

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

NOV 06 2019

David J. Bradley, Clerk of Court

UNITED STATES OF AMERICA

v.

CRIMINAL NO.

TOWER RESEARCH CAPITAL LLC,
Defendant.

19-819

DEFERRED PROSECUTION AGREEMENT

Defendant Tower Research Capital LLC (the "Company"), pursuant to authority granted by the Company's members reflected in Attachment B, and the United States Department of Justice, Criminal Division, Fraud Section, and the United States Attorney's Office for the Southern District of Texas (collectively, the "Fraud Section and the Office"), enter into this deferred prosecution agreement (the "Agreement").

Criminal Information and Acceptance of Responsibility

1. The Company acknowledges and agrees that the Fraud Section and the Office will file the attached one-count criminal Information in the United States District Court for the Southern District of Texas charging the Company with commodities fraud, in violation of Title 18, United States Code, Section 1348(1). In so doing, the Company: (a) knowingly waives its right to indictment on this charge, as well as all rights to a speedy trial pursuant to the Sixth Amendment to the United States Constitution, Title 18, United States Code, Section 3161, and Federal Rule of Criminal Procedure 48(b); and (b) knowingly waives any objection with respect to venue to any charges by the United States arising out of the conduct described in the Statement of Facts attached hereto as Attachment A and consents to the filing of the Information, as provided under the terms of this Agreement, in the United States District Court for the Southern District of Texas. The Fraud Section and the Office agree to defer prosecution of the

Company pursuant to the terms and conditions described below.

2. The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, members, employees, and agents as charged in the Information, and as set forth in the attached Statement of Facts, and that the allegations described in the Information and the facts described in the attached Statement of Facts are true and accurate. Should the Fraud Section and the Office pursue the prosecution that is deferred by this Agreement, the Company stipulates to the admissibility of the attached Statement of Facts in any proceeding, including any trial, guilty plea, or sentencing proceeding, and will not contradict anything in the attached Statement of Facts at any such proceeding.

Term of the Agreement

3. This Agreement is effective for a period beginning on the date on which the Information is filed and ending three years from that date (the "Term"). The Company agrees, however, that, in the event the Fraud Section and the Office determine, in their sole discretion, that the Company has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of the Company's obligations under this Agreement, an extension or extensions of the Term may be imposed by the Fraud Section and the Office, in their sole discretion, for up to a total additional time period of one year, without prejudice to the right of the Fraud Section and the Office to proceed as provided in Paragraphs 25-29 below. Any extension of the Agreement extends all terms of this Agreement, including the terms of the reporting requirement in Attachment D, for an equivalent period. Conversely, in the event the Fraud Section and the Office find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the reporting requirement in Attachment D, and that the other provisions of this Agreement have been satisfied, the Agreement may be

terminated early.

Relevant Considerations

4. The Fraud Section and the Office enter into this Agreement based on the individual facts and circumstances presented by this case and the Company, including:

a. the Company did not receive voluntary disclosure credit because it did not voluntarily and timely disclose to the Fraud Section and the Office the conduct described in the Statement of Facts attached hereto as Attachment A (“Statement of Facts”);

b. the Company received full credit for its cooperation with the investigation conducted by the Fraud Section and the Office, including conducting a thorough internal investigation, making regular factual presentations to the Fraud Section and the Office, voluntarily making employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information for the Fraud Section and the Office;

c. the Company provided to the Fraud Section and the Office all relevant facts known to it, including information about the individuals involved in the conduct described in the attached Statement of Facts;

d. the Company engaged in extensive remedial measures, including swiftly moving in early 2014 to terminate the traders involved in the conduct described in the attached Statement of Facts. The Company enhanced its compliance program and internal controls to ensure they were designed to deter and detect spoofing, commodities fraud, and other types of market manipulation through, among other things, (i) substantial investments in staffing and resources for the Company’s legal and compliance teams; (ii) updated policies, procedures, and supervisory structures with a specific emphasis on the prohibitions against spoofing; (iii) expanded compliance training on spoofing and market

manipulation including annual compliance training to all traders that covers spoofing and the issuance of bulletins and alerts regarding new regulatory developments and enforcement cases; and (iv) significant investments in sophisticated trade surveillance tools that are supported by a dedicated compliance staff and a team of in-house developers. In addition, the Company made changes to its senior management and revised the Company's corporate governance structure;

e. the Company has enhanced and has committed to continuing to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement (Corporate Compliance Program);

f. accordingly, after considering (a) through (e) above, the Company received an aggregate discount of 25 percent off of the bottom of the otherwise-applicable United States Sentencing Guidelines fine range for purposes of calculating the appropriate Criminal Monetary Penalty under this Agreement;

g. based on the Company's remediation and the state of its compliance program, the fact that the conduct described in the attached Statement of Facts concluded in 2013, and the Company's agreement to report to the Fraud Section and the Office as set forth in Attachment D to this Agreement (Corporate Compliance Reporting), the Fraud Section and the Office determined that an independent compliance monitor was unnecessary;

h. the nature and seriousness of the offense conduct, which involved thousands of episodes of unlawful trading activity by three traders employed by the

