Commodity Futures Trading Commission
CEA CASES

NAME: J. H. KENT, THE KENT COMPANY, AND EDWARD C. EPPERSON

CITATION: 28 Agric. Dec. 656

DOCKET NUMBER: 137

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(No. 12,525)

In re J. H. KENT, THE KENT COMPANY, and EDWARD C. EPPERSON. CEA Docket No. 137. Decided June 6, 1969.

Aggregation of trades -- Exceeding trading limit -- Denial of trading privileges

Where trades in commodity futures of respondents and others were made pursuant to a common trading plan or agreement and total of trades was much in excess of trading limits, respondents wilfully violated the act, and all contract markets are directed to refuse all trading privileges to respondents for a period of 90 days.

Self-incrimination -- Statements to investigator -- The *Miranda* doctrine

Voluntary statements made by respondent to investigator while respondents were not under restraint or in custody are admissible in evidence and the *Miranda* rule does not apply.

Earl L. Saunders for Commodity Exchange Authority.

Douglas C. Wynn, Greenville, Miss., for respondents.

Benj. M. Holstein, Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) against three respondents -- The Kent Company, a partnership, J. H. Kent, managing partner thereof, and Edward C. Epperson, his son-in-law and also a

partner in the partnership. The amended complaint, issued under section 6 (b) of the act (7 U.S.C. 9) by the Assistant Secretary of Agriculture, alleges that during the latter part of 1965 and through most of 1966, respondents, acting pursuant to a common trading plan determined by respondent J. H. Kent under an agreement or understanding among respondents Kent and Epperson and two other members of the Kent family who are not respondents herein, made trades and held positions in commodity futures on contract markets which, when combined, were in excess of the maximum speculative limits established by the Commodity Exchange Commission (17 CFR 150.1, 150.4, 150.10). The complaint charges that the respondents thereby wilfully violated section 4a of the act (7 U.S.C. 6a).

Respondents filed a joint answer which admits the jurisdictional allegations of the complaint and the futures transactions and positions described therein, but deny any understanding, agreement or common trading plan, or any violation of the act. The answer asserts that the trades were made and the positions held

separately and independently with respect to each account, and that the only connection between the partnership transactions and those of respondent Epperson was that respondent Epperson borrowed various sums of money from respondent partnership and sought the advice of respondent J. H. Kent, the managing partner.

An oral hearing was held and evidence received in Greenville, Mississippi, in December 1966, before Benj. M. Holstein, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, who was assigned to the proceeding as referee. Earl L. Saunders, Office of the General Counsel, United States Department of Agriculture, appeared for complainant. Respondents were represented by Douglas C. Wynn, Attorney at Law, Greenville, Mississippi. Following the hearing, suggested findings of fact, conclusions and order, and supporting briefs were filed by counsel for the parties.

Hearing Examiner Holstein issued a recommended decision upholding the charges of the amended complaint and he proposed an order to the contract markets to refuse all trading privileges to respondents for a period of 90 days.

Respondents filed exceptions and oral argument was held before the Judicial Officer in Washington, D. C. on March 28, 1969.

The issues raised by respondents are discussed hereinafter under the heading "Conclusions".

FINDINGS OF FACT

1. Respondent J. H. Kent, an individual whose business address is 1269 Wilson Avenue, Greenville, Mississippi, is now and was at all times material herein the managing partner in respondent partnership, The Kent Company, and at all such times managed, controlled and had sole responsibility for the trading in commodity futures by said firm. Respondent Kent is now and was at all such times a member of the Board of Trade of the City of Chicago (Chicago Board of Trade) and of the Chicago Mercantile Exchange, and a substantial trader in commodity futures with approximately 30 years of experience in that field (Answer, par. 1; Tr. pp. 287, 334-335, 476, 480-484, 560).

2. Respondent The Kent Company, whose address is Abraham Building, Greenville, Mississippi, is now and has been since January 1, 1966, a partnership composed of respondent J. H. Kent, Marilyn Kent Epperson, his daughter and wife of respondent Edward C. Epperson, Karlin Kent Wood, his daughter and wife of Robert C. Wood, Allan R. Kent, his son, and respondent Edward C. Epperson in his capacity as trustee of the Marcia Kent trust. Marcia Kent is the wife of respondent J. H. Kent. For several years prior to January 1, 1966, said partnership was composed of respondent J. H. Kent, respondent Edward C. Epperson in his capacity as trustee of the Marcia Kent trust, and Marcia Kent in her capacity as trustee of separate trusts for each of the three Kent children named above (Resp. Ex. 15; Tr. pp. 15, 19-22, 476-478, 584). Prior to January 1, 1966, respondent partnership was engaged in various business enterprises including ranching, farming, merchandising grain and feed, and manufacturing dog food (Tr. pp. 478-480). Subsequent thereto, said partnership confined itself to trading in commodity futures and investing in stocks and bonds, etc., (Tr. pp. 336-337, 479, 533). Said partnership trades in commodity futures under various trade names, *viz.,* The Kent Company, Kentland Ranch, and J. H. Kent Company (Tr. p. 335).

