

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FILED
JUL 20 2000

10:35 AM
STEPHEN R. LUDWIG, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

PHILLIP FERGUSON, individually and
doing business as Ferguson Financial,
B&F Trading, and First Investors
Group, Inc.,

Defendant.

CIVIL ACTION NO. 1:00 CV 0300

Hon. William Lee

7-20-00
[Signature]
U.S. DISTRICT COURT

PRELIMINARY INJUNCTION ORDER

This matter comes before the Court on the Motion for Preliminary Injunction filed by plaintiff, the Commodity Futures Trading Commission ("Commission"). The Court has previously issued an *ex parte* statutory restraining order freezing the Defendant's assets and containing other relief. The Court has reviewed the memoranda, declarations, and other exhibits filed with the Court, and having heard testimony and now being fully advised in the premises finds that:

- (1) this Court has jurisdiction of the subject matter of this case, and there is good cause to believe it will have jurisdiction over all parties;
- (2) there is good cause to believe that Defendant Phillip Ferguson individually and d/b/a Ferguson Financial, B&F Trading and First Investor's Group has engaged in and is likely to engage in acts and practices that violate Sections 4b(a) and 4m(1) of the Commodity Exchange Act, as amended,

- (the "Act"), 7 U.S.C. §§ 6b(a) and 6m(1)(1994), and Regulations 1.31 and 4.23 §§ 17 C.F.R. §§1.31 and 4.23 and there is a substantial likelihood that the Commission will prevail on the merits of this action;
- (3) the Defendant or someone acting at his direction prepared and mailed false Trade Logs to commodity pool investors who invested funds with the Defendant for use in the commodity futures markets in violation of 4b(a)(ii), of the Commodity Exchange Act, §6b(a)(ii) (1994);
 - (4) the Defendant has solicited and accepted millions of dollars from members of the public to participate in two successive commodity pools without proper registration with the Commission as required by Section 4m(1) of the Commodity Exchange Act, 7 U.S.C. § 4m(1) (1994);
 - (5) the Defendant failed to provide required books and records to representatives of the Commission as required by Regulation 1.31 and 4.23, 17 C.F.R. §§ 1.23 and 4.23 (1999);
 - (6) there is a substantial likelihood that, absent the continuation of the asset freeze, the Defendant will conceal, dissipate or otherwise divert his assets, thereby defeating the possibility of effective final relief in the form of equitable monetary relief for investors; and
 - (7) weighing the equities and considering the Commission's likelihood of success in its cause of action, this Order is in the public interest.

DEFINITIONS

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

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including but not limited to chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables, lines of credit, contracts, insurance policies, and all cash, wherever located.

2. The term "document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes, but is not limited to, writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

3. "Defendant" means Phillip Ferguson ("Ferguson") individually and d/b/a, Ferguson Financial, B&F Trading ("B&F") and First Investors Group Inc. ("FIG"), and any person insofar as he or she is acting in the capacity of an officer, agent, servant, employee or attorney of the Defendant and any person who receives actual notice of this Order by personal service or otherwise insofar as he or she is acting in concert or participation with the Defendant.

RELIEF GRANTED

Prohibited Conduct

I.

IT IS HEREBY ORDERED that the Defendant, in or in connection with orders to make, or the making of, contracts of sale for future delivery, made, or to be made, for or on behalf of any other persons, where such contracts for future delivery were or could be used for the purposes set forth in Section 4b(a) of the Act, 7 U.S.C. § 6b(a) (1994) is restrained and enjoined from violating Section 4b(a)(ii) of the Act, 7 U.S.C. § 6b(a)(ii) (1994), by willfully making or causing to be made to other persons false reports or statements thereof, or willfully entering or causing to be entered for other persons false records thereof;

II.

IT IS FURTHER ORDERED that the Defendant is restrained and enjoined from directly or indirectly soliciting or accepting any new customers for commodity futures or

commodity options trading or soliciting or accepting any new deposits of funds from existing customers; and

III.

