UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

Linda Heagy, Complainant,	*	
v.	*	CFTC Docket No. 02-R008
David Joseph Aguirre, and Kenneth Lee Voss, Respondents.	*	

NOTICE OF CORRECTION

Attached is a corrected version of the Initial Decision, with corrections to minor punctuation and typographical errors on pages 8 and 9. This Notice does not affect that filing deadline for any Notice of Appeal.

Dated February 25, 2003.

Philip V. McGuire,
Judgment Officer

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INITIAL DECISION
(Corrected version)

Linda Heagy, a resident of Tonasket, Washington, seeks to recover lost profits and out-of-pocket losses from Kenneth Lee Voss and David Joseph Aguirre, co-brokers in the Costa Mesa, California branch office of now defunct Concorde Financial Group. In September 1999, Heagy decided to open a non-discretionary account with Concorde, after Bradley Schmid had promised that he would focus on "conservative" and long-term trades, and that he would closely monitor the account and frequently call her. Because Schmid did call Heagy at least twice a week and because the first trade, a heating oil spread, did realize a decent profit, Schmid's representations appeared to be truthful, and Heagy thus decided not to name Schmid as a respondent. In early December 1999, Schmid left Concorde, and Voss and Aguirre became Heagy's account executives. Heagy alleges that as soon as Voss and Aguirre took over her account, Voss churned her account by fraudulently convincing her to liquidate a long-term soybean trade, in order to fund a ten-day coffee trade that Voss guaranteed would generate great profits. Relying on Voss's advice, Heagy agreed to sell the soybean options prematurely, and at a modest profit, in order to fund the purchase of out-of-the-money February coffee call options.

Based on Voss's promise to "get her in and out in ten days," Heagy believed that she had authorized him to sell the options on or about the tenth day, December 20. A few weeks later, the February coffee calls touted by Voss would expire worthless after spiking briefly on the tenth day, December 20. Meanwhile the March soybean options maligned by Voss would hit triple profits in mid-January.

Soon after Heagy had bought the coffee options, Voss took off on an extended vacation without telling her, and Aguirre assumed sole responsibility for Heagy's account. However, Aguirre did not call her to consult about the coffee trade, did not sell the coffee options on the tenth day, and did not return her calls on and around December 20. Heagy alleges that these various failures to act by Voss and Aguirre improperly frustrated her from taking advantage of the fortuitous spike in the value of the coffee options on the tenth day.

Voss and Aguirre filed answers generally denying any violations. Concorde failed to file an answer, and was found in default by order dated July 9, 2002.

After reviewing the documentary record[1] and the parties' oral testimony, it has been concluded that the weight of the evidence establishes: that Voss fraudulently induced Heagy into selling the soybean options and buying the coffee options in order to generate commissions, and that Voss and Aguirre recklessly failed to follow her instructions to sell the February coffee calls on the tenth day, in violation of Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10; and that Voss's violations

[1] The documentary record consists of: (1) Heagy's complaint, complaint addendum and affidavit, and Heagy's letter to Richard Padron, dated January 11, 2000; (2) Voss's answer and affidavits; (3) Aguirre's answer and affidavit; (4) affidavits by Floyd King of Vision Limited, and Peter Rukrigl and Richard Padron of Concorde, filed in response to *sua sponte* subpoenas; and (5) the following documents produced by the carrying broker, Vision Limited in response to *sua sponte* subpoenas: Heagy's account-opening documents, a complete set of monthly account statements and confirmation statements for the Heagy account, and the monthly year-to-date profit-loss summaries for Schmid, Voss and Aguirre during their employment by Concorde. *See* Notice dated July 9, 2002, and Order dated September 4, 2002.

proximately caused $10,883.25 in damages, and that Aguirre's violations proximately caused $4,217.75 in damages.

