

REPRESENTATIVE CASES

CASE STUDY SESSIONS 1 and 2
Friday, June 13, 2008
Kenneth R. Lench
U.S. Securities and Exchange Commission

1. SEC v. Theodore Roxford, et al., Lit. Rel. No. 20487 (March 11, 2008).
2. SEC v. James R. Belcher, Lit. Rel. No. 20382 (December 4, 2007).
3. SEC v. Sonja Anticevic, et al., Lit. Rel. No. 19650 (April 11, 2006).
4. Staff Statement at SEC v. Anticevic Press Conference (April 11, 2006).
5. In Re: Joe D. Thomas, '34 Act Rel. No. 51883 (June 20, 2005).
6. SEC v. James J. McDermott, Jr., et al., Lit. Rel. No. 19250 (June 7, 2005).
7. Report of Investigation, '34 Act Rel. No. 51283 (March 1, 2005).
8. SEC v. Wachovia Corp., Lit. Rel. No. 18958 (November 4, 2004).
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10. SEC v. Ira J. Gaines, et al., Lit. Rel. No. 18535 (January 9, 2004).
11. In re: William A. Wilkerson, et al., '34 Act Rel. No. 48703 (October 27, 2003).
12. SEC v. Toks, et al., Lit. Rel. No. 18309 (August 25, 2003).



U.S. Securities and Exchange Commission

U.S. SECURITIES AND EXCHANGE COMMISSION

Litigation Release No. 20487 / March 11, 2008

SEC v. Theodore Roxford a/k/a Lawrence David Niren and Hollingsworth, Rothwell and Roxford, Civil Action No. 07-CV-6146 (S.D.N.Y. filed June 29, 2007)

SEC Obtains Judgments Against Theodore Roxford and Hollingsworth, Rothwell & Roxford For Tender Offer Fraud and Market Manipulation

On March 3, 2008, in a civil action previously filed by the Securities and Exchange Commission ("Commission"), Judge P. Kevin Castel of the United States District Court for the Southern District of New York entered a judgment permanently restraining and enjoining the partnership Hollingsworth, Rothwell & Roxford ("HRR") from future violations of the anti-manipulation and tender offer anti-fraud provisions of the federal securities laws, Sections 9(a) and 14(e) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 14e-8 thereunder. HRR was ordered to pay \$900,000 in civil monetary penalties, pursuant to Section 21(d)(3) of the Exchange Act. On March 7, 2008, in the same matter, Judge Castel also entered a judgment permanently restraining and enjoining Theodore Roxford a/k/a Lawrence David Niren ("Roxford") from future violations of Exchange Act Sections 9(a) and 14(e), and Rule 14e-8 thereunder. Roxford was also ordered to pay \$900,000 in civil monetary penalties. Both judgments were entered by default.

The Commission's Complaint alleged that beginning in 2003, Roxford, in some instances through the partnership HRR, made false and materially misleading statements in connection with purported tender offer announcements for five publicly-traded companies - Sony Corporation, Zapata Corporation, Edgetech Services, Inc., Playboy Enterprises, Inc., and PeopleSupport, Inc. In connection with these phony offers, Roxford, and in some cases HRR, made misrepresentations to the public regarding the existence of financial backers or banks that supposedly were interested in financing the tender offers, even though Roxford and HRR did not have any financial backing nor independent means of financing the acquisitions. Roxford and HRR publicized the phony offers through press releases, internet message board postings, and in at least one filing with the Commission. They made these fake offers in order to manipulate the price of the target companies' stock by inducing investors to purchase the stock.

With judgments entered against all of the defendants, this concludes the Commission's action in this matter.

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Modified: 03/11/2008

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The Securities and Exchange Commission yesterday filed a settled civil injunctive action in the United States District Court for the District of Colorado against James R. Belcher. Belcher is an attorney and was a partner in the Cheyenne, Wyoming office of a large regional law firm based in Denver, Colorado. Belcher was charged with engaging in illegal insider trading by purchasing shares of Western Gas Resources, Inc. (Western), formerly a Denver-based company engaged in the exploration and production of natural gas, in violation of the antifraud provisions of the federal securities laws. Without admitting or denying the allegations in the Commission's complaint, Belcher has agreed to settle this matter by consenting to the entry of a final judgment against him which imposes injunctive and monetary relief.

The complaint alleges that Western, a client of Belcher's law firm, engaged Belcher to provide legal advice regarding whether approval by a Wyoming regulatory body was required in the event Western merged into another entity. Thereafter, Western provided Belcher with more detailed information related to the contemplated merger transaction. The complaint alleges that on the basis of that material, nonpublic information, on June 19, 2006, Belcher purchased 800 shares of Western at \$40.83 per share. Western announced on June 23, 2006 that it was merging into Anadarko Petroleum Corporation. Western's share price, which had closed at approximately \$41 on June 22, rose 46% to approximately \$60 a share by the close of the market on June 23. Belcher sold his shares and is alleged to have made profits of \$15,537.

The complaint alleges that Belcher knew, or was reckless in not knowing, that he purchased Western shares based on material, nonpublic information obtained from his firm's client, and in so doing breached a fiduciary duty owed to Western's shareholders. Based on the facts alleged, the Commission charged Belcher with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Without admitting or denying the allegations in the complaint, Belcher has consented to the entry of a final judgment that: (i) permanently enjoins him from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; (ii) requires him to disgorge \$15,537 in illicit gains and \$1,171 in prejudgment interest thereon; and (iii) additionally orders him to pay a civil penalty of \$15,537.

► [SEC Complaint in this matter](#)

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Modified: 12/04/2007

[Home](#) | [Previous Page](#)**U.S. Securities and Exchange Commission****U.S. SECURITIES AND EXCHANGE COMMISSION****Litigation Release No. 19650 / April 11, 2006****Securities and Exchange Commission v. Sonja Anticevic et al., 05 Civ. 6991 (KMW) (S.D.N.Y.)****SEC COMPLAINT CHARGES INTERNATIONAL INSIDER TRADING RING INCLUDING PERSONNEL AT MERRILL LYNCH AND GOLDMAN SACHS**

On April 11, 2006, the Securities and Exchange Commission sought leave to file a second amended complaint ("Complaint") in its pending action in the United States District Court for the Southern District of New York, alleging insider trading in advance of the August 3, 2005, announcement ("Announcement") by Reebok International Ltd. ("Reebok") that it had agreed to be acquired by adidas-Salomon AG ("Adidas"). The Complaint alleges widespread and brazen international schemes of serial insider trading orchestrated by two individuals — Eugene Plotkin ("Plotkin"), a research analyst in the Fixed Income division of Goldman Sachs Group ("Goldman Sachs"), and David Pajcin ("Pajcin"), a former employee of Goldman Sachs — that yielded at least \$6.7 million of illicit gains.

In one scheme, Plotkin and Pajcin persuaded a mergers and acquisitions analyst at Merrill Lynch & Co., Inc. ("Merrill Lynch") to provide tips on upcoming mergers in return for a share of the trading profits. In another scheme, Plotkin and Pajcin recruited two individuals to obtain jobs at a printing plant in Wisconsin, steal advance copies of *Business Week* magazine and tip Plotkin and Pajcin on the names of companies discussed favorably in the "Inside Wall Street" ("IWS") column before the magazine became public. Plotkin and Pajcin traded on the inside information, initially in an account in Pajcin's name and later, in accounts in the names of others in Europe and the United States. Plotkin and Pajcin also tipped several individuals in the United States and Europe in return for a share of their trading profits.

In total, Plotkin and Pajcin traded in at least 25 stocks within one year based on inside information obtained through these schemes. The Commission's Complaint charges 13 individuals in the United States and Europe for their roles in the schemes. This Complaint follows two prior complaints filed by the Commission in August 2005, charging insider trading in Reebok securities and successfully freezing over \$6 million in trading proceeds.

In its initial filing in this matter, on August 5, 2005, the Commission obtained a court order freezing a securities account in the name of Sonja Anticevic ("Anticevic"), a Croatian national and resident. The Anticevic account engaged in a series of highly profitable trades in "out of the

money" call options of Reebok just prior to Reebok's Announcement. On August 18, 2005, the Court entered a Preliminary Injunction against Anticevic which, among other relief, continues the asset freeze.

