BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 3 Complainant, vs. Investment Management & Research, Inc. St. Petersburg, Florida Milton Anthony Greene Atlanta, George Kenneth Craig Krull Marysville, Washington Michael John DiGirolamo St. Petersburg, Florida, Respondents.	DECISION Complaint No. C3B940028 District No. 3 Dated: July 25, 1997

Investment Management and Research, Inc. ("IMR" or the "Firm"), Milton Anthony Greene ("Greene"), Kenneth Craig Krull ("Krull"), and Michael John DiGirolamo ("DiGirolamo") have appealed the May 9, 1996 Decision on Remand of the District Business Conduct Committee for District No. 3 ("DBCC") pursuant to Article III, Section 1 of the NASD's Code of Procedure (now Procedural Rule 9310). After a review of the entire record in this matter, we find that Krull recommended unsuitable mutual fund switches, as more fully described below.[1] We also find that IMR's supervisory procedures

[1]We affirm the DBCC's findings as to 115 mutual fund switches, reverse and dismiss the

were not reasonably designed to detect mutual fund switching in Krull's branch office. We dismiss cause two as to Greene and DiGirolamo.

We order that Krull be censured, barred in any principal or supervisory capacity, suspended for one year in any capacity, fined $20,000, and required to requalify as a general securities representative before again acting in that capacity. We also order that Krull pay $171,140.93 in restitution to his customers, as more fully described below. We order that IMR be censured, fined $10,000, and required to submit satisfactory written supervisory procedures to the staff of the District in which the firm is domiciled. We also order IMR to pay $42,785.21 in restitution to Krull's customers, as more fully described below. On the basis of our reversal of findings against Greene and DiGirolamo, we eliminate the sanctions against them. We assess costs of the DBCC hearing against IMR and Krull in the amount of $4,922.50, jointly and severally.

Background. IMR is an NASD member firm that conducts a general securities business on a fully-cleared basis. Its principal office is in St. Petersburg, Florida. As of March 2, 1994, IMR had a total of 1,112 registered representatives in 506 branch offices in 50 states. Three hundred and sixty of the branch offices were offices of supervisory jurisdiction ("OSJs"), 151 of which were one-person offices, each staffed by a general securities principal.

Greene founded IMR and has been its President since April 1, 1975. DiGirolamo is the head of IMR's compliance department and reports directly to Greene. DiGirolamo has been a Vice President of IMR since September 1991, and he was an Assistant Vice President prior to that time. Krull entered the securities business in 1981 and joined IMR in 1986. IMR required Krull to become licensed as a general securities principal. During the review period, Krull was the sole registered person in IMR's Marysville, Washington office, and he also served as the branch manager. Krull's office was registered with the NASD as an office of supervisory jurisdiction. Krull is presently employed by KMS Financial Services.

Procedural History

This matter is on appeal to us from the DBCC pursuant to our remand order of March 11, 1996, in which we remanded the matter to the DBCC for reconsideration of the sanctions, including the issue of restitution.[2] The DBCC issued its Decision on Remand on May 9, 1996. We address the May

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DBCC's findings as to 30 switches, and affirm in part and reverse in part as to two transactions.

[2]The parties filed briefs addressing these issues on April 3 and 9, 1996. No hearing was held on remand, but the parties were given the opportunity to address the issue of sanctions in writing. On appeal to the NBCC, respondents contended that the DBCC made new findings of credibility to substantiate the increased sanctions that it imposed on remand. Respondents contended that this was unfair, since the matter was remanded for the purpose of addressing sanctions, and respondents were

9, 1996 DBCC decision.

Discussion

The NASD has repeatedly expressed its concern about trading mutual fund shares and has warned its member firms that such activity raises serious questions under NASD rules. In a statement of policy under Article III, Section 2 of the NASD Rules of Fair Practice (now and hereinafter referred to as Conduct Rule 2310), the NASD Board of Governors listed "trading in mutual fund shares, particularly on a short-term basis" among practices that have resulted in disciplinary action and that violate a member's responsibility for fair dealing. The Board stated:

> It is clear that normally these securities are not proper trading vehicles and such activity on its face may raise the question of rule violation.

In 1969, the NASD advised its members that, in determining whether mutual fund switches violated Article III, Section 2 of the Rules, "considerable weight would be given to the appearance of any pattern, such as the frequency with which changes in holdings were made, or the extent to which they were general."

In March 1994, the NASD issued Notice to Members 94-16 in order to remind members of their mutual fund sales practice obligations. Among other things, NASD members were reminded of their obligation to evaluate the net investment advantage of any recommended mutual fund switch. The Notice stated that members should consider whether the transaction fees would undermine the financial gain or investment objective to be achieved by the switch. The Notice also reminded members that recommendations to engage in market timing transactions should be made, if at all, for transactions within a family of funds or where there are virtually no transaction costs associated with the trade. The Notice also reminded members that recommending diversification among several funds with similar investment objectives may not be in the best interests of a customer, especially if the customer is thereby

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asked solely to address the issue of sanctions. Thus, respondents contended, they did not have the opportunity to address the issues of credibility noted by the DBCC. They also suggested that, since issues of credibility were not briefed on remand, staff must have had some input in making these credibility determinations.

We have taken notice of each instance in which the text of the DBCC's May 9, 1996 differs from that of its February 8, 1996 decision, and have disregarded such changes in the May 9, 1996 decision in reaching our determinations. In any event, our review is an independent, de novo review of the record itself, and our findings are based on that record and not the DBCC's May 9, 1996 decision. In re Ronald Earl Smits, Exchange Act Rel. No. 30787 (June 8, 1992).

deprived of a breakpoint.[3]

The Securities and Exchange Commission ("SEC") and NASD have long held that excessive turnover rates of mutual funds are not consistent with the mutual fund concept of investment. In 1963, the SEC stated that, "[e]xcept in unusual cases, a switching transaction is analogous to 'churning' or overtrading an account in listed or over-the-counter securities, and violates the NASD suitability rule." Report of Special Study of Securities Market of the Securities and Exchange Commission, Part 4, p. 151 (1963). In 1976, the SEC stated:

> Mutual fund shares generally are suitable only as long-term investments and cannot be regarded as a proper vehicle for short-term trading, especially where such trading involves new sales loads. A pattern of switches from one fund to another by several customers of a registered representative, where there is no indication of a change in the investment objectives of the customers and where new sales loads are incurred, is not reconcilable with the concept of suitability.

In re Winston H. Kinderdick, 46 S.E.C. 636, 639 (1976). See also In re Harold R. Fenocchio, 46 S.E.C. 279 (1976) (SEC relied on NASD determination that because mutual funds have a high initial sales charge, they should be recommended and sold as long-term investment vehicles -- if clients desire to adjust readily to changing markets, other investment vehicles should be recommended); Charles E. Marland, supra (mutual funds are normally suitable only as long-term investments and are inappropriate short-term trading vehicles, especially in view of substantial sales charges usually involved). However, what may appear to be an excessive turnover of mutual fund holdings may or may not be unsuitable.

The SEC has stated that where a pattern of similar switching transactions in fund shares is established, it is incumbent upon the person responsible to demonstrate the unusual circumstances that justified such a clear departure from the manner in which investments in mutual funds are normally made. It is then incumbent upon the broker to rebut the presumption that his recommended transactions were not suitable for the customer. See, e.g., Kinderdick, supra, at 639; In re Charles E. Marland & Co., Inc., 45 S.E.C. 632 (1974) (pattern of switches in customer accounts justified presumption of improper recommendations that respondent failed to rebut); In re Russell L. Irish, 42 S.E.C. 735 (1965) (volume of switching could not be explained on basis of considerations advanced by respondent). See also In re Terry Wayne White, 50 S.E.C. 211 (1993) (respondent did not attempt to defend the pattern of trading that SEC found to be unsuitable for any customer).

The SEC has found that a "generally declining market," poor performance, and the impending departure of a fund manager were not sufficient reasons to justify 61 switches in 52 customer accounts

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[3] See footnote 5 for the definition of "breakpoint."

during a three-year period. Charles E. Marland, supra. See also Kinderdick, supra (contention that three switches made within a period of 13 months for the purpose of "better performance" and to get into a fund with a monthly withdrawal plan not deemed credible); In re Russell L. Irish, 42 S.E.C. 735 (1965) (SEC not persuaded by broker's argument that use of mutual funds as trading vehicle was appropriate for managing customer accounts in light of the customers' tax liabilities and brackets, or because the broker had lost confidence in the management of the fund, or because he believed that the asset value of a fund specializing in stocks of a particular industry would decline).

The DBCC found that all 147 switches at issue in this matter were unsuitable on the basis that the "patterns" of switching recommended by Krull in various mutual funds were unsuitable based upon the customers' financial circumstances, needs, and investment objectives and the investment objectives of the funds. The DBCC analyzed recommended purchases and sales in specific funds, but did not make specific findings on a trade-by-trade basis in each of the 10 accounts alleged in the complaint.

It is undisputed that Krull recommended the 147 mutual fund switches at issue, and that these switches occurred as alleged in the complaint. It is further undisputed that Krull recommended switches in the same funds to many, and sometimes all, of the accounts at issue, and often during the same discrete periods of time. The record also establishes the frequency with which mutual fund switches occurred in the 10 accounts at issue. We find that the mutual fund switching patterns evidenced in these accounts raise the presumption that the 147 switches at issue were unsuitable. The fact, however, that Krull engaged in what appears to be excessive switching in these accounts does not necessarily make each switch per se unsuitable. Further, any particular holding period for mutual funds is not per se suitable or unsuitable for a particular customer. Because the pattern of switches recommended by Krull raises the presumption that the switches alleged in the complaint were unsuitable for the customers, we have reviewed each account on a transaction-by-transaction basis to determine the suitability of each switch alleged in the complaint.[4]

Among other things, we have considered the pattern and frequency of switches in the account, the characteristics of the funds being redeemed and purchased, and the amount of the load (and the economic feasibility of the customer's making a profit as a result of the switch). We have also considered Krull's stated reasons for making each switch, including his decision to trade part or all of a

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[4]In the instant matter, we have analyzed each transaction separately in order to show why Krull's reasons for engaging in particular patterns of trading C that resulted in moving groups of accounts into and out of mutual funds C did not rebut the presumption that such short-term switches were unsuitable. A finding of mutual fund switching does not, however, necessarily require a transaction-by-transaction analysis. An analysis of the pattern of trading on an account-by-account basis may suffice to show that mutual fund switches in that account were unsuitable provided that NASD Regulation reasonably defines the set of transactions it finds violative. See In re Investment Planning, Inc., 51 S.E.C. 520, 523 n.11 (1993).

customer's holdings, whether there was a valid investment purpose for the switch in light of the customer's financial circumstances and investment objectives (and whether there had been a change in the customer's financial circumstances and investment objectives), and the customer's reason for making the switch (as described on the switch form).

In making our determinations, we have considered that all of these switches, except for the switches into the Alger Small Cap Fund (which had a "contingent deferred" load), were into "front load" funds that generated commissions for Krull at the time of each switch. None of these switches occurred within a family of funds, which would have permitted the customers to switch without generating a commission for Krull. The record indicates that the Delaware Group, Idex, Franklin, American Funds Group, Alger Group, Templeton, and Phoenix families of funds offered a number of funds within their families of funds for which there would have been no charge or a small charge for a switch. Krull did not provide any evidence for his assertion that in no instance was he able to find a suitable alternative for a customer within the same family of funds.

Further, Krull recommended incremental purchases of funds without regard to the potential benefits of commission-saving devices. Where the customers received "rights of accumulation," they did so because of action taken by the particular mutual fund, and not by virtue of any action by Krull. There is no evidence in the record that Krull made any effort to curtail his commissions for the benefit of his customers. Krull did not in any transaction at issue obtain for his customers letters of intent ("LOIs") or seek the benefit of breakpoints, which would have reduced their commissions. Nor did he, when switching a customer back into a fund, obtain any reinstatement privileges.[5]

In reaching its findings, the DBCC compared the customers' earnings during the review period to earnings they would have made using a "buy and hold" strategy, i.e., maintaining the positions in the funds that they had immediately prior to the time alleged in the complaint. The DBCC also determined that the customers had suffered no "out-of-pocket" losses by following Krull's recommendations. These analyses are not relevant. Customer losses and gains are irrelevant in determining whether a registered representative's recommendations were suitable at the time they were made.

Krull asserted that it was appropriate to switch his customers from one mutual fund to another

[5]Mutual funds generally discount commissions based upon the size of a customer's purchase. The levels at which the discounts become effective are called "breakpoints." The size of a single purchase may trigger a breakpoint. Breakpoints may also be achieved through the use of an LOI, which is a statement given to the fund by the customer that indicates the customer's intent to purchase a certain amount of shares over a 13-month period. Mutual funds may also give customers "rights of accumulation" when their aggregate purchases reach a certain level, which may trigger a breakpoint. Also, some mutual funds reduce or eliminate commissions when a customer repurchases shares in the fund.

based on a variety of factors, including actual fund performance, fund goals, Morningstar ratings,[6] his perception of a fund's potential, and his forecast of fund performance based on outside factors, such as world economic conditions and political events. Krull testified that he used "stock picking" techniques to evaluate and recommend funds to his customers. Krull also attributed a number of the switches to changes in the accounts' investment objectives, as evidenced by the customers' representations on their switch forms or their oral representations to him. The record, however, clearly shows that Krull traded in and out of particular mutual funds based on his perception of the funds' potential future performance. We conclude, based on the record, that Krull not only used stock-picking techniques to select these funds, but traded these funds as if they were equity stocks. Krull rationalized this trading by linking purported changes in the customers' investment objectives to his changing evaluations of the funds. We find that Krull's trading philosophy was not consistent with the purchase and sale of mutual funds. We find that the type and frequency of switches that Krull recommended to these 10 accounts were excessive and unsuitable for his customers. We find that Krull's recommendation of frequent mutual fund switches that caused his customers to incur new sales loads in the absence of a change in their investment objectives is antithetical to the concept of suitability.

Where Krull's reasons for switching into or out of a particular fund were the same for more than one customer, we have not repeated those reasons, but have referred to the earlier explanations. Further, based on the record evidence, we have determined that certain switches into or out of particular funds were unsuitable for each account in which they occurred.

<u>Customers.</u> The following customer accounts are at issue:

TMB
VAN
NWA
RR Trust
CAR IRA
NT & FT
HN
Mrs. JdH
Mr. JdH IRA
Mr. & Mrs. JdH

<u>Patterns of Switching.</u> During generally discrete periods of time, Krull switched many if not all of the above 10 customer accounts in and out of the following funds:

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[6]Morningstar, Inc. of Chicago has established a system for rating mutual funds and annuities. The system assigns a rating ranging from one to five stars, based on a risk-adjusted performance measurement in which performance equals total return.

- <u>Phoenix Growth Fund ("Phoenix").</u> Phoenix was a member of the Phoenix family of funds. There were exchange privileges among the Phoenix funds. Phoenix was a common stock fund with a principal objective of "growth." In 1990 and 1991, Krull recommended Phoenix to all 10 accounts on the basis that interest rates were falling, and he believed that his clients should invest in a growth fund (common stock). Krull sold Phoenix to eight of the accounts in increments -- sometimes within one or two months, and sometimes within five to seven months. Only five of the accounts held their positions in Phoenix for more than one year after their last purchase of the fund.

Krull switched one account out of Phoenix in December 1991, and the remaining nine accounts out of Phoenix in March, April, May, June, and September 1992. Krull recommended six different funds as alternatives to Phoenix, five of which had a principal objective of "growth" and one of which had a principal objective of "income and growth." Krull explained that Phoenix' price had fallen, and that after examining its price-to-book ratio, the growth ratios, the debt composition, and the portfolio composition, he concluded that other funds offered better potential. The record shows that Phoenix was valued at approximately $20 per share in 1990, rose to approximately $23 by the Fall of 1991, and fell to approximately $20.50 during the first half of 1992. Because Krull switched the accounts into six different funds, our analysis of the suitability of Krull's recommended switches out of Phoenix relies to an extent upon an analysis of the recommended alternative funds. Krull made no representation as to why other funds within the Phoenix family were not suitable.

- <u>Franklin Growth Fund ("Franklin Growth").</u> Franklin Growth was a member of the Franklin family of funds. Its principal objective was "growth." Krull recommended that four accounts switch into Franklin Growth in June, October, and November 1991, and that an additional five accounts switch into the fund in February and April 1992. Krull testified that he recommended Franklin Growth because it offered better potential based on its price-to-earnings and price-to-book ratios, its growth ratio, and its debt and portfolio compositions. Krull recommended in September and October 1992 that four of these accounts switch from Franklin Fund to another mutual fund. The price per share of the fund had decreased from approximately $29 per share in the last quarter of 1991 and the first quarter of 1992 to approximately $14 per share in September and October 1992.

- <u>Idex Fund ("Idex").</u> Idex was a common stock fund with a principal objective of "growth," and was a member of the IDEX family of funds. Any switch of $1,000 or more was free within the family of funds, and a $5 transaction fee was assessed for transactions of less than $1,000. Krull made no representation as to why other funds within the Idex family were not suitable. At Krull's recommendation, all 10 accounts bought Idex between the Spring of 1991 and the Spring of 1992 on the basis that it had a growth objective and a below-average risk, was rated "five stars" by Morningstar, and had had a good performance over one, three, five, and 10 years. Krull stated that he thought that Idex fit within the growth parameter on his customers' New Account sheets. By June 1992 and through November 1992, Krull recommended that nine of the accounts switch (completely or partially) from Idex into either Franklin Rising Dividends Fund or Euro Pacific Growth Fund on the basis that Idex' price had fallen, and the fund did not appear to be doing well. Krull stated that he was also concerned that the fund's managers had given notice that they might add derivatives and options to the Idex portfolio. Krull stated that he believed that this change in fund policy created a risk that he could not quantify. Only one customer bought and held Idex. As discussed below on an account-by-account basis, we find that these switches were unsuitable.

Within one month of the last sale of Idex, Krull began to switch accounts back into Idex. By April 1993, Krull had recommended that five accounts repurchase Idex on the basis that the fund had not, in fact, added derivatives to its portfolio notwithstanding its ability to do so. Krull stated that the fund had retained its five-star rating, and that it looked like an attractive investment again. He stated that it had been a mistake to switch his customers out of Idex. Within two months, Krull had switched the seven accounts out of Idex again on the basis that Morningstar had dropped its coverage of the fund, and he did not think that it was prudent to keep his customers in the fund. He stated that Alger looked more attractive to him. As discussed below, we find that the switches back into Idex in December 1992 and April 1993, and then out again in June 1993, were unsuitable for the five accounts in which they occurred.

- Franklin Rising Dividends Fund ("Franklin Rising"). Franklin Rising was a member of the Franklin family of funds. Intra-family switches could be made without incurring a sales charge. Krull made no representation as to why other funds within the Franklin family were not suitable. Franklin Rising was a common stock fund with a principal objective of "income and growth." Between June and October 1992, all 10 accounts switched into Franklin Rising at Krull's recommendation. Krull testified that he recommended Franklin Rising because of the fund manager's "disciplined approach," the fund's five-star rating, and the fact that the fund was a "little more growth and income oriented," a "sort of a blend of growth and income." Krull stated that the economy was weak, and Franklin Rising was probably "a better downside protection in kind of a shaky economy."

Starting in November 1992, however, Krull began recommending that his customers switch out of Franklin Rising. Eight accounts switched out of Franklin Rising in stages between November 1992 and May 1993 to purchase a variety of funds. One account switched out of Franklin Rising in June 1993.

- Alger Small Capitalization Portfolio ("Alger Small Cap"). Alger Small Cap, a member of the Alger Group of funds, was a common stock fund with a principal objective of growth. Krull made no representation as to why other funds within the Alger family were not suitable. Starting in January 1993, all 10 accounts switched into Alger Small Cap at Krull's recommendation. Alger Small Cap, one of seven different portfolios in The Alger Fund (Alger family of funds), invested primarily in over-the-counter companies, including companies still in the developmental stage, older companies that appeared to be entering a new stage of growth, or companies that provided products or services with high-unit volume growth. The fund had a growth objective and "above average" risk. Krull stated that he found Alger Small Cap "attractive both because of the fund's philosophy and the fact that the fund charged contingent-deferred commissions "which kept the costs reasonable to clients." He testified that he believed that "domestic small-capitalization growth was a good place to be, and that's where we went, a little more aggressive than the growth and income of the Franklin Rising Dividends. So we added to the Alger position." Krull stated that he recommended Alger Small Cap to his customers in "an effort to get them into a long-term position." Krull continued to switch his customers into Alger Small Cap over a period of five months until June 1993, generally through monthly purchases.

By July 1993, Krull had recommended that eight accounts sell a part of their Alger Small Cap holdings in order to diversify into Oppenheimer Global Biotech (and, in two accounts, Delaware Group Value Fund).

- GT Global Health Care Fund. GT Global Health Care was a member of the GT Global family of funds. Krull recommended GT Global Health Care to each of the 10 accounts at issue between January and May 1992. Five of the accounts purchased the fund in two or more stages. Krull testified that when he switched customers out of a particular family of funds to purchase GT Global Health Care, there was no comparable health care fund in any of those other families. He recommended that seven accounts switch out of the fund in September and December 1992 and January 1993. Three accounts did not switch out of GT Global Health Care during the period alleged in the complaint. Krull made no representation as to why other funds within the GT Global family were not suitable.

Mutual funds are not meant to be used as trading vehicles. In addition, a perception that the asset value of a fund specializing in stocks of a particular industry will decline has been deemed by the SEC to be an insufficient reason for a short-term switch. Russell L. Irish, supra. Nevertheless, the record shows that during the relatively short period of time that the selling customers held the fund, the value of the fund decreased from approximately $22 in January 1992 to $18 in September 1992, and that it remained at that level in January 1993. It appears that Krull's customers decided to follow Krull's recommendation to switch from GT Global Health Care to minimize their losses. We give Krull the benefit of the doubt as to these switches and find that Krull's recommended switches out of GT Global Health Care were not unsuitable.

- Templeton World Fund ("Templeton World"). Templeton World was a member of the Templeton family of funds. Switches could be made within the Templeton family without incurring additional sales charges. Krull made no representation as to why other funds within the Templeton family were not suitable. Templeton World was a global fund with a principal objective of "growth." Between November 1990 and August 1991, Krull recommended that each of the 10 accounts purchase Templeton World. He recommended incremental purchases of Templeton World to five of the accounts. Between November 1991 and August 1992, Krull recommended that each of the 10 accounts switch out of Templeton World to one of five other funds on the basis that Templeton World's year-to-date performance was only five percent and it was only rated "three stars" by Morningstar. Krull switched six accounts in November and December 1991, three accounts in February 1992, and one account in August 1992.

- Oppenheimer Gold Fund. Krull recommended Oppenheimer Gold to five accounts in July, August, and December 1990. He recommended partial or full switches out of two accounts in May 1991 and three accounts in April 1992. Krull made no representation as to why other funds within the Oppenheimer family were not suitable. The record does not provide information as to the fund's investment objectives.

- Sogen International Fund ("Sogen"). Krull recommended Sogen to eight accounts between June 1990 and early 1991. The record does not provide information as to the fund's investment objectives. In June 1992, Krull switched seven accounts from Sogen to Franklin Rising; in November 1992, he switched one account from Sogen to Euro Pacific Growth Fund. The accounts purchased Sogen at approximately $18 to $18.80 per share and sold the fund for approximately $19 per share. Each of the accounts held Sogen for between one and two years. As more fully discussed below, we find that the record does not contain sufficient information about Sogen to make a determination that Krull's recommendations to switch from Sogen to another fund were unsuitable.

- Euro Pacific Growth Fund ("Euro Pacific"). Euro Pacific was an international fund with a principal objective of "growth." Krull recommended Euro Pacific to eight accounts between September and November 1992. Krull testified that he switched his customers into Euro Pacific because he believed that a "diversification into a European, a Pacific-based fund would make some sense for my clients." He provided no rationale except to state that there had been cuts in the interest rate "to stimulate the economy." In January 1993, within two months of recommending Euro Pacific, Krull recommended that each of these eight accounts switch out of Euro Pacific. Krull began to switch his customers out of the fund on the basis that his customers should invest in U.S. stocks. Krull stated that he believed that the U.S. was "sort of the political and economic leader of the world and that the growth was going to be in the United States, particularly in the small-capitalization area." We find that Krull's rationale fails to rebut the presumption that the short-term switches out of Euro Pacific were unsuitable. Accordingly, as more fully described below, we find that each of these switches was unsuitable.

- Delaware Decatur I Fund ("Decatur I"). Decatur I was a member of the Delaware Group of funds. Decatur I was a common stock fund with principal objectives of growth and income. Switches within the Delaware Group incurred no additional sales charges. Krull recommended that three accounts purchase Delaware I in July 1990 and that another three purchase the fund in September 1990. One account made an additional purchase of the fund in March 1991. Krull switched all six accounts out of the fund between May and December 1991. Krull made no representation as to why other funds within the Delaware family were not suitable.

Discussion of Customer Accounts

TMB. TMB was a 37-year-old widow with four children who was confined to a wheelchair because of multiple sclerosis. TMB was unemployed but had an annual income of $25,000, consisting primarily of Social Security payments. She had a net worth, excluding her residence, of $200,000, comprised of her husband's life insurance and retirement proceeds. She had no other brokerage accounts. Krull described TMB as very frugal, and an "inexperienced" investor who had taken a greater interest in her investments over time. TMB listed "income" and "long-term growth" as her investment objectives on her new account card.

TMB opened an account with Krull in August 1987. Between December 13, 1991 and July 12, 1993, TMB made 11 switches in her account at Krull's recommendation. These switches occurred once every two or three months and generated $12,517 in gross commissions. We find that nine recommended switches were unsuitable and dismiss two as discussed below.

12/13/91 **Sold: Decatur I @ 15.76**
Bought: Idex @ 19.71
Commission: $800.23

TMB purchased Decatur I in July and September 1990 and switched from Decatur I to Idex in December 1991. Krull testified that he recommended Decatur I to TMB on the basis that the fund's objective was "equity income," which he thought "fit within the growth parameter" on her new account form. Krull testified that he switched TMB out of Decatur I because the fund's manager had left.

Krull stated that he switched TMB into Idex because it had a five-star Morningstar rating, the risk was below average, it was classified by objective as a growth stock, and it had "superior" year-to-date, five and 10-year statistics. Krull testified that he considered switching TMB within the Delaware Fund family. He stated that the DelCap Fund's statistics were not as "attractive" as Idex; Decatur II had only a three-star rating; the Delaware Fund was rated two stars and its statistics were not as "attractive;" and the Delaware Trend was rated three stars and was an aggressive fund. Krull testified that he thought that Idex' performance would "more than make up for" the cost to switch funds. We find this reasoning to be faulty, since this was TMB's third purchase of Idex at Krull's recommendation at full commission price, and Krull had given TMB no advice as to LOIs or breakpoints. Further, as more fully discussed below, notwithstanding Idex' attractiveness to Krull at the time of this switch, it apparently was not attractive enough to warrant TMB's holding it for more than seven months.

We therefore find that Krull's recommendation that TMB switch out of Decatur I was unsuitable. Krull presented no evidence that the change in managers had a detrimental effect on Decatur I. Krull had already switched the CAR and JdH accounts out of Decatur in May and July 1991, at which time the fund was valued at approximately the same price as it was six months later. Thus, Krull not only did not present any evidence of any detrimental effect on the fund during those six months as a result of the fund's change in managers, he failed to explain why he waited six months to switch TMB.

7/31/92 **Sold: Idex @ 18.25**
Bought: Franklin Rising @ 15.63
Commission: $1,200.00

9/25/92 **Sold: Idex @ 18.69**
Bought: Euro Pacific @ 35.28
Commission: $1,501.56

Within seven months of TMB's third purchase of Idex, Krull switched her out in two increments. In July 1992, Krull switched Idex for Franklin Rising. He stated that Idex was "down in price," and he was looking for something "more stable maybe" notwithstanding that Idex continued to have a five-star rating. In fact, Krull sold Idex at $18.25 and $18.69, and had purchased the fund at $18.04, $17.86, and $19.71. Krull also was concerned over an announcement that Idex could choose to include derivatives and options in its portfolio. There is no evidence, however, that Idex did in fact add derivatives and options or any description of the way in which Ibex would trade those securities.

Krull stated that he chose Franklin Rising based on the fact that he "liked the manager's approach." Krull asserted that he chose Euro Pacific because he believed that a "diversification into a European, a Pacific-based fund would make some sense" for his customers. He provided no rationale except to state that there had been cuts in the interest rate "to stimulate the economy." Krull stated that he considered switching into Idex II, which could own up to 25 percent foreign stock, but it did not own any at that time. We find that Krull's rationale for making these switches fails to rebut the presumption that these short-term switches, which generated $2,700 in commissions, were unsuitable.

2/28/92 **Sold: Templeton World @ 14.49**
Bought: GT Global Health Care @ 20.90
Commission: $1,487.20

Krull recommended that TMB switch from Templeton World to GT Global Health Care seven months after he had recommended the purchase of Templeton World in July 1991, solely to diversify TMB into health care. Krull testified that health care funds were "down in price," and that he recommended GT Global Health Care because it looked like "the most attractive one." Krull testified that he could not recall any alternatives within the Templeton family that were specific to health care. Krull presented no evidence as to why TMB should sell Templeton other than his desire to switch TMB into a health care fund. The switch cost TMB approximately $1,500 in commissions. We find that this reasoning fails to rebut the presumption that this switch was unsuitable.

9/14/92 **Sold: GT Global Health Care @ 17.95**
Bought: Franklin Rising @ 15.92
Commission: $1,200.00

Krull switched TMB out of GT Global Health Care approximately seven months later because he believed that this recommendation had been a mistake. For the reasons previously stated, we dismiss the finding that this transaction was unsuitable.

