

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. _____

05-21577

UNITED STATES COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff,

v.

E-METAL MERCHANTS, INC., a Florida
corporation, BENJI DAYAN, an individual, and
ANDREW STERN, an individual,
Defendants.

SEALED
ORDER GRANTING

7 KEEN

STATUTORY RESTRAINING ORDER TO FREEZE ASSETS,
PRESERVE BOOKS AND RECORDS, AND PERMITTING EXPEDITED DISCOVERY
AND AN ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION

This matter came before the Court on the United States Commodity Futures Trading Commission's, (Commission) motion for an *ex parte* statutory restraining order and an order to show cause regarding a preliminary injunction. The Court, having considered the Commission's, motion, memorandum of law, complaint, and other relevant materials, and all other evidence and arguments presented by the Commission, 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 (Act), as amended, 7 U.S.C. § 13a-1 (2002).
2. Venue lies properly within this District pursuant to Sections 6c(e) of the Act, 7 U.S.C. § 13a-1(e).

3. There is good cause to believe that defendants E-Metal Merchants, Inc., Benji Dayan, and Andrew Stern (collectively defendants) have engaged, are engaging, and are about to engage in acts and practices constituting violations of the Act, 7 U.S.C. § 1, *et seq.*, and Commission Regulations (Regulations), 17 C.F.R. § 1.1 *et seq.* (2004).

4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for investors 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 the Court.

5. Good cause exists for freezing defendants' assets and for entry of an order prohibiting defendants from destroying records and denying agents of the Commission access to inspect and copy records.

6. 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:

7. 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, drives, networks, servers, 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.

8. "Assets" mean 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.

9. "Defendants" shall mean and refer to not only E-Metal Merchants, Inc., Benji Dayan, and Andrew Stern, but also to any d/b/a, successor, or other entity controlled by any of the aforementioned individuals.

RELIEF GRANTED

I. ORDER AGAINST TRANSFER, DISSIPATION, AND DISPOSAL OF ASSETS

IT IS HEREBY ORDERED that:

10. Defendants, and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, 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 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.

11. 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 any or all of the defendants.

II. DIRECTIVES TO FINANCIAL INSTITUTIONS AND OTHERS

IT IS FURTHER ORDERED, pending further order of this Court, that any financial or brokerage institution, business entity, or person that holds, controls, or maintains custody of any account or asset of defendants, or has held, controlled, or maintained custody of any account or asset of defendants at any time since May 1, 2004, shall:

12. Prohibit defendants 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;

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

14. Provide counsel for the Commission, within two (2) 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 titled in the name, individually or jointly, of each and every defendant, or held on behalf of, or for the benefit of, each and every defendant; (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 either titled in the name, individually or jointly, of each and every defendant or is otherwise subject to access by defendants; and

15. 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, Internal Revenue Service 1099 forms, and safe deposit box logs.

III. ACCOUNTING AND TRANSFER OF FUNDS AND DOCUMENTS

IT IS FURTHER ORDERED that within three (3) business days following the service of this order, defendants shall:

16. Provide the Commission with a full accounting of all funds, assets, and documents inside and outside of the United States that are held by each and every defendant, for their benefit, or under their direct or indirect control, whether jointly or singly;

17. Transfer to the territory of the United States all funds, documents, and assets located outside of the United States that are held by each and every defendant for their benefit, or under their direct or indirect control, whether jointly or singly; and

18. Provide the Commission access to all records of each and every defendant held by financial institutions located outside the territorial United States.

IV. MAINTENANCE OF BUSINESS RECORDS

IT IS FURTHER ORDERED that:

19. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with them, and all other 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 defendants.

V. INSPECTION AND COPYING OF BOOKS AND RECORDS

IS FURTHER ORDERED that:

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

21. Defendants and their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with the defendants 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 defendants, wherever such books and records may be situated.

VI. EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that:

22. The prohibition upon discovery before the early meeting of counsel pursuant to Rule 26(d) of the Federal Rules of Civil Procedure is removed.

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

24. 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 telecopier number.

25. The parties may also commence discovering documents from third parties pursuant to normal discovery procedures.

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VII. BOND NOT REQUIRED OF PLAINTIFF

IT IS FURTHER ORDERED that:

26. The Commission is an agency of the United States of America and, accordingly, need not post a bond.

VIII. ORDER TO SHOW CAUSE

IT IS FURTHER ORDERED that:

27. Defendants shall appear before this Court on the 21st day of June, 2005, at 11 a.m., before the Honorable Theodore Klein at the United States Courthouse for the Southern District of Florida, 300 NE First Ave., Ninth Courtroom, Miami, Florida to show cause, if there be any, why an order for preliminary injunction should not be entered to preserve the status quo obtained by the statutory restraining order, prohibit further violations of the Act and grant other relief requested pending trial on the merits of this action.

28. Should any party wish to file a memorandum of law or other papers in opposition to Plaintiff's Motion for a Preliminary Injunction, all papers shall be filed on or before June 17, 2005, at noon, 2005 and served no later than June 17, 2005, at noon, 2005.

IX. SERVICE OF ORDER


IT IS FURTHER ORDERED that:

29. Copies of this order may be served by any means, including facsimile transmission, upon any entity or person that may have possession, custody, or control of any documents or assets of defendants or that may be subject to any provision of this order, and, additionally, that Richard Glaser, Jan M. Folena, and Lacey Dingman are specially appointed by the Court to effect service.

X. FORCE AND EFFECT

IT IS FURTHER ORDERED that this order shall remain in full force and effect until *the close of business on June 23rd, 2005,*
~~further order of this Court~~ and that this Court retains jurisdiction of this matter for all purposes.

IT SO ORDERED, at Miami, Florida on this 13 day of June, 2005 *at 3:40 P.M.*


UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA