

United States of America
Before the
Commodity Futures Trading Commission

In the Matter of

Andy Saberi,

Respondent

CFTC Docket No. 01-11

2002 06 23 P 2 12

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Appearances:

David M. Cole, Esq. on behalf of the Division of Enforcement

Hugh J. Cadden, Esq. on behalf of Respondent Andy Saberi

Before: Painter, ALJ

INITIAL DECISION

I. Procedural History

The Commission filed a one-count administrative complaint against Respondent Andy Saberi on or about June 26, 2001, charging that Respondent violated §4(a)(e) of the Commodity Exchange Act, 7 U.S.C. § 6(a)(e), by exceeding the fifty contract position limit imposed by the Chicago Mercantile Exchange (“CME”) for the August 2000 frozen pork belly futures.

Respondent filed a timely answer on or about July 28, 2001, denying that any violation occurred.

The Division of Enforcement (“DoE”) filed its Pre-Hearing Memorandum on or about November 14, 2001. Respondent filed his Pre-Hearing Memorandum on or about November 15, 2001. Respondent then moved for summary disposition on or about March 27, 2002. This Court denied Respondent’s motion for summary disposition on or about April 12, 2002. Respondent

immediately filed a request for Certification of Interlocutory Appeal on or about April 4, 2002. Upon reviewing Respondent's argument, this Court issued an order denying the request for certification on or about April 5, 2002.

On or about May 10, 2002, Respondent Saberi and the DoE submitted a Joint Motion for Use of Shortened Procedure in Lieu of Hearing pursuant to Regulation 10.92, 17 C.F.R. § 10.92 (2002). Both parties submitted a Joint Stipulation of Undisputed Facts and Documents on or about May 31, 2002.

The DoE filed its Opening Statement on or about May 31, 2002. Respondent filed his Answering Statement on or about June 20, 2002. The DoE filed its Statement in Reply on or about July 2, 2002.

This matter is ready for decision. The Findings of Fact set out below are based on stipulations of undisputed facts and the exhibits appended to the pleadings, including declarations, letters and investigative transcripts, admitted into the evidentiary record.¹

II. Findings of Fact

1. Andy Saberi, is a resident of California. He has been trading a variety of commodities since 1989, including silver, cocoa, gold, copper, cotton, cattle, lean hogs and frozen pork bellies. (OS Tabs 8, 9, 13, 15; Saberi IT 18) Saberi is not registered with the Commission and he is not a member of the Chicago Mercantile Exchange ("CME"). (JS) Saberi's trading levels

¹ The listed documents are referred to by the following abbreviations:

OS – DoE's Opening Statement
AS – Respondent's Answering Statement
JS – Joint Stipulations of Undisputed Facts
Saberi IT – April 5, 2001 Voluntary Investigative Testimony of Andy Saberi
Kirkham IT – April 5, 2001 Voluntary Investigative Testimony of Craig Kirkham
Sandy Decl. – Declaration of Thomas Sandy
Wolff Decl. – Declaration of Eric Wolff

became high enough to require him to file a Form CFTC-40 Statement of Reporting Trader. (OS Tabs 16-19, 44, 45)

2. On or about October 11, 1989, Saberi opened a commodities account at Dean Witter Reynolds, Inc., now Morgan Stanley Dean Witter (“Dean Witter”), a registered futures commission merchant (“FCM”). (OS Tab 2) Saberi controlled the account at all relevant times. (JS) Craig Kirkham is Saberi’s account executive at Dean Witter. (OS Tab 2)

3. Saberi opened a second trading account on or about January 6, 1992 with Jack Carl/312 Futures, a division of ED&F Man International, Inc. (“ED&F Man”), a registered FCM. (OS Tab 1) Saberi controlled the account at all relevant times. (JS)

4. August is the last month of the frozen pork belly contract yearly cycle and can be susceptible to manipulation. The maximum number of contracts a trader can hold depends on the available deliverable supply in any given month. During the month of August 2000, the deliverable supply of August 2000 frozen pork belly futures was under 399 contracts. At the close of trading on August 14, 2000, the position limit for August 2000 frozen pork belly futures was set to fifty (50) contracts in accordance with CME Rule 8302(E). (OS Sandy Decl.)

