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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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: **SECURITIES AND EXCHANGE COMMISSION,** :
: **Plaintiff,** :
: **- against-** : **05 Civ. ()**
: **BARRY HERTZ,** : **COMPLAINT**
: **Defendant.** :
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Plaintiff, Securities and Exchange Commission (“Commission”), for its Complaint against defendant Barry Hertz (“Hertz”), alleges as follows:

SUMMARY

1. The Commission charges Barry Hertz, chairman and chief executive officer of Track Data Corporation (“Track Data”), with violating the federal securities laws by insider trading in Track Data stock and by illegally tipping his relatives while he possessed material, nonpublic information concerning (i) Track Data’s negative financial results prior to the company’s public announcement of its revenues and earnings for the second and third quarters of 2003 and (ii) the development of a plan during the summer of 2003 to issue a first-time dividend to the company’s stockholders.

2. Prior to mid-July 2003, Hertz was privy to Track Data's internal revenue reports detailing negative revenue data for the second quarter of 2003. On July 11, Hertz received an e-mail notifying him of Track Data's quarterly "black-out" period prohibiting trading in Track Data stock between July 10 and August 12, 2003, when Track Data would announce financial results for the second quarter. Between July 11 and July 22, 2003, Hertz sold Track Data stock out of several accounts which he controlled and/or over which he had trading authority, including accounts in the name of Roxton Enterprises, Inc. ("Roxton"), which is owned by Hertz's sister and brother-in-law, and The Haor Beacon Fund Ltd. ("Haor Beacon"). Hertz also tipped several relatives, who sold their stock as well. Following the public announcement of Track Data's financial results on August 12, 2003, the stock lost 21% of its value. By engaging in insider trading before the public disclosure of Track Data's disappointing news, Hertz and his tippees illegally avoided trading losses of approximately \$60,000.

3. Between August 13 and 20, 2003, with knowledge of the impending issuance of a stock dividend by Track Data, Hertz purchased Track Data stock for the Roxton account. After the announcement of the dividend on August 25, 2003, the price of the stock increased by 19%. By engaging in insider trading before the public disclosure of the issuance of a dividend, Hertz had potential profits of approximately \$13,000.

4. Prior to November 2003, Hertz was privy to Track Data's internal revenue reports detailing negative revenue data for the third quarter of 2003. On November 5 and 6, 2003, Hertz attempted to sell Track Data stock by placing limit orders to sell Track Data stock out of the Roxton account. Those sales did not take place because the stock remained below the limit price. Also, on November 6, 2003, Hertz authorized the sale of Track Data stock from another account that he controlled in the name of Vaad L'Hatzolas Nidchei Yisroel Inc. ("Vaad

L'Hatzolas"). Following the public announcement of Track Data's third quarter financial results on November 11, 2003, the stock lost 14.2% of its value. By engaging in insider trading before the public disclosure of Track Data's disappointing third quarter financial results, Hertz illegally avoided trading losses in that account of approximately \$1,000.

5. By the conduct alleged herein, Hertz engaged, directly or indirectly, in transactions, acts, practices, or courses of business that constitute violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder. Absent a permanent injunction by this Court, Hertz will continue to engage in the transactions, acts, practices and courses of business set forth in this Complaint and in transactions, acts, practices and courses of business of similar type and object.

JURISDICTION AND VENUE

6. The Commission has brought this action pursuant to the authority conferred upon it by Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), for permanent injunctive relief against Hertz, from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint, and for civil penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d)(3). The Commission also has brought this action pursuant to Section 21A of the Exchange Act, 15 U.S.C. § 78u-1, for civil penalties against Hertz under the Insider Trading and Securities Fraud Enforcement Act of 1988. In addition, the Commission has sought an order barring Hertz from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. § 781, or that is required to file reports pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. § 78o(d),

pursuant to Section 20(e) of the Securities Act, 15 U.S.C. § 77t(e), and Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2), and for such other relief as the Court may deem appropriate.

