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1155 21st Street, NW, Washington, DC 20581

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PROCEEDINGS

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JAMES E. NESMITH, JR., and LARRY D. YOUNG, Complainants v. BENJI SCOTT DAYAN and UNIVERSAL COMMODITY CORPORATION, Respondents	)	CFTC Docket No. 99-R059

I. ORDER VACATING DISMISSAL OF PROCEEDING
and
II. DEFAULT ORDER AND REPARATION AWARD AGAINST RESPONDENTS

Background: On April 28, 2000, this proceeding was dismissed "*contingent upon respondents' payment* of the agreed-upon settlement amount to complainants" under a settlement reached prior to – and resulting in the cancellation of – an oral hearing in this case (emphasis added).

In June, respondents' attorney forwarded to this Office copies of several letters he had sent to his clients seeking their immediate payment of the settlement. In a letter of which a copy was received here on June 29, counsel for respondents expressly warned his clients that if payment was not made the CFTC could order sanctions, including a default order against them. That letter also asked his clients to contact him immediately to discuss their course of action, but nothing further has been received from counsel.

In early July, complainant Young notified this Office that the complainants still have not received payment of the settlement. Telephone calls to complainants in mid-July and August 2 confirmed that although complainants had received copies of the attorney's correspondence, there has been no further word and payment has not been received.

A telephone call on Thursday, July 27, to Mr. Dayan's daytime telephone number provided by him in his answer reveals that he has not been at that company "for a long time." However, the person answering the telephone number identified the firm owning the telephone as "Universal" and stated that he works with Mr. Stern, the president of (apparently) now-defunct respondent Universal Commodity Corporation. Apparently the new Universal is a separate entity from the

respondent Universal, although Mr. Stern is associated with both. In any event, the person who spoke with the Judgment Officer stated that he would (1) attempt to find out Mr. Dayan's current location, and (2) discuss the unpaid settlement with Mr. Stern. He was asked to provide those gentlemen, if possible, with the message that a default judgment would be imposed for the *full amount* of the reparations claim, plus interest, if the settlement's terms were not complied with by forwarding a cashier's or certified check, or money order, to complainants by overnight delivery by close-of-business on Thursday, July 27. No response to this request has ever been received from either Mr. Dayan or Mr. Stern.

Attempts to reach respondents' attorney were finally successful on Friday, July 28. Mr. Patton indicated that he has been trying to obtain his clients' compliance with the settlement agreement since April and that he had not heard from either client since his letters to them in June. Patton agreed to try to contact Mr. Dayan at a telephone number Mr. Patton had in papers he had left at home and to provide that telephone number the following week. Mr. Patton was instructed to inform his clients that they would face a default judgment if payment of the settlement was not immediately sent to complainants.

On Monday morning, July 31, Mr. Patton called this Office and left a message that he had talked with Mr. Dayan on Friday evening. The message, which also included Mr. Dayan's current telephone number, stated that Mr. Patton had forwarded the default information to Mr. Dayan as requested, and indicated that Mr. Dayan said he would try to find the money in order to make payment by Monday. Mr. Patton's message said that he had not heard anything more since then.

On Tuesday, August 1, the Judgment Officer called Mr. Dayan at the new telephone number. Mr. Dayan attempted to explain that he did not think he should have to pay the settlment for a variety of reasons, and that he had told his attorney and Mr. Stern all along that he would not pay more than the $300 he earned on complainants' account. He also stated that ever since he first discussed the case with Mr. Stern last year he had been assured that Universal would take care of everything. Mr. Dayan repeated his feeling that he had done nothing wrong, but he was not allowed to elaborate on this point since the settlement mooted any need for the undersigned to evaluate liability. Questioned about his comment that he had never had any intention to pay more than the $300 he claimed he earned on complainants' account, Mr. Dayan admitted that he had not ever made any attempt to send that much. Neither had he ever made inquiry to Mr. Patton or Mr. Stern as to what the status was regarding this case or the settlement. Nevertheless, Mr. Dayan admitted he had entered into the settlement agreement. He also seemed to understand the explanation of the Judgment Officer regarding the prejudice accruing to complainants stemming from the apparently reneged-upon settlement, including the cancelled hearing and, in the interim, the apparent demise of Universal and loss of the benefits of having that company remain a viable party. Finally, Mr. Dayan stated that he had been talking with Mr. Stern and that it appeared Mr. Stern had no intent to pay the settlement on behalf of Universal, although Mr. Dayan was seeking a loan from Mr. Stern in order to pay.

Because this was the first actual conversation with Mr. Dayan, he was granted until Thursday, August 3, in which to provide proof that he had sent either a cashier's check or money order to complainants by overnight delivery. Otherwise a default would be entered for the full

claim amount, plus prejudgment interest and costs. Mr. Dayan stated that he was unemployed currently but he would do his best to attempt to secure the funds. He also indicated that he would contact the undersigned by Thursday whatever the outcome of his funding efforts.

Late on Thursday, the day of the deadline, Mr. Dayan left a message on the Judgment Officer's telephone stating that he was still trying to locate funds, but that he had been unable to do so. No word has ever been received from Mr. Stern.

