UNITED STATES OF AMERICA Before the COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Steven C. Brenner and Jami Weisner Brenner,

CFTC Docket No. 00-08

Respondents.

ERRATA

Certain inexplicable citation errors in the Initial Decision issued March 30, 2001 have been called to the attention of the court. Those errors are corrected below.

Citations to Section 8(b) of the Act at lines 10 and 21 of page 6 are corrected to read Section 8b of the Act.

Conclusion of Law Number 1, appearing at page 14, is corrected to read as follows: Steven C. Brenner violated section <u>8b</u> of the Commodity Exchange Act, 7.U.S.C. <u>12b</u>, by trading the Boylan account in violation of this Commission's trading prohibition Order issued in 1990.

Conclusion of Law Number 2 is corrected to read as follows: Steven C. Brenner violated Section 8b of the Commodity Exchange Act, 7 U.S.C. 12b, by trading the Weisner-Peregrine account in violation of this Commission's trading prohibition order issued in 1990.

Conclusion of Law Number 3 is corrected to read as follows: Steven C. Brenner violated Section 8b of the Commodity Exchange Act by trading the LFG account in violation of this Commission's trading prohibition Order issued in 1990.

Conclusion of Law Number 4 is corrected to read as follows: Steven C. Brenner violated Section 8b of the Commodity Exchange Act, 7 U.S.C. 12b by trading the Spike account in violation of this Commission's trading prohibition Order issued in 1990.

Conclusion of Law Number 5 is corrected to read as follows: Jami Weisner Brenner willfully aided and abetted Brenner's violations of Section <u>8b</u> of the Act.

Order number 2 is corrected to read as follows: Brenner is ordered to cease and desist from violating Section <u>8b</u> of the Act by making or causing to be made contracts for future delivery of commodities, on or subject to the rules of contract markets, in contravention of an order of the Commission as charged in the Complaint.

Order number 5 is corrected to read as follows: Weisner shall cease and desist from aiding and abetting Brenner in connection with violations of Section <u>8b</u> of the Act.

Issued April 17, 2001

Corge H. Painter, A



In the Matter of:

STEVEN C. BRENNER and JAMI WEISNER BRENNER,

CFTC Docket No. 00-08

Respondents.

ORDER OF CORRECTION

Page 11 of the Initial Decision issued March 30, 2001 failed to copy. Accordingly a corrected Initial Decision, including page 11, is appended hereto.

Issued April 2, 2001

Administrative Law Judge

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OFFICE OF PROCEEDINGS PROCEEDINGS CLERK

UNITED STATES OF AMERICA Before the COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

CFTC Docket No. 00-08

Steven C. Brenner

and

Jami Weisner Brenner

Respondents.

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

Appearances:

On Behalf of the Division of Enforcement:

Paul Hayeck, Esq.
Karen Kenmotsu, Esq.
Commodity Futures Trading Commission
Division of Enforcement
1155 21st Street, NW
Washington, DC 20581

On Behalf of Respondents:

Marshall C. Hanbury, Esq. Mayer, Brown & Platt 190 South LaSalle Street Chicago, IL 60603

Before: Painter, ALJ

Procedural History

The Commodity Futures Trading Commission ("Commission") issued the Complaint in this matter against the respondents on or about April 18, 2000.

Respondents failed to file a timely Answer, and on May 9, 2000 were ORDERED TO SHOW CAUSE why the allegations in the complaint should not be deemed true, with judgment against the respondents. On May 11, 2000, respondents filed a purported Answer in which they refused to admit or deny any substantive allegations in the complaint, claiming "marital confidential communications privilege" and "Fifth Amendment rights".

On July 14, 2000, the Division of Enforcement ("Division") served Requests for Admission on the respondents. Again, respondents refused to answer any of the substantive allegations in the Requests, based on their "rights guaranteed under the Fifth Amendment to the United States Constitution" and "adverse spousal testimony privilege".

On October 16, 2000, based upon the pleadings, declarations, testimony, documents and responses to the Requests for Admission, the Division moved for Summary Disposition of its charges against Steven C. Brenner ("Brenner") that he traded on United States Exchanges that are designated contract markets while being prohibited from doing so and Jami Weisner Brenner ("Weisner"), for aiding and abetting such trading.

