

Approved: _____
MARIA E. DOUVAS/JOSHUA KLEIN
Assistant United States Attorneys

Before: HONORABLE HENRY B. PITMAN
United States Magistrate Judge
Southern District of New York

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UNITED STATES OF AMERICA : SEALED COMPLAINT
- v. - : Violation of 15 U.S.C. §§
JAMES NICHOLSON, : 78j(b), 78ff; 17 C.F.R. §
Defendant. : 240.10b-5; 18 U.S.C. § 1344.
: COUNTY OF OFFENSE:
: NEW YORK
- - - - -x

SOUTHERN DISTRICT OF NEW YORK, ss.:

WILLIAM MCGROGAN, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI") and charges as follows:

COUNT ONE
(Securities Fraud)

1. From at least in or about 2004 through at least in or about February 2009, in the Southern District of New York and elsewhere, JAMES NICHOLSON, the defendant, unlawfully, wilfully and knowingly, by the use of the means and instrumentalities of interstate commerce and of the mails, in connection with the purchase and sale of securities directly and indirectly, would and did use and employ 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.

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

COUNT TWO
(Bank Fraud)

2. From in or about January 2009 up to and including in or about February 2009, in the Southern District of New York and elsewhere, JAMES NICHOLSON, the defendant, and others known and unknown, unlawfully, willfully and knowingly, executed, and attempted to execute, a scheme and artifice to defraud a financial institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and obtained the moneys, funds, credits, assets, securities, and other property owned by, and under the custody and control of, such financial institution, by means of false and fraudulent pretenses, representations, and promises, to wit, NICHOLSON presented checks, which were drawn on accounts with insufficient funds, maintained by Bank of America and Citibank.

(Title 18, United States Code, Section 1343.)

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

3. I have been a Special Agent with the FBI for over 12 years. I am currently assigned to a squad responsible for investigating violations of the federal securities laws and related offenses. I have participated in numerous investigations of these offenses, and I have made and participated in making arrests of numerous individuals for participating in such offenses.

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: (a) information provided to me by the United States Securities and Exchange Commission (the "SEC"); (b) bank records; (c) trading records; (d) documents obtained from certain individuals; and (e) publicly available information. 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 conversations and events are referred to herein, they are related in substance and in part. Where figures and calculations are set forth herein, they are approximate.

Relevant Entities and Individuals

5. According to private offering memoranda that

Westgate Capital Management LLC ("Westgate Capital") provided to its investors, Westgate Capital is an institutional money management firm, which was founded in August 1999. JAMES NICHOLSON, the defendant, is the President and General Partner of Westgate Capital.

6. Based on my conversations with individuals who worked with JAMES NICHOLSON, the defendant, at Westgate Capital, I have learned the following:

a. Westgate Capital has offices in Pearl River, New York and New York, New York.

b. During the period from in or about 1999 through in or about February 2009, NICHOLSON formed the following funds that received and invested money from investors: Westgate Alpha Fund, Westgate Equity Fund, Westgate Focus Fund, Westgate Growth Fund LP, Westgate Premier Growth Fund LP, Westgate Strategic Growth Fund LP and Westgate Summit Fund (collectively, the "Westgate Funds"). NICHOLSON also formed the Westgate Opportunity Fund Ltd. (the "Opportunity Fund") and the Westgate Absolute Fund.

c. During the relevant period, NICHOLSON was the investment fund manager for the Westgate Funds, and is the only individual who possessed authority to trade the money invested in the Westgate Funds.

d. NICHOLSON, as well as at least three other employees of Westgate Capital, had discretion to trade the money invested in the Westgate Absolute Fund and the Opportunity Fund. At its peak, the Westgate Absolute Fund had approximately \$45 million under management, and the Opportunity Fund had approximately \$18.5 million under management.