The deadline given to Mr. Dayan and Mr. Stern (through counsel) has passed. No proof of payment has been made.

Order Vacating Dismissal of Proceeding: It is concluded on these facts that the contingent dismissal dated April 28 was based upon misrepresentations by Mr. Dayan and Universal Commodity Corporation (acting through Mr. Stern, who signed the agreement on behalf of the firm) of their intent to fulfill the terms of their settlement agreement, which required payment by mid-April. It is concluded that the actions of Mr. Dayan and Universal Commodity Corporation consisting of representing to the court their intent to pay when they had no such intent, and in thus obtaining a cancellation of the oral hearing in this matter, constituted a fraud on the court. The failure of either of these signatories to the settlement agreement to contact the other side, the Judgment Officer, or the complainants to notify them that payment had not, and would not, be made pursuant to the agreement, is likewise deemed fraud on the other side and on the court insofar as the failure to provide such notification resulted directly in the dismissal of the proceeding. Accordingly, the contingent April 28, 2000, Order of Dismissal is VACATED as having been fraudlently obtained by respondents and based on a contingency that respondents knew, but never informed the court, had not been – and would not be – fulfilled.[1]

Order of Default and Reparation Award: Respondents are found in DEFAULT as a sanction for their bad-faith conduct.[2] The proceeding thus becomes a default proceeding under the provisions of CFTC Rule 12.22. Under that Rule, respondents are treated as if they had not filed

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[1] *See Jordan v. Chippas,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,341 at page 46,573 (CFTC May 11, 1998) (Commission Order suspending respondent's registration after failure to comply with settlement agreement entered into to pay reparations judgment: "Chippas has not paid the award in full, and the release by its terms is now a nullity.") *Cf. Wills v. First Financial Corp. of America,* [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,605 (CFTC May 31, 1985) (breach of contract entered into without an intent to fulfill its terms constitutes fraud).

[2] No evidence suggests that Mr. Patton was more than an unwitting agent of respondents in their efforts to obtain a dismissal based on their bad-faith settlement scheme. It appears that he tried in good faith to secure his clients' fulfillment of their obligations.

On the other hand, the finding of fraud perpetrated upon the Court by Universal Commodity Corporation – through Mr. Stern's signing and presenting a settlement agreement on behalf of Universal when he knew that Universal had no intention to comply with that settlement -- constitutes a finding of misrepresentation ***personally*** by Mr. Stern in the course of a CFTC proceeding. Corporate officers generally have immunity for good-faith actions taken on behalf of their companies, but they do not have the right to personally engage in fraud upon a forum. If respondents allow the default order to become final, this finding may need to be reported as an update to registration records. *See* CFTC/NFA Form 8-R, Question 18A(iii).

any answer to the complaint, and the allegations of the complaint are treated as true. Affirmative defenses, the right to contest complainants' evidence, and the right to cross-examine complainants regarding their verified submissions are treated as waived.

Based solely on the allegations of the complaint, it is concluded that respondent Dayan, an associated person working on behalf of respondent Universal Commodity Corporation, engaged in unauthorized transactions in complainants' account by placing orders for commodity futures options different from the orders placed by complainants. Furthermore, it is concluded that when complainants objected to the trade, respondent Dayan refused to correct it and misrepresented both his expertise regarding trading and the likelihood of profits to be made on the erroneous trade. As a result of their reliance on Dayan's statements, complainants retained their incorrect options until expiration, and lost their entire $7,700 investment less a cash balance in their account of $11.08.

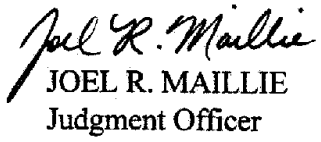
The unauthorized trading and misrepresentations engaged in by Dayan violated CFTC Rules 166.2(a) and 33.10, respectively, as well as Section 4c(b) of the Commodity Exchange Act, and are attributable to Universal Commodity Corporation by operation of the *respondeat superior* provisions of Section 2(a)(1)(A)(iii) of the Commodity Exchange Act.

Violations having been found, respondents Benji Scott Dayan (a.k.a. "Ben Dayan") and Universal Commodity Corporation are ORDERED to pay reparations to complainants James Nesmith, Jr., and Larry Young in the amount of $7,688.92, plus prejudgment interest compounded annually at the rate of 6.375 % from December 18, 1996[3] to the date of payment, plus $125 in costs (representing complainants' filing fee). LIABILITY IS JOINT AND SEVERAL.

Motions to Vacate: Motions to vacate default orders are provided for in CFTC Rule 12.23. In addition to the criteria established therein, any motion to vacate this default order must (1) demonstrate that the findings and conclusions underlying the default are either erroneous, (2) be accompanied by full affidavits establishing any facts presented in support of the motion, (3) be served upon complainants, and (4) include a certificate of service showing that the motion was properly served upon complainants.

Respondents may obtain an order vacating the default upon presentation of proof that they have fully paid the amounts due to complainants – and that complainants have received payment – under the settlement agreement. This opportunity will expire if such proof is not ***received*** in the Office of Proceedings by close of business on August 25, 2000.

Dated: August 4, 2000



JOEL R. MAILLIE
Judgment Officer

[3] This is the date on which complainants' final deposit into the account was made.