

Commodity Futures Trading Commission
CEA CASES

NAME: JEAN GOLDWURM, JULA GOLDWURM, IRA HAUPT AND COMPANY, IRVING WEIS, AND IRVING WEIS AND COMPANY

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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AGRICULTURE DECISIONS

(Agric. Dec. 1734)

In re JEAN GOLDWURM, JULA GOLDWURM, IRA HAUPT AND COMPANY, IRVING WEIS, AND IRVING WEIS AND COMPANY. CEA Doc. No. 38. Decided April 21, 1948.

Suspension of Registration and Denial of Trading Privileges -- Violation of Wash Sale Provision -- Customers, Futures Commission Merchants and Floor Brokers

Customers, futures commission merchants, and floor brokers each found to have violated section 4c of the Commodity Exchange Act by virtue of his own acts and not as the result of the actions of any other respondent, and it is therefore ordered that the registration of respondents Ira Haupt and Company and Irving Weis and Company as futures commission merchants and the registration of Irvin Weis as a floor broker be suspended for 10 days, and that all contract markets deny trading privileges thereon to Jean Goldwurm and Julia Goldwurm for 10 days, such suspension and denial of trading privileges to be held in abeyance for a period of two years from the date of this order pending future compliance with the act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Wash Sales -- Essential Elements -- Section 4c of Commodity Exchange Act

A "wash sale" is a form of fictitious transaction, the essential and identifying characteristics of which is the intent not to make a bona fide acquisition or disposition of stocks or commodities. The term is not expressly reserved for market manipulation, price manipulation, or fraud, and those elements are not essential to constitute a transaction a wash sale within the meaning of section 4c of the Commodity Exchange Act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Wash Sales -- Simultaneous Execution -- Evidence -- Fictitious Nature of Transaction

It is not of the essence of a wash or fictitious trade that the purchase and sale be executed simultaneously, simultaneous execution being a matter of evidence which tends to show the fictitious nature of the transaction. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Wash Sales -- Customers' Position in Futures Market

The character of transactions in cotton futures contracts as "wash" or "fictitious" is not affected by the fact that the customer for whose benefit they are executed has a position in the cotton futures market at the time of execution. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Fictitious Trades -- Futures Contracts Mutually Offsetting -- Section 4c of Commodity Exchange Act

Transactions in cotton futures contracts which are intended to be and which are mutually offsetting, entered into for the purpose of establishing purchases and sales to be matched against other sales and purchases for income tax purposes, are fictitious from the standpoint of reality and substance because each purchase cancels or washes out each sale, or vice versa, and their execution upon the floor of the New York Cotton Exchange does not give them vitality and validity under the prohibition contained in section 4c of the Commodity Exchange Act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Futures Trading -- Customer's Equally Balanced Positions "Out of the Market"

Where a customer of a futures commission merchant has equally balanced positions, long and short, in the same future of the same commodity on the same market, such a customer is "out of the market" with respect to that future. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Floor Broker -- Offset -- Simultaneous Execution of Orders -- Section 1.39 of Rules and Regulations Under Commodity Exchange Act

Where buying and selling orders for cotton futures contracts are offset by a floor broker under section 1.39 of the rules and regulations under the Commodity Exchange Act, simultaneous execution of such orders takes place. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Purchase and Sale -- Opposite Brokers -- Simultaneous Execution -- Mutually Contingent Bids and Offers -- Evidence

The fact that a purchase and a sale of identical quantities of cotton futures contracts by a floor broker are both reported on the same time slip of the New York Cotton Exchange as having taken place at 12:13 p. m., and the fact that the opposite side of each such transaction is taken by the same opposite broker, are weighty evidence to show that such purchase and such sale were executed simultaneously and by means of a mutually contingent bid and offer. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Customers -- Violation of Wash Sale Provision -- Section 4c of Commodity Exchange Act

A customer who orders the purchase and sale of identical quantities of the same future of the same commodity in the same market at not more than 3 points

loss, for the purpose of establishing transactions to be used for reporting income taxes, and who accepts confirmation of the execution of such orders, has entered into wash sales and fictitious sales in violation of section 4c of the Commodity Exchange Act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Futures Commission Merchants -- Violation of Wash Sale Provision -- Section 4c of Commodity Exchange Act

A futures commission merchant who receives orders from a customer to buy and sell identical quantities of the same future of the same commodity in the same market at not more than 3 points loss, who transmits such orders to a floor broker for execution and accepts and confirms the executed transactions, has confirmed the execution of wash sales and fictitious sales in violation of section 4c of the Commodity Exchange Act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Floor Brokers -- Violation of Wash Sale Provision -- Section 4c of Commodity Exchange Act

A floor broker who receives orders from a futures commission merchant to buy and sell the same future of the same commodity at not more than 3 points loss, with instructions not to offset such orders, is in a position to know that such orders are for the same account and their execution by the floor broker by means of simultaneous and mutually contingent bids and offers is a violation of section 4c of the Commodity Exchange Act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Wash Sales -- Statutory Standards -- Due Process of Law -- Section 4c of Commodity Exchange Act

The prohibitions against wash sales and fictitious sales in section 4c of the Commodity Exchange Act are not so deficient in standards or intelligibility as to constitute a violation of due process of law. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Violation of Act -- Responsibility of Partnership

Where individual respondent found to have violated the act is a partner in the respondent partnership which received and accepted brokerage commissions paid for execution of the transactions, respondent partnership is equally responsible for such violation. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Wash Sales -- Effect of Absence of Regulation by Commodity Exchange Authority Relating to Equally Balanced Positions as Open Accounts on Broker's Books

The absence of any regulation by the Commodity Exchange Authority prescribing the carrying of equally balanced positions as open accounts on a broker's books does not justify the execution of wash or fictitious transactions for the purpose of the application of such transactions against such equally balanced positions. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Wash Sales -- Intent of Congress -- Section 4c of Commodity Exchange Act

The broad language in section 4c of the Commodity Exchange Act, making it unlawful to enter into any transaction which "is, of the character of, or

is commonly known to the trade as, a 'wash sale', 'cross trade', or 'accommodation trade', or is a fictitious sale: . . ." evinces an intention on the part of Congress to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arm's length trading on the basis of supply and demand factors and trading opinion of these factors. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Mr. Benj. M. Holstein for complainant. *Messrs. Hess, Mela & Popkin*, of New York City, for respondents *Jean and Jula Goldwurm*. *Messrs Baer & Marks*, of New York City, for respondent *Ira Haupt & Company*. *Messrs. Corbin, Bennett & Delehanty*, of New York City, for respondents *Irving Weis and Irving Weis & Company*. *Mr. Phelan Beale*, of New York City, for intervenor. *Mr. John B. Poindexter*, Referee.

Decision by Thomas J. Flavin, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Commodity Exchange Act (7 U. S. C. Chapter 1) initiated by a complaint issued on May 7, 1946, by Clinton P. Anderson, Secretary of Agriculture. The complaint charges that respondents entered into and confirmed the executions of transactions in cotton futures contracts that were of the character of "wash sales" and fictitious sales in violation of the act. The complaint alleges in substance that on three occasions, namely July 19, 1944, November 14, 1944, and October 10, 1945, respondents *Jean and Jula Goldwurm* acting through their brokers, respondents *Ira Haupt and Company*, caused the execution of purchases of certain quantities of cotton futures on the New York Cotton Exchange against the simultaneous sales of identical quantities of cotton futures and that respondent *Irving Weis*, a member of the firm of *Irving Weis and Company*, acted as floor broker for respondent *Ira Haupt and Company* in the execution of such purchases and sales.

The complaint goes on to state that respondents *Jean and Jula Goldwurm* caused the simultaneous purchases and sales to be applied against other purchases and sales in their accounts in a manner which resulted in profits appearing to be realized from transactions which had been in existence for more than six months, when as a matter of fact such profits were actually realized from transactions which had been in existence for less than six months.

All respondents filed answers to the complaint. In general, the answers admit that the purchases and sales of cotton futures described in the complaint took place. However, the answers do not admit the simultaneity of the transactions and they deny that the transactions were of the character of "wash sales" or fictitious transactions.

After adjournment of the original hearing on December 5, 1946, the hearing was reopened on April 30, 1947, on motion of complainant,

for the purpose of affording complainant an opportunity to introduce further testimony.

Three witnesses testified at the hearing, all on behalf of complainant. In addition to the oral testimony, complainant introduced thirty-three exhibits in evidence, and respondent Ira Haupt and Company introduced seven exhibits. Respondent Irving Weis and Company introduced two exhibits. The respondents did not offer any oral testimony, and at the close of complainant's case and at the conclusion of the original and the reopened hearings, respondents moved that the complaint be dismissed on the ground that the evidence did not prove the allegations made in the complaint. Such motions to dismiss were denied by the referee.

The referee issued his report on July 25, 1947, proposing in general that respondents had violated the act as alleged in the complaint but recommending, as suggested by complainant, that the imposition of sanctions be suspended.

