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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED

NOV 25 1998

NANCY DOHERTY, CLERK  
BY Deputy

SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff,

v.

SHARP CAPITAL, INC., a Texas Corporation, and  
MAURICIO A. GUTIERREZ,

Defendants,

EMERGING MARKETS CAPITAL ADVISORS, LTD.,  
a Bahamian Limited Company,

Relief Defendant.

CIVIL ACTION NO.  
398 CV 2792-G

## COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission"), for its claims against the defendants, alleges as follows:

## **SUMMARY**

1. Since April 1997, Sharp Capital, Inc. ("Sharp"), an investment adviser registered with the Commission, and its president, Mauricio Gutierrez ("Gutierrez"), operating from offices in Irving, Texas, have entered into advisory agreements with at least 130 investors in several states in Mexico. Under these agreements, Sharp promised to invest clients' monies in conservative, liquid investments, including U.S. Dollar- and Euro-denominated debt instruments; Sharp's clients entrusted at least \$82 million to it for these purposes. Contrary to Sharp's and Gutierrez's representations, Sharp pooled client monies in a

Bahamian corporation, Emerging Markets Capital Advisors, Ltd. ("EMCA"), to which Sharp provided advisory services, and without clients' knowledge or consent directed their funds into highly leveraged, speculative investments, consisting primarily of debt instruments issued by companies in emerging markets such as Russia and Argentina.

2. As a result of declines in these emerging markets during August 1998, as much as 80% of the value in EMCA's portfolio was lost, and the U.S. broker-dealers that had custody of the securities sold off the most liquid securities to satisfy EMCA's obligations under repurchase agreements. At present, the EMCA portfolio contains debt instruments that, if held to maturity, would return approximately \$22.5 million; if liquidated immediately, these securities would return, upon information and belief, only approximately \$5 million. Consequently, Sharp and Gutierrez have caused investor losses of as much as \$77 million.

3. By reason of these activities, Sharp and Gutierrez violated the anti-fraud provisions of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77a - 77bb], the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78a - 78jj], and the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-1 - 80b-20], requiring remedial orders and sanctions. Additionally, because EMCA holds funds or securities purchased or obtained with the proceeds of these unlawful activities, it too should be subject to remedial orders. Based on the defendants' violations of the federal securities laws, as described herein, the Commission seeks the following: Sharp and Gutierrez should be preliminarily and permanently enjoined from violating the anti-fraud provisions of the Securities Act, the Exchange Act, and the Advisers Act, and ordered to pay civil money

penalties based on these violations; Sharp, Gutierrez and EMCA should be ordered to pay disgorgement, and transfer assets, for the benefit of Sharp's clients, and Sharp's and EMCA's assets should be frozen and placed in the custody of a Court-appointed Special Master pending further order of this Court, to ensure recovery by these clients; Sharp should be ordered to provide a sworn accounting, detailing the receipt, use and disposition of the funds it received from advisory clients; and Sharp, Gutierrez and EMCA should be prohibited from moving, altering or destroying their books and records, and ordered to provide expedited discovery.

#### **VENUE AND JURISDICTION**

4. This Court has jurisdiction over this action pursuant to Sections 20(d) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(d) and 77v(a)], Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 89t(d), 78t(e) and 78aa], and Sections 209(e) and 214 of the Advisers Act [15 U.S.C. §§ 80b-9(e) and 80b-14].
5. Certain of the acts, practices, courses of business, and transactions constituting violations of the Securities Act, the Exchange Act, and the Advisers Act, as alleged in this Complaint, have occurred within the Northern District of Texas. Sharp's and Gutierrez' main office, from which all the violative activities set out herein were conducted or emanated, and Gutierrez' residence are located in the Northern District of Texas. All of EMCA's relevant business records are maintained in Sharp's offices, and its securities trading activities were conducted by Gutierrez and several Sharp employees from the adviser's offices.

## DEFENDANTS

6. Sharp is a Texas corporation, incorporated in May, 1986. Sharp's main offices are located in Irving, Texas. Since August 1987, Sharp has been registered with the Commission as an investment adviser.
7. Gutierrez, 39, has been the president of Sharp since 1986, and owns all of its stock. Gutierrez is a resident of Irving, Texas. Sharp is Gutierrez's alter ego, and he controls and directs all of its activities.

