UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:

D. MICAHEL SHEAVES

Respondent.

CFTC Docket No. 01-25

INTIAL DECISION ON DEFAULT

I. Procedural History

The Commission issued its complaint against Respondent Sheaves ("Sheaves") on or about September 28, 2001. As Sheaves failed to timely file an answer to the complaint, the court issued its Order to Show Cause on November 21, 2001 requiring Sheaves to file his answer. On November 29, 2001 the court received a typed, unsigned letter, purportedly from Sheaves, claiming that an unsigned letter sent to the Division of Enforcement ("DOE") in August 2001 constituted his Answer to the complaint. Commission regulation 10.12(e)(4) requires that the original of all papers be signed in ink by the person filing the same or his designated attorney. Commission regulation 10.12(f)(3) further provides that "If a document is not signed . . . it may be stricken as sham and false." The purported unsigned answer is hereby struck from the evidentiary record. On November 29, 2001, Sheaves was ordered to Show Cause as to " . . . why the Court should not deem the allegations in the complaint to be true." Sheaves was ordered to respond on or before December 3, 2001 and to include a proper Answer with his response. Sheaves made no response.

By Motion filed December 6, 2001, the DOE moved for an Order that the purported Answer of Sheaves constituted an admission that the allegations set forth in the complaint are true and that Sheaves has waived his right to a hearing. Sheaves failed to file any response to the motion. On December 20, 2001 this court issued an order notifying the DOE and the parties of their right to file proposed findings of fact, conclusions of law, and any recommended sanctions on or before January 22, 2002. The DOE made a timely filing. Sheaves made no responsive filing.

II. Findings of Fact and Conclusions of Law

The court adopts the undisputed findings of fact and conclusions of law submitted by the DOE on January 22, 2002. They are in accord with the evidentiary record and appended hereto.

More specifically, the court finds and concludes as follows:

A. Findings of Fact

1. Sheaves resides at 1301 Ridge Drive, Kerville, Texas 78028. (Complaint and Notice of Hearing ("Complaint") at ¶ 4)

2 Except for a brief suspension for noncompliance with an ethics training requirement from August 28, 1997 to September 24, 1997, Sheaves has been registered with the Commission as a commodity trading advisor ("CTA") since January 8, 1996. He has done business as a CTA under the name of Strategic Trading & Investing. (Complaint at ¶ 4)

3. Since March 30, 2001, Sheaves has been registered as an associated person ("AP") of Ameri Group Financial Services, LLC, a registered introducing broker.

Since July 13, 2001, Sheaves has been a branch manager and principal of Ameri Group Financials. (Complaint at ¶ 4)

4. Starting in December 1999, Sheaves began trading commodity futures on behalf of his clients using his NASDAQ 100 Index futures contract trading program ("NASDAQ Program"). He made a profit for his first NASDAQ Program client until March 2000. From April 2000 to June 2000, Sheaves incurred significant losses for his first client. (Complaint at ¶¶ 1, 5)

5. After March 2000, Sheaves solicited more NADSDAQ Program clients by providing prospective and actual clients with a disclosure document dated March 4, 2000 ("March"). It provided profitable monthly performance results through February 2000. (Complaint at ¶ 7; March 4, 2000 Disclosure Document of Sheaves ("March DD"))

6. Sheaves gave prospective and actual NASDAQ Program clients another disclosure document dated April 1, 2000 ("April") which disclosed profitable monthly performance through March 2000. (Complaint at ¶ 8; April 1, 2000 Disclosure Document of Sheaves ("April DD"))

7. Starting in March 2000 to at least August 2000, Sheaves traded on behalf of ten more NASDAQ Program clients and the trading resulted in net losses for these clients and a negative rate of return. (Complaint at ¶ 9; Declaration of Michael Tallarico at ¶¶ 6, 7)

8. From April through August 2000 Sheaves' clients incurred aggregate losses of up to $403,553, not including more than $10,000 in commissions. (Declaration of Michael Tallarico at ¶ 8)

