

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**SECURITIES AND EXCHANGE COMMISSION,  
100 F Street, N.E.  
Washington, DC 20549**

**Plaintiff,**

**v.**

**DAVID L. NALLY,**

**Defendant.**

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: **Civil Action No.**  
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: **COMPLAINT**  
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Plaintiff Securities and Exchange Commission ("Commission") alleges:

**SUMMARY**

1. David L. Nally ("Nally") engaged in a fraudulent trading scheme by executing at least 138 wash sales between various brokerage accounts that he controlled in order to transfer funds from a traditional IRA account ("Rollover") to a Roth IRA account ("Roth"). Through this fraudulent scheme, Nally transferred approximately \$152,606.80 from his Rollover account to his Roth account. To accomplish his fraudulent goal, Nally used thinly traded stocks, and executed his wash sales in the less liquid after-hours market [the periods between 7:30 a.m.-9:15 a.m. and 4:15 p.m.-8:00 p.m.]. The wash sales consisted of near-simultaneous matching limit orders to buy and sell the same securities, which were placed in two accounts Nally controlled and were often placed at prices that were away from the existing market price to further ensure his buy order was filled with securities from the account in which he placed the sell order.

2. Through his fraudulent scheme, Nally sought to avoid the tax consequences of withdrawing funds from his Rollover account and thereby violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5. Unless permanently enjoined, Nally will continue to engage in such acts and practices.

3. The Commission seeks an injunction against future violations and civil monetary penalties pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. §§ 78u(d)(3)].

### **JURISDICTION**

4. This Court has jurisdiction pursuant to Sections 21(d)(1), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(1), 78u(e), and 78aa].

### **THE DEFENDANT**

5. David L. Nally, age 41, is a self-employed trader who resides in Ivins, Utah.

### **FACTS**

#### **Wash Sales Scheme**

##### **Background**

6. Nally's wash sales scheme involved trades between his Rollover and Roth accounts, which were both maintained at the same broker-dealer.

7. Wash sales are transactions involving no change in beneficial ownership. Nally's sole motivation for engaging in his wash sales scheme was to transfer money from his Rollover account to his Roth account while avoiding the tax consequence of directly withdrawing funds from his Rollover account. At the time that Nally initiated his wash sales

scheme, he had approximately \$630,000 in his Rollover account and \$4,200 in his Roth account.

8. Nally pursued his wash sales scheme from at least January 14, 2004 through November 29, 2004, conducting wash sales in at least eight different stocks and making at least 138 wash trades as part of his wash sales scheme. Through the wash trades Nally improperly shifted approximately \$152,606.80.00 from his Rollover account to his Roth account.

Wash Sales by David Nally

9. The majority of Nally's wash sales were executed in the after-hours market, the periods between 7:30 a.m.-9:15 a.m. and 4:15 p.m.-8:00 p.m. Nally consciously chose to conduct his wash sales in the after-hours market to avoid competing market activity that could be executed against the matching limit orders he devised.

10. In order to further minimize the chance that other market participants would execute against his limit orders, Nally frequently executed wash sales at a price that was outside the existing national best bid and offer spread.

11. In order to transfer funds between the accounts, Nally would either use his Rollover account to buy a stock from his Roth account at a price above the prevailing market price or sell stock from his Rollover account to his Roth account at a price below the prevailing market price. The following is an example of Nally's trading:

- On February 5, 2004
  - Nally ordered the Rollover account to SELL 140 Province Healthcare shares for \$14.03
  - Nally ordered the Roth account to BUY 140 Province Healthcare shares for \$14.03
- These orders were executed against each other at 08:23:10.
  - Nally ordered the Rollover account to BUY 140 Province Healthcare shares for \$18.55

- Nally ordered the Roth account to SELL 140 Province Healthcare shares for \$18.55
- These orders were executed against each other at 19:46:13.

While it appeared to the market that 280 shares traded hands in arms length transactions, in reality Nally used 140 shares of Province Healthcare to effectively transfer \$632.80 (140 x \$4.52) from the Rollover account to the Roth account.

12. Between February 3, 2004 and May 28, 2004, Nally executed 39 pre-arranged wash sales in Annuity and Life Re (Holdings) Ltd. These trades, totaling 180,000 shares, effectively transferred \$29,495 from the Rollover account to the Roth account. On February 3, 2004, Nally executed two wash sales in Phosphate Resource Partners LP. These trades, totaling 2,000 shares, effectively transferred \$800 from the Rollover account to the Roth account.

13. Between February 10, 2004 and February 25, 2004, Nally executed four wash sales in Revlon, Inc. These trades, totaling 16,000 shares, effectively transferred \$6,480 from the Rollover to the Roth account. Between March 30, 2004 and May 28, 2004, Nally executed 27 wash sales in Triton PCS Holdings Inc. These trades, totaling 31,000 shares, effectively transferred \$27,450 from the Rollover to the Roth account. Between February 17, 2004 and April 15, 2004, Nally executed 13 wash sales in Terra Industries. These trades, totaling 12,710 shares, effectively transferred \$4,140 from the Rollover to the Roth Account. Between February 3, 2004 and May 28, 2004, Nally effectively transferred \$68,997.80 from his Rollover account to his Roth account.

Nally Knew Wash Sales Were Improper

14. Nally understood the tax implications associated with his Rollover account and his Roth account. In addition, he knew that there was an early withdrawal penalty if he

withdrew funds from his Rollover account before age 59. Nally engaged in his wash sales scheme solely as a means to transfer money from his Rollover account to his Roth account to avoid the tax consequences of withdrawing funds from his Rollover account.

