

12 MAG 2897

Approved: _____

JILLIAN B. BERMAN

Assistant United States Attorney

Before: HONORABLE ANDREW J. PECK
United States Magistrate Judge
Southern District of New York

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: SEALED COMPLAINT

UNITED STATES OF AMERICA

: Violations of

- v. -

18 U.S.C. §§ 1343 & 2;

: 15 U.S.C. §§ 78j(b) & 78ff;

BERTON HOCHFELD,

17 C.F.R. § 240.10b-5

:

Defendant.

COUNTY OF OFFENSE:

:

NEW YORK

- - - - - x

SOUTHERN DISTRICT OF NEW YORK, ss.:

MICHAEL HOWARD, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation, and charges as follows:

COUNT ONE

(Securities Fraud)

1. From at least in or about December 2010, up to and including at least in or about October 2012, in the Southern District of New York and elsewhere, BERTON HOCHFELD, the defendant, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material facts and omitting 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) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, HOCHFELD misappropriated investor money and made false

representations to investors regarding their investments in the Heppelwhite Fund, L.P.

(Title 15, United States Code, Sections 78j(b) & 78ff;
Title 17, Code of Federal Regulations, Section 240.10b-5, and
Title 18, United States Code, Section 2.)

COUNT TWO
(Wire Fraud)

2. From at least in or about December 2010, up to and including at least in or about October 2012, in the Southern District of New York and elsewhere, BERTON HOCHFELD, the defendant, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, to wit, HOCHFELD caused emails to be sent to an investor, including emails on or about July 2, 2012 and August 1, 2012, writings, signs, signals, and sounds for the purpose of executing such scheme and artifice to defraud, to wit, HOCHFELD misappropriated investor money and made false representations to investors regarding their investments in the Heppelwhite Fund, L.P.

(Title 18, United States Code, Sections 1343 and 2.)

The bases for my knowledge and the foregoing charges are, in part, as follows:

3. I am a Special Agent with the New York Office of the Federal Bureau of Investigation of the Department of Justice ("FBI") and I have been personally involved in the investigation of this matter. I have been a Special Agent with the FBI for approximately 5 years, and I have been working on white collar investigations for more than 3 years. During this time, my responsibilities have included the investigation of violations of the federal securities fraud and wire fraud statutes, among others, and I have participated in numerous investigations of offenses involving such violations.

4. The information contained in this affidavit is based upon my personal knowledge, as well as information obtained during this investigation, directly or indirectly, from other sources and agents, including information provided to me by witnesses who participated in conversations and written communications with BERTON HOCHFELD, the defendant. Because this

affidavit is prepared for limited purposes, I have not set forth each and every fact I have learned in connection with this investigation. Where the contents of documents and the actions, statements and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

Relevant Individuals and Entities

5. At all times relevant to this Complaint, BERTON HOCHFELD, the defendant, was the Manager of Hochfeld Capital Management, L.L.C. ("HCM"), which served as the General Partner of the Heppelwhite Fund, L.P. (the "Fund"), which had more than \$6 million in assets under management. At various times relevant to this Complaint, Hochfeld Capital Management, L.L.C. maintained an office at 245 Park Avenue, New York, New York.

6. According to a Private Placement Memorandum for the Fund (the "PPM"), the Fund is a Delaware limited partnership that was formed to invest in publicly traded securities, and HCM is a Delaware limited liability company organized by BERTON HOCHFELD, the defendant, for the purpose of managing the Fund's investments. The stated investment strategy of HCM is to "seek[] capital appreciation primarily through investments in publicly-traded companies in the technology sector, . . . as well as data and voice networking equipment."