9. By June 1, 2000 the March and April disclosure statements were inaccurate since they only reflected profits and failed to reflect the losses that had been incurred up to date. Sheaves never corrected the disclosure statements he had already distributed and continued to solicit clients through the distribution of false disclosure documents. (Complaint at ¶ 10)

10. On or about September 22, the National Futures Association ("NFA") requested that Sheaves remove the April disclosure statement from his website. On November 22, 2000, Sheaves informed the NFA in writing that he had complied with the request. However, the erroneous disclosure statement was not removed until about the middle of January 2001. (Complaint at ¶ 11; December 11, 2000 Letter to NFA's Mathew Reyburn; Website Copy of April DD)

11. In a May 16, 2000 letter ("May 16 letter") Sheaves solicited clients by stating only his profits of $93,500 and omitting his April and May 2000 losses. Additionally, he falsely stated in the May 16 letter he that he had firm commitments for additional investments of $1.12 million. (Complaint at ¶¶¶ 12, 13, 14; Declaration of Donald Hoban at ¶ 5; May 16, 2000 Letter to Investors)

12. During April 2000 Sheaves had accumulated losses of $96,252 and by May 15, 2000 an additional $180,000 in losses. (Declaration of Michael Tallarico at ¶ 5)

13. Donald Hoban ("Hoban"), a NASDAQ Program client, relied on the May 16 letter when deciding to invest. Hoban's account was started with $50,000. Including commissions, the account lost $11,923.18 in July 2000. (Declaration of Donald Hoban at ¶¶¶ 7,8, 9; Declaration of Michael Tallarico at ¶¶ 9, 10)

14. Sheaves failed to include a simulated performance disclaimer as required

by Commission Regulation 4.41(b)(1)(i) in his Year-to-Date-Trading System Performance Report. He made further inaccurate disclosures of monthly performance results when marketing his NASDAQ Program. (Complaint at ¶¶¶ 15, 17, 18, Summary of TradeStation Strategy Performance Report)

B. Conclusions of Law

1. Sheaves violated Section 4b(a)(i) and (iii) of the Commodity and Exchange Act ("Act"), 7 U.S.C. § 6(b)(a)(i) and (iii) (1994) by making material misrepresentations and omissions to NASDAQ clients in disclosure documents as described in the findings.

2. Sheaves violated Section 4o(1)(A) and (B) of the Act, 7 U.S.C. § 6o(1)(A) and (B) (1994) by use of instrumentalities of interstate commerce that deceived or misled customers as described in the findings.

3. Sheaves violated and continues to violate Commission Regulation 4.41(a) and 4.41(b)(1)(i) by advertising in the manner described in the findings.

4. As described in the findings above, Sheaves violated and continues to violate Commission Regulation 4.36(c) by failing to correct his disclosure statements three months after being notified by the NFA of the violations.

III Discussion

The DOE's proposed sanctions include a cease and desist order, a revocation and suspension of registrations, a civil monetary penalty, and restitution. These proposed sanctions are in complete accord with Commission's regulations, policies, and past decisions.

A) Cease and Desist Order

A cease and desist order is appropriate when it is likely that a respondent would persist in illegal activities in the future. *In re Collins*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,418 at 46,973 (CFTC September 4, 1998); *Precious Metals Assocs., Inc. v. CFTC*, 620 F.2d 900, 912 (1st Cir. 1980). Sheaves engaged in illegal conduct for over a year by disseminating inaccurate disclosure documents and he took three months to correct his NFA rule violations once notified. Without a cease and desist order, his past misconduct suggests that Sheaves would persist in illegal activities.

B) Revocation and Suspension of Registrations

The commission is authorized to disqualify and revoke registration if a fraud is committed, as defined by Section 8a(2)(E) of the Act. While registered as a CTA, Sheaves committed fraud on many occasions and the court therefore finds he is unfit to be registered. *See In Re Gordon*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,181 (CFTC March 16, 1993). Accordingly, Respondent Sheaves's registration as a CTA shall be revoked the date this decision becomes final. Although not registered at the time of the fraudulent acts as an AP, Sheave's fraudulent actions as a CTA warrants a suspension of his registration as an AP for a period of six months. Therefore, Sheaves' registration as an AP shall be suspended for six months commencing the date this decision becomes final.

