

UNITED STATES OF AMERICA  
Before the  
U.S. COMMODITY FUTURES TRADING COMMISSION

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In the Matter of: )  
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MF Global Inc., formerly known )  
as Man Financial Inc, and )  
Thomas Gilmartin )

CFTC Docket 08-02

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Respondents. )  
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**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 U.S. Commodity Futures Trading Commission (“Commission”) has reason to believe that MF Global Inc. (“MFG”), formerly known as Man Financial Inc, and Thomas Gilmartin (“Gilmartin”) have violated Section 4g of the Commodity Exchange Act, as amended (“Act”), 7 U.S.C. § 6g (2002), and Commission Regulations (“Regulations”) 1.35(a-1)(1) and 166.3, 17 C.F.R. §§ 1.35(a-1)(1) and 166.3 (2007). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether MFG and Gilmartin have engaged in the violations as set forth herein and to determine whether an order should be issued imposing remedial sanctions.

**II.**

In anticipation of instituting an administrative proceeding, MFG and Gilmartin have each submitted an *Offer of Settlement* (“*Offers*”), which the Commission has determined to accept. Without admitting or denying any of the findings herein, MFG and Gilmartin acknowledge service 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*”).<sup>1</sup>

<sup>1</sup> MFG and Gilmartin consent 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 MFG and Gilmartin do not consent to the use of the *Offers*, or the findings consented to in the *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 do MFG or Gilmartin consent to the use of the *Offers* or this *Order*, or the findings in this *Order* consented to in the *Offers*, by any other party in any other proceeding.

### III.

The Commission finds the following:

#### A. Summary

From approximately June 2004 through June 2005, Philadelphia Alternative Asset Management Company LLC (“PAAMCo”), a registered Commodity Pool Operator (“CPO”) and Commodity Trading Advisor (“CTA”), and Paul M. Eustace, Associated Person and president of PAAMCo, fraudulently operated the Philadelphia Alternative Asset Fund Ltd., a Cayman Islands hedge fund (“Offshore Fund”). Eustace opened commodity futures and options trading accounts at MFG, a registered Futures Commission Merchant (“FCM”). Gilmartin was an account executive at MFG and was primarily responsible for the Offshore Fund trading accounts at MFG.

Through a trading subaccount opened at MFG in March 2005, Eustace and PAAMCo fraudulently concealed mounting, massive trading losses. Eustace and PAAMCo also backdated execution dates of Exchange for Physicals trades (“EFPs”) in order to bolster the apparent profitability of the Offshore Fund. Ultimately, the Offshore Fund sustained net losses of approximately \$133 million in its trading accounts at MFG.

On June 22, 2005, the Commission filed an emergency injunctive action charging Eustace and PAAMCo with fraud in connection with the Offshore Fund and other commodity pools, and obtained an *ex parte* statutory restraining order freezing assets under their control, which included the Offshore Fund assets held at MFG. As a result, over \$75 million in assets was frozen and preserved for investors. *See CFTC v. Eustace*, civ. no. 05-2973-MMB (E.D. Pa.).<sup>2</sup>

MFG, through its employees, and Gilmartin failed to diligently supervise the handling of the Offshore Fund accounts by MFG employees. MFG failed to follow its policies and procedures with respect to transfers of trades and opening of new accounts. MFG also failed to provide sufficient guidance concerning potential conflicts of interest and timeliness of disclosures, and failed to have sufficient internal controls, policies and procedures concerning external communications with third parties and changes to internet access of account information. MFG and Gilmartin failed to respond to and investigate accumulating indications of questionable activity by Eustace. MFG failed to adequately supervise Gilmartin and his trading group and failed to institute sufficient internal controls, policies and procedures to detect and deter possible wrongdoing. Lastly, MFG and Gilmartin failed to comply with order taking and recordkeeping requirements.

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<sup>2</sup> On July 12, 2007, the court entered a Consent Order of Permanent Injunction and Other Equitable Relief against Eustace, which included findings of fact and conclusions of law relating to his fraud, enjoined him from further violations of the Act and Regulations and from engaging in certain commodity related activity, including trading, and required payment of restitution and a civil monetary penalty in amounts to be determined. On November 8, 2007, in the same court, a grand jury indicted Eustace for commodities fraud. *See United States v. Eustace*, crim. no. 07-693-JG (E.D. Pa.).

In determining to accept MFG's and Gilmartin's offers of settlement, the Commission considered the fact that MFG and Gilmartin are paying collectively \$75 million to resolve claims in a related action brought by the Receiver ad litem, appointed at the request of the Commission, in the Commission's fraud action against Eustace and PAAMCo.

**B. Respondents**

**MF Global Inc., formerly known as Man Financial Inc.**, has been registered as an FCM with the Commission since 1996. MFG is a public company whose shares are traded on New York Stock Exchange. The events set forth in this Order occurred in MFG's New York office.

**Thomas Gilmartin** was hired by MFG in February 2004 and registered as an Associated Person ("AP") of MFG since April 2004. Prior to that, Gilmartin was an AP at Carr Futures for eleven years and registered with the Commission as an AP at other FCMs since 1992. MFG placed Gilmartin on paid administrative leave after the Commission filed its action against Eustace and PAAMCo.

**C. Facts**

**1. Gilmartin Did Not Disclose His Ownership Interests in PAAMCo**

In 2002, Eustace and others formed PAAMCo to manage hedge funds that traded commodity futures and options on behalf of investors. From approximately June 2004 through June 2005, Eustace and PAAMCo operated two commodity pools, the Offshore Fund and the Philadelphia Alternative Feeder Fund LLC ("Feeder Fund"), a domestic fund that invested in the Offshore Fund.<sup>3</sup> PAAMCo and Eustace eventually had over \$250 million in assets under management in the Offshore Fund. The Offshore Fund had two directors and retained a third-party fund administrator ("Fund Administrator") which was responsible for, amongst other things, subscriptions, determining the Net Asset Value ("NAV") of the Fund, and issuing monthly NAV statements. The Offshore Fund held trading accounts at MFG and another FCM, which were controlled by PAAMCo and Eustace. As discussed below, even though he was the account executive for the Offshore Fund accounts, Gilmartin failed to disclose to MFG that he held an ownership interest in PAAMCo and that he benefited from that interest.

Gilmartin, who first met Eustace in college, invested seed money in PAAMCo and helped Eustace to establish PAAMCo, by facilitating introductions to and meetings with people.

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<sup>3</sup> PAAMCo became registered with the Commission as a CPO and Eustace registered as the sole AP of PAAMCo in October 2003. The Offshore Fund was formed in approximately June 2004; the Feeder Fund was formed in October 2004. Prior and subsequent to operating the Offshore Fund, PAAMCo formed and was managing another commodity pool, the Philadelphia Alternative Asset Fund, LP. Separate from PAAMCo, Eustace also operated the Option Capital Fund, LLC. All these funds were defrauded by Eustace and/or PAAMCo. Only the Offshore Fund held accounts at MFG.

Gilmartin also initially held a passive, non-voting ownership interest in PAAMCo of more than 19 percent. In late 2004, following an audit by the National Futures Association (“NFA”), PAAMCo counsel advised Gilmartin that based on his ownership interest and based on his position as an account executive for the Offshore Fund accounts, Gilmartin met the definition of a Principal of PAAMCo who needed to be registered with NFA, and he had a conflict of interest. PAAMCo counsel further advised that as long as Gilmartin held any interest in PAAMCo and the Offshore Fund held accounts at MFG, the Offshore Fund and MFG would be obligated to identify Gilmartin in disclosure documents as an owner of PAAMCo who had an incentive to have the Offshore Fund actively trade through MFG to maximize commissions. PAAMCo counsel also advised that PAAMCo would have to obtain verification from MFG that Gilmartin had disclosed his ownership interest and the conflict of interest to MFG. Gilmartin was given the option of either partially or fully redeeming his interest, depending upon whether he wanted to continue to retain the Offshore Fund business. Gilmartin elected to redeem his interests fully and continue as an account executive for the Offshore Fund. PAAMCo bought out Gilmartin’s interest in December 2004, six months after the Offshore Fund started trading at MFG. Gilmartin redeemed his initial \$10,000 investment for approximately \$103,000. Gilmartin also earned approximately \$35,000 as his percentage share of PAAMCo’s net income for 2004.

Gilmartin never disclosed his ownership interest in PAAMCo to MFG. MFG did not learn about it until after the Commission filed its action in June 2005. MFG did not provide sufficient guidance as to what constitutes a potential conflict of interest or as to timeliness of such necessary and critical disclosures.

## **2. MFG’s Supervisory Structure**

During this period, MFG had a diffuse and decentralized system of supervision and internal controls. In February 2004, Gilmartin joined MFG, then known as Man Financial Inc. Gilmartin, recruited by, amongst others, the Chief Executive Officer (“CEO”) of MFG, was hired as a senior vice president. Gilmartin was assigned to the interest rates product group, which was headed by a senior vice president of MFG. Gilmartin described his unit within the group as the Futures and Options Team. He had two employees who reported to him.

Gilmartin did not view anyone at MFG as his direct supervisor. Gilmartin instead viewed himself as having direct reporting lines to the various departments of MFG, such as Legal and Compliance, Operations, human resources, sales and marketing and administration. Gilmartin also identified the CEO of MFG as the person from whom he would seek guidance, if needed. The head of the interest rates product group did not perform adequate, routine or day-to-day supervisory functions relating to Gilmartin and was not involved in the handling of and the events surrounding Eustace’s trading activity. There also was no general supervisor for the trading floor at MFG.

Gilmartin’s group was subject to an audit in October 2004. MFG, however, failed to obtain a report of the audit until after the Commission filed its action against Eustace and PAAMCo in June 2005. The unseen audit report identified Gilmartin as reporting directly to the CEO and stated that “the desk expects that in the future it may partake in the management and/or incentive fees generated by the third party advisors.” The report recommended that a

supervisory principal be appointed in the trading room to oversee Gilmartin's desk and the other order desks. The report also recommended that an organizational chart be developed depicting personnel with designations, responsibilities and reporting lines, and addressed order ticket preparation issues.<sup>4</sup> The recommendations and issues identified in the audit report were not addressed by MFG due to its failure to obtain the report.

As Gilmartin was hired in February 2004, his first performance review would not have occurred until over a year later in spring/summer of 2005, which was after the filing of the Commission's action against Eustace and PAAMCo. MFG did not conduct any interim review or evaluation of Gilmartin.

### **3. MFG and Gilmartin Failed to Respond to Indicators of Questionable Activity or Potential Wrongdoing By PAAMCo and Eustace**

At the outset of trading in July 2004, Eustace experienced losses in his trading on behalf of the Offshore Fund.<sup>5</sup> From January 2005 until the Commission filed its action in late June 2005, PAAMCo and Eustace sustained mounting and substantial trading losses in the combined FCM accounts of the Offshore Fund. Eustace masked the severe trading losses occurring in the accounts at MFG from investors and the Fund Administrator through two primary means: 1) the backdating of the execution dates of EFPs in order to improve the performance of the prior month; and 2) the concealment of a second subaccount, the "50 subaccount," which he opened in March 2005 and in which he placed or transferred losing positions. As set forth below, MFG and Gilmartin failed to respond to indicators of questionable activity or potential wrongdoing by Eustace, as Eustace was taking steps to conceal the Offshore Fund's trading losses.

In June 2004, Eustace opened accounts on behalf of the Offshore Fund at MFG. The Offshore Fund was Gilmartin's largest client, and Gilmartin was primarily responsible for MFG's handling of the Offshore Fund accounts. The initial trading subaccount at MFG was known as the "10 account."<sup>6</sup> Later, Eustace opened another trading account for the Offshore

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<sup>4</sup> Gilmartin and his group had numerous recordkeeping violations in connection with the preparation of the office order tickets relating to the Offshore Fund accounts, including failing to provide account identification and to properly time stamp the orders. MFG as an FCM is responsible for such recordkeeping violations.

<sup>5</sup> In July 2004, Eustace deposited into the Offshore Fund's account at MFG three cashier's checks totaling \$607,000. Unbeknownst to MFG, those assets belonged to other funds Eustace managed. MFG accepted the checks as deposits of funds into the Offshore Fund account for purposes of trading, making an exception to its internal requirement that all incoming wires and checks come from the actual account holder. The Fund Administrator's established procedure for investor funds coming into the Offshore Fund's account was that investors sent subscriptions to the Fund Administrator which then wired money to MFG. (Eustace used these funds to ensure the Fund Administrator reported a profitable NAV for that first month of trading.)

<sup>6</sup> Eustace opened the 10 account at MFG claiming to be President and Secretary of the Offshore Fund, which he was not. He was not a director or officer of the Fund. The documentation relating to the Offshore Fund, including an unsigned trading advisory agreement with PAAMCo and draft Offering Memorandum, was at best ambiguous as to PAAMCo or Eustace's authority

Fund at the other FCM. As stated, Eustace also opened the 50 subaccount at MFG in March 2005.

The Fund Administrator prepared the monthly NAV statements for the Offshore Fund by accessing account statements provided over the internet by MFG and the other FCM. The Fund Administrator also used trading information and reconciliations obtained from PAAMCo and Eustace directly. The Fund Administrator did not receive paper copies of statements.<sup>7</sup> At MFG, the internet access system is known as the eMidas system. MFG's eMidas system provides daily and monthly account statements for each account. In June 2004, upon the opening of the 10 account, employees of the Fund Administrator and Eustace were provided eMidas access to the daily and monthly account statements for the 10 account.

From January through April 2005, the Fund Administrator issued monthly NAVs showing positive gains; in May, the NAV reflected slight losses. The reality of the trading in the Offshore Fund's accounts at MFG and the other FCM, aggregately, was losses in every month from January through May 2005 as follows: \$0.5 million in January; \$18.6 million in February; \$5.9 million in March; \$33.5 million in April; and \$87.9 million in May. The aggregate total of these losses in all accounts from March through May alone was \$127 million, with losses of \$144.5 million for the same time period in the 50 subaccount, which Eustace concealed from the Fund Administrator.

**a. MFG Failed to Have Sufficient Internal Controls and Supervision Concerning External Communications Relating to EFPs**

Commencing in October 2004, Eustace caused the Fund Administrator to backdate trade dates for certain EFPs executed through MFG in order to bolster apparent profits or minimize losses and thereby artificially improve the NAV for the Offshore Fund.<sup>8</sup> Eustace caused the

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to open accounts. None of the documents identified Eustace as an officer or director of the Offshore Fund. In light of his ownership interest in PAAMCo, Gilmartin, who forwarded the documentation to the MFG Account Opening Department, should have known that Eustace was not president of the Offshore Fund. MFG failed to follow its procedure to obtain the signatures of the directors of the Offshore Fund in opening the Offshore Fund account. However, the Fund's directors as well as other PAAMCo employees and directors knew that Eustace had established an account at Man in June 2004 and did not object subsequently to the opening of the account.