The Fraudulent Scheme

General Overview

7. Based on all of the sources of information referenced herein, including all of the facts and circumstances described herein, I have probable cause to believe the following:

a. From at least in or about 2004 through at least in or about February 2009, JAMES NICHOLSON, the defendant, engaged in a fraudulent scheme to defraud investors who invested in one or more of the Westgate Funds by making materially false and misleading representations to investors, including: (i)

falsely inflating the value of Westgate Funds' assets under management; (ii) falsely representing that the Westgate Funds were audited by an independent auditing firm; (iii) falsely representing the performance of the Westgate Funds to be consistently positive; and (iv) falsely guaranteeing that investor funds would be returned to investors by a particular date.

b. NICHOLSON and Westgate Capital appear to have falsely represented to investors, at various times, that Westgate Capital had assets under management ranging from \$600 million to \$900 million while the true value of its assets was materially lower than these figures.

c. NICHOLSON and Westgate Capital provided a Private Offering Memorandum to various investors in the Westgate Strategic Growth Fund, LP (the "Strategic Growth Fund"), a copy of which I have reviewed, that stated that the Strategic Growth Fund is audited by an independent accounting firm located in New York, New York (the "Auditing Firm"). This is a claim that I believe to be false.

d. Marketing brochures for the Strategic Growth Fund claimed positive returns for each month from January 2004 through August 2008. A similar brochure for the Westgate Growth Fund shows, except for September 2001, uniformly positive returns for each month between October 1999 and December 2007. Account statements for individual investors show similar returns through November 2008. However, it appears the performance of these Westgate Funds was materially lower than what NICHOLSON represented to investors.

e. Beginning in December 2008, based, in large measure, on the disclosure of criminal and civil fraud charges, filed by the United States Attorney's Office in the Southern District of New York and the Securities and Exchange Commission, against Bernard Madoff, numerous investors in the Westgate Funds have sought to redeem their investments. To date, I have learned of nearly two dozen investors who received, in response to their requests to redeem their investments, checks totaling, collectively, nearly \$5 million. All of these checks were returned for insufficient funds. I have learned of other investors who have sought, without success, to redeem funds totaling in excess of \$10 million.

f. It appears that investors have invested at least \$100 million with various Westgate Funds since 2004.

The Fraudulent Misrepresentations And the Dissipating Assets

8. Based on my conversations with individuals who worked with JAMES NICHOLSON, the defendant, at Westgate Capital, and the review of documents, I have learned the following:

a. NICHOLSON generated the account statements to be sent to investors and instructed at least one employee of Westgate Capital to mail those account statements to investors.

b. The Opportunity Fund contained investments from both NICHOLSON and individual investors.

c. In or about September 2008, NICHOLSON sustained trading losses of over \$40 million in the Westgate Absolute Fund and the Opportunity Fund. As a result of those trading losses, in or about October 2008, NICHOLSON instructed the employees of Westgate Capital to stop trading in the Westgate Absolute Fund and the Opportunity Fund. Additionally, NICHOLSON closed the Opportunity Fund because it had sustained approximately \$1 million more in losses than it had in assets.

d. NICHOLSON instructed an employee of Westgate Capital to "rollover" all of the people who invested in the Opportunity Fund into the Strategic Fund.

e. NICHOLSON admitted to at least one employee that he did not inform investors of the Opportunity Fund that Westgate Capital had sustained trading losses in September 2008.

f. In or about January 2009, NICHOLSON told three of his employees that Westgate Capital had approximately \$900 million under management, and that at least \$400 million in assets were in the custody of a securities brokerage firm (the "Securities Firm"), a claim which, as described below, I later determined to be false. NICHOLSON also stated that he did not maintain equity positions overnight and therefore did not have any exposure to risk that his holdings would decrease in value overnight, a claim which directly contradicts claims made by Westgate Capital in the offering memoranda distributed to investors.

g. NICHOLSON told employees that the Westgate Funds were independently audited by the Auditing Firm, an accounting firm that NICHOLSON claimed to be located at a particular address in New York, New York, a claim which, as described below, I later determined to be false.

h. Starting in or about January 2009, NICHOLSON stopped paying vendor bills, including the monthly lease on the

Pearl River, New York office.

i. Starting on or about January 15, 2009, NICHOLSON stopped paying employees of Westgate Capital with Paychex, a payroll and payroll tax services company, and paid them with personal checks instead. Many of NICHOLSON's January 15, 2009 payroll checks were returned for insufficient funds.

j. Employees of Westgate Capital have not been paid since January 30, 2009.

9. Based on conversations that I have had with investors and employees of Westgate Capital, as well as the Strategic Growth Offering Memorandum, JAMES NICHOLSON, the defendant has named at least seven securities brokerage firms that he claims serve as primer brokers for Westgate Capital (the "Prime Brokers"), and indicated that the assets of Westgate Capital were custodied with these firms. I have spoken with representatives, or reviewed documents, from the Prime Brokers, and discovered that Westgate Capital has not maintained trading accounts with any of the Prime Brokers for several years and that those institutions currently do not hold any assets for any of the Westgate Funds.

10. On or about February 23, 2009, an agent of the FBI went to the purported address of the Auditing Firm. The agent informed me of the following:

a. The Auditing Firm does not have any physical space located at the specified address.

b. A company that does business by the name of "The New York City Virtual Presence" (the "Virtual Office") is located at the specified address.

c. On or about February 23, 2004, JAMES NICHOLSON, the defendant, signed a lease agreement between the Virtual Office and the Auditing Firm for virtual space at the specified address.

d. In connection with that lease agreement, NICHOLSON provided the Virtual Office with a copy of his driver's license, and charged the lease using his own personal VISA credit card.

e. NICHOLSON listed the Auditing Firm's billing address and business phone number as the billing address and business phone number of Westgate Capital. NICHOLSON further listed his personal home number as the home number of the Auditing Firm.

f. NICHOLSON informed the receptionist of the Virtual Office that his partner was a person with the same last name as the name of the Auditing Firm.

g. For a period of time, the Virtual Office provided business phone answering services for the Auditing Firm. All messages were directed to the numbers provided by NICHOLSON in the lease agreement.

The Defrauded Investors

11. According to documents obtained from one of its employees, and conversations, Westgate Capital currently has approximately 372 investors who have invested in the Westgate Funds. Investors of the Westgate Funds are located throughout the United States, including in Rockland County, New York and New York, New York. In the regular course of business, each investor is provided with an Offering Memorandum and a Private Placement Agreement that correspond with the fund in which the investor has invested.

12. Other members of law enforcement and I have spoken with over two dozen investors of the Westgate Funds. I have spoken with over 15 investors, and learned the following:

a. Investor-1 is an investor located in Rockland County, New York who invested in the Premier Growth Fund, the Equity Fund and the Westgate Focus Fund that JAMES NICHOLSON, the defendant, managed. Based on my conversations with Investor-1, I have learned the following:

- i. Prior to the investments, NICHOLSON told Investor-1 that NICHOLSON had discretionary authority over all trades in the Westgate Funds, and that he maintained 25% of all assets in cash.
- ii. In or about December 2008, NICHOLSON called Investor-1 and solicited Investor-1 to invest in the Westgate Focus Fund. Specifically, NICHOLSON told Investor-1 that there was an opportunity to earn an 8% to 10% return on any investments made into the Focus Fund. NICHOLSON guaranteed that any monies invested in the Focus Fund would be returned by January 15, 2009. Based on NICHOLSON's statements, Investor-1 invested \$225,000 in the Focus Fund.

- iii. On or about December 19, 2008, Investor-1 requested a redemption or return of all Investor-1's money from the Westgate Focus Fund. Investor-1 also requested a redemption or return of all Investor-1's money from the Premier Growth Fund and the Equity Fund.
- iv. On or about February 3, 2009, Investor-1 drove to Westgate Capital's offices in Pearl River, New York, and picked up ten separate checks totaling approximately \$1,614,913.33. Each of the ten checks were signed by NICHOLSON and drawn on a Citibank account.
- v. On or about February 4, 2009, Investor-1 deposited all ten redemption checks into Investor-1's bank account.
- vi. On or about February 5, 2009, a representative from Citibank returned all ten redemption checks for insufficient funds.
- vii. On or about February 6, 2009, and again on February 7, 2009, NICHOLSON promised Investor-1 that the funds would be available on February 9, 2009.
- viii. Subsequently, in or about February 2009, NICHOLSON e-mailed Investor-1. In that e-mail, NICHOLSON claimed that he currently had in excess of \$800 million under management, and that he expected to have approximately \$1 billion under management by the end of the year.
- ix. To date, Investor-1 has not received any of Investor-1's monies from Westgate Capital.