All the respondents filed exceptions to the referee's report, and requested oral argument before the deciding officer. Oral argument was held before me in Washington, D. C., on October 27, 1947. Upon its request, the New York Cotton Exchange, represented by Phelan Beale of Bouvier and Beale, New York, New York, was allowed to intervene in the argument and to file a brief.

FINDINGS OF FACT

1. The New York Cotton Exchange was at all times mentioned herein and is now a duly designated contract market under the provisions of the Commodity Exchange Act.

2. Jean and Jula Goldwurm are individuals residing in New York, New York, and were at all times mentioned herein customers of Ira Haupt and Company.

3. Ira Haupt and Company is a partnership registered under the act as a futures commission merchant, with an office at 111 Broadway, New York, New York.

4. Irving Weis is an individual and a member of the partnership of Irving Weis and Company and registered as a floor broker under the act.

5. Irving Weis and Company is a partnership registered under the act as a futures commission merchant, with an office at 60 Beaver Street, New York, New York.

6. On July 19, 1944, Jean and Jula Goldwurm ordered their broker Ira Haupt and Company to buy and sell for their joint account, whichever could be executed first, 1,200 bales of March cotton futures contracts and 1,200 bales of December cotton futures contracts, with

instructions that such purchases and sales were to be executed at not more than three points loss per pound.

7. On November 16, 1944, Jean and Jula Goldwurm instructed Ira Haupt and Company to buy and sell for their joint account, whichever could be executed first, 1,000 bales of December cotton futures contracts, such purchase and sale to be executed at not more than three points loss per pound.

8. On October 10, 1945, Jean Goldwurm and Jula Goldwurm directed the purchase and sale by Ira Haupt and Company, whichever could be executed first, for their respective individual accounts, of 800 bales of October cotton futures contracts with instructions that such purchase and sale were to be executed at not more than three points loss per pound.

9. Respondent Ira Haupt and Company transmitted each of the orders referred to in Findings 6, 7, and 8 to the respondent Irving Weis for execution on the floor of the New York Cotton Exchange.

10. In connection with the orders of October 10, 1945, Ira Haupt and Company informed Irving Weis that the orders were for two different customers or accounts and instructed him to execute such orders by a purchase and sale on the market without "offsetting."

11. Respondent Irving Weis executed the order of July 19, 1944, by buying 1,200 bales of March cotton futures from Eugene R. Burnett at 21.24 cents per pound and by simultaneously selling the same quantity of March cotton futures to the said Eugene R. Burnett at 21.23 cents per pound, and by buying 1,200 bales of December cotton futures from R. W. Sigel at 21.35 cents per pound and simultaneously selling the same quantity of December cotton futures to the said Sigel at 21.34 cents per pound.

12. In executing these transactions, the respondent Irving Weis made simultaneous and mutually contingent bids and offers on the floor of the New York Cotton Exchange to buy and sell cotton at a loss.

13. Respondent Irving Weis executed the order of November 16, 1944, by recording the purchase and sale of 1,000 bales of December cotton futures at 21.74 cents per pound as an "offset" transaction, as authorized by section 1.39 of the regulations (17 CFR § 1.39), both sides of the transactions being made by Irving Weis and clearing through respondent Ira Haupt and Company.

14. Respondent Irving Weis executed the order of October 10, 1945, by buying 1,600 bales of October cotton futures from Perry Moore and R. W. Sigel at 23.14 cents per pound and simultaneously selling the same quantity of October cotton futures to Perry Moore and R. W. Sigel at 23.13 cents per pound.

15. In executing the transactions mentioned in Finding 14, respondent Irving Weis made a simultaneous bid and offer on the floor of the New York Cotton Exchange to buy and sell cotton at a loss.

16. Respondent Irving Weis reported each of the transactions described in Findings 11, 13, and 14 to Ira Haupt and Company as having been executed, who accepted such confirmations and entered the completed transactions in its books in the accounts of respondents Jean and Jula Goldwurm and notified Jean and Jula Goldwurm of the executed orders.

17. With respect to the transactions of November 16, 1944, Irving Weis reported that this purchase and sale had been executed as an "offset" transaction, as made in Finding 13.

18. The purchases on July 19, 1944, November 16, 1944, and October 10, 1945, were matched up by Ira Haupt and Company with sales by the Goldwurms on previous or later dates for purposes of income tax reporting by the Goldwurms and the sales by the Goldwurms on the specified dates were similarly matched up with purchases on other dates for the same purposes.

CONCLUSIONS

I

Although there has been considerable argument written and oral throughout this proceeding, there is little dispute about most of the facts outlined in the Findings of Fact. Respondents' principal disagreement with regard to facts found concerns the manner of execution of the trades on the floor of the Exchange by Irving Weis. They contend that the hearing record does not establish that the trades in question were accomplished by simultaneous purchases and sales and as a result of mutually contingent bids and offers. The trades of November 16, 1944, were "offset" or "crossed" by the floor broker, Irving Weis, and were unquestionably of simultaneous execution. As to the purchase and sale on October 10, 1945, they are both recorded on the records of the New York Cotton Exchange as having taken place at 12:13 p. m. and they are both recorded on the same time slip showing that the transactions were reported to the New York Cotton Exchange observer on the floor at the same time. Moreover, as to both the transactions on July 19, 1944, and October 10, 1945, the opposite sides of the purchases and the sales happened to be taken by the same brokers. These factors are weighty evidence to show simultaneity and mutually contingent bids and offers. And, of course, Mr. Weis' statements to the Business Conduct Committee (Government Exhibits X

and Y) establish that the purchase and sale of October 10, 1945, were executed by making a simultaneous bid and offer which were accepted as a single transaction.

II

However, the issues are almost entirely issues of law. The most important of these is the question whether the transactions of July 19, 1944, November 16, 1944, and October 10, 1945, are violations of section 4c of the act, that is whether they are transactions that are, are of the character of, or are commonly known as, "wash sales," or are fictitious sales.

Respondents' position in general is that the transactions in question were concededly not entered into with any intent to manipulate cotton prices, that manipulative or fraudulent intent has been present in all the reported court decisions on "wash sales," that manipulative or fraudulent intent is an indispensable element of "wash sales," and that the intent of the act is to this effect. Respondents say that the transactions in issue here were gone through for "legitimate tax purposes" n1 and without any manipulative or fraudulent intent. On the other hand, the complainant contends that the transactions were meaningless as far as the cotton futures market was concerned, that in each case the sale and the purchase "washed" each other out, that the transactions were of the character of wash sales or were fictitious transactions in violation of section 4c of the act even though there was no intent to manipulate prices in the usual sense.

n1 Of course, the legitimacy of the tax purpose cannot be conceded, denied, or decided here. The Goldwurm respondents cite William V. Griffin, 45 B. T. A. 588 (1941), William R. Tracy, 38 B. T. A. 1366 (1938), and Dupont v. Commissioner, 98 F. (2d) 459 (C. C. A. 3d, 1938). The applicability of these decisions concerning trading in stocks is not very evident for the purposes claimed. Furthermore, in Trenton Cotton Oil Co. v. Commissioner of Internal Revenue, 147 F. (2d) 23 (C. C. A. 6th, 1945) (rehearing denied 148 F. (2d) 208 (1945)), the court said that where cottonseed oil futures were purchased and later sold as they matured and replaced with deferred futures (p. 36), "Petitioner's transactions in futures were sales and profit or loss resulted from each transaction depending upon whether petitioner received more or less than the original cost of the future sold."

In support of their general position that manipulative or fraudulent intent is a necessary element of the violation "wash sale" under the act, respondents point out that in the court decisions involving wash sales cited by the parties, fraud, deception or manipulative purpose is present. They also invoke Respondents' Exhibit 1, "Glossary of Futures Trading Terms" issued by the United States Department of Agriculture in September 1939, which describes a "wash sale" as "A fictitious transaction made usually for the purpose of creating apparent volume or price activity on the market." Respondents further refer to statements by Senator Pope and Senator Murray on the floor

of the Senate during the debate upon the bill that became the Commodity Exchange Act. n2

n2 Senator Pope: "Wash sales are pretended sales made openly in the pit or trading place for the purpose of deceiving other traders. They are employed to give a false appearance of trading and to cause prices to be registered which are not true prices. They may be entered and recorded as real trades, but by agreement between the parties privately are either cancelled or washed out by other trades. * * *" (80 Cong. Record 6162.)

Senator Murray: "The bill seeks to minimize cheating or fraudulent practices by outlawing so-called trading in privileges (puts and calls), wash sales, cross-trades, accommodation trades, and other fictitious transactions." (80 Cong. Record 7858.)

It is true as pressed by respondents that "wash sales" as violations of law generally appear in court decisions as devices used for manipulation of market prices, usually in connection with stocks. But even in these decisions cited by the parties, it is apparent that such a purpose is not an indispensable requirement of the characterization "wash sale." For example, in *United States v. Brown*, 5 F. Supp. 81, 93 (N. D. N.Y. 1931), the court said:

"The indictment accuses the defendants in this case of all the practices which the courts have condemned as a fraud on the public for it is alleged, not only that they manipulated purchases and sales on the New York Stock Exchange for the purpose of raising the price of the stock of the Manhattan Electric Supply Company for the purpose of disposing of their holdings therein as the price rose but *that they also opened accounts with various brokers by which they operated wash sales * * **" [Italics supplied.]

On appeal, 79 F. (2d) 321, 323 (C. C. A. 2d, 1935), the Circuit Court also said: "'Washing' sales was made possible by the numerous accounts controlled by the defendants between whom transactions could be cancelled." In *Harris v. United States*, 79 F. (2d) 771, 778 (C. C. A. 9th, 1931), the court said: "A wash sale, whether or not it was permitted by the rules of the exchange, would under the circumstances disclosed by the evidence, be equally effective to carry out the scheme of the defendants." *United States v. Minuse*, 114 F. (2d) 36, 38 (C. C. A. 2d, 1940), also refers to "wash" sales used as a manipulative device along with "matched, orders," etc.

There are some other court usages of the term "wash sales" not involving prosecutions for manipulative or fraudulent practices. In *In re Wettengel*, 238 Fed. 798, 799 (C. C. A. 3d, 1917), a bankruptcy case, a broker ordered the purchase of stock for a customer from another broker. After the purchase but without delivery of the stock to the first broker, that broker ordered the second broker to sell short the same number of shares of the same stock and the purchased stock was used to cover the short sale, the two brokers settling at the money difference. After this description of the transaction, the court said: "In other words, the transaction is what is known as a 'washed sale'." The Supreme Court of the United States in *United States v. New York*

Coffee and Sugar Exchange Inc., et al., 263 U. S. 611, 616 (1924), said of trading on the exchange, "There are no 'wash' sales, i. e., merely bets upon the market in which it is understood between the parties that neither is bound to deliver or accept delivery."

Since the Revenue Act of 1921 there has been a section of the Internal Revenue Code (presently 26 U. S. C. 118) dealing with loss from wash sales of stock or securities. The section has been amended several times and has been before the courts on numerous occasions. The general purpose has been to disallow, for income tax purposes, losses on the sales of securities where it is apparent from repurchase of the securities that the intent of the taxpayer was not to make a bona fide disposition of them. n3 In proposing the first wash sales provision in the Revenue Bill of 1921, the House Committee said in its report (H. R. Rep. No. 350, 67th Cong., 1st Sess. 11), "Section 214 would limit the deductions for losses by providing that no deduction shall be allowed for losses sustained in the sale of securities where the taxpayer at or about the time of such sale purchases identical securities. This change will, if adopted, prevent evasion of the tax *through the medium of wash sales.*" [Italics supplied.] The report of the Senate Committee on Finance (Sen. Rep. No. 271, page 14) likewise refers to the prevention of tax evasion through the medium of wash sales.

n3 Whereas prior to the wash sales provisions of the Revenue Act of 1921, a deductible loss was not allowed where equivalent stock was simultaneously repurchased with the sale, *Esperson v. Commissioner of Internal Revenue*, 59 F. (2d) 259 (C. C. A. 5th, 1931), deductible loss had been allowed where a time interval occurred between the sale and the repurchase and the sales and repurchases were accomplished through different brokers, *Samuel M. Vauclain, Petitioner v. Commissioner of Internal Revenue*, 16 B. T. A. 1005. It was apparently to close such loopholes that the wash sales provisions of the Internal Revenue Code were enacted.

In summary, it appears then that the term "wash sale" is not exclusively reserved for market manipulation or fraud. Wash sales of course have often been used for such purposes. This is shown by judicial decisions and by the description of "wash sale" in the "Glossary of Futures Trading Terms" issued by the Department and invoked by respondents. This description or definition carries the limitation "usually" which respondents would read out. The essential and identifying characteristic of a "wash sale" seems to be the intent not to make a genuine, bona fide trading transaction in stocks or commodities. A wash sale is a form of fictitious transaction. n4

n4 Webster's New International Dictionary (1944) has the following definition of "wash sale": "*Stock Exchange*. A prearranged fictitious sale of a given security for the purpose of influencing the market. *The transaction is prohibited because there is no intent to make delivery or change ownership.*" [Italics in last sentence supplied.]

