UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:	)	
	)	
SUMMERHAVEN INVESTMENT MANAGEMENT LLC,	)	**CFTC Docket No. 21-07**
	)	
Respondent.	)	

ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I. INTRODUCTION

The Commodity Futures Trading Commission ("Commission") has reason to believe that from in or about June 2018 to in or about July 2018 ("Relevant Period"), SummerHaven Investment Management LLC ("SummerHaven") violated Section 4c(a)(l) and (2)(A) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 6c(a)(l)-(2)(A) (2018), and Commission Regulations ("Regulations") 1.38(a) and 166.3, 17 C.F.R. §§ 1 .38(a), 166.3 (2020). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether SummerHaven engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

In anticipation of the institution of an administrative proceeding, SummerHaven has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, SummerHaven consents to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions ("Order"), and acknowledges service of this Order.[1]

[1] SummerHaven consents to the use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. SummerHaven does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. SummerHaven does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

In July 2018, SummerHaven engaged in wash sales in violation of Section 4c(a)(1) and (2)(A) of the Act, 7 U.S.C. § 6c(a)(1)-(2)(A) (2018). SummerHaven entered bids and offers for the same quantities of the same futures contracts for trading accounts that had the same beneficial owner and which were intended to and did in fact offset each other upon execution. By intentionally entering these offsetting orders in this manner and achieving the goal of having these bids and offers offset each other upon execution, SummerHaven negated the risk or price competition incidental to an open and competitive marketplace and thus engaged in noncompetitive transactions in violation of Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2018).

During the Relevant Period, SummerHaven, a registered commodity trading advisor ("CTA") and commodity pool operator ("CPO"), also failed to supervise its activities in violation of Regulation 166.3, 17 C.F.R. § 166.3 (2018). SummerHaven's supervision failures resulted in the aforementioned wash sales.

B. RESPONDENT

SummerHaven is a Delaware limited liability company with its principal place of business in Stamford, Connecticut. SummerHaven is a commodity-focused asset management firm and has been registered with the Commission as a CTA and CPO since October 9, 2009.

C. FACTS

During the Relevant Period, SummerHaven managed a commodity futures portfolio for a third party, Entity A. In or around June 2018, SummerHaven decided to move certain of Entity A's commodity futures positions from one futures commission merchant ("FCM 1") to another ("FCM 2"). SummerHaven employees and partners discussed two methods of transferring the positions from FCM 1 to FCM 2: (1) moving the positions via a back-office transfer managed by both FCMs in accordance with the rules of the designated contract market, in what is commonly known as an "ex-pit" transfer, *see, e.g.*, CME Rule 853; or (2) placing offsetting orders at both FCMs that would allow SummerHaven to close the positions at FCM 1 and reestablish the same positions at FCM 2. Individual A, who was then SummerHaven's Managing Partner and Head of Trading, preferred not to ex-pit the positions, purportedly out of concern that the FCMs might make an error in executing the transfer. Individual A instead decided that SummerHaven should move the positions by placing offsetting orders at both FCMs, waiting approximately thirty seconds between the placement of each offsetting order. Individual B, who at that time was a SummerHaven partner and SummerHaven's Chief Compliance Officer, approved the decision, and told SummerHaven employees that the transactions were not improper because they were exposed to market risk for a short period of time.

At the direction of Individual A, over the course of several hours on July 2, 2018, two SummerHaven traders placed more than one hundred orders to sell futures in accounts at FCM 1 and buy the same futures in accounts at FCM 2, or vice versa. The traders followed Individual A's instruction to wait 30 seconds between the placement of an order at one FCM and the corresponding order at the other FCM, and executed offsetting trades in 11 different markets, sequentially placing orders on a contract-by-contract basis (i.e., executing offsetting orders in one futures contract before moving onto the next futures contract). The traders took steps to minimize exposure to market risk, placing orders at times when there was less trading activity in a contract or the bid-ask spread was wider, and avoiding placing orders around the time that reports or other news might come out that could increase activity or volatility in a specific contract.

