UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of **Cantor Fitzgerald & Co.,** **Respondent.**	**CFTC Docket No:** 11-08 **ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Cantor Fitzgerald & Co. ("Cantor" or "Respondent") is liable for wash sales and non-competitive trades entered into by its employee in violation of Section 4c(a) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 6c(a) (2006), and Commission Regulation ("Regulation") 1.38(a), 17 C.F.R. § 1.38(a) (2010), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B)(2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and thereby are, instituted to determine whether Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Without admitting or denying any of the findings herein, Respondent acknowledges service of this Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions ("Order").[1]

[1] The Respondent consents to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, the Respondent does not consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. The Respondent does not consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, by any other party in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

On one or more occasions during the period from March through April 2007 (the "relevant period"), a then employee of Cantor simultaneously entered orders with certain floor brokers from two different floor brokerage operations, on behalf of the same customer, to buy and sell New York Mercantile Exchange ("NYMEX") Reformulated Gasoline Blendstock for Oxygen Blending ("RB gasoline") futures contracts for the same quantity, price and contract month. In each instance, the employee prearranged to have these identical orders executed opposite each other.

Because these trades were intended to negate market risk and avoid a bonafide market transaction, they were in violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a)(2006), which, inter alia, prohibits any person from entering into a transaction that is, or is of the character of, or is commonly known to the trade as, a "wash sale." Furthermore, these were noncompetitive transactions in violation of Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2010).

Because Cantor's employee undertook his actions within the scope of his employment, Cantor is liable for the employee's acts, omissions and failures in violation of Section 4c(a) of the Act and Regulation 1.38(a) pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006).

B. RESPONDENT

Cantor Fitzgerald & Co. is located at 110 East 59th Street, New York, NY 10022. Cantor has been registered with the Commission as a futures commission merchant since 1982.

C. FACTS

On at least three occasions during the relevant period, an employee of Cantor received orders on behalf of the same customer to buy and sell hundreds of RB gasoline futures contracts. The quantity, price and contract month for these buy and sell orders were identical. The employee entered these orders with certain traders at two different floor brokerage operations ("FBO #1" and "FBO #2") for execution on the NYMEX. For each of these identical buy and sell orders, the employee prearranged to have them executed opposite each other.

For example, on March 14, 2007, the employee placed a telephone call to a trader at FBO #1 to sell RB gasoline futures contracts at a certain price on behalf of a Cantor customer. The employee then placed a telephone call to a trader at FBO #2 to buy the same amount of RB gasoline futures contracts at the same price as the sell order and on behalf of the same customer. The employee also instructed the trader at FBO #1 to execute this order opposite the trader from FBO #2.

In total, the Cantor employee prearranged the purchase and sale of hundreds of RB gasoline futures contracts.

D. LEGAL DISCUSSION

1. Respondent is Liable for its Employee's Wash Sales in Violation of Section 4c(a) of the Act

Section 4c(a) of the Act makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction" that "is of the character of, or is commonly known to the trade as, a 'wash sale'..." 7 U.S.C. § 6c(a) (2006). A wash sale is a form of fictitious transaction. *In re Gimbel,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,003 (CFTC Apr. 14, 1988), *aff'd as to liability*, 872 F.2d 196 (7th Cir. 1989); *In re Goldwurm,* 7 A.D. 265, 274 (CEA 1948). Further, the Commission has long held that prearranged trading is a form of fictitious sales. *In re Harold Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,903 (CFTC Apr. 4, 1986).

A wash sale is a transaction made without an intent to take a genuine, bona fide position in the market, such as a simultaneous purchase and sale designed to negate each other so that there is no change in financial position. *Reddy v. CFTC*, 191 F.3d 109, 115 (2d Cir 1999). *See also Goldwurm*, 7 A.D. at 274. Wash sales are "grave" violations, even in the absence of customer harm or appreciable market effect, because "they undermine confidence in the market mechanism that underlies price discovery." *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,691 (CFTC Sep. 29, 2000), *aff'd sub nom. Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir 2003) (wash sales are designed to give the appearance of submitting trades to the open market, while negating the risk or price competition incident to the market and produce a virtual financial nullity because the resulting net financial position is near or equal to zero). *See also CFTC v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979) (wash sales may mislead market participants because they do not reflect the forces of supply and demand).

"The factors that show a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price." *Piasio*, ¶ 28,276 at 50,685 (citing *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991)). In addition to these factors, intent must be proved to establish a violation of Section 4c of the Act. *Reddy*, 191 F.3d at 119; *see also In re Citadel Trading Co. of Chicago, Ltd.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,190 (CFTC May 12, 1986) ("[t]he central characteristic of a wash sale is the intent not to make a genuine bona fide trading transaction") (citations omitted). In the context of liability for a wash sale transaction, the scienter requirement relates to the intent at the time the challenged transactions are initiated; specifically whether it was intended to negate market risk or price competition. *Piasio*, ¶ 28,276 at 50,685. Negated risk is not "the equivalent of no risk or the complete elimination of risk;" rather the Commission has "clearly held that risk is negated whenever it is 'it is reduced to a level that has no practical impact on the transactions at issue.'" *Id.* at 50,688 (quoting *Gimbel,* ¶ 24,213 at 35,003 n.7). "[S]cienter may be inferred from the circumstantial evidence" and while motive is not an element of a trade practice case, "evidence of motive strengthens an inference of intent." *Reddy*, 191 F.3d at 119 (citations omitted).

