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UNITED STATES OF AMERICA

Before the

COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	
GRAIN LAND COOP.,	:	**CFTC Docket No. 97-1**
Respondent.	:	

INITIAL DECISION

On Behalf of the Division of Enforcement:

Gary J. Dernelle, Esq.
Susan F. LaMarca, Esq.
Laura L. Flippin, Esq.
Commodity Futures Trading Commission
Division of Enforcement
1155 21st Street, NW
Washington, DC 20581

On Behalf of Respondent Grain Land:

James R. Crassweller, Esq.
John F. Kapacinskas, Esq.
David A. Meyer, Esq.
Doherty, Rumble & Butler, Professional Association
2800 Minnesota World Trade Center
30 East 7th Street
St. Paul, Minnesota 55101-4999

BEFORE: PAINTER, ALJ

PROCEDURAL HISTORY

The Commodity Futures Trading Commission ("Commission") issued the Complaint and Notice of Hearing ("Complaint") in this matter on November 12, 1996, pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 13a-1, 13a-2. The one-count Complaint alleges that respondent Grain Land Cooperative ("Grain Land") violated Section 4(a) of the Act, 7 U.S.C. § 6, by offering to enter into and entering into off-exchange futures contracts from 1993 to 1996. Respondent filed its Answer and Affirmative Defenses on January 16, 1997, denying any wrongdoing, along with its Motion for Order to Show Cause ("Motion") as to why the proceeding should not be dismissed. The Division responded to the Motion on February 10, 1997, and the Motion was denied on February 11, 1997.

On April 8, 1997, respondent Grain Land filed Motions for Certification for Interlocutory Review and to Stay Proceedings, which were denied on April 11, 1997. Respondent then filed with the Commission, on April 16, 1997, its Motion for Interlocutory Review.

On May 20, 1997, respondent Grain Land filed its Motion to Amend its Answer, which was granted on April 4, 1997. Respondent's Amended Answer and Affirmative Defenses was filed on June 11, 1997.[1]

The Division of Enforcement ("Division") timely filed its Prehearing Memorandum on June 25, 1997. Respondent's Prehearing Memorandum was timely filed on July 29, 1997.

The Commission, on September 12, 1997, issued its Opinion and Order on Interlocutory Review denying respondent's Motion for Interlocutory Review filed in April. Respondent then filed in federal district court a Petition for a Writ of Prohibition and/or Writ of Mandamus ("Petition for Writ") to enjoin this administrative action, which was denied, *in toto*, by Judge

Kyle on January 7, 1998. Grain Land Coop v. CFTC, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,240 at 45,981 (D.Minn. 1998).

The hearing in this matter was held in two phases in Minneapolis, Minnesota. The Division presented its case February 9-11, 1998. Respondent Grain Land presented its case on March 23, 1998. Post-Hearing Briefs were timely filed by the Division and respondent on May 6, 1998, and June 5, 1998, respectively. The Division's Reply to Respondent's Post-Hearing Brief was filed on June 26, 1998. This matter is now ready for disposition.

INTRODUCTION

Agricultural merchandising contracts, collectively referred to as "Hedge-to-Arrive" (or "HTA") contracts, have been the subject of much controversy. Although the "Hedge-to-Arrive" label has become a term of art used to describe a type of hybrid grain merchandising contract, there are numerous and significant contractual variations within this group. Variations are most readily evident in the written provisions of the contract but also extend to the way in which the contracts are marketed and administered. The following discussion and determination is limited to the specific facts surrounding Grain Land's merchandising contracts.

The present case involves the use of particular grain merchandising contracts by a cooperative grain elevator, Grain Land Cooperative ("Grain Land"), which was formed in 1993 with the consolidation of six farmer-owned Minnesota cooperatives. The Complaint, issued by this Commission in November 1996, alleges that Grain Land, from its inception in 1993 until selling its assets in 1996, offered to enter into, and entered into, off-exchange futures contracts in violation of Section 4(a) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6. These contracts

[1] Respondent included two additional affirmative defenses.

will be referred to as Flex Hedge-to-Arrive ("Flex HTA") contracts. This administrative enforcement action reached oral hearing in February and March of 1998 and its disposition follows.

Grain Land's Private Action Against Producers

During the interim, from the issuance of the Complaint by the Commission to its present disposition, Grain Land was involved in litigation with numerous producers. Grain Land commenced piecemeal litigation in December 1996 to enforce its Flex HTA contracts against approximately 160 producers ("Producers") who had "repudiated" them earlier that year. In re Grain Land Coop Cases, 978 F.Supp. 1267, 1270 (D.Minn. 1997). The claims were initially filed in various state courts but removed by the Producers to federal district court in Minnesota. Id. The federal district court created a Master Docket and case file for efficiency. Id. Grain Land, along with two of its employees, Michael Christensen and Joseph Burke, ("Plaintiffs") filed a seven-count Master Complaint in January 1997 and filed a Third-Party Complaint against Farmers Commodities Corporation ("FCC") in February 1997, seeking contribution and indemnification from FCC to the extent the Plaintiffs were found liable. Id. at 1270-71. The Producers filed their eleven-count Master Pleadings later that month, alleging among other things that the Flex HTA contracts were illegal off-exchange futures contracts. Id. at 1271.

In May 1997, the Plaintiffs filed a Motion for Partial Summary Judgment ("Motion"), requesting dismissal of a majority of the Producers' claims. Id. at 1271. The court stated, however, at its Motion hearing, that the issue of whether the Flex HTA contracts were cash forward contracts or futures contracts needed to be first resolved. Id. at 1271. The parties thereafter had the opportunity to brief this preliminary issue and present oral arguments to the court. Id. at 1271-72. Chief Judge Magnuson ruled in October 1997 that the Flex HTA contracts were cash forward contracts excluded from regulation under the Commodity Exchange Act and granted Plaintiffs' Motion, in part. Id. at 1280.

PRELIMINARY MATTERS

Prior to discussing the merits of the case, it is necessary to address respondent's challenges to this Commission's jurisdiction. Respondent has advanced several arguments why this case should be dismissed. As the following discussion will demonstrate, the arguments are without merit.

Respondent's Arguments for Dismissal

1. The Commission is Collaterally Estopped

Respondent argues the "complaint against Grain Land violates a fundamental principle of jurisprudence that the agency is bound by the district court's finding that Grain Land's contracts are excluded from regulation under the CEA [Commodity Exchange Act]." (Respondent's Post-Hearing Brief ("RBrief") at 12 n.11). In essence, respondent argues that the Commission is collaterally estopped from bringing this administrative enforcement action and that this case should be dismissed because of the determination in In re Grain Land Coop Cases, 978 F.Supp. 1267, 1280 (D.Minn. 1997), that the Flex HTA contracts at issue here are cash forward contracts.

Respondent has already advanced this exact argument, to no avail, to the federal district court in its Petition for Writ of Mandamus and/or Writ of Prohibition ("Petition for Writ"), seeking to dismiss this administrative enforcement action following .[2] Grain Land Coop v. CFTC, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,240 at 45,981 (D.Minn. 1998). In support of its Petition for Writ, respondent argued that: (1) the Commission's administrative proceeding threatens the integrity of Judge Magnuson's ruling; (2) the Commission's administrative proceeding exceeds the jurisdiction of the Commission; and (3) the Commission is collaterally estopped from proceeding on account of Judge Magnuson's ruling. Id. at 45,982. As the court noted, "[t]hese three arguments are, however, so inter-related as to be merely restatements of each other, and each rests on the premise that the CFTC is estopped from proceeding by the previous case before Chief Judge Magnuson to which it was not a party." Id. (emphasis added). On January 7, 1998, the district court denied Grain Land's Petition for Writ, holding that the Commission is not collaterally estopped from pursuing the present administrative proceeding, and stating that Grain Land's "position is flatly rejected both by Supreme Court case law and by the very structure of judicial review." Id. The court's opinion makes abundantly clear why Grain Land's position is totally lacking in merit and the argument will not be discussed any further.[3]

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[2] Grain Land asked the Commission on two occasions in October 1997 to voluntarily dismiss the administrative complaint it had filed. Id. at 45,982. The Commission notified Grain Land on October 17, 1997, that it did not intend to do so. Id.

[3] The substance of the federal district court's opinion is provided as follows. The court stated that "[c]ollateral estoppel may only be applied if the party against whom the earlier decision is being asserted had a 'full and fair' opportunity to litigate the issue in the prior adjudication." Id. at 45,982 (quoting In re Miera, 926 F.2d 741, 743 (8th Cir. 1991)). The court acknowledged that there were three instances when even a nonparty to an earlier decision, such as the CFTC, will be bound by a prior adjudication: (1) when the nonparty controls the original action; (2) when the nonparty's interests are represented by a party to the original action; or (3) when the nonparty is the successor-in-interest to a party to the original action. Id. (quoting Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 938 (8th Cir. 1995)). The district court stated that the only chance Grain Land had of having the Commission bound in accordance with the aforementioned was to successfully show that the Commission's interests were represented by the Producers. Id. The district court rejected this by stating that the Supreme Court has "[h]as point[ed] out the very different interests and conduct of Government litigation and private litigation" and that "'what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which

2. Official Notice Was Taken

Respondent contends that because this forum granted respondent's request to "take official notice of Judge Magnuson's ruling as well as his factual findings . . . the complaint against Grain Land must be dismissed." RBrief at 11-12. Respondent is in error as to the use of official notice. Although this forum agreed to take official notice of In re Grain Land Coop Cases and the factual findings therein, in accordance with Regulation 10.67(b)(i), 17 C.F.R. § 10.67(b) (1998), this forum is neither bound by the judgment rendered in that case nor required to adopt the district court's factual findings. As the Division correctly points out, the notice taken was to allow the record in this proceeding to reflect that respondent has brought claims against the producers subject to the Flex HTA contracts at issue in this case as well as the outcome of that case. Division's Reply to Respondent's Post-Hearing Brief ("DReply") at 31. Such notice, however, is "'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation.'" Id. (quoting Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2d Cir. 1992)). Moreover, as the Division notes, to do so would have the effect of collaterally estopping the government from litigating whether the Flex HTA contracts are futures contracts. DReply at 32 (citing United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994)).

3. Improper Review by This Forum

Respondent also argues that dismissal is mandated since this forum is improperly attempting to "review" or "ignore" the decision by Chief Judge Magnuson, In re Grain Land

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peculiarly affect the Government.'" Id. at 45,983 (quoting United States v. Mendoza, 464 U.S. 154, 159, 104 S.Ct. 568, 572 (1984)).

Coop Cases. RBrief at 10-11. Grain Land's reliance on Town of Deerfield, N.Y. v. FCC., 922 F.2d 420 (2nd Cir. 1993) as the authority that this agency may not "review" a federal district court's opinion is misplaced since that case spoke to an attempt by a federal agency, the Federal Communications Commission, to hear a case between the same two parties who had already litigated their case in federal district court. Id. at 427-28. The problem was that the FCC was improperly providing an additional forum, a second chance, for a case that had already been litigated and decided between a private citizen and the Town of Deerfield. Id. at 429-30. The case at bar differs in that this is the first forum to hear the dispute between Grain Land and the Commission. As such, the present case is in no manner an attempt to "review" the decision rendered in In re Grain Land Coop Cases – a private case between Grain Land and the Producers.

Moreover, respondent's primary reliance on Flores v. Secretary of Health, Education and Welfare, 228 F.Supp. 877, 877 (D.P.R. 1964), to buttress its argument that this forum may not "ignore" Chief Judge Magnuson's decision is also inapposite. RBrief at 12 n.11. In Flores, the statutory scheme provided that the decision of a hearing examiner of a federal government agency was to be reviewed by a federal district court. Flores, 228 F.Supp. at 878. The district court, in that case, reversed and vacated the decisions of both the hearing examiner, who refused plaintiff's claims for benefits, and the Appeals Council, which denied plaintiff's request for review of that decision. Id. The Flores court admonished the hearing examiner for his refusal to follow the district court's prior rulings mandating that benefits be paid in the particular situation. Id. Unlike the procedural setup for review in Flores, the initial decision of an administrative law judge of this Commission is not subject to review by a federal district court, but subject to review by the Commissioners, whose decision is then subject to review by the United States Court of Appeals. Regulation 10.101, *et seq.*, 17 C.F.R. § 10.101, *et seq.* This Court, therefore, is bound by what the Commission decides and, in turn, the decision of a particular federal court of appeals. As such, respondent's application of the Flores court's holding in this instance is inappropriate.

In sum, based on the aforementioned arguments, there is no merit in respondent's assertions that this case should be dismissed.

FINDINGS OF FACT

The findings and conclusions[4] set out below are well supported by the testimony and exhibits of record.[5] Each of the fact witnesses presented by the Division and Grain Land was credible and reliable on the whole. As the testimony and exhibits show, the material facts in this case are well-settled.

The expert witnesses presented by the parties were not persuasive, and their testimony did not influence the findings and conclusions set out below.

