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In the Matter of	*	
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JOEL J. FETCHENHIER,	*	CFTC Docket Nos. 91-12, SD 93-14
	*	
Respondent.	*	
	*	

INITIAL DECISION

Appearances: Mark H. Bretscher, Esq.
Rocelle J. Cyrus, Esq.
Commodity Futures Trading Commission
Central Regional Office
525 West Monroe Street
Suite 1100
Chicago, Illinois 60661
Attorneys for the Division of Enforcement

James H. Schwartz, Esq.
141 West Jackson Boulevard
Suite 300
Chicago, Illinois 60604
Attorney for Respondent Joel J. Fetchenhier

Before: Bruce C. Levine, Administrative Law Judge

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Overview

This order marks the latest chapter of the "Chicago sting" cases. Here, we consider Joel J. Fetchenhier's petition for an early termination of his 10-year personal trading ban. As explained below, Fetchenhier failed to present any reliable new evidence to demonstrate that he has become rehabilitated and, for that reason, we deny his petition.

Background[1]

Fetchenhier is a former floor trader at the Board of Trade of the City of Chicago ("CBOT"). In May 1991, a federal court convicted him on one felony count of violating Section 4b(B) of the Commodity Exchange Act,[2] three misdemeanor counts of

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[1] Because the events and history of the proceedings that resulted in Fetchenhier's trading ban (and his pending petition seeking the ban's early termination) are extensively recounted in other published opinions and orders, we give only a brief account here. See In re Fetchenhier, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,175 (CFTC Oct. 31, 1997); In re Fetchenhier, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,055 (CFTC May 8, 1997) (amended May 13, 1997); In re Fetchenhier, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,098 (CFTC June 1, 1994); In re Fetchenhier, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,844 (CFTC Sept. 16, 1993); In re Fetchenhier, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,838 (CFTC Aug. 13, 1993); In re Ashman, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,302 (CFTC June 10, 1992); In re Fetchenhier, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,173 (CFTC Oct. 23, 1991).

[2] 7 U.S.C. §6b(B). The initiation of Fetchenhier's criminal and Part 10 proceedings and the acts for which he was prosecuted predated the Futures Trading Practices Act of 1992, Pub. 102-546, 106 Stat. 3590, and the 2000 enactment of the Commodity Futures Modernization Act, Pub. L. No. 106-554, 114 Stat. 2763.

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violating Section 4c(a)(A) of the Act,[3] one felony count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO")[4] and two felony counts of violating the federal wire fraud statute.[5] Within weeks, the Commission filed a three-count administrative complaint against Fetchenhier that charged him with having violated Sections 4b(B) and 4c(a)(A) of the Act, and

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Consequently, the pre-1992 version of the Commodity Exchange Act governed the criminal and enforcement proceedings. For this reason, all references and citations to the Act and to the United States Code refer to both as they existed in 1991.

[3] 7 U.S.C. §6c(a)(A).

[4] 18 U.S.C. §1962.

[5] 18 U.S.C. §1343. United States v. Joel J. Fetchenhier, No. 89 CR 666-14 slip op. at 1 (N.D. Ill. June 11, 1991), aff'd, United States v. Ashman, 979 F.2d 469 (7th Cir. 1992). Fetchenhier's conviction, along with the convictions of nine other traders, had its genesis in a sting operation conducted during 1987-1988 in the soybean futures pit of the CBOT. The court sentenced Fetchenhier to a prison term of two years to be followed by three years of supervised release. The court also ordered him to pay restitution of $1,250, forfeit $150,000 and pay a fine of $10,000. Id. at 2-6; United States v. Dempsey, 768 F. Supp. 1277, 1291 (N.D. Ill. 1991).

Fetchenhier was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin and served the last three months of his term at a pre-release facility and in home confinement. Declaration of Joel J. Fetchenhier, dated November 10, 1993, at 2 (received into evidence as Exhibit RX-G in the prior proceeding in CFTC Docket Nos. 91-12, SD 93-14). While he was in prison, the CBOT suspended Fetchenhier from active membership privileges for a period of 18 months retroactive to January 1991. In re Fetchenhier, 92-INV-09 slip op. at 3 (CBOT Nov. 17, 1992) (settlement).

Commission Regulation 1.38(a)[6] by engaging in the same entry of false records, accommodation trading and non-competitive trading that led to his criminal conviction.[7] The Division of Enforcement prevailed in the ensuing litigation and, in October 1997, the Commission (1) denied Fetchenhier's application for floor trader registration, (2) entered of a cease and desist order and (3) prohibited Fetchenhier from trading on any Commission-regulated market for 10 years.[8] It is the last of these sanctions that concerns us here.

When it penalized Fetchenhier, the Commission stated a willingness to consider the early termination of the trading ban after half of it had run.[9] Just over five years later,

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[6] 17 C.F.R. §1.38.

[7] In re Fetchenhier, CFTC Docket No. 91-12, 1991 WL 113259 (CFTC June 6, 1991) (complaint). Two years after filing its complaint, the Commission filed a separate action, again based on the same set of facts, challenging Fetchenhier's application for registration as a floor trader. In re Fetchenhier, CFTC Docket No. SD 93-13, 1993 WL 268858 (CFTC July 19, 1993) (notice of intent to deny application). The two proceedings were consolidated for hearing. Order Granting Joint Motion of Division of Enforcement and Joel J. Fetchenhier, dated November 18, 1993.

[8] Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,589.

[9] Id. at 45,589 n.11. Fetchenhier's ban took effect on November 30, 1997. Id. at 45,589. Accordingly, it expires on November 30, 2007.

Fetchenhier petitioned for early relief from his trading ban.[10] The Division opposed his request[11] and, on July 1, 2003, we conducted an oral hearing in Chicago, Illinois.[12] The parties subsequently filed post-hearing memoranda[13] and the matter is now ripe for decision.

The Standards Governing Our Consideration Of Fetchenhier's Petition

Section 9(b) Of The Act

In considering petitions such as Fetchenhier's, we apply the same standards that the Commission employed when it imposed the trading ban.[14] In this earlier determination, the Commission

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[10] Letter from Joel J. Fetchenhier to Jean A. Webb, filed December 24, 2002 ("Petition"). We note that the Petition is erroneously dated "December 16, 2003."