Some of the orders were executed within seconds, while others rested on the order book for longer. Ultimately, SummerHaven executed pre-arranged trades in WTI Crude Oil ("CL"), Gold ("GC"), Heating Oil ("HO"), Live Cattle ("LE"), Lean Hogs ("HE"), Soybean Meal ("ZM"), Gasoline ("RB") Cocoa ("CC"), Cotton No. 2 ("CT"), Brent Crude Oil ("B"), and Low Sulphur Gasoil ("G"). In total, SummerHaven's wash sales accounted for more than 11,000 contracts—723 lots of CL, 314 lots of GC, 517 lots of HO, 842 lots of LE, 1,851 lots of HE, 1,303 lots of ZM, 582 lots of RB, 1,932 lots of CC, 1,080 lots of CT, 1,784 lots of B, and 640 lots of G. Each of these transactions produced a wash result, meaning that the transaction was at the same or similar price and for accounts with the same beneficial ownership.

The aggregate value of the contracts traded through these pre-arranged transactions exceeded $570 million. For several instruments, the pre-arranged trades accounted for a majority of the contracts traded on July 2, 2018.

Although SummerHaven had compliance policies and procedures in place, and required employees to complete quarterly compliance certifications, those policies and procedures did not prohibit or otherwise address wash sales. In addition, SummerHaven did not have in place any programs or protocols to detect or prevent wash sales from occurring. Moreover, persons with supervisory authority and compliance responsibilities actually authorized the unlawful trades in dereliction of supervisory duties.

III. LEGAL DISCUSSION

A. SummerHaven Entered into Wash Sales in Violation of Section 4c(a)(1) and (2)(A) of the Act

Section 4c(a)(1) and (2)(A) of the Act, 7 U.S.C. § 6c(a)(1)-(2)(A) (2018), in part, makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction" that "is of the character of, or is commonly known to the trade as, a 'wash sale.'" A wash sale is a form of fictitious sale. *In re Gimbel,* CFTC No. 84-40, 1988 WL 232267, at *1 (Apr. 14, 1988), *aff'd as to liability sub nom. Gimbel v. CFTC*, 872 F.2d 196 (7th Cir. 1989). "[T]he Commission also remains of the view that transactions initiated with an intent to avoid bona fide trading transactions that result in a 'wash' of the constituent positions are wash sales under Section 4c(a)(A) without regard to the motivation for the particular transaction." *Id.* at *4 n.6.

To establish that a wash sale has occurred, the Commission must initially demonstrate that the transaction at issue achieved a wash result. The Commission may demonstrate that the trades resulted in a wash by showing: "(1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price." *Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir. 2003) (citing *In re Gilchrist*, CFTC No. 83-58, 1991 WL 83518, at *9 (Jan. 25, 1991)).

In addition to the factors enumerated in *Gilchrist*, intent must be proven to establish a violation of Section 4c of the Act. *See, e.g.*, *Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999). The intent to negate risk or price competition and avoid a bona fide market position can be inferred from prearrangement, or "from the intentional structuring of a transaction in a manner to achieve the same result as prearrangement." *In re Three Eight Corp.*, CFTC No. 88-33, 1993 WL 212489, at *7 n.15 (Jun. 16, 1993) (citing *In re Collins*, CFTC No. 77-15, 1986 WL 66165, at *5 (Apr. 4, 1986), *rev'd on other grounds sub nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987)). The placement of offsetting orders to buy and sell, while simultaneously taking steps to "enhance the likelihood that the buy and sell orders would be filled at the same or a similar price" is persuasive evidence that the trader intends to negate risk and price competition. *Collins*, 1986 WL 66165, at *5; *see also In re Piasio*, CFTC No. 97-9, 2000 WL 1466069, at * 10 (Sept. 29, 2000) (finding customer who placed paired buy and sell orders, with specific pricing and loss limitation instructions, "structured its orders to negate risk" and thus had intent to violate Section 4c), *aff'd sub nom. Piasio v. CFTC*, 54 Fed. App'x 702 (2d Cir. 2002).

SummerHaven entered offsetting orders for the purchase and sale of the same delivery month of the same futures contract at the same price, and those orders traded and achieved wash results. Additionally, SummerHaven knowingly entered into the purchase and sale of these futures contracts for the purpose of negating market risk, and it structured and timed offsetting orders to enhance the likelihood that those orders would match with each other or be filled at the same or similar price. In doing so, SummerHaven violated Section 4c(a)(1) and (2)(A) of the Act by entering into transactions of the character of, and commonly known as, wash sales.

B. SummerHaven Executed Noncompetitive Trades in Violation of Commission Regulation 1.38(a)

Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2020), requires that all purchases and sales of commodity futures be executed "openly and competitively." The purpose of this requirement is to ensure that all trades are executed at competitive prices and that all trades are directed into a centralized marketplace to participate in the competitive determination of the price of futures contracts. Noncompetitive trades are also a type of fictitious sale because they negate the risk incidental to an open and competitive market. *In re Fisher*, CFTC No. 93-2, 2004 WL 584216, at *3 n.11 (Mar. 24, 2004); *see also In re Copersucar Trading A.V.V.*, CFTC No. 17-22, 2017 WL 3588915, at *3-4 (Aug. 15, 2017) (consent order) (structuring and transferring positions between proprietary accounts constituted violations of Regulation 1.38 (a)).

SummerHaven entered offsetting orders with the intent that they would offset, and timed and structured those orders to minimize market competition. SummerHaven also knew that the trades were not subject to competitive market forces because it knew that the orders would trade with others that SummerHaven had already submitted. The executions of these orders were not open and competitive, and because SummerHaven engaged in noncompetitive trades, it violated Regulation 1.38(a).

C. **SummerHaven's Supervision Failures Violated Regulation 166.3**

Regulation 166.3, 17 C.F.R. § 166.3 (2020), requires that every Commission registrant "diligently supervise the handling by its partners, officers, employees, and agents of all commodity interest accounts carried, operated, advised or introduced by the registrant." Regulation 166.3 imposes upon a registrant an affirmative duty to supervise its employees and agents diligently by establishing, implementing, and executing an adequate supervisory structure and compliance program. *CFTC v. Carnegie Trading Grp., Ltd.*, 450 F. Supp. 2d 788, 805 (N.D. Ohio 2006); *see also* Adoption of Customer Protection Rules, 43 Fed. Reg. 31,886, 31,889 (July 24, 1978) (codified at 17 C.F.R. pts. 1 and 166).

A violation of Regulation 166.3 is an independent violation for which no underlying violation is necessary. *In re GNP Commodities, Inc.*, CFTC No. 89-1, 1992 WL 201158, at *17 n. 11 (Aug. 11, 1992), *aff'd in part and modified sub nom; Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993); *In re Paragon Futures Ass'n,* CFTC No. 88-18, 1992 WL 74261, at *13 (Apr. 1, 1992). However, evidence of underlying violations that "should be detected by a diligent system of supervision . . . because of the nature of the violations" is probative of a failure to diligently supervise. *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999).

For a registrant to fulfill its duties under Regulation 166.3, it must both design an adequate program of supervision and ensure that the program is followed. *See, e.g., GNP Commodities, Inc.,* 1992 WL 201158, at *19. A violation of Regulation 166.3 "is demonstrated by showing either that: (1) the registrant's supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently." *In re FCStone, LLC*, CFTC No. 15-21, 2015 WL 2066891, at *3 (May 1, 2015) (consent order) (citing *In re Murlas Commodities, Inc*., CFTC No. 85-29, 1995 WL 523563, at *9 (Sept. 1, 1995) (noting Regulation 166.3 can be violated with an inadequate system); *GNP Commodities, Inc.*, 1992 WL 201158, at 19 (noting Regulation 166.3 can be violated if the adequate system is not diligently administered)). "The focus of any proceeding to determine whether Rule 166.3 has been violated will be on whether [a] review [has] occurred and, if it did, whether it was 'diligent.'" *Paragon*, 1992 WL 74261, at *14.

SummerHaven violated Regulation 166.3 in two ways, both employing an inadequate supervisory system and failing to perform its supervisory duties diligently.

First, SummerHaven failed to design an adequate supervisory system with respect to wash sales. Although SummerHaven had compliance policies and procedures in place, and required employees to complete quarterly compliance certifications, those policies and procedures did not prohibit or otherwise address wash sales. In addition, SummerHaven did not have in place any programs or protocols to detect or prevent wash sales from occurring.

Second, SummerHaven failed to perform its supervisory duties diligently. The decision to transfer positions through wash sales was brought to the attention of, reviewed by, and directed by senior supervisory management, including SummerHaven's then-CCO and then-

Managing Partner. By failing to recognize that these trades constituted illegal wash sales, and failing to prevent them from occurring, SummerHaven failed to conduct a diligent review of the trades and thus failed to diligently supervise the handling of its commodity interest accounts.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, SummerHaven violated Section 4c(a)(l) and (2)(A) of the Act, 7 U.S.C. § 6c(a)(l)-(2)(A) (2018), and Regulations 1.38(a) and 166.3, 17 C.F.R. §§ 1 .38(a), 166.3 (2020).

V. OFFER OF SETTLEMENT

SummerHaven has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

A. Acknowledges service of this Order;

B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;

C. Waives:

1. The filing and service of a complaint and notice of hearing;

2. A hearing;

3. All post-hearing procedures;

4. Judicial review by any court;

5. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;

6. Any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2018), and 28 U.S.C. § 2412 (2018), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2020), relating to, or arising from, this proceeding;

7. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201–253, 110 Stat. 847, 857–74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and

8. Any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, including this Order;

D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which SummerHaven has consented in the Offer; and

E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:

1. Makes findings by the Commission that SummerHaven violated Section 4c(a)(l) and (2)(A) of the Act, 7 U.S.C. § 6c(a)(l)-(2)(A) (2018), and Regulations 1.38(a) and 166.3, 17 C.F.R. §§ l .38(a), 166.3 (2020);

2. Orders SummerHaven to cease and desist from violating Section 4c(a)(l) and (2)(A) of the Act and Regulations 1.38(a) and 166.3;

3. Orders SummerHaven to pay a civil monetary penalty in the amount of Five Hundred Thousand Dollars ($500,000.00), plus post-judgment interest, according to the terms set forth below; and

4. Orders SummerHaven and its successors and assigns to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order.

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

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. SummerHaven and its successors and assigns shall cease and desist from violating Section 4c(a)(l) and (2)(A) of the Act, 7 U.S.C. § 6c(a)(l)-(2)(A) (2018), and Regulations 1.38(a) and 166.3, 17 C.F.R. §§ l .38(a), 166.3 (2020).

B. SummerHaven shall pay a civil monetary penalty in the amount of Five Hundred Thousand Dollars ($500,000.00) ("CMP Obligation"), plus any post-judgment interest. SummerHaven shall satisfy the CMP Obligation by making payments as follows:

a. $100,000 to be paid within 10 days of entry of this Order;

b. $200,000 to be paid within 12 months of the date of entry of this Order; and

c. $200,000 to be paid within 24 months of the date of entry of this Order.

Post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2018). Post-judgment interest will be waived for any amounts paid in compliance with the above deadline.

Payments shall be deemed made on the date they are received by the Commission. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of the CMP Obligation, plus any post-judgment interest, shall be due and payable immediately.

SummerHaven shall pay the CMP Obligation and any post-judgment interest by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

MMAC/ESC/AMK326
Commodity Futures Trading Commission
Division of Enforcement
6500 S. MacArthur Blvd.
HQ Room 181
Oklahoma City, OK 73169
(405) 954-6569 office
(405) 954-1620 fax
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds transfer, SummerHaven shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. SummerHaven shall accompany payment of the CMP Obligation with a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. SummerHaven shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

C. SummerHaven and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:

1. Public Statements: SummerHaven agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect SummerHaven's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. SummerHaven and its successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.

2. Partial Satisfaction: SummerHaven understands and agrees that any acceptance by the Commission of any partial payment of SummerHaven's CMP Obligation shall not be deemed a waiver of its obligation to make further payments pursuant

to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.

3. Change of Address/Phone: Until such time as SummerHaven satisfies in full its CMP Obligation as set forth in this Order, SummerHaven shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

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

By the Commission.

Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: May 18, 2021