On August 18, 2005, the Commission also filed an amended complaint seeking additional emergency relief against eight additional defendants, including residents of the United States, Croatia and Germany, trading through several domestic and off-shore accounts. As alleged in the amended complaint, the defendants acted in concert or under a common direction in placing the Reebok trades, and collectively netted a profit of over \$6 million. Among others, the amended complaint charged Pajcin, who is Anticevic's nephew, alleging that Pajcin placed or directed some of the Reebok trades, and tipped other defendants who placed Reebok trades. Also charged were Henry Siegel, a resident of Pomona, New York; Monika Vujovic, a resident of New York, New York; Elvis Santana, a resident of Brooklyn, New York; Zoran Sormaz, a resident of Zagreb, Croatia; Perica Lopandic, a resident of Reinbek, Germany; Ilija Borac, a resident of Zagreb, Croatia; and Certain Unknown Persons trading in an account at an Austrian broker, Direktanlage.at AG (the "Direktanlage Traders").

Acting on the Commission's request for emergency relief, the Court issued temporary restraining orders which, among other things, froze the proceeds of trading in Reebok securities in the domestic accounts and required the repatriation and freezing of the proceeds in the foreign accounts. Ultimately, the Court entered a preliminary injunction against all of the defendants, and, as a result, the Commission obtained Court orders freezing over \$6 million in illegal profits stemming from insider trading in Reebok securities.

The Commission's Complaint, today, alleges that Plotkin and Pajcin explored a variety of audacious insider-trading schemes. Among others, Plotkin and Pajcin met with a series of individuals employed at various investment banks in an attempt to get them to provide non-public information about deals those banks were handling. Plotkin and Pajcin also contemplated various schemes involving exotic dancers, including having them garner information from bankers while dancing, and using them to induce investment bankers to provide Plotkin and Pajcin with information. At least two schemes were consummated:

The Merrill Lynch Scheme

The Complaint alleges that Plotkin and Pajcin infiltrated the investment banking unit of Merrill Lynch, repeatedly learning of mergers and acquisitions transactions before they became public. In exchange for a share of the illegal profits, Stanislav Shpigelman ("Shpigelman"), an analyst at Merrill Lynch, leaked confidential information to defendants Plotkin and Pajcin concerning at least six mergers or acquisitions that Merrill Lynch was working on, prior to the time the deals became public, including deals between (i) The Proctor & Gamble Company and The Gillette Company; (ii) Novartis AG and Eon Labs, Inc.; (iii) Duke Energy and Cinergy Corp.; (iv) Quest Diagnostics, Inc. and LabOne, Inc.; (v) Celgene Corp. and a company considering acquiring Celgene; and (vi) Reebok and Adidas. Plotkin and Pajcin traded on the insider information and passed the insider information on to individuals in the United States and Europe ("Traders") who traded on it. Plotkin and Pajcin had an agreement with the Traders,

pursuant to which they were to receive a percentage of the illicit profits made by the Traders. The Merrill Lynch Scheme yielded over \$6.4 million in illicit trading profits.

The Business Week Scheme

The Complaint further alleges that Plotkin and Pajcin also infiltrated one of the printing plants utilized by *Business Week*, repeatedly obtaining advance copies of the market-moving IWS column in *Business Week*. Plotkin and Pajcin recruited two individuals — first, Nickolaus Shuster ("Shuster"), and later Juan C. Renteria, Jr. ("Renteria") — to obtain employment at Quad/Graphics, Inc., one of four printing plants that print *Business Week* magazine, for the sole purpose of stealing copies of upcoming editions of the magazine, and calling Plotkin or Pajcin to read them key portions of IWS — a widely-read column in the magazine that generally moves the price of the securities of companies mentioned in it — prior to the time the column became available to the public. The Complaint alleges that Shuster and Renteria provided Plotkin or Pajcin with insider information concerning at least twenty companies that were featured in the IWS column. Plotkin and Pajcin then either traded on the IWS insider information or passed the information to some or all of the Traders, who traded on the insider information. The *Business Week* Scheme yielded over \$345,000 in illicit trading profits.

The Commission's Complaint names 5 new defendants — Plotkin, Shpigelman, Shuster, Renteria, and Mikhail Plotkin. To date, the Commission has charged the following persons in this matter:

Orchestrators of Fraud

- **Eugene Plotkin**, age 26, is a resident of New York, New York. Plotkin has been employed at Goldman Sachs since July 2000, where he is currently an Associate in the Fixed Income Research division. Plotkin was, along with Pajcin, the architect of the Merrill Lynch and *Business Week* Schemes. Plotkin contributed funds to Pajcin's trading account, which traded on the basis of insider information obtained from the two schemes in certain of the securities referred to in the Complaint. Plotkin and Pajcin agreed to split the profits from Pajcin's trading, along with all the proceeds they collected from their tippees, evenly between themselves.
- **David Pajcin**, age 29, was, during the Relevant Period, a resident of Clifton, New Jersey. Pajcin was formerly associated with several broker-dealers, including Goldman Sachs. Pajcin was, along with Plotkin, the architect of the Merrill Lynch and *Business Week* Schemes. Pajcin traded for his own account, on the basis of insider information obtained from the two schemes, in certain securities referred to in the Complaint. Pajcin also passed the insider information on to other persons in exchange for a share of their illicit profits.

Sources of Insider Information

- **Stanislav Shpigelman**, age 23, is a resident of Brooklyn, New York. Shpigelman has been employed as a Mergers and Acquisitions Analyst

at Merrill Lynch since July 2004. Shpigelman was the source of the non-public confidential information, and a tipper, in connection with the six mergers and acquisitions deals identified under the Merrill Lynch Scheme.

- **Nickolaus Shuster**, age 24, was, during the relevant period a resident of Newark, New Jersey, Hartford, Wisconsin, and, most recently, Lexington, Tennessee. Shuster was employed at Quad Graphics from approximately October 11, 2004, to approximately January 6, 2005, when he was terminated. Shuster was a source of the non-public confidential information, and a tipper, in the *Business Week* Scheme.
- **Juan C. Renteria**, age 20, is a resident of Milwaukee, Wisconsin. Renteria began working at Quad on or about May 15, 2005, where he is currently employed. Renteria was a source of the non-public confidential information, and a tipper, in the *Business Week* Scheme.

Tippees/Nominees

- **Sonja Anticevic**, age 63, is a Croatian national residing in Omis, Croatia. Anticevic, a retired seamstress, is Pajcin's aunt. Certain of the securities referred to in the Complaint were traded through various domestic and foreign accounts held in Anticevic's name. Anticevic permitted Pajcin to trade through Anticevic's various accounts. Anticevic received at least 30,000 Euros for her participation in the frauds.
- **Henry Siegel**, age 55, is a resident of Pomona, New York. Siegel traded for his own account in certain of the securities referred to in the Complaint. Siegel was a tippee of Plotkin and Pajcin in the Merrill Lynch and *Business Week* Schemes.
- **Elvis Santana**, age 23, is a resident of Brooklyn, New York. Santana traded for his own account in certain of the securities referred to in the Complaint. Santana was a tippee of Plotkin and Pajcin in the Merrill Lynch and *Business Week* Schemes.
- **Monika Vujovic**, age 23, is a resident of New York, New York. Certain of the securities referred to in the Complaint were traded through an account held in Vujovic's name. Vujovic permitted Pajcin to trade through Vujovic's account. Vujovic was promised 50% of all fraudulent proceeds made through her account.
- **Perica Lopandic**, age 39, is a German national residing in Reinbek, Germany. Lopandic traded for his own account in certain of the securities referred to in the Complaint. Lopandic was both a tipper and a tippee in the Merrill Lynch and *Business Week* Schemes.
- **Mikhail Plotkin**, age 49, is a resident of Palo Alto, California, and is Plotkin's father. Mikhail Plotkin traded in certain of the securities referred to in the Complaint. Mikhail Plotkin was a tippee of Plotkin and Pajcin in the Merrill Lynch and *Business Week* Schemes.
- **Zoran Sormaz**, age 40, is a Croatian national residing in Zagreb,

Croatia. Sormaz traded for his own account in certain of the securities referred to in the Complaint. Sormaz was a tippee in the Merrill Lynch and *Business Week* Schemes.

