



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

JAMES P. and MARILOU R. COCHRAN, *
Complainants, *
v. *
THOMAS JOSEPH AMADIO and *
NICHOLAS VINCENT LOBUE, *
Respondents. *

CFTC Docket No. R110-99-55

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ORDER ENTERING DEFAULT JUDGMENT

Overview

This matter was scheduled to be heard today, at the United States Bankruptcy Court in Albuquerque, New Mexico.¹ When it appeared that respondents Thomas Joseph Amadio ("Amadio") and Nicholas Vincent LoBue ("LoBue") both had abandoned this proceeding, the Court ordered them to file notices of their

¹ Order Lifting Stay and Setting Matter for Hearing, dated November 16, 1999 ("Order Lifting Stay"). This matter was originally set to be heard in May 1999. Order Setting Time and Place of Oral Hearing, dated February 23, 1999. After the parties entered into a settlement agreement, however, the Court stayed this case. Order Staying Proceeding, dated May 6, 1999. The Court reset the hearing after the agreement was breached. Order Lifting Stay.

intent to appear at the hearing.² In so doing, it cautioned the respondents that their failure to file the required notices would result in the initiation of default proceedings.³ After neither respondent filed a notice, the Court canceled the hearing.⁴

By this Order, the Court finds respondents Amadio and LoBue to be in **DEFAULT**. Consequently, the Court takes the complaint's well-pled allegations of fact to be true.⁵ On this basis, the Court finds that the complaint, as supplemented by the record, is sufficient to establish that Amadio and LoBue violated numerous anti-fraud provisions of the Commodity Exchange Act ("Act") and its implementing regulations, and that these violations have proximately caused actual damages to complainants James P. and Marilou R. Cochran ("the Cochrans") of \$18,800. Accordingly,

² Order, dated December 9, 1999. The respondents were required to file the notices by December 20, 1999. Id. at 2.

³ Id. See 17 C.F.R. §§12.22, 12.23, 12.35 and 12.312(b)(2).

⁴ See Order Canceling Hearing, dated December 27, 1999. Although LoBue did not respond to the Court's December 9, 1999 Order, Amadio contacted the Court to confirm that he would not attend the hearing, and to consent to disposition under default procedures. See Memorandum from Scott Russell, Esq., to the File, CFTC Docket No. 98-R118, dated December 15, 1999.

⁵ 17 C.F.R. §§12.22-23; see infra note 26; see generally, In re Global Link Miami Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,391 (CFTC June 26, 1998), rev'd on other grounds, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,669 (CFTC June 21, 1999).

Amadio and LoBue are **ORDERED TO PAY** to the Cochrans reparations in that amount, plus prejudgment interest and filing costs.⁶

⁶ This is not the first default judgment entered in this case against Amadio and LoBue. After both respondents initially failed to respond to the complaint, the Director of the Office of Proceedings ("Director") forwarded the complaint to a Judgment Officer, who promptly entered a summary order granting an award of \$57,281.23 against them. Default Order and Reparation Award ("July 23 Default Order"), dated July 23, 1998. It was only after the respondents filed their answers, and the Judgment Officer vacated the July 23 Default Order, that this matter was forwarded to this Court. See Order Granting Motions to Vacate Default, dated November 18, 1998; Letter from Tempest S. Thomas, Proceedings Clerk, to the Parties, dated November 19, 1998; Notice and Order, dated November 19, 1998.

Since the Cochrans elected to proceed under Subpart E of the Rules Relating to Reparations, 17 C.F.R. §§12.300-315, the Director's authority to initially assign this case to a Judgment Officer, rather than to an Administrative Law Judge, is questionable. See 17 C.F.R. §12.26(c) (where claim is in excess of \$30,000 and complainant elects to proceed under Subpart E, "the Director of the Office of Proceedings shall . . . forward . . . for a proceeding to be conducted in accordance with" that subpart) (emphasis added); 17 C.F.R. §12.304 (Subpart E proceedings are to be conducted by an Administrative Law Judge, who "shall have the authority . . . [t]o issue default orders for good cause"). After all, as the Supreme Court has stated, "the mandatory 'shall' . . . normally creates an obligation impervious to . . . discretion." Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). See also Final Rules Relating to Reparations, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,006 at 28,470 (CFTC Feb 22, 1984) ("In the Commission's view, the Director is required to institute a proceeding on a complaint pursuant to §12.26, unless from his review of the pleadings he finds that the matters stated in the complaint are not cognizable in reparations.") (emphasis added). Indeed, in its 1984 rulemaking, the Commission rejected a proposal to authorize a judicial officer, other than the adjudicator generally authorized to conduct the proceedings, to enter default judgments. Id. at 28,457-58, 28,484.

