

JUDGE KAPLAN

12 CIV 7786

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. COMMODITY FUTURES
TRADING COMMISSION

Civil Action No. _____

RECEIVED
OCT 18 2012
U.S.D.C. S.D. N.Y.
CASHIERS

v.

DAVID M. NUNN

Defendant.

COMPLAINT FOR PERMANENT
INJUNCTION, CIVIL MONETARY
PENALTIES, AND OTHER
EQUITABLE RELIEF

Jury Trial Demanded

ECF Case

I. SUMMARY

The U.S. Commodity Futures Trading Commission (the "Commission"), by and through its attorneys, alleges as follows:

1. From at least July 2008 through September 2010, David M. Nunn ("Nunn" or the "Defendant") engaged in a series of illegal transactions on or subject to the rules of ICE Futures U.S. ("ICE"), specifically, non-competitive, fictitious sales of coffee futures contracts between his account in his own name and accounts in the name of another person (the "Other Account Holder"). Nunn conducted more than 1,300 trades between their accounts, resulting in more than \$1.68 million passing from Nunn to the Other Account Holder.

2. To accomplish this money pass, Nunn prearranged bids and offers, either by the Other Account Holder placing trade orders by telephone after speaking to Nunn or by Nunn logging into the Other Account Holder's trading account through his computer and entering trades in the Other Account Holder's account directly.

3. The vast majority of the Other Account Holder's trades were opposite Nunn, and all of the trades yielded a profit for the Other Account Holder and a corresponding loss for Nunn.

4. By this conduct, Nunn violated Section 4c(a)(2)(A) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §6c(a)(2)(A) (2006) (current version at 7 U.S.C. §6c(a)(2)(A) (Supp. IV 2011) by knowingly entering into a transaction that is of the character of or is commonly known to the trade as a "wash sale" or "accommodation trade" or is a fictitious sale or is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price involving the purchase or sale of a commodity for future delivery which transaction was used or may have been used to hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity; or to determine the price basis of any such transaction in interstate commerce in the commodity; or to deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

5. With this conduct, Nunn further violated Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a), by knowingly entering into illegal noncompetitive transactions to buy and sell futures contracts.

6. Furthermore, on September 23, 2010, Nunn willfully made false and misleading statements to staff of ICE, a registered entity, in violation of Section 9(a)(4) of the Act, as amended, 7 U.S.C. § 13(a)(4).

7. Due to Nunn's conduct and further conduct described herein, Nunn has engaged, is engaging, or is about to engage in acts and practices in violation of certain trade practice provisions of the Act, 7 U.S.C. §§ 1 *et seq.* (2006), as amended.

8. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), the Commission brings this action to enjoin Nunn's unlawful acts and practices, and to compel Nunn

to comply with the Act and Regulations. In addition, the Commission seeks civil monetary penalties and remedial ancillary relief, including, but not limited to, trading and registration bans, disgorgement, post-judgment interest, and such other relief as the Court may deem necessary and appropriate.

9. Unless restrained and enjoined by this Court, Nunn is likely to continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order thereunder.

11. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1 in that the Defendant is to be found in, inhabit, or transact business in the District, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places. Venue also properly lies with this court pursuant to 7 U.S.C. § 1391(b)(2).

III. PARTIES

12. Plaintiff United States Commodity Futures Trading Commission is an independent federal regulatory agency that is charged by Congress with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.* (2006), as amended, and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.*

13. Defendant David M. Nunn is a resident of Bondville, Vermont. From November 1997 through December 2010, Nunn was registered with the CFTC as a floor broker and was a member of ICE. On December 8, 2010, Nunn was expelled from ICE pursuant to a Settlement Agreement with ICE's Business Conduct Committee, which resolved ICE's proceedings against Nunn for the fictitious, prearranged trading and other conduct at issue in this Complaint.

IV. FACTS

Background

14. A "futures contract" is an agreement to purchase or sell a commodity for delivery, in the future, at a price determined at the initiation of the contract, that obligates each party to fulfill the contract at the specified price. Futures contracts are used to assume, or shift, price risk and may be satisfied by delivery or offset.

15. A "calendar spread" is the purchase of one delivery month of a given futures contract and simultaneous sale of a different delivery month of the same futures contract

16. Nunn traded coffee futures contracts and coffee futures calendar spreads through his personal account (the "Nunn Account") and also traded coffee futures contracts and coffee futures calendar spreads through at least two other accounts set up in the name of the Other Account Holder but which trading Nunn controlled (the "Other Accounts").

The Illegal Trades

17. From at least July 2008 through September 2010 (the "Relevant Period"), Nunn conducted more than 1,300 trades between the Nunn Account and the Other Accounts.

18. In each instance, Nunn would execute a trade in which the two accounts traded with one another, thereby opening equal and opposite spread positions in coffee futures. Nunn would later conduct another trade between the accounts to close the positions.

19. At the beginning of the scheme, Nunn prearranged bids and offers by speaking with the Other Account Holder on the telephone prior to placing orders. After speaking with Nunn, the Other Account Holder placed orders in one of the Other Accounts by telephone. At some point during the Relevant Period, the Other Account Holder provided Nunn with the account online UserID and Password for the Other Accounts. Nunn then coordinated bids and offers by entering orders directly online in the Other Accounts.

20. During the Relevant Period, the vast majority of trades in the Other Accounts were made with the Nunn Account, and in every series of trades, the Other Account recognized a profit while the Nunn account recognized a loss.

21. For example, on August 13, 2010, at 1:37:01 P.M., Nunn entered in one of the Other Accounts an order to buy forty-three (43) September 2010 – September 2011 coffee calendar spreads (i.e. simultaneously buying September 2010 contracts and selling September 2011 contracts) at a limit differential price of one and six tenths of a cent (1.60¢). At 1:38:16 P.M., Nunn's account entered a sell order that matched with that Other Account's buy order into a trade with a differential price of one and six tenths cents (1.60¢), resulting in a long calendar spread position for that Other Account and short calendar spread position for Nunn's Account. At 1:50:46 P.M. that Other Account entered an order to sell forty-three (43) September 2010 – September 2011 coffee calendar spreads at a limit differential price of two and one tenth cents (2.10¢); at 1:51:32 P.M. the Nunn Account entered a buy order that matched with that Other Account's sell order into a trade with a differential price of two and five hundredths cents (2.05¢). The trade subsequently offset the open positions of the two accounts, resulting in seven thousand, two hundred fifty-six dollars (\$7,256) of profits for that Other Account and an equivalent amount of losses to the Nunn Account.

22. That same day, at 1:53:44 P.M., that Other Account entered an order to sell forty-three (43) September 2010 – September 2011 coffee calendar spreads at a limit differential price of two and five hundredths cents (2.05¢); at 1:54:05 P.M. the Nunn Account entered a buy order that matched with that Other Account's sell order into a trade with a differential price of two and five hundredths cents (2.05¢), resulting in a short calendar spread position for that Other Account and long calendar spread position for the Nunn Account. At 1:56:01 P.M., that Other Account entered an order to buy forty-three (43) September 2010 – September 2011 coffee calendar spreads at a limit differential price of one and fifty-five hundredths cents (1.55¢); at 1:58:46 P.M. the Nunn Account entered a sell order that matched with that Other Account's buy order into a trade with a differential price of one and fifty-five hundredths cents (1.55¢). The trade subsequently offset the open positions of the two accounts, resulting in eight thousand, sixty-two dollars and fifty cents (\$8,062.50) of profits for that Other Account and an equivalent amount of losses to the Nunn account.

The Money Passes and Returns

23. This distinct pattern of activity repeated itself for at least 1,300 calendar spread trades from July 2008 to September 2010, resulting in at least \$1.68 million being lost from the Nunn Account to two of the Other Accounts as a result of the illegal, prearranged, fictitious trades. As part of the scheme, the Other Account Holder returned approximately \$1 million of that money to Nunn.

