UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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VIVIAN K.A. CHILDS,
Complainant,

v.

EXECUTIVE COMMODITY CORPORATION,
THOMAS COURTLAND KENNEDY,
DON DWIGHT CAMPBELL, and
JEFFREY TRACY FIELDS,
Respondents.

CFTC Docket No. 05-R084

INITIAL DECISION

Appearances

Vivian K.A. Childs, Durham, North Carolina, complainant, *pro se*

Thomas Courtland Kennedy, Coconut Creek, Florida, respondent, *pro se,* and representative for Executive Commodity Corporation, respondent, *pro se*

Don Dwight Campbell, Parkland, Florida, respondent, *pro se*

Jeffrey Tracy Fields, Lake Worth, Florida, respondent, *pro se*

Introduction

Vivian Childs, a widow with three college-age children and with limited experience trading stocks and stock options and no experience trading commodity options, alleges that respondents defrauded her out of a large portion of her modest life savings. According to Childs, Jeffrey Fields and Don Campbell gained her trust by falsely representing themselves as devout, caring Christians and as reliable, successful options traders. Childs asserts that Fields and Campbell fraudulently abused her trust in a variety of ways, such as:

- falsely promising to take care of her and to protect her funds

- falsely warranting that they would place her in safe trades that were suitable for her principal financial goals: building her retirement nest egg and paying for tuition for herself and her kids

- falsely guaranteeing that, within ten days, she could safely empty her IRA account, easily double her investment, and quickly return the principal and profits to her IRA account without incurring a penalty

- pressuring her with false assertions that she was missing out on great profits enjoyed by their other customers

- failing to disclose that they planned to steer her into a series of high-risk, commission-generating, equity-depleting trades.

According to Childs, once Fields and Campbell convinced her to commit the bulk of her savings, they churned her account. That is, they fraudulently maximized their commissions by pressuring and convincing her to approve the purchase of a series of short-lived, multi-contract, out-of-the-money or deep-out-of-the-money, option spreads.

Childs also asserts that Fields and Campbell, working together, perpetuated and compounded their fraud by providing false or deceptive status reports and by deflecting her requests to explain the confusing and inaccurate account statements. When Childs began to complain about the discrepancies between respondents' positive promises and the negative trading results, Fields and Campbell allegedly disregarded her requests to return her funds. Childs subsequently amended her complaint to add as a respondent a co-owner of Executive Commodity Corporation, Thomas Kennedy, whom she alleges aided and abetted the fraud committed by his firm and his employees.[1]

[1] Childs also amended her complaint by increasing the amount of damages claimed from $28,369 (based on her out-of-pocket losses) to $30,000 (based on the $45,800 in commissions, subject to the $30,000 ceiling on damage claims in summary proceedings). *See* pages 5-6, Order dated March 6, 2006 (highlighting relevant issues), and page 1, Order dated August 4, 2006 (granting motion to amend complaint).

In response to Childs' complaint, Executive, Fields and Campbell filed a joint answer in which they generally deny any violations and assert that their written risk disclosure statements supplied adequate disclosure. This answer is a slight variation on a form answer that their law firm has been filing on behalf of other respondents in other cases for several years, and as such does not offer any genuine detailed description of Fields' and Campbell's conversations with Childs, any substantiation for their claims of integrity and trading expertise, or any rationale for the trades to which they steered Childs.[2] Executive, Fields and Campbell subsequently amended their answer by adding the affirmative defense of accord and satisfaction.[3] Kennedy did not file an answer to the amended complaint, and has been found in default.[4]

As explained below, after carefully reviewing the documentary evidence,[5] and Childs' credible, and un-rebutted, testimony,[6] I have concluded that Childs has

[2] The law firm of Homer & Bonner, of Miami, Florida, filed the joint answer on behalf of Executive, Fields and Campbell. Soon after the case had been forwarded to my docket, Homer & Bonner was permitted to withdraw as respondents' counsel, after Childs complained that Kennedy had used undue influence and coercion to trick and rush her into agreeing to withdraw the complaint in exchange for payment of a modest amount. *See* Order dated July 13, 2006 (granting motion to withdraw).

[3] *See* order dated March 6, 2006 (directing respondents to produce affidavit by Kennedy in support of motion), and order dated July 10, 2006 (denying respondents' motion to dismiss, and permitting respondents to amend answer).

[4] The default order, dated September 6, 2006, became a final order of the Commission on October 11, 2006.

[5] The documentary record includes the following significant documents: Childs' complaint and addendum to complaint; Childs' affidavit dated October 13, 2006; Childs' notes of her conversations with respondents; the monthly account statements, confirmation statements and equity runs for the Childs account, and affidavits concerning the performance of Executive customer accounts, produced by International Commodity Clearing, in response to three *sua sponte* subpoenas; the account-opening package for Childs' account; an audio recording of portions of Fields' solicitation in August 2004, and of four conversations with Fields and Campbell in October 2004; and an audio recording of Childs' last conversation with Kennedy in February 2006. In addition, official notice has been taken of exchange data, produced at my request by the CFTC Office of the Chief Economist, which shows that the trades recommended by respondents involved deep-out-of-the-money, or substantially out-of-the-money, options.

[6] At Kennedy's instigation, Campbell and Fields refused to participate in the hearing. The failure by Kennedy, Campbell and Fields to appear at the hearing constitutes a waiver of the rights: to appear at the hearing, to offer direct testimony, to cross-examine Childs, to offer additional evidence, and to supplement their legal arguments. Also, their failure to appear – especially when viewed in light of the reliable and compelling evidence that supports Childs' contentions -- constitutes good grounds to draw adverse inferences that their testimony: one, would have substantiated Childs' allegations about their abusive

established by a preponderance of the evidence numerous violations by Fields, Campbell, Kennedy, and Executive Commodity Corp., and that Childs has established that she is entitled to an award of $30,000, plus prejudgment interest and costs.

Factual Findings

The parties

1. Vivian Childs, a resident of Durham, North Carolina, is a widow with three college-age children, who at the relevant time was studying part-time for a Bachelor's degree in business administration. Her plausible and believable testimony revealed her to be a sincere, and credulous, individual. Childs laces her conversation with references to her deep and abiding religious faith. Thus, it would have been readily apparent to Fields, Campbell and Kennedy that Childs' faith provided the key to fabricating an affinity and gaining her trust.

At the time of her first contact with respondents, Childs had traded stocks and stock options, and had learned from that experience that she did not know enough to invest successfully without additional education and guidance. On her account application, Childs indicated that she was 52 years old, that she had worked for seven years as a data administrator for the Life Community Church, and that she had eight years experience with stocks and stock options, but no previous experience with commodity

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tactics, deceptions, misrepresentations and omissions; two, would have shown that their claims of integrity, expertise and trading success were false and deceptive; and three, would have shown that their recommended trading strategies lacked a reasonable basis and were designed to generate excessive commissions. *See Melton v. Pasqua*, Comm. Fut. L. Rep. (CCH) ¶ 29,152, fn. 12 at 53,998 (CFTC 2002). (Under CFTC rule 312(b)(2) -- the analog to CFTC rule 12.209(b) -- parties who fail to appear at a hearing subject themselves to considerable risk, including the adverse inferences sanction.) Finally, respondents' failure to offer requested affidavits supports similar adverse inferences concerning their expertise and advice. [Order dated March 6, 2006 (compelling production of affidavit by Kennedy), Order dated July 10, 2006 (compelling production of affidavits by Kennedy, Campbell and Fields), and Order dated August 23, 2006 (imposing adverse inference sanctions on respondents for failure to produce affidavits).]

futures or options on futures. Childs had not begun working, or become involved in investing, until after her husband had passed away. Before that time, she and her husband agreed that she should stay at home to raise the children, because her husband had grown up without a mother.

When Childs became a widow, she went to work and took responsibility for the family finances. Childs had profitably traded stocks near the end of the 90's bull market, but then lost those gains during a poorly prepared foray into options on stocks. At the time that Jeffrey Fields cold-called her, Childs had been surfing the web in an effort to learn more about stock trading and to avoid a repeat of her previous mistakes. It is possible that one of these websites forwarded the lead for Childs to Executive Commodity Corporation.

