UNITED STATES OF AMERICA

Before the

COMMODITY FUTURES TRADING COMMISSION

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In the Matter of: GREGORY W. ELLIOTT, individually and d/b/a SOFTRADE, INC. and SOFTRADEINC.COM, Respondent.	CFTC Docket No. 03-07

INITIAL DECISION

Preliminary Statement:

On January 21, 2003, the Commission filed a two-count Complaint against George W. Elliott ("Elliott"), individually and d/b/a SofTrade, Inc. ("SofTrade") and www.softradeinc.com ("Softradeinc.com"). Based on the findings of the Division of Enforcement (the "Division"), the Commission charges that Elliott violated Sections 4o(1)(A) and 4o(1)(B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 6o(1)(A) and (B) (1994); and Commission Regulations 4.41(a) and 4.41(b), (the "Regulations"), 17 C.F.R. §§ 4.41(a) and 4.41 (b) (2002) by employing a scheme to defraud his clients and prospective clients; by engaging in business which operated as a fraud upon his clients and prospective clients; and by failing to include required warnings.

On February 28, 2003, Elliott filed an *Answer to Complaint* admitting the truth of all the material allegations of fact contained in the Complaint.

On March 7, 2003, the Division filed a *Motion for Leave to Submit Proposed Findings of Fact and Conclusions of Law* pursuant to Commission Regulations section 10.23 (d), 17 C.F.R. § 10.23 (d) (2002), which provides that if a respondent's answer admits to all the material allegations of fact contained in the complaint, it shall constitute a waiver of hearing on those allegations. This Court granted the motion and ordered the Division to submit proposed findings of fact and conclusions of law by March 17, 2003.

On March 17, 2003, the Division filed *Proposed Findings of Fact and Conclusions of Law* and requested that the following sanctions be imposed: (1) a cease and desist order and (2) a civil monetary penalty in the amount of $25,000. The Respondent has not filed a response to the Division's *Proposed Findings of Fact and Conclusions of Law*, which includes the Division's recommended sanctions. This matter is ready for decision.

I. Findings of Fact

The Findings of Fact set out below incorporate in large measure the facts set forth in the Division's *Proposed Findings of Fact and Conclusions of Law.* The Division's findings are fully supported by the record.

1. Gregory W. Elliott is self-employed and currently resides in Chicago, Illinois. He was registered with the Commission in 1994 as an associated person ("AP"), then at various times as a commodity trading advisor ("CTA") and introducing broker ("IB") until permanently barred on April 26, 1999 for mishandling client funds. (Commission records; Complaint ¶ 3; Answer).

2. Through SofTrade, Elliott developed and marketed a commodity trading system known as the QuantumLevel S&P E-mini S&P DayTrading System ("QuantumLevel") for use in the futures market. (Complaint ¶ 4; Answer). QuantumLevel provided definitive buy and sell recommendations for the S&P 500 E-mini futures contract. (Complaint ¶ 5; Answer).
3. Elliott solicited customers to purchase QuantumLevel since at least March of 2001 by placing advertisements on the Internet via his website, Softradeinc.com and through electronic mail advertising messages that he sent to chat rooms and newsgroups. (Complaint ¶ ¶ 4, 5, 7, 11; Answer).
4. From on or about March 2001 to September 2002, Elliott sold the system to the public, charging fees ranging from $750 to $1,750. (Complaint ¶ 6; Answer).
5. Elliott's advertisements created the impression that the system produced actual results. However, performance results were based on simulated or hypothetical results. In reality, Elliott was not trading at all. (Complaint ¶¶ 7, 8; Answer). Elliott represented to the public the following:
    - "That's with REAL Money Trading!!!"
    - "This system makes REAL Money no matter what the Stock Market does!!!"
    - "Click Here to request Actual Trade Records" (Complaint ¶ 8; Answer).
6. Elliott misstated profit potential. Elliott advertised "Up over 200% so far in 2002." In trading reports available on the website, he claimed to have made net trading profits of $30,825.00, $13,987.50 and $23,812.50 (or returns on account of 106.66%, 40.54% and 61.97%) in trading of the S&P E-mini contracts for March, June and September 2002, respectively. He also claimed to have made net trading profits of $37,612.50,

$52,687.50, $21,950.00 and $27,487.50 (or returns on account of 132.97%, 186.17%, 80.74% and 100.83%) in trading of the S&P 500 E-mini contracts for March, June, September and December 2001, respectively. (Complaint ¶ 10; Answer).

7. Elliott failed to adequately warn investors of the risks inherent in futures trading. Elliott sent advertising messages to financial chat rooms and newsgroups on the Internet. For example, a message sent to the misc.invest.futures newsgroup at Google.com stated "up over 200% this year with Actual Trading" and "Averaging over $10,000 per Month." (Complaint ¶ 11; Answer).

II. Discussion

Pursuant to Commission Regulation 10.91(e), 17 C.F.R. 10.91(e) (2002), an Administrative Law Judge shall grant a motion for summary disposition if the undisputed pleaded facts show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) such party is entitled to a decision as a matter of law. Such circumstance exists here.

A. Violation of the Act and Regulations

1. Sections 4o(1)(A) and 4o(1)(B) of the Act and Regulation 4.41(a)

In order for this Court to find that Elliott violated Section 4o(1), Elliott must have acted as a CTA by using the mail or any means of interstate commerce. A CTA is defined by the Act as any person who advises another about the value or advisability of trading in futures contracts, directly or through publications, writings or electronic media, for compensation or profit.[1]

[1] Section 1a(6) of the Act, 7 U.S.C. §1a(6) (2002). The statute applies to any person; therefore whether or not Elliott was registered with the Commission as a CTA during the relevant time period is irrelevant. *Commodity Trend Service v. CFTC*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,777 at 48,705 (N.D. Ill. Sept. 29,

Elliott's conduct clearly falls within the definition of a CTA. Through his commodity futures trading system, QuantumLevel, Elliott advised his customers by providing definitive buy and sell recommendations for the S&P 500 E-mini futures contract for compensation. (FF 2, 4). Therefore, since Elliott conducted himself as a CTA by using the Internet, a means of interstate commerce, his conduct is governed by Section 4o. (FF 3).

Count I charged Elliott with violations of Sections 4o(1)(A) and 4o(1)(B) of the Act and Regulations 4.41(a)(1) and 4.41(a)(2) by his use of false and misleading advertisements, which represented hypothetical or simulated trading results as actual trading results, overstated profit potential, and misrepresented Elliott's trading record.[2] The Division alleges that Elliott engaged in these fraudulent acts, misrepresentations and omissions to convince others to purchase his trading system. (Complaint ¶ 15, 16).

Section 4o(1)(A) prohibits CTAs from employing any device, scheme or artifice to defraud any client or prospective client. Similarly, Regulation 4.41 (a)(1) prohibits a CTA from advertising in a fraudulent or misleading manner. Since Elliott has admitted that the statements on the website were based on simulated or hypothetical results (FF 5) and that he misstated profit

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1999), *aff'd* 233 F.3d 981 (7th Cir. 2000) (finding a corporation that regularly issued related publications containing specific recommendations for buying and selling commodity futures or options contracts was a CTA).

[2] Section 4o(1) of the Act provides, in relevant part:

> It shall be unlawful for a [CTA]...by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly --
> (A) to employ any device, scheme or artifice to defraud any client...or prospective client...or
> (B) to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client...or prospective client.

Commission Regulation 4.41(a) provides in relevant part:

> No...[CTA], or any principal thereof, may advertise in a manner which:
> (1) [e]mploys any device, scheme or artifice to defraud any...client or prospective client; or
> (2) [i]nvolves any transaction, practice or course of business which operates as a fraud or deceit upon any...client or any prospective...client.

potential (FF 6), this Court is left to decide whether Elliott's statements were so material that a substantial likelihood exists that a reasonable investor would consider the matter important in making an investment decision[3] and if Elliott acted with scienter.[4] The Commission has held that the actual use of a trading program would be material information to a reasonable customer.[5] Likewise, a trading record and past experience are material facts to a reasonable investor where a material misrepresentation would violate the Act.[6]

This Court finds that the statements "REAL Money Trading!!!" and "Click Here to request Actual Trade Records" on the softradeinc.com website would lead a reasonable investor to believe that the QuantumLevel trading system generated profits "Up over 200% so far in 2002," thereby constituting a material misstatement of fact. (FF 5, 6). Elliott has admitted that his statements were supposititious (FF 5, 6) and was afforded an opportunity to respond to the Division's *Proposed Findings of Fact and Conclusions of Law*. However, Elliott has not provided any explanation for his conduct. Thus, absent any evidence to the contrary, this Court can only logically conclude that Elliott omitted the hypothetical nature of QuantumLevel's trading results and misrepresented trading profitability with the intent to defraud investors and potential customers, thereby acting with scienter.

Section 4o(1)(B) prohibits CTAs from engaging in any practice or course of business, which operates as a fraud or deceit. Similarly, Regulation 4.41(a)(2) prohibits a CTA from

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[3] *Sudol v. Shearson Loeb Rhodes, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119 (CFTC Sept. 30 1985).

[4] *CFTC v. Savage*, 611 F.2d 270 (9th Cir. 1979).

[5] *Levine v. Refco, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,488 at 36,115 (CFTC July 11, 1989); *see also CFTC v. Skorupskas*, 605 F. Supp. 923, 933 (E.D. Mich 1985) ("failure to disclose information that a performance record does not represent the results of actual trading but of hypothetical or fictitious trading is a violation of section 4o(1)").