A response from Respondents was initially due by November 1, 2000. On October 30, 2000, the Commission received Respondents' Motion for Time to Respond

to the Division's Motion for Summary Disposition. On October 31, 2000, Respondents' Motion for Time was granted. On December 4, 2000, the Commission received Respondents' Response Brief (and other materials) to the Division's Motion for Summary Disposition and respondents' Motion for Summary Disposition in their favor. On December 19, 2000, the Division's Opposition Brief to Respondent's Motion for Summary Disposition was filed. On January 2, 2001, Respondent's Reply to the Opposition Brief of the Division was timely filed with this Court.

Discussion

Pursuant to Rule 10.91(e) of the Commission's Regulations, 17 C.F.R. § 10.91 (e) (2000) ("Regulations"), a Motion for Summary Disposition shall be granted if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) such party is entitled to a decision as a matter of law.

In support of its Motion for Summary Disposition the Division has placed in the record testimony, declarations and affidavits of witnesses who identified Brenner as the person trading the accounts identified in the complaint. This evidence, and the Respondents' responses to the Division's Requests for Admissions, establish conclusively that there is no genuine issue as to any material fact and no necessity to further develop the record. The Division's Statement of Undisputed Facts in support of its Motion for Summary Disposition is fully supported by evidentiary record.

Respondents have placed nothing in the record to indicate otherwise. Respondents'

refusal to admit or deny the substantive charges set forth in the complaint warrants the inference that the allegations are true.

The Commission's two-count Complaint against Brenner and Weisner charges
Brenner with violating Section 8b of the Commodity Exchange Act (the "Act"), 7 U.S.C.

§ 12b, by making or causing to be made contracts for future delivery of commodities, on or subject to the rules of contract markets, in contravention of an order of the
Commission. Weisner is charged with aiding and abetting Brenner's violations of
Section 8b of the Act. In order to be liable as an aider and abettor under Section 13(a) of the Act, a person "must knowingly associate himself with an unlawful venture, participate in it as something he wishes to bring about and seek by his actions to make it succeed." In the Matter of: Seungho Kim, 970 Bunkerhill # 128 Houston, Texas 77024,

John Ki Park, 727 Bunkerhill # 68 Houston, Texas 77024, and Houston Texas Trading

LLC, 970 Bunkerhill # 128 Houston, Texas 77024, CFTC Docket No: 00-24 June 29,

2000 CFTC No. 00-24, Comm. Fut. L. Rep. ¶ 28,176, 2000 WL 873545 (C.F.T.C.),

quoting In re Commodities International Corp., [Current Transfer Binder] Comm. Fut. L.

Rep. (CCH) ¶ 26,943 at 44,564 (CFTC Jan. 14, 1997).

Respondents have asserted the "adverse spousal testimony privilege" thereby refusing to answer any of the substantive allegations in the Division's Requests for Admission. The marital privilege permits each spouse to preclude the adverse testimony of the other spouse and permits each spouse to decline to testify against the other spouse. See Hawkins v. United States, 358 U.S. 74 (1958). However, it has been recognized that the marital privilege is only applicable in criminal cases. See United States v. 281

Syosset Woodbury Road, 862 F. Supp. 847, 852 (E.D.N.Y. 1994) (asserting the Magistrate Judge's determination that the privilege against adverse spousal testimony is only applicable in criminal actions is not erroneous or contrary to law); Ryan v. Commissioner, 568 F.2d 531, 543 (7th Cir. 1977) (affirming the decision of the Tax Court in which a husband and wife were held in contempt of court who, on the grounds of the marital privilege, refused to answer interrogatories given by the Commissioner of Internal Revenue).

Respondents have refused to answer any substantive allegations in the Division's Requests for Admissions based on their rights guaranteed under the Fifth Amendment of the United States Constitution. The Fifth Amendment specifically states "no person ... shall be compelled in any criminal case to be a witness against himself." See U.S. Const. Amend V. Since this is not a criminal proceeding, Respondents' cannot assert their Fifth Amendment privilege.