C) Civil Monetary Penalty

Section 6(b) of the Act, 7 U.S.C. § 9(b) (1994), permits the Commission to assess civil penalties on "evidence received". The amount of a civil monetary penalty should be high enough to deter future violations. *In re Gordon*, [1992-1994 Transfer Binder]

Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (CFTC March 16, 1993). In determining the size of the civil monetary penalty, this court will consider the gravity of the violations. *CFTC Policy Statement Relating to the Commission's Authority to Impose Civil Monetary Penalties; Penalty Guidelines*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 at 42,247 (November 1994). In assessing gravity, the court will consider intent, frequency and time span of the violation, actual harm caused to others, benefit received from violation, and if the violation involved core provisions of the act. In the instant case, all these factors are present. First, Sheaves knew that his disclosure to his clients and prospective clients was false but did not change its substance for over three months after the NFA told him to stop engaging in fraudulent conduct. Second, Sheaves's NASDAQ Program clients were harmed since he incurred aggregate trading losses of $403,553 in their accounts between April and August 2000. Third, between April and August 2000 Sheaves earned more than $10,000 in commissions. Finally, Sheaves violated Section 4b(a)(i) and (iii) and 4o(1)(A) and (B) of the Act, both core fraud provisions of the Act.

Section 6(d) of the Act allows the imposition of a fine not greater than $110,000 for violations prior to October 23, 2000, and not greater than $120,000 for violations after October 23, 2000. In the alternative, a fine not greater than three times the amount Sheaves gained may be imposed. The Division of enforcement recommends a fine of $50,000. In view of the gravity of the violations, and Sheaves' failure to correct his disclosure statements after notification by the NFA, the $50,000 fine is appropriate. Therefore, Sheaves shall pay a civil monetary penalty of $50,000 thirty (30) days after this decision becomes final.

D) Restitution

Section 6(c) of the Act, 7 U.S.C § 9 (c) (1994), allows the CFTC to "require restitution to customers of damages proximately caused by the violations of such persons". In the May 16 letter, Sheaves tried to persuade Hoban to invest in his NASDAQ Program. Hoban relied on this letter to allow Sheaves to trade on his behalf. Hoban stated that the May 16 letter did not disclose Sheaves's trading losses and his lack of additional investor commitment. Hoban stated that had he known these facts, he would not have invested. Hoban invested $50,000 in June 2000 as a result of the fraudulent May 16 letter and incurred losses of $11,923.18. Thus, the losses of $11,923.18 were a proximate result of Sheaves's fraud and Sheaves should pay the same in restitution.

ORDER

1. Sheaves is ordered to cease and desist from violating Section 4b(a)(i) and (iii) and 4o(1)(A) and (B) of the Commodity Exchange Act and Commission Regulations 4.41(a), 4.36(c) and 4.41(b)(1)(i).

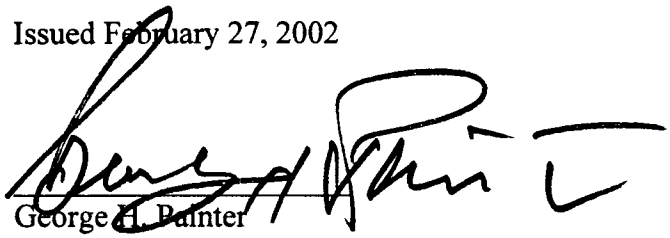
2. Sheaves's registration as a CTA is hereby revoked and his registration as an AP is hereby suspended for a period of six (6) months.

3. Sheaves is ordered to pay civil monetary penalty in the amount of $50,000 thirty (30) days after this decision becomes final.

4. Sheaves is ordered to pay restitution in the amount of $11,923.18 to for damages proximately cause by the violations of Sheaves to his NASDAQ Program client Hoban.

So ordered.

Issued February 27, 2002



George H. Painter
Administrative Law Judge

Dhaval Patel
Law Student Extern