4/24/92 **Sold: Oppenheimer Gold @ 9.60**
Bought: Franklin Growth @ 28.98
Commission: $321.10

TMB had purchased Oppenheimer Gold in June and September 1990 at $13 and $12 per share. (Krull also recommended that the CAR, RR, JdH, and NWA accounts purchase Oppenheimer Gold in the third and fourth quarters of 1990). Krull switched TMB from Oppenheimer Gold to Franklin Growth in order to change from a "defensive-type," "insurance-type" investment to a growth vehicle. We have also considered that the fund had decreased in price during the time TMB owned it, and that TMB did not reinvest the entire proceeds from the sale of Oppenheimer because she needed some cash. On the basis of the foregoing, we dismiss the finding that this transaction was unsuitable.

11/16/92 **Sold: Phoenix @ 20.80**
Sold: Franklin Growth @ 14.06
Sold: Sogen @ 19.31
Bought: Euro Pacific @ 34.03
Commission: $937.95

We affirm the finding that this switch was unsuitable for TMB. It appears that the basis of Krull's recommendation to switch into Euro Pacific was that the fund was a European/Asian based fund. This may explain the switch from Phoenix and Franklin Growth, but it does not explain his recommendation to switch from Sogen into Euro Pacific, another international fund. Further, although Franklin Growth had lost half of its value during the time that TMB owned the fund, Krull does not explain why he did not recommend switching TMB into Franklin Rising, a member of the Franklin family of funds, which he had recommended to seven accounts in October 1992 and an eighth account in November 1992. We find that Krull has not provided sufficient justification to overcome the presumption that this switch was unsuitable.

2/12/93 **Sold: Franklin Rising @ 16.23**
Bought: Alger Small Cap @ 23.26
Commission: $1,280.23

4/30/93 **Sold: Franklin Rising @ 15.35**
Bought: Alger Small Cap @ 20.51
Commission: $600.00

We find that these switches were unsuitable. Krull recommended that all 10 accounts purchase Franklin Rising between June and December 1992. In each account, Krull purchased Franklin Rising in increments, thereby depriving the customers of any benefit of an LOI or break- point. Krull recommended that each account switch out of Franklin Rising, generally between December 1992 and May 1993. Krull switched all but one account (NWA) out of Franklin Rising in increments.

Krull testified that he recommended the sale of Franklin Rising because President Clinton had won the election and he was "generally thought to be the most favorable Democratic president to business that [the U.S.] had ever had." Krull opined that domestic growth would be "strong," and the fund "looked like a way to get out of a little bit more conservative growth and income and into growth." Krull selected five different accounts -- Alger Small Cap, Alger Growth, Idex, Delaware Group Value, Small Cap World, and Phoenix -- as alternative investments. During this period of time, the price of Franklin Rising remained consistent, generally between approximately $15.50 and $16.20 per share. TMB sustained losses on both transactions. Given that TMB's investment objectives consistently were "long term growth" and "income," we find that this short-term switch was not suitable for TMB. Accordingly, we affirm the finding that these switches were unsuitable.

2/26/93 **Sold: Euro Pacific @ 33.61**
Bought: Alger Small Cap @ 21.15
Commission: $2,000.79

Krull recommended three switches into Alger Small Cap, from Franklin Rising in February and April 1992, and from Euro Pacific in February 1992. These switches generated approximately $3,900 in commissions. Five and three months, respectively, after TMB's two purchases of Euro Pacific, Krull switched TMB out of that fund because he believed that his customers should invest in U.S. stocks. Krull he stated that he believed that the U.S. was "sort of the political and economic leader of the world and that the growth was going to be in the United States, particularly in the small-capitalization area." We find that Krull's rationale fails to rebut the presumption that the switch out of Euro Pacific was unsuitable.

7/12/93 **Sold: Alger Small Cap @ 22.89**
Bought: Oppenheimer Global Biotech @ 22.77
Commission: $1,187.50

Three months after her last purchase of Alger Small Cap, Krull switched TMB out of a portion of her Alger holdings into Oppenheimer Global Biotech. We note that Krull recommended that TMB switch out of Euro Pacific in part because of economic and political events in Europe and Asia that he believed would cause an economic downturn in those areas, including the Russia's collapse, the cutting of interest rates by the Bundus Bank, and the reunification of East and West Germany. Nonetheless, Krull recommended that TMB sell 25 percent of her Alger holdings to invest in another international fund, Oppenheimer Global Biotech. He stated that this switch seemed "prudent" to him based on

Alger's price weakness. We note that in July 1993, Alger was valued at $22.89 as compared to $20.51 in April 1993 and $21.15 and $23.26 in February 1993. Further, Alger had a contingent deferred sales load based on the purchase price. TMB paid a sales load equal to five percent of the purchase price based on the fact that the sale occurred during the first year. Thus, we find that Krull's rationale does not support a finding of suitability. We note that Krull recommended that eight of the accounts switch from Alger Small Cap to Oppenheimer Global Biotech. We find that each of these switches was likewise unsuitable.

VAN. VAN was a 72-year-old retiree when he opened an account with Krull in January 1989. He was referred to Krull by a neighbor and client of Krull's. VAN had retired in 1979 as a nuclear control operator. He did not graduate from high school. VAN, who had been a widower, remarried in 1988. VAN received approximately $1,150 per month in Social Security payments, and his wife, Laverne, had a monthly income of approximately $1,600. VAN represented that he and his wife lived "comfortably" on approximately half of their income. VAN had a net worth, excluding residence, of $100,000.

VAN indicated an investment objective of "tax free" on his new account card and invested approximately $155,000 in three municipal investment trusts between January and July 1989 to provide tax-free income. In 1990, VAN received $45,000 from the sale of his home and followed Krull's recommendation that he invest that money in mutual funds. Between August and October 1991, at Krull's recommendation, VAN sold his municipal trusts and invested the funds in mutual funds. Between December 1991 and January 1993, Krull recommended six switches in VAN's account, which generated a total of $5,887 in commissions. We find that five switches were unsuitable and dismiss one as discussed below.

Krull categorized VAN as a "very inexperienced" investor. VAN had minimal investment experience when he opened his account in 1989. Krull contended that VAN's investment objective changed from "tax free" to "long term growth" about six months after VAN opened an account with him. The new account form, however, was not updated to reflect that change. VAN contended that his investment objective was always "tax-free income," and did not change. It was undisputed that VAN relied on Krull to make investment recommendations. VAN testified that Krull did not discuss sales charges with him.

12/30/91 **Sold: Decatur I @ 15.86**
Bought: Idex @ 19.29
Commission: $375.58

VAN invested $10,000 in Decatur I in September 1990 and switched from Decatur I to Idex 15 months later. The fund had not decreased in value as of December 1991, and VAN paid approximately half of his profits from the sale of Decatur I to purchase Idex. We therefore affirm the finding that this switch was unsuitable.

1/31/92 **Sold: Kemper Environmental @ 15.49**
Bought: GT Global Health Care @ 22.51
Commission: $1,062.50

VAN had owned Kemper Environmental five months when Krull recommended the switch to GT Global Health Care. VAN not only took a $.50 loss per share, he paid Krull approximately $1,060 in commissions. Krull stated that he recommended the sale of Kemper because the fund "had not done particularly well" and the environmental sector "just was not doing well." In fact, the fund lost about $.50 in value per share between August 1991 and January 1992. Krull stated that Kemper did not have a health care choice; thus, he recommended the switch to GT Global Health Care. We have previously discussed the reasons for Krull's selection of GT Global Health Care. We find that Krull's rationale for moving a group of accounts to GT Global Health Care does not rebut the presumption that this short-term switch was unsuitable. We therefore affirm the finding that this switch was unsuitable.

6/1/92 **Sold: Phoenix @ 20.45**
Bought: Franklin Rising @ 15.57
Commission: $1,400.05

8/14/92 **Sold: Phoenix @ 20.48**
Bought: Franklin Rising @ 15.90
Commission: $1,240.00

8/20/92 **Sold: Templeton World @ 14.79**
Bought: Franklin Rising @ 15.74
Commission: $1,089.09

Krull recommended that VAN sell his position in Phoenix in two increments and switch into Franklin Rising. In doing so, Krull made no effort to obtain a breakpoint or LOI for VAN. VAN had purchased approximately $67,500 of Phoenix in four purchases between November 1990 and October 1991. VAN lost money on the switches and also paid approximately $2,600 in additional commissions. Krull stated that VAN was concerned about losing principal with Phoenix, which had lost about $3 in value. Krull stated that he chose Franklin Rising because it was more "income" oriented than Phoenix and he believed it offered better "potential." Krull did not, however, offer any explanation as to whether he considered switching funds within the Phoenix family. Although VAN indicated on his switch form a change in investment objectives, both funds had an objective of "growth."

Templeton World had lost about $1.20 in value per share. Krull commented that VAN had held Templeton World "for some time" and that Templeton World had a three-star rating compared to Franklin's five-star rating. The cost to VAN for this switch, however, was approximately $3,700. We note that when Krull recommended that TMB switch out of Templeton World in February 1992, the fund was sold at $14.49 per share. Six months later, in August 1992, VAN received $14.79 per share. We find that having held a fund for "some time" does not constitute a sufficient reason for its sale. Krull also did not explain why he chose to switch VAN into Franklin Rising in three increments within two months, thereby denying VAN the benefit of a potential breakpoint. Having considered the circumstances of these switches, we find that Krull has not presented a sufficiently convincing rationale to overcome the presumption of unsuitability.

1/15/93 **Sold: GT Global Health Care @ 17.92**
Bought: Alger Small Cap @ 22.39
Commission: $720.06

For the reasons previously stated, we dismiss the finding that this switch was unsuitable.

NWA. NWA opened an account with Krull in July 1986. He was 72 years old, single, with no dependents. NWA had an annual income of $25,000 and a net worth, excluding residence, of $200,000. According to Krull, NWA also had accounts at two other broker/dealers, but eventually transferred all of his assets to IMR. According to Krull, NWA was also active in real estate investments, including a mobile home park that he owned. Krull described him as "very sophisticated and very active." Krull testified that his objective was "to accumulate wealth . . . primarily . . . long-term growth." NWA generally followed Krull's recommendations.

NWA's new account card, dated 1986, showed investment objectives of income and long-term growth. According to Krull, the "objectives changed over time. He had . . . some income from municipal bonds, he had the income from his property, but his objective was to generally have his capital grow over time." Krull testified that this change occurred around 1991. Krull did not update the new account card to reflect the change in objective, or when he later remarried. NWA was diagnosed with Alzheimer's disease sometime in 1993 or 1994 and died in August 1994. Against Krull's advice, NWA liquidated his entire mutual fund portfolio in November 1993. Krull recommended five switches in NWA's account between February 1992 and June 1993, which generated a total of $6,729 in commissions. We affirm the DBCC's findings that four switches were unsuitable, and dismiss one as discussed below.

2/3/92 **Sold: Templeton World @ 14.51**
Bought: GT Global Health Care @ 22.32
Commission: $1,487.50

Krull recommended that NWA, like TMB, switch from Templeton World to GT Global Health Care in February 1992 seven months after his recommendation to buy the fund. Krull noted that NWA had held Templeton World "for some time," and he wanted to diversify NWA's holdings into health care.[7] We note that this switch included shares of Templeton World that NWA purchased in May 1990 as well as in July 1991. For the reasons given in our discussion of the TMB and VAN accounts, we find that this switch was unsuitable. We find that Krull's rationale that the switch from Templeton World to GT Global Health Care, which was made in order to diversify NWA's holdings and which was sold 11 months later, fails to rebut the presumption that the switch was unsuitable.

4/24/92 **Sold: Oppenheimer Gold @ 9.60**
Bought: Franklin Growth @ 28.98
Commission: $280.53

We have previously determined that a switch out of Oppenheimer Gold was suitable for TMB and NWA. For the same reasons, we find that Krull's recommendation that NWA switch out of Oppenheimer Gold was also suitable.

6/1/92 **Sold: Phoenix @ 20.45**
Bought: Franklin Rising @ 15.57
Commission: $1,760.03

NWA had purchased Phoenix in March, April, and May 1991. Krull, like VAN, recommended that NWA switch from Phoenix to Franklin Rising in June 1992 after approximately one year because the fund had decreased in value. The price per share of Phoenix had decreased from a high of $23.37 in April 1991 to $20.45 in June 1992. Like VAN, NWA indicated a change in investment objectives on his switch form. For the reasons previously stated as to VAN, we find that switch was unsuitable.

1/15/93 **Sold: GT Global Health Care @ 17.92**
Bought: Alger Small Cap @ 22.39
Commission: $1,000.39

For the reasons previously discussed, we dismiss the finding that this switch was unsuitable.

6/11/93 **Sold: Franklin Rising @ 15.36**
Bought: Alger Small Cap @ 22.80
Commission: $2,200.66

On Krull's recommendation, NWA purchased Franklin Rising in June and October 1992 and

[7]We note that this switch included shares of Templeton World that NWA purchased in May 1990 as well as in July 1991.

sold his position in June 1993 to purchase Alger Small Cap. The price of Franklin Rising during that time varied only by approximately $.40 per share. Krull gave as his reason for the switch that Alger Small Cap was "more attractive" because "domestic small-capitalization growth was a good place to be," and also that Alger was "a little more aggressive than the growth and income of [Franklin Rising]." This switch, made after NWA had purchased Franklin Rising in June and October 1992, only 12 and eight months previously, cost NWA approximately $3,200 in commissions. We find that Krull's rationale for this switch fails to rebut the presumption that this switch was unsuitable.

RR Trust. The RR's owned a large farm north of the Tri-Cities in Eastern Washington. They transferred an account for the RR Trust to Krull in March 1987. RR was then 50 years old, married, with no dependents. His annual income was $100,000 and his net worth, excluding residence, was $500,000. The RR's opened another account with Krull in 1992 in which they invested $200,000 in municipal bonds.

According to Krull, RR had some investment experience. His investment objectives for the Plan were shown on the new account card as "long-term growth" and "short-term appreciation." RR depended on Krull for financial advice and generally followed Krull's recommendations. According to Krull, the RR's were "very sophisticated business people. Again, the situation is similar, that they pretty much rely on my recommendations to them and act on them."

Krull recommended 18 switches in the RR account between June 1991 and July 1993. The switches generally occurred monthly or bi-monthly, and generated a total of $31,023 in commissions. We find that 15 of these switches were unsuitable, and dismiss the findings as to three switches.

6/28/91	**Sold: Kemper U.S. Gov Secs @ 8.89**
	Bought: Phoenix @ 22.52
	Commission: $800.81
	Bought: Idex @ 17.41
	Commission: $1,250.26
8/30/91	**Sold: Kemper U.S. Gov Secs @ 9.07**
	Bought: Templeton World @ 16.03
	Commission: $1,250.34
	Bought: Idex @ 18.95
	Commission: $1,250.70

Between June and December 1991, Krull recommended that RR make four switches in order to place the funds in a growth fund. RR paid approximately $5,340 in commissions to make these switches and was not given the benefit of an LOI or breakpoint.