[6] *Reed v. Sage Group,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,942 at 34,299 (CFTC Oct. 14, 1987).

advertising that operates as a fraud or deceit on prospective clients.[7] The charge for these violations encompass the same facts as the Section 4o(1)(A) and Regulation 4.41(a)(1) claim discussed *supra*. Likewise, the omission or misrepresentation at issue must be of material fact, however, no proof of scienter is required.[8] This court has already found that Elliott's placement of misleading statements on the website and omitting their hypothetical nature constitutes a misstatement and omission of material facts in relation to Section 4o(1)(A) and Regulation 4.41(a)(1) violations. By doing so, Elliott engaged in a business practice on the Softradeinc.com website which operated as a fraud or deceit upon investors and prospective customers, thereby violating Section 4o(1)(B) and Regulation 4.41(a)(2).

2. Regulation 4.41(b)

In accordance with Regulation 4.41(b), it is unlawful for any person to fail to include required warnings regarding the limitations of trading performance results based on hypothetical or simulated data.[9] Count II charged Elliott with violating Regulation 4.41(b) for failing to provide the disclosure orally or in written form on his website, in financial chat rooms and

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[7] *See supra* note 2.

[8] *First Nat'l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1341-1342 (6th Cir. 1987) ("[Section] 4o(1)(B) does not require intent...[the language of the statute] focuses on the effect of the conduct upon the clients, not on the intent of the advisor").

[9] Commission Regulation 4.41(b) provides in relevant part that any presentation of simulated or hypothetical performance must disclose orally or if written, display prominently the following statement:

> Hypothetical or simulated performance results have certain inherent limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown.

newsgroups on the Internet. Elliott has admitted that he failed to include the required warnings, (FF 7), thus, this Court finds Elliott violated Regulation 4.41(b).

B. Sanctions

The Division proposed that this court order Respondent Elliott to cease and desist from further violating the sections of the Act and Regulations charged in the Complaint; and order Respondent to pay a civil monetary penalty of $25,000.[10]

1. Cease and Desist Order

Pursuant to section 6(d) of the Act, 7 U.S.C. §13b (2002), a cease and desist order is appropriate when it is likely that a respondent will repeat the violative conduct in the future.[11] This Court has found that Elliott engaged in illegal conduct for an eighteen-month period after he was permanently barred from membership in April 1999. (FF 1, 4). Upon consideration of the record and Respondent Elliott's pattern of misconduct, it is reasonable to assume that Elliott would be likely to engage in future illegal conduct.

2. Civil Monetary Penalty

Pursuant to section 6(e) of the Act, 7, U.S.C. §9a (2002), a civil monetary penalty must be appropriate to the gravity of the violation. The Division was unable to determine the amount by which Respondent profited from his conduct during the relevant time period.[12] Thus, the Division based its proposed sanction on recent cases where the Commission ordered civil monetary penalties ranging from $10,000 to $50,000 for similar violations concerning the

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[10] *Proposed Findings of Fact and Conclusions of Law* ¶ 37.

[11] *In re Collins*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,418 at 46,973 (CFTC Sept. 4, 1998).

[12] *Memorandum of Law in Support of the Division of Enforcement's Proposed Findings of Fact and Conclusions of Law* at 14-15.

profitability of commodity futures trading systems.[13] Most recently, the Commission approved a civil penalty of $25,000 for overstating profit potential and for failure to disclose required warnings on internet websites.[14] Upon consideration of the record, Respondent Elliott's failure to provide the Division with information necessary to determine his wrongful gain, and the Division's basis for the proposed penalty, this court finds the recommended penalty of $25,000 appropriate.

[13] *Id.* at 12-16.
[14] *In the Matter of Stephen Alan Pierce, individually and d/b/a/ Rapid Fire Swing Trading and The Chart Traders*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,275 (CFTC Jan. 21, 2003).

ORDER

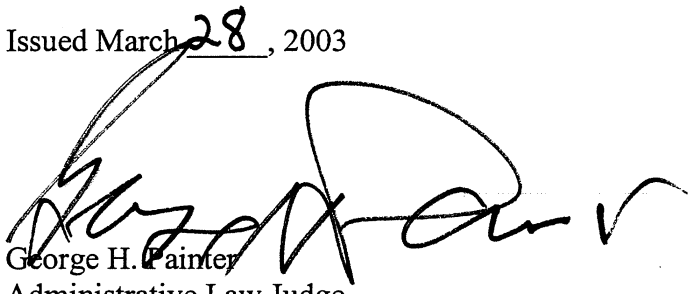
The Division has proven by a preponderance of the evidence that Respondent Gregory W. Elliott violated Sections 4o(1)(A) and 4o(1)(B) of the Commodity Exchange Act, and Commission Regulations 4.41(a) and 4.41(b). Accordingly, Respondent Elliott is hereby:

1) **ORDERED** to **CEASE AND DESIST** from further violating the sections of the Act and the Regulations as charged.

2) **ORDERED** to pay a civil monetary penalty of Twenty-Five Thousand Dollars ($25,000) to the Commission within thirty (30) days after this decision becomes final.

So ordered.

Issued March 28, 2003



George H. Painter
Administrative Law Judge

Rolaine Soril Bancroft
Law Student Extern