

E-FILED: August 19, 2013

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United States District Court
For the Northern District of California

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

No. C12-04519 HRL

Plaintiff,

**ORDER THAT CASE BE
REASSIGNED TO A DISTRICT
COURT JUDGE**

v.

JEFFREY GUSTAVESON,

**REPORT AND RECOMMENDATION
THAT MOTION FOR DEFAULT
JUDGMENT BE GRANTED**

Defendant.

_____ /

The United States Commodity Futures Trading Commission (the “Commission” or “Plaintiff”) sues Jeffrey Gustaveson for alleged violations of the Commodity Exchange Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”)), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), 7 U.S.C. §§ 1 et seq. (2006 and Supp. III 2009), and as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010) (“Dodd-Frank Act”), §§ 701-774 (enacted July 21, 2010), to be codified at 7 U.S.C. §§ 1 et seq. (the “Act”). Plaintiff seeks restitution, civil monetary penalties, and injunctive relief for Defendant’s alleged violations of the Act’s anti-fraud provisions.

1 Plaintiff alleges that Gustaveson accepted \$2,495,000 from investors for the purpose of
2 operating a pool to trade commodity futures (the "Pool") on their behalf. According to the
3 complaint, Defendant traded less than a fifth of the Pool funds, for a loss, and stored the remaining
4 funds in a checking account that he used to pay personal expenses. To conceal the fraud,
5 Gustaveson distributed false trading account statements.

6 After several unsuccessful attempts at service of the complaint and summons, at multiple
7 addresses, Defendant was finally served on November 21, 2012. (Dkt. 18) Defendant failed to
8 answer or otherwise respond. At Plaintiff's request, the Clerk of the Court entered Defendant's
9 default on December 20, 2012. (Dkt. 20).

10 The Commission now moves for default judgment and asks the court to order a permanent
11 injunction, restitution, and a civil monetary penalty. More specifically, the Commission seeks a
12 final default judgment against Gustaveson that:

- 13 1) Finds that Defendant violated Sections 4b(a)(1)(A),(B) and (C), and 4o(1) of the Act, as
14 amended, 7 U.S.C. §§ 6b(a)(1)(A),(B), (C), and 6o(1);
- 15 2) Permanently enjoins Defendant from further violating the provisions of the Act;
- 16 3) Imposes trading and registration bans against the Defendant;
- 17 4) Requires Defendant to pay restitution in the amount of \$410,000 plus interest; and
- 18 5) Requires Defendant to pay a civil monetary penalty of \$1,230,000 plus post-judgment
19 interest, an amount equivalent to triple the Defendant's monetary gain from his violations of
20 the Act.

21 The Court held a hearing on March 12, 2013. At the hearing, the Court invited plaintiff to
22 provide further briefing on its request to impose on defendant a permanent personal trading ban of
23 commodity futures, and directed plaintiff to serve the Motion for Final Default Judgment and
24 Proposed Default Judgment Order on defendant¹, which it has now done. (Dkt. 28). Gustaveson
25 did not file any response, and briefing on this matter is closed. Upon consideration of the moving
26 papers and the record in this case, this Court recommends granting the Commission's motion.

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¹ Plaintiff inadvertently sent these documents to one of defendant's previous addresses where
service had failed.

BACKGROUND FACTS

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2 Because of the entry of default, the following well-pleaded allegations from the complaint
3 are deemed admitted²:

4 Gustaveson operated several companies in the futures industry. (Complaint for Injunctive
5 and Other Equitable Relief and For Civil Monetary Penalties Under the Commodity Exchange Act,
6 Dkt. 1 (“Complaint” or “Compl.”), ¶ 10.) Once such company was GCM Ventures, LLC. (*Id.*) In
7 late 2009, an investor contacted Gustaveson via LinkedIn and the two met at Gustaveson’s Morgan
8 Hill, California office. (*Id.*, ¶¶ 17, 18.) Gustaveson gave a PowerPoint presentation that indicated
9 that, through his businesses, he applied “systematic short-term trading models to numerous global,
10 liquid futures markets.” (*Id.*, ¶ 18.) His presentation also indicated that he had \$6.5 million under
11 management and an impressive ratio of returns. (*Id.*)

12 After the meeting, Gustaveson and the investor decided to form a company, Ashby ST Fund,
13 LLC (“Ashby ST Fund”), for the purpose of trading options and commodity futures. (*Id.*, ¶ 19.)
14 The investor gave Gustaveson \$245,000 as an initial investment by wiring the money to a bank
15 account titled in the name of GCM Ventures, LLC. (*Id.*) A few days after the wire, Gustaveson
16 changed the name on the account to Ashby ST Fund, LLC. (*Id.*) Ashby ST Fund functioned as a
17 commodity pool and commodity pool operator. Gustaveson was the managing member of Ashby
18 ST Fund, and had exclusive control over its bank accounts and trading accounts. (*Id.*, ¶ 20.) He
19 controlled and made decisions on behalf of the company. (*Id.*)

20 The initial investor spoke with some of his friends about investing in the Ashby ST Fund,
21 and the investor shared with these friends Gustaveson’s PowerPoint presentation. (*Id.* at 21.) Three
22 of the investor’s friends then wired a total of \$2,250,000 to the Ashby ST Fund account. (*Id.*)
23 Gustaveson and the original investor prepared and signed a Subscription Agreement that “described
24 the Ashby ST Fund investment program and stated that ‘100% of each subscriber’s subscription
25 amount will be used as trading capital.’” (*Id.*, ¶ 22.) The additional investors signed the
26 Subscription Agreement after they sent their initial deposits. (*Id.*)

27 Gustaveson transferred only approximately \$400,000 of the funds received from the
28 investors into commodity futures trading accounts. (*Id.*, ¶ 23.) Those accounts then lost about

² See *TeleVideo Systems, Inc. v. Heidenthal*, 826 F. 2d 915, 917 (9th Cir. 1987).

1 \$34,657. (*Id.*) The remaining \$2,095,000 remained in the Ashby ST Fund bank account, and
2 Gustaveson withdrew from this account at least \$400,000 to pay his personal expenses. (*Id.*)

3 To conceal the misappropriation, Gustaveson distributed false account statements through
4 electronic mail using the email address info@dormantradestmts.com. (*Id.*, ¶ 24.) The statements
5 purported to be issued by a futures commission merchant (“FCM”). (*Id.*) The statements indicated
6 that Gustaveson was trading more than \$3,000,000 in Pool trading accounts, and yielding a net
7 profit. (*Id.*) The statements were false because (1) Gustaveson had not opened any trading accounts
8 in the name of the Pool at the FCM that purportedly issued the statement; (2) Gustaveson only
9 traded about \$400,000 of the investors’ funds; and (3) he lost approximately \$34,657 of those funds
10 trading. (*Id.*) Also, the statements did not disclose that Gustaveson was using investor funds for his
11 personal expenses. (*Id.*)

12 The charade cracked when the original investor contacted the FCM that had purportedly
13 issued the false statements, and discovered that the FCM had no record of the accounts listed on the
14 statements. (*Id.*, ¶ 25.) In response to a demand for the return of all the investments, Gustaveson
15 repaid \$2,085,000 to all the investors, leaving \$410,000 unpaid. (Declaration of Mary E. Spear,
16 Dkt. 22-1, ¶¶ 14, 15.) As to the amount still owed, Gustaveson admitted that he spent the money on
17 personal expenses, past-due taxes, and repaying a previous investor. (Compl., ¶ 26.)

18 DISCUSSION

19 After entry of default, courts may, in their discretion, enter default judgment. See FED.
20 R. Civ. P. 55; *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In deciding whether to
21 enter default judgment, a court may consider the following factors: (1) the possibility of
22 prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claim; (3) the sufficiency of
23 the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute
24 concerning material facts; (6) whether the default was due to excusable neglect; and (7) the
25 strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.
26 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In considering these factors, all
27 factual allegations in the plaintiff’s complaint are taken as true, except those relating to
28

1 damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

2 All of the *Eitel* factors favor entry of default judgment here. Plaintiff's claims have
3 merit and are sufficiently pled. Having reviewed the complaint, the court finds that the well-plead
4 allegations in the Complaint show that Gustaveson violated Sections 4b(a)(1)(A)-(C) of the Act, as
5 amended, 7 U.S.C. §§ 6b(a)(2)(A)-(C) (Supp. III 2009). These sections state that it shall be
6 unlawful:
7

8 [F]or any person, in or in connection with any order to make, or the making of, any contract
9 of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on
10 behalf of, or with, any other person, other than on or subject to the rules of a designated
contract market--

11 (A) to cheat or defraud or attempt to cheat or defraud the other person;

12 (B) willfully to make or cause to be made to the other person any false report or
13 statement or willfully to enter or cause to be entered for the other person any false
14 record;

15 (C) willfully to deceive or attempt to deceive the other person by any means
16 whatsoever in regard to any order or contract or the disposition or execution of any
order or contract.

17 7 U.S.C. §§ 6b(a)(2)(A)-(C). Gustaveson violated these sections of the Act by taking the investor's
18 money but failing to invest it as promised or required by contract, by creating and distributing false
19 account statements, and by misappropriating Pool funds for his personal benefit.

20 The allegations in the Complaint also show that Gustaveson violated Section 4o(1) of the
21 Act, 7 U.S.C. § 6o(1) (2006), which states:

22 It shall be unlawful for a commodity trading advisor, associated person of a commodity
23 trading advisor, commodity pool operator, or associated person of a commodity pool
24 operator, by use of the mails or any means or instrumentality of interstate commerce,
directly or indirectly--

25 (A) to employ any device, scheme, or artifice to defraud any client or participant or
26 prospective client or participant; or

27 (B) to engage in any transaction, practice, or course of business which operates as a
28 fraud or deceit upon any client or participant or prospective client or participant.

1 7 U.S.C. § 6o(1). Gustaveson violated this section of the Act by creating the false account
2 statements and sending them through electronic mail. He is liable for this and other violations of the
3 Act because he was Ashby ST Fund's control person.

4 Plaintiff has submitted competent evidence in support of its request for \$410,000 in
5 restitution. (*See* Declaration of Mary E. Spear, Dkt. 22-1, ¶¶ 14, 15.) As for the civil monetary
6 penalty, Section 6c(d)(1) of the Act, 7 U.S.C. § 13a-1(d)(1) (2006), and Regulation 143.8(a)(2), 17
7 C.F.R. § 143.8(a)(2) (2012), authorize the Commission to seek a civil monetary penalty in an
8 amount no greater than: (1) triple the monetary gain for each violation; or (2) \$140,000 for each
9 violation of the Act occurring on or after October 23, 2008. Here, Plaintiff has established that
10 defendant retained \$410,000 in funds from his clients. Plaintiff requests a penalty of \$1,230,000 –
11 triple that amount.

12 The sum of money at stake in the action is not insignificant. Nevertheless, because all
13 liability-related allegations are deemed true, there is no possibility of a dispute as to material facts.
14 Moreover, Gustaveson has failed to appear or present a defense in this matter; and, there is no
15 indication that defendant's default was due to excusable neglect. While the court prefers to decide
16 matters on the merits, Gustaveson's failure to participate in this litigation makes that impossible. A
17 default judgment against Gustaveson is Plaintiff's only recourse.

18 As to the request for the permanent injunctive relief, the well-pled allegations of the
19 complaint adequately establish that Defendant violated certain provisions of the Act and that a
20 reasonable likelihood of a future violation exists. *See* Section 6c(b) of the Act, 7 U.S.C. § 13a-1(b)
21 (2006); *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978); *CFTC v. British Am., Commodity*
22 *Options Corp.*, 560 F.2d 135, 142; *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999).
23 Accordingly, the issuance of permanent injunctive relief is justified.
24

25 CONCLUSION

26 Because all parties have yet to consent to the undersigned's jurisdiction, IT IS
27 ORDERED THAT this case be reassigned to a District Judge. Further, it is RECOMMENDED
28 that plaintiffs' motion for default judgment be granted as follows:

1 (1) Defendant is permanently enjoined and prohibited from directly or indirectly violating
2 Sections 4b(a)(1)(A)-(C), to be codified at 7 U.S.C. §§ 6b(a)(1)(A)-(C), and Section
3 4o(1), 7 U.S.C. § 6o(1);

4 (2) Defendant is further permanently enjoined and prohibited from:

5 a. trading on or subject to the rules of any registered entity, as that term is defined in
6 Section 1a of the Act, to be codified at 7 U.S.C. § 1a;

7 b. entering into any transactions involving commodity futures, options on commodity
8 futures, commodity options (as that term is defined in Regulation 1.3(hh), 17 C.F.R.
9 § 1.3(hh) (2012)) (“commodity options”), security futures products, and/or foreign
10 currency (as described in Section 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended,
11 to be codified at 7 U.S.C. §§ 2(c)(2)(B), 2(c)(2)(C)(i)) (“forex contracts”), and/or
12 swaps (as that term is defined in Section 1a(47) of the Act, as amended, and as
13 further defined by Commission Regulation 1.3 (xxx), 17 C.F.R. § 1.3 (xxx), for his
14 own personal account or for any account in which he has a direct or indirect interest;

15 c. having any commodity futures, options on commodity futures, commodity options,
16 security futures products, and/or forex contracts traded on his behalf;

17 d. controlling or directing the trading for or on behalf of any other person or entity,
18 whether by power of attorney or otherwise, in any account involving commodity
19 futures, options on commodity futures, commodity options, security futures products,
20 and/or forex contracts;

21 e. soliciting, receiving, or accepting any funds from any person for the purpose of
22 purchasing or selling any commodity futures, options on commodity futures,
23 commodity options, security futures products, and/or forex contracts;

24 f. applying for registration or claiming exemption from registration with the
25 Commission in any capacity, and engaging in any activity requiring such registration
26 or exemption from registration with the Commission, except as provided for in
27 Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012); and

28 g. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. §
3.1(a) (2012)), agent, or any other officer or employee of any person (as that term is
defined in Section 1a of the Act, as amended, to be codified at 7 U.S.C. § 1a)
registered, exempted from registration, or required to be registered with the
Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9)
(2012);

(3) Defendant is liable for restitution in the amount of \$410,000 plus post-judgment interest (“Restitution Obligation”). The Restitution Obligation shall commence immediately upon entry of this Order. Post-judgment interest shall accrue commencing 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. The Restitution Obligation shall not limit the ability of any customer to prove that a greater amount is owed, and nothing herein shall be construed in any way to limit or abridge the rights of any

1 customers whose funds were given to the Defendants that exist under state or common
2 law;

- 3 (4) Pursuant to Fed. R. Civ. P. 71, Ashby ST Fund Pool participants are explicitly made
4 third-party beneficiaries of this Order and may seek to enforce obedience of this Order to
5 obtain satisfaction of any portion of the restitution that has not been paid by Defendant;
- 6 (5) Upon the date of entry of this Order, Gustaveson is liable for, and a judgment is entered
7 against him to pay, a civil monetary penalty in the amount of \$ 1,230,000, plus post-
8 judgment interest (“CMP Obligation”). Post-judgment interest shall accrue beginning on
9 the date of entry of this Order and shall be determined by using the Treasury Bill rate
10 prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961;
- 11 (6) To receive payment from the Defendant and to make distributions to the Pool
12 participants, the Court appoints the National Futures Association (“NFA”) as Monitor.
13 The Monitor shall collect restitution payments from the Defendant, and make
14 distributions as set forth below. Because the Monitor is not being compensated for these
15 services, and these services are outside the normal duties of the Monitor, it shall not be
16 liable for any action or inaction arising from their appointment as Monitor, other than
17 actions involving fraud.

18 The Defendant shall make his required restitution payments under this Order in the name
19 of “Ashby Restitution Fund” and shall send such payments by electronic funds transfer,
20 or by U.S. postal money order, certified check, bank cashier's check, or bank money
21 order, to the Office of Administration, National Futures Association, 300 South
22 Riverside Plaza, Suite 1800, Chicago, Illinois 60606 under a cover letter that identifies
23 the Defendant making the payment and the name and docket number of this proceeding.
24 The Defendant making the payment shall simultaneously transmit copies of this cover
25 letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity
26 Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW,
27 Washington, D.C. 20581; and (2) the Chief, Office of Cooperative Enforcement,
28 Division of Enforcement, Commodity Futures Trading Commission, at the same address.

The Monitor shall oversee the Restitution Obligation and shall have the discretion to
determine the manner of distribution of funds in an equitable fashion to Pool participants
or may defer distribution until such time as it may deem appropriate. In the event that the
amount of payments to the Monitor are of a *de minimis* nature such that the Monitor
determines that the administrative costs of making a distribution to Pool participants 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
following the instructions for civil monetary penalty payments as set forth below.

Defendant shall execute any documents necessary to release funds by any repository,
bank, investment or other financial institution wherever located, in order to make partial
or total payment toward the Restitution Obligation.

To the extent that any funds accrue to the U.S. Treasury as a result of the Restitution
Obligation, such funds shall be transferred to the Monitor for disbursement in accordance
with the procedures set forth above.

1 Defendant shall pay his CMP Obligation by electronic funds transfer, U.S. postal money
2 order, certified check, bank cashier's check, or bank money order. If payment is to be
3 made other than by electronic funds transfer, the payment shall be made payable to the
4 Commodity Futures Trading Commission and sent to the following address:

5 Commodity Futures Trading Commission
6 Division of Enforcement
7 Attn: Accounts Receivables – AMZ 340
8 E-mail Box: 9-AMC-AMZ-AR-CFTC DOT/FAA/MMAC
9 6500 S. MacArthur Blvd.
10 Oklahoma City, OK 73169
11 Telephone: (405) 954-5644

12 If payment by electronic funds transfer is chosen, Defendant shall contact Linda Zurhorst
13 or her successor at the address above to receive payment instructions and shall fully
14 comply with those instructions. Defendant shall accompany payment of the CMP
15 Obligation with a cover letter that identifies Defendants and the name and docket number
16 of this proceeding. Defendant shall simultaneously transmit a copy of the cover letter and
17 the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures
18 Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C.
19 20581; and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement,
20 Commodity Futures Trading Commission, at the same address;

21 (7) Any acceptance of partial payment of the Restitution Obligation and/or CMP Obligation
22 shall not be deemed a waiver of Defendant's obligation to make further payments
23 pursuant to this Order or a waiver of the Commission's right to seek to compel
24 Defendant's payment of any remaining balance;

25 (8) All notices required to be given by the Order shall be sent via certified mail, return
26 receipt requested, as follows:

27 Notice to Plaintiff Commission:
28 Director of the Division of Enforcement Commodity Futures Trading
Commission
Three Lafayette Centre
1155 21st Street NW
Washington, D.C. 20581

Notice to Defendant:
Jeffrey Gustaveson
555 Claremont Drive
Morgan Hill, CA 95037

(9) The injunctive and equitable relief provisions of this Default Judgment Order shall be
binding upon Defendant, upon any person under his authority or control, and upon any
person who receives actual notice of this Default Judgment Order, by personal service, e-
mail, facsimile or otherwise insofar as he or she is acting in active concert or
participation with Defendants;

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(10) This Court shall retain jurisdiction of this action in order to resolve reserved issues of restitution and civil monetary penalties, to implement and carry out the terms of this Default Judgment Order, and any suitable application or motion for additional relief within the jurisdiction of the Court, and to assure compliance with this Default Judgment Order.

Any party may serve and file objections to this Report and Recommendation within fourteen days after being served. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

Dated: August 19, 2013



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

United States District Court
For the Northern District of California

1 **C 12-04519 HRL Order will be electronically mailed to:**

2 Ava Michelle Gould agould@cftc.gov, croem@cftc.gov

3 David Chu dchu@cftc.gov

4 Lindsey L Evans levans@cftc.gov, croem@cftc.gov

5 **C 12-04519 HRL Order will be mailed to:**

6 Jeffrey Gustaveson
7 555 Claremont Dr.
8 Morgan Hill, CA 95037

9 **Counsel are responsible for distributing copies of this document to co-counsel who have not
10 registered for e-filing under the court's CM/ECF program.**

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