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2003 APR 29 AM 11:54
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16 Commodity Futures Trading Commission

17 **UNITED STATES DISTRICT COURT**
18 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

19 Commodity Futures Trading Commission,

20 Plaintiff,

21 v.

22 Richard Swannell,

23 Defendant.

03-2979 TJH (RZX)
Case No.:

COMPLAINT FOR A
PERMANENT
INJUNCTION,
OTHER EQUITABLE
RELIEF
AND CIVIL MONETARY
PENALTIES

1 enforcing the Commodity Exchange Act, as amended, 7 U.S.C. §§1 *et seq.* ("Act"),
2 issued an order, filing and simultaneously settling, an administrative proceeding
3 against Swannell. *In the Matter of: International Trading Systems, Ltd.,*
4 *International Trading Systems Australia PTY Limited and Richard Swannell,*
5 *Docket No. 00-28 (CFTC December 6, 2000.)*
6

7
8 5. The Commission's Order contained findings, among others, that
9 Swannell had employed a scheme to defraud a client, engaged in a course of
10 business that operated as a fraud upon a client while acting as a commodity trading
11 advisor ("CTA"), in violation of Section 4o of the Act, and advertised in a manner
12 that employed a scheme to defraud clients and prospective clients while acting as a
13 CTA, in violation of Section 4.41(a) of the Commission's Regulations, 17 C.F.R.
14 §4.41(a) (2002).
15
16

17
18 6. The Order required Swannell, among other things, to cease and desist
19 from those violations, and to comply with undertakings to avoid similar
20 misconduct in the future.
21

22 7. Nevertheless, since at least September 12, 2002, Swannell has
23 repeatedly violated, and continues to violate, the Act, Regulations and Order by
24 failing to include appropriate risk disclosures and disclaimers regarding
25 hypothetical trading and financial gain when soliciting customers.
26
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1 8. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2001),
2
3 the Commission brings this action to enjoin the Defendant Swannell's unlawful acts
4 and practices and to compel his compliance with the Act, Regulations and Order. In
5 addition, the Commission seeks a civil monetary penalty and such equitable relief as
6 this Court may deem necessary or appropriate, including disgorgement of
7 Defendant's ill-gotten gains.
8

9 **III. THE PARTIES**

10
11 9. Plaintiff Commission is an independent federal regulatory agency
12 charged with the responsibility for administering and enforcing the provisions of
13 the Act, 7 U.S.C. §§ 1 *et seq.* (2001), and the Regulations promulgated under it, 17
14 C.F.R. §§ 1 *et seq.* (2002).
15

16 10. Defendant Richard Swannell, an individual, resides in Australia. He
17 has never been registered with the Commission in any capacity.
18

19 **IV. FACTS**

20 21 **A. The Prior Commission Litigation**

22 11. From at least November 1998 until July 2000, Swannell used the
23 Internet to sell software programs to customers in the United States that generated
24 recommendations for trading commodity futures on United States boards of trade
25 through an Internet Web site.
26
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1 12. The software package consisted of five “fully automated, mechanical
2 systems” referred to as “The Collective.” On a daily basis, purchasers of the
3 software could input certain market information, and the trading systems would
4 then generate specific instructions that could be sent to a broker. The system was
5 marketed primarily to United States customers.
6

7
8 13. On the Web site, Swannell “guaranteed” that purchasers of the
9 software programs would double their money year after year and falsely implied
10 that over several years the trading system produced “exceptional and consistent”
11 returns in actual trading.
12

13
14 14. In fact, none or virtually none of the customers who used Swannell’s
15 systems doubled their money in a one year period, and the past performance results
16 touted on the Web site were the product of hypothetical, rather than actual trading.
17 Swannell failed to accompany the performance claims with the statement
18 prescribed by the Commission’s Regulations concerning the inherent limitations of
19 claims based on hypothetical performance.
20

21
22 15. After Division staff contacted Swannell in 2000 to discuss his
23 activities, he agreed to discontinue his fraudulent representations and to consent to
24 an order dated December 6, 2000, prohibiting further violations of Sections
25 4b(a)(i), 4b(a)(iii), and 4o(i) of the Act and 4.41(a) & (b) of the Commission’s
26 Regulations (“Consent Order”).
27
28

1 16. In pertinent part, the Consent Order states:

2 A. [Swannell shall] cease and desist from violating
3 Sections 4b(a)(i) and (iii) of the Commodity
4 Exchange Act (the "Act"), as amended, 7 U.S.C. §§
5 6b(a)(i) and (iii) (1994), and Section 4o(1) of the
6 Act, as amended, 7 U.S.C. § 6o(1) (1994) and
7 Sections 4.41(a) and (b) of the Commission's
8 Regulations, 17 C.F.R. § 4.41(a) and (b) (2000);

9 C. [Swannell] shall comply with the following
10 undertakings:

11 2. [Swannell] shall not present the performance
12 of any simulated or hypothetical commodity
13 interest account, transaction in a commodity
14 interest or series of transactions in a
15 commodity interest unless such performance
16 is accompanied by the following statement, as
17 required by 17 C.F.R. § 4.41(b):

18 Hypothetical or simulated performance results
19 have certain inherent limitations. Unlike an
20 actual performance record, simulated results
21 do not represent actual trading. Also, since the
22 trades have not actually been executed, the
23 results may have under- or over-compensated
24 for the impact, if any, of certain market
25 factors, such as lack of liquidity. Simulated
26 trading programs in general are also subject
27 to the fact that they are designed with the
28 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, [Swannell] shall clearly identify
 those hypothetical or simulated performance
 results which were based, in whole or in part,
 on hypothetical trading results.

