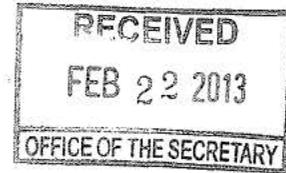


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15155

In the Matter of :

JEFFREY A. LISKOV, :

Respondent. :

**DIVISION OF ENFORCEMENT'S
MOTION FOR SUMMARY DISPOSITION
AGAINST RESPONDENT JEFFREY A. LISKOV**

The Division of Enforcement (“Division”), pursuant to Rule 250 of the Commission Rules of Practice, 17 C.F.R. § 201.250, and with leave of the Administrative Law Judge (“ALJ”), hereby files this motion for summary disposition (“Motion”) against Respondent Jeffrey A. Liskov (“Liskov” or “Respondent”). All facts necessary for summary disposition have previously been determined by the entry of a final judgment, including a permanent injunction against future violations of various provisions of the federal securities laws, against Liskov on December 12, 2012 by the United States District Court for the District of Massachusetts (“Court”) in the civil action captioned Securities and Exchange Commission v. EagleEye Asset Management, LLC and Jeffrey A. Liskov, Case No. 11-11576 (“Civil Action”). The Division therefore asserts that summary disposition is appropriate in this matter and that sanctions against Liskov are in the public interest and should be imposed by the ALJ.

I. INTRODUCTION

On September 8, 2011, the Commission filed the Civil Action against Liskov and his advisory firm, EagleEye Asset Management LLC (“EagleEye”).¹ Bernstein Decl. ¶ 2.

On December 12, 2012, the Court entered a final judgment in the Civil Action against both EagleEye and Liskov permanently enjoining them from violating Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder and Sections 206(1), 206(2), and 204 of the Investment Advisers Act of 1940 (“Advisers Act”) and Rules 204(2)(a)(1)-(6) and 204-2(a)(8) thereunder. In addition, the Court ordered that EagleEye and Liskov were jointly and severally liable for the payment of disgorgement in the amount of \$301,502.26, plus prejudgment interest of \$29,603.59. The Court also ordered EagleEye and Liskov each to pay a civil penalty of \$725,000. Bernstein Decl. ¶¶ 6-7; Final J. (App. Ex. E).

On December 27, 2012, the Commission issued an Order Instituting Proceedings (“OIP”) to commence the above-caption matter against Liskov pursuant to Section 203(f) of the Advisers Act. On the same date, proceedings were instituted against EagleEye pursuant to Section 203(e) of the Advisers Act. See In the Matter of EagleEye Asset Management, LLC, Advisers Act Rel. No. 3528, Admin. Proc. File No. 3-15156 (Dec. 27, 2012).

In this proceeding, the Division seeks permanent investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization associational bars against Liskov based on the injunction that the Court entered against him in the Civil Action and because such bars are in the public interest.

¹ In support of this Motion, the Division submits an Appendix (“App.”) containing the Declaration of Deena R. Bernstein (“Bernstein Decl.”) and true and accurate copies of various pleadings, orders, and other documents from the Civil Action, including the complaint (“Compl.”), the final judgment entered against EagleEye and Liskov (“Final J.”), the jury verdict form, and various transcripts of Court proceedings, including the transcript of the Court’s hearing on remedies (cited herein as “Tr.” followed by the date of the transcript and a page reference). Pursuant to Commission Rule 323, 17 C.F.R. § 201.323, the Division requests that the ALJ take judicial notice of the Civil Action filings and their contents.

II. BACKGROUND

A. **Allegations in the Complaint**

In its complaint in the Civil Action, the Commission alleged that, between at least November 2008 and August 2010, EagleEye, an investment adviser registered with the Commission since April 2008, and Liskov, EagleEye's sole owner and its president, chief executive officer, and chief investment officer, made material misrepresentations to induce clients to make foreign currency exchange ("forex") investments. Bernstein Decl. ¶ 2; Compl. ¶¶ 1, 12, 13, 17, 29 (App. Ex. A). With respect to two EagleEye clients, Liskov misrepresented the nature of the forex investments he made on their behalf such that they did not know they were investing in forex. Bernstein Decl. ¶ 2; Compl. ¶¶ 1, 29-31 (App. Ex. A). As to at least three other EagleEye clients who knowingly made investments in forex that EagleEye managed, Liskov misled the clients concerning his experience and track record in forex trading. Bernstein Decl. ¶ 2; Compl. ¶¶ 1, 17, 29, 32-34 (App. Ex. A). Specifically, the Commission alleged that Liskov failed to disclose his poor performance trading in forex for himself and for other clients. Bernstein Decl. ¶¶ 2-3; Compl. ¶¶ 17, 29 (App. Ex. A); Jury Verdict Form (App. Ex. B).

The Commission's complaint in the Civil Action further alleged that, as to two EagleEye clients, Liskov made unauthorized liquidations of securities investments and subsequent transfers of assets into forex investments without the client's knowledge or authorization. Bernstein Decl. ¶ 2; Compl. ¶¶ 1, 35 (App. Ex. A). Liskov accomplished the foregoing by doctoring forex account opening documentation as well as written requests to transfer funds from client brokerage accounts to forex accounts. Bernstein Decl. ¶ 2; Compl. ¶¶ 35-55 (App. Ex. A).

B. Jury Trial

After a two-week jury trial and less than four hours of deliberation, the jury in the Civil Action found the following: (1) Liskov made intentional or reckless misrepresentations of material fact in violation of the Advisers Act as to five clients; (2) Liskov made fraudulent misrepresentations of material fact with intent to deceive in connection with the sale of a security in violation of the Exchange Act as to four clients; (3) Liskov fraudulently failed to disclose his forex trading record in violation of the Exchange Act as to four clients; and (4) Liskov intentionally engaged in a scheme to defraud in violation of the Exchange Act as to four clients.² See Bernstein Decl. ¶ 3, Jury Verdict Form (App. Ex. B).

C. Remedies Hearing

Subsequent to the jury verdict, the Commission filed a post-trial brief seeking remedies, including injunctive relief, disgorgement, and a civil penalty. Bernstein Decl. ¶ 3. Liskov and EagleEye submitted responsive briefing. Id. On December 11, 2012, the Court held a hearing on remedies, allowing both sides to present argument and inviting Liskov to make a statement in his defense. See Bernstein Decl. ¶ 5; Tr. 12/11/12 at 28 (App. Ex. D).

Liskov in part stated the following to the Court during the remedies hearing:

I would like to mention that I do feel, as I mentioned at the trial, that I failed my clients in what they had asked me to do. I failed them from the perspective of the care that I needed to take every day with them in handling their money. There's no question about that. And as I tried to explain to my children, I accept responsibility for everything that has come my way, and everything that has come my family's way, it falls on me. . . . However as I stand here today, I must tell you part of the reason I'm in the financial condition I am is because I invested in the very, quote, unquote scheme that I thought my clients would do well in. And I still

² As to whether there was a scheme in violation of Section 10(b) of the Exchange Act, the Court required that the jury find that Liskov acted intentionally and instructed the jury that recklessness was insufficient. See Bernstein Decl. ¶ 3-4; Jury Verdict Form (App. Ex. B); Tr. 11/16/12 at 89-90, 101-02 (App. Ex. C). Also, prior to the submission of the case to the jury, at the Court's suggestion, the parties agreed that, if the jury found Liskov liable, then EagleEye would be deemed liable as Liskov's alter ego. See Tr. 11/16/12 at 89, 103-05 (App. Ex. C).

believe that I should have made sure that they were not getting involved as I had got them involved to the extent that I did. There's no question about that. But I also believe that they were with me. I did not try to mislead them in any way and I did not feel at the time that they were being misled. I felt like they were as hopeful as I was that they would make money with me.

Bernstein Decl. ¶ 5; Tr. 12/11/12 at 29 (App. Ex. D).

After considering the presentation of evidence to the jury and hearing Liskov's statement, the Court explained to Liskov the reasons for the relief it was imposing, as follows:

Here's what I understand from this case. I fully understand that you invested as well as your clients and you got the clients fraudulently to invest in this extraordinarily risky [forex] venture. You – there's no other way to say it. You were gambling with your own money and you were gambling with their money. . . . I have looked over these exhibits. And you're trading at all hours of the night. Your conduct is the same as someone who is out at a casino playing the slots. It is the view of this Court that you got into this, needed funds to further support your speculative ventures, and fraudulently obtained those funds from these various clients. You are in denial, sir, if you think that they were caught up in this as you were. Yes, they were looking to make a profit. . . . But you seem to be utterly deaf to your responsibility as a fiduciary. It was your duty to counsel these people, truly to counsel them, about the risks as well as the rewards. It was your duty to explain your own, your own poor trading record. The jury expressly so found and properly found.

Bernstein Decl. ¶ 5; Tr. 12/11/12 at 31-32 (App. Ex. D).

D. Relief in the Civil Action

On December 12, 2012, the Court entered final judgment against EagleEye and Liskov in the Civil Action. Bernstein Decl. ¶¶ 5-7; Final J. (App. Ex. E). The Court ordered that EagleEye and Liskov be permanently enjoined from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 204 of the Advisers Act, and Rules 204-2(a)(1)-(6) and 204-2(a)(8) thereunder. Final J. (App. Ex. E); Tr. 12/11/12 at 30-31 (App. Ex. D). In addition, the Court ordered EagleEye and Liskov to pay, jointly and severally, disgorgement of \$301,502.26, plus prejudgment interest of \$29,603.59, and the Court also

ordered EagleEye and Liskov each to pay a civil penalty of \$725,000. Final J. (App. Ex. E); Tr. 12/11/12 at 30-31 (App. Ex. D).

III. ARGUMENT

A. **Summary Disposition is Appropriate Against Liskov.**

Summary disposition is appropriate where the pertinent facts already have been litigated in an earlier judicial proceeding. See, e.g., John W. Lawton, Advisers Act Rel. No. 3513, 2012 WL 6208750, at *4-5 & 13 (Dec. 13, 2012) (Commission finding that grant of Division's motion for summary disposition was appropriate and imposing associational bars); Jeffrey L. Gibson, Exchange Act Rel. No. 57266, 92 S.E.C. Docket 1596 (Feb. 4, 2008) (Commission finding that grant of Division's motion for summary disposition was appropriate and barring respondent from associating with broker, dealer, and investment adviser based on injunction entered against respondent and because bar was in public interest), petition denied, Gibson v. SEC, 561 F.3d 548 (6th Cir. 2009); Conrad P. Seghers, Advisers Act Rel. No. 2656, 91 S.E.C. Docket 1945 (Sep. 26, 2007) (on appeal from initial decision, Commission holding summary disposition was appropriate where respondent was permanently enjoined in district court action from violating anti-fraud provisions of federal securities laws and imposing permanent investment adviser bar), petition denied, Seghers v. SEC, 548 F.3d 129 (D.C. Cir. 2008); Joseph P. Galluzzi, Exchange Act Rel. No. 46405, 78 S.E.C. Docket 906 (Aug. 23, 2002) (Commission upholding grant of Division's motion for summary disposition where facts were determined by earlier criminal conviction and injunctive action), aff'g Initial Decision Rel. No. 187, 75 S.E.C. Docket 1320 (Aug. 7, 2001). See also Richard S. Kern and Charles Wilkins, Initial Decision Rel. No. 281 (Apr. 21, 2005), 85 S.E.C. Docket 799 (initial decision granting summary disposition and ordering penny stock bars in follow-on proceeding based on permanent injunction); Currency

Trading International, Inc., et al., Initial Decision Rel. No. 263, 83 S.E.C. Docket 3008 (Oct. 12, 2004) (granting Division's motion for summary disposition in follow-on proceeding based on entry of injunction); Michael D. Richmond, Initial Decision Rel. No. 224, 79 S.E.C. Docket 2084 (Feb. 25, 2003) (granting summary disposition to the Division in follow-on proceeding based on permanent injunction).

Pursuant to Section 203(f) of the Advisers Act (by way of reference to Section 203(e)(4) of the Advisers Act), an individual may be barred from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, if the person has been "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of a security," and the bar is in the public interest. Thus, under these provisions, an injunction may furnish the sole basis for remedial action if such action is in the public interest. See Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994). Recently, the Commission held that Section 203(f) as amended by Section 925 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") authorized the institution of bars against associating with all regulated entities, including for conduct that preceded the enactment of Dodd-Frank. See Lawton, 2012 WL 6208750, at *10.

Based on the record, the ALJ should conclude as a matter of law that Liskov has been enjoined within the meaning of Section 203(f) of the Advisers Act based on the entry of the injunction against him in the Civil Action. See Glenn M. Barikmo, Initial Decision Rel. No. 436, 2011 WL 4889086 (Oct. 13, 2011) (ALJ found that injunction by federal district court from violating anti-fraud provisions sufficient for imposition of sanctions pursuant to Section 203(f)).

The Division believes that the record is clear, and that indeed the Respondent would not dispute, that a qualifying injunction was entered in the Civil Action. Therefore, the ALJ should grant summary disposition in favor of the Division against Liskov.

B. Sanctions Against Liskov are in the Public Interest.

The ALJ further should conclude that remedial sanctions against Liskov are appropriate and in the public interest for the protection of investors based on the factors set forth in Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979). The following are relevant considerations in making the public interest determination: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. Steadman, 603 F.2d at 1140.

The Commission and ALJs in other matters, applying the Steadman factors, have found that a bar is appropriate in circumstances similar to those in this matter. See, e.g., Lawton, supra (Commission finding that bar was in public interest in follow-on proceeding based on permanent injunction); Gibson, supra (Commission finding that bar was in public interest in follow-on proceeding based on permanent injunction); Seghers, supra (same); Galluzzi, supra (Commission finding imposition of bar against respondent appropriate under Steadman on basis of criminal conviction for mail and wire fraud and entry of Section 10(b) injunction); Charles Phillip Elliott, Exchange Act Rel. No. 31202, 52 S.E.C. Docket 1462 (Sep. 17, 1992) (Commission finding that violations of securities laws were sufficient to support conclusion that permanent bar was in public interest), aff'd, Elliot v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) (also finding that conviction of "serious violations of the securities law . . . in itself" supported Commission conclusion that

bar was in public interest); Nolan W. Wade, Initial Decision Rel. No. 207, 77 S.E.C. Docket 3022 (June 24, 2002) (ALJ citing Steadman and finding a bar in the public interest, where registered representative was enjoined from violations of the federal securities law anti-fraud provisions); Peter M. Harrington, Exchange Act Rel. No. 38518, 64 S.E.C. Docket 768 (Apr. 17, 1997) (ALJ finding bar was in public interest against registered representative who had been enjoined from anti-fraud violations in underlying injunctive action).

The Division believes that all the Steadman factors here weigh in favor of imposing the full range of permanent associational bars against Liskov. This belief is bolstered by both the jury's verdict and the judge's stated reasoning for the relief he ordered in the Civil Action.

The jury's verdict against Liskov starkly illustrates the egregiousness of his conduct, the repetitive nature of his violations, and his high degree of scienter. See Jury Verdict Form (App. Ex. B). The jury found that Liskov violated the anti-fraud provisions of both the Exchange Act and the Advisers Act. The jury further found that Liskov committed each of these violations as to multiple clients, such that his conduct was not isolated but recurring. Perhaps even more telling, the jury found that Liskov intentionally engaged in a scheme to defraud. Because the judge crafted the jury verdict form such that the jury had to find an intentional scheme to defraud (and instructed the jury that a reckless state of mind did not suffice for scheme liability), there is no doubt that the jury found that Liskov possessed the highest level of scienter contemplated by the securities laws. See Jury Verdict Form (App. Ex. B); Tr. 11/16/12 at 89-90, 101-02 (App. Ex. C). Finally, even in the absence of a specific statute, regulation, or other guiding principle of law requiring investment advisers to disclose their past performance, the jury found that Liskov's failure to disclose his own poor track record in forex trading for himself and for other clients violated Section 10(b) of the Exchange Act. See Jury Verdict Form (App. Ex. B); Tr. 12/11/12

at 31-32 (App. Ex. D). The jury's particularly-detailed findings against Liskov in the Civil Action provide overwhelming support for the imposition of strong sanctions against him in this proceeding.

Equally compelling is the fact that the judge in the Civil Action, assessing many of the same factors set forth in Steadman, determined that an anti-fraud injunction and the imposition of a third-tier monetary penalty against Liskov were appropriate. For example, by imposing the injunction, the judge implicitly concluded that, unless sanctioned, there is a likelihood that Liskov will commit future violations. The judge's remarks about the nature of Liskov's forex trading (namely that he engaged in trading akin to gambling in disregard of the best interests of his clients) also speak to the egregiousness of Liskov's conduct and the level of his scienter. See Tr. 12/11/12 at 31-32 (App. Ex. D).

Finally, Liskov has neither recognized the wrongfulness of his conduct nor provided assurances against future violations. In fact, by his public statements, he has done the opposite. In both his statement to the Court at the remedies hearing in the Civil Action and his answer to the OIP in this matter, Liskov has continued to deny all responsibility for his actions. At the remedies hearing, Liskov persisted in his position that he thought he was acting in his clients' interests and that they were in agreement about his forex trading on their behalf. See Tr. 12/11/12 at 29 (App. Ex. D). In his answer to the OIP, Liskov states that he "continues to deny the Commission's allegations." Answer ¶ 4. These statements by Liskov do nothing to guard against the likelihood that, given the opportunity, Liskov will commit further violations in the future.

All of the foregoing, in light of prior precedent, supports the imposition of permanent bars against Liskov from associating with any investment adviser, broker, dealer, municipal

securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization.

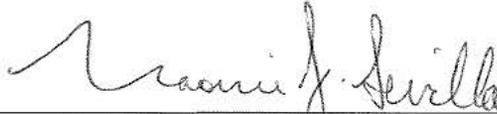
IV. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the ALJ: (a) grant the Division's motion for summary disposition against Liskov; (b) conclude that the allegations against Liskov in the OIP are true; and (c) permanently bar Liskov from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization.

Respectfully submitted,

DIVISION OF ENFORCEMENT

By its attorneys,



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Dated: February 21, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 21, 2013



ADMINISTRATIVE PROCEEDING
File No. 3-15155

In the Matter of

JEFFREY A. LISKOV,

Respondent.

DIVISION OF ENFORCEMENT'S APPENDIX
IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION
AGAINST RESPONDENT JEFFREY A. LISKOV

Respectfully submitted,

DIVISION OF ENFORCEMENT

By its attorneys,

A handwritten signature in black ink, appearing to read "Deena R. Bernstein". The signature is written in a cursive, flowing style.

