account in violation of Section 4b of the Act, and awarded Petitioner $197,700, his out-of-pocket losses.

B. Fraudulent Assurances Claim.

The judge found that Maloley began trading his personal account (the "Maloley account") on a "one or two contract" basis in April 1978. In early June 1978, Maloley noticed unauthorized trades in his account, including one such trade for ten cattle contracts. When Petitioner complained, Roberts said that the trades were a mistake that would be rectified. After the Maloley account showed more unauthorized trades (not specifically identified by Maloley)[6], it went into a deficit margin status.[7] Petitioner made additional

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6/ See C.R. 82 at 274-75; C.R. 83 at 402.

7/ A commodity customer generally makes an earnest money deposit known as "initial margin," at the time futures contracts are executed for his account. If the contracts decline in value, the customer may be required to deposit additional funds ("maintenance margin") to keep sufficient equity in his account. An account would be in a "deficit margin status" whenever the account equity has dwindled below the margin requirements of his broker. In such a situation, the customer typically must make a maintenance margin deposit or face liquidation of his futures contracts.

cash deposits into the account to meet margin calls, upon receiving assurances from Roberts that the account would be "taken care of," and that respondent Gottsch would trade Maloley out of his losses, and could do so in "one day"--but only if Maloley let Roberts and Gottsch trade his account as they saw fit, made margin deposits as necessary, and did not complain. (C.R. 117 at 6; C.R. 83 at 372-73.)

From April 1978 through January 1979, Petitioner made cash deposits into this account totalling $191,000. Trading was discontinued in January with a deficit of $15,293.50. In April 1979, Roberts credited Petitioner's account with the deficit amount,[8/] and the Maloley account resumed trading until June 1979 when it went into deficit and was closed. Maloley made one additional margin deposit of $5,000 between April and June 1979. (C.R. 82 at 257-58.)[9/] The ALJ found that Maloley's out-of-pocket loss for this account was $167,815.50.

The ALJ also found that in July 1978, Roberts and Maloley opened a joint account under the name "Mr. Z's Meats," as a bet between Maloley and Roberts, as partners, and Bonnie Maloley (Petitioner's wife) and respondent Krempke, as partners, as to who could make more money trading--with the winners receiving steak dinners. The original understanding between Maloley and Roberts was that they were to trade one contract per day. Soon, however, Roberts traded as many as ten contracts a day. Maloley testified that he acquiesced in this departure from the original understanding because Roberts represented to him

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8/ Roberts testified at one point that he considered this a loan to Maloley. (C.R. 84 at 628.) At another point, he testified that he believed that the credit reimbursed Petitioner for Roberts' share of the deposits into the Mr. Z's Meats account, which is discussed in the following text. (C.R. 701.)

9/ This $5,000 was ultimately lost through unprofitable trading when the account was closed in June 1979 with a $3,659 deficit. (C.R. 84 at 699.)

that his ability to recover Maloley's losses depended upon this increased volume of trading. (C.R. 82 at 250.) Petitioner continued to satisfy the margin calls for this account, which was traded through October 1978 (CR 87 at 1227-28, 1231). Throughout the life of the Mr. Z's Meats account, Maloley made deposits of $42,584.50. The ALJ found that Roberts gave Petitioner $12,700 as a portion of Roberts' share of the account (C.R. 117 at 7), so that Petitioner sustained out-of-pocket losses of $29,884.50 in the Mr. Z's Meats account.

The ALJ concluded that Roberts' assurances that the Maloley account losses would be corrected were "false" and "operated as a fraud to keep Maloley in the market as a trader," in violation of Section 4b of the Act. Although the judge found that the "losses were of course known well beyond the two-year limit . . ." (C.R. 117 at 14), "Roberts' assurances were made in a manner which prevented Maloley from making further inquiry or seeking recompense." Id. at 18. The judge, reasoning that "[d]iscovery of the fraud could not be made during the period of alleged reassurance," id. at 14, concluded that the two-year limitations period was tolled until the Maloley account was closed in June 1979. Because Petitioner's May 5, 1981, reparation claim was filed within two years of the Maloley account closing, the judge concluded that it was not time-barred, and awarded Maloley $197,700 (his combined out-of-pocket losses from the two accounts) plus postjudgment interest and costs.

All parties appealed the initial decision to the Commission. The respondents challenged, inter alia, the ALJ's conclusion that the fraudulent assurances and fraudulent inducement claims were not barred by the statute of limitations. Maloley appealed from the ALJ's determination not to award him prejudgment interest.