- **Ilija Borac**, age 50, is a Croatian national residing in Zagreb, Croatia. Borac traded for his own account in certain of the securities referred to in the Complaint. Borac was a tippee in the Merrill Lynch and *Business Week* Schemes.
- **The Direktanlage Traders** are certain unidentified individuals who traded in certain securities as set forth in the Complaint through Direktanlage account number 34401046. The Direktanlage Traders were tippees in the Merrill Lynch and *Business Week* Schemes.

The Commission alleges that, as a result of trading in various securities on the basis of material, non-public information obtained pursuant to the Merrill Lynch Scheme or the *Business Week* Scheme, the defendants engaged in illegal insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. In addition, the Commission alleges that defendants Plotkin, Pajcin, and Shpigelman violated Section 14(e) of the Exchange Act and Rule 14e-3 thereunder by trading in the stock of a company while in possession of material, non-public information related to a cash tender offer for such company's stock. Among other things, the Complaint seeks permanent injunctive relief, the disgorgement of all illegal profits plus prejudgment interest, the imposition of civil monetary penalties, and orders requiring the defendants to repatriate to the United States proceeds of the fraud in accounts outside the United States.

The Commission acknowledges the assistance of the United States Attorney's Office for the Southern District of New York and the Federal Bureau of Investigation. The Commission also acknowledges the assistance of the Financial Supervisory Authority in Denmark, the Financial Market Authority in Austria, the Croatian Securities Commission, and the Financial Services Authority in the United Kingdom.

For information about earlier developments in this matter, please see Litigation Release No. 19340 (August 19, 2005) and No. 19327 (August 5, 2005).

- [SEC Complaint in this matter](#)
- [Complaint Exhibit A](#)
- [Complaint Exhibit B](#)

<http://www.sec.gov/litigation/litreleases/lr19650.htm>

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Modified: 04/11/2006

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Staff Statement at *SEC v. Anticevic* Press Conference

by

Mark K. Schonfeld

*Director, Northeast Regional Office
U.S. Securities and Exchange Commission*

New York, NY
April 11, 2006

Good Morning. I am Mark Schonfeld, Director of the SEC's New York office.

This investigation began, as many investigations begin, with a phone call. On August 3, 2005, Reebok announced an agreement to be acquired by Adidas, causing Reebok stock price to jump 30%. That afternoon, I received a call from the SEC's Office of Market Surveillance in Washington. They had detected an unusual volume of trading in Reebok call options in the days leading up to Reebok's announcement.

Within 24 hours, attorneys and investigators in our office had traced some of the trading across the Atlantic and back again and uncovered that the trading was unusual for more than its volume. Among other things, it seemed that a 63 year old retired seamstress in Croatia named Sonja Anticevic, trading through an online broker in the United States, had made over \$2 million buying Reebok options just before the announcement — realizing a nearly 17-fold return on a two-day investment. Ms Anticevic, it seemed, was either the most successful investor in the history of Wall Street, or part of something highly nefarious. Within 48 hours of the merger announcement, we were in federal court obtaining an order to freeze the proceeds of that trading.

Less than two weeks later, we had traced the trading to eight more individuals and accounts in the United States and Europe, including an individual residing in New Jersey named David Pajcin — Ms. Anticevic's nephew. We immediately went back to court to charge the additional defendants and to obtain an order freezing a total of \$6 million in trading proceeds. By that point, we had also uncovered suspicious contemporaneous trading in other stocks in these accounts.

Over the next several months, our investigation uncovered one of the most widespread, varied, and premeditated insider trading rings we have ever prosecuted. Today we have submitted to the Court our third complaint in this case, bringing to 13, the total number of defendants charged in this insider trading scheme.

At the center of this scheme were defendants Eugene Plotkin, an analyst with Goldman Sachs, and David Pajcin, a former analyst at Goldman Sachs. In one scheme, Plotkin and Pajcin persuaded defendant Stanislav Shpigelman, a mergers and acquisitions analyst at Merrill Lynch, to provide tips on upcoming mergers in return for a share of the trading profits. In another scheme, Plotkin and Pajcin recruited defendants Nickolaus Shuster and Juan Renteria to obtain jobs at a printing plant in Wisconsin, steal advance copies of Business Week magazine and tip Plotkin and Pajcin on the names of companies discussed favorably in the "Inside Wall Street" column before the magazine became available to the public.

Plotkin and Pajcin traded on the inside information, initially in an account in Pajcin's name. Then, in an effort to hide their trading, they traded in accounts in the names of others in Europe and the United States, including Pajcin's Croatian aunt and an account in the name of a friend, defendant Monika Vujovic, an "exotic dancer" in New York City. In order to profit further from the inside information, Plotkin and Pajcin also tipped other individuals in the United States and Europe, who in turn traded on the information, and agreed to share their profits with Plotkin and Pajcin. In total, Plotkin and Pajcin traded in at least 25 stocks within one year based on inside information obtained through these schemes.

The defendants in the SEC's civil case include the individuals who have been charged criminally by the United States Attorney, as well as eight additional individuals who were either tipped by one or more of the defendants or who permitted their accounts to be used for insider trading in return for a share of the profits. The additional defendants in the SEC's action are Ms. Anticevic, Pajcin's aunt in Croatia, Mikhail Plotkin, the father of defendant Eugene Plotkin, Monika Vujovic of New York City, Henry Siegel of Pamona, New York, Elvis Santana of Brooklyn, Perica Lopandic, a German national, and Zoran Sormaz and Ilija Borac, both Croatian nationals.

This case demonstrates that despite all the advances in technology and electronic security, businesses remain as vulnerable to infiltration as the people they employ. In this case, at the same time Plotkin and Pajcin carried out these schemes, they were in the process of trying to find other individuals at prominent investment banks who would be willing to provide similar tips in return for a share of trading profits. They even contemplated using exotic dancers to obtain confidential information from investment banker clientele.

In closing, I would like to recognize the tremendous job done by the SEC staff on these investigations, including David Rosenfeld, David Markowitz, Scott Black, Sanjay Wadhwa, Wendy Griffin, Mona Akhtar, Brenda Chang, Melissa Coppola, Elizabeth Baier, Kathy Murdocco and Roseann Daniello. I would also like to thank United States Attorney Michael Garcia and the United States Attorney's Office and the FBI for their assistance and commitment to this investigation. I would also like to acknowledge the assistance of the Financial Supervisory Authority in Denmark, the Financial Market Authority in Austria, the Croatian Securities Commission, and the Financial Services Authority in the United Kingdom.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 51883 / June 20, 2005

ADMINISTRATIVE PROCEEDING

File No. 3-11957

In the Matter of

JOE D. THOMAS,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Joe D. Thomas ("Thomas" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and the Respondent's Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

A. RESPONDENT

Thomas, age 50, is a Salt Lake City, Utah resident. Thomas owns and operates a mortgage banking business. Between October 18, 2001, and January 24, 2002, Thomas was the president and sole director of a publicly held company, Gateway International Holdings, Inc. ("Gateway").

B. RELATED ENTITY

Gateway International Holdings, Inc. f/k/a Gourmet Gifts, Inc. is a Nevada corporation with offices in Anaheim, California. Following its inception in 1997, the company unsuccessfully attempted to sell seasonal gourmet food and beverage items. By August 1999 it had become an inactive shell with no significant assets, revenues or operations. On January 25, 2002, Gateway engaged in a reverse merger under which it combined with a privately held machine tool manufacturing company through a stock-for-stock exchange. In July 1999, Gateway registered its stock pursuant to Section 12(g) of the Exchange Act. Gateway stock was quoted on the Bulletin Board (a quotation service operated by the NASD) until August 28, 2003. Gateway stock is currently quoted in the electronic quotation service operated by the Pink Sheets, LLC. As of February 10, 2003, there were 26,426,300 shares of its common stock issued and outstanding.

