

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

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**In the Matter of**

**James R. Burgess  
and Optioneer Inc. d/b/a  
Optioneer Systems,**

**Respondents.**

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**CFTC Docket No:** 06-03

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

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CFTC  
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ORDER PROCEEDINGS  
SECTION 6(c) AND 6(d)

**I.**

The Commodity Futures Trading Commission ("Commission") has reason to believe that Optioneer Inc., doing business as "Optioneer Systems" ("Optioneer"), by and through its employees and/or agents, including James R. Burgess ("Burgess"), has violated Sections 4o(1)(A) and (B) of the Commodity Exchange Act, as amended ("the Act"), 7 U.S.C. §§ 6o(1)(A) and (B) (2002), and Sections 4.41(a)(1) and (2) and 4.41(b)(1) and (2) of the Commission's Regulations promulgated thereunder, 17 C.F.R. §§ 4.41(a)(1)-(2), 4.41(b)(1)-(2) (2005) ("Regulations"). Burgess is liable as a controlling person for Optioneer's violations of the Act and Commission Regulations pursuant to Section 13(b) of the Act. Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Optioneer and Burgess (collectively, the "Respondents") 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 an administrative proceeding, Respondents have submitted a Joint Offer of Settlement ("Joint Offer"), which the Commission has determined to accept. Respondents acknowledge service of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act, Making Findings and Imposing Remedial Sanctions ("Order"). Respondents, without admitting or denying the findings of fact or conclusions of law herein, consent 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>

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<sup>1</sup> Respondents do not consent to the use of the Joint Offer or this Order, or the findings consented to in the Joint Offer or this Order, as the sole basis for any other proceeding brought by the

### III.

The Commission finds the following:

#### A. SUMMARY

From at least August 2002 through July 2004 (the “relevant period”), Optioneer, an unregistered commodity trading advisor (“CTA”), used misleading and false advertising to solicit members of the public to purchase its Optioneer trading system, which included hardware, software, training, technical support, monthly data and market information. On its website, www.Optioneer.com (“the Optioneer website”), the company falsely touted substantial profits that could be made using the trading system and a related commodity options trading advisory service. However, the Respondents had no documentary evidence to support such claims. Finally, Optioneer failed to tell clients and prospective clients that the performance histories of the system and advisory service were based on simulated or hypothetical trading, and failed to provide those persons with the required disclosures concerning the inherent limitations of hypothetical or simulated trading.

By making such material misrepresentations about its trading system, Optioneer, by and through its agents, including Burgess, violated Sections 4o(1)(A) and (B) of the Act and Commission Regulation 4.41(a)(1) and (2). In addition, Optioneer’s failure to advise clients and prospective clients about the hypothetical or simulated nature of the performance histories and advisory service, and failure to provide the required disclosure concerning hypothetical trades, violated Commission Regulation 4.41(b)(1) and (2).

At all times during the relevant period, Burgess was the controlling person of Optioneer and he is therefore liable for Optioneer’s violations of Sections 4o(1)(A) and (B) of the Act and Commission Regulations 4.41(a)(1) and (2), 4.41(b)(1) and (2), pursuant to Section 13(b) of the Act.

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Commission other than a proceeding in bankruptcy, or to enforce the terms of the Order. Nor do Respondents consent to the use of the Joint Offer or this Order, or the findings consented to in the Joint Offer or this Order, by any other party in any other proceeding.

## **B. SETTLING RESPONDENTS**

**Optioneer Inc. d/b/a Optioneer Systems** is a Delaware corporation with its principal office located in Orem, Utah. Optioneer Inc. has never been registered as a commodity trading advisor with the Commission. In or about February 2005, Optioneer LLC d/b/a Optioneer Trading, a related firm under common ownership, took over the marketing of Optioneer Inc.'s products and services. Optioneer LLC became registered with the Commission as an Introducing Broker in April 2005.

**James R. Burgess** resides in Newport Beach, California. Burgess is the majority shareholder of Optioneer. Since August 2001, he has also owned and controlled the Optioneer website. Burgess has never been registered with the Commission in any capacity. He is currently listed with NFA as a principal of Optioneer LLC.

## **C. FACTS**

### **1. Products and Services Offered and Sold**

During the relevant period, Optioneer, by and through its employees and/or agents, including Burgess, marketed and sold its trading system through the Optioneer website. The Optioneer trading system is designed to assist users in the purchase and sale of commodity options. The Optioneer system is marketed to include a mini-computer and software, six hours of training, technical support, monthly data and market information. On its website, Optioneer markets the hardware, software, and training for \$5,000; technical support for \$2,000; and monthly data and market information for \$250/month. During the relevant period, Optioneer sold the Optioneer System to approximately 668 clients.