Company between March 2012 and December 2013 and approximately \$32,593,849 of loss to market participants;

- i. the Company has no prior criminal history;
- j. the Company has agreed to continue to cooperate with the Fraud Section and the Office as set forth in Paragraph 5, below; and
- k. the Company has resolved with the United States Commodity Futures Trading Commission (“CFTC”) through a proceeding pursuant to Section 6(c) and (d) of the Commodity Exchange Act, relating to the conduct described in the Statement of Facts.

Future Cooperation and Disclosure Requirements

5. The Company shall cooperate fully with the Fraud Section and the Office in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and other conduct related to violations of the Commodity Exchange Act, Title 7, United States Code, Section 1, *et seq.*, and the commodities fraud statute, Title 18, United States Code, Section 1348 (collectively and hereafter, the “Commodities Laws”) that is under investigation by the Fraud Section and the Office until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the end of the term specified in paragraph 3. At the request of the Fraud Section and the Office, the Company shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies in any investigation of the Company, its affiliates, or any of its present or former officers, members, employees, agents, and consultants, or any other party, in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and other conduct related to violations of the Commodities Laws. The Company’s cooperation pursuant to

this Paragraph is subject to applicable law and regulations, as well as valid claims of attorney-client privilege or attorney work product doctrine; however, the Company must provide to the Fraud Section and the Office a log of any information or cooperation that is not provided based on an assertion of law, regulation, or privilege, and the Company bears the burden of establishing the validity of any such an assertion. The Company agrees that its cooperation pursuant to this paragraph shall include, but not be limited to, the following:

a. The Company shall truthfully disclose all factual information with respect to its activities, those of its affiliates, and those of its present and former members, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which the Company has any knowledge or about which the Fraud Section and the Office may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Company to provide to the Fraud Section and the Office, upon request, any document, record or other tangible evidence about which the Company has knowledge or about which the Fraud Section and the Office may inquire of the Company.

b. Upon request of the Fraud Section and the Office, the Company shall designate knowledgeable employees, agents or attorneys to provide to the Fraud Section and the Office the information and materials described in Paragraph 5(a) above on behalf of the Company. It is further understood that the Company must at all times provide complete, truthful, and accurate information.

c. The Company shall use its best efforts to make available for interviews or testimony, as requested by the Fraud Section and the Office, present or former officers, members, employees, agents and consultants of the Company. This obligation

includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with domestic or foreign law enforcement and regulatory authorities. Cooperation under this Paragraph shall include identification of witnesses who, to the knowledge of the Company, may have material information regarding the matters under investigation.

d. With respect to any information, testimony, documents, records or other tangible evidence provided to the Fraud Section and the Office pursuant to this Agreement, the Company consents to any and all disclosures to other governmental authorities, including United States authorities and those of a foreign government of such materials as the Fraud Section and the Office, in their sole discretion, shall deem appropriate.

6. In addition to the obligations in Paragraph 5, during the Term, should the Company learn of any evidence or allegation of conduct that may constitute a violation of the Commodities Laws, the Company shall promptly report such evidence or allegation to the Fraud Section and the Office.

Total Criminal Monetary Amount

7. The Company and the Fraud Section and the Office agree that the Total Criminal Monetary Amount to be paid by the Company pursuant to this Agreement is \$67,493,849, which is comprised of the following components set forth below: (1) a Criminal Monetary Penalty in the amount of \$24,400,000; (2) a Criminal Disgorgement Amount of \$10,500,000; and (3) a Victim Compensation Payment Amount of \$32,593,849.

8. The Fraud Section and the Office agree that the amount of the Criminal Monetary Penalty and Criminal Disgorgement will be offset by the amount of any payment made pursuant

to the order and settlement between the Company and the CFTC relating to the conduct described in the attached Statement of Facts.

9. The Company acknowledges that no tax deduction may be sought in connection with the payment of any of the components of the Total Criminal Monetary Amount. The Company shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the Total Criminal Monetary Amount or any disgorgement amounts that the Company pays pursuant to any other agreement entered into with an enforcement authority or regulator, including the CFTC, concerning the facts set forth in the attached Statement of Facts.