C. INACCURATE AND UNTIMELY DISCLOSURES ABOUT SHARE OWNERSHIP AND TERMS OF REVERSE MERGER

1. In late August and early September 2001, Thomas and others, who did not then own any Gateway stock, met with representatives of a privately held corporation concerning a possible reverse merger with Gateway. On about September 4, 2001, the parties informally agreed that Gateway would acquire all of the outstanding shares of the privately held corporation in exchange for newly issued shares of Gateway stock. On January 25, 2002 ("Effective Date"), Gateway engaged in a reverse merger with the privately held corporation.

2. On or before September 24, 2001, Thomas was informed that in addition to transferring the private corporation's stock to Gateway, certain obligations had to be paid to successfully consummate the transaction. In turn, Thomas told an officer of the private corporation to make \$160,000 in payments, \$25,000 of which went to Gateway to eliminate its existing debts, and \$135,000 of which went directly to Gateway shareholders. Of the \$135,000, \$100,000 was paid to a Gateway shareholder as a finder's fee; \$15,000 was paid to another shareholder to purchase shares; and \$20,000 was divided among three other shareholders who collectively held one million shares of Gateway stock.

3. Between September 24, 2001 and approximately February 2003, Thomas owned outright 800,000 shares issued to Thomas by Gateway in October 2001.²

² A four-for-one forward split of Gateway's outstanding common stock became effective on December 7, 2001. The quantities discussed herein are post-split.

4. Between approximately September 24, 2001 and early January 2002, Thomas owned or exercised control over 200,000 additional Gateway shares purchased from the shareholder who received \$15,000. As a result, Thomas is deemed to either have owned outright, or indirectly controlled, as many as 23% of Gateway's 4,384,000 outstanding shares.

5. On the Effective Date, 13.5 million new shares of Gateway stock were issued to the private company's shareholders. By shortly after that date, Thomas owned less than 5% of the nearly 18 million shares of Gateway stock that were then issued and outstanding.

6. Thomas was required to make filings with the Commission disclosing his beneficial ownership of Gateway stock, but in certain instances omitted to do so. Thomas never filed a Schedule 13D with the Commission reporting his ownership or disposition of any Gateway shares, and never filed an annual statement of beneficial ownership on Form 5.

8. On April 30, 2004, Thomas filed Forms 3 and 4 belatedly reporting his acquisition and subsequent sale in 2003 of 800,000 shares of Gateway stock, but omitted reference to the other shares described above. The effect of this omission was to render the Forms 3 and 4 misleading.

9. Between October 24, 2001 and January 25, 2002, Thomas signed, and/or caused Gateway to file, two preliminary or definitive information statements pursuant to Section 14(c) of the Exchange Act, an information statement pursuant to Section 14(f) of the Exchange Act, and a current report on Form 8-K.

10. Gateway's information statements filed pursuant to Section 14(c) of the Exchange Act indicated that the reverse merger was effected solely through a stock-for-stock exchange, but did not disclose the \$160,000 in payments to Gateway and certain of its shareholders. The effect of this omission was to render the information statements misleading.

11. Further, in purporting to identify all persons known to beneficially own more than 5% of Gateway's stock, the Form 8-K stated that Thomas owned stock representing 18.25% of Gateway's outstanding shares, but omitted reference to the other shares described above. The effect of this omission was to render the Form 8-K misleading.

12. All of Gateway's information statements stated that, "to the Company's knowledge . . . all Section 16(a) [of the Exchange Act] filing requirements applicable to its officers, directors, and greater than 10% beneficial owners were complied with for the [fiscal] year ended September 30, 2001," but omitted reference to Thomas' failure to file a Form 3 reporting his share ownership of more than 10% of Gateway's outstanding shares. The effect of this omission was to render the information statements misleading.

13. Thomas should have known that the effect of the omissions described in Paragraphs II. C. 8, and C. 10-C. 12 above was to render the Form 8-K and information statements misleading, since he knew about the undisclosed payments to certain Gateway shareholders, certain of which tended to demonstrate his ownership or control over the 200,000 unreported shares described in Paragraph 4, and knew about his failure to file a Form 3.

14. Section 13(a) of the Exchange Act and Rule 13a-11 requires reporting issuers to file a Form 8-K disclosing certain events, including any change in control. Rule 12b-20 requires that statements and reports contain all information necessary to ensure that statements made in them are not materially misleading. By signing Gateway's Form 8-K, Thomas caused Gateway's violations of Section 13(a) and Rules 12b-20 and 13a-11 thereunder.

15. Section 14(c) of the Exchange Act and Rule 14c-6 thereunder prohibit misleading statements in information statements. By causing the filing of Gateway's information statements filed pursuant to Section 14(c), Thomas caused Gateway's violations of Section 14(c) of the Exchange Act and Rule 14c-6 thereunder.

16. Section 14(f) of the Exchange Act and Rule 14f-1 thereunder require issuers replacing a majority of their directors in connection with an acquisition or tender offer to file with the Commission and transmit to certain holders of securities of the issuer information required by certain items of the Commission's proxy rules. Rule 12b-20 requires that information statements contain all information necessary to ensure that statements made in them are not materially misleading. By causing the filing of Gateway's information statement filed pursuant to Section 14(f), Thomas caused Gateway's violations of Section 14(f) of the Exchange Act and Rule 14f-1 thereunder.

17. Section 13(d) of the Exchange Act and Rule 13d-1 require any person who acquires more than five percent of an issuer's common stock to file a Schedule 13D with the Commission within ten days after the acquisition. A Schedule 13D must be "promptly" amended to disclose any "material increase or decrease" in the percentage of stock owned by the filing person. *See* Rule 13d-2(a). Thomas violated Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder because he never filed a Schedule 13D disclosing his individual acquisition of more than five percent of Gateway stock and did not file amendments to such a schedule disclosing subsequent material decreases in the number of shares he owned.

18. Section 16(a) of the Exchange Act and Rules 16a-2 and 16a-3 thereunder require corporate officers, directors and holders of more than 10 percent of any class of a company security to file reports (on Forms 3, 4 and/or 5) with the Commission disclosing purchases and sales of company stock. Thomas owned more than 10 percent of Gateway stock between about September 24, 2001 and January 25, 2002. Thomas' Forms 3 and 4 that were filed on April 30, 2004 were late and understated his personal holdings. Further, Thomas never filed an annual statement of beneficial ownership with regard to his Gateway holdings on Form 5. Thomas therefore violated Section 16(a) of the Exchange Act and Rules 16a-2 and 16a-3 thereunder.

III.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Thomas' Offer.

Accordingly, it is hereby ORDERED that Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(d) and 16(a) of the Exchange Act and Rules 13d-1, 13d-2, 16a-2 and 16a-3 thereunder, and from causing violations and any future violations of Sections 13(a), 14(c), and 14(f) of the Exchange Act and Rules 12b-20, 13a-11, 14c-6, and 14f-1 thereunder.

By the Commission.

Jonathan G. Katz
Secretary

[Home](#) | [Previous Page](#)**U.S. Securities and Exchange Commission****U.S. SECURITIES AND EXCHANGE COMMISSION**

Litigation Release No. 19250 / June 7, 2005

SECURITIES AND EXCHANGE COMMISSION v. JAMES J. MCDERMOTT JR., et al., Civil Action No. 99 Civ. 12256 (MBM) (S.D.N.Y.) (filed December 21, 1999)**COURT ENTERS FINAL JUDGMENT AGAINST JAMES J. MCDERMOTT AND KATHRYN B. GANNON SEC BARS MCDERMOTT FROM THE SECURITIES INDUSTRY**

On May 23, 2005, the U.S. District Court for the Southern District of New York entered final judgments against James J. McDermott, Jr. ("McDermott"), the former Chairman and Chief Executive Officer of Keefe, Bruyette & Woods, Inc., and Kathryn B. Gannon (a.k.a. "Marilyn Starr"), a former actress in adult films, based upon charges of insider trading. In its Complaint filed on December 21, 1999, the Commission alleged that while he was Chairman and Chief Executive Officer of Keefe, Bruyette & Woods, Inc., McDermott provided Gannon with material nonpublic information concerning merger transactions involving Central Fidelity Banks, Inc., Advanta Corporation, Barnett Banks, Inc., First Commerce Corp., California State Bank (West Covina), and First Commercial Corp. The Complaint further alleged that Gannon made illegal profits of at least \$88,135 by trading in these securities while in possession of material nonpublic information. In addition, the Complaint alleged that Gannon tipped Anthony Pomponio ("Pomponio") with material nonpublic information in advance of five of the merger transactions, that he traded on the basis of the information, and reaped illegal profits of at least \$86,378. The Commission's action against Pomponio continues.

