

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

RECEIVED
C.F.T.C.
2002 JUN 10 A 8:56
OFFICE OF PROCEEDINGS
AND RECORDS CLERK

In the Matter of:

MICHAEL RADCLIFFE,

Respondent.

CFTC Docket No. 02-04

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL
SANCTIONS

I.

On February 15, 2002, the Commodity Futures Trading Commission (the "Commission" or "CFTC") filed a Complaint and Notice of Hearing against Michael Radcliffe ("Radcliffe"). The Complaint alleged that Radcliffe violated Section 4o(1) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 *et seq.* (*the "Act"*), 7 U.S.C. §6o(1) and Section 4.41(a) of the Commission's Regulations, 17 C.F.R. §§ 1 *et seq.* (*the "Regulations"*), 17 C.F.R. 4.41(a).

II.

In order to dispose of the allegations and issues raised in the Complaint, Radcliffe has submitted an Offer of Settlement which the Commission has determined to accept. Without admitting or denying any of the allegations of the Complaint or the findings of fact in the Order Making Findings and Imposing Remedial Sanctions ("Order"), and prior to any adjudication on the merits, the Respondent acknowledges service of the Order and consents to the use of the findings in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Radcliffe does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. He does not consent to the use of the Offer or this Order, or the findings to which he has consented in his Offer, by any other person or entity in this or any other proceeding. The findings made in the Order are not binding on any other person or entity named as a defendant or respondent in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

From at least 1997 through September 2001, Respondent Michael Radcliffe ("Radcliffe") solicited customers as part of his predominantly Internet-based commodities advisory business. Using the Internet web site *www.mikeysmethods.com*, Radcliffe offered and sold, among other goods and services, two items: (i) a commodity trading manual called "Mikey's Methods to Money or Madness" ("Mikey's Methods"), which lays out a system for trading commodity futures; and (ii) *Learn to Earn*, a book about commodity futures trading written by Radcliffe. The web site contained claims that Radcliffe made "good profits" from his own trading of the "Mikey's Methods" system, and that he made his living through such trading. In fact, however, Radcliffe sustained aggregate net losses in his personal trading and therefore did not make either "good profits" or "a living" from his commodity futures trading. As a result of these false statements, Radcliffe, acting as a commodity trading advisor ("CTA") violated § 4o of the Act, 7 U.S.C. § 6o, as well as Regulation § 4.41, 17 C.F.R. § 4.41.

B. RESPONDENT

Michael Radcliffe is the author of the "Mikey's Methods" trading manual and the *Learn to Earn* book. He also operated the *www.mikeysmethods.com* web site until at least September 30, 2001. Radcliffe has never been registered with the Commission in any capacity.

C. FACTUAL BACKGROUND

1. Products And Services Sold Through the Internet

During the period 1997 through 2001, Radcliffe wrote and published a futures trading manual containing a trading system called "Mikey's Methods" and the futures trading book *Learn to Earn*. During the same time period, Radcliffe operated a web site called *www.mikeysmethods.com*, from which he offered and sold those written materials. The web site also advertised a service by which Radcliffe provided daily "paper trading" e-mails to subscribers that discussed market direction and provided recommendations for entering and exiting the futures markets while trading a hypothetical, or "paper," portfolio.

2. False Claims Concerning Profits

The web site contained statements that Radcliffe, using the “Mikey’s Methods” trading system, traded commodity futures successfully and made his living that way. The specific misrepresentations include:

- “Mikey’s Methods helps me trade well enough so that I don’t need to work. Isn’t that your objective as well?”
- “Not long after I started making good profits in commodity trading several of my friends wanted to learn.”
- “Do you have what it takes? It is not whether or not you have a higher education: many successful traders were low income construction laborers and blue collar workers. It’s not a matter of money. Some (like myself) have started with as low as \$1,000 initial investment capital.”
- “If you want to learn commodity trading from the ground up from someone who became successful with very little capital, this is the course for you.”
- “These are the same simple commodity trading strategies that Mikey has been using to trade for a living.”
- “I trade commodities for a living.”

Despite these claims, however, Radcliffe suffered aggregate losses in his trading accounts. As such, the trading system “Mikey’s Methods” did not successfully generate “good profits” or provide any sort of “living” for Radcliffe.

D. LEGAL DISCUSSION

Radcliffe, while acting as a CTA, violated Section 4o(1) and Regulation 4.41(a) on the web site in that he misrepresented that the trading system contained in “Mikey’s Methods” would result in substantial profits by stating that he had personally made substantial profits trading commodity futures.

To establish a violation of Section 4o(1) of the Act, the Division must prove that Radcliffe is a CTA. Section 1a(6) of the Act requires that to be deemed a CTA, a person must have advised another about the value or advisability of trading in futures contracts, either directly or through publications, writings or electronic media, for compensation or profit. 7 U.S.C. § 1a(6).² Radcliffe gave commodity futures trading advice for compensation or profit through the sale of the “Mikey’s Methods” manual and *Learn to Earn* book, and through the daily “paper trading” e-mails. The web site also made many statements in the first

² Section 1a(6) specifically excludes from the definition of a CTA anyone who is “the publisher or producer of any print or electronic data of general and regular dissemination, including its employees” if such publisher’s or producer’s provision of commodity futures trading advice is “solely incidental to the conduct of [its] business or profession,” and thus Section 4o(1) of the Act and Section 4.41 of the Regulations do not apply to such persons. This exclusion is designed to protect incidental publishers of advice, such as general magazines and newspapers, not publishers who specifically concentrate on commodities advice. *R&W Technical Svcs., Ltd. v. Commodity Futures Trading Comm’n*, 205 F.3d 165, 174 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000). This exclusion is not applicable here.

person, as though being "spoken" by Radcliffe, about his prowess and success as a trader and advisor, and offered advisory products and services related to commodities trading on the basis of that purported prowess and success. Radcliffe therefore acted as a CTA, whether or not he was registered, or required to be registered, as such.³

Section 4o(1) prohibits both registered and unregistered CTAs from misleading their clients.⁴ *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 (CFTC March 16, 1999), *aff'd in relevant part, R&W Technical Services, Ltd. v. Commodity Futures Trading Commission*, 205 F.3d 165, 170 (5th Cir. 2000) (prohibiting fraud by an unregistered CTA who sold trading systems to the public). Commission Regulation 4.41(a) prohibits a CTA, whether registered or unregistered, from advertising in a misleading manner.⁵ Radcliffe violated both Section 4o(1) and Regulation 4.41 by misrepresenting on the web site that following the trading strategies in "Mikey's Methods" resulted in profitable trades for him, and that he has been able to earn a living from those trades. These representations were made notwithstanding the fact that he suffered net trading losses during the period in question using the same strategies set forth on the web site and therefore were false. *See CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994), *citing, inter alia, Reed v. Sage Group*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 23,942 at 34,299 (CFTC Oct. 14, 1987) (misrepresentations regarding a firm or broker's trading record and experience are fraudulent because past success and experience are material facts to reasonable investors).⁶

Radcliffe violated Section 4o(1)(A) of the Act and Regulation 4.41(a)(1) with scienter because he knew that his trading track record did not achieve "good profits" and that he never

³ *See CFTC v. British American Commodity Options Corp.*, 560 F.2d 135, 141 (2d Cir. 1977), *cert. denied*, 438 U.S. 905 (1978) (a firm that "offer[ed] opinions and advice, and issued analyses and reports concerning the value of commodities" to customers, was a CTA under the Act); *Gaudette v. Panos*, 644 F. Supp. 826, 839 (D. Mass. 1986) (defendants who represented their advisory skills to be exemplary, suggested that plaintiffs open a commodity account and then recommended certain futures contracts for investment were CTAs).

⁴ Section 4o(1) of the Act provides, in pertinent 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.

⁵ Commission Regulation 4.4(a) provides, in pertinent part:

No . . . commodity trading advisor, 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.

⁶ Radcliffe's statements that he made a good living from trading his system are, in effect, false claims that his trading system generates consistent profits. False claims concerning the profits associated with his trading systems can violate Section 4o(1) of the Act. *See In re R&W Technical Services*, Comm. Fut. L. Rep. (CCH) ¶27,582 (CFTC March 16, 1999), *aff'd in relevant part, R&W Technical Services v. CFTC*, 205 F.3d 165 (5th Cir. 2000).

made a living from his personal trading of his system. By reason of the same conduct, Radcliffe violated Section 4o(1)(B) of the Act regardless of his scienter.⁷ Since his misconduct involved commercial advertising that misled customers, he also violated Regulation 4.41(a)(2). See *Commodity Trend Service v. Commodity Futures Trading Commission*, 233 F.3d 981, 994 (2000).

IV.

OFFER OF SETTLEMENT

Radcliffe has submitted an Offer in which he neither admits nor denies the allegations in the Complaint or the findings in this Order. Subject to the foregoing, Radcliffe acknowledges service of this Order and admits the jurisdiction of the Commission with respect to the matters set forth in the Complaint and the Order. He waives: (1) a hearing and all post-hearing procedures; (2) judicial review by any court; (3) any objection to the staff's participation in the Commission's consideration of the Offer; (4) 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 Regulations, 17 C.F.R. §§ 148.1, *et seq.*, relating to or arising from this action; and (5) 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.

Radcliffe stipulates that the record basis on which this Order is entered consists of the Complaint and the Order and the findings to which he has consented in the Offer, which are incorporated in this Order. Radcliffe consents to the Commission's issuance of this Order, which makes findings as set forth herein, and orders that Radcliffe:

1. cease and desist from violating the provisions of the Act and the Regulations that he has been found to have violated;
2. pay a civil monetary penalty ("CMP") of \$15,000;
and
3. comply with the undertakings as set forth in the Offer and incorporated in this Order.

⁷ Scienter must be proved to establish a violation of Section 4o(1)(A) and Regulation 4.41(a)(1), but it is not necessary to establish a violation of Section 4o(1)(B). *Commodity Trend Service v. Commodity Futures Trading Commission*, 233 F.3d 981, 993 (2000); *In re Kolter* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994, amended Nov. 16, 1994).

V.

FINDINGS OF VIOLATIONS

Solely on the basis of the consent evidenced in the Offer, and prior to any adjudication on the merits, the Commission finds that Radcliffe violated Section 4o(1) of the Act, 7 U.S.C. §§ 6o(1) and Section 4.41(a) of the Regulations, 17 C.F.R. § 4.41(a).

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Radcliffe shall cease and desist from violating Section 4o(1) of the Act, 7 U.S.C. §§ 6o(1), and Section 4.41(a) of the Regulations, 17 C.F.R. § 4.41(a);
- B. Radcliffe shall pay a civil monetary penalty ("CMP") in an amount of \$15,000, due within ten (10) days of the date of the Order; payment is to be made by electronic transfer to the account of the Commodity Futures Trading Commission at the United States Treasury, 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 a letter that identifies Radcliffe and the name and docket number of the proceeding; Radcliffe shall simultaneously transmit a copy of the cover letter and of the form of payment to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if Radcliffe fails to make payment of this penalty within fifteen (15) days of the respective due date, he shall be automatically prohibited from trading on or subject to the rules of any registered entity, as defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29), until he shows to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of payment has been made; and,
- C. Radcliffe shall comply with his undertakings as set forth in Section III of his offer as follows:
 1. Radcliffe shall not misrepresent, expressly or by implication:
 - a. 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

- b. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service.
2. Radcliffe 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 Commission Regulation 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 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, Radcliffe shall clearly identify those hypothetical or simulated performance results that are based, in whole or in part, on hypothetical trading results.

3. Radcliffe 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 and options trading involves high risks with the potential for substantial losses.
4. Radcliffe shall not represent, expressly or by implication:
 - a. the performance, profits or results achieved by, or the results that can be achieved by, users of any commodity futures or options trading system or advisory service;
 - b. the risks associated with trading using any commodity futures or options trading system or advisory service;
 - c. 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:

- a. Radcliffe possesses and relies upon a reasonable basis substantiating the representation at the time it is made; and

b. for two (2) years after the last date of the dissemination of any such representation, Radcliffe 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

5. Radcliffe shall not apply for registration or seek exemption from registration with the Commission in any capacity nor engage in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9), or act as a principal, agent, officer or employee of any person registered, required to be registered, or exempted from registration, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9);

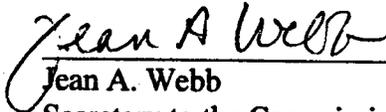
6. Neither Radcliffe, nor any of his agents or employees under his authority or control, shall take any action or make any public statements denying, directly or indirectly, any allegation in the Complaint or findings and conclusions in the Order, or creating, or tending to create, the impression that the Complaint or the Order is without a factual basis; provided, however, that nothing in this provision shall affect Radcliffe's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party.

IV.

The provisions of this Order shall be effective on this date.

BY THE COMMISSION.

Dated: June 10, 2002



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