3. The Commission's Opinion and Order.

On appeal, the Commission, while adopting the relevant credibility findings by the ALJ, reversed the ALJ's conclusion that the limitations period was tolled for Petitioner's fraudulent assurances and inducement claims until June 1979 and September 1979 respectively. The Commission found that had Maloley exercised reasonable diligence, he could have discovered the existence of these claims at least by the fall of 1978, well in advance of May 5, 1979, two years predating the filing of his complaint. Accordingly, the Commission ruled that Petitioner's fraud claims were barred by the statute of limitations, reversed the initial decision, and dismissed the complaint against respondents. The Commission declined to reach the merits of Petitioner's fraud claims, the respondents' defenses thereto, and Petitioner's appeal of the denial of prejudgment interest. (C.R. 142 at 2.)

In assessing the timeliness issue, the Commission observed that under Section 14(a) of the Act, 7 U.S.C. § 18(a)

> a cause of action for fraud accrues and the two-year time period begins when the complainant discovers the fraud or in the exercise of reasonable diligence should have discovered the fraud. The limitations period begins to run not when complainant "becomes aware of all of the various aspects of the alleged fraud but rather [as soon as the complainant] should have discovered the general fraudulent scheme." The statutory period does not await complainant's "leisurely discovery of the full details of the alleged scheme."

(C.R. 142 at 7.) (Citations omitted.) The Commission ruled that once the respondents raised the statute of limitations as an affirmative defense, the burden was on Maloley to show that he exercised reasonable diligence in seeking to learn the facts that would uncover the fraud. (C.R. 142 at 8.) The Commission also found, however, that, given the circumstances of this case, the result would not be different even if the burden had been shifted to

the respondents to show that Maloley failed to exercise reasonable diligence. (C.R. 142 at 8 n.11.)

A. Petitioner's Fraudulent Inducement Claim.

The Commission agreed with the ALJ that when Maloley opened his account in April 1978, he had no duty to inquire whether Roberts was registered. The Commission also agreed with the ALJ that early on when Maloley was warned by Karen Jeffrey that Roberts was unregistered, he had a duty to inquire about Roberts' registration. Although the Commission also agreed with the ALJ that Petitioner subsequently made that inquiry, the Commission found that the ALJ overlooked a critical fact—when Petitioner inquired. Petitioner, in his only testimony on point, conceded that he may not have inquired until January 1979. (C.R. 83 at 410.) The Commission determined that Petitioner failed to exercise due diligence by not making his first inquiry about Roberts' registration until eight months after he was warned about it. And, because Roberts became registered on January 30, 1979, and Maloley did not inquire until January 1979, Roberts' statement about registration may have been true. (C.R. 142 at 10.)

The Commission determined that Petitioner also failed to act with due diligence by not asking someone other than (or in addition to) Roberts, the very subject of the warning whom Maloley suspected of placing unauthorized trades. (C.R. 142 at 9.) The Commission further reasoned that "Maloley had ample opportunities during the summer and fall of 1978 to verify Roberts' status through Roberts, Gottsch, RJOB and/or the CFTC." (C.R. 142 at 9-10.)

The Commission also noted that unlike some other more complex frauds, "one telephone call might have sufficed to unravel" the alleged deceit as to registration. (C.R. 142 at 10 n.13.) Thus, the Commission concluded that

Petitioner failed to show that he exercised reasonable diligence to discover the fraud, and that his claim for fraudulent inducement was barred by the statute of limitations.

B. Petitioner's Fraudulent Assurances Claim.

Roberts had made the initial assurances to Maloley about rectifying the account losses in June 1978. (C.R. 82 at 274.) By September and October 1978, Maloley had account losses exceeding $100,000 (or one-third his net worth). (C.R. 142 at 12-13.) The Commission reasoned that by that time "Petitioner knew or reasonably should have known that Roberts and Gottsch could not 'trade him out' of his losses as promised." Id. at 11. And, the Commission found, "a reasonable person in Petitioner's position would not have believed for a period of one year Roberts' continuous assurances that account losses would be 'taken care' of in 'one day.'" Id. (citations omitted). Thus, Petitioner was found to have failed to exercise due diligence by continuing to rely on these assurances beyond the fall of 1978.

In addition, the Commission found that Maloley's failure to exercise due diligence was also demonstrated by his failure to verify Roberts' assurances with RJOB, or Gottsch--"the very person who, with Roberts, was supposed to rectify his account." (C.R. 142 at 11.) Indeed, the Commission reasoned, Petitioner should have been suspicious because Roberts warned him not to talk to Gottsch. The Commission recognized that a single telephone call to RJOB or Gottsch could have revealed the fraudulent nature of the assurances. Id. at 12. Instead, the Commission concluded, "Maloley transformed Roberts' assurances into an opportunity 'to play the market with impunity, only repudiating the trades in question if they finally became losing positions.'" Id. at 12 (quoting Watters v. Thomson McKinnon Securities, Inc.,

[Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,329 at 29,577 (CFTC Aug. 21, 1984)). Accordingly, the Commission reversed the ALJ's conclusion that discovery of this cause of action could not reasonably have been made during the period of the assurances. The Commission observed that

> [n]o triggering event occurred in June [1979] to apprise Maloley that Roberts' assurances were false. Maloley simply closed his account in June [1979] and the ALJ arbitrarily found that that was when his cause of action accrued. (C.R. 142 at 13.)