These conclusions reflect the determination that Heagy's testimony was sincere, consistent, and plausible. In contrast, Voss and Aguirre each produced testimony that was less convincing, less plausible, and contradicted by reliable evidence. For example, Voss's assertion in his answer and his affidavit that he had only provided a status report, and thus had not recommended any trades, was contradicted by reliable documentary evidence that established that he had in fact received the commissions for all of the trading activity in Heagy's account in December 1999.[2] Also, Voss eventually conceded that he could not remember his conversations with Heagy.[3] Aguirre undermined his credibility with his implausible and unsubstantiated assertion that Concorde had unfairly "tied his hands" by prohibiting him from calling clients just to report the status of their accounts. The inherently unbelievable nature of this assertion was underscored by the fact that a few months after Concorde had closed its California office and terminated him, Aguirre applied to become registered again with Concorde.

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[2] Vision Limited's 1999 profit-loss summaries for accounts assigned to Voss reported that Heagy's account – along with all of Schmid's accounts -- had been transferred to Voss (identified by broker number 50588) in December 1999, and that the trades in December for Heagy's account had generated a total of $703.73 in commissions and fees, which corresponded to the commissions and fees reported in the confirmation statements on December 7 and 9, 1999. In addition, the December 9 and 31 account statements show that the account number was changed (from 50617-190900 to 50588-190900) consistent with the assignment of the account to Voss. *See* Order dated September 4, 2002.

[3] *See* Voss's testimony, at page 56 (" I really don't recall speaking with Ms. Heagy."); page 68 of hearing transcript ("I don't recall that exact conversation."); and Voss's affidavit at ¶¶ 5 and 6 ("I do not recall purchasing any options for Heagy's account;" and "I do not recall any recommendation to sell any position in Heagy's account.").

Factual Findings

The parties

1. Linda Heagy, a resident of Tonasket, Washington, was 46 years old when she opened her Concorde account. Heagy was employed, along with her husband, as a caretaker of a show ranch. During the relevant time, the Heagy's joint income was $25,000, and Linda Heagy's individual net worth was $10,000. Heagy received a certificate of graduation from a commercial business school. Other than a modest investment in a mutual fund, she had no previous investment experience. [*See* pages 4-8 of hearing transcript; and account application.]

2. Concorde Trading Group, Incorporated, which introduced Heagy's account, was a registered introducing broker from March 1988 until May 21, 2002, with its principal place of business in Aventura, Florida. Arthur John Schlecht, Peter Heinz Rukrigl, and Dennis Richard Gee were the registered principals of Concorde. Concorde has been sanctioned for systemic fraudulent sales practices in three National Futures Association disciplinary actions,[4] and one CFTC injunctive action.[5] Also, Concorde has been named as a respondent in 110 reparations cases, most of which have involved allegations of fraudulent sales and trading practices. [CFTC and NFA records.]

Concorde principally compensated its account executives and branch office managers with a percentage of the commissions collected from its customers. In this connection, Concorde charged commissions based on the number of contracts traded, and

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[4] *In re Concorde Trading Group, et al.*, 92-BCC-20, Decision Accepting Settlement Offer (NFA March 5, 1993) ($25,000 fine and enhanced supervisory procedures); *In re Concorde Trading Group, et al.*, 95-BCC-5, Decision Accepting Settlement Offer (NFA October 14, 1998) ($120,000 fine and enhanced supervisory procedures); *In re Concorde Trading Group, et al.*, 01-BCC-14, Decision Accepting Settlement Offer (NFA May 21, 2002) (termination of registration).

[5] *In re Concorde Trading Group, et al.*, Civ. 93-1567, Consent Order of Permanent Injunction (S.D. Florida July 19, 1996) ($1.5 million restitution and enhanced supervisory procedures).

