U.S. COMMODITY FUTURES TRADING COMMISSION



Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

OFFICE OF PROCEEDINGS

CAROLYN LEE RICE, Complainant,

v.

CFTC Docket No. 95-R145

FUTURES TRADING GROUP, INC., and GREGG SCOTT HAVASS,
Respondents.

INITIAL DECISION

Appearances: Caryln Rice, pro se

Ken Berg, Esq., for respondents

Before: Philip V. McGuire, Judgment Officer

Carolyn Lee Rice seeks to recover \$7,399 that she lost on a silver options trade. According to commissions she paid and the advice she received. According to Rice: respondents failed to disclose the amount of the commissions on the silver trade; respondents charged excessive commissions on the silver trade; Gregg Havass first "lured" her into buying, and then lulled her into holding, the silver options by assuring her that she would likely "walk away" with \$13,000;

^{1/} The complaint consists of a factual description to the initial complaint; exhibits to the initial complaint, including a CFTC Division of Enforcement questionnaire completed and signed on August 28, 1995, by Rice ("CFTC questionnaire"); and an unsworn affidavit served on November 3, 1995 as an addendum to the complaint ("addendum to the complaint").

and Havass gave recommendations to purchase, and then to hold, the silver options without a reasonable basis. 2 / Respondents deny any violations.

The findings and conclusions below are based on the parties' oral testimony and documentary submissions, and reflect my determination Havass's testimony was more reliable than Rice's testimony, which was often confused or inconsistent. 4/
Unless otherwise noted, amounts are rounded to the nearest dollar and dates are in 1995.

The Parties

1. Rice has a bachelor's degree in nutrition and food management from Ohio State University. During the relevant time, Rice had licenses to sell insurance and real estate, and was self-employed as the owner of the Carolyn Rice Vending Company which serviced 135 Mintomatic machines. Rice had no previous experience with futures or options, or similar risky derivatives, and her investment experience was limited to a mutual fund and an investment in Servicemaster stock. [Rice's reply to respondents' interrogatory 4; account application (exhibit 1 to joint answer); and Rice's resume (reply to respondents' document requests).]

 $^{2^{\}prime}$ See pages 1-3 of the factual description in the initial complaint; ¶ 8 of CFTC questionnaire (exhibit to complaint); addendum to complaint; and Rice's reply to respondents' interrogatories 18 and 20.

^{3/} See, e.g., pages 73-77 of hearing transcript.

 $[\]frac{4}{}$ Compare Rice's testimony at pages 61-62 and pages 73-77.

According to Rice, she had been under medical care for emotional depression before her first contact with respondents, and was still suffering from depression during her dealings with respondents. However, Rice never told respondents that she was suffering from depression or taking any medication that could affect her judgment. [See pages 35-36, 39-42, and 84-87 of hearing transcript; and Rice's affidavit dated May 16, 1996.]

2. Futures Trading Group, Incorporated ("FTG") is a registered introducing broker that cleared its customer trades through Vision Limited Partnership. Gregg Scott Havass is a registered associated person with FTG.

The Parties' Records of Telephone Conversations

- 3. Over the life of the account, Rice typically spoke to Havass at least three times each week. [Rice's reply to respondents' interrogatory 14; and pages 42, 56-57 of hearing transcript.] In this connection, Havass maintained an option client card in which Havass made entries briefly summarizing his conversations with Rice. [Respondents' discovery production served April 12, 1996; see page 18 of hearing transcript.]
- 4. Respondents produced recordings of conversations between Rice and "Denise" of the FTG compliance department on the following dates: February 22 (account-opening compliance review and authorization to buy gasoline options); April 20 (authorization to sell gasoline options); May 12 (authorization to buy silver options); and July 5 (authorization to sell silver options).

