

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COMMODITY FUTURES)
TRADING COMMISSION)
and)
STATE OF MARYLAND EX REL)
MARYLAND SECURITIES)
COMMISSIONER)
Plaintiffs,)
vs.)
ANDREW M. SILBERSTEIN)
3107 Szold Dr. Baltimore, MD 21208)
Defendant.)

Case No.

1:04-cv-6666

COMPLAINT FOR INJUNCTIVE
AND OTHER EQUITABLE
RELIEF AND FOR CIVIL
PENALTIES UNDER THE
COMMODITY EXCHANGE ACT
AND THE MARYLAND
SECURITIES ACT

FILED COURT
U.S. DISTRICT COURT MARYLAND
2004 MAR -5 A 11:04
CLERK OF COURT
M. BENTLEY
DEPUTY

I.

JURISDICTION AND VENUE

1. The Commodity Exchange Act, 7 U.S.C. § 1 et seq. (2001) ("Act") establishes a comprehensive system for regulating the purchase and sale of commodity futures contracts and options. This Court has jurisdiction over this action pursuant to Sections 6c and 6d of the Act, 7 U.S.C. § 13a-1 and § 13a-2 (2001).
2. Section 6c of the Act provides that whenever it shall appear to the Commodity Futures Trading Commission ("Commission") that any 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 promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act.

3. Section 6d(1) of the Act provides that whenever it shall appear to any State that the interests of the residents of the State have been, are being, or may be threatened or adversely affected because of such violations of the Act, the State may bring a suit in the district courts of the United States to enjoin such acts or practices and to enforce compliance with the Act, or to obtain such other and further relief as the court deems appropriate, including the State of Maryland Ex Rel the Maryland Securities Commissioner ("State of Maryland") claims brought pursuant to Section 12(e) of the Act, 7 U.S.C. § 16(e), over which this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

4. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2001), in that Defendant 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, among other places.

II.

SUMMARY

5. Between December 2000 and October 2003, Defendant Andrew Silberstein solicited, accepted, and pooled approximately \$630,000 from at least seven members of the general public to participate in an unnamed commodity pool ("pool") operated by Defendant to trade in S&P 500 futures contracts. Defendant then misappropriated much of the pool's funds to pay for personal expenses, fabricated false statements regarding his alleged investments, and provided those fraudulent statements to pool participants.

6. Furthermore, Defendant operated as a commodity pool operator (“CPO”) without being registered as such, and, while operating as a CPO, failed to operate the pool as a legal entity separate from himself, received pool funds in his own name, commingled investor funds with his personal accounts, and failed to provide pool participants with Disclosure Documents.

7. By pooling investor funds and promising to trade those funds on behalf of his clients for compensation, Defendant offered investment advice and sold investment contract securities as defined by Maryland law.

8. Defendant’s misappropriation of pool participants’ funds and issuance of false statements to participants violates Sections 4b(a)(2)(i) -(iii) and 4g(1) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) -(iii) and 6o(1) (2001), and Sections 11-301 and 11-302 of the Maryland Securities Act, Corporations and Associations Article, Title 11, Annotated Code of Maryland (1999 Repl. Vol. and 2002 Supp.) (the “Maryland Securities Act”).

9. Defendant’s failure to register as a CPO violates Section 4m(1) of the Act, 7 U.S.C. §6m(1) (2001). Defendant’s failure to operate the pool as a legal entity separate from himself, his receipt of pool funds in his own name, his commingling of investor funds with his personal accounts, and his failure to provide pool participants with Disclosure Documents violate Commission Regulations 4.20 and 4.21, 17 C.F.R. §§ 4.20 and 4.21.

10. Defendant’s failure to register or seek an exemption from the Maryland Securities Division for the pooled investment vehicle violates Section 11-501 of the Maryland Securities Act. By selling investment contract securities and offering

investment advice in connection with the commodity pool, he acted as an unregistered agent and an unregistered investment adviser in violation of Section 11-401 of the Maryland Securities Act.

11. Accordingly, pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2001) and Section 11-702 of the Maryland Securities Act, Plaintiff Commission and Plaintiff State of Maryland bring this action to enjoin the unlawful acts and practices of Defendant. In addition, Plaintiffs seek civil monetary penalties for each violation of the Commodity Exchange Act and the Maryland Securities Act, disgorgement of Defendant's ill-gotten gains, restitution to customers, prejudgment interest and such other relief as this Court may deem necessary or appropriate.

12. Unless enjoined by this Court, Defendant is likely to continue to engage in the acts and practices alleged in this Complaint, as more fully described below.

III.

THE PARTIES

13. Plaintiff Commission is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (2001).

14. Plaintiff State of Maryland is one of the fifty sovereign states of the United States. Melanie Senter Lubin is the Maryland Securities Commissioner, the principal executive officer of the Maryland Securities Division, a division of the Office of the Attorney General of Maryland. The Maryland Securities Commissioner brings this action for the State of Maryland under the Maryland Securities Act.

15. Defendant Andrew M. Silberstein is an individual whose last known place of residence is 3107 Szold Drive, Baltimore, Maryland 21208. Defendant has been engaged in the business of soliciting customers to open commodity futures trading accounts and has accepted funds from customers to trade on their behalf in the commodity futures market. Defendant has never been registered with the Commission or the Maryland Securities Division in any capacity.

IV.

FACTS

16. Since at least December 2000 and continuing until at least October 2003, Defendant solicited prospective pool participants to invest in an unnamed pool operated by Defendant that traded S&P 500 futures contracts. Following these solicitations, at least seven clients believing Defendant would trade their funds in S&P 500 futures contracts, sent funds totaling over \$630,000.

17. Defendant has served as a cantor at a synagogue in Baltimore County, Maryland. Most of Defendant's investors were long time friends, fellow synagogue congregants and associates from musical activities. In the course of social conversation, Defendant made it known to potential investors that he had great success in trading S&P 500 futures contracts. Defendant offered to share his success with these people by trading in S&P futures contracts on their behalf. In some cases Defendant visited the homes or offices of potential investors and showed them the strategy and software he used to trade S&P 500 futures contracts.

18. Based upon Defendant's representations, the investors believed that Defendant achieved significant profitable returns investing in S&P 500 futures contracts and gave Defendant money to invest on their behalf. At no time, however, did Defendant furnish investors with written Disclosure Documents relating to any investment he made with their funds.

19. Among other investors, Defendant told a friend and business associate in New York City, New York about his success trading S&P 500 futures contracts. After several conversations, the friend gave Defendant an initial deposit of \$100,000 in April 2003 to commence trading. Altogether, the investor gave Defendant \$400,000 to invest during a six-month period in 2003.

20. In May 2003, the New York City investor requested Defendant's overall performance returns for the previous six months. Defendant sent the investor monthly performance rates that purported to be for his trading program from January 2002 through May 29, 2003. The lowest monthly return was 8.57% and the highest monthly return was 45.30% in February 2003. Each monthly return was positive.

21. Relying upon Defendant's alleged past performance, the investor sent Defendant an additional \$100,000 in late May 2003.

22. Defendant e-mailed his New York City client monthly account statements that purported to be for the investor's own account, starting in May 2003 and going through September 2003. Each of these e-mailed statements shows the beginning balance, additions or withdrawals, profits or losses, Defendant's fee taken as 15% of any purported profits, and the net balance at the end of the month. As with the performance

returns described above, each monthly statement e-mailed to the New York City client showed a profit in the investor's account.

23. The New York City investor mailed Defendant \$100,000 for the trading program in early September 2003, and a fourth deposit of \$100,000 on or about October 21, 2003.

24. In or about October 2003, the investor asked Defendant for copies of the monthly account statements from Defendant's registered futures commission merchant through whom Defendant maintained his account ("the FCM").

25. On October 31, 2003, Defendant faxed the investor a statement for the period ending September 30, 2003. The statement appeared to come from the FCM, and showed an account in Defendant's name with a balance at the end of September 2003 of \$1,123,647.

26. Defendant also e-mailed the investor additional monthly brokerage statements that appeared to come from the FCM for May through September 2003. According to these statements, Defendant's account at the FCM grew from a balance of \$586,288 at the beginning of May 2003 to a balance of \$1,123,647 at the end of September 2003.

27. The purported FCM monthly account statements described above show trading profits, though the account balance declined in some months because of withdrawals.

28. In late October 2003, the New York City investor asked Defendant to return his investment. Defendant mailed the investor a check for \$526,712, but the check

was returned for insufficient funds. Later, Defendant sent the investor two cashier's checks and a wire transfer totaling approximately \$50,000. The investor has not received any other return on his investment of \$400,000.

29. Defendant's other known investors invested a total of approximately \$230,000 and, as with the New York City investor noted above, received individualized account statements showing overall profitable trading. Some investors, consistent with the operation of a Ponzi scheme, received a return of some or all of their investment. One investor, who gave Silberstein \$50,000, requested the return in full of his money, but, to date, has received only \$10,000. Another investor has suffered a financial loss of \$50,000 on an investment of \$60,000. Four others recovered at least their principle.

30. Defendant did not open individual accounts for any of his investors. Instead, he deposited over \$630,000 of investor funds into his personal bank accounts and then transferred approximately \$ 374,000 to several brokerage accounts in his own name, with the majority of funds transferred to Defendant's primary account located at the FCM. He used the balance of investors' funds for personal expenses and to repay initial investors. Out of the amount transferred to the brokerage accounts, approximately \$ 154,000 was returned to his personal bank accounts, again to be used for personal expenses and to repay investors. Of the \$ 630,000 collected from investors, only about \$ 220,000 was ever actually traded. All of the money traded was lost in trading. Except for a few months where the account sustained modest profits, the account consistently suffered trading losses each month. Overall, Defendant lost all the funds transferred to the accounts and used for trading between December 2000 and October 2003.

31. Instead of trading all of his clients' funds in S&P 500 futures contracts, Defendant kept a substantial portion of the funds he received from clients in his personal bank accounts to pay for personal items, such as his mortgage, rent, other household expenses, and his daughter's college expenses.

32. Defendant fabricated the FCM account statements that he gave to his New York City investor. The account balances greatly overstate the correct amount in his brokerage account, showing an account balance of \$1,123,647 at the end of September 2003, when the actual balance was only \$26,666.76. Moreover, the account number appearing on the statements is not a valid account number of the FCM.

33. Defendant also e-mailed false account statements purporting to show the status of his individual client accounts. The statements show significant returns every month except for October 2003, when, in fact, Defendant's pooled account at the FCM routinely lost money.

V.

VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT ONE

VIOLATIONS OF SECTIONS 4b(a)(2) OF THE ACT : FRAUD BY MISAPPROPRIATION AND FALSE STATEMENTS

34. The allegations set forth in paragraphs 1 through 33 are re-alleged and incorporated herein by reference.

35. Since approximately December 2000 to at least October 2003, Defendant has: (1) cheated or defrauded or attempted to cheat or defraud other persons; and/or (2)

willfully deceived or attempted to deceive other persons, in or in connection with orders to make, or the making of, contracts of sale of commodities for future delivery, made, or to be made, for or on behalf of any other persons, where such contracts for future delivery were or could be used for the purposes set forth in Section 4b(a) of the Act, 7 U.S.C. § 6b(a), all in violation of Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii).

36. By using funds solicited to trade commodity futures for investors for his own personal expenses, as set forth above, Defendant has knowingly misappropriated funds in violation of Sections 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. §§ 6b(a)(2)(i) and (iii).

37. Furthermore, as set forth above, Defendant has willfully made or caused to be made to other persons false reports and statements which falsely represent the profits and the value of the investors' accounts, in violation of Section 4b(a)(2)(ii) of the Act, 7 U.S.C. § 6b(a)(2)(ii).

38. Each act of misappropriation and each false statement made during the relevant time period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4b(a)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(i)-(iii) (2001).

COUNT TWO

VIOLATION OF SECTION 4b(1) OF THE ACT: FRAUD AS A CPO

39. Paragraphs 1 through 38 are re-alleged and incorporated herein.

40. Beginning in at least December 2000 and continuing through at least October 2003, Defendant, while acting as a CPO, violated Section 4o(1) of the Act, 7 U.S.C. § 6o(1), in that Defendant directly or indirectly employed or is employing a device, scheme, or artifice to defraud customers or prospective customers, or has engaged or is engaged in transactions, practices or a course of business which operated or operates as a fraud or deceit upon customers or prospective customers by using the mails or other means or instrumentalities of interstate commerce. Defendant's fraudulent acts consisted of, among other things, the misappropriation of customer funds and issuance of false statements as set forth above.

41. Each fraudulent act made during the relevant time period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1).

COUNT THREE

VIOLATIONS OF SECTION 4m(1) OF THE ACT: FAILURE TO REGISTER AS A COMMODITY POOL OPERATOR

42. The allegations set forth in paragraphs 1 through 41 are re-alleged and incorporated herein by reference.

43. Defendant has used the mails or instrumentalities of interstate commerce in or in connection with his business as a CPO while failing to register with the Commission as a CPO, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1).

COUNT FOUR

VIOLATIONS OF REGULATION 4.20: CPO'S ACCEPTING POOL FUNDS OTHER THAN IN THE NAME OF THE POOL, COMMINGLING OF POOL FUNDS WITH HIS OWN FUNDS, AND FAILURE TO TREAT THE POOL AS A SEPARATE ENTITY

44. The allegations set forth in paragraphs 1 through 43 are re-alleged and incorporated herein by reference.

45. As alleged above, by depositing pool funds into his personal accounts and not into accounts in the name of the pool, Defendant failed to operate the pool as a legal entity separate from himself as the pool operator, in violation of Commission Regulation 4.20(a), 17 C.F.R. § 4.20(a).

46. As alleged above, Defendant, while operating as a CPO, accepted pool funds in his own name, in violation of Commission Regulation 4.20(b), 17 C.F.R. § 4.20(b).

47. As alleged above, Defendant commingled the pool funds with his own property, in violation of Commission Regulation 4.20(c), 17 C.F.R. § 4.20(c).

COUNT FIVE

VIOLATIONS OF REGULATION 4.21: FAILURE TO PROVIDE POOL DISCLOSURE DOCUMENTS

48. The allegations set forth in paragraphs 1 through 47 are re-alleged and incorporated herein by reference.

49. Commission Regulation 4.21, 17 C.F.R. § 4.21, requires that, prior to soliciting, accepting or receiving funds, a CPO must furnish the pool participant with a

written Disclosure Document containing specific language set forth by regulation. In addition, prior to accepting or receiving funds, a CPO is required to receive from pool participants an acknowledgment signed and dated by the participants that they received and understood the Disclosure Document.

50. As alleged above, 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 in violation of Regulation 4.21, 17 C.F.R. § 4.21.

VI.

VIOLATIONS OF THE MARYLAND SECURITIES ACT

COUNT SIX

VIOLATIONS OF SECTION 11-501 OF THE MARYLAND SECURITIES ACT: SALE OF UNREGISTERED SECURITIES

51. The allegations set forth in paragraphs 1 through 50 are re-alleged and incorporated herein by reference.

52. Section 11-501 of the Maryland Securities Act makes it unlawful for any person to offer or sell any security in Maryland unless that security is registered, exempt from registration or is a federal covered security.

53. Interests in Defendant's commodity pool constitute an investment contract and, therefore, a security as defined in Section 11-101(r) of the Maryland Securities Act. By pooling client funds that he promised to use to trade commodity futures, Defendant engaged in the offer and sale of securities.

54. The Maryland Securities Division has no record of the registration of the securities, no filing of a notice of claim of exemption from registration requirements and no filing of a notice of preemption of the registration requirements as federal covered securities.

55. By offering and selling unregistered securities, Defendant violated Section 11-501 of the Maryland Securities Act.

COUNT SEVEN

VIOLATIONS OF SECTION 11-401 OF THE MARYLAND SECURITIES ACT: SALES BY UNREGISTERED BROKER-DEALER OR ISSUER AGENT AND OFFER OF INVESTMENT ADVICE BY UNREGISTERED ADVISER

56. The allegations set forth in paragraphs 1 through 55 are re-alleged and incorporated herein by reference.

57. Section 11-401 of the Maryland Securities Act makes it unlawful for any person to transact business in Maryland as a broker-dealer or agent unless that person is registered pursuant to the Maryland Securities Act.

58. Section 11-101(c) of the Maryland Securities Act defines broker-dealer to include a person engaged in the business of effecting transactions in securities for the account of others or for his own account.

59. Section 11-101(b) of the Maryland Securities Act defines agent to mean an individual other than a broker-dealer, including a partner, officer, or director of an issuer, who represents a broker-dealer or issuer in effecting or attempting to effect the purchase or sale of securities.

60. Section 11-101(h) of the Maryland Securities Act defines investment adviser to include a person who, for compensation, engages in the business of advising others, either directly or through publications and writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities.