Also during the relevant period, Burgess exercised day-to-day authority over Optioneer and its employees, and performed all significant managerial functions, such as supervising the other Optioneer employees. He also controlled the content posted on Optioneer's website and included in other Optioneer promotional materials.

### **2. Optioneer's Material Misrepresentations**

#### **i. Exaggerated Performance Claims and Minimized Risks**

During the relevant period, Optioneer, by and through its employees and/or agents, including Burgess, posted numerous misrepresentations directed at clients and prospective clients on the Optioneer website. The misrepresentations concerned profit potential, the limited nature of the risk of options trading, and the Optioneer system's track record. For example, the Optioneer website contained the following statements:

- "Consistently earn 60% to 70% per year using the Optioneer System"
- "Even in years of market downturn, Optioneer members realized an average return of 70% per year"
- "Proven historical data"

- “Historically, Optioneer users realize 5 to 15%, for annualized returns of 60 to over 100%”
- “Using Optioneer to trade options, you make money in falling markets- not just in rising markets”
- “With Optioneer you have the opportunity to multiply your returns over and above what the market normally offers.”

Optioneer, by and through its employees and/or agents, including Burgess, made these claims knowing that its clients were not consistently making the returns advertised, and without possessing or reviewing any documentary evidence to support such claims.

## ii. **Material Omissions**

During the relevant period, Optioneer, by and through its employees and/or agents, including Burgess, failed to disclose to prospective and actual clients that certain trading results posted on its website were based on simulated or hypothetical trades. In addition, Optioneer, by and through its employees and/or agents including Burgess failed to disclose, in light of the purported trading track record posted on the Optioneer website, that neither Burgess nor Optioneer ever employed the system using real trades.

During the relevant period, Optioneer, by and through its employees and/or agents including Burgess, identified the following returns based on a \$10,000 investment on the Optioneer website:

- Year 1 -36% \$13,600
- Year 2- 46% \$19,856
- Year 3- 30% \$25,812
- Year 4- 46% \$37,685
- Year 5- 40% \$52,759
- Total – 527% \$52,759

Optioneer, by and through its employees and/or agents including Burgess, included these performance results on the Optioneer website, knowing that the results were based on a hypothetical investment, but failed to disclose this fact on the website.

Optioneer, by and through its employees and/or agents including Burgess, also made claims such as “5 years traded” and “6 years user traded” without disclosing the fact that neither Burgess nor Optioneer ever traded the Optioneer system using actual trades. Furthermore, Optioneer, by and through its employees and/or agents including Burgess, made these claims when they did not possess or review any documentary evidence to support such claims.

## D. LEGAL DISCUSSION

### 1. Optioneer Committed Fraud in Violation of Sections 4o(1)(A) and (B) of the Act and Regulations 4.41(a)(1) and (2)

Optioneer, while acting as an unregistered CTA, violated Sections 4o(1)(A) and (B)<sup>2</sup> of the Act and Commission Regulations 4.41(a)(1) and (2)<sup>3</sup> by falsely representing to clients and prospective clients in written statements on the Optioneer website the performance of the Optioneer system and the risk involved.

To violate Section 4o(1) of the Act, Optioneer must have acted as a CTA. Section 1a(6) of the Act defines a CTA as “any person who, for compensation or profit, engages in the business of advising others either directly or through publications, writings or electronic media, as to the advisability of trading in any” commodity futures contract or options contract. 7 U.S.C. § 1a(6). Commodity trading advice includes the sale of a trading system that generates specific trade recommendations. *CFTC v. Avco Financial Corp.*, 28 F. Supp.2d 104, 118-19 (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) (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 Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,738 (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) (trading signals generated by computerized trading system together with advertisements which convince clients that the signals will be highly profitable constitute advising others). Here, Optioneer acted as a CTA because it provided commodity options trading advice for compensation or profit through the sale of the Optioneer trading system, which provides its users with specific buy and sell recommendations for commodity options contracts.

Section 4o(1)(A) and (B) of the Act prohibit both registered and unregistered CTAs from making material misrepresentations and omissions to their clients regarding commodity options transactions. *R&W Technical Services, Ltd.*, 205 F.3d at 170 (prohibiting fraud by an unregistered CTA who sold a trading system to the public). Similarly, Commission Regulations 4.41(a)(1) and (2) prohibit a CTA, whether registered or unregistered, from advertising in a fraudulent or misleading manner. *In the Matter of Stenberg*, Comm. Fut. L. Rep. (CCH) ¶ 29,

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<sup>2</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>3</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.

