

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of :
: CFTC DOCKET NO. 02-15
:
: Stephen Alan Pierce, individually and :
d/b/a Rapid Fire Swing Trading and : ORDER MAKING FINDINGS AND
The Chart Traders, : IMPOSING REMEDIAL SANCTIONS
: Respondent. :

:

I.

On July 30, 2002, the Commodity Futures Trading Commission (“Commission”) filed a Complaint and Notice of Hearing (“Complaint”) against Stephen Alan Pierce, individually and d/b/a Rapid Fire Swing Trading and The Chart Traders (“Pierce”). The Complaint charges that Pierce violated Sections 4n(3)(A), 4o(1)(A) and 4o(1)(B) of the Commodity Exchange Act, as amended (“Act”), 7 U.S.C. §§ 6n(3)(A), 6o(1)(A) and 6o(1)(B) (2001), and Commission Regulations 4.33, 4.41(a) and 4.41(b)(1)(i), 17 C.F.R. §§ 4.33, 4.41(a) and 4.41(b)(1)(i) (2002).

II.

In order to dispose of the allegations and issues raised in the Complaint, Pierce has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the allegations of the Complaint or the findings herein, and without any adjudication on the merits, Pierce acknowledges service of this Order Making Findings and Imposing Remedial Sanctions (“Order”). Pierce consents to the use of the findings

in this Order in this or any other proceeding brought by the Commission or to which the Commission is a party.¹

III.

The Commission Finds the Following:

A. SUMMARY

From approximately March 2000 through July 2002, Pierce, a registered commodity trading advisor (“CTA”) sold subscriptions to his futures trading recommendations and related services through various internet websites. Pierce’s internet advertising conveyed a false impression that he was actually trading in the futures market. In particular, Pierce touted his trading record and failed to disclose that it is based on hypothetical or simulated trading, and not actual performance. Further, the website claims overstated profit potential for Pierce’s trading recommendations and understated the risk of loss. Finally, as a registered CTA, Pierce is required to keep certain books and records, including client or subscriber information, which he failed to do.

B. SETTLING RESPONDENT

Stephen Alan Pierce resides in Ann Arbor, Michigan. From time to time, during the relevant time, Pierce has done business as “Rapid Fire Swing Trading” and “The Chart Traders.” Pierce became a registered CTA in March 2000, and continues to be so registered.

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

C. FACTS

Pierce, through his websites, sold various products and services to assist customers in trading the commodity futures market. Pierce began doing business at least as early as March 2000, selling his products and services through various internet websites he designed and controlled. Through the internet, Pierce solicited customers to subscribe to his websites that featured specific futures trading recommendations.

1. Claims Concerning Actual Trading

The description of Pierce's services conveyed a false impression to the public that Pierce was actually trading, when in fact Pierce was not. For instance, on his various websites, Pierce stated:

- “All tactics in this ebook are actually used everyday by real Chart Traders making real money ... We are blessed to bank thousands of dollars each week in net winning profits from the markets. They have blown by so fast, some days they actually bank over \$5,000.00 in net realized profits. It's A Fact.”
- “Take a look at a recent month of real time trading results using this method. These are NOT hypothetical results – This is all actual money made by using this method in real time trading. That's 12 trades on a single contract basis, in 5 recent months (not back testing) of this year, producing net total profits after losses of +\$46,127.50. Staying in each trade for a MAXIMUM of 3 DAYS! These are not back tested results. These are real trades – made in real time with our Chart Traders.”
- “Just last month we had 33 trades of which 18 were winners producing +\$10,207.00 in profits-we had 15 losing trades producing –(\$4,132.15) in losses for a *NET PROFIT* of +\$6,074.85 in one month. Trading *one contract* in just a few short minutes each day and holding the contract on average of ONLY 3 DAYS!”

