Commodity Futures Trading Commission
CEA CASES

NAME: FOX DELUXE FOODS, INC., ROLAND N. GERGEN, HAROLD W. FOX, AND BERT E. FOX

CITATION: 18 Agric. Dec. 582

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(No. 5957)

In re Fox DELUXE FOODS, INC., ROLAND N. GERGEN, HAROLD W. FOX, AND BERT E. FOX. CEA Docket No. 74. Decided June 26, 1959.

Manipulation -- Squeeze -- Price Support as Manipulation

Respondents are found to have attempted to manipulate and to have manipulated egg futures prices and cash refrigerator egg prices in violation of the Commodity Exchange Act in December 1953 and January 1956 by utilizing their long positions and those of customers and affiliated accounts -- the total of which were greatly in excess of deliverable stocks of refrigerator eggs in Chicago -- to "squeeze" the shorts and to pressure prices upward.

While purchases of cash fresh eggs on the spot call of the Chicago Mercantile Exchange to support prices of such eggs constituted a manipulation of such prices, no violation of the act is found in connection therewith separate and apart from the manipulations of futures and cash refrigerator egg prices since the complaint seems to allege such purchases as part of the latter manipulations.

Mr. Benj. M. Holstein, for Commodity Exchange Authority. *Messrs. Daniel M. Healy and James L. Fox, Jr.,* of Chicago, Illinois, for respondents. *Mr. Clarence H. Girard,* Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1), instituted July 23, 1956, by a complaint and notice of hearing issued under section 6(b) of the act (7 U.S.C. § 9) by an Assistant Secretary of Agriculture.

Respondents are (1) Fox DeLuxe Foods, Inc., an Illinois corporation, a wholesale egg and poultry dealer, a clearing member of the Chicago Mercantile Exchange, and a registered futures commission merchant under the Commodity Exchange Act which traded in egg futures on the Exchange for the accounts of customers and also for its own or house accounts; (2) Roland N. Gergen, secretary of the corporation during December 1953 and its executive vice-president during January 1956; (3) Harold W. Fox, a vice-president and director of the corporation during December 1953 and January 1956, a member of the Exchange and a registered floor broker under the Commodity Exchange Act; and (4) Bert E. Fox, a vice-president and director of the corporation during December 1953 and January 1956, a member of the Exchange and a registered floor broker under the Commodity Exchange Act.

The complaint charges that the respondents attempted to manipulate and did in fact manipulate prices of egg futures on the Chicago Mercantile Exchange and cash eggs in Chicago in December 1953 and January 1956 in violation of sections 6(b) and 9 of the Commodity Exchange Act (7 U.S.C. §§ 9, 13).

In connection with December 1953 the complaint alleges that, beginning about December 9, 1953, the respondent corporation closed out all short positions on its books in the December 1953 egg future, purchased large quantities of such future on the Chicago Mercantile Exchange on behalf of itself and its customers, and increased this long position to a point where it was substantially in excess of storage stocks available for delivery and finally represented 100 percent of the open interest; that near the close of trading in the future, the respondent corporation purchased all the fresh cash eggs of deliverable grade and quality offered for sale on the Exchange and immediately resold them at a loss; and that after the termination of trading in the future the respondent corporation received, on behalf of itself and certain customers, substantially all the eggs delivered on the December future and resold them at fixed prices in excess of their true market value to the shorts for redelivery to respondent corporation.

With respect to January 1956 the complaint alleges that in December 1955 and January 1956 the respondent corporation, acting for itself, a group of affiliated accounts, and a number of other customers, again concentrated its activities on the long side of the market and purchased January 1956 egg futures on the Chicago Mercantile Exchange in large quantities, increasing such long position until it was many times in excess of storage stocks available for delivery and finally represented about 99 percent of the open interest; that at the same time the corporation supported the price of fresh eggs by substantial purchases of such eggs on the Exchange, which eggs it immediately resold at a loss; that it also arranged for similar purchases at its expense by an independent trader; and that these activities increased

the price of the future to a point where it exceeded the price of fresh eggs, and took large quantities of fresh eggs out of normal channels of trade and diverted them to Chicago for delivery on the future.

The complaint also alleges that these activities were undertaken for the purpose and with the intent of concentrating in the hands of the respondent corporation such a quantity of the current egg future as would represent a major portion of the open interest and exceed available deliverable supplies, thereby causing a squeeze and a resultant price increase; that the respondents intended and expected that the firm's customers would be influenced by the respondents' examples, suggestions, advice, and recommendations, and would follow respondents' lead; that such customers were in fact so influenced and did in fact follow respondents' lead; and that the acts of the respondents brought about a squeeze and caused artificial and manipulated prices in futures and cash refrigerator eggs on both occasions in wilful violation of the act.

On November 5, 1956, the individual respondents filed a joint answer and the corporate respondent filed a separate answer. The material recitals in both answers are identical. The respondents admit the jurisdictional allegations and the transactions in futures and cash eggs substantially as alleged in the complaint; but they deny that they intended to manipulate or that they did in fact manipulate prices, or that their customers were influenced solely by them and did in fact follow their lead; and they assert that if there was a squeeze, it was brought about without any intent or purpose on their part. The answer states that, with respect to the customers and affiliated accounts, the corporate respondent acted merely as a broker on orders received from such accounts; that the purchases of January 1956 futures were made for the house account and the affiliated accounts because it appeared that prices were reasonable; and that the fresh eggs purchased on the Chicago Mercantile Exchange in December 1953 and January 1956 were sold at a loss because it became obvious that the fresh egg market was declining and the respondents acted to minimize the loss as far as possible.

Clarence H. Girard, Office of Hearing Examiners, "United States Department of Agriculture, was assigned as referee and presided at the hearing. The respondents were represented by Daniel A. Healy and James L. Fox, Jr., of Healy, Newby, Barrett, and Healy, a Chicago law firm. Benjamin M. Holstein, Office of the

General Counsel, United States Department of Agriculture, appeared as counsel for complainant. The oral hearing was held in Chicago, Illinois, April 9, 10, 12, 15, 16, 17, and July 10, 11, 12, 18 and 19, 1957. Both sides offered oral and documentary evidence. Twenty-one witnesses testified for complainant and ten testified for respondents, including the individual respondents Roland N. Gergen and Harold W. Fox. Respondent Bert E. Fox was not present at the hearing. Ninety-one exhibits were received in evidence. Main briefs, which contained suggested findings and conclusions, and reply briefs were filed by the parties.

The referee issued a report recommending that respondents be found to have violated the act as charged. Respondents filed lengthy exceptions to the report. Oral argument before the deciding officer was not requested and was not held.

Respondents object to the statement of the referee in his report to the effect that most of the underlying or subsidiary facts are admitted but that there is sharp dispute as to the relevancy of some of the evidence and as to the inferences to be drawn from the basic facts. But obviously the referee's observation was correct. The physical facts as to the trading in egg futures and cash eggs by respondent and its customer accounts are not and cannot be denied. The bedrock issues then are whether in doing the trading involved respondents were attempting to manipulate the prices of egg futures and cash eggs and did in fact manipulate such prices. Respondents in answer to the complaint, in evidence and in briefs ascribe legitimate purposes to the actions regarded by complainant as proof of manipulative motive and contend also that the prices of egg futures and cash eggs were not manipulated.

FINDINGS OF FACT

1. Respondent Fox DeLuxe Foods, Inc., a corporation with offices and a place of business at 1122 Fulton Street, Chicago 7, Illinois, is now and has been at all times material herein a wholesale egg and poultry dealer, a clearing member of the Chicago Mercantile Exchange, and a registered futures commission merchant under the Commodity Exchange Act.

2. Respondent Roland N. Gergen, whose address is 1122 Fulton Street, Chicago 7, Illinois, was the secretary of respondent corporation during December 1953 and the executive vice-president of the corporation during December 1955 and January 1956. At all such times, he was also a member of the board of directors of

respondent corporation and supervised its trading in egg futures and cash eggs. Respondent Gergen participated in the decisions by the board of directors of the corporation with respect to the transactions in December 1953 and January 1956 egg futures hereinafter described.

3. Respondent Harold W. Fox, whose address is 7318 Ridge Avenue, Chicago, Illinois, was a vice-president of the respondent corporation and a member of its board of directors during December 1953, December 1955 and January 1956, and was in complete charge of its trading on the floor of the Chicago Mercantile Exchange at all such times. This respondent is now and was at all times material herein a member of the Exchange and a registered floor broker under the Commodity Exchange Act. He participated in the decisions by the board of directors of respondent corporation with respect to the transactions in December 1953 and January 1956 egg futures hereinafter described.

4. Respondent Bert E. Fox, whose address is 1122 Fulton Street, Chicago 7, Illinois, was at all times material herein a vice-president and director of respondent corporation and a member of the Chicago Mercantile Exchange. This respondent executed some of the futures transactions hereinafter described, and directed the execution of other such transactions. He was registered as a floor broker under the Commodity Exchange Act during January 1956 and is now so registered.

