

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

**In the Matter of:**

**PRUDENTIAL SECURITIES  
INCORPORATED, et al.,**

**Respondents.**

**CFTC Docket No. 97-8**

**ORDER MAKING FINDINGS AND  
IMPOSING REMEDIAL SANCTIONS  
AS TO RESPONDENT KEVIN  
MARSHBURN**

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**I.**

On May 20, 1997, the Commodity Futures Trading Commission (the "Commission") filed a Complaint and Notice of Hearing (the "Complaint") against Kevin Marshburn and others. The Complaint charges, among other things, that Marshburn violated Sections 4b(a) (i), (ii) and (iii) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6b(a) (i), (ii) and (iii) and pursuant to Section 13(a) of the Act, 7 U.S.C. § 13(c) aided and abetted violations of Section 4g of the Act, 7 U.S.C. § 6g, and Sections 1.31(a), 1.35(a), and 1.35(a-1)(1) of the Regulations, 17 C.F.R. §§ 1.31(a), 1.35(a), and 1.35(a-1)(1).

## II.

In order to dispose of the allegations and issues raised in the Complaint, Marshburn 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, Marshburn acknowledges service of this Order Making Findings and Imposing Remedial Sanctions (“Order”) and consents to the use of 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.<sup>1</sup>

## III.

The Commission finds the following:

### A. SUMMARY

From May 1993 through March 1994, Marshburn, while registered as an Associated Person (“AP”) of Prudential Securities, Inc. (“PSI”) trading Frozen Concentrated Orange Juice (“FCOJ”) futures contracts on the Citrus Associates of the New York Cotton Exchange (“CANYC”) engaged in a fraudulent trade allocation scheme. In addition, Marshburn accepted orders from certain customers without immediately preparing a written record of the customer orders including account identification and entered such customer orders to the trading floor of the CANYC without providing account identification to the floor broker.

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<sup>1</sup> Marshburn does not consent to the use of his Offer or this Order, or the findings to which he has consented 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. Nor does Marshburn consent to the use of his Offer, this Order, or the findings consented to in his Offer by any other party in any other proceeding. The findings to which Marshburn has consented in his 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.

**B. SETTling RESPONDENT**

Kevin Marshburn was employed by PSI from approximately January 7, 1991 through approximately June 8, 1994 as an account executive who solicited and accepted customer orders for commodity interest accounts. He was registered with the Commission as an AP of PSI from January 7, 1991 to June 8, 1994, pursuant to Section 4k of the Act, 7 U.S.C. § 6k. He is currently not registered with the Commission or employed in the commodity futures industry.

**C. FACTS**

Between January 1991 and June 1994, Marshburn, was employed as an account executive in PSI's Orlando, Florida office. The majority of his customers were FCOJ commercial entities, which primarily hedged physical product in FCOJ futures. Between May 1993 and March 1994, Marshburn had a personal futures account at PSI which he actively traded almost exclusively in FCOJ futures. He frequently traded the same contract months and quantities as one or more of his customers.

At various times between May 1993 through March 1994, Marshburn, accepted, or caused others to accept, orders from certain customers for trades involving FCOJ futures without immediately preparing a written record of the customer orders that included account identification and the time, within the nearest minute, the order was received. Marshburn then entered, or caused others to enter, orders to the trading floor of the CANYC without providing account identification to the floor broker and without recording account identification on the office orders at the time.

After the orders were executed, Marshburn allocated the trades he entered or caused to be entered without account identification, either to his personal account or to

one or more of three specific customer accounts. Marshburn allocated trades at better prices or profitable roundturn trades to his personal account and trades at worse prices or less profitable or losing trades to the customer accounts thereby defrauding his customers.

Finally, Marshburn aided and abetted PSI's failure to retain and produce unfilled or canceled customer orders prepared during the period of May 1993 through March 1994.

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

Marshburn violated Section 4b(a)(i) by fraudulently allocating trades. The Commission has long held that the intentional allocation of trades to disadvantage one or more customers constitutes fraud under Section 4b(a) of the Act. *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,360, at 39,215 (CFTC August 11, 1992), *aff'd sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) ("*GNP*"). *In re Lincolnwood Commodities*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,243-28,246 (CFTC Jan. 31, 1984). As the Commission emphasized in *GNP*, proof of an allocation scheme that disadvantages one or more customers may be found in both the "opportunity" to allocate trades and in the comparison of trading results among accounts. *GNP* ¶ 25,360 at 39,215. The "opportunity" to allocate exists whenever orders are entered to the floor of the exchange without simultaneous identification of accounts.

