

SECURITIES AND EXCHANGE COMMISSION

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Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

MARY L. SCHAPIRO, CHAIRMAN

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL L. GALLAGHER, COMMISSIONER

(64 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66076 / January 3, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14513

In the Matter of

**Shepaug Corp.,
Simone Group, Inc.,
Skynet Holdings, Inc.,
Skyview Development Corp.,
SMC Ventures, Inc. (f/k/a Gensci
Regeneration Sciences, Inc.),
Sonora Diamond Corp., and
Sonus Communication Holdings, Inc.,**

Respondents.

**ORDER MAKING FINDINGS AND
REVOKING REGISTRATION OF
SECURITIES PURSUANT TO SECTION 12(j)
OF THE SECURITIES
EXCHANGE ACT OF 1934 AS TO SMC
VENTURES, INC. (f/k/a GENSCI
REGENERATION SCIENCES, INC.)**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors to accept the Offer of Settlement submitted by SMC Ventures, Inc. (f/k/a Gensci Regeneration Sciences, Inc.) ("SMC Ventures" or "Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on August 24, 2011, pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

1 of 64

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to SMC Ventures, Inc. (f/k/a Gensci Regeneration Sciences, Inc.) ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that¹:

1. SMC Ventures (CIK No. 934801) is a British Columbia corporation located in Vancouver, British Columbia, Canada. At all times relevant to this proceeding, the securities of SMC Ventures have been registered under Exchange Act Section 12(g).

2. SMC Ventures has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 or 13a-16 thereunder because it has not filed any periodic reports with the Commission since the period ended December 31, 2002.

IV.

In view of the foregoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

Pursuant to Exchange Act Section 12(j), registration of each class of Respondent's securities registered pursuant to Exchange Act Section 12 be, and hereby is, revoked.

For the Commission, by its Secretary, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

¹The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

*Chairman Schapiro
Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66088 / January 3, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14682

In the Matter of

WILLIAM ECHEVERRI,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b)(6) OF
THE SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against William Echeverri ("Echeverri" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

2 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Echeverri, 40 years old, is a resident of Park Ridge, New Jersey. During the relevant period, Echeverri was a registered representative associated with broker-dealers registered with the Commission.

2. On December 27, 2011, a final judgment was entered by consent against Echeverri, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. William Echeverri, et al., Civil Action Number 2:11-cv-07314, in the United States District Court for the District of New Jersey.

3. The Commission's complaint alleged that on June 5, 2008, Echeverri received material, nonpublic information concerning the proposed offer by GE Healthcare, a wholly-owned subsidiary of the General Electric Company ("GE"), to acquire Vital Signs, Inc. ("Vital Signs"), a New Jersey company then trading on the Nasdaq National Market, at a price over 20% above the company's then-current trading price. The complaint alleged that Echeverri received this information from a Vital Signs officer who Echeverri knew or should have known was providing the information in breach of his duty of trust and confidence he owed to Vital Signs. The complaint alleged that, with scienter, Echeverri then bought shares of Vital Signs while in possession of the material, nonpublic information of GE's proposed takeover offer, which he sold after the takeover was announced for profits of \$150,121.19. The complaint further alleged that Echeverri also conveyed to five other people the material, nonpublic information about GE's proposed takeover of Vital Signs.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Echeverri's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Echeverri be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

these proceedings, and the findings contained in Section III., Paragraph 2, below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Parks, age 61, is an attorney licensed to practice in Texas.
2. On December 6, 2006, the Commission filed a complaint against Parks and others in *SEC v. Lindsey P. Vinson and Clyde R. Parks* (Civil Action No. 3:06-CV-2240/NDTX). On December 9, 2011, the court entered an order permanently enjoining Parks, by consent, from future violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5 and 13a-14 thereunder and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-13 thereunder. Parks was ordered to pay \$8,769 in disgorgement relief, \$702 in prejudgment interest and a civil penalty of \$8,769.
3. The Commission's complaint alleged that from about October 2003 through August 2005, Lindsey P. Vinson, a recidivist securities law violator, schemed to increase the price of stock in a company named Moliris Corporation. During a portion of this period, Parks acted as the company's president and signed its periodic filings and a certification under Exchange Act Rule 13a-14. While this scheme was ongoing, Vinson received more than \$200,000 in illicit payments from Moliris's bank accounts and through sales of Moliris stock. Parks was unjustly enriched through sales of Moliris stock under his control.

IV.

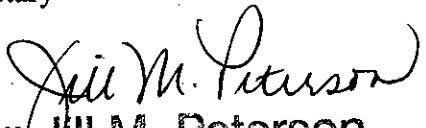
In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Parks' Offer.

Accordingly, it is hereby ORDERED, effective immediately, that Parks is suspended from appearing or practicing before the Commission as an attorney for five years. Furthermore, before appearing and resuming practice before the Commission, Respondent must submit an affidavit to the Commission's Office of the General Counsel truthfully stating, under penalty of perjury, that he has complied with this Order, that he is not the subject of any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district,

commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Chairman Schapiro
Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 9291 / January 4, 2012

SECURITIES EXCHANGE ACT OF 1934

Release No. 66091 / January 4, 2012

INVESTMENT ADVISERS ACT OF 1940

Release No. 3348 / January 4, 2012

INVESTMENT COMPANY ACT OF 1940

Release No. 29912 / January 4, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14684

In the Matter of

ANTHONY FIELDS, CPA
d/b/a ANTHONY FIELDS &
ASSOCIATES and d/b/a
PLATINUM SECURITIES
BROKERS,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTIONS
15(b) AND 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, SECTIONS
203(e), 203(f), 203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND SECTION
9(b) OF THE INVESTMENT COMPANY
ACT OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers ("Fields" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

SUMMARY

1. This matter involves numerous violations of the federal securities laws by Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers. Anthony Fields & Associates ("AFA") is an Illinois-based registered investment adviser that Fields controls as a sole proprietor. Platinum Securities Brokers ("Platinum") likewise is a Fields-controlled sole proprietorship that holds itself out on the Internet as a "leading institutional broker-dealer." During the relevant period, Fields made fraudulent offers of fictitious securities through various forms of social media. Fields also reported false and materially misleading information to the Commission on AFA's Form ADV, failed to maintain required books and records and to implement adequate compliance policies and procedures, and published false and materially misleading information on the websites of both AFA and Platinum. In addition, Fields, without being registered as a broker-dealer, has used social media platforms, including LinkedIn, to offer to buy and sell fraudulent bank guarantees and medium term notes ("MTNs") in exchange for transaction-based compensation.

RESPONDENT

2. **Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers ("Fields")**, age 54, is a resident of Lyons, Illinois. Fields is the founder, president, chief compliance officer, and sole control person of AFA and Platinum. Fields became licensed as a CPA in the state of Illinois in 1987. However, he subsequently failed to renew his license and it expired in 2006.

OTHER RELEVANT ENTITIES

3. **Anthony Fields & Associates** is a sole proprietorship that has been registered with the Commission as an investment adviser since March 2010. Its primary place of business is Lyons, Illinois. Fields is its founder, president, chief compliance officer, and sole control person.

4. **Platinum Securities Broker** is a sole proprietorship that holds itself out on the Internet as a "leading institutional broker-dealer." Fields is its founder, president, chief compliance officer, and sole control person. Although Platinum registered with the Commission as a broker-dealer in March 2010, Fields, on behalf of Platinum, filed a Form BDW to withdraw Platinum's registration on July 7, 2010, and the withdrawal became effective on September 4, 2010.

FACTUAL BACKGROUND

A. Fraudulent Offers of Securities Through Social Media Websites

5. From Fall 2010 through the present, Fields made multiple fraudulent offers of fictitious bank guarantees and MTNs on social media website LinkedIn.

6. Fields, while neither registered with the Commission as a broker-dealer nor licensed as an associated person of a registered broker-dealer, posted the following offers in LinkedIn discussions to attempt to induce the purchase of fictitious securities:

"Bank Guarantees, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JP Morgan Chase, BNP Paribas, UBS, RBS or Barclays, One (1) year and one (a) day, Fresh Cut USD 500 Billion (USD 500,000,000,000) with Rolls and Extensions 40% or better plus 1% commission fee to be paid, to buy side and sell side consultants 50/50. First Tranche: 500M USD If you are interested you can email for particulars"

"Medium Term Notes, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JPMorgan Chase, BNP Paribas, UBS, RBS or Barclays, Ten (10) years and one (1) day. Fresh Cut 7.5% expected. USD 500 Billion (USD 500,000,000,000) with Rolls and Extensions. 30% or better plus 1% Commission Fees to be paid, to buy side and Sell side consultants 50/50. First Tranche 500 M USD. All interested parties can email me for particulars"

7. Fields received multiple emails indicating interest from purported potential buyers who responded to his postings in LinkedIn.

8. Fields set up an unfunded investment adviser and an unfunded broker-dealer and registered both entities with the Securities and Exchange Commission. Fields identified himself as a principal of both of these entities in his LinkedIn profile.

B. Fields Filed a False Form ADV and Was Ineligible to Register With the Commission

9. On March 15, 2010, Fields filed a Form ADV with the Commission in which he falsely represented that he had \$400 million in assets under management. Additionally, Fields represented that he was managing assets for pooled fund vehicles, companies, and high net worth individuals. Contrary to his representations, AFA has never had any assets under management or managed assets for pooled fund vehicles, corporations, or high net worth individuals.

10. AFA's "Organizational Brochure," filed with the Commission as Part 2 of AFA's Form ADV, misrepresented Platinum as a registered broker-dealer that would execute securities transactions for AFA clients.

C. Fields Made Material Misrepresentations to Clients and Prospective Clients

11. From at least March 2010 to the present, Fields disseminated materially false and misleading information to the public through AFA's website. In addition to highlighting AFA's (improper) registration with the Commission, falsely stating that Platinum was a registered broker-dealer, and directing potential clients to its Commission filings, which contained false representations about AFA's assets under management and its clients, AFA's website falsely

claimed (i) to have a \$50 billion contract to trade U.S. Treasury securities; (ii) that AFA affiliate Platinum was a primary dealer licensed by the Federal Reserve Bank of New York ("FRBNY") to trade U.S. Treasury securities directly for the U.S. Treasury; and (iii) that AFA would utilize Platinum as a primary dealer to reduce client commissions.

D. Fields Failed to Adopt or Implement Written Books and Records

12. From March 2010 through October 2010, Fields, an investment adviser registered with the Commission, failed to adopt or implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and its rules. During this time, Fields had no written policies and procedures.

13. In November 2010, approximately eight months after Fields filed his Form ADV with the Commission, he purchased a one-year subscription from a compliance outsourcing firm, which allowed him to download an electronic template entitled "Investment Adviser Policies and Procedures Manual." The template included a "fill-in-the-blank" function, which allowed Fields to insert "AFA" as investment adviser and "Fields" as chief compliance officer at various places throughout the document. Although the template allows subscribers to tailor the manual to their specific advisory business, Fields did not make any such substantive changes to the template. Additionally, AFA failed to take any steps to implement the facially deficient policy or to conduct his required annual review of the adequacy of his policies and procedures and the effectiveness of their implementation.

E. Fields Failed to Maintain Required Books and Records

14. Fields also failed to maintain many of the books and records that are required of registered investment advisers. Fields utilizes several email and online communication providers, including Netzero, LinkedIn and Trade Key, each of which routinely deletes emails and online communications after six months. Nevertheless, Fields did nothing to retain these communications.

F. Fields Failed to Establish and Maintain a Written Code of Ethics

15. Although registered investment advisers are required to establish, maintain and enforce a written code of ethics, from March 2010 through May 2011, Fields had none.

G. Fields Acted as a Broker Without Being Registered

16. Fields makes the following representations on the Platinum website:

- "Platinum Securities Brokers is an institutional broker/dealer in U.S. Government securities. Licensed in the State of Illinois and registered with the Securities and Exchange Commission."
- "Platinum Securities Brokers is one of the leading institutional broker/dealers in government securities with state of the art electronic trading capabilities and a portfolio of over 25,000 U.S. Government securities."

- “[Platinum has] tremendous influences on the financial markets because we can either buy or sell a large volume of U.S. Government securities.”
- “This institutional brokerage firm . . . [has] strong relationships with major Fixed Income sources like the United States Treasury, Department [sic] and the Bureau Of [sic] Public Debt and other leading issuers of Treasury obligations.”

17. Contrary to the claims Fields makes on Platinum’s website, Platinum is not a registered broker-dealer;¹ it has no customers, no assets, no securities in inventory, no in-house experience in trading government securities (indeed, Fields has never bought or sold any securities for himself or others and does not hold any securities licenses), and Platinum is not a primary dealer authorized by the FRBNY to buy and sell securities directly for the U.S. Treasury.

18. Fields, through his sole proprietorship Platinum, held himself out as a broker and actively solicited customers. Platinum’s website touts: “At Platinum Securities Brokers you can buy bills, notes bonds, tips and strips or mutual funds either by calling one of the our representatives or by transacting these securities yourself on the internet.” Platinum’s website further claims that it “provide[s] Prime Brokerage Services. The services provided under prime brokering are securities lending (after one year), leveraged trade executions, and cash management, among other things” and that it has “state of the art electronic trading capabilities and a portfolio of over 25,000 U.S. Government securities.”

VIOLATIONS

19. As a result of the conduct described above, Fields willfully violated Sections 17(a)(1) and 17(a)(3) of the Securities Act by, in the offer or sale of securities, employing devices, schemes or artifices to defraud potential investors and engaging in transactions, practices or courses of business that operated or would operate as a fraud or deceit upon potential investors.

20. As a result of the conduct described above, Fields willfully violated Section 15(a) of the Exchange Act by operating as an unregistered broker-dealer.

21. As a result of the conduct described above, Fields willfully violated Section 203A of the Advisers Act for having improperly registered with the Commission.

22. As a result of the conduct described above, Fields willfully violated Section 204 of the Advisers Act and Rules 204-2(a)(11) and 204-2(e)(3)(i) thereunder by: (a) failing to make and maintain required records relating to AFA’s advisory business; and (b) failing to establish procedures to preserve required electronic records, such as email, “so as to reasonably safeguard them from loss, alteration, or destruction” and to maintain those records in a manner that “permits easy location, access and retrieval of any particular record.”

¹ Fields briefly registered Platinum with the Commission as a broker-dealer from March 15, 2010 through September 2, 2010, when Platinum’s Form BDW became effective.

23. As a result of the conduct described above, Fields willfully violated Section 204A of the Advisers Act and Rule 204A-1 thereunder by failing to establish, maintain, and enforce a written code of ethics.

24. As a result of the conduct described above, Fields willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients or engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

25. As a result of the conduct described above, Fields willfully violated Section 206(4) of the Advisers Act and Rules 206(4)-1(a)(5) and 206(4)-7 thereunder by: (a) disseminating false and misleading representations on AFA's website and in its Form ADV brochure regarding, among other things, its industry experience and expertise and its association with a "leading institutional broker-dealer" that would provide AFA clients with direct access to a primary dealer and reduced trading commissions; and (b) failing to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder by AFA and its supervised persons.

26. As a result of the conduct described above, Fields willfully violated Section 207 of the Advisers Act by making untrue statements of a material fact in registration applications AFA filed with the Commission.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest pursuant to Sections 203(e) and 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 9(b) of the Investment Company Act; and;

E. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act, Section 15(a) of the Exchange Act, and Sections 203A, 204, 204A, 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rules 204-2(a)(11), 204-2(e)(3)(i), 204A-1,

206(4)-1(a)(5), and 206(4)-7 thereunder, whether Respondent should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, and Section 203(i) of the Advisers Act, and whether Respondent should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, and Section 203 of the Advisers Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Barades
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66101 / January 4, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14685

In the Matter of

James L. Haley,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against James L. Haley ("Haley" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

5 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Haley, age 51, is a resident of Utah. Haley was the sole owner of Cornerstone Capital Fund ("Cornerstone") and Vantage Point Capital ("Vantage Point"). Haley has never been registered as a broker-dealer or associated with a broker or dealer registered with the Commission and has never held any securities licenses. Haley solicited investors for Cornerstone and Vantage Point, neither of which registered any offering of its securities under the Securities Act of 1933 ("Securities Act") or a class of securities under the Exchange Act and there was no valid exemption from registration of the securities.

2. On December 22, 2011, a final judgment was entered by consent against Haley, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Raymond P. Morris, et al., Civil Action Number 2:11-cv-00021, in the United States District Court for the District of Utah, Central Division.

3. The Commission's complaint alleged that, in the offer or sale, and in connection with the purchase or sale, of securities in unregistered transactions, Haley made material misrepresentations to investors and omitted important information in order to raise approximately \$20 million in investor funds through Cornerstone and Vantage Point. Haley told investors their investment was safe and high returns were guaranteed. Haley misrepresented how investor funds would be controlled, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Haley's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Haley be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any

disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

*Commissioner Walter
Commissioner Parades
Commissioner Gallagher
not participating*

INVESTMENT COMPANY ACT OF 1940
Release No. 29913/ January 4, 2012

In the Matter of

WELLS FARGO BANK, N.A.
101 North Phillips Avenue
Sioux Falls, SD 57104

FIRST INTERNATIONAL ADVISORS, LLC
30 Fenchurch Street
London, England
UK EC3M 3BD

METROPOLITAN WEST CAPITAL MANAGEMENT, LLC
610 Newport Center Drive
Suite 1000
Newport Beach, CA 92660

GOLDEN CAPITAL MANAGEMENT, LLC
5 Resource Square
Suite 400
10715 David Taylor Drive
Charlotte, NC 28262

ALTERNATIVE STRATEGIES BROKERAGE SERVICES, INC.
401 South Tryon Street
Charlotte, NC 28288

ALTERNATIVE STRATEGIES GROUP, INC.
401 South Tryon Street, TH 3
Charlotte, NC 28288

WELLS FARGO FUNDS MANAGEMENT, LLC
525 Market Street, 12th Floor
San Francisco, CA 94105

WELLS CAPITAL MANAGEMENT INCORPORATED
525 Market Street, 10th Floor
San Francisco, CA 94105

PEREGRINE CAPITAL MANAGEMENT, INC.
800 LaSalle Avenue, Suite 1850
Minneapolis, MN 55402

GALLIARD CAPITAL MANAGEMENT, INC.
800 LaSalle Avenue, Suite 1100
Minneapolis, MN 55402

NELSON CAPITAL MANAGEMENT
1860 Embarcadero Road, #140
Palo Alto, CA 94303

WELLS FARGO FUNDS DISTRIBUTOR, LLC
525 Market Street, 12th Floor
San Francisco, CA 94105

(812-13987)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF
1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

Wells Fargo Bank, N.A. ("Wells Fargo Bank"), First International Advisors, LLC, Metropolitan West Capital Management, LLC, Golden Capital Management, LLC, Alternative Strategies Brokerage Services, Inc., Alternative Strategies Group, Inc., Wells Fargo Funds Management, LLC, Wells Capital Management Incorporated, Peregrine Capital Management, Inc., Galliard Capital Management, Inc., Nelson Capital Management, and Wells Fargo Funds Distributor, LLC (collectively, "Applicants") filed an application on December 8, 2011 and two amendments to the application on December 9, 2011, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which Wells Fargo Bank is or hereafter becomes an affiliated person (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered by the United States District Court for the District of New Jersey on December 9, 2011, against Wells Fargo Bank.

On December 9, 2011, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act (Investment Company Act Release No. 29881) until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the conduct of the Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application, as amended, filed by Wells Fargo Bank, N.A., et al. (File No. 812-13987), that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, as amended, entered by the United States District Court for the District of New Jersey on December 9, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

Chairman Schapiro
Commissioner Gallagher
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66113 / January 6, 2012

Admin. Proc. File No. 3-14195

In the Matter of the Application of

DANTE J. DIFRANCESCO
56 Batten Road
Croton on Hudson, NY 10520

For Review of Disciplinary Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered securities association found that former registered representative of member firm engaged in conduct inconsistent with just and equitable principles of trade when he downloaded confidential nonpublic information concerning 36,000 customers and sent that information to another member firm with whom he was to become associated. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Dante J. DiFrancesco, pro se.

Marc Menchel, Alan Lawhead, and Colleen E. Durbin, for FINRA.

Appeal filed: January 18, 2011
Last brief received: April 1, 2011

7 of 64

I.

Dante J. DiFrancesco, a registered representative formerly associated with member firm Banc of America Investment Services, Inc. ("BAIS"), appeals from FINRA disciplinary action.¹ FINRA found that DiFrancesco violated NASD Conduct Rule 2110² by misusing confidential customer information that constituted "nonpublic personal information" under Regulation S-P, privacy rules promulgated pursuant to the Gramm-Leach-Bliley Act of 1999 ("GLBA").³ FINRA suspended DiFrancesco in all capacities for ten business days and fined him \$10,000.⁴ We base our findings on an independent review of the record.

II.

A. DiFrancesco Joins BAIS.

The facts are largely undisputed. DiFrancesco first became registered in the securities industry in 1994 and joined BAIS in October 2004. As an associate of BAIS, DiFrancesco was

¹ In July 2007, the National Association of Securities Dealers, Inc. ("NASD") was consolidated with the regulatory arm of the New York Stock Exchange ("NYSE"), resulting in the formation of the Financial Industry Regulatory Authority, Inc. ("FINRA"). See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (approving proposed rule change to reflect NASD's name change to FINRA). Because the conduct took place before the consolidation, NASD's Conduct Rules apply.

² NASD Conduct Rule 2110 (now FINRA Rule 2010) requires members, "in the conduct of [their] business, [to] observe high standards of commercial honor and just and equitable principles of trade." Rule 2110 applies to DiFrancesco through NASD General Rule 115 (now FINRA Rule 140), which provides that persons associated with a member have the same duties and obligations as a member.

³ The GLBA required the Commission and other federal agencies to adopt rules implementing notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers. See 15 U.S.C. § 6801 *et seq.* Under the GLBA, a financial institution must provide its customers with notice of its privacy policies and practices, and must not disclose nonpublic personal information about a consumer to a nonaffiliated third party unless the institution provides certain information to the consumer and the consumer does not opt out of the disclosure. The GLBA also required the Commission to establish appropriate standards to protect customer information for the financial institutions subject to its jurisdiction. Regulation S-P implements those requirements with respect to registered investment advisers, broker-dealers, and investment companies. See *Privacy of Consumer Financial Information (Regulation S-P)*, Exchange Act Rel. No. 42974 (June 22, 2000), 72 SEC Docket 2114.

⁴ FINRA also assessed costs totaling \$4,229.52.

subject to the BAIS Code of Conduct ("BAIS Code"). The BAIS Code stated, in relevant part, that "[BAIS] respects the privacy of customer records, and access to personal information should be restricted to a business need-to-know basis. Absent the customer's consent, [a]ssociates should not disclose personal information to nonaffiliated third parties, except to the extent required by law or customer agreements." The BAIS Code also stated:

Confidential information obtained from or about a customer, which is specifically identifiable to that customer (such as customer account numbers, customer account balances and transaction information, financial condition, anticipated changes in management, business plan or projections) must be accorded a high level of confidentiality. We provide information to other companies only in order to conduct our business, comply with applicable law, protect against fraud or other suspected illegal activity, or help us meet customer needs, or when the customer specifically consents or has been given an opportunity to request that the information not be shared. Any information shared will be limited to that needed or legally required and may be subject to confidentiality agreements. In addition, [a]ssociates are only authorized to access customer information for legitimate business purposes of [BAIS] or its affiliates on a need-to-know basis.⁵

Upon associating with BAIS, DiFrancesco entered into three written agreements: a "Confidentiality Agreement," a "Series 7 Agreement," and a "Multiple Employment Agreement." Under the Confidentiality Agreement, DiFrancesco "specifically underst[oo]d and agree[d]" that confidential customer information, including names, addresses, and account numbers, was "the sole and exclusive property of [BAIS]"; that he would "not reproduce or appropriate for [his] own use, or for the use of others, any property of" BAIS; and that, for a period of twelve months after his termination, he would not solicit any customers to whom he had provided services while employed by BAIS. The other agreements contained similar provisions.

B. DiFrancesco Seeks to Leave BAIS.

In March 2007, DiFrancesco began looking for employment at other securities firms. His search led to discussions with Dan Kasht, manager of the Elmsford, New York branch office of National Securities Corp. ("NSC"), about associating with NSC. DiFrancesco told Kasht that he intended to bring his 180 to 200 clients from BAIS with him. According to Kasht, DiFrancesco also told him that he did not have any employment contracts with BAIS, and that there were no impediments to his bringing his clients to NSC.⁶

⁵ While the BAIS Code did not cite to either the GLBA or Regulation S-P, its language tracked those privacy provisions.

⁶ DiFrancesco testified that he did not remember whether Kasht asked him about any impediments, but that a person named "Glen" at NSC would have been the one to ask about such matters. DiFrancesco testified that he could not recall whether "Glen" had raised the subject (continued...)

DiFrancesco testified that he believed it was standard industry practice for a registered representative to take his "client book" with him when leaving a firm. Because DiFrancesco did not have a physical book of clients, he decided that he would copy his clients' information, *e.g.*, names, addresses, telephone numbers, account numbers, and net worth information, from BAIS's computer database. On May 24, 2007, while still employed at BAIS, DiFrancesco downloaded his clients' information and attempted to email it to his home email account. However, BAIS's email review system intercepted the email and prevented it from being transmitted. That same day, his manager came by his office and told him that the email with his client list had been quarantined. Both he and his manager then agreed that he would leave BAIS immediately. According to DiFrancesco, he asked his manager if he could take his client list with him, and his manager answered, "Don't worry about that."⁷ DiFrancesco interpreted this response to mean, "basically[,] good luck and good-bye," and did not believe that his manager would send him his client list. Consequently, before leaving BAIS, he downloaded his clients' information onto a portable flash drive that he placed into his pocket and took home with him. He admitted that he used the flash drive because he thought another email "would get blocked off," and because he wanted to get "[his] accounts over" to NSC.

C. DiFrancesco Leaves BAIS and Joins NSC.

DiFrancesco's employment at BAIS ended on May 25, 2007. DiFrancesco testified that he did not realize until after he had left BAIS and transferred the customer data from the flash drive to an Excel spreadsheet that he mistakenly had downloaded the names, addresses, telephone numbers, account numbers, and net worth information for approximately 36,000 additional BAIS customers. DiFrancesco claimed that he only intended to download the information relating to his 180 to 200 clients, in order to maintain his client relationships when he changed firms. FINRA accepted this claim, although it made no explicit finding as to his credibility.

On June 6, 2007, DiFrancesco sent Kasht an email with the Excel spreadsheet as an attachment from his home email address. In the email, DiFrancesco wrote: "Dan, as mentioned I am having trouble exporting the client files from this list. Here it is with 31k [sic] names.⁸ I will call you to review the items so we can get this stuff out pronto. Thanks."⁹ DiFrancesco admitted that he knew at the time that he was sending Kasht a list of tens of thousands of BAIS customers.

⁶ (...continued)

with him, but admitted that, if asked, his answer would have been that there were "no" impediments.

⁷ DiFrancesco's manager did not testify at the hearing.

⁸ DiFrancesco stipulated prior to the hearing that the Excel spreadsheet actually included approximately 36,000 customer names.

⁹ Kasht testified that, contrary to the suggestion in the email, DiFrancesco had not said anything to him previously about having trouble "exporting" client files.

By way of explanation, he testified that he was not "Ex[c]el savvy" and intended to "scratch out" the names of those customers who were not his clients.

DiFrancesco became associated with NSC on June 11, 2007, and immediately began using the downloaded information to send letters to his clients introducing them to NSC. DiFrancesco testified that Kasht printed out the Excel spreadsheet, and together they reviewed it to obtain information related to his clients.¹⁰ DiFrancesco stated that he later "destroyed" the flash drive, but that he did not know what Kasht did with either the email or the Excel spreadsheet.¹¹ FINRA found no evidence that DiFrancesco used, intended to use, or expected NSC to use, the confidential information of the 36,000 BAIS customers who were not his clients.

On June 18, 2007, Kasht arrived at his office to find a fax waiting for him: a "cc" of a letter from BAIS's attorneys to DiFrancesco threatening legal action against him for failing to adhere to his written agreements with BAIS. The letter accused DiFrancesco of misappropriating confidential customer information and improperly soliciting BAIS's customers to transfer their accounts to NSC. The letter demanded that DiFrancesco "immediately cease and desist using [BAIS] confidential and proprietary customer information."

Kasht testified that NSC would not have hired DiFrancesco had it known he was subject to an employment contract with BAIS that impeded his ability to bring his clients with him. In fact, DiFrancesco represented, in his "Application for Association" with NSC, that he was not subject to "any contract or non-compete agreement." On June 21, 2007, NSC terminated DiFrancesco. He associated with another member firm in July 2007 and is currently registered with that firm.

D. FINRA Proceedings.

DiFrancesco admitted at the hearing that he did not "respect the confidentiality" of BAIS's customers' nonpublic information.¹² On questioning by the Hearing Officer, DiFrancesco also admitted that he intentionally violated his Confidentiality Agreement with BAIS because he

¹⁰ Kasht contradicted this statement, testifying that he never printed out the Excel spreadsheet. FINRA noted the discrepancy in their testimony, but did not make any credibility finding with respect to DiFrancesco's and Kasht's divergent testimony, and left unresolved the conflict between the two. We do not find the conflicts in their testimony to be material to our disposition of this case.

¹¹ Kasht testified that he deleted the email, along with the Excel spreadsheet, after reviewing it.

¹² DiFrancesco testified: "I didn't respect the confidentiality of the information [relating to the financial affairs of BAIS's customers], yes, because quite frankly, that information as my understanding -- as my clients would have been -- that confidentiality would have been between me and the clients."

believed his right to his clients' information outweighed BAIS's contractual rights to keep that information:

Q: So if I can try to articulate what I think you're saying, you understood fully that Banc of America did not believe you were entitled to take your client list with you?

A: That's correct, sir.

Q: You understood that the import of the confidentiality agreement was to bind you to the view that Banc of America had that that client information was proprietary to Banc of America?

A: Of course, sir.

Q: But you disagreed with that?

A: Yes, sir.

Q: Even though you signed it?

A: Yes, sir.

Q: So you intentionally violated the confidentiality agreement because you believed that your right to your client information base was -- overrode the Banc of America's right to make you leave it with them?

A: Yes, sir.

DiFrancesco admitted that he did not tell anyone at BAIS that he was taking his clients' information with him, nor did he ask his clients to provide him with any written documentation authorizing him to take their information to NSC. When asked by the Hearing Officer why he did not write down the names and addresses of his clients before leaving BAIS, DiFrancesco replied, "[l]aziness."

DiFrancesco further testified that he did not believe he was "stepping over the bounds" of Regulation S-P's privacy rules by transmitting private customer information to a competitor firm. DiFrancesco acknowledged that he might have been "blinded," but he thought that Kasht would assist him in extracting his clients' confidential information and that the rest would be "shredded and in the trash":

Q: . . . The question is, and it's a very simple point that [R]eg[ulation] S[-]P makes, that information about those clients is private, and you shared that . . . with a competitor. Did that ever cross your mind that that was stepping over the bounds of the regulations that you were supposed to be living under?

A: I can't answer you. Honestly, it didn't. It really didn't. Again, maybe I was blinded. I believed basically that if Dan [Kasht] would have assisted me basically in breaking down the accounts and everything else, that basically everything else would have been shredded and in the trash, and he would have protected that. I wouldn't have allowed him to basically look at the rest.

Q: But he had it, he had it on E-mail. He could have done anything he wanted with it.

A: That is true. That is absolutely true. I did ask him. I did ask him after the fact, sometime after Chris Ortiz [Kasht's superior] called me and basically said gee, I have the E-mail. I said are you returning that E-mail back to me and the client list, and he said no, we're holding this for . . . future reference. I'm not doubting that I did something foolish and stupid. I'm again, trying to explain. I'm not denying it. I said as much since the very beginning, but my intent was clear. My intent was that I was attempting to move my clients over, and that basically is the structure of this.

Following the hearing, a FINRA Hearing Panel ("Panel") determined that DiFrancesco violated NASD Conduct Rule 2110.¹³ It suspended him for ten business days and imposed a \$10,000 fine.¹⁴ On appeal, FINRA's National Adjudicatory Council ("NAC") affirmed the Panel's finding that DiFrancesco violated Rule 2110 based on his misuse of customer information that constituted "nonpublic personal information" under Regulation S-P.¹⁵ The NAC noted that we had "affirmed that a registered representative's breach of confidentiality is a violation of the ethical principles expressed in a just and equitable principles of trade rule," citing our decision in

¹³ In its decision, the Panel expressly stated that it did not reach the issue of whether DiFrancesco would have violated Rule 2110 by taking only the information relating to his 180 to 200 clients, because the complaint charged him with misusing information with respect to 36,000 BAIS customers, and because the evidence sustained the charge. Because FINRA did not reach this issue, we decline to address it in the first instance and express no opinion as to its merits.

¹⁴ The Panel assessed \$2,702.77 in hearing costs.

¹⁵ The Panel further had found that DiFrancesco violated Rule 2110 based on a breach of contract theory. The NAC acknowledged Commission precedent holding that "a breach of contract alone is not automatically unethical conduct in violation of [just and equitable principles of trade], but that such breach may constitute a violation if it was 'unethical or dishonorable' or 'without equitable excuse or justification.'" *Heath*, 2009 WL 56755, at *5 (footnote omitted). While the NAC "doubt[ed] that DiFrancesco had any valid justification for breaching his contracts with BAIS," it expressly declined to find that he violated Rule 2110 based on a breach of contract theory.

Thomas W. Heath, III.¹⁶ The NAC also affirmed the Panel's decision to impose a ten-business-day suspension and \$10,000 fine, stating that these sanctions were "necessary to remediate DiFrancesco's misconduct and to deter others who might consider shirking their ethical obligations under NASD Conduct Rule 2110 in favor of their potential for financial gain."¹⁷ This petition for review followed.

III.

A. DiFrancesco Violated NASD Conduct Rule 2110.

NASD Conduct Rule 2110 requires the observance of "high standards of commercial honor and just and equitable principles of trade."¹⁸ "[W]e have long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action under" just and equitable principles of trade rules ("J&E Rules").¹⁹ J&E Rules state "broad ethical principles" and center on the "ethical implications" of an applicant's conduct.²⁰ J&E Rules "serve[] as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession."²¹

¹⁶ Exchange Act Rel. No. 59223 (Jan. 9, 2009), 2009 WL 56755, *aff'd*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2351 (2010).

¹⁷ The NAC affirmed the Panel's order that DiFrancesco pay \$2,702.77 in hearing costs and assessed an additional \$1,526.75 in appeal costs.

¹⁸ DiFrancesco does not dispute that his activities arose "in the conduct of his business," as required by NASD Conduct Rule 2110. It is well established that FINRA's disciplinary authority under Rule 2110 "is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security." *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (*per curiam*); see *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 & n.8 (2002) (quoting *Vail* and citing cases). We find that DiFrancesco's actions in taking and downloading confidential nonpublic information relating to approximately 36,000 BAIS customers involved both his business relationship with BAIS and his commercial relationship with his customers. As such, his conduct was "business-related."

¹⁹ *Heath*, 2009 WL 56755, at *4 (discussing NYSE Rule 476, counterpart to NASD Conduct Rule 2110) (footnote omitted).

²⁰ *Id.* & nn.10-11.

²¹ *Id.* & n.12.

J&E Rules set forth a standard intended to encompass "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."²² As a result, J&E Rules "focus[] on the securities professional's conduct rather than on a subjective inquiry into the professional's intent or state of mind."²³ Thus, proving motive or scienter is not required,²⁴ and a showing of unethical conduct, even if not in bad faith, can be sufficient to establish liability.²⁵

In analyzing a securities professional's conduct under J&E Rules, we frequently have focused on whether the conduct implicates a generally recognized duty owed to clients or the firm.²⁶ For instance, in *Thomas W. Heath, III*,²⁷ a former investment banker and managing director (Heath) at an NYSE member firm (JPMorgan Securities, Inc.) disclosed confidential information about the pending acquisition of a client to a future colleague at a competitor firm. The NYSE held that, although Heath did not act in bad faith, his disclosure constituted unethical conduct in violation of NYSE's J&E rule.

On review, we found that Heath, in disclosing confidential client information, violated "one of the most fundamental ethical standards in the securities industry."²⁸ We stated that "[t]he duty to maintain the confidentiality of client information is grounded in fundamental fiduciary principles, and is further codified in the [JPMorgan] Code of Conduct."²⁹ We observed that the JPMorgan Code "expressly prohibits the disclosure of confidential information to anyone outside the firm unless . . . authorized to do so, and instructs that, even when disclosure is permitted,

²² *Id.* at *5 & n.13.

²³ *Id.* & n.14.

²⁴ *Id.* & n.15.

²⁵ *See Heath*, 586 F.3d at 139 (stating that "the SEC has made clear that no scienter is required and mere unethical conduct is sufficient outside the breach of contract context").

²⁶ *See, e.g., Heath*, 2009 WL 56755, at *5 (applicant's disclosure of client's material nonpublic information breached his duty of confidentiality and violated J&E Rules); *Manoff*, 55 S.E.C. at 1163 (applicant's unauthorized use of customer's credit card constituted breach of his fiduciary duties and violated J&E Rules); *Louis Feldman*, 52 S.E.C. 19, 22 (1994) (applicant's transfer of customer accounts to new firm without prior consent violated J&E Rules because "under fundamental principles of agency law such prior consent is required").

²⁷ Exchange Act Rel. No. 59223 (Jan. 9, 2009), 2009 WL 56755.

²⁸ *Id.* at *4.

²⁹ *Id.*

employees should use [their] judgment to limit the amount of information shared and disclose it only on a need-to-know basis."³⁰

We also found that Heath's disclosure was "self-interested and for his, not his principal's, purposes."³¹ In making the disclosure, Heath favored his own interest in establishing a collegial relationship with a future colleague over his client's interest in the confidentiality of its material nonpublic information.³² Nor were we persuaded that the absence of demonstrable client harm excused his breach, stating that "[t]he ethical prohibition on the disclosure of confidential client information is not contingent upon future harm."³³

Like *Heath*, this case "is a breach of confidence case, which implicates quintessential ethical considerations not necessarily implicated in a breach of contract case."³⁴ DiFrancesco breached his duty of confidentiality when he "surreptitiously" downloaded BAIS's customers' confidential nonpublic information, including account numbers and net worth figures, and transmitted that information to his future branch manager at a competitor firm.³⁵ As in *Heath*, we find that this duty is grounded in agency law principles and reflected in the BAIS Code. The BAIS Code stated, *inter alia*, that "[c]onfidential information obtained from or about a customer, which is specifically identifiable to that customer (such as customer account numbers, customer account balances and transaction information, financial condition, anticipated changes in management, business plan or projections) must be accorded a high level of confidentiality"; that "access to personal information should be restricted to a business need-to-know basis"; and that, "[a]bsent the customer's consent, [a]ssociates should not disclose personal information to nonaffiliated third parties"

We also find that DiFrancesco's conduct was "self-interested" and for his own purposes. In downloading and transmitting BAIS's customers' confidential nonpublic information to Kasht and NSC, DiFrancesco favored his own interest in maintaining his client base over customers' interest in the confidentiality of their nonpublic information. Nor do we find that the absence of

³⁰ *Id.* (footnote and internal quotations omitted).

³¹ *Id.*

³² *Id.* at *9.

³³ *Id.*

³⁴ *Heath*, 586 F.3d at 137.

³⁵ DiFrancesco argues that Enforcement's statements that his conduct was "surreptitious" were untrue. During the hearing, a Hearing panelist asked DiFrancesco, "So what is it you thought you were risking, even just taking your 200 [clients'] names? What was the risk? Obviously you did it surreptitiously." DiFrancesco replied, "Yes."

demonstrable customer harm excuses or mitigates his actions,³⁶ particularly in light of the volume of information and number of customers involved.

We conclude that DiFrancesco violated the professional standards of ethics covered by NASD Conduct Rule 2110.³⁷ This conclusion finds support in the privacy requirements of Regulation S-P,³⁸ which imposes certain duties on broker-dealers.³⁹ Rule 30 of Regulation S-P requires broker-dealers to "adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information."⁴⁰ Rule 10 of Regulation S-P prohibits broker-dealers from "disclos[ing] any nonpublic personal information about a consumer to a nonaffiliated third party unless" the consumer receives proper notice and a "reasonable opportunity" to opt out of the disclosure.⁴¹ FINRA has reminded members of their obligations relating to the protection of confidential customer information.⁴²

Under Regulation S-P, "nonpublic personal information" means "personally identifiable financial information."⁴³ "Personally identifiable financial information" means information a consumer provides to a broker-dealer to obtain a financial product or service; information about a

³⁶ See *Heath*, 2009 WL 56755, at *9.

³⁷ See *id.* at *5 & n.21 (stating that the Commission looks to internal firm compliance policies to inform its determination of whether the conduct at issue violates J&E Rules).

³⁸ See *Heath*, 586 F.3d at 139-40 (stating that "the SEC has made clear that industry norms and fiduciary standards are determinative as to what constitutes unethical conduct").

³⁹ See *In re S.W. Bach & Co.*, 435 B.R. 866, 891 (Bankr. S.D.N.Y. 2010) (stating that the GLBA "places the duty to protect the customer's financial privacy and to safeguard the customer's records and information on the covered financial institution, not the individual representative") (quoting *Next Fin. Group*, Initial Decision No. 349 (June 18, 2008), 93 SEC Docket 6899, 6925 (ALJ opinion), *declared final*, Exchange Act Rel. No. 58192 (July 18, 2008), 93 SEC Docket 7987).

⁴⁰ 17 C.F.R. § 248.30(a). It also requires these written policies and procedures to be "reasonably designed to: (1) [i]nsure the security and confidentiality of customer records and information; (2) [p]rotect against any anticipated threats or hazards to the security or integrity of customer records and information; and (3) [p]rotect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer." *Id.*

⁴¹ 17 C.F.R. § 248.10(a)(1).

⁴² See, e.g., *Notice to Members* 05-49 (July 2005).

⁴³ 17 C.F.R. § 248.3(t)(1)(i).

consumer resulting from a transaction involving a financial product or service between a broker-dealer and consumer; or information a broker-dealer otherwise obtains about a consumer in connection with providing a financial product or service to the consumer.⁴⁴ We previously have stated that names, addresses, and telephone numbers are "financial" information and covered under the GLBA.⁴⁵ In September 2000, FINRA advised members that, "[u]nder Regulation S-P, any information given by consumers or customers to broker-dealers to obtain a product or service will generally be considered to be nonpublic financial information."⁴⁶

DiFrancesco's hearing testimony demonstrates that he understood the import of Regulation S-P and that it protected some, if not all, of the customer information he downloaded as "nonpublic personal information." But DiFrancesco turned a "blind[]" eye to its privacy requirements and the obvious risk his actions posed to customers when he downloaded and transmitted that information to Kasht and NSC, third parties not affiliated with BAIS, for his own use and benefit. As FINRA found, DiFrancesco's conduct prevented BAIS from giving customers proper notice and an opportunity to opt out of the disclosures, as required by Regulation S-P, and caused NSC to improperly receive BAIS's customers' "nonpublic personal information."

B. DiFrancesco's Arguments Against Liability Lack Merit.

1. DiFrancesco's primary argument against liability is that his conduct conformed to ethical standards and practice in the securities industry. He points to a 2004 agreement, "Protocol for Broker Recruiting," entered into by a number of large broker-dealers whereby the signatories agreed not to sue one another for recruiting one another's registered representatives if the representative took only limited customer information to another participating firm.⁴⁷ A departing

⁴⁴ 17 C.F.R. § 248.3(u)(1)(i)-(iii). A "consumer" is "an individual who obtains or has obtained a financial product or service from [a broker-dealer] that is to be used primarily for personal, family, or household purposes, or that individual's legal representative." 17 C.F.R. § 248.3(g)(1). A "customer" is a consumer who has a continuing relationship with a broker-dealer under which the broker-dealer provides one or more financial products or services that are to be used primarily for personal, family, or household purposes. 17 C.F.R. §§ 248.3(j), (k)(1).

⁴⁵ See *Privacy of Consumer Financial Information (Regulation S-P)*, 72 SEC Docket at 2124; see also *TransUnion LLC v. FTC*, 295 F.3d 42, 49-51 (D.C. Cir. 2002) (rejecting argument that names, addresses, and telephone numbers are not "financial" information and thus should not come within GLBA's definition of "nonpublic personal information" as including "personally identifiable financial information").

⁴⁶ Notice to Members 00-66 (Sept. 2000).

⁴⁷ See *Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information*, Exchange Act Rel. No. 57427 (Mar. 4, 2008), 92 SEC Docket 2900, 2910 n.91 (discussing Protocol). Neither party introduced the Protocol into

(continued...)

representative could take names, mailing addresses, telephone numbers, addresses, and account titles, but not other information such as account numbers, net worth, and annual income.⁴⁸ BAIS became a signatory to the Protocol in November 2008, after the events at issue, and therefore the Protocol did not apply to DiFrancesco. Even so, his conduct fell outside its provisions because he took customer account and net worth information.

DiFrancesco also points to a March 2008 proposed amendment to Regulation S-P that would have allowed for the limited disclosure of certain customer information, *e.g.*, names, contact information, and general description of account types and products held, when a broker moved from one firm to another.⁴⁹ However, this amendment was never adopted and, in all events, would not have aided DiFrancesco. It applied only to firms, not to individual brokers; did not provide for the disclosure of net worth information; specifically excluded the disclosure of account numbers; and authorized disclosure of customer information only when the departing representative provided his firm, prior to his departure, with a written record of the information to be disclosed.⁵⁰

2. DiFrancesco argues that he only intended to take financial information relating to his 180 to 200 clients, and his downloading of financial information relating to approximately 36,000 additional customers was inadvertent. Proof of scienter is not required to establish a violation of J&E Rules.⁵¹ DiFrancesco's state of mind therefore has no bearing on the question of his liability, but, instead, only potentially as to sanctions. While FINRA accepted his claim that he had no intention to take information relating to any BAIS customers other than his own,⁵² once DiFrancesco learned of the error, he took no action to remedy his mistake. He did not attempt to return the data to BAIS or to notify BAIS about what had occurred. Nor did he seek to separate the confidential information pertaining to his 180 to 200 clients from that pertaining to the other BAIS customers before transmitting all the information to Kasht and NSC. Instead, DiFrancesco

⁴⁷ (...continued)
evidence, and it is not part of the record.

⁴⁸ *See Next Fin. Group*, 93 SEC Docket at 6928-29.

⁴⁹ *See Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information*, 92 SEC Docket at 2910-12 (discussing proposed amendment to Regulation S-P adding new exception to notice and opt out requirements to permit limited disclosure of investor information when registered representative moves from one firm to another).

⁵⁰ *See id.*

⁵¹ *See supra* text accompanying note 24.

⁵² We typically defer to a fact-finder's credibility findings in the absence of substantial evidence to the contrary. *See Manoff*, 55 S.E.C. at 1161-62.

knowingly emailed the spreadsheet with the confidential, nonpublic information of approximately 36,000 BAIS customers to Kasht, a person he had just met and barely knew, and to NSC, a competitor firm. He took no precautions to ensure that the information would not be misused or disseminated further.

3. DiFrancesco argues that his clients' accounts belonged to him, not to BAIS, and that the Panel erred in finding that he "misused property of his employer under Regulation S-P." As an initial matter, it is the NAC's, not the Panel's, decision that is the final action of FINRA subject to Commission review.⁵³ That aside, it has been held that, "[u]nder Regulation S-P, '[t]he departing representative has no property right to a customer's nonpublic personal information[,] and thus '[t]he longstanding dispute about whether the brokerage firm or the registered representative 'owns' the customer relationship is irrelevant.'"⁵⁴

4. DiFrancesco objects that the FINRA Board of Governors erred by declining to review this disciplinary proceeding. Under FINRA Rule 9349, the FINRA Board "may" call a disciplinary proceeding for review.⁵⁵ If the FINRA Board, acting in its discretion, does not call the matter for review, as was the case here, then the NAC's determination becomes the final disciplinary action of FINRA.⁵⁶

IV.

Section 19(e)(2) of the Securities Exchange Act of 1934 directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on

⁵³ *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22035 n.16, *aff'd*, 416 F. App'x 95 (2d Cir. 2011).

⁵⁴ *In re S.W. Bach & Co.*, 435 B.R. at 891 (quoting *Next Fin. Group*, 93 SEC Docket at 6925).

⁵⁵ See FINRA Rule 9349(c) ("The National Adjudicatory Council shall provide its proposed written decision to the FINRA Board. The FINRA Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the FINRA Board does not call the disciplinary proceeding for review, the proposed written decision of the National Adjudicatory Council shall become final, and the National Adjudicatory Council shall serve its written decision on the Parties and provide a copy to each member of FINRA with which a Respondent is associated. The decision shall constitute the final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1), unless the National Adjudicatory Council remands the proceeding.").

⁵⁶ *Id.*

competition.⁵⁷ DiFrancesco does not argue that FINRA's sanctions impose an unnecessary or inappropriate burden on competition. Rather, he argues only that they are "extremely onerous and unfair."

We initially observe that the sanctions imposed by FINRA are consistent with the Sanction Guidelines ("Guidelines").⁵⁸ The Guidelines contain no specific recommendation for the conduct at issue. Accordingly, FINRA properly considered the Guidelines' Principal Considerations in Determining Sanctions applicable to all violations.⁵⁹

In imposing a ten-business-day suspension and \$10,000 fine, FINRA stated that "it provide[d] some measure of mitigation that DiFrancesco ha[d] been forthcoming in admitting throughout these proceedings that he improperly downloaded confidential customer information and forwarded that information to a third party not affiliated with BAIS." However, FINRA found that this mitigating factor was outweighed by numerous aggravating factors, including the seriousness of DiFrancesco's misconduct, his potential for financial gain with respect to BAIS clients who decided to open an account with him at NSC, and his failure to recognize the potential harm his misconduct could have caused customers concerning the privacy of their nonpublic financial information.

We agree with FINRA's assessment. As we admonished in *Heath*, "[t]he ability to credibly assure a client that [confidential nonpublic information] will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship."⁶⁰ Given DiFrancesco's lack of understanding or appreciation of his obligations as a securities professional and his continued employment in the securities industry, a ten-business-day suspension and \$10,000 fine will have the remedial effect of protecting the investing public from harm by impressing upon DiFrancesco and others the importance of maintaining the privacy of customers' confidential nonpublic

⁵⁷ 15 U.S.C. § 78s(e)(2).

⁵⁸ Although we are not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5125, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

⁵⁹ See *FINRA Sanction Guidelines* 6-7 (2007), setting forth a nonexhaustive list of factors that should be considered.

⁶⁰ *Heath*, 2009 WL 56755, at *10.

information.⁶¹ We find that FINRA's sanctions achieve the goals of being remedial and deterring future violations, without being excessive or oppressive.

An appropriate order will issue.⁶²

By the Commission (Commissioners WALTER, AGUILAR and PAREDES);
Chairman SCHAPIRO and Commissioner GALLAGHER not participating.


Elizabeth M. Murphy
Secretary

⁶¹ See *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2006) (stating that, "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry"); *PAZ Sec.*, 494 F.3d at 1066 (quoting *McCarthy*).

⁶² We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 66113 / January 6, 2012

Admin. Proc. File No. 3-14195

In the Matter of the Application of

DANTE J. DIFRANCESCO
56 Batten Road
Croton on Hudson, NY 10520

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority against Dante J. DiFrancesco be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

Chairman Schapiro
Commissioner Aguilar
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66114 / January 6, 2012

Admin. Proc. File No. 3-14307

In the Matter of the Application of

WORLD TRADE FINANCIAL CORP.,
JASON TROY ADAMS, FRANK EDWARD
BRICKELL, and RODNEY PRESTON MICHEL
c/o John Courtade, Esq.
Law Office of John Courtade
4408 Spicewood Springs Road
Austin, TX 78759

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY
PROCEEDING

Unregistered Sales of Securities

Conduct Inconsistent with Just and Equitable Principles of Trade

Failure to Establish Written Supervisory Procedures

Failure to Supervise

Member firm of registered securities association and registered representative engaged in unregistered sale of securities in violation of Securities Act and association's rules.

Member firm, its president, and its trading supervisor failed to reasonably supervise firm's registered representative engaging in unregistered sale of securities. Member firm and president also failed to maintain adequate written supervisory procedures. *Held*, association's findings of violations and sanctions imposed *sustained*.

APPEARANCES:

John Courtade, of the Law Office of John Courtade, and *Irving Einhorn*, of the Law Offices of Irving Einhorn, for *World Trade Financial Corp.*, *Jason Troy Adams*, *Frank Edward Brickell*, and *Rodney Preston Michel*.

Marc Menchel, Alan Lawhead, and Leavy Matthews III, for Financial Industry Regulatory Authority, Inc.

Appeal filed: March 24, 2011

Last brief received: August 11, 2011

I.

World Trade Financial Corporation ("World Trade" or the "Firm"), a FINRA member firm,¹ and three persons associated with it, Rodney Preston Michel, its president, Jason Troy Adams, its trade desk supervisor, and Frank Edward Brickell, a registered representative (collectively, the "Applicants"), appeal from a FINRA disciplinary action.² FINRA found that World Trade and Brickell unlawfully sold securities without registration or an available exemption in violation of Section 5 of the Securities Act of 1933 and NASD Conduct Rule 2110. In connection with these sales, FINRA also found that World Trade, Michel, and Adams failed reasonably to supervise Brickell and that World Trade and Michel failed to maintain adequate written supervisory procedures in violation of NASD Conduct Rules 3010 and 2110.³

For the registration violations, FINRA fined World Trade \$15,000, fined Brickell \$15,000, and suspended him in all capacities for thirty business days. For the supervisory violations, FINRA fined World Trade \$30,000, fined Michel \$30,000 and suspended him for forty-five calendar days, and fined Adams \$20,000 and suspended him for thirty business days. FINRA also imposed administrative costs. We base our findings on an independent review of the record.

¹ On July 26, 2007, the Commission approved a proposed rule change NASD filed reflecting its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with its consolidation of regulatory functions with NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because this matter was instituted after consolidation, references to FINRA include references to NASD.

² FINRA's complaint also charged similar violations against two other member firms and various associated persons for their sale of iStorage stock, although none of the firms or associated persons were alleged to have been related. Midas Securities, LLC, and its president also appeal from the underlying FINRA decision. That appeal is pending.

³ NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." FINRA has since recodified NASD Rule 2110 as new FINRA Rule 2010, without substantive change. See Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174. NASD Conduct Rule 3010, as discussed *infra* in notes 57-60 and accompanying text, requires members to have adequate written procedures as well as a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules."

II.

The facts are largely undisputed.⁴ During the period from December 2004 to March 2005, World Trade sold 2.3 million shares of a thinly traded penny stock, iStorage, Inc. ("iStorage"), on behalf of three customers who held accounts with World Trade. iStorage's securities traded in the over-the-counter market and were quoted on the "Pink Sheets."⁵ Brickell admitted that he sold the iStorage shares for the customers. The transactions were not registered with the Commission.

A. World Trade

World Trade is a registered broker-dealer, headquartered in San Diego, California. At all relevant times, Michel and Adams were principals and part owners of the Firm, and Brickell was a registered representative.⁶ Since becoming a FINRA member in 1998, World Trade's business has consisted almost entirely of the purchase and sale of securities on behalf of customers in the over-the-counter market. A large part of that business comprises the unregistered sale of securities for customers based on their unsolicited orders.

Michel's duties as president included developing the written procedures that were in effect at the Firm. According to the Firm's Supervisory Procedures Manual (the "Supervisory Manual"), Michel had "responsibility for establishing supervisory systems and overall oversight of compliance functions." Michel's and Adams's testimony indicated that they shared responsibility for supervising the Firm's registered representatives and trading activity. Their supervision included reviewing monthly account statements, trade blotters, and stock certificates that customers deposited, and conducting periodic "spot checks" of trade confirmations. According to the supervisors' testimony, Adams handled more of the day-to-day supervision of the Firm's trading activity and reported to Michel.

⁴ The parties stipulated to many facts at issue in this case. *See generally James F. Glaza*, 57 S.E.C. 907, 914 (2004) ("[S]tipulated facts serve important policy interests . . . [and] should not be set aside without a showing of compelling circumstances.").

⁵ The "Pink Sheets," now known as OTC Link, is an electronic quotation system, operated by OTC Markets Group Inc., which displays quotes and last sale information for many over-the-counter securities. At the time of the stock sales in question, the Pinks Sheets did not have any listing requirements for companies whose securities were quoted on its system.

⁶ According to the parties' stipulations, Brickell is now a principal at the Firm, serving as its chief compliance officer.

The Supervisory Manual had written procedures applicable to the sale of "control" or "restricted" stock. The Supervisory Manual did not define either term, but characterized both as "144 Stock."⁷ The Supervisory Manual contained a list of conditions to meet before a representative could sell such securities:

1. There must be current information available to the public about the company;
2. In some instances, only a limited quantity of the stock can be sold in any three-month period;
3. The securities must be sold in a broker transaction or directly to a market maker;
4. In some instances, a notice must be transmitted to the SEC and . . . [the relevant stock exchange].
5. In the case of restricted stock, the stock must have been owned and fully paid for a specified period of time; and
6. The certificates of the stock must have been re-issued free of any restrictive legends.

In addition, personnel were required to contact Adams and "obtain the necessary documentation from the customer" before executing the transaction, although the Supervisory Manual did not define "the necessary documentation."

Adams and Michel testified that, in practice, the Firm's registered representatives identified "control" and "restricted" stock by checking whether the stock certificate deposited by the customer bore a restrictive legend.⁸ According to Adams, a stock certificate that lacked a restrictive legend meant the stock was "free trading," "not restricted," and could be readily resold to the public, while a stock certificate that bore a restrictive legend would be handled "through the [Rule] 144 process" by the registered representative who would undertake efforts "to remove

⁷ Rule 144 of the Securities Act provides a non-exclusive safe harbor from registration for resales of restricted securities. 17 C.F.R. § 230.144. Rule 144 defines the term "restricted securities" to include "[s]ecurities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering." 17 C.F.R. § 230.144(a)(3). The term "control securities," while not expressly defined by Rule 144, "is used commonly to refer to securities held by an affiliate of the issuer." *Revisions to Rules 144 and 145*, Securities Act Rel. No 8869 (Dec. 17, 2007), 92 SEC Docket 143, 145.

⁸ A restrictive legend is "a statement placed on restricted stock notifying the holder that the stock may not be resold without registration." *Charles F. Kirby*, 56 S.E.C. 44, 48 (2003), *petition denied sub. nom, Geiger v. SEC*, 363 F.3d 481 (D.C. Cir. 2004).

the legend." Michel testified that "the only procedures we have for stock without a legend is to submit them to a clearing firm to be cleared, transferred, and to be sold."

B. iStorage

The predecessor of iStorage was incorporated in 1997 as Camryn Information Services, Inc. ("Camryn"), a Delaware shell company. From 1999 until November 2004, Camryn's corporate charter was deemed void by the State of Delaware for non-payment of taxes. On November 3, 2004, Camryn entered into a reverse merger with iStorage, a development-stage company, that had been in operation since May 28, 2004.⁹ The resulting entity of the reverse merger was renamed iStorage.¹⁰

There was limited information available about iStorage on the Pink Sheets Web site at the time World Trade made the sales in question. iStorage described itself as a developer of "network storage solutions" that partnered with leading software and hardware providers. An unaudited financial statement reported that, as of October 31, 2004, iStorage had little operating history, no earnings, and a net operating loss of \$205,000. At the time of its merger with Camryn, iStorage had only four shareholders, all of whom were previous shareholders of Camryn. Three of the iStorage shareholders each owned 1,000,000, or 12.5%, of the outstanding and issued shares (the "12.5% Shareholders"), and the remaining iStorage shareholder owned 5,000,000, or 62.5%, of the outstanding shares (the "62.5% Shareholder").

Also in the online materials was a legal opinion, dated November 2, 2004 (before Camryn entered the reverse merger), from Bertsch & Associates, PC, a law firm representing the 12.5% Shareholders (the "Bertsch Legal Opinion"). The Bertsch Legal Opinion requested that Camryn's transfer agent,¹¹ Routh Stock Transfer, Inc. ("Routh Transfer"), remove the restrictive legends from the 12.5% Shareholders' Camryn stock certificates. In support of its request, the law firm stated that the shareholders had held the shares for "more than two years" and none had been "an officer, director or 10% shareholder of the company for the previous three months" and that,

⁹ Statement of Financial Accounting Standards No. 7 defines a development-stage company "as a business devoting substantially all of its efforts to establishing a new business in which either: (1) planned principal operations have not commenced, or (2) there have been no significant revenues therefrom." *Russell Ponce*, 54 S.E.C. 804, 806 n.9 (2000), *aff'd*, 345 F.3d 722 (9th Cir. 2003).

¹⁰ See *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies*, Securities Act Rel. No. 8587 (July 15, 2005), 85 SEC Docket 3697, 3698 (discussing mechanics of a "reverse merger"); *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 344 & n.4 (S.D.N.Y. 1998).

¹¹ A transfer agent conducts various stock-related functions for an issuer, including recording changes of ownership, maintaining the security holder records, canceling and issuing stock certificates, and distributing dividends. See *Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1090-91.

under Securities Act Rule 144(k),¹² it believed the 12.5% Shareholders were not "affiliates" of Camryn.¹³

Although it was error for the Bertsch Legal Opinion to state that the 12.5% Shareholders' percentage of ownership in Camryn was less than 10% for the previous three months, Routh Transfer subsequently removed the restrictive legends from their Camryn stock certificates.¹⁴ On November 3, 2004, iStorage issued a 3.334-to-1 forward stock split to the company's four shareholders, an action that more than tripled the number of their shares of what had become Storage stock. Thereafter, between November 9 and November 15, 2004, the 12.5% Shareholders conveyed up to 5.2 million of their iStorage shares to various individuals and entities, several of which were stock promoters and marketers. The shares of the 62.5% Shareholder were canceled at the time.¹⁵

In late December 2004, FINRA began investigating possible market manipulation of iStorage's stock, after receiving several unsolicited bulk e-mails or "spam," from an unidentified source, touting iStorage's stock. The e-mails heralded iStorage as an "UNDISCOVERED STOCK GEM," claimed that a "big PR campaign [was] underway," and encouraged recipients of the e-mail to "GET IN NOW" because iStorage's share price was about to "EXPLODE."¹⁶ The spam campaign coincided with several upbeat press releases issued by iStorage at the time, beginning with its announcement on December 8, 2004, that its stock had started trading on the

¹² At the time, Securities Act Rule 144(k) permitted a non-affiliate, who had been a non-affiliate for the three-month period preceding the sale, to publicly resell restricted securities without being subject to any of the conditions in Rule 144 after holding the restricted securities for a period of at least two years, as computed in accordance with Rule 144(d). Rule 144(k) has since been repealed and replaced by Rule 144(b). *Revisions to Rules 144 and 145*, 92 SEC Docket at 145 & n.23.

The record indicates that Bertsch & Associates, in addition to representing the 12.5% Shareholders, was a direct beneficiary of the removal of the restrictive legends, having acquired 227,000 iStorage shares from its clients that it later resold to the public through another broker-dealer for \$27,742, without registration.

¹³ An "affiliate" of an issuer is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1).

¹⁴ See *infra* note 52 and accompanying text.

¹⁵ The 62.5% Shareholder's iStorage shares were canceled on November 15, 2004, when the individual resigned as iStorage's president.

¹⁶ Emphasis in original.

Pink Sheets. Other press releases followed in rapid succession, announcing that the company had secured several large purchase orders and expanded to global markets.

During the first month of iStorage's trading, iStorage averaged a daily trading volume of 357,781 shares. iStorage's stock began selling on December 9, 2004, at \$0.65 per share. Its share price fell to \$0.13 by year end and continued declining to \$0.05 by February 2005. By March 24, 2005, over 3.7 million iStorage shares had been publicly sold in the over-the-counter market without registration.

C. The Unregistered Sales of 2.3 Million Shares of iStorage Stock

It is undisputed that, from December 20, 2004, to March 24, 2005, World Trade, through Brickell, sold more than 2.3 million shares of iStorage stock to the public on behalf of three customers —Robert Koch, Anthony Caridi, and Kimberly Koch—who had received those shares from the 12.5% Shareholders. Specifically, Brickell conducted the following sales:

- On fourteen days, between December 20, 2004, and January 7, 2005, he sold a total of 1,456,800 iStorage shares for Robert Koch.
- On twenty-eight days, between December 22, 2004, and March 7, 2005, he sold a total of 746,000 iStorage shares for Caridi.
- On four days, between December 22, 2004, and March 24, 2005, he sold a total of 108,000 iStorage shares for Kimberly Koch.

The transactions yielded approximately \$295,000 in sales proceeds, which Brickell wired to the customers shortly after the sales cleared. Brickell earned approximately \$9,270 in commissions on the sales.

At FINRA's hearing, Brickell testified that, at the time of the transactions, he knew Robert Koch was a stock promoter who founded and managed Dailyfinancial.com ("Daily Financial"), a stock promotion Web site "where [Robert Koch] . . . posted profiles" and press releases of companies that sold on the Pink Sheets and OTC Bulletin Board. Brickell admitted that he also knew that Caridi and Kimberly Koch worked at Daily Financial: Caridi as a stock promoter and Kimberly Koch as a personal assistant to her brother, Robert.¹⁷ Brickell also understood that all three customers received stock as compensation from companies that Daily

¹⁷ In September 2006, in an unrelated proceeding, Robert Koch pleaded guilty to criminal securities fraud for engaging in a "pump and dump" scheme in 2004–2005, involving another penny stock, in which Koch admittedly used spam and misleading press releases to artificially inflate the stock. In September 2011, Koch pleaded guilty to additional securities fraud charges for conduct occurring from 2006–2008 with respect to another penny stock. He awaits sentencing. *United States v. Koch*, S1 06 Cr. 902 (RWS) (S.D.N.Y. filed Sept. 29, 2006).

Financial promoted and that they intended to use their World Trade accounts to liquidate this stock.

The three customers' World Trade accounts were open less than four months¹⁸ when they deposited large blocks of iStorage shares into their accounts and requested that the shares be liquidated. Robert Koch made the first deposit in the amount of 2.8 million shares on November 26, 2004, followed by Caridi's deposit of 746,000 shares on December 2, and Kimberly Koch's 200,000 shares on December 20. Each customer deposited at World Trade a single stock certificate issued by iStorage on November 15, 2004, which did not have a restrictive legend.

As part of Applicants' stipulations, Brickell admitted that he "knew or should have known" that iStorage at the time was a "little-known development stage issuer that had a very short operating history," that it recently underwent a "reverse merger, forward stock split and name change," that it was "thinly traded in the over-the-counter market," and that the stock "just began trading shortly before the initiation of trading by [his] customers."

He testified that, because his customers' stock certificates lacked a restrictive legend, he conducted no inquiry about iStorage before selling the stock. He also acknowledged that, although his customers sought to sell a large block of recently issued shares, he did not ask them how they acquired the shares, what percentage of iStorage stock they owned, or whether they were associated or affiliated with iStorage, the issuer of the stock. Brickell also acknowledged that he took no steps before selling iStorage stock to determine whether the proposed sales were registered with the Commission or whether the iStorage stock could be sold under an exemption from registration.

Brickell instead maintained throughout his testimony that he relied on iStorage's transfer agent, Routh Transfer, and World Trade's clearing firm to conduct any required due diligence when they processed his customers' stock certificates. He expressed the belief that his responsibility for conducting the sales was limited to "asking [the transfer agent] whether or not [the stock was] free trading or if any stops or restrictions [existed] that would prevent the shareholder from transferring or selling." Brickell testified that, while he recalled reviewing some of the online information, including the Bertsch Legal Opinion, "a day or two after" trading the stock, he did not rely on such information when selling the shares.

¹⁸ According to the parties' stipulations, Robert Koch opened an account with World Trade in August 2004; Caridi, in November 2004; and Kimberly Koch, in December 2004.

In March 2005, in response to a FINRA information request, World Trade stated that the Firm "did not conduct any due diligence research on Istorage [sic]." In their "Wells" submission on December 18, 2006,¹⁹ Applicants explained that they conducted no inquiry because they relied on the transfer agent to determine whether the stock could be legally sold:

All brokers rely on the transfer agent for a determination as to whether stock is eligible for transfer. Indeed, without the transfer agent, a firm like World Trade has no way to ascertain whether any particular stock is restricted or not restricted. We are aware of no brokerage firm that has a mechanism for making this determination itself.

Applicants also denied having any "responsibility to determine if the certificates being deposited into the customer's account are part of an unregistered distribution," asserting that "the regulatory scheme places this responsibility squarely on the shoulders of the transfer agent and the issuer and its counsel." However, Applicants also stipulated that neither Routh Transfer nor the clearing firm considered itself responsible for conducting any inquiry on behalf of the Firm.

Adams testified that, as Brickell's supervisor, he was aware that the Kochs and Caridi were selling large blocks of recently issued iStorage stock and that the customers worked for a stock promoter. Adams, like Brickell, believed that the Firm had no responsibility to investigate the stock it sold for customers when there was no restrictive legend. Michel agreed, stating his assumption that the responsibility for conducting any due diligence of stock rested with "the transfer agent and with the attorney who wrote the opinion" to remove the restrictive legend. Accordingly, neither supervisor required Brickell to ask any questions of his customers regarding their proposed sale of iStorage, nor did they conduct any investigation of their own into Brickell's iStorage sales.

Applicants also admitted in their answer that World Trade had no written procedures addressing the circumstances under which its registered representatives should initiate an inquiry into the registration or exemption status of shares its customers proposed to sell. For instance, the written procedures did not include a list of risk factors to consider before conducting unregistered sales for customers, such as a little-known issuer, a thinly traded security, or deposit of a large volume of shares that may indicate a public distribution requiring registration.²⁰ The procedures also lacked any guidance to determine whether a proposed sale required registration or qualified for an exemption, such as asking the customer how, when, and under what circumstances the customer obtained the shares.

¹⁹ See FINRA Notice to Members 09-17 (discussing FINRA's "Wells Process" that allows a "potential respondent an opportunity to submit a . . . Wells Submission, which discusses the facts and applicable law and explains why formal charges are not appropriate").

²⁰ "The term 'distribution' refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hand of the investing public." *Geiger*, 363 F.3d at 487 (citation omitted).

D. FINRA's Proceeding

On March 3, 2011, FINRA's National Adjudicatory Council (the "NAC") affirmed a FINRA Hearing Panel's findings that World Trade's and Brickell's sale of 2.3 million shares of iStorage stock for their customers violated Securities Act Section 5 and NASD Rule 2110. The NAC also sustained findings that World Trade, Adams, and Michel failed to adequately supervise Brickell's securities trading and that World Trade and Michel failed "to establish and maintain a system and written procedures to ensure compliance with [Securities Act] Section 5's requirements" in violation of NASD Rule 3010 and Rule 2110.

In sanctioning the Applicants, the NAC upheld the suspensions imposed against Michel, Adams, and Brickell and the \$15,000 fines assessed against World Trade and Brickell for their registration violations, but increased the fines against World Trade, Michel, and Adams for their supervisory failures. The NAC, citing "several red flags that should have prompted an inquiry into whether iStorage shares were part of an unlawful distribution," fined World Trade and Michel each \$30,000 and Adams \$20,000. The NAC also prohibited the Firm "from receiving and selling unregistered securities until" it revises its written procedures to comply with Securities Act Section 5, based on a review by an independent consultant, acceptable to FINRA.

III.

A. Violations of Securities Act Section 5

1. Securities Act Section 5

Section 5(a) of the Securities Act prohibits the "sale" of any securities, in interstate commerce, unless a registration statement is in effect as to the offer or sale of such securities or there is an applicable exemption from the registration requirements.²¹ Securities Act Section 5(c) prohibits the "offer for sale" of any securities, unless a registration statement has been filed as to such securities or an exemption is available.²² The purpose of the registration requirements is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions."²³ "This policy," we have stated, "is equally applicable to the distribution of a new issue and to a redistribution of outstanding securities which 'takes on the characteristics

²¹ 15 U.S.C. § 77e(a).

²² 15 U.S.C. § 77e(c).

²³ *SEC v. Ralston Purina*, 346 U.S. 119, 124 (1953); *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (stating that a fundamental purpose of the securities laws is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*").

of a new offering by reason of the control of the issuer possessed by those responsible for the offering."²⁴

A *prima facie* case for violation of Securities Act Section 5 is established upon a showing that (1) no registration statement was in effect or filed as to the securities; (2) a person, directly or indirectly, sold or offered to sell the securities; and (3) the sale or offer to sell was made through the use of interstate facilities or mails.²⁵ *Scienter*—i.e., an intent to deceive—is not a requirement.²⁶

World Trade and Brickell concede that FINRA established a *prima facie* case for violations of Securities Act Sections 5(a) and (c) through their sale of iStorage shares, by interstate means, without a registration statement in effect or filed with the Commission.

2. The Section 4(4) Exemption

Exemptions from the registration requirements are affirmative defenses that must be established by the person claiming the exemption.²⁷ Registration exemptions "are construed strictly to promote full disclosure of information for the protection of the investing public."²⁸

²⁴ *Ira Haupt & Co.*, 23 S.E.C. 589, 595 (1946) (quoting Report of Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. H.R. Rep. No. 85 at 592 (1933)); *see also Pennaluna & Co.*, 410 F.2d 861, 865 (9th Cir. 1969) ("[T]he presumptive need for registration implicit in § 5 extends to all secondary distributions not insignificant in their proportions.").

²⁵ *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006); *SEC v. Calvo*, 378 F.3d 1211, 1214-15 (11th Cir. 2004).

²⁶ *Calvo*, 378 F.3d at 1215; *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976).

²⁷ *See, e.g., Zacharias v. SEC*, 569 F.3d 458, 464 (D.C. Cir. 2009) (citing *Ralston Purina*, 346 U.S. at 126 ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.")), *aff'd in relevant part*, *John A. Carley*, Exchange Act Rel. No. 57246 (Jan. 31, 2008), 92 SEC Docket 1693; *Swenson v. Engelstad*, 626 F.2d 421, 425 (5th Cir. 1980) (stating that Securities Act Section 4(2)'s private offering exemption "is an affirmative defense which must be raised and proved by the defendant." (collecting cases)).

²⁸ *Cavanagh*, 445 F.3d at 115; *see also SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) (same).

Evidence in support of an exemption must be explicit, exact, and not built on conclusory statements.²⁹

World Trade and Brickell claim that their iStorage transactions were exempt under Securities Act Section 4(4), which exempts "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders."³⁰ We have stated that the Section 4(4) exemption, commonly known as the brokers' exemption, is designed to exempt "ordinary brokerage transactions" and is not available if the broker "knows or has reasonable grounds to believe that the selling customer's part of the transaction is not exempt from Section 5 of the Securities Act."³¹ Brokers thus have "a duty of inquiry" into the facts surrounding a proposed sale.³²

The amount of inquiry required necessarily varies with the circumstances of the proposed transaction, as we have explained:

[On the one hand,] [a] dealer who is offered a modest amount of a widely traded security by a responsible customer, whose lack of relationship to the issuer is well known to him, may ordinarily proceed with considerable confidence. On the other hand, when a dealer is offered a substantial block of a little-known security . . . where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.³³

²⁹ *Ronald G. Sorrell*, 47 S.E.C. 539, 541 n.8 (1981) (quoting *Lively v. Hirschfeld*, 440 F.2d 631, 633 (10th Cir. 1971)), *aff'd*, 679 F.2d 1323 (9th Cir. 1982).

³⁰ 15 U.S.C. § 77d(4).

³¹ *Carley*, 92 SEC Docket at 1707; *see also Butcher & Singer, Inc.*, 48 S.E.C. 640, 642 (1987), *aff'd*, 833 F.2d 303 (3d Cir. 1987) (without opinion); *Quinn & Co.*, 44 S.E.C. 461, 467 (1971), *aff'd*, 452 F.2d 943 (10th Cir. 1971).

³² *Jacob Wonsover*, 54 S.E.C. 1, 13 (1999), *petition denied*, 205 F.3d 408 (D.C. Cir. 2000); *Robert G. Leigh*, 50 S.E.C. 189, 193 (1990); *Owen V. Kane*, 48 S.E.C. 617, 621 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988); *cf.* Securities Act Rule 144(g)(4), 17 C.F.R. § 230.144(g)(4) (stating that the term "brokers' transactions" in Securities Act Section 4(4) would not be deemed to include, for purposes of Rule 144, transactions in which the broker does not conduct a "reasonable inquiry").

³³ *Distribution by Broker-Dealers of Unregistered Securities*, Securities Act Rel. No. 4445 (Feb. 2, 1962), 27 Fed. Reg. 1251 ("1962 Securities Act Release"); *see also Sales of Unregistered Securities by Broker-Dealers*, Exchange Act Rel. No. 9239 (July 7, 1971), 1971 SEC LEXIS 19 ("1971 Exchange Act Release") ("The customer's responses or other particular
(continued...)")

This duty of inquiry extends to both the broker and the registered representative executing the transactions.³⁴ Both, as agents for their customers, "have a responsibility to be aware of the requirements necessary to establish an exemption from the registration requirements of the Securities Act and should be reasonably certain such an exemption is available."³⁵

Here, the customers deposited large blocks of a recently issued, little-known stock into their World Trade accounts and directed Brickell to sell the shares shortly thereafter without a registration statement in effect.³⁶ Given these circumstances, Brickell was required to conduct a searching inquiry to assure himself that his customers' proposed sales qualified for an exemption from registration and were not part of an unlawful distribution.³⁷ Brickell and World Trade, however, admit conducting no inquiry into their customers' proposed sales or how they acquired their shares, nor did they attempt to gather information about iStorage, the issuer of the stock. Had Applicants conducted even a cursory investigation of iStorage before selling the stock, the information on the Pink Sheets Web site should have raised red flags, showing iStorage to be a newly formed company that had been trading for less than two weeks, had little operating or earnings history, and had a negative balance sheet. By failing to conduct the necessary inquiry under the circumstances, Applicants have not met their burden of establishing that the Section 4(4) exemption applied to their iStorage sales.³⁸

³³ (...continued)

circumstances may reasonably indicate that there is a duty to make further inquiries and verify the information received. The most obvious situations are where a previously unknown customer may be seeking to sell a significant amount of securities and the issuer may be relatively unknown to the public.").

³⁴ *Leigh*, 50 S.E.C. at 193.

³⁵ *Stone Summers & Co.*, 45 S.E.C. 105, 108 (1972): *see also Paul L. Rice*, 45 S.E.C. 959, 961 (1975) (explaining that, while salespersons need not be "finished scholars in the metaphysics of the Securities Act . . . [,] familiarity with the rudiments is essential").

³⁶ *See Wonsover*, 54 S.E.C. at 13 n.25 ("A distribution within a relatively short period after acquisition is evidence of an original intent to distribute." (citing 1 L. Loss, *Securities Regulation* 552 (2d ed. 1961))).

³⁷ *See, e.g., Michael A. Niebuhr*, 52 S.E.C. 546, 550 (1995) ("[W]e have long stated, a 'searching inquiry' . . . is called for when a broker-dealer is offered a substantial amount of a little-known security"); *Gilbert F. Tuffli, Jr.*, 46 S.E.C. 401, 409 (1976) (holding a "searching" inquiry is essential whenever a salesman is presented with a large block of an obscure stock").

³⁸ *Stone Summers*, 45 S.E.C. at 108-09 (finding the Section 4(4) exemption unavailable where "respondents made no serious effort to determine the source and the circumstances of the acquisitions of such stock and did not even question either of the sellers").

The customers' known stock promotion activities should have raised additional concerns that the sales were part of an unlawful distribution. A broker cannot rely on the Section 4(4) exemption when his customer is an "underwriter," defined as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security" ³⁹ As used in the definition of "underwriter," an "issuer" includes "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." ⁴⁰ Brickell admittedly knew that his customers received stock from issuers as compensation for the customers' promotional activities. He also knew that they intended to use their World Trade accounts to liquidate the stock. Notwithstanding these facts, Brickell failed to ask whether his customers received their shares from iStorage, the issuer, or from a control person of the company. The record shows that, had Brickell done so, he would have learned that the customers obtained their shares from the 12.5% Shareholders, whose ownership interest in iStorage and coordinated sales of a large block of its stock a week after the reverse merger were strong indicia that they controlled iStorage and their sales of iStorage shares were part of an unregistered distribution. ⁴¹

We reject World Trade and Brickell's argument that they met their statutory burden under Section 4(4) by establishing that their transactions were "unsolicited." To the contrary, determining whether a transaction is an "ordinary brokerage transaction" under Section 4(4) requires more than examining whether solicitation was used. We have long recognized that unregistered sales of large blocks of securities by brokers "without [the use of] solicitations or other sales activities" may nonetheless violate the registration requirements. ⁴² As we have repeatedly held, a "broker relying on Section 4(4) cannot merely act as an order taker, but must

³⁹ 15 U.S.C. § 77b(a)(11).

⁴⁰ *Id.*; see also *Pennaluna*, 410 F.2d at 864 n.1 ("If any person buys from a controlling person with a view to redistribution . . . , this becomes a transaction by an underwriter which requires registration.").

⁴¹ See 17 C.F.R. § 230.405 (defining "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise"); *Cavanaugh*, 445 F.3d at 113 n.19 ("Although there is no bright-line rule declaring how much stock ownership constitutes 'control' . . . , some commentators have suggested that ownership of something *between ten and twenty percent* is enough, especially if other factors suggest actual control. Here, the four partners sold their shares as a block" (emphasis added and citation omitted)).

⁴² *Haupt & Co.*, 23 S.E.C. at 605 & nn. 25-26; *Quinn & Co.*, 44 S.E.C. at 467.

make whatever inquiries are necessary under the circumstances to determine that the transaction is only a normal 'brokers' transaction' and not part of an unlawful distribution."⁴³

Applicants also incorrectly state that FINRA was required to prove that World Trade and Brickell's sales in fact involved an underwriter but that FINRA failed to do so. Applicants assert that FINRA did not produce any evidence showing how the 12.5% Shareholders "acquired their shares, whether they were in fact control persons of iStorage . . . , and whether any exemption was ultimately available to them in their sales to the firm's customers." Applicants' position wrongly shifts the burden of establishing an exemption to FINRA. Once FINRA proved a *prima facie* Section 5 violation, it became Applicants' burden to show that Section 4(4) exemption applied by, among other things, showing they conducted a reasonable inquiry.⁴⁴ Indeed, the questions that Applicants claim FINRA failed to answer during the proceeding were some of the questions that Applicants should have asked their customers upon their request to sell a large block of an obscure security without registration.⁴⁵ Although Applicants claim that they had "no power . . . to compel [such] information" from their customers or others (such as iStorage and the 12.5% Shareholders), they made no attempt to gather relevant information. If Applicants had attempted to do so and were denied, they could have declined to sell the stock for the customers.

Applicants additionally claim that FINRA was required to prove that Applicants "knew, actually or circumstantially, the facts which indicated an illegal distribution." However, the U.S. Court of Appeals for the D.C. Circuit in *Geiger v. SEC*⁴⁶ rejected a similar argument made by a broker who unknowingly traded shares for a statutory issuer in reliance on the absence of restrictive legends on the stock certificates and the seller's assurances that the stock was "free-trading." The court held the broker's conduct was violative of Securities Section 5 because he "failed to inquire sufficiently into the circumstances of the transaction[.]" given the classic "warning signs that were present" requiring a "searching inquiry."⁴⁷ World Trade's and Brickell's

⁴³ *Leigh*, 50 S.E.C. at 193 (citing the 1962 Securities Act Release, *supra* note 33); *see also Wonsover*, 54 S.E.C. at 15 (rejecting this "truncated view of a broker-dealer's essential duties").

⁴⁴ *See Cavanagh*, 445 F.3d at 111 n.13 (citing *Ralston Purina*, 346 U.S. at 126).

⁴⁵ *Benjamin Werner*, 44 S.E.C. 745, 747 n.5 (1971) (stating that a broker claiming the brokers' exemption, at a minimum, must "question his customer to obtain facts reasonably sufficient under the circumstances to indicate whether the customer is engaged in a distribution").

⁴⁶ 363 F.3d at 485.

⁴⁷ *Id.*; *see also James L. Owsley*, 51 S.E.C. 524, 529 (1993) (sustaining NASD findings of Section 5 violations, notwithstanding representative's claim he "did not know [the illegal distribution] was occurring," because the circumstances presented "the classic pattern of
(continued...)

failure to conduct any inquiry rendered their stock sales similarly violative of the registration requirements.⁴⁸

3. Reliance on Transfer Agent and Industry Standard

Applicants argue, alternatively, that "to the extent that a requirement is implied in the [Section 4(4)] exemption that a broker make some kind of inquiry . . . reliance on transfer agents was commonly accepted practice in the industry." They contend that their reliance on Routh Transfer's removal of restrictive legends from the stock certificates was "logical and cost effective," asserting that "[o]nly the issuer, the shareholder, the transfer agent, and the attorney who gives the opinion to free up the shares . . . are aware of the circumstances under which shares were issued."

It is well established that the willingness of a transfer agent to remove a restrictive legend does not relieve a broker of his obligation to investigate.⁴⁹ Nor does "[t]he absence of a restrictive legend on stock certificates . . . warrant the conclusion that [the shares] must be freely tradeable."⁵⁰ We have emphasized that brokers, "as professionals in the securities business and as persons dealing closely with the investing public, are expected to secure compliance with the

⁴⁷ (...continued)

an unlawful distribution"); *Niebuhr*, 52 S.E.C. at 550-51 (sustaining NASD findings of Section 5 violations, notwithstanding representative's claim he "was not privy to the information about" the stock, because he made no "more than a token inquiry regarding [the stock]'s tradeability").

⁴⁸ We also reject Applicants' contention they lacked sufficient notice of their requirements under the Securities Act. As discussed, we have long regarded a broker's obligation to conduct reasonable inquiry as fundamental. *See e.g., Wonsover*, 54 S.E.C. at 13-14 (quoting, at length, the 1962 Securities Act Release, *supra* note 33). FINRA, too, has issued relevant guidance. *See, e.g.,* NASD Notice to Members 00-49 (cautioning firms about purportedly "free trading" stock of "blank-check companies," a type of development-stage company, and reminding brokers of the "obligation to . . . conduct a meaningful investigation . . . to ensure that it is not engaged in the distribution of an unregistered security").

⁴⁹ *Wonsover*, 205 F.3d at 415 (rejecting the "argument that [broker] justifiably relied on the clearance of sales by [his firm's restrictive stock department], the transfer agent and counsel" (citing, *e.g., Stead v. SEC*, 444 F.2d 713, 716 (10th Cir. 1971) ("[C]alling the transfer agent is obviously not a sufficient inquiry.")). Indeed, we have cautioned that "information received from little-known companies or their officials, transfer agent or counsel must be treated with great caution as these are the very parties that may be seeking to deceive the firm." 1971 Exchange Act Release, *supra* note 33 (citing *SEC v. Culpepper*, 270 F.2d 241, 251 (2d Cir. 1959)).

⁵⁰ *Carley*, 92 SEC Docket at 1713 n.55 (quoting *Tuffli*, 46 S.E.C. at 409).

requirements of the [Securities] Act to protect the public from illegal offerings."⁵¹ Applicants' reliance on Routh Transfer did not reasonably secure such compliance. Even assuming *arguendo* that Routh Transfer acted properly in removing the restrictive legends from the 12.5% Shareholders' stock certificates—relying on the Bertsch Legal Opinion despite, for example, the obvious error in calculating their ownership interest at less than 10%—such action related only to the legality of the reissuance of the Camryn stock certificates without restrictive legends to the 12.5% Shareholders, not to subsequent transactions of iStorage stock, such as Brickell's sales for his customers.⁵² Applicants, moreover, concede that Routh Transfer did not consider itself responsible for conducting any due diligence on Applicants' behalf, and there was no evidence it conducted the necessary inquiry.

Applicants also have not established their claim that reliance on the transfer agent "was widely, if not universally, the practice in the brokerage industry." Applicants' broad assertion is based on testimony from fact witnesses at FINRA's hearing. All but one of these witnesses were employees of member firms that were charged with registration violations—including World Trade's Brickell, Michel, and Adams and those employed by another firm that sold iStorage shares.⁵³ Such testimony is not evidence of an industry-wide standard, only that the practice was widespread at these particular firms. Applicants neither introduced expert testimony nor do they cite any authority to support their claim of a widespread industry practice. Applicants additionally cite testimony given by a FINRA examiner. However, the examiner testified as a fact witness, not an expert witness. Moreover, the examiner testified only that he could not confirm the "custom and practice in the industry" because he "[hadn't] surveilled the entire industry."

In any event, we note, as courts have held, compliance with the industry standard is only one factor, not the controlling factor, to be weighed in determining the standard of care for a particular regulation.⁵⁴ In our view, given the long-standing requirement of a broker under the

⁵¹ *Butcher*, 48 S.E.C. at 643 (quoting *Quinn & Co.*, 452 F.2d at 946); *Kane v. SEC*, 842 F.2d 194, 198 (8th Cir. 1988) (brokers are uniquely positioned "to ask relevant questions, acquire material information, or disclose [their] findings" regarding an illegal distribution).

⁵² See e.g., *Leigh*, 50 S.E.C. at 194 (broker not entitled to rely on "counsel[']s letter] . . . to the transfer agent" because it "dealt only with the legality of reissuing the . . . shares to [sellers], not with the legality of sales by those persons."); *Owsley*, 51 S.E.C. at 530 n.21 (broker could not "reasonably rely on an attorney who was acting for the individual making the distribution in question").

⁵³ See *supra* note 2.

⁵⁴ *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004) (citing *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 857 (9th Cir. 2001) ("The industry standard is a relevant
(continued...)

Section 4(4) exemption to conduct a reasonable inquiry before engaging in unregistered sales of securities, the applicable standard of care was clear.⁵⁵

Accordingly, we find that World Trade and Brickell failed to meet their burden of establishing that their unregistered sales of iStorage stock qualified for the Section 4(4) exemption and therefore conclude that they violated Securities Act Section 5 and Rule 2110.⁵⁶

B. Supervisory Failings

"Assuring proper supervision is a critical component of broker-dealer operations."⁵⁷ NASD Rule 3010(a) requires member firms to "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." To ensure compliance with this requirement, "red flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of the securities laws."⁵⁸

NASD Rule 3010(b) further requires member firms to "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives . . . that are reasonably designed to achieve compliance

⁵⁴ (...continued)

factor, but the controlling standard remains one of reasonable prudence.")); *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 274 (3d Cir. 1998) (noting that "a universal industry practice may still be fraudulent").

⁵⁵ *Wonsover*, 205 F.3d at 415 (stating that the 1962 Securities Act Release's "oft-quoted paragraph," discussed *supra* note 33 and accompanying text, "clarifies when a broker's inquiry can be considered reasonable").

⁵⁶ A violation of Securities Act Section 5 also violates NASD Rule 2110. *Sorrell*, 679 F.2d at 1326 ("such an obvious violation of the securities laws also" violates FINRA's rule requiring members to observe high standards of commercial honor and just and equitable principles of trade).

⁵⁷ *Ronald Pellegrino*, Exchange Act Rel. No. 59125 (Dec. 19, 2008), 94 SEC Docket 12628, 12641.

⁵⁸ *John B. Busacca, III*, Exchange Act Rel. No. 63312 (Nov. 12, 2010), 99 SEC Docket 34481, 34495-96 (citation omitted), *petition denied*, 2011 U.S. App. LEXIS 25933 (11th Cir. Dec. 28, 2011); *see also George J. Kolar*, 55 S.E.C. 1009, 1016 (2002) (stating that "[d]ecisive action is necessary whenever supervisors are made aware of suspicious circumstances, particularly those that have an obvious potential for violations").

with applicable . . . rules of NASD." With respect to the registration provisions of the Securities Act, we have emphasized that "all registered broker-dealers should establish minimum standard procedures to prevent and detect violations of the federal securities laws and to ensure that the firm meets its continuing responsibility to know both its customers and the securities being sold."⁵⁹ These procedures must be made known to firm personnel "and be sufficient to reveal promptly to supervisory officials transactions which may, when examined individually or in the aggregate, indicate that sales in a security should be halted immediately" for violations of the Securities Act.⁶⁰

There is no dispute that Michel and Adams shared responsibility for supervising the Firm's registered representatives' trading activities, as World Trade's Supervisory Manual and their testimony confirmed their authority. Michel also admitted that, as World Trade's president, he was responsible for developing the Firm's written procedures that were in effect.

We agree with FINRA that Michel, Adams, and World Trade⁶¹ "ignored key 'red flags' that should have prompted them to investigate whether [Brickell] . . . [was] participating in an unlawful distribution." Adams, the day-to-day supervisor, admittedly knew that Brickell was selling large blocks of recently issued shares of a little-known penny stock, without registration, for customers with known ties to stock promotion. Michel, like Adams, reviewed the Firm's trade blotters and customer account statements and monitored Brickell, and had he properly done so, he would have found that Brickell's iStorage sales met the classic warning signs of an unregistered distribution. Such red flags required both supervisors to respond promptly and decisively by investigating whether Brickell's sales complied with the registration requirements.⁶²

⁵⁹ *A.G. Becker Paribas Inc.*, 48 S.E.C. 118, 120-21 (Feb. 19, 1985) (settled proceeding) (quoting the 1971 Exchange Act Release, *supra* note 33); L. Loss & J. Seligman, *Fundamentals of Securities Regulation* 427 (4th ed. 2004).

⁶⁰ 1971 Exchange Act Release, *supra* note 33.

⁶¹ A violation by a firm's supervisors of their duty to supervise may be imputed to the firm. *See, e.g., CE Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988).

⁶² *Owsley*, 51 S.E.C. at 535 (finding firm president and compliance officer failed to supervise under NASD rules where they "were aware that vast amounts of the securities of two small and unseasoned companies were being sold" but "made no independent investigation . . . [into] the registration status of those securities"); *cf. Merrill, Lynch, Pierce, Fenner, & Smith, Inc.*, 45 S.E.C. 185, 189 (1972) (finding branch manager failed to supervise under the Exchange Act, where he was aware of facts strongly suggesting customer was a statutory underwriter but "made no further inquiries and did not 'find an exemption' under the Securities Act for [the unregistered] sales").

Neither supervisor conducted any investigation into Brickell's sales, nor did they require registered representatives to conduct any inquiry into the stock they sold for customers. We regard such failures as symptomatic of a supervisory system that was not reasonably designed to achieve compliance with the securities laws. Adams himself believed that a stock certificate without a restrictive legend meant the shares were automatically "free trading." Michel agreed, asserting that the Firm had no independent responsibility to look into the circumstances of stock it was asked to sell for customers. As noted above, however, a broker-dealer has the primary responsibility to prevent illegal sales of securities from taking place and supervisors "may no more ignore the obvious need for further inquiry . . . than may a salesperson."⁶³

World Trade's written procedures were also deficient. While a large portion of World Trade's business comprised unregistered stock sales on the Pink Sheets, the Firm's procedures were poorly designed to supervise this type of business and were not reasonably designed to deter or detect misconduct. The Supervisory Manual lacked meaningful guidance setting forth "reasonable inquiry" procedures for registered representatives to follow when customers sought to sell large amounts of an unknown stock to the public without registration. Although World Trade had minimal procedures in place for selling "control" or "restricted" stock, these procedures, as the supervisors testified, assumed that such stock could be easily identified by checking whether the stock certificate bore a restrictive legend—a process that, as discussed, neither ensures that securities are being lawfully sold nor comports with a broker's responsibility in transacting business in the securities industry.

It is particularly critical that a firm, such as World Trade, that devotes a significant portion of its business to the unregistered sale of securities have adequate procedures instructing its sales staff how to identify an unlawful distribution.⁶⁴ The written procedures, as Applicants admitted, included no specific risk factors alerting sales personnel to the possibility that a proposed transaction might be part of an unlawful distribution, including the classic warning signs of an obscure issuer, a thinly traded security, and the deposit of stock certificates in a large volume of shares. The procedures also lacked any meaningful guidance to sales personnel to determine whether a proposed sale is exempt from registration,⁶⁵ such as basic questions to ask

⁶³ *Carley*, 92 SEC Docket at 1722 (citing *Sorrell*, 679 F.2d at 1327).

⁶⁴ See, e.g., *Gary E. Bryant*, 51 S.E.C. 463, 471 (1993) (holding that a mere list of procedures listing "things that the firm and its representatives should not do" is insufficient to establish a reasonable supervisory system but must include "mechanisms for ensuring compliance"); *Steven P. Sanders*, 53 S.E.C. 889, 900 (1998) (finding firm's procedures inadequate where compliance manual correctly stated the rule but gave no meaningful guidance about how to comply with it).

⁶⁵ For example, while the procedures required staff to sell "144 Stock" in a "broker transaction" and to obtain "the necessary documentation" before selling the stock, the procedures
(continued...)

their customers, including how, when, and under what circumstances the customer acquired the stock, as well as background information regarding the issuer.⁶⁶ As a result of these deficiencies, the Firm's written procedures also failed to provide the supervisors with a reliable mechanism for flagging unregistered sales of securities that should be investigated or halted for violating the Securities Act.⁶⁷

Applicants do not deny that their written procedures failed to contain such guidance but assert that the Supervisory Manual "was subject to routine examination by FINRA," and "there is no complaint by FINRA in connection with any examination about the [Firm's] procedures," which they claim is further evidence they followed the industry standard. Applicants have offered no evidence regarding FINRA's previous responses to these specific procedures and, in any event, we have long rejected similar attempts to shift regulatory compliance to FINRA.⁶⁸ Moreover, we do not view the Firm's failure to have relevant procedures in its Supervisory Manual as sufficient to establish an industry-wide standard.⁶⁹

Accordingly, we find that World Trade, Michel, and Adams violated NASD Rules 3010(a) and 2110 by failing to supervise Brickell with a view to ensuring compliance with the Securities Act and NASD rules. We further find that World Trade and Michel violated NASD Rules 3010(b) and 2110 by failing to establish adequate procedures to ensure compliance with applicable requirements.

⁶⁵ (...continued)
failed to define those terms.

⁶⁶ "Basic information concerning the issuer such as its address, business activities, principals, products, assets, financial condition and number of shares of stock outstanding, should be obtained independently as a matter of course." 1971 Exchange Act Release, *supra* note 33.

⁶⁷ See, e.g., *La Jolla Capital Corp.*, 54 S.E.C. 275, 282 (1999) (finding firm's procedures deficient, where the manual identified a prohibited practice, "but it did not set forth any specific procedures that the branch manager should use to detect or prevent those practices").

⁶⁸ See, e.g., *CMG Inst'l Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13813 n.33; *Owsley*, 51 S.E.C. at 534 n.27; *Don D. Anderson & Co.*, 43 S.E.C. 989, 991 (1961), *aff'd*, 423 F.2d 813 (10th Cir. 1970).

⁶⁹ See *supra* notes 52-54 and accompanying text.

IV.

Under Exchange Act Section 19(e)(2), we sustain sanctions imposed by FINRA unless we find, giving "due regard for the public interest and the protection of investors," the sanctions are "excessive or oppressive" or impose an unnecessary or inappropriate burden on competition.⁷⁰ For unlawfully selling securities without registration, FINRA fined World Trade and Brickell each \$15,000 and imposed against Brickell a thirty-day suspension. For failing to supervise Brickell and having deficient written procedures, FINRA aggregated its sanctions against World Trade and Michel, fining each \$30,000 and suspending Michel for forty-five days. For failing to supervise, FINRA fined Adams \$20,000 and suspended him for thirty days.

The imposed sanctions are consistent with FINRA's Sanction Guidelines.⁷¹ For the unregistered sale of securities, the Guidelines recommend a fine between \$2,500 and \$50,000, (plus any financial benefit Applicants may have derived) and, in egregious cases, a suspension of the individual for up to two years or a bar. For failing to supervise, the Guidelines recommend a fine between \$5,000 and \$50,000 and a suspension up to 30 business days, and, in egregious cases, a bar. For having deficient written procedures, the Guidelines recommend a fine of \$1,000 to \$25,000, and, in egregious cases, a suspension of the responsible individual for up to one year and the firm for thirty days and thereafter until the procedures are amended to conform to rule requirements.

We agree with FINRA that World Trade and Brickell's unlawful sales were egregious. The "essential purpose of the 1933 Act is to protect investors by requiring registration with the Commission of certain information concerning securities offered for sale."⁷² Broker-dealers, in occupying a "cardinal role . . . in the securities distribution process," must "take all reasonable steps to avoid participation in distributions violative of [the registration provisions]."⁷³ The relevant FINRA Guidelines direct adjudicators to consider whether Applicants "attempted to comply with an exemption from registration" and "the share volume and dollar amount of the transactions involved." World Trade and Brickell, however, failed to make any reasonable effort

⁷⁰ 15 U.S.C. § 78s(e)(2). Applicants do not claim, nor does the record show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

⁷¹ We are "not bound by the Guidelines [but] use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG*, 95 SEC Docket at 13814 n.38.

⁷² *Gilligan, Will & Co.*, 267 F.2d 461, 463 (2d Cir. 1959); *see also Kirby*, 56 S.E.C. at 72 ("The registration requirements are the heart of the securities regulatory system.").

⁷³ *Wonsover*, 54 S.E.C. at 17 (internal alteration and quotation omitted) (quoting *L.A. Frances, Ltd.*, 44 S.E.C. 588, 593 (1971)); *see also Apex Fin. Corp.*, 47 S.E.C. 265, 269 (1980) (noting broker-dealers' responsibility "to prevent their firms from being used as conduits for illegal distributions").

to comply with the Section 4(4) exemption, making no inquiry of their customers before selling the iStorage stock without registration. Their sale of 2.3 million shares of iStorage was substantial and yielded approximately \$295,000 in sales proceeds over a three-month period. World Trade and Brickell's claimed reliance on the transfer agent to conduct due diligence on their customers' sales showed a lack of understanding of a critical duty of a securities professional.⁷⁴ On these grounds, we find the sanctions FINRA imposed were warranted, as they fall within the middle range of the sanctions recommended.⁷⁵

The conduct of World Trade's supervisors was similarly unacceptable. "Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules" and a "critical component to ensuring investor protection."⁷⁶ The Guidelines call for consideration of whether Applicants "ignored 'red flag' warnings that should have resulted in additional supervisory scrutiny." Both supervisors possessed information that should have prompted their investigation into whether Brickell's iStorage sales were part of a public distribution, such as indications that the sales involved a little-known issuer, recently issued shares, a large volume of shares, and sellers known to work for a stock promoter. The supervisors, however, ignored the obvious need for inquiry, and their erroneous assumption that the Firm had no duty to investigate stock it sold for customers contributed substantially to the Firm's deficient supervisory system.

The Guidelines further instruct adjudicators to consider whether deficient supervisory written procedures "allowed violative conduct to occur or to escape detection." As FINRA stated, World Trade had "no procedures to keep . . . [the] firm compliant with Section 5's registration requirements or to direct the firm's representatives to the proper way to avoid unlawful distributions." FINRA found the absence of such procedures aggravating given that "75 percent" of World Trade's business involved unregistered sales of securities. World Trade's written supervisory procedures also gave the Firm's sales personnel no meaningful guidance on

⁷⁴ *Culpepper*, 270 F.2d at 251 (finding broker's "sole reliance on the self-serving statements of his sellers and their counsel without reasonably exploring the possibility of contrary facts demonstrate . . . a behavior which at best was unconcerned with compliance with the [Securities] Act").

⁷⁵ We note that Exchange Act Section 19(e)(2) "permits us to 'cancel, reduce, or require the remission of' a sanction imposed by a self-regulatory organization, but does not permit us to increase the sanction." *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19055 n.41. Although the applicable Guidelines authorized FINRA to include as part of the fine imposed any remuneration Applicants received for selling iStorage shares, it declined to do so.

⁷⁶ *Dennis S. Kaminski*, Exchange Act Rel. 65347 (Sept. 16, 2011), __ SEC Docket __, __ (collecting cases).

determining whether a given sale was exempt from registration.⁷⁷ Rather, as FINRA found, the Firm left all "responsibility for compliance with the Securities Act" to third parties, such as transfer agents and clearing firms, denying it had any responsibility of its own.

Applicants claim the sanctions "are excessive and punitive in light of the circumstances." In support, they again assert that their conduct conformed with industry practice and therefore cannot be egregious or intentional. As discussed above, Applicants failed to prove a prevailing industry practice. Moreover, we agree with FINRA that Applicants' failure to conduct any inquiry or to ensure compliance with Securities Act Section 5 was at least reckless, particularly given the numerous red flags raised by the stock and that most of the Firm's trading business involved the unregistered sale of securities.⁷⁸

Applicants further argue that FINRA's sanctions were punitive, not remedial, because FINRA refused to "stagger" the suspensions against Michel, Adams, and Brickell, a decision which Applicants state will result in the Firm having no principals "for a period of 6 weeks."⁷⁹ Applicants assert that this "w[ill] prevent the[ir] customers from executing transactions for an extended period" and "[e]ffectively . . . put[] the firm out of business." Applicants contend that their argument is consistent with the General Principles of FINRA's Sanction Guidelines, which recommend the consideration of a firm's size and available resources to ensure that a sanction is remedial, not punitive.

Since at least May 12, 2009, when Michel, Adams, and Brickell were first suspended by the Hearing Panel, the Firm has been aware of the possibility that all three individuals would be suspended concurrently, and not consecutively. The Firm thus "had ample opportunity to take steps to provide for interim managerial and supervisory arrangements" to ensure that management responsibilities would be carried out by properly registered principals, but took no

⁷⁷ The supervisors indicated that, since FINRA commenced this action, the Firm has begun "on a trial basis" using customer questionnaires before selling "unlegended" stock for customers. Such a questionnaire was not admitted into evidence and there was no other indication that the Firm has taken corrective measures. FINRA included among its sanctions an undertaking that World Trade subject its procedures to review by an independent consultant, approved by FINRA.

⁷⁸ See *McCurdy v. SEC*, 396 F.3d 1258, 1264 (D.C. Cir. 2005). Nor does Applicants' ignorance of their duty to conduct reasonable inquiry serve to mitigate their nonfeasance. *Prime Investors, Inc.*, 53 S.E.C. 1, 5 (1997) (holding that "ignorance of the regulations at issue affords no excuse").

⁷⁹ Since the conduct at issue occurred, World Trade has promoted Brickell to chief compliance officer. See *supra* note 6.

action.⁸⁰ Moreover, an otherwise remedial sanction does not become punitive simply because its imposition might cause some harm to a small firm. Rather, such harm is one factor, among others, to consider as part of the overall remedial inquiry.⁸¹ The fact that the three principals who committed these violations are World Trade's only principals does not outweigh the public interest in protecting investors from recurrence of similar violations of the registration requirements. All three principals consistently testified that they have no responsibility to protect the public against illegal distributions.

Applicants cite three instances in which FINRA has imposed suspensions of the principals consecutively. The appropriate sanction, however, depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings.⁸² Applicants also assert that they "have been operating World Trade without further problems in the area of unlegended securities for the last 7 years." We have repeatedly stated that a "lack of disciplinary history is not a mitigating factor" because "firms and their associated persons should not be rewarded for acting in accordance with their duties."⁸³

Accordingly, we find that the sanctions FINRA imposed were neither excessive nor oppressive but remedial. Applicants' failure to discharge their duties as securities professionals caused 2.3 million shares of an unknown stock to be sold to investors without registration or exemption therefrom, depriving investors of the protections afforded by the registration and disclosure requirements of the Securities Act. As we have stressed, "[t]he importance of broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the antifraud and other provisions of the securities laws frequently depend for their consummation . . . on the activities of broker-dealers who fail to make diligent

⁸⁰ *Bruns, Nordeman & Co.*, 40 S.E.C. 652, 664 (1961) (rejecting request of settling respondents for "consecutive rather than concurrent [suspensions] in order that both of the senior partners will not be absent from the firm at the same time"); *accord Hans N. Beerbaum*, Exchange Act Rel. No. 55731 (May 9, 2007), 90 SEC Docket 1863, 1871 & n.22 ("[O]nce Beerbaum was suspended, it was Applicants' obligation to cause management responsibilities to be carried out by a properly registered principal.").

⁸¹ *Beerbaum*, 90 SEC Docket at 1871-72 & n.22 (rejecting argument by firm's president and sole owner who claimed barring him would cause him "great economic hardship" and "unfair" punishment because, effectively, "[he] is the Firm"); *see also Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (stating that "economic harm alone is not enough to make the sanctions imposed . . . by [FINRA] excessive or oppressive").

⁸² *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 187 (1973).

⁸³ *CMG*, 95 SEC Docket at 13816 (quoting *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (internal quotation marks and alteration omitted)).

inquiry to obtain sufficient information to justify their activity in the security."⁸⁴ In addition, the sanctions imposed serve both general and specific deterrence, encouraging these Applicants, as well as others in the industry, to ensure that they comply with the requirements of Section 5 of the Securities Act when conducting transactions on behalf of their customers.⁸⁵

An appropriate order will issue.⁸⁶

By the Commission (Commissioners WALTER, PAREDES, and GALLAGHER);
Chairman SCHAPIRO and Commissioner AGUILAR not participating.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

⁸⁴ *Transactions in the Securities of Laser Arms Corp. by Certain Broker-Dealers*, 50 S.E.C. 489, 506 n.35 (1991) (Exchange Act 21(a) report) (quoting *Alessandrini & Co.*, 45 S.E.C. 399, 406 (1973)).

⁸⁵ *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) ("[G]eneral deterrence is not, by itself, sufficient justification for expulsion or suspension . . . [but] may be considered as part of the overall remedial inquiry.").

⁸⁶ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 66114 / January 6, 2012

Admin. Proc. File No. 3-14307

In the Matter of the Application of

WORLD TRADE FINANCIAL CORP.,
JASON TROY ADAMS, FRANK EDWARD
BRICKELL, and RODNEY PRESTON MICHEL

c/o John Courtade, Esq.
Law Office of John Courtade
4408 Spicewood Springs Road
Austin, TX 78759

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action, and the costs imposed, by FINRA against World Trade Financial Corp., Jason Troy Adams, Frank Edward Brickell, and Rodney Preston Michel, be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66117 / January 6, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14686

In the Matter of

RPM Advantage, Inc.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS AND
NOTICE OF HEARING PURSUANT TO
SECTION 12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. RPM Advantage, Inc. (CIK No. 1077385) ("RPMV") is a Nevada corporation located in Houston, Texas. On November 8, 2011, the Commission, pursuant to delegated authority, accepted RPMV's offer of settlement and, pursuant to Exchange Act Section 12(j), revoked the registration of each class of its securities registered pursuant to Exchange Act Section 12(g). *In the Matter of Circadian, Inc. et al. (as to Communitronics of America, Inc. (n/k/a RPM Advantage, Inc.))*, Exchange Act Release No. 65704, Administrative Proceeding File No. 3-14301 ("RPMV Revocation Order").

B. MATERIALLY DEFICIENT REGISTRATION FORM

2. On November 9, 2011, RPMV filed a Form 10 with the Commission ("RPMV Form 10") to re-register its common stock under Exchange Act Section 12(g)

3. On November 23, 2011, the Commission's Division of Corporation Finance sent a letter to RPMV identifying numerous deficiencies in the RPMV Form 10. These included, among others, the following:

- a. The RPMV Form 10 falsely implied that the company has operations and assets when in fact it has none; The RPMV Form 10 falsely implied that it is currently an independent operator in the exploration and production segment of the oil and gas industries when in fact it is not;
 - b. The independent public accountant's report for the review period covering the period as of September 30, 2011, was dated July 5, 2011, a date prior to the end of the period which was the subject of the review, in direct violation of Rule 8-03 of Exchange Act Regulation S-X. Moreover, the review covered only the nine months ended September 30, 2011 and not the prior periods ended as presented in the financial statements, as required.
 - c. RPMV failed to include "since inception" figures for its statements of income, cumulated deficit, and cumulative cash flow in its periodic and annual financials statements as required by ASC Topic 915. The annual figures are required to be audited.
4. The RPMV Form 10 also contains several statements which are directly untrue or materially misleading descriptions of the events related to the administrative proceeding that resulted in the revocation of the Exchange Act registration of its common stock. First, RPMV claimed to have filed "all delinquent [sic] filing [sic]" during the pendency of the administrative proceeding, whereas EDGAR establishes that RPMV completely failed to file nine periodic reports for the periods from December 31, 2002 through December 31, 2004, inclusive. Second, RPMV represented that its amendments to its late-filed periodic reports "addressed and corrected all the mistakes that the [Division] claimed existed" in its initial filings made after the institution of the earlier administrative proceedings, whereas the amendments failed to correct all of the material deficiencies in the prior filings and introduced new material deficiencies that have yet to be corrected.
5. The Respondent filed a materially deficient Form 10 to re-register its stock and has failed to amend or withdraw that filing. Exchange Act Section 12(g) requires issuers wishing to register a class of securities pursuant thereto to "file[] with the Commission a registration statement . . . containing such information and documents as the Commission may specify . . ." Form 10, promulgated by the Commission pursuant to Exchange Act Sections 12(b) and 12(g), is the primary form used by issuers seeking to register securities thereunder, and contains fifteen items which require certain specific information spelled out in Regulations S-K and S-X concerning, among other things, the issuer's business and financial position.
6. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 12(g), Rule 12b-20, and Regulations S-K and S-X thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to deny or suspend the effective date of the RPMV Form 10 (including amendments, if any, that may be filed) or suspend for a period not exceeding twelve months, or revoke the registration of each class of securities that may become registered pursuant thereto.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answers, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Commissioner Aquilar
not participating*

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 3354 / January 10, 2012

Admin. Proc. File No. 3-14130

In the Matter of the Application of

R.E. BASSIE & CO.
and
R. EVERETT BASSIE, C.P.A.
c/o Dwight E. Jefferson
405 Main Street, Suite 950
Houston, TX 77002

For Review of Disciplinary Action Taken by

PCAOB

OPINION OF THE COMMISSION

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD -- REVIEW OF
DISCIPLINARY PROCEEDINGS

Refusal to Cooperate with Investigation

Registered public accounting firm and associated person refused to cooperate with board investigation. *Held*, findings of misconduct and sanctions imposed are *sustained*.

APPEARANCES:

Dwight E. Jefferson, of *Dwight E. Jefferson, PLLC*, for R.E. Bassie & Co. and R. Everett Bassie, C.P.A.

J. Gordon Seymour, Michael Stevenson, and Davis B. Tyner, for PCAOB.

Appeal filed: November 17, 2010
Last brief filed: February 22, 2011

10 of 64

I.

R. Everett Bassie, C.P.A., and R.E. Bassie & Co., a registered public accounting firm ("REB" or the "Firm" and, together with Bassie, "Applicants"), filed an application pursuant to Section 107(c) of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act")¹ for review of disciplinary action taken by the Public Company Accounting Oversight Board ("PCAOB" or the "Board"). Acting pursuant to Section 105(b)(3) of the Act² and PCAOB Rule 5300(b),³ the Board found that Applicants refused to cooperate with an investigation by the Board's Division of Enforcement and Investigations (the "Division"), permanently revoked the Firm's registration, permanently barred Bassie from association with any registered public accounting firm, and imposed a civil money penalty of \$75,000 on Bassie. We base our findings on an independent review of the record.

II.

FACTS

A. Background

This case concerns Applicants' protracted failure to produce to PCAOB staff documents that the staff had requested in connection with an investigation. The facts, which are largely undisputed, are as follows.

¹ 15 U.S.C. § 7217(c).

² *Id.* § 7215(b)(3). Section 105(b)(3) authorizes the Board to impose sanctions, including revocation of the registration of a public accounting firm, bar from association of an associated person, and "such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board," if a registered public accounting firm or an associated person thereof "refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation" under Section 105.

³ Rule 5300(b), incorporating by reference certain provisions of Rule 5300(a), provides that the Board may impose "such disciplinary or remedial sanctions as it determines appropriate," including civil money penalties, if it finds that a registered public accounting firm or an associated person thereof "has failed to comply with an accounting board demand . . . or has otherwise failed to cooperate in an investigation." PCAOB rules may be found at the Board's website: <http://pcaobus.org>.

REB is a public accounting firm that has been registered with the Board pursuant to Section 102 of the Act⁴ and PCAOB rules since October 2003. Bassie, who is licensed as a certified public accountant in Texas, was, at all relevant times, the sole proprietor of REB and an associated person of a registered public accounting firm as defined in Section 2(a)(9) of the Act⁵ and PCAOB Rule 1001(p)(i).

B. January 2006: Issuance of Order of Formal Investigation

On January 10, 2006, the Board issued an Order of Formal Investigation ("OFI") pursuant to PCAOB Rule 5101(a)(1). The OFI stated that the Board had received information indicating that REB and one of its associated persons may have violated PCAOB rules by failing to comply with certain standards in auditing and reviewing the financial statements of Calypso Wireless, Inc. ("Calypso"). The OFI authorized a formal investigation "to determine whether [REB] or any associated persons of [REB] have engaged in or are engaging in any of the acts or practices described [in the OFI] or in acts or practices of similar purport or object." The OFI further authorized Division staff to issue Accounting Board Demands ["ABDs"] to any person "pursuant to Section 105(b)(2) of the Act, and the Board's Rules thereunder, to the extent that the information sought is relevant to the matters described" in the OFI.⁶

⁴ 15 U.S.C. § 7212.

⁵ 15 U.S.C. § 7201(a)(9).

⁶ In relevant part, Section 105(b)(2)(B) of Sarbanes Oxley permits the Board, by rule, to "require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof . . . that the Board considers relevant or material to the investigation." 15 U.S.C. § 7215(b)(2)(B). Rule 5103(a) tracks the statutory language closely: it permits the Board, and PCAOB staff designated in an OFI, to issue ABDs "for the production of audit work papers or any other document or information in the possession of a registered public accounting firm or any associated person thereof . . . that the Board or its staff considers relevant or material to the investigation."

The "relevant or material" standard is also used in Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(b), which authorizes the Commission and its officers, in conducting investigations, "to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." The statutory grant of authority to the Commission under Exchange Act Section 21(b) has been called "[a] potent [weapon], but hardly dispensable in the protection of the investing public and the fairness and honesty of the Nation's financial markets." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).

The staff also obtained information that REB's audit work on behalf of Calypso may have involved Bassie's dealings with entities related to the management of another REB audit client, American International Industries, Inc. ("AMIN"). During investigative testimony on May 19, 2006, Bassie testified that, while the Firm was serving as outside auditor for AMIN, Bassie was "charged with a lawsuit" involving Calypso, along with the brother of the president and chief executive officer of AMIN. Bassie further testified that the litigation arose from a reverse merger involving Calypso and AMIN management, that a dispute arose over payment, and that Bassie was given contested shares to hold pending resolution of the dispute. Bassie hypothesized that he was named as a defendant in order to pressure the president of Calypso to settle. He testified that he did not consider whether this lawsuit impaired his independence as an auditor.⁷ Bassie was served with the complaint in this lawsuit before REB issued its audit report on Calypso's 2003 financial statements. However, Applicants admitted in their response to the Board OIDP that there was no disclosure concerning the lawsuit in those financial statements.

On November 17, 2006, Division staff served on REB through counsel ("Counsel I") an ABD (the "Firm ABD") requiring REB to produce certain documents pertaining to audit, review, or other services that the Firm provided to AMIN and one of AMIN's subsidiaries, International American Technologies, Inc. ("IAT").⁸ Among the documents requested were "all working papers and other documents concerning the audit, review or other services performed by [REB and its officers and employees]" for AMIN and IAT for the period from January 1, 2003 to the date of the Firm ABD. The Firm ABD required production of the documents by December 1, 2006. The Firm did not respond.

⁷ The Board's Order Instituting Disciplinary Proceedings ("Board OIDP"), issued January 9, 2009, alleged that

[i]n auditing the financial statements of Calypso, Respondents violated PCAOB Rule 3100, *Compliance with Auditing and Related Professional Practice Standards*, and Rule 3600T, *Interim Independence Standards*, by failing to comply with relevant PCAOB standards, in that Bassie . . . failed to consider whether his role as a co-defendant with Calypso in a dispute involving his service as an escrow agent in a transaction involving both Calypso and the management of Calypso and AMIN

impaired his independence as an auditor.

⁸ The Division had previously issued ABDs requiring the production of documents concerning Calypso (the "Calypso ABDs"). The Board's brief on appeal acknowledges that Applicants produced documents responsive to the Calypso ABDs. *But see infra* note 12 (noting that the Division stated, in a letter dated March 27, 2007, that some documents requested by the Calypso ABDs had not yet been produced).

C. December 2006: Issuance of Demand Letter

On December 6, 2006, Division staff sent Counsel I a letter "again demanding the immediate production of all documents responsive to the [Firm] ABD," and stating:

As we have repeatedly reminded your clients, R.E. Bassie & Co. and Mr. Bassie's cooperation in this matter, including the timely production of documents requested pursuant to an ABD, is required by [the Act] and the rules of [the PCAOB]. See § 105(b) of the Act and PCAOB Rule 5110. Failure to comply with an [ABD] may constitute grounds for instituting a disciplinary proceeding for non-cooperation with an investigation. See PCAOB Rule 5110(a).

On December 8, Counsel I told Division staff that due to a miscommunication between Counsel I's office and Bassie, Bassie had only recently received the Firm ABD, and that Bassie would produce responsive documents the following week.

As of December 27, however, REB had still not produced any documents responsive to the Firm ABD. On that date, Division staff sent another letter to Counsel I demanding the immediate production of all such documents. The letter again warned that failure to comply with an ABD could lead to disciplinary action.⁹

By letter dated January 2, 2007, Counsel I sought to quash the request for documents. Counsel I asserted that the Board lacked jurisdiction to request any work product created before the effective date of Sarbanes-Oxley and suggested that "some of the recent requests for documents may have fallen within this category." The letter nonetheless represented that "Mr. Bassie is in the process of gathering and submitting the requested relevant information and will forward it to you pursuant to your request." On January 10, Division staff responded, noting that (1) the Firm ABD requested only documents from January 1, 2003 or later, and thus not documents created before the effective date of the Act; (2) nothing in the Act or Board rules prohibited the staff from seeking documents created before the effective date of the Act; and (3) Section 105(b)(2)(B) of the Act¹⁰ and Rule 5105(b) permit the Board to require from a registered public accounting firm the production of any document that the Board considers "relevant or material" to the investigation. The letter reiterated the demand for the immediate production of documents responsive to the Firm ABD.

⁹ Additional letters dated February 2, 2007, March 27, 2007, and May 17, 2007 included similar warnings. *See infra*.

¹⁰ 15 U.S.C. § 7215(b)(2)(B).

By January 12, 2007, REB had retained new counsel ("Counsel II"). Counsel II informed Division staff that Counsel I had provided to Bassie only the transmittal letter for the Firm ABD, not the Firm ABD itself, which specified the documents to be produced.¹¹ Counsel II therefore asked Division counsel to resend the Firm ABD and to allow REB "a reasonable amount of time" to respond. Division staff sent a copy of the Firm ABD to Counsel II on January 12, but stated that "[b]ecause responsive documents were due nearly 45 days ago, extending additional time to respond to the ABD is not appropriate. Under the circumstances, we would expect your client to produce documents immediately, and in any event no later than next week."

Counsel II wrote again on January 23, 2007, stating that Bassie had not received the Firm ABD until after Division staff sent it to Counsel II on January 12 and that "my client is cooperating with your request and *is* in the process of locating said information; however, as he has a very limited staff and is currently in the middle of tax season, it is going to take some time to locate all of the information that you are requesting" (emphasis in original). Counsel II also commented that the OFI mentioned in Division staff's January 12 letter

seemed to indicate that the investigation was pursuant to "In the Matter of R.E. Bassie & Co's audit and review of Calypso Wireless, Inc. PCAOB 105-OFI-2006-001" only. The information that you are presently requesting [is] for two entirely different companies. While my client is in the process of obtaining your requested information, . . . please provide us with a copy of the Board's Formal Orders of Investigation for Calypso Wireless, Inc., American International and International American Technologies.

On February 2, 2007, Division staff sent yet another letter to Counsel II, stating that Bassie had not yet produced documents responsive to the Firm ABD and referring to a telephone conversation between Division staff and Counsel II that addressed, among other things, Counsel II's question regarding the staff's authority to seek documents not directly related to REB's audits and reviews of Calypso: "As we discussed, the [OFI] does not limit the Division's investigation to matters involving Calypso. On the contrary, the OFI expressly provides that the Division may investigate any 'acts or practices of similar purport or object.'"

On February 16, 2007, having still not received documents responsive to the Firm ABD, Division staff sent Bassie an ABD requiring him individually to produce certain documents related to audits, reviews, or other services performed for AMIN for the period from January 1, 2003 to the present (the "Bassie ABD"; together with the Firm ABD, the "AMIN ABDs"). The Bassie ABD required Bassie to produce the documents by March 2, 2007. Bassie did not produce any documents.

¹¹ The record does not explain how Bassie could have been "in the process of gathering and submitting the requested information" on January 2 if, as of January 12, he had not yet received the Firm ABD.

D. March 3, 2007: Applicants' Final Response to the AMIN ABDs

By letter dated March 3, 2007, Counsel II made his final written response to the staff regarding the production of documents requested by the AMIN ABDs: "I want to make it perfectly clear that Mr. Bassie is not exhibiting conduct that in any way is meant to be construed as non-cooperation. Mr. Bassie has a small accounting practice and is in the middle of the busiest time of the year for tax professionals . . . Tax season!" (ellipsis in original). Counsel II further wrote,

[T]he documents you are requesting are several years old and it is requiring a considerable amount of time to collect them and then to prepare them for inspection. . . . To gather the documents at the pace you are requesting would require Mr. Bassie to halt his practice in the middle of tax season and that would be and it is unreasonable. What we have [asked for] and continue to ask for is additional time until the end of the tax season to complete your request.

The March 3 letter additionally observed that Counsel II had reviewed various statutory provisions "and [had] not found a section in the code [sic] that provides you the authority to request the information concerning [AMIN and IAT], under an order of investigation for an entirely unrelated company and order." Counsel II then asked for copies of any other OFIs that had been issued concerning Bassie or REB.

In a reply dated March 27, 2007, Division staff noted that the AMIN ABDs had been outstanding since November 17, 2006 and February 16, 2007 respectively and stated that it was "simply not credible" that the occurrence of tax season was responsible for Applicants' failure to comply with the AMIN ABDs.¹² The staff therefore refused to allow additional time for providing the documents. Finally, the staff informed Counsel II that the staff had authority to demand documents related to the AMIN and IAT audits under the Calypso OFI, pointing out that the OFI "explicitly authorizes the staff to investigate not only the potential violations specified therein, but also 'acts or practices of similar purport or object.'" Division staff sent additional letters to Counsel II regarding Applicants' failure to produce documents responsive to the AMIN ABDs on May 17, 2007 and June 1, 2007. Counsel II did not respond.

¹² The letter also rejected the contention that production of the documents would require Bassie to halt his practice, pointing out that, if REB complied with PCAOB auditing standards regarding document retention (which provided that a complete and final set of audit documentation should be assembled for retention as of a date not more than forty-five days after the report release date), it should not require much time to have the AMIN and IAT work papers copied and produced to the Division.

The Division's March 27 letter additionally stated that some documents requested by two of the Calypso ABDs had not yet been produced. As noted above, however, compliance with the Calypso ABDs is not at issue in this proceeding. *See supra* note 8.

E. September 10, 2007: Staff Notifies Applicants of Potential Disciplinary Action

On September 10, 2007, Division staff sent Counsel II a letter stating that it intended to recommend that the Board commence a disciplinary proceeding to determine whether Applicants had violated certain rules, laws, or professional standards within the Board's jurisdiction, by, among other things, failing to comply with the AMIN ABDs.¹³ The letter offered Applicants an opportunity to submit to the Division, by September 25, a written statement setting forth their positions regarding whether such a proceeding should be commenced.¹⁴

On the afternoon of September 25, Counsel II left a voicemail message stating that Bassie was preparing a response and requesting additional time to complete and send in the response. Applicants were granted an extension until October 2, 2007. On October 1, Bassie retained new counsel ("Counsel III"), who requested an additional thirty-day extension. Bassie was granted an extension until November 1, 2007. On November 1, Counsel III wrote that he was "diligently analyzing the issues in [the] September 10, 2007 letter," but that he was not yet prepared to respond, and requesting a further sixty-day extension. The staff agreed to a thirty-day extension, noting that "[t]he length of this investigation is a direct result of Mr. Bassie's repeated and continuing failure to cooperate." Applicants never submitted a position statement, nor have they produced documents responsive to the AMIN ABDs.

III.

PCAOB PROCEEDINGS

The Board OIDP alleged, among other things, that Applicants had failed to comply with the AMIN ABDs, and that this conduct constituted noncooperation with a Board investigation. On March 3, 2009, the Division filed a motion for summary disposition. On April 9, 2009, the hearing officer issued an initial decision granting the motion and imposing a revocation and bar, but no money penalty (the "Initial Decision").¹⁵

¹³ Rule 5110(a)(1) permits the Board to institute a disciplinary proceeding for noncooperation with an investigation "if it appears to the Board . . . that a registered public accounting firm, or a person associated with such a firm, may have failed to comply with an accounting board demand."

¹⁴ See PCAOB Rule 5109(d) (providing for the submission of such statements of position).

¹⁵ The hearing officer also granted summary disposition in favor of the Division on a charge that Bassie knowingly made false material declarations in sworn testimony during the Division's investigation. On appeal, however, the Board found that genuine issues of material fact precluded resolution of that charge by summary disposition. In light of the sanctions

(continued...)

Applicants filed a petition for Board review of the Initial Decision on April 20, 2009.¹⁶ In paragraph 1 of their petition, Applicants argued that "Enforcement has unreasonably interpreted [Applicants'] requests for additional extensions of time due to tax season as intentional noncooperation with the investigation," and that Bassie "at all times complied with Enforcement's requests and there is no evidence that he knowingly refused to respond to or produce the requested documents." In paragraph 3 of their petition, however, Applicants asserted that Bassie

did in fact rely on the legal advice of counsel. [Counsel II] found no authority for [the Division] to request information regarding AMIN under an order of investigation for an entirely unrelated company, advice on which Mr. Bassie relied. Mr. Bassie made complete disclosure to [Counsel II], sought advice on the legality of the issue, received advice that he did not have to produce information regarding a company wholly unrelated to the investigation, and relied in good faith on the advice.

In their petition, Applicants did not attempt to harmonize the assertions in paragraph 1 – that Bassie's requests for more time should not be construed as noncooperation and that the Division acted unreasonably in refusing to give Bassie more time – with the assertions in paragraph 3 – that Bassie was told by Counsel II that he did not have to produce information regarding AMIN and that he relied in good faith on that advice.

On May 5, 2009, Applicants filed an amended petition for review. The amended petition reiterated the arguments made in the original petition, but it included as an attachment an affidavit of Bassie. Among other things, the affidavit recited that

I reasonably relied in good faith on counsel's advice that [the Division] did not have the authority to demand documentation regarding AMIN because AMIN was not the subject of the Board's investigation. Specifically, the advice I relied upon was that I did not have to respond to an ABD unless the ABD specified AMIN. The only ABD I received was regarding Calypso Wireless, Inc., which was the only subject of the investigation.

After retaining [Counsel II] as my counsel, I did not directly receive any correspondence, including ABDs, from the PCAOB.

¹⁵ (...continued)

imposed, the Board did not remand that aspect of the case or order any further proceedings, effectively dismissing that charge, and it is therefore not before us.

¹⁶ By this time, Applicants had retained new counsel, who continues to represent them on appeal.

On May 29, 2009, Applicants filed their opening brief, in which they offered to "make available the documents requested by the Board at a mutually agreeable time and place," under a variety of conditions that included a requirement that the Board be responsible for the costs involved in procuring and, if desired, photocopying relevant documents. Applicants also argued that the Initial Decision should not be summarily affirmed and that the revocation and bar were harsh and excessive.

The Board refused to allow the submission of Bassie's affidavit. It found that Applicants did not file a motion describing any grounds for their failure to adduce the affidavit in the proceedings before the hearing officer, and that it was not apparent from anything in the record what possible grounds there could be. The Board also found that the affidavit was "at odds with what [Applicants] repeatedly told the Division during the investigation – that they were gathering the documents, intended to cooperate, and just needed an extension until after the tax season," and that it was also at odds with the assertions in the petition for review that their request for an extension until after tax season was reasonable and that the Division had unreasonably interpreted Applicant's requests for additional time due to tax season as intentional noncooperation with the investigation.

As to the merits of the proceeding, the Board, citing its authority under Section 105(b)(3) of the Act and Rule 5300(b), found, as an undisputed fact, that Applicants possessed, but did not produce, documents responsive to the AMIN ABDs. The Board further found that each Applicant's conduct constituted noncooperation, and that summary disposition was appropriate. The Board held that although Section 105(b)(3) is worded in terms of a "refus[al] to . . . produce documents, or otherwise cooperate" with an investigation, the refusal need not be express: "To hold otherwise would render [S]ection 105(b)(3) a dead letter, since any noncooperating registered firm or associated person could then avoid [S]ection 105(b)(3) sanctions merely by refraining from expressly articulating a refusal to cooperate."

The Board found that Applicants did not dispute, either before the hearing officer or before the Board, that the AMIN ABDs were within the scope of ABDs authorized by the Calypso OFI. The Board acknowledged that Applicants argued that they relied on legal advice they claimed to have received before the disciplinary proceeding was initiated to the effect that they were not obligated to produce documents concerning AMIN and IAT because the OFI named only Calypso, but it found that they did not establish such reliance.

The Board affirmed the sanctions imposed by the hearing officer and additionally imposed a civil money penalty against Bassie in the amount of \$75,000. The Board stated that Applicants' offer, made in their opening brief, to make the documents available for review and copying was not, as Applicants contended, a mere "delay" in the production of the documents. The Board therefore gave that offer no weight in the determination of sanctions. This appeal followed.

IV.

ANALYSIS

The record shows that, during the period between the issuance of the Firm ABD on November 17, 2006 and the institution of disciplinary proceedings on January 9, 2009, Applicants did not produce any documents in response to the AMIN ABDs, effectively refusing to cooperate with the investigation.¹⁷ Instead, Applicants engaged in a protracted campaign of stalling and delay. The Division granted several extensions and addressed Applicants' questions about the propriety of the ABDs, but Applicants continued to withhold the documents, ultimately lapsing into total noncommunication.

A. Applicants' Substantive Arguments

Applicants contend that "Calypso was the only proper subject of the OFI and Applicants produced documents in compliance with the OFI." By asserting that Calypso was "the only proper subject," they appear to contend that the AMIN ABDs were not authorized by the OFI and that they therefore had no obligation to produce documents responsive to the AMIN ABDs.

We reject Applicants' attempt to restrict the scope of the OFI to Calypso, the company named as its subject. Both Sarbanes-Oxley Section 105(b)(2)(B) and PCAOB Rule 5103 permit the Board and designated staff to require the production of any documents that the Board or its staff considers "relevant or material" to an investigation.¹⁸ The OFI authorized the staff to issue ABDs "to the extent that the information sought is relevant to matters described in this Order of Formal Investigation." Thus, the statute, the rule, and the OFI are consistent in authorizing requests for information "relevant" to the investigation.

As described above, Bassie testified that he held shares involved in a dispute between Calypso and AMIN management and that he was named as a party in a lawsuit involving AMIN management and Calypso, perhaps in order to pressure Calypso's president to settle. These events transpired while Bassie was auditing both AMIN and Calypso. The questions about Applicants' independence as auditors raised by Bassie's role in the lawsuit involving Calypso and AMIN management made Applicants' relationship to AMIN relevant to the investigation authorized by the OFI. Bassie testified, however, that he did not consider whether his involvement in the lawsuit impaired his independence as an auditor, a potential violation of

¹⁷ As noted above, Applicants' responsiveness to the Calypso ABDs is not at issue in this proceeding.

¹⁸ See *supra* note 6 (discussing Section 105(b)(2)(B) and Rule 5103(a)).

PCAOB rules.¹⁹ We therefore find that the AMIN ABDs comported with the statutory and regulatory standard: they required the production of documents relevant or material to the investigation authorized in the OFI. Thus, Applicants were required to produce documents responsive to those ABDs.²⁰

Applicants contend that they "were willing to make available to the PCAOB the documents it requested subject to a mutually agreeable time and place at the advice of [their current counsel]." Applicants made their offer more than two years after the issuance of the AMIN ABDs, and only after the hearing officer had issued the Initial Decision, recommending a bar for Bassie and revocation for the Firm. Applicants' belated and conditional offer, which was made only when they faced the imminent prospect of sanctions, does not constitute compliance with the AMIN ABDs.²¹ Moreover, the unwarranted conditions that accompanied the offer further diminish its value.

Applicants assert that "[t]here is no evidence to suggest that Applicants would not have produced documents related to AMIN had the PCAOB properly issued an OFI for the same." As discussed above, however, the Division was authorized to issue the AMIN ABDs because the materials sought appeared to be relevant or material to the investigation authorized in the OFI that named Calypso. There was no requirement that the Board issue an additional OFI naming AMIN and IAT. In any event, the assertion that Applicants would have complied had the ABD been worded differently cannot be tested and is not a defense.

¹⁹ See *supra* note 7 (noting allegation in Board OIDP that Bassie failed to consider whether his involvement in the lawsuit impaired his independence, a potential violation of PCAOB rules). Bassie's admission that Calypso's 2003 financial statements contained no disclosure regarding the lawsuit further illustrates the relevance of Applicants' involvement with AMIN to the investigation authorized by the OFI.

²⁰ Applicants suggest that their willingness to cooperate with the Division is demonstrated by their production of documents related to the Calypso audit. Applicants' compliance with the Calypso ABDs does not, however, excuse their failure to produce documents responsive to the AMIN ABDs. Similarly, Applicants contend that "Bassie was never found in violation of any state or federal regulation regarding the audit work he performed for Calypso, nor was he ever required to re-state Calypso's financial statements." Whether Applicants' audit work for Calypso violated regulations or standards is not at issue in this proceeding, and the resolution of that question would have no apparent bearing on whether Applicants failed to produce documents in response to the AMIN ABDs.

²¹ Cf., e.g., *CMG Institutional Trading, LLC*, Securities Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13810 ("[W]e have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests" (citations omitted)); *Gately & Assocs.*, Exchange Act Rel. No. 62656 (Aug. 5, 2010), 99 SEC Docket 31023, 31045 (applying same principles to PCAOB inspection requests).

For the above reasons, we sustain the Board's action finding that Applicants' failure to produce documents in response to the AMIN ABDs constitutes noncooperation for which the Board was authorized to impose sanctions pursuant to Section 105(b)(3) of the Act and Rule 5300(b).

B. Applicants' Remaining Arguments

1. Propriety of Summary Disposition

Applicants argue that the hearing officer erred in granting the Division's motion for summary disposition because, they claim, there was a material dispute about whether, in refusing to produce the documents in question, they were relying on the advice of counsel. We disagree.

PCAOB Rule 5427(d) provides that summary disposition is appropriate in Board disciplinary proceedings "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law."²² A party seeking summary disposition must make a preliminary showing that no genuine issue of material fact exists.²³ The burden then shifts to the nonmovant. To avoid summary disposition, the nonmovant "must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue."²⁴ In determining whether there is a genuine dispute as to a material fact, the record "should be 'viewed most favorably to the non-moving party,' but the hearing officer 'need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences.'"²⁵

²² As we have previously noted, Rule 5427 "mirrors the summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure," and we have therefore found federal court interpretations of Rule 56 instructive in interpreting the Board rule. *Gately*, 99 SEC Docket at 31031.

²³ *E.g.*, *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

²⁴ *Id.*

²⁵ *Gately*, 99 SEC Docket at 31032 (quoting *Nat'l Amusements*, 43 F.3d at 735).

There is no factual dispute as to whether Applicants provided to the PCAOB documents specified in the AMIN ABDs. They did not.²⁶ The Division introduced facts establishing the refusal to produce documents in the statement of undisputed facts filed to support their motion for summary disposition. The burden then shifted to Applicants to show that there was a trialworthy issue.

Applicants attempted to establish a trialworthy issue by arguing that they received and reasonably relied on legal advice in refusing to produce the documents. They identify two items in the record as supporting their assertion: first, the March 3, 2007 letter from Counsel II stating that he "[had] not found a section in the code" that provided the Board the authority to request information for AMIN under an OFI that named only Calypso, and second, the Bassie affidavit submitted with the amended petition for review.

a. Counsel Letter. The March 3, 2007 letter is not sufficient to establish a genuine issue of material fact as to whether Applicants received and relied on legal advice that they were not required to produce documents requested in the AMIN ABDs. The letter states:

Mr. Bassie is not exhibiting conduct that in any way is meant to be construed as non-cooperation. . . . [I]t is taking a considerable amount of time to collect [the documents] and then to prepare them for inspection. . . . What we have [asked for] and continue to ask for is additional time . . . to complete your request.

These statements are inconsistent with the premise that Counsel II had advised Applicants that they were not required to provide the AMIN documents. There would be no need to collect the documents or prepare them for inspection, and no need for additional time to complete the request, if the ultimate intention were to refuse to produce the documents.

Nor does Counsel II's statement that he had not identified a statutory provision allowing the Division to request the AMIN documents create a genuine issue as to whether Counsel II advised Applicants that they should refuse to produce the documents. That statement suggests only that Counsel II was looking into the question of the breadth of the Board's authority.

²⁶ Applicants assert that the Division made a "patently false" statement that "it had never received one document pursuant to the [ABDs] it served on Applicants" because Applicants produced documents in response to the Calypso ABDs. However, the Division did not assert, and the Board did not find, that Applicant's response to the Calypso ABDs was inadequate. The Division's brief in support of its motion for summary disposition accurately states that "[n]otwithstanding numerous efforts by Enforcement over nearly 12 months to obtain [documents concerning AMIN], and numerous written warnings that failure to comply with ABDs could lead to disciplinary action, [Applicants] failed to produce a single document." From the context, it is clear that the Division's statement relates only to the failure to produce documents required by the AMIN ABDs. The Division did not challenge Applicants' response to the Calypso ABDs.

Nothing in the record considered by the Board suggests that Counsel II concluded, after writing the March 3 letter, that the staff's authority did not extend to demanding the documents specified in the AMIN ABDs, nor does the record show that Counsel II conveyed any such conclusion to Bassie. Moreover, Applicants do not explain how Bassie could have continued to rely on such a conclusion after Division staff reiterated its position, in its March 27 letter, that the OFI's grant of authority was broad enough to encompass ABDs for documents related to AMIN and IAT. A finding that Bassie reasonably relied on the advice of Counsel II in refusing to respond to the AMIN ABDs would therefore be based not on evidence, but on the sort of "rank speculation" that does not justify reversing the summary disposition.

b. Refusal to Consider Bassie's Affidavit. Applicants challenge the Board's decision to exclude Bassie's affidavit from the record. However, PCAOB Rule 5464 requires a party seeking to introduce additional evidence when a matter is on appeal before the Board to "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." Applicants did not attempt to make such a showing when they submitted Bassie's affidavit with their amended petition for review. Thus, the Board properly refused to consider the affidavit.

