

**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**

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In the Matter of

CURTIS M. EBAUGH,

Respondent.

CFTC Docket No. 03-16

**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  
CURTIS M. EBAUGH**

**I.**

The Commodity Futures Trading Commission ("Commission") has reason to believe that Curtis M. Ebaugh ("Ebaugh") has violated Sections 4o(1)(A) and (B) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6o(1)(A) and (B), and Sections 4.41(a)(1) and (2), 4.41(b)(1) and (2) of the Regulations promulgated under the Act ("Regulations"), 17 C.F.R. §§ 4.41(a)(1) and (2), 4.41(b)(1) and (2). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Ebaugh 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, Ebaugh has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept.

Ebaugh 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”). Ebaugh, 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.<sup>1</sup>

### III.

The Commission finds the following:

#### A. SUMMARY

From December 2001 through July 2002 (the “relevant time period”), Ebaugh successfully promoted the sale of a commodity futures trading method, which he developed and called the PinPoint Day Trading Method (“PinPoint Method”). Ebaugh solicited prospective customers on the Internet through eBay, the online market place. In his marketing, Ebaugh created the false impression that he was trading commodity futures contracts successfully using his PinPoint method and that as a result he made his living from trading commodity futures contracts. Ebaugh provided examples of profitable trading, identifying one trade as a hypothetical trade while listing a series of others without identifying that they were hypothetical. As a result, it appeared that the series of profitable trades were actual trades he made using his PinPoint Method when they were not. Ebaugh proclaimed that others could achieve his results

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<sup>1</sup> Ebaugh 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.

and bolstered the false impression that he was successfully trading using his method by claiming he was living his dream life and posting a photograph of himself sitting in a luxury automobile.

Contrary to the image he created on his website, Ebaugh did not engage in any commodity futures trading, did not even have a futures trading account or otherwise earn profits from any futures trading conducted on his behalf. Ebaugh did not disclose those facts in his marketing.

In promoting his trading method, Ebaugh also downplayed the risk of loss associated with futures trading by touting the high rate of purported successful trading achieved by using the PinPoint trading method without otherwise disclosing the risks of futures trading. Further, Ebaugh failed to provide the disclosure concerning the inherent limitations of hypothetical trading in close proximity, as required by the Commission's Regulations.

By making such material misrepresentations about his trading, Ebaugh violated Sections 40(1)(A) and (B) of the Act and Sections 4.41(a)(1) and (2) of the Commission's Regulations. Ebaugh's failure to provide the required disclosure concerning hypothetical trades violated Sections 4.41(b)(1) and (2) of the Regulations.

## **B. SETTLING RESPONDENT**

**Curtis M. Ebaugh**, a resident of Winter Park, Florida, is a self-employed computer programmer and is also registered with the Commission as a commodity trading advisor ("CTA").

## **C. FACTS**

Between December 2001 and July 2002, Ebaugh used the Internet online market place eBay to offer his PinPoint commodity futures trading method to customers on the world wide

web. In his advertisement on eBay, Ebaugh mislead customers and prospective customers by falsely implying that he was profitably trading commodity futures contracts using his PinPoint Method and earning his living from such profitable trades. At the same time, Ebaugh downplayed the risk of loss associated with futures trading by touting the high rate of purported successful trading from using the PinPoint Method.

Ebaugh created the false impression that he was profitably trading commodity futures contracts in several different ways. Ebaugh provided examples of profitable trades, identifying only one of those trades as hypothetical and thus, implying that the other examples of trades were, in fact, genuine trades that achieved profits through the use of his method. For example, Ebaugh's first page proclaimed "You could have made over \$239,560 trading the NASDAQ mini contract this year." He followed that statement with claims of "93% Winning Days" and "I am convinced Anybody Can Copy What I'm Doing." He then listed a series of a half dozen trades in the S&P 500 futures contracts that were set forth on trading charts described trading profits such as "\$2,000 Profit in 3 Days" and "\$3,600 Profit in 6 Days !!!." Ebaugh failed to disclose that the profitable trades he listed were hypothetical.

Ebaugh bolstered the false impression that he was profitably trading futures by implying that he made his living from trading pursuant to his PinPoint Method. Besides encouraging others to "copy" what he has achieved, Ebaugh's ad featured a photograph of himself seated in a new luxury automobile with the caption "I live the life I have always dreamed of and feel that its time to give something back. Check out the picture of me in my new Jaguar XK8 Convertible. I am not showing you this picture to brag, but to show you that Im (sic) for real and that PinPoint is my gift to you. For \$97 I hope you can tell I'm not making a living selling it."

Ebaugh also minimized the significant risks of trading commodity futures contracts by emphasizing the purported high degree of trading success with the PinPoint Method and the method's consistency with such statements as "93% Winning Days !!!!!" and "I dare you to Find a method of trading that has been more consistent!!!!!" Ebaugh again did not disclose that the trading was hypothetical and did not balance such glowing affirmative representations with any disclosure about the significant risks of trading commodity futures contracts.