Because he failed to make reasonable inquiry about Roberts' assurances by the fall of 1978, the Commission ruled that Petitioner failed to show that he exercised due diligence in discovering this claim, and therefore, it was time-barred.10/

This appeal followed.

ARGUMENT

THE COMMISSION'S CONCLUSION THAT PETITIONER'S CLAIMS FOR FRAUDULENT INDUCEMENT AND FRAUDULENT ASSURANCES ARE BARRED BY THE STATUTE OF LIMITATIONS IS SUPPORTED BY THE WEIGHT OF EVIDENCE.

The proper scope of judicial review of CFTC reparation orders is narrow. Section 6(b) of the Act, 7 U.S.C. § 9 (1982), as incorporated by Section 14(e) of the Act, 7 U.S.C. § 18(e) (1982), provides that "the findings of the Commission, as to the facts, if supported by the weight of evidence, shall . . . be conclusive." As this Court has recognized, in reviewing the Commission's reparation orders, the courts' function

> is something other than that of mechanically reweighing

10/ The Commission also noted that Maloley gave "no plausible explanation why he waited to file his reparations complaint until May 1981." (C.R. 142 at 10n.14.)

> the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining "whether the finder of fact was justified, i.e., acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported [the] findings."

Myron v. Hauser, 673 F.2d 994, 1005 n.17 (8th Cir. 1982), quoting Haltmier v. CFTC, 554 F.2d 556, 560 (2d Cir. 1977).[11/]

"If the evidence of record is such that it supports inconsistent inferences and conclusions, the courts must defer to administrative choice." Nueces County Navigation District No. 1 v. ICC, 674 F.2d 1055, 1063 (5th Cir. 1982), cert. denied, 459 U.S. 1035 (1982) (citing Illinois Central Railroad Co. v. Norfolk & Western Railway Co., 385 U.S. 57, 69 (1966)). And where, as here, the inferences to be drawn from the record relate to standards of diligence applicable to commodity customers--matters particularly within the agency's expertise, they are entitled to special deference by the reviewing court. See, e.g., NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915 (9th Cir. 1982); Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1079 (9th Cir. 1977).

11/ In his appeal brief (Petitioner's Brief ["Pet. Br."] at 15-16), Petitioner argues that if this Court should reverse the Commission's April 21, 1986 order and rule that Petitioner's two fraud claims are not barred by the statute of limitations, the Court should affirm the ALJ's award of $197,700 on those claims because, according to Petitioner, the Commission adopted the ALJ's findings and conclusions and ruled that, but for the limitations defense, Petitioner would be entitled to the $197,700 award. This is not the case. The Commission expressly declined to reach the merits of Petitioner's fraud claims, the respondents' defense of equitable estoppel, or Petitioner's argument that he should not have been denied prejudgment interest. (C.R. 142 at 2.) Accordingly, if this Court reaches a different conclusion on the statute of limitations question, the appropriate course would be to remand the proceeding to the Commission to enable the Commission initially to consider the merits of Petitioner's fraud claims, respondents' defenses, and the propriety of the ALJ's denial of prejudgment interest.

A. The Weight Of The Evidence Supports The Commission's Conclusion That The Burden Of Establishing Due Diligence Remained With The Petitioner.

In Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944), the U.S. Supreme Court observed that statutory limitations periods are designed to promote justice by preventing the "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Cognizant of this important public policy behind statutes of limitations, courts have nevertheless recognized that, in limited circumstances, statutory limitations periods should be tolled so long as defrauded parties remain in ignorance of their cause of action through no fault of their own. E.g., Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874). Accordingly, it has become well-settled that the limitations period in fraud cases does not begin to run until the fraud is discovered, or upon reasonable inquiry, should have been discovered. Harris v. Union Electric Company, 787 F.2d 355, 360 (8th Cir. 1986); Buder v. Merrill Lynch, Pierce, Fenner & Smith, 644 F.2d 690, 692 (8th Cir. 1981) ("Buder"); Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir. 1970), cert. denied, 400 U.S. 852 (1970).[12/]

As this Court has recognized, the standard for what constitutes a reasonable inquiry is an objective one, i.e., "[w]hat facts would alert a reasonable person to the possibility of wrongdoing?" Koke v. Stifel, Nicolaus & Co., Inc., 620 F.2d 1340, 1343 (8th Cir. 1980) ("Koke"). In Koke, the Eighth Circuit stated:

> Investors are not free to ignore warning signals which would cause a reasonable person to ask questions, but must "exercise reasonable diligence in seeking to learn

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12/ Accord Wood v. Carpenter, 101 U.S. 135 (1879); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L. Ed. 636 (1874).

