INITIAL DECISION RELEASE NO. 860
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15842

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of TOTAL WEALTH MANAGEMENT, INC., JACOB KEITH COOPER, NATHAN MCNAMEE, AND DOUGLAS DAVID SHOEMAKER	INITIAL DECISION August 17, 2015

APPEARANCES: David J. Van Havermaat, John B. Bulgozdy, Gary Y. Leung, and Carol Lally for the Division of Enforcement, Securities and Exchange Commission

Vincent J. Brown for Jacob Keith Cooper

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings against Total Wealth Management, Inc. (Total Wealth), Jacob Keith Cooper (Cooper), Nathan McNamee (McNamee), and Douglas David Shoemaker (Shoemaker) on April 15, 2014. The proceeding is stayed as to McNamee, Shoemaker, and Total Wealth based on agreements in principle to settlements that will resolve the proceeding on all major terms. *Total Wealth Mgmt., Inc.*, Admin. Proc. Rulings Release No. 2306, 2015 SEC LEXIS 506 (Feb. 11, 2015); Admin. Proc. Rulings Release No. 2445, 2015 SEC LEXIS 1022 (Mar. 19, 2015).

I held a four-day hearing, March 30 through April 2, 2015. The final brief was filed on July 6, 2015.[1]

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[1] I will cite to the transcript of the hearing as "Tr. __." I will cite to the Division's and Cooper's exhibits as "Div. Ex. __," and "Resp. Ex. __." I will use similar designations in citations to the post-hearing filings.

Facts

The factual findings and legal conclusions are based on the entire record. I applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision.

Total Wealth Management and Jacob Cooper

Cooper is a resident of Washington, Utah. Tr. 668. He held Series 6 and 63 securities licenses and was associated with several broker-dealer and investment advisory firms from 2001 to 2005; he has not held any security licenses since 2005. Tr. 680-86. Cooper relinquished his insurance license in 2011. Tr. 733. Cooper has no undergraduate or post-graduate academic degrees; he attended the Berklee College of Music for the 1995-96 academic year. Tr. 668-69. Cooper represented, however, that he had a master's level academic certificate in Executive Financial Planning from San Diego State University and used CFP (Certified Financial Planner), CWPP (Certified Wealth Preservation Planner), and CAPP (Certified Asset Protection Planner), after his name.[2] Tr. 669-71, 676-77; Div. Exs. 19, 344 at 2. The master's level academic certificate Cooper referenced resulted from attending a single course. Tr. 669-70.

In September 2005, Cooper and Shoemaker founded Total Wealth Management, LLC (Total Wealth LLC), in San Diego, California. Tr. 688-89; Div. Ex. 357 at 24, 28.[3] Total Wealth LLC became a registered investment adviser in California in 2006. Tr. 692, 1116; Div. Ex. 357 at 29. Cooper and Shoemaker were the two owners of Total Wealth LLC, and Cooper served as CEO. Tr. 689, 691.

In 2008, Cooper formed Total Wealth, a C corporation, to serve as a successor to Total Wealth LLC. Tr. 689-91, 740. Shoemaker relinquished ownership of Total Wealth LLC and became an independent contractor to Total Wealth. Tr. 689-91, 740; Div. Exs. 81, 357 at 30. That left Cooper as the CEO and sole owner of Total Wealth. Tr. 689. Cooper was also the only signatory on Total Wealth's bank accounts. Tr. 740-41. Total Wealth filed and became a Commission registered adviser in 2009, when its assets under management reached a level requiring registration with the Commission. Tr. 692. Cooper testified that Total Wealth had a fiduciary responsibility to put its clients' interests first. Tr. 719.

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[2] Cooper used the designation CFP from 2004 until 2014 when the CFP board requested Cooper cease using the CFP designation. Tr. 670-71. The CWPP and CAPP designations are awarded by the Wealth Preservation Institute; Cooper ceased using both designations in 2014. Tr. 676-77. Cooper also used the designation CSA, which was undefined at the hearing but appears to refer to "Certified Senior Adviser." Div. Ex. 344 at 2.

[3] Shoemaker gave investigative testimony under oath on October 30, 2012, and invoked the Fifth Amendment when called by the Division to testify on March 30, 2015. Tr. 139-43; Div. Ex. 357 at 1. Upon the Division's request, I admitted Division Exhibit 357 into evidence pursuant to Rule 235, 17 C.F.R. § 201.235. Tr. 145-46.

Total Wealth had three chief compliance officers (CCO) throughout its existence. Shoemaker was Total Wealth's CCO from 2009 until 2011, when he was replaced by McNamee.[4] Tr. 712-13; Div. Ex. 99 at 107; Div. Ex. 125. Cooper also named McNamee as Total Wealth's President in mid-2011. Tr. 711-12. Brittany Fowler (Fowler), Total Wealth's office manager, became CCO after McNamee left Total Wealth in December 2013. Tr. 714, 1156-57. Fowler has a degree in Graphic Design from Dixie State University and did not hold any security licenses. Tr. 714.

Total Wealth LLC's original focus was insurance products. Tr. 691. As Total Wealth LLC grew and transitioned into Total Wealth, it began to focus on securities and assets under management while continuing its insurance business. Div. Ex. 357 at 29. Total Wealth's advisory business began growing at the end of 2008. Tr. 1118. It marketed itself as an expert in alternative investments, which Cooper agreed could be defined as anything that was not a traditional investment such as stocks, equities, bonds or cash. Tr. 747. Cooper promoted the idea that different asset classes and strategies lowered overall risk and increased returns. Tr. 171-72; Div. Ex. 3 at 3.

Beginning in 2003, while working for another company, Cooper and Shoemaker identified potential investors by hosting workshops and dinner seminars sponsored by the Society for Financial Awareness in San Diego, California, a nonprofit designed to spread awareness of financial industry issues. Div. Ex. 357 at 19-23, 89-90, 93. In 2005-06, Total Wealth hosted dinner seminars where invitations were sent to persons with annual incomes over $75,000. Div. Ex. 357 at 93-94. Cooper also obtained clients from hosting a radio show in San Diego, on broadcast time that he paid for from 2008 to 2011 and again in 2012, where he described alternative investments as a way to potentially reduce investment risk. Tr. 747-49.

Related Entities

As Total Wealth's business transitioned into securities and asset management, Cooper began to create other entities. In 2009, Altus Capital Management, LLC (Altus Management), was formed, with Total Wealth serving as its owner and managing member. Tr. 693-95; Div. Ex. 136 at 7. Altus Management had no employees or independent contractors, but served as the general partner for the Altus Capital Opportunity Fund LP (ACOF), an unregistered fund also created in 2009. Tr. 695, 699, 759; Div. Exs. 135 at 00009, 000050, 136 at 7. In 2011, with ACOF reaching its cap on investors, Cooper established the Altus Portfolio Series, containing six separate funds.[5] Tr. 699-700; Div. Ex. 357 at 114. I refer to the six Portfolio Series funds and ACOF collectively as "the Altus Funds." The Altus Funds were each a "fund of funds," meaning that it was a fund composed of various underlying funds, allowing investors to participate in

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[4] McNamee was hired by Total Wealth as an independent contractor on July 1, 2009. Div. Ex. 40.

[5] The funds were: (1) Altus Conservative Portfolio Series LP; (2) Altus Focused Growth Portfolio Series LP; (3) Altus Income Portfolio Series LP; (4) Altus Moderate Growth Portfolio Series LP; (5) Altus Moderate Portfolio Series LP; and (6) Altus Growth Portfolio Series LP. Tr. 699-701. Each of the six funds purportedly had a different investment strategy. Tr. 701.

various investment alternatives within one fund. Div. Ex. 357 at 59, 62, 65. Each Altus Fund offered a pool of approved funds that could be selected by investors. Tr. 703. Total Wealth and Altus Management served as the investment adviser and general partner, respectively, for all the Altus Funds. Tr. 701-02.

Cooper controlled Altus Management and the Altus Funds. He admitted that he controlled Altus Management, by virtue of being CEO and sole owner of its managing member, Total Wealth. Tr. 695. He was the sole signatory on Altus Management bank accounts. Tr. 740. Cooper controlled the Altus Funds through his control of their investment adviser, Total Wealth, and their general partner, Altus Management. Tr. 695-97, 702-03. Cooper's control included selecting which funds were added to each of the Altus Funds' "approved pool" of funds in which investors could invest. Tr. 703-04; *see* Div. Ex. 135 at 00050 (ACOF PPM stating that Total Wealth, "acting as Managing Member of the General Partner, will be responsible for investment decisions"). Total Wealth had discretionary authority over almost all client accounts. *See* Div. Ex. 325 at 1-2 (section titled "Discretionary Authority").

The Division's expert found that while Total Wealth offered a range of possible investments, through its discretionary authority over client accounts, it primarily invested client money in private unregistered hedge funds and private unregistered investment vehicles that were not directly marketed to the public. Div. Ex. 271 at 12. Total Wealth clients could invest with these entities in one of two ways. They could invest in these private funds directly, or they could invest in these funds by investing in one of the Altus Funds that held that investment. Div. Ex. 357 at 112-15, 117-19. The latter option offered clients the possibility of less paperwork and allowed clients, in theory, to be able to pool their investments together to meet a minimum required investment amount in certain funds. Div. Ex. 357 at 115, 118-19.

Pinnacle Wealth Group, Inc. (Pinnacle), is a corporation that Cooper formed in 2005. Tr. 704-05. Cooper was the sole owner and only employee. Tr. 705.

Cooper exercised total ownership and control over Total Wealth and related entities since 2009. Tr. 695, 699, 705, 740, 829. According to Shoemaker, in 2012, Total Wealth had between 350 and 400 clients and six investment advisers, including Cooper and Shoemaker. Div. Ex. 357 at 63, 79-80. Total Wealth and the Altus Funds peaked at the end of 2012, or the beginning of 2013, with over 500 accounts and nearly $130 million in assets under management. Tr. 753.

Revenue Sharing and Consulting Agreements

Total Wealth and the Altus Funds invested client money in various funds. Cooper and Total Wealth entered into revenue sharing agreements with many of these funds, whereby Total Wealth would receive some portion of the fees that the funds charged Total Wealth's investors. Tr. 759-60. Among the funds with revenue sharing agreements with Total Wealth were Private Placement Capital Notes II, LLC (PPCN II);[6] Aegis Atlantic, LLC (Aegis Atlantic); Aegis Retail

[6] According to the Division, there were two offerings: Private Placement Capital Notes LLC (PPCN), in 2007, and Private Placement Capital Notes II (PPCN II) in 2010. Tr. 845, 895, 903;

Group, LLC (Aegis Retail); Metropolitan Coffee and Concession, LLC (Metro Coffee); Rainmaker Capital, Inc. (Rainmaker); LJL Funding, LLC (LJL); Prime Meridian Income Fund; Moneta Macro Global Equity Fund (Moneta Macro); Moneta Income Fund; and Luminary Commodities Future Fund. Tr. 760-61, 813, 822-23. Total Wealth received the revenue sharing payments whether or not the underlying fund was profitable. Tr. 808, 827.

Many of these revenue sharing agreements stem from Cooper's relationship with Don Davis (Davis), who managed or was associated with several of the funds listed above. For example, Rainmaker, a "fund of managed futures managers," managed by Davis, entered into several revenue sharing agreements with Total Wealth between 2009 and 2011. Tr. 801; Div. Exs. 141, 142, 143, 144, 271 at 23. In 2009, Cooper signed a revenue sharing agreement with Rainmaker. Div. Ex. 141. The agreement provided that Total Wealth, described as a consultant, would introduce interested investors to Rainmaker and Rainmaker would pay Total Wealth a 10% incentive fee and a 1% annual management fee, out of the 2% that Rainmaker charged. Tr. 806; Div. Ex. 141 at 1. In 2010, Cooper signed another revenue sharing agreement with Rainmaker, providing for a 5% incentive fee and a 1.5% management fee. Tr. 827-28; Div. Ex. 142 at 1. In 2011, Total Wealth and Rainmaker entered into two new revenue sharing agreements, under which Rainmaker was paying its *entire* management fee to Total Wealth. Tr. 836-37; Div. Exs. 143 at 1, 144 at 1. Therefore, a Total Wealth client who invested in Rainmaker would pay two sets of management fees: 1% to 1.4% directly to Total Wealth and 2% to Rainmaker, which Rainmaker would then provide to Total Wealth. Tr. 839.

Likewise, in 2009, Total Wealth entered into a revenue sharing agreement with Moneta Capital Management, LLC (Moneta Capital), whereby Total Wealth promised to "introduce to Moneta [Capital] investors that are interested in investing," in exchange for a 5% incentive fee and a 0.5% management fee, out of the 2% Moneta Capital charged. Div. Ex. 140 at 1. Davis also introduced Cooper to the Aegis Atlantic and Aegis Retail funds (collectively, Aegis), and their constituent investments, including Metro Coffee.[7] Tr. 981-82, 1045. Total Wealth then entered into a revenue sharing agreement, titled a "Management Agreement,"[8] with Aegis and Metro Coffee, by which it received 2.25% of the aggregate capital invested by clients of Total Wealth in exchange for various management services. Tr. 1055-56; Div. Ex. 139.

Div. Ex. 53 at 1. PPCN in 2007 was to invest primarily in bridge loans while PPCN II, gave the principal, Tony Hartman, wide discretion in selecting investment opportunities. Tr. 915-16

[7] Aegis Retail was involved in an "East Coast project," which was a planned restaurant in the Lipstick Building in New York City. Tr. 1169-70; Div. Ex. 357 at 192-93, 207; Resp. Ex. 334. The restaurant was called Sprig or Preserve24 and featured a piano hung from the wall. Tr. 1170, 1173-74, 1176-78; Resp. Ex. 337. According to the audited 2010 financials of Metro Coffee, Aegis is the Managing Member and Metro Coffee "holds a supply and license agreement with Peet's Coffee and Tea Company to operate four Peet's Coffee and Tea Cafes within the San Francisco Bay area." Div. Ex. 195 at 7.

[8] Cooper agreed that management agreements were revenue-sharing agreements. Tr. 860.

Total Wealth also entered into a revenue sharing agreement with LJL starting sometime in 2008. Tr. 779-82; Div. Ex. 15. In exchange for referring "prospective investors" to LJL, Total Wealth received, for the first year, 1% annually of its client funds invested in LJL, to be followed by 0.5% annually in perpetuity. Div. Ex. 15 at 1-2. After entering into the revenue sharing agreement, Total Wealth invested client assets into LJL. Tr. 789. LJL also gave Cooper a mortgage on his Utah home purchase, though he received no "breaks" on the mortgage. Tr. 792.

In addition, Cooper, through Pinnacle, had consulting agreements with entities affiliated with funds in which, discussed below, Total Wealth and the Altus Funds invested client money. Cooper entered into a consulting agreement with JOMAC, LLC (JOMAC), an entity affiliated, in that it shared two managers, Michael McNamara (McNamara) and John Staiano (Staiano), with a fund called Life's Good S.T.A.B.L. Mortgage Fund, LLC (Life's Good). Div. Exs. 352, 354. The consulting agreement called for Cooper, through Pinnacle, to be paid $12,500 a month in addition to a $15,000 retainer. Div. Ex. 352. Cooper also entered into a consulting agreement, through Pinnacle, with a Davis-affiliated entity named Novus Investments (Novus). Tr. 1042-43.

Cooper also had consulting agreements with the Denver Financial Group (Denver Financial) and its principal, Tony Hartman (Hartman), who also served as the principal for the PPCN and PPCN II offerings. Tr. 843-44. Denver Financial began making payments to Cooper, through Pinnacle, starting in 2007. Tr. 844-45. A signed agreement in 2009 directed that Cooper, through Pinnacle, would be paid $150 an hour for consulting services. Tr. 848; Div. Ex. 56. Later in 2009, another written agreement was signed, by Hartman and Cooper, whereby Denver Financial paid Pinnacle $36,000 a month for consulting services. Div. Ex. 57. Shortly after, in early 2010, that number was negotiated upwards to $60,000 a month. Tr. 854-55; Div. Ex 108. Finally, in an agreement on June 30, 2010, Total Wealth entered into a revenue sharing agreement with PPCN II, signed by Hartman and Cooper, and replacing the prior consulting arrangements between Denver Financial and Pinnacle; this agreement was executed the day after Cooper received an inquiry from the Commission about Total Wealth's investment in Life's Good. Tr. 858-60, 963; Div. Ex. 60. The revenue sharing agreement called for Total Wealth to be paid 1.5% of the amount of money Total Wealth clients invested in PPCN II. Tr. 862-63; Div. Ex. 60 at 4.

