

CRIMINAL COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-v-

PAUL A. FLYNN,

Defendant.

-----X

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

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

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 January 2001 to in or about September 2003, in the County and State of New York and elsewhere, defendant committed the offenses of:

GRAND LARCENY IN THE FIRST DEGREE, in violation of Penal Law §155.42, a class B Felony; (2 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; and

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

in that defendant, acting in concert with managing officers at Security Trust Company, N.A. (“STC”) and at two hedge funds described below:

- (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 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; and

(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.

Defendant committed these crimes as follows:

I have reviewed personnel records and other business records of the Canadian Imperial Bank of Commerce (“CIBC”) and/or certain subsidiaries. According to those records and to Danielle DeGeorge, a desk assistant at CIBC who worked for defendant, from May 2001 to December 2003, defendant was employed as Managing Director of Equity Investments, which was part of the Equity Arbitrage Department of Canadian Imperial Holdings, Inc., a subsidiary of CIBC. Defendant worked out of CIBC’s offices at 425 Lexington Avenue in New York County. DeGeorge informs me that two hedge funds, Canary Capital Partners and its affiliates (“Canary”) and Samaritan Asset Management and its affiliates (“Samaritan”) (collectively “the Hedge Funds”), were defendant’s clients; and that, during the time period in this complaint, defendant caused CIBC to finance the Hedge Funds’ trades of mutual fund shares that they conducted through STC, which was an intermediary between the Hedge Funds and mutual fund companies. I am further informed by my examination of business records of CIBC and STC that, using financing provided by CIBC and accounts that defendant caused to be established at STC in CIBC’s name, STC obtained mutual fund shares for the Hedge Funds valued in excess of one million dollars each from mutual funds MFS Emerging Growth Fund and Artisan International Fund.

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) of the Investment Company Act of 1940 requires registered mutual funds, and their principal underwriters, dealers and others, 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.”

I am informed by Nicole McDermott (“McDermott”) that between 2000 and late 2003 she was employed as Vice President of Corporate Services at STC. I am further informed by McDermott that on December 9, 2003, she pled guilty to a violation of §352-c(6) of the General Business Law (Martin Act) for her participation in the conduct described herein. McDermott stated under oath that together with Grant Seeger and William Kenyon, STC’s then-CEO and President respectively (charged separately in a criminal action pending in New York State Supreme Court, County of New York), she placed and directed others to place numerous orders on behalf of the Hedge Funds for the purchase and sale of shares of mutual funds after 4:00 pm (Eastern Time), and executed each of these orders at a price that was only available to investors who had placed their orders before 4:00 pm (Eastern Time).

I am further informed by McDermott that, in addition to the Hedge Funds, STC’s clients included retirement plans, defined contribution plans or third party administrators; and that these entities were permitted to transmit to STC after 4:00 pm (Eastern Time) the requested trades they received from their individual members before 4:00 pm (Eastern Time). McDermott informs me that she, Seeger and Kenyon developed and employed several schemes to deceive the Mutual Funds by falsely representing the Hedge Funds’ trades to be those of retirement plans, defined contribution plans or third party administrators. Moreover, I have examined STC trading records that falsely identified trades placed by the Hedge Funds as those of a retirement plan, defined contribution plan or third-party administrator.

The shared intent among defendant, STC and the Hedge Funds to obtain property by misrepresenting to the mutual funds the true identities of the Hedge Funds, and their entitlement to place trades after 4:00 p.m. at that day's NAV, is demonstrated in a memorandum that defendant authored and distributed within CIBC. I have reviewed this memorandum, which is dated October 12, 2001. In the memorandum, defendant described "two significant benefits" that STC provided to Samaritan and Canary. First, STC allowed the Hedge Funds to late trade in that it allowed clients of CIBC to submit trades up until midnight and still obtain that day's NAV. Defendant explained in his memorandum:

A pricing list is prepared by the company and submitted to our clients who are then able to run their timing models against actual closing prices instead of the previous day before they submit trades. Standard platforms require trades to be into [sic] before 4:00 p.m. submitted by specific account number and broker reference.

Second, STC utilized several strategies to reduce the chance that mutual funds would detect the Hedge Funds' market timing and late trading:

[T]he company allows our clients to submit trades in a number of methods to reduce the chance that they would appear to be timing a specific mutual fund. The different types of investing are as follows; 1) Traditional account specific fund investing keeping account balances small; 2) Using a number of multiple legal vehicles (i.e. different Tax ID numbers) they rotate the ownership of the mutual fund transferring balances between related accounts; 3) Piggy backing non-12(b)1 accounts (i.e. 401k etc.) to invest in pools of funds on a net basis as specific ownership is not known by the fund; and 4) Piggy backing 12(b)1 accounts w[h]ere a specific agreement is made with a broker to include the additional fund investments....

I am informed by Harley Nelson ("Nelson") of the Securities and Exchange Commission ("SEC") that he examined STC's records of the trades that the Hedge Funds placed between May 2000 and September 2003. Nelson informs me that STC placed hundreds of trades of mutual fund shares that were transmitted to STC by the Hedge Funds after 4:00 p.m. Nelson's analysis further discloses that approximately 99% of Canary's trades were transmitted to STC after the 4:00 p.m. market close and that 82% of its trades were transmitted to STC between 6:00 p.m. and 9:00 p.m. (Eastern Time).

The Trades

I have reviewed STC's records pertaining to the CIBC-financed trading accounts and these records show that pursuant to the above-described schemes, STC used those accounts to obtain for the Hedge Funds property having a value in excess of one million dollars from both MFS Emerging Growth Fund and Artisan International Fund.

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.

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.

I am informed by Mr. Cavan and Mr. Totsky 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