Payment of Criminal Monetary Penalty

10. The Fraud Section and the Office and the Company agree that application of the United States Sentencing Guidelines (“USSG” or “Sentencing Guidelines”) to determine the applicable fine range yields the following analysis:

- a. The November 1, 2018 USSG are applicable to this matter.
- b. Offense Level. Based upon USSG § 2B1.1, the total offense level is 33, calculated as follows:

(a)(1)	Base Offense Level	7
(b)(1)(L)	Loss Exceeds \$25,000,000	+22
(b)(2)(A)(i)	More Than 10 Victims	+2
(b)(10)(c)	Sophisticated Means	+2
TOTAL		<u>33</u>

- c. Base Fine. Based upon USSG § 8C2.4(a), the base fine is \$32,593,849 (the pecuniary loss under USSG § 8C2.4(a)(3), which is greater than the \$22,000,000 fine indicated in the Offense Level Fine Table under §8C2.4(a)(1))

d. Culpability Score. Based upon USSG § 8C2.5, the culpability score is 5, calculated as follows:

(a)	Base Culpability Score	5
(b)(4)	the organization had 50 or more employees and an individual within substantial authority personnel of the organization participated in, condoned, or was willfully ignorant of the offense	+2
(g)(2)	the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	- 2
	TOTAL	<u>5</u>

Calculation of Fine Range:

Base Fine	\$32,593,849
Multipliers	1 (min) / 2 (max)
Fine Range	\$32,593,849 / \$65,187,698

11. The Company agrees to pay a criminal monetary penalty in the amount of \$24,400,000 (representing a reduction of approximately 25 percent off the low-end of the above calculated fine range) to the United States Treasury no later than ten (10) business days after the Agreement is fully executed (hereafter, the “Criminal Monetary Penalty”) pursuant to payment instructions provided by the Fraud Section and the Office in their sole discretion. The Company and the Fraud Section and the Office agree that this Criminal Monetary Penalty is appropriate given the facts and circumstances of this case, including the Relevant Considerations described in Paragraph 4.

12. The \$24,400,000 Criminal Monetary Penalty is final and shall not be refunded. Furthermore, nothing in this Agreement shall be deemed an agreement by the Fraud Section and the Office that \$24,400,000 is the maximum fine that may be imposed in any future prosecution,

and the Fraud Section and the Office are not precluded from arguing in any future prosecution that the Court should impose a higher fine, although the Fraud Section and the Office agree that under those circumstances, they will recommend to the Court that any amount paid as part of the Criminal Monetary Penalty should be offset against any fine the Court imposes as part of a future judgment.

Payment of Criminal Disgorgement Amount

13. The Company agrees that the overall profits earned from the Relay Team's trading activity, including the conduct set forth in the Statement of Facts, is at least \$10,500,000. The Company hereby agrees to disgorge to the United States the sum of \$10,500,000 (the "Criminal Disgorgement Amount"). The Company shall pay the Criminal Disgorgement Amount no later than ten (10) business days after the Agreement is fully executed, pursuant to payment instructions provided by the Fraud Section and the Office in their sole discretion.

14. The Criminal Disgorgement Amount paid is final and shall not be refunded should the Fraud Section and the Office later determine that the Company has breached this Agreement and commence a prosecution against the Company. In the event of a breach of this Agreement and subsequent prosecution, the Fraud Section and the Office may pursue additional disgorgement and civil and criminal forfeiture in excess of the Criminal Disgorgement Amount. The Fraud Section and the Office agree that in the event of a subsequent breach and prosecution, they will recommend to the Court that the amounts paid pursuant to this Agreement be offset against whatever disgorgement the Court shall impose as part of its judgment. The Company understands that such a recommendation will not be binding on the Court.

Payment of Victim Compensation Amount

15. The Company agrees to pay the amount of \$32,593,849 in order to compensate victims for their losses as set forth in Paragraph 4(h) above (hereafter, the “Victim Compensation Amount”). The Company shall pay the full Victim Compensation Amount to the United States no later than ten (10) business days after the Agreement is signed pursuant to payment instructions provided by the Fraud Section and the Office in their sole discretion.

16. The Fraud Section and the Office shall serve as the claims administrator for making victim compensation payments, and shall have sole discretion to determine how the Victim Compensation Amount will be disbursed.

