UNITED STATES OF AMERICA
BEFORE THE
COMMODITY TRADING FUTURES COMMISSION

In the Matter of:	:	CFTC Docket No. 93-2
Mark B. Fisher, *et al.*	:	
Respondents.	:	

Order of Correction

The second full paragraph appearing on page 62 contains editing errors. The paragraph should read as follows:

> Respondents addressed price changes. Beyond arguing regular mistakes in the ordinary course, they pointed out that price changes could occur in trades where brokers lost money. In general, the Court has observed whether or not customers benefited from the price changes.

The following changes correct other typographical errors to clarify unintended ambiguities:

On the title page, names including typographical errors include: William O. Hoar, Julie Reiley, Susan LaMarca and Melvin A. Brosterman. In addition, the firm Stumpp and Bond inadvertently lacks a "t".

On page 1, in the fifth line of the second paragraph, the words "of the Act" are added after "§ 4b" before the end of the sentence.

On page 3, footnote 3, formerly stating "All references to trade numbers cited in this opinion are to the appendices, as revised, listing 166 trading sequences. (*See*, DOE CONCL. 32)." now reads: All references to trade numbers cited in this opinion are to the appendices, as revised.

On page 3, the last sentence of footnote 5, a space is inserted so that the line now reads: For example, "(Amodeo App. 3 RA 3, 4)."

On page 4, finding 2, the extraneous period immediately after "1" is deleted.

On page 4, finding 7, "RA7" reads: RA 7

On page 4, finding 8, the word "Mazzara's" now reads: Mazzara

On page 5, the citation formerly stating "(Amodeo App. 3 RA 3,4)." now reads: (Amodeo App. 3 RA 3, 4).

On page 5, finding 20, the sentence stating: "The minimum fluctuation was one tenth of one per cent, or $5.00 per contract." reads: The minimum fluctuation was one tenth of one cent per ounce, or $5.00 per contract.

On page 6, footnote 7, now reads: *See*, §§ 5b and 4g(b) of the Act regarding audit trail and daily trading requirements.

On page 7, finding 23, "card based" is hyphenated to read: card-based

On page 7, finding 24, the sentence stating "The clerks quantity, price, contract month, as well as both brokers, the clearing firm, the time, and customer type indicator commonly abbreviated as "CTI" on these brokerage firms" now reads: The clerks recorded quantity, price and contract month, as well as both brokers, the clearing firm, the time, and customer type indicator (commonly abbreviated as "CTI") on these brokerage forms.

On page 8, finding 29, Brewer is capitalized.

On page 11, finding 51, the word complied reads: compiled

On page 12, finding 58, the penultimate line of text currently stating "1987 stock market crash, and according to the records, the price of the contracts fell from $8.24" now reads "1987 stock market crash. According to the records, the price of the contracts fell from $8.24"

On page 13, finding 59, in the phrase "the 1/1 as a price out" is altered to read: sequence 1/1 as a price out

On page 14, finding 64, the portion stating "6-8/;" now reads: 6-8/1;

On page 14, finding 66, the word "unit" is hereby excised and replaced by the word contract.

On page 17, finding 87, the portion now stating "$7.57per contract" now reads: $7.57 per contract.

On page 18, finding 91, a coma is inserted after the word "turn"

On page 23, finding 123, the portion now stating "In sequence 5/2 Cornell sold, 5 contracts at $15.39 to Effron" now reads: In sequence 5/2, Cornell sold 5 contracts at $15.39 per contract to Effron

On page 25, in finding 136, "18/2Effron" now reads: 18/2 Effron

On page 25, finding 136, the words "per contract" are added at the end of the first sentence

On page 25, finding 137, the words "per contract" are added before the words "to Cornell"

On page 28, footnote 32, a period is inserted after the word "broker"

On page 30, finding 161, the words "of profit to benefit" now reads: of profit and to benefit

On page 30, finding 164, the sentences stating:

> Under the argument presented that traders were expected to evenly fix outs among themselves during the relevant time period such a trade should have evened out to an effective average of 300 contracts at $12.615 per contract. Yet the three hundred contract trade was effectively divided at $12.666 per contract.

now reads:

> Under the argument presented, i.e., that traders were expected to evenly fix outs among themselves during the relevant time period, such a trade should have evened out to an effective average of 300 contracts at $12.615 per contract. Yet, the three hundred contract trade was effectively divided at $12.666 per contract.

On page 40, finding 218, the extra period after the first word on the page is deleted

On page 44, in finding 239, the portion of the sentence formerly stating "45/1, 24/2" now reads: 45/1, 4/2, 24/2

On page 46, in finding 259, the extraneous "r" is deleted.

On page 46, finding 46, the second and duplicative "respondent Orlando is guilty for sequences" is deleted.

On page 49, in the second paragraph, "Holding" is changed to "holding" and the words "in it" are excised from the parenthetical statement

On page 50, the word "whether" is inserted after the word "questioning" on line 20 of the page

On page 51 Mr. Falis is not in the possessive.

On page 51, footnote 47, the phrase "case as Judge Shipe" now reads: case, Judge Shipe

On page 52, the phrase appearing on the third and fourth lines stating "trade, the Division recognizes, that it" now reads: trade, as the Division recognizes, it

On page 57, the citation now stating "PFF102-03," is amended to read: PFF 102-03,

On page 60, the first full paragraph, the date "25," is inserted after "Feb." and the ")" symbol is moved up one line so that the term appears as: (CCH)

On page 60, footnote 60, the sentence "The Court disagrees." is deleted.

On page 62, the subheading "IV" is relabeled "V" and the subheading on page 65 is relabeled "VI."

On page 66, quotation marks are inserted after the end of the next to last sentence of the full paragraph.

On page 67, the first full paragraph, the portion stating "(CFTC 1983)" reads: (CFTC April 4, 1983)

On page 67, the portion stating "(March 16, 1999 CFTC)" reads: (CFTC March 16, 1999)

On page 67, a coma is inserted after the date "Feb. 3"

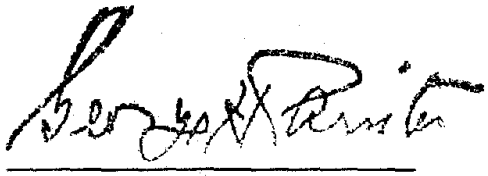
On page 69, "(CFTC May 23, 1986) is inserted between after "¶ 23,082" and before the period at the end of the sentence.

On page 69, the term "banned" is capitalized to read: BANNED

On page 69, "revoked" now reads: REVOKED

The Court anticipates providing the Initial Decision as modified by this Order for the convenience of the interested parties.

Issued this 7th day of May, 1999



G.H. Painter, ALJ

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY TRADING FUTURES COMMISSION

In the Matter of:	:	CFTC Docket No. 93-2
Mark B. Fisher, *et al.*	:	
Respondents.	:	

Appearances at the Administrative Hearing:

On Behalf of the Commodity Futures Trading Commission:

William D. Hoar, Esquire
Susan Berkowitz, Esquire
Julie Reilley, Esquire
Susan laMarca, Esquire

On Behalf of Respondent Mark B. Fisher:

Melvin L. Brosterman, Esquire
Michelle L. Jacobsen, Esquire
Stroock, Stroock & Lavan, LLP

On Behalf of Respondents Kenneth Carter and Frank Amodeo:

William J. Dockery, Esquire
Scotto, Georoulis, Dockery and Scotto

On Behalf of Respondent Michael Singer:

Melvin J. Falis, Esquire
Gusrae, Kaplan & Bruno

On Behalf of Respondent Frank Mazzara:

Louis Burke, Esquire
Burke, Snow, Baker, Crouse

On Behalf of Respondents John Orlando and Louis D'Amico:

Gary D. Stumpp, Esquire
Sumpp and Bond, LLP

Before: Painter, ALJ

INITIAL DECISION

I

Synopsis of Procedural History

On October 19, 1992 the Commodity Futures Trading Commission ("Commission" or "CFTC"), following the recommendation of the Division of Enforcement ("Division"), filed a seven count Complaint and Notice of Hearing ("complaint") charging ten respondents with violating the Commodity Exchange Act ("CEA" or the "Act"), and Commission regulations in the period from October 19, 1987 through July 26, 1988. Respondents initially named by the Commission in the complaint were: Mark B. Fisher ("Fisher"), Craig W. Effron ("Effron"), Frank J. Mazzara ("Mazzara"), John P. Gandolfo ("Gandolfo"), Louis D'Amico ("D'Amico"), James J. Kaulentis ("Kaulentis"), Kenneth L. Carter ("Carter"), John J. Orlando ("Orlando"), Frank Amodeo ("Amodeo"), and Michael Singer ("Singer").

Respondents were charged under 7 USC § 6b, 7 USC § 6c, 7 USC § 13(c), and/or 17 C.F.R. 1.38(a) for trading activities occurring on and between October 17, 1987, and April 28, 1989.[1] The first four counts of the complaint charged all of the respondents, except for Kaulentis, either directly, and/or through aiding and abetting under § 13(a), with violations of the first four sub-sections of § 4b. More specifically, Count I alleged cheating and defrauding in violation of §4b(A), Count II alleged the willful making of false records in violation of § 4b(B), Count III alleged willful or attempted acts of deception in violation of § 4b(C), and Count IV alleged bucketing in violation of § 4b(D). Count V of the complaint charged that all of the respondents engaged in non-competitive trading in violation of 17 C.F.R. § 1.38(a). Counts VI and VII respectively charged all respondents with wash-sales, fictitious sales and accommodation trades in violation § 4c(a)(A), and with causing untrue or not bona fide prices to be recorded in violation of § 4c(a)(B).

The allegations were brought with regard to futures trading in three different markets. Allegations regarding audit trail irregularities and violations on the Commodity Exchange, Inc, ("COMEX") silver futures market were levied against Mazzara, D'Amico, and Fisher, as well as

[1] Since the time of the events at issue the Act was amended in part by the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590. Designations are as in the complaint.

Gandolfo and Effron. Allegations regarding audit trail irregularities and violations in the New York Mercantile Exchange ("NYMEX") crude oil futures market were levied against Carter, Orlando and Fisher, as well as Effron. Finally, allegations regarding audit trail irregularities and violations in the Coffee, Sugar & Cocoa Exchange ("CSCE") sugar futures market were levied against Amodeo, Singer, and Fisher.[2] In aggregate, the Commission drew over one hundred questionable trades to this Court's attention.[3]

On December 4, 1992 Kaulentis and the Commission entered a settlement into the record. Effron and Gandolfo also reached settlement agreements which were entered into the record on March 4, 1997 and March 7, 1997, respectively. Later that year, three sets of hearings, from March 10 through 13, October 20 through 24, and November 12 and 13, were held in New York. Mazzara and the Commission's settlement was issued thereafter on June 30, 1998.

On November 23, 1998 the Division filed its final Reply to respondents' proposed findings.[4] Any motions before the Court not specifically addressed herein are DENIED. The matter is ready for decision.[5]

II

Findings of Fact and Conclusions of Law

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[2] Currently, COMEX is a division of NYMEX. The CSCE combined with the New York Cotton Exchange to form the New York Board of Trade.

[3] All references to trade numbers cited in this opinion are to the appendices, as revised, listing 166 trading sequences. (*See*, DOE CONCL. 32).

[4] On February 1, 1999, respondent Fisher filed a motion to reopen the hearings. Respondents Amodeo, Carter, D'Amico and Singer subsequently joined the motion. The Commission denied a motion to appeal that decision on April 30, 1999.

[5] The Court employs several abbreviations. Expert verified statements are denoted by surname. Other filings denote the party's surname and an abbreviation as follows: "Ans." for answer; "PFF" for Proposed Finding of Fact, "CONCL." for conclusion of law; "PREHG" for pre-hearing memorandum. The Division of Enforcement's Reply Brief To Respondent's Proposed Findings of Fact and Conclusions of Law is abbreviated "DOE Reply to PFF." Thereafter the page number, and possibly other information, is denoted. However, where it may be more appropriated, the paragraph number may be cited instead as prefaced by the symbol "¶." The transcript is abbreviated as "Tr." Footnotes are indicated by "FN." Trading cards and other documents within the audit trail are denoted by bates number. For example, "DX 27-66 - 68/3" corresponds to pages 66 through 68 of the audit trail documents in trade sequence 27 of Appendix Three. Requests for admissions are indicated by surname and Appendix number and the referenced request to admit number. For example, "(Amodeo App. 3 RA 3,4)."

A. Respondents and Experts

1. The facts in this case refer to the period between 1987 and 1989. (The "relevant period").

2. Fisher was at all relevant times a member of the COMEX, NYMEX and CSCE. He was registered with the Commission as a floor broker pursuant to §§ 4e and 4f of the Act as amended. (Fisher Ans. 1.).

3. Fisher's alpha identification number was FSH, and his badge number was 7036. He cleared oil trades through MBF Clearing Corp., of which he was a principal. He cleared silver trades through Sterling Commodities Corp., and sugar futures through Gelderman & Co. (Hastings 4; Kozlowski 6).

4. Fisher may be labelled a "scalper" or a "local" in that he traded solely on his own behalf and generally sought not to carry long term positions. (Fisher PFF 4, ¶ 20). He was, however, willing to assume large positions. (Tr. 982, Fisher). From his trading strategies, Fisher developed a model about how to trade, which became computerized in 1984 or 1985. (Tr. 949, Fisher).

5. Effron testified pursuant to a settlement agreement. In re Fisher, CFTC No. 93-2, 1997 WL 90923. (Tr. 15-56). At all relevant times he traded for his own account as a registered floor broker and member of the COMEX and the NYMEX. (Complaint ¶ 2).

6. Effron testified that it did not even occur to him to decline cooperating in a passout. (Tr. 174).

7. Mazzara and the Commission reached a settlement agreement. In re Fisher, CFTC No. 93-2, 1998 WL 347046. Mazzara was at all relevant times a member of the COMEX and the NYMEX, and was registered with the Commission as a floor broker pursuant to §§ 4e and 4f of the Act as amended. He traded for Semel and Company and for his own account. (Mazzara Ans. ¶ 3). Mazzara's alpha identification number was MAZA, and his badge number was 7162. (Fisher App. 1 RA7).

8. Mazzara's testified that he stood by Fisher or Effron in the ring. (Tr. 616). He stated his practice was to never arbitrarily change prices, and did so to resolve mistakes or if instructed by the exchange. (Tr. 619-20). He agreed that if someone accepted errors from him he would be more willing to trade with them, i.e., give them recognition. (Tr. 619).

9. Gandolfo testified pursuant to a settlement agreement. In re Fisher, CFTC No. 93-2, 1997 WL 106438. (Tr. 75). He was a member of the COMEX, and a member of the floor committee in 1987 and 1988. (Tr. 119). At all relevant times he was registered with the Commission as a floor broker pursuant to §§ 4e and 4f of the Act as amended. (Compl. ¶ 4).

10. D'Amico was at all relevant times a member of the COMEX. He traded on his own behalf and also executed customers' orders for DBL Trading Corp as well as for a proprietary account belonging to DBL. D'Amico's alpha identification number was LOUD, and his badge number was 7256. He is registered with the Commission as a floor broker pursuant to §§ 4e and 4f of the Act as amended. (D'Amico Ans. ¶ 5). D'Amico was less experienced than some of the brokers. (Tr. 194).

11. Kaulentis and the Commission have settled. The Commission issued an Opinion and Order Accepting Settlement on December 2, 1992. In re Fisher, CFTC No. 93-2, 1992 WL 362826. (D'Amico PFF 2, FN 5). Kaulentis did not testify in these proceedings.

12. Carter was at all relevant times a member of the NYMEX, and traded on his own behalf. He also executed customers' orders for J. Tafaro Brokerage ("Tafaro"). Carter's alpha identification number was KNY, and his badge number was 4175. (Carter App. 2 RA 14, 15). He was registered with the Commission as a floor broker pursuant to §§ 4e and 4f of the Act as amended. (Carter Ans. ¶ 7).

13. Orlando was at all relevant times a member of the NYMEX, and traded on his own behalf. He also executed customers' orders for Benchmark Energy ("Benchmark"). Orlando's alpha identification number was BNCH, and his badge number was 4554. He is registered with the Commission as a floor broker pursuant to §§ 4e and 4f of the Act as amended. (Orlando Ans. ¶ 8). Orlando's usual practice was to distinguish his personal accounts on his trading cards with an "X" symbol. (DOE PFF 4, ¶ 13).

14. Amodeo was at all relevant times a member of the CSCE, and traded on his own behalf. He cleared trades for his own account either through Gelderman & Co. or Dyer and Co. (Kozlowski 5) He also executed customers' orders for Leto, Mauro & Co. ("L & M"). Amodeo's alpha identification number was Frank, and his badge number was 817. (Amodeo App. 3 RA 3,4). He was registered with the Commission as a floor broker pursuant to §§ 4e and

4f of the Act as amended. (Amodeo Ans. ¶ 9).[6] Amodeo's usual practice was to place the letter "S" to demarcate trades executed for his personal account. (Tr. 1723).

15. Singer was at all relevant times a member of the CSCE, and traded on his own behalf. He also executed customer orders for Rosa Commodities. (Singer Ans. ¶ 10). Singer's alpha identification number was SING, and his badge number was 420. (Singer App. 3 RA 5,6). At all relevant times Singer was registered with the Commission. Singer's usual practice was to write either "X" or "XM" on his trading cards to demarcate trades executed for his personal account (Tr. 1780; Singer PFF 3).

16. The following persons were deemed expert witnesses: Elizabeth Hastings ("Hastings"), Martha Kozlowski ("Kozlowski"), Hugh J. Cadden ("Cadden"), Mark S. Berens ("Berens"), and Gordon C. Rauser ("Rauser"). (Order of July 1, 1996).

17. Kozlowski and Hastings were well versed in the processes that create an audit trail. (Hastings 2-4; Kozlowski 1-4).

B. The Markets and Trading Records

18. The three markets at issue in this case generated time and sales reports based on reported prices, and they generated exchange records based on cards submitted by brokers.[7]

19. Appendix One trades took place on the COMEX, the duly designated contract market for the trading of silver future contracts. 7 U.S.C. § 7, CEA § 5. All orders made therein were subject to the rules of the COMEX.

20. COMEX silver futures contracts consisted of 5000 troy ounces of silver. The minimum fluctuation was one tenth of one per cent, or $5.00 per contract. A $.01 movement equaled $50 per contract. (DOE PFF 18).

21. The COMEX usually stationed about six reporters around the ring. Reporters hand signaled price changes to one or two catchers at the podium. This information was then transmitted from the podium to data-entry clerks via a dedicated phone line. When entered into the database, the data was disseminated on the wallboards and the ticker. This display system typically required three to five seconds. (Tr. 38-43).

22. In a Rule Enforcement Review of COMEX targeting the period from April 1, 1987 to

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[6] The answer "[a]dmits the allegations contained in paragraph 9 of the complaint.Denies [sic] ... knowledge sufficient to form a belief..." The Court deems these inconsistent statements an admission.

[7] *See*, § 5b and 4g(b) of the Act, regarding audit trade and daily trading records requirements.

March 31, 1988, the CFTC approximated 87% of trades were executed within a three minute window of a time corresponding to a print on the price change register. (Fisher Exhibit 9).

23. The card based recording system employed by the COMEX changed in the relevant period. Under COMEX Rules in effect from at least 1987 through February 1988, traders were required to chronologically record trades as they occurred to the nearest minute. In 1988 COMEX amended its rules. The rules, as amended, required traders to record trades sequentially, regardless of whether trades were executed for their own or for a house account. Although the COMEX rules, as amended, did not require members to record other trades chronologically, all respondents trading for customers in the COMEX market utilized trading cards. (Tr. 24-27; Hastings 7-10).

24. COMEX clerks received trading cards from their traders. The clerks verified price, quantity, and contract month against the clerk working for the trader on the opposite side of the transaction. In the period up until early 1988, the clerks also completed brokerage forms. The clerks quantity, price, contract month, as well as both brokers, the clearing firm, the time, and customer type indicator commonly abbreviated as "CTI" on these brokerage firms.[8] COMEX received two copies of the forms, which it entered into its database. (Hastings 7-10).

25. After changes in early 1988, and through the remainder of the relevant period, COMEX clearing firms were to keypunch the data. Locals could opt to let COMEX enter the data under the old system, or rely upon their clearing member. If a customer order was involved, pre-printed multi-copy COMEX broker tickets were to be used. The order was written in the upper portion of these tickets; the lower portion contained columns in which to write pertinent information including, price, quantity, time, and the opposite broker. Once the order was filed and time stamped out, clearing firms received their sheet for data entry. This data was used by COMEX to produce the Daily Brokerage Recap ("DBR"). (Hastings 9).

26. Appendix Two trades took place on the NYMEX, the duly designated contract market for the trading of crude oil future contracts. 7 U.S.C. § 7, CEA § 5. All orders made therein were also subject to the rules of the NYMEX. (Hastings 10).

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[8] Trades are summarized according to a CTI, or Customer Type Indicator number of either 1, 2, 3 or 4. A CTI 1 indicates a trade conducted for a personal account. *THE CFTC GLOSSARY: A LAYMAN'S GUIDE TO THE LANGUAGE OF THE FUTURES INDUSTRY,* (last modified Jan. 1, 1997) <http://www.cftc.gov/opa/brochures/glossary.html>.

27. NYMEX oil futures contract consisted of 1000 barrels of light "sweet" crude oil. The minimum fluctuation was $.01 per barrel, or $10.00 per contract; a $.01 movement equaled $50 per contract. (Hastings 6-7).

28. Trading hours on NYMEX were scheduled from 9:45 a.m. until 3:10 p.m. Each day's trading began with an opening call in which each contract month opened sequentially, beginning with most current month and continuing through all months listed. The last two minutes were designated as the close. (Hastings 6-7).

29. NYMEX's time and sales system also employed reporters. Usually, about ten or so price reporters witnessed and signaled month and price information to the catcher at the podium via hand signals. Mr. Kenneth brewer, a senior reporter at the NYMEX, testified reporters might clap to draw the catcher's attention. (Tr. 832, 834, Brewer). The catcher transmitted this information to a CRT operator for dissemination on the boards and the ticker system. There was no "fast market" or split ring designation. This system usually took about two through five seconds to be displayed, but could be slower. (Tr. 839, Brewer). In accordance with Commission Regulation 1.35(h), NYMEX recorded price changes for every contract month in each future, to the nearest second, in a time and sales report. (Hastings 9).

30. During 1988 through a portion of 1989, NYMEX rules did not require trading cards, and when trading cards were used they did not have to be sequential. (Tr. 212, Henderson; *See also*, Fisher Ex. 4 regarding NYMEX Rule 6.9).[9]

31. Although trading cards were not required, NYMEX traders submitted pit cards. The seller tossed a card containing the commodity, quantity, contract month, price, and buyer's identification into a net. These cards were collected and time-stamped. The data was entered into a database and identified by a "board and line number," a unique number given to every trade by the exchange. (Hastings 10). Pit card data often arrived for display five to ten minutes after submission. Together, this data formed the basis of the NYMEX streetbook, the record of all trades cleared on a given day. The streetbook encodes pitcards which were submitted outside the ordinary one minute time allotted with a "22" code. (Tr. 219-20; Tr. 224-25).

32. Although during relevant times there was no NYMEX requirement that trades be recorded sequentially, all of the germane respondents, except Carter, chose to use trading cards.

[9] Mr. George Vincent Henderson testified as the Vice President of Floor Support Systems on the NYMEX. (Tr. 210).

(Orlando PFF 9; Hastings 18).

33. Under most circumstances floor transactions were recorded sequentially. (Hastings 18).

34. Appendix Three trades took place on the CSCE, which at all relevant times comprised the duly designated contract market for the trading of sugar future contracts. 7 U.S.C. § 7, CEA § 5. All orders made were also subject to contemporaneous CSCE rules. (Kozlowski 9).

35. On the CSCE the opening call at 10:00 a.m. initiated trading in the most current month. Thereafter, each month listed was traded sequentially. Then trading began in all months (Kozlowski 8).

36. The CSCE Sugar No. 11 futures contracts comprising Appendix Three consisted of 50 tons (2,240 pounds per ton) each. The minimum price fluctuation was one point, the equivalent of .01 cents. A one-point movement equaled $11.20 per contract. (Kozlowski 8).

37. For CSCE time and sales about eight or so "trade reporters" hand signaled their reports to a scribe at the podium who recorded the data and handed this information to a data entry clerk. (Tr. 876-77, Dutko).[10] This information was displayed on the boards and was compiled into a CSCE Trade Register. (Tr. 589, Registro).[11]

38. In times of volatile trading, the ring the floor committee could declare a fast market. This designation could indicate that more than one price was trading in the ring and/or that trading was too hectic for reporters to keep pace with the trading. (Tr. 606, Registro.).

39. The CSCE provided traders with pre-stamped three-ply trading cards. The original top white page was to be submitted to the exchange within ten minutes from the close of the bracket period. Members retained a yellow and pink carbon copy. The pink copy was used to record the opposite trader's clearing firm. (Kozlowski 9).

40. The CSCE delineated half-hour bracket periods which were designated as follows:

Code	Time Period
B	10:00 – 10:30
C	10:30 – 11:00
D	11:00 – 11:30
E	11:30 – 12:00
F	12:00 – 12:30

[10] Mr. Robert Dutko testified as an Assistant Vice President Head Caller for the Floor operations for the CSCE. (Tr. 874).

[11] Mr. Joseph Registro testified as a Floor Operations System Vice President on the CSCE. (Tr. 586).

G	12:30 – 1:00
H	1:00 – 1:30
J	1:30 – 2:00

During the "J" period trading was suspended from 1:43 through 1:45 p.m. each day. (Kozlowski 8).

41. Under CSCE Rule 3.18 trades were required to be "in the exact chronological order of execution" on a separate line provided on the CSCE trading cards. CSCE Rules required traders to denote the time of the first trade to the nearest minute on the first trade of each card. If a trader made a cross trade, that fact was to be noted with an "X" and the time of the trade.[12] (Kozlowski 9).

42. The information accumulated from CSCE trading cards was used to prepare clearing sheets. The clearing sheets contained the times noted for cross trades and the first trade per card, as well as the card and line number of each trade. This information was produced for both buys and sells. The system is designed to record all trades rather than price changes. (Tr. 589, Registro).

43. At times, traders and their clerks would often attempt to verify trades by watching the screens. Robert Dutko testified that in his experience it might be important for everyone to get their prints up. (Tr. 891). However, a trader responsible to make a fill for another party may have had greater incentive to verify some prices were reported. (Tr. 458-60).

44. In the three exchanges discussed the time and sales reporting mechanisms were imperfect, but functioned well. (Tr. 847, Brewer; Tr. 744, Thompson). No one has demonstrated any incentive or means to falsify wallboard or ticker displays.

45. Just because a print appears in time and sales this does not necessarily indicate a valid trade at this price. (Tr. 77, Gandolfo).

C. The Trades

46. In an indirect bucket one trader typically buys and sells the same quantity, or nearly the same quantity, of futures for the same contract month, at or about the same price, opposite an accommodating trader. (Hastings 16; Kozlowski 11). The Division alleges indirect buckets in sequences 14, 31, 39 and 51 of Appendix One, in sequences 2, 3, 14, 20, 21, 30, 38, 43, 45, 46, 47, 55, 57, 61, 62, and 64 of Appendix Two, and in sequences 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 1,7 18, 20, 21, 23, 25, 26, 28, 29, 30, 31, and 33, 34, 35, and 36 of Appendix Three.

[12] Kozlowski testified that the existence of a cross trade authorization would not affect her opinion. (Tr. 550).

(Hastings 367; Kozlowski Attachment 2).

47. The Division defines an unlawful offset as "a noncompetitive trade in which a broker matches customer buy and sell orders opposite the same trader and the prices are pegged to give the trader a profit... The pattern of these trades is the same as an indirect bucket except that the broker buys and sells for customers." (DOE CONCL. 8). The Division alleges unlawful offsets in sequences 22, 23, 55, and 56 of Appendix One, in sequences 9, 22, and 44 of Appendix Two, and in sequence 12/3. (Hastings 374).[13]

48. A money pass creates a profit and loss through arranged trades.[14] The Division alleges there were money passes in sequences 2, 45, and 58 of Appendix One, and in sequences 17 and 32 of Appendix Two.

49. A price alteration involves changing the prices recorded on trading cards or the cards upon which the trade was recorded. The Division alleged there were price alterations in sequences 1, 6, 8, 9, 18, 20, 21, 46, 53, 67, 71 and 72 of Appendix One, sequences 1, 8, 25, 31, 37, 38, 42, 56, and 65 in Appendix Two, and in sequences 1, 4, 5, 17, 22, 27, and 32 of Appendix Three. (Hastings 370-71; Kozlowski Attachment 1).

50. Generally, dual trading involves trading from the trader's own accounts as well as for others. This practice may or may not be prohibited. *See*, § 4j of the Act. The practice was prohibited on the NYMEX during the relevant period. (Hastings 216, FN 98, *citing*, NYMEX Rule 6.41). The Division alleges that impermissible dual trading with affiliated brokers occurred in trade sequences 5, 6, 7, 13, 18, 19, 23, 24, 33, 35, and 41 of Appendix Two.

51. As initially complied, there were 74 sequences in Appendix One and 66 trade sequences in Appendix Two. Hastings cited indirect buckets in sequences 14, 31, 39, and 51 of Appendix One and sequences 2, 3, 30, 38, 45, 46, 47, 54, 55, 61, 62, 64 and 66 of Appendix Two (Hastings, 364).

52. The second category Hastings describes is noncompetitive trades executed to allow a broker's personal trade opposite an affiliated broker's trade for a customer in violation of

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[13] *See*, U.S. v. Ashman, 979 F.2d 469 (7th Cir. 1992) (finding the term offset is not too vague under the Act); *cf.* Precious Metals Associates v. Commodity Futures Trading Comm'n, 620 F.2d 900, 907-08 (1st Cir. 1980) (discussing a vagueness challenge to the Act).

[14] For example, broker A might pass money to broker B by selling broker B contracts at one price, and then repurchasing them at a lower price.

NYMEX Rule 6.41. All of the trades remaining for disposition in the NYMEX involve Orlando. They are sequences 5, 6, 7, 13, 16, 18, 19, 23, 24, 33, 35, and 41 in Appendix Two.

53. In the third category, Hastings concluded there were illegal offsets involving trade sequences 22, 23, 55 and 56 of Appendix One and sequences 9, 22 and 44 of Appendix Two. (Hastings 369). As examples, the Court notes several details regarding sequences 56 and 57 of Appendix One, offsets involving trial time.

54. The fourth type of violation Hastings noted is price changes. She pointed out these changes in sequences 1, 6, 8, 9, 18, 20, 21, 46, 53, 63, 64, 67, 71 and 72 of Appendix One, and sequences 1, 8, 25, 31, 34, 37, 38, 42, 56 and 65 of Appendix Two. (Hastings 370-71).

55. The fifth type of violation Hastings described is titled: "Floor Brokers Executed Trades For Customer Orders Non-competitively at Prices Beneficial to Opposite Trader's Personal Account and Detrimental to Customer." Sequences cited include 65, 66, and 68-70 in Appendix One and sequences 39 and 48 in Appendix Two. (Hastings 372).

56. The sixth type of violation Hastings described is labelled "Noncompetitive Trades Executed to Remedy Floor Brokers' Errors." Sequences cited include: 19, 24, 43, 52, and 57 of Appendix One and sequences 15, 49, 54, 55, 58-60, 62, and 63 of Appendix Two. (Hastings 373).

57. The seventh category Hastings cites is money passes. Sequences cited include: 2, 45, and 58 of Appendix One and sequences 10, 17, and 32 of Appendix Two. (Hastings 374).

58. In sequence 1/1 Mazzara sold 57 contracts to Fisher on behalf of a customer.[15] The Division charges Fisher under every count other than Count IV. (Compl. 21, 16, 18, 25, 27, 31). In essence, the Division alleges respondents Fisher and Mazzara non-competitively changed the price on their cards from $8.24 to $8.23 - resulting in a $2,850 gain in Fisher's personal account at the expense of Mazzara's customer. (Hastings 25-26). Sequence 1/1 occurred on the day of the 1987 stock market crash, and according to the records, the price of the contracts fell from $8.24 to $8.23 in the period from 11:15:57 to the next report a second later before again returning to

[15] It is sufficient herein to denote facts concerning how the trades cleared and the appearance of some of the anomalies which occurred in the audit trail without delving into the technical clearing process or formal delivery and payment obligations.

$8.24 at a reported time of 11:16:05.[16] (DX 1-71/A/1).

59. Respondents present a simple price out explanation in the first trade sequence in the case. Cadden identified the 1/1 as a price out. (Cadden 48-49). He stated that the order Mazzara filled was at $8.23 with a cancel notation to sell only one contract at the $8.24 price. Based on the evidence, it does not appear Mazzara would have suffered as a result of a possible out whereby the customer only received a minimum figure, and the Court is unaware if Mazzara's customer would know if he was deprived of the full profit on the trade. The Court agrees that Fisher's clerk might be inclined to resolve any such potential outs to Fisher's benefit.

60. At issue in sequence 1/1 is whether there was a valid reason for both traders to change their cards, or if Fisher and/or his clerk (sent or verified by Fisher) approached Mazzara after a busy trading day to divert from Mazzara's customer.[17] There was no cancellation in sequence 1/1. If there was a legitimate error, it was resolved outside formal error resolution methods.[18] (Hastings 25-26; DX 1-31 – 32/1; DX 1-67 – 67A/1; DX 1-132 – 142).

61. In sequence 1/1 both traders had the same initial price recorded, and both traders made the same change. The Court is not persuaded by the proposition that both he and Mazzara remembered about the actual price they claim to have transacted on the floor. The Court also does not find that there would have been reason for Mazzara's clerk to have initiated the change during the card checking process because the price Mazzara recorded "must have been a mistake." (Fisher PFF 42, ¶ 317).

62. There was no price out in sequence 1/1. A preponderance of the evidence demonstrates money was diverted from Mazzara's customer.

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[16] Some respondents stressed the hectic nature of their work to apparently demonstrate that mistakes were rampant. The record even contains a video-tape of news reports illustrating floor commotion. (Exhibit RJ 1). Indeed, many of the sequences occurred during busy days. The Commission noted elsewhere that hectic market conditions are neither unusual nor unforeseeable. *See, e.g.*, In re Cox, [1996-1998 Transfer Binder] (CCH) Comm. Fut. L. Rep. ¶ 26,939 at 44,529 (CFTC Jan. 17, 1997). The facts in this case indicate that if a broker made a mistake, others, usually locals, helped them out through non-competitive transactions; with this realization the existence of hectic activity is dual edged.

[17] Hastings concludes the change on the card itself was made by a clerk since it is written with the same color ink as was used to check the card. (Hastings 26, FN 12).

[18] Hastings states: "there is no indication that the price $8.24 was cancelled which would be a legitimate reason for Mazzara and Fisher to change the price. Therefore I believe that because both originally executed the trade... and changed it.... Mazzara lowered the price for Fisher's benefit." (Hastings 26).

63. In sequence 2/1 Fisher made four quick round-turn trades opposite Mazzara. The second round turn trade is half the quantity and twice the price of the first. Mazzara actually recorded the same differential on these trades as Fisher, but at different prices. Fisher thereby transferred $2,500 to Mazzara. (Hastings 25-26; DX 1-31 – 32/1; DX 1/132 – 133/1).

64. In sequence 6/1 Mazzara sold 50 contracts to Fisher at $6.98 per contract. Fisher cooperated to lower the price on his purchase by $.01 per contract to Mazzara's customer's detriment. (Hastings 54-56; DX 6-39 – 40/1; DX 6-36/1; DX 6-8/; DX 6-46/1).

65. In sequence 8/1 Mazzara traded for a customer opposite Fisher. Mazzara sold 10 contracts to Fisher at $6.77 per contract and Fisher sold 12 contracts to Mazzara at $6.76 per contract. Fisher changed his trade from 22 contracts to two trades of 12 and 10 contracts. In violation of COMEX rules, and his usual procedure, he recorded the trades on the same line of his card. Mazzara's cards have similar irregularities. Fisher benefited at Mazzara's customer's expense. (Hastings 57-59; DX 8/54 – 55/1; DX 8-1/1; DX 8-43/1).

66. In sequence 9/1 Mazzara traded for a customer opposite Fisher. Mazzara sold 5 contracts to Fisher at $6.54 per contract, and Fisher sold 45 contracts at $6.53 per contract to Mazzara. The two traders broke down a 50 unit trade into a 45 and 5 contract sale. Mazzara and Fisher both crossed out the initial quantities on their cards. There is no evidence that demonstrates a credibly innocent reason they would have needed to change the trades to deprive a customer of $2,500. (Hastings 60-61; DX 9-28 30/1; DX 9-10/1).

67. In sequence 14/1 Mazzara sold 20 contracts to Fisher on behalf of a customer, and Mazzara bought 20 contracts at $.01 more per contract directly from Fisher. Mazzara carried forward a net 20 contract short position to his last trading card. On the same day, there are trades inserted on his trading cards as the result of Mazzara's claims. Fisher bought 20 contracts from Mazzara near the low of the treading range. Fisher's 39th numbered card contains only three trades. It was unlikely that Fisher was too busy to not have recorded the trades opposite Mazzara. (Hastings 62-64; DX 14-8/1-10/1; DX 14-55/1; DX 14-57/1; DX 14-58/1; DX 14-64/1; DX 14-69/1).

68. In sequence 14/1 there is no valid and plausible reason for Mazzara to have made a claim on Fisher. Fisher accommodated Mazzara taking the opposite side of his customer's order. (Hastings 62-64).

69. In sequence 18/1 Mazzara bought for a customer opposite Fisher. Both traders

changed their cards from $7.09 to $7.08. Fisher benefited at Mazzara's customer's expense. (Hastings 71-72; DX 17-80/1; DX 18-18/1).

70. In sequence 19/1 Fisher sold contracts to Mazzara, who allocated trades for himself and for customers. Mazzara bought 4 contracts at $7.140 per contract. Fisher's card contains trades inserted on different lines in the original and carbon copies. It further appears that Fisher accepted the non-competitive claim after trading to help Mazzara fill an order. (Hastings 73-76; DX 17-90 – 94/1; DX 17-126 – 130/1; DX 18-8 –9/1).

71. In sequence 20/1 Gandolfo sold for another firm's broker opposite Fisher. Both changed the price of the trade by $.005 per contract to Fisher's benefit. (Hastings 77-78; DX 20-32/1; DX 20-6/1).

72. In sequence 21/1 Mazzara sold 38 contracts at $7.24 per contract. The price of this trade was lowered by $.01 per contract to Mazzara's customer's detriment. (Hastings 79-80; DX 21—62 – 64/1; DX 21-56/1; DX 21-8/1).

73. In sequence 22/1 Mazzara, trading on behalf of a customer, sold 26 contracts to Fisher and Fisher sold 50 contracts at one penny more per contract to Mazzara who again traded for a customer. The two traders recorded the trades in contradictory sequence and made quantity changes to their cards. Fisher's profited $1,300 at customer expense. (Hastings 81-84; DX 21-56/1; DX 21-8/1; DX 22-17 – 20/1).

74. In sequence 23/1 Mazzara, trading on behalf of a customer, sold 50 contracts to Fisher at $7.21 per contract, and Fisher sold 100 contracts at $.01 more per contract to Mazzara, who again traded for a customer. This sequence occurred on June 7, 1988. Mazzara made another trade on behalf of a customer selling an additional 50 contracts at $7.22 per contract. Mazzara's clerk assigned times to these trades between 2:20 and 2:22, times which are consistent with time and sales but out of sequence with the card itself. Fisher profited at customer expense on the non-competitive roundturn trading of 50 contracts. (Hastings 85-87: DX 28-58 – 59/1; DX 21-10/1; DX 21-56 – 59/1).

75. In sequence 24/1 Mazzara made a sale to Fisher.[19] Fisher, or his clerk, accepted various trades from other brokers which were recorded in pen on the carbon copies of his penultimate trading card. Hastings cites to sequences 21-24, all of which occurred within a few minutes of each-other, as a likely motive for Fisher to accept the trade. The Court is not

[19] The trade appears to have occurred on June 7, 1988, not in July. (Hastings 88).

convinced the Division has met its burden in this sequence. (Hastings 88-90; DX 21-10/1).

76. In sequence 31/1 Fisher sold 10 contracts to Amoia, and Amoia sold 10 contracts at $.05 more per contract to Fisher on behalf of a proprietary account ("CTI 2"). Fisher did not include these trades in his tally, and they are out of sequence with his other trades. However, the trades were included in Fisher's clerk's totals. (Hastings 103-104).

77. In sequence 31/1 Fisher appears to have arranged the trades before his clerk became involved. Fisher accommodated another trader's bucketing of someone else's order. (Hastings 103-04; DX 31-6/1; DX 31-19/1-20/1; DX 31-30/1-31/1; DX 75/1).

78. In sequence 39/1 Mazzara sold 32 contracts to Fisher on behalf of a customer and Mazzara bought 20 contracts for his own account at the same price from Fisher. Fisher helped Mazzara to trade at a price which was better than the market. These trades were non-competitively executed to allow Mazzara to take the opposite side of a customer's order. (Hastings 122-24; DX 39-78/1; DX 39-3/1; DX 39-99/1; DX 39-3 – 5/1).

79. In sequence 43/1 Gandolfo bought 20 contracts from Fisher on behalf of a customer. Gandolfo wrote "WHO" on his trading card, indicating he did not know the opposite trader. The card also states "S/B FSH" meaning should be Fisher. (DX 43-32/1). Fisher wrote the trade after another 40 contract trade with Gandolfo, and inserted the trade on the very bottom of his card, suggesting that Fisher did not originally record the trade with Gandolfo. Fisher's clerk did not include the trade in the position tally. (Hastings 130-31).

80. Based on the facts the Court has found regarding sequence 43/1, the Court concludes this trade was most likely added non-competitively in order to allow Gandolfo to fix an error. (Hastings 130-31; DX 43-32 – 33/1; DX 43-34/1).

81. In sequence 45/1 Fisher traded directly opposite Mr. Amoia ("JA"), netting Amoia $125 at Fisher's expense. The purchase and sale of 5 contracts with JA are not recorded on Fisher's tally. (Hastings 135-36; DX 45-2/1; DX 45-10/2; DX45-4/1). Despite the audit trail in this sequence, there is an absence of an explicit motive; the Court is in equipoise regarding the evidence in this sequence.

82. In sequence 46/1 Gandolfo sold for another firm's broker opposite Fisher. Both changed the price of the trade by $.005 per contract to Fisher's benefit at the expense of a clearing firm's proprietary account. (Hastings 137-38; DX 46-34/1; DX 46-17/1).

83. In sequence 47/1 Fisher sold 10 contracts to Mazzara for $7.41 per contract.

Although there was no claim from Mazzara Fisher recorded the trade on the back of his card and it was not included in his tally. There does not seem to be any indication that there was an out necessitating a possible resolution of some error. (Hastings 139-40; DX 47-8/1).