> the facts which would disclose fraud . . . . [T]he statutory period does not await appellant's leisurely discovery of the full details of the alleged scheme."

Id. (citations omitted.) See also Buder, 644 F.2d at 642.

Once the defense of statute of limitations is affirmatively raised, the burden is on the complainant to show that he exercised reasonable diligence in seeking to learn the facts that would uncover the fraud. E.g, Cook v. Avien, Inc., 573 F.2d 685, 696 (1st Cir. 1978); Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970). On appeal, Petitioner asserts (Pet. Br. 28-29) that respondents concealed facts that would have enabled him to discover his causes of action, and therefore, he argues, he should be excused from making any due diligence showing. In so arguing, Petitioner relies upon a doctrine, not followed by this and other circuits (see note 13, infra), that relieves the complainant of any duty of exercising due diligence where fraudulent concealment is shown, and thus tolls the limitations period until his actual discovery of the cause of action. See, e.g., Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975) ("Tomera"); Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979).13/ But this Court in Kansas City, Mo. v. Federal Pacific Electric Co.,

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13/ Like the Eighth Circuit, see Bruno v. United States, 547 F.2d 71 (8th Cir. 1976), and Kansas City, Mo. v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1962), discussed infra, the Sixth and Tenth Circuits have ruled that proof of concealment does not relieve the complainant of a duty to exercise due diligence; rather, the concealment is one factor to be weighed in deciding whether a failure by the complainant to discover the fraud within the limitations period was not attributable to a lack of due diligence. E.g., Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th Cir. 1982) ("Campbell"); Ohio v. Peterson, Lowry, Ralli, Barber & Ross, 651 F.2d 687, 694-95 (10th Cir.), cert. denied, 454 U.S. 895 (1981).

And, As the Commission correctly observed, ~~however,~~

> the split in the circuits may be more illusory than real "because in the cases following the Tomera rule" the actions of defendants were such that even reasonably diligent plaintiffs would not have been put on notice [of the existence of their claims].

(footnote continued)

310 F.2d 271 (1962), apparently the first Eighth Circuit opinion addressing the fraudulent concealment doctrine, adopted a different view, stating:

> [W]e hold that the fraudulent concealment doctrine is to be read into the statute of limitations so that . . . the limitation period begins to run from the time that plaintiff by the exercise of reasonable diligence, discovers or should have discovered the cause of action.

310 F.2d at 284. Similarly, in Bruno v. United States, 547 F.2d 71 (8th Cir. 1976), this Court recognized that

> "the doctrine of fraudulent concealment comprehends two elements--the use of fraudulent means by the party who raises the ban of the statute and successful concealment from the injured party" . . . . An established defense to a claim of fraudulent concealment as a basis for tolling the period of limitations is that plaintiff knew or by the exercise of due diligence could have known that he might have a cause of action. (Emphasis added.)

547 F.2d at 74 (citation omitted). See also Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 294-96 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976) (applying duty of due diligence notwithstanding Plaintiff's claim of fraudulent concealment). Thus, it is well established in the Eighth Circuit that fraudulent concealment does not relieve a plaintiff from the duty of exercising reasonable diligence in discovering his cause of action.

In any event, even in circuits following the Tomera rule, "the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." Hobson v. Wilson, 737 F.2d 1, 35 and n.107 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 1843 (1985). As the Commission found, Maloley clearly had notice of both of his potential claims by the fall of 1978, at

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C.R. 142 at 11 n.16 (quoting Campbell, 676 F.2d at 1128).

least two-and-one-half years before filing his complaint. Maloley was warned by Karen Jeffrey that Roberts was unregistered "right after" he began trading with RJOB and Roberts in April 1978. By the fall of 1978, Maloley had notice that Roberts' assurances would probably not be fulfilled, after the assurances went unfulfilled for a period of three months during which Petitioner accumulated losses in excess of $100,000—or a third of his net worth. Because, as discussed below, the record fully supports these findings, the doctrine of fraudulent concealment is wholly inapplicable to this proceeding, and the burden of establishing due diligence in discovering the fraud remained with Petitioner.[14/]

B. The Commission's Conclusion That Petitioner Failed To Establish Due Diligence In Discovering His Claim For Fraudulent Inducement Is Supported By The Weight Of The Evidence.

The Commission found that Maloley was warned by Karen Jeffrey right after he began trading with RJOB that Roberts was not registered, and therefore due diligence required Maloley at that time to inquire into Roberts' registration status. Maloley's only testimony concerning the timing of such an inquiry was that he may not have inquired about Roberts' registration until possibly January 1979. The Commission concluded that this inquiry did not establish due diligence in discovering the fraud, because, aside from its untimeliness, Maloley inquired only of Roberts, the very subject of the warning, whose character had already been called into question by unauthorized trades, by

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14/ Because the doctrine of fraudulent concealment has no application to this proceeding, Petitioner's alternative argument (Pet. Br. 19, 28-29), made in reliance upon Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 1843 (1985), that the burden must shift to the respondents to prove that Maloley failed to exercise due diligence in discovering his causes of action, must also be rejected. And, in any event, as the Commission recognized (C.R. 142 at 8 n.11), the result would not have been different even had the burden been shifted to the respondents.

unfulfilled assurances of account correction, and by suspicious warnings to Maloley not to talk to Gottsch or RJOB. And, the Commission also found, Maloley's failure in the spring and summer of 1978 to attempt to ask Gottsch, RJOB, or the Commission, about Roberts' registration highlighted his failure to exercise due diligence. (C.R. 142 at 9-10.)

In challenging the Commission's conclusion, Maloley argues: (1) that Karen Jeffrey's testimony is unworthy of belief and was imprecise about the timing of her warning (Pet. Br. 20, 20-21 n.6); (2) that Petitioner "probably" asked Roberts about his registration status much earlier than January 1979 (Pet. Br. 24); (3) that when he received the alleged warning, Maloley had just commenced futures trading for the first time in his life, and there is no evidence that he then understood the significance of CFTC registration (Pet. Br. 26); and (4) that, in any event, due diligence did not require Maloley to ask anyone other than Roberts about Roberts' registration (Pet. Br. 25-26).

In finding that Karen Jeffrey did warn Petitioner shortly after he began trading with RJOB and Roberts, the ALJ made a credibility determination based on conflicting testimony. Jeffrey testified that she definitely warned Maloley that Roberts was not registered with the CFTC. (C.R. 83 at 537-38.) Petitioner testified that no warning about Roberts' lack of registration was given to him by Jeffrey at any time. (C.R. 83 at 348-49.) The ALJ's assessment of Jeffrey as a credible witness, based on her demeanor while testifying, is entitled to great deference by this Court, see Myron v. Hauser, 673 F.2d 994, 1005 (8th Cir. 1982), and should not be disturbed unless clear error is shown. E.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951); Snodgrass v. Nelson, 503 F.2d 94, 96 (8th Cir. 1974). Maloley provides no reason for discrediting Jeffrey's testimony (see Pet. Br. at 20-21 and n.6), and thus has utterly failed to demonstrate that the ALJ or the Commission com-

mitted clear error in finding that Jeffrey gave Petitioner a warning about Roberts' non-registration. Indeed, Maloley's brief for the most part assumes arguendo that he was warned. Id.

Maloley's challenges to the reasonableness of the Commissions' findings as to the timing of Karen Jeffrey's warning as well as the timing of Petitioner's initial inquiry to Roberts are equally without merit. Ms. Jeffrey testified that she warned Maloley "probably right after" he began trading with Roberts. She candidly admitted that she was motivated by concern that she would lose business to Roberts. (C.R. 83 at 537-38.) This testimony clearly supports the ALJ's and the Commission's inference that the warning came very soon after Petitioner commenced trading with Roberts.15/

As stated above, Maloley's concession that he may not have asked about Roberts' registration until possibly January 1979 (C.R. 83 at 410) is the sole evidence in the record relating to the timing of his initial inquiry to Roberts about registration. Petitioner's argument that "it is likely that Maloley inquired much earlier than January, 1979 because it would have been a reasonable thing to do, and Petitioner was a reasonable person," (Pet. Br. 24) is pure speculation that has no support in the record. In essence, Maloley is asking this Court to second-guess the Commission's factual inference on the basis of his counsel's representation, devoid of record support, that his

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15/ On appeal, Maloley challenges the record support for the ALJ's and the Commission's findings that he traded with Jeffrey at Peavey Company before opening an account with RJOB. Maloley did not make this contention on appeal to the Commission, and accordingly, should not be permitted to make it here. See, e.g., United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Monark Boat Co. v. NLRB, 708 F.2d 1322, 1325 and n.5 (8th Cir. 1983). In any event, there is ample support in the record (including Maloley's own testimony) for these findings. (C.R. 82 at 295-96). Even if Maloley's RJOB account had been opened simultaneously with or prior to his Peavey account, Jeffrey would have had the same pecuniary interest, as a competitor of Roberts, in warning Maloley about Roberts' lack of registration.

inference is "[a] more reasonable interpretation." Id. This argument plainly ignores the well-settled limitations of judicial review. Myron v. Hauser, 673 F.2d at 1005 n.17. In any event, it was clearly reasonable for the Commission to infer that Maloley's first inquiry was not made until, as he testified, January 1979.