In their brief on appeal, Applicants assert that "Applicants were unaware that an affidavit was required to be submitted in support of previous sworn testimony until Enforcement specifically charged that the burden was on Bassie to point to specific facts demonstrating a trialworthy issue." They point to a passage of the Initial Decision stating that "Applicants have not submitted an affidavit from Bassie or any other evidence to support the truth of Bassie's PCAOB testimony" and assert that "[t]his statement invited [Applicants] to submit an affidavit."²⁷

There was no requirement that Applicants submit an affidavit. As discussed above, once the Division introduced evidence sufficient to establish the misconduct at issue, the burden shifted to Applicants to show that there was a genuine issue of material fact that would preclude

²⁷ Applicants' quotation from the Initial Decision is taken out of context. As noted above, the hearing officer granted summary disposition in favor of the Division with respect to the allegation that Bassie provided false testimony during the investigation, an issue that is not involved in this appeal. *See supra* note 15. The statement that Applicants introduced no affidavit "to support the truth of Bassie's testimony" related to that allegation; it thus has no relevance to this appeal.

the entry of summary disposition. Whether Applicants attempted to satisfy this burden by testimony, by affidavit, or otherwise was their choice. But if Applicants wanted to strengthen their case by introducing an affidavit, they should have done so before the hearing officer, not on appeal to the Board.²⁸

For these reasons, we find that Applicants did not demonstrate that there was a trialworthy issue with respect to whether they reasonably relied on the advice of counsel in failing to produce documents in response to the AMIN ABDs.²⁹

²⁸ Bassie's affidavit, even if timely presented, would have done little to strengthen his case. Bassie merely asserted that he was relying on counsel's advice; he provided no details showing that he had made full and complete disclosure to counsel and received relevant advice appropriately tailored to the circumstances. *See, e.g., Howard Brett Berger*, Exchange Act Rel. No. 58590 (Nov. 14, 2008), 94 SEC Docket 11615, 11630-31 (discussing cases holding that the advice received must be based on "a full and complete disclosure" to counsel and that a person cannot successfully establish reliance by "offer[ing] nothing more than his say-so" but must, instead, "produc[e] the actual advice from an actual lawyer," for example, in the form of an opinion letter or the attorney's live testimony (citations omitted)), *petition denied*, 2009 WL 3160620 (2d Cir. 2009) (summary disposition). Bassie's affidavit, which does not even specify which of his successive attorneys allegedly rendered the advice on which he purportedly relied, falls far short of this standard.

Moreover, the assertions in the affidavit appear to conflate two issues: whether Bassie was required to respond to the AMIN ABDs when the OFI named only Calypso, and whether he was required to respond to the AMIN ABDs if they were not sent to him "directly" by the PCAOB. Bassie does not assert, in the affidavit or elsewhere, that he was advised by counsel that he was not required to respond to ABDs unless they were sent to him "directly."

We also note that, although Bassie asserts that "[t]he only ABD I received was regarding Calypso Wireless, Inc.," he did not argue earlier in the proceeding that he did not receive the Bassie ABD, which was addressed to him. Further, Counsel II's January 23, 2007 letter stating that Bassie had not received the Firm ABD until after staff sent it to Counsel II on January 12 implies that Bassie did subsequently receive the Firm ABD, and Counsel II's representations in the January 23, 2007 letter that Bassie "is cooperating with your request and is in the process of locating said information" shows that if Bassie did not receive the Firm ABD, he was at a minimum aware of the documents he was required to produce.

²⁹ Because the Board determined that Applicants did not establish reliance on the advice of counsel, it did not reach the question whether reliance on such advice would be material to the question whether Applicants' conduct constituted noncooperation, or whether such reliance would be relevant to a determination of sanctions. *But see, e.g., Berger*, 94 SEC Docket at 11629-30 (finding that advice-of-counsel claim "is not relevant to liability" for failure to appear and provide information to NASD because scienter is not an element of the violation);

(continued...)

SANCTIONS

Applicants challenge the sanctions imposed by the Board as unwarranted. They claim that they "have not exhibited behavior constituting noncooperation, nor has Bassie ever been accused of performing insufficient audits."³⁰ In particular, they contend that the civil penalty is unjust and groundless in light of the revocation and bar.

Section 107(c)(3) of Sarbanes-Oxley governs our review of sanctions imposed by the Board.³¹ If we find, "having due regard for the public interest and the protection of investors," that the sanction "is not necessary or appropriate in furtherance of [the] Act or the securities laws," or that the sanction "is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed," then we may enhance, modify, cancel, reduce, or require the remission of the sanction.³² As discussed below, we find no basis to modify the sanction.

Congress established the Board to "protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."³³ To further these goals, the Board is required to "establish, by rule, . . . fair procedures for the investigation

²⁹ (...continued)

Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000) ("Reliance on counsel . . . does not excuse Chiulli from his obligation to supply information to the NASD. When Chiulli registered with the NASD, he agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations." (footnotes omitted)); *Michael Markowski*, 51 S.E.C. 553, 557 (1993) ("When Markowski became registered with the NASD, he agreed to abide by its Rules of Fair Practice, which are unequivocal with respect to the obligation to cooperate with the NASD. Reliance on counsel is immaterial to an associated person's obligation to supply requested information to the NASD." (footnotes omitted)), *aff'd*, 34 F.3d 99 (2d Cir. 1994).

³⁰ In fact, the OIDP alleges numerous statutory and regulatory violations in Applicants' audits of both Calypso and AMIN. However, these allegations are not at issue in this proceeding, and we have not considered them.

³¹ 15 U.S.C. § 7217(c)(3).

³² *Id.*

³³ Sarbanes-Oxley § 101(a), 15 U.S.C. § 7211(a).

and disciplining of registered public accounting firms and associated persons of such firms."³⁴ The Board may, among other things, "require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof . . . that the Board considers relevant or material to the investigation."³⁵ The Act requires every registered public accounting firm to consent "to cooperat[e] in . . . and compl[y] with any request for . . . the production of documents made by the Board in furtherance of its authority and responsibilities" under the Act, to agree to secure and enforce similar consents from each associated person of the firm,³⁶ and to acknowledge that the firm "understands and agrees" that cooperation and compliance with any such request for documents, and the securing and enforcement of the required consents from the firm's associated persons, are conditions to the continuing effectiveness of the registration of the firm with the Board.³⁷

It is clear from these statutory provisions that investigations play a crucial role in furthering the Board's goals of investor protection and the preparation of informative, accurate, and independent audit reports. The requirements that registered public accounting firms consent to cooperate with document production requests, obtain and enforce similar consents from associated persons, and acknowledge that such cooperation is a condition to the continuing effectiveness of a firm's registration with the Board underscore the seriousness with which Sarbanes-Oxley views cooperation with the Board in furtherance of the Board's statutory responsibilities. Imposing sanctions to deter noncooperation with PCAOB investigations thus clearly serves the public interest.

A. Revocation and Bar

Nearly ten months passed between the date the Firm ABD was served on REB and the date Division staff warned Applicants that it intended to recommend the commencement of a disciplinary proceeding. In all those months, not a single document responsive to the AMIN ABDs was produced. Applicants repeatedly represented (through counsel) that they were in the process of gathering the documents and that they needed more time. The Division repeatedly responded by granting extensions, while reminding Applicants of their obligation to comply with the ABDs. The record does not show, however, that Applicants were actually using the extra time to collect the information requested, rather than simply trying to postpone the investigation as long as possible. Ultimately, Applicants simply stopped responding. This failure to cooperate impairs the Division's ability to investigate, which in turn impairs the Board's ability to identify violations and sanction violators. For these reasons, failure to cooperate in an investigation is very serious misconduct.

³⁴ *Id.* § 105(a), 15 U.S.C. § 7215(a).

³⁵ *Id.* § 105(b)(2), 15 U.S.C. § 7215(b)(2).

³⁶ *Id.* § 102(b)(3)(A), 15 U.S.C. § 7212(b)(3)(A).

³⁷ *Id.* § 102(b)(3)(B), 15 U.S.C. § 7212(b)(3)(B).

Applicants argue that no specific harm to a particular investor can be traced back to their failure to cooperate, and that the lack of such identifiable harm should be considered in assessing sanctions. The Board's power to impose appropriate sanctions in disciplinary proceedings is fundamental to its ability to act in the public interest.³⁸ Failure to respond to ABDs frustrates the oversight system envisioned by Sarbanes-Oxley, impeding the Board's ability to discover violations. Noncooperation deprives investors of an important protection that the Act was intended to provide.³⁹ The fact that the Board could not identify whether there was specific harm to a particular investor does not detract from the seriousness of the misconduct.⁴⁰

We find, as the Board did, that Applicants' conduct warrants revocation of the Firm's registration and a bar on Bassie's association with any registered public company accounting firm. In choosing to register with the Board, Applicants agreed to cooperate with the Board when it sought information from them. Bassie, who chose to be an associated person of the Firm, made a similar agreement. Rather than fulfilling these agreements, however, Applicants used the excuse that they needed more time to collect the information, thus delaying the Division's investigation into their conduct. As the Board observed, in the absence of mitigating circumstances – of which we find none⁴¹ – noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors. Allowing the Firm to remain registered and Bassie to remain an associated person would give them opportunities in the

³⁸ Cf. *Berger*, 94 SEC Docket at 11620 (characterizing NASD Rule 8210, which required NASD members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding as "at the heart of the self-regulatory system for the securities industry").

³⁹ *Id.* at 11620-21 (finding that delay and neglect by NASD members and their associated persons in responding to requests for information "undermine the ability of the NASD to conduct investigations and thereby protect the public interest" (quoting *Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996))).

⁴⁰ Cf. *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5129 ("[A] Rule 8210 violation will rarely, in itself, result in direct harm to a customer. Rather, failing to respond undermines NASD's ability to detect misconduct that may have occurred and that may have resulted in harm to investors Thus, even if the failure to respond does not result in . . . harm to investors, it is serious because it impedes detection of such violative conduct." (footnote omitted)), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Gately*, 99 SEC Docket at 31044-45 (finding that absence of fraud or deceit does not diminish seriousness of failure to cooperate in PCAOB inspection designed, among other things, to uncover any such misconduct).

⁴¹ We have explained above why we do not consider mitigating (1) Applicants' purported reliance on advice of counsel, (2) the belated and conditional offer to make documents available, (3) the production of documents responsive to the Calypso ABDs, or (4) the lack of findings that Applicants' audits were insufficient.

future to similarly undermine those processes and thus erode the investor protection that Congress intended the Board to provide. Moreover, the awareness that a revocation and bar may be imposed as sanctions for noncooperation may deter other firms and associated persons from engaging in similar misconduct.⁴² We therefore sustain the bar and revocation imposed by the Board.⁴³

B. Civil Money Penalty

We similarly sustain the imposition of a civil money penalty of \$75,000. In cases involving intentional or knowing conduct, including reckless conduct, that results in a violation of the applicable statutory, regulatory, or professional standard, the Board may impose a civil money penalty not exceeding \$800,000 against an individual for each violation.⁴⁴

Applicants refused for months to produce documents required by the AMIN ABDs. They repeatedly attempted to stall for time, representing to staff that they were working to fulfill the requests but citing work pressure to justify the alleged need for extensions. The staff allowed multiple extensions, reminded Applicants repeatedly of their obligation to cooperate with the investigation, and warned Applicants over and over again of the consequences of a failure to cooperate. Applicants finally stopped responding altogether. In light of this course of conduct,

⁴² In making this determination, we note that "general deterrence . . . may be considered as part of the overall remedial inquiry." *Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (quoting *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007)), *cert. denied*, 130 S. Ct. 3333 (2010); *see also Boruski v. SEC*, 289 F.2d 738, 740 (2d Cir. 1961) ("The public interest requires that appropriate sanctions be imposed to secure compliance with the rules, regulations and policies of both NASD and SEC.").

⁴³ Applicants contend that the hearing officer's imposition of a bar and revocation was based in part on his finding that Bassie made material false declarations in sworn testimony during the Division's investigation. *See supra* note 15. Applicants contend that because the Board effectively dismissed this charge, the sanction should be lowered accordingly. The Board, however, imposed a bar and revocation even though it did not find the allegations of making false declarations established. We agree with the Board that the bar and revocation were appropriate as sanctions for the failure to cooperate charge that was not dismissed. *See Sarbanes-Oxley Section 105(b)(3)(A)*, 15 U.S.C. § 7215(b)(3)(A) (authorizing Board to impose revocation and bar, among other sanctions, for refusal to produce documents in connection with investigation).

⁴⁴ Sarbanes-Oxley Sections 105(c)(4)(D)(ii), 105(c)(5), 15 U.S.C. §§ 7215(c)(4)(D)(ii), 7215(c)(5); 17 C.F.R. § 201.1003. The Act also provides for the imposition of a civil penalty not exceeding \$110,000 against an individual for each violation where there is no showing of scienter. Sarbanes-Oxley Section 105(c)(4)(D)(i), 15 U.S.C. § 7215(c)(4)(D)(i); 17 C.F.R. § 201.1003. As noted above, *see supra* note 3, PCAOB Rule 5300(b) expressly provides for the imposition of civil penalties for failure to comply with an ABD.

we find that Applicants' deliberate or reckless refusal to cooperate with the investigation satisfies the statutory standard for the imposition of a civil penalty.

The Act does not specify factors to be considered in determining whether a penalty is in the public interest. Here, the Board considered the factors set forth in Exchange Act Section 21B(c), which the Commission may consider in determining whether it would be in the public interest to impose a civil penalty in an administrative proceeding. These factors are whether there was fraudulent misconduct or deliberate or reckless disregard of a regulatory requirement, harm to others, or unjust enrichment, whether the respondent had committed prior violations, and the need for deterrence, as well as such other matters as justice may require.⁴⁵ However, as the Board recognized, a penalty may be imposed under Section 21B(c) even when not all of these factors are present.⁴⁶

We have not previously considered the application of the Section 21B factors to a failure to cooperate with an investigation.⁴⁷ However, Section 21B allows the consideration not only of the enumerated factors (not all of which need be present), but of "such other matters as justice may require." An analysis based on Section 21B is therefore sufficiently flexible to be used in this context.

In this case, Applicants' deliberate or reckless disregard of their obligation to cooperate with the Board's investigation strongly supports the imposition of a civil penalty. By refusing to produce the requested documents, Applicants prevented the Board from carrying out an investigation that was necessary to determine whether it was proper for Applicants to be allowed to continue to perform audits. Moreover, by dragging out the matter for months, Applicants caused the Board's staff to expend considerable time trying to obtain the cooperation Applicants should have freely given.

Applicants' failure to comply harmed the Board's ability to carry out its investigation. The Board's investigatory power is central to its ability to carry out its statutory responsibilities and fulfill its goals in the public interest. Its ability to obtain documents from registered public accounting firms and their associated persons is, in turn, critical to the effective conduct of

⁴⁵ Exchange Act Section 21B(c), 15 U.S.C. § 78u-2(c).

⁴⁶ See, e.g., *Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (imposing civil penalty against respondent "even though there is no evidence that unjust enrichment resulted from the violations and even though [the respondent] does not have a history of regulatory violations").

⁴⁷ In Commission investigations, when the recipient of an administrative subpoena requiring the production of documents or an appearance for the taking of testimony refuses to comply, the Commission has recourse to federal district court, which may issue an order enforcing the subpoena, "and any failure to obey such order of the court may be punished by such court as a contempt thereof." Exchange Act Section 21(c), 15 U.S.C. § 78u(c).

investigations. The recalcitrance manifested by Applicants, who had consented to cooperate with the Board's document production requests, interferes with and hinders the Board's performance of these important duties. Moreover, Applicants' failure to cooperate indirectly harmed investors by depriving them of important protection that they should have had under Sarbanes-Oxley. We therefore regard Applicants' refusal to cooperate with the investigation as very serious misconduct.

The need for deterrence also supports a civil penalty. In imposing a civil penalty in addition to revocation and bar, the Board noted that if individuals are concerned that cooperation with an investigation may provide information that could lead to sanctions, those individuals – absent the threat of a civil penalty – could have an incentive to avoid cooperation in order to maximize their income from issuer audit work for as long as possible. As the Board observed, in public filings with the Commission, issuers disclosed having paid audit fees totaling \$154,000 to the Firm for audit services performed during the period of Applicants' noncooperation.⁴⁸ The Board found that imposition of a civil penalty in such cases may act as a deterrent. We agree.

The record would not support a finding of unjust enrichment, nor a finding of a history of prior misconduct. The absence of these factors is not determinative; in applying Section 21B in the context of administrative proceedings, we have found civil penalties appropriate "even though there is no evidence that unjust enrichment resulted from the violations and even though [the respondent] does not have a history of regulatory violations."⁴⁹ Moreover, we find that justice requires the consideration of several factors relevant to this matter that are not explicitly enumerated in Section 21B. The Firm collected \$154,000 in audit fees from issuers for audit services performed during the period of Applicants' noncooperation.⁵⁰ Both the duration of the period of noncooperation and the amount of fees collected are factors that may be considered under Section 21B as "such other matters as justice may require." Additionally, Applicants' stalling, through statements that they were working on collecting the documents and merely needed more time (statements that were not supported by any other record evidence), while not clearly deceitful or fraudulent, is relevant to our consideration of whether a penalty is appropriate.

⁴⁸ See Form 10-K/A filed by FTS Group, Inc. on May 15, 2008 (including REB audit report dated April 11, 2008 on financial statements for period ended December 31, 2007 and disclosing audit fees of \$45,000 to REB); Form 10-KSB filed by Larrea Biosciences Corp. on August 6, 2007 (including REB audit report dated July 26, 2007 on financial statements for period ended April 30, 2007 and disclosing audit fees of \$64,000 to REB); Form 10-K filed by FTS Group, Inc. on April 16, 2007 (including REB audit report dated April 11, 2007 on financial statements for period ended December 31, 2006 and disclosing audit fees of \$45,000 to REB).

⁴⁹ *Phlo Corp.*, 90 SEC Docket at 1113 n.84.

⁵⁰ See *supra* note 48.

For the reasons discussed above, we find the penalty justified.⁵¹

As noted above, Sarbanes-Oxley allows the imposition of a civil penalty as high as \$800,000 against an individual for each violative act. The \$75,000 penalty imposed by the Board is far below this limit.⁵² The Board explained that the penalty is designed in part as deterrence against avoiding cooperation in order to continue collecting audit fees during the pendency of an investigation. While imposing a larger penalty in this case might provide an even greater deterrent against similar stalling by other registered public accounting firms and their associated persons, a civil penalty of \$75,000 appears sufficient to have a deterrent effect on a firm such as Bassie's. Under these circumstances, we find a civil penalty of \$75,000 not excessive, oppressive, inadequate, or otherwise inappropriate.⁵³

⁵¹ The consideration of "such other matters as justice may require" may result in the need to consider additional factors in future cases involving failure to cooperate with an investigation.

⁵² As noted above, a penalty not exceeding \$110,000 would be allowed even if the misconduct at issue were not intentional or reckless. *See supra* note 44.

⁵³ Applicants assert that "they do not possess the financial means to pay any civil fine, let alone \$75,000," and they argue that the Commission "must provide Applicants with a separate opportunity to argue specifically against the imposition of a civil money penalty."

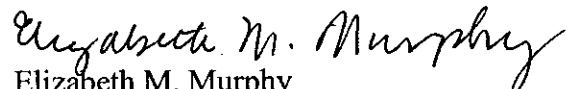
Sarbanes-Oxley does not recognize ability to pay as a factor to consider in determining whether to impose a civil money penalty. In cases where the Commission may impose a penalty under Section 21B(c), the ability to pay may be considered, but it is only one factor, it is discretionary, and where, as here, the conduct is egregious, inability to pay may be disregarded. *See, e.g., Thomas C. Bridge*, Exchange Act Rel. No. 60736 (Sept. 29, 2009), 96 SEC Docket at 20848 (stating that "when conduct is 'sufficiently egregious,' the Commission may impose a sanction despite a demonstrated inability to pay" and refusing to grant discretionary waiver of penalties where egregiousness of conduct outweighed any reason to do so (citations omitted)), petition denied sub nom. *Robles v. SEC*, 2010 U.S. App. LEXIS 26537 (D.C. Cir. Dec. 30, 2010) (unpublished).

Applicants had every opportunity to argue against the imposition of a civil penalty in their briefs, yet they gave no substantiation of their claim beyond making the flat statement that they could not pay. Moreover, although the briefing scheduling order expressly provided Applicants the opportunity to file a reply brief on appeal, Applicants did not take advantage of this opportunity. Under these circumstances, we find that Applicants did not establish that they were unable to pay the penalty, and we decline to grant them a separate hearing as to this issue.

For the foregoing reasons, we sustain the findings of misconduct and sanctions imposed by the PCAOB.

An appropriate order will issue.⁵⁴

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, PAREDES and GALLAGHER); Commissioner AGUILAR not participating.


Elizabeth M. Murphy
Secretary

⁵⁴ We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record filed by the parties, Applicants' request for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ACCOUNTING AND AUDITING ENFORCEMENT

Rel. No. 3354 / January 10, 2012

Admin. Proc. File No. 3-14130

In the Matter of the Application of

R.E. BASSIE & CO.
and
R. EVERETT BASSIE, C.P.A.
c/o Dwight E. Jefferson
405 Main Street, Suite 950
Houston, TX 77002

For Review of Disciplinary Action Taken by

PCAOB

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY PUBLIC COMPANY
ACCOUNTING OVERSIGHT BOARD

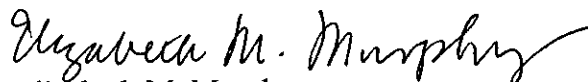
On the basis of the Commission's opinion issued this day, it is

ORDERED that PCAOB's findings that R.E. Bassie & Co. and R. Everett Bassie, C.P.A. failed to cooperate with an investigation by the Board's Division of Enforcement and Investigations be, and they hereby are, sustained; and it is further

ORDERED that the sanctions imposed by PCAOB be, and they hereby are, sustained; and it is further

ORDERED that the automatic stay of the Board sanctions imposed on Applicants pending the Commission's review be, and it hereby is, terminated.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66127 / January 10, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14687

In the Matter of

Stephen M. Folan,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTIONS 15(b) AND
15B(c) OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 15B(c) of the Securities Exchange Act of 1934 ("Exchange Act") against Stephen M. Folan ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2 and III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Sections 15(b) and 15B(c) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

11 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. From at least January 2005 until March 2011, Folan was a registered representative associated with FTN Financial Securities Corporation, a broker-dealer registered with the Commission, and with FTN Financial Capital Markets, a municipal securities dealer registered with the Commission. Folan, age 48, is a resident of Plainfield, Illinois.

2. On December 16, 2011, a final judgment was entered by consent against Folan, permanently enjoining him from aiding and abetting future violations of Section 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"), in the civil action entitled Securities and Exchange Commission v. Stephen M. Folan, Civil Action Number 11-cv-8905, in the United States District Court for the Northern District of Illinois.

3. The Commission's complaint alleged that, in connection with a year-end 2006 repurchase transaction between FTN Financial Securities Corporation and the registered investment adviser Sentinel Management Group, Inc. ("Sentinel"), Sentinel provided materially misleading financial statements and made other related material misstatements to its clients. Folan aided and abetted Sentinel's violations of Section 206(2) of the Advisers Act.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Folan's Offer.

Accordingly, it is hereby ORDERED pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act that Respondent Folan be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

with the right to apply for reentry after 3 years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially

waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

**Securities Act of 1933
Release No. 33-9294 / January 11, 2012**

**Securities Exchange Act of 1934
Release No. 34-66141 / January 11, 2012**

**ORDER APPROVING PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
BUDGET AND ANNUAL ACCOUNTING SUPPORT FEE FOR CALENDAR YEAR
2012**

The Sarbanes-Oxley Act of 2002, as amended (the "Sarbanes-Oxley Act"),¹ established the Public Company Accounting Oversight Board ("PCAOB") to oversee the audits of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. The PCAOB is subject to the comprehensive oversight of the Securities and Exchange Commission (the "Commission").

Section 109 of the Sarbanes-Oxley Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Under Section 109(f) of the Sarbanes-Oxley Act, the aggregate annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. The PCAOB's annual budget and accounting support fee is subject to approval by the Commission.

¹ 15 U.S.C. 7201 et seq.

Section 982 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)² amended the Sarbanes-Oxley Act to provide the PCAOB with explicit authority to oversee auditors of broker-dealers registered with the Commission. In addition, the PCAOB must allocate the annual accounting support fee among issuers and among brokers and dealers.

Section 109(b) of the Sarbanes-Oxley Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB’s internal procedures, subject to approval by the Commission. Rule 190 of Regulation P facilitates the Commission’s review and approval of PCAOB budgets and annual accounting support fees.³ This budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB’s ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, and a list of definitions that apply to the rule and to general discussions of PCAOB budget matters.

In accordance with the budget rule, in March 2011 the PCAOB provided the Commission with a narrative description of its program issues and outlook for the 2012 budget year. In response, the Commission provided the PCAOB with economic assumptions and budgetary guidance for the 2012 budget year. The PCAOB subsequently delivered a preliminary budget and budget justification to the Commission. Staff from the Commission’s Offices of the Chief

² Pub. L. No. 111-203, 124 Stat. 1376 (2010).

³ 17 CFR 202.190.

Accountant and Financial Management dedicated a substantial amount of time to the review and analysis of the PCAOB's programs, projects and budget estimates; reviewed the PCAOB's estimates of 2011 actual spending; and attended several meetings with management and staff of the PCAOB to further develop an understanding of the PCAOB's budget and operations. During the course of this review, Commission staff relied upon representations and supporting documentation from the PCAOB. Based on this review, the Commission issued a "pass back" letter to the PCAOB.

On November 30, 2011, the PCAOB approved its 2012 budget during an open meeting and submitted that budget to the Commission for approval. Upon review of the submitted budget and budget justification, Commission staff raised questions regarding the calculation and presentation of the accounting support fee in the budget justification. On December 23, 2011, the PCAOB supplemented the original budget justification with additional materials, including a revised calculation and presentation of the accounting support fee. Due to the time needed to resolve this matter, consideration of the budget and accounting support fee was delayed beyond the normal expected date of December 23rd.⁴

After considering the above, the Commission did not identify any proposed disbursements in the 2012 budget adopted by the PCAOB that are not properly recoverable through the annual accounting support fee, and the Commission believes that the aggregate proposed 2012 annual accounting support fee does not exceed the PCAOB's aggregate recoverable budget expenses for 2012. The Commission also acknowledges the PCAOB's

⁴ See 17 CFR 202.190(c). The budget rule also provides that in the event the Commission has not approved a budget prior to the beginning of the fiscal year, the PCAOB may spend funds from its reserve and continue to incur obligations as if the budget most recently approved by the Commission were continuing in effect. See 17 CFR 202.190(e)(3).

updated strategic plan and looks forward to providing views to the PCAOB as future updates are made to the plan.

In light of the recent report on information technology ("IT") governance and staffing by the PCAOB's Office of Internal Oversight and Performance Assurance,⁵ the Commission understands that the PCAOB has recently taken, and plans to continue to take, significant steps designed to improve its IT program. These steps include IT staffing changes, conducting a review of the IT program, implementing IT governance structures, and strengthening Board oversight over its IT program. In addition to these important steps, the Commission directs the Board to continue to provide in its quarterly reports to the Commission detailed information about the state of the PCAOB's IT program, including planned, estimated, and actual costs for IT projects, and the level of involvement of consultants. These reports also should include: (a) a discussion of the Board's assessment of the progress and implementation of the Board actions mentioned above; and (b) the quarterly IT report that will be prepared by PCAOB staff and submitted to the Board.

The Commission also directs the PCAOB during the 2012 budget cycle to continue to include in its quarterly reports to the Commission information about the PCAOB's inspections program. Such information is to include: (a) statistics relative to the numbers and types of firms budgeted and expected to be inspected in 2012, including by location and by year the inspections that are required to be conducted in accordance with the Sarbanes-Oxley Act and PCAOB rules; (b) information about the timing of the issuance of inspections reports for domestic and non-U.S.

⁵ The PCAOB's Office of Internal Oversight and Performance Assurance provides internal examination of the programs and operations of the PCAOB. A public summary of the Office's report on IT is available here: http://pcaobus.org/InternalOversight/Documents/2011_Information_Technology.pdf.

inspections; and (c) updates on the PCAOB's efforts to establish cooperative arrangements with respective non-U.S. authorities for inspections required in those countries.

The Commission has determined that the PCAOB's 2012 budget and annual accounting support fee are consistent with Section 109 of the Sarbanes-Oxley Act. Accordingly,

IT IS ORDERED, pursuant to Section 109 of the Sarbanes-Oxley Act, that the PCAOB budget and annual accounting support fee for calendar year 2012 are approved.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66142 / January 11, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3349 / January 11, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14688

In the Matter of

Lloyd V. Barriger,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Lloyd V. Barriger ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

13 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Barriger, was, at all relevant times, an unregistered investment adviser who conducted business in Monticello, New York; the president of the Gaffken & Barriger Fund, LLC (the "G&B Fund," or, the "Fund"), an unregistered investment company located in Monticello, New York; the principal shareholder, director and officer of G&B Partners, Inc., the Fund's managing member and sole common shareholder; the sole owner of Bridgeville Management, LLC, the purported investment manager to the Fund; and an indirect owner of the entity that underwrote and serviced the Fund's loans. From its inception in 2001, through July 2008, Barriger also owned a 30% equity interest in Campus Capital Corp. ("Campus"), another unregistered investment company, and jointly controlled and co-managed Campus. During the relevant period, Barriger was also the chairman and CEO, and a registered representative and principal of, Barriger & Barriger, Inc., which was at all relevant times a registered broker-dealer. Barriger, 55 years old, is a resident of Damascus, Pennsylvania.

2. On December 14, 2011, a final judgment was entered by consent against Barriger, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Lloyd Barriger, Civil Action Number 11 Civ. 3250, in the United States District Court for the Southern District of New York (the "Civil Action").

3. The Commission's complaint in the Civil Action alleged that Barriger fraudulently offered and sold unregistered securities in two upstate New York real estate funds he managed – the G&B Fund and Campus – and defrauded the funds themselves by misusing fund assets. More specifically, the Commission's complaint in the Civil Action alleged that Barriger defrauded investors and prospective investors in the G&B Fund by misrepresenting that the Fund was a relatively safe and liquid investment that paid a minimum return of 8% per year while knowing, or recklessly disregarding, that the Fund's actual performance did not justify these performance claims, and without disclosing information about the Fund's true performance and financial condition. The Commission's complaint in the Civil Action alleged that Barriger defrauded the G&B Fund by causing it to misuse its assets to pay cash distributions not justified by the Fund's performance, and to redeem investors at inflated values. Barriger defrauded Campus and prospective investors in Campus by causing Campus to inject a total of nearly \$2.5 million into the G&B Fund at a time when the G&B Fund was in distress, and by raising money for Campus without disclosing his use of Campus's assets to prop up the ailing G&B Fund. The Commission's complaint in the Civil Action further alleged that Barriger caused Campus to engage in transactions that personally benefitted him and were contrary to Campus's restrictions on related-party transactions.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Barriger's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Barriger be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66143 / January 11, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14554

In the Matter of

Justin William Rifkin,

Respondent.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934**

I.

On September 20, 2011, the Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Notice of Hearing against Justin William Rifkin ("Rifkin" or "Respondent"), (Rel. No. 34-65357).

In connection with these proceedings, Rifkin has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of settling these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, prior to a hearing pursuant to the Commission's Rules of Practice, 17 C.F.R. § 201.100 *et seq.*, and without admitting or denying the Commission's findings contained herein, except as to the jurisdiction of the Commission over him and over the subject matter of these proceedings, and the findings contained in Section II. 2, which are admitted, Respondent Rifkin consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

II.

On the basis of this Order and the Respondent's Offer, the Commission finds that:

1. Rifkin, age 31, resides in Corpus Christi, Texas. From May 2007 through June 2009, Rifkin was the managing member and owner of Wellco Energy L.L.C. ("Wellco"), which he operated in Colorado Springs, Colorado. He and other salesmen under his direction offered and

14 of 64

sold securities in the form of fractional undivided interests in oil and gas rights in four projects operated by another Colorado company. He was engaged in the business of effecting transactions in securities for the account of others for which he received compensation. However, from May 2007 through June 2009, Rifkin was not registered with the Commission as a broker or dealer, and was not associated with a broker or dealer registered with the Commission.

2. On August 31, 2011, a final judgment was entered against Rifkin permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Wellco Energy L.L.C. et al., civil action number 1:09-CV-1114, in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that in connection with sale of fractional undivided interests in oil and gas rights, Rifkin misrepresented that Wellco was the operator of the four oil and gas projects. The complaint also alleged that Wellco did not operate the projects and instead purchased fractional undivided interests from another company, which interests it further divided and resold to investors. The complaint further alleged that Rifkin misrepresented that he had extensive experience in operating oil and gas prospects. The complaint also alleged that in fact, Rifkin's experience was limited to raising money through sales of other oil and gas projects, and he had no experience operating oil and gas wells. The complaint further alleged that he also misrepresented the use of investors' funds and did not disclose that he used approximately 42% of investors' funds to acquire the working interests in the oil and gas wells, but spent the rest on sales commissions and business expenses or for his personal expenses. The complaint also alleged that Rifkin sold the securities when no registration statement was in effect or filed with the Commission. The complaint also alleged Rifkin was not registered as a broker or dealer, and was not associated with a broker or dealer registered with the Commission during the time when he offered and sold the securities at issue in the case.

III.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondent's Offer.

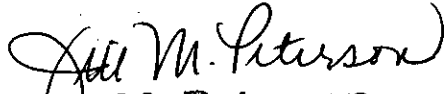
Accordingly, it is ORDERED that pursuant to Section 15(b)(6) of the Exchange Act, Respondent Rifkin be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any

disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66144 / January 11, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14689

In the Matter of

Kay Berensen-Galster,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 17A OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 17A of the Securities Exchange Act of 1934 ("Exchange Act") against Kay Berensen-Galster ("Respondent" or "Galster").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 17A of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

15 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Kay Berensen-Galster, age 59, is a resident of Salt Lake City, Utah. Galster was the President and part-owner of National Stock Transfer, Inc. ("National"), a suspended Utah corporation with its principal place of business in Salt Lake City, Utah. As President, Galster operated and was familiar with National's business. National became registered with the Commission as a transfer agent on March 29, 1983.

2. On November 9, 2011, a judgment was entered by consent against Galster, permanently enjoining her from aiding and abetting future violations of Sections 17(a)(3) and 17A(d) of the Exchange Act and Rules 17Ad-2, 17f-1, 17f-2(a), 17Ac2-1(c), 17Ac2-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15(c), 17Ad-17 and 17Ad-19 thereunder, in the civil action entitled Securities and Exchange Commission v. National Stock Transfer, Inc., et al., Civil Action Number 2:11-cv-798, in the United States District Court for the District of Utah.

3. The Commission's Complaint alleged that, for at least five years, National violated many of the transfer agent provisions of the federal securities laws, including, among other things, that National, as aided and abetted by Galster, failed to report lost or stolen securities in a timely manner, failed to maintain certain records, failed to maintain control books for all of its issuers and failed to file its annual report with the Securities and Exchange Commission. During the time period covered by the Complaint, National acted as the transfer agent for at least 58 issuers of common and preferred stock.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Galster's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 17A(c)(4)(C) of the Exchange Act that Respondent Galster be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

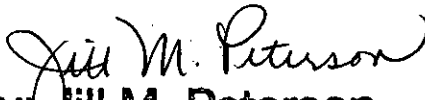
barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any

disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66147 / January 12, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3350 / January 12, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14690

In the Matter of

WILLIAM C. TAK,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against William C. Tak ("Respondent" or "Tak").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Tak joined California Wealth Management, Inc., d.b.a. IFC Advisory, an investment adviser registered with the Commission until November 2010, in September 2006 as a senior vice president. From September 2006 until July 2009, Tak was a registered representative of a registered broker-dealer, until the firm terminated his association for failure to maintain on-site records as required by the firm's written supervisory procedures. From November 2009 to the present, Tak has been associated with another registered broker-dealer. Tak, age 43, is a resident of Newport Beach, California.

2. On January 5, 2012, a final judgment was entered by consent against Tak, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled SEC v. Homestead Properties, L.P., et al., Civil Action Number SACV09-01331, in the United States District Court for the Central District of California, Southern Division.

3. The Commission's first amended complaint ("complaint") alleged that from June 2007 to at least November 2009, Tak sold securities interests in an investment fund, Homestead Properties, L.P., ("Homestead"), that raised over \$9.8 million from 36 investors, at least 33 of whom were between 60 and 97 years old at the time they invested. Tak sold the Homestead offering to at least 29 of the 36 investors. The complaint alleged that Tak misrepresented to investors that Homestead would use a registered broker-dealer to sell interests in Homestead to investors, and that the source of Homestead's distributions to investors would originate or relate in some way to Homestead's accrued net profits. Instead, Homestead did not sell interests through a broker-dealer and thus had no oversight or supervision of the offering from a broker-dealer. Homestead also had no accrued net profits, and thus paid investor distributions with money from investors' capital contributions. Lastly, the complaint alleged that Tak sold unregistered securities, and that he was not associated with a registered broker-dealer for purposes of selling the Homestead offering.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Tak's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Tak be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, and from participating in any offering of penny stock, with the right to reapply for reentry after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Chairman Schapiro
Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940

Release No. 3351 / January 13, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14691

In the Matter of

CORY A. MARTIN,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Cory A. Martin ("Martin" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

17 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Martin, 34 years old, was Chief Investment Officer of Jadis Capital, Inc., a New York corporation ("Jadis Capital"), from November 2004 to December 2005. Jadis Capital was the sole owner of Jadis Investments, LLC, a Delaware limited liability company ("Jadis Investments") and Uniondale, NY-based investment adviser registered with the Commission. Martin received a bachelor's degree in finance from Siena College and an MBA from Sage Graduate School. Martin has been registered with the Commission as an investment adviser affiliate and has held Series 7, 63, and 65 licenses.

2. On July 16, 2009, Martin pled guilty to conspiracy to commit securities fraud, in violation of Title 18 United States Code, Section 371 before the United States District Court for the Eastern District of New York, in United States v. Cory A. Martin, 09 Cr. 392-01 (E.D.N.Y.) (JG). On September 24, 2010, a judgment in the criminal case was entered against Martin. He was sentenced to 6 months of home detention, five years of probation, and 150 hours of community service, and was ordered to make restitution in the amount of \$3,303,207.99.

3. The criminal information to which Martin pled guilty, United States v. Cory A. Martin, 09 Cr. 392-01 (E.D.N.Y.) (JG), alleged, inter alia, that Martin, together with others, participated in a fraudulent investment scheme by mailing marketing materials in the Donum Fund, and by giving a presentation to potential investors, that contained materially false representations and omitted material facts about the Donum Fund and its investment manager, Jadis Investments.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Martin's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, Respondent Martin be, and hereby is barred from association with any investment adviser.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a

customer, whether or not related to the conduct that served as the basis for the Commission order;
and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct
that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66150 / January 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14692

In the Matter of

CLIFTON K. ORAM,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Clifton K. Oram ("Oram" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

18 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Between 2006 and the end of 2008, a Mexican entity known as MexGroup offered to investors interests in an unregistered foreign currency exchange trading program. MexGroup attracted investors by, among other things, touting inflated monthly returns on its website. MexGroup raised at least \$50 million from mostly U.S. investors, and pooled the proceeds. Respondent Oram attracted investors to the MexGroup offering by, among other things, discussing the inflated trading returns. Prior to agreeing to solicit investors on MexGroup's behalf, Oram took insufficient steps to investigate MexGroup, its principals, or the viability of the investment.

2. On December 29, 2011, a permanent injunction was entered by consent against Respondent Oram, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Clifton K. Oram, et al., Civil Action Number 2:10-cv-01173-DB, in the United States District Court for the District of Utah.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Oram's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Oram be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order;

and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66151 / January 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14693

In the Matter of

DON C. WINKLER,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Don C. Winkler ("Winkler" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

19 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Between 2006 and the end of 2008, Don C. Winkler offered interests in an unregistered foreign currency exchange trading program offered by a Mexican entity known as MexGroup. MexGroup, through Winkler and others, offered investors the opportunity to pool their money and invest in a foreign currency trading program. MexGroup attracted investors by, among other things, touting inflated monthly returns on its website and paying U.S. sales agents to direct investors to that website. MexGroup raised at least \$50 million from mostly U.S. investors. Winkler offered the MexGroup interests to investors by, among other things, touting the inflated trading returns. Prior to agreeing to solicit investors on MexGroup's behalf, Winkler took insufficient steps to investigate MexGroup, its principals, or the viability of the investment.

2. On December 22, 2011, a permanent injunction was entered by consent against Respondent Winkler, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Clifton K. Oram, et al., Civil Action Number 2:10-cv-01173-DB, in the United States District Court for the District of Utah.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Winkler's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Winkler be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a

customer, whether or not related to the conduct that served as the basis for the Commission order;
and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct
that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Karedes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66152 / January 13, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3352 / January 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14694

In the Matter of

WILLIAM R. MICHAEL,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against William R. Michael ("Michael" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

20 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Between 2006 and the end of 2008, William R. Michael promoted and sold interests in a fraudulent, unregistered foreign currency exchange trading program offered by a Mexican entity known as MexGroup. MexGroup, through Michael and others, offered investors the opportunity to pool their money and invest in a foreign currency trading program. MexGroup attracted investors by, among other things, touting inflated monthly returns on its website and paying U.S. sales agents to direct investors to that website. MexGroup raised at least \$50 million from mostly U.S. investors. Michael offered and sold the MexGroup interests to investors by, among other things, touting the inflated trading returns. Prior to agreeing to solicit investors on MexGroup's behalf, Michael took no significant steps to investigate MexGroup, its principals, or the viability of the investment.

2. On December 22, 2011, a permanent injunction was entered by consent against Respondent Michael, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Clifton K. Oram, et al., Civil Action Number 2:10-cv-01173-DB, in the United States District Court for the District of Utah. Respondent Michael was at times relevant to the allegations in the Commission's civil action associated with the firm Michael, Musgrave & Jackson, LLC, which has been registered as an investment adviser with the State of California since February 19, 2008.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Michael's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, Respondent Michael be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or

issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66154 / January 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14695

In the Matter of

SARANG AHUJA,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Sarang Ahuja ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Ahuja is a registered representative who was associated with broker-dealers registered with the Commission from 2002 until 2008.
2. On February 16, 2010, the Commission filed a complaint against Ahuja in the civil action entitled Securities and Exchange Commission v. Steven Scoppetuolo, et al., Civil Action Number 10-CV-20475, in the United States District Court for the Southern District of Florida. On December 2, 2011, the Court entered an order permanently enjoining Ahuja, by consent, from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Court also imposed a civil penalty and disgorgement to be determined based upon the Commission's motion.
3. The Commission's complaint alleged, among other things, that Ahuja engaged in illegal insider trading in the securities of World Fuel Services Corporation ("World Fuel"). Ahuja received a tip from his client, Robert Tocci, and/or World Fuel employee, Steven Scoppetuolo, about World Fuel's worse-than-expected earnings in advance of World Fuel's May and August 2007 earnings announcements. Before the announcements, Ahuja purchased put options for himself, his family members, and his clients. After the announcements, Ahuja sold the put options for profits.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Ahuja's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Ahuja be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially

waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Investment Advisers Act of 1940
Release No. 3353 / January 13, 2012

Investment Company Act of 1940
Release No. 29917 / January 13, 2012

Administrative Proceedings
File No. 3-11696

In the Matter of

**RS Investment Management, Inc., RS
Investment Management, L.P.,
G. Randall Hecht and Steven M. Cohen,

Respondents.**

**ORDER MODIFYING ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION 203(e),
203(f) and 203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940 AND SECTIONS 9(b)
AND 9(f) OF THE INVESTMENT COMPANY ACT
OF 1940, MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-AND-
DESIST ORDER AS TO RS INVESTMENT
MANAGEMENT, INC. AND RS INVESTMENT
MANAGEMENT, L.P.**

I.

On October 6, 2004, the United States Securities and Exchange Commission (the "Commission") instituted administrative and cease-and-desist proceedings pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "2004 Order") against RS Investment Management, Inc. and RS Investment Management, L.P (collectively "respondents").¹

II.

In anticipation of the institution of these proceedings, respondents consented to the 2004 Order. Among other things, the 2004 Order required respondents to cease and desist from further violations of the federal securities laws, directed respondents to pay disgorgement and civil money penalties, and directed respondents to comply with various undertakings. In 2006, RS Investment Management Co. LLC ("RS") became the successor to RS Investment

¹ See Advisers Act Rel. No. 2310, October 6, 2004, Admin. Proc. File No. 3-11696.

Management, Inc. and RS Investment Management, L.P. by acquiring all interest in both entities, and became subject to the undertakings of the 2004 Order.

III.

RS has submitted an Amended Offer of Settlement (the "Offer") proposing to relieve it of the obligations to continue to: (1) hold a shareholders' meeting at which the Board of Trustees for RS is elected not less than every fifth calendar year in accordance with paragraph 25.b. of the 2004 Order; (2) establish and maintain a Compliance Systems Committee in accordance with paragraph 26.a.iii. of the 2004 Order; and (3) undertake a periodic compliance review in accordance with paragraph 28 of the 2004 Order. Solely for purposes of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, RS consents to the entry of this Order Modifying Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to RS Investment Management, Inc. and RS Investment Management, L.P. ("Order"), as set forth below.

IV.

The Commission deems it appropriate and in the public interest to modify the 2004 Order as agreed to in RS's Offer.

Accordingly, IT IS HEREBY ORDERED that:

A. Paragraph 25.b. of the 2004 Order is modified as follows:

25.b. Commencing in 2005 and not less than every fifth calendar year thereafter through 2011, each RS Fund will hold a meeting of shareholders at which the board of Trustees will be elected.

B. Paragraph 26.a.iii. of the 2004 Order is modified as follows:

26.a.iii. Until January 2012, RS shall establish a Compliance Systems Committee (the "committee") whose purpose it is to coordinate compliance goals with operations. Members of the committee will include the CEO, COO, CFO, CCO, General Counsel, and personnel representing Sales and Marketing. Meetings of the committee shall be held weekly. The Compliance Systems Committee shall be chaired by RS's Chief Compliance Officer, and shall have as its members senior executives of RS's operating businesses. Notice of all meetings of the Compliance Systems Committee shall be given to the independent staff of the Trustees of the RS funds, who shall be invited to attend and participate in such meetings. The Compliance Systems Committee shall review compliance issues throughout the business of RS, endeavor to develop solutions to those issues as they may arise from time to time, and oversee implementation of those

solutions. The Compliance Systems Committee shall provide reports on internal compliance matters to the Risk Management Committee of the Trustees of the RS funds with such frequency as the independent Trustees of such funds may instruct, and in any event at least quarterly. RS shall also provide to the Risk Management Committee of RS the same reports of the Code of Ethics Oversight Committee and the Compliance Systems Committee that it provides to the Risk Management Committee of the RS funds;

C. Paragraph 28 of the 2004 Order is modified as follows:

28. Periodic Compliance Review. RS has undertaken that, commencing in 2006, and at least once every other year thereafter through 2011, RS shall undergo a compliance review by a third party, who is not an interested person, as defined in the Investment Company Act, of RS. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning RS's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and federal securities law violations by RS and/or its employees in connection with their duties and activities on behalf of and related to the RS Funds. Each such report shall be promptly delivered to RS's chief compliance officer and to the Compliance or Audit Committee of the Board of Trustees or directors of each RS fund.

D. All other provisions of the 2004 Order remain in effect.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
RELEASE NO. 66157 / January 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14614

In the Matter of:

1st GLOBAL STOCK
TRANSFER LLC and
HELEN BAGLEY,

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTIONS 17A(c)(3) AND
17A(c)(4) OF THE SECURITIES EXCHANGE
ACT OF 1934

I.

On November 4, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Sections 17A(c)(3) and 17A(c)(4) of the Securities Exchange Act of 1934 ("Exchange Act") against 1st Global Stock Transfer LLC ("1st Global") and Helen Bagley ("Bagley") (collectively "Respondents").

II.

Respondents, pursuant to Rule 240(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.240(a), have now submitted Offers of Settlement ("Offers") in connection with these public administrative proceedings, which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission; or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Sections 17A(c)(3) and 17A(c)(4) of the Securities Exchange Act of 1934 ("Order") as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

23 of 64

A. RESPONDENTS

1. 1st Global is a Nevada Corporation registered with the Commission as a transfer agent beginning in October 2001. At all relevant times, 1st Global operated as a transfer agent for transactions in the stock of CMKM Diamonds, Inc., a Nevada corporation that concocted and carried out a complex scheme to illegally issue and sell billions of shares of CMKM stock in several unregistered distributions between December 2002 and September 2004.

2. Bagley is the principal of 1st Global, and owned and operated 1st Global at all relevant times.

B. ENTRY OF THE INJUNCTION

3. On August 1, 2011, after the Commission's motion for summary judgment against Respondents was granted, a final judgment was entered against 1st Global and Bagley, permanently enjoining them from violating Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, and additionally permanently barring Bagley from participating in an offering of penny stock, in the civil action entitled *SEC v. CMKM Diamonds, Inc. et al.*, Case No. 2:08-cv-00437-LRH-RJJ, in the United States District Court for the District of Nevada.

4. In granting the Commission summary judgment, the Court concluded, among other things, that the following facts were uncontroverted:

(a) Bagley was the individual who removed the restrictive legends from CMKM's stock certificates for at least 270 billion shares of CMKM stock;

(b) 1st Global and Bagley were both necessary participants and substantial factors in the sale of unrestricted CMKM stock in violation of Section 5 of the Securities Act because: (i) but for their participation in removing the restrictive legends, there would not have been a sale of unregistered securities because the CMKM stock would still have had the restrictive legend on each certificate; and (ii) their participation was not *de minimis* as they issued billions of shares of CMKM stock without the restrictive legend and then transferred those unrestricted certificates to broker-dealer NevWest Securities Corporation for the purpose of sale to the general public.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED pursuant to Section 17A(c)(3) of the Exchange Act that the registration of Respondent 1st Global as a transfer agent be, and hereby is, revoked.

It is further ORDERED pursuant to Section 17A(c)(4) of the Exchange Act that Respondent Bagley be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by Bagley will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Chairman Schapiro
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66161 / January 17, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14696

In the Matter of

Chalmer E. Detling, II, Esq.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Chalmer E. Detling, II, Esq. ("Detling" or "Respondent") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.¹

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.B below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

¹ Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appear or practicing before it any attorney . . . who has been by name . . . [p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

A. Detling, age 35, is an attorney licensed in Georgia. He is currently General Counsel at an engineering firm and resides in Marietta, Georgia. In 2006, Detling served as legal counsel to Charles A. Aiken ("Aiken") and Aiken Continental, L.L.C. ("Aiken Continental") in connection with the offer and sale of industrial development revenue bonds by Raleigh County, West Virginia in October 2006 (the "Bond Transaction"). In 2006, Detling also represented Aiken in a prior, unrelated criminal proceeding.

B. On December 29, 2011, the Commission filed a Complaint against Detling in the United States District Court for the Northern District of Georgia, Atlanta Division. The case is United States Securities and Exchange Commission v. Chalmer E. Detling, II, Esq., (Civil Action No. 1:11-cv-4565-TWT). On January 5, 2012, the Court entered a final judgment in that case, upon Detling's consent, ordering that Detling be permanently enjoined from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder; and from aiding and abetting violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Detling was ordered to pay \$10,000 in disgorgement of ill-gotten gain, \$3,052 in prejudgment interest, and a \$25,000 civil penalty.

C. The Commission's Complaint alleged, among other things, that Detling made material misrepresentations and omissions in connection with the Bond Transaction. In October 2006, Aiken's firm, Aiken Continental, acquired Continental Casket, Inc. ("Continental Casket"), a casket manufacturer based in Beckley, West Virginia. Aiken, at the time an employee of Continental Casket, was able to complete this acquisition through financing that Raleigh County, West Virginia made possible through the Bond Transaction. Aiken Continental was the conduit borrower and received proceeds from the Bond Transaction in order to acquire Continental Casket. Detling failed to disclose to key participants to the transaction, including the issuer, bond counsel, the underwriter, and the bondholders' trustee, that Aiken had been indicted for financial fraud in late 2005. Detling also failed to disclose that he was in the process of negotiating a plea agreement for Aiken just before the bonds were issued in October 2006. In addition, Detling failed to disclose material information about a \$200,000 loan to Aiken and Aiken Continental from a company that was partially owned by Detling, in order to facilitate the closing of the transaction. This loan required a \$100,000 interest payment, and gave the lender a twenty percent equity interest in Aiken Continental if the loan plus interest was not fully repaid within six months. Detling's failure to disclose details about Aiken's criminal proceeding and the loan rendered certain statements in the bonds' Official Statement (the "OS") materially misleading. By reviewing the OS, which was distributed to investors in connection with the transaction, and failing to correct the misstatements and omissions therein, Detling aided and abetted the violations of Aiken and Aiken Continental. In addition, Detling signed an opinion letter as counsel to Aiken Continental in which he made false and misleading representations. Specifically, Detling represented that no proceeding at law was pending which would adversely affect Aiken Continental, and that the OS did not contain any untrue statement of material fact or omit any material facts. These representations were materially false and misleading due to Detling's failures to disclose material information about Aiken's criminal proceeding and the loan.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Detling's Offer.

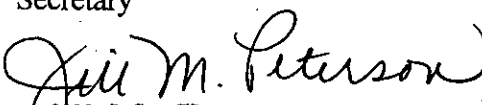
Accordingly, it is hereby ORDERED, effective immediately, that:

A. Detling is suspended from appearing or practicing before the Commission as an attorney.

B. After five (5) years from the date of the Order, Detling may request that the Commission consider his reinstatement by submitting an affidavit to the Commission's Office of the General Counsel truthfully stating, under penalty of perjury, that he has complied with the Order, that he is not subject to any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66162 / January 17, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14698

In the Matter of

Charles Mark Hall,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Charles Mark Hall ("Hall" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Hall, 52 years old and formerly a resident of Smithfield, North Carolina, was a registered representative between August 1999 and December 2003 of a broker dealer registered with the Commission. Between December 2003 and August 2009, Hall was a registered representative of a different broker dealer registered with the Commission.

25 of 64

2. On May 5, 2011, the General Court Of Justice, Superior Court Division, Johnston County, North Carolina entered judgments against Hall after Hall pleaded guilty to twelve counts of embezzlement by an insurance agent, one count of embezzlement of property received by virtue of office or employment, and two counts of exploiting the trust of a disabled/elderly person in violation of N.C.G.S. §58-2-162, §14-90, and §14-112(B) in North Carolina v. Hall, Charles Mark, Case Nos. 09CRS005803, 09CRS005804, 09CRS006447, 09CRS006448, 09CRS006449, 09CRS006450, 09CRS006451, 09CRS006452, 09CRS006453, 09CRS006454, 09CRS006455, 09CRS006456, 09CRS006457, 09CRS006458, and 09CRS006459. Hall was sentenced to two 60-to-81 months prison terms to run consecutively, work release at the discretion of the North Carolina Department of Corrections, and ordered to make restitution in the amount of \$2,840,594.56.

3. The counts of the criminal indictments to which Hall pleaded guilty alleged, inter alia, that from November 2001 to August 2009, Hall knowingly and willfully devised and intended to devise a scheme and artifice to defraud and misappropriate approximately \$2.2 million from customers' accounts by means of false and fraudulent pretenses, representations, promises, and omissions.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Hall's Offer.

Accordingly, it is hereby ORDERED

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Hall be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of

factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

*Commissioner Aguilar
Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3355 / January 17, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 29919 / January 17, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14697

In the Matter of

LISA B. PREMO,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTIONS 203(f) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND SECTIONS 9(b) AND 9(f) OF THE
INVESTMENT COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Lisa B. Premo ("Premo" or the "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Premo, 55 years of age, is a resident of Charlotte, North Carolina. From October 1996 to December 2008, Premo was employed by Evergreen Investment Management Company, LLC (the "Evergreen Adviser"). Premo served as the lead portfolio manager of the Evergreen Ultra Short Opportunities Fund (the "Ultra Fund" or the "Fund") from its inception in May 2003 through at least June 2008. Beginning in December 2007, Premo became the Evergreen Adviser's chief investment officer for liquidity and structured solutions as well as a member of the Evergreen Valuation Committee (the "EVC"). At all relevant times, Premo was an investment adviser to the Fund. From June 1990 to August 1997, Premo was a registered representative of a broker-dealer.

26 of 64

B. OTHER RELEVANT ENTITIES

2. The Evergreen Adviser was, at all relevant times, registered with the Commission as an investment adviser and its principal place of business is in Boston, Massachusetts. During the relevant period, the Evergreen Adviser was the registered investment adviser for the Evergreen family of mutual funds, including the Ultra Fund, and received payment of advisory fees based on the net asset value ("NAV") of each fund. At all relevant times, the Evergreen Adviser was a wholly-owned subsidiary of Wachovia Corporation and currently is a wholly-owned subsidiary of Wells Fargo & Company, a San Francisco, California-based company whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act. The Evergreen Adviser is no longer registered with the Commission.

3. The Ultra Fund was a series of the Evergreen Fixed Income Trust, an open-end management investment company (*i.e.*, a mutual fund) registered with the Commission. The Ultra Fund invested primarily in commercial and residential fixed and variable rate mortgage-backed securities, including collateralized debt obligations, collateralized mortgage obligations, and other mortgage-related investments. From February 2007 to June 2008, the Ultra Fund was consistently ranked by a national ranking firm as one of the top five to ten funds of the 40-50 funds in its category based upon its reported performance. On June 19, 2008, the Evergreen Adviser publicly announced that the Ultra Fund's Board of Trustees had approved a plan to liquidate the Fund, that shareholders of record as of June 18, 2008 would receive a cash distribution of \$7.48 per share, and that shares of the Fund would no longer be available for purchase by new shareholders. The Fund has since been liquidated.

4. The EVC was established by the Ultra Fund's Board of Trustees (the "Board") to assist the Board in determining the valuation of fair-valued securities. The EVC's membership included the Evergreen Adviser's chief investment officers for fixed income, equity, high yield and international products, as well as representatives from the Evergreen Adviser's legal, risk management and fund administration departments.

C. PREMO FAILED TO INFORM THE EVERGREEN VALUATION COMMITTEE OF MATERIAL INFORMATION REGARDING A COLLATERALIZED DEBT OBLIGATION HELD BY THE ULTRA FUND

Overview

5. During the period from at least March 2008 to early June 2008, the NAV of the Ultra Fund was materially overstated as a result of the conduct of Premo, the Fund's lead portfolio manager. In early February 2008, Premo learned that a collateralized debt obligation ("CDO") owned by the Fund had experienced an event of default. In late March 2008, Premo learned that, as a result of the event of default, the CDO would no longer make payments to the Fund. However, Premo did not convey this information to the EVC, which had been charged by the Board with the responsibility of calculating the value of Fund holdings. Premo was an EVC member. When, in early June 2008, the EVC became aware of the event of default and the payment stoppage, it reduced the aggregate value being assigned to the CDO from approximately \$6.98 million to \$0, resulting in a \$0.10 per share drop in the Fund's NAV that set in motion a sequence of events that, within a week, led to the Fund's liquidation. By failing to convey to either the EVC or the Board itself the material information she possessed concerning the value of the CDO, Premo breached the fiduciary duty that, as the Fund's portfolio manager, she owed to the Fund.

The Purchase Of The Collateralized Debt Obligation

6. On February 6, 2007, Premo decided to purchase on behalf of the Ultra Fund \$13 million worth of a \$375 million CDO. The CDO was primarily backed by subprime residential mortgage-backed securities, meaning that the CDO was ultimately backed by mortgages issued to borrowers who were not considered to be prime credit risks (e.g., borrowers whose credit scores were below approximately 650). The Fund's holding in the CDO gave it the right to receive a payment every three months, reflecting a portion of the interest (but not the principal) payments being made on the mortgages that ultimately underlay the CDO. The CDO was divided into several tranches – the A-1, A-2, B, C, D and subordinated tranches. The holders of the A-1 tranche had priority over the holders of the A-2 tranche, who, in turn, had priority over the holders of the B tranche, and so on. This meant that, should the flow of payments to the holders of the CDO be impaired in any way, the available stream of payments would be directed first to the holders of the A-1 tranche and, only when they were paid in full, would any portion of the payment stream be directed to the holders of the A-2 tranche. For this reason, the rate of interest to be paid to the holders of the A-2 tranche of the CDO was higher than the rate of interest to be paid to the holders of the A-1 tranche. The Fund's position in the CDO was in the A-2 tranche.

Evergreen's Valuation Policies

7. During the relevant period, the prospectus for the Ultra Fund stated that the Fund would, as a general rule, value each security it owned at the price at which the security could be

sold in the market. The prospectus stated that, for each security for which current market prices were readily available, the Fund would value the security in accordance with its market price. The prospectus stated that, for each security for which a market price was not readily available, the Fund would determine a "fair value" for that security under policies established by the Fund's Board of Trustees. Like many of the Fund's holdings (residential mortgage-backed securities and collateralized debt obligations backed by such securities), market quotations were not readily available for the A-2 tranche of the CDO, making this CDO a "fair valued" security. The valuation policies established by the Fund's Board of Trustees entrusted the calculation of the valuation of fair-valued securities to the EVC.

8. During the relevant period, pursuant to procedures established by the Fund's Board of Trustees, the EVC employed a three-tiered system in fair valuing securities held by the Ultra Fund. Under the first and most preferred tier, securities were valued in accordance with prices provided by a third-party pricing vendor such as Standard & Poor's ("S&P"), PricingDirect, Interactive Data Corporation, or Reuters. Under the second tier, such securities were valued in accordance with prices provided by one or more third-party broker-dealers. Under the third and least preferred tier, such securities were valued in accordance with the prices recommended by the Fund's portfolio management team.

The Vendor Override

9. Prior to July 24, 2007, the EVC valued the Ultra Fund's position in the A-2 tranche of the CDO in accordance with a price provided by a third-party pricing vendor, S&P. However, on July 18, 2007, S&P lowered the price it assigned to the A-2 tranche of this CDO from \$96.72 (down from an issued value of \$100) to \$72.89. After S&P reduced its price, Premo and the senior portfolio manager told the EVC that, for a variety of reasons, the S&P price did not reflect the CDO's fair value and recommended that the EVC "override" S&P's price with a value based on quotes, ranging from approximately \$82.53 to \$96, that they had received from two or three broker-dealers. The EVC adopted this recommendation and overrode the S&P price. One of these quotes (the \$96 quote) came from a broker-dealer located in Florida (the "Florida broker-dealer"). The Florida broker-dealer provided a quote on the A-2 tranche at the request of Premo. By August 31, 2007, the Florida broker-dealer was the only broker-dealer that would provide the Evergreen Adviser with a daily quote on the A-2 tranche and, on or about that date, the EVC, at the recommendation of Premo and the senior portfolio manager, decided to value the A-2 tranche in accord with the daily price provided by the Florida broker-dealer from that point onward. The Evergreen Adviser was the only entity for which the Florida broker-dealer valued securities on a daily basis in the 2007 and 2008 period. By June 2008, the Florida broker-dealer was pricing sixteen securities for the Ultra Fund. Between June 10th and June 16th, the EVC reduced the valuation assigned to fifteen of these securities -- eight (including the CDO) by more than 90%.

Premo Learns That The CDO Has Stopped Making Payments to the Ultra Fund

10. On February 6, 2008, the trustee for the CDO sent an email to the senior portfolio

manager, informing him that the CDO had experienced an event of default because it was no longer considered to be overcollateralized. In early February 2008, the CDO accounted for approximately one percent of the overall value of the Ultra Fund. The senior portfolio manager informed Premo of the event of default soon after he learned of it. This event of default was the first default that had ever occurred with respect to a Fund holding. In fact, this default was the first default that had occurred in any fund being managed by Premo. Premo viewed the CDO's event of default as a very unusual event. By mid-February, 2008, the senior portfolio manager learned that the event of default gave the holders of the A-1 tranche of the CDO the right to "accelerate" the CDO by directing that all future payments of principal and interest made on the mortgages underlying the CDO be transmitted to them until they were paid off in full. The senior portfolio manager informed Premo of the possibility of acceleration soon after he learned of it. On March 27, 2008, the senior portfolio manager received an email from the trustee for the CDO notifying him that the holders of the A-1 tranche had, in fact, decided to accelerate the transaction, the senior portfolio manager informed Premo of the acceleration on or about that date. Premo believed that the decision by the holders of the A-1 tranche to accelerate meant that the Ultra Fund would probably not receive any payment (*i.e.*, cash flow) in connection with this CDO for ten or more years. Up until that time, the Fund had received a payment in connection with this CDO every three months. The February 4, 2008 payment amounted to approximately \$176,000. Consistent with the March 27th notice, the A-2 tranche of the CDO did not make its scheduled payment to the Fund in early May 2008.

The EVC Learns That The CDO Has Stopped Making Payments And Reduces Its Value To \$0

11. On the afternoon of June 9, 2008, several members of the EVC learned that the CDO had experienced an event of default, had gone into acceleration, and had not made the payment that had been due to the Ultra Fund in early May 2008. In the course of two "special" EVC meetings that were called on June 10th to discuss the situation, the senior portfolio manager stated that he did not expect the CDO to resume making payments for about thirteen years. At the end of these meetings, the EVC reduced the value it was assigning to the CDO from \$53.72 to \$0. This decision decreased the Fund's assets by approximately \$6.98 million and resulted in a nearly \$0.10 per share drop in the Fund's NAV (to \$8.95 per share). Because day-to-day volatility in the Fund's NAV was very low (from at least as far back as February 1, 2007, the Fund's NAV had never changed by more than five cents per share in one day), this NAV decrease was very significant.

12. On June 11, 2008, the day after it re-priced the CDO to \$0, the EVC decided to stop using valuations provided by the Florida broker-dealer or the portfolio management team to override vendor prices with respect to approximately 11 Ultra Fund securities. Since the vendor prices on these securities were generally lower than the Florida broker-dealer/portfolio management team valuations, this action decreased the Fund's NAV by \$0.12 per share. In the days that followed, the EVC re-priced downward additional Fund securities. The substantial drops in the Fund's NAV that resulted from these re-pricings, combined with the large number of redemption requests that ensued, threatened to force the Fund to sell its illiquid securities and

ultimately led the Fund's Board of Trustees to decide to liquidate the Fund and to make a liquidating distribution of \$7.48 per share to shareholders on June 18, 2008.

Premo Failed To Timely Notify The EVC of Material Information Regarding The CDO

13. Premo knew that the primary reason why the Ultra Fund purchased a portion of the A-2 tranche of the CDO was to acquire the right to receive a portion of the payments made on the underlying mortgages. In addition, Premo understood throughout the relevant period that a CDO that was making payments to and thus generating cash flow for its holder would be worth more than one that was not. In fact, Premo would not have approved the Fund's purchase of the CDO if she had thought that it would not generate cash flow for the Fund for ten years. Moreover, Premo knew from February 2008 through June 2008 that the Evergreen Adviser's Pricing Procedures made it clear that the responsibility for valuing the A-2 tranche of the CDO lay not with her but with the EVC. Premo further understood during this time period that the pricing procedures required her as a portfolio manager for the Fund to review on a daily basis the prices being assigned to each holding in the Fund and to notify the EVC of any price that she did not think reflected the holding's fair value.

14. Throughout the relevant period, the Evergreen Adviser's fund administration department emailed to Premo and every other EVC member weekly pricing summaries setting forth the pricing issues associated with several fair-valued securities, including the issues concerning the A-2 tranche of the CDO. From February 6, 2008 to June 3, 2008, Premo received 16 of these summaries -- nine after the CDO went into acceleration on March 27th. None of these pricing summaries contained any indication that the CDO had experienced an event of default or had stopped generating cash flow for the Ultra Fund. In fact, each of the summaries stated that "[t]here has been no new information regarding this security; therefore, no change to the current valuation process was needed." Nevertheless, at no point during that period, did Premo take any step to ensure that the EVC was aware that the CDO had experienced an event of default, had stopped generating cash flow for the Ultra Fund, and would likely not resume generating cash flow for ten or more years.

15. On June 2, 2008, the Ultra Fund's Board of Trustees decided to value a security that Premo had proposed pricing at \$61 at \$9.50. Two days later, on June 4th, Premo and the senior portfolio manager informed the EVC that they had performed an analysis on the CDO that doubled the default scenarios and that generated a value of \$53.72 -- 20% less than its current price of \$67.47. Premo and the senior portfolio manager then recommended valuing the CDO at \$53.72, and the EVC concurred. Premo said nothing to the EVC on June 4th about the fact that the CDO had stopped making its scheduled payments to the Fund and was not expected to resume making payments for several years to come. After learning on the afternoon of June 9, 2008 that the CDO had experienced an event of default, had gone into acceleration, and had not made the payment that had been due to the Ultra Fund in early May 2008, the chair of the EVC sent an email to the Evergreen Adviser's pricing administrator, directing him to call a meeting of the EVC to address these facts. In addition, the chair asked "Are these new developments . . . these points definitely were not clearly stated at the [June 4, 2008] meeting?" After receiving the

chair's email, the pricing administrator sent an email to, among others, Premo, the EVC chair, the head of the Evergreen Adviser's risk management department, and the Evergreen Adviser's chief operating officer. In this message, the pricing administrator directed the following statement to Premo: "Lisa & Team – New information has been presented requiring another review and discussion on [the CDO]. On last week's EVC call, there was no discussion regarding the A2 Tranche missing its May payment or cashflows being diverted to the A1 tranche. Was this information built into the analysis you did on 6/4? If not, would the analysis change?" Premo did not challenge the pricing administrator's assertion that the information concerning the CDO missing its May payment and stopping its cash flow was "new" and that this information had not been discussed during the June 4th EVC meeting.

16. For the reasons set forth above, the CDO was overvalued from at least March 27, 2008 to June 9, 2008. Because the CDO was priced higher than it should have been, the NAV of the Ultra Fund was overstated during this period and the Evergreen Adviser received higher advisory fees than it would have had the Fund's NAV been accurately reported. Also for the reasons set forth above, the EVC was unaware from at least March 27, 2008 of material information concerning the CDO – namely that it had experienced an event of default, was in acceleration, and had stopped generating cash flow for the Fund.

D. VIOLATIONS

17. By failing to disclose to the EVC the CDO's event of default, acceleration, and cash flow stoppage, and by failing to include in her June 4, 2008 report to the EVC on the CDO any reference to these developments, thus rendering what she communicated to the EVC that day materially misleading, Premo willfully violated Sections 206(1) and 206(2) of the Advisers Act. Section 206(1) of the Advisers Act makes it unlawful for any investment adviser, directly or indirectly, to employ any device, scheme, or artifice to defraud any client or prospective client. Section 206(2) of the Advisers Act makes it unlawful for any investment adviser, directly or indirectly, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

18. As a result of the conduct described above, Premo willfully aided and abetted and caused the Evergreen Adviser's violation of Sections 206(1) and 206(2) of the Advisers Act. Through its failure to factor readily-available negative information concerning the CDO into its valuation of that security, the Evergreen Adviser provided an overstated NAV to the Ultra Fund, which, in turn, generated higher advisory fees paid by the Fund to the Adviser. Through these actions, the Evergreen Adviser breached its fiduciary duty to and defrauded the Ultra Fund in violation of Sections 206(1) and 206(2) of the Advisers Act. By failing to disclose to the EVC the CDO's event of default, acceleration, and cash flow stoppage, and by failing to include in her June 4, 2008 report to the EVC on the CDO any reference to these developments, thus rendering what she communicated to the EVC that day materially misleading, Premo provided knowing and substantial assistance to and thereby aided and abetted and caused the Evergreen Adviser's violation of this statute.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3356 / January 17, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 29920 / January 17, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14699

In the Matter of

**UBS Global Asset Management
(Americas) Inc.**

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 203(e) OF THE
INVESTMENT ADVISERS ACT OF 1940
AND SECTIONS 9(b) AND 9(f) OF THE
INVESTMENT COMPANY ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS, CIVIL
PENALTIES AND A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against UBS Global Asset Management (Americas) Inc. ("UBSGAM" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 203(e) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making

27 of 64

Findings, and Imposing Remedial Sanctions, Civil Penalties and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This proceeding concerns the misstatement of the Net Asset Values ("NAVs") of certain registered investment companies (the "Funds") managed by UBSGAM. UBSGAM failed to cause certain fixed-income securities in the portfolios of the Funds to be valued in accordance with the Funds' fair valuation procedures. UBSGAM's failure to properly fair value these securities resulted in a misstatement of the NAVs of the Funds.

2. In June 2008, UBSGAM purchased approximately 54 fixed-income securities from various broker-dealers for the Funds ("the Securities") for an aggregate purchase price of approximately \$22 million. Most of the Securities were part of subordinated tranches of non-agency mortgage-backed securities. Non-agency mortgage-backed securities are issued by private institutions; their underlying collateral generally consists of mortgages which do not conform to the requirements (size, documentation, loan-to-value ratios, etc.) for inclusion in mortgage-backed securities guaranteed or issued by Ginnie Mae, Fannie Mae or Freddie Mac. The Securities also included asset-backed securities and collateralized debt obligations. These securities were not listed or sold on any exchange, and there was not an active market for them.

