

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
: :
WARREN LAMMERT, : INITIAL DECISION
LARS SODERBERG, and : April 28, 2008
LANCE NEWCOMB :
:

APPEARANCES: Thomas J. Krysa, Polly A. Atkinson, and Jeffrey Oraker for the Division of Enforcement, Securities and Exchange Commission

Graeme W. Bush, Alexandra W. Miller, and Jill Dash of Zuckerman Spaeder, LLP for Respondent Warren Lammert

Richard M. Beckler, Joseph Walker, and Kyle Cohen of Howrey LLP for Respondent Lars Soderberg

Mark B. Dorfman, Ellen Wheeler, and Jodie Fredericksen of Foley & Lardner LLP for Respondent Lance Newcomb

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision dismisses charges brought against Lance Newcomb (Newcomb) and imposes cease-and-desist orders against Warren Lammert (Lammert) and Lars Soderberg (Soderberg) (collectively, Respondents). The charges concerned Respondents' roles in "market timing" transactions in mutual funds managed by their employer, investment adviser Janus Capital Management LLC (Janus).

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) against Lammert, Soderberg, and Newcomb on July 31, 2006, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of

the Securities Exchange Act of 1934 (Exchange Act), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (Investment Company Act). Lammert, Soderberg, and Newcomb filed timely Answers.

The undersigned held a ten-day hearing in Denver, Colorado, on October 10 through 17, 2007, and Washington, D.C., on November 13, 14, and 16, 2007. The Division of Enforcement (Division) called eleven witnesses from whom testimony was taken, including Respondents and one expert witness. Respondents called an additional six witnesses, including three expert witnesses. Numerous exhibits were admitted into evidence.¹

The findings and conclusions in this Initial Decision are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the parties' December 7, 2007, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Briefs; and (2) their December 14, 2007, Replies. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

This proceeding concerns Respondents' roles in "market timing" transactions in mutual funds managed by Janus, with which Respondents were associated. The transactions at issue were arranged by two broker-dealers, Trautman Wasserman & Co., Inc. (TWCO), and Brean Murray & Co., Inc. (Brean Murray) in furtherance of concealed "late trading" schemes. The OIP alleges that the funds' prospectuses prohibited market timing transactions and charges that Respondents' roles in facilitating the transactions violated the antifraud provisions of the securities laws.² The Division requests: (1) cease-and-desist orders against Respondents; (2)

¹ Citations to the transcript will be noted as "Tr. ___." Citations to exhibits offered by the Division and Respondents will be noted as "Ex. ___." Exhibits offered by the Division are numbered >0 <999; by Lammert, >1000 <1999; by Soderberg, >2000 <2999; and by Newcomb, >3000.

² Specifically, the OIP alleges: (1) Lammert (i) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, willfully aided and abetted and caused Janus's violations of these provisions, and (ii) willfully aided and abetted and caused Janus's violations of Section 206(1) and 206(2) of the Advisers Act and of Section 34(b) of the Investment Company Act; (2) Soderberg (i) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, willfully aided and abetted and caused Janus's violations of these provisions, and (ii) willfully aided and abetted and caused Janus's violations of Section 206(1) and 206(2) of the Advisers Act and of Section 34(b) of the Investment Company Act; and (3) Newcomb (i) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, willfully aided and abetted and caused Janus's violations of these provisions, (ii) willfully aided and abetted and caused Janus's violations of

third-tier civil penalties of \$240,000 each against Lammert and Soderberg and of \$120,000 against Newcomb; and (3) investment adviser and investment company bars against Respondents and broker-dealer bars against Soderberg and Newcomb.

Respondents argue that the transactions at issue were not prohibited by the prospectuses, and, in any event, their roles in the transactions did not violate the securities laws.