In Huebner, *The Stock Market*, D. Appleton and Company (1922), pp. 325, 326, the author refers to wash sales as used for manipulative purposes and says that they are prohibited by exchanges throughout the country. He quotes as illustration, however, a paragraph of the Constitution of the New York Stock Exchange (1920) which provides as follows:

"Fictitious transactions are forbidden. A member of the Exchange or a member of a firm represented thereon who shall give or with knowledge execute an order for the purchase or sale of securities *which would involve no change of ownership*, shall be deemed guilty of conduct or proceeding inconsistent with just and equitable principles of trade, and punished as prescribed in Section 6 of Article XVII of the Constitution." [Italics supplied.]

Despite the exploration of some of the respondents into the technicalities and intricacies of futures trading there is little doubt that the transactions complained of in this proceeding were empty formalities as far as the cotton futures market is concerned. The purchases offset or cancelled the sales and vice versa. The evidence shows that in each instance the Goldwurm respondents were equally balanced, long and short, in the cotton future in which the questioned transactions took place. For all practical purposes they were "out of the market" with respect to this future. n5

n5 *Crowley, Alien Property Custodian v. Commodity Exchange, Inc., et al.*, 141 F. (2d) 182 (C. C. A. 2d, 1944); *Commodity Exchanges*, Baer and Woodruff, Chap. IV (Harper and Bros. 1929); *Commodities, The Things We Live By*, Merrill, Lynch, Pierce, Fenner and Beane (1944), pp. 14, 15; Section 1.3 (t), General Regulations under the Commodity Exchange Act, 17 CFR § 1.3 (t).

Respondents urge however that the Goldwurm respondents had "open" positions, long and short the same amount in the same future, because they instructed respondent Ira Haupt and Company to keep their positions "open" on the books, that there was no regulation of the Commodity Exchange Authority forbidding this, and that such a practice was permitted by the Commodity Exchange

Authority. I do not see how the failure of the Commodity Exchange Authority to proscribe the keeping of customers' position "open" on a broker's book can justify as permissible the execution of the transactions in dispute. Whether the Goldwurm accounts were equally balanced in the same future or not, the transactions in issue were intended to and were mutually offsetting. The Goldwurms did not intend and did not order a bona fide sale or a bona fide purchase of cotton futures in any sense. By these transactions, they were using the cotton futures markets merely to get purchases and sales which they could match against other sales and purchases for purposes of reporting for income tax purposes. The transactions were, then, at least artificial as far as futures trading is concerned. They were fictitious from the standpoint of reality and substance. The execution upon the floor of the Exchange does not give them vitality and validity for the purposes of section 4c of the act.

Section 4c of the act does not stop at the prohibition of "wash sales." It also prohibits any transaction that *is of the character of a wash sale*, is commonly understood to the trade as a wash sale, or is a fictitious

sale. The language could hardly be broader and, together with the other prohibitions in this section and other parts of the act, evinces an intention to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arms-length trading on the basis of supply and demand factors and trading opinion of these factors. In addition to the comments in the legislative history cited by respondents (n. 2 above), Senator Pope also said, "All fictitious transactions are prohibited by this bill (80 Cong. Rec. 6163)." Where Congress intended trading transactions in the nature of "wash sales" or "matched orders" to be violations of law only when used for market manipulative purposes, it said so specifically. Section 78 (i) of the Securities Exchange Act, 15 U. S. C. 78 (a) *et seq.* Without reference to section 4c of the act, sections 6 (b) and 9 prohibit manipulations and attempts to manipulate.

As have been delineated above, the transactions in issue were artificial and were fictitious to the cotton futures market. Not only that, but as revealed by the trades of July 19, 1944, and October 10, 1945, a pricing element wholly extraneous and unreal to the cotton futures market was injected into the trading, namely an accomplishment of the orders at a loss because a purchase and a sale of the same amount of the same future were sought simultaneously. The orders were not concerned with the price of the purchase or the price of the sale, or whether the purchase or sale occurred first, so long as both were transacted at not more than three points loss. The broad coverage of the statutory wording should not be delimited to exclude this type of trading. As alleged in the complaint, the transactions were "of the character" of wash sales and were also "fictitious" sales within the meaning of section 4c of the act. Naturally this conclusion applies only to the facts and circumstances disclosed by this record and there is no need, nor is there any intention, to cover all the different kinds of situations that respondents claim would be branded as violations of the act if the complaint in this proceeding should be sustained.