McDermott was indicted by the U.S. Attorney for the Southern District of New York, and on June 29, 2001, pled guilty to a single count of insider trading for tipping Gannon in connection with her trading in the securities of Barnett Banks, Inc., and was sentenced to five months incarceration. On June 12, 2002, Gannon pled guilty to two counts of conspiracy to commit securities fraud in connection with this matter and was sentenced to three months incarceration.

Without admitting or denying the allegations in the Commission's Complaint, McDermott and Gannon each consented to the entry of the final judgment, which permanently enjoins them from violating the antifraud provisions contained within Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The Court also ordered McDermott to pay \$230,464.23, comprising full disgorgement of Gannon's profits of \$88,135.05 and \$54,194.13 in prejudgment interest, and a one-time civil penalty of \$88,135.05. While the court held Gannon liable for \$141,157.75 in disgorgement and prejudgment interest, based on sworn

representations in her Statement of Financial Condition dated August 4, 2004, and other documents and information submitted to the Commission, the Court waived payment of disgorgement and prejudgment interest and did not order her to pay a civil penalty.

Today, based on the entry of the Court's injunction, the Commission instituted settled administrative proceedings against McDermott. Without admitting or denying the Commission's findings, McDermott consented to the entry of the Commission's Order, which bars him from associating with any broker, dealer or investment adviser. *In the Matter of James J. McDermott, Jr.*, Administrative Proceeding File No. 3-11943; Securities Exchange Act of 1934 Release No. 51794 (June 7, 2005). See also Litigation Release No. 16395 (December 21, 1999).

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Modified: 06/07/2005



U.S. Securities and Exchange Commission

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 51283 / March 1, 2005

Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on potential Exchange Act Section 10(b) and Section 14(a) liability¹

Today, the Commission filed a settled federal court enforcement action against The Titan Corporation ("Titan"), a military intelligence and communications solutions provider.² The Commission's complaint alleged that Titan violated the Foreign Corrupt Practices Act of 1977 ("FCPA") by paying over \$3.5 million to its agent in Benin, Africa approximately \$2 million of which was funneled toward the election campaign of Benin's incumbent President at the direction of at least one former senior Titan officer based in the United States. According to the complaint, Titan made these payments to assist the company in its development of a telecommunications project in Benin and to obtain the Benin government's consent to an increase in the percentage of Titan's project management fees for that project.

On September 15, 2003, Titan became a party to a merger agreement (the "Merger Agreement"), in which Lockheed Martin Corporation ("Lockheed") agreed to acquire Titan, pending certain contingencies. Titan affirmatively represented in the Merger Agreement that:

To the knowledge of the Company, neither Company nor any of its Subsidiaries, nor any director, officer, agent or employee of the Company or any of its Subsidiaries, has ... taken any action which would cause the Company or any of its Subsidiaries to be in violation of the Foreign Corrupt Practices Act of 1977, as amended, or any applicable law of similar effect. ("FCPA Representation.")

The FCPA Representation was publicly disclosed and disseminated by Titan in two places. The proxy statement disclosed that "the merger agreement contains representations and warranties by Titan that expire upon completion of the merger as to, among other things ... Titan's compliance with the Foreign Corrupt Practices Act of 1977, as amended." In addition, the Merger Agreement containing the FCPA Representation was appended to Titan's proxy statement. The proxy statement was filed with the Commission and sent to Titan's shareholders. The Merger Agreement and the proxy statement were amended at various times after September 15, 2003, primarily due to SEC and Department of Justice investigations of potential Titan violations of the FCPA. Throughout this period, the FCPA Representation itself remained unchanged. In June 2004, Lockheed terminated the Merger Agreement.

We issue this Report of Investigation ("Report") pursuant to Section 21(a) of the Securities Exchange Act of 1934 ("Exchange Act") to provide guidance concerning potential liability under Exchange Act Sections 10(b) and 14(a), and Rules 10b-5 and 14a-9 thereunder, for publication of false or misleading material disclosures regarding material contractual provisions such as representations.

This Report highlights for issuers their responsibility to ensure that disclosures regarding material contractual provisions such as representations are not misleading. When an issuer makes a public disclosure of information -- *via* filing a proxy statement or otherwise -- the issuer is required to consider whether additional disclosure is necessary in order to put the information contained in, or otherwise incorporated into that publication, into context so that such information is not misleading. The issuer cannot avoid this disclosure obligation simply because the information published was contained in an agreement or other document not prepared as a disclosure document. Representations, covenants, or other provisions of an agreement made by an issuer that are not public or disclosed to shareholders are not covered by the scope of this Report.

In this case, the shareholders of Titan were not beneficiaries of the FCPA Representation as it appeared in the Merger Agreement. However, the inclusion of the FCPA Representation in a disclosure document filed with the Commission, whether by incorporation by reference or other inclusion, constitutes a disclosure to investors. Depending on the context in which the disclosure is made (including the significance of the representation or other contractual provision and the total mix of information available to the investor), a reasonable investor could conclude that the statements made in the representation describe the actual state of affairs and the information could be material. *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988) ("materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information"). In such a situation, where a document containing such a representation is disclosed, if additional material facts exist, such as those contradicting or qualifying the disclosure of the original representation (for example, knowledge by the senior officers of the company that the facts described in the representation are not true), omission of which makes that disclosure misleading, a company would also be required to disclose those facts. This is particularly true when an issuer knows of new information before the original proxy statement, or amendments, are published. Where the failure to make such disclosure is negligent, an issuer would violate Section 14(a) of the Exchange Act and Rule 14a-9 thereunder, and where the failure involved scienter, the issuer would also violate Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

This Report is not intended to change the way issuers engage in merger, or other contractual, negotiations or to alter existing diligence obligations or to suggest, absent special circumstances (such as provisions intended to create third party beneficiaries), that provisions such as representations and covenants in such agreements are binding on or intended to benefit persons other than parties thereto.

As is the case in other circumstances, where specific additional material facts exist that are known to an issuer, or an issuer was reckless in not knowing them, (in the case of Section 10(b) of the Exchange Act and Rule

10b-5 thereunder), or an issuer was negligent in not knowing them, (in the case of Section 14(a) of the Exchange Act or Rule 14a-9 thereunder) general disclaimers regarding the material accuracy and completeness of disclosure may not be sufficient disclosure, for example, in situations where an issuer has material information contradictory to representations it has made. *Rubinstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994) (“[T]he inclusion of general cautionary language regarding a prediction would not excuse the alleged failure to reveal known material, adverse facts.”); *In re Initial Public Offering Sec. Litig.*, 2004 WL 2320364, at *15 (S.D.N.Y. October 15, 2004) (party may not rely on general disclosure if party is aware of “problem worthy of disclosure”).

We highlight the important principle that disclosures regarding material contractual terms such as representations may be actionable by the Commission. We will consider bringing an enforcement action under Sections 10(b) and 14(a) of the Exchange Act and Rules 10b-5 and 14a-9 thereunder in the future if we determine that the subject matter of representations or other contractual provisions is materially misleading to shareholders because material facts necessary to make that disclosure not misleading are omitted.

By the Commission.

¹ Section 21(a) of the Exchange Act authorizes the Commission to investigate “whether any person has violated, is violating, or is about to violate” the federal securities laws. “The Commission is authorized . . . to publish information concerning such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of” the federal securities laws. This report does not allege a violation by Titan of Sections 10(b) or 14(a) of the Exchange Act or Rules 10b-5 and 14a-9 thereunder and the Commission has not charged Titan with such violations. This Report also does not constitute factual findings or an adjudication of any issue addressed herein. Titan does not admit or deny any of the statements or conclusions contained herein.

² On March 1, 2005, the Commission filed *SEC v. The Titan Corporation*, Civil Action No. 05-0411 (D.D.C.) (JR). Without admitting or denying the allegations in the complaint, Titan consented to the entry of a final judgment permanently enjoining it from violating Sections 30A, 13(b)(2) (A), 13(b)(2)(B) and 13(b)(5) of the Exchange Act, and Rule 13b2-1 thereunder. Pursuant to the final judgment, Titan will pay \$15,479,195.47, comprising \$12,620,000 in disgorgement and \$2,859,195.47 in prejudgment interest.

