UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

Nancy C. Fijolek	:	CFTC Docket No. 99-R115
v.	:	
Houshang Salimian, Margil Capital Management and RB&H Financial Services, LP	:	OPINION AND ORDER

SUMMARY

Respondents Margil Capital Management ("Margil"), the introducing broker for complainant's account; Houshang Salimian ("Salimian"), formerly an associated person at Margil; and RB&H Financial Services LP ("RB&H"), the futures commission merchant that guaranteed and cleared Margil's accounts, appeal from the Initial Decision of the Administrative Law Judge ("ALJ") awarding complainant Nancy C. Fijolek ("Fijolek") out-of-pocket damages of $63,089.86.

For the reasons explained herein, the Commission finds that Fijolek has failed to establish her claim of fraudulent inducement. The Initial Decision is vacated as to all respondents. The Commission, however, also finds that Fijolek was led to abandon a colorable churning claim based on advice she received, but misunderstood, from members of the Commission's staff. Accordingly, the Commission remands this case and grants Fijolek leave to amend her complaint to plead churning. Fijolek shall not replead her fraudulent inducement claim or any other issue litigated before the ALJ.

BACKGROUND

The following facts are not in dispute. In the spring of 1997, Fijolek sought advice from a friend about how to invest a recent inheritance. The funds were being held in a money market account and she sought a better return. The friend, Armando Barzaghi ("Barzaghi"), referred Fijolek to Salimian, and accompanied her on her first visit to Salimian at Margil's offices.

The meeting took place in mid-July. Salimian explained his futures trading techniques, gave Fijolek account opening documents to review, and indicated where she should sign if she decided to open an account. Fijolek took the material home, executed the forms, including a power of attorney authorizing Salimian to trade her account, and returned them with a check for $100,000.

Fijolek received daily confirmation statements and monthly statements showing spread and outright trades in two stock index futures, the S&P 500 and the New York Stock Exchange index contracts. She retained all of her account statements and also kept notes regarding her account. She and Salimian spoke about once a month.

Several events relating to the account took place in February 1998. Early in the month, Fijolek called Salimian for assistance in reading her account statements, and to generally check on the status of her account. Throughout February, Fijolek received calls and letters from another introducing broker, Tradeline, advising her that her account was being traded excessively, resulting in substantial losses; that Margil was being sold; and that her account was in limbo.[1] Shortly after the contacts from Tradeline began, Margil

[1] Margil was in the process of merging with another firm that cleared through another futures commission merchant. RB&H mounted an aggressive campaign through Tradeline to keep Margil's customers on its books. *See* Tr. at 74 (testimony of Margil president Robert Martin); *see also* Tradeline's letter to Fijolek dated February 6, 1998 and RB&H's mailgram dated February

informed its customers that it was merging with another introducing broker, Main Street Trading Company ("Main Street"), which cleared through, but was not guaranteed by, ADM Investor Services, Inc. ("ADM"). Margil customers were asked to complete new account opening documents for ADM.

In light of these developments, Fijolek demanded a meeting with Salimian. Again, accompanied by Barzaghi, she visited Salimian at Margil's offices on February 21, 1998. Salimian told her that she had lost half her account equity because of conditions in the Asian markets and that her account balance stood at $50,000. Fijolek expressed her dismay, and declined his suggestion to add money to the account, but allowed him to continue trading in an effort to recoup her losses.

Despite this setback, Fijolek transferred her account to Main Street and ADM, again designating Salimian as the person authorized to trade for her. A $60,000 Treasury bill, $15,000 in cash, and five open positions were transferred from RB&H to ADM for Fijolek's account at the end of February.

Fijolek's account suffered further declines through May. Following a discussion with Salimian about continuing losses, she asked for a written guarantee that he would stop trading if her account balance reached $25,000. He declined. Shortly thereafter she closed her account with a balance of $28,000, which was returned to her. This action was filed a year later.