<sup>7</sup> From the outset, MFG mailed hard copies of account statements to the Offshore Fund's directors at an address provided by Eustace in the account opening documents, which was also the address specified in the Agreement for Provision of the Offshore Fund's Directors. Once the 50 subaccount was opened, MFG mailed hard copies account statements for both the 10 and 50 subaccounts to the Offshore Fund directors.

<sup>8</sup> An EFP is a form of privately negotiated physical settlement of long and short positions held by two parties. Generally, the parties take an exchange traded futures position and privately negotiate their physical trade. Instead of offsetting their futures trades with subsequent trades on the exchange, they inform the exchange that they want to transfer the futures from one party to the other at an agreed upon price, thus offsetting and closing out their respective positions.

Fund Administrator to backdate certain EFPs throughout 2005. The failures by Gilmartin and MFG relate to several EFPs that were executed on February 1 but backdated to January 31, 2005. By such backdating, Eustace improved the apparent results for January by \$2.6 million, instead of reporting to investors a negative return due to the actual losses of approximately \$500,000 in the combined FCM accounts.

On February 1, 2005, Eustace executed several EFPs using the settlement prices for January 31 to set the futures prices on the EFPs. To accomplish the backdating, Eustace first notified the Fund Administrator that the trades were executed on January 31 and blamed posting delays at MFG to explain why the MFG daily account statement showed the EFPs with execution dates of February 1. The Fund Administrator requested that Eustace obtain documentation.

Eustace thereafter requested that Gilmartin send an email to the Fund Administrator, which Eustace had drafted. Eustace instructed Gilmartin to “send the email just as I sent it to you to me and [the Fund Administrator].” Gilmartin did as requested. Using Eustace’s exact words, Gilmartin’s email stated that there was a processing delay for EFPs at MFG that caused a one-day lag in getting the trades booked and representing that the trade execution dates were January 31, not February 1 as shown on the daily statement. Eustace then responded to Gilmartin and the Fund Administrator as if he had never seen the email.

After the Fund Administrator again requested that Eustace obtain “something” from MFG that states which trades on the February 1 statement were executed on January 31, Eustace again drafted an email and instructed Gilmartin to send the email to the Fund Administrator and to “use the exact wording and cc: [him].” Again, Gilmartin complied and sent the Fund Administrator the email, as if he had written it, stating “To clarify, please be advised that EFP currency trades that were posted on 1 February were executed on 31 January....[D]ue to posting issues associated with EFPs, they were posted on 1 February.”

By Gilmartin’s actions, the Fund Administrator believed that MFG and Gilmartin confirmed that all of the EFPs showing a February 1 execution date on the February 1, 2005 daily account statement should be treated as January 31 trades. Gilmartin did not sufficiently investigate and verify whether all the listed EFPs were in fact executed on January 31. Gilmartin also did not obtain appropriate authorization before sending emails drafted by a third party that purported to verify trading activity executed through MFG. Gilmartin’s confirmation of the

January 31 execution dates is particularly questionable because he received standard internal MFG emails confirming that certain EFPs were executed on February 1.<sup>9</sup>

MFG did not have adequate internal controls, policies and procedures addressing external communications verifying trade information. MFG did not have an adequate system of supervision and internal controls relating to patterns of questionable trading and failed to investigate adequately the factual basis for the written communications sent by Gilmartin.

**b. MFG and Gilmartin Failed to Respond and Investigate Questions Concerning the Cumulating Losses in the 50 Account**

On March 1, 2005, Eustace opened a new subaccount at MFG, known as the “50 account”. He immediately started using this subaccount to hide accumulating trading losses and concealed the existence of this subaccount from the Fund Administrator so that the losses would not be included in the Offshore Fund’s NAV. As set forth below, MFG and Gilmartin did not respond to and investigate growing indications of questionable activity by Eustace.

**1. MFG Failed To Have Adequate Internal Controls Concerning Changes to Internet Account Access and Gilmartin Failed To Question Changes By Eustace**

The same day Eustace opened the 50 subaccount at MFG, Eustace took steps to conceal its existence from the Offshore Fund Administrator. To accomplish this, Eustace removed the Fund Administrator’s access to the 50 subaccount on MFG’s eMidas system.

Eustace claimed to Gilmartin that he was going to do an “experiment for these two accounts,” referring to the 10 and 50 subaccounts. He instructed Gilmartin to leave the first account, the 10 subaccount, on eMidas and fax statements for the second account, the 50 subaccount, to Eustace, instead of putting it on eMidas. In response to Gilmartin’s question as to whether it was important not to have it on eMidas, Eustace said it would make for a “clean test.” Gilmartin did not question then or later what Eustace meant. Gilmartin later informed Eustace that he could allow “Eustace and nobody” else to have access to the 50 subaccount, and Eustace stated, “that’s perfect.” At Eustace’s request, Gilmartin identified for Eustace the persons who had eMidas access to all the accounts, including identifying the employees of the Fund Administrator who had access. Eustace then provided further instructions to add a new user

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<sup>9</sup> Gilmartin had processed two late day EFP trades on January 31 that were treated, at Eustace’s request, as February 1, 2005 trades. However, the emails Eustace authored were broadly written and not limited to those two particular trades. Instead, as discussed above, both emails referred to EFPs posted on the February 1 daily statement with February 1 execution dates that should be treated as January 31<sup>st</sup> trades. There were 19 EFPs on the February 1<sup>st</sup> daily statement with February 1 execution dates. In addition, while in response to Gilmartin’s question, Eustace said that the emails related to those two particular trades Gilmartin had processed, he also stated that the emails applied “more generally ...to give [them] a little bit more of flexibility.” Gilmartin never questioned what Eustace meant and did not further investigate the EFPs at issue.



name for the 10 and 50 subaccounts. The existing user name, which the Offshore Fund Administrator used, would allow access only to the 10 subaccount.

Gilmartin has claimed that he believed that other persons would still have access to the 50 subaccount through PAAMCo and by viewing what he thought was a master account available on eMidas.<sup>10</sup> With that apparent understanding, Gilmartin did not question, either at the time of Eustace's request or later when Gilmartin had other indications of questionable activity, the "clean test" explanation provided by Eustace. Gilmartin also did not question why Eustace would go through the process of removing everyone from eMidas access for that one subaccount if they were otherwise still able to access the information through other means.

MFG failed to have adequate internal controls, policies and procedures concerning changes to internet access of account information.

## **2. MFG and Gilmartin Failed to Follow MFG's Procedures For Transfers of Trades Between Related Accounts**

In opening the 50 subaccount on March 1, 2005, Eustace also informed Gilmartin that he wanted to "strip" a portion of two existing large futures positions in the 10 subaccount. Rather than "simply transferring the positions," Eustace wanted to do the equivalent of an "as of" trade to move two substantial long positions in Treasury bond contracts. Eustace emailed Gilmartin a series of trades he wanted posted into the subaccounts to move positions with prices, volumes and as of dates of February 28.

Generally, transfers of trades involving accounts with the same beneficial owner occur by cancelling the existing trades that established the position in the originating account and adding that same trade to the receiving account, maintaining the original trade date, price and volume. MFG and Gilmartin, however, acquiesced to Eustace's request and allowed offsetting trades to be added to the 10 and 50 accounts with the result that the positions were closed in the 10 account and established in the 50 account. The MFG operations employee initially handling the request informed his supervisor that the specific open bond positions in the 10 account had different prices than those provided by Eustace. Despite this, the supervisor approved the posting of the trades in the accounts at the prices dictated by Eustace. The trades thus were not executed on an exchange and were added to the accounts at different prices than the original trades that established the positions. Gilmartin caused to be prepared office order tickets to reflect the added trades. The account statements of MFG reflected these offsetting trades and did not otherwise indicate that they were "transfer" trades.

As a result, the 50 account took a loss of approximately \$14 million and the NAV for the 10 account eliminated such losses. The Offshore Fund was charged commissions for the offsetting trades of approximately \$75,000.

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<sup>10</sup> Yet, on two occasions, one of which occurred more than a month after the 50 account opened, Gilmartin mentioned the 50 account to a key PAAMCo employee who appeared unaware of the 50 account. Gilmartin never questioned why this employee did not seem to know about this second significant trading account at MFG, more than a month after it opened.

Eustace's purported justification to Gilmartin for the trade transfer instructions was the desire to have an audit trail. Gilmartin did not question this justification. However, if the typical process for transferring trades had been used, the originating account would have shown that a trade had been cancelled and the receiving account would have shown a trade "as of" the original date, *i.e.*, an audit trail.<sup>11</sup>

MFG failed to adhere to the procedures it had in place for transfer trades.

### **3. MFG and Gilmartin Failed to Respond to and Investigate The 50 SubAccount's Rapid and Substantial Trading Losses**

From March through June, 2005, Eustace transferred losing positions into the 50 subaccount from the 10 subaccount and moved trades into the 10 subaccount from the 50 subaccount to offset trades profitably. Eustace sometimes went directly to the Operations Department to get approval for the transfers, but Gilmartin requested the Operations Department to notify him. Gilmartin otherwise facilitated many transfers and knew, or should have known, that the transfers were occurring. Eustace also established positions directly into the 50 subaccount. Gilmartin did not review and was not required by MFG to view the subaccounts unless he had an error to resolve.

The 50 subaccount immediately became the account at MFG that held the losing positions of the Offshore Fund while the 10 subaccount, the account visible to the Fund Administrator, became the profitable subaccount. For example, in March and April 2005, the 50 subaccount had losses of almost \$34 million and \$38 million, respectively, while the 10 subaccount had gains of approximately \$26 million and \$13 million. Also, through the transfers, Eustace moved massive losing positions initiated in the 10 subaccount. For instance, a transfer on April 25 resulted in unrealized losses of \$23.6 million being moved out of the 10 subaccount and into the 50 subaccount. At the end of May, while the 10 subaccount also sustained losses of \$3 million, the 50 subaccount had almost \$73 million in losses.

MFG did not have adequate internal controls, policies or procedures to identify trading patterns reflecting possible wrongdoing.

### **4. MFG Failed To Prohibit External Communications Concerning NAV of Offshore Fund**

On at least one occasion at the end of March 2005, Gilmartin authorized a member of his staff to provide NAV information for the Offshore Fund to a third party upon Eustace's request.

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<sup>11</sup> Eustace requested a second set of "as of" trades on March 7, 2005 to clear out positions in the accounts. Gilmartin asked the Operations Department to handle Eustace's request. When the Operations Department staff responded to Gilmartin that "we should not be doing this . . . no we cannot," Gilmartin pressed the staff to make an exception. The Operations Department refused and instead, transferred the positions by cancelling the trades in one account and adding it to the other account, as of the original trade date and price. Subsequent transfers occurred in the same manner.

Gilmartin did not seek approval from MFG. Subsequently, the same staff member provided general NAV information to a potential investor. MFG's policies and procedures did not explicitly prohibit employees making representations as to the NAV of funds managed by a third party and did not require prior approval before such representations were made. Such representations by an FCM may create the impression, whether intentional or not, that the FCM is independently verifying the NAV for the fund.<sup>12</sup>

**5. Gilmartin Accepted Offsetting Orders for the 10 and 50 Subaccounts and Did Not Alert MFG to the Attempted Cross Trade**

In early May 2005, Eustace attempted to execute a cross trade between the Off-Shore Fund subaccounts at MFG. Such a trade, if executed, would be illegal because the trade would be between the same beneficial account owner. Gilmartin accepted offsetting orders from Eustace for the 10 and 50 subaccounts and forwarded the orders to the floor clerk. The floor clerk declined to accept the orders, because upon questioning of Gilmartin, he realized that the orders were for accounts with the same beneficial owner. The floor clerk explained this to Gilmartin, telling him that they had been fined for that in the past. Despite that, in response, Gilmartin suggested the orders could be executed. The floor clerk again refused to accept the orders and the orders were not executed. Gilmartin conveyed that to Eustace who acknowledged it was a cross trade. Gilmartin failed to recognize that it was an improper trade and failed to notify anyone at MFG that Eustace had attempted a cross trade.

**6. Gilmartin's Failure to React to an NFA Notice Concerning the Fund, Eustace and Gilmartin and to the Fund's Large Margin Calls**

On May 25, 2005, the NFA issued a Notice to Members requesting information concerning Eustace, PAAMCo, the Offshore Fund, and other individuals, including Gilmartin. Despite being named in the Notice, Gilmartin accepted Eustace's explanation that NFA was inquiring about another PAAMCo client and never spoke to anyone at MFG about the Notice or Eustace's explanation.

Also on May 25, MFG issued a "very large" margin call to the Offshore Fund on May 25, in the amount of \$19.3 million. Another "very large" margin call followed on June 2. With respect to the May 25 call, while Eustace met the call through transfer of funds from another account, liquidation of positions and market movement, Eustace promised he had wired funds to meet the margin call. Those funds were never received, and beyond an initial questioning of Eustace, MFG did not follow up to find out why he had not sent the funds. Beginning on May 31, 2005, Gilmartin participated in the margin call communications with Eustace and personnel from MFG's risk, credit and margin departments, including the call concerning the \$15 million in funds never received.

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<sup>12</sup> Neither Gilmartin nor his staff attempted to verify the NAV prior to making the communication. However, the NAV they represented was approximately what was being reported by the Fund Administrator and posted on PAAMCo's website. At the time, Gilmartin's staff provided the apparent NAV, the 50 subaccount had trading losses. However, the Offshore Fund also had an account at another FCM, the profitability of which MFG would not know.

At that time, neither MFG nor Gilmartin questioned Eustace as to why the 10 account was consistently profitable and the 50 account overwhelmingly negative. Gilmartin did not appear aware of this and did not alert anyone at MFG concerning earlier events, including the requests to send emails concerning the EFPs authored by Eustace, the eMidas access changes, NAV information sent out on behalf of Eustace, the March 1 “transfer trades” or Eustace’s explanation for the NFA Notice.

MFG and Gilmartin failed to respond and investigate adequately the indicators of possible wrongdoing. MFG also did not have adequate systems in place designed to identify patterns of questionable trading, including large losses rapidly accumulating in one subaccount where other related accounts were profitable.

#### **D. Legal Discussion**

##### **1. MFG and Gilmartin Failed to Diligently Supervise**

Regulation 166.3 provides that every Commission registrant (except APs who have no supervisory duties) diligently supervise the handling by its partners, employees and agents of all activities relating to its business as a registrant. Regulation 166.3 imposes on registrants an affirmative duty to supervise their employees and agents diligently by establishing, implementing, and executing an adequate supervisory structure and compliance programs. “The duty to supervise . . . include[s] the broader goals of detection and deterrence of possible wrongdoing by [a registrant’s] agents.” *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 33,444 (CFTC Dec. 14, 1989). “In appropriate circumstances, a showing that the registrant lacks an adequate supervisory system can be sufficient to establish a breach of duty under Rule 166.3. See *In re Thomas W. Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 (CFTC Dec. 10, 1997). The existence of violations that should have been detected by a diligent system of supervision is independent proof of a failure to supervise. See *In re Paragon Futures Ass’n*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850 (CFTC Apr. 1, 1992). The violations which occurred must be of a type that should be detected because of their nature or because they have occurred repeatedly. *Id.* An underlying violation, however, is not necessary to establish a supervisory violation. *Id.*

MFG and Gilmartin violated Regulation 166.3 by failing to diligently supervise the handling of the Offshore Fund accounts by MFG employees. Specifically, MFG and Gilmartin failed to respond and investigate indicators of questionable activity and failed to follow MFG’s internal policies and procedures. See *In re Thomas W. Collins*, ¶ 27,194 (if a supervisory system is in place, then the registrant must diligently administer it); *In re GNP*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,219 (CFTC Aug. 11, 1992), *aff’d sub nom.*, *Monieson v. CFTC*, 996 F.2d 852 (7<sup>th</sup> Cir. 1993) (discussing “the importance of a line supervisor’s duty to investigate questionable activity after that activity is brought to the supervisor’s attention”). MFG also violated Regulation 166.3 by failing to have an adequate supervisory system in place for supervising Gilmartin and his group and by failing to have an adequate system in place to detect potential wrongdoing. *CFTC v. Trinity Financial Group Inc.*,

[1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,179 at 45,635 (S.D. 1997), *aff'd in relevant part, vacated in part and remanded sub nom. Sidoti v. CFTC*, 178 F.3d 1132 (11<sup>th</sup> Cir. 1999).

## **2. MFG and Gilmartin Committed Recordkeeping Violations**

Pursuant to Section 4g of the Act and Regulation 1.31, an FCM is required to maintain books and records, including original records of orders for customer accounts, for a period of five years, and to make those records available to the Commission for inspection when requested to do so. Regulation 1.35(a-1)(1) requires FCMs to immediately prepare a written record of a customer's order upon receipt including account identification and order number, and to record thereon the date and time, to the nearest minute, the order is received, and in addition for options customers' orders, the time to the nearest minute, the order is transmitted for execution.

Under the Act, the FCM is held responsible for the recordkeeping of its employees. *See In re GNP Commodities, Inc.*, ¶ 25,360 at 39,217-39,218. FCM employees "play a vital day-to-day role in the record keeping systems maintained by FCMs." *In re Shahrokh Nikkah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,887-49,888 (CFTC May 12, 2000). Account executives who are delegated the responsibility for recordkeeping may be held liable as an aider and abettor of the FCM's violations. *Id.*, ¶ 28,129 at 49,888.

MFG and Gilmartin, committed numerous recordkeeping violations in violation of Section 4g of the Act and Regulation 1.35(a-1)(1).

## **IV. FINDINGS OF VIOLATIONS**

Based upon the foregoing, the Commission finds that MFG and Gilmartin violated Section 4g of the Act, 7 U.S.C. § 6g (2002), and Regulations 1.35(a-1)(1) and 166.3, 17 C.F.R. §§ 1.35(a-1)(1) and 166.3 (2007).

## **V. OFFERS OF SETTLEMENT**

MFG and Gilmartin have submitted their *Offers* in which they, without admitting or denying the findings herein:

- A. Acknowledge receipt of service of this *Order*;
- B. Admit the jurisdiction of the Commission with respect to all matters set forth in this *Order*;
- C. Waive: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; all objections to the participation by any member of the Commission's staff in consideration of the

*Offers*; all claims that they may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2007), relating to, or arising from, this proceeding; and any claim of Double Jeopardy based upon 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 upon which this *Order* is entered shall consist solely of the findings contained in this *Order* to which the Respondents have consented in their *Offers*; and
- E. Consent, solely on the basis of the *Offers*, to entry of this *Order* that:
1. makes findings by the Commission that MFG and Gilmartin violated Section 4g of the Act, 7 U.S.C. § 6g (2002), and Regulations 1.35(a-1)(1) and 166.3, 17 C.F.R. §§ 1.35(a-1)(1) and 166.3 (2007);
  2. orders MFG and Gilmartin to cease and desist from violating Section 4g of the Act, 7 U.S.C. § 6g (2002), and Regulations 1.35(a-1)(1) and 166.3, 17 C.F.R. §1.35(a-1)(1) and 166.3 (2007);
  3. orders MFG to pay a civil monetary penalty in the amount of two million dollars (\$2,000,000);
  4. orders Gilmartin to pay a civil monetary penalty in the amount of two hundred and fifty thousand dollars (\$250,000) with payment of \$125,000 due by January 15, 2008 and the second and final payment of \$125,000 due by April 15, 2008; and
  5. orders MFG and Gilmartin to comply with their undertakings consented to in their *Offers* and set forth below in Part VII of this *Order*.