## RELIEF DEFENDANT

8. EMCA is an Bahamian corporation formed in 1996, for which Gutierrez exercises power of attorney, and for which Sharp contracted to act as investment adviser. Upon information and belief, EMCA was formed and is controlled by Gutierrez and a business associate in Mexico who was responsible for referring investors to Sharp. EMCA has consented to the in rem jurisdiction of the Court in this matter.

## SHARP'S AND GUTIERREZ' FRAUDULENT ACTIVITIES

9. Sharp's advisory clients are almost exclusively residents of Mexico. Sharp is also the investment adviser to EMCA. Since April 1997, Sharp has entered into and maintained investment advisory agreements with approximately 130 Mexican investors, managing at least \$82 million dollars that they entrusted to it. Although many of these clients were referred to Sharp by brokers in Mexico, all of the clients maintain a direct advisory relationship with Sharp, and each executed an advisory agreement with Sharp that was signed by Gutierrez. Additionally, Sharp's Mexican brokers were in direct

contact with Sharp in establishing and maintaining the clients' relationship with the adviser.

10. Sharp's advisory clients sought conservative investments, and their advisory agreements specify that their portfolios should be comprised of investments similar in character and risk to "Eurobonds, Euro CDs and money market funds."<sup>1</sup> Some of these clients also received a Sharp brochure which touted the adviser's handling of client funds in conservative investments, and made claims that the adviser's strategies provided "the utmost in security, profitability and liquidity, selected to fit the requirements of each individual investor."

11. In response to Sharp's clients' stated investment objectives, and in accordance with its general statement of a conservative investment philosophy, Gutierrez represented to clients that the adviser was purchasing specific conservative instruments issued by well-known companies for their accounts. In fact, many clients designated specific securities of particular companies and instructed Sharp and Gutierrez to invest their monies only in these companies. Clients were typically told, either by Gutierrez or Sharp's agents in Mexico, that the initial investment period was one year, that their investment principal would not be placed at risk, and were variously promised returns ranging from 7% to 11% per annum. After the initial investment period, clients were

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<sup>1</sup> A Eurobond is a debt instrument issued and traded outside the country in whose currency it is denominated, and outside the regulations of a single country -- usually a bond issued by a non-European country deposited in Europe. A Euro CD is a CD issued by banks outside the U.S., primarily in Europe, with interest and principal paid in U.S. dollars. Euro CDs usually have minimum denominations of \$100,000 and short-term maturities of less than two years.

"permitted," and encouraged, to reinvest in instruments from the same issuers, often with maturities of 90 days or less.

12. In reality, very little client money was actually invested in Eurobonds, Euro CDs or moneymarket funds, as was represented in the advisory agreements, confirmations and portfolio statements. Instead, Sharp pooled clients' funds in EMCA, and, in turn, used these funds to make highly leveraged purchases of securities through the use of repurchase agreements with various broker-dealers.<sup>2</sup>

13. In furtherance of this scheme, to both conceal its prior fraudulent activities and to induce "roll-overs" and additional investments, Sharp sent its clients false monthly portfolio statements and confirmations on Sharp letterhead, which reflected purported purchases, sales and interest accruals from various transactions in the clients' accounts in specific instruments issued by well-known Mexican banks and corporations. Sharp and Gutierrez used these statements to entice clients to reinvest, purportedly in these same securities, and, to further entice them, "permitted" clients to purchase shorter maturity instruments with the same returns, which clients typically did. Sharp and its agents encouraged clients to make additional investments on the basis of the adviser's putative past performance, as reported in these false monthly portfolio statements and confirmations.

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<sup>2</sup> A repurchase agreement is a mechanism employed by broker-dealers and customers to finance purchases of certain non-marginable securities. The broker-dealer loans its customer funds to purchase securities, reserving the right to repurchase the customer's securities within a certain period at a certain price. The difference between the purchase price and the negotiated repurchase price reflects the credit extended by the broker-dealer, which is, essentially, secured by the securities held by the customer. By use of these repurchase agreements, Sharp routinely obtained credit from the selling broker-dealer ranging from 60% to 80% of the purchase price for securities purchased for EMCA's portfolio.

14. As a result of Sharp's and Gutierrez' undisclosed investment activities, Sharp's clients' monies were secured by an interest in the EMCA portfolio, rather than, as represented, invested in particular securities. Moreover, EMCA's portfolio was comprised not of safe, secure debt instruments, but was instead invested in volatile emerging markets, including Russia, Venezuela, and Brazil. In August 1998, at least 75% of the fund was invested in Russian ruble-denominated debt instruments, whose value plummeted in mid-August 1998, when the ruble collapsed.

15. As a result of the turbulence in the emerging markets in which EMCA invested, by September 1998, Sharp was no longer able to honor clients' requests for withdrawals. Finally, in mid-September 1998, Gutierrez included a letter with Sharp's August 1998 portfolio statements in which he admitted, for the first time, that clients' monies were invested in emerging markets through highly leveraged repurchase transactions, that much of their money had been lost, and what remained was held in illiquid investments.

16. Sharp and Gutierrez, by their fraudulent activities, put the adviser's clients' funds at enormous, undisclosed, client prohibited risk. Following the foreign currency market collapse of August 1998, the value of assets held in EMCA's portfolio declined from \$82 million, the amount contributed by Sharp's clients, to between \$22.5 and as little as \$5 million, depending on various liquidity factors and market conditions. By reason of Sharp's and Gutierrez' reckless gamble, Sharp's clients collectively lost as much as \$77 million, or 94% of their total investments.

**FIRST CLAIM**

**FRAUD IN THE OFFER AND SALE OF SECURITIES**

**Violations of Section 17(a) of the  
Securities Act [15 U.S.C. § 77q(a)]**

17. The allegations of paragraphs 1 through 16 of this Complaint are realleged and incorporated herein by reference, as if set forth here verbatim.

18. Sharp and Gutierrez, at the various times stated herein, singly, and in concert with others, directly and indirectly, in the offer and sale of securities, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, have :

- a. employed devices, schemes or artifices to defraud;
- b. obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and
- c. engaged in transactions, practices or courses of business which operate or would operate as a fraud and deceit upon purchasers and prospective purchasers.

19. As a part of and in furtherance of the scheme, Sharp and Gutierrez misrepresented to clients that their monies would be invested in instruments similar in nature and risk to Eurobonds, Euro CDs and money market funds, and never disclosed that their monies would be pooled in EMCA and used in a highly leveraged, speculative investment scheme.

20. Also in furtherance of the scheme, Sharp and Gutierrez, directly and indirectly, prepared and disseminated false and misleading portfolio statements so that it appeared to clients that Sharp had invested the clients' monies in accordance with the clients' directions.

21. Sharp and Gutierrez perpetuated this scheme by recommending that clients "roll-over" their investments, again without disclosing how client monies were being misused, and misrepresenting that their monies would be invested in specific securities.

22. Sharp and Gutierrez have intentionally, knowingly and/or recklessly engaged in the acts and practices described in this First Claim. By reason of the foregoing, Sharp and Gutierrez have violated, and unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

23. By reason of the foregoing, Sharp and Gutierrez have violated, and unless enjoined, will continue to violate Sections 17(a)(2) and (3) of the Securities Act [15 U.S.C. §77q(a)(2) and (3)].

### **SECOND CLAIM**

#### **FRAUD IN CONNECTION WITH THE PURCHASE AND SALE OF SECURITIES**

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

24. The allegations of paragraphs 1 through 16 and 19 through 21 of this Complaint are realleged and incorporated herein by reference as if set forth here verbatim.

25. Sharp and Gutierrez, at the various times stated herein, singly, and in concert with others, directly and indirectly, in connection with the purchase and sale of securities, by

use of the means and instrumentalities of interstate commerce and by use of the mails, have:

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

26. Sharp and Gutierrez have intentionally, knowingly, and/or recklessly engaged in the devices, schemes, artifices to defraud, making of untrue statements and omissions, acts, practices and courses of business described in this Second Claim.

27. By reason of the foregoing, Sharp and Gutierrez have violated, and unless enjoined, will continue to violate the provisions of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

### THIRD CLAIM

#### INVESTMENT ADVISER FRAUD

##### Violations of Sections 206(1) and (2) of the Advisers Act [15 U.S.C. § 80b-6(1) and (2)]

28. The allegations of paragraphs 1 through 16 and 19 through 21 of this Complaint, are realleged and incorporated herein by reference, as if set forth here verbatim.

