

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:

Michael Alan Garber

Respondent.

CFTC Docket No. 03-24

**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 Michael Alan Garber ("Garber") has violated Section 4c(a) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 6c(a) (1994), and Commission Regulation 1.38, 17 C.F.R. § 1.38 (2003). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Garber engaged in the violations set forth herein, and to determine whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Garber has submitted an Offer of Settlement (the "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, Making Findings and Imposing Remedial Sanctions ("Order"), and prior to any adjudication on the merits, Garber acknowledges service of this Order. Garber consents 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.¹

¹ Garber does not consent to the use of the Offer or this Order as the sole basis for any other proceeding brought by the Commission other than a proceeding to enforce the terms of this Order, nor does Garber consent to the use of the Offer, or the findings in the Order consented to in the Offer, by any other person or entity in this or 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 any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

In July 2000, Garber, trading for his own account, executed a series of trades opposite an independent floor broker on the New York Mercantile Exchange ("NYMEX"), through which they bought and sold Crude Oil futures contracts in the same quantities and contract months and at the same prices which, when averaged at the end of the day, netted neither a profit nor a loss to either of them. Garber and the floor broker entered into those trades with the intent to avoid taking *bona fide* positions in the market. Such trading constitutes wash sales in violation of Section 4c(a)(A) of the Act² and Regulation 1.38. By entering into such illegal, non-competitively executed trades, Garber and the floor broker reported, or caused to be reported, prices that were not true and *bona fide*, in violation Section 4c(a)(B).

B. RESPONDENT

Michael Alan Garber resides in Forest Hills, New York, 11375. Garber has been registered with the Commission as a floor broker since 1995 and has been a member of the NYMEX since January 1995.

C. FACTS

On at least four days in July 2000, Garber entered into a series of trades on the NYMEX that constituted illegal wash transactions. Trading for their personal accounts, Garber and an independent floor broker bought and sold Crude Oil futures contracts in the same quantities and contract months and at the same averaged prices. The net outcome was neither a gain nor loss to either Garber or the broker. Garber and the floor broker engaged in this trading in order to improve their rates for submitting their Pit Cards to the Exchange within the required time limits.³ Garber had been previously disciplined by NYMEX for failing to maintain an adequate Pit Card submission rate, resulting in disciplinary fines.

² Sections 4c(a)(A) and (B) of the Act 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.

³ NYMEX Rule 6.10, Reporting of Trades Executed on the Trading Floor, requires that floor brokers ensure that their Pit Cards are submitted to the pit within one minute of execution.

D. LEGAL DISCUSSION

1. Respondent Engaged in Wash Sales in Violation of Section 4c(a)(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 a 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.*

The Commission has articulated a three-part test “to establish that a wash sale has occurred, [in which] the Division must initially demonstrate that the transaction at issue achieved a wash result. The factors that show a wash sale are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685 (CFTC Sept. 29, 2000) (citing *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991)).

The pattern of trading between Garber and the independent floor broker demonstrates there was no intent to take a *bona fide* position in the market. On each of the suspect days, Garber and the floor broker intentionally tried to improve their Pit Card submission rate by establishing equal and opposite positions, buying and selling the same futures contract, for the same delivery month, at the same averaged prices. The non-competitive nature of the trades ensured that neither broker would gain or lose as a result of their trading. Thus, the trades avoided taking the risk that legitimate futures trading involves, and were, accordingly, wash sales in violation of Section 4c(a)(A) of the Act.

2. Respondent Engaged in Non-Competitive Trading In Violation of Regulation 1.38 of the Commission Regulations

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 exchange rules. Non-competitive trades are generally transacted in accordance with expressed or implied agreements or understandings between and among the traders. *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,652 (CFTC Jan. 25, 1991). Trades can be noncompetitive even though they were executed in the pit. *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,683 (CFTC Jan. 25, 1991)(citing *Laiken v. Dep’t of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)). As set forth above, Garber and the independent floor broker’s trades avoided the market

risk that legitimate, competitive trading entails. Accordingly, Garber failed to execute his trades openly and competitively and thus violated Section 1.38 of the Commission Regulations.

3. Respondent Reported Non-Bona Fide Prices In Violation of Section 4c(a)(B)

Section 4c(a)(B) of the Act 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." See, e.g., *In re Gilchrist*, ¶ 24,993 at 37,653. Garber and the floor broker separately and together unlawfully caused trades to be executed non-competitively. Thus, the prices that were reported to the NYMEX were not true and *bona fide*. Accordingly, Garber violated Section 4c(a)(B) of the Act.

IV.

OFFER OF SETTLEMENT

Garber has submitted an Offer of Settlement in which, without admitting or denying the findings herein, and prior to any adjudication on the merits, he acknowledges service of the Order, admits jurisdiction of the Commission with respect to the matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based upon violations or for enforcement of the Order; waives service of a complaint and notice of hearing, 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, any claim of double jeopardy based on the institution of this proceeding or the entry of any order imposing a civil monetary penalty or other relief, and all claims which they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. Section 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-232, 110 Stat. 862-63, and part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2003), relating to, or rising from, this action; stipulates that the record basis upon which this order is entered consists solely of this Order, including the findings in this Order; consents to the Commission's issuance of this Order, in which the Commission makes findings, including findings that Garber violated Section 4c(a)(A) and (B) of the Act and Commission Regulation 1.38 and orders that Garber cease and desist from violating the provisions of the Act and Regulation he has been found to have violated; pay a civil monetary penalty of seven-thousand five hundred dollars (\$7,500), and comply with the undertaking set forth below.

V.

FINDING OF VIOLATIONS

Based on the foregoing the Commission finds that Garber violated Section 4c(a)(A) and (B) of the Act, 7 U.S.C. §§ 6c(a) (1994), and Commission Regulation 1.38, 17 C.F.R. § 1.38 (2003).

VI.

ORDER

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Garber shall cease and desist from violating Section 4c(a)(A) and (B) of the Act, and Commission Regulation 1.38.

2. Garber shall pay a civil monetary penalty of seven-thousand five hundred dollars (\$7,500), within ten (10) business days of the entry of this Order. Respondent shall make such payment by electronic funds transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable to the Commodity Futures Trading Commission and addressed to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington D.C. 20581, under cover of a letter that identifies Garber and the name and docket number of the proceeding. A copy of the cover letter and the form of payment shall be simultaneously transmitted to Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 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 Garber fails to make payment of his penalty within fifteen (15) days of the due date, he shall be automatically prohibited from trading on or subject to the rules of any registered entity as defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), and his registration with the Commission shall be suspended automatically 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.

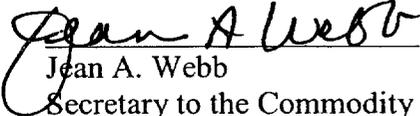
3. Garber shall comply with the following undertaking:

Public Statements

Garber agrees that neither he nor any of his agents or employees acting under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings 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 Garber's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Garber will undertake all steps necessary to assure that all of his agents and employees understand and comply with this agreement.

The provisions of this Order shall be effective on this date. A copy of this Order shall be served on all contract markets, and on the National Futures Association.

By the Commission.


Jean A. Webb
Secretary to the Commodity
Futures Trading Commission

Date: September 8, 2003