17. The Company is currently a defendant in a putative class action captioned *Boutchard v. Gandhi, et. al*, No. 18-cv-7041 (N.D. Ill.) (the “Class Action”). In the event of a settlement or judgment in the Class Action or any other class action based on similar allegations, at any time during the Term and at the Company’s request, the Fraud Section and the Office will consider, in their sole discretion, whether any members of the class are entitled to a victim compensation payment from the Victim Compensation Amount and, if so, whether any portion of the Victim Compensation Amount shall be used to pay class members in full or partial satisfaction of the settlement or judgment. No portion of the Victim Compensation Amount shall be paid out for attorney’s fees in the Class Action or any other class action based on similar allegations.

18. The Company agrees that any unclaimed part of the Victim Compensation Amount remaining at the end of the Term shall revert to the United States in the form of an additional Criminal Monetary Penalty.

Conditional Release from Liability

19. Subject to Paragraphs 25-29, the Fraud Section and the Office agree, except as

provided in this Agreement, that they will not bring any criminal or civil case against the Company relating to any of the conduct described in the attached Statement of Facts or the criminal Information filed pursuant to this Agreement. The Fraud Section and the Office, however, may use any information related to the conduct described in the attached Statement of Facts against the Company: (a) in a prosecution for perjury or obstruction of justice; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code.

a. This Agreement does not provide any protection against prosecution for any future conduct by the Company.

b. In addition, this Agreement does not provide any protection against prosecution of any individuals, regardless of their affiliation with the Company.

Corporate Compliance Program

20. The Company represents that it has implemented and will continue to implement a compliance and ethics program designed to prevent and detect violations of the Commodities Laws throughout its operations, including those of its affiliates agents, and joint ventures (to the extent that the Company manages or controls such joint ventures), and those of its contractors and subcontractors whose responsibilities relate to commodities trading or supervision of commodities trading, including, but not limited to, the minimum elements set forth in Attachment C.

21. In order to address any deficiencies in its internal controls, policies, and procedures, the Company represents that it has undertaken, and will continue to undertake in the future, in a manner consistent with all of its obligations under this Agreement, a review of its

existing controls (including its trade surveillance tools), policies, and procedures regarding compliance with the Commodities Laws. Where necessary and appropriate, the Company agrees to adopt a new compliance program, or to modify its existing one, including internal controls, compliance policies, and procedures in order to ensure that it maintains an effective compliance program, including a system of internal controls, designed to effectively detect and deter violations of the Commodities Laws. The compliance program, including the internal controls system, will include, but not be limited to, the minimum elements set forth in Attachment C.

Corporate Compliance Reporting

22. The Company agrees that it will report to the Fraud Section and the Office annually during the Term regarding remediation and implementation of the compliance measures described in Attachment C. These reports will be prepared in accordance with Attachment D.

Deferred Prosecution

23. In consideration of the undertakings agreed to by the Company herein, the Fraud Section and the Office agree that any prosecution of the Company for the conduct set forth in the attached Statement of Facts be and hereby is deferred for the Term. To the extent there is conduct disclosed by the Company that is not set forth in the attached Statement of Facts, such conduct will not be exempt from further prosecution and is not within the scope of, or relevant to, this Agreement.

24. The Fraud Section and the Office further agree that if the Company fully complies with all of its obligations under this Agreement, the Fraud Section and the Office will not continue the criminal prosecution against the Company described in Paragraph 1 and, at the conclusion of the Term, this Agreement shall expire. Within six months after the Agreement's expiration, the Fraud Section and the Office shall seek dismissal with prejudice of the criminal

Information filed against the Company described in Paragraph 1, and agrees not to file charges in the future against the Company based on the conduct described in this Agreement and the attached Statement of Facts.

Breach of the Agreement

25. If, during the Term, the Company (a) commits any felony under United States federal law; (b) provides in connection with this Agreement deliberately false, incomplete, or misleading information, including in connection with its disclosure of information about individual culpability; (c) fails to cooperate as set forth in Paragraphs 5 and 6 of this Agreement; (d) fails to implement a compliance program as set forth in Paragraphs 21 and 22 of this Agreement and Attachment C; or (e) otherwise fails to completely perform or fulfill each of the Company's obligations under the Agreement, regardless of whether the Fraud Section and the Office become aware of such a breach after the Term is complete, the Company shall thereafter be subject to prosecution for any federal criminal violation of which the Fraud Section and the Office have knowledge, including, but not limited to, the charges in the Information described in Paragraph 1, which may be pursued by the Fraud Section and the Office in the United States District Court for the Southern District of Texas or any other appropriate venue. Determination of whether the Company has breached the Agreement and whether to pursue prosecution of the Company shall be in the sole discretion of the Fraud Section and the Office. Any such prosecution may be premised on information provided by the Company or its personnel. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Fraud Section and the Office prior to the date on which this Agreement was signed that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the Company, notwithstanding the

