

**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**

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COMMODITY FUTURES TRADING COMMISSION

In the Matter of \_\_\_\_\_  
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Casas Sendas Comercio E Industria S.A. \_\_\_\_\_  
:  
:  
-and- \_\_\_\_\_  
:  
:  
Café Nord Corporation, \_\_\_\_\_  
:  
:  
Respondents. \_\_\_\_\_

**CFTC Docket No:** 03-23

**ORDER INSTITUTING  
PROCEEDINGS PURSUANT TO  
SECTIONS 6(c) and 6(d) OF THE  
COMMODITY EXCHANGE ACT  
MAKING FINDINGS AND IMPOSING  
REMEDIAL SANCTIONS**

**I.**

The Commodity Futures Trading Commission ("Commission") has reason to believe that Casas Sendas Comercio E Industria S.A. ("Sendas") and Café Nord Corporation ("Nord") (collectively, "Respondents") have violated Section 4c(a)(A) and (B) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 6c(a)(A) and (B), and Section 1.38 of the Commission's Regulations, 17 C.F.R. § 1.38. Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Sendas and Nord engaged in the violations set forth herein, and to determine whether any order should be issued imposing remedial sanctions.

**II.**

In anticipation of the institution of an administrative proceeding, Sendas and Nord have submitted a Joint Offer of Settlement ("Joint Offer"), which the Commission has determined to accept. Without admitting or denying the findings of fact in this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanctions ("Order"), Sendas and Nord acknowledge service of this Order. Sendas and Nord consent to the use of the findings in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.<sup>1</sup>

**III.**

The Commission finds the following:

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<sup>1</sup> Sendas and Nord do not consent to the use of the Offer or this Order, or the findings to which they have consented in the 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. Sendas and Nord do not consent to the use of the Offer or this Order, or the findings to which they have consented in the Offer, by any other person or entity in this or any other proceeding. The findings to which Sendas and Nord have consented in the Offer, as contained in this Order, are not binding on any other person or entity named as a respondent or defendant in this or in any other proceeding.

**A. SUMMARY**

Prior to December 21, 2000, Sendas and Nord entered into at least nine non *bona-fide* exchange for physicals transactions (“EFPs”)<sup>2</sup>. The EFPs were not executed in accordance with exchange rules and resulted in the reporting of non *bona fide* prices. Accordingly, Nord and Sendas engaged in wash sales and reported non *bona fide* prices in violation of Section 4c(a)(A) & (B)<sup>3</sup> of the Commodity Exchange Act, as amended, 7 U.S.C. §6c(a)(A) & (B), and engaged in non-competitive trading in violation of Section 1.38 of the Commission’s Regulations.

**B. RESPONDENTS**

Casas Sendas Comercio E Industria S.A. is a Brazilian corporation located in Sao Joao de Meriti, Brazil. Its principal business is a chain of supermarkets. Sendas is not registered with the Commission in any capacity.

Café Nord Corporation is a British Virgin Islands corporation located in Tortola, British Virgin Islands. Its principal business is trading in physical coffee. Nord is not registered with the Commission in any capacity.

**C. FACTS**

On November 25, 1997, Nord opened a commodity trading account with a futures commission merchant (“FCM”) through an introducing broker (“IB”). On December 2, 1999, Sendas opened a commodity trading account at the same FCM through the same IB. The trading in both accounts was commonly controlled.

In July 2000, Nord and Sendas executed through their IB at least nine non *bona-fide* EFPs. These transactions were posted on the Coffee, Sugar & Cocoa Exchange (“CSCE”), a subsidiary of the New York Board of Trade (“NYBOT”), and involved the alleged transfer of coffee futures and physical coffee. However, none of the nine EFPs involved the actual transfer of physical coffee. Instead, each transaction was simply a noncompetitive transfer of futures at an agreed upon price which resulted in, and was intended to result in, a profit for one party and a loss for the other.