Respondents also produced recordings of conversations between Rice and Havass and Havass' supervisor Les Sobel on the following dates: June 27 (three conversations with Sobel, and one conversation with Havass); June 28 (two conversations with Havass); June 30 (one conversation with Havass); and July 5 (one conversation each with Havass and Sobel). Respondents began recording conversations with Rice on June 27 after she had begun angrily protesting respondents commissions and trading advice on June 26. Respondents told Rice that they were recording the four conversations with Denise, but did not initially tell her that they were recording the conversations with Havass and Sobel. [See pages 62-65 of hearing transcript.] However, Rice's statement -- "He [Havass] admitted it [promising great profits by mid-July] in his tape [of a conversation on June 28]." -- at the end of the July 5 conversation with Sobel indicates that she was aware by that date that her conversations were being recorded. [Respondents' discovery production served April 12, 1996; ¶ 20 of Customer Contract (customer consent to tape-recording of conversations), Exhibit A to Answer.]

The Account Opening and the First Trade

- 5. In early 1994, Rice heard an FTG commercial on the Sonny Bloch radio show, and called a toll-free number. [Rice's reply to respondents' interrogatory 5.] Havass returned her call and told her that he would be sending an account-opening package.
- 6. The account-opening package included a Vision customer application and customer contract, a standard combined futures

and options risk disclosure statement, a small FTG brochure, and an FTG "Notification of Fees and Costs." [Exhibit 1 to joint answer.] On February 18, Rice would sign or initial the customer contract and the various disclosures. [See Rice's testimony at pages 39-42 of hearing transcript.]

The first sentence of the options risk disclosure statement
--signed by Rice -- stated: "Transactions in options carry a
high degree of risk." Rice also initialed a separate
acknowledgement that she was entering an investment that is
"speculative, involve[s] a high degree of risk, and [is] suitable
only for persons who can afford to lose all funds invested."
The FTG brochure explained that its purpose was to provide a
"brief overview of the products that [FTG] offers," and clearly
stated that "each product . . . is highly speculative and has
different levels of risk and reward." [Compare Rice's reply to
respondents' interrogatories 5 and 6 (claiming that the Vision
agreement did not disclose risk) and Rice's reply to respondents'
interrogatory 11 (claiming that respondents did not disclose
speculative nature of investment).]

The FTG "Notification of Fees and Charges" -- signed by Rice -- clearly disclosed FTG's sliding commission scale. The notification stated that for options FTG charged per "round-turn" a \$200 commission for premiums of "\$850 or greater," and a \$150 commission for premiums of \$650 or greater." [Exhibit

⁵/ The rate charged for the first trade.

 $[\]frac{6}{}$ The rate charged for the second trade.

- 2 to joint answer.] [Compare Rice's reply to respondents' interrogatory 7 (claiming that the "commission structure was never made clear to me"), Rice's reply to respondents' interrogatory 28 (claiming that "I never understood the commission structure and still don't."), and Rice's testimony at pages 67 of hearing transcript.]
- 7. Both sides produced sketchy descriptions of the account solicitation. According to Rice, Havass represented that he would provide "advice, guidance and expert information as needed, including articles . . . to assist me in managing my account.

 [¶1 of affidavit filed August 20, 1996; see also Rice's replies to respondents' interrogatories 5 and 6.] According to Havass, he represented that FTG provided "continual market analysis through various research services . . . , trading recommendations, constant monitoring of her account, and toll-free telephone service to permit frequent contact with her account executive." Havass also asserts that he fairly and adequately explained that the significant profit potential of options was accompanied by a commensurate high degree of risk, and that he explained FTG's sliding commission structure. [¶9 of affidavit filed August 15, 1996.]
- 8. On February 22, 1995, Rice deposited \$9,000, and accepted Havass' recommendation to purchase eight July unleaded gasoline call options.

Rice next spoke to "Denise," an FTG compliance department employee, who conducted an account-opening compliance review.

Denise confirmed that she had reviewed and signed the various account forms and risk disclosures. Denise then confirmed Rice's order:

DENISE: Pursuant to your instructions for account 60124, you're going to buy eight July 60 unleaded gas calls --

RICE: Uh-huh.

