

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:

**UNITED ENERGY, INC.,
DANA CHRISTOPHER BRAY**

Respondents.

CFTC Docket No. 04-18

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

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that United Energy, Inc. (“United Energy”) has violated Section 4g of the Commodity Exchange Act, as amended, (the “Act”), 7 U.S.C. § 6g (2002) and Commission Regulations (“Regulations”) 1.35(a-1)(2)(i) and 166.3, 17 C.F.R. §§ 1.35(a-1)(2)(i) and 166.3 (2003) and that Dana Christopher Bray (“Bray”) aided and abetted United Energy’s violations pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2002). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether United Energy and Bray (collectively the “Respondents”) have 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, United Energy and Bray have submitted Offers of Settlement (“Offers”) that the Commission has determined to accept. Without admitting or denying the findings of fact herein, United Energy and Bray acknowledge service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act, as Amended, Making Findings and Imposing Remedial Sanctions (“Order”). United Energy and Bray consent to the use of the findings herein in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.

III.

The Commission finds the following:

A. SUMMARY

Between February 21, 1999 and May 19, 2000, (the “relevant time period”) Dana Christopher Bray (“Bray”), while registered as an associated person (“AP”) of United Energy, Inc. (“United Energy”), accepted natural gas futures orders without obtaining specific account identification from a certain customer trading several differently owned accounts. Bray then relayed the orders to United Energy phone clerks working on the New York Mercantile Exchange (“NYMEX”) trading floor without specific account identifying information. The phone clerks prepared floor order tickets and relayed them for execution without specific account identification. United Energy did not have policies and procedures in place that were reasonably designed to detect and deter the

type of conduct engaged by Bray and its phone clerks, including supervisory and compliance systems reasonably designed to detect and respond to indicators of possible recordkeeping violations. As a result, United Energy violated Section 4g of the Act and Regulations 1.35 (a-1)(2)(i) and 166.3 and Bray aided and abetted United Energy's actions pursuant to Section 13(a) of the Act.

B. RESPONDENTS

United Energy, Inc. ("United Energy"), a New York corporation, maintains its principal place of business at 111 Broadway, 18th Floor, New York, New York 10006. United Energy is a NYMEX member firm that operates an order execution business on the NYMEX trading floor and is affiliated with United Fuels International, Inc. ("United Fuels"), an Iowa corporation, located at 1000 Winter St., #3550, Waltham, MA 02154. United Energy has been registered with the Commission as an introducing broker ("IB") since February 28, 1986 and as a commodity trading advisor ("CTA") since April 13, 1999.

Dana Christopher Bray ("Bray") resides in Boxford, MA. Bray was registered with the Commission as an AP of United Energy from April 29, 1992 to May 1, 2000 and was listed as a branch manager of United Energy from June 21, 1994 to May 1, 2000. Bray is not currently registered with the Commission in any capacity.

C. FACTUAL BACKGROUND

From in or about March 1992 to May 2000, Bray worked for both United Fuels and United Energy in the Boston, MA office. After becoming registered as an AP, Bray solicited and accepted customer orders for commodity interest accounts. In June 1994, United Energy promoted Bray to branch manager.

Between February 12, 1999 and May 19, 2000, Bray performed his AP duties in United Energy's Boston office. During this time, Bray's major customer was Richard Hale ("Hale"), a general manager of Howard-Northwestern Gas, Ltd. ("H&N Gas"), a natural gas marketing company and a co-partner of Allegheny Gulf Investments ("AGI"), a natural gas trading company. Hale was an experienced natural gas cash and futures trader, who was trading natural gas futures on the NYMEX for his own account and for the account of his employer, H&N Gas. Hale also traded the futures accounts belonging to AGI and three AGI joint venture accounts; one with Arthur Pamas ("Pamas"), one with Rick Avare ("Avare"), and one with Wayne Laufer ("Laufer"). Hale, on occasion, also placed orders for Bray, August G. Fromuth ("Fromuth"), and Fromuth's company AGF, Inc. None of the accounts Hale traded had identical ownership.

Between February 21, 1999 and May 19, 2000, Bray accepted orders from Hale to trade natural gas futures on the NYMEX for the aforementioned trading accounts without obtaining a specific account identification number for each order. Bray then telephoned a United Energy phone clerk on the NYMEX trading floor and placed these orders for Hale without providing specific account identification.

The floor phone clerks prepared floor orders without specific identification for each account. Instead, the clerks used the short code "HW" which stood for Howard Energy, H&N Gas's general partner.

After United Energy's floor brokers filled the HW orders, and often toward the end of the trading day, Bray called a United Energy phone clerk and gave a specific account identification number for each HW order. The various orders identified as HW

were assigned account numbers with different ownership. The phone clerk then added the account identification numbers to the HW floor order tickets.

Bray, as a registered AP of United Energy, knew or should have known the recordkeeping requirements of the Commission's Regulations. He repeatedly, knowingly and willfully failed to provide United Energy's phone clerks with sufficient account identification information to uniquely identify the account for which each order had been placed. Without this information, United Energy floor clerks could not properly and completely prepare floor order tickets of customer orders, immediately upon receipt, that included specific account identification.

Between February 21, 1999 and May 19, 2000, United Energy did not have an adequate system, policy or procedure designed to detect recordkeeping violations involving an AP accepting natural gas futures orders without obtaining specific account identification from a customer trading several differently owned accounts, and the phone clerks who accepted such orders and relayed them to floor brokers without specific account identification. During this time, United Energy had no routine system of oversight that required supervisory or compliance personnel to recognize, respond to, and report on recordkeeping irregularities. Further, United Energy had no written policy or procedures concerning APs and phone clerks accepting orders from customers without specific account identification.

D. VIOLATIONS OF THE ACT AND COMMISSION REGULATIONS

1. Section 4g of the Act and Regulation 1.35(a-1)(2)(i)

Pursuant to Section 4g of the Act, every registered introducing broker shall keep books and records pertaining to customer transactions and positions in commodities for future delivery on any board of trade in the United States or elsewhere in a form and manner as required by the Commission. 7 U.S.C. § 6g (2002). The Commission, by regulation, requires that each member of a contract market prepare a written record of all customer orders immediately upon receipt of such order on the floor of such contract market, including on the written record the account identification, the order number, and the date and time the order is received on the floor of the contract market. *See* 17 C.F.R. § 1.35(a-1)(2)(i) (2003).

Between February 21, 1999 and May 19, 2000, United Energy violated Section 4g of the Act and Regulation 1.35(a-1)(2)(i) in that United Energy, as a contract member of the NYMEX, failed to properly prepare written floor order tickets of customer orders immediately upon receipt that included separate account identification numbers.

These recordkeeping duties are imposed directly on FCMs, similarly on IBs and contract market members, but not on APs. However, APs play a vital day-to-day role in recordkeeping system and are often delegated responsibility for obtaining the account identification information required by Regulation 1.35(a-1)(2)(i), 17 C.F.R. § 1.35(a-1)(2)(i) (2003). Such delegation does not impose a direct regulatory obligation on the AP, but it does, however, create an opportunity for APs to aid and abet an FCM's, similarly an IB's and contract market member's failure to meet its regulatory

responsibilities. *In re Shahrokh Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,887-49,888 (CFTC May 12, 2000).

Liability as an aider and abettor requires proof that (1) the Act was violated, (2) the named respondent had knowledge of the wrongdoing underlying the violation, and (3) the named respondent intentionally assisted the primary wrongdoer. *Id.* at n.28; *CFTC v. Hanover Trading Corp. et al.*, 34 F.Supp.2d. 203 (S.D.N.Y. 1999). In other words, to be guilty of aiding and abetting under the Act, one must knowingly associate himself or herself with an unlawful venture, participate in it as something that he or she wishes to bring about, and seek by his or her actions to make it succeed. *In re Richardson Securities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,145 (CFTC Jan. 27, 1981).

Bray, as an AP of United Energy, failed to provide United Energy's phone clerks with sufficient account identification information so that they could properly and completely prepare the written records of customer orders, as required of a NYMEX market member by Commission Regulation 1.35(a-1)(2)(i). Bray knew, or should have known, that specific account identification was required to be recorded on floor order tickets immediately upon receipt of the order. As a result of Bray's conduct, United Energy violated Section 4g of the Act, 7 U.S.C. § 6g (2002) and Commission Regulation 1.35(a-1)(2)(i), 17 C.F.R. § 1.35(a-1)(2)(i) (2003). Bray, thus, aided and abetted United Energy's violations within the meaning of Section 13(a), 7 U.S.C. § 13c(a) (2002). By aiding and abetting United Energy's violations, Bray violated Section 4g of the Act, 7 U.S.C. § 6g (2002) and Commission Regulation 1.35(a-1)(2)(i), 17 C.F.R. § 1.35(a-1)(2)(i) (2003).

