

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Robert Benjamin Harmon, Jr.

Respondent.

CFTC Docket No. 03-25

**ORDER MAKING  
FINDINGS AND IMPOSING  
REMEDIAL SANCTIONS**

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I.

On September 8, 2003, the Commodity Futures Trading Commission ("Commission") issued a Complaint and Notice of Hearing against Robert Benjamin Harmon, Jr. ("Harmon"). The Complaint charges that Harmon violated Section 4c(a)(A) and (B) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6c(a)(A) and (B) (1994), and Section 1.38 of the Commission's Regulations, 17 C.F.R. § 1.38 (2002) ("Regulations").

II.

Harmon has submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. Harmon acknowledges service of this Order Making Findings and Imposing Remedial Sanctions ("Order"). Harmon, without admitting or denying the findings of fact or conclusions of law herein, 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>

<sup>1</sup> Harmon does not consent to the use of the Offer or this Order, or the findings consented to in the Offer as entered in this Order, 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 he consent to the use of the Offer or this Order, or the findings consented to in the Offer as entered in this Order, by any other party in any other proceeding. The findings made in this 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

In July 2000, Harmon, trading for his own account, executed a series of trades opposite a 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. Harmon 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 Act<sup>2</sup> and Regulation 1.38. By entering into such illegal, non-competitively executed trades, Harmon 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

**Robert Benjamin Harmon, Jr.** resides in Cos Cob, Connecticut, 06807. Harmon has been registered as a floor broker since February 2000 and has been a member of the NYMEX since January 2000, and has been a member of the COMEX since March 1979.

#### C. FACTS

On at least four days in July 2000, Harmon entered into a series of trades on the NYMEX that constituted illegal wash transactions. Trading for their personal accounts, Harmon and another 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 Harmon or the other broker. Harmon 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.<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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 Harmon and the other floor broker demonstrates there was no intent to take a *bona fide* position in the market. On each of the suspect days, Harmon and the other 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, Harmon and the other floor broker’s trades avoided the market risk

that legitimate, competitive trading entails. Accordingly, Harmon 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. Harmon and the other 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, Harmon violated Section 4c(a)(B) of the Act.

IV.

**OFFER OF SETTLEMENT**

Harmon 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.* (2002), 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 Harmon violated Section 4c(a)(A) and (B) of the Act and Commission Regulation 1.38 and orders that Harmon 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 eight-thousand five hundred dollars (\$8,500), and comply with the undertaking set forth below.

V.

**FINDING OF VIOLATIONS**

Based on the foregoing the Commission finds that Harmon violated Section 4c(a)(A) and (B) of the Act, 7 U.S.C. §§ 6c(a)(A) and (B) (1994), and Commission Regulation 1.38, 17 C.F.R. § 1.38 (2002).

VI.

**ORDER**

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

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

2. Harmon shall pay a civil monetary penalty of eight thousand five hundred dollars (\$8,500), within ten (10) 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 21<sup>st</sup> Street, N.W., Washington D.C. 20581, under cover of a letter that identifies Harmon 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 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 Harmon 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. Harmon shall comply with the following undertaking:

**Public Statements**

Harmon 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 Harmon's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Harmon 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: January 16, 2004