Respondent Grain Land and its Employees

1. **Respondent Grain Land Coop ("Grain Land")** was a Minnesota agricultural cooperative at all times relevant to the activities described in the Complaint. Answer at ¶ 1. Grain Land

[4] The following abbreviations will be used:

Division Exhibit	("DX")
Grain Land Exhibit	("GX")
Transcript Volume 1	("Tr1")
Transcript Volume 2	("Tr2")
Transcript Volume 3	("Tr3")
Transcript Volume 4	("Tr4")

[5] The Court rejected Division Exhibits 502, 503, 606, 607 and 701, among other exhibits, at the hearing in this matter. The Division renewed its request in its Post-Hearing Brief ("DBrief") to admit these exhibits as prior admissions of respondent Grain Land and respondent's employees, Mr. Christensen and Mr. Burke. The Court holds fast in its decision to keep these exhibits excluded.

was formed in April 1993 through a merger of six farmer-owned Minnesota cooperatives.[6] Id.; Tr1 at 135; Tr4 at 9, 114. Grain Land operated through nine elevator locations.[7] Tr1 at 160, 172; Tr4 at 13-14, 32, 114.

2. Michael Christensen ("Christensen") was employed as respondent's general manager at all relevant times. DX 416 at 003874. He had been employed as general manager of Wells Farmers Elevator prior to coming to Grain Land. Id.

3. Joseph Daly ("Daly") served as Grain Land's corn merchandiser from its inception until May 1995. DX 416 at 003875; Tr1 at 133-35, 170. Daly reported to Christensen. Tr1 at 134, 138-39. Daly testified that he had been employed by Wells Farmers Elevator as a grain merchandiser prior to coming to Grain Land. DX 416 at 003875; Tr1 at 134, 164-65, 176. It was Christensen who requested in May of 1995 that Daly leave Grain Land. Tr1 at 135.

4. Joseph Burke ("Burke") was employed by Grain Land in August 1994 to take over the grain origination program – controlling the type of merchandising contracts the elevator entered – as well as training. Tr1 at 158-59; Tr3 at 29. The grain origination program required Burke to work with employees and producers and instruct them on the various market alternatives available. Tr3 at 30-31. Burke eclipsed Daly in terms of educating producers about the Flex HTA as an alternative marketing tool. Tr1 at 158-59, 170; Tr2 at 17; Tr3 at 30-31. Burke also reported to Christensen. Tr3 at 31. In October 1996, Burke became interim manager of Grain Land and was responsible for running the day-to-day operations which included handling accounts and negotiations. Tr3 at 29-30. Burke left Grain Land in December 1997. Tr3 at 29.

5. Curt Miller ("Miller") was employed by Grain Land from April 1995 until December 1996 as grain merchandiser, taking over Daly's duties.[8] Tr4 at 33-34, 60-61, 85-86. The grain merchandiser is responsible for hedging, storage, transportation needs, and cash bid prices, among other things. Tr4 at 86. Miller worked at the merchandising desk and was responsible for setting the basis for various locations. Tr4 at 33.

6. Fritz Bleess ("Bleess") was employed by Grain Land as soybean merchandiser and handled soybean Flex HTA contracts. DX 416 at 003867; Tr2 at 20, 63.

7. William Erickson ("Erickson") was employed as Grain Land's controller and chief financial officer, in charge of accounting, finance and administrative type activities, from January 1994 to September 1996. Tr4 at 26, 59. At hearing time he was employed by Wantonwan Farm

[6] The elevators were located in: Wells, Winnebago-Delavan, Blue Earth, Frost, Easton, Bricelyn and Kiester. Answer at ¶ 1.

[7] These locations were: Kiester, Bricelyn, Frost, Blue Earth, Winnebago, Delavan, Easton, Minnesota Lake and Wells. Tr4 at 13-14, 114.

[8] Miller then took over Bleess's duties in July or August 1995. Tr4 at 95.

Services Company ("Wantonwan")[9], the agricultural co-op designated by Grain Land as its agent to receive grain on its behalf. Tr4 at 25-26, 78.

8. Neither Grain Land nor any of its directors or employees were registered with the Commission in any capacity when the Commission commenced this proceeding. Answer at ¶ 1.

Grain Land's Operation

9. Grain Land's "core business [was in] feed, seed, petroleum and agronomy services on the input side and grain marketing on the output side." DX 416 at 003877. Grain Land purchased corn and soybeans from its member producers, which it then resold to commercial intermediate or end users. Tr4 at 9-10. Grain Land made a profit by buying grain, subtracting a basis value and then reselling it with a smaller basis differential. Tr1 at 60, 62-63; Tr4 at 107. This differential varied throughout the year.[10] Tr4 at 107. Grain Land's other sources of income included selling agronomy inputs and the milling of feed. Tr1 at 60, 62-63; Tr4 at 9. Grain Land also received income from charging rolling fees and cancellation fees. See Findings of Fact #71, 77, 78, 81.

10. To be a member of Grain Land, one needed to be a "producer," live within the trade territory of the cooperative, and conduct at least $1,000 worth of business with Grain Land. GX 47 at 007197; Tr4 at 11. A "producer" was defined as any entity "actually engaged in the production of any one or more agricultural products," which included either grain or livestock. GX 47 at 007197-7098.

11. Grain Land's gross receipts were first applied to offset the costs and expenses incurred by Grain Land, including operating expenses and additions to working capital, with the remainder being distributed to patrons. Tr1 at 36-37; GX 47 at 007207-007211. Profits were returned to members as patronage were computed to reflect the percentage of business a particular member conducted with a particular department (i.e. the feed or grain department). GX 47 at 007207-007211; Tr1 at 36-37; Tr4 at 11-13.

12. Grain Land had multiple ways to purchase grain: (1) "standard" forward delivery contracts; (2) basis contracts; (3) hedge-to-arrive contracts; (4) extended price later contracts; (5) minimum price contracts; and (6) deferred payment contracts. GX 228 at ¶ 12; Tr4 at 15.

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[9] Wantonwan purchases grain from farmers and sells farm supplies. Tr4 at 25-26.

[10] Grain Land's budget estimated an eight cent differential for corn and an eleven to twelve cent differential for soybeans. Tr4 at 107.

19. Daly had been employed by FCC as a grain marketing consultant prior to working for Wells Farmers Elevator and then Grain Land. DX 416 at 003875; Trl at 134-35, 164-65, 176. Daly was never an "employee" of Grain Land, however – he served under the grain merchandising agreement Grain Land had with FCC. DX 414 at 002181. His paycheck while at Grain Land was written by FCC, who then billed Grain Land. Trl at 134-35, 165; Tr4 at 61; see Findings of Fact #18. It is undetermined whether Daly had the same arrangement with FCC while at Wells Farmers Elevator.

20. The FCC Proposal also offered to make Grain Land an introducing broker of FCC so that "members will have the ability to use all of the typical cash contracts and use the futures and options markets when applicable."[14] DX 412 at 003732. It also stated "[i]n addition to cash and futures recommendations for Grainland [sic] members educational programs and seminars will be provided enabling them to make informed decisions about pricing their production. As the producer futures and options volume increase a full time broker can be added." DX 412 at 003732.

21. FCC submitted to Grain Land extensive information on "Marketing Alternatives" including discussion regarding twelve different types of marketing contracts along with sample forms, including a "Hedge to Arrive Contract" and "Forward Delivery Cash Flex Contract." DX 412 at 003660-01, 003694-95, 003698-99, 003700-01.

The Origins of Grain Land's Flex Hedge-To-Arrive Contract

22. Grain Land began offering Flex HTA contracts as a response to the grain marketing activities of its competitors. Trl at 137; Tr4 at 52-53, 83. Flex HTA contracts succeeded in attracting producers that had not previously or regularly marketed grain through Grain Land. Trl at 95; Tr2 at 44, 62; Tr3 at 8-9.

23. Grain Land offered, within a week of its inception in April 1993 through at least February 1996, what it referred to as "flex hedge-to-arrive" contracts and "hedge-to-arrive" contracts with "flex" delivery provisions (collectively referred to as "Flex HTA" contracts) for corn and soybean marketing. See generally DX 1-353; Trl at 136-37, 143.

24. Daly developed Grain Land's Flex HTA contract by taking an "ordinary hedge-to-arrive" contract, such as the one used by other elevators or supplied by FCC, and adding "flexible privileges" which included a rolling provision and a cancellation provision. Trl at 137-41, 174-75, 185; DX 412 at 003692-95; GX 58 at 6550.

25. Daly presented to Christensen for his approval the Flex HTA contract he had developed. Trl at 138-39. The board of directors was not informed of the Flex HTA contracts until early

[14] On May 10, 1994 Daly submitted to Christensen for review, a letter from FCC outlining the steps needed for Grain Land to become a branch office of FCC Futures, Inc. DX 412 at 003735.

1995, nearly two years after its creation and use. Tr4 at 17-18. The board of directors never reviewed any marketing materials. Tr4 at 18.

The Marketing of Flex HTA contracts

26. At Grain Land's formation, in April 1993, the board of directors and management held focus meetings at each elevator location to hear from its patrons. Tr4 at 14, 116. The patrons requested that Grain Land provide marketing program education. Tr4 at 14-15, 116-17.

27. Over a three month period, in early Spring 1995, Burke conducted at least sixty educational marketing meetings for producers. Tr1 at 95-96, 158, 170; Tr2 at 17; Tr4 at 132, 137; DX 414 at 001981-88, 002726-2728, 002112, 002129-2179; DX 416 at 003890. Meetings were advertised by the local division manager, on the Data Transmission Network (DTM), and in local papers. DX 416 at 003862; Tr1 at 24, 48. Grain Land had an email on the data line screen of the DTM. Tr1 at 24, 68-69; DX 416 at 003862.

28. Grain Land held marketing meetings advertised "For Women Only," specifically for the wives of producers. DX 414 at 001982, 1983. Grain Land also conducted marketing meetings for entities lending money to producers. Tr4 at 131-32, 137.

29. Many producers met individually with Burke or Daly to discuss the use of Flex HTA contracts. Tr1 at 24-25, 76, 153; Tr2 at 4-5, 7, 45; Tr3 at 10.

30. The Flex HTA was marketed as a hedge tool to be used when the producer was satisfied with the price on the futures market – the producer would commit to a certain amount of bushels whose "delivery date is not set until basis is fixed" which then turned the Flex HTA into a forward contract. DX 414 at 002100-01, 002113.

31. Marketing materials stated that the producer would "Set price by fixing basis for a specific delivery month. The FHTA [Flex HTA] now becomes a forward contract." DX 414 at 002113. Producers were told that when the basis was set, their contract would become a forward contract. Tr2 at 6, 40-41.

32. Grain Land marketed the goals of the Flex HTA as protecting price, capturing gains on basis, picking up a carry, and providing flexibility to defer delivery. DX 414 at 002089; Tr1 at 141-42.

33. Grain Land marketed the risk of the Flex HTA being that basis could widen but the reward was that "good price levels are locked in on futures [with] flexibility to roll positions if wanting to defer deliver [sic] because of crop failure or to gain on carry in market [and the] ability to lock in 1-3 years production." DX 414 at 002100-01, 002113. The Flex HTA was to be used "when profit goals are reached without committing to a specific deliver [sic] time." Id.

34. Producers viewed the Flex HTA contracts as a superior method of funding a futures position, one in which any costs associated with a futures position, such as margin, commissions and interest charged on funds financing margin, covered by Grain Land. Tr1 at 37, 97-98, 124-26, 154-55; Tr2 at 6, 18, 40.

35. Grain Land represented to producers that Flex HTA positions corresponded to short futures positions on the CBOT, saying that the futures reference price was equal to the price traded on the CBOT. Tr1 at 147, 154-55; Tr2 at 6, 13, 18, 40-41; Tr4 at 84.

36. Grain Land marketed the Flex HTA as a method of capturing futures trading gains and losses. DX 414 at 002078-2079, 002113; see generally DX 414.

37. Form #1 and Form #3 of the Flex HTA contracts stated "BUYER [Grain Land] confirms the following futures transaction was made for seller [producer] today on the Chicago Board of Trade . . . . Buyer [Grain Land] shall be responsible for commissions and margin requirements of this transaction." DX 1, DX 5 at 100029, 100032, 100043; Tr4 at 63. Form #2 of the Flex HTA contract stated "The following futures pricing on the Chicago Board of Trade is being made at the Seller's request . . . ." DX 262 at 800433

38. Grain Land's Flex HTA contract was marketed as a "win-win" situation for producers, since the only risk was in an inverted market, in which case the Flex HTA contract could be rolled out of an invert and into a carry. DX 414 at 002076; Tr1 at 77-79, 98; Tr2 at 6, 10, 18-19, 21, 63-64; Tr3 at 11.

39. The Flex HTA contract enabled producers to market multiple years of grain. DX 5, DX 70, DX 153, DX 208, DX 252, DX 414 at 002076, 002100, 002114, DX 416 at 003854; Tr1 at 26-28, 155-57, 184; Tr2 at 6, 8, 17-18, 20, 46-47, 63, 72; Tr4 at 21, 139. Grain Land marketing materials touted the Flex HTA contract as enabling producers to "lock in price for 1-3 years production." DX 415 at 003724. There is also evidence of delivery plans for five years or more. Tr1 at 26-27; Tr2 at 8, 20, 72. There is even evidence of a delivery plan through the year 2005. Tr4 at 21. Grain Land assisted producers in establishing "stair step," "inverted pyramid" or "scale-up marketing" plans to market multiple years of production (the producer would initially contract for a smaller number of bushels and, as the futures price increased, contract for a larger number of bushels in order to skew the price average higher). DX 416 at 003901; Tr1 at 26-27, 101, 155-56; Tr2 at 7-8, 46-47, 64-65, 72, 75.

40. Producers could "lock in prices at profit levels" while still taking advantage of favorable price movements in the futures (should futures contract prices in deferred months increase relative to the futures reference price). DX 414 at 002076, 002100, 002114; DX 416 at 003890; Tr2 at 63, 72.

41. Grain Land informed producers that they could "roll positions forward if producer wishes" and "take advantage of spreads" or "a carry in the market." DX 414 at 002076; DX 415 at 003724, 003915; Tr1 at 98. Grain Land told producers that if losses were incurred in the process of rolling a Flex HTA contract, the producer could continue to roll the contract

forward until the market moved in the producer's favor or roll backward during an inverted market. Tr1 at 32-34, 77-78, 98; Tr2 at 6, 10, 18-19, 63-64; Tr3 at 15-16.

42. Grain Land told producers they had the option, when the cash price was higher than their price under the Flex HTA contract, to deliver their grain into the cash market (entering into a cash contract with Grain Land for their current production) and roll their Flex HTA contract forward. Tr1 at 105-06, 141-42, Tr2 19-20, 53-54, 63; Tr4 at 20-21, 82. This option was used by producers. Tr1 at 105-06; Tr2 at 19-20, 53-54; Tr4 at 20-21, 82.

43. Producers were told they could always cancel their Flex HTA. Tr1 at 25, 27, 76-77, 109, 120-21, 141, 146-47; Tr2 at 10, 18, 21, 34-37, 63, 65-66, 68-70; Tr3 at 10-11. Grain Land told producers that if their Flex HTA was worth more than the futures price on the CBOT, gains could be captured by canceling the Flex HTA contract. Answer at ¶¶ 4, 11; Tr2 at 8-9.

44. Burke stated that profit obtained from the futures position established and then offset could be added to the price of a subsequent, separate cash contract. DX 414 at 002079. The price received upon a producer's delivery of grain was the cash price plus or minus the futures gain or loss. DX 414 at 002078.

45. Grain Land also presented its Flex HTA contracts to livestock producers as a means to reduce feed costs by profiting in futures market trading via the Flex HTA and canceling out. Tr1 72, 75-77; Tr3 at 10-11.

46. Producers viewed the Flex HTA as obligating Grain Land to buy grain if the producer decided to set basis, and deliver in the futures reference price month, but not obligating the producer to deliver. Tr1 at 47, 64; Tr4 at 59, 119-20.

<u>The Flex HTA contract</u>

47. Each Flex HTA contract was separately entered into between Grain Land and a producer. Tr1 at 137-39, 153; Tr4 at 42.

48. The price a producer would receive under the contract was determined by (1) establishing a "reference price" for the grain at the time the contract was entered; and (2) setting "basis" at some later time. Answer at ¶ 3; GX 228 at ¶ 21; Tr1 at 143, 173-74.

49. There were three different standardized forms of Flex HTA contracts. The forms were entitled as either "Flex Hedge to Arrive Contract" or "Hedge-to-Arrive Contract" with "flex" delivery terms. DX 69; DX 81; DX 82; DX 97; DX 102; DX 104; DX 106; DX 117; <u>see generally</u> DX 1-353; Tr1 at 137-38, 143.

50. The first type of standardized Flex HTA contract ("Form #1") was entitled "Flex Hedge to Arrive Contract" and was used only for corn. DX 5; <u>see generally</u> DX 1-353. It had a rolling provision, a cancellation provision, an arrival period as "open," and a stated destination. This form had pre-filled blanks for "Grade & Grain," "Arrival Period," rolling fee, and

cancellation fee, which did not vary from contract to contract and were pre-printed as "#2-Y-Corn," "OPEN," and "2 CENTS" per bushel and "5 CENTS" per bushel, respectively. The deadline for setting basis was pre-printed as on or before the "25th DAY PRECEDING THE FUTURES MONTH OF DELIVERY." DX 5; see generally DX 1-353.

51. The second type of Flex HTA contract ("Form #2") was also entitled "Flex Hedge to Arrive Contract" and was used only for corn. DX 12; see generally DX 1-353. It had a rolling provision, a cancellation provision, "Destination" filled in or left blank, and an "Arrival Period" as "open" or left blank. It specified fees for rolling and cancellation, and the deadline for setting basis – all of which were identical to Form #1. The cancellation fee, however, did change to "10 cents" per bushel on some of these forms in 1995 and 1996. DX 112; see generally DX 1-353.

52. The third type of Flex HTA contract ("Form #3") was entitled "Hedge to Arrive Contract" and was only used for soybeans. DX 7; see generally DX 1-353. The delivery date blank was always filled in as "FLEX." Although the contract did not have a provision for rolling or cancellation, the majority showed evidence of rolling through notation of "Rolled @" at the bottom with a two cent rolling fee subtracted. DX 7, DX 8; DX 47; DX 47-50; DX 56; DX 63; DX 64; DX 69; DX 72. There was also evidence of cancellation on some of these contracts through notations that the contract had been "bought back," with subtraction of the five cent per bushel cancellation fee also noted. DX 49.

53. Each form of the Flex HTA contract contained "flexible provisions" or notation on the contract that it was administered with such provisions. DX 5 at 100029, 100032, 100043; DX 262 at 800433; DX 10353; Tr1 at 143.

54. It is unclear why one version of the contract was used in some instances as opposed to others – sometimes all three forms were used by the same producer in the same year. DX 69; DX 81; DX 82; DX 97; DX 102; DX 104; DX 106; DX 117; DX 239; DX 241; DX 260; DX 263; DX 266; DX 318; DX 325; DX 345; DX 349. Form #1 and Form #3 of the Flex HTA contract was used in 1993, 1994, 1995 and 1996. DX 125; DX 145; DX 7; DX 63. Form #2 of the Flex HTA contract was used only in 1995 and 1996. DX 12; DX 2.

Establishing the Futures Reference Price

55. The initial price of the Flex HTA contract was the "futures reference price" (or "futures contract price") which the producer selected. DX 5 at 100029, 100032, 100043; DX 262 at 800433; Answer at ¶ 3; Tr1 at 25, 29-30, 80-82, 171-72, Tr3 at 12-13; Tr4 at 42. The futures reference price was the futures price of a specific futures contract month (in corn or soybeans) traded on the CBOT. DX 5 at 100029, 100032, 100043; DX 262 at 800433, DX 414 at 002077; Answer at ¶ 3; Tr1 at 25, 80, 97, 103-04, 143-44, 154; Tr2 at 47; Tr3 at 13.

56. The futures reference price selected for multiple year Flex HTA contracts was in the nearby crop year, requiring that the producer exercise the rolling provision if delivery was intended.

DX 5, DX 70, DX 153, DX 208, DX 252; DX 414 at 002076, 002100, 002114-2115; Tr2 at 9-10, 46-49; Tr4 at 19-20, 139-40.

57. The producer also selected the number of bushels, although Grain Land required that this amount be in 5,000 increments for corn and 1,000 bushel increments for soybeans so as to correspond to the futures position Grain Land established on the CBOT (or Mid America). Answer at ¶ 4; DX 5 at 100029, 100032, 100043; DX 262 at 800433; see generally DX 1-353; Tr1 at 28-29, 81, 171; Tr3 at 14, 22; Tr4 at 42.

58. The producer would notify Grain Land of his futures reference price selection in the form of an "offer" which meant that the producer was willing to enter into a Flex HTA with Grain Land at this particular price. Tr1 at 81-82, 102-04, 143-44; Tr3 at 13-15; Tr4 at 61-62. Grain Land personnel would fill out an "offer contract" which memorialized this offer. DX 5 at 100038; DX 34 at 200093; DX 153 at 500016; DX 230 at 100676; DX 252 at 200399; DX 262 at 001469; Answer at ¶ 5. Although some offer contracts had specific prices, other offer contracts stated "market." DX 42, DX 66, DX 68, DX 69.

59. The "offer contract" was then transferred to Grain Land's broker FCC, who would then place an open order for a position on the CBOT corresponding to the futures reference price requested by the producer. Answer at ¶ 6; Tr4 at 33-36, 69-71, 95-96.

60. The Flex HTA became effective the moment the futures position was established on the Chicago Board of Trade. Tr1 at 82; 103, 144; Tr3 at 22; Tr4 at 35-36. A producer could "pull back" an offer at any time prior to the offer being filled by Grain Land's broker. Tr2 at 68.

61. The futures position was held in Grain Land's name. DX 700; Tr1 at 179-80; Tr4 at 36-37, 62-63. All margin requirements were met and paid for by Grain Land. Answer at ¶ 6; DX 700; Tr4 at 37. Nevertheless, the producer was strictly liable to Grain Land for any loss sustained on the futures position. Conversely, any gain on the position would ultimately benefit the producer.

62. Once the futures position was established, Grain Land would complete a Flex HTA contract form, always filling in blanks for the futures reference price, the futures contract month and the number of bushels, which then was signed by the producer. Tr4 at 36; see generally DX 1-353. The delivery period on the Flex HTA contract was always listed as "OPEN" or "FLEX" or left blank.[15] DX 5 at 100029, 100032, 100043; DX 262 at 800433; DX 1-353; Tr4 at 100. The producer also selected which Grain Land local elevator was the delivery destination. Tr1 at 172; Tr4 at 42, 128. With Form #2 of Flex HTA contract, however, often the delivery destination was stated as "open" or left blank. see generally DX 1-353.

[15] Grain Land used the futures reference price month as the delivery date. Answer at ¶ 4; DX 424 at 000051; Tr4 at 74-78.

63. Grain Land's Flex HTA contract permitted a producer to alter or avoid delivery through three methods: (1) a "rolling" provision; (2) a "cancellation" provision; (3) a "redelivery" provision. See Findings of Fact #64-97.

Option #1: The Rolling Provision

64. The "rolling" provision entitled a producer to defer delivery from the reference price month by altering the futures reference price and corresponding delivery month under the Flex HTA contract. DX 5 at 100029, 100032, 100043, DX 262 at 800433, DX 414 at 002078, 002089; Answer ¶¶ 4, 7-8; Tr1 at 30-34, 76-78, 98, 105-06, 117, 140-42, 145-46, 171, 181, 185; Tr2 at 4-6, 10, 17-20, 45-46, 48-50, 62-64; Tr4 at 39-41.

65. The producer could unilaterally make the determination whether to exercise the rolling provision, so long as it was exercised prior to the 25th day of the month preceeding the "delivery month." DX 5 at 100029, 100032, 100043; DX 262 at 800433; DX 700; GX 11 at 006004; Tr1 at 17-18, 30-34, 47-52, 85, 98, 140-42, 145-46, Tr2 at 5-6, 17-19, 46, 73; Tr3 at 17; Tr4 at 21-22, 42. After the 25th, Grain Land could set the basis automatically but Grain Land's written policy was that the Flex HTA would be automatically rolled. Answer at ¶ 7; DX 700; GX 11 at 006004; Tr4 at 42.

66. There is no evidence that producers were ever told by Grain Land that their rolling requests had to be agreed upon by Grain Land. Tr1 at 51. There is no evidence that any producer's rolling request was ever denied.

67. The rolling provision did not limit the number of times a producer could exercise this option. Tr1 at 77, 145-46, 171. Grain Land's written policies stated that the Flex HTA was capable of "unlimited rolls." DX 700 at 006004; GX 11 at 006004; Tr4 at 22-25, 41.

68. The producer could roll the futures reference price forward, to a later futures contract month, or backward, to an earlier futures contract month, for any reason. Answer at ¶¶ 7-8; DX 5 at 100029, 100032, 100043; DX 262 at 800433; DX 414 at 002076, 002078, 002080, 002100, 002114; DX 700; GX 11 at 006004; Tr1 at 25, 27, 33, 145, 171; Tr2 at 5-6, 17-18.

69. To effect a roll, Grain Land would place an order through its broker to offset the existing futures contract position while simultaneously establishing a position in another futures contract month; often a form was filled out by Grain Land on the producer's behalf for transmittal to its broker who placed an open order on the CBOT for the month requested by the producer. Answer at ¶ 8; DX 5 at 001649, 100036; DX 34 at 003596; DX 153 at 003467; see generally DX 1-353; Tr1 at 145-46.