DENISE: -- at 210 or better to open. That is a day order. Premium on those are 882 times the 8 positions: is \$7,056. Your commission is 200 times the 8 positions: \$1,600. Total, premium plus commission, is \$8,658.

• • • •

DENISE: You have a 14-cent NFA fee, transaction clearing and brokerage-related fees. Those are charged at a rate of approximately \$11.00 per transaction. Do you understand those fees?

RICE: Yes, yes.

[Emphasis added, side 1 of Tape 1, respondents' discovery production served April 12, 1996; compare Rice's reply to respondents' interrogatory 7 (FTG's commission structure was "never reviewed with me in detail."); Rice's reply to respondents' interrogatory 28 (claiming that "I never understood the commission structure and still don't"); and Rice's testimony at pages 67 of hearing transcript.]

The order was filled at 2.10. Thus Rice paid the exact amounts estimated by Denise: \$7,056 in premiums, \$1,600 in commissions, and \$89 in fees, for a total purchase cost of \$8,650. Rice had no difficulty understanding the confirmation statement for this transaction. [Pages 43-44 of hearing transcript.]

- 9. On April 20, 1995, Rice decided to sell the gasoline calls because she needed the money for her vending business. The order was filled at 3 points; and Rice collected \$10,080 in premiums and paid an additional \$89 in fees, realizing a net profit of \$1,296. Although, the FTG account statements did not report the net profit, the record establishes that Rice was quite aware of her net profit on gasoline trade. [See first July 5 conversation, side 1 of tape 2.] On April 21, 1995, Vision sent to Rice a check for the \$10,247 account balance.
- 10. Also on April 20, Havass suggested that Rice consider speculating in the silver market. Rice's description of this conversation was sketchy at best. Rice claimed in her written submissions that Havass assured her that she would make a "big return" and "would make a nice return." [Pages 1-2 of factual description of complaint; and Rice's replies to respondents interrogatories 5 and 6.] Rice could provide no additional detail about Havass's specific representations, other than to claim that he assured her that the silver trade promised to be "lucrative," which she subsequently recanted. [Rice's testimony at pages 45-51 of hearing transcript; see Havass' testimony at pages 28-30 of hearing transcript.]

Havass sent Rice a package of written materials about the silver market. The package included: (1) a "Special Report on Silver and Gold," dated October 3, 1995 and prepared for FTG, that presented a long-term fundamental outlook on the silver market through 1995; (2) Wall Street Journal articles dated

December 21, 1994 and May 5, 1995 (quoting bullish and bearish views on the market); and a December 1994 Barron's article. Rice admitted that "to an extent," these materials supported FTG's bullish stance on silver in May 1995. [Rice's reply to respondents' request for admission number 8.]

11. On May 12, 1995, Rice authorized the purchase of nine silver call options. Denise of the FTG compliance department confirmed Rice's order, estimated the premium to be paid (based on a fill at 16.5 cents), and clearly informed Rice that she would be paying \$1,350 in commissions to buy the nine options:

DENISE: Today's date is May 12, 1995. The time is 1:47 p.m. Pursuant to your instructions for account 60124, you want to buy 9 September \$6.00 silver calls, at 16-1/2 or better, to open day order. The premium on those are \$825 times the 9 positions: \$7,425.

Commission is \$150 times the 9 positions: \$1,350.

Total, premium plus commission, is \$8,775. And they expire on August 11th with a break-even of 19 and 1/2.

Do I have your permission to place that order?

MS. RICE: Uh-huh.

[Emphasis added, side 1 of Tape 1, respondents' discovery production served April 12, 1996; compare Rice's reply to respondents' interrogatory 7 (FTG's commission structure was "never reviewed with me in detail").]

The order was filled at 16.00 points. Rice paid \$7,200 in premiums, \$1,350 in commissions, and \$99.63 in fees, for a total of \$8,649.63.

