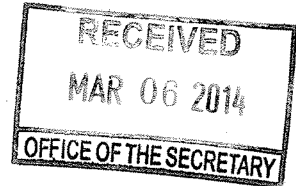
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15613

In the Matter of **JULIEANN PALMER MARTIN,** **Respondent.**

DIVISION OF ENFORCEMENT'S PRETRIAL BRIEF

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I. INTRODUCTION

Julieann Palmer Martin ("Martin") made material misstatements and omitted to state material facts to investors in connection with the offer and sale of securities. National Note of Utah, LC ("National Note"), where Martin worked for seventeen years, offered and sold securities, in the form of promissory notes, under the guise of a profitable real-estate investment business. The company promised investors large, guaranteed returns purportedly generated from real-estate investments. The reality, however, was that the company was operating a Ponzi scheme and was struggling to pay its basic operating expenses.

Martin was a key player in the scheme. She worked closely with the National Note's principal, Wayne Palmer ("Palmer"). She was heavily involved in the company's day-to-day operations. As early as March 2010, Martin knew that the company could not repay investors' principal. By at least September 2011, it was also unable to pay investors' returns, or cover its operating expenses, including payroll and utilities. Despite this knowledge, Martin offered and sold securities to investors without disclosing the company's financial woes. She also made affirmative misrepresentations: she represented that the company could pay a guaranteed 12% return from its real-estate business, and that it was profitable.

National Note's promissory notes were securities. Its offering of these securities was not registered under the federal securities laws or subject to an exemption from such registration. In addition, Martin was acting as an unregistered broker in selling these securities.

Martin violated multiple federal securities laws. First, she violated the antifraud provisions of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder. Second, she violated the provisions of Sections 5(a) and (c) of the Securities Act. Third, she sold securities as an unregistered broker in violation of Section 15(a) of the Exchange Act.

II. FACTS

National Note, where Martin worked for seventeen years, was a Utah company that claimed to purchase, manage, and sell real property and also buy and sell loans backed by real-property interests. From at least 2004 to mid-2012, National Note sold over $100 million in unregistered securities to approximately 600 investors in a purported Regulation D offering. National Note guaranteed investors a 12% yearly return paid from the company's profits from real-estate investments and lending.

Unfortunately, National Note was an offering fraud and Ponzi scheme. The private placement memorandum ("PPM"), which the company used to raise investor funds, contained material misstatements and omissions. Far from generating investors' returns from real-estate profits, the company was using new investors' money to pay existing investors' returns.

Eventually, by the spring of 2010, National Note began delaying payments to investors. In mid-2011, it began having difficulty paying its own operating expenses. By the fall of 2011, the wheels fell off. The company could no longer make payments to its investors. Leading up to the collapse, Martin solicited and accepted new investments

despite knowing about the company's dire financial situation and that the company was operating a Ponzi scheme.

In the summer of 2012, the Commission sought and obtained a temporary restraining order and asset freeze against National Note and Palmer. Subsequently, National Note and Palmer consented to a preliminary injunction. National Note's business and assets are currently in control of a receiver.

A. Martin played a key role at National Note.

Martin worked for seventeen years at National Note. She started as a bookkeeper in 1995 and eventually also assumed responsibilities as its de facto office manager and Palmer's assistant. She had significant responsibilities related to investor funds. She handled all deposits from investors and, with the help of Lindsey Madsen, National Note's receptionist ("Madsen"), she prepared the checks and wires for interest and principal payments to investors. She also maintained records of payments to investors by using National Note's accounting software (Peachtree and NoteSmith). Martin was responsible for managing accounting data and generating statements of account for investors. According to Palmer, Martin managed "every penny that [came] in or [went] out on a particular note, notes receivable, and note payable." Martin also had access to the company's two bank accounts. She and Palmer were the only signatories on the accounts.

Martin was also heavily involved in collecting income from National Note's real-estate investments. She kept track of the payments, notified Palmer if any were late, and sent out demand letters when necessary. She also paid the company's operating

expenses. At any given time, she knew the balance on the bank accounts and whether National Note's income was sufficient to pay its obligations.

Martin also dealt with National Note's sales agents. She explained the commission structure to them, provided them with packets containing the private placement memorandum to distribute to investors, tracked their commissions, and sent them their checks.

B. Martin was a primary point of contact for prospective and existing investors.

Martin was often investors' primary, if not only, contact at National Note. Investors testified that Martin provided them with substantive information about investments, including representing that National Note paid a guaranteed 12% return generated from profits on its real-estate investments. She told investors that the company had a perfect payment record. Despite multiple investors' testimony to the contrary, Martin testified that her communication with investors was limited to taking down their contact information or answering clerical questions. For substantive matters, she claimed that she referred the investors to Palmer.

Martin also assisted new investors with the transfer of their IRA funds to an independent trust administrator that would allow the investor to place their funds with National Note. She also prepared and transmitted investors' monthly checks and statements, as well as Palmer's periodic updates regarding the company.

C. Martin was a sales agent for National Note.

National Note's records include numerous emails between Martin and prospective investors, in which she described the investment to them and answered their questions. On multiple occasions, Martin convinced investors to invest in the company. In one

email, Richard Hicks, a National Note sales agent ("Hicks"), wrote to Martin to thank her for speaking to his client: "Thank you for your time. Your confidence solidified his commitment and he couldn't wait to sign the contract to move $110k of his self directed IRA to NN."

The company paid Martin commissions for bringing in new investors. The receiver has provided copies of checks and wires to Martin totaling $366,500 that were recorded in Peachtree as "commissions." These checks displayed the word "commission" in the memo field. Additionally, Martin herself signed some of her own checks on behalf of National Note, noting "commissions" on the memo line of each such check. During her testimony, Martin eventually acknowledged that she received referral fees on new investments.

D. Martin knew about National Note's financial problems.

As early as March 2010, Martin became aware that National Note was having financial troubles, and was unable to repay investors' principal at maturity. By mid-2011, she knew that National Note was having difficulty covering its own operating expenses; and by September 2011 that it was also unable to make interest payments in a timely fashion. By October 2011, she knew that National Note was no longer making some interest payments to investors.

Financial problems first became apparent when investors requested their principal at maturity and the company could not pay. In November 2009, Gerald Wallin notified National Note that he wanted his principal returned at maturity, in March 2010. He received a call from Martin explaining that National Note did not have the funds to pay him until it received a new investment. Ultimately, after numerous emails from Martin,

Wallin had to accept a payment plan from National Note, and it took most of that year for him to receive his principal.

In October 2010, Martin participated in a conference call with James Morrow ("Morrow"), an investor whose note had matured. Also on the call was Hicks, the sales agent who had referred Morrow to National Note. Martin informed Morrow and Hicks that National Note could not return the principal at that time. Martin strung Morrow along for several months through emails, reassuring him that Palmer was "working on a deal" to generate funds. Morrow never received a cent of his principal. Instead, he received an unsolicited renewal note.

Morrow was not the only investor who did not receive his principal. Several other investors whose notes had matured requested repayment of their principal. Martin was aware of these requests and communicated with Palmer seeking instructions. On several occasions, rather than repaying principal as requested, the company instead sent unsolicited renewal notes to investors.

Second, Martin was aware that National Note could not cover its operating expenses, including payroll. Beginning in July 2011, she contacted Palmer asking him to transfer funds in order to cover health insurance costs and payroll. She also notified him that the company was overdrawn at its bank. The company even received notice that its electricity would be shut off. Similar to principal repayments and investor payments, the company started delaying its payroll payments. Martin emailed Palmer on several occasions notifying him of the problem.

Third, as early as fall 2011, Martin was aware that the company could not pay investors' monthly returns. She, along with Madsen, was responsible for preparing and mailing out the investor payments on the first of every month. When she and Madsen were in the process of preparing the September 2011 checks, however, they were told to stop because the checks could not go out.

After that point, payments fell further and further behind. Palmer asked Madsen to prepare a spreadsheet reflecting late and missed investor payments. This spreadsheet contained the investors' name, the date the payment should have been made, and the date the payment was actually made, if any. Madsen testified that many of the checks that were supposed to go out were never mailed, and were voided.

Investors became increasingly worried and panicked because they were not receiving their guaranteed 12% return. Many investors contacted National Note to inquire about the company's situation. Martin fielded many of the calls and emails. One such email read,

> Julie, sorry but now as we go into the end of the month my SS money is spent and the $1200 from Nat Note is the only income I have to count on until the 1st of Oct . . . . So, I can't get it soon enough and I will need next months [sic] on time because I have already taken my credit card cash advances.

Still, Martin claimed in her testimony that she was unaware of her company's financial problems.

> Q: So was there a time when you came to think that National Note was in financial trouble?
> A: No.
> Q: Not at any point?
> A: No.
> Q: Was payroll ever late?
> A: Not that I know of. I mean, you know, I wasn't in charge of payroll.

E. Despite knowing that the company was in serious financial trouble, Martin continued soliciting and accepting new investments.

At the same time National Note was delaying repayments of principal, payments of investor returns, and payments for operating expenses, Martin was soliciting and accepting new investments. Although she explained the company's business and the terms of the investment to these prospective investors, Martin did not mention the fact that the company was in serious financial trouble.

One email in January 2012 demonstrates Martin's knowledge of the Ponzi scheme. She sent an email to Madsen with an attached, current copy of the spreadsheet reflecting late interest payments. At this point, National Note was in severe financial trouble and little new money was coming in.

> Jackie Christensen is wiring 52k this morning. . . . She will then pick up the check I left on your desk so her mother is current. Wayne also said something about getting their money over to Old Glory and then working with the rest after covering payroll and "the hot fires." I'm not exactly sure what those are, but if there is any money left over he said we could send a few payments. Depending on how much, my first choices would be . . . .

A list of investors followed. This email shows that Martin was aware that Jackie Christensen's investment was not going to real-estate projects. Rather, the money was used to pay operating expenses and returns to existing investors, including her own mother. Madsen testified that "as soon as we'd get any [funds] in, we'd try to dump it out as quick as possible to 'hot fires,' as they put it."

Investors testified that Martin never disclosed the company's financial woes to them. One investor, who was placing his aunt's money with the company, specifically asked Martin in late 2011/early 2012 if National Note had ever missed an interest payment. Martin answered no. This investor continued to communicate with Martin

through February 2012, when he made the investment. Martin never mentioned late payments or unreturned principal. She instead told the investor that National Note had never missed a payment. Another investor who also spoke with Martin in February 2012 had a similar experience—Martin confirmed Palmer's rosy picture of the company and made no mention of the company's severe financial predicament.

In the end, Martin herself testified that she never told any new investors in late 2011 or early 2012 that National Note could not pay investors on time, or that the company was using new investor funds to cover payroll and pay other investors.

F. Martin testified untruthfully.

During her testimony, Martin made several statements that appear untruthful. She attempted to distance herself from Palmer and National Note and claimed that she did not know about many aspects of the business. The evidence contradicts her statements.

First, Martin claimed that she did not know how National Note—where she worked for seventeen years—generated income. Yet, multiple investors testified that Martin explained that the company paid guaranteed 12% returns generated from real-estate projects.

Second, Martin testified that she did not know whether National Note had any sales agents or referral agents. However, several emails she sent explain the commission fee structure to potential sales agents. What is more, she herself acted as a sales agent, receiving $366,500 in commissions for bringing in investors.

Third, Martin maintained that her contact with investors was ministerial. Investor testimony indicates otherwise. Investors stated that Martin thoroughly explained the

company's business and guaranteed 12% return. For some investors, Martin was the only source of information regarding National Note.

Fourth, Martin claimed that she was unaware of any financial problems at National Note. Her email correspondences contradict this. Between summer 2011 and spring 2012, she exchanged almost daily emails with Palmer about the company's cash-flow problems. Madsen, the receptionist, was also aware of the company's inability to pay investor returns and meet operating expenses. If the receptionist knew about the financial woes, Martin certainly knew. Not only was she Palmer's personal assistant, but she was also responsible for tracking the company's revenue, investor-return payments, and expenses.

III. LEGAL ANALYSIS

A. Martin violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

In order to prove Martin violated Sections 17(a) of the Securities Act and 10(b) of the Exchange Act, the Commission must establish, by a preponderance of evidence, that (1) in connection with the offer and sale of securities; (2) Martin engaged in a scheme to defraud when she made untrue statements, omitted material facts, and engaged in transactions, practices or courses of business that operated as a fraud or deceit upon the investor; (3) Martin's misrepresentations or omissions were material, such that a reasonable investor would consider the misrepresented or omitted facts to be important in making an investment decision; (4) Martin acted with the requisite scienter in that he intended to deceive, manipulate or defraud investors, or acted recklessly in doing so; and (5) Martin used the means and instrumentalities of interstate commerce to affect the fraud.

1. Martin made fraudulent statements and material omissions.

Section 17(a) of the Securities Act prohibits persons, in the offer or sale of a security, from employing any device, scheme or artifice to defraud; obtaining money or property through materially false or misleading statements or omitting to state material facts; or engaging in any transaction, practice, or course of business which operates as a fraud or deceit. United States v. Naftalin, 441 U.S. 768, 773 (1979). Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit similar conduct in connection with the purchase or sale of a security. Section 10(b) was designed to prevent all manner of fraudulent practices. See, e.g., Chiarella v. United States, 445 U.S. 222, 226 (1980). The misrepresented fact must be material, which means that the representation or omission of that fact must be such that there is a substantial likelihood a reasonable investor would consider the fact important in making an investment decision. Basic, Inc. v. Levinson, 485 U.S. 224 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

Martin received $366,500 in commissions by making false statements and omitting to disclose material facts. As early as October 2010, Martin became aware of the company's financial troubles when she learned that it could not return Morrow's principal. She frequently communicated with Palmer about National Note's cash-flow problems. She was well aware of the company's inability to pay investor returns.

All the while, Martin provided detailed information about the company to prospective investors. She made false statements of material facts to prospective investors by informing them that National Note generated investor returns through profits from real-estate projects. She also told investors that the business was profitable enough to generate a guaranteed 12% return. The reality, however, was that the business was

collapsing and was operating as a Ponzi scheme in which new investor funds were used to pay earlier investor returns. Martin conceded in her testimony that she never told investors that the company was continuously late in making investor payments and that it used new investor money to pay returns. Certainly, such information would be important to a reasonable investor's investment decision.

2. Martin's fraud occurred in connection with the purchase or sale of securities.

Martin made misrepresentations "in connection with" the purchase or sale of securities, in the form of promissory notes. As the Supreme Court has reaffirmed, the "in connection with" requirement is to be construed broadly and flexibly to effectuate its remedial purposes. SEC v. Zandford, 535 U.S. 813, 819 (2002). Thus, the "in connection with" requirement is satisfied when someone utilizes a device "that would cause reasonable investors to rely thereon" and "so relying, cause them to purchase or sell a corporation's securities." See, e.g., Carter-Wallace, Inc. v. Hoyt, 150 F.3d 153, 156 (2d Cir. 1998) (citing SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 860-62 (2d Cir. 1968) (Section 10(b) applies "whenever assertions are made ... in a manner reasonably calculated to influence the investing public."). The "device" used to deceive can take many forms. See, e.g., Geman v. SEC, 334 F.3d 1183, 1185-91 (10th Cir. 2003) (misrepresentations contained in a firm's brochure and customer agreements); CFTC v. Vartuli, 228 F.3d 94, 101 (2d Cir. 2000) (holding the "in connection with" requirement is met when an advertisement makes false representations regarding securities transactions); Carter-Wallace, 150 F.3d at 156 (concluding false statements appearing in drug advertisements in a medical journal could meet the "in connection with" requirement).

Here, National Note utilized several "devices," including promotional and sales brochures, speaking arrangements, and seminars. There was a direct and intended link between these devices and the purchase and sale of securities by National Note investors. See Zandford, 535 U.S. at 819. The company's misrepresentations regarding the use of funds occurred in the course of the sale of those securities.

3. Martin's misrepresentations and omissions were material.

Martin's misrepresentations and omissions regarding the use of investors' funds were material. See SEC v. Cochran, 214 F.3d 1261, 1268 (10th Cir. 2000) ("information implicating the fair market value would be material to a reasonable investor"); Everest Sec., Inc. v. SEC, 116 F.3d 1235, 1239 (8th Cir. 1997) ("It would be material to an investor to know that the offering company's existing project had been abandoned, that none of its asset value was to be recouped."). Information is material if a substantial likelihood exists that the facts would have assumed actual significance in the investment deliberations of a reasonable investor. Basic, Inc., 485 U.S. at 224.

National Note's securities were an extremely speculative investment packaged as a profitable venture guaranteeing high returns. Even when National Note faced severe financial difficulties, Martin represented that the company successfully made investor returns and was profitable. In reality, however, National Note was struggling to keep the lights on. What's more, the company was paying investor returns with new investors' money. Certainly both existing and new investors would consider it important to know their funds were being misappropriated to operate a Ponzi scheme. See SEC v. Smith, No. C2-CV-04-739, 2005 U.S. Dist. LEXIS 21427, at *15 (S.D. Ohio Sept. 27, 2005) ("[I]t is obvious that a reasonable investor would consider it important to know that his

money would not be invested in bank stock but would instead be used for other purposes, such as to pay for [Defendant's] American Express bill, car washes, dating services, and the expenses of [Defendant's] other companies."). And certainly investors would consider it important to know that the company was no longer profitable and could not make investor returns or return investors' principal. Simply put, reasonable investors would not have purchased National Note securities if they knew the truth about the company.

4. Martin acted with scienter.

Scienter is an element of violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder but is not a required element of a violation of Sections 17(a)(2) or 17(a)(3) of the Securities Act. Aaron v. SEC, 446 U.S. 680, 696-97 (1980). The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Reckless conduct has been held to satisfy the scienter requirement. Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1232 (10th Cir. 1996) (noting that all circuits deciding the question have settled on "reckless" scienter). The Tenth Circuit ruled that the threshold mental state for specific "intent to deceive" is merely "recklessness." Id. Reckless conduct itself is defined as behavior that is "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." SEC v. Pros Int'l, Inc., 994 F.2d 767, 772 (10th Cir. 1993) (citing Hackbart v. Holmes, 675 F.2d 1114, 1118 (10th Cir. 1982)).

Martin acted with the requisite scienter. She had actual knowledge as early as October 2010 that National Note could not pay back some investors' principal. She also knew, as early as summer of 2011, that the company was in desperate need of cash and that it could not pay for its utility bills, payroll, or investor payments. Despite this knowledge, Martin accepted new investments without disclosing to new investors the fact that National Note was not paying investor returns. Worse yet, she made affirmative statements that National Note had never missed an interest payment.

5. Martin used the means and instrumentalities of interstate commerce.

Martin used the requisite jurisdictional means to affect the fraud. In Pereira v. United States, 347 U.S. 1, 8-9 (1954), the United States Supreme Court found that, when a defendant knows the use of mail or of wire services is a reasonably foreseeable consequence of their operations, that knowledge is sufficient to satisfy the "jurisdictional means" element. "All that is required to establish a violation of [Section 17(a), Section 10(b) or Rule 10b-5] is a showing that a means, instrumentality or facility of a kind described in the introductory language of th[e] section was used, and that in connection with that use an act of a kind described . . . occurred." Matheson v. Armbrust, 284 F.2d 670, 673 (9th Cir. 1960).

Here, National Note made use of the mails, the Internet, and of the telephone to solicit investments. Investors wired funds to National Notes accounts at National Notes' direction. The company then transferred most funds to a separate account used to make interest payments to earlier investors. Martin also used the telephone and email to communicate with investors. That is all that is required.

B. Martin violated Sections 5(a) and 5(c) of the Securities Act by selling unregistered securities to unsophisticated investors.

Martin violated Section 5 by offering to sell and actually selling unregistered securities. As an initial matter, National Note's promissory notes constituted securities in that they were sold as investments. Investors who purchased the notes were guaranteed a 12% return that National Note claimed to generate from real-estate projects. Additionally, the securities did not fall under the exemptions contained in Section 3(a)(11) of the Securities Act or in the safe-harbor provisions in Regulation D.

1. National Note's promissory notes were securities.

As a preliminary matter, National Note's promissory notes were securities. The company's PPM and sales brochure referred to the promissory notes it offered and sold as "investments," and to prospective purchasers as "investors." From 2007 forward, the notes were offered in a purported Rule 506 offering and investors were asked to complete a questionnaire to enable the company to determine whether or not they were accredited. Under both the Reves and Howey tests, National Note's promissory notes constitute securities.

Notes are presumed to be securities unless the notes fall into certain judicially created categories that are plainly not securities or the notes bear a family resemblance to the notes in those categories. Reves v. Ernst & Young, 494 U.S. 56 (1990). In Reves, the court identified four facts to be considered in determining whether a particular note is a security:

> (1) The motivations that would prompt a reasonable seller and buyer to enter into [the transaction]. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the interest is likely to be a "security" . . . (2) the "plan of

> distribution" of the instrument . . . (3) . . . the reasonable expectations of the investing public . . . [and] (4) . . . whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary.

Id. at 66-67.

First, National Note's purpose in selling notes was to raise funds for the company's operations, as stated in the PPM, and the note holders were interested in the profit to be generated by the note, in the form of a 12% guaranteed interest rate that was much higher than the rate available from conventional investments.

Second, the plan of distribution of the notes was to sell up to $50 million worth of notes. The size of this offering, and the $25,000 minimum investment, suggests a widespread distribution to a relatively large number of holders. This is more typical of a securities offering than of a borrower-lender relationship.

The third Reves factor requires a consideration of "whether a reasonable member of the investing public would consider these notes as investments." McNabb v. SEC, 298 F.3d 1126, 1132 (9th Cir. 2002). Here, note holders were told that their funds would be used by National Note for the business operations of the company, which was to buy, sell and underwrite mortgage loans and buy, sell and lease real property. Note holders understood that they would be repaid from National Note's profits from that business, in which they had no active role. Therefore, a reasonable member of the investing public would have considered these notes to be investments rather than loans.

Finally, there are no risk-reducing factors or alternative regulatory schemes that would have reduced the risk to the investors in this case. Therefore, under Reves, the notes issued by National Note were securities.

National Note's promissory notes also constitute securities under the Howey test. The National Note investors purchased securities in the form of investment contracts. In assessing whether an investment is a security, the Supreme Court has noted that the fundamental purpose of the Securities Acts is "to eliminate serious abuses in a largely unregulated securities market." United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975). In defining the scope of the products it wished to regulate, Congress painted with a broad brush. It realized the virtually unlimited scope of "human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" Reves, 494 U.S. at 61 (1990) (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946)).

The term "security" is defined in Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act to include any "investment contract." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). In Howey, the Supreme Court defined an "investment contract" as (1) "an investment of money;" (2) "in a common enterprise;" and (3) with a reasonable expectation of profits to be derived "solely from the efforts of others." Howey, 328 U.S. at 301; United Hous. Found., 421 U.S. at 852. Moreover, the nature of an "investment contract" is determined by the representations made to investors by promoters, and not on the promoters' actual conduct. SEC v. Lauer, 52 F.3d 667, 670 (7th Cir. 1995). The Tenth Circuit recently reiterated that "[t]he [Supreme] Court has 'repeatedly held that the test is what character the instrument is given in commerce by the terms of the offer, the plan on distribution, and the economic inducements held out to the prospect.'" SEC v. Shields, No. 12-1438, 2014 WL 685369, at *6 (10th Cir. Feb. 24, 2014) (quoting Marine

Bank v. Weaver, 455 U.S. 551, 556 (1982)). In this case, the elements of Howey are satisfied.

First, National Note investors invested money in the company. To invest money, "investors must choose to give up specific consideration, meaning they gave up 'some tangible and definable consideration in return for an interest that had substantially the characteristics of a security.'" Berrios-Bones v. Nexidis, LLC, No.: 2:07CV193DAK, 2007 WL 3231549, at *5 (D. Utah Oct. 30, 2007) (quoting International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 559-60 (1979)). National Note investors gave up specific consideration—thousands of dollars—in exchange for returns based on the company's real-estate profits. Thus, the National Note investments constitute an "investment of money."

Second, investors invested in a common enterprise. The Tenth Circuit determines whether an investment is in a common enterprise by considering the "economic reality of the transaction." Shields, 2014 WL 685369, at *6; McGill v. Am. Land & Exploration Co., 776 F.2d 923, 925 (10th Cir. 1985). "The determining factor of a common enterprise and the economic reality of the transaction is whether or not the investment was for profit." Berrios-Bones, 2007 WL 3231549, at *5. If the transaction was an investment for profit, "the economic reality requirement is often fulfilled and there is strong indicia that the investment is a security." Id.

The National Note promissory notes were investments for profits. National Note investors made their investments with the expectation that they would receive returns generated from real-estate profits. Put simply, investors placed funds with National Note so that National Note could generate profits and pay back investors with a portion of

those profits. This is an investment for profit and, under the economic-reality approach, satisfies the second prong of the Howey test.

Third, National Note investors reasonably expected to receive profit generated from the efforts of others. Profit is "either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investors' funds." United Hous. Found., 421 U.S. at 852.

National Note solicited investors by telling them that the company would use investor money to generate profits. Investors would then receive returns based on those profits. Investors took no part in generating the profits. Instead, they reasonably expected to receive profits based on the efforts of National Note. Given investors' reasonable expectations, the third prong of the Howey test is satisfied.

2. Martin sold unregistered securities to unsophisticated investors in violation of Sections 5(a) and (c) of the Securities Act.

Section 5(a) of the Securities Act prohibits the direct or indirect sale of securities through the mail or interstate commerce unless a registration statement has been filed and is in effect. Section 5(c) prohibits the direct or indirect offer for sale of securities through the mail or interstate commerce unless a registration statement has been filed. Anderson v. Autotek, 774 F.2d 927, 929 (9th Cir. 1980). A prima facie violation of Section 5 exists when: (1) no registration statement was filed or was in effect as to the security; (2) the defendants offered to sell or sold the security; and (3) interstate transportation or communications or the mails were used in connection with the offers or sales. See SEC v. Cont'l Tobacco Co., 463 F.2d 137, 155 (5th Cir. 1972). Once the prima facie elements of a Section 5 violation are established, the defendant bears the burden of proving the

transaction is exempt from registration. SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953).

There is no scienter requirement in Section 5. See Aaron, 446 U.S. at 714 n.5; SEC v. Friendly Power Co., 49 F. Supp. 2d 1363, 1367 (D.D.C. 1997). Rather, it imposes strict liability on anyone who directly or indirectly violates its plain terms. See, e.g., SEC v. DCI Telecomms., Inc, 122 F. Supp. 2d 495, 501 (S.D.N.Y. 2000); SEC v. Current Fin. Servs., Inc., 100 F. Supp. 2d 1, 5 (D.D.C. 2000).

Martin committed a per se violation of Section 5(a) and (c). In an eight-year span, National Note offered and sold over $100 million in securities to approximately 600 investors. As stated, the investments Martin offered and sold constituted a security under Reves. She violated Section 5(a) by selling securities, through the mail or by means of interstate commerce, when a registration statement had not been filed and was not in effect. She also violated Section 5(c) by offering the securities, through the mail or by means of interstate commerce, when a registration statement has not been filed.

3. The securities were not exempt under Section 3(a)(11) or the Safe Harbor Provisions in Regulation D.

Section 3(a)(11) of the Securities Act exempts securities which are sold "only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory." 15 U.S.C.A. § 77c(a)(11). This exemption does not apply, because National Note offered and sold securities to residents of several states.

Section 4(a)(2) of the Securities Act exempts nonpublic offerings. Rules 504, 505, and 506 of Regulation D establish the exemption requirements. Rule 504 of

Regulation D provides an exemption when company raises less than $1,000,000 and does not engage in any general solicitation. See 17 C.F.R. § 230.504. This exemption is not available because National Note raised more than $1,000,000 and engaged in general solicitation. Id.

Rules 505 and 506 of Regulation D require that (1) the company does not offer or sell its securities through general solicitation; (2) the company informs purchasers that the securities are "restricted" for resale purposes; (3) there are no more (or the company reasonably believes that there are not more) than 35 unaccredited investors; and (4) unaccredited investors have access to information normally found in a prospectus for a registered offering, like audited financial statements. See 17 C.F.R. §§ 230.505-506.

National Note does not qualify for either exemption. The company engaged in general solicitation by distributing brochures at real-estate seminars. Also, the company did not conduct any reasonable investigation to assure investors were accredited. Finally, the company did not provide unaccredited investors—or any investors—with the required financial information.

C. Martin willfully violated Section 15(a) of the Exchange Act by selling securities as an unregistered broker.

Respondent acted as an unregistered broker by selling National Note promissory notes as a regular course of business. Section 15(a) of the Exchange Act prohibits a broker or dealer from using interstate commerce to effect or attempt to induce transactions in securities unless registered with the Commission in accordance with Section 15(b). SEC v. United Monetary Servs., Inc., No. 83-8540-CIV-PAINE, 1990 U.S. Dist. LEXIS 11334, at *22 (S.D. Fla. May 18, 1990). Scienter is not required in

order to prove a violation of Section 15(a). SEC v. Nat'l Exec. Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

To determine whether an individual acted as a broker, courts generally requires showing a certain regularity of participation in securities transactions "at key points in the chain of distribution." Massachusetts Fin. Servs., Inc. v. Sec. Investor Protection Corp., 411 F. Supp. 411, 415 (D. Mass. 1976); see also SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003) (holding that "regularity of participation in securities transactions at key points in the chain of distribution" is primary indication that one is engaged in the business of effecting securities transactions for the account of others, thereby acting as a broker-dealer) (citations omitted) (internal quotation marks omitted).

Courts have identified a list of factors to determine whether an individual acts as a broker under the Exchange Act. Importantly, not all of the factors need to be satisfied for a person to be considered a broker. See SEC v. Hansen, No. 83 Civ. 3692, 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. Apr. 6, 1984) (citations omitted). The factors include solicitation of investors to purchase securities; involvement in negotiations between issuers and investors; receipt of transaction-based compensation; current or previous sales of securities of other issuers; valuation or advice as to the merits of an investment; and acting as an active rather than passive finder of investors. See, e.g., Martino, 255 F. Supp. 2d at 283; Hansen, 1984 U.S. Dist. LEXIS 17835.

Martin violated Section 15(a) by selling National Note promissory notes to investors as a regular course of business. Martin actively solicited investors by providing them with the PPM and other substantive information about the investment. She was investors' primary point of contact at National Note. She received $366,500 in

transaction-based compensation. By doing so, she engaged in the business of effecting transactions in securities without registering as a broker.

IV. REQUESTED SANCTIONS

A. Cease and desist

Section 8A of the Securities Act and Section 21C of the Exchange Act permit this Court to enter an order requiring a person who is violating or has violated, or who is about to violate any provision of, rule or regulation of the Securities Act or the Exchange Act to cease and desist from committing or causing such violations and any future violation of those provisions.

To impose a cease-and-desist order, there must be a risk of future harm. The risk, however, need not be very great and, absent evidence to the contrary, violations, by themselves, raise a sufficient risk of future violations. See In re KPMG Peat Marwick, L.L.P., Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *102 (Jan. 19, 2001), aff'd, 289 F.3d 109 (D.C. Cir. 2002).

As stated above, Martin willfully violated several provisions of the securities laws. She acted with a high level of scienter when she offered and sold unregistered securities as an unregistered broker and made material misrepresentations and omissions. Despite knowing of the company's dire financial situation, she told investors that all was well and that they could expect steady returns. There is currently no barrier to preclude Martin from repeating this conduct in the future. Given Martin's role in National Note's scheme, this Court should order Martin to cease and desist from violations of Sections 5(a) and (c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 15(a) of the Exchange Act.

B. Collateral bar

Section 15(b)(6) of the Exchange Act and Section 9(b) of the Investment Company Act authorize this Court to censure, suspend or bar a person associated with a broker or dealer if such person has willfully violated any provision of the federal securities laws and it is in the public interest. As discussed above, Martin has violated the registration and antifraud provisions of the Securities Act and Exchange Act. These violations occurred while Martin was associated with National Note, a company that sold securities. Therefore, barring Martin from association with any broker or dealer and other regulated entities is appropriate and in the public interest.

