



# U.S. COMMODITY FUTURES TRADING COMMISSION

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JOYCE POZNIKO,  
Complainant,

v.

LESLIE ANN BURTON, and  
MAN FINANCIAL, INCORPORATED,  
Respondents.

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\* CFTC Docket No. 04-R57  
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## INITIAL DECISION

### Introduction

Joyce Pozniko's primary allegation is that Leslie Ann Burton gave her bad trading advice by deviating from trade signals generated by a trading system purchased by Pozniko. In reply, Man Financial and Leslie Burton assert that Pozniko specifically approved each trade in her account, including the trades that deviated from the trading signals, assert that Burton's advice had a reasonable basis, and otherwise deny any violations. After the parties had submitted their documentary evidence, a telephonic hearing was scheduled. Unfortunately, about twenty minutes into her testimony, Pozniko stated that a chronic medical condition precluded her from further testifying. After the hearing was terminated, Pozniko stated that she was willing to waive the right to a hearing and to rest her case on her documentary evidence. After carefully reviewing the evidentiary record, it has been concluded that Pozniko has failed to establish by a preponderance of the evidence any violations by respondents.

## **Factual Findings**

1. Joyce Pozniko is a resident of South Carolina. When she opened her account with respondents, she was 51 years old. Pozniko has a bachelor's degree in fine arts. Pozniko had invested in securities for 15 years, and had traded securities options for five years, but had no previous experience trading commodity futures. Pozniko worked in car sales before becoming disabled. [See Pozniko's Man account application.]

According to Pozniko, she is quite frail and suffers from severe migraine headaches and Raynaud's Syndrome, which can easily be triggered by emotional stress. About twenty minutes into the hearing, in response to routine questions about her initial conversations with Burton, I noticed that Pozniko seemed distracted and unfocused. When asked if she needed to take a break, she stated that she had a migraine, could not think straight, and had to recline because her body was "shutting down." Eventually, she determined that she was too ill to go through with a hearing. After the hearing, Pozniko stated that she was willing to waive the right to a hearing and to rest her case on her documentary evidence.

2. At the relevant time, Man Financial, Incorporated was a registered futures commission merchant, located in Chicago, Illinois. Leslie Ann Burton was a registered associated person with Man. Burton acted as Pozniko's account executive. Ed Young, an associated person with Man, also assisted Burton and provided trading advice to Pozniko.

3. Gen Phn is a trading system marketed by Gen-Phn Productions, a third-party developer of trading software. Man never solicited referrals from Gen Phn or compensated Gen Phn for referrals.

Pozniko learned about Gen Phn from a "fancy" promotional postcard that she received in the mail. The post card featured hypothetical trading profits of over 400% in one year. Nothing

in the evidentiary record indicates that Pozniko ever told respondents about Gen-Phn's profit claims.

When asked to describe her initial conversations with George Cantero at Gen-Phn Productions, Pozniko did not so much describe what Cantero said about the performance and mechanics of the Gen Phn trading system as describe her resultant expectations:

My understanding of the Gen Phn system was to eliminate most, if not all, of the guesswork out of losing money in each trade. Cantero reassured me of the precise mathematical accuracy of entering and exiting trades. Gen Phn was to generate the greatest accuracy in successful trading. The expense of Gen Phn's system seemed to point in that direction.

[Paragraph 3 of Pozniko's prehearing affidavit.] Cantero gave Pozniko a list of firms, including Man, which would accept Gen-Phn trade signals. After talking to Cantero, Pozniko sent \$1,000 to Gen-Phn to use their system for one month, and decided to open a account with Man.

4. Pozniko then called Man and spoke to Burton. Pozniko asserts that Burton told her that she was familiar with the Gen-Phn system, and had used it as the basis for trading strategies. However, this assertion is at odds with Pozniko's assertion that shortly afterwards, when trading began, Pozniko told her that "she did not think much of the validity of the Gen Phn system."

[Compare paragraphs 2 and 7 of Pozniko's pre-hearing affidavit.] In contrast, Burton asserts that the initial conversation focused on the letter of direction which would authorize Man to place trades for the account pursuant to signals generated by the Gen-Phn system. [See paragraphs 2 and 3 of Burton's pre-hearing affidavit.]

5. Pozniko reviewed and signed various account-opening documents, including: a customer agreement, a Letter of Agreement; and an Additional Disclosure for New Accounts. The Letter of Agreement granted Man "a limited power of attorney . . . for the sole purpose of entering orders in accordance with the [Gen-Phn] signals," which could be "modified, from time

to time,” and provided that Man promised to use “commercially reasonable efforts to enter orders pursuant to signals.” The Letter of Agreement also included an acknowledgment that Man had not solicited or recommended the Gen-Phn system, and that “Man cannot and does not imply that [Pozniko] will make a profit from trading the system.” The Additional Disclosure included a warning that “Man does not and cannot endorse or vouch for the accuracy, completeness, or validity of . . . any trading advice customer may have received or may receive in the future from any person not employed by Man.”

6. Pozniko maintained her account with respondents for about two months. She deposited \$12,000. When she transferred her account, the liquidating value was \$6,289. Thus, her out-of-pocket losses with respondents totaled \$5,711.

7. A total of 22 trades were made in Pozniko’s account with respondents. Phone records show about three hundred phone calls between Pozniko and Man, with at least one call, and sometimes multiple calls, on the date of each buy and sell.

8. In addition to consulting Burton, and her assistant Ed Young, during the life of her account with respondents, Pozniko received advice from at least two other individuals: Cantero and a Mr. Guerraro at another firm, to which she would transfer her account. Based on Pozniko’s assertions, it appears that Cantero was critical of Burton’s trading expertise, and that Guerraro was critical of Burton’s, and Cantero’s, trading expertise.

Typically, Pozniko would call Burton, who would read her the Gen-Phn trading signals for that day. They then would discuss how many contracts to trade, and whether to place the trade “as is,” or to tweak the trade with a different entry price, stop-loss price, or profit objective. Pozniko also asked Burton to monitor open trades, and call her if she thought a stop order or profit target should be modified. Out of these conversations, Pozniko approved twelve trades for

which Burton had “tweaked” the entry and exit points. Pozniko also approved ten trades that were based on information that Pozniko had received from a third source, or as the result of a request to Burton for a trade recommendation based on Man’s research. [See ¶¶ 5-17 of Pozniko’s pre-hearing affidavit, and ¶¶ 4-16 of Burton’s pre-hearing affidavit.]

Respondents produced a summary of the tweaked trades, which showed that Burton’s tweaked trades collectively realized about \$6,401 in losses, compared to a modest \$125 aggregate profit for trades based on the Gen-Phn entry and exit points. For eight of these trades, the Burton trades had worse results than the Gen-Phn trades, three had better results, and one had an identical result. [Appendix B to Burton’s pre-hearing affidavit.]

9. On one occasion, Burton thought that the market was temporarily over-bought and due for a correction, and called Pozniko to recommend an early exit. Unfortunately, Pozniko had gone to Walmart to buy a bag of potting soil. By the time she got home and called Burton, the market had corrected and she had missed a profit opportunity. Burton replied “That’s an expensive bag of dirt.” Pozniko angrily replied that she wished that Burton had acted without consulting her. Burton explained that she could not have done that because the Letter of Direction did not authorize her to deviate from Gen-Phn entry and exit signals without Pozniko’s specific authorization

10. After about two months, Pozniko became “very upset and distressed” by her trading losses and “unsatisfied” with the handling of her account, and instructed that the account be transferred to a different firm. [See ¶ 18 of Pozniko’s pre-hearing affidavit.]

## CONCLUSIONS

In order to recover damages, Joyce Pozniko must establish by a preponderance of the evidence that respondents committed a violation and that the violation proximately caused

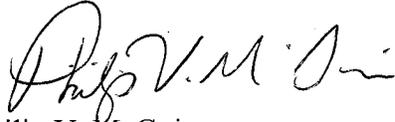
monetary damages. Unfortunately for Pozniko, when she waived the opportunity to offer oral testimony, she missed her last opportunity to elaborate on her written testimony, to explain various gaps and inconsistencies, and various vague or implausible assertions, in her written testimony, and to produce credible testimony on crucial disputed factual matters. As a result, she has failed to produce sufficiently reliable and convincing evidence to sustain any of her allegations.

As to Pozniko's principal allegation that Burton violated her fiduciary duty when she "tweaked" the trade signals, Pozniko must establish that Burton's advice lacked a "reasonable basis," which involves matters of degree in judgment that rarely lend themselves to clear-cut answers. A recommendation has a reasonable basis when the commodity professional has considered those relevant factors that were reasonably ascertainable in the context of the recommendation and has exercised rational judgment in light of those factors. The recommendation need not be unassailable or even the most preferable of acceptable alternatives. Here, Pozniko's claim is based on no more than the mere fact that Burton's trading advice was not profitable, as Pozniko had hoped. This assertion, by itself, neither establishes that Burton's advice lacked a reasonable basis, nor shifts the burden to Burton to produce a detailed justification for each trade. *See Syndicate Systems, Inc. v. Merrill Lynch*, Comm. Fut. 1. Rep. ¶ 23,289, at 32,788 (CFTC 1986).

**ORDER**

Joyce Pozniko has failed to establish any violations by Leslie Ann Burton and Man Financial, Incorporated. Accordingly, the complaint in this matter is dismissed.

Dated November 30, 2007.

A handwritten signature in black ink, appearing to read "Philip V. McGuire". The signature is written in a cursive style with a large initial "P" and "M".

Philip V. McGuire,  
Judgment Officer