Cooper claims to have mostly performed these consulting services by phone; he had no written work product. Tr. 817, 852, 1044, 1078. Cooper negotiated and signed all of these revenue sharing and consulting agreements. *See* Div. Exs. 15, 56, 57, 60, 139-44, 352.

<u>Cooper's Investment Allocations</u>

To the extent that financial records exist, they demonstrate that a large portion of Total Wealth's client funds were invested in entities with revenue sharing or consulting arrangements.[9]

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[9] Cooper testified that most clients were invested in funds with revenue sharing agreements, especially as investors began liquidating out of the Altus Funds. Tr. 811-12.

The report of the Receiver for Total Wealth, Kristen Janulewicz (Janulewicz) is particularly illuminating.[10]

According to the Receiver's Report, many of the Altus Funds, despite having different investment objectives and risk profiles, contained essentially the same set of investments, among which were PPCN II, Aegis Retail, Aegis Atlantic, Metro Coffee, Rainmaker, LJL, and Novus, all subject to revenue sharing or consulting agreements. Div. Ex. 310 at 17; s*ee also id.* at 26 (showing similar investments currently held across the Altus Funds). Therefore, it is not surprising that a large portion of client funds were invested into entities with revenue sharing and consulting agreements. As of the publication of the Receiver's Report, nearly $30 million of the Altus Funds' estimated assets of $38 million remain invested in PPCN II, an entity subject to a revenue sharing agreement with Total Wealth and previously subject to a consulting agreement with Pinnacle. Div. Exs. 60, 310 at 26. For ACOF, the largest of the Altus Funds, the Receiver estimated that 88% of its current assets are invested in three funds—PPCN II, LJL, and Metro Coffee—that were subject to revenue sharing or consulting agreements. Tr. 539-40; Div. Ex. 310 at 26. Based off my calculations, and relying on the Receiver's estimates of Altus Fund assets, over 90% of the total Altus Funds' remaining assets are in those three funds.[11] *See* Div. Ex. 310 at 26. This is not a new development, as ACOF's 2010 audited financials indicate that at least 90% of its investments at the time were in entities with revenue sharing agreements. Div. Exs. 68, 271 at 10.

The fact that client funds were highly concentrated in certain entities, and not diversified, put those clients at risk if those entities did not perform. In large part, that is precisely what happened.

For instance, after Total Wealth and ACOF had invested approximately $2.4 million of client funds in Life's Good, the Commission notified Cooper that Life's Good was a Ponzi scheme operated by Robert Stinson, a recidivist offender. Tr. 1021-22; Div. Ex. 310 at 19; *see SEC v. Stinson*, No. 10-cv-03130-BMS (E.D. Pa.); *United States v. Stinson*, No. 2:10-cr-00724 (E.D. Pa.). On July 7, 2010, Cooper informed Total Wealth and ACOF investors of Life's Good status. Tr. 1024; Div. Ex. 346. Total Wealth wrote the value of its Life's Good investment down to zero between January 1 and September 30, 2010. Tr. 572; Div. Ex. 310 at 19. The Life's Good investments caused Total Wealth and the various funds to write off approximately $2.4 million in asset value. Tr. 572. In 2011, the Receiver of Life's Good sued Cooper; Cooper

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[10] In February 2015, the Commission obtained the appointment of a Receiver for Total Wealth in *SEC v. Total Wealth Mgmt., Inc.*, No. 15-cv-226 (S.D. Cal), ECF No. 8. Janulewicz graduated from Cal State Fullerton in August 2003, with a degree in Accounting. Tr. 532. She has been a Certified Public Accountant in the State of California since April 2008, and is employed by Thompson & Company. Tr. 532. Her report is in evidence as Division Exhibit 310.

[11] Based on my calculations, the investments in the LJL, PPCN II, and Metro Coffee entities, including unpaid loans, totals $34,940,779 out of the estimated remaining $38,698,288 in assets. *See* Div. Ex. 310 at 26.

testified that he settled the lawsuit. Tr. 1039-40; *see* Receiver's Ancillary Compl., *Schwartzman v. Jomac, LLC*, No. 2:11-cv-06027 (E.D. Pa.), ECF No. 1.

Total Wealth invested approximately $18 million in Aegis: over $12 million in Aegis Atlantic and over $5 million in Aegis Retail, but by May and July 2014, Total Wealth had written down the value of both investments to zero. Tr. 553-54. While an investment in Metro Coffee is still listed on the books of the Altus Funds, the Receiver believes that this investment of over $3 million dollars is mostly worthless and that Metro Coffee was insolvent since inception; Metro Coffee currently operates four Peet's Coffee & Tea Inc. (Peet's) kiosks in San Francisco BART stations and was placed in bankruptcy in 2014. Tr. 552; Div. Ex. 310 at 3, 17-18, 26. In May 2011, Aegis and Metro Coffee sued Peet's for "nixing an agreement under which Aegis agreed to help Peet's expand in the New York area." Tr. 568-69; Div. Ex. 271, App. P at 3. Yet even so, after June 1, 2011, Total Wealth and funds it managed dispersed $3,777,720.62 to various Aegis entities. Tr. 569; Div. Ex. 347. All told, Cooper estimates that investor losses in Aegis Atlantic, Aegis Retail, and Metro Coffee will be at least $18 million. Tr. 1071. Another fund, LJL, suspended revenue sharing in 2012 and liquidated at some point after, possibly in 2013. Tr. 789-91; Div. Ex. 15.

The most staggering losses, potentially, come from Total Wealth's massive investment in PPCN II. Total Wealth is PPCN II's largest single creditor, and the Receiver's Report shows PPCN owes Total Wealth's funds $29.8 million.[12] Tr. 551; Div. Ex. 310 at 26. PPCN II appears to be deeply troubled: its principal, Hartman, told the Receiver that its assets included a golf resort under development and requiring substantial repair, which was being refinanced; a $3 million investment in Good Earth Minerals, which had non-revenue producing calcium sulfate mines in Utah; and $2 million in loans backed by first deeds. Tr. 545-46; Div. Ex. 310 at 12, 15. Hartman did not have funds for a $150,000 investment obligation. Tr. 547. Neither Hartman nor his attorney supplied the Receiver with requested documentation, including 2013 audited financials for PPCN II. Tr. 548-51. Hartman also refused to provide information about payments by PPCN II and Denver Financial to Total Wealth, Cooper, Altus Capital, and Pinnacle, PPCN II's financials for 2010-11 and 2013-14; and a list of all PPCN II assets. Tr. 551-52, 844.

Cooper began winding down Total Wealth and the Altus Funds in January 2014, and returned more than $6 million to investors between July 2014 and January 2015. Tr. 192-93; Div. Exs. 310 at 11, 337. Cooper sent out a letter dated March 14, 2014, informing clients that:

> If you are receiving this, you are an investor in one or two (or both) Aegis investment opportunities, namely Metro Coffee and Concessions (which operates as a licensee of Peet's Coffee and Tea and owns several Peet's locations along the BART system in the bay area) and Aegis Atlantic (which owns and operates Preserve24 restaurant in Manhattan).

[12] The value was set by PPCN. Tr. 1068-69. There is no evidence of actual market value.

> . . . Going forward, we are working diligently on a recovery plan to salvage as much of our investment in Metro Coffee and Concessions and Preserve24 as we can. *This is a salvage mission.*
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> . . . Perhaps, however, the most notable change is that Altus now is in a position to assist with Aegis' business activities going forward, and will make every effort to mitigate losses to the greatest extent possible.
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> . . . While a conflict of interest indeed can exist with Altus being closely involved in the management of the various entities, it is important to note that neither Altus, [Total Wealth], nor any of their offices or employees, have any economic interest in the Aegis entities or are receiving any form of compensation.

Div. Ex. 328; Tr. 405-06.

In total, the Receiver estimates that, as of February 10, 2015, Total Wealth and the Altus Funds have 319 remaining investors and assets of almost $38.7 million. Tr. 539; Div. Ex. 310 at 26. The estimated total losses to Total Wealth and Altus Funds investors could be as high as $43.9 million. Div. Ex. 310 at 26. Total Wealth vacated its San Diego office in approximately October 2014, with several months of rent payments outstanding. Tr. 534-35.

<u>Revenues Received from Revenue Sharing Agreements</u>

Despite enormous losses for their investors, the revenue sharing and consulting agreements proved extremely lucrative for Total Wealth and Cooper. Total Wealth had total income of approximately $388,000 in 2009, $587,000 in 2010, $1.2 million in 2011, $1.6 million in 2012, and $1.7 million in 2013, for a total of $5.6 million across those years. Div. Ex. 1. Of that total, advisory fees earned directly either from its clients or from clients of the Altus Funds constituted approximately $3.6 million. Tr. 732-33; Div. Ex. 1. Fees from the revenue sharing agreements were also a major revenue component: $46,000 in 2009, $111,000 in 2010, $369,000 in 2011, $415,000 in 2012, and $284,000 in 2013, for a total of $1.2 million. Div. Ex. 1. Cooper admitted that investing client funds in entities with revenue sharing agreements provided an added financial benefit to Total Wealth and himself. Tr. 811.

These findings are corroborated by the Receiver, who found specifically that Total Wealth received approximately $1.3 million in revenue sharing fees between October 2009 and September 2014, including: 1) $124,242 from Aegis Retail in 2011-12; 2) $106,879 from LJL in 2010-12; 3) $349,383 from PPCN in 2012-14; and 4) $198,890 from Rainmaker in 2009-14. Div. Ex. 310 at 13-14. The Receiver's report also noted that the payments from Aegis Retail and LJL were unusual given the massive losses both funds experienced during the period specified. *Id.* at 13-14.

Likewise, Dora Zaldivar (Zaldivar),[13] a Division accountant, presented a summary of the general ledger cash account data showing Total Wealth received $982,057.72 in fee sharing from October 2009 through February 2014, broken down as follows: 1) $249,566.45 from PPCN; 2) $190,691.48 from Aegis Atlantic; 3) $123,064.47 from Aegis Retail; 4) $72,298.59 from Metro Coffee; 5) $44,027.22 from LJL; 6) $43,421.18 from an LJL "Secured High Yield Income Fund"; 7) $33,897.37 from Rainmaker; 8) $44,529.26 from First Trust Company of Onaga;[14] 9) $38,608.97 from Reich and Tang; 10) $3,600 from Pacific West Capital Group, Inc., and 11) $138,352.73 from an unknown source. Tr. 600, 612-13; Div. Exs. 272A, 272B.[15]

Cooper also received sizable sums from the consulting arrangements entered through Pinnacle. Pinnacle had revenue of $838,154 in 2009, and $800,943 in 2010. Tr. 1202-03. A substantial portion of that revenue was consulting fees. The Receiver reported that Pinnacle received approximately $415,000 in "solicitor fee revenue" from Denver Financial. Div. Ex. 310 at 14. Other documents, produced by Denver Financial, peg that number at $585,657.53 just for the years 2007 to 2010. Tr. 979-80; Div. Ex. 55. Still another document, obtained from Pinnacle, places the number received from Denver Financial at $415,000, with an additional $52,500 coming from Brentwood Equity, an entity affiliated with JOMAC, and $366,435.27 coming from Dynamic Sales Inc., which was another name for Novus. Tr. 981-82; Div. Ex. 348.[16] Finally, records examined by Zaldivar show that between October 2009 and May 2013, Pinnacle received $845,048.58 in consulting fees, split the following ways: 1) Denver Financial paid, in total, $468,000; 2) Novus paid $307,664.58; and 3) JOMAC paid $69,384. Div. Ex. 272C.[17]

[13] Zaldivar, a graduate of Cal State Los Angeles with a bachelor's of science in business, has been a Certified Public Accountant for approximately fifteen years and a certified fraud examiner for approximately twelve years. Tr. 587-88. Zaldivar performed audits and investigations with two major accounting firms for thirteen years prior to joining the Division in July 2008. Tr. 586-87.

[14] Cooper claimed that the fees from Onaga were not revenue sharing but merely advisory fees that had been wrongly classified. Tr. 734.

[15] Zaldivar created these summary exhibits based off the information she found in Total Wealth and Pinnacle's general ledgers; she did not authenticate or define what the financial records represented. Tr. 650, 655-57.

[16] Division Exhibit 348 was created by Zaldivar as a summary of the entries contained within the "solicitor fee" account in Pinnacle's general ledger. Tr. 570.

[17] Pinnacle's general ledger did not identify the source of solicitor fee deposits; to determine the source, Zaldivar matched the payments with the bank accounts for Pinnacle. Tr. 620-22.

Cooper was well compensated. The Receiver, relying on Total Wealth's general ledger and other accounting records, concluded that his total pay from February 2010 to December 2014 was $1,884,753.58. Tr. 566-68; Div. Ex. 350.[18]

Due Diligence

In its Forms ADV, Total Wealth touted that the due diligence it conducted on its investments was rigorous and extensive:

> Generally, [Total Wealth] uses a variety of analytical information to assist with its security analysis. Such information may include charting, fundamental and technical analysis, and from time to time cyclical analysis. The primary sources of information used by [Total Wealth] include market news reports, financial publications, corporate rating services, outside research reports, annual reports, prospectuses, private placement memorandums, offering circulars, SEC filings, and company press releases. [Total Wealth] measures and selects mutual funds by using various criteria, such as the fund manager's tenure, and/or overall career performance.
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> . . .
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> In selecting Independent Managers and allocating assets among them, [Total Wealth] considers both quantitative and qualitative factors including, but not limited to, an Independent Manager's performance during various time periods and market cycles; an Independent Manager's reputation, experience and training; its articulation of, and adherence to, its investment philosophy; the presence and deemed effectiveness of an Independent Manager's risk management discipline; the structure of an Independent Manager's portfolio and the types of securities or other instruments held; its fee structure; on-site interviews of an Independent Manager's personnel; the quality and stability of an Independent Manager's organization, including internal and external professional staff; and whether an Independent Manager has a substantial personal investment in the investment program it pursues.

Div. Exs. 120 at 12, 218 at 12, 220 at 12, 224 at 12; *see also* Div. Ex. 136 at 11-12 (containing similar language).

ACOF's sales literature made similar claims, assuring investors that the ACOF team "conducts regular reviews of all Fund investments including on-site manager visits and in-depth qualitative and quantitative due diligence." Div. Exs. 3 at 21801-02, 122 at 3819. In person, Cooper extolled his rigorous due diligence to investors, claiming that due diligence was

[18] Cooper denies receiving certain payments listed on Division Exhibit 350, such as $138,143.66 on December 31, 2014, and the two payments on August 22 and September 30, 2014, totaling $289,849.93. Tr. 1204; Div. Ex. 350.

something he "took great pride in," that "he was very thorough with making sure that [client] money was invested with [their] goals," that "due diligence was a huge part" of Total Wealth's business practices, and that they were "very rigorous . . . before client money went into these investments." Tr. 115, 379.

According to Shoemaker, due diligence was conducted by Cooper. Div. Ex. 357 at 195-96. Cooper admitted that Total Wealth's due diligence was probably "lacking." Tr. 757. He testified that after Life's Good was revealed as a Ponzi scheme, he realized that Total Wealth's due diligence program needed improvement. Tr. 755-56, 1021.

Cooper testified that his due diligence on Rainmaker in 2009 consisted of reviewing the financial profiles of its underlying managers on a service called Autumn Gold, conversations with Davis, a review of Davis's status with the National Futures Association, and a look at the identity of Rainmaker's legal counsel and auditor. Tr. 796-800. Cooper also testified that his due diligence on Rainmaker came at a time when "we were still growing our compliance and due diligence program," and that with the benefit of added knowledge, he would have also performed a site visit. Tr. 798-99. Cooper admitted on cross examination that he was not aware of any parameters on Rainmaker's investments except that the investments were "managed future commodities or options," that he was not aware of the criteria Davis would use to choose fund managers, and that Total Wealth had no control over Davis's decisions as to Rainmaker. Tr. 803-05.

For his due diligence on the two PPCN funds (I and II), Cooper, as a result of his consulting agreements with PPCN II, had access to various financial documents. Tr. 894. Among these documents were financial statements related to PPCN I, which showed that PPCN I ended 2009 with only $8,000 in cash and nearly $11 million in liabilities. Tr. 894-96; Div. Ex. 192 at 2. PPCN I's financial statement further revealed that the entity had converted its interest in three investments from debt to equity, which Cooper agreed potentially meant those loans were no longer paying. Tr. 897-98; Div. Ex. 192 at 5. Moreover, PPCN I planned to merge into PPCN II, and PPCN I had a note payable from PPCN II worth $600,000. Tr. 906-07; Div. Ex. 192 at 6. Nonetheless, Cooper was still comfortable with the finances of PPCN I and PPCN II. Tr. 901. During his due diligence, Cooper also had access to the PPM for PPCN II and was comfortable with the wide discretion given to PPCN II in selecting investment opportunities. Tr. 913-16; Div. Ex. 53. Cooper knew that the 12.5% interest paid to PPCN II noteholders was not guaranteed. Tr. 917-18, 926; Div. Ex. 53 at 00017-18. Shoemaker testified that a lot of due diligence for PPCN was done over phone conversations, but that Cooper also did internet research on Hartman, PPCN's principal. Div. Ex. 357 at 155, 166. Total Wealth began recommending its clients invest in PPCN I before Total Wealth had any audited financials from PPCN. *Id.* at 157.

