

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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3:59 pm, Feb 08, 2013

In the Matter of:)

Gelber Group, LLC,)

Respondent.)
)
)
)

CFTC Docket No. 13-15

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, AS AMENDED,
MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Gelber Group, LLC (“Respondent” or “Gelber”) committed violations of the Commodity Exchange Act, as amended (“the Act”), and the Commission’s Regulations thereunder in two separate incidents, the first occurring from at least August 20, 2009 through February 16, 2010, the second occurring from at least March 2010 to August 2010 (the “relevant periods”). In the first incident, Gelber violated Sections 4c(a)(2)(B), and 9(a)(2) of the Act, as amended, 7 U.S.C. §§ 6c(a)(2)(B) and 13(a)(2), and, in the second incident, Gelber violated Section 4c(a)(2)(A) of the Act, as amended, 7 U.S.C. § 6c(a)(2)(A), and Commission Regulation 1.38, 17 C.F.R. § 1.38 (2012). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether the Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

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

¹ Respondent consents to the entry of this Order and to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Respondent does not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in

III.

The Commission finds the following:

A. SUMMARY

First, from at least August 20, 2009 through February 16, 2010, a Gelber proprietary trader entered electronic orders for the CME Group, Inc.'s ("CME") NASDAQ E-mini 100 futures contract ("NASDAQ E-mini") on Globex, the CME's electronic trading platform, during Globex's pre-opening session that were not true and bona fide. Although these orders could not be executed in the pre-opening session, they would become executable on the open. The trader had no intention of allowing the orders to be executed and ultimately cancelled them prior to the open. These orders caused price fluctuations in the indicative opening price ("IOP") for the contract.

Second, from at least March 2010 to August 2010 two Gelber proprietary traders, at the direction of a trading group manager, engaged in wash trades in certain Russell Index futures contracts on the IntercontinentalExchange ("ICE") in order to inflate Gelber's volume in these contracts and enable Gelber to obtain increased rebates from ICE as part of an ICE incentive program.

B. RESPONDENT

Gelber Group, LLC is a proprietary trading group headquartered in Chicago at 141 West Jackson Boulevard, Suite 2100A. Gelber also maintains offices in California, Connecticut, New Jersey, London, England and Schindellegi, Switzerland.

C. FACTS

1. Gelber Entered Illegal Orders in the NASDAQ E-mini 100 Futures Contract

a. The Pre-Opening Session

There are two trading sessions for NASDAQ E-mini futures contract – a day session and an overnight session. In addition, there is a pre-opening session. Globex users are able to enter electronic orders during the pre-opening session that become executable upon the opening of the day session unless they are cancelled prior to the open. There is a 30 second "lock-down" period immediately before the open during which time Globex users can enter new orders but cannot modify or cancel existing orders. The purpose of the pre-opening session is to help determine at what price the market will open for the day trading session.

b. The Indicative Opening Price

The IOP is the price at which a CME product is expected to trade at the opening of trading, if the existence of matching bids and offers makes that possible, or the opening bid or

bankruptcy or to enforce the terms of this Order. Nor does Respondent consent to the use of the Offer or this Order, or the findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

offer if no trade occurs. At pre-defined times prior to the opening, a CME Globex algorithm calculates an IOP based upon pre-opening orders that have been entered for the product. Trading begins at an equilibrium price that falls within the overlap of the bid and offer prices (*i.e.*, where the bids and offers converge). The IOP is broadcast to all CME Globex users and to the CME market data feed. The CME market data feed is available to publishers of financial data who purchase the data and disseminate the information. The IOP is used by other market participants in making trading decisions and by cash market participants in making buy and sell decisions in the cash market.

c. The Gelber Proprietary Trader's Activity

During the relevant time period, the Gelber proprietary trader entered the orders in the pre-open session for the NASDAQ E-mini contract for the purpose seeing where the offers were so he could use that information in making trading decisions. The Gelber trader admitted that he did not intend to allow the orders to become executable. In February 2010, the Gelber trader's orders caused the IOP price to fluctuate, and at least one market participant contacted the CME questioning the accuracy of the IOP. The Gelber trader had engaged in similar activity since at least August 2009.

2. Gelber Entered Into Illegal Wash Trades in Russell Index Futures Contracts

a. The ICE Incentive Program

Gelber was a participant in an ICE incentive program called the Russell Member Firm Fee Program. Under the terms of the program, ICE agreed to rebate fees on all Russell Index futures contracts (including the actively traded Russell 2000 futures contract) if the program participant traded pre-determined volumes of contracts in some thinly traded Russell 1000 Index contracts on a monthly basis, specifically, the Russell 1000 Index Mini, the Russell 1000 Growth Index and the Russell 1000 Value Index futures contracts ("Russell 1000 contracts"). ICE determined the volume of trading in the Russell 1000 contracts at the end of the month, calculated the reduction in fees and rebated that amount to the participant through the participant's clearing member.

b. The Gelber Proprietary Traders' Activity

A Gelber executive who arranged Gelber's participation in the program approached a trading group manager and asked the trading group manager to select traders in his group to begin trading the Russell 1000 contracts with the goal of trading enough volume to qualify for the rebates. They agreed that rebates would be apportioned between Gelber and the trading group manager.