<http://www.sec.gov/litigation/investreport/34-51283.htm>

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Modified: 03/01/2005

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The Securities and Exchange Commission today filed a settled civil action in the United States District Court for the District of Columbia against Wachovia Corporation ("Wachovia") for violations of proxy disclosure laws and other reporting rules involving the 2001 merger between First Union Corporation ("First Union") and Old Wachovia Corporation ("Old Wachovia"). The Complaint alleges that Old Wachovia and First Union failed to disclose in quarterly reports and in a joint proxy statement-prospectus filed in connection with the merger the total number of shares of First Union common stock ("FTU") that Old Wachovia intended to and did purchase during the period when First Union and SunTrust Corporation ("SunTrust") were engaged in a hostile takeover battle for Old Wachovia. Without admitting or denying the allegations in the complaint, Wachovia consented to entry of a judgment enjoining it from violating the Sections 13(a) and 14(a) of the Securities Exchange Act of 1934 and Rules 12b-20, 13a-13 and 14a-9 thereunder and to pay a civil penalty of \$37 million.

The Commission's complaint alleges:

- On April 16, 2001, First Union and Old Wachovia announced that they had signed a stock-for-stock merger proposal, which offered Old Wachovia shareholders two shares of First Union common stock (NYSE:FTU) for each share of Old Wachovia common stock (NYSE:WB) plus either a one-time special payment of \$0.48 or two preferred shares with dividends.
- On May 4, 2001, Old Wachovia began purchasing shares of FTU and continued to do so on numerous days until June 28, 2001, the day before a restrictive period, pursuant to Regulation M, commenced. During this time period, Old Wachovia purchased a total of 16,491,000 shares of FTU for a total purchase price of \$551,281,036.
- Almost all of Old Wachovia's purchases were made pursuant to a May

2, 2001 Old Wachovia authorization signed by its Investment Management Committee, which authorized the purchase of up to \$500 million worth of FTU stock during the period when Old Wachovia was repurchasing its own stock. Because of its desire to consummate the merger with First Union, Old Wachovia had an interest in ensuring that First Union's stock did not become significantly less valuable in relation to Old Wachovia's stock as a result of Old Wachovia's repurchases of its own stock, because such a change would make the First Union offer appear less valuable. This interest intensified after SunTrust's made a hostile takeover bid for Old Wachovia on May 14, 2001, which initially offered a higher premium to Old Wachovia's shareholders relative to First Union's proposal.

- On June 28, 2001, after the initial authorization had been exhausted, Old Wachovia's Investment Management Committee authorized the purchase of an additional \$55 million worth of FTU stock, which Old Wachovia used to purchase additional FTU stock on June 28. First Union was aware of Old Wachovia's purchases at the time they were made.
- Between May 2 and May 8, 2001, Old Wachovia bought approximately \$18 million of FTU shares on the open market. Old Wachovia stopped buying on May 8 pending regulatory clearance of its purchases under the Hart-Scott-Rodino Act. On May 31, 2001, Old Wachovia resumed buying FTU shares. Between May 31 and June 28, 2001, Old Wachovia purchased approximately \$537 million of FTU shares.
- Old Wachovia knew that its First Union purchases during this period likely would have the effect of supporting the price of FTU, which in turn would support the value of First Union's merger proposal and make it appear more attractive to Old Wachovia shareholders. In fact, on June 25, 2001, Old Wachovia purchased 2.85 million shares of FTU, or 53% of the total trading volume for FTU on that day. The stock closed approximately \$.50 higher on June 25 and the closing price on that day was included in the joint proxy statement sent to shareholders.
- In connection with its FTU purchases, Old Wachovia instructed the broker executing the FTU purchases to do so in compliance with Rule 10b-18, a safe harbor provision applicable to a company purchasing its own securities or those of an affiliate, in this case First Union. In October 2003, the Commission adopted amendments to certain provision of Rule 10b-18. Release 34-48766 (Nov. 10, 2003), 68 FR 64952. The amendment clarified that the safe harbor is not available for purchases affected from the time of public announcement of a merger, acquisition, or similar transaction involving a recapitalization, until the earlier of the completion of such transaction or the completion of the vote by target shareholders, subject to certain exceptions. The safe harbor is not available once such a transaction is announced, because an issuer has considerable incentive to support or raise the market price of the stock in order to facilitate the merger or acquisition. 68 FR at 6495. The Commission also emphasized that "regardless of whether an issuer's repurchases technically satisfy the conditions of the Rule, the safe harbor is not available if the repurchases are fraudulent or manipulative, when viewed in the

totality of the facts and circumstances surrounding the repurchases (i.e. facts and circumstances in addition to the volume, price, time, and manner of the repurchases)." 68 FR 64953. "To come within the safe harbor, however, an issuer's repurchases must satisfy (on a daily basis) each of the section's four conditions. Failure to meet any one of the four conditions will remove all of the issuer's repurchases from the safe harbor for the day." 17 240.10b-18 Preliminary Note 1.

With respect to these purchases, neither First Union nor Old Wachovia disclosed in their Forms 10-Q and 10-Q/A filed in May and June 2001, or in their joint proxy sent to over two hundred thousand shareholders on June 29, 2001, that: a) Old Wachovia authorized the purchase of FTU shares; b) subject to regulatory filings, Old Wachovia intended to purchase up to \$500 million worth of FTU shares; and c) the total number of FTU shares that Old Wachovia purchased in May and June 2001. This material information was not disclosed until August 2001, after the shareholders voted on the merger. Old Wachovia should have publicly disclosed more detailed information about its purchases of FTU stock so that the market would be able to evaluate the effect of those purchases on FTU's stock price during that period. By failing to disclose this material information, First Union and Old Wachovia violated Sections 13(a) and 14(a) of the Securities Exchange Act of 1934.

During the course of the SEC staff's investigation into this matter, Wachovia provided incomplete and untimely document productions and failed to ensure comprehensive and complete responses to requests made and subpoenas issued by the SEC staff. These production deficiencies and delays unnecessarily prolonged the SEC staff's investigation.

► [SEC Complaint in this matter](#)

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U.S. Securities and Exchange Commission

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**Securities Exchange Act of 1934
Release No. 50584 / October 22, 2004**

Admin. Proc. File No. 3-11717

<p>In the Matter of</p> <p style="padding-left: 40px;">HAWAIIAN AIRLINES, INC.,</p> <p>Respondent.</p>	<p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p>	<p>ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934</p>
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I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Hawaiian Airlines, Inc. ("Hawaiian" or "Respondent").

II.

In anticipation of the institution of these proceedings, Hawaiian has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

A. Summary

1. This matter involves the failure to disclose material changes during the course of a \$25,000,000 issuer tender offer by Hawaiian (in which Hawaiian bought back its own outstanding stock) in mid-2002. This offer was intended to allow Hawaiian's majority shareholder, a partnership controlled by Hawaiian's then CEO, to cash out some of its Hawaiian holdings. Hawaiian failed to disclose to its shareholders that, prior to the closing of the tender offer, the company had experienced two months of financial results falling far short of Hawaiian's internal projections and casting doubt on Hawaiian's stated conclusion in the offering materials that the tender offer would not impair its future solvency. Had they disclosed the information, a higher proportion of Hawaiian's shareholders reasonably could have decided to tender their shares, reducing the sales proceeds for Hawaiian's majority shareholder. Instead, non-tendering shareholders retained their shares, to their detriment; nine months later, Hawaiian filed for bankruptcy.

2. According to the Offer to Purchase statement ("OTP") filed by Hawaiian with the Commission, the board of directors had determined that the \$25 million tender offer was "a prudent use of Hawaiian's financial resources." The OTP represented that the board of directors also had determined that paying for the tender offer would not render Hawaiian insolvent under Hawaii law. Hawaiian based these conclusions on the opinion of an outside consultant retained by the board to determine that, as required by Hawaii law, the tender offer would not render the company insolvent. However, the consultant's opinion relied on internal projections that were no longer valid. For example, the projections given to the consultant in April 2002 forecast a \$12 million net profit for the fiscal year ending December 31, 2002; by mid-June, just prior to the closing of the tender offer, Hawaiian had experienced two consecutive months of disappointing results and had revised its internal forecasts to project a \$13 million loss for the year. Hawaiian never disclosed the dramatic change in the company's financial condition to its shareholders, and made no revisions to the OTP.

B. Respondent

3. Hawaiian Airlines, Inc. is a Hawaii corporation headquartered in Honolulu, Hawaii. Hawaiian is an airline engaged primarily in the scheduled transportation of passengers, cargo and mail. During the relevant period, Hawaiian's stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and was listed on the American Stock Exchange and Pacific Exchange. In August 2002, Hawaiian restructured and became a wholly owned subsidiary of Hawaiian Holdings, Inc. ("Holdings"). In the restructuring, each share of Hawaiian was traded for a share of Holdings, which began trading on the American Stock Exchange and Pacific Exchange. Hawaiian filed for bankruptcy protection under Chapter 11 in March 2003, and continues to operate. Holdings did not file for bankruptcy, and its shares continue to trade in the market.

C. Background

4. After experiencing net losses in four of five years from 1996 to 2000, Hawaiian experienced significant financial hardship as a result of the terrorist attacks on September 11, 2001. In late 2001, Hawaiian received

\$25 million in payments from the federal government to compensate air carriers for losses related to the attacks.

5. In May 2002, Hawaiian's then CEO, who also served as the managing partner of Hawaiian's majority shareholder, proposed to Hawaiian's board a \$25 million issuer tender offer, in which Hawaiian would purchase just under six million shares from the company's shareholders at \$4.25 per share. The majority shareholder indicated its intention to tender all of its shares subject to the condition that it would retain over fifty percent of Hawaiian's outstanding shares after the tender offer. In the event that more than six million shares were tendered, Hawaiian would purchase the shares on a pro rata basis.

6. On March 25, 2002, Hawaiian's outside legal counsel informed Hawaiian's then-CEO that under Section 414 111 of Hawaii's Business Corporations Act, Hawaiian could purchase its shares only if, after giving effect to the tender offer: (i) Hawaiian's assets would exceed the sum of its liabilities; and (ii) Hawaiian would be able to pay its debts as they became due in the usual course of business (together, the "solvency test"). Hawaiian's counsel advised Hawaiian's then-CEO that the solvency test should be measured at the time of the distribution of the tender offer proceeds, and that Hawaiian's balance sheet was expected to show a deficit at that time. Hawaiian's counsel further advised Hawaiian's then-CEO that instead of relying on Hawaiian's balance sheet, Hawaiian could retain an expert to provide an opinion to Hawaiian's board as to an alternative method of measuring the assets and liabilities of Hawaiian. Hawaiian hired an outside firm to provide an opinion that the tender offer would not violate the Hawaii statute.

7. Hawaiian provided the expert with certain internal projections that had been prepared in April 2002. In mid-May 2002, relying on these projections, the expert informed the company that it would be able to issue an opinion that Hawaiian could conduct the tender offer without violating Hawaii law.

D. Hawaiian Approves the Tender Offer

8. On May 29, 2002, Hawaiian's board convened a telephonic board meeting for the special purpose of considering the tender offer. Hawaiian's expert, relying on the April projections, informed Hawaiian's board that the \$25 million tender offer would not render the company insolvent under Hawaii law. Hawaiian's board voted to approve the tender offer subject to further review of Hawaiian's financial condition at a board meeting on June 14, 2002.

9. On May 31, 2002, two days after Hawaiian's board voted to approve the tender offer, Hawaiian publicly announced the tender offer and Hawaiian filed tender offer documents with the Commission. The terms of the tender offer required Hawaiian shareholders to tender their shares by June 27, 2002. Hawaiian could, at its option, rescind the tender offer up until June 27, 2002, if it experienced, or would likely experience, a "material adverse effect" in its income or operations. Further, Hawaiian stated in its tender offer documents that it was required to disclose any material changes in the information that it provided to shareholders concerning the offer.

10. Hawaiian's OTP stated that Hawaiian's board made no recommendation as to whether shareholders should tender or refrain from tendering their shares. However, the OTP represented that: (1) Hawaiian's board believed the "Offer is a prudent use of Hawaiian's financial resources"; (2) the board had conducted a review of Hawaiian's financial position and had determined that Hawaiian could complete the tender offer and still pass the solvency test under Hawaii law; (3) Hawaiian's remaining cash would "still provide sufficient working capital for our operations for the foreseeable future"; and (4) shareholders who did not tender might receive a benefit because they would own a larger interest in Hawaiian.

E. Hawaiian's Financial Deterioration

11. Between the May 31st tender offer announcement and the June 27, 2002 closing date, Hawaiian (but not Hawaiian's minority shareholders) learned that the company's financial condition had materially deteriorated. In preparation for a June 14, 2002 board meeting, Hawaiian prepared final financial results for April 2002 and "flash" financial results for May 2002. The April results reflected a \$7.7 million net loss for that month compared to a projected net loss of only \$500,000 as provided to Hawaiian's expert in the April projections. The flash May results reflected a likely operating loss for May of \$7 million, in contrast to the \$2.3 million projected loss contained in the projections relied upon by the expert. Based on the April final and May flash results, Hawaiian once again revised its financial forecast for fiscal year 2002 downward. The revised forecast projected a \$9.3 million operating loss for 2002, rather than the \$12 million operating profit as reflected in the projections provided to and relied upon by Hawaiian's expert. Hawaiian did not file a notice of material change to inform minority shareholders that prior representations about the company's solvency were based on projections that had been rendered obsolete by two months of disappointing financial results.

F. Final May Results

12. On June 17, 2002, Hawaiian prepared its final May results. Those results showed an operating loss of \$10.8 million for May (compared to the \$2.3 million loss for May in the projections provided to Hawaiian's expert). For April and May combined, Hawaiian experienced actual operating losses of \$18.5 million, compared to the \$3.5 million operating loss for those months in the projections provided to Hawaiian's expert. Hawaiian now revised its fiscal year projections to show a *\$13 million operating loss* compared to the projected *\$12 million operating profit* provided to Hawaiian's expert. Once again, Hawaiian did not disclose the substantial decline in the company's financial health to its minority shareholders.

G. The Tender Offer Closes

13. The tender offer closed on June 27, 2002. Of Hawaiian's nearly 34 million outstanding shares, over 26 million shares were tendered. Because the tender offer was oversubscribed, Hawaiian accepted the tendered shares on a pro rata basis. Hawaiian's majority shareholder had over 4 million shares accepted, and received proceeds of over \$17 million.

H. Hawaiian Files For Bankruptcy Protection

14. Hawaiian's financial condition continued to deteriorate after the tender offer closed. On March 21, 2003 (less than nine months after funding the tender offer), Hawaiian filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

I. Legal Conclusion

15. Section 13(e)(1) of the Exchange Act prohibits an issuer from purchasing its own shares in a self-tender offer if to do so would violate rules and regulations adopted by the Commission. Rule 13e-4(j)(2) thereunder prohibits an issuer from making a self-tender offer unless it complies with, among other things, the disclosure requirements in Rules 13e-4(c), (d) and (e).

16. Rules 13e-4(c), (d), and (e) of the Exchange Act require an issuer conducting a self-tender offer to disclose promptly any material changes in the information provided to securities holders. Hawaiian failed to disclose to its shareholders that its financial results for April and May 2002, and the revised projections based on those results, materially undermined statements made by Hawaiian in the tender offer documents.

17. As a result of the conduct above, Hawaiian violated Section 13(e)(1) of the Exchange Act and Rule 13e-4(j)(2) thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Hawaiian's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 21C of the Exchange Act, that Respondent Hawaiian cease and desist from committing or causing any violations and any future violations of Section 13(e)(1) of the Exchange Act and Rule 13e-4(j)(2) thereunder.

By the Commission.

Jonathan G. Katz
Secretary

Endnotes

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

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[Home](#) | [Previous Page](#)**U.S. Securities and Exchange Commission****U.S. SECURITIES AND EXCHANGE COMMISSION****Litigation Release No. 18535 / January 9, 2004*****Securities and Exchange Commission v. Ira J. Gaines, et al.* Civil Action No. 02-CV-1685 PHX (PGR), United States District Court for the District of Arizona.**

On January 6, 2004, the Honorable Paul G. Rosenblatt, U.S. District Judge, District of Arizona, entered an Agreed Final Judgment against Ira J. Gaines, which permanently enjoins Gaines from violating Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, and Rules 10b-5 and 14e- thereunder. Further, under the terms of the order to which Gaines consented, he is prohibited from directly or indirectly, offering, making or engaging in mini-tender offers in the future. In addition, Gaines must also pay \$72,413 in disgorgement, including prejudgment interest, and a \$50,000 civil penalty.

The Commission's Complaint charged that Gaines, individually and d/b/a Wrigley Drive Partners and Morten Avenue Partners, from September 1999 through March 2001, made fraudulent "mini-tender offers" to shareholders to purchase up to 1% of the outstanding stock of 287 public companies. "Mini-tender offer" is a securities industry term for a tender offer resulting in ownership by the offeror of not more than 5% of a public company's securities. Gaines deceived the shareholders by failing to disclose in his offers the following material facts: (1) Gaines' offer price was below the prevailing market price; (2) Gaines reserved sole discretion to modify his offers, including such terms as the offer price and the offer period; and (3) Gaines reserved the right to terminate his offers without notice, regardless of how many shareholders had tendered shares. According to the Commission, Gaines knew, or was reckless in not knowing, that the shareholders were not receiving this material information, and supported this allegation by pointing out that in 1999, for virtually identical conduct, Gaines agreed to a Commission order against his previous company, IG Holdings. In the Matter of IG Holdings, Inc., Exchange Act Release No. 41759 (August 19, 1999).

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Modified: 01/09/2004



U.S. Securities and Exchange Commission

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 48703 / October 27, 2003

Administrative Proceedings
File No. 3-11315

In the Matter of
William A. Wilkerson and The Phoenix Group of Florida, Inc.,
Respondents.
ORDER INSTITUTING PROCEEDINGS
PURSUANT TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-AND-
DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against William A. Wilkerson ("Wilkerson") and The Phoenix Group of Florida, Inc. ("Phoenix Group").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which Respondents admit, Respondents consent to the entry of this Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order").

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

A. Respondents

Wilkerson, 61, is a resident of Florida. He is Chairman of the Board, Chief Executive Officer and President of BCT International, Inc. Wilkerson is also the sole officer and shareholder of The Phoenix Group of Florida, Inc.

Phoenix Group is a Nevada corporation headquartered and doing business in Florida. Wilkerson formed Phoenix Group for the purpose of acquiring and owning shares of BCT International, Inc.

B. Other Relevant Entities

BCT International, Inc. ("BCTI") is a Delaware corporation headquartered in Fort Lauderdale, Florida. BCTI is a holding company of Business Cards Tomorrow, Inc., which franchises wholesale thermography printing plants and sells paper stock and catalogs. BCTI's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the NASDAQ Electronic Bulletin Board under the symbol BCTI.OB.

Phoenix Acquisition Corp. ("PAC") is a Delaware corporation and a wholly-owned subsidiary of Phoenix Group that was formed solely for the purpose of effecting transactions involving the purchase or acquisition of the issued and outstanding shares of BCTI.

C. Facts

1. Summary

This matter involves violations of the "going private" rules under Section 13(e) of the Exchange Act.² Rule 13e-3 under the Exchange Act requires issuers or their affiliates who take steps to effect a going private transaction to promptly disclose information relating to that transaction by filing a Schedule 13E-3 with the Commission. Between May and September 2001, Wilkerson and Phoenix Group engaged in a series of transactions to purchase BCTI stock for the purpose of acquiring control of BCTI and taking it private. However, Wilkerson and Phoenix Group failed to timely file a Schedule 13E-3 disclosing these purchases and their intent to effect a going private transaction, and they failed to disseminate the disclosure to security holders as required by Rule 13e-3(f). As a result, holders of BCTI securities and other investors did not know of Respondents' efforts to take BCTI private, nor were they provided with other important information that was required to be disclosed, such as: (i) the purposes for the transaction; (ii) the effects that the transaction would have on BCTI and its unaffiliated security holders; and (iii) the factors concerning the fairness of the transaction to the unaffiliated security holders. Finally, Wilkerson and Phoenix Group also failed to make adequate and timely disclosures in the Schedules 13D that they filed with the Commission. Respondents thus violated Sections 13(d) and 13(e) of the Exchange Act and Rules 13d-1, 13d-2 and 13e-3 thereunder.

2. Respondents' Acquisitions of BCTI Stock

Beginning in 1986, Wilkerson acquired shares of the company through the sale of his business to BCTI, the conversion of loans he made to the company, and a convertible debenture that he converted into BCTI stock. By May 1, 2001, Wilkerson owned 998,057 shares of BCTI stock, or 19.1% of its issued and outstanding shares. He also acquired options under BCTI's stock option plan to purchase an additional 330,000 shares of BCTI stock.³

In May 2001, Wilkerson initiated a series of transactions to purchase additional BCTI stock. The purpose of these transactions was to gain control of the company and take it private. All of the transactions were private transactions in which Wilkerson

purchased or acquired the right to purchase BCTI stock. Wilkerson entered into these transactions directly or through Phoenix Group, an entity that he formed in June 2001 for the purpose of acquiring and owning BCTI stock. Between May and September 2001, Wilkerson and/or Phoenix Group made the following acquisitions of BCTI stock:

Date	Transaction	# of Shares	Price per share	Shares Owned by Wilkerson/Phoenix Group	Wilkerson/Phoenix Group's % of BCTI shares outstanding
5/20/01	Rights under Option Agreement ⁴	623,782	\$1.75	1,951,839	35.8% ⁵
8/17/01	Assignment of Rights under Stock Purchase Agreement ⁶	618,442	\$1.50	2,570,281	47.1%
8/20 - 21/01	Private Negotiated Purchases	237,848	\$0.90	2,808,129	51.6%
9/1/01	Private Negotiated Purchases	288,858	\$0.90	3,096,987	56.8%

As a result of these transactions, by August 21, 2001, Wilkerson and Phoenix Group had acquired majority ownership and control of the company.

3. Respondents' Plan to Take BCTI Private

On May 23, 2001, Wilkerson disclosed to BCTI's board of directors, which he controlled, his May 20 acquisition of an option to purchase 623,782 shares of BCTI stock. According to the minutes of the board meeting, Wilkerson "expressed to the BCTI Board his interest in exploring the possibility of purchasing the shares of BCTI common stock not already owned by him."

In June 2001, Wilkerson sought financing for his purchases of BCTI stock. In mid-June, Wilkerson received a loan proposal from a bank reflecting that the purpose of the financing was "the purchase of outstanding shares of common stock of [BCTI] in one or more private transactions." On June 19, Wilkerson informed BCTI's board of directors that he was preparing a proposal "involving the purchase of the Company's shares not already owned by [him]." In anticipation of Wilkerson's proposal, BCTI's board retained counsel to assist it in connection with its "review of matters related to a potential 'going private' transaction." Shortly thereafter, on June 25, Wilkerson formed Phoenix Group to acquire the outstanding shares of BCTI stock that he did not already own.

4. Respondents' Schedule 13D Filings

On June 29, 2001, Wilkerson filed a Schedule 13D with the Commission disclosing his acquisition of the option on May 20, which increased in his beneficial ownership of BCTI stock from 19% to 35.8%. In the Schedule 13D, Wilkerson disclosed in boilerplate fashion that he was "considering various alternative courses of action with respect to the management and ongoing operations of the Issuer" and that he may engage in one or more of the following activities: (i) the acquisition of additional BCTI stock; (ii) the acquisition of all or substantially all of BCTI's assets or the remaining outstanding BCTI stock (whether by means of a merger or another form of transaction); (iii) meetings and discussions with BCTI's board (on which Wilkerson then served) with the intent to influence the BCTI's business and affairs; and (iv) any other activities deemed by Wilkerson to be effective for the purpose of so influencing BCTI's business and affairs.

