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FILED
CLERK, U.S. DISTRICT COURT
OCT 27 2004
CENTRAL DISTRICT OF CALIFORNIA
BY [initials] DEPUTY

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U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT CALIFORNIA
WESTERN DIVISION

18 Commodity Futures Trading
19 Commission,

Plaintiff,

vs.

21 Barry Schotz, and Randolph Gale, dba
22 Bear Invest Fund,

Defendants

Case No. CV04-8889

SJO

(SSX)

) ~~PROPOSED~~ STATUTORY
) RESTRAINING ORDER
) AND ORDER TO SHOW CAUSE RE:
) PRELIMINARY INJUNCTION
) JUDGE:
) DATE:
) TIME:
) PLACE:

1. This matter came before the Court on the application of Plaintiff

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1 Commodity Futures Trading Commission ("CFTC"), for a statutory restraining
2 order against Barry Schotz ("Schotz") and Randolph Gale ("Gale") (collectively
3 "Defendants"), and the Court having considered the complaint, memorandum of
4 points and authorities, declarations and other filings and evidence in support
5 thereof, makes the following findings:

7 2. This Court has jurisdiction over the parties and over the subject matter of
8 this action, and venue lies properly in this Judicial District.

10 3. There is good cause to believe that defendants have engaged in and are
11 likely to engage in acts and practices that violate the Commodity Exchange Act, 7
12 U.S.C. § 1 *et seq.*, (2002) (the "Act"), and Commission Regulations promulgated
13 thereunder ("Regulations"), 17 C.F.R. § 1.1 *et seq.* (2004), and that the CFTC is
14 likely to prevail on the merits of this action.

16 4. There is good cause to believe that immediate and irreparable damage to
17 the Court's ability to grant effective final relief for customers in the form of
18 monetary redress will occur from the sale, transfer, assignment, or other
19 disposition by Defendant Schotz of his assets or destruction of records unless
20 Defendants are immediately restrained and enjoined by Order of this Court and,
21 accordingly, there is good cause to issue this Order.

24 5. Good cause exists for freezing Defendant Schotz's assets, the issuance of
25 an order prohibiting the Defendants from destroying records and denying agents
26

1 of the CFTC access to inspect and copy records and prohibiting further violations
2 of the Act and Regulations.

3 6. Weighing the equities and considering the CFTC's likelihood of success
4 in its claims for relief, the issuance of a statutory restraining order is in the public
5 interest.
6

7 **ORDER**

8 **DEFINITIONS**

9
10 For the purposes of this Order, the following definitions apply:

11 7. "Assets" means any legal or equitable interest in, right to, or claim to, any
12 real or personal property, including but not limited to chattels, goods, instruments,
13 equipment, fixtures, general intangibles, effects, leaseholds, mail or other
14 deliveries, inventory, checks, notes, accounts including bank accounts and
15 accounts at financial institutions, credits, receivables, lines of credit, contracts
16 including spot and futures contracts, insurance policies, and all cash, wherever
17 located.
18
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20 8. The term "document" is synonymous in meaning and equal in scope to
21 the usage of the term in Federal Rule of Civil Procedure 34(a), and includes,
22 writings, drawings, graphs, charts, photographs, audio and video recordings,
23 computer records, and other data compilations from which information can be
24 obtained and translated, if necessary, through detection devices into reasonably
25
26

1 usable form. A draft or non-identical copy is a separate document within the
2 meaning of the term.

