U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Office of Proceedings

RECEIVED
C.F.T.C.
2008 APR 23 A 9:21
OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

PAUL M. PAKAN, Complainant, v. DENNIS JAVIER PATINO, and DAVID JUDE JAVOR, Respondents.	* * * * * * * * * *	CFTC Docket 06-R034

INITIAL DECISION

Appearances

Paul M. Pakan, Schenectedy, New York, *pro se*, complainant

Dennis Javier Patino, Tamarac, Florida, *pro se*, respondent

David Jude Javor, Del Ray Beach, Florida, *pro se*, respondent

Introduction

Paul Pakan's complaint arises from the solicitation and handling of his non-discretionary options account with KJW, LLC, a now defunct introducing broker. Pakan named as respondents: KJW, LLC; Ken Wolf, KJW owner and chief trader; Andrew Cole and Michael Alexson, KJW sales managers; and Dennis Patino and David Javor, Pakan's account executives.

Pakan's principal allegations are: that Patino fraudulently induced him to make three deposits totaling $35,468; that Patino and Javor churned his account for $22,204 in commissions and fees; that Patino disregarded an instruction to liquidate two spreads; that Wolf, Cole and Alexson violated their supervisory duty by failing to assign a broker for Pakan when Patino abruptly left the country to attend his grandfather's funeral in Argentina; and that Javor fraudulently lulled Pakan into more trades when he succeeded Patino as Pakan's broker. During Patino's tenure as Pakan's account executive – January 25 to April 25, 2005 -- Pakan paid a total of $14,459 in commissions and fees, and the account liquidation value declined about $14,264. During the time that KJW had assigned no broker to handle the account in Patino's absence – April 26 to May 13, 2005 -- the account liquidation value declined an additional $14,120. During Javor's tenure as account executive – May 16, to November 16, 2005 -- Pakan paid an additional $7,745 in commissions, and the account liquidation value declined an additional $7,084.

In response to Pakan's allegations, respondents filed answers denying any violations or liability.[1] After the hearing, Pakan settled with KJW, Wolf, Alexson, and Cole. Under two separate settlement agreements, Pakan received a total of $9,000: $3,000 from Cole, and $6,000 from KJW, Wolf, and Alexson.[2] Under a simplified apportionment: the commissions and losses during Patino's tenure as account executive were reduced by $3,600; the losses during Patino's absence were reduced by $3,600; and the losses and commissions during Javor's tenure were reduced by $1,800.[3]

---

[1] Cole, Javor and Patino filed individual answers; and KJW, Wolf and Alexson filed a joint answer.
[2] This case was stayed for an extended period, while the settling respondents made a series of installment payments.
[3] This apportionment reflects the fact that the settling respondents were potentially directly or derivatively liable for all of the damages, and that approximately 40% of the damages had been incurred during Patino's tenure, approximately 40% during Patino's absence, and approximately 20% during Javor's tenure.

After reviewing the documentary record and the parties' oral testimony,[4] I have concluded that Pakan has established that Patino and Javor churned his account, and that Pakan is entitled to separate awards: $10,859 from Patino, and $5,945 from Javor.

This conclusion reflects my assessment of the testimony of the principal witnesses: Pakan, Patino and Javor. On one hand, each of these witnesses appeared to sincerely believe that they were offering truthful testimony. On the other hand, their recollection of significant conversations appeared self-serving and selective. Patino and Javor only took terse notes of their conversations with Pakan, who, in turn, took no notes.[5] As a result, each of the witnesses could recall the gist, but not the detailed substance, of particular conversations, and Pakan was noticeably confused about the dates and sequences of certain conversations. Pakan's recollection was further hampered by the fact that he had not mastered options terminology, the fact that he had not adequately understood respondents' explanations about their trading strategies, and the fact that he had not made a serious effort to understand the written account statements. However, Patino corroborated, and the other respondents did not dispute, Pakan's believable testimony that Patino and Javor merely disclosed that KJW charged a $100 commission per option, but did not clearly disclose the total commission cost for the trades that they recommended, which ranged from $1,500 to $7,500 per transaction.[6] Similarly, Patino

