INITIAL DECISION RELEASE NO. 973
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15967

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

In the Matter of LAWRENCE M. LABINE	REDACTED (PUBLIC) INITIAL DECISION March 2, 2016

APPEARANCES: Duane K. Thompson, Melissa Armstrong, Charles Davis, and Adam Eisner for the Division of Enforcement, Securities and Exchange Commission

Alan S. Baskin, Baskin Richards PLC, for Respondent Lawrence M. LaBine

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Respondent Lawrence M. LaBine recommended and sold investments in debt securities called Series D debentures issued by Domin-8 Enterprise Solutions, Inc., a startup software company. The vast majority of LaBine's clients who purchased these debentures were his advisory clients. The Division of Enforcement alleges that LaBine violated the antifraud provisions of the federal securities laws because he 1) did not disclose potential incentive compensation for the sales, 2) did not disclose his fundraising role and commitments to Domin-8 to sell the debentures, and 3) made material misrepresentations about the investment's risks. The evidence supports the allegations. Taking into account LaBine's financial condition, the following sanctions are appropriate and in the public interest: a cease-and-desist order; a two-year investment company bar; a bar from association with any investment adviser, broker, or dealer, with a right to reapply for association in two years; and disgorgement of $100,000 plus prejudgment interest.

PROCEDURAL BACKGROUND

The Securities and Exchange Commission instituted this proceeding on July 8, 2014. As authority, the order instituting proceedings (OIP) cites Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940.

LaBine filed an answer denying the alleged violations on July 31, 2014. The proceeding was stayed in November 2014 pending the Commission's consideration of LaBine's settlement offer, and the stay lapsed in April 2015 when the Commission rejected it. I held seven days of hearing in August and September 2015.[1] Fourteen witnesses testified including LaBine, investors and experts presented by the Division and LaBine, and a former Domin-8 officer. In addition, three experts who did not testify presented four written reports. Hundreds of exhibits were admitted into evidence. Briefing closed in November 2015.

CONSTITUTIONAL CLAIM

LaBine seeks dismissal of this proceeding on the purported basis that the appointment and tenure of Commission administrative law judges violate the Constitution. The Commission has rejected similar claims in other proceedings. *See, e.g.*, *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 SEC LEXIS 3854, at *89-112 (Sept. 17, 2015), *appeal filed*, No. 15-1416 (D.C. Cir.); *Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628, at *5, *76-90 (Sept. 3, 2015), *appeal filed*, No. 15-1345 (D.C. Cir.). I therefore reject LaBine's constitutional claim and proceed to the merits.

FINDINGS OF FACT

My factual findings and legal conclusions are based on the entire record.[2] 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 decision.

Respondent and Associated Entities

Lawrence M. LaBine, age fifty-five, is an Arizona resident and has worked in the securities industry since 1986. Tr. 660, 703-04; Div. Ex. 44 at 5; Div. Ex. 59 at 14. He has a bachelor of science degree in economics and psychology, is a chartered financial consultant, and has multiple securities licenses. Tr. 660-62. From 2007 to 2010, LaBine was affiliated with: **DeWaay Advisory, LLC**, as a registered investment adviser representative, and **DeWaay Financial Network, Inc.**, as a registered representative.[3] Stip. ¶ 1; Tr. 666. The DeWaay entities are, respectively, an advisory and brokerage firm. Tr. 673-74; Stip. ¶ 1. As of 2008, LaBine had approximately five hundred core clients, predominately senior citizens with whom

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[1] Erin Fallon, Brittany Hodges, and Patrick Murphy were part of the Division's litigation support team.

[2] In this decision, I cite the transcript of the hearing as Tr. __; the Division's and Respondent's exhibits as Div. Ex. __ and Resp. Ex. __; the page numbers of certain exhibits by the last non-zero numerical digits of their Bates numbers; and the parties' joint stipulations as Stip. ¶ __ or Stip. Table __.

[3] In this decision, I usually refer to the specific DeWaay entities as either DeWaay Advisory or DeWaay Financial, although the distinction is not always relevant and at times I refer to either firm as simply DeWaay.

he had long-term relationships. Tr. 675-76. Many of his clients followed him as he moved from one financial services firm to another. Tr. 691-92. He was terminated from the DeWaay entities in 2010. Stip. ¶ 1. LaBine is currently affiliated with Newbridge Securities Corp. and works at an Arizona branch office. Tr. 660, 706; Stip. ¶ 1. He estimated having "a couple hundred million" in assets currently under his management. Tr. 1034.

Around the period of the events at issue, LaBine touted himself as a financial planner who could offer the "whole package" of financial and estate planning services to clients. Div. Ex. 47 at 67-68; Tr. 669-72, 674, 863. He used two firms that he owned to market himself and attract clients: Pinnacle Wealth Management that primarily operated in California, and Financial & Estate Planning International (FEPI) that primarily operated in Arizona. Tr. 664-65, 672-74; Div. Ex. 47 at 69; Div. Exs. 75-76. LaBine's firms, however, were "just the name on the door." Tr. 673. Many clients held advisory or brokerage accounts at the DeWaay entities, and, for the Domin-8 Series D debentures, securities transactions were offered through DeWaay Financial. Tr. 672-74, 740; Stip. ¶¶ 1, 8. His FEPI staff assisted him in servicing accounts held with the DeWaay entities. Tr. 682. In addition to attracting clients through his two firms, LaBine obtained clients through referrals from estate planning lawyers. Tr. 1030; Div. Ex. 20; Div. Ex. 47 at 62-73.

At the hearing, LaBine acknowledged that his services often included investment advice. Tr. 670. In his investigative testimony, he explained that he sought to "make people money with the investment advice." Div. Ex. 47 at 68. And in testimony before FINRA, he said that clients hired him "to vet out investments," and he would "give them investment advice and show them products that we believe will be suitable and helpful." Div. Ex. 48.1 at 190; *see* Tr. 696. LaBine's staff maintained a single file for each client even if the client had separate advisory and brokerage accounts, and LaBine acknowledged that having both types of accounts facilitated diversification of his clients' investment portfolios. Tr. 740-41.

When LaBine sold publicly traded securities to a client with an advisory account, he usually earned a 1.25% annual management fee; on the other hand, when he recommended and sold an alternative product such as a real estate investment trust (REIT), he would be paid a sales commission, which he said was in the range of 6 or 7%. Tr. 741-42. According to LaBine, he moved clients out of publicly traded securities to alternative investments such as REITs and the Domin-8 debentures because of the market's financial crisis in 2008. Tr. 742-43.

Prior to his affiliation with the DeWaay entities and the events at issue, LaBine had resigned from two prior firms with which he was employed: one firm alleged that LaBine did not follow compliance policies, and the second firm alleged that LaBine did not follow its internal policies and industry standards. Tr. 708-09, 711-14; Div. Ex. 59 at 19. In November 2005, the National Association of Securities Dealers suspended LaBine for fifteen business days, fined him $25,000, and required him to requalify as a general securities representative, as a result of making unsuitable recommendations to customers. Tr. 709-11; Div. Ex. 59 at 86-87. In 2007, the state of Illinois entered a consent order that withdrew LaBine's registration as a salesperson in the state with no application for re-registration for eighteen months, imposed a fine, and required him to be subject to a heightened supervision program upon re-registration. Div. Ex. 59

at 88-89; Lawrence Michael LaBine (CRD# 1279935) BrokerCheck Report at 9-10 (Feb. 8, 2016), http://brokercheck.finra.org; *see* 17 C.F.R. § 201.323 (official notice).

Pursuant to that consent order, DeWaay Financial imposed a heightened supervision plan on LaBine; under that plan, LaBine's own FEPI employee, Steven Swanson, acted as LaBine's local supervisor. Tr. 1092-94, 1188-89; Resp. Ex. 10. DeWaay's chief compliance officer at its home office was assigned as a supervisory representative. Resp. Ex. 10. LaBine's 2010 termination from the DeWaay entities was the result of allegations of violations of industry standards and regulations, as well as fraud; and DeWaay's owner paid $100,000 in settlement based on client allegations against LaBine. Tr. 709, 1032-33; Div. Ex. 59 at 92-93. In addition to this administrative proceeding, LaBine has a pending FINRA action against him based on similar allegations related to his Domin-8 sales and other alternative investments. BrokerCheck Report at 15-16. He also has been the subject of multiple arbitration claims brought by former DeWaay clients, some of which resulted in substantial awards. *See, e.g.*, Div. Ex. 59 at 69-70, 77-78; Stip. Table 1 #21, 102.

Domin-8 Enterprise Solutions

Domin-8 was formed in 2002 as a privately held startup company that provided software and related services to property managers and owners. Stip. ¶ 2; Tr. 95-100. From 2005 to 2007, Domin-8 embarked on an aggressive acquisition strategy as part of its founder's vision to "dominate" this market in software services. Stip. ¶ 2; Tr. 97-98. Domin-8 had a significant customer base that managed or owned approximately five million property units, but the company was critically underfunded. Tr. 102-03, 233. By year-end 2007, Domin-8's total debt was $14.7 million with $709,834 cash-on-hand and a $14.5 million net loss; and by mid-2008, the company had a substantially negative cash flow.[4] Div. Ex. 56.2 at bates 183; Tr. 109-10, 114; Stip. ¶ 3. By year-end 2008, Domin-8's total debt was $28 million with $416,000 cash-on-hand and a $16.6 million net loss. Div. Ex. 56.1 at 20, Ex. G at 5; Tr. 114-15; Stip. ¶ 5. Domin-8's total assets consisted of, among other items, $2 million in net accounts receivable, $18 million in goodwill, property and equipment of less than $600,000, and intangible assets of less than $9 million. Div. Ex. 56.1, Ex. G at 2; Tr. 122-23.

In 2007, Domin-8 began a series of debt offerings, but did not meet its funding objectives. Stip. ¶ 4; Tr. 104-09. In June 2008, Domin-8 began another round of debt financing consisting of **Series D debentures**, with the hope of raising at least $12 million. Stip. ¶ 5. It is undisputed that these debentures are securities. Stip. ¶ 11. The Series D debentures were offered via a private placement memorandum (PPM) dated June 30, 2008. Stip. ¶ 6; Div. Ex. 56.2. The PPM specified that the securities being offered were the debentures, which consisted of 240 units priced at $50,000 each, as well as a warrant to purchase shares of Domin-8 common stock at a preset price. Div. Ex. 56.2 at bates 145. The debenture purchasers had a secured interest senior to the prior debt offerings but subordinate to certain seller notes. Div. Ex. 56.2 at bates 147, 156,

[4] The parties stipulated to a $14.5 million net loss in 2007; however, Domin-8's PPM and audited consolidated financial statement for that year reflects a $4.5 million net loss. *Compare* Div. Ex. 56.2 at bates 150, 304, 306, *with* Stip. ¶ 3.

158. The PPM disclosed that if the minimum offering of $5 million was reached, it would use nearly $4 million to pay the seller notes; and that if a maximum offering of $12 million was reached, it would use $5.2 million to pay the seller notes. Div. Ex. 56.2 at bates 157.

The PPM identified **GunnAllen Financial, Inc.**, an investment banking and brokerage firm, as the placement agent for the offering, and disclosed that the placement agent was entitled to receive commissions for sales of the debentures, as well as a warrant to purchase shares of Domin-8 common stock.[5] Stip. ¶ 7; Div. Ex. 56.2 at bates 140. The PPM set a formula by which GunnAllen's warrant rights would be determined by the proceeds raised in relation to the exercise or strike price. Div. Ex. 56.2 at bates 140.

DeWaay Financial, the brokerage firm with which LaBine was then associated, participated in the Series D offering as a selling agent. Tr. 119; Div. Ex. 16. GunnAllen and DeWaay Financial entered into a selling agreement dated June 30, 2008, under which DeWaay Financial, in exchange for its assistance in selling the debentures, would receive eighty percent of payable commissions and warrants for its sales, and GunnAllen would receive the remainder. Stip. ¶ 8; Div. Ex. 16 at bates 8. Although DeWaay Financial was listed on the cover pages of Domin-8 offering documents, the selling agreement was not disclosed in the PPM or its supplements, and DeWaay Financial was not listed as a placement agent.[6] Stip. ¶ 9; *see, e.g.*, Div. Exs. 56.2, 56.5 to 56.12.

Domin-8 filed for bankruptcy on September 17, 2009. Tr. 211-12; Div. Ex. 113 at 9. At the time, LaBine still believed that Domin-8's business plan was fundamentally sound. Tr. 1012-13. D8 Acquisition Corp. was then formed as part of a stalking horse bid to acquire the assets of Domin-8 and its affiliates. *See* Div. Ex. 106 at bates 11077; Tr. 1012. LaBine, together with Domin-8's management, participated in D8's bid. Tr. 1012. LaBine was named to the board of directors and given an equity stake in D8, which he believed could be potentially very remunerative if the bid were accepted. Tr. 1021-23, 1027; Div. Ex. 106 at bates 11128.

All of LaBine's clients signed a consent agreement in October 2009 that they would exchange their rights in Domin-8 debentures for D8 secured subordinated notes. Stip. ¶ 27; Resp. Ex. 75; Tr. 1015-16, 1019-20. However, the bankruptcy court did not accept D8's stalking horse bid and found that investors would fare better under the bid of a competitor, RealPage. Div. Ex. 113 at 47-59; Tr. 276-78. At the hearing, LaBine estimated that RealPage is now worth $1.8 billion, with the apartment units formerly under Domin-8 comprising about half of RealPage's business. Tr. 1142. Domin-8's former chief financial officer, Daniel Buettin, could

[5] Similar to a stock option, a warrant is a financial instrument that gives the holder the right, but not the obligation, to purchase a specified amount of shares of the issuer's common stock at a specified price (the exercise or strike price) within a specified time period. *See Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 430 n.2 (D.N.J. 2004). The PPM defined these shares of Domin-8 common stock as warrant shares. Div. Ex. 56.2 at 139.

[6] The PPM was amended and restated in June 2009, and was supplemented at least eight times over the course of the Series D offering. Stip. ¶ 6.

not estimate RealPage's value, but his testimony supports the notion that a sizable portion of RealPage's business came from its acquisition of Domin-8. Tr. 93-94, 233-34.

LaBine's clients received back approximately sixty-five percent of their principal in connection with Domin-8's bankruptcy. Stip. ¶ 29. Many of LaBine's clients also received interest payments on their debentures prior to Domin-8's bankruptcy. *Id.*

LaBine's Recommendation and Sales of Domin-8 Series D Debentures

From August 2008 to August 2009, LaBine and his employee Swanson sold $7 million worth of Domin-8 Series D debentures to at least one hundred investors, usually in the range of $50,000 or $100,000 per investor.[7] Stip. ¶¶ 10, 13 & Table 1; Tr. 743-44, 746, 1409. Approximately eighty percent of investors had a net worth of $1 million or more, and the remaining investors had a net worth typically exceeding $500,000. Div. Ex. 86, Row I; Tr. 675. The overwhelming majority of investors were age sixty or older at the time of purchase, and many funded the investments with money from retirement or trust accounts. Div. Ex. 86, Row E; Stip. Table 4.