1 3. [Swannell] shall not make any representation
2 of financial benefits associated with any
3 commodity futures or options trading system
4 or advisory service without first disclosing,
5 prominently and conspicuously, that futures
6 trading involves high risks with the potential
7 for substantial losses.

8 17. As described in more detail below, on or about November 27, 2001,
9 Swannell registered a new Web site, *www.elliottwaveresearch.com*, and began a
10 new business selling trading software.

11 **B. Swannell's Activities After the Issuance of the December 6, 2000**

12 **Order**

13 18. In September of 2002, the Commission became aware of Swannell's
14 new Web site, *elliottwaveresearch.com*, ("Web site") which touted the "Elliott
15 Wave Analyzer," a software trading package.

16 19. Richard Swannell is the registered owner of the domain name
17 *www.elliottwaveresearch.com*.

18 20. Swannell also claims to be Director of Research for
19 *elliottwaveresearch.com* According to the Web site, the software system can tell
20 you "when to buy, when to sell, when to exit, and maybe even more importantly,
21 when not to trade!"

22 21. In addition, the Web site also offers a subscription service to traders
23 which offers Elliott Wave Forecasts, stating "[y]ou don't need to spend your
24 25
26
27
28

1 valuable time learning to use a new software forecasting system-we do all the work
2 for you. We produce the forecasts using the powerful Elliott Wave Analyzer, our
3 expertise and many years of experience.”
4

5 22. The Web site includes numerous claims and statements in support of
6 the software’s success, including:
7

- 8 (a) *Software 84.9% accurate-Statistically Proven*
- 9 (b) *Many Thousands of traders depend on it every day*
10 *to help establish more profitable trades.*
- 11 (c) *Tells you when to buy, when to sell, when to exit,*
12 *and maybe even more importantly, when not to*
13 *trade!*
- 14 (d) *We have collected statistical evidence that proves*
15 *the Elliott Wave Analyzer 3 can accurately*
16 *forecast market movement.*
- 17 (e) *Just imagine: You are sitting in front of your*
18 *computer testing the results of the Elliott Wave*
19 *Analyzer 3. You notice that 84.9% of the*
20 *projections have come true when tracking the*
21 *accuracy of particular Elliott waves. This is not*
22 *the first time. These findings have remained*
23 *consistent while analyzing close to 5000 random*
24 *projections of 33 stocks of the S&P 100.*
- 25 (f) *How would your trading profits improve with these*
26 *results available at your fingertips?*
- 27 (g) *We confidently believe that the Elliott Wave*
28 *Analyzer 3 WILL be recognized as the world’s*
most accurate market forecasting tool for
analyzing stocks, indices, futures and commodities.

1
2 23. Along with these statements are several customer “testimonials:”

3 (a) *I remember going short one afternoon and taking a*
4 *\$10,000 profit in about 2 hours. The best thing I*
5 *like about the Elliott Wave Analyzer is its*
6 *projections for market direction and wave counts.*
7 *Stephen Fraser*
waji@msn.com

8 (b) *It can do the analysis in much more depth using a*
9 *consistent set of criteria than an individual can. It*
10 *can also be changed to improve its performance*
11 *and accuracy to keep it up to date, making it a*
12 *valuable analysis tool for the trader or investor to*
13 *have to help him make profitable trades and*
14 *investments.*
Thomas Long
talong@ozemail.com.au

15
16 24. While the Web site does provide a disclaimer regarding hypothetical
17 performance results, the disclaimer must be accessed separately and the link to the
18 disclaimer first appears on page six of the Web site. Even then, the link is at the
19 bottom of page next to the copyright and separate from other links to the rest of the
20 site. More importantly, the page claiming “Software 84.9% accurate-Statistically
21 Proven” has no disclaimer and no link to the disclaimer.
22
23

24 C. **Elliottwaveresearch.com undergoes changes**

25
26 25. Examination of the *Elliottwaveresearch.com* Web site by the
27 Commission in January and February 2003 revealed numerous changes to both the
28 format and content of the site. Most significant is the removal of the claim of

1 84.9% accuracy and the customer testimonial claiming a ten thousand dollar profit.

2 The disclaimer regarding hypothetical trading results remains obscured.

3
4 26. Additionally, the Web site prominently features an invitation to attend
5 “the first ever Elliott Trader’s Mastermind Alliance.” This event will be hosted by
6 Richard Swannell, and will take place in June 2003 in Los Angeles.

7
8 27. The invitation includes the following statements:

9
10 (a) *Our goal is to create the ultimate trader’s*
11 *mastermind alliance-One that Rich Swannell will*
12 *lead and direct. . . . One that helps you identify*
13 *“screaming” opportunities that you’re not taking*
14 *advantage of at all.*

15
16 (b) *Elliott Wave Research is the only company in the*
17 *world to statistically analyze and significantly*
18 *refine the Elliott Wave Principle-to forecast stocks*
19 *and commodities markets more accurately, and*
20 *give you the ability to take more money out of the*
21 *markets than ever before.*

22
23 (c) *The exact probability of a forecast being correct*
24 *can now be calculated accurately, which offers*
25 *traders, like you, a massive money making*
26 *advantage previously unseen.*

27
28 (d) *The total investment required to be involved is only*
US \$5000...Bear in mind that direct access to our
database alone is worth more than a million
dollars a year.

29
30 28. Swannell’s transmittal of these, as well as other statements, triggered
31 his obligation under the terms of the Consent Order to “first disclos[e],
32 prominently and conspicuously, that futures trading involves high risks with the

1 potential for substantial losses.” Swannell’s Web site neither prominently nor
2 conspicuously contains such a disclosure. Rather, the only disclosure regarding the
3 high risk of loss associated with trading commodity futures or options is tucked
4 away toward the very end of a litany of rhetorical questions that must be accessed
5 separately through a web link that does not appear until after the appearance of
6 several of these statements.
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12 **V. VIOLATIONS OF THE COMMODITY EXCHANGE ACT**

13 **COUNT I**

14 **VIOLATION OF THE COMMISSION’S ORDER OF SEPTEMBER 6, 2000**
15 **AND SECTION 6(c) OF THE ACT**

16 29. The allegations contained in paragraphs 1 through 28 are realleged
17 and incorporated herein by reference.
18

19 30. On December 6, 2000, the Commission issued an Order pursuant to
20 Sections 6(c) and 6(d) of the Act, 7 U.S.C. §§9, 13b and 15 (2001). Section VI,
21 paragraph C of the Order directs Swannell, to comply with the undertakings
22 outlined in Section VI, paragraph C of the Order, as more fully described in
23 Paragraph 16 above.
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1 31. Through the conduct described in Paragraphs 1 through 28 above,
2 Defendant has violated the undertakings contained in Section VI, paragraph C of
3 the Order, and Section 6(c) of the Act.
4

5 32. Each act by Swannell in violation of the Order, including those
6 specifically alleged herein, constitutes a separate and distinct violation of Section
7 6(c) of the Act.
8

9
10 **COUNT II**

11 **VIOLATION OF COMMISSION REGULATION 4.41(b), 17 C.F.R. §**
12 **4.41(b):**
13 **FAILURE TO PROVIDE CAUTIONARY STATEMENT REGARDING**
14 **LIMITATIONS OF HYPOTHETICAL TRADING RESULTS**

15 33. Paragraphs 1 through 28 are realleged and incorporated herein by
16 reference.

17 34. Commission Regulation 4.41(b) makes it unlawful for any person to
18 present the performance of any simulated or hypothetical commodity interest
19 account, transaction in a commodity interest or series of transactions in a
20 commodity interest of a commodity pool operator, CTA, or any principal thereof,
21 unless such performance is accompanied by a prescribed cautionary statement
22 concerning the limitations of simulated or hypothetical trading results.
23
24

25 35. Through the conduct described in Paragraphs 1 through 28 above,
26 Defendant violated Regulation 4.41(b)(2) by failing to prominently display the
27
28

1 disclaimer required by Regulation 4.41(b)(1) while presenting hypothetical trading
2 results.

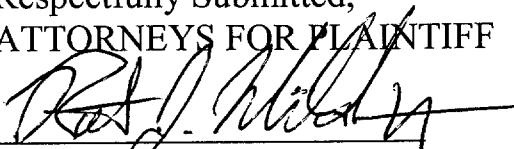
3
4 36. Each failure to include the required hypothetical disclaimer, including
5 those specifically alleged herein, constitutes a separate and distinct violation of
6
7 Regulation 4.41(b).

8 **VI. RELIEF REQUESTED**

9
10 WHEREFORE, the Commission respectfully requests that this Court, as
11 authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own
12 equitable powers, enter:

- 13
14
15 a) An order of permanent injunction prohibiting Defendant
16 Swannell from engaging in conduct violative of Commission
17 Regulation 4.41(b), 17 C.F.R. §4.41(b), and the Commission's
18 September 6, 2000 Order;
- 19 b) An order directing Defendant Swannell to disgorge all
20 benefits received, directly or indirectly, from acts or practices
21 that constitute violations of the Act, Regulations or Order, as
22 described herein, to pay interest thereon from the date of such
23 violations, and to pay costs and fees as permitted by law;
- 24 c) An order directing the Defendant to pay a civil monetary
25 penalty in the amount of not more than the higher of \$120,000
26 per violation or triple the monetary gain to the Defendant for
27 each violation of the Act or Regulations;
- 28 d) Such other and further equitable or remedial ancillary relief as
the Court may deem appropriate.

1 Respectfully Submitted,
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COMMODITY FUTURES TRADING
COMMISSION