7. According to the PPM, HCM "will select investments" for the Fund based "to a large extent on the judgment of Berton Hochfeld, . . . who has spent most of his career either as an executive of various technology companies or as an analyst following a broad range of firms within this sector." The PPM further provides, among other things, that:

a. HCM, as General Partner of the Fund, "receives from each limited partner quarterly management fees at an annual rate of 1% of the value of the capital account of each limited partner."¹ HCM then "bears the overhead expenses" of the Fund, "including secretarial salaries, utilities, and office rent." In addition, HCM is entitled to 20% of each limited partner's yearly net profits as a performance bonus.

b. With respect to investments in the Fund,

¹ As described in the PPM, investors in the Fund purchased "limited partnership interests;" thus, the term "limited partners" described Fund investors.

aside from the fees and performance bonus described above and certain other defined operating and organizational expenses, "[a]ll of the assets of the [Fund] will be deposited in brokerage accounts with the [Fund's] prime broker and used by the [Fund] to engage directly in the trading of securities and option interests."

c. The Fund "will not make loans to or purchase debt obligations issued by the General Partner or any of its principals."

Overview Of The Scheme To Defraud

8. Based on my interviews with individuals who performed administrative and accounting work for the Fund and who invested in the Fund, as well as my review of various documents, including bank and brokerage records, offering materials relating to the Fund, including the PPM, and documents that BERTON HOCHFELD, the defendant, provided to Fund investors and others, I have learned that beginning in at least April 2011, HOCHFELD began withdrawing money from the Fund for his own personal use, contrary to representations made to investors as to how investment monies would be spent. Thereafter, at HOCHFELD's direction, monthly account statements were provided to Fund investors that falsely inflated the value of the Fund by failing to account for the monies that HOCHFELD had withdrawn. In addition, as early as December 2010, HOCHFELD was aware that the internal accounting for the Fund reflected an inflated net asset value for the Fund ("NAV") as compared to the value reflected in the books of the prime broker where the Fund assets were located (the "Prime Broker").² Despite this, monthly statements sent to Fund investors at HOCHFELD's direction reflected the higher NAV of the Fund as calculated by internal accounting records, rather than the NAV reflected by the books of the Prime Broker. In total, HOCHFELD misappropriated more than \$1 million from the Fund.

The Fund Administrator

9. Based on my interviews with an individual who began performing administrative and accounting work for the Fund in approximately December 2010 (the "Administrator"), and who

² A prime broker serves as a centralized clearing facility for hedge funds and other clients. Its services include settling of securities, custody of securities and assets, providing financing for leveraged transactions, and preparing account statements.

worked from a location in Connecticut, I am aware of the following:

a. The Administrator carried out a number of responsibilities on behalf of the fund, all at the direction of BERTON HOCHFELD, the defendant, including the following: (1) maintaining internal accounting records for the Fund, which included the recording and valuation of trades executed on behalf of the Fund, and the movement of money in and out of various Fund bank accounts to pay for, among other things, Fund expenses and overhead; (2) maintaining records reflecting the balance of each investor's investment in the Fund, including earnings on capital contributions, and providing monthly statements via email to each Fund investor that reflected each investor's investment balance, as well as a letter prepared by HOCHFELD that summarized the monthly performance of the Fund; (3) sending potential Fund investors offering materials pertaining to the Fund, typically by email; and (4) reviewing account statements issued by the Prime Broker for the Fund.

b. Shortly after the Administrator began working for the Fund in approximately December 2010, the Administrator discovered that the internal accounting records for the Fund reflected a greater NAV for the Fund - in the amount of more than \$150,000 - than the NAV reflected in the Prime Broker statements. This discrepancy grew over time until it was more than \$1 million in 2012. The Administrator repeatedly advised HOCHFELD of this discrepancy; HOCHFELD was dismissive of the Administrator's concern. Moreover, despite this discrepancy, HOCHFELD directed the Administrator to send Fund investors monthly account statements that reflected each investor's investment balance based on internal accounting records, even though HOCHFELD knew that the sum of those individual balances did not reconcile with the actual assets of the Fund in the custody of the Prime Broker. The Administrator provided these statements to Fund investors - including investors located in Westchester County, New York, and New York, New York.

c. In addition, at the time the Administrator began working for the Fund in December 2010, HCM - managed by HOCHFELD - had an account in the Fund (the "HCM Account") with a balance of approximately \$400,000, consisting of a combination of investment capital provided by HOCHFELD as well as fees and profits earned by HCM in connection with its management of the Fund. On various occasions thereafter, at HOCHFELD's direction, the Administrator electronically transferred money from the Fund to a personal account for HOCHFELD (the "Hochfeld Account"), and debited the withdrawals from the balance of the HCM Account. By

approximately April 2011 the balance in the HCM Account was zero, yet HOCHFELD continued to request additional monies from the Fund. The Administrator advised HOCHFELD of his negative balance and that he did not have any capital to draw from, but HOCHFELD nonetheless continued to request money from the Fund. In response to HOCHFELD's repeated requests, the Administrator provided additional funds to HOCHFELD, including via electronic transfer, from either bank or brokerage accounts containing Fund assets, all the while recording the steadily increasing negative balance in the HCM Account. As of approximately September 2012, the negative balance in the HCM Account was more than \$1 million. The amount that HOCHFELD misappropriated from the Fund was not reflected in monthly balance statements the Administrator emailed from Connecticut to investors - including investors located in Westchester County, New York, and New York, New York - thereby giving Fund investors the false impression that all of their monies were maintained in the Fund.

HOCHFELD's Representations to Victims

10. I have interviewed several investors in the Fund. Paragraphs 11 through 13 below set forth some of what I have learned based on my interviews with four of these investors, and my review of various documents, including bank records, investor statements sent by BERTON HOCHFELD, the defendant, and correspondence with HOCHFELD.

Victim-1

11. Based on my interview with Victim-1, I have learned the following:

a. Victim-1 invested more than \$800,000 in the Fund beginning in approximately 2008, and understood that the Fund invested primarily in publicly traded technology stocks, with investment decisions being made principally by BERTON HOCHFELD, the defendant.

b. Following Victim-1's investments, and through approximately August 2012, Victim-1 received via email monthly statements summarizing the balance of Victim-1's investment and accumulated earnings in the Fund, as well as a letter from HOCHFELD that summarized the performance of the Fund.

c. Victim-1 did not receive any account statements for September 2012, and in or about October 2012, Victim-1 learned from another Fund investor that HOCHFELD had admitted to that investor that HOCHFELD had taken money from the

Fund to which HOCHFELD was not entitled. Thereafter, in late October 2012, Victim-1 and other investors met with HOCHFELD (and others) in New York, New York, to demand an explanation concerning the status of the Fund (the "Meeting"). At the Meeting, HOCHFELD stated, in sum and substance, that: (1) beginning in approximately September 2011, he had taken approximately \$100,000 a month from the Fund; (2) he had a "weakness" for buying antiques and had spent millions of dollars on antiques in the past decade; and (3) he also spent money on fine dining and vacations. In total, HOCHFELD stated that he had taken more than \$1 million of investor money from the Fund. HOCHFELD further stated that he was going to sell his antiques in order to try to pay back the money he had taken from the Fund.

Victim-2

12. Based on my interview with Victim-2, I have learned the following:

a. Victim-2 invested approximately \$500,000 in the Fund in 2010 and 2011. After reviewing investment materials for the Fund, Victim-2 understood that the Fund invested primarily in publicly traded technology stocks, with investment decisions being made principally by BERTON HOCHFELD, the defendant.

b. Following Victim-2's investments, and through approximately August 2012, Victim-2 received via email monthly statements summarizing the balance of Victim-2's investment and accumulated earnings in the Fund, as well as a letter from HOCHFELD that summarized the performance of the Fund.

c. Victim-2 did not receive any account statements for September 2012, and in or about October 2012, Victim-2 received a letter from HOCHFELD in which HOCHFELD stated that he overdrew approximately \$1 million from the Fund. Thereafter, in late October 2012, Victim-2 participated with Victim-1 and others in the Meeting with HOCHFELD in New York, New York, during which HOCHFELD admitted to taking money from the Fund to which he was not entitled. Among other statements, HOCHFELD told another investor at the Meeting that this investor's money was never deposited into the Fund; rather, HOCHFELD had taken it for himself. HOCHFELD further stated that he spent the investor money he had taken on antiques and vacations.