[4] The documentary record includes: (1) Pakan's complaint, addendum to the complaint, motion to amend the complaint, and affidavit; (2) Patino's answer and affidavit; (3) Javor's answer, statement (attached to his discovery requests), and affidavit; (3) Cole's answer; (4) the joint answer of KJW, Wolf and Alexson; (5) Mark Adrian's affidavit (produced by KJW); (6) Stephen Montgomery's affidavit, and equity runs and account-opening documents for the Pakan account (produced by the clearing broker, Rosenthal-Collins); (7) account statements for the Pakan account (produced by various parties); (8) the broker's log maintained by Patino and Javor (produced by Javor); (9) order tickets, "customer profile," "broker attestation," and "account transfer sheet" (produced by KJW); (10) Patino's employment claim (produced by KJW); (11) NYMEX price data provided by CFTC Office of the Chief Economist; and (11) NFA records.

[5] *See* Pakan's testimony at pages 64-65 of hearing transcript.

[6] Pakan's recollection of commission-related discussions was more reliable, because commissions are not an arcane concept unique to options. Moreover, Pakan's testimony on this issue was substantiated by the fact that, throughout this proceeding whenever respondents were asked about disclosures or trading strategies, they consistently shied

corroborated and the other respondents did not dispute, Pakan's credible testimony that when Patino and Javor recommended a trade, they routinely did not provide a detailed explanation of the trade, but rather merely said that they were relaying Ken Wolf's advice to buy or sell a particular energy spread.

Factual Findings

The parties

1. Paul Pakan was 56 years old when he opened his account with respondents. At that time, he had retired from his job as a sheriff's department investigator. Pakan essentially had no investment experience. For better or worse, upon his father's death, he had liquidated the stocks and bonds that he had inherited, and purchased bank certificates of deposit. He had no experience with commodity futures or options. [*See* Rosenthal-Collins "Account Information Form" and "Customer Profile;" Pakan's letter to Patino, dated February 24, 2005 (exhibit to Patino answer); Pakan affidavit; and Pakan testimony, at pages 6-9, and 65-67 of hearing transcript.]

2. KJW, LLC was based in Boca Raton, Florida, and was a registered introducing broker from November 2003, to January 2006. KJW introduced its customers accounts to Rosenthal Collins Group.

Kenneth Wolf, the owner of KJW, conducted the account-opening "due diligence compliance review" for the Pakan account, and generated all of the trade recommendations that Patino and Javor passed on to Pakan.[7] As explained below, these trades involved multi-contract, out-of-the-money, option spreads, with commission charges that ranged from $1,629 to $7,550,

---

away from acknowledging the actual size of the commissions, or acknowledging the detrimental effect of the large commissions on profit potential.

[7] KJW did not produce a copy of the recorded compliance review.

and commensurate commission-to-net-premium-paid ratios that ranged from 36% to 42%.[8]

Michael Alexson was the KJW sales manager, and supervisor of Patino and Javor, from early January 2005, to late April 2005. In that capacity, Alexson obtained Pakan's authorization to place the five trades recommended by Patino.[9]

Andrew Cole was the KJW sales manager, and supervisor of Patino and Javor, from late April 2005, until KJW went out of business in January 2006. In that capacity, Cole obtained Pakan's authorization to place the three trades recommended by Javor. [*See* 2nd and 3rd paragraphs on page 1, and 2nd and 3rd paragraphs on page 2, KJW, Wolf, Alexson and Cole joint answer; Adrian affidavit and supplement to affidavit; page 3, Javor statement; ¶ 1, Javor affidavit; ¶ 1, Patino affidavit; Montgomery statement; NFA records; and Cole testimony, at pages 112-115 of hearing transcript.]

