UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

Omega Cotton Company, Inc., Complainant, v. Keith L. **Brown** d/b/a, Keith L. Brown & Company, and Rosenthal Collins Group, LLC, Respondents.	CFTC Docket No. 04-R027

INITIAL DECISION

Before: Painter, ALJ

Appearances: Christopher L. Gallinari
Nicholas P. Iavarone
Joel J. Bellows
Attorneys for the
Omega Cotton Company

Thomas L. Kirbo, III
Attorney for Keith L. Brown and Keith L. Brown & Company

Jeffrey Schulman
Attorney for Rosenthal Collins Group, LLC

PROCEDURAL HISTORY

On January 30, 2004, Complainant Omega Cotton Company, Inc. ("Omega") filed a complaint against Respondents Keith L. Brown, an introducing broker d/b/a Keith L. Brown & Company ("Brown), and Rosenthal Collins Group, LLC ("Rosenthal"). Rosenthal, the guarantor of the introducing broker, carried the Omega account at issue in this proceeding. Complainant alleges that Respondent Brown defrauded Omega by placing hedge transactions in Sutton's personal account rather than in Omega's account; that Brown failed to alert Brogdon and Powell of the existence of the Sutton account; that Brown refused to provide Omega with any information concerning Sutton's personal account; and that Brown's conduct was in contravention of Section 4b of the Commodity Act and resulted in actual damages to Omega in the amount of $1,011,264.80. Omega also claims costs and attorney fees amounting to $178,713.48.

It is undisputed that Avondale Mills initiated an arbitration proceeding against Omega in September 2002. Avondale was successful in the arbitration proceeding, and was awarded an amount of $925,290.73 plus interest at ten percent (10%) per annum from August 1, 2003 until payment.[1]

Respondents have filed separate Answers, each denying all allegations of wrongdoing. The trial took place in Tallahassee, Florida on April 25 and 26, 2005. Parties thereafter filed post-hearing briefs, including recommended findings of fact and conclusions of law. The matter is ready for decision.

[1] Ex. 50.

FINDINGS OF FACT

1. Franklin Brogdon, Ed Powell, and Lloyd Sutton are long-term members of the Omega business community. Brogdon and Powell have been in the cotton business together since 1974.[2] In 1995, Brogdon, Powell and Sutton together formed the Omega Cotton Company, which was a cotton merchandising company.[3] In 1995 Omega incorporated, and thereinafter operated as a corporation.[4] Omega operated as a cotton merchandising company, and would enter into contracts to purchase cotton from farmers, and contracts to sell cotton to mills, merchants, and other commercial users.[5] Omega sought to profit on the price difference between their purchases and sales. Omega opened its account with Rosenthal for the singular purpose of hedging its purchase and sales contracts.

2. The three principals of Omega were Sutton its president, Brogdon its vice-president and Powell its secretary and treasurer.[6]

Omega's Futures Trading Account with Rosenthal

3. In March 1996, Omega opened a commodity futures trading account with Rosenthal through Brown, the introducing broker.[7] Brown was originally guaranteed by Refco, Incorporated, and later by Rosenthal.[8] Rosenthal is a registered futures commission merchant (FCM).[9]

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[2] Transcript of Proceedings, 4/25/05 ("Hearing Tr. I") at 31.
[3] Hearing Tr. I at 32.
[4] Ex. 1, Omega incorporation in 1995. Prior to the formation of the corporation, the three Omega principals, Sutton, Brogdon and Powell operated its predecessor, Omega Cotton Company, as a partnership.
[5] Transcript of Proceedings, 4/26/05 ("Hearing Tr. II") at 49.
[6] Hearing Tr. I at 33.
[7] Ex. 2; Tr. I at 33-34.
The CEA defines the term Introducing Broker ("IB") to mean any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant) engaged in soliciting 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 or derivatives transaction execution facility who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure trades or contracts that result or may result thereof. Section 1(a)(23) CEA

4. Brogdon, Powell and Sutton each owned one third of the company and had discretionary trading authority over Omega's futures account. Sutton was primarily responsible for hedging, through the futures market, Omega's risks in contracting to buy and sell cotton.[10] Each principal signed the account opening documents, including the risk disclosure statement.[11]

5. Brown, as the Introducing Broker, never held power-of-attorney or discretionary trading authority over any Omega commodity account.[12] Omega's futures account with Rosenthal had two sub-accounts: one to handle hedges against Omega's purchase commitments to farmers, and another to handle hedges against Omega's sales commitments to mills, merchants, and other commercial users.[13]

6. Omega opened its futures account with Rosenthal in 1996. The agreement between Avondale and Omega provided that Avondale would determine the time for "fixing" the price on cotton contracts between the parties. Avondale would instruct Sutton to fix the contract based on current futures prices. Sutton would then direct Brown to enter a futures order for that purpose.

