UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-1849
88-2029

STUART N. GIMBEL,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

BRIEF OF RESPONDENT COMMODITY FUTURES TRADING COMMISSION

COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Commission's proceeding below, which considered evidence of liability and sanctions in a single hearing, satisfied the requirements of due process as well as of section 6(b) of the Commodity Exchange Act, 7 U.S.C. § 9.

STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28(b)(3), respondent states that the jurisdictional summary in petitioner's brief is complete and correct.

NATURE OF THE CASE, COURSE OF PROCEEDING AND DISPOSITION BELOW

The instant petitions for review grow out of two decisions of the Commodity Futures Trading Commission (the "Commission" or "CFTC") in an administrative enforcement proceeding, In the Matter of Stuart N. Gimbel, et al, CFTC Docket No. 84-20.

On February 1, 1984, the Commission issued a fourteen count complaint against Stuart N. Gimbel ("Gimbel"), David M. Mondi ("Mondi"), Roman Sasin ("Sasin"), and Philip M. Getson ("Getson")(collectively, the "respondents"). As to Gimbel, the sole petitioner before this Court, the complaint charged that he filed false or misleading reports with the Commission concerning positions he held in lumber-related futures contracts traded on the Chicago Mercantile Exchange ("CME" or "Exchange")[1/], and that he failed to report to the Commission that he controlled futures positions in accounts owned by the other respondents. This conduct was alleged to violate sections 4i and 6(b) of the Commodity Exchange Act and sections 18.00, 18.01(a), 18.01(d), and 18.04(e) of the Commission's regulations.[2/] The complaint further alleged that Gimbel engaged in wash trading and noncompetitive trading in violation of

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[1/] During the relevant period, the CME was a Commission-designated "contract market" in two "random length" lumber contracts, and one "studs" lumber contract. These contracts were collectively known as the "lumber complex".

[2/] As pertinent here, Sections 4i and 6(b), 7 U.S.C. §§ 6i, 9 generally established reporting requirements for traders and prescribed the filing of false or misleading reports with the Commission. Sections 18.00, 18.01(a), 18.01(d), and 18.04(e) [now 18.04(d)], of the Commission's regulations, 17 C.F.R. §§ 18.00, 18.01(a), 18.01(d), and 18.04(e) (1979) implemented the reporting requirements of the Act. The role these provisions play in the Commission's market surveillance program is discussed at pp. 5-10 below.

section 4c(a)(A) of the Act and section 1.38(a) of the Commission's regulations, and that he violated a 1975 order entered by the Secretary of Agriculture requiring him to cease and desist violating section 4i of the Act by filing false reports concerning the futures positions he owned or controlled in accounts belonging to others.3/

The Commission's complaint set these matters for evidentiary hearing. Moreover, the complaint specifically ordered that the hearing on the foregoing charges would include an inquiry into whether Gimbel should be denied registration as a floor broker, ordered to cease and desist from further violations, prohibited from trading on all "contract markets" (futures exchanges), and assessed a civil monetary penalty not to exceed $100,000 for each violation.

After Gimbel filed an answer denying the essential allegations of the complaint, and after he was afforded an opportunity to take discovery and subpoena witnesses, an oral evidentiary hearing was held in Chicago before an Administrative Law Judge ("ALJ"). During eight days of hearings, Gimbel and the other parties were each afforded an opportunity to present direct testimony, cross examine witnesses, and introduce documentary evidence. At the conclusion of the hearing, both Gimbel and the Commission's Division of Enforcement ("Division") filed proposed findings of fact and conclusions of law.

3/Prior to April 1975, the Commodity Exchange Act was enforced through administrative proceedings brought by the Secretary of Agriculture. See 7 U.S.C. § 9 (1970).

On January 31, 1986, the ALJ issued a comprehensive 44-page initial decision which found, among other things, that Gimbel had committed each of the violations charged. Furthermore, on the basis of these violations and evidence of Gimbel's prior history of violations of the Act, the ALJ ordered that Gimbel be denied registration as a floor broker; that Gimbel cease and desist from further violations of sections 4c(a)(A), 4i and 6(b) of the Act and the Commission's underlying regulations; and that Gimbel be prohibited from trading on all futures exchanges. Without explanation, the ALJ declined to assess a civil monetary penalty as requested by the Division.

Gimbel and the Division cross appealed the initial decision to the Commission. Gimbel challenged the liability conclusions and sanctions. The Division appealed the ALJ's failure to assess a civil monetary penalty. After full briefing by the parties, and its own consideration of the record, the Commission entered an order on April 14, 1988 affirming all of the findings, liability conclusions, and sanctions recommended by the ALJ. In addition, after independently assessing the record, the Commission imposed a civil monetary penalty against Gimbel in the amount of $115,000.

On May 2, 1988, Gimbel petitioned this Court to review the Commission's April 14 order (docketed in this Court as No. 88-1849). That same day Gimbel sought reconsideration and a stay of sanctions from the Commission. In orders dated May 17 and May 18, 1988, the Commission denied Gimbel's motion for reconsideration and for a stay of sanctions. On June 2, 1988, Gimbel petitioned this Court to review those Commission orders (docketed in this Court as No. 88-2029). On May 31, 1988, this Court granted Gimbel's petition for a stay of administrative sanctions pending judicial review. Additionally,

on July 1, 1988, the Court granted the Commission's motion to consolidate Gimbel's petitions into one proceeding.

COUNTERSTATEMENT OF THE CASE

I. Statutory Background

A. Regulation of Futures Trading Under The Commodity Exchange Act

The Commodity Exchange Act establishes a comprehensive regulatory scheme to assure that futures markets serve their economic purpose by operating properly and competitively, that trading is free from artificial prices or price distortion, and that all who use the markets are treated equitably.[4/]

[4/] Among other things, Section 3 of the Act finds that commodity futures affects the public interest and interstate commerce:

> Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest. Such futures transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce. The prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce. Such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price. The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein . . . .

7 U.S.C. § 5 (1982).

The Act outlaws price manipulation and other trading abuses. See Sections 6(b) and 9(b) of the Act, 7 U.S.C. §§ 9, 13(b). Moreover, it grants the Commission authority to impose limits on the number of speculative futures positions that may be held or controlled by any one trader, and prohibits traders from acquiring, selling or holding positions that exceed those limits. Section 4a of the Act, 7 U.S.C. § 6a; see, e.g., CFTC v. Hunt, 591 F.2d 1211, 1215-16 (7th Cir. 1979).

The Commission's powers complement the self-regulatory role of commodity exchanges in restricting market abuses by large traders. Thus, section 4a(5), enacted in 1982, expressly acknowledges the authority of commodity exchanges to establish and enforce their own limits on the amount of speculative futures trading that may be done by any person, and at the same time requires that an exchange's limits be the same or more restrictive than limits the Commission may have set. 7 U.S.C. § 6a(5). Finally, the Commission is empowered, whenever it has reason to believe that an emergency exists, to take such action as is necessary in its judgment to maintain or restore orderly trading in, or liquidation of, any futures contract. Section 8a(9) of the Act, 7 U.S.C. § 12a(9); see also Board of Trade of the City of Chicago v. CFTC, 605 F.2d 1016 (7th Cir. 1979).5/

5/ To strengthen the regulation of futures trading, Congress in 1974 vested a panoply of new regulatory and enforcement powers in the Commission. 120 Cong. Rec. 34736 (October 9, 1974) (remarks of Rep. Poage); 120 Cong. Rec. 34998 (October 10, 1974) (remarks of Sen. Clark). The Commission was given the authority to bring actions in federal district court against any person to enjoin violations of the Act or the Commission's rules. Section 6c, 7 U.S.C. § 13a-1 (1976). The Commission was also empowered to institute administrative proceedings to impose civil monetary penalties on any person found to have violated provisions under the Act and the rules thereunder. Section 6(b), 7

(Footnote Continued)

B. The Commission's Large Trader Reporting System Under The Act

To detect and, if necessary, take swift remedial action against actual or attempted market manipulations, squeezes, corners, position limit violations, or any other events which may result in market emergencies, the Commission has implemented an extensive market surveillance program to monitor the activities of large position traders on a daily basis. Critical to the success of this surveillance program is the Commission's ability to require and rely upon reports filed by large traders that accurately describe the number of futures positions they hold or control.6/

Section 4i of the Act, 7 U.S.C. 6i, empowers the Commission to acquire the necessary information about large traders and their positions.7/ Pursuant

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(Footnote Continued)
U.S.C. § 9 (1976). These powers supplemented already existing administrative remedies by which the Commission may order any person to cease and desist from unlawful conduct, deny any person trading privileges on contract markets, and suspend or revoke the registration of violators. See Sections 6(b) and 6(c), 7 U.S.C. §§ 9 and 13b (1976).

6/ In In re Wiscope, S.A., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,785, at pp. 23,191-92, vacated on other grounds, 604 F.2d 764 (2d Cir. 1979), the Commission explained:

> In order that the Commission be able to discern potentially disruptive activity and to take either prophylactic or remedial action, the Commission requires certain information from market participants. Indeed, the Commission's information gathering function is critical to its regulatory program [citing, inter alia, section 4i of the Act].

