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JOHN T. WISE, Calif. State Bar No. 87567  
COMMODITY FUTURES TRADING COMMISSION  
140 Broadway, 19<sup>th</sup> Floor  
New York, NY 10005  
Telephone (646) 746-9815  
Facsimile (646) 746-9940

**ORIGINAL**

FILED  
CLERK, U.S. DISTRICT COURT  
JUL 22 2004  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

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Attorney for Plaintiff  
Commodity Futures Trading Commission

FILED  
CLERK, U.S. DISTRICT COURT  
JUL 22 2004  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

COMMODITY FUTURES TRADING ) Case No. CV 02-4898 JFW (Manx)  
COMMISSION, )  
) [PROPOSED] CONSENT ORDER  
) OF PERMANENT INJUNCTION  
Plaintiff, ) AND ANCILLARY RELIEF  
) AGAINST ALL DEFENDANTS  
vs. )  
)  
DONALD STEVEN SMITH, an )  
individual, and FIBIT.COM, a California )  
Trust, )  
Defendants. )  
Docketed  
Copies / NTC Sent  
JS - 5 / JS - 6  
JS - 2 / JS - 3  
CLSD

DOCKETED ON CM  
JUL 23 2004  
BY *[Signature]* 004

On June 20, 2002, plaintiff Commodity Futures Trading Commission ("CFTC") filed a Complaint against Donald Steven Smith ("Smith") and Fibit.com ("Fibit") (collectively the "Defendants") seeking injunctive and other ancillary relief for violations of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §§ 1 *et seq.* (2001), and the Regulations promulgated thereunder, 17 C.F.R.

60

1 §§ 1 *et seq.* (2002).

SCANNED

2 I.

3  
4 CONSENTS AND AGREEMENTS

5 To effect settlement of the matters alleged in the Complaint against Smith  
6 and Fibit without a trial on the merits or any further judicial proceedings,  
7  
8 Defendants:

9 1. Consent to the entry of this Consent Order of Permanent Injunction  
10 and Other Ancillary Relief Against All Defendants (“Order”);

11  
12 2. Affirm that Defendants Smith and Fibit have agreed to this Order  
13 voluntarily, and that no promise or threat has been made by the CFTC or any  
14 member, officer, agent or representative thereof, or by any other person, to induce  
15 consent to this Order, other than as specifically set forth herein;

16  
17 3. Acknowledge service of the Summons and Complaint;

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

20  
21 5. Admit that venue properly lies with this Court pursuant to Section 6c  
22 of the Act, 7 U.S.C. § 13a-1;

23  
24 6. Waive:

25 a. all claims which they may possess under the Equal Access to  
26 Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412  
27 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110  
28

1 Stat. 862-63, and Part 148 of the Regulations, 17 C.F.R. §  
2 148.1, *et seq.* (2002), and the Small Business Regulatory  
3 Enforcement Fairness Act ("SBREFA"), 1996 HR 3136, Pub.L.  
4 104-121, §§ 231-232, 110 Stat. 862-63 (Mar. 29, 1996),  
5 relating to, or arising from, this action, the Complaint and this  
6 Order;  
7

- 8
- 9 b. any claim of double jeopardy based upon the institution of this
  - 10 proceeding or the entry in this proceeding of any order
  - 11 imposing civil monetary penalties or any other relief; and;
  - 12
  - 13 c. all rights of appeal from this Order.

14 7. Consent to the continued jurisdiction of this Court for the purpose of  
15 enforcing the terms and conditions of this Order and for any other purpose  
16 relevant to this matter.  
17

18 8. Neither admit nor deny the allegations of the Complaint and the  
19 Findings and Conclusions of this Order, except as to jurisdiction and venue.  
20

21 9. Agree they shall not take any action or make any public statements  
22 denying, directly or indirectly, any allegation in the Complaint or findings in this  
23 Order, or creating or tending to create the impression that the Complaint and this  
24 Order are without factual basis; provided, however, that nothing in this provision  
25 affects Defendants' (i) testimonial obligations, or (ii) their right to take legal  
26 positions in other proceedings to which the CFTC is not a party.  
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II.

FINDINGS AND CONCLUSIONS

SCANNED

Being fully advised in the premises and finding that there is just cause for entry of this Order that fully disposes of all issues in this matter, THE COURT FINDS THAT:

10. Plaintiff CFTC is an independent federal regulatory agency that is charged with responsibility for administering and enforcing the provisions of the Act, 7 U.S.C. §§ 1 *et seq.*

12. Defendant Donald Steven Smith is an individual who is a trustee of Fibit. He was registered with the CFTC as a commodity trading advisor ("CTA") from January 13, 2000 to April 1, 2001. He has never been registered with the CFTC in any other capacity.

