UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14999

In the Matter of	
ANGELICA AGUILERA,	
Respondent.	

DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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I. INTRODUCTION

This matter concerns Angelica Aguilera's failure to reasonably supervise two registered representatives at LatAm Investments, LLC who engaged in a fraudulent markup scheme that defrauded two Brazilian pension funds and another foreign institutional customer by tens of millions of dollars during the period in which she served as President of the firm.

Aguilera became LatAm's President in October 2007. As President of the small broker-dealer, Aguilera had ultimate supervisory authority at the firm. Aguilera, however, failed to reasonably discharge that responsibility in order to prevent the registered representatives from defrauding LatAm's customers.

The two registered representatives, Fabrizio Neves and Jose Luna, carried out the scheme to mark up structured notes issued by major commercial banks from no later than November 2006 to September 2009. The markups were substantial, ranging between 19 and 67 percent.

While Aguilera was President, Neves, with Luna's assistance, engaged in eight structured note transactions from July 2008 to September 2009 in which they first traded the notes with offshore nominee accounts before selling the notes to the institutional customers they were negotiated for. The nominee accounts, controlled by people related to or associated with Neves and Luna, were used as intermediaries to increase the prices of the notes eventually sold to the end customers. In the process, the nominee accounts profited from the transactions and Neves obtained substantial commissions. In several of the transactions, Neves directed Luna to alter pricing information on the original term sheets issued by various banks to conceal the markups from the end customers.

As President, Aguilera was responsible for establishing LatAm's policies and procedures relating to markups and markdowns charged to customers, and for ensuring those procedures were implemented properly. Aguilera, however, failed to implement procedures in place to detect and correct the excessive markup scheme. Aguilera knew Neves' trading on behalf of the two Brazilian funds represented more than 90 percent of the firm's revenue. She also knew the firm experienced dramatic increases in revenue each year during the period in which Neves and Luna engaged in the scheme. Yet, Aguilera failed to attempt to inquire about the source of the revenue or to ensure their trading was compliant with the firm's policies and procedures.

Aguilera also failed to reasonably delegate her supervisory responsibilities. Rather, she unreasonably delegated certain compliance supervisory authority to the firm's Chief Compliance Officer, Esdras Vera. Despite knowing she had a duty to verify and check Vera's work, Aguilera failed to ensure Vera adequately reviewed the firm's trade blotters and rarely spot-checked his work. In fact, despite developing a number of specific concerns about Vera's performance that led her to consider firing him three times during the relevant time period, Aguilera did not increase her efforts to monitor his work. Instead, she outsourced compliance supervision to a consultant.

Aguilera, in fact, had a motive to turn a blind eye to Neves and Luna's conduct. As LatAm's revenues increased, so did her compensation, both in salary and other lump sum payments. Prior to Neves joining LatAm, Aguilera earned a modest salary. By 2009, her reported income was more than one million dollars.

At the hearing, Aguilera attempted to establish that a cover-up to conceal the fraud prevented her from discovering the scheme. However, the evidence reveals she had access to all of the pricing information for the transactions in the firm's books and records. In fact, Aguilera had

access to the same documents FINRA obtained as part of its examination in late 2009 that uncovered the fraudulent scheme.

In addition, Aguilera's attempts to assert that others at LatAm were in control are unpersuasive. Aguilera was the firm's President and took on the responsibilities associated with that position. She supervised the registered representatives, approved all wires and commission payments, and had responsibility for ensuring the fairness of markups. Aguilera abdicated her responsibilities, permitting Neves and Luna to conduct their fraudulent markup scheme.

As a result of the conduct described above, the Division of Enforcement has shown Neves and Luna violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and willfully aided and abetted LatAm's violations of Section 15(c)(1) of the Exchange Act. The Division also has proved Aguilera failed reasonably to supervise Neves and Luna within the meaning of Section 15(b)(4)(E) as incorporated by reference in Section 15(b)(6) of the Exchange Act, with a view to detecting and preventing their violations of the antifraud provisions of the federal securities laws.

II. BACKGROUND

A. Respondent and Other Individuals and Entity

Aguilera, 46, was a shareholder and Financial & Operations Principal of LatAm from March 2004 until April 2010. DX 53; Tr. 364 at L.8-13. [1] Beginning in October 2007 until the firm ceased operations in 2010, Aguilera served as President of LatAm. DX 17 at FINRA-0289304; DX 53. Aguilera held Series 7, 24, and 27 securities licenses. DX 53; Tr. 362 at L.1-3.

[1] We cite references to the hearing transcript as "Tr." We cite references to the Division's exhibits as "DX," and references to Respondent's exhibits as "RX." References to the "Answer" refers to the Answer of Angelica Aguilera dated January 14, 2013.

As LatAm's President, Aguilera maintained responsibility for overall supervision of the firm. DX 17 at FINRA-0289296; Tr. 371 at L.4 to 372 at L.8.

Neves, 43, was a shareholder and registered representative associated with LatAm from approximately May 2006 to November 2009. DX 51. According to the firm's records, Neves maintained a one percent ownership interest in the firm. DX 17 at FINRA-0289289; Tr. 285 at L.1-5. During the same period, Neves maintained an ownership interest in Atlantica Asset Management, a Brazilian-based portfolio management company. Tr. 394 at L.5-19. During the relevant period, Neves held Series 7 and 66 securities licenses. DX 51. In May 2010, FINRA barred Neves, by consent, from association with any FINRA member firm in any capacity. DX 51.

Luna, 45, joined LatAm in approximately May 2006 as Operations Manager, assisting Neves in executing trades for his customers, among other things. Tr. 79 at L. 9 to 80 at L.3. Luna left LatAm in December 2009. DX 52; Tr. 63 at L.9-12. Luna held Series 7 and 11 licenses. Tr. 60 at L.7-11. In June 2010, FINRA permanently barred Luna, by consent, from association with any FINRA member firm in any capacity. DX 52; Tr. 60 at L.18 to 61at L.14. A federal judge barred Luna from the securities industry as a part of a consent to settle securities fraud charges with the Commission. Tr. 61 at L.15-20.

LatAm, fka Acosta Financial Services, Inc., was a Florida Limited Liability Company formed in 2004, which had its principal place of business in Miami, Florida and was registered as a broker-dealer. DX 75 at 6; DX 106. In January 2010, LatAm ceased trading operations. DX 77 at 6. LatAm was a small broker-dealer, with only 10 to 15 employees. Answer ¶ 2; Tr. 270 at L.14-15. In April 2010, LatAm filed a Form BD-W, withdrawing its registration with the Commission. DX 106.

B. LatAm's Formation and Operations

In 2003, Aguilera formed LatAm with Maximino "Jimmy" Acosta. Tr.. 363 at L.15-20. At the time, Aguilera contributed $125,000 to the firm. Tr. 659 at L.13 to 660 at L.2. Aguilera obtained a 33 percent ownership interest in the firm, while Acosta obtained a 66 percent ownership interest. DX 17 at FINRA-0289289; Tr. 660 at L.6-12.

LatAm engaged First Bridgehouse Consulting ("First Bridgehouse") to assist with the formation of the firm. Tr. 278 at L.22 to 279 at L.5. First Bridgehouse, owned by Howard Landers, performed the regulatory work necessary to get the firm approved by FINRA, including preparing CRD filings and drafting Written Supervisory Procedures ("WSPs"). Tr. 279 at L.11-24. Subsequently, First Bridgehouse provided additional services to the firm, including performing annual regulatory work and being on call for questions about compliance issues. Tr. 280 at L.7 to 281 at L.2.

In 2005, LatAm began its trading operations. Tr. 661 at L.11-15. The firm's main business was to buy and sell securities on a riskless basis with customers and other dealers. DX 75 at 6. LatAm's clearing firm was Pershing, LLC. DX 106. At the end of 2005, LatAm's revenues were minimal, at $34,803. Answer ¶13

In the first quarter of 2006, LatAm's revenues grew slightly, to $72,981. DX 54 at 5. In May 2006, Fabrizio Neves joined LatAm as a fixed income trader. Tr. 664 at L.10-22; DX 51. Neves brought two Brazilian pension fund accounts to the firm and served as their broker. Tr. 285 at L.6-13. Neves became the firm's largest producer, generating approximately 90 percent of LatAm's revenue. Tr. 388 at L.14-16; Tr. 258:21-259:3. Following Neves' arrival, LatAm's revenue grew more than $2.2 million by the end of 2006. DX 57 at 5.

In late 2007, Acosta left as principal of LatAm to form another broker-dealer in Panama and to avoid the firms becoming affiliates. Tr. 281 at L.10-22. Acosta entered into a consulting agreement with LatAm that removed him from day-to-day management of the firm. DX 16; Tr. 282 at L.1 to 284 at L.10. In a letter to FINRA dated May 14, 2008, Landers, on behalf of LatAm, wrote that "Mr. Acosta is no longer registered with the firm and does not maintain a management position." DX 17 at FINRA-0289289.

Following Acosta's departure, Aguilera assumed Acosta's position as President. DX 17 at FINRA-0289304; Tr. 284 at L.11-15. LatAm also hired Vera as Chief Compliance Officer in October 2007. Tr. 490 at L.15-20; DX 17 at FINRA 0289294. In May 2008, Acosta placed control of his 66 percent ownership in LatAm into a Voting Trust that Aguilera controlled. DX 86; Tr. 492 at L.25- 493 at L.6; Tr. 669 at L.23-24.

In July 2008, the firm hired Marcos Konig as Chief Operating Officer. Tr. 564 at L.21-22; Tr. 566 at L.17-18. As COO, Konig's role was to develop equities trading at the firm; he had no involvement in the fixed-income trading side of LatAm's operations. Tr. 566 at L.19 to 568 at L.16.

During this period, LatAm's revenues continued to soar, reaching more than $8 million by the end of 2007 and more than $12.8 million in 2008. DX 58 at 5, DX 59 at 5, DX 60 at 5, DX 61 at 5, DX 62 at 5, DX 63 at 5, DX 64 at 5, and DX 65 at 5. In 2009, LatAm's revenues nearly tripled, to more than $37.9 million. DX 66 at 5, DX 67 at 5, DX 68 at 5, DX 69 at 5. As described below, LatAm generated the majority of these revenues as a result of Neves and Luna's fraudulent markup scheme.

III. FRAUDULENT MARKUP SCHEME

Prior to joining LatAm, Neves and Luna worked together at another broker-dealer, Capital Investment Services. Tr. 68 at L.2-14. At Capital Investment, Neves traded sovereign bonds for two Brazilian funds, the Atlantica Real Sovereign Fund ("Atlantica Fund") and the Brazil Sovereign II FIDEX Fund ("Brazil Sovereign Fund"), (collectively, the "Brazilian funds"). Tr. 68 at L.2 to 70 at L.6. The Brazilian funds were pension funds for post office employees in Brazil, known as Postalis. Tr. 80 at L.17 to Tr. 81 at L.11.

When Neves and Luna joined LatAm in 2006, Neves brought the two Brazilian funds, his most important clients, to LatAm. Tr. 74 at L.12 to 75 at L.5; Tr. 80 at L.7-16. At LatAm, Neves served as the Brazilian funds' registered representative. Tr. 63 at L.22-25. The Brazilian funds became LatAm's largest customers and generated the vast majority of the firm's revenues. Tr. 258 at L.21-23; Tr. 509 at L.13-17; DX 76 at 7.

Atlantica Asset Management, an investment adviser in Brazil, made trading decisions on behalf of the two funds. Tr. 264-265; 69 at L.3-10. Neves, as well as three foreign associates at LatAm, Cristiano Arndt, Leandro Ecker, and Andres Barbieri, were affiliated with Atlantica Asset Management. Tr. 84 at L.10-23; Tr. 120 at L.17 to Tr. 121 at L.9; Tr. 162 at L.17 to 163 at L.3. Thus, in addition to directing the trading for the Brazilian funds' accounts as their broker, Neves made investment decisions for the funds. Tr. 94 at L.2-8; DX 95A.

