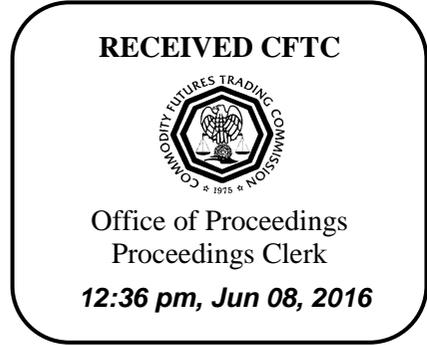




**U.S. COMMODITY FUTURES TRADING COMMISSION**

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Office of Proceedings

\_\_\_\_\_  
PETER ALAN BANACH,  
Complainant,

v.

KELSO COMMODITIES LLC, and  
R.J. O'BRIEN ASSOCIATES LLC,  
Respondents.  
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CFTC Docket No. 12-R34

**INITIAL DECISION**

**Before:**

Philip V. McGuire  
Judgment Officer  
Commodity Futures Trading Commission  
Washington, DC

**Appearances:**

Thomas F. Burke, Esq.  
Chicago, Illinois  
For complainant

Philip A. Tanzar, Esq.  
Chicago, Illinois  
For respondents

**Introduction**

Complainant Peter Banach and his wife Lois Banach, Scott Kelso, the owner of respondent Kelso Commodities, and Libby Heaton, Scott's sister and Kelso Commodities' office manager, have lived and worked for all or most of their lives in or near Macomb, Illinois, a town with a population of about 21,000, southwest of Peoria,

surrounded by fields of soybean. Before starting up Kelso Commodities -- an introducing broker located in the Kelso farm house outside of town, and guaranteed by R.J. O'Brien Associates ("RJO") -- Kelso's and Heaton's parents had operated a local branch office of Packers Trading Company since 1979. Kelso Commodities' clientele consists principally of local farmers and merchants. Peter Banach, who has lived in Macomb since attending and graduating from Western Illinois University, actively and avidly traded soybean complex futures through the Kelso family for about twenty-five years before the disputed soybean futures trade which gave rise to his complaint. Over these years, Banach won and lost, and reliably covered margin calls and account deficits. Banach co-owns *Change of Pace*, a nightclub in a converted grain elevator catering to students at Western Illinois University. His wife, a special education teacher, never traded commodity futures.

In the summer of 2006, Banach suffered a serious stroke which damaged his brain. Banach was diagnosed with moderate to severe mixed aphasia. Banach walked with a limp, spoke with a slur, and generally had trouble comprehending speech, expressing his thoughts, comprehending written material and recognizing numbers. The direct, indirect and hidden costs incurred by the Banachs presumably have been considerable.

Not long after the stroke, a friend drove Banach to Kelso Commodities to close his account. Kelso and Heaton had already learned of Banach's stroke, because their sons and the Banach's sons played together on various high school sports teams.

Over the next six years, Banach regularly attended speech therapy sessions at Western Illinois University and the University of Michigan. Lois Banach testified that the therapy helped her husband improve, but with relapses and persistent impairment.

Significantly, she also testified that he became adept at masking his symptoms and bluffing his way through certain social situations, particularly those with which he was comfortable and familiar. Lois Banach gave her husband \$400 to \$500 per month for incidentals out of his monthly Social Security disability check. Peter Banach resumed driving his car around town, and regularly spent time at *Change of Pace*. However, he no longer managed the club, because he no longer could readily count cash, place orders with vendors, and supervise the staff. Thus, he essentially performed no more than janitorial and maintenance tasks. Although Kelso and Heaton did not patronize the *Change of Pace*, they did notice Banach's car regularly parked in front of his club and so assumed, incorrectly, that he had resumed managing his business.

In the spring and summer of 2012, record drought conditions over much of the continental U.S., including western Illinois, propelled the price of soybeans futures. By this time, without telling his wife, Banach had set aside from his monthly allowance around \$4,000 in cash. Unsolicited, on Thursday June 28, Banach drove to the office of Kelso Commodities and opened a new account. Over the next three weeks, he would pyramid a total of twenty long November soybean futures. Kelso and Heaton both observed that although Banach still moved slower and spoke with a slur, he had dramatically improved since he had closed his account, and concluded that he appeared fully cognizant of what he was doing. On Friday July 20, Banach rejected Kelso's advice to take the trade off the table and reap a 1000%-plus profit. Over that weekend the rains returned to the upper farm belt, and on Monday July 23, the November soybean dropped the maximum allowable daily limit.