2. Regulation 166.3

Commission Regulation 166.3, 17 C.F.R. § 166.3 (2003) requires registrants “to diligently supervise the handling by its...employees, agents (or persons occupying similar status or performing similar functions) of all commodity interest accounts carried...by the registrant”, and imposes on registrants an affirmative duty to supervise its officers, employees and agents by establishing an adequate supervisory structure and compliance programs and to carry out diligently such programs. “[The] duty to supervise...include[s] the broader goals of detection and deterrence of possible wrongdoing by [a registrant’s] agents.” *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 33,444 (CFTC Dec. 14, 1989).¹

In promulgating this Regulation, the Commission decided not to adopt specific supervisory requirements and instead has dealt with adequacy of supervision on a case-by-case basis. 43 Fed. Reg. 31888 (CFTC July 24, 1978). “In appropriate circumstances, a showing that the registrant lacks an adequate supervisory system can be sufficient to establish a breach of duty under Rule 166.3.” *In the Matter of Thomas W. Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 (CFTC Dec. 10 1997) (“*Collins*”) (citing *In the Matter of First Nat’l Trading Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 (CFTC July 20, 1994)).²

¹ The Commission has made it clear that “[t]he basic purpose of [Regulation 166.3] is to protect customers by ensuring that their dealings with the employees of Commission registrants will be reviewed by other officials in the firm.” *Adoption of Customer Protection Rules*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,642 at 22,624 (CFTC July 24, 1978).

² “Failure to supervise is an independent and primary violation of the Commission’s rules.” *In re Paragon Futures Association*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 (CFTC April 1, 1992). There is no requirement to charge an underlying violation of the Act. *In re First National Trading Corporation*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 at 41,786 (CFTC July 20, 1994) (“In appropriate circumstances, proof of an independent
Footnote Continued

United Energy failed to meet this standard test. It had an inadequate system in place to detect Bray's failure to provide immediate specific account identification for the orders he placed, and the phone clerks' failure to place specific account identification on floor orders before relaying them for execution. United Energy had no written policies or procedures addressing the preparation of floor orders. United Energy also had no system that enabled supervisory or compliance personnel to identify and correct possible recordkeeping violations resulting from one individual trading several differently owned accounts.

IV.

OFFER OF SETTLEMENT

United Energy and Bray have each submitted an Offer of Settlement in which they neither admit nor deny the findings in the Order. Subject to the foregoing, United Energy and Bray acknowledge service of this Order and admit the jurisdiction of the Commission with respect to the matters set forth in this Order; waive (1) a hearing and all post-hearing procedures; (2) judicial review by any court; (3) any objection to the staff's participation in the Commission's consideration of the Offer; (4) all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28

substantive violation is not a necessary element to establish a breach of the duty imposed by Rule 166.3.”), *aff'd without op.*, *Pick v. CFTC*, No. 95-3761 (6th Cir. Oct. 26, 1996). However, Regulation 166.3 liability does not attach for every wrongful act by an employee, but requires and attaches to culpable nonfeasance or misconduct in the act of supervision. *See In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,981 at 44,747 n.114 (CFTC Mar. 5, 1997). Accordingly, evidence of underlying violations of the Act “is probative of a firm's failure to supervise, if the violations which occurred are of a type which should be detected by a diligent system of supervision, either because of the nature of the violations or because the violations have occurred repeatedly.” *Paragon*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850. United Energy's recordkeeping violations were both detectable and frequent.

U.S.C. § 2412 (2000), and Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2003), relating to or arising from this action, and (5) 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.

United Energy and Bray stipulate that the record basis on which this Order may be entered shall consist solely of the Order and the findings in the Order consented to in their Offers. United Energy and Bray consent to the Commission's issuance of this Order, which makes findings as set forth below:

1. Orders the Respondents to cease and desist from violating the provisions of the Act and Commission Regulations that they have been found to have violated;
2. Orders United Energy to pay a civil monetary penalty of \$20,000;
3. Orders Bray to pay a civil monetary penalty of \$13,000; and
4. Orders Respondents to comply with the undertakings as set forth below.

V.

FINDINGS OF VIOLATIONS

Solely on the basis of Respondents' consent as evidenced in their Offers, and prior to any adjudication on the merits, the Commission finds that (1) United Energy violated Section 4g of the Act, 7 U.S.C. § 6g (2002) and Commission Regulations 1.35(a-1)(2)(i) and 166.3, 17 C.F.R. §§ 1.35(a-1)(2)(i) and 166.3 (2003), and (2) Bray aided and abetted United Energy's violations pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2002).

VI.

ORDER

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

1. United Energy shall cease and desist from violating Section 4g of the Act, 7 U.S.C. § 6g (2002) and Commission Regulation 1.35(a-1)(2)(i), 17 C.F.R. § 1.35(a-1)(2)(i) (2003).
2. United Energy shall cease and desist from violating Commission Regulation 166.3, 17 C.F.R. § 166.3 (2003);
3. United Energy shall pay a CMP in the amount of twenty thousand dollars (\$20,000) within ten business (10) days of the date of this Order. United Energy shall make such payment by electronic fund transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable in the Commodity Futures Trading Commission, and addressed to Dennese Posey, Division of Enforcement, at 1155 21st Street, N.W., Washington, D.C. 20581 under cover of letter that identifies United Energy and the name and docket number of the proceeding. A copy of the cover letter and form of payment shall be simultaneously transmitted to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2)(2002), if this amount is not paid within fifteen (15) days of the due date, United Energy shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has 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; and

4. Neither United Energy nor any of its employees or agents acting under its 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 (i) the testimonial obligations of United Energy, its employees or agents; or (ii) their right to take legal positions in other proceedings to which the Commission is not a party. United Energy will undertake all steps necessary to assure that all of its employees and agents understand and comply with this agreement.

5. United Energy shall cooperate fully with the Commission and its staff in this proceeding and in any related inquiry, investigation or legal proceeding by, among other things: (1) responding promptly, completely, and truthfully to any inquiries or requests for information; (2) authenticating documents; (3) testifying completely and truthfully; and (4) not asserting privileges under the Fifth Amendment of the United States Constitution.

IT IS FURTHER ORDERED THAT:

6. Bray shall cease and desist from violating Section 4g of the Act, 7 U.S.C. § 6g (2002) and Commission Regulation 1.35(a-1)(2)(i), 17 C.F.R. § 1.35(a-1)(2)(i) (2003);

7. Bray shall pay a CMP in the amount of thirteen thousand dollars (\$13,000) within ten business (10) days of the date of the entry of this Order. Bray shall make such payment by electronic fund transfer to the account of the Commission at the United States Treasury or by certified check or bank cashier's check made payable in the

Commodity Futures Trading Commission, and addressed to Dennese Posey, Division of Enforcement, at 1155 21st Street, N.W., Washington, D.C. 20581 under cover of letter that identifies Bray and the name and docket number of the proceeding. A copy of the cover letter and form of payment shall be simultaneously transmitted to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581.

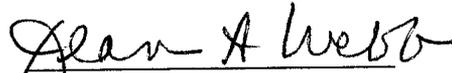
8. For a period of two (2) years after the date of the Order, Bray shall undertake to not apply for registration with the Commission in any capacity nor engage in any activity requiring such registration, or act as an agent or officer of any person registered or required to be registered with the Commission except as provided for in Section 4.14(a)(9) of the Regulations 17 C.F.R. § 4.14(a)(9).

9. Bray shall not 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 Bray's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party.

10. Bray shall cooperate fully with the Commission and its staff in this proceeding and in any related inquiry, investigation or legal proceeding by, among other things: (1) responding promptly, completely, and truthfully to any inquiries or requests for information; (2) authenticating documents; (3) testifying completely and truthfully; and (4) not asserting privileges under the Fifth Amendment of the United States Constitution.

The provisions of this Order shall be effective on this date, unless otherwise specified.

By the Commission.

A handwritten signature in cursive script that reads "Jean A. Webb".

Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Date: July 6, 2004