The confirmation statement reported the \$1,350 commission charge in a somewhat confusing manner: first reporting an \$1,800 commission debit in the upper "confirmation" section of the

statement, and then reporting a \$450 commission credit adjustment in the lower "account balance" section of the statement.

[Exhibit to complaint.]

Upon receipt of the confirmation statement on or about May 15, 1995, Rice initially misread the account statement and incorrectly believed that she had been charged \$1,800 in commissions. She immediately called Havass who confirmed that she had only been charged \$1,350, and that she should be receiving an account statement showing the adjustment. (Apparently, Havass was not aware that the adjustment had already been reported in the May 12 confirmation statement.) testified that she had mistakenly believed that the adjustment had not been reported until the monthly account statement was issued on May 31, 1995, but that, in any event, she understood upon receipt in early June of the May monthly account statement that she had been charged only \$1,350 in commissions. [See Rice's testimony at pages 51-54 of hearing transcript.] However, just three weeks later Rice would forget respondents' written and oral explanations that she had actually been charged \$1,350 in commissions, and would vehemently complain that she had been charged \$1,800 in commissions. See finding 15 below.

On May 17, 1995, Rice deposited \$8,650 to cover the cost of the nine premiums.

12. The silver calls traded at or above the 20.5-cent break-even price on May 15, 16, 17, 18, 19 and 25, hitting a high

of 24.5 points on May 25.7/ After May 25, the silver calls steadily declined. Rice and Havass spoke regularly during May and June. Havass discussed the possibility of selling for a small profit, but informed Rice that FTG was advising its customers to hold the silver contracts into July, based in part on early signs of inflation. Rice became increasingly concerned about the decreasing value of her options, but decided to accept Havass' advice to hold.

- 13. On or about June 26, Rice spoke to a broker at Merrill Lynch, who told her that Merrill was bearish on silver and opined that FTG's charged "excessive" commissions.
- 14. Rice then called Havass. Havass informed her that the silver options were trading at 6.5 cents, for a liquidation value of \$3,725. Rice complained about the commissions 4 and about Havass' advice. Havass explained to Rice that he had been advising her to hold rather than to sell because FTG expected the silver market to go up in reaction to expected action by the Federal Reserve in early July. Havass mentioned that Rice's September silver options could potentially go to over 28 cents, which would translate into a \$13,000 premium. [Rice's testimony

 $[\]frac{7}{}$ If Rice had sold the nine silver calls at 24.5 points, she would have collected a \$11,025 premium and realized a net profit of \$1,275.

^{8/} In sharp contrast to Rice's written submissions that consistently characterize FTG's commissions as excessive compared to Merrill Lynch's commissions, Rice testified that she considered the \$1,800 commission she mistakenly thought she had been charged to be excessive, but that she considered the \$1,350 she was actually charged to be "adequate." Page 67 of hearing transcript.

at pages 61-62, and Havass' testimony at pages 28-31, and 33 of hearing transcript.]

The documentary evidence supports the conclusion that this June 26 conversation was the first time that Havass specifically mentioned the possibility of collecting a \$13,000 premium. significantly, statements by Rice closer to the events in question point to the unrecorded conversation on June 26 as the date of this statement. [See \P 8 of CFTC questionnaire, signed by Rice on August 28 ("His statement one week before I liquidated [the order placed on Wednesday July 5 and filled on Friday July 7] was if I stayed in another week I'd walk away with \$13,000."), and finding 18 below.] This evidence also undermines Rice's later assertion that Havass had virtually guaranteed a \$13,000 premium every time that they spoke from April 20 to June 26. [See ¶ 4 of Rice's affidavit dated August 20, 1996.] In addition, Rice's assertion that she held the silver positions because Havass repeatedly guaranteed a \$13,000 premium in mid-July cannot be squared with her allegation that on May 24 she would have "folded" -- and collected a much smaller premium of between \$7,425 and \$10,350 (based on the 16.5 cent low and 23 cent high) -- if Havass had not purportedly failed to tell her that the market had bounced up a little. [Pages 54-55 of hearing transcript.]

