

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

**GREGORY L. GRAMALEGUI,
d/b/a S&P Safe Co.**

Respondent.

CFTC Docket No. 01-16

**ORDER INSTITUTING PROCEEDINGS
PURSUANT TO SECTIONS 6(c) AND 6(d) OF
THE COMMODITY EXCHANGE ACT AND
MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS AS TO RESPONDENT
GREGORY L. GRAMALEGUI**

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Gregory L. Gramalegui ("Gramalegui"), doing business as S&P Safe Co., has violated Section 4o(1)(B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6o(1)(B), and Sections 4.41(a)(2) and (b) of the regulations promulgated under the Act (hereafter the "Regulations"), 17 C.F.R. § 4.41(a)(2) and (b) (2001). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Gramalegui engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of these administrative proceedings, Gramalegui has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept.

Gramalegui acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act and Making Findings and Imposing Remedial Sanctions (“Order”).

Gramalegui, without admitting or denying the findings of fact or conclusions of law herein, consents to the use of the findings contained in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

III.

The Commission finds the following:

A. SUMMARY

Gramalegui, doing business as the S&P Safe Co. ("S&P Safe"), developed a software futures trading program called the Trend Reflection Trading System (“Trend System”). Since 1997, he has offered the Trend System to the public through advertisements in futures industry magazines, and, since at least June 2000, through an Internet web site. In a series of magazine advertisements, Gramalegui made false claims that his mother traded the Trend System and implied that her trading results were positive. As such, Gramalegui's solicitations to actual and prospective customers of the Trend System constituted a practice or course business that operated as a fraud or deceit upon customers in violation of Section 40(1)(B) of the Act and Section 4.41(a)(2) of the Regulations.

Gramalegui also failed to disclose the fact that the Trend System trading results he published in his magazine advertisements and on his Internet web site were hypothetical, rather than actual, trading results, in violation of Section 4.41(b) of the Commission’s Regulations,

¹ Gramalegui does not consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. Nor does he consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, by any other party in any other proceeding. The findings made in this Order are not binding on any other person or entity named as a defendant or respondent in this or any other proceeding.

which require that hypothetical trading and the inherent limitations of hypothetical trading be disclosed in the form prescribed by Section 4.41(b).

B. SETTLING RESPONDENT

Gregory L. Gramalegui resides at 2614 Larkspur Lane, Vail, Colorado 81657.

Gramalegui developed and markets the Trend Reflection Trading System as his full-time business.

Gramalegui has never been registered with the Commission in any capacity.

S&P Safe Co., a d/b/a for Gramalegui, has its business address at 2614 Larkspur Lane, Vail, Colorado 81657. S&P Safe has never been registered with the Commission in any capacity.

C. FACTS

A. Gramalegui's Misrepresentations

Gramalegui has offered his Trend System through advertising since June of 1997. Between July 1998 and June 1999 Gramalegui ran a misleading advertisement that appeared in various financial publications, including *Technical Analysis of Stocks & Commodities* and *Futures*. The ads, each identical, featured a photograph of Gramalegui's mother, together with the statement, "Does your system vendor's mom trade his software? Mine does every day." This statement was displayed over a multi-year line graph displaying substantial annual profits for the Trend System. Gramalegui's mother, however, never traded the system; instead, Gramalegui traded an account in his mother's name for seven months. In addition, that trading was not profitable, but sustained a net loss of approximately \$6,000. The account Gramalegui traded in his mother's name was not even active during three of the months that Gramalegui advertised his mother's supposed trading.

Further, the trading results Gramalegui advertised were the product of hypothetical, rather than actual, trading, and Gramalegui consistently failed to provide the hypothetical trading statement required by Section 4.41(b) of the Commission's Regulations when displaying those statistics in his magazine advertisements. Specifically, Gramalegui advertised the Trend System on a monthly basis from June 1997 through at least November 2000 in futures industry magazines, and each magazine advertisement displayed a Trend System profit history chart beginning in 1988. No advertisement disclosed that the profits displayed on that chart were hypothetical. Gramalegui's Internet web pages also displayed the Trend System's hypothetical trading record, and while sometimes the web pages provided the statement required by Section 4.41(b), at other times they did not.

IV.

LEGAL DISCUSSION

A. **Section 4o(1)(B) of the Act and Regulation 4.41(a)(2)**

Section 4o(1)(B) makes it a violation of the Act for a commodity trading advisor “to engage in any ... practice or course of business which operates as a fraud or deceit upon any client or prospective client... .” Similarly, Regulation 4.41(a)(2) prohibits advertising by a commodity trading advisor that operates as a fraud or deceit on clients or prospective clients. Section 4o(1)(B) applies to persons who fit the definition of a commodity trading advisor, whether such persons are required to be registered but are not, are registered, or are exempt from registration. *CFTC v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985); *see* Section 4.15 of the Commission's Regulations, 17 CFR §4.15 (2001). Scierter is not required to prove a violation of Section 4o(1)(B), *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,701 at 48,315 (CFTC July 19, 1999), *aff'd. in relevant part, Slusser v. CFTC*, 210

F.3d 783 (7th Cir. 2000), or a violation of Section 4.41(a)(2), *Commodity Trend Serv. v. Commodity Futures Trading Commission*, 233 F.3d 981, 993 (7th Cir. 2000).