[11] Division of Enforcement's Response to Petition of Joel J. Fetchenhier, filed March 24, 2003.

[12] Transcript of Proceedings, dated July 1, 2003 ("Tr.").

[13] Joel J. Fetchenhier's Brief in Response to the Division of Enforcement's Post Hearing Brief, filed August 4, 2003 ("Petitioner's Brief in Response"); Petitioner's Proposed Findings of Fact and Conclusions, filed July 21, 2003 ("Petitioner's Proposed Findings"); Division of Enforcement's Proposed Findings of Fact and Conclusions of Law, filed July 22, 2003 ("Division's Proposed Findings"); Division of Enforcement's Post-Hearing Brief in Support of its Proposed Findings of Fact and Conclusions of Law, filed July 22, 2003. Although authorized to respond to Fetchenhier's proposed findings, the Division chose not to do so. Tr. at 64.

[14] In re LaCrosse, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,229 at 50,429-30 (CFTC Aug. 28, 2000).

applied Section 9(b) of the Act.[15] It held that, under this provision, Fetchenhier's Section 4b felony conviction, when coupled with his three other felony and three misdemeanor convictions, triggered a presumption that he should be barred from trading for 10 years.[16] To rebut this presumption, the Commission required Fetchenhier to establish, by the weight of the evidence, that "his continued access to the markets regulated by the Commission will pose no substantial threat to their integrity."[17] The proof that Fetchenhier's could have presented on this issue fell into four categories: (1) evidence that his criminal misconduct was not of such a nature as to substantially

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[15] At the time the case commenced, Section 9(b) stated, in relevant part,

> A person convicted of a felony under [Section 4b] shall be . . . barred from using or participating in any manner in any market regulated by the Commission for five years or such longer period as the Commission shall determine on such terms and conditions as the Commission shall prescribe, unless the Commission determines that imposition of such . . . market bar is not required to protect the public interest.

7 U.S.C. §13(b). Section 9(b) also provided, "The Commission may upon petition later review such . . . market bar and for good cause shown reduce the period thereof." Id. See supra text accompanying note 9.

[16] Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,016-17. See Fetchenhier, [1992-1994 Transfer Binder] ¶25,838 at 40,746-47.

[17] Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,008.

threaten Commission-regulated markets;[18] (2) evidence that the seriousness of his wrongdoing was mitigated;[19] (3) evidence that he had undergone rehabilitation;[20] and (4) evidence that the role he intended to play in the markets was of a type that posed a reduced threat of repeated misconduct.[21] In imposing the 10-year ban, the Commission found Fetchenhier's evidence on these four factors to be deficient.[22]

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[18] Fetchenhier, [1992-1994 Transfer Binder] ¶25,838 at 40,746 ("In examining the risk a respondent may pose to market integrity, we first look to the nexus between the wrongdoing underlying his conviction and a threat to the market mechanism.").

[19] Id. Under Commission case law, mitigation is shown by "evidence that the wrongdoing at issue arose from a good faith error or some type of exigent circumstance unlikely to be repeated in the future." In re Horn, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,836 at 36,940 n.16 (CFTC Apr. 18, 1990).

[20] Fetchenhier, [1992-1994 Transfer Binder] ¶25,838 at 40,746. Rehabilitation evidence focuses on the registrant's "changed direction in his activities" since the time of his violation. In re Walter, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,215 at 35,013 (CFTC Apr. 14, 1988) (quoting In re Tipton, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,673 at 22,752 (CFTC Sept. 22, 1978)). In order to establish rehabilitation, a respondent "must produce evidence that directly relates to the wrongful conduct at issue and shows that conduct of that nature will not be repeated." In re Akar, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,927 at 31,709-10 (CFTC Feb. 24, 1986).

[21] Fetchenhier, [1992-1994 Transfer Binder] ¶25,838 at 40,747.

[22] Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,589; Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,017. Observing that the Seventh Circuit had found that Fetchenhier was "involved in a systematic scheme to match trades whereby profits were shifted to floor traders at the expense of customers," the

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When assessing Fetchenhier's petition to terminate the ban early, the presumption remains unchanged that protection of the markets requires Fetchenhier's banishment from trading for the full 10-year term.[23] Essentially, the petition procedure gives Fetchenhier a second opportunity to overcome this presumption by presenting evidence made available with the passage of time.[24]

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Commission also made the necessary finding that there was a sufficient "nexus between the wrongdoing underlying Fetchenhier's conviction and a threat to the market mechanism." Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,013, 45,016 (citing Ashman, 979 F.2d at 477, 485); see Fetchenhier, [1992-1994 Transfer Binder] ¶25,838 at 40,746 ("When the violations at issue involve criminal conduct committed on the trading floor of an exchange, the threat a repetition of that conduct poses to market integrity is clear and unequivocal."). It further concluded that Fetchenhier had failed to produce significant evidence mitigating the seriousness of his wrongdoing and that his evidence of rehabilitation was "unconvincing." Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,586-88; Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,014-16. Lastly, the Commission noted, "With respect to the role he intends to play in the market, Fetchenhier proposes to trade as a floor trader, the same role in which he was functioning at the time of his wrongdoing. In essence this would put him in a position to repeat his misconduct." Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,016 (footnote omitted).

[23] LaCrosse, [1999-2000 Transfer Binder] ¶28,229 at 50,429-30.

[24] As the Commission explained in LaCrosse,

> Relevant circumstances that already were or should have been considered -- those that were either previously presented to the Commission or could have been presented prior to the close of the hearing record in the prior proceeding -- need not be weighed a second time. Nevertheless, the petitioner

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Since the circumstances underlying the Commission's determination as to the seriousness of a petitioner's misconduct or its lack of mitigation are unlikely to change with time,[25] a petitioner is generally limited to augmenting his prior showing with new evidence of rehabilitation[26] or any changes in his anticipated role upon re-entry into the market that may serve to reduce the risk that he poses.[27] Fetchenhier concedes that his goal remains to return to the CBOT as a floor trader,[28] "the same role in which he was functioning at the time of his wrongdoing."[29] Thus, his hopes of having the trading ban lifted early rest on his

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> should have an opportunity to develop the record regarding relevant circumstances arising after the close of the hearing record in the prior proceeding.

Id. at 50,430.

[25] Id. ("As a result, absent extraordinary circumstances, evidence of these factors need not be weighed a second time.").

