



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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

OFFICE OF  
PROCEEDINGS

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JAMES E. WARD,  
Complainant,

v.

AMERICAN NATIONAL  
TRADING CORPORATION, and  
WARREN ANDREW WILSON,  
Respondents.

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CFTC Docket No. 97-R6  
Judgment Officer McGuire

OFFICE OF PROCEEDINGS  
MAR 25 12 17 PM '98  
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**INITIAL DECISION**

This dispute centers on the commissions paid and the services rendered in exchange for payment of those commissions. Specifically, Ward claims that respondents churned his non-discretionary options account for \$23,045 in commissions and fees, and that respondents failed to contact him or to provide adequate advice when his account liquidating value declined about \$24,000 between May 8 and June 5, 1996. Respondents deny any violations.

The findings and conclusions below are based on the parties' documentary submissions and oral testimony, and reflect my determination that respondents' testimony on crucial points, especially concerning the issue of control over trading activity in the account, tended to be more credible and better substantiated by reliable documentary evidence. Unless otherwise stated, dates are in 1996, and amounts are rounded to the nearest dollar.

## FINDINGS OF FACT

### *The parties*

1. James Ward, a resident of San Leandro, California with bachelor's and master's degrees in engineering, is a majority owner of an engineering firm with personal net worth over a million dollars. Ward indicated on his account-opening documents that he could commit up to \$100,000 in speculative capital. Ward had no previous commodities experience, and had limited experience with stocks. [Account application attached as exhibit to Answer; Ward's reply to respondents' interrogatory 9; and pages 8-10 of hearing transcript.]

2. American National Trading Corporation ("ANTC") is a futures commission merchant in Century City, California. Warren Wilson, a registered associated person with ANTC, solicited Ward's account and acted as his account executive. Wilson was compensated by a 40% share of commissions and execution fees charged to Ward's account. [Respondents' submission served November 14, 1997; page 118-119 of hearing transcript.]

### *Commission Disclosures*

3. On December 13, Wilson cold-called Ward. Wilson and Ward would speak again on January 8 and 10 before Ward decided to open an account with ANTC. Ward and Wilson both testified that they could remember little of these conversations. However, both agreed that Wilson informed Ward that ANTC charged a 35% commission, that Ward told Wilson that he "was willing to take a chance and trust [Wilson's] experience," and that Wilson and Ward did not discuss

any strategies to limit any losses. [See Ward's testimony at pages 10-15, and Wilson's testimony at pages 118-121 and 129 of hearing transcript; see also Glenn Ford's testimony at pages 133-135, 146-148, and 156-157 of hearing transcript.] Ward also acknowledged that he understood the risky nature of trading options. [Paragraph 7 of complaint.]

4. On January 10, 1996, Ward forwarded a check for \$7,500, after reviewing and signing the account-opening documents, including the customer contract, and the risk disclosure statements. These documents also included a commission disclosure statement that set out ANTC's commission structure:

[ANTC] advises option customers that commissions and other charges may vary widely among introducing brokers and futures commission merchants and consulting more than one firm before opening an account may be advisable.

I understand and agree that [ANTC] will charge a commission of (35%) of the option premium plus \$155.00 for the initiation of each option position, \$155.00 for the close out or exercise of each option, and 14 cents [NFA] fee for each option/s traded.

[Emphasis added, attachment to answer.]

5. On January 11, ANTC's new account department conducted a brief account-opening review, which covered the commissions:

ANTC: Okay. Then, about our fees and commissions. When you purchase an option through America National Trading Corporation, your commission will be 35 percent of the cost of the option premium, plus a charge of \$155 per option. When you close out your option, your charge will be \$155 only. Is that clear?

Ward: Yes.

[Emphasis added, attachment to answer.] Ward testified that he did not question or comment on the heavy commission structure because

he had assumed that it was typical among other firms.<sup>1/</sup> Ward also testified that he understood that the commission costs had to be overcome to realize any profit. [Pages 15-16 of hearing transcript.]

