

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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STATE OF NEW YORK,

Plaintiff,

**Index No.:** 403728/2003

-against-

PILGRIM BAXTER & ASSOCIATES, LTD.,  
GARY L. PILGRIM and HAROLD J. BAXTER,

Defendants.

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**AFFIRMATION OF CHARLES T. CALIENDO  
IN SUPPORT OF SETTLEMENT WITH DEFENDANTS  
GARY L. PILGRIM AND HAROLD J. BAXTER**

Charles T. Caliendo, an attorney duly admitted to practice before the courts of the State of New York, makes this affirmation under penalty of perjury as follows:

1. I am an Assistant Attorney General in the Investment Protection Bureau of the New York State Attorney General's Office and attorney of record for the plaintiff in the captioned action.

2. I make this affirmation in support of the request herein by Plaintiff that this Court enter the proposed Judgment On Consent Against Gary L. Pilgrim And Harold J. Baxter (hereinafter referred to as the "Judgment"). Defendants Gary L. Pilgrim and Harold J. Baxter have executed consents to entry of the Judgment without further notice, which consents are submitted herewith. As explained further below, plaintiff's claims against defendant Pilgrim

Baxter & Associates, Ltd., now known as Liberty Ridge Capital (“PBA”), were previously settled and a stipulation of discontinuance with prejudice will be filed with the Court.

3. Plaintiff, after an investigation by the New York State Attorney General, filed the above-entitled action against defendants PBA, the investment adviser for the PBHG family of mutual funds, and Gary L. Pilgrim and Harold J. Baxter, the founders of the PBHG fund family. The Complaint alleges, *inter alia*, that, in violation of Article 23-A of the General Business Law, section 349 of the General Business Law, and Executive Law § 63(12):

(a) the defendants allowed certain hedge funds and others to conduct “market timing” transactions in the PBHG family of mutual funds in contravention of the express restrictions of the applicable prospectuses and in breach of defendants’ fiduciary obligations to fund shareholders;

(b) the entities permitted to “time” the PBHG funds included (i) a hedge fund in which defendant Gary L. Pilgrim, a founder and former senior executive of PBA and the PBHG funds, had a substantial interest, and (ii) the clients of a New York-based brokerage firm owned by a close friend of defendant Harold J. Baxter, another founder and former senior executive of PBA and the PBHG funds;

(c) the defendants disclosed to hedge funds the portfolio holdings of certain PBHG funds to facilitate the hedge funds’ “market timing” strategies in PBHG funds; and

(d) these “market timing” transactions caused substantial dilution and other harm to the long-term shareholders of the PBHG funds.

4. On or about November 20, 2003, plaintiff served a copy of the Summons and Complaint (attached hereto as Exhibit 1) on each of the defendants. On or about April 23, 2004, each of the defendants filed answers to the Complaint. (Copies of the Answers of defendant

PBA, defendant Gary L. Pilgrim and defendant Harold J. Baxter are attached hereto as Exhibits 2, 3 and 4, respectively.)

5. On or about June 18, 2004, plaintiff reached a settlement with defendant PBA only pursuant to which PBA agreed to pay FORTY MILLION DOLLARS (\$40,000,000) in disgorgement and restitution and a civil penalty in the amount of FIFTY MILLION DOLLARS (\$50,000,000) for a total payment of NINETY MILLION DOLLARS (\$90,000,000). In addition, PBA agreed to reduce the management fees it charges the shareholders of the PBHG family of funds for a five-year period. The value of these fee reductions is estimated to be TEN MILLION DOLLARS (\$10,000,000) which brings the total value of the settlement with PBA to ONE HUNDRED MILLION DOLLARS (\$100,000,000). The terms of the settlement with PBA are set forth in an Assurance of Discontinuance Pursuant to Executive Law § 63(15) dated June 18, 2004 and a Stipulation of Dismissal With Prejudice discontinuing the action as against defendant PBA only will be filed with the Court.

6. Plaintiff has now reached a resolution of the action with the remaining defendants Gary L. Pilgrim and Harold J. Baxter. Both Mr. Pilgrim and Mr. Baxter have executed consents to entry of the Judgment.

7. The following is a summary of the terms of the Judgment:

- a. Defendants Gary L. Pilgrim and Harold J. Baxter are each permanently enjoined from investing or trading in mutual funds (except money market funds) on their own behalf or on behalf of others; provided, however, that they each may purchase mutual fund shares on their own behalf or on behalf of their respective

Family that are held for at least one year (the term “Family” is defined to mean the respective individual Defendant’s spouse, siblings, children, grandchildren, great-grandchildren, nieces and nephews and their respective spouses);

- b. Defendants Gary L. Pilgrim and Harold J. Baxter are permanently enjoined from directly or indirectly engaging or attempting to engage in violations of Article 22-A of the General Business Law, Article 23-A of the General Business Law, or Executive Law § 63(12).
- c. Defendants Gary L. Pilgrim and Harold J. Baxter are permanently enjoined from directly or indirectly engaging or attempting to engage in any business relating to the purchase or sale of, or offer to purchase or sell, securities (as governed and/or defined by Article 23-A of the General Business Law) or commodities or commodities contracts (as governed and/or defined by Article 23-A of the General Business Law), or the rendering of investment advice, to or from the public as more fully set forth in the Judgment.
- d. Gary L. Pilgrim shall pay EIGHTY MILLION DOLLARS (\$80,000,000) no later than January 31, 2005 of which SIXTY MILLION DOLLARS (\$60,000,000) shall be designated as disgorgement and restitution and TWENTY MILLION DOLLARS (\$20,000,000) shall be designated as a civil penalty.
- e. Harold J. Baxter shall pay EIGHTY MILLION DOLLARS (\$80,000,000) no later than January 31, 2005 of which SIXTY MILLION DOLLARS (\$60,000,000)

shall be designated as disgorgement and restitution and TWENTY MILLION DOLLARS (\$20,000,000) shall be designated as a civil penalty.

- f. Payment and distribution of such disgorgement, restitution and civil penalties by defendants Gary L. Pilgrim and Harold J. Baxter shall be made in accordance with the terms of the Orders Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 8A of the Securities Act, Sections 17A(c)(4)(C) and 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act of the United States Securities and Exchange Commission in the Administrative Proceedings styled *In The Matter of Gary L. Pilgrim* and *In The Matter of Harold J. Baxter*, respectively. (Copies of the SEC Orders are attached to the Judgment as Exhibit A.)
- g. No payments made or costs incurred by defendants Gary L. Pilgrim and/or Harold J. Baxter pursuant to or in connection with the Judgment shall be borne directly or indirectly by any mutual fund managed or advised by PBA or the investors therein.
- h. Defendants Gary L. Pilgrim and Harold J. Baxter shall not, together or alone, seek or accept, directly or indirectly, reimbursement or indemnification, including, but not limited to, payment made pursuant to any insurance policy, with regard to any or all of the amounts payable pursuant to the Judgment.

- i. Defendants Gary L. Pilgrim and Harold J. Baxter shall comply with all the provisions of the SEC Orders.
- j. Defendants Gary L. Pilgrim and Harold J. Baxter shall cooperate with the Attorney General's continuing investigation relating to the subject matter of the Complaint as more fully set forth in the Judgment.

6. Based upon the Attorney General's investigation of this matter, the Attorney General believes that the Judgment represents a fair and equitable resolution of this matter. Defendants have acknowledged and admitted service and receipt of the Summons and Complaint, waived their right to a trial on the merits and to an appeal from the entry of the Judgment, admitted and consented to the jurisdiction and venue of this Court, and agreed to the terms of the Judgment. Entry of the Judgment will allow the Attorney General to enforce the terms of the settlement, which are set forth in the Judgment.

7. No previous application has been made to this or any other court for the relief sought herein.

WHEREFORE, Plaintiff respectfully requests that this Court enter the Judgment.

Dated: New York, New York  
November 17, 2004

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CHARLES T. CALIENDO  
Assistant Attorney General