

FILED IN CHAMBERS  
U.S.D.C. Atlanta

DEC 15 2009

UNITED STATES DISTRICT COURT  
FOR NORTHERN DISTRICT OF GEORGIA  
ATLANTA GEORGIA

JAMES N. HATTEN, Clerk  
By:  Deputy Clerk

_____	)	
U.S. COMMODITY FUTURES	)	
TRADING COMMISSION,	)	
	)	
Plaintiff,	)	
	)	CASE NO. 1:05-CV-2492 RWS
v.	)	
	)	
AMERICAN DERIVATIVES CORP.,	)	
et al.,	)	
	)	
Defendants.	)	
_____	)	

**[PROPOSED] CONSENT ORDER OF PERMANENT INJUNCTION AND  
OTHER EQUITABLE RELIEF AGAINST AMERICAN DERIVATIVES  
CORP., BROKERAGE MANAGEMENT CORP., LAYNE GERSTEL,  
DEVEREAUX BOOTH AND DAVID MITTLER**

I.

**BACKGROUND**

On September 26, 2005 the Commodity Futures Trading Commission (“Plaintiff” or “Commission”) filed this action against American Derivatives Corp. (“American Derivatives”), Brokerage Management Corp. (“Brokerage Management”), National Commodities Corporation Inc. (“NCCI”), International Commodity Clearing LLC (“ICC”), Layne D. Gerstel (“Gerstel”), Devereaux D.

Booth (“Booth”), and David N. Mittler (“Mittler”) seeking injunctive and other equitable relief for violations of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 *et seq.* (2002) (the “Act”), and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2005) (“Regulations”). On that same day, pursuant to the Commission’s filing, the Court issued a Statutory Restraining Order freezing the assets of American Derivatives, Brokerage Management, NCCI, ICC, Gerstel, Booth and Mittler and preserving their books and records. On November 23, 2005, the Court issued an Order preliminarily enjoining them from violating the Act and Regulations but removing the asset freeze. Subsequently, on February 7, 2008, the Commission, NCCI and ICC entered into a Consent Order of Judgment in this action to settle the Commission’s Complaint solely against NCCI and ICC.

## II.

### CONSENTS AND AGREEMENTS

Solely to effect settlement of the matters alleged in the Complaint in this action without a trial on the merits, any further judicial proceedings, or presentation of any additional evidence, American Derivatives, Brokerage Management, Gerstel, Booth and Mittler (collectively, “Defendants”):

1. Consent to the entry of this Consent Order of Permanent Injunction and Other Equitable Relief (the “Consent Order”);

2. Affirm that they have read and agreed to this Consent Order voluntarily, and that no threat or promise has been made by the Commission or any member, officer, agent, or representative thereof, or by any other person, to induce consent to this Consent Order, other than as set forth specifically herein;

3. Acknowledge service of the Summons and Complaint;

4. Admit that this Court has jurisdiction over them and the subject matter of this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1;

5. Admit that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1;

6. Waive:

a. Any and all claims that they may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1 et seq. (2009), relating to, or arising from, this action relating to or arising from this action;

b. Any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, §§ 231-232, 110

Stat. 862-63 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to or arising from this action;

c. Any claim that they may possess 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;

d. The entry of findings of fact and conclusions of law in this action pursuant to Rule 52 of the Federal Rules of Civil Procedure; and

e. Any and all rights of appeal from this action;

7. Agree that no provision of this Consent Order shall in any way limit or impair the ability of any other person or entity to seek any legal or equitable remedy against Defendants or any other person in any other proceeding;

8. Neither admit nor deny the allegations of the Complaint except as to jurisdiction and venue, which Defendants admit. Defendants do not consent to the use of the allegations of the Complaint or this Consent Order as the sole basis for any other proceeding brought by the Commission, other than any proceeding to enforce the terms of this Consent Order or a Commission registration proceeding relating to Defendants pursuant to Section 8a of the Act, 7 U.S.C. § 12a(1), and/or Part 3 of the Regulations, 17 C.F.R. §§ 3.1 *et seq.*, and any proceeding in bankruptcy filed by or against Defendants. Solely with respect to any proceeding

to enforce this Consent Order and any Commission registration proceeding relating to Defendants pursuant to Section 8a of the Act, 7 U.S.C. § 12a(1), and/or Part 3 of the Regulations, 17 C.F.R. §§ 3.1 *et seq.*, or any proceeding in bankruptcy filed by or against Defendants, Defendants agree that the allegations of the Complaint and this Consent Order shall be taken as true and correct and be given preclusive effect, without further proof;

9. Defendants shall provide immediate notice to this Court and the Commission of any bankruptcy proceeding filed by, on behalf of, or against any of the Defendants, individually or collectively. Defendants shall also provide notice of any change of address, phone number, or contact information, via certified mail in the manner required by Section V of this Consent Order within sixty days for up to five years after execution of this Consent Order;

10. Consent to the continued jurisdiction of this Court over them for the purpose of enforcing the terms and conditions of this Consent Order and for any other purpose relevant to this action, even if Defendants now or in the future reside outside the jurisdiction;

11. Agree that neither Defendants nor any of their agents, employees, or representatives under their authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the Complaint or

creating, or tending to create, the impression that the Complaint or this Consent Order is without a factual basis; provided, however, that nothing in this provision shall affect Defendants' (a) testimonial obligations; or (b) right to take legal positions in other proceedings to which the Commission is not a party. Defendants shall take all necessary steps to ensure that all of their agents, employees, and representatives under their authority or control understand and comply with this agreement; and

12. Acknowledge that American Derivatives, Gerstel, Booth and Mittler previously voluntarily withdrew from registration in all capacities with the Commission and the National Futures Association ("NFA").

### **III.**

#### **ORDER FOR PERMANENT INJUNCTION**

#### **IT IS NOW HEREBY ORDERED THAT:**

13. Defendants are permanently restrained, enjoined and prohibited from directly or indirectly:

a. Offering to enter into, entering into, executing, confirming the execution of, or conducting business for the purpose of soliciting, accepting any order for, or otherwise dealing in any transaction in, or in connection with, a commodity option contrary to any rule, regulation, or order of the Commission

prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006); and

b. In or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, or the maintenance of, any commodity option transaction, cheating or defrauding or attempting to cheat or defraud any person; or deceiving or attempting to deceive any person by any means whatsoever, in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2006), and Regulations 33.10(a) and (c), 17 C.F.R. §§ 33.10(a) and (c).

14. American Derivatives, Gerstel and Booth are permanently restrained, enjoined and prohibited from directly or indirectly failing to diligently supervise the handling by its/his partners, officers, employees and agents of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its/his partners, officers, employees and agents relating to its business as a Commission registrant, in violation of Regulation 166.3, 17 C.F.R. § 166.3 (2009).

15. Defendants are 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) (2006) (“commodity interest”), including, but not limited to, the following:

- a. Trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29) (2006);
- b. Engaging in, controlling or directing the trading for any commodity interest account for or on behalf of any other person or entity, whether by power of attorney or otherwise;
- c. Soliciting, receiving, or accepting any funds in connection with the purchase or sale of any commodity interest contract;
- d. 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) (2009), or acting as a principal, agent, officer or employee of any person registered, exempted from registration, or required to be registered with the Commission, except as provided for in Commission Regulation 4.14 (a)(9), 17 C.F.R. § 4.14(a)(9) (2009);  
and
- e. Engaging in any business activity related to commodity interest trading.

16. Notwithstanding paragraph 15, above, upon full satisfaction by Gerstel, Booth, or Mittler (collectively, the “Individual Defendants”) of his respective restitution and civil monetary penalty obligations described in Sections IV.A and B of this Consent Order, below, the Individual Defendant who satisfies his restitution and civil monetary obligations shall be permitted to trade personal commodity interest accounts solely for his personal benefit.

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

#### IV.

#### **ORDER FOR RESTITUTION, CIVIL MONETARY PENALTIES AND OTHER ANCILLARY RELIEF**

#### **IT IS NOW HEREBY ORDERED THAT:**

Defendants shall comply fully with the following terms, conditions, and obligations relating to the payment of restitution and the payment of civil monetary penalties.

**A. RESTITUTION**

18. American Derivatives and Brokerage Management shall pay, jointly and severally, restitution in the amount of \$4,700,000.00, plus any post-judgment interest that may accrue.

19. Gerstel shall pay restitution in the amount of \$309,000.00, plus any post-judgment interest that may accrue.

20. Booth shall pay restitution in the amount of \$110,000.00, plus any post-judgment interest that may accrue.

21. Mittler shall pay restitution in the amount of \$250,000.00, plus any post-judgment interest that may accrue.

22. Post-judgment interest shall accrue beginning on the date of entry of this Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Consent Order pursuant to 28 U.S.C. § 1961(a).

23. All restitution payments are immediately due and owing. Any amount paid to any American Derivatives customer shall not limit the ability of any customer from independently proving in a separate action that a greater amount is owed from any person or entity, and nothing herein shall be construed in any way

to limit or abridge the rights of any customer that exist under federal, state, or common law to assert a claim for recovery against any of the Defendants subject to any offset or credit that any of the Defendants may be entitled to claim under the law governing that customer's claim. Omission of any customer from Attachment A shall in no way limit the ability of such customer from seeking recovery from any person or entity.

24. To effect payment by Defendants and distribution of restitution, the Court appoints the NFA as Monitor ("Monitor"). The Monitor shall collect restitution payments from Defendants, and make distributions as set forth below. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, it shall not be liable for any action or inaction arising from its appointment as Monitor, other than actions involving fraud.

25. Defendants shall make restitution payments under this Consent Order to the NFA 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 "American Derivatives Settlement Fund" and sent to Office of Administration, National Futures Association, 300 S. Riverside Plaza, Suite 1800, Chicago, IL 60606-6615, under a cover letter that identifies the paying Defendant and the name and docket

number of the proceeding. The paying Defendants shall simultaneously transmit copies of the cover letter and the form of payment to i) the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, and ii) the Chief, Office of Cooperative Enforcement, Division of Enforcement, at the same address.

26. The Monitor shall oversee Defendants' restitution obligations and shall have the discretion to determine the manner for distribution of funds in an equitable fashion to defrauded American Derivatives customers as appropriate. Restitution payments shall be made in an equitable fashion as determined by the Monitor to the persons identified on Attachment A to this Consent Order.

27. Should the Monitor be unable to locate certain American Derivatives customers after making reasonable efforts to locate such investors, the Monitor shall distribute the funds owed to those customers equitably to the other American Derivatives customers. In the event that the Monitor determines that the amount of funds available for distribution to customers is of a *de minimus* nature such that the Monitor determines that the administrative costs of making a restitution distribution is impractical, the Monitor may, in its discretion, transfer such funds to the Commission to be applied to Defendants civil monetary penalty obligation under Section IV.B of this Consent Order.

28. Defendants shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify American Derivatives customers to whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any restitution payments.

29. Subsequent to the entry of this Consent Order, Defendants shall provide the Commission and the Monitor with immediate notice of any filing or compromise and settlement of any private or governmental actions relating to the subject matter of this Consent Order in the manner required by Section V of this Consent Order.

30. To the extent that any funds accrue to the U.S. Treasury as a result of Defendants restitution obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in paragraph 24, above.**B.**

**B. CIVIL MONETARY PENALTIES**

31. American Derivatives shall pay a civil monetary penalty in the amount of \$1,000,000.00, plus post-judgment interest.

32. Brokerage Management shall pay a civil monetary penalty in the amount of \$120,000.00, plus post-judgment interest.

33. Gerstel shall pay a civil monetary penalty in the amount of \$120,000.00, plus post-judgment interest.

34. Booth shall pay a civil monetary penalty in the amount of \$60,000.00, plus post-judgment interest.

35. Mittler shall pay a civil monetary penalty in the amount of \$100,000.00, plus post-judgment interest.

36. Post-judgment interest shall accrue beginning on the date of entry of this Consent Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Consent Order pursuant to 28 U.S.C. § 1961(a).

37. Defendants shall pay their civil monetary penalties by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, the payment shall be made payable to the Commission and sent to the address below:

Commodity Futures Trading Commission  
Division of Enforcement  
Attn: Marie Bateman – AMZ-300  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
(405) 954-6569

If payment is to be made by electronic funds transfer, the paying Defendant shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. The paying Defendant shall accompany payment of the penalty with a cover letter that identifies the paying Defendant and the name and docket number of this proceeding. The paying Defendant shall simultaneously transmit copies of the cover letter and the form of payment to the Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21<sup>st</sup> Street, NW, Washington, DC 20581, and the Chief, Office of Cooperative Enforcement, at the same address.

**C. PRIORITY OF MONETARY SANCTIONS AND PARTIAL PAYMENTS**

38. All payments by Defendants pursuant to this Consent Order shall first be applied to satisfaction of their restitution obligations, consistent with the authority granted the Monitor in Part IV.A., above. After satisfaction of their respective restitution obligation, payments by Defendants pursuant to this Consent Order shall be applied to satisfy the paying Defendant's respective civil monetary penalty obligation.

39. Any acceptance by the Commission and/or Monitor of partial payment of any Defendant's restitution obligation and/or civil monetary penalty

shall not be deemed a waiver of the paying Defendant's requirement to make further payments pursuant to this Consent Order, or a waiver of the Commission's and/or Monitor's right to seek to compel payment of any remaining balance.

**D. EQUITABLE RELIEF PROVISION**

40. The equitable relief provisions of this Consent Order shall be binding upon Defendants and any person who is acting in the capacity of officer, agent, employee, servant, or attorney of Defendants, and any person acting in active concert or participation with Defendants who receives actual notice of this Consent Order by personal service or otherwise.

**V.**

**MISCELLANEOUS PROVISIONS**

**IT IS FURTHER ORDERED THAT:**

41. Jurisdiction of this Court: This Court shall retain jurisdiction of this cause to assure compliance with this Consent Order and for all other purposes related to this action.

42. Notices: All notices required by this Consent Order shall be sent by certified mail, return receipt requested. Defendants shall provide the Commission and the Monitor with written notice of all changes to their contact telephone

number(s) and/or mailing address(es) within ten (10) calendar days of the change(s).

43. Waiver: The failure of any party to this Consent Order or of any customer at any time to require performance of any provision of this Consent Order shall in no manner affect the right of the party or customer to enforce the same or any other provision of this Consent Order at a later time. No waiver in one or more instances of the breach of any provision contained in this Consent Order shall be deemed or construed as a further or continuing waiver of such breach or waiver of the breach of any other provision of this Consent Order.

44. Invalidation: If any provision, or the application of any provision, of this Consent Order is held invalid, the remainder of this Consent Order and the application of the provision to any other person or circumstance shall not be affected by the holding.

45. Successors and Assigns: This Consent Order shall inure to the benefit of and be binding upon the successors, assigns, heirs, beneficiaries, and administrators of all parties to this Consent Order.

46. Integration: This Consent Order incorporates all of the terms and conditions of the settlement of the parties to this Consent Order. Nothing shall

serve to amend or modify this Consent Order in any respect, unless: (1) reduced to writing; (2) signed by all parties hereto; and (3) approved by order of this Court.

47. Counterparts and Facsimile Execution: This Consent Order may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered (by facsimile or otherwise) to the other party, it being understood that all parties need not sign the same counterpart. Any counterpart or other signature to this Consent Order that is delivered by facsimile shall be deemed for all purposes as constituting good and valid execution and delivery by such party of this Consent Order.

48. Acknowledgements: Defendants acknowledge and understand that this Consent Order must be accepted and ratified by the Commission before it becomes final. However, Defendants understand and agree that by their signatures they are bound by the terms and conditions of this Consent Order, unless the Commission refuses to accept and ratify the Consent Order.

49. Authority (American Derivatives): Gerstel hereby warrants that he was the president, chief executive officer, chief financial officer, and the corporate secretary of American Derivatives during the time the company was an active Georgia corporation and prior to its dissolution on May 16, 2008, and that this

Consent Order has been duly authorized by American Derivatives and/or its successors and he has been duly empowered to sign and submit it on behalf of American Derivatives and/or its successors.

50. Authority (Brokerage Management): Gerstel hereby warrants that he was the chief executive officer, chief financial officer, and the corporate secretary of Brokerage Management during the time the company was an active Georgia corporation and prior to its dissolution on May 16, 2008, and that this Consent Order has been duly authorized by Brokerage Management and/or its successors and he has been duly empowered to sign and submit it on behalf of Brokerage Management and/or its successors.

**WHEREFORE**, there being no just reason for delay, the Clerk of the Court is hereby directed to enter this Consent Order of Permanent Injunction and Other Equitable Relief Against American Derivatives Corp., Brokerage Management Corp., Layne Gerstel, Devereaux Booth And David Mittler

**SO ORDERED**, at Atlanta, Georgia on this 15<sup>th</sup> day of December, 2009.

  
HONORABLE RICHARD W. STORY  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF GEORGIA

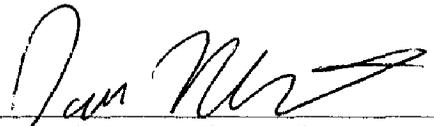
**CONSENTED TO AND APPROVED BY:**

\_\_\_\_\_  
Layne D. Gerstel on behalf of  
Defendant American Derivatives Corp. Dated: \_\_\_\_\_

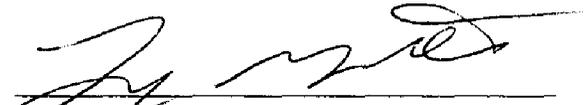
\_\_\_\_\_  
Layne D. Gerstel on behalf of  
Brokerage Management Corp. Dated: \_\_\_\_\_

\_\_\_\_\_  
Defendant Layne D. Gerstel  
Individually Dated: \_\_\_\_\_

\_\_\_\_\_  
Defendant Devereaux D. Booth  
Individually Dated: \_\_\_\_\_

  
\_\_\_\_\_  
Defendant David N. Mittler  
Individually Dated: 7/31/09

**CONSENTED TO AND APPROVED BY:**



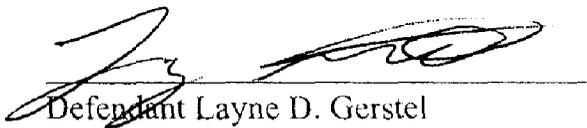
Layne D. Gerstel on behalf of  
Defendant American Derivatives Corp.

Dated: 7/31/09



Layne D. Gerstel on behalf of  
Brokerage Management Corp.

Dated: 7/31/09



Defendant Layne D. Gerstel  
Individually

Dated: 7/31/09

\_\_\_\_\_  
Defendant Devereaux D. Booth  
Individually

Dated: \_\_\_\_\_

\_\_\_\_\_  
Defendant David N. Mittler  
Individually

Dated: \_\_\_\_\_

**CONSENTED TO AND APPROVED BY:**

\_\_\_\_\_  
Layne D. Gerstel on behalf of  
Defendant American Derivatives Corp.

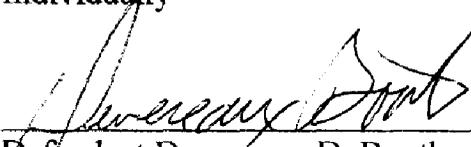
Dated: \_\_\_\_\_

\_\_\_\_\_  
Layne D. Gerstel on behalf of  
Brokerage Management Corp.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Defendant Layne D. Gerstel  
Individually

Dated: \_\_\_\_\_

  
\_\_\_\_\_  
Defendant Devereaux D. Booth  
Individually

Dated: 8-3-09

\_\_\_\_\_  
Defendant David N. Mittler  
Individually

Dated: \_\_\_\_\_

Each of the undersigned counsel for the parties hereby consents to entry of the foregoing Consent Order of Permanent Injunction and Other Equitable Relief.



Daniel C. Jordan (*pro hac vice*)  
Kathleen Banar (*pro hac vice*)  
James W. Deacon (*pro hac vice*)  
U.S. Commodity Futures Trading  
Commission  
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*Sally Quillian Yates*

~~David E. Nahmias~~

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