# NATIONAL FUTURES ASSOCIATION BEFORE THE BUSINESS CONDUCT COMMITTEE

In the Matter of:	) FILED
OPTION INVESTMENTS, INC. (NFA ID #326814),	) ) ) MAR 2 6 2012
SCOTT A. ALTENBURG (NFA ID #248596),	) NATIONAL FUTURES ASSOCIATION LEGAL DOCKETING
ANDRE JULIAN (NFA ID #274176),	) ) )
JACOB J. GULLICK (NFA ID #308793),	) NFA Case No. 12-BCC-008 )
ROBERT M. HUDSON (NFA ID #334391),	) ) )
KYLE E. AURE (NFA ID #382377),	) ) )
JASON S. BOYLE (NFA ID #384999),	) ) )
SCOTT A. DAUGHERTY (NFA ID #331973),	) ) )
MITCHELL FEE (NFA ID #305802),	) ) )
ROBERT M. HART (NFA ID #370858),	) ) )
and	) )
SEAN L. KIRKSEY BRANUM (NFA ID #403285),	) ) )
Respondents.	<i>)</i>

## **COMPLAINT**

Having reviewed the investigative report submitted by the Compliance Department of National Futures Association ("NFA"), and having found reason to believe that NFA Requirements are being, have been or are about to be violated and that the matter should be adjudicated, NFA's Business Conduct Committee issues this Complaint against Option Investments, Inc. ("OpVest"), Scott A. Altenburg ("Altenburg"), Andre Julian ("Julian"), Jacob J. Gullick ("Gullick"), Robert M. Hudson ("Hudson"), Kyle E. Aure ("Aure"), Jason S. Boyle ("Boyle"), Scott A. Daugherty ("Daugherty"), Mitchell Fee ("Fee"), Robert M. Hart ("Hart") and Sean L. Kirksey Branum ("Branum").

## **ALLEGATIONS**

## **JURISDICTION**

- At all times relevant to this Complaint, OpVest was an introducing broker ("IB") NFA
  Member. As such, OpVest was and is required to comply with NFA Requirements
  and is subject to disciplinary proceedings for violations thereof.
- 2. At all times relevant to this Complaint, Altenburg and Julian were principals and associated persons ("APs") of OpVest and NFA Associates. As such, they were and are required to comply with NFA Requirements and are subject to disciplinary proceedings for violations thereof. OpVest is liable for violations of NFA Requirements committed by Altenburg and Julian in the course of their activities on behalf of OpVest.
- 3. At all times relevant to this Complaint, Gullick, Hudson, Aure, Boyle, Daugherty, Fee, Hart and Branum were APs of OpVest and NFA Associates. As such, they were and are required to comply with NFA Requirements and are subject to disciplinary proceedings for violations thereof. OpVest is liable for violations of

NFA Requirements committed by Gullick, Hudson, Aure, Boyle, Daugherty, Fee, Hart and Branum in the course of their activities on behalf of OpVest.

## **BACKGROUND**

- 4. OpVest has been a registered IB Member of NFA since April 2003. It is located in Irvine, California. Altenburg is OpVest's chief executive officer. He owns 50% of the firm and the other half is owned by Julian, who is the firm's chief financial officer. Altenburg and Julian exercise day-to-day supervisory authority over OpVest.
- 5. NFA began an audit of OpVest on January 11, 2011. At that time, OpVest had 34 APs and approximately 1,000 customers. Ninety-five percent of the accounts that it introduced were actively trading. NFA found that the vast majority of OpVest's customers sustained net realized losses. Specifically, in 2009, 1,484 of 1,567 customers (94.7%) suffered overall losses totaling more than \$12.4 million. In 2010, 1,236 of 1,399 customers (88.35%) suffered overall losses totaling approximately \$6.6 million. In contrast to the consistent and sizable losses experienced by its customers, OpVest's standard commission of \$65 per contract generated approximately \$10.6 million during those two years.
- 6. NFA's auditors reviewed OpVest's trading and commission records and customer account opening documents and interviewed a sample of OpVest's customers.
  Generally speaking, the customers had little or no experience trading in futures or options on futures and indicated that they depended on their OpVest APs for trading advice.
- 7. NFA determined that the trades recommended by OpVest's APs in the sample of accounts that NFA tested trended strongly toward generating maximum

commissions while leaving customers with little chance to make a profit. This was due in large part to the high hurdles that customers needed to overcome to simply recoup commissions and fees. NFA identified many instances where customers needed to experience returns of at least 30% in order to break even and, in some instances, trades required a return of more than 100% to break even. In addition, some multi-legged trades generated commissions and fees that exceeded the premium collected on the short leg.

