

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

BURTON G. FRIEDLANDER and
FRIEDLANDER CAPITAL
MANAGEMENT CORPORATION,

Defendants.

Case No. 1:03-CV-08319-KMW-KNF

and Judgment

~~Proposed~~ Consent Order of Permanent
Injunction and Other Equitable Relief
Against Defendants Burton G. Friedlander
and Friedlander Capital Management
Corporation

I. INTRODUCTION

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On October 3, 2003, Plaintiff U.S. Commodity Futures Trading Commission

(Commission) filed a complaint against Burton G. Friedlander ("Friedlander") and Friedlander Capital Management Corporation ("FCMC") (collectively, "defendants") seeking injunctive and other equitable relief for violations of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1 *et seq.* (2002), and various Commission Regulations ("Regulations"), 17 C.F.R. §§ 1.1 *et seq.* (2004).

II. CONSENTS AND AGREEMENTS

To effect a settlement of the matters alleged in the complaint against Friedlander and FCMC without a trial on the merits or further judicial proceedings, defendants:

1. Consent to entry of this Consent Order of Permanent Injunction and Other Equitable Relief Against Defendants Burton G. Friedlander and Friedlander Capital Management, Corporation ("order");
2. Affirm that they have read and agreed 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;

3. Acknowledge service upon them of the summons and complaint in this action;
4. Admit that this Court possesses personal and subject matter jurisdiction over them and 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. All claims that they may possess pursuant to the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and Part 148 of the Regulations, 17 C.F.R. § 148.1 *et seq.*, relating to or arising from this action;
 - b. Any claim of double jeopardy based on the institution of this proceeding or order imposing civil monetary penalties or any other relief; and
 - d. All rights of appeal from this order.
7. Consent to the continued jurisdiction of this Court for the purpose of enforcing the terms and conditions of this order and for any other purpose relevant to this matter;
8. Agree they shall not take any action or make any public statements denying, directly or indirectly, any allegation of the complaint or ~~findings~~ ^{statements} in this order, or creating or tending to create the impression that the complaint and this order are without factual basis; provided, however, that nothing in this provision affects defendants’ (i)

testimonial obligations, or (ii) their right to take legal positions in other proceedings to which the Commission is not a party; and

9. Agree, and the parties to this order intend, that the allegations of the Commission's complaint and all of the admissions of fact and law contained in this order shall be taken as true and correct and shall be given preclusive effect without further proof in any bankruptcy proceeding filed by, on behalf of, or against, defendants, or any proceeding to enforce this order. Defendants also shall provide immediate notice of any bankruptcy proceeding filed by, on behalf of, or against them in the manner required by this order.

III. ADMISSIONS OF FACT AND LAW

Defendants admit the following facts and conclusions of law:

10. The Commission is an independent federal regulatory agency charged with administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et. seq.* and Regulations, 17 C.F.R. § 1.1
11. Between 1994 and 2001, Friedlander was the sole owner, manager and operator of FCMC, a Connecticut corporation and commodity pool that had its principal place of business in Greenwich, Connecticut. Friedlander was registered with the Commission as a floor broker from March 24, 1982 to December 13, 1984. Since that time, Friedlander has not been registered with the Commission in any capacity. FCMC has never been registered with the Commission.
12. Between 1998 and 2001, FCMC and Friedlander, while acting, respectively, as an unregistered commodity pool operator ("CPO") and an unregistered associated person ("AP") of a CPO, solicited approximately eight participants to invest approximately \$2

million in the FCMC pool managed by Friedlander in violation of Sections 4m(1) and 4k(2) of the Act, 7 U.S.C. §§ 6m(1) and 6k(2) and Regulation 3.12, 17 C.F.R. § 3.12. At various times, defendants falsely represented that the FCMC pool traded, among other things, commodity futures, and was generating significant profits. In fact, starting as early as 1998, Friedlander and FCMC continued to solicit additional contributions from pool participants by making similar false representations, all in violation of Sections 4b(a) and 4o(1) of the Act, 7 U.S.C. §§ 6b(a) and 6o(1). Based upon these representations, pool participants made additional investments in the pool.

13. As part of the solicitation, Friedlander distributed an investment advisory services agreement (“investment agreement”) to prospective pool participants that described the operation of the pool. The investment agreement stated that investor funds would “be pooled with other amounts that may be delivered from time to time by the client and by other clients of [FCMC] with such aggregate amounts to be deposited into one or more accounts maintained in the name of [FCMC].” According to the investment agreement, Friedlander and FCMC were authorized to trade on behalf of the FCMC pool, including “purchasing, selling and trading stocks, bonds, warrants, and other securities of any and all natures and types, including commodities.”
14. From 1998 through 2001, FCMC maintained an account in its own name at Refco, Inc (“Refco”), a registered futures commission merchant, in which Friedlander traded commodity futures contracts for the benefit of the FCMC pool. In addition, from at least July 1998 through at least December 1999, FCMC also maintained an account in its own name at PCH Asset Management (“PCH”), in which Friedlander traded securities for the benefit of the FCMC pool.

15. Defendants never established a separate, cognizable legal entity to act as the pool. Rather, customer funds intended for investment in the FCMC pool were deposited and wired into FCMC's business checking account at Citibank NA, Account No. 37260228 ("Citibank account") for which Friedlander was the sole signatory. From at least August 1998 through at least 2000, Friedlander failed to deposit new investments from FCMC pool participants into commodity and security trading accounts for the FCMC pool, in violation of Regulation 4.20, 17 C.F.R. § 4.20.
16. Friedlander used these funds and other FCMC pool money to pay for his personal expenses, including, but not limited to, boat payments and expenses, car payments, country club dues, personal legal expenses, and personal credit cards. Friedlander also used new incoming investor contributions to the FCMC pool to repay pool participants who requested redemption of their purported share of FCMC pool funds and to fund loans that were not repaid in violation of Sections 4b(a) and 4o(1) of the Act, 7 U.S.C. §§ 6b(a) and 6o(1).
17. Pursuant to the Act, Friedlander was required to provide pool participants with pool disclosure documents and quarterly and annual written statements of the net asset value of the FCMC pool. Defendants never provided pool participants with pool disclosure documents or quarterly account statements and failed to provide pool participants with accurate annual account statements, in violation of Section 4n(4) of the Act, 7 U.S.C. § 6n(4) and Regulations 4.21 and 4.22, 17 C.F.R. §§ 4.21 and 4.22.
18. Friedlander and FCMC knew at the time they solicited prospective customers and current pool participants to invest additional funds that the FCMC pool was not generating the profits represented by Friedlander. This was due, in part, to

Friedlander's misappropriation of investor funds and the actual trading losses sustained in FCMC's accounts at Refco and PCH.

19. Defendants forwarded to pool participants fraudulent annual "compilation reports" from 1998 through 2000. These compilation reports were false and misleading because they overstated the value of pool participants' assets and returns. For example, in the compilation reports forwarded to pool participants for the year ending December 31, 1998, defendants represented the total pool assets to be over \$3.29 million; however, actual FCMC pool assets as of that date were less than \$1.86 million. In the compilation reports forwarded to pool participants for the year ending December 31, 1999, defendants represented the total pool assets to over \$4.7 million, when actual FCMC pool assets as of that date were less than \$245,000. Similarly, in the compilation reports forwarded to pool participants for the year ending December 31, 2000, defendants represented total pool assets to be over \$5.7 million; however, actual FCMC pool assets as of that date were less than \$227,000.
20. The compilation reports were further false and misleading because they were prepared on forged letterhead from the accounting firm KPMG and fraudulently signed "KPMG Peat Marwick LLP." In early 1995, Friedlander had engaged KPMG to prepare a compilation report of the FCMC pool's gains or losses for investor portfolio and tax purposes for the year ending December 31, 1994. KPMG prepared the compilation reports for each investor, setting forth the year-end investment results, including information on the management fee and instructions on tax reporting. The compilation reports were five pages in length, several pages of which were on "KPMG Peat Marwick" letterhead. The reports were also signed "KPMG Peat Marwick LLP."

Following this engagement, KPMG provided no further services for either Friedlander or FCMC.

21. For each year from 1998 through 2000, however, FCMC and Friedlander forwarded to the pool participants compilation reports in the same form and same length, and using the same wording as those prepared by KMPG in 1995. The compilation reports were also on "KPMG Peat Marwick LLP" letterhead and, for years 1999 and 2000, were signed "KPMG Peat Marwick LLP."
22. KPMG did not prepare or assist in preparing the compilation reports forwarded by defendants for the years 1998 through 2000. KPMG did not authorize the use of its letterhead, nor did it sign or approve any of these compilation reports. In fact, KPMG had ceased using "Peat Marwick" in its name and in its letterhead in late 1998.

IV. ORDER OF PERMANENT INJUNCTION

IT IS HEREBY ORDERED THAT:

23. Based on the admissions of fact and law upon and in connection with the foregoing conduct, defendants are permanently restrained, enjoined and prohibited from, directly or indirectly:
 - a. Cheating or defrauding or attempting to cheat or defraud other persons, willfully making or causing to be made to any persons any false report or statement, or willfully to enter or cause to be entered for such a person any false record, or willfully deceive or attempt to deceive any person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person or deceiving or attempting to deceive other persons by making false,

deceptive or misleading representations of material facts, by failing to disclose material facts, and by misappropriating customer funds in or in connection with orders to make, or the making of, contracts of sale of commodities for futures delivery, made or to be made for or on behalf of any other person, in violation of Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. § 6b(a)(2)(i)-(iii);

- b. employing a device, scheme, or artifice to defraud commodity pool participants or prospective pool participants, or engaging in transactions, practices or courses of business which operate as a fraud or deceit upon pool participants or prospective pool participants, in violation of Section 4o(1) of Act, 7 U.S.C. § 6o(1);
- c. making use of the mails or any means or instrumentality of interstate commerce in connection with a business as a commodity pool, unless first registered with the Commission in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1);
- d. associating with a commodity pool as a partner, officer, employee, consultant, or agent, or any other person occupying a similar status or performing similar functions, in any capacity that involves (1) the solicitation of funds, securities, or property for participation in a commodity pool or (2) the supervision of any person or persons so engaged, unless first registered as an associated person of a commodity pool operator with the Commission, and from permitting such a person to become or remain associated with the commodity pool operator in any such capacity unless such person is registered as an associated person of a commodity pool operator with the Commission, in violation of Section 4k(2) of the Act, 7 U.S.C. § 6k(2) and Section 3.12 of the Regulations, 17 C.F.R. § 3.12;

- e. soliciting, accepting or receiving funds, securities or other property from a prospective pool participant, unless the commodity pool operator has, by the time of delivery of the subscription agreement, has caused to be delivered to the prospective participant a disclosure document for the commodity pool containing the information required by the Regulations promulgated by the Commission, and failing to provide commodity pool participants with timely monthly account statement and an annual report containing the information required by the Regulations promulgated by the Commission, in violation of Section 4n(4) of the Act, 7 U.S.C. § 6n(4) and Regulations 4.21 and 4.22, 17 C.F.R. §§ 4.21 and 4.22;
- f. operating a commodity pool that is not also a cognizable legal entity separate from the pool operator; commingling the property of any commodity pool with that of any other person; and receiving funds, securities or other ~~property~~^{property} from commodity pool participants not in the name of the commodity pool, in violation of Section 4.20 of the Regulations, 17 C.F.R. § 4.20.

Based on the admissions of fact and law, **IT IS FURTHER ORDERED THAT:**

- 24. Defendants are permanently restrained, enjoined and prohibited from directly or indirectly:
 - a. engaging in, controlling or directing the trading for any commodity futures, security futures, options on futures, or foreign currency options account, in any markets or on any entity regulated by the Commission or on behalf of any other person or entity, whether by power of attorney or otherwise; and
 - b. applying for registration or seeking exemption from registration with the Commission in any capacity or engaging in any activity requiring registration or exemption from

registration, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9), and acting, directly or indirectly, as a principal, officer, director, supervisor, agent or employee of any person registered, required to be registered or exempted from registration, unless such exemption is pursuant to Commission Regulation 4.14(a)(9). 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 or soliciting prospective customers related to the purchase or sale of any commodity futures, security futures, options, options on futures, or foreign currency futures, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