It is undisputed that eighty-two of these Domin-8 investors were LaBine's regular advisory clients, many with whom LaBine had written advisory or investment management agreements and charged advisory fees, and eighteen were brokerage only customers.[8] Tr. 701-02, 1057-58, 1409-10; Stip. ¶ 32 & Table 3; Div. Ex. 86; *see, e.g.*, Div. Ex. 22 (sample advisory agreement). Domin-8 investments were usually held in brokerage accounts or directly with Domin-8. Tr. 1068. LaBine did not directly receive advisory or management fees for his clients' Domin-8 investments, only sales commissions. Tr. 1069-70. However, in several instances, the Domin-8 investments were funded with money from clients' advisory accounts. Tr. 1068-69; Stip. ¶¶ 30, 33 & Table 4; Div. Ex. 86, Row R; *see, e.g.*, Div. Ex. 58.5g (noting transfer of money from NWE advisory account); Div. Ex. 58.8a (same); Div. Ex. 58.11i at bates 4322-23 (same). Indeed, LaBine conceded that he advised many of his clients to fund their Domin-8 investments with money from their advisory accounts that he managed. Tr. 852. Some of his advisory clients opened brokerage accounts specifically to hold the debentures. *See, e.g.*, Stip. Table 3 #96; Tr. 1228-29.

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[7] Although Swanson made some of these sales, the parties have stipulated that Swanson's sales were at the direction and on behalf of LaBine, LaBine asked to receive commissions based on Swanson's sales, and LaBine asked to receive warrants based on his own and Swanson's sales. Stip. ¶¶ 17-20. Thus, I consider Swanson's sales one and the same as LaBine's sales. Furthermore, there is no dispute that the sales involved the use of the mails, phone lines, and wire transfers. Tr. 896-97.

[8] Regarding the number of advisory and brokerage clients, the written stipulation is not entirely clear. It appears that three clients with advisory or investment management agreements were not identified as advisory clients, perhaps because they did not have an advisory account at the time of the Domin-8 sales. Stip. ¶ 32 & Table 3 #46, 94, 98; Tr. 1534-36. In any event, I accept the undisputed stipulation stated at the hearing that eighty-two investors were his advisory clients. Tr. 1409-10.

LaBine's clients all executed a DeWaay disclosure form when they purchased Domin-8 Series D debentures. Stip. ¶ 12. That form required clients to acknowledge receipt of the PPM, and that they understood the importance of reading and understanding the PPM. Resp. Ex. 5. It also required clients to acknowledge, among other items, that the risk factors were explained, they met the suitability requirements, and they understood the investment was a long-term investment with "no or very limited liquidity." *Id.*

When recommending the debentures to clients, LaBine took his clients' entire investment portfolio into account, made the recommendations as part of a purported strategy to manage their portfolio in view of the financial crisis and to diversify their portfolio, and usually recommended other products along with the Domin-8 debentures. Tr. 741-44, 1074-75. LaBine said he would spend forty-five minutes to an hour with each client discussing the debentures before they made a decision on whether or not to buy. Tr. 760. He did not have a prepared script or talking points, but testified about the key points he had discussed with clients. Tr. 760-68. His staff would typically send prospective investors a letter stating that LaBine was recommending the debentures and enclosing the PPM. Tr. 845-46, 850; Div. Ex. 81.

LaBine understood that investment advisers have fiduciary duties to their clients, and his financial interest in recommending a particular security to clients was a conflict of interest that had to be eliminated or disclosed. Tr. 723-24, 830-31. He also understood that as a registered representative associated with DeWaay Financial, he had a duty to his customers to disclose material conflicts of interest. Tr. 735-39, 868-70. LaBine, however, claimed that he did not have any conflicts of interest when he sold the debentures. Tr. 726, 735, 868-69.

In making the Domin-8 sales, LaBine contended that he primarily saw himself as a broker selling a product for which he earned commissions. Tr. 1061-63. Nonetheless, LaBine did not recall telling advisory clients to whom he sold the debentures that he was acting solely as a broker; rather, in LaBine's view, the facts that the debentures were held in a brokerage account and that he earned commissions should have alerted clients to his role as only a broker. Tr. 829-33, 838-44.

LaBine received at least $524,408 in commissions based on his sales of Series D debentures. Stip. ¶ 14.

Potential Incentive Compensation: Warrants

At the time he began recommending and selling the debentures in August 2008, LaBine was aware of the selling agreement between GunnAllen and DeWaay Financial. Tr. 747. He also knew that DeWaay Financial was entitled to most of the payable brokerage commissions and to most of the warrants that accrued to GunnAllen based on DeWaay Financial's sales. Tr. 747-48. He expected that he would receive at least ninety percent of brokerage commissions payable to DeWaay Financial for his sales, per industry standard.[9] Tr. 748-50; Div. Ex. 47 at 157-58.

In October 2008, Domin-8 revised the warrant grant with more favorable terms to incentivize debenture sales. Tr. 132-33. LaBine asked DeWaay Financial's management whether he would receive ninety percent of any warrants paid to DeWaay on account of his and Swanson's sales. Stip. ¶¶ 20, 24. In a November 25, 2008, email to DeWaay Financial's top executives, LaBine emphasized that he had already sold $3 to $4 million worth of debentures. Div. Ex. 17; Tr. 753-54. LaBine then asked:

> My question I want to clarify is in regards to the warrant coverage.
>
> Are we splitting the warrants compensation that goes with raising these funds on a 90/10 split? Before I raise more money I would like to clarify this question. As you know this stands to be a substantial sum in the future if the company can perform up to [its] expectations.
>
> Please have you or your staff communicate with me as soon as possible.

Div. Ex. 17.

LaBine's email was forwarded by DeWaay Financial's chief compliance officer, Charles Wiegert, to Dustin Thomas, an investment banking officer at DeWaay Financial's home office. Div. Ex. 17; Tr. 753, 755. On November 26, 2008, Thomas responded to Wiegert:

> Here is some more background to this request from Larry.
>
> Domin-8 has been supported by a few large producers for this round. Larry has been one of their larger producers. They would like to provide an incentive reward of an additional 5% warrant coverage to producers of over $5MM of the round. Larry is pushing that mark. I talked to Greg [McGrath, Domin-8's CEO,] and they expect only 2 or 3 reps to qualify including Larry, and they want to make sure that as much as is allowed is passed through to Larry for all of the work and support he has provided the company. I believe according to our selling agreement with GunnAllen we take 80% of the sales commissions granted and they take 20%. We may need to call and discuss how this special incentive allocation of warrants will work . . . .

Div. Ex. 17 (formatting and spacing altered). The same day, McGrath emailed LaBine, with the subject line "warrants." Resp. Ex. 17. McGrath stated: "I spoke with the folks at DeWaay regarding the commissions and they agreed that it made sense to have them go directly to you.

[9] It appears that LaBine did not enter into a formal contract with DeWaay Financial until June 2010. Div. Ex. 110 at 9-11; Tr. 749-50. However, the absence of a formal agreement before that time does not obviate the fact that LaBine expected to be compensated for his sales.

I asked for a conformation[sic] form[sic] them and when I receive I will forward to you." *Id.* Although McGrath's email says "commissions," it is apparent from this chain of events and the email's subject line that McGrath was assuring LaBine of his potential entitlement to warrants.

LaBine asserted that he did not receive a response from DeWaay Financial and believed that its owner, Don DeWaay, would have kept the warrants for himself. Tr. 754-57. According to LaBine, he inquired about the warrants because he "might as well ask because you can't ask when it's too late." Tr. 756-57. It appears that there was never any formal agreement entitling LaBine to warrants. Tr. 299-300.

Nonetheless, LaBine conceded that he thought at the time of the debenture sales that the warrants could be worth a substantial sum. Tr. 757. He also thought at the time that Domin-8, if it performed well, could be worth \$200 to \$300 million and that his clients could have an incredible investment opportunity. Tr. 777-79. As such, the warrants presented a potentially lucrative opportunity and incentive to continue to sell the debentures. After the November 2008 emails about the warrants, LaBine continued to sell the debentures at about the same pace. He raised approximately \$3.4 million through the end of November 2008 and approximately \$3.6 million from December 2008 until August 2009, when he ceased selling the debentures. Stip. Table 2.

At an April 2009 dinner with Domin-8's CFO Dan Buettin, LaBine indicated his belief that the strike price of the warrants should be reduced, so as to increase their value. Tr. 165-69, 929-30. In an April 21, 2009, email, Buettin recapped his discussion with LaBine:

> Change in pricing of warrants - Management would like to re-price stock options and GunnAllen would like to re-price existing warrants to incent [sic] their brokers to contribute to our survival plans. You agreed and felt that Series D pricing of warrants should be the same as stock options and other re-pricing.

Resp. Ex. 34 at 2.

On April 27, 2009, LaBine's contact at GunnAllen, Roger Overby, emailed him with the following news:

> [W]e are working on incentive program for all [GunnAllen] reps – it starts tomorrow afternoon. Domin-8 is going to reduce warrant price from \$2.95 to around \$1.50 (that should help get our guys re-focused on Domin-8 again and also make your warrants worth a lot more). . . . [E]veryone at [Domin-8] is really panicked right now so we really need you to come thru (again) in a very big way. Must have \$1.5 mil from you by May 31st (need 500k of that in next 7-10 days).

Div. Ex. 19. LaBine replied to Overby: "I will go for it this week and work this Saturday. Should and will try to hit 500k sold by Saturday." Div. Ex. 19. Subsequently, in May 2009, LaBine told Buettin that Domin-8 should extend the life of the warrant exercise period, and, the next month, Domin-8 extended the warrant exercise period from five to seven years and further reduced the strike price. Tr. 193-200; Div. Ex. 56.12 at bates 12237; Div. Ex. 63.

Considering LaBine and Swanson's total sales, ninety percent of the warrants to which DeWaay Financial was entitled under the selling agreement would equal 260,852 shares of Domin-8 common stock. Stip. ¶ 25.

LaBine admitted that he did not verbally disclose to his Domin-8 clients that he might receive warrants. Tr. 727, 774; *see, e.g.*, Tr. 837-38, 861-63, 895, 1005. According to LaBine, such disclosure was covered by the DeWaay disclosure form that his clients would initial and sign. Tr. 725-26, 837-38; *see, e.g.*, Div. Ex. 58.8e at bates 3621. That disclosure form provided: "I/we understand that this investment has or may have front-end costs that will be deducted from my initial investment, including but <u>not limited</u> to a commission to my rep/advisor." Resp. Ex. 5. The disclosure form did not mention anything about the potential to receive warrants. Moreover, any warrants that LaBine could have received would not have been deducted from an initial investment, but were an added compensatory incentive as discussed above.

LaBine did not recall whether he verbally told clients about the selling agreement. Tr. 774-75. He claimed that he did not have to tell clients about the selling agreement because the front page of the PPM listed DeWaay Financial and GunnAllen, and because it is "obvious" that he could not sell a product without a selling agreement in place. Tr. 728-31, 774-75. It is true that the PPM featured the names of GunnAllen and DeWaay Financial at the bottom of the first page, and disclosed that the placement agent, defined as GunnAllen, was entitled to a warrant to purchase Domin-8 common stock; but nothing in the PPM disclosed that DeWaay Financial had a selling agreement with GunnAllen under which DeWaay Financial was entitled to warrants for its sales. Div. Ex. 56.2. None of the written materials came close to indicating that there was the potential for LaBine to receive warrants as an incentive for his sales.

During the investigation, LaBine said that the warrants would be "worthless" if the company entered bankruptcy. Div. Ex. 47 at 222-23. Ultimately, Domin-8 entered bankruptcy and LaBine never received any warrants. Stip. ¶ 26; Div. Ex. 113 at 9.

LaBine's Fundraising Role and Commitments

By December 2008, Domin-8 "almost gave up" because it had not raised enough money through the Series D debentures offering and there was concern that the company would not survive. Tr. 144-45. By January 2009, LaBine was aware of GunnAllen's anemic fundraising efforts for Domin-8. Tr. 873. On January 22, 2009, LaBine went to Ohio and met with Domin-8's management to discuss the company's business prospects. Tr. 354-58, 870-71, 1111-12. After the meeting, LaBine came away with a "strong belief" that the company could succeed if it had the necessary cash and decided to continue selling the debentures. Tr. 1112-13.

Buettin reported during a Domin-8 board meeting on January 30, 2009, that LaBine had committed to raising $500,000 that current week through the sale of Series D debentures. Div. Ex. 69 at bates 1306; Tr. 144, 872-73. That same day, LaBine reported to GunnAllen that he had processed paperwork for $550,000 in new business for Domin-8, and Overby reported the news to Buettin.[10] Div. Ex. 62; Tr. 149-51.

On February 11, 2009, LaBine directed his staff to issue a memo to everyone at FEPI's office that he needed to "raise $250,000 a week, every week, for about the next two months for [Domin-8]." Div. Ex. 2; Tr. 877. The next day, LaBine told Domin-8's board of directors that he would raise $250,000 per week and that he had the capacity to raise enough money to fund the entire Series D debenture offering if necessary. Tr. 152-53, 877-79; Div. Ex. 69 at bates 1316. LaBine's fundraising efforts were the overriding reason why the board elected to continue with the debenture offering, which otherwise would have been unviable. Tr. 176-77. From then forward, LaBine's staff would transmit sales reports to Domin-8 on a regular basis. Tr. 154-56, 879-80; Div. Exs. 70.1 to 70.10. At the hearing, LaBine acknowledged that he began to "ramp up" his Domin-8 sales efforts in the first few months of 2009. Tr. 913-14. He also tried to rally other producers to continue to raise money. Tr. 904.

In March 2009, Buettin told LaBine that Domin-8 was having cash flow problems and that the company needed a "surge" to get back on track. Div. Ex. 46; Tr. 907. In April 2009, Overby and Buettin repeatedly apprised LaBine of Domin-8's critical underfunding and need for cash to make payroll and other basic payments. Div. Exs. 3, 7, 18, 19, 30, 45. For example, Overby told LaBine that "Domin-8 will not make it without your $250,000 per week to close on" and "will not survive without your support." Div. Exs. 30, 45. Also in April 2009, LaBine told his staff that "we have to concentrate on [Domin-8] [for] the next 30 days" and to make appointments with several clients. Div. Ex. 4; Tr. 914-15.

After a dinner meeting with LaBine in late April, Buettin emailed LaBine with a recap of their discussion:

> We agreed that the other major brokers are not living up to their promised funding levels. We will work together to ensure the Company is funded adequately to resolve our vendor issues and to be able to pay off the seller notes. You have again promised to deliver funding of $1.5 million in the next 45 days and then funding $1.0 million [per month] through late in 2009 when we have raised the full $15 million.