[26] Id. ("Circumstances that show a changed direction in petitioner's activities since the time of the wrongdoing may develop during the period between the decision imposing a trading prohibition and a decision on whether to lift a pending prohibition.").

[27] Id. ("The role that a petitioner intends to play in the markets can also change during the period between the decision imposing a trading prohibition and a decision on whether to lift a pending prohibition.").

[28] Petition at 2. Tr. at 55-56, 60-61.

[29] Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,016.

ability to present significant new evidence to bolster his heretofore insubstantial showing of rehabilitation.[30]

The Nature of Rehabilitation Evidence

The case law reveals that persuasive evidence of rehabilitation is both sharply focused and narrowly circumscribed. It centers on the nature and circumstances of the respondent's misconduct. In this regard, the Commission has explained,

> A respondent seeking to counter a prima facie case by showing rehabilitation must do more than show that time passed without the occurrence of further wrongful conduct or that certain witnesses find him trustworthy. He or she must produce evidence that directly relates to the wrongful conduct at issue and shows that conduct of that nature will not be repeated . . . .[31]

Because rehabilitation evidence looks to the respondent's "changed direction in his activities" since the time of his violation,[32] evidence of proper conduct prior to the disqualifying act is "essentially irrelevant."[33] Similarly, civic achievements or charitable associations, being unrelated to

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[30] See id. at 45,014-16 (discussing the rehabilitation evidence presented by Fetchenhier at his April 1994 hearing); see also Fetchenhier, [1992-1994 Transfer Binder] ¶26,098 at 41,634-36.

[31] Akar, [1986-1987 Transfer Binder] ¶22,927 at 31,709-10 (footnote omitted).

[32] Walter, [1987-1990 Transfer Binder] ¶24,215 at 35,013 (quoting Tipton, [1977-1980 Transfer Binder] ¶20,673 at 22,752).

[33] In re Horn, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. ¶23,731 at 33,889-90 (CFTC July 21, 1987).

the activities which spawned the respondent's misconduct, do not generally count as significant evidence of rehabilitation.[34] Likewise, expressions of remorse,[35] professional accomplishments,[36] or favorable opinions expressed by friends, family and colleagues[37] normally receive no significant weight.

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[34] In re Riley, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,611 at 52,226 (CFTC Aug. 9, 2001); In re Riley, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,672 at 48,191-92 (CFTC June 8, 1999); Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,941.

[35] In re Ashman, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,336 at 46,548 (CFTC Apr. 22, 1998) ("expressions of contrition following detection deserve significant weight only if the wrongful nature of the conduct was unclear at the time of the violations"); In re Scheck, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,072 at 45,125 (CFTC June 4, 1997); Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,940.

[36] Horn, [1986-1987 Transfer Binder] ¶23,731 at 33,890; In re Anderson, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,085 at 32,209 (CFTC May 30, 1986).

[37] In this regard, the Commission has observed, "[a]lmost every respondent can . . . produce testimony by a friend or colleague attesting to the witness' trust in respondent and belief that he will not repeat his violative conduct." In re LeClaire, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,282 at 42,428 (CFTC Dec. 12, 1994). Issues of partiality aside, these individuals are not regarded as experts on questions relevant to the risk of recidivism. Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,015 ("As a general rule, we do not accord significant weight to the character testimony of a witness unless such witness was qualified as an expert."); Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,941. Nonetheless, the Commission "does not reject character witness testimony solely because the witness is not an expert." In re Zuccarelli, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,637 at 52,429 (CFTC Sept. 7, 2001).

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Although the absence of further, wrongful conduct since the time of the disqualifying act may support a finding of rehabilitation,[38] such a showing is insufficient standing alone.[39] Moreover, "since the focus of the [rehabilitation] inquiry is on the protection of the public . . . neither sympathy for [the

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Lay opinion testimony may be probative on the issue of rehabilitation if it is supported by the witness's concrete and credible factual testimony as to behavior or circumstances which are inconsistent with a substantial likelihood that the violative conduct will reoccur. In re Zuccarelli, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,597 at 47,835 (CFTC April 15, 1999). For example, "when a fellow trader espouses a belief that the respondent is honest or has mended his ways, we may consider whether the trader understands the nature of the respondent's prior misconduct and whether he or she has observed a difference in the respondent's pre-violation and post-violation trading practices." Id. Accordingly, "there may be situations in which the opinion of a lay witness may significantly aid the decisionmaker" in determining issues of rehabilitation. Id. at 47,834 n.19. However, such situations are rarely found in the case law.

[38] LaCrosse, [1999-2000 Transfer Binder] ¶28,229 at 50,430 n.7 ("[T]he passage of a substantial period of time without additional wrongdoing can be an important circumstance in evaluating rehabilitation.").

[39] In re Rousso, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,133 at 45,310 (CFTC Aug. 20, 1997) ("Clean records after the fact, without more, are not sufficient to rebut the presumption of unfitness . . . ."); In re Castellano, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,920 at 44,457 (CFTC Dec. 10, 1996) ("To merit substantial weight, the passage of time must be accompanied by persuasive evidence of an affirmative 'change in direction' during that time."); In re Bryant, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,847 at 36,999 (CFTC Apr. 18, 1990); Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,941.

respondent's] position nor a showing that he had 'suffered enough'" are significant considerations.[40] It is within this framework that we assess Fetchenhier's rehabilitation evidence.

Fetchenhier's Rehabilitation Evidence Fails To Rebut The Presumption That He Should Continue To Be Barred From Trading

In support of his petition, Fetchenhier presented his own testimony and that of four other lay witnesses.[41] None of this testimony, individually or cumulatively, amounts to evidence that would reliably support the inference that Fetchenhier's mindset has changed or that he is now any less likely to repeat his criminal misconduct that he was in 1997,[42] when the Commission imposed the 10-year ban.[43] Indeed, Fetchenhier's testimony, if

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[40] Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,941.

[41] Fetchenhier submitted no new documentary evidence. Tr. at 10-12.

[42] The oral hearing in the prior proceeding, at which testimonial and documentary evidence was received, occurred in April 1994. See Transcript of Proceedings, dated April 13, 1994 ("1994 Tr."). However, when imposing the ban, the Commission considered additional post-hearing evidence on the issue of rehabilitation that Fetchenhier submitted in 1997. Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,587-88. Finding the new evidence to be "insufficient," the Commission denied Fetchenhier's request for a new hearing. Id.