3 9. "Defendants" means Schotz and Gale and any person insofar as he or she
4 is acting in the capacity of an officer, agent, servant, employee or attorney of
5 Schotz or Gale and any person who receives actual notice of this Order by
6 personal service or otherwise, including facsimile, insofar as he or she is acting in
7 concert or participation with Schotz and Gale.
8
9

10 **RELIEF GRANTED**

11 **I. ASSET FREEZE**

12 10. **IT IS ORDERED** Defendant Schotz is restrained and enjoined from
13 directly or indirectly withdrawing, transferring, removing, dissipating, selling,
14 alienating, liquidating, encumbering, pledging, leasing, loaning, assigning,
15 concealing, converting, or otherwise disposing of any funds, assets or other
16 property, wherever located, including funds, property or assets held outside the
17 United States, except as ordered by the Court. The assets affected by this
18 Paragraph shall include both existing assets and assets acquired after the effective
19 date of this Order.
20
21
22

23 11. **IT IS FURTHER ORDERED** that Defendant Schotz is restrained and
24 enjoined from directly or indirectly withdrawing, transferring, removing,
25 dissipating, selling, alienating, liquidating, encumbering, pledging, leasing,
26

1 loaning, assigning, concealing, converting, or otherwise disposing of any funds,
2 assets or other property, wherever located, including funds, property or assets
3 held outside the United States which are directly or indirectly related to or used
4 for any business of Bear Invest Fund, except as ordered by the Court. The assets
5 affected by this Paragraph shall include both existing assets and assets acquired
6 after the effective date of this Order.
7

8
9 12. **IT IS FURTHER ORDERED** that, pending further Order of this
10 Court, any financial or brokerage institution, business entity, or person that holds,
11 controls, or maintains custody of any funds, assets or other property of Defendant
12 Schotz, or has held, controlled, or maintained custody of any funds, assets or
13 other property of any Defendant Schotz, and who receives notice of this order by
14 any means, including facsimile, shall: -
15

16 A. Prohibit Defendant Schotz and ^{his agents} ~~any other person~~ from
17 withdrawing, removing, assigning, transferring, pledging, encumbering,
18 disbursing, dissipating, converting, selling or otherwise disposing of any such
19 asset except as directed by further order of the Court;
20

21 B. Deny Defendant Schotz, and ^{his agents} ~~all other persons~~ access to any
22 safe deposit box that is:
23

24 (1) titled in the name of Defendant Schotz, either
25 individually or jointly; or
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1 (2) otherwise subject to access by Defendant Schotz;

2 C. Provide counsel for the CFTC within five (5) business days of
3 receiving a copy of this Order, a statement setting forth:

4 (1) the identification number of each such account or asset
5 titled in the name, individually or jointly, of any of the Defendants, or held on
6 behalf of, or for the benefit, of any of the Defendants;

7 (2) the balance of each such account, or a description of the
8 nature and value of such asset as of the close of business on the day on which this
9 Order is served, and, if the account or other asset has been closed or removed, the
10 date closed or removed, the total funds removed in order to close the account, and
11 the name of the person or entity to whom such account or other asset was remitted;
12 and
13

14 (3) the identification of any safe deposit box that is either
15 titled in the name, individually or jointly, of Defendant Schotz, or is otherwise
16 subject to access by any Defendant Schotz;

17 D. Upon the request by the CFTC, promptly provide the CFTC
18 with copies of all records or other documentation pertaining to such account or
19 asset, including, but not limited to, originals or copies of account applications,
20 account statements, signature cards, checks, drafts, deposit tickets, transfers to and
21 from the accounts, all other debit and credit instruments or slips, currency
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1 transaction reports, 1099 forms, and safe deposit box logs; and

2 E. Cooperate with all reasonable requests of the CFTC relating to
3 implementation of this Order, including producing records related to Defendant
4 Schotz's accounts.

5
6 F. A list of such financial institutions, as far as they are known at
7 this time, is as follows:

8 (1) Bank of America Account # 445717049 in the name of Michael Schotz.

9 (2) Bank of America Account # 0445506919 in the name of Concise
10 Concepts International d/b/a Bear Invest Fund/Barry Schotz.

11 (3) Refco Inc., LFG Division of Refco, LLC Account # C 245 I004 ST829.