3. Upon the Funds' purchases of the Securities, all but six of the Securities were valued at prices in excess of the transaction prices. The majority of the Securities were valued at prices at least 100% higher than the transaction prices.

4. The Securities were valued during this period using valuations provided by broker-dealers or a third-party pricing service (the "Pricing Sources") that did not appear to take into account the prices at which the Funds had purchased the Securities.

5. UBSGAM did not fair value the Securities until it held a meeting of the Global Valuation Committee ("GVC") on June 30, 2008, more than two weeks after UBSGAM began receiving reports ("Price Tolerance Reports") identifying the discrepancies between the purchase prices and the valuation of the Securities based on the Pricing Sources.

6. By initially using the valuations provided by the Pricing Sources instead of the transaction prices, the Funds did not follow their own written valuation procedures. These procedures required the Securities to be valued at the transaction price until UBSGAM received a response to a price challenge based on the discrepancy identified in the Price Tolerance Report or

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

the GVC made a fair value determination. The procedures provided that the transaction price could be used for up to five business days until a decision would need to be made as to the fair value. By failing to implement these procedures, the Funds violated Rule 38a-1 under the Investment Company Act and UBSGAM aided and abetted and caused the violations.

7. Because the Funds did not properly or timely fair value the Securities, the NAVs of the Funds were misstated between one cent and ten cents per share for several days in June 2008. Consequently, the Funds sold, purchased, and redeemed their shares based on inaccurately high NAVs on those days. The Funds thus violated Rule 22c-1 adopted pursuant to Section 22(c) of the Investment Company Act. UBSGAM aided and abetted and caused the Funds' violations of Rule 22c-1 under the Investment Company Act.

Respondent

8. **UBS Global Asset Management (Americas), Inc.**, is a registered investment adviser incorporated in Delaware and currently headquartered in New York. At the time of the transactions at issue, UBSGAM was headquartered in Chicago, Illinois. UBSGAM served as an investment adviser to the Funds during the period of the transactions described herein.

The Funds' Stated Valuation Procedures

9. Rule 22c-1 under the Investment Company Act prohibits selling, redeeming, or repurchasing any redeemable security except at a price based on the current net asset value of such security. Under Section 2(a)(41)(B) of the Investment Company Act, registered investment companies must use: (1) market values for portfolio securities with readily available market quotations; and (2) fair value for all other portfolio assets, as determined in good faith by the board of directors.

10. The Boards of the Funds established the methodologies to be used for valuing the Funds' assets and delegated the responsibility for implementing those methodologies to UBSGAM. UBSGAM appointed the GVC to carry out its valuation responsibilities pursuant to a list of Price Sources for each type of securities ("Pricing Hierarchies"). In general, where broker-dealers supplied market quotes on mortgage-backed securities that were more than three percent different from the prices supplied by the designated third-party pricing vendor, UBSGAM used the broker-dealer price for valuation purposes in lieu of the prices supplied by the third-party vendor. For most of the Securities, the GVC designated a particular broker-dealer to provide daily market quotes. The GVC designated a third-party pricing vendor the remainder of the Securities. The Boards reviewed the GVC's valuations for the purposes of either ratifying or adjusting the GVC's decisions.

11. The Funds' valuation procedures provided for various exceptions and deviations from valuations received from the designated Pricing Sources.

12. One exception provided that whenever the difference between the transaction price for a security and the Pricing Source valuation (referred to in the Funds' procedures as the "vendor price") was three percent or more:

Fund Treasury will have the Funds'/Accounts' custodian(s) go with the 'Trade Price' until a response is received in regards to the price challenge or until a fair market price can be determined. Using the 'Trade Price' to value the security can be used for up to five (5) business days until a decision will need to be made in terms of fair valuing the security. During the five (5) day period, the Valuation Committee can advise the Funds'/Accounts' custodian to switch back to the vendor price if it is deemed appropriate. If no decision is made by the end of the 5th business day then the Valuation Committee shall make a valuation determination.

13. The procedures thus required the Funds to use the transaction price (referred to by UBSGAM as the "trade price") as the value for a security for up to five business days whenever there was a variance of three percent or more between the transaction price and the quote or value obtained from a Pricing Source. The procedures also required that UBSGAM issue a price challenge to request justification from the Pricing Source for the price quoted. After receiving a response to the price challenge, the GVC could revert to the Pricing Source's quote price if justified. If no resolution was reached by the end of five business days after issuance of a Price Tolerance Report, the procedures required the GVC at that point to make a valuation determination.

14. As part of its compliance procedures, UBSGAM conducted automated price checks comparing transaction prices with internal valuations for recently purchased securities, which resulted in the creation of Price Tolerance Reports when the transaction price and quote price for a given security varied by three percent or more. When generated, Price Tolerance Reports were sent to the UBSGAM compliance department for investigation. The Price Tolerance Reports put UBSGAM on notice that the quotes it received may not accurately reflect the market for the security, and then the GVC was required to follow the above procedures.

The Procedures Actually Used

15. Between June 5 and June 25, 2008, UBSGAM caused the Funds to purchase the Securities from various broker-dealers.

16. Immediately after each purchase and pursuant to the Pricing Hierarchies, UBSGAM began using broker-dealer quotations to price 43 of the Securities; 11 were valued by using third-party vendor pricing services.

17. The quotations received from the broker-dealers for 28 of the 54 Securities were more than 100% higher than the transaction prices and, in some cases, were more than 1,000% higher. Additionally, during this period certain of the broker-dealers' market quotes were stale and were not priced daily. And, in some cases the prices were based on prior month-end prices.

18. The prices supplied by the third-party vendors similarly substantially exceeded the transaction prices.

19. Given the large variance between the transaction prices and prices from the Pricing Sources, Price Tolerance Reports were generated for almost all of the Securities. Certain members of UBSGAM's GVC received the first Price Tolerance Report on June 16, 2008, and received Price Tolerance Reports for most of the remaining Securities as the Funds purchased them.

20. The Securities, however, were not valued at the transaction price, despite the requirement under the procedures.

21. Also in contravention of the Funds' valuation procedures, UBSGAM did not issue challenges to the Pricing Sources for a majority of the Securities that appeared on the Price Tolerance Reports. When UBSGAM did issue challenges, it received responses for only a handful of the Securities. For the remaining Securities, UBSGAM did not follow up with the challenged Pricing Source or make fair value determinations at the end of five business days, as required by the valuation procedures. Instead, UBSGAM continued to use the substantially higher broker-dealer quotes and third-party vendor prices until June 30, 2008, when the GVC finally met to discuss the valuation issues relating to the Securities.

22. At the conclusion of the June 30 meeting, the GVC members decided to fair value the securities at the midpoint between the transaction price and the quote prices from Pricing Sources until they received responses to price challenges. The Boards subsequently ratified this decision.

23. Price challenges were not issued for a majority of the Securities until July 1, 2008, and they were never issued for some Securities.

UBSGAM Caused the Funds to Misstate their NAVs

24. As a result of the conduct described in paragraphs 1 through 23 above, the NAVs of the Funds were misstated between one cent and ten cents for several days during June 2008.

Violations

25. The Funds misstated their NAVs and executed transactions in redeemable securities at prices not based on current net asset values. The Funds thus violated Rule 22c-1 under the Investment Company Act, which prohibits selling, redeeming, or repurchasing any redeemable security except at a price based on the current net asset value of such security. UBSGAM willfully² aided and abetted and caused these violations.

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

26. As described above, the Funds did not adequately implement valuation procedures and thus violated Rule 38a-1 under the Investment Company Act, which requires each registered investment company to adopt and implement written policies and procedures reasonably designed to prevent violations of the federal securities laws by the funds. UBSGAM willfully aided and abetted and caused these violations.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent UBSGAM's Offer.

Accordingly, pursuant to Section 203(e) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent UBSGAM cease and desist from committing or causing any violations and any future violations of Rules 22c-1 and 38a-1 under the Investment Company Act.

B. Respondent UBSGAM is censured.

C. Pursuant to Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act, Respondent shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$300,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies UBS Global Asset Management (Americas), Inc. as a Respondent in these proceedings and includes the file number of these proceedings, a copy of which cover letter and wire transfer, money order or check shall be sent to Robert Burson, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Boulevard, Suite 900, Chicago, Illinois 60604.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

Release No. 34-66164; File No. 4-645

Comment Request for Study Regarding Financial Literacy Among Investors

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: In connection with a study regarding financial literacy among investors as mandated by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), the Securities and Exchange Commission is requesting public comment on the following: methods to improve the timing, content, and format of disclosures to investors with respect to financial intermediaries, investment products, and investment services; the most useful and understandable relevant information that retail investors need to make informed financial decisions before engaging a financial intermediary or purchasing an investment product or service that is typically sold to retail investors, including shares of registered open-end investment companies; and methods to increase the transparency of expenses and conflicts of interests in transactions involving investment services and products, including shares of registered open-end investment companies.

DATES: Comments should be received on or before [insert date 60 days from publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>);
- or

- Send an e-mail to rule-comments@sec.gov. Please include **File Number 4-645** on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. All submissions should refer to **File Number 4-645**. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Lori J. Schock, Director, (202) 551-6500 or Mary S. Head, Deputy Director, (202) 551-6500, Office of Investor Education and Advocacy, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2551.

SUPPLEMENTARY INFORMATION:

Section 917 of the Dodd-Frank Act requires the Commission to conduct a study regarding financial literacy (the "Study") among investors and submit a report on the study to the Senate Committee on Banking, Housing, and Urban Affairs and the House of Representatives Committee on Financial Services no later than two years after enactment of the Dodd-Frank Act, that is, by July 21, 2012.

The provisions of Section 917(a) of the Dodd-Frank Act require that the Study include a number of specific components. In particular, Sections 917(a)(2)-(4) of the Dodd-Frank Act require that the Study identify:

- (i) methods to improve the timing, content, and format of disclosures to investors with respect to financial intermediaries, investment products, and investment services;
- (ii) the most useful and understandable relevant information that retail investors need to make informed financial decisions before engaging a financial intermediary or purchasing an investment product or service that is typically sold to retail investors, including shares of registered open-end investment companies ("mutual funds"); and
- (iii) methods to increase the transparency of expenses and conflicts of interest in transactions involving investment services and products, including shares of mutual funds.

As part of its study of the issues raised in Sections 917(a)(2)-(4) of the Dodd-Frank Act, the Commission's Office of Investor Education and Advocacy is conducting investor testing using qualitative and quantitative public opinion research methods. In addition, the Commission is soliciting public comment on each of the issues identified in Sections 917(a)(2)-(4) of the Dodd-Frank Act.¹ All interested parties are invited to submit their views on one or more of these issues. Comments will be of greatest assistance if accompanied by supporting data and analysis.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

Dated: January 17, 2012

¹ In April 2011, pursuant to Section 917(a)(5) of the Dodd-Frank Act, the Commission formally solicited public comment regarding the most effective existing private and public efforts to educate investors and has received more than 80 public comments. See Securities Exchange Act Release No. 64306 (April 19, 2011), [76 FR 22740 (April 22, 2011)]. The public comments are available at <http://www.sec.gov/comments/4-626/4-626.shtml>.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 66173 / January 18, 2012

Admin. Proc. File No. 3-14618

In the Matter of the Application of

KEATH ALLEN WARD

For Review of Disciplinary Action Taken by

FINRA

CORRECTED ORDER
DISMISSING
APPLICATION FOR
REVIEW

On November 9, 2011, Keath Allen Ward, formerly a registered representative associated with CFD Investments, Inc. ("CFD"), a FINRA member firm, filed an application for review of a FINRA disciplinary action. FINRA barred Ward pursuant to FINRA Rule 9552(h)¹ for failing to respond to a request to provide information pursuant to Rule 8210.² In his application for review, Ward appealed his suspension and bar. Ward represented that he had responded to FINRA information requests in November 2010. Ward stated that he subsequently had gone through a contested divorce and moved from his residence. He further stated that he had not received any subsequent letter from FINRA and wanted "the chance to clear this matter up."

On December 21, 2011, FINRA filed with the Commission a "Motion to Dismiss Application for Review and to Stay Briefing Schedule." In its motion, FINRA states that, by letter dated December 14, 2011, FINRA terminated the suspension and vacated the bar imposed on Ward to afford him the opportunity to provide the requested information to FINRA. FINRA accordingly asserts that Ward's application for review is now moot and requests that the

¹ FINRA Rule 9552(h) provides that, if FINRA suspends a person subject to FINRA's jurisdiction who fails to provide information and that person subsequently fails to request termination of the suspension within three months, that person will be automatically barred.

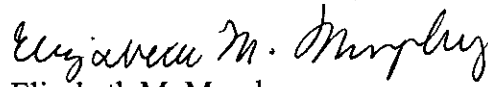
² FINRA Rule 8210 requires persons associated (or formerly associated) with a member firm to provide information with respect to any matter related to an investigation, complaint, or proceeding.

Commission dismiss the application for review. Under the circumstances, we find it appropriate to grant FINRA's motion to dismiss Ward's application for review.

Accordingly, it is ORDERED that Keath Allen Ward's application for review be, and it hereby is, dismissed; and it is further

ORDERED, that the briefing schedule order issued December 1, 2011 be, and it hereby is, rescinded.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Aquilar
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66181 / January 18, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3357 / January 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14700

In the Matter of

GREGORY BARTKO, ESQ.,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934 AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940
AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Gregory Bartko, Esq. ("Respondent" or "Bartko").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Bartko, age 58, was an attorney licensed to practice law in Georgia, Michigan, and North Carolina and has represented clients before the Commission. From 1999 through the date of his conviction, Bartko was also the president and chief executive officer of Capstone Partners, LC ("Capstone"), a broker-dealer registered with the Commission. During the relevant time, Capstone was also registered as an investment adviser with the states of Georgia and North Carolina but has since failed to renew its registration with these states.

30 of 64

B. ENTRY OF THE RESPONDENT'S CRIMINAL CONVICTION

2. On November 18, 2010, a judgment of conviction was entered against Bartko in *United States v. Gregory Bartko*, No. 5:09-CR-321, in the United States District Court for the Eastern District of North Carolina (Western Division), finding him guilty of one count of conspiracy in violation of 18 U.S.C. § 371, four counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, and one count of the sale of unregistered securities in violation of 15 U.S.C. §§ 77e and 77x and 18 U.S.C. § 2.

3. The counts of the criminal indictment for which Bartko was convicted alleged, inter alia, that Bartko, along with others, collected hundreds of thousands of dollars in proceeds obtained through the fraudulent sales of investments, transferred these funds to bank accounts he and others controlled in Georgia, California, and North Carolina, and then converted a significant portion of these funds to his and others' personal use.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act; and

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by

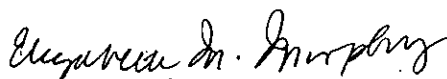
Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.360.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66182 / January 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14701

	:	
In the Matter of	:	
	:	
GREGORY BARTKO, ESQ.,	:	ORDER OF SUSPENSION PURSUANT
	:	TO RULE 102(e)(2) OF THE
Respondent.	:	COMMISSION'S RULES OF PRACTICE
	:	

I.

The Securities and Exchange Commission ("Commission") deems it appropriate to issue an order of forthwith suspension of Gregory Bartko ("Bartko") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].¹

II.

The Commission finds that :

1. Bartko was an attorney licensed to practice law in Georgia, Michigan and North Carolina.
2. On November 18, 2010, a judgment of conviction was entered against Bartko in *United States v. Gregory Bartko*, No. 5:09-CR-321, in the United States District Court for the Eastern District of North Carolina (Western Division), finding him guilty of one count of conspiracy in violation of 18 U.S.C. § 371, four counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, and one count of the sale of unregistered securities in violation of 15 U.S.C. §§ 77e and 77x and 18 U.S.C. § 2.

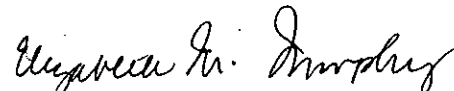
¹ Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

III.

In view of the foregoing, the Commission finds that Bartko has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED that Bartko is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.


Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 19, 2012

In the Matter of

**TapSlide, Inc.,
TTC Technology Corp. (f/k/a SmarTire
Systems Inc.),
TWL Corp.,
TXP Corp.,
Valentec Systems, Inc. (f/k/a Acorn
Holdings Corp.),
Verdant Technology Corp., and
VPGI Corp.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of TapSlide, Inc. because it has not filed any periodic reports since the period ended July 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of TTC Technology Corp. (f/k/a SmarTire Systems Inc.) because it has not filed any periodic reports since the period ended April 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of TWL Corp. because it has not filed any periodic reports since the period ended March 31, 2008.

32 of 64

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of TXP Corp. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Valentec Systems, Inc. (f/k/a Acorn Holdings Corp.) because it has not filed any periodic reports since the period ended September 30, 2007.

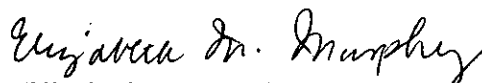
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Verdant Technology Corp. because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of VPGI Corp. because it has not filed any periodic reports since it filed a registration statement on March 31, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on January 19, 2012, through 11:59 p.m. EST on February 1, 2012.

By the Commission.


Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66184 / January 19, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14702

In the Matter of

**TapSlide, Inc.,
TTC Technology Corp.
(f/k/a SmarTire Systems Inc.),
TWL Corp.,
TXP Corp.,
Valentec Systems, Inc.
(f/k/a Acorn Holdings Corp.),
Verdant Technology Corp., and
VPGI Corp.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents TapSlide, Inc., TTC Technology Corp. (f/k/a SmarTire Systems Inc.), TWL Corp., TXP Corp., Valentec Systems, Inc. (f/k/a Acorn Holdings Corp.), Verdant Technology Corp., and VPGI Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. TapSlide, Inc. (CIK No. 1358652) is a revoked Nevada corporation located in Broomfield, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TapSlide is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the

33 of 64

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No.

ADMINISTRATIVE PROCEEDING

File No.

In the Matter of

**TapSlide, Inc.,
TTC Technology Corp.
(f/k/a SmarTire Systems Inc.),
TWL Corp.,
TXP Corp.,
Valentec Systems, Inc.
(f/k/a Acorn Holdings Corp.),
Verdant Technology Corp., and
VPGI Corp.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents TapSlide, Inc., TTC Technology Corp. (f/k/a SmarTire Systems Inc.), TWL Corp., TXP Corp., Valentec Systems, Inc. (f/k/a Acorn Holdings Corp.), Verdant Technology Corp., and VPGI Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. TapSlide, Inc. (CIK No. 1358652) is a revoked Nevada corporation located in Broomfield, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TapSlide is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the

period ended July 31, 2009, which reported a net loss of over \$275,000 for the prior six months. As of January 6, 2012, the company's stock (symbol "TSLI") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. TTC Technology Corp. (f/k/a SmarTire Systems Inc.) (CIK No. 1057293) is a British Columbia Corporation located in Lehigh Acres, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TTC Technology is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended April 30, 2009, which reported a net loss of over \$2.2 million for the prior nine months. As of January 6, 2012, 2011, the company's stock (symbol "TCLIF") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. TWL Corp. (CIK No. 101704) is a permanently revoked Nevada corporation located in Carrollton, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TWL is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2008, which reported a net loss of over \$9 million for the prior nine months. On October 19, 2008, TWL filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Texas, which was converted to Chapter 7, and the case was still pending as of January 18, 2012. As of January 6, 2012, the company's stock (symbol "TWLO") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. TXP Corp. (CIK No. 1171749) is a revoked Nevada corporation located in Richardson, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TXP is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over \$7 million for the prior nine months. TXP filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas on June 19, 2009, and the case was closed on June 8, 2011. As of January 6, 2012, the company's stock (symbol "TXPO") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Valentec Systems, Inc. (f/k/a Acorn Holdings Corp.) (CIK No. 737243) is a void Delaware corporation located in Minden, Louisiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Valentec Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of over \$5.9 million for the prior nine months. As of January 6, 2012, the company's stock (symbol "VSYN") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Verdant Technology Corp. (CIK No. 1298700) is a forfeited Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Verdant Technology is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2008, which reported a net loss of over \$1.4 million for the prior twelve months. As of January 6, 2012, the company's stock (symbol "VTHC") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. VPGI Corp. (CIK No. 755229) is a Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VPGI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2008, which reported a net loss of over \$98,000 for the prior nine months. As of January 6, 2012, the company's stock (symbol "VPGC") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

9. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

10. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each

class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Chairman Schapiro
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66191 / January 19, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14703

In the Matter of

e-Smart Technologies, Inc.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent e-Smart Technologies, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

E-Smart Technologies, Inc. ("ESTT," "e-Smart" or "Respondent")¹ (CIK No. 1112999) is a Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ESTT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2007, which reported a net loss of \$12,045,780 for the prior twelve months. On October 17, 2008, the Commission suspended the trading of e-Smart's securities pursuant to Section 12(k) of the Exchange Act. As of December 15, 2010, the common stock of ESTT was quoted on the over the counter markets.

¹The short form of each issuer's name is also its stock symbol.

33a of 64

B. DELINQUENT PERIODIC FILINGS

As described in more detail above, the Respondent is delinquent in its periodic filings with the Commission, have repeatedly failed to meet its obligations to file timely periodic reports, and failed to heed delinquency letters sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires issuers to file quarterly reports.

As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may

be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940

Release No. 3358 / January 19, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14704

In the Matter of

CHARLES P. COPELAND,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Charles P. Copeland ("Charles Copeland" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Charles P. Copeland, age 64, resides in Yucaipa, California. Charles Copeland is Copeland Wealth Management's founder and 33% part-owner and was its president. Copeland Wealth Management is an investment adviser registered with the Commission. Charles Copeland received his B.S. degree in Business Administration and received his M.S. in Taxation. Charles Copeland obtained his CPA license in November 1979 in California. Charles Copeland holds a series 65 license.

2. On October 19, 2011, a final judgment was entered by consent against Charles Copeland, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Charles P. Copeland, Copeland Wealth Management, A Financial Advisory Corporation, and Copeland Wealth Management, A Real Estate Corporation, Civil Action No. 11-08607, in the United States District Court for the Central District of California.

3. The Commission alleges in its complaint that from 2003 through May 31, 2011 in connection with the sale of limited partnership interests by Copeland Wealth Management and unregistered investment adviser Copeland Wealth Management, a Real Estate Corporation, Charles Copeland made material misrepresentations and omissions regarding: (1) the use of investor funds, (2) conflicts of interest, (3) guaranteed returns, (4) the unauthorized trading of put options, and (5) the payment of undisclosed real estate commissions and other related compensation.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Charles Copeland's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Charles Copeland be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a

customer, whether or not related to the conduct that served as the basis for the Commission order;
and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct
that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 20, 2012

In the Matter of

**Amstem Corporation,
Anesiva, Inc.,
Balsam Ventures, Inc., and
Catcher Holdings, Inc.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Amstem Corporation because it has not filed any periodic reports since the period ended December 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Anesiva, Inc. because it has not filed any periodic reports since the period ended September 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Balsam Ventures, Inc. because it has not filed any periodic reports since the period ended September 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Catcher Holdings, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the

securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on January 20, 2012, through 11:59 p.m. EST on February 2, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66198 / January 20, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14706

In the Matter of

**Amstem Corporation,
Anesiva, Inc.,
Balsam Ventures, Inc., and
Catcher Holdings, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Amstem Corporation ("AMST")¹ (CIK No. 1360479) is a defaulted Nevada corporation located in San Francisco, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AMST is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2009, which reported a net loss of \$506,225 for the prior nine months. As of January 18, 2012, the common stock of AMST was quoted on OTC Link, had ten market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

¹The short form of each issuer's name is also its stock symbol.

2. Anesiva, Inc. ("ANSVQ") (CIK No. 1131517) is a void Delaware corporation located in South San Francisco, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ANSVQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2009, which reported a net loss of \$13,161,000 for the prior nine months. On January 15, 2010, ANSVQ filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of California, which was still pending as of October 26, 2011. As of January 18, 2012, the common stock of ANSVQ was quoted on OTC Link, had ten market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Balsam Ventures, Inc. ("BSVN") (CIK No. 1103092) is a Nevada corporation located in Bellingham, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BSVN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2009, which reported a net loss of \$79,255 for the prior nine months. As of January 18, 2012, the common stock of BSVN was quoted on OTC Link, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. Catcher Holdings, Inc. ("CTHH") (CIK No. 1230802) is a void Delaware corporation located in Portland, Oregon with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CTHH is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of \$11,359,864 for the prior nine months. As of January 18, 2012, the common stock of CTHH was quoted on OTC Link, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66205 / January 20, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14707

In the Matter of

LEO T. BUGGY,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Leo T. Buggy ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

37 of 64

1. From June 1982 through January 2009, Buggy was a registered representative associated with AXA Advisors, LLC, a broker-dealer registered with the Commission. Buggy, 53 years old, resided in Green River, Wyoming, and is currently incarcerated at USP Leavenworth, Leavenworth, Kansas.

2. On July 17, 2009, Buggy pled guilty to one count each of mail fraud, wire fraud, and money laundering in violation of Title 18 United States Code, Sections 1341, 1343, and 1957, before the United States District Court for the District of Wyoming, in United States v. Leo T. Buggy, No. 09-CR-190-B. On October 16, 2009, Buggy was sentenced to a prison term of 46 months followed by three years of supervised release and ordered to make restitution in the amount of \$1,220,067.80.

3. The counts of the criminal information to which Buggy pled guilty alleged, inter alia, that Buggy knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money from his clients at AXA Advisors by means of false and fraudulent pretenses, representations, and promises, which scheme was furthered by the use of wire communications and the mail.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Buggy's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Buggy be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in any offering of penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a

customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Aguilar
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66200 / January 20, 2012

Admin. Proc. File No. 3-14308

In the Matter of the Application of

MIDAS SECURITIES, LLC, and JAY S. LEE
c/o John Courtade, Esq.
Law Office of John Courtade
4408 Spicewood Springs Road
Austin, TX 78759

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Unregistered Sales of Securities

Conduct Inconsistent with Just and Equitable Principles of Trade

Failure to Establish Written Supervisory Procedures

Failure to Supervise

Former member firm of registered securities association engaged in the unregistered sale of securities in violation of Securities Act and association's rules and failed, together with its president, to maintain adequate written supervisory procedures and exercise reasonable supervision over the firm's registered representatives engaging in unregistered sales. *Held*, association's findings of violations and sanctions imposed *sustained*.

APPEARANCES:

John Courtade, of the Law Office of John Courtade, and *Irving Einhorn*, of the Law Offices of Irving Einhorn, for *Midas Securities, LLC*, and *Jay S. Lee*.

Marc Menchel, *Alan Lawhead*, and *Leavy Matthews III*, for Financial Industry Regulatory Authority, Inc.

38 of 64

Appeal filed: March 24, 2011
Last brief received: July 27, 2011

I.

Midas Securities, LLC ("Midas Securities" or the "Firm"), formerly a FINRA member firm,¹ and Jay S. Lee (collectively, the "Applicants"), Midas's president and chief executive officer, appeal from a FINRA disciplinary action.² FINRA found that Midas violated Section 5 of the Securities Act of 1933 and NASD Conduct Rule 2110 by unlawfully selling securities without a registration statement in effect or an available exemption. In connection with these sales, FINRA also found that Applicants violated NASD Conduct Rules 3010 and 2110 by failing to maintain adequate written supervisory procedures and to supervise reasonably Firm registered representatives who engaged in the unregistered sales.³ FINRA fined Midas \$80,000, fined Lee \$50,000, suspended Lee in all principal capacities for two years, and assessed costs.⁴ We base our findings on an independent review of the record.

¹ Midas voluntarily withdrew its FINRA membership, effective January 12, 2010.

² On July 26, 2007, the Commission approved a proposed rule change NASD filed reflecting its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with its consolidation with NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because this disciplinary action was instituted after consolidation, references to FINRA herein include references to NASD.

³ NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." FINRA has since recodified NASD Rule 2110 as new FINRA Rule 2010, without substantive change. *See* Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174. NASD Conduct Rule 3010, as discussed *infra* in notes 64-67 and accompanying text, requires members to have adequate written procedures as well as a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable NASD Rules."

⁴ FINRA's complaint also charged similar violations against two other member firms and various associated persons for their sale of iStorage stock, although none of the firms or associated persons were alleged to have been related. World Trade Financial Corp. and three associated persons also appealed from the underlying FINRA decision, which is the subject of a separate Commission opinion in *World Trade Financial Corp.*, Exchange Act Rel. No. 66114 (Jan. 6, 2012), __ SEC Docket __.

II.

Many of the core facts are not in dispute.⁵ During the period from December 20, 2004, to February 11, 2005, Midas sold 760,000 shares of a thinly traded penny stock, iStorage, Inc. ("iStorage"), for Petar D. Mihaylov ("Mihaylov"), who held an account at Midas. iStorage's securities traded in the over-the-counter market and were quoted on the "Pink Sheets."⁶ Midas registered representatives Benjamin Centeno and Jeffrey Santohigashi admitted that they sold the stock for Mihaylov.⁷ None of the transactions was registered with the Commission.

A. Background

Beginning in 1999, Midas was a registered broker-dealer located in Anaheim, California. Midas's business consisted primarily of providing direct market access to the U.S. securities markets for orders originating in Korea. Lee joined Midas in 2002 and was its president, CEO, chief compliance officer ("CCO"), chief supervisory officer ("CSO"), and Financial and Operations Principal ("FINOP").

In 2003, Lee expanded Midas's business to retail brokerage by hiring several salespersons from Equitrade Securities Corp. ("Equitrade"), which was closing. Midas's new sales staff included Centeno and Santohigashi, who specialized exclusively in purchasing and selling securities for customers in the over-the-counter market. Centeno and Santohigashi had limited securities experience: Centeno testified that he formerly worked as a part-time employee at Equitrade and had been a registered representative since 2001; Santohigashi testified that he worked as a clerk in Equitrade's back office and did not become a registered representative until June 2003, after joining Midas.

Mihaylov opened his Midas account in December 2003. As part of his account application, Mihaylov represented that he was a Bulgarian national, residing in Pazardjik, Bulgaria, employed as a "web designer," and interested in investing in "long-term growth." However, several of Mihaylov's initial representations were inaccurate. The registered

⁵ The parties stipulated to many facts relating to the unregistered sales at issue in this case. *See generally James F. Glaza*, 57 S.E.C. 907, 914 (2004) ("[S]tipulated facts serve important policy interests . . . [and] should not be set aside without a showing of compelling circumstances.").

⁶ The "Pink Sheets," now known as OTC Link, is an electronic quotation system, operated by OTC Markets Group Inc., which displays quotes and last sale information for many over-the-counter securities. At the time of the stock sales in question, the Pink Sheets had no listing requirements for companies whose securities were quoted on its system.

⁷ FINRA also charged Centeno and Santohigashi. Before commencement of FINRA's hearing, both consented, without admitting or denying the allegations, to an order finding their iStorage sales were violative of Securities Act Section 5, fining each \$10,000, and suspending Centeno and Santohigashi in all capacities for thirty and twenty days, respectively.

representatives testified that they later learned that Mihaylov was a stock promoter for penny stock companies and was interested exclusively in selling stock that he held in the short term. Santohigashi testified that, after opening his account, Mihaylov did "quite a bit of business" liquidating large blocks—typically "500,000 to a million shares"—of "Bulletin Board and Pink Sheet securities."⁸

By March 2004, Centeno helped negotiate a Finder's Agreement between Midas and Mihaylov. Under the agreement, Midas referred companies to Mihaylov for him to promote. In turn, Mihaylov paid Midas 10% of any cash or stock he received from the companies that Midas had referred. Both registered representatives testified that Lee was aware of the Finder's Agreement and accepted Mihaylov's referral fees—often in stock of the company that Mihaylov promoted—on behalf of the Firm.

B. Midas's Policies and Procedures on Selling Restricted Securities

Lee testified that he was responsible for ensuring that the Firm's practices and procedures were "correct, full, and complete." Midas's Supervisory Procedures Manual (the "Supervisory Manual") set forth written procedures applicable to the sale of "restricted securities," which it defined to include "[s]ecurities that are acquired directly or indirectly from the issuer or from an affiliate of the issuer, in a transaction not involving any public offering." According to the Supervisory Manual, Midas's registered representatives were required to conduct "[a]ll restricted securities transactions" in accordance with Securities Act Rule 144 and to contact Lee, as CSO, for his approval "[b]efore conducting a restricted security transaction."⁹

Firm personnel testified that, in practice, the Firm identified restricted securities by inspecting whether the stock certificate deposited at the Firm bore a restrictive legend against the resale of the security.¹⁰ According to Centeno, a stock certificate that lacked a restrictive legend was "free trading" and "we would [then] send it to the clearing firm," which in consultation with iStorage's transfer agent, would reissue the stock in "street name" to be resold to the public.

⁸ In July 15, 2008, in an unrelated proceeding, the Commission filed a civil complaint against Mihaylov alleging he "carried out a \$32 million pump-and-dump fraud scheme," involving "so-called 'free trading' stock" of another penny stock company. The case, which alleges, among other things, that Mihaylov used a "spam e-mail campaign" to orchestrate the fraud, remains pending. *SEC v. Homeland Safety Int'l, Inc.*, 3-08CV1197-0 (filed July 15, 2008, N.D. Tx.).

⁹ Rule 144 of the Securities Act provides a non-exclusive safe harbor from registration for resales of restricted securities. 17 C.F.R. § 230.144.

¹⁰ A restrictive legend is a "statement placed on restricted stock notifying the holder that the stock may not be resold without registration." *Charles F. Kirby*, 56 S.E.C. 44, 48 (2003), *petition denied sub nom.*, *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004).

Santohigashi agreed, stating that, "once it came back from the transfer agent as free trading, that is the point at which it would be okay to sell it."¹¹

C. Applicants' Prior FINRA Disciplinary Action

On November 10, 2004, just prior to the conduct at issue, Midas and Lee executed a letter of Acceptance, Waiver and Consent ("AWC") to settle FINRA disciplinary action involving the sale of restricted securities. The AWC stated that FINRA charged Applicants with violating Securities Act Section 5 and NASD Rule 2110 by selling 125,000 shares of Midas's parent company, Midastrade.com, Inc., without a registration statement in effect or an available exemption. According to the AWC, although "there was no trading restriction legend" on the stock certificate, the shares were restricted from resale. The AWC further stated that Lee had "authorized these sales" on behalf of the Firm.

In a corrective action statement accompanying the AWC, Lee assured FINRA that "the [F]irm is committed to not let an incident like this happen again." He represented that Midas had "done a thorough review of procedures for the acceptance of restricted and Rule 144 securities" and would "obtain an expert opinion such as outside legal counsel when it is unclear if securities are unregistered or registered." On December 27, 2004, FINRA accepted the AWC, censured and fined them \$10,000. As part of the agreement, the AWC stated that "[t]he AWC will become part of [Applicants'] permanent disciplinary record and may be considered in any future actions brought by [FINRA]."¹²

D. iStorage

The predecessor of iStorage was incorporated in 1997 as Camryn Information Services, Inc. ("Camryn"), a Delaware shell company. From 1999 until November 2004, Camryn's corporate charter was deemed void by the State of Delaware for non-payment of taxes. On November 3, 2004, Camryn entered into a reverse merger with iStorage, a development-stage

¹¹ William Cantrell, another Midas employee, discussed *infra* in text following note 24, testified that it was the Firm's practice to assume that a stock certificate that lacked a restrictive legend was freely tradable, requiring no investigation of the stock before selling it in the market.

¹² The AWC and Lee's corrective action statement were admitted into evidence. Applicants also stipulated to many of the facts contained in those documents.

company, that had been in operation since May 28, 2004.¹³ The resulting entity of the reverse merger was renamed iStorage.¹⁴

There was limited information available about iStorage on the Pink Sheets Web site at the time Midas made the sales in question. iStorage described itself as a developer of "network storage solutions" that partnered with leading software and hardware providers. An unaudited financial statement reported that, as of October 31, 2004, iStorage had little operating history, no earnings, and a net operating loss of \$205,000. At the time of its merger with Camryn, iStorage had only four shareholders, all of whom were previous shareholders of Camryn. Three of the iStorage shareholders each owned 1,000,000, or 12.5%, of the outstanding and issued shares (the "12.5% Shareholders"), and the remaining iStorage shareholder owned 5,000,000, or 62.5%, of the outstanding shares (the "62.5% Shareholder").

Also in the online materials was a legal opinion, dated November 2, 2004 (before Camryn entered the reverse merger), from Bertsch & Associates, PC, a law firm representing the 12.5% Shareholders (the "Bertsch Legal Opinion"). The Bertsch Legal Opinion requested that Camryn's transfer agent,¹⁵ Routh Stock Transfer, Inc. ("Routh Transfer"), remove the restrictive legends from the 12.5% Shareholders' Camryn stock certificates. In support of its request, the law firm stated that the shareholders had held the shares for "more than two years" and none had been "an officer, director or 10% shareholder of the company for the previous three months" and that,

¹³ Statement of Financial Accounting Standards No. 7 defines a development-stage company "as a business devoting substantially all of its efforts to establishing a new business in which either: (1) planned principal operations have not commenced, or (2) there have been no significant revenues therefrom." *Russell Ponce*, 54 S.E.C. 804, 806 n.9 (2000), *aff'd*, 345 F.3d 722 (9th Cir. 2003).

¹⁴ See *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies*, Securities Act Rel. No. 8587 (July 15, 2005), 85 SEC Docket 3697, 3698 (discussing mechanics of a "reverse merger"); *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 344 & n.4 (S.D.N.Y. 1998).

¹⁵ A transfer agent conducts various stock-related functions for an issuer, including recording changes of ownership, maintaining the security holder records, canceling and issuing stock certificates, and distributing dividends. See *Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1090-91.

under Securities Act Rule 144(k),¹⁶ it believed that the 12.5% Shareholders were not "affiliates" of Camryn.¹⁷

Although it was error for the Bertsch Legal Opinion to state that the 12.5% Shareholders' percentage of ownership in Camryn was less than 10% for the previous three months, Routh Transfer subsequently removed the restrictive legends from their Camryn stock certificates. On November 3, 2004, iStorage issued a 3.334-to-1 forward stock split to the company's four shareholders, an action that more than tripled the number of their shares of what had become iStorage stock. Thereafter, between November 9 and November 15, 2004, the 12.5% Shareholders conveyed up to 5.2 million of their iStorage shares to various individuals and entities, several of which were stock promoters and marketers. The shares of the 62.5% Shareholder were canceled at the time.¹⁸

In late December 2004, FINRA began investigating possible market manipulation in iStorage's stock, after receiving several unsolicited bulk e-mails or "spam," from an unidentified source, touting iStorage's stock. The e-mails heralded iStorage as an "UNDISCOVERED STOCK GEM," claimed that a "big PR campaign [was] underway," and encouraged recipients of the e-mail to "GET IN NOW" because iStorage's share price was about to "EXPLODE."¹⁹ The spam campaign coincided with several upbeat press releases issued by iStorage at the time, beginning with its announcement on December 8, 2004, that its stock had started trading on the Pink Sheets. Other press releases followed in rapid succession, announcing that the company had secured several large purchase orders and expanded to global markets.

¹⁶ At the time, Securities Act Rule 144(k) permitted a non-affiliate, who had been a non-affiliate for the three-month period preceding the sale, to publicly resell restricted securities without being subject to any of the conditions in Rule 144 after holding the restricted securities for a period of at least two years, as computed in accordance with Rule 144(d). Rule 144(k) has since been repealed and replaced by Rule 144(b). *Revisions to Rules 144 and 145*, Securities Act Rel. No. 8869 (Dec. 17, 2007), 92 SEC Docket 143, 145 & n.23.

The record indicates that Bertsch & Associates, in addition to representing the 12.5% Shareholders, was a direct beneficiary of the removal of the restrictive legends, having acquired 227,000 iStorage shares from its clients that it later resold to the public through another broker-dealer for \$27,742, without registration.

¹⁷ An "affiliate" of an issuer is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1).

¹⁸ The 62.5% Shareholder's iStorage shares were canceled on November 15, 2004, when the individual resigned as iStorage's president.

¹⁹ Emphasis in original.

During the first month of iStorage's trading, iStorage averaged a daily trading volume of 357,781 shares. iStorage's stock began selling on December 9, 2004, at \$0.65 per share. Its share price fell to \$0.13 by year end and continued declining to \$0.05 by February 2005. By March 24, 2005, over 3.7 million iStorage shares had been publicly sold in the over-the-counter market without registration.

E. Midas's Unregistered Sales of 760,000 Shares of iStorage Stock

Pursuant to a stock purchase agreement, Mihaylov bought 760,000 shares of iStorage stock from one or more of the 12.5% Shareholders on November 4, 2004, at a price of \$0.0025 a share, for a total of \$1,900.²⁰ On November 15, 2004, iStorage issued the shares to Mihaylov in a single certificate that did not have a restrictive legend. On November 26, 2004, Mihaylov deposited all 760,000 shares of the recently issued iStorage stock into his Midas account and shortly thereafter requested that they be sold.²¹

Centeno and Santohigashi testified that they knew "nothing" about iStorage at the time of Mihaylov's deposit but conducted no inquiry into the issuer. Moreover, although Mihaylov had deposited a large block of recently issued securities, Centeno and Santohigashi admitted that they did not ask Mihaylov how he acquired the shares, what percentage of iStorage stock he owned, or whether he was associated or affiliated with iStorage. According to their testimony, neither salesman was aware of the existence of Mihaylov's stock purchase agreement with the 12.5% Shareholders until FINRA's hearing in this matter. They also admitted that they took no steps to determine whether the proposed iStorage stock sales were registered with the Commission or qualified for an exemption from registration. Instead, they relied on the fact that Mihaylov's stock certificate bore no restrictive legend against resale.

Upon receipt of Mihaylov's stock, they immediately forwarded it to the clearing firm and transfer agent for processing. Santohigashi, who handled many of Mihaylov's transactions, admitted that he did not contact the transfer agent before selling the stock. As part of Applicants' stipulations, Applicants conceded that neither the transfer agent nor the clearing firm considered itself responsible for conducting any inquiry into the circumstances surrounding a stock sale on

²⁰ The stock purchase agreement did not specify whether one or more of the 12.5% Shareholders would contribute shares to the sale to Mihaylov, although iStorage's stock ledger, which was admitted into evidence, indicates that the Mihaylov's stock originated from one of the 12.5% Shareholders.

²¹ Mihaylov did not testify at FINRA's hearing. There is no evidence in the record establishing that Midas referred iStorage to Mihaylov, pursuant to the parties' Finder's Agreement. See *supra* text following note 8.

behalf of Midas.²² Centeno and Santohigashi began selling Mihaylov's iStorage shares over the next two months. The sales yielded \$102,000 in proceeds for Mihaylov, which generated approximately \$2,200 in sales commissions.

F. Supervision of Centeno and Santohigashi

Midas's Supervisory Manual identified Lee as having "overall supervisory responsibilities" and "overall [responsibility for] general compliance with [FINRA] and SEC Rules and Regulations." It also listed Lee and a designated principal—which the Supervisory Manual did not otherwise identify—as responsible for the Firm's "Sales" department and supervision of associated persons. The supervisors' duties included reviewing the daily trade blotters and investigating questionable sales activity by Firm personnel.²³ The Supervisory Manual also specified, as noted, that sales personnel were to contact Lee before selling restricted securities for customers.

Lee testified that, as Midas's president, he was often away from the office, spending up to "two-third[s]" of his time "soliciting business" in Korea. He admitted that he "didn't know" the type of securities business Centeno and Santohigashi conducted until November 2005, after FINRA had begun its investigation into the Firm's iStorage sales. Lee also acknowledged that he did not know the Firm's procedures for determining if stock was restricted from resale or what level of inquiry was required of brokers prior to selling stock without registration. Lee explained that, because he "had no retail experience," he "rel[ied] a lot" on others in the office to supervise the Firm's retail trading, acknowledging that his supervisory style was generally to wait for personnel to come to him with issues.²⁴

Lee testified that, during the period at issue, William K. Cantrell ("Cantrell") was the direct supervisor responsible for overseeing the Firm's trading activities and registered representatives. The Firm's Supervisory Manual stated that Cantrell held the title "Manager and Supervisor of Market Making" and listed him, among four other individuals (including Lee), as a "Responsible Supervisor" who oversaw "associated persons." Lee hired Cantrell in June 2004 to replace a former supervisory principal who had left Midas in April 2004. However, Lee

²² According to the Firm's clearing agreement, Midas's clearing firm disclaimed any responsibility to conduct "any investigation into the facts surrounding any transaction that it" had with Midas.

²³ In his hearing testimony, Lee claimed that the Supervisory Manual identified another individual as responsible for Sales. However, the Supervisory Manual clearly lists "Sales" under Lee's set of responsibilities, not the other individual's.

²⁴ According to a FINRA examiner's testimony, Lee told FINRA staff during its investigation that, "if anybody at [Midas] had tried to undertake efforts to determine whether . . . unlegended certificate securities were free trading, he would not have allowed it." Because Lee's on-the-record ("OTR") testimony was not admitted into evidence at FINRA's hearing, we have not considered it, although FINRA and Applicants reference it in their briefs on appeal.

acknowledged that Cantrell's supervisory authority was limited: Cantrell could not hire and fire personnel, incur office expenses, address payroll issues, or grant the registered representatives any time off from work—all of which were handled by Lee. Lee testified that he informed Centeno and Santohigashi shortly after he hired Cantrell that Cantrell was their supervisor.

In his testimony, Cantrell denied having any supervisory responsibility at the Firm. Cantrell stated that he was hired exclusively to help "clean up" the Firm's back-office affairs, which he described as "a mess when [he] got [there]." Although Cantrell acknowledged that he had some prior supervisory experience,²⁵ he testified that, during his employment negotiations, Lee specifically rejected Cantrell's offer to become a supervisor at Midas, explaining that Lee "didn't want to pay [him]" for the added responsibilities. According to Cantrell, he was supervised by Lee, whom Cantrell described as "supervis[ing] everybody," and the only responsibility that Lee delegated to him was the approval of new account forms because of Lee's extended absences from the office.

Centeno and Santohigashi corroborated Cantrell's testimony, characterizing Cantrell's duties at the Firm as "administrative" and related to back-office operations. Both testified that Lee, not Cantrell, was their direct supervisor, but they explained that neither Lee nor anyone else at the Firm actually supervised their trading activity during the period at issue. As Santohigashi testified, Lee was often "busy doing other . . . things" and out of the office half of the time. Although the registered representatives had limited securities experience, both testified that they did not need any authorization from a supervisor to sell stock from customers' accounts, nor did the Firm place any restrictions on their trading activities.²⁶ In addition, both Centeno and Santohigashi testified that they were unaware of the Firm's November 2004 AWC regarding the Firm's sale of restricted stock of its parent company.

In their answer to FINRA's charges, Applicants admitted that the Firm had no written procedures addressing when its sales personnel should initiate an inquiry into the registration or exemption status of shares its customers proposed to sell. The Firm's procedures also lacked any guidance about how to determine whether a proposed sale required registration or qualified for an exemption from registration.

²⁵ According to the Central Registration Depository ("CRD"), which is publicly available at www.finra.org, Cantrell entered the securities industry in 1988. In 1997, Cantrell, while a FINOP for another member firm, was fined, censured, and suspended for failing to comply with the net capital requirements. *William K. Cantrell*, 52 S.E.C. 1322 (1997).

²⁶ Centeno and Santohigashi left Midas in January 2006: Centeno's Form U5 stated that he was "discharged" for "frequent absences," whereas Santohigashi resigned voluntarily, citing in his testimony Midas's financial difficulties as the reason. Cantrell was "discharged" from the Firm in September 2005.

G. FINRA's Proceeding

On May 12, 2009, a FINRA Hearing Panel found Midas's unregistered sales of 760,000 iStorage shares for Mihaylov violated Securities Act Section 5 and NASD Rule 2110.²⁷ The Hearing Panel also found that Midas and Lee violated NASD Rules 3010 and 2110 by failing to adequately supervise Centeno and Santohigashi and by failing "to establish and maintain adequate supervisory procedures to achieve compliance with the requirements of Section 5." The Hearing Panel held that Lee was responsible for the Firm's supervisory failings, finding "Cantrell to be far more credible than Lee on the subject of Cantrell's duties and responsibilities" and rejecting "Lee's claim that Cantrell was [the registered representative's] designated supervisor."

On March 3, 2011, FINRA's National Adjudicatory Council (the "NAC") affirmed the Hearing Panel's findings of liability, including its determination that Lee was responsible for supervising Midas's trading activities. The NAC further upheld the Hearing Panel's imposition of a two-year suspension against Lee as a principal for his failure to supervise and \$30,000 fine against Midas for its unregistered sales, but decided to increase the fines assessed against Midas and Lee for their supervisory failures, fining them each \$50,000.²⁸ This appeal followed.

III.

A. Violations of Securities Act Section 5

1. Securities Act Section 5

Section 5(a) of the Securities Act prohibits the "sale" of any securities, in interstate commerce, unless a registration statement is in effect as to the offer or sale of such securities or there is an applicable exemption from the registration requirements.²⁹ Section 5(c) of the Securities Act prohibits the "offer for sale" of any securities, unless a registration statement has been filed as to such securities or an exemption is available.³⁰ The purpose of the registration requirements is to "protect investors by promoting full disclosure of information thought

²⁷ Before commencement of FINRA's hearing, Lee consented to findings that he failed to update his Form U4 to reflect his receipt of a FINRA Wells notice regarding the charges in this matter. Lee was suspended forty-five days and fined \$15,000.

²⁸ The NAC also prohibited Midas "from receiving and selling unregistered securities until" it revises its written procedures to comply with Securities Act Section 5, based on a review by an independent consultant, acceptable to FINRA. As noted, Midas has since withdrawn from its membership with FINRA.

²⁹ 15 U.S.C. § 77e(a).

³⁰ 15 U.S.C. § 77e(c).

necessary to informed investment decisions."³¹ "This policy," we have stated, "is equally applicable to the distribution of a new issue and to a redistribution of outstanding securities which 'takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.'"³²

A *prima facie* case for violation of Securities Act Section 5 is established upon a showing that (1) no registration statement was in effect or filed as to the securities; (2) a person, directly or indirectly, sold or offered to sell the securities; and (3) the sale or offer to sell was made through the use of interstate facilities or mails.³³ *Scienter*—i.e., an intent to deceive—is not a requirement.³⁴

Midas concedes that FINRA established a *prima facie* case for violations of Securities Act Sections 5(a) and (c) by showing that its registered representatives, Centeno and Santohigashi, sold iStorage shares, by interstate means, without a registration statement in effect or filed with the Commission.³⁵

³¹ *SEC v. Ralston Purina*, 346 U.S. 119, 124 (1953); see also *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (stating that a fundamental purpose of the securities laws is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*").

³² *Ira Haupt & Co.*, 23 S.E.C. 589, 595 (1946) (quoting Report of Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. H.R. Rep. No. 85 at 592 (1933)); see also *Pennaluna & Co.*, 410 F.2d 861, 865 (9th Cir. 1969) ("[T]he presumptive need for registration implicit in § 5 extends to all secondary distributions not insignificant in their proportions."). The term "distribution" refers to "the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the investing public." *Geiger*, 363 F.3d at 487.

³³ *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006); *SEC v. Calvo*, 378 F.3d 1211, 1214-15 (11th Cir. 2004).

³⁴ *Calvo*, 378 F.3d at 1215; *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976).

³⁵ Centeno's and Santohigashi's misconduct as Firm registered representatives is imputed to Midas. See, e.g., *CE Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988).

2. The Section 4(4) Exemption

Exemptions from the registration requirements are affirmative defenses that must be established by the person claiming the exemption.³⁶ Registration exemptions "are construed strictly to promote full disclosure of information for the protection of the investing public."³⁷ Evidence in support of an exemption must be explicit, exact, and not built on conclusory statements.³⁸

Midas claims that its iStorage transactions were exempt under Securities Act Section 4(4), which exempts "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders."³⁹ We have stated that the Section 4(4) exemption, commonly known as the brokers' exemption, is designed to exempt "ordinary brokerage transactions" and is not available if the broker "knows or has reasonable grounds to believe that the selling customer's part of the transaction is not exempt from Section 5 of the Securities Act."⁴⁰ Brokers thus have "a duty of inquiry" into the facts surrounding a proposed sale.⁴¹

³⁶ See, e.g., *Zacharias v. SEC*, 569 F.3d 458, 464 (D.C. Cir. 2009) (citing *Ralston Purina*, 346 U.S. at 126 ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.")), *aff'd in relevant part*, *John A. Carley*, Exchange Act Rel. No. 57246 (Jan. 31, 2008), 92 SEC Docket 1693; *Swenson v. Engelstad*, 626 F.2d 421, 425 (5th Cir. 1980); *Rodney R. Schoemann*, Securities Act Rel. No. 9076 (Oct. 23, 2009), 97 SEC Docket 21726, 21735, *aff'd*, 398 F. App'x 603 (D.C. Cir. 2010) (unpublished).

³⁷ *Cavanagh*, 445 F.3d at 115; see also *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) (same).

³⁸ *Ronald G. Sorrell*, 47 S.E.C. 539, 541 n.8 (1981) (quoting *Lively v. Hirschfeld*, 440 F.2d 631, 633 (10th Cir. 1971)), *aff'd*, 679 F.2d 1323 (9th Cir. 1982).

³⁹ 15 U.S.C. § 77d(4).

⁴⁰ *Carley*, 92 SEC Docket at 1707; see also *Butcher & Singer, Inc.*, 48 S.E.C. 640, 642 (1987), *aff'd*, 833 F.2d 303 (3d Cir. 1987) (without opinion); *Quinn & Co.*, 44 S.E.C. 461, 467 (1971), *aff'd*, 452 F.2d 943 (10th Cir. 1971).

⁴¹ *Jacob Wonsover*, 54 S.E.C. 1, 13 (1999), *petition denied*, 205 F.3d 408 (D.C. Cir. 2000); *Robert G. Leigh*, 50 S.E.C. 189, 193 (1990); *Owen V. Kane*, 48 S.E.C. 617, 621 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988); cf. Securities Act Rule 144(g)(4), 17 C.F.R. § 230.144(g)(4) (stating that the term "brokers' transactions" in Securities Act Section 4(4) would not be deemed to include, for purposes of Rule 144, transactions in which the broker does not conduct a "reasonable inquiry").

The amount of inquiry required necessarily varies with the circumstances of the proposed transaction, as we have explained:

[On the one hand,] [a] dealer who is offered a modest amount of a widely traded security by a responsible customer, whose lack of relationship to the issuer is well known to him, may ordinarily proceed with considerable confidence. On the other hand, when a dealer is offered a substantial block of a little-known security . . . where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.⁴²

A broker, as an agent for its customers, "ha[s] a responsibility to be aware of the requirements necessary to establish an exemption from the registration requirements of the Securities Act and should be reasonably certain such an exemption is available."⁴³

Here, Midas's customer Mihaylov deposited a large block of recently issued shares of a little-known stock into his account and directed Midas to sell the shares shortly thereafter without a registration statement in effect.⁴⁴ Given these circumstances, Midas was required to conduct a searching inquiry to assure itself that Mihaylov's proposed sales were exempt from the registration requirements and not part of an unlawful distribution.⁴⁵ However, no one at Midas conducted any inquiry into Mihaylov's proposed sales nor did anyone attempt to gather information about iStorage, the issuer of the stock. Had anyone done so, the information on the

⁴² *Distribution by Broker-Dealers of Unregistered Securities*, Securities Act Rel. No. 4445 (Feb. 2, 1962), 27 Fed. Reg. 1251 ("1962 Securities Act Release"); *see also Sales of Unregistered Securities by Broker-Dealers*, Exchange Act Rel. No. 9239 (July 7, 1971), 1971 SEC LEXIS 19 ("1971 Exchange Act Release") ("The customer's responses or other particular circumstances may reasonably indicate that there is a duty to make further inquiries and verify the information received. The most obvious situations are where a previously unknown customer may be seeking to sell a significant amount of securities and the issuer may be relatively unknown to the public.").

⁴³ *Stone Summers & Co.*, 45 S.E.C. 105, 108 (1972); *see also Paul L. Rice*, 45 S.E.C. 959, 961 (1975) (explaining that, while salespersons need not be "finished scholars in the metaphysics of the Securities Act . . . [,] familiarity with the rudiments is essential").

⁴⁴ *See Wonsover*, 54 S.E.C. at 13 n.25 ("A distribution within a relatively short period after acquisition is evidence of an original intent to distribute." (citing 1 L. Loss, *Securities Regulation* 552 (2d ed. 1961))).

⁴⁵ *See, e.g., Michael A. Niebuhr*, 52 S.E.C. 546, 550 (1995) ("[W]e have long stated [that] a 'searching inquiry' . . . is called for when a broker-dealer is offered a substantial amount of a little-known security"); *Gilbert F. Tuffli, Jr.*, 46 S.E.C. 401, 409 (1976) (holding a "searching" "inquiry is essential whenever a salesman is presented with a large block of an obscure stock").

Pink Sheets Web site would have raised red flags, showing iStorage to be a newly formed company that had been trading for less than two weeks, had little operating or earnings history, and had a negative balance sheet. By failing to conduct the necessary inquiry, Midas has not met its burden of establishing that the Section 4(4) exemption applied to its iStorage sales.⁴⁶

Mihaylov's known stock promotion activities should have raised additional concerns that his sales were part of an unlawful distribution. A broker cannot rely on the Section 4(4) exemption when his customer is an "underwriter," defined as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security" ⁴⁷ As used in the definition of "underwriter," an "issuer" includes "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." ⁴⁸ Both registered representatives knew that Mihaylov was a stock promoter who received stock from issuers as compensation for promoting their stock and used his Midas account to liquidate those shares. Indeed, Midas received a fee for referring companies to Mihaylov. Notwithstanding these facts, neither registered representative asked Mihaylov, before selling his stock, whether he obtained his block of iStorage shares from the issuer or from a control person at the company. Had the representatives conducted a reasonable inquiry, they would have learned from Mihaylov's stock purchase agreement that he bought his shares from one or more of the 12.5% Shareholders, whose ownership interest of iStorage and coordinated sales of a large block of iStorage stock shortly after the reverse merger were strong indicia that they controlled iStorage and their iStorage stock sales were part of an unregistered distribution.⁴⁹

We reject Midas's argument that it met its statutory burden under Securities Act Section 4(4) by establishing that the transactions were "unsolicited." Contrary to Midas's view, determining whether a transaction is an "ordinary brokerage transaction" under Section 4(4) requires more than examining whether the broker solicited the transaction. We have long

⁴⁶ *Stone Summers*, 45 S.E.C. at 108-09 (finding Section 4(4) exemption unavailable where "respondents made no serious effort to determine the source and the circumstances of the acquisitions of [the] stock and did not even question either of the sellers").

⁴⁷ 15 U.S.C. § 77b(a)(11).

⁴⁸ *Id.*; see also *Pennaluna*, 410 F.2d at 864 n.1 ("If any person buys from a controlling person with a view to redistribution . . . , this becomes a transaction by an underwriter which requires registration.").

⁴⁹ See 17 C.F.R. § 230.405 (defining "control" as "the possession, direct, or indirect, of the power to direct or cause the direction of the management and policies of a person, through the ownership of voting securities, by contract, or otherwise"); *Cavanaugh*, 445 F.3d at 113 n.19 ("Although there is no bright-line rule declaring how much stock ownership constitutes 'control' . . . , some commentators have suggested that ownership of something *between ten and twenty percent* is enough, especially if other factors suggest actual control. Here, the four partners sold their shares as a block" (emphasis added and citation omitted)).

recognized that unregistered sales of large blocks of securities by brokers "without [the use of] solicitations or other sales activities" may nonetheless violate the registration requirements.⁵⁰ As we have repeatedly held, "[a] broker relying on Section 4(4) cannot merely act as an order taker, but must make whatever inquiries are necessary under the circumstances to determine that the transaction is a normal 'brokers' transaction' and not part of an unlawful distribution."⁵¹

Midas also contends that FINRA was required to prove that Midas's sales in fact involved an underwriter, but that FINRA failed to do so. Midas asserts that FINRA did not produce any evidence as to how the 12.5% Shareholders "acquired their shares, whether they were in fact control persons of iStorage . . . , and whether any exemption was ultimately available to them in their sales to the firm's customers."

Midas's assertions improperly shift the burden of establishing an exemption to FINRA. Once FINRA proved a *prima facie* Section 5 violation, it was Midas's burden to show that the Section 4(4) exemption applied by, among other things, showing it conducted a reasonable inquiry of the proposed transaction.⁵² Indeed, the questions that Midas asserts FINRA failed to answer during the proceeding were some of the questions its registered representatives should have asked Mihaylov upon his request to sell a large block of an obscure stock without registration.⁵³ Although Midas further claims that it had "no power . . . to compel [such] information"—from Mihaylov or others (such as iStorage and the 12.5% Shareholders)—it made no attempt to gather relevant information. If Midas had attempted to do so and was denied, it could have declined to sell the stock for its customer.

Midas also claims that FINRA was required to prove that Midas's registered representatives "knew, actually or circumstantially, the facts which indicated an illegal distribution." As discussed, Midas was aware of substantial indicia that the proposed iStorage transactions were part of an illegal distribution. Moreover, the U.S. Court of Appeals for the D.C. Circuit in *Geiger v. SEC*⁵⁴ rejected a similar argument made by a broker who unknowingly traded shares for a statutory issuer, in reliance on the absence of restrictive legends and the seller's assurances that the stock was "free trading." The court held that the broker, nonetheless, violated Securities Section 5 by "fail[ing] to inquire sufficiently into the circumstances of the

⁵⁰ *Haupt & Co.*, 23 S.E.C. at 605 & nn. 25-26; *Quinn & Co.*, 44 S.E.C. at 467.

⁵¹ *Leigh*, 50 S.E.C. at 193 (citing the 1962 Exchange Act Release and *Kane*, 48 S.E.C. at 621); see also *Wonsover*, 54 S.E.C. at 15 (rejecting this "truncated view of a broker-dealer's essential duties").

⁵² See *Cavanagh*, 445 F.3d at 111 n.13 (citing *Ralston Purina*, 346 U.S. at 126).

⁵³ *Benjamin Werner*, 44 S.E.C. 745, 747 n.5 (1971) (stating that a broker claiming the brokers' exemption, at minimum, must "question his customer to obtain facts reasonably sufficient under the circumstances to indicate whether the customer is engaged in a distribution").

⁵⁴ 363 F.3d at 485.

transaction[.]" given the classic "warning signs" requiring a "searching inquiry."⁵⁵ Midas's failure to conduct any inquiry rendered its conduct similarly violative of the registration requirements.

3. Reliance on the Transfer Agent and Clearing Firm

Midas asserts that to sell Mihaylov's iStorage shares it relied on Routh Transfer in removing the restrictive legend from the iStorage stock and on its clearing firm in processing the shares for resale. However, it is well established that the clearance of sales by a transfer agent and clearing firm does not relieve a broker of its obligation to investigate.⁵⁶ As we have emphasized, brokers, "as professionals in the securities business and as persons dealing closely with the investing public, are expected to secure compliance with the requirements of the [Securities] Act to protect the public from illegal offerings."⁵⁷ Midas also conceded that neither Routh Transfer nor the clearing firm considered itself responsible for conducting an inquiry for Midas, nor is there evidence that either conducted the necessary inquiry.⁵⁸

⁵⁵ *Id.*; see also *James L. Owsley*, 51 S.E.C. 524, 529 (1993) (sustaining NASD findings of Section 5 violations, notwithstanding representative's claim he "did not know [the illegal distribution] was occurring," because the circumstances presented "the classic pattern of an unlawful distribution"); *Niebuhr*, 52 S.E.C. at 550-51 (sustaining NASD findings of Section 5 violations, notwithstanding representative's claim he "was not privy to the information about" the stock, because he made no "more than a token inquiry regarding [the stock]'s tradeability").

⁵⁶ *Leigh*, 50 S.E.C. at 193-94 (collecting cases); see also *Wonsover*, 205 F.3d at 415-16 (rejecting "argument that [broker] justifiably relied on the clearance of sales by [his firm's restrictive stock department], transfer agent and counsel" (citing *A.G. Becker Paribas, Inc.*, 48 S.E.C. 118, 121 (1985) (settled proceeding) ("If a broker relies on others to make the inquiry called for in any particular circumstances, it does so at its peril.")). Indeed, we have cautioned "that information received from little-known companies or their officials, transfer agent or counsel must be treated with great caution as these are the very parties that may be seeking to deceive the firm." 1971 Exchange Act Release, *supra* note 42 (citing *SEC v. Culpepper*, 270 F.2d 241, 251 (2d Cir. 1959)).

⁵⁷ *Butcher & Singer*, 48 S.E.C. at 643 (quoting *Quinn & Co.*, 452 F.2d at 946-47); see also *Kane v. SEC*, 842 F.2d 194, 199 (8th Cir. 1988) (stating that brokers are uniquely positioned "to ask relevant questions, acquire material information, or disclose [their] findings" regarding an illegal distribution).

⁵⁸ Moreover, Midas was not entitled to rely on the Bertsch Legal Opinion because it related only to the legality of the reissuance of the Camryn stock certificates without restrictive legends to the 12.5% Shareholders, not to subsequent transactions of iStorage stock. *Leigh*, 50 S.E.C. at 194 (holding that broker could not rely on "counsel[']s letter" . . . to the transfer agent" because it "dealt only with the legality of reissuing the . . . shares to [sellers], not with the legality of sales by those persons"); *Owsley*, 51 S.E.C. at 530 n.21 (holding that broker "could not reasonably rely on an attorney who was acting for the individual making the distribution in

(continued...)

The November 2004 AWC, in which Applicants settled charges that they violated Securities Act Section 5, also served as notice that "[t]he absence of a restrictive legend on stock certificates does not 'warrant the conclusion that they must be freely tradeable.'"⁵⁹ The AWC included the explicit statement, to which Applicants also stipulated, that the stock Midas had sold for its parent company had "no trading restriction legend" on the stock certificate but was nonetheless restricted from resale. Applicants attempt to distinguish the facts of the AWC by claiming it involved "an inept clerk" selling shares without authorization, not Centeno's and Santohigashi's trading for a customer. However, at a minimum, the AWC alerted Midas to the need to determine whether its unregistered sales of securities complied with Section 5 of the Securities Act, irrespective of whether the stock certificate it received bore a restrictive stock legend.

Equally unpersuasive is Midas's additional claim that reliance on the transfer agent was "widely, if not universally, the practice in the brokerage industry." Midas's broad assertion of industry practice is based on testimony from fact witnesses at FINRA's hearing. All but one of these witnesses were employees of member firms that were charged with registration violations—including Centeno, Santohigashi, Cantrell, and those employed by another firm that sold iStorage shares.⁶⁰ This testimony is evidence only that the practice was widespread at these particular firms, not industry-wide. The only authority Midas cites for its proposition is testimony from a FINRA examiner. However, the examiner testified as a fact witness, not an expert witness. Moreover, the examiner testified only that he could not confirm the "custom and practice in the industry" because he "[hadn't] surveilled the entire industry."

In any event, compliance with the industry standard is only one factor, not the controlling factor, to be weighed in determining the standard of care for a particular regulation.⁶¹ In our view, given the long-standing duty of a broker under the Section 4(4) exemption to conduct a reasonable inquiry before selling securities without registration, as well as the notice provided by the AWC, the applicable standard of care was clear for Midas.⁶²

⁵⁸ (...continued)
question").

⁵⁹ *Carley*, 92 SEC Docket at 1713 n.55 (quoting *Tuffli*, 46 S.E.C. at 409). As noted, the AWC stated that it "may be considered in any future actions brought by [FINRA]."

⁶⁰ See *supra* note 4.

⁶¹ *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004) (citing *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 857 (9th Cir. 2001) ("The industry standard is a relevant factor, but the controlling standard remains one of reasonable prudence."); *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 274 (3d Cir. 1998) (noting that "a universal industry practice may still be fraudulent").

⁶² *Wonsover*, 205 F.3d at 415 (stating that the 1962 Securities Act Release's "oft-
(continued...)

Based on the foregoing, we find that Midas has failed to meet its burden of establishing that its unregistered sales of iStorage stock qualified for the Section 4(4) exemption and therefore conclude that it violated Securities Act Section 5 and NASD Rule 2110.⁶³

B. Supervisory Failings

"Assuring proper supervision is a critical component of broker-dealer operations."⁶⁴ NASD Rule 3010(a) requires member firms to "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable NASD Rules." To ensure compliance with this requirement, "red flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of the securities laws."⁶⁵

NASD Rule 3010(b) further requires member firms to "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives . . . that are reasonably designed to achieve compliance with applicable rules of NASD." With respect to the registration provisions of the Securities Act, we have emphasized that "all registered broker-dealers should establish minimum standard procedures to prevent and detect violations of the federal securities laws and to ensure that the firm meets its continuing responsibility to know both its customers and the securities being

⁶² (...continued)

quoted paragraph," discussed *supra* in text accompanying note 42, "clarifies when a broker's inquiry can be considered reasonable"). For similar reasons, we reject Applicants' claim that they lacked sufficient notice of their requirements under the Securities Act. As discussed, we have long regarded a broker's obligation to conduct reasonable inquiry as fundamental. *See e.g., Wonsover*, 54 S.E.C. at 13-14. *Leigh*, 50 S.E.C. at 193; *Stone Summers*, 45 S.E.C. at 109. FINRA, too, has issued relevant guidance. *See, e.g.,* NASD Notice to Members 00-49 (cautioning firms about purportedly "free trading" stock of "blank-check companies," a type of development-stage company, and reminding brokers of the "obligation to . . . conduct a meaningful investigation . . . to ensure that it is not engaged in the distribution of an unregistered security").

⁶³ A violation of Securities Act Section 5 also violates NASD Rule 2110. *Sorrell*, 679 F.2d at 1326.

⁶⁴ *Ronald Pellegrino*, Exchange Act Rel. No. 59125 (Dec. 19, 2008), 94 SEC Docket 12628, 12641.

⁶⁵ *John B. Busacca, III*, Exchange Act Rel. No. 63312 (Nov. 12, 2010), 99 SEC Docket 34481, 34495-96 (citation omitted), *petition denied*, 2011 U.S. App. LEXIS 25933 (11th Cir. Dec. 28, 2011) (unpublished); *see also George J. Kolar*, 55 S.E.C. 1009, 1016 (2002) (stating that "[d]ecisive action is necessary whenever supervisors are made aware of suspicious circumstances, particularly those that have an obvious potential for violations").

sold."⁶⁶ These procedures must be made known to firm personnel and "and be sufficient to reveal promptly to supervisory officials transactions which may, when examined individually or in the aggregate, indicate that sales in a security should be halted immediately" for violating the Securities Act.⁶⁷

Midas lacked an adequate supervisory system to deter and detect Centeno's and Santohigashi's unlawful sales of iStorage securities. The record showed that Midas's system of supervision consisted solely of relying on transfer agents and clearing firms to ensure that its unregistered sales complied with the Securities Act, a process that, as described above, neither ensures that stock is lawfully sold, nor comports with a broker's responsibilities. Moreover, the registered representatives who sold the iStorage stock had minimal experience in the securities industry and were relatively new hires to the Firm. We have often stressed the "obvious need to keep [a] new office with . . . untried personnel under close surveillance."⁶⁸ Yet the representatives testified that no one at Midas was supervising their sales practices, nor were there any restrictions on their trading activities in the over-the-counter markets.

The registered representatives' sale of a large block of recently issued shares of a little-known, thinly traded stock was ignored by the Firm, despite numerous red flags that the sales were part of an unlawful distribution in violation of Securities Act Section 5. Mihaylov's stock promotion activities were well known at the Firm and Midas received a fee, often in the form of stock, for referring customers to him. These activities, together with Mihaylov's frequent liquidation of large blocks of stocks, should have further alerted supervisors of the need for a reasonable inquiry into his proposed iStorage sales.

Midas's written procedures also inadequately addressed the unregistered sale of securities. Although a significant portion of Midas's business comprised unregistered securities sales in the over-the-counter markets, the Firm's written procedures were poorly designed to deter and detect violations of the Securities Act's registration requirements. The minimal written procedures the Firm had lacked meaningful guidance setting forth "reasonable inquiry" procedures for registered representatives to follow when customers sought to sell large amounts of an unknown stock to the public without registration.⁶⁹ As Applicants admitted, the written procedures included no

⁶⁶ *A.G. Becker Paribas*, 48 S.E.C. at 120-21 (quoting the 1971 Exchange Act Release, *supra* note 42).

⁶⁷ 1971 Exchange Act Release, *supra* note 42.

⁶⁸ *LaJolla Capital Corp.*, 54 S.E.C. 275, 282 & n.18 (1999) (internal punctuation omitted) (collecting cases).

⁶⁹ See, e.g., *Gary E. Bryant*, 51 S.E.C. 463, 471 (1993) (holding that a mere list of procedures listing "things that the firm and its representatives should not do" is insufficient to establish a reasonable supervisory system but must include "mechanisms for ensuring compliance"); *Steven P. Sanders*, 53 S.E.C. 889, 900 (1998) (finding firm's procedures

(continued...)

specific risk factors alerting registered representatives to the possibility that a proposed transaction might be part of an unlawful distribution—such as the classic warning signs of an obscure issuer, a thinly traded security, and the deposit of stock certificates in a large volume of shares. The procedures also lacked any guidance to registered representatives about how to determine whether a proposed sale was exempt from registration, including asking their customer how, when, and under what circumstances the customer acquired the stock.⁷⁰ Because of these deficiencies, the written procedures also failed to provide the supervisors with a reliable mechanism for identifying securities sales that should be investigated or halted for violating the Securities Act.⁷¹

Lee does not dispute the fact that he was responsible for the Firm's written supervisory procedures but claims he delegated supervision for the Firm's trading and registered representatives to Cantrell. However, the weight of the evidence does not support a finding that Lee effectively or reasonably delegated his supervisory duties to Cantrell. The Hearing Panel found Cantrell's testimony that he was not the responsible supervisor "was far more credible than Lee[']s." We see no basis for rejecting their conclusion.⁷² Both documentary and testimonial evidence corroborates Cantrell's testimony. The Supervisory Manual identified Lee—not Cantrell—as responsible for supervising the Firm's trading department and for approving any restricted securities transactions. Both Centeno and Santohigashi, moreover, testified that they considered Lee to be their supervisor, not Cantrell, and there was no support for Lee's claim that he informed Centeno and Santohigashi that Cantrell was their supervisor. In addition, Lee admitted that Cantrell could not incur office expenses on behalf of the Firm and could not hire,

⁶⁹ (...continued)

inadequate where compliance manual correctly stated the rule but gave no meaningful guidance about how to comply with it).

⁷⁰ See, e.g., 1971 Exchange Act Release, *supra* note 42 (noting that "[b]asic information concerning the issuer such as its address, business activities, principals, products assets, financial condition, and number of shares of stock outstanding, should be obtained independently as a matter of course" with the level of inquiry increasing based on the circumstances presented).

⁷¹ See *La Jolla*, 54 S.E.C. at 282. We also find no merit to Applicants' claim that Midas's failure to have relevant procedures in its Supervisory Manual was reflective of an industry-wide standard. As discussed, Applicants have not established a prevailing industry practice.

⁷² *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993) ("It is well settled that credibility determinations of an initial fact finder are entitled to considerable weight" and "can be overcome only where the record contains 'substantial evidence' for doing so." (citing *Universal Camera v. NLRB*, 340 U.S. 474, 496 (1950)), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

fire, or approve the registered representatives' leave from the office—*i.e.*, indications that could otherwise signal Cantrell's supervisory authority over the registered representatives.⁷³

Lee cites various circumstantial evidence that he claims shows that Cantrell was the responsible supervisor—such as Cantrell's prior supervisory experience and that he replaced a former supervisor when he was hired in June 2004, was paid like a supervisor, and admittedly performed some supervisory functions while Lee was away from the office. Lee's cited evidence does not refute his failure to effectively delegate supervision by clearly vesting supervisory responsibility in Cantrell for Centeno's and Santohigashi's sales.⁷⁴

Even if we accepted Lee's claim that he delegated line-supervision to Cantrell, Lee, as the Firm's president, retained a duty to follow-up on that delegation, but he failed to do so. We have long held that "the president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless . . . he or she reasonably delegated [that] particular function to another person in the firm, and neither 'knew nor had reason to know that such person was not properly performing his or her duties.'" ⁷⁵ However, "[i]t is not sufficient for the person with overarching supervisory responsibilities to delegate supervisory responsibilities to a subordinate . . . and then simply wash his hands of the matter until a problem is brought to his attention."⁷⁶ As we have stated, "[i]mplicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised."⁷⁷ The obvious red flags in the registered

⁷³ *Richard F. Kresge*, Exchange Act Rel. No. 55988 (June 29, 2007), 90 SEC Docket 3072, 3086 (finding firm's "compliance consultant" was not a supervisor because "no one had a clear understanding of [the consultant]'s responsibilities" and he "had no hiring or firing authority") (citing *Arthur James Huff*, 50 S.E.C. 524, 535 (1991)).

⁷⁴ *Kirk A. Knapp*, 50 S.E.C. 858, 862 (1992) (finding president "never made a reasonable or effective delegation" to an employee who denied he was the sales supervisor and "the sales force did not consider [the employee] its supervisor, and was not even aware that he was supposedly functioning in that capacity"); *William E. Parodi, Sr.*, Exchange Act Rel. No. 27299 (Sept. 27, 1989), 44 SEC Docket 1337, 1345 (settled proceeding) ("An important factor in the supervisory breakdown was [the firm]'s failure to clearly vest supervisory responsibility.").

⁷⁵ *Busacca*, 99 SEC Docket at 34495-96 (quoting *Pellegrino*, 94 SEC Docket at 12641).

⁷⁶ *Pellegrino*, 94 SEC Docket at 12647 (quoting *Harry Gliksman*, 54 S.E.C. 471, 484-85 (1999), *aff'd*, 24 F. App'x 702 (9th Cir. 2001) (unpublished)); *Stuart K. Patrick*, 51 S.E.C. 419, 422-23 (1993), *petition denied*, 19 F.3d 66 (2d Cir. 1994).

⁷⁷ *Castle Secs. Corp.*, 53 S.E.C. 406, 412 & n.19 (1998) (collecting cases).

representatives' trading, as discussed above, presented Lee with ample notice that supervision in the Firm's retail trading department was not being effectively carried out.⁷⁸

Lee's settlement of the November 2004 AWC served as additional notice. Although Lee assured FINRA at the time that "the [F]irm is committed to not let an incident like this happen again," he exhibited little concern for Centeno's and Santohigashi's unregistered securities sales during the period at issue. Lee admitted that he was often away from the office for long periods of time, "didn't know" of Centeno's and Santohigashi's trading activity until FINRA's investigation, and was unaware of a broker's duty to conduct reasonable inquiry prior to selling stock publicly without registration.

Lee also asserts that FINRA abused its discretion when it excluded from evidence an e-mail that Lee claims proves that Cantrell was charged with supervising the registered representatives. The e-mail, dated June 11, 2004, from Cantrell to Don Carrig, a Midas employee, states that "[C]antrell's Position at Midas Securities, LLC" would involve supervising the "'Trading Desk' and associated persons," including Centeno and Santohigashi. Before FINRA's hearing, FINRA's Hearing Officer precluded Applicants from offering exhibits at the hearing because Applicants had failed to identify any documents in their prehearing submissions that they intended to introduce at the hearing, as previously required by the Hearing Officer's order.⁷⁹ Although Lee does not challenge the entry of the preclusion order in the first instance, he asserts that FINRA should have admitted the e-mail at the hearing when he introduced it during his direct testimony. He argues that the e-mail was "rebuttal" evidence, offered to discredit Cantrell's testimony, explaining that he "was unaware Cantrell" would contend "that he was not the supervisor until he actually heard Mr. Cantrell's testimony."

Based on the record before us, we find that FINRA did not abuse its discretion in excluding the Cantrell e-mail from evidence.⁸⁰ Lee cites no authority for his claim that the e-mail was "rebuttal" evidence. The term generally applies to evidence offered by the plaintiff to meet

⁷⁸ *Kresge*, 90 SEC Docket at 3087 (finding that firm president failed reasonably to delegate supervision to branch office managers, where president "did nothing to follow up and review their performances").

⁷⁹ FINRA Code of Procedure Rule 9280(b)(2) authorizes a Hearing Officer to preclude evidence of a party at the subsequent hearing if the party "without justification fail[ed] to disclose information required" by a pre-hearing order. The NAC upheld the Hearing Officer's ruling.

⁸⁰ *See, e.g., Mercado v. Ahmed*, 974 F.2d 863, 872 (7th Cir. 1992) ("It is well established that the admission of rebuttal evidence lies within the sound discretion of the trial court and appellate courts will not interfere with the trial court's ruling unless there is a clear abuse of discretion." (citation omitted)).

new facts brought out by the defense's case-in-chief.⁸¹ There is also no support for Lee's claim that he was "unaware" of Cantrell's position. FINRA's complaint charged Lee, not Cantrell, with failure to supervise. FINRA also explicitly stated in its pre-hearing brief (which predated the preclusion order) that "Cantrell, whom Lee has tried to portray as their supervisor, . . . will . . . testify that he performed mostly administrative and clerical tasks, and did not supervise any registered representative."⁸² In any event, the contents of the e-mail do not add to what Lee claimed in his testimony: that Cantrell was a designated supervisor. If that were so, as discussed, Lee nonetheless was required as president "with overall supervisory responsibilities" to ensure that Cantrell was performing whatever supervisory duties that were assigned to him. Despite numerous red flags in the Firm's iStorage trading, Lee failed to discharge that duty.⁸³

Accordingly, we find that Applicants violated NASD Rules 3010(a) and 2110 by failing to supervise Centeno and Santohigashi with a view to ensuring compliance with the Securities Act and NASD rules. Applicants also violated NASD Rule 3010(b) and 2110 by failing to establish adequate procedures to ensure compliance with applicable requirements.

IV.

Under Exchange Act Section 19(e)(2), we sustain sanctions imposed by FINRA unless we find, giving "due regard for the public interest and the protection of investors," that the sanctions are "excessive or oppressive" or impose an unnecessary or inappropriate burden on

⁸¹ *Lubanski v. Coleco Indus., Inc.*, 929 F.2d 42, 47 (1st Cir. 1991) ("Rebuttal [evidence] is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in [the] opponent's case in chief." (quoting *Morgan v Commercial Union Assurance Co.*, 606 F.2d 554, 555 (5th Cir. 1979)); see also 22 Wright & Graham, *Fed. Prac. & Proc.: Evidence* § 5177, at 147 (1st ed. 1978) (noting that "'rebuttal evidence' properly so-called" is where "the proponent argues that his evidence should be admitted, not because of a logical relationship to the issues framed by the pleadings but because of a relationship between it and evidence already introduced by his opponent").

⁸² FINRA's pre-hearing materials also included Cantrell's OTR testimony given to FINRA during its investigation, which provided Lee with further notice of Cantrell's position.

⁸³ *Owsley*, 51 S.E.C. at 535 (finding that firm president and compliance officer failed to supervise under NASD rules, where they "were aware that vast amounts of the securities of two small and unseasoned companies were being sold" but "made no independent investigation . . . [into] the registration status of those securities"); see also *Sanders*, 53 S.E.C. at 904 (explaining that "where supervisory responsibility is shared between firm executives, each can be held liable for supervisory failure").

competition.⁸⁴ For unlawfully selling securities without registration, FINRA fined Midas \$30,000. For failing to supervise Centeno and Santohigashi and having deficient written procedures, FINRA aggregated its sanctions against Midas and Lee, fining each \$50,000 and suspending Lee from associating with any FINRA member for two years in all principal capacities.

We initially observe that the sanctions FINRA imposed were consistent with the recommendations set forth in FINRA's Sanction Guidelines.⁸⁵ For the unregistered sale of securities, the Guidelines recommend a fine between \$2,500 and \$50,000, (plus any financial benefit respondent may have derived) and, in egregious cases, a suspension of the respondent for up to two years or a bar. For failure to supervise, the Guidelines recommend a fine between \$5,000 and \$50,000 and a suspension up to thirty business days and, in egregious cases, a bar. For having deficient written procedures, the Guidelines recommend a fine of \$1,000 to \$25,000 and, in egregious cases, a suspension of the responsible individual for up to one year and of the firm for thirty days and thereafter until the procedures are amended to conform to rule requirements.

We agree with FINRA that Midas's unlawful sales were egregious. The "essential purpose of the 1933 Act is to protect investors by requiring registration with the Commission of certain information concerning securities offered for sale."⁸⁶ We have further "stressed the responsibility of brokers to prevent their firms from being used as conduits for illegal distributions."⁸⁷ The record establishes that Midas gave little regard for this critical duty, allowing Mihaylov, a known stock promoter, to use his Midas account to liquidate large blocks of penny stocks without questioning his activities.

FINRA Guidelines additionally recommend the consideration of any attempts by Applicants "to comply with an exemption from registration" and "the share volume and dollar amount of the transactions involved." Midas, however, made no effort to comply with the

⁸⁴ 15 U.S.C. § 78s(e)(2). Applicants do not claim, nor does the record show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

⁸⁵ We are "not bound by the Guidelines [but] use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG Inst'l Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13814 n.38.

⁸⁶ *Gilligan, Will & Co.*, 267 F.2d 461, 463 (2d Cir. 1959).

⁸⁷ *Apex Fin. Corp.*, 47 S.E.C. 265, 269 (1980); *Wonsover*, 54 S.E.C. at 17 ("[I]n light of the cardinal role occupied by broker-dealers in the securities distribution process, we cannot overemphasize the importance of their obligation to take all reasonable steps to avoid participation in distributions violative of [the registration provisions of the Securities Act]." (internal alteration omitted) (quoting *L.A. Frances, Ltd.*, 44 S.E.C. 588, 593 (1971))).

Section 4(4) exemption, failing to conduct any inquiry into Mihaylov's iStorage stock before selling it in the over-the-counter market over a two-month period. The Firm's unregistered sale of 760,000 shares of iStorage stock was a significant volume of shares for a single customer and yielded approximately \$102,000 in sales proceeds over a two-month period.

FINRA's imposition of serious sanctions for Applicants' supervisory failings was also warranted, as Midas's supervisory system regarding the unregistered sale of securities was virtually nonexistent. We have emphasized that "[p]roper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules" and a "critical component to ensuring investor protection."⁸⁸ The applicable Guidelines call for consideration of whether Applicants "ignored 'red flag' warnings that should have resulted in additional supervisory scrutiny." As discussed, the registered representatives' iStorage trading presented considerable red flags—in particular, the sale of a large block of a recently issued, obscure stock for a known stock promoter—yet Applicants ignored this obvious need for inquiry.

The Guidelines further instruct adjudicators to consider whether deficient supervisory written procedures "allowed violative conduct to occur or to escape detection." We agree with FINRA that Midas had "no procedures to keep . . . [the] firm compliant with Section 5's registration requirements or to direct the firm's representatives to the proper way to avoid unlawful distributions." Midas's written supervisory procedures also gave the Firm's sales personnel no meaningful guidance for determining whether a given sale was exempt from registration. Rather, as FINRA found, Applicants left all "responsibility for compliance with the Securities Act" to third parties, such as transfer agents and clearing firms. Applicants denied that they had any responsibility of their own.⁸⁹

We also treat Applicants' November 2004 AWC involving similar violations of Securities Act Section 5 as an aggravating factor. The AWC itself stated that it "may be considered in any future actions brought by [FINRA]." "We have long recognized that prior disciplinary history . . . provides evidence of whether an applicant's misconduct is isolated, the sincerity of the applicant's assurance that he will not commit future violations and/or the egregiousness of the applicant's misconduct."⁹⁰ FINRA Guidelines also state that "[d]isciplinary sanctions should be

⁸⁸ *Dennis S. Kaminski*, Exchange Act Rel. 65347 (Sept. 16, 2011), __ SEC Docket __, __ (collecting cases).

⁸⁹ *Culpepper*, 270 F.2d at 251 (finding broker's "sole reliance on the self-serving statements of his sellers and their counsel without reasonably exploring the possibility of contrary facts demonstrate . . . a behavior which at best was unconcerned with compliance with the [Securities] Act").

⁹⁰ *Consolidated Inv. Servs.*, 52 S.E.C. 582, 591 (1996); see also *Gregory O. Trautman*, Exchange Act Rel. No. 61167 (Dec. 15, 2009), 97 SEC Docket 23492, 23527 n.85

more severe for recidivists . . . [as] past misconduct . . . evidences disregard for regulatory requirements, investor protection, or commercial integrity." Applicants' repeated misconduct underscores the egregiousness of their violations and demonstrates a conscious disregard for their regulatory obligations.⁹¹ Although Applicants previously assured FINRA that they were committed not to let similar Section 5 violations happen again, they quickly broke that commitment six weeks later. Such recidivism indicates "the need for sanctions severe enough to deter further misconduct, and to impress [upon Applicants] the need for scrupulous compliance" in their future dealings.⁹²

Applicants claim the sanctions "are excessive and punitive in light of the circumstances." In support, they again assert that their conduct conformed with industry practice and therefore cannot be egregious or intentional. As discussed above, Applicants failed to prove a prevailing industry practice. Moreover, we find that Applicants' failure to conduct any inquiry or to ensure compliance with Securities Act Section 5 was at least reckless, particularly given the November 2004 AWC, the numerous red flags raised by the stock, and the lack of concern exhibited at Midas for safeguarding investors from the threat of illegal distributions.⁹³

⁹⁰ (...continued)

(stating that, in factoring in disciplinary history, "we have considered orders in both settled and litigated proceedings" (citing *Pagel, Inc. v. SEC*, 803 F.2d 942, 948 (8th Cir. 1986)).

⁹¹ Cf. *Carley*, 92 SEC Docket at 1731-32 (finding broker's continued "violations of Securities Act Section 5, after being sanctioned for similar conduct . . . , justify a bar from association with any broker or dealer").

⁹² *Lowell H. Linstrom*, 48 S.E.C. 609, 613 (1986). The NAC also found "particularly aggravating" statements Lee apparently made in his OTR testimony that "it was his opinion that Midas . . . representatives did not have a duty to determine whether unregistered securities were freely tradable and that he would *prohibit* them from contacting an attorney to assist them in making this determination" (emphasis in original). Lee's OTR testimony was not admitted into evidence, so we have not considered it in conducting our *de novo* review. A FINRA examiner's hearing testimony, which Lee does not contest, introduced Lee's OTR statements to a lesser degree, stating that Lee told investigators that, "if anybody at [Midas] had tried to undertake efforts to determine whether . . . unlegended certificate securities were free trading, he would not have allowed it." Given this testimony and the substantial evidence that Lee abdicated his supervisory responsibilities despite his earlier settlement of the AWC, we find that the sanctions FINRA imposed against Lee were neither excessive nor oppressive but were remedial, in the public interest, and for the protection of investors.

⁹³ See *McCurdy v. SEC*, 396 F.3d 1258, 1264 (D.C. Cir. 2005). Nor does Applicants' ignorance of their duty to conduct reasonable inquiry serve to mitigate their nonfeasance. *Prime Investors, Inc.*, 53 S.E.C. 1, 5 (1997) (holding that "ignorance of the
(continued...)

Applicants further argue that FINRA's imposition of a two-year suspension against Lee is "particularly excessive" because, as Applicants claim, "Lee is an indispensable person in the firm's" direct market access trading program and the Firm no longer conducts retail securities business. Applicants assert that the "chances of finding . . . another Korean-speaking principal with the necessary FINRA licenses . . . are remote," imperiling the Firm's "substantial Korean business." They contend that their argument is consistent with the General Principles of FINRA's Sanction Guidelines, which recommend the consideration of a firm's size and available resources,⁹⁴ and suggest imposition of alternative sanctions that limit Midas's "right to engage in any future retail business or prohibit Mr. Lee from acting as a supervisor in connection with such retail business."

We do not view Lee's two-year suspension "in all principal capacities" as excessive or oppressive and thus decline to modify the sanctions. Midas's claimed economic harm does not outweigh our concerns that Lee poses a continued threat to investors, warranting a significant time out from serving in a principal capacity.⁹⁵ Lee's failings as a supervisor were instrumental to allowing the Firm's unlawful sales to take place for a two-month period. Moreover, his Firm's multiple violations of Securities Act Section 5—a requirement that we have stated lies at "the heart of the securities regulatory system"⁹⁶—constitute repeated fundamental failures to meet his obligations as a securities principal. Although Applicants do not explain why Lee's "FINRA licenses" are "necessary" given that Midas is no longer a FINRA member, we believe imposition of a principal suspension remains nevertheless important because nothing would prevent Lee from associating in that capacity with another member firm during his period of suspension.⁹⁷

⁹³ (...continued)
regulations at issue affords no excuse").

⁹⁴ The General Principles state that adjudicators "should consider firm size with a view toward ensuring that the sanctions imposed are not punitive but are sufficiently remedial to achieve deterrence."

⁹⁵ *Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 90 SEC Docket 1863, 1871-72 & n.22 (May 9, 2007) (rejecting argument by firm's president and sole owner who claimed barring him would cause him "great economic hardship" and "unfair" punishment because, effectively, "[he] is the Firm"); *see also Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (stating that "economic harm alone is not enough to make the sanctions imposed . . . by [FINRA] excessive or oppressive").

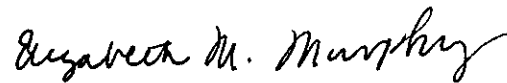
⁹⁶ *Kirby*, 56 S.E.C. at 72.

⁹⁷ According to the CRD, about one month after the Hearing Panel's decision in this matter, Lee became the CEO, CCO, and over 75% owner of Midas Execution Services LLC, an Illinois-based broker-dealer, whose application for FINRA membership is pending.

We accordingly find the sanctions FINRA imposed appropriately remedial. Applicants' failure to discharge their duties as securities professionals caused 760,000 shares of an unknown stock to be sold to investors without registration or an exemption therefrom, depriving investors of the protections afforded by the registration and disclosure requirements of the Securities Act. As we have repeatedly stressed, "[t]he importance of broker-dealer's responsibility to use diligence where there are any unusual factors is highlighted by the fact that violations of the antifraud and other provisions of the securities laws frequently depend for their consummation . . . on the activities of broker-dealers who fail to make diligent inquiry to obtain sufficient information to justify their activity in the security."⁹⁸ The sanctions imposed serve the public interest and protect investors by encouraging others in the securities industry, as well as Applicants, to ensure compliance with the Securities Act before engaging in the unregistered sale of securities on behalf of their customers and to conduct watchful supervision of these activities to avoid facilitating the unlawful distribution of securities.⁹⁹

An appropriate order will issue.¹⁰⁰

By the Commission (Commissioners WALTER, PAREDES, and GALLAGHER);
Chairman SCHAPIRO and Commissioner AGUILAR not participating.


Elizabeth M. Murphy
Secretary

⁹⁸ *Transactions in the Securities of Laser Arms Corp. by Certain Broker-Dealers*, 50 S.E.C. 489, 506 n.35 (1991) (Exchange Act 21(a) report) (quoting *Alessandrini & Co.*, 45 S.E.C. 399, 406 (1973)).

⁹⁹ *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) ("[G]eneral deterrence is not, by itself, sufficient justification for expulsion or suspension . . . [but] may be considered as part of the overall remedial inquiry.").

¹⁰⁰ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66200 / January 20, 2012

Admin. Proc. File No. 3-14308

In the Matter of the Application of

MIDAS SECURITIES, LLC, and JAY S. LEE
c/o John Courtade, Esq.
Law Office of John Courtade
4408 Spicewood Springs Road
Austin, TX 78759

For Review of Disciplinary Action Taken by

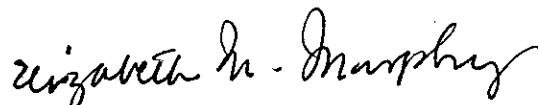
FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action, and the costs imposed, by FINRA against Midas Securities, LLC, and Jay S. Lee be, and they hereby are, sustained.

By the Commission.



Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66202 / January 20, 2012]

Order Making Fiscal Year 2012 Annual Adjustments to Transaction Fee Rates

I. Background

Section 31 of the Securities Exchange Act of 1934 ("Exchange Act") requires each national securities exchange and national securities association to pay transaction fees to the Commission.¹ Specifically, Section 31(b) requires each national securities exchange to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted on the exchange.² Section 31(c) requires each national securities association to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted by or through any member of the association other than on an exchange.³

Section 31 of the Exchange Act requires the Commission to annually adjust the fee rates applicable under Sections 31(b) and (c) to a uniform adjusted rate, and in some circumstances, to also make a mid-year adjustment. On April 29, 2011, the Commission issued an order establishing the uniform adjusted rate for fiscal year 2012 and beyond.⁴ We noted in that order, however, that if a regular appropriation to the Commission for fiscal year 2012 was not enacted by October 1, 2011, the new uniform adjusted rate would never go into effect and the Commission would need to establish a new uniform

¹ 15 U.S.C. 78ee.

² 15 U.S.C. 78ee(b).

³ 15 U.S.C. 78ee(c).

⁴ Exchange Act Rel. No. 34-64373, Order Making Fiscal Year 2012 Annual Adjustments to the Fee Rates Applicable under Section 31 of the Securities Exchange Act of 1934 (April 29, 2011).]

adjusted rate for fiscal year 2012 pursuant to amendments made to Section 31 of Exchange Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").⁵ Because a regular appropriation to the Commission for fiscal year 2012 was not enacted by October 1, 2011, the Commission now is required to establish a new fee rate for fiscal year 2012 pursuant to the amended provisions of Section 31 of the Exchange Act.

II. Fiscal Year 2012 Annual Adjustment to the Fee Rate

The Dodd-Frank Act amendments to Section 31 of the Exchange Act establish a new method for annually adjusting the fee rates applicable under Sections 31(b) and (c) of the Exchange Act. Specifically, the Commission must now adjust the fee rates to a uniform adjusted rate that is reasonably likely to produce aggregate fee collections (including assessments on security futures transactions) equal to the regular appropriation to the Commission for the applicable fiscal year.⁶ In short, the new fee rate is determined by (1) subtracting the sum of fees estimated to be collected during fiscal year 2012 prior

⁵ Prior to amendment by the Dodd-Frank Act, Section 31(j)(4)(A) of the Exchange Act provided that the fiscal year 2012 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2011, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2012 is enacted.

Section 991 of the Dodd-Frank Act, however, amended Section 31 of the Exchange Act effective on the later of October 1, 2011 or the date of enactment of an Act making a regular appropriation to the Commission for fiscal year 2012. Those amendments are now effective, because a regular appropriation to the Commission was enacted on December 23, 2011. The amendments require the Commission to make a new adjustment to the fee rates applicable under Section 31 for fiscal year 2012.

⁶ See 15 U.S.C. § 78ee(j)(1) (The Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for such fiscal year, is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the regular appropriation to the Commission by Congress for such fiscal year.").

to the effective date of the new fee rate and estimated assessments on securities futures transactions to be collected under Section 31(d) of the Exchange Act for all of fiscal year 2012 from an amount equal to the regular appropriation to the Commission for fiscal year 2012, and (2) dividing the difference by the estimated aggregate dollar amount of sales for the remainder of the fiscal year following the effective date of the new fee rate.

The regular appropriation to the Commission for fiscal year 2012 is \$1,321,000,000. The Commission estimates that it will collect \$503,552,340 in fees for the period prior to the effective date of the new fee rate and \$17,328 in assessments on round turn transactions in security futures products during all of fiscal year 2012.⁷ Using a methodology for estimating the aggregate dollar amount of sales for the remainder of fiscal year 2012 (developed after consultation with the Congressional Budget Office and the Office of Management and Budget), the Commission estimates that the aggregate dollar amount of sales for the remainder of fiscal year 2012 to be \$45,419,684,665,277.

As described above, the uniform adjusted rate is computed by dividing the residual fees to be collected of \$817,430,332 by the estimate of the aggregate dollar amount of sales for the remainder of fiscal year 2012 of \$45,419,684,665,277. This results in a uniform adjusted rate for fiscal year 2012 of \$18.00 per million.⁸

III. Effective Dates of the Annual Adjustments

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2012 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act

⁷ The estimate of fees to be collected prior to the effective date of the new fee rate is determined by applying the current fee rate to the dollar amount of sales prior to the effective date of the new fee rate.

⁸ Appendix A shows the purely arithmetical process of calculating the fiscal year 2012 annual adjustment. The appendix also includes the data used by the Commission in making this adjustment.

shall take effect on the later of October 1, 2011, or 60 days after the date on which a regular appropriation to the Commission for fiscal year 2012 is enacted. The regular appropriation to the Commission for fiscal year 2012 was enacted on December 23, 2011, and accordingly, the new fee rates applicable under Sections 31(b) and (c) of the Exchange Act will take effect on February 21, 2012.

IV. Conclusion

Accordingly, pursuant to Section 31 of the Exchange Act,⁹

IT IS HEREBY ORDERED that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be \$18.00 per million effective on February 21, 2012.

By the Commission.



Elizabeth M. Murphy
Secretary

⁹

15 U.S.C. 78ee(j).

APPENDIX A

This appendix provides the formula for determining the annual adjustment to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act for fiscal year 2012.¹⁰ Section 31 of the Exchange Act requires the fee rates to be adjusted so that it is reasonably likely that the Commission will collect aggregate fees equal to its regular appropriation for fiscal year 2012. To make the adjustment, the Commission must project the aggregate dollar amount of covered sales of securities on the securities exchanges and certain over-the-counter markets over the course of the year. The fee rate equals the ratio of the Commission's regular appropriation for fiscal year 2012 (less the sum of fees to be collected during fiscal year 2012 prior to the effective date of the new fee rate and aggregate assessments on security futures transactions during fiscal year 2012) to the projected aggregate dollar amount of covered sales for fiscal year 2012 (less the aggregate dollar amount of covered sales prior to the effective date of the new fee rate).

For 2012, the Commission has estimated the aggregate dollar amount of covered sales by projecting forward the trend established in the previous decade. More specifically, the dollar amount of covered sales was forecasted for months subsequent to November 2011, the last month for which the Commission has data on the dollar volume of covered sales.¹¹

The following sections describe this process in detail.

¹⁰ Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

¹¹ To determine the availability of data, the Commission compares the date of the appropriation with the date the transaction data are due from the exchanges (10 business days after the end of the month). If the business day following the date of the appropriation is equal to or subsequent to the date the data are due from the exchanges, the Commission uses these data. The appropriation was signed on December 23. The first business day after this date was December 27. Data for November were due from the exchanges on December 14. So the Commission used November 2011 and earlier data to forecast volume for December 2011 and later months.

A. Baseline estimate of the aggregate dollar amount of covered sales for fiscal year 2012.

First, calculate the average daily dollar amount of covered sales (ADS) for each month in the sample (November 2001 - November 2011). The monthly aggregate dollar amount of covered sales (exchange plus certain over-the-counter markets) is presented in column C of Table A.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.0087 and the standard deviation is 0.126. Assuming the monthly percentage change in ADS follows a random walk, calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 1.7 %.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for November 2011 (\$261,614,593,980) to forecast ADS for December 2011 (\$265,994,342,797 = \$261,614,593,980 x 1.017).¹² Multiply by the number of trading days in December 2011 (21) to obtain a forecast of the total dollar volume for the month (\$5,585,881,198,747). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume of covered sales are in column G of Table A. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).
2. For each month t , calculate the change in ADS from the previous month as

$$\Delta_t = \log (ADS_t / ADS_{t-1}), \text{ where } \log (x) \text{ denotes the natural logarithm of } x.$$

¹² The value 1.017 has been rounded. All computations are done with the unrounded value.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \dots, \Delta_{120}\}$. These are given by $\mu = 0.0087$ and $\sigma = 0.126$, respectively.
4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t .
5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t / ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.017 \times ADS_{t-1}$.
6. For December 2011, this gives a forecast ADS of $1.017 \times \$261,614,593,980 = \$265,994,342,797$. Multiply this figure by the 21 trading days in December 2011 to obtain a total dollar volume forecast of $\$5,585,881,198,747$.
7. For January 2012, multiply the December 2011 ADS forecast by 1.017 to obtain a forecast ADS of $\$270,447,413,976$. Multiply this figure by the 20 trading days in January 2012 to obtain a total dollar volume forecast of $\$5,408,948,279,516$.
8. Repeat this procedure for subsequent months.

B. Using the forecasts from A to calculate the new fee rate.

1. Use Table A to estimate fees collected for the period 10/1/11 through 2/20/12. The projected aggregate dollar amount of covered sales for this period is $\$26,226,684,370,811$. Actual and projected fee collections at the current fee rate of 0.0000192 are $\$503,552,340$.
2. Estimate the amount of assessments on securities futures products collected during 10/1/11 and 9/30/12 to be $\$17,328$ by projecting a 1.7% monthly increase from a base of $\$1,387$ in November 2011.

3. Subtract the amounts \$503,552,340 and \$17,328 from the target offsetting collection amount set by Congress of \$1,321,000,000 leaving \$817,430,332 to be collected on dollar volume for the period 2/21/12 through 9/30/12.
4. Use Table A to estimate dollar volume for the period 2/21/12 through 9/30/12. The estimate is \$45,419,684,665,277. Finally, compute the fee rate required to produce the additional \$817,430,332 in revenue. This rate is \$817,430,332 divided by \$45,419,684,665,277 or 0.0000179973.
5. Round the result to the seventh decimal point, yielding a rate of .0000180 (or \$18.00 per million).

Table A. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/11 to 2/20/12 (\$Millions)	26,226,684
b. Baseline estimate of the aggregate dollar amount of sales, 2/21/12 to 9/30/12 (\$Millions)	45,419,685
c. Estimated collections in assessments on securities futures products in FY 2012 (\$Millions)	0.017
d. Implied fee rate (((\$1,321,000,000 - 0.0000192*a - c) / b)	\$18.00

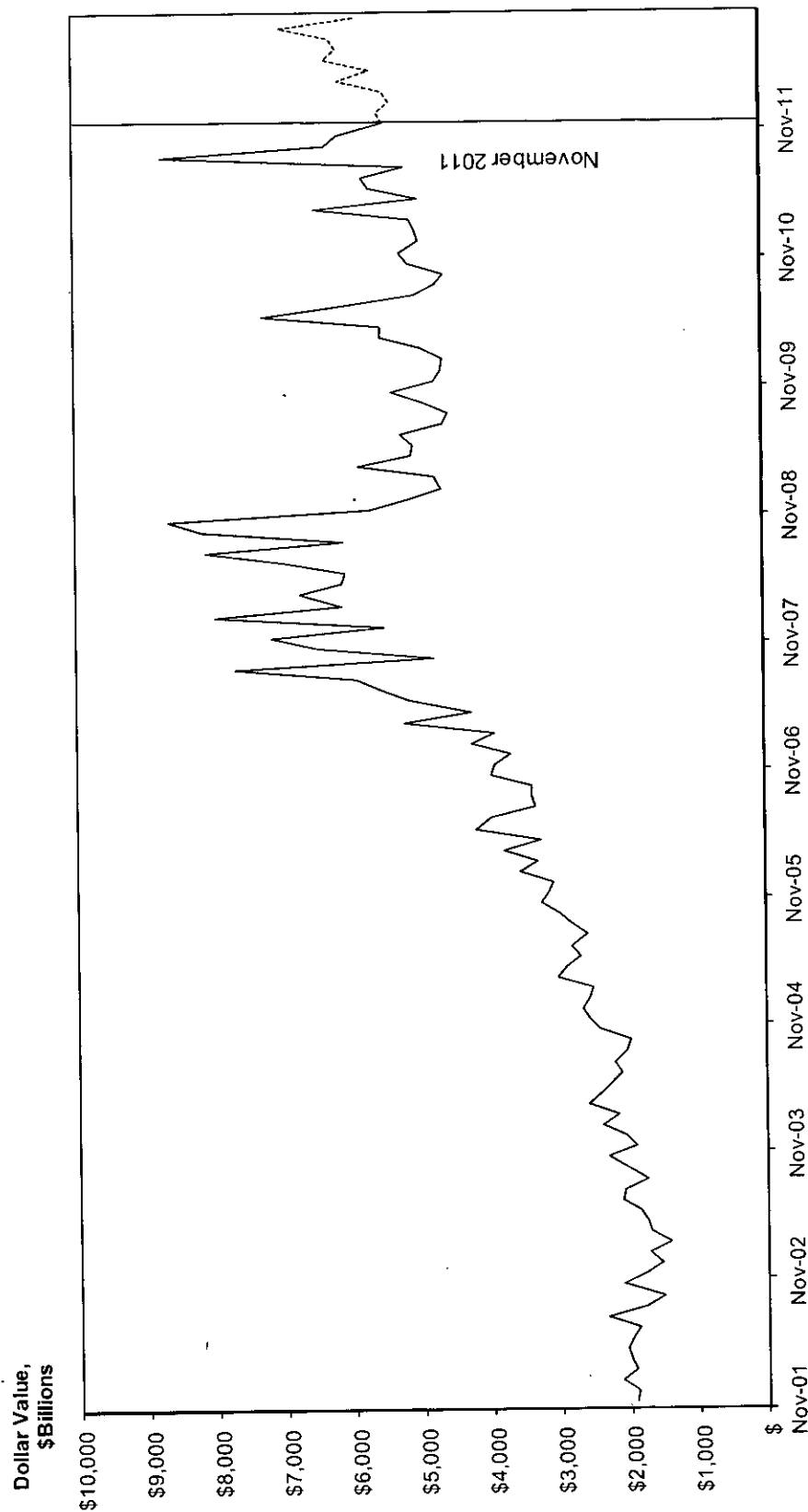
Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Nov-01	21	1,939,427,217,518	92,353,677,025	-		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		
Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,847,200,448	129,092,360,022	0.060		
Feb-05	19	2,532,202,408,589	133,273,810,978	0.032		
Mar-05	22	3,030,474,897,226	137,748,858,965	0.033		
Apr-05	21	2,906,386,944,434	138,399,378,306	0.005		
May-05	21	2,697,414,503,460	128,448,309,689	-0.075		
Jun-05	22	2,825,962,273,624	128,452,830,619	0.000		
Jul-05	20	2,604,021,263,875	130,201,063,194	0.014		
Aug-05	23	2,846,115,585,965	123,744,155,912	-0.051		
Sep-05	21	3,009,640,645,370	143,316,221,208	0.147		
Oct-05	21	3,279,847,331,057	156,183,206,241	0.086		
Nov-05	21	3,163,453,821,548	150,640,658,169	-0.036		
Dec-05	21	3,090,212,715,561	147,152,986,455	-0.023		
Jan-06	20	3,573,372,724,766	178,668,636,238	0.194		

Feb-06	19	3,314,259,849,456	174,434,728,919	-0.024		
Mar-06	23	3,807,974,821,564	165,564,122,677	-0.052		
Apr-06	19	3,257,478,138,851	171,446,217,834	0.035		
May-06	22	4,206,447,844,451	191,202,174,748	0.109		
Jun-06	22	3,995,113,357,316	181,596,061,696	-0.052		
Jul-06	20	3,339,658,009,357	166,982,900,468	-0.084		
Aug-06	23	3,410,187,280,845	148,269,012,211	-0.119		
Sep-06	20	3,407,409,863,673	170,370,493,184	0.139		
Oct-06	22	3,980,070,216,912	180,912,282,587	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,263,986,570,973	213,199,328,549	0.138		
Feb-07	19	3,946,799,860,532	207,726,308,449	-0.026		
Mar-07	22	5,245,051,744,090	238,411,442,913	0.138		
Apr-07	20	4,274,665,072,437	213,733,253,622	-0.109		
May-07	22	5,172,568,357,522	235,116,743,524	0.095		
Jun-07	21	5,586,337,010,802	266,016,048,133	0.123		
Jul-07	21	5,938,330,480,139	282,777,641,911	0.061		
Aug-07	23	7,713,644,229,032	335,375,836,045	0.171		
Sep-07	19	4,805,676,596,099	252,930,347,163	-0.282		
Oct-07	23	6,499,651,716,225	282,593,552,879	0.111		
Nov-07	21	7,176,290,763,989	341,728,131,619	0.190		
Dec-07	20	5,512,903,594,564	275,645,179,728	-0.215		
Jan-08	21	7,997,242,071,529	380,821,051,025	0.323		
Feb-08	20	6,139,080,448,887	306,954,022,444	-0.216		
Mar-08	20	6,767,852,332,381	338,392,616,619	0.098		
Apr-08	22	6,150,017,772,735	279,546,262,397	-0.191		
May-08	21	6,080,169,766,807	289,531,893,657	0.035		
Jun-08	21	6,962,199,302,412	331,533,300,115	0.135		
Jul-08	22	8,104,256,787,805	368,375,308,537	0.105		
Aug-08	21	6,106,057,711,009	290,764,652,905	-0.237		
Sep-08	21	8,156,991,919,103	388,428,186,624	0.290		
Oct-08	23	8,644,538,213,244	375,849,487,532	-0.033		
Nov-08	19	5,727,998,341,833	301,473,596,939	-0.221		
Dec-08	22	5,176,041,317,640	235,274,605,347	-0.248		
Jan-09	20	4,670,249,433,806	233,512,471,690	-0.008		
Feb-09	19	4,771,470,184,048	251,130,009,687	0.073		
Mar-09	22	5,885,594,284,780	267,527,012,945	0.063		
Apr-09	21	5,123,665,205,517	243,984,057,406	-0.092		
May-09	20	5,086,717,129,965	254,335,856,498	0.042		
Jun-09	22	5,271,742,782,609	239,624,671,937	-0.060		
Jul-09	22	4,659,599,245,583	211,799,965,708	-0.123		
Aug-09	21	4,582,102,295,783	218,195,347,418	0.030		
Sep-09	21	4,929,155,364,888	234,721,684,042	0.073		
Oct-09	22	5,410,025,301,030	245,910,240,956	0.047		
Nov-09	20	4,770,928,103,032	238,546,405,152	-0.030		
Dec-09	22	4,688,555,303,171	213,116,150,144	-0.113		
Jan-10	19	4,661,793,708,648	245,357,563,613	0.141		
Feb-10	19	4,969,848,578,023	261,570,977,791	0.064		
Mar-10	23	5,563,529,823,621	241,892,601,027	-0.078		
Apr-10	21	5,546,445,874,917	264,116,470,234	0.088		
May-10	20	7,260,430,376,294	363,021,518,815	0.318		
Jun-10	22	6,124,776,349,285	278,398,924,967	-0.265		
Jul-10	21	5,058,242,097,334	240,868,671,302	-0.145		

Aug-10	22	4,765,828,263,463	216,628,557,430	-0.106		
Sep-10	21	4,640,722,344,586	220,986,778,314	0.020		
Oct-10	21	5,138,411,712,272	244,686,272,013	0.102		
Nov-10	21	5,279,700,881,901	251,414,327,710	0.027		
Dec-10	22	4,998,574,681,208	227,207,940,055	-0.101		
Jan-11	20	5,043,391,121,345	252,169,556,067	0.104		
Feb-11	19	5,114,631,590,581	269,191,136,346	0.065		
Mar-11	23	6,499,355,385,307	282,580,668,926	0.049		
Apr-11	20	4,975,954,868,765	248,797,743,438	-0.127		
May-11	21	5,717,905,621,053	272,281,220,050	0.090		
Jun-11	22	5,820,079,494,414	264,549,067,928	-0.029		
Jul-11	20	5,189,681,899,635	259,484,094,982	-0.019		
Aug-11	23	8,720,566,877,109	379,155,081,613	0.379		
Sep-11	21	6,343,578,147,811	302,075,149,896	-0.227		
Oct-11	21	6,163,272,963,688	293,489,188,747	-0.029		
Nov-11	21	5,493,906,473,584	261,614,593,980	-0.115		
Dec-11	21				265,994,342,797	5,585,881,198,747
Jan-12	20				270,447,413,976	5,408,948,279,516
Feb-12	20				274,975,035,021	5,499,500,700,425
Mar-12	22				279,578,453,990	6,150,725,987,779
Apr-12	20				284,258,939,832	5,685,178,796,640
May-12	22				289,017,782,741	6,358,391,220,309
Jun-12	21				293,856,294,511	6,170,982,184,735
Jul-12	21				298,775,808,896	6,274,291,986,814
Aug-12	23				303,777,681,979	6,986,886,685,506
Sep-12	19				308,863,292,545	5,868,402,558,346

Figure A.
 Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)¹
 Methodology Developed in Consultation With OMB and CBO
 (Dashed Line Indicates Forecast Values)



¹Forecasted line is not smooth because the number of trading days varies by month.

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66206 / January 20, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14708

In the Matter of)

AXA ADVISORS, LLC,)

Respondent.)
_____))

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b)(4) OF
THE SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act") against AXA Advisors, LLC ("AXA Advisors" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b)(4) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that¹:

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

1. Respondent failed reasonably to supervise Leo T. Buggy ("Buggy") with a view to preventing and detecting his violations of the federal securities laws during the period December 2005 through December 2008. During this time period, Buggy fraudulently induced customers to redeem securities held at AXA Advisors, including variable annuities and mutual funds, under the false representation that the proceeds from such redemptions would be invested in other securities through AXA Advisors. Instead, Buggy caused customers to place those funds in a bank account controlled by Buggy, from which he misappropriated the funds.

Respondent

2. Respondent is a Delaware limited liability company, with its principal place of business in New York, NY and has been registered with the Commission as a broker-dealer since 1974 and as an investment adviser since 1978.

Other Relevant Person

3. Buggy was a registered representative with Respondent from 1982 through January 2009, when he was terminated in connection with the matters discussed herein. From 2005 forward, Buggy operated out of an AXA Advisors' office in Rock Springs, Wyoming, where he was the sole registered representative, or from his home in Green River, Wyoming, and was supervised by an AXA Advisors' branch office in Salt Lake City, Utah.

Criminal Action Against Buggy

4. On July 10, 2009, in the United States District Court for the District of Wyoming, Buggy was charged with three counts of mail fraud, wire fraud, and money laundering. Buggy entered a plea of guilty, and on October 16, 2009, Buggy was sentenced to forty-six months in prison to be followed by three years supervised probation upon his release.

Buggy's Misconduct

5. Buggy fraudulently induced investors, who were customers for whom he acted as registered representative, to redeem securities, including variable annuities and, to a much lesser extent, mutual funds, under the false representation that he would invest the proceeds for them in other securities products. Based on these representations, customers authorized the redemptions of variable annuity and the proceeds were sent to them at their home address or wired directly into their personal bank accounts. Buggy then misappropriated the proceeds by causing the customers either to write checks payable to "Equitable Life" that Buggy deposited into an account at a local bank that Buggy controlled for his personal benefit, or to wire funds directly into that account. Buggy gave his personal account the name "Leo T. Buggy - Equitable Life Agency," a name similar to an AXA Advisors affiliate, which enabled him to deposit checks that appeared to be made out to legitimate AXA Advisors entities and further misled customers into

believing that their funds were being invested in AXA Advisors securities. Altogether, Buggy fraudulently misappropriated approximately \$1.2 million from seven customers (three individuals and two couples) in approximately 32 transactions. By virtue of such conduct, Buggy violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. During much of the time that Buggy defrauded his customers, he was either certified as disabled by Respondent's disability insurance carrier or was appealing denial of disability certification.

Respondent's Failure to Supervise

6. Respondent failed to implement adequate procedures regarding the review of redemptions by customers of variable annuities. During the relevant period, Respondent had procedures in place requiring supervisory review of securities transactions but did not have in place adequate procedures for the review of redemptions of variable annuities which occurred in the accounts of Buggy's customers. Buggy had customers partially redeem their variable annuities and then reinvest the funds in his "Leo T. Buggy - Equitable Life Agency" personal account. Had Respondent implemented adequate procedures for supervisory review of redemptions from the variable annuities of Buggy's customers, Buggy's conduct likely would have been detected and prevented.

7. Respondent failed to establish reasonable procedures to supervise registered representatives who were on leave for an extended period of time, including absences due to disability, with respect to the registered representatives' servicing of customer accounts. From approximately November 2006 through January 2007 and February 2007 through June 2007, Buggy was certified as disabled by Respondent's disability insurance carrier and was receiving benefits under Respondent's short term disability program. Although Buggy was considered by the disability carrier as no longer eligible to receive benefits as of June 2007, Buggy continued to advise Respondent that he was not well and continued to take extended periods of leave. Buggy appealed the disability carrier's determination and continually sought to have his benefits reinstated from the summer of 2007 until he was terminated from Respondent in January 2009. The disability carrier retroactively certified Buggy as disabled and eligible for benefits for the period of approximately February 2008 through February 2010. During the time period that Buggy was certified as disabled and while he was appealing, Respondent assigned for servicing some of Buggy's customer accounts to other registered representatives who were subject to the firm's supervision. However, these measures were not sufficient to adequately supervise Buggy with respect to his servicing of the remainder of his customer accounts. Buggy perpetrated his fraud, in part, during this time period. Had Respondent implemented adequate procedures for the supervision of registered representatives on extended leave, as Buggy was for his disability, then it is likely that AXA Advisors would have prevented and detected Buggy's violative conduct.

Conclusions

8. Under Section 15(b)(4)(E) of the Exchange Act, broker-dealers are responsible for reasonably supervising, with a view to preventing violations of the federal securities laws, persons subject to their supervision. Respondent was responsible for supervising Buggy.

9. Because Buggy violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Respondent failed to establish adequate procedures that would reasonably be expected to prevent and detect such violations, Respondent failed reasonably to supervise Buggy for purposes of Section 15(b)(4)(E) of the Exchange Act.

Respondent's Remedial Efforts

10. In determining to accept Respondent's Offer, the Commission considered the remedial acts undertaken by Respondent to make improvements to its supervisory system, including, among other things, the creation of a Variable Product Withdrawal Report, which provides for supervisory review of customer redemptions of variable annuities and other variable products, and the creation and implementation of an automated system for reviewing redemptions. The Commission also considered the cooperation afforded the Commission staff in its investigation of this matter, the cooperation afforded the criminal authorities who investigated Buggy's scheme, and Respondent's prompt reimbursement of all losses experienced by its customers. Shortly after Buggy's termination, Respondent conducted an outreach to all the clients assigned to Buggy and no further substantive concerns were identified.

Undertakings

11. Respondent has represented to the staff of the Denver Regional Office that it has engaged an Independent Compliance Consultant having substantial regulatory and industry experience to evaluate, and if appropriate, recommend enhancements to, its supervisory and compliance practices for circumstances where registered representatives are on extended leave, and in particular situations where registered representatives are receiving or seeking disability benefits, giving due regard to applicable employment and disability law considerations. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by Respondent. Respondent shall cooperate fully with the Independent Compliance Consultant and shall provide the Independent Compliance Consultant with access to files, books, records, and personnel as reasonably requested for the development of recommendations.

12. Respondent shall require that, at the conclusion of the review, which in no event shall be more than 120 days after the date of entry of this Order, the Independent Compliance Consultant shall submit a Report to Respondent. The Report shall address the issues described in paragraph 11 above, and shall include a description of the review performed, the conclusions reached, the Independent Compliance Consultant's recommendations for changes in or improvements to Respondent's policies and procedures with respect to such issues, and a procedure for implementing the recommended changes in or improvements to those policies and procedures.

13. Respondent shall adopt all recommendations contained in the Report of the Independent Compliance Consultant; provided, however, that, within 150 days after the date of entry of this Order, Respondent shall, in writing, advise the Independent Compliance Consultant and the staff of the Commission of any recommendations that it considers to be unnecessary or inappropriate or contrary to applicable employment or disability laws or regulations. With

respect to any such recommendation, Respondent need not adopt that recommendation at that time but shall propose, in writing, an alternative policy, procedure or system designed to achieve the same objective or purpose.

14. As to any recommendation with respect to the policies and procedures of Respondent on which Respondent and the Independent Compliance Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 180 days of the date of entry of this Order. In the event Respondent and the Independent Compliance Consultant are unable to agree on an alternative proposal, Respondent shall abide by the determinations of the Independent Compliance Consultant to the extent that they are consistent with applicable employment or disability laws or regulations.

15. Respondent shall not terminate the Independent Compliance Consultant without the prior written approval of the staff of the Commission. Respondent shall compensate the Independent Compliance Consultant for services rendered pursuant to this Order at its reasonable and customary rates. Neither Respondent nor any of its affiliates shall be in or have an attorney-client relationship with the Independent Compliance Consultant and neither Respondent nor its affiliates shall seek to invoke the attorney client or any other doctrine or privilege to prevent the Independent Compliance Consultant from transmitting any information, reports, or documents to the staff of the Commission.

16. Respondent shall require that the Independent Compliance Consultant, for the period of the engagement and for a period of two years from completion of the engagement, shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondent or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Respondent shall require that any firm with which the Independent Compliance Consultant is affiliated in the performance of his, her or its duties under this Order shall not, without prior written consent of the staff of the Commission enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondent or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

17. Respondent shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Julie K. Lutz, Associate Regional Director, Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, CO, 80202, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F St., NE, Stop 6553, Washington, DC, 20549 no later than 60 days from the date of the completion of the undertakings.

18. Respondent shall preserve for a period of not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of Respondent's compliance with the undertakings set forth in this section.

19. The staff of the Commission may extend any of the procedural dates set forth above for good cause shown.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 15(b)(4) of the Exchange Act, Respondent is hereby censured;

B. Respondent shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of \$100,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission, (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549, and (D) submitted under cover letter that identifies AXA Advisors as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Donald Hoerl, Regional Director, Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, CO 80202.

C. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

D. Respondent shall comply with the undertakings enumerated in paragraphs 11 through 19 above.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

19. As a result of the conduct described above, Premo willfully aided and abetted and caused the Ultra Fund's violation of Rule 22c-1(a) promulgated pursuant to Section 22(c) of the Investment Company Act, which requires registered investment companies like the Fund to sell and redeem shares only at a price based on the current NAV of those shares. Through its improper pricing of the CDO, the Evergreen Adviser caused the Ultra Fund to materially overstate its NAV and to sell and redeem its shares at a price other than the Fund's current NAV. By failing to disclose to the EVC the CDO's event of default, acceleration, and cash flow stoppage, and by failing to include in her June 4, 2008 report to the EVC on the CDO any reference to these developments, thus rendering what she communicated to the EVC that day materially misleading, Premo provided knowing and substantial assistance to and thereby aided and abetted and caused the Ultra Fund's violation of Rule 22c-1(a).

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against the Respondent pursuant to Section 203(f) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203 of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against the Respondent pursuant to Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 9 of the Investment Company Act; and

D. Whether, pursuant to Section 203(k) of the Advisers Act and Section 9(f) of the Investment Company Act, the Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) or 206(2) of the Advisers Act or Rule 22c-1(a) promulgated pursuant to Section 22(c) of the Investment Company Act, and whether Respondent should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If the Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against her upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon the Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

Release No. 33-9295; File No. S7-31-11

RIN 3235-AL20

COVERED SECURITIES OF BATS EXCHANGE, INC.

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting an amendment to Rule 146 under Section 18 of the Securities Act of 1933, as amended, ("Securities Act") to designate certain securities listed, or authorized for listing, on BATS Exchange, Inc. ("BATS" or "Exchange") as covered securities for purposes of Section 18 of the Securities Act. Covered securities under Section 18 of the Securities Act are exempt from state law registration requirements. The Commission also is making corrections to the rule text to reflect name changes.

EFFECTIVE DATE: [Insert date that is 30 days from the date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: David R. Dimitrious, Senior Special Counsel, (202) 551-5131, Ronesha Butler, Special Counsel, (202) 551-5629, or Carl Tugberk, Special Counsel, (202) 551-6049, or Tyler Raimo, Special Counsel, (202) 551-6227, Division of Trading and Markets ("Division"), Commission, 100 F Street, NE, Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION:

I. Introduction

In 1996, Congress amended Section 18 of the Securities Act to exempt from state

41 of 64

registration requirements securities listed, or authorized for listing, on the New York Stock Exchange LLC ("NYSE"), the American Stock Exchange LLC ("Amex") (now known as NYSE Amex LLC),¹ or the National Market System of The NASDAQ Stock Market LLC ("Nasdaq/NGM")² (collectively, the "Named Markets"), or any national securities exchange designated by the Commission to have substantially similar listing standards to those of the Named Markets.³ More specifically, Section 18(a) of the Securities Act provides that "no law, rule, regulation, or order, or other administrative action of any State . . . requiring, or with respect to, registration or qualification of securities . . . shall directly or indirectly apply to a security that – (A) is a covered security."⁴ Covered securities are defined in Section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are

¹ On October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation ("AMC") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger"). In connection with the Merger, NYSE Amex's predecessor, the Amex, a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC ("NYSE Alternext"). See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger). In 2009, the Exchange changed its name from NYSE Alternext to NYSE Amex LLC ("NYSE Amex"). See Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR-NYSEALTR-2009-24) (approving the name change).

² As of July 1, 2006, the National Market System of The NASDAQ Stock Market LLC is known as the Nasdaq Global Market ("NGM"). See Securities Exchange Act Release Nos. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) and 54071 (June 29, 2006), 71 FR 38922 (July 10, 2006).

³ See National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (October 11, 1996).

⁴ 15 U.S.C. 77r(a).

“substantially similar” to those of the Named Markets (“Covered Securities”).⁵

Pursuant to Section 18(b)(1)(B) of the Securities Act, the Commission adopted Rule 146.⁶ Rule 146(b) lists those national securities exchanges, or segments or tiers thereof, that the Commission has determined to have listing standards substantially similar to those of the Named Markets and thus securities listed on such exchanges are deemed Covered Securities.⁷ BATS has petitioned the Commission to amend Rule 146(b) to designate certain securities listed on BATS⁸ as Covered Securities for the

⁵ 15 U.S.C. 77r(b)(1)(A) and (B). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of Section 18 of the Securities Act. 15 U.S.C. 77r(b)(1)(C).

⁶ Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998) (determining that the listing standards of the Chicago Board Options Exchange, Incorporated (“CBOE”), Tier 1 of the Pacific Exchange, Inc. (“PCX”) (now known as NYSE Arca, Inc.), and Tier 1 of the Philadelphia Stock Exchange, Inc. (“Phlx”) (now known as NASDAQ OMX PHLX LLC) were substantially similar to those of the Named Markets and that securities listed pursuant to those standards would be deemed Covered Securities for purposes of Section 18 of the Securities Act). In 2004, the Commission amended Rule 146(b) to designate options listed on the International Securities Exchange, Inc. (“ISE”) (now known as the International Securities Exchange, LLC) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8442 (July 14, 2004), 69 FR 43295 (July 20, 2004). In 2007, the Commission amended Rule 146(b) to designate securities listed on the Nasdaq Capital Market (“NCM”) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

⁷ 17 CFR 230.146(b).

⁸ BATS recently filed an immediately effective rule change to amend Rule 14.1 of its listing standards to include all securities listed on the Exchange pursuant to Rule 14.11 as Tier I securities. Exchange Rule 14.11 sets forth the criteria for listing certain exchange traded products, including exchange traded funds, portfolio depository receipts, index fund shares and various other types of securities (collectively, “ETPs”). ETPs were not designated as either Tier I or Tier II securities prior to this amendment. The Exchange’s recent filing modifies the definitions of “Tier I” in Rule 14.1(a)(29), and “Tier I security” in Rule

purpose of Section 18 of the Securities Act.⁹

On August 8, 2011, the Commission issued a release proposing to amend Rule 146(b) to designate certain securities listed, or authorized for listing, on BATS as covered securities for purposes of Section 18(a) of the Securities Act.¹⁰ The Commission also proposed to update certain references in the rule. The Commission received one comment letter,¹¹ which favored amending Rule 146(b) to reflect the name change of Phlx, as proposed by the Commission. In connection with its petition, BATS filed a proposed rule change to establish standards for the listing of securities on BATS.¹² On

14.1(a)(30), to make clear that ETPs are considered Tier I securities for purposes of the Exchange's rules. See Exchange Act Release No. 65809 (November 23, 2011), 76 FR 74079 (November 30, 2011). The Commission notes that this is only a definitional change. It does not result in any substantive changes to the Exchange's existing listing standards that are the subject of this rule amendment.

⁹ See letter from Eric Swanson, Senior Vice President and General Counsel, BATS, to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2011 (File No. 4-632) ("BATS Petition").

¹⁰ Securities Act Release No. 9251 (August 8, 2011), 76 FR 46698 (August 11, 2011) ("Proposing Release").

¹¹ See letter to Elizabeth M. Murphy, Secretary, Commission, from Keith Paul Bishop, former California Commissioner of Corporations, dated August 23, 2011 ("Bishop Letter"). The commenter concurred with the Commission that Rule 146(b)(1)(iv) should be updated to reflect the term "NASDAQ OMX PHLX LLC" instead of "the Philadelphia Stock Exchange, Inc." The commenter also requested that the Commission review the current standards of the PHLX with respect to the listing and trading of securities to determine whether the current listing standards of PHLX are substantially similar to standards of Named Market. The Commission has carefully considered the comment letter, and believes that the request of the commenter with regard to the listing standards of Phlx is beyond the scope of the Commission's proposed rule. However, the Commission notes that, via its oversight, inspection and enforcement functions, it regularly monitors the operations of registered exchanges and their compliance with the securities laws and rules applicable to them.

¹² See Securities Exchange Act Release No. 64546 (May 25, 2011), 76 FR 31660 (June 1, 2011) (proposing qualitative and quantitative listing requirements and standards for securities).

August 30, 2011, the Commission approved this proposed rule change.¹³

Based on the approved BATS listing standards and after careful comparison, the Commission has determined that BATS' listing standards for Tier I and Tier II securities are substantially similar to the listing standards of the Named Markets. Accordingly, the Commission today is amending Rule 146(b) to designate securities listed, or authorized for listing, on Tier I and Tier II of BATS as Covered Securities under Section 18(b)(1) of the Securities Act.¹⁴ Amending Rule 146(b) to include these securities as Covered Securities will exempt those securities from state registration requirements as set forth under Section 18(a) of the Securities Act.¹⁵ The Commission also is adopting, as proposed, updated references in the rule.

The Commission notes that the proposed rule text would have designated any security listed, or authorized for listing, on BATS as a Covered Security. In light of BATS recent rule amendment defining "Tier I" and "Tier I securities" to include ETPs,¹⁶ the Commission is refining the rule text adopted today to designate those securities listed on Tier I and Tier II of the Exchange as Covered Securities. This designation is substantively identical to the proposed rule text, as the same securities that the Commission proposed to be designated as Covered Securities in the Proposing Release will be so designated.

¹³ Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011).

¹⁴ 15 U.S.C. 77r(b)(1).

¹⁵ 15 U.S.C. 77r(a).

¹⁶ See supra note 8.

II. Amendment to Rule 146(b) to Include BATS Securities

Under Section 18(b)(1)(B) of the Securities Act,¹⁷ the Commission has the authority to determine that the listing standards of an exchange, or tier or segment thereof, are substantially similar with those of the NYSE, NYSE Amex, or Nasdaq/NGM. The Commission initially compared BATS' listing standards for Tier I and Tier II securities with those of one of the Named Markets. If the listing standards in a particular category were not substantially similar to the standards of that market, the Commission compared BATS' standards to one of the other two markets.¹⁸ In addition, as it has done previously, the Commission interpreted the "substantially similar" standard to require listing standards at least as comprehensive as those of the Named Markets.¹⁹ If BATS' listing standards were higher than those of the Named Markets, then the Commission still determined that BATS' listing standards are substantially similar to those of the Named Markets.²⁰ Finally, the Commission notes that differences in language or approach would not necessarily lead to a determination that BATS' listing standards are not substantially similar to those of any Named Market.²¹

The Commission has reviewed BATS' listing standards for securities to be listed and traded on BATS and, for the reasons discussed below, has determined that the

¹⁷ 15 U.S.C. 77r(b)(1)(B).

¹⁸ This approach is consistent with the approach that the Commission has previously taken. See, e.g., Securities Act Release No. 7494 (January 13, 1998), 63 FR 3032 (January 21, 1998).

¹⁹ See id.

²⁰ See Securities Act Release No. 8791, supra note 6.

²¹ Id.

standards are substantially similar to those of a Named Market.²² Accordingly, the Commission is amending Rule 146(b) to include securities listed, or authorized for listing, on Tier I and Tier II of BATS. Because the Commission has determined BATS' qualitative listing standards for BATS' Tier I and Tier II securities, Tier I quantitative listing standards are substantively identical to the listing standards for Nasdaq/NGM securities (and, therefore, are "substantially similar" to a Named Market as required by Section 18(b)(1)(B)),²³ the discussion below focuses on BATS' Tier II quantitative listing standards. The Commission included in the Proposing Release its preliminary view that the Tier I and Tier II qualitative listing standards and Tier I quantitative listing standards were substantively identical to the listing standards for Nasdaq/NGM securities and received no comments on that view.²⁴

A. Primary Equity Securities

As discussed in the Proposing Release, the Commission preliminarily believed that BATS' initial listing standards for primary equity securities listed on Tier II of the Exchange were substantially similar to those of NYSE Amex's common stock listing

²² See generally BATS Chapter XIV; Securities Exchange Act Release No. 64546, supra note 8, 76 FR 31660. In making its determination of substantial similarity, as discussed in detail below, the Commission generally compared BATS' proposed qualitative listing standards for both Tier I and Tier II securities with Nasdaq/NGM's qualitative listing standards, BATS' proposed quantitative listing standards for Tier I securities with Nasdaq/NGM's quantitative listing standards, and BATS' proposed quantitative listing standards for Tier II securities with NYSE Amex's quantitative listing standards.

²³ See infra notes 42-49.

²⁴ See Proposing Release at 49699 to 49700 and n. 25 to n. 26. See id. at 49703 (discussing ETPs).

standards.²⁵ The Commission has determined that BATS' initial listing standards for primary equity securities are substantially similar to those of NYSE Amex. BATS' requirements relating to bid price,²⁶ round lot holders,²⁷ shares held by the public,²⁸ and

²⁵ See Proposing Release at 49700. BATS' use of "primary equity securities" and NYSE Amex's use of "common stock" is simply a difference in nomenclature, as BATS' listing standards define "primary equity security" as a company's first class of common stock. See BATS Rule 14.1(a)(21).

²⁶ BATS' listing standards require a minimum bid price of \$4 per share for initial listing and \$1 per share for continued listing while NYSE Amex requires a minimum bid price of \$2-3 per share depending on the issuer for initial listing and will consider delisting if the price per share is "low." Compare BATS Rule 14.9(b)(1)(A) with Section 102 of the NYSE Amex Company Guide. The Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets; the Commission may determine that a petitioner's standards are substantially similar if they are higher, and differences in language or approach of the listing standards are not dispositive. See *supra* notes 19-21 and accompanying text.

²⁷ While BATS' listing standards require at least 300 round lot holders, NYSE Amex's listing standards require 400 or 800 public shareholders (depending upon the number of shares held by the public), or 300 or 600 public shareholders for its alternate listing standards. The Commission does not believe this difference precludes a determination of substantial similarity between the standards. Additionally, BATS' listing standards are identical to the listing standards of NCM, which the Commission previously found to be substantially similar to a Named Market. See Securities Act Release 8791, *supra* note 6 (determining that NCM listing standards, which are identical to BATS' listing standards for primary equity securities on Tier II of the Exchange, are substantially similar to these same Amex standards). With respect to NCM having alternative listing standards for the number of round lot holders, the Commission noted that this difference did not preclude a determination of substantial similarity between the standards. See Securities Act Release 8791, *supra* note 6, 72 FR at 20412; Securities Act Release No. 8754 (November 22, 2006), 71 FR 67762 (November 22, 2006) (proposing that the Commission amend Rule 146(b) to designate securities listed on the NCM as covered securities for purposes of Section 18(b) of the Securities Act).

²⁸ BATS' listing standards require a minimum of 1,000,000 publicly held shares while NYSE Amex requires a minimum of 500,000. Compare BATS Rule 14.9(b)(1)(B) with Section 102(a) of the NYSE Amex Company Guide. The Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets; the Commission may determine that a petitioner's standards are substantially similar

required number of registered and active market makers²⁹ are substantially similar to NYSE Amex requirements. Additionally, BATS' proposed equity,³⁰ market value,³¹ and net income³² standards are substantially similar to NYSE Amex standards.

In addition to the above initial listing requirements, BATS requires that American Depositary Receipts ("ADRs") comply with an additional criterion. Specifically, BATS requires there be at least 400,000 ADRs issued for such securities to be initially listed on BATS.³³ However, NYSE Amex does not have specific requirements for ADRs in

if they are higher, and differences in language or approach of the listing standards are not dispositive. See supra notes 17-19 and accompanying text.

²⁹ BATS' listing requirements require at least three registered and active market makers while NYSE Amex requires one specialist to be assigned. Compare BATS Rule 14.9(b)(1)(D) with Section 202(e) of the NYSE Amex Company Guide. The Commission may still determine that the petitioner's listing standards are substantially similar to those of the Named Markets if a petitioner's listing standards are higher than the Named Markets. See Securities Act Release No. 8791, supra note 6.

³⁰ BATS' listing standards require a company to have stockholder equity of at least \$5 million, a market value of publicly held shares of at least \$15 million, and a two-year operating history. See BATS Rule 14.9(b)(2)(A). NYSE Amex requires stockholder equity of at least \$4 million, a market value of publicly held shares of at least \$15 million, and a two-year operating history.

³¹ BATS' listing standards require a market value of listed securities of at least \$50 million and a market value of publicly held shares of at least \$15 million, which is the same as required by NYSE Amex. Compare BATS Rule 14.9(b)(2)(B) with Section 101(c)(2)-(3) of the NYSE Amex Company Guide.

³² BATS' listing standards require net income from continuing operations of at least \$750,000, which is the same as required by NYSE Amex. Compare BATS Rule 14.9(b)(2)(C) with Section 101(d)(1) of the NYSE Amex Company Guide.

³³ See BATS Rule 14.9(b)(1)(E). This requirement is identical to NCM. See Nasdaq Rule 5505(a)(5); see generally Securities Act Release 8791, supra note 6 (determining that NCM listing standards, which are identical to BATS' standards for primary equity securities on Tier II of the Exchange, are substantially similar to the Amex standards).

addition to its initial listing standards for primary equity securities.³⁴ As noted above, the Commission may still determine that the petitioner's listing standards are substantially similar to those of the Named Markets if BATS' listing standards are higher than the Named Markets.³⁵ Further, as noted above, differences in language or approach of listing standards are not dispositive.³⁶ The Commission has determined that the quantitative initial listing standards for primary equity securities on Tier II of the Exchange are substantially similar to those of NYSE Amex.

The Commission has determined that the continued listing requirements for primary equity securities listed on Tier II of the Exchange, while not identical, are substantially similar to those of NYSE Amex.³⁷ NYSE Amex's delisting criteria are triggered by poor financial conditions or operating results of the issuer.³⁸ Specifically, NYSE Amex will consider delisting an equity issue if: (i) stockholders' equity is less than \$2 million and such issuer has sustained losses from continuing operations and/or net losses in two of its three most recent fiscal years; (ii) stockholders' equity is less than \$4 million and such issuer has sustained losses from continuing operations and/or net losses in three of its four most recent fiscal years; (iii) stockholders' equity is less than \$6 million if such issuer has sustained losses from continuing operations and/or net losses in

³⁴ See Section 102 of the NYSE Amex Company Guide. See also Section 110 of the NYSE Amex Company Guide.

³⁵ See Securities Act Release No. 8791, supra note 6.

³⁶ See id.

³⁷ See generally Securities Act Release 8791, supra note 6 (determining that NCM continued listing standards, which are identical to BATS' continued listing standards for primary equity securities on Tier II of the Exchange, were substantially similar to the Amex standards).