In late 2006, Neves began trading structured notes for the Brazilian funds.[2] Tr. 97 at L.4 to Tr. 98 at L.7. Luna's role in these structured note transactions included processing the trades and later sending transaction information to agents of the Brazilian funds. Tr. 81 at L.18 to 24.

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[2] Structured notes are debt instruments of their issuer, generally financial institutions such as broker-dealers, banks, or their affiliates. DX 96 at 4. Unlike other debt instruments such as conventional bonds, most structured notes do not pay a specified nominal rate of interest. *Id.* Rather, their returns are

In addition, Neves, with Luna's assistance, negotiated two structured notes on behalf of a Colombian entity, Corporacion Autonoma Regional Del Valle Del Cauca ("CVC"). Tr. 98 at L.11-20; Tr. 121 at L.10-12; Tr. 574 at L. 21 to Tr. 575 at L.10.

A. Structured Note Trading Process

At the hearing, Luna explained the process by which Neves engaged in structured note trading on behalf of the Brazilian funds. First, Neves negotiated the pricing for the notes in phone calls with the banks. Tr. 94 at L.13 to Tr. 95 at L.3. After Neves and the banks reached an agreement providing for LatAm to buy a particular note on behalf of a customer, Neves instructed the bank to send Luna, whom he introduced as his assistant, confirmation of the trade by email. Tr. 95 at L.10-24. The bank then sent a copy of the term sheet for the structured note to Luna by email. Tr. 96 at L.5-24. Three to four days later, the bank sent Luna the final term sheet. Tr. 96 at L.5-24.

Because Neves did not want Luna to forward anything by email, Luna printed and then physically brought the term sheet to Neves' office or home. Tr. 96 at L.5-24. Neves also did not want to use cell phones for communication with Luna. Tr. 89 at L.20 to Tr. 90 at L.10. Instead, Luna communicated with Neves using Nextel radios and Skype video or texting. Tr. 87 at L.14 to Tr. 88 at L.7. Neves instructed Luna to make sure Skype text messages were not preserved. Tr. 93 at L.12 to Tr. 94 at L.1.

The process of putting the notes together with the banks generally took between two days and a week. Tr. 95 at L.4-9.

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determined based on the relative performance of some other financial instrument or a market index. *Id.* Typically structured notes have maturities of ten years or less. DX 96 at 5, fn.7. Structured notes typically have limited liquidity as no active secondary market exists. DX 96 at 5. Consequently, structured notes are created based on specific criteria identified by institutional investors. *Id.*

B. Use of Intermediary Accounts

In eight transactions between July 2008 and September 2009, Neves first sold the notes negotiated on behalf of the Brazilian funds or the CVC to nominee accounts that he, Luna, or others at LatAm controlled.[3] DX 72. The structured note transactions between LatAm and the issuer were conducted via DVP (delivery versus payment), meaning LatAm's riskless principal account acted as a pass-through account, requiring a buyer for the note on the same day.[4] Tr. 98 at L.21 to Tr. 99 at L.11. According to Luna, once LatAm purchased a structured note, Neves told Luna which intermediary account would first buy the note and at what price. Tr. 102 at L.4-23. As part of his duties, Luna filled out a trade ticket for the transactions with the intermediary accounts pursuant to Neves' instructions. Tr. 101 at L.8-24.

Each note had a settlement date of about a week. Tr. 108 at L.15-19. After the note settled, Neves directed LatAm to buy the note back from the intermediary account and then sell it again to the end customer. Tr. 108 at L.15 to Tr. 109 at L.2. When LatAm purchased the note back from the intermediary account, LatAm paid the account a markup from the price the intermediary account originally paid for the note, resulting in a profit for the intermediary account. Tr. 109 at L.3-7; Tr. 133 at L.23 to 134 at L.12. LatAm also charged the end customer a markup. Tr. 109 at 8-11. Luna testified that Neves determined the markups on the structured notes. Tr. 100 at L.7-8.

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[3] Neves also marked up structured notes without the use of intermediary accounts in a small number of transactions. Tr. 99 at L.17 to Tr. 100 at L.8. In these transactions, Neves directed Luna to fill out the order tickets for LatAm's purchase of the notes from the bank and then for the sale to the customer on the same day. Tr. 101 at L.8-24.

[4] In a riskless principal transaction, a broker-dealer receives an order from a customer to buy or sell a security and then executes the order by purchasing or selling that security in the firm's own account. DX 96 at 2, fn.5. Both the customer side of the transaction and the broker-dealer side of the transaction are executed simultaneously so the broker-dealer bears no risk in the transaction. *Id.* The broker-dealer is compensated for the transaction by charging the customer a markup or markdown. *Id.*

Markups on the eight transactions ranged between 19 and 67 percent over the price the issuer originally charged. DX 72.[5]

For each transaction, Pershing automatically sent confirmations to the customers. Tr. 105 at L.7-15. The confirmations, however, did not show the price at which the issuer originally sold the note to LatAm. Tr. 107 at L.6-22; Tr. 109 at L.19-23. For transactions with the Brazilian funds, Luna reported the trade information to Atlantica Asset Management, which in turn, reported the information to the funds' administrator, Mellon Bank. Tr. 69 at L.13-20; Tr. 71 at L.3-6; Tr. 74 L.1-11; Tr. 111 at L.4-18.

C. Specific Intermediary Accounts

Neves and Luna used the following nominee accounts at LatAm as intermediaries in the eight structured note transactions:

- Spectra Group Holding Ltd., ("Spectra") an offshore British Virgin Islands corporation registered to an entity named Spectra Trust. Tr. 103 at 19 to 104 at L.11; Tr. 168 at L.12 to 169 at L.17. The beneficiary of the Spectra account was Alexej Predtechensky, the President of Postalis and a friend of Neves. Tr. 168 at L.12 to 169 at L.17; DX 110. Neves served as the registered representative on the account. DX 109. Neves used Spectra as an intermediary in two transactions. DX 72.

- River Consulting ("River"), an offshore British Virgin Islands entity registered to Neves' mother-in-law.[6] Tr. 82 at L.3-13. Neves used River as an intermediary in five transactions. DX 72.

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[5] Division Exhibit 72 documents each transaction by which Neves and Luna marked up (or in one instance, marked down) the eight structured notes, including notes issued by Commerzbank, Barclays, Standard Bank, JP Morgan, Lehman Brothers and Deutsche Bank. Division Exhibit 72 was prepared by William Tudor, an SEC examiner, based on blotter data contained in Division Exhibit 71, which FINRA produced to the Division. Tudor's declaration sets forth the method by which he prepared Division Exhibit 72, including his calculation of the amount by which prices were increased or decreased in each transaction. *See* DX 73.

[6] Luna testified he opened the River account at Neves' direction. Tr. 82 at L.14-24. While Neves' mother-in-law was the purported beneficiary, Neves directed the trading for the account. Tr. 82 at L.25 to 83 at L.2. According to Luna, Neves treated the account like it was his own and directed fund transfers to and from the account. Tr. 85 at L.8 to 19. Luna and Arndt served as registered representatives on the River account. Tr. 83 at L.6 to 84 at L.9.

- Treasure on the Bay ("Treasure"), an offshore British Virgin Islands entity registered to Ecker. Tr. 200 at L.22 to Tr. 201 at L.6. Neves used Treasure as an intermediary in three transactions. DX 72.

- HAA International ("HAA"), an offshore British Virgin Islands trust for the benefit of Luna's sister-in-law.[7] Tr. 103 at 19 to 104 at L.11; Tr. 104 at L.5-20; Tr. 148 at L.7-10; DX 91. Luna used the HAA account as an intermediary in two transactions. DX 72.

- Luis Sinfon, an account in the name of Luna's brother-in-law. Tr. 147 at L.20-25. Luna directed the trading in the Sinfon account and used it as an intermediary in two transactions. Tr. 148 at L.5-6; DX 72.

- Carmen Tang, an account in the name of Luna's mother-in-law. Tr. 168 at L.4-8. Luna used the account as intermediary in one transaction. DX 72.

Aguilera signed and approved the account opening documents for the River, HAA and Spectra accounts. DX 93; Tr. 151 at L.16 to 152 at L.14; DX 91; Tr. 175 at L.12-21; DX 92.

D. The Fraudulent Scheme Resulted in Profits to the President of Postalis

Luna testified he opened the Spectra account at LatAm. Tr. 169 at L.20-22. To open the account, Spectra provided a trust instrument that included Neves' signature as a witness. Tr. 174 at L.2-20; DX 37 at FINRA-0713295. In November 2007, Neves funded the Spectra account by directing a $1.5 million journal from Ecker's Treasure account. Tr. 199 at L.4 to 200 at L.17; Tr. 206 at L.10-19; DX 108; DX 109. Neves directed the trading for both the Treasure and the Spectra accounts. Tr. 206 at L.20 to 207 at L.4.

To fund the Spectra account without generating questions from Pershing, Luna testified he provided to the clearing firm an altered corporate resolution for Spectra. Tr. 203 at L.3 to 204 at L.25; DX 108. Luna sent Pershing corporate resolutions for Spectra and Treasure, each showing

[7] Neves advised Luna to open the HAA account for Neves to pay Luna extra commissions. Tr. 148 at L.11-20. Neves paid Luna $500,000 through the account. Tr. 149 at L.8-11. Neves funded the HAA account through another account at LatAm in the name of Punch Development, registered to Arndt. Tr. 149 at L.24 to 150 at L.9. Luna directed the trading and shared in the profits in the HAA account. Tr. 152 at L.4-11; Tr. 148 at L.5-6.

Ecker was the beneficiary of both accounts. Tr. 201 at L.7-20; DX 108. According to Luna, the corporate resolution with Ecker's signature as the settler of the Spectra Trust was not accurate. DX 108; Tr. 201 at L.21 to 202 at L.21. The original corporate resolution for Spectra included a signature by Predtechensky as the settler. DX 37 at FINRA-0713295. As a result of the fraudulent markup scheme, Spectra profited by approximately $1 million. DX 109; Tr. 207 at L.20 to 214 at L.19.

E. Alteration of Term Sheets

At Neves' direction, Luna changed the pricing information on the term sheets the issuers provided to hide the original price of the notes from the Brazilian funds and the CVC in a number of transactions. Tr. 113 at L.13-17; Tr. 114 at L.16-19; Tr. 113 at L.18 to 114 at L.5; Tr. 121 at L.25 to 122 at L.8. *Also compare* DX 2 *with* DX 3, DX 8 *with* DX 9, and DX 10 *with* DX 11. In some instances, rather than changing the price, Luna omitted the pricing information altogether from the term sheets. Tr. 114 at L.6-8; *Compare* DX 4 *with* DX 5 and DX 6 *with* DX 7. Luna altered the pricing information on the term sheets by: using white out; cutting out a new price typed into Word to put on top of the original price and then making a new copy; or using Acrobat to save a copy of the original term sheet and then modifying it electronically. Tr. 115 at L.11-20; Tr. 115 at L.21 to 116 at L.4.

Neves always reviewed the altered term sheets before authorizing Luna to send them out. Tr. 117 at L.24 to 118 at L.2; Tr. 118 at L.3-20. At Neves' direction, Luna sent the term sheets to the Brazilian funds' agents at Atlantica Asset management via email.[8] Tr. 110 at L.10 to 111 at

[8] Vera, who was responsible for reviewing LatAm's email correspondence, claimed at the hearing he did not become aware of the altered terms sheets until FINRA's examination because Luna sent emails attaching the altered term sheets from his personal account. Tr. 531 at L.17-25. However, this testimony is not consistent with several documents demonstrating that Luna emailed the altered term sheets from his LatAm account. DX 3A, DX 5A, DX 7A, and DX 9A.