V. ORDER FOR OTHER EQUITABLE RELIEF

Based on the admissions of fact and law, **IT IS FURTHER ORDERED THAT:**

25. RESTITUTION: Defendants shall be jointly and severally liable to pay restitution in the amount of \$2,032,674, representing the full amount of restitution due and owing to defrauded investors. It is further ordered and adjudged that the restitution amount of \$2,032,674 shall be reduced, dollar for dollar, by any amounts paid in the below noted criminal case and that such restitution amount shall be deemed satisfied upon full payment to the investors identified on Attachment A hereto of the \$2,032,674 held in escrow in connection with defendant Friedlander's guilty plea on May 25, 2005, and related plea agreement in United States v. Friedlander No. 03CR1172 (JGK) in the United States District Court for the Southern District of New York.

26. Should defendants fail to pay in full the \$2,032,674 restitution amount ordered in the criminal matter, the restitution judgment in this matter will not be deemed satisfied and the \$2,032,674 will remain due and owing to the Commission in this matter.
27. The National Futures Association is designated as Monitor to oversee any restitution payments made to the Commission by defendants, should they fail to make restitution payments in the criminal matter, as described above.
28. Any restitution payments made by defendants to the Commission shall be 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 National Futures Association and sent to Vice President, Compliance, National Futures Association, 200 West Madison Street, Chicago, IL 60606, under cover of a letter that identifies defendants and the name and docket number of this proceeding. Defendants will simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581.
29. The Monitor will distribute funds obtained from defendants in an equitable fashion as determined appropriate by the Monitor to all persons who gave funds, either directly or indirectly, to defendants as a result of their course of illegal conduct as alleged in the complaint.

VI. MISCELLANEOUS PROVISIONS

30. Entire Agreement, Amendments, and Severability: This order incorporates all of the terms and conditions of the settlement among the parties. Nothing shall serve to amend or modify this order in any respect whatsoever, unless: (1) reduced to writing; (2) signed

by all parties; and (3) approved by order of the Court. If any provision of this order or the application of any provision or circumstances is held invalid, the remainder of the order shall not be affected by the holding.

31. Successors and Assigns: This order shall inure to the benefit of and be binding on the parties' successors, assigns, heirs, beneficiaries, and administrators.
32. Waiver: The failure of any party hereto at any time or times to require performance of any provision hereof shall in no manner affect the right of such party at a later time to enforce the same or any other provision of this order. No waiver in one or more instances of the breach of any provision shall be deemed to be or construed as waiver of the breach of any other provision of this order.
33. Acknowledgments: Upon being served with a copy of this order after entry by this Court, defendants shall sign an acknowledgment of service and serve such acknowledgment on this Court and the Commission within seven (7) calendar days.
34. Jurisdiction: This Court shall retain jurisdiction of this cause to assure compliance with this order and for all other purposes related to this action.

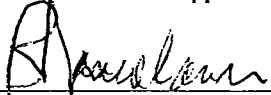
IT IS SO ORDERED.

Dated: 2-20-07


United States District Court Judge

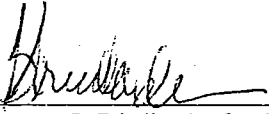
The Clerk of Court is directed to close this case. Any pending motions are moot.

Consented to and Approved as to Form:



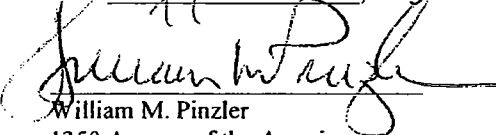
Burton G. Friedlander

Date: 3/9, 2006



Burton G. Friedlander for defendant
Friedlander Capital Management Corporation

Date: 3/9, 2006



William M. Pinzler

1350 Avenue of the Americas

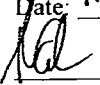
New York, New York 10019

Attorney for defendant Burton G. Friedlander

Date: 3/10, 2006

~~Patricia Jakowski
Bankruptcy Trustee for defendant
Friedlander Capital Management Corporation~~

Date: May 15, 2006


Richard Glaser, Esq. (pro hac vice)

Attorney for Plaintiff

U. S. Commodity Futures Trading Commission

Date: May 15, 2006