3. Dennis Patino had limited commodities experience. He first became registered in 2004, and was a registered associated person with KJW from January 10, to May 16, 2005. He is currently not registered. Patino solicited the Pakan account, and was assigned to Pakan's account from January 25, to May 13, 2005. Pakan recommended a total of five spread trades for the Pakan account. Patino's last conversation with Pakan was on April 25, 2005. Soon afterwards, Patino traveled to Argentina, for a family funeral, and then was terminated by KJW upon his return. During Patino's tenure as Pakan's active account executive – from January 25, to April 25, 2005 -- Pakan paid a total of $14,459 in commissions and fees, and the account liquidation value declined about $14,264. [*See* 3rd paragraph, on page 1, and 12th through 14th paragraphs, on page 4, Patino answer; ¶ 1, Patino affidavit; 1st paragraph on page 2, KJW, Wolf, Alexson

---

[8] The commission-to-net-premium-paid ratio, in essence, is the break-even rate, *i.e.*, the amount that an option position, or option spread position, must appreciate to overcome the cost of commissions and fees in order to break even. The higher the commission-to-premium-paid ratio, the less likely the option or option spread will break even or realize a net profit.

[9] KJW did not produce a copy of the recorded trade authorizations by Alexson and Cole.

and Cole joint answer; Adrian affidavit and supplement to affidavit; ¶ 1, Javor affidavit; page 1, KJW, Wolf, Alexson and Cole joint answer; KJW "Account Transfer" form, dated Friday, May 13, 2005; and NFA records.]

4. David Javor was first registered as an associated person in 1995. Javor was a registered associated person with KJW from January 2004, to January 2006. He is currently not registered. Javor's first day as Pakan's account executive was Monday, May 16, 2005. Javor recommended a total of three spread trades for the Pakan account. During Javor's tenure as account executive, Pakan paid an additional $7,745 in commissions, and the account liquidation value declined an additional $7,084. [*See* page 2, Javor answer; page 3, Javor statememt; ¶ 1, Javor affidavit; 1st paragraph on page 2, KJW, Wolf, Alexson and Cole joint answer; "Account Transfer" document dated May 13, 2005; NFA records; and Javor testimony, at page 141 of hearing transcript.]

The solicitation and account opening

5. In mid-January 2005, Patino cold-called Pakan, and they spoke for about an hour. Pakan was initially reluctant to speak to Patino, because he had placed himself on the do-not-call list. Nonetheless, since Pakan found Patino low-key and likable, he gave him an opportunity to make a presentation. Pakan told Patino that he had no investment experience, that he had his savings in bank CD's, that he knew very little about the petroleum markets, and that he knew nothing about exchange-traded options. Patino told Pakan that Ken Wolf, the owner of KJW, specialized in trading energy options, and strongly inferred that Wolf had been successfully trading energy contracts, and making money for his firm's clients for many years.

Patino discussed the mechanics of options trading, discussed the energy markets, and discussed the risk of loss generally associated with options trading. Pakan explained that Wolf would be providing the trade recommendations, which Patino in turn would pass on to Pakan. According to Pakan, Patino told him that Wolf was routinely making 40% profits for his customers. In contrast, Patino asserted that he merely told Pakan that Wolf's target was to make a 40% profit. Patino also asserted that he told Pakan that options on futures could potentially achieve a higher rate of return than bank CD's, but with a correspondingly higher risk of loss. Pakan and Patino agree that Patino emphasized that with options any losses could not exceed the purchase cost of options, or the purchase cost of option spreads.

Patino also stated that Wolf would control risk by using option spreads. Like many novice traders, Pakan had a difficult time mastering, and recalling, the new terminology used by Pakan, and as a result, he concluded from Patino's explanation of spreads that somehow spreads involved a reduced, "hedged," level of risk, and that the worst case scenario would be that he could break even. Patino told Pakan that KJW charged a $100 dollar commission. When Pakan stated that $100 sounded like a large amount, Patino replied that some firms charge $200. Unfortunately, Patino did not use this obvious opportunity to explain to Pakan that he should expect to pay thousands of dollars in commissions for multi-contract spread trades. At the conclusion of the conversation -- through a combination of confusion by Pakan, and incomplete disclosure about the size of commissions by Patino -- Pakan believed that Wolf was a successful trader who had reliably made money for his firm's customers; that the strategies recommended by Wolf had a reasonable likelihood of achieving a 40% return; that Wolf could limit the risk of loss, and the size of loss, by using spread trades; and that KJW's commissions would run in the hundreds, not the thousands, of dollars, per transaction. [*See* Pakan testimony, at pages 8-17, and Patino testimony, at pages 126-132, of hearing transcript; pages 1 and 2 of Pakan complaint;