Fields encouraged Childs to exaggerate her financial status on the account application by entering that she had an income between $20,000 and $40,000, and a liquid net worth of $60,000 to $80,000. In actuality, Childs' income was closer to $20,000, and her liquid net worth was closer to $50,000, with most of that in an IRA account that had been set up and funded by her late husband. [Childs' account application; first paragraph of Childs' letter to CFTC, dated July 21, 2005; first four paragraphs of Childs' addendum to complaint, dated November 15, 2005; paragraphs 1 through 7 of Childs' affidavit, dated October 14, 2006; and Childs' testimony at pages 3-5, and 33 to 34, of hearing transcript.]

2. International Commodity Clearing ("ICC"), a futures commission merchant located in Ft. Lauderdale, Florida, carried the Childs' account. ICC became registered on April 29, 2004. ICC's registration has been suspended since August 21, 2006. The three

registered principals of ICC have been registered principals or branch office managers of a long string of tainted firms that have been disciplined by the NFA or the CFTC for fraudulent sales and trading practices. [NFA records.]

ICC's account statements did not report cumulative commission totals, and did not report the net results of options trades – *i.e.*, the difference between credits (premiums collected at the sell of an option) and debits (premiums paid at the purchase of an option, plus commissions and fees). Thus Childs would be forced to rely on Fields and Campbell to report the net results, or to explain how to calculate the net results. Childs credibly testified that Fields and Campbell did neither. Rather, they ignored her requests to explain the account statements, they obscured the reality that huge commission charges were rapidly depleting Childs' investment, and they seldom provided accurate, useful or complete reports on the costs, status, and net results of trades.[7] [Childs' testimony at page 23 of hearing transcript, and ¶¶ 18, 19, 20, 23, 24, and 26 of Childs' statement dated October 13, 2006.]

3. Executive Commodity Corp., an introducing broker located in Pompano Beach, Florida, became registered in February 1999. Executive is no longer in business and its registration has been suspended since November 2006. Thomas Courtland Kennedy and Mark J. Dym, at the relevant time, each owned 50% of Executive, and were registered principals of Executive. Prior to starting up Executive, Kennedy had been associated with eight firms, all of which have been disciplined by the NFA or the CFTC for fraudulent sales and trading practices. Kennedy and Dym currently are not registered.

[7] The ICC statements also were not particularly accurate or reliable. For example, the ICC statements dated September 15, and October 29, did not report the initiation, or the liquidation, of the short leg of a Yen spread.

On information and belief, Kennedy is currently retailing off-exchange foreign currency and precious metals futures contracts.

In 2003 and 2004, Executive routinely advised its customers to trade high-risk, significantly out-of-the-money, or deep-out-of-the-money, options or option spreads. This crude, high-risk, commission-generating stratagem, sometimes employed by boiler-room operations,[8] is readily detectable by someone with knowledge or experience in the options business, but typically not readily detectable by unsophisticated novice traders. Executive charged a total of $4 million in commissions in 2003, and $2.1 million in 2004. In 2003, around 95% of Executive's 400-plus customers had lost money, with an average customer loss of about $14,000, and aggregate net losses totaling $6.2 million. Similarly, in 2004, around 80% of Executive's 200-plus customers lost money. For all accounts in 2004, the average customer loss was about $31,180, and the aggregate net losses totaled $6.77 million.

Although a larger percentage of accounts in 2004 realized profits, the overall picture remained bleak for Executive customers: one, the average customer loss was much greater; and two, the $84,340 in total net profits for the profitable accounts and the $2,010 average net profit per profitable account were dwarfed by the $6,850,590 in total net losses for the losing accounts and the $38,920 average net loss per losing account. In addition, a significant share of the profitable accounts realized net profits under $100, and a little over half realized net profits under $1,000.

Before Fields cold-called Childs in June 2004, Kennedy, Dym and Executive had been named in an National Futures Association disciplinary proceeding in which the

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[8] *See, e.g, CFTC v. Chilmark Commodities Corp.*, Consent Order of Permanent Injunction (U.S. Dist Ct. S.D. Fla., September 15, 1988); and *Martin v. Chilmark Commodities Corp.,* Comm. Fut. L. Rep. (CCH) ¶24,813 (Initial Decision 1990).

NFA alleged that Executive and several of its associated persons had made deceptive sales solicitations, used high-pressure sales tactics, used deceptive sales material, and facilitated fraudulent activity by unregistered individuals, and that Dym and Kennedy had failed to supervise Executive's operations. Executive, Dym and Kennedy denied any violations, but did not dispute NFA's summary of the extensive customer losses in 2003. Executive, Dym and Kennedy subsequently consented to various sanctions, including a requirement that Executive tape record all solicitations for one year. (NFA Decision dated May 1, 2003, *In re Executive Commodity Corporation*, et al. NFA Case No. 02-BCC-018). In connection with the mandatory tape-recording requirement, respondents produced recordings of conversations on three dates: August 12, 2004, when Fields finally convinced Childs to open the account; three conversations on October 21, 2004, when Fields and Campbell deflected Childs' demand that they make good on their promise to return her investment, by convincing her that the only way to recoup her losses was to approve more trades; and October 29, 2004, when Campbell browbeat Childs into approving what would be the last trade.[9] [NFA records, and ICC replies to *sua sponte* subpoenas.]

4. Out of the total of $2,100,000 paid in 2004 by Executive customers, $546,700 was charged to accounts assigned to Campbell, and $279,050 was charged to accounts assigned to Fields. Thus, Campbell and Fields generated over 40% of Executive's commission income in 2004. [ICC replies to *sua sponte* subpoenas.]

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[9] It is possible that respondents had not intended to produce these particular recordings – which substantiated Childs' version of events -- because the joint answer mischaracterized the recording as including the account-opening compliance review, and the buy and sell authorizations for all ten trades. In any event, it is evident that neither respondents, nor their counsel, actually carefully listened to the recordings, which underscores the cursory nature of their pre-filing inquiry.

5. Jeffrey Tracy Fields cold-called Childs, represented that he could help her successfully profit from predicted market movements, convinced her to open the account with an initial deposit of $3,000, and recommended the first trade. Fields also introduced Don Campbell to Childs as the owner of Executive, a highly successful and capable trader, and a fellow devoted and trustworthy Christian. After Campbell took over as the lead account executive, Fields would regularly advise Childs by praising Campbell's expertise and commitment to Childs, by assuring her that trades were working as planned, and by passing on some of Campbell's trade recommendations. Near the end of the short-lived account, Fields would deflect or disregard Childs' requests that Executive return her investment, as he and Campbell had promised.

Fields was a registered associated person with Executive from February 2004 to June 2005. Fields had no previous commodities-related experience before 2004, and is not currently registered. [NFA records.]

In 2004, 20 accounts were assigned to Fields, all of which realized net losses. For Fields' accounts, the net losses totaled $367,130, and the average net loss per account was $17,480. [ICC replies to *sua sponte* subpoenas.]

6. Don Dwight Campbell took over as the lead account executive for the Childs' account after the first trade, convinced Childs to liquidate most of the stock in her IRA account and commit an additional $48,000, and regularly calmed her growing apprehension with pledges that he was guided by his religious faith to protect and increase her savings.

Campbell became a registered associated person with Executive in August 2001, and became a registered principal of Executive in February 2003. However, Campbell never held an ownership interest in Executive, as he and Fields would represent to Childs. Campbell's previous commodities-related experience had been limited to eight months with American Financial Trading Corporation in 2000. Campbell has not been registered since December 12, 2005. [NFA records.]

If Campbell had developed any expertise, it was generating substantial commission income for Executive (over half-a-million dollars in 2004), rather than making profits for Executive's customers. In 2004, twenty-six accounts were assigned to Campbell. For these 26 accounts, the aggregate net loss for these accounts was $429,270, and the average net loss per account was $16,504. Fourteen of Campbells' 26 accounts did realize an overall net profit. However, for these 14 winning accounts: the net profits totaled just $9,960; the average net profit per profitable account was only $711; seven accounts realized net profits under $50; twelve accounts realized net profits under $1,000; and the largest net profit was a modest $3,870. In sharp contrast, for Campbells' 12 losing accounts: the net losses totaled $439,230; the average net loss per losing account was $36,600; eleven accounts lost more than $1,000; seven accounts lost more than $20,000; and the largest net loss was an impressive $192,540. [ICC replies to *sua sponte* subpoenas.]