RR had purchased Kemper in January and April 1990 at $9.47 and $8.98 per share, respectively. Approximately 18 months later, Krull recommended the sale of Kemper because interest rates were falling and there was "a buildup toward the Gulf War" causing the government mortgage-based securities in the fund to drop in value as the mortgages were being refinanced at lower and lower rates. We note, however, that Krull sold RR's position in Kemper in two stages. The second sale, executed two months after the first, was at a higher price. Further, Krull chose to keep RR in Kemper notwithstanding his recommendation to CAR that she sell more than 23,000 shares between November 1990 and March 1991. We find that Krull has failed to present sufficient justification for these switches, and we therefore find that these switches were unsuitable.

12/13/91 **Sold: Templeton World @ 13.51**
Sold: Templeton World @ 13.51
Bought: Idex @ 19.50
Commission: $1,500.53

RR had purchased Templeton World four and nine months earlier at $15.41, $15.27, and $16.03 per share. RR was one of five accounts in which Krull recommended a switch from Templeton World to Idex in November or December 1991. Krull stated that he recommended that RR switch out of Templeton World because he was concerned with the world economy's "being down" and the fund's "price weakness." We find that Krull's reasons for making the switch fail to rebut the presumption that this short-term switch was unsuitable. We have also considered that this switch was part of an incremental switch into Idex without the benefit of any breakpoint. We find that this switch was unsuitable.

12/30/91 **Sold: Decatur I @ 15.86**
Bought: Idex @ 19.09
Commission: $540.06

Krull recommended that the RR accounts, like the TMB and VAN accounts, switch from Decatur I to Idex in December 1991. For the same reasons, we find that Krull's recommendation that RR switch out of Decatur I was likewise not suitable.

4/10/92 **Sold: Phoenix @ 20.25**
Bought: Franklin Growth @ 28.49
Commission: $2,401.14

RR had purchased Phoenix in October and November 1990 and June 1991. He had held the fund for between 14 and 18 months when Krull recommended that he switch into Franklin Growth. Krull testified that he recommended a switch out of Phoenix because its price had fallen. We note that RR bought Phoenix at $19.78 and $22.52 per share, and sold it for $20.25 per share. Krull stated that he recommended Franklin Growth because it "offered better potential for what [he] saw as the U.S. economy" based on Phoenix' price-to-earnings ratios and debt and portfolio composition.

Notwithstanding that RR had held Phoenix for more than one year, we do not find Krull's reasons for the switch to be persuasive. This switch cost RR approximately $1,400 in commissions. We note that although Krull made the switch because he expected better long-term results, he recommended the sale of the fund eight months later. We find that this switch -- from one growth fund to another -- was unsuitable for RR . We find that Krull has not presented sufficiently convincing rationale for the switch from one growth fund to another to rebut the presumption that this switch was unsuitable.

4/24/92 **Sold: Oppenheimer Gold @ 9.60**
Bought: Franklin Growth @ 28.98
Commission: $600.47

We have previously determined that a switch out of Oppenheimer Gold was suitable for NWA. For the same reasons, we find that Krull's recommendation that RR switch out of Oppenheimer Gold was also suitable, and we dismiss the finding that this switch was unsuitable.

6/12/92 **Sold: Sogen @ 19.11**
Bought: Franklin Rising @ 15.73
Commission: $680.17

Krull stated that he switched RR out of Sogen, a world stock fund, because it was very conservative, and he wanted RR in a domestic fund with a "little more growth and income." We note that RR held Sogen for almost two years. As was the case with TMB, we cannot determine from the record whether this switch was suitable. We therefore dismiss the DBCC's finding that this switch was unsuitable.

7/10/92 **Sold: Idex @ 18.47**
Bought: Franklin Rising @ 15.55
Commission: $2,320.06

Between April and October 1992, Krull recommended four switches into Franklin Rising in the RR account. We have already discussed Krull's asserted reasons for recommending the sale of Idex. Krull testified that he considered that the fund was "down on performance" and that he was concerned about the possible addition of derivatives. Idex had, in fact, increased in price during the time RR held the fund in his account. Nonetheless, for a commission of approximately $2,300, Krull determined that it was appropriate to sell it. We find that his rationale for this switch does not rebut the presumption that the switch was unsuitable.

10/19/92 **Sold: GT Global Telecommunication @ 10.64**
Bought: Franklin Rising @ 15.59
Commission: $357.50

Krull testified that he recommended the sale of GT Global Telecom because of a price drop. We note that the fund had fallen in value by approximately $1.50. We find that this is not a sufficient reason for making a switch after seven months. Further, Krull recommended a series of purchases of Franklin Rising without making any effort to obtain a breakpoint or LOI for RR. We therefore affirm the finding that this switch was unsuitable.

10/30/92	**Sold: Idex @ 18.40** **Sold: Franklin Growth @ 13.78** **Bought: Euro Pacific @ 33.88** **Commission: $3,300.25**
11/16/92	**Sold: Idex @ 18.92** **Bought: Euro Pacific @ 33.68** **Commission: $550.16**

In October and November 1992, Krull switched RR out of Idex and Franklin Growth into Euro Pacific (which he sold in April 1993). He explained that he recommended Euro Pacific because the Bundus Bank had cut its rates, and he thought that Euro Pacific, which had a four-star rating, below-average risk, and a good long-term record, provided a "better growth opportunity." He also stated that he had taken advantage of a "price weakness" in Euro Pacific. We find that Krull's reasons for these switches do not justify the $3,800 cost to RR. We also note that Krull made no effort to give RR the benefit of an LOI or breakpoint in his purchase of Euro Pacific. We affirm the finding that these switches were unsuitable. Although the switch from Franklin Growth Fund may have been prudent based on its precipitous price drop, we find that the switch into Euro Pacific was unsuitable on the basis that two months later, Krull recommended Franklin Rising to RR. Had the switch been made between funds, RR would not have incurred a sales commission.

12/28/92	**Sold: GT Global Health Care @ 18.62** **Bought: Franklin Rising @ 16.59** **Commission: $550.21**

For the reasons previously discussed, we dismiss the finding that this switch was unsuitable.

1/29/93	**Sold: Euro Pacific @ 33.46** **Bought: Alger Small Cap @ 23.17** **Commission: $2,600.60**

Starting in January 1993, Krull began to accumulate a position in Alger Small Cap in RR's account on the basis that Alger Small Cap was a domestic growth fund. Krull recommended four switches into Alger in January, February, April, and June 1993, without benefit of LOI or breakpoint. The switches into Alger cost RR approximately $5,700 in commissions. RR had owned Euro Pacific between five and six months when Krull recommended that he switch out of the fund. As previously discussed, we find that Krull's reasons for this short-term switch do not rebut the presumption that this switch was unsuitable for RR.

2/12/93	**Sold: Franklin Rising @ 16.23** **Bought: Alger Small Cap @ 23.26** **Commission: $2,080.00**
4/16/93	**Sold: Franklin Rising @ 15.24** **Bought: Idex @ 19.76** **Commission: $1,350.60** **Bought: Delaware Group Value @ 20.08** **Commission: $1,350.38**

We likewise find that Krull's recommended switches from Franklin Rising to Alger Small Cap, Idex, and Delaware Group Value were unsuitable for RR. RR had owned Franklin Rising less than one year when Krull recommended these switches notwithstanding Krull's recommendation to buy Franklin Rising because it was a more attractive fund for the long term. Krull justified his switch from Franklin Rising within months after he recommended its purchase on the basis that he wanted to get the RR account "into a long-term position which ended up by being Alger." He acknowledged that this rationale did not make sense. We agree. We have already discussed the incremental purchases of Idex, which we find to have been unsuitable. Krull has presented no evidence to rebut the presumption that the switch into Delaware Group Value was unsuitable. We therefore affirm the findings that all of the above switches were unsuitable.

4/30/93	**Sold: Euro Pacific @ 36.39** **Bought: Alger Small Cap @ 20.51** **Commission: $1,400.00**
6/25/93	**Sold: Euro Pacific @ 18.07** **Sold: Idex Fund @ 18.16** **Bought: Alger Small Cap @ 22.32** **Commission: $1,400.00**

The third and fourth switches into Alger Small Cap[8] involved switches from Euro Pacific and Idex. Notwithstanding that he had recommended the purchase of Idex in April 1993, Krull recommended that RR sell his entire position two months later because Morningstar had stopped

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[8]Krull recommended two additional purchases of Alger Small Cap in March and April 1993 that did not involve switches.

covering it. Krull stated that he did not think that retaining a position in Idex was "prudent," and that Alger was "more attractive." We find that Krull's rationale for this switch does not rebut the presumption of unsuitability, and we find that the switch from Idex in Alger Small Cap was unsuitable. We have previously discussed the suitability of the switches from Euro Pacific, which occurred in all 10 accounts, and we find that this switch was also unsuitable.

7/12/93	**Sold: Alger Small Cap @ 22.89** **Bought: Oppenheimer Global Biotech @ 22.77** **Commission: $1,187.50**
7/23/93	**Bought: Delaware Group Value @ 20.23** **Commission: $1,500.05**

One month after he recommended that RR purchase $55,000 (2,465 shares) of Alger Small Cap, Krull recommended that RR sell $50,000 (2,276 shares) of that position because Alger had become less "attractive" to Krull. Not only did RR pay a $2,200 commission to purchase the security on June 25, he paid a $1,200 commission to switch into Oppenheimer Global Biotech on July 12. Krull stated that he recommended Oppenheimer Global to diversify RR 's account. This recommendation followed by one month the recommendation to sell Euro Pacific, another foreign-based fund, on the basis that Krull thought that an investment in U.S. securities was more attractive. Krull had recommended Delaware Group Value approximately two months earlier; nevertheless, he made no attempt to obtain a breakpoint or LOI for RR. We find that Krull's rationale for this switch does not rebut the presumption of unsuitability.

<u>CAR.</u> CAR opened an IRA account with Krull in 1982. According to Krull, CAR was the "widow of a very successful real-estate developer" who was "quite well to do." CAR was 72 years old at the beginning of the review period. According to the new account card, her annual income was $100,000. By the end of 1993, CAR had a total of $600,827 invested with Krull in two accounts. This amount consisted of $339,607 in the account at issue in the complaint and $261,219 in an account that was not mentioned by the complaint.

The investment objectives on CAR's new account card were "relative safety of principal," "income," and "tax exempt income." According to Krull, CAR's investment objective for certain personal funds was "tax-free income," whereas her objective for her husband's IRA was "growth," so that she could take out the required distributions at age 70 2, maintain her principal, and pass it on to her children. According to Krull, CAR's investment objectives changed around 1982 to "growth;" however, he did not update her account card to reflect that change. CAR completed switch forms in May 1991 and March, June, July, August, September, and October 1992 that indicated that her investment objectives had changed. Krull testified that CAR's investment objective remained "growth," and that the switch forms that indicated a change in the customer's investment objective actually were meant to indicate a change in the objectives of a particular fund.

According to Krull, CAR had "very little interest in securities investment." Krull agreed that CAR "had no experience in investing and no real interest in investments." According to Krull, "our relationship was that, again, I would give her recommendations, and she would take those."

Krull recommended 25 switches in CAR's account between November 1990 and July 1993, which generated a total of $56,641 in commissions. These switches generally occurred once a month or once every two months. We find that 19 of Krull's recommendations were unsuitable, dismiss five, and affirm one and dismiss one in part.

11/29/90	**Sold: Kemper U.S. Gov Secs @ 8.88** **Bought: Templeton World @ 13.08** **Commission: $1,250.45** **Bought: Phoenix @ 20.18** **Commission: $1,312.66**
12/28/90	**Sold: Kemper U.S. Govt Secs @ 8.99** **Bought: Pioneer II @ 16.91** **Commission: $600.64** **Bought: Oppenheimer Gold & Sp. Min @ 10.48** **Commission: $840.08** **Bought: Decatur I @ 15.36** **Commission: $600.27**
1/25/91	**Sold: Kemper U.S. Govt Secs @ 9.01** **Bought: Amev Growth @ 18.67** **Commission: $1,000.71** **Bought: Templeton World @ 13.21** **Commission: $750.33** **Bought: Phoenix @ 20.21** **Commission: $788.34**
3/28/91	**Sold: Kemper U.S. Govt Secs @ 8.96** **Bought: Sogen @ 17.98** **Commission: $470.28** **Bought: Templeton World @ 14.75** **Commission: $720.04** **Bought: Decatur I Ser @ 16.12** **Commission: $700.17** **Bought: Phoenix @ 22.51** **Commission: $340.58**

CAR purchased approximately 11,000 shares of Kemper in January and April 1990 at $9.37 and $8.81 per share, respectively; however, she sold an additional 13,000 shares between November and March 1991. The record does not indicate when she purchased those shares. Krull recommended that CAR switch out of her position in Kemper in four increments -- in November and December 1990, and in January and March 1991. As previously discussed, Krull recommended that RR, who also had purchased Kemper in January and April 1990, switch out of Kemper in June and August 1991 at $8.89 and $9.07 per share, respectively. As previously noted, Krull recommended the switch out of Kemper because of falling interest rates and the anticipated Gulf War, which Krull believed would cause government mortgage-based securities to drop in value. We note, however, that Kemper's price during these five months varied only by $.12. There is no evidence that the value of the fund decreased as Krull had speculated that it would. Although Krull recommended in May and November 1991 that CAR purchase another fund within the Kemper family (Kemper Environmental Fund), he did not recommend a switch from Kemper U.S. Government Securities into another Kemper fund. Krull earned approximately $9,300 as a result of these switches. On the basis of the evidence in the record, we find that these switches were unsuitable.

	Sold: Oppenheimer Gold & Sp Min @ 9.81
	Sold: Decatur I Ser @ 15.97
5/9/91	**Bought: Idex @ 17.27**
	Commission: $2,000.73
5/31/91	**Bought: Kemper Environmental @ 15.31**
	Commission: $1,820.73

We have previously determined that a switch out of Oppenheimer Gold was suitable for TMB and NWA. For the same reasons, we find that Krull's recommendation that CAR switch out of Oppenheimer Gold was also suitable.

For the same reasons that we determined that a switch out of Decatur I was unsuitable for TMB, VAN, and RR, we find that Krull's recommendation that CAR switch out of Decatur I was not suitable.

9/27/91	**Sold: Pioneer II @ 18.13**
	Bought: Idex @ 19.12
	Commission: $640.14

Krull recommended that CAR purchase Pioneer II in December 1990 at $16.91 per share. CAR was the only one of the customers at issue for whom Krull recommended this fund. Krull stated that he recommended Pioneer II because it was an old-line Boston fund that was "attractively rated by Morningstar" and "a little bit more aggressive than the old Pioneer fund." Krull recommended that CAR sell Pioneer II 10 months later on the basis that the fund "was up slightly" and Idex looked more attractive based on Morningstar statistics. CAR paid a $600 commission when she bought Pioneer II.