³⁸ See generally Sections 1001 through 1006 of the NYSE Amex Company Guide.

its five most recent fiscal years; or (iv) the issuer has sustained losses which are so substantial in relation to its overall operations or its existing financial resources, or its financial condition has become so impaired that it appears questionable, in the opinion of the exchange, as to whether such company will be able to continue operations and/or meet its obligations as they mature.³⁹

Although BATS does not have the same continued listing provisions for Tier II, BATS also looks at the financial condition and operating results of the issuer in order to determine whether to delist an issuer. BATS' continued listing standards for Tier II securities require compliance with either a (1) shareholder equity, (2) market value of listed securities or (3) net income standard. Specifically, for continued listing, BATS requires shareholder's equity of at least \$2.5 million, market value of listed securities of at least \$35 million, or net income of \$500,000 from continuing operations in the past fiscal year or two out of three past fiscal years.⁴⁰ Further, BATS requires an issuer to

³⁹ See Section 1003(a) of the NYSE Amex Company Guide. While not identical to NYSE Amex, BATS, as noted below, also has a shareholder equity standard. See infra note 37 and accompanying text. NYSE Amex, however, will not normally consider suspending dealing in (i) through (iii) noted above if the issuer is in compliance with the following: (1) total market value of market capitalization of at least \$50,000,000; or total assets and revenue of \$50,000,000 each in its last fiscal year, or in two of its last three fiscal years; and (2) the issuer has at least 1,100,000 shares publicly held, a value of publicly held shares of at least \$15,000,000 and 400 round lot holders. Id.

NYSE Amex also will consider delisting if: (i) an issuer has sold or otherwise disposed of its principal operating assets or has ceased to be an operating company or has discontinued a substantial portion of its operations or business; (ii) if substantial liquidation of the issuer has been made; or (iii) if advice has been received, deemed by the Exchange to be authoritative, that the security is without value, or in the case of a common stock, such stock has been selling for a substantial period of time at a low price. See Section 1003(c) and (f)(v) of the NYSE Amex Company Guide.

⁴⁰ BATS Rule 14.9(e)(2)(A)-(C). NYSE Amex focuses on a shareholder equity standard for continued listing. BATS' shareholder equity standard requires at

have (i) a minimum bid price for continued listing of \$1 per share,⁴¹ (ii) at least two registered and active market makers, (iii) 300 public holders, and (iv) a minimum number of publicly held shares of at least 500,000 shares with a market value of at least \$1 million.⁴² The Commission has determined that the differences in the maintenance criteria for primary equity securities on BATS for Tier II Securities and common stock listed on NYSE Amex are not significant and that, taken as a whole, the criteria are substantially similar.⁴³

B. Preferred Stock and Secondary Classes of Common Stock

The Commission compared the listing standards of preferred stock and secondary classes⁴⁴ of common stock on Tier II of the Exchange to the Nasdaq/NGM standards. As

least \$2.5 million shareholders' equity compared to NYSE Amex's lowest shareholder equity standard of \$2 million, if the NYSE Amex issuer has sustained losses from continuing operations and/or net losses in two of its three most recent fiscal years. Compare BATS Rule 14.9(e)(2)(A)-(C) with Section 1003(a) of the NYSE Amex Company Guide.

⁴¹ See BATS Rule 14.9(e)(1)(B). Amex will consider delisting if the price per share is "low." See Section 1003(f)(v) of the Amex Company Guide. See also Securities Act Release 8791, *supra* note 6 (noting the same regarding the NCM and Amex bid price standards).

⁴² BATS Rule 14.9(e)(1)(A)-(E). NYSE Amex will consider delisting the common stock of an issuer if the aggregate market value of such publicly held shares is less than \$1 million for more than 90 consecutive days, the number of publicly held shares is less than 200,000 shares, or the number of its public stockholders is less than 300. See Section 1003(b) of the NYSE Amex Company Guide.

⁴³ The Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets, and differences in language or approach of the listing standards are not dispositive. See *supra* notes 17-19 and accompanying text. See also Securities Act Release 8791, *supra* note 6 (determining that NCM continued listing standards, which are identical to BATS' continued listing standards for primary equity securities on Tier II of the Exchange, are substantially similar to the Amex standards).

⁴⁴ A secondary class of common stock is a class of common stock of an issuer that has another class of common stock listed on an exchange. See Securities Act Release No. 8791, *supra* note 6, at 20411.

discussed in the Proposing Release,⁴⁵ the Commission preliminarily believed that BATS' standards were substantially similar to those of Nasdaq/NGM. BATS' initial and continued listing standards with respect to the number of round lot holders,⁴⁶ bid price,⁴⁷ number of publicly held shares,⁴⁸ market value of publicly held shares,⁴⁹ and number of market makers⁵⁰ are substantially similar to the Nasdaq/NGM standards.⁵¹ As such, the

⁴⁵ See Proposing Release at 49701 to 49702.

⁴⁶ BATS' initial and continued listing standards require 100 round lot holders, as Nasdaq/NGM requires. Compare BATS Rule 14.9(c) with Nasdaq Rule 5510; compare BATS Rule 14.9(f) with Nasdaq Rule 5460(a)(4).

⁴⁷ While BATS' bid price requirement for initial listing is \$4 and the Nasdaq/NGM requirement is \$5, the Commission does not believe this difference is significant. Compare BATS Rule 14.9(c)(1)(A) with Nasdaq Rule 5510(a)(1). See also Securities Act Release No. 8791, supra note 6, at 20412 n. 28 (determining that an NCM bid requirement, which is identical to BATS' bid requirement, was substantially similar to the Nasdaq/NGM requirement). Both BATS' standard and Nasdaq/NGM's existing standard require a \$1 bid price for continued listing. Compare BATS Rule 14.9(f)(1) with Nasdaq Rule 5460(a)(3).

⁴⁸ BATS' standard requires 200,000 publicly held shares for initial listing, and 100,000 publicly held shares for continued listing, which is the same as Nasdaq/NGM requires. Compare BATS Rule 14.9(c)(1)(C) and 14.9(f)(1)(c) with Nasdaq Rules 5415(a)(1) and 5460(a)(1).

⁴⁹ BATS' standard for initial listing of preferred stock or a secondary class of common stock requires a market value of publicly held shares of at least \$3.5 million. Nasdaq/NGM requires a market value of publicly held shares of at least \$4 million. Compare BATS Rule 14.9(c)(1)(D) with Nasdaq Rule 5415(a)(2). BATS standard for continued listing requires a market value of publicly held shares of at least \$1 million. Nasdaq/NGM requires a market value of publicly held shares of at least \$1 million for continued listing. Compare BATS Rule 14.9(f)(1)(D) with Nasdaq Rule 5460(a)(1). The Commission believes BATS' initial and continued listing standards for preferred stock and secondary classes of common stock are substantially similar to Nasdaq/NGM. See also Securities Act Release No. 8791, supra note 6, at 20411-12 (determining that NCM listing standards, which are identical to BATS' listing standards for preferred stock and secondary classes of common stock, are substantially similar to the Nasdaq/NGM standards).

⁵⁰ BATS' standards for initial listing require at least three registered and active market makers, while its continued listing standards require at least two registered

Commission has determined that BATS' quantitative listing standards for preferred stock and secondary classes of common stock are substantially similar to those of Nasdaq/NGM.

C. Warrants

The Commission compared BATS' listing standards for warrants to Nasdaq/NGM's standards. In the Proposing Release, the Commission stated that it preliminarily believed that the BATS' standards were substantially similar to the Nasdaq/NGM standards.⁵² BATS' initial listing standards require that 400,000 warrants be outstanding for initial listing, and that there be at least three registered and active market makers and 400 round lot holders.⁵³ Nasdaq/NGM's standards are identical except that Nasdaq/NGM requires 450,000 warrants to be outstanding.⁵⁴ Though not identical with respect to the number of warrants outstanding standard, the Commission believes that the Nasdaq/NGM higher listing standards do not preclude a finding of substantial similarity. BATS' initial listing standards also require the issuer's underlying security to be listed on the Exchange or be a Covered Security.⁵⁵ The Commission notes

and active market makers. Nasdaq/NGM requires the same. Compare BATS Rule 14.9(c)(1)(E) with Nasdaq Rule 5415(a)(2).

⁵¹ The Commission notes that these requirements apply to instances when the common stock or common stock equivalent security of the issuer is listed on BATS as a Tier II Security or otherwise is a Covered Security. If the common stock or common stock equivalent is not listed as a Tier II Security or is a Covered Security, then the security would be required to meet the initial primary equity listing requirements for Tier II noted above. Nasdaq/NGM contains a similar requirement. Compare BATS Rule 14.9(f)(2) with Nasdaq Rule 5460(b).

⁵² See Proposing Release at 49702.

⁵³ See BATS Rule 14.9(d)(1)(A), (C) and (D).

⁵⁴ See Nasdaq Rule 5410(a), (c) and (d).

⁵⁵ See BATS Rule 14.9(d)(1)(B).

that Nasdaq/NGM has a similar standard that the underlying security be listed on Nasdaq/NGM or be a Covered Security and believes BATS' standard is substantially similar to Nasdaq/NGM.⁵⁶ Therefore, the Commission has determined that BATS' initial listing standards for warrants are substantially similar to those of Nasdaq/NGM.⁵⁷

As discussed in the Proposing Release, the Commission also preliminarily believed that BATS' continued listing requirements for warrants that there be two registered and active market makers (one of which may be a market maker entering a stabilizing bid) and that the underlying security remain listed on the Exchange or be a Covered Security were substantially similar to that of Nasdaq/NGM.⁵⁸ The Commission has determined that BATS' continued listing standards for warrants are substantially similar to those of Nasdaq/NGM.

D. Index Warrants

For index warrants traded on BATS, BATS has the same standards (both initial and continuing) that apply to index warrants traded on Nasdaq/NGM.⁵⁹ Therefore, the Commission has determined that the listing standards for index warrants traded on BATS are substantially similar to the standards applicable to index warrants traded on the Nasdaq/NGM market.

E. Convertible Debt

⁵⁶ See Nasdaq Rule 5410(b).

⁵⁷ See also Securities Act Release 8791, supra note 6 (determining that NCM initial listing standards, which are identical to BATS' standards for warrants on Tier II of the Exchange, are substantially similar to the Amex standards).

⁵⁸ See Proposing Release at 49702. Compare proposed BATS' Rule 14.9(g)(1) with Nasdaq Rule 5455(1) and (2).

⁵⁹ Compare BATS Rule 14.9(d)(3) with Nasdaq Rule 5725.

The Commission has compared BATS' listing standards for convertible debt to NYSE Amex's listing standards for debt, and preliminarily believed that BATS' initial listing standards for convertible debt were substantially similar to those of NYSE Amex. BATS' listing standards for convertible debt, regarding the threshold principal amount outstanding,⁶⁰ the availability of current last sale information,⁶¹ and number of market makers⁶² are substantially similar to NYSE Amex standards.⁶³ In addition to the requirements noted above, BATS' listing standards require that one of four additional

⁶⁰ BATS' rule requires a principal amount outstanding of at least \$10 million for initial listing and \$5 million for continued listing. See BATS Rule 14.9(d)(2)(A) and 14.9(g)(2)(A). NYSE Amex requires a principal amount outstanding of at least \$5 million for initial listing and will consider delisting if the principal amount outstanding is less than \$400,000 or if the issuer is not able to meet its obligations on the listed debt security. See Sections 104 and 1003 of the NYSE Amex Company Guide. As the Commission noted in a prior release, while these requirements are not identical, the Commission believes that both standards are designed to ensure the continued liquidity of the debt security, and, thus, are substantially similar. See Securities Act Release 8791, *supra* note 6, at 20412 (finding that an identical NCM listing standard was substantially similar to the Amex standard).

⁶¹ Both BATS and NYSE Amex include an initial listing requirement that there be current last sale information available in the United States with respect to the underlying security into which the bond or debenture is convertible. Compare BATS Rule 14.9(d)(2)(B) with Section 104 of the NYSE Amex Company Guide. Additionally, Section 1003(e) of the NYSE Amex Company Guide states that convertible bonds will be reviewed when the underlying security is delisted and will be delisted when the underlying security is no longer the subject of real-time reporting in the United States. BATS' continued listing standards for a convertible debt security also require that current last sale information be available in the United States with respect to the underlying security, whereas NYSE Amex does not. Compare BATS Rule 14.9(g)(2)(C) with Section 1003(e) of the NYSE Amex Company Guide.

⁶² BATS' standard requires at least three registered and active market makers for initial listing and two registered and active market makers for continued listing (one of which may be a market maker entering a stabilizing bid), whereas NYSE Amex requires one specialist to be assigned. Compare BATS Rule 14.9(d)(1)(C) with NYSE Amex Rule 104.

conditions be met for listing of convertible debt. Specifically, BATS will not list a convertible debt security unless one of the following conditions is met: (i) the issuer of the debt security also has equity securities listed on the Exchange, NYSE Amex, the NYSE, or Nasdaq/NGM; (ii) an issuer of equity securities listed on the Exchange, NYSE Amex, the NYSE, or Nasdaq/NGM directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security; (iii) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or (iv) if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned an investment grade rating to an immediately senior issue or a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.⁶⁴ Therefore, the Commission has determined that BATS' listing standards for convertible debt are substantially similar to those of NYSE Amex.

F. Units

⁶³ NYSE Amex will not list a convertible debt issue containing a provision which gives an issuer discretion to reduce the conversion price unless the issuer establishes a minimum 10-day period within which such price reduction will be in effect. See Section 104 of the NYSE Amex Company Guide. The Commission believes that omission of such a provision does not impact its determination. See Securities Act Release Nos. 39542, supra note 6 (finding PCX listing standards to be substantially similar to Amex even with the absence of this provision); 8791, supra note 6, at 20412 (finding NCM's listing standard, which is identical to BATS' listing standard for convertible debt, was substantially similar to Amex even with the absence of this provision).

⁶⁴ These standards are identical to the initial listing standards for convertible debt securities on NYSE Amex and NCM). Compare BATS Rule 14.9(d)(2)(D)(iv) with Section 104(A)-(E) of the NYSE Amex Company Guide and Nasdaq Rule 5515(b)(4).

The listing requirements for units on Tier II of the Exchange, NYSE Amex, and Nasdaq/NGM are all the same, as each evaluates the initial and continued listing of a unit by looking to its components.⁶⁵ If all of the components of a unit individually meet the standards for listing, then the unit would meet the standards for listing.⁶⁶ Because the components for units proposed by BATS are substantially similar to those of a Named Market, as discussed above, the Commission has determined that BATS' listing standards for units to be listed on Tier II of the Exchange are substantially similar to a Named Market.⁶⁷

The Commission is amending Rule 146(b) as proposed to reflect the following name changes:

- Sections (b)(1) and (b)(2) of Rule 146 use the term "Amex" to refer to the American Stock Exchange LLC. As noted above, on October 1, 2008, NYSE Euronext acquired Amex and renamed it NYSE Alternext.⁶⁸ Further, in 2009, NYSE Alternext was renamed NYSE Amex LLC.⁶⁹ The Commission is making a conforming change to Rule 146(b).
- Section (b)(1) of Rule 146 refers to "the Philadelphia Stock Exchange,

⁶⁵ A unit is a type of security consisting of two or more different types of securities (e.g., a combination of common stocks and warrants). See, e.g., Securities Exchange Act Release No. 48464 (September 9, 2003), 68 FR 54250 (September 16, 2003) (order approving NYSE Amex proposed rule change to amend Sections 101 and 1003 of the NYSE Amex Company Guide to clarify the listing requirements applicable to units).

⁶⁶ See generally BATS Rule 14.4, Section 101(f) of the NYSE Amex Company Guide, and Nasdaq Rule 5225.

⁶⁷ See Securities Exchange Act Release No. 64546, supra note 11, 76 FR 31660 at 31664.

⁶⁸ See Securities Exchange Act Release No. 58673, supra note 1.

⁶⁹ See Securities Exchange Act Release No. 59575, supra note 1.

Inc.”⁷⁰ On July 24, 2008, The NASDAQ OMX Group, Inc. acquired Phlx and renamed it “NASDAQ OMX PHLX LLC.”⁷¹ The Commission is making a conforming change to Rule 146(b).

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply because the amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 et seq.

IV. Economic Analysis

A. Introduction

Section 2(b) of the Securities Act⁷² requires us, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We have considered, and discuss below, the effects of the amendment to Securities Act Rule 146, with regard to BATS’ listing standards to designate certain securities that will be listed, or authorized for listing, on BATS as Covered Securities, on efficiency, competition, and capital formation, as well as the benefits and costs associated with the rulemaking.

⁷⁰ See supra note 10.

⁷¹ On July 24, 2008, The NASDAQ OMX Group, Inc. acquired Phlx and renamed it “NASDAQ OMX PHLX LLC.” See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035).

⁷² 15 U.S.C. 77b(b).

Congress amended Section 18 of the Securities Act to exempt covered securities from state registration requirements. These securities are listed on the Named Markets or any other national securities exchange determined by the Commission to have “substantially similar” listing standards to those of the Named Markets (“Designated Markets”).⁷³ Consistent with statutory authority, the Commission has determined that the listing standards for securities listed, or authorized for listing, on BATS are substantially similar to those of a Named Market, specifically Nasdaq/NGM or NYSE Amex. Securities listed, or authorized for listing, on BATS, therefore, will be exempt from state law registration requirements.

There are three Named Markets (NYSE, NYSE Amex, and Nasdaq/NGM) and currently five Designated Markets (Tier I of NYSE Arca, Tier I of the Philadelphia Stock Exchange, CBOE, ISE, and Nasdaq/NCM). NYSE and Nasdaq/NGM are currently the largest exchanges in terms of number of securities listed. As of April 19, 2011, in terms of securities listed, NYSE lists 3,255, Nasdaq/NGM lists 2,854, NYSE Arca lists 1,213, and NYSE Amex lists 544.⁷⁴

The direct economic effect of the rule amendment will be to exempt issuers that list, or are authorized to list, on BATS from the requirements of state registration. Instead, these issuers will be required to comply with BATS’ listing standards and the federal securities laws, rules and regulations with respect to the registration and sale of securities. The requirements of state registration typically include: (i) paperwork and labor hours necessary to comply with state registration requirements, (ii) meeting the

⁷³ See 15 U.S.C. 77r(b)(1)(B).

⁷⁴ These listed securities include exchange traded funds and multiple securities from the same issuer.

disclosure standards, and (iii) in some states, meeting certain minimum merit requirements to make public offerings.⁷⁵ The Commission solicited comments concerning the costs and benefits associated with the proposal, but received none.

The Commission believes that an indirect effect of the rule amendment will be that, by removing the requirements of state registration for issuers that list, or are authorized to list, on BATS – the same privilege granted to other Covered Securities – the rule can improve BATS’ ability to compete effectively with other exchanges. Therefore, the Commission believes an important economic effect of the rule amendment can be to engender greater competition in the market for listing services.

Exchanges generally compete in multiple areas, which include the market for listing, the market for trading, and the market for order-flow. This rule amendment and BATS’ listing standards⁷⁶ relate primarily to the market for listing, although the rule amendment and the entry of a new participant in the listings market could impact other markets as well.⁷⁷ In the market for listing, exchanges compete for issuers to list on their exchanges, so that the exchange may collect listing fees. Domestic exchanges face

⁷⁵ It has been noted that the purpose of such review is “to prevent ‘unfair’ and ‘oppressive’ offerings of securities,” and, as of 2011, merit review is employed in about 30 states. See Jeffrey B. Bartell & A.A. Sommer, Jr., Blue Sky Registration, SECURITIES LAW TECHNIQUES (Matthew Bender ed., 2011). Typical elements of merit review include: offering expenses, including underwriter’s compensation, rights of security holders, historical ability to service debt or pay dividends, financial condition of the issuer, cheap stock held by insiders, the quantity of securities subject to options and warrants, self-dealing and other conflicts of interest, and the price at which the securities will be offered. See *id.* Some merit regulation would be imposed on these issuers through application of exchange listing standards.

⁷⁶ See Securities Exchange Act Release No. 64546, *supra* note 11.

⁷⁷ See, e.g., Thierry Foucault and Christine A. Parlour, Competition for Listing, 35 RAND J. ECON. 329 (2004) (describing how listing fees and trading costs both affect firms’ incentives to list with one exchange versus another).

listing competition from other domestic exchanges and from foreign exchanges.⁷⁸ The benefit of listing for issuers generally is to gain greater access to capital through measures designed to help promote quality certification and visibility to public investors, which will generally result in a reduction in the cost of raising capital for these issuers. This access to capital may be further enhanced through listing on particular exchanges, which could affect the level of investors' trust in a listed company's governance structure and the fairness of trading in the company's securities (through the perceived effectiveness of exchanges' conduct rules and surveillance of trading as well as other services and regulatory functions).

Exchanges may try to compete for issuers by reducing listing fees or by improving the quality of services they offer, or both. The cost of listing for an issuer includes listing fees and the cost of complying with listing standards. In principle, this means exchanges can compete by reducing listing fees, by relaxing the listing standards issuers must meet, or by offering several trading segments with different listing standards on each, though such standards must be determined to be substantially similar to a Named Market in order to get the benefit of the Securities Act Section 18(b)(1)(B)

⁷⁸ It has been noted that NYSE and the London Stock Exchange, for example, compete for listings of firms in third countries, in particular from emerging economies. See Thomas J. Chemmanur & Paolo Fulghieri, Competition and Cooperation Among Exchanges: A Theory of Cross-Listing and Endogenous Listing Standards, 82 J. FIN. ECON. 455, 456 (2006). See generally Craig Doidge, Andrew Karolyi, and René Stulz, Has New York Become Less Competitive than London in Global Markets? Evaluating Foreign Listing Choices Over Time, JOURNAL OF FINANCIAL ECONOMICS 91, 253-277 (2009); Craig Doidge, Andrew Karolyi, and René Stulz, Why Do Foreign Firms Leave U.S. Equity Markets?, JOURNAL OF FINANCE 65, 1507-1553 (2010); Caglio, Cecilia, Hanley, Kathleen Weiss and Mariëtta-Westberg, Jennifer, Going Public Abroad: The Role of International Markets for IPOs (March 16, 2010), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572949. Additionally, differences in regulatory regimes may impact listing decisions.

exemption from state registration requirements. The Commission believes that any concern that exchanges may try to compete by lowering the listing standards to attract issuers (and hence enter in a "race-to-the-bottom") is mitigated by the fact that (1) listing standards affect exchanges' reputations among investors, which, in turn, impacts their attractiveness to issuers, (2) any proposed listing standards or proposed changes to existing listing standards must be filed with the Commission pursuant to Section 19(b) of the Exchange Act and must meet its requirements to become effective,⁷⁹ and (3) lower listing standards that are not substantially similar to those of a Named Market will not have the benefit of the exemption from state registration requirements.⁸⁰

The competition among exchanges for listings is only partially based on price. Exchanges also compete in various other areas, which contribute to the quality of the services listed issuers receive, including, but not limited to, provision of trade statistics, regulatory and surveillance services, access to new technology, attractive trading mechanisms, and marketing services.

One important dimension of competition is brand name.⁸¹ Issuers place high value on being listed on certain exchanges because investors may more readily trust those

⁷⁹ Any revision to exchange listing standards must be done in accordance with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. Any Commission approval of a listing standard revision is conditioned upon a finding by the Commission that the revision is consistent with the requirements of the Exchange Act and rules thereunder. See 15 U.S.C. 78s.

⁸⁰ See Chemmanur & Fulghieri, *supra* note 74, at 458.

⁸¹ See generally Clement G. Krouse, Brand Name as a Barrier to Entry: The Rea Lemon Case, 51 SOUTHERN ECON. J. 495 (1984) (describing the effect of brand name on competition in markets with incomplete information); see also Tibor Scitovsky, Ignorance as a Source of Oligopoly Power, 40 AMER. ECON. REV. 48, 49 (1950) ("An ignorant buyer . . . is unable to judge the quality of the products he buys by their intrinsic merit. Unable to appraise products by objective

exchanges, which may, in turn, reduce the cost of raising capital for those issuers. As a result, NYSE and Nasdaq/NGM, which are already the two largest exchanges in terms of securities listed, may be able to charge listing fees that are above marginal cost—that is, what it would cost them to list additional issuers—and higher than other competing exchanges; therefore, certain exchanges may earn economic rent from these higher listing premiums (the amount of fee difference certain exchanges can charge, above a competitor's price, because of its brand name). In addition to brand name recognition, the market for listing exhibits positive network externalities: issuers may prefer to be listed on exchanges where many other issuers are listed and where there are more intermediaries trading because of increased liquidity and visibility.⁸² This indicates that, all else being equal, large exchanges (in terms of listings) will tend to be favored over smaller ones. In theory, this preference may persist to some extent even if large exchanges were to offer slightly inferior services than their smaller counterparts because the advantages of being listed on a large exchange, where there are many issuers and intermediaries, might outweigh the cost of being offered slightly inferior services. Because of these brand name effects and positive externalities, the Commission believes that the market for listings, to some extent, exhibits certain barriers to entry for new entrants to the listing markets, such as BATS.⁸³

standards, he is forced to base his judgment on indices of quality, such as . . . general reputation of the producing firms.”).

⁸² See, e.g., Carmine Di Nola, Competition and Integration Among Stock Exchanges in Europe: Network Effects, Implicit Mergers and Remote Access, 7 EUROPEAN FIN. MAN. 39 (2001) (“Firms may derive more utility in being listed on exchanges where there are more intermediaries as they give more liquidity to the market.”).

⁸³ Brand name recognition is frequently recognized as a barrier to entry mainly because consumers do not have all the information regarding product quality and thus tend to rely on brand names as a proxy for quality. See, e.g., Brand Name as

B. Benefits, Including the Impact on Efficiency, Competition, and Capital Formation

By exempting securities listed, or authorized for listing, on BATS from state law registration requirements, the Commission believes that issuers seeking to list securities on BATS could have the benefit of reduced regulatory compliance burdens, as compliance with state blue sky law requirements will not be required. One benefit of this amendment will be to eliminate these compliance burdens with respect to securities listed, or authorized for listing, on BATS. The Commission expects that the rule amendment can improve efficiency by eliminating duplicative registration costs for issuers and improving liquidity by allowing for greater market access to issuers who have not been listed previously.

To the extent that state merit reviews may have inhibited certain smaller businesses from making public offerings,⁸⁴ the Commission believes an exemption from

a Barrier to Entry: The Rea Lemon Case, 51 S. ECON. J. 495 (1984); Tibor Scitovsky, Ignorance as a Source of Oligopoly Power, 40 AMER. ECON. REV. 48 (1950). Network externalities are also recognized as a barrier to entry. See, e.g., Gregory J. Weden, Network Effects and Conditions of Entry: Lessons from the Microsoft Case, 69 Antitrust L.J. 87 (2001); Douglas A. Melamed, Network Industries and Antitrust, 23 HARV. J. L. & PUB. POL'Y 147 (1999).

⁸⁴ A number of scholarly articles have expressed concerns over the possibility for blue sky merit regulation to hinder capital formation. See, e.g., Martin Fojas, Ay Dios NSMIA!: Proof of a Private Offering Exemption Should Not Be a Precondition for Preempting Blue Sky Law Under the National Securities Markets Improvement Act, 74 BROOKLYN L. REV. 477 (2009); Rutheford B. Campbell, Jr., Blue Sky Laws and the Recent Congressional Preemption Failure, 22 J. CORP. L. 175 (1997); Brian J. Fahrney, State Blue Sky Laws: A Stronger Case for Federal Pre-Emption Due to Increasing Internationalization of Securities Markets, Comment, 86 NW. U. L. REV. 753 (1991-92); Roberta S. Karmel, Blue-Sky Merit Regulation: Benefit to Investors or Burden on Commerce, 53 BROOK. L. REV. 106 (1987-88). While the concerns are numerous, other studies have shown some positive effect of merit regulation. See Jay T. Brandi, The Silverlining in Blue Sky Laws: The Effect of Merit Regulation on Common Stock Returns and Market Efficiency, 12 J. Corp. L. 713 (1986-87) (reporting that merit regulation can have

state registration requirements will facilitate capital formation.

The Commission believes that the amendment to Rule 146(b) should permit BATS to better compete for listings with other markets whose listed securities already are exempt from state law registration requirements, and the Commission believes that this result can enhance competition, thus benefiting market participants and the public. Specifically, BATS currently intends to enter the listing market with generally lower fees than incumbent exchanges in order to compete with them.⁸⁵ In response to BATS' entry, although recognizing the significant barriers to entry noted above, the incumbent exchanges might choose to reduce their listing fees to match or come closer to those proposed by BATS. Incumbent exchanges might also enhance the other services they provide to their currently listed issuers (e.g., regulatory and surveillance services, access to new technology, attractive trading mechanisms, marketing services) as a way to counteract BATS' lower listing fees.

The Commission believes that additional competition in the market for listings can enable some issuers, both public and private, that have (1) either not listed on any exchange or (2) have listed on an exchange but have chosen not to list on certain exchanges because of the costs of listing there, to list on any Named or Designated Market due to the potential for lower listing fees across all exchanges. The Commission

a positive effect on investor returns); Ashwini K. Agrawal, "The Impact of Investor Protection Law on Corporate Policy: Evidence from the Blue Sky Laws," working paper (2009) (reporting that the passage of investor protection statutes causes firms to pay out greater dividends, issue more equity, and grow in size), available at <http://ssrn.com/abstract=1442224>. Some merit regulation would be imposed on these issuers through application of exchange listing standards.

⁸⁵ See Securities Exchange Act Release No. 64546, supra note 11, 76 FR at 31666 & n. 27-28 (representing that BATS' pricing, while not necessarily cheaper for all issuers at all other markets, is roughly equivalent to or less than the price issuers would pay at other exchanges, including NGM and NCM).

further believes that this will result in a lower cost of capital for those issuers that previously had not listed on an exchange and could benefit the current investors in such issuers in the form of higher company value arising from the reduced cost of capital and increased liquidity. Since currently unlisted firms may be able to list because of lower listing fees, the Commission believes this may improve efficiency and capital formation since future investors in these issuers would have easier access to invest in them and to further diversify their investment portfolios.

The Commission believes that those issuers that are currently listed on an exchange, including the Named Markets, and that remain listed there, can potentially benefit from any reduced listing fees; however, because any such benefit will come at the expense of the exchange on which they are listed in the form of potentially reduced profit, this aggregate effect would be a transfer from one group of investors (exchange shareholders) to another group of investors (listed issuer shareholders).

Additionally, the Commission believes that some issuers currently listed on other Named or Designated Markets could potentially switch their listings to BATS, thus potentially lowering their listing costs (provided the Named or Designated Markets do not reduce their listing fees). The size of any such potential benefit will depend on how large any cost savings due to listing on BATS would be in comparison to the cost of giving up any valuable services that the other exchanges might provide that BATS might not. In addition, the behavior of these issuers will depend heavily on the extent to which these other exchanges respond to BATS' entry by making themselves more competitive to the issuers.

C. Costs, Including the Impact on Efficiency, Competition, and Capital Formation

The rule amendment will eliminate state registration requirements for securities listed, or authorized for listing, on BATS. The Commission notes that there may be certain economic costs to investors through the loss of benefits of state registration and oversight. For example, by listing on BATS, issuers will no longer be required to comply with certain states' blue sky laws, which could mandate more detailed disclosure than BATS' listing standards and the requirements imposed pursuant to the federal securities laws, rules, and regulations. In such circumstances, investors could lose the benefit of the additional information. Additionally, to the extent blue sky laws result in additional enforcement protections in the form of another regulator policing issuer activity, then investors from these states could incur costs when issuers choose to list on BATS. Some researchers have also expressed a concern that the exemption from blue sky laws could prompt riskier public offerings.⁸⁶

From the perspective of competition in the market for listing, the Commission notes that there could be a concern that, to the extent the market for exchange services exhibits network effects, as explained above, there could be a loss in efficiency as a result of having a greater number of networks, if one or more of the existing large exchanges (in terms of listings) shrinks in size. However, the Commission also notes that the overall efficiency effect will depend on the precise fragmentation of the exchanges. It is possible, for instance, that, through specialization of exchanges, there could be an efficiency gain from having more distinct exchanges, each of which specializes in listing issuers from certain types of industries.

⁸⁶ See, e.g., Brandi, *supra* note 84.

The Commission acknowledges that these costs are difficult to quantify. The Commission believes that Congress contemplated these costs in relation to the economic benefits of exempting Covered Securities from state regulation. The rule amendment otherwise imposes no recordkeeping or compliance burdens, but will provide a limited purpose exemption under the federal securities laws. The Commission solicited comments on the rule amendment's effect on competition, efficiency, and capital formation, but received none. Thus, the Commission believes that the amendment to Rule 146(b) should not impair efficiency, competition, and capital formation.

V. Regulatory Flexibility Act Certification

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act,⁸⁷ that the amendment to Rule 146 will not have a significant economic impact on a substantial number of small entities. This certification was included in the Proposing Release.⁸⁸ The Commission solicited comments as to the nature of any impact on small entities, and generally on whether the amendment to Rule 146(b) could have an effect that has not been considered. No comments on these issues were received.

VI. Statutory Authority and Text of the Rule

The Commission is adopting an amendment to Rule 146 pursuant to the authority of Section 19(a) of the Securities Act of 1933⁸⁹ particularly Sections 18(b)(1)(B) and 19(a).⁹⁰

List of Subjects in 17 CFR Part 230

⁸⁷ 5 U.S.C. 605(b).

⁸⁸ See Proposing Release at 49706.

⁸⁹ 15 U.S.C. 77a et seq.

⁹⁰ 15 U.S.C. 77r(b)(1)(B) and 77s(a).

Securities.

For the reasons set forth in the preamble, the Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 111-203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

2. Section 230.146 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 230.146 Rules under section 18 of the Act.

* * * * *

(b) * * *

(1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange (“NYSE”), the NYSE Amex LLC (“NYSE Amex”), or the National Market System of the Nasdaq Stock Market (“Nasdaq/NGM”), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:

- (i) Tier I of the NYSE Arca, Inc.;
- (ii) Tier I of the NASDAQ OMX PHLX LLC;

- (iii) The Chicago Board Options Exchange, Incorporated;
- (iv) Options listed on the International Securities Exchange, LLC;
- (v) The Nasdaq Capital Market; and
- (vi) Tier I and Tier II of BATS Exchange, Inc..

(2) The designation of securities in paragraphs (b)(1)(i) through (vi) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, NYSE Amex, or Nasdaq/NGM.

By the Commission.



Elizabeth M. Murphy
Secretary

January 20, 2012

*Commissioner Watter
Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3359 / January 20, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14709

In the Matter of

NOAH FREEMAN,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Noah Freeman ("Freeman" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2, and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

42 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Freeman, age 35, resides in Boston, Massachusetts. From June 2008 to January 2010, Freeman was employed as a portfolio manager in the Boston office of SAC Capital Management LLC, an unregistered investment advisor based in Stamford, Connecticut. Prior to June 2008, Freeman was a managing director at Sonar Capital Management, LLC (Sonar Capital), an unregistered hedge fund adviser located in Boston. Sonar Capital was a registered investment advisor from April 2005 until October 2006.

2. On February 8, 2011, the Commission filed a civil action against Freeman in SEC v. Longoria et al., Civil Action No. 11-CV-0753 (S.D.N.Y.). On December 23, 2011, the Court entered an order permanently enjoining Freeman, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

3. The Commission's amended complaint alleged that, in connection with the purchase or sale of securities, Freeman knew, recklessly disregarded, or should have known, that material non-public information he received from a tipper was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Freeman is liable for the trading by Sonar Capital because he directly or indirectly caused Sonar Capital to place trades and/or unlawfully tipped inside information to Sonar Capital.

4. On February 8, 2011, Freeman pled guilty to one count of securities fraud and one count of conspiracy to commit securities fraud and wire fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Noah Freeman, 11-CR-00116 (JSR).

5. The counts of the criminal indictment to which Freeman pled guilty alleged, inter alia, that Freeman, and others, participated in a scheme to defraud by executing securities trades based on material nonpublic information that had been disclosed or misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Freeman's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Freeman be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Aguilar
not participating*

CORRECTED

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934
Release No. 66212A / January 23, 2012**

**INVESTMENT ADVISERS ACT OF 1940
Release No. 3360A / January 23, 2012**

**ADMINISTRATIVE PROCEEDING
File No. 3-14710**

In the Matter of

**1st DISCOUNT BROKERAGE,
INC. and MICHAEL R.
FISHER**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934 AND SECTIONS 203(e) AND
203(f) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS,
IMPOSING REMEDIAL SANCTIONS AND A
CENSURE ORDER AS TO 1st DISCOUNT
BROKERAGE, INC., AND MAKING
FINDINGS AND IMPOSING REMEDIAL
SANCTIONS AS TO MICHAEL R. FISHER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), against 1st Discount Brokerage, Inc. ("Respondent 1DB" or "1DB") and Michael R. Fisher ("Respondent Fisher" or "Fisher") (1DB and Fisher being sometimes hereinafter referred to individually as a "Respondent" and collectively as the "Respondents").

II.

In anticipation of the institution of these proceedings, each Respondent has submitted an Offer of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

43 of 64

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondents and the subject matter of these proceedings, which are admitted, each Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and a Censure Order as to 1st Discount Brokerage, Inc., and Making Findings and Imposing Remedial Sanctions as to Michael R. Fisher (the "Order"), as set forth below.

III.

On the basis of this Order and each of the Respondents' Offers, the Commission finds¹ that:

Summary

These proceedings arise out of 1DB's and Fisher's failure reasonably to supervise Michael J. Park ("Park") with a view to preventing and detecting his violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. From 2002 to 2008, while Park was a registered representative associated with 1DB, he operated a Ponzi scheme which defrauded over 50 investors of nearly \$9 million.

1DB did not have policies and procedures reasonably designed to detect and prevent violations of the securities laws by registered representatives like Park. Had 1DB had such reasonable policies and procedures, it would have likely uncovered Park's fraud. Specifically, had 1DB had reasonable policies and procedures in the review of the "doing business as" business accounts of its registered representatives, it is likely that 1DB would have observed a substantial influx of money from 1DB's existing customers into Park's business account, through which he conducted his Ponzi scheme. In addition, 1DB had no policy requiring compliance auditors who were conducting audits to review the work papers and reports of previous compliance audits. Had 1DB had reasonable policies and procedures in this regard, it would have been apparent that Park had a history of insufficient or absent signage. As a result, auditors were unable to identify a reoccurring issue that, with follow-up, could have uncovered that Park took steps to conceal from his customers his association with 1DB for fear that they would alert the firm to his suspicious investment scheme. 1DB also failed to conduct unannounced audits in the Nashville office as specifically required in the firm's procedures. Had 1DB implemented a system to follow its own procedure of conducting unannounced audits in the Nashville office, it is likely that 1DB would have found evidence of Park's Ponzi scheme. For example, an unannounced audit would have

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

revealed that Park did not consistently provide signs to indicate to customers his association with 1DB.

From 2004 to 2008, Fisher was delegated the responsibility to oversee 1DB's Heightened Supervision Committee ("HSC"). Pursuant to 1DB's compliance and sales management manuals, the HSC is a part of 1DB's supervisory structure. As the designated head of the HSC, Fisher was responsible for having a system to implement the firm's policies and procedures regarding the periodic review of all activities of 1DB's registered representatives. Had 1DB, through Fisher, developed such a system for periodic reviews of the activities of all of 1DB's registered representatives, the HSC would have reviewed Park's activities and would have found several red flags, including inadequate or missing signage that required Park to disclose his association with 1DB, a customer complaint of unauthorized trading, and declining commissions. With respect to the declining commissions, any follow up by the HSC would have reasonably focused on Park's remaining customer accounts and contacting those customers, many of whom were also victims of Park's Ponzi scheme. As a result of Fisher's failure to implement the firm's policies and procedures regarding the periodic review of all activities of 1DB's registered representatives, Fisher failed reasonably to supervise Park with a view to preventing and detecting his violative conduct.

Respondents

1. 1st Discount Brokerage, Inc. is a Florida corporation head-quartered in West Palm Beach, Florida and operates as an introducing broker through over 80 offices and over 200 independent financial consultants. 1DB has been registered with the Commission as a broker-dealer since 1995 and as an investment adviser since 2007.

2. Michael R. Fisher, age 49, of Helen, Georgia, was during the relevant times, the executive-vice president for 1DB. From September 2004 through May 2008, Fisher had primary responsibility at 1DB, as defined within the firm's compliance and sales management manual, to oversee 1DB's HSC. The HSC was a committee created by 1DB to, according to the firm's compliance and sales management manual, "reduce the firm's exposure as a result of inappropriate [registered representative] conduct that might otherwise go undetected."

Other Relevant Person

3. Michael J. Park is a former registered representative employed by 1DB from August 21, 2002 to June 26, 2008. On October 29, 2008, a judgment was entered by consent in an action brought by the Commission against Park permanently enjoining him from future violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder in the United States District Court for the Middle District of Tennessee. On December 18, 2008, the Commission barred Park from associating with any broker, dealer, or investment adviser. On February 27, 2009, Park pled guilty to wire and mail fraud charges brought by the United States Attorney's Office for the Middle District of Tennessee. In his criminal plea, Park admitted to operating a fraudulent scheme from 2001 to 2008 that defrauded 28 investors in excess of \$8.6 million. In September 2010, Park was sentenced to a 96 month term of

incarceration. The Financial Industry Regulatory Authority, Inc.'s Central Registration Depository shows that prior to joining 1DB Park received three customer complaints in connection with his employment at a prior Commission registered broker-dealer from July 1995 to June 1998. Two of the complaints alleged excessive commissions and margin interest on unsuitable trades. This prior broker-dealer terminated Park in connection with a complaint that he had received loans from two customers without receiving the firm's permission. From January 1999 to February 2000, Park worked for another Commission registered broker-dealer. This other broker-dealer terminated Park for forging a client's signature on a letter of authorization instructing the firm to charge a \$3,500 loss to the client.

Background

4. From 2001 to 2008, Park operated a Ponzi scheme that defrauded more than 50 investors, some of whom were 1DB customers, out of almost \$9 million. Park operated his fraudulent scheme through his securities business, which did business as Park Capital Management Group, Inc. ("PCMG"). Park convinced investors to transfer money to him to manage through PCMG by representing to them that they would earn substantial returns on their PCMG accounts through investments in publicly traded securities and/or in investment pools that Park managed. Once the investors transferred funds to PCMG, Park misappropriated the funds to subsidize his extravagant life-style which included a \$1.7 million house, expensive cars, and private school tuition for his children.

5. From 2002 through 2008, Park was a registered representative of 1DB. The firm, however, failed to detect Park's fraud due, in part, to multiple failures in its supervisory system, many of which directly related to Fisher's individual failure to implement the HSC as plainly specified in the firm's written compliance policies and procedures.

1DB's Failure to Have Reasonable Policies and Procedures Regarding its Compliance Audits

Failure to Review "Doing Business As" Accounts

6. 1DB employs an independent contractor broker model, which requires greater supervision than that of a traditional wire house brokerage firm. See, e.g., In the Matter of Royal Alliance Assocs., Inc., Exchange Act Rel. No. 38174 (Jan. 15, 1997). Despite the need to have stronger supervision, 1DB failed to establish reasonable policies and procedures for its review of Park's operations.

7. At 1DB, independent contractors, like Park, typically operate their securities business through a "doing business as" ("DBA") name and pay expenses for the business by using an account under the DBA's name ("DBA Account"). Although 1DB's compliance audit modules required review of limited information about a registered representative's DBA, the procedures were not reasonably designed to prevent and detect underlying securities law violations by registered representatives like Park.

8. 1DB's review of Park's DBA – PCMG – was limited to investigating whether 1DB was a party to any leases or contracts entered into by the registered representative.

9. Had 1DB had reasonable policies and procedures regarding the review of Park's DBA, 1DB's auditors could have discovered Park's Ponzi scheme.

10. Specifically, Park used the DBA Account to accept investments from victims and to make payouts. For example, Park described in the DBA Account records a May 2007 \$40,000 deposit by one of his victims as an "Initial Stock purchase." Park described a September 2005 check written to one of the investors as a "Liquidation of Account."

11. A review of Park's DBA Account would have likely uncovered the suspicious activity in the account and led to an investigation revealing Park's Ponzi scheme.

*Failure to Require Compliance Auditors to Review
Compliance Audit Reports from Previous Years*

12. During the relevant time period, 1DB failed to have reasonable policies or procedures requiring compliance auditors to review compliance audit reports from previous years. Each year, 1DB compliance auditors conducted announced audits of its registered representatives' operations. The auditor documented the compliance audit by completing an audit report with information about the operations, appearance, and possible deficiencies in the registered representative's business.

13. 1DB's auditors in subsequent audits could have used the information contained within prior audit reports to identify potential red flags. However, 1DB did not provide subsequent auditors with the previous audits. As a result, current auditors had no benchmark to compare a registered representative's current activities to his or her past compliance conduct. Consequently, the current auditor did not have the requisite information to identify reoccurring, potential red flags.

14. In the immediate matter, 1DB auditors failed to identify a reoccurring red flag: Park's failure to have adequate signage outside of his office that would have provided investors notice of Park's affiliation with 1DB. Compliance auditors audited Park's office annually from 2002 to 2007, inclusive. However, due to 1DB's failure to provide audits from previous years, auditors did not have an opportunity to identify Park's consistent failure to have proper signage, which was a red flag that Park was trying to conceal his affiliation with his broker in order to avoid a complaining customer alerting 1DB of his fraudulent conduct.

15. Specifically, Park failed to have adequate signage for three years in a row. In 2004, a 1DB compliance auditor noted that Park's signage at the front of his office door did not state that Park sold securities through 1DB. In 2005, a different auditor noted again a deficiency in Park's signage, namely that it was a temporary sign. In 2006, a third auditor noted that, as with the audit in 2004, Park's sign did not display 1DB's name. Because the auditors were not provided with previous audits, they were unable to realize that Park's failure to have proper signage was not

inadvertent, but was intended to conceal Park's association with 1DB so that investors in his Ponzi scheme would not contact 1DB regarding Park's suspicious investment scheme.

16. Had 1DB's compliance auditors received and reviewed previous audits of Park's operations, they would have likely discovered the recurring, red flag of Park's inadequate signage. Such discovery would have led 1DB to conduct a future examination of PCMG uncovering Park's Ponzi scheme.

*Failure to Conduct Unannounced Compliance Audits, as Required by the
Compliance and Sales Management Manual*

17. 1DB could have reasonably discovered Park's fraud had it conducted unannounced audits of Park and PCMG as specifically required in the firm's compliance and sales management manual. 1DB conducted annual audits of its registered representatives. However, the firm informed the registered representatives of the audit one month in advance.

18. 1DB's failure to have unannounced audits at Park's office contravened its compliance and sales management manual that stated that the firm would conduct "[u]nannounced inspections and audits, including reviewing customer accounts and other records, [and] sales methods."

19. With Park, each year of his affiliation with 1DB he received a "reminder" a month in advance of the upcoming audit. Such a reminder afforded Park the opportunity to conceal his fraudulent activity. For example, Park put up temporary signage for announced compliance audits and then removed them once the compliance audits were completed.

20. Had 1DB conducted unannounced compliance audits, it would have likely noted Park's failure to have any 1DB signage, which would have led to further examination of Park's activities and detection of his Ponzi scheme.

*Fisher's Failure in His Delegated Responsibilities
over 1DB's Heightened Supervision Committee*

21. In 1997, 1DB created a HSC in response to a 1997 National Association of Securities Dealers, Inc.'s ("NASD") Notice to Members recommending firms create heightened supervision procedures. The HSC's charge, according to 1DB's compliance and sales management manual, is to provide "continued special supervision of registered representatives" and "reduce the firm's exposure as a result of inappropriate RR conduct that might otherwise go undetected."

22. The HSC is a part of 1DB's supervisory system as evidenced by the fact that its duties and responsibilities are set forth in the compliance and sales management manual under the section entitled "STANDARDS OF SUPERVISION." Among other things, the HSC is, according to the compliance and sales management manual, to conduct "periodic reviews of

activities of all 1DB [registered representatives], including their [Central Registration Depository] disclosures and customer complaint history.”

Fisher Delegated with Overseeing the Heightened Supervision Committee

23. 1DB’s compliance and sales management manuals state that the HSC is to conduct periodic reviews of the activities of all of 1DB’s registered representatives. From 2004 to 2008, Fisher, 1DB’s executive-vice president, was delegated the responsibility for having a system to implement the firm’s policies and procedures for such periodic reviews. However, Fisher failed to implement the firm’s policies and procedures.

Red Flags of Park’s Conduct the Heightened Supervision Committee Missed Because it Failed to Conduct Periodic Reviews of 1DB’s Registered Representatives

24. Had the HSC conducted such a review of Park, it would have discovered several red flags regarding Park’s conduct. First, the HSC would have discovered that Park repeatedly violated NASD Rule 2210, requiring communications with the public to not be misleading, and the firm’s requirement for clear signage with respect to his office and its affiliation with 1DB. To the extent Park had any signage, it was insufficient.

25. Second, the HSC’s review of Park’s activities likely would have included inquiry into his declining commissions. Park’s annual commissions declined from their high in 2003 of \$72,000 to an annualized low in 2008 of \$9,500. An inquiry into this dramatic decline would have included examining Park’s remaining customer accounts and contacting customers who were closing or liquidating their accounts. Contacting these customers would have revealed that many of them were closing and/or liquidating their accounts in order to invest with Park’s other business, a Ponzi scheme.

26. Third, the HSC’s review of Park’s activities would have revealed that in March 2007 a 1DB customer filed a complaint alleging that Park engaged in unauthorized trading in the customer’s account. Because there was no review of Park’s activities, this complaint was never investigated by the HSC. If this complaint had been investigated, it is likely that the HSC would have contacted other customers regarding Park’s handling of their accounts, which likely would have led to the detection of Park’s Ponzi scheme.

27. As a result of the conduct described above, 1DB failed reasonably to supervise Park within the meaning of Section 15(b)(4)(E) of the Exchange Act, and within the meaning of Section 203(e) of the Advisers Act, when it failed to supervise Park with a view to preventing and detecting his violations of the federal securities laws.

28. As a result of the conduct described above, Fisher failed reasonably to supervise Park within the meaning of Section 15(b)(4)(E) of the Exchange Act, and within the meaning of Section 203(f) of the Advisers Act, when he failed to supervise Park with a view to preventing and detecting his violations of the federal securities laws.

29. In March 2009, 1DB entered into a voluntary settlement agreement with all of Park's victims, the majority of whom were not customers or clients of 1DB and had no contractual or other legal connection with 1DB. Pursuant to the voluntary settlement, 1DB contributed \$2 million to be distributed among Park's victims.

Remedial Efforts

In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by the Respondents and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in each of the Respondent's Offers.

Accordingly, pursuant to Section 15(b) of the Exchange Act and Sections 203(e) and 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent 1DB shall pay civil penalties of \$40,000 to the Securities and Exchange Commission. Payment shall be made in the following installments: four installments of \$10,000 with the first payment to be made within ten days of the entry of the administrative order, and the remaining installment payments made 120, 240 and 360 days after the date of the administrative order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payments shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies 1DB as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to William P. Hicks, Associate Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, Suite 900, Atlanta, GA 30326.

B. Respondent 1DB is censured.

C. Respondent Fisher be, and hereby is, suspended from association in a supervisory capacity with any broker, dealer, or investment adviser with the right to reapply for association in a supervisory capacity after nine (9) months to the appropriate self-regulatory organization, or if there is none, to the Commission.

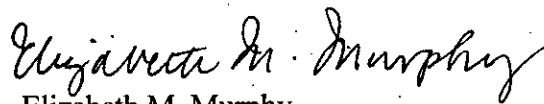
D. Any reapplication for association by Respondent Fisher will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the

conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

E. Respondent Fisher shall pay civil penalties of \$10,000 to the Securities and Exchange Commission. Such payment shall be made within ten days of the entry of the administrative order. If such payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Michael R. Fisher as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to William P. Hicks, Associate Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, Suite 900, Atlanta, GA 30326.

F. Such civil money penalties may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payments of civil penalties in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66212 / January 23, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3360 / January 23, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14710

In the Matter of

1st DISCOUNT BROKERAGE,
INC. and MICHAEL R.
FISHER

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934 AND SECTIONS 203(e) AND
203(f) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS,
IMPOSING REMEDIAL SANCTIONS AND A
CENSURE ORDER AS TO 1st DISCOUNT
BROKERAGE, INC., AND MAKING
FINDINGS AND IMPOSING REMEDIAL
SANCTIONS AS TO MICHAEL R. FISHER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), against 1st Discount Brokerage, Inc. ("Respondent 1DB" or "1DB") and Michael R. Fisher ("Respondent Fisher" or "Fisher") (1DB and Fisher being sometimes hereinafter referred to individually as a "Respondent" and collectively as the "Respondents").

II.

In anticipation of the institution of these proceedings, each Respondent has submitted an Offer of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings

44 of 64

herein, except as to the Commission's jurisdiction over Respondents and the subject matter of these proceedings, which are admitted, each Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and a Censure Order as to 1st Discount Brokerage, Inc., and Making Findings and Imposing Remedial Sanctions as to Michael R. Fisher (the "Order"), as set forth below.

III.

On the basis of this Order and each of the Respondents' Offers, the Commission finds¹ that:

Summary

These proceedings arise out of 1DB's and Fisher's failure reasonably to supervise Michael J. Park ("Park") with a view to preventing and detecting his violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. From 2002 to 2008, while Park was a registered representative associated with 1DB, he operated a Ponzi scheme which defrauded over 50 investors of nearly \$9 million.

1DB did not have policies and procedures reasonably designed to detect and prevent violations of the securities laws by registered representatives like Park. Had 1DB had such reasonable policies and procedures, it would have likely uncovered Park's fraud. Specifically, had 1DB had reasonable policies and procedures in the review of the "doing business as" business accounts of its registered representatives, it is likely that 1DB would have observed a substantial influx of money from 1DB's existing customers into Park's business account, through which he conducted his Ponzi scheme. In addition, 1DB had no policy requiring compliance auditors who were conducting audits to review the work papers and reports of previous compliance audits. Had 1DB had reasonable policies and procedures in this regard, it would have been apparent that Park had a history of insufficient or absent signage. As a result, auditors were unable to identify a reoccurring issue that, with follow-up, could have uncovered that Park took steps to conceal from his customers his association with 1DB for fear that they would alert the firm to his suspicious investment scheme. 1DB also failed to conduct unannounced audits in the Nashville office as specifically required in the firm's procedures. Had 1DB implemented a system to follow its own procedure of conducting unannounced audits in the Nashville office, it is likely that 1DB would have found evidence of Park's Ponzi scheme. For example, an unannounced audit would have

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

revealed that Park did not consistently provide signs to indicate to customers his association with 1DB.

From 2004 to 2008, Fisher was delegated the responsibility to oversee 1DB's Heightened Supervision Committee ("HSC"). Pursuant to 1DB's compliance and sales management manuals, the HSC is a part of 1DB's supervisory structure. As the designated head of the HSC, Fisher was responsible for having a system to implement the firm's policies and procedures regarding the periodic review of all activities of 1DB's registered representatives. Had 1DB, through Fisher, developed such a system for periodic reviews of the activities of all of 1DB's registered representatives, the HSC would have reviewed Park's activities and would have found several red flags, including inadequate or missing signage that required Park to disclose his association with 1DB, a customer complaint of unauthorized trading, and declining commissions. With respect to the declining commissions, any follow up by the HSC would have reasonably focused on Park's remaining customer accounts and contacting those customers, many of whom were also victims of Park's Ponzi scheme. As a result of Fisher's failure to implement the firm's policies and procedures regarding the periodic review of all activities of 1DB's registered representatives, Fisher failed reasonably to supervise Park with a view to preventing and detecting his violative conduct.

Respondents

1. 1st Discount Brokerage, Inc. is a Florida corporation head-quartered in West Palm Beach, Florida and operates as an introducing broker through over 80 offices and over 200 independent financial consultants. 1DB has been registered with the Commission as a broker-dealer since 1995 and as an investment adviser since 2007.

2. Michael R. Fisher, age 49, of Helen, Georgia, was during the relevant times, the executive-vice president for 1DB. From September 2004 through May 2008, Fisher had primary responsibility at 1DB, as defined within the firm's compliance and sales management manual, to oversee 1DB's HSC. The HSC was a committee created by 1DB to, according to the firm's compliance and sales management manual, "reduce the firm's exposure as a result of inappropriate [registered representative] conduct that might otherwise go undetected."

Other Relevant Person

3. Michael J. Park is a former registered representative employed by 1DB from August 21, 2002 to June 26, 2008. On October 29, 2008, a judgment was entered by consent in an action brought by the Commission against Park permanently enjoining him from future violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder in the United States District Court for the Middle District of Tennessee. On December 18, 2008, the Commission barred Park from associating with any broker, dealer, or investment adviser. On February 27, 2009, Park pled guilty to wire and mail fraud charges brought by the United States Attorney's Office for the Middle District of Tennessee. In his criminal plea, Park admitted to operating a fraudulent scheme from 2001 to 2008 that defrauded 28 investors in excess of \$8.6 million. In September 2010, Park was sentenced to a 96 month term of

incarceration. The Financial Industry Regulatory Authority, Inc.'s Central Registration Depository shows that prior to joining 1DB Park received three customer complaints in connection with his employment at a prior Commission registered broker-dealer from July 1995 to June 1998. Two of the complaints alleged excessive commissions and margin interest on unsuitable trades. This prior broker-dealer terminated Park in connection with a complaint that he had received loans from two customers without receiving the firm's permission. From January 1999 to February 2000, Park worked for another Commission registered broker-dealer. This other broker-dealer terminated Park for forging a client's signature on a letter of authorization instructing the firm to charge a \$3,500 loss to the client.

Background

4. From 2001 to 2008, Park operated a Ponzi scheme that defrauded more than 50 investors, some of whom were 1DB customers, out of almost \$9 million. Park operated his fraudulent scheme through his securities business, which did business as Park Capital Management Group, Inc. ("PCMG"). Park convinced investors to transfer money to him to manage through PCMG by representing to them that they would earn substantial returns on their PCMG accounts through investments in publicly traded securities and/or in investment pools that Park managed. Once the investors transferred funds to PCMG, Park misappropriated the funds to subsidize his extravagant life-style which included a \$1.7 million house, expensive cars, and private school tuition for his children.

5. From 2002 through 2008, Park was a registered representative of 1DB. The firm, however, failed to detect Park's fraud due, in part, to multiple failures in its supervisory system, many of which directly related to Fisher's individual failure to implement the HSC as plainly specified in the firm's written compliance policies and procedures.

1DB's Failure to Have Reasonable Policies and Procedures Regarding its Compliance Audits

Failure to Review "Doing Business As" Accounts

6. 1DB employs an independent contractor broker model, which requires greater supervision than that of a traditional wire house brokerage firm. See, e.g., In the Matter of Royal Alliance Assocs., Inc., Exchange Act Rel. No. 38174 (Jan. 15, 1997). Despite the need to have stronger supervision, 1DB failed to establish reasonable policies and procedures for its review of Park's operations.

7. At 1DB, independent contractors, like Park, typically operate their securities business through a "doing business as" ("DBA") name and pay expenses for the business by using an account under the DBA's name ("DBA Account"). Although 1DB's compliance audit modules required review of limited information about a registered representative's DBA, the procedures were not reasonably designed to prevent and detect underlying securities law violations by registered representatives like Park.

8. 1DB's review of Park's DBA – PCMG – was limited to investigating whether 1DB was a party to any leases or contracts entered into by the registered representative.

9. Had 1DB had reasonable policies and procedures regarding the review of Park's DBA, 1DB's auditors could have discovered Park's Ponzi scheme.

10. Specifically, Park used the DBA Account to accept investments from victims and to make payouts. For example, Park described in the DBA Account records a May 2007 \$40,000 deposit by one of his victims as an "Initial Stock purchase." Park described a September 2005 check written to one of the investors as a "Liquidation of Account."

11. A review of Park's DBA Account would have likely uncovered the suspicious activity in the account and led to an investigation revealing Park's Ponzi scheme.

*Failure to Require Compliance Auditors to Review
Compliance Audit Reports from Previous Years*

12. During the relevant time period, 1DB failed to have reasonable policies or procedures requiring compliance auditors to review compliance audit reports from previous years. Each year, 1DB compliance auditors conducted announced audits of its registered representatives' operations. The auditor documented the compliance audit by completing an audit report with information about the operations, appearance, and possible deficiencies in the registered representative's business.

13. 1DB's auditors in subsequent audits could have used the information contained within prior audit reports to identify potential red flags. However, 1DB did not provide subsequent auditors with the previous audits. As a result, current auditors had no benchmark to compare a registered representative's current activities to his or her past compliance conduct. Consequently, the current auditor did not have the requisite information to identify reoccurring, potential red flags.

14. In the immediate matter, 1DB auditors failed to identify a reoccurring red flag: Park's failure to have adequate signage outside of his office that would have provided investors notice of Park's affiliation with 1DB. Compliance auditors audited Park's office annually from 2002 to 2007, inclusive. However, due to 1DB's failure to provide audits from previous years, auditors did not have an opportunity to identify Park's consistent failure to have proper signage, which was a red flag that Park was trying to conceal his affiliation with his broker in order to avoid a complaining customer alerting 1DB of his fraudulent conduct.

15. Specifically, Park failed to have adequate signage for three years in a row. In 2004, a 1DB compliance auditor noted that Park's signage at the front of his office door did not state that Park sold securities through 1DB. In 2005, a different auditor noted again a deficiency in Park's signage, namely that it was a temporary sign. In 2006, a third auditor noted that, as with the audit in 2004, Park's sign did not display 1DB's name. Because the auditors were not provided with previous audits, they were unable to realize that Park's failure to have proper signage was not

inadvertent, but was intended to conceal Park's association with 1DB so that investors in his Ponzi scheme would not contact 1DB regarding Park's suspicious investment scheme.

16. Had 1DB's compliance auditors received and reviewed previous audits of Park's operations, they would have likely discovered the recurring, red flag of Park's inadequate signage. Such discovery would have led 1DB to conduct a future examination of PCMG uncovering Park's Ponzi scheme.

*Failure to Conduct Unannounced Compliance Audits, as Required by the
Compliance and Sales Management Manual*

17. 1DB could have reasonably discovered Park's fraud had it conducted unannounced audits of Park and PCMG as specifically required in the firm's compliance and sales management manual. 1DB conducted annual audits of its registered representatives. However, the firm informed the registered representatives of the audit one month in advance.

18. 1DB's failure to have unannounced audits at Park's office contravened its compliance and sales management manual that stated that the firm would conduct "[u]nannounced inspections and audits, including reviewing customer accounts and other records, [and] sales methods."

19. With Park, each year of his affiliation with 1DB he received a "reminder" a month in advance of the upcoming audit. Such a reminder afforded Park the opportunity to conceal his fraudulent activity. For example, Park put up temporary signage for announced compliance audits and then removed them once the compliance audits were completed.

20. Had 1DB conducted unannounced compliance audits, it would have likely noted Park's failure to have any 1DB signage, which would have led to further examination of Park's activities and detection of his Ponzi scheme.

*Fisher's Failure in His Delegated Responsibilities
over 1DB's Heightened Supervision Committee*

21. In 1997, 1DB created a HSC in response to a 1997 National Association of Securities Dealers, Inc.'s ("NASD") Notice to Members recommending firms create heightened supervision procedures. The HSC's charge, according to 1DB's compliance and sales management manual, is to provide "continued special supervision of registered representatives" and "reduce the firm's exposure as a result of inappropriate RR conduct that might otherwise go undetected."

22. The HSC is a part of 1DB's supervisory system as evidenced by the fact that its duties and responsibilities are set forth in the compliance and sales management manual under the section entitled "STANDARDS OF SUPERVISION." Among other things, the HSC is, according to the compliance and sales management manual, to conduct "periodic reviews of

activities of all 1DB [registered representatives], including their [Central Registration Depository] disclosures and customer complaint history.”

Fisher Delegated with Overseeing the Heightened Supervision Committee

23. 1DB’s compliance and sales management manuals state that the HSC is to conduct periodic reviews of the activities of all of 1DB’s registered representatives. From 2004 to 2008, Fisher, 1DB’s executive-vice president, was delegated the responsibility for having a system to implement the firm’s policies and procedures for such periodic reviews. However, Fisher failed to implement the firm’s policies and procedures.

Red Flags of Park’s Conduct the Heightened Supervision Committee Missed Because it Failed to Conduct Periodic Reviews of 1DB’s Registered Representatives

24. Had the HSC conducted such a review of Park, it would have discovered several red flags regarding Park’s conduct. First, the HSC would have discovered that Park repeatedly violated NASD Rule 2210, requiring communications with the public to not be misleading, and the firm’s requirement for clear signage with respect to his office and its affiliation with 1DB. To the extent Park had any signage, it was insufficient.

25. Second, the HSC’s review of Park’s activities likely would have included inquiry into his declining commissions. Park’s annual commissions declined from their high in 2003 of \$72,000 to an annualized low in 2008 of \$9,500. An inquiry into this dramatic decline would have included examining Park’s remaining customer accounts and contacting customers who were closing or liquidating their accounts. Contacting these customers would have revealed that many of them were closing and/or liquidating their accounts in order to invest with Park’s other business, a Ponzi scheme.

26. Third, the HSC’s review of Park’s activities would have revealed that in March 2007 a 1DB customer filed a complaint alleging that Park engaged in unauthorized trading in the customer’s account. Because there was no review of Park’s activities, this complaint was never investigated by the HSC. If this complaint had been investigated, it is likely that the HSC would have contacted other customers regarding Park’s handling of their accounts, which likely would have led to the detection of Park’s Ponzi scheme.

27. As a result of the conduct described above, 1DB failed reasonably to supervise Park within the meaning of Section 15(b)(4)(E) of the Exchange Act, and within the meaning of Section 203(e) of the Advisers Act, when it failed to supervise Park with a view to preventing and detecting his violations of the federal securities laws.

28. As a result of the conduct described above, Fisher failed reasonably to supervise Park within the meaning of Section 15(b)(4)(E) of the Exchange Act, and within the meaning of Section 203(f) of the Advisers Act, when he failed to supervise Park with a view to preventing and detecting his violations of the federal securities laws.

29. In March 2009, 1DB entered into a voluntary settlement agreement with all of Park's victims, the majority of whom were not customers or clients of 1DB and had no contractual or other legal connection with 1DB. Pursuant to the voluntary settlement, 1DB contributed \$2 million to be distributed among Park's victims.

Remedial Efforts

In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by the Respondents and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in each of the Respondent's Offers.

Accordingly, pursuant to Section 15(b) of the Exchange Act and Sections 203(e) and 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent 1DB shall pay civil penalties of \$40,000 to the United States Treasury. Payment shall be made in the following installments: four installments of \$10,000 with the first payment to be made within ten days of the entry of the administrative order, and the remaining installment payments made 120, 240 and 360 days after the date of the administrative order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payments shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies 1DB as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to William P. Hicks, Associate Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, Suite 900, Atlanta, GA 30326.

B. Respondent 1DB is censured.

C. Respondent Fisher be, and hereby is, suspended from association in a supervisory capacity with any broker, dealer, or investment adviser with the right to reapply for association in a supervisory capacity after nine (9) months to the appropriate self-regulatory organization, or if there is none, to the Commission.

D. Any reapplication for association by Respondent Fisher will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the

conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

E. Respondent Fisher shall pay civil penalties of \$10,000 to the United States Treasury. Such payment shall be made within ten days of the entry of the administrative order. If such payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Michael R. Fisher as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to William P. Hicks, Associate Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, Suite 900, Atlanta, GA 30326.

F. Such civil money penalties may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payments of civil penalties in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC- 29926; File No. 812-13994]

GE Asset Management Incorporated, et al.; Notice of Application and Temporary Order

January 24, 2012

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against GE Funding Capital Market Services, Inc. ("GE Funding CMS") on January 23, 2012 by the United States District Court for the District of New Jersey ("Injunction") until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: GE Asset Management Incorporated ("GEAM"), GE Investment Distributors, Inc. ("GEID") and GE Funding CMS (each an "Applicant" and collectively, the "Applicants").¹

Filing Date: The application was filed on December 23, 2011, and amended on January 23, 2012.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 21, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest,

¹ Applicants request that any relief granted pursuant to the application also apply to any other company of which GE Funding CMS is or may become an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the "Covered Persons").

Commissioner Watter
Commissioner Bredes
Commissioner Gallagher
not participating

7

the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: GEAM and GEID, 1600 Summer Street, Stamford, CT 06905 and GE Funding CMS, 201 High Ridge Road, Stamford, CT 06905.

For Further Information Contact: Jean E. Minarick, Senior Counsel, at 202-551-6811 or Daniele Marchesani, Branch Chief, at 202-551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at <http://www.sec.gov/search/search.htm>, or by calling (202) 551-8090.

Applicants' Representations:

1. GE Funding CMS is a corporation organized under the laws of Delaware. GE Funding CMS does not currently serve as investment adviser, sub-adviser, or depositor of any registered investment company, business development company ("BDC"), or principal underwriter for any registered open-end investment company, registered unit investment trust ("UIT") or registered face amount certificate company, or investment adviser of any employees' securities company, as defined in section 2(a)(13) of the Act ("ESC") ("Fund Service Activities"). "Funds" refers to the registered investment companies, BDCs or ESCs for which a Covered Person provides Fund Service Activities. GE Funding CMS is an indirect, wholly-owned subsidiary of General Electric Company ("GE"), which also directly or indirectly wholly-owns the other Applicants. GE is a large and diversified technology, media and financial services company that serves customers in more than 100 countries.

2. GEAM, a Delaware corporation, is registered as an investment adviser under the Investment Advisers Act of 1940, as amended ("Advisers Act"). GEAM serves as investment adviser or sub-adviser to a number of Funds. GEID is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended ("Exchange Act"). GEID serves as principal underwriter to a number of Funds.

3. On January 23, 2012, the United States District Court for the District of New Jersey entered a judgment, which included the Injunction, against GE Funding CMS ("Judgment") in a matter brought by the Commission.² The Commission alleged in the complaint ("Complaint") that from August 1999 to September 2004, personnel of GE Funding CMS engaged in fraudulent practices and made misrepresentations and omissions in connection with bidding on municipal reinvestment instruments. The Complaint alleged that GE Funding CMS engaged in fraudulent practices, misrepresentations, and omissions that affected the prices of certain reinvestment instruments, deprived certain municipalities of a presumption that their reinvestment instruments were purchased at fair market value, and/or jeopardized the tax-exempt status of certain securities. Based on the alleged misconduct described above, the Complaint alleged that GE Funding CMS violated section 17(a) of the Securities Act of 1933. Without admitting or denying any of the allegations in the Complaint (other than those relating to the jurisdiction of the District Court over it and the subject matter, solely for purposes of this action), GE Funding CMS consented to the entry of the Injunction and other relief, including disgorgement, prejudgment interest, and a civil monetary penalty.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been

² U.S. Securities and Exchange Commission v. GE Funding Capital Market Services, Inc., Case No. 2:11-cv-07465-WJM-MF (D.N.J. Dec. 23, 2011).

enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered UIT, or registered face-amount certificate company or as investment adviser of an ESC. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that GE Funding CMS is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that, as a result of the Injunction, they would be subject to the prohibitions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to the Applicants, are unduly or disproportionately severe or that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and other Covered Persons from the disqualification provisions of section 9(a).

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants engaging in Fund Service Activities. Applicants state that to the best of their knowledge none of the current or former directors, officers, or employees of the Applicants (other than GE Funding CMS) that were involved in providing Fund Service Activities had any knowledge of or had any involvement in the violative conduct alleged in the Complaint. Applicants further represent that the personnel of GE Funding CMS who had any responsibility for, or involvement in, the violations alleged in the Complaint are no longer employed by GE Funding CMS and have had no, and in the present or future will not have any, involvement in providing Fund Service Activities to the Funds.

5. Applicants state that the inability of the Applicants to engage in Fund Service Activities would result in potentially severe financial hardships for the Funds they serve and the Funds' shareholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds (excluding for this purpose the ESCs) (the "Boards"), including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, describing the circumstances that led to the Injunction, any impact on the Funds, and the application. Applicants state that they will provide the Boards with the information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they were barred from providing Fund Service Activities to registered investment companies and ESCs, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establish an expertise in providing Fund Service Activities. Applicants further state that

prohibiting them from providing Fund Service Activities would not only adversely affect their businesses, but would also adversely affect approximately 460 employees that are involved in those activities. Applicants also state that disqualifying certain Applicants from continuing to provide investment advisory services to ESCs is not in the public interest or in furtherance of the protection of investors. Because the ESCs have been formed for the benefit of key employees, officers, and directors of GE and its affiliates, it would not be consistent with the purposes of the ESC provisions of the Act to require another entity not affiliated with GE to manage the ESCs. In addition, participating employees of GE and its affiliates likely subscribed for interests in the ESCs with the expectation that the ESCs would be managed by GEAM.

