

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<b>I. (a) PLAINTIFFS</b> Securities and Exchange Commission ("SEC")	<b>DEFENDANTS</b> David L. Hersh
<b>(b)</b> County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)	County of Residence of First Listed Defendant <u>Wake</u> (IN U.S. PLAINTIFF CASES ONLY)
<b>(c)</b> Attorney's (Firm Name, Address, and Telephone Number) Robert K. Gordon / William P. Hicks - Securities and Exchange Commission, 3475 Lenox Road, Suite 500, Atlanta, Georgia 30326, 404.842.7652	NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.  Attorneys (If Known)

<b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)																								
X 1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)  <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:47%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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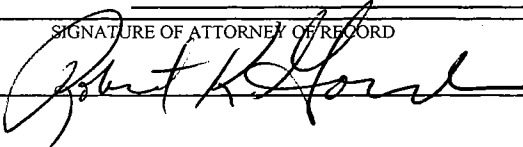
<b>IV. NATURE OF SUIT</b> (Place an "X" in One Box Only)				
<b>CONTRACT</b>	<b>TORTS</b>	<b>FORFEITURE/PENALTY</b>	<b>BANKRUPTCY</b>	<b>OTHER STATUTES</b>
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury  <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability  <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act  <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))  <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input checked="" type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

<b>V. ORIGIN</b> (Place an "X" in One Box Only)						
X 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Reremanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment

<b>VI. CAUSE OF ACTION</b>	Cite the U.S. Civil Statute under which you are filing ( <b>Do not cite jurisdictional statutes unless diversity</b> ): SEC 15 U.S.C. §§77q(a)(1), (a)(2) and (a)(3); 15 U.S.C. §78j(b); 15 U.S.C. §80b-6(1), 6(2) & 6(4); 15 U.S.C. §§77e(a) and e(c) Brief description of cause: Securities Fraud and unregistered securities
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<b>VII. REQUESTED IN COMPLAINT:</b>	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	<b>DEMAND \$</b> _____	CHECK YES only if demanded in complaint: <b>JURY DEMAND:</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
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<b>VIII. RELATED CASE(S) IF ANY</b>	(See instructions):	JUDGE _____	DOCKET NUMBER _____
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DATE <u>9/21/09</u>	SIGNATURE OF ATTORNEY OF RECORD 			
FOR OFFICE USE ONLY				
RECEIPT # _____	AMOUNT _____	APPLYING IFP _____	JUDGE _____	MAG. JUDGE _____

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example:

U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Securities and Exchange Commission

Plaintiff

v.

David L. Hersh

Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

David L. Hersh
3704 Carriage Manor Court
Wendell, North Carolina 27591

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Robert K. Gordon
Senior Trial Counsel
Securities and Exchange Commission
3475 Lenox Road, N.E., Suite 500
Atlanta, Georgia 30326-1232

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DENNIS P. IAVARONE, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(1))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION**

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**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**v.**

**DAVID L. HERSH,**

**Defendant.**

**CIVIL ACTION NO.**

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**COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF**

The Plaintiff, Securities and Exchange Commission (“Commission” or “Plaintiff”), files this Complaint (“Complaint”) and alleges the following:

**SUMMARY**

1. This is a civil enforcement action by the Commission against David L. Hersh (“Hersh”) of Wendell, North Carolina for fraud in connection with the offer and sale of unregistered securities and misappropriation of client funds. From early 2007 through September 2008, Hersh obtained more than \$2 million in funds from investors through the purported sale of promissory notes. Although, nominally, the notes had fixed terms and interest rates, in fact, Hersh told the investors that he would invest their funds in an options trading program. Hersh falsely and misleadingly told the investors (1) they could expect a 40% annual rate of return, and (2) the trading program involved minimal risk. Of the approximately \$2 million in investor funds that Hersh took in, he misappropriated approximately \$575,000 for his personal use and lost approximately \$1,136,000 through risky options trading. By October 2008, the accounts in

which Hersh traded the investors' funds were virtually depleted and he ceased the options trading. The Commission brings this action to enjoin Hersh's violation of the federal securities laws, to obtain disgorgement of his ill-gotten gains and prejudgment interest on that sum, and for the imposition of civil penalties against Hersh.

### **JURISDICTION AND VENUE**

2. The Commission brings this action pursuant to Sections 20(b), (c) and (d) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b)-(d)], Sections 21(d) and 21(e) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d)-(e)], and Sections 209(d) and 209(e) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-9(d)-(e)], to enjoin Hersh 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 disgorgement of illegally obtained funds and other equitable relief, and for civil money penalties.

3. The Court has jurisdiction over this action pursuant to Sections 20(b), 20(d) and 22(a) of the Securities Act [15 U.S.C. §§77t(b), 77t(d) and 77v(a)], Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§78u(d), 78u(e) and 78aa], and Section 214 of the Advisers Act [15 U.S.C. §80b-14].

4. Hersh, directly and indirectly, made use of the mails, the means and instrumentalities 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.

5. Venue lies in this Court pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], Section 27 of the Exchange Act [15 U.S.C. § 78aa], and Section 209 of the Advisers Act [15 U.S.C. § 80b-9], because certain of the transactions, acts, practices and courses of business constituting violations of the Securities Act, Exchange Act, and Advisers Act occurred within the Eastern District of North Carolina. Among other things, Hersh resides within the Eastern District of North Carolina. Furthermore, investors in the Eastern District of North Carolina have been solicited to purchase, and have purchased, investments by and through Hersh, as set forth herein.

### **FACTS**

6. David L. Hersh, 40, has been a resident of Wendell, North Carolina since 2003. Hersh has no securities industry experience.

7. From early 2007 through September 2008, Hersh offered and sold approximately \$2,054,500 in purported promissory notes to twelve investors for principal amounts ranging from \$35,000 to \$930,000 per investor. Hersh recruited the investors who became victims of his scheme through personal contacts.

8. Although the promissory notes typically had fixed terms and rates of interest, Hersh told the investors that their funds would be invested in an options trading program.

9. Hersh pooled the investors' funds in his and his wife's respective Wachovia Securities, LLC ("Wachovia Securities") accounts, and pursued an options trading strategy that involved selling put option contracts on equities and equity indexes, frequently without taking positions to mitigate the risk of these transactions. Hersh never disclosed the true risks or results of his options trading to actual or potential investors.

10. Hersh falsely and misleadingly told existing and potential investors that his options trading strategy involved minimal risk and that the expected annual returns were 40%. In fact, Hersh knew that his options trading strategy was inherently risky, and Hersh did not expect the investments to return 40% annually.

11. Hersh created and used false trading documents, including fake trade confirmations, in order to lull existing investors and to obtain new ones. Hersh personally prepared phony trade confirmations by electronically copying actual online trade confirmations and falsifying them. The false trade confirmations reflected supposedly successful options trading that, in fact, never occurred.

12. In September and October 2008, Hersh incurred trading losses of approximately \$1,136,000, virtually wiping out the options trading program account balances and causing him to cease his options trading program. Hersh continued to make payments and false statements to investors to lull them through approximately January 2009.

13. During the scheme, Hersh misappropriated approximately \$575,000 of the investors' funds for his personal use.

#### **COUNT I—FRAUD**

##### **Violations of Section 17(a)(1) of the Securities Act** **[15 U.S.C. § 77q(a)(1)]**

14. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

15. From approximately January 2007 through January 2009, Hersh, in the offer or sale of securities, directly or indirectly, employed devices, schemes, or artifices to defraud



purchasers of such securities, all as more particularly described herein.

16. Hersh knowingly, intentionally and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud.

17. In engaging in such conduct, Hersh acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severe reckless disregard for the truth.

18. While engaging in the courses of conduct described above, Hersh, directly or indirectly, made use of the mails, or means or instruments of transportation or communication in interstate commerce, or means or instrumentalities of interstate commerce.

19. By reason of the foregoing, Hersh violated, and, unless restrained and enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

#### **COUNT II—FRAUD**

#### **Violations of Sections 17(a)(2) & 17(a)(3) of the Securities Act[15 U.S.C. §§ 77q(a)(2) & 77q(a)(3)]**

20. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

21. From approximately January 2007 through January 2009, Hersh, in the offer or sale of the securities described herein, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly: (a) obtained money or property by means of untrue statements of material facts and omissions of material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (b) engaged in transactions, practices, or courses of business

which would and did operate as a fraud or deceit upon the purchasers of securities, all as more particularly described herein.

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

### **COUNT III—FRAUD**

#### **Violations 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]**

23. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

24. From approximately January 2007 through January 2009, Hersh, in connection with the purchase or sale of securities described herein, by use of the means and instrumentalities of interstate commerce and by use of the mails, directly or indirectly: (a) employed devices, schemes, or 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 the light of the circumstances under which they were made, not misleading; and (c) engaged in acts, practices, or courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities.

25. Hersh knowingly, intentionally and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, make 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, Hersh acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severe reckless disregard for the truth.

26. By reason of the foregoing, Hersh violated, and, unless restrained and enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(a)(2)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**COUNT IV—FRAUD**

**Violations of Section 206(1) of the Advisers Act**  
**[15 U.S.C. § 80b-6(1)]**

27. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

28. From approximately January 2007 through January 2009, Hersh, acting as an investment adviser, by use of the mails and the means and instrumentalities of interstate commerce, directly or indirectly, employed devices, schemes, and artifices to defraud one or more advisory clients and/or prospective clients, all as more particularly described herein.

29. Hersh knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud. In engaging in such conduct, Hersh acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severe reckless disregard for the truth.

30. By reason of the foregoing, Hersh violated, and, unless restrained and enjoined, will continue to violate Section 206(1) of the Advisers Act [15 U.S.C. § 80b-6(1)].

**COUNT V--FRAUD**

**Violations of Section 206(2) of the Advisers Act**  
**[15 U.S.C. § 80b-6(2)]**

31. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

32. From approximately January 2007 through January 2009, Hersh, acting as an investment adviser, by the use of the mails and the means and instrumentalities of interstate commerce, directly and indirectly, engaged in transactions, practices and courses of business which would and did operate as a fraud and deceit on one or more advisory clients and/or prospective clients.

33. By reason of the foregoing, Hersh violated, and, unless restrained and enjoined, will continue to violate Section 206(2) of the Advisers Act [15 U.S.C. § 80b-6(2)].

**COUNT VI--FRAUD**

**Violations of Section 206(4) of the Advisers Act [15 U.S.C. § 80b-6(4)] and Rule 206(4)-8**  
**thereunder [17 C.F.R. § 275.206(4)-8]**

34. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

35. Hersh's pool of investor funds constituted an investment company under Section 3(a) of the Investment Company Act of 1940 and a "pooled investment vehicle" under Rule 206(4)-8 thereunder.

36. From approximately January 2007 through January 2009, Hersh, acting as an investment adviser, by the use of the mails and the means and instrumentalities of interstate

commerce, directly and indirectly, engaged in acts, practices and courses of business which were fraudulent, deceptive, and manipulative with respect to one or more investors and/or prospective investors in Hersh's pooled investment vehicle, including making untrue statements of material fact or omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to one or more investors and/or prospective investors in Hersh's pooled investment vehicle.

37. By reason of the foregoing, Hersh violated, and, unless restrained and enjoined, will continue to violate Section 206(4) of the Advisers Act [15 U.S.C. § 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8].

#### **COUNT VII--UNREGISTERED OFFERING OF SECURITIES**

##### **Violations of Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)]**

38. Paragraphs 1 through 13 are hereby realleged and are incorporated herein by reference.

39. No registration statement has been filed or is in effect with the Commission pursuant to the Securities Act and no exemption from registration exists with respect to the Hersh scheme and transactions in such scheme described herein.

40. At various times from approximately January 2007 through January 2009, Hersh, directly and indirectly: (a) made use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell the securities described herein, through the use or medium of any prospectus or otherwise; (b) carried securities or caused such

securities, as described herein, to be carried through the mails or in interstate commerce, by means or instruments of transportation, for the purpose of sale or for delivery after sale; and (c) made use of the means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy, through the use or medium of any prospectus or otherwise, the securities described herein; without a registration statement having been filed with the Commission as to such securities.

41. By reason of the foregoing, Hersh, directly and indirectly, violated and, unless enjoined, will continue to violate Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully prays for:

##### I.

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

##### II.

A permanent injunction enjoining Hersh, his officers, agents, servants, employees, and attorneys from violating, directly or indirectly, Section 5(a), 5(c), and 17(a) of the Securities Act [15 U.S.C. §§ 77e(a), 77e(c), and 77q(a)], Section 10(b) [15 U.S.C. § 78j(b)] of the Exchange Act and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder, and Sections 206(1), 206(2), and 206(4) [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] of the Advisers Act and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8].

III.

An order requiring Hersh to disgorge all ill-gotten gains with prejudgment interest to effect the remedial purposes of the federal securities laws.

IV.

An order pursuant to Section 20(d) of the Securities Act, [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)], imposing civil penalties against Hersh.

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: September 21, 2009.

Respectfully submitted,

/s/William P. Hicks

William P. Hicks  
Regional Trial Counsel  
Georgia Bar No. 351649  
[hicksw@sec.gov](mailto:hicksw@sec.gov)  
(404)842-7675

/s/Robert K. Gordon

Robert K. Gordon  
Senior Trial Counsel  
Georgia Bar No. 302482  
[gordonr@sec.gov](mailto:gordonr@sec.gov)  
(404)842-7652

COUNSEL FOR PLAINTIFF  
Securities and Exchange Commission  
3475 Lenox Road, N.E., Suite 500  
Atlanta, Georgia 30326-1232  
Facsimile: (404)842-7679