



**UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION**

IN THE MATTER OF

**Cunningham Commodities, LLC and
Salvatore Carmen Russo,**

Respondents.

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) **CFTC Docket No. 16-15**
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**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF
THE COMMODITY EXCHANGE ACT AND MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Cunningham Commodities, LLC (“Cunningham”), a registered futures commission merchant (“FCM”), has violated Commission Regulations 1.12(h), (j) and 17.00(a), 17 C.F.R. §§ 1.12(h), (j) and 17.00(a) and that Cunningham’s Controller, Salvatore Carmen Russo (“Russo”), aided and abetted Cunningham’s conduct and thereby also violated Regulation 1.12(h). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether Cunningham and Russo (“Respondents”) have engaged in the violations as set forth herein and to determine whether any order shall be issued imposing remedial sanctions.

II.

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

¹ Respondents consent to the entry of this Order and 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 Respondents do not consent to the use of the Offer, or the findings or conclusions consented to in this Order, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor

III.

The Commission finds the following:

A. Summary

On March 10-12, 2014, Cunningham violated Commission's Regulations 1.12(h) and 1.12(j) when it failed to immediately report to the Commission a shortfall in the firm's customer segregated account and being under its targeted residual interest amount for customer accounts. These violations resulted from an operational cash transfer error at the firm on March 10 that the firm discovered on March 11, but the firm did not report the violations to the Commission until March 12, 2014. Cunningham's Controller, Russo, aided and abetted the firm's violation of Regulation 1.12(h) by treating the under-segregated event as a bank reconciling error so as to conceal the firm's customer segregated account shortfall from the Commission. In unrelated transactions, Cunningham also violated Regulation 17.00 in 2014 by twice failing to report special account positions to the Commission for an extended period of time.

B. Respondents

Cunningham Commodities LLC is an FCM located in Chicago, Illinois. Cunningham has been continuously registered with the Commission since January 1982.

Salvatore Carmen Russo, a resident of Wheaton, Illinois, is the Controller and head accountant at Cunningham. Russo has never been registered in any capacity with the Commission.

C. Facts

On March 12, 2014, Cunningham notified the Commission that as a result of a clerical error in transferring funds, Cunningham fell more than \$3.4 million below the amount required to be held in its segregated customer account and that it also fell below its target residual interest in segregated funds. The reported shortfall had occurred on March 10, 2014, when the firm failed to properly transfer more than \$5 million in loaned funds to the firm's customer segregated account, causing the account to be under-segregated overnight. On the morning of March 11, 2014, Cunningham's Controller, Russo, detected the error when doing his daily reconciliations. He immediately directed the staff accountant who made the error to contact the bank that held Cunningham's customer segregated account and transfer more than \$5 million from the firm's house account to its customer segregated account. Russo also told the accountant to ask the bank to adjust the date that the transfer took place by to make it appear that the funds were transferred on March 10. The bank accommodated this request to back-date the transfer.

do Respondents consent to the use of the Offer or this Order, or the findings or conclusions consented to in the Offer or this Order, by any other party in any other proceeding.

Russo did not bring the overnight under-segregation to the attention of the firm's Chief Compliance Officer ("CCO").

Nonetheless, the Chicago Mercantile Exchange ("CME") audit staff detected an approximate \$5 million cash discrepancy between Cunningham's submitted daily segregation statement versus the outside sources reported total, and early in the afternoon of March 11, 2014, a CME representative emailed the Cunningham CCO for an explanation. The CCO replied that she could not immediately explain the apparent under-segregation, but she was confident that the accounts must have reconciled or Russo would not have already left for the day. Even though the CCO was advised that CME records reflected that the total amount of funds on deposit in segregated accounts on behalf of customers trading on designated contract markets was \$5 million less than reported, and thus likely less than the total amount of such funds required, Cunningham and its CCO did not immediately notify the Commission about the under-segregation of its customer account and that it was below the target residual interest in segregated funds. Instead, Cunningham notified the Commission of these deficiencies the following day, March 12.

In unrelated violations during the same time frame, Cunningham twice failed to report special positions to the Commission for extended periods of time. In May 2014, the Commission's Office of Data and Technology ("ODT") staff advised Cunningham that it had failed to report silver contract positions for a period of almost six-months (from November 27, 2013 to May 14, 2014). After determining that the cause of the failure to report the positions was a problem with its outside software vendor, which had failed to properly set up the silver contract for reporting, Cunningham assured the Commission staff that the problem had been resolved. Nonetheless, Cunningham subsequently failed to report soybean option positions for a two-week period (from July 3-15, 2014), due to the outside vendor's similar failure to set up the soybean option contract for reporting to the Commission.