Fijolek's original complaint named Salimian, Margil and Main Street as respondents, and related various events that occurred during the life of her account, yet failed to state a cause of action under the most expansive reading of her statement. After

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27, 1998, submitted with Fijolek's complaint; and Fijolek's notes attached to her complaint describing calls from Tradeline personnel.

receiving oral and written guidance from staff in the Office of Proceedings, she filed a supplemental statement on June 5, 1999. The statement alleged, "I believe Mr. Salimian lied to me throughout the entire period of our relationship," and "exploited" her trust and lack of investment experience. Supplemental Statement at 3. In describing her first meeting with Salimian, Fijolek stated that she explained that her prior investment experience had been confined to mutual and money market funds. She went on to state:

> Even though I did not understand much of what Mr. Salimian was saying, I felt pressed to make a decision and "put my money to work . . . ." Mr. Salimian encouraged me to establish a "discretionary account" with him acting as my account representative. Mr. Salimian implied that he had the knowledge to act competently on my behalf. I wanted to believe his story.

Id. She also alleged that Margil and Main Street failed to supervise Salimian.

Under the heading, "Why I decided to invest with Mr. Salimian," Fijolek stated, "I admired the way Mr. Barzaghi handled his own personal finances and I respected his judgment." *Id* at 2. In addition, Fijolek stated that Barzaghi told her that Salimian "had a 70% success rate on his transactions" and "could get a 20% percent return even if things went wrong." *Id.* She described her investment objective as seeking a retirement program "in a way that would preserve my principal and make a good return on my money," *Id.* at 1, and indicated that she communicated these objectives to Barzaghi. Neither the complaint nor the supplemental statement contained any allegations concerning how Salimian himself (as opposed to Barzaghi) represented his track record.

Fijolek asked for $71,246.01 in damages, the difference between the $100,000 she invested and her closing account balance of $28,753.99. After filing the supplemental statement, she amended her complaint one more time, to add RB&H as a respondent based on its status as Margil's guarantor.

RB&H filed an answer through counsel, denying any liability on its part and asserting that the complaint failed to state a claim cognizable in reparations. Margil filed a *pro se* response through its president, Robert Martin ("Martin"), denying liability. Main Street, instead of filing an answer, promptly settled with Fijolek for $14,600.

Salimian filed a *pro se* answer denying liability and giving his version of events. He asserted:

- "Mrs. Fijolek was introduced to me by my wife's boss, Armando Barzaghi. . . . She told me she was investing in mutual funds, office buildings and other investments. She explained to me that her goal was to make 20% on her investments, but that 100% would be great." Salimian Answer at 2.

- "I told Mrs. Fijolek that I couldn't guarantee that she could make that kind of return on her investment and that she could also lose her money. . . . There was no pressure on my part for her to open the account." *Id.*

- "Mrs. Fijolek was in full communication with me and Bob Martin during the trading periods and totally kept informed about her account status." *Id.*

The parties conducted minimal discovery. A one-day hearing was held in January 2000, in San Diego. In contrast to the allegations contained in her supplemental statement, at the hearing Fijolek attributed to Salimian the representations made regarding his track record. Specifically, Fijolek testified that Salimian told her that she could expect a 20 percent return on her investment, stating, "he said that in a bad market I could plan on about 20 percent return, and if it was a good market, a strong market it would even be higher." Tr. at 12. She also said he told her that "he was making money for about 70 percent of his customers." *Id.*

Fijolek displayed uncertainty regarding the financial instruments she had traded for 11 months, claiming she thought she was trading stocks. At one point the ALJ asked

her whether Salimian had "recommend[ed] this futures trading for you, futures and options" *Id.* at 11. She replied, "[h]e did not recommend it. Futures and options [were] never mentioned. I still thought it was stocks. Actually, as I look back, I don't know that I really knew what it was . . . but my friend had recommended him so I trusted his judgment." *Id.* Under further questioning by the ALJ, Fijolek testified that she and Salimian "talked a little bit about risk" before she opened her account, and acknowledged reading the risk disclosure statement in her account opening documents, but reiterated her lack of understanding. *Id.* at 13.

Fijolek also testified that, while she retained her account statements, she could not understand them and did not rely on them to monitor the status of her account. She reviewed her statements with Salimian when they met in February 1998, but remained unable to decipher them thereafter. *See generally id.* at 14-18.

Fijolek stated further that, at the February meeting with Barzaghi and Salimian, when she refused Salimian's request to add more money to her account, she told Salimian, "'that's not a possibility. I have lost confidence.'" She testified further, "[b]ut I wanted to trust him. I was relying on him, so I continued with him." *Id.* at 17. During cross-examination, Martin asked her if she knew she could close her account and if she ever had discussed it. She said she knew she could, but the subject never came up. *Id.* at 55-56.

Fijolek testified, and respondents do not dispute, that she paid total commissions of approximately $35,000 while her account traded at R&B, at a rate of $50 per contract, per round turn trade. *See id.* at 26-28 (testimony of Fijolek); *id.* at 83-84 (testimony of Robert Martin); *see also* Fijolek's account statements submitted with her complaint.

On direct examination, in contrast to Fijolek's testimony, Salimian denied telling her that most of his clients, or any specific percentage, made money, or that Fijolek could expect returns of 20 percent, or any other specific amount. *See* Tr. at 98-100. The following excerpt containing responses by Salimian to questions posed by RB&H's attorney gives the flavor of his testimony:

> Q. [Y]ou heard Nancy Fijolek testify before this court under oath that you had said to her that 70 percent of your clients made money in the commodities market. Did you hear that?
>
> A. Yes.
>
> . . . .
>
> Q. Did you say that to Ms. Fijolek?
>
> A. No.
>
> Q. Are you telling us now . . . that when Ms. Fijolek said that, she was lying on the witness stand?
>
> A. I don't know if she was lying. Maybe she believes that, but I didn't say that.
>
> Q. You didn't say that at all?
>
> A. No.
>
> Q. You think she may have misunderstood that from something else that may have been said?
>
> A. Yes.
>
> Q. Do you know of anything that could have led her to believe that you had made a representation to her that 70 percent of your clients made money?
>
> A. I had some clients that were making money.
>
> Q. No, but 70 percent. Did you ever say 70 percent of your clients?
>
> A. I don't remember saying that.

Q. You don't remember . . . or you didn't say it? . . . [D]id you say that?

A. No.

Id. at 98-99; *see also id.* at 112-13 (a similar series of questions posed by the ALJ).

When questioned by the ALJ, Salimian conceded that all of his discretionary accounts that traded during 1996 ended the year with losses; and that, while some of his discretionary accounts were ahead when he began trading for Fijolek in 1997, none of them—he estimated the number at between seven and ten—closed at a profit. *Id.* at 113-16.

Martin also testified briefly, stating that he and Fijolek had several conversations while her account was open—some initiated by her about Margil's merger with Main Street, others made by him in the nature of courtesy calls to a large account holder. According to Martin, they never discussed the trading taking place in her account and she never expressed any dissatisfaction with her account or with Salimian. *Id*. at 77-80.

Near the end of the hearing, the ALJ offered Fijolek an opportunity to rebut any testimony with which she disagreed. The following exchange took place:

ALJ: You just heard this gentleman [Salimian] testify. Do you want to rebut any of it? . . . Did he testify honestly? Everything he said was true, according to your belief, Ms. Fijolek?

Fijolek: Yes, as I recall.

ALJ: Everything he said is true?

. . . .

You testified on this stand up here that he told you 70 percent of his clients made money. He said you lied. I'm asking you, what is your response to that statement?

Fijolek: I did not lie.

ALJ: Why don't you say it then?

. . . .

Fijolek: I did not lie about my understanding of him saying 70 percent of his clients made money."

Id. at 129-31.

After the hearing, the parties filed post-hearing briefs. Fijolek argued that Salimian and Martin knew or should have known she probably would lose money, but failed to apprise her of this. She asserted that Salimian controlled her account, traded it heavily, communicated with her infrequently, and misrepresented her account statements to her because he himself could not read them. Fijolek appeared to retreat from her claim that Salimian told her 70 percent of his customers made money and that she could expect a 20 percent return. In this regard, she stated:

> Complainant and Respondents will never be able to reconcile their differing accounts of who said what to whom and when it was said. . . . Salimian and . . . Martin . . . have either denied that the conversations took place or have denied that they said what the Complainant thought they said. Accordingly, Complainant will limit her assertions of pertinent facts to those which are . . . not in dispute.

Complainant's Proposed Findings of Fact and Conclusions of Law at 1-2 (Feb. 15, 2000).

RB&H filed a post-hearing brief, joined by the other respondents, arguing that Fijolek had not established fraudulent inducement or any other misrepresentation by Salimian. Respondents asserted that Fijolek's testimony was unpersuasive on her principal claim—that Salimian told her 70 percent of this clients made money—and that she essentially abandoned this claim in her rebuttal testimony and in her post-hearing brief. Respondents also argued that Fijolek's pleadings and testimony show that she relied on Barzaghi, not Salimian, in deciding to trade. They contended that the ALJ improperly acted as an advocate for Fijolek. Finally, respondents noted that while "[c]omplainant *might* have had one possible claim . . . for churning," no churning claim

had been raised and litigated before the ALJ, and therefore, "no decision may be lawfully based thereon." RB&H Post-Hearing Brief at 16.

The ALJ issued an Initial Decision in Fijolek's favor. *See Fijolek v. Houshang Salimian, Margil Capital Management and RB&H Financial Services*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,125 (Apr. 19, 2000) ("I.D."). The ALJ held that "Salimian was not a credible witness," and "did, in fact, make statements to the effect that most of his clients made profits and that Fijolek could expect to receive a 20% return in a 'bad' year." I.D. at 49,866. In finding Salimian not credible, the ALJ quoted evasive passages from his testimony, *e.g*., Salimian's response, "I don't remember saying that," when asked, "[d]id you ever say 70 percent of your clients [made a profit]?" *Id.* (*quoting* Tr. at 99).

He held that "the failure to disclose Salimian's sorry performance record, combined with his misrepresentations that most of his customers made money . . . fraudulently induced Fijolek to open a commodity account with RB&H." *Id.*

The ALJ made no credibility findings regarding Fijolek's testimony, and did not otherwise discuss her testimony except to find that she testified that Salimian misrepresented her profit potential and his performance record, *id.*, and that she believed him. *Id.* at 49,867.

The ALJ found the trading strategy used to trade Fijolek's account—taking spread positions in different stock index futures—"serves to reduce risk, limit potential profits, and generate commissions." *Id*. at 49,866. He also found Margil and Main Street liable for failing to supervise Salimian. He awarded Fijolek $63,089.86 in damages for the time her account was at Margil, based on the statement prepared by her accountant.

RB&H and Martin filed timely notices of appeal. RB&H filed an appeal brief through counsel and Martin filed a *pro se* brief. Salimian filed an out-of-time notice of appeal and later submitted a one-sentence letter joining the arguments of RB&H. Fijolek, through counsel, filed a four-page answering brief that merely recited general principles of appellate law without addressing the legal issues or facts of this case. Several days later, she filed a second, *pro se* brief that countered respondents' arguments in more detail.

Respondents seek *de novo* review of all issues and renew their post-hearing argument that the ALJ acted impartially and became an advocate for Fijolek. They again contend that the record fails to establish that misrepresentations were made to Fijolek by Salimian or that she relied on anything Salimian told her in deciding to open an account. Fijolek seeks affirmance of the decision below.