29. Sharp has been registered with the Commission as an investment adviser, under relevant provisions of the Advisers Act, since August 1987. Gutierrez operates and controls Sharp as his alter-ego, and has directed it in the violative activities described in this Third Claim. During the period from at least April 1997, to the present date, Gutierrez has obtained monies from Sharp's advisory clients for investment.

30. At times relevant to the Commission's claims, Sharp, operating under Gutierrez' direction and control, has, by use of the mails and other means and instrumentalities of interstate commerce, directly and indirectly:

- a. employed devices, schemes and artifices to defraud clients and prospective clients; and
- b. engaged in transactions, practices, and courses of business which operated as a fraud or deceit upon clients and prospective clients.

31. By reason of the foregoing, Sharp and Gutierrez have violated, and unless enjoined, will continue to violate Section 206(2) of the Advisers Act [15 U.S.C. § 206(2)]. Furthermore, Sharp and Gutierrez have intentionally, knowingly or recklessly conducted the activities described in this claim, so that they violated and, unless enjoined, will continue to violate Section 206(1) of the Advisers Act [15 U.S.C. § 80b-6(1)].

## FOURTH CLAIM

### ANCILLARY EQUITABLE RELIEF

#### Relief Defendant EMCA Has Either Been Unjustly Enriched, or, in the Alternative, Holds Sharp's Clients' Funds in Constructive Trust

32. The allegations of paragraphs 1 through 16 and 19 through 21 of this Complaint, are realleged and incorporated herein by reference, as if set forth here verbatim.

33. Upon information and belief, EMCA was formed by Gutierrez and a Mexican business associate in 1996 to pool and hold Sharp's clients' funds, and to invest such funds for the benefit of Sharp's advisory clients. Gutierrez holds a power of attorney for EMCA, and Sharp provides EMCA with investment advisory services pursuant to contract. All, or practically all, of EMCA's business records have been maintained in Sharp's offices in Irving, Texas, and its brokerage accounts are maintained with broker-dealers that are domiciled in or are residents of the United States. Gutierrez, a Mexican business associate and several Sharp employees have exclusive trading authority over these securities accounts.

34. EMCA's brokerage accounts contain funds and securities deposited by, or purchased with funds deposited by, Sharp's clients. Sharp's clients, however, have not been told that EMCA holds their funds or securities purchased therewith, and EMCA has no legitimate claim to these funds or securities, apart from holding such funds or securities for Sharp's clients. Since EMCA has no legal or equitable claim to these investors' funds and securities, permitting it to retain the same would unjustly enrich it. As well, EMCA holds funds and securities it knows, or should have reasonably known,

and now certainly knows, were obtained by means of fraudulent acts and practices; it, thus, holds these funds in constructive trust for Sharp's advisory clients.

**RELIEF REQUESTED**

WHEREFORE, the Commission respectfully requests that the Court:

I.

Preliminarily and permanently enjoin Sharp and Gutierrez from violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act.

II.

Order that Sharp's and EMCA's assets be frozen, pending a showing to the Court that they have sufficient funds or assets to satisfy all claims arising from Sharp's and EMCA's violations of the federal securities laws alleged in this Complaint

III.

Order defendant Sharp to prepare and file with the Court and serve on the Commission an accounting, under oath, detailing all funds, securities or other assets received, directly and indirectly, from the activities alleged herein.

IV.

Appoint a Special Master to take immediate possession, and assess the value and liquidity, of Sharp's assets and EMCA's portfolio, and recommend an appropriate disposition thereof.

V.

Order defendants Sharp and EMCA to disgorge all ill-gotten profits or proceeds that they have received as a result of the activities alleged herein with prejudgment interest.

VI.

Order defendants Sharp and Gutierrez to pay civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d) of the Exchange Act [15 U.S.C. § 79u(d)] and Section 209(e) [15 U.S.C. § 80b-9] of the Advisers Act, for their violations of the federal securities laws as alleged in this Complaint.

VII.

Order that Sharp, Gutierrez and EMCA not move, alter or destroy any of their books or records.

VIII.

Order such further relief, both equitable and legal, including interim relief, as this Court may deem just and proper.

Dated: November 25, 1998

Respectfully submitted,



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