

IN THE UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF OHIO  
 WESTERN DIVISION

FILED  
 KENNETH J. MURPHY  
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 SECURITIES AND EXCHANGE COMMISSION,  
 Plaintiff,  
 v.  
 MARK E. GATCH and HENRY BENJAMIN  
 SCHMIDT,  
 Defendants.  
 -----x

Civil Action No.  
**C-1-97-1599**  
COMPLAINT

**J. BECKWITH**

**M. J., SHERMAN**

Judge	<u>4878</u>
Mag.	<u>BD</u>
Journal	_____
Filed	_____
Docketed	<u>1.</u>

Plaintiff Securities and Exchange Commission (the "Commission"), for its Complaint against Mark E. Gatch ("Gatch") and Henry Benjamin Schmidt ("Schmidt") (together, "Defendants"), alleges as follows:

PRELIMINARY STATEMENT

1. This action concerns a fraudulent scheme by Gatch and Schmidt, acting through their company Ben Mar Investments, Inc. ("Ben Mar"), an unregistered investment adviser. From in or about February 1992 through March 1995, Gatch and Schmidt, through Ben Mar, raised approximately \$19.5 million from at least 365 entities or individuals by selling promissory notes (the "Notes"). The Notes promised to repay principal and pay interest based on the performance of an investment pool, managed by Gatch and Schmidt through Ben Mar, that supposedly traded put and call options on the S&P 100 index (the "Ben Mar Fund" or "Fund"). In fact, Gatch and Schmidt operated a Ponzi scheme, using investor funds to pay principal and interest in order to conceal millions

of dollars of trading losses and their own misappropriation of investor funds. When the scheme collapsed in March 1995, investors in the Ben Mar Fund and other advisory clients had lost at least approximately \$12.2 million, including approximately \$4 million that Gatch and Schmidt took for themselves.

2. Gatch and Schmidt made material misrepresentations, and omitted to state material information, to investors and prospective investors in the Ben Mar Fund and to Ben Mar's advisory clients and prospective advisory clients, concerning the performance of the Fund and the advisory client accounts, Gatch's investment strategy, and his strategy's risks. For example, Gatch and Schmidt told prospective investors and advisory clients that they could expect to earn 4% to 5% a month on their investment, based on past performance. Gatch also represented that his trading strategy included certain limits on loss. Contrary to these representations, Gatch's trading resulted in substantial losses. Gatch concealed the losses and maintained the illusion of trading profits by, among other things, using the funds of existing Ben Mar Fund investors and new investors to repay principal and pay purported profits.

3. Gatch and Schmidt violated or aided and abetted violations of the antifraud provisions of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77a et seq., the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a et seq., and the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-1 et seq.. In addition to their violations of the

antifraud provisions, Gatch and Schmidt illegally sold unregistered securities -- the Notes -- in violation of the registration provision of the Securities Act, and also violated or aided and abetted violations of the registration and custody provisions of the Advisers Act.

4. Defendants Gatch and Schmidt, unless enjoined and restrained by this Court, will continue to engage in the transactions, acts, practices, and courses of business alleged herein, and in transactions, acts, practices, and courses of business of a similar type and object. By this action, the Commission seeks permanent injunctive relief; the imposition of civil money penalties under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Remedies Act"), 15 U.S.C. §§ 77t(d), 78u(d)(3), and 80b-9(e), against Gatch; the fixing of appropriate amounts of disgorgement and prejudgment interest, and civil penalties under the Remedies Act, to be paid by Schmidt; and such other and further relief as the Court may deem appropriate.

#### JURISDICTION AND VENUE

5. The Commission brings this action pursuant to authority conferred by Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), Sections 21(d) and (e) of the Exchange Act, 15 U.S.C. §§ 78u(d) and (e), and Section 209(d) of the Advisers Act, 15 U.S.C. § 80b-9(d). This Court has jurisdiction over this action, and venue lies in this District, pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), Sections 21(e) and 27 of the

Exchange Act, 15 U.S.C. §§ 77u(e) and 78aa, and Section 214 of the Advisers Act, 15 U.S.C. § 80b-14. Venue in this District is proper because Gatch is a resident of Clermont County, Ohio, which is within this District and division, and transactions and events giving rise to the claims alleged herein occurred in Clermont County, Ohio and other counties within this District and division.

6. Gatch and Schmidt, directly and indirectly, made use of the means or instruments of transportation or communication in interstate commerce, the means or instrumentalities of interstate commerce, the mails, or the facilities of a national securities exchange, in connection with the transactions, acts, practices, and courses of business alleged in this Complaint.