b. Investor-2 is an investor located in New Jersey who invested in the Strategic Growth Fund that JAMES NICHOLSON, the defendant, managed. Based on my conversations with Investor-2, I have learned the following:

- i. In or about November 2008, Investor-2 invested approximately \$280,970 in the Strategic Growth Fund. Prior to

investing in the Strategic Growth Fund, Investor-2 received a copy of the Strategic Offering Memorandum and the Limited Partnership Agreement.

- ii. Prior to investing in the Strategic Growth Fund, Investor-2 was told by NICHOLSON that Strategic had earned positive returns each month since its inception in 2004. Additionally, NICHOLSON told Investor-2 that the size of Investor-2's potential investment was "so small" in comparison to the size of the Strategic Growth Fund that Investor-2 could request a redemption at any time.
- iii. In or about 2008, Investor-2 received a document purportedly from the Auditing Firm dated April 12, 2008, and entitled the Independent Auditors' Report (the "Independent Auditors' Report"). The address listed for the Auditing Firm was the specified address described above in New York, New York. According to the Independent Auditors' Report, the Westgate Strategic Fund had \$173,148,184 in assets and \$30,100 in liabilities. The Independent Auditors' Report also claimed that the Westgate Strategic Fund realized a total return of 39.13% during the period of January 1, 2007 through December 3, 2007.
- iv. In or about late December 2008, Investor-2 placed approximately four telephone calls to the phone number listed in the Independent Auditors' Report for the Auditing Firm. During each of those telephone calls, an answering service answered the telephone. During one of those calls, Investor-2 was told, in substance, that Jim Nicholson and a person with the same last name as the name of the Auditing Firm worked there.
- v. On or about December 31, 2008, Investor-2 requested a redemption or return of all Investor-2's money from the Strategic Growth Fund.

- vi. On or about January 9, 2009, Investor-2 received an e-mail from Westgate Capital which stated, in relevant part, that the Strategic Growth Fund was "up about 3/8%."
- vii. On or about January 15, 2009, NICHOLSON called Investor-2 and stated that Investor-2 would receive the redemption checks promptly.
- viii. On or about January 20, 2009, Investor-2 received two checks from Westgate Capital, totaling approximately \$282,325.22, drawn on the account of Keybank, N.A. and signed by NICHOLSON (the "Keybank Redemption Checks").
- ix. On or about January 20, 2009, Investor-2 deposited the Keybank Redemption Checks into an account. Keybank subsequently returned the Keybank Redemption Checks because the account on which the checks were drawn was closed.
- x. After the Keybank Redemption Checks had not been honored, Investor-2 received two additional checks from Westgate Capital, totaling approximately \$282,325.22, drawn on the account of Citibank, N.A. ("Citibank").
- xi. On or about February 4, 2009, Investor-2 deposited the two Westgate Capital checks from Citibank into an account. Both of these checks were returned by Citibank, on or about February 6, 2009, for insufficient funds.
- xii. To date, Investor-2 has not received any monies from Westgate Capital.

c. Investor-3 is an investor who invested in the Westgate Premier Fund and the Westgate Equity Fund that JAMES NICHOLSON, the defendant, managed. Based on my conversations with Investor-3, I have learned the following:

- i. From in or about 2006 to in or about 2007, Investor-3 invested at least \$300,000 in the Westgate Premier Fund and

the Westgate Equity Fund.

- ii. In or about 2009, Investor-3 requested a redemption or return of all money from the Westgate Premier Fund and the Westgate Equity Fund.
- iii. On or about February 5, 2009, Investor-3 received two checks from Westgate Capital Management, totaling approximately \$341,827.24, drawn on an account with Bank of America and signed by NICHOLSON (the "Bank of America Redemption Checks").
- iv. On or about February 9, 2009, Investor-3 deposited the Bank of America Redemption Checks in an bank account. Bank of America refused to honor the Bank of America Redemption Checks due to insufficient funds.

d. Investor-4 is an investor located in Rockland County, New York who invested in the Strategic Growth Fund and the Westgate Focus Fund that JAMES NICHOLSON, the defendant, managed. Based on my conversations with Investor-4, I have learned the following:

- i. In or about February 2008, Investor-4 invested at least approximately \$12,241,420.66 in the Strategic Growth Fund. Investor-4 received account statements until in or about November 2008. In or about December 2008, Investor-4 invested an additional \$1,000,000 in the Westgate Focus Fund.
- ii. Prior to investing in the Strategic Growth Fund and the Westgate Focus Fund, Investor-4 received the Strategic Offering Memorandum. Investor-4 was also told that Strategic had earned positive returns each month, but one, since its inception in 2004.
- iii. Investor-4's account statements, which I have reviewed, indicate that Investor-4 has realized a total return of 10.51% since investing in the Strategic Growth Fund.

- iv. In or about 2008, Investor-4 received the Independent Auditors' Report from the Auditing Firm dated April 12, 2008, and entitled the Independent Auditors' Report (the "Independent Auditors' Report"). The address listed for the Auditing Firm was the specified address described above in New York, New York. According to the Independent Auditors' Report, the Westgate Strategic Fund had \$173,148,184 in assets and \$30,100 in liabilities. The Independent Auditors' Report also claimed that the Westgate Strategic Fund realized a total return of 39.13% during the period of January 1, 2007 through December 3, 2007.
- v. In or about February 2009, Investor-4 requested a redemption or return of all Investor-4's money from the Westgate Focus Fund. Despite having previously been told that any investments in the Westgate Focus Fund would be returned promptly in February 2009, Investor-4 was told that the money would not be returned to Investor-4 until in or about March 2009.

13. I have reviewed banking records from Bank of America. According to those records:

a. On or about January 30, 2009, JAMES NICHOLSON, the defendant, and another employee of Westgate Capital, opened a Westgate Capital account with Bank of America (the "Westgate Bank of America Account").

b. From in or about January 30, 2009 to in or about February 5, 2009 - the date on which NICHOLSON presented to Investor-3 a check in the amount of \$341,827.24, which was drawn on the Westgate Bank of America Account - Westgate Capital made the following deposits into the Westgate Bank of America Account, totaling approximately \$160,000:

- i. On or about February 2, 2009, a deposit of \$25,000.
- ii. On or about February 5, 2009, a deposit by wire transfer in the amount of \$70,000.

iii. On or about February 5, 2009, a deposit by wire transfer in the amount of \$50,000.

iv. On or about February 5, 2009, a deposit by wire transfer in the amount of \$15,000.

c. From in or about January 30, 2009 to in or about February 9, 2009 - the date on which Investor-3 deposited the Bank of America Redemption Checks, the account balance of the Westgate Bank of America Account was overdrawn in the amount of \$668,275.91 due to a series of wire transfers and checks drawn on the Westgate Bank of America Account.

d. On or about February 10, 2009, NICHOLSON deposited a Citibank check in the amount of \$360,000 in the Westgate Bank of America Account. That check was returned by Citibank on or about February 17, 2009 for insufficient funds.

e. Based on information currently known, as of February 18, 2009, Bank of America has sustained losses in the Westgate Bank of America Account totaling approximately \$115,385.70

14. Through investigation, I have learned that Bank of America and Citibank are insured by the Federal Deposit Insurance Corporation.

WHEREFORE, the deponent prays that an arrest warrant be issued for JAMES NICHOLSON, the defendant, and that he be imprisoned or bailed as the case may be.

WILLIAM MCGROGAN
SPECIAL AGENT
FEDERAL BUREAU OF INVESTIGATION

Sworn to before me this
24th day of February 2009

THE HONORABLE HENRY B. PITMAN
CHIEF UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK