

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

U.S. COMMODITY FUTURES	)
TRADING COMMISSION	)
	)
	)
Plaintiff,	)
	)
v.	)
ATWOOD & JAMES, LTD.,	)
a New York Corporation,	)
ATWOOD & JAMES, S.A., INC.,	)
a New York Corporation,	)
MICHAEL A. KARDONICK,	)
an individual, and	)
GARY R. SHAPOFF,	)
an individual	)
Defendants.	)
	)
	)

*EX PARTE* STATUTORY  
RESTRAINING ORDER,  
ACCOUNTING  
APPOINTMENT OF A  
TEMPORARY RECEIVER,  
FOR EXPEDITED DISCOVERY  
AND TO SHOW CAUSE  
REGARDING PRELIMINARY  
INJUNCTION

CASE NO. **09 CV 6032**

This matter came on for hearing on January 22, 2009 on the Plaintiff U.S. Commodity Futures Trading Commission's (the "Commission" or "Plaintiff") *Ex Parte* Motion for Statutory Restraining Order, Preliminary Injunction, An Accounting, Expedited Discovery and Appointment of a Receiver (the "Motion"). The Court, having considered the Complaint for Injunctive and Other Equitable Relief and for Civil Penalties under the Commodity Exchange Act, the Motion, Plaintiff's Memorandum in Support of the Motion and exhibits thereto, other materials and all other evidence presented by Plaintiff, and having heard the arguments of Plaintiff's counsel, finds that:

1. This Court has jurisdiction over the parties and over the subject matter of this action pursuant to Section 6c of the Commodity Exchange Act, as amended, 7 U.S.C. § 13a-1 (2006) (the "CEA").

2. Venue lies properly within this District pursuant to Section 6c(e) of the CEA,

7 U.S.C. § 13a-1(e) (2006). There is good cause to believe that the Defendants have engaged, are engaging and are about to engage in acts and practices constituting violations of the CEA, 7 U.S.C. §§ 1, *et seq.* (2006).

3. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for customers or clients in the form of monetary redress will occur from the sale, transfer, assignment, or other disposition by Defendants of assets or records unless Defendants are immediately restrained and enjoined by Order of this Court.

4. Good cause exists for the freezing of assets owned, controlled, managed or held by, on behalf of, or for the benefit of Defendants (hereinafter "Defendants' Assets" and for entry of an order prohibiting Defendants, their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with the Defendants, including any successor thereof, from destroying records and/or denying agents of the Commission access to inspect and copy records.

5. Good cause exists to permit expedited discovery before the early meeting of counsel pursuant to Rule 26(d) of the Federal Rules of Civil Procedure in order to determine the full extent of Defendants' wrongdoing, locate customers or clients, and other of Defendants' Assets and clarify the source of funds.

6. Pursuant to Rule 30(a)(2) of the Federal Rules of Civil Procedure, immediate depositions are consistent with the principles of Rule 26(b)(2) of the Federal Rules of Civil Procedure.

7. Weighing the equities and considering the Commission's likelihood of success in its claims for relief, the issuance of a statutory restraining order is in the public

interest.

## DEFINITIONS

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

8. 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.

9. "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 including bank accounts and accounts at financial institutions, credits, receivables, lines of credit, contracts including spot and futures contracts, insurance policies, and all cash, wherever located.

10. "Defendants" means Atwood & James, Ltd., Atwood & James, S.A., Inc., Michael A. Kardonick and Gary R. Shapoff, and any person insofar as he or she is acting in the capacity of an officer, agent, servant, employee, or attorney of Defendants, 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 Defendants.

## **RELIEF GRANTED**

### **I.**

#### **ORDER AGAINST TRANSFER, DISSIPATION, AND DISPOSAL OF ASSETS**

**IT IS HEREBY ORDERED** that

11. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with the Defendants, including any successor thereof, who receive actual notice of this Order are restrained and enjoined from directly or indirectly transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise disposing of any Defendants' Assets, wherever located, including assets held outside the United States, except as provided in Paragraph III of this Order, or as otherwise ordered by the Court. The assets affected by this paragraph shall include both existing assets and assets acquired after the effective date of this Order.

12. Defendants are restrained and enjoined from directly or indirectly opening or causing to be opened any safe deposit boxes titled in the name or subject to access by the Defendants.

### **II.**

#### **DIRECTIVES TO FINANCIAL INSTITUTIONS AND OTHERS**

**IT IS FURTHER ORDERED** that

13. Pending further Order of this Court, that any financial or brokerage institution, business entity, or person that holds, controls, or maintains custody of any of Defendants' Assets or accounts, or has held, controlled, or maintained custody of any Defendants' Assets or accounts at any time since July 1, 2001, shall:

14. Prohibit Defendants and all other persons from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling or otherwise disposing of any of Defendants' Assets except as directed by further order of the Court;

15. Deny Defendants and all other persons access to any safe deposit box that is: (a) titled in the name of the Defendants either individually or jointly; or (b) otherwise subject to access by the Defendants;

16. Provide counsel for the Commission, within five (5) business days of receiving a copy of this Order, a statement setting forth: (a) the identification number of each and every such account or asset owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendants, either individually or jointly; (b) 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 (c) the identification of any safe deposit box that is owned, controlled, managed, or held by, on behalf of, or for the benefit of Defendants, either individually or jointly, or is otherwise subject to access by the Defendants; and

17. Upon request by the Commission, promptly provide 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.

### **III.**

#### **ACCOUNTING AND TRANSFER OF FUNDS AND DOCUMENTS**

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

18. Provide the Commission with a full accounting of all of Defendants' Assets and documents, including those outside of the United States, that are held by them, for their benefit, or under their direct or indirect control, whether jointly or singly, from at least July 2001 to the date of this Order;

19. Transfer to the territory of the United States to the possession, custody and control of the Temporary Receiver, all of Defendants' Assets and documents located outside the United States; and

20. Provide the Commission access to all records of the Defendants held by financial institutions located within or outside the territorial United States by signing the Consent to Release of Financial Records attached to this Order.

### **IV.**

#### **MAINTENANCE OF BUSINESS RECORDS**

**IT IS FURTHER ORDERED** that:

21. Defendants and all persons or entities who receive notice of this Order by personal service or otherwise, are restrained and enjoined from directly or indirectly destroying, mutilating, erasing, altering, concealing or disposing of, in any manner, directly or indirectly, any documents that relate to the business practices or business or

personal finances of the Defendants.

V.

**INSPECTION AND COPYING OF BOOKS AND RECORDS**

**IT IS FURTHER ORDERED** that:

22. Representatives of the Commission be immediately allowed to inspect the books, records, and other documents of the Defendants and their agents including, but not limited to, electronically stored data, tape recordings, and computer discs, wherever they may be situated and whether they are on the person of the Defendants or others, and to copy said documents, data and records, either on or off the premises where they may be situated; and

23. Defendants and their agents, servants, employees, attorneys, and persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including facsimile transmission, shall cooperate fully with the Commission to locate and provide to representatives of the Commission all books and records of the Defendants, wherever such books and records may be situated.

VI.

**TEMPORARY RECEIVER**

24. **IT IS FURTHER ORDERED** that **ROBB EVANS** <sup>+ ASSOCIATES LLC</sup> is appointed (D)  
Temporary Receiver for the Defendants and any affiliates or subsidiaries of Defendants, with the full powers of an equity receiver. The Temporary Receiver shall be the agent of this Court in acting as Receiver under this Order.

25. **IT IS FURTHER ORDERED** that the Temporary Receiver is directed and authorized to accomplish the following:

- A. Assume full control of Atwood & James, Ltd. and Atwood & James, S.A., Inc. by removing any officer, independent contractor, employee, or agent of Atwood & James, Ltd. and Atwood & James S.A., Inc., from control and management of the affairs of the same;
- B. 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 Defendants, 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 Defendants, including documents related to customers or clients whose interests are now held by or under the direction, possession, custody or control of the Defendants. The Receiver shall have discretion to determine that certain personal property or other assets of the Defendants shall be under the Receiver's control, but shall remain in the possession or custody of the Defendants;
- C. Take all steps necessary to secure the business premises of the Defendants and any and all other premises under the control of the Defendants;
- 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 Defendants, and otherwise protect the interests of customers or clients;

- F. Manage and administer the Defendants by performing all acts incidental thereto that the receiver deems appropriate, including hiring or dismissing any and all personnel or suspending operations;
- G. Collect all money owed to the Defendants;
- H. 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 Defendants or to carry out his or her duties pursuant to this Order;
- I. 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;
- J. Issue subpoenas to obtain documents and records pertaining to the receivership, and conduct discovery in this action on behalf of the receivership estate;
- K. Open one or more bank accounts as designated depositories for funds of the Defendants. The Receiver shall deposit all funds of the Defendants in such designated accounts and shall make all payments and disbursements from the receivership estate from such accounts; and
- L. 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

Defendants prior to the date of entry of this Order, except for payments that the Receiver deems necessary or advisable to secure assets of the Defendants.

**VII.**

**ORDER PERMITTING EXPEDITED DISCOVERY**

**IT IS FURTHER ORDERED** that:

26. The Commission and Temporary Receiver may conduct expedited discovery, removing the prohibition upon discovery before the early meeting of counsel pursuant to Rule 26(d) of the Federal Rules of Civil Procedure.

27. The prohibition upon the immediate commencement of depositions is removed pursuant to Rule 30(a)(2)(C) of the Federal Rules of Civil Procedure.

28. The parties may proceed to take the oral deposition of any person upon three calendar days actual notice if the notice is served upon the parties personally or by telecopier to the party's last known business telecopier number.

29. The parties may take the deposition of any person for the purpose of discovering the nature, location, status and extent of Defendants' alleged wrongdoing (including but not limited to the possible involvement of others), locate other clients, identify client funds and Defendants' Assets and clarify the source of various funds.

**VIII.**

**BOND NOT REQUIRED OF PLAINTIFF**

**IT IS FURTHER ORDERED** that:

30. Plaintiff Commission is an agency of the United States of America and,

accordingly, no bond need be posted by the Commission.

IX.

ORDER TO SHOW CAUSE

IT IS FURTHER ORDERED that:

31. Defendant shall appear before this Court on the 6<sup>TH</sup> day of FEBRUARY 2009, at <sup>4:00</sup>~~am~~ pm, before the United States District Judge at the United States Courthouse for the Western District of New York, Rochester Division, to show cause, if there be any, why an Order for Preliminary Injunction should not be granted to prohibit further violations of the CEA and Regulations and why the other relief requested should not be granted pending trial on the merits of this action. CJ

32. Should any party wish to file a memorandum of law or other papers in opposition to the Motion, all papers shall be filed on or before JAN 31, 2009 and served no later than FEB 2, 2009. CJ

X.

SERVICE OF ORDER

IT IS FURTHER ORDERED that:

33. This Order shall be served on Defendants by personal service consistent with Federal Rule of Civil Procedure Rules 4(e) and 4(f). All subsequent pleadings, correspondence, notices required by this Order, and other materials be served consistent with Federal Rule of Civil Procedure Rule 4.

XI.

**FORCE AND EFFECT**

**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**, at Rochester, New York on this 23 day of January 2009 at  
4:25  
       am/pm.

Cherew Stragusa  
UNITED STATES DISTRICT JUDGE