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Dated: February 21, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 21, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15155

In the Matter of

JEFFREY A. LISKOV,

Respondent.

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**DECLARATION OF DEENA R. BERNSTEIN
IN SUPPORT OF DIVISION OF ENFORCEMENT'S
MOTION FOR SUMMARY DISPOSITION**

1. I am a Senior Trial Counsel in the Division of Enforcement ("Division") of the Securities and Exchange Commission's Boston Regional Office. I was actively involved in the Division's investigation that preceded the filing of the civil action entitled Securities and Exchange Commission v. Jeffrey Liskov and EagleEye Asset Management, LLC, Case No. 11-11576 (the "Civil Action"), in the United States District Court for the District of Massachusetts (the "Court"). I was lead counsel of record in the Civil Action, and I am now one of the Division attorneys in the above-captioned proceedings against Jeffrey Liskov ("Liskov") and related proceedings (A.P. File No. 3-15156) against EagleEye Asset Management, LLC ("EagleEye"). I make this declaration based upon my personal knowledge and in support of the Division's Motion for Summary Disposition.

2. On September 8, 2011, the Commission filed the Civil Action against Liskov and EagleEye. Attached hereto as Exhibit A is a true and accurate copy of the Complaint in the Civil Action.

3. On November 26, 2012, after a two-week jury trial and less than four hours of deliberation the jury found Liskov liable for the following: 1) Liskov had made intentional or reckless misrepresentations of material fact in violation of the Adviser's Act as to five clients; 2) Liskov made fraudulent misrepresentations of material fact with intent to deceive in connection with the sale of a security in violation of the Exchange Act as to four clients; 3) Liskov violated the Exchange Act by fraudulently failing, in connection with the sale of a security, to disclose his forex trading record as to four clients; and 5) Liskov *intentionally* engaged in a scheme to defraud in connection with the sale of a security in violation of the Exchange as to four clients. . Attached hereto as **Exhibit B** is a true and accurate copy of the Jury's Verdict Form

4. Prior to the submission of the case to the jury, the parties agreed that if the jury found Liskov liable, that EagleEye would be found liable as Liskov's alter ego so EagleEye's conduct was not submitted to the jury. Attached as **Exhibit C** is a true and accurate copy of the November 16, 2012 court transcript reflecting that agreement

5. Subsequent to the jury verdict, the Division filed a Post Hearing Brief seeking remedies including injunctive, relief, disgorgement, and a penalty. Liskov and EagleEye submitted responsive briefing. On December 11, 2012, the court held a remedies hearing. During the hearing, both sides presented arguments, and Liskov was allowed to make a statement in his defense. Attached hereto as **Exhibit D** is a true and accurate copy of the transcript of that hearing.

6. On December 13, 2012, the court issued final judgments against Liskov and EagleEye.

7. Attached hereto as **Exhibit E** is a true and accurate copy of the Final Judgment entered against EagleEye and Liskov in the Civil Action.

Dated: February 21, 2013

A handwritten signature in black ink, appearing to read 'D.R. Bernstein', written over a horizontal line.

Deena R. Bernstein

Appendix Table of Contents

Declaration of Deena R. Bernstein

Exhibit A Complaint

Exhibit B Jury Verdict Form

Exhibit C November 16, 2012 Court Transcript (Excerpt)

Exhibit D December 11, 2012 Hearing Transcript

Exhibit E Final Judgment against EagleEye

Exhibit F Final Judgment against Liskov

A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)
SECURITIES AND EXCHANGE)
COMMISSION,)
))
Plaintiff,)
))
v.)
))
EAGLEEYE ASSET MANAGEMENT,)
LLC, and JEFFREY A. LISKOV,)
))
Defendants.)
_____)

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Securities and Exchange Commission (“Plaintiff” or “Commission”) alleges the following against EagleEye Asset Management, LLC (“EagleEye”) and Jeffrey A. Liskov (“Liskov”) (collectively, “Defendants”):

PRELIMINARY STATEMENT

1. This case involves material misrepresentations to advisory clients to induce them to make foreign currency exchange (“forex”) investments, and unauthorized liquidations of client securities investments and subsequent transfers of client assets into forex investments, by EagleEye Asset Management, LLC (“EagleEye”), a registered investment adviser, and its sole principal, Jeffrey Liskov (“Liskov”). With respect to at least two EagleEye clients, Liskov misrepresented the nature of the forex investments he made on their behalf and, in some instances without their knowledge, sold their securities and transferred the proceeds into forex investment accounts in which he conducted erratic trading and sustained steep losses. As to at least three other EagleEye clients who knowingly made investments in forex that EagleEye

managed, Liskov misled the clients concerning his experience and track record in forex trading. In all, Liskov lost approximately \$4 million in client funds in forex trading, yet, in many cases, EagleEye first collected performance fees (on temporary gains) collectively totaling over \$300,000.

2. Through the activities alleged in this Complaint, EagleEye and Liskov engaged in: (i) fraudulent or deceptive conduct in connection with the purchase or sale of securities, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder; and (ii) fraudulent or deceptive conduct with respect to investment advisory clients, in violation of Sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act"). In addition, EagleEye violated numerous record-keeping provisions contained in Sections 204 of the Advisers Act and Rules 204-2(a)(1)-(6) & (8) thereunder, and Liskov aided and abetted EagleEye's violations of those provisions.

3. As a result of the foregoing, the Commission seeks the following relief: (a) entry of a permanent injunction prohibiting EagleEye and Liskov from violations of the relevant provisions of the federal securities laws; (b) disgorgement of EagleEye and Liskov's ill-gotten gains, plus pre-judgment interest thereon; and (c) the imposition of a civil monetary penalty due to the egregious nature of EagleEye and Liskov's violations.

JURISDICTION AND VENUE

4. The Commission brings this action pursuant to the enforcement authority conferred upon it by Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)] and Section 209(d) of the Advisers Act [15 U.S.C. § 80b-9(d)].

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and Sections 21(d) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d) & 78aa] and Sections 209(d) and 214 of the Advisers Act [15 U.S.C. §§ 80b-9(d) & 80b-14].

6. The Commission seeks a permanent injunction and disgorgement pursuant to Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)] and Section 209(d) of the Advisers Act [15 U.S.C. § 80b-9(d)].

7. The Commission seeks the imposition of a civil monetary penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)].

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred in this district and because EagleEye is located, and Liskov resides, in this district.

9. In connection with the conduct alleged in this Complaint, Defendants directly or indirectly made use of the means or instruments of transportation or communication in interstate commerce, the facilities of a national securities exchange, or the mails.

10. Defendants' conduct involved fraud, deceit, or deliberate or reckless disregard of regulatory requirements, and resulted in substantial loss, or significant risk of substantial loss, to other persons.

11. Unless enjoined, Defendants will continue to engage in the securities law violations alleged herein, or in similar conduct that would violate the federal securities laws.

DEFENDANTS

12. **EagleEye** is a Massachusetts limited liability company headquartered in Plymouth, Massachusetts. EagleEye became registered with the Commission as an investment

adviser on April 9, 2008. According to its most recent Form ADV annual amendment filed on March 31, 2010, EagleEye had between 26 and 100 clients and over \$53 million in assets under management. EagleEye did not have custody of any client assets.

13. **Liskov**, age 40, resides in Plymouth, Massachusetts. From August 1993 through December 2007, Liskov was a registered representative of a Commission-registered broker-dealer. Since 2008, Liskov has been EagleEye's sole officer, manager, and employee. Liskov operated EagleEye's offices out of his home.

FACTUAL ALLEGATIONS

Advisory Business and Clients

14. In 2008, Liskov began operating his own investment advisory firm, EagleEye. According to filings with the Commission, EagleEye provided financial planning and portfolio management services to high net worth and other individuals.

15. Several of Liskov's former, longtime brokerage customers became advisory clients of EagleEye in 2008 and 2009. As of mid-2010, EagleEye was listed as the investment adviser on 88 customer accounts custodied at the brokerage firm where Liskov previously worked. Among the former Liskov brokerage customers who became advisory clients of EagleEye were several individuals who were at or near retirement age, all with generally conservative investment goals, including a 68-year-old woman with a net worth of over \$10 million ("Client A"), a married couple in their seventies ("Clients B"), and a 62-year-old retired man ("Client C"), as well as others (referred to herein as "Client D," "Client E," and "Client F").

Forex Trading and Losses

16. Beginning in or about August 2004, Liskov opened a personal foreign currency exchange ("forex") trading account at Forex Capital Markets, LLC ("FXCM"), an online retail

currency exchange dealer. As of November 2008, Liskov had invested nearly \$270,000 in his personal FXCM account and had sustained trading losses of over \$215,000 in that account, with most of these losses occurring in 2008. Liskov opened and conducted trading in four additional personal accounts at FXCM (in January and April 2008, and in January and May 2009) and also sustained losses in these accounts. Liskov invested a total of nearly \$350,000 in his later-four FXCM accounts and sustained trading losses totaling over \$200,000. By May 2009, Liskov continued actively trading in only two of his personal FXCM accounts. In one account, between May 2009 and August 2010, Liskov invested over \$275,000 and lost over \$187,000 in trading.

17. Despite having lost his own money in forex trading, and without disclosing this to EagleEye's clients, beginning in 2008 and continuing through 2010, Liskov advised several EagleEye clients to open forex trading accounts at FXCM for him to manage on their behalf and to liquidate existing investments in securities and instead invest these assets in forex trading. During this period, Liskov managed forex trading in a total of thirteen FXCM accounts belonging to nine clients, six of whom had been brokerage customers of Liskov's. Eight of these nine clients had one FXCM account in which Liskov managed the forex trading. One client (Client A) had five actively-traded accounts in her name at FXCM in which Liskov traded.

18. For each of the FXCM accounts of EagleEye's clients, a Limited Power of Attorney ("LPOA") authorized EagleEye (and thus Liskov) to conduct trading in the account. Each LPOA contained a "performance fee" provision, which specified that EagleEye could earn performance fees on any net profits in the account for a specified time period. The LPOAs for EagleEye's clients' FXCM accounts purportedly reflected a performance fee rate of 10-20% that EagleEye could earn on any profits generated in the account on a monthly basis.

19. With respect to the LPOA pertaining to the FXCM accounts of at least one EagleEye client (Client A), the performance fee percentage was blank when the client signed the LPOA, and, on information and belief, Liskov only later filled in a 20% performance fee rate. The client did not know or learn what the performance fee rate was until at least August 2010.

20. According to the terms of FXCM's standard form of LPOA, an authorized trader could earn performance fees even if trading in an account occurred only for a short period of time. For example, if an account began trading with only a few days remaining in a calendar month, a performance fee could be earned for any profits generated during those few days. Thus, traders potentially could earn a performance fee without establishing a longer track record of success. These terms could create an incentive for traders to generate quick temporary gains in a client's account and collect a performance fee at the end of the first calendar month of trading. Also, FXCM's procedures did not take into account the performance in a customer's prior account(s) before allowing a trader to collect a performance fee on gains in a new account in the name of the same customer. These procedures could create an incentive for a trader who was seeking to earn a performance fee, but who had sustained prior losses in a customer's account, to start trading customer funds in a new account instead of first recouping losses in existing accounts. Liskov, on information and belief, knew all of the foregoing but did not disclose these facts to EagleEye's clients whose FXCM accounts he managed.

21. Liskov's forex trading strategy for EagleEye's clients involved continuous purchases and sales of foreign currencies over the course of any given day. Trading occurred in client accounts even during overnight hours. Liskov's forex trading on behalf of EagleEye's clients was assisted or controlled automatically by computer software. Liskov did not disclose the foregoing facts to clients.

22. EagleEye's clients suffered significant losses in their forex investments that Liskov managed, while EagleEye (and ultimately Liskov) in many instances earned substantial performance fees on these investments. In general, the performance fees that EagleEye (and ultimately Liskov) earned were disproportionately high, particularly given that the fees were earned on extremely short-term gains, the clients suffered such steep losses over such short periods, and the clients previously were invested in longer-term securities investments with more fixed and predictable fee structures. Specific client investment amounts, loss amounts, and performance fees generated are further detailed below.

23. A total of \$3.9 million of Client A's money was invested across a total of five FXCM accounts between November 2008 and June 2010. The total trading losses in Client A's five FXCM accounts during this period exceeded \$3.1 million. The performance fees EagleEye collected on Client A's five accounts during this period totaled nearly \$300,000.

24. A total of \$270,000 of Clients B's money was invested in their FXCM account between November 2008 and March 2010. The trading losses in their account through July 2010 exceeded \$250,000. Most of Liskov's trading on behalf of Clients B was not profitable, and EagleEye earned performance fees of less than \$800 on Clients B's account.

25. In July 2009, Client C agreed to invest \$100,000 in an FXCM account managed by EagleEye in which Liskov conducted the trading. Client C was able to recoup approximately half of this investment, while EagleEye earned performance fees totaling nearly \$6,000.

26. As one of the first clients whom Liskov recruited for a forex investment in November 2008, Client D agreed to invest \$26,000 in an FXCM account managed by EagleEye. Client D lost all but \$500 of this investment by the end of December 2008. EagleEye nonetheless earned a performance fee of nearly \$700 on temporary profits in November 2008.

27. Beginning in May 2009, Client E invested a total of \$130,000 in an FXCM account managed by EagleEye. The trading losses in Client E's account exceeded \$125,000 by December 2009. Client E recouped less than \$1,000 of his original investment, while EagleEye earned performance fees of over \$600 on early profits in the account.

28. In the fall of 2009, Client F invested a total of \$285,000 in an FXCM account managed by EagleEye. Liskov lost nearly all of this investment in trading within a few weeks, and EagleEye did not earn a performance fee from Client F's account.

Material Misrepresentations to Induce Clients to Make Forex Investments

29. Liskov provided different degrees of disclosure to EagleEye's clients about forex trading in general and about their accounts at FXCM in particular. Liskov provided some clients (specifically, Clients C, E, and F) with selective or otherwise misleading information concerning the nature of the investment, the risks, and Liskov's own expertise in forex trading, while other clients (specifically, Clients A and B) had virtually no understanding of the nature of these investments or the extent to which Liskov liquidated their securities investments and instead invested their assets in forex trading in FXCM accounts.

30. For example, Liskov never mentioned forex trading at all to Client A, and she did not know that FXCM was a forex firm. Instead, Liskov referred to an "FX account," but Client A did not have a clear understanding of what types of investments were involved. Also, based on what Liskov told her, Client A understood that the FX account would be held alongside her other accounts at the brokerage firm where Liskov used to work. Client A never authorized Liskov to invest any of her money in any accounts outside of that brokerage firm or to liquidate any of her securities investments at the brokerage firm and use the proceeds for non-securities investments outside the firm.

31. Similarly, Liskov never discussed forex trading with Clients B and never told them about FXCM. Clients B did not know about the existence of their FXCM account and did not know what FXCM was. Liskov repeatedly told Clients B that all of their investments would remain in an account at the brokerage firm where he used to work. Clients B never agreed that Liskov could move any of their investments to any account outside of the brokerage firm and never authorized any liquidation of the securities investments in their brokerage account or the transfer of the proceeds to FXCM.

32. Liskov first suggested forex trading to Client C, a former brokerage customer of Liskov's, in July 2009. At a meeting at Client C's home to discuss his investments, Liskov told Client C about an opportunity to invest in something that Liskov termed "FX," which Liskov described as involving a little more risk than Client C's existing investments, which consisted of a mix of equity securities and money market funds. Because Liskov had been extremely conservative with Client C's investments in the past, Client C trusted Liskov not to invest in anything too risky. Liskov never explained to Client C that "FX" was forex trading, and Client C only learned that later. Liskov also told Client C that Liskov would be making all the trades and trading decisions in Client C's "FX" account, but Client C later learned that an automated computer system controlled the trading. Based on Liskov's representations in July 2009, Client C agreed to invest \$100,000 in the "FX" market.

33. Liskov first raised the prospect of investing a portion of Client E's portfolio in forex trading in the spring of 2009. Although Liskov mentioned to Client E that forex investments were risky, Liskov also told Client E that forex trading would act as a hedge against risk in other investments. Liskov alluded to his capabilities in forex trading and told Client E that he was a "pretty good" forex trader. Liskov did not disclose the performance of any of his

personal or other client accounts at FXCM to Client E. Based on Liskov's representations about his expertise and their long-time adviser-client relationship, Client E decided to open an FXCM account in which he initially invested \$100,000 in late May 2009. In August 2009, Liskov persuaded Client E to invest \$30,000 more in his FXCM account, but by December 2009 all of these funds were lost in trading, and Client E then abandoned forex trading.

34. Client F began discussing the possibility of forex trading with Liskov in the spring or summer of 2009. Liskov, whom Client F had known from his brokerage firm days, made various representations that ultimately influenced Client F's decision to choose Liskov manage his forex investment. For example, Liskov told Client F that Liskov had had prior success for other clients in forex trading, causing Client F to believe that Liskov had expertise and a successful track record in this arena. In reality, by the time Client F invested in forex in September 2009, several EagleEye clients had experienced losses in forex investments that Liskov managed. Client F was not aware that Liskov's clients had suffered such losses or that Liskov had personally invested in forex trading and lost money doing so, and Client F would not have made any such investment with Liskov if he had known about the prior losses. Like Client C, Client F also understood that Liskov would conduct the trades in his FXCM account manually and only later learned that Liskov instead used an automated computer trading system.

Unauthorized Liquidations and Transfers in Accounts of Client A

35. With respect to at least two EagleEye clients—Clients A and B—at least some of the transfers of their assets from securities investments in their brokerage accounts to FXCM occurred either without their full understanding or altogether without their knowledge or authorization. Liskov accomplished the foregoing by doctoring FXCM account opening documentation (in the case of Client A) as well as written requests to transfer funds from client

brokerage accounts—funds that had been invested in securities—to FXCM (in the case of Clients A and B).

36. Client A always intended to cap her “FX” investment at \$600,000, and Liskov knew this. Moreover, Client A only knew about and authorized Liskov to trade in one FXCM account. However, as noted above, Liskov managed trading in five FXCM accounts in Client A’s name between November 2008 and June 2010, and a total of \$3.9 million was invested in these five accounts.

37. After the opening of Client A’s initial FXCM account in November 2008, additional FXCM accounts were opened in October 2009, February 2010, May 2010, and June 2010. Client A was not aware of the opening of the later accounts. The original FXCM account opening documents, kept in Liskov’s files at EagleEye’s offices, contain “white out” correction fluid over certain fields. Liskov thus altered the FXCM account opening documentation for the later accounts in various respects by applying “white out” correction fluid over certain information. Specifically, to open the later accounts, Liskov used old account opening documentation that Client A had signed but whited-out the date and inserted a new date.

38. Although Client A received emails from FXCM confirming the opening and initial funding of each new FXCM account, neither FXCM nor Liskov notified Client A of subsequent deposits into her FXCM accounts. On at least one occasion, Liskov affirmatively misled Client A concerning an email she received from FXCM pertaining to the opening of one of her later FXCM accounts. On February 15, 2010, Liskov sent an email to Client A indicating that an FXCM email confirming the opening of Client A’s third FXCM account in February 2010 instead related to a prior account. The email stated: “This is a confirmation email from my support group at fxcn for the paperwork we completed together *back in October*. We will cover

the strategies I have implemented for these accounts in person in May when you are back from FL..." (Emphasis added.)

39. Client A's first FXCM account was opened in November 2008 with an initial deposit of \$100,000. The initial deposit into Client A's first FXCM account came from a withdrawal in the same amount from a money market fund in her brokerage account. At that time, the holdings in that brokerage account consisted of approximately 75% mutual funds and lesser percentages of stocks, bonds, and a money market fund.

40. Liskov's trading in Client A's first FXCM account in November 2008 generated a profit of approximately \$1,300, and FXCM withdrew a 20% performance fee, or \$266.61, from Client A's account and credited this amount to EagleEye's account at FXCM. By January 15, 2009, approximately 45 days after the opening of Client A's first FXCM account and after active trading, account statements reflect that the account had lost nearly all of its value and that a balance of less than \$1,000 remained of the original \$100,000 investment. Liskov did not inform Client A of these losses at the time, and she was not aware of the losses. In February and July 2009, two additional deposits, totaling \$500,000, were made into Client A's first FXCM account, for a total investment in the first account of \$600,000.

41. Coinciding with the date of the opening of Client A's second FXCM account in October 2009, a new account at the brokerage firm where Liskov previously worked also was opened in Client A's name, although she already had several existing accounts there. The account opening documentation reflects that, unlike Client A's other accounts at the brokerage firm, EagleEye had full discretion over the new account, meaning that Liskov could not only conduct transactions in the new account but also had the authority to transfer assets out of the account. Client A never knowingly provided Liskov with full authority over any of her accounts.

42. All of the funds that ultimately were transferred into Client A's second, third, fourth, and fifth FXCM accounts originated from the new brokerage firm account opened in October 2009. Between October 2009 and June 2010, there were seven transfers totaling \$3.3 million from Client A's new brokerage account to one of the four later-opened FXCM accounts. Within days before each such transfer to FXCM, there was a transfer in the same amount from one of Client A's pre-existing brokerage accounts into the brokerage account opened in October 2009. In every instance, the funds from Client A's pre-existing accounts were withdrawn from investments in money market funds.

43. Although Liskov had authority to make transfers out of Client A's new brokerage account, each of the transfers from this account to one of her four later-opened FXCM accounts is evidenced by a written wire transfer request that was purportedly signed by Client A. All of the transfer requests bear Liskov's fax number at the top of the page. In the requests for the three wire transfers in each of October, November, and December 2009, Client A's signature is dated in October 2009. Similarly, in the requests for three later wire transfers, two in May 2010 and one in June 2010, Client A's signature is dated in March 2010. Several of the original transfer requests, kept in Liskov's files at EagleEye's offices, contain "white out" correction fluid over certain fields, including the transfer amount. Liskov thus doctored the transfer requests without informing the client and, because Liskov faxed the transfer requests, the whited-out information was not apparent to the brokerage firm.

44. After accomplishing (in the foregoing manner) the transfer of funds to Client A's FXCM accounts, which funds were derived from assets that had invested in securities in Client A's brokerage accounts, Liskov's trading in each of Client A's four later-opened FXCM accounts adhered to the same general pattern, as follows: First, all four accounts were opened

and funded around mid-month or later. Second, three of the four accounts generated some profits by the end of the month in which they were opened, and EagleEye collected a performance fee. Finally, after either the collection of a performance fee on early gains or the inability to generate such gains, the balance in each account plummeted, and, soon after, the next new account was opened, funded, and traded.

45. In particular:

- In the first two weeks of trading in Client A's second FXCM account, from October 18, 2009 until October 31, 2009, Liskov earned a profit of \$112,250 over the initial investment amount of \$400,000. EagleEye collected a performance fee of 20% of the profit, or \$22,454.21, on or about November 5, 2009. In November 2009, Liskov continued trading in Client A's second account, and there were vast fluctuations in the account value. There were additional deposits into the account in November and December 2009. In the following months, the account again experienced wide swings of temporary gains and eventual losses. By February 11, 2010, the account value was down to \$13,151.41. Between the opening of the second account on October 15, 2009 and February 11, 2010, Liskov lost nearly \$1.1 million of Client A's assets without notifying her.
- Within two weeks after the opening of Client A's third FXCM account on February 16, 2010, the account's value nearly doubled from an initial investment of \$600,000.00 to \$1,189,581.05, such that the month-end profits equaled \$589,581.05, and EagleEye collected a performance fee of \$117,916.21. On March 4, 2010, just before the performance fee was withdrawn, Client A's third account reached a peak value of \$1,400,416.45. By the end of the next day, the

account had sustained steep losses, leaving a balance of under \$200,000. The account balance continued to decline in March and April 2010, and, by early May 2010, there was a negative account balance.

- In the days following the opening of Client A's fourth FXCM account on May 25, 2010, with an initial deposit of \$400,000, the account lost nearly \$330,000. On or about May 30, 2010, there was an additional deposit of \$200,000 into the account. The account continued to lose value, and, by June 8, 2010, the account balance fell below \$100,000.00 and did not again exceed six figures.
- On or about June 14, 2010, Client A's fifth FXCM account was opened with an initial deposit of \$1 million. There were temporary gains in the account, and it finished the month with a value of \$1,474,349.29. These profits resulted in a performance fee of \$94,869.86, credited to EagleEye's account on July 7, 2010. By July 16, 2010, the account balance fell below \$100,000.00.

46. Liskov also did not inform Client A of the status of her FXCM accounts, the volume of trading activity and vast account value fluctuations described above, and, most importantly, the steep losses in the accounts and the serial opening and funding of new accounts.

47. In July 2010, Client A sought assurances from Liskov concerning the safety of her investments. At that time, unbeknownst to her, Client A's fifth FXCM account was on its way to losing much of its value. On July 3, 2010, Client A emailed Liskov:

I am worried about the fxcn account—originally, we were going to put 600 thousand in—then it kept going up—I have watched it go up up and a big down—I think we maybe should be less risky after we get back to 1.5—I do not want to lose my shirt—just some trepidation at this point....

Liskov responded three days later, on July 6, 2010, with the following email:

I completely understand, and can assure you that no one is going to lose their shirt on my watch – we can and will take on less volatility.... I am looking forward to the next 2 quarters as a successful end to 2010....

On the same day, the fifth account lost \$765,466.51 and never recovered these losses.

48. Shortly thereafter, on or about July 21, 2010, an account was opened in Client A's name at Deutsche Bank's forex trading platform ("dbFX"). Client A was not aware of the opening of this account. On July 23, 2010, without Client A's authorization, there was a transfer of \$800,000.00 from her brokerage account opened in October 2009 to her dbFX account. As with prior transfers to FXCM, the funds that were transferred to dbFX originated from assets held in a money market fund in one of Client A's pre-existing brokerage accounts, the faxed transfer request came from Liskov's fax number, and Liskov used an old transfer request signed by Client A but changed the date, amount, and destination bank for Client A's funds.

49. Around this time, in late July 2010, Client A again questioned Liskov about her FXCM account. On July 27, 2010, Client A emailed Liskov as follows:

...I am very concerned—I cannot access the fxcn account and have no idea how much there is in there or how much I have gained or lost—again, I thought this account would have under a million in it—but there is much too much going into it....

Several hours later, Client A again emailed Liskov with the following:

...I am more concerned than before. We never discussed a new bank and that is on the table for Monday. Please do not take any more monies from [my brokerage account]. I really want to see the transactions that have occurred as I have been asking for some time. I think it would be wise to put the \$800,000 back in [my brokerage account]. I thought we agreed that we would keep most of the money in fixed and stable accounts and the plan was to work with \$600[,]000. Something is wrong. We need to get on this....

Liskov thereafter did not respond to Client A's emails.

Unauthorized Liquidations and Transfers in Accounts of Clients B

50. Like Client A, Clients B did not authorize Liskov to make any investment in forex trading on their behalf or to withdraw any assets from the money market fund in their brokerage account for transfer to or trading at FXCM.

51. Between November 2008 and March 2010, there were six withdrawals totaling \$270,000 from a money market fund in Clients B's brokerage account and corresponding deposits into their FXCM account. Three of these withdrawals, in November 2008, January 2009, and April 2009, were by checks, each in the amount of \$30,000. The other three withdrawals were by wires of \$50,000 in July 2009, \$80,000 in December 2009, and \$50,000 in March 2010.

52. The three checks were payable to "FXCM" and appeared to have been signed by Mrs. Client B, as did the written requests for the wire transfers. As to the checks, Liskov told Clients B that he needed the money for investments in Clients B's EagleEye account. As to the wires, Clients B never authorized or knew about any wire transfers from their brokerage firm account to FXCM. In fact, on the date of one of the wires in July 2009, Clients B were out of town and did not speak with Liskov at all. As indicated above, Clients B never authorized Liskov to move any of their assets outside of the brokerage firm where they kept their account.

53. Liskov faxed each of the one-page handwritten requests for each of the three wire transfers from their brokerage account to their FXCM account, apparently signed by Clients B. The transmittal information at the top of the page indicates that they came from his fax number, and his name appears on the fax cover sheet for one of the transfer requests.

54. The original transfer requests, kept in Liskov's files at EagleEye's offices, contain "white out" correction fluid in certain places. Liskov thus doctored at least one of the transfer

requests without informing the client and, because Liskov faxed the transfer requests, the whited-out information was not apparent to the brokerage firm.

55. Liskov did not inform Clients B of the status of their FXCM account, the volume of trading activity and vast account value fluctuations described above, and, most importantly, the steep losses in the accounts. Clients B did not learn about the full extent of the investments and losses in their FXCM account until Client A warned them in July 2010 that something was amiss with Liskov.

Other Misrepresentations to Clients

56. Liskov's misrepresentations to clients and mismanagement of client funds were not limited to liquidating client securities to invest and trade in forex instead but also included ill-advised investments in risky securities. For example, in May of 2008, a couple who had been brokerage customers of Liskov's ("Clients G") entered into an investment management contract for EagleEye to manage approximately \$800,000 of their retirement savings. Liskov invested a significant portion of this investment in a risky and unsuitable leveraged exchange traded fund. This investment was not in line with their conservative investment goals and resulted in a loss of approximately \$85,000.

**Liskov's Personal Use of Forex Performance Fees
And Other Monetary Benefits to EagleEye and Liskov**

57. All performance fees earned in the FXCM accounts of EagleEye clients between November 2008 and July 2010 were deducted from the clients' accounts and deposited into an account in EagleEye's name at FXCM. From there, the vast majority of the performance fees were transferred to EagleEye's business bank account, then to Liskov's personal bank accounts at one of several banking institutions. From there, the money that originated from the performance fees was either used for Liskov's personal expenses or was eventually transferred

back to Liskov's personal trading account(s) at FXCM and, for the most part, lost in forex trading in those accounts.

58. Between at least April 2008 and July 2010, EagleEye (and thus ultimately Liskov) earned certain investment advisory and/or investment management fees from EagleEye's clients, including Clients A through G.

Liskov's Scheme Comes to an End

59. On July 15, 2010, FXCM notified Liskov by email that it was terminating its relationship with Liskov due to continuous client trading losses.

60. In early August 2010, the brokerage firm where Liskov previously worked removed him and EagleEye as the adviser on all EagleEye customer accounts.

61. In August 2010, Liskov informed EagleEye's clients in writing that he was ceasing EagleEye's investment advisory operations.

EagleEye's Books and Records

62. As of August 2010, Liskov did not maintain certain required records related to EagleEye's advisory business, including financial records, such as journals, ledgers, check books, bank statements, trial balances, and financial statements, and other documents necessary to support trading activity in managed accounts. Also, EagleEye's list of active and terminated accounts was missing certain information, such as the names of clients with FXCM accounts.

FIRST CLAIM FOR RELIEF
(EagleEye and Liskov's Violations of Section 10(b)
of the Exchange Act and Rule 10b-5 Thereunder)

63. The Commission repeats and incorporates by reference the allegations in paragraphs 1-62 above.

64. By engaging in the conduct described above, EagleEye and Liskov, directly or indirectly, acting knowingly or recklessly, in connection with the purchase or sale of securities, by the use of means and instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange: (a) employed or are employing devices, schemes or artifices to defraud; (b) made or are making untrue statements of material fact or has omitted or is omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engaged or are engaging in acts, practices or courses of business which operate as a fraud or deceit upon certain persons.

65. The conduct of EagleEye and Liskov involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

66. As a result, EagleEye and Liskov violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

SECOND CLAIM FOR RELIEF
(Liskov Aided and Abetted EagleEye's Violations of
Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder)

67. The Commission repeats and incorporates by reference the allegations in paragraphs 1-62 above.

68. By reason of the foregoing, EagleEye, directly or indirectly, acting knowing or recklessly, in connection with the purchase or sale of securities, by the use of means and instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange: (a) employed or are employing devices, schemes or artifices to defraud; (b) made or are making untrue statements of material fact or has omitted or is omitting to state a material fact

necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engaged or are engaging in acts, practices or courses of business which operate as a fraud or deceit upon certain persons.

69. Liskov knew or recklessly disregarded that EagleEye's conduct was improper and knowingly rendered to EagleEye substantial assistance in this conduct.

70. The conduct of Liskov involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

71. As a result, Liskov aided and abetted, and, unless enjoined, will continue to aid and abet, EagleEye's violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

THIRD CLAIM FOR RELIEF
(EagleEye and Liskov's Violations of
Sections 206(1) and 206(2) of the Advisers Act)

72. The Commission repeats and incorporates by reference the allegations in paragraphs 1-62 above.

73. EagleEye was an "investment adviser" within the meaning of Section 202(a)(11) of the Advisers Act [15 U.S.C. § 80b-2(a)(11)]. Likewise, Liskov was an "investment adviser" because of his ownership and control of EagleEye.

74. EagleEye and Liskov, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, acting intentionally, knowingly or recklessly: (a) have employed or are employing devices, schemes, or artifices to defraud; or (b) have engaged or are engaging in transactions, practices, or courses of business which operate as a fraud or deceit upon a client or prospective client.

75. The conduct of EagleEye and Liskov involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

76. As a result, EagleEye and Liskov have violated and, unless enjoined, will continue to violate Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§ 80b-6(1), (2)].

FOURTH CLAIM FOR RELIEF
(Liskov Aided and Abetted EagleEye's Violations of
Sections 206(1) and 206(2) of the Advisers Act)

77. The Commission repeats and incorporates by reference the allegations in paragraphs 1-62 above.

78. EagleEye, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, acting intentionally, knowingly or recklessly: (a) have employed or are employing devices, schemes, or artifices to defraud; or (b) have engaged or are engaging in transactions, practices, or courses of business which operate as a fraud or deceit upon a client or prospective client.

79. Liskov knew or recklessly disregarded that EagleEye's conduct was improper and knowingly rendered to EagleEye substantial assistance in this conduct.

80. The conduct of Liskov involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

81. As a result, Liskov aided and abetted and, unless enjoined, will continue to aid and abet EagleEye's violations of Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§ 80b-6(1), (2)].

FIFTH CLAIM FOR RELIEF
(EagleEye's Violations of Section 204
of the Advisers Act and Rule 204-2 Thereunder)

82. The Commission repeats and incorporates by reference the allegations in paragraphs 1-62 above.

83. Section 204 of the Advisers Act and certain rules promulgated thereunder require a registered investment adviser to make and keep true, accurate, and current books and records.

84. Rules 204-2(a)(1), (2), (4), (5), and (6) promulgated under the Advisers Act require a registered investment adviser to keep certain financial records, such as journals, ledgers, check books, bank statements, trial balances, and financial statements. As of August 2010, Liskov maintained bank statements for EagleEye's financial records but no journals, ledgers, bills, trial balances, or other financial statements.

85. Rule 204-2(a)(3) promulgated under the Advisers Act requires registered investment advisers keep a memorandum of each order given by the investment adviser for the purchase or sale of any security, any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security, and any modification or cancellation of any such order or instruction. Such memoranda must: (i) show the terms and conditions of the order, instruction, modification or cancellation; (ii) identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed such order; and (iii) show the account for which entered, the date of entry, and the bank, broker or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary authority must be so designated. Liskov kept broker confirmations as the only support for trades that EagleEye conducted on behalf of its clients.

However, the broker confirmations lacked the elements required by Rule 204-2(a)(3), including whether or not the trade was executed pursuant to discretionary authority.

86. Rule 204-2(a)(8) promulgated under the Advisers Act requires an investment adviser to keep a list or other record of all accounts for which the investment adviser has discretionary authority with respect to any funds or transactions. At least one version of EagleEye's client list as of August 2010 failed to include the FXCM accounts for clients that held accounts at both FXCM and Liskov's former brokerage firm.

87. The conduct of EagleEye involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

88. As a result, EagleEye violated and, unless enjoined, will continue to violate Section 204 of the Advisers Act [15 U.S.C. §§ 80b-4] and Rules 204-2(a)(1)-(6) and 204-2(a)(8) thereunder [17 C.F.R. §§ 275.204-2(a)(1)-(6) & 204-2(a)(8)].

SIXTH CLAIM FOR RELIEF
(Liskov Aided and Abetted EagleEye's Violations of
Section 204 of the Advisers Act and Rule 204-2 Thereunder)

89. The Commission repeats and incorporates by reference the allegations in paragraphs 1-62 above.

90. By reasons of the foregoing, EagleEye failed to maintain required books and records for an investment advisor in violation of Section 204 of the Advisers Act [15 U.S.C. § 80b-4] and Rule 204-2 thereunder [17 C.F.R. § 204-2].

91. Liskov knew or recklessly disregarded that EagleEye's conduct was improper and knowingly rendered to EagleEye substantial assistance in this conduct.

92. The conduct of Liskov involved fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements and directly or indirectly resulted in substantial losses to other persons.

93. As a result, Liskov aided and abetted and, unless enjoined, will continue to aid and abet EagleEye's violations of Section 204 of the Advisers Act [15 U.S.C. §§ 80b-4] and Rules 204-2(a)(1)-(6) and 204-2(a)(8) thereunder [17 C.F.R. §§ 275.204-2(a)(1)-(6) & 204-2(a)(8)].

PRAYER FOR RELIEF

WHEREFORE, the Commission requests that this Court:

A. Enter a permanent injunction restraining Defendants and each of their agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, including facsimile transmission or overnight delivery service, from directly or indirectly engaging in the conduct described above, or in conduct of similar purport and effect, in violation of:

1. Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder;
2. Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §§ 80b-6(1) & 80b-6(2)]; and
3. Section 204 of the Advisers Act [15 U.S.C. § 80b-4] and Rules 204-2(a)(6), 204-2(a)(8) thereunder [17 C.F.R. §§ 275.204-2(a)(1)-(6) & 204-2(a)(8)].

B. Require Defendants to disgorge their ill-gotten gains, plus pre-judgment interest;

C. Order Defendants to pay a civil monetary penalty;

D. Retain jurisdiction over this action to implement and carry out the terms of all

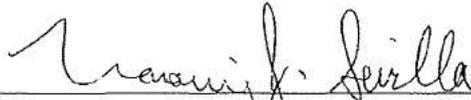
orders and decrees that may be entered; and

E. Award such other and further relief as the Court deems just and proper.

Respectfully submitted,

**SECURITIES AND EXCHANGE
COMMISSION**

By its attorneys,



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Dated: September 8, 2011

11/26/2012
3:30 PM

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE)	
COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	NO. 11-11576-WGY
JEFFREY LISKOV,)	
and)	
EAGLEEYE ASSET MANAGEMENT, LLC,)	
)	
Defendants.)	

JURY VERDICT

1.a. Did Mr. Liskov make negligent misrepresentations of material fact in violation of the Investment Advisers Act to:

[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]

2.a. Did Mr. Liskov make intentional or reckless misrepresentations of material fact in violation of the Investment Advisers Act to:

[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]

3.a. Did Mr. Liskov make fraudulent misrepresentations of material fact with intent to deceive in connection with the sale of a security in violation of the Securities Exchange Act of 1934 to:

[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]
[REDACTED]	_____	[REDACTED]	_____	[REDACTED]

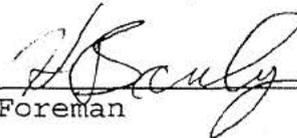
[REDACTED]

- b. Did Mr. Liskov violate the Securities Exchange Act of 1934 by fraudulently failing, in connection with the sale of a security, to disclose his forex trading record to:

[REDACTED]

- c. Did Mr. Liskov intentionally engage in a scheme to defraud in connection with the sale of a security in violation of the Securities Exchange Act of 1934?

[REDACTED]


Foreman

Date: 11-26-2012

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3 Civil Action
4 No. 11-11576-WGY

5 * * * * *
6 SECURITIES AND EXCHANGE *
7 COMMISSION, *
8 Plaintiff, *
9 v. *
10 JEFFREY LISKOV and EAGLEEYE *
11 ASSET MANAGEMENT, LLC, *
12 Defendants. *
13 * * * * *

* DAILY TRANSCRIPT
* OF THE EVIDENCE,
* MOTION HEARING
* and JURY CHARGE
* CONFERENCE
* (Volume 8)

14
15
16 BEFORE: The Honorable William G. Young,
17 District Judge, and a Jury

18 APPEARANCES:

19 SECURITIES & EXCHANGE COMMISSION (By Deena
20 R. Bernstein, Senior Trial Counsel and Naomi J.
21 Sevilla, Senior Enforcement Counsel), 33 Arch
22 Street, 23rd Floor, Boston, Massachusetts 02110,
23 on behalf of the Plaintiff

24 DUANE MORRIS LLP (By Albert P. Zabin, Esq.
25 and Jennifer Mikels, Esq.), 100 High Street, Suite
2400, Boston, Massachusetts 02210, on behalf of
the Defendants

1 Courthouse Way
Boston, Massachusetts

November 16, 2012

1 clerk.

2 So what I'm going to do now is I'll take a recess
3 until a quarter of 12:00. I will review this motion, I will
4 hear such argument as is appropriate on the motion, and then
5 I want, assuming some of the case is left standing, I want
6 to talk to you about the charge and the verdict slip which I
7 ought have for you at that time.

8 So we'll recess now for one-half hour. We'll
9 recess.

10 **THE CLERK:** All rise.

11 (Recess.)

12 **THE CLERK:** All rise. The United States District
13 Court is back in session, you may be seated.

14 **THE COURT:** All right, I will hear argument. But
15 let me just pass out to you a proposed verdict slip. But,
16 Mr. Zabin, I'll hear you. Why -- how do you think you can
17 get a directed verdict in part or in whole here?

18 **MR. ZABIN:** All right. We assume that the jury
19 could believe what the various witnesses Striano and
20 McLaughlin -- well, let me start with McLaughlin because
21 that's a separate case, a separate, a different issue, and I
22 think it is easily, more easily disposed.

23 Mr. McLaughlin was never an investment advisee.
24 All he hired Mr. Liskov to do was to trade for him. He was
25 not trading in securities. And the only evidence of

1 whether, that supports -- well, there's no evidence that
2 supports the plaintiff's theory that simply cashing in
3 securities to buy non-securities makes this a securities
4 case, because he testified that the first investment came
5 from a cash account from his bank. The 30,000 --

6 **THE COURT:** Wait a minute. The last thing you said
7 I follow. And so, under the Securities Exchange Act,
8 McLaughlin cannot be the basis of a finding of statutory
9 violation. But I had thought that under the Investment
10 Advisers Act he could even if the trading was in forex.

11 **MR. ZABIN:** Well, your Honor, there are two answers
12 to that. The first answer which I think disposes of the
13 question is that the second came from an account which he
14 referred to as a cash account. The evidence in the case
15 is --

16 **THE COURT:** Wait a minute. I'm with you as to the
17 Securities Exchange Act.

18 **MR. ZABIN:** Okay.

19 **THE COURT:** The complaint in this case invokes, or
20 alleges violation of two statutes.

21 **MR. ZABIN:** Yes.

22 **THE COURT:** The Securities Exchange Act and the
23 Investment Advisers Act. I think your argument as to
24 McLaughlin is right under the Securities Exchange Act. But,
25 because I had not expected to break this out investor by

1 investor, the way I was going to handle that is allow or
2 deny your motion and we just won't let Ms. Bernstein argue
3 that as to McLaughlin the Securities Exchange Act was
4 violated. But she's got other investors. And as to them
5 she's right, isn't she, that a money market account is a
6 security?

7 **MR. ZABIN:** Well, that, with respect, with respect
8 to that, that's why I started to address the matter of the
9 second, the second investment. There's no evidence that
10 that was a money market as opposed to the core accounts
11 which you heard is a cash account. That's -- so, that's the
12 plaintiff's burden, if that's relevant.

13 The second, and I think what's clearly dispositive
14 is that the Investment Advisers Act applies to investment
15 advisers carrying on the work of investment advisers.

16 **THE COURT:** All right.

17 **MR. ZABIN:** All right.

18 **THE COURT:** You made, you made that point --

19 **MR. ZABIN:** Okay.

20 **THE COURT:** -- right at the beginning. But I want
21 to push back on that point. This is a motion for, you and I
22 used to call it directed verdict, but now they're all into
23 judgment as matter of law.

24 **MR. ZABIN:** Right.

25 **THE COURT:** But the standard is the same. I have

1 to take all the evidence I've let the jury hear and I have
2 to give it, every reasonable inference has to be drawn in
3 favor of the SEC.

4 **MR. ZABIN:** Right.

5 **THE COURT:** Against that standard it seems to me
6 that this jury could find that he was acting as an
7 investment adviser.

8 **MR. ZABIN:** No, your Honor.

9 **THE COURT:** I'll hear you.

10 **MR. ZABIN:** It cannot. Because the testimony from
11 both Mr. McLaughlin and from Mr. Liskov is that they never
12 had an investment adviser agreement. The testimony from Mr.
13 McLaughlin is solely that he engaged Mr. Liskov to trade
14 non-securities for him.

15 **THE COURT:** I understand the argument. What else
16 do you have?

17 **MR. ZABIN:** Not persuaded?

18 **THE COURT:** Respectfully, no. So, let's move on.

19 **MR. ZABIN:** All right. So, I don't know how to
20 argue that issue to the jury because I don't know how the
21 plaintiff can argue that to the jury.

22 **THE COURT:** Well, maybe we, maybe we ought to --
23 hold up a minute and take a look at this proposed verdict
24 slip. All right? I haven't ruled.

25 **MR. ZABIN:** I've --

1 **THE COURT:** And I know I've just handed it to you.
2 But here's my approach here, if you look at it.

3 The SEC gave me a verdict slip and it made some
4 logical sense. But I think it's difficult for the jury to
5 understand and I have proposed what I think is a simpler
6 approach. And the first thing is it seems undisputed that
7 EagleEye and Mr. Liskov are one and the same, so I propose
8 to treat them as one and the same and then legally --

9 **MR. ZABIN:** Sensible. Yes.

10 **THE COURT:** You have no problem with that?

11 **MR. ZABIN:** I don't.

12 **THE COURT:** Well, then my second approach then,
13 because I don't think they, we can talk about this, but I
14 don't think they have to go investor by investor. And so I
15 arranged the factual issues which I would like answers to in
16 what I consider ascending degree of difficulty. Starting
17 with 1a and under section 2 of the Investment Advisers Act
18 negligent misrepresentations will do it. So I explain that.
19 And then 1b, negligent failure to disclose forex trading,
20 and I'm going to follow that throughout, I would like to
21 know what the jury thinks about that, that's 1b. Up to 3c
22 which, where the, where the SEC has to prove the most. A
23 scheme or artifice to defraud has got to mean an intentional
24 scheme. You don't have reckless schemes. You're going to
25 tell me you do?

1 **MS. BERNSTEIN:** For scienter it actually, for both
2 it is reckless.

3 **THE COURT:** Well, you're saying that in a
4 conclusory way. I need --

5 **MS. BERNSTEIN:** I'll get you, I'll get case law.

6 **THE COURT:** You're going to have to.

7 **MS. BERNSTEIN:** Okay.

8 **THE COURT:** Because I just don't -- I understand --
9 I think I understand. I have had occasion to write opinions
10 which means I have to read a lot of opinions. I know the
11 big scienter problems with 10b-5 and what the different
12 circuits say about that. But I always -- I don't see how
13 you have a reckless seem. A scheme to defraud recklessly?
14 That's, that's my hangup. But whether or not, whether or
15 not you prevail on that --

16 **MS. BERNSTEIN:** Okay.

17 **THE COURT:** -- to me that's the hardest thing the
18 government, the SEC has to prove. Intentionally engaged in
19 a scheme or artifice to defraud in connection with the sale
20 of a security, and then that's Securities Exchange. And
21 that's going to be the whiteout business.

22 **MR. ZABIN:** Sure, I understand that.

23 **THE COURT:** So that's the worst, or the hardest
24 thing they have to prove.

25 Now, focusing on that, without, tell me whether you

1 like this verdict slip. Defense. We'll get to the
2 plaintiff in a minute.

3 MR. ZABIN: Well, just, without having, you know, a
4 chance to parse the language, which is probably not much, I
5 don't think there's a lot of point to that --

6 THE COURT: But, but you have a week --

7 MR. ZABIN: But I do have --

8 THE COURT: -- and feel free to do it.

9 MR. ZABIN: I have a real serious problem with 1b.

10 THE COURT: And accordingly with --

11 MR. ZABIN: Because --

12 THE COURT: -- 2b and 3b, I imagine, which are all
13 the same.

14 MR. ZABIN: No, they're not.

15 THE COURT: All right.

16 MR. ZABIN: Because 1b -- most respectfully.

17 THE COURT: Yes.

18 MR. ZABIN: 1b specifically hangs out, failing to
19 disclose forex trading records. Now, your Honor --

20 THE COURT: I didn't say records. His -- maybe I
21 should use a different word. His forex trading experience.

22 MR. ZABIN: Well, I have a real problem with it
23 substantively because I think that is not the law under this
24 evidence. Under -- if, if he is not required, as he's not,
25 by regulation, by the governing regulatory agency and by the

1 way by the CFTC as well at this time, if he is not required
2 to disclose his track record --

3 **THE COURT:** Right.

4 **MR. ZABIN:** -- to allow liability for him not to
5 have done that is close to a denial of due process.

6 **MS. BERNSTEIN:** Your Honor, I may actually be able
7 to shortchange this because I would agree with him to remove
8 lb.

9 **THE COURT:** Thank you. This is helpful. I'm not
10 asking questions we needn't ask. So you just won that, Mr.
11 Zabin.

12 **MR. ZABIN:** I will shut up, on that point.

13 **THE COURT:** Well, I will get to you, Ms. Bernstein.

14 **MS. BERNSTEIN:** Okay.

15 **THE COURT:** I mean, I know you're chomping at the
16 bit.

17 **MR. ZABIN:** Okay.

18 **MS. BERNSTEIN:** I apologize.

19 **THE COURT:** No, don't apologize. Are you going
20 to -- do you agree to dropping anything else? That will
21 save us some time.

22 **MS. BERNSTEIN:** Well, I mean, in other words, I
23 think the whole forex trading is subsumed generally into the
24 negligent material misrepresentations. So I don't think we
25 have to parse them out separately.

1 **THE COURT:** All right. Do you, because I am going
2 to let you argue, and it's not now, do you want to drop any
3 of these other questions?

4 **MS. BERNSTEIN:** Let me just -- well, we actually
5 have to add because, because of charging issues and penalty
6 issues, EagleEye does need to be in there separately.

7 **THE COURT:** Well, I'll hear you on that.

8 **MS. BERNSTEIN:** Okay.

9 **THE COURT:** Because I don't think -- I disagree,
10 but we'll talk it through.

11 All right. So, there.

12 **MR. ZABIN:** Okay.

13 **THE COURT:** There is no 1b and therefore there's
14 just a 1. Go ahead.

15 **MR. ZABIN:** So --

16 **THE COURT:** What else?

17 **MR. ZABIN:** Okay. Well, that changes the
18 complexion of the rest of our argument but not really the
19 substance of it. Because I do not, most respectfully, I
20 just think to allow the plaintiff to argue that
21 McLaughlin's, that somehow McLaughlin, whatever they think
22 he did --

23 **THE COURT:** Here's how --

24 **MR. ZABIN:** Yes.

25 **THE COURT:** -- I propose to do it. And the clerk

1 and I were talking about this. I propose, subject to
2 hearing Ms. Bernstein, but for now I'm just talking with
3 you, I propose to say she can't argue McLaughlin. But
4 that's it. We're not going to tell the jury that. And
5 here's the reason. If I tell the jury that that carries
6 with it, and my experience in conspiracy cases I think
7 confirms this, the negative pregnant that I think, though I
8 will give them cautions that I don't think anything about
9 the case, that I think the other investors are from the sale
10 of a security. I would simply keep her away from
11 McLaughlin. She doesn't need him.

12 **MR. ZABIN:** All right.

13 **THE COURT:** And let it go at that.

14 Now, that's how I propose, if you, if you win on
15 this point, that's how I propose to deal with it. Doesn't
16 that make sense?

17 **MR. ZABIN:** Yes, it does.

18 **THE COURT:** All right. Okay. So what other part
19 of this should I direct out?

20 **MR. ZABIN:** You should direct out the claim of
21 Bodi. Because while the plaintiff has put in evidence that
22 Mr. Bodi lost his \$26,000, there's no evidence that there
23 was any misrepresentation to him at all. So, he should be
24 out of the case.

25 **THE COURT:** All right, I hear what you say. What

1 else?

2 **MR. ZABIN:** I think Smith should be out of the case
3 because if the jury, if you believe everything he said about
4 what Mr. Liskov said there is no misrepresentation. He
5 agrees Mr. Liskov did not pass himself off as an expert, did
6 not tell him he was successful with other clients, basically
7 take, take his word at a hundred percent. There's nothing
8 in it.

9 **THE COURT:** All right. Anything else?

10 **MR. ZABIN:** Striano. Striano I think, I think as
11 your Honor observed at the side bar, the statement in quotes
12 in the complaint is that Mr. Liskov said I'm pretty good at
13 forex trading. Your Honor indicated, quite correctly, we
14 gave you a First Circuit case, not that you need backup,
15 but --

16 **THE COURT:** I don't consider the First Circuit as
17 backup. I work for the First Circuit.

18 **MR. ZABIN:** I know.

19 **THE COURT:** Go ahead.

20 **MR. ZABIN:** I know. Gallus humor.

21 **THE COURT:** Go ahead.

22 **MR. ZABIN:** But nonetheless, that is the claim that
23 the, that the plaintiff advanced, you know, in a
24 particularized pleading which they put in quote marks. That
25 is an unambiguous statement of what their evidence is

1 supposed to be. And it wasn't that. And even if we were to
2 assume that we would, that Mr., that Mr. Striano did say
3 that that is just classical puffing. No liability for fraud
4 can be based on a statement of anybody who says I'm pretty
5 good.

6 **THE COURT:** But my problem is that, I propose to
7 give a puffing charge here, but it seems to me that that is
8 the proper way to handle it, give a charge that liability
9 can't be based upon forward looking puffing and let the jury
10 resolve these questions, but not to prevent her from arguing
11 Striano.

12 Is there any other point that you wish to make?

13 **MR. ZABIN:** Well, I think -- I gather I'm batting
14 200 on this. And that I guess is the ballgame. But my
15 views, I hope you'll give some thought, more thought to it.

16 **THE COURT:** Oh, believe me, believe me, I will.

17 **MR. ZABIN:** I don't think she should -- see, I
18 don't think that the plaintiff should be allowed to argue
19 that there is a scheme based on testimony by individual
20 investments when that testimony doesn't show fraud. I just
21 think that, I just think that's grossly unfair.

22 **THE COURT:** Well --

23 **MR. ZABIN:** I mean --

24 **THE COURT:** -- if you're going back to press me on
25 my ruling on reliance, I think I'm right on that. In an

1 enforcement action they don't have to prove reliance.

2 **MR. ZABIN:** They do not. But they do have to prove
3 that the statement, that there were either a fraudulent
4 scheme, fraudulent misrepresentations writ large, but they,
5 but that's not, but nonetheless that isn't reliance. They
6 have been, the plaintiff has been trying this case, even
7 though reliance is not their burden, nor is the amount of
8 losses their burden, they have tried this case as if it were
9 an investment adviser malpractice case.

10 **THE COURT:** There's some truth to that.

11 **MR. ZABIN:** Huh?

12 **THE COURT:** There's some truth to that.

13 **MR. ZABIN:** And that's proper. Because what they
14 put in, even though that's not why they put in, is relevant
15 to show that there was a fraudulent scheme, and as I think
16 it was the Sixth Circuit said plaintiff can show that a
17 scheme was successful in order to show that it was
18 fraudulent. I understand that. I don't like it, but I
19 understand it.

20 **THE COURT:** All right.

21 **MR. ZABIN:** But now when it comes to arguing this
22 case and they've got, they've made a claim which they open,
23 which is what set out as I recall Ms. Bernstein's very
24 strong opening, that there was a scheme, and as part of that
25 scheme all these investors were defrauded. And now it turns

1 out that four of the six investors don't make statements
2 that justify a finding of fraud.

3 **THE COURT:** Well, you know, I think the way to
4 handle this issue is, as follows. It's open to a federal
5 judge, to a state judge now, to charge first. I'm going to
6 charge first. And I'm going to say as to Question 3c that
7 that relates to the whiteout business. Now, while I'm not
8 going to emphasize it, the negative pregnant of that
9 statement is that's the scheme or artifice to defraud, not
10 some overarching scheme from the beginning.

11 Now, having charged first, though I'll let
12 everyone, and you should, take issue with the charge before
13 you have to argue, once the charge is out there the parties
14 are stuck with that charge, subject to a later appeal.

15 **MR. ZABIN:** Right.

16 **THE COURT:** So, the argument's going to have to
17 conform to the charge, and that's how I plan to handle it.

18 Now, let's hear --

19 **MR. ZABIN:** That's fine.

20 **THE COURT:** Okay, let's handle -- let's hear from
21 Ms. Bernstein.

22 I've said I was disposed not to let you argue
23 McLaughlin. I haven't said anything -- as to the Securities
24 Exchange Act. I haven't said anything about the others.
25 But I do understand his argument, and I'll hear you.

1 **MS. BERNSTEIN:** First of all, your Honor, we didn't
2 put a lot of in evidence about the liquidation of securities
3 for the following reason. This was Stipulation Number 5.

4 **THE COURT:** Right.

5 **MS. BERNSTEIN:** Beginning in 2008 and continuing
6 through 2010, Liskov advised several clients to open foreign
7 currency exchange or forex trading accounts at FXCM LLC, an
8 online retail currency firm, and to liquidate investments in
9 securities and instead invest in forex.

10 So, we were perhaps now lulled by the idea that we
11 didn't have to prove investor by investor --

12 **THE COURT:** I don't -- you see, I don't think you
13 do. Nevertheless, it seems to me my approach is, is fair
14 and you'd simply want -- in other words, emphasize that
15 stipulation. My charge will say that a stipulation, they
16 have to take the stipulation as given. And they will have
17 the stipulations. So you don't have to go investor by
18 investor. But my instinct is to say that you are not to
19 argue a violation of the Securities Exchange Act as to Mr.
20 McLaughlin.

21 **MS. BERNSTEIN:** He actually testified that there
22 were liquidations of his Fidelity account. So it's open to
23 interpretation as to him. Because he did actually testify,
24 and there was an argument about whether that was cash or
25 whether it was a core account, and that would be a jury

1 question whether we put in enough evidence as to it.

2 **THE COURT:** Show me --

3 **MS. BERNSTEIN:** As to the second investment.

4 **THE COURT:** Show me the transcript on that.

5 **MS. BERNSTEIN:** I will.

6 **THE COURT:** You -- well, you've got a week.

7 **MS. BERNSTEIN:** Okay.

8 **THE COURT:** You've got a week. So we can do that.

9 **MS. BERNSTEIN:** And there was an argument about
10 core account and I'm sure I can find it.

11 **THE COURT:** I don't need it right now. You just
12 show it to me.

13 **MS. BERNSTEIN:** We're concerned a little bit about
14 the jury verdict form, and can I be heard --

15 **THE COURT:** Well, now, we're going to get to that.
16 Because in all other respects, other than your agreement to
17 drop Question 1b, in all other respects the motion for
18 judgment as matter of law is denied. Don't argue
19 McLaughlin, cull him out as violation of the Securities
20 Exchange Act, unless I take that back in light of looking at
21 the transcript.

22 **MS. BERNSTEIN:** Would I be free, though, because I
23 actually think the real strength of McLaughlin is the e-mail
24 that he sent to Mr. Liskov. Because that's -- I mean,
25 because this is all about scienter. Right? Really the

1 first couple of investors and those losses is a pattern.
2 And that's also why the overall scheme really does encompass
3 all of them. Because it goes to his scienter and the scheme
4 to defraud through time. He starts with the earlier
5 investors, who are savvier, who are able to look at their
6 account statements. So he gets them in the door, but he
7 can't do very much. But that's the beginning of the scheme.
8 And he takes acts in furtherance of it.

9 But then you have with the Starretts, he's got
10 whiteout. And you have, with Stott you have whiteout. And
11 so the scheme actually starts in November and October. And
12 that's also why we discussed Bodi. Because it's more of a
13 notice issue as to these early ones and steps that he takes
14 and indications that bring him -- and I don't think it is
15 just the whiteout. He's trying to get people into
16 investments in forex by hook or by crook. And he does it,
17 he picks the ways he does it depending on the investor. And
18 some of it is misrepresentations and some of it is other
19 actions. With the Starretts there are other actions.

20 **THE COURT:** So the scheme is to get people in
21 there -- how does he make money on this scheme?

22 **MS. BERNSTEIN:** Performances in the short run,
23 losses in the long run. And that's one, that's one of the
24 exhibits you saw.

25 **THE COURT:** And you say -- I understand. And you

1 say that that's, that he intentionally did that. All right.
2 Or all right, I understand that.

3 And let's talk about the verdict slip.

4 **MS. BERNSTEIN:** A couple of issues.

5 **THE COURT:** I will tell you -- I said let's talk
6 about it and now I'm interrupting. Forgive me.

7 I will tell you that this confirms my approach that
8 you're going to have to prove he intentionally did that.
9 You don't recklessly do that.

10 **MS. BERNSTEIN:** I will check the case law.

11 **THE COURT:** The word reckless just doesn't, won't
12 bear that type of freight. Intention will. And so I am
13 confirmed or I tend to be confirmed in my intention to hold
14 you to that standard.

15 **MS. BERNSTEIN:** I hear you --

16 **THE COURT:** What's your issues with the verdict
17 slip?

18 **MS. BERNSTEIN:** -- and I'll look it up.

19 **THE COURT:** Right.

20 **MS. BERNSTEIN:** Issues about misrepresentations
21 under the securities law, because he was a fiduciary, under
22 United States v. Chiarella he had an affirmative duty under
23 the Securities Exchange Act of '34 to disclose material
24 facts. It isn't just in the context, it's generally. So
25 it's true for both the Investment Advisers Act and for the

1 Securities Act.

2 THE COURT:: I agree with that but I don't think --

3 MS. BERNSTEIN: Okay.

4 THE COURT: -- I have to call out anything.

5 MS. BERNSTEIN: Okay. The other issue --

6 THE COURT: You see, that's why, that's why I am
7 calling out now 2b and 3b. I want to know what they say
8 about that. But, yes, I think you're entitled to such a
9 charge. There are, under both these statutes, affirmative
10 duties to make disclosures. All my judicial notice was
11 there's no statute, regulation, rule expressly on
12 this point. That's how we're going to revisit that issue.

13 Go ahead.

14 MS. BERNSTEIN: Because he actually stands
15 differently than the normal person in terms of the
16 Securities Exchange Act.

17 THE COURT: Well, argue it to the jury.

18 MS. BERNSTEIN: Well, no, that's the law. That's
19 the law under Chiarella. And that's why I was bringing it
20 out.

21 THE COURT: I will give an appropriate charge.

22 MS. BERNSTEIN: Okay.

23 THE COURT: Now, why, with Mr. Zabin's agreement
24 that we are just going to treat them together, why isn't
25 this an adequate verdict slip?

1 **MS. BERNSTEIN:** Because then, it would be if we're,
2 he's going to agree that EagleEye is there for, liable as
3 Mr. Liskov is.

4 **THE COURT:** Well, that's the implication of what he
5 just agreed to and I'm taking it that way.

6 **MS. BERNSTEIN:** Because there are separate
7 penalties for both the way --

8 **THE COURT:** There may be.

9 **MS. BERNSTEIN:** -- it was charged and they're
10 separate actions for both that would accrue from actions of
11 this Court in an administrative context.

12 **THE COURT:** Yes. You agree we can treat them the
13 same?

14 **MR. ZABIN:** I just want to make sure that I
15 understand where we are. The comments that I made talking
16 about 1b applied to 2b. Is that out as well?

17 **THE COURT:** No, no. It's in and you're going to
18 have to --

19 **MR. ZABIN:** Well --

20 **THE COURT:** It's in and I guess your rights are
21 saved, insofar as I do intend to charge 2b, your rights are
22 saved. Now, what I say, if you disagree with how I explain
23 it, I mean, you know First Circuit law is very strict on
24 that, I'll invite you to the side bar and you're going to
25 have to take your exception at that point.

1 **MR. ZABIN:** Yes.

2 **THE COURT:** But here's what I think you've agreed
3 to, Mr. Zabin. If they answer yes to one or more of these
4 questions then there is going to have to be a further
5 hearing before the Court. I understood your agreement to
6 be, but we need to have it clear, that I would be
7 considering sanctions against EagleEye as well as sanctions
8 against Liskov because we have agreed to treat them as one
9 and the same. Is that okay?

10 **MR. ZABIN:** Yes.

11 **THE COURT:** That's sufficient for me, Ms.
12 Bernstein.

13 **MR. ZABIN:** My, my problem with, is not just
14 intentionally or recklessly. My problem that I thought I, I
15 thought I argued, at least if not persuasively, at least
16 clearly, is that there cannot be liability --

17 **THE COURT:** Oh, you have. You have. I disagree
18 with you. I disagree with you based upon the more general
19 statutes that Ms. Bernstein just alluded to and the concept
20 of the T.J. Hooper which I seem to have embraced.

21 **MR. ZABIN:** T.J. Hooper is a negligence case.

22 **THE COURT:** I understand that.

23 **MR. ZABIN:** I know. But the considerations are
24 entirely different.

25 **THE COURT:** I think the principle is sufficiently

1 similar.

2 Go ahead, Ms. Bernstein.

3 **MS. BERNSTEIN:** I'm actually happy to get rid of
4 2b. I thought that's actually what --

5 **THE COURT:** You are? Fine.

6 **MS. BERNSTEIN:** Because I think it just goes to
7 general misrepresentations and leave it to the jury.

8 **THE COURT:** I'm fine with that. I'm fine with
9 that.

10 **MS. BERNSTEIN:** And failures to disclose material
11 misrepresentations.

12 **THE COURT:** Okay. And so what about -- you're
13 going to leave it in under 3b? Or do you want it out under
14 that?

15 **MS. BERNSTEIN:** No, because I think it's subsumed
16 generally in material misrepresentation, it's one among
17 many. And I don't think we need to ask the question
18 separately about forex trading.

19 **THE COURT:** Well, I tell you, one of the reasons I
20 wanted to preserve a separate question, candidly, and this
21 discussion is very helpful to the Court, is that, while I
22 have rejected Mr. Zabin's able argument, I don't think at
23 all that the matter is free from doubt. And therefore, I
24 thought by asking a separate question, I could get the view
25 of the jury on that issue and I could do it without

1 prejudicing either side which would give me a better record
2 to conduct further proceedings and also should there be an
3 appeal give the appeals court, the court of appeals, a
4 better record on which to review my conduct.

5 So, if you want it out under the Investment
6 Advisers Act, that's fine, but I think I'm going to leave it
7 there under, under the Securities Exchange Act and 10b-5.

8 **MS. BERNSTEIN:** It's just that I think it's
9 focusing on -- it's interesting, we're both arguing on the
10 same thing as well.

11 **THE COURT:** That's true.

12 **MS. BERNSTEIN:** I think it's focusing on --

13 **MR. ZABIN:** Two great minds arriving at the same
14 place on different roads.

15 **MS. BERNSTEIN:** I think that may be accurate.

16 Because I think it's a misnomer, this whole
17 negligence failure, we did brief it that way in summary
18 judgment because it was not, it was not disputed. What was
19 disputed was what the investors came in and said. And they
20 all, and all three of them did come in and say that he made
21 affirmative representations about his abilities. Our
22 argument is once you make an affirmative representation,
23 once you actually say I'm good at forex or I have traded --

24 **THE COURT:** I'm going to let you make that
25 argument.

1 **MS. BERNSTEIN:** And there's --

2 **THE COURT:** Because in my charge I will be saying
3 in the circumstances that you believe in this case, it was,
4 it was a violation to intentionally or recklessly fail to
5 disclose.

6 **MS. BERNSTEIN:** But the problem is this focuses on
7 that disclosure to the absence of all others. What --

8 **THE COURT:** Such as what?

9 **MS. BERNSTEIN:** Okay. When I'm asking you for a
10 check for \$200,000, I didn't tell you what your balance was.
11 Every time -- he had, as an investment adviser, fiduciary
12 duty, he had an affirmative duty, this is capital gains,
13 Supreme Court precedent, to disclose all of, to all,
14 affirmatively disclose all material facts.

15 **THE COURT:** Here's what we're going to do, Ms.
16 Bernstein. Because I think you've done an interesting thing
17 here, the way you've pleaded this and the way you've gone
18 about it. My charge under 3a will cover the waterfront, but
19 I'm asking 3b because I want to know what they have to say
20 about it.

21 **MS. BERNSTEIN:** But I would request that it makes
22 clear that a failure --

23 **THE COURT:** The charge --

24 **MS. BERNSTEIN:** -- that there was a negligent
25 failure to disclose material facts. Because that is the

1 requirement. That he had an affirmative duty to disclose
2 all material facts.

3 **THE COURT:** Under the Investment Advisers Act.

4 **MS. BERNSTEIN:** Actually also under the Exchange
5 Act. Because that's United States v. Chiarella. If you
6 have an affirmative duty, and one way to have an affirmative
7 duty is to have a fiduciary duty, then you actually have to
8 disclose material facts. Is isn't the more narrow version
9 of disclose, you know, material misrepresentations or
10 omissions --

11 **THE COURT:** I will, I will reflect on that, and
12 you've given me briefs and I am grateful for them. But I am
13 not persuaded of that.

14 **MS. BERNSTEIN:** It's in our, just to point out,
15 it's in our summary judgment and we actually cited to the
16 case law.

17 **THE COURT:** Oh, I'm sure, it's the cases that I'm
18 going to be reading. I thought that the mens rea required
19 an intentional or reckless statement or omission.

20 **MS. BERNSTEIN:** It does.

21 **THE COURT:** It's not that it's negligent omissions.

22 **MS. BERNSTEIN:** No, no, it's not negligent for the
23 Securities Act. But my point is that --

24 **THE COURT:** Isn't that what we just said? It's
25 negligent under the Investment Advisers Act.

1 **MS. BERNSTEIN:** It can be. My point is just that
2 he has --

3 **THE COURT:** Under section 2 it can be.

4 **MS. BERNSTEIN:** Right. My point is only under the
5 Securities Exchange Act, because he had a fiduciary duty, he
6 had a broader duty to disclose material facts.

7 **THE COURT:** Oh, that I will say.

8 **MR. ZABIN:** Well.

9 **THE COURT:** But the duty is violated only by
10 intentional or reckless omissions.

11 **MS. BERNSTEIN:** Absolutely, your Honor.

12 **THE COURT:** Okay, fine, we're on the same -- all
13 right, this is helpful. I will revise the verdict slip this
14 way.

15 Now, here's, here's all we need say. I think. So
16 nine o'clock Monday morning, the 26th, I will charge. My
17 charges always follow the same format, and let's go through
18 it and we can focus on specifics if need be.

19 I charge the jury as to their duties, pay attention
20 to the evidence, free from bias or prejudice, unanimous
21 verdict based on the evidence.

22 I charge them as to my duty, to instruct as to the
23 law. Tell them they can ask questions just as they've asked
24 questions to the witnesses.

25 I tell them to listen to my entire charge. Tell

1 them that I build for them a complete mental framework and
2 they're not to take from me that I have any view about how
3 any question should be answered.

4 I go over the evidence. I think I will go over the
5 evidence in the following order. I think I will mention the
6 stipulations and say they must take the stipulations as
7 established.

8 Mention my taking judicial notice and say that that
9 is essentially undisputed. Then I will give a stock charge
10 on credibility. This is a case where witnesses have
11 testified differently about the same events. And so, I will
12 tell the jury they can resolve that. Then I will, as part
13 of that I will tell them about depositions again and how
14 they can use depositions.

15 I will tell them about exhibits and that they will
16 have all the exhibits.

17 I will tell them then about some things -- at that
18 juncture I'll pass out the verdict slip so they each have
19 one so they can follow it. And I will tell them some things
20 that are not evidence.

21 I will compliment you, and genuinely. This has
22 been a very well-tried and interesting case. I will
23 compliment you all, and then I will say pay no attention to
24 the lawyers. Or pay no attention to that. But the point I
25 want to make is if they like a lawyer or dislike a lawyer

1 that doesn't count, and I will say that.

2 I'll say the same about myself, that I have no view
3 about the case. I do not. That I do not talk to the
4 substance of the case.

5 I will tell them about reasonable inferences and
6 then go from reasonable inferences into the fact that the
7 SEC has the burden of proof here as to each of these
8 questions by a fair preponderance of the evidence.

9 Having done that, I will tell them things that are
10 not evidence. And you in essence -- not evidence, but not,
11 we're not asking them about. It is not evidence of anything
12 that Mr. Liskov lost clients' money. This is not that type
13 of case. At the same time, the SEC does not have to prove
14 that any of the people with whom he spoke relied on,
15 actually depended on what he said.

16 And then I will start going through the questions
17 question by question. I will, in Question 1, I will define,
18 I will start on the question of duty. And I will say that
19 an investment adviser stands in a special fiduciary
20 relationship with a client, and I will explain that. So
21 that's the duty.