By such representations, Ebaugh effectively represented to prospective customers that he was a trader who made his living from trading commodity futures and that some of the trades identified represented actual, profitable trading results he achieved pursuant to the PinPoint Method. To the contrary of those representations, Ebaugh did not trade commodity futures using his PinPoint Method, did not make his living trading commodity futures contracts and, indeed, did not trade commodity futures contracts at all. Ebaugh failed to disclose in his ad that all of the trades he touted were hypothetical and to provide with the trades he listed the disclosure statement concerning the inherent limitations of claims based on hypothetical performance, as required by Section 4.41(b) of the Regulations.<sup>2</sup>

#### IV.

#### LEGAL DISCUSSION

A. **Ebaugh Committed Solicitation Fraud In Violation of Sections 4o(1)(A) and (B) of the Act and Regulations 4.41(a)(1) and (2)**

Ebaugh, while registered and acting as a CTA, violated Sections 4o(1)(A) and (B) of the Act and Regulations 4.41(a)(1) and (2), by representing to customers and prospective customers

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<sup>2</sup> Ebaugh published on the twelfth page of his eBay ad the Section 4.41(b) disclosure statement. However, Ebaugh's series of purported profitable trades are listed on the first nine pages of his eBay ad and are not accompanied by any disclosure statement. Such a remote placement of the disclosure statement fails to conform to

that he was using his PinPoint method to make profitable futures contracts trades and by suggesting that he was earning his living from such profitable trades. Ebaugh also violated these provisions by representing hypothetical trades as actual trades and by misrepresenting the risks associated with his trading method.

To violate Section 4o(1) of the Act, Ebaugh must have acted as a commodity trading advisor ("CTA"). Pursuant to Section 1a(6) of the Act, a CTA is a person who advises another about the value or advisability of trading in futures contracts, either directly or through publications, writings or electronic media, for compensation or profit. Commodity trading advice includes the sale of trading systems that generate specific trade recommendations. *CFTC v. Avco Fin. Corp.*, 28 F. Supp. 2d 104, 118-119 (S.D.N.Y. 1998), *aff'd in relevant part, rev'd and remanded in part sub nom., CFTC v. Vartuli*, No. 98-6280 (2d Cir. September 22, 2000) (company acted as a CTA under "the plain language of the {Act}" when it marketed computer software that generated specific recommendations to buy and sell futures contracts); *In re R&W* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) at 47,738 (trading signals generated by computerized trading system, together with advertisements which convince clients that the signals will be highly profitable, constitute advising others).

Ebaugh acted as a CTA because through his business of selling his commodity futures trading method, he advised others on commodity futures trading. Moreover, not only did Ebaugh act as a CTA by giving commodity futures trading advice for compensation or profit through the sale of the PinPoint trading method, but he was also registered with the Commission as a CTA

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Section 4.41(b)(1), which requires each hypothetical trade or performance to be accompanied by the disclosure statement and 4.41(b)(2) which requires it to be prominently disclosed.

Sections 4o(1)(A) and (B) of the Act prohibit both misrepresentations and omissions regarding futures and options transactions.<sup>3</sup> *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 methods to the public). Similarly, Commission Regulations 4.41(a)(1) and (2) prohibit a CTA from advertising in a misleading manner.<sup>4</sup>

Ebaugh violated both Sections 4o(1)(A) and (B) of the Act and Regulations 4.41(a)(1) and (2) by implicitly representing in his ads that he profitably traded commodity futures contracts using his PinPoint Method and made his living from trading commodity futures contracts when, in fact, he did not engage in any commodity futures trading and did not even maintain a commodity futures account. *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); *In re R & W*

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<sup>3</sup> 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. . . .

<sup>4</sup> Commission Regulation 4.41(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.

*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*, 2000 WL 217498 (5<sup>th</sup> Cir. Feb. 24, 2000) ("The use of a trading method by its developers is important to reasonable consumers because it reflects a meaningful vote of self-confidence and a sign of authenticity").

Ebaugh also violated Sections 4o(1)(A) and (B) and Regulations 4.41(a)(1) and (2) by implicitly representing hypothetical trades as actual profitable trades obtained by following the PinPoint Method. *R&W Technical Svcs., Inc. v. CFTC*, 205 F.3d 165, 170 (5<sup>th</sup> Cir. Feb. 24, 2000) ("Because simulated results inherently overstate the reliability and validity of an investment method, and because extravagant claims understate the inherent risks in commodities trading, a reasonable investor would find [such] fraudulent misrepresentations to be material."). *See also CFTC v. Skorupska*, 605 F. Supp. 923,933 (E.D. Mich. 1985) (misrepresenting performance tables as being actual trading results violates anti-fraud provisions of the Act).

Ebaugh further violated both Sections 4o(1)(A) and (B) and Regulations 4.41(a)(1) and (2) by claiming that his method produced a high degree of success, thus allowing for trading with much less risk without otherwise balancing such extravagant claims with appropriate disclosures of the risks involved in trading futures contracts. It is well established that claims of minimal risk in options and futures trading are false as a matter of law even when presented with risk disclosure. *Keller v. First Nat'l Monetary Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) P22, 402 at 29,823 (CFTC Oct. 22, 1984) ("statements that lead investors to believe that a particular investment is risk free and will almost certainly yield a profit are not protected from claims of fraud simply because the broker has made pro forma disclosure of risk"). Here Ebaugh provided no disclosure of the risks involved in trading commodity futures contracts.



While violations of Section 4o(1)(B) and Regulation 4.41(a)(2) do not require scienter, in order to establish a violation of Section 4o(1)(A) of the Act and Regulation 4.41(a)(1) it must be shown that Ebaugh acted with scienter. Ebaugh violated Section 4o(1)(A) of the Act and Regulation 4.41(a)(1) with scienter because he knew that he earned no profits from actual futures trading when at the same time he advertised that he was making profits by trading the PinPoint method and that he was making a living trading. Ebaugh also had no reasonable basis to claim his trading method could be traded with much less risk because of its high degree of success.

**B. Ebaugh Failed To Provide Required Hypothetical Disclaimer In Violation of Regulations 4.41(b)(1) and (2)**

Pursuant to Section 4.41(b)(1)(i) and (ii) of the Regulations, no person may present commodity interest trading performance results based upon hypothetical or simulated data, unless such performance results are accompanied by one of the following:

(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 profits or losses similar to those shown.” or

(ii) A statement prescribed pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act.

Section 4.41(b)(2) requires that:

If the presentation of such simulated or hypothetical performance is other than oral, the prescribed statement must be prominently disclosed.

Ebaugh violated Regulations 4.41(b)(1) and (2) by presenting simulated performance results in his web pages and failing to accompany those results with a prescribed cautionary statement in close proximity.

V.

**OFFER OF SETTLEMENT**

Ebaugh 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 Complaint and Order; waives the filing of a complaint and notice of a hearing, 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 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 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's Regulations, 17 C.F.R. §§ 148.1, et seq. relating to, or arising from this action.

Ebaugh 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. Ebaugh consents to the Commission's issuance of this Order, which makes findings, as set forth above, and orders that Ebaugh cease and desist from violating the provisions of the Act and Regulations he has been found to have violated; that requires Ebaugh pay a civil monetary penalty of \$15,000; that suspends his registration with the Commission for three months, and that Ebaugh comply with his undertakings as set forth in his Offer and incorporated in this Order.

## VI.

### FINDING OF VIOLATIONS

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

## VII.

### ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Ebaugh shall cease and desist from violating Sections 4o(1)(A) and (B) of the Act, 7 U.S.C. §§ 6o(1)(A) and (B) and Sections 4.41(a)(1) and (2), 4.41(b)(1) and (2) of the Commission's Regulations, 17 C.F.R. §§ 4.41(a)(1) and (2), 4.41(b)(1) and (2);
2. Ebaugh shall pay a civil monetary penalty in the amount of fifteen thousand dollars (\$15,000);<sup>5</sup>

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<sup>5</sup> Ebaugh shall pay the total amount within ten days (10) 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, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, under cover of letter that display Ebaugh's name and the docket number of the proceeding. Ebaugh shall simultaneously transmit a copy of his cover letter and the form of payment to Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9(a)(2), if Ebaugh fails to make payment of his penalty within fifteen days (15) of the due date, he shall be automatically prohibited from the privileges of all registered entities and his registration with the Commission shall

3. Ebaugh's registration with the Commission as a CTA shall be suspended for a period of three months commencing on the date of this Order; and

4. Ebaugh shall comply with the following undertakings as set forth in his Offer:

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

B. Ebaugh shall not present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest account or series of transactions in a commodity interest account 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, Ebaugh shall clearly identify those hypothetical or simulated performance results which were based, in whole or in part, on hypothetical trading results.

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

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

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be suspended automatically 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.

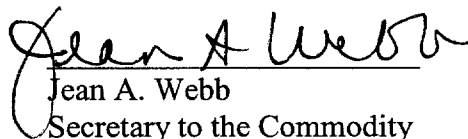
1. the performance, profits or results achieved by, or the results that can be achieved by users, including himself, of any commodity futures or options trading method, method or advisory service;
2. the risks associated with trading using any commodity futures or options trading method, method or advisory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

unless: (a) Ebaugh 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, Ebaugh 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, Ebaugh agrees that neither he 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 Ebaugh's (1) testimonial obligations, or (2) right to take legal positions in other proceedings to which the Commission is not a party. Ebaugh 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: June 30, 2003