Concorde's research department favored recommendations to trade cheaper out-of-the-money options. Thus, Concorde provided the motivation and the means for its account executives to recommend trading strategies designed to maximize commission income to the detriment of the best interests of their customers. In Heagy's case, Schmid would maximize commission income by advising Heagy to purchase a heating oil option spread and to purchase out-of-the-money gold and soybean options. After Concorde terminated Schmid's employment, Voss and Aguirre would take over the account, and Voss would maximize commission income by fraudulently convincing Heagy to liquidate prematurely a profitable trade in order to fund the purchase of yet more out-of-the-money options.[6]

3. Bradley Schmid solicited the Heagy account, and acted as Heagy's account executive until December 6, 1999. Schmid was a registered associated person with Concorde from August 5, 1999 to January 12, 2000. During the relevant time, he worked in Concorde's Costa Mesa, California branch office. In these five months, Schmid opened and managed six accounts, none of which realized overall net profits. These accounts realized a total of $44,415 in net losses, and generated $12,579 in commissions and fees. [*See* Notice dated July 9, 2002.]

Before working for Concorde, Schmid had been an associated person with American Futures Group, from October 1994 to January 1995; Commonwealth Financial Group, from January to November 1996; American Financial Trading Corporation, from November 1996 to February 1997; Universal Commodity Corporation, from February to December 1997; and Barkley Financial Corporation, from February 11 to June 9, 1998.

[6] The commissions and fees resulted in a commission-to investment ratio of about 32%, a commission-to-premium-paid ratio of about 32% for the trades recommended by Schmid, and a commission-to-premium-paid ratio of about 27% for the trade recommended by Voss.

American Futures Group and Commonwealth Financial Group have been disciplined by the NFA or the CFTC for fraudulent sales practices. Schmid is currently not registered. [NFA records.]

4. Kenneth Lee Voss, along with David Aguirre, succeeded Schmid as Heagy's account executive, and recommended the last trade in her account. Voss was a registered associated person with Concorde from August 3, to December 27, 1999, and worked with Schmid and David Aguirre in Concorde's Costa Mesa, California branch office. Voss and Aguirre had a long-standing informal arrangement where they agreed to split their commissions and watch each other's accounts. In this connection, soon after he had convinced Heagy to enter into a trade that he promised would realize large profits within ten days, Voss left on an extended vacation, and Aguirre assumed sole responsibility for the Heagy account. [Pages 50-53, 72-73, and 78-80 of hearing transcript, and ¶¶ 1-3 of Voss's affidavit (dated August 19, 2002).]

By the time that he took over as the co-broker for Heagy's account, Voss had opened and managed 63 accounts, 58 of which had realized overall net losses. These 63 accounts generated $3,375,994 in commissions and fees and realized a total of $5,138,396 in net losses. [*See* Notice dated July 9, 2002.]

After working for Concorde, Voss was registered with U.S. Options Corporation from January 26, 2000 to June 7, 2001; American National Trading Corporation, from June 18, 2001 to March 5, 2002; and Secure American Trading L.L.C., from August 2 to 30, 2002. [NFA records.]

By consent order dated July 9, 2002, the NFA found that Voss had conducted a deceptive and misleading solicitation, which "contained patent falsehoods and gave a distorted and misleading impression of the profit potential and risk of loss associated with options and made it appear that large profits were easily obtainable [by] trading options." The NFA imposed a $4,000 fine, and directed Voss to tape-record all conversations with customers and prospective customers for the next six months during which Voss is registered. *In re U.S. Options, et al.*, NFA Case No. 01-BCC-017 (NFA Decision, July 9, 2002).[7] Voss's registration was suspended on January 21, 2003, for failure to pay a reparations award. [*See* Order Pursuant to Delegated Authority dated December 20, 2002, *Joseph Zemen v. Alan Ader, Concorde Trading Group, Allan Kanter, and Kenneth Voss* (CFTC Docket No. 01-R86).]

5. David Joseph Aguirre, along with Voss, became Heagy's account executive on December 7. Aguirre spoke to Heagy three times: first, in late November when he tried to convince her to invest more funds and buy more heating oil options; second, on December 9, when he reported the fill on the soybean trade recommended by Voss; and third, on January 10, when he spoke to her after she had called Concorde's owners to complain that he had not returned her calls for several weeks.