The EFPs occurred in two different ways. First, on six occasions, Nord used the futures side of an EFP to offset futures positions previously established. For example, on July 18, Nord initiated a short position of 563 September coffee futures contracts. Sendas had previously established a long position in the same contract month. Nord’s short position was then offset via the futures side of an EFP opposite Sendas for 563 September contracts. However, no actual

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<sup>2</sup> An EFP is a transaction in which the buyer of a physical commodity transfers to the seller a corresponding amount of long futures contracts or receives from the seller a corresponding amount of short futures, at a price difference mutually agreed upon.

<sup>3</sup> Sections 4c(a)(A) & (B) were amended by the Commodity Futures Modernization Act of 2000. This Order cites to those Sections of the Act as it existed at the time of the violations.

physical transfer of coffee ever occurred and the transaction resulted in, and was intended to result in, a futures profit for one party and a loss for the other. On five other occasions, Sendas and Nord executed EFPs fitting this pattern.

Second, on three occasions, Nord executed consecutive EFPs that resulted in high futures profits. For example, on July 19, Nord bought 87 December coffee futures contracts in the futures leg of an EFP opposite a third party. Nord then sold 90 December contracts in the futures leg of an EFP opposite Sendas, offsetting the position established in the previous EFP. Again, no actual physical transfer of coffee ever occurred and the transaction resulted in, and was intended to result in, a futures profit for one party and a loss for the other. On two other occasions, Sendas and Nord executed EFPs fitting this pattern.

#### **D. LEGAL DISCUSSION**

##### **1. Sendas and Nord Entered Into Wash Sales in Violation of Section 4c(a) of the Act**

Section 4c(a)(A) makes it unlawful for any person to “offer to enter into, enter into or confirm the execution of a transaction” if such transaction “is, is of the character of, or is commonly known to the trade as, a ‘wash sale’ . . . .” The central characteristic of a wash sale is the intent to avoid making a *bona fide* trade or taking a *bona fide* position. *In re Citadel Trading Co.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,190 (CFTC May 12, 1986). The Commission has held that intent in wash sales cases may be inferred from the facts and circumstances underlying the challenged transactions, and that, in particular, where a transaction is characterized by virtually simultaneous orders to buy and sell the same commodity futures contract at the same or similar price, it may be inferred that the trader did not intend to take a *bona fide* position. *Id.*

In this case, the pattern of trading in the two accounts suggests there was no intent to take a *bona fide* position in the market. In the first set of trades, Nord established a short futures position via day trading. Sendas held a long position in the same contract month. These two opposite positions were then offset via the futures portion of an EFP between the two companies. The noncompetitive nature of the EFP allowed prices to be set for the futures portion of the EFP without exposure to market risk and that resulted in futures profits in one account and futures losses in the other account.

The other EFPs executed between the two companies followed a similar pattern. On three occasions, Nord executed an EFP with a third party, establishing a futures position opposite an already existing position in the Sendas account. The two opposite futures positions were then offset via the futures portion of an EFP between the two companies. Again, the noncompetitive nature of the EFP allowed prices to be set for the futures portion of the EFP necessarily established profits and losses in the futures accounts of both parties.

Thus, the trades were structured to avoid taking the market risk that legitimate trading entails, and were, accordingly, wash sales, in violation of Section 4c(a)(A) of the Act.

2. **Sendas and Nord Executed Noncompetitive Transactions That Were Not in Compliance with Exchange Rules in Violation of Commission Regulation 1.38**

Commission Regulation 1.38 requires that all purchases and sales of commodity futures contracts be executed openly and competitively except for certain noncompetitive transactions executed in accordance with the rules of the contract market. EFPs are such permitted noncompetitive transactions, provided they are executed in accordance with CSCE rules. The EFPs entered on behalf of the Sendas and Nord accounts were not executed in accordance with CSCE rules.

At the time of the trades in question, CSCE set forth the following requirements for EFPs in CSCE Rule 3.06:

The buyer and seller under the EFP shall be the seller and the buyer respectively for the delivery of a quantity of the cash commodity approximately equivalent to the quantity covered by Exchange contracts.

