

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of : CFTC Docket No. 02-13
JOHN JOYCE, :
Respondent. :
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ORDER MAKING FINDINGS AND IMPOSING SANCTIONS

I.

On July 16, 2002, the Commodity Futures Trading Commission ("Commission") filed a Complaint and Notice of Hearing ("Complaint") against John Joyce and five other respondents. The Complaint charges that Joyce violated Section 4c(a)(1) of the Act and Section 1.38 of the Regulations, and aided and abetted violations of Sections 4b(a)(i)-(iii) of the Act pursuant to Section 13(a) of the Act.

II.

In order to dispose of the allegations and issues raised in the Complaint as to him, Joyce has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Without admitting or denying any of the allegations of the Complaint or the findings herein, Joyce acknowledges service of this Order Making Findings and Imposing Remedial Sanctions ("Order"). Joyce consents to the use of his Offer, this Order, and the findings contained in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Joyce does not consent to the use of his Offer, this Order, or the findings in this Order, consented to in his Offer, as the sole basis for any other proceeding brought by the Commission, other than a proceeding brought to enforce the terms of this Order. Joyce also does not consent to the use of his Offer, this Order, or the findings in the Order by any other person or entity in this or in any other proceeding. The findings made in the Order are not binding on any other person or entity named as a defendant or respondent in this or any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

From January 4, 2000 through October 17, 2000, Joyce entered into wash sales to accommodate indirectly bucketed trades and to accommodate another broker in fraudulently changing the price on a previously executed trade to a worse price for his customer and a better price for Joyce. In so doing, Joyce engaged in wash sales and executing trades at non bona fide prices in violation of Section 4c(a)(1) of the Act, and non-competitive trading in violation of Section 1.38 of the Regulations. Joyce also aided and abetted another broker's illegal price change transaction, in violation of Section 4b(a) of the Act.

B. RESPONDENT

JOHN JOYCE, who resides at 54 Hendel Avenue, North Arlington, New Jersey 07031, has been registered with the Commission as a floor broker pursuant to Sections 4e and 4f of the Act, and a member of the CSCE. At all times relevant to this matter, Joyce was the sole principal of Joyco. Joyce executed orders for Joyco customers and traded for his personal account, primarily in coffee futures on the CSCE.

C. FACTS

1. Wash Sales and Accommodation Trades

From January 4, 2000 through October 17, 2000, Joyce engaged in wash sales and accommodation trades to enable other traders to indirectly bucket their customer orders. In these transactions, Joyce traded for his own account to assist another broker in taking the opposite side of the other broker's customer order.

Joyce noncompetitively engaged in wash sales or accommodation trades on seven occasions. In each case, Joyce bought and sold noncompetitively for his personal account in the same contract month at or at about the same price and time opposite another trader. The other trader would make one trade to fill a customer order and the other trade for his own account. In so doing, the other trader would end up with a position opposite the position of his customer. In each case, Joyce either broke even or made a profit on the two consecutive noncompetitive trades.

In addition, on one occasion, Joyce noncompetitively engaged in wash sales in order to make a profit through another broker's illegal price change transaction.

2. Aiding and Abetting a Fraudulent and Non-Competitive Price Change Transaction

From January 4, 2000 through October 17, 2000, on at least one occasion, a broker trading for a customer changed the price on a trade after execution to a worse price for his customer and a better price for Joyce trading opposite the customer for his personal account. Thus, the customer was deprived of the better original price obtained on the transaction and did not receive competitive execution of his order.

D. LEGAL DISCUSSION

1. ENTERING INTO WASH SALES OR ACCOMMODATION TRADES

Joyce violated Section 4c(a)(1) by engaging in wash sales and accommodation trades. Wash sales are trades undertaken for the purpose of giving the appearance that trades have been executed without positions actually being taken in the market, or without any actual change in the account holder's market position. In *Bear Stearns*, ¶ 24,994 at 37,663, the Commission explained:

In a wash sale, for example, a trader gives the appearance of making independent decisions to buy and then sell (or sell and then buy) one or more futures contracts. His actual intention at the time he initiates the transaction, however, is to both buy and sell the contract at the same or a similar price – in other words, to create a financial and position nullity extraneous to the price discovery and risk shifting functions of the futures market.

Joyce's round-turn accommodation trading for his own account are classic wash sales because in these trades he had no position in the market. They also were illegal accommodation trades because they were noncompetitive trades entered into by one trader to facilitate another trader in making trades prohibited by the Act or Regulations.² Similarly, Joyce engaged in wash sales in order to facilitate another broker's illegal price change transaction, enabling Joyce to make a profit.

2. CHEATING, DEFRAUDING AND DECEIVING CUSTOMERS

Joyce cheated or defrauded, or willfully deceived customers in connection with the execution of customer orders by aiding and abetting another broker in an illegal price change transaction, in violation of Section 4b(a)(i) and (iii).

² See *In re Reddy*, 191 F.3d 109, 115 (2nd Cir. 1999); *Sundheimer v. Commodity Futures Trading Commission*, 688 F.2d 150, 152 (2d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *In re Eisen*, 22 A.D. 758 (1963).

A broker executing customer orders is a fiduciary and has an obligation to act in the best interests of his customers,³ which includes a duty to seek the best possible price for his customers.⁴ As such, executing floor brokers act “on behalf of” their customers, and thus are subject to the anti-fraud provisions of Section 4b of the Act.⁵

Fraud under the Act requires a showing of scienter.⁶ Scienter is established when a respondent commits a wrongful act intentionally or with reckless disregard.⁷ A reckless act is one where there is so little care that it is “very difficult to believe the [actor] was not aware of what he was doing.”⁸ Scienter cannot be avoided by ignorance brought about by willfully or recklessly ignoring the truth.⁹

Joyce willfully aided and abetted another broker’s fraudulent price change. Joyce, while trading for his own account, knowingly participated in the unlawful venture as something that he wished to bring about.¹⁰ In so doing, Joyce knew that he was making a profit at the expense of the other broker’s customer.

3. WILLFULLY MAKING A FALSE RECORD

Section 4b(a)(ii) makes it unlawful for any person in connection with a customer order “willfully to enter or caused to be entered for such person any false record thereof.” Once a trader alters a record so that the record reflects a transaction that did not occur as initially recorded, that record becomes a false record.¹¹ Thus, in those trades where a broker changed the information on his trading card regarding the quantity or price of a trade to fill a customer’s order, he was aided and abetted by the opposite trader and beneficiary of the change, Joyce, in creating a false record in violation of Section 4b(a)(ii).

³ *In re Murphy*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,798, at 31,351-52 (CFTC Sept. 25, 1985).

⁴ *United States v. Ashman*, 979 F.2d 469, 478 (7th Cir. 1992); *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985).

⁵ *In re Murphy*, [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,798 at 31,151 (CFTC Sept. 25, 1985).

⁶ *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206, at 45,810 (CFTC Dec. 18, 1997). See also *Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999).

⁷ *Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990).

⁸ *Do v. Lind-Waldock & Co.*, [2000-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,516, at 43,321 (CFTC Sept. 27, 1995); *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748-49 (D.C. Cir. 1988).

⁹ See *Hammond v. Smith Barney*, [1987-90 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990); see also *Do v. Lind-Waldock & Co.*, ¶ 26,516, at 43,321 (an employee acted recklessly by failing to ascertain the status of an order prior to advising the customer that it was too late to cancel).

¹⁰ *Rousso*, ¶ 27,133 at 45,309 citing *In re Richardson Securities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,145 at 24,643 (CFTC Jan. 21, 1981); see also *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,686 (CFTC Jan. 25, 1991).

¹¹ See *Reddy v. CFTC*, 191 F.3d 109 (2d Cir. 1999) (upholding ALJ’s determination that alteration of records to show a trade that did not originally occur as denoted violates the Act’s prohibition on creating a false record).

4. NONCOMPETITIVE TRADING

By failing to execute trades openly and competitively, Joyce violated Section 1.38 of the Regulations. Noncompetitive trades are generally transacted in accordance with expressed or implied agreements or understandings between the traders and include illegal price changes. Trades can be noncompetitive even though they were executed in the pit.¹² By accommodating other brokers to indirectly bucket their customer orders, Joyce engaged in noncompetitive trading in violation of Section 1.38 of the Regulations.

5. NON BONA FIDE PRICES

Joyce violated Section 4c(a)(1) of the Act, which makes it unlawful to confirm the execution of any commodity futures transaction "if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price."¹³ Bona fide prices are only those prices that result from competitive trading. Joyce executed trades noncompetitively and thus the prices that were reported on his trading cards, to his customers and to CSCE were not bona fide.¹⁴ Such trades are not "bona fide" for purposes of Section 4b(a)(1), even if they accurately reflect the current price prevailing in the pit.¹⁵

IV.

OFFER OF SETTLEMENT

Joyce has submitted an Offer in which he, without admitting or denying the findings herein: (1) acknowledges service of the Complaint and the Order; (2) admits the jurisdiction of the Commission with respect to the matters set forth herein; (3) waives a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63 (1996), and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, et seq. (2001), relating to or arising from this action, and any claim of Double Jeopardy based upon institution of this proceeding or the entry of any order imposing a civil monetary penalty or any other relief; (4) stipulates that the record basis on which the Order may be entered shall consist solely of the Complaint, Order and findings in the Order consented to in the Offer; and (5) consents to the Commission's issuance of the Order, which makes findings as set forth below and: (a) orders Joyce to cease and desist from violating

¹² *In re Buckwalter*, ¶ 24,995 at 37,683 (citing *Laiken v. Dep't of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)).

¹³ *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991).

¹⁴ *See In re Gilchrist*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC January 25, 1991).

¹⁵ *Id.* at n.25; *see also United States v. Winograd*, 656 F.2d 279, 283 (7th Cir. 1981); *CFTC v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979); *In re Goldwurm*, 7 A.D. 265 at 275-276 (1948).

the provisions of the Act and Regulations that he has been found to have violated; (b) imposes a civil monetary penalty upon Joyce of \$25,000; (c) suspends the registration of Joyce for three months; (d) orders Joyce to comply with his undertakings consented to in his Offer.

V.

FINDINGS OF VIOLATIONS

Solely on the basis of the consents evidenced by the Offers, and prior to any adjudication on the merits, the Commission finds that Joyce violated Section 4c(a)(1) of the Act, 7 U.S.C. § 6c(a)(1), and Section 1.38 of the Regulations, 17 C.F.R. § 1.38, and aided and abetted violations of Sections 4b(a)(i-iii) of the Act.

VI.

ORDER

Accordingly, it is hereby ordered that:

1. Joyce shall cease and desist from violating Sections 4b(a)(i)-(iii) and 4c(a)(1) of the Act and Section 1.38 of the Regulations;
2. Joyce shall pay a civil monetary penalty within ten (10) days of the date of this Order in the amount of \$25,000, to be made by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Joyce and the name and docket of this proceeding. Joyce shall simultaneously transmit a copy of the cover letter and the form of payment to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if Joyce fails to pay the full amount of this penalty within fifteen (15) days of the due date, he shall be automatically prohibited from the privileges of all registered entities until he shows to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of payment has been made;
3. Joyce's registration as a floor broker will be suspended for a period of three months beginning on the third Monday after the entry of the Commission Order accepting the Offer (the "Suspension Date");

4. Joyce acknowledges that failure to comply with the Order shall constitute a violation of the Order and may subject him to administrative or injunctive proceedings, pursuant to the Act; and
5. Joyce is directed to comply with his undertakings:
 - a. neither he nor any of his agents or employees shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision affects his: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Joyce shall take all steps necessary to ensure that his agents or employees, if any, understand and comply with this undertaking.
 - b. to cooperate fully with the Commission's Division of Enforcement in this proceeding and any investigation, civil litigation and administrative proceeding related to this proceeding by, among other things: (i) responding promptly, completely, and truthfully to any inquiries or requests for information; (ii) providing authentication of documents; (iii) testifying completely and truthfully; and (iv) not asserting privileges under the Fifth Amendment of the United States Constitution.

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

By the Commission

Jean A. Webb
Secretary to the Commission
Commodity Futures Trading
Commission

Dated: October 8, 2002