

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of)
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)

ANTHONY J. DiPLACIDO,)
)
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Respondent.)
)
)

CFTC Docket No. 01-23

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INITIAL DECISION

Before: George H. Painter, Administrative Law Judge

Appearances: David W. MacGregor, Esq.
Manal Sultan, Esq.
Gregory Compa, Esq.
Commodity Futures Trading Commission
Attorneys for the Division of Enforcement

and

Joseph S. Rosenthal, Esq.
Bondy & Schloss LLP
Attorney for Respondent Anthony J. DiPlacido

PROCEDURAL HISTORY

The Commission issued a ten-count Complaint against Respondents Anthony J. DiPlacido (“DiPlacido” or “Respondent”), Robert S. Kristufek (“Kristufek”), and William H. Taylor (“Taylor”) on August 21, 2001. The Complaint charges Respondent DiPlacido with attempting to manipulate and manipulating the settlement prices of the Palo Verde (“PV”) and/or California Oregon Border electricity futures contracts traded on the New York Mercantile Exchange (“NYMEX”) for the nearby delivery month on April 24, May 22, July 27, and August 25, 1998, and California Oregon Border (“COB”) electricity futures settlement price on July 27, 1998, in violation of Sections 6(c), 6(d), and 9(a)(2) of the Commodity Exchange Act (“Act”) (Counts I through V of the Complaint). The Complaint also charges DiPlacido with aiding and abetting Kristufek and Taylor of Avista Energy (“Avista”) in attempting to manipulate and manipulating the PV and COB settlement prices in violation of Section 6(c), 6(d), and 9(a)(2) of the Act (Counts I through V). Additionally, the Complaint charges DiPlacido with non-competitive trading in furtherance of the manipulation on July 27, 1998, in violation of Sections 4c(a)(1)(A) and 4c(a)(1)(B) of the Act and Commission Regulation 1.38(a) (Counts VI through VIII). The Complaint further charges DiPlacido with reporting the noncompetitively determined price as presumably bona fide in violation of Section 4g of the Act and Commission Regulation 1.35(d) (Count IX). Finally, the Complaint charges DiPlacido with failure to promptly produce documents concerning his manipulative trading as required by a Commission subpoena in violation of Section 4g of the Act and Commission Regulation 1.31(a) (Count X).

On March 6, 2002, DiPlacido filed an Answer denying every count of wrongdoing and moved for dismissal of the Complaint on all Counts. The Court deemed the dismissal motion to

be a Motion for Summary Disposition pursuant to Commission Rule 10.91. On April 24, 2002, the Division filed a Cross-Motion for Summary Disposition on Counts VI through X of the Complaint. To be granted Summary Disposition, the moving party must meet an exacting three-part test: (1) there exists no genuine issue as to any material fact, (2) there exists no need for further factual development, and (3) the movant is entitled to a decision as a matter of law.¹ On January 8, 2003, DiPlacido's deemed Motion for Summary Disposition and the Division's Cross Motion for Summary Disposition were denied.

The evidentiary hearing on this matter commenced on December 2, 2003. The DOE concluded its case-in-chief on December 3, 2002. Respondent's case-in-chief was heard on January and 12 and 13, 2004. Respondent filed a motion, described as an Offer of Proof, to place in the record a sixteen page unsigned and undated document purporting to be a supplement to the direct written testimony of expert witness Dr. Kyle. On January 26, 2004, the Court rejected Respondent's Offer of Proof in its entirety. By letter on January 27, 2004, the Respondent again requested that the Court admit the supplement to Dr. Kyle's testimony into evidence. The Motion, deemed to be a request to reopen the evidentiary record, was denied on February 4, 2004.

CONTROLLING LAW

Section 9(a)(2) of the Act: It shall be unlawful for "Any 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. . . ."²

Section 6(c) of the Act: The Commission may serve a complaint upon any person the Commission has reason to believe has violated any of the provisions of the Act or of the rules,

¹ *Levi-Zeligman v. Merrill Lynch Futures, Inc. et al.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,236 at 42,031 (CFTC September 15, 1994).

² 7 U.S.C. §13.

regulations, or orders of the Commission. The Commission may also issue orders to secure compliance with the provisions of the Act and its Regulations.³

Section 6(d) of the Act: The Commission may enter cease and desist orders against any person who “has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity. . . .”⁴

Section 13(a) of the Act: “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 chapter, or any of the rules; regulations, or orders issued pursuant to this chapter, 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 chapter or any of such rules, regulations, or orders may be held responsible for such violation as a principal.”

Sections 4c(a)(1)(A-B) of the Act: “It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving the purchase or sale of any commodity for future delivery (or any option on such a transaction or option on a commodity) if the transaction is used or may be used to - (A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity; (B) determine the price basis of any such transaction in interstate commerce in the commodity. . . .”⁵

Section 4c(a)(2) of the Act: “A transaction referred to in paragraph (1) is a transaction that – (A)(i) is, is of the character of, or is commonly known to the trade as, a ‘wash sale’ or ‘accommodation trade’; or (ii) is a fictitious sale; or (B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.”⁶

Commission Regulation §1.38(a): “All purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in the commodity or commodity option. . . .”⁷

Commission Regulation 1.35(d): Each member of a contract market is required to “prepare regularly and promptly a trading card or other record showing such purchases and sales” including all the information specified by the Commission.

³ 7 U.S.C. §9.

⁴ 7 U.S.C. §13b.

⁵ 7 U.S.C. §6c(a)(1).

⁶ 7 U.S.C. §6c(a)(2).

⁷ 17 CFR §1.38(a).

Section 4g of the Act: A Commission-registered NYMEX floor broker, such as Respondent, is required to make reports, maintain books and records, and keep them open for inspection.⁸

Commission Regulation 1.31(a): All books and records required to be kept by the Act be “open to inspection” by any representative of the Commission and provided to such representative “upon the representative’s request.” When requested by a Commission representative, either the originals or copies of such records “shall be provided promptly.”⁹

FINDINGS OF FACT

The findings set forth below are based upon reliable testimony and documentary evidence of record. In particular, the testimony of witnesses Porter, Synn, Abernethy, Nakkab, Livingstone, Caesar, McHugh, McCann, and Birbillis was credible, reliable, and honest. In contrast, this court found the testimony of Respondent DePlacido to be self serving and unreliable. Expert witness Bessembinder’s testimony demonstrated that he was intimately familiar with the facts and circumstances of the trading done during the Close on April 24, May 22, June 24, and July 27, 1998, and the impact DiPlacido’s conduct had on the settlement prices. Professor Bessembinder’s testimony was informed and persuasive. The direct testimony of Respondent’s expert witness, Dr. Albert S. Kyle, lacked specificity and dealt directly with only the PV Close of July 27, 1998. Accordingly, Dr. Kyle’s written direct testimony is accorded very little weight in this decision.

1. On September 12, 2002, and October 7, 2003, the Commission entered orders finding that Kristufek and Taylor manipulated the settlement prices of NYMEX PV and COB electricity futures contracts on Option Expiration days in April, May, June and July 1998. Sanctions were imposed against them.¹⁰

2. Respondent is, and has been since 1979, a Commission-registered NYMEX floor broker, whose NYMEX trading badge is “JADE.”¹¹ Respondent owns and is President of Energex, Ltd. (“Energex”), a NYMEX registered floor broker association.¹² Respondent has been disciplined by NYMEX for thirty-two separate violations of NYMEX rules, including twenty-one violations of trade practice or floor recordkeeping rules.¹³

3. Kristufek was a trader at Avista in 1998.¹⁴ Taylor was employed at Avista in 1998, with responsibility for electricity trading.¹⁵

4. In 1998, Robert Livingstone (“Livingstone”) was employed as Respondent’s telephone clerk.¹⁶

⁸ 7 U.S.C. §6g(a).

⁹ 17 CFR §1.31.

¹⁰ *In the matter of DiPlacido et al.*, Comm. Fut. L. Rep. (CCH) ¶ 29,153 (CFTC Sept. 12, 2002); *In re William H. Taylor*, Comm. Fut. L. Rep. (CCH) ¶ 29,594 (CFTC Oct. 7, 2003).

¹¹ DOE Ex. 3, Stipulations, ¶¶ 1-2.

¹² *Id.* at ¶ 9.

¹³ DOE Ex. 37.

¹⁴ Tr. at 254:15-22.

¹⁵ DOE Ex. 1, Livingstone Decl. ¶ 8.

The PV and COB Markets

5. In comparison to other NYMEX energy futures contracts, such as natural gas or crude oil, the market for PV and COB futures contracts in 1998 was small and illiquid.¹⁷

6. Friday, April 24, 1998, was the last day for trading of options on the NYMEX PV and COB futures contracts (“Options Expiration Day”).¹⁸ Friday, May 22, Monday, July 27, and Tuesday 25, 1998, were also Options Expiration Days for NYMEX PV and COB futures contracts.¹⁹

7. On these Options Expiration Days, pursuant to NYMEX Rule 6.52C, the daily settlement price of the PV and COB futures contracts was calculated by determining the weighted average of the prices of all trades executed during the last two minutes of the trading day (the “Close”).²⁰

8. Trades not done in the Close are not to be used in determining the settlement price.²¹

9. On the above Options Expiration Days, the Close of the NYMEX PV futures began at 3:23 p.m. and ended at 3:25 p.m. Eastern Time.²² On the above Options Expiration Days, the Close of the NYMEX COB futures began at 3:28 p.m. and ended at 3:30 p.m. Eastern Time.²³

The PV Close on April 24, 1998

10. Immediately prior to the PV Close, Taylor placed an order with Respondent to sell 50 May PV futures contracts, instructing him to “sell them down as hard as we can during the Close” and that he wanted the sales “as low as possible”²⁴ to which Respondent replied “OK, alright.”²⁵

11. Taylor placed an order to sell 10 more PV futures contracts at “market worst” which Livingstone relayed to DiPlacido.²⁶

12. Respondent explained to Livingstone that he executed Avista’s instructions to sell “worst” by accepting all existing bids, or by not acknowledging them, then offering to sell at prices far

¹⁶ *Id.* at ¶¶ 2-3.

¹⁷ DOE Ex. 2, Bessembinder Decl. ¶ 24; DOE Ex. 10, Answer, ¶ 27.

¹⁸ DOE Ex. 9, ¶ 40; DOE Ex. 10, ¶ 40.

¹⁹ DOE Ex. 9, ¶¶ 49, 59, 77; DOE Ex. 10, ¶¶ 49, 59, 77.

²⁰ DOE Ex. 9, ¶ 32; DOE Ex. 10, ¶ 32.

²¹ *Id.*

²² DOE Ex. 9, ¶ 30; DOE Ex. 10, ¶ 30.

²³ DOE Ex. 9, ¶ 31; DOE Ex. 10, ¶ 31.

²⁴ Tr. at 319:9-320-21; DOE Ex. 1001 at 1:46-1:51; DOE Ex. 19 at p. 2.

²⁵ DOE Ex. 1001 at 1:51-1:55; DOE Ex. 19 at p. 2.

²⁶ Tr. at 121:16-122:13; DOE Ex. 1001 at 4:54-4:57; DOE Ex. 19 at p. 4.

below those normally shown to the trading ring, instead of obtaining the best price for the customer.²⁷

13. Respondent violated bids in executing Avista's order in the PV Close by offering prices far below the prevailing bid in the trading ring.²⁸ Respondent sold 65 PV futures contracts for Avista during the PV Close at progressively lower prices.²⁹ The settlement price of the May 1998 PV futures contract on April 24, 1998, was \$24.14, which was \$.41 less than the price of the last trade before the Close and \$.31 less than the average price in the hour prior to the Close.³⁰ This \$.31 drop in the May PV contract exceeded the decrease in the same measure for the June 1998 PV contract by \$.45. The quick reversal of the change in the PV settlement price on April 24, 1998 also indicates price artificiality as opposed to market fundamentals.³¹

14. The trades Respondent executed in the PV Close were large relative to the typical trading in NYMEX electricity markets, were all in the same direction (selling), and were concentrated in the short closing range (final two minutes). These trades accounted for 30.8% of the total trading volume in the Close.³²

The PV Close on May 22, 1998

15. Before the beginning of the Close, Taylor placed a sell order in NYMEX June PV futures contracts with Respondent with instructions to sell "worst."³³ Acting in concert with Taylor, Kristufek placed orders with Respondent and another trader, Caesar, to sell June contracts "worst."³⁴ Respondent sold 150 June PV futures contracts during the Close for Avista³⁵ while violating bids and offering at prices below the prevailing bids.³⁶

16. The settlement price of the June PV contract decreased \$.50 from the previous day.³⁷ The settlement price was \$.51 less than the price of the last trade before close, and \$.53 less than the average price of the contract in the hour prior to close.³⁸ Whereas these prices decreased, the price of the July PV futures contract rose by \$.27 during the same interval of time, which indicates price artificiality.³⁹

17. The trades Respondent executed in the PV Close were large relative to the typical trading in NYMEX electricity markets, were all in the same direction (selling), and were concentrated in

²⁷ Livingstone Decl. ¶8.

²⁸ Tr. at 124:7-17; Livingstone Decl. ¶¶7, 8, 10.

²⁹ Respondent Ex. C; DOE Ex. 15a; Bessembinder Decl. ¶64.

³⁰ Bessembinder Decl. at p. 32, Table 1 and ¶45.

³¹ Bessembinder Decl. at ¶¶55-59.

³² Bessembinder Decl. at ¶¶62-64.

³³ DOE Ex. 101a at 0:59-1:12 and 2:29-2:51.

³⁴ DOE Ex. 101a at 0:27-0:38 and 1:35-1:41; DOE Ex. 23 at p. 1.

³⁵ DOE Ex. 15b.

³⁶ Tr. at 129:23-130:25; Livingstone Decl. ¶10.

³⁷ Bessembinder Decl. ¶59 and at p. 32, Table 1.

³⁸ Bessembinder Decl. ¶46 and at p. 32, Table 1.

³⁹ *Id.*

the short closing range (final two minutes). These trades accounted for 52.4% of the total trading volume in the Close.⁴⁰

The PV and COB Closes on July 27, 1998

18. On the morning of July 27, Respondent told Livingstone he expected an electricity futures order from Avista, to be executed in the same manner as on the Options Expirations Days in April and May, 1998.

19. Kristufek placed an order with Respondent to buy 250 August PV futures contracts during the Close with instructions to bid the prices as high as possible.⁴¹ Respondent took an order ticket for 150 and gave an order ticket for 100 to another trader, Goldfarb.⁴²

20. Livingstone observed Respondent violating offers by bidding higher than the prevailing offers in the trading ring during the PV and COB Closes.⁴³

21. Respondent and Goldfarb's purchases accounted for 60.5% of the total trading volume during the PV Close that day.⁴⁴

22. Between the PV and COB Closes, Kristufek told Respondent he needed him to have purchased all 250 PV futures contracts he ordered to which Respondent expressed surprise.⁴⁵ Livingstone, who was present during this conversation, believes Respondent was surprised because he understood Avista's goal was to influence the settlement price, not purchase a set number of futures contracts.⁴⁶ Kristufek then told Livingstone not to buy more PV futures contracts unless they counted in the Close in determining the settlement price.⁴⁷

23. Immediately prior to the opening of the COB Close, Kristufek placed a buy order for 150 COB futures contracts, with the purchases to be "ugly", or the worst possible prices. After the opening bell sounded, Kristufek ordered the purchase of an additional 50 COB futures contracts with instructions to purchase at the worst possible prices.⁴⁸ Respondent purchased 182 COB contracts during the COB Close.⁴⁹

24. During the PV Close, NYMEX member John McCann observed Respondent violate broker NNJA by bidding to buy at \$58.00 while NNJA was offering to sell at \$57.00.⁵⁰ During the

⁴⁰ Bessembinder Decl. ¶64.

⁴¹ DOE Ex. 104h at 2:09-2:29.

⁴² Tr. at 100:1-7; Livingstone Decl., ¶16.

⁴³ Tr. at 102:3-16; Livingstone Decl., ¶19.

⁴⁴ Bessembinder Decl., ¶64.

⁴⁵ DOE Ex. 104m at 4:12-4:17.

⁴⁶ Livingstone Decl., at ¶17.

⁴⁷ DOE Ex. 104m at 4:44-4:49; Livingstone Decl., ¶17.

⁴⁸ Livingstone Decl., ¶18; DOE Ex. 104m at 5:53-7:53.

⁴⁹ Bessembinder Decl., ¶64.

⁵⁰ Tr. 223:11-224:12.

COB Close, NYMEX member Anthony Birbilis observed Respondent violate broker GRAM by bidding to buy at \$46.00 while GRAM was offering to sell at \$45.50.⁵¹

25. The settlement price of the August PV futures contract on was \$56.81, an increase of \$2.89 from the previous day,⁵² which was \$1.71 higher than the settlement price of the second nearest contract (September).⁵³ On the next trading day, the August PV contract closed down \$5.39, completely reversing the rise in the settlement price.⁵⁴

26. The settlement price of the August COB futures contract was \$45.28, an increase of \$3.26 from the previous day,⁵⁵ which was \$1.66 higher than the settlement price of the second nearest contract (September).⁵⁶ On the next trading day, the August COB contract closed down \$4.79, completely reversing the rise in the settlement price.⁵⁷

Respondent's After-Hours, Noncompetitive Trade On July 27, 1998

27. Respondent purchased 25 PV futures contracts from NYMEX member Patrick McHugh after the end of the trading day and altered his trading card so it appeared the trading was done during the Close.⁵⁸

28. McHugh admitted the 25 PV contracts trade occurred after the end of the trading day and was a separate transaction from the 10 contracts trade made with Respondent during the Close.⁵⁹

The PV Close on August 25, 1998

29. Kristufek placed an order with Respondent to buy 75 September PV futures contracts during the Close with instructions to bid the prices as high as possible.⁶⁰

30. The settlement price of the September PV futures contract increased by \$2.22 from the previous trading day and exceeded the settlement price of the second nearest PV futures contract (October) by \$2.57.⁶¹ On the next trading day, September PV futures contract closed down \$3.05, completely reversing the rise in the settlement price.⁶²

⁵¹ Tr. 241:22-242:13.

⁵² Bessembinder Decl., p. 32 and ¶58.

⁵³ *Id.* at p. 33 and ¶¶53-54.

⁵⁴ *Id.* at ¶58.

⁵⁵ *Id.* at p. 32 and ¶58.

⁵⁶ *Id.* at p. 33 and ¶¶53-54.

⁵⁷ *Id.* at ¶¶62-64.

⁵⁸ Tr. at 294:8-22, 296:20-297:8; DOE Ex. 15c.

⁵⁹ Tr. at 202:10-13.

⁶⁰ DOE Ex. 106g at 0:30-0:55 and 1:39-1:44.

⁶¹ Bessembinder Decl., ¶¶54, 58 and p. 33 Table 2.

⁶² *Id.* at ¶58 and p. 32 Table 1.

Respondent's Failure to Comply Promptly With a Commission Subpoena

31. On August 4, 2000, the Commission issued a subpoena to Respondent to produce books and records he was required to maintain under the Act, including all records relating to his trading of PV and COB futures contracts for Avista in 1998.⁶³

32. The subpoena required Respondent to produce these documents by August 16, 2000 and Respondent did not comply.⁶⁴ In October 2001 (more than one year after the subpoena was issued), Respondent produced the documents requested in the subpoena.⁶⁵

DISCUSSION

1. Respondent's Manipulation of the Closes (Counts I – V)

Sections 9(a)(2), 6(c), and 6(d) of the Act prohibit manipulation and attempts to manipulate. Section 9(a)(2) makes it 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 contract market, or to corner or attempt to corner any such commodity.”⁶⁶ Sections 6(c) and 6(d) authorizes the Commission to serve a Complaint if it “has reason to believe that any person . . . is manipulating or attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market. . .or otherwise is violating or violated any of the provisions of the Act,” and to assess fines and penalties accordingly.⁶⁷ Manipulation cases require fact-specific, case-by-case analysis to determine if prices were affected by factors other than the legitimate forces of supply and demand.⁶⁸

⁶³ Tr. 396:7-18; DOE Ex. 8; DOE Ex. 9 ¶86; DOE Ex. 10 ¶86; DOE Ex. 5c.

⁶⁴ DOE Ex. 8 p. 1; Tr. 396:7-22.

⁶⁵ Tr. 396:7-22.

⁶⁶ 7 U.S.C. §13(a)(2).

⁶⁷ 7 U.S.C. §§13b and 15.

⁶⁸ *Accord 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); *Frey v. CFTC* 931 F.2d 1171, 1175 (7th Cir. 1991).

Sustaining a charge of manipulation requires establishing four elements by a preponderance of the evidence: (1) the Respondent had the ability to influence market prices; (2) the Respondent specifically intended to influence market prices; (3) an artificial price existed; and (4) the Respondent caused the artificial price.⁶⁹

a. Respondent Had the Ability to Influence Prices

Manipulation does not require a dominant or near dominant position in the futures market, cash market, or a combination of the two.⁷⁰ The mere floating of false rumors suffices may influence prices.⁷¹ *In re Henner*⁷² showed that inappropriate trading practices constitute the ability to influence prices. Henner entered trading with a large long position in shell egg futures and engaged in intensive buying at the close that drove the price up 11 ticks to the limit-up price. The Judicial Officer found that an artificial price existed and no other factors besides Henner's bidding could account for it. Henner's unusual and unnecessarily high final bid showed his clear intent to create an artificial price that would have benefited his long position.⁷³

As in *Henner*, Respondent DiPlacido executed large orders during the Closes, violating offers and bids to raise or lower the settlement prices. The PV and COB futures contracts markets were relatively illiquid and relatively small orders had an appreciable effect on prices.⁷⁴ Because of the illiquidity of the markets, Respondent had the ability to influence prices by executing the relatively large orders for Avista.

⁶⁹ *In re Cox* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,786 at 34,061 (CFTC July 15, 1987).

⁷⁰ *Indiana Farm Bureau*, supra, at 57,285.

⁷¹ *In re Hohenberg Brothers* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,271 at 21,477 (CFTC Feb. 18, 1977).

⁷² *In re Henner*, 30 A.D. 1151 (1971).

⁷³ *Id.* at 1157-75.

⁷⁴ Bessembinder Decl., ¶25.

b. Respondent Specifically Intended to Influence Prices

Proving intent requires a showing that Respondent “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.”⁷⁵ The evidence clearly shows that Respondent specifically intended to influence the market prices. Respondent repeatedly violated bids and offers by offering prices higher or lower than the outstanding prices. His actions had no apparent business or economic rationale except to influence the market prices.

Recorded conversations and reliable testimony of recprd establish that Respondent willingly complied with Avista’s instructions to drive down or drive up the futures contracts prices. On July 27, 1998, Respondent not only violated offers when trading during the Closes, but actively engaged in planning the manipulation by bringing in another trader to drive up the market price. Also, several NYMEX members observed Respondent violating bids and offers in the trading ring. Respondent’s actions clearly had the purpose of causing a price that did not reflect the factors of supply and demand.

c. Artificial Prices Existed at the End of the Closes

Proving manipulation requires showing that artificial prices existed.⁷⁶ An artificial price is one “that does not reflect the market or economic forces of supply and demand.”⁷⁷ If price was affected by factors not intrinsic to the market, it is necessarily artificial:

Thus, to determine whether an artificial price has occurred, one must look at the aggregate forces of supply and demand and search for those factors which are extraneous

⁷⁵ *Indiana Farm Bureau*, supra, at 27,283.

⁷⁶ *Cox*, ¶23,786 at 34,061.

⁷⁷ *Id.*, at 34,064.

to the pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity market. When the aggregate forces of supply and demand bearing on a particular market are all legitimate, it follows that the price will not be artificial. On the other hand, when a price is effected (*sic*) by a factor which is not legitimate, the resulting price is necessarily artificial. Thus, the focus should not be as much on the ultimate price, as on the nature of the factors causing it.⁷⁸

Respondent's violation of bids and offers during trading and his noncompetitive, after-hours trading are illegitimate factors. Under *Cox* and *Indiana Farm Bureau*, the resulting settlement prices were necessarily artificial.

Under *Henner*, such improper trading practices alone may prove the existence of artificial prices. As the Judicial Officer ruled, "[t]he inference is inescapable that the respondent paid more than he had to . . . for the purpose of causing the closing price to be at that high level. No further proof is needed to show" that the settlement price was artificial.⁷⁹ By paying more than he had to, Henner created an artificially high price.⁸⁰ Likewise, Respondent DiPlacido on each date in question paid more or less than was required, creating illegitimate factors and thus making the settlement prices necessarily artificial.⁸¹

d. Respondent Caused Artificial Settlement Prices During All of the Closes

Causation of artificial prices is established when it is shown that artificial market prices resulted from the conduct of a trader, or group of traders acting in concert, rather than from the legitimate forces of supply and demand.⁸² Such conduct need not be the sole cause of the

⁷⁸ *Indiana Farm Bureau*, ¶21,796 at 27,288; *Cox*, ¶23,786 at 34,064.

⁷⁹ *Henner*, 30 A.D. at 1194.

⁸⁰ *Id.*, at 1174-75.

⁸¹ See Bessembinder Declaration and Division's Post Hearing Brief for further objective determination that artificial prices existed at the end of each Close.

⁸² *Cargill v. Hardin*, 452 F.2d 1154, 1171-72 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); *Indiana Farm Bureau*, ¶21,796 at 27,288.

artificial price. It is sufficient “. . . for purposes of a finding of manipulation . . . that respondents’ action contributed to the price [movement].”⁸³

Respondent DiPlacido directly executed orders for the purpose of influencing the Closing price and DePlacido was aware that he had, in fact, successfully influenced the price. The orders were executed during the two-minute Close, all in one direction, for the purpose of driving the price either up or down. DiPlacido repeatedly violated bids and offers and executed transactions outside of the prevailing prices. The record clearly shows that Respondent caused artificial prices to exist.⁸⁴

2. Respondent Attempted to Manipulate Settlement Prices During All of the Closes

Respondent is additionally liable for attempted manipulation of the settlement prices during the Closes. Proving attempted manipulation requires establishing only “. . . an intent to affect the market price of the commodity and some overt act in furtherance of that intent.”⁸⁵ The showing above of specific intent to influence prices also shows that Respondent has the requisite scienter for an attempted manipulation. All of the steps DiPlacido took to carry out the manipulative scheme and to cover it up constitute overt acts sufficient to sustain a count of attempted manipulation.

3. Respondent Aided and Abetted Manipulation of the Settlement Prices

⁸³ *In re Kosuga*, 19 A.D. 603, 624 (1960); *Cox*, ¶23,786 at 34,066.

⁸⁴ See Bessemlinder Declaration and Division’s Post Hearing Brief for further explication of the causation of artificial prices.

⁸⁵ *In re Hohenberg*, supra, at 21,477. *Accord In re Abrams*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,479 at 41,136 (CFTC July 31, 1995).

To find Respondent liable for aiding and abetting 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.”⁸⁶ The evidence set forth above clearly establishes that the Act was violated, Respondent had knowledge of the manipulation, and Respondent intentionally assisted Taylor and Kristufek in the manipulation. Accordingly, Respondent aided and abetted Taylor and Kristufek in manipulating the settlement prices.

4. Respondent Engaged in a Noncompetitive Trade (Counts VI-IX)

Respondent executed a 25 contract noncompetitive trade of the August 1998 PV futures contract with McHugh after the end of the trading day and not done by open outcry in the trading ring on July 27, 1998. During the PV Close, Respondent had executed a 10 contract trade with McHugh. Following the after-hours trade, DiPlacido altered his trading card by changing the quantity of the 10 contract trade to 35 so that it falsely appeared that the noncompetitive 25 contract trade occurred during the Close.

Count VI charges Respondent with violating Section 4c(a)(1)(A) of the Act which prohibits accommodation trades and fictitious sales. Accommodation, or noncompetitive trading, negates the risk of price competition that is integral to an open, competitive market. Fictitious sales include transactions that appear to have been executed in the open market, but in fact were executed noncompetitively. Respondent’s after-hours trade with McHugh was

⁸⁶ *In re Nikkiah*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129 at 49,888 n.28 (CFTC May 12, 2000) citing *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,746 (CFTC March 16, 1999).

negotiated between them and not done by open outcry. Accordingly, it was a noncompetitive trade in violation of Section 4c(a)(1)(A).

Count VII charges Respondent with violating Section 4c(a)(1)(B) of the Act which prohibits confirming the execution of any futures transaction “. . . if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.”⁸⁷ Because Respondent falsified his trading card to report the noncompetitively determined price of the after-hours trade, the prices reported on his trading card to the NYMEX and other market participants were not bona fide. Accordingly, DiPlacido violated Section 4c(a)(1)(B).

Count VIII charges Respondent with violating Section 1.38(a) of the Commission’s Regulations which requires all purchases and sales on or subject to the rules of a contract market to be “executed openly and competitively.” Respondent’s trading outside of the Exchange prescribed trading hours was neither open nor competitive. Accordingly, DiPlacido violated Regulation 1.38(a) by executing after-hours trades.

Count IX charges Respondent with violating Section 4g of the Act and Section 1.35(d) of the Commission’s Regulations. Section 4g requires every registered floor broker to make such reports as required by the Commission and to keep such books and records open to inspection by any representative of the Commission. Regulation 1.35(d) requires that members of contract markets document their trades through trading cards or similar records and for each transaction the card or record must include: (a) the member’s name or identification; (b) the identity of the clearing member; and (c) the date, hour, and minute of the transaction. DiPlacido violated

⁸⁷ *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,993 at 37,653 (CFTC Jan. 25 1991).

Section 4g and Regulation 1.35(d) by falsely recording and reporting the noncompetitive trade on July 27, 1998, as bona fide and altering his trading card to conceal the trade.

5. Respondent Failed to Comply With a Commission Subpoena (Count X)

Count X charges Respondent with violating Section 4g of the Act and Commission Regulation 1.31(a) which requires registered members to promptly provide records when requested by Commission subpoena. The Commission subpoenaed Respondent to produce certain records on August 4, 2000, and Respondent did not complete production of records pursuant to that subpoena until October, 2001. DiPlacido points out several reasons for the holdup, but they do not excuse the lengthy delay. The Commission has previously stated that “[r]egistrants are strictly liable for recordkeeping violations, for which a showing of scienter is not required.”⁸⁸ Accordingly, Respondent violated Section 4g and Regulation 1.31(a) by his failure to comply with the subpoena.

CONCLUSIONS OF LAW

1. DiPlacido manipulated the settlement price of the PV electricity futures contracts on April 24, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

2. DiPlacido attempted to manipulate the settlement price of the PV electricity futures contracts on April 24, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

3. DiPlacido willfully aided and abetted Taylor’s and Kristufek’s manipulation and attempted manipulation of the settlement price of the PV electricity futures contract on April 24, 1998, in violation of §§13(a), 9(a)(2), 6(c), and 6(d) of the Act.

⁸⁸ *In re Kelly*, [1998-1999 Transfer Binder] Comm. F. L. Rep. (CCH) ¶27,514 at 47,373 (CFTC Nov. 19 1998).

4. DiPlacido manipulated the settlement price of the PV electricity futures contracts on May 22, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

5. DiPlacido attempted to manipulate the settlement price of the PV electricity futures contracts on May 22, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

6. DiPlacido willfully aided and abetted Taylor's and Kristufek's manipulation and attempted manipulation of the settlement price of the PV electricity futures contract on May 22, 1998, in violation of §§13(a), 9(a)(2), 6(c), and 6(d) of the Act.

7. DiPlacido manipulated the settlement price of the PV and COB electricity futures contracts on July 27, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

8. DiPlacido attempted to manipulate the settlement price of the PV and COB electricity futures contracts on July 27, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

9. DiPlacido willfully aided and abetted Taylor's and Kristufek's manipulation and attempted manipulation of the settlement price of the PV and COB electricity futures contract on July 27, 1998, in violation of §§13(a), 9(a)(2), 6(c), and 6(d) of the Act.

10. DiPlacido manipulated the settlement price of the PV electricity futures contracts on August 25, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

11. DiPlacido attempted to manipulate the settlement price of the PV electricity futures contracts on August 25, 1998, in violation of §§9(a)(2), 6(c), and 6(d) of the Act.

12. DiPlacido willfully aided and abetted Taylor's and Kristufek's manipulation and attempted manipulation of the settlement price of the PV electricity futures contract on August 25, 1998, in violation of §§13(a), 9(a)(2), 6(c), and 6(d) of the Act.

13. DiPlacido executed a noncompetitive trade outside of exchange-prescribed trading hours and altered his trading card in violation of §§4c(a)(1)(A), 4c(a)(1)(B), and 4g of the Act, and Commission Regulations 1.38(a) and 1.35(d).

14. DiPlacido failed to promptly produce records in response to a Commission subpoena in violation of Section 4g of the Act and Commission Regulation 1.31(a).

SANCTIONS

The Division has proved by a preponderance of the evidence that Respondent violated the Act and Commission Regulations as charged in the ten counts of the Complaint. The violations were deliberate, flagrant, and egregious. At no time during the course of this proceeding did Respondent exhibit a scintilla of remorse or contrition for his wrongful conduct, and there is nothing in the record to show any semblance of rehabilitation. Accordingly, sanctions must be imposed to protect the integrity of the industry and deter others from committing similar offenses.

Cease and Desist Order

The Division requested that a cease and desist order be entered against Respondent. Section 6(d) of the Act provides that a person who violates any of the provisions of the Act or Commission Regulations may be directed to cease and desist from engaging in any further

violations.⁸⁹ The Commission has consistently held that the imposition of a cease and desist order is appropriate where the wrongful conduct was repeated in the past and is likely to be repeated in the future.⁹⁰ Given that Respondent's violations occurred repeatedly over several months and do not appear likely to stop without the intervention of NYMEX and the Commission, a cease and desist order is an appropriate sanction. Accordingly, Respondent DiPlacido is ORDERED to CEASE AND DESIST from violating the Act and implementing regulations as charged in the complaint.

Trading Ban

The Division requested a permanent trading prohibition against Respondent. Section 6(c) provides that the Commission may impose a trading ban on a respondent who has violated any provisions of the Act or Commission Regulations.⁹¹ The Commission has stated, "(t)rading prohibitions are appropriate when a nexus connects a respondent's violations to the integrity of the futures market."⁹² A threat to the integrity of the futures market is established if the "conduct erodes 'public perception, protection, and confidence in the markets.'"⁹³

The Commission has consistently held that the duration of trading bans should correlate to the gravity of the violations.⁹⁴ The factors to evaluate when determining the length of trading bans are: "(1) the relationship of the violation at issue to the regulatory purposes of the Act; (2)

⁸⁹ 7 U.S.C. §13(b).

⁹⁰ *In the Matter of First Financial Trading, Inc.*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,089 at 53,690 (CFTC Jul. 8, 2002); *In re Gordon*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,667 at 40,181 (CFTC Feb. 25, 1993).

⁹¹ 7 U.S.C. §9.

⁹² *First Financial* at 53,694 citing *In re Incomco*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,198 at 38,537 (CFTC Dec. 30, 1991).

⁹³ *Id.* at 53,694 citing *In the Matter of Miller*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,440 at 42,914 (CFTC June 16, 1995).

⁹⁴ *First Financial* at 53,695.

respondent's state of mind; (3) the consequences flowing from the violative conduct; and (4) respondent's post-violation conduct."⁹⁵

. By repeatedly manipulating and attempting to manipulate settlement prices, Respondent demonstrated a disregard for rules designed to protect the futures market and investor interests. Accordingly, Respondent DiPlacido is prohibited from trading on or subject to the rules of any designated commodity exchange for a period of 20 years from the date this decision becomes final. .

Revocation of Registration

The Division requested that Respondent's registration with the Commission be revoked. Section 6(c) of the Act provides that if the Commission has reason to believe that any person "is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder . . ." the Commission may, upon evidence received, "revoke the registration of such person."⁹⁶ Because DiPlacido has repeatedly violated the Act and Commission regulations, revocation of his registration is entirely an appropriate sanction to impose. Accordingly, it is ORDERED that Respondent's registration be revoked effective the date this decision becomes final.

Civil Monetary Penalties

The Division requested a civil monetary penalty of at least \$1.10 million for Respondent's violations of Counts I through X. Section 6(c) of the Act permits the assessment of a civil monetary penalty against any respondent who violates the Act or Commission

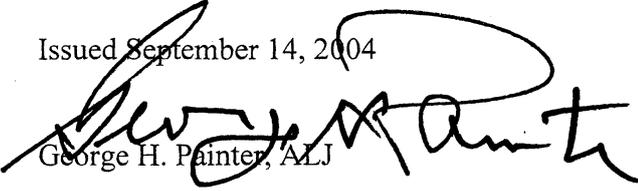
⁹⁵ *R&W Technical Services, Ltd.* at 47,748.

⁹⁶ 7 U.S.C. §§ 9 and 15.

Regulations and provides that the penalty may not be more than the higher of \$100,000 or triple the monetary gain to such person for such violation.⁹⁷

Civil monetary penalties are imposed to deter the wrongdoer from repeating the violations and to deter others from engaging in similar activity. Accordingly, the penalty should be sufficiently high to deter potential violators by making unlawful activity unprofitable.⁹⁸ Section 6(e)(1) of the Act states that in determining the amount of the monetary penalty the appropriateness of the penalty to the gravity of the violation must be weighed.⁹⁹ This court finds that the violations were deliberate, extremely serious, and inflicted great harm to the integrity of the industry futures generally and, more specifically, to the New York Mercantile Exchange. Accordingly, DiPlacido is ORDERED to pay a civil monetary penalty of \$50,000 for each of the counts in the complaint, for a total of \$500,000 within 10 days after this decision becomes final.

Issued September 14, 2004


George H. Painter, ALJ

⁹⁷ 7 U.S.C. §9.

⁹⁸ *In re GNP Commodities, Inc.* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,360 at 39,222 (CFTC Aug. 11, 1992).

⁹⁹ 7 U.S.C. §9a.