

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

_____	:	
SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	
ROBERT A. GIST and	:	
GIST, KENNEDY & ASSOCIATES, INC.,	:	
	:	
Defendants,	:	
	:	
and	:	
	:	
ENCAP TECHNOLOGIES, LLC,	:	
	:	
Relief Defendant.	:	
_____	:	

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff, Securities and Exchange Commission (“Commission”), alleges that:

OVERVIEW

1. From approximately 2003 to the present, Robert A. Gist (“Gist”), while acting as an unregistered broker, and an entity that he controls, Gist, Kennedy & Associates, Inc. (“Gist Kennedy”), engaged in a scheme to defraud at

least 32 customers out of at least \$5.4 million. Gist obtained the funds from his customers on the fraudulent pretense that he would make conservative investments on their behalf in corporate bonds and other securities. Gist, however, invested none of the funds, but, instead, he converted and dissipated the funds.

2. Gist used the converted customer funds for his personal expenses, for the operation of a company that he controlled known as ENCAP Technologies, LLC (“ENCAP”), and for the payment of purported dividends and proceeds from securities sales that he falsely and fraudulently claimed to have purchased on behalf of his customers.

3. Gist used the funds of some of his customers to pay to other customers purported dividends and proceeds from the sale of securities that he fraudulently claimed to have purchased on their behalf.

4. Throughout the scheme, Gist regularly provided his customers with fictitious account statements that he created identifying securities that he falsely claimed to have purchased on their behalf. The fictitious account statements included false account activity, false valuations, false earnings, false dividends, and false account balances. The account statements also falsely stated that Gist Kennedy was a member of the National Association of Securities Dealers (NASD),

the Securities Investor Protection Corporation (SIPC), and the Municipal Securities Rulemaking Board (MSRB).

5. Of the at least \$5.4 million in customer funds that Gist converted, Gist directed at least \$2.2 million of these funds to Relief Defendant ENCAP for its operations expenses. Relief Defendant ENCAP provided nothing of value in return for these funds and was therefore unjustly enriched by at least that amount.

6. Defendants Gist and Gist Kennedy have engaged, and unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], and in regard to Defendant Gist, violations of Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)].

JURISDICTION AND VENUE

7. The Commission brings this action pursuant to Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) and 78u(e)] to enjoin Defendants Gist and Gist Kennedy from engaging in the transactions, acts, practices, and courses of business alleged in this complaint, and transactions, acts, practices, and courses of business of similar purport and object, for civil penalties and for other equitable relief.

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

9. Defendants Gist and Gist Kennedy, directly and indirectly, made use of the mails, the means and instruments of transportation and communication in interstate commerce and the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this complaint.

10. Certain of the transactions, acts, practices, and courses of business constituting violations of the Exchange Act occurred in the Northern District of Georgia. Defendants Gist and Gist Kennedy, who are residents of the Northern District of Georgia, have converted the funds of, and have issued false account statements to, residents of the Northern District of Georgia. Relief Defendant ENCAP has offices in the Northern District of Georgia and transacts business in the District.

11. Defendants Gist and Gist Kennedy, unless restrained and enjoined by this Court, will continue to engage in the transactions, acts, practices, and courses of business alleged in this complaint, and in transactions, acts, practices, and courses of business of similar purport and object.

DEFENDANTS

12. **Robert A. Gist** is 62 years of age and resides in Atlanta, Georgia. Gist is the president of Gist, Kennedy. From 1983 through December 31, 2011, Gist was associated with various registered broker-dealers. From March 2001 through December 31, 2011, Gist was associated with a registered broker-dealer in Vinings, Georgia. Gist is licensed to practice law in Georgia and he has represented professional athletes as a sports agent. From approximately 2002 through early 2013, Gist was CEO and president of Relief Defendant ENCAP.

13. **Gist, Kennedy & Associates, Inc.**, a Georgia corporation formed in 1991, is a law firm specializing in estate planning and also held itself out as an investment firm. Gist was the president of Gist Kennedy and controlled the company.

RELIEF DEFENDANT

14. **ENCAP Technologies, LLC** is a Georgia limited liability company formed in 2001 with its principal place of business in Roswell, Georgia. On information and belief, Relief Defendant ENCAP is in the business of developing industrial coatings for metal surfaces to prevent corrosion. Gist was CEO and president of ENCAP from approximately 2002 through early 2013. Gist is no longer an officer of ENCAP. Of the at least \$5.4 million in funds of Gist Kennedy

customers that Gist converted, at least \$2.2 million went to fund the operations of ENCAP. ENCAP provided nothing of value in return for these proceeds.

FACTS

15. From March 2001 through December 31, 2011, while he was associated with a registered-broker dealer with offices in Vinings, Georgia, Gist convinced approximately 20 of his customers to transfer their investments, held in accounts with the registered broker-dealer, to Gist Kennedy. During this period, Gist also recruited approximately a dozen new customers to invest through Gist Kennedy. Gist promised the customers of Gist Kennedy that he would invest their funds in low risk corporate bonds, stocks, and money market funds.

16. Gist did not reinvest the customers' funds in low risk corporate bonds, stocks, and money market funds, as he had agreed to do—or in any other securities. Instead, upon obtaining his customers' funds, Gist deposited them in an account of Gist Kennedy and subsequently converted them for his personal expenses, for the operation of ENCAP, and for making payments to some customers of Gist Kennedy which Gist falsely represented to be dividends and/or proceeds from the sale of securities.

17. Some of the victims of Gist's fraud were former professional athletes, members of their families, and others associated with them. On information and

belief, Gist obtained these customers through his work as a sports agent representing professional athletes.

18. In order to conceal the conversion of his customers' funds, Gist created false account statements and false trade confirmations and sent them to the customers of Gist Kennedy. The earnings, dividends, valuations, and account balances shown on the customer account statements were fictitious.

19. From approximately 2003 to the present, Gist converted at least \$5.4 million in funds of customers of Gist Kennedy and used these funds to pay his personal expenses, to operate ENCAP, and to make payments of purported dividends, redemptions, and withdrawals to customers of Gist Kennedy in order to perpetuate the scheme.

20. Gist directed at least \$2.2 million of the at least \$5.4 million in converted funds of customers of Gist Kennedy for operation expenses of ENCAP, and ENCAP gave no consideration for these funds. Thus, ENCAP was unjustly enriched by at least \$2.2 million in funds from the defrauded customers of Defendants Gist and Gist Kennedy.

COUNT I—FRAUD

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

(Defendants Gist and Gist Kennedy)

21. Paragraphs 1 through 20 are hereby realleged and are incorporated herein by reference.

22. From approximately 2003 to the present, Defendants Gist and Gist Kennedy, in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly:

- 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 would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.

23. Defendants Gist and Gist Kennedy knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud,

made untrue statements of material facts and omitted to state material facts, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, the defendants acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severe reckless disregard for the truth.

24. By reason of the foregoing, Defendants Gist and Gist Kennedy, directly and indirectly, have violated and, unless enjoined, will continue to violate 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].

COUNT II

EFFECTING SECURITIES TRANSACTIONS FOR THE ACCOUNTS OF OTHERS WITHOUT BEING REGISTERED WITH THE COMMISSION AS A BROKER-DEALER

Violations of Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)]

(Defendant Gist)

25. Paragraphs 1 through 20 are hereby restated and incorporated herein by reference.

26. From in or around 2003 through the present, Defendant Gist has been using the mails and the means and instrumentalities of interstate commerce to effect transactions in, or induce or attempt to induce the purchase or sale of

securities, without registering with the Commission as a broker, as more particularly described above.

27. By reason of the transactions, acts, omissions, practices and courses of business set forth above, Defendant Gist has violated, and unless enjoined will violate, Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)].

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Commission respectfully prays for:

I.

Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, finding that Defendants Gist and Gist Kennedy committed the violations alleged herein.

II.

Permanent injunctions enjoining Defendants Gist and Gist Kennedy, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order of injunction, by personal service or otherwise, and each of them, from violating, directly or indirectly, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and

Rule 10b-5 [17 C.F.R. 240.10b-5] promulgated thereunder, and, in regard to Defendant Gist, from violating, directly or indirectly, Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)].

III.

An order: (a) requiring an accounting of the use of the converted customer funds described in this Complaint, (b) requiring the disgorgement by Defendants of all ill-gotten gains or unjust enrichment with prejudgment interest, to effect the remedial purposes of the federal securities laws, (c) requiring the disgorgement of all unjust enrichment with prejudgment interest by Relief Defendant, (d) imposing an asset freeze with respect to Defendants' assets, and (e) prohibiting the destruction, alteration, or removal of documents by Defendants Gist and Gist Kennedy.

IV.

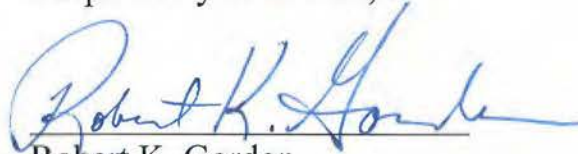
An order pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. 78u(d)(3)] imposing civil penalties against Defendants Gist and Gist Kennedy.

V.

Such other and further relief as this Court may deem just, equitable, and appropriate in connection with the enforcement of the federal securities laws and for the protection of investors.

Dated this 31st day of May, 2013.

Respectfully submitted,

A handwritten signature in blue ink that reads "Robert K. Gordon". The signature is written in a cursive style and is positioned above the printed name.

Robert K. Gordon
Senior Trial Counsel
Georgia Bar No. 302482
E-mail: gordonr@sec.gov

Counsel for Plaintiff:

Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1382
Phone: (404)842-7652
Facsimile: (404)842-7679