Victim-3

13. Based on my interview with Victim-3, I have learned the following:

a. Victim-3 invested approximately \$200,000 in the Fund in 2011. After reviewing investment materials for the Fund, Victim-3 understood that the Fund invested primarily in publicly traded technology stocks, with investment decisions being made principally by BERTON HOCHFELD, the defendant.

b. Following Victim-3's investment, and through approximately August 2012, Victim-3 received via email monthly statements summarizing the balance of Victim-3's investment and accumulated earnings in the Fund, as well as a letter from HOCHFELD that summarized the performance of the Fund.

c. Victim-3 did not receive any account statements for September 2012, and in or about October 2012, Victim-3 learned from another Fund investor that HOCHFELD had stolen money from the Fund. Thereafter, in late October 2012, Victim-3 participated with Victim-1, Victim-2, and others in the Meeting with HOCHFELD in New York, New York, during which HOCHFELD admitted to taking money from the Fund.

Victim-4

14. Based on my interview with Victim-4, I have learned the following:

a. Victim-4 invested more than \$100,000 in the Fund beginning in the late 1990s, and understood that the Fund invested primarily in publicly traded technology stocks, with investment decisions being made principally by BERTON HOCHFELD, the defendant.

b. Following Victim-4's investments, and through approximately August 2012, Victim-4 received via email monthly statements summarizing the balance of Victim-4's investment and accumulated earnings in the Fund, as well as a letter from HOCHFELD that summarized the performance of the Fund. This included emails on July 2, 2012 and August 1, 2012, which Victim-4 received and opened in locations within the Southern District of New York.

15. Based on my conversations with Victim-1, Victim-2, Victim-3, and Victim-4, I have learned that these individuals did not authorize BERTON HOCHFELD, the defendant, to withdraw money from the Fund for his own personal use.

The Inflated Statements

16. I have reviewed certain monthly balance statements sent via email to Fund investors and compared the balances set forth in those statements with the actual assets of the Fund, as reflected by bank and brokerage statements where Fund assets were custodied. Based on this review, I am aware that as of July 31, 2012, the cumulative monthly statements sent to Fund investors reflected that the NAV of the Fund was \$9,846,996. In contrast, the actual NAV of the Fund was \$6,408,726, with the difference representing both the monies that HOCHFELD misappropriated from the Fund (more than \$1 million) and the discrepancy between the internal accounting of the NAV of the Fund and the value of the Fund as reflected in the books of the Prime Broker.

HOCHFELD's Scheme Unravels

17. In or about early October 2012, the Administrator resigned from his role with the Fund. Thereafter, on or about October 11, 2012, BERTON HOCHFELD, the defendant, sent a letter to investors (the "Letter"), on behalf of HCM, titled "Important Disclosure, Heppelwhite Fund, LP." In this letter, HOCHFELD stated that: (a) "[d]uring the past year, the general partner of the Fund, Hochfeld Capital Management, LLC ("HCM"), overdrew its capital account with the Fund by approximately \$1 million;" (b) HOCHFELD intended to repay this money to the Fund by, among other means, "sell[ing his] personal assets" such as antiques; and (c) in addition to the above-described misappropriation, there appeared to be "an accounting irregularity in the calculation of the net asset value ("NAV") of the Fund," in that the "NAV as calculated by the Fund's former administrator" differed from that calculated by the Fund's prime broker, as a result of which "the amount of the Fund's NAV may have been overstated by approximately \$800,000" and "account statements sent to [investors] may also have overstated the value of [their] interest in the Fund."

18. Following this disclosure to Fund investors, HOCHFELD admitted to certain investors, including Victim-1, Victim-2, and Victim-3, as described in paragraphs 11(c), 12(c), and 13(c), that HOCHFELD had taken their money for his own personal use.

WHEREFORE, deponent prays that a warrant be issued for the arrest of BERTON HOCHFELD, the defendant, and that he be arrested and imprisoned or bailed, as the case may be.



MICHAEL HOWARD
Special Agent
Federal Bureau of Investigation

NOV 08 2012

Sworn to before me this
day of November, 2012



UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

ANDREW J. PECK
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK