

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

COMMODITY FUTURES	)	
TRADING COMMISSION, et. al,	)	Case No. 1:04-CV-666
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
ANDREW M. SILBERSTEIN	)	
	)	
Defendant.	)	
	)	

CONSENT ORDER OF PERMANENT INJUNCTION, MONETARY JUDGMENT AND  
OTHER EQUITABLE RELIEF AGAINST DEFENDANT ANDREW M. SILBERSTEIN

On March 5, 2004, Plaintiffs, the Commodity Futures Trading Commission ("Commission"), and the State of Maryland Ex Rel Maryland Securities Commissioner ("Maryland Securities Commissioner"), filed a Complaint for permanent injunction and other relief, and moved pursuant to Section 6c and 6d of the Commodity Exchange Act ("Act"), as amended, 7 U.S.C. § 13a-1 and § 13a-2 (2001), for a Statutory Restraining Order and Preliminary Injunction, freezing the assets of the Defendant, Andrew M. Silberstein, and prohibiting the Defendant from destroying any business records, books or documents.

On April 8, 2004, 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 Regulations as alleged in the Complaint, froze Defendant's assets, ordered the maintenance of and access to business records, and required Silberstein to complete a financial disclosure document.

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, Defendant consents to the entry of this *Consent Order of Permanent Injunction, Monetary Judgment, and Other Relief Against Defendant Andrew M. Silberstein* ("Order").

2. Defendant admits that this Court has jurisdiction over him and the subject matter of this action.

3. Defendant admits that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. §13a-1 (2001).

4. In addition, Defendant waives: (a) all claims that he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63; (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.

5. By consenting to the entry of this Order, Defendant neither admits nor denies any of the findings made in this order or the allegations contained in the Complaint except as to jurisdiction and venue, which Defendant admits. However, Defendant agrees that the allegations of the Complaint and all of the Findings of Fact made by this Court and contained in Section II of this Order shall be taken as true and correct and be given preclusive effect without further proof only for the purpose of any subsequent bankruptcy proceeding filed by, on behalf of, or against Defendant for the purpose of determining whether his restitution obligation and/or other payments ordered herein are excepted from discharge. Defendant also shall provide immediate notice of any bankruptcy filed by, on behalf of, or against him in the manner required by Section IV, paragraph 4 of this Order.

6. Defendant 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 Defendant's (a) testimonial obligations, or (b) right to take legal positions in other proceedings to which the Commission or the Maryland Securities Commissioner is not a party. Defendant shall take all necessary steps to ensure that all of his agents, servants, employees, contractors and attorneys understand and comply with this agreement.

7. Defendant 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, the Maryland Securities Commissioner, 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. Defendant consents to the continued jurisdiction of this Court 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 the Order.

9. 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 and §6d of the Act, 7 U.S.C. § 13a-1 (2001), as set forth herein.

## II.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

## A. FINDINGS OF FACT

1. While acting as an unregistered Commodity Pool Operator ("CPO"), Defendant Andrew M. Silberstein solicited, accepted, and pooled approximately \$632,000 from at least seven members of the general public to participate in an unnamed commodity trading pool ("Pool") operated by Defendant to trade in S&P 500 futures contracts.

2. Defendant misappropriated investor funds, in part to pay his own personal expenses, and used investor funds in furtherance of a Ponzi scheme through which initial investors were paid back with funds from new investors.

3. During the course of the Pool's operations, the Defendant misrepresented to Pool participants and prospective Pool participants orally and in writing:

(i) the trading done by the Pool;

(ii) the performance record of the Pool;

(iii) the Pool's value; and

(iv) the value of the individual Pool participants' shares in the Pool.

4. Defendant made misrepresentations to customers about his past investment performance and issued false account statements to investors showing trading profits when in fact, there were overall trading losses.

5. Defendant obtained additional Pool funds and Pool participants in part based upon the false information contained in the account statements provided to current Pool participants.

6. The Defendant misrepresented orally and in writing to Pool participants that their investments were making substantial rates of return and generating substantial profits.

7. Of approximately \$632,000 given to the Defendant by investors, approximately \$220,000 net of any profits was lost in trading.

8. Despite the fact that he had no net trading profits, Defendant returned

approximately \$266,000 in principal and purported profits to Pool participants.

9. Defendant misappropriated Pool participants' funds for his personal use totaling approximately \$146,000.

10. Defendant still owes three investors a total of \$440,000.

11. While acting as an unregistered CPO, Defendant also failed to provide required Disclosure Documents to investors, accepted investors' funds in his own name rather than in the name of the Pool, and commingled investor funds with his own funds.

## **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 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.

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. The Commission, the Maryland Securities Commissioner and the Defendant have agreed to this Court's retention of continuing jurisdiction over each of them for the purpose of enforcing the terms of this Order.

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

6. Defendant violated Section 4b(a)(ii) of the Act, 7 U.S.C. § 6b(a)(ii)(2001), in that, he

willfully made or caused to be made to Pool participants false reports or statements, or willfully entered or caused to be entered false records, by knowingly delivering to Pool participants trading account statements which reported false profits.

7. Defendant violated Section 4m(1) of the Act, 7 U.S.C. §6m(1) (2001), in that, he used the mail and other means of interstate commerce in connection with his business as a CPO, while failing to register with the Commission as a CPO.

8. Defendant, while acting as a CPO, violated Section 4a(1)(A) and (B) of the Act, 7 U.S.C. § 6a(1)(A) and (B)(2001), 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 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)(2001), in that, by failing to open a trading account or a bank account in the name of the 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)(2001), in that, while operating as a CPO, he accepted Pool funds in his own name.

11. Defendant violated Regulation 4.21, 17 C.F.R. § 4.21 (2001), in that, Defendant failed to furnish pool participants with a written Disclosure Document and failed to receive signed and dated acknowledgments from the pool participants stating that they received and understood the Disclosure Document.

12. Defendant violated Section 11-301 of the Maryland Securities Act, Corporations and Associations Article, Title 11, Annotated Code of Maryland (1999 Repl. Vol. and 2004 Supp.) ("Maryland Securities Act"), in that, he misappropriated Pool participants' funds and issued false statements to participants.

13. Defendant violated Sections 11-401 and 11-501 of the Maryland Securities Act, in that Defendant, while not registered as a broker-dealer, broker-dealer agent, or investment advisor, sold unregistered securities.

14. Defendant violated Section 11-302 of the Maryland Securities Act, in that, Defendant committed fraud in the offer of investment advice by employing a scheme to defraud, misrepresenting material facts, engaging in a course of business which operated as a fraud, and engaging in unethical practices previously described herein.

15. There is good cause for entry of an order permanently enjoining Defendant from engaging in future violations of the act and requiring Defendant to pay restitution in the amount of \$440,000 and a civil monetary penalty in the amount of \$120,000.

### III.

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

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

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

iii. willfully deceiving or attempting to deceive other persons;

all in violation of Section 4b(a)(i), (ii) and (iii) of the Act;

- b. while acting as a CPO or an AP of a CPO, employing a device, scheme or artifice to defraud pool participants or prospective pool participants, in violation of Section 4o(1)(A) of the Act;
- c. while acting as a CPO, engaging in a transaction, practice or course of business which operates as a fraud or deceit upon pool participants or prospective pool participants, in violation of Section 4o(1)(B) of the Act;
- d. using the mails or instrumentalities of interstate commerce in or in connection with the business of a CPO while failing to register as a CPO, in violation of Section 4m(1) of the Act;
- e. while acting as a CPO, (a) accepting pool funds other than in the name of the pool or (b) failing to treat the pool as a separate entity in violation of Regulation 4.20(a) and (b); and
- f. while acting as a CPO, prior to soliciting, accepting or receiving pool funds, (a) failing to furnish the pool participants with a written Disclosure Document or (b) failing to receive from pool participants an acknowledgement signed and dated by the participants that they received and understood the Disclosure Document in violation of Regulation 4.21.

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

3. Defendant is further permanently restrained, enjoined and prohibited from directly or indirectly:

- a. trading on or subject to the rules of any registered entity;
- b. engaging in, controlling or directing the trading for any commodity futures, security futures, options, options on futures, or foreign currency options account 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 with the Commission, except

as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9) (2003), or acting as a principal, agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9) (2003). This includes, but is not limited to, soliciting, accepting or receiving any funds, revenue or other property from any person, giving commodity trading advice for compensation, except as provided for in Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9) (2003), or soliciting prospective customers, related to the purchase or sale of any commodity futures, security futures, options, options on futures, or foreign currency futures.

4. Defendant is further enjoined from entering into any commodity futures or options 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.

5. Defendant is permanently enjoined from engaging in acts and practices that violate the Maryland Securities Act and from engaging in securities or investment advisory business or activities in Maryland or from being or acting as a principal or consultant in any company engaged in such activities.

6. The injunctive provisions of this Consent Order shall be binding upon the Defendant, upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of the Defendant 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 the Defendant.

**IT IS FURTHER ORDERED THAT DEFENDANT ANDREW M. SILBERSTEIN PAY RESTITUTION AND A CIVIL MONETARY PENALTY:**

1. **RESTITUTION:** Defendant shall pay and be liable for restitution to investors in the amount of \$440,000 plus pre-judgment interest of \$\_\_\_\_\_. Post-judgment interest after the date of this Order until the restitution is paid in full shall be paid at the post-judgment interest rate set forth in 28 U.S.C. § 1961. Pool participants shall be repaid in the amounts set forth in

Attachment A which is incorporated by reference into this Order and Judgment.

2. CIVIL MONETARY PENALTIES

a. CFTC CIVIL MONETARY PENALTY: Pursuant to § 6c of the Act, 7 U.S.C. § 13a-1 (2001), Defendant shall pay and be liable for a civil monetary penalty of \$60,000.00 plus post-judgment interest. Interest after the date of this Order until the civil monetary penalty is paid in full shall be paid at the post-judgment interest rate set forth in 28 U.S.C. § 1961. Defendant shall pay such civil monetary penalty 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, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Defendant and the name and docket number of the proceeding; Defendant shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581 and to Maryland Assistant Attorney General, Lucy Cardwell at the following address: 200 St. Paul Place, Baltimore, Maryland 21202. All payments of the civil monetary penalty shall be paid to the US Treasury.

b. STATE OF MARYLAND CIVIL MONETARY PENALTY: Pursuant to § 11-702(b) of the Maryland Securities Act, Defendant shall pay and be liable for a civil monetary penalty of \$60,000.00 plus post-judgment interest. Interest after the date of this Order until the civil monetary penalty is paid in full shall be paid at the post-judgment interest rate set forth in Courts & Judicial Proceedings, § 11-107(a), Annotated Code of Maryland (2002 Repl. Vol. and 2004 Supp.). Defendant shall pay such civil monetary penalty 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 Office of the Attorney General, 200 St. Paul Place, Baltimore, MD 21202, under cover of a letter that identifies Defendant and the name and docket number of the proceeding; Defendant shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581 and to Maryland Assistant Attorney General, Lucy Cardwell at the following address: 200 St. Paul Place, Baltimore, Maryland 21202.

3. **PARTIAL PAYMENTS:** All sums collected from Defendant pursuant to this Order will first go toward restitution and then toward the civil monetary penalty. Any acceptance by the Plaintiffs' of partial payment of Defendant's restitution and/or civil monetary obligations, shall not be deemed a waiver of his obligation to make further payments pursuant to this Order, or a waiver of the Plaintiffs' right to seek to compel payment of any remaining balance.

4. **THIRD-PARTY BENEFICIARIES:** Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each of the individuals identified in Attachment A is explicitly made an intended third-party beneficiary of this Order and may seek to enforce obedience of this Order to obtain satisfaction of any portion of the restitution amount which has not been paid by Defendant, to ensure continued compliance with any provision of this Order and to hold Defendant in contempt for any violations of any provision of this Order.

5. **COLLATERAL AGREEMENTS:** Defendant shall immediately notify the Commission and the Maryland Securities Commissioner if he makes or has previously made any agreement with any investor obligating him to make payments outside of this Order. He shall also provide immediate evidence to the Court, the Commission and the Maryland Securities Commissioner of any payments made pursuant to such agreement.

6. TRANSFER OF ASSETS: Defendant shall not transfer or cause others to transfer funds or other property to the custody, possession, or control of any other person for the purpose of concealing such funds from the Court, the Commission, the Maryland Securities Commissioner or any investor until the restitution amounts have been paid in full.

#### IV.

##### **MISCELLANEOUS PROVISIONS**

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

3. 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.

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:

Kevin K. Batteh  
Erin Vespe  
Commodity Futures Trading Commission  
1155 21st Street, NW  
Washington, DC 20581  
Telephone (202) 418-5000

Facsimile (202) 418-5538

Notice to State of Maryland:

Lucy A. Cardwell  
Assistant Attorney General  
J. Joseph Curran, Jr.  
Attorney General for the State of Maryland  
200 St. Paul Place  
Baltimore, Maryland 21202  
Telephone: (410) 576-6337  
Facsimile: (410) 576-6532

Notice to the Defendant:

Andrew M. Silberstein  
[andrew@silbersteins.com](mailto:andrew@silbersteins.com)

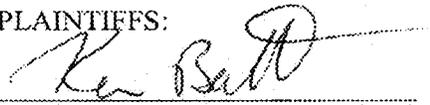
5. In the event that Defendant changes his residential or business telephone number(s) and/or address(es) at any time, he shall provide written notice of the new number(s) and/or address(es) to the Commission and the State of Maryland within ten calendar days thereof.

SO ORDERED, this 28<sup>th</sup> day of FEB., 2005, at Baltimore, Maryland.

  
RICHARD D. BENNETT  
UNITED STATES DISTRICT JUDGE

Consented to and  
approved for entry by:

PLAINTIFFS:

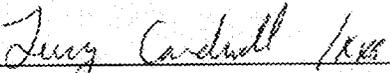
  
Erin E. Vespe, CT. Bar No. 407295  
Kevin K. Batteh, DC Bar No. 482021

Rachel Entman, GA Bar. No. 249365

Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581  
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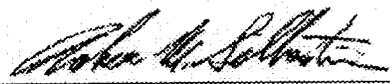
ATTORNEYS FOR THE PLAINTIFF

COMMODITY FUTURES TRADING  
COMMISSION

  
Lucy A. Cardwell, MD Bar No. 07311  
Assistant Attorney General  
J. Joseph Curran, Jr.  
Attorney General for the State of Maryland  
200 St. Paul Place  
Baltimore, MD 21202  
Telephone: (410) 576-6337  
Facsimile: (410) 576-6532  
(Signed by Kevin K. Batteh with permission from  
Lucy A. Cardwell)

ATTORNEYS FOR THE PLAINTIFF  
STATE OF MARYLAND EX REL  
MARYLAND SECURITIES COMMISSIONER

DEFENDANT:

  
ANDREW M. SILBERSTEIN, pro se  
andrew@silbersteins.com  
1-410-358-2045

**Exhibit A**

<b>Customer</b>	<b>Invested</b>	<b>\$ Returned</b>	<b>\$ Owed</b>	<b>% Share</b>
Mordechai Martin Edry	\$50,000.00	\$10,000.0	\$40,000.00	9.1%
Harvey Kramer	\$50,000.00	\$0.0	\$50,000.00	11.4%
Harry Newton	\$400,000.00	\$50,000.0	\$350,000.00	79.5%
	<b>\$500,000.00</b>	<b>\$60,000.00</b>	<b>\$440,000.00</b>	<b>100.00%</b>