

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of

CFTC Docket No. 03-17

ROBERT GUDINO,

**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
ROBERT M. GUDINO**

Respondent.

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Robert Gudino ("Gudino") 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 Gudino 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, Gudino has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept.

Gudino 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”). Gudino, 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.¹

III.

The Commission finds the following:

A. SUMMARY

From July 2001 through November 2001 (the “relevant time period”), Gudino successfully promoted the sale of a commodity futures trading method called the PinPoint Day Trading Method (“PinPoint Method”) on the Internet through eBay the online market place. In his marketing Gudino created the false impression that he was trading commodity futures contracts successfully and as a result made his living from trading commodity futures contracts. Gudino provided examples of profitable trades without disclosing that the listed trades were hypothetical. He also encouraged customers to copy what he was doing with his trading and asserted that through his trading he was his own boss. As a result it appeared that Gudino’s trades were actual trades using the PinPoint Method when they were not.

Contrary to the image he created on his website, Gudino did not engage in any commodity futures trading, did not even have a commodity futures trading account or otherwise

¹ Gudino 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.

earn profits from any futures trading conducted on his behalf. Gudino did not disclose those facts in his marketing.

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

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

B. SETTLING RESPONDENT

Robert Gudino, a resident of Apopka, Florida, is an independent marketing consultant. Gudino has never been registered with the Commission.

C. FACTS

Between July 2001 and November 2001, Gudino 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, Gudino misled customers and prospective customers by falsely implying that he was profitably trading commodity futures contracts using the PinPoint Method and earning his living from such profitable trades. At the same time, Gudino

downplayed the risk of loss associated with trading that method by touting the high rate of purported successful trading from using the PinPoint Method.

Gudino created the impression that he was profitably trading commodity futures contracts in several ways. Gudino provided examples of profitable trades, implying that the examples were, in fact, genuine trades that achieved profits through the use of his method. For example, Gudino's first page proclaimed, "You could have made over \$2,000 trading the NASDAQ in the last three days." Gudino's following pages 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 "\$2,400 Gain in 3 Days" and "\$3,600 Profit in 6 Days !!!!" Gudino failed to disclose that the profitable trades he listed were hypothetical.

Gudino bolstered the impression of his profitable futures trading by claiming that he was trading for a living by using to his PinPoint Method. His ad asserted that, "Years ago I had the 8 to 6 job and it was slowly killing me. So I decided that trading was my only way out of the personal hell that my job created in my life. I have done just that. ... I have been my own boss for 3 years !!!"

Gudino 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--"80 to 90% Accurate !!!!!!!" and the method's consistency "You will learn how to consistently make \$300-\$1000 a day trading the E-mini Futures contract." Gudino again did not disclose that those results were based on hypothetical trading and did not balance such glowing affirmative representations with any disclosure about the significant risks of trading commodity futures contracts.

By such representations, Gudino effectively represented to prospective customers that he was a trader who made his living from trading commodity futures and that the trades identified represented actual, profitable trading results he achieved pursuant to the PinPoint Method. To the contrary of those representations, Gudino 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. Gudino further failed to disclose in his ad that all of the trades he touted were hypothetical and to provide with the trades the disclosure statement concerning the inherent limitations of claims based on hypothetical performance, as required by Section 4.41(b) of the Regulations.

IV.

LEGAL DISCUSSION

A. Gudino's Commodity Sales Solicitation Fraud In Violation of Sections 4o(1)(A) and (B) of the Act and Regulations 4.41(a)(1) and (2)

Gudino, while acting as a commodity trading advisor ("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 that he was using the PinPoint Method to make profitable futures contracts trades and by suggesting that he was earning his living from such profitable trades. Gudino 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, Gudino must have acted as 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). Gudino acted as a CTA because through his business of selling the PinPoint commodity futures trading method, he furnished commodity futures trading advice.

Sections 4o(1)(A) and (B) of the Act prohibit both misrepresentations and omissions regarding futures and options transactions.² *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 Regulation 4.41(a)(1) prohibits a CTA from advertising in a misleading manner.³

² 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. . . .

³ 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

Gudino violated both Sections 4o(1)(A) and (B) of the Act and Regulations 4.41(a)(1) and (2) by implicitly representing hypothetical trades as actual profitable trades obtained by following the PinPoint Method and by claiming he made his living from commodity futures trading. See *In re R & W 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 (5th 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"). Gudino also violated Section 4o(1)(A) and Regulation 4.41(a)(1) by representing hypothetical trades as actual profitable trades obtained by following the PinPoint trading Method. *R&W Technical Svcs., Inc. v. CFTC*, 205 F.3d 165, 170 (5th 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).

Gudino further violated both Sections 4o(1)(A) and (B) and Regulations 4.41(a)(1) and (2) by claiming that the PinPoint 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 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

any transaction, practice or course of business which operates as a fraud or deceit upon any . . . client or any

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 Gudino 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 Gudino acted with scienter. Gudino 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. Gudino 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. Gudino 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.

Gudino violated Regulations 4.41(b)(1) and (2) by presenting simulated performance results in his advertisements without accompanying those results with a prescribed cautionary statement.

V.

OFFER OF SETTLEMENT

Gudino 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.

Gudino 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.

Gudino consents to the Commission's issuance of this Order, which makes findings, as set forth above, and orders that Gudino cease and desist from violating the provisions of the Act and Regulations he has been found to have violated; that requires Gudino pay a civil monetary penalty of \$6,000; and that Gudino comply with his undertakings as set forth in his Offer and incorporated in this Order.

VI.

FINDING OF VIOLATIONS

Solely on the basis of Gudino's consent, as evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Gudino 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. Gudino 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. Gudino shall pay a civil monetary penalty in the amount of six thousand dollars (\$6,000); and⁴

⁴ Gudino 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 21st Street, N.W., Washington, D.C. 20581, under cover of letter that display Gudino's name and the docket number of the proceeding. Gudino shall simultaneously transmit a copy

3. Gudino shall comply with the following undertakings as set forth in his Offer:

A. Gudino 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. Gudino 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, Gudino shall clearly identify those hypothetical or simulated performance results which were based, in whole or in part, on hypothetical trading results.

C. Gudino 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. Gudino 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 method, method or advisory service;

of his cover letter and the form of payment to 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. § 9(a)(2), if Gudino 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 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.

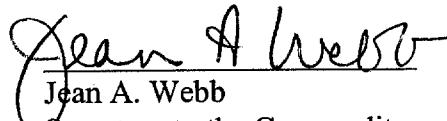
2. the risks associated with trading using any commodity futures or options trading method, method or advisory service;
3. the performance, profits, results achieved by any user, or represented in any testimonial or endorsement of the commodity futures or options trading method, method or advisory service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

unless: (a) Gudino 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, Gudino 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, Gudino 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 Gudino's (1) testimonial obligations, or (2) right to take legal positions in other proceedings to which the Commission is not a party. Gudino 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