Overview of Trading Activity

7. Childs would deposit a total of $51,000: $3,000 on August 12; $30,000 on August 20; and $18,000 on August 25, 2004. Childs would receive back a total of $22,631: $5,894 on November 1, and $16,737 on November 29, 2004. Thus, Childs' net, or out-of-pocket, losses would total $28,369.

8. For the first five trades, Fields and Campbell would recommend multi-contract trades for which the total purchase cost exceeded the amount of funds that Childs had agreed to commit. As a result, over the first month, the account carried a significant debit balance: August 12 ($90); August 13 to 16 ($29,492); August 17 to 19 ($46,413); August 24 ($18,963); and August 27 to September 15 ($12,864).

As described below, in connection with the $12,864 debit balance in early September, Campbell would convince Childs to send him a post-dated check for $12,000 – to be forwarded to ICC after she had received an expected financial aid check from her school. However, on or about September 15, Childs would inform Campbell that the refund was not forthcoming. Campbell would then advise Childs to liquidate all of the spread trades in her account, ostensibly to cover the margin deficit, despite the fact that a partial liquidation of just one spread trade – or a partial refund of commissions -- would have eliminated the margin deficit. Campbell would then advise her to initiate three new spread trades, which generated an additional $10,380 in commissions.

9. Respondents would recommend ten option trades, eight of them spread trades. All ten trades would involve either deep-out-of-the-money options or out-of-the-money options. Three factors worked together to assure that these trades would generate exponentially greater commissions than would have the straight purchase of comparable in-the-money options: one, Executive charged commissions based on the number of option contracts, rather than the value of the position; two, for the same outlay, many more cheap out-of-the-money options than more expensive in-the-money options can be purchased;[10] and three, the short leg of a spread generates a credit (for the premium

[10] *Out-of-the-money* is a term used to describe an option that has no intrinsic value. For example, a call option with a $400 strike price, on gold futures trading at $390, is out-of-the-money $10. *In-the-money* is a

collected on the sale of an option) which in turn can be used to fund a greater number of options.

Executive's huge commission charges created an onerous impediment to the potential profitability of the trades that Fields and Campbell foisted on Childs. For example, the first trade that Campbell would recommend – 30 light crude call spreads – had a purchase cost of $29,400,[11] generated <u>$12,000</u> in commissions, and thus had to appreciate <u>67%</u> to overcome the commission cost and break even. For approximately the same purchase cost, Campbell could have recommended the straight purchase of fourteen of the identical out-of-the-money options in the long leg ($1,780 premium, and $250 commission, per contract). Such a trade would have generated a significantly smaller commission total, <u>$3,500</u>, and thus would have had to appreciate at a significantly smaller rate, <u>13.5%</u>, to break even and begin to show a profit. In turn, for approximately the same purchase cost, Campbell could have recommended the straight purchase of eight comparable, but substantially less risky, in-the-money light crude options, ($3,250 premium, and $250 commission, per contract). Such a trade would have generated an even smaller commission total, <u>$1,750</u>, and would have had an even smaller break-even rate, <u>8%</u>, and would have a greater profit potential.

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term used to describe an option that has a positive value of exercised. For example, a call option with a $400 strike price, on gold futures trading at $410, is in-the-money $10. *CFTC Glossary: A Layman's Guide to the Language of the Futures Industry*. The profit potential of an in-the-money option -- as measured by its "delta," *i.e.*, its sensitivity to changes in the value of the underlying instrument or commodity – is greater than that of an out-of-the-money option. That is why an in-the-money option is more valuable than an out-of-the-money option.

[11] The purchase cost for a spread is the sum of the debits for the commissions paid, debits for the premiums paid for options bought for the long leg of the spread, and credits for the premiums collected for options sold for the short leg. For this spread, the long leg was out of the money, and the short leg was deep out of the money.

10. Set out below is a summary of the trading activity in the Childs account:

Trade Description	*In*	*Out*	*Net profit/ (loss)* [12]	*Commission*[13]	*Com.-Prem. Ratio*[14]	*Cummulative Commissions*
3 Nov. heating oil call spreads	8-12	9-15	($ 1,326)	$ 1,200	63%	$ 1,200
30 Nov. light crude call spreads	8-13	9-15	(15,600)	12,000	67%	13,200
18 Nov. light crude call spreads	8-17	9-15	(10,260)	7,200	74%	20,400
4 Dec. gold calls	8-24	9-07	(1,740)	750	76%	21,150
14 Nov. light crude call spreads	8-27	9-15	(4,480)	5,600	88%	26,750
9 Dec. cotton puts	9-15	9-20	2,025	2,250	53%	29,000
10 Dec. Yen call spreads	9-15	10-29	4,125	4,000	62%	33,000
9 Jan. light crude call spreads	9-20	10-21	4,230	3,600	75%	36,600
13 Mar. Euro FX call spreads	10-21	11-26	4,550	5,200	74%	41,800
10 Jan. heating oil call spreads	10-29	12-28[15]	(10,120)	4,000	62%	45,800

The average commission-to-premium ratio for these trades would be little over 70%. Within the first two weeks of trading, $26,750 in commissions would already be charged, which represented a little over half of Childs' total investment. In the end, after just ten weeks, the $45,800 in total commissions would consume almost 90% of the amount invested.

[12] In some instances, the net profit/loss has been approximated due to the inaccurate or incomplete ICC account statements.

[13] Commissions were charged when a trade was initiated. For each spread, ICC simultaneously debited a $250 commission per contract, and credited $50 per contract, for a "discounted" commission of $200 per leg of a spread, or $400 per spread.

[14] The commission-to-net-premium-paid ratio (for spreads), and the commission-to-premium-paid ratio (for straight option purchases), reflect the rate at which an option spread, or option purchase, must appreciate to recover purchase costs and break even. Thus: the higher the ratio on a single trade, the more remote the possibility that a particular trade will be profitable; and the higher the average ratio for all of the trades, the more remote the possibility that the account will be overall profitable.

[15] After November 29, respondents stopped monitoring Childs' account, and permitted the heating oil spreads to expire worthless.

Exclusive of the commissions: six of the ten trades actually realized a gross profit (*i.e.*, a net premium collected), with an average gross profit of about $5,000; and overall the ten trades realized a modest aggregate gross profit. Of course, none of the gross profit would reach Childs' pocket, since the gross profit was extinguished by the burdensome commissions. It was this illusory gross profit to which Thomas Kennedy would brazenly refer when he advised Childs that her fraud claim had no basis because she had "made money."

Fields Hands Childs to Campbell

11. On or about June 30, 2004, Jeff Fields cold-called Childs. Fields told Childs that Executive Commodity Corporation was offering a great opportunity to reap profits from an expected seasonal run-up in the price of crude oil. Childs told Fields: that she was a widow with three older children; that she made a modest income working for her church; that she had limited liquid funds and was struggling to save for her retirement and to help her kids pay for college; that she had limited experience and mixed success trading stocks and stock options; that she was trying to learn more about stock investing; that she could not afford to repeat her poorly planned attempt to trade stock options; and that she knew nothing about commodities and had not been looking to trade commodities.

Fields disregarded Childs' modest means, averseness to risk, lack of investment sophistication, and ignorance of commodity options, and said nothing -- in this conversation or in any subsequent conversation -- that fairly and accurately reflected, or remotely alluded to, the reality: that a significant majority of respondents' customers had failed to realize profits; that respondents planned to pressure her to commit ever increasing sums of money; that respondents would be steering her into high-risk, commission-generating trades with a grim 70% average break-even rate and remote possibility of profit; that they would be recommending trades with an average commission per trade of over $4,500; and that they would be manipulating her into paying $26,750 in commissions within two weeks and $45,800 in total. At the end of the conversation, Childs indicated that she was not ready to trade commodity options, principally because she lacked liquid funds, because she had been focused on stocks, and because she was not familiar with commodity options. However, Childs did acquiesce when Fields said he would like to send her an account-opening package.

