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1 HELANE L. MORRISON (CA Bar No. 127752)
JOHN S. YUN (CA Bar No. 112260)
2 THOMAS J. EME (IL Bar No. 6224870)

3 Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
4 44 Montgomery Street, Suite 2600
San Francisco, California 94104
5 Telephone: (415) 705-2500
Facsimile: (415) 705-2501
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FILED

JUN 23 2005

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

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JA

11 SECURITIES AND EXCHANGE COMMISSION,

Case No. C-03-3252-WHA

12 Plaintiff,

FINAL JUDGMENT OF EQUITABLE AND
OTHER RELIEF AND SEVERING OF CIVIL
PENALTIES FOR LATER DETERMINATION

13 vs.

14 OLIVER HILSEN RATH AND DAVID S.
15 KLARMAN,

16 Defendants.
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18 The Securities and Exchange Commission having filed a Complaint and Defendant
19 David S. Klarman ("Defendant") having entered a general appearance; consented to the Court's
20 jurisdiction over him and the subject matter of this action; consented to entry of this Final Judgment
21 of Equitable and Other Relief and Severing of Civil Penalties for Later Determination ("Final
22 Judgment") without admitting or denying the allegations of the Complaint (except as to jurisdiction);
23 waived findings of fact and conclusions of law; and waived any right to appeal from this Final
24 Judgment:

I.

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's
26 agents, servants, employees, attorneys, and all persons in active concert or participation with them
27 who receive actual notice of this Final Judgment by personal service or otherwise are permanently
28 restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange
Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder

1 [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the
2 mails, or of any facility of any national securities exchange, in connection with the purchase or sale of
3 any security:

- 4 (a) to employ any device, scheme, or artifice to defraud;
- 5 (b) to make any untrue statement of a material fact or to omit to state a material fact
6 necessary in order to make the statements made, in the light of the circumstances
7 under which they were made, not misleading; or
- 8 (c) to engage in any act, practice, or course of business which operates or would
9 operate as a fraud or deceit upon any person.

10 II.

11 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and
12 Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation
13 with them who receive actual notice of this Final Judgment by personal service or otherwise are
14 permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the
15 "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or
16 instruments of transportation or communication in interstate commerce or by use of the mails,
17 directly or indirectly:

- 18 (a) to employ any device, scheme, or artifice to defraud;
- 19 (b) to obtain money or property by means of any untrue statement of a material fact or any
20 omission of a material fact necessary in order to make the statements made, in light of
21 the circumstances under which they were made, not misleading; or
- 22 (c) to engage in any transaction, practice, or course of business which operates or
23 would operate as a fraud or deceit upon the purchaser.

24 III.

25 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and
26 Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation
27 with them who receive actual notice of this Final Judgment by personal service or otherwise are
28 permanently restrained and enjoined from violating Section 13(b)(5) of the Exchange Act [15 U.S.C.
§78m(b)(5)] and Rule 13b2-1 [17 C.F.R. § 240.13b2-1] thereunder by knowingly falsifying an
issuer's book, record, or account.

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from aiding and abetting any violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1, and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1, and 240.13a-13] thereunder by knowingly providing substantial assistance to an issuer that files with the Commission an annual or quarterly report that contains an untrue statement of material fact or omits to state material information required to be stated therein or necessary in order to make the required statements made, in the light of the circumstances under which they were made, not misleading.

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from aiding and abetting any violation of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. §78m(b)(2)(A)] by knowingly providing substantial assistance to an issuer that fails to make and keep books, records, or accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

VI.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating Rule 13b2-2 under the Exchange Act [17 C.F.R. §240.13b2-2] by, as an officer or director of an issuer, in connection with the audit or examination of the financial statements of an issuer or the preparation and filing of statements and reports with the Commission, directly or indirectly, making or causing to be made materially false or misleading statements to an accountant or omitting to state, or causing another person to omit to state to an accountant, material facts necessary in order to make statements made to the accountant, in light of the circumstances under which such statements were made, not misleading.

VII.

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2 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section
3 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], Defendant is prohibited, for 10 years following
4 the date of entry of this Final Judgment, from acting as an officer or director of any issuer that has a
5 class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is
6 required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VIII.

7 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is
8 liable for disgorgement of \$3,185,060 plus prejudgment interest thereon of \$677,829, for a total of
9 \$3,862,929. Within 30 days of the date of this Final Judgment, Defendant shall provide written proof
10 to the Court and the Commission that he has placed such amount of \$3,862,929 in an escrow account
11 with the Clerk of Court pursuant to his plea agreement in U.S. v. Klarman, No. CR-03-0213-WHA
12 (“the criminal matter”), which is currently pending before this Court.

IX.

13 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the amount of any civil
14 penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of
15 the Exchange Act [15 U.S.C. § 78u(d)(3)] Defendant must pay in this civil matter shall be determined
16 at a later hearing to be set by the Court in a separate order. For purposes of determining civil
17 penalties, Defendant agrees that the Court may deem the allegations in the Commission’s complaint
18 to be undisputed. The total amount of any civil penalties in this matter will be set at no more than
19 \$300,000. For any amounts Defendant pays pursuant to his sentence in the criminal matter,
20 Defendant shall receive a dollar-for-dollar credit toward his obligation to pay disgorgement,
21 prejudgment interest thereon, and any civil penalties in this civil matter. As part of his plea
22 agreement, Defendant has agreed to place \$5,000,000 in an escrow account with the Clerk of Court,
23 with these funds earmarked for possible future disbursement as part of his sentence in the criminal
24 matter. If for any reason Defendant is not required to permanently surrender the entire amount of
25 funds he escrows in the criminal matter under the plea agreement, then Defendant shall apply such
26 remaining funds toward any remaining liability for disgorgement, prejudgment interest thereon, or
27 civil penalties he may have after receiving any dollar-for-dollar credit.
28

X.

The Commission may by motion propose a plan, subject to the Court's approval, to distribute funds Defendant pays as disgorgement, prejudgment interest, and any civil penalties in this civil matter. Such a plan may provide that such funds shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002.

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of David S. Klarman filed in this action is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

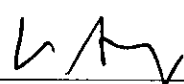
XII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment and conducting any further hearings.

XIII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: 6-23-05



UNITED STATES DISTRICT JUDGE

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