Aguirre was registered with Concorde from November 24, 1998, to January 12, 2000. As noted above, Aguirre and Voss had a long-standing informal arrangement where they agreed to split their commissions and watch each other's accounts. [*See* pages 50-53, 72-73, and 78-80 of hearing transcript; and ¶¶ 1-3 of Aguirre's affidavit.]

After working for Concorde, Aguirre was associated with U.S Options from January 13, 200 to May 25, 2001; with American National Trading Corporation from June 18, 2001 to May 1, 2002; and with Peregrine Financial Group from May 8 to June

[7] Secure American apparently terminated Voss because it was not interested in implementing the required enhanced supervision of Voss' activities. *See* pages 48-49 of hearing transcript.

6, 2002. In May 25, 2001, Aguirre applied to be associated again with Concorde, but never actually went to work there again. Aguirre is currently associated with Laguna Capital Management, LLC. [*See* page 68 of hearing transcript, and NFA records.]

By the time that he took over as the co-broker for Heagy's account, Aguirre had opened and managed 11 accounts, all of which had realized overall net losses. These 11 accounts generated $167,188 in commissions and fees, and realized a total of $297,336 in net losses. [*See* Order dated September 4, 2002.]

Schmid solicits and trades the account

6. In September 1999, after Heagy had contacted Concorde in response to a television commercial, Schmid convinced Heagy to open a non-discretionary account. Heagy's decision to open the account was based principally on Schmid's promises to select "conservative" trades, to closely monitor her account, and to advise her on a frequent basis. Schmid also represented that it was reasonable for her to expect to eventually make a $60,000 profit on a $10,000 investment, and that he would accomplish this with a "conservative," long-term trading strategy, starting with seasonal trades in heating oil, where he would send Heagy the expected profits and reinvest her original investment. However, none of Schmid statements reflected the underlying reality that his and Concorde's customers eventually lost most or all of their investments, even if they may occasionally have enjoyed large profits on isolated trades. Schmid also did not provide an accurate disclosure of commissions. He told Heagy that Concorde would charge a $195 commission "on a trade," but did not accurately explain that Concorde charged $195 per contract, and that for each trade he would be recommending the purchase of multiple out-of-the-money options, which would generate substantially more

commissions per trade than would the purchase of similar, but more expensive in-the-money options. However, the distorted and deceptive nature of Schmid's solicitation never became apparent to Heagy, because – in sharp contrast to Voss and Aguirre -- Schmid developed a rapport with her by calling her regularly, and because the one trade completed by Schmid had realized a decent profit.

On September 28, 1999, Heagy opened the account by signing the account-opening documents, Schmid convinced Heagy to deposit a total of $13,712. Schmid also recommended the first three trades in Heagy's account, which would generate an aggregate $4,410 in commissions and fees, and ultimately would realize an overall net loss of $2,220. Schmid represented that each of these trades were "conservative" and "long-term;" that is, he anticipated that Heagy would hold the options several weeks, or until they had adequately appreciated.

On September 30, Schmid recommended the purchase of ten out-of-the-money December heating oil spreads, which generated $2,550 in commissions. On November 16 -- three days before the expiration date -- he recommended that Heagy liquidate the spreads, which realized a gross profit of $5,040 (*i.e.*, net premium collected), and a net profit of about $2,490 (*i.e.*, $5,040 net premium, less the $2,550 cost of the commissions). However, Schmid unfairly reported to Heagy that the trade had made a $5,040 profit, without mentioning the much smaller, and patently material, net result.

Next, on November 17, Schmid advised Heagy to buy five out-of-the-money March soybean calls, which generated $855 in commissions. Schmid advised Heagy that he anticipated that she would hold these options for several weeks before capturing the anticipate profits. On December 7, when he took over from Schmid, Voss would immediately convince Heagy to sell the March soybean calls for a small profit, so as to fund the purchase of February coffee call options. Subsequently, the March soybean calls would continue to appreciate, and ultimately almost triple in value by late January.

