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

OFFICE OF PROCEEDINGS

PAVEL IVANOV,
Complainant,

v.

PRUDENTIAL SECURITIES, INC., and BRUCE F. EISEN,
Respondents.

CFTC Docket No. 95-R146

INITIAL DECISION

The gravamen of Pavel Ivanov's complaint is that respondents churned his account. Ivanov also alleges that on May 23, 1994 Eisen gave him false information about the execution of an order to buy two silver contracts, and that on June 6, 1994, Eisen failed to return Ivanov's call after Ivanov had left a message that he wished to liquidate all of his positions. Respondents deny Ivanov's allegations. After reviewing the parties' documentary evidence, it is concluded that Ivanov has failed to establish any violations by respondents.

Factual Findings

1. Pavel Ivanov is employed as an architect. On Ivanov's Prudential account application, he stated that he had an annual income of about $45,000 and that he had two years of investment experience in commodities, options, and stocks and bonds. In the section of the account application asking Ivanov to identify his investment objective, he checked the box for "speculation." (The choices not selected by Ivanov included "safety of principal,"

"long-term growth," and "income.")

2. Bruce Eisen solicited Ivanov's account and acted as Ivanov's account executive. Sergio Castro, Eisen's assistant, sometimes accepted buy and sell orders from Ivanov when Eisen was unavailable. [*See* ¶18 of Ivanov's Final Verified Statement.]

3. On March 23, 1994,[1/] Ivanov signed the various account-opening documents, including a standard risk disclosure statement. In this regard, Ivanov asserts: "As to risk, I don't deny that I signed the risk statements or that I didn't know that there were risks in these markets; however, I did believe that I was going to get sound advice from someone so that there was a reduction in risk potential for loss." [¶12 of Ivanov's final verified statement.] Ivanov has produced no evidence of any statements by respondents that downplayed or undermined the written risk disclosures. Ivanov does not dispute Eisen's assertion that he discussed the "upside and down side of leverage," or the use of stop-loss orders. [*Compare* ¶13 of answer *with* ¶13 of Ivanov's final verified statement.][2/]

4. Ivanov transferred two open positions from his Dean Witter account to his Prudential account. Trading activity in Ivanov's Prudential account stretched from April 6 to June 6. During this time, Ivanov routinely called Eisen daily, often before the market

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1/ All dates are in 1994.

2/ Ivanov was directed to include in his final verified statement his version of factual events set out in certain paragraphs of the joints answer. Ivanov numbered the paragraphs in his final verified statement to correspond to the paragraph numbers in the answer.

closed and several times during the day. [¶15 of answer; and ¶¶ 10 and 15 of Ivanov's final verified statement.] Ivanov authorized all trades in the account and typically made his trading decisions in consultation with Eisen or Castro. [*Compare* ¶14 of answer *with* ¶14 of Ivanov's final verified statement ("I would call to ask advice and as a result often told [Eisen] to buy or sell."); *see also* tenth and sixteenth paragraphs of complaint.] In addition, Ivanov does not dispute respondents' assertions that several orders, including the disputed orders initiating grain positions on May 23 and May 24, were unsolicited. [*Compare* ¶17 of answer *with* ¶17 of Ivanov's final verified statement.]

5. Prudential charged a $55 commission per round-turn, per contract. (Prudential charged a total $55 commission for two positions that were transferred from Ivanov's Dean Witter account.) Prudential also charged a flat $4.50 "trading activity fee" each day that there was trading activity. Finally, the account was charged modest exchange and NFA fees for each round-turn trade. Ivanov paid a total of $2,475 in commissions for the futures trades in his account,[3/] and paid a total of $76.50 in trading activity fees.

6. Twenty-one round-turn futures trades, involving a total of forty-five contracts, were made in Ivanov's account; four trades were day trades; and two trades were overnight trades. The trades in the account were open an average of about five-and-a-half days.

[3/] Ivanov also paid $220 in commissions for two silver forward transactions.

7. At no time was the account undermargined.[4] On only two days did that day's aggregate losses exceed 50% of the closing cash balance from the previous day: on May 24 ($2,715 losses exceeding the $2,282 closing balance on May 23); and on June 6 ($6,802 losses exceeding 50% of the $10,282 closing balance on June 3).

8. All trades involved long positions in a variety of July 1994 futures contracts. Set out below is a summary of the trading activity:

Date in	*Date out*	*Contract*	*Gross*	*Commission*
4-06	4-19	1 Silver	$(1,475)	$ (27.50)
4-13	5-02	2 Soybean Meal	0	(110.00)
4-28	5-02	1 Soybean Oil	(12)	(55.00)
4-28	5-03	1 Corn	0	(55.00)
3-17	5-03	1 Platinum	(140)	(27.50)
5-06 5-12	5-18	3 Soybean Oil	2,628	(165.00)
5-18	5-18	1 Soybean Oil	0	(55.00)
5-06 5-17 5-18	5-19	3 Corn	125	(165.00)
5-20	5-20	3 Soybean Oil	(360)	(165.00)
5-20	5-23	2 Corn	300	(110.00)
5-23	5-23	2 Corn	(350)	(110.00)

(continued next page)

[4] A meaningful calculation of the average daily equity was precluded by the fact that the Prudential account statements did not state the value of open positions, and by the high frequency of fund transfers between Ivanov's futures account and Ivanov's stock account. Ivanov made deposits into his futures account on May 3 ($11,303), May 19 ($1,099), May 24 ($4,000), May 27 ($3,300), June 2 ($4,043), and June 6, 1994 ($320); and made withdrawals on May 12 ($7,437) and June 8, 1994 ($2,922).

Date in	*Date out*	*Contract*	*Gross*	*Commission*
5-23	5-23	6 Soybean Meal	(1,950)	(330.00)
5-23[5]	5-24	2 Silver	(920)	(110.00)
5-20	5-24	1 Platinum	75	(55.00)
5-06 5-18 5-19 5-23	5-24	6 Soybean Meal	(160)	(330.00)
5-23	5-24	5 Soybean Oil	(1,710)	(275.00)
5-27	6-03	1 Soybean Meal	290	(55.00)
5-27	6-03	1 Soybean Oil	(96)	(55.00)
5-23	6-06	2 Silver	(4,824)	(110.00)
5-31	6-06[6]	1 Soybean Meal	(1,120)	(55.00)
5-31	6-06	1 Soybean Oil	(858)	(55.00)

As can be seen, in mid-May Ivanov became more aggressive in the grains markets, increasing the size of his positions on May 12, 17, 18, 19 and 23. Initially, this strategy was successful, and on May 18, Ivanov realized his largest gain, a $2,628 gross profit on a three-contract soybean oil trade. According to Ivanov, he relied on Eisen to "keep up" with this increased trading activity. [Fifteenth paragraph of complaint.]

9. On Friday, May 20, Ivanov accepted Eisen's recommendation to place a market order to buy two silver contracts. The order ticket indicates that the order was placed at 1:55 p.m. Pacific

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5/ Although the Prudential account statements reported that this purchase was made on May 24, the corresponding order ticket indicated that the order was filled on May 23.

6/ The gross loss on the June 6 trades is estimated from the June monthly account statement, because neither side produced the confirmation statement for June 6.

time (after the close) on May 20, and that the fill confirmation was received at 5:52 a.m. Pacific time on May 23. The May 23rd confirmation statement reported the 572.80 fill price.

On Monday, May 23, Ivanov accepted Castro's recommendation to place a market order to buy two more silver contracts. The order ticket indicates that the order was placed at 12:41 p.m. and filled at 12:48 p.m. Pacific time. The May 24th confirmation statement reported the 581.20 fill price.

On the morning of May 24, Ivanov accepted respondents' recommendation to sell at the market the two silver contracts that he had bought on May 23. The order ticket time-stamps are partially obscured, but do indicate that this order was placed sometime during the morning of May 24. The corresponding confirmation statement confirmed a two-contract round-turn silver trade with a 581.20 purchase fill price and a 572.00 sale fill price.

On June 2, Ivanov authorized a 5.20-point stop-loss order on the two silver contracts that had been purchased on May 20.

10. On June 6, Ivanov closed out all of his positions. According to Ivanov:

> I called [Eisen's office] at 5:30 a.m. . . . I had decided I could not throw any more money into the account and I was going to tell Mr. Eisen to sell all my holdings. I was told that he had stepped out. I asked to have him call me at home immediately. Nobody called, even though I had left a message that I was quitting. After an hour, I called him again. He placed the sell orders, but I was sold-out at a far lower price than I would have received if he had placed the orders at the open.

[Nineteenth paragraph of complaint; and ¶20 of Ivanov's final verified statement.] However, Ivanov has not explained why he did not just place market sell orders during the first conversation, in light of the fact that he had previously placed such orders with other Prudential employees; Ivanov has not explained why he waited an hour before calling Eisen again; and Ivanov has not produced any evidence supporting his contention that each of his contracts were sold "at a far lower price" than the opening price. In contrast, respondents have produced reliable evidence in the form of time-stamped order tickets filled out in Eisen's hand-writing establishing that he was in the office at 5:30, and respondents also have asserted that Eisen typically was the only employee in the office at that hour. [¶20 of answer.]

11. Ivanov lost a total of $13,090 in his Prudential account.

Conclusions

To establish churning, Ivanov must show that respondents controlled the trading in his account and that the level of trading was excessive in light of his investment objectives. *Secrest v. Madda Trading Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,627 (CFTC 1989); and *Smith v. Siegel Trading Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,105 (CFTC 1980). In the absence of a written grant of discretionary trading authority, Ivanov must show that respondents had de facto control over the trading activity in his account. The de facto control analysis involves the examination of seven factors relating to the customer-broker relationship: (1) the customer's lack of sophistication; (2) a lack of the customer's commmodity trading experience; (3) a minimum amount of time the customer devotes to the account; (4) a high amount of trust and confidence reposed in the broker by the customer; (5) a large percentage of transactions entered into by the customer based upon the broker's recommendation; (6) the absence of prior customer approval for transactions entered on his behalf; and (7) the customer's approval of recommended transactions where approval is not based on full, truthful and accurate information. *Gatens v. International Precious Metals Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,636 (CFTC 1985). Here, the weight of the evidence supports the conclusion that Ivanov, not Eisen and Castro, was primarily responsible for the level of the trading in the account. While respondents provided advice and recommended many of the trades, Ivanov: was in contact with respondents almost every day, sometimes several times during a day; discussed each and every trade in the account prior to execution; participated in determining the type and volume of trading; and initiated some of the trades. These circumstances compel the conclusion that Ivanov controlled the trading activity and thus defeat his churning claim.

Ivanov has also failed to establish the other alleged violations by a preponderance of the evidence. According to Ivanov, on Friday, May 20, he told Eisen that he only wanted to buy two silver contracts, then on the following Monday Eisen told Ivanov either that "no silver had been bought," or that "there was no buy order," and that Ivanov then authorized the purchase of two silver contracts. Ivanov purportedly did not know that he had purchased four contracts until he received the May monthly account statement. [Eleventh, twelfth and sixteenth paragraphs of complaint; and ¶20 of Ivanov's final verified statement. *See also* ¶20 of answer.] However, Ivanov's version of events is undermined by the fact that he authorized the sale of two contracts on May 24, without any apparent protest; by the fact that the first written notification of the second trade was the May 24 confirmation statement which Ivanov probably received a week before he received the May monthly account statement; and by the fact that Ivanov continued to trade without protest. In these circumstances, where Ivanov has not shown that Eisen made any reckless or intentional misrepresentations, Ivanov is not entitled to recover his loss on the second silver trade. Finally, the evidence supports the conclusion that Ivanov is primarily responsible for any delay in liquidating his account on June 6, 1994, and that respondents did not act negligently or recklessly in connection with the account liquidation.

ORDER

No violations having been established, the complaint is DISMISSED.

Dated March 28, 1997.

Philip V. McGuire,
Judgment Officer