[43] In a post-hearing submission, Fetchenhier argues that, "[He] has done everything possible to show that he is a rehabilitated person. His affirmations of the lessons he has learned by his own rehabilitation are credible and supported by witnesses. One

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anything, hurt his cause.[44]

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is hard pressed to imagine what else could be done to demonstrate rehabilitation." Petitioner's Proposed Findings at 5. Nonsense.

As discussed below, Fetchenhier's "affirmations" are not credible nor is he assisted by the hollow vouchings of a few selected friends and an exchange representative. Moreover, it would have taken no exercise of imagination to determine "what else could be done to demonstrate rehabilitation." This is so because, in the prior proceeding, the Commission explicitly told Fetchenhier about the critical role that expert testimony can play in evidencing rehabilitation. Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,015 ("As a general rule, we do not accord significant weight to the character testimony of a witness unless such witness was qualified as an expert."). The message was not entirely lost since, in his petition, Fetchenhier stated his intent to "present a clinical psychologist who will testify to my rehabilitation." Petition at 2. Evidently, however, Fetchenhier changed his mind since he did not present a psychologist or any other witness to testify as a rehabilitation expert. See Letter from Joel J. Fetchenhier to the Court, filed June 24, 2003; Letter from Joel J. Fetchenhier to the Court, filed June 16, 2003; Order and Notice of Hearing, dated April 14, 2003, at 3 n.7. "In choosing to establish his rehabilitation case without the benefit of such witnesses, [Fetchenhier] assumed a risk he would come up short in meeting his burden of persuasion." Ashman, [1996-1998 Transfer Binder] ¶27,336 at 46,551.

[44] In certain respects, Fetchenhier directly contradicted the testimony that he gave in 1994. See infra notes 53-54 and accompanying text. The nature of the inconsistent testimony strongly suggests that he may have perjured himself in one of the hearings or, at a minimum, testified without sufficient regard for the truth. Riley, ¶28,611 at 52,227 (finding the applicant's "less than candid conduct at his hearing" to be evidence that he "remains unchanged"); In re Antonacci, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,835 at 36,934 (CFTC Apr. 18, 1990) ("reckless disregard for the truth of statements made under oath is not a risk to which futures customers ought to be exposed").

Fetchenhier's Testimony

Other than professing his own rehabilitation in general terms during the brief time he was on the witness stand,[45] Fetchenhier did little more than make the following expression of remorse and acknowledgement:

> I would say I knew it was wrong when I did it, when I got on the other side of these orders. I knew it was wrong. Today, I know it's wrong, but I'm not, I would never do it again. Even though I did it at the time, I knew it was wrong. Today, I know it's wrong and I would never do it. . . . Of course, I'm sorry. I'm sorry it affected my family, but it affected the market, it affected other traders and mostly it affected the customer. You know, I took money out of a customer's pocket . . . .[46]

Under scrutiny, Fetchenhier's testimony has no probative value concerning rehabilitation.

The Commission has held that a respondent's expressions of remorse generally deserve no significant weight unless the wrongful nature of the conduct was unclear at the time of the

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[45] Tr. at 50-62.

[46] Tr. at 57. See Tr. at 53 ("[W]hen I did [the trades] they were wrong and I knew they were wrong . . . ."); Tr. at 55 ("Most people have never been in prison and it's not fun. And there is just no way I would ever do anything again to even come close to that."); Tr. at 56 (" I think I've pretty well learned my lesson. I wouldn't be, absolutely not be a threat in any marketplace."); Tr. at 57-58 (Fetchenhier responding "Yes" to the question, "Do you feel at this time that you're rehabilitated?").

violation (a condition not present here).[47] This case illustrates the good sense of that rule. Fetchenhier has a large stake in the outcome of this proceeding, making his confessions of wrongdoing and statements of contrition both expected[48] and suspect.[49] As it turns out, however, there are other

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[47] In re Vercillo, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,071 at 45,115 (CFTC May 30, 1997) (citing Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,940).

[48] With no apparent marketable skills other than that of a trader, Fetchenhier has been unemployed since the ban took effect in 1997. Tr. at 51. See Affidavit of Joel J. Fetchenhier, dated June 4, 1997 at 2 (attached as Exhibit A to Joel J. Fetchenhier's Response to Order to Show Cause, filed June 9, 1997) ("I request the Commission to re-evaluate its order prohibiting my trading for 10 years. . . . By suspending me, the Commission will take away any opportunity that I have to earn a living. I do not have any other job qualifications apart from trading which I have done exclusively since 1976."). As a result, he is motivated to end the trading ban. When it imposed the 10-year ban, the Commission found that Fetchenhier had "not acknowledged the gravity of his misconduct," and in failing to do so, had "not even taken the important first step on the path of rehabilitation." Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,015. See Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,588. Thus, it put Fetchenhier on notice that fessing-up to his wrongdoing was a necessary (albeit insufficient) condition for the success of his petition. Given these circumstances, it is not too surprising that Fetchenhier purported to take this "important first step."

[49] Interest in the outcome of litigation may, of course, motivate a witness to testify falsely or color a witness's impressions. John Henry Wigmore, Evidence in Trials at Common Law §§945, 948-49, 966 (1970).

circumstances beyond its inherent qualities[50] that lead us to discredit Fetchenhier's testimony.

As we have explained in earlier cases, credibility assessments frequently turn on an examination of consistency or its absence.[51] Remarkably, the Division made no apparent effort to review Fetchenhier's testimony (or that of any other witness) for consistency with earlier statements.[52] Had it done so, the Division would have found a contradiction between Fetchenhier's testimony that, when he committed the crimes for which he was convicted, he knew the wrongful nature of his acts[53] and the

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[50] Apart from economic interest, a party's testimony as to his own morals, ethics, motivations and aspirations is especially susceptible to coloring by cognitive biases. In re Gorski, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,742 at 48,493 n.67 (CFTC Aug. 23, 1999).

[51] To be more exact, we consider the internal consistency of a witness's testimony, the consistency of the testimony with earlier statements and the consistency of the testimony with those portions of the record that seem reliable. Udiskey v. Commodity Resource Corp., [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,599 at 47,848 n.68 (CFTC April 2, 1999).

[52] Perhaps because of this oversight, the Division made no attempt to characterize Fetchenhier's testimony as fundamentally incredible. See Division's Proposed Findings at 6-7. We shall see a similar lapse in the Division's evaluation of the testimony of Fetchenhier's friend, Estelle Honsik. See infra notes 79-84 and accompanying text.

[53] Tr. at 57 ("I knew it was wrong when I did it, when I got on the other side of these orders. I knew it was wrong."), Tr. at 53 ("[W]hen I did [the trades] they were wrong and I knew they were wrong . . . .")

statements he made to this Court in 1994.[54] When not adequately explained, inconsistencies such as these go to the witness's capacity to testify accurately and/or the truthfully.[55] Here, the inconsistency prevents us from crediting Fetchenhier's professions of contrition and change.

Dean Payton's Testimony

In support of his claim of rehabilitation, Fetchenhier presented Dean Payton.[56] Payton is the CBOT's Vice President of the Office of Investigations and Audits[57] and he appeared as a CBOT representative rather than in his personal capacity.[58]

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[54] 1994 Tr. at 61 ("I don't think I did anything wrong."); 1994 Tr. at 62 ("There was no harm to anyone. No customer ever lost a penny because of an accommodation trade."); 1994 Tr. at 70 ("It's never been my practice to knowingly do something wrong . . . .").

[55] See United States v. Wong, 78 F.3d 73, 79-80 (2d Cir. 1996). Moreover, we observed nothing in Fetchenhier's demeanor that bolstered his credibility.

[56] Tr. at 33-38.

[57] Tr. at 34. Payton has been an employee of the CBOT since 1988. He has held his current position, which he described as that of "chief regulator at the exchange," for approximately two years. Tr. at 34, 36.

[58] Tr. at 35-36. See Petitioner's Brief in Response at 4 ("Payton appeared as a representative of the CBOT, not as a personal witness."); Petitioner's Proposed Findings at 4 (Payton "testified as to the position of the CBOT"). The CBOT has long been a steadfast supporter of Fetchenhier. For example, it filed an amicus curiae brief in the prior proceeding arguing, among other things, for leniency in the Commission's sanctioning of Fetchenhier. Brief of the Board of Trade of the City of Chicago as Amicus Curiae, dated March 23, 1992, at 11 (contending that a five-year ban on Fetchenhier's trading would be overly harsh).

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Payton testified that, in the CBOT's opinion, Fetchenhier's return to trading would pose no substantial threat to market integrity. To be more precise, he stated the following:

> Obviously I'm not an expert on rehabilitation and I don't know Joel well enough personally to speak to him, speak of him as an individual in that capacity. However, I would say that, you know, I think that on behalf of the Board of Trade, I wouldn't be here today if we thought that Joel returning to the Chicago Board of Trade as a floor trader would represent any threat to the integrity of the markets. Obviously, the Board of Trade itself and certainly in my role as the chief regulator at the exchange, our foremost concern is the integrity of our marketplace. And if we thought that there was any substantive threat, we wouldn't be here on his behalf.[59]

Since Payton provided no basis whatsoever for this opinion, we give it no weight.[60] Indeed, this type of opinion evidence is so

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Earlier, the CBOT had filed an amicus curiae brief in support of Fetchenhier and the other "Chicago sting" appellants before the Seventh Circuit, contending that the mail fraud statute did not cover the conduct for which the appellants were convicted and that RICO's "pattern" requirement was unconstitutionally vague as applied to them. Brief of the Board of Trade of the City of Chicago as Amicus Curiae in Support of Defendants-Appellants, United States v. Ashman, 979 F.2d 469 (7th Cir. 1992) (No. 91-2390).

[59] Tr. at 35-36.

[60] Zuccarelli, [1998-1999 Transfer Binder] ¶27,597 at 47,835 ("A layperson's view of [a respondent's rehabilitation] is not helpful, unless accompanied by a description of the factual bases for the opinion. . . . [B]road statements, unsupported by underlying facts, are of little assistance in resolving the issue. . . .").

unhelpful[61] that, had the Division lodged an objection to its admission, it would have been sustained and the testimony would have been stricken.[62]

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[61] Payton's fact testimony was equally unhelpful. He testified that Fetchenhier traded on the floor of the CBOT without "disciplinary action" from 1993, after his prison term had been served, until the trading ban took effect in 1997. Tr. at 35. See Tr. at 52-53 (Fetchenhier's testimony to the same effect). However, this fact was evidenced in the record of the prior proceeding and considered by the Commission when it imposed the 10-year ban. Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,588. On the more general issue of whether Fetchenhier has avoided illegal conduct since he committed the crimes for which he was punished, the Commission has held that the absence of further misconduct can be an important factor but is insufficient without other, persuasive, evidence to establish rehabilitation. See supra notes 38-39 and accompanying text. Indeed, the Commission imposed the 10-year trading ban nine years after any evidenced misconduct on Fetchenhier's part. Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,589. In this case, the mere fact that six more years have passed does little to assist Fetchenhier in demonstrating rehabilitation. After all, his opportunities to engage in material misconduct during the last six years have been fundamentally limited by his inability to openly trade. See Tr. at 51.

As the "chief regulator" at the CBOT, Payton might have provided useful testimony by "describ[ing] the methods exchange members are now using to observe" floor traders such as Fetchenhier, "and how [the CBOT] has improved [its] ability to determine whether Fetchenhier has violated any rules." Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,588. However, Fetchenhier's counsel did not question him on these topics.

[62] In considering the admissibility of opinion evidence, the Commission has adopted the approach taken by the Federal Rules of Evidence and the cases applying those rules. Zuccarelli, [2000-2002 Transfer Binder] ¶28,637 at 52,429; Zuccarelli, [1998-1999 Transfer Binder] ¶27,597 at 47,835. Payton was not offered as an expert but as a lay witness. Tr. at 35-36. See Order and Notice of Hearing, dated April 14, 2003, at 3 n.7 (setting forth

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procedural requirements for designating expert witnesses). Federal Rule of Evidence 701 states,

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

As the Tenth Circuit observed, "[t]he primary purpose of Rule 701 is to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury." Randolph v. Collectramatic, Inc., 590 F.2d 844, 846 (10th Cir. 1979). The rule is not a means by which to admit all opinion testimony. Id. Subsection (a) of Rule 701 restricts lay opinions to those based on "first hand-knowledge or observation" and of the type generally available to the populace at large. Zuccarelli, [1998-1999 Transfer Binder] ¶27,597 at 47,835 (citing Fed. R. Evid. 701 advisory committee note); Industrial Hard Chrome, Ltd., IHC v. Hetran, Inc., 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). For example, a lay witness may offer an opinion that a person with whom he has spoken was drunk, or that a car he observed was traveling in excess of a certain speed. United States v. Marshall, 173 F.3d 1312, 1315 (11th Cir. 1999). However, "where in order to express an opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 [expert] opinion and not a Rule 701 lay opinion." Industrial Hard Chrome, 92 F. Supp. 2d at 791 (brackets in original, quoting Charles E. Wagner, Federal Rules of Evidence Case Law Commentary 733 (1999)).

Although Payton did not clarify the bases (if any) for his opinion that Fetchenhier posed no substantial threat of repeated misconduct, it is evident that he did not draw his opinion from

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Nickolas Neubauer's Testimony

Nickolas Neubauer also testified for Fetchenhier.[63] Neubauer is a CBOT floor trader and a former Chairman of the exchange.[64] He has known Fetchenhier as a fellow trader and a friend for approximately 15 years.[65] During the course of their long business and personal association, Neubauer and Fetchenhier avoided discussing the specifics of Fetchenhier's convictions or the wrongdoing underlying them.[66] Consequently, Neubauer's "recollection of the specifics" of the conduct for which Fetchenhier was convicted "is pretty vague."[67] Notwithstanding

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personal observation. Indeed, he freely admitted to scarcely knowing Fetchenhier. Tr. at 34-36. Moreover, Payton's opinion was not "helpful" in understanding any of his factual testimony. Fed. R. Evid. 701(b). For these reasons, his opinion testimony fails to meet the admissibility standards of Rule 701.

[63] Tr. at 15-24.

[64] Neubauer was the CBOT Chairman from January 2001 through March 2003. Tr. at 15-16.

[65] As traders in "the same trading area" of the CBOT, Neubauer has known Fetchenhier "at least by nodding acquaintance" over a period of 25 years. Tr. at 16. However, it has been over the last 15 years, that Neubauer "began to see Joel -- games of golf and -- on the trading floor." Tr. at 16-17.

[66] Tr. at 21-22.

[67] Neubauer and Division counsel participated in the following exchange.

> Q Have you ever discussed Mr. Fetchenhier's convictions with him?

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his apparent ignorance and disinterest in the details of Fetchenhier's misconduct, Neubauer had "no doubt" that Fetchenhier's return to trading "would not be a threat to the market"[68] and believed that Fetchenhier was rehabilitated.[69]

(..continued)

> A Not in specifics. You know, not in specifics. I'm aware of generally what happened.
>
> . . . .
>
> Q What is your understanding of what Mr. Fetchenhier did that resulted in his convictions?
>
> A Well, you have to remember the, you know, the events themselves occurred actually 14 years, 14 or 15 years. And so, my recollection of the specifics at this point is pretty vague. So, to answer your question specifically, I really can't, except it involved a customer order and it was something in the order of a thousand dollars.
>
> Q Did Mr. Fetchenhier ever tell you that he intended to break the law?
>
> A No.
>
> Q Did he ever tell you he did not intend to break the law?
>
> A We did not have a discussion on that, you know, on that subject.

Tr. at 21-22.

[68] Tr. at 17.

[69] Tr. at 19. Neubauer also testified to two facts, neither of which assists Fetchenhier. First, he corroborated Payton's and

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Unfortunately, like Payton, Neubauer left us to guess what reasoning undergirded his opinion[70] and, thereby, sapped it of any probative value.[71]

Estelle Honsik's Testimony

Estelle Honsik testified that she and her husband have known Fetchenhier and his wife for over 25 years.[72] Although the couple has long tried to help Fetchenhier in his criminal and administrative proceedings,[73] Honsik professes ignorance

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Fetchenhier's testimony that Fetchenhier traded without incident after his return to the floor. Tr. at 18 ("There were no problems."). See supra note 61. In addition, Neubauer stated that he would be "comfortable" trading with Fetchenhier. Tr. at 18. Neubauer's comfort in trading with Fetchenhier is not illuminating since Fetchenhier's misconduct was not the type that would generate mistrust among floor traders. He was part of a conspiracy of floor traders who cheated customers -- not each other. Ashman, 979 F.2d at 477-78, 480, 485.

[70] An assessment of the reliability of lay opinion testimony as to a respondent's rehabilitation, focuses, among other things, on "whether the witness was fully informed of the circumstances material to his judgment [and] explained the criteria he used in evaluating the respondent . . . ." Riley, ¶28,611 at 52,226.

[71] Again, a more aggressive Division could have succeeded in having this testimony stricken. For although Neubauer's opinions may have been drawn from his personal observation of Fetchenhier, they were not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701(b). See supra note 62.

[72] Tr. at 26. Her complete testimony is set forth at pages 25-32 of the hearing transcript.

[73] Honsik's husband, Kenneth, gave character testimony on behalf of Fetchenhier in the prior enforcement proceeding. 1994 Tr. at

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concerning the nature of the wrongdoing that led to those cases.[74] Nonetheless, she is convinced that Fetchenhier is rehabilitated due to the remorse that he experienced resulting from the impact that his criminal conviction had on his family life.[75]

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7-16; Declaration of Kenneth Honsik, dated November 11, 1993 (received into evidence as Exhibit RX-M in the prior proceeding). Although Estelle Honsik did not testify at the 1994 hearing, Fetchenhier introduced a letter in that proceeding which the Honsiks had previously written to the sentencing judge in Fetchenhier's criminal case, a letter in which the Honsiks had asked the judge to be lenient in the sentencing of Fetchenhier. Letter from Ken and Estelle Honsik to the Honorable George Marovich, U.S. District Judge, dated April 26, 1991 ("1991 Honsik Letter") (received into evidence as Exhibit RX-X). Estelle Honsik was the letter's primary author. 1994 Tr. at 10-11.

[74] Tr. at 31.

[75] Honsik explained,

> I think what really crushed Joel was not so much the embarrassment of the situation, the hype, the media, any of that, was the impact it had on his family.
>
> He is truly, he just loves his wife and his two daughters and his new grandson. And I think that this just destroyed him. And when we saw him at prison, when you came and you went, Joel was just crying. And it was hard to see those kids come and go after visiting him.
>
> I think Joel is so rehabilitated because he was so devastated by that situation.
>
> . . . .

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Honsik's testimony must be evaluated with due regard for her personal relationship with Fetchenhier.[76] At the hearing, both by her words and her demeanor, Honsik revealed intense personal feelings for Fetchenhier. She testified that the Fetchenhiers "[a]re probably our dearest friends. . . . I would trust him. With my life, I would trust Joel."[77] Such strongly held personal

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> I don't think there's any question about it. I think what Joel went through so impacted his life that there would be no way ever, he would ever risk that again. The separation from his family is really what just killed him.

Tr. at 27-29.

[76] Riley, [2000-2002 Transfer Binder] ¶28,611 at 52,226 n. 15 (a character witness's business or personal relationship is a "factor in the overall evaluation of the quality of the judgment offered by the character witness") (quoting In re Laken, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,458 at 51,494 n.41 (CFTC Feb. 8, 2001)). Cf. In re LeClaire, [1994-1996 Transfer Binder] ¶26,282 at 42,428 ("Almost every respondent can . . . produce testimony by a friend or colleague attesting to the witness' trust in respondent and belief that he will not repeat his violative conduct."), cited in Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,015.

[77] Tr. at 26-27, 30. See Tr. 27 ("And our children are close to each other also.").

The letter which the Honsiks wrote to Fetchenhier's sentencing judge 12 years ago is powerful evidence of the emotional stake that Honsik has in Fetchenhier's happiness and, therefore, in the outcome of this proceeding. 1991 Honsik Letter at 2 ("There's no question that this whole miserable ordeal has taken its toll on Joel and his family, and all who know them and love them, wrap their love around them trying to protect them from any more hurt. . . . Your Honor, we are begging you to show

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ties and sympathies are particularly likely to bias Honsik's subjective judgments as to Fetchenhier's character in such a manner as to render them unreliable.[78]

There are additional reasons, however, for discrediting Honsik's testimony. On cross-examination, Division counsel questioned Honsik about her judgment of Fetchenhier's honesty in 1988 (the period in which he was engaging in his felonious conduct) by asking, "And in 1988, did you regard Mr. Fetchenhier as an honest man?"[79] Honsik avoided the question by responding, "We knew Joel probably not as well as we know him now back then because we were new acquaintances."[80] This evasiveness appears to have been motivated by fear that a truthful answer would hurt

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leniency on Joel and give him back to the people who need him and love him.").

[78] As we explained in Gorski, "[t]o the degree that testimony rests on interpretation as well as perception, the danger that a cognitive bias can affect testimony would seem to increase." [1998-1999 Transfer Binder] ¶27,742 at 48,493. A cognitive bias creates a filter through which events become distorted because certain values become internalized or certain views become held even in the face of contrary facts. Crampton v. Michigan Dep't of State, 235 N.W.2d 352, 356-57 (Mich. 1975); John R. Allison, Ideology, Prejudgment, and Process Values, 28 New Eng. L. Rev. 657, 691-705 (1994). Cf. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1312-13 (D.C. Cir. 1981) (MacKinnon, J., dissenting).

[79] Tr. at 32.

[80] Tr. at 32.

her "dearest friend."[81] However, the avoidance had the same effect by ensnaring her in a lie.

Moments before stating that she and Fetchenhier were "new acquaintances" in 1988, Honsik testified that she had "continuously" known Fetchenhier for "over 25 years."[82] Another statement made by Honsik places the beginning of her relationship with Fetchenhier in 1976 or 1977.[83] At this point, we need not determine which version of events is true -- whether, in 1988, Honsik and Fetchenhier were old friends or "new acquaintances" -- or whether either version is true.[84] The inconsistencies, themselves, show that Honsik has a tendency to speak untruthfully

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[81] We have evidence that, had Honsik answered the question directly and truthfully, she would have revealed that, prior to Fetchenhier's criminal misdeeds and at the time of his conviction, she considered him to have good character. 1991 Honsik Letter at 1-2. ("We have know both Joel and [his wife] for almost fifteen years now. . . . . Joel and [his wife] are such caring people . . . . [I]t is absolutely beyond our comprehension that this gentle, caring man has been charged with wire-fraud and RICO."). Such evidence would have suggested that she is a poor judge of character in general or a poor judge of Fetchenhier's character in particular.

[82] Tr. at 26.

[83] 1991 Honsik Letter at 1 ("We have known both Joel and [his wife] for almost fifteen years now . . . . We met . . . and struck up an immediate friendship.").

[84] The Division was, once again, oblivious to patent inconsistencies in the record. See supra notes 52-54 and accompanying text. It comfortably accepted Honsik's last word on the subject as true. Division's Proposed Findings at 4 ("Honsik did not know Fetchenhier as anything more than [an] acquaintance before the underlying criminal conduct." (citing Tr. at 32)).

to achieve certain ends, one of which is "to protect [Fetchenhier and his family] from any more hurt."[85] For the reasons discussed above, we give Honsik's testimony no weight.[86]

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[85] 1991 Honsik Letter at 2.

[86] In an effort to demonstrate his "change in direction," Honsik volunteered that she believed that Fetchenhier had increased his charitable undertakings after his release from prison. Tr. at 29. This type of evidence is essentially irrelevant. Riley, [2000-2002 Transfer Binder] ¶28,611 at 52,226 ("Nance's testimony evidenced Riley's charitable impulses, but was not relevant to the issue of Riley's potential risk if allowed to trade."); Riley, [1998-1999 Transfer Binder] ¶27,672 at 48,191-92 ("Virtues and vices frequently co-exist in mortals of the normal sort. . . . [T]here is no reason to believe that Riley's traits of personal kindness are incompatible with his repeating an act of fraud on a faceless customer or with continuing his habit of lying to regulators."); Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,941 ("Charitable fundraising is certainly worthwhile, but it is too common an activity to raise an inference of a 'changed direction.'").

Even if material, this testimony would have been difficult to credit as evidence of a change in direction. Honsik did not elaborate on the nature and extent of the increase in Fetchenhier's charitable acts. In addition, she and her husband provided the following description of Fetchenhier's altruism 12 years ago:

> Judge, when you stop to think about all the time and effort that Joel has put into helping other people, all the fund raisers he has helped to make successful and the wonderful things he has done for the elderly and indigent, it would be mindboggling to put a value on it.

1991 Honsik Letter at 1-2. Given the presence of this statement in the record, we cannot confidently determine "whether [Fetchenhier's] charitable activities increased, decreased or remained the same in the period following the wrongful conduct." Horn, [1990-1992 Transfer Binder] ¶24,836 at 36,941.

Valdo Oleari's Testimony

Fetchenhier's fourth and final character witness was Valdo Oleari II.[87] Like Honsik, his personal ties to Fetchenhier run long and deep. A 32-year old CBOT floor trader, Oleari has known Fetchenhier since he was 13 years old[88] and the two "have been good friends from the get go."[89] Indeed, it was Fetchenhier who helped Oleari line up his first job at the CBOT in 1993.[90]

Fetchenhier and Oleari "have very many common interests."[91] The nature of Fetchenhier's wrongdoing, however, is apparently not one of them. Although he is a soybean trader who works in the same pit once occupied by Fetchenhier,[92] Oleari claimed to have "no idea of what [Fetchenhier] actually did to warrant" the criminal charges of which he was convicted.[93] Like Neubauer and

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[87] Tr. at 39-50.

[88] Tr. at 39-41.

[89] Tr. at 41. See Tr. at 41-42 ("He had children that were around the same age as me and so on.").

[90] Tr. at 40 ("I got that job, Joel Fetchenhier mentioned my name to Mr. Nick Kampton who is who I work[ed] for.").

[91] Tr. at 42.

[92] Tr. at 48.

[93] Tr. at 45-46. Only minutes before, Oleari had testified that he and Fetchenhier had discussed "what happened and how [Fetchenhier] feels." Tr. at 42. Thus, if we are to believe Oleari, we may infer these "discussions" were something less than comprehensive. See Petitioner's Brief in Response at 2

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Honsik, Oleari's ignorance of Fetchenhier's crimes did not stop him from venturing an opinion that Fetchenhier would not be a threat to repeat them.[94] Like Honsik, Oleari proved to be a friend of unwavering loyalty[95] and blind to the implications of

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("Fetchenhier did not discuss the specifics o[f] his criminal wrongdoing with any of his witnesses.").

[94] Oleari offered that opinion in the following exchange with Fetchenhier's counsel.

> Q And based upon those discussions with [Fetchenhier] and the continuous connection with him, do you have an opinion as to whether he is rehabilitated?
>
> A Yes, I do.
>
> Q And what is that opinion?
>
> A My opinion is that he has owned up to his mistakes and he realizes he has made a mistake and does not intend to do it again. He has, when I first started trading, his words of advice to me were just make sure you do the right thing. And he definitely does not seem a threat to me.
>
> A Well, that's my next question. Would you consider him in any way, shape or form a threat to the marketplace?
>
> Q To the trading marketplace, no, I do not. I believe he is not a threat. In fact, he would be a great asset.

Tr. at 42-43.

[95] The evidence also shows that Oleari has a poor track record when it comes to judging Fetchenhier's criminal proclivities. In response to Division counsel's question as to whether he regarded

(continued..)

Fetchenhier's misconduct.[96] As such, he was not a credible witness as to Fetchenhier's rehabilitation. Thus, as we have with the testimony of Fetchenhier's other three character witnesses, we decline to credit Oleari's meagerly supported opinion.[97]

Conclusion

For the above-stated reasons, neither Fetchenhier nor his witnesses offered credible testimony as to Fetchenhier's rehabilitation. As a result, Joel J. Fetchenhier failed to

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Fetchenhier "as an honest man" in 1988, Oleari testified, "Oh '88? Yes, I've always regarded him as an honest man." Tr. at 47-48.

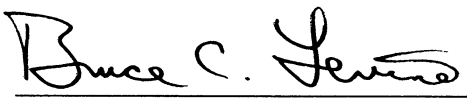
[96] As in the prior proceeding, the testimony of Fetchenhier's witnesses reflected "little concern for the customers harmed by Fetchenhier's wrongdoing." Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,015. See Vercillo v. CFTC, 147 F.3d 548, 557 (7th Cir. 1998) ("the testimony of Vercillo's witnesses was 'not persuasive' because it only showed 'at best a perfunctory concern with the customers harmed by Vercillo's wrongdoing,' and therefore showed that they had a limited appreciation of the interest of the public" (quoting Vercillo, [1996-1998 Transfer Binder] ¶27,071 at 45,116)).

[97] The only change that Oleari testified to observing in Fetchenhier, is that he "[s]eemed like he wanted to make up for lost time and spend a lot of time with his family." Tr. at 48. This fact is of minimal importance. See Fetchenhier, [1996-1998 Transfer Binder] ¶27,055 at 45,015 n.36 (stating that a "respondent's remorse resulting from the impact on his family and finances is not a significant factor in evaluating the public interest."). He also testified that he would not "have any problems trading" with his good friend, should Fetchenhier return to the CBOT. Tr. at 43-44. As earlier discussed, this is another irrelevant fact. See supra note 69.

establish, by the weight of the evidence, that his access to the markets regulated by the Commission would pose no substantial threat to their integrity.[98] Accordingly, his petition seeking relief from the Commission's order prohibiting him from trading on Commission-regulated markets for a period of 10 years[99] is **DENIED.**

IT IS SO ORDERED.[100]

On this 20th day of August, 2003



Bruce C. Levine
Administrative Law Judge

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[98] LaCrosse, [1999-2000 Transfer Binder] ¶28,229 at 50,429.

[99] Fetchenhier, [1996-1998 Transfer Binder] ¶27,175 at 45,589.

[100] Any party may appeal this initial decision to the Commission by serving upon all parties and filing with the Proceedings Clerk a notice of appeal within 18 days of the date of the initial decision. 17 C.F.R. §10.102(a). If a party does not properly perfect an appeal -- and the Commission does not place the case on its own docket for review -- the initial decision shall become the final decision of the Commission, without further order by the Commission, within 30 days after service of the initial decision. 17 C.F.R. §10.84(c).