

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

D. Michael Sheaves
1301 Ridge Drive
Kerrville, Texas 78028,

Respondent.

CFTC Docket No. 01-25

COMPLAINT AND NOTICE OF
HEARING PURSUANT TO
SECTIONS 6(c) AND 6(d) OF THE
COMMODITY EXCHANGE ACT, AS
AMENDED

The Commodity Futures Trading Commission ("Commission") has received evidence from its staff which tends to show, and the Commission's Division of Enforcement ("Division") alleges, that:

I.

SUMMARY

1. In December 1999, D. Michael Sheaves ("Sheaves"), a registered commodity trading advisor ("CTA") doing business under the name Strategic Trading & Investing ("STI"), began to trade commodity futures accounts on behalf of clients using his NASDAQ 100 Index futures contract trading program ("NASDAQ program"). In connection therewith, and beginning in at least March 2000, Sheaves prepared and distributed STI disclosure documents to prospective clients that reported past monthly rates of return for his NASDAQ program.

2. Beginning in April 2000, Sheaves experienced substantial losses trading his NASDAQ program on behalf of his clients. However, Sheaves failed to revise or update his disclosure documents to reflect those losses and continued to distribute the

misleading disclosure documents to solicit new managed account clients and made other misrepresentations, thereby committing a fraud upon his clients and prospective clients, in violation of Sections 4b(a)(i) and (iii) and 4o(1)(A) and (B) of the Commodity Exchange Act, as amended (“Act”) and Commission Regulation 4.41(a). Further, his continued use of the disclosure documents without revision also constitutes a violation of Commission Regulation 4.36(c).

3. Since at least November 1999, Sheaves has also been offering his services, for a fee, as a “personal trading coach” to teach clients who want to learn to trade the NASDAQ 100 Index futures contract pursuant to his “Real-Time Mentor Program” (“Mentor Program”). On May 16, 2000, Sheaves solicited clients for his Mentor Program by sending them a letter that omitted material information about the recent losses he had sustained trading for clients and which letter made other misrepresentations. Commencing on at least July 11, 2000 and continuing through at least mid-January 2001, Sheaves’ solicitation for his Mentor Program via his website included a disclosure document with inaccurate or misleading monthly performance results. Commencing on at least February 23, 2001 and continuing through at least April 2001, Sheaves’ solicitation for his Mentor Program via his website also described past profitable trading results without disclosing that those results were hypothetical or simulated. Such acts by Sheaves constitute fraud upon his clients and prospective clients, in violation of Section 4o(1)(A) and (B) of the Act and Commission Regulation 4.41(a). Further, his failure to include the hypothetical or simulated disclaimer statement in his advertising constitutes a violation of Commission Regulation 4.41(b).

II.
RESPONDENT

4. D. Michael Sheaves, age 42, resides at 1301 Ridge Drive, Kerrville, Texas 78028. In November 1999, he organized a sole proprietorship under the name Strategic Trading & Investing for the purpose of managing commodity futures trading accounts for customers. Pursuant to Section 4n(1) of the Act, he has been registered with the Commission as a CTA, doing business as STI, since January 8, 1996, with the exception of a brief period from August 28 through September 24, 1997, when Sheaves was suspended for failure to timely comply with CFTC ethics training requirements. Pursuant to Section 4k(1) of the Act, he has been registered as an associated person (“AP”) of Ameri Group Financial Services, LLC, a registered introducing broker (“IB”), since March 30, 2001, and since July 13, 2001, Sheaves has been a branch manager and principal of that firm.

III.
FACTS

5. Commencing in December 1999, Sheaves began trading pursuant to this NASDAQ Program for one of his existing managed account clients (“first NASDAQ client”). Sheaves earned profits trading for the first NASDAQ client through March 2000. However, commencing in April 2000 and continuing through June 2000, Sheaves lost significant sums trading for the first NASDAQ client.

6. In March 2000 and thereafter, Sheaves solicited past seminar attendees and clients in his Mentor Program to have him manage their trading accounts using his

NASDAQ Program. He also solicited additional NASDAQ Program clients on his internet website at www.strategictradinginvest.com.

7. In March 2000, Sheaves prepared and provided his prospective and actual clients in the NASDAQ Program with a disclosure document dated March 4, 2000 (“March DD”). The March DD reported the NASDAQ Program’s profitable monthly performance results through February 2000.

8. Sheaves prepared another disclosure document, dated April 1, 2000, (“April DD”) that he gave to other prospective and actual clients of his NASDAQ Program. The April DD reported the NASDAQ Program’s profitable monthly performance results through March 2000.

9. Commencing in March 2000 and continuing through at least August 2000, Sheaves traded his NASDAQ Program on behalf of ten other clients. Sheaves’ trading resulted in overall losses for each of these clients.

10. By no later than June 1, 2000, both the March DD and the April DD (collectively, “DDs”) became materially inaccurate and incomplete in that they failed to reflect the multiple client account losses sustained by Sheaves’ NASDAQ Program beginning in April 2000. Nevertheless, Sheaves never corrected the DDs that had already been distributed to clients and prospective clients by preparing, as required by Commission Regulation 4.36(c), an amendment or by distributing, as required, an addendum to the DDs to reflect such losses, and, in fact, after June 1, 2000, Sheaves continued to trade the NASDAQ Program for clients that had received the March DD. Moreover, after June 1, 2000, Sheaves distributed the inaccurate and incomplete April

DD to prospective clients and continued to solicit new clients via his website which linked to the April DD.

11. On or about September 22, 2000, the National Futures Association (“NFA”) requested Sheaves to remove the April DD from his website. In a November 20, 2000 telephone conversation and in a letter dated December 11, 2000, Sheaves represented to NFA that he had removed the April DD from his website. Nevertheless, Sheaves continued to make the April DD available to prospective clients who could download the April DD from Sheaves’ internet website until at least sometime in mid-January 2001.

12. In a letter dated May 16, 2000, Sheaves solicited prospective clients of his NASDAQ and Mentor Programs and made the following representations to them:

- a. “I began trading the program for my managed accounts on December 14, 1999. **In the next three and one-half months, I made over \$93,500 for my clients** trading one contract of the NASDAQ 100 Index.”
- b. “Since January 1, 2000, the Advisor has achieved the following results:
 - First Quarter 2000 Performance
 - January, +147%
 - February, +40%
 - March, +104%”
- c. “As of April 10, 2000, the Advisor has . . . additional commitments for \$1.12 million.”

13. The statements described in paragraphs 12a and 12b were material and misleading by omission because Sheaves failed to disclose that the client accounts sustained significant trading losses during April and May 2000.

14. The statement described in paragraph 12c was material and false or misleading because Sheaves did not have firm commitments for additional investments and merely fabricated the dollar figure used in this solicitation.

15. Sheaves marketed his Mentor Program on his website. Beginning on at least July 11, 2000 and continuing through at least mid-January 2001, Sheaves' solicitation for his Mentor Program via his website included inaccurate or misleading disclosure document monthly performance results.

16. Beginning on at least February 23, 2001 and continuing through at least April 2001, Sheaves marketed his Mentor Program on his website by publishing a "Year-to-Date Trading System Performance Report" which purported to summarize his trading results for the NASDAQ 100 Index futures contract.

17. Sheaves' Year-to-Date Trading System Performance Report was false and misleading in that he suggested that the profits reported therein were based upon actual trading, when, in fact, the purported profits were based only upon hypothetical or simulated trading.

18. Sheaves' advertising for his Mentor Program also failed to include the simulated or hypothetical performance disclaimer set forth in Commission Regulation § 4.41(b).

IV.

VIOLATIONS OF THE ACT AND REGULATIONS

COUNT ONE

**VIOLATIONS OF SECTION 4b(a)(i) and (iii) OF THE ACT:
SOLICITATION FRAUD**

19. The allegations contained in paragraphs 1 through 14 are realleged and incorporated herein by reference.

20. Sheaves violated Section 4b(a)(i) and (iii) of the Act, 7 U.S.C. § 6(b)(a)(i) and (iii) (1994) in that he cheated or defrauded or willfully deceived or attempted to cheat or defraud or attempted to deceive prospective NASDAQ Program clients as follows:

(a) From June 1, 2000 until mid-January 2001, by making material misrepresentations and omissions to prospective NASDAQ program clients as set forth in paragraphs 7 to 11; and

(b) On or about May 16, 2001, by making material misrepresentations and omissions to prospective NASDAQ program clients as set forth in paragraphs 12 through 14.

21. Sheaves engaged in this conduct in or in connection with orders to make, or the making of, contracts of sale of commodities for future delivery, made, or to be made, for or on behalf of other persons where such contracts for future delivery were or may have been used for (a) hedging any transaction in interstate commerce in such commodity, or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof.

22. Each misrepresentation and omission, including those specifically alleged herein, constitutes a separate and independent violation of 4b(a)(i) and (iii) of the Act.

COUNT TWO

**VIOLATIONS OF SECTION 4o(1)(A) and (B) OF THE ACT:
COMMODITY TRADING ADVISOR FRAUD**

23. The allegations in paragraphs 1 through 18 are realleged and incorporated herein by reference.

24. From at least December 1999 to date, Sheaves acted as a CTA because, for compensation or profit, through his NASDAQ Program of managed account services he engaged in the business of advising others as to the value of or the advisability of trading in the NASDAQ 100 Index futures contract.

25. Sheaves violated Section 4o(1)(A) and (B) of the Act, 7 U.S.C. § 6o(1)(A) and (B) (1994), in that, by use of the mails or other means or instrumentalities of interstate commerce, he directly or indirectly, employed a device, scheme or artifice to defraud clients or prospective clients, or engaged in a transaction, practice, or course of business which operated as a fraud or deceit upon such persons as follows:

(a) From June 1, 2000 until mid-January 2001, by making material misrepresentations and omissions to prospective NASDAQ program clients as set forth in paragraphs 7 through 11;

(b) On or about May 16, 2001, by making material misrepresentations and omissions to prospective clients for both his NASDAQ and Mentor Programs as set forth in paragraphs 12 through 14;

(c) From approximately July 11, 2000 through mid-January 2001, by making material misrepresentations and omissions to prospective Mentor Program clients as set forth in paragraphs 7 through 11 and 15; and

(d) From at least February 23, 2001 through at least April 2001, by making material misrepresentations and omissions to prospective Mentor Program clients as set forth in paragraphs 16 through 18.

26. Each misrepresentation or omission, including those specifically alleged herein, constitutes a separate and independent violation of Section 4o(1)(A) and (B) of the Act.

COUNT THREE

VIOLATIONS OF COMMISSION REGULATION 4.41(a): FRAUDULENT ADVERTISING BY A COMMODITY TRADING ADVISOR

27. The allegations in paragraphs 1 through 11 and 15 through 18 are realleged and incorporated herein by reference.

28. Sheaves violated and continues to violate Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a) (2001), in that he advertised in a manner which employed a device, scheme or artifice to defraud clients or prospective clients as follows:

(a) From at least July 11, 2000 through mid-January 2001, by making material misrepresentations and omissions to prospective Mentor Program clients as set forth in paragraphs 7 through 11 and 15; and

(b) From at least February 23, 2001 through at least April 2001, by making material misrepresentations and omissions to prospective Mentor Program clients as set forth in paragraphs 16 through 18.

29. Each misrepresentation or omission, including those specifically alleged herein, constitutes a separate and independent violation of Commission Regulation 4.41(a).

COUNT FOUR

**VIOLATIONS OF COMMISSION REGULATION 4.36(c):
FAILURE TO CORRECT MATERIAL DEFECT IN CTA DISCLOSURE
DOCUMENT**

30. The allegations in paragraphs 1 through 11 are realleged and incorporated herein by reference.

31. Commencing on June 1, 2000, Sheaves violated and continues to violate Commission Regulation 4.36(c), in that he failed to correct his March or April DD, by way of amendment or sticker affixed to the March or April DD or similar means, to reflect the trading losses sustained by Sheaves for his NASDAQ Program clients in early May 2000, and continued to use his April DD in the solicitation of new clients and did not distribute said correction to all of his existing clients within 21 days of the date upon which Sheaves knew or should have known of the defects in his March and April DDs.