5. The transactions hereinafter described were carried out under the direction and supervision and by means of the acts of the individual respondents in their capacities as officers, agents, or employees of the respondent corporation.

6. The Chicago Mercantile Exchange is now and has been at all times material herein a duly designated contract market under the Commodity Exchange Act.

7. Trading in egg futures on the Exchange is conducted in units of one contract or carlot consisting, at all times material herein, of 480 cases of 30 dozen eggs per case. Trading ends several days before the last business day in the delivery month, but contracts still open at the end of trading may be satisfied by delivery during the remaining business days of the month. Cash eggs or shell eggs are actual eggs as distinguished from egg futures, and may be either refrigerator eggs or fresh eggs. Refrigerator eggs, sometimes called storage eggs, are eggs which have been in cold storage more than 29 days. Fresh eggs are eggs which have not been in cold storage, or which have been in cold storage not more than 29 days (Tr. pp. 23-37). Cash eggs bought and sold in the City of Chicago are produced in Illinois and other Midwestern States, moved into Chicago for storage and consumption, and shipped from Chicago to points outside Illinois.

8. The December 1953 and January 1956 egg futures contracts on the Exchange were refrigerator egg contracts, and represented the purchase and sale of refrigerator eggs for delivery in those months. Under the specifications of the Exchange governing deliveries on these contracts, par delivery consisted of refrigerator eggs described as U. S. Extras, Minimum 50 percent A grade, meeting certain weight and packaging requirements. Under the specifications, fresh eggs were "deliverable on the same basis as refrigerator eggs," that is, without any premium or discount by reason of the fact that they were fresh eggs. During the months of December and January, fresh eggs are more valuable than refrigerator eggs and command a higher market price unless a technical situation exists. A technical situation exists when outstanding long contracts in the future are greatly in excess of deliverable supplies of refrigerator eggs. (Complainant's Exhibits 1, 2, 35; Tr. pp. 207-217, 276-277, 287, 291, 306, 315, 322, 334, 342, 591, 655.)

9. It was the general practice, at all times material herein, for respondent Fox DeLuxe to advise its customers when to buy or sell and to recommend the action to be taken by its customers. Nonindustry customers usually followed such recommendations or left the buying or selling for their accounts and the price at which the purchase or sale was to be made to the discretion and judgment of respondents. (Tr. pp. 628, 629, 777, 831, 832, 844, 847, 848, 876-878.)

10. During December 1953, respondent Fox DeLuxe, in its capacity as a registered futures commission merchant, carried 32 commodity futures trading accounts for various individuals and firms, hereinafter referred to as customers or customers' accounts, each of which traded and held positions in the December 1953 egg future on the Chicago Mercantile Exchange during December 1953. Included among such accounts were the accounts of Earl Barnes, Charles Burbulis, and J. A. Roeser. Earl Barnes was an associate broker of respondent Fox DeLuxe, and Charles Burbulis, who was in the produce business and not in the egg business, was a speculator customer of Earl Barnes. The J. A. Roeser account

was in fact the account of respondent Roland N. Gergen, who did all the trading in the account, received the profits thereof,

and was responsible for the losses, but there was nothing in the records of respondent Fox DeLuxe which would so indicate. (Complainant's Exhibits 3, 12, 13; Tr. pp. 623, 650-651.)

11. On November 30, 1953, n1 positions in December 1953 egg futures on the books of respondent Fox DeLuxe aggregated 77 carlots long for the accounts of 13 customers, and 63 carlots short for the accounts of six customers. Between December 1 and 8, 1953, both inclusive, most of the long customers sold December futures and liquidated or reduced their long positions, with the result that on December 8, 1953, such long positions had decreased to a total of 22 carlots for five customers. During the same period, the short customers held their positions substantially unchanged, and on December 8, 1953, such positions totaled 60 carlots for five customers. Respondent Fox DeLuxe did not trade or hold any position in the December 1953 egg future for its own or house account during this period. (Complainant's Exhibit 3.)

n1 Unless otherwise stated, references to positions or stocks on specified dates are as of the end of business on that day.

12. On or about December 8, 1953, at a time when the price of the December egg future was 43 to 44 cents, n2 respondents Harold W. Fox and Roland N. Gergen recommended to the board of directors of respondent Fox DeLuxe that December 1953 egg futures contracts be purchased because stocks of refrigerator eggs were at a low level, that the supply of eggs of deliverable grade and quality in Chicago warehouses would be insufficient to meet outstanding long contracts in the future and that accordingly the price of the future would rise and a speculative profit would result. The other directors of respondent Fox DeLuxe, including respondent Bert E. Fox, unanimously agreed with such recommendations, respondent Fox DeLuxe made similar recommendations to its customers, and the purchases of December futures for house and customers' accounts hereinafter described were made as a result of such recommendations. (Tr. pp. 618-621, 652-656, 690, 711-712, 731-732, 759-760, 764, 784-785, 798-799, 817.)

n2 All price references are in cents per dozen.

13. Beginning on December 9, 1953, and continuing through December 21, 1953, respondent Fox DeLuxe purchased 355 carlots and sold 92 carlots of December 1953 egg futures for its own account and the accounts of its customers, reaching a maximum aggregate long position of 225 carlots on December 21, 1953. All such transactions were speculative. n3 (Tr. pp. 618-622, 652-656,

690, 731-732, 759-761.) The quantities purchased and sold daily, the resulting positions of respondent Fox Deluxe as a clearing member, the number of accounts holding positions unchanged each day including December 22 and 23, the last two days of trading, are as follows:

Date 1953	Bought (Carlots)	Sold (Carlots)	Long Position	Short Position	Accts. Buying	Accts. Holding	Accts. Selling
Dec. 8			22	60			
Dec. 9	98	17	43	0	8	0	4
Dec. 10	64	0	107	0	7	4	0
Dec. 11	24	10	121	0	6	6	2
Dec. 14	19	49	91	0	7	6	5
Dec. 15	7	14	84	0	3	9	3
Dec. 16	11	0	95	0	4	10	0
Dec. 17	82	1	176	0	13	5	1
Dec. 18	38	1	213	0	9	11	1
Dec. 21	12	0	225	0	4	18	0

Date 1953	Bought (Carlots)	Sold (Carlots)	Long Position	Short Position	Accts. Buying	Accts. Holding	Accts. Selling
Dec. 22	15	27	198	0	3	11	11
Dec. 23	0	102	96	0	0	0	33

n3 The difference between speculation and hedging under the Commodity Exchange Act is discussed at length in Corn Products Refining Company v. Benson, 232 F.2d 554 (2d Cir. 1956).

14. The purchases and sales described in Finding of Fact 13 were made for the following classes of customers or accounts and resulted in the following changes in position (Complainant's Exhibit 3) :

(a) *Short Customers.* On December 9, 1953, the 60 carlots held for the short customers were entirely covered by purchases of the December future, and such purchases continued during that day and thereafter until long positions in the future had been established for all customers who were short on December 8, 1953, and after this date neither respondent Fox DeLuxe nor any of its customers held a short position in the December future.

(b) *Long Customers.* Beginning on or about December 9 and 10, 1953, and continuing thereafter, purchases of the December future were made for most of the long customers who had theretofore been selling the December future in order to liquidate or reduce their long positions, as described in Finding of Fact 11, and such purchases reestablished or increased the long positions of such customers.

(c) *New Customers.* Beginning on or about December 10, 1953, and continuing until the day before the end of trading, purchases of the December future were made and long positions were established for an increasing number of new customers who had not previously held any position in the December future through respondent Fox DeLuxe during that month.

(d) *House Account.* Respondent Fox DeLuxe purchased 25 carlots of the December future for its house account on December 10, 1953, and made similar purchases thereafter, reaching a maximum long position of 46 carlots on December 17, which position it held unchanged until the last trading day.

15. Of the 82 carlots of December futures purchased December 17, 1953, respondent Fox DeLuxe distributed 52 carlots among the following accounts, in the following quantities, and at the following prices (Complainant's Exhibit 5):

Price	Fox DeLux	Earl Barnes	Charles Burbulis	J. A. Roeser
44.45		3	1	1
44.50			1	1
44.55	3	3	1	1
44.60	4	3	1	1
44.65	3	3	1	1
44.70	4	3	1	1
44.75	4	3	2	2
TOTAL	18	18	8	8

16. Between December 8 and 21, 1953, both inclusive, the open interest in the December future on the Chicago Mercantile Exchange decreased from 931 carlots to 515 carlots, and total long contracts in such future held through clearing members other than the respondent corporation decreased from 909 carlots to 290 carlots. During the same period, as a result of the above-described purchases, the long position in such future of respondent Fox DeLuxe as a clearing member increased from 22 carlots to 225 carlots, or from 2.4 percent to 43.7 percent of the open interest. On the last three days of this period, December 17, 18 and 21, 1953, respondent Fox DeLuxe purchased 132 carlots for its house account and 18 other accounts. During these three days Fox DeLuxe sold a total of two carlots, and withheld from sale the balance of the long December futures in its own account and the customers' accounts (Complainant's Exhibit 3).

17. On December 22, 1953, the long position in the December future of respondent Fox DeLuxe for itself and its customers was 198 carlots, or 53.7 percent of the open interest. On December 23, 1953, the last day for trading in the future, respondent Fox DeLuxe offered these 198 long carlots for sale on the Exchange at 48 cents. This price was 0.15 cent less than the maximum price at which the future could be bought or sold on that day under the rules of the Chicago Mercantile Exchange. On the

same day, the price in Chicago for fresh eggs described as U. S. Extras, Large, Minimum 60 percent A Grade, was 46 to 46.50 cents. Such eggs were of better quality than required for par delivery on December futures contracts. (Complainant's Exhibits 3, 27, 28; Tr. pp. 127, 656-657, 732-733, 810-811.)

18. On December 23, 1953, respondent Fox DeLuxe sold 102 carlots of the 198 carlots of December futures which it offered, and after the end of trading Fox DeLuxe had a total of 96 long contracts, which represented the remaining open interest. The short side of this remaining open interest was distributed among 17 other clearing members. The 96 long contracts held by respondent Fox DeLuxe were in its house account and in the accounts of Earl Barnes, Charles Burbulis, and J. A. Roeser, and these long contracts were subsequently satisfied by the delivery of eggs to respondent Fox DeLuxe as hereinafter described. (Complainant's Exhibits 3, 10, 11.)

19. Of the 102 carlots of December futures sold on December 23, 1953, respondent Fox DeLuxe distributed 36 carlots among the same accounts to which it had previously distributed the purchases described in Finding of Fact 15. The distribution of sales was made in the following quantities and at the following prices (Complainant's Exhibit 5):

Price	Fox DeLuxe	Earl Barnes	Charles Burbulis	J. A. Roeser
47.90	1	1		1
48.00	12	10	6	5
TOTAL	13	11	6	6

20. (a) On November 30, 1953, there were in Chicago cold storage warehouses approximately 50 carlots of shell eggs, some of which were not deliverable upon futures contracts. By December 8, 1953, this quantity had declined to approximately 42 carlots, by December 17 to about 27 carlots, and by December 23, 1953, to approximately 25 carlots. This information was available on a daily basis and was known to respondents. During the last four business days prior to the end of trading on December 23, the quantities of long December futures held by respondent Fox DeLuxe and its customers were between six and one-half and eight and one-half times as large as total stocks of shell eggs in Chicago cold storage warehouses. After the end of trading, respondent Fox DeLuxe was the only source of refrigerator eggs in Chicago which could be used by traders who were on the short

side of the 96 carlots of long December futures held by this respondent. On December 31, 1953, there were 36 carlots of shell eggs in Chicago cold storage warehouses, all of which were held by respondent Fox DeLuxe. (Complainant's Exhibits 4, 17; Tr. pp. 216-217, 228-229, 306-307, 329-330, 453, 489-493, 620-621, 659-660.)

(b) For the period December 9-23, 1953, stocks of storage eggs in Chicago and the long positions of respondent Fox DeLuxe, the Barnes, Burbulis, and Roeser accounts and of other customer accounts carried by respondent Fox DeLuxe were as follows:

Date 1953	Shell Eggs in Storage Carlot Equiv.	DeLuxe House Account	Barnes, Burbulis and Roeser Accounts	Other Customer Accounts	Total Accounts
Dec. 9	42	0	22	21	43
Dec. 10	41	25	40	42	107

Date 1953	Shell Eggs in Storage Carlot Equiv.	DeLuxe House Account	Barnes, Burbulis and Roeser Accounts	Other Customer Accounts	Total Accounts
Dec. 11	39	25	35	61	121
Dec. 14	38	25	45	21	91
Dec. 15	35	25	40	19	84
Dec. 16	32	28	41	26	95
Dec. 17	27	46	75	55	176
Dec. 18	27	46	88	79	213
Dec. 21	26	46	88	91	225
Dec. 22	25	46	86	66	198
Dec. 23	25	34	62	0	96

21. At all times between December 10 and the end of trading December 23, 1953, the total outstanding short contracts in the December future held by persons other than respondent Fox DeLuxe and its customers, which had to be covered by the purchase of futures or by the delivery of eggs and which represented "demand" by others, exceeded the total of outstanding long contracts in the future held by persons other than the said respondent and its customers, plus refrigerator eggs held by such persons, which represented the "supply" available to fill such demand. The minus quantities in the following table represent carlot deficits on and after December 10, that is, the extent to which "demand" exceeded "supply" (Complainant's Exhibit 9):

Date	Deficit
Dec. 10	-66
Dec. 11	-82
Dec. 14	-53
Dec. 15	-49
Dec. 16	-63
Dec. 17	-149
Dec. 18	-186
Dec. 21	-199
Dec. 22	-173
Dec. 23	-71

On and after approximately December 17, 1953, such deficits could not be satisfied except by the purchase of December futures from respondent Fox DeLuxe or its customers.

22. Respondent Fox DeLuxe received 47 carlots of eggs out of a total of 48 carlots of final deliveries n4 made on the December 1953 future. Of the 47 carlots so received, 23 carlots were refrigerator eggs in Chicago cold storage warehouses, 10 carlots were refrigerator eggs in cold storage warehouses outside Chicago, and 14 carlots were fresh eggs. All of these were received after trading ended (Complainant's Exhibit 15). As soon as they were received, the 23 carlots of Chicago refrigerator eggs, together with one carlot of fresh eggs, were sold by respondent Fox Deluxe to short traders, who then redelivered the eggs to respondent Fox DeLuxe, and this process was repeated by sales to other shorts until respondent Fox DeLuxe had made a total of 49 such sales, each of which was followed by a redelivery to respondent. These 49 redeliveries plus the 47 carlots originally delivered to respondent Fox DeLuxe served to satisfy the 96 carlots of long December futures held by respondent after the end of trading. (Complainant's Exhibit 16; Tr. pp. 89-91, 659-660.)

n4 A long receiving a carlot of eggs on delivery may sell futures and redeliver the carlot on his futures contract, and this process may be repeated, or a long receiving a carlot on delivery may sell the eggs for cash and the purchaser may deliver the carlot against his short position, or sell it to someone else for that purpose. The same carlot may, therefore, be delivered and received more than once in the same delivery month. A carlot received on delivery which does not subsequently reappear in delivery channels is a final delivery. (Tr. pp. 89-91.)

23. The sales to short traders described in Finding of Fact 22 were the only sales of deliverable eggs made by respondent Fox DeLuxe between the end of futures trading and the end of the delivery period December 31, 1953. Respondent Harold W. Fox demanded 47.95 cents from the shorts, refused to sell for less, and received this price on each of the 49 carlots sold. After the end of the delivery period, 19 of the 23 carlots of refrigerator eggs used in such sales were resold as cash eggs by respondent Fox DeLuxe at 41, 41.25, and 41.50 cents, and the remaining

four carlots were sold at 43.10 cents. The 14 carlots of fresh eggs received by respondent Fox DeLuxe were sold after the delivery period at prices ranging form 43.50 to 47 cents, and the 10 carlots of refrigerator eggs received outside Chicago were delivered on the January 1954 future at prices of 44.50 and 44.85 cents. (Complainant's Exhibit 16; Tr. pp. 819-825.)

24. The price of 47.95 cents which respondent Fox DeLuxe demanded for the refrigerator eggs which it sold to the shorts was determined by respondent Harold W. Fox on the basis of the fact that this was the closing price of the December future at the end of trading December 23, and the price which any short would have had to pay if he had bought futures to cover his short position. This price was substantially in excess of the true market value of fresh and refrigerator eggs. At the time of these sales, the price of fresh eggs in Chicago ranged between 45.50 and 46.50 cents and the price of refrigerator eggs should have been approximately four to six cents less than the price of fresh eggs. Respondent Fox DeLuxe was able to demand and receive 47.95 cents only because it was the sole source of supply of deliverable eggs in Chicago at that time, and the short traders needed such eggs to satisfy their outstanding contracts. There was insufficient time between the end of futures tradings and the end of the delivery period in which to procure fresh eggs, ship them to Chicago, pack them according to delivery specifications, and have them inspected and graded for delivery. (Complainant's Exhibit 27; Tr. pp. 208-209, 212-214, 222-226, 228-229, 303-307, 333-336, 353, 633, 655, 659-660, 733-734, 818-819.)

