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18 Commodity Futures Trading Commission

19 UNITED STATES DISTRICT COURT  
20 CENTRAL DISTRICT CALIFORNIA  
21 WESTERN DIVISION

22 Commodity Futures Trading Commission, )  
23 Plaintiff, )

24 vs. )  
25 Barry Schotz et al, )  
26 Defendants )

27 Randolph Gale )  
28 Cross Claimant, )  
29 vs. )  
30 Barry Schotz et al, )  
31 Cross Defendants. )

Case No: CV04-8889 SJO (SSx)

Consent Order of Permanent Injunction  
and Other Ancillary Relief Against  
Defendant Randolph Gale

JUDGE: S. James Otero

TIME:

DATE:

PLACE

DOCKETED ON CM  
JUN 17 2005  
BY [Signature] 503  
56

FILED  
CLERK, U.S. DISTRICT COURT  
JUN 16 2005  
CENTRAL DISTRICT OF CALIFORNIA  
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U.S. DISTRICT COURT  
JUN - 9 2005  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

1 1. Plaintiff, Commodity Futures Trading Commission ("Commission" or  
2 "CFTC"), filed a Complaint against Defendants Barry Schotz ("Schotz") and  
3 Randolph Gale ("Gale") (collectively "Defendants") on October 27, 2004,  
4 seeking injunctive and other equitable relief for violations of the Commodity  
5 Exchange Act, as amended ("Act"), 7 U.S.C. §§ 1 et seq. (2002), and Regulations  
6 promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2004). The Court entered a  
7 Statutory Restraining Order the same day. On November 10, 2004, the Court  
8 entered a Consent Order of Preliminary Injunction and Other Ancillary Relief  
9 against both Defendants  
10  
11  
12

13 **I. Consent And Agreement**

14 2. To effect settlement of the matters alleged in the Complaint against  
15 Defendant Gale without a trial on the merits or any further judicial proceedings,  
16 without admitting or denying the allegations of the complaint:  
17

18 3. Gale consents to the entry of this Consent Order of Permanent Injunction  
19 and Other Equitable Relief ("Order").  
20

21 4. Gale affirms that he has agreed to this Order voluntarily, and that no  
22 promise or threat has been made by the CFTC or any member, officer, agent or  
23 representative thereof, or by any other person, to induce consent to this Order,  
24 other than as set forth specifically herein.  
25

26 5. Gale acknowledges service of the Summons and Complaint.

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

5 7. Gale 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 8. 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 Gale or any other person  
20 in any other proceeding, including any current or subsequent bankruptcy.  
21

22 Furthermore, the allegations of the Complaint and the findings in this Order shall  
23 be taken as true and correct and be given preclusive effect, without further proof  
24 for the purpose of any current or subsequent bankruptcy proceeding filed by, or  
25 on behalf of, Gale, or any proceeding to enforce this Order, or any other  
26

1 proceeding relating to the fitness of Gale to act in various capacities governed by  
2 the Act.

3 9. Gale agrees to cooperate with staff of the Commission in the continuing  
4 litigation of this matter. As part of such cooperation, Gale 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 Gale's possession, custody, or control, and  
9 permitting Commission staff to inspect and copy such documents; (3) testifying  
10 completely and truthfully in this action and producing statements to the  
11 Commission, interviews, depositions, or testimony, and to provide testimony  
12 (including witness preparation) related to any trial the subject matter of this  
13 proceeding.  
14  
15  
16  
17

18 10. Gale agrees that neither he nor any of his agents or employees acting  
19 under his authority or control shall take any action or make any public statement  
20 denying, directly or indirectly, any allegation in the Complaint or findings or  
21 conclusions in this Order, or creating, or tending to create, the impression that the  
22 Complaint or this Order is without a factual basis; provided, however, that  
23 nothing in this provision shall affect Gale's: i) testimonial obligations; or ii)  
24 rights to take legal positions in other proceedings to which the CFTC is not a  
25  
26

1 party. Gale shall take all necessary steps to ensure that all of his agents and  
2 employees understand and comply with this agreement.

3 11. Gale Consents to the continued jurisdiction of this Court for the  
4 purpose of enforcing the terms and conditions of this Order and for any other  
5 purposes relevant to this case.  
6

## 7 **II. Findings of Fact**

8 The Court hereby makes the following findings of fact:  
9

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

13 13. Venue properly lies with this Court pursuant to Section 6c of the Act,  
14 7 U.S.C. § 13a-1 because Gale is found in, inhabits, or transacts business in this  
15 district, and the acts and practices in violation of the Act have occurred, are  
16 occurring, or are about to occur within this district, among other places.  
17

18 14. From about August 2003 through May 2004, Gale was associated with  
19 Schotz in the operation of a commodity pool called the Bear Invest Fund ("Bear")  
20 without being registered with the CFTC as an associated person ("AP") of a  
21 commodity pool operator ("CPO").  
22

23 15. Gale and Schotz agreed that Gale would solicit pool participants using  
24 account opening documents created by Schotz. Schotz also would report pool  
25 trading results to Gale, who was then to report them to pool participants. Schotz  
26

1 also continued to solicit pool participants independently from Gale.

2 16. Gale sent pool participation agreements by e-mail or by facsimile to  
3 prospective pool participants along with instructions on how to wire funds into  
4 the Bear pool bank account established by Schotz.  
5

6 17. From about August 2003 to May 2004, Gale solicited approximately  
7 \$1,960,000 in the name of Bear, from approximately 34 pool participants, most of  
8 whom resided in and around Los Angeles County, California. Pool participants  
9 deposited these funds into the Bear bank account established by Schotz, and Gale  
10 also deposited his own money in the Bear pool. These pooled funds were used to  
11 trade commodity futures through at least two accounts at two different futures  
12 commission merchants ("FCMs").  
13  
14

15 18. At the end of April 2004, Gale sought to withdraw his purported profits  
16 from the pool. Schotz informed him that there were no pool trading profits and  
17 that Schotz had lost money trading pool funds. In early May 2004, Gale notified  
18 the FCM clearing trades for the pool that Schotz was engaging in pool fraud.  
19

20 19. In early May 2004, Gale commenced gathering the funds needed to  
21 make whole all the pool participants whom Gale had solicited. This amount was  
22 approximately \$1,635,000, which represented the amount that those participants  
23 had deposited into the pool less amounts pool participants had withdrawn. Gale  
24 accumulated funds from three sources. At Gale's request, Schotz transferred  
25  
26

1 approximately \$900,000 from the clearing FCM to Gale's attorney to be used for  
2 distribution to pool participants. Gale also disgorged all funds he had received  
3 from the pool and made up the shortfall to pool participants from his own funds.  
4  
5 Gale then made full restitution to Bear pool participants he had solicited.

6 20. Gale assisted the CFTC in the prosecution of this action by providing  
7 evidence, a declaration under oath, records of pool activity, and a statement under  
8 oath detailing both his and Schotz's activity in the operation of the pool.  
9

10 **III. Conclusions of Law**

11 21. From at least August 2003 to the filing of the complaint, Gale acted as  
12 an AP of a CPO by associating with a commodity pool operator as a partner,  
13 officer, employee, consultant, or agent (or as a person occupying a similar status  
14 or performing similar functions), in a capacity that involves (i) the solicitation of  
15 funds, securities, or property for a participation in a commodity pool or (ii) the  
16 supervision of any person or persons so engaged, without being registered with  
17 the CFTC as an associated person of such commodity pool operator, and engaged  
18 in these activities without the benefit of registration, in violation of Section 4k(2)  
19 of the Act, 7 U.S.C. § 6k(2) (2003).  
20  
21  
22

23 **IV. Order For Permanent Injunction**

24 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

25 22. Gale and his agents are permanently restrained, enjoined and prohibited  
26

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1 from directly or indirectly:

2 A. Acting as an associated person ("AP") of a CPO by associating with a  
3 commodity pool operator as a partner, officer, employee, consultant, or agent (or  
4 as a person occupying a similar status or performing similar functions), in a  
5 capacity that involves (i) the solicitation of funds, securities, or property for a  
6 participation in a commodity pool or (ii) the supervision of any person or persons  
7 so engaged, without being registered with the CFTC as an associated person of a  
8 commodity pool operator in violation of Section 4k(2) of the Act, 7 U.S.C.  
9 § 6k(2) (2002).

12 B. Soliciting, receiving or accepting any funds from any person in  
13 connection with the purchase or sale of any commodity futures or options and/or  
14 using any funds received from third parties for the purpose of trading commodity  
15 futures or options.

17 C. Engaging in, controlling, directing or accepting funds for the trading for  
18 any commodity futures or options accounts for or on behalf of any other person or  
19 entity, whether by power of attorney or otherwise;

21 D. Applying for registration or claiming exemption from registration with  
22 the Commission in any capacity, and engaging in any activity requiring such  
23 registration or exemption from registration, except as provided for in Commission  
24 Regulation 4.14(a)(9), 17 C.F.R § 4.14(a)(9), or acting as a principal, agent,  
25  
26

1 officer or employee of any person registered, exempted from registration, or  
2 required to be registered with the Commission unless such exemption is pursuant  
3 to Commission Regulation 4.14(a)(9).  
4

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

6 **IT IS FURTHER ORDERED THAT:**

7 23. No civil monetary penalty is being imposed upon Gale because of his  
8 early reporting of the misconduct in this matter, his cooperation with the CFTC,  
9 his voluntary disgorgement of benefits and making of restitution, and his  
10 agreement to take other steps relevant to the issue of preventing future violations,  
11 which are factors considered under *Enforcement Advisory: Cooperation Factors*  
12 *In Enforcement Division Sanction Recommendations*. [2003-2004 Transfer  
13 Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,819 (CFTC Aug. 11, 2004), in  
14 determining the assessment of civil monetary penalties.  
15  
16  
17

18 24. The injunctive provisions of this Order shall be binding on Gale, upon  
19 any person insofar as he or she is acting in the capacity of officer, agent, servant,  
20 employee or attorney of Gale, and upon any person who receives actual notice of  
21 this Order by personal service, facsimile or otherwise insofar as he or she is  
22 acting in active concert or participation with Gale.  
23

24 25. This Order incorporates all of the terms and conditions of the  
25 settlement among the parties hereto. Nothing shall serve to amend or modify this  
26

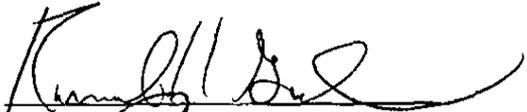
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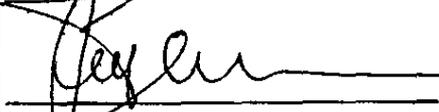
1 Consent Order in any respect whatsoever, unless: (1) reduced to writing;  
2 (2) signed by all parties hereto; and (3) approved by order of this Court.

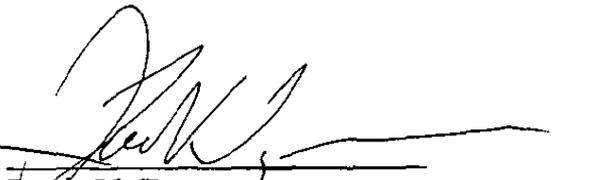
3 26. The failure of any party to this Order to require performance of any  
4 provision of this Order shall in no manner affect the right of such party at a later  
5 time to enforce the same or any other provision of this Order. No waiver in one  
6 or more instances of the breach of any provision contained in this Order shall be  
7 construed as a further or continuing waiver of a breach of any other provision of  
8 this Order.  
9  
10

11 27. This Court shall retain jurisdiction of this cause to assure compliance  
12 with this Consent Order and for all purposes related to this action.  
13

14 **CONSENTED TO AND APPROVED BY:**

15   
16 Randolph Gale

17   
18 Peter Clinco, Esq.  
19 Attorney for Defendant  
20 Randolph Gale

17   
18 Louis V. Traeger  
19 Attorney for Plaintiff  
20 Commodity Futures Trading Commission

21  
22 **IT IS SO ORDERED.**

23 Dated: 6/14/05  
24

25   
26 UNITED STATES DISTRICT JUDGE

SCANNED

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 June 8, 2005, I caused to be served true copies of the foregoing document by causing to be sent 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 June 8, 2005, at Chicago, Illinois.

  
Louis V. Traeger

Service List

SCANNED

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