22 Negligence is the failure to, to exercise that
23 degree of care that a reasonable investment adviser in the
24 same or similar circumstances would exercise.

25 I'll define misrepresentation. I will define fact

1 as opposed to puffing. I will define material as something
2 that a reasonable investor would think would make a
3 difference about an investment. I will mention without
4 being specific that this can include omissions to state
5 facts which under the circumstances ought be stated. I'll
6 take some time on that one.

7 And then when I get now to 2a I will define, and
8 I'll say that this requires something different. It's the
9 same misrepresentation of material fact, it's the same
10 fiduciary duty under the Investment Advisers Act, but we are
11 talking about intentional or reckless misrepresentation. I
12 will define both.

13 Then I'll go to 3a. And I will -- I've covered
14 everything except it must be in connection with the sale of
15 a security. I will say that stocks and bonds are
16 securities. I will say that the money market fund of
17 Fidelity is a security. But I've covered the other things.

18 Under 3b -- oh, but I will emphasize that
19 omissions, that the law requires the disclosure of facts
20 which ought be disclosed, so the omission of facts may, the
21 intentional or reckless omission of facts may be in
22 connection with the sale of a security because no one, is
23 being purchased here, I won't use the word sucking it out,
24 but the sale of securities in order to invest in forex.

25 Then 3b, which no one wants me to charge on, I

1 will, and it's the, that one I will focus on the forex
2 trading records. And I'll make clear we're not talking
3 about written records, we're talking about experience. In
4 fact, if you would like the word experience better than
5 record --

6 **MR. ZABIN:** My problem with it is --

7 **THE COURT:** Is conceptual.

8 **MR. ZABIN:** -- not semantic.

9 **THE COURT:** That's fine. I understand.

10 And then c, unless some brief in the interim puts
11 me off it, I will say that the, it has to intentionally
12 engage in a scheme or artifice to defraud. I will give the
13 broad, like mail fraud definition of artifice. But I think
14 it has to be intentional.

15 I will say that this, you may consider this
16 business about whiteout, but I will make it broader than
17 that, I won't limit it to that.

18 Now, if I'm going to go first that's where I'll
19 stop. I'll invite you to the side bar. You may, don't just
20 do it for the record, though I emphasize that the First
21 Circuit is very strict, you've got to make your objection in
22 a way that I understand it. But also, I mean, try again to
23 persuade me. And I will say to the jury I may have left
24 something out, I may have misstated something. And that's
25 true, I may. So correct me.

1 When we're done with that there will be a recess.
2 Then there will be final arguments. I follow the
3 Massachusetts procedure. The defense will argue first, the
4 SEC having the burden of proof will argue last. There will
5 be no rebuttal. Half an hour a side. You might tell me
6 that morning who's going to argue because I like to call you
7 by name. Then as soon as you're done arguing, I have about
8 five minutes of, from my point of view, boilerplate,
9 completely neutral, about how they deliberate together, they
10 don't pass their notes around, how they, again, how they ask
11 questions, how we're going to get them lunch, and then at
12 the end, trying to call them to their duty, about how
13 important it is that the verdict be fair and impartial.

14 I will not invite you to the side bar. If you
15 think that there's anything in that last charge that is
16 objectionable, please stand and ask to come to the side bar.

17 One consequence of my charging first, and you
18 people are so good, I don't think there will be this
19 problem, but it's my charge, and if any of you put a spin on
20 it, I'm not waiting for an objection on the other side, I
21 will correct it. But that's all. It happens rarely.

22 Now, we'll start with the SEC. That's how it's
23 going to go. Any other specific comments before we recess?

24 **MS. BERNSTEIN:** Just I think the one concern again
25 about this affirmative disclosure, say in the context. I

1 think it's broader than -- because that's the normal
2 disclosure requirement, that you either have to make a
3 material misrepresentation or an omission in the, you know,
4 or a material omission in the context that you should have.
5 In other words, you say something that's technically true
6 but it's misleading and that's why you should speak further,
7 in the context of an investment adviser for both the
8 purposes of the Investment Adviser Act and for the Exchange
9 Act, it doesn't matter about context. He's supposed to
10 disclose from an affirmative -- he's supposed to disclose
11 the material fact because you have an affirmative duty,
12 according to United States v. Chiarella you have to
13 disclose. You can't just, you can't just stay silent.

14 **THE COURT:** I will read Chiarella.

15 Anything else, Mr. Zabin?

16 **MR. ZABIN:** I do.

17 **MS. BERNSTEIN:** Oh, one, actually I'm reminded, I
18 apologize, one other thing.

19 **THE COURT:** That's all right.

20 **MS. BERNSTEIN:** The law says absolutely, your
21 Honor, they do not go to damages, they don't have to prove
22 damages, but the losses go to scienter.

23 **THE COURT:** You may argue that.

24 **MS. BERNSTEIN:** Okay.

25 **THE COURT:** I'm not going to prevent you from

1 arguing that.

2 **MS. BERNSTEIN:** Okay.

3 **THE COURT:** But I'm not going to say anything about
4 it.

5 **MS. BERNSTEIN:** That's fine, as long as I'm free to
6 say that in the closing.

7 **THE COURT:** You are free to say it.

8 Mr. Zabin?

9 **MR. ZABIN:** The comment about what you propose to
10 charge about the fiduciary duty. A fiduciary -- every
11 breach, as I think it's pretty clear, every breach of
12 fiduciary, of a fiduciary duty is not necessarily a
13 violation of either the Securities Exchange Act or the
14 Investment Advisers Act. And somehow I think the jury
15 should be charged that there's got to be evidence of the
16 standard of --

17 **THE COURT:** The standard, the standard is what I
18 take from the law itself and the case law. And I will use
19 those words. Those are the standards. But how -- and this,
20 this is the relationship of the T.J. Hooper, which I will
21 not explain to them, but this is how it fits in here. I
22 know it's a negligence case. I do strongly feel that how
23 the legal framework, more generally legal framework is
24 applied to the specific facts that they believe in this case
25 is for them. That's, that's it.

1 **MR. ZABIN:** Well, if you --

2 **THE COURT:** We're going to ask them that.

3 **MR. ZABIN:** If you would look, if you would look at
4 the case we cited on page 14 of our brief, a 2012 case, S&A
5 Farms out of the Eighth Circuit. That case I think
6 correctly states what the law is, the plaintiff has to show
7 what the standard of care for an adviser is.

8 Now, in this case, what do we have? We have the
9 SEC, the regulatory agency saying no duty --

10 **THE COURT:** No, no.

11 **MR. ZABIN:** -- to disclose.

12 **THE COURT:** No, no. That, that isn't what they
13 say. That emphatically is not what they say, and if you
14 argue that, I will correct you. They, they start out rule
15 making and they decide not to implement such a rule.

16 **MR. ZABIN:** Right.

17 **THE COURT:** In my view that's the same thing as
18 expressing no opinion on the matter. They have general
19 authority under the Investment Advisers Act and the
20 Securities Exchange Act. And they have engaged in rule
21 making under the Securities Exchange Act 10b-5. And that
22 rule making has engendered a whole lot of cases that, some
23 of which I am going to read again and some for the first
24 time. But I will have read what I think is germane. And
25 I'll explain that to the jury. I'm not going there.

1 **MR. ZABIN:** Okay.

2 **THE COURT:** And if it's error an appellate court
3 will straighten me out.

4 **MR. ZABIN:** All right. Accepting, even on your
5 formulation, the SEC has said it does not require by rule
6 disclosure.

7 **THE COURT:** No, it hasn't. It just hasn't -- it
8 has not said that.

9 **MR. ZABIN:** But it has because it faced the
10 problem, it said we're not going to do it.

11 **THE COURT:** Yes.

12 **MR. ZABIN:** Okay.

13 **THE COURT:** That's the same thing as expressing no
14 opinion. There are myriad circumstances.

15 **MR. ZABIN:** Well.

16 **THE COURT:** You see, that's -- it's the problem --
17 this is a fascinating issue conceptually. It's an issue
18 that goes to the heart of what we consider law. There are
19 general statutes. The problem with enacting statutes is
20 that by definition they are at one and the same time both
21 over inclusive, they catch people that congress never really
22 thought they would catch by their plain language, and
23 various people who congress wanted to catch they don't
24 catch. So, we try to fill in those blanks first by
25 regulation. Regulations are more nuanced but they have the

1 same problem. They're both at one and the same time over
2 inclusive and under inclusive.

3 We then fill in what interstices are left by
4 judicial decision. And we have a whole hierarchy of doing
5 that. The, the decision of a district court is not
6 precedential. The decision of a circuit is precedential
7 within that circuit. And sometimes you can get the
8 attention of the Supreme Court and they bind the Third
9 Branch.

10 The jury plays a role in that. And it's a vital
11 role. I must accurately describe the legal framework which
12 means I must accurately describe the Investment Advisers Act
13 and the Securities Exchange Act as they apply in this case,
14 and properly characterize Rule 10b-5, and then I'm going to
15 stop. And the jury will decide in the circumstances of this
16 particular case whether there has been a violation or not.
17 Once they've decided that as part of our common law that
18 will be instructive, not just to Mr. Liskov, but one expects
19 to Fidelity. And that's another reason why I'm asking 3b,
20 even though Ms. Bernstein eschews it.

21 **MR. ZABIN:** I agree with your Honor that this is a
22 fascinating issue, but I think, most respectfully, I think
23 you're overlooking a very important fact in that rule making
24 decision. If you go back and look at our submission you
25 will see that they actively considered, all right, and they,

1 and they said they're not going to do it now, they'll take
2 another look at another time. So, for now you cannot look
3 to the SEC regulations as creating a standard by which Mr.
4 Liskov's action or inaction is to be judged.

5 **THE COURT:** That's true.

6 **MR. ZABIN:** I'm not saying any more than that.

7 **THE COURT:** And what, the way you framed it then
8 I'm fine with.

9 **MR. ZABIN:** All right.

10 **THE COURT:** I'm fine with that.

11 **MR. ZABIN:** Another possible source for the
12 standard would be what is generally followed in the
13 profession.

14 **THE COURT:** You can argue it.

15 **MR. ZABIN:** There's no evidence of that except the
16 testimony from Fidelity that it is disfavored.

17 **THE COURT:** You may argue it.

18 **MR. ZABIN:** Okay. So, now we look to the general,
19 the general law or principles of what is reasonable, what,
20 you know, what is necessary. And that it seems to me,
21 especially if you're going, if you're looking to a case like
22 T.J. Hooper, that requires either evidence which would be
23 normally done through expert testimony of what the standard
24 of practice is for the ordinary reasonable investment
25 adviser, or it is so clear and so necessary that lay persons

1 can make that decision. I think we're not --

2 **THE COURT:** I follow that, Mr. Zabin, and that's
3 helpful in my consideration of your S&A Farms case. I will
4 look at it. All right.

5 **MR. ZABIN:** Thank you very much for putting up with
6 me, your Honor.

7 **THE COURT:** Not at all.

8 **MS. BERNSTEIN:** There's a couple of things. The
9 S&A Farm case is a Commodities Exchange Act case, it is
10 actually not a securities case.

11 **THE COURT:** I said I would look at it.

12 **MS. BERNSTEIN:** Okay.

13 **THE COURT:** And I will.

14 **MS. BERNSTEIN:** And in terms of the negligence, the
15 standard actually is is it a material -- I mean, let's come
16 back to what the standard is for being negligent under the
17 IA Act, is that did you negligently fail to disclose a
18 material fact. So the issue to the jury is to ask
19 themselves whether it was a material fact.

20 **THE COURT:** I will give a proper charge.

21 **MS. BERNSTEIN:** The other, the other issue is, and
22 I have to bring this up because the Commission authorized it
23 as one of the charges, in our complaint, and which is why we
24 had that witness explain about what paper we got and what
25 paper we didn't get, the reason we had it is because we

1 actually have a report claim in there, that he failed to
2 comply with the reporting requirements for the Act. And
3 they have not stipulated to that he didn't, we were still
4 arguing about it during the summary judgment.

5 **THE COURT:** Let's deal with it this way, though
6 it's a -- Mr. Zabin, this case is interesting enough for a
7 jury. I don't propose to direct that out of the case, but I
8 do propose to deal with that jury waived.

9 Is your client okay with that?

10 **MR. ZABIN:** That's fine.

11 **MS. BERNSTEIN:** I'm fine with that, your Honor.

12 **MR. ZABIN:** That's fine.

13 **THE COURT:** I'm sure you would be. Okay. And I
14 express no opinion on it. I hadn't even -- so we just -- so
15 no argument about that. We're going to have to deal with
16 that sometime.

17 Now, that does raise one other thing though. I
18 express no opinion about what's going to happen, indeed I
19 will tell the jury if the answers to all of these are no
20 this case is over, because largely it is, though this report
21 business now I'm going to have to deal with.

22 I propose, if any of this is yes or even if they're
23 all no and I have to deal with this report business, to hear
24 you jury waived -- and let me consult with the clerk just a
25 minute so we can --

1 (Whereupon the Court and the Clerk conferred.)

2 **THE COURT:** I propose to do the following. It's
3 unlikely, it would seem to me, but we'll wait and see
4 what -- well, you tell me, Ms. Bernstein. I don't need to
5 take any more evidence on this reporting claim, you think
6 it's a matter of record, you just want argument on that.

7 **MS. BERNSTEIN:** Right.

8 **THE COURT:** All right. The rest of it I do have to
9 make an assumption. If the answers to these questions are
10 no, given the stipulation, that's it, it's only the
11 reporting claim. If you're yes as to anything, I have to
12 hold further hearings.

13 But am I correct that you're not going to introduce
14 any other evidence, you're going to argue what you think is
15 the appropriate sanction in view of the yes answers.

16 **MS. BERNSTEIN:** I think that's right, your Honor.
17 But that is part of the reason we put the losses in because
18 that does go --

19 **THE COURT:** I -- no, no.

20 **MS. BERNSTEIN:** Yes is the answer.

21 **THE COURT:** The answer is yes, I have it.

22 **MS. BERNSTEIN:** The answer -- we put that evidence
23 in so it's already in front of the Court.

24 **THE COURT:** So I tell you, as I look at my docket,
25 I propose then to call you back for such a hearing, not

1 immediately, in other words, not Tuesday after the Monday
2 because I have jury waived --

3 **MS. BERNSTEIN:** Okay.

4 **THE COURT:** -- but sometime before December 17th.

5 **MS. BERNSTEIN:** Okay.

6 **THE COURT:** People are going to generally be
7 around? While everything's fresh and the --

8 **MS. BERNSTEIN:** I hate to say this, but I have a
9 kid thing on December 6th that I really have to be at.

10 **THE COURT:** We are going to honor your kid thing.

11 **MS. BERNSTEIN:** Okay.

12 **THE COURT:** And thank you very much.

13 We can work it out. But I thought I would put it
14 on -- this is not like a motion session. This is one for
15 more extended argument and nuanced determination. So I was
16 going to put it on in the morning. We'll give you as much
17 notice as possible, and I may have some flexibility. But
18 you're protected for the 6th.

19 **MR. ZABIN:** One other thing. You didn't mention, I
20 don't know if you mentioned it, the duty of care, as I, as I
21 read the Supreme Court cases decided, the duty of care is
22 not a general duty of care, it's a duty to exercise
23 reasonable care to ensure that the clients are not misled.
24 I do not -- I think that --

25 **THE COURT:** Well, a fiduciary has a heightened

1 duty.

2 **MR. ZABIN:** Well, heightened. But that's what, his
3 heightened duty is to use, use a higher degree of care.

4 **THE COURT:** I will have what you will think is --

5 **MR. ZABIN:** Yes.

6 **THE COURT:** -- appropriate language. Thank you.

7 **MS. BERNSTEIN:** Because that is actually the
8 general statement, but then it goes into specifics about
9 what that looks like.

10 **THE COURT::** I, I will take it from an
11 authoritative source. Thank you all very much.

12 **MR. ZABIN:** Thank you very much, your Honor.

13 **THE COURT:** We'll recess then, nine o'clock, Monday
14 morning, the 26th of November. Thank you. We'll recess.

15 **THE CLERK:** All rise.

16 (Adjournment.)
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C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

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D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 11-11576-WGY

* * * * *

SECURITIES AND EXCHANGE *
 COMMISSION, *
 *
 Plaintiff, *
 *
 v. * **HEARING** *
 *
 JEFFREY LISKOV and EAGLEEYE *
 ASSET MANAGEMENT, LLC, *
 *
 Defendants. *
 * * * * *

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

SECURITIES & EXCHANGE COMMISSION (By Deena R. Bernstein, Senior Trial Counsel and Naomi J. Sevilla, Senior Enforcement Counsel), 33 Arch Street, 23rd Floor, Boston, Massachusetts 02110, on behalf of the Plaintiff

DUANE MORRIS LLP (By Albert P. Zabin, Esq.), 100 High Street, Suite 2400, Boston, Massachusetts 02210, on behalf of the Defendants

1 Courthouse Way
Boston, Massachusetts

December 11, 2012

1 **THE CLERK:** All rise. The United States District
2 Court is now in session, you may be seated.

3 Now hearing Civil Matter 11-11576, Securities &
4 Exchange Commission v. EagleEye Asset, et al.

5 **MR. ZABIN:** Good morning, your Honor. Is it all
6 right if Mr. Liskov sits at counsel table?

7 **THE COURT:** It is. In fact, he's welcome there.
8 Let me sketch what -- he's welcome. Let me sketch what I
9 think we're doing and before we start have you correct me.

10 We are now at the remedy phase of this litigation.
11 No further evidence from our earlier discussions need be
12 proffered, nor do I understand anyone intends to proffer any
13 other evidence. So, the question before the Court is what
14 is the appropriate remedy. This is entirely a civil
15 proceeding but it's somewhat analogous to a sentencing.
16 Don't draw any conclusions from that. I'm just setting it
17 up procedurally.

18 So, procedurally, I obviously have read the
19 memoranda about remedy, the positions are significantly
20 different, and I thought what I would do is hear from the
21 SEC, hear from Mr. Liskov's counsel, and again analogous,
22 allow Mr. Liskov to make an unsworn statement if he wanted
23 to. It just strikes me that fairness might be served by
24 affording him that opportunity. But I emphasize he's not
25 required to in any way, and if he chooses not to, I would

1 never hold that against him. But that's how I propose to
2 proceed.

3 Ms. Bernstein, doesn't that make sense?

4 **MS. BERNSTEIN:** Actually --

5 **MS. SEVILLA:** Yes, your Honor.