25. Speculative traders in futures do not ordinarily take delivery, and futures commission merchants usually advise such customers not to take delivery. In the event that a clearing member receives delivery by reason of a customer's long position, it is normal practice to enter the delivery and the proceeds of any subsequent sale in such customer's account. Of the 96 long carlots of December futures held by respondent Fox DeLuxe after the termination of trading, 34 carlots were in its house account, 29 carlots in the account of Earl Barnes, 19 carlots in the account of Charles Burbulis, and 14 carlots in the J. A. Roeser (respondent Gergen) account. The original deliveries, the proceeds of sales to the shorts, and the redeliveries received by respondent Fox DeLuxe in the liquidation of these 96 long contracts, were not entered in any of the above accounts but were entered by respondent Fox DeLuxe in a single cash egg account, and after

final disposition, the proceeds were distributed on a basis determined by respondent Roland N. Gergen. (Complainant's Exhibits 3, 14; Tr. pp. 93-96, 480, 504-505.) The respondent Fox DeLuxe and the above-named customers who held long contracts at the end of trading in the December futures realized a net profit of $ 21,571.07. (Respondents' Exhibit 6; Tr. p. 627.)

26. Cash eggs are bought and sold on the "spot call" of the Chicago Mercantile Exchange by posting bids and offers, and the prices paid in such transactions are posted and published. The prices of cash eggs bought and sold by private negotiation are not posted or published. On December 21, 22 and 23, 1953, respondent Fox DeLuxe purchased all the fresh eggs of deliverable grade,

quality and weight sold on the spot call of the Exchange. Total purchases were 2,200 cases (four and one-half carlots) and the prices paid were 46, 46.25, and 46.50 cents. Respondent Fox DeLuxe disposed of such eggs a day or two later by private negotiation at an average loss of 1.03 cents, the majority being sold for shipment outside Chicago. Most of these purchases were made by a broker not affiliated with respondent Fox DeLuxe. The broker was instructed by respondent Harold W. Fox to purchase whatever was offered at the above prices and to post bids at such prices for additional quantities and, in giving such instructions, respondent Harold W. Fox did not specify any limit as to the total quantities to be purchased. Respondent Fox DeLuxe made such purchases in order to support the price of deliverable eggs, ascertain how many of the eggs were available, and remove them from delivery channels. The 2,200 cases which respondent was able to purchase indicated to it that such supplies were small. Respondent Fox DeLuxe employed an independent broker to make such purchases in order to conceal the fact that it was engaged in buying the eggs purchased by the independent broker. Such brokers are customarily used to conceal the identity of traders whose transactions are instrumental in raising or lowering prices. (Complainant's Exhibits 6, 7, 8, 14; Tr. pp. 54, 105-113, 434, 738-739, 829-831.)

27. Fresh egg prices in December are normally higher than December futures prices, and the opposite relationship exists only when a technical situation has developed in the market, that is, when the open interest in the futures is very high in relation to the quantity of refrigerator eggs available for delivery. From December 10 through 23, 1953, fresh egg prices in Chicago decreased from 47.75 to 46.25 cents. During the same period,

prices of the December future increased from 44.30 to 47.75 cents. This period covered the last ten trading days in the December 1953 future, and the increase in the price of the future during this period was the second largest increase in the price of the December future in any comparable period in the ten years from 1947 through 1956. The largest such increase, which occurred in December 1952, was the result of manipulative operations described in *In re G. H. Miller and Company,* 15 Agric. Dec. 1015 (15 A.D. 1015) (1956), *aff'd,* 260 F.2d 286 (7th Cir. 1958), *cert. denied,* February 24, 1959. (Complainant's Exhibits 27, 28, 28A, 30 30A, 31; Tr. pp. 208-216, 223, 655.)

28. Under normal market conditions, December and January futures prices move approximately together, and a divergence in such movement can be expected only in technical situations. During the last ten trading days in December 1953, the price of the January 1954 future did not increase. As a result of the increase in the price of the December future during this period, the difference or spread between the prices of these two futures widened by approximately 3.48 cents. Only two other years from 1947 through 1956 show increases in the December-January futures price spread during the last ten days of trading in December. These two years were 1947 and 1952, and the increases on these occasions were caused by manipulative operations described in *In re Great Western Distributors, Inc.,* 10 Agric. Dec. 783 (10 A.D. 783) (1951), *aff'd,* 201 F.2d 476 (7th Cir. 1953), *cert. denied,* 345 U.S. 997 (1953), and *In re G. H. Miller and Company, supra,* respectively. (Complainant's Exhibits 29, 30, 30B; Tr. p. 210.)

29. Daily market letters issued by Harris, Upham and Company, a brokerage firm, contained the following comments with respect to the Chicago egg market on the dates indicated:

December 14, 1953, Morning Produce Letter (Complainant's Exhibit 18). ". . . December eggs at 45 cents are only 21/2 cents under large extras and 1 cents under Standards, suggesting that fresh eggs may be delivered on December contract should congestion develop."

December 15, 1953, Closing Produce Letter (Complainant's Exhibit 19). ". . . The 10 markets withdraw 2,598 cases which was 3,688 less out than last year. Local withdrawals 557 cases, reducing total stocks on hand to 18,185 cases.

This is really the motive behind the late advances today as shorts attempting to cover found practically nothing for sale."

December 16, 1953, Morning Produce Letter (Complainant's Exhibit 20). ". . . Absence of deliveries is not surprising in view of the fact total Chicago stocks are less than 40 cars and cash prices for deliverable eggs are well above the futures."

December 17, 1953, Morning Produce Letter (Complainant's Exhibit 21). ". . . Support came largely from interests who were already long and the commitment figures show that that class of buying predominated as the total is up 39 cars to 596."

December 17, 1953, Closing Produce Letter (Complainant's Exhibit 22). ". . . Support was in evidence on all weak spots from a distributing house, which is understood to be on the long side of December."

December 21, 1953, Morning Produce Letter (Complainant's Exhibit 23). ". . . The outstanding features were apparent congestion in December egg contracts and extreme weakness in the cash market for top grade eggs."

December 21, 1953, Closing Produce Letter (Complainant's Exhibit 24). ". . . The market was supported at the start by the leading long interests and buying throughout the session appeared to come from shorts."

December 22, 1953, Morning Produce Letter (Complainant's Exhibit 25). ". . . There is no indication as yet of the longs liquidating but it would seem logical to expect realizing sales on a scale up from this level as the maximum which may be obtained under the rules will be about 49 1/2 cents as of the close on Wednesday. The situation is definitely tight and it is getting exceedingly difficult to execute orders without running the price up or down 1/4 to 1/2 cents on comparatively small orders."

December 23, 1953, Morning Produce Letter (Complainant's Exhibit 26). "Although trading in December egg contracts was slow yesterday there was persistent evidence that liquidation was in progress and the open interest figures show a reduction of 146 cars. That still left 369 cars open and trading will end today. As of Tuesday night Chicago cold storage stocks were only about 25 cars and therefore no substantial deliveries may be expected unless they be of fresh eggs. The large merchandising interest which has been conspicuous on the long side of December has apparently been buying

fresh eggs on the spot call and prices for top grades are now about at the December level."

The author of the market letters above was an employee of Harris, Upham and Company, with 45 years of experience in observing and reporting commodity market prices and conditions, and the above comments reflected conditions in the market as he saw them on the dates in question. The reference to "interests who were already long," a "distributing house which is understood to be on the long side," "leading long interests," and "the large merchandising interest which has been conspicuous on the long side of December," applied to respondent Fox DeLuxe. (Complainant's Exhibits 18-26, inclusive; Tr. pp. 115-120.)

30. The Chicago Price Current, a recognized trade publication devoted to furnishing information on various commodities, including eggs, contained the following comment under date of December 23, 1953 (Complainant's Exhibit 32):

". . . expert market observers were of the opinion that the futures trading and spot trading were united in some sort of unholy matrimony thus making for the sporadic trading and large volume of sales."

The above comment reflected the view of traders in the market as summarized by the author. (Tr. pp. 136-145.)

31. During January 1956, respondent Fox DeLuxe, in its capacity as a registered futures commission merchant, carried 115 commodity futures trading accounts for various persons and firms, each of whom traded and held positions in the January 1956 future during January 1956. Thirty of the accounts were carried for persons who were officers, directors, associate brokers, or branch managers of respondent Fox DeLuxe, or members of the Fox family, or who were related to such persons directly or indirectly. Such accounts, hereinafter called affiliated accounts, were as follows (Complainant's Exhibits 33, 53):

W. J. or William J. Fox, president *a*)

Bert E. Fox, vice-president and director *a*)

Harold W. Fox, vice-president and director *a*)

Roland N. Gergen, executive vice-president and director

A. J. or Maude J. Gergen, wife of Roland N. Gergen

R. J. or Robert J. Fox, vice-president *a*)

Edward A. Fox, director *a*)

Louise M. Fox *b*)

Joan R. Fox *a*)

Kenneth Fox *a*)

Olive Fox *b*)

Mary J. Gelderman *a*)

Ada C. Hickey *a*)

B. Fox Friedrich *a*)

L. A. Friedrich *b*)

Norma Fox *b*)

J. A. Donahoe *b*)

P. J. Donahoe, brother of J. A. Donahoe

J. T. Donahoe, uncle of J. A. Donahoe and P. J. Donahoe

Joseph J. Fox, Jr., associate broker *a*)

Earl Barnes, associate broker

Eva Barnes, wife of Earl Barnes

Duggan Barnes, brother of Earl Barnes

Sol Goldwasser, associate broker

Mark Stewart, associate broker

G. W. Fiehler, father-in-law of Mark Stewart

W. V. Sweeney, associate broker

Francis Devuono, wife of Frank Devuono, former associate broker

Edson C. Eldredge, branch manager

R. C. Kersten, branch manager

a) Member of Fox family

b) Married to member of Fox family

During January 1956, respondent Fox DeLuxe also traded in egg futures for its own account. All trading in the Maude J. Gergen account was controlled and directed by respondent Roland N. Gergen. The G. W. Fiehler account was opened and the transactions in this account were ordered and financed by his son-in-law, the above-described Mark Stewart, without the prior knowledge or consent of G. W. Fiehler. (Tr. pp. 148, 293-296, 674, 751-752.)

32. In December 1955, at a time when the price of the January 1956 egg future was approximately 44 cents, respondent Harold W. Fox recommended to the board of directors of respondent Fox DeLuxe that the future be purchased in quantities greater than available refrigerator egg supplies, because long positions in excess of such supplies would then have to be satisfied by the delivery of fresh eggs, resulting in a speculative profit. The board of directors unanimously agreed with this recommendation, and respondent Harold W. Fox made similar recommendations to approximately 26 customers whose accounts he handled, including some of the affiliated accounts. Respondent

Fox DeLuxe made like recommendations to the other customers and affiliated accounts, and the purchases of January 1956 futures hereinafter described were made as a result of these recommendations. On or about January 1, 1956, respondent Harold W. Fox concluded that the decrease in cold storage stocks between December 1, 1955, and January 1, 1956, was "terrific," that holdings of such stocks were "very light," and that further decreases in the quantity of such holdings could be expected, and these factors convinced him that the purchasing program which he had recommended to respondent Fox DeLuxe and its customers should be continued. (Tr. pp. 724-725, 742, 759-768, 774-776, 831.)

33. On December 1, 1955, respondent Fox DeLuxe had a long position for all accounts on its books of 92 carlots in the January future. During the month of December, pursuant to the recommendations made by respondent Harold W. Fox, respondent Fox DeLuxe purchased substantial quantities of the January future for its house account, the affiliated accounts, and the other cstomers' accounts, and on December 30, 1955, the respondent corporation had a long position in such future of 236 carlots for its house account and 22 affiliated accounts, and an additional 357 carlots for the accounts of 51 other customers, or a total long position of 593 carlots, which position constituted 35.7 percent of the open interest in the future. On the same date, respondent Fox DeLuxe had a total short position in the future of five carlots for three customers, representing about 0.3 percent of the open interest. (Complainant's Exhibits 33, 34.)

34. After December 30, 1955, respondent Fox DeLuxe continued to purchase January 1956 egg futures, and between January 3, 1956 (the first business day following December 30), and January 16, the respondent corporation increased its long position by 353 carlots, of which 144 carlots were for its house account and 18 affiliated accounts, and the remaining 209 carlots were for the accounts of other customers. All such purchases were speculative. On January 16, 1956, as a result of these purchases, respondent Fox DeLuxe had a long position in the January future of 946 carlots, consisting of 334 carlots for its house account and 26 affiliated accounts, plus 612 carlots for the accounts of 70 other customers. On the same date this respondent had a total short position of 12 carlots for two customers (Complainant's Exhibit 33).

35. Between December 30, 1955, and January 16, 1956, the

open interest in the January 1956 egg future on the Exchange decreased from 1661 carlots to 1514 carlots, and total long contracts in the future held by clearing members other than respondent Fox DeLuxe decreased from 1068 carlots to 568 carlots, or by 46.8 percent. During the same period, as a result of the above-described purchases, the long position in such future of respondent Fox DeLuxe as a clearing member increased by 59 percent -- from 593 to 946 carlots -- and its position of the open interest rose from 35.7 to 62.5 percent Between January 16 and the end of trading the long position of respondent corporation for all accounts was never less than 59 percent of the open interest. During this period, which constituted the last seven trading days, respondent Fox DeLuxe purchased 158 carlots of the January future for 18 new accounts which had not previously traded or held any position in such future through respondent Fox DeLuxe during that month. The maximum short position in the January future held by respondent Fox DeLuxe during January 1956 was 26 carlots for the accounts of four customers on January 12, representing 1.90 percent of the open interest. Thereafter, its maximum short position in the future did not exceed 12 carlots, and on January 19, 20 and 23, consecutive trading days, it held no short position in the future for any account. During these three days respondent Fox DeLuxe made total net liquidating sales of 26 carlots for all accounts, and during such period the respondent corporation withheld from sale the balance of the long January futures in its own account, the affiliated accounts, and the other customers' accounts. (Complainant's Exhibit 33.)

36. On January 23, 1956, the long position in the January future of respondent Fox DeLuxe for 73 accounts was 737 carlots, or 70.4 percent of the open interest. On January 24, 1956, the last day for trading in the future, respondent Fox DeLuxe offered these 737 long carlots for sale on the Chicago Mercantile Exchange at 46.50 cents, which was the highest price recorded for the January future on that day. On the same day, the price in Chicago for fresh eggs described as U. S. Extras, Large, Minimum 60% A Grade, was 44 to 45 cents. These eggs were of better quality than required for par delivery on January 1956 egg futures contracts. (Complainant's Exhibits 33, 33A, 33B, 34, 34A, 49, 50; Tr. p. 742.)

37. On January 24, 1956, respondent Fox DeLuxe sold 337 carlots of the 737 carlots of January futures which it offered,

leaving it, after the end of trading, with long positions for its house account, 13 affiliated accounts, and ten other customer accounts, in the amount of 400 carlots, out of a remaining open interest of 405 carlots, the other five carlots being held by one other clearing member. On the short side of these 405 carlots, respondent held one carlot and the remaining 404 carlots were distributed among 27 other clearing members. The 400 long carlots held by respondent Fox DeLuxe were satisfied by the delivery of eggs to respondent as hereinafter described. (Complainant's Exhibits 33, 34, 36, 37.)

38. As a result of the transactions described above, trading on the long side of the January 1956 egg future was concentrated largely in the hands of respondent Fox DeLuxe during January 1956. On December 1, 1955, respondent Fox DeLuxe held long contracts in the January future in the amount of 92 carlots, while all other clearing members held a total of 1482 carlots. Thereafter, during December and January, long contracts in the future held by respondent Fox DeLuxe increased while those held by other clearing members decreased, with the result that on and after January 12, 1956, respondent held more long contracts than all other clearing members combined. Between January 16 and 22, respondent Fox DeLuxe held one and one-half times as many long contracts as the total held by all other clearing members. On January 23, 1956, respondent held approximately two and one-half times as many long contracts as did all other clearing members. Between January 16 and the end of trading, 36 clearing members in addition to respondent Fox DeLuxe carried long positions in the January 1956 future. Only four of these 36 clearing members attained maximum long positions during this period of more than 50 carlots, the largest being 227 carlots. During this period respondent Fox DeLuxe held between 715 and 946 carlots. On the short side of the January future during this period, approximately 53 clearing members in addition to respondent Fox DeLuxe carried positions, and the largest short position reached by any of these was 183 carlots. The largest short position held by respondent Fox DeLuxe during this period was 12 carlots. (Complainant's Exhibits 33, 34, 34A, 36, 37.)

39. On December 30, 1955, there were approximately 101 carlots of shell eggs in Chicago cold storage warehouses. This quantity declined steadily until

January 18, 1956, when it reached a low point of 63 carlots, after which these stocks increased

and on January 23 there were 104 carlots of shell eggs in such warehouses. During the week of January 16 the quantities of long January futures held by respondent Fox DeLuxe for its house account and the affiliated accounts were between two and five times as large as total stocks of shell eggs in Chicago cold storage warehouses, and the quantities of such future held by respondent for all accounts were between nine and fifteen times as large as such total stocks during this period. At all times in January 1956 up to the last day of trading in the future, respondent Fox DeLuxe held more than five and one-half times as many January futures contracts for all accounts as there were stocks of shell eggs in Chicago cold storage warehouses. (Complainant's Exhibits 33, 38.)

40. On December 30, 1955, and January 3, 1956, consecutive business days, fresh egg prices in Chicago declined by three cents. On January 4, 1956, Mark Stewart, an associate broker for respondent Fox DeLuxe, purchased for its account approximately 900 out of a total of 950 cases of fresh eggs of deliverable grade, quality and weight sold on the spot call of the Exchange. These purchases were made at prices of 50 to 51.50 cents. On the same day, respondent Fox DeLuxe sold 600 cases of these eggs for shipment out of Chicago at a price which represented a loss of 0.2 cent. On January 5, respondent sold an additional 200 cases for shipment out of Chicago at a loss of 2.1 cents, and on January 6 it sold the remaining 100 cases in Chicago at a loss of 2.1 cents. (Complainant's Exhibits 39, 45, 49; Tr. pp. 167-169.)

41. Fresh egg prices in Chicago continued to decline after January 4, 1956, and by January 17 had fallen an additional nine cents. On or about January 18, Isadore Katz, president of a Chicago firm engaged in the business of breaking eggs to make liquid and frozen eggs, attempted to purchase refrigerator eggs from respondent Fox DeLuxe for such use, but was informed by respondent Gergen that the refrigerator eggs which respondent Fox DeLuxe had in inventory were not for sale. Thereupon respondent Gergen, acting for his firm and with the knowledge of respondents Harold W. Fox and Bert E. Fox, entered into an oral contract with Isadore Katz, whereby Katz agreed to buy fresh eggs of deliverable grade, quality and weight on the Chicago Mercantile Exchange, without limit as to quantity, at 44 to 45 cents for his own account and use, and respondent Fox DeLuxe agreed to reimburse him, as hereinafter described,

for any loss incurred. Fresh eggs purchased at 44 to 45 cents could not profitably be converted into liquid or frozen eggs. Pursuant to the contract, Katz purchased all the fresh eggs of deliverable grade, quality and weight sold on the spot call of the Exchange on January 19, 20 and 23, 1956, consecutive business days. Such purchases were made at prices of 44 to 45 cents, and total purchases were 12,000 cases (25 carlots). Katz also posted bids for 3,000 cases (six carlots) at the same price, which remained unfilled at the close of the spot call session. Subsequently, in accordance with the agreement described above, respondent Fox DeLuxe paid to Katz the sum of $ 26,880, representing the difference between the purchase price of the fresh eggs and the price at which Katz was bidding for refrigerator eggs for breaking purposes in mid-February 1956, plus one-half cent per dozen profit, plus expenses incurred in carrying such fresh eggs. Respondent Fox DeLuxe entered this sum on its books as payment for 107,000 pounds of frozen egg whites purchased and received from the Katz firm, but no such purchase or receipt had taken place, Katz having used such fresh eggs in the usual course of his business. (Complainant's Exhibits 40, 41, 42, 49; Tr. pp. 239-245, 248, 643-648, 666-671.)

42. Respondent Fox DeLuxe entered into and carried out the above-described contract with Katz in order to support the price of fresh eggs and January futures, and to remove from the open market eggs of deliverable grade, quality and weight which might otherwise be available to the shorts for delivery on the

future. The prices of 44 to 45 cents paid by Katz on January 19, 20 and 23 were from two to three cents in excess of the true market value of fresh eggs. On January 25 after futures trading had ceased and the above-described agreement was no longer in effect, eggs of identical grade, quality and weight were unsuccessfully offered on the spot call of the Exchange at 41 cents, and on that day Katz posted maximum bids on the spot call of 40.50 cents for such eggs. On January 27, eggs of identical grade, quality and weight were unsuccessfully offered on the spot call at 38.50 cents, and on that day maximum bids of 38 cents for such eggs were posted on behalf of Katz. (Complainant's Exhibits 43, 44, 49; Tr. pp. 245-246, 314-316, 645-646, 667-668.)

43. On December 30, 1955, the price of fresh eggs in Chicago was 8.25 cents higher than the price of the January future, and on January 3, 1956, it was 6.50 cents higher. During the next two weeks, this differential or spread was reduced by reason of a steady decline in the price of fresh eggs while the price of the January future remained comparatively stable, and on January 16 the price of fresh eggs fell below the price of the future. During the next few days fresh egg prices increased, but remained below the price of the future at all times during the rest of the futures trading period, and at the end of futures trading on January 24, the January future closed at 46.45 cents as against 43.75 cents for fresh eggs. Thereafter fresh egg prices resumed their decline, and on January 27, the price of fresh eggs fell to 38.75 cents. (Complainant's Exhibits 49, 49A, 50, 51.)

44. Fresh egg prices in January are normally higher than futures prices, and both prices normally move in the same general direction. An inverted price relationship or movement of the prices in opposite directions indicates the presence of factors other than supply and demand. The production of eggs in January 1956 was increasing and the supply of fresh eggs was in excess of demand, and the trend of fresh egg prices in January 1956 reflected this supply and demand situation. The prices of the January future, particularly on and after January 16, were not justified by and did not reflect the supply and demand situation in the egg market, but were substantially in excess of true market value and were brought about by continued heavy purchases of the future and by concentration of the long interest in the future on the books of respondent Fox DeLuxe. When January futures prices became higher than fresh egg prices, the January future became the best market for fresh eggs. This created an abnormal demand for fresh eggs for shipment to Chicago and delivery on the future, and between January 19 and 31, 352 carlots of such eggs were diverted from normal channels of trade, shipped to Chicago, placed in cold storage, and delivered on the January future. This movement reduced supplies customarily available in producing areas, increased the prices of such supplies, distorted normal distribution patterns, and interfered with established merchandising operations. (Complainant's Exhibits 46, 47, 48; Tr. pp. 214, 229-235, 264-265, 268-270, 274-278, 284-292, 299-300, 313-316, 319-323, 326, 341-345, 510-511, 655.)

45. Respondent Fox DeLuxe received 441 carlots of eggs on delivery in January 1956, of which 41 carlots were received before the end of trading and 400 carlots after the end of trading. Total deliveries on a final receiver basis in January 1956 were 446 carlots. The largest quantity of eggs delivered on the January future in any other year from 1938 through 1957 was 143 carlots. Of the 446 carlots delivered in January 1956, 393 carlots were fresh eggs. The largest quantity of fresh eggs delivered on the January future in any other year from 1938 through 1957 was 25 carlots. Respondent Fox DeLuxe received 388 of the 393 carlots of fresh eggs delivered in January 1956. (Complainant's Exhibits 46, 47; Tr. p. 187.)

46. The 441 carlots of eggs received on delivery by respondent Fox DeLuxe in January 1956, as described above, were disposed of by selling 3531/2 carlots of shell eggs at prices ranging from 25.50 to 43.25 cents, breaking and selling 671/2 carlots as liquid eggs at prices equivalent to 21 to 31 cents, and delivering the remaining 20 carlots on September 1956 futures which had been sold at prices of 31.15 to 35.65 cents. The 441 carlots were received by respondent Fox DeLuxe on behalf of its house account and more than 23 of the affiliated and other customer accounts. The respondent did not enter such receipts or the proceeds of disposition in the individual accounts, but handled such receipts and proceeds as a unit by entering them in a single cash egg account on its books. This was contrary to the usual practice. (Complainant's Exhibit 33; Tr. pp. 178-180, 183-186.)

47. On January 19, 1956, James Koutsky of the Chicago office of the Commodity Exchange Authority addressed the following letter to Everette B. Harris, president of the Chicago Mercantile Exchange (Complainant's Exhibit 52):

141 West Jackson Blvd. -- Room 1200

Chicago 4, Illinois

January 19, 1956

Mr. Everette B. Harris, President

Chicago Mercantile Exchange

Chicago 6, Illinois

Dear Mr. Harris:

Mr. Rodger R. Kauffman has requested me to transmit the following teletype message to you:

"We have received widespread complaints that January egg futures and actual eggs are being manipulated on your Exchange. Most recent information available to us shows continuing large open contracts in the face of an apparently very limited quantity of eggs available for delivery. Of the 1284 contracts open as of January 18, 762 carlots

were held by one of your clearing members for itself and a number of customers. A substantial proportion of these were purchased on or since January 16. Prices for the January Refrigerator contract are approximately 21/2 cents above those quoted for the February fresh egg contract. "The above is called to your attention for such action as your Board of Governors may consider appropriate pursuant to the requirement for the prevention of manipulation and cornering set forth in Section 5(d) of the Commodity Exchange Act.

"Rodger R. Kauffman

Administrator

Commodity Exchange Authority"

Very truly yours,

James Koutsky

Exchange Supervisor in Charge

In January 1956, Everette B. Harris informed respondent Harold W. Fox that if the Chicago Mercantile Exchange found any evidence of manipulation in the January future, Harold W. Fox would be brought to task. Mr. Harris also informed respondent Gergen that there was to be no trouble with the liquidation of January futures contracts, and the respondent promised to cooperate. (Tr. pp. 601-602, 607.)