THE DEFENDANTS AND OTHER RELEVANT ENTITIES

7. Mark Edward Gatch, age 39, is and was at all relevant times a resident of Clermont County, Ohio. Gatch is the co-founder, president, and chief financial officer of Ben Mar. Gatch handled all of Ben Mar's trading and accounting. During the relevant period, Gatch was also a registered representative of Mariner Financial Services, Inc., a registered broker-dealer. Gatch has pleaded guilty to one count of wire fraud on the basis of his role in the fraud upon investors in the Ben Mar Fund. United States v. Mark E. Gatch, Judgment and Commitment Order, No. 96-90 (WOB) (E.D. Ky. Mar. 18, 1997).

8. Henry Benjamin Schmidt, age 63, resides in Crestview Hills, Kentucky and St. Petersburg, Florida. Schmidt is the

owner and co-founder of Ben Mar. Schmidt has filed for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. In re Schmidt, Henry Benjamin, No. 96-11220-8G7 (Bankr. M.D. Fla. 1996).

9. Ben Mar Investments, Inc., an unregistered investment adviser formerly known as Ben Mar Investments, was incorporated in Ohio in February 1993. Its principal places of business were Amelia, Ohio and Florence, Kentucky. Ben Mar was placed in bankruptcy in March 1995 and is in liquidation. In re Ben Mar Investments, Inc., No. 95-11121 (Bankr. S.D. Ohio 1995).

10. The Ben Mar Fund was an unregistered investment company managed by Ben Mar, that was required to be registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq.

**GATCH'S AND SCHMIDT'S FRAUDULENT  
MISREPRESENTATIONS AND OMISSIONS  
TO INVESTORS AND PROSPECTIVE INVESTORS  
IN THE BEN MAR FUND AND TO BEN MAR'S  
ADVISORY CLIENTS AND PROSPECTIVE ADVISORY CLIENTS**

11. From in or about February 1992 through March 1995, Gatch and Schmidt, acting through Ben Mar, offered and sold the Notes (memorializing interests in the Ben Mar Fund) to at least 365 investors, who invested a total of approximately \$19.5 million. The Ben Mar Fund investors were from Ohio, Kentucky, Florida, and several other states.

12. The ostensible purpose of the Ben Mar Fund was to invest Fund investors' money in put and call options on the S&P 100 index ("OEX options"), pursuant to a trading strategy carried out by Gatch. The Notes promised to repay principal upon demand

and to pay "interest" based upon the performance of the Ben Mar Fund:

. . . . It is understood that [name of investor(s)] will receive interest each month from BEN-MAR INVESTMENTS, INC. based on performance. The note can be repaid upon demand within 5 days. A monthly statement will be issued with the payment to reflect interest earned and return on principle [sic].

In return for Ben Mar's management of the Fund, Ben Mar investors agreed to pay Ben Mar performance-based management fees, to be deducted from their Fund accounts.

13. Gatch and Schmidt, through Ben Mar, also managed or sought to manage, for a fee, investments according to the same strategy purportedly employed for the Ben Mar Fund, for individuals and entities ("advisory clients") in individual accounts separate from the Fund. Ben Mar had at least six advisory clients.

14. Gatch and Schmidt personally solicited investors for the Ben Mar Fund and advisory clients for Ben Mar's investment advisory services.

15. Throughout the relevant period, during their solicitations of prospective Fund investors and Ben Mar advisory clients, Gatch and Schmidt knowingly or recklessly made materially false statements, and omitted to state material facts necessary to make the statements made not misleading, concerning the performance of the Fund, Gatch's investment strategy, and/or the risks of that strategy, in at least the following ways:

- a. Gatch and Schmidt told prospective investors and advisory clients that the Ben Mar Fund had earned

profits of approximately 4% to 5% per month. Gatch and Schmidt further told prospective investors and advisory clients that, based on past performance, Fund investors and Ben Mar advisory clients could earn profits of approximately 4% to 5% per month. In fact, the Ben Mar Fund did not earn an average monthly profit of 4% to 5%. Indeed, from February 1992 through March 1995, the Ben Mar Fund suffered losses in 27 of the 38 monthly trading periods, and suffered substantial losses overall.