Cooper first heard of Life's Good from a client. Tr. 991-92. After reaching out to Life's Good, Cooper was contacted by McNamara and Staiano of Brentwood Equity, a selling agent. Tr. 989. They gave him audited Life's Good financials for 2008, Morningstar rating reports, Barclays rankings, and the sales brochure. Tr. 988-92. Cooper reviewed the documents and was impressed, particularly with the Morningstar report, though the client who had referred Life's Good was skeptical. Tr. 997-98; Div. Ex. 355. He also performed Google searches on Stinson, Life's Good's principal. Tr. 1027; Div. Ex. 357 at 166. On February 22, 2010, Cooper participated in a call regarding Life's Good with McNamara, Staiano, and Stinson. Tr. 1001-03. McNamara and Staiano were also managers for Life's Good, and affiliated with JOMAC, and during the call, the parties also discussed a potential consulting agreement between Cooper and JOMAC. Tr. 1003-04; Div. Exs. 352, 354 at 5. By the next day, Cooper was recommending Life's Good, and very shortly afterwards, began directing investor funds into Life's Good. Tr. 1005-06, 1010. About a week after that, Cooper, through Pinnacle, entered into a consulting agreement with McNamara and Staiano, through JOMAC. Tr. 993-94; Div. Ex. 352. In April 2010, Cooper finally met some of the principals of Life's Good in person. Tr. 1010-11. In June of that year, Cooper was informed that Life's Good was a Ponzi-scheme. Tr. 1020-21.

In determining whether to recommend investments in Metro Coffee, Cooper relied on quantitative measures such as standard deviations and Sharpe ratios. Tr. 1048. Cooper defended his due diligence procedures and argued that there were "at least four" times he declined to invest in entities after conducting due diligence, even when those entities offered revenue sharing agreements. Tr. 1119, 1162-64; *see* Resp. Ex. 326.

Disclosure

In December 2008, Total Wealth hired Compliance Works, Inc., a compliance consulting firm, to perform an inspection of its compliance program. Tr. 459-60. The inspection was performed by Jeffrey James Groves (Groves)[19] and Kelley Barker-Alfino on January 27, 2009, and a few weeks later, they issued a report. Tr. 462, 500; *see* Div. Ex. 126. Both Cooper and Shoemaker participated in the inspection, though in general Groves' primary contact was Shoemaker. Tr. 460, 462. Cooper also attended the opening meeting, occasionally questioned disclosures being made in marketing materials, and attended the exit meeting. Tr. 461-62, 469, 505-06.

Groves found Total Wealth to have glaring compliance deficiencies in that it had no compliance manual, no documented training activities, no documentation of trading activity, no trading blotter, no order tickets, no code of ethics, no written policies and procedures manual, and in particular, an insufficient Form ADV that did not disclose conflicts of interest. Tr. 463-65, 467, 481-83, 504-05. One of the conflicts that Groves felt needed to be disclosed was that Pinnacle was owned by Cooper, and was therefore an affiliated entity. Tr. 471-72; Div. Ex. 126 at 429. Groves drafted a Form ADV that disclosed the existence of Pinnacle. Tr. 1100; Resp. Ex. 317. At the inspection, Groves was not told that Total Wealth or Pinnacle had entered into

[19] Groves graduated with a degree in finance from Cal State Fullerton and did some graduate work at Pepperdine University. Tr. 449. He completed a FINRA certified regulatory compliance professional program in 2005, requiring nearly a year and a half and sixty classroom hours. *Id.* After graduating college, Groves worked in the financial industry and eventually became the chief compliance officer for an investment/valuation firm between 1997 and 2005. Tr. 450-53. After that firm was wound down, he worked as a senior compliance consultant for a year at a company called Compliance Max, and then in 2007, founded Compliance Works. Tr. 453-54.

revenue sharing or consulting agreements with other entities. Tr. 472-73, 483. Groves expected that a client would have informed him of such an agreement and that such agreements required disclosure. Tr. 484, 488. In February or March of 2009, Groves began drafting a Form ADV for Total Wealth. Tr. 486.

A half year later, in August or September 2009, Groves was finally told of the existence of the revenue sharing and consulting fee agreements. Tr. 488-89. Groves testified that there were at least two instances in which this should have been disclosed, in January 2009 during the inspection, and a few months later when Groves began drafting Total Wealth's Form ADV. Tr. 489. Both Cooper and Shoemaker had opportunities to disclose it. Tr. 489. Groves felt that the existence of these revenue sharing agreements was a clear conflict of interest, and was "dumbfounded" that they had not been disclosed or discussed earlier; he felt disclosure of these agreements was "absolutely crucial." Tr. 490. In September 2009, Groves drafted new language for Total Wealth's Form ADV, with the "primary objective" of disclosing the conflict of interest regarding revenue sharing. Tr. 490-91; Div. Ex. 128. Groves disclosed the conflict in the following manner:

> The Adviser routinely purchases a certain type of security, usually a limited partnership interest with a hedge fund or other type of unregistered investment vehicle, on behalf of a client of the Advisor. The Advisor has entered into solicitation agreements with the firms offering the investment product and as a result of placing a client in those investment products, the Adviser may receive a referral fee. The referral fee may be up to 20% of the management fee charged by the limited partnership fund. The amount of the management fee charged to a client is not affected by the referral fee. However, a conflict in interest arises as the referral fees create an financial incentive to purchase securities from funds that customarily pay referral fees or for the purchase of funds with higher levels of referral fees.

Div. Ex. 128 at 1.

Groves felt that this level of disclosure was needed to make it clear to clients that Total Wealth had "received payment from a non-client regarding investment products that are used in the client portfolios of Total Wealth Management." Tr. 492. He used the language "routinely purchases" because Shoemaker had indicated to him that investments in entities with revenue sharing agreements "were extensively used in client portfolios." Tr. 493. Shortly afterwards, Groves prepared a second, final, version of the disclosure, with slightly different language:

> The Adviser routinely purchases a certain type of security, usually a limited partnership interest with a hedge fund or other type of unregistered investment vehicle, on behalf of a client of the Advisor. The Advisor has entered into solicitation agreements with the firms offering the investment product and as a result of placing a client in those investment products, the Adviser may receive a percentage of the investment advisory fees charged by the firm offering the security. The percentage of the investment advisory fees may be up to 50% of the management fee and performance

> fee (as applicable) charged by the limited partnership fund. The amount of the management fee charged to a client is not affected by the referral fee. However, a conflict in interest arises as the split of investment advisory fees creates an financial incentive to purchase securities from funds that customarily provide for the Adviser to share in the investment advisory fees or for the purchase of funds with higher percentage splits of investment advisory fees.

Div. Ex. 131 at 1; Tr. 494-95.

Groves felt that these disclosures were necessary because there was an actual conflict of interest because the revenue sharing agreements actually existed and were in operation. Tr. 496. However, shortly after submitting this draft in October 2009, Groves and his company were terminated by Total Wealth. Tr. 499. Shoemaker informed Groves that the "arrangement wasn't working for them." Tr. 500.

Total Wealth did not use the disclosures drafted by Groves.[20] Tr. 496-97. Instead, Total Wealth filed a Form ADV dated May 24, 2010, stating that "[t]he Adviser *may* have arrangements with certain Independent Managers whereby the Adviser receives a percentage of the fees charged by such Independent Managers." Div. Ex. 136 at 8 (emphasis added); *see also* Div. Exs. 120 at 5, 218 at 5, 220 at 5, 224 at 5. Cooper testified that the revised Form ADV was done by Michelle Jacko's (Jacko) consulting firm, Core Compliance and Legal Services, and that she or someone working for her altered the disclosure language that Groves had drafted. Tr. 1114-16, 1140-41. Similarly, ACOF's PPM, dated December 1, 2009, stated that "[s]ome Private Funds *may* pay the General Partner or its affiliates a referral fee or a portion of the management fee paid by the Private Fund to its general partner or investment adviser, including a portion of any incentive allocation." Div. Ex. 135 at 00066 (emphasis added).

Groves testified that the language in the filed Forms ADV did not adequately disclose the conflict of interest caused by the revenue sharing agreements because it uses the word "'may' as opposed to 'is' when there was, in fact, already existing agreements." Tr. 497-98. He further testified that the word "may" suggests "there's a conditionality that the agreements may or may not have been in place which would appear to be incorrect." Tr. 527. Groves agreed that the deficiencies he found at Total Wealth were "glaring," noting that "[t]he disclosure with the ADV was completely ineffective . . . with respect to what was required to disclose in the Schedule F." Tr. 504-05. He also noted that there was no record of Total Wealth providing its Form ADV to clients, and in fact, Shoemaker, the CCO, was not aware that provision of the Form ADV to clients was required. Tr. 478-80.

When asked why Total Wealth's Forms ADV did not explicitly disclose the consulting agreements, Cooper said that he relied on advice from Jacko, testifying that:

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[20] However, Total Wealth did follow Groves's advice to draft a policies and procedures manual and to adopt a code of ethics. Tr. 512-13, 716-18; *see* Div. Exs. 87, 127.

> We told [Jacko] all about our private entities that were in place for consulting and tax planning, and they prepared language and the ADVs. It did not contain the names of our private companies. I don't know why it didn't, but we believed that they were leading us properly, and so went with their language.

Tr. 821.

Cooper also testified that both Groves and Jacko had been okay with Cooper's consulting agreements through Pinnacle, as long as they were properly disclosed. Tr. 820, 1099-1100. But Cooper testified that he terminated Groves because in mid-to-late 2009 an attorney told him the consulting agreements were not proper and he lost faith in Groves who had advised that the consulting agreements were allowable. Tr. 1113-14.

Cooper stated that for ACOF's PPM, he relied on compliance counsel John Lively (Lively), who had been referred to Total Wealth by Groves. Tr. 768-69, 771. Once Groves left, Cooper primarily relied on Jacko for advice concerning the appropriate disclosures in the Forms ADV. Tr. 774. Cooper also credits Jacko for helping put some already-existing oral revenue sharing agreements into writing. Tr. 779-82. Cooper stated that he relied on counsel to determine what disclosures were appropriate in marketing materials, and was never informed by counsel that marketing materials needed to disclose conflicts of interest. Tr. 946. Cooper also testified that before disclosures were made in Total Wealth's Forms ADV, he would disclose the existence of revenue sharing and consulting agreements orally to his clients. Tr. 809-10.

<u>Division's Expert Stephen Behnke</u>

Stephen Behnke (Behnke)[21] offered a twenty-nine page statement with sixteen appendices.[22] Div. Ex. 271, Apps. A-P. According to Behnke, Total Wealth and Cooper committed three major violations.

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[21] Behnke graduated from Arizona State University in 1971 with a bachelor's of science in economics and has been employed in the securities industry since 1972. Tr. 295; Div. Ex. 271 at App. A. His previous employers include Security Pacific National Bank; Crocker National Bank; MG Trading, LLC; Wiatrack-Behnke Capital Management; Montgomery Securities; Banc of America Securities; and Presidio Financial Partners, LLC. Div. Ex. 271 at App. A. Since 2009, Behnke has been Managing Director of the Bates Group, LLC, an expert witness and consulting firm. *Id*.

[22] App. A is Behnke's resume; App. B is a history of Behnke's trial, arbitration, expert report, publication and deposition history; App. C is the Initial Report and Recommendations and Petition for Instructions of Receiver, Kristen A. Janulewicz, *SEC v. Cooper,* No. 3:15-cv-00226 (Mar. 12, 2015); App. D is the Commission's Information for Newly-Registered Investment Advisers (modified Nov. 23, 2010); App. E is a letter to the Commission's Secretary from the Investment Adviser Association dated August 30, 2010, with attachments; App. F consists of copies of five internet postings from 2007-2009 concerning investment adviser disclosures; App. G is a Form ADV; App. H is a Draft of Total Wealth's Policies and Procedures Manual (effective : June__ 2010); App. I is an Alternative Investments Due Diligence Checklist; App. J

First, Behnke stated that Total Wealth and Cooper failed to disclose to clients that Total Wealth received referral fees from funds into which they invested client assets. Div. Ex. 271 at 6-11.

Cooper acknowledged that Total Wealth advised clients to invest in private funds from which Total Wealth received referral fees. Tr. 741. Behnke considered this to be a clear conflict of interest. Div. Ex. 271 at 8. For one, Behnke concluded that the "various arrangements for [Total Wealth] to receive fees from the Private Funds that [Total Wealth] was recommending to its clients had . . . a direct impact as to where clients' funds were invested." *Id.* at 10. Behnke pointed out that, according to its 2010 audited financials, ACOF had investments listed with a "Fair Value" of nearly $34.4 million and approximately 90% of those investments were in funds with revenue sharing agreements. *Id.*

However, Behnke found Total Wealth's Forms ADV, PPMs, and other materials provided insufficient disclosure of this fact, which was a clear conflict of interest. Tr. 306-15; Div. Ex. 271 at 10. Total Wealth's Form ADV disclosed only that it "may" receive revenue sharing from funds in which it invests, which Behnke considers misleading and insufficient because the revenue sharing arrangements were in fact in existence at that time, and thus required disclosure of an *actual*, as opposed to potential, conflict of interest. Tr. 360; Div. Ex. 271 at 10. In support, Behnke points to the general instructions to the Form ADV, which state that an adviser is obliged to avoid conflict of interest situations and to "provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage and can give informed consent to such conflicts or reject them." Div. Ex. 271 at 7.

Behnke found that Total Wealth and Cooper had multiple undisclosed arrangements with private fund managers and marketing agents to be paid based on the amount of investments by Total Wealth and the Altus Funds. *See* Div. Ex. 271 at 8-9. These included arrangements with LJL, Moneta Capital, PPCN, Rainmaker, Aegis Atlantic, Aegis Retail, and Metro Coffee. *Id*. Cooper, through Pinnacle, also had arrangements for monthly payments from Denver Financial, who shared a principal, Hartman, with PPCN II, and a consulting agreement with Novus. Tr. 1043; Div. Exs. 56, 60.

Second, Behnke opined that Total Wealth and Cooper failed to perform adequate due diligence on the investments offered to clients. Div. Ex. 271 at 11-27. Behnke found in most

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is a Due Diligence Checklist; App. K is an April 12, 2010, email exchange between Cooper and Davis; App. L is Commission Form D, Notice of Exempt Offering of Securities; App. M is a Morningstar webpage regarding Life's Good; App. N is a February 14, 2008, article from Morningstar titled "Morningstar Launches Star Ratings and Indexes for Hedge Funds"; App. O is an August 12, 2010, email from Cooper to Davis and Horrell; and App. P is a Summons in *Aegis Retail Group, LLC v. Peet's Coffee & Tea, Inc.,* No. 651326-2011 (Sup. Ct. May 17, 2011), ECF No. 1, and a May 18, 2011, Law360 article titled "Peet's Owes $200M for Expansion Pact Violation: Suit."

cases that what Total Wealth and Copper claimed was due diligence did not "come close to due diligence." Tr. 354-55. What Total Wealth referred to as its due diligence process was lacking in several aspects and Total Wealth's due diligence files did not contain the documentation required by Investment Advisers Act of 1940 (Advisers Act) Rule 204-2. Tr. 350-52. Behnke's review of Total Wealth's materials did not disclose evidence of basic due diligence measures such as visits to fund offices, interviews with fund personnel, and the verification of fund management's representations. Tr. 351-52. Behnke considers Total Wealth's "Due Diligence Checklist" relating to due diligence purportedly performed on AmeriFunds to "demonstrate[] a complete failure [by Total Wealth] to meet [its] duty to perform reasonable due diligence" because Total Wealth

> [D]id not perform an on-site visit; did not request or obtain legal or regulatory documents; interviewed only the manager and did not independently verify his representations; did not obtain compliance and operations policies; did not discuss IT, administration, or business continuity; [it] did not perform reference checks; and [it] limited their document evaluation to those documents available on AmeriFunds' website.