Lastly, on November 18, Schmid advised Heagy to purchase five out-of-the-money February gold calls, which generated $1,005 in commissions, and which would expire worthless on January 18, 2000. [*See* pages 8-34 of hearing transcript, and Heagy affidavit.]

Voss and Aguirre take over and take off

7. In early December, Schmid's employment with Concorde was terminated for reasons not sufficiently explained on this record; and, sometime in January, Concorde would close its California office without any prior warning to its customers.

On or about December 7, 1999, Voss called Heagy. Voss could neither recall this conversation, nor provide a specific justification for his trade recommendation. [*See* footnote 3, *supra*; and pages 51-74 of hearing transcript.] In sharp contrast, Heagy credibly testified that Voss -- before even telling her that he and Aguirre had taken over as her account executives – urged her first to exit the long-term soybean trade because waiting for profits was like "watching paint dry." Voss then promised that he would "get [Heagy] in and out in ten days," and make up to $20,000 on his recommended coffee trade. Voss reinforced the impression that Schmid's long-term soybean trade had lost its luster by not informing Heagy that the soybean calls had been steadily appreciating, and that trading volume in the calls had almost doubled since November 17.

Despite the fact that he had never spoken to Schmid about Heagy and had never spoken before to Heagy, Voss did not attempt to ascertain from Heagy her overall trading objectives, her understanding of the specific risks associated with trading the strategies recommended by Concorde, or the sort of advice and services that Schmid had been providing. Heagy did volunteer that she had been happy with Schmid, because she believed that he had been recommending safe, conservative, long-term trades. In reply, Voss emphasized that he would get her in and out in ten days with tremendous profits, because the price of "Folgers was going through the roof." Voss did not mention that he would be recommending the purchase of multiple out-of-the-money options, which would generate substantially more commissions per trade than would the purchase of similar, but more expensive in-the-money options. Voss also said nothing that would have fairly and accurately reflected the dismal actual performance of his other customers' accounts. As a result, Voss presented a distorted and deceptive view of the likelihood of earning profits. Heagy then authorized the sale of the March soybean calls, and the purchase of the February coffee calls. Based on Voss's promise to "get her in and out in ten days," Heagy believed that Voss intended to sell the options after ten days, on or about December 20. On sale of the March soybean calls, Heagy collected a premium of $3,875, and thus realized a net profit of $1,250. On the purchase of the three February coffee calls, which were bought on December 9, at a price of 2.00, Heagy paid a $2,250 premium and paid $603 in commissions and fees. Soon afterwards, Aguirre called and reported the fill price. [*See* pages 34-39, and 51-75 of hearing transcript.]

8. From December 10 through 16, the February coffee calls traded below the purchase price, but on Friday December 17, the coffee calls rebounded to above the

break-even price, and on Monday December 20, hit a high of 3.75, with a corresponding liquidation value of $4,217.75.[8]

Sometime after December 9, Voss took off on a lengthy vacation without informing Heagy. Since Voss and Aguirre had developed a routine where if one was out the other would automatically know to "watch" his accounts, they did not discuss specific customer accounts. Since neither Voss nor Aguirre discussed the Heagy account, Aguirre did not know that Voss had promised to get Heagy out of the coffee trade in ten days, *i.e.*, on December 20. Furthermore, Aguirre kept himself in the dark about Heagy's expectations by not bothering to call her after December 9. [*See* pages 57-63, 75, 79-81, and 86-89 of hearing transcript.]

On December 20, Heagy had not heard from Voss. Although Heagy assumed that Voss had gotten her out of the trade -- since he had promised to get her in and out in ten days with profits -- she called Voss to discover the results. Heagy ended up calling several times. Each time, the Concorde receptionist or assistant told her that Voss was busy or in a meeting, but would return her calls. As a result, Heagy did not realize that Voss on vacation, and thus did not ask for Aguirre or for another Concorde broker. At the same time -- despite the fact that the ten days were up and that the coffee options had become profitable -- Aguirre did not call Heagy. And he would not call Heagy for another twenty days, until after she had complained to Concorde's headquarters office that her account had been abandoned. Aguirre testified that he did not call Heagy because Concorde's research department had not issued any sell recommendations for the February coffee calls. Aguirre also testified that he did not know that Heagy had been

[8] After December 20, the February coffee calls would reverse and steadily decline, and would expire worthless on January 18.

trying to get in touch with her broker. In this connection, Aguirre, near the end of his testimony, asserted that he had had problems getting messages from clients because Concorde's support staff was inept.[9] When asked -- given that Concorde's support staff was purportedly not reliably forwarding clients' calls -- to describe any corrective action he had taken, Aguirre replied tersely: "[I] left the company." [Page 89-90 of hearing transcript.] Thus, it appears that Aguirre, while he was actually employed by Concorde and handling his and Voss's accounts, took no meaningful remedial steps to overcome this purported problem and assure that his clients could effectively communicate with him. [*See* pages 38-40, 53-55, 57-65, 75, 79-93, and 95-98 of hearing transcript.]

9. On January 10, Heagy called Concorde's Florida office to complain about her frustrating experience with the California office. Peter Rukrigl, Concorde's compliance director, told her that he would instruct her broker Aguirre to call her. Soon afterwards, Aguirre called her and started the conversation as if it were a routine update, giving her the liquidating value and the prognosis for the coffee and gold trades. Aguirre tried to deflect Heagy's complaint about her unreturned calls, by asserting that she would have made at most $1,600 on the coffee trade, and by saying that Schmid was a bad choice for a broker. Heagy indicated to Aguirre these responses were inadequate, and followed up with a series of unfruitful discussions with Rukrigl, and then Richard Padron. Rukrigl promised her that he was immediately going to California to "find out what was going on," and that he would soon call her back. However, Rukrigl never called her again. When Heagy complained to Padron that Concorde had "abandoned her account," Padron discounted her complaint by replying: "You made money in heating oil, so what are you

[9] In contrast, Aguirre's earlier testimony and Voss's testimony indicated that their support staff was capable. *See* pages 58 and 79 of hearing transcript.

complaining about." Thus did Padron succinctly sum up the cavalier indifference towards Heagy's interests that had permeated Concorde from top to bottom. [Pages 42-47 and 81-84, 98-99 of hearing transcript.]

Conclusions

The preponderance of the evidence establishes that Voss violated Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10,[10] by churning Heagy's account, and that Voss and Aguirre violated Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10 by disregarding Voss's promise to sell the coffee options on December 20.

Churning by Voss

To establish churning, Heagy must establish three elements: one, that Voss "controlled the trading activity" in Heagy's account during the relevant time; two, that the premature sale of the March soybean options and the purchase of the out-of-the-money February coffee call options was "excessive" in light of Heagy's trading objectives; and three, that Voss acted with intent to defraud or reckless disregard of Heagy's interests. *Hinch v. Commonwealth Financial Group*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,056, at 45,021-45,022 (CFTC 1997).

[10] 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."

Control

Here, where Heagy was a first-time trader, with modest financial resources, who placed a high degree of trust in Schmid and Voss to pick trades and to decide when to buy and sell, the evidence supports the conclusion that Voss controlled the trading in Heagy's account. *Hinch, supra,* at 45,021.

Excessive trading

When a new account executive urges a switch to a different trading strategy, that account executive "bears the burden of providing a credible explanation justifying the change." *Hinch, supra*, at 45,002. In this connection, considerable weight is placed "upon the fact that [the customer was] steered away from their original trading objective as soon as [the new broker] gains control of [the] account," as was case with Voss and the Heagy account. *Id.* Here, Voss has failed to articulate any reasonable basis to justify his hasty switch from a long-term to a short-term trading strategy. Moreover, his assertion that he was passing on the trade recommendations of Concorde's in-house research department was insufficient, where he had recklessly failed to ascertain Heagy's trading objectives, and thus inevitably failed to "show a reasoned application of [his advice] to the particular needs and desires of [Heagy.]" *Id.*