IV

A great deal of argument was had in the proceeding as to whether the transactions became violations of the act solely because of the manner of the execution of the trades by the floor broker, Irving Weis. In the Preliminary Statement in the referee's report (p. 5), the referee explained the principal contention of the complainant to be that by the very nature of the orders to buy and sell at not more than three points loss, each of the respondents knew or should have known that simultaneous purchases and sales would be necessary, that the transactions were so executed, that they had the effect of wiping each other

out and were, therefore, fictitious and "wash sales." The Goldwurm and Haupt respondents and the New York Cotton Exchange claim that the orders could have

been executed in a legitimate fashion by the floor broker either (1) without "lifting a leg", that is by waiting until he could simultaneously hit the bid of one broker and accept the offer of another within the limits set by the orders, or (2) by "lifting a leg", that is by executing one side of the order and by taking a chance that he could later execute the other side of the order within the limits of his instructions. It is therefore argued that the customer and the futures commission merchant should not be held responsible for illegal executions by a floor broker when the orders could have been carried out in a proper manner.

Reference to the complainant's brief (p. 13) in support of its Suggested Findings of Fact, Conclusions and Order which was before the referee shows that complainant specifically contended that it is not of the essence of a "wash" or fictitious transaction that a purchase and sale be executed simultaneously. Complainant then and since, as shown by the transcript of the oral argument before me, held rather to the viewpoint that where both sides of a trade are executed simultaneously, or nearly so, the fictitious nature of the transaction is more readily apparent. The realities of the situation are that the Goldwurms gave *at the same time buying and selling orders of the same amount of the same future for execution on the same day for the same account* with no interest in whether the purchase or sale was executed first so long as there was not more than three points loss on the total transaction. Respondent Ira Haupt and Company had the Goldwurm accounts on its books. It was obvious on the face of the Goldwurm orders that they requested the execution of transactions at more or less the same time that were mutually offsetting and meaningless as far as the cotton futures market is concerned. Haupt and Company, nevertheless, passed on the orders to the floor broker Weis for execution. Haupt and Company accepted and confirmed the executed transactions as did the Goldwurms. Regardless of whether the Goldwurms or Ira Haupt and Company/knew or should have known precisely how the floor broker would execute the trades, n6 they had asked the floor broker to execute what amounted to "wash sales" and fictitious sales and they accepted and confirmed the transactions. This is the essence of the violations as far as these respondents are concerned. Furthermore, they confirmed and accepted transactions that were revealed

as of simultaneous execution. The records of the transactions that came to Haupt and Company show this. The trade of November 16, 1944, was clearly reported to Haupt and Company as a "cross" or "crossed" trade by the floor broker Weis.

n6 We agree, nevertheless, with the view of complainant and the referee that it should be apparent, at least to Ira Haupt and Company, that no prudent floor broker would undertake the execution of the trades within the narrow range of three points -- in the light of price fluctuations between transactions on the Exchange -- unless by some such methods as employed by Weis.

Coming to the case against Weis, we must assume, for the purposes of this proceeding at least, that Mr. Weis "crossed" or "offset" the trades of November 16, 1944, in the belief that the purchase and the sale were for different accounts. The same cannot be said for the transactions of July 19, 1944, and October 10, 1945.

The line of defense for Mr. Weis in this proceeding is that Mr. Weis received the orders from a reputable house, Ira Haupt and Company, and that he had no way of knowing whether the purchases and sales were for one customer or more than one. The purchases and sales orders were tied in, however, by the limitation of not more than three points loss on both the purchases and sales. There would be no reason for such a limitation if the purchases were for one account and the sales for another. In Mr. Weis' appearances before the Business Conduct Committee of the New York Stock Exchange (Government Exhibits X and Y), he explained that in connection with the October 10, 1945, transactions, the floor

clerk for Ira Haupt and Company told him that the orders were for two customers but that Ira Haupt and Company did not want the orders "offset." Since the orders were to buy and sell for each of two accounts, the floor clerk for Haupt and Company may have been technically correct in an ambiguous way. But, unless buying and selling for one account were ordered, why should the orders not be "offset" under section 1.39 of the regulations? Certainly it would be a lot easier to "offset" them as was done with the November 16, 1944, deal than to attempt to execute them on the floor within the narrow range of three points loss allowed by the orders. A further indication of Mr. Weis' knowledge that buying and selling orders for one principal were involved is seen in the fact that despite the information from Haupt and Company's clerk that the October 10, 1945, orders were for two customers, Mr. Weis went for advice to the Chairman of the Committee on Commissions from whom he says he received permission to execute the trades. If the orders were the usual sort of thing that respondents make them out to be, it would seem that such a step would not be necessary. With respect to this matter, Mr. Weis admitted to the Business Conduct Committee that the Chairman of the Committee on Commissions very likely told him that if the buying and selling orders were for the same principal they could not be offset by the floor broker but would have to be executed in the market (Government Exhibit, p. 6). There seems little doubt then that as to the July 19, 1944, and the October 10, 1945, trades, Mr.

Weis was in a position to know and did know, as shown by the simultaneity of the purchases and sales and the mutual contingency of the bids and offers, that the purchases and sales of the same amount of the same future were for one account. As to these transactions then, Mr. Weis is found to have violated section 4c of the act as alleged in the complaint.

Since respondent Irving Weis is a partner in the respondent partnership Irving Weis and Company, and since the respondent partnership received and accepted the brokerage commissions paid by Ira Haupt and Company for the execution of these transactions, Irving Weis and Company is equally responsible for the execution and confirmation of the execution of the transactions in violation of section 4c of the act.

V

Respondents voiced many objections to the admissibility of evidence. Each respondent protested that evidence in connection with the activities of any of the other respondents was inadmissible and not binding as to him. Each respondent, however, has been found to have violated the act in connection with his activities and not as a result of another respondent's actions and even under the rule of evidence applicable in court proceedings, the evidence as to each respondent was admissible. Respondents strongly protested the answer of complainant's witness Caldwell to a hypothetical question as to how he would execute the Goldwurm orders if he were a floor broker. Mr. Caldwell's answer was that he would "prearrange" the transactions with another floor broker. This answer was not utilized by the complainant in the suggested findings of fact filed and was disregarded by the referee in his proposed findings of fact and conclusions. It also played no part in this decision, as is evident. Comment has been made on some of respondents' objections and exceptions. There are others but this decision overrules all objections and exceptions not consistent with it.

VI

Respondents urge the unconstitutionality and invalidity of section 4c of the act on the ground that the statute provides criminal penalties and that section 4c of the act, if it is construed to prohibit the transactions in issue, is so vague that it violates the essentials of due process of law. Respondents cite *Connolly v. General Construction Company*, 969 U. S. 385 (1926); *United States v. L. Cohen Grocery Company*, 255 U. S. 81 (1921); and *United States v. Brewer*, 139 U. S. 278 (1891). The prohibitions in the applicable portions of section 4c of the act as interpreted here are not so deficient in standards or intelligibility

as to constitute a violation of due process of law in a criminal proceeding. In the *Connolly* decision cited by respondents the Supreme Court said (pp. 391, 392):

"But it will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them [cases cited], or a well settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ [cases cited], or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Company*, 255 U. S. 81, 92 * * * 'that, for reasons found to exist either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'"

See also *United States v. Petrillo*, 332 U. S. 1, 5, 7 (1947). This, however, is not a criminal proceeding and it is not a penal proceeding. *Nichols & Co. v. Secretary of Agriculture*, 131 F. (2d) 651 (C. C. A. 1st, 1942).

Nevertheless, it is recognized that this is a case of first impression. The complainant suggested that the sanctions recommended be suspended. The referee concurred. There is not present in this proceeding the purpose of manipulating the market which is usually true when wash sales in violation of law are employed. For the Goldwurms and Ira Haupt and Company it may also be said that there may not have been full realization that, under the facts and circumstances disclosed, they were engaging in violations of section 4c of the act without reference to the precise manner of execution of the trades by the floor broker. We find no ground, then, for departing from the complainant's suggestion and the referee's proposal to suspend the effectiveness of sanctions.

ORDER

Effective on the 30th day after the date of this order, the registration of Ira Haupt and Company and of Irving Weis and Company as futures commission merchants and the registration of Irving Weis as a floor broker are suspended for a period of ten (10) days.

Effective on the 30th day after the date of this order, all contract markets shall refuse all trading privileges thereon to Jean Goldwurm and Jula Goldwurm for a period of ten (10) days.

However, such suspension of registrations and denial of trading privileges shall be held in abeyance for a period of two years from the date of this order: *Provided That*, if within such two-year period the said Jean Goldwurm, Jula Goldwurm, Ira Haupt and Company, Irving Weis, or Irving Weis and Company should, after complaint

and hearing in accordance with established procedure be found to have again violated the act, then, without further notice, the Secretary of Agriculture, or his lawful delegatee, may issue a supplemental order in this proceeding against any of such persons so found to have again violated the act, which supplemental order shall make effective the aforesaid suspension of registration or denial of trading privileges, as the case may be, for such ten-day period.

A copy of this decision and order shall be sent by registered mail to each respondent and to each contract market under the act.

LOAD-DATE: June 8, 2008

