

JUDGE COTE

11 CV 2576

COTE, J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

OTMANE EL RHAZI,

Defendant.

Civil Case No. _____

~~[Proposed]~~

**EX PARTE STATUTORY
RESTRAINING ORDER FREEZING
ASSETS, PROHIBITING THE
DESTRUCTION OR ALTERATION
OF DOCUMENTS, GRANTING
EXPEDITED DISCOVERY,
ORDERING AN ACCOUNTING OF
ASSETS, AND AN ORDER TO SHOW
CAUSE WHY A PRELIMINARY
INJUNCTION SHOULD NOT BE
GRANTED**

(ECF CASE)

Plaintiff, U.S. Commodity Futures Trading Commission (the "Commission") has filed a complaint for a preliminary and permanent injunction and other relief, and moved pursuant to Section 6(c) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2006), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act ("CRA"), §§ 13101-13204, 122 Stat. 1651 (effective June 18, 2008), to be codified at 7 U.S.C. §13a-1 for an *ex parte* statutory restraining order freezing assets, prohibiting the destruction of books, records, or other documents, granting leave to the Commission to engage in expedited asset discovery for the purpose of discovering the nature, location, status, and extent of assets, and ordering Defendant Otmane El Rhazi (the "Defendant") to show cause why a preliminary injunction should not be issued.

The Court has considered the pleadings, the declaration of Brian Rushton and the memorandum of law filed in support of the Commission's application and now, being fully advised in the premises, finds that:

- (1) This Court has jurisdiction over the subject matter of this case, and Section 6c of the Act, 7 U.S.C. §13a-1, as amended by the CRA, authorizes the *ex parte* relief;
- (2) There is good cause to believe that the Defendant has engaged in, is engaging in, or is about to engage in (a) fraud constituting violations of 7 U.S.C. §§ 6b(a)(2)(A) and (C), (b) fictitious sales in violation of 7 U.S.C. §6c(a) as amended by the CRA, (c) noncompetitive trading and failure to report the same in violation of 17 C.F.R. § 1.38;
- (3) Absent the entry of this statutory restraining order, the Defendant is likely to cause the dissipation or transfer assets and destruction of business records. As such, good cause exists for the freezing of Defendant's assets and for entry of an Order prohibiting the Defendant from destroying records and denying agents of the Commission access to inspect and copy records;
- (4) Good cause exists for the freezing of the Defendant's assets and for entry of an order prohibiting Defendant from destroying records and denying agents of the Commission access to inspect and copy records;
- (5) Good cause exists to permit asset discovery before the meeting of counsel pursuant to Rule 26(d) of the Federal Rules of Civil Procedure;
- (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; and
- (8) This is a proper case for granting a statutory restraining order to preserve the status quo, protect customers from loss and damage, and enable the Commission to fulfill its statutory duties, therefore the Court orders as follows:

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, contracts, insurance policies, and all cash, wherever located, whether in the United States or abroad.
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 reasonable usable form. A draft or non-identical copy is a separate document within the meaning of the term.
3. The term "Defendant" refers to Otmane El Rhazi 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

I. Asset Freeze

IT IS HEREBY ORDERED that the Defendant, except as otherwise ordered by this Court, is restrained and enjoined from directly or indirectly:

- A. Transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise disposing of any assets, wherever located, including assets held outside the United States, except as provided in this Order, or as otherwise ordered by the Court;
- B. Opening or causing to be opened any safe deposit boxes titled in the name or subject to access by the Defendant.

II. Identification and Preservation of Assets

IT IS FURTHER ORDERED, pending further Order of this Court, that any financial or brokerage institution or business entity 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, including, but not limited to, Interactive Brokers LLC and/or its affiliates, subsidiaries and assigns, shall:

- A. Prohibit the Defendant and all other persons from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling or otherwise disposing of any such asset, except as directed by further order of the Court;
- B. Deny the Defendant and all other persons access to any safe deposit box that is titled in the name of the Defendant or otherwise subject to access by the

Defendant;

- C. Provide the Commission, within five (5) business days of receiving a copy of this Order, a statement setting forth:
- (1) the identification number of each such account or asset titled in the name 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, 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 of Defendant, or is otherwise subject to access by the Defendant;
- D. 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, trading records, and safe deposit box logs; and
- E. Cooperate with all reasonable requests of the Commission relating to implementation of this Order, including producing records related to Defendant's accounts.

III. Accounting of Assets

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

- A. Provide the Commission with a full accounting of all funds, documents, and assets both within and outside the United States which are (1) titled in the name of the Defendant; or (2) held by any person or entity, for the benefit of the Defendant; or (3) under the Defendant's direct or indirect control; or (4) subject to direct or indirect access by the Defendant; and
- B. Provide the Commission access to all records of accounts or assets of the Defendant held by financial institutions located both within and outside the territorial United States by signing the Consent to Release of Financial Records attached to this Order.

IV. Maintenance of and Access to Business Records

IT IS HEREBY ORDERED that the Defendant, 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 Defendant.

V. Commission's Access to and Inspection of Documents

IT IS FURTHER ORDERED that representatives of the Commission be immediately allowed to inspect the books, records, and other documents of the Defendant and his agents including, but not limited to, paper documents, electronically stored data, tape recordings, and computer discs, wherever they may be situated and whether they are in the possession of the

Defendant or others, and to copy said documents, data and records, either on or off the premises where they may be situated. Upon request of the Commission, the Defendant is ordered to deliver to the Commission 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, cancelled checks, records of wire transfers, and check registers), lists of customers, title documents, other papers, 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 information identifying the accounts, employees, properties, or other assets or obligations of the Defendant.