5. On the morning of August 14, 2000, Saberi had fifty (50) contracts held short in his Dean Witter account and thirty-three (33) contracts held short in his ED&F Man account. (OS Tab 40; OS Sandy Decl.)

6. Thomas Sandy, Manager of Agricultural Surveillance in Division of Market Regulation at the CME, contacted Dean Witter and ED&F Man to inform them that Saberi’s current positions held on August 14, 2000 would violate the fifty-contract position limit imposed at the end of the trading day if his positions were not reduced. (OS Sandy Decl.) Dean Witter’s

compliance department then contacted Saberi's account executive, Craig Kirkham, to inform Kirkham of his client's possible violation. (Kirkham IT 41-42.)

7. Kirkham contacted Saberi around 8:30 a.m. on August 14, 2000 and informed Saberi that he would be in violation of the fifty-contract position limit at the end of the day if his positions were not reduced. Kirkham informed Saberi that all of his positions held at different FCMs would be aggregated to determine whether he was in violation of the limit. (Kirkham IT 43)

8. No one at ED&F Man contacted Saberi on August 14, 2002. (OS Sandy Decl.; AS Tab 2)

9. At approximately 9:49 a.m. on August 14, 2000, Saberi entered a telephone order with ED&F Man to sell an additional ten August 2000 frozen pork belly futures contracts. (OS Sandy Decl.; OS Tab 20) ED&F Man executed Saberi's order at approximately 9:52 a.m. (OS Tab 20)

10. At the close of trading on August 14, 2000, Saberi held a net short position of ninety-three (93) August 2000 frozen pork belly futures contracts. (OS Tab 40)

11. Sandy, at the CME, contacted Dean Witter and ED&F Man again on August 15, 2002 to inform each of them that Saberi's aggregate position exceeded the August 2000 contract limit by forty-three contracts. (OS Sandy Decl.)

12. ED&F Man and Kirkham each contacted Saberi and told him that he was in violation of Rule 8302.E and that Saberi must liquidate his positions to comply with the fifty-contract limit. (Kirkham IT 57-58; Saberi IT 52)

13. On October 31, 2000, Saberi was sent a letter from the Division of Market Regulation, stating that he was in violation of Rule 8302.E by exceeding the fifty-contract position limit. The letter also informed Saberi that because his positions exceeded 150 percent of the established speculative position limit the matter was referred to the CME's Business Conduct Committee ("BCC") and the CFTC. (OS Wolff Decl.)

14. Saberi made approximately \$54,930 in profits on August 15, 2000 after liquidating the excess forty-three shares. (OS Tab 41)

III. Discussion

The Division of Enforcement (“DoE”) alleges that Respondent violated Section 4(a)(e) of the Commodity Exchange Act (“Act”) by violating the speculative position limits established by Chicago Mercantile Exchange (“CME”) Rule 8302.E. Section 4(a)(e) states that it shall be a violation of the Act for any person to violate any rule of a contract market that fixes limits on the number of positions a person is allowed to have under contracts for the sale of commodities if such rule was approved by the Commission. CME Rule 8302.E was approved by the Commission on May 5, 1998. Respondent contends that he did not violate Section 4(a)(e) of the Act because he did not intentionally violate the rule. The DoE argues that intent is not required under Section 4(a)(e).

The DoE cites CFTC v. Hunt, et al., 591 F.2d 1211 (7th Cir. 1979), in support of its argument. Even though Hunt pertained to a violation of Section 4(a)(1) (now 4(a)(a)), the case is analogous. Section 4(a)(a) pertains to violations of position limits created by the Commodity Futures Trading Commission. In Hunt, the Commission held that no specific intent to exceed the speculative limits was necessary to have a violation of Section 4(a)(a). Looking to the plain language of Section 4(a)(e), it appears that no intent is necessary for a violation of the Section to occur. In fact, Congress expressly made an exception to that rule at the end of Section 4(a)(e) stating, “*Provided*, that the provisions of Section 9(c) [application to Insider Trading] of this Act should apply only to those who *knowingly* violate such limits.” (emphasis added) Congress

clearly meant that intent was only necessary under Section 4(a)(e) when pertaining to insider trading.