In this case, Cantor's employee prearranged to have identical buy and sell orders executed opposite each other during the relevant period on behalf of the same customer. This establishes that the resulting trades were intended to negate market risk and avoid a bonafide market transaction. Consequently, these transactions violated Section 4c(a) of the Act, which makes it unlawful to offer to enter into, or to enter into, any commodity futures transaction that is a wash sale.

Cantor is liable for its employee's violations. Under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B)(2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010), the act, omission, or failure of any official, agent, or other person acting for any corporation within the scope of his employment or office shall be deemed the act, omission, or failure of such corporation. "[I]t does not matter if the principal participated in or even knew about the agent's acts, he is strictly liable for them." *Stotler & Co. v. CFTC*, 855 F.2d 1288, 1292 (7th Cir. 1988) (citing *Cange v. Stotler*, 826 F.2d 581, 589 (7th Cir. 1987)). Because the employee was acting within the scope of his employment when he committed the acts in violation of Section 4c(a) of the Act, Cantor is liable for these violative acts pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010).

2. Respondent is Liable for its Employee's Execution of Noncompetitive Trades in Violation of Regulation 1.38(a)

Regulation 1.38(a) requires that "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...." 17 C.F.R. § 1.38(a). "The purpose of this requirement is to insure that all trades are executed at competitive prices and that all trades are directed into a centralized marketplace to participate in the competitive determination of the price of futures contracts." S. REP. NO. 93-1131, at 16 (1974); *see also* Disapproval of Contract Market Rules, 46 Fed. Reg. 23,516, at 23,518 (Apr. 27, 1981) (Commission's disapproval of the Commodity Exchange, Inc.'s proposal to conduct a trading session after the close of regular trading). Trades can be non-competitive even though they are executed in the pit. *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,683 (CFTC Jan. 25, 1991) (citing *Laiken v. Dep't of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)). Prearranged trading is a form of anti-competitive trading that violates Regulation 1.38(a). *Gimbel*, ¶ 24,213 at 35,003.

Because its employee, acting in the scope of his employment with Cantor, caused the execution of prearranged noncompetitive trades, Cantor is liable for its employee's acts in violation of Regulation 1.38(a) pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010).

In settling this matter, the Commission has taken into account the effective cooperation of Cantor and the prompt corrective action Cantor undertook upon discovery of the above-described activity.

IV.

OFFER OF SETTLEMENT

Cantor has submitted an Offer in which it, without admitting or denying the findings herein: (1) acknowledges service of the Order; (2) admits the jurisdiction of the Commission with respect to the matters set forth herein; (3) waives the filing and service of a complaint and notice of hearing, a hearing, all post-hearing procedures, judicial review by any court, any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer, any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-30 (2010), relating to, or arising from, this proceeding, any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, §§ 201-253, 110 Stat. 847, 857-68 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this proceeding, and any claim of Double Jeopardy based upon institution of this proceeding or the entry of any order imposing a civil monetary penalty or any other relief; (4) stipulates that the record basis on which this Order may be entered shall consist solely of this Order and findings in this Order consented to in the Offer; and (5) consents to the Commission's issuance of this Order, which makes findings as set forth below and: (a) orders Respondent to cease and desist from violating the provisions of the Act and Regulations that it has been found to have violated; (b) imposes a civil monetary penalty upon Cantor of $100,000; and (c) orders Respondent to comply with the undertakings consented to in its Offer and set forth below in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Respondent's Offer.

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Cantor violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2010), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B)(2006), and Regulation 1.2, 17 C.F.R. § 1.2 (2010).

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Cantor shall cease and desist from violating Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2010); and

2. Cantor shall pay a civil monetary penalty in the amount of $100,000 plus post-judgment interest within ten (10) days of the entry of this Order (the "CMP Obligation"). Should Cantor not satisfy its CMP Obligation within ten (10) days of the date of entry of this Order, post judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

   Cantor shall pay its CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission, and sent to the address below:

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

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

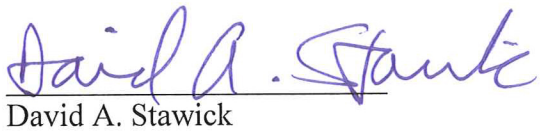
3. Respondent shall comply with the following undertakings:

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

B. Respondent acknowledges that failure to comply with this Order shall constitute a violation of this Order and may subject it to administrative or injunctive proceedings, pursuant to the Act; and

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

By the Commission,



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

Dated: February 22, 2011