

III.

A. SUMMARY

As set forth below, Pinemore and Birchmore developed and implemented a trading strategy that involved trades that are, are of the character of, or are commonly known as wash sales in violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006).

On one or more occasions in November and December 2006, Pinemore and Birchmore, two limited partnerships controlled by the same general partner and with substantially identical ownership, ordered through their broker certain futures trades in natural gas on the New York Mercantile Exchange (“NYMEX”) that were wash sales. The trades were part of a strategy involving the purchase and sale of the same quantity of NYMEX natural gas futures contracts by Pinemore and the opposite sale and purchase of the same quantity of NYMEX natural gas futures contracts by Birchmore. The resulting profit to Pinemore was intended by the general partner to be equal or similar to the resulting loss to Birchmore, or vice versa. This strategy was designed to take advantage of the volatility of the natural gas future contract price over a short period of time. Pinemore and Birchmore instructed the broker to minimize the “slippage” or price difference between the long and short positions purchased on their behalf.

Once the losses and gains were captured and recognized by the partnerships, through liquidation of the positions, the trading losses from the partnership that had the losing position were to be funded by the general partner to offset taxable capital gains. The gains from the partnership that had realized gains from its trades would be allocated to all limited partners, one of whom was a retirement trust, thus deferring taxes on the trading gain allocated to such limited partner.

Because the trades ordered by Pinemore and Birchmore were designed to give the appearance of submitting trades to the open market, while negating the risk incident to the market and produced a virtual financial nullity, they constituted wash sales in violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006).

The Commission acknowledges the cooperation of Respondents during the investigation of this matter.

B. RESPONDENTS

Pinemore, L.P. is a limited partnership formed under the laws of Alberta, Canada with its principal place of business in Calgary, Alberta, Canada. Pinemore has never been registered with Commission.

Birchmore, L.P. is a limited partnership formed under the laws of Alberta, Canada with its principal place of business in Calgary, Alberta, Canada. Birchmore has never been registered with Commission.

C. FACTS

Pinemore and Birchmore Ordered Wash Sales That Were Executed On The NYMEX

Pinemore and Birchmore are limited partnerships that are 99.5% owned by identical partners. They have a common general partner (hereafter “trader”) that directed and controlled both of their futures trading. In or about 2006, the trader decided to implement a trading strategy in response to tax advice he received. The trader developed a trading strategy that involved the purchase of the same quantity of opposite positions of NYMEX natural gas futures contracts by Pinemore and Birchmore, long in one account and short in the other. This strategy was designed to take advantage of the volatility of the natural gas futures contract price over a short period of time. Once the losses and gains were captured and recognized by the partnerships, through liquidation of the positions, the trading losses from the partnership that had the losing position were to be funded by the general partner to offset taxable capital gains. The gains from the partnership that had realized gains from its trades would be allocated to all limited partners, one of whom was a retirement trust, thus deferring taxes on the trading gain allocated to such limited partner.

The trader contacted the broker to implement this strategy. The broker discussed with Pinemore and Birchmore the possibility of trading opposite each other electronically, but ultimately advised against it. Pinemore and Birchmore then instructed the broker to minimize the “slippage” or price difference between the long and short positions purchased on their behalf.

On one or more days in November and December 2006, a matching (buy versus sell) NYMEX natural gas futures market orders were entered for the Pinemore and Birchmore accounts. In each instance, the matching pair of orders were executed either at the same price or prices that differed by a maximum of half a cent per million British thermal units of natural gas.

D. LEGAL DISCUSSION

The Pinemore and Birchmore Transactions Were Wash Sales in Violation of Section 4c(a) of the Act

Section 4c(a) of the Act, in relevant part, makes it “unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction” that “is of the character of, or is commonly known to the trade as, a ‘wash sale’ . . .” 7 U.S.C. § 6c(a) (2006). A wash sale is a form of fictitious transaction. *In re Gimbel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,003 (CFTC Apr. 14, 1988), *aff’d as to liability*, 872 F.2d 196 (7th Cir. 1989); *In re Goldwurm*, 7 A.D. 265, 274 (CEA 1948).

A wash sale is a transaction made without intent to take a genuine, bona fide position in the market, such as a simultaneous purchase and sale designed to negate each other so that there is no change in financial position. *Reddy v. CFTC*, 191 F.3d 109, 115 (2d Cir 1999). *See also Goldwurm*, 7 A.D. at 274. Wash sales are “grave” violations, even in the absence of customer harm or appreciable market effect, because “they undermine confidence in the market mechanism that underlies price discovery.” *In re Piasio*, [1999-2000 Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶ 28,276 at 50,691 (CFTC Sep. 29, 2000), *aff'd sub nom. Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir 2003) (wash sales are designed to give the appearance of submitting trades to the open market, while negating the risk or price competition incident to the market and produce a virtual financial nullity because the resulting net financial position is near or equal to zero). *See also CFTC v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979) (wash sales may mislead market participants because they do not reflect the forces of supply and demand).

The central characteristic of a wash sale is the intent to avoid making a *bona fide* transaction or taking a *bona fide* market position. *In re Citadel Trading Co. of Chicago, Ltd.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,190 (CFTC May 12, 1986). “The factors that show a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price.” *Piasio*, ¶ 28,276 at 50,685 (citing *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991)). Here, Pinemore and Birchmore purchased and sold the same delivery month of the same futures contracts at substantially the same price with the intention to avoid taking a *bona fide* market position.

In addition to the factors enumerated above, intent must be proved to establish a violation of Section 4c of the Act. *Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999). In the context of a customer’s liability for a wash sale transaction, the scienter requirement relates to the customer’s intent at the time the challenged transactions are initiated; specifically whether the customer intended to negate market risk or price competition. *Piasio*, ¶ 28,276 at 50,685. Negated risk is not “the equivalent of no risk or the complete elimination of risk;” rather the Commission has “clearly held that risk is negated whenever it is ‘reduced to a level that has no practical impact on the transaction at issue.’” *Id.*, ¶ 28,276 at 50,688 (quoting *Gimbel*, ¶ 24,213 at 35,003 n.7). “[S]cienter may be inferred from the circumstantial evidence” and while motive is not an element of a trade practice case, “evidence of motive strengthens an inference of intent.” *Reddy*, 191 F.3d at 119 (citations omitted).

Pinemore’s and Birchmore’s avowed purpose in entering into the natural gas futures trades on NYMEX was to capture both the gain and the loss based on movement of the market prices. Pinemore and Birchmore intentionally structured the trades with the intent to negate market risk, to thereby avoid a *bona fide* market transaction. Accordingly, Pinemore and Birchmore entered into transactions that were wash sales and therefore violated Section 4c(a) of the Act.

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Pinemore and Birchmore violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006).

V.

OFFERS OF SETTLEMENT

Respondents have submitted Offers in which, without admitting or denying the findings herein, they each:

(A) Acknowledge service of this Order;

(B) Admit the jurisdiction of the Commission with respect to all the matters set forth herein;

(C) Waive: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of their Offers; any and all claims that it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2009), relating to, or arising from, this proceeding; any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, §§ 231-232, 110 Stat. 857, 862-63 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to, or arising from, this proceeding; and any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;

(D) Stipulate that the record basis on which this Order may be entered consists solely of this Order and the findings in this Order consented to in their Offers; and

(E) Consent to the entry of this Order, which

(1) makes findings that Pinemore and Birchmore violated Section 4c(a) of the Act;

(2) orders Pinemore and Birchmore to cease and desist from violating Section 4c(a) of the Act,

(3) orders Pinemore and Birchmore to each pay civil monetary penalties in the amount of \$250,000; and

(4) orders Respondents to comply with the undertakings consented to their Offers and set forth below in Section VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Pinemore and Birchmore shall each cease and desist from violating Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006);
2. Pinemore shall pay a civil monetary penalty of Two Hundred Fifty Thousand Dollars (\$250,000) and Birchmore shall pay a civil monetary penalty of Two Hundred Fifty Thousand Dollars (\$250,000) within ten (10) business days of the date of entry of this Order. Pinemore and Birchmore shall pay their respective civil monetary penalties by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone 405-954-6569

If payment by electronic transfer is chosen, the paying Respondent shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondents shall accompany payment of their penalties with a cover letter that identifies the paying Respondent, and the name and docket number of this proceeding. Respondents shall simultaneously transmit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581 and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2) (2006), any Respondent that does not pay their respective civil monetary penalty in full within fifteen (15) days of the due date shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made; and

3. Respondents shall comply with the following undertakings as set forth in their Offers:

(a) Future Cooperation With the Commission

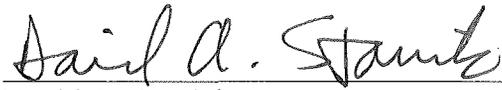
Respondents shall continue to cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this proceeding and in any civil or criminal investigation, litigation, or administrative or self-regulatory matter related to the subject matter of this proceeding. As part of such cooperation with the Commission, Respondents agree to:

- (1) preserve all records relating to the subject matter of this proceeding, including but not limited to audio files, e-mails, and trading records for a period of five years from the date of this Order;
- (2) comply fully, promptly, completely, and truthfully with any inquiries or requests for information or documents;
- (3) provide authentication of documents and other evidentiary material;
- (4) produce any current (as of the time of the request) officer, director, employee, or agent of Respondents, regardless of the individual's location and at such location that minimizes Commission travel expenditures, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation; and
- (5) assist in locating and contacting any prior (as of the time of the request) officer, director, employee or agent of either of the Respondents.

(b) Public Statements

Neither Respondents nor any of Respondents' agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without factual or legal basis; provided, however, that nothing in this provision shall affect Respondents' (i) testimonial obligations; or (ii) right to take appropriate legal positions in other proceedings to which the Commission is not a party. Respondents shall undertake all steps necessary to ensure that all of their agents and employees under their authority or control understand and comply with this undertaking.

By the Commission.

A handwritten signature in cursive script, reading "David A. Stawick", written over a horizontal line.

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: January 28, 2010