- b. Gatch and Schmidt showed some prospective investors and advisory clients documents created or altered by Gatch, including but not limited to Ben Mar monthly account statements, that reported that the Fund had made profits. In fact, as stated above, the Ben Mar Fund suffered losses in most months.
- c. Gatch and Schmidt led Ben Mar Fund investors and advisory clients to believe that Gatch had significant expertise and success in trading options. In fact, Gatch did not have significant expertise in trading options, and his trades were generally unsuccessful.

16. In addition to the misstatements and omissions set forth in paragraph 15, Gatch, frequently in the presence of

Schmidt, knowingly or recklessly made materially false statements, and omitted to state material facts necessary to make the statements made not misleading, concerning the performance of the Fund, Gatch's investment strategy, and/or the risks of that strategy, to prospective Ben Mar Fund investors and Ben Mar advisory clients, in at least the following ways:

- a. Gatch told investors and advisory clients that his trading strategy involved simultaneously selling put and call OEX options through a structured hedging practice known as a "debit-credit spread" or "straddle." In fact, Gatch did not always employ the strategy he described, but rather employed a far riskier strategy. For example, Gatch frequently abandoned the "straddle" strategy disclosed to investors, and instead made trades that were not fully hedged, based on his (frequently wrong) predictions of market movements.
- b. Gatch also told prospective investors that their risk of loss would be limited to 10% to 15% in each monthly trading cycle and led some investors to believe that approximately 50% of capital was invested, as a reserve, in safe, liquid investments such as certificates of deposit. In fact, Gatch did not employ a strategy limiting the risk of loss to 10% to 15% per trading cycle and



did not maintain a reserve of 50% of capital.

17. Gatch and Schmidt also knowingly or recklessly made materially false statements, and omitted to state material facts necessary to make the statements made not misleading, concerning the performance of the Ben Mar Fund, Gatch's investment strategy, and the risks of that strategy, to existing investors in the Fund, to induce them to invest additional sums and not to redeem their investments in the Fund, in at least the ways set forth in paragraphs 15 and 16 above.

18. Gatch and Schmidt also knowingly or recklessly made materially false statements, and omitted to state material facts necessary to make the statements made not misleading, concerning the performance of the Ben Mar Fund, Gatch's investment strategy, and the risks of that strategy, to Ben Mar's advisory clients, in at least the ways set forth in paragraphs 15 and 16 above.

19. Gatch concealed the losses of the Ben Mar Fund and the individual accounts of advisory clients, and maintained the illusion of trading profits, in various ways, including by continuing to seek and accept new investments in the Ben Mar Fund and by using the funds of new Ben Mar Fund investors and existing investors to repay principal and pay purported profits. By using investors' funds to pay off other investors, Gatch operated the Ben Mar Fund as a Ponzi scheme.

20. Neither Gatch nor Schmidt disclosed to existing or prospective Ben Mar Fund investors or advisory clients the losses incurred in Gatch's trading, the change in Gatch's trading

strategy and associated risks, or the use of Ben Mar Fund investors' funds to pay purported profits and to return principal.

21. Gatch and Schmidt -- who were fiduciaries to Ben Mar Fund investors and advisory clients -- knew or recklessly disregarded material facts, including the true facts concerning the performance of the Ben Mar Fund and the other advisory client accounts, Gatch's investment strategy, the risks of that strategy, and the use of Ben Mar Fund investors' funds to pay purported profits and to return principal. Gatch handled all the trading and accounting for the Ben Mar Fund -- including disbursements from the Fund -- and the advisory client accounts. The funds and securities of the Ben Mar Fund were never verified by an independent audit. Schmidt knew that Gatch handled all the trading and accounting for the Ben Mar Fund and the advisory client accounts and knew that Gatch's statements of the Fund's profits and holdings were not audited or otherwise reviewed. Schmidt did not make any investigation to determine the accuracy of any of the representations that he and Gatch made concerning the performance of the Ben Mar Fund, Gatch's investment strategy, and the risks of that strategy. Schmidt also failed to take steps to monitor or verify Gatch's statements of the profits, funds or securities in the accounts of the Ben Mar Fund or the advisory clients.

LOSSES TO BEN MAR FUND INVESTORS AND  
BEN MAR ADVISORY CLIENTS AND ILL-GOTTEN  
GAINS TO GATCH AND SCHMIDT

22. Ben Mar Fund investors and Ben Mar advisory clients suffered substantial losses as a result of the fraudulent conduct described above. Ben Mar Fund investors suffered losses of approximately \$12.2 million and Ben Mar advisory clients suffered losses of approximately \$3.2 million. By March 1995, when Ben Mar was placed in bankruptcy, nearly all the Ben Mar Fund's assets were gone, most of the funds having been lost through trading, used to pay purported profits and repay principal to Ben Mar Fund investors, or disbursed to Gatch and Schmidt.