7. Applicants state that Applicants and certain other affiliated persons of the Applicants have previously received orders under section 9(c) of the Act, as the result of conduct that triggered section 9(a), as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that the Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from January 23, 2012, until the Commission takes final action on their application for a permanent order.

By the Commission.

A handwritten signature in black ink, reading "Elizabeth M. Murphy". The signature is written in a cursive style with a large, stylized "M".

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 25, 2012

In the Matter of

**Tornado Gold International Corp.,
Twin Faces East Entertainment Corp.,
Universal Ice Blast, Inc.,
US Farms, Inc.,
US Microbics, Inc., and
Visitel Network (a/k/a PRG Group, Inc.),**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Tornado Gold International Corp. because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Twin Faces East Entertainment Corp. because it has not filed any periodic reports since the period ended June 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Universal Ice Blast, Inc. because it has not filed any periodic reports since the period ended June 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of US Farms, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

46 of 64

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of US Microbics, Inc. because it has not filed any periodic reports since the period ended June 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Visitel Network, Inc. (a/k/a PRG Group, Inc.) because it has not filed any periodic reports since the period ended September 30, 1995.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on January 25, 2012, through 11:59 p.m. EST on February 7, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary


By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66233 /January 25, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14712

In the Matter of

**Tornado Gold International Corp.,
Twin Faces East Entertainment Corp.,
Universal Ice Blast, Inc.,
US Farms, Inc.,
US Microbics, Inc., and
Visitel Network
(a/k/a PRG Group, Inc.),**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Tornado Gold International Corp., Twin Faces East Entertainment Corp., Universal Ice Blast, Inc., US Farms, Inc., US Microbics, Inc., and Visitel Network (a/k/a PRG Group, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Tornado Gold International Corp. (CIK No. 1168895) is a void Delaware corporation located in Reno, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tornado Gold International is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2008, which reported a net loss of over \$184,000 for the prior six months. As of January 12, 2012, the

company's stock (symbol "TOGI") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Twin Faces East Entertainment Corp. (CIK No. 1074865) is a defaulted Nevada corporation located in Henderson, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Twin Faces East Entertainment is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2006, which reported a net loss of over \$210,000 for the prior six months. As of January 12, 2012, the company's stock (symbol "TFAC") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Universal Ice Blast, Inc. (CIK No. 1067530) is a revoked Nevada corporation located in Kirkland, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Universal Ice Blast is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2004, which reported a net loss of over \$720,000 for the prior six months. On August 9, 2011, Universal Ice Blast filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, and the case was dismissed on January 6, 2012. As of January 12, 2012, the company's stock (symbol "UIBT") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. US Farms, Inc. (CIK No. 1054311) is a Nevada corporation located in Irvine, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). US Farms is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over \$3.1 million for the prior nine months. As of January 12, 2012, the company's stock (symbol "USFM") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. US Microbics, Inc. (CIK No. 774454) is a delinquent Colorado corporation located in Carlsbad, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). US Microbics is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of over \$2.6 million for the prior nine months. As of January 12, 2012, the company's stock (symbol "BUGS") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Visitel Network, Inc. (a/k/a PRG Group, Inc.) (CIK No. 846878) is a void Delaware corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Visitel Network is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 1995, which

reported a net loss of over \$1.2 million for the prior twelve months. PRG Group claims it is a successor to Visitel Network, and as of January 12, 2012, the company's stock (symbol "PRGJ") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). Based upon Delaware state corporate records, it appears that Visitel Network's corporate identity was hijacked by PRG Group. PRG Group has not separately registered its securities under Exchange Act Section 12(g).

B. DELINQUENT PERIODIC FILINGS

7. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

9. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further

order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940

Release No. 3364 / January 25, 2012

ADMINISTRATIVE PROCEEDING

File No. 14716

In the Matter of

SAMIR BARAI,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Samir Barai ("Barai" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2, and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

48 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Barai, age 38, resides in New York, New York. Barai founded Barai Capital Management ("Barai Capital"), an unregistered investment adviser, in March 2008 and was the portfolio manager of the Barai Capital Master Fund. Prior to founding Barai Capital in 2008, Barai worked as a portfolio manager at Tribeca Global Management, a hedge fund owned by Citigroup, as well as at Ziff Brothers Investments.

2. On February 8, 2011, the Commission filed a civil action against Barai in SEC v. Longoria, et al., Civil Action No. 11-CV-0753 (S.D.N.Y.). On January 23, 2012, the Court entered an order permanently enjoining Barai, by consent, from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

3. The Commission's complaint alleged that, in connection with the offer, purchase or sale of securities, Barai knew, recklessly disregarded, or should have known, that material non-public information he received from a tipper was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Barai is liable for the trading that occurred at Barai Capital because he directly or indirectly caused Barai Capital to place trades and/or unlawfully tipped inside information to Barai Capital.

4. On May 27, 2011, Barai pled guilty to one count of securities fraud, one count of conspiracy to commit securities fraud and wire fraud, one count of wire fraud, and one count of obstruction of justice, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2; 18 U.S.C. § 371; 18 U.S.C. §§ 2, 1343; and 18 U.S.C. §§ 2, 1512(c), respectively, before the United States District Court for the Southern District of New York, in United States v. Samir Barai, 11-CR-116 (DAB).

5. The counts of the criminal indictment to which Barai pled guilty alleged, inter alia, that Barai, and others, participated in a scheme to defraud by executing securities trades based on material nonpublic information that had been disclosed or misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Barai's Offer.

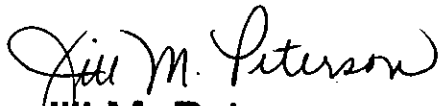
Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Barai be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer or transfer agent.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Chairman Schapiro,
Commissioner Faredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66236 / January 25, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-11590

In the Matter of

Janus Capital Management LLC

Respondent.

ORDER TRANSFERRING
REMAINING FUNDS TO THE U.S.
TREASURY, TERMINATING FAIR
FUND, AND DISCHARGING FUND
ADMINISTRATOR

On August 18, 2004, Janus Capital Management LLC ("JCM") consented to the entry of an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), which directed, among other things, that JCM pay disgorgement of \$50 million and a civil money penalty of \$50 million. The Order further established a fair fund ("Fair Fund") to provide for the distribution of these payments and required that JCM retain an independent distribution consultant ("IDC") to develop a plan for distributing the \$100 million to shareholders in the mutual funds affected by the market timing.

On May 31, 2007, the Securities and Exchange Commission (the "Commission") issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Release No. 55835) pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1103. The Commission received comments and, on April 25, 2008, the Commission approved the Modified Plan of Distribution ("Plan") (Exchange Act Release No. 57721). The Plan provided for the distribution of the Fair Fund to harmed investors according to the methodology set forth in the Plan.

Pursuant to the Plan the Commission issued six orders directing disbursements of the Fair Fund. Beginning in August 2008, a total of \$102,014,001.99 was ordered to be disbursed directly to injured investors: \$18,226,501.55 on August 1, 2008; \$24,034,633.39 on September

8, 2008; \$15,140,136.53 on October 17, 2008; \$22,582,329.59 on December 5, 2008; and \$22,030,400.93 on May 28, 2009.¹ Also, on December 1, 2010, the residual amount of \$22,825,910.79 was ordered to be distributed as provided for in the Plan (Exchange Act Rel. No. 63407 (Dec. 1, 2010)).

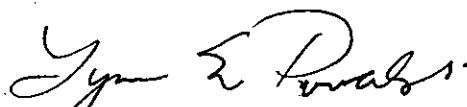
The Fund Administrator submitted a Final Accounting of the Fair Fund pursuant to Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans. The Final Accounting was approved by the Commission. According to the Final Accounting, an amount of \$14,281.65 remains in the JCM Fair Fund. The Commission has determined to transfer to the U.S. Treasury all funds remaining in the JCM Fair Fund and any additional funds that may be subsequently returned to the JCM Fair Fund.

Accordingly, IT IS ORDERED that:

- A. The \$14,281.65 remaining in the JCM Fair Fund shall be transferred to the U.S. Treasury;
- B. Any additional funds subsequently returned to the JCM Fair Fund shall be transferred to the U.S. Treasury;
- C. The JCM Fair Fund is terminated; and
- D. The Fund Administrator, Rust Consulting, Inc., is discharged.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Lynn M. Powalski
Deputy Secretary

¹ See Exchange Act Rel Nos. 58294 (Aug. 1, 2008); 58475 (Sept. 8, 2008); 58810 (Oct. 17, 2008); 59059 (Dec. 5, 2008); and 59992 (May 28, 2009), respectively.

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66237 / January 25, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14717

In the Matter of

BOB NGUYEN,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Bob Nguyen ("Nguyen" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2, and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

50 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Nguyen, age 32, resides in Santa Clara, California. From February 2008 through February 2010, Nguyen was a Technology Analyst and Semiconductor Vertical Manager at Primary Global Research LLC ("PGR"). Nguyen holds a Series 7 license that was registered with PGR during the relevant time period.

2. On February 3, 2011, the Commission filed a civil action against Nguyen in SEC v. Longoria, et al., Civil Action No. 11-CV-0753 (S.D.N.Y.). On January 23, 2012, the Court entered an order permanently enjoining Nguyen, by consent, from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Nguyen knew, recklessly disregarded, or should have known, that material nonpublic information he received from consultants to PGR was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence. Nguyen facilitated the transfer of the material nonpublic information to hedge fund clients of PGR and/or passed the information directly to PGR clients himself. Certain hedge fund clients of PGR traded based on the material nonpublic information.

4. On January 11, 2011, Nguyen pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343 and one count of conspiracy to commit wire fraud and securities fraud in violation of 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Bob Nguyen, 11-CRIM-032.

5. The counts of the criminal information to which Nguyen pled guilty alleged, inter alia, that Nguyen, and others, participated in a scheme to defraud public companies of material nonpublic information and to engage in insider trading. Nguyen did so by obtaining material nonpublic information and transmitting it directly to clients of PGR, and by facilitating meetings, phone calls, and other communications with PGR clients knowing that material nonpublic information would be divulged. Nguyen understood that the material nonpublic information would be used for purposes of executing and causing others to execute trades in the securities of public companies. The information Nguyen and others acquired was obtained in violation of fiduciary and other duties of trust and confidence owed by PGR consultants to their employers, among others.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Nguyen's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b) of the Exchange Act that Respondent Nguyen be, and hereby is:

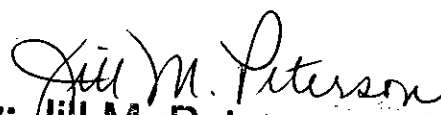
barred from association with any broker, dealer, investment adviser, municipal securities dealer or transfer agent; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66241)

Order Granting Application by BOX Options Exchange LLC for a Conditional Exemption
Pursuant to Section 36(a) of the Exchange Act from Certain Requirements of Rules 6a-1 and 6a-2 under the Exchange Act

January 26, 2012

I. Introduction

On December 19, 2011, BOX Options Exchange LLC (the "Applicant") submitted to the Securities and Exchange Commission ("Commission") an application on Form 1 under the Securities Exchange Act of 1934 ("Exchange Act") to register as a national securities exchange.¹ In addition, the Applicant, pursuant to Rule 0-12² under the Exchange Act, has requested an exemption under Section 36(a)(1) of the Exchange Act³ from certain requirements of Rules 6a-1(a) and 6a-2 under the Exchange Act.⁴ This order grants the Applicant's request for exemptive relief, subject to the satisfaction of certain conditions, which are outlined below.

¹ On December 28, 2011, the Applicant submitted Amendment No. 1 to its Form 1 application. Amendment No. 1, among other things, provides the unconsolidated financial statements for certain affiliates of the Applicant that are required in Exhibit D to Form 1 but were not included in the Applicant's initial Form 1 application. In its initial Form 1 application, the Applicant only submitted consolidated financials for certain of these affiliates. See Securities Exchange Act Release No. 66242 (January 26, 2012) (publishing for notice and comment the Applicant's Form 1 application, as amended, to register as a national securities exchange).

² 17 CFR 240.0-12.

³ 15 U.S.C. 78mm(a)(1).

⁴ 17 CFR 240.6a-1(a) and 6a-2. See letter from Lisa J. Fall, General Counsel and Secretary, Boston Options Exchange Group LLC, to Elizabeth Murphy, Secretary, Commission, dated December 16, 2011 ("Exemption Request").

II. Application for Conditional Exemption from Certain Requirements of Exchange Act Rules 6a-1 and 6a-2

A. Filing Requirements under Exchange Act Rule 6a-1(a)

Exchange Act Rule 6a-1(a) requires an applicant for registration as a national securities exchange to file an application with the Commission on Form 1. Exhibit C to Form 1 requires the applicant to provide certain information with respect to each of its subsidiaries and affiliates.⁵ For purposes of Form 1, an "affiliate" is "[a]ny person that, directly or indirectly, controls, is under common control with, or is controlled by, the national securities exchange . . . including any employees."⁶ Form 1 defines "control" as "[t]he power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise"⁷ Form 1 provides, further, that any person that directly or indirectly has the right to vote 25% or more of a class of voting securities, or has the power to sell or direct the sale of 25% or more of a class of voting securities, is presumed to control the entity.⁸

Exhibit D to Form 1 requires an applicant for exchange registration to provide unconsolidated financial statements for the latest fiscal year for each subsidiary or affiliate.

⁵ Specifically, Exhibit C requires the applicant to provide, for each subsidiary or affiliate, and for any entity that operates an electronic trading system used to effect transactions on the exchange: (1) the name and address of the organization; (2) the form of organization; (3) the name of the state and statute citation under which it is organized, and the date of its incorporation in its present form; (4) a brief description of the nature and extent of the affiliation; (5) a brief description of the organization's business or function; (6) a copy of the organization's constitution; (7) a copy of the organization's articles of incorporation or association, including all amendments; (8) a copy of the organization's by-laws or corresponding rules or instruments; (9) the name and title of the organization's present officers, governors, members of all standing committees, or persons performing similar functions; and (10) an indication of whether the business or organization ceased to be associated with the applicant during the previous year, and a brief statement of the reasons for termination of the association.

⁶ Form 1 Instructions, Explanation of Terms, 17 CFR 249.1.

⁷ Id.

⁸ Id.

Exhibit D requires the financial statements to include, at a minimum, a balance sheet and an income statement with such footnotes and other disclosures as are necessary to avoid rendering the financial statements misleading. Exhibit D provides, in addition, that if any affiliate or subsidiary of the applicant is required by another Commission Rule to submit annual financial statements, a statement to that effect, with a citation to the other Commission rule, may be provided in lieu of the financial statements required in Exhibit D.

A Form 1 application is not considered filed until all necessary information, including financial statements and other required documents, have been furnished in the proper form.⁹

B. Filing Requirements under Exchange Act Rule 6a-2

Exchange Act Rule 6a-2(a)(2) requires a national securities exchange to update the information provided in Exhibit C within 10 days of any action that causes the information provided in Exhibit C to become inaccurate or incomplete. In addition, Exchange Act Rule 6a-2(b)(1) requires a national securities exchange to file Exhibit D on or before June 30 of each year, and Exchange Act Rule 6a-2(c) requires a national securities exchange to file Exhibit C every three years.

C. Exemption Request

On December 19, 2011, the Applicant requested that the Commission grant an exemption under Section 36 of the Exchange Act, subject to the conditions set forth below, from the requirement under Exchange Act Rule 6a-1 to file the information requested in Exhibits C and D

⁹ 17 CFR 202.3(b)(2). See also 17 CFR 240.0-3(a). Defective Form 1 applications "may be returned with a request for correction or held until corrected before being accepted as a filing." See 17 CFR 202.3(b)(2). See also Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70881 (Dec. 22, 1998) ("Regulation ATS Adopting Release").

to Form 1 for the "Foreign Indirect Affiliates," as defined below, of the Applicant.¹⁰ In addition, the Applicant requested an exemption, subject to certain conditions, with respect to the Foreign Indirect Affiliates from the requirements under: (1) Exchange Act Rule 6a-2(a)(2) to amend Exhibit C within 10 days if the information in Exhibit C becomes inaccurate or incomplete; and (2) Exchange Act Rule 6a-2(b)(1) and (c) to file periodic updates to Exhibits C and D.

MX US 2, Inc., a Delaware corporation, would hold a 20% voting interest and a 40% equity interest in the Applicant. MX US 2, Inc. also would hold a 53.83% interest in BOX Holdings LLC, which would be the 100% owner of BOX Market, which would own and operate the Boston Options Exchange options trading platform as a facility of the Applicant.¹¹

MX US 2, Inc. is a wholly-owned subsidiary of MX US 1, Inc., a Delaware corporation.

MX US 1, Inc. is a wholly-owned subsidiary of Bourse de Montreal, Inc., a Canadian corporation. Bourse de Montreal, Inc. is a wholly-owned subsidiary of TMX Group, Inc., a Canadian corporation. According to the Applicant, the parent ownership structure of MX US 1, Inc. is comprised entirely of foreign entities, Bourse de Montreal, Inc. and TMX Group, Inc. (the "Foreign Direct Affiliates"), which in turn own interests, either directly or indirectly, of 25 percent or more in a number of other foreign entities (the "Foreign Indirect Affiliates").¹²

Because of the limited and indirect nature of its connection to the Foreign Indirect Affiliates, the Applicant believes that the corporate and financial information of the Foreign Indirect Affiliates required by Exhibits C and D of Form 1 would have little relevance to the

¹⁰ See Exemption Request, supra note 4.

¹¹ MX US 2, Inc. currently holds a 53.83% interest in the Boston Options Exchange Group, LLC, a facility of NASDAQ OMX BX, Inc.

¹² See Exemption Request, supra note 4, at 3-4.

Commission's review of the Applicant's Form 1 application or to the Commission's ongoing oversight of the Applicant as a national securities exchange if the Commission were to approve the Applicant's Form 1 application.¹³ In this regard, the Exemption Request states that the Foreign Indirect Affiliates have no ability to influence the management, policies, or finances of the Applicant and no obligation to provide funding to, or ability to materially affect the funding of, the Applicant.¹⁴ The Exemption Request also states that (1) the Foreign Indirect Affiliates have no ownership interest in the Applicant or in any of the controlling shareholders of the Applicant; and (2) there are no commercial dealings between the Applicant and the Foreign Indirect Affiliates.¹⁵ Further, the Exemption Request states that obtaining detailed corporate and financial information with respect to the Foreign Indirect Affiliates (1) is unnecessary for the protection of investors and the public interest and (2) would be unduly burdensome and inefficient because these affiliates are located in foreign jurisdictions and the disclosure of such information could implicate foreign information sharing restrictions in such jurisdictions.¹⁶

As a condition to the granting of exemptive relief, the Applicant has agreed to provide: (i) a listing of the names of the Foreign Indirect Affiliates; (ii) an organizational chart setting forth the affiliation of the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant; and (iii) in Exhibit C of the Applicant's Form 1 application, a description of the nature of the Foreign Indirect Affiliates' affiliation with the Foreign Direct Affiliates and the Applicant. In addition, as a condition to the granting of exemptive relief from the requirements

¹³ Id. at 4.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id. The Applicant also believes that providing the information required by Exhibits C and D with respect to the Foreign Indirect Affiliates could raise confidentiality concerns because many of the Foreign Indirect Affiliates are not public companies. Id.

of Exchange Act Rule 6a-2(a)(2), 6a-2(b)(1), and 6a-2(c), as described above, the Applicant has agreed to provide amendments to the information required under conditions (i) through (iii) above on or before June 30th of each year. Further, the Applicant notes that it will provide the information required by Exhibits C and D for all of its affiliates other than the Foreign Indirect Affiliates, including the Foreign Direct Affiliates.¹⁷

III. Order Granting Conditional Section 36 Exemption

Section 6 of the Exchange Act¹⁸ sets forth a procedure for an exchange to register as a national securities exchange.¹⁹ Exchange Act Rule 6a-1(a)²⁰ requires an application for registration as a national securities exchange to be filed on Form 1 in accordance with the instructions in Form 1. A Form 1 application is not considered filed until all necessary information, including financial statements and other required documents, have been furnished in the proper form.²¹ Exchange Act Rule 6a-2 establishes ongoing requirements to file certain amendments to Form 1.

Section 36(a)(1) of the Exchange Act provides that “the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of

¹⁷ See Exemption Request, supra note 4, at 4.

¹⁸ 15 U.S.C. 78f.

¹⁹ Specifically, Section 6(a) of the Exchange Act states that “[a]n exchange may be registered as a national securities exchange . . . by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.” Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

²⁰ 17 CFR 240.6a-1(a).

²¹ 17 CFR 202.3(b)(2). See also supra note 9.

[the Exchange Act] or of any Rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”²²

For the reasons discussed below, the Commission believes that it is appropriate in the public interest and consistent with the protection of investors to exempt the Applicant from the requirement under Exchange Act Rule 6a-1 to provide the information required in Exhibits C and D to Form 1 with respect to the Foreign Indirect Affiliates, subject to the following conditions:

- (1) the Applicant must provide a list of the names of the Foreign Indirect Affiliates;
- (2) the Applicant must provide an organizational chart setting forth the affiliation of the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant; and
- (3) as part of Exhibit C to the Applicant's Form 1 Application, the Applicant must provide a description of the nature of the affiliation between the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant.

The Commission believes, further, that it is appropriate in the public interest and consistent with the protection of investors to exempt the Applicant, with respect to the Foreign Indirect Affiliates, from the requirements under: (a) Exchange Act Rule 6a-2(a)(2) to amend Exhibit C within 10 days of any action that renders the information in Exhibit C inaccurate or incomplete; (b) Exchange Act Rules 6a-2(c) to provide periodic updates of Exhibit C; and (c) Exchange Act Rules 6a-2(b)(1) to provide periodic updates of Exhibit D, subject to the

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15 U.S.C. 78mm(a)(1).

condition that the Applicant provides amendments to the information required under conditions (1) through (3) above on or before June 30th of each year.

As part of an application for exchange registration, the information included in Exhibits C and D is designed to help the Commission make the determinations required under Sections 6(b) and 19(a) of the Exchange Act with respect to the application. The updated Exhibit C and D information required under Exchange Act Rule 6a-2 is designed to help the Commission exercise its oversight responsibilities with respect to registered national securities exchanges.

Specifically, Exhibit D is designed to provide the Commission with information concerning the financial status of an exchange and its affiliates and subsidiaries,²³ and Exhibit C provides the Commission with the names and organizational documents of these affiliates and subsidiaries.²⁴ Such information is designed to help the Commission determine whether an applicant for exchange registration would have the ability to carry out its obligations under the Exchange Act, and whether a registered national securities exchange continues to have the ability to carry out its obligations under the Exchange Act.

Since the most recent amendments to Form 1 in 1998,²⁵ many registered national securities exchanges that previously were member-owned organizations with few affiliated entities have demutualized. Some of these demutualized exchanges have been consolidated under holding companies with numerous affiliates that, in some cases, have only a limited and indirect connection to the registered national securities exchange, with no ability to influence the

²³ See Securities Exchange Act Release No. 18843 (June 25, 1982), 47 FR 29259 (July 6, 1982) (proposing amendments to Form 1); see also Form 1, 17 CFR 249.1, and supra Section II.A.

²⁴ Form 1, 17 CFR 249.1. See also supra note 5.

²⁵ See Regulation ATS Adopting Release, supra note 9.

management or policies of the registered exchange and no obligation to fund, or to materially affect the funding of, the registered exchange. The Commission believes that, for these affiliated entities, the information required under Exhibits C and D would have limited relevance to the Commission's review of an application for exchange registration or to its oversight of a registered exchange.

Based on the Applicant's representations, the indirect nature of the relationship between the Applicant and the Foreign Indirect Affiliates, and the information that the Applicant will provide with respect to the Foreign Direct Affiliates and the Foreign Indirect Affiliates, the Commission believes that it will have sufficient information to review the Applicant's Form 1 application and to make the determinations required under Sections 6(b) and 19(a) of the Exchange Act with respect to its application for registration as a national securities exchange.²⁶ The Commission believes, further, that it would have the information necessary to oversee the Applicant's activities as a national securities exchange if the Commission were to approve the Applicant's Form 1 application. In particular, the Commission notes that the Applicant has represented that it would have no direct connection to the Foreign Indirect Affiliates, that the Foreign Indirect Affiliates would have no ability to influence the management or policies of the Applicant, and that the Foreign Indirect Affiliates would have no obligation to fund, or ability to materially affect the funding of, the Applicant. In addition, the Commission notes that the Applicant represented that: (1) the Foreign Indirect Affiliates have no ownership interest in the Applicant or in any of the controlling equity holders of the Applicant; and (2) there are no

²⁶ 15 U.S.C. 78f(b) and 78s(a). Section 6(b) of the Exchange Act enumerates certain determinations that the Commission must make with respect to an exchange before registering the exchange as a national securities exchange. The Commission will not register an exchange as a national securities exchange unless it is satisfied that the exchange meets these requirements. See Regulation ATS Adopting Release, *supra* note 9, at IV.B.

commercial dealings between the Applicant and the Foreign Indirect Affiliates.²⁷ The Commission also believes that, based on the Applicant's representations, it could be burdensome for the Applicant to obtain detailed corporate and financial information with respect to the Foreign Indirect Affiliates because these affiliates are located in foreign jurisdictions and the disclosure of such information could implicate foreign information sharing restrictions in such jurisdictions.²⁸

Given the limited and indirect relationship between the Applicant and the Foreign Indirect Affiliates and the location of the Foreign Indirect Affiliates in foreign jurisdictions, as described above, the Commission believes that the detailed corporate and financial information required in Exhibits C and D with respect to the Foreign Indirect Affiliates is unnecessary for the Commission's review of the Applicant's Form 1 application and would be unnecessary for the Commission's oversight of the Applicant as a registered national securities exchange following any Commission approval of its Form 1 application.

For the reasons discussed above, the Commission finds that the conditional exemptive relief requested by the Applicant is appropriate in the public interest and is consistent with the protection of investors.

²⁷ See Exemption Request, supra note 4, at 4.

²⁸ See id.

IT IS ORDERED, pursuant to Section 36 of the Exchange Act,²⁹ and subject to the conditions described above, that the Applicant is exempt from the requirements to: (1) include in its Form 1 application the information required in Exhibits C and D to Form 1 with respect to the Foreign Indirect Affiliates; and (2) with respect to the Foreign Indirect Affiliates, update the information in Exhibits C and D to Form 1 as required by Exchange Act Rules 6a-2(a)(2), 6a-2(b)(1), and 6a-2(c).

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

²⁹ 15 U.S.C. 78mm.

*Chairman Schapiro
Commissioner Walter
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66259 / January 26, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3366 / January 26, 2012

Admin. Proc. File No. 3-13655

In the Matter of

THEODORE W. URBAN

ORDER DISMISSING
PROCEEDING

On October 19, 2009, the Commission issued an order instituting administrative proceedings ("OIP") against Theodore W. Urban,¹ formerly the general counsel, executive vice president, and member of the Board of Directors of Ferris Baker Watts, Inc. ("FBW"), a registered broker-dealer and investment adviser.² The OIP alleged that FBW registered representative Stephen Glantz violated the anti-fraud provisions of the securities laws, that Urban was a supervisor of Glantz, and that Urban failed to exercise this supervision reasonably, within the meaning of Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940.³ In a decision issued September 8, 2010, an administrative law judge found that Glantz engaged in securities laws violations and that Urban was his supervisor. The law judge dismissed the proceedings against Urban, however, because she found that Urban did not fail to exercise that supervision reasonably.⁴

¹ Securities Exchange Act Rel. No. 60837 (Oct. 19, 2009), 96 SEC Docket 21500.

² FBW was acquired by the Royal Bank of Canada in 2008 and now operates under the name RBC Wealth Management.

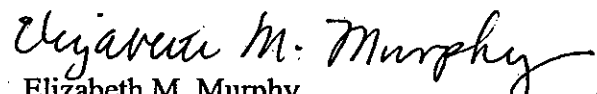
³ 15 U.S.C. §§ 78o(b); 80b-3(f).

⁴ Initial Dec. Rel. No. 402 (Sept. 8, 2010), 99 SEC Docket 32157.

On appeal, the Commission is evenly divided as to whether the allegations in the OIP have been established. Accordingly, it is

ORDERED that the proceeding instituted against Theodore W. Urban be, and it hereby is, dismissed.⁵

By the Commission (Commissioners AGUILAR and PAREDES; Chairman SCHAPIRO and Commissioners WALTER and GALLAGHER not participating).


Elizabeth M. Murphy
Secretary

⁵ See Commission Rule of Practice 411(f), 17 C.F.R. § 201.411(f) ("In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result."); *Jeffrey Steinberg*, 58 S.E.C. 670 (2005) (dismissing proceeding where the "Commission [was] evenly divided as to whether the allegations . . . [were] established").

Urban has requested oral argument. Under Commission Rule of Practice 451(a), 17 C.F.R. § 201.451(a), we grant requests for oral argument with respect to the review of initial decisions of hearing officers except in "exceptional circumstances." However, "because the issues here have been thoroughly briefed, and given the resolution of this matter, we believe there is no prejudice" to Urban in denying his request for oral argument. *D.E. Wine Invs., Inc.*, 54 S.E.C. 1213, 1221 n.25 (2001). We therefore deny his request, and we deny as moot the pending motion of the amici curiae in this case to participate in oral argument.

We also deny Urban's Motion to Strike the Division's References to Information Not Admitted As Evidence in the Record, which primarily concerns evidence relevant to a determination of sanctions, a question we do not reach. Finally, we deny Urban's Motion to Adduce Additional Evidence Not in the Record, which seeks to introduce an index to the investigative file in this case, because the index is not material to Urban's assertion that the OIP failed to provide adequate notice of the underlying securities law violations at issue here. See Commission Rule of Practice 452, 17 C.F.R. § 201.452 (requiring that motions to adduce additional evidence "show with particularity that such evidence is material and that there were reasonable grounds for failure to adduce such evidence previously").

Commissioner Walter
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 66260 / January 26, 2012

ACCOUNTING AND AUDITING ENFORCEMENT

Rel. No. 3357 / January 26, 2012

Admin. Proc. File No. 3-14629

In the Matter of

PAUL FREE, CPA

ORDER DENYING A
STAY OR POSTPONEMENT OF
PROCEEDINGS

On November 16, 2011, we issued an order instituting proceedings ("OIP") against Paul Free, a certified public accountant and former Controller and Chief Accounting Officer of Delphi Corporation from 1998 through 2002, pursuant to Commission Rule of Practice 102(e)(3)(i),¹ that temporarily suspended him from appearing or practicing before the Commission as an

¹ Rule of Practice 102(e)(3)(i), 17 C.F.R. § 201.102(e)(3)(i), provides, in pertinent part, that:

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any . . . accountant . . . who has been by name:

(A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

accountant.² The OIP finds that Free was enjoined on October 31, 2011 by the United States District Court for the Eastern District of Michigan from violating and/or aiding and abetting violations of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, 13a-13, 13b2-1, and 13b2-2 thereunder.³ The underlying complaint alleged that Free, while Delphi's Controller and Chief Accounting Officer, engaged in conduct that resulted in the Company materially misstating its financial condition and operating results in filings with the Commission, in offering documents, and in other statements to investors. The complaint alleged, for example, that Free, among others, was responsible for Delphi having improperly accounted for and disclosed a payment that it made to its former parent company, pursuant to a settlement agreement.

On December 15, 2011, following our issuance of the OIP, Free filed a document titled, "Motion Pursuant to Rule 401 of the Commission's Rules of Practice for Stay of Rule 102(e) Proceedings." In his motion, Free states that the time for him to appeal the district court's judgment has not yet run. He asserts that he will be entitled to reinstatement to appear and practice before the Commission upon appropriate application to the Commission under Rule 102(e)(5) if he is successful in an appeal of that judgment. Free believes that "[i]t would be an inefficient use of both the Commission's and [his] resources for [him] to petition the Commission now to lift or limit his suspension, and to do so again after the conclusion of an appeal." Free therefore requests, pursuant to Rule 401, that "the 102(e) proceedings against him be stayed pending the outcome of any appeal that he may file."

The Division of Enforcement opposes the motion. The Division asserts that "such a stay would significantly delay the outcome of these proceedings," and Free "fails to show that denial of his motion would substantially prejudice his case." The Division states that, should Free appeal the district court judgment, a resolution may not occur for one to two years and that a delay of the Rule 102(e) proceedings here would be significant and "would not serve the public interest."

Rule 401(c) permits motions for stays by persons aggrieved by a Commission order "who would be entitled to review in a federal court of appeals."⁴ However, Rule 401(c) is inapplicable

² *Paul Free, CPA*, Securities Exchange Act Rel. No. 65759 (Nov. 16, 2011), <http://www.sec.gov/litigation/admin/2011/34-65759.pdf>.

³ *Free*, <http://www.sec.gov/litigation/admin/2011/34-65759.pdf>, at 2.

⁴ 17 C.F.R. § 201.401(c).

here because the Commission has not yet entered a final order, reviewable by an appellate court, that we could consider staying.⁵

Although Rule 401 is inapplicable, we will consider Free's motion as a request for an extension of time, postponement, or adjournment under Rule 161.⁶ That rule provides that "the Commission, at any time, . . . may, for good cause shown . . . postpone or adjourn any hearing" so long as any such postponement or adjournment meets certain requirements.⁷ When deciding whether to grant such a motion, we "adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice" his or her case.⁸ We find that Free has not made the requisite showing under Rule 161.

As we have previously stated, the pendency of an appeal generally is an insufficient basis upon which to prolong a Commission proceeding.⁹ A postponement in these circumstances could delay significantly the outcome of these proceedings. The inefficient use of resources that Free cites in having to petition the Commission twice is a potential inconvenience that does not override the strong public interest in the prompt enforcement of the federal securities laws.¹⁰

⁵ See *Eric S. Butler*, Order Denying a Stay or Postponement of Administrative Proceedings, Admin. Proc. File No. 3-13986 (Mar. 31, 2011), at 3 & n.7 (citing *Michael J. Markowski*, Order Denying Request for a Stay and Granting Extension of Time for Filing Briefs, Exchange Act Rel. No. 4748 (Dec. 4, 1998), 68 SEC Docket 2156, 2159 ("Neither the initial decision of the law judge nor our order scheduling briefing in this proceeding is a Commission order entitling [respondent] to appellate review.")).

⁶ 17 C.F.R. § 201.161. In determining whether to postpone a proceeding under Rule 161, we consider such factors as the length of the proceeding to date, the number of postponements previously granted, the stage of the proceeding at the time of the request for a postponement, the efficient and timely administration of justice, and any other matters justice requires. 17 C.F.R. § 201.161(b)(1).

⁷ *Id.*

⁸ *Id.*

⁹ See *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2714 n.15 (stating that "it is well established that a pending appeal does not affect the injunction's status as a basis for this administrative proceeding") (citing cases).

¹⁰ See *Butler*, at 4 n.12 (citing *Jon Edelman*, 52 S.E.C. 789, 790 (1996)).

Under Rule 102(e)(3)(ii), Free could have appealed his temporary suspension within thirty days of being served with the OIP. It does not appear that Free has filed such an appeal. The suspension therefore has become permanent pursuant to Rule 102(e)(3)(ii).¹¹

Accordingly, IT IS ORDERED that Paul Free's request for a stay or postponement of this proceeding be, and hereby is, denied; and

IT IS FURTHER ORDERED that the temporary suspension imposed upon Paul Free has become permanent pursuant to Rule 102(e)(3)(ii).

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

¹¹ 17 C.F.R. § 201.102(e)(3)(ii). As Free notes, he may apply to the Commission for reinstatement pursuant to Rule 102(e)(5)(i). See 17 C.F.R. § 201.102(e)(5)(i) (stating that an "application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this rule may be made at any time").

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66242; File No.10-206)

January 26, 2012

BOX Options Exchange LLC; Notice of Filing of Application, as amended, for Registration as a National Securities Exchange under Section 6 of the Securities Exchange Act of 1934

On December 19, 2011, BOX Options Exchange LLC (the "Applicant" or "BOX Exchange") submitted to the Securities and Exchange Commission ("Commission") a Form 1 application under the Securities Exchange Act of 1934 ("Exchange Act"), seeking registration as a national securities exchange under Section 6 of the Exchange Act.¹ On December 28, 2011, the Applicant submitted Amendment No. 1 to its Form 1 application.² The Commission is publishing this notice to solicit comments on the Applicant's Form 1 application, as amended. The Commission will take these comments into consideration in making its determination about whether to grant the Applicant's request to be registered as a national securities exchange. The Commission will grant the registration if it finds that the requirements of the Exchange Act and the rules and regulations thereunder with respect to the Applicant are satisfied.³

The Applicant's Form 1 application, as amended, provides detailed information on how it proposes to satisfy the requirements of the Exchange Act. BOX Market LLC ("BOX Market"), a wholly-owned subsidiary of BOX Holdings Group LLC ("BOX Holdings") would own and

¹ On January 26, 2012, the Commission issued an order granting the Applicant exemptive relief, subject to certain conditions, in connection with the filing of its Form 1 application. See Securities Exchange Act Release No. 66241. Because the Applicant's Form 1 application was incomplete without the exemptive relief, the date of filing of such application is January 26, 2012.

² Amendment No. 1, among other things, provides the unconsolidated financial statements for certain affiliates of the Applicant that are required in Exhibit D to Form 1 but were not included in the Applicant's initial Form 1 application. In its initial Form 1 application, the Applicant only submitted consolidated financials for certain of these affiliates.

³ 15 U.S.C. 78s(a).

operate the options trading platform as a facility of the Applicant.. Specifically, BOX Market would operate the Boston Options Exchange ("BOX") options trading platform, which would be operated as a facility of the Applicant, as the successor-in-interest to BOX Options Exchange Group, LLC, which currently operates BOX. BOX would be an all-electronic marketplace for the trading of listed options and would not maintain a physical trading floor. Liquidity on BOX would be derived from orders to buy and orders to sell submitted electronically by order flow providers, as well as from market makers, which would have certain market making obligations. The Applicant's Form 1 application is available at the Commission's Public Reference Room and www.sec.gov.

Interested persons are invited to submit written data, views, and arguments concerning the Applicant's Form 1 application, as amended, including whether the application is consistent with the Exchange Act. In addition to any other areas for which interested persons may wish to submit comments, the Commission seeks comment on the proposed corporate structure of the Applicant. In order to approve the registration, the Commission must find that the Applicant is "so organized and has the capacity to be able to carry out the purposes of [the Exchange Act]."⁴ As noted above, the Applicant, BOX Exchange, would be a separate corporate entity from BOX Market, the owner and operator of its trading facility, BOX. BOX Market would in turn be owned by BOX Holdings. As discussed in further detail in the Form 1 documents, the same persons would own BOX Exchange and BOX Holdings, albeit in different percentages. The Commission requests comment on all aspects of this proposed structure, including:

- Commenters views on the registration of an entity as a national securities exchange that does not own or operate its trading facility.

⁴ See Section 6(b)(1) of the Exchange Act, 15 U.S.C. 78f(b)(1).

- How, if at all, the proposed corporate structure (including that the Applicant will not own the facility) potentially would impact the ability of the Applicant to carry out its statutory obligations to regulate and oversee BOX. If commenters believe there would be an impact, and that the impact could be detrimental, what, if any, steps do commenters think the Commission could take to address the potential impact?
- How, if at all, the proposed corporate structure potentially would impact the ability of the Commission to carry out its oversight responsibilities with respect to BOX Exchange and its trading facility BOX.
- What are commenters' views as to whether the separation of the regulatory and oversight function of the Applicant from the market operations function in the manner proposed would have an impact on the independence of the regulatory function of the Applicant and its ability to fulfill its responsibilities? If commenters believe that there would be an impact, please describe the nature of the impact and the reasoning as to why they believe it would occur.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 10-206) on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 10-206. This file number should be included on

the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the Applicant's Form 1 applications filed with the Commission, and all written communications relating to the application between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 10-206 and should be submitted on or before [insert date 45 days from publication in the Federal Register].

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Aguilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 9296 / January 26, 2012

SECURITIES EXCHANGE ACT OF 1934

Release No. 66246 / January 26, 2012

INVESTMENT ADVISERS ACT OF 1940

Release No. 3365 / January 26, 2012

INVESTMENT COMPANY ACT OF 1940

Release No. 29936 / January 26, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14557

In the Matter of

SPENCER D. MINDLIN, and
ALFRED C. MINDLIN, CPA,

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER PURSUANT
TO SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTION 203(f) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND SECTION
9(b) OF THE INVESTMENT COMPANY ACT
OF 1940

I.

On September 21, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Spencer D. Mindlin ("Spencer Mindlin"), and cease-and-desist proceedings pursuant to

55 of 64

Section 8A of the Securities Act and Section 21C of the Exchange Act against Alfred C. Mindlin, CPA ("Alfred Mindlin" and together with Spencer Mindlin, "Respondents").

II.

Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

1. These proceedings arise out of an insider trading scheme involving Spencer Mindlin and his father Alfred Mindlin, who traded while in possession of material nonpublic information obtained by Spencer Mindlin while he was employed at Goldman, Sachs & Co. ("Goldman"). While working on Goldman's Exchange-Traded Funds Desk ("ETF Desk"), Spencer Mindlin obtained material nonpublic information concerning the plans of certain Goldman employees to purchase and sell large amounts of securities on behalf of Goldman ("Goldman's Trading Intentions"). Goldman's Trading Intentions concerned securities underlying an exchange-traded fund ("ETF"), the SPDR S&P Retail ETF ("XRT"). Prior to these Goldman employees placing large buy orders in securities underlying the XRT, Spencer and Alfred Mindlin took long positions in those same securities. When these Goldman employees placed large sell orders in securities underlying the XRT, Spencer and Alfred Mindlin took short positions in those same securities.

2. Specifically, on four occasions, in December 2007 and March 2008, Spencer Mindlin and Alfred Mindlin traded securities underlying the XRT ("XRT underliers") with knowledge of Goldman's Trading Intentions, reaping illicit profits in excess of \$57,000. Spencer Mindlin learned of Goldman's Trading Intentions through e-mail communications shortly before he and Alfred Mindlin placed their trades in XRT underliers.

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

3. Spencer Mindlin did not conduct any of the trading in XRT underliers through his own account at Goldman. Instead, Spencer and Alfred Mindlin placed almost all of their trades in a brokerage account in the name of a family member.

4. By virtue of their conduct, Spencer Mindlin and Alfred Mindlin willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Respondents

5. **Spencer Mindlin**, age 33, resides in New York, New York. From September 2007 until his resignation in August 2009, Spencer Mindlin was an employee on Goldman's ETF Desk. During this period, Goldman was a broker-dealer and investment adviser registered with the Commission. Spencer Mindlin previously worked as an analyst at Goldman Sachs Execution & Clearing, L.P. and its predecessor firm Spear, Leeds & Kellogg from June 2001 through September 2007. Currently, he is unemployed. Since 2003, he has held Series 7, 55 and 63 licenses.

6. **Alfred Mindlin**, age 68, resides in Massapequa, New York and Delray Beach, Florida. He is a certified public accountant licensed in New York but has not practiced before the Commission. Alfred Mindlin is the president and sole employee of Alfred Carl Mindlin, C.P.A., P.C.

Other Relevant Entities

7. **Goldman** is a Delaware corporation headquartered in New York, New York. Goldman is the principal U.S. broker-dealer of The Goldman Sachs Group, Inc., a global investment banking, securities and investment management firm.

8. **Sport Supply Group Inc.** ("Sport Supply") is a Delaware corporation headquartered in Dallas, Texas. In August 2010, Sport Supply was acquired by a private equity firm, Onex Corporation. Prior to the acquisition, Sport Supply's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the American Stock Exchange under the symbol "RBI."

9. **PC Mall, Inc.** ("PC Mall") is a Delaware corporation headquartered in Torrance, California. PC Mall is a direct marketer of technology products and services to businesses, governments and educational institutions. PC Mall's securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on the Nasdaq under the symbol "MALL."

10. **Stage Stores, Inc.** ("Stage Stores") is a Nevada corporation headquartered in Houston, Texas. Stage Stores is a specialty department store retailer that focuses on small and mid-sized markets. Stage Stores' securities are registered with the Commission pursuant to

Section 12(b) of the Exchange Act, and its stock trades on the New York Stock Exchange under the symbol "SSI."

11. **ValueVision Media, Inc.** ("ValueVision") is a Minnesota corporation headquartered in Eden Prairie, Minnesota. ValueVision is a multi-media retailer, engaged in marketing, selling and distributing products directly to consumers through various digital platforms. ValueVision's securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on the Nasdaq under the symbol "VVTV."

Background

Insider Trading

12. Spencer and Alfred Mindlin made over \$57,000 in profits by trading XRT underliers with knowledge of Goldman's nonpublic trading intentions in December 2007 and March 2008. Prior to December 2007, neither Spencer nor Alfred Mindlin had ever purchased or sold XRT underliers around an index rebalance. Rather than use Spencer Mindlin's personal brokerage account, Spencer and Alfred Mindlin chose to execute almost all of these trades in a brokerage account at TD Ameritrade, Inc. ("TD Ameritrade") held in the name of a family member. Early on, Spencer and Alfred Mindlin also traded in one of Alfred Mindlin's brokerage accounts.

13. The XRT is an equal-weighted ETF, composed of a mix of U.S.-based apparel, automotive and bargain retailers. The XRT is designed to replicate the S&P Retail Select Industry Index ("S&P Retail Index") and rebalances quarterly on the third Friday of the last month of the quarter (the "Rebalance Effective Date") to mirror the S&P Retail Index. The securities to be added and deleted from the S&P Retail Index are published before each Rebalance Effective Date. On the Rebalance Effective Date, the XRT adds and deletes the same securities from its holdings as the S&P Retail Index adds and deletes from its holdings.

14. By virtue of his position on Goldman's ETF Desk, Spencer Mindlin knew that Goldman maintained a large net long position in XRT. Spencer Mindlin also knew that Goldman sold short securities added to the S&P Retail Index and purchased securities deleted from the S&P Retail Index in order to hedge this position in XRT. Spencer Mindlin also understood that XRT was an equal-weighted ETF as opposed to a traditional market-capitalization weighted ETF because it holds stocks in equal amounts rather than by market capitalization.

December 2007 Trades in Sport Supply

15. In December 2007 -- three months after Spencer Mindlin started working on Goldman's ETF Desk -- father and son embarked on their scheme with their trading in Sport Supply put options. Specifically, Spencer and Alfred Mindlin used nonpublic information about Goldman's intentions to sell Sport Supply stock. Spencer Mindlin obtained this information via emails from his colleagues at Goldman and by virtue of his position on the ETF Desk. Spencer

and Alfred Mindlin reaped a total profit of \$24,608 from trading Sport Supply securities in the family member's account at TD Ameritrade and in Alfred Mindlin's brokerage account.

16. Spencer Mindlin did not disclose these brokerage accounts to Goldman, even though Goldman's policies required their disclosure.

17. Spencer Mindlin sought nonpublic information from his colleagues about Goldman's Trading Intentions in Sport Supply days after learning that it would be added to the XRT. On December 12, 2007, Standard & Poor's Financial Services LLC announced the securities that would be added and deleted from the S&P Retail Index, which the XRT mirrors, on the Rebalance Effective Date of December 21, 2007. One of the securities to be added, Sport Supply, had an average daily trading volume of less than 30,000 shares.

18. On December 17, 2007 at 1:30 p.m., Spencer Mindlin emailed a Goldman employee on Goldman's trading desk, asking "you got 10 min to talk about this rebal trade?" The email further stated that Spencer Mindlin "just want[ed] to better understand how we put together the rebalance trade and the piece to short in advance."

19. Shortly after Spencer Mindlin sought this nonpublic information about Goldman's rebalance strategy, he calculated the critical piece of nonpublic information that he and his father relied on to trade Sport Supply securities. At 5:21 p.m. on December 17, 2007, Spencer Mindlin sent an email to his colleagues on the ETF Desk stating that the desk would need to rebalance its hedge of 3.85 million shares of XRT on the Rebalance Effective Date. This nonpublic data provided sufficient information for Spencer Mindlin to calculate Goldman's Trading Intentions in those underlier securities to be added to and deleted from the XRT.

20. Spencer Mindlin knew that Goldman's Trading Intentions could place significant downward pressure on the price of Sport Supply stock on the Rebalance Effective Date. On December 17, 2007, a Goldman employee emailed Spencer Mindlin and his former colleagues on the ETF Desk a spreadsheet with the subject line "XRT Q4 rebalance." According to this spreadsheet, Goldman would have to sell short 2,931.38 shares of Sport Supply per 50,000 shares of XRT to modify its hedge of XRT, which is a calculation based on public information. Therefore, to hedge its 3.85 million share position in XRT, Goldman would have to sell short approximately 225,000 shares of Sport Supply, which amounted to more than seven times the average daily volume of Sport Supply.

21. Spencer and Alfred Mindlin were in unusually close communication on the same day that Spencer Mindlin calculated the ETF Desk's nonpublic position in XRT. On December 17, 2007, Spencer Mindlin placed five telephone calls to Alfred Mindlin's office phone number, as well as two back-to-back calls to Spencer Mindlin's parents' residence, at 8:45 p.m. and 9:52 p.m., which lasted approximately sixty-seven minutes and sixteen minutes, respectively. Earlier in the day, Spencer and Alfred Mindlin engaged in an instant message exchange concerning puts. Spencer Mindlin concluded the exchange by writing "that's enough convo." On December 18, 2007, Spencer Mindlin's office telephone line and Alfred Mindlin's residence exchanged at least eight calls or attempted calls.

22. After receiving nonpublic information about Goldman's position in XRT on December 17, 2007, Spencer and Alfred Mindlin traded XRT underliers the next day. On Tuesday, December 18, 2007 at 12:00 p.m., Spencer Mindlin emailed his father, instructing him to "ask him to do it with a \$.35 limit. Be sure to get that limit on the trade." On the same day, Alfred Mindlin purchased 60 Sport Supply put option contracts with a strike price of \$10 in his brokerage account at Citigroup Global Markets, Inc. ("Citigroup"). All of these put options were set to expire three days later on December 21, 2007 -- the same day as the Rebalance Effective Date. The limit price on the Sport Supply put options was \$.35, as Spencer Mindlin had instructed in his email.

23. On December 18, 2007 at 12:37 p.m., Alfred Mindlin phoned TD Ameritrade to upgrade the family member's account to allow for the trading of options. While on hold with the TD Ameritrade representative, Alfred Mindlin received a call on another line from Spencer Mindlin. Because Alfred Mindlin's call with TD Ameritrade was recorded, Spencer and Alfred Mindlin's conversation was also captured on tape. Father and son proceeded to engage in the following exchange before the TD Ameritrade representative returned to the call:

Alfred Mindlin: It's done.

Spencer Mindlin: It's done?

Alfred Mindlin: Yep.

Spencer Mindlin: Okay. What price?

Alfred Mindlin: Three-Five.

Spencer Mindlin: Okay. Great.

Alfred Mindlin: Okay.

Spencer Mindlin: Actually, did I tell you what happened? I mean why I started freaking out?

Alfred Mindlin: No. No, you didn't tell me anything.

Spencer Mindlin: But, I did. I was talking to you before. I told you, right?

(Emphasis in the original).

24. According to Spencer Mindlin's cellular phone records, father and son spoke for another seven minutes after the TD Ameritrade phone call ended. Approximately five minutes later, at 12:51 p.m., the TD Ameritrade account purchased a total of 30 Sport Supply put option contracts with a strike price of \$10 that were set to expire on December 21, 2007. At 2:06 p.m., Spencer Mindlin telephoned TD Ameritrade, pretending to be his father and sought advice concerning the mechanics of covering his short option position with a market-on-close purchase order on Friday, when the options were set to expire. This telephone conversation was recorded by TD Ameritrade. In response to the TD Ameritrade representative's questions concerning why he needed to place a market-on-close order, Spencer Mindlin stated, "I believe it is going to close at the lowest [price]." Spencer Mindlin further stated that he did not want TD Ameritrade's risk group "to be buying stock all day Friday."

25. Spencer and Alfred Mindlin added to their bearish position hours prior to Goldman's large sales in Sport Supply stock and shortly after receiving further assurances of Goldman's nonpublic trading intentions. On the Rebalance Effective Date of Friday, December 21, 2007 at 10:56 a.m., a colleague on Goldman's ETF Desk emailed Spencer with a subject line reading "FW: XRT trade based on 4,350,000 shares." As stated above, Goldman's current position in XRT, 4,350,000 shares, is the only nonpublic information required to calculate Goldman's Trading Intentions in XRT underliers. On that same day, Spencer Mindlin impersonated his father on at least three calls to TD Ameritrade, all of which were recorded by TD Ameritrade. Throughout these conversations, Spencer Mindlin repeatedly stressed that TD Ameritrade's Risk Department should not purchase Sport Supply securities throughout the day because this would "chew into my profit -- my profit on this trade." At 2:19 p.m., during his last call of the day with TD Ameritrade, Spencer Mindlin attempted to purchase an additional 22 Sport Supply put option contracts with a strike price of \$10 notwithstanding the fact that the options were set to expire in less than 90 minutes and cost \$1.25 per contract. At the time, Sport Supply was trading at \$9.09 per share. This purchase was highly risky because Spencer and Alfred Mindlin would lose money unless the price of Sport Supply fell below \$8.75 within a short window. Because of margin requirements, however, Spencer Mindlin was able to purchase only 7 additional put option contracts. The total cost of the Sport Supply put options purchased in the TD Ameritrade account was \$4,243. During the same call, Spencer Mindlin placed a market-on-close order to purchase 3,700 shares of Sport Supply, which would cover the exercise of the 37 put option contracts. After placing this order, Spencer Mindlin said, "Okay. I'll see you in the money Great. Thank you so much."

26. As Spencer Mindlin predicted in his call with TD Ameritrade, Goldman and other large traders caused the price of Sport Supply stock to plummet in the final hour of trading on December 21, 2007. During the last hour of trading on December 21, 2007, the price of Sport Supply fell from \$9.05 to \$7 per share, a decline of approximately 22 percent. During this same hour, Goldman was a large and significant seller of Sport Supply stock. There was no significant news about Sport Supply during the week of December 21, 2007.

27. The put options in the TD Ameritrade account and in Alfred Mindlin's Citigroup account were exercised at the market close on December 21, 2007, and the accounts collectively purchased 9,700 shares of Sport Supply to cover the short position created by the exercised put options, resulting in a total profit of \$24,608.

March 2008 Trades in PC Mall, Stage Stores and ValueVision Media

28. During the next quarterly index rebalancing, Spencer and Alfred Mindlin traded XRT underliers using nonpublic information about Goldman's Trading Intentions that Spencer Mindlin had obtained from emails with his Goldman colleagues. These trades proved yet again to be profitable, resulting in a total profit of \$32,873.

29. On March 7, 2008, Standard & Poor's Financial Services LLC announced the securities that would be added and deleted from the S&P Retail Index, which the XRT mirrors, on the Rebalance Effective Date of March 20, 2008. Three of the securities to be deleted, PC Mall,

Stage Stores and ValueVision Media, had average daily trading volumes of less than 300,000 shares, 500,000 shares, and 500,000 shares, respectively.

30. The trades in March 2008 were again placed in the family member's brokerage account, which Spencer Mindlin had not disclosed to Goldman, even though Goldman's policies required disclosure.

31. Spencer Mindlin received nonpublic information concerning Goldman's position in XRT shortly before his and his father's decision to trade XRT underliers in March 2008. On March 17, 2008 at 4:26 p.m., Spencer Mindlin received an email stating that the two desks involved in the XRT rebalance had a total of over \$30 million in XRT inventory. As stated above, this data was sufficient to calculate Goldman's Trading Intentions in the securities to be added to and deleted from the XRT. PC Mall, Stage Stores, and ValueVision were three of the least liquid stocks to be deleted from the XRT. Spencer Mindlin, therefore, knew that Goldman would need to purchase a large block of these securities in order to rebalance its hedge of the XRT.

32. Throughout this period, Spencer and Alfred Mindlin exchanged timely calls followed by Spencer Mindlin seeking and obtaining information concerning Goldman's Trading Intentions from his co-workers. On March 18, 2008, Alfred Mindlin sent his son an instant message asking Spencer Mindlin to call him later that evening. A call lasting approximately six minutes took place between Spencer Mindlin's office telephone and Alfred Mindlin's residential telephone line that night. The next morning, Spencer Mindlin sent an email with the subject "[u]pcoming rebalances" to a colleague at Goldman asking "do you have an update on how this trade is going you're sending out." The body of the email contained an earlier email that referenced the rebalance of the XRT and another ETF. On March 19, 2008 at 10:20 a.m., Spencer Mindlin received an email listing a position in XRT of over 9.5 million shares for the ETF Desk and the synthetic products group desk, which handled the hedging of Goldman's lending inventory in XRT.

33. Spencer Mindlin traded XRT underliers within hours after receiving Goldman's nonpublic XRT position contained in the March 19 email. On March 19, 2008 at 1:59 p.m., Spencer Mindlin logged onto the TD Ameritrade account. Minutes later, an order was placed in the TD Ameritrade account to purchase 500 shares of PC Mall stock and 400 shares of ValueVision stock. That evening, father and son had three calls lasting approximately 6 minutes, 35 minutes and 14 minutes each.

34. Spencer and Alfred Mindlin added to their bullish positions minutes after receiving further assurances of Goldman's Trading Intentions. On March 20, 2008 at 10:55 a.m., Spencer Mindlin received an email attachment containing additional nonpublic information about Goldman's rebalance trades in the XRT underliers. As expected from the earlier emails, three of the largest purchases listed in the March 20 email attachment were in PC Mall, ValueVision and Stage Stores. Upon receiving this email attachment, Spencer Mindlin logged onto the TD Ameritrade account. Minutes later, orders were placed in the TD Ameritrade account to purchase 30 PC Mall call option contracts at a total cost of \$1,682, 30 ValueVision call option contracts at a total cost of \$7,082, and 25 Stage Stores call option contracts at a total cost of \$1,178. All of the

option contracts were set to expire within five hours of purchase. Later that day, market-on-close orders were placed to sell short 3,000 shares of PC Mall and ValueVision and 2,500 shares of Stage Stores to cover the position created by the exercised call options, and market-on-close orders were placed to sell 500 shares of PC Mall and 400 shares of ValueVision to close the long positions created on March 19, 2008.

35. Goldman and other large traders caused the price of PC Mall, ValueVision, and Stage Stores to rise sharply toward the market close on March 20, 2008. During the last hour of trading on March 20, 2008, the stock price of PC Mall, ValueVision and Stage Stores increased approximately 62, 49, and 7 percent, respectively. In that same hour, Goldman was a large and significant purchaser of PC Mall, ValueVision, and Stage Stores stock. There was no significant news about PC Mall, ValueVision, and Stage Stores during the week of March 20, 2008.

36. The market-on-close orders in the TD Ameritrade account executed at the close on March 20, 2008. The TD Ameritrade account made \$21,287.05, \$7,995.31 and \$3,590.81 from the trades in PC Mall, ValueVision and Stage Stores, respectively.

Spencer Mindlin's Duty to Keep Confidential All Material Nonpublic Information About Goldman's Trading Intentions

37. As an employee of Goldman, Spencer Mindlin had a duty to keep confidential all material nonpublic information concerning Goldman, including information concerning its trading intentions.

38. The Goldman Sachs Equities General Compliance Training specifically prohibited employees from trading "when in possession of or with knowledge of material proprietary information." The policy defined proprietary information as "nonpublic information, analyses and plans that are created or obtained by [Goldman] for [Goldman's] business purposes," and included "trading positions" and "trading intentions" as examples of proprietary information. The policy further prohibited the use of proprietary information for an employee's "personal benefit or shared with others for their personal gain."

39. Spencer Mindlin attended a training session on September 11, 2007 that covered the Goldman Sachs Equities General Compliance Training.

Spencer and Alfred Mindlin Acted with the Requisite Scienter

40. Spencer Mindlin knowingly or recklessly, for his direct or indirect benefit, in breach of a duty to Goldman (a) purchased and sold shares of XRT underliers while in possession of material nonpublic information and (b) communicated to Alfred Mindlin, in words or in substance, material nonpublic information concerning Goldman's Trading Intentions.

41. Alfred Mindlin knew, or acted with reckless disregard of the fact, that: (a) Spencer Mindlin was aware of material nonpublic information concerning Goldman's Trading Intentions; (b) Spencer Mindlin communicated to Alfred Mindlin, in words or in substance,

material nonpublic information concerning Goldman's Trading Intentions; and (c) Spencer Mindlin's conveyance of this material nonpublic information to Alfred Mindlin constituted a breach of a duty to keep confidential all material nonpublic information obtained from Goldman.

42. As a result of the conduct described above, Respondents willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase, or sale of securities.

Disgorgement and Civil Penalties

43. Respondent Spencer Mindlin has submitted a sworn Statement of Financial Condition dated November 22, 2011 and other evidence and has asserted his inability to pay a civil penalty greater than \$25,000, an amount that is in addition to a joint obligation with his father to pay disgorgement of \$57,481 and prejudgment interest of \$10,081.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act as to Spencer Mindlin and pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act as to Alfred Mindlin, it is hereby ORDERED that:

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Spencer Mindlin be, and hereby is:

- i. barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;
- ii. prohibited 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; and
- iii. barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for

purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock,

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent Spencer Mindlin will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent Spencer Mindlin, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondents shall, jointly and severally, within ten days of the entry of this Order, pay disgorgement of \$57,481 and prejudgment interest of \$10,081 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Spencer Mindlin and Alfred Mindlin as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Sanjay Wadhwa, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 4300, New York, New York 10281.

E. Respondent Spencer Mindlin shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of \$25,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Spencer Mindlin as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Sanjay Wadhwa, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 4300, New York, New York 10281.

F. Based upon Respondent Spencer Mindlin's sworn representations in his Statement of Financial Condition dated November 22, 2011 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent Spencer Mindlin greater than \$25,000.

G. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent Spencer Mindlin provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent Spencer Mindlin was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent Spencer Mindlin may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Commissioner Aquilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66247 / January 26, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14718

In the Matter of

Richard V. Rizzo,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 15(b) AND 21C
OF THE SECURITIES EXCHANGE ACT
OF 1934, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Richard V. Rizzo ("Rizzo" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

56 of 64

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise from trading access that Zanshin Enterprises, LLC ("Zanshin"), an unregistered firm, provided to an individual who subsequently used that trading access to profit from an account intrusion and market manipulation scheme. On nine occasions from October 2009 to December 2009, the individual made profitable trades through Zanshin contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts of innocent and unknowing account holders at multiple U.S. broker-dealers. The individual generated ill-gotten gains of \$55,725 from the scheme through Zanshin.

2. By effecting securities transactions for the individual, Zanshin acted as an unregistered broker in violation of Section 15(a) of the Exchange Act. Rizzo, who arranged for the individual to receive trading access through Zanshin, aided and abetted and caused Zanshin's failure to register as a broker in violation of Section 15(a).

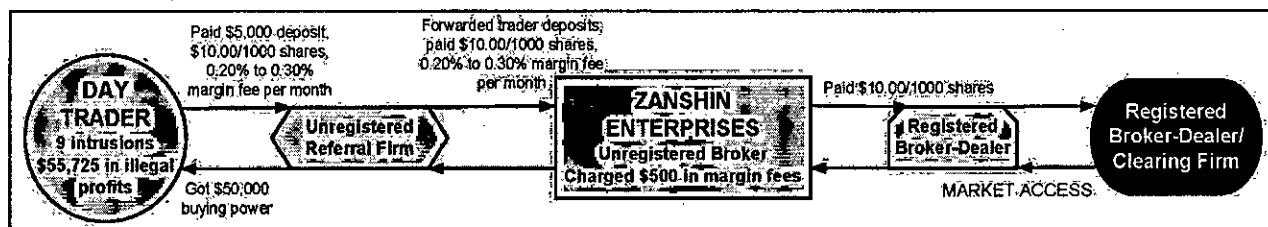
Respondent

3. Richard V. Rizzo maintained a website soliciting day traders and arranged for traders to receive market access through Zanshin Enterprises, LLC from September 2009 to December 2009 (the "relevant period"). In that capacity, Rizzo was associated with Zanshin. Rizzo previously held Series 7, 24 and 63 licenses but did not hold any securities licenses and was not registered with the Commission in any capacity during the relevant period. Rizzo, age 41, is a resident of Oceanside, New York.

Other Relevant Entity

4. Zanshin Enterprises, LLC is a Texas limited liability company that had its principal place of business in Boise, Idaho during the relevant period. Zanshin has never been registered with the Commission in any capacity. During the relevant period, approximately 125 individuals traded as many as four million shares per month on U.S. exchanges in omnibus accounts held in Zanshin's name at a registered broker-dealer.

Sponsored Market Access



5. Sponsored market access is a form of trading access whereby a broker-dealer permits customers to enter orders into the public market without the orders first passing through the broker-dealer's trading systems. During the relevant period, Zanshin received sponsored

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other persons or entities in this or any other proceeding.

market access from its registered broker-dealer and Rizzo arranged for traders to receive sponsored market access through Zanshin.

6. During the relevant period, Rizzo maintained a website soliciting day traders and arranged for traders to receive market access through Zanshin pursuant to a "professional service agreement." Approximately 20 traders who had been solicited by Rizzo were trading in Zanshin's omnibus account via sponsored market access during the relevant period.

7. In September 2009, Rizzo arranged for an individual who claimed to be a day trader from Latvia to receive market access through Zanshin. With Rizzo's knowledge, Zanshin provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through Zanshin's account. In so doing, Zanshin provided and controlled an electronic trading platform for the Latvian trader to trade in the public market.

8. The Latvian trader wired \$5,000 of his own money to Rizzo as a risk deposit, which Rizzo forwarded to Zanshin. Rizzo also entered into an agreement with the Latvian trader stating that the trader was responsible for 100% of any trading losses that he incurred through Zanshin's account.

9. With Rizzo's knowledge, Zanshin then used the trading software to extend the trader \$50,000 in "buying power" through Zanshin's account, which was a portion of the trading margin that Zanshin received from its registered broker-dealer. Although Zanshin extended credit to the trader to purchase securities, Zanshin's capital was not ultimately at risk because the trading software allowed it to see his trading in real time and would automatically cut off his trading access if his capital balance fell below \$2,000, effectively allowing Zanshin to ensure that the trader would never lose money in excess of his capital balance.

10. With Rizzo's knowledge, Zanshin charged the Latvian trader a monthly fee that ranged from 0.20 to 0.30 percent of every dollar of margin above his capital balance that he was authorized to trade through Zanshin.

11. During the relevant period, Zanshin tracked the Latvian trader's capital balance, adding the trading profits that he generated through Zanshin's account and subtracting its margin fees and the trading commissions charged by Zanshin's registered broker-dealer. Zanshin transferred the Latvian trader's net profits to Rizzo, who then transferred them to an offshore account maintained by the Latvian trader.

Account Intrusions

12. On nine occasions from October 2009 to December 2009, the Latvian trader made profitable trades in Zanshin's account contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts at multiple U.S. broker-dealers. The unauthorized trading in hijacked online brokerage accounts was conducted by the Latvian trader outside the electronic trading platform provided by Zanshin and Rizzo.

13. On each occasion, the trader first established a long or short position in a security through Zanshin's account. Then the trader surreptitiously gained access to an online brokerage account and made large unauthorized trades in the same security to manipulate the stock price in his favor, through unauthorized purchases if he held a long position through Zanshin or through

unauthorized sales or short sales if he held a short position through Zanshin. Finally, during or shortly after the manipulative trading in the intruded account, the trader closed out his position through Zanshin at the artificial market price to generate a profit.

14. The trader generated ill-gotten gains of \$55,725 from the scheme through Zanshin's account. The trader engaged in similar manipulative trading through other unregistered firms, and generated total profits of \$874,886 from 159 account intrusions between June 2009 and August 2010.

15. As a result of providing the Latvian trader with electronic order-taking and order-routing services that he used to conduct an illegal account intrusion and market manipulation scheme, Zanshin received approximately \$500 in margin fees and other charges.

16. By providing trading access in the manner described above and allocating trades conducted by the traders against capital provided by the traders themselves, Zanshin engaged in the business of effecting transactions in securities for the account of others.

Violations

17. As a result of the conduct described above, Zanshin acted as an unregistered broker in violation of Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

18. As a result of the conduct described above, Rizzo willfully² aided and abetted and caused Zanshin's violation of Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Respondent is censured.

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

C. Respondent shall pay a civil penalty of \$35,000 to the United States Treasury. Payment shall be made in the following installments:

Payment Date	Amount
30 days after issuance of Order	\$7,000
90 days after issuance of Order	\$7,000
180 days after issuance of Order	\$7,000
270 days after issuance of Order	\$7,000
365 days after issuance of Order	\$7,000
TOTAL	\$35,000

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance, plus interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application. Payments shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Richard V. Rizzo as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and check, money order, or wire transfer confirmation shall be sent to Jina L. Choi, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery St, 26th Floor, San Francisco, CA 94104.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Commissioner Aguilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66248 / January 26, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14719

In the Matter of

Mercury Capital and Lisa R.
Hyatt,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 15(b)(4), 15(b)(6)
AND 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND CEASE-AND-DESIST
ORDERS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4), 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Mercury Capital ("Mercury") and Lisa R. Hyatt ("Hyatt") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents each have submitted an Offer of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b)(4), 15(b)(6) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders ("Order"), as set forth below.

57 of 64

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

1. These proceedings arise from trading access that Mercury Capital, an unregistered firm, extended to an individual who subsequently used that trading access to profit from an account intrusion and market manipulation scheme. On 77 occasions from April 2010 to July 2010, the individual made profitable trades through Mercury contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts of innocent and unknowing account holders at multiple U.S. broker-dealers. The individual generated ill-gotten gains of \$433,816 from the scheme through Mercury.

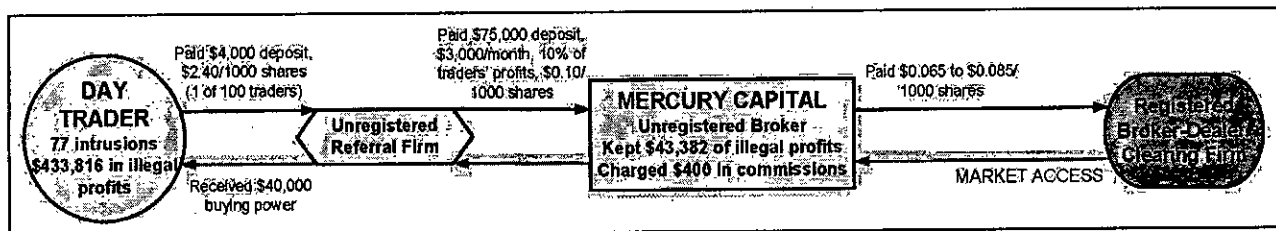
2. By effecting securities transactions for the individual, Mercury acted as an unregistered broker in violation of Section 15(a) of the Exchange Act. Hyatt, Mercury's President, aided and abetted and caused Mercury's failure to register as a broker in violation of Section 15(a).

Respondents

3. Mercury Capital is a Nevada corporation that had its principal place of business in La Jolla, California from June 2009 until it ceased operations in November 2010 (the "relevant period"). Mercury has never been registered with the Commission in any capacity. During the relevant period, approximately 600 individuals traded as many as 800 million shares per month on U.S. exchanges through an omnibus account held in Mercury's name at a registered broker-dealer.

4. During the relevant period, Lisa R. Hyatt was President of, and associated with, Mercury. In that capacity, Hyatt caused Mercury to extend market access to traders through Mercury. She also has been Managing Member of a broker-dealer registered with the CBOE Stock Exchange since June 2009. Hyatt held Series 7, 55 and 63 licenses from 2002 to 2005 but did not hold any securities licenses during the relevant period. Hyatt, age 42, is a resident of Escondido, California.

Sponsored Market Access



5. Sponsored market access is a form of trading access whereby a broker-dealer permits customers to enter orders into the public market without the orders first passing through the broker-dealer's trading systems. During the relevant period, and with Hyatt's knowledge,

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other persons or entities in this or any other proceeding.

Mercury received sponsored market access from its registered broker-dealer and passed the sponsored market access on to Mercury's traders.

6. During the relevant period, and with Hyatt's knowledge, Mercury maintained an independent contractor agreement with a Canadian entity that solicited day traders through its website and referred traders to Mercury to receive sponsored market access. Approximately 100 traders who had been referred by the Canadian entity were trading through Mercury's omnibus account via sponsored market access during the relevant period.

7. Under the independent contractor agreement, Mercury charged the Canadian entity a monthly fee of \$3,000 plus a "clearing fee" of \$0.10 per thousand shares traded, which exceeded the commission of \$0.065 to \$0.085 that Mercury paid its registered broker-dealer. With Hyatt's knowledge, Mercury therefore received transaction-based compensation for extending the market access.

8. With Hyatt's knowledge, the Canadian entity made an initial risk deposit of \$75,000 and was responsible for 100% of any trading losses that its traders incurred through Mercury's account.

9. During the relevant period, and with Hyatt's knowledge, Mercury maintained documentation tracking the Canadian entity's deposit balance against all commissions, fees, and profits or losses for all trading activity through Mercury's account by traders referred by the Canadian entity.

10. In April 2010, the Canadian entity referred to Mercury an individual who claimed to be a day trader from Latvia. With Hyatt's knowledge, Mercury provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through Mercury's account. In so doing, Mercury provided and controlled an electronic trading system for the Latvian trader to trade in the public market. The Canadian entity agreed that Mercury could retain 10% of any trading profits generated by the Latvian trader through Mercury's account.

11. The Latvian trader wired \$4,000 of his own money to the Canadian entity as a risk deposit. With Hyatt's knowledge, Mercury then used the trading software to extend the trader \$40,000 in "buying power" through Mercury's account, which was a portion of the trading margin that Mercury received from its registered broker-dealer. Although Mercury extended credit to the trader to purchase securities, Mercury's capital was not ultimately at risk because it was entitled to recoup losses from the Canadian entity and the trading software allowed Mercury to see the Latvian trader's trading in real time and automatically cut off his trading access if he or other traders referred by the Canadian entity incurred losses greater than the Canadian entity's deposit balance.

Account Intrusions

12. On 77 occasions between April 2010 and July 2010, the Latvian trader made profitable trades through Mercury's account contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts at multiple U.S. broker-dealers. The unauthorized trading in hijacked online brokerage accounts was conducted by the Latvian trader outside the electronic trading platform provided by Mercury and Hyatt.

13. On each occasion, the trader first established a long or short position in a security through Mercury's account. Then the trader surreptitiously gained access to an online brokerage account and made large unauthorized trades in the same security to manipulate the stock price in his favor, through unauthorized purchases if he held a long position through Mercury or through unauthorized sales or short sales if he held a short position through Mercury. Finally, during or shortly after the manipulative trading in the intruded account, the trader closed out his position through Mercury at the artificial market price to generate a profit.

14. The trader generated ill-gotten gains of \$433,816 from the scheme through Mercury's account. The trader engaged in similar manipulative trading through other unregistered firms, and generated total profits of \$874,886 from 159 account intrusions between June 2009 and August 2010.

15. As a result of providing the Latvian trader with electronic order-taking and order-routing services that he used to conduct an illegal account intrusion and market manipulation scheme, Mercury retained 10% of the trading profits, or \$43,382, and also received \$395.50 in trading commissions.

16. By extending market access to the traders referred by the Canadian entity in the manner described above and allocating trades conducted by the traders against deposits provided by the Canadian entity or the traders themselves, Mercury engaged in the business of effecting transactions in securities for the account of others.

Violations

17. As a result of the conduct described above, Mercury willfully violated Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

18. As a result of the conduct described above, Hyatt willfully² aided and abetted and caused Mercury's violation of Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

Disgorgement and Civil Penalty

19. Respondent Mercury has submitted a sworn Statement of Financial Information dated September 30, 2011 and other evidence and has asserted its inability to pay disgorgement plus prejudgment interest.

20. Respondent Mercury has submitted a sworn Statement of Financial Information dated September 30, 2011 and other evidence and has asserted its inability to pay a civil penalty.

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 15(b)(4), 15(b)(6) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondents Mercury and Hyatt cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Respondents Mercury and Hyatt are censured.

C. Respondent Mercury shall pay disgorgement of \$43,777.50 and prejudgment interest of \$1,970.10, but that payment of such amount is waived based upon Mercury's sworn representations in its Statement of Financial Information dated September 30, 2011 and other documents submitted to the Commission.

D. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Mercury provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and prejudgment interest. No other issue shall be considered in connection with this petition other than whether the financial information provided by Mercury was fraudulent, misleading, inaccurate, or incomplete in any material respect. Mercury may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

E. Based upon Mercury's sworn representations in its Statement of Financial Information dated September 30, 2011 and other documents submitted to the Commission, the Commission is not imposing a penalty against Mercury.

F. The Division may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Mercury provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Mercury was fraudulent, misleading, inaccurate, or incomplete in any material respect. Mercury may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

G. Respondent Hyatt shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$35,000 to the United State Treasury. If timely payment is not made, interest shall accrue pursuant to 31 U.S.C. Section 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F

St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Lisa R. Hyatt as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and check, money order, or wire transfer confirmation shall be sent to Jina L. Choi, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery St, 26th Floor, San Francisco, CA 94104.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

*Commissioner Aguilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66249 / January 26, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14720

In the Matter of

Alchemy Ventures, Inc., KM
Capital Management, LLC,
Zanshin Enterprises, LLC,
Mark H. Rogers, Steven D.
Hotovec, Joshua A. Klein,
Yisroel M. Wachs, Frank K.
McDonald, and Douglas G.
Frederick,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 15(b)(4), 15(b)(6)
AND 21C OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4), 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Alchemy Ventures, Inc. ("Alchemy"), KM Capital Management, LLC ("KM"), Zanshin Enterprises, LLC ("Zanshin"), Mark H. Rogers ("Rogers"), Steven D. Hotovec ("Hotovec"), Joshua A. Klein ("Klein"), Yisroel M. Wachs ("Wachs"), Frank K. McDonald ("McDonald"), and Douglas G. Frederick ("Frederick") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

Summary

1. These proceedings arise from trading access that Alchemy, KM, Zanshin, and Mercury Capital ("Mercury"), each an unregistered firm, extended to an individual who subsequently used that trading access to profit from an account intrusion and market manipulation scheme. On a total of 134 occasions from September 2009 to August 2010 (the "relevant period"), the individual made profitable trades through Alchemy, KM, Zanshin, or Mercury contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts of innocent and unknowing account holders at multiple U.S. broker-dealers. The individual generated ill-gotten gains totaling \$760,051 from the scheme through Alchemy, KM, Zanshin, and Mercury.

58 of 64

2. By effecting securities transactions for the individual, Alchemy, KM, Zanshin, and Mercury acted as unregistered brokers in willful violation of Section 15(a) of the Exchange Act. Rogers, Hotovec, Klein, Wachs, McDonald, and Frederick, each acting directly and through the unregistered firm that he controlled and operated, acted as unregistered brokers in willful violation of Section 15(a) of the Exchange Act by effecting securities transactions for the individual. Rogers, Hotovec, Klein, Wachs, McDonald, and Frederick also willfully aided and abetted and caused an unregistered firm's failure to register as a broker in violation of Section 15(a).

3. Registered broker-dealers are required to comply with regulations that are intended to promote confidence in the securities markets by ensuring that persons who effect transactions for the accounts of others can be relied upon to understand and faithfully execute their obligations to customers and the markets. Regulatory obligations that are incumbent on a registered broker-dealer include membership in a self-regulatory organization and in the Securities Investor Protection Corporation; know-your-customer and anti-money laundering obligations; recordkeeping and supervision requirements; and capital and margin requirements. In addition, registered broker-dealers are subject to statutory disqualification standards and the Commission's disciplinary authority, which are designed to prevent persons with adverse disciplinary histories from becoming, or becoming associated with, registered broker-dealers.

Respondents

4. Alchemy Ventures, Inc. is a California corporation with its principal place of business in San Mateo, California. Alchemy has never been registered with the Commission in any capacity. Alchemy's wholly-owned subsidiary Alchemy Alternatives, Inc. is a registered broker-dealer. During the relevant period, approximately 250 individuals traded as many as 300 million shares per month on U.S. exchanges in an omnibus account held in Alchemy's name at a registered broker-dealer.

5. During the relevant period, Mark H. Rogers was President of, and associated with, Alchemy. In that capacity, Rogers caused Alchemy to extend market access to traders through Alchemy. Also during the relevant period, Rogers was President of Alchemy Alternatives, Inc. and held Series 7, 24 and 63 licenses. Rogers, age 51, is a resident of San Carlos, California.

6. During the relevant period, Steven D. Hotovec was Vice President of, and associated with, Alchemy. In that capacity, Hotovec caused Alchemy to extend market access to traders through Alchemy. Also during the relevant period, Hotovec was an officer of Alchemy Alternatives, Inc. and held Series 7, 24 and 63 licenses. Hotovec, age 45, is a resident of Redwood City, California.

7. KM Capital Management, LLC is a Pennsylvania limited liability company with its principal place of business in Philadelphia, Pennsylvania. KM has never been registered with the Commission in any capacity. During the relevant period, approximately 10 individuals traded as many as two million shares per month on U.S. exchanges in omnibus accounts held in KM's name at a registered broker-dealer.

8. During the relevant period, Joshua A. Klein was a principal of, and associated with, KM. In that capacity, Klein caused KM to extend market access to traders through KM. Klein has never held securities licenses or been registered with the Commission in any capacity. Klein, age 28, is a resident of Philadelphia, Pennsylvania.

9. During the relevant period, Yisroel M. Wachs was a principal of, and associated with, KM. In that capacity, Wachs caused KM to extend market access to traders through KM. Wachs has never held securities licenses or been registered with the Commission in any capacity. Wachs, age 28, is a resident of Philadelphia, Pennsylvania and Jerusalem, Israel.

10. Zanshin Enterprises, LLC is a Texas limited liability company that had its principal place of business in Boise, Idaho until it ceased operations in February 2010. Zanshin has never been registered with the Commission in any capacity. During the relevant period, until Zanshin ceased operations, approximately 125 individuals traded as many as four million shares per month on U.S. exchanges in omnibus accounts held in Zanshin's name at a registered broker-dealer.

11. During the relevant period, Frank K. McDonald was Managing Member of, and associated with, Zanshin. In that capacity, McDonald caused Zanshin to extend market access to traders through Zanshin. McDonald did not hold any securities licenses and was not registered with the Commission in any capacity during the relevant period. McDonald, age 55, is a resident of Boise, Idaho.

12. During the relevant period, Douglas G. Frederick provided management services to, and was associated with, Mercury Capital. In that capacity, Frederick caused Mercury to extend market access to traders through Mercury. Frederick previously held Series 6, 7, 55 and 63 licenses but was barred in 2008 from association with a broker or dealer. *See In re Frederick*, Admin. Proc. File No. 3-13004, Initial Decision (Sept. 9, 2008) and Notice that Initial Decision Has Become Final (Oct. 8, 2008). Frederick, age 41, is a resident of Brighton, Michigan.

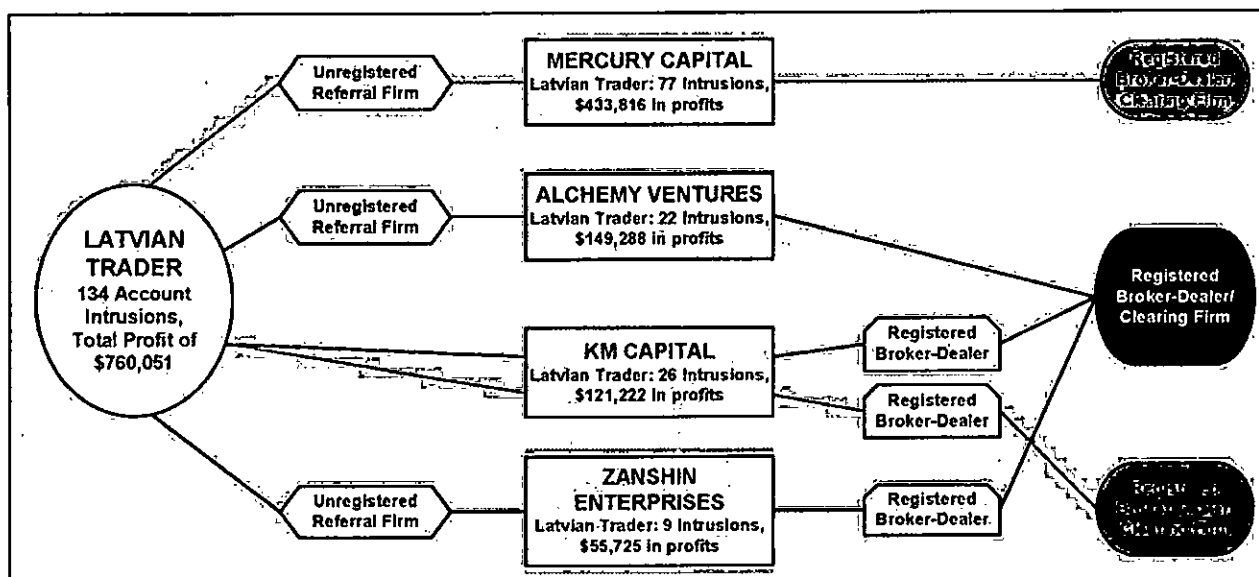
Other Relevant Entity

13. Mercury Capital is a Nevada corporation that had its principal place of business in La Jolla, California during the relevant period. Mercury has never been registered with the Commission in any capacity. During the relevant period, approximately 600 individuals traded as many as 800 million shares per month on U.S. exchanges in an omnibus account held in Mercury's name at a registered broker-dealer.¹

Sponsored Market Access

14. The following chart illustrates the relationships through which the unregistered firms received market access from registered broker-dealers and extended the market access to an individual identified as a citizen of Latvia ("the Latvian trader") who conducted an account intrusion and market manipulation scheme. In the case of Alchemy, Zanshin, and Mercury, the firms extended market access through arrangements with unregistered referral firms.

¹ Simultaneous with the institution of these administrative and cease-and-desist proceedings, the Commission is issuing an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b)(4), 15(b)(6) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders as to Mercury Capital and Lisa R. Hyatt. Exchange Act Rel. No. 34-_____, 2012).

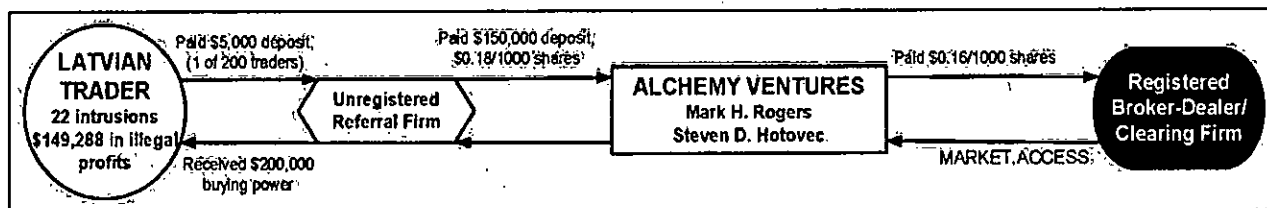


15. Sponsored market access is a form of trading access whereby a broker-dealer permits customers to enter orders into the public market without the orders first passing through the broker-dealer's trading systems.

16. During the relevant period, Alchemy, KM, Zanshin and Mercury each received sponsored market access from a registered broker-dealer and passed the sponsored market access on to the Latvian trader, who subsequently used that trading access to profit from an account intrusion and market manipulation scheme.

Alchemy Ventures, Inc.

17. The following chart illustrates the relationships through which Alchemy, Rogers, and Hotovec extended market access to the Latvian trader who conducted an account intrusion and market manipulation scheme.



18. During the relevant period, Alchemy, and Rogers and Hotovec, through Alchemy, received sponsored market access from a registered broker-dealer and passed the sponsored market access on to traders through a Canadian entity that solicited traders through its website and referred them to Alchemy.

19. In connection with extending sponsored market access to traders through the Canadian entity, Alchemy, Rogers, and Hotovec participated in the order-taking and order-routing process, extended credit to the traders in connection with securities transactions, and handled customer funds and securities.

20. During the relevant period, Alchemy, at the direction of Rogers and Hotovec, maintained an agreement with the Canadian entity. Under the agreement, approximately 200

traders who had been referred by the Canadian entity were trading through Alchemy's omnibus account via sponsored market access during the relevant period.

21. Under the agreement, Alchemy charged the Canadian entity a commission of \$0.18 per thousand shares traded, which exceeded the commission of \$0.16 per thousand shares traded that Alchemy paid its registered broker-dealer. Rogers and Hotovec were responsible for setting the commission rate and directed Alchemy to charge transaction-based compensation for extending the market access.

22. Under the agreement, Alchemy and the Canadian entity divided the trading profits generated by traders referred by the Canadian entity.

23. Rogers and Hotovec initially required the Canadian entity to maintain a risk deposit of \$150,000 with Alchemy. Under the agreement, the Canadian entity was responsible for 100% of any trading losses that its traders incurred through Alchemy's account.

24. During the relevant period, Rogers and Hotovec directed Alchemy to maintain documentation tracking the Canadian entity's deposit balance against all commissions, fees, and profits or losses for all trading activity through Alchemy's account by traders referred by the Canadian entity.

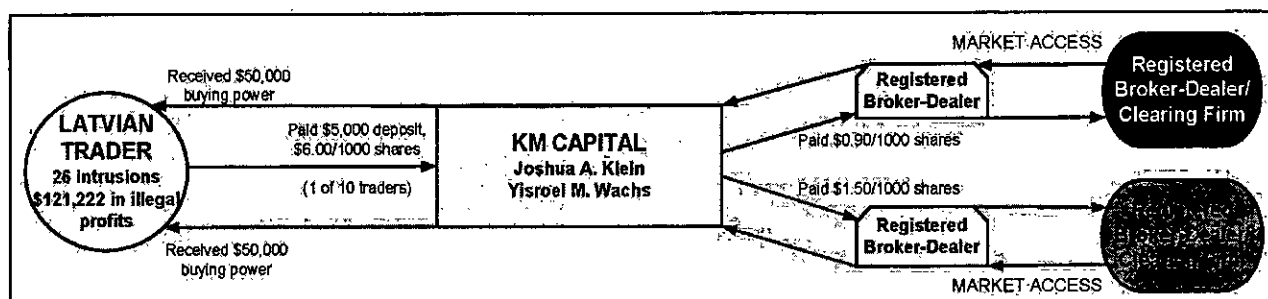
25. In September 2009, the Canadian entity notified Alchemy that the Latvian trader had requested market access. Alchemy provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through Alchemy's account. In so doing, Alchemy, at the direction of Rogers and Hotovec, provided order-taking and order-routing services and controlled an electronic trading system for the Latvian trader to trade in the public market.

26. Rogers and Hotovec were ultimately responsible for authorizing traders referred by the Canadian entity to trade through Alchemy's account, for determining whether to terminate a trader's access, and for controlling the trading parameters in the trading software, including the amount of margin each trader received.

27. The Latvian trader wired \$5,000 of his own money to the Canadian entity as a risk deposit. Alchemy then used the trading software to extend the Latvian trader \$200,000 in "buying power" through Alchemy's account, which was a portion of the trading margin that Alchemy received from its registered broker-dealer. Although Alchemy extended credit to the Latvian trader to purchase securities, Alchemy's capital was not ultimately at risk because it was entitled to recoup losses from the Canadian entity and the trading software allowed Alchemy to see the Latvian trader's trading in real time and automatically cut off his trading access if he or other traders referred by the Canadian entity incurred losses greater than the Canadian entity's deposit balance.

KM Capital Management, LLC

28. The following chart illustrates the relationships through which KM, Klein, and Wachs extended market access to the Latvian trader who conducted an account intrusion and market manipulation scheme.



29. During the relevant period, KM, and Klein and Wachs, through KM, received sponsored market access from registered broker-dealers and passed the sponsored market access on to KM's traders.

30. In connection with extending sponsored market access to traders, KM, Klein, and Wachs participated in the order-taking and order-routing process, extended credit to the traders in connection with securities transactions, and handled customer funds and securities.

31. During the relevant period, KM, at the direction of Klein and Wachs, maintained a website and made postings on internet message boards soliciting traders to trade through KM. Approximately 10 traders were trading through KM's omnibus accounts via sponsored market access during the relevant period.

32. In November 2009, the Latvian trader requested to receive market access through KM. KM, at the direction of Klein and Wachs, entered into an independent contractor agreement with the Latvian trader.

33. The independent contractor agreement stated that the Latvian trader was responsible for 100% of any trading losses that he incurred through KM's account and required the Latvian trader to contribute \$5,000 of his own money as a risk deposit.

34. Pursuant to the independent contractor agreement, KM, at the direction of Klein and Wachs, provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through KM's account. In so doing, KM, at the direction of Klein and Wachs, provided order-taking and order-routing services and controlled an electronic trading system for the Latvian trader to trade in the public market.

35. Klein and Wachs were ultimately responsible for authorizing traders to trade through KM's account, for determining whether to terminate a trader's access, and for controlling the trading parameters in the trading software, including the amount of margin each trader received.

36. KM used the trading software to extend the trader \$50,000 in "buying power" through KM's account, which was a portion of the trading margin that KM received from its registered broker-dealer. Although KM extended credit to the Latvian trader to purchase securities, KM's capital was not ultimately at risk because it was entitled to recoup losses from the Latvian trader and the trading software allowed KM's principals to review his trading in real time and would automatically cut off his trading access if trading losses caused his deposit balance to fall below \$1,000, effectively allowing KM to ensure that he would never lose money in excess of his deposit balance.

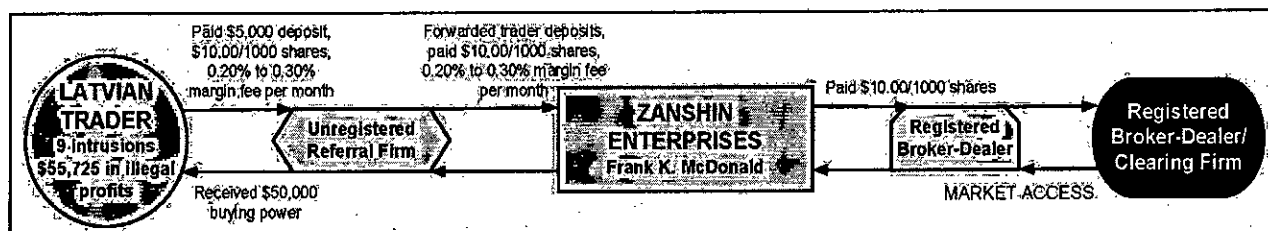
37. In March 2010, KM opened an omnibus account with a different registered broker-dealer and provided the Latvian trader with sponsored access trading software and a user ID and password so that he also could trade online through the new KM account. KM extended the Latvian trader the same level of buying power in the new KM account.

38. KM charged the Latvian trader a commission of \$6.00 per thousand shares traded, which exceeded the commissions ranging from \$0.90 to \$1.50 per thousand shares traded that KM paid its registered broker-dealers. Klein and Wachs were responsible for setting the commission rate and directed KM to charge transaction-based compensation for extending the market access.

39. During the relevant period, Klein and Wachs directed KM to maintain documentation tracking the Latvian trader's deposit balance against all commissions, fees, and profits or losses from his trading activity through KM's accounts.

Zanshin Enterprises, LLC

40. The following chart illustrates the relationships through which Zanshin and McDonald extended market access to the Latvian trader who conducted an account intrusion and market manipulation scheme.



41. During the relevant period, Zanshin, and McDonald, through Zanshin, received sponsored market access from a registered broker-dealer and passed the sponsored market access on to traders through a referral firm that solicited traders through its website and referred them to Zanshin.

42. In connection with extending sponsored market access to traders through the referral firm, Zanshin and McDonald participated in the order-taking and order-routing process, extended credit to the traders in connection with securities transactions, and handled customer funds and securities.

43. During the relevant period, McDonald arranged for traders solicited by the referral firm to receive market access through Zanshin. At McDonald's direction, approximately 20 traders who had been solicited by the referral firm were trading through Zanshin's omnibus account via sponsored market access during the relevant period.

44. In September 2009, the referral firm notified Zanshin that the Latvian trader had requested market access. Zanshin provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through Zanshin's account. In so doing, Zanshin, at McDonald's direction, provided order-taking and order-routing services and controlled an electronic trading system for the Latvian trader to trade in the public market.

45. McDonald was ultimately responsible for authorizing traders referred by the referral firm to trade through Zanshin's account, for determining whether to terminate a trader's access, and for controlling the trading parameters in the trading software, including the amount of margin each trader received.

46. The Latvian trader wired \$5,000 of his own money to the referral firm as a risk deposit, which the referral firm forwarded to Zanshin. The referral firm arranged for the Latvian trader to sign a "trader agreement" stating that the Latvian trader was responsible for 100% of any trading losses that he incurred through Zanshin's account.

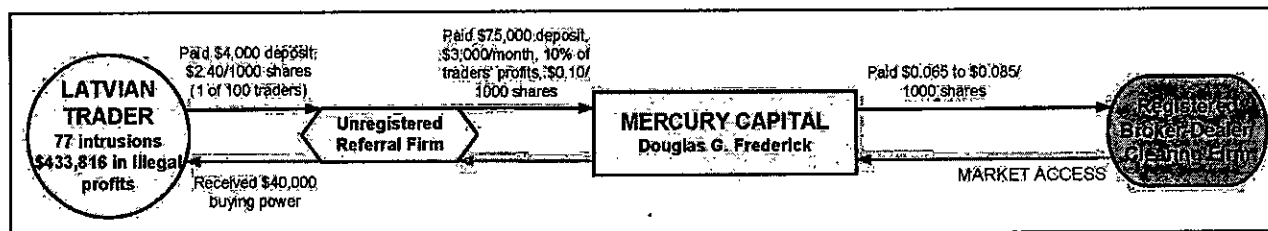
47. Zanshin then used the trading software to extend the Latvian trader \$50,000 in "buying power" through Zanshin's account, which was a portion of the trading margin that Zanshin received from its registered broker-dealer. Although Zanshin extended credit to the Latvian trader to purchase securities, Zanshin's capital was not ultimately at risk because it was entitled to recoup losses from the Latvian trader and the trading software allowed Zanshin to see the Latvian trader's trading in real time and would automatically cut off his trading access if his deposit balance fell below \$2,000, effectively allowing Zanshin to ensure that the Latvian trader would never lose money in excess of his deposit balance.

48. Instead of charging commissions, Zanshin received remuneration by charging the Latvian trader and other traders referred by the referral firm a monthly fee that ranged from 0.20 to 0.30 percent of every dollar of margin above their deposit balance that they were authorized to trade through Zanshin. McDonald was responsible for setting the amount of the margin fees and directed Zanshin to collect these margin fees for extending the market access.

49. During the relevant period, McDonald directed Zanshin or its registered broker-dealer to track the Latvian trader's deposit balance, adding the trading profits that he generated through Zanshin's account and subtracting the margin fees charged by Zanshin and the trading commissions charged by Zanshin's registered broker-dealer.

Mercury Capital

50. The following chart illustrates the relationships through which Mercury and Frederick extended market access to the Latvian trader who conducted an account intrusion and market manipulation scheme.



51. During the relevant period, Mercury, and Frederick, through Mercury, received sponsored market access from a registered broker-dealer and passed the sponsored market access on to traders through a Canadian entity that solicited traders through its website and referred them to Mercury.

52. In connection with extending sponsored market access to traders through the Canadian entity, Mercury and Frederick participated in the order-taking and order-routing

process, extended credit to the traders in connection with securities transactions, and handled customer funds and securities.

53. During the relevant period, Mercury, at Frederick's direction, maintained an independent contractor agreement with the Canadian entity. Approximately 100 traders who had been referred by the Canadian entity were trading through Mercury's omnibus account via sponsored market access during the relevant period.

54. Under the independent contractor agreement, Mercury charged the Canadian entity a monthly fee of \$3,000 plus a "clearing fee" of \$0.10 per thousand shares traded, which exceeded the commission of \$0.065 to \$0.085 that Mercury paid its registered broker-dealer. Frederick was one of the individuals responsible for setting the fee and commission rate and directing Mercury to charge transaction-based compensation for extending the market access.

55. Mercury, at Frederick's direction, required the Canadian entity to make an initial risk deposit of \$75,000 and made the Canadian entity responsible for 100% of any trading losses that its traders incurred through Mercury's account.

56. During the relevant period, Frederick directed Mercury to maintain documentation tracking the Canadian entity's deposit balance against all commissions, fees, and profits or losses for all trading activity through Mercury's account by traders referred by the Canadian entity.

57. In April 2010, the Canadian entity notified Mercury that the Latvian trader had requested market access. Mercury provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through Mercury's account. In so doing, Mercury, at Frederick's direction, provided order-taking and order-routing services and controlled an electronic trading system for the Latvian trader to trade in the public market. The Canadian entity agreed that Mercury could retain 10% of any trading profits generated by the Latvian trader through Mercury's account.

58. Frederick was one of the individuals responsible for authorizing traders referred by the Canadian entity to trade through Mercury's account, for determining whether to terminate a trader's access, and for controlling the trading parameters in the trading software, including the amount of margin each trader received.

59. The Latvian trader wired \$4,000 of his own money to the Canadian entity as a risk deposit. Mercury then used the trading software to extend the Latvian trader \$40,000 in "buying power" through Mercury's account, which was a portion of the trading margin that Mercury received from its registered broker-dealer. Although Mercury extended credit to the Latvian trader to purchase securities, Mercury's capital was not ultimately at risk because it was entitled to recoup losses from the Canadian entity and the trading software allowed Mercury to see the Latvian trader's trading in real time and automatically cut off his trading access if he or other traders referred by the Canadian entity incurred losses greater than the Canadian entity's deposit balance.

Account Intrusions

60. On 134 occasions between September 2009 and August 2010, the Latvian trader made profitable trades through an omnibus account of Alchemy, KM, Zanshin, or Mercury contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts at multiple U.S. broker-dealers.

61. On each occasion, the Latvian trader first established a long or short position in a security through Alchemy, KM, Zanshin, or Mercury. Then the Latvian trader surreptitiously gained access to an online brokerage account and made large unauthorized trades in the same security to manipulate the stock price in his favor. Finally, during or shortly after the manipulative trading in the intruded account, the Latvian trader closed out his position through Alchemy, KM, Zanshin, or Mercury at the artificial market price to generate a profit.

62. The Latvian trader generated ill-gotten gains of \$760,051 from the scheme through the electronic trading systems provided by Alchemy, KM, Zanshin, and Mercury.

63. As a result of providing electronic order-taking and order-routing services that the Latvian trader used to conduct an illegal market manipulation scheme, Alchemy received \$149,288 in illegal trading profits and also received trading commissions and fees.

64. As a result of providing electronic order-taking and order-routing services that the Latvian trader used to conduct an illegal market manipulation scheme, KM received \$121,222 in illegal trading profits and also received trading commissions and fees.

65. As a result of providing electronic order-taking and order-routing services that the Latvian trader used to conduct an illegal market manipulation scheme, Zanshin received \$55,725 in illegal trading profits and also received margin fees.

66. As a result of providing electronic order-taking and order-routing services that the Latvian trader used to conduct an illegal market manipulation scheme, Mercury received \$433,816 in illegal trading profits and also received trading commissions and fees.

67. By extending market access to traders either directly or through the referral firms in the manner described above, including through participating in the order-taking and order-routing process, extending credit in connection with securities transactions, handling customer funds and securities, and allocating trades conducted by the traders against deposits provided by the traders or their referral firm, Alchemy, KM, Zanshin, Mercury, Rogers, Hotovec, Klein, Wachs, McDonald, and Frederick engaged in the business of effecting transactions in securities for the account of others.

68. As described above, Rogers, Hotovec, Klein, Wachs, McDonald, and Frederick each was aware of his role in furthering improper or illegal activity by one of the firms and provided substantial assistance to one of the firms in connection with conduct that constituted a violation of the federal securities laws.

Violations

69. As a result of the conduct described above, Alchemy, KM, Zanshin, Mercury, Rogers, Hotovec, Klein, Wachs, McDonald, and Frederick each willfully violated Section 15(a) of

the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

70. As a result of the conduct described above, Rogers, Hotovec, Klein, Wachs, McDonald, and Frederick each willfully aided and abetted and caused a violation by an unregistered firm of Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Sections 15(b)(4) or 15(b)(6) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act; and

C. Whether, pursuant to Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents each shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

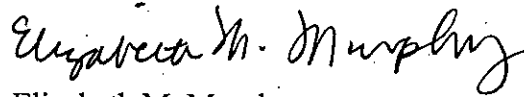
If any of the Respondents fails to file the directed answer, or fails to appear at a hearing after being duly notified, that Respondent may be deemed in default and the proceedings may be determined against that Respondent upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally, by certified mail, or as otherwise provided by Rule 141 of the Commission's Rules of Practice, 17 C.F.R. § 201.141.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.360(a)(2).

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66264 / January 27, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14722

In the Matter of

**Airbee Wireless, Inc.,
Axial Vector Engine Corp.
(n/k/a Avec Corporation), and
Exploration Drilling International, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Airbee Wireless, Inc. ("ABEW")¹ (CIK No. 1297533) is a void Delaware corporation located in Nungambakkam, Chennai, India with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ABEW is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of \$1,927,466 for the prior nine months. As of January 25, 2012, the common stock of ABEW was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

¹The short form of each issuer's name is also its stock symbol.

2. Axial Vector Engine Corp. (n/k/a Avec Corporation) ("AVEC") (CIK No. 1144130) is a defaulted Nevada corporation located in Dubai, United Arab Emirates with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AVEC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2007, which reported a net loss of \$3,943,756 for the prior nine months. As of January 25, 2012, the common stock of AVEC was quoted on OTC Link, had twelve market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Exploration Drilling International, Inc. ("EXDL") (CIK No. 1219606) is a defaulted Nevada corporation located in Muenster, Germany with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EXDL is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of \$3,064,204 for the prior nine months. As of January 25, 2012, the common stock of EXDL was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 27, 2012

In the Matter of

**Airbee Wireless, Inc.,
Axial Vector Engine Corp.
(n/k/a Avec Corporation), and
Exploration Drilling International, Inc.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Airbee Wireless, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Axial Vector Engine Corp. (n/k/a Avec Corporation) because it has not filed any periodic reports since the period ended March 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Exploration Drilling International, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is

60 of 64

ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on January 27, 2012, through 11:59 p.m. EST on February 9, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66268 / January 30, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3358 / January 30, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14723

In the Matter of

**SYMMETRY MEDICAL,
INC. and FRED L. HITE,**

Respondents.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND A CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Symmetry Medical, Inc. ("Symmetry" or "the Company") and Fred L. Hite ("Hite") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, each of the Respondents has submitted an Offer of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over each and over the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order and a Civil Penalty ("Order"), as set forth below.

61 of 64

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

A. SUMMARY

1. In April 2008, Symmetry restated its financial statements for its 2005 and 2006 fiscal years and its first and second quarters of fiscal 2007, along with selected financial data for its 2003-2006 fiscal years. The restatement was required because of a financial fraud orchestrated by senior management at one of Symmetry's wholly owned subsidiaries, the Sheffield, England-based Symmetry Medical Sheffield LTD, f/k/a Thornton Precision Components, Limited ("TPC"), whose financial data was at all relevant times consolidated into Symmetry's financial statements filed with the Commission. Among other things, TPC's senior officers—one of whom was also an officer of Symmetry—materially overstated TPC's revenues and assets, materially understated its expenses, and falsified corporate books and records. This misconduct went undetected and uncorrected in part because Symmetry failed to devise and maintain adequate internal accounting controls and because TPC personnel circumvented the controls that did exist. The fraud at TPC caused Symmetry to file with the Commission eight quarterly reports on Form 10-Q and three annual reports on Form 10-K that materially misstated the Company's consolidated financial results throughout the relevant period. It also caused Symmetry's books and records to be materially inaccurate throughout the relevant period.

2. Moreover, in July 2006, Symmetry's CFO (Respondent Hite), did not provide Symmetry's Audit Committee with a copy of a status report concerning TPC by Symmetry's former Director of Internal Audit (the "IA"). In the report, the IA identified exceptions at TPC, citing among other things bill-and-hold transactions, and failures by TPC (i) to provide requested evidence; (ii) to provide complete evidence; and (iii) to perform proper account reconciliations. In the report the IA also sought permission to solicit outsourcing proposals from other "Big Four" firms to provide, for the balance of 2006 and for 2007, internal audit services at TPC that would include "internal controls testing and financial audits" there. The IA resigned from Symmetry shortly after preparing this report, and accordingly, was not present at the next Audit Committee meeting (held on July 26, 2006) to present the foregoing findings and request concerning TPC. Hite—the conduit for materials to be included in board packets for directors' consideration—provided the status report to the Company's independent auditor, but did not include it in the Board Packet for the July 2006 Audit Committee meeting, and the Committee did not otherwise learn of the report until after the fraud at TPC was discovered in September 2007.

3. Finally, Hite received bonuses and incentive-based and equity-based compensation from Symmetry, and also realized Symmetry stock-sale profits, during periods covered by the Company's April 2008 restatement, for which he has not, to date, reimbursed Symmetry.

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

B. RESPONDENTS

4. **Symmetry Medical, Inc.** (“Symmetry” or “the Company”) is a Delaware corporation headquartered in Warsaw, Indiana. Through its operating subsidiaries, Symmetry is a manufacturer of medical implants and instruments and also manufactures specialized products for the aerospace industry. Since its December 2004 initial public offering, Symmetry’s common stock has been registered with the Commission pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange. At all relevant times, TPC was one of Symmetry’s operating subsidiaries, and accounted for a substantial portion of Symmetry’s consolidated revenues and net income.

5. **Fred L. Hite** (“Hite”), age 44, has served as Symmetry’s Chief Financial Officer and Senior Vice President since March 2004.

C. FACTS

The Fraud at TPC

6. Beginning prior to Symmetry’s December 2004 initial public offering, and continuing until late September 2007, personnel at the Company’s TPC subsidiary—led by certain members of TPC’s senior management—engaged in a financial fraud through which TPC’s consolidated assets and earnings were materially overstated. As a result, the financial statements included in Symmetry’s annual reports on Form 10-K for its 2004, 2005 and 2006 fiscal years, as well as its quarterly reports on Form 10-Q for (among other quarters) the first and second quarters of its 2007 fiscal year, were materially false and misleading and did not comply with generally accepted accounting principles (“GAAP”). The financial fraud at TPC involved the systematic understatement of expenses and overstatement of assets and revenues, and was achieved primarily by improperly and prematurely recognizing revenue, improperly capitalizing expenses, overvaluing inventory, and understating costs of goods sold. The scheme stopped only when, on September 24, 2007, a manager at TPC disclosed the scheme to Symmetry’s CEO.

Symmetry’s 2008 Restatement

7. Several months later, as a direct result of the fraud at TPC, Symmetry restated its financial statements for its 2005 and 2006 fiscal years and for the first two quarters of its 2007 fiscal year. Symmetry also restated selected financial data for its 2003-2006 fiscal years. The cumulative impact of the restatement—as the table below reflects—was, among other things, to reduce Symmetry’s net income for its 2004 fiscal year from \$11.7 million (as originally reported) to \$8.4 million (as restated), its net income for its 2005 fiscal year from \$31.8 million (as originally reported) to a net *loss* of \$9.9 million (as restated), and its net income for its 2006 fiscal year from \$24.1 million (as originally reported) to \$18.5 million (as restated):

Fiscal Period	Reported Income	Restated Income	Difference	Overstatement
FY 2004	\$11.7 million	\$8.4 million	-\$3.3 million	39%
FY 2005	\$31.8 million	-\$9.9 million	-\$41.7 million	421% ²
FY 2006	\$24.1 million	\$18.5 million	-\$5.6 million	30%
Q1 2007	\$3.7 million	\$1.6 million	-\$2.1 million	131%
Q2 2007	\$4.4 million	\$4.7 million	+ 0.3 million	-6.4% ³

8 The restatement also caused the following percentage reductions to Symmetry's financial statement line items for accounts receivable, inventories, and total assets:

Balance Sheet Item	FY 2005	FY 2006	Q1 2007	Q2 2007
A/R (Net)	-18%	-31%	-30%	-28%
Inventories	-28%	-30%	-34%	-30%
Total Assets	-13%	-14%	-15%	-14%

9. In the seven months between the close of trading on October 4, 2007, after which Symmetry made its first disclosure concerning accounting irregularities at TPC, and the close of trading on April 25, 2008, the day after Symmetry filed its restatement, Symmetry's stock price fell more than 26%, from \$17.74 per share to \$13.05 per share.

Symmetry's Deficient Internal Controls

10. Between 2004 and September 2007, Symmetry failed to implement and maintain adequate internal controls over financial reporting that were sufficient to provide reasonable assurance that Symmetry's financial statements were accurately stated in accordance with GAAP. As a result, Symmetry's accounting controls failed to prevent or detect the above-described fraud at TPC that led to the Company's April 2008 restatement.

11. Symmetry did not maintain an effective control environment at its TPC subsidiary. This control deficiency included inadequate operation of corporate entity-level controls, including monitoring controls that were not sufficiently sensitive in scope and therefore failed to detect and prevent on a timely basis management override of controls at TPC and collusion of TPC's management team to achieve desired financial accounting results. In certain instances, information

² \$33.6 million—or more than 80%—of the reduction in earnings for FY 2005 resulted from the write down of goodwill associated with the acquisition of TPC, since the fraud at TPC had pre-dated the acquisition.

³ Symmetry's gross profits for Q2 2007 were, however, materially reduced as a result of the restatement, from \$15.5 million (as originally reported) to \$14.7 million (as restated).

critical to an effective review of transactions and accounting entries was not disclosed to corporate management and internal and external auditors.

12. TPC did not maintain effective controls over the period-end financial reporting process, including controls with respect to journal entries, account reconciliations and proper segregation of duties. Journal entries, both recurring and nonrecurring, were not uniformly accompanied by sufficient supporting documentation and were not adequately reviewed and approved for validity, completeness and accuracy. Account reconciliations over balance sheet accounts were not uniformly properly performed and approved for validity and accuracy of supporting documentation. TPC did not uniformly uphold proper segregation of duties within their accounting department with respect to financial reporting.

13. TPC did not maintain effective controls over the inventory management process including controls with respect to inventory existence. TPC did not utilize a comprehensive enterprise resources planning (ERP) system to control its inventories, but rather relied upon physical inventory counts. The process for compiling and reconciling these physical counts to the general ledger was subject to management override of controls and a lack of proper segregation of duties resulting in inaccurate reporting of inventory quantities on hand.

14. TPC did not maintain effective controls over the sales and accounts receivable process, including controls with respect to the existence of receivables, sales cutoff, the application of cash receipts, and segregation of duties. Accordingly, certain sales transactions were fictitiously recorded while certain other transactions were recorded prior to the completion of the revenue process.

15. TPC did not maintain effective controls over the preparation of the income tax provisions and related deferred and current tax calculations. Account analyses and reconciliations were not prepared for various tax accounts resulting in erroneous entries which were posted to the tax accounts not being detected or corrected in a timely manner.

Hite's Conduct

A. The Internal Audit Status Report

16. In the Fall of 2005, Symmetry created an internal audit unit, headed by the IA, who was to report to the Chairman of Symmetry's Audit Committee. On July 17, 2006, the IA provided Hite and the Company's independent auditor with a status report for submission to Symmetry's Audit Committee for consideration at its next meeting, which was scheduled to be held at TPC on July 26, 2006. Hite was the conduit for materials to be included in the board packets provided to Symmetry's directors in connection with their board and committee meetings. In that report, the IA claimed to have identified problematic bill-and-hold transactions at TPC and further asserted that TPC personnel had not provided requested evidence pertaining to the IA's Q1 2006 sales cut-off, cash cutoff and monthly controls testing. By July 2006, TPC was misstating its revenues and net income primarily by booking top-side journal entries of fictitious sales revenue and overvaluing inventory to conceal its understatement of costs of goods sold. These misstatements had not been

detected by the IA and were not included in the report. Rather the IA's report only implied the *potential* presence of deeper problems at TPC, since the report sought permission to solicit outsourcing proposals from "Big Four" accounting firms to provide, for the remainder of 2006 and 2007, internal audit services at TPC to include "internal controls testing and financial audits" there, saying, "The extent and severity of issues identified at [TPC] exceed the size and ability of IA's current staff and consultants from other firms."

17. Hite forwarded the status report to the Company's independent auditor as well as Symmetry's controller and they discussed it with the IA. After the IA resigned on or about July 19, 2006, Hite did not, however, include the report in the board packet for the July 26 Audit Committee meeting. According to the minutes of that meeting, Hite told the Committee that the IA had "tested all facilities and all were acceptable with a few exceptions found at [TPC]." The Audit Committee discussed the IA's resignation and thereafter the chair of the Audit Committee conducted an exit interview with the IA. However, Hite did not provide the IA's report to the Audit Committee, and the Committee did not otherwise learn of the report until after the fraud at TPC was discovered. Hite did immediately hire a new IA whose initial work included internal controls testing at TPC.

B. The Receipt of Bonuses, Equity-Based Compensation and Stock-Sale Proceeds

18. As a result of the misconduct at TPC described in paragraph 6 above, Symmetry issued materially inaccurate and non-compliant accounting statements in its (i) December 2004 initial public offering and July 2005 secondary offering registration statements; (ii) annual public filings with the Commission for fiscal years 2004, 2005 and 2006; and (iii) quarterly public filings for the first and second quarters of 2007. Specifically, Symmetry filed Forms 10-K for fiscal years 2004 through 2006 and Forms 10-Q for the first and second quarters of 2007 that were in material non-compliance with its financial reporting requirements under the federal securities laws, and Symmetry was required to restate its financial statements for fiscal years 2005 and 2006 and for the first two quarters of its 2007 fiscal year, along with selected financial data for its 2003-2006 fiscal years.

19. During the 12-month periods following Symmetry's filing of inaccurate financial statements in: (i) its December 2004 IPO and July 2005 registration statements; (ii) its 2004-6 annual public filings; and (iii) its quarterly filings for the first and second quarters of 2007, Respondent Hite received, from Symmetry, bonuses and incentive and equity based compensation, and also realized profits from the sale of Symmetry stock.

20. Respondent Hite has not reimbursed Symmetry for the bonuses, incentive and equity-based compensation or profits from sales of Symmetry stock that he received or obtained during the statutory time periods established by Section 304(a) of the Sarbanes-Oxley Act of 2002.

21. The Commission has not exempted Respondent Hite, pursuant to Section 304(b) of the Sarbanes-Oxley Act of 2004 [15 U.S.C. § 7243(b)], from the application of Section 304(a) [15 U.S.C. § 7243(a)] of that Act.

Symmetry's Remedial Efforts

22. In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by Symmetry and cooperation afforded the Commission staff by Respondents.

D. LEGAL ANALYSIS

Symmetry

23. Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13 require issuers of registered securities to file annual and quarterly reports with the Commission. Exchange Act Rule 12b-20 requires that these periodic reports contain all material information necessary to make the required statements not misleading. The filing of a periodic report containing materially false or misleading information constitutes a violation of these provisions. *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978). Exchange Act Section 13(b)(2)(A) requires issuers of registered securities to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect transactions and dispositions of assets. Exchange Act Section 13(b)(2)(B) requires such issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that its transactions were recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles. Exchange Act Section 13(b)(5) provides that no person shall, among other things, knowingly circumvent a company's system of internal accounting controls.

24. As described above, Symmetry failed to devise and maintain effective internal accounting controls in violation of Exchange Act Section 13(b)(2)(B). This failure allowed officers and employees of Symmetry's TPC subsidiary to perpetrate a financial fraud that caused Symmetry to maintain materially inaccurate books, records, and accounts in violation of Exchange Act Section 13(b)(2)(A), and to file periodic reports with the Commission that included materially false and misleading financial statements in violation of Exchange Act Section 13(a) and Exchange Act Rules 12b-20, 13a-1, and 13a-13. In particular, the assets and earnings Symmetry reported in its annual reports on Form 10-K for its 2004 through 2006 fiscal years, and its quarterly reports on Form 10-Q for the first two quarters of its 2007 fiscal year, were materially overstated.

Hite

25. Symmetry's internal audit function, and the reports prepared by Symmetry's IA for Symmetry's Audit Committee in connection with the IA's internal audit testing, were, as Hite knew, a part of Symmetry's system of internal accounting controls as defined in Exchange Act Section 13(b)(2)(B). Hite knowingly circumvented this facet of Symmetry's system of internal accounting controls

by failing to furnish the IA's report to Symmetry's Audit Committee. Accordingly, Hite violated Exchange Act Section 13(b)(5) and was a cause of Symmetry's violation of Exchange Act Section 13(b)(2)(B).

26. As a result of Hite's failure to reimburse Symmetry for the bonuses, incentive and equity-based compensation or profits from sales of Symmetry stock that he received or obtained during the statutory time periods established by Section 304(a) of the Sarbanes-Oxley Act of 2002, Hite violated that provision.

IV.

FINDINGS

Based on the foregoing, the Commission finds that:

- (a) Symmetry violated Exchange Act Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) and Rules 12b-20, 13a-1 and 13a-13 thereunder; and
- (b) Hite violated Exchange Act Section 13(b)(5) and Sarbanes-Oxley Act Section 304(a), and was a cause of Symmetry's violation of Exchange Act Section 13(b)(2)(B).

V.

ORDER

Accordingly, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers, and it is hereby ORDERED, pursuant to Section 21C of the Exchange Act that:

- A. Respondent Symmetry cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder;
- B. Respondent Hite cease and desist from committing or causing any violations and any future violations of Section 13(b)(5) of the Exchange Act and Section 304(a) of the Sarbanes-Oxley Act, and from causing any violations and any future violations of Section 13(b)(2)(B) of the Exchange Act; and
- C. Respondent Hite shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of \$25,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-

delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Hite as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

D. Respondent Hite shall, within thirty (30) days of the entry of this Order, reimburse Symmetry for a total of \$185,000 in Symmetry bonuses, other incentive-based or equity-based Symmetry compensation, and Symmetry stock sale profits pursuant to Section 304 of the Sarbanes-Oxley Act, 15 U.S.C. § 7243. Defendant shall satisfy this reimbursement obligation to Symmetry by paying over to Symmetry a combination of cash and vested Symmetry stock that, collectively, totals \$185,000 in value, with the stock portion thereof not to exceed \$85,000, and with the value of said stock being based on Symmetry's closing share price on the date the shares are transferred to Symmetry. Defendant shall simultaneously deliver proof of satisfying this reimbursement obligation to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66269 / January 30, 2012

ACCOUNTING AND AUDITING ENFORCEMENT

Release No. 3359 / January 30, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14724

In the Matter of

**CHRISTOPHER J. KELLY,
ACA**

and

MARGARET HEBB, ACA

Respondents.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 4C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Christopher J. Kelly, ACA ("Kelly") and Margaret Hebb, ACA ("Hebb") (collectively the "Respondents") pursuant to Section 4C¹ of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

62 of 64

II.

In anticipation of the institution of these proceedings, each Respondent has submitted an Offer of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds³ that:

A. SUMMARY

1. These proceedings arise out of the Respondents' improper professional conduct during audits of the 2004, 2005 and 2006 financial statements of Symmetry Medical Sheffield LTD, f/k/a Thornton Precision Components, Limited ("TPC"). TPC has, since 2003, been a wholly owned U.K. subsidiary of Symmetry Medical, Inc. ("Symmetry"). Since December 2004, Symmetry has been an NYSE listed company. TPC's financial data has at all relevant times been included in Symmetry's consolidated financial statements filed with the Commission as part of Symmetry's quarterly 10-Q and annual 10-K filings. From 1999 through late September 2007, TPC's management was engaged in a scheme to improperly boost TPC's revenues, net income and other performance indicators by fraudulently manipulating TPC's financial accounts. TPC booked fictitious sales revenues, understated costs of goods sold, created fictitious inventories, improperly capitalized certain tool and die to reduce expenses, and engaged in other accounting manipulations, resulting in material overstatements of net income and material misstatements of other financial line items in Symmetry's financial statements.

2. Since 2003, Ernst & Young, LLP ("E&YUS") has served as Symmetry's independent auditor. In connection with its 2004-6 audits of Symmetry's consolidated financial statements, E&YUS engaged Ernst & Young LLP UK ("E&YUK") to audit the financial statements

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

³ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

of TPC. Respondent Kelly served as the audit partner on E&YUK's 2004-6 TPC audits, while respondent Hebb was the audit manager on the 2005 and 2006 audits.

3. Respondents' audits failed to comply with numerous Public Company Accounting Oversight Board ("PCAOB") auditing standards. Respondents failed to obtain sufficient competent evidential matter, failed to exercise due professional care in the planning and performance of their audits, and failed to properly supervise the audits. The fraud at TPC was not uncovered and E&YUK issued unqualified audit opinions on TPC's 2004-6 financial statements. E&YUS, in turn, issued unqualified audit reports for Symmetry's 2004-6 Form 10-K filings that incorrectly stated that Symmetry's financial statements were fairly reported in conformity with Generally Accepted Accounting Principles ("GAAP"). Respondents' conduct, as further described below, constituted improper professional conduct within the meaning of Rule 102(e)(1)(ii) and (iv) and Section 4C of the Exchange Act.

B. RESPONDENTS

4. **Christopher J. Kelly, ACA**, age 49, is a citizen of the United Kingdom. In 1987, Kelly became a member of the Institute of Chartered Accountants of England and Wales ("ICAEW"), a professional credential corresponding to that of certified public accountant in the United States.⁴ Kelly was employed with E&YUK from 1984 to 2009 and served as the audit partner on the TPC audit engagement from 2003 until the Fall of 2007.

5. **Margaret Hebb, née Whyte, ACA**, age 50, is a citizen of the United Kingdom. Hebb became a member of the ICAEW in 1994. Hebb served as the senior manager on the TPC audit engagement for the 2005 and 2006 audits.

C. OTHER RELEVANT PARTIES

6. **Symmetry Medical, Inc. ("Symmetry")**, is a Delaware corporation founded in 1976 with its headquarters in Warsaw, Indiana. Symmetry manufactures medical implants and instruments and also manufactures specialized products for the aerospace industry. Symmetry operates facilities in the United States, the United Kingdom, France, Ireland and Malaysia. Symmetry completed its initial public offering in December 2004. At all relevant times, Symmetry's common stock has been registered with the Commission pursuant to Section 12(b) of the Exchange Act and has been listed on the New York Stock Exchange.

7. **Symmetry Medical Sheffield LTD, f/k/a Thornton Precision Components, Limited ("TPC")** is a UK limited liability company wholly owned by Symmetry and located in Sheffield, UK. Symmetry acquired TPC in June 2003. TPC manufactures forged, cast, and machined implants for the global orthopedic device and aerospace markets. TPC's financial data has at all relevant times been included in Symmetry's consolidated financial statements filed with the Commission as part of Symmetry's quarterly 10-Q and annual 10-K filings.

⁴ The designations "ACA" (for Associate Chartered Accountant) and FCA (for Fellow Chartered Accountant) are used in the United Kingdom and are analogous to the CPA designation in the United States.

8. **Ernst & Young, LLP ("E&YUS")** is a national public accounting firm headquartered in New York City, with offices located throughout the United States. At all relevant times, E&Y has provided auditing, consulting, and tax services to a variety of companies, including companies whose securities are registered with the Commission. E&YUS has served as Symmetry's external auditor since June 2003.

9. **Ernst & Young LLP UK ("E&YUK")** is an Ernst & Young "member firm" providing accounting and auditing services in the United Kingdom. E&YUK has audited TPC's financial accounts since June 2003. E&YUK is registered with the PCAOB and was required to register with the PCAOB in order to participate—through its audit of TPC—in E&YUS's audit of Symmetry.

D. FACTS

The Fraud at TPC

10. From 1999 through late September 2007, TPC was engaged in a scheme to improperly boost TPC's revenues, net income and other performance indicators by fraudulently manipulating TPC's financial accounts. TPC booked fictitious sales revenues, understated costs of goods sold, created fictitious inventories, improperly capitalized certain tool and die to reduce expenses, and engaged in other accounting manipulations, resulting in material overstatements of net income and material misstatements of other financial line items in Symmetry's financial statements.

Fictitious Sales Revenues

11. TPC booked fictitious sales revenues in an effort to make up shortfalls to its monthly and quarterly sales revenues targets. TPC recorded the fictitious sales by making top-side journal entries to sales and accounts receivable. When TPC needed additional sales to meet its monthly target, for example, its practice was to book a top-side sales entry to meet that target.

12. TPC's booking of fictitious sales revenues had a significant impact on TPC's accounts receivable ("AR") balances. For example, for fiscal year 2005, TPC's reported AR was £10,717,000, but of that amount, at least £4,122,000, or roughly 38%, was fictitious. For fiscal year 2006, TPC's reported AR was £12,440,000 but of that amount, at least £6,031,000, or roughly 48%, was fictitious.

Understatement of Cost of Revenues and Manipulation of Inventories

13. In an effort to boost TPC's profits artificially, TPC intentionally understated cost of revenues. Rather than report the actual costs of inventory sold, TPC's accounting group made journal entries reducing expense and increasing inventory balances. As a result of these manipulations, TPC's balance sheet overstated inventory.

14. In order to conceal their manipulation of costs and inventory, TPC's accounting staff falsified their detailed inventory ledger, which was prepared after every physical inventory count. TPC added fictitious work in process (WIP) inventory to the listing to make it appear that TPC's inventory subledger reconciled to the general ledger and balance sheet.

15. TPC's manipulation of cost of revenues and inventories had a significant impact on TPC's financial statements. For example, for fiscal year 2005, TPC reported inventories valued at £9,753,000. In reality, only £3,531,000, or 36%, of that inventory actually existed. That same year, TPC underreported its cost of revenues by £2,505,000, thus increasing gross profit by the same amount. For fiscal year 2006, TPC reported inventory valued at £10,973,000. In reality, only £3,692,000, or 33%, of that inventory actually existed. For the same period, TPC under-reported costs of goods sold by £1,058,000, thus increasing TPC's gross profit by the same amount.⁵

Symmetry's 2008 Restatement

16. The fraud at TPC was not discovered until September 2007, when an employee of TPC came forward and confessed the fraud to Symmetry's CEO.

17. On April 23, 2008, after completing an internal investigation into the accounting irregularities at TPC, Symmetry filed a Form 10-K Annual Report for the fiscal year ended December 29, 2007 and amended Quarterly Reports on Form 10-Q/A for the first and second quarters of fiscal 2007, collectively reflecting the restatement of: (i) Symmetry's previously issued consolidated financial statements for the 2005 and 2006 fiscal years and the first and second quarters of fiscal 2007; (ii) selected financial data for the 2003, 2004, 2005 and 2006 fiscal years; and (iii) Management's Discussion and Analysis, based on the restated annual and quarterly financial information. According to Symmetry, the restatement was necessitated by the accounting irregularities at TPC.

18. The restatement negatively impacted Symmetry's previously reported financial results for fiscal years 2003 through the second quarter of 2007. The chart below shows that the errors were material to Symmetry's 2004-6 financial statements:

Fiscal Year	Reported Net Income	Restated Net Income	Difference	Overstatement
2004	\$11.7 million	\$8.4 million	-\$3.3 million	-39%
2005	\$31.8 million	-\$9.9 million	-\$41.7 million ⁶	-421%
2006	\$24.1 million	\$18.5 million	-\$5.6 million	-30%

⁵ TPC engaged in a number of other improper and fraudulent accounting manipulations in an effort to meet its monthly performance targets. These techniques included improper tool and die capitalization and manipulation of its accounts payable.

⁶ \$33.6 million of the reduction in earnings for FY 2005 resulted from the write down of goodwill associated with Symmetry's acquisition of TPC.

19. In the seven months between the close of trading on October 4, 2007, after which Symmetry made its first disclosure concerning accounting irregularities at TPC, and the close of trading on April 25, 2008, the day after Symmetry filed its restatement, Symmetry's stock price fell more than 26%, from \$17.74 per share to \$13.05 per share.

E&YUK's Deficient TPC Audits

Background

20. E&YUS audited Symmetry's consolidated financial statements for fiscal years 2004-6. In connection with its Symmetry audits, E&YUS engaged E&YUK to audit TPC's financial accounts. E&YUK's audits were to be conducted in accordance with PCAOB auditing standards, and TPC's financial reporting packages were to be prepared in compliance with US GAAP. E&YUS relied on the results of E&YUK's audits to issue its unqualified audit reports for Symmetry's Form 10-K filings for fiscal years 2004-6.

21. Respondent Kelly was the E&YUK engagement partner on TPC's 2004-6 year-end audits. Respondent Hebb was the E&YUK audit manager on the 2005 and 2006 audit engagements.⁷ The following deficiencies were common to the 2004-6 fiscal year audits.

E&YUK Failed to Properly Audit TPC's Accounts Receivable Balances

22. E&YUK failed to reconcile TPC's accounts receivable general ledger account to a detailed accounts receivable subsidiary ledger. See AU § 326.19. E&YUK was told by TPC that this detailed ledger was unavailable, but did not adequately question this assertion. Instead, E&YUK reconciled the general ledger account to a summary listing of aged debt by customer. Had E&YUK reconciled to TPC's detailed ledger, they would have seen that the general ledger balance, inflated due to premature and fictitious revenue recognition, was far greater than the subsidiary ledger balance.

23. E&YUK failed to properly confirm accounts receivable. For fiscal year 2004 E&YUK relied entirely on alternative procedures, and was able to validate only 7% of its sample through that testing. E&YUK supplemented this by checks to delivery notes, but its work papers do not clearly document whether this covered the entire sample or only part thereof. For the fiscal year 2005 audit, 59% of the confirmation sample value was never validated through confirmations or alternative procedures. For the fiscal year 2006 audit, 26% of the sample was never validated.

24. E&YUK failed to properly document in its work papers, and in its Summary Review Memoranda ("SRM") submitted to E&YUS, the results of its AR testing. With respect to the 2005 audit, E&YUK's SRM contains *no* discussion of its confirmation of receivables, notwithstanding the fact that E&YUK had been unable to confirm roughly 60% of items tested.

⁷ Hebb did not work on the 2004 audit engagement, although she had access to the 2004 work papers in connection with her work on the 2005 and 2006 audit engagements.

E&YUK did not adequately review TPC's journal entries

25. During fiscal years 2004-6, TPC booked fictitious revenues via monthly top-side journal entries. Any top-side journal entry to sales should have been a red flag to the the audit teams under Respondents' supervision requiring further investigation. See AU §§ 316.58-62. Notwithstanding purported documentation in E&YUK's work papers that they had reviewed and agreed to supporting documentation all "non-standard or significant" journal entries, E&YUK failed to detect and investigate TPC's monthly top-side journal entries to revenue.

E&YUK failed to properly audit TPC's inventories

26. In order to conceal TPC's manipulation of costs of revenues, TPC added fictitious WIP inventory to TPC's inventory ledger. E&YUK failed to detect this manipulation in their audits of TPC's inventories. While E&YUK staff did attend and observe the year-end physical inventory counts at TPC, they failed to perform the crucial audit procedure of ensuring control over inventory tags. Before leaving the count, the audit teams should have obtained a complete list of all inventory tags issued in the count, or, alternatively, copies of all of the tag books created as part of the physical inventories. See AU §§ 331 and 316.54. In each of the audit years in question, the audit teams either failed to do this or failed to properly document that it was done.

27. Therefore, when E&YUK's audit team reviewed TPC's final inventory listing during the year-end audit, they did not determine that fictitious items had been added. The significance of E&YUK's failure to properly audit inventories can be seen when TPC's reported inventories for 2004-6 are compared to its restated inventories for the same time period.

FY	REPORTED INVENTORY	RESTATED INVENTORY	Percentage of Reported Inventory that actually existed
2004	£6,968,000	£3,250,000	47%
2005	£9,753,000	£3,531,000	36%
2006	£10,973,000	£3,692,000	34%

Respondents' Improper Professional Conduct

28. The "applicable professional standards" for accountants practicing before the Commission include the PCAOB auditing standards.

29. PCAOB auditing standards require that the auditor be proficient in accounting matters and that the "auditor with final responsibility for the engagement should know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client." AU §230.06, *Due Professional Care in the Performance of Work*; see also AU § 210, *Training and Proficiency of the Auditor*. AU Section 230 also requires an auditor to exercise due professional care and professional skepticism, which includes demonstrating a questioning mind and a critical assessment of audit evidence.

30. PCAOB auditing standards require that "sufficient competent evidential matter...be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit. AU § 326.01 *Evidential Matter*.

31. Auditors must adequately plan, staff and supervise the audit. See AU § 150.02, *Generally Accepted Auditing Standards*; 230.06; AU § 311.01 *et seq.*, *Planning and Supervision*; 311.11 *et seq.*

32. Further, AU § 316, *Consideration of Fraud in a Financial Statement Audit*, requires the auditor to assess the risks of material misstatement due to fraud and to presume that revenue recognition is a fraud risk.

33. Kelly, as the engagement partner, had overall responsibility for the audit engagements to ensure that E&YUK's audits of TPC were conducted in accordance with PCAOB auditing standards, including planning and supervising the audit and the review of field work. AU § 311. During the 2004-6 TPC audits, Kelly unreasonably departed from the PCAOB auditing standards in the manner further described below.

34. Hebb, as the audit manager on the 2005 and 2006 engagements, was responsible for supervising and reviewing documentation of field work performed. During the 2005-6 TPC audits, Hebb unreasonably departed from the PCAOB auditing standards in the manner further described below.

35. Respondents (and the audit teams under their supervision) failed to obtain sufficient competent evidential matter in connection with their audits of TPC's accounts receivable. Respondents failed to properly evaluate the results of their confirmation procedures and did not consider whether the unexamined items could be misstatements and the impact of such potential misstatements on the accounts receivable balance. The non-validated sample balances were material to TPC's financial statements and exceeded the tolerable error assigned to the TPC audit by E&YUS.

36. Respondents failed to evaluate the implications, both quantitative and qualitative, of their inability to validate selected receivables. They did not consider whether the reasons for this inability necessitated a change in assessed risks or a reevaluation of the degree of reliance on management representations. AU §§ 316.68, 316.74, and 350.25.

37. The following chart reflects the extent to which E&YUK failed to substantiate the existence of receivables reported by TPC in fiscal years 2004-6, but nonetheless issued unqualified audit opinions.

FY	Reported AR Balance (as of date of testing)	Sample Balance Tested	% of Sample Balance Validated by E&YUK	Value of non-validated sample balance
2004	£9,136,248	£3,671,012	7% ⁸	£3,420,265
2005	£11,195,346	£5,689,114	41%	£3,354,692
2006	£11,553,278	£9,095,968	74%	£2,357,305

38. Respondents and the audit teams under their supervision failed to properly document in E&YUK's work papers, and in their Summary Review Memoranda (SRM) submitted to E&YUS, the results of E&YUK's AR testing. With respect to the 2005 audit, E&YUK's SRM contains *no* discussion of its confirmation of receivables, notwithstanding the fact that E&YUK had been unable to confirm roughly 60% of the items tested.

39. Respondents failed to adequately plan, staff and supervise the audits. As a result, E&YUK failed to properly review TPC's journal entries and, accordingly, failed to detect and investigate TPC's fictitious top-side journal entries designed to inflate revenue. Likewise, because Respondents failed to adequately plan, staff and supervise the inventory audits, E&YUK failed to detect TPC's manipulation of its inventories.

E. VIOLATIONS

40. Rule 102(e)(1)(ii) of the Commission's Rules of Practice and Section 4C of the Exchange Act authorize the Commission to censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to accountants who are found to have engaged in improper professional conduct. Such improper professional conduct includes "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission." Rule 102(e)(1)(iv)(B)(2).

41. Respondents' actions during the engagements were unreasonable, failed to conform to applicable professional standards and indicate a lack of competence to practice before the Commission. Respondents failed: (i) to obtain sufficient competent evidential matter in violation of AU § 326; (ii) to exercise due professional care in the planning and performance of the audit in violation of AU §§ 230 and 316; (iii) to adhere to the standards for conducting and evaluating the results of accounts receivable confirmation procedures in violation of AU §§ 330 and 350; (iv) to adhere to standards for observation and testing of physical inventory counts in violation of AU §§ 331 and 316.54; (v) adequately to test journal entries for evidence of possible material misstatement due to fraud in violation of AU § 316.58-62; and (vi) properly to plan and supervise the audit in violation of AU § 311.

⁸ As noted in ¶ 23 above, E&YUK supplemented its 2004 AR testing by checks to delivery notes, but its work papers do not clearly document whether this supplemental testing covered the entire sample or only a part thereof.

F. FINDINGS

42. As a result of the conduct describe above, the Commission finds that Respondents Kelly and Hebb engaged in improper professional conduct pursuant to Rules 102(e)(1)(ii) and 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice and Section 4C of the Exchange Act.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Kelly is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After two years from the date of this order, Kelly may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Kelly, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Kelly, or the registered public accounting firm with which he is associated, has been inspected by the Board or equivalent U.K. organization and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Kelly has resolved any disciplinary issues with the Board or equivalent UK organization, and has complied with all terms and conditions of any sanctions imposed by the Board or equivalent U.K. organization (other than reinstatement by the Commission); and

(d) Kelly acknowledges his responsibility, as long as Kelly appears or practices before the Commission as an independent accountant, to comply with all requirements

of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Kelly to resume appearing or practicing before the Commission provided that his chartered accountant license is current and he has resolved any disciplinary issues with the ICAEW. However, if licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Kelly's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

D. Hebb is denied the privilege of appearing or practicing before the Commission as an accountant.

E. After two years from the date of this order, Hebb may request that the Commission consider her reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Hebb's work in her practice before the Commission will be reviewed either by the independent audit committee of the public company for which she works or in some other acceptable manner, as long as she practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

- (a) Hebb, or the public accounting firm with which she is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

- (b) Hebb, or the registered public accounting firm with which she is associated, has been inspected by the Board or equivalent U.K. organization and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

- (c) Hebb has resolved any disciplinary issues with the Board or equivalent UK organization, and has complied with all terms and conditions of any sanctions imposed by the Board or equivalent U.K. organization (other than reinstatement by the Commission); and

- (d) Hebb acknowledges her responsibility, as long as Hebb appears or practices before the Commission as an independent accountant, to comply with all requirements

of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

F. The Commission will consider an application by Hebb to resume appearing or practicing before the Commission provided that her chartered accountant license is current and she has resolved any disciplinary issues with the ICAEW. However, if licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Hebb's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 31, 2012

In the Matter of

**Thermo Tech Technologies Inc.,
T.V.G. Technologies Ltd., and
Visual Frontier, Inc.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Thermo Tech Technologies Inc. because it has not filed any periodic reports since the period ended April 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of T.V.G. Technologies Ltd. because it has not filed any periodic reports since the period ended December 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Visual Frontier, Inc. because it has not filed any periodic reports since the period ended September 30, 2004.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

63 of 64

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on January 31, 2012, through 11:59 p.m. EST on February 13, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 66281 / January 31, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14725

In the Matter of

**Thermo Tech Technologies Inc.,
T.V.G. Technologies Ltd., and
Visual Frontier, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF
THE SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Thermo Tech Technologies Inc., T.V.G. Technologies Ltd., and Visual Frontier, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Thermo Tech Technologies Inc. (CIK No. 919965) is a Yukon corporation located in Selangor, Malaysia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Thermo Tech Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended April 30, 2000, which reported a net loss of over \$43 million (Canadian) for the prior twelve months. As of January 23, 2012, the company's stock (symbol "TTRIF") was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. T.V.G. Technologies Ltd. (CIK No. 906332) is an Israeli company located in Rehovot, Israel with a class of securities registered with the Commission pursuant to

64 of 64

Exchange Act Section 12(g). T.V.G. Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2000, which reported a net loss of over \$6.2 million for the prior twelve months. As of January 23, 2012, the company's stock (symbol "TVGTF") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Visual Frontier, Inc. (CIK No. 1103760) is a void Delaware corporation located in Taipei Hsien, Taiwan with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Visual Frontier is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of over \$1 million for the prior nine months. As of January 23, 2012, the company's stock (symbol "VFTR") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the

Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: **Jill M. Peterson**
Assistant Secretary