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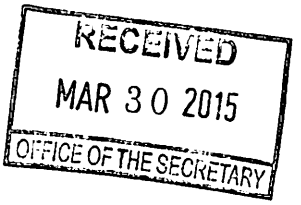
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15617

In the Matter of

LARRY C. GROSSMAN
and GREGORY J. ADAMS,

Respondents.

DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO RESPONDENT LARRY C. GROSSMAN'S PETITION FOR REVIEW OF INITIAL DECISION

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I. INTRODUCTION

As the Law Judge correctly determined, the evidence presented at the Final Hearing in this matter established that Respondent Larry C. Grossman willfully and repeatedly violated the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act") and the Investment Advisers Act of 1940 ("Advisers Act") in blatantly failing to disclose to advisory clients of his company, Sovereign International Asset Management, Inc. ("Sovereign"), that in return for placing their investments in certain offshore hedge funds, he received more than $3.4 million in illicit kickbacks from the funds. Grossman solicited and directed clients to invest and remain invested almost exclusively in these funds, and represented the investments as safe, diversified and suitable for his clients' portfolios. To the contrary, however, the funds were risky and not diversified, and Grossman failed to investigate, and in some instances wholly disregarded, numerous red flags about the funds and their management.

As a result of Grossman's repeated violations of the Securities Act, the Exchange Act and the Advisers Act, the Law Judge properly sanctioned him by imposing a cease-and-desist order and an industry-wide associational bar, and ordering him to pay disgorgement in the amount of $3,004,180.65 plus prejudgment interest, and a civil money penalty in the amount of $1,550,000.

In his Initial Brief, Grossman makes a number of arguments as to why the Law Judge purportedly erred in her Initial Decision – all of which the Law Judge already considered and correctly rejected. These arguments fall generally into two broad categories. First, Grossman contends the misconduct at issue accrued prior to the five-year limitations period set forth in 28 U.S.C. § 2462, and thus it was error to assess a civil money penalty. This argument is flawed because the evidence presented at the Final Hearing established Grossman continued his pattern and practice of misconduct well into the limitations period, and the Law Judge properly applied the

continuing violations exception in levying the penalty. Even if the continuing violations exception was not applicable, however, the Law Judge still would have been justified under established Commission precedent in taking Grossman's prior misconduct into account when assessing the penalty.

And second, Grossman argues all of the Division's requests for equitable relief, including disgorgement and a cease-and-desist order, are punitive measures and therefore subject to the same limitations period in 28 U.S.C. § 2462 as civil money penalties. Despite his reliance on an isolated decision on this issue reached by the Southern District of Florida (a decision which the Commission itself currently has on appeal to the Eleventh Circuit), Grossman's position directly contravenes decades-long case law, both from the Commission and federal courts around the country, that conclusively and definitively hold equitable remedies are not subject to 28 U.S.C. § 2462.

Additionally, throughout the Initial Brief, Grossman slips in a few isolated arguments in which he challenges some of the evidence the Division presented at the Final Hearing and claims certain other errors were committed during the proceedings. As the Division explains in more detail below, however, not only are these issues not properly on appeal, as Grossman failed to enumerate them in his Petition for Review as required by Rule 410(b) of the Commission's Rules of Practice, but Grossman also has waived the right substantively to raise these issues now because he failed to follow the proper procedures set forth in the Rules of Practice both before and at the Final Hearing.[1]

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[1] In this appeal, Grossman is not challenging the sufficiency of the evidence to support the charges in the OIP. Nor is he challenging whether disgorgement, prejudgment interest, civil penalties, a cease-and-desist order and associational bars are substantively appropriate, or the amount of disgorgement, prejudgment interest or civil penalties assessed against him. He contends only that the Law Judge erred in not finding these various remedies to be barred by the limitations period in 28 U.S.C. § 2462.

II. FACTUAL BACKGROUND

A. Procedural History

The Commission issued the Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") in this matter against Grossman and the co-respondent, Gregory J. Adams,[2] on November 20, 2013. In sum, the OIP alleged Grossman failed to disclose over $3.4 million in kickbacks he received from investments he made on behalf of Sovereign's advisory clients. Grossman solicited and directed clients to invest and remain invested almost exclusively in hedge funds and a managed account controlled by Nikolai Battoo, a fraud defendant in another Commission action. Grossman misrepresented his compensation and failed to disclose the kickbacks Battoo paid him in return for investments from Sovereign clients. In addition, at conferences and in written materials, Grossman told clients he chose Battoo's funds based on an extensive selection and due diligence process. He promoted the funds as safe, diversified, independently administered, audited, and suitable for the investment objectives and risk profiles of Sovereign clients, most of whom were retirees. To the contrary, investments in the funds were risky, lacked diversification, and did not have independent administrators and auditors. And Grossman failed to investigate, and in some cases wholly disregarded, numerous red flags concerning the funds and Battoo himself.

The OIP alleges Grossman willfully violated Section 17(a)(2) of the Securities Act, Section 15(a) of the Exchange Act, and Sections 206(1), 206(2), 206(3) and 207 of the Advisers Act; and willfully aided and abetted and caused violations of Section 15(a) of the Exchange Act, and Section 206(4) and Rules 204-3 and 206(4)-2 of the Advisers Act.

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[2] This appeal does not concern Adams or any of the Law Judge's rulings against him. Adams has not appealed the Initial Decision.

Grossman filed an Answer on December 13, 2013 ("Answer"), denying the allegations of the OIP in all material respects. In March and April 2014, the Law Judge held a four-day public Final Hearing in Tampa, Florida, during which numerous witnesses testified and over 150 exhibits were received in evidence. The Law Judge issued her 55-page Initial Decision on December 23, 2014. The decision found Grossman committed the violations charged in the OIP, and sanctioned him with a cease-and-desist order and an industry-wide associational bar, and ordered him to pay disgorgement in the amount of $3,004,180.65 plus prejudgment interest, and a civil money penalty in the amount of $1,550,000.

Grossman filed his Petition for Review with the Commission on January 12, 2015, and his Initial Brief on February 25, 2015.

B. Formation of Sovereign

Grossman was the founder, managing partner and sole owner of Sovereign until October 1, 2008, when he sold the company along with three related entities he controlled [Anguilla-registered Sovereign International Asset Management, LLC ("SIAM LLC"), Florida-based Anchor Holdings, LLC ("AH Florida"), and Nevis-based Anchor Holdings, LLC ("AH Nevis")] to Adams. (Tr. Vol. I at 174:19-23; DX 1 at 1; Answer ¶ 1.)[3] Grossman currently is the principal manager of Sovereign International Pension Services, Inc. ("SIPS"), an IRA administrator. (Answer ¶ 1.)

Grossman formed Sovereign in Florida in 2001. (Tr. Vol. I at 168:18-24; Answer ¶¶ 3, 10.) The company was registered with the Commission as an investment adviser from June 21, 2002, through at least July 7, 2011, the date it filed its last Form ADV Part 1 with the Commission. (Tr. Vol. I at 170; Answer ¶ 2.) Grossman himself was registered as an Investment Adviser Representative of Sovereign from September 5, 2006 through December 31, 2011. (DX 2 at 3.)

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[3] We cite the Final Hearing transcripts as "Tr. Vol. __ at __:__." We refer to the Division's hearing exhibits as "DX at __" and Grossman's exhibits as "GX at __." We also cite the Initial Decision as "ID at __."

Notably, this was more than three years after he sold the company to Adams. As described in more detail below, during this latter post-sale period, Grossman remained actively involved in Sovereign's operations and continued to perpetrate a fraud on Sovereign's clients.

C. Sovereign's Operations

At its peak in 2008, Sovereign had about 500-700 advisory clients and reported $85 million in assets under management. (DX 34 at 8; DX 40 at 8; DX 84 at 8; Tr. Vol. II at 453; Vol. III at 640.) Grossman targeted investors seeking to invest their money offshore, and most of Sovereign's clients were retirees with self-directed IRAs. (Tr. Vol. I at 28:12-13; 189:11-15.) In promotional materials, Grossman touted that Sovereign employed "proprietary investment methodologies" and an "extensive investment selection process" that was based on significant due diligence Sovereign supposedly performed on the investments Grossman recommended. (DX 46B at 1-3.) When he designed individual portfolios, Grossman claimed a personal, individualized approach, telling clients he would consider their existing holdings, what they needed, their risk tolerances, and whether they were conservative investors. (Tr. Vol. I at 220.)

Clients relied on Grossman's credentials as an expert in offshore investments and as a Certified Investment Management Analyst (CIMA) designee. (Tr. Vol. I at 26:15-18; DX 152 at 14:17-19.) Indeed, Grossman was a frequent presenter on offshore investments at conferences around the world, authored a book and more than one hundred articles on the subject, and even served as a Fox Business News contributor. (Tr. Vol. I at 190:1-4, 191:8-12; Tr. Vol. III at 643:4-5, 7-8; DX 44.) At the time of the events in question in this case, Grossman had been specializing in offshore investments for over 20 years. (Tr. Vol. I at 195:2-4.)

Most Sovereign clients were novices when it came to alternative investments, such as hedge funds, and their reliance on Grossman's experience in the area was a determining factor in

their choosing to do business, and continuing to do business, with Sovereign. (*See id.*; *see also* Tr. Vol. I at 27:18; 107:10-11; DX 152 at 21:7-9.) Clients particularly liked the fact that Grossman represented he examined each individual situation and developed a targeted investment program specifically for that person. (Tr. Vol. I at 28; DX 50.) In addition, clients specifically told Grossman their investment goals were to preserve their base retirement funds, achieve capital growth, and invest in low to medium risk portfolios. (Tr. Vol. I at 33:2-3; DX 152 at 22:10-16; DX 50 at ¶¶ 4, 6.)

D. The Battoo Funds and PIWM

Despite his clients' conservative investment objectives, and despite his representations concerning due diligence he supposedly performed and the individualized approach to investment recommendations he supposedly took, Grossman advised Sovereign clients to invest and remain invested almost exclusively in hedge funds and a managed account controlled by Battoo (collectively, the "Battoo Funds"). (Tr. Vol. II at 353-54; 453:19-23; DX 50 at ¶ 16; DX 50K; DX 152 at 38:14-19, Ex. 5, 20; GX 105, 121, 134.) The Battoo Funds consisted of: Anchor Hedge Fund Classes A, B, C and E (the "Anchor Funds"); FuturesOne Diversified Fund Ltd. ("FuturesOne"), a mutual fund formed in the British Virgin Islands, for which Battoo was the sole member and chairman of its investment advisory board; and PIWM, a managed account for which Battoo served as principal. (Tr. Vol. I at 202:10-13, 216:13-16, 204:19-21; DX 19 at 6, 17; DX 66 at 5; DX 67 at 5.)

Grossman never mentioned investments other than the Battoo Funds to clients, and identified only those particular funds when he presented his final written investment recommendations, despite having discussed alternative investments such as hedge funds generally with clients before finalizing his written proposals. (DX 50 at ¶ 16; DX 152 at 30:13-20.)

Remarkably, Grossman advised clients that investments in the Battoo Funds were "moderately conservative" or low risk and would provide improved returns over past investments for reduced risk and volatility. (Tr. Vol. I at 48-51, 106, 118-19, 154; DX 46D at 11; DX 152 at 22; GX 99 at 10.) He also represented the funds were "highly diversified with different managers, styles and strategies"; that a portfolio containing 35% Anchor A and 35% Anchor C was "moderately conservative"; and that Anchor A was suitable for "widows and orphans." (DX 46D at 10; DX 50 at 3; DX 64 at 1; GX 99 at 10; DX 152 at Ex. 5.)

The Law Judge properly found, however, that the Battoo Funds and PIWM were high risk and unsuitable for the retirees who comprised most of Sovereign's investors, and that Grossman turned a blind eye to numerous red flags that signaled obvious problems with the funds. Indeed, he failed to proffer a single witness who would testify he told clients the private placements he recommended, and into which clients transferred considerable assets, were highly risky, unregistered securities unsuitable for IRA and other retirement funds. (ID at 35.) Instead, as a matter of course and without any regard for an individual customer's preferences or financial situation, Grossman recommended the Battoo Funds almost exclusively. (ID at 34.) And Battoo himself recognized the importance of this referral relationship in remarking that Grossman was "part of us." (DX 30 at 1.)

Grossman deposited investors' funds in a pooled account at AH Florida and then made a single investment in the Battoo Funds in the name of AH Nevis, even though Sovereign's investment adviser agreement ("IAA") and Forms ADV represented the company would not have custody of client assets, and even though clients believed they had individual positions in the Battoo Funds. (*Id.* at 34, 36; *see also* Tr. Vol. I at 69:20-23, 124:19-23; DX 152 at 74:2-11.)

Despite Grossman's representations to the contrary, the Battoo Funds were not diversified with different managers, styles, and strategies. (ID at 35.) Instead of investing in instruments described in the private placement memoranda (such as bank deposits, derivatives and corporate debt), the funds consisted of several layers of underlying funds, all of which ultimately fed into the Madoff funds. (*Id.*) In addition, Grossman failed to disclose the cross-portfolio liability of the various Anchor fund share classes, with the assets of one class available to meet the liabilities of another. (*Id.*)

Moreover, Grossman did not perform reasonable due diligence before recommending Anchor A and the other Battoo Funds to Sovereign clients.[4] (*Id.* at 37.) Grossman admitted that Battoo failed to provide him with basic information about the funds, such as the identity of the underlying investments, and instead, Grossman relied primarily on one-page summary PerTrac reports, which were prepared by the funds' supposedly independent administrator, Folio Administrators, Ltd. ("Folio"). (*Id.*) Grossman knew, however, that Folio was not independent, as two members of the funds' investment manager, AHF Hedge Fund Management Ltd. ("AHFM"), also doubled as (i) members of Folio's board; (ii) managers of the funds' director, Fiduciary Group Ltd.; and (iii) members of the boards of PIWM and BC Capital Group (another of Battoo's entities). (DX 28 at 12; DX 19 at 30; DX 73 at 5; GX 13; GX 14; GX 62 at 2.) In that regard, Grossman knew his representations to clients concerning the independent administration of the funds and the independent preparation of the financial statements and asset verification reports were false. (ID at 37.) In short, given ample opportunity at the Final Hearing, Grossman failed to

[4] The same holds true for PIWM. Indeed, PIWM itself consisted of a series of underlying investments comprised of the Anchor Hedge Fund, FuturesOne, and the Galaxy Fund (another of Battoo's funds). (DX 69 at 12; DX 70.) Despite Grossman's representations to the contrary, PIWM was not a diversified managed account so much as it was simply a composite of Battoo's various other hedge funds. (Tr. Vol. I. at 274:11-13, 19-21.)

show he performed anything close to adequate due diligence as to the investments into which he recommended clients put their hard-earned life savings and retirement funds. (*Id.*)[5]

E. Referral and Consulting Fees

Grossman entered into three different agreements with Battoo under which the Battoo Funds and PIWM paid Sovereign referral fees through SIAM LLC for each investment in the funds a Sovereign client made. (ID at 14.) In addition, Grossman signed a separate consulting agreement with Battoo pursuant to which, in return for a fee, Grossman advised AHFM as to, among other things, the "performance of all investments" for the Battoo Funds. (*Id.* at 15.) Battoo paid the fees under each of these agreements to an account SIAM LLC maintained at a Danish bank. (*Id.* at 16.) In total, Grossman received over $3.4 million from Battoo. (*Id.*at 17.)

The Law Judge found the particular IAA Sovereign provided to clients up until at least 2005 failed to mention any of these agreements and also failed to mention that Grossman was receiving fees in return for placing clients' investments in the Battoo Funds. (*Id.*) In fact, the Law Judge found the IAA specifically represented that Sovereign and Grossman did ***not*** receive any fees based on clients' investments. (*Id.*) The Law Judge also determined Sovereign's Forms ADV Parts 1 and II in effect during this time period failed to disclose the referral and consulting fees, and, as with the IAA, specifically represented Sovereign did not have any financial arrangements with, and did not receive any compensation from, third party investments. (*Id.* at 17-18.)

Apart from the omissions in the IAA and the ADVs, Sovereign clients testified at the Final Hearing that Grossman never made them aware, either orally or in writing, of the referral and consulting agreements or his receipt of compensation from Battoo. (Tr. Vol. I at 39:13-17, 41:9-13, 62:1-25, 111:22-25, 123:19-25, 124:1-18; DX 152 at 75:1-25, 76:1-13; DX 50 at ¶ 7.) Notably,

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[5] For the Commission's reference, some of the losses sustained by Sovereign clients include: for investor James Davidson, over $1.5 million; Carmen Montes-Perkins, over $100,000; Stephen Richards, almost $200,000; C.W. Gilluly, $156,000; and Marge Van Dyke, over $2 million. (ID at 22-29.)

Grossman's own investor witness, C.W. Gilluly, testified Grossman did not make any of these specific disclosures to him. (Tr. Vol. II at 554:4-23.) After finding out about the compensation arrangements with Battoo, Sovereign clients considered them to be a conflict of interest. (Tr. Vol. I at 63:2-5.)

F. Examination by OCIE

The Division presented testimony from two examiners from the Commission's Office of Compliance, Inspections and Examinations ("OCIE") who conducted a field examination of Sovereign in 2004. Upon completion of the examination, OCIE issued a deficiency letter on February 7, 2005. (ID at 18.)[6] The Law Judge found the deficiencies concerned, among other things, the disclosure (or lack thereof) of the referral agreements and fees Grossman received from Battoo. (*Id.*) OCIE determined Sovereign's then-existing IAA was misleading and that Sovereign should either (i) do what the IAA represented and not take fees from Battoo; or (ii) amend the IAA to disclose the fees. (*Id.*) The deficiency letter also stated that Sovereign's ADVs "may" need to be revised. (*Id.*) The examiners testified that "may" in this context meant that if Sovereign chose not to stop receiving fees, but instead opted to revise its IAA to disclose the fees, then the same disclosure would need to be made in the ADVs. (*Id.*)

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[6] Grossman contends in his Initial Brief that documents gathered by OCIE during its examination of Sovereign in 2004 were not produced to him. (Initial Brief, at 4 n.2.) The Division notes, however, that if Grossman believed this information somehow was relevant to the case, then he could have moved the Law Judge for an order to subpoena OCIE's files pursuant to Rule 230(a)(2) of the Commission's Rules of Practice. He failed to do that. In addition, Grossman also criticizes the examiners for not being able to recall specific conversations they supposedly had with him during the exam. (Initial Brief, at 4 n.2.) The examiners testified, however, these conversations would have been of minimal value, as only the written deficiency letter is OCIE's final pronouncement on whether a registrant is in compliance with the securities laws. (Tr. Vol. IV at 934-35.) Moreover, the examiners confirmed as a matter of course they do not engage in conversations with registrants concerning intended compliance or requests for approval of planned revisions to practices or procedures. (*Id.* at 934.) Instead, the written deficiency letter is the sole avenue for that activity. (*See id.*)

Grossman responded to the deficiency letter on March 8, 2005, representing to OCIE that Sovereign's IAA and ADVs were revised to more accurately reflect the compensation Grossman was receiving. (*Id.* at 19.) But the Law Judge properly found these supposed revisions inadequate. For instance, Grossman amended the IAA and Form ADV Part II to state that Sovereign "may" receive performance-based compensation from certain investments Sovereign clients made. (*Id.* at 19.)[7] The amendments also represented Sovereign would provide advance notice to clients of all fees received. (*Id.*) Grossman testified his use of the word "may" was based on use of the same word in OCIE's deficiency letter. (*Id.*) As explained above, however, OCIE did not use that term as Grossman interpreted.

To the contrary, the Law Judge found Grossman's semantical game to be misleading, as the evidence at the Final Hearing clearly demonstrated that Grossman actually was receiving the referral and consulting fees from Battoo. (*Id.* at 20.) Thus, it was not that he ***may receive*** compensation; it was that he ***did receive*** it. (*Id.*) The Law Judge accurately captured this concept in her ruling: "At the time Grossman revised the IAA and Form ADV Part II, payments to Grossman were not a possibility, they were a fact." (*Id.* at 38.) Accordingly, the Law Judge properly determined that even after the OCIE examination, Sovereign's disclosures were still lacking.

G. Grossman Remained Actively Involved with Sovereign after the Sale to Adams and Continued to Mislead Clients

On October 1, 2008, Grossman sold Sovereign, SIAM LLC, AH Florida and AH Nevis to Adams. Notwithstanding the sale, and further notwithstanding Grossman's attempt both during the

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[7] The Division notes the evidence presented at the hearing showed the first time Sovereign actually made these revisions in an attempt to correct the omissions identified in the deficiency letter was not until the Form ADV Part II that Sovereign prepared on August 22, 2006, and the IAA that Sovereign prepared in August 2006. (Tr. Vol. III at 851:16-24; 866:7-20.) This was approximately 18 months after the deficiency letter was sent.

Final Hearing and in his Initial Brief to distance himself from the company's operations after October 1, the evidence adduced at the Final Hearing demonstrate Grossman remained actively involved with Sovereign well into at least 2009 and continued to provide misleading investment advice to clients about the Battoo Funds and PIWM.

(1) Grossman's Continued Role at Sovereign

On October 14, 2008, Adams emailed a letter signed by Grossman to Sovereign clients in which Grossman wrote that he "want[ed] to reiterate that our hedge fund investments are 'Fund of Funds' that are highly diversified with different managers, styles and strategies." (DX 64 at 1; DX 151 at 3-4; Tr. Vol. I at 76:7-12, 77:14-18, 134:14-19, 135:9-13, 165:8-9.) Although the letter did not specifically refer to the Battoo Funds by name, at the time of the sale, as noted above, 75% of Sovereign clients were invested almost entirely in the Battoo Funds, and no clients had investments in hedge funds other than the Battoo Funds and PIWM. (Tr. Vol. II at 453:19-23, 482:21-25, 483:1.)

The letter introduced Adams and informed clients that Adams had been named Sovereign's President and Chief Investment Officer. (DX 64 at 2.) The letter also confirmed Grossman would (i) remain on Sovereign's Board of Advisers; (ii) remain Managing Director of SIPS – the IRA company Grossman controlled – which was "only a few doors from [Adams'] office;" and (iii) be "actively involved in the day-to-day strategy development as needed." (*Id.*) The letter did not actually state, however, that Grossman had sold the company to Adams, and clients were still under the assumption, even following the sale, that Grossman remained their investment adviser. (Tr. Vol. I at 54:23-25, 55:1-2, 76:7-12, 77:14-18, 134:14-19, 135:9-13, 16-22. 165:8-9; DX 50 at ¶ 28.) Indeed, Grossman's own investor witness, C.W. Gilluly, testified at the Final Hearing he did not learn of the sale until the first quarter of 2009. (Tr. Vol. II at 560.)

On January 16, 2009, Adams notified clients by email that Grossman had become the Managing Director of Sovereign and would be working closely with the company's asset management committee. (ID at 8; DX 151 at 11.) In his post-sale capacity, Grossman remained on Sovereign's payroll and continued to receive paychecks for his services as late as March 23, 2009. (Tr. Vol. II at 454:6-17; DX 48 at 3.) He also continued to be listed as an associated person on Sovereign's Form ADV Part II, dated October 30, 2008, and as noted above, remained registered as an Investment Adviser Representative of Sovereign through December 31, 2011. (DX 42 Sch. F at 4; DX 2 at 3.) Furthermore, Grossman's digital signature was on Sovereign's Form ADV Part 1 filed with the Commission on December 23, 2008 and he was listed as the contact person. (DX 84 at 2, 28.)[8]

(2) The Sovereign-SIPS Overlap

Following the sale of Sovereign, SIPS continued to act as the IRA administrator for Sovereign's clients. (Tr. Vol. I at 177:5-9, 24-25, 178:1-4.) Additionally, for a period well into 2009, Sovereign and SIPS continued to: (i) share the same computer system, with joint control of each company's files and client information, and the ability to access data entries and even change them; (ii) interchange employees, with SIPS employees performing Sovereign functions and Sovereign employees performing SIPS functions; and (iii) use the same office space. (Tr. Vol. II at 569:21-25; 587:8-14; 595:2-5, 15-23.)

In fact, Jessina Paturzo, a Sovereign employee who testified for Grossman at the Final Hearing, admitted that during that time period, prospective clients entering the Sovereign-SIPS office would have no way of telling what operations were Sovereign's and what were SIPS'. (*Id.* at 596:11-17.) And existing Sovereign clients did not even realize SIPS was a separate company, as

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[8] Although at the Final Hearing Grossman denied signing the ADV, Adams could not proffer any explanation as to how Grossman's signature got on the document. (Tr. Vol. II at 464-66.)

the two entities had the same logo and the same employees registered clients for both entities' services. (Tr. Vol. I at 147-48.)

(3) Grossman Actively Advised Sovereign Clients

Sovereign clients also testified at the Final Hearing that Grossman worked with them on their investments from mid-October 2008 through at least January 2009 and continued to serve as, and represented that he remained, their investment adviser. (Tr. Vol. I at 54:10-13, 23-25; 55:1-2; 81:15-19; 137:5-16; 160:18-21; DX 152 at 95:11-18). Despite Grossman's self-serving denial of that testimony, Adams admitted at the hearing he was not present during every phone call or conversation Grossman had with clients, so Adams was unaware of whether Grossman was telling clients, after the sale of Sovereign or even later in 2009, to invest or retain their investments in the Battoo Funds and PIWM. (Tr. Vol. II at 497:23-25; 498:1-4.) Adams also could not explain why, in 2009 when Battoo completed an audit of investments in PIWM, Battoo shared and discussed the results of the audit with Grossman, but not with Adams. (Tr. Vol. II at 472:16-19.) In weighing the credibility of the witnesses, including Grossman, the Law Judge was justified in finding the investor witnesses' testimony concerning Grossman's post-sale representations and activities toward them to be more reliable.

In addition, Grossman contacted clients to supplement their files at Sovereign, and worked closely with them in late 2008 and well into 2009 on the status of their investments in the Battoo Funds. (DX 152 at 77:1-9, 104:15-21; DX 152 at Ex. 12, 15.) For example, clients testified at the Final Hearing that Grossman made specific investment recommendations to them on November 21, 2008 (Tr. Vol. I at 145:14-20, 25; 146:1-6; DX 113 at 2; DX 113-1 at 2.) These recommendations concerned the swap of shares between Anchor Hedge Fund Class C and PIWM. The evidence adduced at the Final Hearing showed clients received the recommendations in letters

Grossman signed. (Tr. Vol. I at 145:25, 146:1-6; *see also* DX 113-1.) In response, Grossman's witness, Jessina Paturzo, claimed on direct examination that: (i) Grossman did not sign the letters; (ii) she was instructed to send the letters to the clients; (iii) she was a new employee of Sovereign at the time; (iv) Sovereign was understaffed; and (v) she had mistakenly sent clients the wrong form letter. (Tr. Vol. II at 574:20-25; 575:20-25; 576:1-6.)[9]

On cross examination, however, Paturzo admitted that (i) she, in fact, was not a new employee, but had been working for Sovereign for eight months prior to sending out the letters; (ii) she indeed was intimately familiar with the correct client forms Sovereign used; (iii) she specifically used Sovereign letterhead for the letters instead of SIPS letterhead; (iv) Grossman himself continued to have access to the computer system where the letters were stored; and (v) Grossman, along with other employees, had the ability to retrieve files and change them subsequently. (*Id.* at 582:6-12; 587:1-3, 8-14; 594:17-22; 602:1-4.) In addition, Adams testified he recognized the forms used for the recommendations, but could not state for sure that Grossman did not send the documents to Sovereign clients. (Tr. Vol. II at 502:23-25; 503:1-4; 507:18-20.) Given the lack of credibility in the testimony proffered by Grossman's witnesses on this issue, the Law Judge properly credited the investors' testimony that they received these recommendations from Grossman. (Tr. Vol. I at 146:1-6.)

In February 2009, Grossman, under the title of Sovereign's Managing Director, sent a letter to clients notifying them of the suspension of redemptions in Class A of the Anchor Hedge Funds and that the funds were discovered to be linked to Madoff. (DX 50P at 1.) When asked by an investor how this was possible given Grossman's prior assurances of Anchor A's supposedly

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[9] Paturzo currently works for Grossman. (Tr. Vol. II 562:12-14.) Accordingly, he ultimately controls her continued employment status.

diversified investment portfolio, Grossman professed unawareness that the managers of the underlying funds invested in Madoff. (DX 50 at 3, 6.)

In addition, Grossman's own investor witness, C.W. Gilluly, testified at the Final Hearing that Grossman had been advising Sovereign clients about their investments at least until 2011. (Tr. Vol. II at 558-59.) Indeed, on June 28, 2011, Gilluly wrote to an investor who like him was frustrated and agitated at not being able to receive his Sovereign investments that "[i]t's great that [Grossman] is willing to be so 'transparent.'" (*Id.*)

Still to this date refusing to show remorse for his actions, Grossman goes on the offensive in his Initial Brief, chastising his inexperienced investor clients for their allegedly "fading" memories. (Initial Brief, at 6-7.) In response, the Division notes while these investors may not have been able to remember the exact title of one of the many documents Grossman supposedly gave them, they did recall – definitively – that Grossman failed to disclose that he received fees from Battoo and that Grossman continued to mislead them well after Adams purchased Sovereign in October 2008.

Moreover, with respect to the Law Judge's admission of investor James Davidson's declaration and exhibits thereto (DX 50-50AA) in place of his live testimony, if Grossman was concerned about not having an opportunity to examine Mr. Davidson, he could have objected to the introduction of the declaration. He declined to do so. (Tr. Vol. I 18:8-12.) Similarly, if Grossman believed the truthfulness of investor Stephen Richards' deposition testimony somehow was tainted by medical procedures Mr. Richards had undergone prior to the deposition, Grossman could have moved to exclude the entirety of the testimony. Once again, however, he failed to do so.[10]

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[10] Mr. Richards suffers from terminal brain cancer, and the parties agreed to take his testimony by deposition. Despite his affliction, Mr. Richards testified he gave truthful responses to the questions he

The fact that Grossman himself could not recall the composition of the Battoo Funds or at his continued registration as an Investment Adviser Representative of Sovereign through December 31, 2011 (DX 2 at 3) is unavailing. Indeed, somehow he was able to (i) recount intimate details of conversations he claimed to have with the examiners over ten years ago; (ii) deny he did anything of substance for Sovereign or its investors post-sale; and (iii) detail specific due diligence he claims to have performed on Battoo.

Grossman complains on appeal the Law Judge unfairly singled him out for a "fading memory" and scolded him for not recalling information about the Battoo Funds' underlying investments. (Initial Brief, at 20.) However, it was utterly reasonable for the Law Judge to conclude that Grossman, as an experienced investment adviser for over 20 years who recommended hedge funds to clients on an exclusive basis and who received over $3.4 million from the funds that he intentionally failed to disclose, should have had something more to say on the topic at the hearing other than "I can't recall."

(4) Grossman Continued to Promote Sovereign to Prospective Investors and Solicit Investments

Grossman promoted Sovereign's status as an SEC-registered investment adviser and told a prospective investor on February 11, 2009 that Sovereign had the capability to take the investor's plan offshore (DX 120 at 2). Grossman forwarded Adams an email chain between himself and the investor who was looking for recommendations with "all the world financial turmoil." (DX 120 at 67050.) Grossman stated:

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was asked. (DX 152 at 221-22.) He also testified he reviewed the written declaration he provided the Division during the investigation in this matter, that the declaration was prepared prior to the start of any of his cancer treatments, and that under no circumstances would he have signed the declaration if it contained inaccuracies or otherwise was not truthful. (*Id.* at 222-24.) Grossman's attempt to accuse Mr. Richards of engaging in nefarious behavior with respect to the declaration and deposition testimony therefore is completely unwarranted.

> Randy had me review their plan document to ascertain if they would be able to take it offshore, which they are. I mentioned most of the clients we deal with ultimately need assistance in deciding where to invest once the funds are offshore. Would you be so kind as to prepare a proposal for Randy. He is very interested in ***our approach***.

(*Id.*) (emphasis added).

The following month, on February 19, 2010, Grossman commented to Adams on a client interaction between Adams and a Sovereign client: "You missed a big one you should go back and clarify. See me or send me an IM. I would rather not put it in an email." (DX 123 at 67055.) Furthermore, Grossman and Adams planned, as late as December of 2010, to meet on a weekly basis to discuss Sovereign's operations. (DX 119 at 67046.) Indeed, Grossman planned to help Adams "get your business running in a better way for you and get you back on the road to success." (*Id.*)

In short, the Law Judge properly found it was activities like these that led clients to believe Grossman remained their investment adviser well after the sale of Sovereign to Adams on October 1, 2008. (Tr. Vol. I at 54:23-25, 55:1-2, 81:15-19, 135:16-22.)

III. LEGAL DISCUSSION

The Law Judge correctly determined Grossman committed flagrant, intentional and repeated violations of the securities laws in deliberately misleading Sovereign clients and in failing to disclose, time and again, that he profited in excess of $3.4 million at the expense of his clients from the fees Battoo paid him. The Law Judge therefore was justified in imposing sanctions, including a civil penalty.

On appeal, the Commission's standard of review is *de novo*, and the Commission has broad discretion not only to consider the Law Judge's findings and conclusions, but also to make its own independent determinations and interpretation of the evidence adduced at the Final Hearing. *See*,

e.g., *In the Matter of Gary M. Kornman*, AP File No. 3-12716, 2009 SEC LEXIS 367, at *36 n. 44 (Feb. 13, 2009); *In the Matter of Gregory M. Dearlove*, CPA, AP File No. 3-12064, 2008 SEC LEXIS 223, at *34 (Jan. 31, 2008).

A. The Law Judge Properly Took Into Account All of Grossman's Misconduct in Assessing a Civil Penalty

Grossman devotes a substantial part of his Initial Brief to arguing the Division's various claims first accrued prior to the start of the five-year limitations period set forth in 28 U.S.C. § 2462. (Initial Brief, at 11-15.) Under that statute and the Supreme Court's interpretation of it in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), the Division's request for a civil penalty would be time barred if Grossman's violations of the securities laws first accrued before November 20, 2008 (*i.e.*, five years prior to the filing of the OIP on November 20, 2013). Therefore, the operative limitations period at issue in this case is November 20, 2008 through November 20, 2013 ("Limitations Period").

Grossman's argument, however, misses the mark. As discussed below, Grossman continued his pattern and practice of misconduct, deceiving investors and steadfastly failing to disclose the fees he received from Battoo, well into the Limitations Period. Thus, under the continuing violations doctrine, any violations that first accrued prior to the Limitations Period would be brought current into the period and properly sanctioned in civil penalties. In addition, even if the continuing violations doctrine did not apply, the Law Judge still would have been justified in considering Grossman's prior misconduct as evidence of his motive, intent, or knowledge in committing violations within the Limitations Period, for purposes of assessing a civil penalty.

(1) The Law Judge Properly Applied the Continuing Violations Doctrine in Levying a Penalty

Grossman contends the Law Judge improperly applied the continuing violations doctrine ("CVD") as an exception to the statute of limitations set forth in 28 U.S.C. § 2462 in assessing a civil penalty. The arguments he makes with respect to the issue, however, are misguided and misinterpret not only the Law Judge's findings but also the very definition and purpose of the CVD.

As a preliminary matter, Grossman contends the CVD should not even exist in enforcement cases like this because the doctrine originally was limited just to employment discrimination claims. (Initial Brief, at 24-25.) As much as Grossman would like to remain rooted in times past, the proverbial ship on this issue has sailed, and has been at sea for quite some time. The fact remains that numerous courts consistently have applied the CVD with full force and effect to securities enforcement actions. *See, e.g.*, *SEC v. Geswein*, 2 F. Supp. 3d 1074, 1084 (N.D. Ohio 2014); *SEC v. Kovzan*, Case No. 11-cv-2017, 2013 U.S. Dist. LEXIS 147947, at *6 (D. Kan. Oct. 15, 2013); *SEC v. Huff*, 758 F. Supp. 2d 1288, 1340 (S.D. Fla. 2010), *aff'd*, 455 F. App'x 882 (11th Cir. 2012); *SEC v. Kelly*, 663 F. Supp. 2d 276, 288 (S.D.N.Y. 2009); *SEC v. Ogle*, No. 99-cv-609, 2000 U.S. Dist. LEXIS 239, at *11 (N.D. Ill. Jan. 10, 2000); *In the Matter of Simpson*, AP File No. 3-9458, 1999 SEC LEXIS 1908, at * 116-17 (Sept. 21, 1999).

As the Law Judge correctly observed, the CVD is an equitable tolling mechanism that applies where, as here, the unlawful practices begin prior to the five-year limitations period in 28 U.S.C. § 2462 but continue into the period. (ID at 45.) If that happens, a civil penalty may properly take into account ***all*** of a respondent's misconduct, even that which otherwise would be time-barred. To invoke the CVD, the unlawful practices must be part of an ongoing fraud or wider scheme and not separate, discreet acts. *See, e.g.*, *Kovzan*, 2013 U.S. Dist. LEXIS 147947, at *9;

Kelly, 663 F. Supp. at 288. In addition, the later misconduct must not be simply the continuing effects of the original violations. *Huff*, 758 F. Supp. 2d at 1341. Instead, the respondent must continue the violations into the limitations period. *See id.* The CVD itself, as properly noted by the Law Judge, is based on the premise that the securities laws should be construed not technically, but flexibly to effectuate their remedial purposes. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)); *see also* ID at 45. Applying an inflexible, bright line cut-off in the context of an ongoing scheme not only is unworkable as a general matter but also serves to frustrate the purposes of the securities laws and the mandates of the Commission. *See Huff*, 758 F. Supp. 2d at 1340.[11]

As noted above, the Limitations Period at issue in this case is November 20, 2008 through November 20, 2013 (*i.e.*, five years prior to the filing of the OIP on November 20, 2013). Accordingly, if Grossman engaged in misconduct after November 20, 2008, the CVD applies and makes ***all*** of his unlawful practices, even those that first accrued prior to the sale of Sovereign on October 1, 2008, properly sanctionable in civil penalties. Contrary to Grossman's position, the Law Judge properly found he continued his pattern and practice of deceit well beyond November 20, 2008, and such misconduct both "outside and within the limitations period was part of one continuous scheme to defraud investors." (ID at 45.)

Specifically, Grossman did not disclose to Sovereign clients that he had sold the company to Adams until well into Limitations Period. (Tr. Vol. I at 54:23-25, 55:1-2, 76:7-12, 77:14-18, 134:14-19, 135:9-13, 16-22. 165:8-9; DX 50 at ¶ 28.) For example, Grossman's own investor

[11] Grossman's argument that *Gabelli* somehow ruled by implication that tolling through use of the CVD was improper already has been rejected. *See Geswein*, 2 F. Supp. 3d at 1084 ("[T]he [c]ourt refuses to read more into the Supreme Court's decision than it says on its face . . . The [c]ourt finds that *Gabelli* announces only the narrow holding that the discovery rule is inapplicable to actions for civil penalties brought by the SEC.")

witness, C.W. Gilluly, testified he did not learn of the sale until the first quarter of 2009. (Tr. Vol. II at 560.) Other investors found out about the sale around the same time.[12] (Tr. Vol. I at 160:17-21; DX 152 at 216:8-13.) Instead of simply stating the company had been sold, Grossman and Adams made cryptic communications to clients concerning Grossman's role at the company. On October 14, 2008, Grossman told clients he was on Sovereign's Board of Advisors, and on January 16, 2009, Adams represented Grossman was the Managing Director of the company and would be working closely with the company's asset management committee. (ID at 8; DX 64 at 2; DX 151 at 11.) Not surprisingly, investors testified they were under the assumption, even after they had received Grossman's October 14 letter, that he remained in charge of the company and still served as their investment advisor. (Tr. Vol. I at 54:23-25, 55:1-2, 76:7-12, 77:14-18, 134:14-19, 135:9-13, 16-22. 165:8-9; DX 50 at ¶ 28.)

The Law Judge properly held such deliberately evasive behavior on Grossman's part to constitute a breach of duty to clients. The Supreme Court has interpreted Section 206 of the Advisers Act as imposing fiduciary duties on an investment adviser with an affirmative obligation of utmost good faith and full and fair disclosure of all material facts to the adviser's clients. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1308 (S.D. Fla. 2007). The Law Judge was justified in finding that given investors' testimony concerning their inexperience in alternative investments and reliance on Grossman's years of experience in the field, they chose to become Sovereign clients ***because of*** Grossman. As such, the Law Judge properly could find that clients would consider Grossman's sale of the company to be a material fact that should have been disclosed. Frankly, Grossman should have known better than to conceal the transition. His clients deserved better.

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[12] Investor James Davidson testified that he learned of the sale on November 24, 2008. (DX 50 at ¶ 28.) That is still ***after*** the start of the Limitations Period on November 20, 2008.

Moreover, the Law Judge properly determined the evasiveness Grossman caused during the Limitations Period was escalated by the overlapping operations of Sovereign and SIPS. Because the two companies effectively looked and acted like one cohesive unit, Grossman further breached his fiduciary duties to clients. Indeed, if a SIPS client became a Sovereign client and invested in the Battoo Funds after November 20, 2008, Grossman had an ongoing, undisclosed conflict of interest. He neglected to tell clients he remained on the Sovereign payroll as late as March 23, 2009. Each time a SIPS-Sovereign client invested with Battoo, or even swapped an investment in one of the Battoo Funds for another, the referral fees Battoo paid Sovereign were filtered to Grossman through the Sovereign payroll and further through the installment payments Adams made to Grossman as part of the sale of the company. (DX 1; Tr. Vol. II at 494:8-19.) Notably, Sovereign's ledger reflects an installment payment to Grossman as late as September 14, 2009. (DX 48 at 13.) Grossman's continued failure in the Limitations Period to advise SIPS clients of his conflict of interest in being compensated for their investments through Sovereign was improper. *See Capital Gains*, 375 U.S. at 194 (investment advisers are prohibited from using clients' assets to benefit themselves); *see also Vernazza v. SEC*, 327 F.3d 851, 858-59 (9th Cir. 2003) (failure to disclose referral fees is a conflict of interest).[13]

Furthermore, it goes without saying that each time Grossman interacted with Sovereign clients after November 20, 2008 concerning their investments in the Battoo Funds, which investments he had placed prior to the sale of the company to Adams, and each time he failed during the interaction to tell clients he had received millions of dollars at their expense, he

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[13] The compensation is sufficient to bring Grossman within the definition of a "broker" under Sections 3(a)(4)(A) and 15(a) of the Exchange Act after the Limitations Period. In receiving transaction-based remuneration from the Battoo Funds through Sovereign, and in continuing to advise Sovereign clients to invest and remain invested in the Battoo Funds, Grossman continued to violate the broker registration provisions of the Exchange Act.

committed an ongoing scheme that was a breach of his fiduciary duty under Section 206 of the Advisers Act. He also committed an ongoing omission under Section 17(a)(2) of the Securities Act. Indeed, by recommending on November 21, 2008 that Sovereign clients swap their shares between Anchor Hedge Fund Class C and PIWM without disclosing that Sovereign received referral fees from Battoo (which Grossman then received as compensation from Sovereign), he violated the antifraud provisions of Section 17.

In his Initial Brief, Grossman claims Sovereign investors knew of the sale of company sooner because they were provided with the Form ADV Part II dated October 30, 2008, and that the document identified Adams as the company's registered agent and the person providing investment advice. (Initial Brief, at 27.) Investors testified, however, that either they never received ***any*** Forms ADV Part II from Sovereign at all, or, in the case of investor James Davidson, the last ADV he received was back in 2006, and in the case of investor Stephen Richards, he did not receive the particular ADV in question until December 1, 2008 – which would have been ***after*** the start of the Limitations Period on November 20, 2008. (Tr. Vol. I at 44:9-12; DX 50 at ¶ 5; DX 152 at 83-84.) Moreover, contrary to what Grossman claims, he continued to be listed as an associated person on that ADV. (DX 42 Sch. F at 4.)

Grossman also identifies the IAA that Sovereign provided to Mr. Richards, which lists Adams as Sovereign's registered agent. Mr. Richards testified, however, that the IAA was not provided until December 1, 2008 – again, ***after*** the start of the Limitations Period. (DX 152 at 83-84.)

Not surprisingly, Grossman makes only a passing reference in his brief to the fact he signed and remained listed as the contact person and managing director on Sovereign's Form ADV Part 1 filed with the Commission on December 23, 2008 – once again, ***after*** the start of the

Limitations Period on November 20, 2008. (*See* DX 84.) As noted above, Adams could not offer any explanation as to how Grossman's signature appeared on the form, and Grossman himself denied doing so. But as with all witnesses and testimony, the Law Judge was within her discretion to weigh the credibility and presentation of these arguments and find that Grossman in fact signed the document.

Moreover, the Law Judge properly could interpret the ADV as being misleading in light of the failure to disclose the referral arrangements with Battoo in the conflicts of interest sections set forth in Items 7 and 8. In particular, Grossman improperly answered "no" to the question of whether Sovereign recommended securities to clients in which Sovereign or a related person (*i.e.*, Grossman) had an interest. (*See* DX 84 at 11.) Given his failure to disclose the same information in the prior ADVs he prepared before he sold Sovereign, Grossman continued his violations of Section 207 of the Advisers Act into the Limitations Period. *See K.W. Brown*, 555 F. Supp. 2d at 1309 (noting that under Section 207, an adviser has a duty to file ADVs that are not false or misleading and that do not omit to state material facts).

The Law Judge also correctly found Grossman continued to serve and act as an investment adviser during the Limitations Period. Grossman's ongoing registration as an Investment Adviser Representative of Sovereign through December 31, 2011 (DX 2) is perhaps the most telling of the capacity in which he acted following the sale of Sovereign and continuing for more than ***three years*** after the sale and well into the Limitations Period. Based on that disclosure alone, the Law Judge could properly determine either Grossman was indeed an investment adviser, as the registration represented, or he was actively misrepresenting his role to the public in violation of Section 206 of the Advisers Act. No matter the outcome, Grossman

committed ongoing violations. And all Grossman could offer in his defense on this subject is "I can't recall."

Sovereign's investors, however, actually could recall the advisory role Grossman played in the post-sale period. Testimony at the hearing demonstrated conclusively that Grossman worked with clients on their Battoo investments in mid-October 2008 and at least until January 2009 and continued to serve as, and represented that he remained, their investment adviser. (Tr. Vol. I at 54:10-13, 23-25; 55:1-2; 81:15-19; 137:5-16; 160:18-21; DX 152 at 95:11-18). Despite Grossman's self-serving denial of that evidence, Adams admitted at the hearing he was not present during every phone call or conversation Grossman had with clients, so Adams was unaware of whether Grossman was telling clients, after the sale of Sovereign or even later in 2009, to invest or retain their investments in the Battoo Funds and PIWM. (Tr. Vol. II at 497:23-25; 498:1-4.) Adams also could not explain why, in 2009 when Battoo completed an audit of investments in PIWM, he shared and discussed the results of the audit with Grossman, but not with Adams. (Tr. Vol. II at 472:16-19.) In weighing the credibility of the evidence, including Grossman's and Adam's testimony, the Law Judge was justified in finding the investor witnesses' testimony concerning Grossman's post-sale representations and activities toward them to be more reliable. Moreover, because he remained on the Sovereign payroll while he continued providing advice and recommendations to clients, Grossman continued to satisfy the definition of "investment adviser" under Section 202(a)(11) of the Advisers Act in being a person who, for compensation, engages in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

In addition, Grossman contacted clients to supplement their files at Sovereign, and worked closely with them in late 2008 and well into 2009 on the status of their investments in the Battoo

Funds. (DX 152 at 77:1-9, 104:15-21; DX 152 at Ex. 12, 15.) For example, clients testified at the Final Hearing that Grossman made specific investment recommendations to them on November 21, 2008 (Tr. Vol. I at 145:14-20, 25; 146:1-6; DX 113 at 2; DX 113-1 at 2.) These recommendations concerned the swap of shares between Anchor Hedge Fund Class C and PIWM. The evidence adduced at the Final Hearing showed clients received the recommendations in letters Grossman signed, and based on Grossman's recommendations, clients invested in PIWM. (Tr. Vol. I at 136, 145:25, 146:1-6; *see also* DX 113-1.) In response, Grossman proffered the testimony of his employee, Jessina Paturzo, at the Final Hearing. As discussed previously, however, her testimony was not credible. On the one hand, she claimed she made a mistake in sending the swap letter out because she was a new employee, but on the other hand, she admitted she actually was not a new employee and in fact was intimately familiar with the proper form of the letter. Adams' testimony also did not lend support to Grossman's denial of having sent the letter, as Adams too admitted he could not state for sure that Grossman did not send the documents to Sovereign clients. (Tr. Vol. II at 502:23-25; 503:1-4; 507:18-20.)

Grossman also played an active role in the Limitations Period in concealing the fraud he perpetrated on Sovereign's clients. In February 2009, using the title of Managing Director of Sovereign, Grossman sent a letter to clients notifying them of the suspension of redemptions in Class A of the Anchor Hedge Funds and that the funds were discovered to be linked to Madoff. (DX 50P at 1.) When asked by an investor how this could have been possible given Grossman's prior assurances of Anchor A's supposedly diversified investment portfolio, Grossman professed unawareness that the managers of the underlying funds invested in Madoff. (DX 50 at 3, 6.) Grossman neglected, however, to disclose the lack of due diligence he did on the underlying funds, despite having represented to clients that he engaged in an "extensive investment selection

process" (DX 46B at 1-3), and that he merely took Battoo's assurances at face value. Grossman also failed to disclose the $3.4 million in fees that he received from Battoo in recommending the funds to Sovereign clients. On each occasion like this during the Limitations Period, Grossman continued to perpetrate his scheme on clients and continue to engage in fraud by omission. Such repeated violations of his fiduciary duties as an investment adviser further justify application of the CVD. *See In the Matter of Warwick Capital Mgmt., Inc. et al.*, AP File No. 3-12357, 2008 SEC LEXIS 96, at *38 (Jan. 16, 2008) ("Here, Respondents engaged in not one but repeated instances of egregious violative behavior."); *In the Matter of David Henry Disraeli et al.*, AP File No. 3-12288, 2007 WL 4481515, at *62 (Dec. 21, 2007) (finding respondent committed repeated violations in making multiple disseminations of a misleading client memorandum).

Grossman's own investor witness, C.W. Gilluly, even testified at the Final Hearing that Grossman had been advising Sovereign clients about their investments at least until 2011. (Tr. Vol. II at 558-59.) Indeed, on June 28, 2011, Gilluly wrote to an investor who like him was frustrated and agitated at not being able to receive his Sovereign investments that "[i]t's great that [Grossman] is willing to be so 'transparent.'" (*Id.*)

These activities on Grossman's part show his affirmative involvement in Sovereign's affairs post-sale and also demonstrate, contrary to his argument in the Initial Brief, that he ***did*** have decision-making authority on behalf of the company. Notably, Grossman did not elicit any testimony from Adams at the Final Hearing concerning Grossman's authority post-sale. Just the opposite, Adams admitted Grossman signed the December 23, 2008 Form ADV Part 1. (Tr. Vol. II at 464:4-11.) And, as detailed above, Adams was not present during every conversation Grossman had with Sovereign clients, which therefore leaves the clients' testimony, that

Grossman in fact continued to provide them misleading investment advice, contradicted only by Grossman's self-serving denials.[14]

Grossman even continued to bring new clients to Sovereign well into the Limitations Period. He promoted Sovereign's status as an SEC-registered investment adviser and told a prospective investor on February 11, 2009 Sovereign had the capability to take the investor's plan offshore (DX 120 at 2). Grossman told Adams:

> Randy [the investor] had me review their plan document to ascertain if they would be able to take it offshore, which they are. I mentioned most of the clients we deal with ultimately need assistance in deciding where to invest once the funds are offshore. Would you be so kind as to prepare a proposal for Randy. He is very interested in ***our approach***.

