

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

UBS Securities LLC

Respondent.

CFTC Docket No. 10-11

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

Received
C.F.T.C.

2010 APR 29 11:51

Office of
Proceedings
Administration

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that UBS Securities LLC (“UBS Securities” or “Respondent”) has aided and abetted its customer’s violation of Section 9(a)(4) of the Commodity Exchange Act (“CEA”), 7 U.S.C. § 13(a)(4) (2006), and that pursuant to Section 13(a) of the CEA, UBS Securities is liable for that violation. Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether UBS Securities has aided and abetted the violation as set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, UBS Securities has submitted an Offer of Settlement (“Offer”) that the Commission has determined to accept. Without admitting or denying any of the findings herein, UBS Securities acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”).¹

¹ UBS Securities consents to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that UBS Securities does not consent to the use of the Offer, or the findings in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor does UBS Securities consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, by any other party in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

On February 6, 2009, UBS Securities' employee broker aided and abetted UBS Securities' customer's concealment of material facts from the New York Mercantile Exchange ("NYMEX") in violation of Section 9(a)(4) of the CEA, 7 U.S.C. § 13(a)(4) (2006). Pursuant to NYMEX Rules, a block trade must be reported to NYMEX "within five minutes of the time of execution" consistent with the requirements of NYMEX Rule 6.21C(A)(6). Although the block trade in question was executed earlier in the day, UBS Securities' employee broker aided and abetted its customer's concealment of facts when, in response to the customer's request to delay reporting the trade until after the close of trading, UBS Securities' employee did not report the trade until after the close. Because the employee broker undertook his actions within the scope of his employment, pursuant to Section 2(a)(1)(B) of the CEA, 7 U.S.C. § 2(a)(1)(B) (2006), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2009), UBS Securities is liable for the employee broker's aiding and abetting of its customer's violation of Section 9(a)(4) of the CEA.

B. RESPONDENT

UBS Securities is a Delaware limited liability company with its principal place of business located at 1285 Avenue of the Americas, New York, NY. UBS Securities employs registered brokers who are members of NYMEX.

C. FACTS

On February 6, 2009, around mid-day, UBS Securities' customer agreed to the block purchase of 29,110 March 2009 NYMEX Light Sweet Crude Oil futures contracts and sale of 29,110 April 2009 contracts.² UBS Securities' customer requested that UBS Securities' employee broker delay the reporting of the block trade until after the close, contrary to NYMEX Rule 6.21C(A)(6), which requires the reporting of block trades to NYMEX "within five minutes of the time of execution."³ UBS Securities' employee broker agreed to the customer's request. The block trade was entered onto the NYMEX ClearPort clearing system only after the close, between 2:37 p.m. and 2:49 p.m.⁴ Such failure to timely report the block trade to NYMEX aided

² The order ticket initially indicated a volume of 29,110 contracts for each of March and April 2009, but was subsequently stricken to reflect a greater volume of 33,110 contracts for each month, which was the actual volume that was transacted for the block trade.

³ As of February 2009, NYMEX Rule 6.21C(A)(6) provided "[t]he buyer and seller must ensure that each block trade is reported to [NYMEX] within five minutes of the time of execution." As of September 14, 2009, the NYMEX Rules have been revised, and Rule 6.21C(A)(6) in particular has been revised as Rule 526.F. to limit the obligation to only sellers, rather than both buyers and sellers.

⁴ The 33,110 March and 33,110 April contracts were entered onto NYMEX ClearPort between 2:37 p.m. and 2:49 p.m. over six blocks of 9,500 contracts and two blocks of 4,610 contracts.

and abetted UBS Securities' customer's concealment of a material fact—the time at which the block trade was executed—from NYMEX.

D. LEGAL DISCUSSION

Section 9(a)(4) of the CEA makes it unlawful to willfully conceal a material fact from a board of trade such as NYMEX acting in furtherance of its official duties under the CEA. 7 U.S.C. § 13(a)(4) (2006); *In re EMF Financial Products, LLC*, [Current Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,441 at 63,317 (CFTC Nov. 13, 2009) (speaking order) (concealments and misrepresentations of material information in response to market surveillance inquiry by the Chicago Board of Trade violated Section 9(a)(4) of the CEA); *CFTC v. Cornerstone Capital Mgmt.*, No. 1:07-cv-0274/Story, Consent Order of Permanent Injunction and Ancillary Equitable Relief (N.D. Ga. Nov. 6, 2007) (willful concealment of material information from the National Futures Association in response to its inquiries violated provisions of the CEA, including Section 9(a)(4)). By requesting UBS Securities' employee broker to delay entry of the block trade onto NYMEX ClearPort until after 2:30 p.m. even though the block trade was executed around mid-day, UBS Securities' customer was willfully concealing from NYMEX the fact of the execution of the block trade and the time of execution of the trade, which are facts material to NYMEX's surveillance function, in violation of Section 9(a)(4) of the CEA.

Section 13(a) of the CEA holds responsible as a principal any person who willfully aids and abets the commission of a violation of the CEA. 7 U.S.C. § 13c(a) (2006). Liability as an aider and abettor requires proof that: (1) the CEA was violated, (2) the aider and abettor had knowledge of the wrongdoing underlying the violation, and (3) the aider and abettor intentionally assisted the primary wrongdoer. *In re Rogers and Toczykowski*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,808 at 56,367 (CFTC July 14, 2004). Although actual knowledge of the primary wrongdoer's conduct is required, knowledge of the unlawfulness of such conduct is not necessarily required to be demonstrated. *Id.*; see *In re Global Minerals & Metals Corp.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,686 at 48,249-51 (CFTC June 30, 1999) (aider and abettor had requisite knowledge because it "correctly concluded" that the primary wrongdoer's trading was not "motivated by any genuine commercial need"). Intentional assistance is demonstrated if the aider and abettor "knowingly participate[s] in the venture and seek[s] by his actions to make it succeed." *In re Rogers and Toczykowski*, ¶ 29,808 at 56,368.

Section 9(a)(4) of the CEA was violated by UBS Securities' customer's concealment of the block trade onto NYMEX ClearPort until after 2:30 p.m. UBS Securities' employee broker aided and abetted such violation because he knew about the customer's request to delay the entry of the block trade onto NYMEX ClearPort and acquiesced to it, and intentionally assisted the customer in carrying out the customer's request by entering the block trades onto NYMEX ClearPort between 2:37 p.m. and 2:49 p.m., instead of around mid-day. Pursuant to Section 13(a) of the CEA, UBS Securities' employee broker is liable for aiding and abetting the customer's violation of Section 9(a)(4) of the CEA.

Pursuant to Section 2(a)(1)(B) of the CEA and Commission Regulation 1.2, strict liability is imposed on principals for the actions of their agents. See, e.g., *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986); *Dohmen-Ramirez & Wellington Advisory, Inc. v. CFTC*, 837 F.2d

847, 857-58 (9th Cir. 1988). Because UBS Securities' employee broker was acting as its agent when he aided and abetted UBS Securities' customer's violation of the NYMEX Rule, UBS Securities is liable for his acts in aiding and abetting its customer's violation of Section 9(a)(4) of the CEA. Accordingly, UBS Securities violated Section 9(a)(4) of the CEA, 7 U.S.C. § 13(a)(4) (2006).

IV.

Subsequent to the above referenced incident, UBS Securities has strengthened its compliance program through additional compliance training sessions and the engagement of counsel to prepare procedures for the rolling of positions on behalf of commodity funds, including instructions to report block trades to NYMEX within five minutes of their execution. UBS Securities also placed the employee broker on administrative leave following his disclosure of the above referenced incident, and has since terminated his employment.

UBS Securities promptly reported to the Commission's Division of Enforcement (the "Division") the above referenced incident and its potential NYMEX Rule 6.21C(A)(6) violation when it learned about the incident from the employee broker. UBS Securities has brought information to the attention of the Division during the course of its investigation that likely would not have otherwise been discovered. UBS Securities has been proactive and forthcoming with information and has fully cooperated with the Division throughout its investigation.

V.

FINDING OF VIOLATIONS

Based on the foregoing, the Commission finds that UBS Securities is liable for its employee's acts in aiding and abetting its customer's violation of Section 9(a)(4) of the CEA, 7 U.S.C. § 13(a)(4) (2006), and is therefore liable for violating Section 9(a)(4) of the CEA.

VI.

OFFER OF SETTLEMENT

UBS Securities has submitted the Offer in which it, without admitting or denying the findings herein:

- A. Acknowledges receipt of service of the Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all posthearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the 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 Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996) as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (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. Stipulates that the record upon which this Order is entered shall consist solely of the findings contained in this Order to which the Respondent has consented; and
- E. Consents, solely on the basis of the Offer, to entry of this Order that:
 - 1. makes findings by the Commission that UBS Securities aided and abetted its customer's violation of Section 9(a)(4) of the CEA, 7 U.S.C. § 13(a)(4) (2006);
 - 2. orders UBS Securities and its successors and assigns to cease and desist from violating Section 9(a)(4) of the CEA, 7 U.S.C. § 13(a)(4) (2006);
 - 3. orders UBS Securities to pay a civil monetary penalty of \$200,000, plus post-judgment interest, which is commensurate with its commissions earned in connection with the February 6, 2009 block trade within ten (10) days of the date of the entry of this Order. Post-judgment interest shall accrue beginning eleven (11) days after the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961; and
 - 4. orders UBS Securities and its successors and assigns to each comply with its undertakings consented to in its Offer and set forth below in Part VII of this Order.

Upon consideration, the Commission has determined to accept UBS Securities' Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. UBS Securities and its successors and assigns shall cease and desist from violating of Section 9(a)(4) of the CEA, 7 U.S.C. § 13(a)(4) (2006);
- B. UBS Securities shall pay a civil monetary penalty of \$200,000, plus post-judgment interest, within ten (10) days of the date of the entry of this Order. Post judgment interest shall accrue beginning eleven (11) days after entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. UBS Securities shall pay this civil monetary penalty by 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
(405) 954-6569

If payment by electronic transfer is chosen, UBS Securities shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. UBS Securities shall accompany payment with a cover letter that identifies UBS Securities, and the name and docket number of this proceeding. UBS Securities shall simultaneously submit a copy of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 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 CEA, 7 U.S.C. § 9a(2) (2006), if this amount is not paid in full within fifteen (15) days of the due date, UBS Securities 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

C. UBS Securities and its successors and assigns shall comply with the following undertakings set forth in its Offer:

- a. neither UBS Securities nor any of its successors, assigns, nor their 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 a factual basis; provided, however, that nothing in this provision shall affect UBS Securities' (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. UBS Securities and its successors and assigns shall take all steps necessary to assure that all of their agents and employees under their authority or control understand and comply with this undertaking.
- b. UBS Securities shall continue to cooperate fully and expeditiously with the Commission, including the Division, in this proceeding and in any civil or criminal investigation, litigation, or administrative matter related to the subject matter of this proceeding. As part of such cooperation with the Commission, UBS Securities agrees to:

- (1) preserve all records that have been previously identified by it to the staff of the Commission as relevant to the subject matter of this proceeding (including records copies of which have been previously provided to the staff of the Commission in connection with the investigation that led to this proceeding), including but not limited to 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 UBS Securities, 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 UBS Securities.

The provisions of the Order shall be effective as of this date.

By the Commission.



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

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

Dated: April 29, 2010