6. Before the first option purchase on January 12, the ANTC verification desk confirmed Ward's authorization to place an order, and reviewed matters such as the contract description and the number of contracts, but did not discuss matters such as the cost, the premiums, the commissions and fees, the break-even point, or the expiration date. Ward and Wilson both testified that for this option purchase, and all each subsequent option purchase, Wilson told Ward the total cost, and that Ward understood that the commissions were included in that total.<sup>2/</sup> [Tape recording of verification desk conversations attached to answer; and pages 16-18, 120-121, 146-147 of hearing transcript.]

7. On January 23, eleven days after the first option purchase, the ANTC verification desk called Ward, and reviewed the total cost for the three options, the total cost per option, and the commission and fee per option. Ward then complained:

Well, I have some real questions about your commission charges, so I guess I need to talk to somebody about those. . . . Well, I got your bill here. You know, you guys -- you guys -- I mean, you took a third of the price, for crying out loud, on your fees.

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<sup>1/</sup> Ward was not asked to reconcile this assumption with ANTC's commission disclosure statement that clearly notified Ward that commission "charges may vary" and that "consulting more than one firm before opening an account may be advisable."

<sup>2/</sup> The ANTC verification desk followed the same routine for the other option purchases in the account.

At the ANTC employee's suggestion, Ward then spoke to Wilson. Neither Ward nor Wilson could remember this particular conversation. [Pages 21, and 121-122 of hearing transcript.]

Ward and the ANTC verification desk employee then resumed their conversation:

Ward: Well, if [the \$7,350 total cost] includes \$2,200.50 worth of fees for that, I told [Wilson] that I was really chagrined that that's the price tag. But, we'll see -- see how it all comes out in the end

ANTC: [reviews expiration date and break-even point]

Ward: Yeah. This is great fun. And you charged me \$2,250 just for that. . . . Well, this is an interesting experience thus far.

ANTC: Okay. Well, hopefully everything will go your way, and good luck with your trading.

Ward: All right.

ANTC: Okay?

Ward: Thankyou.

ANTC: Uh-huh.

Ward testified that although he knew that ANTC was going to deduct over a third for commissions he became upset and "chagrined" when he saw the deduction in print on the confirmation statement. In connection with his statements that the experience up to that point had been "interesting," and "we'll see how it all comes out in the end," Ward testified that:

I knew there was risk; I wanted to see what would happen; and I wasn't ready to make a quick decision on the basis of one statement as to what the long-term possibilities were, so we'll basically see what happens.

[Pages 20-23 of hearing transcript.] Despite his belated sticker shock, Ward would authorize numerous additional option purchases

and deposit additional funds. Also, Ward would not ask to renegotiate the commissions until April 16.

8. Ward would pay \$23,045 in total commissions and execution fees.<sup>3/</sup> ANTC received 60%, and Wilson 40% of the commissions and execution fees. [See Ward's submission dated November 11, 1997; and respondents' submission served November 14, 1997.]

#### *Phone records*

9. Respondents produced itemized phone bills that established 104 calls between respondents and Ward.<sup>4/</sup> [Attachment to answer.] Forty-eight of these calls were more than one minute long.

10. Almost all of the calls were outgoing calls from ANTC to Ward's office or his cellular phone. Most of the calls to Ward's cell phone were in May. [Pages 127-130 of hearing transcript.]

11. For each day of an option purchase and sale, Ward and ANTC either spoke more than once that day, or spoke once that day and then again the next business day, which supports Wilson's contention that he routinely called Ward with fill reports. Ward testified that he could not remember whether or not he received fill reports. [See pages 25-26, 125-126, and 148 of hearing

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<sup>3/</sup> From January 12 to April 15, the 35% commission was reported in the account statements as a "commission," and the \$155 per contact fee was reported as an "execution fee." Ward paid \$13,610 in 35% commissions up to April 15, and \$9,455 in execution fees. On April 16, at Ward's request to reduce the commissions, respondents waived the 35% commission, and in most instances, the \$155 per contract fee was thereafter reported as a "commission" in the account statements. [See sixth paragraph of answer, and page 39 of hearing transcript.]

<sup>4/</sup> A list of these calls is attached as Appendix A.

transcript.]

12. Set out below are the longest calls on dates that Ward authorized a buy or sale, or deposited additional funds:

Jan. 12	3.9 min.	Apr. 11	5.7 min.
Jan. 16	7.6	Apr. 15	1.9
Jan. 18	2.5	Apr. 19	2.3
Feb. 14	9.4	Apr. 22	1.4
Feb. 16	4.5	Apr. 24	2.8
Feb. 20	0.9	May 8	1.9
Mar. 29	6.2	May 15	1.9
Apr. 10	2.7		

As can be seen, most of these conversations were less than five minutes long.

13. Wilson and Ward typically spoke two or three times a week, with the exception of four times when Wilson skipped a week to call Ward: first, between January 31 and February 14; second, between March 13 and March 26; third, between April 25 and May 7; and fourth, between May 23 and June 5. Ward did not question or protest the first three communication gaps. [See Ward testimony at pages 23-50 of hearing transcript, and Wilson testimony at pages 120-128 of hearing transcript.] The fourth communication gap is the subject of Ward's reparations complaint.

14. The phone records establish that between May 8 and June 5, ANTC called Ward seven times: on May 13 (two calls, including one of 22 minutes), May 15, May 22, and May 23. The record of these calls contradicts Ward's allegations that no one from ANTC called him between May 8 and June 5,<sup>5/</sup> and supports Wilson's

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<sup>5/</sup> Ward made a series of inconsistent claims about when Wilson allegedly had ceased to contact him. In his reparations complaint,  
(continued...)

credible testimony that he regularly spoke to Ward during this time. [See pages 128-142 of hearing transcript; and Wilson affidavit dated November 14, 1997.]

#### Trading Activity

15. Notwithstanding his reservations about the commissions, Ward would make six additional deposits, for a total of \$32,274.<sup>6/</sup> On July 18, ANTC would return \$12,121. Thus, Ward's out-of-pocket losses would total \$20,153. [See Ward's submission dated November 11, 1997; and respondents' submission served November 14, 1997.]

16. Following Wilson's advice, Ward initiated a total of twelve option positions between January 12 and May 8. Wilson and Ward never discussed any strategy that would limit losses, such as the use of stop-loss orders for any of these trades. [See pages 25, 28, 32, 35, 41, 42, 43, and 129 of hearing transcript.]

17. Set out below is a summary of trading in the Ward

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<sup>5/</sup> (...continued)

and in a series of protest letters sent to ANTC, Ward claimed that respondents failed to call him after May 8. [See complaint; and letters to ANTC dated June 7, July 15, and July 25, 1996, produced by Ward on July 23, 1997.] After ANTC produced an itemized phone bill showing several calls between May 8 and June 6, 1996, Ward admitted that Wilson spoke to him on May 13, but asserted that Wilson did not discuss the account liquidating balance on that date and asserted that Wilson did not speak to him after May 13. [Ward affidavit produced November 11, 1997.] However, at the hearing, Ward first admitted that Wilson also spoke to him on May 15, but then in his closing argument asserted that Wilson failed to call him after "mid-April". [See pages 52-55, and 157 of hearing transcript.]

<sup>6/</sup> The additional deposits were for \$7,500 on January 12; \$2,098 on January 19; \$4,852 on February 20; \$4,124 on April 1; \$13,600 on April 12; and \$100 on May 15.

account:

<u>In</u>	<u>Out</u>	<u>Contract</u>	<u>Net Premium</u>	<u>Fees and Commissions</u>
1-12	4-11	3 Jul. soybean call		
1-16	4-15	1 "	\$ 5,625	\$(3,620)
2-14	4-12	2 Jul. corn 37¢ call		
2-16	4-15	1 "	7,900	(2,068)
3-29	4-15	1 Sep. wheat 47¢ call		
3-29	4-19	"	6,325	(1,609)
4-10	4-19	2 Sep. wheat 51¢ call		
4-10	4-22	3 "	12,250	(4,875)
4-11	7-15	5 Dec. corn 38¢ call	1,500	(3,568)
4-12	7-15	2 Dec. gold call	(1,980)	(1,211)
4-15	7-16	1 Sep. coffee call	(2,775)	(1,330)
4-19	6-24	4 Jul. bean meal call	(2,900)	(620)
4-19	5-15	10 Sep. copper call	(1,000)	(1,550)
4-22	7-15	6 Aug. soybean call	(8,850)	(936)
4-24	6-24	4 Jul. gas call	(3,360)	(620)
5-08	7-15	5 Dec. wheat 62¢ call	(10,250)	(785)

As can be seen, the first four trades were profitable, generating by April 22 a net profit for Ward of almost \$20,000, and commissions and fees for respondents of about \$12,175.

The overall trading activity realized a modest gross trading profit of about \$3,000 (i.e., the aggregate net premiums collected), which was obliterated many times over by the \$23,045 in commissions and fees.

18. Ward typically received the account statements about five days after ANTC issued them. [See June 7 letter, produced July 23,

1997, and first paragraph of complaint.]

The account statements that confirmed option purchases reported the premium paid, the commissions and fees paid, and the market price at which the option was purchased. The account statements that confirmed option sales reported the fees paid, the premium collected, the net premium collected or paid (i.e, the gross trading profit or loss), but not the net profit or loss, reflecting the commissions and fees. However, Ward testified that he was able to calculate the net results of each completed trade, and Wilson credibly testified that he routinely reported the net results. [Pages 126 and 148 of hearing transcript.]

In addition, the confirmation statements and the monthly account statements reported the liquidation value and current market price of each open position, and the aggregate liquidation value of the account. Ward testified that when he reviewed the account statements he focussed on the account liquidation value rather than the liquidation value of individual positions. [Pages 48-49 of hearing transcript.]

19. On May 8, the account had a closing liquidation value of \$40,088.

Also that day, Ward reviewed the April 30 monthly account statement, which reported that he had paid a total of \$13,510 in commissions that month.<sup>1/</sup> This statement showed that six of the

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<sup>1/</sup> ANTC changed Ward's account number when it adjusted the commission structure for Ward's account. The statement for account 22797 covered activity between April 1 and 15, and the statement for account 89251 covered activity after April 15.

open positions were trading below the purchase price, that two positions were trading above the purchase price, and that the account had a liquidation value of \$34,772.

Also on May 8, Ward accepted Wilson's recommendation to buy five wheat calls, which would be the last option purchase for the account. Ward also informed Wilson that he would not be investing additional funds or authorizing additional option purchases until he "saw some positive return on my current investment amount." [Third paragraph of factual description of Complaint; see pages 49-50, 128, and 140 of hearing transcript; Ward affidavit dated November 11, 1997; and Wilson affidavit dated November 14, 1997.]

20. The phone records establish that Wilson called Ward on May 13, 15 and 22. Wilson also credibly testified that during each of these phone calls he reported the account liquidation value, which had dropped to \$30,469 on May 15, and \$22,782 on May 22. Ward and Wilson both testified that Ward agreed with Wilson's advice to hold the options on a long-term basis.<sup>8/</sup> [Pages 50-58, 129-133, 139-142, and 148 of hearing transcript.]

21. By May 31, the account liquidating value had dropped to \$17,838. Ward would receive the May 31 monthly account statement on June 6.

22. Wilson went on vacation after the Memorial day holiday, from Tuesday, June 3, to Thursday, June 5. Before leaving, Wilson had advised his supervisor (Steve Roy) and a co-broker (Glenn Ford)

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<sup>8/</sup> At this point, Ward's account held positions that expired on June 21 and 22, July 20, August 2, and November 8 and 16.

of Ward's long-term watch-and-wait strategy. However, Wilson did not tell Ward about his upcoming vacation. [See pages 7-109, 132-133, and 139 of hearing transcript; and ¶4 ANTC affidavit attached to respondents' submission served November 14, 1997.]

23. By June 5, the account liquidation value had dropped to \$13,850. Also, on June 5, Ward had received the May 31 statement, and Roy called Ward. Roy reported that the all of the trades had lost money and reported the declining account liquidation value. In response, Ward complained that Wilson should have paid closer attention to the account; however, Ward accepted Roy's advice to hold the positions.

Ward spoke with Roy and Wilson a few more times, and then ordered ANTC to liquidate the account on July 15. On July 15, ANTC returned the \$12,121 account balance.

Ward does not seek to recover his \$1,739 losses after June 5. [See page 157 of the hearing transcript.]

24. Ward sent ANTC a series of letters complaining about the commissions and about his losses in late May. By letter dated June 7, Ward complained that the May monthly account statement reported "inordinately significant losses," and alleged that:

At no time since the procurement of these commodities . . . have you made any attempt to contact me regarding the status of the commodities nor to provide recommendations to sell or take any other action. By allowing these positions to freefall without any notification or advice to me in complete and total failure of your fiduciary responsibility constitutes gross and culpable negligence in the management of this account.

By letter dated June 24, Roy replied that he had "researched your allegations thoroughly, and have found them to be without merit,"

stated that he would personally handle the account, and confirmed that Ward had decided not to liquidate the account at that time.

By letter dated July 15, Ward alleged that Wilson's primary interest had been generating commissions, and alleged that after May 8, he "didn't hear anymore from Mr. Wilson or anyone else from your office until June 5th or 6th."

By letter dated July 25, Ward's attorney, Phillip E. Handin, complained that ANTC's commissions were "unconscionable," and complained that after May 8, Wilson had "rather abruptly . . . ceased communications" with Ward. [Ward's production filed July 23, 1997.]

#### Conclusions

In order to establish his churning claim, Ward must first establish that the level and frequency of trading in his non-discretionary account was in fact controlled by Wilson. The proper focus of this determination is whether Ward "possessed sufficient financial acumen" to independently assess his broker's recommendations. *Lehman v. Madda Trading Co.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,417, at 29,867 (CFTC 1984); see *Morris v. Stotler & Co.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,080, at 38,047-38,050 (CFTC 1991), *aff'd Morris v. CFTC* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,533 (9th Cir. 1992). Here, the evidence does not establish that Ward lacked the sophistication to evaluate meaningfully Wilson's trading advice. The mere fact that Ward was less sophisticated about options and futures trading than Wilson, and relied on Wilson

to provide trading advice, does not support an inference that he surrendered control. *Morris v. Stotler*, at 25,081; and *Ball v. Shearson Hayden Stone Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,184, at 24,875 (CFTC 1981). Similarly, the fact that he was unable to devote significant time to trading decisions because he was often pressed for time by the demands of his job does not establish that he surrendered control of the trading activity to Wilson, especially where Ward had agreed to a long-term holding strategy, spoke to Wilson on a regular basis, and showed that he could be assertive when it mattered, such as when he initially complained about the commissions and when he told Wilson on May 8 that he would not authorize additional option purchases until he could evaluate the performance of the open positions. *Morris v. Stotler*, at 25,080-25,081. Having failed to establish that Wilson exercised control over the account, Ward's churning claim must fail.<sup>2/</sup>

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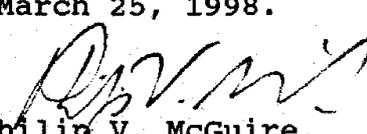
<sup>2/</sup> In the alternative, if Ward's churning claim could fairly be construed as a claim that ANTC's commission structure was unconscionable, it would also fail in light of the Commission's refusal "to directly regulate the level of fees a commodity customer may agree to pay a commodity professional for his services." *Johnson v. Fleck*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,957, at 37,498-37,499, fn. 5 (CFTC 1990); but see *In re Commodities International*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943, at 44,563 (CFTC 1997) (37% to 45% annual management fee found to be "unconscionably high.") In addition, the record contains no evidence that respondents made any representations about profitability that were improper in light of the obviously onerous commissions. See Gramm concurrence, *Johnson v. Fleck*, at 37,501-37,502 ("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 properly claim regarding profit potential.").

Finally, the evidence does not establish that respondents should be held liable for Ward's losses in May. Here, there is no evidence that respondents promised to limit his losses or to contact him if his account declined. Moreover, respondents' conduct in late May and early June could not fairly be characterized as inconsistent with Ward's instructions since he had agreed to a long-term strategy to hold the options for several more weeks, he had never expressed any desire to limit his losses to some predetermined level or range, and he had never protested previous gaps in communication.

**ORDER**

No violations having been established, the complaint is DISMISSED.

Dated March 25, 1998.

  
Philip V. McGuire,  
Judgment Officer