24. Nunn directed how the Other Account Holder would return money to him. In order to return money to Nunn, the Other Account Holder wired money from the Other Accounts to her bank account and then transferred money from her bank account to Nunn and to third-parties for Nunn's benefit.

25. Nunn caused the Other Account Holder to return money to him by writing checks on the Other Account Holder's bank account to Nunn and to Nunn's wife.

26. Nunn caused the Other Account Holder to return money to Nunn by making payments for his benefit to pay his credit card bill.

27. Nunn also caused the Other Account Holder to return money to Nunn by paying the rent at an apartment in Battery Park City New York (the "BPC Apartment"), in which Nunn lived. The Other Account Holder rented the BPC Apartment in the Other Account Holder's name and paid the rent thereon, while Nunn resided in the BPC Apartment.

28. Nunn caused the Other Account Holder to return money to Nunn by paying for other of Nunn's living expenses, including Nunn's cell phone bill, Nunn's telephone bill, and Nunn's parking space rental.

29. The Other Accounts consistently showed profits from trading. The Other Account Holder reported trading income from the accounts on the Other Account Holder's personal income tax returns and used money from the Other Accounts to pay those taxes.

30. Nunn allowed the Other Account Holder to keep some of the money when she and Nunn agreed that the Other Account Holder could withdraw money from the Other Accounts for the Other Account Holder's own use.

The False Statements

31. In September 2010, ICE representatives became aware that every trade made in one of the Other Accounts was profitable and that every trade was opposite Nunn's account.

32. On September 23, 2010, ICE representatives conducted an interview of Nunn, during which they asked Nunn about trading between his account and the Other Accounts. Nunn made false statements and omitted material information in order to hide his illegal scheme from the ICE representatives.

33. During the interview, the following exchanges occurred:

ICE Representative: Are you compensated in any way from the trading in [The Other Account Holder's] account?

Nunn: No

And

ICE Representative: Would this be in any respect a facility for making payments or transferring funds or anything like that?

Nunn: No

34. Nunn's answers were false. In reality, profits from that Other Account were transferred to Nunn as described above.

35. Nunn also omitted material facts in his interview with ICE representatives, including the fact that he controlled the trading in the Other Accounts.

V. VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND COMMISSION REGULATIONS

COUNT I

Nunn's Violations of Section 4c(a) of the Act, as amended to be codified at 7 U.S.C. 6c(a)

36. Paragraphs 1 through 35 are re-alleged and incorporated herein.

37. Nunn violated section 4c(a) of the Act, 7 U.S.C. 6c(a), by entering into a transaction that is of the character of, or is commonly known to the trade as, a "wash sale" or "accommodation trade" or is a fictitious sale involving the purchase or sale of a commodity for future delivery which transaction was used or may have been used to hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity; or to determine the price basis of any such transaction in interstate commerce in the commodity; or to deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

38. Each non-competitive, fictitious transaction entered into by Nunn including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4c(a) of the Act, 7 U.S.C. 6c(a).

COUNT II

Nunn's Violations of Commission Regulation 1.38(a)

39. Paragraphs 1 through 35 are re-alleged and incorporated herein.

40. Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a), requires that all purchases and sales of commodity futures contracts be executed "openly and competitively."

41. Nunn violated Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) by engaging in a series of unlawful, non-competitive commodity futures or options transactions.

42. Each non-competitive transaction entered into by Nunn, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a).

COUNT III

Nunn's Violations of Section 9(a)(4) of the Act; False Statements to ICE Futures U.S.

43. The allegations set forth in paragraphs 1 through 35 above are re-alleged and incorporated herein by reference.

44. Section 9(a)(4) of the Act, as amended, 7 U.S.C. § 13(a)(4), makes it a felony for any person "willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, or futures association designated or registered under this Act acting in furtherance of its official duties under this Act."