70. The gain or loss reflected in the spread between the old and new futures contract months was credited or charged to the producer's Flex HTA futures reference price. Answer at ¶ 7; DX 5 at 100029, 100032, 100043; DX 70 at 500011; DX 34 at 200087; DX 208 at 900226-235; DX 222 at 600340, 600342; DX 252 at 2000421; DX 262 at 800433; DX 414 at 002076,

002078, 002080, 002100, 002100, 002114; Tr1 at 30-32; Tr2 at 47-50, Tr4 at 40-41, 130-31, 138.

71. Each time a producer rolled his Flex HTA contract he had to pay a two cent per bushel rolling fee which was subtracted at that time from the new futures reference price. DX 5 at 100029, 10032, 100043; DX 70 at 500011; DX 34 at 200087; DX 208 at 900226-235; DX 252 at 200421; DX 262 at 800433; Tr1 at 31, 85; Tr2 at 17-18, 50. Daly testified that the rolling fee was "just a number we [Grain Land] pulled out of the air . . . approximately what it cost to take and do a futures position." Tr1 at 142. Grain Land asserts that the rolling fee was to reimburse Grain Land for costs associated with offsetting and reestablishing a futures contract position on the exchange, although it only cost Grain Land approximately 1/3 to 1/2 a cent to do the transaction. Tr1 at 142. Grain Land testified that it did not make a profit by charging this fee because the Flex HTA program on the whole lost money. GX 35; Tr4 at 50-53, 57. There is no probative evidence of record to prove or disprove this assertion. A two cent per bushel rolling fee amounts to $100 per futures position (futures contracts on the CBOT are in 5,000 bushel increments) which is considerably more than the commission for a round turn trade. It is entirely possible that Grain Land paid the entire amount to FCC. The record will not support a finding that Grain land did not profit from the two cent per bushel rolling fee.

72. Form #1 of the corn Flex HTA contract stated "SELLER agrees that this Flex Hedge Contract must be priced or rolled to another option month at a cost of 2 CENTS plus or minus the spread to that option, prior to the first notice day of the underlying futures shown above or at such time as Buyer elects to roll the underlying futures hedge position." DX 1, DX 23, DX 40; see generally DX 1-353.

73. Form #2 of the corn Flex HTA contract stated "During Chicago Board of Trade trading hours and prior to the 26th day of the month preceding the Futures Contract Month, Seller may roll the Futures Contract Month to a different futures option month at a cost of 2 cents per bushel plus or minus the spread . . . . " DX 2, DX 12, DX 15; see generally DX 1-353.

74. Form #3, the soybean Flex HTA contract, had no written rolling provision but was administered with a rolling provision, evidenced by "Rolled @" notation at the bottom of the contract along with a two cent deduction memorialized. DX 7, DX 8; see generally DX 1-353.

75. Rolling permitted a producer to lock in a gain or loss on an existing contract in hopes of capturing a gain on a new futures reference price. DX 414 at 002076, 002089, 002100, 002114-2115; Tr1 at 31-34, 98; Tr2 at 10, 18-19; Tr4 at 130-31.

76. A majority of Flex HTA contracts were rolled numerous times. DX 222 at 600342, 000603, 600340; see generally DX 1-353; Tr4 at 19-21. Producers could roll a Flex HTA contract within a crop year as well as from one crop year to another. DX 414 at 002114, 002115; Tr1 at 145-46.

77. From December 1993 to April 1996, a total of 47,093,000 bushels of corn due under Flex HTA contracts were rolled at some point.[16] GX 35 at 008034-8036. Grain Land earned a total of $941,860 in rolling fees during this time as a result. GX 35 at 008034-8036. Rolling figures pertaining to soybeans were not supplied.

Option #2: The Cancellation Provision

78. The "cancellation provision" entitled a producer to extinguish his Flex HTA contract by paying a cancellation fee in addition to paying to or receiving from Grain Land any losses or gains having accrued. DX 5 at 100029, 100032, 100043; DX 262 at 800433; Tr1 at 25, 27, 33, 76, 108-09, 120-21, 141, 146-52; Tr2 at 5-8, 10, 16-17, 20-21, 45-46, 50-53, 62-71; Tr3 at 10-12, Tr4 at 55-59, 84, 140-41; Answer at ¶¶ 4, 11, 12.

79. When the producer exercised the cancellation provision to cancel the Flex HTA contract, the amount the producer owed to Grain Land or that Grain Land owed to the producer was the difference between the "current" Flex HTA contract price – which reflected gains or losses from past rolling as well as rolling fees deducted – and the current price of the reference futures contract on the CBOT. DX 5 at 100029, 100032; DX 262 at 800433; DX 34 at 200086; DX 208 at 900487, 900488; DX 242 at 100003-4; Tr1 at 129-31, 146-48; Tr2 45-46, 50-53; Tr3 11-12; Tr4 at 56-57.

80. The producer had the unequivocal right to exercise the cancellation provision and its exercise was not contingent on any conditions. Tr1 at 152; DX 5 at 100029, 100032, 100032, 100043; DX 262 at 800433. Specifically, producers could cancel in accordance with their economic best interest. Tr1 at 122. Daly added the cancellation clause to provide the Flex HTA with the greatest level of "flexibility." Tr1 at 137-41.

81. Grain Land asserts that the cancellation fee charged to producers reimbursed Grain Land for administrative expenses associated with carrying the futures position underlying the Flex HTA contract price.[17] Tr1 at 142. There is no probative evidence of record to prove or disprove this assertion. Daly testified that the cancellation fee was "just a number we [Grain Land] pulled out of the air . . . approximately what it cost to take and do a futures position." Tr1 at 142. Grain Land asserts that the fee was to reimburse Grain Land for costs associated with offsetting and reestablishing a futures contract position on the exchange, although it only costs Grain Land approximately 1/3 to 1/2 a cent to do the transaction. Tr1 at 142. Nevertheless, the five cents per bushel charge amounts to $250 per bushel contract, an amount vastly in excess of any round turn commission charge.

[16] See Appendix B for a month-by-month breakdown.

[17] Erickson testified that Grain Land only made a "minimal" amount of money through the exercise of the cancellation clause. GX 35; Tr4 at 57-58.

82. The cancellation clause in Form #1 in 1994 read:

> Seller [producer] also has the right to cancel contract at a cost of 5 cents per bushel, plus or minus cancelled price of the futures and the contract price. DX 5 at 100029.

83. This cancellation clause in Form #1 was then modified in 1995 and 1996 to read:

> SELLER [producer] also has the right to cancel futures contract at a cost of 5 CENTS per bushel, plus or minus cancelled price of the futures from the previously contracted futures price. SELLER also agrees that he/she must make a delivery of grain sometime to collect gains. DX 5 at 100032.

This version added conditions to realizing gains in that the producer was required to make a delivery at some future time. Tr1 at 146-49.

84. The cancellation clause in Form #2 of Flex HTA contracts read:

> During a trading session at the CBOT Seller [producer] shall have the right to cancel this contract at a cost of [5 or 10] cents per bushel plus or minus the difference between the CBOT intrasession price of the selected futures and the Futures Contract Price. Any payment due Buyer [Grain Land] is due upon cancellation. Any payment due Seller shall be divided by the number of bushels canceled and added to the cash price of a like number of bushels physically delivered at a future date. Delivery of grain is a condition [sic] Seller's right to collect any such gains. DX2 at 800130, DX 262 at 800433.

85. Form #3 of Flex HTA contract did not have any written cancellation clause. The contract, however, was marketed and administered with a cancellation provision similar to the others, with notation on the contract that it was "bought back" along with the five cent cancellation fee deducted. DX 49 at 100131, 134, 137.

86. None of the forms contained a delivery requirement when the producer accrued losses. DX 5 at 100029, 100032, 100043; DX 262 at 800433; see Findings of Fact #96.

87. A number of producers entered Flex HTA contracts with the intention to cancel them since delivery was not feasible. Tr1 at 77, 83-84; Tr3 at 11-12. Producers who articulated to Burke that they had no intention to deliver were told they could roll and cash out of their Flex HTA contracts. Tr1 at 77, 83-84; Tr3 11-12.

88. More than 45 producers cancelled at least one of their Flex HTA contracts. DX 4, DX 21, DX 34, DX 40, DX 41, DX 44, DX 48, DX 49, DX 67, DX 71, DX 75, DX 96, DX 106, DX 123, DX 172, DX 175, DX 179, DX 181, DX 193, DX 212, DX 237, DX 238, DX 242, DX 244, DX 246, DX 251, DX 252, DX 253, DX 259, DX 270, DX 272-274, DX 281, DX 291, DX 294, DX 295, DX 297, DX 300, DX 301, DX 307, DX 315, DX 324, DX 331, DX 332, DX 340, DX 342, DX 353; Tr2 at 68-71.

89. Although respondent contends that only 12 producers cancelled their contracts, this is based on Erickson's identification of 12 "disbursements" (checks written by Grain Land) to producers as payment for gains earned on Flex HTA contracts which were cancelled. RBrief at 6-7, 30; Tr4 at 58.

90. Grain Land had written "policies for paying off producer" – those producers who terminated their Flex HTA contracts. DX 418 at 002686, 002683.

91. Between March and May of 1996 alone, at least 846,000 bushels of grain contracted pursuant to Flex HTA contracts were canceled. DX 4, DX 21, DX 34, DX 40, DX 41, DX 44, DX 48, DX 49, DX 67, DX 71, DX 75, DX 96, DX 106, DX 123, DX 172, DX 175, DX 179, DX 181, DX 193, DX 212, DX 237, DX 238, DX 244, DX 246, DX 251, DX 253, DX 259, DX 270, DX 272, DX 273, DX 274, DX 281, DX 291, DX 294, DX 295, DX 297, DX 300, DX 301, DX 307, DX 315, DX 324, DX 331, DX 332, DX 340, DX 342, DX 353.

Flex HTA Gains

92. Although Grain Land initially told producers that Flex HTA gains could be disbursed by check, producers were later told in 1994 that this was not possible because Grain Land was not a "legalized broker." Tr2 at 65-66, 69-70, 77-78; Tr3 at 11-12.

93. There were producers who received Flex HTA gains in the form of a check without incurring any additional delivery requirements. DX 208 at 900487-488; DX 208A, DX 251, DX 253; Tr1 at 148-49; Tr2 at 12-17, 50-51, 53; Tr4 at 58-59.

94. Other producers had their Flex HTA gains credited to their accounts. DX 242 at 100001, 100002, 100005, DX 252 at 200420-424, Tr1 at 148-50. The gains could be applied against other expenses incurred by the producers while doing business with Grain Land, such as a bill for soil gritting services performed by Grain Land, or through inflated prices on unrelated cash forward grain contracts at some future time at the producer's convenience. DX 252 at 200420-423; Tr2 at 14-17, 70-71.

Flex HTA Losses

95. Between March and May of 1996, many producers cancelled their Flex HTA contracts, extinguishing their contracts at a loss. DX 4, DX 21, DX 34, DX 40, DX 41, DX 44, DX 48, DX 49, DX 67, DX 71, DX 75, DX 96, DX 106, DX 123, DX 172, DX 175, DX 179, DX 181, DX 193, DX 212, DX 237, DX 238, DX 244, DX 246, DX 251, DX 253, DX 259, DX 270, DX 272, DX 273, DX 274, DX 281, DX 291, DX 294, DX 295, DX 297, DX 300, DX 301, DX 307, DX 315, DX 324, DX 331, DX 332, DX 340, DX 342, DX 353; GX 1.

96. The producer could pay losses incurred by check. DX 281 at 400195; GX 1. The producer could also pay losses by signing a promissory note to Grain Land. DX 71 at 400063-64; DX 75 at 600091-95; DX 238 at 600358, 362, 364, 367; DX 273 at 400177; DX 274 at 400180; DX 291 at 400202; DX 301 at 600434; DX 332 at 400252.

Option #3: The Redelivery Procedure

97. The "redelivery procedure" entitled a producer to simultaneously "purchase" from Grain Land the grain pledged under their Flex HTA and "redelivering" it to Grain Land, thereby effectuating a "delivery" without any physical movement of grain. Trl at 150-52, 183. The redelivery procedure was marketed specifically to livestock producers who produced grain as feed for their hogs, dairy cows or other livestock, and lacked the intent to make physical delivery of the grain contracted under the Flex HTA contracts. Id.

Third-Party Alternative

98. A producer could purchase grain from third parties and deliver the purchased grain in satisfaction of the Flex HTA contract. Trl at 184.

Setting "Basis" and Delivering

99. If a producer decided to deliver grain, the producer informed the elevator and set the "basis." Answer at ¶¶ 3, 7; DX 5 at 100029, 100032, 100043; DX 262 at 800433; see generally DX 1-353; Trl at 27, 47, 143; Tr2 at 14-15, 39-40, 56-57; Tr4 at 119. Once the producer set basis, he would deliver grain to Grain Land during the futures reference month contained in his Flex HTA. Answer at ¶ 4; Tr2 at 14-15; Tr4 at 67-68, 77-78.

100. Basis is the difference between an elevator's cash price on any given day and the price quoted on the Chicago Board of Trade for the nearest futures price (the difference between the then-current futures month price and the then-current cash price). DX 5 at 100029, 100032, 100043; DX 262 at 800433; Trl at 172-73; Tr4 at 38, 68-69, 107-10.

101. Basis may vary from one elevator to another and is set daily by the grain merchandiser. Trl at 172; Tr4 at 33, 38, 68-69, 107-10. Basis reflects the cost of delivery to market of the commodity and fluctuates daily in response to such factors as local transportation costs, supply and demand, and operation costs; it is added to the reference price to adjust that price for local delivery. Trl at 172-73; Tr4 at 107-10. Basis is also used to attract grain to one location versus another location. Tr4 at 68-69, 111.

102. Form #1 of the Flex HTA contracts stated "SELLER agrees to set the 'Cash Basis' and determine the cash value of said grain on or before 25th DAY PRECEDING THE FUTURES MONTH OF DELIVERY. Unless other terms have been agreed upon by both Buyer and Seller prior the [sic] said date, and grain has not been price by seller. Buyer is authorized to set the Cash Basis and to set the cash price of contract." DX 5; see generally DX 1-353.

103. Form #2 of the Flex HTA contracts stated that the "Seller shall set the Cash Basis and Cash Price on or before the 25th day of the month preceding the Futures Contract Month. If Seller does not set a price prior to this date, Buyer will roll the contract to the next futures option month available as outlined above." DX2 at 800130; see generally DX 1-353.

104. Form #3, the soybean Flex HTA contract, stated "Seller agrees to set the 'Cash Basis' and determine the cash value of said grain prior to delivery or before --------, unless other terms have been agreed upon." This deadline date for setting basis was always left blank. In reality, the deadline date was treated identically to the other Flex HTA contract forms. DX 7; see generally DX 1-353.

105. The producer could decide to establish basis at any time on or before the 25th day of the month preceding the contracted Flex HTA futures reference price month. DX 5 at 100029, 100032, 100043; DX 262 at 800433; GX 11 at 006004; Answer at ¶ 7. After this time, the Flex HTA contract stated that Grain Land could automatically set basis and require delivery. Tr1 at 145-46; Tr4 at 41-42. Grain Land's written internal policy, however, called for automatic rolling. DX 700; GX 11 at 006004.

106. The price was set by "fixing basis for a specific delivry [sic] month. The FHTA now becomes a forward contract." DX415 at 003917; DX 416 at 003820. The producer's actual obligation to deliver grain was then reduced to a separate cash or forward delivery contract entered into between Grain Land and the producer. DX 89 at 400038, 400077; DX 411 at 004012; DX 151 at 600298-300; DX 161 at 300019, 300307; DX 411 at 004077; DX 203 at 80097-98; Tr2 at 40-41.

107. This separate cash forward contract utilized by Grain Land designated, among other things, which party pays for increases in freight rates, that the seller has an affirmative obligation to delivery which continues even if the buyer is not able to accept delivery at the time specified, and that "In the event of default of seller in seller's performance of this contract, seller agrees to pay all costs of buyer's enforcement of this contract, including, but not limited to, reasonable attorneys' fees and court costs." DX 89 at 400077, DX 161 at 300307.

108. The price the producer received for grain he delivered was equivalent to the current Flex HTA contract price minus the basis. DX 5 at 100029, 100032, 10043; DX 262 at 800433; Tr1 at 143; Tr4 at 37-38. The actual final price received by the producer may have fluctuated from the Flex HTA formula based upon the quality of grain delivered. Tr1 at 173-74; Tr4 at 38-39.

Grain Land's Financing

109. Grain Land's ability to operate, take deliveries of grain and finance margin payments for its positions on the Chicago Board of Trade underlying the Flex HTA contracts was dependent upon financing from the St. Paul Bank for Cooperatives ("St. Paul Bank"). Tr3 at 35-40; DX 426 at 003169-003224; DX 401 at 002572-2574, 002575-2678; DX 425 at 003240-2523. The St. Paul Bank was informed of each Flex HTA contract in order to know Grain Land's futures positions and to anticipate Grain Land's borrowing needs if the market climbed. Tr3 at 37-38.

110. In late 1995 Grain Land requested a $10,000,000 increase in its seasonal loan package from the St. Paul Bank to fund its margin calls in connection with the Flex HTA contracts. DX 401 at 002572. This brought its total seasonal loan package to $53,000,000. Id.

111. In Spring 1996, the St. Paul Bank was concerned with Grain Land's dramatic increase in Flex HTA positions. DX 401 at 002572-2574. St. Paul Bank viewed Grain Land's Flex HTA contracts with producers as unsecured loans to producers with no set repayment date. DX 401 at 002573. It viewed the risks of the Flex HTA program to "includ[e] credit extension to producers for margin deposits and the risk of non-delivery. We reviewed that risk of non-delivery is influenced by spread risk, financial risk and price increases that make delivery on the contract less attractive. DX 401 at 002572 (emphasis added).

Grain Land's Hedging Procedure

112. Grain Land's practice was to hedge any type of grain transaction involving a contract with a fixed price in order to protect itself against market fluctuations after the price was set. Tr4 at 27-28, 64-65. Grain Land had a "singular" hedging process that it followed with all types of contracts. Tr4 at 34-35. Its policy was to hedge in order to keep its risk position within 5,000-10,000 bushels of all purchases and sales netted, a policy ruled by the fact that the minimum hedge with a full contract was 5,000 bushels. Tr4 at 28-29, 88. Grain Land's open grain ("[c]ompany-owned cash grain not covered by a contract for sale or by a hedged position") was not to exceed 5,000 bushels per commodity at the close of market any day. GX 46 at 008336.

113. All contracts, including the Flex HTA, came to Grain Land's central merchandising desk to be aggregated, regardless of type, in order to determine the proper hedge for Grain Land. Tr4 at 34-35. Grain Land then placed the appropriate open offer contracts with its introducing broker, either Cargill or Advanced Trading, on the Chicago Board of Trade. Tr4 at 28, 35, 60. If the price was not hit, the connected offers would die. Tr4 at 35-36. If the price was hit, Grain Land entered the contracts with the appropriate producers (the person at the hedge desk would notify each elevator location of the accepted offers from producers, that is, the offers which were filled.) Tr4 at 36. The local elevator would then prepare the appropriate contract for the producer's signature. Id. Grain Land held all hedges in its name and financed all hedges itself. Tr4 at 36-37, 88.

Grain Land's Demise

114. From Fall 1995 through Spring 1996, grain prices continued to rise, resulting in lowered grain prices for producers who rolled their Flex HTA contracts. Tr1 at 52; Tr4 at 53.

115. In March 1996, Burke contacted producers and indicated that a relatively large number of producers in the May futures contract month had a very bad contract price vis-à-vis the market which was costing Grain Land an enormous amount of money. Tr1 at 37-38. As a result, Burke stated that Grain Land was going to impose marketing policy changes because it was suffering a huge cash drain and producers needed to be reminded that even though they

were not paying margin calls, they were still short futures. Tr1 at 38. Grain Land wanted producers to sign a contract which included a provision for a twenty cent buy-up of individual positions to help fund the cash needed by Grain Land for margin costs. Tr1 at 38-39, 63, 182-83; Tr3 at 19.

116. In March 1996, the Board voted to accept new marketing policies as well as a new Flex HTA contract. DX 419 at 003643. On April 4, 1996, Grain Land announced "policy changes" as adopted by its Board of Directors and that it was "terminating the prior indefinite contract" with the end of the stated futures contract month. DX 417 at 002635; DX 418 at 003814; DX 419 at 003651. In addition, producers who wanted to roll the futures contract month had two alternatives – alternatives which modified present contractual provisions of the Flex HTA. DX 417. Grain Land also stated that a new contract had been developed to include the "obligation of setting delivery dates." DX 419 at 003651.

117. On April 15, 1996 counsel for the producers sent a response, arguing that Grain Land "has no power or authority to unilaterally terminate or modify the Contracts or force the Producers to agree to a modification or amendment, and that therefore Mr. Christensen's statements concerning the actions taken by the Coop have no force or effect." DX 417. The producers also demanded from Grain Land adequate assurance of due performance that Grain Land would honor Flex HTA in its present form. Id.

118. On April 16, 1996 counsel for Grain Land responded to the producers' demand, although arguing that reasonable grounds for insecurity do not exists, and stated that "Grain Land intends to honor its contractual obligations under each of the contracts until they are terminated which will include, specifically, Grain Land's obligation to roll each of the contracts each time the producer in question requests Grain Land to do so until the contract is terminated." DX 417 (emphasis added).

119. On April 17, 1996, Grain Land sent out a letter to all holders of Flex HTA contracts stating the requirements to continue in the Flex HTA program with Grain Land. DX 417 at 002632; DX 419 at 003650-53. Grain Land stated that it was extending the termination of Flex HTA contracts from the end of the current futures contract month until December 31, 1996, or the end of the futures contract month for which the cash price and basis were determined, whichever was earlier. DX 417 at 002632-34; DX 419 at 003652. Grain Land also stated that the cash price and basis had to be set by no later than November 25, 1996 otherwise it would be priced on the first business day thereafter. Id. If the contract holder did not notify Grain Land that it wants to roll to a new futures contract month, the position would be rolled to the next futures contract month, not later than December 1996, at which time delivery was due and had to be made within a reasonable time thereafter. Id. Producers who wanted to remain in the program beyond December 31, 1996, had to notify Grain Land before June 25, 1996 and enter into a new contract stating delivery dates. Id.

120. On April 25, 1996, Grain Land sent out a letter stating that 130 farmers had hired legal counsel and were in negotiations with Respondent and that the alternatives resulting from the negotiations had been offered to all contract holders. DX 417 at 002629-30. The letter also

stated that "[b]y including delivery dates in the new contracts and offering alternatives to current contract holders, we have taken positive steps toward limiting losses to members, while staying within the limits of the established trading guidelines to keep Grain Land's balance sheet healthy into the future." DX 417 at 002631 (emphasis added).

121. On June 21, 1996, counsel for the producers sent a letter to Grain Land notifying them that Grain Land had "failed to provide adequate assurance under the circumstances, given that the Coop's letters to the Producers dated April 4, 1996, and April 17, 1996, both stated that the Coop was unilaterally terminating the Contracts and limiting the Producers' ability to roll . . . . [which] constitute[s] a repudiation of the Contracts." DX 417. The letter also stated that the aforementioned, in addition to the illegality of the contracts as off-exchange futures contracts, "have terminated the Producers' obligations to perform further under the Contracts." Id.

122. In September 1996, Grain Land was unable to continue operations in light of the cost of funding exchange traded positions, due to nondelivery by producers, and transferred a substantial portion of its fixed assets to a limited liability company which was leased, managed and operated by Wantonwan Farm Service Company. DX 417. Grain Land retained ownership of certain investments and all hedge-to-arrive related assets, hoping to eventually repay its remaining debt and then retire stockholder equities. DX 417.

123. Grain Land continues to receive deliveries of grain pursuant to its Flex HTA contracts through Wantonwan Farm Service, which receives the grain on Grain Land's behalf and then makes the appropriate financial arrangements. Tr4 at 43-44, 78-79. Grain Land has received approximately one million bushels of grain pursuant to Flex HTA contracts since October 1996, when it sold its assets. Tr4 at 43.

124. In December 1996 Grain Land entered into litigation with 156 farmers who entered into Flex HTA contracts with Grain Land and have not delivered in excess of 15,000,000 million bushels of grain pledged under 796 Flex HTA contracts. Tr4 at 53-54; See In re Grain Land Coop Cases, 978 F.Supp. 1267 (D.Minn. 1997).

DISCUSSION

Background

The Commodity Exchange Act ("Act") serves to comprehensively regulate futures contracts and options on futures by prohibiting their existence unless conducted on or through a board of trade designated as a contract market and monitored by the Commodity Futures Trading Commission ("Commission"). Salomon Forex v. Tauber, 8 F.3d 966, 970 (4th Cir. 1993)(citing

Commodity Exchange Act, 7 U.S.C. §§ 2, 6); see also Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options, 50 Fed.Reg. 39656 (Sept. 30, 1985). The purpose of the Act is "to ensure fair practices and honest dealing on the [futures exchanges] and to control manipulative activity and speculative excesses that undermine the markets." NRT Metals, Inc. v. Manhattan Metals (Non-Ferrous) Ltd., 576 F.Supp. 1046, 1050 (D.N.Y. 1983)(citing S. Rep. No. 850, 95th Cong. 2d Sess. 12, reprinted in 1978 U.S.C.C.A.N. 2087, 2100). To accomplish this, the Act provides the Commission with regulatory jurisdiction over "accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . or any other board of trade, exchange, or market." Section 2(a)(1)(A)(i), 7 U.S.C. § 2 (emphasis added). Such contracts, referred to as "futures contracts," which are not offered and sold on regulated boards of trade constitute illegal "off-exchange" contracts in violation of Section 4(a) of the Act. In re Bybee, 945 F.2d 309, 312 (9th Cir. 1991)(citing 7 U.S.C. § 6(a)).