In addition, Voss recommended the purchase of substantially out of the money ("OTM") coffee calls, which were nearing expiration, when comparable in-the-money ("ITM") calls were available. The purchase of OTM coffee calls significantly increased respondents' income, because Concorde charged Heagy commissions based on the number of contracts traded, rather than the value of the position, and because more OTM options could be purchased since the premium for an OTM option is lower than the premium for a comparable ITM option. Here, Voss offered no meaningful explanation or evidence that shows that the recommendation to purchase OTM options was consistent with Heagy's objective to make conservative trades with a reasonable likelihood of profits. Moreover, no patently plausible rationale can be discerned. The "increased leverage" rationale typically raised by brokers who recommend OTM options can almost never be justified for a customer whose trading objective is "conservative," or otherwise includes a reasonable chance of profit. First, the value of a low-priced option is almost always less responsive to price changes in the underlying commodity or asset. Second, the total premium value represents the amount of risk, regardless of the number of contracts. And third, the profit potential of an OTM option, as measured by its delta, is lower than that of an ITM option of the same type. *See Ferriola v. Kearse-McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172, at 50,154-50,155 (CFTC 2000). 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." *Id.*, at 50,155. Thus, Voss's guarantees of huge profits when he convinced Heagy to trade OTM options failed to reflect the reality that the strategy of buying OTM options, compared to buying comparable ITM options, was significantly more risky and less profitable, and that the only real guarantee was that respondents' stream of commission revenue would be unnecessarily increased.[11] In these circumstances, the record supports the conclusion that the switch from the March soybean calls to the February coffee calls was based solely on Voss's desire to generate commission income, and thus that Voss's trading was excessive.

Intent and damages

The intentional nature of Voss's churning violation is underscored by his knowledge that Heagy was an inexperienced and unsophisticated trader, by the fact that Heagy told him that she had been relying on Schmid to select conservative trades, by the fact that he failed to inquire further about her trading objectives, by the fact that he advised her to change trading strategy as soon as he took over the account, and by the patently false and misleading nature of his misrepresentations. The proper measure of damages for Voss's churning violation -- where the record shows that Voss recklessly ignored Heagy's trading objectives, that Voss made fraudulent misrepresentations and omissions about the March soybean trade, that Voss made fraudulent guarantees of profits about the February coffee trade, and that Voss made a bad faith promise to exit the coffee trade in ten days -- is $6,665.50: the sum of the $2,853 out-of-pocket loss on the February coffee trade recommended by Voss; plus the $3,812.50 lost profit on the March

[11] Furthermore, Voss's promises of certain profits similarly failed to reflect the detrimental effect of Concorde's burdensome commissions on profit potential. Here, the commissions and fees charged to Heagy's account resulted in a commission-to-premium-paid ratio of twenty-seven percent, which represented a formidable barrier to profit potential. Thus, Voss's unrestrained ten-fold profit projections was materially deceptive, even if the coffee options did briefly double in value:

> Because the size of a firm's commissions and fees affects the profit potential of an investment, it affects the kinds of representations that can be made about profitability. . . . All else being equal, customers of a firm with a high commission or fee structure will have a more difficult time making a profit than those who employ a less expensive firm. As a result, the firm charging higher commissions and fees is more limited in what it can claim regarding profit potential.

Johnson v. Fleck, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,957, at 37,502 (CFTC 1990) (Chairman Gramm concurrence).

soybean trade (based on the difference between the $7687.50 peak liquidation value on January 27, 2000, and the $3,875 premium collected on December 9, 1999, when at Voss's fraudulent urging Heagy sold the March soybean calls in order to fund the purchase of the February coffee calls). *See Hinch, supra*, at 45,002.