3. Respondent Edward C. Epperson is an individual whose address is Bayou Road, Greenville, Mississippi. Said respondent is a partner in respondent partnership as described in Finding 2, and was employed in various capacities by said partnership from

1950 to early 1966 at an annual salary not in excess of $ 14,000.00 (Tr. pp. 349-360, 459-460). In March 1966, respondent Epperson became an employee, as

hereinafter described, of Hayden, Stone Inc., a stock and commodity brokerage firm with a branch office in Greenville, Mississippi (Tr. p. 459).

4. On August 6, 1965, respondent partnership opened a commodity trading account in the name of The Kent Company with Goodbody & Company, a stock and commodity brokerage firm. On October 22, 1965, said partnership opened a commodity trading account with Goodbody & Company in the name of Kentland Ranch (Comp. Exs. 33, 34; Tr. p. 252). On November 22, 1965, respondent Epperson opened a commodity trading account with Goodbody & Company and made his first trade in commodity futures on that date by purchasing 50 contracts of pork belly futures. n1 The Epperson account was "introduced" to Goodbody & Company by respondent J. H. Kent (Comp. exs. 19, 30; Tr. pp. 236, 253-254, 274, 360). In the early part of 1966, respondent partnership opened a commodity trading account in the name of J. H. Kent Company with Hayden, Stone Inc. (Tr. pp. 526-527). On or about March 16, 1966, respondent Epperson became a trainee for the position of registered representative in the Greenville, Mississippi office of Hayden, Stone Inc. (Tr. p. 459), and when that firm transferred the ownership of its Greenville office to Goodbody & Company in November 1966, respondent Epperson continued as a trainee with Goodbody & Company and was so employed at the time of hearing (Tr. pp. 265, 311).

n1. Pork bellies, a livestock product, were not regulated under the Commodity Exchange Act at the time of this transaction. Livestock products were included in the coverage of the act by the amendments of February 19, 1968, P.L. 90-258.

5. The Board of Trade of the City of Chicago (Chicago Board of Trade) and the New York Mercantile Exchange are now and were at all times material herein duly designated contract markets under the Commodity Exchange Act. The trades and positions in wheat and soybean futures hereinafter described were made on or subject to the rules of the Chicago Board of Trade, and the trades and positions in potato futures hereinafter described were made on or subject to the rules of the New York Mercantile Exchange. All such trades and positions were speculative (Tr. p. 171).

6. At all times material herein, orders of the Commodity Exchange Commission (17 CFR 150.1, 150.4, 150.10), promulgated under section 4a of the Commodity Exchange Act (7 U.S.C. 6a),

provided the following limits on the maximum net long or net short position in wheat, soybeans, or potato futures which any person could hold or control on or subject to the rules of any one contract market, and on the maximum amount of such futures which any person could buy and on the maximum amount which any person could sell during any one business day on or subject to the rules of any one contract market:

Future	Position Limit	Trading Limit
Wheat	2,000,000 bushels in any one future or in all futures combined	Same
Soybeans	2,000,000 bushels in any one future or in all futures combined	Same
Potatoes	300 carlots in any one future except April future 150 carlots maximum and May future 150 carlots maximum; 350 carlots in all futures combined	Same

Each of the above orders contains the following provision (17 CFR 150.1 (f), 150.4 (f), 150.10 (f)):

(f) *Application of limits.* The foregoing limits upon positions and upon daily trading shall be construed to apply, respectively, to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single individual.

7. At the opening of business on December 3, 1965, respondent The Kent Company held a long position with Goodbody & Company of 500,000 bushels of March 1966 wheat futures on the Chicago Board of Trade. Between December 3 and December 15, 1965, said respondent purchased March and May 1966 wheat futures on the Chicago Board of Trade through the said firm, reached a long position of 2,000,000 bushels in such futures on December 15, 1965, and held such position without change until February 28, 1966 (Comp. Ex. 2). On December 20, 1965, respondent Edward C. Epperson made his first trade in regulated commodities on a contract market by purchasing 2,000,000 bushels of May, July and September 1966 wheat futures on the Chicago Board of Trade through Goodbody & Company, and said respondent held such position without change until April 7, 1966 (Comp. Ex. 3; Tr. pp. 277, 370). As a result of the above transactions, during the period December 20, 1965 through April 5, 1966, respondents The Kent Company and Edward C. Epperson held a

combined net long position of 2,150,000 bushels in the May 1966 wheat future on the Chicago Board of Trade and a combined net long position in March, May and September 1966 wheat futures on the Chicago Board of Trade in amounts ranging from 2,190,000 to 4,000,000 bushels (Comp. Ex. 4). All such positions were held on the books of Goodbody & Company (Tr. pp. 36-48).

8. Between December 1, 1955 and September 20, 1966, respondent The Kent Company, trading as The Kent Company and Kentland Ranch with Goodbody & Company and as J. H. Kent with Hayden, Stone Inc., bought and sold soybean futures on the Chicago Board of Trade (Comp. Exs. 5, 7). Between January 11, 1966 and September 20, 1966, respondent Edward C. Epperson also bought and sold soybean futures on the Chicago Board of Trade through Goodbody & Company (Comp. Ex. 6). The purchases and sales made by said respondents included the following transactions and positions:

(a) On January 11, 1966, said respondents sold a combined total of 2,850,000 bushels of August 1966 soybean futures and bought a combined total of 2,850,000 bushels of September 1966 soybean futures, such transactions consisting of the sale by the Kentland Ranch account of 1,900,000 bushels of August soybeans and the purchase of the same quantity of September soybeans, and the sale by respondent Epperson of 950,000 bushels of August soybeans and the purchase by said respondent of the same quantity of September soybeans (Comp. Exs. 5, 6);

(b) During the periods hereinafter set forth, said respond-dent held combined net positions in soybean futures in the following amounts on the Chicago Board of Trade (Comp. Ex. 8; Tr. pp. 49-58):

Period 1966	Future	Position	Amount (Thousands of bushels)
1/11-7/11	August 1966	Short	From 2,375 to 4,000
1/11-4/14	September 1966	Long	From 2,210 to 3,500
6/14-9/13	September 1966	Long	From 2,375 to 3,800
7/12-9/19	Various	Long	From 2,010 to 3,900

9. Between July 26 and October 12, 1966, respondent The Kent Company, trading as J. H. Kent Company, respondent Edward C. Epperson, Rebecca Kent, wife of the aforesaid Allan R. Kent, a registered representative in the Greenville office of Goodbody & Company, and the aforesaid Robert C. Wood, son-in-law of

respondent J. H. Kent, bought and sold April and May 1967 potato futures on the New York Mercantile Exchange through Hayden, Stone Inc. Such purchases and sales included the following transactions and positions (Comp. Exs. 9, 10, 11; Tr. pp. 59-65):

(a) On July 26, 1966, respondent The Kent Company, trading as J. H. Kent Company, and Rebecca Kent bought 100 carlots and 85 carlots, respectively, of May 1967 potato futures, resulting in a combined net long position of 185 carlots in such future in these two accounts;

(b) On July 29, 1966, the aforesaid accounts purchased an additional 50 carlots and 65 carlots, respectively, of May 1967 potato futures, which increased the net long position in each of these two accounts to 150 carlots in such future; and the combined net long position in such future to 300 carlots;

(c) On August 1, 1966, Edward C. Epperson and Robert C. Wood bought 150 carlots and 144 carlots, respectively, of May 1967 potato futures, resulting in a combined net long position in such future of 594 carlots in the accounts of J. H. Kent Company, Rebecca Kent, respondent Edward C. Epperson and Robert C. Wood;

(d) From August 1 through October 12, 1966, The J. H. Kent Company, Rebecca Kent, Edward C. Epperson, and Robert C. Wood accounts held combined net long positions in the May 1967 potato futures which ranged between 264 and 600 carlots;

(e) At the opening of business on August 12, 1966, the Rebecca Kent account had a long position of 2 carlots in the April 1967 potato future. On that date, J. H. Kent Company, Edward C. Epperson, Rebecca Kent, and Robert C. Wood each bought 100 carlots of April 1967 potato futures, resulting in a combined net long position of 402 carlots in such future in these four accounts;

(f) From August 12 through October 12, 1966, J. H. Kent Company, Edward C. Epperson, Rebecca Kent, and Robert C. Wood held combined net long positions in the April 1967 potato future which ranged between 292 and 473 carlots; and

(g) From August 1 through October 12, 1966, J. H. Kent Company, Edward C. Epperson, Rebecca Kent, and Robert C. Wood held combined net long positions in April and May 1967 potato futures which ranged between 556 and 1073 carlots.

10. On January 16, 1966, Torrey A. Craig, Regional Director of the Commodity Exchange Authority in New Orleans, interviewed respondent Epperson in the partnership offices in Greenville, Mississippi, with respect to the transactions in question. During the course of the interview, respondent Epperson stated that he did not have extensive experience in commodity futures trading, that he financed the trades in his accounts with funds borrowed from the Kent Company, that he executed unsecured notes bearing 5 1/2 percent interest on such loans, that any profits resulting from the trades would belong to him, and that there was no agreement concerning losses. In a separate interview with respondent Kent on the same day, Kent told Craig that Epperson followed the pattern of trading which Kent set for the partnership, but that in doing so respondent Epperson acted on his own and without any control or suggestion by respondent Kent, that any profits in the Epperson account accrued to respondent Epperson, that any losses would be held open, that he (Kent) knew of no law requiring the notes given by Epperson to be repaid immediately upon closing of the trades, that the interest of his daughter Marilyn Kent Epperson in the Kent estate far exceeded the sum of the notes signed by respondent Epperson, and that the family had to be considered at all times (Tr. pp. 11-16, 18). Respondent Kent inquired of Craig whether the trades of his son, Allan R. Kent, were required to be combined with those of the partnership for reporting purposes and whether an employee could follow an employer's pattern of trading without combining the trades for reporting purposes, and Craig suggested that these inquiries be directed to the Chicago or Washington offices of the Commodity Exchange Authority (Tr. pp. 18-19).

11. The trades and positions in wheat and soybean futures in the partnership and Epperson accounts, described in Findings 7 and 8, were made, held, and liquidated pursuant to an understanding or agreement between respondents J. H. Kent and Epperson that said respondents would follow a particular trading plan or pattern. The trading and positions in potato futures in the partnership and Epperson accounts and in the accounts of

Rebecca Kent and Robert C. Wood, described in Finding 9, were made, held, and liquidated pursuant to a similar understanding or agreement among respondent J.

H. Kent, respondent Epperson, Rebecca Kent and Robert C. Wood. Pursuant to said agreements, respondent J. H. Kent financed the trading in the Epperson accounts with partnership funds, and between November 22, 1965 and September 16, 1966, respondent J. H. Kent advanced a total sum in excess of $ 1,230,000 for this purpose. In making such advances, respondent J. H. Kent withdrew funds at various intervals from the partnership accounts, delivered the funds to respondent Epperson, and respondent Epperson deposited such funds in his trading accounts (Comp. Exs. 18, 24; Tr. pp. 98-111, 171-179, 577).

12. In January 1965, prior to the transactions described in the above findings, the Kentland Ranch account exceeded the speculative limit of 2,000,000 bushels on soybean futures, and on January 21, 1965, the Exchange Supervisor in charge of the Commodity Exchange Office in Chicago called this fact to the attention of respondent J. H. Kent in writing and requested that the position be reduced to permissible limits. At the same time, a Commodity Exchange Authority release was sent to respondent J. H. Kent informing him with respect to the speculative trading and position limits on all commodities, including wheat, soybeans and potatoes (Tr. pp. 29-36, 111-112; Comp. Exs. 1, 1A, 25).

CONCLUSIONS

There is no dispute over the trades made and the positions held that are described above in the Findings of Fact. The complainant claims that all the trading done by the partnership respondent, respondent Epperson and (in the case of potato futures trading) by the two members of the Kent family who are not respondents were under the direction and control of respondent Kent, managing partner of the respondent partnership. Therefore, complainant contends that the positions held by all the accounts are to be aggregated and that, so aggregated, the maximum permissible trading limits were exceeded. Respondents, on the other hand, say that the trades made and positions held were separate and independent for each account.

The hearing examiner concluded that the trading by respondent Epperson was merely an extension of the trading by the partnership respondent and that all the trading involved was under the

unified control of respondent Kent as managing partner of the respondent partnership.

We agree with the hearing examiner and our findings of fact and conclusions are substantially the same as those of the hearing examiner.

On December 15, 1965, the account of respondent The Kent Company reached a maximum long position of two million bushels in wheat futures on the Chicago Board of Trade, and none of the partnership accounts could then buy any more wheat futures on that market without violating the speculative limit (Comp. Ex. 2). Five days later respondent Epperson, who had never previously traded in any regulated commodity, entered the wheat futures market on the Chicago Board of Trade with a purchase of two million bushels (Comp. Ex. 3), a very costly purchase of the maximum permissible trading limit. Thereafter, there was no activity in either of the above accounts for a period of some 10 weeks during which each account held its position unchanged. The position of The Kent Company, which was in the March and May 1966 futures, was entirely liquidated between February 28 and March 6, 1966. The Epperson position, which was in the May, July and September 1966 futures, was entirely liquidated during April 1966.