Respondent Brenner has failed to offer any evidence to controvert the documentary evidence and testimony demonstrating that he posed as Weisner and was the only person to trade the Spike Trading accounts in her name. Respondent Brenner has also failed to dispute the facts set forth by the Division regarding the LFG Account. Brenner's sole defense is the theoretical possibility that Weisner may have traded the accounts in question. Without offering any evidence to support this assertion, this Court cannot deny the Division's Motion for Summary Disposition on the basis of an unsupported theoretical possibility. See Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363, 393 (S.D.N.Y. 1992) (asserting that Summary Judgment

should not be denied because of the theoretical possibility of an issue of fact).

Consequently, all allegations made by the Division in the Complaint are deemed true.

Upon consideration of the Division's Motion for Summary Disposition,

Memorandum in Support of the Motion, and Exhibits, this Court has determined that the

Division has clearly fulfilled "its burden of establishing that (1) there is no genuine issue
as to any material fact; (2) there is no necessity that further facts be developed on the
record; and (3) it is entitled to a decision as a matter of law." LeClair [1994-1996

Transfer Binder] Comm. Fut. L. Rep. (CCH) at 42,429.

The Division has established by a preponderance of the evidence that Brenner violated Section 8(b) of the Act, 7 U.S.C. § 12b, by making or causing to be made contracts for future delivery of commodities, on or subject to the rules of contract markets, in contravention of an order of the Commission as charged in the Complaint. A cease and desist order is imposed when there is a reasonable likelihood that the wrong will be repeated or continued. In the Matter of Elliott, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27, 243, at 46.007. In light of Brenner's continued efforts to trade futures contracts regardless of being prohibited from doing so, a cease and desist order is warranted. In addition, a civil monetary penalty of \$100,000 is issued for Brenner's egregious violations.

The Division has further established that Weisner is liable as an aider and abettor under Section 13(a) of the Act for aiding and abetting Brenner's violations of Section 8(b) of the Act. Knowing conduct for purposes of establishing aiding and abetting liability can be inferred from the attendant facts and circumstances. In re Lincolnwood

Commodities, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 (CFTC Jan. 31, 1984). Therefore, in light of Weisner's actions in aiding and abetting Brenner, a cease and desist order is warranted for Weisner, as well.

This court finds respondents' Motion for Summary Disposition, filed December 4, 2000, to be singularly without merit and it is denied. Respondents also moved for dismissal on December 4, 2000, charging that counsel for the Division wrongfully withheld exculpatory materials. For reasons amply set forth in the Division's response, the Motion for Dismissal is denied.

FINDING OF FACT

- 1. On August 27, 1990, the Commission prohibited Brenner from trading commodity futures and options on any contract market for a period of ten (10) years and ordered him to pay a civil monetary penalty of \$10,000. (DX. 1)¹
- 2. On July 7, 1992, Judge Norgle of the U.S. District Court for the Northern District of Illinois entered an order of permanent injunction prohibiting Brenner from violating the Commission order. (DX. 2)
- 3. Brenner violated Judge Norgle's injunction and was criminally prosecuted for violating an order of the Court. Brenner entered into a plea agreement which covered the period from July 2, 1993 to December 28, 1994. (DX. 3)

Boylan Account

4. In or about October 11, 1993, an account was opened at First Commercial Financial Group, Inc. in the name of Ronald Boylan ("Boylan Account"). Boylan

¹ DX. means Division of Enforcement Exhibit.

testified that the Boylan account was not his account and that he had known Brenner since about 1982. (DX. 5; DX. 6)