15. On June 27, Rice spoke to Sobel, and resumed her protest about the commissions:

RICE: I paid \$1,800 in commissions. I've run that by a couple of people. They said that's excessive.

SOBEL: Okay.

RICE: I'm questioning it.

SOBEL: Well --

RICE: There were two people that said that. Merrill Lynch just said it should have been \$270.

SOBEL: Well, let me just say this to you, Carolyn, is that many different brokerage houses have different --

RICE: \$1,800, sir?

SOBEL: Uh-huh.

RICE: On an \$8,600 trade?

SOBEL: Yep.

RICE: It's excessive. It's excessive. It's not

right. It wasn't that much the first time.

SOBEL: Well, you may not have done nine trades.

RICE: It was a high number of trades. That's an excessive amount of commission. I've talked to two different people who sell on the Wall Street market and that is an excessive amount of commission. I want to know why I was charged that.

SOBEL: Because that is our going commission.

RICE: Pardon me?

SOBEL: That is the commission that is charged.

RICE: Everyone's telling me it's excessive. I just spoke with Merrill Lynch.

SOBEL: Well, I understand. Merrill Lynch can charge what they want to charge, and other companies charge --

RICE: Well, I wasn't advised I was going to be charged \$1,800 when I did the trade.

SOBEL: No, I beg to differ. On the disclosure for every single trade, the commission is disclosed to you prior to the trade going into the market.

RICE: No, it was not told to me I was going to pay \$1,800.

SOBEL: Well, we, I know that our compliance people, when they talk to you that they go through the amount of the premium, the amount of the commission, the amount of the fees.

RICE: No, no. The amount of the commission was not told me.

SOBEL: Okay, what I can do in this, Carolyn, is I can, I can pull the tape up on that.

RICE: Yeah, pull it.

SOBEL: I can listen to it and if you'd like I can play it back for you.

[continued argument over size and disclosure of commissions is deleted.]

RICE: <u>Because Merrill Lynch is saying he would have</u> [charged] 270 [dollars] on this trade for 9 options.

SOBEL: Well, that's what Merrill Lynch charges. You know, Merrill Lynch --

RICE: \$1,800 is a lot different from 270.

SOBEL: I understand that.

RICE: Please pull it and advise me because I'm not going to trade with you anymore. It's not, it's excessive. It's not fair. It's not right.

SOBEL: Again, let me just say this to you also, Carolyn. In the disclosure documents that you --

RICE: What disclosure documents? I don't have any.

SOBEL: When you opened up your account.

RICE: Yeah.

[conversation where Rice confirms that she various account-opening documents is deleted.]

SOBEL: You also signed a commission fee schedule.

RICE: Uh-huh.

SOBEL: On that commission fee schedule, the commissions were broken out for you as to how much commission was being charged per option.

RICE: You said it had to be in the tape, two minutes ago. Now you're saying --

SOBEL: I'm saying it's in both places.

RICE: It was not \$1,800. It was not, it was buried by the amount of the trade. And a bigger trade like this, it should have been less.

SOBEL: The commission varies by the amount of the option.

RICE: Why don't you find out what's on the tape and why don't we find out where silver is today so I can get out and not do business with you anymore?

According to Rice's testimony, she had forgotten about the commission adjustment, although it had recently been explained by Havass and reported in the May monthly account statement. [Pages 66-67 of hearing transcript.]

Sobel then transferred Rice to Havass. Rice first, complained that FTG's commissions were "excessive" and "outlandish"; second, asked: "I want to know where it was disclosed to me I would pay \$1,800 in commissions on this trade?"; and third, complained about Havass' trading advice. In response to Rice's protest about the commissions, Havass explained that she had been charged \$1,350, and that the adjustment had in fact been reported to her:

HAVASS: It appears you got filled at 16 cents on the options. Your fee was \$150.

RICE: Yeah.

HAVASS: And that translates to \$1,350, not \$1,800.

RICE: It was \$1,800 on the paper I got. On the paper I received in the mail it was \$1,800.

HAVASS: Okay, and then they put a commission adjustment right below it and that brings you down to

\$1,350.

RICE: The paper I got said \$1,800. I don't know.

HAVASS: Uh-huh. Well, you fax me over a copy of that.

RICE: I don't have, I have to find it. I don't where it's at.

Havass also attempted to explain the basis for his advice to buy and to hold the silver options:

RICE: And they also said silver's not going to do a damned thing, the guy at Merrill Lynch.

HAVASS: Well, I guess everyone has their opinion.

RICE: Yeah.

RICE: Where's silver at today?

HAVASS: September silver's trading right now at 537 on the day.

RICE: So, what would I come out with? What kind of money would I come out with?

HAVASS: What do you mean?

RICE: If I liquidated today, what would I come out with?

HAVASS: If you liquidated today? If you got filled at six points on the option, that's \$300 an option. . . so it would . . . around \$2,600.

RICE: Unbelievable. That's unbelievable. And he said he doesn't think it's going to do anything.

HAVASS: Well, I tell you want. Let me give you the news that I have from our analysts and you make up your own mind But if you want to sell the positions out --

RICE: Not at \$2,600, no.

Havass explained that FTG was relying on bullish reports by

Robert Prechter and David Hightower -- whom he represented as

"not right on every trade," but "as accurate as I've seen over

the last few years in people's projections on these metals" -- as

well as other inflationary expectations. Havass concluded that

"If the market itself is going to move, and move sharply higher,

it's going to give you the opportunity to pick up some good money
on your options," and also suggested that Rice transfer her

account if she thought that Merrill Lynch "would have [her]

interest that much better at heart." Rice declined because she

thought that her current unrealized loss was too great, and hung

up on Havass.

Sobel called Rice later that day. Rice repeated her complaints that FTG's commissions were excessive compared to Merrill Lynch's commissions and that respondents had not disclosed the amount of the commissions. Rice also claimed for the first time that "[Havass is] telling me [that] during the middle of July, I'm going to be making \$13,000 -- I'll be walking away with \$3,500," which, Rice complained, was contradicted by Merrill Lynch's advice. Sobel replied that "Merrill Lynch was entitled to their opinion," strongly suggested that she take her business to Merrill Lynch if she preferred their advice, expressed doubt that Havass had guaranteed a \$13,000 premium, and repeated his offer to play the tape-recording of Denise's disclosures about the commissions. [See Rice's testimony at pages 70-73 of hearing transcript.]

Later that day, Sobel left a message on Rice's answering machine that he was ready to play the FTG compliance tapes.

16. When Rice and Sobel next spoke, on June 28, Rice appeared to drop her complaint about the commissions, but continued to complain about Havass' advice:

RICE: Yes. Even if you have a tape, how does that clear you from telling me advice to stay in the market until the middle of July? It's very risky and it's bullshit. It's bullshit for Greg to be telling me to stay in the market until July, the middle of July and I'm going to come out with \$13,000.

SOBEL: Carolyn --

RICE: There's no absolute facts to back it up at all and send them in the mail. I want to see them. [hangs up.]

Later that day, Rice and Havass spoke. Havass said that FTG continued to be bullish on the September options, and Rice said that she had not yet decided whether to hold or sell the options or whether to stay with FTG or go to Merrill Lynch. [See pages 78-79, 90-91, and 95-97 of hearing transcript.]

At the end of the day on June 28, Sobel sent a letter to Rice in which he again strongly suggested, in light of her apparent preference for Merrill Lynch's market opinion, that she either sell the options to mitigate her losses or transfer her account with the silver position to Merrill Lynch.

- 17. On June 30, Rice told Havass that she was holding the options because she believed that they would "go up some before" expiration. [See Rice testimony at page 80 of hearing transcript.]
 - 18. Rice and respondents next spoke on July 5, when she had

received Sobel's letter and advice from Merrill Lynch to sell.

[Rice's reply to respondent's interrogatory 22.] That day, after Havass told her that the options had declined further, Rice complained variously that:

[Why did you tell me] a week ago [apparently on June 26 and 27] to sit tight and possibly come out with a big gain the middle of July?;

<u>Last week</u> I was encouraged by you that I would probably make a profit of \$4,000 if I stayed in.

A week ago, you told me to sit tight, by the middle of July things should be improved.

Havass told me that I would make a bundle of money by the middle of July.

[Sides 1 and 2, Tape 2.]

Rice finally decided to sell the nine silver puts. Rice collected \$1,350 in premiums and paid an additional \$100 in fees, and a net loss of \$7,400,

- 19. On July 10, 1995, Vision sent to Rice a check for the \$1,250 account balance.
- 20. Rice realized an aggregate net loss of \$8,153, based on the difference between \$17,650 in total deposits (\$9,000 on February 20, and \$8,650 on May 17) and \$11,497 in total refunds (\$10,247 on April 21, and \$1,250 on July 10).

Conclusions

Rice has failed to establish by a preponderance of the evidence any of the alleged violations by respondents. As to Rice's complaint about the commissions, the evidence overwhelmingly contradicts her assertion that respondents did not

disclose the amount of the commissions. Rice received and read FTG's written disclosure about its commission structure; received from the FTG compliance department a clear and accurate disclosure of her commission costs before each of her trades; received confirmation and monthly account statements that separately and accurately reported the commission charges and had no problem understanding the statements reporting the costs of the unleaded gasoline trade. When Rice was initially confused by the statement confirming the silver purchase, Havass promptly explained that she had paid \$1,350, rather than \$1,800, in commissions. Moreover, in late June when Havass again explained that she had paid \$1,350, rather than \$1,800, in commissions, and when Sobel offered to play the tape-recordings of her conversations with the FTG compliance department, Rice appeared to be dropping the matter of respondents' commission disclosures.

As to Rice's allegation that respondents' commissions were "excessive," the Commission consistently has refused to find that a high level of commissions can be considered fraudulent (in the absence of churning) so long as the commission structure has been fairly disclosed and the customer knowingly agrees to it.

Johnson v. Fleck, [1990-1992 Transfer Binder] Comm. Fut. L Rep.
¶ 24,957, footnote 5 at pages 37,498-37,499 (CFTC November 20, 1990). Therefore, Rice's claim on this theory must fail.

Havass' recommendations to buy and to hold the silver options proved to be unprofitable for Rice. However, the Commission will not award reparations merely because the trading

strategy chosen by a broker turns out unsuccessful, or because other available strategies would have been profitable, absent evidence of bad faith. Vetrono v. Manglapus, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,702 (CFTC 1985). This is based on a policy not to second-guess trading decisions so long as they are made with a reasonable basis. Here, that the trade proved unprofitable, that Merrill Lynch was bearish rather than bullish on silver, or that Rice could have minimized her losses by selling earlier, does not establish that Havass' advice was made in bad faith or lacked a reasonable basis.

Rice has not produced, or pointed to, any evidence that respondents knew, or should have known, of Rice's depression, or took advantage of it. Without any knowledge of Rice's depression, or reason to discover it, respondents were under no heightened duty to protect Rice, and thus cannot be held liable if her depression adversely affected her capacity to make investment decisions. See Phacelli v. ContiCommodity Services, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,250 at 32,672-75 (CFTC 1986); and Fermin v. First Commodity Corporation of Boston, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,905 (CFTC 1987), aff'd, 858 F.2d 774 (D.C. Cir. 1988).

Finally, Rice failed to produce reliable testimony or reliable documentation in support of her allegation that from April 20 to June 26 Havass regularly guaranteed that she would collect a \$13,000 premium in mid-July. Therefore, that

allegation too must fail.

ORDER

No alleged violations causing damages having been established by a preponderance of the evidence, the complaint is DISMISSED.

Dated April 24, 1997.

Philip W. McGuire, Judgment Officer