The Commission's jurisdiction turns on whether a futures contract is involved. The Act defines "future delivery" as not including "any sale of any cash commodity for deferred shipment or delivery." Section 1a(11), 7 U.S.C. § 1a(11). This exclusion, involving contracts referred to as "cash forward" contracts, means that such contracts are outside the purview of the Commission and its regulation. CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573, 577 (9th Cir. 1982). Unfortunately, the Act does not further elucidate these terms.

The issue which must be resolved vis-à-vis respondent's Flex HTA contracts is whether they are cash forward contracts, as respondent contends, or futures contracts, as the Division argues. A determination that the Flex HTA contracts are futures contracts would mean that Grain Land's actions were in violation of Section 4(a) of the Act, 7 U.S.C. § 6, as illegal "off-exchange" futures contracts. Resolution of this issue requires that the definitions of cash forward contracts and futures contracts be given greater precision with respect to respondent's Flex HTA contract.

Although the courts and this Commission have discussed on many occasions the difference between a futures contract and a cash forward contract, there is a dearth of federal and state cases applying this analysis to "hedge-to-arrive" contracts. The present matter is the first administrative enforcement case brought by the Commission that has reached disposition.[18]

Legislative History of the Commodity Exchange Act

The legislative history of the Act has been examined closely in the past in order to provide guidance as a direct result of the Act's failure to further define the terms "future delivery" or "cash commodity for deferred shipment or delivery," both pivotal to the Act and the case at bar. CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573, 577 (9th Cir. 1982); Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188, 39,190 (CFTC Sept. 25, 1990).

The genesis of the forward contract exclusion was with the Futures Trading Act (1921), Pub.L. No. 67-66, 42 Stat. 187, the first statute passed by Congress to regulate boards of trade engaged in futures trading. Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 970 (4th Cir. 1993); Co Petro, 680 F.2d at 577 (citing S. Rep. No. 212, 67th Cong., 1st Sess. 4-5 (1921)). Congress utilized its taxing power to enact a "prohibitive tax" on all futures contracts unless traded on regulated contract markets. In re Stovall, Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,780 (CFTC

[18] Although there have been a number of reparations cases filed with the Office of Proceedings that involve hedge-to-arrive contracts, none of these cases has reached full disposition on the merits.

Dec. 6, 1979); Tauber, 8 F.3d at 970. Excluded from this tax, by direct exclusion from the term "future delivery," was "'any sale of cash grain for deferred shipment.'" Co Petro, 680 F.2d at 577 (citing S. Rep. No. 212, 67th Cong., 1st Sess. 1 (1921)(emphasis added)); In re Stovall, ¶ 20,941 at 23780.

The Futures Trading Act was declared unconstitutional the following year as an improper tax and prompted the Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 998, which utilized the Commerce Clause as a means to the same regulatory ends. Tauber, 8 F.3d at 970 (citing Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922)); In re Stovall, ¶ 20,941 at 23,871 (citation omitted). The "future delivery" exclusion remained unchanged. Co Petro, 680 F.2d 573, 578 (citing Pub. L. No. 67-331, § 2, 42 Stat. 998 (1922)); In re Stovall, ¶ 20,941 at 23,781. The Grain Futures Act was upheld in Chicago Board of Trade v. Olsen, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (1923), since Congress was now directly regulating futures trading by prohibiting such trading if not conducted on a regulated contract market instead of attempting to do so indirectly through a prohibitive tax. Co Petro, 680 F.2d at 578 n.7; In re Stovall, ¶ 20,941 at 23,781.

The Grain Futures Act was followed by the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936), in which the "future delivery" exclusion was redefined as "any cash commodity for deferred shipment or delivery." Co Petro, 680 F.2d at 578 (citing Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936)(emphasis added)). Even though numerous amendments of the Act have followed, the cash forward exclusion has not been altered in substance since that time. Co Petro, 680 F.2d at 578.

The cash forward contract exclusion, found in both the Futures Trading Act of 1921 and the Grain Futures Act of 1922, was to ensure that the regulatory scheme would not interfere with "the owners and growers of grain who merchandised the physical commodity." In re Stovall, ¶ 20,941, at 23,780-81 (citations omitted).[19] "The term 'cash grain,' as used in the exclusion, refer[s] to 'the actual grain.'" Id. at 23,777 (citing Hearings on H.R. 5676 Before the Senate Committee on Agriculture and Forestry, 67th Cong., 1st Sess. 463 (1921)(emphasis added)). Although undergoing a slight definitional change in 1936, the cash forward exclusion which presently exists still places primary emphasis on that sale of a "cash commodity" – a contract revolving around an actual physical commodity.

Why the Flex HTA Contract Cannot Be a Cash Forward

Respondent argues that its Flex HTA contracts fall outside the purview of the agency's jurisdiction since they are cash forward contracts, involving the sale of grain for deferred shipment or delivery. Respondent's Flex HTA contracts fail to constitute cash forward contracts as intended by Congress pursuant to the cash forward contract exclusion of Section 2(a)(1)(A) of the Act, 7 U.S.C. § 2. Although there are numerous reasons why the Court has determined the Flex HTA contracts are futures contracts, the first issue to be discussed will be the primary obstacle to finding that the Flex HTA contract was a cash forward.

[19] The courts have found "no indication that Congress drew this exclusion otherwise than to meet a particular need such as that of a farmer to sell part of next season's harvest at a set price to a grain elevator or miller." Co Petro, 680 F.2d 577 (citation omitted). "A cash forward contract . . . guarantees . . . a price but allows delivery to be deferred 'until such time as he could process the wheat.'" Co Petro, 680 F.2d at 578 (quoting H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 129-30 (1974)(emphasis added)).

The Fundamental Problem – Grain Land Provided the Producer with Optional Delivery

The Flex HTA contract, as written, permits the producer to unilaterally and unequivocally avoid delivery for any reason by canceling the contract. A producer who entered respondent's Flex HTA contract was not binding himself, at the time he signed the Flex HTA contract, to deliver grain – but only to deliver grain if the producer chose to set basis or if the producer failed to set basis by a certain time and respondent did. This distinction is of critical importance when coupled with the fact that the original Flex HTA contract gave the producer sole discretion to utilize the cancellation provision for any reason as a means to avoid setting basis. Respondent's contention that its approval was needed to effectuate a producer's request for cancellation is unsupported by the testimony of record, the literal wording of the contracts, and the marketing materials submitted into evidence. Not only does the cancellation clause preclude a finding that the producer was obligated to deliver grain, it also precludes Grain Land from successfully arguing that it entered into the Flex HTA expecting delivery in light of providing delivery discretion solely to the producer.

The Commission's hallmark case, In re Stovall, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,777-778 (CFTC Dec. 6, 1979)(emphasis added), stated that

> [t]he "cash commodity" exclusion was intended to cover only contracts for sale which are entered into with the expectation that delivery of the actual commodity will eventually occur through performance on the contracts . . . . Although the desire to acquire or dispose of a physical commodity is the underlying motivation for entering such a contract, delivery may be deferred for purposes of convenience or necessity.

The cancellation provision as written and marketed by Grain Land is inconsistent with such a desire. The "optional" use of the Flex HTA by the producer for delivery is counterintuitive to the underlying purpose of the cash forward – to deliver or receive an actual physical commodity.

In CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982), one of the well-known federal court cases discussing the cash forward exclusion, the Ninth Circuit focused on "the facts underlying the purchase agreement" which revolved around "intent of the parties" to the contract vis-a-vis "physical transfer of the actual commodity." In re Bybee 945 F.2d 309, 313 (9th Cir. 1991)(citing Co Petro, 680 F.2d at 578).

In 1991, when the Ninth Circuit revisited the cash forward issue, it altered its focus to reflect the numerous interpretive releases issued by the Commission since Co Petro discussing the cash forward exclusion. In re Bybee, 945 F.2d at 313-14. The Ninth Circuit found that the "real innovation . . . is [the] treatment of the delivery obligation" in large part due to the Commission's articulation that the regulatory scheme "should not apply to . . . transactions which create enforceable obligations to deliver." Id. at 314-15 (quoting Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188, 39190 (CFTC Sept. 25, 1990)(emphasis supplied by court)).[20] In Bybee, the Ninth Circuit found that both parties did in fact have "the legal obligation to make or take delivery upon the demand of the other." Id. at 315 (emphasis added).

The emphasis on the subjective delivery intent of the parties, however, was reemphasized in 1995 by the Ninth Circuit which reiterated Co Petro by stating that "a cash forward contract is one in which the parties contemplate physical transfer of the actual commodity." CFTC v. Noble Metals International, Inc., 67 F.3d 766, 773 (9th Cir. 1995)(quoting Co Petro, 680 F.2d at 578)(emphasis added).

[20] The Ninth Circuit also noted that the Commission "characterized a forward contract as 'a binding agreement on both parties to the contract: one must agree to make delivery and the other to take delivery of the commodity.'" Id. at 313-14 (quoting Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options, 50 Fed. Reg. 39656 (CFTC Sept. 30, 1985)(emphasis added)).

Regardless of which aspect of delivery is focused on, the Flex HTA contract comes up short as a cash forward contract. The Flex HTA contract, as written and marketed, simply permitted the producer to unilaterally and unequivocally avoid setting basis, and avoid delivery for any reason. Marketing materials stated that only when the producer sets basis would the Flex HTA become a forward contract. Not surprisingly, the producers viewed the Flex HTA contract as always obligating Grain Land to buy grain if the producer decided to set basis but not obligating the producer to deliver.

Although the Division insists that the low occurrence of actual delivery versus contracted delivery over the life of the Flex HTA program is dispositive evidence that the contracts were not cash forwards, the delivery percentages are not as persuasive as the delivery flexibility evidenced by the plain language of the Flex HTA cancellation provision. As for the parties' subjective intent concerning delivery, the optional delivery provided to the producer by Grain Land in the Flex HTA contract can only signify something less than Grain Land's intent that delivery actually occur with each Flex HTA contract.

It simply is not true, as respondent asserts, that its cancellation provision was really a liquidated damages provision similar to that used by "traditional" forward contracts. Specifically, respondent alleges that it was fundamentally "misled" by Commission pronouncements, citing the one issued in 1985 by the Office of General Counsel. RBrief at 13-14 (citing <u>Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options</u>, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,718, at 31,024 (OGC Sept. 30, 1985)). Such is hardly the case. In that statement, the Office of General Counsel discussed agricultural contracts in which the "[d]elivery of the commodity is mandatory, absent an <u>intervening event such as crop failure</u>." <u>Id.</u> at 31,029 (emphasis added). Specifically, it noted that a liquidated damages provision in a cash forward contract does not change the nature of the contract because "it is intended that delivery of the physical crop occur, absent destruction of all or a portion of the crop by forces which neither party can control." Id. at 31,029 n.35 (emphasis added). As previously discussed, this was not the case with the Flex HTA contract which had a cancellation provision exercised at the producer's sole discretion for any reason. In fact, the Office of General Counsel went on to state explicitly that "a contract provision which permitted a producer to avoid delivery for a reason other than for an intervening condition not in the control of either party could change any conclusion about the nature of the contract."[21] Id. It is true that not all cash forward contracts result in delivery.[22] The "failure to deliver," therefore, is not necessarily dispositive of whether a contract is a cash forward. These exceptions to delivery, however, are premised on an intervening event out of the control of the parties. A contractual provision providing otherwise corrupts a cash forward contract.

Respondent also argues, without success, that the Flex HTA cancellation provision is analogous to those used with the 15-Day Brent contracts which were exempted as cash forward contracts by the Commission in 1990. Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188 (CFTC Sept. 25, 1990). This argument is also without merit. The Commission, in that situation, determined that these privately negotiated transactions, involving Brent system crude oil, between commercial parties in connection with a line of

[21] The Office of General Counsel also stated that "the Commission is aware that public marketing and sales presentations made to prospective purchasers of certain instruments sometimes differ markedly from the written offering material. Thus, the Commission and the courts have consistently looked beyond written materials and examined the day-to-day operations of a transaction to determine its underlying purpose." Id.

[22] Under a valid cash forward contract, even though the purpose of the contract is to set the price for future delivery of harvest, "there is always the possibility that the farmer will be unable to deliver at the forward date, because of a crop failure or other intervening event. Absolute certainty of ability to perform in the future simply is not a requirement of a cash forward contract." Top of Iowa Coop. v. Schewe, 6 F.Supp.2d 843, 858 (N.D. Iowa 1998).

business did in fact fit within the cash forward exclusion even though the parties to the transaction may ultimately forego delivery through the "payment-of-differences" in accordance with a cancellation agreement referred to as a "book-out." Id. at 39189-90; see also In re Bybee, 945 F.2d at 314. The Commission found that although these cancellation agreements, also referred to as "close-outs" or "by-passes," may exist in cash forward contracts, "[i]t is noteworthy that while such agreements may extinguish a party's delivery obligation, they are separate, individually negotiated, new agreements, there is no obligation or arrangement to enter into such agreements, they are not provided for by the terms of the contracts as initially entered into, and any party . . . is nevertheless entitled to require delivery of the commodity to be made.." Id. at 39191-92. This is in marked contrast to respondent's Flex HTA contracts which contained standardized cancellation provisions in the original Flex HTA contract. See Findings of Fact #82-84. The cancellation right of the producer was an integral part of the original "bargain" of the Flex HTA and not a subsequent and unrelated provision.

Respondent also contends, unsuccessfully, that the numerous cash buy-outs of Flex HTA contracts conducted with producers from March 1996 to May 1996 were entirely consistent with CFTC Interpretative Letter No. 96-41 and should not be considered as evidence that the Flex HTA contracts were not cash forward contracts. Division of Economic Analysis Statement of Policy in Connection With the Unwinding of Certain Existing Contracts for the Delivery of Grain and Statement of Guidance Regarding Certain Contracting Practices, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,691 (CFTC May 15, 1996). The Court disagrees. Once again, the statement by the Commission spoke to instances where parties to Hedge-to-Arrive or Flexible Hedge-to-Arrive contracts "mutually agree by a separately negotiated settlement, entered into subsequent to entry into the original contract, to unwind, arrange a work-out, or restructure the original transaction through cash payments, wholly or in part." Id. at 43,851 (emphasis added). The producers in the present case were merely doing what the Flex HTA contract had always permitted them to do – unilaterally cancel their Flex HTA contract by paying Grain Land, by check or promissory note, for any losses accrued under the contract, including a cancellation fee per bushel.

Grain Land makes much of the fact that the Flex HTA contract was not entered into with the "general public" but commercial parties who engaged in the purchase or sale of grain as part of their business. This argument is not persuasive. "While public involvement is certainly a factor to consider . . . it is not the sole determinant of the status of a transaction." In re Bybee, 945 F.2d at 313. According to Grain Land's analysis, any contract entered into between an elevator and a producer would automatically be precluded from being a futures contract by sheer virtue of the status of the parties – in essence, "carv[ing] out a non-public commercial party exception to commodities regulation." Id. Needless to say, this would be unacceptable.

In sum, the contractual terms of respondent's Flex HTA contracts, consistent with the way they were marketed, readily allowed a producer to unilaterally and unequivocally avoid delivery for any reason.[23] This "privilege" is fundamentally at odds with the rationale underlying a cash forward contract – the desire to dispose of or acquire grain. A necessary result of such a provision is that it precludes a finding that Grain Land legitimately anticipated delivery from each producer, based on the contractual language of the Flex HTA. The cancellation provision which existed in the Flex HTA contract is anathema to the cash forward contract exclusion.

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[23] It is worth noting that Grain Land's "standard" forward contracts stated that "In the event of default of seller in seller's performance of this contract, seller agrees to pay all costs of buyer's enforcement of this contract, including, but not limited to, reasonable attorneys' fees and court costs." DX 89 at 400077, DX 161 at 300307.

Grain Land asserts that the handful of federal and state courts which have found various hedge-to-arrive contracts to be cash forwards should be used as a model in deciding this case.[24] Respondent's attempt to characterize its Flex HTA contract as "identical" to the hedge-to-arrive contracts in those cases to be disingenuous, at best. Respondent overlooks the fact that none of those hedge-to-arrive contracts contained a cancellation clause similar to Grain Land's Flex HTA. Even the Grain Land employee who created the Flex HTA contract testified that he constructed the Flex HTA by adding a cancellation provision to a "standard" hedge-to-arrive contract. See Findings of Fact #24.

Why The Flex HTA Contract is a Futures Contract

The contractual language, respondent's marketing of the contract, and the way in which the contracts were administered, mandates a finding that respondents Flex HTA contracts were the functional equivalent of a futures contract.[25] The Flex HTA contract "when viewed as a whole, served substantially the same function as exchange-traded futures contracts: providing participants with an opportunity to assume or shift the risk of price changes in an underlying commodity without the forced burden of delivery." In the Matter of First Nat'l Monetary Corp.,

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[24] See Countrymark Cooperative, Inc. v. Smith, (Ohio App. 3d 1997); Farmers Cooperative Elevator v. Heyes; Oeltjenbrun v. CSA Investors, Inc., 3 F.Supp.2d 1024 (N.D. Iowa 1998); Top of Iowa Coop. v. Schewe, 6 F.Supp.2d 843 (N.D. Iowa 1998); Andersons, Inc. v. Crotser, 7 F.Supp.2d 931 (W.D. Mich. 1998); Bunker v. Farmers Elevator Co. of Hopkins, (W.D. Mo. 1997); Barz v. Geneva Elevator Co., 12 F.Supp.2d 943 (N.D.Iowa 1998); Johnson v. Land O' Lakes, Inc, -- F.Supp.2d --, 1998 WL 527284 (N.D. Iowa Aug. 10, 1998).

[25] The Commission also noted that "[w]hen instruments have been determined to constitute the functional equivalent of futures contracts neither we nor the courts have hesitated to look behind whatever self-serving labels the instruments might bear." In the Matter of First Nat'l Monetary Corp., ¶ 22,698, at 30,974 (citations omitted).

[1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,698, at 30,976 (citing Co Petro, 680 F.2d at 580)(emphasis added).[26]

Both the Division and Grain Land readily acknowledge there is no definitive list or "bright line" definition as to what constitutes a futures contract. Co Petro, 680 F.2d at 581. The numerous federal and Commission cases which have addressed the characteristics of a futures contract have all been subject to the same qualifications or caveats – that the factors listed were not exclusive and that no particular factor was dispositive of a determination. When determining whether a futures contract exists, "the transaction must be viewed as a whole with a critical eye toward its underlying purpose." Co Petro, 680 F.2d at 581; See Regulation of Hybrid and Related Instruments, 52 Fed. Reg. 47022, 47023 (CFTC Dec. 11, 1987).

The following discussion has been structured to focus on the particular aspects of the Flex HTA contract that compel the determination that the Flex HTA serves the functional equivalent of a futures contract.

Underlying Purpose of Flex HTA – Speculation

The Supreme Court has noted that "[t]he purchase or sale of a futures contract on an exchange is . . . motivated by a single factor - the opportunity to make a profit (or to minimize the risk of loss) from a change in the market price." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 358, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982). Quite simply, futures contracts serve to transfer price risk. Salomon Forex, Inc. v. Tauber, 8 F.3d 966 at 971; In re

[26] In that case, the Commission noted that "Respondents' forwards obligate the parties to fulfill their contractual commitments, but, like other off-exchange instruments that have been found to be futures contracts, the forwards provide an opportunity to forego delivery by means of offset or rollover (*i.e.*, simultaneously entering an offsetting transaction or acquiring the same position in a forward contract with a more distant delivery month)." In the Matter of First Nat'l Monetary Corp., ¶ 22,698, at 30,975 (emphasis added).

Stovall, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,491 (CFTC Dec. 6, 1979). Even though actual delivery did in fact occur with a portion of the grain contracted pursuant to the Flex HTA contract, this was not the main purpose of the Flex HTA contracts and certainly not their primary appeal. As even Grain Land concedes, the Flex HTA contract was offered as a means to provide producers with something that was not otherwise available through Grain Land's other merchandising contracts or other local elevators. Quite simply, the Flex HTA contract provided an opportunity for producers to obtain futures positions financed by Grain Land.

"A futures contract enables an investor to hedge the risk that the price of the commodity will change between the date the contract is entered and the date delivery is due—without having to take physical delivery of the commodity." CFTC v. Noble Metals Int'l, Inc., 62 F.3d 766, 772 (9th Cir. 1995)(citing Co Petro, 680 F.2d at 579-80 (emphasis added)). A chance to hedge price risk is exactly what the Flex HTA contract was marketed as able to do, and the fact that actual delivery may have occurred on a portion of the Flex HTA contracts is not inconsistent with this. See Findings of Fact #30. As the Commission has noted, "a party to a commodity futures contract may eventually perform on the contract, that is, make or take delivery, at the maturation of the contract, thereby using the futures market to make or take delivery of actual commodities in exchange for money." In re Stovall, ¶ 20,941, at 23,777 (emphasis added).

First and foremost, the Court finds most disturbing the language contained in each of the Flex HTA contracts regarding the purchasing of futures positions by Grain Land. Form #1 and Form #3 of the Flex HTA contracts stated "BUYER [Grain Land] confirms the following futures transaction was made for seller [producer] today on the Chicago Board of Trade . . . . Buyer [Grain Land] shall be responsible for commissions and margin requirements of this transaction."

See Findings of Fact #37. Form #2 of the Flex HTA contract stated "The following futures pricing on the Chicago Board of Trade is being made at the Seller's request . . . ." See Findings of Fact #37. Such language corroborates the testimony provided at the hearing as well as the marketing materials submitted in evidence, that the Flex HTA contract was a superior means to fund a futures position – profits from which could eventually be paid to the producer.

Grain Land marketed its Flex HTA contracts as representing the underlying short futures positions for which Grain Land would cover all margin calls, interest on margin financing, and commissions. As previously discussed, the Flex HTA contract provided for delivery at the producer's sole option. The language contained in respondent's contracts, as well as the way the contract was marketed, makes it abundantly clear that the producer alone could decide to exit the Flex HTA contract at any time, for any reason. Producers could pay losses to Grain Land by check or by signing a multi-year promissory note. As for gains that had accrued, Grain Land paid them initially by check. This practice stopped, however, when respondent acknowledged that it was not a "legalized broker." See Findings of Fact #92. Grain Land still "paid" gains in the sense that they were applied to other costs the producer incurred while doing business at Grain Land, such as soil gritting charges, or by receiving inflated prices for subsequent, unrelated grain deliveries made by the producer at the producer's convenience and pursuant to a "standard" cash forward contract.[27] Although the form may have varied, the substance remained the same. Producers were directly accessing the futures market, and accruing gains and losses – albeit with Grain Land as the middleman.

[27] Some forms of the Flex HTA contract provided for a "condition" for producers to collect gains – requiring that delivery be made at some time for collection – but such a delivery was made through unrelated grain deliveries at the producer's convenience. See Findings of Fact.

Futures contracts provide a means to make a profit, or suffer a loss, "for any differences in price between the initial and offsetting transactions." In re Stovall, ¶ 20,941 at 23,777; See also Noble Metals, 67 F.3d at 772. This is precisely how the Flex HTA contract accrued gains or losses. Looking at the computations on the Flex HTA contracts themselves demonstrate this. Each time the contract was rolled, the futures reference price was compared to the price of the futures contract used by Grain Land to offset the existing futures contract. This differential was then added to or subtracted from the price of establishing a new futures position.[28] See Findings of Fact #69, 70. Each roll of the Flex HTA, therefore, permitted customers "to deal in commodity futures without the forced burden of delivery" since rolling did not impact the producer's ability to eventually use the cancellation cause. Co Petro, 680 F.2d at 580.

The fact that the Flex HTA contract gave the producer the unilateral and unequivocal right to exercise the rolling provision is further proof that the Flex HTA contract served as a means for the producer to speculate. Grain Land touted the ability of the producer, and the producer alone, to roll the Flex HTA contract forwards or backwards, within the crop year and between crop years, specifically as a means to capture futures trading gains, "spreads" and "carries" in the market. See Findings of Fact #65-68. Moreover, Grain Land's attempt to characterize its rolling provision as requiring respondent's consent is unsupported by the plain language of the Flex HTA contract, the marketing material submitted into evidence and the testimony provided at the hearing. There is no evidence that a producer's request to roll his Flex HTA contract was ever denied. Moreover, on April 16, 1996, counsel for Grain Land stated in a letter to producers that "Grain Land intends to honor its contractual obligations under each of the

[28] The rolling fee of two cents also needed to be subtracted before the new futures reference price computed.

contracts until they are terminated which will include, specifically, Grain Land's obligation to roll each of the contracts each time the producer in question requests Grain Land to do so until the contract is terminated." See Findings of Fact #118.

Standardized Terms

One of the hallmarks of a futures contract is its standardized terms.

> Futures contracts traded on the designated markets have certain basic characteristics. Except for price, all the futures contracts for a specified commodity are identical in quantity and other terms. The fungible nature of these contracts facilitates offsetting transactions by which purchasers or sellers can liquidate their positions by forming opposite contracts. The price differential between the opposite contracts then determines the investor's profit or loss.

Co Petro, 680 F.2d at 579-80 (citations omitted)(emphasis added). Respondent's characterization of Flex HTA contracts as individualized and separately negotiated contracts does not square with the facts. Although the Flex HTA contract is different than the contracts at issue in Co Petro, that court's analysis is still valuable. The Co Petro court noted that although the contracts in that case

> were not as rigidly standardized as futures contracts traded on licensed contract markets, neither were they individualized [there was] uniformity in the basic units of volume, multiples of which were offered for sale. Similarly, relevant dates . . . were uniform. The date on which an investor had to notify [respondent] of his intent to take delivery or . . . resell the contract was set.