- 5. The handwriting on the Boylan Account opening documents is not the handwriting of Ronald Boylan. (DX. 6 at p. 51)
- 6. The Boylan Account was not an account opened or maintained by Ronald Boylan and Boylan never authorized anyone to use or sign his name. In addition, Boylan identified the telephone number on the Boylan Account opening documents as that of Steven Brenner. (DX. 6 at pp. 86-87)
- 7. Some time after 1995, Brenner admitted to Boylan that Brenner had used Boylan's name to open the Boylan Account and trade. (DX. 6 at pp. 35-37)
- 8. Brenner admitted to Steven Michael ("Michael") that he used Boylan's name. (DX. 8)
- 9. Michael testified that Brenner used Boylan's name in connection with an account opened by Weisner in November 1997 at Finacor Vendome, Inc. ("FVI"), in Chicago, to trade on foreign exchanges. (Id.)
- 10. Weisner signed a power of attorney to "Ron Boylan" and the account traded on foreign exchanges under the direction and control of a person known as "Ron Boylan". (DX. 12)
- 11. The real Boylan never had a power of attorney over any Weisner account, had no knowledge of the Weisner power of attorney to him, did not recognize the "Boylan" signatures on the account documents for FVI, and did not trade any account for Weisner. (DX. 6 at pp. 93-100)

- 12. Brenner was known as "Ron" to an employee of FVI and to employees at the Rosenthal Collins Group foreign exchange desk which shared office space with FVI. (DX. 14 at pp. 12-13, 16-18)
- 13. On at least two occasions during 1998, Brenner, posing as Ron Boylan, traded on Commission-regulated exchanges, including the Standard and Poor's 500 Index ("S&P 500s"). (DX. 8 at pp. 36-37)
- 14. David Ambre was the Peregrine Financial employee who personally dealt with Brenner. (DX. 7) When presented with a copy of a photograph of the real Boylan, Ambre testified that it was not a picture of the person he knew as Boylan. (Id.) Ambre identified a picture of Brenner as the person he knew as Boylan. (DX. 19 at ¶¶ 2-3)
- 15. Brenner used an account at Peregrine under the name of Boylan. On or about May 11, 1995, Peregrine stopped the trading in the Boylan Account due to excessive risk of loss and a debit balance in excess of \$38,000. (DX. 8 at p. 26; DX. 5; DX. 7 at pp. 10-12)
- 16. Brenner (using the name Boylan) negotiated an arrangement with Peregrine to work for free as an order clerk in order to compensate Peregrine for the losses and continued to pose as Boylan while he worked at Peregrine for approximately one year. (DX. 7 at pp. 18-19, 27-28)
- 17. The real Boylan testified that he never lived or worked in the Chicago area and never worked for Peregrine. (DX. 6 at pp. 35-37)
- 18. Brenner asserted his Fifth Amendment privilege in response to the Complaint and Notice of Hearing, Requests for Admissions and a subpoena regarding the

allegations that he traded the Boylan Account in violation of the trading prohibition.

(Answer at ¶¶ 8-10; Brenner Admissions Response No. 3-7; DX. 24; DX. 25)

- 19. Weisner asserted her Fifth Amendment privilege with respect to the issues pertaining to the opening and trading of the Boylan Account. (Answer at ¶¶11-12)
- 20. The Boylan Account traded futures on or subject to the rules of a contract market including S&P 500s, in February and March, 1995. (DX. 5)

Weisner-Peregrine Account

- 21. On May 19, 1995, trading began in an account in the name of Jami Weisner at Peregrine ("Weisner-Peregrine Account"). (DX. 4)
- 22. The Weisner-Peregrine Account traded mainly at night. As the night order clerk for Peregrine, Brenner had the ability to trade the Weisner Account. (DX. 7 at pp. 31-34)
- 23. Weisner lacked the knowledge and sophistication to trade the Weisner-Peregrine Account. In addition, Weisner knew of Brenner's trading prohibition at the time she opened the Weisner-Peregrine Account. (DX. 8 at pp. 38-39; DX. 6 at p. 39; Weisner Admissions Response at No. 9)
- 24. The Weisner-Peregrine Account traded a variety of futures contracts on or subject to the rule of a contract market, including S&P 500s from May 1995 to October 1996. (DX. 4)
- 25. The Weisner-Peregrine Account profited in excess of \$38,000 in 1995 and profited in excess of \$22,000 in 1996. (Id.)

- 26. Brenner asserted his Fifth Amendment privilege in response to the Complaint and Notice of Hearing, Requests for Admissions and a subpoena regarding the allegations that he traded the Weisner-Peregrine Account in violation of the trading prohibition. (Answer at ¶¶ 11-12; Brenner Admissions Responses, Nos. 8-19; DX. 24; DX. 25) However, the Fifth Amendment privilege does not apply to civil proceedings.
- 27. Weisner asserted her Fifth Amendment privilege with respect to the issues pertaining to the opening and trading of the Weisner-Peregrine Account. (Answer at ¶¶ 11-12; Weisner Admissions Responses, Nos 8-19; DX. 15 at pp. 50-56) However, the Fifth Amendment privilege does not apply to civil proceedings.

LFG

- 28. Prior to May 25, 1995, an employee of LFG, LLC, Luigi R. Auriemma ("Auriemma") called "Ron Boylan", whom he had previous experience with at First Commercial from 1992 to 1994, to solicit his business for LFG. (DX. 17)
- 29. When contacted by Auriemma, "Boylan" admitted that his real name was Steven Brenner. (DX. 17 at ¶ 2)
- 30. Auriemma identified a copy of a photograph of Brenner as the person he knew as Boylan and, later, as Brenner. (DX. 17 at ¶ 3)
- 31. On or about May 25, 1995, an account in the name of Weisner was opened at LFG, LLC ("LFG Account"). (DX. 17 at ¶ 3; DX. 16)
- 32. Someone other than Weisner signed the account opening documents for the LFG Account and the account in the name of Weisner was traded by Brenner, who

identified himself to an LFG employee as Weisner. (DX. 23 at ¶ 5; DX. 17 at ¶ 4; Scalziti Declaration at ¶ 4)

- 33. Following the opening of the LFG Account, Brenner and Weisner had a meeting with Auriemma in order to discuss the account. (DX. 17 at ¶ 3)
- 34. During the nearly two years the account was open, Auriemma discussed the account with Brenner in person, made numerous calls to Brenner/Weisner household to discuss the account, including discussions of one disputed trade, and discussed the account with both Brenner and Weisner. (DX. 17 at ¶ 4)
- 35. Brenner and Weisner have unsuccessfully asserted their Fifth Amendment privilege with respect to the issues pertaining to the opening and trading of the LFG Account. (Answer at ¶¶ 13-14; Brenner Admissions Responses, Numbers 20-23; Weisner Admissions Responses, Numbers 20-23; DX. 15 at pp. 56-63; DX. 24; and DX. 25)
- 36. Weisner was aware that there was an account in her name traded by Brenner. (DX. 17 at ¶ 4; DX. 23 at ¶ 5)
- 37. The LFG Account traded in a variety of futures contracts on or subject to the rules of contract markets, including S&P 500s, from May 1995 to March 1997. (DX. 16)

Weisner-Spike Accounts

38. In April 1997, Weisner opened two accounts at Spike Trading in the name of Weisner ("Weisner-Spike Accounts") which traded a variety of futures contracts on or

subject to the rules of contract markets, including S&P 500s and E-Mini S&Ps. (DX. 23; DX. 8; DX. 10; DX. 11)

- 39. Weisner's signature appears on the account opening documents for the Weisner-Spike Account. (DX. 23 at ¶ 4)
- 40. Joseph Brusca, an employee of Spike Trading, identified Brenner as the person he knew as Weisner, and while posing as Weisner, Brenner called in the trades for the accounts and appeared at the offices of Spike Trading. (Brusca Declaration at ¶¶ 2-3; DX. 10 at pp. 10-11, 14-16; Good Testimony at p. 14)
- 41. Brenner, posing as Weisner, was the only person who traded the account or otherwise dealt with matters pertaining to the account. (DX. 10 at pp. 15-16; Good Testimony at p. 9-13, 18-19; Brusca Declaration, at ¶ 2)
- 42. Weisner signed documents in order to allow Brenner to trade the Weisner-Spike Account. (DX. 23; Weisner Admissions Responses, Nos 8-19)
- 43. Brenner and Weisner have asserted their Fifth Amendment privilege with respect to the issues pertaining to the opening and trading of the Spike Accounts.

 (Answer at ¶¶ 15-16; Brenner Admissions Responses, Nos 24-29; Weisner Admissions Responses, Nos 24-29; DX. 15 at pp. 66-70; DX. 24; DX. 25)

Man Account

44. In December 1997, just after trading wound down in the Spike Trading accounts, a man identifying himself as Jami Weisner opened a trading account at ED & F Man ("Man"). (DX. 22 at ¶¶ 2-3)

- 45. When a new account executive began servicing the account, a woman identifying herself as Jami Weisner began communicating with Man regarding the account. (DX. 21 at ¶ 3)
- 46. Weisner gave oral permission for her husband to call in trades and communicate with the account executive and order clerks regarding the account. (DX. 21 at \P 3)
- 47. Brenner, Weisner's husband, ordered trades in the Man account and communicated with the account executive. (DX. 21 at \P 4)
- 48. The account traded a variety of futures contracts, including S&P 500s, on or subject to the rules of contract markets until October 1999. (DX. 12)
- 49. Brenner and Weisner have asserted their Fifth Amendment privilege with respect to the opening and trading of the Man Account. (Answer at ¶¶ 17-19; Brenner Admissions Responses, Nos 31-34; Weisner Admissions Responses, Nos 31-34; DX. 15 at pp. 70-73; DX. 24; DX. 25)

Conclusions of Law

- Steven C. Brenner violated Section 8(b) of the Commodity Exchange Act,
 U.S.C. § 12(b) and Rule 10.91 (b) of the Commission's Regulations, 17 C.F.R. § 10.91
 (b) (2000) by trading the Boylan account in violation of this Commission's trading prohibition Order issued in 1990.
- Steven C. Brenner violated Section 8(b) of the Commodity Exchange Act,
 U.S.C. § 12(b) and Rule 10.91 (b) of the Commission's Regulations, 17 C.F.R. § 10.91

- (b) (2000) by trading the Weisner-Peregrine Act account in violation of this Commission's trading prohibition Order issued in 1990.
- 3. Steven C. Brenner violated Section 8(b) of the Commodity Exchange Act, 7 U.S.C. § 12(b) and Rule 10.91 (b) of the Commission's Regulations, 17 C.F.R. § 10.91 (b) (2000) by trading the LFG account in violation of this Commission's trading prohibition Order issued in 1990.
- 4. Steven C. Brenner violated Section 8(b) of the Commodity Exchange Act, 7 U.S.C. § 12(b) and Rule 10.91 (b) of the Commission's Regulations, 17 C.F.R. § 10.91 (b) (2000) by trading the Spike account in violation of this Commission's trading prohibition Order issued in 1990.
- 5. Jami Weisner Brenner violated Section 13(a) of the Act, by willfully aiding and abetting Brenner's violations of Section 8(b) of the Act and Rule 10.91 (b) of the Commission's Regulations, 17 C.F.R. § 10.91 (b) (2000) by knowingly participating in and seeking to profit from Brenner trading the Spike account.
- 6. The violations of the Act committed by Steven C. Brenner were flagrant, grave and egregious, and posed a clear threat to the integrity of the market place and to the public interest. Therefore, pursuant to the provisions of Section 6(c) of the Act, a civil monetary penalty of \$100,000 is assessed against Brenner.

ORDER

1. The Division's Motion for Summary Disposition against Brenner with respect to his trading of the Boylan Account, Weisner-Spike Account and LFG Account is GRANTED.

- 2. Brenner is ordered to cease and desist from violating Section 8(b) of the Act by making or causing to be made contracts for future delivery of commodities, on or subject to the rules of contract markets, in contravention of an order of the Commission as charged in the Complaint.
 - 3. Brenner is ordered to pay a civil monetary penalty of \$100,000.
- 4. The Division's Motion for Summary Disposition against Weisner with respect to her aiding and abetting of Brenner's trading of the Spike and LFG Accounts is GRANTED.
- 5. Weisner shall cease and desist from violating Section 13(a) of the Act, by willfully aiding and abetting Brenner's violations of Section 8(b) of the Act.
 - 6. The Respondents' Motion for Summary Disposition is denied.

Issued this 30th day of March, 2001

George H. Painter

Administrative Law Judge