On Tuesday morning July 24, Banach instructed Kelso to close out the trade. The twenty contracts were sold for a loss that left a \$38,035 account deficit, which Banach would pay with a check made out by his wife.

Banach seeks \$42,035 in damages, and claims: one, that Banach's cognitive skills were sufficiently impaired to render him incompetent to enter into the RJO account agreement, thus rendering the contract null and void; two, that Kelso and Heaton knew or should have known from observing close up Banach's affect and conduct that he remained cognitively impaired from the stroke and was no longer suitable for trading commodity futures, and therefore Kelso and Heaton should have consulted Banach's wife before permitting him to resume trading; three, that R.J. O'Brien failed to diligently supervise Kelso Commodities; and four, that R.J. O'Brien failed to deliver trade confirmation statements to the Banach's residence.<sup>1</sup>

In response, R.J. O'Brien and Kelso Commodities assert: one, that they and their agents acted diligently and in good faith in their dealings with Banach; two, that Banach's speech and motor impairments do not conclusively establish cognitive impairment, and that his patient and covert foresight, planning and calculation to resume trading may have shown poor judgment, but also showed that he had retained sufficient cognitive skills to remain competent to trade soybean futures; three, that even if Banach was not competent to understand the risks and consequences of his trading strategy, Kelso and Heaton cannot reasonably be deemed to have known about any cognitive impairment based on the conduct that they observed; four, that R.J. O'Brien diligently supervised Kelso Commodities; and five, that R.J. O'Brien -- through a third

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<sup>1</sup> See Burke opening statement, at pp. 5-10 of hearing transcript; and complainant's post-hearing closing argument.

party mail service provider, following its routine business practices -- mailed the six trade confirmation statements to the correct address for the Banachs' residence.<sup>2</sup>

As discussed below, after carefully considering the parties' documentary submissions<sup>3</sup> and oral testimony,<sup>4</sup> I have concluded that Banach has failed to establish any violations proximately causing damages. This conclusion reflects my determination that although the testimony of all of the witnesses was generally sincere, the testimony of respondents' witnesses was generally more reliable.

## **Factual findings**

### *The parties and witnesses*

1. Lois Banach is complainant Peter Banach's wife. She has been employed as a special education teacher by the West Prairie School District since 1981. She has never traded futures. Before her husband's stroke they had maintained separate bank accounts. After her husband's stroke, he closed his bank account, and she handled his financial affairs pursuant to a power of attorney. In that capacity, she was the designated payee for his disability payments, and allotted to him a portion of his

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<sup>2</sup> See Tanzar opening statement, at pp. 10-19; and respondents' post-hearing closing argument.

<sup>3</sup> The principal documentary submissions considered include: (1) R.J. O'Brien account-opening documents completed by Banach with Heaton's assistance (account application, risk disclosure statement for futures and options, additional risk disclosure statement, account agreement, introducing broker authorization, and substitute form W-9); (2) Heaton's Preliminary Risk Assessment Report; (3) confirmation statements, monthly account statements and equity runs for Banach's account; (4) bar chart for November 2012 soybean future; (5) RJO's debit notice; (6) various speech therapists progress reports, and disability insurance claim, concerning Banach's aphasia; (7) McNeil & Copeland "Aphasia Theory, Models, and Classification;" (8) Mendez & Clark, "Neuropsychiatric Aspects of Aphasia and Related Disorders;" (9) Ellen Ehrgott's affidavit; (10) Lois Banach's factual description for Peter Banach's reparations complaint; (11) Lois Banach's pre-hearing affidavit; (12) Peter Banach's response to interrogatories; (13) Peter Banach's pre-hearing affidavit; (14) Sal Vitale's pre-hearing affidavit; (15) Banach's pre-hearing memorandum; (16) Banach's post-hearing closing argument; (17) respondents' joint answer and supplement to answer; (18) respondents' response to interrogatories; (19) Lisa Baker's pre-hearing affidavit; (20) Libby Heaton's pre-hearing affidavit; (21) Scott Kelso's pre-hearing affidavit; (22) respondents' pre-hearing memorandum; and (23) respondents' post-hearing closing argument.

