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In the Matter of

DAVID YOST,

Respondent.

CFTC Docket No. 04-07

INITIAL DECISION

On December 22, 2003, the Commission issued a one-count complaint in which it found reason to believe that UR-Link and David Yost violated subparts (a)(i) through (a)(iii) of Section 4b of the Commodity Exchange Act, 7 U.S.C. §6b(a)(i)-(iii), by willfully misappropriating customer funds and issuing misleading account statements that concealed the misappropriation.[1] Yost did not answer the complaint. Consequently, we noted the possibility that he was in default, discussed the need to establish that appropriate service occurred in order to obtain a default judgment and established procedural deadlines.[2] On May

[1] Complaint and Notice of Hearing Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, dated December 22, 2003 ("Complaint"), ¶¶24-28. The Complaint was recently dismissed as it related to UR-Link. Order of Dismissal, dated October 27, 2004, at 2.

[2] In re Yost, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,708 at 56,003 (CFTC Feb. 27, 2004).

7, 2004, the Division of Enforcement moved for a default judgment.[3]

Three month later, we issued a partial default order. This order included findings that Yost was in default, that he had violated 7 U.S.C. §6b(a)(i)-(iii) and that the following sanctions were merited: (1) a cease and desist order, (2) a nine-month personal trading ban and (3) a $300,000 civil monetary penalty.[4] We also determined that, before the case against Yost was fully disposed of, the Division was entitled to further develop the record as it related to restitution and that such record development should begin with determining the likelihood that a restitution order would result in meaningful relief.[5] To that end, we established procedures for relevant

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[3] Division of Enforcement's Motion for Entry of a Default Judgment Order Against David Yost and UR-Link, dated May 5, 2004, at 1.

[4] In re Yost, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,828 at 56,468-74 (CFTC Aug. 4, 2004). We refrained from actually issuing the sanctions until all related matters were resolved, in part, because of the effect that a restitution award might have on the civil monetary penalty. Id. at 56,472-73.

[5] We noted that, while a restitution award may be appropriate in this proceeding, it would depend on Yost's ability to pay. Id. at 56,473-74. A review of the record left us convinced of the need for additional fact finding with respect to: 1) Yost's ability to pay restitution, 2) his willingness and ability to participate in any restitution plan that may be imposed and 3) the likelihood of effective restitution in the event Yost is unwilling to comply with an order of restitution. Id. at 56,474.

discovery and set a deadline for the Division to notify us of whether it intended to seek restitution from Yost.[6] On October 19, 2004, the Division represented that it was unable to obtain any discovery from Yost and asked that we "rule on the issue of restitution based on the current record."[7]

The Division Has Not Established That Yost Can Pay Restitution

Since Yost has no right to introduce evidence and the Division apparently has no more evidence to present, if the record does not permit an award of restitution, there will be no additional fact finding.[8] As we have explained previously, a restitution award is supposed to be meaningful to the potential payees and not merely a gesture of goodwill.[9] Thus, we do order restitution unless the record provides adequate support to the inference that restitution will be paid either voluntarily or as the result of coercion.[10] The record sheds no light on Yost's

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[6] Id.

[7] Division of Enforcement's Notice Concerning its Restitution Claim Against David Yost, dated October 12, 2004, at 3-4.

[8] Cf. In re Global Link Miami Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,391 at 46,786-87 (ALJ June 26, 1998), rev'd on other grounds, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,669 (CFTC June 21, 1999).

[9] Yost, [Current Transfer Binder] ¶29,828 at 56,473-74.

[10] See id. Because restitution is supposed to be a practical remedy, we eschew inferential theories based on a lack of cooperation. Id. at 56,474 n.124. After all, a government agency's failure to obtain evidence of assets either through a

(continued..)

current finances.[11] Consequently, an order requiring him to pay restitution is not appropriate. Given this determination, we can now impose the other sanctions discussed in our August 4th order.

For the reasons previously stated,[12] it is **ORDERED** that: (1) respondent David Yost **CEASE AND DESIST** from violating 7 U.S.C. 6b(a)(i)-(iii), (2) respondent David Yost be **PROHIBITED**, for a nine-month period beginning 15 days after the effective date of this order, from directly or indirectly **TRADING** on or subject to the rules of any contract market, either for his own account or for the account of any person, interest or equity, and all registered entities are **REQUIRED TO REFUSE** David Yost any and all trading privileges for a period of nine months beginning 15 days after the effective date of this order; and

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(..continued)
respondent's cooperation, compelled discovery or other means bodes ill for the prospects of extracting money from the respondent at a later time.

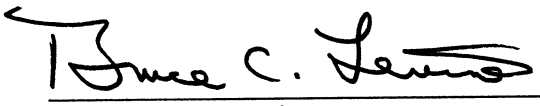
[11] See id. at 56,473-74; Division of Enforcement's Brief in Support of its Motion for Entry of Default Judgment Order Against David Yost and UR-Link, dated May 5, 2004, at 24-25.

[12] Yost, [Current Transfer Binder] ¶29,828 at 56,470-73.

(3) respondent David Yost **PAY** a civil monetary penalty of **$300,000** within 30 days of the effective date of this order.[13]

IT IS SO ORDERED.

On this 28th day of October, 2004



Bruce C. Levine
Administrative Law Judge

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[13] Any party may appeal this initial decision to the Commission by serving upon all other parties and filing with the Proceedings Clerk a notice of appeal within 15 days of the date of the initial decision. 17 C.F.R. §§10.12, 10.102. If a party does not properly perfect an appeal and the Commission does not place the case on its own docket for review, the initial decision shall, without further order, become the final decision of the Commission 30 days after service of the initial decision. 17 C.F.R. §10.84(c).