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

RECEIVED
C.F.T.C.
'00 MAR 7 AM 10 33
OFFICE OF PROCEEDINGS
PROCEEDINGS CLERK

OFFICE OF
PROCEEDINGS

LUIS PINA, Complainant,	*	
v.	*	CFTC Docket No. 99-R41
SCOTT DONALD TURESKY, Respondent.	*	

Before McGuire, Judgment Officer

Appearances G. Mark Brewer, Esq., La Jolla, California, for Luis Pina, San Diego, California

Scott Donald Turesky, *pro se*, El Cajon, California

INITIAL DECISION

Luis Pina alleges that Scott Turesky fraudulently solicited his discretionary account by using high-pressure sales tactics and by guaranteeing that he would reimburse any losses, and that Turesky disregarded Pina's instructions to cease trading and close the account.[1] Turesky asserts that Pina understood the risks and signed a risk disclosure statement, and otherwise denies the allegations.[2]

---

[1] *See* ¶¶ 7-21 of complaint, and pages 5-8 and 159-163 of hearing transcript. Pina also named as respondents the introducing broker Heritage West Financial and the guarantor futures commission merchant Vision Limited Partnership. Soon after filing their answers, Heritage West and Vision settled with Pina, and the complaint against them was dismissed. Under the terms of the settlement agreements, Heritage West and Vision paid a total of $5,500 to Pina.

[2] Turesky's assertion that Pina "failed to exercise personal responsibility" after Turesky's alleged failure to cease trading has been treated as an estoppel and a failure to mitigate damages affirmative defenses.

The findings and conclusions below are based on the parties' documentary submissions,[3] and the oral testimony of Pina and Turesky and their mutual friend Edward Fortune May. The testimony of Turesky and May was found to be self-serving and unreliable. The testimony of Pina was found to be sufficiently sincere and reliable concerning the account-opening in December 1996 and his instruction to close the account in early February 1997. However, Pina's testimony was too vague, confused and inconsistent about conversations and events after early February 1997 to be found reliable.

As explained below, it has been concluded that Pina has established that Turesky violated Sections 4b and 4c(b) of the Commodity Exchange Act and CFTC rules 1.56 and 33.10 during the account-opening by guaranteeing Pina against any losses, and that Turesky violated Sections 4b and 4c(b) of the Commodity Exchange Act and CFTC rule 33.10 by disregarding Pina's instructions to close the account. It has also been concluded that Turesky has established that Pina had a duty to mitigate his losses no later than May 31, 1997. Therefore, the measure of damages is $7,998, based on the difference between the $21,215 account liquidation value

[3] The principal documentary evidence consisted of Pina's declaration (Exhibit C to Complaint); May's declaration (Exhibit B to complaint); Turesky's Answer and Final Verified Statement; the itemized phone bill for outgoing calls from Heritage West, between January 15 and April 10, 1997 (attachment to Turesky's Final Verified Statement); Pina's account-opening documents (most complete set produced by Vision in response to subpoena, and most legible set produced by Turesky); May's account application (attachment to Heritage West's Answer); Pina's letter terminating power of attorney dated May 23, 1997 (Exhibit A to Vision Answer); monthly account statements and confirmation statements dated January 23, 24, 27 and 28, 1997 (collectively produced by Vision, Heritage West and Pina); the guarantee agreement between Vision and Heritage West (produced April 27, 1999); the copy of case file in *Parmenter v. Turesky, et al.* (produced by Pina September 16, 1999); Letter from NASD Regulation to Turesky dated May 1, 1997 (produced by Pina September 10, 1999); and Stipulation and Waiver dated July 12, 1993, and Order Removing Sanctions dated January 31, 1996, *In re the Matter of the Licenses and Licensing*

account when Pina instructed Turesky to close the account on or about January 31, 1997, and the $13,217 liquidation value on May 31, 1997, which has been found to be the latest date by which Pina should have taken additional steps to close the. The $7,998 damages, in turn, have been reduced by the $5,500 that Pina has received from Vision and Heritage West pursuant to the settlement agreements, leaving an award of $2,498.

Factual Findings

1. Luis Pina is a United States citizen and a resident of San Diego, California. Pina is a part-owner of a family-owned farming operation in Zacate, Mexico that exports all of its crops to the United States. Pina graduated from high school in Mexico, speaks and comprehends well in English, and was 32-years old when he opened the Heritage West account. [*See* pages 15-18 of hearing transcript.] On the account application, Pina stated that his net worth was over one million dollars, his annual income $200,000, and his liquid net worth $100,000.

2. Heritage West Financial, Incorporated is a registered introducing broker, guaranteed by Vision Limited Partnership, and located in San Diego, California.

3. Scott Donald Turesky was a registered associated person with Heritage West during the relevant time. He is not currently registered with the NFA. Before working for Heritage West, he worked for a series of insurance companies as well as Sentry Securities.

Rights of Scott Donald Turesky, File No. SD 6501-AP (California Department of Insurance) (produced by Pina September 10, 1999).

4. Edward Fortune May, a resident of Alpine, California, was a mutual friend of Pina and Turesky. May has been the owner of Yummie Veggies, Incorporated, since 1993.

May has known Pina since 1989. In 1992, Pina purchased some property from Turesky to help him recover from some financial difficulties.

In 1996, May met Turesky and proposed a business relationship where May would solicit insurance customers and solicit commodity customers for Turesky, who in turn would split or kick back commissions to May if Turesky sold an insurance policy or opened a commodity account. However, Turesky never reimbursed May for referring Pina, and the arrangement otherwise would ultimately generate little or no money for May.

On this record, it appears that May never disclosed the conflict of interest to Pina.

5. At May's urging, on December 17, 1996, Pina and May visited Turesky's office to discuss opening a commodity futures and options account. Pina credibly testified that he agreed to open a discretionary account when Turesky promised that he was so confident that Pina could make money that he would personally guarantee Pina against any losses. Pina told Turesky he would invest $10,000 and that if the trading was in fact profitable he would invest another $10,000.

Pina gave Turesky a check for $10,000 and signed various Vision account-opening documents, including a power of attorney that gave discretionary trading authority to the owner of Heritage West, John Christian Jensen, a customer

contract,[4] and a risk disclosure statement. Turesky also provided a Heritage West brochure which identified Jensen as the president of Heritage West, and gave two phone numbers for Jensen.

7. The first trade was the sale of a T-Bond call option on January 2, 1997. The call was bought back on January 9, 1997 for a modest $140 net profit. Turesky called May and reported that the first trade had been profitable. May told Pina that the first trade had been profitable and reminded Pina of his promise to invest more funds if the trading was profitable. Pina deposited another $10,000 on January 27, 1997.

On January 31, 1997, the account liquidating value was $21,215. At this time, May advised Pina to close the account since he was ahead. Pina agreed and told Turesky to close the account. However, Turesky did not close the account, and trading continued. After some time had passed and Pina had not received any money, he called Turesky's office several times, but was told each time that Turesky was unavailable. Pina called May and asked him to call Turesky. May testified that he called Turesky, who promised to call Pina and assured May "not to worry" in light of the guarantee against loss. Neither May nor Pina testified that May passed

[4] The account-opening package provided confusing information about the role of Vision. On one hand, paragraph 9 of the customer contract included standard language that Pina was obligated to notify Vision promptly of any problems with trades reported in the account statements. On the other hand, the account-opening documents did not mention Vision' status as guarantor of Heritage West, paragraph 23 of the customer contract contained an indemnification and hold-harmless clause, and page 8 of the account-opening package, titled "Introduced Accounts," stated among other things, that "Vision's role is limited to execution and bookkeeping for transactions for the account," and that Vision was totally independent from Heritage West with no duty to supervise Heritage West.

on Turesky's assurances about the guarantee to Pina. In any event, Turesky and Pina did not speak; and the trading continued, with trades executed on February 24, 25 and 26, March 4, 17 and 27, April 14, and May 27. The last trade would be liquidated on June 13, 1997. The account liquidation value was $17,976 on March 31, and $13,217 on May 31, 1997.

The testimony of Pina and May about events and conversations after late January and early February was vague and confused. Neither could recall even the approximate dates of their attempts to close the account. Pina did not produce any phone records to establish the dates of his subsequent efforts to contact Turesky and to close the account.[5]

8. As noted above, trading continued through March, April and May. Although Pina could not completely understand the account statements, he understood that the trading activity had not ceased, and that he had not received back any money. When asked why he did not take additional steps, such as calling Jensen, calling Vision, or making a written demand, Pina explained simply that he thought it would have been disrespectful to go over Turesky's head.

