

CRIMINAL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

-v-

FELONY COMPLAINT
(AAG Ricardo Velez 212-416-6550)

GRANT SEEGER (D.O.B. 06/07/63),
WILLIAM KENYON (D.O.B. 04/01/46),
NICOLE MCDERMOTT (D.O.B. 02/09/69),

Defendants.

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STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Confidential Investigator Herbert Antomez, of the Criminal Investigations Bureau of the New York State Office of the Attorney General (“OAG”), being duly sworn, deposes and says that during a period from in or about May 2000 to in or about September 2003, in the County and State of New York and elsewhere, defendants committed the offenses of:

GRAND LARCENY IN THE FIRST DEGREE, in violation of Penal Law §155.42, a class B Felony (six counts);

A VIOLATION OF GENERAL BUSINESS LAW § 352-C (5), a class E Felony;

A VIOLATION OF GENERAL BUSINESS LAW § 352-C (6), a class E Felony (four counts);

SCHEME TO DEFRAUD IN THE FIRST DEGREE, in violation of Penal Law § 190.65(1)(a), a class E Felony; and

FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, in violation of Penal Law § 175.10, a class E Felony (two counts),

in that the defendants:

- (1) Stole property valued in excess of \$1 million from an owner thereof;
- (2) intentionally engaged in a scheme constituting a systematic ongoing course of conduct with the intent to defraud ten or more persons and to obtain property from ten or more persons by false and fraudulent pretenses, representations or promises, and so obtained property from one or more of such persons while engaged in inducing and promoting the issuance, distribution, exchange, sale, negotiation and purchase of any securities or commodities;
- (3) intentionally engaged in fraud, deception, concealment, suppression, false pretense

and fictitious and pretended purchase and sale, and with intent to deceive and defraud, made material false representations and statements, while engaged in inducing and promoting the issuance, distribution, exchange, sale, negotiation and purchase within and from this state of a security, and thereby wrongfully obtained property of a value in excess of two hundred fifty dollars;

(4) engaged in a scheme constituting a systematic ongoing course of conduct with the intent to defraud ten or more persons and to obtain property from ten or more persons, by false and fraudulent pretenses, representations and promises, and so obtained property from one or more such persons; and

(5) with intent to defraud and to commit another crime and to aid and conceal the commission thereof, made and caused to be made a false entry in the business records of an enterprise.

Defendants committed these crimes as follows:

I have reviewed documentation provided by the staff of the Securities and Exchange Commission, as well as rules promulgated under the Investment Company Act of 1940. I am informed that Rule 22c-1(a) under the Investment Company Act requires registered mutual funds, and their principal underwriters and dealers, to sell and redeem fund shares at a price based on the current net asset value (“NAV”) next computed after receipt of an order to buy or redeem. I am further informed that mutual funds generally determine the daily price of mutual fund shares as of 4:00 p.m. (Eastern Time). In these circumstances, orders received before 4:00 p.m. must be executed at the price determined as of 4:00 p.m. that day. Orders received after 4:00 p.m. must be executed at the price determined as of 4:00 p.m. the next trading day. The practice of placing or accepting trades after 4:00 p.m. at the expired 4:00 p.m. price is known as “late trading.”

As set forth below, a share of a mutual fund is a type of security that is sold to the public.

As discussed below, I am informed by Jay Marran, a former employee of Security Trust Company, N.A. (“STC”), and Edward J. Stern, the head of a series of hedge funds (collectively “Canary”), that defendants Grant Seeger, William Kenyon and Nicole McDermott repeatedly misrepresented and directed STC employees to misrepresent to mutual funds that Canary trades were originating from retirement and pension plans -- plans whose members placed trades before

4 p.m. In fact, defendants knew both that Canary was a hedge fund trading for its own account and also that it was placing its trades with STC after 4 p.m. Because Canary was a hedge fund (the actual investor), it was required to place its trades before 4 p.m. Only intermediaries like third party administrators (“TPAs”) and plan administrators could transmit trades after 4 p.m. When a hedge fund – the actual investor – places trades after 4:00 p.m. and receives the 4:00 p.m. price, it is "late trading."

Through their deceptions and misrepresentations, defendants obtained mutual fund shares for Canary valued in excess of one million dollars from each of six mutual fund companies. In all cases, defendants and Canary lacked permission or authority to do so.

As set forth below, pursuant to this scheme, defendants also falsified business records in connection with Canary’s trades.

Security Trust Company

I am informed by Jay Marran (“Marran”) that he was employed by STC during the time period set forth in this complaint and served as STC’s Vice President of Mutual Fund Services from in or about October 2002 through in or about October 2003. According to Marran, defendants Grant Seeger (“Seeger”), William Kenyon (“Kenyon”) and Nicole McDermott (“McDermott”) were employed by STC as Chief Executive Officer, President, and Senior Vice President of Corporate Services, respectively.

I am further informed by Marran that STC, based in Phoenix, Arizona, provided trust and custody services to retirement plans, defined contribution plans and their TPAs. Marran explained to me that STC is an intermediary between administrators of these plans and hundreds of mutual fund families. In its intermediary role, it provides to plan administrators ready access to hundreds of mutual fund families with whom STC contracts to act as an intermediary for transmitting trade orders.

According to Marran, STC places its trades by use of an electronic trading platform that it

designed, and originally used, for processing trades made exclusively by TPAs and retirement plans, trades that plan members placed with their plans before 4:00 p.m. (Eastern Time). According to Marran, having received trade orders from their customers before 4:00 p.m., the TPAs and plans would then transmit their members' trades to STC after 4:00 p.m. (Eastern Time) for processing.

Upon receiving the trade orders, STC transmitted these trades to the National Securities Clearing Corporation ("NSCC"), based in New York County, through NSCC's Defined Contribution Clearing and Settlement service ("DCC&S") in order to complete the transaction to purchase shares from the mutual funds.

Canary's Disguised Trades

According to Marran, defendants also used this system to transmit Canary trades as well. First, Marran informs me, based on his conversations with defendants, that defendants used STC's electronic trading platform to transmit trades originated by Canary. According to Marran, in their electronic transmissions to NSCC, defendants falsely identified Canary's trades as those of TPAs. According to Carol Jameson, Vice President of NSCC, the NSCC received numerous transmissions of trade data from STC; transmitted STC's trade data to the relevant mutual funds or their agents; and maintained STC's trade data as its own records in New York County and elsewhere.

Second, Marran informs me, again based on conversations with defendants, that defendants knew that Canary – which does not collect and process individual customer orders as TPAs and plans do – was placing its orders with STC after 4 p.m. I have examined e-mails created and received by, between and among the above-named defendants in which the individual defendants indicate their knowledge that Canary was not a retirement plan, a defined contribution plan or a TPA, and that STC was receiving Canary's orders after 4:00 p.m. I am informed by Marran that defendants shared this knowledge with each other. Nonetheless, defendants repeatedly directed the placement of Canary's trades through its trading platform as if they were TPA trades.

I am informed by Edward J. Stern ("Stern") that, at all relevant times, he was the President

of Hartz Trading, Inc. and the Managing Principal of Canary Capital Partners, LLC, Canary Capital Partners, LTD and Canary Investment Management, LLC, and that Canary Capital Partners, LLC, Canary Capital Partners, LTD were hedge funds (collectively “Canary”).

Stern informs me that he was in charge of Canary, and that Canary regularly placed late trades with STC and defendants. According to Stern, in or about May 2000 Canary commenced a trading relationship with STC that continued through July 2003. Stern reports that, throughout, he identified Canary to defendants Seeger, Kenyon and McDermott as a hedge fund engaged in private investments on behalf of his family. Stern informs me that, during the time period set forth in this paragraph, Canary made its trading decisions and transmitted to STC purchase orders for shares of mutual funds after 4:00 p.m. (Eastern Time).

I am informed by Harley Nelson (“Nelson”) of the Securities and Exchange Commission (“SEC”) that he examined STC’s records of the trades Canary placed during the time period of this complaint. Nelson informs me that STC placed hundreds of mutual fund trades transmitted to STC by Canary in numerous mutual funds. Nelson’s analysis further discloses that approximately 99% of Canary’s trades were transmitted to STC after the 4:00 p.m. market close; 82% of the trades were sent to STC between 6:00 p.m. and 9:00 p.m. (Eastern Time).

False Entries

I am informed by Nelson that he has examined records of the following trades which, among hundreds of others, STC placed for Canary and which were entered into the records of NSCC in New York County and elsewhere.

On January 10, 2001 STC transmitted an order for shares of Janus Worldwide Fund and indicated that the trade was on behalf of Lee Smart Cook Martin Paterson P.S. Inc. 401K Plan & Trust, when in reality it was on behalf of Canary; and

On October 22, 2001, STC transmitted an order for shares of American Funds EuroPacific Fund and indicated that the trade was on behalf of Immunex Corporation Profit Sharing 401K Plan & Trust, when in reality it was on behalf of Canary;

Value

Stern informs me that pursuant to these schemes, defendants obtained property having a value in excess of one million dollars for Canary from each of the following mutual funds:

MFS Emerging Growth Fund,
Legg Mason Value Trust Fund,
Artisan International Fund,
AXP International Y Fund,
SEI International Equity A Fund, and
SEI International Emerging Markets I Fund.

The Mutual Funds

I am further informed about these mutual funds as follows:

MFS Emerging Growth Fund

I am informed by Stephen Cavan, that he is the Secretary and Clerk of the MFS, Emerging Growth Fund, which offers shares in that fund. Mr. Cavan informs me that a share of a mutual fund is a type of security that is sold to the public.

I am further informed by Mr. Cavan, that the price of a share in the MFS Emerging Growth Fund is determined as of the time of the close of the New York Stock Exchange (NYSE) typically 4:00 p.m. (Eastern Time). All purchase orders placed by an investor any time before 4:00 p.m. on a typical trading day are sold at the 4:00 p.m. price. All purchase orders placed after 4:00 p.m. must be sold at the next trading day's price, which is typically determined at 4:00 p.m. on the next business day.

Legg Mason Value Trust Fund

I am informed by Marc R. Duffy, that he is the Vice President and Secretary of the Legg Mason Value Trust Fund, which offers shares in that fund. Mr. Duffy informs me that a share of a mutual fund is a type of security that is sold to the public.

I am further informed by Mr. Duffy, that the price of a share in the Legg Mason Value Trust Fund is determined as of the time of the close of the New York Stock Exchange (NYSE) typically

4:00 p.m. (Eastern Time). All purchase orders placed by an investor any time before 4:00 p.m. on a typical trading day are sold at the 4:00 p.m. price. All purchase orders placed after 4:00 p.m. must be sold at the next trading day's price, which is typically determined at 4:00 p.m. on the next business day.

Artisan International Fund

I am informed by Lawrence Totsky, that he is the Treasurer and Chief Financial Officer of the Artisan Mutual Fund Family, which offers shares in the Artisan International Fund. Mr. Totsky informs me that a share of a mutual fund is a type of security that is sold to the public.

I am further informed by Mr. Totsky, that the price of a share in the Artisan International Fund is determined as of the time of the close of the New York Stock Exchange (NYSE) typically 4:00 p.m. (Eastern Time). All purchase orders placed by an investor any time before 4:00 p.m. on a typical trading day are sold at the 4:00 p.m. price. All purchase orders placed after 4:00 p.m. must be sold at the next trading day's price, which is typically determined at 4:00 p.m. on the next business day.

AXP International Y Fund

I am informed by Leslie L. Ogg, that he is the Secretary of AXP International Fund, which offers its Class Y shares to certain institutional investors. Mr. Ogg informs me that a Class Y share of the AXP International Fund is a type of security that is sold to the public through various institutions, primarily qualified and non-qualified plans, and college savings plans.

I am further informed by Mr. Ogg, that as stated in the prospectus, the price of a share in the AXP International Fund is determined as of 4:00 p.m. (Eastern Time). All purchase orders received by the distributor, transfer agent, or their respective agents, at any time before 4:00 p.m., on a typical trading day are sold at the 4:00 p.m. price. All purchase orders received after 4:00 p.m. on a typical trading day must be sold at the next day's price.

SEI International Equity A Fund and SEI International Emerging Markets I Fund

I am informed by Edward Loughlin, that he is the President of the SEI Family of Funds, which offers shares in SEI Institutional Trust, which offers shares in the SEI International Equity A Fund and SEI International Emerging Markets I Fund. Mr. Loughlin informs me that a share of these funds is a type of security that is sold to the public.

I am further informed by Mr. Loughlin, that the price of a share in the SEI International Equity A Fund and SEI International Emerging Markets I Fund is determined as of the time of the close of the New York Stock Exchange (NYSE) typically 4:00 p.m. (Eastern Time). All purchase orders placed by an investor any time before 4:00 p.m. on a typical trading day are sold at the 4:00 p.m. price. All purchase orders placed after 4:00 p.m. must be sold at the next trading day's price, which is typically determined at 4:00 p.m. on the next business day.

I am informed by the above named individuals that no one selling or purchasing shares in their funds has permission or authority from their fund to engage in late trading. Nor do the terms of their fund prospectuses permit or authorize late trading.

FALSE STATEMENTS MADE HEREIN
ARE PUNISHABLE AS A CLASS A
MISDEMEANOR PURSUANT TO
SECTION 210.45 OF THE PENAL LAW

HERBERT ANTOMEZ
NEW YORK STATE ATTORNEY GENERAL'S OFFICE