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

## **VI. MFG's REPRESENTATIONS**

In its *Offer*, MFG states that it has made the following changes in light of the events discussed in this *Order*:

1. MFG prepared new compliance manuals and it has required its employees to adhere to the new manuals;
2. MFG revised and formalized the supervisory structure that governs its Associated Persons in its New York office by identifying a listed principal in charge of the New York office and requiring supervisors for each trading desk;

3. MFG manually checked every hedge fund with an account carried by MFG in order to ensure that MFG has access to the correct mailing address of the funds' administrators and that the funds' administrators have access to all their funds' accounts and subaccounts through its eMidas platform or through receipt of hard copy account statements;
4. MFG revised its internal operating systems so that its account statements show that a position has been "transferred" between related accounts, including a specific indication of the transferor and the transferee accounts;
5. MFG requires all position transfers occurring three or more days after opening the position to have the approval of MFG's compliance department;
6. MFG increased its continuing education and training programs which, among other things, help account executives learn how to identify questionable activity;
7. MFG is developing additional exception reports to help detect and deter wrongful activity;
8. MFG now requires that any request for information about a fund customer directed to any MFG employee must, prior to any response, be received by either MFG's accounting department (if financial data requested) or compliance department (if any other data requested); and
9. MFG now requires that any request to add or delete access to account information through eMidas must be scrutinized by its client services department, and, if necessary, referred to Compliance.

**VII.  
ORDER**

**Accordingly, IT IS HEREBY ORDERED THAT:**

- A. MFG and Gilmartin shall cease and desist from violating Section 4g of the Act, 7 U.S.C. § 6g (2002), and Regulations 1.35(a-1)(1) and 166.3, 17 C.F.R. §§ 1.35(a-1)(1) and 166.3 (2007);
- B. MFG shall pay a civil monetary penalty in the amount of two million dollars (\$2,000,000). Gilmartin shall pay a civil monetary penalty in the amount of two hundred and fifty thousand dollars (\$250,000) with payment of \$125,000 due by January 15, 2008 and the second and final payment of \$125,000 due by April 15, 2008. MFG and Gilmartin shall pay their civil monetary penalties by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payments shall be made payable to the Commodity Futures Trading Commission, and sent to the address below:

Commodity Futures Trading commission  
Division of Enforcement  
ATTN: Marie Bateman – AMZ-300  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
Telephone: 405-954-6569

If payment by electronic transfer is chosen, the paying respondent shall contact Marie Bateman or her successor at the above address to receive payment instruction and shall fully comply with those instructions. MFG and Gilmartin shall accompany payment of their penalties with cover letters that identify the paying respondent and the name and docket number of this proceeding. MFG and Gilmartin shall simultaneously transmit copies of their cover letters and the forms of payment to (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581 and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2) (2002), if this amount is not paid in full within fifteen (15) days of the due date, MFG and Gilmartin shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until the non-paying respondent has shown to the satisfaction of the Commission that payments of the full amounts of the penalties with interest thereon to the dates of the payments have been made; and



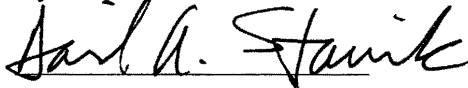
C. MFG and Gilmartin shall comply with their respective undertakings set forth in their *Offers*:

1. Public Statements: MFG and Gilmartin agree that neither MFG, nor Gilmartin, nor any of their successors, assigns, employees, agents, or representatives shall take any action or make any public statement denying, directly or indirectly, any finding 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 affects MFG's or Gilmartin's: (i) testimonial obligations; or (ii) rights to take appropriate legal positions in other proceedings to which the Commission is not a party. MFG and Gilmartin will undertake all steps necessary to assure that all of their successors, assigns, agents and employees under their authority and/or actual or constructive control understand and comply with this undertaking;

2. Gilmartin shall not apply for registration or seek exemption from registration with the Commission in any capacity, except as provided in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2007), and shall not engage in any activity requiring such registration or exemption from registration, except as provided for in Regulation 4.14(a)(9), or act as a principal, officer, employee or agent of any person registered with the Commission, required to be registered or exempted from registration with the Commission, except as provided for in Regulation 4.14(a)(9).

**The provisions of this Order shall be effective as of this date.**

By the Commission.



David A. Stawick  
Secretary of the Commission  
U.S. Commodity Futures Trading Commission

Dated: December 26, 2007