II. FINDINGS OF FACT

A. Definitions

“Market timing” is commonly understood to refer to buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing and often involves frequent trading in and out of funds. SEC v. Pimco Advisors Fund Mgmt., 341 F.Supp.2d 454 (S.D.N.Y. 2004); SEC v. Gann, 2006 WL 616005 (N.D. Tex. 2006). Market timing is not in itself illegal but may be prohibited by a fund’s prospectus. In re Mutual Fund Investment, 384 F. Supp. 2d 845, 856 (D. Md. Aug. 25, 2005). “Late trading” is the practice of placing orders to buy or sell mutual fund shares after the time as of which the fund has calculated its net asset value (NAV) (usually as of the close of trading at 4:00 p.m. ET) but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market-moving information that occurs after 4:00 p.m. and is not reflected in that day’s price. Late trading violates Investment Company Act Rule 22c-1(a) (17 C.F.R. § 270.22c-1(a)).

B. Relevant Individuals and Entities

1. Janus and Respondents

Janus is an investment adviser that offers products to retail investors and institutions, directly and through financial intermediaries. Tr. 161. There are three Janus mutual fund trusts: the Janus Investment Fund (JIF), the Janus Adviser Fund (JAD), and the Janus Aspen Series (JAS). Tr. 162. Each of these mutual fund families is organized as a separate business trust; Janus was selected by the common Board of Trustees to act as the investment adviser of the Janus mutual funds. Tr. 162, 1900-01. There are five products at issue in this proceeding: the Mercury, Enterprise, Global Value, Adviser Worldwide, and Adviser International (later, International Growth) Funds. These funds were sold in the JIF and JAD Series of Funds.³

Sections 206(1) and 206(2) of the Advisers Act, and (iii) willfully aided and abetted and caused Janus’s violations of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder.

³ The Mercury Fund, the Enterprise Fund, and the Global Value Funds were in the JIF Series, and Adviser Worldwide Fund and Adviser International Fund were in the JAD Series. See Exs. 484-8, -13, -14, -17, -19, -21, -23, -25.

Lammert, 45, a Massachusetts resident, was the Executive Vice President and Portfolio Manager of the Mercury Fund during most of the relevant period.⁴ Tr. 753; Lammert Answer ¶4. Lammert holds a Bachelor of Arts degree in Economics from Yale University and a Master of Science degree in Economic History from the London School of Economics. Ex. 484-8 at 82. In approximately 1993, Lammert established, and was the initial Portfolio Manager for, the Mercury Fund. Tr. 753. Lammert was an officer of Janus. Tr. 752. Lammert left Janus and the Mercury Fund in late February 2003. Tr. 753.

Soderberg, 48, of Denver, Colorado, was an Executive Vice President of Institutional Services at Janus from 2002 until he resigned from Janus in July 2004. Tr. 929-30; Soderberg Answer ¶5. From 1995 until he became Executive Vice President, Institutional Services, Soderberg was a vice president and director of defined contributions at Janus. Tr. 929. Prior to working at Janus, Soderberg worked for Fidelity Investments for thirteen years. Tr. 926-27. At all relevant times, Soderberg was a registered representative associated with Janus Distributors, Inc., a broker-dealer registered with the Commission. Soderberg Answer ¶5.

Newcomb, of Castle Rock, Colorado, was an Assistant Vice President and Regional Sales Director for Janus. Tr. 413-17. He has a bachelor's degree from the University of Northern Colorado. Tr. 413. Newcomb joined Janus in 1992 as an investor service representative. Tr. 414. In 1998 he joined the institutional sales division where he stayed until he left the company in August 2003. Tr. 415-17; Newcomb Answer ¶6. Newcomb was one of several salesmen in Janus's registered investment adviser (RIA) sales channel. Tr. 1481; Ex. 3210A. He served as the point of contact for RIAs, answering questions, arranging meetings or contacts with portfolio managers, forwarding literature to clients, and performing other similar administrative functions. Tr. 417-18. Newcomb was never an officer, director, or principal of Janus. Tr. 1478. At all relevant times, Newcomb was a registered representative associated with Janus Distributors, Inc., a broker-dealer registered with the Commission. Newcomb Answer ¶6. Newcomb was the least senior of the Respondents; he was several levels below Lammert and Soderberg on Janus's organizational chart, and his compensation was a fraction of theirs. Exs. 3204, 3210A, 3210B.

2. TWCO and Brean Murray

During the time at issue TWCO was a registered broker-dealer. Gregory Trautman (Trautman) was a principal of TWCO. Scott Christian (Christian) and James Wilson (Wilson) operated TWCO's late-trading and market-timing scheme in Janus and other fund families.⁵ Tr.

⁴ The relevant period is November 2001 through September 2003.

⁵ TWCO's late trading scheme violated the antifraud and other provisions of the securities laws; its broker-dealer registration was revoked, and it was ordered to pay disgorgement and penalties. See Trautman Wasserman & Co., Inc., Exchange Act Release No. 57493 (Mar. 13, 2008) declaring final Initial Decision Release No. 340 (Jan. 14, 2008) (ID No. 340) as to TWCO. Trautman has petitioned for review of ID No. 340 concerning its adverse findings as to him. Wilson entered a settlement of the proceeding against him. Trautman Wasserman & Co., Inc., Securities Act Release No. 8895 (Feb. 14, 2008). Christian settled a proceeding against him that

1119-21. As discussed below, Respondents and other Janus employees were unaware that TWCO was engaged in late trading, which was accomplished through intermediaries.⁶

During the time at issue Brean Murray was a registered broker-dealer. Michael Grady (Grady) and Ryan Goldberg (Goldberg) negotiated timing capacity with mutual funds on behalf of Brean Murray clients that wished to time. Tr. 627-36. As with TWCO, the transactions that resulted were invariably late trading, unbeknownst to Respondents and other Janus employees.⁷ Tr. 692.

C. TWCO's and Brean Murray's Trading at Janus

1. TWCO Begins Trading at Janus

In April 2001, Lammert was introduced to Trautman by a professor at New York University School of Medicine. Each had a family member with a serious medical condition and together, with others, they engaged in philanthropic work to benefit similarly situated families and in plans to raise funds for research into promising therapies for the medical condition. Tr. 1399-1400. Lammert and Trautman's relationship at times involved daily communication concerning these matters. Tr. 786-87, 1405.

Trautman soon used his relationship with Lammert for financial gain. Shortly after they met, Trautman approached Lammert about the possibility of TWCO's trading in Janus Funds. Tr. 756-57; Ex. 434. Trautman informed Lammert that TWCO's client had an asset allocation model of trading, but did not specify the exact number of trades that TWCO intended to make. Lammert understood this to mean that "the use of this model . . . could result in movements in or out of the fund." Tr. 757-58. Lammert agreed to allow Trautman to invest \$100 million in the Mercury Fund. Tr. 757-58. As of April 30, 2001, the Mercury Fund had over \$11 billion under management. Ex. 484-8 at 87. On November 12, 2001, Trautman e-mailed Lammert, informing him that "we also allocated the first \$20 million of client money into your fund last week and I have a few comments to make sure we follow proper protocol as we increase that to \$100 million." Ex. 33. Two days later, on November 14, 2001, Trautman sent Lammert a more

was based on his involvement in the TWCO late trading scheme. Scott A. Christian, 85 SEC Docket 4345 (July 29, 2005).

⁶ TWCO traded through Banc of America Securities (BofA) as its clearing broker. Tr. 1120-1123. Since processing of mutual fund purchase and redemption orders received before 4:00 p.m. ET took several hours, Janus had no way of knowing if the 4:00 p.m. ET trading deadline had been violated and had to rely on BofA to enforce it. Tr. 358-59. BofA allowed TWCO to place late trades after 4:00 p.m. ET. Tr. 1120-23.