Div. Ex. 271 at 13-14, App. J. Behnke found "no evidence that [Total Wealth] performed reasonable or prudent qualitative due diligence on the Private Funds into which it placed its clients" and that Cooper's description of Total Wealth's due diligence processes "barely scratch the surface of good due diligence practices." Div. Ex. 271 at 21.

Behnke found serious fault with Total Wealth and Cooper's claims to have conducted "quantitative due diligence." Div. Ex. 271 at 15-16. While an adviser can employ quantitative measures to great effect in assessing risk, such measures usually require some degree of historical performance data on the investment. *Id.* at 15-16. However, no historical performance data was available when Cooper performed due diligence on Metro Coffee, Aegis Retail, Aegis Atlantic, Rainmaker, and Moneta Macro. *Id.* at 16. Behnke reviewed testimony where Cooper claimed to have used quantitative due diligence metrics such as standard deviation and Sharpe ratios on the above funds, and opined that such measures would provide no meaningful data for funds, like Aegis Retail and Metro Coffee, that were without historical performance data. *Id.* at 16-17.

Behnke also stated that Total Wealth and Cooper performed "extremely insufficient" qualitative due diligence, which includes, for instance, assessing the fund manager's business practices and investment strategies. Tr. 342; Div. Ex. 271 at 20. According to Behnke, true qualitative due diligence usually "takes place in the offices of the fund itself to observe and evaluate the quality of staff, their systems, their procedures and their investment discipline." Div. Ex. 271 at 18. Visits to the physical location are critical and every employee directly involved in the investment process should be interviewed. *Id.* at 18-19.

However, for due diligence on Life's Good, Cooper simply relied on materials given to him by a selling agent and a few internet searches. Div. Ex. 271 at 21. Even worse, Cooper relied heavily on a 5-star rating given to Life's Good by Morningstar, despite the fact that Morningstar does not perform due diligence on the funds it ranks, but simply analyzes data provided to it by the funds themselves. Tr. 1024-25; Div. Ex. 271 at 21-22. Cooper did not meet with anyone from Life's Good in person until *after* Total Wealth had already placed client funds into Life's Good. Div. Ex. 271 at 22.

Likewise, for the funds associated with Davis (Moneta Macro, Rainmaker, Aegis Retail), Behnke concludes that Cooper failed to conduct adequate qualitative due diligence, instead relying on his personal relationship with Davis. Div. Ex. 271 at 22. For instance, Behnke states that there is no evidence Cooper ever saw any financials for any of the three Moneta entities or related entities before investing in them. *Id.* at 23. Behnke also argues that Cooper's diligence on Rainmaker, which was a "fund of funds" reliant on the returns of the fund managers it selected, consisted of nothing more than analyzing a few profiles of fund managers that Davis might select, without any knowledge of the criteria that Davis would use to select them. *Id.* at 23-24; *see also* Tr. 804. In other words, there was no assurance Davis would pick those fund managers that Cooper had reviewed, and also the futures and commodities that were to be invested in were of an "indeterminate and undefined nature." Div. Ex. 271 at 24; *see also* Tr. 804. Finally, Cooper's qualitative due diligence on Aegis Retail failed to spot that Novus, Davis's company, was being paid sales compensation to sell Aegis Retail, raising questions about Davis's objectivity in recommending the fund in the first place. Div. Ex. 271 at 25.

Behnke also noted that, based on his review, Total Wealth did not have a written due diligence policy until 2011, and failed to follow the written due diligence checklists that purportedly were in place. Div. Ex. 271 at 13-14.

In summary, Behnke testified that in "the overwhelming majority of the cases, [Total Wealth] did no due diligence to verify the information that was represented to them either in the quantitative information that was given to them or in the qualitative information that was given to them." Tr. 348-49.

Third, Behnke concluded that Total Wealth violated Adviser Act Rule 206(4)-2, known as the custody rule, by knowingly using an auditor that was not registered with the Public Company Accounting Oversight Board (PCAOB) for the funds it managed. Div. Ex. 271 at 27-28. According to Behnke, registered investment advisers such as Total Wealth are required to have reasonable belief that the custodian is providing periodic client statements, and in the case of pooled investment vehicles like the Altus Funds, those statements are typically sent to the general partner. *Id.* at 27. An exception to this rule exists if the fund undergoes an annual audit conducted by an accountant registered with the PCAOB and financial reports prepared during the audit are in accordance with U.S. Generally Accepted Accounting Principles (GAAP) and are delivered to investors within 120 days of the end of the fiscal year. *Id*. at 27-28.

Behnke stated that Total Wealth violated the custody rule, and did not qualify for the exception because the Altus Funds were audited by Ogbomo CPA LLC (Ogbomo CPA), which was not subject to annual inspection by the PCAOB. Div. Ex. 271 at 28. Furthermore, Behnke does not consider Ogbomo CPA to be an independent public accountant because it also provided accounting services to Davis, who managed Rainmaker and the three Moneta entities in which ACOF invested. *Id.*

Lisa Horrell

In 2009 and 2010, Lisa Horrell (Horrell), a licensed CPA in Kansas, was a partner in an entity called Private Fund Administrative Solutions, LLC (PFAS), which did partnership and portfolio accounting.[23] Tr. 13-16, 18, 82; Div. Ex. 21. Horrell and Lively founded PFAS. Tr. 13-16. PFAS's four to six private investment fund clients included ACOF. Tr. 19; Div. Ex. 21. PFAS secured ACOF as a client through Lively's relationship with Cooper. Tr. 20-21. PFAS created and maintained ACOF's checkbook, bank statements, cash reconciliations, trial balances, and general and auxiliary ledgers, and calculated its net asset value. Tr. 46. Horrell prepared monthly statements for ACOF clients showing the performance of investments based on information from the accounting department of the underlying fund; she did not herself confirm the information provided by the funds.[24] Tr. 32-33.

Horrell testified that Cooper was the recipient of the management fees paid by ACOF investors. Tr. 49. The management fees themselves were calculated based on each investor's net asset value. Tr. 49-50. Horrell recalled that a "fair amount" of ACOF's investors paid a management fee of 1.4%. Tr. 54. Cooper told Horrell in January 2010, however, that "almost all" paid management fees "a little different from the 1.4%." Div. Ex. 23. ACOF investors were mainly individuals and a small number of IRA accounts and trusts. Tr. 23. ACOF's PPM permitted the general partner to waive the minimum investment requirement of $250,000, and Cooper waived the minimum requirement so that there were numerous small investments in the $750 to $2,000 range.[25] Tr. 59-60; Div. Ex. 135 at 00012.

On January 29, 2010, Horrell asked Cooper for "side letters" containing the investor's approval of the variance in fees away from the 1.4%. Tr. 63-64; Div. Ex. 23. Cooper responded, "I don't have side letters for the fees, I plan on simply dictating what they are." Tr. 64; Div. Ex. 23. Horrell did not recall ever receiving a side letter supporting different fee structures. Tr. 64-65. In general, the agreement between PFAS and ACOF named Cooper as the sole individual with authority to give instructions on behalf of ACOF. Tr. 43-48. Horrell relied on Cooper for information about ACOF, and Cooper often provided only an email as a supporting document for Horrell's accounting work. Tr. 47, 65. Horrell understood that Cooper controlled Total Wealth, ACOF, and Altus Management. Tr. 43-44; *see* Div. Ex. 21.

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23 Horrell earned a bachelor's of science from the University of Wyoming. She has worked at a number of CPA firms and as a company controller. She now has her own CPA firm. Tr. 10-12.

24 Horrell was not aware that Cooper, Total Wealth, or Pinnacle had revenue-sharing or consulting arrangements with underlying funds in which ACOF invested or that they received a fee based on the investor funds they placed into the underlying funds. Tr. 65-66.

25 Horrell proposed that PFAS change how it was compensated for ACOF work because the numerous investors with investments significantly below $250,000 created more work for PFAS, while not increasing assets under management, on which PFAS's compensation was based. Tr. 66-73.

Eventually, Cooper terminated the relationship with PFAS, effective December 31, 2010. Tr. 66, 82. Horrell believes that Cooper terminated the relationship because he wanted a less expensive service. Tr. 66-67. David Barton, a California resident with an accounting firm headquartered in the Bahamas, became the accountant for ACOF in November 2010. Tr. 742, 1122-23.

<u>Taiwo Ogbomo</u>

Taiwo Ogbomo (Ogbomo), a CPA from Georgia, earned a bachelor's of science in accounting from the University of Massachusetts and a master's in business administration from Suffolk University. Tr. 208. Ogbomo has operated Ogbomo CPA, a sole proprietorship located in Marietta, Georgia, since 2008. Tr. 206-07, 219. His practice focuses on investment partnerships, including those that invest in private funds, and he has audited private funds in the past. Tr. 207.

Ogbomo alone performed the 2010 ACOF audit. Tr. 209, 223. He also started an ACOF audit for 2011 but it was never completed. Tr. 209. He never saw a Form ADV for Total Wealth; however, Total Wealth was not his audit client. Tr. 215-16. Ogbomo was engaged to begin the 2010 ACOF audit on December 7, 2010, and completed the audit on February 24, 2012. Tr. 218, 225; Div. Exs. 42, 68. His engagement letter was addressed to and signed by Cooper. Div. Ex. 42. According to Ogbomo, Cooper had the ultimate responsibility for accounting treatment decisions at ACOF. Tr. 209. After Ogbomo completed his audit, he wrote a letter to Cooper identifying weaknesses in ACOF's internal controls. Tr. 273-75; Div. Ex. 45. The letter described three material weaknesses: (1) in the "design and operation of controls over the preparation of financial statements"; (2) in "document retention"; and (3) in "documentation of initial and ongoing alternative investments due diligence procedures." Div. Ex. 45. The letter defined a material weakness as "a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected on a timely basis." *Id.*

Ogbomo's firm was never subject to regular or surprise inspection by the PCAOB, and he explained this to McNamee and Total Wealth.[26] Tr. at 210-14; Div. Ex. 137. For the purposes of compliance with Rule 206(4)-2 of the Advisers Act (custody rule), Ogbomo said that the audit he performed on ACOF was neither "an annual surprise examination" to independently verify the assets Total Wealth had in custody, nor an "annual audit by an [] accountant registered with and subject to regular inspection by [the PCAOB]." Tr. 216-17; *see also* Div. Ex. 120 at 25-26 (discussing the requirements to be in compliance with the custody rule). He further agreed that because his audit was not finished until February 2012, the audited 2010 ACOF financials could not have been distributed to ACOF's limited partners within 120 days of December 31, 2010. Tr. 225-26.

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[26] As Ogbomo explained to McNamee, only a handful of auditing firms in the country are subject to that level of inspection by the PCAOB. Div. Ex. 137. No one at Total Wealth ever inquired further. Tr. 212-15.

In addition to performing the 2010 ACOF audit, Ogbomo also performed the 2010 Rainmaker audit. Tr. 235; Div. Ex. 182. Ogbomo believes that Cooper and McNamee were aware that he was auditing Rainmaker. Tr. 248-49. ACOF was a major investor in Rainmaker, and Ogbomo tested ACOF's valuation of investments in Rainmaker by looking at the Rainmaker financials. Tr. 235-36. The source of valuations for both ACOF and Rainmaker was the entities' self-reports. Tr. 237. The Rainmaker audit showed almost $5.2 million in total assets, investment income of $5,622, a net investment loss of $700,395, capital withdrawals of over $1.8 million, a decrease in net assets from operations of about $48,000, net assets at the beginning of the year of $2.6 million, and an increase in net assets from capital contributions of over $4.1 million. Div. Ex. 182 at 2, 4-5, 7.

Ogbomo was engaged to audit the 2010 financials of Aegis Retail and Metro Coffee, but did not complete the audits because management did not approve of his doubts that the firms could continue as going concerns. Tr. 250-56. If Ogbomo had completed the audits, it would have been the first time both entities were audited. Tr. 254-55; Div. Ex. 74. Another auditor, DZH Phillips, eventually completed 2010 audits for Aegis Retail and Metro Coffee; those audits included no comment on their ability to continue as going concerns. Tr. 260-62; Div. Exs. 176, 195. Cooper and McNamee were aware that Ogbomo had disengaged from the Aegis Retail and Metro Coffee audits, but Ogbomo does not think he ever disclosed to them exactly why he disengaged. Tr. 255-58.

Ogbomo also conducted the 2010 audit of Moneta Macro, which was completed on May 11, 2011. Div. Ex. 187. At the hearing, Ogbomo doubted that Moneta Macro still existed. Tr. 245.

<u>**Investors**</u>

David Brunet (Brunet), a Total Wealth client, invested in the Altus Portfolio Series. Tr. 1201-02; Div. Ex. 366. On June 22, 2011, Brunet responded to information Cooper provided on Brunet's investing in Aegis. Div. Ex. 366. Brunet told Cooper that he had discovered that Peet's had filed a Form 8-K disclosing a dispute with Aegis; Brunet found the information "very disturbing" and commented, "Aegis was promoting opening Peet's in New York locations but [] their license was not good for the New York market." *Id.* Cooper told Brunet that he had it wrong, that Aegis was suing Peet's, and the Aegis offering did not depend on establishing Peet's locations. *Id.*

Christopher Bryant (Bryant), active in real estate, worked with Total Wealth and Cooper, on a discretionary account basis, and invested approximately $500,000, primarily from retirement accounts, beginning in 2010. Tr. 376, 393, 398. Bryant believed Cooper to be his fiduciary and that he would put Bryant's "interests first at all times." Tr. 406-07. Bryant does not remember ever receiving a Form ADV from Total Wealth. Tr. 423. Bryant found Cooper's alternative investment approach attractive based on Cooper's representation that alternative investments were not correlated to the behavior of securities in the public markets, meaning that when markets were volatile, alternative investments were stable, conservative investments. Tr. 377-78. Bryant consistently told Cooper that he wanted conservative, diversified investments that were not correlated to publicly traded securities. Tr. 391-92.

Bryant testified that, both on Cooper's radio program and in conversations between Cooper and Bryant, Cooper stressed that he and Total Wealth were experts in the alternative investments niche, and performed diligent and rigorous due diligence before committing client funds. Tr. 379-81. Bryant trusted in the benefits of alternative investments because of representations in brochures on ACOF and Total Wealth and the collective investment management experience of the Total Wealth team. Tr. 381-88; Div. Exs. 3, 122, 123.

Bryant was interested in being a hands-on investor, and expected to be consulted on investments; Bryant discussed some investments with Cooper, but despite badgering Cooper, Bryant never received PPMs, audited financials, or other due diligence materials for any of the investments underlying the funds in which Bryant invested. Tr. 388-90, 393-94, 432. Bryant testified that Aegis was marketed as Peet's Coffee & Tea private bonds. Tr. 392, 413. Bryant later learned that Aegis consisted merely of notes in "some licensee agreements with Peet's Coffee and Tea promoter in the Bay area, which [were] then . . . rolled to another entity which was to open more Peet's Coffee & Tea locations in [the] New York Metro Area." Tr. 392.

Bryant testified that, after he had told a Total Wealth employee that he did not want any new investments through Total Wealth and would be liquidating his accounts to pay for a down payment on a home, he learned that Total Wealth had liquidated half of Bryant's investments and reinvested about $400,000 in Aegis, with a small portion invested in PPCN. Tr. 395-97. Bryant was upset because his investments were not diversified or liquid and he questioned Cooper's due diligence and judgment. Tr. 397-98.

In late January 2014, Bryant was trying to liquidate his Aegis holdings; this caused Cooper to write Bryant, in part, that "Aegis is in trouble[; t]here's no question" and that Total Wealth discovered all this fairly recently and ha[s] been focused on it for several months." Tr. 400-02; Div. Ex. 320. Emails continued to be exchanged between Cooper and Bryant on the subject of Aegis, yet Cooper did not disclose that Aegis was paying Total Wealth to assist in Aegis's management and operations. Tr. 402-03; Div. Ex. 320. Among these exchanges, Bryant wrote:

> I think [a particular Total Wealth employee] will recall our conversations about 12+ months ago . . . where I emphasized our strategy of staying semi-liquid and my desire to direct investment with either reallocation or new investment dollars. I did bring this up with [that employee] after I realized that one holding across most of our accounts was liquidated and all proceeds went into Aegis. It was worrisome for me because of the illiquidy [sic] and the fact we already had sizable positions with this sponsor.

Div. 320. Cooper responded in part, "We'll give more info on our actions with Aegis if we can." *Id.*

Bryant received the March 4, 2014, letter to Aegis investors from Cooper announcing "a recovery plan to salvage as much of our investment in Metro Coffee and Concessions and Preserve24 we can"; the letter further stated:

> While a conflict of interest can exist with Altus being closely involved in the management of the various entities, it is important to note that neither Altus, [Total Wealth], nor any of their officers or employees, have any economic interest in the Aegis entities or are receiving any form of compensation.

