

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

**MIRANT AMERICAS ENERGY
MARKETING, LP,**

Respondent.

)
) **CFTC Docket No. 05-05**
)

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

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I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Mirant Americas Energy Marketing, LP (“MAEM” or “Respondent”), a wholly owned indirect subsidiary of Mirant Corporation, has violated Section 9(a)(2) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. § 13(a)(2) (2002). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether MAEM 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, Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Without admitting or denying the findings of fact herein, Respondent consents to the entry of this Order, and acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”).¹ Respondent consents to the use by the Commission of the findings herein in this proceeding brought by the Commission and in any other proceeding brought by the Commission or to which the Commission is a party.²

¹ MAEM and Mirant have obtained prior approval from the United States Bankruptcy Court for the Northern District of Texas (Bankruptcy Case No. 03-46590 (DML) (jointly administered) (the “Authorization Order”)) to enter into this Order. The terms of the allowance, treatment and classification of the civil monetary penalty provided for in Section VI of this Order are set forth in, and shall be governed by, the Authorization Order.

² Respondent does not consent to the use of the Offer or the findings in this Order as the sole basis for any other proceeding brought by the Commission, except that respondent does consent to the use by the Commission of the Offer or the findings in this Order in the Bankruptcy Case or to enforce the terms of this Order. Respondent does not consent to the use of the Offer or the findings in this Order by any other person or entity in this or any other proceeding. The findings made in this Order are not binding on any other person or entity, including, but not limited to, any person or entity named as a defendant or respondent in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

From January 2000 through December 2001, MAEM, through employees trading natural gas, knowingly reported as MAEM transactions, false price, volume, and/or counterparty information concerning natural gas cash transactions, information concerning fictitious trades, and/or trades observed in the market to certain reporting firms. Between January and October 2000, certain MAEM west region traders knowingly delivered the false reports in an attempt to manipulate the price of natural gas by skewing the indexes to benefit its trading positions in the physical marketplace.

At all relevant times, price and volume information was used by the reporting firms to calculate published indexes of natural gas prices for various pipeline hubs throughout the United States. Counterparty information was, at times, used to verify the accuracy of submitted price and volume information.

The Commission recognizes the cooperation of Respondent during the Division of Enforcement's investigation of this matter.

B. RESPONDENT

Mirant Americas Energy Marketing, LP is a wholly owned indirect subsidiary of Mirant Corporation, located in Atlanta, Georgia. MAEM buys and sells natural gas in the wholesale market throughout the United States. On July 14, 2003, MAEM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. MAEM's bankruptcy case is jointly administered, along with other affiliated debtor estates, with the bankruptcy case filed by its indirect parent, Mirant Corporation.

C. FACTS

1. Gas Market Participants' Use of Information from Reporting Firms

At all times relevant herein, reporting firms compiled and published indexes of natural gas prices for natural gas hubs throughout the United States. The reporting firms calculated the indexes based upon trading information, including volume and price information, collected from market participants. Participants in the natural gas markets use these indexes to price and settle commodity transactions. Moreover, natural gas futures traders refer to the prices published by the reporting firms for price discovery and for assessing price risks. For instance, an increase in prices at a natural gas trading hub signals either stronger demand or weakened supply, and futures traders take account of both price movements and changes in the supply/demand balance when conducting their futures trading.

2. MAEM Knowingly Reported False or Misleading or Knowingly Inaccurate Market Information and Attempted to Manipulate the Price of Natural Gas

From January 2000 through December 2001, certain MAEM traders knowingly reported false or misleading or knowingly inaccurate price, volume, and/or counterparty information concerning natural gas cash transactions to certain reporting firms including *Inside FERC*, *Gas Daily*, and *Natural Gas Intelligence (NGI)*. The reports, delivered electronically through the Internet via electronic mail, contained false price, volume, and/or counterparty information concerning natural gas cash transactions executed by MAEM, information concerning fictitious trades, and/or transactions observed in the market that were represented as MAEM's actual trades.

From January 2000 to October 2000, certain MAEM employees trading natural gas for the western region of the United States knowingly delivered false or misleading or knowingly inaccurate information to reporting firms including *Inside FERC*, *Gas Daily*, and *NGI*. The reports, delivered electronically through the Internet via electronic mail and represented as MAEM's actual trades, contained fictitious trades, selected non-physical trades, trades observed in the market, and/or certain physical trades in which the price, volume, and/or counterparty had been altered. The traders delivered the reports in an attempt to manipulate the price of natural gas by skewing the published index to benefit Respondent's trading positions.

D. LEGAL DISCUSSION

1. By Reporting False or Misleading or Knowingly Inaccurate Market Information, MAEM Violated Section 9(a)(2) of the Act

Section 9(a)(2) of the Act makes it unlawful for any person "knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce [.]"³ MAEM violated Section 9(a)(2) of the Act between January 2000 and December 2001 when certain of its employees knowingly delivered false or misleading or knowingly inaccurate price and volume information to the

³ See, e.g., *United Egg Producers v. Bauer Int'l Corp.*, 311 F. Supp. 1375, 1383 (S.D.N.Y. 1970) (concluding that false press releases regarding egg importation "tended to affect the price of eggs in interstate commerce"); *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1046 (N.D. Ill. 1995) (concluding that false reports can influence prices and constitute part of a manipulation claim); *CFTC v. Enron*, No. Civ. A. 03-909-H, 2004 WL 594752 (S.D. Tex. Mar. 10, 2004)(quoting *Cargill Inc v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971); *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 58 (5th Cir. 1962))(manipulation can be "any and every operation or transaction or practice...calculated to produce a price distortion of any kind in the market," the means of which "are limited only by the ingenuity of man.")

reporting firms,⁴ which is information that affects or tends to affect the market price of natural gas, including futures prices as traded on the New York Mercantile Exchange (“NYMEX”).

2. By Attempting to Manipulate Prices, MAEM Violated Section 9(a)(2) of the Act

Section 9(a)(2) provides that it is unlawful for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to corner or attempt to corner any such commodity.”

The following elements generally are required to show an attempted manipulation: (1) an intent to affect the market price and (2) some overt act in furtherance of that intent. See *In re Hohenberg Bros. Co.*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,271 at 21,477 (CFTC Feb. 18, 1977). To prove the intent element of manipulation or attempted manipulation, it must be shown that MAEM “acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.” *In re Indiana Farm Bureau Cooperative Association*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796 at 27,281 (CFTC Dec. 17, 1982).

From January 2000 to October 2000, certain MAEM employees trading natural gas for the western region of the United States specifically intended to manipulate the price of natural gas, a commodity in interstate commerce, and knowingly submitted false or misleading or knowingly inaccurate transaction information to the reporting firms to effectuate that intent. The submission of the transaction information constitutes the overt act in furtherance of the attempted manipulation. Accordingly, Respondent’s conduct constituted an attempted manipulation of the price of natural gas in the cash market as set forth in Section 9(a)(2) of the Act, which, if successful, could have affected prices of NYMEX natural gas futures contracts.

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that from January 2000 through December 2001, MAEM violated the false reporting provision of Section 9(a)(2), 7 U.S.C. § 13(a)(2), and that from January 2000 through October 2000, MAEM violated the attempted manipulation provision of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2).

⁴ Under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B), and Section 1.2 of the Commission’s Regulations, 17 C.F.R. § 1.2 (2004) the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust. “[I]t does not matter if the principal participated in or even knew about the agent’s acts; he is strictly liable for them.” *Stotler and Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988) (citing *Cange v. Stotler*, 826 F. 2d 581, 589 (7th Cir. 1987); *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966-67 (7th Cir. 1986)). Consequently, MAEM is liable for its employees’ violations of the Act.

V.

OFFER OF SETTLEMENT

Respondent has submitted an Offer of Settlement in which, without admitting or denying the findings herein, it 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 and filing 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 any other relief, and all claims which it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000) and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2004), relating to, or arising from, this action; stipulates that the record basis on which this Order is entered consists solely of this Order, including the findings in this Order; and consent to the Commission's issuance of this Order. Pursuant to the Offer, Respondent agrees to entry of the Order, in which the Commission makes findings, including findings that Respondent violated Section 9(a)(2) of the Act and orders Respondent to cease and desist from violating the provision of the Act that it has been found to have violated; and imposes a civil monetary penalty of Twelve and One-Half Million Dollars (\$12,500,000); and Respondent shall comply with the conditions and undertakings as set forth in this Order. Upon consideration, the Commission has determined to accept the Offer.

VI.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent shall cease and desist from violating Section 9(a)(2) of the Act;
2. A civil monetary penalty of Twelve and One-Half Million Dollars (\$12,500,000) is imposed upon Respondent;
3. Respondent and Mirant Corporation shall comply with the following conditions and undertakings as specified:

(a) **Future Cooperation With the Government**

Respondent and Mirant Corporation shall continue to cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement ("Division"), and all other federal government agencies (hereafter, collectively referred to as, the "Government") in this proceeding, and in any investigation, civil litigation, or administrative matter related to the subject matter of this proceeding or any current or future Government investigation related thereto. Respondent and Mirant Corporation agree to cooperate fully and expeditiously with the Government's ongoing efforts to discover documents and information related to reporting trade prices and/or volumes to energy reporting services and price indexes. As part of such cooperation, Respondent and Mirant Corporation agree to:

- (1) preserve all records requested by the Commission pursuant to its investigation of Respondent and/or Mirant or called for pursuant to the Commission subpoena *duces tecum* of March 28, 2003 in their possession, custody or control as of the date of this Order, including, but not limited to, audio files, e-mails, and trading records for a period of five years from the date of this Order; and
- (2) comply fully, promptly, and truthfully with any inquiries or requests for information including, but not limited to, inquiries or requests:
 - (i) for authentication of documents;
 - (ii) for any documents within Respondent's or Mirant Corporation's possession, custody, or control, including, inspection and copying of documents;
 - (iii) to produce any current (as of the time of the request) officer, director, employee, or agent of Respondent or Mirant Corporation, regardless of the employee's location and at such location that minimizes Commission travel expenditures, to provide assistance at any Commission trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including, but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such Commission proceeding, trial, or investigation; and,

- (iv) for assistance in locating and contacting any prior (as of the time of the request) officer, director, or employee of Respondent and Mirant Corporation.

Respondent and Mirant Corporation also agree that they will not undertake any act that would limit their ability to cooperate fully with the Commission. Respondent and Mirant Corporation designate Paul J. Pantano, Jr. of the McDermott Will & Emery LLP law firm to receive all requests for information pursuant to this undertaking. Should Respondent or Mirant Corporation seek to change the designated person to receive such requests, notice shall be given to the Division of such intention fourteen (14) days before it occurs. Any person designated to receive such request shall be located in the United States.

(b) **Public Statements**

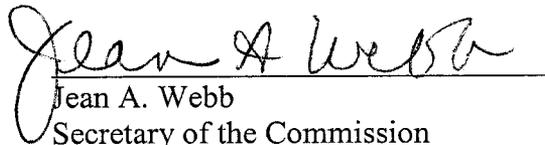
By neither admitting nor denying the findings of fact, Respondent and Mirant Corporation agree that neither they nor any of Respondent's and Mirant Corporation's agents or employees under their authority and control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order or creating, or tending to create, the impression that the Order is without factual or legal basis; provided, however, that nothing in this provision shall affect Respondent's or Mirant Corporation's: (i) testimonial obligations; or (ii) right to take factual or legal positions in other proceedings to which the Commission is not a party. Respondent and Mirant Corporation will undertake all steps necessary to assure that all of their agents and employees under their authority and control understand and comply with this agreement.

(c) **Miscellaneous Provisions**

- (i) This Order shall inure to the benefit of and be binding on Respondent and Mirant Corporation, which are presently debtors-in-possession in Bankruptcy Case Nos. 03-45690(DML)11 and 03-45691 before the United States Bankruptcy Court, Northern District of Texas, successors, assigns, beneficiaries and administrators.

- (ii) Nothing in this Order affects the exclusive jurisdiction of the Bankruptcy Court, Northern District of Texas, with respect to matters related to the administration of the Mirant and MAEM bankruptcy estates, including determination of the priority of any claims as defined in Section 101(5) of the Bankruptcy Code, arising against MAEM from this Order.

By the Commission.



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

Dated: December 3, 2004