- 8. OpVest and its APs recommended a number of different strategies to their customers that all resulted in maximizing commissions. Examples of these strategies include: mini-contracts when standard contracts would have achieved the same economic purpose; multi-legged spreads that, although Altenburg suggested were used to limit risk, had such high commissions and fees that profit chances were remote; and liquidating one position only to quickly enter another similar position.
- 9. The widespread and consistent nature of the commission maximizing advice given to customers by OpVest's APs gives ample evidence that OpVest, Altenburg and Julian did virtually nothing to effectively monitor the trading in the firm's customers' accounts to detect and prevent abusive trading recommendations and that, at the very least, OpVest and its owners failed to diligently supervise the trade recommendations made by the firm's APs.

## **APPLICABLE RULES**

- 10. NFA Compliance Rule 2-4 provides that Members and Associates shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity futures business.
- 11. NFA Compliance Rule 2-9(a) provides that each Member shall diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the Member. Each Associate who has supervisory duties shall diligently exercise such duties in the conduct of that Associate's commodity futures activities on behalf of the Member.

## **COUNT I**

VIOLATION OF NFA COMPLIANCE RULE 2-4: FAILURE TO UPHOLD HIGH STANDARDS OF COMMERCIAL HONOR AND JUST AND EQUITABLE PRINCIPLES OF TRADE.

- 12. The allegations contained in paragraphs 1 through 8 and 10 are realleged as paragraph 12.
- 13. NFA's Interpretive Notice entitled "Commissions, Fees and Other Charges," in pertinent part, provides that a Member who recommends transactions or strategies to retail customers to increase the amount of commissions and fees generated, without serving any economic or other purpose for the customers, violates high standards of commercial honor and just and equitable principles of trade.
- 14. OpVest customer Robert Schmitt ("Schmitt") opened a joint account with his wife in May 2008. The Schmitts had almost no options trading experience at the time. The account was serviced by OpVest APs Boyle and Aure, who both made trade recommendations to the Schmitts.

- 15. The Schmitts did not initiate any trades on their own and always went along with what was recommended to them by Boyle and Aure. They deposited \$254,357 into their account which traded options in Silver, Coffee, Euro Dollars, the S&P, Corn and T-Bonds, among other markets. The majority of activity was concentrated in the S&P. Most of the trading activity took place between May 2008 and March 2009. Over that time period, the Schmitts paid \$114,429 in commissions and fees. By the end of March 2009 their equity had dwindled to \$16,871.
- 16. Boyle and Aure recommended trades to the Schmitts that were not in their best interests and were apparently motivated to maximize commissions for Boyle, Aure and OpVest. For example, Boyle and Aure recommended trades that served little or no beneficial economic purpose for the Schmitts. In one instance, on September 16, 2009 a call spread was closed with the Schmitts paying more in fees (\$210) than they collected in premium (\$100). NFA's analysis of a sample of trades in the Schmitts' account revealed breakeven points to recover commissions and fees of between 25% and 38%. Further, NFA's review of a sample of the spreads initiated in the Schmitts' account determined that as much as 44% of the premium collected went to cover commissions and fees.
- 17. Boyle and Aure also recommended trading mini-contracts to the Schmitts when the same economic position could have been achieved at a lower transaction cost by trading standard contracts. For example, on December 15, 2008 they recommended a trade that involved selling 20 Sep 09 E-Mini S&P 1120 calls and buying 40 Sep 09 E-Mini S&P 1150 calls. The same Sep 09 ratio spread could have been achieved by selling 4 Sep 09 standard S&P 1120 calls and buying 8

- Sep 09 standard S&P 1150 calls, costing only \$603 in commissions and fees, as opposed to the \$3,016 in commissions and fees generated by the recommendations of OpVest's APs.
- 18. The E-Mini trading described in the previous paragraph was not an isolated incident. The Schmitts' December 31, 2008 monthly statement reported three different E-Mini ratio spreads comprising a total of 180 contracts. The E-Mini trading strategy yielded no benefit to the Schmitts as compared to trading standard contracts as the same financial positions could have been achieved using only 36 standard sized contracts for a savings to the Schmitts of \$7,237.44 (144 X \$50.26) in commissions and fees.
- 19. The Schmitts lost 96% of their total investment. Their account was ultimately closed on February 19, 2010 with a balance of \$9,010. Boyle and Aure's recommendation of trades to the Schmitts that maximized commissions to them and to OpVest without regard for the best interests of the Schmitts constituted a gross breach of their obligation to uphold high standards of commercial honor and just and equitable principles of trade.
- 20. OpVest customer Ian Brown ("Brown") opened an account with OpVest in January 2009. He had little or no experience trading futures or options on futures when he opened his account. The account was handled by OpVest APs Gullick and Hudson.
- 21. Brown relied on Gullick and Hudson for trading advice and all of the trades placed in his account were based on their recommendations. From the onset, the trading in Brown's account consisted of multi-legged spreads. As was the case with other OpVest accounts, positions were traded in myriad markets.

- including Gold, Frozen OJ, RBOB Gasoline, Cotton, Swiss Francs, J-Yen, Crude Oil, the S&P and others. Brown's account was open from January 2009 through June 2010. He deposited a total of \$25,000 into his account and lost all but \$303 of that amount. More than \$14,000 of his loss (56% of his total investment) was attributable to commissions and fees.
- 22. Gullick made trade recommendations to Brown that had breakeven percentages as high as 91% to cover commissions and fees and Hudson's recommendations had breakeven percentages as high as 61%.
- 23. One problematic facet of the activity in Brown's account was that it did not appear that anyone at OpVest was taking existing positions in the account into consideration when recommending new trades to Brown. An example that illustrates this point is a series of trades recommended by Gullick and Hudson to Brown that was initiated on March 17, 2009. On that day, at Gullick's recommendation, Brown purchased 5 Swiss Franc call butterfly spreads. On April 29, 2009, with the butterfly spread still profitable by over \$2,000, Hudson recommended selling a vertical call spread in the Swiss Franc. This created a five legged position in the same expiration month. This trade did nothing to secure the profit on the existing butterfly spread and generated more commission revenue for OpVest. As a result of the lack of individualized attention given to Brown's account, the five legged position was left open and unmonitored as the Swiss Franc rallied through each of the strikes until the options expired. At this point, all in-the-money options (both short and long) became offsetting futures positions, which generated \$1,440 more in commissions and fees to be paid by Brown. The ultimate result of this series of transactions was a total loss to Brown

- of more than \$10,000. Had anyone been actively overseeing the account to protect Brown's best interests, the option trades would, at the very least, have been offset before expiration to avoid incurring the additional commissions and fees generated from exercise and assignment.
- 24. Gullick and Hudson's recommendation of trades to Brown that maximized commissions to them and to OpVest without regard for the best interests of Brown constituted a gross breach of their obligation to uphold high standards of commercial honor and just and equitable principles of trade.
- 25. OpVest customer Lloyd Turner ("Turner") and his wife opened a joint account through OpVest on July 31, 2009 with a \$10,000 deposit. They had less than a year of futures and options trading experience. Turner opened another account (an IRA) with a \$24,845 deposit in November 2009. The Turners' accounts were handled by OpVest AP Daugherty. The trading in the Turners' accounts was virtually all based on recommendations made by Daugherty.
- 26. The \$10,000 deposited into the Turners' original account in July 2009 had diminished to \$1,415 by the end of June 2010. During that period, nearly \$7,000 went to commissions and fees. The trades recommended to the Turners by OpVest resulted in breakeven percentages to recover commissions and fees on some trades that ranged from 57% to 84%. Worse yet, a May 10 Sugar call condor spread which was traded on December 17, 2009 needed a return of more than 110% in order to be profitable.
- 27. The Turners placed trades in their joint account that had been recommended to them by Daugherty that resulted in commission to equity ratios as high as 48%,

- breakeven points to recover commissions and fees as high as 110% and commissions and fees that were as high as 41% of the premiums collected.
- 28. Trade recommendations by Daugherty for Turner's IRA account also maximized commissions while establishing high hurdles for Turner to recoup his commission and fee expenses. A sample of trades in the account that were analyzed by NFA needed returns of 44%-58% to break even. In addition, commission costs for some trades ranged from 31%-41% of premiums collected. From November 2009 through December 2010, Turner's \$24,845 initial investment in the IRA account waned to \$11,426. He paid commissions and fees of \$11,643.
- 29. Daugherty's recommendation of trades that maximized commissions to him and OpVest without regard for the best interests of the Turners constituted a gross breach of his obligation to uphold high standards of commercial honor and just and equitable principles of trade.
- 30. OpVest customer Thomas Remar ("Remar") and his wife opened a joint account through OpVest in September 2009. Their account was handled by OpVest APs Fee and Hart.
- 31. Neither of the Remars had significant trading experience trading futures, options or stocks, and they depended on Fee and Hart for trading recommendations.

