

III.

The Commission finds the following:

A. SUMMARY

On one or more days in 2004, Otis and Millar aided and abetted DFA's violation of the Chicago Mercantile Exchange's ("CME") speculative position limits in Class III milk futures contracts, in violation of Section 4a(e) of the Act.

B. SETTLING RESPONDENTS

Frank Otis was Chief Executive Officer of a DFA subsidiary. He is a resident of Ambler, Pennsylvania.

Glenn Millar was Vice President of Procurement and Operations for a DFA subsidiary. He is a resident of Las Vegas, Nevada.

C. FACTS

In a separate order, see CFTC Docket No. 09-02, the Commission found that DFA violated Section 4a(e) of the Act by exceeding Class III milk futures speculative position limits on one or more days in 2004. Otis and Millar aided and abetted DFA's violation by directing the speculative trading of Class III milk futures in an internal sub-account designated for one of DFA's subsidiaries.³

D. LEGAL DISCUSSION

Under Section 13(a) of the Act, aiders and abettors are liable as principals for a violation of the Act or Commission Regulations if they had knowledge of the wrongdoing⁴ underlying the violation and intentionally assisted the primary wrongdoer. *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,888 n. 28 (CFTC May 12, 2000) (citing *In re R & W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,746 (CFTC Mar. 16, 1999)); *In re DiPlacido*, CFTC Docket No. 01-23, 2008 WL 4831204 (CFTC Nov. 5, 2008).⁵ Otis supervised and Millar directed the trading in one of the sub-accounts in the name of a DFA subsidiary, and, thereby, aided and abetted DFA's violation of the CME's

³ CME Rule 5202.E provides that "no person shall own or control more than 1,500 contracts long or short in any contract month," and Rule 5202.F requires that positions in accounts directly or indirectly owned or controlled by a person or persons shall be aggregated.

⁴ The Commission does not need to establish *scienter* to prove a violation of Section 4a(e). *CFTC v. Hunt*, 591 F.2d 1211 (7th Cir. 1979); see also *In re Saberi*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,031 (CFTC March 2, 2005).

⁵ The "assistance" element of Section 13(a) of the Act has been construed very broadly. For example, "in appropriate circumstances, passive conduct may amount to intentional assistance of the primary wrongdoer." *Nikkhah*, ¶ 28,129 at 49,888 n. 28 (citing *In re Western Financial Management*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,814 at 31,401 (Nov. 14, 1985)).

speculative position limit in the Class III milk futures contracts. Otis and Millar, therefore, are liable for violating of Section 4a(e) of the Act.

IV.

OFFER OF SETTLEMENT

Without admitting or denying the findings herein, Respondents have submitted an Offer in which they: acknowledge receipt and service of the Order; admit the jurisdiction of the Commission with respect to all matters set forth in the Order; waive 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 the Commission's consideration of the Offer, any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, any and all claims that they may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and/or Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2008), relating to, or arising from, this proceeding, and any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 847 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to, or arising from, this proceeding.

Respondents stipulate that the record basis on which this Order is entered consists solely of the Order to which Respondents have consented, including the findings in this Order; and consent to the Commission's issuance of this Order. Pursuant to the Offer, Respondents agree to entry of the Order that: makes findings that Otis and Millar, by aiding and abetting DFA's violation of Section 4a(e) of the Act, 7 U.S.C. § 6a(e), are liable for violating Section 4a(e) of the Act, 7 U.S.C. § 6a(e) pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a); orders Respondents to cease and desist from violating the provisions of the Act that they have been found to have violated; orders Otis to pay a civil monetary penalty in the amount \$60,000, plus post-judgment interest, and Millar to pay a civil monetary penalty in the amount of \$90,000, plus post-judgment interest, within ten (10) days of the date of entry of this Order; and orders Respondents to comply with the undertaking as set forth in this Order.

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

V.

FINDINGS OF VIOLATIONS

The Commission finds that Otis and Millar aided and abetted DFA's violation of Section 4a(e) of the Act, and Otis and Millar are therefore liable for violating Section 4a(e) of the Act, 7 U.S.C. § 6a(e) (2006), pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2006).

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondents shall cease and desist from violating Section 4a(e) of the Act, 7 U.S.C. §6a(e) (2006).
2. Otis is liable for, and shall pay, a civil monetary penalty in the amount of \$60,000, plus post-judgment interest, and Millar is liable for, and shall pay, a civil monetary penalty in the amount of \$90,000, plus post-judgment interest, within ten (10) days of the date of entry of this Order. Post-judgment interest shall accrue beginning eleven (11) days after the date of entry of this Order and shall be determined using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. Respondents shall pay these civil monetary penalties by making 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 payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

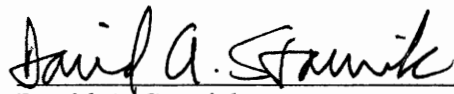
Commodity Futures Trading Commission
Division of Enforcement
Attn: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
(405) 954-6569

3. If payment by electronic funds transfer is chosen, the paying Respondent shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. The paying Respondent shall accompany payment of the penalty with a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW, Washington, DC 20581, and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. §9a(2) (2006), if this amount is not paid in full within fifteen (15) days of the due date, the non-paying Respondent shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until the non-paying Respondent shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made.
4. Respondents shall comply with the following undertaking as set forth in their Offer:

Respondents agree that neither they nor any of their successors, assigns, employees, agents, attorneys or representatives shall take any action or make any public statement denying, directly or indirectly, any finding or conclusion in this Order or creating, or tending to create, the impression that this Order is without factual or legal basis provided, however, that nothing in this provision shall affect Respondents': (i) testimonial obligations; or (ii) right to take positions in other proceedings to which the Commission is not a party. Respondents and their successors and assigns shall take all steps necessary to ensure that all of their employees, agents, attorneys and employees under their authority and/or actual or constructive control understand and comply with this undertaking.

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

By the Commission.



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

Dated: December 15, 2008