IT IS FURTHER ORDERED that the Defendant is restrained and enjoined from operating as a commodity pool operator engaged in the business of soliciting, accepting, or receiving from others, funds, securities, or property, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market without being registered with the Commission as a commodity pool operator, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994).

Maintenance and Access to Records

IV.

IT IS HEREBY ORDERED that the Defendant is restrained and enjoined from failing to allow representatives of the Commission immediate and continuing access to inspect or immediately copy the books, records, and other documents of Defendant and his agents, as required by these regulations, in violation of Regulations 1.31 and 4.23, 17 C.F.R. §§ 1.31 and 4.23; and

V.

IT IS FURTHER ORDERED that the Defendant and his officers, agents, servants employees or attorneys are restrained and enjoined from destroying, mutilating, concealing, altering or disposing of any books and records, documents, correspondence, brochures, manuals, electronically stored data, taped records or other property of Defendants, wherever located, including all such records concerning Defendant, Ferguson Financial, FIG and B&F's business operations;

Asset Freeze

VI.

IT IS HEREBY ORDERED that the Defendant is restrained and enjoined from directly or indirectly:

- A. Withdrawing, transferring, removing, dissipating, concealing or disposing of, in any manner, any funds, assets, or other property, wherever situated, including but not limited to, all funds, personal property, money or securities held in safes, safety deposit boxes and all funds on deposit in any financial institution, bank or savings and loan account held by, under the control, or in the name of Ferguson, Ferguson Financial, FIG or B&F, including, but not limited to Account R 61000 860 20017, held at Rosenthal Collins Group LP in the name of Lois A. Johnson, Tax ID Number 306 38 8176 ("the Johnson account").
- B. Notwithstanding the provisions of this paragraph, Defendant shall transfer possession of all assets of the Defendant pursuant to paragraph XI of this Order.

The assets affected by this paragraph shall not include assets that have been obtained by the Defendant after the entry of this order and are not derived from or otherwise related to the activities alleged in the Commission's complaint.

VII.

IT IS FURTHER ORDERED, pending further Order of this Court, that any financial or brokerage institution, business entity, or person that holds, controls, or maintains custody of any account or asset titled in the name of, held for the benefit of, or otherwise under the control of the Defendant, or has held, controlled, or maintained custody of any such account or asset of the Defendant at any time since January 1, 1997, shall:

- A. Prohibit the Defendant and all other persons from withdrawing, transferring, removing, dissipating, concealing or disposing of, in any manner, any funds, assets, or other property, wherever situated, including but not limited to, all funds, personal property, money or securities held in safes, safety deposit boxes and all funds on deposit in any financial institution, bank or savings and loan account held by, under the control, or in the name of Ferguson, Ferguson Financial, FIG or B&F, including, but not limited to, the Johnson account, except as directed by further order of the Court or, as to receivership assets, as directed by the Receiver appointed herein;

Notwithstanding this Paragraph, the Receiver appointed herein shall be provided with access to any safes, safety deposit boxes, bank or savings and loan account titled in the name of, or subject to access by the Defendant;

- B. Provide the Receiver and counsel for the Commission, within five (5) business days of receipt of a copy of this Order, a statement setting forth:
1. the identification number of each such account or asset titled in the name, individually or jointly, of the Defendant or held on behalf of, or for the benefit of the Defendant or under the control of the Defendant;
 2. the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted; and

3. the identification of any safe deposit box that is either titled in the name, individually or jointly, of the Defendant or is otherwise subject to access by the Defendant;
- D. Upon request by the Receiver or the Commission, promptly provide the Receiver and the Commission with copies of all records or other documentation pertaining to such account or asset, including, but not limited to, originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs; and
- E. Cooperate with all reasonable requests of the Receiver or Commission relating to implementation of this Order, including transferring funds at the Receiver's direction and producing records related to Defendant's accounts.

VIII.