61. Defendant acted as an agent and investment adviser in Maryland.

62. The Maryland Securities Division has no record that Defendant has ever registered pursuant to the Maryland Securities Act as an agent or investment adviser.

63. By acting as an unregistered agent and investment adviser, Defendant violated Section 11-401 of the Maryland Securities Act.

COUNT EIGHT

VIOLATIONS OF SECTION 11-301 OF THE MARYLAND SECURITIES ACT: FRAUD IN THE OFFER AND SALE OF SECURITIES

64. The allegations set forth in paragraphs 1 through 63 are re-alleged and incorporated herein by reference.

65. Section 11-301 of the Maryland Securities Act prohibits any person, in connection with the offer, sale or purchase of any securities, directly or indirectly to:

- (1) Employ any device, scheme or artifice to defraud;
- (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or
- (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

66. In connection with the offer and sale of a security in Maryland, in the form of participation in Defendant's commodity pool, Defendant employed a scheme to

defraud, misrepresented material facts and engaged in a course of business which operates or would operate as a fraud, in violation of the Maryland Securities Act, by stating that:

- (1) investors' accounts were profitable;
- (2) Defendant's brokerage account had a balance of more than one million dollars on September 30, 2003, and was profitable when, in fact, it had less than \$27,000 and suffered losses; and
- (3) he was entitled to a 15% fee because the commodity trading was profitable.

65. In connection with the offer and sale of a security in Maryland, in the form of participation in Defendant's commodity pool, Defendant omitted material facts, in violation of the Maryland Securities Act, including that he spent a substantial part of investor funds for personal expenses rather than investing in the commodity pool.

COUNT NINE

VIOLATIONS OF SECTION 11-302 OF THE MARYLAND SECURITIES ACT: FRAUD IN THE OFFER OF INVESTMENT ADVICE

68. The allegations set forth in paragraphs 1 through 67 are re-alleged and incorporated herein by reference.

69. Section 11-302 of the Maryland Securities Act prohibits any person who receives, directly or indirectly, any compensation from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser, to:

- (1) Employ any device, scheme or artifice to defraud;

- (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading;
- (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person; or
- (4) Engage in dishonest or unethical practices as the Commissioner may define by rule.

70. In connection with his advisory activities, Defendant employed a scheme to defraud, misrepresented material facts, engaged in a course of business which operated as a fraud, and engaged in unethical practices, in violation of the Maryland Securities Act, by stating that:

- (1) investors' accounts were profitable;
- (2) Defendant's brokerage account had a balance of more than one million dollars on September 30, 2003, and was profitable when, in fact, it had less than \$27,000 and suffered losses; and
- (3) he was entitled to a 15% fee because the commodity trading was profitable.

69. In connection with his advisory activities, Defendant omitted material facts, in violation of the Maryland Securities Act, including that he spent a substantial part of investor funds for personal expenses rather than investing in the commodity pool.

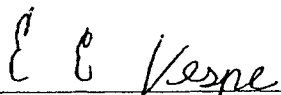
RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1 (2001) and Section 11-702 of the Maryland Securities Act, and pursuant to its own equitable powers enter:

- a) a permanent injunction prohibiting the Defendant from engaging in conduct violative of Sections 4b(a)(i) - (iii), 4m(1) and 4o(1) of the Act, 7 U.S.C. §§ 6b(a)(i) - (iii), 6m(1) and 6o(1) (2002, and Commission Regulations 4.20 and 4.21, 17 C.F.R. §§ 4.20 and 4.21 (2003) and conduct in violation of the Maryland Securities Act;
- b) an order directing the Defendant to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices which constitute violations of the Act or Commission Regulations or violations of the Maryland Securities Act, as described herein, and interest thereon from the date of such violations;
- c) an order directing the Defendant to make full restitution to every client whose funds were received by him as a result of acts and practices which constituted violations of the Act and Commission Regulations or violations of the Maryland Securities Act, described herein, and interest thereon from the date of such violations;
- d) an order directing the Defendant to pay a civil monetary penalty in the amount of not more than the higher of \$120,000 or triple the monetary gain to Defendant for each violation of the Act or Commission Regulations; and
- e) such other and further remedial ancillary relief as the Court may deem appropriate.

Dated: March 5, 2004

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COMMODITY FUTURES TRADING COMMISSION



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