<sup>4</sup> Lois Banach, Peter Banach, Libby Heaton and Scott Kelso testified at the hearing in Chicago. In addition, Ellen Ehrgott, Banach's expert witness, Salvatore Vitale, Banach's friend, and Lisa Baker, RJO associate director of compliance, testified.

monthly disability check to cover “incidentals” he might need while she was at work. She would write the \$38,000 check to cover the account debit balance in his Kelso Commodities account. I found Lois Banach’s testimony to be generally forthright.<sup>5</sup>

2. Peter “Pete” Banach, 60 years old when he opened his new account with Kelso Commodities and RJO, graduated from Western Illinois with a Bachelor of Science Degree in Psychology. He began trading soybean complex futures through the Kelsos about twenty-five years before the disputed soybean futures trades which gave rise to Banach’s complaint. He co-owns *Change of Pace*, a nightclub catering to students at Western Illinois University, and is affable, well-known and well-liked about town. Before the stroke in 2006 he co-managed the club. After the stroke, Banach received therapy and improved to the point that he could drive and shop around town. He also spent time at his club each day to help with basic maintenance, but he no longer managed the club or handled the club’s or his family’s finances. At the hearing in Chicago, I found Peter Banach to be pleasant and alert. However, he did not appear to be completely at ease, spoke in short phrases or monosyllables, and indicated that he essentially could recall nothing about the relevant events.<sup>6</sup>

3. R.J. O’Brien Associates LLC (“RJO”) is a registered futures commission merchant, located in Chicago, Illinois. RJO acts as the guarantor of Kelso Commodities, and cleared the trades in Banach’s account.<sup>7</sup>

4. Kelso Commodities LLC is a small family-owned firm located in the Kelso family’s farm home outside of Macomb, Illinois. Kelso Commodities, a registered

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<sup>5</sup> Lois Banach testimony, at pp. 20-21 of hearing transcript; and Lois Banach pre-hearing affidavit.

<sup>6</sup> Lois Banach testimony, at pp. 21-22, 26-28, 44-46, and 50-52; Peter Banach testimony, at pp.152-159; Peter Banach pre-hearing affidavit; Ellen Ehrgott testimony, at p. 134; and ¶ 2, Kelso affidavit.

<sup>7</sup> Joint answer, p. 1; Lisa Baker pre-hearing affidavit; and NFA records.

introducing broker since 1992, as noted above, is guaranteed by RJO. Kelso generally does not advertise or solicit business. Most of Kelso Commodities' clients are farmers who hedge and speculate. Banach is the first customer to sue Kelso Commodities.

Kelso Commodities has two listed principals: Scott Kelso who is listed as the firm's manager; and Sharon Kelso, Scott's mother, who is listed as the firm's owner. From 1979 to 2002, Scott Kelso's and Libby Heaton's mother and father operated a branch office for Packer's Trading Company. In the late 1980's, Peter Banach would begin actively and avidly trading futures through the Kelso's' branch office. According to Scott Kelso, over the next twenty-five or so years, Banach typically traded in the summer, realized at least as many losses as profits, and reliably added funds to cover any margin calls and account deficits.<sup>8</sup>

5. William Scott Kelso ("Kelso") has been a commodity broker since 1994, when he began as an associated person in his parents' Packers Trading Company Macomb branch office. Kelso's father had continued trading after he had a stroke. Kelso has been a listed principal and registered associated person with Kelso Commodities since 2002. Kelso has known Peter Banach for over 25 years. He had heard about Banach's stroke before Banach visited Kelso Commodities to close the account not long after the stroke, because their sons played together on various teams. Kelso, who was Banach's principal contact at the Kelso Commodities office after Banach had opened the account and placed the first two trades with Libby Heaton, was not present when Banach visited

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<sup>8</sup> Lisa Baker testimony, at pp. 195-196; ¶¶ 3-6, Baker pre-hearing affidavit; Libby Heaton testimony at pp. 229-233, and 241 -242; Scott Kelso testimony, at pp. 279-280, and 284-286; and NFA records.

the office in July 2012 to open a new account and to place the first two orders.<sup>9</sup> I found Kelso's testimony to be sincere and plausible.

6. Libby Heaton, Scott Kelso's sister, is the office manager for Kelso Commodities. Heaton is not registered. Heaton helped Banach fill out the account opening documents and handled his first two orders. Her son also played on teams with the Banach's son.<sup>10</sup> I similarly found Heaton's testimony to be sincere and plausible.