Respondent's actions clearly constitute an intentional violation of CME Rule 8302.E. After receiving Kirkham's phone call warning Respondent that he would be in violation of the CME's speculative position limits if he did not reduce his number of contracts held by the close of trading on August 14, 2000, Respondent placed an order to sell an additional ten contracts of August 2000 frozen pork belly futures. Respondent disregarded the position limits in order to make a profit. Respondent has almost thirteen years of experience in trading commodities. He cannot now argue that he should escape liability for his violation because he did not know the rules with which he was to comply.

Respondent argues that even if it is determined that he violated Rule 8302.E, that violation cannot be considered a violation of Section 4(a)(e) of the Act because the CME only issued a warning letter. Respondent's actions resulted in a violation of Rule 8302.E regardless of the punishment that the CME imposed. Rule 8302.E states it shall be a violation to hold more than fifty contracts when the deliverable supply is 399 contracts or less. The ninety-three (93) contracts held by Saberi constituted a violation of CME Rule 8302.E. CME Rule 443 states that any position "in excess of any allowed by a valid hedge approval shall be deemed a speculative position limit violation." CME Rule 443 sets out different actions that the CME can take against an individual who violates the speculative position limits rules. In this case, the CME's Division of Market Regulation ("DMR") issued Respondent a warning letter, as well as, referred this matter to its Business Conduct Committee ("BCC") and the CFTC. Only violations that the CME considers serious are referred to the BCC. The DMR maintains that the first time violation of Rule 8302.E is deemed a rule violation, even if only a warning letter is sent to the violator.

This Court agrees. Violating the CME rule clearly constitutes a violation of Section 4(a)(e) of the Act. Respondent Saberi exceeded the position limits set for the August 2000 frozen pork belly futures contracts violating CME Rule 8302.E. The violation of CME Rule 8302.E is a direct violation of Section 4(a)(e) of the Act.

ORDER

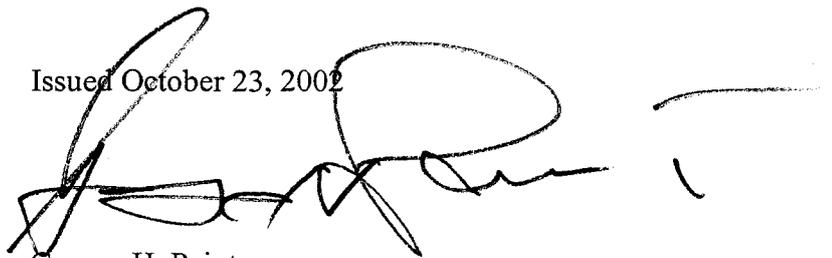
The Division of Enforcement has established by the preponderance of the evidence that Respondent Saberi, in violation of Section 4(a)(e) of the Commodity Exchange Act, 7 U.S.C. § 6(a)(e), exceeded the Chicago Mercantile Exchange position limit for the August 2000 frozen pork belly futures contracts as described in the findings above. Respondent is **ORDERED** to **CEASE AND DESIST** from violating the Act as charged in the complaint.

Pursuant to the provisions of Sections 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9(c) and 9(d), Respondent Saberi is **ORDERED** to pay a civil monetary penalty of \$110,000 within thirty (30) days after this decision becomes final.

Respondent is further **BARRED** from trading on the CME for a period of 180 days.

so ordered

Issued October 23, 2002

A large, stylized handwritten signature in black ink, appearing to read 'George H. Painter', is written over the typed name below it.

George H. Painter

Administrative Law Judge

Margaret Jaffe
Law Student Extern