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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMMODITY FUTURES TRADING)	
COMMISSION,)	
)	Case No. CV 02-4898-MRP (MSNx)
)	
Plaintiff,)	COMPLAINT FOR INJUNCTIVE
)	AND OTHER EQUITABLE
vs.)	RELIEF AND FOR CIVIL
)	PENALTIES UNDER THE
DONALD STEVEN SMITH, an)	COMMODITY EXCHANGE ACT,
individual, and)	AS AMENDED, 7 U.S.C. §§ 1-25
FIBIT.COM, a California trust,)	
)	
Defendants.)	

I.
JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-1 (2001), which authorizes the Commodity Futures Trading Commission (the “Commission”) to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Commodity Exchange Act or any rule, regulation or order thereunder.

1 commodity pool while claiming exemption from the Commission's commodity
2 pool operator's registration requirement pursuant to Commission Regulation
3 4.13(a)(2), 17 C.F.R. § 4.13(a)(2) (2001). Defendants illegally commingled pool
4 funds, fraudulently continued trading after two of the pool participants demanded
5 that they stop, failed to provide account statements to the pool participants, and
6 failed to maintain and produce to the Commission's Division of Enforcement
7 certain business records for their pool activities.

8 7. Defendant Smith also has been managing commodity futures trading
9 accounts for several commodity trading advisory customers, either under formal,
10 written powers of attorney or informally by gaining access to customers' on-line
11 trading accounts. He has illegally managed at least two accounts after his
12 registration with the Commission as a commodity trading advisor lapsed, and he
13 has solicited and unlawfully received the funds of at least one his clients under his
14 own name. He has not been giving his managed account clients the disclosures
15 mandated by the Commission's Regulations, and, in response to requests for
16 documents pursuant to Commission Regulations 1.31 and 4.33, 17 C.F.R. §§ 1.31
17 and 4.33 (2001), he has failed to produce to the Commission's Division of
18 Enforcement any business records for his activities as a commodity trading
19 advisor.

20 8. Accordingly, pursuant to Section 6c of the Commodity Exchange Act, 7
21 U.S.C. § 13a-1 (2001), Plaintiff Commission brings this action to enjoin these

1 unlawful acts and practices of Defendants. In addition, Plaintiff seeks civil
2 monetary penalties in the amount of not more than the higher of \$120,000 or triple
3 the monetary gain to Defendants for each violation of the Commodity Exchange
4 Act or the Regulations thereunder, disgorgement of Defendants' ill-gotten gains,
5 restitution to customers, prejudgment interest and such other relief as this Court
6 may deem necessary or appropriate.

7 9. Unless enjoined by this Court, Defendants are likely to continue to
8 engage in the acts and practices alleged in this Complaint, as more fully described
9 below.

10 IV.

11 FACTUAL ALLEGATIONS

12 A. Defendants' Trading Signals Service

13 10. At all relevant times, Defendants have operated a paid service under the
14 tradename "Fibit.com" whereby, as commodity trading advisors, they transmit
15 trading signals to futures traders over the Internet via Instant Messenger.
16 Defendants advertise the service in futures magazines of national circulation and
17 over the Internet.

18 11. At all relevant times, by this conduct Defendants have acted as
19 commodity trading advisors within the meaning of Section 1a(6) of the
20 Commodities Exchange Act, 7 U.S.C. § 1a(6) (2001).

21 B. Defendants' Commodity Pool

1 12. In April 2000 Defendants began operating a commodity pool for some
2 of their signals service customers. Defendants did not operate the pool as a
3 separate legal entity, and they did not receive funds from existing or prospective
4 pool participants in the pool's name. Instead, they commingled the funds of the
5 pool with their own funds; they failed to provide their pool participants with
6 monthly account statements; and they failed to maintain any accounting records
7 for the pool.

8 13. The Defendants represented to certain of their prospective pool
9 participants that they would stop trading and return the participants' account
10 balances upon request. Nevertheless, in at least two instances the Defendants
11 continued trading the participants' accounts down to a zero balance after receiving
12 written instructions from such participants to cease trading their funds.

13 14. Defendants failed to maintain books and records concerning their
14 activities as commodity pool operators, as required by Commission Regulation
15 4.13(b)(2)(ii), 17 C.F.R. § 4.13(b)(2)(ii) (2001).

16 C. Defendant Smith's Management Of Customer Accounts

17 15. Commencing at least as early as December, 2000, in his capacity as a
18 commodity trading advisor, Defendant Smith began managing and trading the
19 commodity futures trading accounts of some of the Defendants' signals service
20 customers. In general, Smith managed those accounts either pursuant to written
21 power of attorney, or by acquiring the customer's username and password for

1 online trading. In at least one instance, Smith solicited and received funds from a
2 client in Smith's own name, purportedly for the purpose of trading that client's
3 funds.