  They made deposits of \$5,000 and \$35,000 into their account in September and October 2009, respectively. Between September 2009 and October 2010, the Remars paid \$42,437 in commissions and fees. Between September 2009 and July 2010 monthly commission to equity ratios in their account ranged as high as 39% with a monthly average of 24%.

- 32. Fee made recommendations to the Remars to exit existing positions at a loss and to immediately replace them with similar positions, thus generating additional commissions without a significant change in the Remars' market position. For example, on November, 24, 2009, 5 March 10 Silver call spreads were purchased. On December 8, 2009, (just nine trading days later), these spreads were sold at a \$625 loss and replaced by a purchase of 5 May 10 Silver call spreads. By advising the Remars to initiate the second similar position, OpVest and Fee generated an additional \$767 in commissions and fees without materially changing the Remars' market position.
- 33. In addition to Fee recommending that the Remars exit existing positions only to put on similar positions, several transactions required such significant returns to cover transaction costs that their principle purpose appeared to be to generate commissions for Fee and OpVest rather than to serve any potentially beneficial economic purpose for the Remars. For example, on October 28, 2009, acting on Fee's recommendation, the Remars purchased 5 January 10 ECU put condors which required a 39% return in order to break even.
- 34. When Hart began recommending trades to the Remars in March 2010 they had \$18,617 in equity in their account. They had approximately \$1,200 left at the end of July of that year. Commission to equity ratios in the account between March and July 2010 ranged between 21% and 38%. The Remars closed their account on November 9, 2010 and received a check for \$12.21.
- 35. Fee and Hart's recommendation of trades that maximized commissions to them and OpVest without regard for the best interests of the Remars constituted a

- gross breach of their obligation to uphold high standards of commercial honor and just and equitable principles of trade.
- 36. OpVest customer Bryan Enterline ("Enterline") had less than a year of experience trading futures and options when he opened an account through OpVest and Branum on October 30, 2009. Virtually all of the trades in Enterline's account were made at the recommendation of Branum. Between January and November 2010, Enterline deposited \$25,000 into his account and paid total commissions and fees of \$19,560. As of November 30, 2010, Enterline had not withdrawn any funds and had an ending equity balance of only \$5,874.
- 37. The majority of trades that Branum recommended for execution in Enterline's account were multi-legged spreads, which experienced difficulty in consistently making enough profit to cover the transaction costs charged by OpVest. For example, 4 April T-Bond iron condors were offset on March 9, 2010 for a net profit of roughly \$1,800 and immediately rolled into 4 May T-Bond iron condors. On April 5, 2010, the May iron condors were offset at a gross profit of only \$62.52. Since transaction costs on the trade were more than \$1,100, Enterline lost over \$1,000 on the trade. Due to activity such as this, Enterline's account value dwindled month by month, losing over \$19,000 by the end of November 2010. This was nearly the exact amount that OpVest and Branum generated in commissions and fees.
- 38. In addition, a number of the trades recommended by Branum required Enterline to achieve returns of 34% or more just to break even. Credit spreads were noted in which 28% to 30% of the premium collected went to commissions and fees.

- 39. Branum's recommendation of trades to Enterline that maximized commissions to Branum and OpVest without regard for the best interests of Enterline constituted a gross breach of OpVest and Branum's obligation to uphold high standards of commercial honor and just and equitable principles of trade.
- 40. By reason of the foregoing acts and omissions, OpVest, Gullick, Hudson, Aure, Boyle, Daugherty, Fee, Hart and Branum are charged with violations of NFA Compliance Rule 2-4.

## **COUNT II**

# VIOLATION OF NFA COMPLIANCE RULE 2-9(a): FAILURE TO SUPERVISE.

- 41. The allegations contained in paragraphs 1 through 9 and 11 are realleged as paragraph 42.
- 42. Altenburg and Julian are AP/principals of OpVest as well as the owners of the firm and have primary responsibility for supervising all areas of OpVest's operations.
- 43. The duty to diligently supervise, in part, requires Members and Associates who have supervisory duties to initiate effective procedures to ensure that the Member's employees comply with NFA Requirements in all aspects of their futures-related activities, including recommending trades that are in the best interests of their customers.
- 44. Altenburg acknowledged to NFA that OpVest encouraged the use of spreads to "limit risk" in customer accounts. In addition, the firm let each AP conduct their own research and generate their own trading recommendations which would then be recommended to customers.

- 45. Most OpVest customers were trading novices who, at the suggestion of the firm, were trading complex multi-legged trading strategies. Having encouraged their APs to recommend these complicated strategies, Altenburg and Julian were required to be particularly proactive in monitoring the status of their customers' accounts to detect and prevent abusive trading and take appropriate remedial measures when such practices were recognized.
- 46. The allegations contained in paragraphs 11 through 40 are realleged as paragraph 47.
- 47. OpVest, Altenburg and Julian failed in their obligation to diligently supervise trade recommendations made to customers by OpVest APs in that they failed to take effective steps to ensure that those recommendations were not designed to maximize commissions without regard for the best interests of the firm's customers.
- 48. By reason of the foregoing acts and omissions, OpVest, Altenburg and Julian are charged with violations of NFA Compliance Rule 2-9(a).

# PROCEDURAL REQUIREMENTS

## **ANSWER**

You must file a written Answer to the Complaint with NFA within thirty days of the date of the Complaint. The Answer shall respond to each allegation in the Complaint by admitting, denying or averring that you lack sufficient knowledge or information to admit or deny the allegation. An averment of insufficient knowledge or information may only be made after a diligent effort has been made to ascertain the relevant facts and shall be deemed to be a denial of the pertinent allegation.

The place for filing an Answer shall be:

National Futures Association 300 South Riverside Plaza Suite 1800 Chicago, Illinois 60606 Attn: Legal Department-Docketing

E-Mail: <u>Docketing@nfa.futures.org</u>

Facsimile: 312-781-1672

Failure to file an Answer as provided above shall be deemed an admission of the facts and legal conclusions contained in the Complaint. Failure to respond to any allegation shall be deemed an admission of that allegation. Failure to file an Answer as provided above shall be deemed a waiver of hearing.

# POTENTIAL PENALTIES, DISQUALIFICATION AND INELIGIBILITY

At the conclusion of the proceedings conducted as a result of or in connection with the issuance of this Complaint, NFA may impose one or more of the following penalties:

- (a) expulsion or suspension for a specified period from NFA membership;
- (b) bar or suspension for a specified period from association with an NFA Member:
- (c) censure or reprimand;
- (d) a monetary fine not to exceed \$250,000 for each violation found; and
- (e) order to cease and desist or any other fitting penalty or remedial action not inconsistent with these penalties.

The allegations in this Complaint may constitute a statutory disqualification from registration under Section 8a(3)(M) of the Commodity Exchange Act. Respondents in this matter who apply for registration in any new capacity, including as an

associated person with a new sponsor, may be denied registration based on the pendency of this proceeding.

Pursuant to the provisions of Commodity Futures Trading Commission ("CFTC") Regulation 1.63, penalties imposed in connection with this Complaint may temporarily or permanently render Respondents who are individuals ineligible to serve on disciplinary committees, arbitration panels and governing boards of a self-regulatory organization, as that term is defined in CFTC Regulation 1.63.

NATIONAL FUTURES ASSOCIATION BUSINESS CONDUCT COMMITTEE

Dated:

126/2012

Bv:

Chairperson

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#### AFFIDAVIT OF SERVICE

I, Nancy Miskovich-Paschen, on oath state that on March 26, 2012, I served copies of the attached Complaint, by sending such copies by e-mail and regular mail, first-class delivery, in envelopes addressed as follows to:

Michael D. Sefton, Esq. Henderson & Lyman 175 West Jackson Boulevard Suite 240 Chicago, IL 60604

E-mail: msefton@henderson-lyman.com

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Nancy Miskovich-Paschen

Subscribed and sworn to before me on this 26th day of March 2012.

Notary Public

OFFICIAL SEAL
MARY A PATTON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8/28/2013