Resp. Ex. 34; Tr. 169-71. LaBine "promised" Buettin that he could sell $15 million worth of the debentures to his clients. Tr. 184; Div. Ex. 40 at 1.

On May 1, 2009, LaBine told his staff that "the month of May is for Domin-8" and "[e]very appointment possible should be prepped for Domin-8 plus two or three other products, but Domin-8 is the lead investment for prospects and clients." Div. Ex. 6. That same day, he emailed his employee Swanson and told him to "let every employee know that the month of May, we must raise $1.5M for [Domin-8]." Div. Ex. 12. He asked for a list of "all our

[10] Most of the $550,000 in new sales, however, was realized in February 2009 and one sale in May 2009, as none of LaBine's Domin-8 sales closed in January 2009. Stip. Table 1.

investors" and said he "will be attacking the list, and everyone in the office will be helping to schedule and close and sell [to] people on the list" who have not yet invested in Domin-8. *Id.* On May 6, LaBine dictated notes about fundraising for Domin-8. Div. Ex. 58.6m. The notes included a list of LaBine's clients to whom he planned to sell the debentures and a statement that he "[n]eed[ed] to put about $1.5M into [Domin-8] in May, pay off all vendors and get back on track." *Id.* at 2.

In mid-May, Buettin discussed an upcoming board meeting with LaBine. Buettin said that "[o]ne of the reasons we have been able to avoid more negative consequences is your commitment to sell the entire offering," and suggested that LaBine should discuss his fundraising commitments to the board. Div. Ex. 40. LaBine suggested that Series D debenture holders have two seats on the board, and he told Buettin that he wanted "some control or input as to the choices." *Id.*; Tr. 1138-39. At the board meeting, LaBine discussed his suggestion about the board seats; "estimated that he would raise approximately $1 million per month going forward under the Series D Debenture Offering"; and "indicated that he would likely sell $10-12 million of the Series D Debenture Offering, but would not be willing to sell any more than that amount." Resp. Ex. 89 at 1.

In 2009, the year LaBine made these fundraising commitments, his fundraising efforts fell somewhat short, dwindled by the summer, and ended in August 2009. His Domin-8 sales figures in 2009 were $800,000 in February 2009, $350,000 in March 2009, $654,113 in April 2009, $693,500 in May 2009, $717,500 in June 2009, $260,000 in July 2009, and $150,000 in August 2009. Stip. Table 1. In late August 2009, LaBine told Domin-8's management that he was "done selling the Series D [debentures]." Resp. Ex. 60. He communicated that he was "tired of being a loner, very disappointed that no one else [was] contributing, and not going to put any more of his client's money into the offering." *Id.* He also was "very focused on his investors having the first position" in the event of refinancing. *Id.*

At the hearing, LaBine acknowledged that his clients had a right to know that he was Domin-8's primary fundraiser and that he was trying to raise $1 million per month for the company. Tr. 941-43. Regarding whether he actually made such disclosures, he claimed that he told his clients that he was a primary fundraiser for Domin-8, but conceded that he did not tell them that he was trying to raise $1 million per month. Tr. 938. He then said that he did not recall whether he told clients that he was trying to raise $1 million per month or what was meant by the term primary fundraiser, but that he "may have" or "could have" told them, and that his recollection was "fuzzy." Tr. 939-42 947-48. When pressed whether he told a specific client about his fundraising commitments, he testified that he did not recall and then redirected attention to another topic, i.e., what he told clients would happen in the event of Domin-8's bankruptcy. Tr. 980.

The testimony of those witnesses who invested in 2009—the time period when LaBine was making these fundraising commitments—undermines any notion that LaBine disclosed his fundraising role or commitments to clients when selling the Domin-8 Series D debentures. Tr. 477-79 (Pettit), 633-34 (Spaid), 1232-33 (Brabender), 1326 (Sheen), 1524-25 (Hughes), 1548 (Cohen), 1601-03 (Andries); Stip. Table 1 #76, 90, 96, 98, 103-05. And neither the PPM nor any subsequent offering material made such disclosures. Tr. 985, 991; *see* Div. Exs. 56.1 to 56.12. I therefore find as a matter of fact that LaBine did not make such disclosures.

Risks

Domin-8's June 2008 PPM disclosed risks about the Series D debenture offering. Div. Ex. 56.2 at bates 139-40. The second page of the PPM stated in bold print:

> **An investment in the Units being offered hereby is speculative, involves a high degree of risk and should be considered only by investors who can bear the economic risk of their investment for an indefinite period and who can afford to sustain a total loss of their investment. See the section titled "*Risk Factors*."**
>
> **Prospective investors should carefully review this Memorandum in its entirety, including, in particular, the information under "*Risk Factors*."**

Div. Ex. 56.2 at bates 140.

The PPM's risk factors section spanned seven pages and included, among other disclosures, the following:

> 1) The company was in operation since only 2002 and had limited revenue-producing activities until 2006.
>
> 2) It had operating losses and expected to incur additional substantial losses in 2008.
>
> 3) There was no assurance that the company would ever become profitable.
>
> 4) If the company did not become profitable, investors would lose all or part of their investment.
>
> 5) The company needed substantial additional financing and, if it did not raise $12 million through the Series D offering, it likely would not have sufficient capital to execute its business plans.
>
> 6) The company was obligated to pay nearly $4 million of the initial net proceeds of the offering to holders of the seller notes.
>
> 7) The risks associated with integrating previously acquired entities, managing rapid expansion, competition with other players in the property management software industry, and uncertainty of patent and proprietary right protections.
>
> 8) The lack of liquidity of the Series D debentures.

Div. Ex. 56.2 at bates 150-57.

Domin-8 issued several supplements to its PPM, some of which added risk categories and disclosures regarding, among other issues, the company's cash flow problems. *See* Div. Ex. 56.6 at 4-5; Div. Ex. 56.7 at 2; Div. Ex. 56.8 at 4-6; Div. Ex. 56.9 at 3-4. In its December 2008 supplement, the company disclosed: "If we are not able to renegotiate our outstanding liabilities and restructure our capitalization, we will be unable to continue our operations and may be forced to file for bankruptcy protection." Div. Ex. 56.8 at 6 (formatting altered). In June 2009, Domin-8 issued an amended PPM, which made similar risk disclosures and made further apparent the potential for bankruptcy. Div. Ex. 56.1 at 9-17, 27.

Based on the above, the offering documents made full disclosures about the risks of investing in Domin-8. LaBine often presented clients with the PPM when he first told them about Domin-8, and he did not dispute that he would sometimes send clients the PPM after he had already pitched the investment to them. Tr. 806. The fact that LaBine presented clients with the PPM when he pitched the investment is not troubling. The problem is that he did "[n]ot very often" discuss the PPM with his clients. Tr. 806. In at least two instances, the clients received the PPM after they signed paperwork to invest in Domin-8. Tr. 1218, 1227, 1303-04. LaBine thought it was up to his clients to "read and take [it] home and ask questions or call back." Tr. 806.

LaBine testified that he "had long discussions about risk and possibilities," but was vague on details. Tr. 796. He said he would compare the investments to having a senior secured loan—similar to having a $7 million loan against a $50 million office building or Picasso masterpiece. Tr. 794-95, 810-11. LaBine represented that he told "latter clients" in 2009 that "one of the best things that could ever happen is that [they] could end up owning the company." Tr. 807-08, 813; Div. Ex. 47 at 187, 193. In other words, LaBine told clients that the "worst case scenario[]" of the investment was that they "could end up owning the company . . . [which] has a lot of value." Div. Ex. 47 at 147-48. LaBine told clients that Domin-8's bankruptcy could be "a very positive development for them." Tr. 966.

When pressed whether he told clients anything negative about the investment, Labine said: "we talked about all the negatives, and they sign letters stating that it was not publicly traded yet." Tr. 1053. When further pressed, LaBine's answer was: "It could be positive in bankruptcy. I don't recall what else I talked about on the negative side." Tr. 1053.

In prior testimony, LaBine said that even if the company went into bankruptcy, he thought his clients would get back "100 cents on the dollar" because they had a senior secured interest. Div. Ex. 47 at 137, 187; Div. Ex. 48.1 at 260-61. At the hearing, LaBine denied telling clients that the Domin-8 investment was low risk or had no risk, and he denied promising clients that they could not lose money. Tr. 794, 796-97, 806. LaBine testified that if clients had said they wanted to make money but have no risk, he would have advised them to put their money in the bank, find an insurance company, or buy treasury bills. Tr. 1078-79.

LaBine said that he "had a strong belief that they should do well in the worst case scenario." Tr. 797. LaBine knew, however, that there was no guarantor to ensure payment to Series D debenture holders, and he knew that there was no pre-packaged bankruptcy plan at the time he was selling the debentures that would have resulted in his clients having an ownership interest in the company. Tr. 816-17.

Investor Testimony

Presented by the Division

Craig Pettit is a retired engineer. Tr. 434. In April 2009, Pettit purchased $50,000 of Domin-8 Series D debentures. Stip. Table 1 #76. At the time of purchase, he was age fifty-nine and had a net worth of $1.3 million.[11] Div. Ex. 86 #76. He also was LaBine's advisory client. Stip. Table 3 #76. At LaBine's recommendation, Pettit transferred $32,000 in cash or money market proceeds held in his advisory account to fund his Domin-8 purchase. Div. Ex. 58.8d at 3; Div. Ex. 58.8e at bates 3616, 3620; Tr. 458-60.

Pettit retained LaBine in October 2008 for advice on his retirement pension. Tr. 434-35, 437. He told LaBine that he "wanted relatively low-risk investments." Tr. 435, 442. Pettit opened two DeWaay accounts: an investment advisory account over which LaBine had discretionary trading authority, and a brokerage account. Div. Exs. 58.8b, 58.8c; Stip. ¶ 30; Tr. 439, 442, 444. Pettit relied on LaBine to select the investments for both accounts and decide when to buy or sell securities, and LaBine recommended every investment made in both accounts. Tr. 441, 446, 451. LaBine did not explain to Pettit the differences between the two accounts and did not tell Pettit that he had different duties or responsibilities with regard to one account versus the other. Tr. 448-49. In other words, LaBine never drew a distinction between his roles as an investment adviser versus a securities broker, and Pettit thought those roles were one and the same. Tr. 449.

In April 2009, LaBine recommended that Pettit invest in Domin-8. Tr. 453-54. LaBine talked to Pettit for a half hour and discussed the company's software business. Tr. 454-55. LaBine did not disclose the possibility of Domin-8 entering bankruptcy, but instead said that Domin-8 was "a company that was making money" and receiving $10 every time one of its 30,000 tenants accessed its software. Tr. 455-56. If Pettit knew Domin-8 was in danger of entering bankruptcy, he did not think he would have invested in Domin-8. Tr. 503.

Pettit was unsure when he received the PPM; to his recollection, he received it either at the April 2009 meeting with LaBine or after. Tr. 462-63, 505-06. Pettit did not review the PPM before he invested. Tr. 463, 506. Rather than read the PPM, he said he relied on LaBine's investment expertise. Tr. 444-46, 493-94, 499. He testified that he signed and initialed the disclosure form because LaBine directed him to do so, without closely reading the content of the document as he relied on LaBine. Tr. 464-68, 494-95. Contrary to the disclosure form, LaBine did not discuss risk factors with Pettit. Tr. 464-65. LaBine did not promise Pettit that he would not lose money. Tr. 501.

[11] Net worth values in Division Exhibit 86 appear to correlate to each investor's exclusive net worth, i.e., assets minus liabilities, home, auto, and furnishings, but including liquid investments and retirement accounts. *See, e.g.*, Div. Ex. 58.8b at page 4 of 10.

In recommending Domin-8, LaBine did not tell Pettit that he was not acting in his capacity as an adviser and did not disclaim any advisory duties. Tr. 475. Pettit understood that LaBine would earn a standard sales commission, but LaBine did not disclose the possibility of receiving warrants from Domin-8 as extra compensation for client investments. Tr. 471-72, 483-84, 513-15. Such information would have been important to Pettit in deciding whether to invest in Domin-8, as it would have caused Pettit to question whether LaBine "was looking out for my best interest or his best interest." Tr. 474-75. Likewise, LaBine did not disclose the existence of the selling agreement or his fundraising commitments to Domin-8. Tr. 468, 477-78. Such information would have been significant to Pettit in considering whether LaBine was "looking out for me or . . . for himself." Tr. 478.

Jackie Bose (Bose) is a retired teacher. Tr. 517, 590. She is the widow of Herman Bose, who passed away in August 2012. Tr. 517-18. The Boses made all investment decisions together, even if an account was set up under one of their names, and Bose participated in all appointments that Herman had with LaBine. Tr. 518-20, 528-30, 532. In October 2008, Herman purchased $50,000 of Domin-8 Series D debentures. Stip. Table 1 #36. At the time of purchase, Herman was age sixty-two and had a net worth of $1.4 million. Div. Ex. 86 #36. He was not LaBine's advisory client. Stip. Table 3 #36.

The Boses were introduced to LaBine by their trusts and estates attorney. Tr. 520-22. They transferred assets to be managed by LaBine and expected to him to provide financial advice.[12] Tr. 522-23, 527. In September 2008, Herman opened a new retirement brokerage account with DeWaay Financial. Div. Ex. 58.2b; Tr. 528. Bose testified that they told LaBine that they wanted low-risk investments, and she relied on LaBine to make recommendations that were appropriate based on what they had told him. Tr. 533, 539, 548, 571. The Boses did not come up with their own investment proposals and instead followed LaBine's recommendations. Tr. 538-39. When confronted with the fact that the risk levels on Herman's new account form were inconsistent with her hearing testimony, Bose testified that LaBine "handed some papers and said 'sign and initial,'" those papers were pre-filled by LaBine, and, because they trusted LaBine, she did not think they had to read them. Tr. 570-71; *see* Tr. 529-30.

In October 2008, the Boses met with LaBine about investing in Domin-8.[13] Tr. 543-45. At this meeting, LaBine presented Herman with a pre-filled subscription form and directed him to sign or initial the paperwork. Tr. 544-45, 571. Acting on LaBine's recommendation, Herman

[12] The Boses attended lunch or dinner seminars hosted by LaBine. Tr. 522-23, 558-61. They attended primarily for the free meals, but Bose understood that the purpose of the seminars was to sell them investments and that LaBine would use their attendance to hold them out to other guests as satisfied customers. Tr. 559-61, 580-82.

[13] Based on LaBine's office report, LaBine began considering the Domin-8 investment for the Boses, and may have discussed it with them, as early as August 2008. Tr. 585-89; Div. Ex. 58.2d at bates 11410-11.

made his $50,000 purchase of the debentures, using funds from his retirement brokerage account. Stip. Table 1 #36, Table 4 #36; Tr. 543-44, 547; Div. Ex. 58.2c.

Bose testified that LaBine did not explain risks or the possibility of losing money on the investment. Tr. 548, 566-67, 596-98. She claimed that LaBine said that all their investments were safe and that they would receive back their money from all their investments. Tr. 533-34, 548, 571, 597. But upon further questioning, Bose could not confirm whether LaBine affirmatively said that she would not lose money. Tr. 549. Further, she could not recall anything about Domin-8 and could not "remember anything [LaBine] said about any of the accounts that [they] had." Tr. 596-98. Although I credit Bose's testimony that she trusted LaBine, her limited recollection gives me pause about the weight I can give to her testimony insofar as she alleged that LaBine made an affirmative misrepresentation regarding the Domin-8 investment's safety.

Bose did not recall whether LaBine provided a PPM at the October 2008 meeting, although she recalled receiving such document in the mail. Tr. 545-46. She testified that she would receive prospectuses "all the time" and would just "throw them away" without reading them. Tr. 546. When confronted with the risks outlined in the Domin-8 PPM, Bose testified that if she had read the document, they probably would not have invested in Domin-8. Tr. 593-94.

According to Bose, LaBine did not disclose the selling agreement or any compensation he expected to receive as a result of the Domin-8 investment. Tr. 550, 554. Regarding whether it would have made a difference if she knew that LaBine's firm would make extra money based on the Domin-8 sale, Bose said, "Probably not." Tr. 555. Her only concern was whether their money was safe. Tr. 551. On the other hand, Bose expected that if LaBine had a conflict of interest, or a reason not to act in their best interests, he would have disclosed such facts. Tr. 602.

The Boses ended their relationship with LaBine in 2010 because they lost trust in him and felt "cheated." Tr. 562.

Eileen Brabender is a retired management consultant and college instructor. Tr. 1211-12. She is married to William Brabender; they hold most of their assets mutually and make all investment decisions as a team. Tr. 1212-13. In June 2009, they purchased $50,000 of Domin-8 Series D debentures. Stip. Table 1 #96. They funded the investment by selling annuities. Tr. 1219. At the time of purchase, they were both age seventy-three and together had a net worth of $2 million. Div. Ex. 86 #96; Tr. 1256; Div. Ex. 58.3b at bates 1146, 1148. They were LaBine's advisory clients. Stip. Table 3 #96.

The Brabenders became LaBine's clients in 2001 at the reference of an attorney and considered LaBine their financial planner. Tr. 1213-14, 1243. In 2007, they opened advisory accounts with DeWaay, as LaBine had changed firms. Tr. 1214-15; Div. Exs. 58.3b, 58.3c; Stip. ¶ 30. At a meeting in May 2009, LaBine recommended that they invest in Domin-8, along with three real estate investment trusts. Tr. 1216-17. Brabender testified that her recollection of that day was "crystal clear" because she "felt so good about what we had done in terms of moving investments into safer investments with the volatility of the marketplace." Tr. 1216-17. She also testified LaBine had told them that: Domin-8's risk level "was between four to five like a growth [and] income fund[], that it was safe"; and, "if there was a problem with Domin-8 down the line, that . . . his clients with the Series D debentures would be first in line in receiving monies." Tr. 1217, 1223-24. She acknowledged that LaBine did not guarantee that "if there were some sort of an event, that [they] would get all of [their] money back." Tr. 1279.

At that same meeting, the Brabenders signed the paperwork for Domin-8 and the other recommended investments. Tr. 1217. Brabender did not carefully look over the forms because there was a lot of signing and initialing within a short time period, and because they believed that LaBine was representing them well. Tr. 1225-26. They received the PPM after signing the paperwork and left the meeting with the PPM in hand, but did not read it because it "looked very legalese and boilerplate" and they trusted LaBine's recommendation. Tr. 1217-18, 1227. Their purchase closed in June 2009. Tr. 1231. At LaBine's advice, the Brabenders opened a brokerage account to hold their new investments, including Domin-8. Tr. 1228-29; Div. Ex. 58.3a. LaBine did not, however, tell them that he was acting as only their broker. Tr. 1230. Brabender testified that she would like to have known if LaBine thought he was acting in a role other than their investment adviser when he recommended that they invest in Domin-8. Tr. 1230. She said:

> To me, having a financial adviser means that they are there to help you through this very complicated world of finances and help you make decisions that are in your best interest to secure your financial future; whereas a broker to me just buys and sells with no interest . . . on your behalf. So, yes, I would like to have known that.

Tr. 1230-31.

Before the Brabenders made their Domin-8 investment, LaBine did not disclose the existence of the selling agreement or that he might receive warrants; if the Brabenders knew such information, they would have questioned LaBine's motivations. Tr. 1231-32. LaBine also did not disclose his fundraising commitments to Domin-8. Tr. 1232-33. If the Brabenders knew such information, they would not have purchased Domin-8 with LaBine, and their "faith and trust in him would have been shaken." Tr. 1233. Brabender posited, "What is his motivation? It sounds at that point like it's in his best interest, not ours." Tr. 1233.

Brabender confirmed that the PPM's listing of DeWaay Financial on the first page would not have alerted her that the firm might have a selling agreement with GunnAllen or that LaBine might receive warrants. Tr. 1234-35. At the hearing, the Division asked Brabender about the portion of the disclosure form that reads: "this investment has or may have front-end costs that will be deducted from my initial investment, including but <u>not limited</u> to a commission to my rep/adviser." Div. Ex. 58.3f at bates 1109; Tr. 1227. She did not understand that statement and said it was not explained to her. Tr. 1227.

Before the Brabenders invested in Domin-8, LaBine did not discuss certain risks outlined in the PPM or alert them to carefully read those risks. Tr. 1268. If they had read the PPM's risk disclosures, they would not have invested in Domin-8. Tr. 1270-71.

Jack Sheen is a retired U.S. Air Force lieutenant colonel. Tr. 1283-84; Div. Ex. 58.10f at bates 4818. Together with his wife, he purchased $100,000 of Domin-8 Series D debentures in July 2009. Stip. Table 1 #103. They paid for the investment with a personal check. Tr. 1307-08. At the time of purchase, Sheen was age eighty-six and, with his wife, had a net worth of $1 million. Div. Ex. 86 #103; Tr. 1332-33. The Sheens were LaBine's advisory clients. Stip. Table 3 #103.

Sheen attended a dinner seminar at LaBine's invitation in 2007, but did not engage LaBine's services at the time because he was not ready to change his financial adviser. Tr. 1289-91. Subsequently, on July 24, 2009, the Sheens opened an advisory account with DeWaay, with LaBine having discretion over the account. Tr. 1293-95; Div. Ex. 58.10h at bates 4879, 4881. As to Sheen's understanding of their relationship to LaBine, he testified: "Our purpose was to give [LaBine] full control of our account and manage our investments for us." Tr. 1309; *see* Tr. 1311. The Sheens did not setup a brokerage account with LaBine at that time. Tr. 1307. LaBine never told the Sheens that he was not acting in a fiduciary capacity, and it would have been very important to Sheen if LaBine was not doing so. Tr. 1323-25.

Based on LaBine's office report, it appears that LaBine met with the Sheens on July 24, although Sheen did not recall if he discussed investments with LaBine that day. Div. Ex. 58.10b at bates 11623-24; Tr. 1295-96. According to both LaBine's office report and Sheen's calendar, they next met on July 27, 2009. Div. Ex. 58.10b at bates 11623-24; Div. Ex. 58.10j at 4. LaBine told the Sheens that the Domin-8 investment would earn a ten percent return. Tr. 1296-97. LaBine assured them that the company was "doing well" and said that if Domin-8 went bankrupt, they would get "all [their] money back" because they were senior noteholders. Tr. 1297, 1299-1300. LaBine did not disclose that the company was close or likely to enter bankruptcy, and only spoke positively of Domin-8. Tr. 1297, 1300-01. Sheen testified that LaBine assured him that Domin-8 was a low-risk investment, but acknowledged that LaBine did not say that it was a no risk investment. Tr. 1306.

It appears that LaBine gave Sheen the paperwork to sign on July 27, including the disclosure form, although the paperwork and check associated with Sheen's investment are dated July 29, 2009.[14] Tr. 1301-03; Div. Ex. 58.10i. Sheen testified that he had commented to LaBine that the documents involved "[a] lot of initialing," to which LaBine said: "It's not that important." Tr. 1305. Sheen also testified that he did not read the Domin-8 PPM before signing the paperwork because he did not receive it until they "were getting ready to leave" and "walk[ed] out with a pile of documents," which included the Domin-8 PPM and offering documents related to two other investments. Tr. 1303-04.

Before the Sheens invested in Domin-8, LaBine: did not discuss the risks despite the Sheens informing him that they wanted low-risk investments and did not discuss his compensation related to their investment, Tr. 1306-07; did not disclose that the company was close to bankruptcy, Tr. 1297; did not disclose the existence of the selling agreement or the

[14] The discrepancy has a likely explanation: Sheen's check had to be held until that Wednesday, July 29, due to an issue with the bank. Div. Ex. 58.10b at bates 11623.

possibility that he might receive warrants, Tr. 1325; and did not disclose his fundraising commitments to Domin-8 or his role as one of its primary fundraisers, Tr. 1326.

Sheen testified that it would have been helpful to know whether LaBine might receive warrants, as it would have shown "an interest that we didn't know about in the company" and would have cast doubt on the "honest[y]" of LaBine's sales pitch. Tr. 1326-27. Sheen also would have wanted to know about the selling agreement entitling DeWaay Financial to extra compensation, LaBine's commitment to raise $1 million per month for Domin-8, and his role as a primary fundraiser. Tr. 1327-28. When asked whether he would have wanted to know that the company was going to enter bankruptcy, Sheen testified, "You bet your life." Tr. 1328-29. Sheen emphasized that he and his wife pushed for information about the company's safety. Tr. 1329.

Sheen admitted that he had read the offering documents for the two other investments he bought at the same time as Domin-8, but did not read the Domin-8 PPM despite having some doubts shortly after investing. Tr. 1342-43; Resp. Ex. 134 at 22. He also acknowledged that if he had read the PPM, he probably would not have invested in Domin-8. Tr. 1345.

The Sheens ended their relationship with LaBine as their adviser in October 2010. Tr. 1329.

David Spaid is a retired teacher. Tr. 607-08. In August 2009, he purchased $50,000 of Domin-8 debentures and was the last investor to purchase the debentures through LaBine. Stip. Table 1 #105. At the time of purchase, he was age sixty-seven and had a net worth of $10 million. Div. Ex. 86 #105; Tr. 636. He was LaBine's advisory client. Stip. Table 3 #105. The Spaids paid for the investment with a transfer of funds from their DeWaay advisory account. Tr. 626-67; Div. Ex. 58.11i at bates 4322-23.

In 2007, Spaid and his wife opened an advisory account with DeWaay and signed an agreement for investment management services, naming LaBine as their adviser. Tr. 612-13, 616; Div. Exs. 58.11c, 58.11e. The Spaids never had a brokerage account with DeWaay. Tr. 615-16. LaBine first presented Spaid with the Domin-8 investment opportunity and PPM in the fall of 2008, but Spaid did not read the PPM at that time. Tr. 644-45, 654-55; Div. Ex. 58.11a at bates 11634.

On May 19, 2009, LaBine again presented the Domin-8 investment opportunity.[15] Div. Ex. 58.11a at bates 11633-34; Tr. 619, 654. At that meeting, the Spaids signed the paperwork to purchase the debentures. Tr. 618. Spaid testified that LaBine had told them that: Domin-8 was a software company "that would be quite successful and help a great many people who owned rental units"; and "this was going to be a riskless offering, that you might not necessarily make money from it but you couldn't lose." Tr. 619; *see* Tr. 626, 656. Spaid further testified that "the

[15] Spaid asserted that the "very first time" he heard about Domin-8 was in May 2009. Tr. 654. I do not credit this assertion as it is inconsistent with Spaid's earlier testimony at the hearing and record evidence. Tr. 644; Div. Ex. 58.11a at bates 11634.

idea of [the investment] being riskless" was what he liked most about Domin-8. Tr. 626. At the May 19 meeting, LaBine did not disclose that Domin-8 was in danger of bankruptcy, and Spaid did not learn about such fact until much later. Tr. 620. Spaid would have wanted to know that the company was near bankruptcy and testified that such information was "the most incredible one to me of all." Tr. 634.

Spaid testified that he received the PPM in the mail shortly after the May 19 meeting. Tr. 622-23. However, the disclosure form, signed by Spaid, stated that the PPM was provided on May 19. Div. Ex. 58.11i at bates 4324. As I already found, Spaid was provided the PPM for the first time in 2008, but he did not read it at the time or make an investment in Domin-8. It appears likely, and consistent with LaBine's usual practice, that Spaid was provided with the PPM at the May 19 meeting after LaBine pitched the investment to him and possibly after Spaid signed the paperwork, although the circumstances are not entirely clear.

Before the Spaids invested in Domin-8, LaBine did not discuss that he may potentially receive warrants, nor did he disclose his fundraising commitments to Domin-8 or his fundraising role. Tr. 626, 632-33. Spaid did not believe that LaBine ever told him about the selling agreement. Tr. 631-32. Spaid testified that he would have wanted to know whether there was the selling agreement, whether LaBine had an expectation to receive warrants, and about LaBine's fundraising commitments to Domin-8. Tr. 633-34. Spaid said that these points all would have "raise[d] the red light. 'Don't go there.'" Tr. 634. Furthermore, LaBine never told Spaid that he was not acting as his adviser, that he did not have a duty to act in his best interest, or that he should ask for someone else's advice before deciding to invest in Domin-8. Tr. 630-31. Spaid testified that it "would have been a red flag" if LaBine said any of those points. Tr. 631.

The Spaids' purchase of the Domin-8 Series D debentures did not close until August 2009 because the Spaids had not provided a copy of their entire trust document until August. Tr. 627-28. At the August meeting, LaBine again did not verbally disclose that Domin-8 was close to bankruptcy or that the Spaids would be putting their money at risk. Tr. 628-29.

In September 2009, Spaid learned that Domin-8 had entered bankruptcy, but then he invested additional funds in D8 Acquisition. Tr. 647-48. When confronted with this fact that he made another investment with LaBine after the first, supposedly "riskless" Domin-8 investment failed, Spaid said LaBine is "a great wordsmith." Tr. 648. On the other hand, Spaid claimed that if he had read the PPM and disclosures about Domin-8's risk of bankruptcy before investing, he would not have invested in Domin-8. Tr. 649-50.

Presented by LaBine

Earl Mealins is retired. In his last job, he was president of a ship operating company. Tr. 1473. In August 2008, he purchased $100,000 of Domin-8 Series D debentures. Stip. Table 1 #5. He transferred $96,000 from his DeWaay advisory account to his brokerage account to pay for the investment.[16] Div. Ex. 58.7i at bates 3098; Stip. ¶ 30. At the time of purchase, he was age sixty-eight, had a net worth of $3.1 million, and was LaBine's advisory client. Div. Ex. 86 #5; Stip. Table 3 #5. At the time of the hearing, he was still LaBine's client. Tr. 1476, 1502.

In 2006 or 2007, Mealins opened accounts with LaBine on the recommendation of a trust attorney. Tr. 1475. After LaBine joined DeWaay in 2007, Mealins opened brokerage and advisory accounts with DeWaay. Tr. 1475-77, 1492; Resp. Ex. 175; Div. Ex. 58.7f. In the summer of 2008, Mealins attended a seminar at which a Domin-8 representative pitched the investment and LaBine recommended it. Tr. 1479-81. LaBine was optimistic about the investment, telling Mealins that it "was going to grow" and he "would make money on it." Tr. 1481-82. LaBine did not tell Mealins that the investment came with no risk, and never promised that he could not lose his investment. Tr. 1481-82. Mealins knew that there was risk involved. Tr. 1482. However, Mealins he did not recall hearing anything negative. Tr. 1495.

Following the seminar, LaBine's office sent Mealins a copy of the Domin-8 PPM on August 1, 2008. Tr. 1478-79, 1483. Mealins testified that he had time to review the document before making the investment. Tr. 1484-85. He said that LaBine directed him to read the PPM, which contained a section about risk factors, but Mealins "glossed over" that section because, he said, "that stuff is written for lawyers, not me." Tr. 1500, 1502.

On August 19, 2008, Mealins made his Domin-8 purchase. Stip. Table 1 #5. Mealins did not think that LaBine was selling him a product, but rather "providing an investment opportunity" for Mealins. Tr. 1485. Mealins testified that he had retained LaBine as his adviser, but that LaBine would also invest stocks through his brokerage account. Tr. 1503. LaBine never told Mealins that there would be times when he did not have a duty to act in Mealins's best interest in recommending investments. Tr. 1494. Mealins did not recall LaBine saying that he might receive Domin-8 warrants as incentive compensation. Tr. 1497-98. Mealins presumed that LaBine would be compensated for the investment and seemed disinterested in the subject. Tr. 1485-86.

Donna Carol Hughes is retired and previously worked as a teacher and then office secretary for a securities broker. Tr. 1509-10. In May 2009, she purchased $100,000 of Domin-8 Series D debentures. Stip. Table 1 #90. At the time of purchase, she was age sixty-nine, had a net worth of $1.7 million, and was LaBine's brokerage client. Stip. Table 3 #90; Div. Ex. 86 #90; Tr. 1511-12. At the time of the hearing, she was still LaBine's client. Tr. 1529.

Hughes received the PPM at or about the same time she invested in Domin-8. Tr. 1516. She did not recall what LaBine said about the investment's risks. However, LaBine did not promise that the investment had no risk or that she could not lose money. Tr. 1517-18. She

[16] Mealins testified, incorrectly, that the money was transferred from his brokerage account to his advisory account, and did not think that the Domin-8 investment was held in his brokerage account. Tr. 1499, 1506. His brokerage account statement reflects that the Domin-8 investment was made in that account. Resp. Ex. 176; Stip. ¶ 30; Tr. 1477.

testified that she "would have been out of the door" if LaBine had made such a statement because "[t]here's no way that there's no risk involved in any investment." Tr. 1517-18.

Before Hughes invested in Domin-8, LaBine did not disclose that the company would likely enter bankruptcy, and she did not recall any conversation where he discussed the possibility of bankruptcy. Tr. 1523-24. She assumed that LaBine would receive a commission for the investment, but LaBine did not otherwise discuss his compensation. Tr. 1524. LaBine also did not disclose his Domin-8 fundraising role or commitments. Tr. 1524-25.

Steven Cohen has a bachelor's degree in metallurgical engineering and master's degree in economics and finance. Tr. 1532. He has "been investing since [he] was a child." Tr. 1532. In June 2009, he purchased $100,000 of Domin-8 Series D debentures. Stip. Table 1 #98. At the time of purchase, he was age sixty-one, had a net worth of $1.5 million, and had an investment management agreement with LaBine. Stip. Table 3 #98; Div. Ex. 86 #98. He had a brokerage account with DeWaay Financial, but no DeWaay advisory account at the time. Tr. 1534-36; Div. Ex. 58.4c at bates 1360, 1365; Stip. ¶ 30 & Table 3 #98. At the time of the hearing, he was still LaBine's client. Tr. 1532, 1549.

Cohen testified that when LaBine would recommend an investment, he would discuss the risks, as well as other aspects. Tr. 1536-37. Before Cohen invested in Domin-8, LaBine discussed the company's business model, said that it had "a lot of initial debt associated with [its] business," and disclosed that it could face bankruptcy; Cohen did not recall whether LaBine told him that the company would most likely enter bankruptcy. Tr. 1538-39, 1548. LaBine told Cohen that if there was an adverse event, he would be paid first, as he would be investing in a senior security, but did not guarantee he would get all his money back. Tr. 1539. It was Cohen's understanding that bankruptcy "present[ed] risks for certain parties and opportunities for other[s]." Tr. 1540. Cohen testified that he received the PPM, could read and understand the risk factors presented in the document, and understood that the Domin-8 investment presented a "higher risk for higher return." Tr. 1540-41.

Cohen did not recall whether LaBine told him that he was Domin-8's primary fundraiser. Tr. 1548. LaBine did not discuss any form of possible compensation that he would receive as a result of Cohen's investment, other than a commission. Tr. 1548-49.

Medwin Peck is a retired firefighter. Tr. 1557-58. In September 2008, he purchased $100,000 of Domin-8 Series D debentures. Stip. Table 1 #20. He paid for the full investment with funds from his DeWaay advisory account. Tr. 1572; Resp. Ex. 197A at 2; Stip. ¶ 30 & Table 4 #20. At the time of purchase, he was age sixty-three, had a net worth of $1.2 million, and was LaBine's advisory client. Div. Ex. 86 #20; Stip. Table 3 #20. He has been LaBine's client for about twenty years and, at the time of the hearing, was still LaBine's client. Tr. 1558-59, 1577.

On August 28, 2008, Peck had a conversation with LaBine, who discussed the Domin-8 investment opportunity. Tr. 1565-66; Resp. Ex. 197A at 2-3. Afterward, LaBine's office mailed Peck a copy of the PPM, and by mid-September 2008, Peck made his investment. Tr. 1566, 1569-70; Stip. Table 1 #20.

Peck testified that he had an opportunity to review the paperwork before investing. Tr. 1569-70, 1576-77. He did not recall why he decided to invest in Domin-8, but understood there was higher risk with higher returns. Tr. 1567-68. He expected that LaBine would receive a commission, but LaBine did not tell him explicitly how he would be compensated. Tr. 1570, 1574. Peck did not recall LaBine mentioning that he might receive warrants, and LaBine did not disclose the selling agreement. Tr. 1574-75. LaBine did not disclose that Domin-8 was in financial trouble before Peck invested. Tr. 1575.

Roger Andries is retired. He has a college education, served in the military, and worked in the food industry for most of his career. Tr. 1579-80. In August 2009, he purchased $100,000 of Domin-8 Series D debentures. Stip. Table 1 #104. At the time of purchase, he was age sixty-five, had a net worth of $1.6 million, and was LaBine's brokerage client.[17] Tr. 1579, 1581; Div. Ex. 58.1d at bates 273; Div. Ex. 86 #104; Stip. Table 3 #104. At the time of the hearing, he was still LaBine's client. Tr. 1579.

Before investing in Domin-8, Andries received copies of the PPM, which his wife reviewed, and LaBine went over Domin-8 and its business model. Tr. 1587-88, 1590, 1592. LaBine disclosed that the company "was having some financial problems" and that bankruptcy or restructuring was a "possibility," but represented that "the company appeared to be on the right track and was turning around." Tr. 1591. LaBine did not disclose that the company was progressively getting worse or most likely to enter bankruptcy, but presented two possible scenarios: either the company would be successful if it received additional funds or it would enter bankruptcy. Tr. 1600-01.

Andries invested because he thought the risk versus reward was reasonable. Tr. 1592-93. LaBine did not represent that Andries would get all his money back in the event of bankruptcy, and LaBine did not tell him that Domin-8 was a riskless investment. Tr. 1593-94. Andries testified that if LaBine had told him that Domin-8 was riskless, he "would have questioned [LaBine] more." Tr. 1594.

LaBine did not disclose his Domin-8 fundraising role or commitments, the possibility of receiving warrants, or the selling agreement. Tr. 1601-03. Andries, however, said it "wouldn't [have] bother[ed him] one bit" had he known LaBine would receive warrants for selling the debentures. Tr. 1603.

Experts and Summary Witnesses

Professor Arthur B. Laby testified as an expert for the Division. *See* Div. Ex. 101.1. Laby is a law professor at Rutgers University School of Law, where he teaches courses on securities regulation and other business topics. *Id.* at 3. He graduated from Boston University

[17] At the hearing, he said his net worth in 2009 was over $5 million. Tr. 1580. His DeWaay Financial account form reflects otherwise. Div. Ex. 58.1d at bates 275. Division Exhibit 86 incorrectly states his age as ninety-three at the time of purchase.

School of Law, clerked for a federal district judge, was a Fulbright Scholar, and worked for the Commission in several capacities, including assistant general counsel. *Id.* at 4-5. He has authored publications and given presentations on topics relating to the regulation of investment advisers and broker-dealers. *Id.* at 6.

Laby opined that LaBine: acted as an investment adviser representative for the majority of his client accounts and acted as a broker-dealer representative for a smaller number of client accounts; owed significant duties to his advisory and brokerage clients; and failed to act consistently with industry customs and practices when investing client funds in Domin-8. Div. Ex. 101.1 at 3. Laby's rebuttal report is discussed below.

Professor Jill I. Gross testified as an expert for LaBine. *See* Resp. Ex. 202. She is a professor of law at Pace University School of Law, where she serves as director of legal skills and director of the investor rights clinic. *Id.* at 1. One of her areas of instruction is securities arbitration, including the duties of registered investment advisers and associated persons of a broker-dealer. *Id.* In addition, she has taught courses related to securities litigation and published articles about the duties of broker-dealers. *Id.* She graduated from Harvard Law School. Resp. Ex. 203A.

In her report, Gross opined that LaBine was not acting as an investment adviser and was entitled to rely on the broker-dealer exemption to the definition of "investment adviser" under the Advisers Act "for at least some, if not all," of the Domin-8 transactions at issue. Resp. Ex. 202 at 5-6. On cross-examination, it became apparent that Gross was minimally familiar with the record and did not review information about all the investors to whom LaBine sold Domin-8 Series D debentures. *See* Tr. 1355-57, 1364-67, 1369. She admitted that if LaBine had transferred money from his clients' advisory accounts to a brokerage account in order to purchase Domin-8 debentures, and if LaBine had received management fees for that money when it was in the client's advisory account, she would "probably say he was acting as an investment adviser." Tr. 1379-80. She also admitted that her report misstated the broker-dealer exemption in its conclusion and that her report did not address LaBine's duties as a broker. *See* Tr. 1383-84; Resp. Ex. 202 at 6.

In her rebuttal report, Gross disputed Laby's conclusion that LaBine acted as an investment adviser and contended that to make such a determination, a fact-specific, transaction-by-transaction inquiry is required. Resp. Ex. 203 at 1. She argued that the record that Laby reviewed did not contain enough detailed information about LaBine's client relationships for Laby to form his conclusion. *Id.* at 2. On cross, Gross admitted that at the time she wrote her rebuttal report, she was not aware that Laby was also acting as a summary witness. Tr. 1385-86.

In Laby's rebuttal, he opined that: Gross misapplied the broker-dealer exemption, Gross's transaction-by-transaction approach is inconsistent with industry practice, and the record was sufficient for Laby to draw his conclusions. Div. Ex. 102 at 3-8.

Professor Thomas W. Bates submitted an expert report in LaBine's defense. Resp. Ex. 198. He is an associate professor and chair of the finance department at the W.P. Carey School of Business, Arizona State University. Resp. Ex. 198 at 1, 17. He has a Ph.D. in finance from the Katz Graduate School of Business at the University of Pittsburgh. *Id.* at 1. He is the author of corporate finance textbooks and journal articles, and has taught classes on various business topics. *Id.*

In his report, Bates asserted that speculative grade debt, like Domin-8's Series D debentures, are common in many investor portfolios. *Id.* at 2. He also opined that the return on Domin-8's Series D debentures was above average for similar debentures. *Id.* at 3-4. He examined the Domin-8 PPM and financial statements, concluding that it was obvious that Domin-8 was in financial distress but that the investment was still appealing to investors because of high interest rates, the offer of warrants, and the security priority of the Series D debenture holders. *Id.* at 4-6. Regarding the possible warrant compensation for sellers of the debentures, Bates conducted valuations of the warrants and opined that the value of the warrants, under any measure, was negligible. *Id.* at 14; *see id.* at 9-13.

Eugene Canjels submitted an expert report for the Division to rebut Bates's conclusion on the value of the warrants. Div. Ex. 130. He is a supervisory financial economist in the Commission's Division of Economic and Risk Analysis, where he provides economic and statistical consulting for securities enforcement and litigation. *Id.* at 16. He holds a Ph.D. in economics from Northwestern University and has published and served as a reviewer for top economics journals. *Id.* Canjels identified multiple issues with Bates's report. For instance, Bates did not explain or support the methodology he used to calculate the dilution effect from warrants being exercised, and when Canjels re-did Bates's calculations using methodology to account for dilution, he found that three of Bates's four estimates were too low. *Id.* at 7.

The majority of Canjels's report concerns Bates's valuation assumptions. Canjels determined that Bates made seven valuation assumptions in conducting his analysis, and that three of those assumptions were materially wrong or unsupported: volatility, stock price, and time to expiration. Div. Ex. 130 at 8. In performing his valuations, Bates assumed that annualized price volatility was 70%, but Canjels rejoined that Bates never explained how he determined that figure. *Id.* at 9. Canjels pointed out that Domin-8's financial statements assumed that price volatility was 127%, and had Bates used that figure instead, his valuation numbers would have been significantly higher; under one of his scenarios, the valuation of warrants would have increased over seventeen times. *Id.* Bates also assumed that Domin-8 common stock was worth $1.50 per share, but Canjels explained that Bates never disclosed why he made this assumption and ignored Domin-8's own estimates of the stock value, which were generally above $3 a share. *Id.* at 10-11. Canjels found that if Bates had used Domin-8's estimates, Bates's warrant valuation numbers would have dramatically increased for two of his estimates, and decreased for the other two estimates by lesser amounts. *Id.* at 11.