**CLAIM FOR RELIEF**

**Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)]  
and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5]**

15. The Commission realleges and incorporates by reference paragraphs 1 through 14 above.

16. Defendant Nally, by engaging in the conduct described above, directly or indirectly, in connection with the purchase or sale of a security, by the use of means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange:

- a. employed devices, schemes or artifices to defraud;
- b. made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- c. engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

17. By engaging in the conduct described above, the defendant violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5].

**PRAYER FOR RELIEF**

**WHEREFORE**, the Commission respectfully requests that this Court enter a judgment:

**I.**

Permanently enjoining defendant David L. Nally from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5];

**II.**

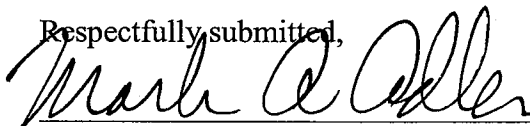
Ordering defendant David L. Nally to pay a civil monetary penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]; and

**III.**

Granting such other relief as the Court may deem just and appropriate.

Dated: May 31, 2007

Respectfully submitted,



Mark A. Adler  
Richard W. Grime  
Charles E. Cain  
Nichola L. Timmons

Attorneys for Plaintiff  
Securities and Exchange Commission  
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Facsimile: (202) 772-9245(Adler)

07-991  
E JR

JS-44

(Rev. 1/05 DC)

<b>I (a) PLAINTIFFS</b> <div style="border: 1px dashed black; padding: 5px; margin-bottom: 5px;">SECURITIES AND EXCHANGE COMMISSION</div> <div style="border: 1px dashed black; padding: 5px; margin-bottom: 5px;">(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES)</div> <div style="border: 1px dashed black; padding: 5px;">(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) 100 F Street, N.E. Washington, D.C. 20549 202-551-4402</div>	<b>DEFENDANTS</b> <div style="border: 1px dashed black; padding: 5px; margin-bottom: 5px;">DAVID L. NALLY</div> <div style="border: 1px dashed black; padding: 5px; margin-bottom: 5px;">COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) <u>Washington</u></div> <div style="border: 1px dashed black; padding: 5px;">NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</div> <div style="border: 1px dashed black; padding: 5px; margin-top: 10px;"> Case: 1:07-cv-00991  Assigned To : Robertson, James  Assign. Date : 5/31/2007  Description: General Civil </div>
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<b>II. BASIS OF JURISDICTION</b> (Place an x in one box only) <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"> <input checked="" type="radio"/> 1 U.S. Government Plaintiff </div> <div style="width: 50%;"> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) </div> <div style="width: 50%;"> <input type="radio"/> 2 U.S. Government Defendant </div> <div style="width: 50%;"> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III) </div> </div>	<b>III CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b> <table style="width: 100%;"> <thead> <tr> <th></th> <th>PTF</th> <th>DFT</th> <th></th> <th>PTF</th> <th>DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td><input type="radio"/> 1</td> <td><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td><input type="radio"/> 4</td> <td><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="radio"/> 2</td> <td><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="radio"/> 5</td> <td><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="radio"/> 3</td> <td><input type="radio"/> 3</td> <td>Foreign Nation</td> <td><input type="radio"/> 6</td> <td><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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**IV. CASE ASSIGNMENT AND NATURE OF SUIT**

(Place a X in one category, A-N, that best represents your cause of action and one in a corresponding Nature of Suit)

<input type="radio"/> <b>A. Antitrust</b>  <input type="checkbox"/> 410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> <b>C. Administrative Agency Review</b> <input type="checkbox"/> 151 Medicare Act <b>Social Security:</b> <input type="checkbox"/> 861 HIA ((1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g) <b>Other Statutes</b> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  Any nature of suit from any category may be selected for this category of case assignment.  *(If Antitrust, then A governs)*
<input checked="" type="radio"/> <b>E. General Civil (Other)</b> OR <input type="radio"/> <b>F. Pro Se General Civil</b>			
<b>Real Property</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property  <b>Personal Property</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<b>Bankruptcy</b> <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>Prisoner Petitions</b> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition  <b>Property Rights</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>Federal Tax Suits</b> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<b>Forfeiture/Penalty</b> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <b>Other Statutes</b> <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input checked="" type="checkbox"/> 810 Selective Service <input checked="" type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 900 Appeal of fee determination under equal access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus-General <input type="checkbox"/> 510 Motion/Vacate Sentence	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights-Employment (criteria: race, gender/sex, national origin, discrimination, disability age, religion, retaliation)  *(If pro se, select this deck)*	<input type="radio"/> <b>I. FOIA/PRIVACY ACT</b>  <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 American w/Disabilities-Employment <input type="checkbox"/> 446 Americans w/Disabilities-Other	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights-Voting (if Voting Rights Act)

**V. ORIGIN**

- ☒ 1 Original Proceeding  
 ☐ 2 Removed from State Court  
 ☐ 3 Remanded from Appellate Court  
 ☐ 4 Reinstated or Reopened  
 ☐ 5 Transferred from another district (specify)  
 ☐ 6 Multi district Litigation  
 ☐ 7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 Securities Fraud Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5]

**VII. REQUESTED IN COMPLAINT**      ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23      **DEMAND \$** \_\_\_\_\_      **JURY DEMAND:** YES ☐ NO ☒ Check YES only if demanded in complaint

**VIII. RELATED CASE(S) IF ANY** (See instruction)      YES ☐ NO ☒ If yes, please complete related case form.

**DATE** 5/31/07      **SIGNATURE OF ATTORNEY OF RECORD** *Mark A. Cade*

**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

JTC

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the Cover Sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff is resident of Washington, D.C.; 88888 if plaintiff is resident of the United States but not of Washington, D.C., and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of case.
- VI. CAUSE OF ACTION: Cite the US Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASES, IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.