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FILED
 CLERK, U.S. DISTRICT COURT
 JUL 21 2005
 CENTRAL DISTRICT OF CALIFORNIA
 DEPUTY

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15 Attorney for Plaintiff
 16 Commodity Futures Trading Commission

ORIGINAL

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT CALIFORNIA
 WESTERN DIVISION

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2005 JUL 15 PM
 CLERK, U.S. DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 LOS ANGELES

17
 18 Commodity Futures Trading Commission,)
 19 Plaintiff,)
 20 vs.)
 21 Barry Schotz et al,)
 22 Defendants)
 23 _____)
 24 Randolph Gale)
 25 Cross Claimant,)
 26 vs.)
 Barry Schotz et al,)
 Cross Defendants.)

Case No: CV04-8889 SJO (SSx)
 Consent Order of Permanent Injunction,
 and Other Ancillary Relief Against
 Defendant Barry Schotz
 JUDGE: S. James Otero
 TIME:
 DATE:
 PLACE:

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1. Plaintiff Commodity Futures Trading Commission ("Commission" or "CFTC") filed a Complaint against Defendants Barry Schotz ("Schotz") and Randolph Gale ("Gale") (collectively "Defendants") on October 27, 2004, seeking injunctive and other equitable relief for violations of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 1 et seq. (2002), and Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2004). The Court entered a Statutory Restraining Order the same day. On November 10, 2004, the Court entered a Consent Order of Preliminary Injunction and Other Ancillary Relief against both Defendants

I. Consent And Agreement

2. To effect settlement of the matters alleged in the Complaint against Defendant Schotz, without a trial on the merits or any further judicial proceedings, and without admitting or denying the allegations of the complaint, or the findings in this Consent Order of Permanent Injunction and Other Equitable Relief ("Order"), Schotz consents to the entry of this Order.

3. Schotz affirms that he has agreed to this Order voluntarily, and that no promise or threat has been made by the CFTC or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Order, other than as set forth specifically herein.

4. Schotz acknowledges service of the Summons and Complaint.

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1 5. Schotz admits the jurisdiction of this Court over him, admits that the
2 Court has subject matter jurisdiction over this action, and admits that venue
3 properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1.
4

5 6. Schotz waives:

6 (a) the entry of findings of fact and conclusions of law pursuant to Rule 52
7 of the Federal Rules of Civil Procedure, except as set forth below;
8

9 (b) all claims which he may possess under the Equal Access to Justice Act,
10 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), relating to, or arising from,
11 this action;
12

13 (c) any claim of double jeopardy based upon the institution of this
14 proceeding or the entry in this proceeding of any order imposing a civil monetary
15 penalty or any other relief; and
16

17 (d) all rights of appeal from this Order.

18 7. No provision of this Order shall in any way limit or impair the ability of
19 any person to seek any legal or equitable remedy against Schotz or any other
20 person in any other proceeding, including any current or subsequent bankruptcy.
21 Furthermore, the allegations of the Complaint and the findings in this Order shall
22 be taken as true and correct and be given preclusive effect, without further proof
23 for the purpose of any current or subsequent bankruptcy proceeding filed by, or
24 on behalf of, Schotz, or any proceeding to enforce this Order.
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1 8. Schotz agrees to provide immediate notice to this Court and the CFTC by
2 certified mail of any bankruptcy proceeding filed by, on behalf of, or against him.

3 9. Schotz agrees to cooperate with staff of the CFTC in the continuing
4 litigation of this matter. As part of such cooperation, Schotz agrees, subject to all
5 applicable privileges, to comply fully, promptly, and truthfully to any inquiries or
6 requests for information or testimony, including but not limited to: (1)
7 authenticating documents; (2) responding to requests for production of documents
8 concerning this matter within Schotz's possession, custody, or control, and
9 permitting CFTC staff to inspect and copy such documents; (3) testifying
10 completely and truthfully in this action and producing statements to the CFTC,
11 interviews, depositions, or testimony, and to provide testimony (including witness
12 preparation) related to any trial the subject matter of this proceeding.
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16 10. Schotz agrees that neither he nor any of his agents or employees acting
17 under his authority or control shall take any action or make any public statement
18 denying, directly or indirectly, any allegation in the Complaint or findings or
19 conclusions in this Order, or creating, or tending to create, the impression that the
20 Complaint or this Order is without a factual basis; provided, however, that
21 nothing in this provision shall affect Schotz's: i) testimonial obligations; or ii)
22 rights to take legal positions in other proceedings to which the CFTC is not a
23 party. Schotz shall take all necessary steps to ensure that all of his agents and
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1 employees understand and comply with this agreement.

