

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

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<b>U.S. COMMODITY FUTURES</b>	)	
<b>TRADING COMMISSION,</b>	)	
	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>Civil Action</b>
<b>v.</b>	)	<b>Docket No. 2:06-CV-00114</b>
	)	
<b>GARY F. SCHOLZE,</b>	)	
<b>an individual,</b>	)	
	)	
<b>Defendant.</b>	)	
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**AMENDED**  
**ORDER OF PERMANENT INJUNCTION, RESTITUTION AND**  
**OTHER EQUITABLE RELIEF AGAINST DEFENDANT GARY F. SCHOLZE**

On June 8, 2006, Plaintiff, the U.S. Commodity Futures Trading Commission (“Commission”) filed a Complaint for permanent injunction and other relief, and moved pursuant to Sections 6c and 6d of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 13a-1 and § 13a-2 (2002), for a Statutory Restraining Order and Preliminary Injunction, freezing the assets of the Defendant, Gary F. Scholze (“Scholze” or “Defendant”), and prohibiting the Defendant from destroying any business records, books or documents.

On June 29, 2006, this Court issued a Statutory Restraining Order and a Preliminary Injunction and other equitable relief which, *inter alia*, preliminarily enjoined Defendant from further violating the Act and Commission Regulations (“Regulations”) as alleged in the Complaint, froze Defendant’s assets, ordered the maintenance of and access to business records, and subsequently, through a modification to the Order, required Scholze to submit to a receivership.

On May 14, 2007, Defendant answered the Complaint, admitting the truth of the factual allegations contained therein. Contained within the Defendant's Answer was Scholze's consent to an Order of Permanent Injunction and his intention to contest the imposition of a civil monetary penalty.

On October 9, 2007, the Court held a joint sentencing/ civil monetary penalty hearing.

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Order and that there is no just reason for delay. The Court therefore directs the entry of findings of fact, conclusions of law and a permanent injunction and ancillary equitable relief pursuant to § 6c and §6d of the Act, 7 U.S.C. § 13a-1 (2002), as set forth herein.

## I.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. FINDINGS OF FACT**

1. Commencing in approximately August 2001, Scholze fraudulently solicited and accepted funds from individuals for the purpose of trading commodity futures and options on their behalf. Scholze offered either the opportunity for him to trade on their behalf through individual managed accounts or to participate in a commodity pool. Following these solicitations, at least thirty-two members of the general public gave Scholze funds totaling approximately \$2.1 million to invest in commodity futures and options.

2. Scholze, a retired chiropractor, placed print advertisements in a professional publication for chiropractors offering to teach individuals how to "trade world markets as a second (or first) career. Retired Chiro will teach you how. Courses customized and guaranteed." Scholze also solicited investors at commodities trading seminars, where he taught the students, among other things, about trading commodity futures and options, for a fee.

3. In his solicitations, Scholze offered several different services, generally holding himself out as a trader in commodity futures and option markets. Specifically, Scholze offered to trade commodity futures and options on behalf of the investors. Depending upon the amount of money invested by the individual, Scholze represented that he would either trade the investor's funds on specific days of the month, or, if the amount invested exceeded \$100,000.00, he would pool those funds with the funds of other investors and "day-trade" the pooled account.

4. Scholze also offered to teach the prospective investor to trade commodity futures and options. This practice involved the investor sending the defendant a set sum of money, from which the defendant deducted a fee for his teaching services. Scholze would then trade the remainder of the investor's funds in his personal trading account and showed the student his trading decisions and results, usually after he had completed the trading.

5. As part of his solicitations, Scholze made material misrepresentations and omissions concerning the trading of commodity futures and options and the handling of investor funds, including but not limited to: promising some investors they would make a profit; reassuring other investors that they would not lose their principal due to his specialized trading strategy; misrepresenting the fact that investors with individual managed accounts would have their funds segregated from other investor funds; and failing to disclose adequately the risks associated with trading commodity futures and options.

6. Investors relied upon Scholze's misrepresentations and omissions in making their decision to invest with Scholze.

7. Contrary to his representations, Scholze deposited all the investors' funds, including the funds of those investors who understood they were to have individual managed accounts, into personal bank accounts held in his name or in the names of family members. Scholze transferred

some, but not all of those funds, into commodity futures and options accounts he held in his own name.

8. From August 2001 through May 2006 (the “relevant period”), Scholze traded commodity futures and options using approximately \$776,000, in at least six trading accounts he held in his own name at various Futures Commission Merchants (“FCMs”). Scholze overall was unprofitable in his trading of commodity futures and options. From April 2001 through 2005, he sustained trading losses of approximately \$215,000.

9. Scholze also misappropriated approximately \$1.5 million of investor funds directly from his personal or family bank accounts to pay for personal expenses, such as tuition payments for his son and payments to his wife.

10. Throughout the relevant period, however, Scholze sent account statements or otherwise falsely reported to his investors that their investments were growing in value due to his profitable trading.

11. Investors relied upon the account statements reflecting profitable results in deciding to remain invested, and, in certain instances, investing additional funds with Scholze.

12. For example, Scholze told one investor that her funds would be kept separate from other investors, guaranteed that he would double her initial investment within twelve months and reassured her that her capital investment would be protected because Defendant’s trading strategy would only utilize a certain percentage of the principal. Scholze failed to disclose the risks involved in trading commodity futures and options. Based upon these misrepresentations and omissions, this investor gave Scholze an initial deposit of \$80,000 in October 2002 to commence trading.

13. In November, 2002, Scholze sent the investor an email falsely representing that

her account had increased in value by over \$6,000 in one month of trading. Scholze thereafter sent this investor monthly emails that falsely reported similar gains.

14. Upon the basis of these false statements, the investor sent additional funds to Scholze. Altogether, this investor gave him \$190,000 to invest. Throughout the relevant period Scholze continued to falsely represent that her account was earning money. Indeed, in February 2005, Scholze sent the investor an email which falsely indicated that her account had grown to approximately \$350,000.00.

15. Although at various times the investor was able to withdraw funds from her account that totaled \$65,000, the investor had made repeated demands since March 2005 to liquidate her account and have her remaining funds returned. Scholze did not return the investor's remaining funds or otherwise respond to these demands.

16. Scholze obtained funds from at least 31 other people, totaling over \$2.1 million. Most, if not all, of the investors received written or oral account statements or reports from Scholze falsely reflecting significant profits purportedly earned by Scholze's trading of those accounts. For example, one investor who made an investment of \$300,000, believed, based on false statements from Scholze, that his investment was worth over \$1 million by early 2005.

17. Commencing in 2004, investors have made demands for some or all of their funds invested with Scholze. Although some investors received partial returns of their investments, since March 2005, investors have not received any funds from Scholze, despite their repeated demands.

## **B. CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the subject matter of this action and all parties hereto pursuant to Section 6c of the Act that 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.

3. This Court has personal jurisdiction over the Defendant, who has acknowledged service of the Complaint and consented to the Court's jurisdiction over him.

4. Defendant violated Sections 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2002), in that he falsely reported profitable rates of return from commodity futures trading through false written statements and oral misrepresentations when, in fact, substantial losses had been incurred, and in that he misappropriated investor funds to his own use.

5. Defendant violated Section 4b(a)(ii) of the Act, 7 U.S.C. § 6b(a)(ii) (2002), in that he willfully made or caused to be made to investors false reports or statements, or willfully entered or caused to be entered false records, by knowingly delivering to investors written representations of account balances that reported false profits.

6. Defendant violated Section 4c(b) of the Act, 7 U.S.C. §6c(b) (2002), and Regulation 33.10, 17 C.F.R. § 33.10 (2007), in that he knowingly cheated or defrauded another person in or in connection with any commodity option transaction, made or caused to be made false statements in or in connection with any commodity option transaction, deceived or attempted to deceive another person in or in connection with any commodity option transaction, and misappropriated funds solicited to trade commodity options from investors for his own personal expenses.

7. Defendant violated Section 4m(1) of the Act, 7 U.S.C. §6m(1) (2002), in that he used the mail and other means of interstate commerce in connection with his business as a

commodity pool operator (“CPO”) and Commodity Trading Advisor (“CTA”), while failing to register with the Commission as a CPO/CTA.

8. Defendant, while acting as a CPO/CTA, violated Section 4o(1)(A) and (B) of the Act, 7 U.S.C. § 6o(1)(A) and (B) (2002), in that he, by reason of having engaged in the conduct described herein, and by use of the mails or other means or instrumentalities of interstate commerce misappropriated client, or participant funds, made oral misrepresentations to clients, and issued false account statements to clients.

9. Defendant violated Regulation 4.20(a), 17 C.F.R. § 4.20(a) (2007), in that, by failing to open a trading account or a bank account in the name of his pool, Defendant failed to operate the pool as a separate legal entity.

10. Defendant violated Regulation 4.20(b), 17 C.F.R. § 4.20(b)(2007), in that, while operating as a CPO, he accepted from existing or prospective participants pool funds in his own name.

11. Defendant violated Regulation 4.21, 17 C.F.R. § 4.21 (2007), in that Defendant: failed to furnish pool participants with a written Disclosure Document; and, prior to accepting or receiving funds, and thereafter, failed to receive signed and dated acknowledgments from the pool participants stating that they received a Disclosure Document for the pool.

12. Defendant violated Regulation 4.30, 17 C.F.R. § 4.30 (2007), in that he accepted funds as a CTA in his own name and deposited those funds into his personal banking and trading accounts, and not into banking and trading accounts in the names of individual investors.

13. Defendant violated Regulation 4.31, 17 C.F.R. § 4.31 (2007), in that Defendant, as a CTA, failed to: furnish investor/clients with a written Disclosure Document; and, prior to accepting or receiving funds, and thereafter, receive signed and dated acknowledgments from the

investor/clients stating that they received the Disclosure Document.

14. There is good cause for entry of an order permanently enjoining Defendant from engaging in future violations of the Act and Regulations.

## II.

### **ORDER FOR PERMANENT INJUNCTION, RESTITUTION, AND CIVIL MONETARY PENALTY**

**NOW THEREFORE, IT IS ORDERED THAT:**

#### **A. RESTITUTION**

Scholze's violations of the Act and Regulations merit the award of significant restitution. However, the Court recognizes that Scholze is already subject to a \$2,124,497.71 criminal judgment restitution obligation entered in *United States v. Gary Scholze*, Case No. 2:06-CR-142-01 (D. Vt.) on December 20, 2007 for misconduct at issue in this civil action (the "criminal restitution obligation"). Because the criminal court imposed restitution to Scholze's defrauded customers, additional restitution is not ordered in this matter.

#### **B. CIVIL MONETARY PENALTY**

The Commodity Exchange Act, 7 U. S. C. §§ 1 *et seq.*, authorizes the Court to impose a civil monetary penalty: "In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation a civil penalty..." For violations occurring between October 23, 2000 and October 22, 2004, the maximum penalty is the higher of either \$120,000 per violation or triple the monetary gain. For violations occurring after October 22, 2004, the maximum penalty is \$130,000 per violation or triple the gain, whichever is higher. In the instant case, Scholze committed approximately 75 violations of the Act, with the gain of about \$1.5 million. The maximum civil penalty is therefore \$4.5 million.

The Court orders a civil penalty of \$1 million, to be paid only after full restitution has been provided to the victims of this offense pursuant to the Court's order in the criminal case against Scholze. The penalty is assessed due to the number of serious violations, the level of planning exercised by Scholze in the commission of this offense, the harm done to victims and to the system, and the need for general deterrence.

**C. PERMANENT INJUNCTION**

1. The Defendant shall be permanently restrained, enjoined and prohibited from directly or indirectly:

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- a. in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other persons, where such contract for future delivery or could be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof,
    - i. cheating or defrauding or attempting to cheat or defraud other persons;
    - ii. willfully making or causing to be made to other persons false reports or statements thereof, or willfully entering or causing to be entered for other persons false records thereof; and/or
    - iii. willfully deceiving or attempting to deceive other persons in violation of Sections 4b(a)(i), (ii) and (iii) of the Act;
  - b. while acting as a CTA/CPO, offer to enter into, enter into, or confirm the execution of any option contrary to any rule, regulation, or order by the Commission prohibiting any such transaction, in violation of Section 4c(b) of the Act and Regulation 33.10;
  - c. while acting as a CTA/CPO, employing a device, scheme or artifice to defraud pool participants or prospective pool participants, in violation of Section 4q(1)(A) of the Act;
  - d. while acting as a CTA/CPO, engaging in a transaction, practice or course of business that operates as a fraud or deceit upon any client or pool

participant, or any prospective client or pool participant, in violation of Section 4q(1)(B) of the Act;

- e. using the mails or instrumentalities of interstate commerce in or in connection with the business of a CTA/CPO while failing to register as a CTA/CPO, in violation of Section 4m(1) of the Act;
- f. while acting as a CPO, (a) accepting from an existing or prospective pool participant pool funds other than in the name of the pool and/or (b) failing to treat the pool as a separate entity in violation of Regulations 4.20(a) and (b); and
- g. while acting as a CPO (a) failing to furnish to a prospective pool participant a Disclosure Document for the pool by no later than the time he delivers to the prospective participant a subscription agreement for the pool, and/or (b) failing to receive from a pool participant, prior to accepting or receiving pool funds, an acknowledgement signed and dated by the participant stating that the prospective participant received the Disclosure Document in violation of Regulation 4.21;
- h. while acting as a CTA, soliciting, accepting or receiving client funds, securities or other property in his own name in violation of Regulation 4.30; and
- i. while acting as a CTA (a) failing to furnish a prospective client with a written Disclosure Document by no later than the time he delivers to the prospective client an advisory agreement to direct or guide the client's account, or (b) failing to receive from a prospective client prior to entering an advisory agreement with the prospective client an acknowledgement signed and dated by the prospective client stating that the client received the Disclosure Document in violation of Regulation 4.31.

2. Defendant is permanently restrained, enjoined and prohibited from directly or indirectly acting as a CTA/CPO involved in the solicitation of funds for participation in a commodity pool or trading in any managed account.

3. Defendant is permanently restrained, enjoined and prohibited from engaging, directly or indirectly, 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) ("commodity interest"), including, but not limited to, the following:

- a. Soliciting, receiving, or accepting any funds from any person in connection with the purchase or sale of any commodity interest;
- b. Controlling or directing the trading of any commodity interest account for or on behalf of any person or entity, directly or indirectly, whether by power of attorney or otherwise;
- 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 Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9), or acting as a principal, agent, officer or employee of any person registered, exempted from registration or required to be registered with the Commission, unless such exemption is pursuant to Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9);
- d. Trading on or subject to the rules of any registered entity, as that term is defined in § 1a(29) of the Act, 7 U.S.C. § 1a(29)(2002);
- e. Entering into any commodity interest transactions for his own personal account, for any account in which he has a direct or indirect interest and/or having any commodity interests traded on his behalf; and
- f. Engaging in any business activities related to commodity interest trading.

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

### III.

#### **MISCELLANEOUS PROVISIONS**

##### **IT IS FURTHER ORDERED THAT:**

1. Invalidation: If any provision of this Order or the application of any provision or circumstance is held invalid, the remainder of this Order, and the application of the provision to

any other person or circumstance, shall not be affected by the holding.

2. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action in order to implement and carry out the terms of all orders and decrees that may be entered herein, to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and to assure compliance with this Order.

3. Notice: All notice required to be given by any provision in this Order shall be sent by certified mail, return receipt requested, as follows:

Notice to the Commission:

Katherine M. Scovin  
James H. Holl, III  
Chief Trial Attorney  
U.S. Commodity Futures Trading Commission  
1155 21st Street, NW  
Washington, DC 20581  
Telephone (202) 418-5000  
Facsimile (202) 418-5538

4. In the event that Defendant changes his residential or business telephone number(s) and/or address(es) at any time, he shall provide written notice of the new number(s) and/or address(es) to the Commission within ten calendar days thereof.

**SO ORDERED**, this 10th day of September, 2008, at Burlington, VT.

/s/ William K. Sessions III  
WILLIAM K. SESSIONS  
UNITED STATES DISTRICT JUDGE