VI. Service of Order

IT IS FURTHER ORDERED that service of a copy of this order upon Defendant via

- (a) Overnight Delivery to Defendant's home address;
- (b) in accordance with Commission Regulation 15.05(b), 17 C.F.R. 15.05(b) (2011) (appointing the futures commission merchant carrying an account for a foreign national to be the agent for service), delivery to Defendant's futures commission merchant Interactive Brokers LLC, One Pickwick Plaza, Suite 200, Greenwich, CT 06830; or
- (c) by electronic mail to the following addresses listed by Defendant in opening said account, to wit, ibfin@yahoo.co.uk and el_rhazi_otmane@yahoo.fr;

shall be good and sufficient service thereof and that copies of this Order may be served by any means, including facsimile or e-mail 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.

VII. Expedited Asset Discovery

IT IS FURTHER ORDERED that the Commission is granted leave, at any time after service of this Order, to take the deposition of and demand the production of documents from any person or entity for the purpose of discovering the nature, location, status, and extent of assets of the Defendant, and the location of documents reflecting the business transactions of the Defendant; forty-eight (48) hours notice shall be deemed sufficient for any such deposition and five (5) days notice shall be deemed sufficient for the production of any such documents.

VIII. Depositions

IT IS FURTHER ORDERED that the limitations and conditions set forth in Federal Rule of Civil Procedure 30(a)(2)(A) regarding subsequent depositions of an individual shall not apply to depositions taken pursuant to this Order. No depositions taken pursuant to Paragraph VII shall count toward the ten-deposition limit set forth in Federal Rule of Civil Procedure 30(a)(2)(A).

IX. Service on the Commission

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 David Oakland, Trial Attorney, Division of Enforcement, U.S. Commodity Futures Trading Commission, Eastern Regional Office, 140 Broadway, 19th Floor, New York, New York 10005.

X. Order to Show Cause

IT IS FURTHER ORDERED that Defendant, show cause before a motion term of this Court, at Room 1118, United States Courthouse, 500 Pearl Street, in the City, County and State of New York, on April 26, 2011, at 2⁰⁰ o'clock in the ~~morning~~/afternoon thereof, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2006), ordering that:

A. Defendant and any of his agents, servants, employees, assigns, attorneys, and persons in active concert or participation with the Defendant, including any successor thereof is preliminarily enjoined from further violations of the Act and Commission Regulations; specifically, prohibiting the Defendant directly or indirectly:

1. Violating section 4c(a) of the Act, 7 U.S.C. § 6c(a) by entering into transactions that are of the character of, or are commonly known to the trade as, “wash sales” or “accommodation trades” or are fictitious sales involving the purchase or sale of a commodity for future delivery which transaction was used or may have been used to hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity; or to determine the price basis of any such transaction in interstate commerce in the commodity; or to deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.
2. Violating Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2009), by engaging in any posting of bids and offers for the purchase or sale of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market, that are not executed openly and competitively.

3. Violating Section 4b(a)(1) of the Act, 7 U.S.C. § 6b(a)(1), by cheating or defrauding or attempting to cheat or defraud any other person, or making or causing to be made any false report or statement thereof or causing to be entered for any person any false record thereof, or deceiving or attempting to deceive any other person by any means whatsoever, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made; on or subject to the rules of a designated contract market for or on behalf of any other person.
4. Engaging in any activity related to trading in any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4) (2006), (“commodity interest”), including, but not limited to, the following:
 - a. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(29) of the Act, as amended, 7 U.S.C. § 1a(29));
 - b. Entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2010)) (“commodity options”), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex contracts”) for his own personal account or for any account in which he has a direct or indirect interest;
 - c. Having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on his behalf;

- d. Controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;
- e. Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;
- f. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and
- g. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2010)), agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010).

B. Continuing the freeze on the assets of the Defendant;

C. Ordering Defendant to repatriate to the territory of the United States and deliver to the Registry of this Court all funds and assets located in foreign countries which are (1) titled in the name individually or jointly of Defendant; or (2) held by a person or entity for the benefit of the Defendant; or (3) under such Defendant's direct or indirect control, whether jointly or singly;

D. Ordering the Defendant, financial or brokerage institutions, business entities, and others to provide all documents specified in this Order to the Commission; and

E. Ordering any additional relief this Court deems appropriate.

Should the Defendant wish to file a memorandum of law or other papers concerning the issuance of a preliminary injunction against the Defendant, such materials shall be filed, served and received by all parties ^{no later than Friday, April 22, 2011,} ~~at least two (2) days before the hearing date ordered above.~~

XI. Force and Effect of Order

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,

On this 15th day of April 2011.

12⁰⁵
pm



U.S.D.J.
United States District Court
Southern District of New York



CONSENT TO RELEASE OF FINANCIAL RECORDS

I, _____, do hereby direct any bank, financial institution or trust company at which I have an 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 accounts to any attorney of the U.S. Commodity Futures Trading Commission, and to give evidence relevant thereto, in the matter of U.S. Commodity Futures Trading Commission v. Otmame El Rhazi Docket No. _____ now pending before the United States District Court for the Southern District of New York, 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 of bank information without the consent of the holder of the account, and shall be construed as consent with respect thereto, and the same apply to any of the bank accounts for which I may be a relevant principal.

Dated: _____, 2011

Signature