9. On or about May 23, 1997, Pina sent a letter to Vision that terminated Jensen's power of attorney. None of the witnesses could recall the circumstances around this letter. When all of the open positions had been liquidated, the account balance was $1,776, which was refunded to Pina.

[5] Pina does not assert, and has otherwise produced no evidence, that when he instructed the account be closed he was still relying on Turesky's guarantee against loss.

Conclusions

Pina has established that Turesky guaranteed him against losses during the account solicitation in violation of Sections 4b and 4c(b) of the Commodity Exchange Act and CFTC rules 1.56 and 33.10. Such guarantees are almost always fraudulent, especially where the customer is an unsophisticated, novice investor. *See Munnell v. Paine, Webber, Jackson & Curtis*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,313 (CFTC 1986); *Hall v. Paine, Webber, Jackson & Curtis*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,317 (CFTC 1986); and *O'Hey v. Drexel Burnham Lambert*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,754 (CFTC 1985). Such guarantees directly contradict the required disclosure that a customer might sustain a total loss of funds. In this connection, Turesky's assertion that Pina's claim is barred because he signed a risk disclosure statement is without merit because the Commission has "consistently" held that the effect of a written risk disclosure can be vitiated by oral misrepresentations and that such written disclosure cannot bar fraud claims. *O'Hey, supra. See Levine v. Refco*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,448 (CFTC 1989).

Pina also has established that Turesky fraudulently breached his fiduciary duty by disregarding Pina' instruction on or about January 31, 1997 to close the account, and then by appointing May as an agent to stall and confound Pina in violation of Sections 4b and 4c(b) of the Commodity Exchange Act and CFTC rule 33.10. However, Pina has not produced <u>any</u> evidence of guarantees or other lulling assurances by May to Pina, or by Turesky to Pina, after early February 1997. In

these circumstances, Pina's initial reliance on his trusted friend May to compel Turesky to comply with Pina's instruction may have been reasonable, but at some point it was no longer reasonable to rely solely on May when his efforts were obviously fruitless. Pina's initial reluctance to contact Vision was also reasonable since Vision had asserted that it was totally independent from Heritage West with no corresponding no duty to supervise. However, this did not justify Pina's failure to take other reasonable steps in March and April, such as delivering written instructions to Turesky by fax, express delivery service or mail, or contacting Jensen who obviously had some sort of authority as owner of Heritage West. Eventually, Pina realized that Vision was his last resort, and in late May sent the letter revoking Jensen's power of attorney.[6] It was at this point that he also should have informed Vision in writing that he wanted the account closed.

Therefore, where Pina has not shown reliance after January 31, 1997 on Turesky's initial guarantee, the proper measure of damages for the fraudulent guarantee during the solicitation and for the fraudulent failure to liquidate the account is $7,998, based on the difference between the $21,215 account liquidation value on January 31, 1997, when Pina first instructed Turesky to close the account, and the $13,217 liquidation value on May 31, 1997, when at the latest Pina should have informed Vision of his decision to close the account. The $7,998 damages, in turn, have been reduced by the $5,500 that Pina has received from

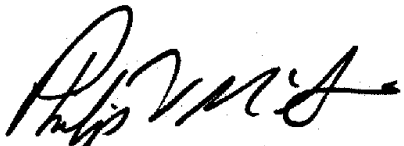
[6] Pina's testimony that he chose not to go over Turesky's head after Turesky had disregarded repeated instructions to close the account, coupled with the revocation of the power of attorney, supports the conclusion that Pina knew that he could take other steps to close the account, but chose not to do so.

Vision and Heritage West pursuant to the settlement agreements, leaving an award of $2,498.

ORDER

David Scott Turesky violated Sections 4b and 4c(b) of the Commodity Exchange Act and CFTC rules 1.56 and 33.10, proximately causing $2,498 in damages; and David Scott Turesky is ORDERED to pay to Luis Pina reparations of $2,498, plus interest on that amount at 6.197% compounded annually from January 31, 1997, to the date of payment, plus $125 in costs for the filing fee.

Dated March 7, 2000.



Philip V. McGuire,
Judgment Officer