6 **THE COURT:** Right. All right. And, Mr. Zabin,
7 doesn't that make sense?

8 **MR. ZABIN:** That's, that's fine, your Honor.

9 **THE COURT:** Okay.

10 **MR. ZABIN:** I think the analogy is well taken.

11 **THE COURT:** Very well.

12 So, Ms. Mikels, here's what I need in your
13 argument. Recognizing that I have read these materials,
14 what I would like you to do is go over the elements of
15 remedy for which the SEC contends, support it by whatever
16 factual or legal framework is appropriate, and that's what I
17 want. And while you're doing it you can rebut Mr. Liskov's
18 contrary positions. Mr. Zabin, naturally, I will want you
19 to deal with each of those elements and why we ought go the
20 same way -- Ms. Sevilla, forgive me. I called you by the
21 wrong name, and I do apologize. All counsel have done an
22 excellent job in this case and I appreciate it.

23 So you counter it, and then once we've heard all
24 that we'll see if Mr. Liskov wants to say anything.

25 So, Ms. Sevilla, I'll hear you.

1 **MS. SEVILLA:** Your Honor, there is only one other
2 thing we had talked about dealing with today and that is the
3 Commission's claims under section 204 of the Advisers Act
4 and Rule 204-2 thereunder as to the books and records.

5 **THE COURT:** We, we had. I had omitted that. Go
6 ahead and speak to it.

7 **MS. SEVILLA:** Just briefly, your Honor, it is in
8 our brief.

9 Under those provisions there are certain required
10 books and records for registered investment advisers. I
11 don't think there's any dispute here that EagleEye was a
12 registered investment adviser. As you heard at trial, there
13 was evidence that the Commission examination staff conducted
14 an examination of EagleEye in August of 2010, requested
15 various records, which we've outlined in the brief, and
16 received some records in return that they didn't deem to
17 meet the requirements of the rule as we heard Mr. Latin
18 testify. So, we would ask the Court to find that there is a
19 violation as to EagleEye of section 204 of the Advisers Act
20 and Rule 204 thereunder, and that Mr. Liskov aided and
21 abetted those violations.

22 **THE COURT:** And what turns on that?

23 **MS. SEVILLA:** We would ask that, in terms of a
24 remedy, we would ask that as part of, we would ask that your
25 Honor enter an injunction against future violations of that

1 provision as well as the other ones which I'll address in a
2 moment.

3 **THE COURT:** All right, I understand that's your
4 position.

5 **MS. SEVILLA:** Your Honor, with respect to the
6 Commission's fraud claims under section 10(b) of the
7 Exchange Act, Rule 10b-5 thereunder, and section 206(1) of
8 the Advisers Act, based on the jury's finding of liability
9 on the defendant's part on those claims, the Commission is
10 asking for various remedies. As we set forth in our brief,
11 we're asking for an injunction against future violations of
12 those provisions of the securities laws, we're asking for
13 disgorgement of ill-gotten gains, plus prejudgment interest
14 calculated thereon, and we're asking for a civil penalty.

15 As to the injunction, the standard is for the
16 Court, the standard is for the Court to make a determination
17 that there's a reasonable likelihood of future violations,
18 and the factors that a Court may consider in making that
19 determination include the egregiousness of the conduct, the
20 level of scienter, and whether the conduct was of a repeated
21 or isolated nature. Those are three sort of related ones.
22 And as to those that, as we laid out in our brief, based on
23 the jury's verdict there was a finding by the jury of
24 liability under the two provisions that I mentioned under
25 both the Exchange Act and the Advisers Act, a finding of the

1 highest level of scienter, a finding of a scheme under
2 section 10(b) with an intentional level of scienter, and a
3 finding of fraud under those provisions as to not only one
4 client but four clients, excuse me, your Honor, five clients
5 under the Advisers Act, four clients under the Exchange Act.

6 So, our position is that it's not isolated conduct,
7 it's conduct of a repeated nature, it's the highest level of
8 scienter, and it's egregious conduct based on the jury's
9 finding. And I don't think as to those factors actually
10 defendants make any arguments otherwise. So, our position
11 is that an analysis of those factors does support the entry
12 of an injunction.

13 Also, your Honor, as we mentioned in our brief, the
14 entry of an injunction does trigger a Commission
15 administrative proceeding to seek other remedies against Mr.
16 Liskov and EagleEye, and those could include an order
17 prohibiting Mr. Liskov from associating with an investment
18 adviser, broker/dealer, other categories of securities and
19 industry professionals.

20 **THE COURT:** But that's not for me.

21 **MS. SEVILLA:** I mention it only --

22 **THE COURT:** I'm just trying --

23 **MS. SEVILLA:** Right.

24 **THE COURT:** -- to understand the statutory scheme.
25 What you contend is I ought now permanently enjoin

1 EagleEye and Mr. Liskov from further reporting violations.

2 **MS. SEVILLA:** And to --

3 **THE COURT:** Permanently enjoin him from further
4 violations of the Securities Exchange Act and the Investment
5 Advisers Act. But those injunctions, which doesn't mean I
6 wouldn't do it, they, they have the societal benefit that if
7 he were to violate he would both be in contempt of a court
8 order in addition to further violating the law. But really
9 it makes no difference. We expect everyone to obey the law.
10 It's just a further sanction. And you are pointing out that
11 were I to enjoin him from further violation of the
12 Securities Exchange Act, then the SEC, but not this Court,
13 could start administrative proceedings in essence to revoke
14 any licenses or ability to trade in these markets that he
15 might have.

16 **MS. SEVILLA:** That's all correct, your Honor. And
17 the reason I raised it is, it's our, it's the Commission's
18 position that based on the specificity of the jury's
19 findings that really both of those things are warranted
20 relief here. An injunction entered by your Honor that, you
21 know, to the extent there may be future violations of the
22 law, there would be harsher consequences, we believe because
23 of the specific findings of the jury that that is warranted
24 in itself. And also, we would like to bring the additional
25 proceeding and that is triggered by the injunction. We

1 think that is --

2 **THE COURT:** And you -- right. You can't do that
3 unless I enjoin.

4 **MS. SEVILLA:** That's right. And we believe it's
5 justified to do that again based on the specificity of the
6 jury's finding.

7 **THE COURT:** You're sort of suggesting that if I
8 enjoin you've got it in your mind you're going to do that.

9 **MS. SEVILLA:** Yes, we will, your Honor.

10 **THE COURT:** Go ahead.

11 **MS. SEVILLA:** Moving on to disgorgement and
12 prejudgment interest. Again, your Honor, based on the
13 jury's verdict which your Honor is aware of and I've
14 outlined, there does need to be a causal connection between
15 any ill-gotten gains from the conduct that the jury found
16 liability on. And what we're asking to be disgorged here,
17 we're asking for the performance fees that Mr. Liskov earned
18 on the forex trading to be disgorged. As I pointed out
19 earlier, your Honor, the jury found a scheme here. The
20 scheme was to lull people to invest in forex so that Mr.
21 Liskov could earn a performance fee.

22 **THE COURT:** I haven't forgotten the trial. And
23 they amount to what?

24 **MS. SEVILLA:** To -- it's the three hundred and one
25 thousand -- excuse me, your Honor, I'll get you the exact

1 number. Three hundred and -- the disgorgement we're seeking
2 is \$301,000 -- \$301,502.26, and then prejudgment interest on
3 that amount of \$29,603.59, for a total of \$331,105.85.

4 **THE COURT:** And these --

5 **MS. SEVILLA:** Jointly and severally as to EagleEye.

6 **THE COURT:** -- these performance fees do not
7 involve Bodi.

8 **MS. SEVILLA:** Correct. We subtracted Bodi out.

9 **THE COURT:** Thank you. All right. And what's the
10 authority for prejudgment interest? Because this is a
11 statutory tort and it dates from the commission of the tort?
12 How did you figure that?

13 **MS. SEVILLA:** We, we calculated it based, for each
14 fee that was taken out of the client's account and put in
15 EagleEye's account on a certain date. So for each fee, that
16 date to the present, December 1st, 2012 is the ending date
17 we used for the calculation. It's a quarterly interest rate
18 statutorily set. Ms. Bernstein's declaration that we
19 attached to our papers outlines that. We did inadvertently
20 forget to attach the exhibit which we do have today for your
21 Honor which I can hand up and also the file as well. And
22 that shows the detailed calculation as to each client's fee.

23 **THE COURT:** I would like that. And Mr. Zabin has a
24 copy of that? Or you're going to give him one?

25 **MS. SEVILLA:** I'm going to give it to him.

1 **THE COURT:** And as you're pointing out that's
2 what's provided for by statute and the rationale for
3 prejudgment interest is the fact that it's a statutory tort.

4 **MS. SEVILLA:** It's also to prevent the defendant
5 from having the benefit essentially of an interest free
6 loan.

7 **THE COURT:** All right.

8 **MS. SEVILLA:** For the period of time that he's not
9 had to pay that money.

10 **THE COURT:** All right. Now, what about a civil
11 penalty?

12 **MS. SEVILLA:** A civil penalty, your Honor, in terms
13 of whether to impose a penalty, the factors for that
14 determination include, similar to the injunction, the
15 seriousness of the violations, the level of scienter, the
16 repeated nature of the conduct, and the either loss or risk
17 of loss to others from the conduct.

18 **THE COURT:** What practical -- a civil penalty is a
19 fine.

20 **MS. SEVILLA:** Yes.

21 **THE COURT:** It will inure to the public fisc.
22 Correct?

23 **MS. SEVILLA:** Yes.

24 **THE COURT:** When in sentencing the Court imposes a
25 fine it frequently takes into account the ability of the

1 offender to pay because fines that really cannot be
2 collected impose administrative costs and glibly -- judges
3 sometimes impose a fine to send a message, and again glibly,
4 but you get the idea, say, well, if he wins the lottery he's
5 going to have to pay this given the egregiousness of the
6 conduct.

7 On the other hand is the argument that it's a
8 somewhat meaningless exercise if he can't pay or can't ever
9 pay because we cannot, we don't have debtors' prisons, we
10 cannot enforce money that he doesn't have. And again, the
11 analogy to a sentencing is only rough, but with a sentencing
12 I have a detailed probation report where I have rather
13 detailed data about an offender's financial affairs. And
14 here there are two. By agreement, it's EagleEye, its assets
15 and the like. But I don't know what the balance sheet of
16 EagleEye is and I don't know what his personal balance sheet
17 is.

18 **MS. SEVILLA:** Your Honor, it's correct that ability
19 to pay is a factor to be considered. As we've pointed out
20 in our papers, we believe based on the egregiousness of the
21 conduct and the jury's finding that a much larger fine or
22 penalty than we're seeking is justifiable based on the fact
23 that your Honor --

24 **THE COURT:** Suppose I --

25 **MS. SEVILLA:** So we have taken into account the

1 ability to pay.

2 **THE COURT:** Right. Suppose I agree with that. I
3 mean, I agree, suppose that a fine is warranted because of
4 the conduct. But then we get into the -- why should I
5 impose a fine as a practical matter if you're never going to
6 see the money. If we can come up down to the penny, what
7 disgorgement and pretrial interest, that's a fair bit of
8 change. And I don't know his or EagleEye's financial
9 situation. But if I imposed that why should I, other than,
10 other, you see, for general deterrence, to send a message to
11 people who also trade, what's it going to get us?

12 **MS. SEVILLA:** I think that is exactly the reason,
13 your Honor. I think that message is important to send based
14 on this jury's findings. To not enter a penalty I think
15 somewhat flies in the face of the jury's very specific
16 findings.

17 **THE COURT:** And so what are you seeking?

18 **MS. SEVILLA:** I think that is a factor.

19 Also, your Honor, there is, you know, the
20 defendants raised this in their papers, the issue of whether
21 this case could have settled before we went to trial. And
22 the fact of having to go through trial, it is just the
23 Commission's position that after a trial, after putting the
24 victims through a trial, specifically not just us, but
25 putting the victims through having to testify again, the

1 defendant can't walk away with a, with a less harsh sanction
2 than he, with no harsher a sanction that he might have
3 gotten short of trial. So, that's part of it, too.

4 **THE COURT:** Well, wait a minute.

5 **MS. SEVILLA:** And in terms of the factors that your
6 Honor considers --

7 **THE COURT:** Wait a minute. Well, that gives me
8 pause because this is the first -- what did you offer to
9 settle the case for?

10 **MS. BERNSTEIN:** Your Honor, I'm the person who did
11 the settlement, if you would like me to talk about it. We
12 settled --

13 **THE COURT:** Well, if you think it's germane.
14 Apparently you do.

15 **MS. BERNSTEIN:** Your Honor, I do. Because I will
16 represent to you that from the day this case was filed, I
17 tried to settle it. And I think even Mr. Zabin will tell
18 you that our settlements offers were reasonable. The reason
19 this case -- my understanding, and we never raised it before
20 this Court before because it was inappropriate, but now,
21 because it goes to acceptance of responsibility and
22 cooperation, which are two of the elements of the penalty, I
23 am raising it. The reason this case -- because he also
24 mentioned criminal interest, which I also was careful not to
25 do during the trial. We were told that this case could not

1 settle unless I made the criminal folks go away, which I
2 couldn't do.

3 **THE COURT:** That's not a surprising position for
4 one who --

5 **MS. BERNSTEIN:** It is not a surprising position.

6 **THE COURT:** All right.

7 **MS. BERNSTEIN:** But obviously I can't tell the U.S.
8 Attorney's office what to do.

9 **THE COURT:** And I fully understand that.

10 **MS. BERNSTEIN:** But what was also made clear by me
11 was that I was going to offer --

12 **THE COURT:** But let me interrupt.

13 **MS. BERNSTEIN:** -- a settlement that would not
14 impact them.

15 **THE COURT:** Wait. Let me interrupt. I know I'm
16 interrupting.

17 What's before me is entirely civil, tried, well
18 tried on both sides as I said, but civil, in which the
19 burden of proof is a fair preponderance of the evidence.
20 And the jury has made its finding and all intendments now
21 are in favor of the jury verdict. And so, what we're
22 talking about now is a civil penalty. And I understand your
23 colleague, Ms. Sevilla's argument as to sending a message.
24 But practically it doesn't look to me from what I've heard,
25 presiding over the case, that the likelihood of recovery is

1 all that great. But now she's raised another factor and you
2 rise to speak to it. And you say -- and now I'll be quiet.
3 Tell me, so you would have settled -- of course he wanted
4 the criminal to go away. You couldn't give him that. He
5 goes to trial. It's a long shot, you know. The only reason
6 you didn't win at summary judgment -- if this had come
7 before me as a case stated the great likelihood is you would
8 have won. Because then I would have drawn reasonable
9 inference from the facts. He stipulated to all the facts.
10 It was just his state of mind that was at issue. So, I deny
11 summary judgment for no better reason, though it's perfectly
12 adequate, than the SEC bears the burden of proof and the
13 jury could, though they did not, disbelieve the evidence
14 that was laid out before them.

15 So, it was a difficult case for him to prevail on.
16 He didn't prevail. But we had a trial. We had a jury
17 trial. I've always thought there was some benefits to that.

18 Now, why does that up the civil penalty because he
19 wouldn't settle?

20 **MS. BERNSTEIN:** Well, in the same reason that when
21 there's not a plea bargain in a criminal, in a criminal
22 trial, because we are analogizing it to sentencing, it tends
23 to up sentencing because --

24 **THE COURT:** Well, you see, there --

25 **MS. BERNSTEIN:** Well, because what it does do --

1 **THE COURT:** You're on very dangerous ground.
2 Because then --

3 **MS. BERNSTEIN:** Because it does affect the
4 sentencing guidelines.

5 **THE COURT:** Hear me. Hear me.

6 **MS. BERNSTEIN:** On acceptance of responsibility you
7 do not get a --

8 **THE COURT:** That is a discount.

9 **MS. BERNSTEIN:** Right. So that's one of the
10 factors.

11 **THE COURT:** And there's a discount -- and the words
12 acceptance of responsibility are sophistry. Everyone knows
13 it. And it demeans the criminal justice system to go around
14 ranting about acceptance of responsibility. It's not that
15 at all. What it is is a discount for sparing the government
16 the burden and expense of a trial. If it were anything else
17 it would be putting a charge, a sanction on the exercise of
18 a constitutional right. So here. And I'm not going to do
19 it. The fact he exercises his constitutional right under
20 the Seventh Amendment to have a jury pronounce the facts
21 doesn't add one dollar. So, I'm not clear how the
22 settlement plays in here.

23 **MS. BERNSTEIN:** Because we were giving him a
24 discount. We were factor -- we were giving him the benefit
25 of the doubt in every one of the factors. The money was

1 significantly lower and in fact --

2 **THE COURT:** And what was it?

3 **MS. BERNSTEIN:** -- at one point it was zero. And
4 we couldn't get it done globally that way. But the
5 numbers -- this would have settled for pretty much
6 disgorgement only if we had not gone to trial.

7 **THE COURT:** I understand.

8 **MS. BERNSTEIN:** We were going to give him a
9 discount for not settling.

10 **THE COURT:** For disgorgement, for disgorgement
11 only.

12 **MS. BERNSTEIN:** Right. We were going to give him a
13 discount --

14 **THE COURT:** To spare the government the burden --

15 **MS. BERNSTEIN:** Exactly.

16 **THE COURT:** -- and expense. And I don't discount
17 the inconvenience to the victims and the like, and
18 acknowledgment of wrongdoing. I don't discount those
19 things.

20 All right. So what are you looking for for a civil
21 penalty?

22 **MS. SEVILLA:** Your Honor, \$840,000 for EagleEye and
23 seven hundred and twenty -- it's the other way around,
24 excuse me. \$725,000 for EagleEye, \$840,000 for Mr. Liskov.
25 That's calculated, the statute provides for certain -- this

1 is a third tier penalty which we think is appropriate
2 because of the level of scienter and the losses and risk of
3 substantial loss to --

4 **THE COURT:** Help me out with how that's calculated.

5 **MS. SEVILLA:** The statute provides a maximum third
6 tier penalty of, for most of the relevant time, \$150,000 per
7 violation for individuals and \$725,000 per violation for
8 entities. Per violation can mean a lot of things as we've
9 outlined in our brief. The statutes that have been
10 violated, here our argument is there are two statutes
11 violated, 10(b) and 206(1). As to 206(1) the jury found
12 five victims, 10(b), four victims. That's nine violations
13 right there. There's case law that supports the counting of
14 violations in that manner. We've actually, again taking
15 into account ability to pay and just practical
16 considerations, have reduced the amount to the amounts that
17 I just stated for your Honor. It's sort of a, it's a
18 combination of counting violations and also the statutory
19 maximum was less for a certain period of time and then
20 increased, so it's a combination of that. As to EagleEye
21 it's essentially one third tier penalty. Again, taking into
22 account we weren't trying to be overly duplicative.

23 **THE COURT:** Yes. Thank you. All right. I
24 understand.

25 And you've now answered my question. Anything else

1 to be said before I turn to Mr. Zabin?

2 **MS. SEVILLA:** No, your Honor, that's all.

3 **THE COURT:** Thank you.

4 **MS. SEVILLA:** Thank you.

5 **THE COURT:** Mr. Zabin.

6 **MR. ZABIN:** Your Honor, first of all, my client
7 would like the opportunity to address the Court. I'm not
8 sure exactly what he'll say, but do you want to hear him
9 before I speak or after or --

10 **THE COURT:** The normal order with which I'm
11 familiar --

12 **MR. ZABIN:** Yes.

13 **THE COURT:** -- is he speaks last. And unless you
14 have some objection to that that's how I --

15 **MR. ZABIN:** Any way you want to do it.

16 **THE COURT:** That's how we'll proceed then.

17 **MR. ZABIN:** Okay. If I -- may I -- I definitely
18 feel like I am addressing the Court in a sentencing
19 procedure. Because as a practical matter, even though what
20 the Commission is looking for is not collectible, it is
21 always over the head, not so much, at least in my view, not
22 so much over my client's head because, although I think the
23 jury, the jury didn't see it this way, and I don't, and I
24 understand how, I understand how a jury could, could come
25 out the way they did, although I think that they were

1 somewhat, they were seriously over influenced, despite your
2 Honor's several cautionary instructions, by the amount of
3 the losses. But I can understand that, and at least we're
4 stuck with that. I'm not going to argue that the, at this
5 point that the jury was wrong. We have no quarrel with the
6 fairness of the trial. And I've been around long enough to
7 recognize a prima facie case when I see one. But the weight
8 of what the Commission is seeking will fall on his wife, but
9 most important, on his children. And these are three
10 entirely innocent people who had no idea what he was doing.
11 And, in fact, the day that the SEC came into the audit was a
12 day of shock for them.

13 **THE COURT:** I'm sure that's true, but that's so in
14 every sort of civil enforcement proceeding and surely in
15 criminal proceedings.

16 **MR. ZABIN:** It is. But because largely the Court
17 has, has discretion both for his penalties and for
18 disgorgement. You're sitting as the chancellor. And as
19 various appeals court have said that, for example,
20 disgorgement is akin to an injunction. The issuing of
21 orders with respect to a civil penalty is also
22 quasi-equitable. One of the most --

23 **THE COURT:** I fully recognize I have discretion
24 and, of course, that's why there's the dividing line between
25 the facts as found by the jury and the remedy as discerned

1 by the judge.

2 **MR. ZABIN:** One of the most fundamental maxims of
3 equity is that the chancellor always should consider the
4 effect of the remedy sought on third persons, especially
5 innocent third persons. And what I'm arguing to the Court
6 is that you should take into consideration, into heavy
7 consideration, most serious consideration, the impact of
8 anything you do, by way of remedy, particularly on the
9 children.

10 His oldest daughter, the oldest child, Sara, is but
11 two years away from college. This is a family now who was
12 living on the edge. Mr. Liskov, as we've, as we've shown in
13 the, in our memorandum and the attachment, his financial
14 statement, he is actually earning, earning money at a level
15 which would entitle him to Medicaid. He is making less than
16 133 percent of the poverty level. What he has, what he has,
17 what he has already had fall on him -- and if your Honor
18 were to say he brought it on himself, I wouldn't argue with
19 that. But he already has, this case has been published in a
20 variety of journals, a variety of, most newspapers, most
21 recently in Bloomberg's, in his local paper in Providence.
22 And I understand that the Commission does this not, I hope,
23 out of spite because we didn't settle. And I do want to
24 address that, even though your Honor's indicated that it
25 ought not, the inability to settle this case shouldn't

1 affect it. But I want you to understand exactly what was
2 involved. But he, he is now disgraced in the eyes of his
3 children. He's disgraced in the eyes of his neighbors. He
4 will never, injunction or no injunction, he will never be
5 able in our lifetime, in his, near future in his lifetime
6 will ever be able to get a job in the financial sector. It
7 will probably be very difficult for him to get a job of any
8 significant responsibility where he could earn money to pay
9 back and still provide for his family and for the children's
10 education. And what I am saying to your Honor sitting there
11 as the chancellor, the conscience of the king, if you will,
12 this is an important factor for your Honor to consider.

13 But let me explain, if I may, just what was
14 involved in the, in the issues that led to, led to the
15 inability to settle the case.

16 **THE COURT:** I will, though I've already said that's
17 not going to be a factor.

18 But before you move there, I understand your
19 argument, Mr. Zabin. And as one would expect, I mean, you
20 articulate it very well. But this is the argument with
21 which I've become familiar on the criminal side almost every
22 day. The sanction of the law does subject one to opprobrium
23 and that slops over onto people that are completely
24 innocent. In this case -- but the goals of remedial
25 sanctions properly here are -- you say, well, there's no

1 real specific deterrence because he's out of this business
2 anyway. But an appropriate goal of the remedy phase is
3 general deterrence for those similarly situated to him. And
4 I'll tell you candidly, it's hard for me, even if I were to
5 exercise my discretion in the way that you see, that you say
6 is appropriate, it's hard for me to conceive of an
7 appropriate sanction less than disgorgement of the profits.
8 We can talk about a civil penalty. But disgorgement here --
9 I shouldn't say profits -- disgorgement would seem, would
10 seem to be the starting point, would seem to be the starting
11 line. This is money he took from these people by virtue of
12 fraud. His ability to pay is not terribly persuasive in
13 that regard.

14 **MR. ZABIN:** I understand. But courts have, and
15 I'll give you citation, courts have declined to order
16 disgorgement in particular harsher cases. I fully agree
17 with the Court and with the Commission that deterrence is,
18 you know, is a key, is a key value that cannot be ignored at
19 this stage of the litigation. I agree with that. I don't
20 know what benefit, in this case, hitting this man with a
21 burden, which he cannot realistically hope to pay, for
22 decades perhaps, if ever, in view of the fact of everybody
23 who gets any of the financial, any of the financial blogs,
24 who gets Bloomberg, who sees the local papers, I don't see
25 how much more deterrence to the, to the, to people similarly

1 situated, you know, a fine would do. I really, really
2 don't. But I have -- but I can give you the citations of
3 cases.

4 **THE COURT:** No, I don't --

5 **MR. ZABIN:** I don't think you need them.

6 **THE COURT:** I don't. Because I understand it's --

7 **MR. ZABIN:** Right.

8 **THE COURT:** -- within my informed discretion.

9 If you wish to speak to settlement, I'll hear you.

10 **MR. ZABIN:** So, the reason I want to just talk a
11 little bit about the settlement, the settlement issues and
12 efforts was because it would lead, I think, to basically a
13 sensible and somewhat creative order.

14 Mr. Liskov was sued not only by the Commission but
15 by the CFTC and by the state Secretary of State. On top of
16 that, for two years he's been threatened with an indictment,
17 which hasn't come. Two weeks before we started this case or
18 so again we were told that it would come shortly. We were
19 told it would come in November. November has come and gone.
20 But it's out there.

21 We had offered a plea. The U.S. Attorney's office,
22 and I don't criticize them for it, said it was unacceptable.
23 And basically they wanted, they wanted a penalty. All the
24 lawyers involved of us, and unfortunately, and we have a
25 family of lawyers, including one of whom I'm very proud, far

1 better than I am, felt that, all felt that given what this
2 case was about it made no sense for him to take the plea
3 based on what, on what the U.S. Attorney's office was
4 taking.

5 We did get a tentative settlement together with
6 counsel for the CFTC, which was less than half of what the
7 Commission wanted, but her superiors would not go along with
8 it. We have a tentative settlement with the Secretary of
9 State. And the terms of that settlement broadly would be
10 that there would be a modest, I mean a really modest payment
11 up front, and it would be essentially an order that he would
12 not ever be an investment adviser or be in a position where
13 he can control other people's or even handle other people's
14 money, and that there would be a clause that if there were
15 substantial improvement, they call it a hit-the-lottery
16 clause, substantial improvement in his financial status that
17 there would be payments on a basis to be arranged. That's
18 the agreement we had in principle. That is what I would
19 hope would be a framework for this Court because that, that
20 meets so many of the interests.

21 **THE COURT:** But isn't that what's going to happen
22 anyway? Whatever monetary sanction this Court imposes will
23 not result in anything akin to a debtor's prison, will allow
24 him modestly to provide for his family, and will, as you
25 say, have the ability, should he hit the lottery or an

1 equivalent benefit, to provide for greater collections
2 downstream. It's not like I'm going to be, you know,
3 putting them on the streets, settlement or not. And now
4 having gone through the trial there isn't much -- I don't
5 fault anyone for going through the trial. That's his
6 constitutional right. But there isn't much leverage to talk
7 about a reduced amount. At least reduced below the amount
8 of disgorgement. That I can see. You say that's creative.
9 But what ends does it serve?

10 **MR. ZABIN:** Well, it serves two ends. First of
11 all, there are cases that hold that the so-called debt act
12 that limits essentially, limits what the, what the
13 government can garnish does not apply to disgorgement.
14 There's a Fifth Circuit case, and I'll give you the
15 citation. I don't think that's the law in every circuit. I
16 don't think it's the law in this circuit.

17 **THE COURT:** It does not apply to, I heard you say
18 extortion?

19 **MR. ZABIN:** Disgorgement.

20 **THE COURT:** Oh, disgorgement.

21 **MR. ZABIN:** Sorry. I --

22 **THE COURT:** Well --

23 **MR. ZABIN:** And, you know, that --

24 **THE COURT:** Let me --

25 **MR. ZABIN:** -- would resonate a problem.

1 **THE COURT:** You ought to rest easy here because it
2 applies in this Court, whatever the Fifth Circuit may say,
3 there's not going to be any especial sanction beyond the
4 amount of the ordered disgorgement and penalty if the Court
5 determines on a penalty. I'm not going to treat this any
6 different than a fine. So, I hear what you say.

7 All right. Perhaps I ought hear him if he wishes
8 to be heard.

9 **MR. ZABIN:** Essentially, your Honor, I understand
10 after one loses a case, one of the things you, one loses
11 besides the judgment is you lose whatever leverage you may
12 have had. As a practical matter, I don't think we ever had
13 leverage that was acceptable to either of the Commissions.
14 It may have been acceptable to the lawyers. I know only
15 that a proposal was tried out on me by counsel for the CFTC.
16 And basically we said it was, it was attractive, see if your
17 folks will approve it. They didn't.

18 We had told the U.S. Attorney, you know, said that
19 if you can get to an acceptable plea, we'll accept whatever
20 the two Commissions and the state wanted. The attitude was
21 he committed a crime, he brought it on himself, too bad.
22 And that really -- and that was even the tone of it.

23 So, basically, we have no -- I am not appealing to
24 any leverage that we have. I'm appealing to the conscience
25 of the Court and, you know, whatever, whatever it is, I'm

1 sure it will be the right thing. One also hopes that it
2 will not be something that is really ruinous to this family.

3 **THE COURT:** Thank you.

4 Now, Mr. Liskov, there is no provision for your
5 speaking now, but I indicated that I would hear you. You're
6 not under oath and I take that into account. But please
7 understand you're not required to say anything. Your lawyer
8 says you wish to. You're not required to say anything. If
9 you say nothing, I will not hold that against you in any
10 way. But I thought fairness indicated that I ought hear
11 from you directly if you wanted to say something. And under
12 those circumstances, if you do, I will hear you.

13 **MR. LISKOV:** Thank you.

14 **MR. ZABIN:** Do you want him here or do you want
15 him --

16 **THE COURT:** No, no, it's not sworn. He can be
17 right where he is now at counsel table.

18 **MR. LISKOV:** Thank you, your Honor.

19 This is the first time I've ever spoken in front of
20 a judge like this so please excuse me, I'm obviously
21 nervous.

22 I have, as Mr. Zabin had said, I have been around
23 lawyers all my life never expecting ever to be in this
24 position surrounded by them. But I have great respect for
25 the Court and all the officers of the Court, including the

1 SEC and the job that they do.

2 I would like to mention that I do feel, as I
3 mentioned at trial, that I failed my clients in what they
4 had asked me to do. I failed them from the perspective of
5 the care that I needed to take every day with them in
6 handling their money. There's no question about that. And
7 as I tried to explain to my children, I accept
8 responsibility for everything that has come my way, and
9 everything that has come my family's way, it falls on me. I
10 certainly do not need a newspaper article or a press release
11 to explain that.

12 However, as I stand here today, I must tell you
13 part of the reason I'm in the financial condition I am in
14 because I invested in the very, quote, unquote, scheme that
15 I thought my clients would do well in. And I still believe
16 that I should have made sure that they were not getting
17 involved as I had got them involved to the extent that I
18 did. There's no question about that.

19 But I also believe that they were with me. I did
20 not try to mislead them in any way and I did not feel at the
21 time that they were being misled. I felt like they were as
22 hopeful as I was that they would make money with me.

23 I would just like to mention, as far as my family,
24 they understand and respect also what the Court must do.
25 And for that I would just like to say thank you for the

1 time.

2 **THE COURT:** This case is going to require a written
3 opinion and findings and rulings, but there is no reason,
4 having been fully tried, having a detailed jury verdict, to
5 stay the order and therefore the Court now imposes the
6 following order.

7 This order applies to EagleEye Asset Management and
8 Jeffrey A. Liskov jointly and severally.

9 One: The Court finds that there has been a
10 violation of the appropriate reporting requirements and
11 therefore permanently enjoins EagleEye and Mr. Liskov, their
12 officers, agents, servants, employees and all persons acting
13 in concert with them, from any further violation of the
14 reporting requirements of the relevant acts.

15 Two: The Court permanently enjoins EagleEye and
16 Jeffrey A. Liskov, their officers, agents, servants,
17 employees and all persons acting in concert with them, from
18 any further violation of the Securities Exchange Act or the
19 Investment, and the Investment Advisers Act.

20 The Court orders disgorgement from both entities
21 jointly and severally in the amount of \$301,502.26, and
22 prejudgment interest, again jointly and severally, in the
23 amount of \$29,603.59.

24 The Court imposes a civil penalty on each, EagleEye
25 and Liskov, but this civil penalty is severally in the

1 amount of \$725,000. That's the order of the Court.

2 Now, let me explain it, Mr. Liskov. Let me explain
3 it to all parties. Here's what I understand from this case.
4 I fully understand that you invested as well as your clients
5 and you got the clients fraudulently to invest in this
6 extraordinarily risky venture. You -- there's no other way
7 to say it. You were gambling with your own money and you
8 were gambling with their money.

9 Look over these exhibits. I mean, I don't need to
10 tell you. I have looked over these exhibits. And you're
11 trading at all hours of the night. Your conduct is the same
12 as someone who is out at a casino playing the slots. It is
13 the view of this Court that you got into this, needed funds
14 to further support your speculative ventures, and
15 fraudulently obtained those funds from these various
16 clients.

17 You are in denial, sir, if you think that they were
18 caught up in this as you were. Yes, they were looking to
19 make a profit. They were looking to make a quick killing.
20 Much greater than the normal market return and certainly
21 greater than any return that someone would get on a secure
22 investment. They were. But you seem to be utterly deaf to
23 your responsibility as a fiduciary. It was your duty to
24 counsel these people, truly to counsel them, about the risks
25 as well as the rewards. It was your duty to explain your

1 own, your own poor trading record. The jury expressly so
2 found and properly found.

3 Now, I should say, because I said in our discussion
4 with counsel, the disgorgement, the prejudgment interest,
5 the civil penalty, will all be treated consistent with how
6 the courts treat a fine. No more severe than that.

7 That's the order of this Court.

8 As I know your counsel will tell you, but I always
9 say this in a criminal case, you have the right to appeal
10 from any findings or rulings either the Jury or this Court
11 has made against you.

12 That's the order of the Court. I do propose to
13 enter an opinion thereon, but this is the judgment.

14 We'll recess.

15 **THE CLERK:** All rise.

16 (Whereupon the matter concluded.)
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C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

DONALD E. WOMACK
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P.O. Box 51062
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C E R T I F I C A T E

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E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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SECURITIES AND EXCHANGE)	
COMMISSION)	
)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	NO. 11-11576-WGY
EAGLEEYE ASSET MANAGEMENT, LLC,)	
and JEFFREY A. LISKOV)	
)	
)	
Defendants.)	
)	
<hr/>		December 12, 2012

FINAL JUDGMENT AS TO BOTH DEFENDANTS

This written Final Judgment memorializes this Court's ruling made orally after a jury trial, a jury verdict, and a judicial hearing on remedies. This Final Judgment applies to both defendants, EagleEye Asset Management, LLC ("EagleEye") and Jeffrey A. Liskov ("Liskov"), jointly and severally, unless stated otherwise.

This Court rules that both EagleEye and Liskov have violated Section 204 of the Advisers Act, 15 U.S.C. § 80b-4, and Rules 204-2(a)(6) and 204-2(a)(8) promulgated thereunder, 17 C.F.R §§ 275.204-2(a)(1)-(6), (8), concerning a registered investment adviser's obligations to keep true, accurate, and current books and records.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that both EagleEye and Liskov, and their agents, servants, employees,

attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment, are permanently restrained and enjoined from violating, directly or indirectly, Section 204 of the Advisers Act and Rules 204-2(a)(6) and 204-2(a)(8) promulgated thereunder.

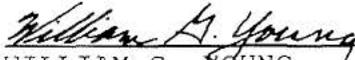
IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that EagleEye and Liskov, and their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment, are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that EagleEye and Liskov, and their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment, are permanently restrained and enjoined from violating Sections 206(1) and (2) of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-6(1), (2).

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that EagleEye and Liskov are liable for disgorgement of \$301,502.26, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$29,603.59.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the EagleEye and Liskov are severally liable for civil penalties in the amount of \$725,000 each pursuant to Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3), and Section 209(e) of the Advisers Act, 15 U.S.C. § 77t(d); 15 U.S.C. § 78u(d)(3); 15 U.S.C. § 80b-9(e).

SO ORDERED.


WILLIAM G. YOUNG
DISTRICT JUDGE