32. Each failure to amend his March or April DD or distribution of Sheaves' April DD commencing on June 1, 2000 and continuing thereafter constitutes a separate and independent violation of Commission Regulation 4.36(c).

COUNT FIVE

**VIOLATIONS OF COMMISSION REGULATION 4.41(b):
CTA'S FAILURE TO INCLUDE HYPOTHETICAL OR SIMULATED
PERFORMANCE DISCLAIMER**

33. The allegations in paragraphs 1 through 6 and 16 through 18 are realleged and incorporated herein by reference.

34. Commission Regulation 4.41(b)(1)(i) requires that the presentation of the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a CTA, or any principal thereof, be accompanied by 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.

35. From approximately February 23, 2001 through at least early April 2001, Sheaves violated Commission Regulation 4.41(b)(1)(i), 17 C.F.R. § 4.41(b)(1)(i) (2001), in that he failed to include a hypothetical or simulated performance disclaimer that comports with the requirements of Commission Regulation 4.41(b)(1)(i) in his Year-to-Date Trading System Performance Report described in paragraphs 14 through 16.

V.

By reason of the foregoing allegations, the Commission deems it necessary and appropriate, pursuant to its responsibilities under the Act, to institute public administrative proceedings to determine whether the allegations set forth in Parts I-IV above are true and, if so, whether an appropriate order should be entered in accordance with Sections 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9 and 15 (1994):

- a) Directing that the Respondent cease and desist from violating the provisions of the Regulations set forth in Parts I-IV of the Complaint;

- b) If the Respondent is registered with the Commission in any capacity, suspending, for a period not to exceed six months, or revoking Respondent's registration;
- c) Prohibiting Respondent from trading on or subject to the rules of any "registered entities," as defined in Section 1a(29) of the Act, as amended by the Commodity Futures Modernization Act of 2000, Appendix E to Pub. L. No. 106-554, 114 Stat. 2763 (2000), and requiring all registered entities to refuse Respondent all privileges thereon;
- d) Assessing against Respondent a civil monetary penalty in an amount of not more than the higher of \$110,000 or triple the monetary gain to Respondent for each violation of the Regulations occurring between November 27, 1996 and October 23, 2000, and assessing against Respondent a civil monetary penalty in an amount of not more than the higher of \$120,000 or triple the monetary gain to Respondent for each violation of the Regulations occurring after October 23, 2000; and
- e) Requiring restitution to customers of damages proximately caused by the violations of the Respondent.

VI.

WHEREFORE, IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the allegations set forth in Section I-IV above be held before an Administrative Law Judge, in accordance with the Commission's Rules of Practice under the Act (the "Commission's Rules"), 17 C.F.R. §§ 10.1 et seq., at a time and place to be set as provided by Section 10.61 of the Commission's Rules, 17 C.F.R. § 10.61, and that all post-hearing procedures shall be conducted pursuant to Sections 10.81 through 10.107 of the Commission's Rules, 17 C.F.R. §§ 10.81-10.107.

IT IS FURTHER ORDERED that each Respondent shall file an Answer to the allegations contained in this Complaint within twenty (20) days after service, pursuant to Section 10.23 of the Commission's Rules, 17 C.F.R. § 10.23, and shall serve two copies of such Answer and of any documents filed in these proceedings upon Scott R. Williamson, Acting Regional Counsel and Susan B. Padove, Senior Trial Attorney, Division of Enforcement, Commodity Futures Trading Commission, Suite 1600-N, 300 S. Riverside Plaza, Chicago, Illinois 60606 or upon such other counsel as may be designated by the Division. If any Respondent fails to file the required Answer, or fails to appear at a hearing after being duly served, such Respondent shall be deemed in default and the proceedings may be determined against such Respondent upon consideration of the Complaint, the allegations of which shall be deemed to be true.

IT IS FURTHER ORDERED that this Complaint and Notice of Hearing shall be served upon each Respondent personally or by registered or certified mail, pursuant to Section 10.22 of the Commission's Rules, 17 C.F.R. § 10.22.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecutorial functions in this or any factually related proceedings will be permitted to participate or advise the

decision in this matter except as a witness or counsel in a proceeding held pursuant to notice.

By the Commission.

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

Date: September 28, 2001