CONCLUSIONS

I

Respondents argue that since the complaint does not make the Fox DeLuxe customers respondents in the proceeding as coconspirators with respondents or as acting in concert with respondents, the positions and the trading of Fox DeLuxe customers cannot be considered and aggregated with respondents' positions and trading in determining whether respondents breached the act. Respondents cite in this connection *General Foods Corporation* v. *Brannan,* 170 F.2d 200 (7th Cir. 1948), which they contend stands for the proposition that one person cannot be held responsible for the actions and statements of another in the absence of a conspiracy or agreement.

The opinion in the *General Foods* case invoked by respondents held that one respondent could not be held liable for the actions and statements of other respondents in the absence of conspiracy, agreement or a relationship kindred thereto. The administrative decision (6 Agric. Dec. 288 (6 A.D. 288) (1947)) overruled by the court held that the respondents were charged with "acting in concert" but the court believed that the words "collaborate" and "collective" had no legal significance and that the complaint was not one of "acting in concert." n5

n5 The administrative decision found that a respondent futures commission firm utilized the trading of Schedule A customers, not respondents, in the attempted manipulation, but the opinion of the court relied upon by respondents here relates not to the customers but to respondents in that case.

Respondents are charged here with substantive violations of the act and not with unlawful agreement or conspiracy as an offense *per se.* There is nothing invalid about such a charge. Manipulations are prohibited by the act whether accomplished by one or more than one person (*In re G. H. Miller and Company, supra),* and respondents are charged with what they did and not with any violations of the act by their customers. Whether or not the customers or some of them knew of the alleged manipulative schemes afoot is not essential to the causes of action made out by the complaint. And the causes of action made out in the complaint are certainly violations of the act if established. Respondents' argument would bring about the strange result that a futures commission merchant would be free to raise or lower futures prices through the use of his customers' trading for such purpose if the customers do not know of the manipulative plan. The mere statement of the contention carries its own negative answer. In a proceeding under the act, *In re Reuben McGuigan,* 5 Agric. Dec. 249 (5 A.D. 249) (1946), the respondent was to have manipulated futures prices to his benefit through his market "tip" sheet and through the sending of hundreds of telegrams to traders. Respondents' view is to the effect that the trading of McGuigan's clients which resulted in the manipulated prices could not be considered against McGuigan unless the traders who took his market advice were engaged in a conspiracy with him or knowingly took part in his manipulation.

The evidence combining positions and trading of customers with those of respondents was not only necessary but essential to the causes of action stated. The Barnes, Burbulis and Roeser accounts in December 1953 and the affiliated accounts in the January 1956 operation are regarded by complainant as being under a greater degree of management or control by respondents than the other customer accounts but we know of no legal requirement that the owners of such accounts must be charged with knowing participation in the manipulation and made parties to the proceeding in order to charge respondents with manipulation.

What the evidence establishes as to the allegations of the complaint with respect to the relationship between respondents' activities and the affiliated and customer accounts will be set out hereinafter.

II

Respondents were responsible for the program of influencing Fox DeLuxe's customers to enter the long side of the market in December 1953 with about 11 days of trading left, for the respondents corporation entering the market as a substantial long, for a stepped-up purchasing program for Fox DeLuxe and customers commencing December 17 as the crucial last few days of trading were coming up, for withholding sales of respondents' futures and respondent corporation's customers futures December 18, 21 and 22, for buying all fresh eggs of deliverable quality offered on the spot call of the Chicago Mercantile Exchange on December 21, 22 and 23, for offering all December futures of Fox DeLuxe and customers on the last day of trading at the highest price for the day, and for charging a uniform price, 47.95 cents, for all refrigerator eggs sold to shorts for delivery purposes after the close of trading and handled as a pool for the Fox DeLuxe, Barnes, Burbulis and Roeser (Gergen) accounts.

The long positions of customers were taken upon the advice and recommendations of respondent Fox DeLuxe. The long positions of customers increased as the crucial last few days of trading approached. The Barnes, Burbulis and Roeser (Gergen) accounts and Fox DeLuxe house account increased their long holdings. There were practically no futures sold from any of the accounts December 17, 18 or 21. On the last day of trading Fox DeLuxe offered for sale all the futures, its own and those for all the other accounts, at the highest price for the day. The house account and the Barnes, Burbulis and Roeser (Gergen) accounts wound up with all the unliquidated long contracts after the close of trading. It is plain from these facts that the trading of the Fox DeLuxe customers and the Barnes, Burbulis and Roeser (Gergen) accounts was not trading in which each customer independently arrived at a decision as to what to do. The trading was influenced, directed and managed by respondents. The Roeser account belonged to Gergen; Barnes was an associate broker for Fox DeLuxe; and Burbulis was a customer of Barnes. The size of the long positions of the Barnes and Burbulis accounts, the manner of purchase of the long contracts for these two accounts and the facts that these two accounts together with the Roeser (Gergen) account and the Fox DeLuxe house account had the only unliquidated long contracts after the close of trading and shared in the delivery pool show management and control of these accounts by respondents and even perhaps awareness of the plan on the part of the owners of the accounts.

Respondents insist, however, that there was no manipulative intent present. But respondents are professional traders. They knew of the small stocks of refrigerator eggs in Chicago and they knew that the maintenance during the last few trading days of an open interest greatly in excess of refrigerator egg stocks would have a price-enhancing effect.

Their manipulative purpose is glaringly revealed by the fresh egg purchases on the Exchange December 21, 22 and 23. Fresh egg prices had been declining and might be expected to continue to do so. But on these three consecutive days respondent Fox DeLuxe stepped in and purchased all the eggs of deliverable grade, quality and weight offered. Most purchases were made through an independent broker and the prices were 46, 46.25 and 46.50 cents with bids at these prices for more eggs. Thus, to shorts considering the possibility of making arrangements for delivery of fresh eggs, the price was established as at least 46 cents. Moreover, respondent Fox DeLuxe moved the fresh eggs purchased out of Chicago making them unavailable to shorts and sold them at a loss. Obviously Fox DeLuxe was taking no chances that fresh egg prices would decline before the close of trading to the point that shorts might decide it to be cheaper to make arrangements to deliver fresh eggs than to liquidate by buying futures, and of course if fresh egg prices declined sufficiently respondent Fox

DeLuxe and customers might receive fresh eggs which would be worth less than the many futures purchased December 17 and 18 at about 441/2 cents by Fox DeLuxe and customers. Respondents' explanation that the purchases of fresh eggs on the Exchange amounted merely to "testing the market" is simply unbelievable.

There is no doubt that the December 1953 operation was manipulative in purpose, that is, that the respondents sought to use the weight of the corporation's trading and that of its customer accounts to put a "squeeze" on the shorts and to influence

upwards the price of egg futures and cash refrigerator eggs. The "squeeze" is a well-known manipulative technique n6 and unquestionably constitutes an attempt to manipulate prices within the meaning of the act.

n6 See, e.g., Encyclopedia of the Social Sciences (1937 ed.), Vol. IV, p. 409; Baer and Woodruff, Commodity Exchanges (3d ed. 1935), p. 146; Hubbard, Cotton and the Cotton Market (1927), p. 396; Report of the Federal Trade Commission on the Grain Trade (1926), Vol. VII, p. 244; Emery, Speculation on the Stock and Produce Exchanges of the United States (1896), p. 175.

We conclude too that manipulated prices were brought about by the trading tactics of respondents. As shown by the Findings of Fact, comparisons of December futures prices with fresh egg prices in December and with January futures in December demonstrate that December futures prices in the last few days of trading were artificially high. These prices were not due to economic conditions in the egg market generally but to the situation within the Chicago futures market of open long contracts greatly in excess of deliverable supplies of refrigerator eggs. A large part of the open long interest was held by respondent corporation and its customers, 35.6 percent December 18; 43.7 percent December 21; and 53.7 percent December 22.

Respondents used the long positions of Fox DeLuxe, the Barnes, Burbulis and Roeser (Gergen) accounts and the customers' accounts to push the futures price up and the price advanced. Respondents by their purposeful activities caused at least part of the price rise and thereby manipulated the futures price. They also, of course, at the same time manipulated prices of cash refrigerator eggs which follow futures prices and they demanded and got a uniform price of 47.95 cents, the manipulated closing futures price, for refrigerator eggs sold to shorts for delivery after the close of trading. Nineteen of the 23 carlots of refrigerator eggs used in such sales were resold after the end of the delivery period by respondent Fox DeLuxe at 41, 41.25 and 41.50 cents and the remaining four carlots at 43.10 cents.