13. Defendant Fibit.com is a California trust, one of whose trustees is Defendant Smith. It has never been registered with the CFTC in any capacity.

**Defendants' Trading Signals Service**

14. At all relevant times, Defendants operated a paid service under the tradename "Fibit.com" whereby, as CTAs, they transmitted trading signals to subscribers over the internet or via emails. Defendants advertised the service in futures magazines of national circulation and over the internet.

15. At all relevant times, by this conduct, Defendants acted as CTAs within the meaning of Section 1a(6) of the Act, 7 U.S.C. § 1a(6).

1 **Defendants' Commodity Pool**

2 16. In April 2000 the Defendants began operating a commodity pool for  
3 some of their signals service customers. Because of the size of the pool,  
4 Defendants were exempt from registration as commodity pool operators ("CPOs")  
5 under CFTC Regulation 4.13(a), 17 C.F.R. § 4.13(a), but were still required to  
6 comply with certain CFTC Regulations in their operation of the commodity pool.  
7 The Defendants did not operate the pool as a separate legal entity, and they did not  
8 receive funds from existing or prospective pool participants in the pool's name.  
9 Instead, they commingled the funds of the pool with their own funds.  
10

11  
12  
13 17. By reason of their failure to operate their commodity pool as a  
14 separate legal entity, their receipt of pool funds in their own names, and their  
15 commingling of pool funds with their own funds, the Defendants violated CFTC  
16 Regulation 4.20(a)-(c), 17 C.F.R. § 4.20(a)-(c).  
17

18 18. As CPOs, Defendants failed to provide their commodity pool  
19 participants with monthly account statements from a futures commission merchant  
20 ("FCM"). By reason of such failure, Defendants violated Section 4n(4) of the Act,  
21 7 U.S.C. § 6n(4), and CFTC Regulation 4.13(b)(2)(i), 17 C.F.R. § 4.13(b)(2)(i).  
22

23  
24 19. The Defendants represented to certain of their prospective pool  
25 participants that they would stop trading and return the participants' account  
26 balances upon request. Nevertheless, in at least two instances Defendants  
27 continued trading these participants' accounts after receiving written instructions  
28

1 from such participants to cease trading their funds.

2 20. By reason of having traded pool participants' funds after being  
3 instructed to cease, and by thereafter failing to return such pool participants'  
4 account balances, Defendants engaged in unauthorized trading in violation of  
5 Section 4a(1)(B) of the Act, 7 U.S.C. § 6a(1). Scienter is not a requirement for  
6 Section 4a(1)(B) of the Act. *See Commodity Trend Service, Inc. v. CFTC*, 233  
7 F.3d 981, 993 (7<sup>th</sup> Cir. 2000).  
8  
9

10 **Smith's Management Of Customer Accounts**

11 21. Commencing at least as early as December, 2000, in his capacity as a  
12 CTA, Smith began managing and trading the commodity futures trading accounts  
13 of some of his signals service customers. In general, Smith managed those  
14 accounts either pursuant to written power of attorney, or by acquiring the  
15 customers' username and password for online trading.  
16  
17

18 22. In at least one instance, Smith solicited and received funds from a  
19 client in Smith's own name, purportedly for the purpose of trading that client's  
20 funds. By reason of the foregoing, Smith violated CFTC Regulation 4.30, 17  
21 C.F.R. § 4.30.  
22

23 23. Smith managed at least two customer trading accounts after his  
24 registration with the CFTC as a CTA had lapsed, while continuing to hold himself  
25 out to the public as a CTA.  
26

27 24. By reason of having held himself out to the public as a CTA and  
28

1 having managed client accounts after his registration had lapsed, Smith violated  
2 Section 4m(1) of the Act, 7 U.S.C. § 6m(1).  
3

4 25. Smith did not provide his managed account customers with the  
5 required Disclosure Document containing the information set forth in CFTC  
6 Regulations 4.34 and 4.35, 17 C.F.R. §§ 4.34 and 4.35. By reason of such failure,  
7 Smith violated CFTC Regulation 4.31(a), 17 C.F.R. § 4.31(a).  
8

9 **Defendants' Failure To Maintain Books And Records And Failure To Provide**  
10 **Books and Records To CFTC Representatives**

11 26. Defendants failed to maintain books and records concerning their  
12 activities as CPOs. Smith failed to maintain the required books and records  
13 concerning his activities as a CTA.  
14

15 27. On January 16 and January 24, 2001, the CFTC's Division of  
16 Enforcement requested in writing, pursuant to CFTC Regulations 1.31,  
17 4.13(b)(2)(ii) and 4.33, 17 C.F.R. §§ 1.31, 4.13(b)(2)(ii) and 4.33, that Defendants  
18 make available their books and records relating to their activities as CPOs and  
19 CTAs.  
20

21 27. By reason of their having failed to maintain the books and records  
22 prepared in connection with their activities as CTAs and CPOs, Defendants  
23 violated Section 4n(3)(a) of the Act, 7 U.S.C. § 6n(3)(A), and CFTC Regulations  
24 1.31, 4.13(b)(2)(ii), and 4.33, 17 C.F.R. § 1.31, 4.13(b)(2)(ii), and 4.33.  
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III.

ORDER

SCANNED

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

29. Defendants Smith and Fibit are permanently restrained, enjoined and prohibited from directly or indirectly:

- A. engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant in violation of Section 4a(1)(B) of the Act, 7 U.S.C. § 6a(1)(B);
- B. failing to operate a commodity pool as an entity cognizable as a legal entity separate from that of the pool operator in violation of CFTC Regulation 4.20(a)(1), 17 C.F.R. § 4.20(a)(1); receiving funds, securities or other property from existing or prospective pool participants for the purchase of an interest or as an assessment (whether voluntary or involuntary) on an interest in a pool in any name other than the pool's name in violation of CFTC Regulation 4.20(b), 17 C.F.R. § 4.20(b); and commingling property of a pool that they operate or intend to operate with the property of any other person in violation of CFTC Regulation 4.20(c), 17 C.F.R. § 4.20(c);
- C. failing to provide commodity pool participants with a monthly account statement for the pool received from an FCM in violation of Section 4n(4) of the Act, 7 U.S.C. § 6n(4), and CFTC Regulation 4.13(c)(3), 17 C.F.R. § 4.13(c)(3)<sup>1</sup>; and
- D. failing to maintain such books and records as having been generated in connection with their activities as CPOs and failing to make such books and records open to inspection by any representative of the CFTC in violation of CFTC Regulations 1.31 and 4.13(c)(1), 17 C.F.R. §§ 1.31 and 4.13(c)(1).<sup>2</sup>

<sup>1</sup> Formerly, 17 C.F.R. § 4.13(b)(2)(i).

<sup>2</sup> Formerly 17 C.F.R. § 4.13(b)(2)(ii).

1 30. Defendant Smith is permanently restrained, enjoined and prohibited  
2 from directly or indirectly:

3 A. soliciting, accepting, or receiving, while acting as a CTA, from  
4 an existing or prospective client funds, securities or other  
5 property (or extend credit in lieu thereof) to purchase, margin,  
6 guarantee or secure any commodity interest of the client in his  
7 own name in violation of CFTC Regulation 4.30, 17 C.F.R. §  
8 4.30;

9 B. while acting as a CTA, unless registered under the Act or  
10 exempted from registration pursuant to CFTC Regulation  
11 4.14(a)(9), 17 C.F.R. § 4.14(a)(9), making use of the mails or  
12 any means or instrumentality of interstate commerce in  
13 connection with his business as such CTA, in violation of  
14 Section 4m(1) of the Act, 7 U.S.C. § 6m(1).

15 C. while acting as a registered CTA, or a CTA required to be  
16 registered under the Act, failing to deliver or causing to be  
17 delivered to a prospective client a Disclosure Document  
18 containing the information set forth in CFTC Regulations §§  
19 4.34 and 4.35, 17 C.F.R. §§ 4.34 and 4.35, for the trading  
20 program to which Smith seeks to direct the client's commodity  
21 interest account or to guide the client's commodity interest  
22 trading by means of a systematic program that recommends  
23 specific transactions by no later than the time he delivers to the  
24 prospective client an advisory agreement to direct or guide the  
25 client's account in violation of CFTC Regulation 4.31, 17  
26 C.F.R. § 4.31; and

27 D. failing, if registered as a CTA or acting in a capacity requiring  
28 such registration following the five-year period set forth in  
paragraph 31(C), to keep the requisite CTA books and records  
and providing such books and records to representatives of the  
CFTC upon request as required by Section 4n(3)(A) of the Act,  
7 U.S.C. § 6n(3)(A), and CFTC Regulations 1.31 and 4.33,  
17 C.F.R. § 1.31 and 4.33.

