Financial Services Authority

FINAL NOTICE

To: Mr Oluwole Modupe Fagbulu

Of: 22 North Approach
Northwood
HA6 2JG

Individual ref: OXF01013

Date: 20 September 2011

TAKE NOTICE: The Financial Services Authority of 25, The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives Mr Fagbulu final notice that it has taken the following action:

1. THE ACTION

1.1. The FSA gave Oluwole Modupe Fagbulu ("Mr Fagbulu") a Decision Notice on 15 March 2010 which notified Mr Fagbulu that the FSA had decided to take the following action:

i) to make an order, pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), prohibiting Mr Fagbulu from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm on the grounds that he is not a fit and proper person ("the Prohibition Order");

ii) to withdraw approval, pursuant to section 63 of the Act, to prevent Mr Fagbulu from continuing to perform the functions to which the approval relates; and

iii) to impose a financial penalty of £500,000 on Mr Fagbulu pursuant to sections 66 and 123(1) of the Act, for breaching Principle 1 of the FSA's Statements of Principle for Approved Persons and for engaging in market abuse.

1.2. Mr Fagbulu referred the matter to the Upper Tribunal (Tax and Chancery Chamber) (the "Tribunal"). The Tribunal, in a written decision dated 14 July 2011, determined that Mr Fagbulu should be prohibited from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm, that his approval should be withdrawn and that a financial penalty of £100,000 should be imposed. The Tribunal found that Mr Fagbulu's behaviour merits the imposition of a penalty of £350,000, but reduced the penalty to £100,000 for reasons of serious financial hardship.

1.3. The decision can be found on the Tribunal's website.

1.4. Accordingly, with effect from 20 September 2011, the FSA withdraws Mr Fagbulu's approval, and imposes the Prohibition Order and a financial penalty on Mr Fagbulu in the amount of £100,000.

2. REASONS FOR THE ACTION

2.1 Mr Fagbulu was employed as the Chief Financial Officer ("CFO") and Compliance Officer at Mercurius Capital Management Limited ("Mercurius"), an FSA authorised company, which acted as Investment Manager for a hedge fund called Mercurius International Fund ("the Fund").

2.2 During the period from July 2006 to January 2008 (the "Relevant Period"), the Fund had approximately 20 investors, who invested approximately €35 million in the Fund. The investors primarily comprised Fund of Hedge Fund companies and other sophisticated investors.

Investment strategy

2.3 The investment objective of the Fund, as stated on page 4 of its Prospectus, was to:

> "*Provide investors with consistent absolute returns primarily through investing and trading in equities of companies incorporated or whose principal operations are in Europe and the United States and related instruments*."

2.4 Materials sent to investors stated that the Fund targeted annual returns greater than 25%, and that Mercurius' investment strategy was comprised of three components:

i) the Fundamental Stock Picking Strategy, which selected stocks that were underperforming in the market;

ii) the Directional (or Momentum) Strategy, which utilised short-term, high-volume trading to take advantage of short-term trends; and

iii) the Event Driven Strategy, which took positions in order to profit from corporate events such as mergers, acquisitions and initial public offerings ("IPOs"). The Event Driven Strategy, in particular, was managed by Mr Visser, the Chief Executive Officer of Mercurius ("CEO").

2.5 During the relevant time, the Fund acquired holdings in two (illiquid) securities: NT Energy Limited ("NT Energy"); and Sandhaven Resources plc ("Sandhaven").

i) NT Energy was an unlisted company which had been established to acquire and develop certain oil leases in Texas. Mr Visser expected that NT Energy would progress rapidly to IPO stage and that the Fund would be able to exit its investment at a profit. This scenario did not transpire.

ii) Sandhaven appears to have been formed to provide financing to NT Energy. The primary assets of Sandhaven were NT Energy shares. The shares of Sandhaven were admitted to trade on PLUS markets ("PLUS") in the course of the Relevant Period.

Investment restrictions

2.6 During the relevant time, the Fund was subject to two key investment restrictions:

i) The Prospectus provided that "The Fund will not: (A) invest more than 30 per cent of its gross assets in the securities of any one issuer;" ("Investment Restriction A"); and

ii) By a side letter with a potential investor who subsequently invested in the Fund, Mercurius agreed that it would not invest "*more than 30% of the Fund's value in companies which had not been admitted on a recognised market or exchange*" (the "Side Letter Restriction").