7. Hertz, directly and indirectly, singly or in concert, made use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of the alleged transactions, acts, practices, and courses of business occurred in the Eastern District of New York, including, but not limited to, Hertz's sales of Track Data stock and his tipping of material, non-public information to certain of his relatives. Accordingly, this Court has jurisdiction over this action, and venue is proper in this district, pursuant to Sections 20(b) and 22(a) of the Securities Act, 15 U.S.C. §§ 77t(b), 77v(a), and Sections 21(d), 21A, and 27 of the Exchange Act, 15 U.S.C. §§ 78u(d), 78u-1, 78aa.

DEFENDANT

8. **Barry Hertz** is 56 years old and resides in Brooklyn, New York. Hertz is the founder of Track Data and has served as the company's chairman and chief executive officer since its inception. At all relevant times, he was the president of Track Data Securities Corp. ("Track Data Securities"), a wholly-owned subsidiary of Track Data. Hertz, who passed his Series 4, 7, 24, 55, and 63 exams, is registered as an options principal, a general securities representative, a general securities principal, an equity trader limited representative, and an agent at Track Data Securities.

OTHER RELEVANT ENTITIES

9. **Track Data Corporation** is a Delaware corporation headquartered in Brooklyn, New York. Track Data's securities are registered with the Commission pursuant to Section 12(g) of the Exchange Act, 15 U.S.C. § 78l(g), and are traded on The Nasdaq National Market. Track Data is a financial services company that supplies electronically delivered financial information, including real-time market data, fundamental research, charting, and analytical services, to institutional and individual investors. The company also owns and operates an electronic communications network, provides a proprietary internet-based online trading system to institutional and individual traders, and distributes news and third-party database information to its customers from worldwide sources. Track Data also owns Track Data Securities, a broker-dealer registered with the Commission.

10. **Roxton Enterprises, Inc.** is a private corporation that invests primarily in real estate. Roxton is incorporated in the British Virgin Islands. Roxton is owned by Hertz's sister and brother-in-law. At all relevant times, Hertz was the secretary of Roxton and had trading authority over the Roxton securities account at Track Data Securities.

11. **The Haor Beacon Fund Ltd.** is a not-for-profit corporation, incorporated in New York State, which provides funding for special education programs. At all relevant times, Hertz's wife was a director of the corporation, and Hertz had trading authority over the Haor Beacon securities accounts at Track Data Securities and Bishop Rosen & Co., Inc. ("Bishop Rosen").

12. **Vaad L'Hatzolas Nidchei Yisroel Inc.** is a not-for-profit corporation incorporated in New York State. At all relevant times, Hertz had trading authority over the Vaad L'Hatzolas securities account at Bishop Rosen.

THE ILLEGAL CONDUCT

Hertz's Fiduciary Duty

13. At the time of the transactions and events alleged in this Complaint, Hertz was Track Data's chief executive officer, and therefore owed a fiduciary duty to Track Data and its shareholders. As a result, Hertz had a fiduciary duty, among other things, not to trade Track Data securities while in possession of material, non-public information and to keep material, non-public information confidential.

Track Data's MX Product

14. At all relevant times, the most important component of the business of Track Data has been the high-end MX product, which offers financial data and other market information to the professional market. The revenue from the MX product has been the lifeblood of the company since its inception. The amount of MX revenue that is recorded monthly is of great significance to the company because it reflects the overall direction of the business, that is, whether the customer base is growing.

The MX Financial Data That Hertz Possessed Prior to His Stock Sales in July 2003

15. At all relevant times, Hertz regularly received bimonthly reports by e-mail containing, among other things, the revenue figures for the MX product. He reviewed the monthly MX revenue numbers and consistently compared each month's revenue to the revenue of the prior month. The monthly revenue figures contained in these reports were for internal use alone. The monthly financial data was not disclosed to the public and was, accordingly, nonpublic information.

16. At all relevant times, Track Data billed its customers subscribing to the MX product in advance at the end of each month for the following month's service. The amount of the

billing was the projected figure for the following month. Then, in the middle of the following month, Track Data, after recording appropriate customer credits, recorded a final revenue figure for that month based on revenues received to date.

17. At all relevant times, Hertz received the first of the bimonthly reports in the middle of each month. The first report compared that month's final revenue figures to the final revenue figures of the previous month. The second report, which Hertz received at the end of each month, compared the final revenue figures for that month to the figures projected for the following month. Each bimonthly report was followed shortly thereafter by reports containing detailed analyses of the revenue figures, including a breakdown of the component parts of the total revenue of the MX product, a trend analysis of the product, and the variance in revenue by amount and percentage of change from the prior month's revenue. The reports also included the totals of each month's revenue from the beginning of the year to date, which allowed the reviewer to see at a glance the amount and percentage of change in MX revenue that had occurred each month from the beginning of the year to the present.

18. Hertz received and reviewed the bimonthly MX revenue reports and the follow-up data for each month in the second quarter ended June 30, 2003, prior to his sales of Track Data stock in mid-July. By mid-July, Hertz possessed all the relevant MX revenue data for the second quarter, including the exact amount of revenue for each month as well as an analysis of the changes in revenue each month from the beginning of the year through the end of the second quarter.

19. By mid-July, Hertz knew, among other things, the exact amount of Track Data's decline in revenue from services to the professional market and knew that the decline was significant.

Hertz Sells Track Data Stock Prior to the Second Quarter Earnings Report

20. On Friday, July 11, 2003, Martin Kaye (“Kaye”), Track Data’s chief financial officer and chief operating officer, sent an e-mail to Hertz and others at Track Data advising:

Due to Insider trading rules and to protect all of us from legal liabilities, no option exercises or sales of Track stock should be made by any officer, director, employee or consultant to Track during the period July 10 through the day after the earnings release (presently expected to be August 12). This same type of no trading period occurs each quarter.

21. On Monday morning, July 15, 2003, Hertz received a copy of a document entitled “Trading Policy for Track Data Stock” (“Trading Policy”). The Trading Policy, which Hertz had received prior to previous earnings releases, prohibits officers, directors, employees, or consultants from trading while in possession of material, nonpublic information. It defines “nonpublic” as information “that has not been publicly released.” Included among the examples of information that could be considered material are “earnings and dividends.” The Trading Policy further explains that not only may a person not trade, but “it is illegal to pass material non-public information on to others who then trade in stock. Accordingly a Track person must not . . . provide material non-public information to family members, business acquaintances, or friends. . . [or] recommend to anyone that they buy or sell stock . . . even if the specific information is not disclosed to that person.”

22. Hertz knew, or was reckless in not knowing, that the monthly MX financial data for the second quarter that he possessed as of mid-July was material, nonpublic information. Hertz also knew, or was reckless in not knowing, that the company’s Trading Policy prohibited him from trading or from recommending trading Track Data stock from July 10, 2003 through the day after the announcement of the second quarter financial results.

23. On July 15, 2003, Hertz sold 3,650 Track Data shares from the account of Haor Beacon at Track Data Securities at \$2.70 per share. On July 17, 2003, Hertz sold 50,000 Track Data shares from the Roxton account at a price range of \$1.88-\$2.00. On July 22, 2003, Hertz sold an additional 1,000 Track Data shares from Haor Beacon's account at Bishop Rosen at \$1.97 per share. In each of the accounts, Hertz sold the entire holding of Track Data stock.

24. On August 12, 2003, Track Data issued a news release announcing results for its second quarter-ended June 30, 2003. Revenues had decreased 22% from the same quarter in 2002. The company noted that it had experienced "a significant decline in revenues from its market data services to the professional market due principally to staffing reductions in the securities industry" That day the stock lost 21% of its value, closing at \$1.26, down from the prior day's close of \$1.60. Trading volume surged to over 1.2 million shares from the prior day's volume of 314,300. The following day, when the quarterly report was filed with the Commission, the stock lost an additional 10%, closing even lower at \$1.13.

25. By selling the stock in the Roxton and Haor Beacon accounts prior to the earnings announcement, Hertz avoided losses in those accounts of approximately \$47,000.

