

Commodity Futures Trading Commission
CEA CASES

NAME: ARTHUR GERBER AND GERBER INVESTMENT CO.

CITATION: 27 Agric. Dec. 1362

DOCKET NUMBER: 150

DATE: NOVEMBER 5, 1968

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(No. 12,121)

In re ARTHUR GERBER and GERBER INVESTMENT CO., INC. CEA Docket No. 150.
Decided November 5, 1968.

**Segregation -- Misuse of funds -- Failure to produce records -- Jurisdiction
-- Denial of trading privileges -- Revocation of registration**

Respondents are found to have operated as a "futures commission merchant" as defined in the act and to have violated the act and regulations thereunder by failing to segregate customers' funds, failing to keep required records, depositing customers' funds in a general bank account, drawing on such bank account for unauthorized purposes, and refusing to produce records required to be kept available for inspection, for which violations the registration of respondent corporation as a futures commission merchant is revoked and all contract markets shall refuse all trading privileges to both respondents for a period of 6 months.

Earl L. Saunders for Commodity Exchange Authority.

Respondents *pro se*.

Jack W. Bain, Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is a proceeding under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) instituted by a complaint filed December 21, 1967, by the Under Secretary of Agriculture. The respondents, a corporation registered under the act as a futures commission merchant and its sole officer and director and major stockholder, were

charged, in part, with failing to segregate customers' funds and failing to keep required records in violation of the act and the regulations issued thereunder. In an amended complaint filed January 4, 1968, by an Assistant Secretary, an additional charge was made that respondents had refused, and continue to refuse, to produce records required by the act and the regulations to be kept available for inspection.

Respondents filed an answer January 11, 1968, denying that respondent corporation is subject to the act as a futures commission merchant although it is so registered and, in effect, denying or explaining the violations of the act charged in the complaint. An oral hearing was held in Chicago, Illinois, February 7, 1968, before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture. At the hearing, complainant was represented by Earl L. Saunders, Office of the General Counsel, United States Department of Agriculture, and respondent Arthur Gerber appeared and

testified on behalf of himself and respondent corporation. After the hearing, the parties filed briefs. On July 18, 1968, the hearing examiner filed a report containing proposed findings of fact and conclusions and recommending that respondents be found to have violated the act as charged, that the registration of respondent corporation as a futures commission merchant under the act be revoked and that all contract markets be ordered to refuse all trading privileges to respondents for a period of three years. Respondents filed exceptions to the hearing examiner's report.

FINDINGS OF FACT

1. Respondent Gerber Investment Co., Inc. is a corporation organized and existing under the law of the State of Illinois whose address during the period involved herein was 230 North Michigan Avenue, Chicago, Illinois. This respondent was organized in May 1966, is registered as a futures commission merchant under the act and has been so registered continuously since November 29, 1967.

2. Respondent Arthur Gerber is an individual whose business address during the period involved herein was 230 North Michigan Avenue, Chicago, Illinois. This respondent organized respondent corporation and is now, and has been at all times since the inception of such corporation, its president and sole officer and director and the owner of more than 92 percent of its capital stock with

the remainder of such stock being equally held by respondent Gerber's daughter and sister-in-law. At all times material herein, Arthur Gerber was in complete control of the corporation, initiated and carried out its acts, dealings, and transactions, and used it merely as a business conduit through which he did business. During the years 1960 through 1964, Arthur Gerber was a member of a partnership doing business as Arthur Gerber and Company, which was registered as and engaged in the business of a futures commission merchant under the act.

3. From on or about May 19, 1967 through December 8, 1967, Arthur Gerber engaged in soliciting and accepting discretionary orders from individual customers for the purchase and sale of Maine Irish potato futures on the New York Mercantile Exchange, a duly designated contract market under the act, and in connection therewith accepted money from each customer to margin the trades to be made for the customer's account. Each such order was in the form of a written trading authorization, which was addressed to "Gerber Investment Company, Inc. Attention: Mr. Gerber", was signed by the customer, and read as follows:

We have, and will, at our discretion, deposit funds in various amounts with Gerber Investment Company, Inc. with the definite understanding that they are to be used only for investment in trading in Maine Potato Futures, which trading shall be handled at the sole discretion of Arthur Gerber, President, of Gerber Investment Company, Inc.

4. In soliciting such trading authorizations, Arthur Gerber mailed "market letters", which he composed, to persons whose names he selected at random from the telephone book. Each "market letter" was typewritten on the letterhead of "Arthur Gerber Foods Company, Division of Gerber Investment Co., Inc.", bore the heading, "The Potato Picture", and was signed, "Gerber Investment Co., Inc., By: Arthur Gerber".

5. During the period specified in Finding of Fact 3, and acting pursuant to the authorizations set forth therein, Arthur Gerber traded in his discretion for the accounts of individual customers in May 1968 Maine potato futures on the New York Mercantile Exchange. Gerber so traded through an omnibus account, that is, an account carried by one futures commission merchant with another in which the transactions of two or more persons are combined rather than designated separately. The account was carried in the name of respondent corporation with F. J. Reardon, Inc., a

registered futures commission merchant and a clearing member of the New York Mercantile Exchange. F. J. Reardon, Inc. rendered to Arthur Gerber all confirmations and statements it prepared in connection with the trades in such account. Respondents did not identify such omnibus account to Reardon as an account for customers. Arthur Gerber prepared and rendered to each of his customers confirmations and purchase and sale statements relating to the trades made for the customer's account. All brokerage and clearing fees incurred in connection with each transaction were paid by the customer for whose account the transaction was made. For his services, Gerber received from each customer a commission of \$ 7.00 for each transaction made for such customer's account.

6. At no time during the period here involved did respondents segregate or account separately for the funds of customers held by respondents. Nor did respondents make any computation or record of the amount of money required to be held in segregated account in order to pay the credits and equities due their customers. Arthur Gerber deposited all customers' funds received by the respondents in his personal bank account carried in the name of the respondent corporation and drew on such account and used the customers' funds not only to pay margin to F. J. Reardon, Inc., but to pay his personal expenses. The total amount of funds held in such bank account and in the trading account carried in the name of the respondent corporation with F. J. Reardon, Inc. was insufficient to pay the credits and equities due the respondents' customers by \$ 8,037.33 on November 30, 1967, and by \$ 10,705.77 on December 8, 1967.

7. On December 19, 1967, Robert Piccirillo, an auditor in complainant's Chicago office, accompanied by a Mr. Zsatko, an investigator for complainant, visited respondents' office and asked Arthur Gerber for permission to examine his books and records. Arthur Gerber refused Messrs. Piccirillo and Zsatko access to his books and records.

CONCLUSIONS

It is apparent from the record that the activities of Arthur Gerber, acting for and on behalf of and, in reality, through, respondent corporation, in the solicitation and acceptance of trading authorizations or discretionary orders from individual customers for the purchase and sale of potato futures and the acceptance, in connection with such solicitation and acceptance of orders, of

money to margin the resulting trades come within the definition of "futures commission merchant" contained in section 2 of the act (7 U.S.C. 2). n1 The record further discloses that Arthur Gerber acting pursuant to the discretionary orders of customers so traded for the accounts of such customers in the May 1968 potato future on the New York Mercantile Exchange.

n1. Section 2 of the act reads, in part, as follows: . . . The words "futures commission merchant" shall mean and include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

However, respondents did not meet the requirements of the act and the regulations issued thereunder in connection with such trades. Respondents did not segregate and account separately for their customers' funds, did not make any computation or record setting forth the amount of customers' money and equities required to be kept in segregation, and deposited all such customers' funds in a general bank account in the name of respondent corporation and drew upon such account and used their customers' funds for respondents' own purposes

and benefit. Such activities clearly violated sections 4d and 4g of the act (7 U.S.C. 6d and 6g) and sections 1.20, 1.21, 1.32 and 1.35 of the regulations issued pursuant to the act (17 CFR 1.20, 1.21, 1.32 and 1.35). Cf., e.g., *In re David Laiken*, 24 Agric. Dec. 1460 (24 A.D. 1460) (1965); *In re Daniel A. DeLattre*, 24 Agric. Dec. 1031 (24 A.D. 1031) (1965); *In re Milrose Brokerage Co., Inc.*, and *Milton E. Rosenberg*, 26 Agric. Dec. 225 (26 A.D. 225) (1967). Further, the refusal of respondents to permit access to complainant's representatives to respondents' records, as set forth in Finding of Fact 7, also violated section 4g of the act and section 1.35 of the regulations issued thereunder.

The actions of Arthur Gerber as set forth in detail in the hearing examiner's report demonstrate his inability and the inability of respondent corporation, as well as their unwillingness or refusal, to function as a futures commission merchant as required by the act. The violations found herein are clearly willful, serious and flagrant. It is concluded, by reason thereof, that the registration of respondent corporation as a futures commission merchant under the act should be revoked and that respondents should be denied trading privileges on all contract markets. However, the period of such denial recommended by complainant and the hearing examiner appears to be excessive. It is further concluded that

respondents should be denied all trading privileges on all contract markets for a period of 6 months.

ORDER

Effective December 1, 1968, the registration of respondent Gerber Investment Co., Inc. as a futures commission merchant under the act is revoked.

Effective December 1, 1968, all contract markets shall refuse all trading privileges to respondents Arthur Gerber and Gerber Investment Co., Inc., for a period of 6 months, such refusal to apply to all trading done and all positions held by the respondents, directly or indirectly.

A copy hereof shall be served upon respondents and upon each contract market.

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