Krull sold Pioneer II at $18.13 per share, for a net profit of approximately $700; however, CAR paid another $600 in commissions to purchase Idex in September 1991. When asked why, in view of the fund's rise in value, he recommended that CAR switch out of the fund, Krull responded that his expectations for Pioneer II would have been at least to match the Standard & Poors index over that time period. We find that Krull's rationale for the sale of Pioneer II after 10 months fails to rebut the presumption that this switch was unsuitable.

We note that this switch into Idex was the first of three recommended purchases of the fund. CAR ultimately purchased approximately 2,500 shares of Idex without benefit of LOI or breakpoint.

11/8/91 **Sold: Templeton World @ 13.84**
Bought: Franklin Growth @ 28.66
Commission: $1,600.37
Bought: Kemper Environmental @ 15.72
Commission: $800.46
Bought: Idex @ 19.60
Commission: $800.00

As previously discussed, Krull recommended that nine of the accounts at issue switch out of Templeton World between November 1991 and February 1992. The tenth account, VAN, switched in August 1992. Krull recommended that the CAR, HN, and Mr. JdH. accounts switch to Franklin Growth. Krull had recommended Franklin Growth, which had a four percent front-end load, as a "growth" vehicle. Krull provided no rationale for his recommended switch into Kemper Environmental.

CAR had purchased Templeton World at Krull's recommendation in November 1990 at $13.08, in January 1991 at $13.21, and in March 1991 at $14.75. Krull recommended that CAR switch out of Templeton World eight months after her third purchase of the fund at $13.84 per share. We find that Krull's explanations for switching CAR out of Templeton World eight months after his last recommendation to purchase Templeton World do not adequately rebut the presumption that this switch was unsuitable.

1/30/92 **Sold: Kemper Environmental @ 15.40**
Bought: GT Global Health Care @ 22.40
Commission: $2,125.82

At Krull's recommendation, CAR purchased Kemper Environmental in May and November 1991. Two months later, in January 1992, Krull recommended that CAR sell her position for approximately what she had paid for it. CAR, however, paid $1,800 in commissions to make those purchases, and did not recoup those commissions in the sale. In addition, she paid approximately $2,000 in commissions to make the switch into GT Global Health Care on the basis of Krull's recommendation that she diversify her holdings into a health care fund.

2/14/92 **Sold: Fortis Growth @ 28.45**
Bought: GT Global Health Care @ 22.29
Commission: $1,912.65

Krull stated that he recommended Fortis Growth (previously called Amev Growth) in January 1991 at $18.67 per share because it was a "well-run" growth fund that was highly rated by Morningstar and was attractive because of economic conditions. (Krull also recommended Amev Growth to the Mr. JdH. account in January 1991). Krull recommended the sale of Fortis Growth approximately 13 months later at $28.45 per share because the fund had experienced a 67 and one-half percent gain, and he thought that CAR should take advantage of it. Although CAR had held Fortis for a relatively short time, we do not believe that it was unreasonable to advise CAR to take advantage of the rise in price. CAR paid a $1,000 commission when she invested $25,000 in Fortis, and a $1,900 commission when she turned over the $40,000 plus an additional $5,000 to purchase GT Global Health Care. Because CAR held this fund for more than one year and realized a substantial profit, we do not find that the record supports a finding that this transaction was unsuitable.

6/12/92 **Sold: Sogen @ 19.11**
Bought: Franklin Rising @ 15.17
Commission: $1,300.11

CAR made two purchases of Sogen, in June 1990 and March 1991. Krull recommended that TMB switch out of Sogen in June 1992 to purchase Franklin Rising. We find that the record does not contain sufficient information about Sogen to determine that this switch was unsuitable for CAR. We therefore dismiss the DBCC's finding that this transaction was unsuitable.

6/26/92 **Sold: Idex @ 17.98**
Bought: Franklin Rising @ 15.17
7/31/92 **Sold: Idex @ 18.25**
Bought: Franklin Rising @ 15.50
Commission: $1,300.11

Krull recommended four purchases of Idex, in May, September, and November 1991 and June 1, 1992, in the CAR account. Krull switched CAR out of Idex in June, July, and September 1992. As previously discussed, Krull recommended Idex to all 10 accounts, primarily between April and December 1991, and switched all 10 accounts out of Idex between June and November 1992 on the basis that Idex might include derivatives in its portfolio. We have previously determined that Krull's rationale for switching his customers out of Idex does not rebut the presumption that these short-term switches were unsuitable.

As previously discussed, we find that Krull's rationale for recommending these switches does not rebut the presumption that these short-term switches were unsuitable for the CAR account. Krull recommended that CAR purchase Idex on June 1, 1992. He recommended its sale on June 26, 1992 and again one month later. We therefore find that these switches were unsuitable.

As previously discussed, Krull recommended Franklin Rising to all 10 accounts because he liked the "disciplined approach" of the fund manager, the fund was rated five stars, and the fund was a "little more growth and income oriented," a "sort of a blend of growth and income." Krull stated that the economy was weak, and Franklin Rising was probably "a better downside protection in kind of a shaky economy." We note that Krull recommended five switches into Franklin Rising in the CAR account between June and October 1992 without benefit of LOI or breakpoint. We find that this alone is sufficient ground for a finding that these switches were unsuitable.

8/28/92	**Sold: GT Global Growth @ 17.62** **Bought: Franklin Rising @ 15.60** **Commission: $1,500.00**
9/25/92	**Sold: GT Global Growth @ 18.24** **Sold: Idex @ 18.69** **Bought: Euro Pacific @ 34.82** **Commission: $1,875.06**

The record contains no information regarding CAR's purchase of GT Global Growth. Thus, we do not know when CAR purchased her shares or how much she paid for those shares. As we are unable to discern why Krull recommended a switch from one global growth fund to another, and the record does not enable us to make a determination of suitability as to these switches, we dismiss the findings of unsuitability as to these switches.

10/19/92	**Sold: GT Global Telecommunications @ 10.64** **Bought: Franklin Rising @ 15.43** **Commission: $437.71**

CAR had purchased GT Global Telecommunications in March 1992 at $12.10 per share. Krull provided no reason for his recommendation that CAR switch out of this fund. Given that the switch occurred within approximately seven months of the purchase date, we find that this transaction was unsuitable for CAR.

10/30/92	**Sold: Franklin Custodian @ 13.78** **Bought: Euro Pacific @ 34.23** **Commission: $1,500.56**

As previously discussed, Krull recommended that all 10 accounts switch into Euro Pacific in September, October, and November 1992 and recommended that all 10 accounts switch out of Pacific in January through June 1993. Krull switched customers into Euro Pacific in order to diversify into a European/Pacific-based fund. The record does not, however, sufficiently evidence Krull's reasons for recommending the switch out of Franklin Custodian, which CAR had purchased 11 months earlier. We therefore dismiss the DBCC's finding of unsuitability as to this switch.

12/11/92	**Sold: Franklin Rising @ 16.05** **Bought: Smallcap World @ 19.18** **Commission: $2,750.12**
12/28/92	**Sold: Franklin Rising @ 16.13** **Bought: Phoenix @ 22.65** **Commission: $1,912.74** **Bought: Idex @ 20.10** **Commission: $2,250.20**

As previously discussed, Krull stated that he recommended Franklin Rising because of the disciplined approach of the fund manager, the fund's five-star rating, and the fund's investment objective of "a blend of growth and income" in a weak economy. Nonetheless, he recommended that CAR switch out of Franklin Rising four months after her last purchase of the fund. We note that Krull recommended that CAR sell her position in Franklin Rising in increments between October 1992 and April 1993. We find that Krull has failed to provide a rationale to rebut the presumption that these short-term switches from one growth fund to two different growth funds, Phoenix and Idex, were suitable. We also note the $100,000 switch into Smallcap World, a global fund, two months after Krull recommended the purchase of $40,000 of Euro Pacific, another global fund. Krull has presented no rationale for this selection, which may have deprived CAR of a breakpoint in Euro Pacific. Accordingly, we find that these switches were unsuitable for the CAR account.

We have previously discussed the pattern of switches recommended by Krull in Phoenix. Here, Krull recommended that CAR purchase Phoenix three months after he recommended that TMB sell the fund, and within six to nine months after he recommended that the nine other accounts, including CAR, sell the fund. On that basis, we can find no justification for this switch, and we affirm the finding of unsuitability.

1/29/93	**Sold: Euro Pacific @ 33.46** **Bought: Alger Small Cap @ 23.17** **Commission: $2,000.03**
2/12/93	**Sold: Smallcap World @ 19.57** **Sold: Euro Pacific @ 33.15**

Bought: Alger Small Cap @ 23.26
Commission: $3,200.58

2/26/93 **Sold: Smallcap World @ 19.17**
Bought: Alger Small Cap @ 21.15
Commission: $3,200.58

In three successive switches, Krull liquidated CAR's position in Euro Pacific and Smallcap World and switched her into Alger Small Cap. There had been no significant price movement in these funds during the time CAR owned them. Krull's stated reason for the switch seems to have been his perception of the world economy and his belief that U.S. small cap stocks would do well. Further, these switches into Alger Small Cap were done incrementally, with no LOI or breakpoint advantage for CAR, and cost her approximately $8,000 in commissions. It had cost CAR approximately $5,200 in commissions to purchase her positions in Euro Pacific and Smallcap World. We find that Krull has failed to provide a rationale for rebutting the presumption of unsuitability as to these switches, and we find that they were unsuitable.

4/16/93 **Sold: Franklin Rising @ 15.24**
Bought: Idex @ 19.45
Commission: $900.15
Bought: Delaware Group Value @ 20.08
Commission: $1,125.48

We have previously discussed Krull's rationale for recommending incremental switches out of Franklin Rising. On that basis, we find that the above switches were unsuitable.

6/11/93 **Sold: Idex @ 18.42**
Bought: Alger Small Cap @ 22.80
Commission: $2,400.38

CAR had purchased Idex in May, September, and November 1991 based on its five-star Morningstar rating, below-average risk, objective as a growth stock, and "superior" year-to-date, five- and 10-year statistics. Krull recommended that CAR switch out of Idex seven months after her last purchase. As previously discussed, Krull switched TMB, VAN, NWA, RR, and CAR out of Idex between June and November 1992 because Idex was "down in price," and he was looking for something "more stable maybe" notwithstanding that Idex continued to have a five-star rating. We note that the price differential in Idex between November 1991 and June 1992 was approximately $.60. We find that this does not justify Krull's recommended switches and the concomitant commissions that CAR was required to pay to make these switches.

Krull reiterated that he recommended the switch from Idex into Franklin Rising because Idex had announced that it could add derivatives to its portfolio, that he believed that this could change the "risk factor," and that he believed that the fund's objectives were no longer within CAR's investment objectives. He stated that he chose to sell Idex in increments because he wasn't in "an absolute panic" about the fund and chose to "scal[e] in and scal[e] out" of the position. He decided to repurchase Idex seven months later because, although the fund did add derivatives, "it didn't seem to affect their ratings with Morningstar or their prices, so it looked attractive again." We note that Krull recommended a $45,000 purchase of Idex, just $5,000 below the breakpoint, thereby depriving CAR of the opportunity to pay 2 2 percent less commission. Six months later, Krull recommended that CAR sell her position in Idex, at a commission cost of $2,400.

6/25/93	**Sold: Phoenix @ 20.67**
	Bought: Alger Small Cap @ 22.32
	Commission: $1,600.79

Krull recommended four incremental switches into Alger Small Cap. He testified that he recommended Alger Small Cap to his customers as a long-term position that they would accumulate.

We have previously discussed Krull's failure to obtain an LOI or breakpoint for his customers. CAR had made a $45,000 investment in Phoenix just six months earlier and had paid a $2,000 commission to make that switch. This switch into Alger Small Cap cost an additional $1,600 in commissions. We find that Krull has failed to provide sufficient rationale to overcome the presumption that this short-term trade was unsuitable, and we affirm the finding that this switch was unsuitable.

	Sold: Alger Small Cap @ 22.89
7/12/93	**Bought: Oppenheimer Global Biotech @ 22.77**
	Commission: $1,187.50
7/23/93	**Bought: Delaware Group Value @ 20.23**
	Commission: $2,160.56

We have previously discussed Krull's recommendation to sell Alger Small Cap within one month of CAR's last purchase of the fund. We see no rationale that could justify this switch. For this reason, and for the reasons discussed with respect to the TMB account, we find that this switch was unsuitable.

NT & FT. The NT & FT opened an account with Krull in July 1986. NT, 79, had owned an auto parts store, and FT was a retired teacher. NTs & FT's new account card stated that they had an annual income of $60,000 and a net worth, excluding residence, of $250,000. By the end of 1993, $587,146 had been invested in the NT's & FT's account through Krull. The investment objectives shown on the new account card were "income" and "long-term growth." NT died in 1990, at which time FT turned over complete responsibility for the account to Krull. According to Krull, FT "was inexperienced [and] relied on [his] recommendations to her."

Krull recommended 19 switches in the NT & FT account between December 1991 and July 1993, which generated a total of $30,011 in commissions. The switches generally occurred once a month or once every two months. We affirm 16 findings of unsuitability and dismiss three.

12/30/91 **Sold: Decatur I @ 15.86**
Bought: Idex @ 19.09
Commission: $600.00

The NT & FT account had held Decatur I for 15 months when, as with the VAN and TMB accounts, Krull recommended the switch from Decatur I to Idex in December 1991. For the same reasons, we find that Krull's recommendation that NT & FT switch out of Decatur I was not suitable.

2/14/92 **Sold: Fortis Growth @ 28.45**
Bought: GT Global Health Care @ 22.29
Commission: $850.70

Krull recommended the switch from Fortis Growth (previously AMEV) to GT Global Health Care in order to diversify into health care. He stated that the sale was based on a weakness in price and "an opportunity to do that." We note that Krull also switched CAR from Fortis to GT Global Health Care on February 14, 1992. We must dismiss the DBCC's finding that this transaction was unsuitable because the record does not indicate the date on which the NT & FT purchased Fortis Growth.

2/28/92 **Sold: Templeton World @ 14.49**
Bought: Franklin Growth @ 29.22
Commission: $1,000.49

Nt & FT bought shares in Templeton World in July 1991 at $15.94 per share. Krull recommended that the NT & FT switch from Templeton World to Franklin Growth, another growth fund, in February 1992, seven months later. Krull explained that he recommended that RR switch out of Templeton World in November 1991 on the basis of the fund's "price weakness." RR sold at $13.51 per share. Two months later, the NT & FT sold at $14.49 per share. We find that Krull has not provided a sufficient rationale to rebut the presumption that this short-term switch was unsuitable.

5/15/92 **Sold: Phoenix @ 20.65**
Bought: GT Global Telecommunications @ 12.26
Commission: $1,062.94
Bought: GT Global Health Care @ 18.87
Commission: $2,125.23

The NT & FT account had made incremental purchases of Phoenix in November 1990 and in February, September, and October 1991. Krull recommended that the NT & FT account switch out of their entire position in Phoenix seven months after their last purchase of the fund. As previously discussed, Krull had recommended Phoenix to all 10 accounts on the basis that interest rates were falling, and he believed that his clients should invest in a growth fund. Within one year, Krull was recommending that his customers switch out of Phoenix into another fund. Krull explained that Phoenix had gone down in price, and after examining its price-to-book ratio, the growth ratios, the debt composition, and the portfolio composition, he concluded that other funds offered better potential. Krull recommended that the NT/FT and Mrs. JdH accounts switch from Phoenix into GT Global Health Care in May 1992. We have previously discussed Krull's rationale for switching customers into GT Global Health Care. Krull did not specifically testify regarding his rationale for recommending GT Global Telecommunications. We find that Krull has not presented evidence that rebuts the presumption that this switch was unsuitable.

6/12/92 **Sold: Sogen @ 19.11**
Bought: Franklin Rising @ 15.73
Commission: $1,920.32

The NT & FT account purchased Sogen in August 1990, and Krull recommended that the NT's & FT's switch from Sogen to Franklin Rising 22 months later. As previously stated, we find that the record does not contain sufficient information from which to make a suitability finding regarding the switch from Sogen to Franklin Rising. We therefore dismiss the finding that this trade was unsuitable for the NT & FT.

7/10/92 **Sold: Idex @ 18.47**
Bought: Franklin Rising @ 15.43
Commission: $1,690.47

For the reasons previously discussed with respect to the TMB and RR accounts, we find that this switch was unsuitable.

9/14/92 **Sold: GT Global Growth @ 17.95**
Bought: Franklin Rising @ 15.79
Commission: $1,950.07

The switch into GT Global Telecommunications and GT Global Health Care cost NT & FT approximately $3,200 in commissions. We have already considered that Krull's reasons for switching customers into GT Global Health Care did not justify short-term switches. As to GT Global Telecommunications, we note that Krull switched NT & FT out of this fund five months later. We find that the switch into GT Global Telecommunications and the switch out of that fund were unsuitable.

9/25/92 **Sold: Idex @ 18.69**
Bought: Euro Pacific @ 34.82
Commission: $2,251.11

Notwithstanding Krull's purported rationale for switching the NT & FT account out of Idex in July and September 1992, we have considered that Krull recommended that the account repurchase Idex three months later in December 1992 and sell again in June 1993. As previously discussed, we find that Krull's recommendations to buy and sell and buy and sell again within a two-year period were unsuitable.

10/19/92 **Sold: GT Global Telecommunications @ 10.64**
Bought: Franklin Rising @ 15.59
Commission: $632.80

Like RR, the NT & FT account had a position in GT Global Telecommunication for seven months. The NT & FT account had purchased additional shares of the fund four months earlier. As discussed regarding the RR account, Krull recommended the sale of GT Global Telecommunications because of a price drop. Krull recommended that the NT & FT account make four switches into Franklin Rising for the reasons we have previously discussed. For the reasons given in connection with the RR switch from GT Global into Franklin Rising in October 1992, we find that this switch was unsuitable.

10/30/92 **Sold: Franklin Growth @ 13.78**
Bought: Euro Pacific @ 34.23
Commission: $938.37

Krull recommended that NT & FT switch out of Franklin Growth eight months later. NT & FT had paid a $1,000 commission to purchase Franklin Growth and sold it at a $1,500 loss. Although the price drop in Franklin Growth might have warranted a sale of the fund, we note that just 11 days earlier, Krull had recommended that the NT & FT account purchase an identical amount -- $23,000 -- of Franklin Rising, a fund in the same family as Franklin Growth. Had the switch been made from Franklin Growth to Franklin Rising instead of Euro Pacific, Krull would have saved the account approximately $900 in commissions. On that basis, we find that this switch was unsuitable.

12/28/92 **Sold: Heritage Income Growth @ 11.35**
Sold: Pioneer III @ 18.95
Sold: Putnam U.S. Govt @ 13.69
Bought: Idex @ 20.48
Commission: $1,250.56

We dismiss the finding that this switch was unsuitable. NT & FT had owned Heritage since February 1987, Pioneer III since June 1989, and Putnam since February 1987. We find that the record does not contain sufficient information regarding these funds to make a suitability determination.

12/11/92	**Sold: Franklin Rising @ 16.05** **Bought: Smallcap World @ 19.18** **Commission: $1,375.06**
02/12/93	**Sold: Franklin Rising @ 16.23** **Bought: Alger Small Cap @ 23.26** **Commission: $2,200.40**
5/14/93	**Sold: Franklin Rising @ 15.42** **Bought: Alger Small Cap @ 22.13** **Commission: $1,600.44**
4/30/93	**Sold: Franklin Rising @ 15.35** **Sold: Euro Pacific @ 36.39** **Bought: Delaware Group Value @ 20.04** **Commission: $1,650.00** **Bought: Alger Small Cap @ 20.51** **Commission: $800.00**

Between July and October 1992, Krull recommended three purchases of Franklin Rising. The NT & FT account paid an average of $15.50 per share. Two months later, Krull recommended that NT & FT begin switching out of their position in Franklin Rising at prices ranging from $15.35 to $16.23. Krull continued to switch NT & FT out of Franklin Rising in February, April, and May 1993. As previously discussed, Krull explained the recommendation on the basis that there had been an election and "market factors changed." Krull started the switches out of Franklin Rising two months after the last switch into the fund. In total, NT & FT held Franklin Rising less than one year. The NT & FT account paid approximately $6,200 in commissions out a purchase price of approximately $180,000 for these shares. We do not find Krull's rationale to be persuasive, and we find that these switches were unsuitable. We note that within approximately one month of recommending a $50,000 purchase of a global fund, Smallcap World, Krull began liquidating approximately $120,000 of Smallcap World and Euro Pacific. We find that Krull has failed to present a rationale that rebuts the presumption that this short-term switch out of Euro Pacific was unsuitable.

1/29/93	**Sold: Euro Pacific @ 33.46** **Bought: Alger Small Cap @ 23.17** **Commission: $2,000.03**

2/26/93 **Sold: Smallcap World @ 19.17**
Bought: Alger Small Cap @ 21.15
Commission: $1,560.02

6/25/93 **Sold: Smallcap World @ 20.27**
Sold: Idex @ 18.16
Bought: Alger Small Cap @ 22.32
Commission: $1,600.79

Krull recommended that the NT & FT account purchase $50,000 of Smallcap World in December 1992. He recommended that the NT & FT account switch from Smallcap World to another small cap fund in increments three and six months later. In April 1993, after only seven months, Krull recommended that the NT & FT account liquidate its position in Euro Pacific in order to purchase Alger Small Cap. Like the RR and HN accounts, Krull recommended that the NT & FT account liquidate its position in Smallcap World incrementally in January and April 1993. Between January and April 1993, the price of Euro Pacific rose $3 per share. As previously discussed, we find that Krull has not presented sufficient evidence to rebut the presumption that these short-term switches were unsuitable.

7/12/93 **Sold: Alger Small Cap @ 22.89**
Bought: Oppenheimer Global Biotech @ 22.83
Commission: $951.04

This switch involved approximately half of the position in Alger Small Cap that Krull had recommended that the NT & FT account purchase one month earlier. We see no justification for this switch, which cost approximately $950 in commissions, and find that this switch was unsuitable.

HN. HN was a retired nurse who had graduated from high school and had three years of nurses' training. She and her former husband, from whom she was divorced, had owned a large hops farm. HN was friends with Krull's mother, and began doing business with Krull in the early 1980s. HN's monthly income consisted of $1,500 in rent from a farm and $400 in Social Security payments. HN had an approximate net worth, excluding residence, of $2.5 million.

The investment objectives shown on the new account card were "income" and "long-term growth." HN testified about her investment objectives as follows: "I had money to invest and I wanted to make some money on it and I wanted it to be safe." She also wanted to have money for her children's education. HN characterized herself as an inexperienced investor who relied on Krull. Krull described HN as someone with extensive investment experience, but testified that HN's only mutual fund investment experience was with him.

According to HN, Krull never told her how much he was receiving on purchases and sales and he never told her that he could have exchanged her investments for purchases in a different fund within the same mutual fund family without an additional sales charge.

Krull recommended 13 switches in HN's account between December 1991 and July 1993 which generated a total of $34,375 in commissions. There were five switches between December 1991 and December 1992, and monthly switches between January and June 1993. We affirm 11 findings of unsuitability, dismiss one, and affirm one and dismiss one in part.

12/13/91 **Sold: Templeton World @ 13.51**
Bought: Idex @ 19.71
Commission: $1,400.20

HN purchased Templeton World in July 1991. As previously discussed, we find that Krull failed to provide sufficient justification for his recommended switches out of Templeton World. Therefore, we find that this switch was unsuitable for HN.

1/30/92 **Sold: Kemper Environmental @ 15.40**
Bought: GT Global Health Care @ 22.17
Commission: $482.80

HN purchased Kemper Environmental in April 1991 at $15.54 per share. Krull recommended that HN switch out of Kemper Environmental nine months later in order to diversify into a health care fund. As previously discussed, we find that Krull's reasons for switching into GT Global Health Care do not justify this short term switch. We therefore find that this switch was unsuitable for HN.

4/10/92 **Sold: Phoenix @ 20.25**
Bought: Franklin Growth @ 28.27
Commission: $813.12

HN purchased $25,000 of Phoenix in September 1991, and at Krull's recommendation, she sold Phoenix for approximately $25,200 and switched into Franklin Growth seven months later. The switch cost HN a commission of approximately $800. As previously discussed, Krull recommended the switch on the basis that Phoenix' price had fallen, and after examining its price-to-book ratio, the growth ratios, the debt composition, and the portfolio composition, he concluded that other funds offered better potential. We find that Krull has failed to rebut the presumption that this short-term switch was unsuitable for HN.

6/12/92 **Sold: Sogen @ 19.11**
Bought: Franklin Rising @ 15.73
Commission: $1,200.51

Like TMB, RR, CAR, and NT/FT, HN purchased Sogen in 1990. She had held the fund for

22 months when Krull recommended that she switch to Franklin Rising. As previously stated, we find that the record does not contain sufficient information to make a suitability finding regarding this switch. We therefore dismiss the DBCC's finding that this switch was unsuitable.

7/10/92 **Sold: Idex @ 18.47**
Bought: Franklin Rising @ 15.55
Commission: $1,600.41

11/16/92 **Sold: Idex @ 18.92**
Sold: Franklin Custodian s @ 14.06
Bought: Euro Pacific @ 33.68
Commission: $1,787.50

As previously discussed, Krull switched each of the 10 accounts into Idex incrementally between May and December 1991. A few additional switches occurred in 1992 and 1993. Krull recommended Idex based on its Morningstar rating and good performance over one, three, five, and 10 years. Krull did not, however, wait even one year after HN's last purchase of Idex in December 1991 to begin switching her out of her position in Idex to Euro Pacific and two Franklin funds. Krull stated that he recommended that his customers liquidate their positions in Idex because the fund's price had fallen, the fund did not appear to be doing well, and he was also concerned about the effect of the addition of derivatives and options to the Idex portfolio. Our review of the record does not substantiate Krull's purported concern about Idex' performance, and we find that Krull has failed to rebut the presumption that these short-term switches were unreasonable. We therefore find that these switches were unsuitable for HN.

1/29/93 **Sold: Euro Pacific @ 33.46**
Bought: Alger Small Cap @ 23.17
Commission: $3,000.05

4/30/93 **Sold: Euro Pacific @ 36.39**
Bought: Alger Small Cap @ 20.51
Commission: $3,600.00
Bought: GT Global Health Care @ 15.50
Commission: $1,200.00

6/25/93 **Sold: Euro Pacific @ 18.07**
Sold: Idex @ 18.16
Bought: Alger Small Cap @ 22.32
Commission: $6,800.46

HN had purchased a $65,000 position in Euro Pacific only three months before Krull began switching her out of her position in the fund. He stated that the reason for buying it at the end of 1992 was that the German economy had been weak and the Bundus Bank had cut rates. This, he stated, led him to believe that "that would stimulate the West German economy and Europe and that it would be a good buying opportunity." The April and June 1993 switches cost HN $7,800 in commissions. Krull testified that he made these recommendations because he had changed his opinion of the world situation, in that the U.S. was now a political and economic leader, that the West German economy was not very strong, that there were problems with the collapse of the U.S.S.R. and with the East German repatriation of principal payments, and that the Nikkei Index[9] was weak. Krull also stated that he thought that Alger would better achieve HN's stated objective of growth. We fine that Krull's rationale fails to rebut the presumption that the switches in January and April 1993 were unsuitable for HN, and we find that these switches were unsuitable for HN.

We dismiss the finding of unsuitability as to the June 25, 1993 switch from Euro Pacific into Alger Small Cap on the basis that the HN record indicates that on June 25, 1993, Euro Pacific was valued at $18.03 per share. This appears to be an error in that, as of April 1993, the fund was valued at approximately $36 per share, and the Mr. JdH. account record indicates that Euro Pacific was valued at $35.56 per share on June 11, 1993. Nonetheless, such a drastic drop in price, if it actually occurred, would warrant a switch into another fund.

We do, however, find that the sale of Idex to purchase Alger Small Cap, as previously discussed, was unsuitable.

3/12/93	**Sold: Franklin Rising @ 15.90** **Bought: Alger Small Cap @ 21.30** **Commission: $4,000.14**
4/16/93	**Sold: Franklin Rising @ 15.24** **Bought: Idex @ 19.45** **Commission: $2,000.24** **Bought: Delaware Group Value @ 20.08** **Commission: $2,500.96**
5/14/93	**Sold: Franklin Rising @ 15.42** **Bought: Alger Growth Portfolio @ 22.13** **Commission: $2,800.77**

[9]The Nikkei Index is an index of 225 leading stocks traded on the Tokyo Stock Exchange.

We find that these switches out of Franklin Rising in March and April 1993 were unsuitable for HN. HN purchased $70,000 of Franklin Rising in June and July 1992 at $15.73 and $15.55 per share, respectively. She paid $2,800 in commissions to effect these purchases. The sales of Franklin Rising were at approximately the same price. As previously discussed, Krull recommended Franklin Rising because he liked the "disciplined approach" of the fund manager, the fund's five-star rating, and its "growth and income" orientation in what Krull perceived to be a weak economy. We find that Krull has failed to present evidence that his initial evaluation of Franklin Rising was incorrect. Thus, we find that these short-term switches out of Franklin Rising were unsuitable for HN.

7/12/93 **Sold: Alger Small Cap @ 22.89**
Bought: Oppenheimer Global Biotech @ 22.77
Commission: $1,187.50

We find that Krull's recommendation that HN switch $50,000 out of her Alger Small Cap position only 17 days after he recommended that HN purchase $170,000 of the fund was unsuitable for HN. Krull testified that he purchased Oppenheimer Global to diversify on the basis of price weakness. In retrospect, Krull testified, it would have been better to go directly from Idex to Oppenheimer Global without making HN incur an additional $1,200 commission. We find this recommendation to have been unsuitable for the reasons stated in our discussion of the TMB account as well as the reasons stated by Krull.

Mr. & Mrs. JdH. Mr. & Mrs. JdH had been well-do-do farmers. When Mr. & Mrs. JdH opened their account with Krull in 1982, Mr. JdH was 54 years old and had sold his farm, moved to Iowa, and become a minister. Mr. & Mrs. JdH had one dependent. Their annual income was $100,000 and their net worth, excluding residence, was $2.5 million.

Mr. & Mrs. JdH had three accounts with Krull at IMR: (1) the Mr. JdH (IRA) account, (2) the Mrs, JdH account, and (3) the joint Mr. & Mrs. JdH account. The investment objectives for the joint account were shown as "income" and "long-term growth." Mrs. JdH's objectives were stated as "tax free" and "long-term growth." Mr. JdH had some investment experience prior to opening an account with Krull, but he relied upon Krull to make recommendations. His investment objectives are not stated.

Krull recommended 16 identical switches in the Mr. & Mrs. JdH and Mrs. JdH. accounts. These switches generated $27,593 in commissions in the Mrs. JdH. account and $24,411.70 in commissions in the Mr. & Mrs. JdH joint account. Because these switches are identical except as to the number of shares switched, we have considered both accounts together. In each of these accounts, we affirm 11 findings of unsuitability and dismiss five.

Mrs. JdH and Mr. & Mrs. JdH Accounts

5/9/91 **Sold: Oppenheimer Gold @ 9.81**
Bought: Idex @ 17.27
Commission: $500.83

We have previously determined that a switch out of Oppenheimer Gold was suitable for TMB, CAR, NWA, and RR. For the same reasons, we find that Krull's recommendation that the Mrs. JdH and Mr. & Mrs. JdH accounts switch out of Oppenheimer Gold was also suitable.

12/13/91 **Sold: Templeton World @ 13.51**
Bought: Idex @ 19.50
Commission: $1,350.18

3/13/92 **Sold: Templeton World @ 14.30**
Bought: GT Global Health Care @ 20.32
Commission: $1,787.70

Krull had recommended that Mrs. JdH purchase a $95,000 position Templeton World in four increments between December 1990 and September 1991. Krull recommended that the account liquidate its entire position in Templeton World in December 1991 and March 1992, and purchase Idex and GT Global Health Care. As previously discussed, Krull recommended alternatives to Templeton World because he was concerned with the world economy "being down" and the fund's "price weakness." We note that although Templeton World had lost about $2 per share since September 1991, the price had again risen about $1 during the next three months. We find that this price variation did not warrant switches out of Templeton World two and five months after Krull recommended its purchase.

Krull recommended that the Mr. & Mrs. JdH account purchase Templeton World in December 1990, February 1991, and July 1991. For the same reasons as TMB and NWA, Krull recommended that Mr. & Mrs. JdH switch from Templeton World to GT Global Health Care. As previously discussed, Krull recommended that his clients switch out of Templeton World because he was concerned with the world economy's "being down" and his concern over the fund's "price weakness." For the reasons given in the discussion of the TMB and NWA accounts, we find that this recommendation was unsuitable.

1/30/92 **Sold: Kemper Environmental @ 15.40**
Bought: GT Global Health Care @ 22.40
Commission: $1,700.27

Krull recommended that Mrs. JdH switch out of Kemper Environmental approximately nine months after he recommended its purchase. Mrs. JdH bought the fund at $15.34 per share and sold it at $15.40 per share. Not only did Mrs. JdH make no profit on the switch, she paid $1,700 in commissions to purchase GT Global Health Care. We further note that this was the first of four purchases of GT Global, and that Krull did not give the Mrs. JdH account the benefit of an LOI or breakpoint in acquiring this position. We find that Krull has failed to present evidence to rebut the presumption that this switch was unsuitable. We therefore find that this switch was unsuitable.

Krull recommended that the Mr. & Mrs. JdH account switch out of Kemper Environmental approximately nine months after he recommended its purchase. The account bought the fund at $15.34 per share and sold it at $15.40 per share. Not only did Mr. & Mrs. JdH make no profit on the switch, they paid $1,700 in commissions to purchase GT Global Health Care. We further note that this was the first of four purchases of GT Global, and that Krull did not give the Mr. & Mrs. JdH account the benefit of an LOI or breakpoint in acquiring this position.

5/15/92 **Sold: Phoenix @ 20.65**
Bought: Idex @ 19.04
Commission: $675.16
Bought: GT Global Health Care @ 18.67
Commission: $975.09

The record indicates that Mrs. JdH purchased $35,000 of Phoenix in December 1990 and February 1991, and also indicates that the Mrs. JdH account sold $60,000 of Phoenix in May 1992. The Mr. & Mrs. JdH account had made its most recent purchase of Phoenix in September 1991. This was a switch from one growth fund to another, as well as a diversification into a health care fund. For the reasons previously discussed, we find that this switch was unsuitable for both accounts.

6/26/92 **Sold: Sogen @ 19.07**
Bought: Franklin Rising @ 15.29
Commission: $1,400.56

Like RR, CAR, NT/FT, and HN, Krull switched the Mrs. JdH and Mr. & Mrs. JdH accounts from Sogen into Franklin Rising in June 1992. Krull stated that the reason for the switch was that Sogen was a very conservative world stock fund, and Franklin Rising was a domestic fund with a "little more growth and income." We find that we do not have sufficient information to determine from the record whether this switch was suitable. We therefore dismiss the finding that this switch was unsuitable as to both accounts.

9/14/92 **Sold: GT Global Health Care @ 17.72**
Bought: Franklin Rising @ 15.79
Commission: $1,787.90

As previously stated, Krull recommended that the Mrs. JdH and Mr. & Mrs. JdH accounts make four purchases of GT Global Health Care. Although the September 1992 switch occurred just four months after the last purchase, the price of the fund had decreased almost $3 per share within those four months. Thus, for the reasons previously discussed, we dismiss the finding that this switch was unsuitable as to both accounts.

10/19/92	**Sold: Idex @ 17.63** **Bought: Franklin Rising @ 15.59** **Commission: $2,062.60**
11/30/92	**Sold: Idex @ 19.46** **Bought: Euro Pacific @ 34.18** **Commission: $2,001.00**

The Mrs. JdH and Mr. & Mrs. JdH accounts made six purchases of Idex between April 1991 and May 1992. In October and November 1992, Krull recommended that the accounts sell a portion of their positions in Idex. Krull did not switch these accounts from their entire position in Idex until June 1993, at which time he switched both accounts out of their remaining $40,000 of Idex. As previously discussed, we find that Krull's recommended switches out of Idex were unsuitable for the accounts in which they occurred.

12/11/92	**Sold: Franklin Custodian @ 14.02** **Bought: Smallcap World @ 19.18** **Commission: 550.13**

We find that we do not have sufficient information regarding Franklin Custodian and Smallcap World to determine whether this switch was suitable. We therefore dismiss the finding of unsuitability as to this switch as to both accounts.

1/15/93	**Sold: GT Global Health Care @ 17.92** **Bought: Alger Small Cap @ 22.39** **Commission: $2,400.00**

For the reasons previously discussed, we dismiss the finding that this switch was unsuitable as to both accounts.

3/26/93	**Sold: Franklin Rising @ 15.81** **Bought: Alger Small Cap @ 21.13** **Commission: $2,400.37**

5/14/93 **Sold: Franklin Rising @ 15.42**
Bought: Alger Small Cap @ 22.13
Commission: $4,000.22

Krull recommended that Mrs. JdH sell $160,000 of Franklin Rising to purchase Alger Small Cap. In June, September, and October 1992, Mrs. JdH paid approximately $5,200 in commissions to purchase her position. She then paid $6,400 in commissions to purchase Alger Small Cap. We note that the price of Franklin Rising remained consistent during this time. Given the cost of these switches, and the fact that Krull was recommending switches from one growth fund to another, we find that these switches were unsuitable for Mrs. JdH We likewise find that these switches were unsuitable for the Mr. & Mrs. JdH account as well.

4/30/93 **Sold: Euro Pacific @ 36.39**
Bought: Alger Small Cap @ 20.51
Commission: $800.00

Mrs. JdH had owned Euro Pacific for five months when Krull recommended that she switch out of the fund on the basis of his evaluation of the world economic situation. We note, however, that Krull did not liquidate her entire position, but only about half. We find that Krull's rationale for switching the Mrs. JdH account out of Euro Pacific five months after he recommended its purchase fails to rebut the presumption that this short-term switch was unsuitable. We therefore affirm the finding that this switch was unsuitable. As in the Mrs. JdH account, Krull recommended a partial sale of Euro Pacific in the Mr. & Mrs. JdH account approximately five months after he recommended its purchase. For the reasons already stated, we find that Krull's rationale for the switch does not rebut the presumption that this short-term switch was unsuitable.

6/25/93 **Sold: Smallcap World @ 20.27**
Sold: Idex @ 18.16
Bought: Alger Small Cap @ 22.32
Commission: $2,200.75

As previously discussed, Krull decided in January 1993 to place all 10 accounts into Alger as a long-term investment. He recommended that the Mrs. JdH and Mr. & Mrs. JdH accounts make six monthly incremental purchases of Alger between January and July 1993. (One such purchase in February 1993 did not involve a switch.) This was the fifth incremental switch into Alger Small Cap. As previously stated, Krull should have given his customers the benefits, if any, of an LOI or breakpoint. We find that this failure alone makes these incremental switches unsuitable.

7/12/93 **Sold: Alger Small Cap @ 22.89**
Bought: Oppenheimer Global Biotech @ 22.59
Commission: $1,000.00

As previously discussed, we find that Krull's recommended switch from Alger Small Cap to Oppenheimer Global Biotech one month after he recommended its purchase was unsuitable for both accounts.

Mr. JdH Account

Krull recommended 18 switches in Mr. JdH's account between December 1990 and July 1993, which generated $24,290.53 in commissions. We affirm 14 findings of unsuitability and dismiss four.

12/13/90	**Sold: Kemper U.S. Govt @ 8.97** **Bought: Phoenix @ 20.67** **Commission: $400.00** **Bought: Templeton World @ 13.35** **Commission: $360.45**
12/28/90	**Sold: Kemper U.S. Govt @ 8.99** **Bought: Templeton World @ 13.42** **Commission: $540.13** **Bought: Phoenix @ 20.00** **Commission: $600.00**
1/25/91	**Sold: Kemper U.S. Govt @ 9.01** **Bought: Amev Growth @ 18.67** **Commission: $400.28** **Bought: Templeton World @ 13.31** **Commission: $500.36** **Bought: Phoenix @ 20.21** **Commission: $525.21**
3/28/91	**Sold: Kemper U.S. Govt @ 8.96** **Bought: Phoenix @ 22.45** **Commission: $1,200.63**

Like CAR, the Mr. JdH. account had accumulated a position in Kemper by April 1990. By December 1990, Mr. JdH. had acquired $60,000 of Kemper. As discussed with respect to the CAR account, Krull recommended switching out of Kemper because he was concerned that the fund would drop in value. Not only did Krull fail to explain why he did not recommend another fund within the Kemper family, he failed to justify the incremental switches into Phoenix without benefit of LOI or breakpoint. We therefore find that these switches were unsuitable.

11/8/91 **Sold: Templeton World @ 13.84**
Bought: Idex @ 19.40
Commission: $600.40
Bought: Franklin Growth @ 28.66
Commission: $800.19

The Mr. JdH. account was one of nine accounts in which Krull recommended switches out of Templeton World between November 1991 and February 1992. We notes that in February 1992, Krull recommended that the NT & FT account sell Templeton World because of its demonstrated price weakness. We find that Krull has failed to present sufficient justification for switching from Templeton World, a growth fund, into two others within one year of recommending a $35,000 position in Templeton World.

2/14/92 **Sold: Fortis Growth @ 28.45**
Bought: GT Global Health Care @ 22.29
Commission: $658.75

As previously discussed regarding the CAR account, Krull recommended Fortis Growth (previously called Amev Growth) to CAR and Mr. JdH. in January 1991 at $18.67 per share because it was a "well-run" growth fund that was highly rated by Morningstar and was attractive because of economic conditions. Krull recommended that Mr. JdH., like CAR, switch out of Fortis Growth approximately 13 months later at $28.45 per share to take advantage of the fund's 67 and one-half percent gain. Mr. JdH. made a profit of approximately $6,000 on the sale of Fortis Growth less a $600 commission to buy it and a $660 commission when he switched out of the fund. Because Mr. JdH. held this fund for more than one year and realized a substantial profit, we do not find that the record supports a finding that this transaction was unsuitable.

3/27/92 **Sold: Phoenix @ 20.84**
Bought: GT Global Telecommunication @ 12.10
Commission: $1,188.01
Bought: GT Global Health Care @ 20.58
Commission: $850.16
Bought: Idex @ 19.50
Commission: $562.92

Mr. JdH had held Phoenix for more than one year when Krull recommended these switches. The account sold $75,000 of Phoenix and purchased $25,000 each of GT Global Telecommunication, GT Global Health Care, and Idex. As previously discussed as to the NT & FT account, we find that the switches into GT Global Telecommunication and GT Global Health Care were unsuitable. We also find that the switch into Idex was unsuitable. Phoenix and Idex were similarly-priced common stock funds with growth objectives. Krull recommended the switch on the basis that Idex offered better potential. We find that this rationale fails to rebut the presumption that the switch was unsuitable.

6/12/92 **Sold: Sogen @ 19.11**
Bought: Franklin Rising @ 15.70
Commission: $1,600.06

We find that the record does not contain sufficient information regarding Sogen to make a suitability determination. We therefore dismiss the finding that this switch was unsuitable.

9/14/92 **Sold: GT Global Health Care @ 17.95**
Bought: Franklin Rising @ 15.79
Commission: $1,950.07

For the reasons previously stated, we dismiss the finding that this switch was unsuitable.

10/19/92 **Sold: Idex @ 17.63**
Sold: GT Global Communication @ 10.64
Bought: Franklin Rising @ 15.59
Commission: $550.05
Bought: Franklin Rising @ 15.59
Commission: $1,237.73

As previously discussed, we find that these incremental switches into Franklin Rising were not suitable for Mr. JdH.

10/30/92 **Sold: Franklin Growth @ 13.78**
Bought: Euro Pacific @ 34.68
Commission: $450.49

For the reasons previously discussed, we find that Krull's recommended switch from Franklin Growth was unsuitable for Mr. JdH.

12/11/92 **Sold: Franklin Rising @ 16.05**
Bought: Smallcap World @ 19.38
Commission: $1,875.02

2/26/93 **Sold: Small Cap World @ 19.17**
Bought: Alger Small Cap @ 21.15
Commission: $1,000.82

6/25/93 **Sold: Smallcap World @ 20.27**
Bought: Alger Small Cap @ 22.32
Commission: $1,000.83

We have previously discussed the unsuitability of switching out of Franklin Rising after only months of having recommended the fund. We also find that the switch from Smallcap World two months later was unsuitable. Krull recommended that Mr. JdH. purchase $25,000 of Smallcap World in December 1992. Three and six months later, he recommended that the Mr. JdH. account sell its position in Smallcap World and purchase Alger Small Cap. The price of Smallcap World had remained stable, and the switches were into another small cap fund.