Hertz's Relatives Sell Track Data Stock Prior to the Second Quarter Earnings Report

26. On or prior to July 11, 2003, Hertz communicated to his brother in words or in substance, the material, nonpublic information he possessed relating to Track Data's financial results for the second quarter. On July 11, 2003, Hertz's brother sold or caused the sale of 1,080 Track Data shares at \$2.18. On July 15, 2003, Hertz's brother sold or caused the sale of an additional 360 shares at \$2.31. By selling the stock prior to the earnings announcement, Hertz's brother avoided losses of approximately \$1,600.

27. On or prior to July 14, 2003, Hertz communicated to his wife's parents in words or in substance, the material, nonpublic information he had relating to Track Data's financial results for the second quarter. On July 14, 2003, they sold 1,400 Track Data shares at \$2.82. By selling the stock prior to the earnings announcement, Hertz's wife's parents avoided losses of approximately \$2,300.

28. On or prior to July 16, 2003, Hertz communicated to his wife's sister, in words or in substance, the material, nonpublic information he had relating to Track Data's financial results for the second quarter. On July 16, 2003, his sister-in-law sold 10,000 Track Data shares at \$2.38-\$2.40. By selling the stock prior to the earnings announcement, she avoided losses of approximately \$12,700.

Hertz Purchases Track Data Stock Prior to the Dividend Announcement

29. In its annual report for year-ended 2002 that was filed with the Commission on March 26, 2003, Track Data noted that it had never paid a cash dividend to its shareholders. The company disclosed that it "does not anticipate that it will do so in the foreseeable future."

30. However, during the summer of 2003, after the passage of a law that lowered the tax rate on dividends, Hertz considered the advantages of replacing the company's ongoing stock buy-back program with the issuance of a dividend to shareholders. During August 2003, Hertz, together with other members of the board of directors, determined that a proposal to issue a dividend would be presented to the board for its approval at its next scheduled meeting. Hertz knew, or had reason to believe, that the proposal, which was confidential, would be approved by the board.

31. From August 13 through August 20, 2003, while in possession of the material, nonpublic information concerning Track Data's issuance of a dividend, Hertz purchased 50,000 Track Data shares for the Roxton account at prices ranging from \$1.12 - \$1.41.

32. On August 21, 2003, the board approved the issuance of a \$.01 per share dividend payable to holders of record on September 8, 2003. Following the public announcement of the dividend on August 25, 2003, the price of the stock, which had previously closed at \$1.26, increased by 19% to \$1.50.

33. By purchasing the stock when he did, Hertz made a potential profit of approximately \$13,000 for the Roxton account. Also as a result of the approval of the dividend, Roxton received a dividend payment of \$500.

Attempted Sales and Sales Prior to the Third Quarter Earnings Report

34. On October 15, 2003, prior to the issuance of the third quarter earnings report, Kaye sent another e-mail to Hertz and others at Track Data reminding them that they were not allowed to trade Track Data securities between October 15, 2003, and November 12, 2003.

35. As described more fully in Paragraphs 15-17 above, Hertz regularly received bi-monthly revenue reports for the MX product. Hertz received and reviewed the bimonthly MX revenue reports and the follow-up data for each month in the third quarter of 2003. By no later than the end of October 2003, Hertz possessed all the relevant MX revenue data for the third quarter, including the exact amount of revenue for each month as well as an analysis of the changes in revenue each month from the beginning of the year through the end of the third quarter. Hertz knew that the decline in revenue was significant.

36. On November 5, 2003, Hertz placed a limit order to sell 300 Track Data shares from the Roxton account at a price over the ask. Hertz subsequently cancelled this order.

37. On November 6, 2003, Hertz again placed a limit order, this time to sell 7,000 shares from the Roxton account at price levels ranging from \$2.01 through \$2.06. This order was automatically cancelled at the end of the day, as the price of the stock never hit those levels.

38. Also on November 6, 2003, Hertz ordered the sale of 3,000 Track Data shares from the account of Vaad L'Hatzolas. The sale of the shares took place at \$1.90 per share.

39. On November 11, 2003, Track Data issued a news release announcing results for its third quarter-ended September 30, 2003. Revenues had decreased 33% from the same quarter in 2002. Although net income for the quarter was up from the comparable period in 2002, the company again noted that it experienced a significant decline in revenues from its services to the professional market. The stock dropped 14.2%, closing at \$1.51, down from the prior day's close of \$1.76. Trading volume surged from 500,000 to over 1 million shares.

40. By ordering the sale of stock in the Vaad L'Hatzolas account prior to the earnings announcement, Hertz avoided losses in that account of approximately \$1,200.

FIRST CLAIM FOR RELIEF

***Hertz Violated Section 17(a) of the Securities Act,
Section 10(b) of the Exchange Act and Rule 10b-5,
When he Sold and Attempted to Sell Track Data Stock
And Tipped Others Who Then Sold Track Data Stock***

41. The Commission realleges and incorporates by reference the allegations contained in Paragraphs 1 through 40 above.

42. Hertz, directly or indirectly, singly or in concert, by the use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or by use of the mails, or of any facility of any national securities exchange, in the offer or sale, and in connection with the purchase or sale, of Track Data securities: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of, or

otherwise made, untrue statements of material fact or 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 transactions, acts, practices and courses of business which operated or would have operated as a fraud or deceit upon purchasers of Track Data securities and upon other persons, as more fully described in Paragraphs 1 through 40 above.

43. As part of and in furtherance of this violative conduct, Hertz, knowingly or recklessly, for his direct or indirect benefit, in breach of a fiduciary duty to Track Data's shareholders and while he was aware of material, non-public information:

- a. On July 15, 2003, sold 3,650 Track Data shares from a Haor Beacon account;
- b. On July 17, 2003, sold 50,000 Track Data shares from the Roxton account;
- c. On July 22, 2003, sold 1,000 Track Data shares from a Haor Beacon account;
- d. From August 13 through August 20, 2003, purchased 50,000 Track Data shares for the Roxton account;
- e. On November 5, 2003, placed a limit order to sell 300 Track Data shares from the Roxton account;
- f. On November 6, 2003, placed a limit order to sell 7,000 Track Data shares from the Roxton account; and
- g. On November 6, 2003, ordered the sale of 3,000 Track Data shares from the Vaad L'Hatzolas account.

44. In addition, as part of and in furtherance of this violative conduct, Hertz, knowingly or recklessly, for his direct or indirect benefit, in breach of a fiduciary duty to Track Data's shareholders, tipped his brother, his wife's parents, and his wife's sister with material,

nonpublic information about Track Data's financial results for the second quarter of 2003. The tippees then sold Track Data stock while aware of that material, nonpublic information.

45. By reason of the activities described in Paragraphs 1 through 40 above, Hertz, singly or in concert, directly or indirectly, violated, and absent an injunction would again violate, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

RELIEF SOUGHT

WHEREFORE, Plaintiff respectfully requests a Final Judgment against Hertz:

- A. Permanently enjoining him, his agents, servants, employees, and attorneys, and all persons in active concert or participation with him who receive actual notice of the injunction by personal service or otherwise, and each of them, from future violations of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), 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;
- B. Ordering him to disgorge the losses avoided and profits from all of the trading in Track Data securities as set forth in paragraphs 1 through 40 above, and to pay prejudgment interest thereon;
- C. Ordering him to disgorge the amount of the dividend that Roxton received from the stock that Hertz purchased in August 2003;
- D. Ordering him to pay civil money penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Sections 21(d) and 21(A) of the Exchange Act, 15 U.S.C. §§ 78u(d)(3), 78u-1;

- E. Ordering that he be barred from acting as an officer or director of a public company pursuant to Section 20(e) of the Securities Act, 15 U.S.C. § 77t(e), and Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2); and
- E. Granting such other relief as the Court shall deem just and proper.

Dated: New York, New York
June 14, 2005

Respectfully submitted,

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