

EXHIBIT E

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SIGNATURE <i>Pamela A. Wegner</i>	
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NA FORM 13040 (10-86)

11:00 o'clock a.m.

Before the HON. STANLEY J. ROSZKOWSKI, Judge.

Hearing resumed pursuant to adjournment.

PRESENT

MR. CONSTANTINE J. GEKAS  
MS. ADRIANNE S. HARVITT  
MR. STEPHEN T. BOBO

MR. ROBERT McFARLAND

MR. PAUL HOMER  
MR. HERBERT L. ZAROV

MELVIN P. KUSIBAB - OFFICIAL COURT REPORTER

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION,  
and TYRONE C. FAHNER, Attorney General  
of the State of Illinois,

Plaintiffs,

vs.

HERITAGE CAPITAL ADVISORY SERVICES, LTD.,  
JEFFREY W. WEAVER, and WARD A. WEAVER,

Defendants.

DOCKETED  
MAR 11 1983  
No. 82 C 5955

Thursday, October 21, 1982

11:00 o'clock a.m.

Before the HON. STANLEY J. ROSZKOWSKI, Judge.

Hearing resumed pursuant to adjournment.

PRESENT:

MR. CONSTANTINE J. GEKAS  
MS. ADRIANNE S. HARVITT  
MR. STEPHEN T. BOBO

MR. ROBERT McFARLAND

MR. PAUL HOMER  
MR. HERBERT L. ZAROV

1 BY THE WITNESS:

2 A Because these are commitments to perform in the  
3 future, it is not necessary to buy first and then sell. The  
4 trader may enter the market selling first.

5 The incentive for entering the market on the buy  
6 side is that the trader expects the price of the commodities  
7 to rise, thereby hoping to sell later at a higher price.

8 If he expects the price of the commodity to fall,  
9 then he would sell first, hoping to buy later at a lower  
10 price; and, thus, if his sell price is higher than his buy  
11 price, he'll have a profit. If his sell price is lower  
12 than his buy price, he'll have a loss.

13 BY MR. GEKAS:

14 Q Well, you've described traders on the floor of  
15 the pit and on the floor of the exchanges in areas that are  
16 called pits.

17 A That's right.

18 Q How does a member of the investing public get in-  
19 volved in the futures market?

20 A A member of the investing public must open an ac-  
21 count with a brokerage house which has been designated by  
22 the Commodity Futures Trading Commission as a futures com-  
23 mission merchant.

24 Once the account is opened, the futures commission  
25 merchant takes the instructions for the futures trade through

1 that same essence is contained in Paragraph -- what's the  
2 number?

3 A Paragraph 3.

4 Q By whom, by the way, is that -- the signature  
5 line of that is in what name?

6 A Jeffrey W. Weaver.

7 Q And Paragraph No. 3 on the fifth page of Exhibit  
8 41 compares, in its substance, as you understand it, with  
9 what paragraph in Exhibit 3?

10 A Paragraph 4.

11 Q On the second page of Exhibit 3?

12 A That's right.

13 Q Now, you've sat through the testimony and seen  
14 some of the exhibits --

15 MR. HOMER: Could I just ask your indulgence be-  
16 cause we weren't given that exhibit, copies of it, as  
17 yet.

18 MR. GEKAS: Oh, you weren't?

19 MR. HOMER: No. It would be helpful if you could  
20 get us an exhibit.

21 BY MR. GEKAS:

22 Q What about a commodity pool? In the parlance of  
23 the trade of the commodity futures industry, what's a com-  
24 modity pool?

25 MR. HOMER: I'm going to object to the question,

Ohlmliller - direct

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1 your Honor. This is one of the ultimate conclusions  
2 that is to be drawn as a matter of law.

3 THE COURT: I think he is asking for her opinion  
4 and based upon her expert knowledge what her opinion as  
5 to what a commodity pool is.