7. Lisa Baker has been an Associate Director of Compliance for RJO since 2002. Baker has personally conducted on-site audits of Kelso Commodities, and testified about: RJO's supervisory procedures with respect to guaranteed introducing brokers and to Kelso Commodities; RJO's review of Banach's account application; RJO's monitoring of trading activity in the Banach account; and RJO's routine procedure for delivering confirmation statements to customers.<sup>11</sup>

8. Sal Vitale is a friend of Peter Banach. He testified primarily about driving Banach to Kelso Commodities in 2006, soon after his stroke, to close his account.<sup>12</sup>

9. Ellen Ehrgott testified as an expert witness for Banach. Ehrgott, who has a graduate degree in speech language pathology and has worked in a number of positions in schools, nursing homes and private practice, currently is the Clinic Coordinator for the Western Illinois University Speech Language Clinic ("Clinic"). The clinic services people in the community and university with speech, hearing and language disorders. She offered her opinion on Banach's skills based on her personal observations, the latest of which was in the summer of 2009, and her review of progress reports around the time

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<sup>9</sup> Lois Banach testimony, at pp. 84-86; Kelso testimony, at 169-171, 279-284, and 304-305; Kelso pre-hearing affidavit; and NFA records.

<sup>10</sup> Heaton testimony, at pp. 226-233; and Heaton prehearing affidavit.

<sup>11</sup> Baker testimony, at 186-194; and Baker pre-hearing affidavit.

<sup>12</sup> Vitale testimony, at 160-168; and Vitale pre-hearing affidavit.

that Banach opened his account in the summer of 2012, none of which she was involved in producing. Ehrgott reviewed the RJO account application and risk disclosure statement for Banach's account, but is not familiar with the basics of trading soybean futures and not familiar with Banach's pre-stroke experience trading futures.<sup>13</sup>

*Peter Banach's stroke*

10. In the summer of 2006, Banach suffered a serious stroke which damaged his brain. Banach was diagnosed with moderate to severe receptive and expressive aphasia manifested by impairments to auditory, expressive, writing, reading, memory and reasoning skills. Banach walked with a limp, spoke with a slur, and had trouble comprehending speech, expressing his thoughts, answering open-ended questions, comprehending written material, remembering his phone number, recognizing numbers, handling more than single digit calculations, and distinguishing the magnitude of numbers. Lois Banach testified that he would look at the same newspaper article for three to four hours, could not comprehend the value of monetary numbers, could not account for money he had spent, and had a difficult time connecting his actions and the consequences.<sup>14</sup>

11. Not long after the stroke, a card-playing buddy, Sal Vitale, drove Banach to Kelso Commodities to close his account, where he had traded soybean complex futures for about 25 years. Kelso and Heaton had already learned of Banach's stroke, because their sons and the Banach's sons played together on various sports teams. Kelso

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<sup>13</sup> Ehrgott testimony, at pp. 90-150; and Ehrgott pre-hearing affidavit.

<sup>14</sup> Lois Banach testimony, at 22-26, and 49-50; ¶¶ 2-4, Lois Banach pre-hearing affidavit; Ehrgott testimony, at pp. 90-138; and University of Michigan Aphasia Program 2007 progress report.

testified that Banach was “in tough shape” and only spoke “a little bit” as they closed the account.<sup>15</sup>

12. Over the next six years, Banach attended regular speech therapy sessions initially at the University of Michigan, then at Western Illinois University. During this time, Heaton and Kelso saw Banach at their son’s games, and Kelso also saw Banach occasionally in town at Vitale’s Italian Restaurant, or at the casino, where Kelso traditionally celebrated his birthday, which he shared with Banach.

Lois Banach credibly testified that therapy helped her husband, but that he often suffered relapses. As a result, Lois Banach took over managing the couple’s finances. Banach no longer could manage the club, because he could not reliably count money, place orders from vendors or supervise employees. However, Peter Banach was able to resume driving his car around town, and regularly spent time at *Change of Pace*, where he performed maintenance tasks. Although Kelso and Heaton did not patronize the *Change of Pace*, they would notice Banach’s car regularly parked in front of his club and would assume, incorrectly, that he was back to managing his business. Lois Banach fostered her husband’s autonomy and dignity by giving him \$400 to \$500 per month out of his monthly Social Security disability check. He became adept at masking his symptoms and bluffing his way through certain social situations, particularly those with which he was comfortable and familiar.<sup>16</sup>

13. Complainant produced a series of progress reports, from late 2007 to late 2012, prepared initially by the University of Michigan Aphasia Program and thereafter by the Western Illinois University Department of Communications Sciences and

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<sup>15</sup> Vitale pre-hearing affidavit; and Kelso testimony, at pp. 169-170, and 286-290.

<sup>16</sup> Lois Banach testimony, at pp. 29-30, 48-76, and 87-89; and ¶ 7, Ehrgott pre-hearing affidavit.