Based on the misleading representations in the promotional material, many subscribers understood that the performance results represented Pierce's actual trading, not simulated or hypothetical results. These websites failed to specify that the purported trades were the result of

hypothetical or simulated trading and failed to give the required cautionary statement about the use of hypothetical trading in performance records.

2. Misrepresenting Profit Potential

Pierce used misleading statements in his web promotions. These statements overstated profit potential and failed to adequately warn investors of the risks inherent in futures trading.

For instance, on his various websites, Pierce stated:

- “You’ll can make money and get the benefit of knowing you’re dealing with consistent winners that have years of commodity experience successfully trading commodities and futures.”
- “An extremely valuable bonus that can easily pay back more than double your eBook Action Pack fee the SAME DAY. When you purchase, you’ll be granted the rights to use the Chart Traders Trend Monitor – which is responsible for over \$25,329.35 a month in average profits for the small trader!”

3. Books and Records

As a registered CTA acting in the capacity of a CTA, Pierce is required to keep certain books and records and provide them upon the request of Commission representatives. This specifically includes the names and addresses of his clients or subscribers. Pierce failed to do so, thereby breaching his record keeping obligations as a CTA.

D. LEGAL DISCUSSION

1. Pierce Violated Section 4o(1) of the Act and Commission Regulation 4.41(a)

Section 4o(1) of the Act and Section 4.41 of the Regulations prohibit a CTA or, with respect to Section 4.41 of the Regulations, a principal thereof, from using the mails or any means to either (A) employ an device, scheme, or artifice to defraud any client or prospective client, or (B) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. Section 4o(1) of the Act prohibits both registered and unregistered CTAs from defrauding their clients. *Commodity Trend Service, Inc. v. CFTC*, 233

F.3d 981 (7th Cir. 2000) (finding that advisors who do not provide personal trading advice and provide only impersonal advice not subject to registration requirements of the Act are nevertheless subject to its fraud provisions). Section 4.41(a) of the Regulations prohibits a CTA or principal thereof from advertising in a fraudulent or misleading manner, regardless of whether those CTAs are required to be registered. *See In re Martin A. Armstrong*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,332 (CFTC March 10, 1995) (respondent violated Regulation 4.41(a) by publishing advertisements that misrepresented hypothetical performance results as actual trading).

Material misrepresentations and omissions regarding futures and options transactions violate the antifraud proscriptions of the Act. *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,810 (CFTC Dec. 18, 1997); *Kelley v. Carr*, 442 F. Supp. 346, 351-354 (W.D. Mich. 1977), *aff'd in part and rev'd in part*, 691 F.2d 800 (6th Cir. 1980). A statement is material if it is substantially likely that a reasonable investor would consider the matter important in making an investment decision. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Sudol v. Shearson Loeb Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748, at 31,119 (CFTC Sept. 30, 1985). A reasonable customer would think it material that the trading program at issue had never been tested through actual trading. *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) (misrepresenting performance tables as being actual trading results violated Section 4^o of the Act).

Omissions and misrepresentations of fact concerning the likelihood of profit and the risk of loss of commodity futures or options transactions also are material and violate the antifraud

provisions of the Act. *See, e.g., CFTC v. Avco Financial Corp.*, 28 F. Supp. 2d 104, 115-16 (S.D.N.Y. 1998), *aff'd in part and remanded in part on other grounds sub nom. Vartuli v. CFTC*, 228 F.3d 94 (2d Cir. 2000); *First Nat. Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1340 (6th Cir. 1987); *CFTC v. Crown Colony Commodity Options Ltd.*, 434 F. Supp. 911 (S.D.N.Y. 1977).

While Section 4o(1)(A) of the Act requires proof of scienter, Section 4o(1)(B) does not. *Commodity Trend Service Inc. v. CFTC*, 233 F.3d at 993. *See also In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26, 262 at 42,198 (CFTC Nov. 8, 1994) (*citing Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-79 (11th Cir. 1988)).

a. Pierce was a CTA

Section 1(a)(b) of the Act defines a CTA as a person who "for compensation or profit, engages in advising others, either directly or through publications, writings, or electronic media as to the value of or the advisability of trading" in futures or options contracts.