Tr. 405-06; Div. Ex. 328. Bryant testified that Cooper never disclosed any actual economic conflicts of interest. Tr. 407. He also testified that no one at Total Wealth told him that Aegis, LJL, and PPCN paid Total Wealth revenue sharing fees when Cooper invested Bryant's funds respectively in Aegis, LJL, and PPCN. Tr. 424-25. Bryant would not have invested with Cooper if he had known of the revenue sharing agreements. Tr. 426.

No one at Total Wealth told Bryant that Peet's had terminated much of its business relationship with Aegis Retail on March 31, 2011, or that Aegis Retail had sued Peet's. Tr. 412-13; *see* Div. Ex. 271, App. P. No one at Total Wealth told Bryant that Cooper knew Aegis was paying existing investors with funds from new investors. Tr. 427.

As of September 2014, Total Wealth continued to take advisory and administrative charges from Bryant's accounts. Tr. 418-22; Div. Ex. 323. Bryant estimates that over his five years of interaction with Cooper, his investments, totaling about $500,000 across multiple accounts, are significantly down; he guesses he has under $100,000 in those accounts today. Tr. 376.

Michael Howard (Howard) became acquainted with Cooper through Cooper's radio show, hired him as his financial adviser when he retired in June 2010, and gave Total Wealth discretionary authority over retirement funds totaling $520,000 and his wife's $100,000 inheritance. Tr. 150-54, 161, 164, 186; Div. Ex. 325. Howard was impressed with Cooper because Cooper claimed his investment planning avoided the risky stock market; Howard hired Cooper to minimize investment risk. Tr. 153-54, 196, 198-99. When Howard engaged Cooper, Cooper gave Howard a signed copy of a book he had authored. Tr. 201. Howard testified that Total Wealth never provided him with its Form ADV. Tr. 169.

Howard believed Cooper that "the judicious inclusion of alternative investments among traditional investments may produce a more predictable and less volatile experience for investors," and that ACOF "conduct[ed] regular reviews of all [ACOF] investments including in-depth qualitative and quantitative due diligence." Tr. 171-73; Div. Ex. 3 (ACOF brochure). Howard had no interest in "higher-reward" investments like hedge funds; he consistently stressed to Cooper that he wanted safe investments and Cooper conveyed that he would safely manage Howard's life savings. Tr. 153-57, 173-74, 197, 202-03. Howard, who had a military and law enforcement background, thought he could trust Cooper because Cooper told him his father had been a Marine and that Cooper had been an Eagle Scout. Tr. 155, 1077. Howard did not understand alternative investments; he put his trust in Cooper. Tr. 173-74, 196-97.

Howard's ACOF's statement dated March 31, 2012, shows investments in Novus Precious Commodities, Rainmaker Fund, Amerifunds Secure Income II, Quadriga Mortgage Fund, Structured Bank Notes, Toro Capital Income Fund, Alpha Titans Fund, LJL High Yield

Income, two PPCN notes, two Aegis Retail notes, and three Aegis Atlantic notes. Div. Ex. 326. Howard was not consulted about and did not receive information, such as PPMs, for any of these investments. Tr. 166-69. Howard does not believe that Total Wealth provided him with the ACOF PPM, and believes Total Wealth did not conduct any due diligence on his investments. Tr. 162, 189.

Howard invested in a PPCN note through ACOF; Cooper believes the risks were explained to Howard and Howard accepted those risks. Tr. 930-31; Div. Ex. 326. The PPM for this PPCN note states that the investment opportunity "is suitable only for purchasers . . . who can bear the economic risks of losing their entire investment, and who can afford to hold the investment for an indefinite period of time" and that "only . . . purchasers who are able to bear the loss of their entire investment, and who otherwise meet the suitability standards . . . , should consider an investment in the [notes]." Tr. 931-32; Div. Ex. 53. Cooper testified that this risk was explained to Howard and Cooper believed the investment to be suitable for Howard. Tr. 931-33.

In March 2014, Howard received the letter from Cooper discussing "salvage" of Aegis Retail notes. Tr. 176-77, 187; Div. Ex. 328. Howard tried to contact Cooper, unsuccessfully, but spoke with an associate of Cooper who told Howard that a New York restaurant in which Aegis Retail was involved had closed over a year ago. Tr. 177-78, 185-87. The May 31, 2014, ACOF statement Howard received showed current values of $0 for Aegis Retail notes. Tr. 181; Div. Ex. 329. On April 4, 2014, Howard asked Fowler for an update on Aegis Retail and Aegis Atlantic; Fowler said Cooper would be unable to meet with Howard, Cooper was 100% focused on the Aegis issue, and while "[t]he recovery continues with Aegis, . . . [t]here is no official update." Tr. 186; Div. Ex. 330.

Howard testified that Total Wealth and Cooper never disclosed their receipt of payments from Aegis, Rainmaker, LJL, or PPCN. Tr. 187-88. Howard considers revenue sharing agreements a conflict of interest and would not have hired Total Wealth if he had known about them. Tr. 188.

Fowler sent an email to Howard on October 6, 2014, stating, "It has been announced on different occasions over the past months that [Total Wealth] is dissolving." Tr. 192-93; Div. Ex. 337. Howard, a pilot with recent experience in Afghanistan, testified that he is "drained from" this experience. Tr. 185. Howard has been told that what remains from his investment is about $55,000 in cash and $253,000 in hedge funds; his wife has about $8,700 in cash. Tr. 152-53, 193.

Mark Jacobson (Jacobson) requested the return of all his funds overseen by Total Wealth on August 28, 2010, as he had also requested in July 2010. Tr. 1036-37; Div. Ex. 161. In his August 28 email to Cooper, McNamee, and Fowler, Jacobson wrote that "after the Life's Good debacle . . . I told you I did not want you buying any thing [sic] without being able to look at it first." Div. Ex. 161. Jacobson also complained that "when we met in July, I was told you had been 'traveling' or on 'vacation'," but it was not mentioned that in fact "[Cooper] moved to St. George about two months ago." *Id.* In a November 17, 2010, email to Cooper, Jacobson wrote that his account had about $650,000 in it. Div. Ex. 162.

James Morin (Morin) emailed Cooper on July 15, 2010, concerning his $55,000 Life's Good loss. Div. Ex. 151. Morin believed Total Wealth had "a small team of well educated, well intentioned workers with high integrity," but "might lack sufficient policy / procedures / methodologies / supporting systems to properly do due diligence." *Id.* Cooper responded that: Total Wealth "did more due diligence than most would have"; "[t]he SEC told me straight out that the information and material disseminated by [Life's Good] were enough to fool any reasonable person"; and Total Wealth would no longer depend merely on third-party audits, Morningstar's qualitative research, "SEC background check[s] on the fund's manager," and "annual, on-site[] reviews of each fund."[27] *Id.*

Carol Smith (Smith) hired Cooper and Total Wealth around November 2007. Tr. 85. Smith gave Cooper discretionary authority because she believed he was an expert and would do research on investment opportunities, and she trusted that he would make sound financial decisions. Tr. 98, 114-15, 131. Cooper expressed great pride in Total Wealth's research, analysis, and due diligence. Tr. 115. On Cooper's advice, Smith placed about $75,000 under Cooper's management in 2010 (which ended up being a total loss) and purchased a $60,000 personal life insurance policy; Smith's husband purchased a $48,000 life insurance policy.[28] Tr. 86, 106; Div. Ex. 342. Smith believes the two insurance policies, after payment of surrender fees, are now worth about $40,000 and $30,000, respectively. Tr. 86.

The funds Smith committed to Total Wealth represented retirement savings from fourteen years working as an elementary school teacher, during which she had $300 taken out of each paycheck. Tr. 87. Smith told Cooper that the money she inherited after her mother's death needed to be invested safely because "I came from a rare family . . . , and all four of my grandparents had college educations that were paid for by their parents," and Smith was determined to do the same for her children. Tr. 90-91. Cooper gave Smith and her husband a "Wealth Transformation Strategy" notebook; the cover page stated, "Your agenda is our agenda. Your goals are our goals. Your dreams direct our mission." Tr. 91; Div. Ex. 344 at 0001. Smith made clear to Cooper that a primary goal was to pay for her children's education. Tr. 94, 116-17; Div. Ex. 344 at 0026.

Smith filled out paperwork with Fowler's assistance in April 2010. Tr. 101-02. Smith believed her $75,000 would be placed in an "Equity-Indexed Account" that "will be classified as an IRA"; Smith later learned that Total Wealth instead invested her funds in Aegis Retail (about $18,000) and Life's Good (about $50,000). Tr. 99-102, 108, 121-22; Div. Ex. 344 at 0027.

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[27] In fact, Total Wealth had not conducted on-site reviews of each firm. Tr. 1036.

[28] Events in Smith's life delayed her placing funds under Total Wealth's management. Tr. 106; Div. Ex. 342. The life insurance policies were funded from inheritances. Tr. 104-06. Smith was supposed to deposit $30,000 a year for five years to purchase a $150,000 policy, but she was only able to make two payments. Tr. 138. Smith did not realize that the life insurance policies had a large amount of monthly fees. Tr. 138.

Smith received a letter from Cooper dated July 7, 2010, stating that Life's Good "appears to be fraudulent," which meant that in two months she had lost the $50,000 placed in that investment. Tr. 111; Div. Ex. 346. On July 15, 2010, Smith emailed Cooper asking why due diligence had not uncovered Stinson's criminal record given that it should have been publicly available information. Tr. 113-14; Div. Ex. 311. Smith testified that, in response, Cooper referenced that "Morningstar had given it a five-star rating." Tr. 115. Smith has been told she might recover $647 from her $50,000 investment. Tr. 135.

In November 2013, Smith emailed Fowler—who, Smith said, was the only person at Total Wealth who returned emails and phone calls—writing, "I want to make it VERY CLEAR, that the 'education' I got on my investment from you all, was very limited." Tr. 107-09; Div. Ex. 340. Cooper was copied on this email. Div. Ex. 340. On December 30, 2013, Smith requested return of her Aegis Retail investment from Terrance Goggin (Goggin), who she understood was an officer of Aegis Retail. Tr. 122-25; Div. Ex. 317. She eventually spoke with Goggin and another person at Aegis Retail, but she was told there was a cash crunch and her money could not be returned, but that funds would be raised which would allow her to get her money back. Tr. 133-34.

Total Wealth did not tell Smith that Aegis Retail paid Total Wealth and Cooper pursuant to a revenue sharing arrangement when Smith invested her funds in Aegis Retail. Tr. 130-31. Cooper did not tell Smith that he received consulting fees from an affiliate of Life's Good or that he had been sued by the receiver for Life's Good. Tr. 120. In early January 2014, Smith asked Cooper why her funds were invested in Aegis Retail when she had made "very clear" that the money needed to be invested safely; Cooper responded that he was sorry Smith did not read the paperwork she signed carefully. Tr. 127; Div. Ex. 315. Smith then realized that she had been duped because the paperwork she signed did not reflect the investments Cooper promised in the notebook. Tr. 127; *see e.g.*, Div. Ex. 344 at 0009, 0026-28. Trusting Cooper is one of the biggest regrets of Smith's life. Tr. 135-36.

Kip Willet (Willet), a Total Wealth client, wrote Cooper on July 13, 2010, that when Willet started investing through Total Wealth, he made clear that he "didn't want to lose anything," and that his losses on his Life's Good investment was more that he earned in all of 2009. Tr. 1033-34; Div. Ex. 156. Willet added, "Morningstar ranking it with 5 [st]ars is not enough for Due Diligence." Div. Ex. 156. Cooper responded in part:

> In the case of Life's Good, we're talking about fraud. We were all defrauded. While all investments have risk of loss, you just never expect it to be something like this Morningstar has been a trusted source for us, whom we pay for their research and due diligence. S[EC] back ground checks, in person meetings with the management team, audited financials, discussing at length with another advisory firm who has been using the fund for years, and having the manager interviewed by another "peer" manager were some of the steps we took.

Id. On November 11, 2010, Cooper wrote Willet calling him "off base" and maintaining that "[w]e have stepped up our due diligence beyond reasonable levels," yet agreed to liquidate Willett's investments before the end of the year. Tr. 1038; Div. Ex. 157.

Arguments of the Parties

In its initial posthearing brief, the Division contends that Cooper and Total Wealth were investment advisers that invested client funds in a variety of investment vehicles that paid revenue sharing and consulting fees to Cooper and entities under his control. Div. Br. at 11-22, 47. The Division alleges that Cooper and Total Wealth never adequately disclosed this arrangement to their clients, even when advised by a consultant that such disclosure was mandatory, and that their current disclosure was inadequate. *Id.* at 22-33, 49-52. In particular, the Division hones in on Cooper and Total Wealth's disclosures that they "may" have revenue sharing arrangements when in fact there were already existing agreements in place. *Id.* at 25-28, 50-51. The Division argues that those disclosures were misleading and should have replaced the "may" with more definite language, such as "is." *Id.* at 26.

The Division also argues that Cooper misrepresented to clients that he would conduct rigorous due diligence into the investments they were making. Div. Br. at 34-35. In fact, the Division contends that Cooper and Total Wealth's due diligence was both undocumented and grossly inadequate. *Id.* at 34-37. For example, the Division alleges that: Cooper invested in Life's Good with knowledge that the company had no auditor or audited financial statements for the most recent year; invested in PPCN II despite its overly speculative nature; and invested in the Davis's funds without performing adequate due diligence. *Id.* at 37-45. Finally, the Division contends that Total Wealth violated the custody rule of Rule 206(4)-2 under the Advisers Act by not complying with the "independent verification requirement" or any exception to the requirement. *Id.* at 45-46.

As a result of this conduct, the Division argues that that Total Wealth violated Exchange Act Section 10(b) and Rule 10b-5(b) and Advisers Act Section 206(4) and Rule 206(4)-2 and that Cooper aided, abetted, and caused those violations. The Division also argues that Cooper violated Securities Act Section 17(a)(1), (2), and (3); Exchange Act Section 10(b) and Rule 10b-5(a), (b), and (c); Advisers Act Section 206(1), (2), (4), and Section 207 and Rule 206(4)-8. Div. Br. at 47-61, 64. The Division seeks substantial sanctions, including a bar from the securities industry, a cease-and-desist order, approximately $1.8 million in disgorgement, and over $28 million in civil penalties. *Id.* at 2, 65-73.

Cooper's post hearing brief argues that Total Wealth's disclosures of its revenue sharing were complete, complied with all relevant securities laws, and were consistent with the industry standard for accuracy. Resp. Br. at 8-10. Cooper contends that only about one-third of the investments offered by Total Wealth had revenue sharing agreements, and Total Wealth did not have revenue sharing arrangements with every fund it invested in, meaning a client's investment portfolio may have possibly consisted entirely of funds *without* any revenue sharing arrangements. *Id.* at 8-10. Cooper likewise argues that using the words "is" or "will" to disclose the possibility of a revenue share agreement, rather than the word "may," would in fact be untruthful and misleading. *Id.* at 9-10. Cooper also argues that the disclosures made in Total Wealth's Form ADV and Altus Funds' PPMs were sufficient and crafted by experienced counsel and compliance experts. *Id.* at 10-14.

Cooper contends that the Altus Funds' PPMs were drafted by an experienced attorney with extensive experience in the investment management area, and Cooper's good-faith reliance on various attorneys and compliance experts in making disclosures negates any finding of scienter. *Id.* at 15-17. Cooper argues that Total Wealth's counsel believed its disclosures on revenue sharing were adequate, pointing to the Commission's July 2010 examination of Total Wealth focused on revenue sharing, which did not cause counsel to substantively change Total Wealth's disclosures. *Id.* at 16-17. Cooper contends that his scienter cannot be established by recklessness, as his conduct, and in particular his reliance on counsel, was not an "extreme departure from the standards of ordinary care," and Cooper did not act negligently, as he had no reason to suspect that the disclosure language was in anyway insufficient. *Id.* at 18-21.

Cooper maintains that Total Wealth conducted extensive due diligence of the funds it invested in, and its due diligence procedures were adequately reflected in Total Wealth's disclosures, including Forms ADV and various brochures. *Id.* at 21, 24-26. Specifically, Cooper argues that his due diligence of the Aegis Funds was reasonable, involving discussion with industry professionals as well as visiting several of the Aegis Funds' investment sites, notwithstanding the Aegis Funds' lack of audited financials other than for fiscal year 2010. *Id.* at 26-29. Cooper also argues that Total Wealth's due diligence of Life's Good was reasonable, and relied on Cooper's discussions with the principals, review of the PPM, analysis of its audited financials, and reports by Barclays and Morningstar. *Id.* at 30. Cooper maintains that Total Wealth's representation to investors that it would do qualitative and quantitative due diligence was not misleading. *Id.* at 31.