IV.

LEGAL DISCUSSION

A. Cunningham Failed to Immediately Report a Customer Segregated Account Deficiency

Regulation 1.12(h), 17 C.F.R. § 1.12(h), requires that an FCM must report any deficiency in its customer segregated account immediately to the Commission. On the morning of March 11, 2014, Cunningham's Controller learned that the firm's customer segregated account was more than \$3.4 million below the amount required to be held in its segregated customer account, and by that afternoon Cunningham's CCO learned from the CME that the firm's customer segregated funds may have been overstated by \$5 million. Immediate notice to the Commission of the customer segregated funds deficiency was required. However, Cunningham

neglected to immediately notify the Commission of this deficiency. Instead, Cunningham reported this deficiency to the Commission on March 12, 2014.

B. Russo Aided and Abetted Cunningham's Failure to Immediately Report its Customer Segregated Account Deficiency

Section 13(a) of the Act, 7 U.S.C. § 13c(a), provides that “any person who commits, or who willfully aids, abets, counsels, commands, induces or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act . . . or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, orders may be held responsible for such violation as a principal.” Liability as an aider and abettor requires proof that: (1) the Act was violated; (2) the aider and abettor had knowledge of the wrongdoing underlying the violation; and (3) the aider and abettor intentionally assisted the primary wrongdoer. *See In re Nikkah*, [1999-2000 Transfer Binder] Comm. Fut. L. rep. (CCH) ¶ 28,129 at 49,888 n. 28 (CFTC May 12, 2000). Although actual knowledge of the primary wrongdoer’s conduct is required, knowledge of the unlawfulness of such conduct need not be demonstrated. *See In re Lincolnwood Commodities, Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,255 (CFTC Jan. 31, 1984). Knowing assistance can be inferred from the surrounding facts and circumstances. *Id.*

After detecting Cunningham’s customer segregated account deficiency, Russo did not immediately take steps to notify the Commission of the shortfall nor did he tell anyone else at Cunningham about the deficiency, including the firm’s CCO. Rather, he directed a subordinate Cunningham accountant to call the firm’s bank to transfer more than \$5 million from the firm’s house account to its customer segregated account to correct the deficiency. Russo also told the Cunningham accountant to ask the bank to adjust the date of the \$5 million fund transfer to make it appear that the funds were transferred “as of” the prior date. Thus, instead of taking steps to immediately notify the Commission about the deficiency, either directly or through the firm’s CCO, Russo acted in a manner which concealed the customer segregated account deficiency from the Commission. Accordingly, although Russo’s efforts proved unsuccessful because the shortfall was also detected by the CME and eventual notification was given to the Commission, Russo aided and abetted Cunningham’s failure to give immediate notification to the Commission of the customer segregated account deficiency in violation of Regulation 1.12(h), 17 C.F.R. § 1.12(h).

C. Cunningham Failed to Immediately Report Being Under its Targeted Residual Interest Amount for Customer Accounts

Regulation 1.12(j) provides, in pertinent part, that: “A futures commission merchant must provide immediate notice, as provided in paragraph (n) of this section, whenever the futures commission merchant does not hold a sufficient amount of funds in segregated accounts for futures customers under § 1.20 . . . of this chapter to meet the futures commission merchant’s

targeted residual interest in the segregated or secured accounts pursuant to its policies and procedures. . .”

In violation of Regulation 1.12(j), Cunningham failed to provide immediate notification to the Commission that the amount of excess proprietary funds in segregation was less than the targeted residual interest when it became aware of the deficiency on March 11, 2015. Regulation 1.23(c) provides guidance for FCMs to determine the sufficiency of their targeted residual interest: “. . . each futures commission merchant shall establish a targeted residual interest (*i.e.*, excess funds) that is an amount that, when maintained as its residual interest in the segregated funds accounts, reasonably insures that the futures commission merchant shall remain in compliance with the segregated funds requirements at all times.” Cunningham reported targeted excess funds of \$600,000 on March 10, 2014. However, given the operational risk experienced by the firm on March 10, the firm’s targeted residual interest funds fell below that sum and should have been reported to the Commission on March 11, 2014, when initially detected by Cunningham, instead of March 12, 2014.

D. Cunningham Failed to Report Special Account Positions to the Commission

Pursuant to Section 4g(a) of the Act, 7 U.S.C. §6g(a) (2012), and Regulation 15.01(b), 17 C.F.R. § 15.01(b) (2014), FCMs, clearing members and foreign brokers are required to submit certain reports to the Commission. In particular, FCMs are required to submit a report for each business day with respect to “all special accounts carried by” the FCM that shows “each futures position, separately for each reporting market and each future” and the “quantity of exchanges for futures for commodities or for derivatives positions and the number of delivery notices issued for each such account by the clearing organization of a reporting market and the number stopped by the account.” 17 C.F.R. § 17.00(a)(1) (2013). These reports, known as the “large trader” reports, are used by the Commission in order to evaluate potential market risks and monitor compliance with Commission requirements. *See In re J.P. Morgan Securities, LLC*, CFTC Docket No. 14-19, 2014 WL 3817865, at *1 (CFTC July 29, 2014) (consent order). Cunningham violated Regulation 17.00(a) by failing to report the special account positions for the Comex silver 1000 oz. contract for almost a six-month period (from November 27, 2013 through May 14, 2014) and soybean option puts positions for two weeks (from July 3, 2014 to July 15, 2014).

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Cunningham violated Commission Regulations 1.12(h), (j) and 17.00(a), 17 C.F.R. §§ 1.12(h), (j) and 17.00(a), and Russo violated Regulation 1.12(h), 17 C.F.R. § 1.12 (h).

VI.

OFFER OF SETTLEMENT

Respondents have submitted an Offer of Settlement in which they, without admitting or denying the findings and conclusions herein:

- A. Acknowledge receipt of service of the Order;
- B. Admit the jurisdiction of the Commission with respect to all matters set forth in the Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of the Order;
- C. Waive:
 - 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 this 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 (2015), 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 that the record basis on which the Order is entered shall consist solely of the findings contained in the Order to which Cunningham and Russo have consented in this Offer; and
- E. Consent, solely on the basis of this Offer, to the Commission's entry of the Order in the form attached hereto that:
1. Makes findings by the Commission that Cunningham violated Regulations 1.12(h), (j) and 17.00(a), 17 C.F.R. §§ 1.12(h), (j) and 17.00(a), and that Russo violated Regulation 1.12(h), 17 C.F.R. § 1.12(h);
 2. Orders Cunningham to cease and desist from violating Regulations 1.12(h), (j) and 17.00(a), 17 C.F.R. §§ 1.12(h), (j) and 17.00(a), and Russo to cease and desist from violation Regulation 1.12(h), 17 C.F.R. § 1.12(h);
 3. Orders Respondents to jointly and severally pay a civil monetary penalty in the amount of one hundred and fifty thousand dollars (\$150,000), within thirty (30) days of entry of this Order; and
 4. Orders Respondents and their successors and assigns to comply with the undertakings consented to in the Offer and as set forth below in Section VII of this Order.

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

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Cunningham shall cease and desist from violating Regulations 1.12(h), (j) and 17.00(a), 17 C.F.R. §§ 1.12(h), (j) and 17.00(a), and Russo shall cease and desist from violating Regulation 1.12(h), 17 C.F.R. § 1.12(h);
- B. Respondents shall jointly and severally pay a civil monetary penalty in the amount of one hundred and fifty thousand dollars (\$150,000) (the "CMP Obligation") within thirty (30) days of the date of entry of this Order. If the CMP Obligation is not paid in full within thirty (30) days of the date of entry of this Order, then 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 (2012).

Respondents 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:

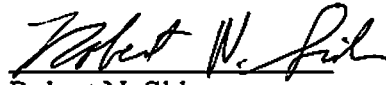
Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables --- AMZ 340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-5644

If payment is to be made by electronic funds transfer, Respondents shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondents shall accompany payment of the CMP Obligation with a cover letter that identifies it and the name and docket number of this proceeding. Respondents 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. Respondents and their successors and assigns shall comply with the following undertakings set forth in its Offer:
1. **Public Statements:** Respondents agree that neither they nor any of their agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondents':
(i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents and their successors 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 undertaking.
 2. **Partial Satisfaction:** Respondents understand and agree that any acceptance by the Commission of partial payment of Respondents' 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.
 3. **Change of Address/Phone:** Until such time as Respondents satisfy in full their CMP Obligation as set forth in this Consent Order, Respondents shall provide written notice to the Commission by certified mail of any change to their telephone number and mailing address within ten (10) calendar days of the change.

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

By the Commission

A handwritten signature in black ink, appearing to read "Robert N. Sidman", written over a horizontal line.

Robert N. Sidman

Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: July 20, 2016