L.3; Tr. 118 at L.24 to 119 at L.8; *see also* DX 3; DX 5; DX 7; DX 9. Luna did not recall sending the term sheets to representatives of the CVC, but testified he gave a copy of the final version of the altered term sheets for the CVC's structured notes to Neves. Tr. 122 at L.9-17. LatAm retained all original term sheets in its records.[9] Tr. 247 at L.20 to 248 at L.5.

Two representatives from Mellon Bank ("Mellon") in Brazil confirmed Mellon received copies of term sheets for the notes transacted for the Brazilian funds from Atlantica Asset Management.[10] Mellon's CEO stated Mellon received the term sheets from Atlantica Asset Management and not directly from the issuers. DX 94A. He also stated Mellon was unaware of the original issue price for the notes and was unaware of any markup charged to the Brazilian funds. DX 94A. Mellon's COO confirmed Mellon received copies of the altered term sheets only. DX 95A.

F. Specific Transactions Illustrating the Fraudulent Scheme

1. Commerzbank Structured Note Transaction

At the hearing, Luna explained how he and Neves conducted the excessive markup scheme with respect to specific transactions, including a structured note issued by Commerzbank.[11] Tr. 124 at L.12 to Tr.134 at L.19; DX 72. In the Commerzbank transaction, LatAm's riskless principal

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[9] Because Landers only reviewed original term sheets provided by the issuers as part of the audits First Bridgehouse conducted, he did not discover any alterations. Tr. 335 at L.17-25. According to Landers, he would have only reviewed the original term sheet in connection with the primary transaction; any secondary trades (such as trades from LatAm's account to the intermediary account) would not have a term sheet associated with the transaction. Tr. 336 at L.21 to Tr. 339 at L.22.

[10] The Division obtained statements acquired by Brazil's Comissão de Valores Mobiliários ("CVM") in connection with depositions of Mellon's CEO and COO in February 2012.

[11] In addition to the Commerzbank structured note transaction, Luna detailed at the hearing the manner in which the scheme operated in connection with the notes issued by Barclays and JP Morgan. Tr. 136 at L.21 to Tr. 145 at L.21; Tr. 147 at L.6 to Tr. 155:12; Tr. 158 at L.3 to Tr. 167 at L.25. *See also* DX 23, DX 27, DX 30.

trading account purchased a structured note with ISIN #XS0439509240 and a $10,000,000 notional amount at a price of 37 percent of the note's notional amount ($3,700,000). DX 25 at LI00061; DX 72. The issuer's original term sheet reflected the issue price as 37 percent of its notional amount. DX 2. On the same day LatAm purchased the note, it resold the note to Neves' River account at a price of 47 percent of its notional amount ($4,700,000). DX 25 at LI00061; DX 72. On July 24, 2009, River sold the note back to LatAm at a price of 59.95 percent of its notional amount ($5,995,000). DX 25 at LI01164; DX 72. That same day, Neves and Luna sold the note from LatAm's account to one of the Brazilian funds at a price of 60 percent of its notional amount ($6,000,000) – a 62 percent markup from the original $3,700,000 price. DX 25 at LI00063; DX 72.

At Neves' direction, Luna filled out the order tickets for each transaction. Tr. 123 at L.15 to Tr. 124 at L.11; DX 25 at LI00061, LI00063. Pershing sent confirmations to each customer for each transaction. DX 25 at LI 00062, L01200, LI01209, LI01164-01169, 01190. The confirmations, however, did not reflect a markup or commission. *Id.* On July 27, 2009, Luna sent an email to Atlantica Asset Management from his LatAm email account attaching an altered version of term sheet for the note, misrepresenting the issue price as 60 percent of its notional amount. DX 3A. The Brazilian Fund paid $6,000,000 for the note. DX 72. Neves' River account profited by nearly $1,300,000. DX 72.

2. JP Morgan Structured Note Transactions

In November 2008, the CVC purchased two structured notes from JP Morgan. DX 72 at 3-6; DX 99A. JP Morgan sent the relevant terms, including pricing information, via email to Luna. DX 100A. On November 25, 2008, LatAm purchased the first note with ISIN #XS0402114200 and a $10,000,000 notional amount at a price of 34.73 percent of the note's notional amount

($3,473,000). DX 12; DX 72. Within days, LatAm resold the note to other accounts, including to a Brazilian fund account and the Treasure account at a price of 36.5 percent of its notional amount ($3,650,000). DX 72. LatAm then purchased the note back at a marked up price of 49.9 percent of its notional amount ($4,990,000). DX 72. On December 12, 2008, LatAm resold the note to the CVC, the intended end customer, at a price of 53.27 percent of its notional amount ($5,327,000). DX 72. The CVC thus paid a 53 percent markup on the note. DX 72 at 4.

Similarly, the second note with ISIN#XS0401826754 had a $50,000,000 notional amount at a price of 32.9 percent of the note's notional amount ($16,450,000). DX 10. On November 24, 2008, LatAm purchased the note into its account at that price, and then sold the note in increments to Treasure and one of the Brazilian funds and repurchased it before ultimately selling the note to the CVC at a price of 53.27 percent of its notional amount ($26,635,000). DX 72. The CVC paid a 62 percent markup on the note, paying in excess of $10,000,000 more than the original price of the note. DX 72 at 6.

Neves and Luna traded the structured notes with the intermediary accounts before selling them to the CVC despite explicit restrictions on resale set forth by the issuer. The term sheet for the JP Morgan structured notes included the following language restricting resale:

> The Notes will be subject to restriction on transfer and resale. You may only transfer your Notes to the Issuer or one of its affiliates, and you may only do so if the Issuer or its affiliates decide in its or their sole discretion to permit it. While the issuer currently intends to repurchase notes offered to it, it is not required to do so and may cease making purchases at any time.

DX 10 at 6; DX 12 at 6.

At Neves' direction, Luna changed the term sheets for the notes, including both pricing and accretion rate information. DX 11; Tr. 158 at L.17 to160 at L.5. Notwithstanding the attempt to conceal the markups, the CVC eventually discovered the markups for these two transactions in

April 2010 when its representatives decided to move its account to another broker-dealer. Tr. 577 at L.21 to 578 at L.21, DX 99A. At that time, the CVC obtained the original term sheets from JP Morgan and discovered the term sheet LatAm had provided had a price and accretion rate different than the original. Tr. 578 at L.5-21; Tr. 580 at L.11-19; DX 99A.

When Konig questioned Neves and Luna about the two versions of the term sheets, Neves blamed it on a mistake by JP Morgan. Tr. 580 at L.20 to Tr. 581 at L.8; DX 101A. Konig, however, contacted JP Morgan and verified that the original term sheet was different than the term sheet LatAm provided to the CVC. Tr. 581 at L.3-8; DX 102, DX 102A.

G. The Brazilian Funds and the CVC Suffered Harm as a Result of the Scheme

During the relevant period, the Brazilian funds paid at least $17 million in undisclosed, excessive fees as a result of the fraudulent scheme. DX 72. The CVC paid more than $12 million in undisclosed, excessive fees. DX 72.

IV. FINRA DISCOVERS THE FRAUDULENT SCHEME FROM AN EXAMINATION OF THE FIRM'S BOOKS AND RECORDS

In the fourth quarter of 2009, FINRA conducted a routine examination of LatAm. Tr. 256 at L. 2-11. As part of the examination, FINRA requested documents maintained at the firm such as trade blotters, bank account statements, WSPs, and organizational charts. Tr. 259 at L.7-14. FINRA's examiners also conducted an on-site exam where, after speaking to Aguilera, they learned Vera, Neves, and Luna planned to leave the firm and the Brazilian funds intended to close their accounts. Tr. 258 at L. 9 to 259 at L. 3.

According to the exam manager, Nick Hartofilis, FINRA flagged LatAm's significant increase in revenue as an area of concern at the outset of the examination. Tr. 256 at L. 16 to Tr.

257 at L.23. To determine the cause for the firm's revenue increase, FINRA's examiners reviewed the firm's trade blotter to determine how the firm derived its revenue. Tr. 259 at L.15 24.

From the review of the trade blotter, FINRA identified excessive markups and markdowns in structured note trading for the two Brazilian funds between January 2006 and November 2009. Tr. 259 at L. 25 to 260 at 7; Tr. 267 at L.17-20. FINRA calculated more than $20 million in markups charged to the two Brazilian funds by looking at the difference in the price at which LatAm bought the notes and the price at which the firm sold the notes to the funds. Tr. 266 at L.7-19; Tr. 269 at L.18-22.

FINRA also determine from the blotter review and other documents that nominee accounts opened by registered representatives at the firm were intermediaries between the firm's riskless principal trading account and the final sale of the notes to the Brazilian funds. Tr. 260 at L. 8-12; Tr. 266 at L.20 to 267 at L .7; Tr. 264 at L. 10-17.

As a result of their findings, FINRA's examiners obtained pricing information from certain issuers involved in the transactions to determine the correct price on the day LatAm sold the notes to the Brazilian funds. Tr. 267 at L. 21 to 268 at L.12. The issuers indicated the price would have been much less than the price LatAm charged to the funds. Tr. 268 at L. 2-10. According to the issuers, there was no reason for the significant fluctuation in price. Tr. 268 at L. 10-12.

From a review of firm's electronic correspondence, FINRA determined LatAm transmitted altered term sheets to the Brazilian funds. Tr. 268 at L. 16 to 269 at L. 6. FINRA's examiners found the original term sheets attached to emails sent from the issuer to registered representatives at the firm. Tr. 268 at L.19-21. FINRA's examiners also found the same term sheet emailed from registered representatives at the firm to the Brazilian funds, with the pricing information changed. Tr. 268 at L. 21-23. FINRA found both versions of the relevant term sheets in LatAm's email

correspondence. Tr. 269 at L. 7-10. During the course of the examination, FINRA found no evidence that anyone at LatAm disclosed the markups to the Brazilian funds. Tr. 269 at L. 14-17.

FINRA also reviewed the firm's financial statements for money going in and out of the firm. Tr. 259 at L. 22-24. FINRA identified large, round-dollar commission payments made to entities controlled by Ecker, Arndt, Barbieri, and Neves related to the transactions involving excessive markups and markdowns. Tr. 262 at L. 17 to 263 at L.13. FINRA identified approximately $22 million in commissions paid to Neves. Tr. 269 at L.23-25. Aguilera told the examiners the four representatives shared in the profits from the Brazilian accounts; however, they did not have a commission sharing agreement. Tr. 262 at L. 20 to 263 at L.13.

At the conclusion of the examination, FINRA referred the matter to the Commission's Division of Enforcement and the CVM in Brazil. Tr. 270 at L.16-22; *see also* DX 113. FINRA also obtained bars against certain individuals, including Neves and Luna. Tr. 270 at L.23 to 271 at L.5.

V. LATAM'S WRITTEN SUPERVISORY PROCEDURES DIFFERED FROM THE FIRM'S ACTUAL SUPERVISORY PRACTICES

A. LatAm's Written Supervisory Procedures

LatAm maintained WSPs originally prepared by Landers, its outside compliance consultant. Tr. 288 at L.4-8. During the relevant period, LatAm revised its WSPs four times. DX 21; DX 89; DX 90; DX 24. The Schedules of Designated Responsibilities contained in the WSPs set forth the specific responsibilities of Aguilera and Vera. DX 21 at 208-210; DX 89 at 211-213; DX 90 at 210-212; DX 24 at 213-214.

Specifically, in the WSPs in place during the fraudulent scheme, both Aguilera and Vera shared primary responsibility for "hiring, registration, and supervision of Registered

Representatives and Associated Persons."[12] DX 21 at 208-209. The WSPs gave primary responsibility to Vera and secondary responsibility to Aguilera for wire transfers.[13] DX 21 at 208-210.