221 (CFTC Nov. 7, 2002); *CFTC v. Wall St. Underground, Inc.*, 281 F. Supp. 2d 1260 at 1270 (D. Kan., 2003).

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). Generally, omissions and misrepresentations of fact concerning the likelihood of profiting from commodity options transactions are material and violate the antifraud provisions of the Act. *See, e.g., Avco Financial Corp.*, 28 F. Supp.2d at 115-16 (S.D.N.Y. 1998).

While violations of Section 4o(1)(A) and Regulation 4.41(a)(1) require proof of scienter, a violation of Section 4o(1)(B) does not. *See In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part, Slusser v. CFTC*, 210 F.3d 783 (7<sup>th</sup> Cir. 2000). Neither does a violation of Regulation 4.41(a)(2) require proof of scienter. *See Commodity Trend Serv. v. Commodity Futures Trading Commission*, 233 F.3d 981, 993 (7<sup>th</sup> Cir. 2000).

Optioneer, by and through its employees and/or agents including Burgess, violated Sections 4o(1)(A) and (B) of the Act and Commission Regulations 4.41(a)(1) and (2) by exaggerating the performance of the Optioneer trading system and minimizing options risk on the Optioneer website, as well as making false representations concerning Optioneer's track record. During the relevant period, Optioneer did not have any actual past performance record, nor was its trading system performing as well as was claimed in the Optioneer website. Optioneer, by and through its employees and/or agents, also failed to disclose that neither Burgess nor Optioneer had ever employed the Optioneer system using actual trades.

Actual and prospective clients of Optioneer would have viewed these facts as material information. *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) ¶ 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); *R & W Technical Services, Ltd.*, ¶27,582 at 47,742 ("The use of a trading system by its developers is important to reasonable consumers because it reflects a meaningful vote of self-confidence and a sign of authenticity"). A reasonable client would think it material that the trading program at issue had never been applied 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 ex rel. Kelley v. Skorupskas*, 605 F. Supp. 923, 933 (E.D. Mich. 1985) (misrepresenting performance tables as being actual trading results violated Section 4o of the Act).

Optioneer, by and through its employees and/or agents including Burgess, also violated Sections 4o(1)(A) and (B) of the Act and Commission Regulations 4.41(b)(1) and (2) by misrepresenting hypothetical or simulated trades as actual profitable trades made by using the Optioneer trading system. *R&W Technical Svcs., Inc. v. CFTC*, 205 F.3d at 170 ("Because simulated results inherently overstate the reliability and validity of an investment method, and

because extravagant claims understate the inherent risks in commodity futures and options trading, a reasonable investor would find [such] fraudulent misrepresentations to be material.”); *See also Skorupskas*, 605 F. Supp. at 933 (misrepresenting performance tables as being actual trading results violates anti-fraud provisions of the Act).

In this case, Burgess acted with scienter because he knew or recklessly disregarded the fact that the Optioneer system did not perform as well as Optioneer represented to clients and prospective clients on the Optioneer website. Burgess also knew or recklessly disregarded the fact that Optioneer did not have an established track record to support the claims on the website. Optioneer therefore violated Sections 4o(1)(A) and (B) of the Act and Commission Regulation 4.41(a)(1) and (2).

**2. Optioneer Failed to Provide Required Hypothetical Disclaimer in Violation of Regulations 4.41(b)(1) and (2)**

Pursuant to Commission Regulation 4.41(b)(1), 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 . . . .

Commission Regulation 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.

Optioneer, by and through its employees and/or agents including Burgess, failed to provide the disclosure orally or in written form on its website during the relevant period, in violation of Commission Regulation 4.41(b)(1) and (2).

**3. Burgess is Liable as a Controlling Person of Optioneer**

Section 13(b) of the Act imposes liability upon “[a]ny person who, directly or indirectly, controls any person who has violated any provision” of the Act or Regulations. “A fundamental purpose of Section 13(b) is to allow the Commission to reach behind the business entity to the controlling individual and to impose liability for violations of the Act directly on such individual as well as on the entity itself.” *In re Glass*, [Current Transfer Binder] Comm. Fut. L. Rep.

(CCH) ¶ 27,337 at 46,561-4 (CFTC April 27, 1998); *see also In re Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,251 at 38,794 (CFTC March 11, 1992).

Controlling person liability attaches if a person possesses the ability to control the activities upon which the primary liability is predicated, even if that ability was not exercised. *See Monieson v. CFTC*, 996 F.2d 852, 859 (7th Cir. 1993). In addition, Section 13(b) of the Act requires that the controlling person “did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.” All that is required to constitute “knowing inducement” under Section 13(b) of the Act is that the controlling person “had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue.” *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC Jan. 12, 1988).

Burgess had the requisite power and control. He exercised day-to-day authority over Optioneer and its employees and performed all important managerial functions. For example, Burgess supervised the other Optioneer employees, and controlled the content posted on Optioneer’s website and set forth in other promotional materials. Thus, Burgess was a controlling person of Optioneer.

At all times during the relevant period, Burgess had actual and/or constructive knowledge of the fraudulent activities, since he knew that the claims posted on the Optioneer website were not supported by any Optioneer track record and that Optioneer’s customers were not consistently achieving the claims posted on its website. In fact, Burgess knew that only one of Optioneer’s clients achieved the results claimed on the Optioneer website. Burgess registered the Optioneer website, helped create the website, and had the ability to control the content of the website, but nevertheless permitted the fraudulent misrepresentations to be made on the website. Burgess either included misrepresentations on the website intentionally or failed to act in good faith by failing to prevent such representations from being posted. Thus, pursuant to Section 13(b) of the Act, Burgess is liable as a controlling person for Optioneer’s violations of Section 40(1)(A) and (B) of the Act and Commission Regulations 4.41(a)(1) and (2) and 4.41(b)(1) and (2).

#### IV.

#### **OFFER OF SETTLEMENT**

Respondents have submitted a Joint Offer of Settlement (“Offer”) in which they, subject to the foregoing, acknowledge service and receipt of this Order; admit the jurisdiction of the Commission with respect to the matters set forth in the Order; waive a hearing, all post-hearing procedures, all rights of appeal, including 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 they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412 (2000), and Part 148 of the Commission’s Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2004) relating to, or arising from this action.



Respondents stipulate 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. Respondents consent to the Commission's issuance of this Order, which makes findings, as set forth above, and orders that Respondents cease and desist from violating the provisions of the Act and Regulations they have been found to have violated; requires Respondents, jointly and severally, to pay a civil monetary penalty of \$130,000; and orders that Respondents comply with their undertakings as set forth in their Offer and incorporated in this Order.

## V.

### FINDINGS OF VIOLATIONS

Solely on the basis of the consents evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Optioneer violated Sections 40(1)(A) and (B) of the Act, 7 U.S.C. §§ 60(1)(A) and (B) (2002), 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)-(2), 4.41(b)(1)-(2) (2004). Burgess, as controlling person of Optioneer, is liable for Optioneer's violations of Sections 40(1)(A) and (B) of the Act and Sections 4.41(a)(1) and (2), 4.41(a)(1) and (2) of the Commission's Regulations pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b)(2002).

## VI.

### ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

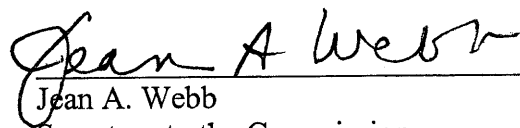
1. Respondents cease and desist from violating Sections 40(1)(A) and (B) of the Act, 7 U.S.C. §§ 60(1)(A) and (B) (2002), and Sections 4.41(a)(1) and (2) and 4.41(b)(1) and (2) of the Commission's Regulations, 17 C.F.R. §§ 4.41(a)(1)-(2), 4.41(b)(1)-(2) (2004);
2. Respondents are jointly and severally liable for, and shall pay, a civil monetary penalty in the amount of One Hundred Thirty Thousand dollars (\$130,000), which is due and payable within ten days of the date of the Order; payment is to be made by electronic funds transfer, 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 a letter that identifies the Respondents and the name and docket number of this proceeding. Respondents shall simultaneously transmit a copy of the cover letter and the form of payment to Gregory Mocek, 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. § 9a(2), if Respondents fail to pay the full amount within fifteen (15) days of the due date, they shall be

automatically prohibited from the privileges of all registered entities until they show to the satisfaction of the Commission that payment of the full amount with interest thereon to the date of payment has been made;

3. Respondents shall comply with the following undertakings as set forth in their Offer:
- a. to implement immediately, to the extent not already in place, and enforce procedures reasonably designed to detect and prevent the conduct described in the Order;
  - b. to deliver within three months of the date of this Order a report to the Division of Enforcement confirming and providing a detailed description of Respondents' compliance with the undertakings set forth in subsection a of this paragraph 3;
  - c. neither the Respondents nor any of their agents or employees, 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 affects their: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents shall take all steps necessary to ensure that their agents or employees, if any, understand and comply with this undertaking.

Unless otherwise specified, the provisions of this Order shall be effective on this date.

By the Commission



Jean A. Webb

Secretary to the Commission

Commodity Futures Trading Commission

Dated: January 31, 2006