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Discussion

During the relevant period, Thomas Joseph Amadio and Nicholas Vincent LoBue were general partners in Riverside Limited Partnership ("the Pool"), an investment pool that they represented as "[e]ngag[ing] in the [s]peculative [t]rading of [l]isted [c]ommodity [f]utures [c]ontracts, [e]quities, and [o]ptions on [f]utures and [e]quities."⁷

In October 1994, James P. and Marilou R. Cochran invested \$50,000 in the Pool.⁸ The Pool, however, turned out to be a scam. As long as the Cochrans made no demands for withdrawals, "[e]verything was going smoothly."⁹ After all, the monthly statements that they received showed that their share of the Pool

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In short, given the plain language, overall structure and regulatory history of the Reparation Rules, it would appear that the Director's authority to forward the pleadings to "a Judgment Officer or Administrative Law Judge," for default proceedings, 17 C.F.R. §12.22(b), is most naturally read as constrained to assignment to the decision-maker who would otherwise dispose of the matter (in this case, an Administrative Law Judge).

⁷ Limited Partnership Agreement, Riverside Ltd. Partnership ("Partnership Agreement"), attached to Complaint, filed April 6, 1998.

⁸ Complaint at 1.

⁹ Id.

had grown to nearly \$77,000 by the end of May 1996.¹⁰ Everything went less smoothly, however, once the Cochrans instructed LoBue, in late 1996, that they wanted to begin withdrawing \$1,600 a month from the Pool.¹¹ They were met with procrastination and bounced checks,¹² although a total of \$11,200 of their \$50,000

¹⁰ Riverside Limited Partnership Monthly Account Statements, attached to Complaint. In the summer of 1996, the Cochrans instructed LoBue to transfer \$5,000 from their Pool account to fund a personal trading account at Windy City Trading, Inc. ("Windy City"), an introducing broker of which LoBue was a principal. Complaint at 2; see National Futures Association Registration Records. Although the Cochrans were led to believe that the Windy City account had been established as instructed, they did not attempt to place any trades in the account until the summer of 1997. Complaint at 2.

¹¹ Id. at 1. The Partnership Agreement provided in relevant part that "[u]pon the request of redemption for all or part of a Limited Partners [sic] interest, payment will normally be made within five (5) business days" Partnership Agreement at 3.

¹² The Cochrans explain:

"Everything was going smoothly that in October/November of 1996, I [James P. Cochran] discussed with Mr. LoBue about being able to withdraw \$1,600.00 per month without hurting the overall return on investment. Mr. LoBue stated that it should not be a problem. I continued to receive monthly statements that reflected a positive growth in the pool. In January 1997, I received the \$1,600.00. In February 1997, I received another withdrawal by check for \$1,600.00. This check (4039) bounced due to insufficient funds and I incurred over 100.00 dollars in late fees. I recovered the funds in late March or April

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investment was eventually returned to them by September of 1997.¹³

Increasingly concerned, the Cochrans, in the summer of 1997, sought assurances that their money was secure. Although LoBue assured them that all of their funds "were safe and intact,"¹⁴

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1997. Between May and July 1997, I received two more checks that were not honored due to insufficient funds. I have since recovered all funds due to insufficient funds, but not without numerous telephone calls to Mr. LoBue."

Complaint at 1.

The Cochrans' difficulties were not limited to obtaining withdrawals from the Pool. In the summer of 1997, the Cochrans decided to start trading their Windy City account, but "could never get through" on the telephone. Id. at 2.

¹³ Supplemental Statement to Clarify the Record ("Supplemental Statement"), filed December 20, 1999, ¶3. None of the checks (bounced or otherwise) and wires that the Cochrans received appear to have been drawn from funds in a Pool-designated account. See Answer of Thomas Joseph Amadio ("Amadio's Answer"), filed August 27, 1998, Exhibit C; Answer of Nicholas Vincent LoBue ("LoBue's Answer"), filed August 25, 1998, Exhibit C. For example, one of the checks that the Cochrans received was drawn on the account of "Kristine M. LoBue." Heritage Community Bank check, dated August 22, 1997, attached to Complaint.

¹⁴ Complaint at 1. In August 1997, LoBue assured the Cochrans that the problems that they were encountering in trading their Windy City account would soon be cured by a transfer of the account to another introducing broker, Hammer Trading, Inc. ("Hammer Trading"). Id. at 2; National Futures Association Registration Records.

when the Cochrans asked for a copy of the Pool's trading records, all they "got was lip service; 'tomorrow, next week, or I'm working on it.'"¹⁵

Thereafter, LoBue informed the Cochrans that he would be liquidating the Pool in December 1997, and that they would be receiving the resulting distribution of funds by the end of that month.¹⁶ Still suspicious, the Cochrans, in December, contacted what they believed to be the Pool's clearing futures commission merchants, First Options of Chicago, Inc. ("First Options") and AB Financial, LLC.¹⁷ They were told that neither firm had any records of trades being placed for the Pool.¹⁸ Moreover, despite continuing assurances from LoBue that he was holding their funds, he never dispersed a cent of the "liquidation" proceeds to the

¹⁵ Complaint at 2.

¹⁶ Id.

¹⁷ Id. In their answers to the Complaint, both LoBue and Amadio aver that "all Riverside trades were cleared through First Options of Chicago." Amadio's Answer, ¶3; LoBue's Answer, ¶3.

¹⁸ Complaint at 2 ("First Options told me [James P. Cochran] that Mr. LoBue made trades using his name but not [the Pool]. While using AB Financial, Mr. LoBue cleared trades made by his firm, Pavilion Securities, Windy City but not [the Pool]. I have not ever found a firm that cleared trades made by Riverside Limited Partnership."). Moreover, a month earlier, in November 1997, the Cochrans had contacted Hammer Trading, where they were told that that firm had no account in their name. Complaint at 3; see supra note 14.

Cochrans.¹⁹ This all (quite naturally) led the Cochrans to conclude that they had been swindled: that the Pool had never been traded, that the Windy City account had never existed, that the statements they had received were a "fabrication," and that their \$50,000 had been criminally converted.²⁰ The record in this proceeding supports the Cochrans' conclusion.²¹

¹⁹ Complaint at 2-3.

²⁰ Supplemental Statement, ¶¶1-2; Pre-Trial Memorandum, filed April 29, 1999, ¶4.

²¹ In discovery, the Cochrans sought the books and trading account records of the Pool. Plaintiffs' First Set of Production of Documents, filed December 18, 1998, ¶¶3, 10. Although LoBue responded that "documents in his possession and control would be turned over to Complainants," none were. Defendant, Nicholas Vincent LoBue's Response to Plaintiffs' First Set of Requests for Production of Documents, filed January 8, 1999, at 2-3. Amadio simply responded that he had "no documents or related information." Answers for Requests for Documents, filed January 12, 1999. In the context of this case, the respondents' failure to produce these documents naturally supports an inference that the requested books and records never existed. See 17 C.F.R. §12.35(a)-(c).

In the absence of any books or records, the respondents nonetheless have asserted that both the bona fides of the Pool and of the Cochrans' share in it, is established by the respondents' submission of a photocopy of what purports to be a purchaser's receipt of a cashier's check. Prehearing Memorandum ("Amadio's Memorandum"), filed April 23, 1999, ¶1; Submissions of Nicholas Vincent LoBue ("LoBue's Submissions"), filed April 22, 1999, at 1-2; Amadio's Answer, ¶3; LoBue's Answer, ¶3. The receipt reflects that a check payable to First Options was remitted by Riverside Limited Partnership on November 3, 1994. Amadio's Answer, Exhibit A; LoBue's Answer, Exhibit A. Written on the receipt is the notation "J. Cochran [illegible]." Id.