The same pattern of heavy trading in the Epperson account when the partnership accounts were at the maximum trading limit is apparent in the soybean trading, with some additional significant features. On January 11, 1966, the Kentland Ranch account sold 1,900,000 bushels of August 1966 soybean futures and bought 1,900,000 bushels of September soybean futures on the Chicago Board of Trade, and at the close of business that day this account had a spread position of 1,500,000 bushels short August and 1,500,000 bushels long September soybeans (Comp. Ex. 5). n2 At the same time, The Kent Company and J. H. Kent

Company accounts had a similar spread position of 500,000 bushels in these futures (Comp. Ex. 7). Thus, on January 11 the partnership accounts had an aggregate spread position of two million bushels short August and two million bushels long September soybeans and the partnership could not sell any more August soybean futures or purchase any more September soybean futures without violating the speculative limit. On that day and

the following day, respondent Epperson made his first trades in soybean futures by selling two million bushels of August soybeans and buying two million bushels of September soybeans at *price differences identical with those in the Kentland Ranch trades* (Comp. Exs. 6, 22, 24). n3

n2. Prior to this trade, the Kentland Ranch account had a long position of 400,000 bushels in the August future against a short position of 400,000 bushels in the September future. (Comp. Ex. 5).

n3. All of the August futures in the Kentland Ranch and Epperson trades were sold at 10 cents per bushel over the purchase price of the September futures (Comp. Exs. 22, 24).

The sequence in which the orders for these soybean trades were filled is significant. There were three orders involved, (1) an order for the Kentland Ranch account dated January 5, 1966, to buy 400,000 bushels of September soybeans and sell 400,000 bushels of August soybeans with August 10 cents per bushel or more over September, (2) an identical order for the Epperson account in the amount of two million bushels, received at 10:28 a.m. January 11, 1966, and (3) an identical order for the Kentland Ranch account in the amount of 1,500,000 bushels, received at 12:02 p.m. on January 11, 1966. Each of these orders was received by the New York office of Goodbody and Company (Comp. Exs. 12, 13, 14; Tr. pp. 68-70, 85-92).

In the usual course of business, orders given to a broker are filled in the sequence in which they are received (Tr. pp. 116-117), but these orders were not so filled. The records of Goodbody and Company show the execution on January 11 of the entire 1,900,000 bushels called for by the first and third orders, which were for the Kentland Ranch account, but the execution of only 950,000 bushels of the second order despite the fact that this order, which was for the Epperson account, was received one and one-half hours before the third order and was, therefore, entitled to prior execution. On January 11, 1966, Goodbody and Company succeeded in executing a total of 2,850,000 bushels of the spread transactions called for by these three orders. Accordingly, 400,000 bushels should have been first allocated to the Kentland Ranch order of January 5, then 2,000,000 bushels to the Epperson order of January 11, with the remaining 450,000 bushels to the Kentland Ranch order of January 11. Instead, the Epperson order received only what remained after both Kentland Ranch orders were completely filled. The balance of the Epperson order (1,050,000 bushels) was not filled until the following day. This departure from normal procedure, for which no explanation is offered, strongly suggests that the broker had received instructions as to the sequence in which the orders should be filled, a circumstance which can only mean that the trading in

these accounts was under unified control. Counsel for respondents argues that there was a "breakdown" in communications among the brokers involved. There is no *evidence* of any such breakdown.

After these transactions of January 11 and 12, there was no further activity in soybeans in the partnership or Epperson accounts for a period of almost seven weeks. The Kentland Ranch account then began to unwind its spread and after this was fully accomplished on April 15 the Epperson account and the other partnership accounts resumed their trading and liquidated their positions (Comp. Exs. 5, 6, 7). The positions in the Kentland Ranch and Epperson accounts were

liquidated pursuant to identical orders each of which specified a price difference of 8 5/8 cents per bushel, August over September (Comp. Exs. 16, 17). The order to liquidate the Kentland Ranch spread was entered February 25 and the Epperson order on February 28, 1966. During the next six weeks all the liquidating trades made by Goodbody were given to the Kentland Ranch account and none to the Epperson account. On April 15, contemporary with the complete liquidation of the Kentland Ranch spread, the first liquidating transactions executed pursuant to the order of February 28 were entered in the Epperson account.

The timing of these wheat and soybean transactions as between the partnership and Epperson, the similiarity with respect to the orders given and positions established by each, the sequential liquidation of such positions, the prices specified by each in the soybean trades, and the method of allocation of such trades by the broker, constitute substantial and persuasive evidence of an understanding or agreement that the Epperson trades were to augment and extend the trades in the partnership accounts.

Further evidence that an agreement existed is the manner in which the respondents traded in pork belly futures. On February 4, 1966, the Memphis office of Goodbody & Company sent the following wire to the New York office of that firm (Comp. Ex. 15; Tr. pp. 92-93, 170-171).

The Epperson account wishes to sell 150 contracts of July pork belly futures and 150 contracts of August pork belly futures after the Kentland Ranch account liquidates its position in February pork belly futures. What will be the margin requirements for the Epperson position.

While trading in pork belly futures was not subject to the Commodity Exchange Act at that time and such transactions are not included in the complaint, the above message compels the conclusion that the Epperson and partnership accounts were not separate and independent as respondents claim, but were intended to complement each other pursuant to a mutual plan or arrangement.

The trading in potato futures by the partnership respondent, respondent Epperson, and two other members of the Kent faimly, Rebecca Kent and Robert C. Wood, also indicates a common plan or pattern. Each of these four traders entered the potato futures market for the first time between July 26 and August 1, 1966, purchased only May 1967 futures during this period, and by August 2 each of these accounts had established a maximum long position of 150 carlots in that future. On August 12 each of these four accounts bought 100 carlots of April 1967 potato futures. The J. H. Kent Company account made no more potato futures trades until after October 12. The other three accounts, with minor variations, held their positions in these two futures until October 6. On October 6, 7, 10 and 11 each of these three accounts liquidated the major portion of its May position and part of its April position, and in most of the transactions identical quantities of the same future were sold on the same day for each account (Comp. Exs. 9, 10). Even if, as respondents argue, the uniformity in the liquidation of these potato futures positions is not significant because the liquidation was undertaken during negotiations between respondents and the Commodity Exchange Authority for settlement of the proceeding (Resp. Brief p. 29), the same cannot be said for the uniformity with which the positions were established and held. Such uniformity negatives any claim of independent action and is consistent only with a group or team operation pursuant to an agreement or understanding.

Counsel for respondents argues that there is no direct proof of any agreement or understanding (Resp. Brief, p. 25). As in most cases of this type, the evidence is largely circumstantial, but it is not necessary to show a formal agreement in order to prove combined action. *American Tobacco Company* v. *United States,* 328 U.S. 781, 809 (1946); *Interstate Circuit* v. *United States,* 306 U.S. 208, 221 (1939). It is well established that an agreement may be inferred from a course of conduct. *United States* v. *Paramount Pictures,* 334 U.S. 131, 142

(1948); *United States* v. *Masonite Corporation,* 316 U.S. 265, 275 (1942); *Interstate Circuit* v. *United States, supra.*

Respondent Kent testified on direct examination that there was no agreement between himself and respondent Epperson or any other member of the Kent family with respect to trading in the various accounts (Tr. p. 525). Mr. Craig testified that, at the interview of January 16, 1966, respondent Kent stated that Epperson followed the pattern of trading which he (Kent) set for the partnership. At the hearing, respondent Kent's testimony on this point was contradictory. He first testified on cross-examination that he could recall no such statement (Tr. p. 535), but admitted that he might have said that he knew of no law which would prevent an employee from following the pattern set by his employer (Tr. p. 537), and then upon redirect examination testified that he had no recollection of the latter statement (Tr. p. 559). This is not persuasive testimony. It should be noted that he did not deny having inquired of Craig whether an employee could follow an employer's pattern of trading without combining the trades for reporting purposes (Tr. pp. 18-19). His last word on the matter upon recross-examination was that the Epperson "trades seem to be the same, approximately the same" as his own but that he (Kent) "would not necessarily say that was a pattern" (Tr. pp. 573-574).

Counsel for respondents contends that Craig's testimony concerning the statements made by respondent Kent at the interview was inadmissible and should be stricken from the record. Counsel argues that, under the rule laid down by the United States Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), Craig's failure to warn respondents Kent and Epperson prior to the interview that a proceeding against them might result (Tr. p. 24) constitutes a breach of the privilege against self-incrimination contained in the Fifth Amendment to the Constitution of the United States (Resp. Brief, pp. 21-24). Even if respondents' position were sound, the remaining testimony in the record is sufficient to establish a pattern or plan of trading pursuant to an agreement. But counsel's position is not well taken. The doctrine of the *Miranda* case is applicable only to situations where the person being questioned is "in custody" and under some form of compulsion. *Hoffa v. United States,* 385 U.S. 293, 303-304 (1966). The custodial surroundings create the need for the warning and where such surroundings do not exist there is no such need. *United States v. Squeri,* 23 Ad. Law 2d 814 (2d Cir. 1968). There was no element of custody, restraint or compulsion connected with the interview in question. It took place in the offices of respondent

partnership, there was no government representative other than Craig present, Craig explained the purpose of his visit and respondent Kent gave the information to Craig voluntarily (Tr. pp. 9, 13, 27, 534). Moreover, this is not a criminal proceeding. In *F. J. Buckner Corp. v. National Labor Relations Board,* 401 F.2d 910 (9th Cir. 1968), Buckner objected to the admission in evidence of a statement made by its president to an NLRB investigator during the investigation leading to the filing of complaint. The Court said (pp. 913-914) "An extension of the Miranda doctrine to situations where there is no criminal charge under investigation and a statement is given by a person who is in no way deprived of his freedom would be wholly unwarranted".

The *Miranda* decision is not applicable and Mr. Craig's testimony was properly admitted.

Respondent Epperson's testimony on direct examination was to the effect that he traded independently and on the basis of his own judgment, that he appraised market conditions before doing so, and that he conferred with respondent Kent, sought his advice, and borrowed money from him, but that the decisions with respect to the trading in his accounts were his own and were not dictated by respondent Kent (Tr. pp. 355, 362-367, 370, 419-428, 432-433). However, the lack of any knowledge of or familiarity with futures trading on the basis of

which respondent Epperson could have made such judgments, appraisals and decisions is revealed by his testimony on cross-examination (Tr. pp. 441-447, 450-455, 466-467, 472, 485-486). Respondent Kent was a successful trader and was undoubtedly well aware of the volatile nature of the futures market and the risks involved, even for a knowledgeable trader. That he advanced more than one and one-quarter million dollars without security, to be used for speculative trading in maximum quantities by one with a minimum of experience and knowledge, and left to such a trader the determination as to when, how, to what extent and under what circumstances the trades were to be made, is not a reasonable conclusion from the evidence in this record.

Counsel for respondent contends that the transactions described above do not show any pattern of trading because there were various deviations among the accounts as to the quantities bought or sold and the dates when this was done, and it is argued that the transactions "show only a mere similarity of action on isolated occasions" (Resp. Brief, pp. 29-35). In the potato futures transactions,

the pattern is obvious. All the transactions were on the long side of the market and there were only minor variations with respect to the dates of purchase or sale, the quantities bought or sold, and the periods during which positions were held (Comp. Ex. 9). We cannot agree that these transactions "show only a mere similarity of action on isolated occasions".

The pattern or plan of trading in the wheat and soybean transactions by the partnership and Epperson was somewhat different. The soybean positions were established simultaneously or nearly so, in identical futures and identical quantities, but they were liquidated in sequence. The wheat transactions in each were identical with respect to total positions established, but the purchases were made in sequence, as were the later sales. This sequential feature does not negate a pattern of trading. A pattern or plan of trading does not necessarily mean trading simultaneously, in identical quantities, or precisely the same. In proving a course of conduct by two or more persons it need not be shown that all concerned took part at the same time or in the same manner, or even to the same extent. *American Tobacco Company v. United States,* 147 F.2d 93, 118-119, (6th Cir. 1944), *affirmed* 328 U.S. 781 (1946). The sequence in which the partnership and Epperson established and liquidated the wheat futures positions and the sequence followed in the liquidation of the soybean spreads were as much a part of the plan as the identical nature of the positions of these respondents in each of these commodities, and the objective was the same as in the case of the potato trades -- the establishment and holding of positions in excess of permissible limits.

Counsel for respondents also argues that Werner Lehnberg, an "independent expert" who testified for respondents, "could find no evidence of a pattern of trading or of any other facts which would indicate collusion or combination between respondents Kent and Epperson" (Resp. Brief, p. 35). Mr. Lehnberg, a general partner in Goodbody & Company, testified to this effect after only a brief examination of some of complainant's exhibits which were shown to him, and his opinion was based largely upon the facts that the wheat futures trades by the partnership and Epperson were not made on the same dates, nor in all cases in the same futures, and that the liquidation of the soybean positions were not on the same dates. Lehnberg had previously expressed a contrary opinion. On February 21, 1966, he was interviewed in New York with respect to these transactions by Mr. Coopersmith, a

representative of the Commodity Exchange Authority, and Lehn-berg later read, approved and signed a written report of that interview, and at the hearing he affirmed the truth of the matters set forth therein (Comp. Ex. 32, Tr. pp. 239, 249, 254). The report contains a paragraph as follows (Comp. Ex. 32, p. 3):

In his opinion, if the limit for the various grain futures had not been two million bushels, then the Epperson account may not have been opened at Goodbody.

In other words, it strikes him at this point that the Epperson account may have been set up to receive the contracts that would have placed the individual Kent accounts over the speculative limits.

On February 21, 1966, Lehnberg also told Coopersmith that he "would not accept any trades which would add to the excess speculative contracts in grain from the Kent account and from the Epperson account" (Tr. pp. 239-240).

It is not a reasonable conclusion from the evidence that the money advanced to Epperson by the partnership constituted loans, as respondents maintain. It should be pointed out first that this is not the issue. The question is whether the trading was done pursuant to agreement or under unified control, regardless of whether any loans were made. On cross-examination, respondent Epperson testified that he received six loans in the total amount of $ 780,000 and that some of the loans had been repaid by personal checks, but he could give no estimate as to the amount repaid or the dates of repayment without examining his records (Tr. pp. 455-457, 472-475). After checking his records at home, respondent Epperson returned for further testimony and described three additional loans in the amount of $ 551,000 and gave details as to repayments made in 1966 totalling over $ 990,000 but he was unable to find any of the cancelled checks given in repayment (Tr. pp. 577-578). Thus it appears that respondent Epperson, whose yearly income did not exceed $ 14,000, had overlooked receiving loans of more than one-half million dollars, could not remember that he had repaid almost one million dollars shortly prior to his testimony, and could not find the evidence of such repayment. We agree with the hearing examiner that this is not credible testimony. This witness' testimony as to the source of the funds with which the repayments were made and as to the arrangements for repayment at the time that he received the loans was in a similar vein (Tr. pp. 457, 463, 580). We conclude that the sums in question were not *bona fide* loans but were advances

to Epperson by the partnership in order to finance the trades in Epperson's name in accordance with the agreement described in Finding 11.

Respondents claim too that they are entitled now to a review of the ruling of the hearing examiner denying their motion to dismiss the complaint made at the close of the presentation of the complainant's evidence. It seems to us that respondents, in putting in their case, lost the opportunity for a review of the hearing examiner's ruling. At this stage we should consider the entire record in arriving at a decision and order. At any rate, we think that the complainant made out a *prima facie* case of violation of the act in its case-in-chief.

Respondents contend that there was no willful violation of the act because they relied upon the advice of their brokers that the contemplated trades would not be illegal (Resp. Brief, pp. 43-44). One who intentionally does a prohibited act, irrespective of evil motive or reliance upon erroneous advice, acts willfully. *Goodman v. Benson,* 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Company v. Benson,* 278 F.2d 606, 609 (3rd. Cir. 1960).

Finally, counsel for respondents claims that the proceeding should be dismissed as against The Kent Company because it was not properly named as a party respondent. Counsel points out that The Kent Company is a partnership composed of four individuals, that under the laws of Mississippi a partnership is not a legal entity and may be made a defendant or respondent only by naming all the partners and that since the complaint here does not name partners Marilyn K. Epperson and Robert C. Wood as respondents, the partnership has not been properly joined as a party respondent (Resp. Breif, pp. 18-21). Whether or not the partnership has been properly joined as a respondent must be determined by the Commodity Exchange Act. Under that act a partnership is "person" and the Secretary is authorized to proceed against "any person" and impose sanctions against "such person" if a violation is found (7 U.S.C. 2, 4, 9). The rules of practice under the act provide that service upon a partnership may be made by serving "a member of the partnership" or its "attorney or agent of record" (17 CFR 0.22 (b)). A copy of the complaint was served upon respondent J. H. Kent,

as an individual, and service of a copy upon the partnership was made upon Mr. Kent, the managing partner. The partnership is therefore

a proper respondent in this proceeding. See *Irving Weis & Co. v. Brannan,* 171 F.2d 232, 235 (2d Cir. 1948).

The combined positions held by respondents were greatly in excess of the maximum limits in three different commodities. These were substantial violations and they were also willful. It is concluded that complainant's recommendation should be adopted and that all the respondents should be denied trading privileges on all contract markets for a period of 90 days.

ORDER

Effective 30 days after the date of this order, all contract markets shall refuse all trading privileges to respondents J. H. Kent, The Kent Company, and Edward C. Epperson for a period of 90 days, such refusal to apply to all trading done and positions held by any of said respondents, and also to all trading done and positions held indirectly through persons owned or controlled by them, or any of them, or otherwise.

A copy of this decision and order shall be served upon each respondent and upon each contract market.

LOAD-DATE: June 10, 2008