

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

_____ :
In the Matter of :

CFTC Docket No: 04-16

Barry Callebaut Sourcing AG, :
Respondent. :

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

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Barry Callebaut Sourcing AG ("Barry") has violated Section 4c(a) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 6c(a) (2002), and Section 1.38(a) of the Commission's Regulations, 17 C.F.R. § 1.38(a) (2004). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Barry engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Barry has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Barry acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act, and Making Findings and Imposing Remedial Sanctions ("Order"). Barry, without admitting or denying the findings of fact or conclusions of law herein, consents to the use of the findings contained in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Barry does not consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. Nor does Barry consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, by any other party in any other proceeding. The findings made in this Order are not binding on any other person or entity named as a defendant or respondent in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

On two separate occasions, in November 2001 and July 2002, respectively, Barry entered simultaneous orders for equal-and-opposite trades in cocoa futures contracts on the Coffee, Sugar & Cocoa Exchange ("CSCE"), a Subsidiary of the New York Board of Trade ("NYBOT"). A Barry trader in Switzerland placed the orders orally with futures commission merchants ("FCMs") in the United Kingdom ("U.K."), who clear their transactions on the CSCE through omnibus accounts held with their affiliated companies in the United States ("U.S."). The November 2001 trades involved simultaneous orders with two FCMs for equal-and-opposite spread transactions at identical price differentials. The July 2002 trade involved an order with one FCM for a cross trade with Barry on both sides, with one side of the trade structured as a "give up" to be cleared through a different FCM designated by Barry. On both occasions, Barry was on each side of the transaction and the trades fashioned a virtual financial nullity.²

Because Barry's trader intentionally entered the simultaneous orders for equal-and-opposite transactions in cocoa futures contracts on the CSCE, and because he designed the buy and sell orders with the intention that they meet each other at the same price, Barry's trader violated Section 4c(a) of the Commodity Exchange Act, 7 U.S.C. §§ 6c(a) (2002), which, *inter alia*, prohibits any person from entering into a transaction that is, or is of the character of, or is commonly known to the trade as, a 'wash sale.' By engaging in wash sales, Barry's trader also violated the proscription contained in Section 4c(a) of the Act, 7 U.S.C. §§ 6c(a) (2002), against entering into a transaction that is used to cause any price to be reported, registered or recorded that is not a true and *bona fide* price. Further, by entering into transactions that were designed to meet each other at the same price in the pit, they were not executed openly and competitively, thereby violating Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2004). Because Barry's trader was an employee of Barry and acting as its agent, Barry is liable for the violations of Section 4c(a) of the Act, 7 U.S.C. §§ 6c(a) (2002) and Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2004), pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2002).

B. RESPONDENT

Barry Callebaut Sourcing AG is a joint stock company incorporated in Switzerland in 1996. Barry's business address is Sumpfstrasse 3, CH-6300 ZG, Switzerland. Its principal activities, and those of its subsidiaries, are the sourcing, processing and trading of cocoa and cocoa products. Barry has never been registered with the Commission in any capacity.

² Except for commissions.

C. **FACTS**

November 13, 2001

On November 13, 2001, Barry's trader in Switzerland simultaneously entered equal-and-opposite spread orders in CSCE cocoa futures contracts. Barry's trader instructed his broker at Fimat International Bank SA (UK Branch) ("FIB"), an FCM in London, to sell 156 December 2001/March 2002 cocoa futures spreads at an 8-point price differential.³ Barry's trader simultaneously instructed his broker at Refco Overseas Ltd. ("Refco"), another London FCM, to purchase 156 December 2001/March 2002 cocoa futures spreads at an 8-point price differential.

Barry's trader orchestrated the equal-and-opposite spread transactions via a telephone call in which Barry's trader was on one telephone line with his FIB broker and, simultaneously, with his Refco broker on another line. In turn, the FIB and Refco brokers, with Barry's trader still on the telephone lines, relayed the equal and opposite spread orders to the CSCE cocoa pit, where the entire 156-lot spread transaction was executed. As Barry's trader intended, the spread trades resulted in Barry being the ultimate customer on each side of the transaction.

July 22, 2002

On July 22, 2002, in what took the form of a 'give up' trade, Barry's trader in Switzerland entered an order with Credit Lyonnais Rouse Limited ("CLR"), an FCM in London, for a 300-lot cross trade in CSCE cocoa futures contracts. Barry instructed CLR to sell 300 September 2002 CSCE cocoa futures contracts, and to buy 300 September 2002 CSCE futures contracts and to 'give up' the buy order transaction to FIB for clearing through FIB's omnibus account with Fimat USA, Inc. ("Fimat").

Barry's simultaneous buy and sell orders were subsequently relayed to a floor broker in the CSCE cocoa futures pit in New York, who crossed 300 lots of September 2002 cocoa futures at a price of 1825. The buy side of the trade was then given up to and cleared through Fimat in the U.S. Barry, as its trader requested, was the ultimate customer on both sides of the 300-lot cross trade.

With regard to both of these transactions, Barry asserts that its FCM did not inform it of the possibility that the transactions could have been executed by means of an ex-pit transfer pursuant to CSCE to Floor Trading Rule 3.06. Barry also asserts that it was not aware of the exchange rules that authorize such ex-pit transfers.

³ An order to sell a spread, *e.g.*, "sell December 2001/March 2002," refers to selling the nearby futures contract (*i.e.*, December 2001) and buying the later futures contract (*i.e.*, March 2002). Conversely, an order to buy a spread refers to buying the nearby futures contract and selling the later futures contract.

D. LEGAL DISCUSSION

1. Barry Caused Prices to be Reported, Registered, or Recorded at Non-Bona Fide Prices in Violation of Section 4c(a) of the Act

Prices derived from wash sales are “not true and non-*bona fide* . . . [because] [s]uch trades and the reported prices do not reflect the forces of supply and demand” *In re Kuhlik*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,926 at 31,697 (ALJ Feb. 21, 1986). “It is the non-*bona fide* price that results from a . . . wash sale that constitutes one of the deleterious effects which the prohibition[] against . . . wash sales seek[s] to eradicate. This is because non-*bona fide* prices interfere with the competitive pricing mechanism . . . which serves as the foundation for the existence of organized futures markets.” *Id.*, ¶ 22,926 at 31,698.

In this case, Barry, through the actions of its trader in Switzerland, neither bargained in good faith nor did it intend to effect a *bona fide* trade in relation to the equal-and-opposite orders that it entered on November 13, 2001 and July 22, 2002. Instead, the intention of Barry’s trader in Switzerland—and therefore Barry’s intention—was to avoid entering into a *bona fide* market transaction by having its equal-and-opposite orders meet and be crossed in the CSCE cocoa pit.

Consequently, by entering into wash sales, Barry’s trader in Switzerland violated Section 4c(a), which makes it unlawful to offer to enter into, or to enter into, any commodity futures transaction “if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and *bona fide* price.” *Gilchrist*, ¶ 24,993 at 37,653. Further, because the trader was an Barry employee and acting as its agent, Barry is liable for such violation pursuant to Section 2(a)(1)(B) of the Act.

2. Barry entered into Wash Sales in Violation of Section 4c(a) of the Act

Section 4c(a) of the Act makes it “unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction” that “is, is of the character of, or is commonly known to the trade as, a ‘wash sale’ . . .” The central characteristic of a wash sale is the intent to avoid making a *bona fide* transaction or taking a *bona fide* market position. *In re Citadel Trading Co. of Chicago, Ltd.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,190 (CFTC May 12, 1986).

The factors that indicate a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price. *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991). In July 2002, Barry bought and sold the same delivery month of the same futures contract at the same price. In November 2001, Barry bought and sold the same delivery month of the same futures contract at the same price in two delivery months (*i.e.*, 156 December 2001 cocoa futures contracts at 1192 per contract and 156 March 2002 cocoa futures contracts at 1200 per contract).

Nonetheless, in addition to these factors, the liability of the customer initiating the wash sale depends upon evidence demonstrating that the customer intended to negate market risk or

price competition. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685 (CFTC Sep. 29, 2000). Market risk or price competition is negated “when it is reduced to a level that has no practical impact on the transactions at issue.” *In re Gimbel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,004 n.7 (CFTC Apr. 14, 1988), *aff’d as to liability*, 872 F.2d 196 (7th Cir. 1989). Similarly, the liability of a participant in the wash sale depends upon the demonstration that the participant knew, at the time he chose to participate in the transaction, that the transaction was designed to achieve a wash result in a manner that negated risk. *In re Bear Sterns & Co.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,665 (CFTC Jan. 25, 1991).

While the intent to avoid a *bona fide* market position can properly be inferred from prearrangement, it can also be inferred “from the intentional structuring of a transaction in a manner to achieve the same result as prearrangement.” *In re Three Eight Corporation*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444 n.15 (CFTC Jun. 16, 1993) (citing *In re Collins* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,900-01 (CFTC Apr. 4, 1986), *rev’d on other grounds sub. nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987) (“*Collins I*)). “In an individual transaction . . . , a trader may avoid a *bona fide* market transaction in many instances merely by structuring the buy and sell orders so that they are simultaneous, or practically so, and by signaling . . . , directly or indirectly, that a price match is the objective of the transaction.” *Collins I*, ¶ 22,982 at 31,900-01.

On November 13, 2001, Barry, via its trader in Switzerland, submitted simultaneous equal-and-opposite spread orders to two separate FCMs with the instructions that the spreads be executed at an identical price differential. Virtually simultaneous orders to buy and sell the same quantity of the same futures contract, “with an instruction calculated 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 respondent] did not intend that the orders result in *bona fide* trading transactions when he initiated them.” *Collins I*, ¶ 22,982 at 31,900.

Further, on July 22, 2002, Barry, again via its trader in Switzerland, entered orders with one FCM to buy and sell the same delivery month of the same futures contract at the same price. Barry, via its trader, requested that the orders be crossed in the CSCE cocoa pit, and that after execution, one side of the transaction be “given up” to another FCM for clearing. “Orders to purchase and sell for the account of the same customer the identical quantity of the same futures contract at identical prices . . . entered virtually simultaneously” are “classic indicia of an intent to avoid making a *bona fide* trading transaction.” *Citadel*, ¶ 23,082 at 32,190.

Moreover, according to Barry, the underlying commercial rationale for entering into the November 13, 2001 and July 22, 2002 trades was to “square away” existing offsetting positions that were held by Barry at different FCMs. Therefore, Barry intended to be on both sides of these equal and opposite trades, and intended for these trades to result in no market risk or price competition. Because Barry’s equal-and-opposite transactions appeared to be the purchase and sale of CSCE cocoa futures contracts, but did not in fact result in establishing or liquidating a *bona fide* market position, i.e., a position that results in neither market risk or price competition, and were not intended to do so, Barry’s trader in Switzerland violated the prohibition against wash sales contained in Section 4c(a) of the Act. *In re Compania Salvadorena de Caf e, S. A.*,

[1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,886 at 27,819 (CFTC Oct. 26, 1986) (a 'wash sale' is any transaction that gives the appearance of being a purchase or sale, but does not in fact result in establishing or liquidating a *bona fide* market position). Accordingly, Barry is liable for that violation pursuant to Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B).

3. **Barry Executed Non-competitive Trades in Violation of Commission Regulation 1.38(a)**

Commission Regulation 1.38(a) 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.⁴ Non-competitive trades are generally transacted in accordance with expressed or implied agreements or understandings between and among the traders. *Gilchrist*, ¶ 24,993 at 37,652. Trades can be noncompetitive even though they were executed in the pit. *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,683 (CFTC Jan. 25, 1991) (citing *Laiken v. Dep't of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)).

Barry, by structuring its simultaneous orders for equal-and-opposite transactions as set forth above, avoided the market risk and price competition which legitimate, competitive trading entails. Accordingly, Barry's Switzerland-based trader violated Commission Regulation 1.38(a) and, pursuant to Section 2(a)(1)(B) of the Act, Barry is liable for these violations.

IV.

OFFER OF SETTLEMENT

Barry has submitted an Offer in which it, without admitting or denying the findings herein: (1) acknowledges service of the Complaint and the Order; (2) admits the jurisdiction of the Commission with respect to the matters set forth herein; (3) waives a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, all claims which it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2004), relating to or arising from this action, and any claim of Double Jeopardy based upon institution of this proceeding or the entry of any order imposing a civil monetary penalty or any other relief; (4) stipulates that the record basis on which the Order may be entered shall consist solely of the Complaint, Order and findings in the Order consented to in the Offer; and (5) consents to the Commission's issuance of the Order, which makes findings as set forth below and: (a) orders Barry to cease and desist from violating the provisions of the Act and Regulations that it has been found to have violated; (b) imposes a civil monetary penalty upon Barry of \$25,000 ; (c) orders Barry to comply with the undertakings consented to in its Offer.

⁴ See Disapproval of Contract Market Rules (CFTC Apr. 27, 1981), 46 F.R. 23516 (Commission disapproving of the Commodity Exchange, Inc.'s proposal to conduct a trading session after the close of regular trading); and Senate Committee on Agriculture and Forestry, Report on H.R. 13113, S. Rep. No. 93-1131, 93rd Cong., 2nd Sess. 16 (1974).

V.

FINDINGS OF VIOLATIONS

Solely on the basis of the consents evidenced by the Joint Offer, and prior to any adjudication on the merits, the Commission finds that Barry has violated Section 4c(a) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6c(a) (2002), and Section 1.38(a) of the Commission's Regulations, 17 C.F.R. § 1.38(a) (2004).

VI.

ORDER

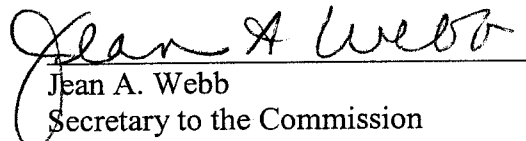
Accordingly, it is hereby ordered that:

1. Barry cease and desist from violating Section 4c(a) of the Act and Section 1.38(a) of the Regulations;
2. Barry pay a civil monetary penalty in the amount of twenty-five thousand dollars (\$25,000) due within ten days of the date of the Order; payment is to be made by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Barry as the payee and the name and docket of this proceeding. Barry shall simultaneously transmit a copy of the cover letter and the form of payment to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581;
3. Barry acknowledges that failure to comply with the Order shall constitute a violation of the Order and may subject it to administrative or injunctive proceedings, pursuant to the Act; and
4. Barry is directed to comply with its undertakings:
 - a. neither Barry nor any of its agents or employees shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision affects their: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Barry shall take all steps necessary to ensure that its agents or employees, if any, understand and comply with this undertaking.

- b. Barry will cooperate fully with the Commission's Division of Enforcement in this proceeding and any investigation, civil litigation and administrative proceeding related to this proceeding by, among other things: (i) responding completely and truthfully to any inquiries or requests for information with attendance pursuant to applicable rules of law; (ii) providing authentication of documents; and (iii) not asserting privileges under the Fifth Amendment of the United States Constitution.

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

By the Commission


Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: May 13, 2004