

III.

The Commission finds the following:

A. Summary

Commencing in mid-2005, Respondents solicited and pooled approximately \$20,000,000 from approximately twenty-five pool participants for the purpose of trading commodity futures and options on commodity futures through a commodity pool, named Maxie Partners LP (“Maxie Partners” or “the pool”).

In May 2007, one of the pool’s largest participants decided to terminate its participation in the pool and made a request to redeem its investment of approximately \$7,000,000. To meet the redemption request, Winell transferred and segregated approximately \$7,000,000 into a bank account. Before transferring the funds to the redeeming participant, the pool sustained significant losses and had margin calls of approximately \$4,000,000 issued by the futures commission merchants (“FCMs”) holding the pool’s trading accounts. To meet the margin calls and to continue trading, Winell transferred approximately \$7,000,000, the participant’s segregated funds, back to the pool’s trading accounts. By such actions, Respondents misappropriated a pool participant’s funds and engaged in unauthorized trading.

B. Respondents

Howard Winell resides in New York, New York. He is not registered with the Commission in any capacity. He previously had been registered at different times as a CPO. Winell was also a listed principle of Winell Associates from November 2004 until February 2008 when his registration was withdrawn. Winell owns, operates and/or controls Winell Associates and Maxie GP. At all relevant times Winell acted as an Associated Person of Winell Associates.

Winell Associates, Inc. is an active corporation organized and existing under the laws of the State of New York. Winell Associates is the investment manager for Maxie LP and acted as an exempt commodity pool operator (“CPO”) pursuant to a Notice of Exemption filed with the National Futures Association. Winell is the principal shareholder and president of Winell Associates.

Maxie Partners GP, LLC is an active corporation organized and existing under the laws of the State of New York. Maxie GP is located at 500 Fifth Avenue, New York, New York, 10110. Maxie GP is the general partner of the commodity pool, Maxie Partners. The pool is a limited partnership organized and existing under the laws of the State of New York and located at the same address. Winell controlled Maxie GP.

C. Facts

Commencing in mid-2005, Respondents solicited approximately \$20,000,000 from approximately twenty-five investors to participate in a commodity pool that would trade

primarily options on commodity futures contracts (“options”) as well as commodity futures contracts (“commodity futures”). According to the offering memorandum for the pool, Winell Associates acted as the investment manager of the pool, Maxie GP was responsible for the management of the business of the pool, and Winell was the portfolio manager for the pool. Winell controlled both Winell Associates and Maxie GP. Winell, through Winell Associates, opened trading accounts in the name of the pool at various FCMs and managed the trading of the accounts.

In the spring of 2007 the pool’s largest participant wanted to withdraw from participation in the pool and therefore requested in writing redemption of its entire investment of more than \$7,000,000. Respondents processed the redemption request and transferred approximately \$7,000,000 out of the pool accounts and segregated those funds in a Winell Associates checking account for return to the pool participant.

Prior to transferring the segregated funds to meet the redemption request, Winell’s trading on behalf of the pool resulted in significant losses. As a result, Winell received margin calls from the FCMs holding the pool’s trading accounts. In order to meet the margin calls and continue to trade, Winell transferred the approximately \$7,000,000 that had been segregated for return to the participant, back into the pool’s trading accounts. Through the margin calls and trading, the Respondents lost approximately \$3,800,000 of participant’s funds.

IV.

LEGAL DISCUSSION

A. **Sections 4b and 4c(b) of the Act and Commission Regulation 33.10: Fraud by Misappropriation and Unauthorized Trading**

Sections 4b(a)(2)(i) and (iii) of the Act, modified and re-designated as Sections 4b(a)(1)(A) and (C) by the as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”)), § 13102, 122 Stat. 1651 (enacted June 18, 2008),² prohibit any person from cheating or defrauding or attempting to cheat or defraud, and willfully deceiving or attempting to deceive any other person by any means whatsoever in or in connection with any order to make or the making of any futures contract for or on behalf of such person. Section 4c(b) of the Act and Commission Regulation 33.10 similarly prohibit cheating, defrauding, deceit and attempts thereof in connection with commodity options transactions.

² The June 2008 legislation reauthorizing the Commission revised Section 4b of the Act, among other things. *See* Section 1302 of the CRA. The objective of the revision was to “clarify that the CEA gives the Commission the authority to bring fraud actions in off-exchange ‘principal-to-principal’ futures transactions.” H.R. REP. NO. 110-627, at 981 (2008) (Conf. Rep.). While the CRA did not change the Act’s prohibition on misconduct such as that at issue here, it reorganized Section 4b so that similar misconduct occurring on or after June 18, 2008 would be in violation of Sections 4b(a)(1)(A) and (C) of the Act as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(1)(A) and (C).

