


FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

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WESTERN DISTRICT OF MICH
BY: 

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

AURIFEX COMMODITIES RESEARCH
COMPANY;
AURIFEX RESEARCH, L.L.C.;
TY KLOTZ, individually and d/b/a
AURIFEX INVESTMENTS; and
MONETTE KLOTZ, individually and d/b/a
AURIFEX INVESTMENTS,

Defendants.

CIVIL ACTION NO. 06-CV-0166

Hon. Robert Holmes Bell

**PRELIMINARY INJUNCTION AND OTHER ANCILLARY RELIEF AGAINST
DEFENDANTS AURIFEX COMMODITIES RESEARCH COMPANY, AURIFEX
RESEARCH, L.L.C., TY KLOTZ AND MONETTE KLOTZ**

Plaintiff, Commodity Futures Trading Commission ("Commission"), has filed a Complaint against Defendants Aurifex Commodities Research Co. ("Aurifex Co."), Aurifex Research, L.L.C. ("Aurifex LLC"), Ty Klotz ("Klotz") and Monette Klotz ("M. Klotz") (collectively the "Defendants") seeking injunctive and other equitable relief for violations of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§ 1 et seq. (2001), and Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2003). The Court entered a Statutory Restraining Order against each of the defendants on March 8, 2006.

The Court has considered the Complaint, Motion for Entry of a Preliminary Injunction, Plaintiff's Brief in Support of Motions for Entry of *Ex Parte* Statutory Restraining Order,

Preliminary Injunction and Expedited Discovery and Appendix of Exhibits, including the declarations of Commission investigators, Ken Hampton and Tom Koprowski, the declaration of the Deputy Record Custodian for the National Futures Association, Sandra A. Guard, the declaration of a Liaison Officer for the Corporation of Lloyd's in the United Kingdom, Steve Browning, and two participants in the commodity pool that is the subject of this lawsuit, namely, Michelle Mullins and Tim Mullins, and other papers filed herein, and on May 31, 2006 received the live testimony of Nancy Carter, Michelle Mullins, John Seiler, ^{Sandy Seiler} Ken Hampton and Tom Koprowski and heard the arguments of counsel for the plaintiff and the defendants.

A. Facts

Plaintiff Commission is an independent federal regulatory agency charged with the responsibility of administering and enforcing the provisions of the Act. Defendant Aurifex Co. is a Michigan corporation whose registered agent, incorporator and president is Richard Robbins ("Robbins"). Defendant Aurifex LLC is an unincorporated membership organization formed under the Michigan Limited Liability Act and was operated by M. Klotz. Defendant Klotz and M. Klotz are both 44 year-old Michigan residents. Each of the defendants has opposed the issuance of a preliminary injunction.

According to Plaintiff, Defendants Aurifex Co, Aurifex LLC and Klotz have solicited and each of them and M. Klotz have accepted and pooled at least \$2 million (hereinafter the "Pool") from at least 300 individuals (hereinafter the "participants"). Defendants used the Pool to trade commodity futures and options and also for their own personal expenditures, thereby misappropriating a portion of those funds. Although the Aurifex Pool lost an aggregate sum of \$60,621 from April 2004 through January 2006 (through futures trading in an account at Xpresstrade), Plaintiff alleges that Klotz hid the losses from the participants by preparing and

distributing false account statements. Furthermore, Plaintiff alleges that while soliciting the participants of the Pool, Klotz made material misrepresentations about the nature of the investment, the risk associated with the investment and the past success of the investment. Plaintiff also alleges that Defendants misappropriated a portion of the Pool and that at least 75 investors are owed a total of more than \$1.2 million.

B. Plaintiff's Motion for Preliminary Injunction

Plaintiff seeks a preliminary injunction under Section 6c of the Act, 7 U.S.C. § 13a-1, freezing Defendant Aurifex Co.'s, Aurifex LLC's, Klotz's and M. Klotz's assets, prohibiting the destruction of, and giving Plaintiff access to, Defendants' books and records, and enjoining Defendants from future violations of the Act. Plaintiff is authorized to bring a motion for preliminary injunction under the Act whenever it appears "that any person has engaged, is engaging or is about to engage in any act or practice constituting a violation of the [Act]." 7 U.S.C. § 13a-1. Furthermore, "[u]pon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." 7 U.S.C. § 13a-1(b). Unlike private actions, which are rooted in the equity jurisdiction of the Court, suits for injunctive relief under section 13a-1 are statutorily created, remedial in nature, and designed to prevent injury to the public and to deter future illegal conduct. *See Commodity Futures Trading Comm'n v. Hunt*, 591 F. 2d 1211, 1219 (7th Cir. 1978). Therefore, restrictive concepts ordinarily associated with private litigation, such as proof of irreparable injury or inadequacy of other remedies, are inapplicable. *See Hunt*, 591 F. 2d at 1219.

A preliminary injunction should be granted under the Act when Plaintiff demonstrates a reasonable likelihood of future violations of the Act. *See Kelley v. Carr*, 442 F. Supp. 346, 356 (W.D. Mich. 1977), *aff'd in part and rev'd in part on other grounds*, 691 F. 2d 800 (6th Cir.

1980); *Commodity Futures Trading Comm'n v. Skorupskas*, 605 F. Supp. 923 (E.D. Mich. 1985) (granting permanent injunction upon finding a “reasonable likelihood of future violations”). In determining whether to issue an injunction, “courts have generally considered the egregiousness of the defendant’s action, the recurrent nature of the violations, the degree of scienter involved, the defendant’s recognition of the wrongfulness of the conduct, and the likelihood of opportunities for future violations.” *Commodity Futures Trading Comm'n v. Skorupskas*, 605 F. Supp. 923 (E.D. Mich. 1985) (citing *Hunt*, 591 F. 2d at 1220). In other words, the determination of the likelihood of future violations is based upon the totality of the circumstances surrounding the defendant’s violations and “factors suggesting that the infraction might not have been an isolated occurrence are always relevant.” *See Hunt*, 591 F. 2d at 1220. Moreover, the Fourth Circuit has held that while the “reasonable likelihood” standard applies to injunctions against future violations of the Act, a prima facie case of illegality is all that is required to enjoin defendants from dissipating any funds until resolution of the case. *See Commodity Futures Trading Comm'n v. Muller*, 570 F. 2d 1296, 1300 (4th Cir. 1978).

PLAINTIFF’S ALLEGATIONS

1. During the relevant time, Klotz, while operating as a representative of Aurifex Co. and Aurifex L.L.C. solicited money from participants for the purpose of trading commodity futures contracts and options on futures contracts in a commodity pool operated by the defendants.

2. During the relevant time, Aurifex Co., Aurifex LLC, Klotz and M. Klotz acted as commodity pool operators (“CPOs”) without being registered as such with the Commission. While acting as CPOs, each of the defendants failed to provide participants with a complete periodic account statement including annual reports required by Commission Regulation 4.22(c).

3. During the course of operating the Aurifex commodity pool ("Pool"), defendants Klotz and M. Klotz misappropriated participants' funds.

4. During the course of soliciting participants, Klotz omitted telling Pool participants the fact that their funds would be deposited in a commodity futures account in which they have no interest, while downplaying the risks of the investment.

5. During the course of soliciting participants, Klotz made the following fraudulent statements to participants and prospective participants:

- (a) Aurifex had been averaging a return of 20% per month for participants over the past two years;
- (b) Klotz had made an average of 20% per month with his own investment in commodity futures through Aurifex;
- (c) An investment with Aurifex had no risk of loss of principal, as the participant's principal was insured with a Lloyd's of London insurance policy presumably paid for by Aurifex as no premiums were collected from participants;
- (d) Aurifex does not trade commodity futures with participant funds since those funds remain on deposit in Klotz's personal bank account at the National City Bank, instead Aurifex only trades Klotz's personal funds;
- (e) Aurifex would only retain 10% of the amount of a participant's principal as its fee once the investment had doubled; and
- (f) Aurifex participants could withdraw their principal and profits at any time.

6. Klotz prepared, or directed the preparation of, and sent out monthly account statements to participants. These statements were false as they always showed profits and never disclosed to participants that the Pool had suffered trading losses or that any portion of their investments had been lost.

7. The only commodity trading account that ever received Pool funds was M. Klotz's account at Xpresstrade. In reality, from April 2004 when M. Klotz first opened her commodity

futures trading account at Xpresstrade, through January 2006, the Pool lost \$60,622 trading commodity futures and options.

8. During the relevant time, defendants collected at least \$2 million from participants in the United States. Further, and more specifically, there was not less than \$400,000 in pooled participant funds, thereby exceeding the level of total gross capital contributions for a person to be exempt from registration as a commodity pool operator under Commission Regulation 4.13(a)(2)(i), 17 C.F.R. § 4.13(a)(2)(i).

9. During the relevant time, defendants collected contributions from at least 300 participants, who defendants have said that they separated into three groups of approximately 100 participants in each group, thereby exceeding the level of 15 participants in the Pool at any time in order to be exempt from registration as a commodity pool operator under Commission Regulation 4.13(a)(2)(i), 17 C.F.R. § 4.13(a)(2)(i).

10. Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz made some payments to some participants, using newly acquired funds from newer participants to repay earlier participants, in a manner akin to a Ponzi scheme.

11. After contacting 75 participants out of 300 total participants, plaintiff has determined that defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz currently owe those 75 participants approximately \$1,259,400.

THE COURT FINDS THAT:

1. This Court has jurisdiction over the subject matter of this action and defendants Aurifex Co, Aurifex LLC, Klotz and M. Klotz pursuant to Section 6c of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 13a-1 (2001), which authorizes 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 Act or any rule, regulation or order thereunder.

2. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2001), in that the Defendants are found in, inhabit, or transact business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

3. Defendants Aurifex Co, Aurifex LLC, Klotz and M. Klotz have been served with the summons and complaint. Aurifex Co, Aurifex LLC and M. Klotz have each formally appeared herein. Klotz has not filed a formal appearance nor answer; however, he has submitted himself to the jurisdiction of this court in that he has submitted himself to a deposition pursuant to a subpoena issued in this matter and has provided two written responses to a formal request to produce documents directed to him by the plaintiff in this matter.

4. At this stage of the proceedings, the Court finds that Plaintiff has brought forth sufficient evidence to indicate that Defendants Aurifex Co., Aurifex LLC and Klotz committed fraud in connection with soliciting funds to be traded in commodity futures in violation of the Act.

5. Plaintiff has also demonstrated that Defendants acted as a CPOs without being registered with the Commission. The term "commodity pool operator" means:

any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms or securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility.

7 U.S. C. § 1a(5). Plaintiff has shown that Defendant Klotz solicited, and that defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz received funds from Participants that were combined with other funds and that a portion of those funds were used to trade commodity futures. Plaintiff has also shown that none of the Defendants have ever been registered with the Commission. Therefore, Plaintiff has brought forth sufficient evidence at this stage of the proceedings to demonstrate that Defendants acted as CPOs without registration.

6. The court finds a “reasonable likelihood of future violations” based on the totality of the circumstances. Plaintiff has offered evidence of fraud and other misconduct on the part of Defendants. Furthermore, Defendant Klotz has not appeared nor answered the Plaintiff’s allegations. Defendants M. Klotz and Aurifex Co. have maintained that they has done nothing wrong, and specifically in their answers have averred that they have not acted as commodity pool operators nor that they misappropriated public funds. Accordingly Plaintiff has brought forth sufficient evidence to warrant the issuance of a preliminary injunction.

7. In addition, the evidence of fraud, coupled with the fact that at least \$1,259,400 of participant funds have not been accounted for and are owed to Participants, justifies freezing the assets of Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz pending resolution of this case.

8. However, this case is at the preliminary injunction level and the merits of the case have not yet been considered. *See Kelly*, 442 F. Supp. at 360.

IT IS THEREFORE ORDERED THAT:

1. Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz are restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

A. Cheating, defrauding or willfully deceiving or attempting to cheat, defraud or willfully deceive other persons in or in connection with an offer to enter

into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity futures transactions, in violation of Sections 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii);

- B. Cheating, defrauding or deceiving or attempting to cheat, defraud or deceive other persons and making or causing to be made to any other person any false report or statement thereof or causing to be made for any person any false record thereof, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transactions, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) and Commission Regulation 33.10, 17 C.F.R. § 33.10; and
- C. While acting in the capacity of a commodity pool operator, employing any device, scheme or artifice to defraud any participant or prospective participant or engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any participant or prospective participant by use of the mails or any means or instrumentality of interstate commerce, in violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1).

2. Defendants Aurifex Co., Aurifex LLC and Klotz are restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly making or causing to be made to any other person any false report or statement thereof or causing to be entered for any person any false record thereof, in violation of Section 4b(a)(2)(ii) of the Act, 7 U.S.C. § 6b(a)(2)(ii);

3. Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz are restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

- A. Using the mails or any means or instrumentality of interstate commerce, while acting in the capacity of a commodity pool operator, without being registered under the Act, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1);
- B. Failing to provide Annual Reports, prepared by a certified independent accountant, and periodic account statements to participants, while acting in the capacity of a commodity pool operator, in violation of Section 4n(4) of the Act, 7 U.S.C. § 6n(4) and Regulation 4.22;

- C. Failing to deliver to prospective participants an accurate Disclosure Document containing the information set forth in Regulation 4.24, 17 C.F.R. § 4.24, including a risk disclosure document, while acting in the capacity of a commodity pool operator, in violation of Regulation 4.21, 17 C.F.R. § 4.21; and
- D. Commingling the property received from any Pool participants with the property of any other person, while acting in the capacity of a commodity pool operator, in violation of 4.20(c).

3. Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz are further restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

- A. Destroying, mutilating, concealing, altering or disposing of any books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants, wherever located, including all such records concerning Defendants' business operations;
- B. Refusing to permit authorized representatives of the Commission to inspect and copy, when and as requested, any books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants, wherever located, including all such records concerning their business operations; and
- C. Withdrawing, transferring, removing, dissipating, concealing or disposing of, in any manner, any funds, assets, choses in action, or other property, wherever situated, including but not limited to, all funds, personal property, money or securities held in safes, safety deposit boxes and all funds on deposit in any financial institution, bank or savings and loan account held by, under the control, or in the name of Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, or otherwise, and the assets affected by this paragraph shall include both existing assets and assets acquired after the effective date of the Court's Order, and the Court's Order shall remain in effect until such time as the Court orders a distribution of same;

4. Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz are further restrained, enjoined and prohibited, until further order of the Court, from directly or indirectly:

- A. Entering into any commodity futures or options transactions for their own accounts, for any accounts in which they have a direct or indirect interest and/or having any commodity futures or options traded on their behalf;

- B. Engaging in, controlling, or directing the trading of any commodity futures or options accounts for or on behalf of any other person or entity, whether by power of attorney or otherwise; and
- C. 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, except as provided for in Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9), or acting, directly or indirectly, as a principal, agent, or any other officer, agent or employee of any person registered, required to be registered, or exempted from registration with the Commission, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9). This includes, but is not limited to, soliciting, accepting or receiving any funds, revenue or other property from any person, giving advice for compensation, or soliciting prospective customers, relating to the purchase or sale of any commodity futures or options.

5. The injunctive provisions of this Order shall be binding on Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, and upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, and upon any person who receives actual notice of this Order by personal service or otherwise insofar as he or she is acting in active concert or participation with Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz.

6. Within five (5) business days following service of this Order, defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz shall transfer to the Registry of the U.S. District Court for the Western District of Michigan all funds located in foreign countries which are (1) titled in the name individually or jointly of such defendant; or (2) held by any person or entity for the benefit of any defendant; or (3) under such defendant's direct or indirect control, whether jointly or singly.

7. Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz shall prepare, sign and file with the Court, within 90 days of this Order, a complete and accurate accounting for the

period of January 1, 2004, to the date of such accounting, which shall be no earlier than the date of this Order. Such accounting shall include, without limitation, the identification of:

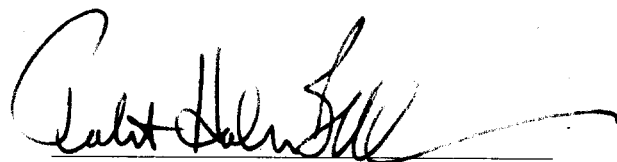
- A. All funds, securities, commodity interests, assets and other property currently owned or controlled (legally, equitably or otherwise) directly or indirectly by Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, whether individually or jointly;
- B. All funds, securities, commodity interests, assets and other property received directly or indirectly by Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, whether individually or jointly, describing the source, amount, disposition, and current location of each listed item;
- C. All funds, securities, commodity interests, assets and other property transferred or otherwise disposed of directly or indirectly by Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, whether individually or jointly, describing the source, amount, disposition, and current location of each listed item, including accounts or assets of Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, held by financial institutions located outside the territorial United States by signing the Consent to Release of Financial Records attached to the Court's Order; and
- D. The name and last known address of each bailee, debtor or other person or entity currently holding any funds, securities, commodity interests, assets or other property owned or controlled (legally, equitably or otherwise) by Defendants Aurifex Co., Aurifex LLC, Klotz and M. Klotz, either individually or jointly.

9. It is further ordered that Merle K. Hampton and Thomas Koprowski, employees of the Commission, are specially appointed to serve this Order and all other papers in this cause and that this order may be served by facsimile.

10. This Order shall remain in effect until further order of the Court and the Court shall retain jurisdiction over this action to ensure compliance with this Order and for all other purposes related to this action.

IT IS SO ORDERED

Dated: June 1, _____, 2006


UNITED STATES DISTRICT JUDGE

CONSENT TO RELEASE OF FINANCIAL RECORDS

I, _____, do hereby direct any bank or trust company at which I have a bank 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 bank accounts to any attorney of the U.S. Commodity Futures Trading Commission, and to give evidence relevant thereto, in the case captioned Commodity Futures Trading Commission v. Aurifex Commodities Research Company; Aurifex Research L.L.C.; Ty Klotz, individually and d/b/a Aurifex Investments; and Monette Klotz, individually and d/b/a Aurifex Investments, pending in the U.S. District Court for the Western District of Michigan, Case No. 05-cv-0166, and this shall be irrevocable authority for so doing. This direction is intended to also 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 shall apply to any of the bank accounts for which I may be a relevant principal.

Dated: _____, 2006

Signature