

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

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In the Matter of )

Jerry W. Slusser, et al., )

Respondents. )  
\_\_\_\_\_)

CFTC Docket No. 94-14

**SUPPLEMENTAL INITIAL DECISION**

**PROCEDURAL HISTORY**

The United States Commodity Futures Trading Commission (hereinafter "Commission") filed a six-count complaint against Respondents Jerry W. Slusser (hereinafter "Slusser"), First Republic and First Republic Trading Corp. (hereinafter "corporate Respondents") in July 16, 1994. The Complaint charged the Respondents with violations of the Commodity Exchange Act (hereinafter "Act") arising out of fraudulent activities that took place in 1988 and 1989. The trial was concluded in October 1997 and the Initial Decision, finding the Respondents liable for churning customer accounts, was issued in August 24, 1998. The Commission affirmed the Initial Decision on July 19, 1999.

The United States Court of Appeals for the Seventh Circuit reviewed the case on April 24, 2000. The Seventh Circuit Court affirmed the Commission's order as to all sanctions with the exception of the imposition of civil monetary penalties, which the court remanded to the Commission for further consideration. Nearly three years later, on February 28, 2003, the Commission tentatively determined that civil monetary penalties of \$600,000 were warranted against each of the Respondents. The Commission remanded the matter to the Administrative

Law Judge with instructions to conduct a supplemental hearing to determine each Respondents' net worth and ability to pay the tentative monetary penalties.

In the same Order, the Commission also gave the parties the option of entering certain stipulations regarding the financial status of the Respondents if the Respondents desired to preserve the confidentiality of financial information. Respondent Slusser entered into a stipulation that he presently has the net worth and financial ability to pay the \$600,000 civil monetary penalty proposed by the Commission. Respondent Slusser also declared under penalty for perjury that the corporate Respondents were dissolved, and had no net worth at the time of dissolution and were unable to pay the civil monetary penalty.

On August 22, 2003, Respondent Slusser filed a brief opposing the Division's Motion for Entry of Civil Monetary Penalty. Respondent Slusser generally challenges the imposition of civil monetary penalties on the grounds that he had a negative net worth at the time of the initial hearing, the Division failed to offer evidence as to his net worth during the initial hearing, the statute of limitations bars the imposition of civil monetary penalties and unreasonable delay on the part of the Commission. Respondent Slusser had full opportunity to raise these issues while the matter was pending before the Commission from April 2000 to February 28, 2003.

This matter was remanded solely for the purpose of determining whether the Commission's tentative civil monetary penalty is appropriate considering Respondents' present net worth and ability to pay a civil monetary penalty. This Court does not have the authority or jurisdiction to alter or modify the Commission's order and opinion. Nothing in this Supplemental Initial Decision shall preclude Respondent Slusser from appealing the imposition of civil monetary penalties to the Commission.

## DISCUSSION

The events giving rise to the instant case occurred in 1989.<sup>1</sup> Prior to 1992 Section 6(e) of the Act provided that in assessing the civil monetary penalty:

“The Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market –

the appropriateness of such penalty to the size of the business of the person charged, the extent of such person’s ability to continue in business, and the gravity of the violation;

and in the case of a person whose primary business does not involve the use of the commodity futures market—

the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation.<sup>2</sup>

The first clause applies to the corporate Respondents<sup>3</sup> while the latter applies to Slusser. The Division bears the burden of proof on the issue of net worth of the person called on to pay the civil monetary penalty.<sup>4</sup> The Division has met its burden by submitting two stipulations and a supporting declaration of Slusser regarding the corporate Respondents as to their net worth. Slusser stipulated that the corporate Respondents have been previously dissolved and do not have the financial ability to pay the \$600,000 civil monetary penalties proposed by the Commission. Additionally, Slusser stipulated that he has the net worth and financial ability to pay a civil monetary penalty of \$600,000.

Among Slusser’s objections to the imposition of civil monetary penalties is the contention that the doctrines of waiver, laches and/or unclean hands should preclude the Division

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<sup>1</sup> See generally Complaint.

<sup>2</sup> 7 U.S.C. §9a.

<sup>3</sup> Because the corporate Respondents have been dissolved, a determination of the appropriate civil monetary penalty to be assessed against the them, in light of the factors listed in the first clause, is moot.

<sup>4</sup> *Gimbel v. CFTC*, 872 F.2d 196, 200 (7<sup>th</sup> Cir.1989); See also *Premex v. CFTC*, 785 F.2d 1403, 1409-10 (9<sup>th</sup> Cir. 1986).

from entering the stipulations concerning the Respondents' net worth into evidence. Slusser argues that the Division intentionally failed to submit evidence about the Respondents' net worth during the initial hearing and should now be estopped from introducing such evidence. This argument is wholly without merit because the 7<sup>th</sup> Circuit Court remanded the instant case back to the Commission in order that evidence concerning Slusser's net worth may be considered in determining the proper civil monetary penalty. Thus, it is appropriate to consider Slusser's net worth at present time. Furthermore, the Commission and case law have never indicated that the Division was required to submit such evidence during the initial hearing.

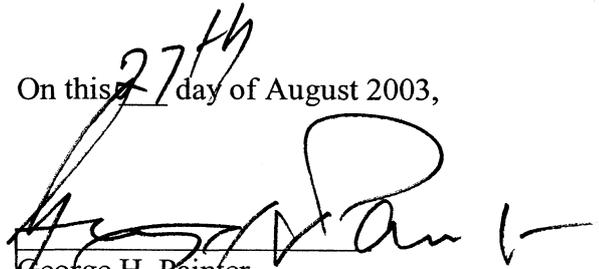
**ORDER**

It having been stipulated that Respondent Slusser has the present net worth and financial ability to pay the \$600,000 civil monetary penalty, Respondent Slusser is hereby ordered to pay a civil monetary penalty of \$600,000 at the time this Supplemental Initial Decision becomes final.

It having been stipulated that the corporate Respondents had no net worth at the time of dissolution, no civil monetary penalties will be assessed against them.

**IT IS SO ORDERED.**

On this 27<sup>th</sup> day of August 2003,

  
George H. Painter,  
Administrative Law Judge

Leah Vu, Law Clerk