45. ICE is a board of trade as defined by Section 1a(2) of the Act, 7 U.S.C. § 1a(2).

46. ICE was acting in furtherance of its official duties under the Act in reviewing Nunn's trading activity.

47. On or about September 23, 2010, Nunn made material misrepresentations to ICE in the manner Nunn described trading between the Nunn Account and the Other Accounts, deliberately concealing from ICE the fact that he was paid from the profits transferred to the Other Accounts and the fact that he controlled the trading in the Other Accounts.

48. By his conduct described above, Nunn violated Section 9(a)(4) of the Act, as amended, 7 U.S.C. § 13(a)(4).

49. Each and every instance of a false, fictitious, or fraudulent statement by Nunn is alleged herein as a separate and distinct violation of Section 9(a)(4) of the Act, as amended, 7 U.S.C. § 13(a)(4).

VI. RELIEF REQUESTED

50. WHEREFORE, the Commission respectfully requests that the Court, as authorized by Section 6(c) of the Act, as amended, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers, enter:

51. An order finding that Nunn violated Sections 4c(a) and 9(a)(4) of the Act, as amended, 7 U.S.C. §§ 6c(b) and 13(a)(4), and Regulation 1.38(a), 17 C.F.R. § 1.38(a);

52. An order of preliminary and permanent injunction prohibiting Nunn and any of his agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Nunn, including any successor thereof, from engaging, directly or indirectly:

- a. Engaging in conduct in violation of Sections 4c(a) of the Act, 7 U.S.C. § 6c(a), as amended, 9(a)(4) of the Act, as amended, 7 U.S.C. § 13(a)(4), and Regulation 1.38(a), 17 C.F.R. § 1.38(a);

- b. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a of the Act, as amended by the Dodd-Frank Act, 7 U.S.C. § 1a);
- c. Entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 1.3(hh), 17 C.F.R. § 1.3(hh) (2011) (“commodity options”), security futures products, foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act as amended by the Dodd-Frank Act, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i) (“forex contracts”), and/or swaps (as that term is defined in Section 1a(47) of the Act, as amended, and as further defined by Commission Regulation 1.3(xxx), 17 C.F.R. 1.3(xxx)) for his own personal account or for any account in which he has a direct or indirect interest;
- d. Having any commodity futures, options on commodity futures, commodity options, security futures products, forex contracts, and/or swaps traded on his behalf;
- e. Controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, security futures products, forex contracts, and/or swaps;
- f. Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, security futures products, forex contracts, and/or swaps;
- g. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011); and
- h. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2011)), agent, or any other officer or employee of any person registered, exempted from registration or required to be registered with the CFTC except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011).

53. An order directing Nunn, as well as any other person or entity associated with him, including any successor thereof, to disgorge, pursuant to such procedure as the Court may

order, all benefits received from the acts or practices that constitute violations of the Act or Regulations, as described herein, and interest thereon from the date of such violations;

54. An order directing the Nunn to pay a civil monetary penalty for each violation of the Act and Regulations described herein, plus post-judgment interest, in the amount of the higher of \$140,000 for each violation of the Act and Regulations committed on or after October 23, 2008, \$130,000 for each violation of the Act and Regulations committed before October 23, 2008, or triple the monetary gain to Nunn for each violation of the Act and Regulations described herein;

55. An order requiring Nunn to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2006); and

56. Such other and further remedial ancillary relief as the Court may deem appropriate.

VII. JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury.

Dated: New York, NY
October 18, 2012

U.S. COMMODITY FUTURES TRADING
COMMISSION

Stephen J. Obie
Regional Counsel

By: Michael P. Geiser
Michael P. Geiser
David W. Oakland
Trial Attorneys

David Acevedo
Manal Sultan
Chief Trial Attorneys

Division of Enforcement
U.S. Commodity Futures Trading Commission
Eastern Regional Office
140 Broadway, 19th Floor
New York, NY 10005
Phone: (646) 746-9700
Fax: (646) 746-9939
mgeiser@cftc.gov