In the trades between Sendas and Nord, neither Sendas nor Nord were a buyer or seller for delivery of a quantity of the cash commodity in any of the transactions and the transactions do not meet the requirements of CSCE Rule 3.06. Therefore, the noncompetitive EFPs were not done in compliance with exchange rules. Accordingly, they are not permitted noncompetitive transactions under Regulation 1.38(a).

3. **Sendas and Nord Reported, Registered, or Recorded Transactions at Non-Bona Fide Prices When They Executed the Noncompetitive EFPs**

Section 4c(a)(B) of the Act also 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 that is not a true and *bona fide* price."<sup>4</sup> By entering into trades that were not permitted by the Act or CSCE rules, Sendas and Nord caused prices to be reported to the CSCE that were not *bona fide*. Accordingly, Sendas and Nord violated Section 4c(a)(B) of the Act.

#### IV.

#### **OFFER OF SETTLEMENT**

Sendas and Nord have submitted an Offer in which they, without admitting or denying the findings herein: (1) acknowledge service of the Order; (2) admit the jurisdiction of the Commission with respect to the matters set forth herein; (3) waive 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 they may possess under the Equal

<sup>4</sup> See *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991).

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) stipulate that the record basis on which the Order may be entered shall consist solely of the Order and findings in the Order consented to in the Offer; and (5) consent to the Commission's issuance of the Order, which makes findings as set forth below and: (a) orders Sendas and Nord to cease and desist from violating the provisions of the Act and Regulations that they have been found to have violated; (b) imposes a civil monetary penalty upon Sendas and Nord of \$10,000 each; (c) orders Sendas and Nord to comply with the undertakings consented to in his Offer.

## V.

### FINDINGS OF VIOLATIONS

Solely on the basis of the consents evidenced by the Joint Offer, and prior to any adjudication on the merits, the Commission finds that Sendas and Nord have violated Section 4c(a)(A) & (B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6c(a)(A) & (B), and Section 1.38 of the Commission's Regulations, 17 C.F.R. § 1.38.

## VI.

### ORDER

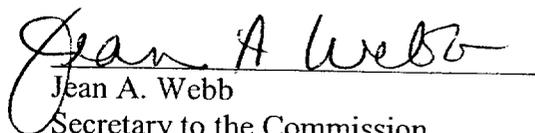
Accordingly, it is hereby ordered that:

1. Sendas and Nord cease and desist from violating Section 4c(a) of the Act and Section 1.38 of the Regulations;
2. Sendas and Nord each pay a civil monetary penalty in the amount of ten thousand dollars (\$10,000) due within ten days of the date of the Order; payment is 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 the payor (Sendas or Nord) and the name and docket of this proceeding. Sendas and Nord 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 21<sup>st</sup> Street, N.W., Washington, D.C. 20581. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if Sendas or Nord fail to pay the full amount within fifteen (15) days of the due date, they shall be automatically prohibited from the privileges of all registered entities until they show to the satisfaction of the Commission that payment of the full amount with interest thereon to the date of payment has been made;

3. Sendas and Nord acknowledge that failure to comply with the Order shall constitute a violation of the Order and may subject them to administrative or injunctive proceedings, pursuant to the Act; and
4. Sendas and Nord are directed to comply with their undertakings:
  - a. neither Sendas nor Nord shall engage in any exchange for physical transactions (“EFPs or AAs”) in which the physical commodity coffee is actually transferred or an exchange for physical transaction in which the physical commodity coffee is reported as being transferred from Nord to Sendas; provided that nothing herein shall prohibit Nord and Sendas from purchasing and selling physical coffee between themselves in the ordinary course of business, nor shall it prohibit Nord and Sendas from transacting an EFP in which physical coffee is transferred from Sendas to Nord.
  - b. neither Sendas nor Nord nor any of their 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 their: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Sendas and Nord shall take all steps necessary to ensure that their agents or employees, if any, understand and comply with this undertaking.
  - c. Sendas and Nord will 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

A handwritten signature in cursive script that reads "Jean A. Webb". The signature is written in black ink and is positioned above a horizontal line.

Jean A. Webb

Secretary to the Commission

Commodity Futures Trading Commission

Dated: August 18, 2003