31. For a period of five (5) years beginning on the date of this Order,

1 Defendants Smith and Fibit are restrained, enjoined, and prohibited from directly  
2 or indirectly:

- 3
- 4 A. soliciting, receiving, or accepting any funds in connection with  
5 purchase or sale of any commodity futures contract or any  
6 option on a futures contract;
- 7 B. controlling or directing the trading of any commodity futures or  
8 commodity options account for or on behalf of any person or  
9 entity, including themselves, directly or indirectly, whether by  
10 power of attorney or otherwise;
- 11 C. applying for registration or claiming exemption for registration  
12 with the CFTC in any capacity, and engaging in activity  
13 requiring such registration or exemption from registration,  
14 except as provided for in CFTC Regulation 4.14(a)(9), 17  
15 C.F.R. § 4.14(a)(9), or acting as a principal, officer, agent or  
16 employee of any person registered, exempted from registration  
17 or required to be registered with the CFTC, unless such  
18 exemption is pursuant to CFTC Regulation 4.14(a)(9), 17  
19 C.F.R. § 4.14(a)(9); and
- 20 D. trading on or subject to the rules of any registered entity, as that  
21 term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29).

22 32. The injunctive provisions of this Order shall be binding on  
23 Defendants Smith and Fibit, upon any person insofar as he or she is acting in the  
24 capacity of officer, agent, servant, employee or attorney of the Defendants, and  
25 upon any person who receives actual notice of this Order by personal service or  
26 otherwise insofar as he or she is acting in active concert or participation with  
27 Defendants Smith and Fibit.  
28

IV.

ORDER FOR ANCILLARY RELIEF

SCANNED

IT IS FURTHER ORDERED THAT:

33. Civil Monetary Penalty: Defendant Smith shall pay a civil monetary penalty of in the amount of fifteen thousand dollars (\$15,000). The civil monetary penalty shall be paid with ten (10) business days of the date of this Order and such payment shall be made by electronic funds transfer to the account of the CFTC at the United States Treasury or by certified check or bank cashier's check made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, NW, Washington, D.C. 20581, under cover of letter that identifies Smith and the name and docket number of this proceeding. Smith shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, NW, Washington, DC 20581 and to the Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, 140 Broadway, New York, NY 10005. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if Smith fails to make payment of his penalty within fifteen (15) days of the due date, he shall be automatically prohibited from trading on or subject to the rules of any registered entity, and his registration, if any, shall be suspended automatically, until he shows to the satisfaction of the CFTC that payment of the full amount of the penalty with

1 interest thereon to the date payment has been made.

2 V.

3  
4 MISCELLANEOUS PROVISIONS

5 34. ENTIRE AGREEMENT, AMENDMENTS and SEVERABILITY:

6 This Order incorporates all of the terms and conditions of the settlement among  
7 the parties. Nothing shall serve to amend or modify this Order in any respect  
8 whatsoever, unless: (1) reduced to writing; (2) signed by all parties; (3) approved  
9 by order of the Court. If any provision of this Order or the application of any  
10 provision or circumstance is held invalid, the remainder of this Order shall not be  
11 affected by the holding.  
12

13  
14 35. SUCCESSORS AND ASSIGNS: This Order shall inure to the  
15 benefit of and be binding on the parties' successors, assigns, heirs, beneficiaries  
16 and administrators.  
17

18 36. WAIVER: The failure of any party hereto at any time or times to  
19 require performance of any provision hereof shall in no manner affect the right of  
20 such party at a later time to enforce the same or any other provision of this Order.  
21 No waiver in one or more instances of the breach of any provision shall be deemed  
22 to be or construed as further waiver of such breach or waiver of the breach of any  
23 other provision of this Order.  
24  
25

26 37. JURISDICTION: This Court shall retain jurisdiction of this cause to  
27 assure compliance with this Order and for all other purposes related to this action.  
28

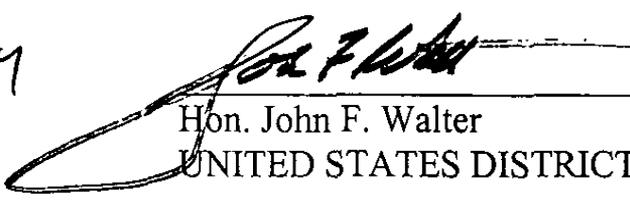
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The Clerk of the Court is hereby directed to enter this Consent Order of Permanent Injunction and Other Ancillary Relief Against Defendants Smith and Fibit.

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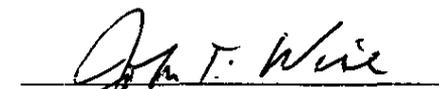
IT IS SO ORDERED.

Dated: July 22, 2009

  
Hon. John F. Walter  
UNITED STATES DISTRICT JUDGE

Consented to and  
Approved as to form:

  
Donald Steven Smith  
Defendant

  
John T. Wise  
Attorneys for Plaintiff  
Commodity Futures Trading Commission  
140 Broadway  
New York, NY 10005

  
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