

Attempted Manipulation of a Futures Contract

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The United States District Court in Manhattan, in *CFTC v. Amaranth Advisors*, --- F. Supp.2d ---, 2008 WL 2123323 (S.D.N.Y. June 10, 2008) (Chin, J.), has defined the elements of attempted manipulation of a commodity futures contract, addressing an issue of doubt and sustained controversy. The Court considered what type of action a plaintiff must prove to establish a claim of attempted manipulation under Section 9(b) of the Commodity Exchange Act ("CEA"). Defendants had contended that, besides manipulative intent, the claim required proof of an "unlawful, fraudulent" act, rather than what they described as legitimate, speculative trading. *Id.* at *9. The CFTC argued, on the other hand, and the Court agreed, that the claim required only an "overt act committed by defendants in furtherance of their intent to manipulate the settlement prices of natural gas futures." *Id.* at * 9 (emphasis added). The Court found manipulative intent to have indicated in some of the trader's e-mails, and identified the concurrent overt acts as follows, finding them sufficient to establish the claim:

"Specifically, the CFTC alleges that shortly before the closing range on February 24, the expiration day for the March 2006 natural gas futures, defendants reversed their overall position from short to long in more than 3,000 futures contracts. Defendants then placed orders to sell those contracts during the closing range when prices would be affected by the large volume of trades. (Compl. ¶¶ 33, 35).

"The CFTC alleges that defendants perpetrated the manipulative scheme again on April 21. Defendants allegedly instructed NYMEX brokers to sell a total of 1,044 natural gas futures contracts in the last eight minutes of trading. (Compl. ¶¶ 55-58). Eight minutes before the end of trading, Hunter allegedly placed another order with a NYMEX broker to sell 2,000 futures contracts. (Compl. ¶¶ 59-61). These allegations sufficiently meet the overt acts requirement of an attempted manipulation claim." The Court found support for its analysis in another case of alleged market manipulation, in the same District but under a different statute, the Securities Exchange Act:

"Defendants, however, contend that to state a claim for attempted manipulation, the CFTC may not simply allege any overt act, but must allege an unlawful, fraudulent act. Without an allegation of fraud or deception, defendants argue, there is no manipulative conduct, but merely "legitimate speculative trading." (Amaranth Mem. at 5, 6). Quoting a recent Second Circuit decision, defendants assert that "short selling-even in high volumes-is not, by itself, manipulative." (Amaranth Mem. at 9, quoting *ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 101 (2d Cir.2007)). At bottom, defendants raise the issue whether manipulative intent alone can support liability for otherwise legal, open-market transactions.

This question, however, has already been addressed in the context of federal securities laws. In *Securities and Exchange Commission v. Masri*, Judge Holwell expressly "decline[d] to adopt defendants' proposed per se rule that open-market activity cannot be considered manipulative based solely on manipulative intent, that is, without additional deceptive or manipulative conduct." 523 F.Supp.2d at 371. Instead, he held that "if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation." *Id.* at 372.

"The open-market transactions at issue in *Masri* involved a specific type of trading strategy known as "marking the close"-the same trading activity at issue in this case. Marking the close refers to the execution of purchase or sale orders at or near the close of the market to affect the closing price of a security. *Sec. & Exch. Comm'n v. Schiffer*, No. 97 Civ. 5853(RO), 1998 WL 226101, at *1 n. 3 (S.D.N.Y. May 5, 1998). Although "transactions made at the close of the day are not prohibited," the timing of such transactions is not only "suspicious," but also "more capable of artificially affecting the price of the security." *Masri*, 523 F.Supp.2d at 370. The *Masri* court thus concluded that allegations of "'end-of-day' transactions, accompanied by evidence sufficiently indicative of manipulative intent, stated a claim for market manipulation in violation of section 10(b) of the Securities Exchange Act of 1934. *Id.* at 372."