DISCUSSION

Fraudulent inducement and the weight of the evidence. Fijolek had the burden of proving fraudulent inducement by the weight of credible evidence in the record. The ALJ heard competing versions of the facts from Fijolek and Salimian and concluded that Fijolek's version was the more credible one. "In recognition of presiding officers' opportunity to assess demeanor-based factors in determining credibility, the Commission generally defers to their credibility determinations in the absence of clear error." *Violette v. LFC, L.C.C.*, slip op. at 16, CFTC Docket No. 98-R188 (Sep. 6, 2001), *citing Ricci v. Commonwealth Financial Group, Inc.* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,917 at 44,444 (CFTC Dec. 20, 1996); *accord, Secrest v. Madda Trading Co.*,

[1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,627 at 36,696 (CFTC Sept. 14, 1989).

Factual findings, however, cannot be based on one party's testimony solely because the presiding officer finds it more believable than the testimony of an opposing party. *See Violette*, slip op at 17. The presiding officer must evaluate the reliability of a witness's version of events in light of the record as a whole. *McDaniel v. Amerivest Brokerage Services*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,264 at 50,589 (CFTC Sept. 26, 2000); *accord, Secrest*, ¶ 24,627 at 36,696.

The ALJ's rejection of Salimian's testimony on the issue of fraudulent inducement is understandable. Salimian took care to say as little as possible in denying the misrepresentations attributed to him. He shed minimum light on the circumstances surrounding the opening of Fijolek's account, saying nothing specific on the nature of his sales presentation other than the statement that his client list included professionals who were "making money." His testimony provided no clue as to how he interested her in becoming a client while skirting the awkward issue of his trading performance. He adequately outlined the general thrust of his trading strategy—he typically established spread positions with a long leg in the S&P 500 futures contract, and a short leg in the New York Stock Exchange index contract, and bet that the market would rise. Tr. at 121. However, as Fijolek observed, he had trouble explaining account statements. Tr. at 105-07.

Shortcomings in Salimian's testimony were matched, however, by weaknesses in Fijolek's. Her lynchpin allegation of fraudulent inducement—that she was told that 70 percent of Salimian's trading made money and that she could expect a 20 percent

return—was attributed to Barzaghi in her complaint, to Salimian at the hearing, then essentially abandoned in her post-hearing brief. Complainants, especially those proceeding *pro se*, do not need to submit perfect pleadings or maintain absolute consistency throughout all phases of litigation. This allegation, however, was the key to Fijolek's case. She neither plausibly explained her contradictory representations on this key point, nor produced corroborating testimony from Barzaghi, who was with her during the initial solicitation and presumably had first-hand knowledge of what Salimian told her.

Also, as RB&H argues, Fijolek's pleadings and testimony suggest that Fijolek relied as much or more on Barzaghi than Salimian in deciding to invest. Once she was in the market, she stayed there. Upon being told in February that her account had lost half its value, she simultaneously declared a loss of faith in Salimian and a desire to continue trusting him, although no reasonable basis for trust remained.[2]

These flaws are outcome determinative here because Fijolek had the burden of proof. The ALJ committed clear error by failing to assess the reliability of her testimony, taking into account the material inconsistencies and weaknesses in the presentation of her case. The record taken as a whole establishes that neither her testimony (nor Salimian's) is sufficiently reliable to support fact-finding that meets the weight-of-the-evidence

[2]Fijolek kept notes throughout the time her account remained opened at RB&H and at ADM. While the original notes are not part of the record, she used them to prepare a chronology of events that was submitted with her original complaint. The chronology describes her confusion in reading her account statements, her inquiries to Salimian to ascertain her account balance, and her exasperation with the flood of calls from Tradeline. In contrast to Martin's testimony, Fijolek's chronology contains an entry in early March 1998 indicating that she told Martin she was unhappy with the handling of her account. The chronology, however, contains no reference to the circumstances surrounding the opening of her account, and makes no mention of futures or options.

standard, and Fijolek presented no corroborative evidence to support her claim. Accordingly, the Initial Decision must be vacated. *Violette*, slip op. at 19.[3]

RB&H's motion to supplement the record on appeal. An unexpected development at the hearing led RB&H to request permission to supplement the record on appeal. At the conclusion of Fijolek's direct testimony, which focused on fraudulent inducement, the ALJ asked if she had anything to add. She testified that during discovery, she received from RB&H a copy of the account opening documents she had executed and given to Margil, and found a discrepancy. In filling out the customer account form, she had named Salimian as the person authorized to trade her account, she testified. On the copy she received from RB&H, Salimian's name had been deleted and replaced with the names of Martin and Margil. Tr. at 20.