Finally, Canjels criticized Bates's use of a one-year time to expiration in his valuations. *Id.* at 11-12. Canjels explained that simply because Domin-8 went into bankruptcy within a year, it does not follow that investors had expected it to enter bankruptcy so soon. *Id.* Instead, Canjels argued that a proper valuation would use the longer expiration periods indicated in the offering documents—when used, the valuation numbers for three of Bates's estimates were substantially increased. *Id.* at 12-13. Applying all of these changes led Canjels to valuation estimates that in most scenarios were much greater than those advanced by Bates. *Id.* at 13-14, Tables 2 & 3.

John T. Foster submitted two expert reports in LaBine's defense. Resp. Exs. 200-01. Foster has been in the financial securities industry since 1981, is qualified as a FINRA dispute resolution arbitrator, and incorporated a financial services consulting firm in 2012. Resp. Ex. 200 at 3. In his first report, Foster opined that: 1) DeWaay Financial had the primary responsibility to conduct, and in fact did conduct, due diligence regarding the Domin-8 Series D debentures, and it encouraged sales of the debentures through the summer of 2009 while aware of Domin-8's deteriorating financial conduction; and 2) the responsibility to halt sales rested with the firm as the regulated broker-dealer, not LaBine or any individual salesperson. Resp. Ex. 200 at 10. In his second report, Foster opined that: by entering into the heightened supervision plan over LaBine, DeWaay Financial placed itself in a position of responsibility for LaBine's actions; and based on Foster's review of the facts, DeWaay Financial was aware of and supported LaBine's Domin-8's sales. Resp. Ex. 201 at 9.

LaBine's Post-OIP Conduct

After the OIP issued but before the hearing was originally scheduled to begin in November 2014, LaBine tried to contact two witnesses. He left a voicemail on Jackie Bose's home phone. Tr. 563-65; Div. Exs. 112, 117. He sought to explain what happened with Domin-8 and then asked Bose to call him back to "discuss if [she was] going to be a witness, or if [she was] going to be sick that [day], or if [she] told them [she was] not going to do it . . . ." Div. Ex. 117 at 3. He suggested that he would "rather have lunch or dinner" with her. *Id.*

LaBine also left a voicemail on Craig Pettit's phone. Tr. 487; Div. Exs. 115, 118. He said he had "met with the SEC," offered to take Pettit out to a "steak dinner," and sought to "clarify some things" about the Domin-8 investment. Div. Ex. 118 at 2. LaBine also said: "[I]f you're sick next time they come to town, November, we're going to court with them, I am. We're bringing in lots of our witnesses." *Id.* at 3.

In 2015, before the hearing, LaBine contacted Jack Sheen and told him that "his high-priced lawyer would make a fool of [Sheen] on the stand if [he] chose to testify." Tr. 1329-30. LaBine's counsel called and apologized to Sheen for the statement.[18] Tr. 1330.

LaBine's Financial Condition

LaBine's August 2015 statement of financial condition establishes that he is in dire financial straits. [[[redacted]

[18] LaBine's counsel played no part in LaBine's calls to these witnesses.

[redacted]]][19] The Division does not challenge LaBine's asserted financial condition, and his August 2015 statement is consistent with the parties' stipulations regarding his financial condition as of June 2014. Stip. ¶¶ 36-39.

ARGUMENTS

In its opening brief, the Division argues that:

1) LaBine acted as an investment adviser for the majority of Domin-8 sales and failed to disclose material conflicts of interest to his advisory clients—namely, his expected receipt of Domin-8 warrants as additional incentive compensation and his major fundraising commitments to Domin-8—in violation of Advisers Act Section 206(1) and (2). Div. Br. at 65-80.

2) LaBine violated the antifraud provisions of the Securities Act and Exchange Act by failing to disclose these material conflicts to his clients. *Id.* at 80-83.

3) LaBine violated the antifraud provisions of the Securities Act, Exchange Act, and Advisers Act by his misrepresentations. *Id.* at 83-85.

4) LaBine's willful violations deserve significant sanctions. *Id.* at 85-91.

In his opening brief, LaBine raises constitutional challenges, as previously noted. Resp. Br. at 2-5; *see supra* page 2. As to the merits, LaBine argues that the Advisers Act is inapplicable to his Domin-8 sales because he acted as a commissioned salesperson (i.e. a broker-dealer), not as an investment adviser. *Id.* at 22-28. LaBine further argues that regardless whether he acted as an adviser, the Division cannot prove its claims because the alleged misrepresentations and omissions are immaterial and LaBine lacked scienter. *Id.* at 28-48. Finally, LaBine contends the Division is not entitled to the requested relief and, in any event, the Division's requested monetary sanctions are mooted by LaBine's inability to pay. *Id.* at 48-58.

In reply, the Division attempts to rebut LaBine's arguments and maintains its contention that LaBine breached his duty to investors by failing to disclose his expectation of receiving Domin-8 warrants and his fundraising commitments. Div. Reply Br. at 2-12. In his reply, LaBine argues that the Division's case is based on a "tiny and inconsistent sample of customers"; investors were warned repeatedly that Domin-8 was high risk; the Division's Advisers Act charge is not based on proof but an argued change in law; the misrepresentation claims are predicated on matters explained in the offering documents; the Division's claim that failure to verbalize possible warrant compensation was a misrepresentation "reads too narrowly the disclosures and too broadly potential conflicts"; the record demonstrates that he did not act with

[19] These details are subject to a protective order and therefore redacted in the public version of this decision. *Lawrence M. LaBine*, Admin. Proc. Rulings Release No. 3229, 2015 SEC LEXIS 4240 (ALJ Oct. 15, 2015).

scienter; the Division improperly seeks to universalize claims absent factual proof; and sanctions are unwarranted. LaBine Reply Br. at 1-23.

LEGAL CONCLUSIONS

LaBine is charged with violating the antifraud provisions of Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Section 206(1) and (2). *See* 15 U.S.C. §§ 77q(a), 78j(b), 80b-6(1), (2); 17 C.F.R. § 240.10b-5; OIP at 7.

Advisers Act Section 206(1) and (2)

Under Advisers Act Section 206(1) and (2), it is:

> unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client; [or]
>
> (2) to 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).

Courts have interpreted Section 206 as establishing a statutory fiduciary duty on investment advisers to act at all times in the best interest of their clients and requiring advisers to exercise utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194, 200-01 (1963); *SEC v. Moran*, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996) (collecting case-law). Congress enacted Section 206 "to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *Capital Gains*, 375 U.S. at 191-92.

Material misrepresentations and nondisclosure of material facts by an adviser constitute fraudulent devices and operate as fraudulent or deceitful practices within the meaning of Section 206(1) and (2). *See id.* at 197-201; *SEC v. Wash. Inv. Network*, 475 F.3d 392, 403-06 (D.C. Cir. 2007); *Moran*, 922 F. Supp. at 896. Scienter is required to establish a Section 206(1) violation, whereas negligence is sufficient for a Section 206(2) violation. *SEC v. Steadman*, 967 F.2d 636, 641 & n.3, 643 & n.5 (D.C. Cir. 1992).

LaBine was an Investment Adviser

An investment adviser is defined as:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or

> as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities[.]

15 U.S.C. § 80b-2(a)(11).

LaBine fits this general definition of an adviser. During the time of the Domin-8 sales, he served in the dual role of a registered investment adviser representative and a registered representative of a broker. Stip. ¶ 1. It is undisputed that eighty-two of LaBine's Domin-8 investors were his advisory clients. Tr. 1409-10. He recommended for those clients to purchase Domin-8 Series D debentures, which were securities, and earned commissions for those sales, which qualifies as "compensation" within the meaning of the Advisers Act. Stip. ¶¶ 10-11, 14, 16 & Table 1; *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) ("The term 'compensation' has been defined broadly as the receipt of any economic benefit, [including] . . . commissions . . . ." (internal quotation marks omitted)); *see Alexander V. Stein*, Advisers Act Release No. 1497, 1995 SEC LEXIS 3628, at *8 (June 8, 1995) (respondent "held himself out as an investment adviser to members of the public when he recommended, in the course of his business activities . . . , that clients invest their funds in his 'fully hedged arbitrage program'" and "received the requisite compensation").

At issue is whether LaBine satisfies the broker-dealer exemption, under which the definition of an investment adviser "does not include . . . any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor[.]" 15 U.S.C. § 80b-2(a)(11). In order to be exempted, a broker or dealer must satisfy both requirements. *Thomas*, 631 F.3d at 1160-61. The phrase "solely incidental" "renders the exemption applicable only when the broker-dealer gives advice in connection with the sale of a product." *Id.* at 1162. In other words, the investment advice must be given "only in connection with the primary business of selling securities." *Id.* at 1164. Moreover, "broker-dealers . . . whose primary business consists of giving advice . . . do not meet the first prong of the broker-dealer exemption." *Id.*

The broker-dealer exemption does not apply because LaBine's investment advice was not "solely incidental" to his business as a broker. He specifically targeted his advisory clients, many of whom were longtime clients, to buy the Domin-8 Series D debentures, and he used his regular advisory business in order to attract investors.

LaBine touted himself as a financial planner offering the "whole package" of services. Div. Ex. 47 at 67-68; Tr. 669-72, 674, 863. His services often included investment advice and related tasks. Tr. 670, 741-44, 1074-75; Div. Ex. 47 at 68; Div. Ex. 48.1 at 190. When recommending the Domin-8 Series D debentures, LaBine took his clients' entire investment portfolio into account; made the recommendations as part of an overall strategy to manage their portfolio; and usually recommended other products along with the Domin-8 debentures. Tr. 740-44, 1074-75. Critically, his fundraising efforts show that he relied heavily on his existing client base to raise money for the Domin-8 offering. *See, e.g.*, Div. Exs. 4, 6, 12, 58.6m; Div. Ex. 69 at bates 1315-16. Of LaBine's clients that purchased Domin-8 Series D debentures, eighty-two of one hundred were his advisory clients. Tr. 1409-10; Stip. Table 3. He advised a number of clients to fund their Domin-8 investments with money from advisory accounts that he managed. Tr. 852, 1068-69; *see, e.g.*, Div. Ex. 58.8d at 3; Div. Ex. 58.8e at bates 3616, 3620; Tr. 458-60 (Pettit); Div. Ex. 58.11i at bates 4322-23; Tr. 626-27 (Spaid). Some of his advisory clients opened brokerage accounts for the first time, at his recommendation, to hold the Domin-8 Series D debentures.[20] *See, e.g.*, Stip. Table 3 #96; Tr. 1228-29.

LaBine failed to tell a single advisory client that he believed he was acting in a non-fiduciary capacity. Some advisory clients were left with the impression that LaBine's roles as a broker and adviser were one and the same. *See, e.g.*, Tr. 449. His advisory clients relied on him to select or present investment opportunities. *See, e.g.*, Tr. 441, 446 (Pettit); Tr. 611-12 (Spaid); Tr. 1214 (Brabender); Tr. 1309 (Sheen); Stip. Table 3 #76, 96, 103, 105. It would be inconsistent with the remedial purposes of the Advisers Act to hold that LaBine could have "switched hats" and disclaimed the fiduciary duties of an adviser without giving notice to his clients. LaBine's proposed "transaction-by-transaction" approach has no basis in the statute, and it would be impossible under such approach for clients to ascertain what role their financial professional was playing.

In conclusion, LaBine acted as an investment adviser, and no exemption is applicable, when he recommended and sold the Domin-8 Series D debentures to his advisory clients.

LaBine Failed to Disclose Material Conflicts of Interest

At the time LaBine recommended and sold the Domin-8 Series D debentures to his clients, there was a potential economic incentive for him to do so: the Domin-8 warrants to buy the company's common stock. LaBine was aware of this incentive program for the major Domin-8 producers and asked DeWaay Financial's management whether he would receive ninety percent of any warrants paid to DeWaay on account of his and Swanson's sales. Stip. ¶¶ 20, 24; Div. Ex. 17; Tr. 753-54. LaBine knew that warrants would accrue to DeWaay Financial based on his sales. Tr. 748. Even if LaBine was not certain whether he would receive the warrants, he sought them as extra incentive compensation.

LaBine contends that the warrants posed no conflict because, in his view, they were worthless. I disagree. The fact that the warrants were tied to the value of the company's common stock and that the value could change does not mean the warrants were worthless. Moreover, the facts that the company ultimately entered bankruptcy and that LaBine did not receive the warrants are not dispositive. In determining the scope of the conflict, the crucial fact is that LaBine sought, and was potentially poised to receive, the warrants as extra incentive compensation at the time of the debenture sales. LaBine thought at the time he sold the Domin-8 Series D debentures that the warrants had the potential to be worth a substantial sum. Div. Ex.

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[20] The fact that LaBine earned more commissions than advisory fees in 2008 and 2009 does not change the outcome. If the form of compensation were dispositive, a financial professional's fiduciary role could be easily evaded. In any event, DeWaay Advisory's standard agreement for investment management (i.e., advisory) services contemplated that direct investments could occur without incurring adviser fees. Div. Ex. 21 at 1.

17; Tr. 757. That was consistent with his belief that the company could be worth up to $300 million. Tr. 778-79. Accordingly, I find his contrary statements that he believed he stood to gain nothing from the warrants to be incredible.[21]

In addition to the conflict presented by the warrants, LaBine made significant fundraising commitments to Domin-8's board of directors. He promised to sell $250,000 worth of debentures a week and that he could get the entire offering funded on his own if necessary. Tr. 152-53, 876-77; Div. Ex. 69 at bates 1316. He knew the company was at a critical point financially and relying on his fundraising efforts to survive. *See, e.g.*, Div. Exs. 30, 40, 45. In turn, LaBine relied heavily on his client base to fulfill these fundraising commitments and galvanized his office staff to help him market Domin-8 to clients. *See, e.g.*, Div. Exs. 4, 6, 12, 58.6m.

LaBine did not disclose to his clients that he could potentially receive or sought to receive warrants as extra incentive compensation, his role as a primary fundraiser for Domin-8, or his fundraising commitments to Domin-8's board. *See* Tr. 726-27, 774; *see also* Tr. 471-72, 477-79, 626, 632-33, 1231-33, 1306, 1325-27. None of the witnesses called in LaBine's defense testified to the contrary.[22] Tr. 1497-98, 1524-25, 1548-49, 1574-75, 1601-03.

These undisclosed conflicts of interest were material because a reasonable investor would consider them important in deciding whether to invest. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *see also Capital Gains*, 375 U.S. at 196 ("An investor seeking the advice of a registered investment adviser must . . . be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving two masters or only one, especially . . . if one of the masters happens to be economic self-interest." (internal quotation marks omitted; second omission in original)); *IMS/CPAs & Assocs.*, Securities Act Release No. 8031, 2001 SEC LEXIS 2323, at *31 (Nov. 5, 2001) ("[E]conomic conflicts of interest . . . are material facts that must be disclosed."). The greater weight of the evidence supports a finding that these conflicts of interest would cause a reasonable investor to question whether LaBine was recommending the Domin-8 investment in the investor's best interest or his personal interest. Tr. 474-75, 478, 633-34, 1231-33, 1326-28. As an investor witness put it: "What is his motivation? It sounds at that point like it's in his best interest, not ours." Tr. 1233.

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[21] The expert report of Bates is unpersuasive. Among other flaws, his figures were based on the notion of LaBine exercising the warrant option within one year, which, as the Division's expert Canjels points out, was a faulty measure. Div. Ex. 130 at 11-12.

[22] Neither the offering documents nor any of the forms disclosed the potential for extra financial incentives. The disclosure form did not mention warrants at all, only commissions and other initial costs that would be deducted from the initial investment. Resp. Ex. 5. Nothing in the PPM disclosed that DeWaay Financial had a selling agreement with GunnAllen under which DeWaay Financial was entitled to a substantial portion of warrants for its sales. Div. Ex. 56.2. No reasonable investor could be expected to glean otherwise from such documents.

The fact that the economic incentive had the potential to be substantial sufficiently establishes materiality. *Cf. Vernazza v. SEC*, 327 F.3d 851, 859 ("It is indisputable that [even] potential conflicts of interest are 'material' facts" that must be disclosed to clients.), *amended*, 335 F.3d 1096 (9th Cir. 2003). The exact amount LaBine stood to gain is not dispositive. *See Kingsley, Jennison, McNulty & Morse Inc.*, Advisers Act Release No. 1396, 1993 SEC LEXIS 3551, at *14 (Dec. 23, 1993). Nonetheless, if circumstances tilted in his favor, he stood to receive 260,852 shares of Domin-8 common stock through the warrants. Stip. ¶ 25.

"The high standards of business morality exacted by our laws regulating the securities industry do not permit an investment adviser to trade on the market effect of his own recommendations without fully and fairly revealing his personal interests in these recommendations to his clients." *Capital Gains*, 375 U.S. at 201. In failing to live up to these standards, LaBine acted with scienter—"a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (internal quotation marks omitted). Scienter is established by "knowing or reckless conduct," without a showing of "willful intent to defraud." *Vernazza*, 327 F.3d at 860. Recklessness is defined as "a highly unreasonable omission," i.e., "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 [respondent] or is so obvious that [he] must have been aware of it." *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003).

It is possible that LaBine might not have been significantly influenced by the potential to receive the warrants. There was no guarantee he would receive them. But even so, LaBine was a securities professional with years of experience in the industry and he either knew or was reckless in not knowing that he had a duty to disclose conflicts of this nature. Tr. 723-24, 735-39, 830-31, 868-70, 1200. It was an extreme departure from his fiduciary duty as an adviser to not make such disclosures, and it was up to his clients, not LaBine, to determine whether such conflicts could be waived. Due to his failure to make the required disclosures, his clients "ha[d] no opportunity to evaluate, much less waive, the conflict[s]." *Feeley & Willcox Asset Mgmt. Corp.*, Advisers Act Release No. 2143, 2003 SEC LEXIS 3148, at *44 (July 10, 2003).

LaBine's Material Misrepresentations About the Investment's Risks

LaBine's former advisory clients, who invested in Domin-8 and testified in the Division's case, were each left with the impression that the Domin-8 investment was safe and none recalled any meaningful discussion by LaBine about the investment's risks. *See, e.g.*, Tr. 455-56, 464-65, 619-20, 1217-18, 1223-24, 1296-97, 1300-01, 1306. In pitching the Domin-8 Series D debentures to investors, LaBine provided minimal insight about risks and gave optimistic assurances about even the hypothetical chance of bankruptcy. He would compare the Domin-8 investment to having a senior secured loan—similar to having a $7 million loan against a $50 million office building or Picasso masterpiece. Tr. 794-95, 810-11. As he admitted, he told "latter clients" in 2009 that "one of the best things that could ever happen is that [they] could end up owning the company." Tr. 807-08, 813; Div. Ex. 47 at 187, 193. He also admitted that he had told clients that the "worst case scenario[]" of the investment was that they "could end up owning the company . . . [which] has a lot of value." Div. Ex. 47 at 147-48.

In LaBine's defense, some investor witnesses testified that they understood that the Domin-8 investment had risks and did not feel misled. But in this enforcement action, the Division need not prove that any investor, much less all of them, actually relied on the material misstatements. *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993); *Charles K. Seavey*, Advisers Act Release No. 2119, 2003 SEC LEXIS 716, at *17 n.20 (Mar. 27, 2003). Moreover, their testimony does not change the fact LaBine made false and misleading representations. For example, one of the defense witnesses, who invested just a month before Domin-8 entered bankruptcy, testified that LaBine told him that bankruptcy was a "possibility" but "the company appeared to be on the right track and was turning around." Tr. 1591; Stip. Table 1 #104. Another defense witness acknowledged that he did not recall hearing anything negative about the company and that Labine's Domin-8 presentation "was all positive." Tr. 1495. And another defense witness, who invested in May 2009, did not recall any conversation where LaBine discussed the possibility or likelihood that the company would enter bankruptcy. Tr. 1523-24; Stip. Table 1 #90. At the hearing, LaBine had no credible response when repeatedly asked whether he disclosed negative aspects of Domin-8. When pressed, LaBine's answer was: "It could be positive in bankruptcy. I don't recall what else I talked about on the negative side." Tr. 1053. Considering the entire record, the weight of the evidence shows that LaBine frequently portrayed the Domin-8 investment opportunity to be safer than it was and did not tell investors the full truth about the company's financial situation or prospects for success.

LaBine's belief that Domin-8 could be worth a fortune, if it succeeded, was reasonable. However, that was not the full truth. Contrary to what LaBine told his clients, the worst case scenario was that the investors could lose all or a substantial portion of their money, with no recourse. He knew that Domin-8 would have collapsed in early 2009 absent his sustained fundraising efforts, that the company was barely making payroll, and that its survival prospects were dim. *See* Tr. 872-73, 876-77, 907-08, 913-14; *see, e.g.*, Div. Exs. 7, 30, 40, 45. He also knew that nothing guaranteed that his clients could be made whole in the event of bankruptcy, let alone that they would own the company. Tr. 816-17. The company had sizable debt, net losses, and a negative cash flow. Numerous risk factors indicated a high chance of failure. It had limited cash-on-hand and tangible assets, was in default of certain obligations, and perhaps most significantly, still owed millions of dollars to holders of the seller notes, which were senior to the Series D debenture holders. Stip. ¶¶ 3–5; Div. Ex. 56.1 at 2, 20, Ex. G at 2, 5; Div. Ex. 56.2 at bates 150-58, 183, 185, 313.

In the circumstances here, the risk disclosures in the offering documents do not render LaBine's oral misrepresentations immaterial. *See SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1250 (11th Cir. 2012) ("The way information is disclosed can be as important as its content. Thus, in evaluating the effect of . . . written disclosures [on a defendant's oral misrepresentations], we must consider not only the content of the written disclosures but also the way in which the disclosures were made."); *id.* at 1252 ("[I]n securities cases, whether written disclosures should trump oral misrepresentations is highly fact-specific and therefore is not amenable to bright-line rules."); *ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4249, 2015 SEC LEXIS 4474, at *51 (Oct. 30, 2015) ("ZPRIM did not sufficiently bring to investors' attention the information it contends cures its misrepresentations."). LaBine's argument that he relied on the contents of the PPM to inform investors about the risks is undercut by the fact that, in some cases, the first meeting in which LaBine pitched the investment and presented the PPM was the same meeting in which the investor was induced to make the purchase. At least two advisory clients received the PPM after they signed paperwork to invest in Domin-8. Tr. 1218, 1227, 1301, 1303-04.

Furthermore, by LaBine's own admission, he did "not very often" discuss the PPM with clients; rather, he thought it was up to his clients to "read and take [it] home and ask questions or call back." Tr. 806. He directed certain clients to initial or sign disclosure forms, but left them with the impression that they did not have to read anything. *See, e.g.*, Tr. 464-65, 1225-27, 1268-69, 1303-05. For example, when one advisory client expressed that the paperwork involved a lot of initialing, LaBine remarked, "It's not that important."[23] Tr. 1305. In most instances, LaBine's clients did not read the PPM because they were relying on him as their trusted adviser. *See, e.g.*, Tr. 464-68, 494-95. One defense witness, who has a solid background in economics and finance and a lifetime of investment experience, testified that he received the PPM and could read and understand the risk factors presented in it. Tr. 1532, 1540-41. But by and large, the investor witnesses did not have such a background, and LaBine knew that the investors relied on him to vet potential investments. Yet, he did not adequately draw attention to the risk factors of Domin-8.

LaBine's misrepresentations about investment risks were material. Any reasonable investor would have wanted to know the truth about Domin-8's financial status and risk factors, including the facts that the company was likely to enter bankruptcy and reliant on LaBine's fundraising efforts to survive. *See SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) ("Surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."); Tr. 503, 634, 649-50, 1270-71, 1328-29, 1344-45.

I credit LaBine's testimony that he believed the company could succeed, and I do not believe he sought to harm his clients. However, his misrepresentations were made with scienter. It was, at the very least, extremely reckless for him to misrepresent the investment opportunity's safety while not discussing known risk factors about Domin-8's dire financial state, the likelihood that the company would enter bankruptcy, and that nothing guaranteed repayment in the event of bankruptcy.[24]

Accordingly, Labine violated Advisers Act Section 206(1) and (2) because he failed to disclose material conflicts of interest and made material misrepresentations concerning the risks of the Domin-8 investment.

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[23] LaBine did on occasion reference the PPM with investors. A defense witness testified that LaBine had directed him to read the PPM, which contained a section about risk factors, but he "glossed over" that section because "that stuff is written for lawyers, not me." Tr. 1500, 1502. This testimony, however, simply indicates that LaBine made a passing reference to the PPM, which alone is insufficient to overcome his oral misrepresentations.

[24] LaBine's misconduct involved the use of interstate means, including the mail, phone lines, and wire transfers. *See David F. Bandimere*, Securities Act Release No. 9972, 2015 SEC LEXIS 4472, at *18-20 & nn.21-22 (Oct. 29, 2015); Tr. 896-97. He does not dispute that this element is satisfied.

Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5

The misconduct violating Advisers Act Section 206 may also form the basis of violations of Securities Act Section 17(a) and Exchange Act Section 10(b), as these antifraud provisions contain overlapping prohibitions. *See United States v. Naftalin*, 441 U.S. 768, 777-78 (1979); *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999); *Rana Research, Inc.*, 8 F.3d at 1363 n.4. As the scope of Rule 10b-5 is coextensive with Section 10(b), a reference to either the rule or the statute in this decision serves as a reference to both. *See SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002) (citing *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)).

The antifraud provisions of the Securities Act and Exchange Act are generally categorized under two theories of liability: Securities Act Section 17(a)(2) and Exchange Act Rule 10b-5(b) prohibit material misstatements and omissions, whereas Securities Act Section 17(a)(1) and (3) and Exchange Act Rule 10b-5(a) and (c) target what is often called scheme liability. *See* 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

Material Misstatements and Omissions

A violation of Exchange Act Section 10(b) and Rule 10b-5(b) is established when a person 1) makes a material misstatement or omission 2) with scienter 3) in connection with the purchase or sale of securities 4) by means of interstate commerce or the mails. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b); *SEC v. Todd*, 642 F.3d 1207, 1215 (9th Cir. 2011); *VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011). By contrast, a violation of Securities Act Section 17(a)(2) turns on whether the respondent has directly or indirectly obtained money or property "by means of" a material untrue statement or omission in the offer or sale of securities using the means of interstate commerce. 15 U.S.C. § 77q(a)(2).

As already discussed, LaBine made material misstatements and omissions with scienter. Whether acting in the capacity of an investment adviser or broker, he had a duty to disclose material conflicts of interest when recommending that clients purchase Domin-8 Series D debentures. Tr. 723-24, 735-39, 830-31, 868-70, 1200. This duty to disclose extended to any potential economic incentives as well as his fundraising role for the issuer Domin-8. *See SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) ("Misrepresenting or omitting to disclose a broker's financial or economic incentive in connection with a stock recommendation constitutes a violation of the anti-fraud provisions."); *Robert Thomas Clawson*, Exchange Act Release No. 48143, 2003 SEC LEXIS 1598, at *11-12 (July 9, 2003) ("When a securities salesperson recommends a stock to a customer, the salesperson must disclose material adverse facts, including any self-interest that could influence the salesman's recommendations." (internal quotation marks omitted)). He did not live up to this duty.

Also, in making representations to clients about Domin-8, LaBine had an obligation to disclose known risk factors and negative information. *See Joseph J. Barbato*, Securities Act Release No. 7638, 1999 SEC LEXIS 276, at *31-32 (Feb. 10, 1999) ("Where a registered representative omits to disclose material information necessary to make his statements not misleading to customers about an investment he is recommending, including known risk factors and negative information about the stock, the representative violates the antifraud provisions."); *see also SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (the federal securities laws "impose[] a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading" (internal quotation marks omitted)). In choosing to speak, LaBine was "obligated to do so truthfully and in a way that was not misleading." *John J. Kenny*, Securities Act Release No. 8234, 2003 SEC LEXIS 1170, at *27 (May 14, 2003), *aff'd*, 87 F. App'x 608 (8th Cir. 2004). He failed to do so.

Furthermore, LaBine obtained money "by means of" the materially false statements and omissions within the meaning of Section 17(a)(2). *See* 15 U.S.C. § 77q(a)(2); *SEC v. Stoker*, 865 F. Supp. 2d 457, 465 (S.D.N.Y. 2012). He earned substantial commissions as a direct result of his Domin-8 sales, in the course of which he made the above-noted material misstatements and omissions.

Regarding the required nexus element, LaBine's misstatements and omissions occurred in the course of his sales of the Domin-8 Series D debentures, which were securities. As such, his misstatements and omissions were made in connection with the purchase or sale of securities within the meaning of Exchange Act Section 10(b), and in the offer or sale of securities within the meaning of Securities Act Section 17(a).[25] *See Zandford*, 535 U.S. at 819-20, 825 (Exchange Act Section 10(b)'s nexus requirement is to be construed broadly); *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).

Accordingly, as a result of his material misrepresentations and omissions, LaBine violated Exchange Act Section 10(b) and Rule 10b-5(b), as well as Securities Act Section 17(a)(2).

Scheme Liability

Under Rule 10b-5(a) and (c), scheme liability extends to a person who, directly or indirectly, 1) "employ[s] any device, scheme, or artifice to defraud," or "engage[s] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," 2) with scienter 3) in connection with the purchase or sale of securities 4) by means of interstate commerce or the mails. 17 C.F.R. § 240.10b-5(a), (c); *see Aaron*, 446 U.S. at 691. Securities Act Section 17(a)(1) and (3) makes it unlawful for a person, in the offer or sale of securities, and by means of interstate commerce or the mails, "to employ any device, scheme, or artifice to defraud," or "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)(1), (3). Section 17(a)(1) requires scienter, whereas Section 17(a)(3) does not. *Aaron*, 446 U.S. at 695-97.

Rule 10b-5 is subject to Section 10(b)'s requirement that fraudulent devices, acts, or practices be manipulative or deceptive. *See* 15 U.S.C. § 78j(b); *Central Bank of Denver, N.A. v.*

[25] As already noted, the interstate means element is satisfied.

First Interstate Bank of Denver, N.A., 511 U.S. 164, 173-74 (1994); *Cooper v. Pickett*, 137 F.3d 616, 624-25 (9th Cir. 1997). To be liable, "the defendant must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds*, *Avis Budget Grp., Inc. v. Cal. State Teachers' Ret. Sys.*, 552 U.S. 1162 (2008); *see SEC v. Dorozhko*, 574 F.3d 42, 50 (2d Cir. 2009) ("In its ordinary meaning, 'deceptive' covers a wide spectrum of conduct involving cheating or trading in falsehoods.").

Scheme liability may be predicated on misstatements or omissions. *See SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1205-06 (D.N.M. 2013); *SEC v. Familant*, 910 F. Supp. 2d 83, 95 (D.D.C. 2012). However, numerous federal courts—including the Ninth Circuit where LaBine resides and where the Domin-8 sales occurred—have held: "A defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rule[] 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions."[26] *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011).

Labine actively sought to raise funds for the issuer Domin-8, made extensive fundraising commitments to Domin-8's board of directors, and promised to fund the entire offering on his own if necessary. He then galvanized his office staff and targeted his existing client base to fulfill the fundraising plan he devised, essentially using those clients—unbeknownst to them—as Domin-8's main line of credit when the company was struggling financially. This plan was deceptive. His misstatements and omissions were deceptive devices, acts, and practices in furtherance of the plan, giving certain clients the false impression that the Domin-8 investment had virtually no risks and that he had no self-interest at stake. Although he may not have intended harm to investors, his plan was nevertheless a scheme within the meaning of the federal securities laws. *See Aaron*, 446 U.S. at 696 n.13 (defining "scheme" as "a plan or program of something to be done; an enterprise; a project; as, a business scheme, or a crafty, unethical project" (quoting Webster's International Dictionary (2d ed. 1934)) (emphasis and brackets omitted)); *Familant*, 910 F. Supp. 2d at 94 (a scheme "is the plan or design, not the ultimate result"). As already established, the other elements for liability under the Securities Act and Exchange Act have been satisfied.

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[26] *See also Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *SEC v. St. Anselm Expl. Co.*, 936 F. Supp. 2d 1281, 1298-99 (D. Colo. 2013); *SEC v. Benger*, 931 F. Supp. 2d 908, 913-16 (N.D. Ill. 2013); *Familant*, 910 F. Supp. 2d at 93-94; *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, No. 2:03-MD-1565, 2006 WL 469468, at *21 (S.D. Ohio Feb. 27, 2006). In an opinion that has since been vacated, the Commission disagreed with the approach of these federal courts. *John P. Flannery*, Securities Act Release No. 9689, 2014 SEC LEXIS 4981, at *49-51 (Dec. 15, 2014), *vacated by* 810 F.3d 1 (1st Cir. 2015). I need not decide whether *Flannery*'s interpretation remains viable because, as discussed in the text, LaBine's conduct involved more than mere misstatements or omissions.

Accordingly, LaBine violated Exchange Act Section 10(b) and Rule 10b-5(a) and (c), as well as Securities Act Section 17(a)(1) and (3).

Willfulness

LaBine's violations were willful, given that he intended to commit the acts which constituted the violations and failed to make disclosures of which he had a known duty to do so. *See Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000); *Donald L. Koch*, Exchange Act Release No. 72179, 2014 SEC LEXIS 1684, at *48-49 n.139 (May 16, 2014), *vacated in part on other grounds*, 793 F.3d 147 (D.C. Cir. 2015).

SANCTIONS

The Division seeks a cease-and-desist order against LaBine, certain industry bars, disgorgement of $524,408, and a single third-tier civil penalty of $150,000. LaBine argues that sanctions are unwarranted and that he is unable to pay monetary sanctions.

Ability to Pay

The Commission may consider a respondent's ability to pay in determining whether to impose monetary sanctions. *See* 15 U.S.C. §§ 77h-1(g)(3), 78u-2(d), 80b-3(i)(4); 17 C.F.R. § 201.630(a); *Robert L. Burns*, Advisers Act Release No. 3260, 2011 SEC LEXIS 2722, at *38 (Aug. 5, 2011). "Ability to pay, however, is only one factor that informs [this] determination and is not dispositive." *Robert L. Burns*, 2011 SEC LEXIS 2722, at *38. Even when a respondent demonstrates an inability to pay, the Commission has discretion not to waive monetary sanctions "particularly when the misconduct is sufficiently egregious." *Id.* at *38-39.

It is undisputed that LaBine's current financial condition would make him unable pay significant monetary sanctions. [[[redacted]]] LaBine's misconduct, while serious, did not involve intent to harm clients and there are other mitigating factors as discussed below. I will therefore consider his financial condition in determining monetary sanctions.

Disgorgement

Securities Act Section 8A(e), Exchange Act Sections 21B(e) and 21C(e), and Advisers Act Section 203(j) authorize disgorgement, including reasonable interest, in this proceeding. 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e), 80b-3(j); OIP at 7. Disgorgement of ill-gotten gains "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *94 (May 2, 2014) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).

The Division asks that I order LaBine to disgorge all of the commissions from his sales of the Domin-8 Series D debentures, totaling $524,408. Div. Br. at 89-90. The Division "has the initial burden of demonstrating a reasonable approximation of profits causally connected to the violation," i.e., "but-for causation between a [respondent]'s violations and profits." *Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *9 (Aug. 21, 2014) (internal quotation marks omitted). Here, the record does not support a conclusion that every sales commission was causally connected to the violations, and the Division failed to provide a sufficient justification for seeking $524,408 in disgorgement.

A reasonable approximation of LaBine's illicit profits consists of the commissions he earned in 2009, totaling $290,009. Stip. Table 1. By late November 2008, LaBine was pursuing the warrants as extra incentive compensation. He began making serious fundraising commitments to Domin-8's board of directors in January 2009. By February 2009, he committed to raising enough money to fund the entire Series D debenture offering if necessary. On these first two issues, LaBine did not make appropriate disclosures to anyone in 2009. Although LaBine made misrepresentations to several investors, particularly latter investors in 2009, the record does not support a finding that he made misrepresentations to every investor.

I consider that inability to pay should be given less weight in determining disgorgement because violations, especially in the antifraud context, should be made unprofitable. *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). I also consider that LaBine still has the ability to earn an income and pay some form of monetary sanction over time. Nonetheless, given LaBine's financial condition, ordering disgorgement of the full $290,009 would be unreasonable. I will therefore order disgorgement of $100,000 plus prejudgment interest.[27]

Other Sanctions

The other requested sanctions call for consideration of overlapping public interest factors and I therefore consider them together. As result of LaBine's willful violations of the federal securities laws, Exchange Act Section 15(b), Investment Company Act Section 9(b), and Advisers Act Section 203(f) authorize remedial actions in this proceeding, including bars from certain segments of the securities industry. 15 U.S.C. §§ 78*o*(b)(4)(D), (6)(A)(i), 80a-9(b)(2), 80b-3(e)(5)&(f); OIP at 7. The Division requests an investment company bar and bar from association with any investment adviser and any broker or dealer against LaBine. Div. Br. at 87. In determining whether such sanctions are in the public interest, the Commission considers the *Steadman* factors: 1) the egregiousness of the respondent's actions; 2) the isolated or recurrent nature of the infraction; 3) the degree of scienter involved; 4) the sincerity of assurances against future violations; 5) the respondent's recognition of the wrongful nature of his conduct; and 6) 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); *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 SEC LEXIS 2924, at *34-35 (Nov. 21, 2008).

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[27] LaBine earned sales commissions through August 7, 2009. Stip. Table 1. Accordingly, prejudgment interest shall run from September 1, 2009, "through the last day of the month preceding the month in which payment of disgorgement is made." 17 C.F.R. § 201.600(a). I will define the prejudgment interest rate in the ordering paragraphs.

Also as a result of LaBine's violations, Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) authorize a cease-and-desist order against him. 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k); OIP at 7. 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 *114 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). In determining whether to issue a cease-and-desist order, the Commission considers the *Steadman* factors as well as "whether the violation is recent, the degree of harm to investors or 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.*; *accord Montford & Co.*, 2014 SEC LEXIS 1529, at *88.

Securities Act Section 8A(g), Exchange Act Section 21B, and Advisers Act Section 203(i) authorize a third-tier civil penalty up to $150,000 because LaBine's acts and omissions involved, at minimum, reckless disregard of regulatory requirements and resulted in substantial pecuniary gain to himself. 15 U.S.C. §§ 77h-1(g)(2)(C), 78u-2(b)(3), 80b-3(i)(2)(C); 17 C.F.R. § 201.1004, Subpt. E, Table IV (adjustment applicable to violations occurring after March 3, 2009); OIP at 7. In deciding whether a civil penalty is in the public interest, the Commission considers several factors, including inability to pay. *Robert L. Burns*, 2011 SEC LEXIS 2722, at *38 & n.57. Other factors include 1) whether the act or omission involved fraud; 2) whether the act or omission resulted in harm to others; 3) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; 4) whether the individual has committed previous violations; 5) the need to deter such person and others from committing violations; and 6) such other matters as justice may require. *Jay T. Comeaux*, 2014 SEC LEXIS 3001, at *22 n.39 (citing statutory factors).

LaBine's misconduct violated the antifraud provisions and involved unjust enrichment in the form of commissions. The Commission has indicated that violations of the antifraud provisions warrant a severe sanction. *See Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). His overly positive misrepresentations of the investment and his failures to disclose conflicts of interest were contrary to his fiduciary role as an adviser and contrary to his obligations to customers as a broker.

Certain factors, however, are mitigating. I do not believe LaBine sought to harm clients; there is no allegation or evidence that he mishandled client assets; and I find that he had a good faith belief that Domin-8 would succeed. That he put so much effort into D8's stalking horse bid once Domin-8 entered bankruptcy reinforces my conclusion that he saw real value in the company and did not want his clients to lose. The Domin-8 investment opportunity was highly speculative, but the company had a real business plan and significant customer base. Ultimately, Domin-8's competitor RealPage won its bid to acquire Domin-8 in bankruptcy and the value of the underlying assets acquired from Domin-8 is worth millions today. Several clients testified that they did not feel misled and understood that their Domin-8 investments came with risks. The violations were not particularly recent, having occurred mostly in 2009.

Furthermore, the harm caused to the investors was not great in proportion to their net worth, typically over $1 million. His clients earned interest payments on their Domin-8 investments and ultimately got back, on average, sixty-five percent of their principal payment. There is no evidence of broad harm to the marketplace. LaBine sold the Domin-8 debentures primarily to older clients, but the Division does not allege that the investments were inherently unsuitable. With appropriate disclosures for clients to make informed decisions, it would have been reasonable for LaBine to invest a portion of his clients' money in this type of alternative investment. Indeed, several of his clients testified to such effect.

It is well established that a respondent's honesty and integrity are critical in deciding whether he should remain in the securities industry. *See Alexander Smith*, Exchange Act Release No. 3785, 1946 SEC LEXIS 228, at *18 (Feb. 5, 1946). LaBine's attempts to contact two witnesses and an angry phone call to another witness are of serious concern. Although it may be human nature for a respondent to be defensive and seek to assuage former clients, the manner in which LaBine contacted these witnesses casts some doubt on his integrity. His regulatory history is also concerning. He has not admitted wrongdoing, but I do not place significant weight on this factor as he is entitled to a robust defense. *See First City Fin. Corp*., 890 F.2d at 1229 ("The securities laws do not require defendants to behave like Uriah Heep in order to avoid injunctions. They are not to be punished because they vigorously contest the government's accusations.").

LaBine's current occupation provides an opportunity for future violations. As one investor noted, LaBine is "a great wordsmith." That he committed violations poses some risk of future violations warranting a cease-and-desist order. Nevertheless, lifetime associational bars with no right to reapply would be excessive given the mitigating factors described. Also, his misconduct does not suggest that he is forever unfit to work in the securities industry. The purpose of administrative sanctions is to remedy misconduct and protect the public, not to punish. *Leo Glassman*, Exchange Act Release No. 11929, 1975 SEC LEXIS 111, at *7 (Dec. 16, 1975); *A.J. White & Co.*, Exchange Act Release No. 10645, 1974 SEC LEXIS 1819, at *4, *6 & n.14 (Feb. 15, 1974). That purpose can be accomplished here by fashioning a sanction that is a significant deterrent but does not foreclose a second chance.

In these circumstances, a cease-and-desist order, two-year investment company bar, and bar from association with any investment adviser, broker, or dealer, with a right to reapply for association in two years, are appropriate and in the public interest. I have already found that $100,000 in disgorgement is appropriate. These sanctions send a clear message to others that similar misconduct will not be tolerated and assure future compliance with the federal securities laws. *See, e.g.*, *Wheat, First Secs., Inc.*, Exchange Act Release No. 48378, 2003 SEC LEXIS 3155, at *58 (Aug. 20, 2003) ("[The statutes] grant[] us the authority to craft cease-and-desist orders that assure future compliance with the securities laws. We believe that a cease-and-desist order requiring continued compliance with the requirements of the securities laws achieves this purpose."). Accordingly, and taking into account LaBine's financial condition and the significant sanctions already imposed, a civil penalty is not in the public interest.

RECORD CERTIFICATION

I certify that the record includes the items set forth in the revised record index issued by the Secretary of the Commission on February 12, 2016. *See* 17 C.F.R. § 201.351(b).

ORDER

Pursuant to Section 8A(a) of the Securities Act of 1933, Section 21C(a) of the Securities Exchange Act of 1934, and Section 203(k) of the Investment Advisers Act of 1940, Lawrence M. LaBine shall CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(1) and (2) of the Advisers Act.

Pursuant to Section 8A(e) of the Securities Act of 1933, Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, and Section 203(j) of the Investment Advisers Act of 1940, Lawrence M. LaBine shall DISGORGE $100,000 plus prejudgment interest. 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), shall be compounded quarterly, and shall run from September 1, 2009, through the last day of the month preceding the month in which payment is made. 17 C.F.R. § 201.600.

Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Lawrence M. LaBine is BARRED from association with any investment adviser, broker, or dealer, with a right to reapply for association in two years.

Pursuant to Section 9(b) of the Investment Company Act of 1940, Lawrence M. LaBine is PROHIBITED for two years 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 and prejudgment interest 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 in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, bank cashier's check, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-15967: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., 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 of Practice 360, 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 of Practice 111, 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 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.

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Brenda P. Murray
Chief Administrative Law Judge