12. The account-opening package consisted of 21 pages under ICC letterhead and about 5 pages under Executive letterhead, and included at least 16 separate documents that required the customer's signature. Fields -- and Campbell when he took over as Childs' lead account executive -- never advised Childs to carefully read these documents; never asked her if she understood, or had any questions about, the documents; never pointed out the more important documents; never highlighted, explained, or elaborated how certain disclosures applied to the specific risks associated with the trading strategies implemented by Executive; and never cured or clarified any ambiguities or inaccuracies in the documents. Rather, once Fields convinced Childs to open the account, he rushed her through the documents, telling her where to sign without any explanation.

The significant account-opening documents included: an ICC customer application; an ICC customer contract; a standard CFTC rule 1.55(c) risk disclosure statement; an ICC supplemental risk disclosure statement for novice traders; an Executive supplemental "For our mutual protection" disclosure; and an Executive fee disclosure. These documents featured a variety of cautionary warnings -- some prominently displayed, some buried in text -- that at least could have served as a generalized cautionary admonition to a naïve, novice trader on the verge of trusting her savings to a firm that intended to steer her to high-risk, high-commission trades with remote possibilities of profit:

- The standard risk disclosure statement featured the following warning: "Trading in futures and options is not suitable for many members of the public. You should carefully consider whether trading is appropriate for you in light of your experience, objectives, financial resources, and other relevant circumstances."

- The ICC supplemental risk disclosure statement for novice traders featured a warning that: "[Y]ou acknowledge that the funds you have committed are purely risk capital and the loss of your investment will not jeopardize your style of living nor will it detract from your future investment program."

- The Executive supplemental "For our mutual protection" disclosure, featured a laundry list of risk warnings, including that: "Except possibly for in-the-money options, a rise in the price of the underlying futures contract does not typically correlate on a one-to-one ratio with the rise in the price of an option on that futures contract."

However, Fields, and then Campbell, undermined these disclosures by strongly implying that they were irrelevant to Childs' decision to trust their guidance. Fields and Campbell undermined the pertinent warnings in the standard risk disclosure statement and the ICC supplemental risk disclosure statement by effectively guaranteeing that they would recommend trades that were safe, sure winners, suitable for Childs. Fields and Campbell undermined the pertinent warning in the Executive supplemental disclosure by failing to highlight and elaborate on its significance, since Executive almost exclusively recommended high-risk deep-out-of-the-money options, or out-of-the-money options with comparable risks.

Even if Fields and Campbell had not undermined the written risk disclosure statements, Childs still would not have received sufficient written warning that directly addressed the specific risks -- *i.e.*, the remote possibility of profit -- associated with their recommended deep-out-of-the-money options, because Fields and Campbell never told Childs that the touted options were deep-out-of-the-money, or out-of-the-money.[16] In addition, the recordings of the October 21st and 29th trade authorizations confirm that "Amy" of the Executive compliance department similarly failed to mention that the options were deep-out-of-the-money, or out-of-the-money.

The Executive fee disclosure statement stated that Executive would charge a $250 commission "per round turn," which obscured the fact that the commission was $250 per contract per trade. Fields and Campbell never cured this deficiency by clearly explaining to Childs that, since Executive charged commissions on a per contract basis, the commission charge for each of the multiple-contract trades into which they intended to steer Childs would be exponentially greater than $250. For Childs' account, the commissions would end up averaging $4,580 per trade. Fields and Campbell, and the Executive compliance department never mentioned the total commissions when recommending trades. In addition, soon after the first trade, Fields and Campbell pushed Childs to approve a second and a third trade, before she had received the confirmation statements reporting the $1,200 and $12,000 commissions, charged for the first and

[16] Futures commission merchants and introducing brokers are required to provide new customers a risk disclosure statement. FCMs and IBs may choose between the risk disclosure statements set out in CFTC rule 1.55(c) or CFTC rule 33.7. The rule 33.7 statement includes a specific warning that: "A person contemplating purchasing a deep-out-of-the-money option (that is, an option with a strike price significantly above, in the case of a call, or significantly below, in the case of a put, the current price of the underlying futures price or underlying physical commodity) should be aware that the chance of such an option becoming profitable is ordinarily remote." Of course, even if respondents had provided such a written warning, they would have undermined its effectiveness since they had never advised Childs that she was trading deep-out-of-the-money options, and otherwise had never disclosed that she was approving trades with a remote chance of profit. *See* CFTC rule 1.55(g) ("[CFTC rule 1.55] does not relieve [an FCM or IB] from any other disclosure obligation it may have under applicable law.")

second trades, respectively. [*See* hearing transcript at pages 4-18, and ¶¶ 7-11 of Childs' affidavit.]

13. A few days after the first conversation, Fields called Childs, who indicated that she had not read or signed the documents. Fields urged her to begin filling out the forms, even if she had not yet read them or decided to open an account. Fields instructed her to sign the standard risk disclosure statement, the Executive "Additional Risk Disclosure Statement," the Executive "For Our Mutual Protection" statement, and the Executive "Fee Notification." However, by the time that she got to the ICC customer contract, Childs hesitated and told Fields that she was not ready to open an account, for the same reasons she stated in the first conversation. Childs put the documents aside and forgot about them.[17] [Pages 1-2 of addendum to complaint; ¶¶ 7, 8 and 11 of Childs' affidavit dated October 13, 2006; Childs' testimony at pages 3 to 5, and 16-17, of hearing transcript.]

14. Around August 10, 2004, Fields called Childs to "give her an update" on the market. In actuality, he had called to convince her to open an account by touting his power of prediction. Set out below is a condensed transcription of the recorded portion of this conversation:

Fields:	I just wanted to give you a quick update on the commodity market.
Childs:	Yeah.
Fields:	Crude oil hit a record high of $45.
Childs:	Whoa.
Fields:	Yes. Big time. Have you seen it on the news?

[17] Fields used a form fax cover sheet which stated, in part: "Included here are the documents needed to open your account. I will call later to help you fill them out properly."

Childs: No, I have not listened to the news.

Fields: I guess you haven't been watching CNBC?

Childs: No.

Fields: Record highs. Vivian.

Childs: Whoa.

Fields: Record, record highs. It makes you think a little bit, doesn't it.

Childs: Sure.

Fields: Everything pretty much happened much bigger and much better than I told you it was going to happen.

Childs: Hmm.

Fields: What we need now is go ahead to take that next step together.

Childs: Um-hmm.

Fields: You need to get the paperwork, let me help you cross the "i's," dot the "t's" [joking], that's what we'll do, fill it out properly, so we can get started on a small account now. Viv.

Childs: OK.

Fields: Fair enough?

Childs: Um-umm.

Fields: Go ahead and grab that paperwork. . . .

Childs: You said something [undecipherable]. Wouldn't it be easy to lose $3,000?

Fields: I don't understand exactly what you're saying. I'm sorry. Can you lose $3,000? Yes, every trade that you put in the market you can lose. . . . But you can't lose a penny more that what you started with. OK? . . . . $3,000 would be the most you could ever lose starting. Now. Do you have a piece of paper there? I want you to write something down. Grab a pen and that package and bring it to the phone.

[Underlining added for emphasis.] The recording ends at this point. A review of the audio tape confirms that Fields used tone and pace to cursorily confirm the possibility of losing $3,000, and quickly switched the topic of the conversation. In the process, Fields implied that the $3,000 could <u>not</u> be "easily" lost, and also implied that the most Childs could <u>ever</u> lose would be $3,000. Subsequently, Fields and Campbell would abandon the pretense of a "small" account for Childs and press her to increase her investment many times over, but would never correct the impression that she could lose no more than $3,000.

Childs' hand-written notes show that when she returned to the phone Fields used a hypothetical trade to demonstrate how a penny move in the price of crude oil would be leveraged into an options profit of thousands of dollars in a few days. This -- coupled with Fields' assurances that Fields and Executive knew how to profit from their ability to predict market moves and that Childs could trade with a relatively modest amount, $3000 -- sealed the deal. Fields proceeded to guide Childs from dotted line to dotted line in the account-opening documents. By the time that Childs signed the documents, Fields had made no effort to ascertain her specific trading objectives beyond her expressed desire to avoid large losses and to build her savings for tuition and retirement; Fields made no effort to assure that Childs adequately understood the mechanics, costs and risks of the specific trading strategies pushed by respondents; and Fields made no effort to instruct her how to interpret the ICC account statements. [Childs' testimony at page 3-5 of hearing transcript; ¶¶ 8 to 11 of Childs' affidavit; pp. 3-5 of addendum to complaint; and Childs' notes.]