The WSPs also gave primary responsibility to Vera and secondary responsibility to Aguilera for the review and approval of markups, markdowns and commissions. DX 21 at 208-210. More specifically, the WSPs provided the supervision of pricing for securities transactions was to include a review of each order ticket or the trade blotter to ensure traders adhered to the firm's markup and commission policies. DX 21 at 27. The WSPs set forth six factors to consider when evaluating the fairness of markups and commissions, including: (1) the type of security involved; (2) the availability of the security in the market; (3) the price of the security; (4) disclosure to the customer; (5) the profit resulting from the transaction; and (6) the dollar amount of money involved. DX 21 at 27. The firm used FINRA's five percent rule as a guideline when evaluating markups and commissions.[14] DX 21 at 28.

B. LatAm's Actual Supervisory Practices

Witnesses testified the actual supervisory practices at LatAm were not necessarily in accordance with the written procedures. For instance, although the WSPs stated Vera had primary responsibility for approving wire transfers, Aguilera actually had responsibility for approving

[12] In the WSPs revised as of September 15, 2009, Vera no longer maintained responsibility for hiring or supervising registered representatives and associated persons. DX 24 at 213. Rather, Aguilera maintained those primary responsibilities. DX 24 at 214.

[13] According to Landers, a primary supervisor has the front line responsibility for the particular task while a secondary supervisor has the responsibility for the particular task when the primary supervisor is not available or has been designated by the primary supervisor to have responsibility. Tr. 292 at L.5-11.

[14] FINRA Rule 2440 and IM-2440-1 (Markup Policy) requires member firms charge fair prices and commissions in all securities transactions and discusses a guideline of five percent as a fair markup. FINRA notes that whether commissions and markups/markdowns are fair and reasonable can only be determined based on the facts and circumstances of each particular transaction. DX 96 at 15-16.

commission payouts, wire transfers, and checks, which she admitted. DX 21 at 208; Tr. 388 at L.20-24; 393 at L.13 to 394 at L.4.

Further, Vera explained that while he maintained responsibility for reviewing the trade blotter, in practice, Aguilera was responsible for approving and signing off on the blotter. Tr. 493 at L.14-20; Tr. 545 at L.16-20. In addition, Aguilera had responsibility for reviewing the trade blotter when she was in the office.[15] Tr. 498 at L.9-12; Tr. 528 at L.9-25; Tr. 464 at L.2-11. According to Vera, Aguilera also maintained responsibility for approving markups. Tr. 514 at L. 17-21.

Additionally, despite the written procedures giving both Vera and Aguilera primary responsibility supervising registered representatives, Landers recalled disagreements between Aguilera and Vera on supervision. Tr. 294 at L.15 to 295 at L.18. Landers testified that in practice, he understood all registered representatives, including Neves and Luna, reported to Aguilera, even in a sales supervisory capacity. Tr. 285 at L.23 to 286 at L.22; Tr. 293 at L.5-7. Vera testified Neves and Luna instructed him to direct all questions concerning their trading to Aguilera and Acosta. Tr. 500 at L. 17-22. An organizational chart dated September 2009 depicts registered representatives, including Neves and Luna, reporting to Aguilera, not Vera. DX 88. At the hearing, Konig also testified that everyone at the firm reported to Aguilera. Tr. 586 at L.15-20.

Landers testified that, notwithstanding the WSPs, Vera's role at LatAm was merely to assure compliance, not sales supervision. Tr. 292 at L.16 to 293 at L.4. Landers said Vera did not have access to all the information he needed to do his job as a compliance officer. Tr. 295 at L.19 to 296 at L.15. Vera confirmed at the hearing that he did not have access to certain financial

[15] Aguilera claimed her role, however, was limited to verifying that Vera reviewed the blotters. Tr. 373 at L.11-25.

records of the firm, and that he notified Aguilera about his lack of access to this information. Tr. 504 at L.17 to 505 at L.9.

Indeed, Aguilera admitted she was responsible for the overall supervision at the firm. Tr. 372 at L.3-8; DX 17. She also admitted that, according to the WSPs, she was responsible for trading even though she lacked knowledge in this area. Tr. 667 at L.1-3; Tr. 374 at L.7-20. Although she claimed this was an oversight and that the WSPs stated this only for regulatory purposes, she conceded she never tried to correct the WSPs. Tr. 667 at L. 23-24. Notwithstanding Aguilera's claim the WSPs were inaccurate, in January 2009 she signed a FINRA Rule 3013 compliance and supervision certification attesting that LatAm had adequate policies and procedures in place. DX 97.

VI. AGUILERA FAILED TO IMPLEMENT THE FIRM'S SUPERVISORY PROCEDURES

Aguilera's obligation as President of a small firm included understanding the source of the firm's significant revenue increases, identifying who was responsible for the trading resulting in the revenue increases, ensuring the firm charged markups in compliance with FINRA rules, and ensuring the firm's trading activity was compliant with FINRA and Commission rules. Tr. 270 at L.1-15.

Aguilera knew about LatAm's substantial revenue increase after Neves joined the firm, and that commission payments to him skyrocketed beginning with a structured note transaction in 2006. Tr. 399 at L.17-23; Tr. 664 at L.23 to 665 at L.1. At the hearing, Aguilera admitted approving millions of dollars in transfers to Neves as commission payments during the relevant period. Tr. 430 at L.2 to Tr. 437 at L.17. Despite knowing Neves was generating substantial revenues and commissions, Aguilera failed to review any information related to his transactions.

According to Luna, the pricing information for the structured note trades was readily apparent from the trade tickets and trade blotters. Tr. 248 at L.11-20. All principals at LatAm, including Aguilera, had access to this pricing information. Tr. 248 at L.21 to 249 at L.11.

Aguilera testified she understood Neves determined the markups for structured note transactions. Tr. 400 at L.2-22. However, she failed to review any term sheets associated with these notes. Tr. 398 at L.22-25. Further, Aguilera reviewed only a sample of trade confirmations once a year. Tr. 402 at L.8-15. Despite other witnesses testifying Aguilera was responsible for reviewing and approving the trade blotters, Aguilera failed to review them herself. Tr. 373 at L.11-21.

Moreover, Aguilera failed to review any information for Neves and Luna's trades despite her knowledge of a potential conflict with Neves' ownership in Atlantica Asset Management. Tr. 394 at L.16 to 395 at L.4; Tr. 396 at L.23 to 397 at L.4. Aguilera admitted she did not ensure that Neves disclosed his association with the entity on his U4, which she conceded was "negligent." Tr. 397 at L.24 to 398 at L.2.

In fact, in May 2008, LatAm's counsel drafted a consent form for the Brazilian funds to sign alerting them to the possible conflict of interest in Neves' position as both a principal of Atlantica Asset Management and a registered representative at LatAm. DX 14 at 3-4. Aguilera admitted the Brazilian funds never signed the consent. Tr. 395 at L.5 to 396 at L.15.

Aguilera also failed to follow up on concerns Vera raised about markups. Tr. 527 at L.15 to 528 at L.3. Vera recalled that the following his review of the trade blotter, he communicated with Aguilera regarding transactions involving the use of intermediary accounts in structured note transactions. Tr. 513 at L.23 to 514 at L.16. Vera testified he created internal compliance

memoranda documenting each trade he had concerns about and provided the memoranda to Aguilera.[16] Tr. 514 at L.11-16; DX 1.

Vera also testified he recommended to Aguilera reversing a trade involving the Spectra account and suspending Luna. Tr. 501 at L.15 to 502 at L.7; Tr. 503 at L.23-25. Despite Vera's concerns, Aguilera did not reverse the trade or suspend Luna. Tr. 502 at L.8-12.

Luna testified Aguilera questioned him about markups two or three times. Tr. 216 at L.22 to Tr. 218 at L.18. Luna testified he directed Aguilera to discuss her questions with Neves. Tr. 218 at L.14-18. Luna did not know what Aguilera or Neves discussed, but he recalled the prices for the transactions were not changed. Tr. 216 at L.22 to 218 at L.18.

Aguilera tried to claim she did not exercise her supervisory authority because Acosta and Neves possessed joint control over LatAm during the relevant time period. Tr. 669 at L.6-11. Aguilera testified Acosta exerted control after he left LatAm as principal and that she did not understand she could exert control over the company with the voting trust.[17] Tr. 669 at L.17-19. Despite these claims, Aguilera admitted Acosta did not sign trade tickets or trade blotters or make trading decisions during the period in which he served only as a consultant to LatAm. Tr. 672 at L.4-10. In addition, when Acosta returned to the firm in 2009, Aguilera conceded his new title did not indicate he had trading supervision, and he did not sign trade tickets or blotters at that time. Tr. 676 at L.19 to 677 at L.9.

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[16] At the hearing, Aguilera denied that Vera informed her of any issues regarding markups and markdowns. Tr. 683 at L.11-13. Aguilera also denied receiving any compliance memoranda from Vera. Tr. 685 at L.7-19.

[17] While Vera claimed Acosta revealed a gun when he confronted Acosta about the excessive markups, Aguilera confirmed she did not feel under threat of physical violence while at LatAm. Tr. 515 at L.10 to 517 at L.15; Tr. 628 at L.20-22.

According to Aguilera, Neves determined the salaries of LatAm employees, including herself and Vera. Tr. 389 at L.3-7. Aguilera testified Neves had the "final say so" in decision-making, including the power to fire individuals such as Luna and Vera. Tr. 670 at L.21 to 671 at L.2; Tr. 681 at L.8-15. Notwithstanding the fact that Neves determined their salaries, Aguilera claimed Vera and Acosta were Neves' bosses. Tr. 671 at L.15-18.

In contrast to Aguilera's claims that others maintained control of the firm, other witnesses testified that neither Acosta nor Neves had actual control at LatAm. According to Konig, Acosta was only in the office sporadically and turned his attention to other businesses. Tr. 572 at L.16-22. Landers testified that Acosta could not supervise once he left the firm as a principal and Neves could not exert control at LatAm because he only possessed a Series 7 license. Tr. 311 at L.23 to 312 at L.5; Tr. 316 at L. 2-6; Tr. 78 at L.18-20.

VII. AGUILERA UNREASONABLY DELEGATED SUPERVISORY AUTHORITY TO VERA

To the extent the WSPs assigned responsibilities to Vera, Aguilera admitted she still maintained a responsibility to verify Vera's work. Tr. 373 at L.3-10. However, she admitted that she "trusted but did not verify" with respect to her supervisory duties. Tr. 703 at L.6-10.

At the hearing, Aguilera acknowledged having concerns with Vera's performance as CCO. Tr. 390 at L.4 to 392 at L.6. Specifically, Aguilera noted the following problems with Vera's performance:

- Vera was not present in LatAm's offices on a regular basis, instead working remotely from his home in New Jersey. Tr. 390 at L.11-16.
- Vera failed to maintain the firm's files properly. Tr. 390 at L.20-22.
- Vera negligently failed to file a timely notification with FINRA of a change in management when Acosta left the firm. Tr. 390 at L.23 to 391 at L.5.

- Vera maintained incomplete client files. Tr. 391 at L.6-8.
- Vera failed to update the firm's web CRD information. Tr. 391 at L.14-16.

Other witnesses, including Konig and Vera's successor as CCO, Darius Lashkari, knew of Aguilera's concerns about Vera's performance. Konig testified Aguilera did not think Vera "effectively did his work as a chief compliance officer." Tr. 573 at L.11-13. According to Konig, supervisory procedures and licenses were in disarray at the time of FINRA's audit. Tr. 594 at L.2-12. Konig also witnessed fighting between Vera, Aguilera and Acosta. Tr. 573 at L.5-8; Tr. 595 at L.4-7.

Similarly, Lashkari understood Aguilera had concerns about Vera's work. Tr. 450 at L.23 to 451 at L.9. Lashkari observed Vera's lack of performance, noting for instance, that copies of the trade blotter were not in good order and Vera did not initial them. Tr. 460 at L.21-24. In addition, Lashkari observed Vera's compliance files were sloppy, making it difficult for the firm to be compliant. Tr. 451 at L.10 to 452 at L.12.

Aguilera admitted that as a result of Vera's performance problems, she wanted to fire him on three occasions in 2008, but did not after consulting with Neves and Acosta. Tr. 391 at L.17 to 392 at L.6; Tr. 678 at L.4 to 681 at L.7.

Aguilera claimed she could not supervise Vera's work because she was not in the office due to her son's medical condition. Tr. 379 at L.12-18. Rather than monitor Vera's work herself, Aguilera outsourced all compliance supervision to Landers, who conducted reviews only two to three times a year. Tr. 376 at L.12 to 378 at L.21; Tr. 681 at L.24 to 682 at L.24. Aguilera admitted she relied on the outside compliance consultant to ensure the accuracy of Vera's blotter reviews. Tr. 373 at L.11-17.

Aguilera also claimed that beginning in June 2008, Konig was also responsible for reviewing Vera's compliance work. Tr. 369 at L.25 to 370 at L.24. According to Aguilera, Konig became Vera's direct supervisor. Tr. 379 at L.5-10; 678 at L.1-3. However, no other witnesses observed that Konig had this responsibility. According to Vera, Konig never participated in regulatory or compliance discussions and did not review the trade blotter. Tr. 498 at L.1-8; Tr. 499 at L.13-15. Konig confirmed he had no responsibility for fixed income trading. Tr. 567 at L.17-21. Luna also testified he did not go to Konig about trading. Tr. 240 at L.22-23. Lashkari observed Konig did not take part in making decisions. Tr. 449 at L.3-13.

VIII. THE DIVISION'S EXPERT WITNESS CONCLUDED AGUILERA FAILED TO REASONABLY SUPERVISE

The report of our expert, David E. Paulukaitis, shows Aguilera failed to detect the excessive markups charged in the structured note transactions at issue because she failed to reasonably fulfill her supervisory responsibilities as President of LatAm.

A. Paulukaitis' Qualifications

Paulukaitis is a Managing Director with Mainstay Capital Markets Consultants, Inc. ("Mainstay"). DX 96 at 1. At Mainstay, Paulukaitis provides consulting services, principally to broker-dealers, focusing on regulatory compliance in the areas of supervision, supervisory controls, and internal compliance systems. DX 96 at 2. Paulukaitis has a BSBA (Finance) from the University of Alabama. DX 96, *Curriculum Vitae* at 2.

Prior to joining Mainstay in 2005, Paulukaitis spent 23 years at the NASD, beginning as an examiner and eventually being promoted to Associate District Director in 1994 in the Atlanta office. DX 96 at 3. *See also* Exhibit 1 at 1-2. While employed at the NASD, Paulukaitis

participated in approximately 100 broker-dealer examinations and dealt with issues such as compliance, operations, and supervision. DX 96, NASD Employment Summary at 1.

Paulukaitis has an extensive history of serving as an expert witness in approximately 90 NASD/FINRA arbitrations, as well as state enforcement proceedings and Commission administrative proceedings. DX 96, Exhibit 2.

B. Paulukaitis' Findings Show Aguilera Failed to Reasonably Supervise Neves and Luna

1. Aguilera's Supervisory Responsibilities

Paulukaitis found that by virtue of her position as President of LatAm, Aguilera had ultimate supervisory responsibility for the activities of LatAm and its registered representatives. DX 96 at 6. Paulukaitis, however, found Aguilera failed to act properly as President. For instance, Aguilera failed to address Neves' conflict of interest as both an officer of Atlantica Asset Management and a registered representative at LatAm. DX 96 at 14. Despite engaging LatAm's outside counsel to draft a consent form for the customers to sign, Aguilera knew the customers never signed the forms. DX 96 at 14.

In addition, broker-dealers have a duty to ensure the prices they charge customers on securities transactions are fair and reasonable. DX 96 at 15. However, Aguilera was unaware of how to determine whether the markups or markdowns on structured note transactions were reasonable. DX 96 at 16. In fact, Aguilera did not appear to understand much about structured notes, despite the fact that they accounted for a significant portion of LatAm's revenues during the relevant time period. DX 96 at 17.

Paulukaitis found that because of the significant size of the markups at issue in this matter (far in excess of FINRA's five percent guideline), even a cursory review of the firm's trade blotters by Aguilera would have identified the excessive markups and should have raised serious concerns

warranting detailed inquiry. DX 96 at 7. *See also* DX 96 at 18, 20. Thus, her failure to identify and question the transactions represented a failure to supervise. DX 96 at 20.

2. Aguilera's Delegation of Supervisory Responsibilities to Vera

In addition, Aguilera had a duty to ensure Vera adequately carried out any supervisory responsibilities she delegated to him. DX 96 at 6. Delegation of supervisory responsibility is reasonable when: (1) the person to whom the responsibility is delegated has sufficient knowledge and experience to perform the functions satisfactorily, and (2) the person delegating the responsibility takes reasonable steps to ensure the delegated functions are performed in a reasonable manner. DX 96 at 10-11.

Paulukaitis evaluated Vera's experience and found that, based on his qualifications, Aguilera's original delegation of supervisory responsibility appeared reasonable. DX 96 at 11. However, because she failed to test the adequacy of Vera's reviews of the trade blotters, her delegation became unreasonable. DX 96 at 12. Paulukaitis found "no evidence that Aguilera ever attempted to confirm in any way that the reviews conducted by Vera were sufficiently comprehensive to detect and prevent violations of securities industry rules or regulations." DX 96 at 12. Similarly, Aguilera could not reasonably rely on reviews conducted by an outside consultant without testing their adequacy in some way. DX 96 at 12. Paulukaitis found no evidence that Aguilera took any steps to test the adequacy of Landers' monitoring of Vera's performance. DX 96 at 12.

Additionally, because Aguilera developed concerns about Vera's performance of his duties and failed to more closely monitor the adequacy or reasonableness his work, particularly with respect to his review of the trade blotters, her delegation to Vera constituted a failure to fulfill her supervisory responsibilities. DX 96 at 7,19. Specifically, after Aguilera considered firing Vera in

June or July 2008, she had a duty "to affirmatively satisfy herself that the supervisory functions she had delegated to him were being adequately performed." DX 96 at 13. Paulukaitis found no evidence that Aguilera more closely scrutinized Vera's work after developing these concerns. DX 96 at 14.

IX. AGUILERA PROFITED FROM THE FRAUDULENT SCHEME

LatAm's significant increases in revenue translated into significant income for Aguilera. Tr. 666 at L.3-5. Prior to Neves joining LatAm, Aguilera received a small salary from LatAm of only $17,700 in 2005 and $39,000 in 2006. DX 79; DX 81. During the relevant period, Aguilera earned a regular salary, paid in increments twice a month from Paychex, Inc.. Tr. 385 at L.9 to 386 at L.11; DX 107; DX 105. In 2008, Aguilera earned $236,000 in salary. DX 107. In 2009, Aguilera earned $307,000 in salary. DX 107. In total, Aguilera earned $597,000 in regular salary payments while serving as LatAm's President beginning in October 2007. Tr. 355 at L.17-19; DX 103; DX 104; DX 107.

Aguilera received compensation from LatAm in addition to regular salary payments during the period in which Neves and Luna carried out their fraudulent scheme. According to LatAm's bank records, Aguilera received 1,019,384.76 in non-salary payments during the period in which LatAm's revenue increased as a result of the fraudulent scheme.[18] Tr. 355 at L.20-22; DX 107; DX 103; DX 104.

Aguilera also admitted to receiving additional funds from LatAm totaling $224,378 for various home improvements, including building a home office. Tr. 422 at L.18 to 428 at L.15. Specifically, in January 2009, Aguilera signed a $110,000 check to a construction company associated with Neves to build a home office. Tr. 423 L.18 to 425 at L. 9; DX 104, Check 2322.

[18] In addition, in 2007, Aguilera received a $275,000 loan from Neves, of which she returned only $75,000. Tr. 383 at L.2-7.

In March 2009, Aguilera also authorized four wires from LatAm's bank account totaling approximately $114,378 to three companies for home improvements.[19] Tr. 425 at L.10 to 428 at L.3; Tr. 429 at L.14-16; DX 104, March 2009 statement at 3-4.

X. LEGAL DISCUSSION

A. Neves and Luna's Antifraud Violations

Section 17(a) of the Securities Act prohibits material misrepresentations or omissions in the offer or sale of securities. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit material misrepresentations or omissions made in connection with the purchase or sale of securities. These provisions also prohibit, among other things, any "device, scheme or artifice to defraud" and any "course of business which operates or would operate as a fraud." 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b).

Neves and Luna directly violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 by knowingly engaging in a fraudulent scheme to charge undisclosed excessive markups in structured note transactions by using offshore nominee accounts as intermediaries before selling the notes to the end customer. Neves and Luna also made material misrepresentations and omissions to LatAm's customers by altering the pricing information in the note's term sheets in order to conceal the fraudulent scheme.

1. Neves and Luna Engaged in a Fraudulent Scheme to Charge Excessive Markups

Exchange Act Rule 10b-5(a) and (c) make it unlawful to, in connection with the purchase or sale of securities, "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." Sections 17(a)(1) and (3) prohibit the same conduct in the offer or sale of securities.

[19] Aguilera authorized the payments for her home improvements just months following the two structured note transactions involving the CVC in November and December 2008. DX 72.

Courts have interpreted these provisions to create what is known as "scheme liability." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008); *United States v. Finnerty*, 533 F.3d 143, 148 (2nd Cir. 2008); *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 111-12 (2nd Cir. 1998); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1471-72 (2nd Cir. 1996); *SEC v. Lee*, 720 F. Supp. 2d 305, 334 (S.D.N.Y. 2010); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336-37 (S.D.N.Y. 2004); *In re AOL Time Warner, Inc. Sec. and ERISA Litig.*, 381 F. Supp. 2d 192, 217, 229 (S.D.N.Y. 2004).

A person violates Sections 17(a)(1) and (3) and Rule 10b-5(a) and (c) upon committing any manipulative or deceptive act that is part of a fraudulent or deceptive course of conduct, or is in furtherance of a scheme to defraud. *SEC v. Durgarian*, 477 F. Supp. 2d 342 (D. Mass 2007). A person is liable for a fraudulent scheme if he has "engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *SEC v. Patel*, 2009 WL 3151143 at *9 (D.N.H. Sept. 30, 2009) (quoting *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006)). The sections prohibit a wide range of manipulative and deceptive activities. *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977) ("No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices").

While claims for engaging in a fraudulent scheme and for making fraudulent statements or omissions are distinct claims, with distinct elements, a person may be liable for all three sub-sections of Section 17(a) and Rule 10b-5 based on the same misrepresentations and omissions. Liability may arise out of the same set of facts where the Division, as we do here, alleges that Neves and Luna "undertook a deceptive scheme or course of conduct that went beyond the misrepresentations." *In re Alstom SA*, 406 F. Supp. 2d 433, 475 (S.D.N.Y. 2005); *SEC v. Pimco*

Advisors Fund Management LLC, 341 F. Supp. 2d 454, 467 (S.D.N.Y. 2004) (scheme liability may exist where the fraudulent activity involved *some* conduct other than participation in a scheme to make a material misrepresentation); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) (defendant may be liable as part of a fraudulent scheme "when the scheme also encompasses conduct beyond misrepresentations or omissions").

The mere fact that material misrepresentations or omissions are made as part of the scheme does not preclude claims that the scheme involved a violation of Section 17(a)(1) and (3) of the Securities Act and Rule 10b-5(a) and (c) of the Exchange Act. *United States v. Bilotti*, 380 F.2d 649, 657 (2nd Cir. 1967) (nondisclosures may be part of a scheme to defraud); *United States v. Rybicki*, 354 F.3d 124, 146 n.20 (2nd Cir. 2003) (quoting *United States v. Autuori*, 212 F.3d 105, 115 (2nd Cir. 2000) ("the phrase 'scheme or artifice to defraud' requires 'material misrepresentations'")). *See also Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972) (scheme liability under Rule 10b-5(a) and (c) established even though case was one "involving primarily a failure to disclose").

Charging customers excessive markups (or markdowns) without proper disclosure is fraudulent conduct and violates Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5. *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1469 (2nd Cir. 1996). Sales of securities by broker-dealers to their customers carry an implied representation that the prices charged in a transaction are reasonably related to the process charged in an open and competitive market. *Id.* Whether a markup is excessive must be determined on a case-by-case basis, but generally, a markup is deemed excessive "when it bears no reasonable relation to the prevailing market price." *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 190 (2nd Cir. 1998) (quoting *Bank of Lexington & Trust Co. v. Vining-Sparks*

Securities, Inc., 959 F.2d 606, 613 (6th Cir. 1992)). Generally, markups in excess of five percent above the prevailing market price for a security are considered excessive and unfair. FINRA Rule 2440, IM-2440-1 (Mark-Up Policy).

Furthermore, transactions for debt securities are typically assessed markups lower than the five percent guideline. *See In re Application of Inv. Planning, Inc.*, Exchange Act Release No. 34-32687, 51 S.E.C. 592, 1993 WL 289728 at *1 (July 28, 1993) ("[I]t has long been recognized that debt securities markups normally are lower than those for equities, and that, in appropriate circumstances, markups under [five percent] may be subject to sanction."). *See also* FINRA Rule IM-2440-1 (Additional Mark-Up for Transactions in Debt Securities) (prevailing market price for a debt security is established by referring to the dealer's contemporaneous cost as incurred, or contemporaneous proceeds as obtained). The Commission previously concluded that undisclosed markups of more than ten percent above the prevailing market price are fraudulent in the sale of equity securities, and markups on debt securities generally are expected to be lower than markups on equity securities. *Zero Coupon Securities*, Exchange Act. Rel. No. 34-24368, fn. 14-15 (April 21, 1987).

Beginning in July 2008, Neves and Luna engaged in at least eight transactions in which they substantially increased the fees they charged to the Brazilian Funds and the CVC on structured note transactions by passing them through nominee or affiliated accounts, allowing them to charge additional markups with each transaction. These charges ranged between 19 and 67 percent. Neves and Luna did not disclose to the customers they first sold the notes, which were structured pursuant to specific customer investment objectives, to nominee or affiliated accounts. As described below, in furtherance of the scheme, Neves and Luna altered term sheets that misrepresented or omitted material pricing information in order to conceal the actual prices

of the notes.

2. Neves and Luna Made Material Misstatements and Omissions by Altering Term Sheets

To establish a violation of Section 17(a)(2) of the Securities Act and Rule 10b-5(b), the Division must show: (1) a misrepresentation or omission (2) that is material (3) made with scienter (4) in the offer of or in connection with the purchase or sale of a security. *SEC v. Chemical Trust*, 2000 WL 33231600 at *9 (S.D. Fla. Dec. 19, 2000); *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992). As a fifth element, we also must establish the use of interstate commerce, the mail, or a national securities exchange. *SEC v. Corporate Relations Group*, 2003 WL 25570113 at *7 (M.D. Fla. March 28, 2003).

During the relevant time period, Neves and Luna knowingly provided representatives of their customers with altered terms sheets via email in order to conceal the markups. The term sheets either omitted or inflated the pricing information. Neves directed Luna to alter these term sheets and approved the alterations before Luna sent them to the customer's representatives, thereby misrepresenting or omitting material pricing information in furtherance of the fraudulent scheme that resulted in defrauding LatAm's customers out of tens of millions of dollars. Providing customers with fictitious instruments constitutes a material misrepresentation. *SEC v. Glanz*, 1995 WL 562180, at *3 (SDNY Sept. 20, 1995) (failure to inform investor that bank notes were fictitious violated Section 10(b)).

A misrepresentation or omitted fact is material "if a reasonable investor would have viewed the misrepresentation or omission as 'having significantly altered the total mix of information made available.'" *Hoff v. Popular, Inc.*, 727 F. Supp. 2d 77, 88 (D. Puerto Rico 2010) (*citing Gross v. Summa Four, Inc.*, 93 F.3d 987, 992 (1st Cir. 1996)), *quoting Basic, Inc., v. Levinson*, 485 U.S. 224, 231-34 (1988). Neves and Luna's alteration of the notes' term sheets was material because pricing of

the notes, particularly prices that were inflated between 19 and 67 percent, are facts that any reasonable investor would want to know in determining whether to buy or sell the notes.

3. Neves and Luna Acted with the Highest Degree of Scienter

Courts have defined scienter as a state of mind embracing intent to deceive, manipulate or defraud.[20] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Numerous courts have concluded scienter may be established by a showing of knowing misconduct or severe recklessness. *SEC v. Carriba Air*, 681 F.2d 1318, 1322-24 (11th Cir. 1982); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 38 (1st Cir. 2002); *Mississippi Public Employees' Retirement Sys. v. Boston Scientific Corp.*, 523 F.3d 75, 85 (1st Cir. 2008); *Greebel v. FTP Software*, 194 F.3d 185, 203 (1st Cir. 1999).

Neves and Luna acted with the highest degree of scienter by deliberately orchestrating a scheme to mark up the price the structured notes negotiated for specific customers. As part of the scheme, Neves and Luna used nominee accounts they controlled as intermediaries, allowing them to charge additional markups with each transaction. The scheme resulted in the Brazilian funds and the CVC paying millions of dollars in excessive prices for the notes. Neves and Luna concealed the markups by altering term sheets which they knowingly provided to the customers' representatives. Neves earned millions in commissions and the nominee accounts profited substantially.

4. Neves and Luna's Antifraud Violations Were In Connection With the Purchase or Sale of Securities

To be liable, Neves and Luna must have engaged in fraudulent activity in the offer of or in connection with the purchase or sale of securities. Although the term "in connection with" is not

[20] Scienter is only required to prove violations of Sections 10(b) and 17(a)(1). Violations of Sections 17(a)(2) and (3) of the Securities Act do not require a finding of scienter. *Aaron v. SEC*, 446 U.S. 680, 697 (1980). The Division may establish violations of these sections by showing negligence. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3rd Cir. 1997). Because Neves and Luna demonstrated scienter, our discussion assumes that by establishing violations of Sections 10(b) and 17(a)(1), we have also demonstrated they had the requisite state of mind to violate Sections 17(a)(2) and (3).

defined in Section 10(b) or Rule 10b-5, the U.S. Supreme Court has consistently embraced an expansive reading of this requirement. *SEC v. Zandford,* 535 U.S. 813 (2002); *SEC v. Pirate Investor LLC,* 580 F.3d 233, 244 (4th Cir. 2009); *SEC v. Woolf,* 835 F. Supp. 2d 111, 119-22 (E.D. Va. 2011).

The Supreme Court has held Section 10(b) should be "construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *Zandford*, 535 U.S. at 819. Under that standard, "the 'in connection with' element is met whenever fraudulent activity . . . touches or coincides with a securities transaction." *Woolf*, 835 F. Supp. 2d at 119, *citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 72 (2006).

Neves and Luna's fraudulent scheme involved the purchase and sale of structured notes, negotiated on behalf of the Brazilian funds and the CVC for their investment objectives. The definition of security under Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act includes "any note." The Division's expert described structured notes as debt instruments of their issuer, similar to conventional notes and bonds, but which have returns determined based on the relative performance of some other financial instrument or market index. DX 96 at 4. Thus, Neves and Luna's excessive markup scheme and misrepresentations and omissions were in connection with the purchase and sale of securities.

B. Neves and Luna Aided and Abetted LatAm's Violations of Section 15(c)(1) of the Exchange Act

Section 15(c)(1)(A) of the Exchange Act prohibits any broker or dealer from using the mails or other means of interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security . . . by means of any manipulative, deceptive, or other fraudulent device or contrivance." Scienter is required to establish a violation of Section

15(c)(1)(A). *SEC v. Dowdell*, 2002 WL 424595 at *6 (W.D. Va. Mar, 14, 2002) ("The same scienter requirement attributed to Section 17(a)(1) and Section 10(b) violations applies to 15(c)(1) violations.").

Individuals may be held liable for willfully aiding and abetting violations of the Exchange Act and its rules if: "1) another party has committed a securities law violation; 2) the accused aider and abetter had a general awareness that his role was part of an overall activity that was improper; and 3) the accused aider and abetter knowingly and substantially assisted the principal violation." *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir. 1980). To act willfully merely requires intent to do the act which constitutes the violation. *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000).

LatAm, a registered broker-dealer, willfully violated Section 15(c) by charging undisclosed excessive markups to its customers in structured note transactions conducted via its riskless principal account as described in the preceding sections. LatAm first sold the notes, intended for the Brazilian funds and the CVC, to nominee accounts. LatAm also provided altered term sheets to these customers in order to conceal the markups. Neves and Luna's scienter, as discussed in Section X(A)(3) above, can be imputed to LatAm. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972); *In the Matter of Del Mar Financial Servs.*, 2001 WL 919968 at *23 (Aug. 14, 2001).

Neves and Luna aided and abetted LatAm's violations because they were aware of their roles in the fraudulent scheme. As described in Section III above, Luna testified as to Neves' general awareness in the scheme including Neves' participation in: negotiating the structured notes; directing Luna to first sell the notes to intermediary accounts; determining the amount of the markups; and approving the altered term sheets to send to the customers to conceal the fraud.

Luna also testified to his general awareness by describing his role in assisting Neves in conducting the transactions and altering the term sheets to conceal the markups. Based on their orchestration of the fraudulent scheme and their misrepresentations and omissions made to LatAm's customers resulting in millions in excessive charges, Neves and Luna knowingly and substantially assisted in LatAm's violations.

C. Aguilera Failed to Reasonably Supervise Neves and Luna

Section 15(b)(4)(E) of the Exchange Act provides for the imposition of sanctions against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6) parallels Section 15(b)(4) and provides for the imposition of sanctions against persons associated with a broker or dealer and who fail reasonably to supervise pursuant to Section 15(b)(4)(E). The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." *In the Matter of Smith Barney, Harris Upham & Co.*, Exchange Act Release No. 21813, 1985 SEC LEXIS 2051 at *22 (Mar. 5, 1985) (settled case).

Broker-dealers must not only adopt effective policies and procedures for supervision, but must also have systems to implement their supervisory procedures. *Quest Strategies, Inc.,* Exch. Act Rel. No. 44935, 2001 WL 1230619 at *5 (Oct. 15, 2001) (Commission opinion); *Consolidated Investment Services, Inc.*, Exch. Act Rel. No. 36687, 1996 WL 20829 at *3 (Jan. 5, 1996) (Commission opinion); *In the Matter of Gary E. Bryant*, Exch. Act. Rel. No. 32357, 1993 WL 183715 at *6 (May 24, 1993) (Commission opinion) (president failed to establish mechanism to ensure compliance with firm's procedures, including designating specific functions to supervisors).

In particular, broker-dealers must provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised. *In the Matter of Mabon, Nugent & Co.*, Exchange Act Release No. 19424, 1983 SEC LEXIS 2641 at *14 (Jan. 13, 1983) (settled case, the Commission subsequently vacated the order but adhered to this principle, *see* Exchange Act Release No. 27301, 1989 SEC LEXIS 1865 (Sept. 27, 1989)). Moreover, as the Division's expert stated in his report, the responsibility of broker-dealers to supervise their employees is critical to the federal regulatory scheme and "adequate supervision has direct impact on maintaining the integrity of securities markets." DX 96 at 7.

1. The President is Ultimately Responsible for Supervision

A broker dealer's President has ultimate responsibility for the firm's compliance. *In the Matter of Donald T. Sheldon*, 1992 SEC LEXIS 3052 (SEC Nov. 18, 1992) *aff'd*, 45 F.3d 1515 (11th Cir. 1995). "Ultimately, it is the broker-dealer's president who is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient." *Id.* at 50; *see also In the Matter of Newbridge Sec. Corp.*, 2009 WL 1684744, at *51 (June 9, 2009); *In the Matter of Robert Prager,* 2005 WL 1584983 at *11, n.45 (July 6, 2005); *In the Matter of Michael T. Studer*, 2004 WL 2735433 at *6 (Oct. 4, 2004); *In the Matter of Kochcapital, Inc.*, 1992 WL 394580 at *5 (SEC Dec. 23, 1992); *In re Montelbano*, 2003 WL 147562 at *8 (SEC Jan. 22, 2003); *In the Matter of Signal Secs. Inc.,* 2000 SEC LEXIS 2030 at *22 (SEC Sept. 26, 2000); Paulukaitis Report DX 96 at 8.

Accordingly, as President, Aguilera maintained ultimate supervisory responsibility at LatAm. Tr. 372 at L.3-8; *see also* DX 17; DX 96 at 9. As described in Section V above, Aguilera

had responsibility for, among other things, supervising all registered representatives at LatAm, approving wire transfers and commission payments, approving the trade blotters, and ensuring the fairness of markups. LatAm's WSPs included specific procedures to follow in order to ensure the fairness of markups and commissions from a review of the firm's trade blotter or order tickets. DX 21 at 27.

Aguilera, however, failed reasonably to discharge her duties to effectively implement LatAm's procedures that sought to ensure the fairness of markups charged by Neves and Luna to LatAm's customers. As described in Section VI above, Aguilera failed to review Neves and Luna's trading activity despite knowing of: (1) the substantial rise in LatAm's revenues after Neves began trading structured notes; (2) the payment of millions of dollars in commissions to Neves; and (3) Neves' potential conflict in serving as both a registered representative for the Brazilian funds and their investment adviser.

Aguilera failed to implement LatAm's markup fairness policy even after Vera presented concerns about specific structured note transactions to her and after questioning Luna about markups. If Aguilera had reasonably implemented the procedures relating to markups, it is likely she would have detected that the markups Neves and Luna charged were excessive. Accordingly, Aguilera failed to reasonably supervise Neves and Luna.

2. Aguilera Did Not Reasonably Delegate Supervisory Authority to the Chief Compliance Officer

Senior managers retain ultimate supervisory responsibility (i) unless and until they reasonably and effectively delegate particular functions to another person in that firm, and (ii) neither know nor have reason to know that such person's performance is deficient. *Sheldon*, 1992 SEC LEXIS 3052 at *50; *Newbridge*, 2009 WL 1684744 at *54-56. In making the assessment as

to whether the delegation is reasonable and effective, the Commission has articulated a number of guiding principles, including: (a) the person delegated to must have adequate experience and qualifications; (b) there must be a clear delineation of supervisory responsibilities where more than one supervisor is involved; (c) the firm must have adequate written supervisory procedures and specific guidelines; (d) there must be adequate follow-up and review; and (e) supervisors must independently verify their employee's assertions. Thus, a manager with ultimate supervisory responsibility may not "delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention.... Implicit is the additional duty to follow-up and review that delegated authority to ensure it is being properly exercised. *Castle Secs. Corp.*, 53 S.E.C. 406, 412 & n.19 (1998); *Newbridge*, 2009 WL 1684744 at *53 (President and CEO failed to conduct the necessary follow-up and therefore, unreasonably delegated supervisory responsibility).

As discussed in Section V(B) above, although LatAm's supervisory procedures delegated some responsibility to Vera to review the trade blotters and evaluate the fairness of markups, Vera lacked supervisory authority over Neves and Luna.[21] Rather, according to both Vera and the firm's outside compliance consultant, Vera acted in a compliance capacity only with a duty to report concerns about markups to Aguilera.

Aguilera's delegation to Vera was unreasonable because she failed to ensure Vera properly reviewed the trade blotters and conducted an analysis concerning the fairness of markups. At the

[21] The Commission has held that employees of brokerage firms who have legal or compliance responsibilities do not become "supervisors" for purposes of Section 15(b)(4) and 15(b)(6) of the Exchange Act solely because they occupy such positions. Rather, determining if a particular person is a "supervisor" depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue. *See James J. Pasztor*, 54 S.E.C. 398, 407-408 & n.27 (1999); *John H. Gutfreund*, 51 S.E.C. 93, 112-114 (1992) (settled case, with Exchange Act Section 21(a) report of investigation).

hearing, Aguilera admitted she understood her responsibility to verify Vera's work, but that instead of verifying, she merely "trusted" his work. Tr. 703 at L.6-10. The Division's expert found "no evidence that Aguilera ever attempted to confirm in any way that the reviews conducted by Vera were sufficiently comprehensive to detect and prevent violations of securities industry rules or regulations." DX 96 at 12.

Moreover, as described in Section VII, Aguilera developed specific concerns about Vera's performance beginning in 2008. If the President of the firm has reason to know her delegation of supervisory responsibility was ineffective or if she becomes aware the supervisor is not properly executing their compliance duties, she is charged with remedying the situation. *In the Matter of First Capital Strategists*, 1997 WL 458704 at *7 (SEC Aug. 13, 1997).

Aguilera developed a number of concerns about Vera's performance, including that he was absent from LatAm's offices on a regular basis and that he failed to maintain complete files, among other things. As described in Section VII above, her concerns about Vera's deficient performance were so strong she considered firing Vera three times, but failed to do so. The Division's expert found that, in light of her concerns about Vera's performance, Aguilera had an affirmative duty to ensure the supervisory functions she delegated to him were being adequately performed. DX 96 at 13. However, rather than monitor his work herself, she relied on others, including outsourcing the job to an outside compliance consultant, to verify Vera's work. Therefore, Aguilera's delegation to Vera was not reasonable.

In summary, as President, Aguilera was ultimately responsible for supervision at LatAm and any delegation of supervisory authority to Vera was not reasonable because she was on notice that her delegation was deficient. For all the reasons set forth above, Aguilera did not reasonably supervise Neves and Luna within the meaning of Section 15(b)(4)(E) as incorporated by reference

in Section 15(b)(6) of the Exchange Act, with a view to detecting and preventing Neves and Luna's violations of the securities laws.

X. REMEDIES

A. Aguilera Should Be Barred From Association With a Broker Dealer In a Supervisory Capacity

Under Section 15(b)(6) of the Exchange Act, the Commission is authorized to bar a person from associating with a broker dealer in a supervisory capacity if it is in the public interest, where a person was associated with a broker dealer at the time of the misconduct and where the person has failed reasonably to supervise with a view to preventing violations by a person subject to his supervision.

The criteria for making public interest determinations are similar to the criteria for determining whether to issue a cease-and-desist order. *In the Matter of Stephen J. Horning*, 2006 WL 2682464, at *12 (citations omitted), *aff'd*, 2009 WL 1812765 (D.C. Cir. 2009). The factors for considering whether a cease-and-desist order is warranted are very similar to the factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), with added emphasis on the possibility of future violations. *In the Matter of KPMG Peat Marwick, LLP*, AP File No. 3-9500, 2001 WL 47245 at *23-26 (Jan. 19, 2001), *aff'd sub nom KPMG v. SEC,* 289 F.3d 109 (D.C. Cir. 2002). The *Steadman* factors are: (1) the egregiousness of a respondent's actions; (2) the isolated or recurrent nature of his securities law infractions; (3) the degree of scienter involved; (4) the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood the respondent's occupation will present opportunities for future violations. *Steadman*, 603 F.2d at 1140. No one factor controls. *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996); *Newbridge*, 2009 WL 1684744 at *59. The severity of the sanction

appropriate in a particular case depends on the facts of the case and the value of the sanction in preventing recurrence. *Berko v. SEC*, 316 F.2d 137, 141 (2nd Cir. 1963); *In the Matter of Leo Glassman*, AP File No. 3-3758, 1975 WL 160534 at *2 (Dec. 16, 1975).

The Division submits that, considering the conduct described above, it is in the public interest to bar Aguilera from being associated with a broker dealer in a supervisory capacity permanently. *See, e.g., Stephen J. Horning*, 2006 WL 2682464 at *20 (imposing permanent bar from association in a supervisory capacity where firm president "does not understand that he failed to discharge basic supervisory responsibilities and, since he does not accept that his supervision was deficient, there is a high probability that he would repeat these actions"); *In the Matter of Sandra Logay*, 2000 WL 95098 at *21-24 (SEC Jan. 28, 2000) (ALJ Decision) (permanent bar from association in a supervisory capacity); *In the Matter of John A. Carley*, 2008 WL 268598 at *22 (Jan. 31, 2008) (same).

Here, all of the factors cited above demonstrate it is in the public interest for the Law Judge to bar Aguilera from associating in a supervisory capacity. With regard to the first two factors, Aguilera's actions were egregious. The evidence shows Aguilera failed to implement the firm's procedures relating to markups for nearly two years, resulting in substantial losses by the affected customers. Aguilera, however, profited substantially from the increased revenues the fraud generated while never asking any questions about how that revenue was generated.

The third factor, the degree of scienter involved, weighs in favor of a permanent bar. Aguilera was extremely reckless in her supervisory duties by turning a blind eye to the substantial revenue increase at the firm generated by Neves and Luna's trading of structured notes. Aguilera failed to inquire about the revenue increase or whether Neves and Luna's trading of structured notes complied with the firm's procedures. In addition, despite knowing that Vera failed to

perform adequately as CCO, Aguilera failed to fire him or take any additional efforts to monitor his work.

The fourth and fifth factors also merit a permanent bar. Despite overwhelming evidence to the contrary, Aguilera refused to acknowledge she had any responsibility as LatAm's President with respect to the fraudulent conduct. Rather, she continues to cast blame on nearly everyone else associated with the firm, claiming she is a victim. Thus, she has not given any assurances against future supervisory failure. Her complete abdication of any supervisory responsibility during the period in which the fraud occurred in the face of the substantial revenues generated by the fraud presents a significant likelihood that she would commit similar violations in the future.

B. Aguilera Should Be Barred from the Industry

Section 15(b) of the Exchange Act authorizes the Commission to censure, place limitations on the activities or functions of a person, suspend for a period up to twelve months, or bar from association with a broker or dealer, someone associated with a broker or dealer who violated a provision of the statute, where it is in the public interest to do so. Section 15(b)(6)(A)(i) incorporates Section 15(b)(4)(e) of the Exchange Act to permit sanctions against a person that "has failed reasonably to supervise, with a view to preventing violations of the provisions of [the securities] statutes, rules and regulations, another person who commits such a violation, if such other person is subject his supervision."

The same six *Steadman* factors discussed above apply to the consideration of a broker-dealer and related industry bars against Aguilera. Neves and Luna's egregious fraudulent violations and Aguilera's failure to supervise over a prolonged period of time caused substantial losses to the affected customers, including pension funds. While Aguilera is not currently employed in the industry, she may re-enter it at any time. Given the nature of the violations and

her failure to acknowledge any responsibility or provide assurances against future misconduct, Aguilera should be permanently barred, or at the very least suspended, from the industry. *Stephen J. Horning*, 2006 WL 2682464 at *13-14 (in addition to a permanent supervisory bar, the Commission also issued a 12 month suspension from association with a broker-dealer); *In the Matter of Consolidated Investment Services, Inc.*, 1996 WL 20829 at *6 (Jan. 5, 1996) (Commission barred President from association with any broker-dealer with right to reapply after one year as a result of his failure to reasonably supervise).

Here, the Division requests that the Law Judge collaterally bar Aguilera from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO"). Section 925 of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the Commission to impose collateral bars in proceedings pursuant to Section 15(b) of the Exchange Act by amending Section 15(b)(6)(A) to "bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization." P.L. 111-203 (July 21, 2010). The collateral bars Dodd-Frank authorized prohibit securities professionals found to have violated the securities laws from associating with any of the Commission-regulated entities specified in amended Exchange Act Section 15(b)(6)(A).

The Dodd-Frank Act's collateral bar provisions are applicable here even though the statute was not enacted until July 21, 2010, after the date of the conduct at issue. *In the Matter of John W. Lawton*, AP File No. 3-14162, 2012 WL 6208750 at *6-10 (Dec. 13, 2012) (Commission concluded Dodd-Frank collateral bar was not impermissibly retroactive and imposed such a bar).

Law Judges in other matters against principals of regulated entities have imposed collateral bars after making post-hearing findings of fraud. *See, e.g., In the Matter of Montford and Co.*, AP File No. 3-14536, 2012 WL 1377372 at *21 (April 20, 2012); *In the Matter of Gualario and Co.*, AP File No. 3-14340, 2012 WL 627198 at *18 (Feb. 14, 2012). The Commission imposed a collateral bar against a supervisor who committed supervisory violations that failed to stop a registered representative's fraudulent conduct. *In the Matter of Eric J. Brown, et al.*, AP File No. 3-13532, 2012 WL 625874 at *13 (Feb. 27, 2012).

A collateral bar is an appropriate remedy against Aguilera. Her egregious supervisory violations resulted in a prolonged period of fraudulent conduct at LatAm and substantial losses to the firm's customers. Aguilera's conduct clearly warrants collaterally barring her from association with any regulated entity.

C. Disgorgement

Aguilera profited from the fraudulent markup scheme by receiving substantial compensation as a result of the revenues generated from the fraud. Consequently, it would be inequitable to allow her to keep ill-gotten funds.

Disgorgement is an equitable remedy designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *Manor Nursing Centers*, 458 F.2d at 1103-1104 ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable"). The Law Judge "has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *First Jersey*, 101 F.3d at 1474.

The Division is entitled to disgorgement "upon producing a reasonable approximation of a

defendant's ill-gotten gains." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). The [Division's] burden for showing "the amount of assets subject to disgorgement . . . is light: . . . . Exactitude is not a requirement.'" *SEC v. ETS Payphones, Inc.*, 408 F.3d 727 at 735 (11th Cir. 2005). Once the Division presents evidence reasonably approximating the amount of a respondent's ill-gotten gains, the burden of proof on the amount the respondent received shifts to the respondent. *First City*, 890 F.2d at 1232; *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1085 (D. N.J. 1996), *aff'd* 124 F.3d 449 (3rd Cir. 1997). The respondent is then "obliged clearly to demonstrate that the disgorgement figure [is] not a reasonable approximation." *First City*, 890 F.2d at 1232.

In addition to disgorgement, pre-judgment interest is equitable in these circumstances. Aguilera has enjoyed access to her ill-gotten gains over a period of time. To require payment of prejudgment interest is consistent with the equitable purpose of the remedy of disgorgement. *Hughes Capital*, 917 F. Supp. at 1090.

Pre-judgment interest should be calculated in accordance with the delinquent tax rate established by the Internal Revenue Service, 26 U.S.C. § 6621(a)(2), and assessed on a quarterly basis, from September 30, 2009, the last date of the relevant period, to April 19, 2013. The rate of interest "reflects what it would have cost to borrow money from the government and therefore reasonably approximates one of the benefits the defendant received." *First Jersey*, 101 F. 3d at 1476.

The Division presented at the hearing evidence demonstrating Aguilera received ill-gotten gains in the form of non-salary payments as a result of the revenue increases generated by the fraud. Prior to Neves' arrival at LatAm, Aguilera's compensation was minimal. However, as revenues increased, Aguilera's compensation increased. Tr. 666 at L.3-5. Apart from regular

salary payments during the period in which Neves and Luna charged excessive markups, Aguilera received $1,019,384.76 in additional payments, as well as another $224,377 in funds used for improvements to her home.[22] It would inequitable to allow Aguilera to keep the portion of her compensation that stemmed from revenues generated from the fraudulent conduct.

Specifically, Aguilera should disgorge the compensation paid separate from her regular salary, totaling $1,243,762.76. In addition, Aguilera should pay prejudgment interest of $161,311.99, calculated from September 1, 2009 to April 19, 2013.[23] 17 C.F.R. § 201.600(a).

D. Civil Penalty

The Division also seeks the imposition of a civil penalty against Aguilera under Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). The purpose of civil penalties is to punish the individual violator as well as deter future violations. *SEC v. Palmisano,* 135 F.3d 860, 866 (2nd Cir. 1998); *SEC v. K.W. Brown*, 555 F. Supp. 2d 1275, 1314 (S.D. Fla. 2007); *SEC v. Tanner,* 02 Civ. 0306, 2003 WL 21523978 at *2 (S.D.N.Y. July 3, 2003); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 17 (D.D.C. 1998); *SEC v. Moran,* 944 F. Supp. 286, 296 (S.D.N.Y. 1996). As set forth in H.R. Report No. 616 - the Report of the Committee on Energy and Commerce of the U.S. House of Representatives on the Remedy Act,

> [T]he money penalties proposed in this legislation are needed to provide financial disincentives to securities law violations other than insider trading ... Disgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud .... The Committee therefore concluded that authority to seek or impose substantial money penalties, in addition to the disgorgement of profits, is necessary for the deterrence of securities law violations that otherwise may provide great financial returns to the violator.

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[22] Aguilera authorized the funds for her improvements in the months following the two JP Morgan structured note transactions with the CVC.

[23] A calculation of the amount of pre-judgment interest Aguilera should pay is attached to this motion as Exhibit 1.

(Citations omitted).

1990 WL 256464 *20, 1990 U.S.C.C.A.N. 1379 *1384 (Leg. Hist.), H.R. Rep. 101-616, H.R. Rep. No. 616, 101st Cong., 2nd Sess. 1990.

Section 21B(b)(1)-(3) of the Exchange Act, 15 U.S.C. § 78u-2(b)(1)-(3) provides for three tiers of penalties in administrative proceedings. Under the "First Tier," the Law Judge may impose a penalty of up to (a) $7,500 for each violation of the securities laws, or (b) the gross amount of pecuniary gain to a respondent as a result of the violation.

The "Second Tier" applies where a violation involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 77t(d). Under this tier, the Law Judge may impose a penalty of up to (i) $75,000 for each violation of the securities laws, or (ii) the gross amount of pecuniary gain to a respondent as a result of the violation.

The "Third Tier" applies when the requirements of a Second Tier penalty are present *and* the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." *Id.* Under this tier, the Law Judge may impose a penalty of up to (i) $150,000 for each violation of the securities laws, or (ii) the gross amount of pecuniary gain to a respondent as a result of the violation.[24]

The Division submits that, based on the fraudulent conduct at issue in this case, the Law Judge should impose a Third-Tier penalty. Supervisory failures "involve fraud" where they allow and are responsible in part for the success and duration of fraudulent misconduct by the persons supervised. *See In the Matter of Kolar,* 2002 WL 1393652 at * 7 (June 26, 2002); *see also Consol.*

[24] The figures for all three tiers come from the Federal Civil Penalties Inflation Adjustment Act of 1990, which adjusted the potential penalty amounts to account for inflation based on violation dates. 17 C.F.R. §§ 201.1001-1004. The figures here were updated in February 2009, in the middle of the fraudulent conduct.

Inv. Servs., 1996 WL 20829 at *6. Here, the underlying violation involves an egregious fraud committed by two registered representatives over the course of a two-year period in which Aguilera served as President of the firm. The victims of the excessive markup scheme, including two pension funds for postal workers in Brazil, were defrauded out of tens of millions of dollars. Because the fraudulent conduct resulted in substantial losses to others and pecuniary gains to Neves, Luna, and Aguilera, a Third-Tier penalty is appropriate. *Newbridge*, 2009 WL 1684744 at * 61.

The Division recommends a penalty of $150,000 against Aguilera, which represents the maximum penalty if the Law Judge treats all of Aguilera's acts over the course of two-year time period in which the fraudulent acts took place as one violation. If Aguilera had reasonably implemented the procedures relating to markups, it is likely that she would have detected the fraudulent scheme and taken appropriate measures to prevent future violations.

The $150,000 penalty the Division is seeking is reasonable given the facts and circumstances of this case. For example, it is less than the $1 million in unjust enrichment Aguilera received as non-salary compensation as a result of the fraudulent scheme. The Division could seek a much higher civil penalty if we sought a penalty for each instance of violative conduct, *e.g.,* for each structured note transaction involving excessive markups and each transmittal of altered term sheets. *See, e.g.,* Exchange Act Section 21B(b)(1) (providing for money penalties to be assessed for "each act or omission" in violation of the securities laws); *Guy P. Riordan*, AP File No. 3-12829, 2009 WL 4731397 at *22 (Dec. 11, 2009) (Commission upheld fraud finding for scheme to defraud and fraudulent course of business in municipal securities bribery scheme and imposed, among other remedies, a penalty of $500,000 – based on a calculation of a $100,000 penalty for each of five fraudulent transactions). Such a method would

result in a much higher penalty calculation – potentially amounting to over a million dollars – than the method and amount we propose. The Division, however, recognizes Aguilera's financial situation and does not seek this method of calculation or the amount of her gross pecuniary gain.

XI. CONCLUSION

For all the forgoing reasons, the Division submits that based on the evidence presented at the hearing in this matter, the Law Judge should find that Aguilera failed reasonably to supervise Neves and Luna within the meaning of Section 15(b)(4)(E) as incorporated by reference in Section 15(b)(6) of the Exchange Act. The Law Judge should impose the sanctions we request.

April 19, 2013

Respectfully submitted,

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U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Aguilera Pre-Judgment Interest

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$1,243,762.76
10/01/2009-12/31/2009	4%	1.01%	$12,539.85	$1,256,302.61
01/01/2010-03/31/2010	4%	0.99%	$12,390.93	$1,268,693.54
04/01/2010-06/30/2010	4%	1%	$12,652.18	$1,281,345.72
07/01/2010-09/30/2010	4%	1.01%	$12,918.77	$1,294,264.49
10/01/2010-12/31/2010	4%	1.01%	$13,049.02	$1,307,313.51
01/01/2011-03/31/2011	3%	0.74%	$9,670.54	$1,316,984.05
04/01/2011-06/30/2011	4%	1%	$13,133.76	$1,330,117.81
07/01/2011-09/30/2011	4%	1.01%	$13,410.50	$1,343,528.31
10/01/2011-12/31/2011	3%	0.76%	$10,159.28	$1,353,687.59
01/01/2012-03/31/2012	3%	0.75%	$10,097.18	$1,363,784.77
04/01/2012-06/30/2012	3%	0.75%	$10,172.49	$1,373,957.26
07/01/2012-09/30/2012	3%	0.75%	$10,360.99	$1,384,318.25
10/01/2012-12/31/2012	3%	0.75%	$10,439.12	$1,394,757.37
01/01/2013-03/31/2013	3%	0.74%	$10,317.38	$1,405,074.75

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
10/01/2009-03/31/2013	**$161,311.99**	**$1,405,074.75**