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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL W. BERGER,
MANHATTAN INVESTMENT FUND LTD., and
MANHATTAN CAPITAL MANAGEMENT, INC.,

Defendants.

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission"), for its Complaint against Michael W. Berger ("Berger"), Manhattan Investment Fund Limited (the "Hedge Fund"), and Manhattan Capital Management, Inc. ("MCM") (collectively, the "Defendants"), alleges that:

NATURE OF THE ACTION

1. The Commission brings this action to stop a massive fraud being perpetrated by the Defendants, who have raised over \$350 million from investors since September 1996 by grossly overstating the performance and market value of the Hedge Fund's holdings. In

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connection with the offer and sale of shares of the Hedge Fund to investors, Defendants have represented that the Hedge Fund has accumulated hundreds of millions of dollars in assets and that it has been profitable. In fact, the Hedge Fund now has assets of less than \$50 million and Defendants have lost over \$300 million of investors' money through an investment strategy centered on the short-selling of securities of internet-related companies. To hide these monumental losses from investors, Defendants created account statements that materially overstated the performance and value of the Hedge Fund, and have caused the Hedge Fund's administrator to send false and misleading account statements to investors. In addition, Defendants have paid certain shareholders who have redeemed their shares more than the value of those shares, to the detriment of remaining shareholders.

2. By engaging in such conduct, Berger, the Hedge Fund, and MCM have violated, and unless enjoined will continue to violate, Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a), and 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. In addition, Berger and MCM have violated, and unless enjoined will continue to violate, Section 206(1) and (2) of the Investment Advisors Act of 1940 ("Advisors Act"), 15 U.S.C. § 80b-6.

3. The Commission brings this action pursuant to Section 20(b) and (d) of the Securities Act, 15 U.S.C. §§ 77t(b) and (d), Section 21(d) of the Exchange Act, 15 U.S.C. § 78(u)(d) and Section 209(d) and (e) of the Advisors Act, 15 U.S.C. § 80b-9(d) and (e), seeking to temporarily restrain, and preliminarily and permanently enjoin the Defendants from engaging in the wrongful conduct alleged in this Complaint. The Commission also seeks a final judgment ordering the Defendants to disgorge any ill-gotten gains and to pay prejudgment interest thereon,

ordering the Defendants to pay civil money penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). The Commission also seeks other equitable relief during the pendency of this action, including an order: (a) freezing the assets of the Hedge Fund and MCM; (b) requiring the Hedge Fund and MCM to repatriate any off-shore funds; and (c) providing for expedited discovery and prohibiting the destruction of documents, as well as an order appointing a receiver for the Hedge Fund and MCM;

JURISDICTION

4. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and Sections 21(e) and 27 of the Exchange Act, 15 U.S.C. §§ 77u(e) and 78aa, and Section 214 of the Advisers Act, 15 U.S.C. § 80b-14.

5. Defendants, directly and indirectly, singly and in concert, have made use of the means and instrumentalities of transportation or communication in, or the instrumentalities of, interstate commerce, or of the mails in connection with the transactions, acts, practices and courses of business alleged in this Complaint.

6. Certain of the transactions, acts, practices and courses of business occurred within the Southern District of New York, including the purchase of investments on the New York Stock Exchange through numerous registered broker-dealers based in this district, and the mailing of falsified account statements to the Hedge Fund's administrator that materially overstated the value of the Hedge Fund's holdings. In addition, defendant Berger resides in the Southern District of New York and defendant MCM has its offices in this District.

7. Unless restrained and enjoined, the Defendants will continue to engage in the transactions, acts, practices and courses of business alleged herein, and in transactions, acts, practices, and courses of business of a similar type and object.

DEFENDANTS

8. **MICHAEL W. BERGER**, age 28, is an Austrian citizen who has a residence in New York, New York, and also has a residence in Westhampton, New York. Berger is the President, Secretary and sole shareholder of defendant MCM, and a director of the Hedge Fund. He is not registered with the Commission as an investment advisor. In addition, Berger is the author of Wall Street Notes, a financial newsletter, in which capacity, for compensation, and as part of a regular business, he issues and promulgates analyses or reports concerning securities.

9. **MANHATTAN INVESTMENT FUND LIMITED** is incorporated as an open-ended investment company under the laws of the British Virgin Islands, and has a mailing address in Tortola. Neither the Hedge Fund, nor securities in the Hedge Fund, are registered with the Commission. The Hedge Fund is designed to permit foreign investors or tax-exempt U.S. investors (such as certain pension funds and trusts) to participate in investments with the objective of achieving capital appreciation through methods including short sales of securities. The Hedge Fund currently has approximately 280 investors. On information and belief, approximately 8 of the investors have U.S. addresses.

10. The Hedge Fund maintains a brokerage account at Financial Asset Management, Inc. ("FAM"), a broker-dealer located in Columbus, Ohio. FAM clears all its transactions through its clearing broker, Bear Stearns Securities Corporation ("Bear Stearns"), in New York

City. As the introducing firm, FAM has not held any of the Hedge Fund's securities or other assets. At all relevant times, the majority of the Hedge Fund's assets and securities have been held in the Bear Stearns account.

11. In addition, the Hedge Fund maintains accounts with approximately 12 to 15 other brokerage firms in the U.S., approximately half of which are located in Manhattan. All securities transactions through these firms on behalf of the Hedge Fund also cleared through Bear Stearns. The Hedge Fund trades exclusively in stocks traded on U.S. stock exchanges or quoted on the NASDAQ, and has engaged in thousands of transactions in U.S. stocks.

12. **MANHATTAN CAPITAL MANAGEMENT, INC.** is a corporation headquartered at 410 Park Avenue, New York, New York, that was formed under the laws of the State of Delaware. MCM serves as investment manager of the Hedge Fund. Pursuant to an Investment Advisory Agreement between MCM and the Hedge Fund, MCM is paid a management fee at an annual rate of 1% of the Hedge Fund's net asset value. MCM is also paid an incentive fee equal to 20% of the net realized and unrealized appreciation of the net asset value per share. MCM has received several million dollars pursuant to the Investment Advisory Agreement. MCM is not registered with the Commission as an investment advisor.

FACTS

Defendant Berger's Control over the Hedge Fund and MCM

13. Defendant Berger owns and controls MCM and is the company's only officer. MCM has no directors. Berger is solely responsible for overseeing MCM's day-to-day operations and supervising its 6 employees.

14. Through MCM, Berger directs the investment program of the Hedge Fund. He alone has the authority and discretion to effect securities transactions for the Hedge Fund.

15. The Hedge Fund has three directors: Berger and two of his close friends, who reside in Austria. Berger, however, is the only director who is actively involved in the Hedge Fund's daily operations.

16. Berger exercises *de facto* control over the affairs of the Hedge Fund. Without consulting with or seeking the approval of the other directors, he has drafted and signed corporate resolutions, prepared Hedge Fund offering documents, opened numerous brokerage accounts in the Hedge Fund's name and effected frequent transfers of monies belonging to the Hedge Fund. There has never been a meeting of the Hedge Fund's board of directors, nor does the Hedge Fund have any employees. Except for an individual in the British Virgin Islands who is the nominal secretary of the Hedge Fund, and who has no active role in the Hedge Fund's business, the Hedge Fund has no officers. Fund Administration Services (Bermuda) Limited (the "Administrator") performs administrative tasks pursuant to a contract with the Hedge Fund, but does not make substantive decisions for the Hedge Fund.

The Hedge Fund's "Short" Strategy

17. Since its inception in April 1996, the Hedge Fund's investment strategy has been to sell short securities issued by certain internet-related U.S. companies. "Selling short" is a technique used when an investor believes a security will decline in price. The investor borrows stock certificates for delivery at the time of the short sale. If the investor is correct and the price of the stock declines, the investor can purchase the stock (or "cover") at a price below the short sale price, resulting in a profit. If the price rises before the investor can cover, he loses. Berger

based his investment strategy on the proposition that the stock market generally, and stocks of internet-related companies particularly, were overvalued, and that there would be a market correction in which the prices of many internet-related stocks would decline sharply. Berger sold these securities short, in order to profit from the anticipated decline. However, because the prices of most internet-related stocks have instead increased dramatically, the Hedge Fund has consistently suffered losses. Those losses now total in excess of \$300 million.