12 **II. PROHIBITION OF DESTRUCTION OF BOOKS AND RECORDS**

13 13. **IT IS FURTHER ORDERED** that the Defendants and all persons or
14 entities who receive notice of this Order by personal service or otherwise,
15 including facsimile, are restrained and enjoined from directly or indirectly
16 destroying, mutilating, erasing, altering, concealing or disposing of, in any
17 manner, directly or indirectly, any documents that relate to the business practices
18 or business or personal finances of any Defendant.

19 **III. ACCESS TO AND INSPECTION OF BOOKS AND RECORDS**

20 14. **IT IS FURTHER ORDERED** that representatives of the CFTC be
21 allowed immediately to inspect the books, records, and other documents of the
22

1 Defendants and their agents including, but not limited to, electronically stored
2 data, tape recordings, and computer discs, wherever they may be situated and
3 whether they are in the possession of the Defendants or ^{their agents} others, and to copy said
4 documents, data and records, either on or off the premises where they may be
5 situated including but not limited to:

7 A. A list of all persons and entities who deposited funds in Bear
8 Invest Fund or who invested with Schotz, including the name, address, telephone
9 number, dates of deposits and withdrawals, and the amounts of such deposits and
10 withdrawals;
11

12 B. Copies of all commodity brokerage account documents
13 reflecting all trades made for or on behalf of Schotz or Bear Invest Fund;
14

15 C. Copies of all statements of account sent to or maintained on
16 behalf of any person who deposited funds with Schotz;
17

18 D. All financial records relating to every transaction which Schotz
19 received money or other assets of any kind for the purpose of investing for other
20 persons.
21

22 **IV. EXPEDITED DISCOVERY OF FINANCIAL RECORDS**

23 15. The CFTC is granted limited immediate discovery. The CFTC is
24 authorized to issue subpoenas for documents to third parties for the purpose of
25 identifying customers of Defendants in connection with Bear Invest Fund, and to
26

1 brokerage and financial institutions to determine where Schotz deposited money
2 he received from others and the amount of such funds. The CFTC is also
3 authorized to take the depositions of Defendants Schotz and Gale.

4
5 **V. PROHIBITION AGAINST VIOLATIONS OF THE ACT AND**
6 **REGULATIONS**

7 16. **IT IS FURTHER ORDERED** that Defendant Schotz is restrained and
8 enjoined from directly or indirectly in or in connection with any order to make, or
9 the making of, any contract of sale of any commodity for future delivery, made,
10 or to be made, for or on behalf of any other persons, where such contract for
11 future delivery was or could be used for (A) hedging any transaction in interstate
12 commerce in such commodity or the products or byproducts thereof, or (B)
13 determining the price basis of any transaction in interstate commerce in such
14 commodity, or (C) delivering any such commodity sold, shipped, or received in
15 interstate commerce for the fulfillment thereof:
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18 A. from cheating or defrauding or attempting to cheat or defraud such other
19 person; willfully to make or cause to be made to such other person any false
20 report or statement thereof, or willfully to entering or causing to be entered for
21 such person any false record thereof; willfully deceiving or attempting to deceive
22 such other person by any means whatsoever in regard to any such order or
23 contract or the disposition or execution of any such order or contract, or in regard
24 to any act of agency performed with respect to such order or contract for such
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1 person in violation of Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-
2 (iii);

3 B. from acting as a commodity pool operator ("CPO") by engaging in a
4 business that is of the nature of an investment trust, syndicate, or similar form of
5 enterprise and in connection therewith, solicited, accepted or received funds,
6 securities or property from others for the purpose of trading in commodities for
7 future delivery on or subject to the rules of contract markets or derivatives
8 transaction execution facilities in violation of 4o(1)(A) and (B) of the Act,
9 7 U.S.C. §§ 6o(1)(A) and (B);

10 C. commingling the property of any pool that he operates or that he intends
11 to operate with the property of any other person in violation of Regulation
12 4.20(c);

13 D. engaging in a business that is of the nature of an investment trust,
14 syndicate, or similar form of enterprise and in connection therewith soliciting,
15 accepting or receiving funds, securities or property from others for the purpose of
16 trading in commodities for future delivery on or subject to the rules of contract
17 markets or derivatives transaction execution facilities in violation of Section
18 4m(1) of the Act, 7 U.S.C. § 6m(1) (2002);

19 E. while acting as a CPO, failing to furnish pool participants with written
20 Disclosure Documents and Account Statements and failing to receive signed and
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1 dated acknowledgments from pool participants stating that they received and
2 understood the Disclosure Document and Account Statements, in violation of
3 Section 4n(4) of the Act and Regulations 4.21 and 4.22.

4
5 **17. IT IS FURTHER ORDERED** that Defendant Gale is restrained and
6 enjoined from directly or indirectly in or in connection with any order to make, or
7 the making of, any contract of sale of any commodity for future delivery, made,
8 or to be made, for or on behalf of any other persons, where such contract for
9 future delivery was or could be used for (A) hedging any transaction in interstate
10 commerce in such commodity or the products or byproducts thereof, or (B)
11 determining the price basis of any transaction in interstate commerce in such
12 commodity, or (C) delivering any such commodity sold, shipped, or received in
13 interstate commerce for the fulfillment thereof:
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16
17 A. acting as an associated person ("AP") of a CPO by associating with a
18 commodity pool operator as a partner, officer, employee, consultant, or agent (or
19 as a person occupying a similar status or performing similar functions), in a
20 capacity that involves (i) the solicitation of funds, securities, or property for a
21 participation in a commodity pool or (ii) the supervision of any person or persons
22 so engaged, without being registered with the CFTC as an associated person of a
23 commodity pool operator in violation of Section 4k(2) of the Act, 7 U.S.C.
24 § 6k(2) (2003).
25
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VI. SERVICE OF ORDER

18. IT IS FURTHER ORDERED that copies of this Order may be served by any means, including facsimile transmission, upon any financial institution or other entity or person that may have possession, custody, or control of any document or asset of any Defendant, or that may be subject to any provision of this Order.

VII. BOND NOT REQUIRED OF PLAINTIFF

19. IT IS FURTHER ORDERED that Plaintiff CFTC is an agency of the United States of America and, accordingly, no bond need be posted by Plaintiff.

VIII. ORDER TO SHOW CAUSE

20. IT IS FURTHER ORDERED that Defendants Schotz and Gale shall show cause, if there be any, at 9:00 o'clock (a.m. / p.m.) on Tuesday, Nov 9, 2004 before the Honorable S. JAMES OTERO

Courtroom 1600, United States District Court, Central District of California, located at 312 N. Spring St, Los Angeles, California, why a

Preliminary Injunction should not be granted to prohibit further violations of the Act and the Regulations promulgated thereunder.

21. IT IS FURTHER ORDERED that Service of a copy of this Order upon Defendants, in accordance with Rule 4 of the Federal Rules of Civil

Procedure or in any manner provided by law on or before 3:00 pm o'clock

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Defendants response to the OSC should be filed no later than 3:00 pm Nov 3, 2004.

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1 a.m. / p.m. on the 28th day of October, 2004, shall be deemed
2 good and sufficient service and notice thereof.

3 22. **IT IS FURTHER ORDERED** that this Order shall [continue in full
4 force and effect until further Order of the Court.] [expire on 9:00 am o'clock
5 a.m. / p.m. on the 9th day of Nov, 2004, unless for good cause
6 shown it is extended, or unless Defendants consent that it may be extended for a
7 longer period.]
8
9

10 **IT IS SO ORDERED.**

11 Signed at 2:00 o'clock am/pm on the 27 day of Oct., 2004
12

13
14 S. J. O. T.
15 UNITED STATES DISTRICT JUDGE

16
17
18 Presented by:
19 [Signature]
20
21 Louis V. Traeger
22 Attorney for Plaintiff
23
24
25
26