As the vendor of the Trend System Gramalegui falls within the statutory definition of a commodity trading advisor as "a person who, for compensation or profit, engages in the business of advising others on the value or advisability of trading in futures or options contracts." Section 1a(5)(A)(i) of the Act. Gramalegui's principal business is selling commodity futures trading systems for compensation, which places him firmly within the statutory definition.

Gramalegui violated Section 4.41(1)(B) of the Act and Regulation 4.41(a)(2) when, acting as a commodity trading advisor, he engaged in a practice that deceived customers and prospective customers by representing that his mother traded futures using the Trend System and by suggesting that her trading was profitable. Representations that the purveyors of a trading system use their own trading system are material. *In re R & W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,742 (CFTC Mar. 16, 1999), *aff'd. in relevant part, R&W Technical Svcs., Inc. v. CFTC*, 205 F.3d 165 (5th Cir. 2000), *cert den.*, 121 S. Ct. 54, 148 L. Ed.2d 22 (U.S. 2000) ("The use of a trading system by its developers is important to reasonable consumers because it reflects a meaningful vote of self-confidence and a sign of authenticity").

B. Section 4.41(b) of the Regulations

Section 4.41(b) of the Commission's Regulations requires that any simulated or hypothetical commodity trading record be accompanied by a statement prescribed by Section 4.41(b) describing the inherent limitations of hypothetical trading. Gramalegui failed to disclose the hypothetical character of the Trend System trading record displayed in numerous magazine

advertisements and, at various times, on his Internet web site. Gramalegui therefore also violated Section 4.41(b) of the Commission's Regulations.

V.

OFFER OF SETTLEMENT

Gramalegui has submitted an Offer of Settlement in which he, subject to the foregoing: acknowledges service and receipt of this Order; admits the jurisdiction of the Commission with respect to the matters set forth in the Order; waives the filing of a Complaint and Notice of Hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, and all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63, and Part 148 of the Commission Regulations, 17 C.F.R. §§ 148.1, et seq. (2001), relating to, or arising from this action.

Gramalegui stipulates that the record basis on which this Order is entered consists solely of the Order and the findings consented to in the Offer which are incorporated in this Order, and consents to the Commission's issuance of this Order, which makes findings, as set forth above, and orders that Gramalegui cease and desist from violating the provisions of the Act and Regulations he has been found to have violated; Gramalegui pay a civil monetary penalty of \$10,000; and that Gramalegui comply with his undertakings as set forth in his Offer and incorporated in this Order.

VI.

FINDING OF VIOLATIONS

Solely on the basis of Gramalegui's consent, as evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Gramalegui violated Section 4o(1)(B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6o(1)(B) (2000) and Sections 4.41(a)(2) and (b) of the Commission's Regulations, 17 C.F.R. § 4.41 (a)(2) and (b) (2001).

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Gramalegui shall cease and desist from violating Section 4o(1)(B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6o(1)(B) (2000), and Sections 4.41(a)(2) and (b) of the Commission's Regulations, 17 C.F.R. § 4.41(a)(2) and (b) (2001);
2. Gramalegui shall pay a civil monetary penalty in the amount of ten thousand dollars (\$10,000) within ten (10) days of the date of the Order²; and
3. Gramalegui shall comply with the following undertakings as set forth in his Offer:
 - A. Gramalegui shall not misrepresent, expressly or by implication:
 1. the performance, profits or results achieved by, or the results that can be achieved by, users, including himself, of any commodity futures or options trading system or advisory service; and

² Gramalegui shall pay the total amount within ten days of the date of the Order by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of letter that display Gramalegui's name and the docket number of the proceeding; Gramalegui shall simultaneously transmit a copies of his cover letter and the form of payment to Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581.

2. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service.

B. Gramalegui shall not present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest unless such performance is accompanied by the following statement, as required by 17 C.F.R. § 4.41(b):

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.

In doing so, Gramalegui shall clearly identify those hypothetical or simulated performance results which were based, in whole or in part, on hypothetical trading results.

C. Gramalegui shall not make any representation of financial benefits associated with any commodity futures or options trading system or advisory service without first disclosing, prominently and conspicuously, that futures trading involves high risks with the potential for substantial losses.

D. Gramalegui shall not represent, expressly or by implication:

1. the performance, profits or results achieved by, or the results that can be achieved by, users, including himself, of any commodity futures or options trading system or advisory service;
2. the risks associated with trading using any commodity futures or options trading system or advisory service;
3. that the experience represented by any user, testimonial or endorsement of the commodity futures or options trading system or advisory service represents the typical or ordinary experience of members of the public who use the system or advisory service;

unless: (i) Gramalegui possesses and relies upon a reasonable basis substantiating the representation at the time it is made; and (ii) for two (2) years after the last date of the dissemination of any such representation, Gramalegui maintains all advertisements and promotional materials containing such representation and all materials that were relied upon or that otherwise substantiated such representation at the time it was made, and makes such

materials immediately available to the Division of Enforcement for inspection and copying upon request.

E. Public Statements. By neither admitting nor denying the findings of fact or conclusions of law, Gramalegui agrees that neither Gramalegui nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision shall affect Gramalegui's (i) testimonial obligations, or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Gramalegui will undertake all steps necessary to assure that all of his agents and employees under his authority and control understand and comply with this agreement.

Unless otherwise specified, the provisions of this Order shall be effective on this date.
By the Commission.

Jean A. Webb
Secretary to the Commodity
Futures Trading Commission

Date: July 12, 2001