**Defendant's Misrepresentations Concerning the
Hedge Fund's Performance and Net Asset Value**

18. Each month since September 1996, the Defendants materially misrepresented the value of the Hedge Fund's holdings and corresponding net asset value to investors. To do so, the Defendants manufactured fictitious account statements.

19. Each day, the Hedge Fund received an account statement from Bear Stearns which accurately summarized the quantities and market values of securities held by the Hedge Fund. Beginning in September 1996, however, Berger began using these Bear Stearns statements as templates to create fictitious FAM account statements. These fictitious FAM account statements substantially overstated the market value of the Hedge Fund's holdings. For example, the fictitious account statement for August 31, 1999 misrepresented the net market value of the Hedge Fund's holdings to be \$426,682,720.97 as of August 31, 1999. In truth, the net market value of the Hedge Fund's holdings on that date, as reflected by the Bear Stearns account statements, was \$27,908,023.49.

20. Every month, Berger forwarded a fictitious FAM statement to the Administrator. Although the Administrator also received accurate statements directly from Bear Stearns, Berger instructed the Administrator to ignore them. Berger told the Administrator that the Bear Stearns

statements were not reflective of the Hedge Fund's entire portfolio. Accordingly, the Administrator calculated the Hedge Fund's net asset value and the market value of each investor's shares in the Hedge Fund based on the fabricated FAM statements, and sent monthly account statements based on these calculations to the Hedge Fund's investors.

21. Berger also misrepresented the true financial condition of the Hedge Fund to the Hedge Fund's independent auditors. For each of the years 1996, 1997 and 1998, the Hedge Fund's auditors, Deloitte & Touche (Bermuda) ("D & T"), sent letters to both Bear Stearns and FAM requesting pertinent financial information concerning the Hedge Fund. Berger asked that FAM forward the auditors' request to him, which FAM did. Berger then sent fictitious financial information to D & T. On occasion, Berger even reprogrammed his fax machine to make it appear that the information he was sending to D & T was being sent directly from FAM. Although D & T also received information from Bear Stearns in response to its inquiries, Berger instructed D & T, through the Administrator, to ignore that information, claiming that it was not reflective of the Hedge Fund's entire portfolio. D & T followed those instructions.

22. D & T issued unqualified audit opinions on the Hedge Fund's financial statements for the years ending December 31, 1996, 1997 and 1998. However, because of Berger's intentional overvaluations of the Hedge Fund's performance and assets, those financial statements were grossly inaccurate. For example, according to the Hedge Fund's inaccurate audited financial statements, the Hedge Fund had net assets as of December 31, 1998 and 1997 of \$263,232,840 and \$91,520,968, respectively. In contrast, the information in Bear Stearns' monthly account statements shows that the Hedge Fund's net assets at Bear Stearns (which constituted virtually all of the Hedge Fund's assets) as of December 31, 1998 and 1997 were

\$3,919,297 and \$39,295,114, respectively. The Hedge Fund's inaccurate financial statements for the years ending December 31, 1996, 1997 and 1998 were sent to all the Hedge Fund's investors.

23. Berger also caused inaccurate information regarding the Hedge Fund's financial performance to be sent to prospective investors in the Hedge Fund. On behalf of the Hedge Fund, at various times, Berger drafted and sent offering documents to prospective investors which contained grossly inaccurate information regarding the Hedge Fund's performance. For example, as reflected in a confidential offering memorandum dated December 1999, Berger and the Hedge Fund represented that the Hedge Fund had achieved returns of 12.4% and 27.4% for the years ended December 31, 1998 and 1997, respectively. In fact, the Hedge Fund's returns were negative for each of those years.

24. Berger's continuing and substantial overvaluations of the Hedge Fund's net asset value caused purchasers of shares in the Hedge Fund to pay more for the Hedge Fund's shares than they were in fact worth. Berger's overstatements of the Hedge Fund's returns induced purchasers to buy on the strength of a "performance" record that was illusory.

