

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

PAUL M. PAKAN

v.

DENNIS JAVIER PATINO and  
DAVID JUDE JAVOR

CFTC Docket No. 06-R034

ORDER OF SUMMARY  
AFFIRMANCE

2009 MAY 22 PM 3:25

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C.F.T.C.

Respondents Dennis Javier Patino ("Patino") and David Jude Javor ("Javor") filed separate appeals from the initial decision awarding churning damages to complainant. Our review of the record and the parties' appellate submissions establishes that the findings and conclusions of the presiding officer regarding respondents' churning violations are supported by the weight of the evidence; we therefore adopt them. In addition, respondents have not raised important questions of law or policy regarding their churning liability that merit extended discussion. Accordingly, we summarily affirm the initial decision's liability determinations.

The outstanding issues before us are (1) the proper calculation of churning damages and (2) Javor's argument that he was prejudiced by the failure of corporate respondent KJW, LLC ("KJW") to provide audio compliance tapes that he sought to support his defense. We modify the presiding officer's damage awards, which when combined with the amounts paid by the settling respondents give complainant more than the amount of his churning damages. We find that Javor waived the prejudice issue by not raising it below despite ample opportunity to do so.

**BACKGROUND**

The facts, as they are relevant here, are as follows. Complainant Paul M. Pakan ("Pakan") opened an account with KJW that originally was brokered by Patino. Patino acted as

account executive from Tuesday, January 25 to Monday, April 25, 2005, a period during which the account was charged \$14,459 in commissions and suffered net trading losses of \$14,263.50, *i.e.*, the liquidation value declined from \$35,622.50 (the amount invested) to \$21,359. As the Judgment Officer noted, the amount of the commissions and the net amount of the trading losses were essentially coextensive. No one was assigned to handle the account from Tuesday, April 26 to Friday, May 13, 2005, after Patino abruptly left town without notice to Pakan. During this period no new commissions were paid, but the account's open positions lost another \$14,120, its liquidation value dropping from \$21,359, to \$7,239.

Javor replaced Patino as Pakan's account executive. During Javor's tenure--from Monday, May 16 to Thursday, December 22, 2005--Pakan paid an additional \$7,745 in commissions and the account lost an additional \$7,084. Again, the amount of the commissions and the net amount of the trading losses were essentially coextensive. Throughout the life of the account, Pakan suffered out-of-pocket losses of \$35,468, nearly his entire investment, and paid a total of \$22,204 in commissions.<sup>1</sup>

Pakan filed a reparations claim against Patino, Javor, KJW, KJW's owner, Kenneth J. Wolf ("Wolf"), and sales managers Michael Alexson ("Alexson") and Andrew Cole ("Cole").<sup>2</sup> On June 11, 2007, one day before the scheduled telephonic hearing, KJW, Wolf and Alexson reached a settlement with Pakan for \$6,000. Tr. at 3. Cole reached a separate settlement with Pakan on August 27, 2007 for \$3,000. Record Tab 41. The Judgment Officer issued an Order of Dismissal with respect KJW, Wolf, Alexson, and Cole on March 19, 2008, noting that they had

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<sup>1</sup> Pakan made three deposits totaling \$35,622.50: \$5,300 on January 25, 2005; \$5,322.50 on February 22; and \$25,000 on March 8. On December 22, RCG returned the \$154.50 account balance. Thus, Pakan's out-of-pocket losses totaled \$35,468.

<sup>2</sup> Pakan received permission to amend his complaint to add Wolf, Alexson and Cole as respondents after the proceeding was underway. Record of Proceedings ("Record") Tab 31 (Order Granting Motion to Amend Complaint).

made full payment under the terms of their separate agreements with Pakan. Record Tab 42. The following month, the Judgment Officer issued his initial decision, finding churning violations against remaining respondents Patino and Javor. *Pakan v. Patino*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 80,831 (Initial Decision April 23, 2008).

The Judgment Officer assessed damages as follows. He began with the amount of commissions paid during the time each respondent handled the account: \$14,459 as to Patino and \$7,745 as to Javor. He then apportioned the settlement amounts, totaling \$9,000, among the account's three distinct phases: Patino's tenure, the interval between brokers, and Javor's tenure. As stated above, about \$14,000 in trading losses, roughly 40% of the total of such losses, occurred during Patino's tenure. Accordingly, the Judgment Officer applied 40% of the settlement proceeds, or \$3600, to reduce the damages against Patino to \$10,859 (\$14,459 - \$3,600). Another 40% of trading losses occurred during the unbrokered interval. The Judgment Officer assigned \$3600 of the settlement to that period. The remaining 20% of trading losses, some \$7,084, occurred during Javor's tenure, resulting in the amount he owed Pakan being reduced by \$1800 to \$5,945 (\$7,745-\$1,800).

### DISCUSSION

Javor argues on appeal that the Judgment Officer's damages calculation is erroneous because it resulted in a total award to Pakan of \$25,084, an amount exceeding his churning damages: *i.e.*, \$9,000 in settlements, \$10,859 damages against Patino and \$5,945 against Javor. Javor argues that the \$9,000 settled amount should be apportioned between the two separate time periods that Patino and Javor handled Pakan's account. Javor contends that Patino, who handled the account for three months, should have his award reduced by \$3,000 to \$11,459, and that Javor himself, who handled the account for six months, should have his award reduced by \$6,000

to \$1,745. This calculation, Javor argues, would allow Pakan to recover the exact amount of his churning damages. Patino argues with respect to damages only that KJW paid its brokers just 30% of commissions charged for their clients' trades and that any damages assessment that did not reflect that practice would be disproportionate. Pakan did not file an answering brief.

We agree that the Judgment Officer's calculation should be modified, but decline to adopt Javor's or Patino's proposed recalculation. Because respondents' liability is based solely on churning, which restricts recoverable damages to commissions, no need existed to consider trading losses during the account's unbrokered period as a factor in the damage assessment. The settlement amounts should have been applied only against commissions, all of which were incurred and paid during the time periods when the account was handled by Patino or Javor. In reducing the amount each owes Pakan, the relevant factor is not the length of time each brokered the account, but the amount of commissions paid while each acted as broker. During Patino's three-month tenure, commissions totaled \$14,459, approximately two-thirds of all commissions paid during the life of the account. During Javor's six-month tenure, commissions amounted to \$7,745, about one-third of all commissions paid. The settlement amount shall be apportioned according to the same 2-to-1 ratio. Thus, Patino shall pay \$8,459 in damages (\$14,459-\$6,000) and Javor shall pay \$4,745 (\$7,745 - \$3,000).

Javor also argues that KJW, Wolf and Alexson did not appear at the hearing and "did not provide any tape recordings of compliance, which would have substantiated defenses for myself." Javor App. Br. at 3. Javor had asked for audio recordings in discovery requests made upon respondents KJW, Wolf and Mark Adrian--a principal of KJW who is not a party to this case--in July 2006. Discovery Request, Record Tab. 17. Javor refiled his discovery request eight months later, apparently having received no response. Record Tab 20.

A telephonic hearing was held on June 12, 2007. The Judgment Officer announced at the beginning of the hearing that KJW, Wolf and Alexson had settled with Pakan the day before. Tr. at 3. They accordingly did not participate.

Javor had ample time before, during and after the hearing to raise the issue of respondents' failure to comply with his discovery requests. Javor waited eight months to renew his requests after respondents ignored his first requests. He said nothing at the hearing about being prejudiced by the settling respondents' absence or their failure to produce evidence helpful to his defense.<sup>3</sup> The Judgment Officer did not dismiss the settling respondents until March 2008--nine months after the hearing--a period during which they remained subject to the jurisdiction of the forum. In that interval Javor could have sought extraordinary relief, *e.g.*, by petitioning to reopen the record, or simply presenting the prejudice issue to the Judgment Officer, but did nothing. Because he did not raise this argument until his appeal, we hold that it is waived.

### CONCLUSION

For the reasons stated above, Patino is ordered to pay complainant \$8,459 in damages and Javor is ordered to pay complainant \$4,745 in damages. Each respondent shall pay interest and

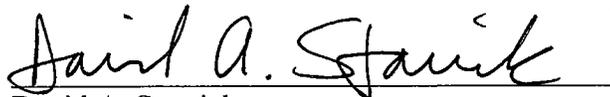
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<sup>3</sup> All parties in this case are *pro se*.

costs on the terms ordered in the initial decision. The initial decision in all other respects is  
AFFIRMED.

IT IS SO ORDERED.<sup>5</sup>

By the Commission (Acting Chairman DUNN and Commissioners LUKKEN, SOMMERS and  
CHILTON).



David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: May 22, 2009

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<sup>5</sup> Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e) (2000)), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.

A party who receives a reparation award may sue to enforce the award if payment is not made within 15 days of the date the order is served by the Proceedings Clerk. Pursuant to Section 14(d) of the Act (7 U.S.C. § 18(d) (2000)), such an action must be filed in the United States District Court. *See also* 17 C.F.R. § 12.407.

Pursuant to Section 14(f) of the Act (7 U.S.C. § 18(f) (2000)), a party against whom a reparation award has been made must provide to the Commission, within 15 days of the expiration of the period for compliance with the award, satisfactory evidence that (1) an appeal has been taken to the United States Court of Appeals pursuant to Sections 6(c) and 14(e) of the Act or (2) payment has been made of the full amount of the award (or any agreed settlement thereof). If the Commission does not receive satisfactory evidence within the appropriate period, such party shall be suspended automatically. Such prohibition and suspension shall remain in effect until such party provides the Commission with satisfactory evidence that payment has been made of the full amount of the award plus interest thereon to the date of payment.