84. Sequence 51/1 alleges an indirect bucket. In this sequence Fisher is charged under Counts I, III-VII. (Compl. 12, 18, 22, 25, 27, 31).

85. In sequence 51/1, Mazzara sold 58 contracts to Fisher at $7.55 per contract on behalf of a customer, and Fisher sold 20 contracts to Mazzara at the same price on July 19, 1988. (Hastings 153-155).

86. In sequence 51/1 Fisher began with an initial 14 contract short position. He took a 58 contract long position opposite Mazzara, allocated by Mazzara to his customer. He also made two 20 contract sales. One of the 20 contract sales was opposite Mazzara. Fisher recorded the two trades opposite Mazzara within two lines of each-other and assigned a time of 1:40 for all three trades. Together these trades form a net 4 contract long position. (Hastings 153-55).

87. In sequence 51/1 Mazzara recorded the two trades with Fisher in the opposite order. Mazzara also recorded his sale of 20 contracts to Fisher at a different time and price ($7.49 at a time of 1:36). Mazzara's sale to Fisher precisely cancels out a long position Mazzara previously took against a different trader, i.e., it is the same number of contracts at the same price. Fisher's card evinces no such trade at that time or price. Thus, while Mazzara recorded a price which restored his equilibrium position, Fisher recorded the 20 contract sales at a $7.55 per contract price. It cleared at this price, even though the market price had risen to $7.57per contract. (Hastings 153-55; DX 51-86/1; DX 51-3/1; DX 51-84/1; DX 50-98/1).

88. Fisher's accommodation in sequence 51/1 saved Mazzara as much as $2,000 at customer expense. (Hastings 155).

89. In sequence 52/1 Fisher sold a variety of September and December contracts to Mazzara. Fisher did not record six separate trades; they were accepted after the fact on the carbon copies. It appears that Fisher cooperated in helping Mazzara fill his missed orders after trading ceased. (Hastings 156-61; DX 51-5 – 7/1; DX 50-72 – 73/1).

90. In sequences 53/1 and 54/1 Gandolfo and Effron each sold 50 contracts opposite Fisher on behalf of customers. They changed the price of the trades by $.04 per contract to Fisher's and Gandolfo's benefit and to a $20,000 detriment for the customer. (Hastings 162-63; DX 50-28/1; DX 50-72/1).

91. In sequence 55/1 Gandolfo, trading on behalf of the clearing account of another member's firm ("CTI 2"), sold 40 contracts to Fisher, and Fisher sold to Gandolfo, buying on behalf of a customer, the same quantity at a penny more per contract. Fisher recorded both trades in close proximity and made no recalculation of his tally, indicating that the trade was likely a fast round-turn and Gandolfo's recordations do not match with time and sales. Fisher profited at Gandolfo's customer's expense. (Hastings 164-67).

92. In sequence 56/1 Fisher sold 20 contracts to D'Amico at $7.86 per contract. It is undisputed that on July 21, 1988, D'Amico bought many contracts over his customer's limit price. (Tr. 1235, D'Amico). D'Amico bought on behalf of his customer and sold 20 contracts at $7.74 per contract to Fisher.

93. In sequence 56/1 Fisher's cards demonstrate he accepted trades that D'Amico used to fill part of the missed limit order.[20] On the same day, D'Amico also bought and sold an equal number of contracts to Fisher from customer accounts netting Fisher a $12,000 profit.[21] D'Amico and Fisher cooperated in an illegal offset. (Hastings 169).

94. In sequence 56/1 D'Amico was executing trades on behalf of others. He received an apparently 9:53 time stamped order, the missed order, to buy 232 contracts at a price of $7.77. (DX 57-01/1).[22] Earlier in the day he received a sell 20 contract order time stamped 8:57 at a price of $7.48 stop, changed to $7.85 stop, and later in the day he received an order to buy 20 contracts at a price of $7.86 time stamped 11:59. (DX 56-42/1). This was a busy trading day, and between 9:53 and 12:16 prices spiked to $8.16 and fell to $7.80. (Fisher CONCL. 81, ¶ 484; Hastings, 169).

95. In sequence 56/1 D'Amico had several orders to watch. It seems he was filling an unrelated order when an order to buy 232 contracts became executable. This order was missed and the market price rose. He recorded a 12:00 time for his purchase of 182 contracts (which he

[20] Fisher argues the evidence demonstrates the trade was at market price. "D'Amico's 40 lot purchase from Fisher appears to be properly sequenced on D'Amico's trading card, and the $7.77 price, as well as the $7.75 price surrounding the three trades, match the prices reported on the price change register as the 12:57 time. (DX 56-34/1; DX 55-110/1)." (Fisher CONCL. 80, ¶ 80). Hastings acknowledges a print at 12:57 stating a $7.77 price, and bases her analysis on other irregularities. (Hastings 171).

[21] Stated mathematically: (20 contracts) (12 cents at $50/ cent) = $12,000.

[22] D'Amico testified that he received the 232 contract order directly on the phone and was further instructed to not write the order on his deck so that none of the other brokers could determine the size of his order. (Tr. 1230-31). There is in fact a time stamp. However, the Court's copy is not entirely clear that the stamp is at 9:53.

appears to have mis-tabulated as 192 contracts), the opposite traders recorded times between 1:10 and 1:20. Someone wrote "Cash $83,600" on D'Amico's card, a sum which represents premium paid to execute 192 contracts outside the $7.77 limit. (DX 57-1/1; *See*, DOE PSTHG 98, ¶ 335, (averring that "D'Amico missed that window and consequently filled all but 40 contracts on the order at prices of $7.87, $7.83 and $7.81. (DOE PFF 98, ¶335 ("DX 56-36/1, line 1; DX 56-29/1, lines 1-9, 11, 13 and 14; Tr. 1225).").

96. Thus, in sequence 56/1 the customer's position was down thousands of dollars more than if the trades had been conducted at the limit based on the calculation of 192 transacted.[23] Even so, another 40 contracts remained to be filled on the 232 order. (Hastings 168-72).

97. Trade sequence 57/1, is a trade between D'Amico and Fisher. D'Amico's card records a 40 contract purchase at a $7.77 price. (DX 56-31 – 34/1).

98. D'Amico could have simply executed a trade opposite Fisher in trade sequence 57/1. This is the version D'Amico essentially offered at trial. He testified that because he missed the market limit on the bulk of the order he became frantic and ran out of the ring. He also expressed that he returned to the ring, bought another ten contracts above the customer's limit, and then threw his trading cards away. Therefore, he explains, he ended up using differently numbered cards before a clerk recovered his original cards containing the first set of pre-printed numbers he was using.[24] (Tr. 1241).

99. The Court does not find D'Amico's explanation of sequences 56/1 and 57/1 credible.

100. For trades in sequences 56/1 and 57/1 there are cross outs on Fisher's cards which are recorded in ink on the original, apparently after having been separated from the two carbon

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[23] In fact, it seems the customer was recompensed by a $83,600 check drawn on a Drexel broker's compensation fund. (D'Amico CONCL. 34; Fisher CONCL. 81, ¶ 583).

[24] D'Amico testified:

Q And then chronologically you've got 4488. Then the next card is preprinted 4489. And then the next card is back to 12340.

A. Yes.

Q. Can you explain how that occurred?

A. Like I said, I might have took a break for a second, sat in the back, and the clerk might have handed me a pad, given me a pad while I'm going back to the ring. He might have just handed me a pad back.

Q. After you threw your pad, which was the pad that was 12339, did the clerk ever find you --

A. He gave me my pad back, yes.

Q. Okay. And that would then be the next card, the 12340?

A. Yes.

(Tr. 1241, Stumpp and D'Amico).

copies. There are no claims reported on these trades. (Hastings 171).

101. Depending on the time it was executed, the trade could be at market price, or Fisher may have agreed to help out D'Amico on his miss and take the loss by buying below market price. However, what seems more likely, and what the Court finds, is that D'Amico arranged to buy 40 additional contracts from Fisher at the limit price in order to try and complete the order as close to the $7.77 limit as possible in exchange for the offset.[25]

102. The illegal offset charged by the Division in relation to the trades between D'Amico and Fisher on July 21, 1988 discussed in sequences 56 and 57 of Appendix One has been established by a preponderance of the evidence.

103. In sequence 58/1 Fisher traded directly opposite Mr. Amoia ("JA"), netting Amoia $500 at Fisher's expense. The round-turn trades are inserted on Fisher's cards. (Hastings 173-74; DX 55-15/1; DX 58-9/1; DX 58-1/1). The Court concludes this was a money pass.

104. Sequences 63 through 72 in Appendix One occurred on July 25, 1988. On that day the price of silver contracts plummeted from $7.60 at about to $7.05 towards the close. (Hastings 185).

105. In sequence 63/1 D'Amico sold 50 contracts to Gandolfo at $7.20 per contract on behalf of a customer, and Gandolfo sold the same quantity at $.05 more per contract to Mr. John Martin ("MRTN"), who bought on behalf of another trader's firm ("CTI 2").

106. Among other irregularities in sequence 63/1, D'Amico changed the broker written on his card from MRTN to Gandolfo's symbol and lowered the trade price by $.05. The white original copy of D'Amico's card contains the broker change, and both the original and carbon copies show the "5" crossed out and replaced by "0." MRTN's card contains the following notation: "LOUD SB 7256" apparently added by the clerk. (Such a notation probably means should be D'Amico at $7.256.) The claim against D'Amico on MRTN's card for a price of $7.256 per contract was assigned the same time as did Gandolfo, 2:10. However, the trade does not accord with time and sales. Gandolfo changed both the quantity and price on his card.

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[25] The DOE also argues there is another offset. "According to D'Amico, the only part of the order filled at the limit price was the 40 contracts that D'Amico bought from Fisher at $7.77. However, [] on the same card, D'Amico recorded purchases of 40 and 20 contracts respectively, each at a price of $7.75... [These trades were] allocated to a Drexel proprietary account for which D'Amico could trade as signified by the "X" recorded next to the trades. Originally, however, the two purchases were allocated... to the account D'Amico missed. D'Amico offset [for a profit]." (DOE PSTHG 98-99, ¶ 36, citations omitted). The Court only addresses charged allegations.

MRTN may have been unaware that the trade with him was changed. As the trade settled Gandolfo profited $12,500 by buying 50 contract from D'Amico which were offset at $.05 more per contract against MRTN. It appears, and the Court finds, that D'Amico traded non-competitively to achieve this outcome. (Hastings 185-89; DX 62-74/1; DX 63-62/1 –65/1; DX 63-78 – 85/1).

107. In sequence 64/1 D'Amico sold on behalf of a customer to Effron. Both traders initially recorded 30 contracts at $7.25 per contract and both cards were lowered by $.05 per contract. A clerk recorded "+7500" on Effron's card. D'Amico's customer thereby lost $7,500. (Hastings 190-91; DX 62-17/1; DX 63-20/1; DX 63-48 – 58/1).

108. In sequences 65 and 66 of Appendix One D'Amico sold to Effron on behalf of customers. Effron and D'Amico recorded the relevant trades in opposite sequence. D'Amico helped Effron to profit handsomely at his customers' expense. (Hastings 192-93; DX 62-17 - 19/1; DX 63-58A/1 – DX 63-58B/1; DX 63-51/1; DX 63-20/1; DX 63-20/1).

109. In sequence 67/1 D'Amico sold on behalf of a customer to Fisher. Both changed the price on the trade to D'Amico's customer's detriment of $24,500. (Hastings 194-95; DX 63-50/1; DX 63-67-6/1).

110. In sequence 68/1 D'Amico sold to Fisher on behalf of a customer. Fisher recorded a time for this trade before D'Amico's order was time stamped. It looks as if Fisher changed the price, but the original price is not discernable. On D'Amico's card the trade with Fisher appears to be inserted, and the tally does not match all of the trades recorded. Fisher profited at D'Amico's customer's expense. (Hastings 196-97; DX 63-50/1; DX 67-9/1).

111. In sequences 69 and 70 of Appendix One D'Amico sold to Mazzara on behalf of customers. D'Amico changed prices in both sequences, and the trades thus settled at the lowest prices on Mazzara's cards. The trades were executed non-competitively to ensure Mazzara's personal account would profit. In fact, Mazzara gained $38,750 on the two sequences. (Hastings 198-99; DX 63-49/1; DX 39-2/1; DX 69-34/1).

112. In sequence 71/1 D'Amico sold on behalf of a customer to Gandolfo. Gandolfo changed the price on his card, and D'Amico did not. Gandolfo gained $25,000 from the change. The most probable explanation of these events is that D'Amico simply allowed Gandolfo to find the best price consistent with D'Amico's minimum obligations to his customer. (Hastings 200; 63-52/1).

113. In sequence 72/1 D'Amico sold on behalf of a customer to Mr. Semel. Mr. Semel made a unilateral price change on his own card which D'Amico accepted outside of error resolution procedures. Mr. Semel profited from non-competitive trades at D'Amico's customer's expense. (Hastings 201; 72-1/1; DX 63-52/1).

113. In sequence 1/2 Fisher traded opposite RVT. RVT traded on behalf of customers. Both originally recorded 15 contracts at $15.10 per contract, and changed this to a 5 contract trade at $17.10 per contract and 10 contracts at $17.05 per contract. This change transferred $500 from RVT's customer to Fisher. (Hastings 208-09; DX 1-1/2; DX 1-24 – 25/2).

114. In sequence 2/2 Carter sold 15 contracts to Fisher, and Fisher sold 5 contracts to Carter at the same price on June 3, 1988. Fisher did not include the 15 contract purchase in his tally. He bought these at the low end of the price range and sold 5 contracts back at the same price. (Hastings 208-09; DX 1-25/2; DX 1-24/2). Fisher accommodated Carter so that Carter could take the opposite side of his customer's order.

115. In sequence 3/2 Carter sold 20 contracts Fisher, and Fisher sold 10 contracts to Carter at the same price on June 29, 1988. Carter's cards show he likely recorded the trades $.01 away from the high of the range. Fisher accommodated Carter's bucket. (Hastings 213-14; DX 3-1/2-2/2; DX 3-15/2-16/2).

116. Sequences 4, 5, and 6 in Appendix Two occurred on July 1, 1988. (Hastings 215, 217, 220).

117. In his post-hearing brief Orlando particularly challenges sequences 4, 18, 19, and 23. (Orlando CONCL. 6).

118. In sequence 4/2 Cornell sold 30 contracts at $15.29 per contract to Effron, and Effron sold 30 contracts at $15.32 per contract to Orlando. (Hastings 215).

119. In sequence 4/2 Cornell was executing an order to sell 100 contracts at $15.30, 4 point discretion not held. As Orlando points out, Cornell broke up the order and executed the other 70 contract sales at prices below $15.30. Cornell sold 30 contracts, for a customer, to Effron at a price of $15.29. (Orlando CONCL. 31; Hastings 215; Tr. 415, Stumpp and Hastings).

120. At some point in sequence 4/2 Effron sold 30 contracts to Orlando at a price of $15.32. Effron's card demonstrates he bought and sold the 30 contracts without intervening trades. He sold 20 contracts also at $15.32 to an unrelated broker earlier on his card. (DX 4-14/2). It appear that Orlando likely traded to enable Effron to profit non-competitively.

121. Hastings believes trades were arranged to allow Effron to make a profit while avoiding risk for Cornell and Orlando. (Hastings 216). The alleged motive is also transfer money at customer expense. (Hastings 215-16; DX 4-71 - 73/2; DX 4-14; DX 4-60/2; DX 4-90 - 93/2).

122. In sequence 4/2 there is no print of $15.29 in time and sales during the relevant 12:29 through 12:35 period, but the price was traded through in the market range. (Orlando PFF 18, Tr. 417, Stumpp and Hastings). These trades appeared close together, Orlando's net position remained unchanged, and Effron profited from the transactions. (Hastings 215-16; DX 4-71 - 73/2; DX 4-14/2; DX 4-90/2; DX 3-93/2).

123. In sequence 5/2 Cornell sold, 5 contracts at $15.39 to Effron, on behalf of a customer, and Effron sold the same quantity and price of contracts to Orlando. This pattern demonstrates the possibility that Orlando traded opposite the customer of an affiliated broker. There are numerous problems with the times recorded for the trades. In this trade the time stamp on the customer order is *after* Cornell's trade with Effron was listed in the streetbook. (DX 4-84/2). Orlando successively purchased 2, 5 and 7 contracts on trading cards 7 and 8. However, the time stamps on these cards are 10:38, 10:54, and 10:45 respectively. The 5 contract purchase was inserted on Orlando's card. In addition, the times on Effron's and Orlando's cards are out of sequence in sequence 5/2. The price at which Cornell sold the 5 contracts was cheaper than the price prevailing in the ring in the next few minutes after the order was apparently filled, and was at the cheapest price which Cornell was then selling contracts. (Hastings 217-18; DX 04-50 – 51/2; DX 5-2/2; DX 4-82 – 88/2). Orlando traded opposite and at the expense of Cornell's customer through Effron.

124. In sequence 6/2 Cornell, on behalf of a customer, sold 9 contracts at $15.10 to Effron, and Effron sold the same quantity and price of contracts to Orlando. The quantity of Cornell's sale was changed from 10 to 9 contracts. Orlando was short 9 contracts. (Hastings 220-22; DX 6-1 – 5/2; DX 62/2; DX 6-90/2). Orlando traded non-competitively on the opposite side of Cornell's customer.

125. In sequence 7/2 Cornell, on behalf of a customer, sold 3 contracts at $15.09 to Effron, and Effron sold the same quantity and price of contracts to Orlando on July 5, 1988. Orlando originally wrote Cornell's identification badge symbol which was altered to indicate

Effron. Orlando sold at the lower end of the price range. (Hastings 223-24; DX 7-66 – 67/2; DX 7-37/2; DX 7-84/2; DX 7-62/2). Orlando traded non-competitively on the opposite side of Cornell's customer.

126. In sequence 8/2 Mr. John McCann ("JONM") traded on behalf of customers opposite Orlando.[26] The audit trail in this sequence indicates that both changed the quantity of a trade from 10 to 5 contracts, transferring $50 to Orlando. (Hastings 225-26; DX 8-1 - 4/2; DX 8 7-52/2).

127. In sequence 8/2 Orlando and JONM changed a trade at JONM's customer's expense.

128. In sequence 9/2 Carter, trading on behalf of a customer, sold 50 contracts to RVT, and RVT sold the same quantity of contracts to Carter, buying on behalf of a customer, at one cent more per contract. RVT lowered the price on his purchase by one cent, which allowed him to profit on the trade. (Hastings 227-28).

129. In sequence 13/2 Cornell, on behalf of a customer, sold 50 contracts at $15.38 to Effron, and Effron sold 10 contracts at the same price to Orlando. Orlando approached the trade 10 contracts short. Cornell's order was at a limit of $15.38. The Court finds that Orlando cooperated in facilitating trading against a customer's interest. (Hastings 233-34, FN 104; DX 13-11/2; DX 13-12/2; DX 13 53/2-54/2; DX 13-67/2).

130. In sequence 14/2 Mr. McCann sold 27 contracts to Orlando on behalf of a customer and bought 14 contracts from Orlando at the same price for his own account. The trades appear in quick succession and in opposite sequence on the opposite cards. (Hastings 235-38; DX 14-1/2; DX 14-25/2). Orlando accommodated McCann's taking the opposite side of his customer's order.

131. Sequence 15/2 involves Carter and Fisher. Unlike most other sequences, the trades concern different contract months. The evidence shows that these trades were most likely executed after the market closed. (Hastings 239-40; DX 15-29 – 35/2; DX 15-5 – 5A/2).

132. In sequence 15/2 Carter sold 12 September contracts at $14.65 per contract on behalf of a customer, and bought 13 August contracts at $14.47 per contract opposite Fisher. Carter's order to sell September contracts was increased from 50 to 79 contracts. The September sale order was stamped only a minute before close. Quite likely, Carter found it difficult to meet

[26] Mr. John McCann is an uncharged floor broker registered with the Commission. (DOE PFF 11, ¶ 39).

both of these orders. Someone inserted the trades listed above after the fact on Fisher's last card; they are recorded in ink on the carbon copies and are in a different writing instrument on the original. The cards were time stamped after the close. As Fisher sold the August contracts at the corrected high of the day it appears that the traders agreed to execute the trades non-competitively off of the floor. (Hastings 239-40; DX 15-1 – 4/2; DX 15-5/2; DX 15-5A/2).

133. In sequence 16/2, Cornell sold, on behalf of a customer, 50 contracts at $14.66 to Effron, and Effron sold 10 contracts at the same price per contract to Orlando. Both Orlando and Effron lowered the price on their trading cards from $14.68 to $14.66. Orlando offset his initial short position of 5 contracts profitably. (He also profited on liquidating his 5 long position.) (Hastings 241-42; DX 16-57 - 58/2; DX 16-4/2; DX 16-69/2; DX 16-33/2).

134. Sequence 17/2 alleges a money pass between Effron and Orlando. Both traders changed the quantity on their cards. (Hastings 243; DX 16-13 – 14/2; DX 16-70/2).

135. Describing sequence 17/2, Hastings stated: "I believe it is unlikely that Effron and Orlando waited for that length of time [i.e., over 24 minutes between when those prices accord near the time and sales data] without trading and then coincidentally executed another trade with exactly the same quantity and future as the earlier trade." (Hastings 244).

136. In sequence 18/2Effron sold 10 contracts at $15.67 per contract and 15 contracts at $15.68 per contract, on behalf of a customer, to Cornell, and Effron bought 13 contracts at $15.66. These trades occurred on July 18, 1988.

137. Less than 10 minutes later, in sequence 19/2, Effron sold 20 contracts at $15.65 to Cornell, and Effron bought 23 contracts at $15.65 per contract from Orlando. Cornell's purchases were on behalf of customers. (Hastings 245-249; DX 18-68 - 71/2; DX 18-82/2; DX 18-54/2; DX 18-19/2; DX 18-92/2). Orlando profited impermissibly.

138. In sequence 20/2 Orlando sold 18 contracts to Effron (10 of which are allocated to himself) and bought 10 contracts at $.01 more per contract from Effron. (Hastings 250-53; DX 18-54/2; DX 18-82/2; DX 18-19/2).

139. In sequence 21/2 Orlando sold 100 contracts on behalf of a customer and bought 40 contracts at the same price for himself. The trades occurred in rapid succession and Orlando relied upon the late submission process. (Hastings 254-56; DX 18-81/2; DX 18-10 – 11/2; DX DX 18-82/2). Orlando indirectly bucketed his customer's order.

140. Sequence 22/2 involves four trades. Fisher, as always, traded for his own account.

Mr. George McNamara ("GMAC") traded opposite Fisher on behalf of another member's firm ("CTI 2").[27] Fisher sold 100 contracts opposite GMAC for $15.85 per contract, and Fisher sold 100 contracts opposite to GMAC in three lots of 25, 65, and 10 contracts all for $15.75 per contract. Fisher did not include these trades in his tally. Fisher gained $10,000 from non-competitive trades on these transactions. (Hastings 257-58; DX 22-37 – 38/2; DX 22-7 – 8/2).

141. In sequence 23/2 Cornell, trading on behalf of a customer, sold 61 contracts to Effron, and Effron sold 20 contracts to Orlando at the same price. Both Effron and Cornell changed the quantity of their trade with each-other by 20 contracts. Orlando profited from his 20 contract purchase in a non-competitive transaction opposite Cornell's customer. (Hastings 260; DX 23-19/2, DX 23-43/2, DX 23-46 – 47/2, DX 19-57/2).

142. One of the Division's weaker presentations is sequence 24/2. In this sequence Orlando is charged for aiding and abetting in violation of Regulation 1.38(a), and for fictitious sales under 4c(a)(A) of the CEA, for trades in trade sequence 24/2. (Compl. 26, 30; Hastings 262).

143. In sequence 24/2 Orlando sold 7 contracts to Effron, and Effron sold 65 contracts to Cornell at the same price. Effron and Orlando traded from their own accounts, Cornell executed a customer order to buy 75 contracts at that price.[28] (Hastings 24).

144. In sequence 24/2 Hastings verified opinion states:

> Although there are no audit trail irregularities evident with this particular trade sequence, I believe that because it conforms to the pattern associated with a broker trading indirectly opposite an affiliated broker's customer order, it is reasonable to conclude that in this case as with other trades identified in Appendix Two, including another instance this same date..., Orlando executed this trade non-competitively with Effron. (Hastings, 263-64).

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[27] Mr. George McNamara is an uncharged floor broker registered with the Commission. He was employed by DBL Trading Corp., which did not allow him to dual trade. (DOE PFF 11, ¶ 40).

[28] The DOE asserts the order is time stamped twice at 12:16. There is a Benchmark buy card for 75 contracts at $16.15 which appears time stamped twice on that date. (Hastings 262). The minute of the hour is not discernable on one of these time stamps. (DX 24-1/2). Orlando does not dispute these time stamps. The evidence he and other respondents cite is similarly imprecise. Thus, for example, in discussing trade the previous trade sequence, Orlando points to a Benchmark card which contains an order to sell 100 contracts at $16.10. Here although the date and some minute designations are discernable the stamps are questionable. (Orlando CONCL. 21; DX 23-47/2). Absent unsupportable declarations based upon the Court's independent assessment of the evidence, and where the parties do not dispute the interpretations offered, the Court has adopted the parties' reasonable interpretations.

145. In sequence 24/2 although there is no card based irregularity, Hastings cites to the pattern, irregularities in the sequence number 23, and the fact that the price established was not reported in times and sales.[29] (Hastings 262-64).

146. In sequence 25/2 Orlando sold on behalf of a customer to Effron. Both lowered the price on the trade originally recorded, transferring $1,000 to Orlando. Orlando also crossed out the higher price on his order ticket and circled the new lower one, which was at his limit. Orlando submitted this trade through the late card submission procedure. The price change accrued to Orlando's customer's detriment. (Hastings 265-66; DX 25-1/2; DX 23-38/2; DX 23-10/2).

147. Another indirect bucket is alleged in trade sequence 30/2. On August 22, 1988, Carter sold 50 contracts to Fisher at a price of $15.90 per contract on behalf of a customer, and Carter bought 8 contracts for himself from Fisher for $15.89 per contract. The order to sell 50 contracts at $15.90 per contract was time stamped as received and executed during 3:09. (DX 30-13 – 14/2). The price and sale report during this minute appears to list prices from $15.90 through $15.92. NYMEX closes at 3:10, and the closing range was $15.89 through $15.93. (DX 30-28 - 29/2; Hastings 277; Carter PSTHG 60).[30]

148. In trade sequence 30/2 Fisher recorded a 50 contract purchase and then an 8 contract sale on the first two lines of his trading card. (DX 30-11 - 12/2). On the third line of his card Fisher appears to have crossed out his position and altered it to reflect an 8 contract trade scribed above. Carter wrote the 50 contract sale on the face of the sell order ticket and recorded his 8 contract purchase on the back of a pit card. "+8 ^ 89 FSH" is written on the lower left corner on the back of Carter's card. This indicates a long position (or addition to his net position) of 8 contracts, in the October month, at a price of 89 cents (the $15 prefix is presumed) opposite Fisher. (Hastings 276-77).

149. Carter's attorney described sequence 30/2 as follows: "The customer got filled at his limit – it was 1 point off of the settlement price of 91. Carter bought 89s from FSH [Fisher]

[29] In Attachment II to Hasting's verified statement she lists the following sequences in Appendix Two as "Trades [in which] Prices Were Not in Sequence with or Reported on Time and Sales[:] 2, 4, 19, 21, 32, 45-48, 51, 62[.]" Trade 24 is not listed. (Hastings 375). Rather than being mis-sequenced, Hastings points out that the reporter never stated this price and acknowledges that the price was within this range.

[30] The Court cannot discern all of the times on document DX 30-29/2.

before he traded the 90s, but Carter also executed other trades in the close at 90 and 92 – which were also in the range." (Carter PSTHG 60). The Court finds that Fisher accommodated non-competitive trades involving Carter. (Hastings 276).

150. In sequence 31/2 Mr. Paul Becker ("PDB") traded on behalf of a customer opposite Fisher and Effron.[32] PDB sold 212 contracts to Fisher at $13.94 per contract and 100 contracts to Effron at $13.95 per contract. Both Fisher and PDB first recorded a 300 contract trade at $13.97 per contract. Both changed the price and quantity. The 100 contracts sale to Effron bought were inserted on the top white copy of his cards. The customer lost over $8,000 from these changes. (Hastings 278-80; DX 31-44 – 46/2; DX 31-38 –39/2).

151. In sequence 32/2 Effron sold 20 contracts to Orlando and bought 20 contracts from Orlando at a $.10 per contract difference Effron transferred $2,000 to Orlando. Orlando started to write both trades on the same line of his card; but recorded the purchase below. (Hastings 281-82; DX 39-62/2).

152. In sequence 33/2 Cornell, trading on behalf of a customer, sold 12 contracts to Effron, and Effron sold the same quantity and price of contracts to Orlando. Effron did not record either of the trades. The trades were inserted on his card with a different writing instrument and are not tabulated in his tally. Orlando initially recorded the trade as opposite Cornell, not Effron. (Hastings 283-85; DX 33-53/2, DX 33-56 – 57/2, DX 33-74/2).

153. In sequence 34/2 Orlando sold to Effron on behalf of a customer. Both lowered the price by $.02 per contract. Effron profited at Orlando's customer's expense. (Hastings 286; DX 33-54/2; DX 33-33/2).

154. In sequence 35/2 Cornell, trading on behalf of a customer, sold 5 contracts to Effron, and Effron sold the same quantity and price of contracts to Orlando. The trades appear inserted on Effron's cards and are not tabulated in Effron's tally. Once again, Orlando interposed Effron as an intermediary so he could trade opposite Cornell. (Hastings 287-89, DX 35-11 – 12/2, DX 35-26 - 26A/2, DX 35-33/2, DX 35-35/2, DX 35-37/2).

155. In sequence 37/2 Mr. Eugene Rozgoyni ("EVR") bought 300 contracts from Fisher. Both changed their cards by increasing the price one penny per contract.[31] Apparently, Fisher changed his carbon copies and the clerk changed the top white copy, for a transfer of $3,000 to

[32] Mr. Becker worked as a registered floor broker (Fisher App. 2 RA 24, 25).
[31] Mr. Eugene Rozgonyi is an uncharged floor broker registered with the Commission. (DOE PFF 10, ¶ 37).

Fisher. Fisher profited at EVR's customer's expense. (Hastings 290-92; DX 37-9/2; DX 37-20 - 21/2).

155. Sequence 38/2 occurred on September 20, 1988. Carter, on behalf of a customer, sold 100 contracts to Fisher at $14.34 per contract, and Fisher sold 4 contracts to Carter at $14.33 per contract for Carter's personal account. (Hastings 293-98; DX 38-1/2; DX 38-28/2; DX 38-38/2).

157. In sequence 38/2 Fisher made price and quantity changes resulting in a $1,000 transfer to his benefit at a customer's expense. Fisher originally recorded a 200 contract trade, which he altered several times to establish the 100 contract figure. He also lowered the price on the final 100 contract trade by $.01 per contract. Fisher wrote a 4 contract trade on his last trading card of the day in this sequence and lowered the price of this trade by $.02 per contract. Fisher made quantity changes, price changes, and tally corrections on the original card before it was separated from its carbon copies. (Hastings 293-98; DX 38-26 - 28/2; DX 38-22 – 23/2; DX 38-38/2; DX 38-41 – 44/2).

158. In sequence 38/2 Carter's cards are also irregular. He sold 175 contracts between $14.35 per contract and $14.37 per contract. He tallied these as 175 on the top center of the card. A line is written in the middle of the card. On this line the 100 contract trade opposite Fisher is recorded. Below the trade opposite Fisher is a separate 115 contract sale. Carter wrote 290 in the card's lower left hand corner. Carter needed the 4 contracts to profitably offset his position. He cooperated in the transfer and received a price near the low end of the range on these 4 contracts. (Hastings 293-98; DX 38-26 - 28/2; DX 38-22 – 23/2; DX 38-38/2; DX 38-41 – 44/2).

159. Sequence 39/2 involves trades on September 23, 1988. On that day Carter received a 900 contract sell order. (DX 39-20 – 21/2). He sold 300 of those contracts to Fisher, 100 of which are in question. Hastings concluded they two traders agreed to a simple 100 contract quantity change from 200 to 300 contracts. (Hastings 299).

160. In sequence 39/2 it appears that the quantity change was made during the trading day. Fisher not only crossed out and replaced the quantity of contracts in that trade with Carter, he had to then change his net tally. He changed the next trading card by an additional one hundred contracts as well. The changes do not continue to occur thereafter; the corrected total is used beginning with card 14. Thus, it is unlikely that Fisher accepted an out after the day had

ended. (Hastings 299-302; DX 39-12 – 14/2).

161. The market moved during this time period when Fisher changed his cards in sequence 39/2. A preponderance of the evidence established the two traders cooperated to deprive a customer of profit to benefit themselves. (Hastings 299-302; DX 39-12/2).

162. In sequence 41/2 Cornell, trading on behalf of a customer, sold 10 contracts to Effron, and Effron sold 5 contracts at the same price to Orlando. Orlando was able to offset the trade at a 2 cent per contract advantage.

163. In sequence 41/2 Hastings acknowledges the primary evidence is the pattern. (Hastings 306). In this sequence, Effron as the accomodator recorded the round turn consecutively. The rapid offset is similarly demonstrated as the very next trade on Orlando's card. (DX 410-29/2).

164. In sequence 42/2 PDB sold to Fisher on behalf of customers. Fisher's original recordation appears to be at a price of $12.62 and PDB wrote $12.61. PDB and Fisher broke down an original trade of 300 contracts into two orders. One was a sale of 200 contracts at $12.61 per contract and another for a sale of 100 contracts at $12.60 per contract. Under the argument presented that traders were expected to evenly fix outs among themselves during the relevant time period such a trade should have evened out to an effective average of 300 contracts at $12.615 per contract. Yet the three hundred contract trade was effectively divided at $12.666 per contract. (Hastings 308; Hastings 307-09; DX 42-58A/2; DX 42-47/2; DX 42-10/2; DX 42-42/2).

165. In Sequence 43/2 Orlando bought 45 contracts on behalf of a customer from Effron, and sold 10 contracts at the same price to Effron. Both recorded a sale and then a buy and both had first recorded trades at higher prices before the trades in this sequence. Orlando, accommodated by Effron, indirectly bucketed his customer's order. (Hastings 310-11; DX 43-7/2; DX 43-33/2).

166. In sequence 44/2 Carter, trading for himself, traded opposite Mr. Van Tongeren ("RVT"), trading on behalf of customers.[32] RVT sold 15 contracts to Carter at $13.15 per contract, and Carter sold 15 contracts to RVT at $13.17 per contract. In addition, RVT sold 10 contracts to Carter at $13.17 per contract, and Carter sold 10 contracts to RVT at $13.18 per

[32] Mr. Van Tongeren is an uncharged registered floor broker. He traded for his own account and Van Tongeren Trading Corp. (Fisher App. 2 RA 16, 17).

contract. There are both price and quantity changes, the upshot of which is as Hastings states "[I]f this was a legitimate price disagreement between Van Tongeren [RVT] and Carter, it appears that it was resolved at the worst possible price for the customer." (Hastings 313; Hastings 312-13; DX 44-1 – 2/2; DX 44-5/2; DX 44-50 – 53/2).

167. Sequences 45 through 47 and sequence 66 of Appendix Two are indirect buckets involving Fisher and Mr. Van Tongeren ("RVT").

168. In sequence 45/2 Fisher bought 10 contracts at $14.11 per contract opposite RVT, he sold 25 contracts against RVT's customer at $14.10 per contract, and bought 10 contracts from RVT at $14.09 per contract. The first two of these three trades appear to have been added to Fisher's card after the price declined. Fisher wrote the trades in close sequence and neither lost nor made money on the transactions. RVT's order likely became executable at a price of $14.10, which was reported at 14:16:58. Thereafter prices dropped. His sale of 10 contracts at $14.11 per contract was inserted out of sequence with the pit card submissions and were unaccounted for in his tally. Fisher helped RVT to minimize his losses at customer expense. (Hastings 314-16; DX 45-49 - 50/2; DX 45-42/2; DX 45-71/2; DX 45-21/2).

169. Sequences 46/2 and 47/2 occurred on October 20, 1988. Although Fisher lost $300 in sequence 46/2, on the same day he gained $400 in another set of trades with RVT. (Hastings 317-21).

170. In sequence 46/2 Fisher sold 10 contracts opposite RVT's customer at $14.70 per contract and bought 10 contracts from RVT at $14.67 per contract. In this sequence Fisher took a loss to help RVT fill a limit order that he apparently missed by at least ten minutes.
In this sequence RVT submitted his card through the late submission procedure and Fisher's cards shows two price changes; the prices do not match with price reports. Fisher accommodated RVT's indirect bucket. (Hastings 317-19; DX 46-7/2; DX 46-38/2, DX 46/2-47/2; DX 62/2).

171. In sequence 47/2 Fisher sold 20 contracts at $14.52 per contract to another member's account controlled by RVT ("CTI 3") and Fisher bought 20 contracts from RVT at $14.50 per contract. The trade on behalf of a third party likely occurred between 3:07:52 and 3:09. Time and sales do not report the price recorded during that time. The price at which RVT sold was at a high and when offset with the 20 contracts he sold back to Fisher, RVT gained $2,000 on the round turn trade. (Hastings 320-21; DX 47-1 -2/2; DX 46-54/2; DX 46-63/2; DX

46-31/2).

172. In sequence 48/2 Carter sold to Fisher on behalf of a customer at the customer's limit price of $13.59 per contract. Carter's floor order was time stamped received at 12:12 and became executable at 2:15. In the next two minutes prices fell and did not climb above $13.40 per contract. Based on Fisher's other trades, and Carter's time stamp after the prices fell, it appears that the purchase from Carter occurred after prices fell. Fisher made a round-turn trade offsetting the sale to Carter with a purchase at $13.20 per contract, netting Fisher $39,000. Carter's customer lost from the non-competitive changes. (Hastings 322-24; DX 48-17/2; DX 48-29 – 30/2).

173. In sequence 49/2 Mr. Maloney ("SLIP") recorded a trade opposite. Lang ("RSL"). However, RSL's corresponding order was for a different month than SLIP. SLIP changed his card to reflect the trade as opposite Fisher. Fisher accepted the errors from both RSL and SLIP. (Hastings 325-27; DX 48-3/2; DX 48-75/2).

174. In sequence 54/2, Carter sold 10 contracts on behalf of a customer at $15.71, and bought 10 contracts at $15.61 per contract opposite Fisher. Carter initially recorded "SLIP" opposite a contract, $15.71 trade, changed to Fisher. However, it appears that Fisher took the trade when SLIP did not recognize it, saving Carter from having to pay the difference on the change in market price. The trade is inserted on Fisher's card and is not included in his tally. (Hastings 335-37; DX 54-61 – 62/2; DX 54-29 – 30/2).

175. In sequence 55/2 SLIP sold 2 contracts to Fisher at $15.62 per contract on behalf of a customer and bought 2 contracts from Fisher at $15.48 per contract from his own account. SLIP recorded a 2 contract purchase at $15.61 per contract, against a member labelled "HELP." This designation is crossed out and replaced with Fisher's. The trade with Fisher is inserted after the original was separated from the carbon copies. (Hastings 338-40; DX 54-6/2; DX 54-33 – 34/2).

176. In sequence 56/2 GMAC bought 50 contracts from Fisher on behalf of a customer. Both changed the prices on the trade to Fisher's benefit and GMAC's customer's detriment. (Hastings 341-42; DX 56-1/2; DX 54-11/2; DX 56-32 – 34/2).

177. In sequence 57/2 Orlando sold 50 contracts on behalf of a customer to Orlando, and bought 10 contracts at the same price from Effron. Both recorded a buy and then a sale. Orlando sold for the customer and bought for himself at the high end of the range. (Hastings

343-44; DX 57-26/2; DX 57-1-2/2).

178. In sequence 58/2 RVT sold to Fisher on behalf of a customer. RVT crossed out the original opposite trader and replaced it Fisher. The trade is inserted on Fisher's card. (Hastings 345-46; DX 58-29 – 32/2).

179. In sequence 59/2 SLIP sold 15 contracts to Fisher, and Fisher sold 15 contracts at $.01 less per contract to RVT. RVT buying on behalf of a customer crossed out his original trade opposite SLIP. The two trades were inserted on Fisher's card. (Hastings 347-48; DX 59-1/2; DX 59-13/2).

180. In sequence 60/2 Fisher traded opposite Carter and three other traders. Carter initially recorded trades opposite these other traders but changed them to Fisher. It appears that Carter and the three other traders confused the months they were trading. Fisher took the opposite side of all of the orders in the months the traders intended. The trades appear as insertions on Fisher's card. (Hastings 349-51; DX 60-19 - 21/2; DX 60-16 - 18/2; DX 68-46 - 54/2).

181. Sequence 61/2 occurred on January 9, 1989. Fisher bought 10 contracts opposite Carter's customer at a price of $17.06 per contract and sold 10 contracts to Carter at $.01 more per contract. Carter and Fisher respectively gained $400 and $100 from the trades. (Hastings 352-54; DX 61-18 – 19/2; DX 61-38/2; DX 61-40 – 41/2; DX 61-10/2; DX 61-45/2; DX 61-9/2).

182. In sequence 62/2 SLIP sold a contract to Fisher for $18.35 on behalf of a customer, and bought a contract opposite Fisher at $18.49 for his own account.[33] Between approximately 1:45 and 2:30 on this day, February 17, 1989, Fisher recorded trades solely opposite SLIP. Both submitted trades through the late submission process. For the relevant period time and sales records an $18.35 -but not $18.49- trade. That is, $18.35 price was not reported when Fisher could have recorded the trades opposite SLIP. (Hastings 355-57; DX 62-26 – 27/2; DX 62-33 - 36/2; DX 62-12 - 14/2; DX 62-38/2 – 46/2).

183. In sequence 63/2 Carter received an order, time stamped in at 10:16, to sell 300 June contracts at a 100 point differential. (DX 63-40 - 41/2). Carter reduced the quantity of his trade opposite Orlando, who apparently only recognized a 5 contract trade. Fisher took the 5 contract

[33] Mr. Dennis Maloney is an uncharged floor broker registered with the Commission. He executed orders for Tafaro where he was affiliated with Carter. (DOE PFF 10, ¶ 38).

out which is inserted on his trading card. Carter's card was submitted through the late submission procedure. (Hastings 358-59; 63-37 – 39/2; DX 63-54/2).

184. As prelude to sequence 64/2, SLIP accepted a trade from Carter in order for Carter to complete his customer order. Fisher sold the 9 contracts to SLIP. In sequence 64/2 SLIP sold 9 contracts to Fisher on behalf of a customer, and Fisher sold 9 contracts to SLIP at $.02 less per contract. Fisher wrote both trades consecutively on his cards and counted the round turn as one transaction in his tally. (Hastings 360-61;DX 64-38/2; DX 64-49/2, DX 64-50/2; DX 64-74/2).

185. In sequence 65/2 GMAC bought from Fisher on behalf of a proprietary account of a clearing member's firm ("CTI 2"). GMAC and Fisher changed their 100 contract trade to two trades at 50 contracts. GMAC's customer lost money from the change. The price of one of the 50 contract blocks was increased by $.03 per contract, i.e., $1,500 more for Fisher. (Hastings 362-63; DX 65-41/2; DX 65-13/2).

186. In sequence 66/2 Fisher bought 10 contracts opposite RVT trading for a customer, and sold 5 contracts for one penny more per contract. RVT submitted his pit card late, possibly about 50 minutes after the time Fisher recorded it. (Hastings 364-65; DX 66-66/2 – 67/2; DX 66-29/2; DX 66-92/2 – 3/2; Fisher PFF 131, ¶ 901).

187. The DOE cited 36 sequences on the CSCE. In Appendix Three an illegal offset was alleged in sequence 12, price changes were alleged in sequences 1, 4, 5, 17, 22, 27, and 32. The remaining sequences, excepting sequences 19 and 24, are alleged indirect buckets.

188. Kozlowski concluded that the traders rearranged the trades in sequences 20, 21, 28, and 34.

189. In sequences 3, 12, 15, 19, 23, 33, 34 and 36 that the traders recorded in conflicting sequence from each-other. Conflicting sequences may occur in indirect buckets if one trader simply directs the accomodator to record a buy and sell on his card. In that event, the accomodator may not necessarily learn what the proper sequence should have been, or may lack the space to place the trades neatly to correspond with the indirect bucketer. (Kozlowski 15-16).

190. Trades were allegedly inserted in sequences 8, 11, 12, 13, 23, 24, and 31. Under CSCE Rule 3.18 and Commission Rule 1.35(d) trades were required to be recorded in the same sequence as they were executed. (Kozlowski 14). In order to make the trades appear to conform to these rules the trades are sometimes inserted into the cards. Aside from trades appearing squeezed in, the original and carbon copies may differ and indicate the trade has not recorded as

executed.

191. A common audit trail irregularity in Appendix Three is quantity changes. (Hastings, *passim*).

192. In sequence 1/3 Fisher sold 5 contracts to Amodeo directly, and Amodeo sold 35 contracts to Fisher at the same price per contract on behalf of a customer. Both changed the trade from 30 to 35 contracts and altered the price by $.01 per contract. The 5 contract change is the same number of contracts Amodeo bought for his personal account. (Kozlowski 24-26; DX 1-5/3; DX 1-9/3; DX 1-20 - 21/3; DX 148/3).

193. In sequence 2/3 Fisher sold 20 contracts to Singer directly at $9.95 per contract, and Singer sold 70 contracts to Fisher at the same price per contract on behalf of a customer. Both changed the trade from 50 to 70 contracts. The 20 contract change is the same number of contracts Singer bought for his personal account. The closing range was $9.94 to $9.98. (Kozlowski 27-28; DX 157 – 158/3; DX 2-27 – 28/3; DX 2-81/3; DX 2-29/3; DX 2-85/3; DX 2-94 - 95/3).

194. In sequence 3/3 Singer sold 15 contracts to Amodeo. This sale was allocated to customers and Singer's own account. In another transaction Singer bought 5 contracts from Amodeo at the same price for his own account. Both Singer and Amodeo changed the initial quantity of the trade from 10 to 15 contracts, and they recorded the trades in opposite sequence. As Kozlowski points out, the upshot was that Amodeo was able to liquidate this position only one point away from the opening range. (Kozlowski 31).[34] Amodeo indirectly bucketed the order. (Kozlowski 29-31; Exhibit AS-1 20-21; DX 3-1 - 2/3; DX 3-40/3; DX 3-64 - 65/3)

195. In sequence 4/3 Mr. William Mauro ("W.Mauro") sold 20 contracts on behalf of a customer at $9.77 per contract to Singer.[35] Both changed the price from $9.78 per contract. Consequently Singer diverted $224 from W.(Kozlowski 32-33).

196. In sequence 5/3 Fisher sold 30 contracts to Amodeo, buying on behalf of a customer, and Amodeo sold 7 contracts directly to Fisher at the same price. Both lowered the price of Amodeo's purchase by $.02 per contract. Amodeo changed the quantity from 23 to 30 contracts.

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[34] Berens opines: "Both Singer and Amodeo happen to mis-record their 5 Lot opposite each-other. Such situations are not unusual..." (Berens, 21). The evidence suggests the recordation was not a simple error.

[35] Mr. William Mauro is an uncharged floor broker registered with the Commission. He was a principal in the brokerage firm that employed Amodeo. (DOE PFF 11, ¶ 41).

Fisher changed the quantity from an unknown figure to 23 to 30 contracts. (Kozlowski 34-36; DX 5-3 – 4/3; DX 5-32/3; DX 5-181 – 196/3).

197. In sequence 6/3 Amodeo traded opposite Mr. L. Mauro ("L.Mauro").[36] L.Mauro's trades cleared on behalf of an another clearing member's proprietary account. He sold 9 contracts at to Amodeo at $10.73 per contract. Amodeo bought for a customer, but directly sold 5 contracts to L.Mauro at $10.72 per contract. Both changed the trade from 4 to 9 contracts, which was the highest price at which Amodeo filled his customer's order. (Kozlowski 37-39; DX 6-13 - 14/3; DX 6-31/3; DX 6-76 – 77/3).

198. In sequence 7/3 Fisher sold 10 contracts to Amodeo. Amodeo, selling on behalf of a proprietary account, sold 20 contracts to Fisher at the same price. Both changed the latter trade from 10 to 20 contracts. (Kozlowski 40-41; DX 7-42 – 43/3; DX 7-102/3; DX 7-139 – 140/3).

199. In trade sequences 8, 12, and 19 of Appendix Three Kozlowski cites inconstancies with the time and sales reports.

200. Sequence 8/3 is another indirect bucket. Singer bought 15 contracts on behalf of a customer at $13.28 per contract and sold 15 contracts at $.01 less per contract directly to Fisher, i.e., from his own account. (Kozlowski 42-27).

201. In sequence 8/3 there are timing problems, cross outs, and the trades are recorded in the wrong sequence. Fisher's same card contains a crossed out trade for 15 contracts, assigned a time of 1:40. Fisher's denotation of 15 contracts appears to contain a 1 written over the circle tallying his position as short 13. It appears he crossed out the initial sale (recorded at 1:40) and re-wrote it above (assigning the re-write an earlier time of 1:36- two minutes before another trade, which was already written as 1:36). Fisher assigned times of 1:34 for the sale to Singer at 13.28 and the data indicates a price range of about 13.17 to 13.25. His tally tabulations and time and sales support this theory of how the trades were recorded. (Kozlowski 42- 47; DX 8-113 - 114/3; DX 150- 151/3; DX 8-213 - 217/3).

202. In the sequence there are cross outs on Fisher's card. The Division's argument is augmented by the appearance of different handwriting and cross outs on the card - indicating that Fisher moved the trade from line ten of the card to line two, where he was restricted because he had already recorded times above and below the insertion. Fisher's same card contains a crossed

[36] Mr. Louis Mauro is an uncharged broker registered with the Commission. His personal trades cleared as a proprietary account ("CTI 2"). He also executed trades on behalf of customers. (DOE PFF 12, ¶ 42).

out trade for 15 contracts, which were assigned a time of 1:40. Fisher's denotation of 15 contracts appears to contain a 1 written over the circle tallying his position as short 13. It appears he crossed out the initial sale (recorded at 1:40) and re-wrote it above (assigning the re-write an earlier time of 1:36– two minutes before another trade, which was already written as 1:36). His tally tabulations and time and sales support the Division's theory of how the trades were recorded. (Kozlowski 42- 47; DX 8-113 - 114/3; DX 150- 151/3; DX 8-213 - 217/3).

203. When combined with Fisher's apparent insertion of the sale onto his card, the profits both traders made at customer expense appear by a preponderance of the evidence to have been non-competitive. (Kozlowski 42-47).

204. Sequences 9/3 and 10/3 are alleged indirect buckets that occurred on July 1, 1988. (Kozlowski 48-52).

205. In sequence 9/3, both Amodeo and Singer changed the trade from 5 to 10 contracts. Amodeo sold 10 contracts to Singer (buying the five for the customer and then changing the quantity to 10) and then Singer sold to Amodeo for their personal accounts. The result was that Singer took a profitable short position and gained $112 on the liquidation. The price reports support the Division's allegations of non-competitive trading. (Kozlowski 48-49; DX 8-39 – 40/3; DX 9-12/3; DX 9-48/3).

206. Sequence 10/3 is akin to 9/3, except that when Singer sold to Amodeo and then back to himself, the second rather than the first purchase was on behalf of a customer. (Kozlowski 12.)

207. Again the quantity of contracts in the sequences was increased, herein from two to five. In sequence 10/3 Singer first sold two contracts short, increased to five by the quantity change. He went short another seven, and liquidated the 12 contracts, six with Amodeo and six with another trader. The three-contract increase amounted to a $67.20 change at the customer's expense. (Kozlowski 50-52; DX 8-33/3; DX 9-10/3; DX 9-35/3).

208. Kozlowski summarized the sequence 10/3 as follows:

> Singer sold the two contracts for himself at 12.80 in what was likely a competitive trade, and then [four seconds later] when the price fell to 12.78, he filled his [buy at limit] orders for the customer at 12.80 and selling for himself at that price. Thus by trading opposite his order, he was able to sell at an advantageous price for himself.

(Kozlowski 52).

209. In sequence 11/3 Fisher bought and sold 5 contracts opposite Singer at a $.05 profit per contract. Singer sold on behalf of a customer but bought for himself. Fisher's tally

tabulations do not accord with his 3 contract purchase. Singer sold at the low end of the range for his customer and bought at the low end for himself. (DX 8-221/3; Kozlowski 53-54; DX 8-99/3; DX 118 – 119/3).

210. In sequence 12/3 Singer sold three contracts to Amodeo and bought 3 contracts at $.05 more per contract from Amodeo. Singer traded on behalf of customers. There appears to be a few minute discrepancy as to the time these trades were recorded, the trades do not sequentially correspond with each-other, the trades on Amodeo's card appear to be in a different writing instrument than the other trades, and there is little corroboration of a proper trade in the time and sales report. Based on the times assigned to other trades, and the rule requiring sequential recordation, it is clear that Singer recorded the trade before 1:34 and Amodeo's shows that he did so after 1:37. (Kozlowski 56).

211. In sequence 12/3 the trades could not have been competitively executed or they did not conform to the CSCE's recordation rules. When the trades between the two trader's cards are compared it appears that Singer sold three, bought three and bought five, while Amodeo would have sold five, bought three, and then sold five. The time and sales reports do not account for sales at these prices until near the close at 2:00. Singer diverted money from customers to Amodeo. (Kozlowski 55-58; DX 9-22/3; DX 9-44/3; DX 8-52 – 55/3; DX 12-1 – 4/3; DX 8-54 – 55/3; DX 8-94/3; DX 12-2 – 4/3).

212. In sequence 13/3 Amodeo sold 5 contracts at $13.11 per contract to Fisher on behalf of a customer, and Amodeo bought 5 contracts at $13.13 per contract directly from Fisher. Both assigned a time of 11:15 to the $13.13 trades in that time prices reached $13.15. Fisher's tally does not cohere with his purchase of 5 contracts. (Here, the tally is written on the same lines as the inserted trades themselves, raising an inference that Fisher did not simply choose to stop keeping a tally). Fisher profited by $.02 per contract for five contracts traded opposite Amodeo. Amodeo sold on behalf of a customer and bought for himself. Fisher's tally does not account for these trades. Amodeo indirectly bucketed the orders to obtain favorable prices for himself and Fisher. (Kozlowski 59-61; DX 13-23 – 24/3; DX 13-25 – 26/3; DX 13-119/3; DX 13-169 – 170/3; DX 13-215 – 220/3; DX 13-307 – 308/3; DX 13-298/3).

213. In sequence 14/3 Mr. Felice sold 31 contracts to Amodeo.[37] Amodeo bought on

[37] Mr. Robert Felice is an uncharged broker registered with the Commission. He traded solely for his own account. (DOE PFF 12, ¶ 43).

behalf of a proprietary account, and sold 11 contracts directly from his own account to Mr. Felice at the same price. Both changed the first trade from 20 to 31 contracts. (Kozlowski 62-64)

214. Amodeo's order card is scribed "too lat[e]" and has a 138 crossed out and replaced by 149. (DX 14-29/3). The 11 contracts is somewhat difficult to trace in this transaction since Amodeo appears to have offset the 11 contract purchase with a sale at the same price as his next trade and there does not appear to be a tally. He changed the quantity buying 31 contracts on line 6; he sold 11 contracts as his next sequentially recorded trade on line 8 also at the same price. (DX 13-11/2; DX 13-11/3 on line 8).

214. A plausible reconstruction of the times indicates Amodeo offset the position at lines 14-15 of that card and the first line of the next card. (Kozlowski 63-64). Mr. Felice also had the same quantity change on his card, and that the contract was likely trading below the price he paid. In this sequence the Court finds Amodeo indirectly bucketed his order. (DX 14-1/3; Kozlowski 64).

215. In sequence 15/3 Felice sold 10 contracts to Amodeo. Amodeo bought on behalf of a customer and sold 5 contracts; at the same price to Felice. Both changed the quantity of their trades from 5 to 10 contracts, they recorded the trades in opposite sequence. The customer thereby lost $112. (Kozlowski 65-67, DX 15-1 – 3/3; DX-7 – 8/3; DX 15-56 – 89/3; DX 15-60/3; DX 15-92/3; DX 15-107 – 108/3).

216. In sequence 16/3 Amodeo sold 7 contracts to Singer. Singer bought on behalf of a customer and sold 3 contracts at the same price to Amodeo. Both changed the trade from 4 to 7 contracts. Singer, accommodated by Amodeo, indirectly bucketed his 3 contracts of his customer's order. (Kozlowski 68-69; DX 16-34 – 35/3; DX 15-48 – 49/3; DX 18-88/3).

217. In sequence 17/3 Singer sold 19 contracts to Amodeo and Amodeo sold 9 contracts to Singer at the same price. Amodeo bought on behalf of a proprietary account and sold for himself, Singer allocated the sale to himself and a proprietary account and bought for his own account. Both changed their initial trade from 19 to 10 contracts and changed the price on Amodeo's buy by adding $.01 per contract as well. Singer gained at Amodeo's customer's expense. (Kozlowski 70-72; DX 17-50 – 51/3; DX 17-98/3; DX 17-149/3; DX 17-202 – 204/3).

218. In sequence 18/3 Amodeo sold 25 contracts at $14.01 per contract to Fisher and Fisher sold 15 contracts at $14.02 to Amodeo. Amodeo sold for a proprietary account and allocated the buys to himself and another member's account ("CTI 3") above his customer's

limit.. Both changed the quantity of the 25 contract trade. Fisher changed it from 15 to 25, but Amodeo's initial figure is not discernable. It also appears that Amodeo did better than his customer's limit price. (Kozlowski 73-75; DX 18-128 – 131/3; Amodeo PSTHG 15).

219. In sequence 19/3 Fisher sold 10 contracts at $12.95 per contract to Amodeo. Amodeo bought the ten contracts on behalf of a customer. Amodeo sold 5 contracts at $12.94 per contract to Fisher on behalf of another member ("CTI 3"). Both increased the quantity of the first trade from 5 to 10 contracts. Amodeo, accommodated by Fisher, used his customer order to help out another CSCE member, and Fisher made a small profit. (Hastings 76-79; DX 19-1 – 4/3; DX 18-25 – 26/3; DX-49/3; DX 18-59/3; DX 18-80 – 81/3).[38]

220. In sequence 20/3 Singer, selling on behalf of a customer, sold 9 contracts to "O'Keefe" and bought 6 contracts from O'Keefe at $.01 per contract for himself. Both changed the quantity of the trade from 3 to 9 contracts. There is evidence that there was another pre-existing 3 contract trade with a third floor trader. Singer participated in indirectly bucketing the trades. (Kozlowski 80-83; DX 20-22 0 23/3; DX 20-194/3; DX 20-59/3; DX 20-99/3).

221. In sequence 21/3 Singer sold 30 contracts to Mr. Reddy on behalf of a customer. Mr. Reddy sold 20 contracts at the same price to Singer; both traded for their own accounts. Both increased the quantity of the trade from 10 to 30 contracts. Singer bought for himself at or about 8 points below the market, depriving a customer of about $1,792. (Kozlowski 84-86; DX 20-27 – 28/3; DX 20-197/3; DX 21-37/3; DX 21-45/3).

222. In sequence 22/3 Fisher bought 20 contracts at $11.35 from Mauro. Both initially recorded a 45 contract sale to fisher at $11.40. On both of their sets of cards this was changed to 2 contracts and the subsequent sale of the other 20 contracts at a lower price was added. The

[38] As stated, in sequence 19/3 Fisher sold 10 contracts to Amodeo, and Amodeo sold 5 contracts to Fisher at a penny less per contract. Amodeo's card indicates these trades took place between 1:05 and 1:10. Amodeo's card also contains two additional trades located between those discussed, for a purchase of 7 and 24 contracts, each with Fisher. Fisher's card assigns a time of 1:08 and 1:09 to the intercalated trades. The time and sales lists a price of 12.92 at 1:08:45 which fell to 12.88 at 1:09:11. The Court draws no conclusion in this sequence as to whether these trades cohere with time and sales data. In other trades on the cards Fisher and Amodeo appear to have conducted trades out of sequence, and time and sales do not cohere with trading at a price of $12.94 after having traded at $12.90. Berens states that this is consistent with time and sales and the trades are simply blocked trades which have been recorded after the fact. (Berens 75). In this sequence, the Court can discern no need for both traders to have engaged in a quantity change at all. The theory that the trades may have been blocked does not explain this.

customer was thus deprived of $.02 for 20 contracts, or $1,120. (Kozlowski 78, 87-88; DX 22-39 - 40/3; DX 22-75/3; DX 22-95 – 96/3; DX 22-135/3; DX 22-135 – 136/3).

223. In sequences 23/3 and 24/3 Fisher traded opposite "W.Mauro." In sequence 23/3 W. Mauro sold 20 contracts at $11.92 per contract to Fisher, allocated to a customer, and bought them back at the same price for his own account at the same price. In sequence 24/3 Fisher bought 20 contracts at $11.95 from W.Mauro, allocated to a customer. It is also notable that, Fisher did not tabulate the trades in his tally, Fisher recorded a buy and sell on the same line of his card (raising the possibility that the trade may have been inserted), he recorded a latter time for this trade than the subsequent trade, and recorded his trades in opposite sequence from W.Mauro. Indirect bucketing was demonstrated as alleged. (Kozlowski 89-92; DX 22-74/3; DX 22-93 – 94/3; DX 22-34 – 35/3).

224. In sequence 25/3 Fisher sold 20 contracts to W.Mauro, and W.Mauro sold 28 contracts at the same price to Fisher. Fisher changed the quantity on his card from 8 to 28 contracts. (Kozlowski 93-95; DX 25-94/3; DX 25-79/3; DX 25-102/3; DX 25-148 – 149/3).

225. In sequence 26/3 Fisher sold 31 contracts to W.Mauro and W.Mauro sold 15 contracts at the same price to Fisher. Mauro allocated the sale between himself and his customers. Both changed the trade from 16 to 31 contracts. Fisher accommodated Mauro's indirect bucket. (Kozlowski 96-98; DX 25-46 – 47/3; DX 25-101/3; DX 25-136 – 137/3; DX 25 – 102/3; DX 25-138 – 139/3; DX 26-1 –2/3).

226. In sequence 27/3 a broker bought 10 contracts from Fisher on behalf of customers. Both traders changed an initial trade of 16 contracts and broke it into two trades – one of 10 contracts at $.02 per contract worse for the customer and better for Fisher. (Kozlowski 99-101; DX 27-3 – 4/3; DX 27-63/3; DX 27-97 – 98/3; DX 27-93 – 96/3).

227. In sequence 28/3 Amodeo sold 10 contracts to Mr. Coulter ("Coulter") from a customer account and Coulter sold five contracts back to Amodeo at a $.01 premium of $10.31. Coulter replaced a five purchase with ten on his trading cards; he recorded the sale of the contracts to Amodeo and rewrote the other trade. Amodeo made a quantity change on his sale, albeit the initial quantity is not discernible. Amodeo was filling a limit order for ten contracts at $10.30. A print of $10.30 is recorded at 1:35:31; the market increased $.01 at 1:35:50. By 10:36:08 the price had increased to $10.34. (Kozlowski 102-105; DX 28-25/3; DX 28-46/3; DX 28-56/3; DX 28-64/3; DX 28-81 – 82/3).

228. Amodeo's cards contain an erasure. Here Kozlowski believes Amodeo engaged in a competitive trade at $10.30 and sold five contracts from his own account when the price jumped to $10.34. Thereafter, he completed the customer's order and offset his position in non-competitive trades with Coulter, depriving the customer of a profit. Amodeo indirectly bucketed the order at Coulter's customer's expense. (Kozlowski 102-105).

229. In sequence 29/3 Singer sold 9 contracts.to Mr. Leto, and Mr. Leto sold 6 contracts at the same price to Singer. Singer sold for customers and Mr. Leto bought for himself and for other members. Singer changed the quantity on the 9 contract trade. Mr. Leto appears to have erased the initial quantity on the trade. Singer indirectly bucketed 6 contracts of his customer's order. (Kozlowski 106-07; DX 29-5/3; DX 29-30/3; DX29-54A 55/3; 29-106 - 107/3; DX 29-169 – 172/3).

230. In sequence 30/3 Amodeo sold 15 contracts to Fisher on behalf of customers, and Fisher sold 5 contracts at the same price to Amodeo. Both changed the quantity of Amodeo's sale from 10 to 15 contracts. Amodeo, accommodated by Fisher, indirectly bucketed 5 contracts of his customer's order. (Kozlowski 108-09; DX 30-19 – 20/3; DX 30-20/3; DX 30-83/3; DX 30-53/3; DX 30-93/3).

231. In sequence 31/3 Amodeo sold 5 contracts at $9.55 per contract to Fisher on behalf of himself, and bought 7 contracts from Fisher at $9.56 per contract on behalf of a customer. Both changed the quantity of the latter trade from 2 to 7 contracts, *i.e.*, the same number of contracts Amodeo bought in the other leg. Fisher's tally appears awkwardly off of the usual center position. They changed the price to help Fisher at Amodeo's customer's expense. (Kozlowski 110; DX 31-12/3; DX 31-20 – 21/3; DX 31-34 – 35/3).

232. In sequence 32/3 Amodeo sold 10 contracts on behalf of a customer to Fisher. Both traders lowered the price of the trade by $.01 per contract. Once again, the price was not taken down; there was no cancellation. They changed the price to help Fisher at Amodeo's customer's expense. (Kozlowski 113; DX 32-17 – 18/3; DX 32-43/3; DX 32-56/3; DX 32-60/3; DX 32-75 – 76/3; DX 32-112 –115/3).

233. Sequence 33/3 involves a trader identified as "L.Mauro." L.Mauro dual traded for himself and the proprietary account of another member's firm. In this sequence he allocated 30 contracts he bought to himself and the other member's proprietary account and sold 10 contracts to Amodeo at the same price. Both Amodeo and L.Mauro changed the quantity on their cards

from 20 to 30 contracts, they recorded the trades in conflicting sequence, and finally the 10 contract change appears "squeezed in" to L.Mauro's column allocating the trades. Amodeo indirectly bucketed 10 contracts of his customer's order. (Kozlowski 114-116; DX 33-42-3; DX 33-75/3; DX 33-119 – 120/3; DX 33-162 - 165/3; DX 33-162 – 163/3; DX 33-217 – 218/3).[39]

234. In sequence 34/3 Amodeo sold 35 contracts at $12.07 per contract to L. Mauro, and L. Mauro sold 5 contracts to Amodeo at $12.08. Amodeo sold on behalf of a customer and bought for himself. Both crossed out the initial trade and rewrote the trade with the 35 contract quantity elsewhere on their cards; they re-recorded in opposite sequence. (L. Mauro also raised the price he had the proprietary account sell to Amodeo one cent to $12.08 per contract). Amodeo indirectly bucketed 5 contracts of his customer's order. (Kozlowski 117-19; DX 34-37/3; DX 34-70/3; DX 143 – 144/3).

235. In sequence 35/3 Amodeo sold 10 contracts at $11.98 per contract to L.Mauro from a customer's to a proprietary account. L.Mauro sold 13 contracts to Amodeo at $11.99 per contract from a proprietary account. Both increased the 50 contract trade by 13 contracts from 37 contracts. Amodeo was able to offset the position at a considerable profit of $2,912. (Kozlowski 120-21; DX 35-23 – 24/3; DX 35-55/3; DX 35-83 - 84/3; DX 35-109 - 110/3; DX 35-146 – 149/3).

236. In sequence 36/3 Amodeo bought 21 contracts at $12.30 per contract and sold 11 contracts for $12.31 per contract opposite Singer. Singer sold on behalf of a proprietary account but bought for himself. Both changed the quantity on their cards from 10 to 21 and they recorded the trades in opposite sequence. Singer, accommodated by Amodeo, indirectly bucketed 11 contracts of his customer's order. (Kozlowski 122-23; DX 36-15/3; DX 36-35/3; DX 36-62/3; DX 33-95/3; DX 36-143 – 144/3).

C. Conclusions as to Violations

237. The following sequences are inapposite because all relevant respondents have settled or were not included in the revised Appendices: sequences 3, 4, 5, 7, 10-13, 15, 16, 17, 25-29, 32-38, 41, [42], 48-50, 59, 60, and 62 of Appendix One, and sequences 10, 11, 12, 26-29, 40, and 50-[53] of Appendix Two.[40]

238. The Division withdrew or did not present evidence relating to sequences 28 and 42

[39] It appears that Mr. L.Mauro and W.Mauro are brothers.

[40] Sequences 42/1 and 52/2 are among those sequences not included in the revised Appendices.

in Appendix One as well as 11, 24, 36, 64, 65, 66 and 70-72 in Appendix Two. (DOE PREHG 4, FN 4).

239. In the outstanding and apposite sequences the DOE bears the burden of proof. The explanation of the trades the DOE cites is itself persuasive, and more plausible than the alternatives Berens and Cadden offered. Respondents knowingly engaged in non-competitive practices. The Court finds respondents guilty of the outstanding charges alleged in all of the outstanding sequences except for sequences: 23/1, 24/1, 45/1, 24/2, 18/3, 24/3 and 25/3.

240. As to Count I, Fisher is guilty of aiding and abetting under section 13(a) the violation of section 4b(A) of the Act in the following trade sequences: Appendix One sequences: 1, 6, 8, 9, 14, 18, 19, 20, 21, 22, 28, 31, 39, 42, 43, 46, 51, 52, 53, 55, 56, 57, 67 and 68; Appendix Two sequences 1, 2, 3, 15, 22, 30, 31, 37, 38, 39, 42, 45, 46, 47, 48, 49, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65 and 66; Appendix Three sequences: 1, 2, 5, 7, 8, 11, 13, 19, 22, 23, 24, 26, 27, 30, 31 and 32.

241. As to Count II, Fisher is guilty of aiding and abetting pursuant to section 13(a) of the Act violations of section 4b(B) of the CEA in the following trade sequences: Appendix One sequences: 1, 6, 8, 9, 18, 20, 21, 46, 53, 55, and 67; Appendix Two sequences: 1, 31, 37, 38, 42, 56 and 65; Appendix Three sequences: 1, 5, 22, 27 and 32.

242. As to Count III, Fisher is guilty of aiding and abetting under section 13(a) the violation of section 4b(C) of the CEA, in the following trade sequences: Appendix One, silver futures, sequences sequences: 1, 6, 8, 9, 14, 18, 19, 20, 21, 22, 23, 28, 31, 39, 42, 43, 46, 51, 52, 53, 55, 56, 57, 67 and 68; Appendix Two sequences: 1, 2, 3, 15, 22, 30, 31, 37, 38, 39, 42, 45, 46, 47, 48, 49, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65 and 66; Appendix Three, sugar futures sequences: 1, 2, 5, 7, 8, 13, 19, 22, 26, 27, 30, 31 and 32.

243. As to Count IV, aiding and abetting under section 13(a) the violation of section 4b(C) of the CEA, respondent Fisher is guilty in Appendix One sequences:14, 28, 31, 39, 42 and 51; Appendix Two sequences: 2, 3, 30, 38, 45 46, 47, 55, 61, 62, 64 and 66; and Appendix Three sequences:1, 2, 5, 7, 8, 11, 13, 23, 26, 30 and 31. Under the same provisions Fisher is guilty of an unlawful offset for trade 56/1.

244. As to Count V, violating 17 C.F.R. § 1.38(a), respondent Fisher is guilty in the Appendix One sequences: 1, 2, 6, 8, 9, 14, 18, 19, 20, 21, 22, 28, 31, 39, 42, 43, 45, 46, 47, 51, 52, 53, 56, 57, 58, 67 and 68; Appendix Two sequences: 1, 2, 3, 15, 22, 30, 31, 37, 38, 39, 42,

45, 46, 47, 48, 49, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65and 66; and Appendix Three sequences: 1, 2, 5, 7, 8, 11, 13, 19, 22, 23, 24, 26, 27, 30, 31 and 32.

245. As to Count VI, violation of section 4c(A) of the CEA, respondent Fisher is guilty in Appendix One sequences: 1, 2, 6, 8, 9, 14, 18, 19, 20, 21, 22, 28, 31, 39, 42, 43, 46, 47, 51, 52, 53, 55, 56, 58, 67 and 68; Appendix Two sequences: 1, 2, 3, 15, 22, 30, 31, 37, 38, 39, 42, 45, 46, 47, 48, 49, 54, 56, 59, 60, 61, 62, 63, 64, 65 and 66; and Appendix Three sequences: 1, 2, 5, 7, 8, 11 13, 18, 19, 22, 23, 24, 25, 26, 27, 30, 31 and 32.

246. As to Count VII, violations of section 4c(a)(B) of the CEA, respondent Fisher is guilty in Appendix One sequences: 1, 2, 6, 8, 9, 14, 18, 19, 20, 21, 22, 28, 31, 39, 42, 43, 45, 46, 47, 51, 52, 53, 55, 56, 57, 58, 67 and 68; Appendix Two sequences: 1, 2, 3, 15, 22, 30, 31, 37, 38, 39, 42, 45, 46, 47, 48, 49, 54, 55, 56, 58, 60, 61, 62, 63, 64, 65 and 66; and Appendix Three sequences: 1, 2, 5, 7, 8, 11 13, 18, 19, 22, 23, 24, 25, 26, 27, 30, 31, and 32.

247. As to Count I, aiding and abetting under 13(a) the violation of section 4b(A) of the CEA, respondent D'Amico is guilty in sequences 56, 57 and 63 in Appendix One.

248. As to Count II, aiding and abetting under 13(a) the violation of section 4b(B) of the CEA, respondent D'Amico is guilty in sequence 63 of Appendix One.

249. As to Count III, aiding and abetting under 13(a) the violation of section 4b(C) of the CEA, respondent D'Amico is guilty in sequences 56, 57, and 63 in Appendix One.

250. As to Count IV, aiding and abetting under 13(a) the violation of section 4b(D) of the CEA, respondent D'Amico is guilty in trade sequence 56/1.

251. As to Count V, the violation of 17 C.F.R. 1.38(a), respondent D'Amico is guilty in sequences 56, 57, 63, 67, and 68 in Appendix One.

252. As to Count VI, aiding and abetting under 13(a) the violation of section 4b(B) of the CEA, respondent D'Amico is guilty in sequences 56, 57, 63, 67, and 68 in Appendix One.

253. As to Count VII, violation of 4c(a)(B) respondent D'Amico is guilty in sequences 56, 57, 63, 67, and 68 in Appendix One.

254. As to Count I, the violation of section 4b(A) of the CEA, respondent Carter is guilty in sequences 2, 3, 9, 15, 30, 38, 39, 48, 54, 60, 61 and 63 in Appendix Two, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence number 44 of Appendix Two.

255. As to Count II, violation of section 4b(B) of the CEA, respondent Carter is guilty in

sequence 38/2.

256. As to Count III, aiding and abetting under 13(a) the violation of section 4b(C) of the CEA, respondent Carter is guilty in sequences 2, 3, 9, 15, 30, 38, 39, 48, 54, 60, 61 and 63 in Appendix Two, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence 44/2.

257. As to Count IV, violation of section 4b(D) of the CEA, respondent Carter is guilty in trade sequences 2, 3, 30 and 38 in Appendix Two, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence 44/2.

258. As to Count V, the violation of 17 C.F.R. 1.38(a), respondent Carter is guilty in sequences 2, 3, 9, 15, 30, 38, 39, 44, 48, 54, 60, 61 and 63 in Appendix Two.

259. As to Count VI, the violation of section 4b(B) of the CEA, r respondent Carter is guilty in sequences 2, 3, 9, 15, 30, 38, 39, 44, 48, 54, 60, 61 and 63 in Appendix Two.

260. As to Count VII, violation of 4c(a)(B), respondent Carter is guilty in sequences 2, 3, 9, 15, 30, 38, 39, 44, 48, 54, 60, 61 and 63 in Appendix Two.

261. As to Count I, the violation of section 4b(A) of the CEA, respondent Orlando is guilty in sequences 20, 21, 25, 34, 43, and 57 in Appendix Two, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence number 14/2.

262. As to Count II, violation of section 4b(B) of the CEA, respondent Orlando is guilty in sequences 25 and 34 in Appendix Two.

263. As to Count III, aiding and abetting under 13(a) the violation of section 4b(C) of the CEA, respondent Orlando is guilty in sequences 20, 21, 25, 34, 43, and 57 in Appendix Two, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence number 14/2.

264. As to Count IV, violation of section 4b(D) of the CEA, respondent Orlando is guilty in trade sequences 20, 21, 36, 43 and 57 and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence number 14/2.

265. As to Count V, the violation of 17 C.F.R. 1.38(a), respondent Orlando is guilty for sequences 5, 6, 7, 13, 14, 16, 17, 18, 20, 21, 24, 25, 32, 33, 35, 36, 41, 43, and 57 in Appendix Two.

266. As to Count VI, the violation of section 4b(B) of the CEA, respondent Orlando is guilty for fictitious sales respondent Orlando is guilty for sequences 5, 6, 7, 13, 14, 16, 17, 18,

20, 21, 24, 25, 32, 33, 35, 36, 41, 43, and 57 in Appendix Two.

267. As to Count VII, violation of 4c(a)(B) respondent Orlando for the following trade sequences: Appendix Two 5, 6, 7, 14, 16, 20, 25, 33-35, 43, and 57.

268. As to Count I, the violation of section 4b(A) of the CEA, respondent Amodeo is guilty in sequences 1, 3, 5, 6, 7, 14, 15, 17, 18, 19, 28, 30, 31, 32, 33, 34 and 35 in Appendix Three, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequences 9, 10, 12, 16, and 36 of Appendix Three.

269. As to Count II, violation of section 4b(B) of the CEA, respondent Amodeo is guilty in the following trade sequences: Appendix Three 1, 5, 17, and 32 in Appendix Three.

270. As to Count III, aiding and abetting under 13(a) the violation of section 4b(C) of the CEA, respondent Amodeo is guilty in sequences 1, 3, 5, 6, 7, 14, 15, 17, 18, 19, 28, 30, 31, 32, 33, 34 and 35 in Appendix Three, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequences 9, 10, 12, 16, and 36.

271. As to Count IV, violation of section 4b(D) of the CEA, respondent Amodeo is guilty in sequences 1, 3, 5, 6, 7, 14, 15, 17, 18, 19, 28, 30, 31, 32, 33, 34 and 35 in Appendix Three, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequences 9, 10, 12, 16, and 36.

272. As to Count V, the violation of 17 C.F.R. 1.38(a), respondent Amodeo is guilty in sequences 1, 3, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 28, 30, 31, 32, 33, 34, 35 and 36 of Appendix Three.

273. As to Count VI, the violation of section 4b(B) of the CEA, respondent Amodeo is guilty for fictitious sales in sequences 1, 3, 5, 6, 7, 9, 12, 13, 14, 15, 17, 18, 19, 28, 30, 31, 33, 33, 34, and 35 of Appendix Three, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence numbers 10, 16, and 36 of Appendix Three.

274. As to Count VII, violation of 4c(a)(B) respondent Amodeo is guilty in sequences 1, 3, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 28, 30, 31, 32, 33, 34, 35 and 36 of Appendix Three.

275. As to Count I, the violation of section 4b(A) of the CEA, respondent Singer is guilty in sequences 2, 8, 9, 10, 11, 12, 16, 20, 21, and 29 in Appendix Three, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequences 3, 4 and 17 of Appendix Three.

276. As to Count II, the violation of section 4b(B) of the CEA, respondent Singer is guilty of aiding and abetting the violation of section 4b(b) of the CEA pursuant to section 13(a) in sequences 4/3 and 17/3.

277. As to Count III, aiding and abetting under 13(a) the violation of section 4b(C) of the CEA, respondent Singer is guilty in sequences 2, 8, 9, 10, 11, 12, 16, 20, 21, and 29 in Appendix Three, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequences 3, 4, and 17 of Appendix Three.

278 As to Count IV, violation of section 4b(D) of the CEA, respondent Singer is guilty in trade sequences, Appendix Three, 2, 9, 10, 11, 16, 20, and 29, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence number 12/3.

279. As to Count V, the violation of 17 C.F.R. 1.38(a), respondent Singer is guilty in the following trade sequences 2, 3, 4, 8, 9, 10, 11, 12, 16, 17, 20, 21 and 29 of Appendix Three.

280. As to Count VI, the violation of section 4b(B) of the CEA, respondent Singer is guilty for fictitious sales for the following trade sequences: Appendix Three, 2, 9, 10, 11, 12, 16, 20, and 29, and with the aiding and abetting of violating the provision pursuant to Section 13(a) for sequence numbers 3, 17 of Appendix Three.

281. As to Count VII, violation of 4c(a)(B) respondent Singer is guilty in the following trade sequences 2, 3, 4, 8, 9, 10, 11, 12, 16, 17, 20, 21 and 29 of Appendix Three.

Discussion

III

Terminology and Methodology

This is an enforcement action brought by the Division against respondents, all registrants, for allegedly committing illegal non-competitive practices in three markets over as many years. Respondents are charged with administering their trades to attain certain results, i.e., of engaging in buckets, illegal offsets, illegal three party trades, money passes, and other non-competitive practices in violation of the Act and CFTC regulation.[41]

[41] Fisher argues that the Division has already admitted the trades were not pre-arranged. (Fisher PFF 38, ¶ 38). The Division's response to Carter's request for admissions filed on November 1, 1993, states: "[T]here is no contention in this case that the trades charged were prearranged. The Division avers, however, that each of the trades was knowingly executed noncompetitively which indicates some advanced understanding." (Division of Enforcement's

The first four Counts in the complaint arise under sections 4b of the Act, the Act's antifraud provision. As stated in Savage, the four subsections of 4b tend to overlap; as a general matter the Division must demonstrate respondents knew their acts were illicit. Similarly, there is no violation of the section 4c provisions, Counts VI and VII, if the respondent faithfully bargained to enter into a *bona fide* trade. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 283-84 (9th Cir. 1979), *citing*, Haltmier v. Commodity Futures Trading Comm'n, 554 F.2d 556, 562 (2d Cir. 1977). Count V alleges violations of 17 C.F.R. § 1.38(a), a regulation requiring competitive trading.[42]

The Division bears the burden to demonstrate respondents knowingly committed these violations. In re Buckwalter, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,684-85 (CFTC Jan. 25, 1991) (Holding that in trade practice cases, beyond proof of the suspect conduct, the Division must establish that the respondent's participation in it was knowing); In re Bear Stearns, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,665-66 (CFTC Jan. 25, 1991). However, this burden may be demonstrated through circumstantial evidence; to prevail in a circumstantial case, the Division must show that, more likely than not, respondents knowingly participated in arranged trades. Once the Division has established a *prima facie* case, the analysis shifts to respondents explanation of the challenged trades. In re Elliott, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 at 46,007 (CFTC Feb. 3, 1998).

While how the trades themselves cleared is a matter of record, the case presented disputed issues, such as the role of recognition between traders and the like causes of price and quantity changes. Perhaps the chief issue was the importance and role of price and quantity changes and other audit trail irregularities. The parties presented evidence and argument on the

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Response to Respondent Carter's Requests for Admission, 85, ¶ 1042). The essential point is that the traders are charged with knowingly engaging in practices outside the scope of permissible competitive trading.

[42] Regulation 1.38(a) provides:

> All purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity or commodity option: Provided, however, That this requirement shall not apply to transactions which are executed non- competitively in accordance with written rules of the contract market which have been submitted to and approved by the Commission, specifically providing for the non-competitive execution of such transactions.

issues at an administrative hearing.

For the hearing the parties were directed to appended direct expert testimony to their pre-hearing memoranda. (Order issued December 23, 1992). As the Division organized the evidence into sequences, most of the experts directed the bulk of their analysis to the audit trail evidence, addressing each sequence a few pages at a time. Typically, each sequence presented a caption showing the price, quantity, month, and CTI number for the trades in the trade sequence as well as documents relied upon. Charts summarizing the analysis were usually included. Of course, the legal significance of the facts was disputed. In particular, the Division and respondents ask the Court to draw different conclusions from the appearance of price and quantity changes scribed before the trades cleared.

The Division's case argued the audit trail contained indicators of inconstancies and irregularities. Thus, for example, the analysis pointed out when a broker's tally (a number written by and for the broker to track his or her position) varied from the actual total of contracts recorded on the cards. The tally evidence may provide evidence as to what the initial quantity of contracts traded was before the brokers changed them through cross-outs and replacements. In this manner, Hastings described why she believed each of the sequences in the COMEX and NYMEX charged in the complaint conform to a pattern of illegal activity and the basis for the alleged violation in the particular sequence. Kozlowski similarly presented her verified statement of all of the sequences relating to the CSCE. Respondents spent considerable effort questioning Kozlowski's and Hasting's statements that the final outcomes of the sequences –i.e., the prices at which trades settled– were consistent with attempts to allocate trades, avoid market risk, and generally commit fraud in violation of the Act.[43] Restated, respondents Kozlowski and Hastings testimony stated that particular sequences conformed to a "pattern" of indirect buckets and so on.

As the Court interprets respondents' arguments, the term pattern presupposes a non-random frequency of trading sequences.[44] Concomitantly, respondents argue that the Division's

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[43] The witnesses appearances affirmed at the hearing that the statements continued to reflect their views. (*See, e.g.*, Tr. 446-47, Hastings).

[44] Respondents seem to suggest that the Court first consider the infrequency of the alleged violations, from which it should conclude that the very small number of questionable trades is insignificant when compared with all trades,

case is statistically unsupported and thus demonstrates no possible pattern. Hence, respondents not only argue that the examples do not form a pattern (within their definition), they contend these comparatively few instances cited by the Commission cannot be a pattern because they are statistically too few. For example, Fisher, cites that about only .110% of trades involving him within the subpoenaed periods.[45] (Fisher PREHG 3, 24; Fisher PFF 2, ¶ 7). Mr. Falis' encapsulates the argument by stating that the DOE "cherry-picked" the sequences it cited to conform to the pattern. (Tr. 1877).

Respondents definition of the term patter mis-characterizes the nature of pattern evidence, and its importance, as the Division employed it.[46] The Court accepts that a "suspect trade either does or does not fit a particular trade configuration." (DOE Reply to PFF 5).[47]

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and that the questionable trades are due to reasonable and innocent human error. The weight of evidence is against this course.

[45] In his pre-hearing brief Fisher argues that this level of trading activity is "normal" and that the trades cited by the DOE occurred on the busiest days of trading. (Fisher PREHG 16, 17, 37-39). Fisher does provide the Court with a chart delineating the total number of trades he executed on a monthly basis for the COMEX, NYMEX and CSCE. (Fisher Exhibit 5; *see also*, Tr. 910, Grace). Yet, neither the DOE nor any of the respondents have supplied much, much less statistically rigorous, evidence of what this normal standard is. Rather, the DOE draws the opposite conclusion from the statistical evidence: "In his Declaration, Dr. Rauser concedes that Fisher's trades fitting the configuration of an indirect bucket constituted only .01%, .02%, and 1% of his trades in the silver, oil and sugar pits respectively. Such fractions do not denote a trading configuration that is 'likely to occur in a competitive market.' Indeed, Rausser's concession supports the Division's theory of the case..." (DOE Reply to PFF 5, citations omitted). Without a basis for comparison, the DOE's 'spin' is as unconvincing as respondents'.

[46] Berens attacks the term more obliquely, but appears to recognize what the Division meant:

> Instead of the term "pattern" as alleged by Ms. Kozlowski to reflect non-competitive trading, there is what appears to be no pattern at all, but just as likely, normal dual trading. For traders to trade with each other at numerous times, once for a customer and thereafter for himself, and the other for himself, and thereafter for a customer, is not a pattern at all.

(Berens 10).

[47] It is worth noting that neither the term pattern nor the Division's methods are novel. For example, when presented with questions about the Division's case in chief in an enforcement case as Judge Shipe noted:

> Respondent ... argue[s] that the only proof adduced by the Division was speculation, that the testimony of [the expert] was 'incompetent' on the issues of the case since he was not a live witness to the transactions. The propriety of using expert witnesses in proceedings of this nature is also disputed. [The expert] drew his opinions from trading patterns that were reflected in trading records, the essential accuracy of which is not contested. His reasoning is fully set forth in his affidavit. This is an accepted and usual method of offering proof where allegations of non-competitive trading are made. The live witnesses to the transactions are primarily the participants, and thus are not available, or are not necessarily reliable sources

While patterns may raise an inference, solely identifying patterns does not necessarily establish a *prima facie*, much less winning, case.[48] *See, e.g.*, In re Angelo, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,943 at 37,434 (CFTC Oct. 19, 1990). Thus, while the Court is not precluded from analyzing the evidence presented on any particular trade, the Division recognizes, that it needs to adduce additional evidence to prove its allegations: "[p]attern evidence serves the initial purpose of detecting potential violators and then, *if other evidence exists* which makes it more probable than not that the Act has been violated, it serves a role of evidencing how the act was violated." (DOE Reply to PFF 3, FN 3, emphasis altered.)

The Court is unaware of how many such patterns should arise randomly. Although the Court bears in mind that with more potential trades there are greater possibilities for patterns to emerge by chance, patterns are not irrelevant. Herein, patterns are indeed supported by additional evidence. Also, the likelihood that these trades randomly match the patterns while they also contain trading card irregularities strains credibility. In fact, the patterns corroborate other evidence that trading did not place in accordance with the Act and the regulations promulgated thereunder.[49]

Hence, the Court is not persuaded by respondents' arguments that pattern evidence is useless. As indicated, first, the Division's case is not indispensably premised upon how often or not alleged violations occur, and the Court has no vigorous statistical basis to compare how often irregularities and mistakes do or do not occur. The sequences are evidence before the Court concerning specific acts of alleged illegal conduct, not generalized instances of trading. Consequently, it is difficult to evaluate the existence of other non-charged trading activity except as an attempt to rebut the Division's evidence that broker's regularly engaged in illegal practices (E.g., whether there was, and the extent of, camaraderie between the brokers, i.e., a *quid pro quo*

> of information on the issues presented.... The use of expert witnesses in administrative proceedings is well accepted by the authorities.

In re Grippo, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,114 at 32,290 (CFTC June 19, 1986).

[48] The Commission continues to affirm that patterns may lead to an inference of non-competitive trading. In re Mayer, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259, at 46,135 (CFTC Feb. 3. 1998).

[49] *Cf.*, Reddy also addresses the conflicting opinions of Hastings and Cadden about, *inter alia*, the relatedness of sequences. In that case, the Commission found a "coordinated scheme" based on evidence such as six trade sequences between the same brokers displaying the same sequencing error. In re Reddy, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,271 (CFTC Feb. 4, 1998).

floor culture). Second, the Court is fully aware normal trading may randomly generate some instances coincident with patterns.[50] Although, again, the court lacks rigorous statistical evidence how often this may occur, it is important to note that patterns do not form the full extent of evidence. The patterns were accompanied by audit trail irregularities. These irregularities, unfailingly not benefiting customers, themselves discount the likelihood that the patterns simply reflect random trades. Third, the Court is also aware that if disparate trades are placed together they do not form any meaningful sequence. Yet, it is not the case herein that the Division sought to match widely disparate trades taking place over long periods to create patterns where they do not otherwise exist. For example, a trade of 10 contracts, matched with an opposite offset of 10 contracts at a different price, is more likely to be a possible money pass if it occurs in quick succession than if the trades were left open to market risk. The Division does not provide precise temporal parameters, but the trades compared within sequences were not only on the same day, they were nearly simultaneous.[51]

The reconstructions compiled by Kozlowski and Hastings detail what the records themselves demonstrate repeatedly -- that respondents consistently arranged trades to ensure that fellow traders never had to take losses for accidentally missed fills -- the hypotheses offered by respondents' expert witnesses are less convincing. Berens and Cadden attempted to refute the summaries Hastings and Kozlowski compiled in every sequence pertaining to the respondents employing them. Although Berens and Cadden were also familiar with trading practices, their opinions often supplant analysis with near conjecture. Respondents' other expert witness, Rauser, supplied the Court with a verified statement which significantly differed from the other expert witnesses; it largely speaks to the statistical relevance of trades as they occur generally. Unfortunately, the type of statistical evidence he produced is of the most minimal relevance to

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[50] Indeed, on cross-examination, Kozlowski admits certain transactions might occur, which when viewed on paper, would fit an indirect bucketing pattern even though they were competitive. (Tr. 557-58).

[51] Mr. Broseterman defined a round turn in his examination of Kozlowski as a buy and sale of the same contract month at or about the same price within a minute. (Tr. 292) The Court adopts that definition for the purposes of this opinion.

Not every trade sequence which might be termed a round turn fits that definition. For example, sequence 17/2 involves nearly half an hour between trades. Such a time period represents exposure to market risk. However, the Court also notes and considers that there were no other trades recorded in the interim.

the issues before the Court.[52]

Although the analyses Hastings and Kozlowski presented was persuasive, the Court is bound to scrutinize expert inferences closely; the Court further affirms that it does not substitute expert testimony for its own judgement of the facts or the law. In re Rosenberg [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,643 (CFTC Jan. 25, 1991); In re Roussou [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,947 at 41,082 (CFTC, ALJ Jan. 28, 1994). The evidentiary record itself must establish respondents' guilt, and the evidence must stand for the Division to establish its case.

Herein, the circumstantial evidence demonstrates that brokers changed the quantities and prices of trades to conform to their requirements, e.g., making sure that brokers would not have to pay out of pocket if a fill was missed or to pay back other brokers for helping them. For instance, Singer is charged under Count V for sequence 20/3. (Compl. 26). In that sequence the increase in quantity that Singer sold for his customer, as in other sequences, equaled the quantity he bought for his personal account. In sum, the numerous audit trail irregularities and precise results underpins the Division's arguments.

IV

The Division's Case

A. Audit Trail Evidence

The DOE corroborates the patterns it identified with several audit trail irregularities. These include: alteration of contract price, time and sales reports comparisons, quantity changes, trade insertions, and conflicting sequences. (See, e.g., DOE PSTHG 15-17; DOE PREHG ¶ ¶ 180, 188.)[53] The probative value of irregularities depends on the Division's ability to plausibly

[52] Rauser's analysis does not inform the Court how often such evidence should randomly appear. Moreover, his methods and conclusions are questionable. *See*, DOE Final Reply, FN 2. While the Court finds little value in Rauser's statement, the Court also does not indorse the view that a statistical analysis is inappropriate for this type of situation. (Tr. 453, Kozlowski). Conceivably, the DOE might have argued its case as respondents suggest, *i.e.*, by contending that the occurrence of a given configuration occurred too often to have been the product of chance. The Court would welcome strong and relevant statistical evidence in trade practice cases.

[53] Attachment II of Hasting's statement lists five descriptions of audit trail evidence: trade insertions, changes to trading records, contradictory sequencing as written, incongruity with time and sales data, and pit card discrepancies on the COMEX. Hasting's also lists five similar categories (Kozlowski, Attachment 4). More specifically these

connect the type of violation alleged and the type of pattern demonstrated. In re Reddy, [1996 - 1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,271, at 46,212, (CFTC Feb. 4, 1998) *citing* In re Gilchrist, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,293 at 37,625 n.22 (CFTC Jan. 25, 1991). In considering the plausibility of the connections the Division draws, the Court looks at the evidence in those trade sequences and as a whole.

Among the corroborative evidence the experts cite are price and quantity changes. (Tr. 563, Kozlowski). While there may be legitimate reasons for price changes to be scribed on the cards, respondents' reliance on these legitimate reasons is unpersuasive. Broker's might possibly disagree on what prices were recorded. The result of resolving these so-called errors was one sided – broker's favored themselves and customers did not benefit from such changes. In the case at bar, brokers were so brazen as to change the trades even though they had first recorded the same prices and/or quantities.

The Court's decision vests, in part, on the credibility of the witnesses. For example, relating to sequences 56/1 and 57/1, the Court specifically finds D'Amico's testimony that he threw his cards away and resumed trading with differently numbered pads not credible. (See Fact 99 *supra*; Tr. 1242). As importantly, respondent's explanations require the Court to find the sequences in question result from a fortuitous calvacade of errors. In the sequences 56/1 and 57/1 the Division has demonstrated that there are many suspicious audit trail irregularities. If the corrections in these trades were innocent, the Court would reason that, notwithstanding the fact the two brokers had recorded same trade, D'Amico pointed out that Fisher had actually cleared a 40 contract and while they were both still on the floor. It would once more happily turn out to be the case that the actual trades about which D'Amico told him in order to make "corrections" would not change his position but would gain him a profit. The circumstantial evidence against the respondents is extensive.

As another example, there is no indication an out was discovered in sequence 38/2. Therein, the following trades cleared as follows: Carter sold 100 contracts to Fisher a $14.34 per contract on behalf of a customer, and Fisher sold 4 contracts to Carter at $14.33 per contract.

Carter had an order to sell 390 contracts for a customer. (DX 38-27 – 28/2). Carter, who

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categories of discrepancies were cited when the audit trail contained questionable markings calculating an actual position, multiple handwriting on cards, multiple trades appearing on the same line in violation of CSCE and COMEX rules, and differences between the original and carbon copies.

did not use trading cards, recorded trades to sell several contracts at prices between $14.35 and $14.37 per contract on the back of the order card. (DOE PFF 157-58, ¶ ¶ 540-41). The back of his ticket contains two additional trades. Between these trades there is a line. On the line is the 100 contract trade with Fisher. Carter scribed a number, an apparent tally, that is 100 contracts too low. These two facts indicate the 100 contract trade may have been inserted.

As for Fisher, it appears he recorded an initial 200 contract trade for $14.35 per contract. The time and sales data show a print at 15:08; the print is consistent with the time-stamp on Carter's order, and the other trades on Fisher's card.[54] Fisher's tally also reflects an initial 200 contract trade for several trades. However the trade cleared for 100 contracts. Despite the initial 200 contract recordation his card has several cross outs, eventually lowering the quantity to 100 contracts and changing the price by $.01 per contract. As with the change in quantity, Fisher's tally figures are replaced with new figures for the series of "corrections" Fisher made when he altered the terms of the trade that he had first recorded. (Hastings 296-97). This change redounds to a $1000 detriment to the customer.

Now, it is *conceivable* that Fisher made a host of errors in recording how many contracts and at what price he traded opposite Carter via open outcry. Cadden theorizes that Fisher was confused as to which month he was trading, and then sought to rectify his errors. (Cadden 113-14). It would also be possible that there was a quantity out between Carter and Fisher. The hypotheses are problematic; they fail to account for the panoply of irregularities. It is difficult to account for the fact that even if the traders could resolve the quantity error, there would be little reason the two should have been able to have learned of the error while on the floor in the first place. The explanations cannot readily explain why Carter would also need to change *his* cards as he did, and it is difficult to theorize why the two should lower the price even though the out involved the quantity of contracts traded.

Fisher provides to provide an entertaining solution to these dilemmas. Fisher first argues that the evidence indicates that Carter ran out of space. (Fisher PFF 102, ¶ 720) He continues to recount the sequences as follows:

> Carter clearly recorded a 100-lot trade at $14.34 with Fisher, though from the pit card and his clerk's notation of "110" on the order ticket it appears that there may have been some confusion as to quantity, no doubt based on the number of fills being executed. Fisher

[54] Hastings provides a comparison of the relevant times on Fisher's trading card which is intercalated between pages 298 and 299 of the verified statement.

> initially recorded a 200 lot trade at a $14.35 price, then corrected the price to $14.34 and changed the quantity at the same time. It is unclear what the corrected quantity was...; the writing is illegible... the quantity was corrected to 110 and then to 100 lots....[T]he following likely happened, consistent with competitive execution: Carter's last fill on the order was his trade to Fisher, and he sold him the balance of the order, estimating 110 contracts, which was then corrected to 100 contracts after all the contracts were counted. Those recordations must simply be an actual error on Fisher's part, which was corrected during trade-checking in the ring when Fisher learned he had mis-recorded the price, and Carter informed Fisher that the balance he had purchased was either 110 or 100, lots, with the final quantity turning out to be 100 lots.... Balance trades are common... [and] lawful...

(Fisher PFF102-03, ¶ ¶ 721-22).

As in other sequences, the theories upon which respondents attempt to explain the irregularities the Division cites is unconvincing. Both Fisher and Carter recorded 110 contracts changed to 100 contracts. Despite this fact, the Court is asked to accept that the broker's are at untrammeled liberty to change the terms of their trades based on their unrecorded agreement. It is as clear now as it was at the time the trades were executed that if such a practice were acceptable the entire purpose of the audit trail would be eviscerated. See *infra* at Section IV, Respondents' Defense.

Even accepting Fisher's theory *arguendo*, it is less plausible than the *prima facie* case established by the Division. As Hastings theorizes, it seems Carter disclosed his order to Fisher and agreed to hold back part of the order for him. Fisher would then have an opportunity to trade against the customer if a better price arose. (Hastings 297, FN 126). It does not seem to be happenstance that Fisher lowered the price on this trade and that Carter was short 4 contracts coming into the transaction. The upshot was that Fisher received a beneficial price on the 100 contract trade, and Carter traded directly against his customer on the 4 contract trade.

Part of the evidence the Division relied upon in attempting to decipher and relate the events surrounding sequence 38/2 involved time and sales data, an indicator which appears to be unfortunately imprecise.[55] Yet, as these reports are created independently and in close

[55] The Court laments imperfect time and sales reports and uncertainty surrounding late card submissions. One CFTC report, using a 3 minute window, approximates a 79.7 to 88 per cent. accuracy for such systems. (Fisher PREHG 24-25). Respondents argue that reporting accuracy is even lower during active trading periods. While individual trades may not be printed, traders are still concerned that highs and lows are reported. (Tr. 458, Kozlowski). Reporters may not relate every trade, and each step in assembling the data is an additional opportunity for error and slight delay. Yet, the imperfections cited are discounted by the fact that not only does the public count

connection with the trades themselves, time and sales reports provide some guidance to reconstructing what happened, and may contrast with the official summaries created after the fact by official trade registers. In addition, when the trade is submitted out of the ordinary and timely procedure in the official register, the Court will consider the potential of mistakes or non-competitive trades. In sequence 38/2 Fisher's trade opposite Carter was submitted several minutes later from other trades. (Hastings exhibit appearing after page 298). As a general matter, the Court's suspicions based on the audit trail evidence itself is piqued by the conspicuous absence of cancellations. If the prices are too far apart they raise an inference that the trade was not conducted in conformance with the Act and regulatory requirements.[56]

Although, during the relevant time period, there may be legitimate reasons why both brokers might cooperate to fix outs, the likelihood that these reasons are innocent is considerably diminished when the result demonstrates consistent customer losses. In a random sampling the Court presumes the errors would occur in a customer's favor in some rough proportionality as against. The quantity errors alleged, typically in Appendix Three, are visible from the physical records themselves. This visibility includes not only crossing out numbers on cards, but differences between original and carbon copies. As in Reddy, this explanation is less than compelling, but is rather a "loose and sundry explanation of what could have happened." In re Reddy, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,271 at 46,208 (CFTC Feb. 4, 1998).

The DOE further cites to inconsistencies between tallies and the actual positions brokers held as well as the order in which trades were executed. As a matter of course, traders regularly recorded their trades sequentially in order to track their positions and simply because it makes

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on the reports, but traders trading on behalf of others watch the boards so as not to miss fill orders. While respondents further seek to undermine time and sales data because locals are not as keen to verify their prices, the data may demonstrate a trading range. Time and sales evidence is an overall important factor given the appearance of staged trading strikes the Court as more likely when a customer is apparently bilked between the extremes of a trading range.

[56] Kozlowski states that: "For example, if a trader sequentially records trades at prices of 9.89, 9.90, 9.88, 9.91, all of which occurred in the same minute, but Time and Sales shows that in that minute a price of 9.88 was reported [which] was prior to prints of 9.89 and 9.90, that would indicate that the trade at 9.88 may have been executed noncompetitively." (Kozlowski 17).

sense.[57] While traders may occasionally be forced to scribe their trades so quickly that sequencing suffers, examples when traders on the opposite side in several transactions in a short period of time, or in combination with other irregularities, is compelling. For example, sequence 39/1, the trades were out of sequence on Fisher's cards, his tallies appear wrong, and the original differed from the carbon copy. (Hastings 123-24). The Division's arguments are more persuasive than Cadden's supposition that Fisher have been temporarily distracted. (Cadden 75).

B. The Division's Non-Audit Trail Evidence

The audit trail evidence against respondents is supported by testimony that respondents had a sense of comradery. Both the DOE and respondents argue more than just the importance of the appearance of trade configurations or the likelihood of record based irregularities. The DOE introduces witnesses who testified that respondents engaged in the alleged practices. The Court observed the demeanor of all of the witnesses and finds Effron and Gandolfo credible witnesses.[58]

Effron testified that he stood in the COMEX silver pit with Mazzara, D'Amico, Amodeo, and Fisher when he was in the ring. (Tr. 158) He testified that he believed there was an informal protocol wherein it was necessary to keep customer's satisfied, and so locals cooperated in working out errors. (Tr. 161).[59] He also testified that he didn't argue about making price

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[57] Sequencing requirements varied across the markets. Kozlowski. cites to CSCE rule 3.18 requiring the "exact chronological order of execution[.]" (Kozlowski. 9). The ordinary course for traders to follow was to record their trades in sequence. Respondents such as Fisher were likely to keep their practices consistent in different markets. Moreover, part of respondents' argument seems to be that changes were so necessary because traders were likely to have difficulties in keeping track of their positions and with whom they traded when the markets were busy. *(See, e.g.,* Exhibit RJ 1). If this is so, purposefully mis-sequencing seems an unlikely practice given that this would exacerbate this problem. Testimony that the trades were sometimes purposefully written out of order with the intent to confuse other traders who might attempt to peek at the cards seems an unlikely explanation of the trades. Mis-sequencing is an indicator that possible misdeeds took place. (*See, e.g.,* Hastings 18; *See also,* DOE CONCL. 15).

[58] In making this determination, the Court was not unaware that DOE fact witnesses settled with the Commission. In re Mayer [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,259 at 46,136 n.36 (noting an agreement to testify does not demonstrate that a witness fabricated testimony).

[59] During the course of the trial respondents stated objections to the effect Effron was possibly being impermissibly coached by the DOE. Respondents were instructed and agreed to submit a written offer of proof. The record appears not to contains any such offer.

changes, since to do so "didn't serve anybody's purpose because we're only going to change the price, either way." (Tr. 173). Gandolfo similarly testified as to the traders with whom he customarily stood. (Tr. 79).

The evidence demonstrates that two groups, one centered around McCann, Effron, Cornell and Orlando, the other around Fisher and Carter, maintained a comradery to help one another out. (DOE CONCL 23-24, G3-G5). This helped to ensure profits for all involved. (DOE CONCL. 23-24). *Cf.*, In re Elliott, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 at 46,007; In re Mayer, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,134 n.64 (CFTC Feb. 1998). This comradery further explains how the various explanations of how innocent mistakes that might have happened consistently led to one broker managing to profit or reduce a loss at the expense of another party. Effron testified that, at that time, the function of a local was viewed as helping out by accepting errors and thus ensuring that operations proceeded smoothly for all traders. (DOE CONCL. 19). Gandolfo's and Mazzara's testimony that preferential treatment was allotted to those traders that helped out when the option was available is persuasive that Fisher was motivated to engage in these practices. (Tr. 88, Gandolfo; DOE CONCL. 20).[60]

Brokers commit non-competitive trades either to make a profit, cover a mistake, or as a gesture of goodwill.[61] The comradery Effron and Gandolfo describe is important to explain respondents' good will motives. The Court finds that there was, in fact, such a comradery as Effron and Gandolfo testified. This evidence helps to explain the trader's motives for being willing to accept a loss until an opportunity to pay the favor back arose. As stated in Buckwalter:

> Standing alone, participation in trades consistent with such a pattern may amount to nothing more than suspicious conduct. Such participation takes on additional meaning, however, when the record establishes that there is both a likely motivation for participants to arrange for the result reflected in the pattern and a likely role for noncompetitive executions in the achievement of one or more of the goals of a plausible arrangement.

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[60] The Court denies Fisher's motion to strike Gandolfo's testimony. (Fisher PFF 10). The Court disagrees.

[61] The DOE argues the most common reasons brokers engage in non-competitive trades are to: (1) secure a better price for personal accounts than those available through open outcry, (2) trade a personal account ahead of a customer order, and then use the customer's order to offset the brokers position at a pre-determined profit; or (3) correct an error in filling an order. (DOE PSTHG 20, *citing* In re Reddy, ¶ 27,271 at 46, 206-07; Kozlowski 17).

In Re Buckwalter, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,684 (CFTC Jan. 25, 1991).

This testimony of a comradery is especially prescient in money passes.[62] Presumably, brokers seek to make money, and transferring funds via a money pass is troubling absent another deal where money was lost, a naked bribe for future recognition, and so on.[63] In these instances, where customers are not as discernibly harmed, Fisher's and others protestations that they comprised too large a portion of the market to require recognition merits discussion. While frequent round turn trades may raise the specter of money passes, local traders gamble on market volatility; traders may legitimately change their minds depending on their views of the markets and win or lose in the process. Thus, a money pass is more probable when a motive is clear. Demonstrating the motive for a money pass may require a broad context.[64]

Respondents also presented several character witnesses who testified as to respondents business relations. Although the Court considers this evidence in evaluating the credibility of respondents' own testimony, a customer's opinion of a broker is not especially germane. Even sophisticated customers are not witnesses to the trading floor.[65] The testimony that a customer believes that the broker trading upon his or her behalf is morally upstanding bears little

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[62] The DOE simply states the motive is typically greed. (DOE CONCL. 21)

[63] There may be tax or other incentive involved as well. Yet, we need not speculate on such issues not presented.

[64] The fact that money passes were regularly used is, however, demonstrated by the record. For example, Effron testified: "if we had an error, an out, and one of us owe [sic] the other person $1,000, instead of a check being written, we'd give him a trade because that was how business was done." (Tr. 188).

[65] Regular customers may especially benefit if trades are arranged with the intent of ensuring their orders are filled – since the expense will be born by a different customer. Hence, the fact that a customer's order is filled, or that a customer proclaims satisfaction with the trader, is not a particularly persuasive indicator of the likelihood of the competitiveness of a trade. In re Mayer, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,137 (the price a customer receives is irrelevant to bucketing). For example, a customer may believe that a sell order was exercised in apparent accordance with instructions. In fact, a sell (buy) order may actually be sold (bought) slightly below (above) the market at the time of execution, and still conform to the prices prevailing in the time and sales reports. Traders may change actual trades, e.g., by blocking them and re-adjusting them so that they shave off only a little profit. Moreover, brokers can reward favored customers through arranging their trades. This is not to state, however, that this necessarily occurred in the case at bar.

persuasiveness as to whether a broker obeyed the Act and concomitant regulations.[66]

IV

Respondents' Defense

Respondents presented a multitude of arguments in opposition to the Division's case. In essence, respondents argue that the Division did not establish its *prima facie* case. They asserted the Division's evidence was weak and open to a different interpretation. They further asserted that their activities constituted regular and non-violative legal activity. Finally, respondents asserted that they introduced sufficient doubt so that the Division could not prevail. The Court believes the Division established its *prima facie* case in the vast majority of allegations and turns to the arguments respondents stressed.

Respondents addressed price changes. Beyond arguing regular mistakes in the ordinary course, they pointed out that price-changed could a loss. In general, the court has observed whether or not customer benefit from errors.

For example, as Fisher argues, price changes were sometimes to his detriment. (Fisher PREHG 18). While facially exculpatory, changes to Fisher's detriment consistently appear to be voluntary losses until such time as when he could be repaid. The Court does not consider rearranging trades to help out other traders on missed fills to be helping customers. The very point of these re-arrangements appears to be, (and involving respondents herein, was), for traders to satisfy their customers if a trader missed a fill at another customer's expense.[67] It is not

[66] Amodeo offers the testimony of various witnesses such as Helen Henglein, an AP, and the customer for sequences 3 and 32 in Appendix Three. (Amodeo PFF 3-4). Her opinion is relevant as to Amodeo's character. Even though the execution of a non-competitive trade – e.g., not executed through open-outcry does not necessarily indicate that the customer suffered as a result, it has long been held to be a *per se* violation of broker obligations under the CEA and Commission regulations. The mere missed opportunity to market access, regardless of a customers satisfaction with a broker's services, constitutes illegal activity. *See, e.g.*, In re Elliot, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 (CFTC Feb. 3, 1998) (holding that even if "freshening" is a legitimate market purpose in order to delay delivery, prohibited trading techniques - which may be demonstrated by the weight of circumstantial evidence, e.g., as precise symmetry within the audit trail - are still unlawful and remain a basis for finding against respondents); United States v. Ashman, 979 F.2d 469, 477 (7th Cir 1992), *en banc*, (holding in a mail fraud case that merely filling a customer's price within the relevant range is not acceptable unless the trade conforms to open outcry requirements).

[67] For instance, Mr. Tony Birbilis, testifying as a member of the NYMEX Board of Directors, affirmed that direct

consistent with the Act to transfer the costs of one broker's mistakes to another broker with the intent of making some customer ultimately foot the bill.

Respondents address quantity changes with arguments aside from the need to correct an accidentally wrong recordation. It was argued that balance trading and blocking could account for irregularities. See, e.g., sequence 38/2 *supra*.

In balance trades one trader announces an intent to accept (to buy or sell) the necessary contracts to fill the order of a customer of another trader. The two brokers likely record a quantity on their cards, but understand that the basis of the trade is the fill order, not the precise numerical quantity (e.g., 10) unless it conforms to the unfilled order.[68] (Tr. 197, Effron). Thus, after review of their cards, traders make corrections among themselves so that the number of contracts traded really does match the number of contracts customers ordered.

The Court does not accept that balance trading really accounts for the audit trail irregularities cited.[69] If traders really would accept balance trades regardless of how the market moved, it appears that the brokers were always lucky in that the market never ultimately moved against them more than it did for the customers. The more likely explanation of the irregularities in this case is explained by simple allocation. If the practice were found to be permissible it would be a license to commit outright trade allocations.[70]

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error resolution is not really impartial and that the aim is to make certain that there is customer resolution, so that the customer doesn't miss a fill. (Tr. 914-15, 921).

[68] Traders in this case usually kept assiduous track of their net positions. (*See, e.g.*, Kozlowski 259). It seems unfathomable that a trader would attempt to keep an unspecified position open. Indeed, while the Court's ultimate conclusion does not depend on the proposition, that an agreement to trade an uncertain quantity of contracts does not constitute a completed contract within the regulatory regime.

[69] A complete trade must denote the specific quantity, price, and contract stated. A broker trading as a customer's agent is responsible to his customer and the opposite broker individually; a trade between two brokers cannot be complete as stated and remain contingent upon verification of what quantity the customer was to have offered. A broker is responsible to his customer for both the price and quantity of contracts traded. The opposite trader cannot agree to a trade at an unspecified customer's price or customer's quantity. Once a trade is complete, mistakes –i.e., as to the specific quantity, price, contract month, or the brokers involved-- can be resolved through appropriate out trade resolution procedures.

[70] The record does indicate that trade allocation was not unusual. For example, Thompson testified that:

> I've seen instances in which a broker sells 50, intending to sell 50 to one person, but another person, say next to them, was also attempting to buy at that time and after the trades occur --and clearly the two brokers have seen they've traded with each other—the member who was attempting to buy as well will then

Respondents contend the occurrence of repetitious trades arise because traders subdivide big orders into smaller blocks so as not to inform other traders that a large order was being transacted. Blocking similarly fails to account for the need to change quantities on trading cards after the fact.[71]

Respondents asseverate more than innocent error, they contend that the cross outs and other indicators are not, in fact, irregularities at all. Rather, it is argued, the audit trail reflects changes the brokers executed under the aegis and direction of the exchanges and the Commission.[72] Respondents state they were routinely expected to resolve errors between themselves, such as when a trade innocently occurred outside a permissible floor or ceiling. Respondents further contend that, even if their acts are found to violate the Act, the Commission was aware that such resolutions were *de rigeur*, and to now hold them responsible for having done so violates their due process rights.[73]

In support of this line of argument, respondents rely upon an interpretative statement that

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> indicate that he would like to have participated in that trade. The broker will say, for instance, "Well you have 35 and you have 15 then."

(Tr. 673, Thompson).

[71] *Cf.* Rite Investment v. Conti Commodity Services, [1980-1982 Transfer Binder] (CCH) ¶ 21,427 (CFTC April 6, 1982).

[72] For example, on cross examination, Effron testified that the Board of Governors "and the people of that nature" set the example for the traders to follow in error resolution procedures. (Tr. 188).

[73] There are several arguments styled in due process terms. Before the administrative hearing, some respondents objected they would be prejudiced in the proceeding because relatively few charges related to them. For example, Orlando's pre-hearing memorandum argues: "...the Division has unfairly prejudiced his ability to defend himself due to the manner in which this complaint was instituted. Specifically, the joinder in the Complaint of claims involving different respondents, trading different futures in different pits... creates unnecessary expense and confusion for him, [and is thus] unfairly prejudicial to him, and violates his due process rights." (Orlando PREHG 6-7). D'Amico also points out that more uncharged traders were involved in the trade sequences in this case than for himself. (D'Amico PFF 7). The Court is sympathetic to the broader tenet discretion should be exercised to avoid creating unduly burdensome joinder, but the Court does not agree there was a lack of due process. *See, e.g.*, Arnold v. Commodity Futures Trading Comm'n, 987 F. Supp. 1463, 1468 (S.D. Fla. 1997), *aff'd*, 165 F.3d 39 (11th Cir. 1998) (holding that the Commission's discretion is analogous to that of a criminal prosecutor and that plaintiff's arguments (1) that they would suffer irreparable harm by having to defend an action before the CFTC, and (2) that the CFTC's decision to bring proceedings against "small" adversaries violates their constitutional due process, were unpersuasive and must fail).

indicates: "[w]hen resolving an error, a member cannot change data that relate to a trade except to correct an actual error." Trading Errors, Unmatched Trades, and Outtrades, 54 Fed. Reg. 37004, 37006 (1989). Respondents also rely on testimony to the effect that traders were encouraged to resolve disputes on the floor and correct errors so long as they were reported in the official exchange record. Thus, for example, brokers would be called upon to split differences if cards failed to match, or if a trader traded outside the range.

These arguments assume there were actual innocent errors or outs between the traders and is unconvincing in light of the full weight of evidence in the case. Brokers were not resolving actual errors. As discussed, cards contain cross outs of trades which would, in fact, match. The resolution of possible errors was neither impartial nor an even division. (*See, e.g.,* sequence 42/2 discussed *supra* at Finding no. 164.) Assuming, *arguendo*, they were resolving genuine out trades, the explanation does not explain the other circumstantial evidence against respondents, especially why resolutions invariably accrue to a trader's benefit. Therefore, the Court does not address any potential preclusive effect of the CFTC's role in floor practices.[74]

Finally, although not argued as fervently, it was often pointed out that customer's received their fills. The fact neither necessarily rebuts the Division's case nor forecloses the Court's inquiry. "Failure to pursue the best price possible can, without more, constitute fraud regardless of whether the customer is harmed financially." In re Mayer, [1996 - 1998 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 27,250 at 46,137 (CFTC Feb. 3, 1998), *citing*, In re Rousso, ¶ 27,133 at 45,310 *citing*, U.S. v. Ashman, 979 F.2d 469, 477-78. To be clear, a broker's obligation to a customer exceeds merely meeting their limit prices. Indeed, as an agent for a customer a broker must mind this obligation even when authorized to trade directly opposite a customer.[75]

V

Sanctions

There are certain fundamental truths concerning futures trading that are well understood by registrants in the business, and by those charged with regulating the industry. Foremost,

[74] For example, Carter points to testimony indicating that CFTC personnel were aware of the floor practices and did not countermand them. (Carter CONCL. 27, *citing* Tr. 686, Birbilis).

[75] Amodeo argues the fact that he had cross letters makes the Division's theory less tenable, since he could trade directly opposite his customers due to his cross letters. (Amodeo PSTHG 6).

futures trading is a zero-sum game. "There are striking similarities ...between futures trading and pari-mutuel wagering. New money is not generated in the futures market. For every dollar lost on a losing contract, one dollar, minus commissions, is won on a winning contract." In re Chicago Mercantile Exchange, CFTC Docket No. 75-8, (CFTC, ALJ Dec. 7, 1976) (an initial decision on file at the Office of Proceedings of the CFTC). For the privilege of trading on the floor of an exchange, floor brokers and floor traders either buy or lease a seat at considerable cost from which they often earn considerable livelihoods. For example, the respondents in Roussou, were found to have had incomes ranging from $150,000 to $1,000,000 dollars. In re Roussou [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,947 at 41,080 (CFTC, ALJ Jan. 28, 1994). Common sense dictates that these incomes were not derived substantially from the relatively small commissions earned in executing the trades.

Given the fact that futures trading involves the recording of gains and losses between parties on the opposite side of a transaction, the Court deplores the lackadaisical manner in which the activities taking place on the exchange floors are made into records. Section 18(a) of the Commodity Exchange Act of 1974 requires this Commission to conduct ongoing research concerning the feasibility of using modern electronic devices. Technology has progressed since 1974 and "[w]ith just a little encouragement, audit trail records of pit trades, involving huge sums of money, might be made as reliable as the hamburger count at the local McDonald's restaurant." In re Reddy, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,544 at 43,425 (CFTC, ALJ Nov. 2, 1995). Despite both technological advances and statutory mandate, the reality is, as this Court noted virtually contemporaneously with the events in question in the case at bar, that: "[t]rading is done today just as it was a hundred years ago. [Meanwhile, o]utside the pits progress pervades the futures industry, and computers, fax machines and other electronic devices are found in the back offices of brokers, traders, and commission merchants. In re Angelo, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,943 at 37436 (CFTC Oct. 19, 1990).

The preceding paragraphs are included solely as a reminder to the regulatory bodies, chiefly the National Futures Association and this Commission, that without major improvements in the system of pit trading, the problems that precipitated the instant complaint will not disappear. Regardless of the reasons and manner in which the evidence brought before this

Court was accumulated, the Court finds that the evidence supporting the Commission's complaint is overwhelming, and severe sanctions must be imposed.

The Division prays that (1) cease and desist orders (2) monetary penalties, (3) registration revocations, and (4) trading bans be levied against all respondents. (DOE CONCL. 84-91).[76] Sanctions should be commensurate with the gravity of the violation. In re Van Den Broeke, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,712 at 26,795 (CFTC 1983).

Cease and desist orders are appropriate when there is a reasonable likelihood that wrongful conduct will be repeated. *See,* § 6(d) of the Act. In re Gordon [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,181 (CFTC March 16, 1993) *citing,* In re Dillon-Gage, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,574 at 30,482 (CFTC June 20, 1984). Based on the numerous instances of misconduct, there is such a reasonable likelihood, and this sanction is appropriate for each respondent.

The Division advocates monetary penalties ranging from $50,000 to $500,000. Notably, the Division does not usually underestimate the appropriate level of monetary penalties. In re Murlas, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440 at 35,929, 35,932 (CFTC April 24, 1989). In assessing sanctions the Commission considers, *inter alia,* (1) the relationship of the violation at issue to the Act's regulatory purposes; (2) the respondent's state of mind; (3) the consequences flowing from the violative conduct; and (4) mitigating circumstances. In re R&W Technical Services, CFTC Docket No. 96-3 (March 16, 1999 CFTC) *available at,* 1999 WL 152619; In re Elliott, [1996 - 1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 at 46,008 (CFTC Feb. 3 1998). Thus, in determining appropriate sanctions, the Court appropriately takes into account both the violations themselves and the integrity of the market as a whole.

The Division did not argue how to asses respondents' arguments that there were mitigating circumstances. For example, D'Amico argued that his inexperience was one of the mitigating factors for the court to consider, on the whole he asserted "certain technical violations

[76] The Division prays cease and desist orders and registration revocations against all respondents in addition to the following:

Fisher:	$500,000 monetary fine and a 10 year trading ban
Carter:	$200,000 monetary fine and a 10 year trading ban
Orlando:	$100,000 monetary fine and a 5 year trading ban
Amodeo:	$150,000 monetary fine and a 5 year trading ban
Singer:	$100,000 monetary fine and a 5 year trading ban

are found to exist, that does not render him unfit for registration, nor does it justify the other sanctions."[77] (D'Amico CONCL. 44; Orlando PSTHG 4). The Court finds that respondents' violations were more than technical; respondents knowingly and willfully committed core violations of the Act.[78] Substantial sanctions are therefore appropriate.

The Division argues that each respondents registration should be revoked to protect market integrity and the public trust.[79] (DOE CONCL. 87). The Court finds registration revocations are appropriate.

For similar reasons, the Division advocates imposing trading bans ranging from ten years for Fisher and two years for D'Amico. (D'Amico CONCL. 43, FN 42). Trading bans require a nexus between the violation and the integrity of the futures markets commensurate with the gravity of the offense to the length of the ban and the impact of a trading prohibition on the respondent. A ban should be long enough to discourage future violations by both the respondent and by other potential violators. In re Haltmeier, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,160 at 20,978 (CFTC May 5, 1976), *aff'd*, 554 F.2d 556, 564 (2d Cir.1977); In re Murphy, (CFTC Sept. 25, 1985) ¶ 22,798 at 33,139; *cf.* In re La Mantia [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,472 at 26,218 (CFTC Feb. 25, 1982) (revoking a floor broker's registration but not imposing a trading ban because of respondent's age and family financial obligations). The Division reasons "[h]ere respondents violated the law, not occasionally, but repeatedly. Clearly, breaking the law was, for them, an accepted way of doing

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D'Amico $50,000 monetary fine and a 2 year trading ban

[77] Apparently, Orlando was suffering from alcoholism. (Orlando CONCL. 8).

[78] *See*, In re Miller, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,297 at 46,349 (CFTC March 12, 1998) (finding that, even if mitigating factors may exist, violating core provisions of the Act, such as defrauding customers, is very grave).

[79] Although the Division's post-hearing brief cites section 8a(2)(E) of the Act, the complaint invoked sections 8a(3) and 8a(4) of the Act. (Compl. 34). 7 U.S.C. § 12.

Respondents have been on notice that their registrations might be revoked as an outcome of these proceedings. Indeed, some respondents sought to preserve a separate penalty phase. (Amodeo Ans. 11, ¶ 59; Carter Ans. 11, ¶ 59). Yet, respondents have already argued there were mitigating factors. Therefore, the Court finds there has been an appropriate hearing on the matter. The Court further notes, in a case D'Amico cited, the Seventh Circuit presumed that clear and convincing evidence would be needed to overcome a presumption raised under the Act that continued registration would not pose a risk of harm to the public. (D'Amico CONCL. 46, FN 44). Vercillo v. Commodity Futures Trading Comm'n, 147 F.3d 548, 554 (7th Cir. 1998).

business. Nothing less than significant trading bans will protect the public interest." (DOE CONCL. 91). The Court agrees; trading bans are appropriate in the case at bar. In re Incomco, ¶ 25,198 (CFTC Dec. 30, 1991); In re Citadel Trading, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082.

Therefore, the Court imposes the following sanctions:

Fisher is ORDERED to Cease and Desist from violating the CEA and regulations pursuant thereto. He is ORDERED to pay a monetary fine of $350,000 and is BANNED from trading for five years. Fisher's registration is REVOKED.

D'Amico is ORDERED to Cease and Desist from violating the CEA and regulations pursuant thereto. He is ORDERED to pay a monetary fine of $50,000 and is BANNED from trading for one year. D'Amico's registration is REVOKED.

Amodeo is ORDERED to Cease and Desist from violating the CEA and regulations pursuant thereto. He is ORDERED to pay a monetary fine of $100,000 and is banned from trading for six months. Amodeo's registration is REVOKED.

Carter is ORDERED to Cease and Desist from violating the CEA and regulations pursuant thereto. He is ORDERED to pay a monetary fine of $100,000 and is BANNED from trading for one year. Carter's registration is revoked.

Orlando is ORDERED to Cease and Desist from violating the CEA and regulations pursuant thereto. He is ORDERED to pay a monetary fine of $50,000 and is BANNED from trading for one year. Orlando's registration is REVOKED.

Singer is ORDERED to Cease and Desist from violating the CEA and regulations pursuant thereto. He is ORDERED to pay a monetary fine of $75,000 and is BANNED from trading for one year. Singer's registration is REVOKED.

Issued this 5th day of May, 1999

George H. Painter
Administrative Law Judge

Todd Rosenthal, Attorney-Advisor