4 16. Smith managed at least two customer trading accounts after his
5 registration with the Commission as a commodity trading advisor had lapsed.

6 17. Smith did not provide his managed account customers with any of the
7 written disclosures required by Commission Regulation 4.31, 17 C.F.R. 4.31
8 (2001).

9 18. Defendant Smith failed to maintain books and records concerning his
10 activities as a commodity trading advisor, as required by Commission Regulation
11 4.33, 17 C.F.R. § 4.33 (2001).

12
13 D. Defendants' Failure To Produce Books and Records To Commission
14 Representatives

15 19. On January 16, 2001 and January 24, 2001 the Commission's Division
16 of Enforcement demanded in writing, pursuant to Commission Regulations 1.31,
17 4.13 and 4.33, 17 C.F.R. §§ 1.31, 4.13 and 4.33 (2001), that Defendants make
18 available their books and records relating to their activities as commodity pool
19 operators and commodity trading advisors.

20 20. Defendants did not make available to the Commission's Division of
21 Enforcement any of the books and records demanded on January 16, 2001 and

1 January 24, 2001.

2 IV

3 VIOLATIONS OF THE COMMODITY EXCHANGE ACT
4 AND COMMISSION REGULATIONS

5 COUNT ONE

6 AGAINST DEFENDANTS SMITH AND FIBIT.COM FOR COMMODITY
7 POOL OPERATOR FRAUD--UNAUTHORIZED TRADING OF POOL FUNDS
8 (SECTIONS 4B AND 4Q OF THE COMMODITY EXCHANGE ACT)

9 21. Plaintiff realleges paragraphs 1 through 20, above, and incorporates
10 them by reference herein.

11 22. Sections 4b(a)(i) and (iii) of the Commodity Exchange Act, 7 U.S.C.
12 §§ 6b(a)(i) and (iii) (2001), make it unlawful for any person, in or in connection
13 with any order to make, or the making of, any contract of sale of any commodity
14 for future delivery, made or to be made, for or on behalf of any other person, if
15 such contract for future delivery is or may be used for any of the purposes set forth
16 in Section 4b(a)(2)(A)-(C) of the Commodity Exchange Act, 7 U.S.C. §
17 6b(a)(2)(A)-(C) (2001):

18 (i) to cheat or defraud, or to attempt to cheat or defraud such other
19 person;

20 *****

21 (iii) willfully to deceive or attempt to deceive such other person by

1 any means whatsoever in regard to any such order or contract or the
2 disposition or execution of any such order or contract, or in regard to any
3 act of agency performed with respect to such order or contract for such
4 person.

5 23. Section 4 Ω (1) of the Commodity Exchange Act, 7 U.S.C. § 6 Ω (1)
6 (2001), makes it unlawful for any commodity pool operator, by use of the mails or
7 any means or instrumentality of interstate commerce, directly or indirectly—(A) to
8 employ any device, scheme, or artifice to defraud any pool participant or
9 prospective pool participant, or (B) to engage in any transaction, practice or a
10 course of business which operates as a fraud or deceit upon any such participant or
11 prospective participant.

12 23. By reason of their having traded pool participants' funds after being
13 instructed to cease, and by thereafter failing to return such pool participants'
14 account balances, Defendants have engaged in fraudulent, unauthorized trading in
15 violation of Sections 4b(a)(i) and (iii) and 4 Ω (1) of the Commodity Exchange Act,
16 7 U.S.C. §§ 6b(a)(i) and (iii) and 6 Ω (1) (2001).

17 24. Each instance of unauthorized trading, including those specifically
18 alleged herein, is alleged as a separate and distinct violation of Sections 4b(a)(i)
19 and (iii) and 4 Ω (1) of the Commodity Exchange Act, 7 U.S.C. §§ 6b(a)(i) and (iii)
20 and 6 Ω (1) (2001).

21 COUNT TWO

1 specifically alleged herein, is alleged as a separate and distinct violation of
2 Regulation 4.20(a)-(c), 17 C.F.R. § 4.20(a)-(c) (2001).

3
4 COUNT THREE

5 AGAINST DEFENDANTS SMITH AND FIBIT.COM FOR
6 FAILURE TO PROVIDE ACCOUNT STATEMENTS TO
7 COMMODITY POOL PARTICIPANTS (SECTION 4N(4) OF THE
8 COMMODITY EXCHANGE ACT AND COMMISSION
9 REGULATION 4.13(b)(2)(i))

10 29. Plaintiff realleges paragraphs 1 through 20, above, and incorporates
11 them by reference herein.

12 30. Section 4n(4) of the Commodity Exchange Act, 7 U.S.C. § 6n(4)
13 (2001), requires all commodity pool operators, whether registered or unregistered,
14 to regularly furnish statements of account to each commodity pool participant.
15 Commission Regulation 4.13(b)(2)(i), 17 C.F.R. § 4.13(b)(2)(i) (2001), requires
16 that commodity pool operators who are exempt from registration pursuant to
17 paragraph (a)(2) of that Regulation and are not registered as such pursuant to that
18 exemption must “[p]romptly furnish to each participant in each pool that it
19 operates a copy of the monthly statement for the pool that such person received
20 from a futures commission merchant... .”

1 engages in the solicitation or enters into the agreement (whichever is earlier),
2 delivers or causes to be delivered to the prospective client a Disclosure Document
3 for the trading program pursuant to which the trading advisor seeks to direct the
4 client's account.

5 35. By reason of his failure to provide his managed account customers with
6 the required Disclosure Documents, Defendant Smith has violated Commission
7 Regulation 4.31(a), 17 C.F.R. § 4.31(a) (2001).

8 36. Each instance in which Defendant Smith solicited a prospective client,
9 or entered into an agreement with a prospective client to direct the client's
10 commodity futures trading account without first providing such prospective client
11 with a Disclosure Document, including but not limited to those specifically
12 alleged herein, is alleged as a separate and distinct violation of Regulation 4.31(a),
13 17 C.F.R. § 4.31(a) (2001).

14
15 **COUNT FIVE**

16 **AGAINST DEFENDANT SMITH FOR MANAGING ACCOUNTS WITHOUT**
17 **BEING REGISTERED AS A COMMODITY TRADING ADVISOR (SECTION**
18 **4M(1) OF THE COMMODITY EXCHANGE ACT)**

19 37. Plaintiff realleges paragraphs 1 through 20, above, and incorporates
20 them by reference herein.
21

1 COMMODITY EXCHANGE ACT AND COMMISSION REGULATIONS 1.31,
2 4.13(B)(2), AND 4.33)

3 45. Plaintiff realleges paragraphs 1 through 20, above, and incorporates
4 them by reference herein.

5 46. Section 4n(3)(A), 7 U.S.C. § 6n(3)(A) (2001), of the Commodity
6 Exchange Act requires registered commodity trading advisors to maintain and to
7 provide to Commission representatives certain records of their activities.
8 Commission Regulation 4.33, 17 C.F.R. § 4.33 (2001), requires all commodity
9 trading advisors who are either registered or required to be registered to maintain
10 and to provide to Commission representatives certain enumerated categories of
11 documents.

12 47. Commission Regulation 4.13(b)(2)(ii), 17 C.F.R. § 4.13(b)(2)(ii)
13 (2001), requires that commodity pool operators exempt from registration under the
14 Commodity Exchange Act and Regulations maintain all books and records
15 prepared in connection with their activities as commodity pool operators for a
16 period of five years and that such books and records shall be open to inspection by
17 representatives of the Commission.

18 48. Commission Regulation 1.31, 17 C.F.R. § 1.31 (2001), requires that all
19 books and records required to be kept by the Commodity Exchange Act or the
20 Regulations must be open to inspection by representatives of the Commission.

1 prohibiting Defendants and any other person or entity associated with
2 them, including any successor thereof, from engaging in conduct violative
3 of Sections 4b, 4c, 4m(1), 4n(3) and 4n(4) of the Commodity Exchange
4 Act, and Regulations 1.31, 4.13(b)(2), 4.20, 4.30, 4.31 and 4.33
5 thereunder, and from engaging in any commodity-related activity,
6 including soliciting new customers or customer funds;

7 2. an order directing Defendants and any successors thereof, to disgorge,
8 pursuant to such procedure as the Court may order, all benefits received
9 from the acts or practices which constituted violations of the Commodity
10 Exchange Act or the Regulations thereunder, as described herein, and
11 interest thereon from the date of such violations;

12 3. an order directing Defendants to make full restitution to every customer
13 whose funds were received by them as a result of acts and practices
14 which constituted violations of the Commodity Exchange Act or the
15 Regulations thereunder, and interest thereon from the date of such
16 violations;

17 4. an order directing Defendants to pay a civil penalty in the amount of not
18 more than the higher of \$120,000 or triple the monetary gain to
19 Defendants for each violation of the Commodity Exchange Act or the
20 Regulations thereunder;

21 5. an order requiring Defendants to pay costs and fees as permitted by

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28 U.S.C. §§ 1920 and 2412(a)(2); and

6. such other and further remedial ancillary relief as the Court may deem
just and proper.

Dated: June 20, 2002

Commodity Futures Trading Commission

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