The importance of this singular fact cannot be overstated. It is self-evident that had account identification been affixed to these orders before their transmission to the floor, as required by Commission Rule 1.35(a-1)(a), these orders would have belonged to individual customers from their inception, and the opportunity to fraudulently allocate the ensuing fills would not have been created.

*Id.* ¶ 25,360 at 39,215, n.8. In addition, the trading results provide independent evidence of the allocation. As the Commission stated in *Lincolnwood*, “actual day trading results...[speak] for themselves and may be used as circumstantial proof permitting the factfinder to infer that allocation had taken place....” *Lincolnwood*, ¶ 21,986 at 28, 244.

By his actions in fraudulently allocating trades, Marshburn also violated Sections 4b(a)(ii) and (iii) by willfully making or causing to be made false reports or statements, or entering or causing to be entered false records in connection with the execution of his customer’s orders and deceiving his customers by failing to disclose his allocation system. See *CFTC v. Savage*, 611 F.2d 270, 283 (9<sup>th</sup> Cir. 1979) (a single act may violate more than one subsection of Section 4b). By affixing customers’ account identification to orders not executed specifically for them, Marshburn created, or caused to be created, false records, and by reporting fills on those orders, made false reports to his customers. See *In re Murphy*, [1984-1985 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,798 at 31,351 (CFTC Sept. 25, 1985) (floor broker falsified records by altering records and reports and committed fraud in violation of Section 4b(A), (B) and (C)).

Marshburn also deceived each of his customers whose accounts he used in his trade allocation scheme by failing to disclose to them the material fact that he entered their orders to the floor of the exchange without providing account identification and later allocating trades to their accounts depending on the prices at which the trades are executed. Such deceptions and omissions represent fraud under Section 4b. *Parciasepe v. Shearson, Hayden, Stone Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,464 at 30,068 (CFTC Jan. 2, 1985) (holding that an AP omitted material facts by failing to disclose to his customer that he was entering trades for the customer

accounts by placing orders to the floor without completing the office order and allocating trades at his discretion after the fills had been reported back).

Pursuant to Section 4g of the Act and Regulation 1.31, a futures commission merchant (“FCM”) is required to maintain books and records, including original records of orders for customer accounts, for a period of five years, and to make those records available for inspection. Regulation 1.35(a) specifies that unfilled and canceled office order tickets are among the records that are required to be retained and produced for inspection. Regulation 1.35(a-1)(1) requires that upon receipt of a customer order, an FCM shall prepare a written record of such order, including the account identification and order number, and shall record on the order the date and time, to the nearest minute, the order is received. As previously stated, failing to place account identification on order tickets immediately upon receipt of orders “provide[s] an opportunity to direct profitable fills to favored accounts.” *GNP*, ¶ 25,360 at 39, 214.

Although these recordkeeping duties are imposed directly on FCMs, FCM employees “play a vital day-to-day role in the record keeping systems maintained by FCMs.” *In re Shahrokh Nikkiah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,887-49,888 (CFTC May 12, 2000). In *Nikkiah*, the Commission noted that APs “are often delegated their employing FCM's responsibility for preparing the ‘written record’ of customers orders required by Rule 1.35(a-1). Such delegation does not impose a direct regulatory obligation on the AP. It does, however, create an opportunity for APs . . . to aid and abet an FCM's failure to meet its regulatory responsibilities.” *Id.* at 49,888. Marshburn was similarly delegated PSI's recordkeeping

obligations, creating the same opportunity for him to aid and abet the FCM's failure to meet its regulatory responsibilities.

Liability as an aider and abettor requires proof that (1) the Act was violated, (2) the named respondent had knowledge of the wrongdoing underlying the violation, and (3) the named respondent intentionally assisted the primary wrongdoer. *Id.* at fn. 28.

Marshburn, as an FCM employee, did not properly and completely prepare the written records of customer orders required of an FCM by Regulation 1.35(a-1)(1). He knew that specific account identification was required to be recorded on an office order ticket immediately upon receipt of the order from the customer; however, he accepted orders without obtaining account identification. Marshburn also knowingly entered orders to the trading floor of the CANYC without providing account identification to the floor broker and without recording account identification on the office orders at the time. In addition, Marshburn also willfully aided and abetted PSI's failure to retain and produce its unfilled or canceled orders for inspection. Under the Act, the FCM is held responsible for the recordkeeping of its employees. *See GNP, supra*, ¶ 25,360 at 39217-218. As a result of the conduct of Marshburn, PSI violated Section 4g of the Act and Regulations 1.31(a), 1.35(a), and 1.35(a-1)(1). Marshburn, thus, aided and abetted PSI's violations.

Section 13(a) of the Act provides:

Any person who commits, or who willfully aids, abets counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, or orders may be held responsible for such violation as a principal.

By willfully aiding and abetting PSI's violations, Marshburn violated Section 4g of the Act and Commission Regulations 1.31(a), 1.35(a), and 1.35(a-1)(1).

#### IV.

#### OFFER OF SETTLEMENT

Respondent has submitted an Offer of Settlement in which he neither admits nor denies the allegations of the Complaint or the findings in this Order. Subject to the foregoing, Marshburn acknowledges service of the Complaint and this Order and admits the jurisdiction of the Commission with respect to the matters set forth in the Complaint and this Order; waives: (1) a hearing; (2) all post-hearing procedures; (3) judicial review by any court; (4) any objection to the staff's participation in the Commission's consideration of his Offer; (5) 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. 862-863, and Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.*, relating to or arising from this action; and (6) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief.

Marshburn stipulates that the record basis on which this Order is entered consists of the Complaint, this Order and the findings to which he has consented in his Offer, which are incorporated in this Order. Marshburn consents to the Commission's issuance of this Order, which makes findings as set forth herein, imposes remedial sanctions and orders him to comply with his undertakings.

V.

**FINDING OF VIOLATIONS**

Solely on the basis of the consent evidenced by Marshburn's Offer, and prior to any adjudication on the merits, the Commission finds that Marshburn violated Sections 4b(a) (i), (ii) and (iii) and 4g of the Act and Regulations 1.31(a), 1.35(a) and 1.35(a-1)(1).

**VI.  
ORDER**

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Marshburn shall cease and desist from violating Sections 4b(a)(i), (ii) and (iii) and 4g of the Act and Regulations 1.31(a), 1.35(a), and 1.35(a-1)(1);
- B. Beginning on the third Monday after the date of this Order, Marshburn shall be prohibited for ten years from trading on or subject to the rules of any contract market and all contract markets shall refuse him trading privileges;
- C. Marshburn shall liquidate all futures and options held by him or on his behalf, or in which he has any beneficial interest, before commencement of the denial of his trading privileges;
- D. Marshburn pay a civil monetary penalty ("CMP") in an amount of up to \$159,000.00 (one hundred and fifty-nine thousand dollars), pursuant to a ten year payment plan (the "payment plan"). Marshburn shall pay \$10,000 as his first payment within ten (10) days of the date of the entry of the Order as provided below. Thereafter, Marshburn shall pay post-judgment interest on the remaining \$149,000 from the date of this Order until his civil monetary penalty is paid in full, at the Treasury Bill rate prevailing on the date of this Order, pursuant to 28 U.S. C. § 1961(a). Marshburn shall make an annual civil monetary penalty payment ("Annual CMP Payment"), as calculated under the payment plan by the monitor designated by the Commission ("the Monitor") on or before July 31 of each calendar year, starting in calendar year 2004 and continuing for ten years,<sup>2</sup> or until the civil monetary penalty is paid in full, if that happens first. Marshburn shall make each such Annual CMP Payment by electronic funds transfer, or by 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, or her successor, Division of Enforcement, Commodity Futures Trading

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<sup>2</sup> Marshburn's ten year CMP period shall run from January 1, 2003 through December 31, 2012. Annual CMP Payments for a calendar year shall take place by July 31 of the following year. Therefore, the final Annual CMP Payment for the year 2012 will occur on or before July 31, 2013.

Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Marshburn and the name and docket number of the proceeding; Marshburn shall simultaneously transmit a copy of the cover letter and the form of payment to the Monitor and to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581;

E. The National Futures Association is hereby designated as the Monitor with respect to the annual CMP payment for a period of eleven years. Notice to the Monitor shall be made to Daniel A. Driscoll, Executive Vice-President, Chief Compliance Officer, or his successor at the following address: National Futures Association, 200 W. Madison St., Chicago, IL 60606;

F. The amount of Marshburn's Annual CMP Payment shall consist of a portion of (1) the adjusted gross income (as defined by the Internal Revenue Code) earned or received by Marshburn during the course of the preceding calendar year, plus (2) all other net cash receipts, net cash entitlements or net proceeds of non-cash assets received by Marshburn during the course of the preceding calendar year. The Annual CMP Payment will be determined as follows:

<b>Where Adjusted Gross Income Plus Net Cash Receipts Total:</b>	<b>Percent of Total to be Paid by Marshburn is:</b>
Up to \$25,000	0%
\$25,000 - \$50,000	20% of the amount between \$25,000 and \$50,000;
\$50,000 - \$100,000	\$5,000 (this represents 20% of the amount between \$25,000 and \$50,000) plus 30% of the amount between \$50,000 and \$100,000;
Above \$100,000	\$20,000 (this represents 20% of the amount between \$25,000 and \$50,000, plus 30% of the amount between \$50,000 and \$100,000) plus 40% of the amount above \$100,000

G. Marshburn shall comply with his undertakings, as set forth in Section III of this Order.

## VII.

In consideration of the Commission's acceptance of this Offer, and solely by virtue of this Offer, Marshburn undertakes as follows:

A. Reporting/Disclosure Requirements to be Reviewed by Monitor.

Marshburn shall provide his sworn financial statement and complete copies of his signed and filed federal income tax returns, including all schedules and attachments thereto (e.g. IRS Forms W-2 and 1099) as well as any filings he is required to submit to any state tax or revenue authority, for the preceding calendar year on or before June 1 of each calendar year, starting on June 1, 2004, and continuing for ten years or until the civil monetary penalty is paid in full, whichever occurs first. The financial statement shall provide:

- i. a true and complete itemization of all of Marshburn's rights, title and interest in (or claimed in) any asset, wherever, however and by whomever held;
- ii. an itemization, description and explanation of all transfers of assets with a value of \$1,000 or more made by or on behalf of Marshburn over the preceding twelve-month interval; and
- iii. a detailed description of the source and amount of all of Marshburn's income or earnings, however generated.

In the event Marshburn moves his residence at any time, he shall provide written notice of his new address to the Monitor and the Commission through Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, or his successor, at 1155 21<sup>st</sup> Street, N.W., Washington D.C. 20581, within ten (10) calendar days thereof.

B. If during the same time period, Marshburn elects to file a joint tax return, he shall provide all documents called for by this paragraph, including the signed and filed joint tax return, plus a draft individual tax return prepared on IRS Form 1040

accompanied by an affidavit or other statement made under penalties of perjury by a licensed certified public accountant who is fully familiar with the joint return and all the information upon which it is based and, based thereon, declaring that he or she has examined the draft individual return and supporting schedules and attachments and that to the best of his or her knowledge and belief they are true, correct and complete. The "Adjusted Gross Income" section shall accurately and completely identify all deductions that Marshburn has a right to claim, and that the deductions contained in the "Adjusted Gross Income" section are equal to or less than 50% of the deductions that Marshburn is entitled to claim on the joint tax return; provided that Marshburn may claim 100% of the deductions contained in the "Adjusted Gross Income" section that are solely Marshburn's. Such individual tax return shall include all schedules and attachments thereto (e.g., IRS Forms W-2 and 1099), as well as any filing required to be submitted by any state tax or revenue authority.

C. Cooperation. Marshburn shall cooperate fully and expeditiously with the Monitor and the Commission in carrying out all aspects of his Annual Payment. He shall cooperate fully with the Monitor and the Commission in explaining his financial income and earnings, status of assets, financial statements, asset transfers, tax returns, and shall provide any information concerning himself as may be required by the Commission. Furthermore, Marshburn shall provide such additional information and documents with respect thereto as may be requested by the Monitor or the Commission.

D. Fraudulent Transfers. Marshburn shall not transfer or cause others to transfer funds or other property to the custody, possession, or control of any member of

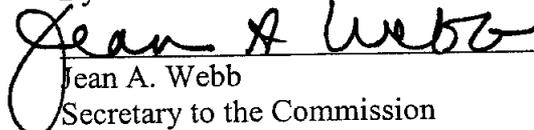
Marshburn's family or any other person for the purpose of concealing such funds or property from the Monitor or the Commission.

E. Registration With The Commission. Marshburn shall never apply for registration or seek exemption from registration with the Commission in any capacity, and shall never engage in any activity requiring registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission Regulations, 17 C.F.R. § 4.14(a)(9); act, directly or indirectly, as a principal, officer or director of any person registered, required to be registered or exempted from registration, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations; act, directly or indirectly, in a supervisory capacity over any person employed by any person registered, required to be registered or exempted from registration, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations.

F. Public Statements. Marshburn shall not take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or finding in the Order, or creating, or tending to create, the impression that the Complaint or Order is without a factual basis; provided, however, that nothing in this provision affects Marshburns's: (i) testimonial obligations; or (ii) right to take appropriate legal positions in other proceedings to which the Commission is not a party.

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

By the Commission.

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

Dated: November 18, 2003