15. Fields then told Childs he had a "good" trade that she needed to approve: three November heating oil spreads. Setting a pattern that would be duplicated by Fields and Campbell in their subsequent trade recommendations, Fields confidently focused on profit potential with little or no mention of risk and cost. Fields confidently assured her that this was a safe trade that would generate profits in a short time, and convinced her to approve the trade before the funds were in her account. Fields did <u>not</u> explain the basis for the trade, did <u>not</u> mention that the options were out-of-the-money or deep-out-of-the-money, did <u>not</u> mention that the commissions would total $1,200 (almost half of her initial deposit), did <u>not</u> reveal that the total cost of the recommended trade would exceed the amount that she had agreed to deposit; and did <u>not</u> discuss the specific risks associated with the trade, *i.e.*, the remote possibility of profit, due principally to the fact that the spread had to appreciate over 60% to overcome the cost of the commissions and begin to show a profit. [Childs' testimony at page 18 of hearing transcript; ¶¶ 12, 13 and 18 of Childs' affidavit; pages 3-5 of addendum to complaint; and Childs' notes.]

16. On Friday, August 13th -- before Childs had received the August 12th confirmation statement, which reported the $1,200 commission – Fields called Childs to introduce her to Campbell. Fields represented that Campbell was the owner of Executive, that Campbell was an experienced, successful and reliable trader who sincerely wanted "to help you improve your financial situation," and that "you will be in good hands," because Campbell was a "Christian" whom she could trust "to take care of you." [Childs' testimony at pages 5-7 of hearing transcript; ¶¶ 12 and 13 of Childs' affidavit; and pages 3-5 of addendum to complaint.]

Campbell Converts Childs' Funds into Commissions

17. Campbell engaged Childs with a warm, confident, and fraternal manner. Campbell pronounced that he was a devout, committed Christian, who journeyed to Washington, D.C. every year for evangelical rallies, and confided that he had a heart-felt desire to help Childs achieve her financial dreams. Campbell confidently claimed that he had made many of his clients into millionaires, and that his clients were enjoying huge profits as they spoke.

Campbell asked Childs how much she had saved, where she had her savings, and what was her rate of return. Campbell then confidently told Childs that he could get her a far greater return, and that he had a "10-day plan" which would double her money. He urged her to maximize her profits by liquidating the stocks in her IRA account, and borrowing from family, friends and neighbors. Campbell confidently predicted that if she sent $100,000, he would double it in ten days. He advised her to inform the bank that she was rolling over the IRA, to trust the funds to him, and that he would quickly return the principal and profits to her before she incurred a tax penalty. Despite Childs' modest means, averseness to risk, lack of investment sophistication, and readiness to trust him, Campbell never said anything -- in this conversation or in any subsequent conversation -- that fairly and accurately reflected, or remotely alluded to, the fact that none of his customers had realized the sort of profits he was guaranteeing, or the fact that he and Fields would be steering her into high-risk, high-commission trades with daunting break-even rates and remote chances of profit.

When Childs said she did not have $100,000, Campbell asked Childs if she could send at least $30,000 to pay for a trade – thirty December light crude spreads -- that he again confidently predicted would double her money in ten days. However -- as with all of his recommendations -- Campbell did not temper the unrestrained, confident and certain tone of his profit projections, did not explain the basis for the trade, did not reveal that the options were deep-out-of-the-money or out-of-the-money, did not mention that the commissions would total $12,000 (40% of her initial deposit), did not reveal that the total cost of the recommended trade would exceed the amount that she had agreed to deposit, and did not discuss the specific risks associated with the trade, *i.e.*, the remote possibility of profit due to the fact that the spread had to appreciate over 67% to overcome the cost of the commissions and begin to show a profit. [Childs' testimony at pages 8-21 of hearing transcript; ¶¶14 to 16 of Childs' affidavit; and pages 3-7 of addendum to complaint.]

18. The next week, on August 17, Campbell renewed his quest to acquire more funds from Childs, before she had received the second confirmation statement which reported the $12,000 commission on the light crude spreads. Campbell began the conversation, as he always did, by proclaiming his strong religious faith and selfless devotion to helping her. Campbell reported, incorrectly, that the light crude trade was already profitable, and told Childs that he had another "good" trade that he strongly implied would make double profits. Childs indicated that she was feeling very uncomfortable about the fate of the $30,000 that she had already entrusted to Fields and Campbell. Campbell assuaged her concerns, as he always did, by reminding her that he was a sincere, honest man of God, who cared for her and who would only place her in safe trades. Thus, Campbell repeated his message that his purported expertise, prudence and devotion assured that the likelihood of huge profits far outweighed the risk of loss,

and convinced Childs to commit an additional $18,000 for another trade, which generated $7,200 in commissions. [Childs' testimony at pages 18 to 21 of hearing transcript; ¶¶ 16 and 18 of Childs' affidavit; and page 5 of addendum to complaint.]

19. During the last week of August, the account had a debit balance, and had a peak liquidation value of $17,498, which meant that Childs' $51,000 investment was down $33,502. Nonetheless, Fields and Campbell repeatedly assured Childs that she was in good Christian hands, and that Campbell's plan to double her money was working, but taking a little longer than expected.

On or about August 27, Campbell called and told Childs that he had "good news": He had just placed her in a great new trade (which generated another $5,600 in commissions), and she needed to send more money. She was flustered by Campbell's aggressive move, and replied that she was expecting a $12,000 financial aid check, but had not planned to use it for option trading. Campbell told her to trust him, because he expected to make a quick profit on the trade, and suggested that she send a post-dated check, which he would forward to ICC after she had made the profit.

On or about September 15, Childs informed Campbell that she was not going to use the financial aid funds for options trading and asked him to return the post-dated check. At this point, the account had been seriously under-margined for a few weeks, and it is not unreasonable to conclude that ICC had been asking Executive to remedy the situation. The margin deficit could have been satisfied by a partial liquidation of some of the light crude spreads, or a partial refund of commissions. However, once Campbell realized that he could not pry additional funds from Childs, he met the margin deficit by telling Childs, without any explanation, that she should liquidate <u>all</u> of the spread trades in her account (for net losses totaling $31,666), and initiate three new spread trades, which generated an additional $10,380 in commissions. [Childs' testimony at pages 20 to 23 of hearing transcript; ¶¶ 20 to 23 of Childs' affidavit; and page 8 of addendum to complaint.]

20. After September 15, Fields and Campbell advised Childs that her losses were nothing but temporary set-backs, and assured her that they would recoup her losses one trade at a time. On September 20, they closed out the cotton trade for the first profit in her account, which served to justify her continuing trust.

Around October 6, Childs received from the National Futures Association a survey questionnaire about ICC. This revived Childs anxiety about the delay in regaining her IRA funds, and she began demanding that Fields and Campbell return her $51,000, as they had promised. Fields and Campbell deflected these demands and alleviated Childs' anxiety with calm, confident assurances that she was in good Christian hands, and that more profits were around the corner. They also began telling Childs to be happy if she realized a 40% profit, which confused her in light of the previous confident double-profit predictions that they had repeatedly made when urging her to send more funds.

On October 21, Fields called Childs and advised her to liquidate the light crude spreads for a 40% profit, and to initiate thirteen Euro spreads. Fields said that $7,000 would be left over that he would return to her. When Childs said that she needed "all the monies now," Fields replied that "I wouldn't be telling you to do anything that is not in your best interest," and that her only choice was to follow his advice, and accept the $7,000 refund.

Fields then had Campbell call Childs, who repeated her demand that Campbell return "all the monies I sent." Campbell replied – accurately this time -- that if she closed the account, she would only get $22,000. When Childs questioned why Fields and Campbell seemed to be prematurely liquidating the spreads before they had made the anticipated 100% profit, Campbell replied that the only way to get back all of her $51,000 would be to "build the account" one trade at a time. Childs then agreed to authorize the liquidation of the light crude spreads and the acquisition of thirteen Euro spreads, which generated another $5,200 in commissions. However, since the Euro spreads cost more than represented by Fields, the promised $7,000 refund was reduced to $5,200. [Recording produced by respondents; Childs' testimony at pages 24 to 26 of hearing transcript; and ¶27 of Childs' affidavit.]