Finally, Cooper argues that he is not liable for any securities violations because he did not act recklessly but acted in good faith with reliance on counsel. *Id.* at 32. Cooper also contends that Total Wealth did not commit any violations, and even if it did, the Division failed to prove that Cooper was "a substantial factor in causing" them. *Id.* at 33-34. Lastly, Cooper argues that the sanctions sought by the Division are not warranted, overly harsh and unjustified, and wholly inappropriate. *Id.* at 35-39. Cooper also maintains that he is destitute. *Id.* at 39.

In its reply brief, the Division reemphasizes its position that Total Wealth disclosures about its revenue sharing agreements were misleading and violated the antifraud provisions of the securities statutes. Div. Reply Br. at 4-9. In particular, the Division contends that Cooper and Total Wealth failed to adopt the disclosure proposed by Groves and instead used disclosure language that the compliance consultant had advised was inadequate. *Id.* at 4-5. In support, the Division cites testimony of Bryant, Howard, and Smith, former clients who would not have invested with Total Wealth and Cooper if they had known about the revenue sharing agreements. *Id.* at 6-7. The Division points out that, even if Total Wealth's Form ADV and ACOF PPM disclosures had been sufficient, all clients did not receive them. *Id.* at 11.

The Division argues that Cooper acted with scienter when failing to disclose the revenue sharing agreements and Cooper has failed to show that he relied in good faith on compliance professionals. Div. Reply Br. at 11-16. The Division contends that Cooper *rejected*, rather than relied, on the advice of professionals, citing Total Wealth's failure to adopt the language Groves proposed. *Id.* at 16-18. The Division maintains Cooper cannot claim he relied in good faith on the advice of counsel when he refused to disclose that advice at the hearing, citing attorney-client privilege. *Id.* at 18.

Finally, the Division reiterates that Cooper misrepresented his due diligence efforts with respect to Life's Good, PPCN, Rainmaker, the Moneta entities, Aegis Retail, Aegis Atlantic, and

Metro Coffee. Div. Reply Br. at 19-20. The Division argues that Cooper's claim of conducting "quantitative" due diligence "make[s] absolutely no sense" and that in truth Cooper invested in funds run by Davis and Hartman, which not incidentally, paid Total Wealth and Cooper lucrative revenue sharing and consulting arrangements. *Id.* at 21-24. The Division estimates investor losses at between $20 million and $40 million and argues that the misconduct warrants the requested sanctions. *Id.* at 25-26.

Legal Conclusions

1) Cooper violated the antifraud provisions of the Securities Act, Exchange Act, and Advisers Act

Cooper is charged with violating the antifraud provisions of Securities Act Section 17(a)(1)-(3), Exchange Act Section 10(b) and Rule 10b-5(a)-(c), and Advisers Act Section 206(1) and (2). OIP at 12-13; *see* 15 U.S.C. §§ 77q(a)(1)-(3), 78j(b), 80b-6(1)-(2); 17 C.F.R. § 240.10b-5(a)-(c).

Relevant Antifraud Statutes and Rule

Securities Act Section 17(a) makes it unlawful for any person in the offer or sale of any securities, by the use of interstate commerce or the mails to (1) to employ any device, scheme, or artifice to defraud; or (2) to obtain money or property by means of any material misstatements or omissions; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. 15 U.S.C. § 77q(a).

Exchange Act Section 10(b) and Rule 10b-5 make it unlawful for any person, by the use of interstate commerce or the mails, in connection with the purchase or sale of any security to: (a) employ any device, scheme, or artifice to defraud; (b) make any material misstatements or omissions; or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(a)-(c).[29]

Advisers Act Section 206 makes it unlawful for any investment adviser, by use of the mails or instrumentalities of interstate commerce, to (1) employ any device, scheme, or artifice to defraud any client or prospective client; or (2) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. 15 U.S.C. § 80b-6(1)-(2).

Scienter is required to establish violations of Securities Act Section 17(a)(1), Rule 10b-5, and Advisers Act Section 206(1). *Aaron v. SEC*, 446 U.S. 680, 695-96, 701-02 (1980); *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001); *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *55-56 (May 2, 2014), *pet. denied*, --- F.3d --- , 2015 WL 4153861 (D.C. Cir. Apr. 23, 2015). A showing of negligence suffices to establish violations of

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[29] As the scope of Rule 10b-5 is coextensive with Exchange Act Section 10(b), I use Rule 10b-5 to refer to both the statute and the rule. *See SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002) (citing *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)).

Securities Act Section 17(a)(2) and (a)(3) and Advisers Act Section 206(2). *Dain Rauscher*, 254 F.3d at 856; *Montford & Co.*, 2014 SEC LEXIS 1529, at *55-56.

To have violated the antifraud provisions, Total Wealth and Cooper must have committed the acts proscribed in Rule 10b-5(a)-(c), Securities Act Section 17(a)(1)-(3), and Advisers Act Section 206(1)-(2) through interstate commerce or the mails and with the requisite scienter or negligence. For violations of Rule 10b-5 and Securities Act Section 17(a), the violative acts must have been committed in connection with the purchase, offer, or sale of a security. To violate Advisers Act Section 206(1) and (2), a person must be an investment adviser. Because the antifraud provisions overlap, conduct that violates one of the antifraud provisions may also violate another. *See John P. Flannery*, Securities Act Release No. 9689, 2014 SEC LEXIS 4981, at *48 & n.67 (Dec. 15, 2014); *see also United States v. Naftalin*, 441 U.S. 768, 773 n.4, 778 (1979); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4 (9th Cir. 1993); *SEC v. Berger*, 244 F. Supp. 2d 180, 192 (S.D.N.Y. 2001); *SEC v. Blavin*, 557 F. Supp. 1304, 1315 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1985). I address each element of proof below.

Cooper is an investment adviser

Total Wealth was a registered investment adviser and Cooper was an investment adviser within the meaning of Advisers Act Section 202(a)(11). Tr. 692; *see Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977); *John J. Kenny*, Securities Act Release No. 8234, 2003 SEC LEXIS 1170, at *63 n.54 (May 14, 2003). From 2009 until it went into receivership, Cooper was Total Wealth's CEO, sole owner, and signatory of its bank accounts. Tr. 740-41; Div. Exs. 99, 125. Cooper made the investment decisions for clients of Total Wealth and its constituent funds, including selecting which funds were available for client investment. Tr. 697-98, 704; Div. Ex. 357 at 76, 78-79, 150. Cooper also negotiated and executed the revenue sharing agreements and received compensation in connection with managing client funds and giving investment advice. Tr. 732-33, 807; Div. Exs. 15 at 4, 139 at 6, 140 at 2, 142 at 2. Because Total Wealth and Cooper made investment decisions on behalf of the Altus Funds—which all meet the definition of a pooled investment vehicle—each was an investment adviser to a pooled investment vehicle for purposes of liability under Advisers Act Section 206(4) and Rule 206(4)-8. *See* 15 U.S.C. §§ 80b-2(a)(11), 80b-6(4); 17 C.F.R. § 275.206(4)-8(a)-(b). Investment advisers owe a fiduciary duty to act for the benefit of their clients, including "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963).

Material misstatements or omissions

Material misstatements and omissions are an element of both Rule 10b-5(b) and Securities Act Section 17(a)(2). 15 U.S.C. § 77q(a); 17 C.F.R. § 240.10b-5(b). An omitted or misstated fact or statement is material if there is a substantial likelihood that a reasonable investor would consider it important. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992). The Division alleges that Cooper violated these provisions by failing to disclose the revenue sharing agreements and by misrepresenting the level of due diligence conducted. Div. Br. at 22-32.

Cooper failed to disclose the revenue sharing and consulting agreements

Total Wealth's and Cooper's revenue sharing and consulting agreements gave rise to conflicts of interest because they provided Total Wealth and Cooper with an incentive to allocate client funds in a way—to maximize fees earned under the revenue sharing and consulting agreements—that was not necessarily in their clients' best interests. Such obvious conflicts of interest must be disclosed. *See Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) (similar scenario involving "financial interest in recommending the investment"); *Capital Gains*, 375 U.S. at 201 (an investment adviser must "fully and fairly reveal[] his personal interests in [] recommendations to his clients").

Total Wealth and Cooper failed to adequately disclose the revenue sharing agreements.[30] Total Wealth's written disclosures, comprising several Forms ADV and the ACOF PPM, merely disclosed that it "may" have revenue sharing agreements with various entities. *See* Div. Exs. 120 at 5, 135 at 00066,[31] 136 at 8, 218 at 5, 220 at 5, 224 at 5. However, these disclosures were made *after* Total Wealth had already entered into revenue sharing agreements with numerous entities and had invested enormous amounts of client funds in these entities. Tr. 540 (Receiver testifying that 88% of remaining ACOF assets are invested in three funds subject to revenue sharing agreements, citing Div. Ex. 310 at 26); Div. Ex. 271 at 10 (Behnke concluding that approximately 90% of ACOF's investments in 2010 were invested in funds subject to revenue sharing agreements). It was grossly inaccurate and misleading for an investment adviser to represent that revenue sharing agreements "may" happen, when they had in fact already happened and governed a substantial portion of client investments.

Furthermore, even assuming that these written disclosures were sufficient, investors testified that they never received them, and as of 2009, Total Wealth's chief compliance officer was not aware that Forms ADV were even supposed to be sent to clients; Total Wealth had no files showing it sent those Forms ADV to clients. Tr. 130-31, 162, 169, 407, 423, 478-79, 502-03. Finally, Cooper claimed that the revenue sharing agreements were disclosed orally, however, the investors who testified rebutted his assertion, and no one recalled Cooper mentioning any conflicts of interest. Tr. 130-31, 187-88, 424-25, 810. I find Cooper's position on this subject, and many others, incredible.

I reject Cooper's argument that it was appropriate to use the word "may" to disclose the revenue sharing and consulting agreements because an investor could potentially have a portfolio consisting entirely of funds without revenue sharing agreements. Resp. Br. at 9. This argument mischaracterizes the purpose of the disclosure. The disclosure is not intended to address whether a client's portfolio may include funds with revenue sharing agreements, but whether such revenue sharing agreements were in place at all. Because such agreements *were* in place, disclosing that such agreements *may* be in place was false and misleading; the disclosures failed

[30] For purposes of liability under Rule 10b-5(b), I find that Cooper possessed ultimate authority over Total Wealth's operations and communications, and is therefore, along with Total Wealth, the "maker" of the written disclosures at issue in this proceeding. *See Janus Capital Grp. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011); *In re Fannie Mae 2008 Secs. Litig.*, 891 F. Supp. 2d 458, 473 (S.D.N.Y. 2012).

[31] The ACOF PPM disclosed that "some Private Funds *may* pay [ACOF] . . . a referral fee or a portion of the management fee." Div. Ex. 135 at 00066 (emphasis added).

to make clear there were actual, present conflicts of interest at play. Tr. 497-99. Cooper's argument also fails because under its own logic, disclosure of existing conflicts of interest is not necessary unless clients are wholly guaranteed to be subject to those conflicts. *See* Resp. Br. at 9 ("*not all* of the private funds held by the Altus Funds had revenue sharing arrangements"). That is simply not the law. *See Vernazza*, 327 F.3d at 860 (investment advisers have a duty to disclose all potential conflicts of interest accurately).

Cooper's failure to properly disclose the revenue sharing agreements was a material misstatement and omission. *See Capital Gains*, 375 U.S. at 200-01. Any reasonable investor would consider the existence of revenue sharing agreements important. *See Steadman*, 967 F.2d at 643. Indeed, investors testified that they would not have invested with Total Wealth had they known that their investment advice was potentially biased toward selecting certain funds that would enrich Cooper. Tr. 131-32, 188, 426.

Cooper misstated the extent of his and Total Wealth's due diligence

In sales literature, Forms ADV, and in person, Total Wealth and Cooper claimed that the due diligence they conducted on their investments was rigorous and extensive.

In practice, the due diligence performed by Total Wealth and Cooper bore no resemblance to the rigorous efforts advertised and fell woefully short of industry practice. Cooper was responsible for due diligence and his efforts resembled a Marx Brothers comedy, but with tragic consequences to investors. Total Wealth failed to establish written due diligence policies until 2011, well after it began investing client money in private funds. Div. Ex. 271 at 13. There is absolutely no evidence that a team conducted regular reviews of all investments including on-site manager visits and in-depth qualitative and quantitative due diligence. Cooper lacked the experience and education to conduct due diligence, because prior to forming Total Wealth, Cooper had no experience investing in or recommending investments in alternative funds. Tr. 749. The evidence is conclusive that Cooper and Total Wealth failed to conduct reasonable due diligence or due diligence at the level represented to their investors.

Total Wealth and Cooper's due diligence on Life's Good is illustrative. Cooper relied on a handful of documents, provided by Life's Good's selling agent, and then participated in a single phone call with the selling agent and Life's Good principal, during which a lucrative "consulting" side agreement between Cooper and the selling agent was discussed. Tr. 992-93, 1003, 1010-14, 1026-27; Div. Exs. 352, 354. He never conducted an on-site visit and had not met anyone from Life's Good in person. Tr. 1010-11. He also knew that Life's Good had no auditor at the time. Tr. 992-93, 998, 1000, 1002, 1026. Yet that did not deter him from directing client funds into Life's Good starting the day after his phone call with the selling agent and Life's Good principal. Tr. 1005-06; Div. Ex. 356.

Cooper's due diligence was similarly subpar for other funds. Cooper's due diligence on Rainmaker consisted of merely reviewing profiles on managers that Rainmaker would potentially select, as Rainmaker had no other financial documents. Tr. 796-97, 804-05. Cooper represented that his due diligence on Aegis Retail and Metro Coffee relied heavily on standard deviations and "Sharpe Ratios," two metrics that Behnke pointed out could only assess investments with prior performance history, and were thus meaningless for these two new offerings. Tr. 1048-50; Div. Ex. 271 at 15-18. Cooper's due diligence of the PPCN II fund included looking at audited financials for PPCN and a PPM for PPCN II, which together revealed that PPCN was in dire financial straits and that PPCN II did not guarantee the return of principal, operated as a "lender of last resort," and was a speculative investment with no history. Tr. 912-27; Div. Ex. 53. Despite these issues, Cooper invested approximately $30 million of client funds with PPCN II. Div. Ex. 310 at 12.

I reject Cooper's argument that Total Wealth's due diligence was adequate and accurately disclosed. Resp. Br. at 21-31. Total Wealth had no written policies concerning due diligence until 2011 and then failed to properly document the due diligence that was conducted. Div. Ex. 271 at 13-15. I accept Behnke's expert testimony that Total Wealth's due diligence files were woefully lacking in documentation, there was no evidence showing that reasonable or prudent qualitative due diligence had occurred, and that Cooper's description of Total Wealth's due diligence processes "barely scratch the surface of good due diligence practices." Div. Ex. 271 at 13-14, 18-21. In response, Cooper relies on *Laird v. Integrated Res.*, 897 F.2d 826, 837 (5th Cir. 1990), to argue that in order to establish liability for a failure to conduct due diligence, the Division needed to show that Cooper "intentionally refused to investigate" a risk. Resp. Br. 21-22. But Cooper completely misreads *Laird*, which discusses the due diligence obligations of *private plaintiffs* seeking to bring securities actions, and has no relevance here. *See Laird*, 897 F. 2d at 837; *see also SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1247 n.16 (11th Cir. 2012) (discussing due diligence requirement applicable to private plaintiffs).

In sum, the due diligence performed by Total Wealth and Cooper bore little resemblance to the due diligence promised in Total Wealth's Forms ADV and sales literature, and in Cooper's personal representations to investors. These misstatements regarding due diligence were clearly material, as investors who testified at the hearing affirmed. *See* Tr. 115, 135, 173, 189-91; *see also SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 8 (D.D.C. 1998) (failure to disclose inadequate due diligence constituted a material misstatement).

By not disclosing the revenue sharing and consulting agreements and misleading investors as to the due diligence program, Total Wealth and Cooper made material misstatements and omissions, as prohibited by Rule 10b-5(b). Further, this conduct allowed Total Wealth and Cooper to solicit funds from investors by hiding facts calling into question the wisdom and objectivity of his investment advice, and they therefore obtained money through material misstatements and omissions in violation of Securities Act Section 17(a)(2).

