

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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3:45 pm, Sep 12, 2019

In the Matter of:)
)
)

Rafael Marconato,)
)

Respondent.)
)
)
_____)

CFTC Docket No. 19-23

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING
FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I. INTRODUCTION

The Commodity Futures Trading Commission (“Commission” or “CFTC”) has reason to believe that from at least January 2018 through November 2018 (“Relevant Period”), Rafael Marconato, (“Marconato” or “Respondent”) violated Sections 4o(1)(B) and 9(a)(4) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6o(1)(B), 13(a)(4) (2012). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

In anticipation of the institution of an administrative proceeding, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Respondent neither admits nor denies the findings and conclusions herein and consents to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (“Order”) and acknowledges service of this Order.¹

¹ Respondent consents to the use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. Respondent does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

Between January 2018 and November 2018 (“the Relevant Period”), Marconato was involved in a fraud being perpetuated by the Chief Executive Officer (“CEO”) of a registered commodity pool operator and commodity trading advisor (the “Trading Firm”). The CEO and the Trading Firm fraudulently solicited pool participants and managed account holders to invest in commodity pools and managed accounts and misappropriated their funds. The CEO also lied to the National Futures Association (“NFA”), the self-regulatory organization (“SRO”) for the U.S. derivatives industry, in order to conceal the fraud.

Marconato also made false statements to NFA to assist the CEO and otherwise engaged in certain actions that operated as a fraud on pool participants. Although he had solicited many of the pool participants to trade commodity interests through investment in one of the Trading Firm’s commodity pools, Marconato denied the existence of that commodity pool (the “Pool”) to NFA and instead represented that the Trading Firm had no customers. He told NFA that the Pool he had been soliciting for was a company that invested in software. He also sent NFA a false limited liability company agreement that stated that the purpose of the company was to create and produce software, even though he knew the true purpose of the Pool, as stated in the private placement memorandum he had distributed to the Trading Firm’s pool participants, was “capital appreciation through trading in commodity interests.”

Moreover, in June 2018, Marconato decided he wanted to recover part of his investment in the Pool and accordingly sold part of his interest in the Pool to an existing pool participant for \$125,000. Marconato, however, did not disclose that he was selling part of his own interest in the Pool.

In accepting the Offer, the Commission recognizes Marconato’s substantial cooperation with the Division of Enforcement’s (the “Division”) investigation of this matter. The Commission notes that Marconato’s substantial cooperation is being recognized in the form of a substantially reduced civil monetary penalty.

B. RESPONDENT

Rafael Marconato currently resides in Limeira, SP, Brazil. During the times relevant to this Order, he resided in Miami, Florida. He was registered with the Commission as an associated person (“AP”) of the Trading Firm from August 2017 until November 1, 2018, and was a principal and Chief Compliance Officer of the Trading Firm, where he was employed from September 2016 through November 2018.

C. FACTS

In 2016, the CEO formed the Trading Firm and created the Pool for the purported purpose of trading commodity futures contracts. He solicited pool participants and prospective

pool participants from, among other places, his church. He met Marconato at his church and solicited him to participate in the Pool.² Marconato also decided to work for the Trading Firm, eventually registering as an AP with the Commission and becoming its Chief Compliance Officer. Marconato also solicited pool participants for the Pool.

The Trading Firm issued statements to pool participants showing profits of as much as 49.05% from February 2016 through November 2017; however, the CEO and the Trading Firm actually conducted no trading with pool participants' money and instead misappropriated participants' funds for their own benefit.

In early November 2017, NFA commenced an examination of the Trading Firm in part to determine whether the Trading Firm was soliciting funds from customers for purposes of trading commodity interests and if so, whether any trading was occurring. As part of the examination, NFA staff called Marconato on January 31, 2018, concerning the operations of the Trading Firm and the Pool. Marconato falsely told NFA that the Trading Firm had no customers who had invested money with it to trade futures and, repeating a story the CEO had told NFA that the Pool was a private equity fund for transforming ideas in software. On February 6, 2018, Marconato sent NFA a purported limited liability company agreement for the Pool that stated the purpose of the company was to act "as private equity fund in other business related to creation and production of software," despite the fact that he knew, as stated in the Pool's private placement memorandum, that the objective of the Pool was to trade commodity interests.

In January 2018, Marconato and the CEO also asked some or all of the customers of the Pool to transfer their investments into a new pool ("Pool II"). In June 2018, one of the pool participants in the Pool asked Marconato about making additional investments. Marconato told the pool participant that another pool participant wanted to sell his shares in Pool II and the pool participant agreed to buy those shares. However, Marconato did not tell the pool participant that he was the other pool participant selling his shares. He also did not disclose to the pool participant that he had told NFA, an SRO for the derivatives markets, that the Trading Firm had no customers and that the Pool was a private equity firm that invested in software. Marconato gave the customer instructions on how to wire his investment, \$50,000, to a bank account in the name of Pool II which was solely controlled by Marconato. Three days after the deposit cleared, Marconato wrote a check for \$50,000 to himself drawn from that account and deposited the money into his personal bank account. In September 2018, this same pool participant sought to make an additional \$75,000 investment in Pool II. Twelve days after the pool participant deposited the money into Pool II's account, Marconato again took the money and deposited it into his personal account.

III. LEGAL DISCUSSION

A. **Violation of Section 4o(1)(B) of the Act: Engagement in a Transaction that Operated as a Fraud upon a Customer.**

Section 4o(1)(B) of the Act, 7 U.S.C. § 6o(1)(B) (2012), makes it unlawful for, among others, an associated person of a commodity pool operator by use of the mails or any means or

² Marconato and his wife thereafter invested \$256,000 in the Pool.

instrumentality of interstate commerce, directly or indirectly, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any participant or prospective participant.

While the language of Section 4o(1)(A) of the Act requires a respondent to act “knowingly,” Section 4o(1)(B) does not—instead, the language of Section 4o(1)(B) places the emphasis on the effect of the prohibited conduct rather than the actor’s state of mind. *CFTC v. Equity Fin. Grp., LLC*, 2006 WL 3751911 *6 (D.N.J. Dec. 18, 2006) (citing *Commodity Trend Serv. v. CFTC*, 233 F.3d 981, 993 (7th Cir. 2000)); *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678–79 (11th Cir. 1988); *First Nat’l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1342 (6th Cir. 1987); see also *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (interpreting the language “operates or would operate as a fraud or deceit” as “plainly focus[ing] on the effect of a particular conduct”). Therefore, under Section 4o(1)(B), the Commission need not show that the respondent intended to defraud, but only that the respondent acted intentionally and that it did defraud a pool participant. *CFTC v. Savage*, 611 F.2d 270, 285 (9th Cir. 1980) (“If the [CPO] intended to do what was done and its consequence is to defraud the client or prospective client that is enough to constitute a violation of section 4O 1”).

Marconato was registered as and acted as an AP of a CPO when he knowingly solicited funds from a pool participant for the purpose of trading commodity interests in Pool II. At no time, did Marconato disclose either his false statements to NFA concerning the true purpose of the Pool or that he was selling his own shares in the Pool. Marconato directed the pool participant to wire his funds into an account in the name of Pool II that Marconato controlled. Marconato’s actions in soliciting \$125,000 via instrumentalities of interstate commerce from a pool participant to invest in Pool II after (i) concealing the existence of the Pool from NFA and failing to disclose as much to the pool participant and (ii) failing to disclose that he was selling his own shares to the pool participant operated as a fraud or deceit on the pool participant.

B. Violation of Section 9(a)(4) of the Act: Material Misrepresentations to NFA.

Section 9(a)(4) of the Act, 7 U.S.C. § 13(a)(4) (2012), makes it unlawful for any person to willfully make a false statement to a futures association acting in furtherance of its official duties under the Act. *CFTC v. Crombie*, 914 F.3d 1208, 1212 (9th Cir. 2019) (“[A] defendant makes false statements ‘willfully’ . . . if the defendant knew the statements were false when made, ‘or else made them with a reckless disregard for whether they were false.’” (citing *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004), amended by 413 F.3d 928 (9th Cir. 2005))).

Marconato willfully made false statements to NFA, a futures association registered under the Act, in connection with an examination that NFA conducted of the Trading Firm in furtherance of NFA’s official duties under the Act. Marconato knowingly misrepresented the purpose and the funding of the Pool to NFA. This conduct violates Section 9(a)(4).

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, Marconato violated Sections 4o(1)(B) and 9(a)(4) of the Act, 7 U.S.C. §§ 6o(1)(B), 13(a)(4) (2012).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he, without admitting or denying the findings and conclusions herein:

- A. Acknowledges service of this Order;
- B. 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 on violation of or enforcement of this Order;
- C. Waives:
 - 1. The filing and service of a complaint and notice of hearing;
 - 2. A hearing;
 - 3. All post-hearing procedures;
 - 4. Judicial review by any court;
 - 5. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
 - 6. Any and all claims that he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2012), and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2018), relating to, or arising from, this proceeding;
 - 7. Any and all claims that he may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, tit. II, 110 Stat. 847, 857-74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this action;
 - 8. Any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, including this Order;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer; and

- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that Respondent is liable for violating Sections 4o(1)(B) and 9(a)(4) of the Act, 7 U.S.C. §§ 6o(1)(B), 13(a)(4) (2012);
 2. Orders Respondent to cease and desist from violating Sections 4o(1)(B) and 9(a)(4) of the Act ;
 3. Orders Respondent to pay restitution in the amount of one hundred and twenty-five thousand (\$125,000) on the date of entry of this Order;
 4. Orders Respondent to pay a civil monetary penalty of twenty-five thousand (\$25,000) on the date of entry of this Order;
 5. Appoints NFA as Monitor in this matter;
 6. Orders that Respondent be permanently prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012)), and all registered entities shall refuse him trading privileges; and
 7. Orders Respondent and his successors and assigns to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Sections 4o(1)(B) and 9(a)(4) of the Act, 7 U.S.C. §§ 6o(1)(B), 13(a)(4) (2012).
- B. Respondent shall pay restitution in the amount of one hundred and twenty-five thousand (\$125,000) ("Restitution Obligation"). If the Restitution Obligation is not paid within ten (10) business days , then post-judgment interest shall accrue on the Restitution Obligation beginning on the date of entry of the Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of the Order pursuant to 28 U.S.C. §1961 (2012).

To effect payment of the Restitution Obligation by Respondent and the distribution of restitution to Respondent's customers, the Commission appoints NFA as "Monitor." The Monitor shall receive payments of the Restitution Obligation and any post-judgment interest from Respondent and make distributions as set forth below. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, it shall not be liable for any action or inaction arising from its appointment as Monitor other than actions involving fraud.

Respondent shall make his payments of the Restitution Obligation and any post-judgment interest under the Order in the name of “Rafael Marconato’s Settlement Fund” and shall send such payments by electronic funds transfer, or U.S. postal money order, certified check, bank cashier’s check, or bank money order to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606, under a cover letter that identifies Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581 and Elizabeth M. Streit, Chief Trial Attorney 525 West Monroe Suite 1100 Chicago, IL. 60661.

The Monitor shall oversee Respondent’s Restitution Obligation and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to the Respondent’s customers, or may defer distribution until such time as the Monitor may deem appropriate. In the event that the amount of payments of the Restitution Obligation to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative cost of making a restitution distribution is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission, as discussed below. To the extent any funds accrue to the U.S. Treasury for satisfaction of Respondent’s Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in this Order.

- C. Respondent shall pay a civil monetary penalty in the amount of twenty-five thousand (\$25,000) (“CMP Obligation”). If the CMP Obligation is not paid within ten (10) business days, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2012).

Respondent shall pay the CMP Obligation and any post-judgment interest by electronic funds transfer, U.S. postal money order, certified check, bank cashier’s check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

MMAC/ESC/AMK326
Commodity Futures Trading Commission
Division of Enforcement
6500 S. MacArthur Blvd.
HQ Room 181
Oklahoma City, OK 73169
(405) 954-6569 office
(405) 954-1620 fax
9-AMC-AR-CFTC@faa.gov

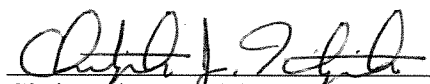
If payment is to be made by electronic funds transfer, Respondent shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581 and Elizabeth M. Streit, Chief Trial Attorney 525 West Monroe Suite 1100 Chicago, IL. 60661.

- D. Respondent is permanently prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012)), and all registered entities shall refuse him trading privileges; and
- E. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
1. Public Statements: Respondent agrees that he shall not take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party.
 2. Respondent agrees that he shall never, directly or indirectly:
 - a. enter into any transactions involving "commodity interests" (as that term is defined in Regulation 1.3, 17 C.F.R. § 1.3 (2018)), for Respondent's own personal accounts or for any accounts in which Respondent has a direct or indirect interest;
 - b. have any commodity interests traded, on Respondent's behalf;
 - c. control or direct the trading, or conducting transactions, for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;
 - d. solicit, receive, or accept any funds from any person for the purpose of purchasing or selling any commodity interests;
 - e. apply for registration or claim exemption from registration with the Commission in any capacity, and engage in any activity requiring such registration or exemption from registration with the Commission except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2018); and/or

- f. act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2018)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012)), registered, required to be registered, or exempted from registration with the Commission except as provided for in Regulation 4.14(a)(9).
3. Cooperation with Monitor: Respondent shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Respondent's victims, whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any restitution payments. Respondent shall execute any documents necessary to release funds that he has in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.
4. Cooperation, in General: Respondent shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this action, in *CFTC v. Bretas de Freitas*, No. 1:19-cv-4238 (S.D.N.Y. May 9, 2019), and in any current or future Commission investigation or action related thereto. Respondent shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, this action.
5. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission or the Monitor of any partial payment of Respondent's Restitution Obligation and CMP Obligation shall not be deemed a waiver of his obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
6. Change of Address/Phone: Until such time as Respondent satisfies in full his Restitution Obligation and CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to his telephone numbers and mailing addresses within ten (10) calendar days of the change.

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

By the Commission.



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 12, 2019