21. On October 29, Campbell called Childs to advise her to sell the Yen spreads and buy ten heating oil spreads. Childs continued to demand the return of her entire investment, complained that she was "shaken" and "could not sleep at night" because they still had her funds, and questioned why Campbell had been advising her to liquidate trades before they had doubled as he had guaranteed. Campbell replied again that her only legitimate choice was to continue trading under his guidance. By this conversation, Campbell attitude had dramatically changed from warm, confident and caring to abrupt, remorseless and patronizing:

> You're paying me to take care of you in the markets. You don't quite understand them as well as I do. So if I give you instructions to sell or call me back, please do. OK? . . . . So right now, we're looking at heating oil. These are some really good positions here. . . . We've got to continue to build this account. . . . Steady progress. Remember we're down, but we're building this thing. We hit the market, and we're going to hit this also. . . . The more time we waste, the less we're going to get on these actual fills. . . . Let me say this, just because I'm a Christian and a part owner, does that

> mean you are guaranteed a win in the market? . . . You want the money home, Vivian? . . . You're trying to run the show right now, and you have no clue what's going on in the market.

When Childs complained that Fields had promised that she would be in good hands with Campbell, and that Campbell had claimed to have a ten-day plan guaranteed to double her money and had assured her it was safe to empty her IRA account, Campbell curtly replied that she was being "a pain in the neck," and that he had merely opined that "hopefully" he would double her money. A momentarily browbeaten Childs followed Campbell's instructions and authorized what would be her last trade. [Recording produced by respondents; Childs' testimony at pages 23-29 of hearing transcript; ¶¶ 24 to 27 of Childs' affidavit; and page 7 of addendum to complaint.]

Had Campbell liquidated the account on this date, rather than taking one more bite of commissions, Childs would have avoided the $10,120 loss on the heating oil trade (including the $4,000 commission), but would have missed out on $8,830 in profits on the Euro trade, for a net loss of $1,290 after October 29.

22. Childs next hired an attorney, who wrote a letter accusing respondents of churning the account, and demanding that the account be closed and Childs' $51,000 be returned. In response, Thomas Kennedy called Childs. Childs said she did not want to talk to him, and asked that he to speak to her attorney. However, Kennedy disregarded this request and kept calling Childs and asking her to tell him what she planned to do.

On November 26, respondents unilaterally closed out the Euro trade, and refunded the account balance. However, respondents did not liquidate the December heating oil spreads -- which on November 26th had a liquidation value of $2,982 -- and allowed the spreads to expire worthless. [Childs' testimony at pages 24 to 29 of hearing transcript; pages 7 to 10 of addendum to complaint; and Karlet letter to Salaiman Husain (ICC), dated November 23rd.]

Kennedy Takes Care of Childs

23. After Executive, Campbell and Fields had filed their joint answer to Childs' reparations complaint, and soon after the case had been forwarded to my docket, Thomas Kennedy called Childs, and re-introduced himself as the owner of Executive. Kennedy renewed Childs' trust with seemingly earnest entreaties that he was an "honest Motorcycle Christian," who from the "goodness of my heart," wanted "to do what is right," and "help you the best and most fair way I can." Childs described to Kennedy Fields' and Campbell's various abuses, including how they had claimed Campbell was a good Christian, had promised to take care of her and place her in safe trades, had guaranteed quick, huge profits, had convinced her to empty her IRA account, and had promised to quickly return her entire investment.

Childs complained that she had belatedly realized that she had paid $15,000 in commissions, which she considered excessive -- thus revealing that she still did not clearly comprehend that she actually had paid more than three times that amount in commissions. Childs also explained that she had to pay approximately $10,000 in tax penalties for the early withdrawal of the lost IRA funds. In response, Kennedy claimed that -- since Campbell and Fields were good men, and since Childs had signed several risk disclosure statements and had "made money" -- he had no idea what Fields and Campbell possibly could have done wrong in their dealings with Childs. Kennedy concluded the conversation by stating that he would consult a neutral and reputable "legal expert," whom he did not identify, who would devise a fair and reasonable resolution to their dispute.

In a subsequent conversation,[18] Kennedy advised Childs that the purported, and still unidentified, legal expert had determined: that, since Childs had signed several written risk disclosure statements, CFTC would hold her responsible for her losses, reject her claim, and make her reimburse respondents' thousands of dollars in attorneys fees; and if she did win, the most that the CFTC would award her would be between $5,000 and $12,000. Kennedy otherwise did not acknowledge or address any alleged misconduct by his firm or employees.

Kennedy also told Childs that Fields and Campbell were unemployed and broke, that Executive was defunct, and that -- although he prayed to start up a new business (Bright Futures Company) -- he was quickly running out of money. Kennedy told Childs that, given respondents' purportedly dire financial situation, the most that they could afford to pay her was $6,000, which represented half of what he had advised her would be her maximum potential recovery. Kennedy pressured Childs to act quickly -- without seeking independent advice -- by strongly asserting that she would end up with nothing if she did not immediately accept his offer. Childs relented and agreed to sign a settlement agreement in exchange for payment of $6,000. Respondents' law firm express-delivered the agreement to her. However, the law firm deviated from its normal practice in other cases and never notified my office about the discussions between Kennedy and Childs or about the pending agreement. A few days later, Childs notified my office that Kennedy had tricked and rushed her into making an "uninformed decision" to sign the agreement.

[18] Childs produced a recording of this conversation which, while of poor audio quality, did substantiate crucial details of Childs' description of Kennedy's conduct.

[Childs' testimony at pages 29 to 31 of hearing transcript, and Childs' submission dated February 24, 2006.]

Conclusions

Accord and Satisfaction

In order to prevail on the accord and satisfaction affirmative defense, respondents must establish by a preponderance of the evidence that the settlement agreement signed by complainant and respondents was the product of valid mutual assent.[19] The record shows that the parties had contractual capacity, expressed mutual assent, and supported their agreement with consideration. However, by refusing to produce any written or oral testimony by Kennedy, respondents have failed to rebut Childs' plausible and believable assertions that Kennedy used spurious legal advice and undue influence to contaminate the agreement and render it void.

The record supports the conclusion that Kennedy induced Childs to sign the settlement agreement with a variety of false, deceptive and inaccurate statements which he offered, not as an articulation of a novel defense or tough bargaining position, but in the guise of neutral, sound and reliable legal advice for Childs' benefit. Kennedy's characterization that Childs' complaint was not cognizable was particularly specious. A couple of conversations with her, a close listen to Fields' and Campbell's recorded conversations, and a careful review of her account-opening documents and account statements would have readily revealed: one, that Childs was a naïve and unsophisticated

[19] *See Melton v. Pasqua*, Comm. Fut. L. Rep. (CCH) ¶29,152 (CFTC 2002), *affirmed* ¶29,152 (4th Cir. 2003) (When validity of a settlement agreement is called into question, a CFTC judge may and should conduct an evidentiary inquiry); and *Chicoine v. Rosenthal & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 21,075, at 24,344 (CFTC 1980), *affirmed in part and vacated in part*, 678 F.2d 727 (7th Cir. 1982) (A proper examination of the relevant circumstances around the execution of a written agreement or written acknowledgement is not strictly confined to the four corners of the document).

investor, with modest financial resources, conservative investment goals, and limited experience trading stocks and stock options and no experience trading commodity options; two, that Fields and Campbell had convinced her to liquidate her IRA account and commit her savings to dubious trading strategies – principally out-of-the-money option spreads -- that Kennedy had to know were certain to generate huge commissions and huge losses; three, that Fields and Campbell routinely had advised Childs to authorize multi-contract trades that cost more than the funds that she had committed; four, that the commissions had totaled over $45,000, which almost wiped out her investment; and five, that it took the prompting of third parties to put a stop to Campbell's predations. Furthermore, Childs' allegations were similar to the NFA charges which had led to Kennedy's consent to significant penalties; and Kennedy, in his position as co-owner of Executive, no doubt was aware that Fields and Campbell had been major producers of commission income for Executive. In these circumstances, Kennedy had good reason to comprehend clearly that Childs had put forth a plausible and compelling claim and that his firm and employees realistically faced substantial liability.

Kennedy's self-styled neutral legal advice was sufficiently spurious and contrary to well-established law to support the conclusion that it was as counterfeit and self-serving as was his brazen assertion to Childs that she had "made money." The measure of damages for fraudulent solicitation and churning is well established under CFTC precedent, and under this precedent Childs' potential damages far exceed the $12,000 ceiling concocted by Kennedy.[20] The measure of damages for fraudulent solicitation is

[20] Respondents did not raise the affirmative defense that Childs should have mitigated her losses. Given Childs' lack of sophistication and respondents' various abuses, obfuscations and deceptions, nothing in the record suggests that this defense if raised would have succeeded. *See Sansom Refining Co. v. Drexel*

the complainant's total out-of-pocket, losses – in Childs' case, $28,369 -- based on the theory that the complainant should be returned to the *status quo ante, i.e.*, her financial status before the fraud occurred.[21] The measure of damages for churning is the total commissions and fees paid by the complainant -- in Childs' case, $45,800 -- based on the *unjust enrichment* theory; *i.e.*, that the broker must return the money unjustly earned by the churning.[22] Finally, it is well established law that, although written risk warnings are a significant part of the mix of information provided to the customer, the written disclosures by themselves will not cure verbal deceptions or automatically bar recovery on a fraud claim.[23]

The record also supports the conclusion that Kennedy used undue influence to obtain Childs' assent to the agreement. In order to establish a finding of undue influence, the evidence must show: one, Childs' "susceptibility" to the sort of influence employed by Kennedy; two, an "opportunity" for Kennedy to exercise undue influence; three, evidence of Kennedy's "disposition" to exercise undue influence; and four, evidence of the "unnatural nature" of the transaction.[24] Here, susceptibility and opportunity have been shown by the fact that Kennedy was obviously aware that Childs had been easily

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Burnham Lambert, Inc., Comm. Fut. L. Rep. (CCH) ¶ 24,596 at 36,563-64 (CFTC 1990) (Duty to mitigate does not arise until complainant becomes aware of the alleged wrongdoing).

[21] *See, e.g., Dunn v. Murlas Commodities*, Comm. Fut. L. Rep. (CCH) ¶ 23,357 (CFTC 1986); *see also Ho v. Dohmen-Rameriz*, Comm. Fut. L. Rep. (CCH) ¶ 23,391 (CFTC 1986), *affirmed* ¶ 24,101 (9t Cir. 1988) (no apportionment of damages on basis of comparative fault).

[22] *See Hinch v. Commonwealth Commodities*, Comm. Fut. L. Rep. (CCH) ¶ 27,056 (CFTC 1997).

[23] *See Bishop v. First Investors Group of the Palm Beaches, Inc.*, Comm. Fut. L. Rep. (CCH) ¶27,004, at 44,841 (CFTC 1997) (providing written risk disclosure statement is not a general cure for deceptive conduct); and *O'Hey v. Drexel Burnham Lambert, Inc.*, Comm. Fut. L. Rep. (CCH) ¶22,754, at 31,141 (CFTC 1985) ("We [the CFTC] have consistently held that the effect of a *pro forma* risk disclosure, even if written, can be vitiated by accompanying oral misrepresentations"). *See also Hammond v. Smith Barney, Harris Upham & Co.*, Comm. Fut. L. Rep. (CCH) ¶ 24,617, at 36,657 (CFTC 1990) (In determining whether or not a customer was defrauded, analysis must be made of the "overall message conveyed" by the broker).

[24] *See* Corbin on Contracts, Vol. 7, §§ 28.9-28.12 (2002); 13 Williston § 1625 (3rd edition); and Restatement (Second) of the Law of Contracts §177, comment a.

swayed by Campbell's pose as a caring and trustworthy Christian, and aware that Childs faced an increasingly dire financial situation caused by her decision to trust Fields and Campbell. Disposition has been shown by the fact that Kennedy took the initiative, established a position of trust by duplicating the tactics successfully employed by Fields and Campbell to exploit Childs' susceptibility to faith-themed beguilements; and then used that trust to offer spurious, self-serving legal advice. The unnatural nature of the transaction is underscored: one, by the fact that Kennedy insisted that Childs must act immediately, that Childs would get nothing if she delayed, and that Childs did not have time to consult anyone else; two, by the fact that respondents paid meager consideration -- merely an eighth of what they had collected in commissions; and three, by the fact that Childs shortly afterwards complained that Kennedy had tricked and rushed her into the agreement. In these circumstances, it is reasonable to conclude that the agreement was not the product of mutual assent. Thus, the settlement agreement is void and unenforceable, and respondents' accord and satisfaction defense must fail.

Fraudulent Inducement and Churning

The preponderance of the evidence establishes that Jeffrey Fields and Don Campbell, in violation of Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10,[25] intentionally defrauded Vivian Childs during the solicitation, the account-opening and the trading of her account, by grossly distorting the relative risks and

[25] Section 4c(b) provides that: "No person shall . . . enter into or confirm the execution of any transaction involving any . . . option . . . contrary to any . . . regulation of the Commission." CFTC rule 33.10 provides that: "It shall be unlawful for any person directly or indirectly -- (a) to cheat or defraud or attempt to cheat or defraud any other person; (b) to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; (c) to deceive or attempt to deceive any other person by any means whatsoever -- in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction."

rewards of following their trading advice, by lulling her into investing ever increasing funds and approving additional trades, and by churning her account.

Fraudulent solicitation and lulling

Fields fraudulently induced Childs to open her Executive account and make the first modest deposit by creating the false impression that she could reasonably expect to make a large return on her modest investment with little or no risk. Fields falsely represented that he and Executive knew how to realize dramatic profits from their ability to predict seasonal market moves, and falsely implied that he would let Childs trade with a relatively modest amount until she became more comfortable and knowledgeable. These types of representations were false and deceptive because the majority of Fields' and Executive's customers were not enjoying profits; because respondents were indifferent to Childs' financial status and investment objectives and clearly planned to press her for as much money as possible; and because well-known price movements and supply and demand forces in the underlying cash or futures market have already been incorporated into the premiums of options, and thus confer no advantage to retail customers. Fields' representation that he could profit from his ability to predict the market was deceptive also because the price movement of the underlying cash commodity or futures market typically does not move in tandem with the price of an option, especially an out-of-the-money option.[26]

When Childs asked Fields whether she could "easily" lose the initial $3,000, Fields offered a technically correct answer that she could lose $3,000, "but no more." However, the fair and accurate answer would have been a simple "yes," given the

[26] *See In re Staryk*, Comm. Fut. L. Rep. (CCH) ¶ 27,206 (CFTC 1997); *In re JCC,* Comm. Fut. L. Rep. (CCH) ¶ 28,059 (CFTC 1994), *affirmed* 63 F.3d 1557 (11th Cir. 1995); and *Bishop, id.*

onerous commission burden and remote possibility of profit attached to the trades that respondents would recommend. Fields not only dodged this fundamental question, but de-emphasized the risks by immediately switching to a hypothetical trade that made a huge profit.[27] Nothing that Fields said to Childs, from the solicitation on, accurately or fairly reflected the reality: that a significant majority of respondents' customers had failed to realize profits; that respondents planned to push her to hand over the bulk of her savings; and that respondents would be steering her into dubious trading strategies which were totally inconsistent with her conservative financial objectives, which would deplete her funds with huge commissions, and which had a high break-even rate and remote possibility of profit. It is "rudimentary" that these types of misrepresentations and omissions about profit potential and risks are material.[28]

Fields similarly set the stage for Campbell's fraud by falsely representing that Campbell was the owner of Executive, that she would be in good hands with him because he was a trustworthy Christian man who would take care of her, and that he was a successful and reliable trader who sincerely wanted "to help her" achieve her conservative financial goals. Campbell perpetuated and compounded Fields' initial fraud with a variety of false and deceptive statements, such as that he was a caring Christian, with a special calling to help Childs achieve her financial dreams; that he had made many of his clients into millionaires and that his clients were currently enjoying huge profits; that he would place her in safe trades; and that he had a "10-day plan" that was guaranteed to double her money.

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[27] *See Bishop, id.*, at 44,481.
[28] *In re JCC, id.*, at 41,576 n.23.

Reliance

Childs' decision to open the account, deposit additional funds and continue trading was consistent with her testimony that she relied on respondents' confident message that she would make quick and large profits with minimal accompanying risk and that she relied on their repeated assurances that Campbell was a trustworthy Christian who would protect and return her investment. The conclusion that Childs reasonably relied on respondents' misrepresentations and omissions to her detriment is supported by the fact that she was a naïve and unsophisticated investor, who had limited experience trading stocks and stock options and no experience trading commodity options, and who was susceptible to their faith-based entreaties.[29]

Respondents' written disclosures of general risks by themselves did not cure the false impression of guaranteed large profits created by Fields and Campbell, where the overall effect of respondents' intentionally deceptive statements substantially outweighed and vitiated the written risk warnings.[30] After the first round of large losses, Childs may have had growing doubts regarding the risk to which she had exposed her savings. However, the overall impression conveyed by Fields and Campbell was that she should continue to trust them and that the losses were temporary and certain to be reversed. Thus, Childs never understood that the chances of recovering her losses were minimal, and her decision to continue trading was caused solely by Fields' and Campbell's lulling conduct.[31]

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[29] *See Ricci v. Commonwealth Financial Group, Inc.*, Comm. Fut. L. Rep. (CCH) ¶26,917, at 44,444 (CFTC 1996).

[30] *Ferriola, id.*, at 50,153; *Bishop, id.*, at 44,841; and *Levine v. Refco,* Comm. Fut. L. Rep. (CCH) ¶24,488, at 36,115-6 (CFTC 1989).

[31] *See Bishop, id.*, at 44,842; and *O'Hey, id.*, at 31,142. In a similar vein, respondents failed to produce a recording of Executive's account-opening compliance review which they mentioned in their answer. However, even if they had produced the recording, the brazen, pervasive fraud practiced by the respondents

Churning

To prove churning, Childs must show: one, that respondents "controlled" the level and frequency of trading in the account; two, that respondents chose an overall volume of trading that was "excessive" in light of Childs' trading objectives; and three, that respondents acted with either "intent" to defraud, or in "reckless disregard" of Childs' interests.[32] Since Childs did not execute a written power of attorney, she must show that respondents exercised *de facto* control over the trading in her account. Evidence of the following factors will establish *de facto* control: (1) the customer lacks sophistication; (2) the customer lacks prior commodity option trading experience and devotes a minimum of time to trading the account; (3) the customer reposes a high degree of trust and confidence in respondents; (4) a large percentage of the transactions are based on respondents' recommendations; (5) the customer does not approve transactions in advance; and (6) the respondents do not provide full, truthful and accurate information prior to obtaining customer approval for transactions.[33] Here, the record shows that Childs was relatively unsophisticated and lacked trading experience. Childs credibly testified that she placed a great deal of trust in Fields and Campbell and invariably accepted their recommendations. In this connection, the recording of Childs' last conversation with Campbell confirms that, from start to finish, he expected her to defer to his advice:

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indicates that it is highly unlikely that this review was designed to detect or cure the sort of fraud practiced by Fields and Campbell, and condoned and facilitated by Kennedy. *See JCC, Incorporated v. CFTC*, Comm. Fut. L. Rep. (CCH) ¶ 26,492, at 43,217-43,218 (11th Cir. 1995) (A perfunctory compliance review cannot be used as "advance exoneration" of fraudulent misrepresentations omissions).

[32] *Ferrioloa, id.*, at 50,154; and *Hinch, id.*, at 45,020.

[33] *Ferrioloa, id.*, at 50,154; and *Hinch, id.*, at 45,021.

> You're paying me to take care of you in the markets. You don't quite understand them as well as I do. So if I give you instructions to sell . . . please do. OK? . . . . You're trying to run the show right now, and you have no clue what's going on in the market.

Finally, the record amply demonstrates that Childs' acceptance of respondents' advice was influenced by their gross deceptions and distortions concerning the likelihood of profits.

Commission case law recognizes that customer objectives are one of the touchstones for an analysis of excessiveness.[34] Here, Childs did not communicate a specific trading objective beyond a conservative concern for capital preservative. It would be unreasonable to expect her articulate much more of an objective given that: Childs knew nothing about options on futures; respondents had cold-called her; respondents did not explain the mechanics and specific risks of their recommended trading strategies; and respondents did not attempt to ascertain a more specific or sophisticated objective.

In any event, the absence of a fully articulated specific trading objective does not justify the use of a trading strategy that emphasizes the account executives' interests over those of their customer.[35] Here Fields' and Campbell's trading strategy focused exclusively on the purchase of a large number of out-of-the-money ("OTM") or deep-out-of-the money options and options spreads, despite the fact they could have purchased far fewer comparable in-the-money ("ITM") options, and achieved the same investment profile at a significantly lower cost. These OTM trades exponentially increased respondents' commission income, because Executive charged Childs commissions based on the number of contracts traded, rather than the value of the position, and because more

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[34] *In re Murlas Commodities, Inc.*, Comm. Fut. L. Rep. (CCH) ¶26,485, at 43,156-57 (CFTC 1985).
[35] *Ferriola, id.*, at 50,154.

OTM options could be purchased since the premium for an OTM option is substantially lower than the premium for a comparable ITM option. Fields and Campbell poured gas onto the fire by steering Childs into option spreads, which permitted them to purchase even more options. The Commission has emphasized that "when customers are paying commissions on a per-contract basis, an account executive seeking to serve his customer's interests will purchase the lower-cost ITM position." Thus, the fact that respondents could have purchased comparable lower cost ITM positions raises an inference – un-rebutted here -- that their focus on purchasing large positions in OTM options was not designed to serve Childs's interest.[36] Additional factors that point to excessive trading include: one, Fields' and Campbell's pattern of advising Childs to approve large trades that cost more than she had agreed to pay and that resulted in a large debit balance; two, Campbell placing a trade without Childs' prior approval and asking for a post-dated check; and three, Campbell instructing to Childs to liquidate all open positions, and initiate a new round of trades, in order to satisfy the debit balance when a partial liquidation or partial commission refund would have done the job. In these circumstances, the record establishes that Fields and Campbell, working together, controlled the trading in Childs' account and traded excessively in order to generate commissions.

Scienter

The intentional nature of respondents' fraud is underscored by their exploitation of Childs' naiveté and lack of trading experience, their blatant disregard of her modest means and conservative financial objectives, their reckless indifference to the source of

[36] *Ferriola, id.,* at 50,154-50,155.

her funds, their failure to provide a fair and accurate disclosure of Executive's oppressive commission structure, and the fact that they rushed her into approving additional trades and investing additional funds before she had received the account statements that actually reported the size of the commissions.

Damages

The proper measure of damages for churning coupled with fraudulent profit guarantees, where the commissions exceed the out-of-pocket losses, is the amount of total commissions: $45,800. The award -- $45,800 in damages, plus approximately $3,600 for 18-months prejudgment interest -- shall be reduced by Kennedy's $6,000 rebate in February 2006, and in turn shall be limited by the $30,000 ceiling applicable to the summary decisional procedure selected by Childs. *See* CFTC rules 12.13(b)(1)(viii), 12.26(b), and 12.210(b)(4).

ORDER

Vivian Childs has established that: Jeffrey Tracey Fields and Don Dwight Campbell violated Section 4c(b) of the Commodity Exchange Act and CFTC rules 33.7 and 33.10; that these violations, separately and together, caused $45,800 in damages; and that Executive Commodity Corporation is liable for the violations of Fields and Campbell pursuant to Section 2(a)(1)(B) of the Act. The damage award shall be limited by the $30,000 ceiling applicable to the summary decisional procedure selected by Childs. Accordingly, Jeffrey Tracey Fields, Don Dwight Campbell, and Executive Commodity Corporation are ORDERED to pay to Vivian Childs reparations of $30,000, plus interest on that amount at 5.05%, compounded annually from August 20, 2004, to the date of payment, plus $125 in costs for the filing fee. Liability shall be joint and several.

Dated March 2, 2007.

Philip V. McGuire,
Judgment Officer