Pierce meets the definition of a CTA because, in addition to being registered as a CTA during the relevant time period, Pierce, for a fee, gave trading advice to others concerning trading in futures or options contracts. Pierce made these recommendations through the Internet, a means of interstate commerce, and issued specific buy and sell trading recommendations to his subscribers. *Commodity Trend Service v. CFTC*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,777 at 48,705 (N.D. Ill. Sept. 29, 1999), *aff'd*, 233 F.3d 981 (7th Cir. 2000) (corporation regularly issuing commodity related publications which contain specific recommendations for buying and selling commodity futures or options contracts is a CTA). *See also Vartuli v. CFTC*, 228 F.3d 94 (2nd Cir. 2000) (finding that AVCO was a CTA when it

provided customers with advice on trading Swiss franc futures contracts through computer software).

b. The misrepresentations in Pierce's internet promotional material were fraudulent

Pierce engaged in the fraudulent promotion of the Chart Traders system from at least March 2000 through July 2002. His promotional materials, among other things, falsely stated that profit figures were based on "real time results . . . NOT hypothetical results." Pierce failed to disclose that the alleged profits were based on simulated trading, and not on actual trading results. The false claim about real time trading and the failure to disclose that the results were based on simulated trading constituted a violation of Section 4o(1). *See R&W Technical Svcs.* ¶ 27,582 at 47,741-45 (use of hypothetical trading to represent actual trading by CTA in sale of computerized trading system violates Section 4o(1) of the Act).

Pierce knew that the performance results used in his Internet advertising material were based solely on simulated trading, but failed to disclose this material fact. *R&W Technical Svcs.*, ¶ 27,582. Additionally, Pierce misrepresented the profit potential and risks associated with commodity futures trading. Generally, omissions and misrepresentations of fact concerning the likelihood of profiting from commodity futures and commodity options transactions are material and violate the antifraud provisions of the Act. *See, e.g., Avco Financial Corp.*, 28 F. Supp.2d 104, 115-16. These misrepresentations and material omissions by Pierce, CTA, violated Section 4o(1)(A) of the Act. *Cf. Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 n.21 (CFTC March 1, 1990).

Further, because Pierce used the fraudulent statements to entice members of the public to subscribe to his services, he engaged in a transaction, practice or course of business that operated

as a fraud or deceit upon his clients or prospective clients in violation of Section 4o(1)(B) of the Act and Commission Regulation 4.41(a).

2. Pierce Violated Commission Regulation 4.41(b)(1)(i)

Section 4.41(b)(1) of the Regulations makes it unlawful for a CTA to fail to include the required warnings about the limitations of trading performance numbers based upon hypothetical or simulated data. Section 4.41(b)(1)(i) of the Regulations provides that no person may present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or a series of transactions in a commodity interest ... unless such performance is accompanied by:

(i) 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 the profits or losses similar to those shown.' or

(ii) A statement prescribed pursuant to rules promulgated by a registered futures association...

Pierce violated this Regulation by presenting simulated performance results without accompanying those results with the prescribed cautionary statement. *See, e.g., Vartuli v. CFTC*, 228 F.3d at 106-107 (failure to have risk disclosure statement accompany the representations to which disclosure was meant to apply results in violation of Commission Regulation 4.41(b)).

3. Pierce Violated 4n(3)(A) of the Act and Regulation 4.33

Section 4n(3)(A) of the Act and Regulation 4.33 require persons that function as CTAs to keep certain books and records. *Cf. New York Currency Research Corp. v. CFTC*, 180 F. 3d 83, 90-91 (2d Cir. 1999) (Section 4n (3)(A) of Act applies to persons that act as CTAs). Pierce, a

registered CTA, is required to comply with these provisions. Among other things, Section 4n(3)(A) of the Act and Regulation 4.33 require CTAs to keep the name and address of each client or subscriber and provide them to Commission representatives upon request. Pierce failed to keep such books and records and thereby violated Section 4n(3)(A) of the Act and Regulation 4.33.

IV.

OFFER OF SETTLEMENT

Pierce has submitted an Offer in which, without admitting or denying the findings in this Order and prior to any adjudication on the merits, he: (1) admits the jurisdiction of the Commission with respect to all matters set forth in this Order, and for any action or proceeding brought or authorized by the Commission based upon violations of, or for enforcement of, this Order; (2) acknowledges service of this Order; (3) waives a 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 claims of double jeopardy based upon the institution of this proceeding or the entry of any order imposing a civil penalty or any other relief; and, all claims which Pierce 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, §§ 231-232, 110 Stat. 862-63, and part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, et seq. (2002), relating to, or arising from, this action; (4) stipulates that the record basis on which this Order may be entered consists solely of the Complaint and the Order and the findings consented to in the Offer, which are incorporated in the Order; and (5) consents to the Commission's issuance of this Order, which makes findings, including findings that Pierce violated 4n(3)(A), 4o(1)(A) and 4o(1)(B) of the Act and Commission Regulations 4.33, 4.41(a) and 4.41(b)(1)(i); and (a) orders Pierce to

cease and desist from violating the provisions of the Act and Regulations that he has been found to have violated; (b) orders Pierce to pay a civil monetary penalty as set forth below; and (c) orders Pierce to comply with the undertakings as set forth in the Order below.

V.

FINDING OF VIOLATIONS

Solely on the basis of the consent evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Pierce violated Sections 4n(3)(A), 4o(1)(A) and 4o(1)(B) of the Act, 7 U.S.C. §§ 6n(3)(A), 6o(1)(A) and 6o(1)(B) (2001), and Commission Regulations 4.33, 4.41(a) and 4.41(b)(1)(i), 17 C.F.R. §§ 4.33, 4.41(a) and 4.41(b)(1)(i) (2002).

VI.

ORDER

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Pierce shall cease and desist from violating Section 4n(3)(A), 4o(1)(A) and 4o(1)(B) of the Act and Sections 4.33, 4.41(a) and 4.41(b)(1)(i) of the Commission's Regulations.
2. Pierce shall pay Twenty-Five Thousand Dollars (\$25,000), which represents a civil monetary penalty, 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 addressed to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Pierce and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Director, Division of Enforcement, Commodity Futures Trading

Commission, 1155 21st Street, N.W., Washington, D.C. 20581, and to Scott R. Williamson, Deputy Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, 525 W. Monroe Street, Suite 1100, Chicago, Illinois 60661. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if Pierce fails to make payment of his penalty within fifteen (15) days of the due date, he shall be automatically prohibited from trading on or subject to the rules of any registered entity, and his registration as a CTA shall be automatically suspended, 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

3. Pierce shall comply with the undertakings as set forth below.

A. Pierce 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, or any commodity futures or options trading system or advisory service; and
2. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service;

B. Pierce 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, Pierce shall clearly identify those hypothetical or simulated performance results which were based, in whole or in part, on hypothetical or simulated trading results;

C. Pierce 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;

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

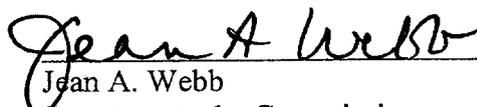
1. the performance, profits or results achieved by, or the results that can be achieved by, users, including himself, of any commodity futures or options trading system or advisory service; and
2. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service;

unless: (1) he 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, he maintains 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 of the Commission for inspection and copying upon request; and he maintains all advertisements and promotional materials in accordance with the Act and Regulations; and

E. Pierce agrees that neither he nor any of his agents or employees acting

under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings 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 affects Pierce's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Pierce will undertake all steps necessary to assure that all of his agents and employees understand and comply with this agreement.

By the Commission:



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

Dated: January 21, 2003