UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **ROBERT G. COLE,** **Defendant.**	:	**Case No. _______________**

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges:

SUMMARY

1. This case involves illegal insider trading by Robert G. Cole ("Cole") in the securities of Diebold, Inc. ("Diebold"), a public company that manufactures and sells automated teller machines ("ATMs"), bank security systems, and electronic voting terminals. In September 2005, Cole, then a regional sales representative for Diebold, made over $500,000 in illegal profits by using material, nonpublic information concerning revenue and order shortfalls at Diebold to engage in highly-leveraged transactions in Diebold securities. Specifically, on September 15, 2005, shortly after learning from his sales manager that revenues and orders in the company's North American regional bank business were significantly below target, Cole began purchasing hundreds of soon-to-expire Diebold put option contracts anticipating that Diebold would lower its earnings forecasts and the price of Diebold stock would fall.

2. On September 21, 2005 – one day after Cole completed purchasing the Diebold put option contracts – Diebold announced that it was lowering its earnings forecasts primarily

because of a revenue shortfall in the company's North American regional bank business. After this public announcement, the price of Diebold stock fell sharply. Cole immediately sold the Diebold put option contracts he had purchased only days before for $70,110, for $579,190, realizing illicit gains of about $509,080 (a 700% return).

3. By virtue of his conduct, Cole violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5]. Unless enjoined, Cole is likely to commit such violations again in the future.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to Exchange Act Sections 21(d)(1), 21(e), 21A, and 27 [15 U.S.C. §§ 78u(d)(1), (e), 78u-1, and 78aa]. Cole, directly or indirectly, made use of the means or instrumentalities of interstate commerce or the mails in connection with the conduct alleged in this Complaint.

5. Cole resides within this judicial district and certain acts or transactions constituting the violations occurred within this judicial district. Therefore, venue is proper in this District pursuant to Section 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa].

DEFENDANT

6. **Robert G. Cole**, age 66, resides in Oklahoma City, Oklahoma. Cole worked as a direct employee of Diebold for 22 years, leaving in 1996. After leaving Diebold, Cole continued to work as a sales representative for Diebold pursuant to manufacturer's representative agreements, working within Diebold's North American regional bank business, and selling products and services to Diebold customers in western Oklahoma.

RELEVANT ENTITY

7. **Diebold, Inc.** is an Ohio corporation headquartered in North Canton, Ohio. Diebold manufactures and sells ATMs, bank security systems, and electronic voting terminals. Diebold's common stock is registered with the Commission pursuant to Exchange Act Section 12(b) and is listed on the New York Stock Exchange.

FACTS

I. Diebold's Earnings Guidance For the Third Quarter and Full Year of 2005

8. On July 27, 2005, Diebold publicly announced its second quarter earnings and provided investors with earnings guidance for the third quarter, which ended on September 30, 2005, and for the entire year of 2005. In a public conference call that day with analysts and investors, Diebold's chief executive officer ("CEO") forecasted that Diebold's *pro forma* earnings would be $0.62 to $0.67 per share in the third quarter of 2005, and $2.60 to $2.70 per share for the entire year of 2005.

9. During that conference call Diebold's CEO stated that "[l]ooking forward to the third quarter, we expect revenue to increase 9 to 11 percent . . ., with good performance across all businesses." In response to an analyst question concerning the North American ATM market, Diebold's CEO further stated that: "We weren't particularly happy with our regional bank orders in [the second quarter]. But the pipeline looks solid. Our forecast looks solid. I think our growth this year is going to lead more internationally, but we see a solid U.S. market."

10. Prior to September 21, 2005, Diebold did not issue any further public earnings guidance for the third quarter or for the entire year of 2005.

II. Cole's Insider Trading

11. At all relevant times, Cole was a sales representative for Diebold, working within Diebold's North American regional bank business, selling products and services to Diebold's regional bank customers in western Oklahoma. As a sales representative, Cole regularly received from Diebold confidential information concerning Diebold's North American regional bank business.

12. In May 2005, Cole signed a manufacturer's representative agreement with Diebold that expressly prohibited Cole from disclosing or using for his own benefit, Diebold's confidential information. Consequently, Cole owed a duty to Diebold not to use confidential information he received from Diebold for his own personal benefit.

13. On the evening of September 13, 2005, Cole and other Diebold sales representatives received from their sales manager two emails with attached financial reports concerning Diebold's North American regional bank business. These emails and the attached reports contained material, nonpublic information, including the following:

a. The first email stated that revenues from Diebold's U.S. regional bank customers in August were 89.9 percent of that month's target, and that year-to-date revenues from the company's U.S. regional bank customers were 78.8 percent of the year-to-date target. The financial report attached to this email also showed, among other information, that revenues from Diebold's sales to regional banks totaled only $71.9 million in July and August, which was 27 percent short of target for those two months, and 3.4 percent lower than revenues in the same two months in 2004.

b. The second email stated that Diebold's U.S. regional bank customer orders in August were 76.5 percent of that month's target, and that year-to-date orders from the company's U.S. regional bank customers were 90.1 percent of the year-to-date target. The financial report attached to this email also showed, among other information, that Diebold's orders from regional banks in July and August totaled only $71.2 million, which was 25.9 percent short of target for those two months, and 24 percent lower than in the same two months in 2004. These July and August monthly order totals were lower than any other preceding month that year. Because orders are the leading indicator of future revenues, this shortfall in orders indicated a likely shortfall in previously anticipated revenues.

14. The revenue and order information in the two September 13, 2005, emails and the attached reports were both nonpublic and material. Diebold's sales to regional banks typically represented approximately 20 percent of Diebold's total revenues and were the company's most profitable sales. Thus, a significant shortfall in revenues and orders by the company's North American regional bank business in July and August of 2005, likely would and, as described below, did cause Diebold to lower its previously announced earnings forecasts for the third quarter of 2005 and for the entire year of 2005.

15. A reasonable investor would have considered the revenue and order information in both September 13, 2005, emails important to his or her investment decision, and a significant alteration of the total mix of information available to the public, particularly in light of the company's prior public earnings and revenue forecasts and other statements concerning its anticipated financial performance.

16. Cole reviewed both September 13, 2005, emails and the attached financial reports.

17. On the morning of September 15, 2005, while in possession of the material, nonpublic information contained in the two September 13, 2005, emails, Cole began placing orders to purchase Diebold "put option" contracts, and continued purchasing Diebold put options contracts through September 20, 2005. In total, Cole purchased 470 Diebold put option contracts with a $45 "strike price" and an October 21 expiration date, and 306 Diebold put option contracts with a $40 "strike price" and a November 18 expiration date, for a total cost of $70,110.

18. A "put option" contract is a security that gives the purchaser the right to sell 100 shares of the underlying stock for a specified price, which is called the "strike price," until the expiration date of the option contract. Generally, the value of a put option contract will increase as the price of the underlying stock decreases, and will decrease as the price of the underlying stock increases. Investing in put options can be very risky. For example, if the option is held to expiration and the price of the underlying security rises above the strike price, the option will expire worthless.

19. While in possession of inside information concerning revenue and order shortfalls at Diebold, Cole purchased the put option contracts anticipating that Diebold would issue an earnings warning and that the price of Diebold stock would fall. Cole knew, or was reckless in not knowing, that he purchased Diebold put option contracts using material, nonpublic information in breach of his duty to Diebold.

III. <u>Diebold's September 21, 2005 Earning Warning</u>

20. On September 21, 2005, before the market opened, Diebold issued to the public a press release announcing a significant earnings warning. Specifically, in that press release Diebold lowered its *pro forma* earnings forecast for the third quarter of 2005 from $0.62 to $0.67

per share, to $0.32 to $0.37 per share, and lowered its *pro forma* earnings forecast for the entire year of 2005 from $2.60 to $2.70 per share, to $1.90 to $2.00 per share. In the press release, Diebold explained that it was lowering its earnings guidance because the revenue from its financial, self-service business line was expected to be more than $50 million lower in the third quarter than its prior guidance had anticipated, with "most of the shortfall occurring in North America as the company experienced continued market weakness in the more profitable regional bank segment."

21. In a public conference call with analysts and investors following this press release, Diebold's chief financial officer stated that, with regard to the third quarter, the company's "significant reduction in earnings-per-share guidance is being driven by the lower financial self-service revenue expectations, especially in North America," and that "[t]his reduction is particularly adverse to earnings-per-share because it is concentrated in the more profitable regional bank segment." In that same conference call, Diebold's CEO stated that, with regard to the company's North American regional bank business, "we see a slowdown," and that "[w]e've certainly seen a major slowdown in the southeast part of the country and that's exactly what's behind our revised outlook."

22. As a result of Diebold's earnings warning on September 21, 2005, the company's stock price fell sharply that day to close at $37.27, down more than 16 percent from the previous day's closing price of $44.13.

IV. Cole Profits From His Inisder Trading

23. On September 22, 2005, and September 23, 2005, Cole sold all the put option contracts he had purchased while in possession of material, nonpublic information.

24. Cole paid a total of about $70,110 for the put option contracts he purchased from September 13, 2005, through September 20, 2005. He sold these put option contracts for about $579,190, realizing illicit profits of about $509,080.

CLAIM FOR RELIEF

Insider Trading in Violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 Thereunder

25. The Commission realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 24 above.

26. As described above, Cole knew or was reckless in not knowing that he purchased Diebold securities while in possession of material, nonpublic information concerning Diebold and that his trading of Diebold securities was in breach of fiduciary duties or similar duties of trust and confidence to Diebold.

27. By reason of the conduct described above, Cole, in connection with the purchase or sale of securities, by the use of any means or instrumentalities of interstate commerce or of the mails, or of any facility of any national securities exchange, directly or indirectly (a) employed devices, schemes, or artifices to defraud; (b) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices, or course of business which operates or would operate as a fraud or deceit upon any persons, including purchasers or sellers of the securities.

28. By reason of the conduct described above, Cole violated Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court enter a judgment:

a) permanently enjoining Cole from violating Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

b) ordering Cole to disgorge, with prejudgment interest, all illicit trading profits resulting from the conduct alleged in this Complaint;

c) ordering Cole to pay civil monetary penalties pursuant to Exchange Act Section 21A [15 U.S.C. § 78u-1]; and

d) granting such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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