

**UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF GEORGIA - MACON DIVISION**

Commodity Futures Trading Commission)	
)	
Plaintiff,)	
)	
v.)	Case No. 5:01-CV-0362-8 (HL)
)	
Ellery Coleman, d/b/a)	
Granite Investments,)	
)	
Defendant.)	
)	

**CONSENT ORDER OF PERMANENT INJUNCTION AND
TO PAY A CIVIL MONETARY PENALTY**

On September 13, 2001, Plaintiff, the Commodity Futures Trading Commission (the “Commission”), filed and served the complaint in this matter against Defendant Ellery Coleman d/b/a Granite Investments (“Coleman”) seeking injunctive and other equitable relief for violations of the Commodity Exchange Act (the “Act”), as amended, 7 U.S.C §§ 1 et seq. (2001), and Regulations promulgated thereunder, 17 C.F.R §§ 1 et seq. (2001). The Court entered a Consent Order of Preliminary Injunction against Coleman on October 3, 2001.

I.

CONSENTS AND AGREEMENTS

1. To effect settlement of the matters alleged in the Complaint in this action without a trial on the merits or any further judicial proceedings, Coleman consents to the entry of this Consent Order of Permanent Injunction. (“Order ”).

2. Coleman acknowledges service of the summons and complaint.

3. Coleman admits that this Court has jurisdiction over him and the subject matter of this action.

4. Coleman admits that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. §13a-1 (1994).

5. In addition, Coleman waives: (a) all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63, and Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 et seq., to seek costs, fees and other expenses relating to, or arising from, this action; (b) the entry of findings of fact and conclusions of law in this action as provided by Rule 52 of the Federal Rules of Civil Procedure, except as provided below in Section II; (c) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief; and (d) all rights of appeal from this Order.

6. By consenting to the entry of this Order, Coleman neither admits nor denies the allegations of the Complaint or findings or conclusions in this Order except as set forth in paragraphs 3 and 4 above. Coleman agrees that neither he nor any of his agents, servants, employees, contractors or attorneys shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or findings or conclusions in the Order or creating, or tending to create, the impression that the Complaint or this Order is without a factual basis; provided, however, that nothing in this provision shall affect Coleman's (a) testimonial obligations; or (b) right to take legal positions in other proceedings to which the Commission is not a party. Coleman shall take all necessary steps to ensure that all of his agents, servants, employees, contractors and attorneys understand and comply with this agreement.

7. Coleman agrees that he has read this Order and agrees to this Order voluntarily and that no promise or threat has been made by the Commission or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Order, other than as set forth specifically herein.

8. Coleman consents to the continued jurisdiction of this Court for the purposes of enforcing this order and for any other purposes relevant to this case.

II.

FINDINGS

The Court, being fully advised in the premises, finds that there is good cause for the entry of this Consent 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 of the Act, 7 U.S.C. § 13a-1 (1994), as set forth herein. THE COURT FINDS THAT:

1. This Court has jurisdiction over the subject matter of this action and all parties hereto 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, in that the defendant is found in, inhabits, or transacts 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.

3. Plaintiff *Commodity Futures Trading Commission* is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.* (2001), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1 *et seq.* (2001).

4. Defendant Coleman, individually and d/b/a Granite Investments, is a sole proprietorship located in Warner Robins, Georgia. Neither Coleman nor Granite Investments is registered with the Commission as a Commodity Trading Advisor (“CTA”) or in any other capacity.

5. Defendant Coleman engaged in conduct in violation of Section 4o of the Act, 7 U.S.C. § 6o, Commission Regulations 4.16 and 4.41(a) and (b), 17 C.F.R. §§ 4.16 and 4.41(a) and (b), and the Commission’s May 1, 2000 Order, *In the Matter of Ellery Coleman d/b/a Granite Investments, Order Instituting Proceedings Pursuant To Sections 6(c) and 6(d) Of The Commodity Exchange Act and Findings and Order Imposing Sanctions*, CFTC Docket No. 00-16 (May 1, 2000) (“Commission’s May 1, 2000 Order”). (attached as appendix)

III.

ORDER OF PERMANENT INJUNCTION

IT IS HEREBY ORDERED THAT:

1. Defendant Coleman is permanently restrained, enjoined and prohibited from directly or indirectly:
 - (a) Employing any device, scheme or artifice to defraud any client or participant or prospective client or participant, or engaging in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or participant

or prospective client or participant in violation of Section 4o of the Act, 7 U.S.C. § 6o.

- (b) Advertising in a manner that employs any device, scheme or artifice to defraud any client or participant or prospective client or participant, or involves any transaction, practice, or course of business that operates as a fraud or deceit upon any client or participant or prospective client or participant in violation of Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a).
 - (c) Presenting the the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a commodity pool operator, CTA, or any principal thereof, unless such performance is accompanied by one of the following:
 - i The following statement: “Hypothetical or simulated performance results have certain inherent limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown.”
 - ii. A statement prescribed pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act,
- or presenting any simulated or hypothetical performance by any means other than oral, without one of the prescribed statements described above in paragraphs i. and ii. being prominently disclosed, in violation of Commission Regulation 4.41(b), 17 C.F.R. § 4.41(b).

(d) Representing or implying in any manner whatsoever that Defendant Coleman's abilities or qualifications have in any respect been passed upon, by the Commission, the Federal government or any agency thereof while acting as a commodity pool operator, CTA, principal thereof or a person who solicits therefore in violation of Commission Regulation 4.16, 17 C.F.R. § 4.16.

2. Defendant Coleman is restrained and enjoined from directly or indirectly violating:

(a) Any provision of the Commission's May 1, 2000 Order, including but not limited to the undertakings outlined in Section VI of the Order;

(b) Any other Commission Order.

3. Defendant Coleman is further permanently restrained, enjoined and prohibited from 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) (2001), or acting as a principal, agent, officer or employee of any person registered, required to be registered, or exempted from registration, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2001).

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

IV.

ORDER TO PAY A CIVIL MONETARY PENALTY

IT IS FURTHER ORDERED THAT:

1. Defendant Coleman shall pay a contingent civil monetary penalty in the amount of up to one hundred and seventy thousand dollars (\$170,000) pursuant to the payment plan set forth below. Pursuant to the plan, Defendant Coleman shall make an annual civil monetary penalty payment ("Annual CMP Payment") as directed by a Monitor designated by the Plaintiff Commission ("the Monitor") on or before July 31 of each calendar year, starting in calendar year 2002 and continuing for ten years (or until the civil monetary penalty is paid in full, if that happens first). The ten-year period shall run from January 1, 2001 through December 31, 2010, and Annual CMP Payments shall take place by July 31 of the following year. Therefore the first Annual CMP Payment for the year 2001 shall take place on or before July 31, 2002, and the final Annual CMP Payment for the year 2010 shall take place on or before July 31, 2011, unless the entire amount of the contingent civil monetary penalty has been paid in full prior to that date. Defendant Coleman shall make each such Annual CMP Payment by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington D.C. 20581 under cover of a letter that identifies Defendant Coleman and the name and docket number of the proceeding. A copy of the cover letter and the form of payment shall be simultaneously transmitted to the Division of Enforcement, Commodity Futures Trading Commission, at 1155 21st Street, N.W., Washington, D.C. 20581. Defendant Coleman's

contingent civil monetary penalty obligation will terminate at the end of the ten-year payment period.

2. The amount of Defendant Coleman's Annual CMP Payment shall consist of a portion of (1) the adjusted gross income (as defined by the Internal Revenue Code) earned or received by Defendant Coleman during the course of the preceding calendar year, plus (2) all other net cash receipts, net cash entitlements or net proceeds of non-cash assets received by Defendant Coleman during the course of the preceding calendar year. The Annual CMP Payment will be determined as follows:

<u>(a) Where Adjusted Gross Income Plus Net Cash Receipts Total:</u>	<u>Percent of total to be paid by Defendant Coleman is:</u>
Under \$25,000	0%
\$25,000 up to and including \$50,000	20% of the amount between \$25,000 and \$50,000
\$50,000 up to and including \$100,000	\$5,000 (20% of \$25,000) plus 30% of the amount between \$50,000 and \$100,000
Above \$100,000	\$20,000 (20% of \$25,000 plus 30% of 50,000) plus 40% of the amount above \$100,000

(b) Defendant Coleman shall cooperate fully and expeditiously with the Monitor and the Commission in carrying out all duties with respect to the civil monetary penalty payments. He will cooperate fully with the Monitor and the Commission in explaining his financial income and earnings, status of assets, financial statements, asset transfers and tax returns, and shall provide any information concerning himself as may be required by the Commission and/or the Monitor.

Furthermore, Defendant Coleman shall provide such additional information and documents with respect thereto as may be requested by the Commission and/or the Monitor.

3. Defendant Coleman agrees that the National Futures Association is hereby designated as the Monitor for a period of eleven years commencing January 1, 2002. Notice to the Monitor shall be made to Daniel A. Driscoll, Esq., Executive Vice President, Chief Compliance Officer, or his successor, at the following address: National Futures Association, 200 West Madison Street, Chicago, IL 60606.

4. Defendant Coleman shall provide a sworn financial statement to the Commission, by providing it to the Monitor on June 30 and December 31 of each calendar year, starting June 30, 2002 and continuing through and including December 31, 2011. The financial statement shall provide:

- (a) A true and complete itemization of all of Defendant Coleman's rights, title and interest (or claimed in) any asset, wherever, however and by whomever held;
- (b) An itemization, description and explanation of all transfers of assets with a value of \$1,000 or more made by or on behalf of Defendant Coleman over the preceding six-month interval; and
- (c) A detailed description of the source and amount of all of Defendant Coleman's income or earnings, however generated.

Defendant Coleman shall also provide the Monitor with complete copies of his signed federal income tax returns, including all schedules and attachments thereto (e.g., IRS Forms W-2) and Forms 1099, as well as any filings he is required to submit to any state tax or revenue authority, on or before June 30 of each calendar year, or as soon thereafter, beginning in 2002

and ending in 2011. If Coleman moves his residence at any time he shall provide written notice of his new address to the Monitor and the Commission, through the Director, Division of Enforcement, Commodity Futures Trading Commission, at 1155 21st Street, N.W., Washington, DC 20181, within ten calendar (10) days thereof.

If, during the same time period, Defendant Coleman elects to file a joint tax return, he shall provide all documents called for by this paragraph, including the signed and filed joint tax return, plus a draft individual tax return prepared on IRS Form 1040 containing a certification by a licensed certified public accountant that the “Income” section (currently lines 7-22 of Form 1040) truly, accurately and completely reflects all of Defendant Coleman’s income, that the “Adjusted Gross Income” section truly, accurately and completely identifies all deductions that Defendant Coleman has a right to claim, and that the deductions contained in the “Adjusted Gross Income” section are equal to or less than 50% of the deductions that Defendant Coleman is entitled to claim on the joint tax return; provided however that Defendant Coleman may claim 100% of the deductions contained in the “Adjusted Gross Income” section that are solely his. Such individual tax return shall include all schedules and attachments thereto (e.g., IRS Forms W-2) and Forms 1099, as well as any filing required to be submitted to any state tax or revenue authority.

5. Based on the information contained in Defendant Coleman’s tax returns, Defendant Coleman’s sworn Financial Disclosure Statement and other financial records provided to the Commission, the Monitor shall calculate the Annual CMP Payment to be paid by Defendant Coleman for that year. On or before July 31 of each year, and starting in calendar year 2002, the Monitor shall send written notice to Defendant Coleman with instructions to immediately pay the Annual CMP Payment.

6. Any failure by Defendant Coleman to carry out any of the terms, conditions or obligations under any paragraph of this Order shall constitute an Event of Default. If any Event of Default occurs, the Commission (or its designee) shall be entitled to:

- (a) an order requiring immediate payment of any unpaid Annual CMP Payments, or, at the Commission's option, the entire unpaid balance, or any unpaid portion, of the civil monetary penalty; and/or
- (b) move the Court for imposition of all other available remedies, including, but not limited to, an order holding Defendant Coleman in contempt for violation of this Order.

7. Upon the occurrence of an Event of Default based upon a claim or cause of action that Defendant Coleman failed to make any Annual CMP Payments when due, Defendant Coleman will be barred from asserting any defense, including expiration of any statute of limitations, waiver, estoppel or laches, where such defense is based on the alleged failure of the Commission to pursue such claims or causes of action during the pendency of this civil action, during the negotiation of the Defendant Coleman's Consent to this Order or while this Order remains in effect. The only issue that Defendant Coleman may raise in defense is whether he has made the Annual CMP Payments as directed by the Monitor. Any motion by the Commission for entry of an order pursuant to this paragraph requiring payment of less than the full amount of the civil monetary penalty, or any acceptance by the Commission of partial payment of the Annual CMP Payments made by the Defendant Coleman, shall not be deemed a waiver of the Commission's right to require Defendant Coleman to make further payments pursuant to the payment plans set forth above, or, in the event of a further Event of Default, a waiver of the

Commission's right to require immediate payment of the entire remaining balance, or any unpaid portion, of civil monetary penalty.

8. Based upon Defendant Coleman's sworn representations in his Financial Disclosure Statements and other evidence provided by Defendant Coleman to the Commission regarding his financial condition, the Commission has agreed that this Order would not require his immediate payment of the entire civil monetary penalty. The Commission's determination not to require immediate payment of the entire civil monetary penalty is contingent upon the accuracy and completeness of Defendant Coleman's Financial Disclosure Statements and other evidence provided by Defendant Coleman regarding his financial condition. If at any time following the entry of this Order, the Commission obtains information indicating that Defendant Coleman's representations to the Commission concerning his financial condition were fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, the Commission may move this Court for an order requiring Defendant Coleman to make immediate payment of his entire civil monetary penalty, or of any portion thereof, the amount of which shall be determined by the Commission. In connection with any such motion, the only issues shall be whether the financial information provided by Defendant Coleman was fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made. In its motion, the Commission may move this Court to consider all available remedies, including, but not limited to, ordering Defendant Coleman to pay funds or transfer assets or directing the forfeiture of any assets, and the Commission may also request additional discovery. Defendant Coleman may not, by way of defense to such motion, challenge the validity of his Consent or this Order, or contest any of the findings of fact or conclusions of law set forth in this Order, assert that payment of a civil monetary penalty should not be ordered, or contest the amount of the civil monetary penalty to be paid. If in

such motion the Commission moves for, and the Court orders, payment of less than the full amount of the civil monetary penalty, such motion will not be deemed a waiver of the Commission's right to require Defendant Coleman to make further payment pursuant to the payment plans set forth above.

V.

MISCELLANEOUS PROVISIONS

1. Upon being served with copies of this Consent Order after entry by the Court, Defendant Coleman shall sign an acknowledgment of such service and serve such acknowledgment on the Commission within seven (7) calendar days.

2. 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. 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.

4. 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:

Lael E. Campbell, Esq.

Division of Enforcement
Three Lafayette Centre
1155 21st St. N.W.
Washington, D.C. 20581

Notice to the Monitor:

Dan Driscoll
National Futures Association
200 West Madison Street
Chicago, IL 60606

Notice to the Defendant:

Ellery Coleman
133 Bunker's Trail
Warner Robins, GA 31088

SO ORDERED, at Macon, Georgia on this 23rd day of April, 2002.

UNITED STATES DISTRICT JUDGE

Consent of Parties

Ellery Coleman

Date

Lael E. Campbell,
Michael Lee,
Vincent A. McGonagle,
Attorneys for Commodity Futures Trading Commission

Date