Bad faith promise by Voss and fraudulent fiduciary breach by Aguirre

In their capacity as Heagy's brokers, Voss and Aguirre had, at a minimum, a duty to place orders consistent with her trading instructions and objectives, and a duty to provide timely, accurate and useful information about the status of the trades in Heagy's account. Voss knew that Heagy was a novice trader with modest financial means who had relied on her broker to pick trades and decide when to enter and exit trades, and once he had obtained Heagy's authorization for the coffee trade with a promise to get her "in and out in ten days," Voss was obligated to take the necessary steps to assure that Heagy's instructions to exit the trade in ten days were carried out. However, the fraudulent nature of Voss's trade recommendation -- coupled with his inexcusable failure to take any of the reasonable and necessary steps to assure that the coffee options were sold by December 20, such as actually telling Heagy about his extended vacation, or informing Aguirre that he had told Heagy that he would get her out of the coffee trade on or about December 20 – supports the conclusion that he fraudulently obtained her to authorization without any intention of honoring his promise to get her out in ten days. *See Wills v. First Financial Corporation of America*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,605 (CFTC 1985) (A bad faith promise to perform coupled with a breach of the agreement is fraudulent.).

Similarly, Aguirre showed a reckless indifference to Heagy's interests by failing to take any reasonable steps to assure that Heagy's instructions were followed. Aguirre assumed sole responsibility for the Heagy account once Voss left on extended vacation after December 9. Aguirre knew that Heagy was a novice trader with modest financial means, that Heagy was a former Schmid client who had recently been transferred to Voss and Aguirre, and that Voss had told him nothing about Heagy's specific instructions or trading objectives. In these circumstances -- especially when the February coffee call options were nearing expiration and were unprotected with stop or limit orders -- Aguirre had a heightened duty to consult Heagy on a regular basis, beginning well before December 20. However, Aguirre ignored Heagy, and thus made himself willfully ignorant of Heagy's expectations and instructions, and assured that her instructions would be thwarted. None of Aguirre's weak and ineffectual excuses justify his effective abandonment of the account after December 9. *See Avis v. Shearson Hayden Stone*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,379 (CFTC 1982) (When a commodity professional knows that a customer intends to rely on the professional to perform a special duty for the customer, the professional, as part of his fiduciary duty must perform that duty, unless the professional has unambiguously disavowed that duty.)

The failure of Voss and Aguirre to follow Heagy's instructions violated Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10. The reckless nature of these violations is underscored by the fact that they knew that Heagy's was an inexperienced and unsophisticated trader with modest financial means, that she had been relying on her Concorde brokers for the selection and timing of trades, and that the February coffee calls were nearing expiration. The proper measure of damages for these violations by Voss and Aguirre is $4,217.75, based on the peak liquidation value of the coffee calls on the tenth day of the trade, December 20, 1999.

ORDER

The weight of the evidence establishes that Kenneth Lee Voss and David Joseph Aguirre violated Section 4c(b) of the Commodity Exchange Act and CFTC rule 33.10, and that Voss's violations proximately caused $10,883.25 in damages, and that Aguirre's violations proximately caused $4,217.75 in damages. Accordingly, Kenneth Lee Voss is ORDERED to pay Linda Heagy reparations of $10,883.25, plus interest on $2,853, at 1.30%, compounded annually from December 9, 1999, to the date of payment, plus interest on $4,217.75, at 1.30%, compounded annually from December 20, 1999, to the date of payment, plus interest on $3,812.50, at 1.30%, compounded annually from January 27, 2000, to the date of payment, plus $125 in costs for the filing fee; and David Joseph Aguirre is ORDERED to pay Linda Heagy reparations of $4,217.75, plus interest on that amount, at 1.30%, compounded annually from December 20, 1999, to the date of payment, plus $125 in costs for the filing fee. Liability is joint and several for $4,217.75, plus prejudgment interest on that amount, plus the cost of the filing fee.[12]

Dated February 24, 2003.

Philip V. McGuire,
Judgment Officer

[12] The $4,217.75 damage award against Aguirre shall not be reduced in the event that Voss satisfies the $10,883.25 damage award against Voss with a payment of $6,665.50 or less, pursuant to any mutual agreement between Voss and Heagy.