Petitioner's argument (Pet. Br. 26) that, even after receiving Karen Jeffrey's warning, he should have been excused from asking about Roberts' registration because there is no evidence that he understood the significance of the CFTC registration requirements of the Commodity Exchange Act is contradicted by the record.[16/] Jeffrey testified that she warned Maloley about Roberts' nonregistration so that Maloley would not get into "trouble" for trading with an unregistered broker. (C.R. 83 at 537-38.) Thus, Jeffrey's warning itself would have alerted any reasonable person to the possibility that Roberts' lack of registration was in violation of the law.[17/]

Finally, Petitioner's challenge to the Commission's conclusion that due

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16/ This argument raises a serious question whether a presumption of reliance on registration would be accorded Petitioner in any consideration of the merits of his fraudulent inducement claim. In a related context, the Commission observed that

> [e]ven assuming that Roberts did have a duty of assurance [about lack of registration], and that Maloley's reliance on Roberts' omission can be presumed . . ., respondents may well have rebutted the presumption by showing Maloley to be someone who liked to bet, who let a warning about registration go unheeded for eight months, and who did not in any other way act as if registration was important to his commodity trading decisions.

(C.R. 142 at 8 n.11.)

17/ And, in Campbell v. Upjohn Co., 676 F.2d 1122, 1127 (6th Cir. 1982), the court observed, "[t]he plaintiff's ignorance of his cause of action does not by itself satisfy the requirements of due diligence and will not toll the statute of limitations." Citing Akron Presform Mold Company v. McNeil Corporation, 496 F.2d 230, 234 (6th Cir. 1974), cert. denied, 419 U.S. 997 (1974).

diligence required Petitioner to inquire about Roberts' registration from someone other than Roberts is likewise groundless. Petitioner was warned in, or shortly after, April 1978 that Roberts was unregistered. In the months that followed, Petitioner: (1) began to suspect Roberts of making unauthorized trades; (2) received unfulfilled assurances from Roberts that his account losses would be recouped; and (3) was warned by Roberts that if he wanted to recover the losses attributable to Roberts' allegedly wrongful conduct, Petitioner had to surrender control of trading decisions, make margin deposits whenever necessary, and not talk to Gottsch or RJOB about this arrangement. Because Petitioner was aware of the warning from Karen Jeffrey, the alleged unauthorized trades, and, by the fall of 1978, the suspicious and unfulfilled assurances, due diligence required Petitioner to do more than to ask only Roberts about his registration possibly as late as January 1979, eight months after receiving Karen Jeffrey's warning. Given the ready access Petitioner had to alternative sources for registration information, including the Commission, and the doubts any reasonable person in Petitioner's position would have had about Roberts' character and honesty, the Commission reasonably concluded that due diligence required Petitioner to inquire about registration from someone other than Roberts, no later than the fall of 1978.[18/]

18/ In his brief (Pet. Br. 26), Petitioner argues that this Court should adopt the ALJ's conclusion that he had no duty to ask anyone other than Roberts, and reverse the Commission's determination on this issue. However, "where an administrative agency disagrees with the conclusions of its ALJ, the standard of judicial review does not change; the ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency['s decision]." Stamper v. Sec'y of Agriculture, 722 F.2d 1483, 1486 (9th Cir. 1984) (citation omitted); NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915 (9th Cir. 1982). And an ALJ's determinations are not entitled to any special deference from the agency except insofar as they are based on witness credibility. Mattes v. United States, 721 F.2d 1125, 1129 (7th Cir. 1983) ("Mattes"). The Commission has not disturbed a single credibility determination of the ALJ, but has disagreed only with the inferences to be drawn from facts found by the ALJ. Thus, it is the Commission's reasonable inferences,

(footnote continued)

C. The Commission's Conclusion That Petitioner Failed To Establish Due Diligence In Discovering His Claim For Fraudulent Assurances Is Supported By The Weight Of Evidence.

As discussed, supra, the Commission found that Maloley failed to exercise reasonable diligence by not undertaking efforts to discover his cause of action for fraudulent assurances by the fall of 1978. The Commission concluded that a reasonable person would not have believed: (1) Roberts' continued assurances for a period of one year; and (2) that, after three months of trading had caused losses to mount to over $100,000 in the fall of 1978, Roberts and Gottsch could still trade him out of his losses in "one day." The Commission also concluded that a reasonable person would have inquired to RJOB or Gottsch directly about the assurances no later than the fall of 1978.

With respect to the Commission's conclusion that Petitioner failed to exercise due diligence in discovering the existence of his cause of action for fraudulent assurances, Petitioner argues that he was not put on notice that the assurances were fraudulent until he closed his account because, according to Petitioner, everything that he could have been aware of from June 1978 through June 1979 indicated that the assurances would be fulfilled. (Pet. Br. at 30.) In support, Petitioner argues that because the assurances to take care of losses were to have been fulfilled through allowing Roberts to continue trading, the continuously escalating losses in his account were not notice to Petitioner that the assurances might be fraudulent. (Pet. Br. at 32.)