2.7 The restrictions were designed to limit the type and extent of risks to which the Fund was exposed.

2.8 In September 2006, the Fund acquired shares in NT Energy. As a result of the acquisition the Fund's investment in NT Energy constituted more than 30% of gross assets in September 2006 and between December 2006 and February 2007. In March 2007, the Fund exchanged approximately half of its NT Energy shares for Sandhaven shares. In September 2007, the Fund acquired further shares in Sandhaven. As a result of this and later acquisitions the Fund's investment in Sandhaven also constituted more than 30% of gross assets between September 2007 and January 2008.

Financing transactions

2.9 On 24 January 2007, Mercurius' prime broker terminated its prime brokerage agreement with Mercurius. A prime broker holds custody of a hedge fund's portfolio of assets, and provides financing and settlement services when the hedge fund trades. A replacement prime broker was not found until 30 March 2007.

2.10 During this interim period, Mr Visser, with Mr Fagbulu's assistance, committed the Fund to two transactions:

i) By agreement dated 6 February 2007, the Fund agreed to sell 1,300,000 Private Trading Systems Inc ("PVTM") shares to a counterparty for $1,200,030, and to repurchase them three weeks later for $1,300,033; and

ii) By email agreement dated 13 March 2007, the Fund agreed to sell 2,475,000 PVTM shares to a counterparty for $1,980,000 and to repurchase them 6 weeks later for $2,227,500.

Trading in Sandhaven shares on 31 May and 29 June 2007

2.11 The Fund's Net Asset Value ("NAV") was calculated by reference to the closing prices of the securities it owned on the last working day of the month. The securities were generally priced in accordance with the market price ("marked to market"). On 31 May 2007 and 29 June 2007 (the last working days of those months), the Fund held a Sandhaven position of approximately 4.5 million shares.

2.12 At the time Sandhaven was quoted on PLUS. PLUS is a "quote-driven" market, where "on market" trades are placed through official market makers registered with PLUS. Shares can also be purchased "off market" in private transactions. Under PLUS rules, a security's closing price is set at the mid point between the lowest offer and highest bid quoted by the registered market makers when the market closes at 4.30pm.

2.13 On 31 May and 29 June 2007, Mr Fagbulu acquired a series of small tranches of Sandhaven shares from a market maker in those shares at significant (and ever increasing) premiums to the opening price on those days.

2.14 On 31 May 2007, the price of Sandhaven shares rose from 130p per share to 155p per share, increasing the value of the Fund's Sandhaven holding by approximately £1.125 million. The Fund reported a gross performance of +5.2% for May 2007. If there had been no increase in the price of Sandhaven shares, the Fund's performance would have been approximately -0.3% for the month.

2.15 On 29 June 2007, the price of Sandhaven shares rose from 142p to 175p per share, increasing the value of the Fund's Sandhaven holding by approximately £1.5 million. The Fund reported a gross performance for the month of +3.4%; had there been no price increase in Sandhaven shares on 29 June 2007, the Fund's performance for the month would have been approximately -3.7%

Transactions in October 2007

2.16 In September 2007, the Fund's replacement prime broker resigned.

2.17 On 26 October 2007, the Fund purportedly acquired 7.9 million Sandhaven shares from a counterparty, for 35p per share, when the market price was 131.5p. In a second transaction on 29 October 2007, the Fund purportedly acquired 120 million Private Trading Systems plc ("PTSP") shares from a company in Dubai with which it had had previous dealings, at a discount to market price.

2.18 The shares purportedly acquired on 26 and 29 October 2007, were included in the October NAV at the market price, rather than the off-market purchase price.

2.19 As Mr Fagbulu knew, the Fund in fact had no funds with which to effect the transactions, and they were both subsequently reversed, without any money or shares changing hands.

Communications with investors

2.20 During the Relevant Period, Mr Fagbulu, in his capacity as Compliance Officer of Mercurius drafted or approved monthly newsletters known as "Flash Reports" and a presentation distributed to investors in October 2007.

2.21 The October 2007 presentation was used as a marketing tool by the Fund. Mr Fagbulu was responsible for reviewing the presentation, which included several examples of successful trading, which did not reflect the actual outcome of the Fund's trading in those securities.

2.22 Every month, Mercurius sent a Flash Report to investors which conveyed performance, trading and risk information. The Flash Reports were accompanied by a commentary discussing the Fund's trading for the month. During the Relevant Period 16 Flash reports were provided by investors. Not one of these reports referred to the illiquid shares in which the Fund had been so heavily invested; the performance information they contained was incorrect and misleading.

Tribunal's findings

2.23 In its Decision dated 14 July 2011, the Tribunal focused on four elements of the FSA's case. In summary, these elements were:

i) that during the relevant period Mr Fagbulu repeatedly disregarded Investment Restriction A and the Side Letter Restriction, as to the levels of particular securities which the Fund was permitted to hold;

ii) that Mr Fagbulu engaged in deliberate market manipulation;

iii) that Mr Fagbulu entered into fictitious transactions, with the objective of overstating the value of assets held by the Fund; and

iv) that Mr Fagbulu repeatedly issued misleading investor communications, and deliberately failed to inform investors of important developments with the intention of misleading them as to the performance of the Fund.

2.24 On the question of the breaches of the two investment restrictions, the Tribunal found that:

> *"the breaches of the two investment restrictions were neither technical nor insignificant, but deliberate, persistent and foolhardy; in reality, as we have concluded, they contributed in large measure to the collapse of the Fund….It seems to us that even if (which we doubt) the strategy of investing heavily in*

NT Energy and Sandhaven, in particular, might initially have been regarded as a sensible course, it did not excuse the repeated and wholesale disregard of the restrictions. There was ample evidence, too, that Mercurius (at Mr Visser's direction) not only failed to take action to correct breaches when they occurred, but that it aggravated them by investing even more into the relevant stock. The restrictions were designed to prevent precisely that which happened, namely the over-reliance on a very small number of stocks with consequent imbalance in the portfolio and the risk, as happened, of uncontrollable losses."

2.25 The Tribunal concluded that Mr Fagbulu:

"knew very well that the restrictions had been breached. One or even two breaches might be regarded as inadvertent, but the number and frequency of the breaches in this case, and the length of time for which they endured, are quite inconsistent with inadvertence. Though we are willing to accept in his favour that Mr Fagbulu did not cause the breaches, by making investment decisions, he did nothing to correct them, or ensure they were corrected, once he became aware of them, and he was quite clearly a willing and active participant, with Mr Visser, in what we can describe only as a systematic concealment of the Fund's true position over a period of many months."

2.26 In relation to the market manipulation, the Tribunal concluded that,

"it is not a sufficient answer for Mr Fagbulu to argue that he dealt on Mr Visser's instructions. As we have said, we do not doubt that Mr Visser instigated the trades—he does not deny it—but we have equally no doubt that Mr Fagbulu understood perfectly what the purpose of the trades was, and that the result, if the exercise was successful, would be to inflate the NAV artificially. Mr Fagbulu is an obviously intelligent man who cannot possibly have thought, despite his lack of dealing experience, that the best way for a purchaser to make a bargain is to offer more than the seller is willing to accept. It is perfectly clear from his exchanges… that he had no interest at all in buying at the best available price. There is also no evidence that he protested, or reported …that the NAV had been increased by this means. The only conclusion to be drawn is that he willingly participated in market manipulation."

2.27 Accordingly, the Tribunal were satisfied that Mr Fagbulu was aware that the purpose of the purchases made by him, at the instruction of Mr Visser, "*was to drive up the price of the shares and the Fund's NAV* ."

2.28 With respect to the detrimental and fictitious transactions entered into by the Fund in February, March and October 2007, the Tribunal concluded that:

"while we accept that Mr Visser was the driving force behind the emergency borrowings in early 2007, and the fictitious or sham transactions in late 2007, we are satisfied that Mr Fagbulu knew their purpose and knew that the later transactions were not what they purported to be, even if he may not have been aware of all of the detail."

