

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)
Daniel J. Bealko,)
Respondent.)

CFTC Docket No. 10- 18

Office of
Proceedings
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2010 SEP 20 AM 9:33

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

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Daniel J. Bealko (“Bealko” or “Respondent”) has violated Sections 4b(a)(2)(i), 4b(a)(2)(iii), and 4c(b) of the Commodity Exchange Act (the “Act”), 7 U.S.C. §§ 6b(a)(2)(i), 6b(a)(2)(ii), 6c(b) (2006), and Commission Regulation (“Regulation”) 33.10(a) and (c), 17 C.F.R. § 33.10(a), (c) (2009). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Bealko 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, Bealko has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Bealko acknowledges service of this Order Instituting Proceedings Pursuant to Section 6(b) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“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 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.

III.

A. SUMMARY

Between 1996 and 2003, Bealko was employed as General Motors Corporation's ("GM") Global Commodities Manager, responsible for devising and implementing GM's aluminum hedging strategies. Between June 2003 and December 7, 2003, Bealko used the commodity markets subject to the jurisdiction of the Commission to defraud GM. Specifically, Bealko, without the knowledge or consent of GM, sold New York Mercantile Exchange ("NYMEX") aluminum futures contracts and options on NYMEX aluminum futures contracts to personally profit from GM's divestiture of surplus aluminum. Bealko reaped approximately \$6,500,000 in ill-gotten gains from his criminal activity.

On November 5, 2009, Bealko appeared before U.S. District Judge Charles Kocoras to enter his plea of guilty to charges of wire fraud and tax evasion in connection with a scheme to defraud his former employer, GM. The facts set forth in the Plea Agreement also establish that Bealko willfully cheated, defrauded and deceived GM in violation of Sections 4b(a)(2)(i), 4b(a)(2)(iii), and 4c(b) of the Act and Regulation 33.10(a) and (c).

Bealko was sentenced on March 17, 2010 and, as part of his Plea Agreement, that total amount of criminal restitution owed by Bealko to GM is equal to his approximate ill-gotten gains, \$6,500,000.²

B. RESPONDENT

Daniel J. Bealko, formerly of Clarkston, Michigan, is currently in the custody of the Federal Bureau of Prisons.

C. FACTS

On November 5, 2009, Bealko pled guilty to one count of wire fraud, in violation of Title 18, United States Code, Section 1343, in connection with his scheme to defraud GM. Bealko also pled guilty to one count of income tax evasion, in violation of Title 26, United States Code, Section 7201. In pleading guilty to these two counts, Bealko admitted the following facts.

Between approximately 1996 and December 2003, Bealko was GM's Global Commodity Manager for Lightweight Metals ("GCM"). As GCM, GM entrusted Bealko with the discretionary authority to devise and implement a plan for GM to divest an

² Under his Plea Agreement, Bealko is required to make full restitution of the financial loss he caused to GM. Accordingly, the Commission has elected to recognize the restitution made in the context of the criminal case and forego the inclusion of restitution in this matter.

extensive physical hedge of bulk aluminum. In so doing, Bealko was responsible for various hedging strategies, such as trading in the aluminum commodities futures market and purchasing bulk aluminum at favorable prices for future use by GM. As the GCM, Bealko owed a fiduciary duty to provide honest services and undivided loyalty to GM in the performance of his duties.

In or about February 2003, Bealko, known within the metals industry as an influential commodities trader, was granted power-of-attorney for a commodity futures trading accounts in the name of Fuci Metals USA (“Fuci”)³ at Carr Futures Inc. (“Carr Futures”), a registered futures commission merchant. This power-of-attorney gave Bealko full authority to manage and conduct transactions in the Fuci accounts.

Bealko used the Fuci accounts at Carr Futures to trade NYMEX aluminum futures contracts and options on NYMEX aluminum futures contracts. Without the knowledge or authority of GM, Bealko caused negotiable warrants for GM-owned aluminum to be delivered and put on deposit with Carr Futures.

Between June 2003 and December 7, 2003, the Fuci trading accounts received payments for the sale of NYMEX aluminum futures contracts and options on NYMEX aluminum futures contracts. Bealko conducted all Commission jurisdictional transactions, and profits earned by Fuci from the futures and options trades were ultimately paid to Bealko in amounts totaling approximately \$6,500,000.

D. LEGAL DISCUSSION

Prior to being revised in June 2008,⁴ Section 4b(a)(2)(i) and (iii) of the Act provided that it was unlawful:

for any person in or in connection with any order to make, or the making of any contract or sale of any commodity for future delivery, made or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for [one of the enumerated purposes herein] (i) to cheat or defraud or attempt to cheat or defraud such other

³ Fuci, unaffiliated with GM, went bankrupt and was dissolved on February 1, 2006.

⁴ The June 2008 legislation reauthorizing the Commission revised Section 4b of the Act, among other things. *See* Section 1302 of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”). The objective of the revision was to “clarify that the CEA gives the Commission the authority to bring fraud actions in off-exchange ‘principal-to-principal’ futures transactions.” H.R. REP. NO. 110-627, at 981 (2008) (Conf. Rep.). While the CRA did not change the Act’s prohibition on misconduct such as that at issue here, it reorganized Section 4b so that similar misconduct occurring on or after June 18, 2008 would be in violation of Section 4b(a)(1)(A) and (C) of the Act as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(1)(A) and (C).

person; ... [or] (iii) to willfully deceive or attempt to deceive such other person by any means whatsoever in regard to such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person

7 U.S.C. § 6b(a)(2)(i) and (iii) (2006).

Section 4c(b) of the Act, 7 U.S.C. § 6c(b), provides that: “No person shall . . . enter into or confirm the execution of, any transaction involving any . . . ‘option’ . . . contrary to any . . . regulation . . . of the Commission . . .” Regulation 33.10, in relevant part, makes it unlawful

for any person directly or indirectly ... (a) [t]o cheat or defraud or attempt to cheat or defraud any other person; ... [or] (c) [t]o deceive or attempt to deceive any other person by any means whatsoever ... in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

17 C.F.R. § 33.10(a), (c) (2009).

The Commission and courts recognize that under the Act employees can cheat or defraud their employer. *See In re Hartog*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,090 (CFTC Mar. 7, 2000) (Commission settlement order finding a general manager of a grain operator to have violated Section 4b(a)(i)-(iii) of the Act and Section 4c(b) of the Act and Regulation 33.10(a)-(c) by defrauding his employer after engaging in unauthorized futures and options trading, deceiving his employer, and making false written statements that concealed the nature of the scheme and his trading losses); *Merrill Lynch Futures, Inc. v. Kelly*, 585 F. Supp. 1245, 1251-1253 (S.D.N.Y. 1984) (a clerk at investment firm who participated in a fraudulent scheme by accepting certain losing trades in the firm’s error account was properly charged with violating Section 4b of the Act); *In re Steven G. Soule*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,690 at 55,927 (CFTC Feb. 11, 2004) (Commission settlement order finding that an in-house trader for an oil company who allocated trades in collusion with others to defraud his employer of profitable trades and altered his in-house paper work to conceal the scheme violated Section 4b of the Act).

Further, employees owe their employer a fiduciary duty. *United States v. Newman*, 664 F.2d 12, 19 (2d Cir. 1981) (“an employee’s breach of his fiduciary obligations is actionable fraud when it encompasses the violation of a ‘duty to disclose material information to his employer’”) (quoting *United States v. Von Barta*, 635 F.2d 999, 1006 (2d Cir. 1980); *see also In re Ryan*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,669 (CFTC Oct. 31, 2001) (Commission settlement order finding that a trader trading his employer’s account owes his employer a fiduciary duty). In

addition to a duty of loyalty and honest services, fiduciaries are required to disclose all material information to whom they owe such a duty. *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985) (finding a commodity broker, who is a fiduciary to his customer, is under an obligation to disclose all material information).

Bealko knowingly engaged in unauthorized futures and options trading as part of his criminal scheme. In so doing, Bealko employed the markets to defraud GM and deprived GM not only of his duty of loyalty and honest services but also the profits earned from his unauthorized trading of NYMEX aluminum futures contracts and options on NYMEX aluminum futures contracts. Bealko also failed to disclose his fraud, cheating and deception to his employer, GM. By this conduct, Bealko violated Sections 4b(a)(2)(i), 4b(a)(2)(iii), and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(2)(i), 6b(a)(2)(iii), 6c(b) (2006), and Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a), (c) (2009).

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent violated Sections 4b(a)(2)(i), 4b(a)(2)(iii), and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(2)(i), 6b(a)(2)(iii), 6c(b) (2006), and Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a), (c) (2009).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he:

- A. Acknowledges receipt and service of this Order;
- B. Admits the jurisdiction of the Commission with respect to the matters set forth in this Order;
- C. Waives: the service and filing of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any claim of Double Jeopardy based upon the institution of this proceeding or the entry of any order imposing a civil monetary penalty or other relief; any and all claims that he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2009), relating to, or arising from, this proceeding; any and all claims that he may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-68 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to or arising from this proceeding;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings in this Order to which Bealko 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 Bealko violated Sections 4b(a)(2)(i), 4b(a)(2)(iii), and 4c(b) of the Act, 7 U.S.C. §§ 6b(a)(2)(i), 6b(a)(2)(iii), 6c(b) (2006), and Regulation 33.10(a) and (b), 17 C.F.R. § 33.10(a), (b) (2009);
2. orders Respondent to cease and desist from violating Section 4b(a)(1)(A) and (C) of the Act as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(1)(A) and (C), Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006), and/or Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a), (c) (2009);
3. permanently prohibits Bealko from, directly or indirectly, 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), for his own account, for any account in which he has a direct interest or indirect interest, or for any other account for or on behalf of any other person or entity, whether by power of attorney or otherwise, and all registered entities shall refuse him all privileges; and
4. orders Bealko to comply with his undertakings consented to in his Offer and set forth below in Section VI of this Order.

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

VI. ORDER

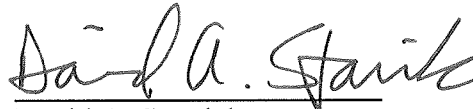
Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Bealko shall cease and desist from violating Section 4b(a)(1)(A) and (C) of the Act as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(1)(A) and (C), Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006), and/or Regulation 33.10(a) and (c), 17 C.F.R. § 33.10(a), (c) (2009).
2. Bealko is permanently prohibited from, directly or indirectly, 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), for his own account, for any account in which he has a direct interest or indirect interest, or for any other account, whether by power of attorney or otherwise, and all registered entities shall refuse him all privileges.
3. Bealko shall comply with the following undertakings set forth in the Offer:
 - (a) Bealko shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never engage in any activity requiring such 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) (2009); and

- (b) Bealko shall not act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2009)), 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) (2009).
- (c) Neither Bealko nor any of his employees or agents under his 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 Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent shall undertake all steps necessary to ensure that all of his employees and agents under his authority or control understand and comply with this undertaking.

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: September 20, 2010