IT IS FURTHER ORDERED that within five (5) business days following the service of this Order, the Defendant shall:

- A. Provide the Commission and the Receiver with a full accounting of all funds, documents, and assets held outside of the United States which are (1) titled in the name the Defendant individually or d/b/a Ferguson Financial, B&F or FIG; or (2) held by any person or entity for the benefit of the Defendant; or (3) under such Defendant's direct or indirect control, whether jointly or singly;
- B. Transfer to the territory of the United States and deliver to the Receiver all funds, documents, and assets located in foreign countries that are (1) titled in the name of the Defendant individually or d/b/a Ferguson Financial, B&F or FIG; or (2) held by any person or entity for the benefit

of the Defendant ; or (3) under such Defendant's direct or indirect control, whether jointly or singly; and

- C. Provide the Commission access to all records of accounts or assets of the Defendant held by financial institutions located outside the territorial United States by signing the Consent to Release of Financial Records attached to this Order.

Permanent Receiver

IX.

IT IS FURTHER ORDERED that R. David Byrnes is appointed the permanent Receiver for the Defendant with the full powers of an equity receiver. The Receiver shall be the agent of this Court in acting as Receiver under this Order.

X.

IT IS FURTHER ORDERED that the Receiver is directed and authorized to accomplish the following:

- A. Take exclusive custody, control, and possession of all the funds, property, mail and other assets of, in the possession of, or under the control of the Defendant, wherever situated. The Receiver shall have full power to sue for, collect, receive and take possession of all goods, chattels, rights, credits, moneys, effects, land, leases, books, records, work papers, and records of accounts, including computer-maintained information, and other papers and documents of the Defendant, including documents related to customers or clients whose interest are now held by or under the direction, possession, custody or control of the Defendant;
- B. Take all steps necessary to secure the business premises of the Defendant, including but not limited to premises located at 241 W. 3rd St. Marion, Indiana 46952 and any and all other premises under the control of the Defendant;

- C. Take all steps necessary to secure the residence(s) of the Defendant, including, but not limited to the residence located at 17641 N. 450 E, Summitville, Indiana 46070;
- D. Preserve, hold and manage all receivership assets, and perform all acts necessary to preserve the value of those assets, in order to prevent any loss, damage or injury to customers or clients;
- E. Prevent the withdrawal or misapplication of funds entrusted to the Defendant, and otherwise protect the interests of customers or clients;
- F. Collect all money owed to the Defendant;
- G. Initiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions or proceedings in state, federal or foreign court necessary to preserve or increase the assets of the Defendant or to carry out his or her duties pursuant to this Order;
- H. Choose, engage and employ attorneys, accountants, appraisers, and other independent contractors and technical specialists, as the Receiver deems advisable or necessary in the performance of duties and responsibilities under the authority granted by this Order;
- I. Issue subpoenas to obtain documents and records pertaining to the receivership, and conduct discovery in this action on behalf of the receivership estate;
- J. Open one or more bank accounts as designated depositories for funds of the Defendant. The Receiver shall deposit all funds of the Defendant in such designated accounts and shall make all payments and disbursements from the receivership estate from such accounts;
- K. Make payments and disbursements from the receivership estate that are necessary or advisable for carrying out the directions of, or exercising the authority granted by, this Order. The Receiver shall apply to the Court for

prior approval of any payment of any debt or obligation incurred by the Defendant prior to the date of entry of this Order, except for payments that the Receiver deems necessary or advisable to secure assets of the Defendant;

- L. Liquidate all assets of the Defendant and hold such assets pending further of the Court; and
- M. Vacate the business premises occupied by the Defendant and consolidate all records and other assets by moving assets and records currently located outside of this District to a secure facility maintained within this District.

XI.

IT IS FURTHER ORDERED that, immediately upon service of this Order upon them, Defendant and any other person or entity served with a copy of this Order, shall immediately or within such time as permitted by the Receiver in writing, deliver over to the Receiver:

- A. Possession and custody of all funds, assets, property, and all other assets, owned beneficially or otherwise, wherever situated, of the Defendant;
- B. Possession and custody of documents of the Defendant, including but not limited to, all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents and other papers;
- C. Possession and custody of all precious metals, other commodities, funds and other assets belonging to members of the public now held by the Defendant;
- D. All keys, computer passwords, entry codes, and combinations to locks necessary to gain or to secure access to any of the assets or documents of the Defendant, including but not limited to, access to the Defendant's

business premises, means of communication, accounts, computer systems, or other property; and

- E. Information identifying the accounts, employees, properties or other assets or obligations of the Defendant.

XII.

IT IS FURTHER ORDERED that the Defendant and all other persons or entities served with a copy of this Order shall cooperate fully with and assist the Receiver. This cooperation and assistance shall include, but not be limited to, providing any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this Order; providing any password required to access any computer or electronic files in any medium; and advising all persons who owe money to the Defendant that all debts should be paid directly to the Receiver.

XIII.

IT IS FURTHER ORDERED that except by leave of the Court, during the pendency of the receivership ordered herein, the Defendant, and all other persons and entities be and hereby are stayed from taking any action to establish or enforce any claim, right or interest for, against, on behalf of, in, or in the name of the Defendant, the Receiver, receivership assets, or the Receiver's duly authorized agents acting in their capacities as such, including but not limited to, the following actions:

- A. Commencing, prosecuting, litigating or enforcing any suit, except that actions may be filed to toll any applicable statute of limitations;
- B. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, property of the Defendant or any property claimed by the Defendant, or attempting to foreclose, forfeit, alter or terminate any

of the Defendant's interests in property, whether such acts are part of a judicial proceeding or otherwise;

- C. Using self-help or executing or issuing, or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property, wherever located, owned by or in the possession of the Defendant, or the Receiver, or any agent of the Receiver; and
- D. Doing any act or thing to interfere with the Receiver taking control, possession or management of the property subject to the receivership, or to in any way interfere with the Receiver or the duties of the Receiver; or to interfere with the exclusive jurisdiction of this Court over the property and assets of the Defendant.

This Paragraph does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

XIV.

IT IS FURTHER ORDERED that the Receiver and all personnel hired by the Receiver as herein authorized, including counsel to the Receiver, are entitled to reasonable compensation for the performance of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred by them, from the assets now held by, or in the possession or control of, or which may be received by the Defendant. The Receiver shall file with the Court and serve on the parties periodic requests for the payment of such reasonable compensation, with the first such request filed no more than sixty (60) days after the date of this Order and subsequent requests filed monthly

thereafter. The Receiver shall not increase the hourly rates used as the bases for such fee applications without prior approval of the Court.

XV.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 754 (1994), the Receiver shall maintain the bond in the amount of \$1,500,000.00 ,

Service of Order and Assistance of United States Marshals Service

XVI.

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 documents or assets of the Defendant or that may be subject to any provision of this Order.

XVII.

IT IS FURTHER ORDERED that the United States Marshals Service is directed to assist the Receiver in taking control and custody of the assets, records and business premises of the receivership Defendants.

Service on the Commission

XVIII.

IT IS FURTHER ORDERED that the Defendant shall serve all pleadings, correspondence, notices required by this Order, and other materials on the Commission by delivering a copy to Darlene Oliver, Trial Attorney, Division of Enforcement, Commodity Futures Trading Commission, 300 South Riverside Plaza, 1600 N Chicago, Illinois 60606.

XIX.

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until further order of this Court, and that this Court retains jurisdiction of this matter for all purposes.

SO ORDERED, this *20* day of July, 2000


UNITED STATES DISTRICT JUDGE

CONSENT TO RELEASE OF FINANCIAL RECORDS

I, _____, do hereby direct any bank or trust company at which I have a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank accounts to any attorney of the Commodity Futures Trading Commission, and to give evidence relevant thereto, in the matter of Commodity Futures Trading Commission v. Phillip Ferguson d/b/a Ferguson Financial, B&F Trading and First Investor's Group, now pending before the United States District Court for the Northern District of Indiana, Fort Wayne Division and this shall be irrevocable authority for so doing. This direction is intended to apply to the laws of countries other than the United States which restrict or prohibit the disclosure or bank information without the consent of the holder of the account, and shall be construed as consent with respect thereto, and the same shall apply to any of the bank accounts for which I may be a relevant principal.

Dated: _____, 2000

Signature