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[8] Ex. 7 (Account Transfer Authorization). All three principals, Sutton, Brogdon and Powell, signed the contractual agreement to warrant the truth of Omega's corporate information, and to inform RCG in writing of any changes to such information when such changes occur. Hearing Tr. II at 46-47.
Ex 8 accompanied the Account Transfer Authorization, whereby Rosenthal's Commodity Customer Agreement put Omega on notice to provide RCG with modifications:
-- at clause 13, that transactions are deemed conclusive and ratified unless notice is immediately given to RCG upon receipt of transaction confirmation. Failure to receive statements for Omega's account by mail within seven days from the date of a transaction in the account, shall be conclusive and deemed ratified by Omega unless RCG is notified immediately in writing of the failure to receive such statements.
-- at clause 19, the Agreement cannot be amended or waived except in writing by a registered Principal of RCG. Any amendments by Omega were not on record.

[9] Ex. 6. The CEA defines the term futures commission merchant ("FCM") to mean an individual, association, partnership, corporation, or trust that -

> (A) is engaged in soliciting 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 or derivatives transaction execution facility; and
> (B) in or 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. Section 1(a)(20) CEA.

[10] Ex. 2; Hearing Tr. I at 33, 49 and 54, Hearing Tr. II at 98.

[11] Ex. 2 New Account and Security Agreement and Assignment of Hedging Account signed via Refco. Ex. 8 and 9 evidences Omega's account transferred to RCG, with signatures of Sutton, Powell and Brogdon. Documents dated June 26, 2000.

[12] Ex. 2; Ex. 7.

[13] Hearing Tr. II at 48-49.

In the event Sutton was not available, it was agreed that Avondale would instruct Brown to place an order to fix the price. Brown would then get approval of an order from Sutton or the other principals, Brogdon or Powell. After execution, Brown would fax the confirmation statement to Omega. [14] Omega;s fax machine was just outside Brogdon's office, and accessible to all Omega princpals. This court finds that the principals of Omega were given prompt notice of each and every trade entered as Omega's futures account with Rosenthal.

7. Omega financed its hedging activities through multiple lines of credit with American Banking Company ("ABC").[15] ABC's collateral for Omega's loans was in the form of personal guarantees by Omega's principals. A security agreement was signed by all three principals, and allowed ABC to demand payment of Omega's debts out of the balance in Omega's futures account, and assignment of Omega's existing futures contracts.[16]

Avondale Mills, Inc.

8. Avondale Mills, Incorporated ("Avondale") was a cotton mill[17] with which Omega had been doing business with since February 2000.[18] Omega had entered into a series of on-call contracts to sell cotton to Avondale.[19] Avondale would later notify Omega that it wished to fix the price at the prevailing futures price.[20] Sutton gave Avondale the instruction that if he were not available to accept Avondale's fix, then Avondale should contact Brown.[21] If Brown was contacted by Avondale to enter a fix, then he would call Sutton to confirm that Omega wanted to enter the fix,

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[14] Hearing Tr. I at 47-48, Hearing Tr. II at 97. Brogdon testified that status reports were sent by Brown and received by Omega on a regular basis. Sutton testified the fax machine was "sitting right there as you went into Ed's office."
[15] Hearing Tr. II at 104.
[16] Hearing Tr. I. 34-35; Exs. 9 and 10. The "Security Agreement and Assignment of Hedging Account" by ABC was signed by Sutton on September 20, 2000.
[17] Hearing Tr. I at 68.
[18] Hearing Tr. I at 81.
[19] Exs. 12-23.
[20] Hearing Tr. I at 69-71.
[21] Hearing Tr. I at 72.