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In short, the Court finds that the Cochrans were the victims of an elaborate scheme, spanning a period of three years, constituting hard-core fraud of the worst sort. It went beyond inducing unwitting individuals²² to make investments that do not have the traits or values represented.²³ In this case, there were no customer investments. Rather, Amadio and LoBue used the promise and appeal of futures and options on futures speculation as a con to obtain investor funds that they converted with criminal intent to their own use and enjoyment.

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Amadio and LoBue claim that the recorded check represents the deposit of the Cochrans' contribution. Amadio's Memorandum, ¶1; LoBue's Submissions at 1-2; Amadio's Answer, ¶3; LoBue's Answer, ¶3.

But, even assuming arguendo the authenticity of this document and that the "Cochran" notation was contemporaneously entered, the photocopy establishes nothing more than that the respondents first parked the Cochrans' money in an account in the name of the Pool at First Options. It does not establish that the Pool ever traded, nor does it rebut the evidence in the record establishing that the Cochrans' funds were at some point converted.

²² The record reveals that at least one other individual, Stuart W. Cochran, was also bilked by the respondents. Supplemental Statement, ¶3.

²³ See generally In re Cantillano-Estrada, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,284 (CFTC Jan. 9, 1995); In re Fritts, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,255 (CFTC Nov. 2, 1994).

Accordingly, on the basis of the default record before it, the Court **FINDS** and **CONCLUDES** that respondents Thomas Joseph Amadio and Nicholas Vincent LoBue violated Sections 4b, 4c(b), 4d(2) and 4o of the Act, 7 U.S.C. §§6b, 6c(b), 6d(2) and 6o, and Commission Regulation 33.10, 17 C.F.R. §33.10,²⁴ and that these violations proximately caused actual damages to complainants James P. and Marilou R. Cochran of \$18,800.²⁵

²⁴ See also Section 9(a) of the Act, providing in relevant part,

"It shall be a felony punishable by a fine of not more than \$1,000,000 (or \$500,000 in the case of a person who is an individual) or imprisonment for not more than five years, or both, together with the costs of prosecution, for:

(1) Any person registered or required to be registered under the Act, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to such person's use or the use of another, any money, securities, or property having a value in excess of \$100, which was received by such person or any employee or agent thereof to margin, guarantee, or secure the trades or contracts of any customer or accruing to such customer as a result of such trades or contracts or which otherwise was received from any such customer, client, or pool participant in connection with the business of such person."

7 U.S.C. §13(a).

²⁵ This sum reflects the Cochran's \$50,000 investment, with offsets for (1) \$11,200 that the respondents returned to them in
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Order

For the reasons set forth above, respondents Thomas Joseph Amadio and Nicholas Vincent LoBue are hereby ORDERED TO PAY to James P. and Marilou R. Cochran actual damages in the amount of \$18,800²⁶ plus prejudgment interest on that amount at the rate of

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1996 and 1997 and (2) \$20,000 received under a 1999 settlement agreement, before the agreement was breached by the respondents. Supplemental Statement, ¶3; Complaint at 1.

²⁶ In entering the earlier default judgment of \$57,281.23 against the respondents, see supra note 6, the Judgment Officer simply adopted the damage amount advanced by the Cochrans in their complaint. July 23 Default Order; see Letter from James Pawley Cochran and Marilou Rose Cochran to the Office of Proceedings, dated April 20, 1998 ("Cochran Amendment"). In doing so, the Judgment Officer erred.

As the Supreme Court explained in the "venerable but still definitive case" of Thomson v. Wooster, 114 U.S. 104 (1885), a default judgment "is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true" and "is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it." Id. at 113; see Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 63 (2d Cir. 1971).

It is well established that, "the defendant, by his default, admits the plaintiff's well-pled allegations of fact," but "a defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment [to be] entered." Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975); see 17 C.F.R. §12.22(b). In other words, "[f]acts not established by the pleadings, or claims which are not well-pleaded, are not binding and cannot support a [default] judgment." Kelly v. Carr, 567 F. Supp. 831, 840 (W.D. Mich.

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1983); see 10A Wright & Miller, Federal Practice and Procedure: Civil, §2688 (3d ed. 1998) Allegations are not well-pleaded merely because they are intelligible. Allegations that are not well-pleaded would include: (1) allegations made indefinite by other allegations in the same complaint, (2) allegations that are made erroneous by the same complaint, (3) allegations that are contrary to facts of which the Court will take judicial notice, (4) alleged facts that are not susceptible of proof by legitimate evidence, or (5) alleged facts that are contrary to the uncontroverted material in the file of the case. Trans World Airlines, 449 F.2d at 63.

Here, the Cochrans' allegations as to the amount of their actual damages were clearly contradicted by other allegations set forth in the Complaint. Similarly, the Judgment Officer's summary findings, based on these allegations, are inconsistent. The Complaint's allegations plainly support the Judgment Officer's findings "that respondents improperly converted complainants' funds deposited for trading to their own use [and] that respondents repeatedly misrepresented the status of complainants' account when in fact no account was opened" July 23 Default Order at 1 (emphasis added). Since the Cochrans' money was stolen, not traded, computation of their actual damages would seem simple enough: it would equal the \$50,000 that they turned over to the respondents minus whatever the respondents gave them back. In short, the damages had to be \$50,000 or less, yet the Complaint makes a claim for \$57,281.23, which the Judgment Officer rubberstamped as the award.

The Complaint's claim for \$57,281.23 is derived from adding the amount reflected in the Cochrans' October 1997 Pool account statement (\$52,901.23) and the closing value of the account supposedly established for them at Windy City (\$4,380.00). Cochran Amendment; Complaint at 4; see Letter from R. Britt Lenz, Director of the Office of Proceedings, to James P. Cochran and Marilou R. Cochran, dated April 17, 1998. This calculation, of course, results in the award of phony, rather than actual, damages, since it includes the phony profits from the non-existent trading reflected on the phony Pool statements. Similarly, although the misrepresentations concerning the transfer of funds from the Cochrans' Pool account to a equally-

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5.67% compounded annually from October 1, 1994 to the date of payment, and filing costs of \$250.²⁷ Amadio and LoBue are

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nonexistent Windy City account may have compounded respondents' lies, it did nothing to compound the Cochrans' damages. See Supplemental Statement, ¶2

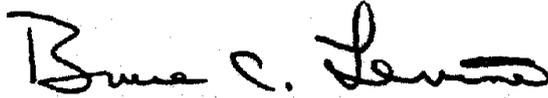
Accordingly, on the record before him, the default judgment entered by the Judgment Officer was improper.

²⁷ In addition to actual damages, the Cochrans seek punitive damages. Motion Requesting Punitive Damages, filed August 24, 1999. Their motion is **DENIED**. Under Section 14(a)(1)(A) of the Act, a customer generally may seek only to recover "actual damages proximately caused by" a Commission registrant's violation of the Act, or a Commission regulation or order. 7 U.S.C. §18(a)(1)(A) (emphasis added). Only under one very limited exception are punitive damages recoverable in the reparations forum. 7 U.S.C. §18(a)(1)(B) (providing for an award of punitive damages up to two times the amount of actual damages based upon a "willful and intentional violation in the execution of an order on the floor of a contract market."). That exception permitting punitive damages is not present here.

jointly and severally liable for the payment of this award.

IT IS SO ORDERED.²⁸

On this 4th day of January, 2000



Bruce C. Levine
Administrative Law Judge

²⁸ Attorney Jeffrey Schulman, Esq., requests withdrawal from representation of LoBue. Motion to Withdraw, filed November 24, 1999. Schulman's request is **GRANTED**. See 17 C.F.R. §12.9(c).