The trading group manager asked two senior traders to trade the Russell 1000 contracts and provided them with the specific volumes of contracts they had to trade to make Gelber eligible for the rebates. However, the two traders had difficulty trading the necessary volume profitably because of the thinness of the Russell 1000 market. The trading group manager directed the traders to trade opposite each other until they reached the necessary volume. The trading group manager further directed a Gelber programmer assigned to his trading group to

create a computer program that would automatically enter matching orders from the traders' computers. The two traders used the computer program each month during the relevant period and executed wash sales repeatedly in the Russell 1000 contracts.

IV.

LEGAL DISCUSSION

A. Gelber, Acting through Its Agent and Employee, Caused a Price that was not True and Bona Fide to be Reported in Violation of Section 4c(a)(2)(B) of the Act

Section 4c(a)(1) and (2) of the Act, read together, provide, in relevant part, "It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction . . . involving the purchase or sale of any commodity for future delivery . . . that (A)(i) is, is of the character of, or is commonly known to the trade as, a 'wash sale' or . . . (ii) is a fictitious sale; or (B) is used to cause any price to be reported, registered or recorded that is not a true and bona fide price." 7 U.S.C. § 6c(a)(1) and (2). "[T]he common denominator of the specific abuses prohibited in Section 4c(a) . . . is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market." *In re Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,902 (CFTC Apr. 4, 1986), *rev'd on other grounds sub nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987); *see also In re Mayer*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,134 (CFTC Dec. Feb. 3, 1998).

Gelber, acting through its agent and employee, violated Section 4c(a)(2)(B) of the Act by: (1) offering to enter into the execution of transactions; (2) involving the purchase or sale of a commodity for future delivery; (3) that caused a price to be reported, registered, or recorded that was not true and bona fide.

The Gelber trader knowingly placed orders for NASDAQ E-mini futures contracts that he did not intend to allow to be executed. The orders caused the IOP to reflect prices that were not true and bona fide. The CME reported the prices to other Globex users as well as to anyone obtaining the information from publishers of the information.

B. Gelber, Acting through Its Agents and Employees, Delivered False, Misleading or Knowingly Inaccurate Reports Concerning Market Information that Affected or Tended to Affect the Price of a Commodity in Interstate Commerce in Violation of Section 9(a)(2) of the Act

Gelber, acting through its agent and employee, violated Section 9(a)(2) of the Act. To state a claim for false reporting in violation of Section 9(a)(2) of the Act, the Commission must show "(1) that a defendant knowingly delivered market reports or market information through interstate commerce, (2) that the information was knowingly false or misleading; and (3) that the information affected or tended to affect the price of a commodity in interstate commerce." *United States v. Valencia*, 394 F.3d 352 (5th Cir. 2004); *see also CFTC v. Johnson*, 408 F. Supp. 2d 259, 267 (S.D. Tex. 2005) (same).

The Gelber trader knowingly delivered false orders into the NASDAQ E-mini futures market. The orders were false and misleading because he did not intend to execute the orders. These orders were included in the IOP, which was published to persons and entities that use such data to make pricing decisions relating to the purchase or sale of the NASDAQ Index, a commodity in interstate commerce.

C. Gelber, Acting through Its Agents and Employees, Entered into Wash Sales in Violation of Section 4c(a)(2)(A)

Section 4c(a) of the Act makes it “unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction” that “is, is of the character of, or is commonly known to the trade as, a ‘wash sale’ . . .” 7 U.S.C. §6c(a). A wash sale is a form of fictitious sale. *In re Gimbel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,003 (CFTC Apr. 14, 1988).

In order to establish that a wash sale has occurred, it must initially be demonstrated that the transaction at issue achieved a wash result. The Commission may demonstrate that the trades resulted in a wash by (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price. *Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir. 2003) citing *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991); see also *In re Citadel Trading*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,082 at 32,190 (“Orders to purchase and sell for the account of the same customer the identical quantity of the same futures contract at identical prices were entered virtually simultaneously.”)

In addition to the factors enumerated in *Gilchrist*, intent must be proven to establish a violation of Section 4c of the Act. *Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999). The intent to negate risk or price competition and avoid a bona fide market position can properly be inferred from prearrangement but it can also be inferred “from the intentional structuring of a transaction in a manner to achieve the same result as prearrangement.” *In re Three Eight Corporation*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444 n.15 (CFTC Jun. 16, 1993) (citing *In re Collins* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,900-01 (CFTC Apr. 4, 1986), *rev'd on other grounds sub nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987) (“*Collins I*”). The placement of offsetting orders to buy and sell, while simultaneously taking steps to “enhance the likelihood that the buy and sell orders would be filled at the same or a similar price” is persuasive evidence that the trader intends to negate risk and price competition. *Collins I* at ¶ 31,900; see also *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685, 50,689-691 (CFTC Sep. 29, 2000) (finding customer who placed paired buy and sell orders, with specific pricing and loss limitation instructions, “structured orders to negate risk” and thus had intent to violate Section 4c), *aff'd sub nom. Piasio v. CFTC*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,251 (2d Cir. Dec. 31, 2002).

Gelber, acting through its agents and employees, violated Section 4c(a)(2)(A) of the Act by entering into transactions of the character of and commonly known as wash sales. The Gelber traders knowingly entered into the wash sales with the intent of inflating Gelber’s trading volume

in the Russell 1000 contracts so Gelber could generate additional rebates from the ICE incentive program.

D. Gelber, Acting through Its Agents and Employees, Executed Trades Noncompetitively in Violation of Commission Regulation 1.38

Regulation 1.38(a) requires that “all purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity or commodity option....” 17 C.F.R. § 1.38(a). “The purpose of this requirement is to insure that all trades are executed at competitive prices and that all trades are directed into a centralized marketplace to participate in the competitive determination of the price of futures contracts.” S. Rep. No. 93-1131, at 16 (1974); see also Disapproval of Contract Market Rules, 46 Fed. Reg. 23,516, at 23,518 (Apr. 27, 1981) (Commission's disapproval of the Commodity Exchange, Inc.'s proposal to conduct a trading session after the close of regular trading). Trades can be non-competitive even though they are executed in the pit. *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,683 (CFTC Jan. 25, 1991) (citing *Laiken v. Dep't of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)). Prearranged trading is a form of noncompetitive trading that violates Regulation 1.38(a). *Gimbel*, ¶ 24,213 at 35,003.

Gelber, acting through its agents and employees, violated Commission Regulation 1.38 by executing trades noncompetitively. The Gelber traders knowingly entered into the noncompetitive trades with the intent of inflating Gelber's trading volume in the Russell 1000 contracts so Gelber could receive additional rebates from the ICE incentive program.

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent Gelber Group, LLC violated Sections 4c(a)(2)(A), 4c(a)(2)(B), and 9(a)(2) of the Act and Commission Regulation 1.38.

VI.

OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;

- C. Waives:
1. the filing and service of a complaint and notice of hearing;
 2. a hearing;
 3. all post-hearing procedures;
 4. judicial review by any court;
 5. any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
 6. any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1-30 (2012), relating to, or arising from, this proceeding;
 7. any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this proceeding; and
 8. any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;
- D. Stipulate(s) that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer;
- E. Consent(s), solely on the basis of the Offer, to the Commission's entry of this Order that:
1. makes findings by the Commission that Respondent violated Sections 4c(a)(2)(A), 4c(a)(2)(B), and 9(a)(2) of the Act and Regulation 1.38;
 2. orders Respondent to cease and desist from violating Sections 4c(a)(2)(A), 4c(a)(2)(B), and 9(a)(2) of the Act and Regulation 1.38; and
 3. orders Respondent to pay a civil monetary penalty in the amount of \$750,000 plus post-judgment interest.

Upon consideration, the Commission has determined to accept the Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Sections 4c(a)(2)(A), 4c(a)(2)(B), and 9(a)(2) of the Act, as amended, 7 U.S.C. §§ 6c(a)(2)(A), 6c(a)(2)(B), and 13(a)(2) and Regulation 1.38, 17 C.F.R. § 1.38 (2011).
- B. Respondent shall pay a civil monetary penalty in the amount of **Seven Hundred Fifty Thousand dollars (\$750,000)**(the "CMP Obligation"). Post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006). Respondent shall pay the CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

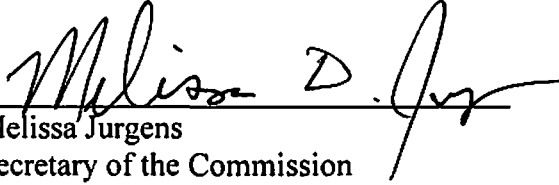
Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables --- AMZ 340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-5644

If payment is to be made by electronic funds transfer, Respondent shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies the Respondent and the name and docket number of this proceeding. The Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

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

- D. Cooperation with the Commission: Respondent shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, and any other governmental agency in this action, and in any investigation, civil litigation, or administrative matter related to the subject matter of this action or any current or future Commission investigation related thereto.
- E. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of partial settlement of Respondent's CMP Obligation shall not be deemed a waiver of its obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
- F. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Consent Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten (10) calendar days of the change.

By the Commission (Chairman GENSLER,
Commissioners O'MALIA, CHILTON and
WETJEN; Commissioner SOMMERS concurring).



Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 8, 2013