The ALJ pursued the matter, and various copies of the account opening documents were examined. It was readily apparent that Martin and Margil had been substituted for Salimian after the account documents left Fijolek's hands, but no one at the hearing could explain when the change had been made, whether it had been made by Margil or RB&H, or why it had been made. Martin and Salimian, when questioned by the ALJ, insisted that Salimian was qualified to trade the account, and had in fact traded the account.[4] The ALJ nevertheless made

> a binding inference that RB&H deleted Salimian's name from the customer account opening documents on grounds that he was legally unfit or otherwise not qualified to manage a customer account. This court further finds that RB&H

[3]In light of our decision to vacate the Initial Decision, we do not reach the issue of whether Salimian has showed good cause for his late notice of appeal.

[4] National Futures Association registration documents indicate that Salimian has been registered continuously since December 1994 and has not been a party to customer actions other than this one.

> deliberately deceived the complainant by altering, without her consent or knowledge, the power-of-attorney form granting discretionary authority to Salimian.

I.D. at 49,866; *see also id.* at 49,867. Based on this inference, the ALJ held that all trades executed for Fijolek's account at Margil were unauthorized. "The present record fails to establish who, in fact, entered trades for complainant's account," the ALJ stated. *Id.* at 49,867.

RB&H seeks to supplement the record with documents that suggest, but do not establish conclusively, that the change was made at Margil, before Margil's staff faxed the account opening documents to RB&H. In light of our decision to vacate the Initial Decision, no need exists to take this step. The motion to supplement the record is denied as moot. No immediately available information supports the ALJ's inference and nothing in the record suggests that anyone other than Salimian made trading decisions for the account.

Churning. Although Fijolek has not prevailed on her allegations of fraudulent inducement, the record suggests that she has a colorable churning claim. Fijolek's original complaint raised the issue of churning, albeit obliquely. The chronology of events attached to the complaint described various calls from Tradeline brokers to solicit Fijolek's account away from Margil. The chronology states that in one such call, a broker from Tradeline told her "my account was in bad shape because of so many trades in order to get commissions." *See* Complaint, Attachment 1 (May 9, 1999). Another entry in the chronology states that Salimian called in December 1997 "advising me that he is required by law to notify me of a lot of activity in my account."

As noted above, Fijolek's original complaint was generally deficient, and failed to set forth in clear fashion a cognizable claim against any of the named respondents. Nevertheless, references in the chronology to excessive trading and trading for the purpose of generating commissions were sufficient to alert staff in the Commission's Office of Proceedings that Fijolek potentially had a churning claim, even if Fijolek herself was unfamiliar with the term or the specific elements of this cause of action.

A May 25, 1999 memo to the file from the Office of Proceedings states that in a telephone conversation on that date, Fijolek was advised, "since you have stated that your account was churned, you should identify your trading goals and explain how the respondents exceeded or deviated from those goals." The memo also states that Fijolek was advised to plead her case with greater clarity, and was told that her statement of facts "does not specifically describe what actions by respondents caused her monetary losses." A May 27, 1999 letter to Fijolek from the Director of Proceedings repeated the oral advice Fijolek received, as described in the memo to the file.

A May 28, 1999 memo to the file describes a telephone conversation of that date between Fijolek and another member of the staff in which Fijolek was advised of the difference in the measure of damages for misrepresentation (out-of-pocket expenses) and churning (commissions). The memo states that Fijolek was advised, "cumulative damages are not permitted . . . and the greater amount is entered in our records as damages."

In Fijolek's June 5, 1999 letter supplementing her original, defective complaint, she concluded:

> I was advised that a complaint must be filed for a specific amount and that the claimed loss is the result of either Mr. Salimian's representations or the

> commissions he charged while churning my account. I am not sufficiently knowledgeable about these matters to prove a claim that Mr. Salimian churned my account. Accordingly, I am hereby withdrawing all claims with respect to the possible churning of my account.

Churning has not been pleaded properly, nor litigated, nor proved on the record before us. The record suggests however, that Fijolek *may* be able to prove it.

To establish churning, a complainant must prove that (1) the broker controlled the trading in an account; (2) the volume of trading was excessive in light of the complainant's trading objectives; and (3) the broker acted with intent to defraud or with reckless disregard for the customer's interests. *Hinch v. Commonwealth Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,056 at 45,020 (CFTC May 13, 1997); *Johnson v. Don Charles & Company*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,986 (CFTC Jan. 16, 1991).

Commission precedents identify several, non-exclusive factors that may demonstrate excessive trading, including a high commission-to-equity ratio; a high percentage of day trades; the broker's departure from an agreed upon strategy; trading while an account is undermargined; and in-and-out trading. *Hinch, supra*; *In re Paragon Futures Ass'n*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,847 (CFTC Apr. 1, 1992).

Aspects of the record tending to indicate the possibility of churning include Salimian's discretionary authority to trade for Fijolek, the periodic high volume of trading in her account; and the high amount she paid in commissions relative to her starting capital and account equity. In addition, Salimian testified that he traded all of his

discretionary accounts according to the same strategy, which may or may not have been consistent with Fijolek's investment goals.[5]

Fijolek's June 5 letter withdrawing any churning claim shows that she did not understand that she could plead both misrepresentation and churning. If she had pleaded and litigated both theories, and prevailed under both, she would have been limited to a single award of damages. Fijolek's letter, however, indicates that she thought she could plead only one theory. Ideally, the staff would have noticed Fijolek's misapprehension and explained that she could plead alternative grounds of liability.

Had the record supported the ALJ's finding of fraudulent inducement, this oversight would have been immaterial, because Fijolek's out-of-pocket losses exceeded the amount she paid in commissions, the general measure of churning damages. We have found, however, that fraudulent inducement was *not* established. Meanwhile, the record that was developed in the course of this unsuccessful litigation contains suggestions of churning, as even respondent RB&H acknowledged in its post-hearing brief. In these circumstances, the staff's failure to correct Fijolek's misunderstanding of their advice—when they had reason to know she had misunderstood—cannot be dismissed as harmless administrative error. Fijolek's original complaint, for all its flaws, mentioned the possibility of churning, and Fijolek is entitled to an opportunity to plead and litigate this

[5] Throughout the fall of 1997, Fijolek received letters from RB&H containing margin calls in various amounts, several times for amounts exceeding $200,000. Salimian told her to ignore these, because they were computer-generated by a program that treated her spread positions as outright trades. A letter from RB&H confirmed this and reiterated Salimian's advice to ignore the margin calls. No action was taken to enforce the margin demands and they are mentioned here as an indication of the nature of the trading in Fijolek's account. Several months after Fijolek's account began trading, RB&H refused to allow spread margins for positions of the kind traded for Fijolek's account. Salimian testified that this decision by RB&H forced him to liquidate positions at a loss. Tr. at 121.

claim. *See* Commission Rule 12.401(f) (establishing the Commission's discretion to consider *sua sponte* any issue arising from the record).

CONCLUSION

The Initial Decision is vacated. The case is remanded to allow Fijolek an opportunity to amend her complaint. The proceedings on remand shall be limited to factual and legal issues material to Fijolek's churning claim.

IT IS SO ORDERED.

By the Commission (Acting Chairman NEWSOME and Commissioners HOLUM, SPEARS, and ERICKSON).

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Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 26, 2001