7/ At all times relevant to this proceeding, Section 4i of the Act provided in pertinent part:

> It shall be unlawful for any person to make any contract for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market unless such person shall report or cause to be reported to the properly designated officer in accordance with the rules and regulations of the Commission (1) whenever such person shall
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> (Footnote Continued)

to Section 4i and its general rulemaking authority under section 8a(5) of the Act, 7 U.S.C. § 12a(5), the Commission adopted regulations establishing reportable levels for trading in lumber futures and requiring traders holding (or controlling) positions at or above those levels to file reports giving certain background concerning their trading in lumber.8/ At all times relevant here, the Commission's regulations established the reportable position level for lumber futures at 25 contracts. 17 C.F.R. § 15.03(a). Thus, for example, during all times relevant to this proceeding, a trader whose lumber positions met or exceeded the 25-contract level was required, that same day and on each day thereafter while the reportable position level was maintained, to file with the Commission "Form 1903" reports. See 17 C.F.R. §§ 15.02, 18.00.9/ Among other things, traders were required to

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(Footnote Continued)

> directly or indirectly make such contracts with respect to any commodity, or any future of such commodity, during any one day in an amount equal to or in excess of such amount as shall be fixed from time to time by the Commission; and (2) whenever such person shall directly or indirectly have or obtain a long or short position in any commodity or in any future of such commodity, equal to or in excess of such amount as shall be fixed from time to time by the Commission. . . . For the purposes of this section, the futures and cash or spot transactions and positions of any person shall include such transactions and positions of any persons directly or indirectly controlled by such person. 7 U.S.C. § 6i (1976).

8/Reporting requirements for lumber became effective in July 1975 when the Commission amended section 15.03 of its regulations and when the CME was formally designated by the Commission as a "contract market" for futures trading in lumber. See 1987 CFTC Annual Report at 115-116 and n.4.

9/On December 8, 1981, the Commission amended section 18.00 of its regulations, 17 C.F.R. § 18.00, to discontinue the requirement that Form 1903 reports be filed routinely by lumber traders as soon as they reached the reportable position level of 25 contracts. In place of that requirement, amended regulation 18.00 now requires lumber traders who reach the 25 contract reportable position level to file Form 1903 reports only upon "special call" for such information by the Commission. In adopting this amendment to

(Footnote Continued)

disclose in these reports the quantity of all open futures contracts (including spread positions) held for speculative purposes. 17 C.F.R. § 18.00(a) (1979).10/

In the event that any trader held or controlled more than one account, regardless of whether such accounts were carried by the same or different brokers, all were to be considered a single account for the purposes of determining whether a reportable position has been reached. 17 C.F.R. § 18.01(a) (1979). Each trader with reportable positions who controlled one or more different accounts was required to show at the bottom of his first Form 1903 report "a breakdown or listing of the names of all such accounts, including joint accounts, and their respective positions." This listing was required to be updated monthly or when any change in the trader's control of accounts occurs. 17 C.F.R. § 18.01(d).

(Footnote Continued)
regulation 18.00, the Commission stated that:

> the elimination of the requirement that '03 reports be filed on a routine basis will cause the Commission to rely more heavily on series '01 reports and Forms 40 and 102 to satisfy its routine needs for large trader information. Concomitant with the increased reliance which the Commission intends to place on these reports to satisfy its informational needs, the Commission will carefully monitor their accuracy and timeliness and vigorously pursue any apparent violation.

46 Fed. Reg. 59960 (1981).

10/ A "spread" position involves "the purchase of one futures delivery month against the sale of another futures delivery month of the same commodity, the purchase of one delivery month of one commodity against the sale of that same delivery month of a different commodity, or the purchase of one commodity in one market against the sale of that commodity in another market, to take advantage of and profit from a change in price relationships." Committee on Agriculture, Nutrition, and Forestry, Futures Trading Act of 1978, 95th Cong., 2d Sess. (1979), Committee Print at 161.

Finally, upon reaching a reportable level of trading, a trader must file with the Commission, no later than ten days after the reportable level is reached, a completed Form 40 "Statement of Reporting Trader." Such a report provides the Commission with detailed information about the personal and business background of the trader, the type of trading engaged in, and the identity of other persons who may have financial interests in any of the trader's accounts. The Form 40 must be updated once annually, or as necessary whenever a previously filed Form 40 becomes no longer accurate. 17 C.F.R. § 18.04(e).11/

In sum, the Commission relies heavily on compliance with reporting requirements to enable it to monitor the activities of large traders for potential market abuses. Truthful reporting by traders is thus a cornerstone for effective market surveillance and the ability of the Commission to meet its statutory mission to protect the integrity of the futures markets.

11/Section 6(b) of the Act, 7 U.S.C. § 9, prohibits a trader from willfully making any false or misleading statement of a material fact in, inter alia, any Form 1903 report or Form 40 report, or from willfully omitting any material fact which is required to be stated in such reports.

II. Counterstatement Of The Facts

A. Events Leading To The Proceeding Below

1. The Transactions Involved In This Proceeding

The following facts (set out in pp. 11-15) are not in dispute:[12] Between January and late April 1980, respondents Gimbel, Mondi, Sasin, and an account owned by the West Texas Trading Retirement, Ltd. (the "WTTR" account) which was traded by respondent Getson and others,[13] acquired and held numerous spread positions in lumber-related futures contracts traded on the CME. These positions proved profitable through February, March and the first part of April 1980. (Tr. 198-200, 1420-23.)[14]

However, in April, a sudden, sharp reversal in the lumber market occurred which caused a major distortion in the price relationships among the CME's lumber-related contracts. (Tr. 725.) When this occurred, respondents' positions very quickly became unprofitable. By the close of trading on April 22, the respondents had liquidated most if not all of these positions,

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[12] Record citations are identified by reference to the Certified Record filed with this Court on July 19, 1988 ("CR"). Citations to the hearing transcript, also filed on July 19, 1988, are identified by reference to the page ("Tr."). Citations to hearing exhibits are identified as either Gimbel Exhibits ("G. Ex.") or Division Exhibits ("D. Ex."). Citations to the decisions in this proceeding are identified by reference to the Appendix filed by petitioner ("App.").

[13] West Texas Trading Retirement, Ltd., was a limited partnership in which Getson and another individual, Robert William Van Deventer, shared a 95% interest. (Tr. 387-89.)

[14] The lone exception was Sasin's spread positions which became unprofitable in late February 1980 and were liquidated at that time for a $6,000 loss. (Tr. 608-09.)

incurring significant losses. (Tr. 152-55, 198, 839.)[15/] During the evening of April 22, Mondi and Gimbel met at Gimbel's home. (Tr. 155, 1425-27.) At that meeting, Gimbel gave Mondi a signed promissory note in the amount of $110,000. (Tr. 156-58, 1437-38.) That same evening, Getson also visited Gimbel at home, and received from Gimbel two signed promissory notes for $382,000 each, one payable to Getson personally, and the other to WTTR.

The foregoing transactions were not the only ones leading up to this proceeding. Two months earlier, on February 29, 1980, respondents Gimbel, Mondi and Sasin also participated in two separate three-party transactions. (Tr. 143-44, 145-48, 533-36.) Specifically, Gimbel bought 10 lumber contracts from Sasin, and sold 10 contracts to Mondi.[16/] Sasin then bought 10 contracts from Mondi and sold 10 contracts to Gimbel. As a result of these transactions, the respondents were left with no new net positions for the day. These transactions caused Mondi to lose $3,500, Gimbel to lose $200, and Sasin to gain $3,700.

15/ By April 22 respondent Mondi's account statement reflected his losses to be $110,000, Sasin had lost $6,000, the WTTR account had lost at least $382,000, and Gimbel had lost approximately $2,000,000. (Tr. 157-58, 350-51, 454-55, 608-09, 1423.) Mondi's account statement was subsequently corrected to reflect that he lost substantially less than initially reported.

16/ By "buying" lumber futures contracts, a trader actually enters into an executory contract to buy a standardized quantity of lumber during a specified delivery month in the future. Conversely, by "selling" lumber futures contracts, a trader actually enters into an executory contract to sell a standardized quantity of lumber during a specified delivery month in the future. A trader who has "bought" a lumber futures contract may liquidate his obligations and avoid taking delivery under that contract by offsetting his existing contract to buy the future with a new futures contract to sell lumber, and vice versa.

2. The CME Investigation

As a result of the distortion in the price relationships among its lumber-related contracts, the CME, in its capacity as a self-regulatory organization, commenced an investigation into spring 1980 lumber trading. (Tr. 725.) During this investigation, both Mondi and Getson admitted acquiring and holding positions for Gimbel in violation of CME rules. (Tr. 728-29, 1074-77.) Getson also provided the CME with a chart listing the lumber trades he held for Gimbel in the WTTR account from February through April 1980. (Tr. 756, 761.) The chart reflected that these trades had lost $381,706 during that period. (D. Ex. 21.)