III

The facts with respect to the January 1956 operation also lead inevitably to the conclusion that respondents, as charged, attempted to and did manipulate January 1956 egg futures prices and prices of cash refrigerator eggs. The operation was conducted on a much larger scale but was of essentially the same manipulative nature, namely, a squeeze to pressure prices of

futures and cash refrigerator eggs upward by the aggressive development and maintenance of long positions of Fox DeLuxe, affiliated accounts and customers greatly in excess of deliverable stocks of refrigerator eggs. For example, during the week of January 16, 1956, respondent Fox DeLuxe had between nine and 15 times as many futures on its books as there were shell eggs, deliverable and undeliverable, in Chicago warehouses and during the entire trading month it never had less than 51/2 times as many. As in December 1953, but again on a larger scale, respondent Fox DeLuxe bought fresh eggs of deliverable quality on the spot call of the Chicago Mercantile Exchange to remove them from the market and from the shorts and to support the price. Fox DeLuxe even went to the extremes of the deal with Katz described in Findings of Fact 41 and 42 which alone is a graphic demonstration of the attempt to manipulate prices of the egg future. Fox DeLuxe withheld from sale the bulk of the dominating long position of itself and customers until the last day of trading when it offered 737 carlots at a uniform price, the highest price for the day. That respondents attempted to manipulate egg futures prices and cash refrigerator egg prices is the only reasonable inference to be drawn from the evidence.

The uniform preference for the long side of the market by 111 of Fox DeLuxe's 116 customer accounts, the continued purchasing and holding of futures while other traders were liquidating, the offer of 737 carlots of futures at the same high price on the last trading day on behalf of 72 different accounts, the election not to close out the long positions of 24 different accounts but to accept delivery of eggs instead, and the common sharing of proceeds and expenses in connection with the disposition of the 441 carlots received on delivery, negative any possibility of separate and independent action on the part of the affiliated accounts and of other Fox DeLuxe customers.

Furthermore, the uniform trading activity again found its way, as it did in December 1953, to a single broker to the exclusion of all others. In January 1956, there were 113 registered futures commission merchants who were members of the Chicago Mercantile Exchange. Of these, there were 58 clearing members who held positions in the January future for themselves or their customers after mid-January. Until the last few trading days, a substantial portion of these clearing members had positions on both sides of the market, although the concentration

of long trading through respondent Fox DeLuxe was, by this time, quite apparent. By the time trading closed, respondent Fox DeLuxe had virtually preempted the long side of the market with 400 out of the 405 remaining contracts, but the short contracts were dispersed among 27 other clearing members (Complainant's Exhibits 36, 37). This concentration of the long interest through a single firm -- one out of 113 -- in conjunction with the other circumstances described, leads to the inescapable conclusion that respondent Fox DeLuxe proceeded in January 1956 in the same fashion as it did in December 1953, and that it encouraged, guided, and lent its facilities, management, and leadership to the development of a large number of individual long positions which it used for manipulative purposes.

It is clear too that respondents' activities brought about manipulated prices for the egg future and cash refrigerator eggs. Findings of Fact 43, 44, 45 and 46 demonstrate convincingly that such was the case.

IV

Concerning the fresh egg purchases on the spot call by respondent Fox DeLuxe in December 1953 and the purchases in January 1956 including the Katz transactions, respondents argue that price "pegging," or support of an existing price, does not constitute manipulation of prices proscribed by the act, citing *General Foods Corporation* v. *Brannan, supra.* Complainant invokes *United States* v. *Socony-Vacuum Oil Company,* 310 U.S. 150, 221 (1940) to the effect that stabilization of prices by a combination is manipulation of prices. We still believe it to be true, as we said in the administrative decision in *In re General Foods Corporation,* 6 Agric. Dec. 288 (6 A.D. 288), 305 (1947), overruled in *General Foods Corporation* v. *Brannan, supra,* that, "To manipulate prices means . . . to cause prices to go up or down by means directed to either such end." In *In re Zenith-Godley Company,* 6 Agric. Dec. 900 (6 A.D. 900) (1947), respondents were found to have manipulated prices of cash butter on the New York Mercantile Exchange in violation of the act by supporting butter prices, that is, by preventing a price decline through purchasing all butter offered for sale. The fresh egg purchases here were accomplished for a price supporting purpose. This is practically admitted as to the Katz transactions, respondents' own explanation being that the transactions were carried out to remove a "glut" on the market. But we do not find it necessary to hold that the supporting of fresh egg prices on the Chicago Mercantile Exchange constituted violations of the act separate and apart from the manipulations of futures and cash refrigerator egg prices since the complaint seems to regard the fresh egg purchases primarily as part of, and in aid of, the manipulation of futures prices and cash refrigerator egg prices.

V

Respondents urge that fresh eggs were deliverable on the December 1953 and January 1956 futures contracts and that therefore there was no attempt to manipulate and no manipulation of futures and cash refrigerator egg prices. Whether or not fresh eggs, a more valuable product than refrigerator eggs, were deliverable on the futures contract seems to us to make little or no difference in adjudication of the issues in this proceedings. True, the availability of fresh eggs might place a ceiling on the extent of manipulation possible just as daily limits on price rises for futures do. And freely available deliverable fresh eggs and declining prices for fresh eggs might make manipulation of futures prices financially unrewarding to the manipulators. But if the prices for futures and for cash refrigerator eggs are artifically enhanced by manipulative means such as a "squeeze" the act is still breached regardless of the deliverability of fresh eggs on the futures contract.

Respondents offer explanations for all or most of the evidence indicating manipulative motive. These explanations are either unconvincing or plainly incredible. All exceptions, objections, etc., inconsistent with this decision and order are denied or overruled whether or not specifically discussed herein.

VI

In view of the foregoing, it is concluded that the respondents attempted to manipulate and did in fact manipulate the prices of egg futures on the Chicago Mercantile Exchange and the prices of cash refrigerator eggs in interstate commerce in December 1953 and January 1956.

The violations were flagrant, deliberate, and extensive in scope. The manipulation in 1953 was repeated on a much larger scale in 1956. The 1956 operation involved a substantial segment of the futures market, adversely affected the cash market in Chicago and outside areas, and interfered with the flow of eggs in interstate commerce. Such violations are very serious. "Manipulations . . . for speculative profit, . . . exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only . . . justifiable hedging but disturb the normal flow of actual consignments." *Board of Trade* v. *Olsen,* 262 U.S. 1, 39 (1922). The Commodity Exchange Act is designed "to remove burdens on interstate commerce caused by manipulation and market control." *Board of Trade of Kansas City* v. *Milligan,* 90 F.2d 855, 857 (8th Cir. 1937).

The evidence discloses that respondents Roland N. Gergen and Harold W. Fox were the leaders who planned and executed the manipulations with the full knowledge and consent of the board of directors of respondent corporation, and considering the gravity of the violations, the sanctions imposed upon these three respondents are necessary to prevent or discourage future manipulations and attempted manipulations by these respondents and others on the commodity exchanges.

The evidence also shows that Bert E. Fox participated in the violations. As a vice-president and member of the board of directors he approved the manipulations and as floor broker he executed some of the transactions. Despite this prima facie showing, Bert E. Fox did not testify or even attend the hearing. Complainant, therefore, has discharged its burden of proof.

The evidence further indicates, however, that Bert E. Fox was not the motivating force behind the manipulations or that he actively planned them, although he acquiesced and went along with the schemes. The president of the Exchange testified in effect that he did not consider Bert E. Fox a very influential member of Fox DeLuxe and never discussed with him any serious matters. Accordingly, it is our opinion that while some sanction should be imposed upon Bert E. Fox, a sanction less severe than that imposed upon the other respondents is justified.

Upon consideration of all the factors, it is concluded that the registration of respondent Fox DeLuxe as a futures commission merchant and the registration of respondent Harold W. Fox as a floor broker be revoked; that the registration of Bert E. Fox as a floor broker be suspended for a period of three months; and that all trading privileges on all contract markets be denied to respondents Fox DeLuxe Foods, Inc., Harold W. Fox, and

Roland N. Gergen for a period of one year, and to respondent Bert E. Fox for a period of six months.

ORDER

Effective 30 days after the issuance of this order, the registration of Fox DeLuxe Foods, Inc., as a futures commission merchant and the registration of Harold W. Fox as a floor broker are revoked, and the registration of Bert E. Fox as a floor broker is suspended for a period of three months.

Effective 30 days after the issuance of this order, all contract markets shall refuse all trading privileges to Fox DeLuxe Foods, Inc., Harold W. Fox, and Roland N. Gergen for a period of one year, and to Bert E. Fox for a period of six months, such refusals to apply to all trading done and positions held directly and also to all trading done and positions held indirectly through persons owned or controlled by any of respondents.

A copy of this decision and order shall be served upon each of the parties and upon each contract market.

LOAD-DATE: June 8, 2008