2 11. Schotz consents to the continued jurisdiction of this Court for the
3 purpose of enforcing the terms and conditions of this Order and for any other
4 purposes relevant to this case.
5

6 **II. Findings of Fact**

7 The Court hereby makes the following findings of fact:

8
9 12. This Court has jurisdiction over the subject matter of this action and all
10 parties hereto pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

11 13. Venue properly lies with this Court pursuant to Section 6c of the Act,
12 7 U.S.C. § 13a-1 because Schotz is found in, inhabits, or transacts business in this
13 district, and the acts and practices in violation of the Act have occurred, are
14 occurring, or are about to occur within this district, among other places.
15

16 14. From about January 1, 2002 to the filing of the complaint in this
17 action, Schotz, without being registered with the CFTC as a commodity pool
18 operator ("CPO"), operated a commodity pool called the Bear Invest Fund
19 ("Bear").
20

21 15. From about January 1, 2002 to the filing of the complaint in this
22 action, Schotz solicited and accepted at least \$5 million in the name of Bear, from
23 at least 51 pool participants, most of whom resided in and around Los Angeles
24 County, California. These funds were pooled to trade commodity futures through
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1 at least two accounts that Schotz controlled at two different futures commission
2 merchants ("FCMs").

3 16. Pool participants were solicited and required to complete account
4 opening documents created by Schotz. Pool participants' funds were deposited
5 into accounts in the name of Schotz or controlled by Schotz.
6

7 17. While Schotz's trading in the Bear pool accounts consistently lost
8 money, Schotz falsely reported to pool participants that Schotz's futures trading
9 in the Bear accounts was highly profitable and that Bear was consistently making
10 money.
11

12 18. Schotz commingled customer funds with his personal funds and failed
13 to provide to pool participants with pool disclosure documents required to be
14 provided by CFTC Regulations.
15

16 19. In May 2004, Schotz reported to some pool participants that he was, in
17 fact, losing money trading Bear pool funds, and that he had never made a profit
18 trading in the Bear accounts.
19

20 20. From May 2004 to the filing of the complaint in this action, Schotz
21 continued to solicit participants and accepted additional funds from them to invest
22 in the Bear pool. Schotz continued to represent to existing and new pool
23 participants that his trading of Bear pool funds was highly profitable, when, in
24 fact, Schotz continued to lose money trading.
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1 21. From January 1, 2002, to the filing of the complaint in this action,
2 Schotz misappropriated funds belonging to pool participants and expended them
3 on his own personal expenses. Schotz misappropriated approximately \$1,712,129
4 in customer funds.
5

6 22. Schotz used the mails and other means or instrumentalities of interstate
7 commerce, directly or indirectly, to engage in business as a CPO of the Bear pool.
8

9 III. Conclusions of Law

10 23. From at least January 1, 2002 to the filing of the complaint in this
11 action, Schotz cheated or defrauded or attempted to cheat or defraud and willfully
12 deceived or attempted to deceive pool participants or prospective pool
13 participants by misrepresenting the performance of the Bear pool and by making
14 other misrepresentations and omissions of material facts in violation of Section
15 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii).
16

17 24. From at least January 1, 2002 to the filing of the complaint in this
18 action, Schotz , while acting as a CPO, violated Sections 4o(1)(A) and (B) of the
19 Act, 7 U.S.C. §§ 6o(1)(A) and (B), by directly or indirectly employing a device,
20 scheme, or artifice to defraud commodity pool participants, or engaging in
21 transactions, practices or a course of business which operated as a fraud or deceit
22 upon commodity pool participants.
23
24

25 25. From at least January 1, 2002 to the filing of the complaint in this
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1 action, Schotz commingled pool funds with his own property, in violation of
2 Commission Regulation 4.20(c).

3 26. From at least January 1, 2002 to the filing of the complaint in this
4 action, Schotz, without being registered with the CFTC as a CPO, acted as a CPO
5 by engaging in a business that is of the nature of an investment trust, syndicate, or
6 similar form of enterprise and in connection therewith solicited, accepted or
7 received funds, securities or property from others for the purpose of trading in
8 commodities for future delivery on or subject to the rules of contract markets or
9 derivatives transaction execution facilities, in violation of Section 4m(1) of the
10 Act, 7 U.S.C. § 6m(1) (2002).

11 27. From at least January 1, 2002 to the filing of the complaint in this
12 action, Schotz, while acting as a CPO, failed to furnish pool participants with
13 written Disclosure Document, failed to receive signed and dated
14 acknowledgments from pool participants stating that they received and
15 understood Disclosure Documents and failed to furnish pool participants with
16 Account Statements, in violation of Section 4n(4) of the Act and Regulations 4.21
17 and 4.22.

23 **IV. Order For Permanent Injunction**

24 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

25 28. Schotz and all persons insofar as they are acting in the capacity of his
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1 agents, servants, employees and attorneys, and all persons insofar as they are
2 acting in concert or participation with him, are permanently restrained, enjoined
3 and prohibited from directly or indirectly:

4
5 A. In or in connection with any order to make, or the making of, any
6 contract of sale of any commodity for future delivery made, or to be made, for or
7 on behalf of any other person if such contract for future delivery is or may be
8 used for (A) hedging any transaction in interstate commerce in such commodity
9 or the products or byproducts thereof, or (B) determining the price basis of any
10 transaction in interstate commerce in such commodity, or (C) delivering any such
11 commodity sold, shipped, or received in interstate commerce for the fulfillment
12 thereof; cheating or defrauding or attempting to cheat or defraud such other
13 person; willfully making or causing to be made to such other person any false
14 report or statement thereof, or willfully entering or causing to be entered for such
15 person any false record thereof; willfully deceiving or attempting to deceive such
16 other person by any means whatsoever in regard to any such order or contract or
17 the disposition or execution of any such order or contract, or in regard to any act
18 of agency performed with respect to such order or contract for such person in
19 violation of Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i)-(iii).

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22 B. Directly or indirectly employing a device, scheme, or artifice to
23 defraud commodity pool participants, or engaging in transactions, practices or a
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1 course of business which operated as a fraud or deceit upon commodity pool
2 participants in violation of Sections 4o(1)(A) and (B) of the Act, 7 U.S.C.
3 §§ 6o(1)(A) and (B).
4

5 C. While acting as a CPO, commingling the property of any pool that
6 he operates or that he intends to operate with the property of any other person in
7 violation of Commission Regulation 4.20(c), 17 C.F.R. § 4.20(c).
8

9 D. Acting as a CPO by engaging in a business that is of the nature of
10 an investment trust, syndicate, or similar form of enterprise and in connection
11 therewith by soliciting, accepting or receiving funds, securities or property from
12 others for the purpose of trading in commodities for future delivery on or subject
13 to the rules of contract markets or derivatives transaction execution facilities
14 without being registered with the CFTC, in violation of Section 4m(1) of the Act,
15 7 U.S.C. § 6m(1).
16
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18 E. While registered as or acting as a CPO, failing to regularly furnish
19 statements of account to each participant in his operations in the form and manner
20 prescribed by the Commission, including complete information as to the current
21 status of all trading accounts in which such participant has an interest and failing
22 to provide on a regular basis, statements of account to each participant which
23 includes complete information as to the current status of all trading accounts in
24 which such participant has an interest, in violation of Section 4n(4) of the Act,
25
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1 7 U.S.C. § 6n(4).

2 F. While registered as or acting as a CPO, failing to deliver or causing
3 to be delivered to a prospective participant in a pool that he operates a Disclosure
4 Document for the pool prepared in accordance with Commission Regulations
5 4.24 and 4.25, 17 C.F.R. §§ 4.24 and 4.25, no later than the time he delivers to the
6 prospective pool participant a subscription for the pool; prior to the time funds or
7 property are received from a prospective pool participant, failing to receive an
8 acknowledgment signed and dated by the prospective participant stating that the
9 prospective participant received a Disclosure Document for the pool, in violation
10 of Regulation 4.21, 17 C.F.R. § 4.21.
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14 G. While registered as or acting as a CPO, failing to provide the
15 reports and Account statements required to be provided by Commission
16 Regulation 4.22, 17 C.F.R. § 4.22.
17

18 H. Soliciting or accepting funds or property from any person in
19 connection with the purchase or sale of any commodity futures or options
20 contract;
21

22 I. Engaging in, controlling, or directing the trading of any commodity
23 futures or options accounts, on his own behalf or for or on behalf of any other
24 person or entity, whether by power of attorney or otherwise or entering into any
25 futures or options transactions for his own account or for any account in which he
26

1 has a direct or indirect interest or having any futures or options traded on his
2 behalf;

3 J. Introducing customers to any other person engaged in the business
4 of commodity futures and options trading;

5 K. Issuing statements or reports to others concerning commodity
6 futures or options trading;

7 L. Otherwise engaging in any business activities related to
8 commodity futures or options trading.

9 M. Applying for registration or claiming exemption from registration
10 with the Commission in any capacity, and engaging in any activity requiring such
11 registration or exemption from registration, except as provided for in Commission
12 Regulation 4.14(a)(9), 17 C.F.R § 4.14(a)(9), or acting as a principal, agent,
13 officer or employee of any person registered, exempted from registration, or
14 required to be registered with the Commission unless such exemption is pursuant
15 to Commission Regulation 4.14(a)(9).

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21 **V. Order For Other Equitable Relief**

22 **IT IS FURTHER ORDERED THAT:**

23 **A. RESTITUTION**

24 29. Upon entry of this Order, Schotz is liable for and a judgment is entered
25 against him in the amount of \$2,983,487 plus prejudgment interest in the amount
26

1 of \$62,466.76 and post judgment interest, as restitution to Bear pool participants.
2 Post-judgment interest after the date of this Order until the restitution is paid in
3 full shall be paid at the post-judgment interest rate set forth in 28 U.S.C. § 1961.
4 Restitution shall be reduced by any additional amounts recovered from Bear
5 assets held by third parties and paid to pool participants, or actually paid by
6 Schotz to pool participants as a result of an order in any criminal proceeding. All
7 payments made by Schotz pursuant to this Order shall be considered restitution
8 payments and dispersed on a pro rata basis until those amounts (including
9 interest) are fully satisfied. All payments after satisfaction of the restitution shall
10 be applied to the civil monetary penalty described below.
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14 30. The CFTC shall propose to the Court a restitution plan for distribution
15 of assets currently held in the Registry of the Court and any other assets available
16 for distribution. The restitution plan shall identify the persons entitled to
17 restitution, the amount each person is entitled to receive, a procedure for giving
18 notice to pool participants and the manner in which distribution shall be made.
19

20 **B. CIVIL MONETARY PENALTY**

21
22 31. Upon entry of this Order, Schotz is liable for and a judgment is entered
23 against him for a civil monetary penalty of \$1.6 million plus post-judgment
24 interest. Post judgment interest from the date of this Order until the civil
25 monetary penalty is paid in full shall be paid at the post-judgment interest rate set
26

1 forth in 28 U.S.C. § 1961. Schotz shall pay such civil monetary penalty by
2 electronic funds transfer, or by U.S. postal money order, certified check, bank
3 cashier's check, or bank money order, made payable to the Commodity Futures
4 Trading Commission, and sent to Dennese Posey, or her successor, Division of
5 Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre,
6 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that
7 identifies Schotz and the name and docket number of the proceeding; Schotz shall
8 simultaneously transmit a copy of the cover letter and the form of payment to the
9 Director, Division of Enforcement, Commodity Futures Trading Commission, at
10 the following address: 1155 21st Street, NW, Washington, D.C. 20581.

14 32. Any acceptance by the CFTC of partial payment of Schotz's restitution
15 and/or civil monetary obligations shall not be deemed a waiver of their obligation
16 to make further payments pursuant to this Order, or a waiver of the CFTC's right
17 to seek to compel payment of any remaining balance.

19 33. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each Bear
20 Invest Fund pool participant is explicitly made an intended third-party beneficiary
21 of this Order and may seek to enforce obedience of this Order to obtain
22 satisfaction of any portion of the restitution which has not been paid by Schotz, to
23 ensure continued compliance with any provision of this Order and to hold Schotz
24 in contempt for any violations of any provision of this Order.
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1 34. Schotz shall immediately notify the CFTC if he makes or has
2 previously made any agreement with any pool participant obligating him to make
3 payments outside of this Order. He shall also provide immediate evidence to the
4 CFTC of any payments made pursuant to such agreement. Information provided
5 by Schotz shall be included in the restitution plan.
6

7 35. Schotz shall not transfer or cause others to transfer funds or other
8 property to the custody, possession, or control of any other person for the purpose
9 of concealing such funds from the Court, the CFTC, or any pool participant until
10 restitution has been paid in full.
11

12 36. All notices required by this Order shall be sent by certified mail, return
13 receipt requested, as follows:
14

15 Notice to CFTC:

16 Director, Division of Enforcement
17 Commodity Futures Trading Commission
18 1155 21st St. NW
19 Washington, DC 20581

20 Notice to Schotz:

21 Barry Schotz
22 4641 Kaapuna Rd.
23 Kilanea, HI 96754

24 37. In the event that Schotz changes his residential or business telephone
25 number(s) and/or address(es) at any time, he shall provide written notice of the
26 new number(s) and/or address(es) to the CFTC within twenty (20) calendar days

1 thereof.

2 38. The injunctive provisions of this Order shall be binding on Schotz,
3 upon any person insofar as he or she is acting in the capacity of officer, agent,
4 servant, employee or attorney of Schotz, and upon any person who receives actual
5 notice of this Order by personal service, facsimile or otherwise insofar as he or
6 she is acting in active concert or participation with Schotz.
7

8 39. This Order incorporates all of the terms and conditions of the
9 settlement among the parties hereto. Nothing shall serve to amend or modify this
10 Order in any respect whatsoever, unless: (1) reduced to writing; (2) signed by all
11 parties hereto; and (3) approved by order of this Court.
12

13 40. The failure of any party to this Order to require performance of any
14 provision of this Order shall in no manner affect the right of such party at a later
15 time to enforce the same or any other provision of this Order. No waiver in one
16 or more instances of the breach of any provision contained in this Order shall be
17 construed as a further or continuing waiver of a breach of any other provision of
18 this Order.
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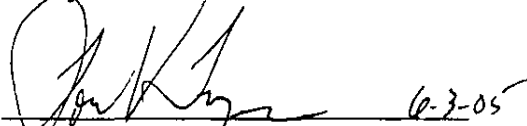
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1 41. This Court shall retain jurisdiction of this cause to assure compliance
2 with this Consent Order and for all purposes related to this action, including
3 securing additional funds or property from third parties for satisfaction of
4 Schotz's obligations for restitution and payment of his civil monetary penalty.
5

6 CONSENTED TO AND APPROVED BY:
7

8 

9 Barry Schotz

10 

11 Louis V. Traeger

12 Attorney for Plaintiff

13 Commodity Futures Trading Commission
14

15 IT IS SO ORDERED.

16 Dated: 7/21/05

17 

18 UNITED STATES DISTRICT JUDGE
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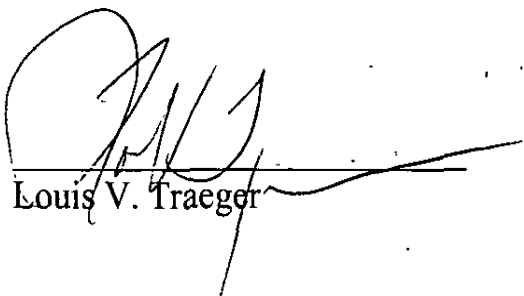
PROOF OF SERVICE

I certify and declare that I am over 18 years of age, not a party to this action, and am a member of the Bar of this Court. My business address is 525 West Monroe Street, Suite 1100, Chicago, Illinois 60661.

On July 25, 2005, I caused to be served true copies of the foregoing document by sending by the United States Postal Service, by first class mail with all fees fully prepaid to the following:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 25, 2005, at Chicago, Illinois.


Louis V. Traeger

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