Scheme to defraud and acts, transactions, or course of business operating as a fraud

Rule 10b-5(a), Securities Act Section 17(a)(1), and Advisers Act Section 206(1) all make it unlawful to "employ any device, scheme, or artifice to defraud." 15 U.S.C. §§ 77q(a)(1), 80b-6(1); 17 C.F.R. § 240.10b-5(a).[32]

Similarly, both Securities Act Section 17(a)(3) and Advisers Act Section 206(2) prohibit "engag[ing] in any transaction, practice, or course of business which operates or would operate

[32] Advisers Act 206(1) prohibits the conduct only as to "any client or prospective client." 15 U.S.C. § 80b-6(1). Because Cooper's actions were directed at clients or prospective clients of an investment adviser, this criterion is met.

as a fraud or deceit." 15 U.S.C. §§ 77q(a)(3), 80b-6(2). Rule 10b-5(c) proscribes identical conduct, except it bars an "act," rather than a "transaction." 17 C.F.R. § 240.10b-5(c); *see John P. Flannery*, 2014 SEC LEXIS 4981, at *61-62 & nn. 97-98 (concluding that "act" is broader than "transaction.").[33]

Cooper's material misstatements and omissions to investors constitute a "device, scheme, or artifice to defraud" under Rule 10b-5(a), Securities Act Section 17(a)(1), and Advisers Act Section 206(1), and "an act" operating as a fraud under Rule 10b-5(c). *See John P. Flannery*, 2014 SEC LEXIS 4981, at *42-45, 58-59, 61-62.[34] When those misstatements or omissions are repeated with enough regularity, they constitute a "practice" or "course of business" operating as a fraud under Securities Act Section 17(a)(3) and Advisers Act Section 206(2). *John P. Flannery*, 2014 SEC LEXIS 4981, at *62-63.[35] As established above, Cooper made material misstatements and omissions that constitute violations of Rule 10b-5(a) and (c), Securities Act Section 17(a)(1) and (3), and Advisers Act 206(1) and (2).

Moreover, even without solely relying on his misstatements and omissions, the evidence shows that Cooper, through Total Wealth and its constituent funds, operated a scheme to defraud his investors and a course of business that operated as a fraud. Despite his protestations to the contrary, it is clear that Cooper's main motivation in selecting investments for his clients was the likelihood of revenue sharing and consulting fees for himself, not the potential return or

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[33] Rule 10b-5(c), Securities Act Section 17(a)(3), and Advisers Act Section 206(2) protect different groups of persons. Rule 10b-5(c) is the broadest, prohibiting conduct as to "any person," while Securities Act Section 17(a)(3) applies only to "the purchaser," and Advisers Act Section 206(2) only concerns "any client or prospective client." 15 U.S.C. §§ 77q(a)(3), 80b-6(2); 17 C.F.R. § 240.10b-5(c). Cooper's conduct induced clients and prospective clients of an investment adviser to purchase securities, and therefore satisfies the criteria of all three provisions.

[34] *Flannery* establishes that material misrepresentations or omissions violate Rule 10b-5(a) and (c) and Securities Act Section 17(a)(1), but does not address whether it violates Advisers Act Section 206(1). *See John P. Flannery*, 2014 SEC LEXIS 4981, at *58-59. However, the Commission's reasoning, and the fact that Advisers Act Section 206(1) contains nearly identical language to the other provisions, strongly suggests that such conduct violates Advisers Act Section 206(1). *Id.* at *58-59; *see Blavin*, 557 F. Supp. at 1315 (conduct that violates Rule 10b-5 also violates Advisers Act Section 206(1) where investment adviser involved); *SEC v. Commonwealth Chem. Secs., Inc.*, 410 F. Supp. 1002, 1019 (S.D.N.Y. 1976) ("scheme to defraud" in violation of Rule 10b-5 and Securities Act Section 17(a) "clearly violate[s]" Advisers Act Section 206); *see also David Henry Disraeli*, Securities Act Release No. 8880, 2007 SEC LEXIS 3015, at *33 & n.49 (Dec. 21, 2007) ("Facts showing a violation of [Securities Act] Section 17(a) or [Exchange Act Section] 10(b) by an investment adviser will also support a showing of a Section 206 violation.") (quoting *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007)) (alterations in original).

[35] The Commission's *Flannery* opinion does not specifically address the Advisers Act, but for the reasons explained in the prior footnote, I interpret the Commission's reasoning as also applying to Advisers Act Section 206(2).

suitability for his investors. I also conclude that Cooper and Total Wealth trumpeted their supposed extensive due diligence in order to attract investors and hide the fact that investments were selected for a clearly self-interested motive. Investors were never told about the revenue sharing or consulting agreements. They were led to believe that their investments had been carefully screened and selected. Cooper's fraudulent schemes and business practices allowed him to enrich himself on the backs of his investors, who collectively lost millions. Tr. 1071.

In addition, Cooper's failure to disclose the conflict of interest generated from the fee sharing agreements was a violation of his fiduciary duty and therefore Advisers Act Section 206(1) and (2). *See Montford & Co.*, 2014 SEC LEXIS 1529, at *51-55 (investment adviser violated Section 206(1) and (2) for violations of fiduciary duty in connection with non-disclosed conflict of interest in payments arrangement).

Cooper acted with scienter

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. at 686 n.5 (internal quotation marks omitted). Scienter may be shown by establishing recklessness, meaning an "extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc) (quoted authority omitted). Proof of scienter may be inferred from circumstantial evidence. *SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987).

The evidence demonstrates that Cooper committed his violations with scienter, either with awareness of how he misled investors or with extreme recklessness in misleading them. Cooper knew that he was a fiduciary to his clients. Tr. 1032-33. He knew that he and Total Wealth had revenue sharing and consulting agreements with numerous entities. He knew that sizable amounts of client funds were being invested into entities with these agreements, and that these agreements earned him considerable fees. The inherent conflict could not be more obvious because the objectivity of an investment adviser is a paramount concern to investors, and these agreements directly put his objectivity into question. Yet despite the clear conflict of interest, Cooper never disclosed the revenue sharing and consulting fees to his clients. Verbal disclosure never occurred. Written disclosure, at best, employed misleading and inadequate language, and there is no evidence these disclosures were ever sent to clients. Simply put, Cooper's failings on this issue are so glaring that he either intentionally concealed, or recklessly failed to disclose, the revenue sharing and consulting agreements in order to defraud his clients.

Furthermore, Cooper solicited investors by touting Total Wealth's supposedly rigorous due diligence; he did so in person, in sales literature, and in Forms ADV. However, the actual due diligence performed by Cooper and Total Wealth was amateurish and perfunctory, and fell far below industry standards. Because he was heavily involved in performing the due diligence, Cooper knew, or was reckless in not knowing, that it did not remotely measure up to the level of due diligence that had been promised to investors.

In contesting a finding of scienter, Cooper primarily argues that he relied on disclosures prepared by compliance counsel. Resp. Br. at 15-17. However, a reliance on counsel defense requires a showing that Cooper "(1) made a complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice it was legal;

and (4) relied in good faith on advice." *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 467 (9th Cir. 1985). While Cooper testified at the hearing that he relied extensively on the advice of counsel for his disclosures, there is simply no evidence in the record that corroborates his statements. *See, e.g.*, Resp. Br. at 15 (citing only to Cooper's testimony for proposition that "Total Wealth made complete disclosure to counsel regarding the manner in which Total Wealth would be paid"). Further, when asked to disclose the advice he received, he invoked attorney-client privilege. Tr. 1028; *see Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (reliance on counsel defense implicitly waives attorney-client privilege). Cooper's bare assertions alone are not sufficient to sustain a reliance on counsel defense.

Cooper's actions satisfy the nexus requirements

Rule 10b-5 requires that the violative conduct be "in connection with the purchase or sale" of a security and Securities Act Section 17(a) requires that the violative conduct be "in the offer or sale" of a security. Each nexus requirement is interpreted very broadly. *See Zandford*, 535 U.S. at 819-20, 825 (Rule 10b-5's nexus requirement is to be construed flexibly and Commission's "broad reading" of the nexus requirement "is entitled to deference"); *Naftalin*, 441 U.S. at 778 (Securities Act Section 17(a) "was intended to cover any fraudulent scheme in an offer or sale of securities").

Cooper's misstatements and omissions were, in part, contained in sales literature and Forms ADV relied upon by investors in the offer, sale, or purchase of securities. I therefore find that his conduct satisfies the nexus requirement of both provisions. *See SEC v. Rana Research, Inc.*, 8 F.3d at 1362 (issuance of press release relating to stock coupled with public trading of that stock satisfied Rule 10b-5 nexus); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978) (filing of fraudulent report for a stock coupled with public trading of the stock satisfied Rule 10b-5 nexus); *SEC v. Goldsworthy*, No. 06-cv-10012, 2008 WL 8901272, at *12 (D. Mass June 11, 2008) ("[W]here a defendant has made false or misleading statements in materials typically relied upon by investors engaged in the ordinary market trading of securities, the requirement that fraud occur 'in the offer or sale' is satisfied."); *SEC v. Joseph Schlitz Brewing Co.*, 452 F. Supp. 824, 829 (E.D. Wisc. 1978) ("[m]isleading information contained in reports filed with the Commission and in media releases" satisfies nexus requirement of both provisions).

Cooper committed these violations through the mails or interstate commerce

Violations of the antifraud provisions must be committed by use of the mails or any means or instrumentality of interstate commerce. 15 U.S.C. §§ 77q, 78j(b), 80b-6; 17 C.F.R. § 240.10b-5. This phrase is construed broadly, "so as to be satisfied by any activity connected with a national securities exchange, by intrastate phone calls, and by even the most ancillary meetings." *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1348 (2d Cir. 1998). Some of Cooper's misstatements and omissions were contained within Forms ADV filed with the Commission and his communications with clients crossed state lines; therefore, the violations were committed through the mails or interstate commerce.

For all the reasons stated, Cooper willfully violated Securities Act Section 17(a)(1)-(3), Exchange Act Section 10(b) and Rule 10b-5(a)-(c), and Advisers Act Section 206(1) and (2).

2) Cooper willfully aided, abetted and caused Total Wealth's antifraud violations

The OIP also alleges that Cooper willfully aided, abetted, and caused Total Wealth's violation of Exchange Act Section 10(b) and Rule 10b-5. OIP at 13; *see* Div. Br. at 59-60. The elements of aiding and abetting liability are: (1) a principal committed a primary violation; (2) the alleged aider and abettor provided substantial assistance to the primary violator; and (3) the alleged aider and abettor provided such assistance with the necessary scienter. *See Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000).

All criteria are met here. First, Total Wealth committed a primary violation of Rule 10b-5 by filing Forms ADV containing material misstatements and omissions as to the revenue sharing agreements and due diligence. Second, Cooper substantially assisted Total Wealth's violations because he entered into the revenue sharing and consulting agreements, performed and directed due diligence, and had ultimate control over how the material facts were disclosed. *See SEC v. Apuzzo*, 689 F.3d 204, 206 (2d Cir. 2012) ("[T]o satisfy the 'substantial assistance' component of aiding and abetting, the SEC must show that the defendant . . . associated himself with the venture, that he participated in it as in something that he wished to bring about, and that he sought by his action to make it succeed.") (internal quotation marks and alterations omitted). Third, Cooper provided his assistance with scienter, as discussed above.

3) Cooper willfully violated Advisers Act Section 206(4) and Rule 206(4)-8

Advisers Act Section 206(4) prohibits an investment adviser from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4). Advisers Act Rule 206(4)-8(a) prohibits an investment adviser to a pooled investment vehicle, as defined in Advisers Act Rule 206(4)-8(b), from, with regard to an investor or prospective investor in a pooled investment vehicle, (1) making any untrue statement of material fact or omitting to state a material fact; or (2) engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. 17 C.F.R. § 275.206(4)-8. Scienter is not an element of a violation of Advisers Act Section 206(4) or Rule 206(4)-8. *Steadman*, 967 F.2d at 647.

Pooled investment vehicles include an investment company as defined under Section 3(a) of the Investment Company Act of 1940. 15 U.S.C. § 80a-3(a); 17 C.F.R. § 275.206(4)-8(b). Section 3(a) of the Investment Company Act defines an investment company, in relevant part, as "any issuer which is or holds itself out as being engaged primarily, in the business of investing, reinvesting, or trading in securities." 15 U.S.C. § 80a-3(a) (formatting altered). The Altus Funds meet that criterion, and are therefore pooled investment vehicles.[36] Through his control of Total

[36] ACOF's PPM claims that it is not an "investment company" under Section 3(a) of the Investment Company Act because of the exemption afforded by Section 3(c)(1) of the same act. Div. Ex. 135 at 00047. However, Section 3(c)(1) of the Investment Company Act only applies if the company has fewer than one hundred investors or owners. 15 U.S.C. §80a-3(c)(1); Div. Ex. 310 at 26 (disclosing that ACOF currently has 192 investors); *see also M.J. Whitman & Co., Inc. Pension Plan v. Am. Fin. Enter., Inc.*, 725 F.2d 394, 397 (6th Cir. 2006) (explaining that a fund with more than one hundred investors could not qualify for the exemption under Section 3(c)(1)). Accordingly, ACOF meets the definition of an investment company under Section 3(a) of the Investment Company Act. 15 U.S.C. § 80a-3(a).

Wealth, Cooper was an investment adviser to the Altus Funds, and he recklessly or intentionally made material misrepresentations and omissions and engaged in deceptive acts to their investors. He therefore violated Advisers Act Section 206(4) and Rule 206(4)-8.

4) Total Wealth willfully violated Advisers Act Section 206(4) and Rule 206(4)-2 and Cooper aided and abetted the violation

Advisers Act Rule 206(4)-2, known as the custody rule, imposes certain requirements on investment advisers with custody of client funds or securities. *See* 17 C.F.R. § 275.206(4)-2. Among these requirements is the "independent verification" requirement of subsection (a)(4) of the custody rule, which requires an annual surprise examination by an independent public accountant unless the audit exception of subsection (b)(4) of the custody rule is available. 17 C.F.R. § 275.206(4)-2(a)(4), (b)(4); *see* Div. Ex. 120 at 26. An investment adviser meets the audit exception if the pooled investment vehicles they advise are, in relevant part (1) annually audited by an independent public accountant registered with and subject to inspection by the PCAOB and (2) annually distribute audited financial statements within 120 days of the end of its fiscal year. 17 C.F.R. § 275.206(4)-2(b)(4).

As the managing member of Altus Management, the general partner of the Altus Funds, Total Wealth had custody of the funds and securities of its clients, the Altus Funds, as well as the funds and securities of the investors in those funds who were Total Wealth clients. *See* 17 C.F.R. § 275.206(4)-2(d)(2); *see, e.g.*, Div. Ex. 120 at 5, 25-26. Total Wealth was therefore subject to the custody rule.

Cooper admitted that Total Wealth violated the custody rule and did not address this subject in his post-hearing brief. Tr. 968, 1074-75. Additionally, Total Wealth could not have qualified for the audit exception because the Altus Funds' auditor, Ogbomo CPA, was not subject to regular inspection by the PCAOB, and did not distribute audited financial statements within 120 days of the end of the fiscal year. Tr. 210, 225-26. Accordingly, Total Wealth violated the custody rule because it did not comply with the "independent verification requirement" of subsection (a)(4), and did not subject the Altus Funds to procedures that satisfy the audit exception of subsection (b)(4). 17 C.F.R. § 275.206(4)-2(a)(4), (b)(4).

Cooper willfully aided and abetted Total Wealth's violations. Cooper substantially assisted in the violations because, as discussed above, he was responsible for engaging Ogbomo CPA, served as one of Ogbomo CPA's contacts at Total Wealth during the audit, signed the management representation letter to Ogbomo CPA, and received Ogbomo CPA's internal control deficiencies letter. Tr. 209, Div. Exs. 42, 45. Cooper also had knowledge of the custody rule violations.

5) Cooper willfully violated Advisers Act Section 207

Advisers Act Section 207 makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under Section 203 or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein." 15 U.S.C § 80b-7. A finding of willfulness does not require an intent to violate, but merely to do the act constituting the violation. *SEC v. K.W. Brown and Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla. 2007) (citing *Wonsover v. SEC*, 205

F.3d 408, 413-15 (D.C. Cir. 2000)). Total Wealth's Forms ADV, filed with the Commission, contained numerous misstatements and omissions of material fact, including the failures to adequately disclose the revenue sharing fees and due diligence programs, as discussed above. *See Zion Capital Mgmt. LLC*, Securities Act Release No. 8345A, 2003 WL 25596513, at *7 (Dec. 11, 2003) (material omissions in Form ADV constituted Section 207 violation). Accordingly, Total Wealth violated Advisers Act Section 207. In addition, as discussed above, Cooper's control and authority over Total Wealth are more than sufficient to hold him as a primary violator of Section 207.

