

**UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION**

**IN THE MATTER OF
BRIAN KEANE**

Respondent.

CFTC Docket No. 09-01

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

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Brian Keane ("Keane" or "Respondent") has violated Sections 4b(a)(1)(i) and (iii) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 6b(a)(1)(i) and (iii) (2006). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether the Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of these administrative proceedings, the Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission accepts. Without admitting or denying the findings herein, the Respondent acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act, As Amended, Making Findings And Imposing Sanctions (the "Order"). The Respondent 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 The Respondent consents to the use of the findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, the Respondent does not consent to the use of the Offer, or the findings consented to in this Order, as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy or to enforce the terms of this Order. Nor does the Respondent 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.

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III.

The Commission finds the following:

A. SUMMARY

Between June 2003 and July 2005 (the “Relevant Period”), the Respondent, in his capacity as a clerk on the New York Mercantile Exchange (“NYMEX”), engaged in several instances of fraudulently allocating favorably priced customer trades to a trading account from which he benefited. Through this scheme, Respondent denied customers opportunities to profit. By this conduct, Respondent violated Sections 4b(a)(1)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(1)(i) and (iii) (2006).

B. RESPONDENT

Brian Keane resides in Valley Stream, New York. Keane was an employee of a member of the NYMEX from July 1997 until April 2006. Keane has never been registered with the Commission in any capacity.

C. FACTS

In several instances during the Relevant Period, the Respondent, acting as a clerk for a NYMEX floor brokerage operation, entered customer orders with brokers to trade various futures contracts. After these orders were executed, Respondent delayed allocating the filled orders to these customers’ accounts. Instead, if the market price moved in a direction that favored the filled order, he allocated the favorably priced fills to an account from which he benefited. Accordingly, Respondent deprived customers of reasonable opportunities to profit.

IV.

LEGAL DISCUSSION

The intentional allocation of trades to disadvantage one or more customers constitutes fraud under Section 4b(a) of the Act.² Allocation schemes such as the one in which the Respondent engaged violate Section 4b(a) because allocating favorably priced trades to one account and less favorably priced trades to another account deprives the customer of a fair opportunity to obtain profitable trades.³

² *In re Lincolnwood Commodities, Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,246 (CFTC Jan. 31, 1984) (respondents allocated winning day trades to their account and losing day trades to customers’ accounts); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,206 (CFTC Aug. 11, 1992), *aff’d sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) (respondents allocated winning trades to respondents’ accounts and losing trades to customer’s account).

³ *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,879 (CFTC May 12, 2000).

Violations of Section 4b require, among other things, a showing of scienter.⁴ Scienter is established when a respondent commits a wrongful act intentionally.⁵ A reckless act is one where there is so little care that it is “very difficult to believe the [actor] was not aware of what he was doing.”⁶ Scienter cannot be avoided by ignorance brought about by willfully or carelessly ignoring the truth.⁷

As discussed above, by allocating winning trades for his own benefit and less favorably priced trades to customers, the Respondent intentionally acted in a fraudulent manner violating Sections 4b(a)(1)(i) and (iii) of the Act.

V.

OFFER OF SETTLEMENT

The Respondent has submitted an Offer in which he, without admitting or denying the findings herein:

- A. Admits the jurisdiction of the Commission with respect to the matters set forth in this Order;
- B. Acknowledges service 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 consideration of the Offer; (6) any and all claims that he may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-30 (2008), relating to or arising from this proceeding; (7) any and all claims that he may possess under the Small Business Regulatory Enforcement Act, Pub. L. 104-121, Subtitle B, Section 223, 110 Stat. 862-63 (March 29, 1996), relating to or arising from this proceeding; and (8) any claim of Double Jeopardy based upon institution of this proceeding or

⁴ *In re Stryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206, at 45,810 (CFTC Dec. 18, 1997). *See also Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999).

⁵ *Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990).

⁶ *Do v. Lind-Waldock & Co.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,516, at 43,321 (CFTC Sept. 27, 1995); *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748-49 (D.C. Cir. 1988).

⁷ *See CFTC v. Savage*, 611 F.2d 270, 283 (9th Cir. 1979); *see also Do v. Lind-Waldock & Co.*, ¶ 26,516, at 43,321 (an employee acted recklessly by failing to ascertain the status of an order prior to advising the customer that it was too late to cancel).

the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;

- D. Stipulates that the record basis upon which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented; and
- E. Consents solely on the basis of the Offer, to the entry of this Order that:
1. makes findings by the Commission that Respondent violated Sections 4b(a)(1)(i) and (iii) of the Act;
 2. orders Respondent to cease and desist from violating Sections 4b(a)(1)(i) and (iii) of the Act;
 3. permanently prohibits Respondent from directly or indirectly:
 - (a) trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006); (b) entering into any commodity futures transactions and/or options on commodity futures transactions for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity futures and/or options on commodity futures traded on his behalf; (c) engaging in, controlling or directing the trading for any commodity futures account and/or options on commodity futures account for or on behalf of any other person or entity, whether by power of attorney or otherwise; and (d) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures contracts and/or options on commodity futures contracts;
 4. orders Respondent to pay a civil monetary penalty in the amount of \$90,000 within ten days of the entry of this Order; and
 5. orders Respondent to comply with the undertakings consented to in his Offer and set forth in this Order.

Upon consideration, the Commission has determined to accept Respondent's Offer.

VI.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent violated Sections 4b(a)(1)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(1)(i) and (iii) (2006).

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. The Respondent shall cease and desist from violations of Sections 4b(a)(1)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(1)(i) and (iii) (2006);
2. The Respondent is permanently prohibited from directly or indirectly: (a) trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006); (b) entering into any commodity futures transactions and/or options on commodity futures transactions for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity futures and/or options on commodity futures traded on his behalf; (c) engaging in, controlling or directing the trading for any commodity futures account and/or options on commodity futures account for or on behalf of any other person or entity, whether by power of attorney or otherwise; and (d) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures contracts and/or options on commodity futures contracts;
3. The Respondent shall pay a civil monetary penalty in the amount of \$90,000, plus post-judgment interest, within ten days of the date of entry of this Order. Post-judgment interest shall accrue beginning eleven days after 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. The Respondent shall pay this civil monetary penalty 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, the Respondent shall make the payment payable to the Commodity Futures Trading Commission, and send to the following address:

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 the payment of the civil monetary penalty is to be made by electronic funds transfer, the Respondent shall contact Marie Bateman, or her successor, at the above address to receive payment instructions and shall fully comply with those instructions. The Respondent shall

accompany the payment of the penalty with the cover of a letter that identifies the Respondent and the name and docket number of this proceeding. The Respondent shall simultaneously transmit copies of the cover letter and the form of payment to: (1) Regional Counsel, Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway, 19th Floor, New York, NY 10005; (2) Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, D.C. 20581; and (3) Chief, Office of Cooperative Enforcement, Division of Enforcement at the same address; and

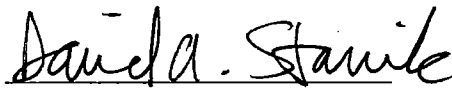
4. The Respondent acknowledges that failure to comply with this Order shall constitute a violation of the Order and may subject him to administrative or injunctive proceedings, pursuant to the Act.

5. Respondent is directed to comply with the following undertakings set forth in his Offer:

- a. Neither the Respondent nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in 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 the Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. The Respondent shall take all steps necessary to ensure that his agents and employees, if any, understand and comply with this agreement; and
- b. Respondent shall never apply for registration or seek exemption from registration with the Commission in any capacity, shall never engage in activity requiring registration or exemption from registration with the Commission, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9), and shall not act as a principal, agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9).

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

By the Commission



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

Dated: October 6, 2008