3/26/93 **Sold: Franklin Rising @ 15.81**
Bought: Alger Small Cap @ 21.13
Commission: $1,600.81

4/16/93 **Sold: Franklin Rising @ 15.24**
Bought: Idex @ 19.76
Commission: $1,250.81
Bought: Delaware Group Value @ 20.08
Commission: $1,000.99

As previously discussed, we find that Krull's recommendations of short-term switches from Franklin Rising to Alger Small Cap were unsuitable.

6/11/93 **Sold: Euro Pacific @ 36.56**
Sold: Idex @ 18.42
Bought: Alger Small Cap @ 22.80
Commission: $1,560.43

As with the other two JdH accounts, Krull recommended a switch of approximately half of the account's holdings in the Euro Pacific fund within months of the account's purchase of the fund. For the reasons previously stated, we find that this switch was unsuitable for the Mr. JdH. account.

7/12/93 **Sold: Alger Small Cap @ 22.89**
Bought: Oppenheimer Global Biotech @ 22.59
Commission: $1,000.00

For the reasons previously discussed, we find that the switch from Alger Small Cap to Oppenheimer Global Biotech was unsuitable. Krull had recommended Alger Small Cap as a long-term investment. We find that the recommended switch of a portion of Mr. JdH.'s position in Alger Small Cap into a global, rather than U.S. small cap fund, was not suitable.

Conclusion

Cause One. We have carefully considered the pattern of mutual fund switching recommended by Krull both as to particular mutual funds and as to individual accounts. We find that these patterns of mutual fund switches create a presumption that the alleged switches were unsuitable. We have also examined Krull's reasons for recommending each switch. Where we have found that the record is insufficient to make a determination regarding the suitability of Krull's recommendations, we have dismissed those switches. Where we have found that Krull's rationale for recommending a switch rebuts the presumption of unsuitability, we have likewise dismissed that switch. On that basis, we have dismissed findings as to 30 switches and affirmed in part and dismissed in part two additional switches as more fully described in this decision.

We do, however, affirm the findings of unsuitability as to 115 of the 147 switches alleged in the complaint (and two switches in part). As noted above, the patterns of switching between funds and within the customers' accounts raise the presumption that the switches were unsuitable. We have carefully considered the reasons given by Krull for recommending these switches to his customers and we find that his reasons do not rebut the presumption that these switches were unsuitable.

In summary, and as discussed above, we find Krull's defense inadequate. First, where we have affirmed findings of unsuitability, we have examined Krull's purported trading strategy as it applied to each switch and have not credited Krull's reasons for making these switches. We find that the patterns of switching between funds are inconsistent with his claimed rationale,[10] and that his rationale for recommending these switches is implausible. Second, we find that Krull did not engage in suitability analyses as required by Conduct Rule 2310. In addition to considering information about a customer's financial status, tax status, and investment objectives, a registered representative must consider "such other information used or considered to be reasonable" in making a recommendation. In this connection, we find that Krull's so-called trading strategy did not give him "an adequate and reasonable basis" for making these recommendations.[11] Moreover, notwithstanding that his purported strategy was not working, Krull did not stop his switching strategy until it was discovered by IMR and he was forced to stop.

Further, the record shows that Krull never considered the costs to the customer of making a switch. Krull did not even investigate whether breakpoints and LOIs might be available. Instead, he made switches into funds between families, often on a repeated, piecemeal basis, and charged full

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[10]It is not necessary to comment on Krull's contention regarding the appropriateness of his use of "stock-picking" techniques to select funds. We have, in the alternative, examined his proferred reasons for individual switches and based our findings on our analysis of those reasons.

[11]See, e.g., Hanley v. SEC, 415 F.2d 589, 597 (2d Cir. 1969).

commissions.[12] Krull contends that, on a few occasions, he investigated making switches within a family of funds, but he has presented only vague, after-the-fact explanations as to why specific funds within a given family were unsuitable for his customers. The record belies Krull's contention that in no case was any switch within a family suitable, since he did recommend different funds in the Franklin, Kemper, Delaware, and Oppenheimer families, albeit not as a switch. To the extent that Krull relied upon his trading strategy, his recommendations appear to have been self-serving, to the detriment of his customers.

We do not credit Krull's argument on appeal that the only possible basis for a determination of unsuitability is a finding that he "churned" his customers' accounts. We have reviewed Krull's recommendations on a transaction-by-transaction basis and made findings on the basis of the suitability of each switch -- in relation to, among other things, Krull's purported rationale for making the switch, the customer's investment objectives, the mutual funds being switched, and the cost to the customer.

We have also considered Krull's contention that it would be inappropriate for the NASD to find that the average commission cost of 3.1 percent that he charged his customers was "unsuitable," when he could have instead charged his customers a three percent annual fee in a wrap account. This argument is misplaced. Krull did not do business with these customers on the basis of an annual fee. He charged them commissions. Thus, it is not appropriate to hypothesize the cost to Krull's customers had they chosen that arrangement. In reaching our findings of unsuitability, we have considered that Krull made no effort whatsoever to give his customers the benefit of reduced commissions. Given the alternatives of LOIs, breakpoints, and reinstatement privileges, as well as switching within families of funds, Krull placed his interests ahead of his customers' by not investigating cheaper ways to accomplish his recommended purposes.[13]

As we stated earlier, mutual fund switches are not per se unsuitable. The suitability of switches, however, must be ascertained, among other things, in light of the concept that mutual funds that have substantial front-end loads are not generally appropriate vehicles for short-term trading. The SEC has

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[12]Krull's disclosure to his customers of the commission costs and their acknowledgement of these costs on the switch forms did not obviate his responsibility to advise them, where applicable, that there were ways in which commission costs could be reduced or eliminated. Thus, we find that mere disclosure of commission costs did not relieve Krull of his obligation to recommend only suitable switches.

[13]We have also considered Krull's contention that even a five percent commission cost could be considered reasonable, given the NASD's five percent mark-up policy. We disagree. The fee/commission structure of the mutual funds involved in this matter is not at issue. The complaint does not allege that Krull's customers paid excessive commissions. The complaint alleges that Krull's recommendations were unsuitable. Thus, the question before us is whether the switches were suitable based on a totality of the circumstances, including Krull's failure to obtain lower or no commission costs for his customers.

specifically stated that "[m]utual fund shares generally are suitable only as long-term investments and cannot be regarded as a proper vehicle for short-term trading, especially where such trading involves new sales loads." Winston H. Kinderdick, supra, at 639. See also Harold R. Fenocchio, supra (mutual funds that have a high initial sales charge should be recommended and sold as long-term investment vehicles); Charles E. Marland, supra (mutual funds normally suitable only as long-term investments and are inappropriate short-term trading vehicles especially where substantial sales charges are involved). Thus, in instances where new sales loads are incurred as a result of switching, an investment strategy of frequent and excessive switching may be unsuitable since the customer will not be able to recoup his costs before he is switched into another fund.

As the SEC stated in Winston H. Kinderdick, supra, "where . . . a pattern of similar switching transactions in fund shares is established, it is incumbent upon the person responsible to demonstrate the unusual circumstances which justified such a clear departure from the manner in which investments in mutual funds are normally made." Id. at 639. As to those trades that we found unsuitable, we considered Krull's explanations and found them to be implausible and lacking any reasonable basis.

Thus, while a broker may believe that such factors as a change in the management or investment objectives of a fund, the poor performance of a fund for a sustained period of time, or a significant change in general market or economic conditions, warrant a mutual fund switch, the broker must take into account the particular facts and circumstances that comprise any suitability analysis, including whether the customer's investment objectives have changed. The broker must also consider the cost incurred by the customer in switching to another mutual fund family, whether purchases can be combined to take advantage of such commission-saving devices as LOIs and breakpoints, and whether there are free exchange investment alternatives within the same fund family.

Cause two. As to cause two, we affirm the DBCC's findings as to IMR and reverse and dismiss the DBCC's findings as to Greene and DiGirolamo.

The issue before us is whether IMR's systems were reasonably designed to detect mutual fund switching activity in Krull's branch office. In July 1993, a computerized system was developed which enabled IMR to obtain information directly from mutual funds. This system immediately picked up Krull's mutual fund activity and reported it to IMR in July 1993.

Prior to July 1993, IMR relied upon the receipt of switch forms from their registered representatives and yearly audits of branch offices to detect mutual fund switching. Switch forms were in triplicate -- with one copy to be filed with IMR's home office. If a registered representative chose not to submit switch forms to the home office, IMR depended on its auditors to detect mutual fund switching.

The record shows that prior to July 1993, Krull had not submitted any switch forms to the home office since 1989, when he submitted two forms. During 1991 through 1993, however, Krull grossed more than $300,000 in each year, with mutual funds accounting for a significant part of his business. Krull generated more than $250,000 in commissions as a result of the switches identified in the complaint. Apparently, the sheer size of Krull's mutual fund business, and the fact that Krull had apparently filed no mutual fund switch forms for four years, raised no red flags in IMR's home office.

Auditors who visited Krull's branch office in 1991 and 1992 did not ask to review switch forms, notwithstanding that such review was presumably part of the audit. Had they done so they would have discovered that the forms, which Krull had kept in the office, were still in the original triplicate. It was not until the July 1993 examination that the IMR auditor noted switches in a customer account and actually requested the switch form file from Krull. When the auditor saw that the switch forms were still in triplicate, he contacted the home office, which conducted its investigation. DiGirolamo could not explain why previous auditors, whom he claimed were well-trained, failed to examine Krull's switch form file. He suggested that unless an auditor reviewed a customer file that contained a switch, he or she would not automatically look at switch forms.

We find that IMR's failure to detect Krull's violative conduct over a two and one-half years is evidence of a fundamental deficiency in IMR's supervisory procedures. We have considered IMR's later efforts to establish and maintain state-of-the-art computerized tracking systems (the system that eventually detected Krull's misconduct was not in effect during the relevant time). Even fundamental procedures, however, had they been in place at the time, would have detected Krull's actions. IMR was aware or should have been aware of the size of Krull's business and commission income, that his business consisted primarily of mutual fund sales, and that it had received only two mutual fund switch forms over a five-year period (and none in the most recent four years). IMR had an obligation to review Krull's business activities to determine whether Krull was complying with all applicable regulatory requirements, but the Firm failed to exercise appropriate supervision with a view toward preventing and detecting the sales practice abuse at issue.

The NASD and SEC have long noted the problems that can arise in branch offices, and the need for appropriate supervision of one-person branch offices. Although an appropriate level of supervision may not necessarily entail one-on-one daily supervision, the level of supervision must be adjusted to suit the particular circumstances in question. We conclude that the size of Krull's business and the fact that a significant portion of Krull's commissions were generated by mutual fund sales should have placed IMR on notice that closer supervision of Krull's activities was warranted. We find that, as alleged in the complaint, IMR failed to ensure that Krull's sales activities were adequately reviewed and monitored to ensure that those activities were being properly conducted in accordance with NASD rules.

We dismiss the DBCC's findings as to Greene and DiGirolamo on the basis that the evidence in the record did not support a finding that these respondents were responsible for IMR's supervisory failures.

Sanctions

In imposing sanctions against Krull, we have considered that he has no prior disciplinary history. We have also considered, however, that Krull engaged in a pattern of recommending short-term switches to his clients which generated significant commissions for him, and that he made no effort whatsoever to reduce or eliminate his commissions on his clients' behalf. By engaging in this course of conduct, Krull placed his interests before those of his customers. In assessing the gravity of Krull's misconduct, we have also considered Krull's failure to submit switch letters to IMR as required. We note that the NASD Sanction Guideline for suitability violations calls, where appropriate, for the consideration of restitution of customer losses. In this case, we have calculated customer losses by the amount of commission paid on each violative transaction.

As to Krull, we impose a censure, bar in any principal or supervisory capacity, and a $20,000 fine. We have concluded, however, that the egregious nature of Krull's violative conduct warrants a suspension for one year in any capacity in lieu of the 90-day suspension imposed by the DBCC. We also require Krull to requalify as a general securities representative (to occur prior to acting in such capacity). In reaching this conclusion, we have considered that Krull's violative conduct spanned a period of more than two years in the 10 customer accounts. We have also considered that Krull's failure to submit mutual fund switch forms to IMR contributed to the Firm's failure to detect his activity.

In lieu of disgorging to the NASD the commissions that Krull received as a result of the switches which we have found to be unsuitable, we order that Krull pay such amounts in restitution to his customers as indicated in Appendix A to this decision. Given that we have dismissed certain of the transactions alleged in the complaint, we have reduced this amount from $202,783 to $171,140.93. This restitution shall be made over time pursuant to a payment plan acceptable to District 3 staff, and shall be a condition for re-entry into the securities industry following Krull's one-year suspension.[14]

On the basis of our dismissal of findings against Greene and DiGirolamo as alleged in cause two,

[14]The sanctions are within the range recommended by the applicable NASD Sanction Guideline (1993 ed.).

We have considered all of the arguments of the parties. They are rejected or sustained to the extent inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will be summarily suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will be summarily revoked for non-payment.

we set aside the sanctions against them. In light of our findings against IMR, however, we affirm the censure, $10,000 fine, and the requirement to submit satisfactory written supervisory procedures to the staff of the District in which the firm is domiciled within 30 days of the date of this decision. In lieu of the order to disgorge, we impose an order of restitution in the amount of $42,785.21, to be paid to customers as described on Appendix A to this decision within 30 days of the date of this decision.

We also affirm the assessment of costs of the DBCC hearing in the amount of $4,922.50 jointly and severally against Krull and IMR. Krull's one-year suspension shall begin on a date to be determined by the President of NASD Regulation, Inc. Krull's bar in any principal or supervisory capacity shall be effective as of the date of this decision.

On Behalf of the National Business Conduct Committee,

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Joan C. Conley, Corporate Secretary

Appendix A

Restitution to be paid by Krull and IMR

Customer	Commissions		
	Gross	Krull	IMR
TMB	$10,995.46	$8,796.37	$2,199.09
VAN	$5,167.42	$4,133.94	$1,033.48
NWA	$6,448.58	$5,158.87	$1,289.71
RR Trust	$29,191.69	$23,353.35	$5,838.34
CAR IRA	$45,051.50	$36,041.20	$9,010.30
NT & FT	$25,989.26	$20,791.41	$5,197.85
HN	$31,270.04	$25,016.03	$6,254.01
Mrs. JdH	$20,953.58	$16,762.87	$4,190.71
Mr. & Mrs. JdH	$18,252.38	$14,601.90	$3,650.48
Mr. JdH	$20,606.23	$16,484.99	$4,121.24
TOTAL	**$213,926.14**	**$171,140.93**	**$42,785.21**