⁷ Brean Murray settled a proceeding against it based on its late trading scheme in, inter alia, Janus funds. Brean Murray & Co., Inc., 84 SEC Docket 3394 (Feb. 17, 2005). Grady and Goldberg settled a proceeding based on their involvement in Brean Murray's late trading scheme. Ryan D. Goldberg, Exchange Act Release No. 56518 (Sept. 25, 2007).

formal e-mail, with copies to Wilson and Christian, again telling Lammert that TWCO had purchased \$20 million of the Mercury Fund with the possibility that they would allocate up to \$100 million in the fund. Ex. 34. Trautman also stated, “our intention would be to have a long-standing active relationship, with your fund.” Ex. 34. Newcomb was assigned to be the day-to-day contact with TWCO. Tr. 425-26. He received regular updates from TWCO when it traded in Janus. Tr. 429-36. Most of TWCO’s trading was on behalf of its client Ritchie Capital Management L.L.C. (Ritchie Capital).⁸ Tr. 1128-31.

On January 8, 2002, Janus employee Faye Banks sent BofA, TWCO’s clearing firm, a letter instructing it to stop TWCO’s exchanges in Janus funds due to excessive trading. Tr. 453-55; Ex. 400. On receiving a copy of the letter, Wilson asked Newcomb to “please handle this matter and let that department know, so this doesn’t happen again.” Ex. 400. Newcomb did not believe that Janus or Lammert wanted TWCO to receive a stop trading letter. Tr. 454. Newcomb called the institutional operations group and explained that TWCO’s trading was pursuant to an approved relationship; he asked that TWCO not be sent stop trading letters. Tr. 455. Lammert did not, and had no responsibility to, keep track of TWCO’s trading in the Mercury Fund. Tr. 807-08. In May 2002, he was asked to supply trade amount thresholds as dollar or percentage amounts for which he would like to be notified. Tr. 361-62; Ex. 1015. Lammert selected two percent of the Mercury Fund’s portfolio as the threshold for large trade reports he would receive. Ex. 1015. At the time, assets under management were approximately \$5 billion; TWCO’s trading was under the two percent (\$100 million) threshold. Tr. 361-64.

2. TWCO Expands into Other Janus Products

Following receipt of the stop trading letter, TWCO was allowed to continue trading in the Mercury Fund. In early 2002, TWCO began looking into other Janus Funds. In March 2002, Trautman approached Lammert about the possibility of expanding TWCO’s trading into international funds, and Lammert and Mark Whiston,⁹ Soderberg’s boss, asked Soderberg to speak to TWCO. Tr. 950-53; Ex. 37. Soderberg contacted Trautman and explained that “while [Janus] didn’t have any explicit trading limits in our international products, there was a point in time in our business where we had lots and lots of people trading and timing international products, so we were asking everyone to control their trading and abide by those general guidelines [four round trips].” Tr. 954-55, 960-61.

TWCO continued to pursue trading in international funds at Janus. On April 16, 2002, Trautman e-mailed Lammert, stating that TWCO would like to target \$200 million in the Janus fund family by year end. Tr. 785-86; Ex. 40. In April 18 and 19, 2002, e-mails, Wilson told Lammert that he would like to meet with several Janus Portfolio Managers of international

⁸ Ritchie Capital and its principals settled a proceeding arising out of its TWCO late trading; the sanctions included various undertakings, \$30 million in disgorgement, and \$2.5 million in penalties. Ritchie Capital Mgmt. L.L.C., Securities Act Release No. 8890 (Feb. 5, 2008).

⁹ Whiston had worked with Soderberg at Fidelity prior to working at Janus and helped recruit him to Janus. Tr. 926-28. Whiston became the CEO of Janus. Tr. 872.

funds, including Jason Yee (Yee), Laurence Chang (Chang), and Sandy Rufenacht (Rufenacht). Ex. 221. Lammert asked Soderberg to coordinate; ultimately Newcomb coordinated the May 2, 2002, meeting. Ex. 221. Soderberg did not attend the meeting. Tr. 957.

Trautman, Wilson, and representatives from Ritchie Capital attended the May 2, 2002, meeting on behalf of TWCO, and Lammert, Newcomb, Chang, and Rufenacht attended the meeting on behalf of Janus. Tr. 464-68, 794-95, 1146. Following the meeting, Christian e-mailed Newcomb, stating that TWCO would like to invest a total of \$100 million in Janus's international products – \$70 million in the Adviser Worldwide Fund (JWGRX) and \$30 million in the International Growth Fund (JIGRX). Ex. 68. Christian also informed Newcomb that \$57.6 million was already invested in JIGRX and JWGRX. Ex. 68. In response, Newcomb explained that “[t]he only thing that I’m trying to avoid is to have all \$70 [million] or all \$30 [million] coming in or out on one day. That is what really raises eyebrows around here.” Ex. 68.

TWCO did not trade for long in the international funds before concerns were raised about the frequency of its trading. On July 2, 2002, Soderberg e-mailed John Mari (Mari), Director of Institutional Operations at Janus,¹⁰ expressing concern about market timing activity in the Adviser international funds; he asked Mari to help determine what accounts were timing those funds. Ex. 285. Mari responded, “[t]he majority of this timing is due to Trautman/Wasserman.” Ex. 285. Some at Janus became concerned about the number of trades TWCO was doing in the international products. On July 17, 2002, Soderberg e-mailed Newcomb and George Hagerman (Hagerman)¹¹ a document detailing TWCO's trading, saying “[i]n case you need this for Trautman when shutting them down in the international products. This is certainly not the 8-10 times a year we were led to believe.” Tr. 500-02; Ex. 70. On the same day, Hagerman e-mailed Newcomb “since they [TWCO have] exceeded the 14 trades we agreed upon you have to shut them down unless they don't trade for the remainder of the year. Lars just doesn't want to be bothered with the market timing activity.” Ex. 71.

Following this exchange, Newcomb shut down TWCO's trading in international funds. However, as Newcomb expected, Trautman wanted to speak to Soderberg directly. Tr. 500-02; Ex. 70. On July 19, 2002, Trautman also approached Lammert about TWCO's being excluded from trading in the international funds, telling him that “the recent market conditions have created an unusually bad environment as each time it appears that the market may be stabilizing it reverses. This has created unusually high activity in even our most conservative accounts.” Ex. 109. Trautman claimed that he was not asking Lammert to get involved in the situation, but

¹⁰ Mari began working at Janus in July 1990 as a “phone rep.” He moved into management in 1992 and became the director of Institutional Operations in 1997. Tr. 157-59. Institutional Operations provided back office support for the distribution of Janus fund shares. Tr. 159. This group also dealt with financial intermediaries by setting up the relationships in the transfer agency system, taking trades from the intermediaries, facilitating settlements of trades, and coordinating between the back offices of the intermediaries and Janus. Tr. 161-162.

¹¹ Hagerman was Soderberg's subordinate and Newcomb's boss. He was also in charge of the institutional money market fund. Tr. 577-78. Hagerman approved the market timing relationship with TWCO. Tr. 230, 310.

that he wanted to find a “win/win path.” Ex. 109. Shortly after this e-mail exchange, Soderberg spoke with Trautman about TWCO’s trading. Trautman asserted that the trading “patterns that he experienced recently were highly unusual, the anomalies in the market had caused their allocation system to move a little more than usual.” Tr. 986. Trautman convinced Soderberg that TWCO would have a much more conservative profile going forward, and Soderberg allowed TWCO to resume trading in international accounts. Tr. 987. Following this interaction, Soderberg asked Hagerman to manage the relationship. Tr. 993. Lammert did not intervene in the discussions about TWCO’s continued trading in the international funds. Tr. 993. Lammert learned that this issue had been handled by Soderberg and Newcomb, whom he believed to be competent to address it. Tr. 803-04. Shortly after Soderberg allowed TWCO to continue trading, Marci Weidemeier (Weidemeier), an operations employee, sent Soderberg and Newcomb an e-mail stating “Lars said no more than 6 exchanges in International funds, they have hit that in 2 weeks. Now what!!!” Tr. 998-1002; Ex. 73. Newcomb responded that “[w]e asked them to move in and out in smaller amounts. So, it looked to me like they had moved into equity and then moved out with some of the money. I look at that as one move.” Ex. 73. Soderberg did not contact Trautman in response to this e-mail exchange. Tr. 1001-02.

TWCO’s trading raised issues again at the end of July when TWCO began trading in the Global Value Fund, a small fund managed by Yee. Ex. 196. Yee wanted the trading stopped because it was disruptive to his management of the fund owing to its small size. Ex. 196. Soderberg reacted quickly and contacted Newcomb and told him, “if Trautman is in Global Value, let’s have him either stop trading or move to a bigger fund and trade only 6 or so times a year.” Ex. 196. Newcomb told Soderberg that it was “[a]ll taken care of. They said no problem.” Ex. 196.

3. Brean Murray Begins Timing Janus Funds

In September 2002 Grady and Goldberg were randomly calling portfolio managers and other executives at mutual funds in an attempt to negotiate market timing capacity for their clients. They reached Lammert, who referred them to Newcomb. Tr. 630-32, 1304-06. After talking to Grady and Goldberg, Newcomb sent Lammert an e-mail outlining Brean Murray’s trading proposal. Brean Murray wanted to “trade the Mercury Fund more than we would generally allow (3 times a month).” Ex. 75. Brean Murray wanted to start with \$50 million. Newcomb told Lammert that “if this will not negatively effect managing the fund, we can let them do it. It’s your call.” Ex. 75. In response, Lammert wrote, “I am willing to bet they cannot time the market successfully and so would welcome the business. But can you track how much they do trade and how big they are so that we can be sure this does not get out of hand? \$50 million or 1% of assets seems like a manageable number relative to frequent trading.” Ex. 75. After he received approval from Lammert, Newcomb informed Brean Murray that it could trade in the Mercury Fund. Brean Murray began trading in late 2002. Tr. 567-68. Brean Murray negotiated timing capacity on behalf of Eddie Stern of Canary Capital, who also operated as Hartz Trading. Tr. 1304-09. Newcomb told Lammert he would keep a close eye on Brean Murray’s trading. Tr. 814.

Lammert allowed Brean Murray to trade more than Janus would typically allow in the Mercury Fund because, based on his understanding of academic literature and his own experience, he did not think it was possible to successfully time the market. Tr. 1418-19.

Brean Murray invested \$25 million in a money market fund, in addition to the \$50 million timing capacity. Tr. 1535. At the hearing, both Grady and Goldberg testified that the \$25 million “sticky” or “static” asset investment was a requirement in exchange for timing capacity in the Mercury Fund. Tr. 643, 1306-07. Additionally, when its timing capacity was reduced, Brean Murray reduced its investment in the money market fund proportionately. Tr. 1539-40; Ex. 474. Newcomb testified, however, that the \$25 million investment in the money market fund was not dependent on the \$50 million timing capacity and was merely the result of cross-selling. Tr. 574-75, 1483-84.

In light of the evidence of record and the Division’s burden of proof, it is not found that Brean Murray’s investment in the money market fund was a static asset provided in exchange for timing capacity. In May 2003, a Brean Murray employee assisting Grady and Goldberg created a document listing companies at which they had market timing capacity for their clients. Tr. 674-78; Ex. 3164. This document contains details about each fund, including the fund company name, the trading platform used, and the ticket size. Ex. 3164. For some of the funds, the details also include a list of sticky assets associated with each account. Janus is listed in this document, but no sticky assets are listed as being associated with Janus. Ex. 3164. Finally, Newcomb’s position at Janus was such that he did not have independent authority to approve market timing relationships or to impose requirements on investors. Tr. 310-11, 1413, 1480-81. In fact, Mari stated that it was not his “understanding that Mr. Newcomb had the authority to approve market timing relationships.” Tr. 311. Moreover, had Newcomb, in 2002, requested that accommodations be made for market timing, Mari would not have followed Newcomb’s request. Tr. 311. There is no evidence in the record that suggests he was ordered to require static assets by anyone else at Janus.

4. Market Timing Raises Concerns

When Brean Murray began trading in the Mercury Fund, the fund’s cash position was about \$500-600 million. Tr. 816-17. By November 2002, the cash position in the Mercury Fund had fallen to \$100-150 million. Tr. 816-17. This caused Lammert to notice large trades that previously would not have caused him concern. Tr. 816-17. On October 31, 2002, Lammert e-mailed Jeff Rood (Rood), a Janus employee, stating “[b]ig inflow today after huge outflow two days ago and a huge inflow the day before that. Would it be possible to get some more data on the nature of these big flows in and out of Mercury?” Ex. 466. Lammert was concerned about the potential of these trades to cause disruption in the future. Tr. 817. Rood responded that these trades were an approximately \$25 million exchange purchase on October 28, 2002, followed by an approximately \$50 million exchange redemption on October 29, 2002, followed by another approximately \$50 million exchange purchase on October 31, 2002. Ex. 466. Lammert was told that these trades were done by Hagerman’s group. Ex. 466.

Lammert contacted Hagerman to determine who was behind these frequent and large trades. Hagerman told Lammert that it was TWCO, and asked if he would like to shut down

TWCO's trading in the Mercury Fund. Ex. 466. Lammert responded by asking Hagerman what the general policy on these types of exchanges was because he is "inclined to set a tighter limit for these guys . . . maybe \$10 mil but I also am a little concerned about really frequent trading generally." Ex. 466. Hagerman responded that the "current Janus policy prohibits more than four roundtrip trades per year so they are in only because of your approval. You call the shots on any exceptions." Ex. 466. Lammert told Hagerman that they should abide by the same rules as everyone else. Tr. 815-21; Ex. 466.

On November 14, 2002, Lammert e-mailed Trautman, explaining that there were approximately \$50 million in trades into and out of the Mercury Fund that occurred over a one-week period. He further explained that his cash position was in the \$100 million range and that swings of this type were problematic. He explained that Janus "appreciate[d] the \$200 mil but may have to cool the size and frequency of trades." Tr. 821-24; Ex. 406. Trautman responded that "as always we want to make sure that the size and frequency of trades do not cause you any concern or issues." Ex. 47. That same day, Trautman sent Lammert another e-mail explaining that he checked TWCO's activity, and that since the October time frame, they had no activity of any substance. Despite their lack of trading, Trautman asked Christian to "instruct the clients to reduce the amount and timing of the activity pending further notice so that there isn't a repeat of the Oct activity." Ex. 48. Lammert informed Trautman that there was a general policy limiting trading to four round trip trades a year, but Janus had some flexibility as to that restriction. Ex. 48.

The trading that Lammert had been told was TWCO's was actually Brean Murray's, and on November 14, 2002, Newcomb advised Lammert of this. Ex. 53. Newcomb explained that he "always know[s] how much these two [TWCO and Brean Murray] are trading because they let me know about them via email." Ex. 54. Newcomb called Brean Murray on November 14, 2002, and asked it to stop trading. Ex. 53.

After Newcomb stopped Brean Murray's trading, Lammert spoke with Brean Murray and reduced its trading limit to \$5 million from the original \$50 million.¹² Tr. 841-42; Exs. 463, 464. He also asked Newcomb if they were "in fact helping or hurting us with their trades." Tr. 842; Ex. 463. Lammert wanted to know "whether there are obvious costs to us of these guys moving in and out in small size. If they are somehow able to time successfully, there would be. If not, they are helping the other shareholders and giving us some free assets besides." Ex. 464. Lammert asked Newcomb to "take a look at that question and are there other costs I am not considering." Ex. 464. Lammert later learned that Brean Murray in fact lost money on these trades. Tr. 843. On November 18, 2002, Newcomb sent Lammert an e-mail stating "[t]hese trades cost us virtually nothing. It's all electronic. Ultimately, I believe that their activity ends up being neutral to our performance. As long as they are not forcing you to sell stock to meet their redemption." Ex. 56. Lammert never took any action that he would not otherwise have

¹² Prior to Lammert informing Newcomb that Brean Murray was allowed to continue trading in the Mercury Fund, Newcomb sent Lammert an e-mail explaining "I called [Brean Murray] before getting your message and asked them not to go back into the fund. They have moved in and out WAY more than we want to see. I'd like to stick to that if it [sic] ok with you." Ex. 464.

