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NORTHERN DISTRICT OF CALIFORNIA

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

CV11 1404

11
12 SECURITIES AND EXCHANGE COMMISSION,
13 Plaintiff,
14 v.
15 MARK A. DUFFELL,
16 Defendant.

Case No.

COMPLAINT

EDL

17
18 Plaintiff Securities and Exchange Commission (the "Commission") alleges:

19 SUMMARY OF THE ACTION

20 1. In this insider trading case, a consultant with a private investment firm netted over
21 \$160,000 by buying stock in a publicly-traded software company while he was participating in
22 confidential discussions about a possible acquisition of that company. Mark Duffell, who at the time
23 served as a consultant for Menlo Park, California private investment firm Accel-KKR ("AKKR"),
24 misappropriated confidential information from AKKR and bought shares of SumTotal Systems, Inc.,
25 a then-public software company, while he was aware of AKKR's interest in SumTotal as a potential
26 acquisition target and was involved in discussions with SumTotal. On March 4 and 5, 2009, while he
27 was in possession of material, non-public information about AKKR's interest in SumTotal, Duffell
28 bought \$90,000 worth of SumTotal stock in his personal trading account. On April 24, 2009, AKKR

1 and SumTotal announced publicly that they had signed a preliminary merger agreement. On the
2 trading day following the acquisition news, SumTotal's share price rose significantly, generating
3 illicit profits of \$162,500 for Duffell.

4 2. By misappropriating material nonpublic information from AKKR and trading on the
5 basis of confidential information he learned from AKKR, defendant Duffell violated Section 10(b) of
6 the Securities Exchange Act ("Exchange Act") of 1934 [15 U.S.C. §78j(b)] and Rule 10b-5 [17
7 C.F.R. 240.10b-5] thereunder. The Commission seeks a court order requiring that defendant Duffell
8 disgorge his ill-gotten gains plus prejudgment interest; imposing civil money penalties; and enjoining
9 him from future violations of these provisions of the securities laws.

10 JURISDICTION AND VENUE

11 3. The Commission brings this action pursuant to Sections 21(d), 21(e), and 21A of the
12 Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78u-1(c)].

13 4. This Court has jurisdiction over this action pursuant to Sections 21(e), 21A and 27 of
14 the Exchange Act [15 U.S.C. §§ 78u(e), 78u-1 and 78aa].

15 5. Defendant, directly or indirectly, made use of the means or instrumentalities of
16 interstate commerce, or of the mails, or of the facilities of a national securities exchange in
17 connection with the transactions, acts, practices and courses of business alleged herein.

18 6. Venue in this District is proper pursuant to Section 27 of the Exchange Act [15 U.S.C.
19 § 78aa] because acts and transactions constituting the violations alleged in the Complaint occurred
20 within the Northern District of California.

21 7. Intradistrict assignment to the San Francisco Division is proper pursuant to Civil L.R.
22 3-2(c) because a substantial part of the events or omissions which give rise to this claim occurred in
23 the County of San Mateo.

24 DEFENDANT

25 8. Defendant Mark A. Duffell, age 49, resides in Coto de Caza, California. From April
26 2008 through March 2010, Duffell was a consultant to Menlo Park, California private investment
27 firm Accel-KKR ("AKKR").
28

1 **RELEVANT ENTITY**

2 9. SumTotal Systems, Inc. is a software company incorporated in Delaware and based in
3 Mountain View, California. SumTotal's common stock was registered with the Commission
4 pursuant to Section 12(b) of the Exchange Act, and was quoted on the NASDAQ Global Market
5 under the ticker symbol "SUMT" until July 22, 2009. SumTotal became a private company after
6 being acquired by a private equity firm in July 2009.

7 **DEFENDANT'S INSIDER TRADING**

8 10. AKKR is a private investment firm that was originally created more than a decade ago
9 by Accel Partners and Kohlberg Kravis & Roberts Company ("KKR"), but is now an independent
10 firm that manages a family of investment funds separate and distinct from funds managed by Accel
11 and KKR. AKKR hired Duffell as a consultant in March 2008 to assist AKKR in evaluating the
12 operations of various software companies where AKKR was considering making an investment. To
13 facilitate this consulting relationship, AKKR formed and capitalized a limited liability company
14 called M2 Technology Partners ("M2"), the purpose of which was to acquire software companies.
15 Under the terms of the M2 limited liability company agreement, Duffell acknowledged that he might
16 receive confidential or proprietary information about potential business opportunities in the course of
17 his work for M2, and he agreed that he would not use any such confidential information for personal
18 profit.

19 11. In the summer of 2008, Duffell was involved in discussions regarding a possible
20 acquisition of SumTotal by AKKR, as part of his consulting relationship with AKKR. AKKR and
21 SumTotal entered into a non-disclosure agreement in August 2008, and AKKR performed due
22 diligence on SumTotal's business. The acquisition negotiations ultimately broke off in October 2008
23 when AKKR and SumTotal could not agree on an acquisition price.

24 12. In January 2009, Duffell contacted SumTotal to discuss restarting acquisition
25 discussions between AKKR and SumTotal. On January 13, 2009, Duffell emailed a SumTotal board
26 member to express interest in AKKR acquiring the company, and to convey that Duffell envisioned
27 that SumTotal's newly hired CEO would remain CEO of the company if AKKR acquired SumTotal.

28

1 Duffell had several telephone discussions with SumTotal's CEO in January and February 2009, and
2 then scheduled an in-person meeting with SumTotal's CEO on March 2, 2009.

3 13. At the March 2 meeting, AKKR indicated that it would be prepared to update its
4 previous due diligence investigation and provide a new indication of price range for a possible
5 acquisition transaction. Duffell also said that he would circulate a list of questions to SumTotal
6 shortly after the meeting to help AKKR update the due diligence it had performed on SumTotal in
7 2008. On March 3, 2009, Duffell emailed SumTotal's CEO thanking him for the meeting, and
8 indicating that he would provide the list of follow up due diligence questions in the next few days.

9 14. On March 4 and 5, 2009, just days after he met with SumTotal's CEO, Duffell
10 purchased 65,000 shares of SumTotal stock at an average price of \$1.33 per share. Duffell did not
11 inform AKKR of his personal trades, which, as noted above, were contrary to the firm's policy.

12 15. On April 1, 2009, AKKR submitted a non-binding letter of interest to acquire
13 SumTotal. On April 24, 2009, AKKR and SumTotal announced publicly that AKKR would acquire
14 SumTotal for \$3.80 per share, but SumTotal had the right to solicit competing bids for the company
15 for a period of thirty days. On the trading day following the news, SumTotal's stock price climbed to
16 \$3.83 per share, amounting to \$162,500 in potential profits for Duffell for the 65,000 shares he
17 bought in March 2009.

18 16. During April and May 2009, AKKR and a private equity firm submitted competing
19 bids to acquire SumTotal. Ultimately, AKKR withdrew from the bidding process on May 26, 2009,
20 and SumTotal was acquired by the private equity firm in July 2009.

21 17. Each of Duffell's purchases of SumTotal stock alleged herein was made based on
22 inside information misappropriated from AKKR in violation of duties of trust and confidence owed to
23 AKKR.

24 18. Duffell knew, or was reckless in not knowing, that the information he misappropriated
25 from his employer regarding AKKR's interest in a possible acquisition of SumTotal was material and
26 nonpublic.

27 19. Duffell knew, or was reckless in not knowing, that he had a duty to refrain from
28 trading on material, nonpublic information.

1 **CLAIM FOR RELIEF**

2 Violations of Section 10(b) of the Exchange Act
3 [15 U.S.C. § 78j(b)] and
4 Rule 10b-5 [17 C.F.R. § 240.10b-5] Thereunder

5 20. Paragraphs 1 through 19 are re-alleged and incorporated herein by reference.

6 21. Defendant, with scienter, directly or indirectly:

7 a) employed devices, schemes, or artifices to defraud;

8 b) made untrue statements of material facts or omitted to state material facts
9 necessary in order to make the statements made, in the light of the
10 circumstances under which they were made, not misleading; and

11 c) engaged in acts, practices, or courses of business which operated or would
12 operate as a fraud or deceit upon other persons, including purchasers and
13 sellers of securities;

14 in connection with the purchase or sale of securities, by the use of means or instrumentalities of
15 interstate commerce, of the mails, or the facilities of a national securities exchange.

16 22. By reason of the foregoing, Defendant violated, and unless restrained and enjoined
17 will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5
18 thereunder [17 C.F.R. § 240.10b-5].

19 **PRAYER FOR RELIEF**

20 WHEREFORE, the Commission respectfully requests that this Court:

21 **I.**

22 Permanently enjoin Defendant from directly or indirectly violating Section 10(b) of the
23 Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder;

24 **II.**

25 Order Defendant to disgorge ill-gotten gains derived from the unlawful trading alleged herein,
26 plus prejudgment interest;

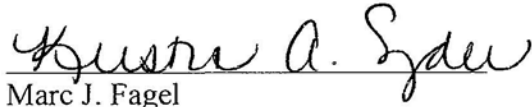
27 **III.**

28 Order Defendant to pay civil penalties pursuant to Section 21A of the Exchange Act [15
U.S.C. § 78u-1]; and

IV.

Grant such other relief as this Court may deem just and appropriate.

Respectfully submitted,



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Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

Dated: March ~~24~~ 2011

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