Contrary to Petitioner's assertion that his continuing losses were insufficient to put him on notice that Roberts' assurances were fraudulent, the

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and not the ALJ's, to which this Court must defer. Mattes, 721 F.2d at 1129.

results of trading activity for his personal account after Petitioner first received assurances were compelling evidence of the need for Petitioner to exercise due diligence in inquiring about the assurances. The net profits and losses (after commission charges) from trading in Maloley's personal account for the end of each month from April 1978 through January 1979, inclusive, were as follows:[19/]

C.R. Doc. 87 at Page No.	Month/Yr.	Profit (Loss)	Cumulative Profits (Losses) (After Commissions)
887	April 1978	$ 2,265.00	$ 2,265.00
922	May 1978	$ 11,897.00	$ 14,162.00
939	June 1978	$(26,018.50)	$ (11,856.50)
982	July 1978	$ 9,611.00	$ (2,245.50)
1005	August 1978	$(36,974.00)	$ (39,219.50)
1033	September 1978	$(79,179.00)	$(118,398.50)
1050	October 1978	$(9,949.00)	$(128,347.50)
1089	November 1978	$ 1,993.50	$(126,354.00)
1129	December 1978	$ 14,801.00	$(111,553.00)
1155	January 1979	$(66,556.00)	$(178,109.00)

The net profits and losses (after commission charges) from trading in "Mr. Z's Meats" account (Petitioner's joint account with Roberts) for the end of each month from July 1978 through December 1978, inclusive, were as follows:

19/ The figures on the following charts may be found on the pages in the Certified Record identified in the left column of the charts. The figures are taken from Petitioner's Month-End Account Statements, and they appear opposite the term, "Regulated Total . . . . P&L." A figure appearing in the left column of the statement, under "Debit," represents a net trading loss (after commission charges). A figure appearing in the right column of the statement, under "Credit," represents a net trading profit (after commission charges).

C.R. Doc. 87 at Page No.	Month/Year	Profit (Loss)	Cumulative Profits (Losses) (After Commissions)
1201	July 1978	$ (120.00)	$ (120.00)
1212	August 1978	$ (3,785.00)	$ (3,905.00)
1224	September 1978	$(35,059.50)	$(38,964.50)
1227	October 1978	$ (3,620.00)	$(42,584.50)
1228	November 1978	No Activity	$(42,584.50)
1231	December 1978	No Activity	$(42,584.50)[20]

Maloley testified that he first received assurances from Roberts that the account losses would be taken care of in June 1978. By the end of June 1978, the month in which the alleged (and for the most part unspecified)[21] unauthorized trades took place, his personal account had cumulative trading losses (including commissions) of $11,856.00. Despite assurances from Roberts that these losses would be "taken care of," and traded out in "one day," the cumulative losses escalated from $2,245.00 in July 1978 to $118,398.50 at the end of September 1978. And by the end of September 1978, the cumulative losses in the Mr. Z's Meats account totalled $38,964.50. The Commission fairly concluded that after three months of unfulfilled assurances and staggering losses approximating one-third of one's net worth, any reasonably diligent person would have recognized the need to inquire about the veracity of these as-

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20/ After his personal account resumed trading in April 1979 (C.R. 117 at 7), Petitioner deposited an additional $5,000 in this account, which was ultimately lost in trading. (C.R. 84 at 699.) When this amount is added to the accumulated losses in Petitioner's personal account ($178,109.00) and the losses in Mr. Z's Meats account ($42,584.50), the combined total equals $225,693.50 in overall trading losses. Reducing this figure by the total of Roberts' four checks ($12,700), discussed infra, and Roberts' April 1979 credit to Petitioner's account ($15,293.50), discussed infra, Petitioner's out-of-pocket losses were $197,700, as the ALJ so found.

21/ The only unauthorized trade that Petitioner specifically identified was the June 1978 trade for ten cattle contracts. See C.R. 82 at 274-75; C.R. 83 at 402.

surances,[22] and would have done so no later than the fall of 1978. Instead of trading Petitioner out of his losses, in August and September 1978, Roberts' trading resulted in losses for Petitioners' two accounts that combined exceeded $157,000, thirteen times the amount of the losses ($11,856) in his personal account at the end of June 1978.

Petitioner also argues that he had received funds from Roberts on five different occasions, which constituted partial performance of Roberts' assurances and which excused Petitioner from making a due diligence inquiry. (Pet. Br. 33.) The first check was in the amount of $1,200 and was dated July 13, 1978; the second check was for $4,000 and was dated July 29, 1978; the third check, dated August 9, 1978, was for $2,500; and the last check, dated October 6, 1978, was for $5,000, and was given to Petitioner when his cumulative trading losses in both accounts exceeded $157,000. (C.R. 1, at 5-6.) Although Petitioner testified that he considered these checks to be partial fulfillment assurances (which he now argues suspended his duty of due diligence), the ALJ found that these checks constituted nothing more than Roberts' share of the margin deposits for Mr. Z's Meats, their joint account. (C.R. 117 at 7.) Petitioner and Roberts both testified that the profits and losses would be shared "fifty-fifty." (C.R. 354, 614-15.) Even if these payments could be construed as partial performance of Roberts' assurances, given the steadily mounting, staggering losses in Maloley's accounts, the Commission clearly acted reasonably in concluding that these "small contributions" to the joint account did not constitute a sufficient basis for any reasonable person to conclude that six-figure losses would be

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22/ Maloley has never challenged the ALJ's finding that although aware that various problems existed, Maloley "did not make any complaints or claims to anyone other than Spence Roberts." (C.R. 117 at 6.)

rectified, and would not excuse a failure to exercise due diligence. (C.R. 142 at 12 n.17.) See Myron v. Hauser, 673 F.2d at 1005 n.17.

Petitioner also argues that the most critical event that should have excused him from exercising due diligence was Roberts' April 1979 credit of $15,293.50 to Petitioner's account. It was clearly reasonable for the Commission to conclude, as it did, that this did not afford Petitioner a reasonable basis for believing that Roberts would rectify his account losses. (C.R. 142 at 12 n.17.) This credit was made at least six months after Petitioner's due diligence duty had already been triggered in the fall of 1978. The credit of $15,000 was insignificant in contrast to the $220,000 in cumulative trading losses that had occurred in both accounts by the end of January 1979.

Maloley also asserts that it was reasonable for him continuously to rely on Roberts' assurances because of his "close" personal relationship with Roberts, which, according to Maloley, the Commission failed to consider in assessing his due diligence. (Pet. Br. 30-31.) While the ALJ, who observed the parties while testifying, did find that Maloley and Roberts became "personal and social" friends after Petitioner opened his RJOB account, he made no specific finding about the closeness of this relationship.[23/] Even if Maloley had shown that he enjoyed a close personal relationship with Roberts, he would not be free to shield his eyes from known facts which cast suspicion about the assurances. See Buder v. Merrill Lynch Pierce, Fenner & Smith, 644 F.2d 690, 692 (8th Cir. 1981); Koke v. Stifel, Nicolaus & Co., 620 F.2d 1340, 1343 (8th Cir. 1980).

First, and most importantly, Maloley believed that Roberts had made

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23/ Because Maloley, in his briefs on appeal to the Commission, did not object to the ALJ's characterization of the nature of his relationship with Roberts, there was no occasion for the Commission to make an independent finding with respect to the closeness of this relationship.

unauthorized trades in his account and therefore had reason to suspect Roberts' character. Second, by October 1978, three months had elapsed without fulfillment of the assurances (even though Petitioner had been assured that he could be traded out of his losses in one day) while the losses in Petitioners' two accounts had multiplied by a factor of thirteen. Third, Roberts promised that Gottsch was the person who would trade Petitioner out of his losses, yet it was only Roberts who traded the account, and Roberts advised Petitioner not to talk to Gottsch to confirm the assurances. As the Commission found (C.R. 142 at 11-12), knowledge of these matters would have alerted any reasonable person of the potential falsity of Roberts' assurances.

None of the other matters cited by Petitioner excused him from a duty of due diligence. Roberts' November 1978 meeting with Gottsch did not result in any assurances to Petitioner by Gottsch that the account would be rectified.[24/] Petitioner's failure directly to contact Gottsch or RJOB in the fall of 1978 was unreasonable, given the suspicions about the assurances, discussed, supra. Nor was it reasonable, as the Commission found, for Petitioner to believe that Gottsch could trade him out of six-figure losses in "one day." A representation about a trading performance so improbable would be enough to trigger suspicion and excite inquiry in the mind of a reasonable person. In his brief (Pet. Br. 33) Petitioner concedes, as the Commission found, that there was no single "triggering event" that occurred in June 1979 that apprised Petitioner of the fraudulent nature of the assurances. Instead, Petitioner cites a "gradual realization" that the assurances would not be fulfilled. But, as this Circuit has recognized, "the statutory period does

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24/ And Petitioner has never, in his appeal to the Commission or to this Court, challenged the ALJ's determination that there was "insufficient evidence to show that Gottsch actually made the assurances attributed to him by Roberts." (C.R. 117 at 20.)

not await appellant's leisurely discovery of the full details of the alleged scheme." Koke v. Stifel, Nicolaus & Co., Inc., 620 F.2d 1340, 1343 (8th Cir. 1980).

CONCLUSION

For all of the foregoing reasons, the Court should affirm the Commission's decision in all respects.

Respectfully submitted,

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