23. Gatch and Schmidt received, respectively, approximately \$1.5 million and \$2.7 million of Ben Mar Fund investors' funds. Gatch and Schmidt knew or recklessly disregarded that they were not entitled to these funds.

FIRST CLAIM FOR RELIEF

VIOLATION OF SECTION 5 OF THE SECURITIES ACT,  
15 U.S.C. § 77(e)

(Offer and Sale of Unregistered Securities)

24. The Commission realleges and incorporates paragraphs 1-23 by reference as if fully set forth therein.

25. The Notes were securities within the meaning of Section 2(1) of the Securities Act, 15 U.S.C. § 77b(1), and Section 3(10) of the Exchange Act, 15 U.S.C. § 78c(10). No registration statement was ever filed with the Commission with respect to the Notes.

26. No exemption from registration applies to the Notes.

27. As more fully described in paragraphs 6, 11-12, and 25 above, Gatch and Schmidt, individually and through Ben Mar, directly, and indirectly (a) made use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell securities through the use or medium of any prospectus or otherwise; (b) carried such securities or caused them to be carried through the mails or in interstate commerce, by means or instruments of transportation, for the purpose of delivery after sale; and (c) made use of means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any securities, while no registration was filed or in effect and no exemption from registration applies.

28. By reason of the foregoing, Gatch and Schmidt violated Section 5 of the Securities Act, 15 U.S.C. § 77(e).

**SECOND CLAIM FOR RELIEF**

**VIOLATION OF SECTION 203(a) OF  
THE ADVISERS ACT, 15 U.S.C. § 80b-3(a)**

**(Failure to Register as Investment Adviser)**

29. The Commission realleges and incorporates paragraphs 1-28 by reference as if fully set forth herein.

30. As more fully described in paragraphs 12-13 above, Gatch, individually and through Ben Mar, directly and indirectly, engaged, for compensation, in the business of advising clients as to the advisability of investing in, purchasing, or selling securities. As a result, Gatch, individually and through Ben

Mar, acted as an investment adviser within the meaning of Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11).

31. As part of and in furtherance of the aforementioned conduct, Gatch and Ben Mar, while acting as an investment adviser, directly and indirectly, made use of the mails or means or instrumentalities of interstate commerce in connection with their business as an investment adviser, without registering as an investment adviser in accordance with Section 203 of the Advisers Act, 15 U.S.C. § 80b-3.

32. No exemption from registration was applicable.

33. As more fully described in paragraphs 6, 11-15, and 21 above, Schmidt knowingly rendered substantial assistance to the unlawful conduct alleged in paragraphs 30-31 by, inter alia, his failure to ensure that Ben Mar complied with the registration provisions of the Advisers Act.

34. By reason of the foregoing, Gatch (and Ben Mar) violated Section 203(a) of the Advisers Act, 15 U.S.C. § 80b-3(a), and Schmidt aided and abetted Ben Mar's and Gatch's violation.

THIRD CLAIM FOR RELIEF

Violations of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2)

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(Fraud in the Offer and Sale of Securities and Upon Advisory Clients and Prospective Advisory Clients)

35. The Commission realleges and incorporates paragraphs 1-34 by reference as if fully set forth herein.

36. As part of and in furtherance of the aforementioned conduct, and as more fully described in paragraphs 6 and 11-23 above, Gatch and Schmidt, directly and indirectly, in the offer or sale, and in connection with the purchase or sale, of securities, by use of the means or instruments of transportation or communication in interstate commerce, the means or instrumentalities of interstate commerce, the mails, or the facilities of a national securities exchange: (a) employed devices, schemes, and artifices to defraud; (b) obtained money or property by means of, or otherwise made, untrue statements of material facts or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, acts, practices, and courses of business that operated as a fraud or deceit upon purchasers of securities and other persons, including the Ben Mar Fund investors and Ben Mar's advisory clients.

37. As more fully described in paragraphs 6 and 11-23

above, Gatch and Ben Mar, while acting as an investment adviser, by use of the mails or means or instrumentalities of interstate commerce, directly and indirectly, employed devices, schemes, or artifices to defraud clients or prospective clients, and engaged in transactions, practices or courses of business which operated as a fraud or deceit upon clients or prospective clients.

38. As part of and in furtherance of the aforementioned conduct, Gatch and Schmidt knowingly or recklessly made materially false and misleading statements and omitted to state material facts, as alleged in paragraphs 15-21 above.

39. By reason of the foregoing, Gatch and Schmidt violated Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

40. As more fully described in paragraphs 11, 13-18, 20-21, and 23 above, Schmidt knowingly rendered substantial assistance to the violation alleged in paragraph 37, by, inter alia, his fraudulent representations to, concealment of the fraud from, and disregard of his fiduciary duty to Ben Mar's advisory clients.

41. By reason of the foregoing, Gatch (and Ben Mar) violated Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Schmidt aided and abetted Ben Mar's and Gatch's violations.

FOURTH CLAIM FOR RELIEF

Violations of Section 206(4) of the Advisers Act,  
15 U.S.C. § 80b-6(4), and Rule 206(4)-2  
thereunder, 17 C.F.R. § 275.206(4)-2

(Failure to Comply with Custody Requirements)

42. The Commission realleges and incorporates paragraphs 1-41 by reference as if fully set forth herein.

43. As more fully described in paragraphs 11-12, 19, 21, and 22-23 above, Gatch and Ben Mar had custody and possession of funds or securities in which advisory clients had a beneficial interest. Moreover, the funds of Ben Mar Fund investors were commingled with other funds, and the funds and securities of the Ben Mar Fund were never verified by an independent audit.

44. As more fully described in paragraphs 6 and 11-12, 19, 21, and 22-23 above, Gatch and Ben Mar, while acting as an investment adviser, by use of the mails or means or instrumentalities of interstate commerce, directly and indirectly, engaged in acts, practices, or courses of business which were fraudulent, deceptive, or manipulative in that Gatch and Ben Mar, while in custody or possession of funds or securities in which clients had a beneficial interest, did an act or took an action, directly or indirectly, with respect to those funds or securities, without: (1) segregating all such securities of each such client, marking such securities to identify the particular client who has the beneficial interest therein, and holding such securities in safekeeping in some place reasonably free from risk of destruction or other loss; (2) depositing in.



one or more bank accounts which contain only clients' funds all such funds of such clients, maintaining such accounts in his name as agent or trustee for such clients, and maintaining a separate record for each account which shows the name and address of the bank where each account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interests in such account; (3) immediately after accepting custody or possession of funds or securities from any client, notifying the client in writing of the place and manner in which such funds and securities will be maintained, and thereafter giving written notice to each client when there was a change in the place or manner in which such funds or securities were being maintained; (4) sending not less frequently than once every three months, an itemized statement showing the funds and securities in the custody or possession of Ben Mar at the end of such period, and all debits, credits, and transactions in such client's account during such period; or (5) verifying by actual examination at least once during each calendar year by an independent public accountant at a time chosen by such accountant without prior notice to Gatch or Ben Mar all such funds and securities of Gatch's or Ben Mar's advisory clients, and attaching to a completed Form ADV-E and transmitting to the Commission a certificate of such accountant stating that an examination of such funds and securities has been made, and describing the nature and extent of the examination.

45. As more fully described in paragraph 21 above, Schmidt

rendered substantial assistance to the violation alleged in paragraphs 43-44, by, inter alia, disregarding his fiduciary duty to ensure that Gatch and Ben Mar complied with custody requirements.

46. By reason of the foregoing, Gatch (and Ben Mar) violated Section 206(4) of the Advisers Act, 15 U.S.C. § 80b-6(4), and Rule 206(4)-2 thereunder, 17 C.F.R. § 275.206(4)-2, and Schmidt aided and abetted Gatch's and Ben Mar's violations.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff Commission respectfully requests that this Court:

A. Order the entry of a final judgment permanently restraining and enjoining defendants Gatch and Schmidt, from, directly or indirectly, singly or in concert, violating Section 5 of the Securities Act, 15 U.S.C. § 77(e); Section 203(a) of the Advisers Act, 15 U.S.C. § 80b-3(a); Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a); Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; Sections 206(1) and (2) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2); and Section 206(4) of the Advisers Act, 15 U.S.C. § 80b-6(4), and Rule 206(4)-2 thereunder, 17 C.F.R. § 275.206(4)-2.

B. Order Gatch to pay a civil money penalty pursuant to the Remedies Act, 15 U.S.C. §§ 77t, 78u(d), and 80b-9.

C. Fix the amount of disgorgement, representing Schmidt's ill-gotten gains from the conduct alleged herein, prejudgment

interest thereon, and civil penalty to be paid by Schmidt.

D. Grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

Trial Attorney:

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REGIONAL DIRECTOR

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