Respondents violated Sections 4b(a)(2)(i) and (iii) of the Act by willfully misappropriating pool participant funds. *CFTC v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d. 676, 687 (D. Md. 2000) (defendants defrauded investors by diverting investor funds for operating expenses and personal use), *aff'd in part, vacated in part, sub nom. CFTC v. Baragosh*, 278 F.3d 391 (4th Cir. 2002); *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part sub nom. Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000) (respondents violated Section 4b by surreptitiously retaining money in their own bank accounts that should have been traded on behalf of participants); *CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985) (defendant violated Section 4b(a) of the Act by misappropriating customer funds entrusted to her for trading commodity futures contracts).

Respondents, through Winell, used pool participant funds to cover margin calls for the pool's accounts. Accordingly, Respondents misappropriated pool participant funds in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii) (2006).

Respondents also violated Sections 4b(a)(2)(i) and (iii) of the Act by willfully engaging in unauthorized trading. Unauthorized trading falls within the Act's anti-fraud prohibition when trades are executed without the account owner's permission or contrary to the account owner's trading instructions. *In re Interstate Securities Corp.*, [1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,595 (CFTC June 1, 1992) (citing *Cange v. Stotler, Inc.*, 826 F.2d 581, 589-590 (7th Cir. 1987); *Haltmier v. CFTC*, 554 F.2d 556, 560-562 (2d Cir. 1977)). Here, Respondents disregarded the pool participant's instructions to redeem their investment, and instead transferred the pool participant's money into the pool's trading accounts to cover margin calls on those accounts. Consequently, when Respondents subjected the pool participant's funds to trading risk subsequent to the redemption request, the pool participant suffered losses of approximately \$3,800,000.

Through the conduct described above and given that Respondents engaged in option transactions during the relevant time, Respondents also violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2010).

**B. Section 4o(1) of the Act:
Fraud by Commodity Pool Operators and Their Associated Persons**

Section 4o(1) of the Act broadly prohibits fraud by CPOs and associated persons ("AP") thereof. Section 4o(1)(A) of the Act, in relevant part, makes it unlawful for a CPO or AP thereof to employ any device, scheme or artifice to defraud any participant or prospective participant. Section 4o(1)(B) of the Act, in relevant part, makes it unlawful for a CPO or AP thereof to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any participant or prospective participant. Unlike Sections 4b and 4o(1)(A) of the Act, the language of Section 4o(1)(B) does not require "knowing" or "willful" conduct as a prerequisite for establishing liability. In this regard, the Commission has held that "[a]lthough *scienter* must be proved to establish a violation of Section 4b and 4o(1)(A), it is not necessary to establish a violation of Section 4o(1)(B)." *In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep.

(CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994) (citing *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988)).

Sections 40(1)(A) and (B) of the Act apply to all CPOs, CTAs, or APs, whether registered, required to be registered, or exempted from registration. *Skorupskas*, 605 F. Supp. at 932. The same fraudulent conduct that violates Section 4b of the Act as set forth above also violates Section 40(1) of the Act. *Id.* at 932-33.

As set forth above, Winell Associates acted as a CPO and Winell acted as an AP of Winell Associates. Furthermore, because the unauthorized transactions and misappropriation of pool participant funds set forth in section IV.A. above are in violation of Sections 4b, 4c(b) and Commission Regulation 32.9, therefore those same acts by Respondents have violated Sections 40(1)(A) and (B). *In re Slusser*, CFTC Docket No. 94-14, 1999 WL 507574, at *14 (CFTC July 19, 1999) (“Where the record establishes that the respondents engaged in fraudulent conduct in violation of section 4b the Division has, as the ALJ observed, surpassed its burden of proof with respect to section 40.”), *aff’d in part, rev’d in part on other grounds, sub nom. Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC Aug. 11, 1992) (the same conduct that violates section 4b can be used to establish a violation of sections 40(1)(A) and (B)), *aff’d in part and modified sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) (affirming liability, modifying sanctions).

**C. Sections 2(a)(1)(B) and 13(b) of the Act:
Respondents’ Derivative Liability for Each Other’s Violations**

The acts, omissions and failures of Winell in violation of the Act and Commission Regulations, as discussed above, occurred within the scope of his agency with Winell Associates, and Maxie GP. Therefore, Winell Associates and Maxie GP are each liable for these acts, omissions and failures pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2010).

Winell, as Winell Associates and Maxie GP’s owner and operator, controlled the day to day operations of Winell Associates and Maxie GP, and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Winell Associates and Maxie GP’s violations of the Act and Commission Regulations, as discussed above. Consequently, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b) (2006), Winell is liable for Winell Associates’ and Maxie GP’s violations of the Act and Commission Regulations to the same extent as Winell Associates and Maxie GP.

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondents violated Sections 4b(a)(2)(i) and (iii), 4c(b) and 40(1) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), §6c(b) and §60(1) (2006), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2010).

VI.

OFFER OF SETTLEMENT

Respondents have submitted their *Offer* in which they, without admitting or denying the findings herein:

- A. Acknowledge receipt of service of this *Order*;
- B. Admit the jurisdiction of the Commission with respect to all matters set forth in this *Order* and for any action or proceeding brought or authorized by the Commission based upon violation of or enforcement of the *Order*;
- 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 the *Offer*; any and all claims that they 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 Commission's Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2010), relating to, or arising from, this proceeding; any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-68 (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. Stipulate that the record upon which this *Order* is entered shall consist solely of the findings contained in this *Order* to which the Respondents have consented in their *Offer*; and
- E. Consent, solely on the basis of the *Offer*, to entry of this *Order* that:
 1. makes findings by the Commission that Respondents violated Sections 4b(a)(2)(i) and (iii), 4c(b) and 4o(1) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii), §6c(b) and §6o(1) (2006), and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2010);
 2. orders Respondents to cease and desist from violating: Sections 4c(b) and 4o(1) of the Act, 7 U.S.C. §§ 6c(b) and 6o(1) (2006); Sections 4b(a)(1)(A) and (C) of the Act, as amended by the CRA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010 ("WSTAA")), §§701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. §§ 6b(a)(1)(A) and (C); and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2010);
 3. orders that Respondents be permanently prohibited from engaging, directly or indirectly, in trading on or subject to the rules of any registered entity (as that

term is defined in Section 1a(40) of the Act, as amended by the CRA and WSTAA, to be codified at 7 U.S.C. § 1a(40)), and all registered entities shall refuse them trading privileges; provided, however, Winell may continue to trade on or subject to the rules of any registered entity for or on behalf of twelve (12) existing and identified customers who are Winell's friends or family members and who have received notice of this action;

4. orders Respondents to pay, jointly and severally, restitution in the amount of \$3,740,277.37 within ten (10) business days of the date of entry of this *Order*, and a civil monetary penalty in the amount of \$1,500,000.00 within ten (10) days of the date of entry of this *Order*; and
5. orders that Respondents comply with the undertakings consented to in the *Offer* and set forth below in Part VI of this *Order*.

Upon consideration, the Commission has determined to accept the Respondents' *Offer*.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondents shall cease and desist from violating: Sections 4c(b) and 4o(1) of the Act, 7 U.S.C. §§ 6c(b) and 6o(1) (2006); Sections 4b(a)(1)(A) and (C) of the Act, as amended by the CRA and the WSTAA, to be codified at 7 U.S.C. §§ 6b(a)(1)(A) and (C); and Commission Regulation 33.10, 17 C.F.R. § 33.10 (2010);
- B. Respondents are permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined Section 1a(40) of the Act, as amended by the CRA and WSTAA, to be codified at 7 U.S.C. § 1a(40), for their own account, for any account in which they have a direct interest or indirect interest, or for any other account for or on behalf of any other person or entity, whether by power of attorney or otherwise, and all registered entities shall refuse them all privileges thereon; provided, however, Winell may continue to trade on or subject to the rules of any registered entity for or on behalf of twelve (12) existing and identified customers who are Winell's friends or family members and who have received notice of this action;
- C. Respondents shall pay, jointly and severally, restitution in the amount of \$3,740,277.37, within ten (10) business days of the date of entry of this *Order* (the "Restitution Obligation"). Should Respondents not satisfy their Restitution Obligation within ten (10) business days of the date of entry of this *Order*, post judgment interest shall accrue on the Restitution Obligation beginning on 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. Respondents shall pay their Restitution Obligation to Prestwick Capital Management Ltd, located at 220 Parkmere Court, Chestermere,

Alberta, Canada. Respondents shall accompany payment of Restitution Obligation with a cover letter that identifies Respondents and the name and docket number of this proceeding. Respondents shall simultaneously submit copies 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;

- D. Respondents shall pay, jointly and severally, a civil monetary penalty of \$1,500,000.00 pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, within ten (10) days of the date of entry of this *Order* (the “CMP Obligation”). Should Respondent not satisfy its CMP Obligation within ten (10) days of the date of entry of this *Order*, post judgment interest shall accrue on the CMP Obligation beginning on 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. Respondents shall pay their CMP Obligation 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 payments 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, Respondents shall contact Marie Bateman or her successor at the above address to receive payment instruction and shall fully comply with those instructions. Respondents shall accompany payment of their penalty with a cover letter that identifies Respondents 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, as amended by the CRA and WSTAA, to be codified at 7 U.S.C. § 9a(2), if this amount is not paid in full within fifteen (15) days of the due date, Respondents shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration(s) shall be suspended automatically until the Respondents have shown to the satisfaction of the Commission that payments of the full amount of the penalty with interest thereon to the date the payment has been made; and

- E. Respondents shall comply with the following undertakings:

1. Public Statements: Respondents agree that neither they nor any of their employees or agents under any of 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 Respondents': (i) testimonial obligations; or (ii) right to take 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 employees and agents under any of their authority or control understand and comply with this undertaking; and
2. Respondents shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never engage in any activity requiring such registration or exemption from registration with the Commission, and Respondents shall not act as a principal (as that term is defined in Commission Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2010)), agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010); provided, however, Winell may continue to trade on or subject to the rules of any registered entity for or on behalf of twelve (12) existing customers who are Winell's friends or family members and who have received notice of this action.

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

By the Commission.



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

Dated: May 2, 2011