C. Disgorgement

Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act authorize disgorgement, including reasonable interest, in any administrative proceeding in which a cease-and-desist order is sought or a civil monetary penalty could be imposed. Disgorgement is necessary to ensure that Martin does not profit from her unlawful conduct. See SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998). Martin should disgorge the $366,500 in commission she received through selling National Note securities, plus prejudgment interest.

D. Civil penalties

This Court should further impose penalties against Martin under Section 21B of the Exchange Act Section 8A of the Securities Act. Section 21B of the Exchange Act authorizes the Commission to seek civil penalties in an administrative proceeding where the conduct, as here, involved fraud, and directly or indirectly resulted in substantial losses to investors. Similarly, Section 8A of the Securities Act authorizes the

Commission to seek penalties in a cease-and-desist proceeding where the conduct, as here, involved fraud, deceit and/or manipulation and resulted, directly or indirectly, in substantial losses to other persons.

Currently, a Court may impose third-tier civil monetary penalties at a rate of up to $150,000 for each violation for each natural investor or natural person. See 17 C.F.R. § 201.1004. While courts have discretion in determining an appropriate civil penalty amounts, Section 21(d)(2) of the Securities Act and Section 21(d)(3) of the Exchange Act provide specific public interest factor a Court might take into consideration. Those public interest factors are: (1) whether the act or omission involved fraud or deceit; (2) the harm the act or omission caused to others, whether directly or indirectly; (3) the extent to which any person was unjustly enriched; (4) whether such person has previously violated the securities laws; (5) the overall need to deter the individual or other persons from committing the acts or omissions; and, (6) other such consideration as justice might require.

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980), established five factors that many courts weigh when calculating a civil monetary penalty: (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of the defendant's professional occupation, that future violations might occur; and, (5) the sincerity of the defendant's assurances against future violations. See also SEC v. Brethen, No. C-3-90-071, 1992 WL 420867, at *23 (S.D. Ohio Oct. 15, 1992) (recognizing SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984))[1]; see also SEC v. Deyon, 977 F. Supp. 510, 519 (D. Me. 1997) (imposing $75,000 penalty against defendant based on his

"fraudulent" conduct); SEC v. Custable, No. 94-C-755, 1996 WL 745372, at *5 (N.D. Ill. Dec. 26, 1996) (imposing civil penalty of $60,000, less than the maximum penalty, based in part on defendant's cooperation during the course of litigation). Although these factors provide guidance, "the civil penalty framework is of a 'discretionary nature' and each case 'has its own particular facts and circumstances which determine the appropriate penalty to be imposed.'" SEC v. Opulentica, LLC, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (quoting SEC v. Moran, 944 F. Supp. 286, 296-97 (S.D.N.Y. 1996)). Courts have recognized that "the amount of the regulatory penalty assessed should have some relationship to the amount of ill-gotten gains." SEC v. One Wall St., Inc., No. 06-cv-4217 (NGG)(ARL) 2008 WL 5082294, at *9 (E.D.N.Y. 2008) (collecting cases).

Martin repeatedly induced investors to participate in National Note's systematic program of deception and fraud. Although she knew investor money was being misappropriated, Martin continued to solicit new investors and take their money. Martin's high level of scienter is further evidenced by the expansive nature of the National Note scheme and by the number of investors involved. Martin did not accurately represent how the money was being used or how profitable the investment was. As such, this Court should grant the Commission's request for third-tier civil penalties against Martin in addition to a permanent injunction and disgorgement of misappropriated investor funds.

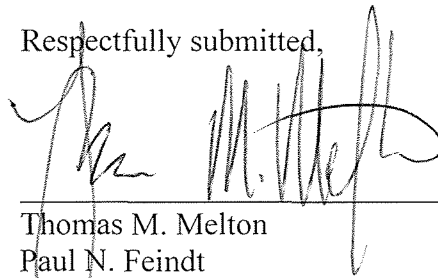
V. CONCLUSION

Martin continued to offer, sell, and accept new investments when she knew that the National Note Ponzi scheme was collapsing. For this reason, the Commission requests that this Court grant the requested sanctions.

The Commission requests that this Court issue an order that Martin cease and desist from violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. The Commission further requests the Court to bar Martin from association with any broker, dealer, or investment adviser.

The Commission also requests that the Court order Martin to disgorge $366,500 representing the commissions she received from sales of National Note securities together with prejudgment interest thereon. Lastly, the Commission requests this Court to impose a civil monetary penalty against Martin.

Respectfully submitted,



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