¶¶ 2 and 3.d, Pakan affidavit; ¶¶ 1 through 4, Patino answer; ¶ 2 of Patino affidavit; and ¶¶ 11 and 12, KJW, Wolf, Alexson and Cole joint answer.]

6. The Rosenthal Collins Group account-opening package included: the account owner information form, the customer agreement, a standard CFTC rule 155 futures and options risk disclosure statement, and an additional risk disclosure statement for first-time traders. A few days after Patino sent the account-opening documents, he called Pakan, who informed him that he was ready to sign the documents. Patino then walked Pakan through the documents, telling him where to sign. [*See* Pakan testimony, at pages 17-20, and 85-97, and Patino testimony, at pages 85-97, of hearing transcript; and ¶ 2 of Patino answer.]

7. Respondents assert that KJW routinely conducted a recorded, account-opening "due-diligence" compliance review. However, respondents did not produce a recording of the review, and respondents did not produce any reliable testimony by anyone with first-hand knowledge of the compliance review conducted for the Pakan account. [*See* Patino testimony, at pages 129-130 of hearing transcript; and ¶¶ 3 and 4 of Patino answer.]

Trading activity

8. Pakan deposited a total of $35,622.50: $5,300 on January 25, 2005; $5,322.50 on February 22; and $25,000 on March 8. On December 22, RCG returned the $154.50 account balance. Thus, Pakan's out-of-pocket losses totaled $35,468.

9. Pakan's KJW account was charged a total of $22,204 in commissions and fees: $14,459 was charged during Patino's tenure as account executive (January 25 to April 25); and $7,745 was charged during Javor's tenure as account executive (May 16 to December 22).

10. The history of Pakan's KJW account can be divided into three distinct periods. During the first period, from January 25, to April 25, Patino acted as the account executive for

the Pakan account. Patino recommended a total of five light crude and unleaded gasoline spread trades, two of which were closed out for a modest profit before April 25, and three of which were open on Patino's last day as Pakan's account executive, April 25. During this first period, the Pakan account was charged $14,459 in commissions, and the account lost $14,263.50: *i.e.* , the liquidation value declined from $35,622.50 to $21,359. Thus, during this period, the amount of the commissions and the net amount of the trading losses were essentially coextensive.

During the second period, from April 25, to May 15, KJW did not assign an account executive to cover Pakan's account in Patino's absence, and the account lost $14,120: *i.e.*, the liquidation value declined from $21,359, to $7,239.

During the third period, from May 16 to December 22, KJW assigned Javor to be the account executive. Javor recommended an additional three light crude oil spread trades. The account was charged an additional $7,745 in commissions and fees, and the account lost an additional $7,084. Thus, during this period, the amount of the commissions and the net amount of the trading losses also were essentially coextensive. [*See* phone log, account statements, and equity runs.]

11. All of the trades in the Pakan account were initially selected by Ken Wolf, and then relayed to Pakan by Patino or Javor. For each of the trades, Patino and Javor would typically inform Pakan that Mr. Wolf was recommending a trade, and then would briefly describe the trade. Pakan convincingly testified that, for each of the trades, Patino and Javor during the initial recommendation, and Alexson and Cole during the trade authorization, did <u>not</u> tell him the total amount of the commissions.

All of the trades were spreads involving out-of-the-money light crude oil or unleaded gasoline options. With the exception of the unleaded gasoline spread, the premium on each of the out-of-the-money options was at most half of the premium for the at-the-money option. According to Wolf:

> The strategy was to purchase a close-to-the-money option spread that would produce results positive results with a relatively small, and highly likely, underlying market movements. We state vigorously that there would be no expert witness that would describe the trades as high risk outside the inherent risk of trading in these markets by their nature.

[6th paragraph of KJW, Wolf and Alexson joint answer.] However, Wolf did not factor into his leverage or price-sensitivity rationale the fact that KJW charged commissions on a per-contract basis, with the result that the out-of-the-money spread trades recommended by Wolf consistently generated substantial commission charges which significantly hindered profitability and thus made the trades significantly more risky.

Set out below is a summary of the trading in the Pakan account. As previously noted, Patino initiated the first five trades, and Javor initiated the other three trades:

In	*Out*	*Trade*	*Net result*	*Commission*	*Commission-to-Premium Ratio*
1-26	3-3	7 May Light Crude calls	$2,310	$1,620	39%
2-18	3-9	7 June Unleaded calls	$2,136	$1,620	39%
3-8	6-16	35 July Light Crude calls	($26,700)	$7,550	39%
3-8	6-16	8 July Light Crude puts	($3,912)	$2,392	38%
3-10	6-16	9 July Light Crude calls	($6,882)	$1,842	36%
5-19	6-2	7 Sep. Light Crude calls	$2,270	$1,510	37%
6-6	8-8	11 Oct. Light Crude calls	$4,006	$2,374	43%
8-8	11-16	16 Dec. Light Crude calls	($11,612)	$3,452	42%

As can be seen, the trades involved multi-contract, out-of-the-money, option spreads, with commission charges that ranged from $1,629 to $7,550, and commensurate commission-to-net-premium-paid ratios that ranged from 36% to 42%. The use of spreads exponentially increased the number of contracts, and thus the amount of commissions, because credit from the premiums collected on the short leg could be used to buy yet more options. For example, for the first trade, with the same amount of funds, Pakan could have paid just $325 in commissions by purchasing three identical options, with a break-even rate under 10%. [*See* ¶ 26 of joint answer of KJW, Wolf and Alexson; and NYMEX price data.]

12. Pakan and Patino spoke once or twice a week from January 25, to April 25, 2005. During this time, Pakan never told Patino that he found the written account statements to be "gibberish." Rather, Pakan chose to rely solely on Patino's verbal reports. Around February 18, Patino reported that the first spread trade was up about 40%, and convinced Pakan to fund a second trade. In early March, Patino told Pakan that Mr. Wolf advised liquidating the first two trades, for an aggregate profit of about $4,400, which represented a 40% return on an $11,000 investment. This impressed Pakan, who decided to go all in, and commit an additional $25,000. Patino recommended three more spread trades. During this time, Pakan did not realize that he had paid a total of $14,459 in commissions and fees, principally because Patino and Alexson, and the KJW agents conducting the trade authorizations, never clearly disclosed the total commission cost for each trade, but also because Pakan made no serious effort to review the written account statements, or to tell any of the respondents that he did not understand the statements. [See Pakan testimony, at pages 20-52, 67-78, 97-101, and Patino testimony, at pages 128-141, of the hearing transcript; ¶¶ 1-6, and 10, Pakan affidavit; pages 1-3, Pakan complaint; ¶¶ 5, 6, and 8-14, Patino answer.]

13. Soon after April 25, Patino traveled to Argentina for his grandfather's funeral, without notifying his customers. After about a week passed without a call from Patino, Pakan

called KJW, asked for Patino, and was routed to Patino's voice mail. After this was repeated a couple of more times, Pakan vociferously demanded to speak to a responsible agent. KJW documents show that on Friday, May 13, the account was transferred from Patino to Javor. Javor made no entry in the pone log until June 2. However, he presumably spoke to Pakan on May 19, when eight July light crude put spreads were liquidated for a loss, and nine July crude calls were initiated. [*See* "Account Transfer" form dated May 16; May 13 and May 16 equity runs (changing account designation from "DP" to "DJ"); Pakan testimony, at pages 51-54, and 81-85, and Cole testimony, at pages 112-126, of hearing transcript; pages 3-4 of Pakan complaint; page 2 of Cole answer; and ¶¶ 16 and 24 of KJW, Wolf and Alexson joint answer.]

14. During the first conversation, Javor apologized, but told Pakan that KJW would not do anything about the losses that Pakan incurred during Patino's absence. Javor reminded Pakan that the first two trades had been profitable, and stated that if Pakan agreed to keep trading that Javor and Wolf would try to recoup his losses. Pakan decided to continue trading. In a manner similar to Patino, Javor passed on Wolf's recommendations for three more trades. Pakan stopped trading when the account became depleted. [*See* Account transfer sheet dated May 16, 2005 (attachment to KJW, *et al.* joint answer); Pakan testimony at pages 51-64, 78-85, and 101-107, Javor testimony at pages 141-150, and Cole testimony at pages 112-126, and 134, of hearing transcript; ¶ 11, Pakan affidavit; pages 3-5, Pakan complaint; addendum to Pakan complaint; ¶¶ 2-4, Javor affidavit; pages 2-3, Javor answer; ¶¶ 16 and 24, KJW, *et al.* joint answer; and page 2, Cole answer.]

Conclusions

To establish churning, Pakan must show by a preponderance of the evidence: one, that respondents *controlled* the level and frequency of trading in his account; two, that the respondents chose an overall volume of trading that was *excessive* in light of his trading objectives; and three, that respondents acted with either *intent* to defraud, or *reckless disregard* of his interests.[10] Since Pakan did not execute a power of attorney, he must show that respondents exercised *de facto* control over the trading in his 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 did not provide full, truthful and accurate information prior to obtaining customer approval for transactions.[11] Here, the record shows that Pakan lacked any trading experience or knowledge, and that he learned little from the open to the close of the account. Pakan credibly testified that he placed a great deal of trust in Patino and Javor, and in Wolf's expertise, and that he invariably accepted their recommendations. Finally, Pakan's acceptance of respondents' advice was influenced by their deceptive and incomplete disclosure about the costs of trades. Thus, Pakan has established that respondents exercised de facto control over the trading activity in his account.

An analysis of excessiveness hinges on customer objectives. Here, Pakan did not communicate a specific trading objective beyond an expectation that losses could be limited or "hedged," and that Ken Wolf would generate recommendations for trades with a reasonable

---

[10] *Ferriola v. Kearse-McNeill*, Comm. Fut. L. Rep. ¶ 28,172, at 50,1154 (CFTC 2000).
[11] *Id.*

likelihood of profit. It would be unreasonable for Pakan to articulate much more of an objective given that: he had been cold-called by Patino; he knew nothing about commodity options and about the petroleum markets; he had no investment experience and no previous trading experience; he learned little from Patino's and Javor's explanations; and Patino and Javor had not attempted to ascertain a more specific or sophisticated objective.

The absence of a fully articulated trading objective does not justify the use of a trading strategy that emphasizes the account executives' and the firm's interests over the interests of their customer.[12] Here, Patino and Javor recommended trading strategies that inevitably generated thousands of dollars in commissions in a short time, by using out-of-the-money option spreads. Because KJW charged commissions on a per-contract basis, the use of spreads more than doubled the amount of commissions, because commissions were collected on the short legs, and the premiums collected for the short legs funded the purchase of a greater number of spreads. As a result, the spreads had much higher break-even rates, compared to the simple long comparable options, and thus were not consistent with Pakan's basic objective to make trades with a reduced risk and a reasonable likelihood of profits.[13]

Wolf's price sensitivity rationale ignores the fact that, all things being equal, the value of a low-priced out-of-the-money ("OTM") option is almost always less responsive to price changes in the underlying commodity or asset than a higher priced in-the-money ("ITM") option. An option's profit potential is measured by its delta – *i.e.*, the sensitivity of the option's premium to changes in the value of the underlying instrument or commodity. The delta of an OTM option is lower than the delta of an otherwise identical ITM option. That is why an ITM option is more valuable than an OTM option, and why a portfolio containing the smaller number of ITM options

[12] *In re Murlas Commodities, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 26,485, at 43,165-57 (CFTC 1985).
[13] *See Grey v. LMB Trading Group, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 28,332 (Initial Decision 2000); *affirmed* ¶ 28,584 (CFTC 2001).

will have a greater profit potential than an equivalent portfolio with a greater number of OTM options.[14] For these reasons, 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."[15] Here, respondents routinely recommended cheaper out-of-the-money options with premiums that typically were about half that of the comparable in-the-money options. Since a larger number of cheaper options could be purchased and since respondents charged commissions on a per-contract basis, respondents were able to charge Pakan much greater commissions, which resulted in unpromising break-even rates that ranged from 36% to 42%. In these circumstances, although Pakan may have realized profits on a few trades, over time his account was destined to be depleted by steadily accumulating commissions. Thus, the out-of-the-money option spreads which respondents routinely recommended were not consistent with Pakan's basic objective to make trades with a reduced risk and a reasonable likelihood of profits, and Pakan has established that the volume of trading was excessive.

The intentional nature of respondents' churning is underscored by their failure to provide a fair and accurate disclosure of KJW's costly commission structure, and by their recommendations and endorsements of questionable trades. The proper measure of damages for churning is the amount of commissions: $14,459 charged for the trades recommended by Patino, and $7,745 charged for the trades recommended by Javor. The awards shall be reduced to reflect the funds that Pakan has received from the other respondents.

Pakan has not established by a preponderance of the evidence any of the other alleged violations by Patino or Javor.

[14] *Ferriola.*, n. 24, at 50,155.
[15] *Id.*

The fact that Patino and Javor relayed, without modification, Wolf's trade recommendations to Pakan does not relieve them of responsibility for the churning of Pakan's account. Patino and Javor held themselves out, and were compensated, as agents for Wolf's firm. In that capacity, Patino and Javor acted as Pakan's primary advisors, and exercised de facto control over Pakan's account. Thus, it was Patino and Javor, not their supervisors, who were primarily obligated to provide fair and accurate disclosure of the costs of the trades that they advised Pakan to approved, obligated to ascertain Pakan's trading objectives, and obligated to confirm that the recommended trades were consistent with Pakan's trading objectives, before he agreed to authorize each trade. Patino's and Javor's failures to fulfill these obligations assured that Pakan's account would be churned and that they would be unjustly enriched with a cut of the excessive commissions. The intentional nature of their fraudulent fiduciary breaches is underscored by their failures to provide a fair and accurate disclosure of KJW's costly commission structure, and by their recommendations and endorsements of questionable trades.

The proper measure of damages for churning is the amount of commissions: $14,459 charged for the trades recommended by Patino, and $7,745 charged for the trades recommended by Javor. The awards shall be reduced to reflect the funds that Pakan has received from the other respondents.

Pakan has not established by a preponderance of the evidence any of the other alleged violations by Patino or Javor.

ORDER

Paul M. Pakan has established by a preponderance of the evidence: that Dennis Javier Patino and David Jude Javor churned his account in violation of Section 4c(b) of the Commodity

Exchange Act and CFTC rule 33.10; and that Patino's violation proximately caused $14,459 in damages, and that Javor's violation proximately caused $7,645 in damages. The payments received by Pakan from the other respondents have reduced the damages caused by Patino's violation to $10,859, and reduced the damages caused by Javor's violation to $5,945. Accordingly: Dennis Javier Patino is ordered to pay to Paul M. Pakan reparations of $10,859, plus interest on that amount at 1.63% compounded annually from March 10, 2005, to the date of payment, plus $62.50 in costs for one-half of the filing fee; and David Jude Javor is ordered to pay to Paul M. Pakan reparations of $5,945, plus interest on that amount at 1.63% compounded annually from August 8, 2005, to the date of payment, plus $62.50 in costs for one-half of the filing fee. Patino's and Javor's liabilities are separate and discrete.

Dated April 23, 2008.

Philip V. McGuire

Philip V. McGuire,
Judgment Officer