2.29 In respect of the detrimental financing transactions entered into in February and March 2007, the Tribunal found that,

> *"There can in our view be no doubt that these transactions were designed to secure short-term funds at a time when there was no other source of cash… We are unable to accept that Mr Fagbulu really believed that these were anything other than artificial transactions (there is no suggestion they were fictitious), or that he was under any illusion that, whether one describes them as disguised borrowings or otherwise, they were in reality a means of raising short-term and expensive funds."*

2.30 In respect of the fictitious transactions entered into in October 2007, the Tribunal further concluded that, although they were willing to accept that the transactions were instigated by Mr Visser:

> *"it is clear from the available documents that Mr Fagbulu was actively involved in them, and that he must have known that, even if he believed a profit would be made, it would not be immediate. His claim that Mr Visser's explanation satisfied him makes no sense: if the purchases were real, money (which on his own evidence the Fund did not have) would be needed for the settlement. The only possible inference we can draw is that he knew the transactions were artificial, if not completely fictitious, yet he cooperated with Mr Visser in the pretence."*

2.31 Finally, in relation to the fourth element, the issuance of misleading investor communications, the Tribunal concluded that Mr Fagbulu:

> *"embarked on a deliberate and calculated course of concealing facts from investors and of misleading them."*

2.32 The Tribunal did not accept Mr Fagbulu's claim that the investors were not in fact deceived or misled. In reaching this decision, the Tribunal formed the following conclusion on this issue:

> *"The impression we formed as Mr Fagbulu gave his evidence was not that information was withheld because it was too sensitive, but that a positive decision was taken, to which Mr Fagbulu was a party, that the Flash Reports and the Presentation would paint a favourable picture of the Fund's performance, and that the truthfulness and completeness of what was said was very much a secondary consideration. It became abundantly clear to us as we heard the evidence that much of what was in the Flash Reports was not merely inaccurate, but could be attributable only to a deliberate attempt to deceive. We do not accept that Mr Fagbulu did not know the information was untrue; we are, on the contrary, satisfied he did, even if he did not know what the truth was."*

2.33 In respect of the prohibition and withdrawal of approval, the Tribunal stated as follows:

> *"We agree with the Authority that those who fail, as in this case persistently and in several different ways, to comply with the obligations they have voluntarily assumed as approved persons, who engage in market manipulation, who breach the trust reposed in them by investors, and who systematically deceive those same investors, deserve to forfeit their right to carry on controlled activities and to suffer severe punishment. Those are not, and are not intended to be, alternatives; the first is designed to protect the public, the second to mark disapproval of the person's conduct and to deter others from similar actions."*

2.34 The Tribunal found that a penalty of £350,000, which had been originally recommended by the FSA's investigation team, was the correct starting point in respect of Mr Fagbulu's misconduct, taking into account Mr Fagbulu's cooperation with the FSA investigation. However, the Tribunal accepted there was some evidence of financial hardship provided by Mr Fagbulu and also determined that his was not a case in which the penalty should be fixed without regard to the bankruptcy it might cause. Nevertheless, the Tribunal stated that *"even a reduced penalty must be large enough to make it clear that conduct of the kind in which Mr Fagbulu engaged will be severely punished."* On this basis, the Tribunal reduced the penalty to £100,000.

3. IMPORTANT

3.1. Final Notice is given to Mr Fagbulu in accordance with section 390 of the Act.

Manner of and time for Payment

3.2. The financial penalty of £100,000 must be paid in full by Mr Fagbulu to the FSA by no later than 4 October 2011, 14 days from the date of the Final Notice.

If the financial penalty is not paid

3.3. If all or any of the financial penalty is outstanding on 4 October 2011, the FSA may recover the outstanding amount as a debt owed by Mr Fagbulu and due to the FSA.

Publicity

3.4. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

3.5. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

3.6. For more information concerning this matter generally, you should contact Greg Brandman (020 7066 3032) or Jonathan Baker (0207 066 1352) of the Enforcement and Financial Crime Division of the FSA.

Matthew Nunan
Acting Head of Department
FSA Enforcement and Financial Crime Division