Co Petro, 680 F.2d at 580 (emphasis added); see also NRT Metals, Inc., 576 F.Supp. 1046, 1051; In re Stovall, ¶ 20,941 at 23,777-78. In the case at bar, respondent's Flex HTA contracts were required to be made in increments of 5,000 bushels for corn and 1,000 bushels for soybeans, the grade of grain for corn was preset as #2-Y-Corn for every Flex HTA contract, the delivery month "selected" by a producer needed to be one of the futures contract months offered by the Chicago Board of Trade for the grain, notification of the producer's intent to roll the contract or set basis was preset as the 25th day of the month preceding the futures reference price month, the rolling fees and cancellation fees were preset and standardized, the delivery location selected by the producer had to be at one of Grain Land's elevators, with some Flex HTA contracts leaving the delivery location blank.

Contrary to respondent's arguments, the fact that the Flex HTA specifies grade of grain and delivery destination in some circumstances does not preclude it from being a futures contract. Even though a minimal percentage of futures contracts result in actual delivery and "many of the traders never intend to take delivery of the underlying commodity, the contracts provide for uniform delivery points and delivery dates." CFTC v. American Metal Exch. Corp., 693 F.Supp. 168, 192 (quoting Breyer v. First Nat'l Monetary Corp., 548 F.Supp. 955, 963 (D.N.J. 1982)(emphasis added)). That being said, the fact that the vast majority of futures contracts do not result in actual delivery do not prevent all futures contracts from specifying delivery destinations, grade of grain, and other details which would only be relevant if delivery occurred.

In addition, the rationale for standardization in futures trading is to "facilitate the formation of offsetting or liquidating transactions [which] is essential since investors rarely take delivery against the contracts." Co Petro, 680 F.2d at 580. The real reason that standardized terms were imperative with the Flex HTA contract was because it was a rarity for producers to deliver against the contract as initially entered – a direct result of Grain Land providing unilateral rolling and cancellation privileges. From December 1993 to April 1996, a total of 47,093,000 bushels of corn alone were rolled. See Findings of Fact #77.

Delivery Unexpected

The aforementioned is sufficient to establish that the Flex HTA contracts were the functional equivalent of futures contracts. That some "producers" who entered into Flex HTA contracts lacked any intent to make physical delivery removes all doubt. "In general, if delivery of the commodity is not an expectation, the investment presumablly [sic] has the character of a futures contract." CFTC v. American Metal Exchange Corp., 693 F.Supp. 168, 192 (D.N.J. 1988)(citation omitted).

There is credible testimony from multiple livestock producers who entered Flex HTA contracts who had no intention to physically deliver any of the grain contracted – a fact explicitly articulated to respondent and accepted by respondent. In fact, such "producers" were the target of respondent's marketing of its "redelivery" procedure in addition to being told that these Flex HTA contracts could always utilize that cancellation clause and cash-out of their contract. Although such individuals were "producers" in the eyes of respondent (who defined a producer as a seller of "agricultural products" which includes livestock), the Flex HTA contract was used exclusively as a means to make money. The fact that these "producers" may have been few in number does not diminish the significance of their existence which attests to the fact that the Flex HTA was constructed and administered to function as a futures contract.

Violation of Section 4(a) of the Act

Having determined that the Flex HTA contracts are futures contract, the Court, therefore, finds that Grain Land's actions were in violation of Section 4(a) of the Act, 7 U.S.C. § 6, which makes it

> unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business . . . for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery . . . unless . . . such transaction is conducted on or subject to the rules of a board of trade which has been, among other things, designated by the Commission as a "contract market" for that commodity.

Successful demonstration by the Division of Grain Land's violation of Section 4(a) of the Act does not require proof of scienter. Noble Metals Int'l, Inc., 67 F.3d at 774. Therefore, it is irrelevant that Grain Land may not have intended to do anything wrong – it is sufficient that Grain Land willfully did the acts proscribed. Id. (citing Lawrence v. CFTC, 759 F.2d 767, 773 (9th Cir. 1985)). Willfulness encompasses a person who "intentionally does an act which is prohibited, – irrespective of evil motive or reliance on erroneous advice." Id. at 774 (quoting Lawrence v. CFTC, 67 F.3d at 773; see also In re Stovall, ¶ 20,941 at 23,783 (citations omitted). It is beyond dispute that Grain Land offered the Flex HTA and entered into the contracts in question with producers.

SANCTIONS

The severity of sanctions imposed by this forum in an enforcement proceeding should be commensurate with the gravity of the offenses committed. In the Matter of Elliott, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243, at 46,007 (CFTC Feb. 3, 1998)(citing In re Brody, [1986-1987] Comm. Fut. L. Rep. (CCH) ¶ 23,081 at 32,181 (CFTC May 20, 1986)). The Division has requested the issuance of a cease and desist order and the imposition of a civil monetary penalty of $110,000 or more based on respondent's violation of Section 4(a) of the Act. DBrief at 37-39.

Cease & Desist Order

The Division has established by a preponderance of the evidence that respondent Grain Land violated Section 4(a) of the Act as charged in the Complaint. A cease and desist order is imposed when there is a reasonable likelihood that the wrong will be repeated or continued. Elliott, ¶ 27,243, at 46,007. In light of respondent's continued denial of any wrongdoing and continued efforts to collect grain pursuant to its Flex HTA contracts, through deliveries made to its agent Wantonwan, a cease and desist order is warranted.

Civil Money Penalty

A civil monetary penalty imposed should relate to the gravity of the offense. As the Division noted, the Commission recently stated that when calculating civil money penalties, "while the assessment of the gravity of respondent's wrongdoing must be based on the record as a whole, the financial benefit that accrued to the respondent and/or the loss suffered by customers as a result of the wrongdoing are especially pertinent factors." In re Grossfeld, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,468 (CFTC Dec. 10, 1996)(citations omitted). A civil monetary penalty shall be based on the aforementioned unless the result is impractical or inappropriate. In the Matter of Gordon, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (CFTC Mar. 16, 1993).

Respondent's wrongdoing involved a key provision of the Act and was lengthy in duration – it spanned approximately three years, from the inception of Grain Land in 1993 until its demise in 1996. As the Division acknowledges, however, respondent's wrongdoing has caused its demise. DBrief at 38-39. The evidentiary record does not show that respondent Grain Land accrued an overall benefit from its unlawful practice and respondent is presently engaged in litigation with producers who "repudiated" the contracts at issue. A civil monetary penalty would serve no purpose in the case and, therefore, such a sanction will not be imposed.

CONCLUSION OF LAW

From 1993 to 1996 respondent Grain Land, by means of its Flex Hedge-to-Arrive contracts, violated Section 4(a) of the Commodity Exchange Act, 7 U.S.C. § 6(a), by offering to enter into, and entering into, illegal off-exchange futures contracts with its members.

ORDER

Respondent Grain Land is hereby **ORDERED** to **CEASE AND DESIST** from violating Section 4(a) of the Commodity Exchange Act, 7 U.S.C. § 6(a), as charged in the Complaint.

Issued this 6th of November, 1998.

George H. Painter
Administrative Law Judge

APPENDIX A

Grain Land had the following amounts of grain (numbers in thousands of bushels) contracted pursuant to its Flex HTA contracts at the following points in time:

As of:	Corn[29]	Soybeans[30]	Total
September 30, 1993	310,000[31]	318,000[32]	628,000
October 31, 1993	367,000[33]	63,500[34]	430,500
November 30, 1993	1,059,000[35]	115,500[36]	1,174,500
December 31, 1993	1,814,000[37]	138,000[38]	1,952,000
January 31, 1994	2,774,000[39]	176,000[40]	2,950,000
February 28, 1994	2,939,000[41]	216,000[42]	3,155,000
March 31, 1994	3,014,000[43]	219,000[44]	3,233,000
April 30, 1994	3,034,000[45]	234,000[46]	3,268,000
May 31, 1994	3,149,000[47]	293,000[48]	3,442,000
June 30, 1994	3,749,000[49]	360,000[50]	4,109,000
July 31, 1994	3,794,000[51]	365,000[52]	4,159,000
August 31, 1994	3,564,000[53]	365,000[54]	3,929,000
September 30, 1994	3,277,000[55]	331,000[56]	3,608,000

[29] DX 408 at 0030032-33; See also GX 35 at 008034-8037.
[30] DX 409 at 003159; See also GX 35 at 008037.
[31] DX 408 at 003036.
[32] DX 408 at 003036.
[33] DX 408 at 003032.
[34] DX 409 at 003156.
[35] DX 408 at 003031.
[36] DX 409 at 003154.
[37] DX 408 at 003029.
[38] DX 409 at 003153.
[39] DX 408 at 003026.
[40] DX 409 at 003151.
[41] DX 408 at 003022.
[42] DX 409 at 003149.
[43] DX 408 at 003018.
[44] DX 409 at 003147.
[45] DX 408 at 003013.
[46] DX 409 at 003145.
[47] DX 408 at 003009.
[48] DX 409 at 003143.
[49] DX 408 at 003004.
[50] DX 409 at 003140.
[51] DX 408 at 002998.
[52] DX 409 at 003137.
[53] DX 408 at 002991.
[54] DX 409 at 003134.
[55] DX 408 at 002986.

October 31, 1994	3,267,000[57]	234,000[58]	3,501,000
November 30, 1994	2,832,000[59]	228,000[60]	3,060,000
December 31, 1994	2,847,000[61]	151,000[62]	2,998,000
January 31, 1995	2,717,000[63]	123,000[64]	2,840,000
February 28, 1995	2,662,000[65]	75,000[66]	2,737,000
March 31, 1995	3,198,000[67]	155,000[68]	3,353,000
April 30, 1995	3,708,000[69]	200,000[70]	3,908,000
May 31, 1995	7,952,000[71]	392,000[72]	8,344,000
June 30, 1995	11,549,000[73]	395,000[74]	11,944,000
July 31, 1995	14,470,000[75]	622,000[76]	15,092,000
August 31, 1995	14,955,000[77]	607,000[78]	15,562,000
September 30, 1995	17,360,000	671,000[79]	18,031,000
October 31, 1995	19,080,000	692,000[80]	19,772,000
November 30, 1995	19,755,000	683,000[81]	20,438,000
December 31, 1995	20,755,000	780,000[82]	21,535,000

[56] DX 409 at 003130.
[57] DX 408 at 002980.
[58] DX 409 at 003128.
[59] DX 408 at 002976.
[60] DX 409 at 003126.
[61] DX 408 at 002972.
[62] DX 409 at 003123.
[63] DX 408 at 002967.
[64] DX 409 at 003122.
[65] DX 408 at 002962.
[66] DX 409 at 003119.
[67] DX 408 at 002955.
[68] DX 409 at 003118.
[69] DX 408 at 002947.
[70] DX 409 at 003115.
[71] DX 408 at 002937.
[72] DX 409 at 003111.
[73] DX 408 at 002915.
[74] DX 409 at 003105.
[75] DX 408 at 002886.
[76] DX 409 at 003099.
[77] DX 408 at 002848.
[78] DX 409 at 003089.
[79] DX 409 at 003081.
[80] DX 409 at 003072.
[81] DX 409 at 003063.
[82] DX 409 at 003054.

January 31, 1996	20,995,000	751,000[83]	21,746,000[84]
February 29, 1996	20,793,000[85]	700,000[86]	21,493,000[87]
March 31, 1996	20,758,000[88] (on 3/29)	677,000[89] (on 3/29)	21,434,000[90]
April 30, 1996	19,123,000[91]	636,000[92]	19,759,000[93]

[83] DX 409 at 003045.
[84] DX 425 at 002513, 003240.
[85] DX 425 at 002520.
[86] DX 425 at 002520.
[87] DX 425 at 002513, 003240.
[88] DX 404 at 001015.
[89] DX 404 at 001021.
[90] DX 425 at 003240.
[91] DX 425 at 003248.
[92] DX 425 at 003248.
[93] DX 425 at 003240.

APPENDIX B

Grain Land rolled the following amounts of corn (numbers in thousands of bushels) pursuant to its Flex HTA contracts at the following points in time:

Month	Bushels of corn rolled pursuant to Flex HTA contracts[94]
December 1993	0
January 1994	0
February 1994	334,000
March 1994	883,000
April 1994	550,000
May 1994	305,000
June 1994	622,000
July 1994	490,000
August 1994	147,000
September 1994	0
October 1994	0
November 1994	295,000
December 1994	0
January 1995	110,000
February 1995	65,000
March 1995	5,000
April 1995	32,000
May 1995	20,000
June 1995	292,000
July 1995	10,000
August 1995	30,000
September 1995	4,718,000
October 1995	1,840,000
November 1995	7,583,000
December 1995	125,000
January 1996	730,000
February 1996	13,164,000
March 1996	85,000
April 1996	14,658,000
Total	47,093,000

[94] GX 35 at 008034-8036.