25. Over the course of the last four years, many new investors have invested in the Hedge Fund, while some investors have redeemed shares in the Hedge Fund. Berger's misstatements of the Hedge Fund's market value have caused the Hedge Fund to pay out to redeeming shareholders more than their shares are worth -- to the detriment of remaining shareholders, whose interests in the Hedge Fund have been diminished. Much of the money used for these investor redemptions has come from new investor funds, which the Hedge Fund has obtained through Defendants' false statements regarding the performance and value of the Hedge Fund.

FIRST CLAIM

Violations of Section 10(b) of the Exchange Act and Rule 10b-5 by Each Defendant

26. The Commission realleges and incorporates by reference the allegations contained in Paragraphs 1 through 25 above.

27. As more fully set forth above, Berger, the Hedge Fund, and MCM each knowingly or recklessly made numerous materially false and misleading statements regarding the performance and value of the Hedge Fund to investors and prospective investors in the Hedge Fund.

28. Defendants Berger, the Hedge Fund, and MCM, directly or indirectly, by use of the means or instruments of interstate commerce, or of the mails, or of a facility of a national securities exchange, knowingly or recklessly: (a) employed devices, schemes and artifices to defraud; (b) made untrue statements of material fact or 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, transactions, practices and courses of business which operated or would operate as a fraud or deceit upon the purchasers of securities and upon other persons, in connection with the purchase or sale of a security.

29. By reason of the foregoing, Berger, the Hedge Fund, and MCM violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

SECOND CLAIM

Violations of Section 17(a) of the Securities Act by Each Defendant

30. The Commission realleges and incorporates by reference the allegations contained in Paragraphs 1 through 29 above.

31. As more fully set forth above, Berger, the Hedge Fund, and MCM each knowingly, recklessly, or negligently made numerous materially false and misleading statements regarding the performance and value of the Hedge Fund to prospective investors in the Hedge Fund.

32. Defendants Berger, the Hedge Fund, and MCM, in the offer or sale of securities, by the use of means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly: (a) employed devices, schemes or artifices to defraud; (b) obtained money or property by means of untrue statements of material facts or omissions to state material facts necessary in order to make the statements made, not misleading; or (c) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers of securities.

33. By reason of the foregoing, Berger, the Hedge Fund, and MCM violated Section 17(a) of the Securities Act.

THIRD CLAIM

Violations of Section 206 of the Investment Advisors Act by Defendants Berger and MCM

34. Paragraphs 1 through 33 are repeated and realleged as if fully set forth herein.

35. Berger and MCM acted as investment advisers to the Hedge Fund. For compensation, they engaged in the business of advising the Hedge Fund and its shareholders, directly and through publications and writings, as to the value of securities and as to the advisability of investing in, purchasing, or selling securities.

36. Berger and MCM, by the use of the mails or any means or instrumentality of interstate commerce, directly or indirectly: (1) employed devices, schemes or artifices to defraud a client or prospective client; and (2) engaged in transactions, practices or courses of business which operated as a fraud or deceit upon a client or prospective client.

37. By reason of the foregoing, Berger and MCM violated Sections 206(1) and (2) of the Advisers Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a Final Judgment:

1. Finding that Berger, the Hedge Fund, and MCM have violated Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), 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, and that Berger and MCM have violated Section 206(1) and (2) of the Investment Advisors Act, 15 U.S.C. § 80b-6;

2. Permanently enjoining, Berger, the Hedge Fund, and MCM from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), 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;

3. Permanently enjoining Berger and MCM from violating Section 206 of the Investment Advisors Act, 15 U.S.C. § 80b-6;

4. Ordering Berger, the Hedge Fund, and MCM to account for and to disgorge any ill-gotten gains realized from the conduct alleged herein and to pay prejudgment interest thereon;

5. Ordering Berger, the Hedge Fund, and MCM to pay civil money penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d) and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3); and

6. Granting such further and other relief as the Court may deem just and equitable.

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