and then Brown would enter the fix.[22] On one occasion Brown could not get in contact with Sutton, so Brown contacted Powell, who told him to "do what Sutton would do".[23]

9. Near the end of 2001, the cotton futures market had turned against Omega. Cotton prices declined and Omega had several thousand outstanding bales on the December call.[24]

10. On September 7, 2001 Sutton filed a separate futures trading account application under his own personal name with Rosenthal[25] and Brown was the introducing broker.[26] Sutton first traded in his personal account in December 2001.[27] Sutton deposited his own personal funds into the new account.[28] The trades placed in his own account corresponded to hedges on Omega's cash contract commitments.[29] Sutton testified that the purpose of having a separate account was that "it was the onliest [sic] way we could hedge anything. Because if we had put it in another account, the bank would have had access to it. If we had left it as Omega Cotton, any money that would have been in there, the bank could have took out at any time."[30] During this time, all three principals were well aware of Sutton's personal account. Brogdon placed three options trades in Sutton's personal account for his own benefit.[31] Sutton traded in his account until

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[22] Hearing Tr. II at 49-50.

[23] Hearing Tr. II at 65. Brown testified "There was an occasion or two...when I called to get permission to do a fixation that Mr. Sutton wasn't there and I talked to Mr. Powell, and he asked me: Well, what would Sutton do? And I said , Well I don't know. I guess he would fix it. Well, then fix it."

[24] Hearing Tr. I at 35-36.

[25] Ex. 11.

[26] Exs. 35, 36 and 46; Hearing Tr. II at 70

[27] Ex. 46; Hearing Tr. II at 113-114. Regarding Sutton's trades in his account, "2002 is when *we* did 99 percent of the trading, I can tell you that." (emphasis added)

[28] The purpose of having separate accounts precluded ABC from having access to and sweeping the funds after Sutton was fired. Sutton testified "If we left it as Omega cotton, any money that would have been in there, the bank could have took out at any time." Hearing Tr. II at 116.

[29] Ex. 46;

[30] Hearing Tr. II at 116.

[31] Hearing Tr. I at 52-53 and Hearing Tr. II at 116. Sutton testified regarding the personal account "I even traded some for him [Brogdon] in this account." Brogdon testified "I asked Buddy [Sutton] to buy me three options, I did."

September 2002, when he withdrew almost the entire remaining balance. Since the initial deposit, Sutton's personal account appreciated by $49,569.88.[32]

11. In late 2001, ABC met with farmers who had orally contracted to deliver cotton to Omega to determine the farmers' ability to deliver or offset with Omega.[33] Many of the farmers denied having valid contracts with Omega, and some indicated they could not pay Omega.[34] As a result of the market conditions and the meeting with the farmers, ABC determined that Omega was not placing true hedges and was speculating in cotton futures.

12. In December 2001, ABC declined to finance any additional unfixed contracts,[35] but continued to finance the previously fixed contracts. In June 2002, ABC insisted Sutton be fired when ABC realized that Omega was not properly hedging its cash market risks.[36] In August 2002, at ABC's request, Sutton was ordered out of the Omega offices.[37]

13. According to Sutton's testimony, Omega was unable to fix remaining contracts at Avondale's request as Omega was out of money. In order to fix the remaining on-call contracts, he opened a personal account, and put only his own money in the account. Sutton told Brown that futures positions resulting from Avondale's fix orders would be placed in this new account. However, Sutton said that he did not provide Brown with information concerning Omega's financial or contractual obligations. Sutton made it clear that he and the two other principals of Omega knew that his personal account was created in an unsuccessful effort to save the company.

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[32] Ex. 46; Hearing Tr. II at 113, Sutton testified to profits earned in his personal account.
[33] Hearing Tr. I at 35-36.
[34] Ex. 44; Tr. I at 35-36, Tr. II at 101,
[35] Ex. 44; Hearing Tr. II at 102-103.
[36] Hearing Tr. I at 19-20.
[37] Hearing Tr. I at 9 and 143.

14. In September 2002, Avondale initiated arbitration proceedings against Omega when it became clear to Avondale that Omega would not be able to honor all of their cash contract commitments to Avondale. On July 31, 2003 Avondale won an arbitration award against Omega for $925,290.73.[38] On March 26, 2004, the arbitration award was affirmed by the Circuit Court of Shelby County, Tennessee. Judgment was rendered in favor of Avondale in the amount of $925,290.73 plus interest at ten percent (10%) per annum from August 1, 2003 until payment.[39]

[38] Ex. 48.
[39] Ex. 50.

DISCUSSION

I

Neither party disputes that Brown was a nondiscretionary broker throughout the duration of his broker-customer relationship with Omega.[40] Under Section 4b of the CEA, a broker for a non-discretionary account has limited duties, including the duty to obtain the customer's authorization before making trades and to exercise reasonable care in placing orders for customer accounts.[41] The broker has no duty to counsel, advise or manage the account.[42] Brown, as an introducing broker for Omega's non-discretionary account, was not be obligated to monitor Omega's cash transactions to ensure that Omega's cash market commitments were properly hedged.

Omega and Avondale entered into a number of on-call cotton contracts in 2002.[43] Avondale would fix the price by notifying Omega that Avondale wished to fix the price at the prevailing futures price.[44] Sutton gave Avondale the instruction that if he was not available to accept Avondale's fix, then Avondale should contact Brown.[45] If Brown was contacted by Avondale to enter a fix, he would first make a notation of Avondale's request, and then he would call Sutton to confirm that Omega wanted to enter the fix. If Sutton assented, Brown would enter the fix.[46]

In a non-discretionary account, Brown was obligated only to exercise due diligence in

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[40] When Omega opened its account with Rosenthal through Brown, it checked the box specifying that "no one other than the customer controls the account." Ex 1. At no time did Omega sign over its power of attorney to Brown, and Omega never alleged that Brown exercised de facto control of the account.
[41] *De Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1302 (2nd Cir. 2002).
[42] *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 514-516 (Colo. 1986).
[43] An on-call contract is a binding contract setting forth the quantity, quality and the delivery date of the cotton; however the price is not "fixed" until a later date. Hearing Tr. I at 70-71.
[44] Hearing Tr. I at 69-71.
[45] Hearing Tr. I at 72.
[46] Hearing Tr. II at 49-50.

transmitting customer orders to Rosenthal. Brown did so. The United States Court of Appeals, Second Circuit confirms in *Henryk De Kwiatkowski v. Bear, Stearns & Co., Inc.*:

> "It is uncontested that a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis. The broker's duties ordinarily end after each transaction is done, and thus do not include a duty to offer unsolicited information, advice or warnings concerning the customer's investments. A nondiscretionary customer by definition keeps control over the account and has full responsibility for trading decisions. On a transaction-by-transaction basis, the broker owes duties of diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale"[47]

Intermittently, when solicited by Sutton, Brown would offer his opinions on price movement in the cotton futures markets.[48] However, giving advice to a nondiscretionary account customer does not give rise to a higher duty on the broker's behalf to continue offering advice.[49] In *De Kwiatkowski*, the customer transferred his account to the brokerage in order to gain access to the brokerage's financial analysts and experts. The customer frequently received unsolicited advice from brokerage employees as to prospective price movements of the dollar, and frequently the customer would trade on the brokerage's recommendations. Despite the broker-customer relationship which was far more comprehensive in *De Kwiatkowski* than in the present case, the court found that there was indeed "insufficient evidence to support a finding that [the broker] undertook any role triggering a duty to volunteer advice and warnings between transactions..."[50]

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[47] *Henryk De Kwiatkowski v. Bear, Stearns & Co., Inc.* 306 F.3d 1293 at discussion para 1.
[48] Hearing Tr. II at 117.
[49] "In establishing a nondiscretionary account, the parties ordinarily agree and understand that the broker has narrowly defined duties that begin and end with each transaction. We are aware of no authority for the view that, [...] a broker may be held to an open-ended duty of reasonable care, to a nondiscretionary client, that would encompass anything more than limited transaction-by-transaction duties. Thus, in the ordinary nondiscretionary account, the broker's failure to offer information and advice between transactions cannot constitute negligence." *Henryk De Kwiatkowski v. Bear, Stearns & Co., Inc.* 306 F.3d 1293 at at 1302
[50] *De Kwiatkowski* at 1307

Therefore, if Sutton sought Brown's advice, Brown was obligated only to use professional care in furnishing the advice. Brown never became obligated to offer unsolicited advice to Sutton or Omega.[51] Agreeing to accept orders for a hedge account did not require Brown to investigate the books and records of Omega to determine the appropriateness of the hedge transactions.[52]

Omega was run by well-seasoned businessmen who operated both personal and business trading accounts through Brown. Long before this event occurred, Omega's principals combined for decades of business experience in the cotton and futures industries. By virtue of their accrued experience, these principals were suitable to trade Omega's futures account. Omega was responsible for its own trading activities, and Brown had no duty to monitor Omega's cash transactions. Thus, Brown is not liable on this claim, as he had no duty to determine whether Omega's hedge trades were appropriate.[53]

II

Complainant charges that Brown violated Section 4b of the CEA as he should have known that Sutton did not have authority to make speculative trades for Omega, and that Brown should have contacted Brogdon and Powell to disclose the trading carried on by Sutton who allegedly exceeded his authority.

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[51] See *Avis v. Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. ¶21,379 at 25,831 (CFTC April 13, 1982). (When a broker agrees to perform duties in addition to those he would otherwise be required to perform, "he must perform those additional duties with a professional standard of care.")

[52] The more expansive duties which Omega seeks to impose, typically arise in situations where the customer has a discretionary account with the broker or the customer is rendered dependent upon the broker, such as a customer who has "impaired faculties...a closer than arms-length relationship with the broker, or one who is so lacking in sophistication that de facto control of the account is deemed to rest in the broker." These situations are not present in this case. *De Kwiatkowski* at 1308.

[53] *Wong v. First London Commodity Options* [1977-1980] Comm. Fut. . Rep (CCH) ¶ 20,834 (CFTC 1979). Each Omega principal signed the Risk Disclosure Statements. Ex. 2 New Account and Security Agreement and Assignment of Hedging Account signed via Refco. Ex. 8 and 9 evidences Omega's account transferred to RCG, with signatures of Sutton, Powell and Brogdon. Documents dated June 26, 2000.

To prove a Section 4b violation of the CEA, a party must prove, by a preponderance of the evidence (1) a misrepresentation or omission on the part of the respondent, (2) the misrepresentation or omission is material, and (3) the misrepresentation or omission has been made with scienter.[54]

Under Section 4b an omission is considered to be fraudulent "where disclosure is necessary to make other representations not materially misleading, or where it is affirmatively required by regulation...[b]ut where neither of these conditions applies, mere silence, or the passive failure to disclose facts, cannot serve, as a general rule, as the basis for a cause of action for fraud."[55]

The Complainant's evidence fails to show that Omega granted Brown any discretionary trading authority. Brown never undertook to monitor Omega's account, and he never represented to Omega that they were properly hedged. Omega's principals had access to the relevant documents. They could determine whether they were properly hedged and to make further due diligence inquiry.[56] It is clear from the record that Sutton had authority to trade on the Omega account and he exercised that authority. Brogdon and Powell also had authority to trade for the purposes of hedging, but that authority was rarely exercised. Brown had a duty to accept orders from the principals of Omega, including Sutton as president. Omega never placed

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[54] Scienter is a necessary element of proof for a violation of Section 4b of the Act. *Hammond v. Smith Barney Harris Upham & Co.*, (CCH) ¶24,617 at 36,659 (CFTC March 1, 1990). "[T]o establish a claim for futures [...] fraud under section 4b(a) of the CEA...the CFTC must demonstrate that the defendant made a material misrepresentation of presently existing or past fact with scienter." "The term "scienter" refers to a mental state embracing an intent to deceive, manipulate, or defraud." CFTC v. Rosenberg, 85 F.Supp.2d 424 at 26-27, citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185.

[55] *Precision Ratios, Inc., v. MAN Financial*, ¶29,813 at 56,393-56,394 [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) (CFTC July 23, 2004) (Commissioner. Brown-Hruska dissenting).

[56] see *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 267 Kan. 245, 260, 978 P.2d 922, 932 (1999) (Element of fraud by silence is that defendant knew of material facts which plaintiff did not have and could not have discovered by exercise of reasonable diligence)

any restrictions on Sutton's trading authority and never advised Brown or Rosenthal that Sutton was fired in August 2002.[57]

Brown's duty as a nondiscretionary introducing broker is limited to accepting instructions from one of the three principals, Sutton, Brogdon or Powell, in placing futures contracts. As an introducing broker, Brown had no authority, duty or responsibility to inspect Omega's books or cash accounts. Brown did not attend board meetings and he was not privy to corporate information regarding transactions other than the orders received from Sutton, Brogdon or Powell.[58] Brown did not know how much cotton Omega had in inventory, the aggregate value of Omega's sales commitments, or Omega's threshold for risk. ABC had relevant information pertaining to Omega's line of credit that Brown did not have.[59] There is no credible evidence in the record to show that Brown ever entered an unauthorized trade, or that Brown ever exercised discretion over any transaction for the Omega account.[60]

III

Lastly, the Complainant's final charge relates to Sutton's personal account, whereby Complainant charges Brown made a fraudulent omission when he did not contact Omega's other

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[57] Rosenthal was not put on notice of changes to Omega's Corporate Information, which included Sutton being fired as President in August 2002. Ex. 7 (Account Transfer Authorization). All three principals, Sutton, Brogdon and Powell, signed the contractual agreement to warrant the truth of Omega's corporate information, and to inform RCG in writing of any changes to such information when such changes occur. Hearing Tr. II at 46-47.
Ex 8 accompanied the Account Transfer Authorization, whereby Rosenthal's Commodity Customer Agreement put Omega on notice to provide RCG [Rosenthal] with modifications.

[58] Hearing Tr. I at 51, Brogdon testified he never asked Brown for advice on what to do about the market, nor did Brown call and offer advice to Brogdon. In addition, Brogdon did have Brown's telephone number and confirmed he could talk to Brown if he chose to. Hearing Tr. II at 104, Sutton testified that it was not Brown's business to know how many outstanding contracts Omega had.

[59] Hearing Tr. II at 104, Sutton testified the Bank (and not Brown) kept a record of accounting to show if Omega "balanced out longs and shorts and cash..."

[60] Complainant did not prove Brown failed to disclose material facts with the requisite scienter. Scienter may be proved by either showing the Respondent knew his misrepresentations were false and calculated to cause harm, or that representations were made with reckless disregard for their truth or falsity. *Commodity Futures Trading Commission v. Weinberg*, 287 F. Supp. 2d at 1105. (Recklessness is sufficient to satisfy scienter requirement) *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742 (D.C. Cir. 1988).

principals, Brogdon and Powell, with information that Sutton opened a futures account in his own name.

A broker can be held liable for non-disclosure only if he is subject to a duty to make a disclosure.[61] The duty of all introducing brokers is to disclose to customers all material facts concerning their transactions, and a "disclosure is necessary to make other representations not materially misleading, or where it is affirmatively required by regulation."[62]

The evidence shows that in September of 2001, Sutton filed a separate application through Brown to open a futures account with Rosenthal under his own personal name.[63] In December of 2001, Brown began processing trades from Sutton's personal account, which corresponded to Omega's cash contract positions in the account.[64] From December of 2001 through to September 2002, Brown took orders for trades in both Sutton's personal account and Omega's account.[65] Sutton requested and assented to the trades placed in both his individual personal account, and in Omega's account.[66] Brown kept Sutton fully informed on all trades made in Sutton's personal account and Omega's account. Therefore, Brown clearly disclosed to Omega the positions which Omega held in its futures accounts, as well as the positions Sutton held in his personal account.

In the fall of 2001, Omega lost a great deal of money on its futures accounts.[67] As a result of its financial difficulties, Omega did not meet a margin call, resulting in ABC Bank

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[61] *Gordon v. Shearson Hayden Stone* [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) 21,016 (CFTC 1980).
[62] *Precision Ratios, Inc., v. MAN Financial* at 53,393-56,934
[63] Ex. 11.
[64] Ex. 46.
[65] Ex. 47. Hearing Tr. II at 113-114
[66] Ex. 47.
[67] Ex. 47. On the cash account side, many of the farmers with whom they had contracted to buy cotton, denied that they had valid contracts with Omega. Ex. 44; Hearing Tr. I at 35-36, Hearing Tr. II at 101. Omega at this point had neither cash, nor cotton. Hearing Tr. I at 55-56.

denying their line of credit.[68] ABC had a security agreement with Omega, which allowed ABC to "sweep" and demand payment of Omega's debts out of the balance in Omega's Rosenthal futures account.[69] Sutton testified that, after he was fired he traded in his personal account as a desperate attempt to save Omega from bankruptcy.[70] Sutton appears to have been carrying out the principals' last attempt to turn around their company.[71] Indeed, Brogdon and Powell knew of the existence of Sutton's personal account,[72] and reasonably hoped to gain additional time for the purpose of providing Omega an opportunity to financially turn around. Sutton had conversations with both Brogdon and Powell regarding his personal account, and Sutton testified that Brown faxed daily account statements to Omega's fax machine which was operating close to Brogdon's office.[73] Brogdon clearly knew of Sutton's account as he even traded options through Sutton's personal account for his own benefit.[74]

Based on all these facts, Complainant cannot show that Brown had knowledge of material facts which Omega did not have, and could not have discovered by reasonable diligence.[75] Sutton and Brogdon were aware and thus there is no omission per se. Brown is not liable this claim.

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[68] Hearing Tr. II at 101.
[69] Exs. 9 and 10; Hearing Tr. I. 34-35.
[70] Ex. 10; Hearing Tr. II at 116. Sutton testified that the purpose of having a separate account was that "it was the onliest [sic] way we could hedge anything. Because if we had put it in another account, the bank would have had access to it. If we had left it as Omega Cotton, any money that would have been in there, the bank could have took out at any time."
[71] Hearing Tr. II at 108, Sutton testified that equity runs on the personal account were opened to handle the hedging on Omega Cotton, and the equity runs were faxed to Omega every day.
[72] Hearing Tr. II. at 112 and 116. Sutton testified that Powell signed checks on Sutton's account, and that Brogdon knew of Sutton's account as Sutton had "traded some for him in this account."
[73] Hearing Tr. II at 108, 116 and 120, equity runs were faxed to Omega every day.
[74] Hearing Tr. I at 52 Brogdon testified "I asked Buddy [Sutton] to buy me three option, I did.". Hearing Tr.I at 56-57, and Hearing Tr. II at 116, Sutton testified regarding the personal account "I even traded some for him [Brogdon] in this account."
[75] see *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 267 Kan. 245, 260, 978 P.2d 922, 932 (1999) (Element of fraud by silence is that defendant knew of material facts which plaintiff did not have and could not have discovered by exercise of reasonable diligence).

Allegations as to Rosenthal Collins Group, LLP

Complainant alleges that as Brown's Guaranteeing Broker, Rosenthal is jointly and severally liable for Brown's Section 4b violations. Complainant has not proven any Section 4b violation against Brown, and hence under respondeat superior principles, the Complainant has not proven a violation against Rosenthal as the Guaranteeing Broker.

CONCLUSIONS OF LAW

Complainant has failed to establish by the weight of the evidence that Respondent Keith Brown violated the CEA or Commission regulation in connection with the Omega account. The charge against Brown is dismissed in its entirety.

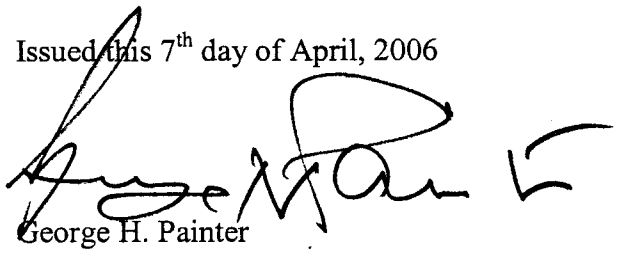
The evidence fails to show that Respondent Rosenthal Collins Group violated the CEA in connection with the Omega or Sutton accounts, or that Rosenthal Collins Group is liable to Complainant by reasons of the guarantee agreement with Respondent Brown. All charges against Rosenthal Collins Group are dismissed with prejudice.

Complainant's claim for costs and attorney's fees is DENIED.

ORDER

So ordered.

Issued this 7th day of April, 2006



George H. Painter
Administrative Law Judge

Steven J. Mickelsen, Law Clerk
Nihan Keser, Extern Law Clerk