6 MR. GEKAS: Yes, your Honor. With that limita-  
7 tion, I'll pose that question.

8 BY THE WITNESS:

9 A It's an entity solicited by a -- or it's  
10 solicited by a person or an entity, funds for the purpose of  
11 putting them into a common fund and then using funds out of  
12 that common fund for the purpose of investing commodity  
13 futures contracts.

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1 BY MR. GEKAS:

2 Q And within the parlance of the trade and in your  
3 opinion, what is the extent of the risk and the potential  
4 for profit in that?

5 MR. HOMER: Objection. I don't find any rele-  
6 vance in that question in this case, your Honor.

7 THE COURT: I'm going to let her answer. This  
8 is an opinion of this witness.

9 BY MR. GEKAS:

10 Q I mean, how do you share, in terms of your in-  
11 vestment, in the profit or loss?

12 A Oh. In a commodity pool, the participants share  
13 in accrued profits from the commodity futures trading on  
14 a pro rata basis, that is, to the extent that they con-  
15 tributed funds, they get the same percentage of the profits,  
16 and the losses are charged in the same fashion.

17 Q From where does a commodity pool operator get his  
18 funds, as a general matter?

19 A From members of the investing public.

20 Q What does he do with them when he gets them?

21 A He puts it into a common fund in a bank account,  
22 and from there -- in the name of the pool -- and from  
23 there he has to go to a futures commission merchant, open up  
24 a commodity futures trading account in the name of the pool,  
25 and deposit funds into the commodity pool trading account,

1 and then he can begin trading commodity futures contracts.

2 Q Who does the trading for a commodities pool?

3 A The pool operator himself may make the trading de-  
4 cisions, or the pool operator may hire a commodity trading  
5 advisor to make the decisions for him.

6 Q And can someone other than a hired trading advisor  
7 do the trading, make the trading decisions?

8 A Any -- I would believe that an associated per-  
9 son or a floor broker could also do it, but whoever does it,  
10 it has to be disclosed to the participants in the fund.

11 Q So, the participants in the fund have to know who  
12 is doing the trading?

13 A That's right.

14 Q And it doesn't necessarily have to be someone who  
15 is designated as a commodity trading advisor, correct?

16 A Right.

17 Q And commodity trading advisor is a technical term  
18 for another kind of registrant that we have, correct?

19 A That's right.

20 Q And he does generally what?

21 A He sells market information to the public, and  
22 that generally takes two types of -- two forms.

23 Either he sells like a market letter, which simply  
24 gives trading advice. Many other trading advisors merely  
25 manage the trading of others' money and are paid for their

1 management of others' funds.

2 Q Well, I guess to clear up the record we ought to -  
3 what's an associated person?

4 A An associated person is an employee of the futures  
5 commission merchant who solicits for his brokerage house for  
6 the purpose of investing in the commodity futures contracts.  
7 He is an account executive or a salesman for the brokerage  
8 house.

9 Q But being an associated person doesn't give you  
10 the right to be a pool operator, right?

11 A That's right.

12 Q Mrs. Ohlmiller, based on your extensive experience  
13 in the commodity futures area as an investigator with the  
14 Commission and its predecessor and based on the evidence  
15 that you've heard in this case and the documents that you've  
16 considered and your study of this matter, do you have an  
17 opinion as to whether or not the investment arrangement  
18 offered by the defendants in this case is or is not a com-  
19 modity pool?

20 A I have an opinion.

21 MR. HOMER: I'm going to object. That is defi-  
22 nitely, it seems to me, one of the conclusions that  
23 we're going to have to address as a matter of law.

24 THE COURT: I think under the Federal Rules she  
25 has a right to go to the ultimate issue in the case and



1 testify as to her opinion. There is no restriction  
2 on that. She may state her opinion.

3 BY MR. GEKAS:

4 Q Do you have an opinion?

5 A I do.

6 Q And what is your opinion?

7 A My opinion is that it is a commodity pool operator.

8 Q Why?

9 A First of all, Ward Weaver and Jeffrey Weaver  
10 solicited funds from the public. They deposited those funds  
11 into two separate -- or two entities, but they were both  
12 funds where the money of various investors was commingled,  
13 and they then gave those funds to Robert Serhant for the  
14 purpose, at least in part, of investing in the futures mar-  
15 ket.

16 They received compensation in the way of commis-  
17 sions for their activities. They collected in excess of  
18 \$200,000. They had in excess of 15 investors.

19 MR. HOMER: I'll object to the -- there is no  
20 foundation in the evidence whatsoever to that state-  
21 ment.

22 BY MR. GEKAS:

23 Q Well, did you hear the testimony -- well, on  
24 what do you base your conclusion that they got commissions?

25 A From the testimony of Frank Zimmerle and from some

1 of the customers.

2 Q On what do you base your conclusion that there  
3 were more than 15 participants?

4 A On the testimony of Frank Zimmerle.

5 Q What was the other one you said? Oh, yes.

6 On what do you base your conclusion that there was  
7 more than \$200,000?

8 A On the testimony of Frank Zimmerle.

9 Q Did I miss anything?

10 A They solicited. That they solicited from the pub-  
11 lic.

12 Q On what do you base your conclusion that they  
13 solicited?

14 MR. HOMER: Excuse me. Would you repeat that?  
15 I'm sorry. We could not hear that interchange.

16 MR. GEKAS: I asked her if I missed something,  
17 and she said that they solicited. So, then I said  
18 on what do you base your conclusion that they solicited  
19 members of the investing public.

20 BY THE WITNESS:

21 A On the testimony of the customers.

22 BY MR. GEKAS:

23 Q Now, what's the essential nature of this invest-  
24 ment program that causes you to conclude that it's a com-  
25 modity pool?

1 A Aside from the fact that money is collected from  
2 the customers and put into common funds, the customers ex-  
3 pected to profit or lose on a pro rata basis according to  
4 the amounts of money that they initially invested with  
5 Jeffrey and Ward Weaver.

6 MR. GEKAS: May we have the indulgence of the  
7 Court for a moment, your Honor?

8 (Brief interruption.)

9 MR. GEKAS: Thank you, your Honor. I have nothing  
10 further.

11 THE COURT: You may cross-examine.

12 MR. HOMER: Your Honor, could you indulge us with  
13 a very brief three-minute recess?

14 THE COURT: Sure. Five minutes.

15 (Brief recess.)

16 MR. HOMER: Do you have Exhibit 43, Counsel?  
17 I would like to take a look at it. That's the one you  
18 didn't have a copy of.

19 MS. HARVITT: Is it 41 or 3?

20 THE WITNESS: 41 is the one I had.

21 THE COURT: 41. I think I have the exhibits 1  
22 through 40.

23 MR. McFARLAND: Your Honor, this is 41.

24 MS. HARVITT: And this is 43. This is the other  
25 one she was using.

THE COURT: This I have a copy of in the State's  
exhibit.

MR. McFARLAND: Correct.

1  
2 CHARLOTTE A. OHLMILLER,  
3 called as a witness by the plaintiffs herein, having been  
4 first duly sworn, was examined and testified as follows:

5 CROSS EXAMINATION

6 BY MR. HOMER:

7 Q I know I'm going to go over some ground that has  
8 been covered, and it's very likely because I didn't understand  
9 some of it, and some of it I didn't hear. So, indulge me.

10 I think you stated an associated person is  
11 someone who solicits people for investments with the operator.  
12 Is that essentially what was said? And if that's inaccurate

13 A What he does is he solicits people to invest in the  
14 commodity futures market.

15 Q He solicits people to invest in the commodity  
16 futures market?

17 A That's right.

18 Q Generally, with an operator?

19 A He must be employed by a futures commission merchant,  
20 and the funds that he solicits must be deposited directly  
21 with the futures commission merchant.

22 Q The futures commission merchant, is that the  
23 operator?

24 A That's the brokerage house.

25 Q That's the brokerage house. You indicated that the

1 trading is done by the operator or by somebody who advises  
2 the operator?

3 A I'm sorry. I don't understand your question.

4 Q The operator of the commodity pool, what does he  
5 do?

6 A The operator -- the commodity pool operator is the  
7 person who solicits the funds and puts them into a common  
8 bank account or a common fund. He then goes to a brokerage  
9 house and must open a commodity account and put the funds into  
10 the commodity account at the brokerage house.

11 In some instances the pool operator also makes  
12 the trading decisions for the commodity futures trades of the  
13 pool.

14 Q But in any case, he will take the funds that he  
15 collects, and then he will take it and deliver it to somebody  
16 who is going to make the investment decision, or he himself  
17 will make the investment decision; is that correct?

18 A He must deliver -- I'm sorry. I don't exactly  
19 understand your question.

20 Q Well, let's put it this way. If I, for example,  
21 solicited you to invest in the commodity futures investments  
22 and I solicited another person, and I gathered the funds  
23 together and I simply delivered them to another party to do  
24 something with, would I be an associated person under those  
25 circumstances? How would you characterize me?

1 A If you put the money into a common fund, say, at  
2 a bank --

3 Q Right.

4 A -- and you then delivered -- you then delivered the  
5 funds for investment in the commodity futures market, I would  
6 say you're a commodities pool operator.

7 Q And to whom would I deliver those funds for  
8 investment?

9 A They should be delivered to a futures commission  
10 merchant.

11 Q You've had experience before, I take it, in  
12 investigating or reviewing a commodity pool operation; is that  
13 correct?

14 A Yes.

15 Q And have you had any occasion to find any commodity  
16 pool operator who had neither discretion in or control over  
17 the assets and funds of the investors?

18 A Every pool operator that I have seen in the  
19 investigations to date, the pool operator has had control  
20 over the funds of the investors.

21 I don't understand your question with regard  
22 to discretion.

23 Q Thank you. You've answered my question.

24 You spoke about sharing in profits and sharing  
25 in losses. Let me ask on a more simple basis, if I understand

1 the question of how you share in a common fund and whether  
2 you are, in effect, locked into the participation in a common  
3 fund.

4 For example, let's say that two or three  
5 people gather their money together and they buy a T-Bill in  
6 common. It would be my thought, in effect, that they are  
7 inextricably locked together in a commonality of enterprise  
8 if they were together until maturity, and that I would presume  
9 to be a common enterprise, a common fund.

10 Would it make any difference in your theory  
11 of commonality if any one of those investors could himself  
12 liquidate his particular proportion or interest in that T-Bill  
13 at any time he chose and withdraw from the commonality or  
14 common enterprise?

15 A I don't understand the question and how it relates  
16 to what I have said about a common pool. I'm sorry. I just  
17 don't understand what you're asking.

18 Q Let me try to rephrase it.

19 You heard testimony here with respect to the  
20 ability to liquidate your investment prior to the maturity  
21 date of a T-Bill. Did you hear the testimony in that respect?

22 A Yes.

23 Q Is that a common incident of an investment in a  
24 commodities pool, or is it distinct or unusual?

25 A From my experience I have seen both types of

1 pools, and it just depends on how the pools, how the disclo-  
2 sure documents have been worded.

3 I have seen pools where people have that  
4 ability and others where they don't.

5 Q Well, are you suggesting then that a pool is  
6 simply where there is a common fund which is obtained,  
7 regardless of how it is invested?

8 A Not regardless of how it is invested. Where the  
9 intent is to invest it in the commodity futures market and  
10 where the participants are told that funds in the common pool  
11 will be invested in the futures market.

12 MR. HOMER: Nothing further.

13 THE COURT: Any redirect?

14 MR. GEKAS: No, your Honor. Thank you.

15 THE COURT: All right. You may step down. Thank  
16 you very much.

17 (Witness excused.)

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