As a result of its investigation, the CME initiated disciplinary proceedings against all four respondents. (D. Ex. 40.) Ultimately, the CME found that Mondi and Getson violated CME Rule 432(q), which prohibited traders from holding undisclosed positions on behalf of others, and ordered that the membership privileges of both be suspended for five days. (Tr. 165.) The CME found that Sasin had violated its rule against prearranged trading, based on his participation in the three-way transactions on February 29, 1980. Sasin paid the CME a $2,000 fine. Gimbel, for his part, was charged with violating CME Rules 432(c) and (o) by exceeding the CME's speculative position limits for lumber, and by holding positions in the accounts of other traders to avoid detection of speculative position limit violations.17/ Gimbel settled the

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17/ During the relevant period, the CME had speculative position limits in effect for its lumber-related contracts. Under these limits, no trader could acquire and hold more than 300 positions in any one contract month, nor
(Footnote Continued)

disciplinary action with the CME without admitting or denying the charges. He agreed to a 15-month suspension of his CME membership privileges, and to pay a $150,000 fine. Gimbel thereafter paid the fine and served the suspension. (Tr. 1450; CR. 153.)

B. The Proceeding Below

1. The Commission Investigation and Hearing

In 1981, the Commission commenced its own investigation of the respondents' lumber trading activities. In September 1981, the Division issued an investigatory subpoena requiring Gimbel to testify about whether he held positions in accounts belonging to Mondi, Getson, WTTR and Sasin. (Tr. 1465.) Gimbel was asked to identify the promissory notes he had given to Mondi and Getson and to describe the circumstances surrounding the preparation of the notes. Invoking a privilege against self-incrimination under the Fifth Amendment to the Constitution, Gimbel did not respond to any of the questions relating to these matters. (Tr. 1467-69.)

Subsequently, on February 1, 1984, the Commission issued its fourteen-count complaint in this case charging the respondents with various violations of the Act and the Commission's regulations, including those governing reporting of positions and noncompetitive trading. Specifically, Gimbel was charged with willfully filing false Form 1903 reports with the Commission about his lumber positions, willfully failing to file other required reports (Forms 40), engaging in noncompetitive and wash trading, and

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(Footnote Continued)
more than 1,000 positions for all contracts. The Commission's regulations did not include speculative position limits for lumber. However, as noted, the Commission had reporting requirements for lumber traders once their positions held or controlled equaled or exceeded 25 contracts.

violating a 1975 cease and desist order issued by the Secretary of Agriculture. After discovery, an eight-day oral hearing was held on the charges against Gimbel and the others. Mondi, Sasin, and Gimbel each testified and was subject to cross examination. As Getson exercised his Fifth Amendment privilege against self-incrimination, Thomas Utrata, the CME's Director of Compliance, was called to testify as to statements Getson made in his presence during the CME investigation of these matters.

Beyond the undisputed facts just recited, Gimbel's testimony at the hearings conflicted sharply with accounts given by Mondi, Sasin, and Utrata concerning the de facto ownership of the disputed lumber spread positions in early 1980. Gimbel denied that he owned or controlled positions in accounts belonging to the other respondents, and denied that he ever asked the respondents to hold positions for him. (Tr. 1414, 1454.) Under Gimbel's version of events, the idea to trade lumber spread positions had originated with Getson. (Tr. 1416.) Gimbel asserted that he thought Getson's idea had great potential for profit, and thus acquired numerous positions. (Tr. 1417-18.) According to Gimbel, Mondi inquired about the spread positions that Gimbel and others were taking. Gimbel claimed to have told Mondi that the spread position was "one of the greatest trades" he had ever seen and that, shortly thereafter, Mondi began to "coat-tail" Gimbel by putting on the same or similar spreads in his own account. (Tr. 1420.) As for the April 22 promissory notes, Gimbel explained that he gave them to Getson and Mondi as a favor so that each could provide assurance of financial solvency to the clearinghouse of the Exchange and gain access to the trading floor. (Tr. 1428, 1431-34, 1437-40.)

In direct contradiction, Mondi testified that 95% of the lumber trades in one of his personal accounts were actually Gimbel's trades that Mondi was holding at Gimbel's explicit direction. (Tr. 104-07, 116-19.) According to Mondi, after the market had moved against these positions, he liquidated them at a loss first reported to be $110,000. (Tr. 157-58.) On the evening of April 22, 1980, Mondi visited Gimbel at home and received Gimbel's promissory note in the amount of $110,000 as reimbursement for those losses. (Tr. 155-58, 219-220.) Mondi further testified that, at Gimbel's request and direction, he had participated in the three-way transactions on February 29, 1980. (Tr. 143-44.) According to Mondi, the February 29 trades were undertaken with Gimbel and Sasin, without open outcry in the trading pit, by simply writing the trade and price information on their respective trading cards. (Tr. 144.)[18/]

Sasin also testified that in early January 1980 Gimbel asked him to execute spread positions and to hold those positions for Gimbel's benefit. (Tr. 488-493.) According to Sasin, he placed the spreads in his account as a favor to Gimbel, who had previously done a favor for him. (Tr. 488-89.) By late February 1980, the positions Sasin held for Gimbel became unprofitable, and Sasin liquidated them at a $6,000 loss. (Tr. 500-500-A, 522, 608-09.) Sasin stated that he participated in the February 29 transactions with Gimbel and Mondi at Gimbel's direction (Tr. 525, 527, 535), and that these

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[18/]Commission regulation 1.38(a), 17 C.F.R. § 1.38(a), generally requires that trades be executed competitively, by open outcry, in the trading pit on the exchange floor.

transactions were Gimbel's way of reimbursing Sasin for the losses on the spread trades. (Tr. 536.)

As noted, Getson exercised his Fifth Amendment privilege not to testify, and CME Compliance Director Utrata testified as to statements Getson had made during the 1980 CME investigation. According to Utrata, Getson declared that from the end of February 1980 through April 22, 1980 he entered, and caused others to enter, lumber positions in the WTTR account that were held for Gimbel. (Tr. 735, 737-38.)19/ Getson also allowed Gimbel to execute trades for the WTTR account, which Gimbel did on some occasions. (Tr. 737-38.) After the sudden reversal in the lumber market in the weeks before April 22, Getson liquidated Gimbel's positions in the WTTR account at a loss of approximately $382,000. (Tr. 751-52, 764.) On the evening of April 22, Getson went to Gimbel's home and obtained from Gimbel two promissory notes, one payable to Getson and the other to "WTT & Retirement, Ltd.," both in the amount of $382,000 (i.e., the amount Getson claimed he had lost due to positions he had held for Gimbel). (Tr. 752, 761, D. Ex. 23.)

As previously stated, Getson produced to the CME a handwritten chart of the trades he caused to be placed in the WTTR account for Gimbel. The CME investigative staff made a copy of the chart. (Tr. 756, 751.) The Division called Richard Fung as an expert witness to analyze the trades on the chart, which showed the date and price at which each trade was entered, the date and

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19/ Getson's business partner in WTTR, Van Deventer, also testified that Getson told him that he had placed trades for Gimbel in WTTR's account. (Tr. 446.)

price at which each trade was liquidated, and the net gain or loss on each transaction. (Tr. 908-11, 986; D. Ex. 21.)[20/]

Fung compared each trade on the Getson chart with transactions appearing on WTTR account statements as well as on a computer printout of trade register data prepared by the CME from its official records. (Tr. 897-99.) Fung testified both as to specific trades on the Getson chart that could be verified from those statements and trade registers, and those that could not. (Tr. 1004-49.) Fung's testimony, when summarized, revealed that 88% of the trades on the Getson chart were verified exactly as they appeared on the original copy of the chart. (App. 23-24.) When the Getson chart was modified for minor discrepancies relating to the dates of trades, or the prices at which the trades were entered or liquidated, 95% of the trades could be verified with those official records.

The Division also demonstrated that Gimbel filed a CFTC Form 1903 report for each trading day from January 2 through April 22, 1980 (excluding April 2-9, 1980). (D. Ex. 19.) These reports purported to notify the Commission of the lumber contracts Gimbel then held in his own account, but did not include contracts held in accounts of Mondi, Sasin and WTTR. Moreover, the Division introduced evidence to show that Gimbel did not file a revised CFTC Form 40, Statement of Reporting Trader, at any time from January 2 through April 21, 1980. (Tr. 706.)

To show that Gimbel had violated an outstanding cease and desist order, the Division placed in evidence an 1975 order issued by the Secretary of

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[20/] Fung was a Supervisory Investigator with the Commission's Division of Enforcement.

Agriculture requiring Gimbel to cease and desist from violating speculative position limits by placing his trades into the accounts of others, from filing false or misleading reports, and from failing to file trader position reports. (D. Ex. 39C.)

In addition to the foregoing proof of substantive violations, the Division presented evidence relevant to the severity of Gimbel's misconduct and the need for severe sanctions. The Division's expert witness, Fung, established that failure to provide accurate information in large trader position reports hinders the Commission's ability to perform its market surveillance responsibilities. (Tr. 964-965.)

The Division also established that Gimbel had a long history of trading and business practices that violated the Act, the Commission's regulations, and CME rules. In this regard, the Division demonstrated that the Secretary of Agriculture had found that:

> -- in 1970, Gimbel took the opposite side of a customer's orders and falsely reported the identity of a floor broker with whom he traded, in violation of section 4b of the Act and sections 1.35 and 1.38 of the regulations. (D. Ex. 39A.);
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> -- in 1972 Gimbel operated a futures commission merchant ("FCM")[21/] which was undersegregated (i.e., undercapitalized in its customer accounts) on three occasions, and which failed to keep records of its net worth in violation of section 4d(2) of the Act and

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21/ The term "futures commission merchant" is defined in section 2(a)(1)(A) of the Act to include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. 7 U.S.C. § 2 (1982).

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> -- in 1970, Gimbel took the opposite side of a customer's orders and falsely reported the identity of a floor broker with whom he traded, in violation of section 4b of the Act and sections 1.35 and 1.38 of the regulations. (D. Ex. 39A.);
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> -- in 1972 Gimbel operated a futures commission merchant ("FCM")[21/] which was undersegregated (i.e., undercapitalized in its customer accounts) on three occasions, and which failed to keep records of its net worth in violation of section 4d(2) of the Act and

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21/ The term "futures commission merchant" is defined in section 2(a)(1)(A) of the Act to include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. 7 U.S.C. § 2 (1982).

sections 1.10(f) and 1.32 of the regulations. (D. Ex. 39B);

-- in 1975 Gimbel attempted to conceal trades in the accounts of others, violated Commission speculative position limits, filed false or incomplete position reports, and failed to file required reports in violation of sections 4a, 4g, 4i and 6(b) of the Act, and six Commission regulations. (D. Ex. 39C.)

On each of these occasions Gimbel was sanctioned by the Secretary for his violations.

The Division also established that Gimbel had been sanctioned by the CME on four separate occasions for violating exchange rules which prohibited holding positions in excess of CME speculative position limits and using the account of another individual to hide overtrading. (D. Exs. 24-28.) At various times, Gimbel had received sanctions from the CME in the form of fines ranging from $3,500 to $10,000 and trading suspensions ranging from five days to 380 days.

Gimbel never attempted to present sanctions-related evidence in rebuttal to the Division's case. Indeed, throughout the hearing, Gimbel argued that evidence relating to sanctions should be excluded until after the ALJ had reached a determination of his liability, and objected to the Division's introduction of the sanctions-related proof discussed above. (Tr. 6-10, 1065-69.) All such evidence was received over his objection. Notwithstanding these rulings, Gimbel never moved for a bifurcated hearing on sanctions, nor sought any clarification from the ALJ about whether a separate hearing would be held on the issue of sanctions.

During the hearing, the Division also sought to present evidence of Gimbel's net worth to create a record to support the imposition of a civil

monetary penalty under section 6(d) of the Act.[22/] To that end, the Division (during discovery) had previously sought to compel Gimbel to produce evidence of his financial circumstances, including tax returns from 1979-1983, and financial statements from 1979 up to the present time (i.e. 1984). (D. Ex. 43.) The ALJ denied Gimbel's motion to quash the Division's subpoena at a pre-hearing conference and he ordered Gimbel to produce the subpoenaed records. (CR 73 at 688-89.) Subsequently, Gimbel agreed to produce his 1980 and 1981 tax returns because he thought they might be probative of the issue of ownership of the disputed trades. Ultimately, however, at the hearing, Gimbel refused to produce the majority of the subpoenaed records, arguing that the question of his ability to pay a civil monetary penalty was premature and could not be addressed until after his liability was determined. (Tr. 6-10.) The ALJ allowed Gimbel to defer that production. (Tr. 10-11.) At the close of the Division's case in chief, the ALJ again allowed Gimbel to defer production of his financial records when Gimbel agreed to stipulate as to his net worth at the appropriate time. (Tr. 1068-69.) No stipulation was ever entered into the record.

Following the hearing, the parties were afforded an opportunity to file proposed findings of fact and conclusions of law with the ALJ. Gimbel filed an 89-page post hearing brief challenging the evidence as to his liability and

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[22/] Section 6(d) provides in pertinent part,

> In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider . . . the appropriateness of such penalty to the net worth of the person charged.

contending that consideration of all sanctions evidence was not appropriate until after there had been a determination as to his liability. (CR. 107.)

2. The Initial Decision

On January 31, 1986, the ALJ issued a 44-page initial decision finding Gimbel liable on all the charges in the complaint. Recognizing that the wide discrepancies between Gimbel's version and that of all other witnesses were pivotal to weighing the evidence, the ALJ at the outset resolved all credibility issues. In this regard, the ALJ found the testimony of Mondi and Sasin to be "honest, truthful and straightforward." App. 4. In contrast, he found Gimbel's testimony to be "highly suspect." Id. The ALJ "believe[d] very little of Gimbel's testimony," and ultimately concluded that "Gimbel was not an honest witness." Id. Consistent with those assessments, the ALJ rejected Gimbel's testimony regarding the promissory notes he issued to Getson and Mondi, stating that he was "persuaded by the evidence of record that the promissory notes meant what they said, i.e., that Gimbel at the time he signed the notes, believed he owed those sums of money to Mondi and Getson or WTTR." App. 5.

Turning to the question of whether Gimbel had improperly traded in the accounts of others, the ALJ found that on various occasions in 1980 Gimbel had directed Mondi, Getson and Sasin to make trades for Gimbel's benefit. App. 8, 14, 25. The ALJ credited testimony that these respondents executed the trades as Gimbel directed and placed the resulting open positions in their own accounts (or, in Getson's case, the WTTR account). Moreover, the ALJ found that, from January 2 through April 22, 1980, Gimbel directly or indirectly

controlled long and short futures positions of Mondi, WTTR, and Sasin in addition to the positions in his own account. App. 27.

The ALJ next assessed whether Gimbel had filed false reports or failed to file required reports. The ALJ found that from January 2 to April 22, 1980, Gimbel filed CFTC Form 1903 reports with the Commission listing open contract positions and controlled accounts which failed to list the positions held for his control by Mondi, Getson and Sasin. The ALJ concluded that "Gimbel's failure to include the positions he controlled in the accounts of others in his Form 1903 reports from January 2 through April 21, 1980, constitute[d] willful omission of material facts from reports required to be filed by the Commission." App. 28-29.[23/]

As a companion matter, the ALJ further found that Gimbel violated Section 4i and Commission regulation 18.04 by willfully failing to submit an updated CFTC Form 40 "Statement of Reporting Trader," which would have disclosed his control over the Mondi, Sasin and WTTR accounts. App. 30-31. In addition to these reporting violations, the ALJ found that Gimbel violated the Secretary of Agriculture's 1975 cease and desist order. App. 29. Finally, the ALJ determined that Gimbel executed trades with Mondi and Sasin noncompetitively and in a manner that violated the Act's prohibition against wash sales, 7

[23/] Specifically, the ALJ concluded that Gimbel violated Sections 4i and 6(b) of the Act and Commission regulations 18.00 and 18.01(a) by filing Form 1903 reports which "failed to show the quantity of all open lumber contract positions which he controlled, directly or indirectly by reason of his having directed the trading in the account of others as well as his own account." App. 40. The ALJ also concluded that Gimbel violated section 18.01(d) of the Commission's regulations by failing in his Form 1903 reports to show a breakdown or listing of the names of all accounts which he controlled and their respective positions. Id.

U.S.C. § 6c(a)(A), and the Commission's regulation against noncompetitive trading, 17 C.F.R. § 1.38(a). App. 31.

Based upon the record as a whole, the ALJ found it appropriate that Gimbel be prohibited from trading on or subject to the rules of any contract market, that his registration revocation be continued,[24/] and that he be ordered to cease and desist further violations of sections 4c(a)(A), 4i, and 6(b) of the Commodity Exchange Act, and Commission Regulations 1.38(a), 18.00, 18.01(a), 18.01(d), and 18.04 (e)(1979) [now 18.04(d)].[25/]

3. The Commission Decisions

On February 14, 1986, Gimbel filed a notice of appeal with the Commission. That same day, Gimbel moved for a separate hearing on the question of sanctions. The Commission denied the motion, stating that neither Commission rules nor Commission precedent provides for a general right to a separate hearing on sanctions. App. 45. In the same order, however, the Commission expressly authorized Gimbel to present argument in his appeal brief concerning

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[24/] Gimbel's registration as a floor broker had been revoked as a result of the 1975 proceeding in which the Secretary of Agriculture found that Gimbel had, inter alia, violated speculative position limits established by the Commodity Exchange Authority. App. 30. Gimbel subsequently reapplied to the CFTC for registration as a floor broker, and this application was pending at the time of this proceeding.

[25/] The ALJ separately found that respondents Getson and Mondi were also liable under the Act. He sanctioned Getson with a six month suspension of trading privileges, a $10,000 civil monetary penalty and ordered Getson to cease and desist violating the Act. In the case of Mondi, who had admitted his violations but contested sanctions, the ALJ imposed a six month suspension of trading privileges, a $5,000 monetary penalty, and an order to cease and desist violations. Mondi appealed these sanctions to the Commission; his appeal was later dismissed upon settlement. Respondent Sasin entered into a settlement with the Commission on all issues prior to the hearing.

his claim that he was led to believe, by the Division or the ALJ, that a separate sanctions hearing would be held. Gimbel was also requested to address how he had been prejudiced by the failure to hold such a hearing and to explain what evidence he would present if such a hearing were held. App. 45.[26]

On April 14, 1988, the Commission issued a final order which affirmed the ALJ's liability findings as well as the sanctions he imposed. The Commission rejected Gimbel's challenges to the ALJ's consideration of the evidence, stating that its review of the record revealed no clear error that would warrant overturning the ALJ's evidentiary rulings, credibility assessments or weighing of the evidence. App. 47. The Commission also rejected Gimbel's legal arguments as contrary to controlling precedent. Id. at nn. 4, 5.

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[26]Gimbel subsequently filed a 59-page appeal brief with the Commission challenging the ALJ's liability conclusions and the imposition of sanctions without a separate hearing. His explanation of the "evidence" he intended to present if such a hearing were held consisted solely of the following representation:

> Had Mr. Gimbel been accorded a hearing, he would have presented substantial evidence, both documentary and testimonial, demonstrating that the offenses which he was charged did not have any effect on the market; the absence of any harm to any customers; his own character; the nature and circumstances involved in the prior infractions; the substantial and extensive evidence of "rehabilitation"; the professional esteem in which he is held; and the ruinous and irreversible economic consequences that a trading ban will have on him and his family, including his financial ability to continue to maintain his severely retarded child in a private care facility. (Mr. Gimbel's sole occupation today, as it has been for the past nineteen years, is that of a commodity trader.) He would have introduced expert testimony on the question of fitness and the inappropriateness of a complete trading ban as a sanction for his conduct.

The Commission further rejected Gimbel's challenge to the ALJ's imposition of sanctions without a separate hearing. The Commission found neither the Act nor its regulations mandated such a procedure, and was not persuaded to recognize such a right in this case. It observed that Gimbel was entitled to a hearing under section 6(b) of the Act, but that such a hearing had been conducted. It further observed that the Division had introduced evidence concerning sanctions which the ALJ had admitted over Gimbel's objections. Although Gimbel had urged the ALJ to determine liability before receiving evidence of sanctions, the Commission found that he never specifically moved for a bifurcated hearing, and that neither the Division nor the ALJ had acquiesced in such a procedure. App. 50.

Finally, the Commission found that neither the ALJ nor the Division misled Gimbel into believing that the proceeding would be bifurcated, and that "any misunderstanding Gimbel may have had was caused by his own failure to seek clarification." App. 51. It concluded that, in these circumstances, the ALJ had not violated Gimbel's rights by not holding a separate hearing on the issue of appropriate sanctions. As a separate matter, the Commission noted that Gimbel had produced no evidence whatsoever concerning sanctions. Id. at n. 10. Moreover, the Commission found Gimbel's description of the evidence he would produce to be conclusory and non-specific. App. 51.

The Commission then addressed the Division's cross appeal of the ALJ's sanctions.27/ Upon consideration of the Division's arguments, the Commission determined to impose a $115,000 civil monetary penalty. The Commission found

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27/The Division, on appeal, sought the imposition of a civil penalty of $215,000.

such a sanction appropriate in light of the nature and seriousness of Gimbel's violations and past precedent in similar cases. Moreover, as required by section 6(d) of the Act, the Commission turned to the question of Gimbel's net worth. In this regard, the Commission initially found that the Division had done a "thorough job of making a record concerning Gimbel's net worth despite his lack of cooperation." App. 52. Moreover, it concluded that Gimbel had in effect waived his rights conferred under section 6(d) of the Act by failing to produce the majority of the financial records sought by the Division. Despite the waiver, the Commission considered evidence Gimbel placed on the record concerning his financial circumstances. App. 52. n. 12.

Gimbel subsequently filed a motion for reconsideration and for stay of sanctions, which was denied. In rejecting Gimbel's request for a stay of sanctions, the Commission focused upon the impact of his continued participation on the market:

> The conduct at issue in this case undermines the confidence of public participants in the futures markets by contributing to the suspicion that insiders are controlling the market for their own benefit. Allowing Gimbel to continue to trade indirectly confirms this suspicion and thus harms all legitimate traders.

App. 65.

SUMMARY OF ARGUMENT

These appeals involve orders of the Commodity Futures Trading Commission which found, after a comprehensive oral evidentiary hearing, that petitioner Stuart N. Gimbel had once again violated provisions of the Commodity Exchange Act and Commission regulations intended to enable the Commission to guard against market abuses. Recognizing that permitting a repeat offender such as Gimbel to continue to trade would disserve the public interest by confirming the suspicion that insiders are controlling the market for their own benefit,

the Commission imposed severe sanctions, including a permanent trading ban, a cease and desist order, and a civil monetary penalty. Each of these findings and conclusions was based on evidence developed at an eight-day evidentiary hearing.

Section 6(b) of the Commodity Exchange Act provides that "the findings of the Commission, as to the facts, if supported by the weight of evidence shall. . .be conclusive." 7 U.S.C. § 9. As this Court has interpreted that standard:

> The function of this Court is something other than that of mechanically reweighing 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 from other pertinent circumstances, supported his findings.

Stotler and Co., et al. v. CFTC, No. 86-2695 (7th Cir. Aug. 25, 1988), slip op. at 5; see also Silverman v. CFTC, 549 F.2d 28, 30-31 (7th Cir. 1977) ("Silverman I"). Further, in Silverman I, this Court has recognized the well-settled principle that courts should accord great deference to the credibility determinations of the trier of fact. 549 F.2d at 35.

The question of liability in this case hinged largely upon the ALJ's evaluation of witness credibility. Over the course of eight days of evidentiary hearings, the ALJ observed and listened to testimony from two CME floor traders (Mondi and Sasin) who stated that they executed and placed in their accounts commodity futures trades owned and controlled by petitioner Gimbel. In addition, through Thomas Utrata, the CME's Director of Compliance, the ALJ heard testimony as to the statements of another CME floor trader, Getson, who had stated in a CME investigation that he, too, had made and held trades for Gimbel. Equally significant, this collective

testimony was corroborated by documentary evidence in the record showing that Gimbel compensated each of these traders for the losses they incurred from holding his trades.

The only counterpoint to this substantial evidence was Gimbel's own uncorroborated oral testimony. The ALJ, however, found Gimbel's testimony "not believable," and made express credibility findings in favor of Mondi and Sasin. Finding nothing incredible or patently unreasonable in these assessments, the Commission properly upheld them on appeal. As Gimbel has not shown these findings to have been unreasonable, they are unquestionably entitled to stand.

In light of the overwhelming record support for the liability conclusions against him, Gimbel makes no serious effort before this Court to argue that the Commission's factual findings are not supported by the weight of evidence. Rather, his principal assertion is that the Commission's hearing was procedurally unfair. Essentially, Gimbel alleges that he should have been accorded an opportunity to present evidence on the sanctions in a second hearing; that the ALJ was biased; that the ALJ's admission of hearsay evidence was prejudicial; and that, under Commission precedent, he was entitled to a separate hearing on net worth.

As will be shown, none of these claims has merit. Gimbel received an administrative hearing on liability and sanctions under a procedure that fully comports with due process and has been approved by this Court. The Commission's complaint clearly notified Gimbel of the charges against him, of the specific sanctions that could be imposed, and more to the point, that a public hearing would be held to receive evidence on both the charges and the potential sanctions. At the hearing, the Commission's Division of

Enforcement made clear that it was offering evidence related to both liability and sanctions and the ALJ made clear that such evidence would be received. True to its word, the Division introduced its sanctions evidence as part of its case in chief. Moreover, the ALJ received that evidence over Gimbel's objections. In these circumstances, where a full hearing was held and Gimbel had otherwise failed to present rebuttal evidence on sanctions in response to the Division's case or move for a separate hearing on sanctions until after the record had been closed, the Commission was surely reasonable to conclude that the ALJ did not violate any of Gimbel's rights by not holding a second hearing on the issue of appropriate sanctions.

The Commission was similarly correct in rejecting Gimbel's claim of bias on the part of the ALJ. To warrant relief, any claim alleging bias must show that a decision was affected by some extrajudicial source. United States v. Grinnell Corp., 384 U.S. 563 (1966). Gimbel does not even allege that any such bias affected this case. Moreover, a review of the record reveals that the ALJ conducted this hearing fairly and evenhandedly, and that each of the material findings in the initial decision were fully documented with detailed references to the record. As a separate matter, Gimbel's complaint about the ALJ's admission of hearsay declarations cannot be sustained where, as here, those declarations were relevant, material, and reliable, and were corroborated by sworn testimony and documentary evidence.

Finally, there is no merit to Gimbel's challenge to the procedural fairness of imposing a civil monetary penalty against him. As will be demonstrated, the Commission had reason to infer that Gimbel had not intended to make any showing at the hearing on the issue of his ability to afford a civil monetary penalty. In any event, the Commission was well

within its discretion to fix such a penalty on appeal based on the record despite the ALJ's disinclination to do so, and to deduce whether the record supported Gimbel's ability to meet that penalty under section 6(d) of the Act. In this regard, there was sufficient information in the record to enable the Commission to "consider" Gimbel's net worth for purposes of meeting a $115,000 civil penalty, the most notable of which was a 1981 personal financial statement showing Gimbel's net worth to be approximately $3 million.

Equally significant, even in the face of prior notice that this financial statement might be used for consideration of his net worth, Gimbel has never argued to the Commission that his current net worth is less than the $3 million shown on the record, or that the $115,000 penalty assessed by the Commission is excessive relative to his net worth. He makes no claim that the penalty is beyond his financial resources even before this Court. In these circumstances, where the Commission had a substantial record basis upon which to consider Gimbel's net worth, the protective purpose of section 6(d) was met, and the Commission's determination to impose a $115,000 civil penalty is entitled to stand.

ARGUMENT

I. THE HEARING IN THIS CASE FULLY COMPORTED WITH DUE PROCESS PRINCIPLES AND THE REQUIREMENTS OF SECTION 6(b) OF THE COMMODITY EXCHANGE ACT.

A. Gimbel Was Afforded A Full Opportunity For A Hearing On Sanctions

The Due Process Clause of the Fifth Amendment to the Constitution grants to every individual a right to be heard before suffering grievous loss. Mathews v. Eldridge, 424 U.S. 319 (1976). As the Supreme Court has also stated, "the Due Process Clause grants the aggrieved party the opportunity to

present his case and have its merits fairly adjudged." Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). As will be shown, Gimbel was afforded due process from the moment the Commission issued its administrative complaint.28/

It is undisputed that the Commission's administrative complaint notified Gimbel of the charges against him and that the scope of the hearing would include an inquiry into sanctions.29/ It is also undisputed that throughout the eight days of hearings, Gimbel was afforded an ample opportunity to examine all witnesses and to present his own case in defense. At no time was Gimbel deprived of the opportunity to show why he should not be sanctioned, i.e., to present evidence of mitigation and/or rehabilitation.30/ Thereafter,

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28/None of the cases upon which Gimbel relies (Pet. Br. 10-11) requires a different result. These cases concern instances where no pretermination hearing was held, Mathews v. Eldridge, supra; Brock v. Roadway Express, Inc., 107 S.Ct. 1740 (1987); Logan v. Zimmerman Brush Co., supra; where there was an inadequate hearing, Richardson v. Perales, 402 U.S. 389 (1971); Morgan v. United States, 304 U.S. 1 (1938); Brock v. Dow Chemical, 801 F.2d 926 (7th Cir. 1986); or where no hearing was even required, Board of Curators v. Horowitz, 435 U.S. 78 (1978).

29/As stated above, the Commission's complaint notified Gimbel of the charges against him and of each of the sanctions that he ultimately received. Section I of the complaint set forth the charges, while Section II specifically identified the sanctions that could be imposed. Most importantly for present purposes, Section III of the complaint

> "ORDERED that a public hearing for the purpose of taking evidence and hearing argument on the allegations and questions set forth in Sections I and II above be held before an Administrative Law Judge in accordance with the Rules of Practice."

(CR. 1 at 18.) The Commission's complaint thus properly notified Gimbel that a single hearing would be held on all matters.

30/As previously stated, Gimbel never attempted to present sanctions-related evidence during the hearing.

Gimbel was provided an opportunity to address the issues in a post hearing brief. Following the issuance of the ALJ's initial decision, Gimbel sought and obtained review of the case by the Commission. In these circumstances, Gimbel's global claim of a denial of due process is groundless. Cf. Silverman v. CFTC, 562 F.2d 432, 439 (7th Cir. 1977)("Silverman II")(due process not denied where record demonstrated that respondent was not deprived of an opportunity to present substantial evidence of mitigation and rehabilitation; "the possibility that additional testimony would have changed the Commission's sanctions is sheer speculation and exists in any proceeding of this kind.")

B. Gimbel Was Not Entitled To A "Separate" Hearing On Sanctions.

Gimbel's real contention is that due process required the Commission to afford him a separate, i.e., second hearing devoted solely to the issue of sanctions after a finding of liability. Gimbel cites no authority for such a sweeping proposition, as no such principle of law exists.31/ On the contrary, the Commodity Exchange Act, as well as applicable judicial and Commission case law, demonstrate that the single evidentiary hearing on liability and sanctions issues held in this proceeding satisfied due process.

Section 6(b) of the Commodity Exchange Act provides that the Commission may issue a notice of hearing and impose various sanctions "upon evidence received." 7 U.S.C. § 9. To like effect is Section 6(c), 7 U.S.C. 13b,

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31/ The only cases located by Commission counsel addressing issues even remotely similar to Gimbel's "separate hearing on sanctions" claim reject his position. See San Diego Regional Employment v. U.S. Dept. of Labor, 713 F.2d 1441, 1445 (9th Cir. 1983); City of Oakland v. Donovan, 703 F.2d 1104, 1107 (9th Cir. 1983).

authorizing imposition of cease and desist orders after "notice and hearing" as provided in Section 6(b). Consistent with these provisions, the ALJ imposed sanctions against Gimbel only after receiving evidence on the issue from the Division and after affording Gimbel an opportunity to submit his own evidence in rebuttal. There is no stated requirement that the imposition of sanctions itself necessitates a second hearing.32/

Gimbel's effort to infer such a requirement from Commission registration cases is a misconstruction of existing law. See In re Horn, [1986-1987 Transfer Binder] Comm. Fut L Rep. (CCH) ¶23,731 (CFTC 1987). Under sections 8a(2)-(4) of the Act, 7 U.S.C. §§ 12a(2)-(4), to suspend or revoke a registration under the Act, the Commission must present a prima facie case establishing that the registrant is subject to a disqualification as provided by statute. That showing having been made, the burden of going forward with evidence shifts to the respondent to rebut the presumption against registration. Traditionally, at this stage of the proceeding, the Commission considers respondents' evidence of mitigating circumstances and rehabilitation. In re Horn, supra. Equally clear, all evidence is received at a single hearing. In essence, Gimbel is engaged in a misguided attempt to elevate the shift of the burden of going forward with evidence into a requirement for a completely separate hearing.

32/ In re Siegel Trading Co. Inc. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,527 at 22,183 (CFTC 1977), cited by petitioner, is not to the contrary. In Siegel, the ALJ addressed the sanctions issue before any hearing was completed, and in that context, the Commission found his consideration of the issue premature.

In any event, this Court reviewed and approved these same hearing procedures in Savage v. CFTC, 548 F.2d 192 (7th Cir. 1977). In Savage, consistent with Commission practice, the ALJ had received evidence supporting Savage's disqualification and respondent's evidence in rebuttal in a single hearing. This Court upheld that procedure under the following rationale:

> Once the Commission proved Savage's 1970 conviction, his application could have been denied; it became Savage's burden to go forward to persuade the Commission to exercise its discretion to allow [his] application despite his past. The proceeding conformed entirely with the guidelines of the Administrative Procedure Act; Savage's presentation simply failed to convince the Commission.

Id. at 196. Like the respondent in Savage, Gimbel was afforded an opportunity to persuade the Commission that he was fit for registration despite his violations, but failed to take advantage of the opportunity. See also Sundheimer v. CFTC, 688 F.2d 150 (2d Cir. 1982) cert. denied, 460 U.S. 1022 (1983).[33/] Due process does not require that Gimbel now be given a second bite at the apple.

Nor can Gimbel claim any confusion on this point based on events at the hearing. (Pet. Br. 16-20.) Shortly after the complaint was issued, the ALJ issued a prehearing order setting a schedule for discovery and the filing of prehearing memoranda. That notice also notified the parties of a single

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33/ In Sundheimer, the Commission established its prima facie case through summary disposition. As a result, the only evidentiary hearing held concerned respondent's attempt to rebut that prima facie case. Sundheimer is thus similar to In re Antonacci [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,038 (CFTC 1986), where the Commission reviewed an initial decision that determined both liability and sanctions on summary disposition. The Commission found the imposition of sanctions on summary disposition inappropriate in that case. Here, in contrast, Gimbel received a hearing, but simply failed to make use of it to offer evidence on sanctions.

anticipated hearing date. (CR. 18.) The ALJ followed that order with a Hearing Notice which set one hearing date for the proceeding. (CR. 81.)

The other parties also understood that only a single hearing was to follow. On the first day of the hearing, Division counsel explicitly stated that it was her understanding that the case would be heard in a single proceeding because Gimbel had not sought bifurcation of any issue. (Tr. 10-11.) Later that first day, Gimbel interrupted Division counsel's opening statement to object to a reference to his past violations of the Act. (Tr. 38.) Division counsel, however, made it clear that the Division would address sanctions in the same hearing in which in presented its case in chief: "The fact that this is not the first time that such conduct has been engaged in is a factor to be considered in determining sanctions we will be requesting against Mr. Gimbel." (Tr. 39.) The ALJ, for his part, overruled Gimbel's objection on this point. Despite this clear notice that sanctions evidence would thus be admitted in a single hearing along with evidence of liability, Gimbel never moved to bifurcate the proceeding then or at any other time during the hearing. Correspondingly, the ALJ never ordered bifurcation on his own motion.

Moreover, as previewed in its opening statement, the Division presented evidence relevant to sanctions, including Gimbel's disciplinary record at the CME (Tr. 813-17, D. Ex. 24); Gimbel's prior record of violations of the Commodity Exchange Act (Tr. 1056-1061, D. Ex. 39A, 39B); and the effect of Gimbel's violations on the Commission's market surveillance program (Tr. 959-65). On each occasion, this evidence was received over Gimbel's objection. Thus, the Division, by its actions, and the ALJ, by his rulings, each made clear their understandings that there was to be one hearing

encompassing all issues, absent a motion for bifurcation from Gimbel. Gimbel, in turn, never attempted to proffer evidence on mitigation or rehabilitation; nor was he otherwise deprived of the opportunity by the ALJ. In these circumstances, the Commission was correct to conclude that neither the ALJ nor the Division misled Gimbel into believing that the proceeding would be bifurcated, and that any misunderstanding Gimbel may have had was caused by his own failure to seek clarification. Cf. Howe v. CFTC, 804 F.2d 1 (1st Cir. 1986).34/

II. THE PROCEEDINGS BEFORE THE ALJ WERE FAIR AND HIS FINDINGS ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Gimbel broadly attacks the fairness of the proceeding conducted by the ALJ. (Pet. Br. 33-40.) Moreover, Gimbel asserts that the ALJ's findings and conclusions were in error. Both claims are frivolous.

It is well established that any claim of bias must be supported by a showing that the judge's actions stemmed "from an extrajudicial source and result[ed] in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. at 583; United States v. English, 501 F.2d 1254 (7th Cir. 1974). It is equally settled that adverse rulings in and of themselves do not establish bias. Ma v. Community Bank, 686 F.2d 459, 472 (7th Cir. 1982). Here, Gimbel

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34/As stated, Gimbel also argues as a separate matter that under Commission precedent, he was entitled to a bifurcated hearing on the issue of a civil monetary penalty. That unrelated contention is discussed below in Part IV of the Argument.

has not even claimed that the ALJ's allegedly biased conduct stemmed from any extrajudicial source, nor has he alleged that the initial decision was based upon consideration of matters outside the record. In these circumstances, where Gimbel has not made even a threshold showing of bias, the Commission was patently correct to dismiss this claim summarily.35/

Gimbel's challenge to the sufficiency of the initial decision is equally baseless. As explained, the ALJ's initial decision contains specific credibility assessments and detailed findings of fact and conclusions of law. Moreover, each of these material findings and conclusions is supported with detailed references to the record.36/

In the final analysis, Gimbel's complaint is essentially not with the form of the initial decision but with its outcome; among other things, petitioner is chagrined that the ALJ believed the Division's witnesses instead

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35/ In any event, many of the references to rulings upon which Gimbel relies to show "bias" undercut his claim of unfairness. Rather, these references demonstrate that Gimbel received numerous favorable rulings from the ALJ. See, e.g., Tr. 25-27 (granting Gimbel's untimely request for discovery on the morning of the trial); Tr. 43-44; (granting him the option of making his opening statement at the outset of the hearing or before his own case in chief); Tr. 51-53, 109-110 (granting Gimbel's objections); Tr. 246-50 (receiving Gimbel's evidence over objections); Tr. 1293 (responding to Gimbel's humor); and Tr. 1307 (criticizing the pace of the Division's cross examination of Gimbel's expert witness). The ALJ upheld Gimbel objections on numerous other occasions, Tr. 960, 1191, 1481. He also allowed Gimbel a full opportunity both to examine witnesses, Tr. 546-64 and to object to the Division's case, Tr. 1294-1306. Moreover, the ALJ recessed the hearing for Gimbel's benefit on two occasions. (Tr. 407-10, 905-07.) In sum, the record refutes Gimbel's bias claim.

36/ Gimbel's reliance upon United States v. Marine Bancorporation, 418 U.S. 602 (1974) is therefore misplaced. (Pet. Br. 36) There, the Court upheld a district court decision while criticizing its verbatim adoption of proposed findings and summary conclusions without references to the record. Id. at 616.

of him, and that the ALJ did not make findings on immaterial uncontroverted issues. On review of this record, the Commission found no basis for overturning the ALJ's credibility assessments or his weighing of the evidence. App. 47. Thus, the only question is whether the Commission was justified in concluding that the evidence supported his findings. 7 U.S.C. § 9; Silverman I, 549 F.2d at 30-31; Precious Metals Associates, Inc. v. CFTC, 620 F.2d 900, 903 (1st Cir. 1980).

As noted, many material facts were uncontroverted. Gimbel, Getson, Mondi and Sasin all traded lumber futures on the CME in the spring of 1980. In April 1980 the market turned adverse to the positions each was holding, resulting in substantial financial losses. On the evening of April 22, 1980, Getson and Mondi visited Gimbel. At that time, Gimbel gave both Getson and Mondi promissory notes to cover their losses.

The only material disputes concerned the true ownership of Getson's, Mondi's and Sasin's positions, and Gimbel's motive for issuing the promissory notes. Mondi, Sasin and Getson (through Utrata) all stated that the disputed lumber trades they were holding were in fact Gimbel's positions. Mondi and Getson both stated that Gimbel wrote promissory notes to reimburse them for losses on those trades. In contrast, Gimbel simply denied that he controlled trades in accounts belonging to Mondi, Sasin or Getson. His explanation was that he gave Mondi and Getson the promissory notes because each had suffered large losses in the market and needed proof of financial worth before they would be permitted to continue trading on the CME. The ALJ considered these conflicting stories and credited Mondi's and Getson's versions over Gimbel's testimony. Most critically for present purposes, the ALJ, after hearing Gimbel's testimony, found that "Gimbel was not an honest witness." App. 4.

In these circumstances, particularly where Mondi's and Getson's versions were corroborated by documentary evidence and probative expert testimony regarding the chart, the Commission was clearly within its discretion to find no objective basis to set aside the ALJ's assessment. As such, Gimbel's entire argument about alleged "unfairness" is in reality nothing more than a thinly disguised effort to have this Court "mechanically reweigh" the evidence and to substitute its own credibility findings. This Court's decision in Silverman I, 549 F.2d at 30-31, rejects that very result.

III. THE GETSON HEARSAY DECLARATIONS WERE PROPERLY ADMITTED IN EVIDENCE AND WEIGHED BY THE ALJ.

Respondent Getson was unavailable to this proceeding because he invoked his Fifth Amendment privilege not to testify at the hearing. In lieu of Getson's personal testimony, the ALJ permitted the testimony of a CME official, Utrata, to the effect that in 1980 Getson stated that he held trades for Gimbel in the account of WTTR over which he had control. Utrata also testified that Getson declared that Gimbel had given him promissory notes to cover the losses that resulted from these trades. At that time, Getson provided Utrata with a chart that listed the trades he had made and held for Gimbel. Gimbel challenges the admissibility and reliability of this testimony.

Consistent with settled principles of administrative law, hearsay evidence is admissible in Commission proceedings if relevant, material, and reliable. 17 C.F.R. § 10.67(a); see also, Stotler and Co. et al. v. CFTC, No. 86-2695 (7th Cir. August 25, 1988), slip op. at 10, and 5 U.S.C. § 556(d). Indeed, under certain circumstances, an agency's failure to consider probative hearsay evidence may itself be reversible error. National Ass'n of Recycling

Industries, Inc. v. Federal Maritime Commission, 658 F.2d 816, 825 (D.C. Cir. 1980). As that court recently explained, "if hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious . . . agencies are entitled to weigh it according to its truthfulness, reasonableness, and credibility." Veg-Mix, Inc. v. U.S. Dept. of Agriculture, 832 F.2d 601, 606 (D.C. Cir. 1987).

Getson's out-of-court statements were clearly reliable on their face. In the first place, there could be no basis for Gimbel to question the accuracy of Utrata's recollection. Although not under oath, Getson made the statements at issue in response to questions posed to him by Gimbel's counsel in 1980. (Tr. 726-27.) Gimbel himself was present when Getson made these statements. (Tr. 726.) Having been afforded the opportunity to hear Getson's statements firsthand as part of an investigation conducted by the CME into trading in its lumber complex in 1980, Gimbel is thus reduced to arguing, without record support, that the statements were made to curry favor with the CME and thus cannot be considered reliable. (Pet. Br. at 43-44.)

Significantly, however, the declarations Getson made in Utrata's presence are substantially corroborated by other oral and documentary evidence, thereby undercutting Gimbel's self-serving claims of unreliability. As Getson's business associate Van Deventer testified, Getson on a different occasion confessed the very same facts to him that he declared before the CME. (Tr. 446.)[37/] In addition, Getson's declarations are corroborated by the two page chart which Getson gave to the CME and the inferences that can be drawn from

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37/Gimbel's brief ignores Van Deventer's testimony.

them.[38] (D. Ex. 21.) This chart lists trades made in WTTR's account from February 28 to April 22, 1980, bears the initials "SNG" (Stuart N. Gimbel), and records profits or losses for each trade. The cumulative losses as of April 22, 1980 as shown on the chart stood at $381,706. Although Gimbel claims the chart does no more than reflect that certain trades were made in the WTTR account on certain dates with certain profits and losses (Pet. Br. at 45), that observation overlooks two critical facts. First, the Getson chart does not reflect all WTTR trading in the designated period, but only certain trades Getson separated from the account's general activity. Second, the cumulative loss of $381,706 virtually matches the $382,000 promissory notes that Gimbel gave to Getson on April 22, 1980. Clearly, it was reasonable to infer on these facts that Gimbel's promissory notes were written to cover a particular category of WTTR trades.

Finally, Getson's out-of-court statements comport with the record as a whole. The Getson declarations paint a pattern of conduct remarkably similar to that testified to, under oath, by Mondi.[39] Moreover, Gimbel had a full opportunity to rebut the declarations through his own testimony. As noted, however, the ALJ found Gimbel's testimony not credible. App. 4-5. In the circumstances, the ALJ and the Commission were justified in considering this evidence.

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[38] Gimbel does not dispute that Getson prepared this chart.

[39] Mondi's testimony does not simply corroborate Getson's statements. It independently establishes that Gimbel violated the reporting requirements of the Act. Viewed in this light, the Getson declarations were cumulative.

IV. THE COMMISSION PROPERLY ACTED WITHIN ITS DISCRETION TO ASSESS GIMBEL A CIVIL MONETARY PENALTY WITHOUT A FURTHER HEARING, AND ITS FINDING THAT GIMBEL'S FINANCIAL RESOURCES WERE SUFFICIENT TO MEET THE AMOUNT OF THAT PENALTY IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

The Commission's authority to impose sanctions against persons who violate the Act emanates from sections 6(b) and 6(c) of the Act, 7 U.S.C. §§ 9 and 13b. Section 6(b) empowers the Commission to prohibit persons from trading on contract markets, to suspend or revoke registrations under the Act, and to assess civil penalties of not more than $100,000 for each violation of the Act. Section 6(c) authorizes the Commission to issue orders compelling violators to cease and desist their illegal conduct.

In the case of civil monetary penalties only, the Act also sets forth specific factors that the Commission must consider before imposing such a penalty under section 6(b). Section 6(d) provides, in pertinent part as follows:

> In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation.

Applying that provision here, the Commission was required to consider only the gravity of Gimbel's violations and his net worth.40/

40/ Because the Commission's other sanctions would bar Gimbel from participating in the futures industry, the question of the impact of a

(Footnote Continued)

As this Court has recognized, the choice of an appropriate sanction is a matter within the agency's discretion. Silverman II, 562 F.2d at 438; see also, Premex v. CFTC, 785 F.2d 1403 (9th Cir. 1986). As already shown, there is overwhelming evidence to support the Commission's finding of sufficient gravity to warrant imposition of a civil monetary penalty. Simply stated, Gimbel is a repeat offender. Once again, he has violated important statutory provisions and Commission regulations intended to protect against market abuse as well as an order of the Secretary of Agriculture intended to remedy Gimbel's past efforts to thwart the Commission's market surveillance program. As the Commission itself explained, "the conduct at issue in this case undermines the confidence of public participants in the futures markets by contributing to the suspicion that insiders are controlling the market for their own benefit." App. 65. Moreover, as demonstrated, Gimbel unquestionably had the opportunity at the hearing to show otherwise in response to the Division's case in chief on sanctions, but failed to do so of his own volition.

The Commission has construed section 6(d) of the Act as "seemingly intended to protect respondents from the imposition of excessive monetary penalties when considered in relation to their financial resources." In re Rothlin, supra, at 27,573. These protections are in the nature of an affirmative defense that is available to a respondent. Id. In re Rosenthal, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,221 at 29,190 (CFTC

(Footnote Continued)
monetary penalty on his ability to continue in business became moot. In re Nelson Ghun and Associates, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,584 (CFTC 1985); In re Rothlin, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,851 n.16 (CFTC 1981).

1984). Gimbel does not profess to have lacked notice that the Commission might impose a civil monetary penalty in this case. Thus, the critical question is whether the protective purpose of section 6(d) was met in this case. The answer is clearly yes.

The Commission first notified Gimbel that he could be subject to a monetary penalty through its complaint. (CR. 1.) During discovery, the Division sought and obtained a subpoena from the ALJ requiring Gimbel to produce a variety of personal financial records, including tax returns from 1979 through 1983, as well as financial statements (with supporting records) from 1979 to the present, which could be used to create a record of his net worth. Although he was ordered to comply with that subpoena, Gimbel refused. (CR. 73 at 688-89.) At the hearing, the Division twice sought enforcement of its subpoena. (Tr. 7-11; 1064-69.) On both occasions Gimbel refused and the matter was deferred. Finally, Gimbel agreed to submit a stipulation as to his net worth, obviating the need for production of his personal financial records. (Tr. 1068.) The matter was then again deferred and the hearing continued. (Tr. 1069.) Ultimately, no stipulation regarding Gimbel's net worth was ever proffered into evidence, and in any event, the initial decision, without explication, declined to assess such a penalty.[41/]

On appeal from the ALJ's nonassessment of a civil monetary penalty, the Division argued that a penalty was warranted on the facts of this case, and pointed to record evidence which in its view showed that Gimbel had sufficient financial resources to support imposition by the Commission of a civil penalty

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[41/] In its post-hearing brief, the Division requested the ALJ to impose a civil monetary penalty in the amount of $400,000. (CR. 93).

in the amount of $215,000. The Commission found that a $115,000 civil penalty was appropriate. Notwithstanding Gimbel's efforts to thwart the Division's creation of a record concerning his net worth, the Commission further found that the record contained sufficient information upon which to base a consideration of Gimbel's net worth for section 6(d). App. 51.

The record plainly supports that finding. Gimbel testified that, with the exception of his losses in 1980, as described above, he had traded successfully on the CME. (Tr. 1420.) He also submitted a financial profile showing that in 1981 his net worth exceeded $3 million (G. Ex. 16.), and verified the accuracy of this profile. (Tr. 1445-49.) Moreover, despite notice of the potential use of this statement for consideration of his net worth during the cross appeals to the Commission, Gimbel never claimed that the 1981 financial statement exceeded his current net worth. Equally significant, at no stage of the proceeding did Gimbel aver to either the ALJ or the Commission that either of the Division's proposed civil penalties exceeded his financial tolerance. The underlying protections of Section 6(d) were thus met.

Nevertheless, Gimbel argues in effect that the Commission was not authorized -- without holding further hearings -- to have independently reviewed the hearing record to determine whether Gimbel's conduct was of sufficient gravity to warrant a civil monetary penalty and, if so, to ascertain whether the record supported Gimbel's financial resources to meet that penalty. (Pet. Br. 32.) The failure to follow these procedures is said to be an unexplained departure from Commission precedent. (Pet. Br. 28.) That argument is plainly at odds with well-settled principles of administrative law and misreads Commission caselaw.

The Commission is entitled to reach its own inferences and weigh the record evidence on review, even if these inferences differ from that reached by the ALJ. Drexel Burnham Lambert v. CFTC, 850 F.2d 742, 747 (D.C. Cir. 1988). The only requirement is that the Commission's findings be reasonably supported by the record. Id. Thus, at best, Gimbel is free to challenge only the reasonableness of the record evidence upon which the Commission relied to support its finding of financial adequacy.

To repeat, there was substantial evidence to support the Commission's inference that Gimbel had adequate net worth or financial resources to support a $115,000 civil penalty, including Gimbel's own testimony and a financial statement showing that he had a net worth of at least $3 million. Equally significant, Gimbel has never asserted that the 1981 financial statement exceeds his current net worth, or that the Commission's assessment of a $115,000 civil penalty is excessive relative to his current net worth. Thus, Gimbel has not even made a threshold showing that the Commission was not entitled to consider the 1981 financial statement as evidence of his current net worth.

There is also no substance to Gimbel's claim that the holdings of In re Rothlin and other Commission cases require a different result. Rather than establishing an inviolate requirement for a bifurcated hearing, Rothlin merely establishes a suggested procedure which may be followed where an ALJ determines that a civil monetary penalty is warranted:

> It is perfectly compatible with the Commission's Rules of Practice for an Administrative Law Judge to employ procedural safeguards which will both protect a respondent from having to make unnecessary or unwarranted showings and yet assure that Section 6(d) of the Act is a viable device for sanctioning wrongdoing. While the Administrative Law Judge have a great deal of flexibility in such matters, one appropriate mechanism which we suggest is bifurcation of the hearing.

In re Rothlin at 27,577. Accord, Nelson, Ghun, ¶ 22,584 at 30,526. Indeed, the Commission, in the order under review, emphasized that "[w]hile the Commission has recognized that a bifurcated hearing may be appropriate when a civil monetary penalty is imposed [citing Rothlin], it has never recognized a general right to require such a procedure." App. 50. Moreover, as the Commission's decision in In re Rosenthal teaches, where the ALJ has not imposed a civil monetary penalty but the Commission finds such a penalty to be warranted, a remand is only required where the record is insufficient to allow the Commission to fulfill its obligation to consider net worth under section 6(d). In re Rosenthal, supra, ¶ 22,221 at 29,191. As stated, the Commission made the requisite finding that the record here was sufficient for that purpose. As such, its exercise of discretion not to remand was consistent with its own precedent. Moreover, as shown, the Commission's determination concerning the sufficiency of Gimbel's net worth was reasonable, and thus is entitled to stand.

CONCLUSION

For all of the foregoing reasons, the petitions for review should be denied.

Respectfully Submitted,

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September 15, 1988