

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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4:02 pm, Feb 08, 2013

_____)
In the Matter of:)
)
Martin A. Lorenzen,)
)
Respondent.) **CFTC Docket No. 13-16**
_____)

**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 Martin A. Lorenzen (“Respondent” or “Lorenzen”) 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) thereunder from at least March 2010 to August 2010 (the “relevant period”). 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 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.

III.

The Commission finds the following:

A. SUMMARY

From at least March 2010 to August 2010 two traders of Gelber Group LLC (“Gelber”), a proprietary trading firm, at the direction of Lorenzen, the manager of a Gelber trading group, 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

Martin A. Lorenzen was, during the relevant period, the manager of a trading group at Gelber that included the two proprietary traders and supervised the traders’ day to day activities. Lorenzen has never been registered with the Commission.

C. FACTS

1. 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, then calculated the reduction in fees and rebated that amount to the participant through the participant’s clearing member.

2. The Gelber Proprietary Traders’ Activity

A Gelber executive who arranged Gelber’s participation in the program approached Lorenzen and asked him 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 the rebates would be apportioned between Gelber and Lorenzen.

Lorenzen asked two 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. Lorenzen directed them to trade the Russell 1000 contracts opposite each other until they reached the necessary volume. Lorenzen further directed a Gelber programmer assigned to his trading group to create a computer program designed to automatically enter matching orders from the traders’ computers. Lorenzen knew that the two

traders used the computer program to trade opposite each other each month during the relevant period and executed wash sales repeatedly in the Russell 1000 contracts.

IV.

LEGAL DISCUSSION

A. **Lorenzen was a Controlling Person of the Two Traders and did not Act in Good Faith or Knowingly Induced the Two Traders' Violations**

Section 13(b), 7 U.S.C. § 13c(b), provides: "Any person who, directly or indirectly, controls any person who has violated any provision of this Act, or any of the rules, regulations or orders issued pursuant to this Act may be held liable for such violation in any action brought by the Commission to the same extent as such controlled person. In such action, the Commission has the burden of proving that the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." A "fundamental purpose" of the statute is "to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as on the corporation itself." *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1334 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004); *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1567 (11th Cir. 1995). The statute is construed liberally and even indirect means of discipline or influence, short of actual direction, is sufficient to find liability as a controlling person. *Monieson v. CFTC*, 996 F.2d 852, 859 (7th Cir. 1993) ("Control person liability will attach if [] a person possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, even if such power was not exercised."); *R.J. Fitzgerald*, 310 F.3d at 1334. Whether proposed defendant possessed the requisite control over the operations in question is a determination of fact, based upon the totality of the circumstances, including an appraisal of the influence upon management and policies of a corporation by the alleged controlling person. *CFTC v. Baragosh*, 278 F.3d 319 at 330 (4th Cir. 2002) (reversing grant of summary judgment); *CFTC v. AVCO Financial Corp.*, 28 F.Supp.2d 104, 117 (SDNY 1998), *aff'd in relevant part CFTC v. Vartuli*, 228 F.3d 94 (2d Cir. 2000).

Lorenzen was the manager of the trading group that included the two traders whose daily activities he supervised. As such, Lorenzen was a controlling person of the two traders. By directing the two traders to trade the Russell 1000 contracts and knowing that they traded opposite each other, Lorenzen did not act in good faith or knowingly induced the act or acts constituting the violations.

B. **Lorenzen did not Act in Good Faith or Knowingly Induced, Directly or Indirectly, the Acts Constituting 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 P*”). 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).

The two Gelber traders that Lorenzen supervised entered into transactions of the character of and commonly known as wash sales with the intent of inflating Gelber’s trading volume in the Russell 1000 contracts. Lorenzen did not act in good faith or knowingly induced, directly or indirectly, the wash sale transactions to generate additional rebates from the ICE incentive program and, pursuant to Section 13(b) of the Act, thereby violated Section 4c(a)(2)(A) of the Act.

C. Lorenzen did not Act in Good Faith or Knowingly Induced, Directly or Indirectly, the Acts Constituting Non-Competitive Trades 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.

The two traders who Lorenzen supervised executed their trades in the Russell 1000 contracts noncompetitively. By his direction of the traders, Lorenzen did not act in good faith or knowingly induced, directly or indirectly, the traders to enter into noncompetitive trades 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. Pursuant to Section 13(b) of the Act, Lorenzen thereby violated Regulation 1.38.

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent Lorenzen violated Section 4c(a)(2)(A) 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 he 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 he 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 Section 4c(a)(2)(A) of the Act and Regulation 1.38;
 2. orders Respondent to cease and desist from violating Section 4c(a)(2)(A) of the Act and Regulation 1.38; and
 3. orders Respondent to pay a civil monetary penalty in the amount of \$200,000 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 Section 4c(a)(2)(A) of the Act, as amended, 7 U.S.C. § 6c(a)(2)(A) and Regulation 1.38, 17 C.F.R. § 1.38.
- B. Respondent shall pay a civil monetary penalty in the amount of **Two Hundred Thousand dollars** (\$200,000)(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,

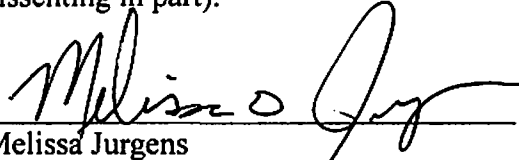
then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

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 his successor or assigns agree that neither he nor any of its agents or employees under his 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 his successor and assigns shall undertake all steps necessary to ensure that all of his agents and/or employees under his 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 satisfaction of Respondent's CMP Obligation shall not be deemed a waiver of his 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 his CMP Obligation as set forth in this Consent Order, Respondent shall provide written notice to the Commission by certified mail of any change to his telephone number and mailing address within ten (10) calendar days of the change.

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

A handwritten signature in black ink, appearing to read "Melissa Jurgens", written over a horizontal line.

Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 8, 2013