Disorders. These reports described Banach's therapy, and progress and lack of progress. Most relevant is the WIU progress report dated April 30, 2012, which covered the period while Banach was secretly setting aside funds and planning to resume trading, February 15, to April 30, 2012. This was a mixed, but generally optimistic, report which described Banach as "energetic and enthusiastic," "quite talkative, and participating in natural conversations," and "occasionally laughing and joking," and which stated, in pertinent part:

### Background Information

Pete, a 60-year old male with anomia and moderate-to-severe aphasia, lives at home with his wife and two sons. He was 5 years past cerebrovascular accident (CVA). He received language services at this clinic 2 times per week for 50-minute individual sessions. Pete has received treatment regularly at WIU from the summer of 2007 to the present for a total of 14 semesters.

### Initial Assessment and Objectives for Spring Semester

**Initial Assessment Statement:** Pete was eager to work from the first session. He participated diligently, even when fatigued near the end of the sessions. Pete read material with accuracy, speed and persistence with success for words he could not initially name. He often left out function words and substituted words more readily recalled when they served the fundamental meaning. Pete self-cued 30% of the time and accurately responded to a prompt with 70% consistency to recall specific vocabulary. Pete had significantly more difficulty naming and recalling numbers, for example: he counted change but did not calculate the difference between an item amount and the amount of money exchanged. Pete named common one syllable words with 80% accuracy and two syllable words with 20% accuracy. Pete named common one syllable items containing blends with 25% accuracy. Pete found reference points on maps of familiar locations with 50% accuracy, this dropped to 10% when places were unfamiliar. Pete initiated simple sentences with 100% consistency, but did not use complex sentences. In a sample of Pete's conversational speech he used verbs in 24% of his utterances and 50% of his utterances were conversational fills. Pete produced a list of familiar semantically related items with 30% accuracy. Pete's good auditory comprehension, imitation, and text decoding skills, as well as his positive attitude, suggest a good prognosis for furthering his vocabulary and conversational skills.

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### Comments/Additional Information

Pete was an energetic and enthusiastic participant in therapy. His communication with the clinician increased significantly throughout the semester, going from saying very little at the beginning to being quite talkative and actively participating in natural conversations by the end. He went from being quite stoic to occasionally laughing and joking. Pete developed confidence and was effective when communicating his need for the speaker to slow down, clarify, repeat and give him more time to process, read or write. Pete's frustrations, which he dealt with regularly at the beginning of the semester, seemed to fade and rarely appeared at all at the end of the semester. He worked diligently through the sessions, rarely requesting a break. His stamina was indicative of his motivation. Pete's writing skills were one of his language strengths, and aided in his progress.

### Summary of Progress

Pete made steady progress throughout the semester. He made gains in both noun and verb naming and in conventional skills. Initially, Pete named common kitchen items, tools and sports related nouns with less than 50% accuracy without cuing, and verbs with less than 30% accuracy without cuing. With practice and use of self-cuing techniques he named nouns with up to 87% accuracy without cuing and produced a plausible verb, given a specific scenario, with up to 70% accuracy. Pete started the semester naming numerals 1-10 with 80% accuracy and numerals 11-20 with 30% accuracy. By semester's end, Pete named numerals 1-10 with 100% accuracy and, numerals 11-20 with 65% accuracy.

Pete attended 22 of 24 scheduled sessions for a total of 22 hours of therapy this summer.<sup>17</sup>

### *Account-opening*

14. In the spring and summer of 2012, extraordinary drought conditions over fifty-five percent of the continental U.S., including western Illinois, the largest such area since 1956, propelled the price of soybeans futures. Banach's conduct at the time, described below, was consistent with knowledge of these fundamentals. The soybean market would continue to rise from June 29, when Banach placed his first order to buy

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<sup>17</sup> See Ehrgott testimony at pp. 117-133.

one November soybean future, through July 2, 10, 13, 16 and 19, to July 20, when he placed subsequent market buy orders, for a total of 20 long November soybean futures.<sup>18</sup>

15. By late June, without telling his wife, Banach had set aside from his monthly allowance around \$4,000 in cash. Unsolicited, on June 28, he drove to the office of Kelso Commodities to place a soybean futures trade. The initial margin requirement on the soybean contract was \$4,050, and the maintenance margin was \$3,000.

Libby Heaton credibly testified that although Banach's speech was a "little slurred," but he appeared to have significantly improved since she had last seen him, and he did not appear to have diminished mental skills or diminished understanding of trading soybean futures. Heaton informed Banach that he had to fill out an account application for a new account and post a minimum of \$4,000.