Sanctions

The Division seeks to bar Cooper from working in the securities industry pursuant to Advisers Act Section 203(f) and Investment Company Act Section 9(b); to impose cease-and-desist orders against Cooper pursuant to Advisers Act Section 203(k), Exchange Act Section 21C, and Securities Act Section 8A; to order Cooper to pay disgorgement pursuant to Advisers Act Section 203(j) and (k)(5), Investment Company Act Section 9(e), Exchange Act Sections 21B(e) and 21C(e), and Securities Act Section 8A(e); and to pay civil penalties pursuant to Advisers Act Section 203(i), Investment Company Act Section 9(d), Exchange Act Section 21B(a), and Securities Act Section 8A(g). OIP at 14-15; Div. Br. at 67-70.

Industry Bar

The Division seeks to bar Cooper from working in the securities industry pursuant to Advisers Act Section 203(f) and Investment Company Act Section 9(b).

In relevant part, Advisers Act Section 203(f) authorizes the Commission to bar any person from the securities industry if such person was associated with an investment adviser at the time of the alleged misconduct, such sanction is in the public interest, and such person (1) has willfully made or caused to be made a materially false or misleading statement, or omitted any material fact, in any application for registration or report required to be filed with the Commission; or (2) has willfully violated or willfully aided and abetted violations of any provision of the Securities Act, Exchange Act, Investment Company Act, or Advisers Act, or of any rules under those statutes. 15 U.S.C. § 80b-3(f), (e)(1), (5), (6).

Investment Company Act Section 9(b) authorizes the Commission to bar any person from association with an investment company or certain affiliated persons if the sanction is in the public interest, and such person (1) has willfully made or caused to be made materially false or misleading statements in any registration statement, application, or report filed with the Commission under the Investment Company Act; or (2) has willfully violated or willfully aided and abetted violations of any provision of the Securities Act, Exchange Act, Advisers Act, or Investment Company Act, or of any rules under those statutes. 15 U.S.C. § 80a-9(b)(1)-(3); *see DeRenzis v. Levy*, 297 F. Supp. 998, 1002 (S.D.N.Y. 1969) (citing Pub. L. No. 768, 76th Cong., 3d Sess., 54 Stat. 789 (1940)).[37]

[37] If the criteria under Advisers Act Section 203(f) are satisfied, the Commission is authorized to bar the person from being associated with an investment adviser, broker, dealer, municipal

Advisers Act Section 203(f) is applicable to Cooper because, while associated with an investment adviser, he willfully made and caused to be made materially false and misleading statements and omissions in the investment adviser's Forms ADV and willfully violated provisions of the Securities, Exchange, and Advisers Acts and rules thereunder. Cooper also willfully aided, abetted, and caused Total Wealth's violations of the Exchange and Advisers Acts. Investment Company Act Section 9(b) also applies to Cooper because he willfully violated provisions of the Securities, Exchange, and Advisers Acts and willfully aided and abetted Total Wealth's violations of the Exchange and Advisers Acts. The only question remaining is whether the sanctions against Cooper are in the public interest.

To determine whether a sanction is in the public interest, the Commission considers the *Steadman* factors: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). The Commission's inquiry regarding the appropriate sanction is flexible, and no one factor is dispositive. *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and deterrence. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006); *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003).

Cooper's willful violations of the antifraud provisions were egregious. Cooper misled investors, most of whom gave him discretionary authority to invest their retirement funds. Cooper was compensated handsomely for directing client funds into certain investments and never disclosed these conflict of interest arrangements to his clients. Cooper also grossly misrepresented the level of due diligence he performed, deceiving investors into thinking that the investments were well-researched when they were not. Cooper's clients lost tens of millions of dollars because of his actions. The Commission has held that violations of the antifraud provisions are particularly egregious and warrant "the severest of sanctions under the securities

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securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. 15 U.S.C. § 80b-3(f). If the criteria under Investment Company Act Section 9(b) are satisfied, the Commission may bar the person from serving as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. 15 U.S.C. § 80a-9(b). I refer to both bars collectively as an industry bar. The court in *Koch* held that an individual may not be barred from associating with municipal advisors or nationally recognized statistical rating organizations if those violations occurred before the 2010 Dodd-Frank Act became effective. *Koch v. SEC*, ---F.3d--- , 2015 WL 4216988 at *8-10 (D.C. Cir. July 14, 2015). While some of Cooper's violations occurred before the Dodd-Frank Act became effective on July 21, 2010, numerous misstatements and omissions occurred after the statute's effective date. I therefore find that a full industry bar can be imposed.

laws." *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013) (internal citation omitted). Cooper's violations were also recurrent and took place for multiple years. Investment advisers have an "affirmative duty of utmost good faith, and full and fair disclosure of all material facts." *Capital Gains*, 375 U.S. at 194 (internal quotation marks omitted). Cooper failed to abide by such standards.

Cooper committed these violations with a high degree of scienter, as explained above. He offered no assurances against any future violations or recognition of the wrongful nature of his conduct, rather he claimed without offering any evidence that his conduct was guided by the advice of counsel. *See* Resp. Br. at 15-17. While Cooper is not currently employed in the securities industry, nothing currently prevents him from re-entering the industry, a development which would present the opportunity for future violations. Lastly, deterrence would be furthered by demonstrating that egregious violations of an investment adviser's fiduciary duty are met with severe sanctions. "Because the securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence, it is essential that the highest ethical standards prevail in every facet of the securities industry." *Donald L. Koch*, Exchange Act Release No. 72179, 2014 SEC LEXIS 1684, at *86 (May 16, 2014) (internal quotations and footnotes omitted), *pet. denied in part on relevant grounds*, ---F.3d--- , 2015 WL 4216988 (D.C. Cir. July 14, 2015).

I find that the public interest requires that Cooper be permanently barred from participating in the securities industry pursuant to Advisers Act Section 203(f), and permanently prohibited from associating with the enumerated persons in Investment Company Act Section 9(b).

Cease-and-Desist Order

The Division seeks to impose cease-and-desist orders against Cooper pursuant to Advisers Act Section 203(k), Exchange Act Section 21C, and Securities Act Section 8A.

Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) authorize the Commission to impose a cease-and-desist order against any person who has violated the Securities Act, Exchange Act, or Advisers Act, respectively, or any rule or regulation thereunder. 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k)(1). In determining whether to issue a cease-and-desist order, the Commission considers essentially the same factors as in *Steadman*. Although there must be some likelihood of future violations whenever the Commission issues a cease-and-desist order, the required showing is "significantly less than that required for an injunction." *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *101, *114, *116 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). Absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. *Id.* at *102-03, *114-15 & n.147. In addition, the Commission considers "whether the violation is recent, the degree of harm to investors of the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Id.* at *116. The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *Id.*; *Montford & Co.*, 2014 SEC LEXIS 1529, at *88.

Consideration of the *Steadman* factors weighs heavily in favor of sanctions. Cooper's egregious and self-serving conduct betrayed his responsibilities as a fiduciary. His conduct violated numerous provisions of the Securities, Exchange, and Advisers Acts. It also occurred over a number of years and cost Total Wealth clients millions of dollars. Even considering the other sanctions sought in this proceeding, a cease-and-desist order will serve the public interest by signaling that Cooper can no longer engage in such misconduct and put others on notice that similar misconduct will not be tolerated. His total lack of understanding or remorse indicates a high likelihood of future violations and necessitates imposition of the broadest possible sanction. For these reasons, a cease-and-desist order against Cooper is in the public interest and will be imposed.

Disgorgement

The Division seeks to order Cooper to pay disgorgement pursuant to Advisers Act Section 203(j) and (k)(5), Investment Company Act Section 9(e), Exchange Act Sections 21B(e) and 21C(e), and Securities Act Section 8A(e).

Advisers Act Section 203(k)(5), Exchange Act Section 21C(e), and Securities Act Section 8A(e) authorize disgorgement, including reasonable interest, in cease-and-desist proceedings such as this one. 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(k)(5). Advisers Act Section 203(j), Investment Company Act Section 9(e), and Exchange Act Section 21B(e) authorize disgorgement in proceedings in which a penalty may be imposed under such sections. 15 U.S.C. §§ 78u-2(e), 80a-9(e), 80b-3(j). Penalties may be imposed under such sections for willful violations of, or willfully aiding and abetting violations of, the securities laws, which I have found have been committed by Cooper. 15 U.S.C. §§ 78u-2(a), 80a-9(d), 80b-3(i).

Disgorgement is an equitable remedy designed to deprive the wrongdoer of unjust enrichment and thereby deter violations of the securities laws. *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1191 (9th Cir. 1998); *see also SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.") (internal quotation marks omitted). "When calculating disgorgement, 'separating legal from illegal profits exactly may at times be a near-impossible task.'" *Montford & Co.*, 2014 SEC LEXIS 1529, at *94 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)). "As a result, disgorgement 'need only be a reasonable approximation of profits causally connected to the violation.'" *Id.* (quoting *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995)). "Once the Division shows that the disgorgement is a reasonable approximation, the burden shifts to the respondent to show that the amount of disgorgement is not a reasonable approximation." *Id.* (citing *SEC v. Happ*, 392 F.3d 12, 32 (1st Cir. 2004)). "The risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* (quoting *Happ*, 392 F.3d at 31); *accord SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010).

The Division argues that Cooper should be ordered to disgorge $1,815,992.99, which it contends is the amount that Cooper received, personally and through Total Wealth and Pinnacle, in revenue sharing and consulting fees. Div. Br. at 68-69; Div. Ex. 272A. The disgorgement amount sought was calculated from Total Wealth and Pinnacle's ledgers, and comprises of $982,057.72 in revenue sharing fees from October 2009 to February 2014 and $833,935.27 in consulting fees from October 2009 to May 2013. Tr. 600; Div. Ex. 272A. Cooper's post-hearing brief does not address the amount of disgorgement sought.

Disgorgement of the revenue sharing and consulting fees earned by conduct that blatantly violated the securities statutes and regulations is appropriate. Cooper did not make investors aware that he was enriching himself with fees which clearly called into question his investment advice and allocations. If Cooper had disclosed this information, many investors would not have chosen to invest with him, thereby depriving him of considerable monetary gain. Accordingly, I will order Cooper to disgorge funds, which comprise a reasonable approximation of his ill-gotten gains and are casually connected to his violations of the securities laws.

Based on these findings and pursuant to Commission Rule of Practice 600, 17 C.F.R. § 201.600, Cooper must disgorge (1) $982,057.72 in revenue sharing fees and (2) $833,935.27 in consulting fees, and pay prejudgment interest on those amounts running from March 1, 2014, and from June 1, 2013,[38] respectively, through the last day of the month in which disgorgement is paid. 17 C.F.R. § 201.600(a).

Civil Penalties

The Division seeks to impose penalties on Cooper pursuant to Advisers Act Section 203(i), Investment Company Act Section 9(d), Exchange Act Section 21B(a), and Securities Act Section 8A(g).

Advisers Act Section 203(i), Exchange Act Section 21B(a), and Investment Company Act Section 9(d) authorize the Commission to impose civil monetary penalties against any person where such penalties are in the public interest and the Commission has found that such person (1) has willfully violated, or aided and abetted violations of, certain provisions of the securities laws; or (2) has willfully made or caused to be made a materially false or misleading statement, or omitted any material fact, in a report required to be filed with the Commission.[39] 15 U.S.C. §§ 78u-2(a), 80a-9(d), 80b-3(i).

The statutes set out a three-tiered system for determining the maximum civil penalty for each act or omission. A maximum third-tier penalty is permitted if: (1) the violations involved

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[38] The dates reflect the different months in which each type of payment was last reported. *See* Div. Ex. 272A; 17 C.F.R. § 201.600(a).

[39] The Division also seeks civil monetary penalties under Securities Act Section 8A(g). Div. Br. at 70; 15 U.S.C. § 77h-1(g). However, that provision was not in effect during a portion of the misconduct at issue, and I therefore decline to impose civil penalties under that provision. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, Title IX, §§ 4, 929P(a)(1), 124 Stat. 1376, 1390, 1862-63 (July 21, 2010).

fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and (2) such act or omission directly or indirectly resulted in substantial losses, or created a significant risk of substantial losses to other persons, or resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. §§ 78u-2(b)(3), 80a-9(d)(2)(C), 80b-3(i)(2)(C). "To impose second-tier penalties, the Commission must determine how many violations occurred and how many are attributable to each person." *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012). Presumably, the same approach should be taken with respect to civil penalties at the third-tier level.

To determine whether a penalty is in the public interest, the statutes call for consideration of: (1) whether the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm caused to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3). Under the statutes, the maximum amount of civil penalty for a violation committed by a natural person after March 3, 2009, at the first tier is $7,500, at the second tier is $75,000, and at the third tier is $150,000. 17 C.F.R. § 201.1004, Subpt. E, Table IV.

It is in the public interest to assess a penalty at the third-tier level because Cooper's violations involved fraud, deceit, or reckless disregard of a regulatory requirement, caused substantial losses to his investors and substantial gains to himself and there is a considerable need to deter Cooper and other persons from committing similar conduct.

The Division seeks the maximum third-tier penalty of $150,000, and proposes that Cooper be assessed that penalty for each of the 192 investors in ACOF, totaling $28.8 million in civil penalties. Div. Br. at 71-73. Given the severity of Cooper's misconduct, I agree that the maximum third-tier penalty is appropriate. However, I do not adopt the Division's seemingly arbitrary method for calculating the number of violations.[40] Instead, I calculate violations based on the number of Total Wealth's Forms ADV in which material misstatements were made. The record contains five filed Forms ADV Part II containing both inadequate disclosure of revenue sharing agreements and misleading descriptions of due diligence. *See* Div. Exs. 120 at 5, 12; 136 at 8, 11-12; 218 at 5, 12; 220 at 5, 12; 224 at 5, 12. Cooper will be assessed a third-tier penalty of $150,000 for each of these Forms ADV, for a total of $750,000.

In addition, the Division seeks a first-tier penalty of $7,500 for each of the years–2010, 2011, 2012, and 2013–that ACOF violated the custody rule. Div. Br. at 73. Cooper does not address or contest this request, and I agree that these penalties are appropriate. Cooper will be assessed a first-tier penalty of $7,500 for the four years of violations, for a total of $30,000.

[40] Equating the number of investors with the number of violations, as the Division seeks to do, is overly simplistic and may lead to wildly disproportionate penalty amounts. Moreover, even assuming I were to assess a third-tier penalty for each of Cooper and Total Wealth's investors, I am unclear why I would only count investors in ACOF, but not investors in Total Wealth or the other Altus Funds.

Fair Fund

Pursuant to Commission Rule of Practice 1100, 17 C.F.R. § 201.1100, I require that the amount of disgorgement, prejudgment interest, and civil monetary penalties be used to create a Fair Fund for the benefit of Cooper's clients harmed by the violations.

Record Certification

Pursuant to Commission Rule of Practice 351(b), 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on July 22, 2015, with the exception of Division Exhibit 292, which was not admitted at the hearing. Tr. 1066.

Order

I ORDER that, pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Section 203(k) of the Investment Advisers Act of 1940:

> Jacob Keith Cooper shall cease and desist from committing or causing violations, and any future violations, of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5; and Sections 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940 and Advisers Act Rules 206(4)-2 and 206(4)-8.

I FURTHER ORDER that, pursuant to Section 8A(e) of the Securities Act of 1933, Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, Section 203(j) and (k)(5) of the Investment Advisers Act of 1940, and Section 9(e) of the Investment Company Act of 1940:

> Jacob Keith Cooper shall disgorge (1) $982,057.72 and (2) $833,935.27, plus prejudgment interest; and
>
> Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. 17 C.F.R. § 201.600. Prejudgment interest for the payment of $982,057.72 shall run from March 1, 2014, and for the payment of $833,935.27 shall run from June 1, 2013, through the last day of the month preceding the month in which each payment is made. *See id.*

I FURTHER ORDER that, pursuant to Section 21B(a) of the Securities Exchange Act of 1934, Section 9(d) of the Investment Company Act of 1940, and Section 203(i) of the Investment Advisers Act of 1940, Jacob Keith Cooper shall pay a civil monetary penalty in the amount of $780,000.

I FURTHER ORDER that, pursuant to 17 C.F.R. § 201.1100, any funds recovered by way disgorgement, prejudgment interest, or penalties shall be placed in a Fair Fund for the benefit of investors harmed by the violations.

I FURTHER ORDER that, pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940, Jacob Keith Cooper is permanently barred from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

Payment of disgorgement, prejudgment interest, and civil penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent(s) and Administrative Proceeding No. 3-15842, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Brenda P. Murray
Chief Administrative Law Judge