Banach took the account application, and returned it later that day partially filled out, which Heaton helped him complete, as she routinely did for many of Kelso Commodities' customers, consistent with RJO compliance procedures. Banach also brought \$4,000 in cash. Heaton informed him that she could not accept cash. Banach returned the next day, June 29, with a cashier's check for \$4,000. In this connection, Lois Banach testified that she had not remotely considered the possibility that her husband had retained or recovered the cognitive capacity for the necessary planning (which included grasping soybean market fundamentals and estimating the amount of

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<sup>18</sup> See "Farmers Hop on Soybean Bandwagon," Wall Street Journal (June 28, 2012); "Corn and Soybeans Reach Records," Wall Street Journal (July 19, 2012) ("Some traders say corn and soybean prices could rise further in coming days. The key growing period for soybeans is approaching in late July and August, when crops will set their pods and then fill them out with beans. 'There's still quite a bit of talk of \$17 or \$18 [for soybeans] if weather doesn't change by mid-August,' said Rich Nelson, director of research at advisory firm, Allendale, Inc. in McHenry, Ill."); and "Widespread Drought is Likely to Worsen," New York Times (July 20, 2012).

cash required for margin), execution and guile to secretly open, fund and trade a futures account.<sup>19</sup>

*November Soybean Future Trade*

16. Set out below is a summary of trading activity for the Banach account.

Banach exclusively used market orders to buy the November soybean future:

<i>Date</i>	<i>Open</i>	<i>Trade</i>	<i>Settle</i>	<i>Open trade equity</i>
6-29	1	buy 1 @ 14.2825	14.2775	\$(25)
7-2	2	buy 1 @ 14.3925	14.38	\$425
7-3	2	--	14.7475	\$4,100
7-5	2	--	15.265	\$9,275
7-6	2	--	15.0575	\$7,200
7-9	2	--	15.4775	\$11,400
7-10	4	buy 2: 1 @ 15.385 & 1 @ 15.3875	15.385	\$10,463
7-11	4	--	15.225	\$7,263
7-12	4	--	15.29	\$8,563
7-13	5	buy 1 @ 15.4875	15.525	\$13,450
7-16	10	buy 5 @ 15.855	15.905	\$24,200
7-17	10	--	15.905	\$24,200
7-18	10	--	16.20	\$38,950
7-19	15	buy 5: 3 @16.6375 2 @16.64	16.5225	\$52,175
7-20	20	buy 5: 1 @ 16.895 4 @ 16.8975	16.8625	\$76,812.50

<sup>19</sup> Lois Banach testimony at pp. 30-38, 44, 76-81, and 88; Heaton testimony at pp. 233-276; Kelso testimony at pp. 170-171, 180, 290-291, and 326-330 ; Baker testimony at pp. 197-200, 2-5-215, and 217-225; Peter Banach pre-hearing affidavit; ¶¶ 9, 15-19, Diane Banach pre-hearing affidavit; ¶¶ 2-4, Heaton pre-hearing affidavit; and ¶ 3, Kelso pre-hearing affidavit.

7-23	20	--	16.2225	\$12,812.50
7-24	--	sell 20: 17 @15.6875 3 @15.69	--	--

A total of about \$1,390 would be charged in commissions and fees to the Banach account.<sup>20</sup>

17. On Friday June 29, after RJO approved the new account, Heaton took Banach's market order to buy one November soybean futures contract. The next business day, July 2, Banach placed an order with Heaton to buy a second November bean future. Both times, he walked in with a folded newspaper, chatted with Heaton, who had no trouble understanding him and thought he "seemed fine," and watched market-related news programs and quotes on screens before leaving.<sup>21</sup>

18. After the Fourth of July holiday, Peter Kelso returned to the office and learned that Banach had resumed trading. Banach typically visited the Kelso Commodities office each day around 11:00 for about ten minutes, and watched the screens and discussed the markets with Kelso. Kelso credibly testified that Banach appeared to have improved dramatically since his stroke, that his impairments appeared to be physical not cognitive, that he appeared to be happy and comfortable in the Kelso Commodities office, and that he often referred to a soybean price chart that he carried when discussing his trading strategy, and appeared to have retained his understanding of the soybean market and the mechanics and risks of futures trading.

Over the first two weeks in July, Banach gradually increased his long position one or two contracts at a time, as bullish market movement created additional equity for

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<sup>20</sup> RJO trade confirmation statements and equity runs. See Kelso testimony, at pp. 310-316, and 324-325; and Baker testimony, at 214-218.

<sup>21</sup> Heaton testimony at pp. 250-256; Kelso testimony, at pp. 176-177; ¶¶ 5-6, and 9, Heaton pre-hearing affidavit; and ¶¶ 5-6, Baker pre-hearing affidavit.

margin, until he was long five contracts. At the close on Friday July 13, Banach's open trade equity was up to \$13,450.<sup>22</sup>

19. During the third week, the drought conditions persisted, the November soybean future continued to surge thus generating more equity for margin, and Banach began to trade more aggressively to take advantage of the weather-related rally: buying additional contracts, five at a time, on Monday July 16, and on Thursday July 19, which increased his position to 15 long November bean contracts.

On Friday July 20, Banach told Kelso he wanted to buy five more contracts. Kelso tried to dissuade Banach. He told Banach that he would probably need to add additional funds on Monday, and urged Banach to reduce his exposure and capture some profits by liquidating at least five contracts. However, Banach rejected Kelso's advice. Kelso filled Banach's market order to buy five more contracts. Thus, at the close that Friday Banach was now long twenty November bean futures. The November bean future settled at 16.8625, which left Banach with an open trade equity of \$76,812.50.<sup>23</sup>

20. Over the weekend, the rain began to fall in the northern regions of the farm belt. On Monday July 23, the November bean future opened between 16.435 and 16.9075, dropped the maximum allowable daily limit, and settled at 16.2225. At the close, Banach's account was on margin call, but with positive open trade equity of

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<sup>22</sup> Kelso testimony, at pp. 177-179, 182-184, 291-292, 300-308, 318-320, and 324; Heaton testimony, at pp. 258-260; ¶¶ 5-6, Kelso pre-hearing affidavit; and ¶ 6, Baker pre-hearing affidavit.

<sup>23</sup> Kelso testimony, at pp. 308-309.

\$12,812.50. Banach did not visit or call Kelso Commodities, and Kelso did not call Banach.<sup>24</sup>

21. On Tuesday morning July 24, Banach instructed Kelso to close out the trade. The twenty contracts were sold – 17 at 15.6875, and three at 15.69 -- for a gross loss of \$40,650, which left a \$38,035 account deficit. After some prodding by Kelso and R.J. O'Brien, Banach paid the deficit with a check made out by his wife.<sup>25</sup>

*R.J. O'Brien's supervision and confirmation statements*

22. As the guarantor of Kelso Commodities, R.J. O'Brien performed annual on-site compliance audits and found no material discrepancies with the CFTC rules and regulations, and RJO's compliance policies and procedures. Kelso Commodities' account-opening process for the Banach account was in accordance with the firm's compliance manual. During the short life of the Banach account, there were no "red flags" and no violations of exchange or RJO margin policies.<sup>26</sup>

23. RJO produced the confirmation statements for Banach's account by generating them from RJO's back office processing system. The address on the statements is the correct address for the Banach's residence. RJO statements are automatically generated and mailed by a third party mail service provider to each RJO customer. RJO and Kelso Commodities cannot suppress or divert the mailing of statements, unless a customer elects to receive statements electronically. Here, Banach did not request electronic delivery, and moreover did not provide any email address.<sup>27</sup>

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<sup>24</sup> Kelso testimony, at p. 310; and "Rains Push Down Corn, Soybeans," Wall Street Journal (July 25, 2012).

<sup>25</sup> Lois Banach testimony, at pp. 38-44, and 46-47; and Kelso testimony, at 310-316, and 324-325.

<sup>26</sup> Baker testimony, at pp. 206-207; and ¶¶ 2-6, Baker pre-hearing affidavit.

<sup>27</sup> Baker testimony, at pp. 200-205; and Kelso testimony, at 292-296, and 316-317. Compare Lois Banach testimony, at pp. 39 and 42, and respondents' post-hearing closing argument, at pp. 15-16.

## **Conclusions**

With the benefit of hindsight, it is clear that had Pete Banach's wife and neighbors done certain things differently, his trading losses could have been avoided. For example, if Lois Banach had firmly insisted on a strict accounting by her husband for his weekly expenditures, she might have prevented or detected his secret accumulation of the \$4,000 that he intended to use to fund a new futures account. But given the profound challenges she faced in managing the couples' financial affairs, coping with her husband's post-stroke condition, and fostering his dignity and autonomy, it seems quite unfair and unreasonable to second-guess her. Similarly, if Scott Kelso had been more proactive on Monday July 23, when the market tanked and Pete Banach did not show up at his usual time, by calling Pete Banach's home and club, he might have successfully convinced Banach to get out with a decent profit before it was too late. However, although such an outcome obviously would have been better for both sides, Kelso was not under a legal obligation to provide such service to Pete Banach, because Pete Banach, however much his speech may have been impaired, was an experienced futures speculator who remained competent to trade soybean futures and Scott Kelso had no compelling reason to believe otherwise.

### *Competency and Suitability*

Banach has failed to establish by a preponderance of the evidence that he was not competent to enter into the RJO customer agreement or to comprehend the risks and consequences of trading commodity futures. In support of his claim of incompetence, Banach produced the testimony of his expert Ellen Ehrgott and his wife Lois Banach.

Ehrgott is a speech pathologist. Her testimony is of limited utility because she last had examined Pete Banach three years before he opened his new account at Kelso Commodities in summer 2012, was not involved in the preparation of the spring 2012 WIU clinic's spring 2012 progress report, and has no familiarity with Banach's extensive futures trading experience or with futures trading in general. Moreover, her expertise does not extend to diagnosing underlying cognitive impairments. Significantly, Ehrgott underestimated Banach's skill with numbers and money. In the summer of 2012, he knew that the weather was driving up the price of soybeans. He knew he needed about \$4,000 for margin on a soybean futures trade, and he saved up that amount. He formulated a bull strategy and knew to place a buy order. He knew that the increasing equity in his account would provide margin for additional buys. He knew when his margin was sufficient to support buy orders for one or two or five contracts.

Ehrgott testified that Banach performs better when dealing with things with which he is familiar, performs better at things that interest and excite him, performs better when relaxed and not under stress, and performs better with male clinicians whom he considered guy buddies. Here, all four factors were present at the office of Kelso Commodities in the summer of 2012: He had known Scott Kelso and Libby Heaton, and their parents for many years. He was familiar with their office. He knew how to trade soybean complex futures, something he had done with the Kelso family for over twenty years, usually in the summer. He had experienced profits and losses. He already understood market fundamentals, such as that a drought limits the supply of beans and thus drives up the price of beans. He already understood the margin requirement for the soybean future. He could follow the daily market price. He could touch base with Scott Kelso each morning for about ten minutes. Therefore, it was not

an unfamiliar or unduly complex task for Banach to place a series of simple market orders to buy a single-digit number of contracts, to stick to the same contract, and to monitor the weather and the price of that contract.

No one knows Pete Banach's post-stroke struggles as well as his wife Lois, but she too underestimated his ability to handle numbers and money. She testified that she had not believed him capable of the foresight, planning, execution and guile to secretly open, fund and trade a futures account. Yet he did. He did not show the best judgment in deceiving his wife and disregarding Kelso's advice to sell off for a profit, but bad judgment alone does not distinguish the legally competent from the incompetent.

Heaton's and Kelso's impressions of Banach were consistent with the spring 2012 progress report by the WIU speech clinic that described Banach as "energetic and enthusiastic," "quite talkative, and participating in natural conversations," and "occasionally laughing and joking." It is possible that Banach was engaging in the bluffing and masking strategies described by his wife whenever he was in the presence of Heaton and Kelso, but Banach has failed to show that they could or should have known that he was masking a cognitive impairment, particularly where it appeared to them that his lingering impairments were physical and not cognitive, that he had dramatically recovered and was closer to his old self, that he had resumed managing his club, that he drove himself around town and to their office each day to watch the screens and discuss the market, and that he had retained his knowledge of the soybean market and futures trading and otherwise still appreciated the mechanics and risks of trading soybean futures.

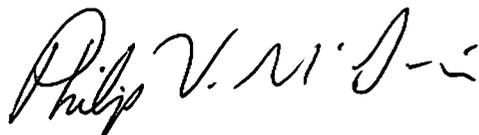
*Supervision and Back Office*

During the short life of the Banach account, there were no "red flags" and no violations of exchange or RJO margin policies. The address on the RJO confirmation statements is the correct address for the Banach's residence. The RJO statements were automatically generated and mailed by a third party mail service provider to each RJO customer. RJO and Kelso Commodities could not suppress or divert the mailing of statements, unless a customer elected to receive statements electronically. Here, Banach did not request electronic delivery, and moreover did not provide any email address. In these circumstances, complainant has failed to establish by a preponderance of the evidence that RJO failed to diligently supervise the handling of Banach's account by Kelso Commodities, or that RJO failed to deliver the confirmation statements to complainant.

**ORDER**

Peter Banach has failed to establish any violations proximately causing damages. Accordingly, the complaint against R.J. O'Brien Associates LLC and Kelso Commodities LLC should be and is hereby dismissed.

Dated June 8, 2016.



Philip V. McGuire,  
Judgment Officer