(DX 120 at 67050) (emphasis added).

The following month, on February 19, 2010, Grossman commented to Adams on a client interaction between Adams and a Sovereign client: "You missed a big one you should go back and clarify. See me or send me an IM. I would rather not put it in an email." (DX 123 at 67055.) Furthermore, Grossman and Adams planned, as late as December of 2010, to meet on a weekly basis to discuss Sovereign's operations. (DX 119 at 67046.) Indeed, Grossman planned to help Adams "get your business running in a better way for you and get you back on the road to success." (*Id.*)

In short, the Law Judge properly found it was activities like these that led clients to believe Grossman remained their investment adviser well after the sale of Sovereign to Adams on October 1, 2008. (Tr. Vol. I at 54:23-25, 55:1-2, 81:15-19, 135:16-22.) And the Division demonstrated

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[14] Even though Grossman actually had decision-making authority on behalf of Sovereign during the Limitations Period, the Division notes that such authority would not have been a prerequisite for Grossman to commit ongoing violations of the securities laws. The Commission has never held that investment advisers must be on an executive-type level in order to breach their fiduciary duties to clients. Instead, ***any*** investment adviser, no matter his or her position, can break the law.

clearly at the Final Hearing that Grossman continued his pattern and practice of deceit and pervasive failure to make the proper disclosures to clients well into the Limitations Period.

Grossman cannot dispute any of the evidence the Division introduced at the Final Hearing showing his misconduct that occurred after November 20, 2008 and its interrelationship with the misconduct that occurred prior to the Limitations Period. Realizing this deficiency, Grossman attempts to find his way out of this corner by relying on *SEC v. Leslie*, Case No. 07-cv-3444, 2010 U.S. Dist. LEXIS 76826 (N.D. Cal. July 29, 2010). There, the district court found the CVD not to apply because the Commission was unable to show any misconduct on the part of the defendant that occurred inside the five-year limitations period. *See id.* at *105. Instead, the Commission could only point to the continuing ill effects of the original violations, all of which occurred prior to the beginning of the period. *See id.*

Here, however, we do not have a situation where only the ill effects are present. Instead, as noted at length above, Grossman engaged in specific misconduct and unlawful acts that took place inside the Limitations Period. He did not offer any evidence to the contrary. He also did not offer any evidence that would suggest the prior misconduct is unrelated to the misconduct that occurred inside the Limitations Period. Accordingly, the CVD is applicable, and the Law Judge properly invoked it in assessing civil penalties against Grossman.

(2) Even if the Continuing Violations Doctrine Did Not Apply, Grossman's Prior Misconduct Still Would Have Been Relevant to a Civil Penalty

Even if the CVD were not applicable in this case, the Law Judge still would have been justified in considering Grossman's prior misconduct as evidence of his motive, intent, or knowledge in committing violations within the Limitations Period, for purposes of assessing a civil penalty. *See, e.g., In the Matter of Donald J. Anthony, Jr.*, AP File No. 3-15514, 2015 SEC LEXIS

707, at *237 (Feb. 25, 2015); *In the Matter of Prime Capital Services, Inc.*, AP File No. 3-13532, 2010 SEC LEXIS 2086, at *8 (June 25, 2010); *In the Matter of John A. Carley et al.*, AP File No. 3-11626, 2008 SEC LEXIS 222, at *86-87 (Jan. 31, 2008); *In the Matter of Joseph J. Barbato*, AP File No. 3-8575, 53 S.E.C. 1259, 1278 (Feb. 10, 1999); *In re Sharon M. Graham et al.*, AP File No. 3-8511, 1998 SEC LEXIS 2598, at *41 (Nov. 30, 1998).

Grossman's review of the Law Judge's findings in his Initial Brief misses the mark. He contends the Law Judge found, explicitly and implicitly, that his unlawful conduct both accrued and concluded prior to the sale of Sovereign to Adams on October 1, 2008. (Initial Brief, at 11-14.) The Law Judge did not make any such finding. Instead, she correctly found that Grossman's pattern and practice of nondisclosure, and deception of Sovereign clients, continued beyond the sale and well into the Limitations Period. Given the similarity in the pre- and post-Limitations Period misconduct, as discussed above in Section III.A.1, the conduct that first accrued prior to November 20, 2008 would qualify as evidence of Grossman's motive, intent and knowledge in violating the securities laws during the Limitations Period, particularly with respect to his continued failure to disclose to Sovereign clients the $3.4 million in referral fees he received at their expense and the fact that he continued to share in the referral fees as part of his ongoing compensation even after Adams purchased the company.

In that regard, no matter how much Grossman protests to the contrary, all of his misconduct, even that which may have first accrued prior to the Limitations Period, would be fair game for penalty purposes.

B. Equitable Remedies are Not Subject to the Limitations Period Set Forth in 28 U.S.C. § 2462

Grossman relies on an isolated decision reached by one federal district court for his sweeping proposition that all of the Division's equitable claims, including disgorgement and a

cease-and-desist order, are punitive and thus subject to the limitations period set forth in 28 U.S.C. § 2462. In *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014), a district judge in the Southern District of Florida broke from decades-long precedent, both from the Commission and federal courts around the country, that conclusively and definitively hold the equitable remedies sought by the Division in this case are not subject to 28 U.S.C. § 2462. Despite Grossman's elevation of *Graham* to celestial-like status, it remains the ***only*** decision to-date that has read *Gabelli* as support for making equitable claims subject to § 2462. It is therefore of little to no value in this case.[15]

First, in the wake of *Gabelli*, Law Judges and district court judges consistently have held the Supreme Court's opinion is limited just to civil penalties, and has absolutely no bearing on equitable claims.[16]

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[15] The Commission has appealed *Graham* to the Eleventh Circuit. *See SEC v. Graham*, Case No. 14-13562-E (11th Cir. 2014). On March 11, 2015, the Court advised the parties it would hold oral argument.

[16] *See, e.g., In the Matter of Harding Advisory LLC et al.*, AP File No. 3-15574, 2015 SEC LEXIS 118, at *253 (Jan. 12, 2015) (noting 28 U.S.C. § 2462 does not apply to equitable claims); *In the Matter of Michael A. Horowitz et al.*, AP File No. 3-15790, 2015 SEC LEXIS 43, at *85 (Jan. 7, 2015) ("Section 2462 [] does not apply to disgorgement, prejudgment interest, or cease-and-desist orders . . ."); *In the Matter of John Thomas Cap. Mgmt. Group LLC et al.*, AP File No. 3-15255, 2014 SEC LEXIS 4162, at *19 (Oct. 17, 2014) ("Cease-and-desist orders and disgorgement are not subject to the five year statute of limitations provided in 28 U.S.C. § 2462"); *In the Matter of Gregory Bartko*, AP File No. 3-14700, 2014 SEC LEXIS 841, at *33-34 (Mar. 7, 2014) (noting that an industry bar does not constitute a "civil fine, penalty, or forfeiture, pecuniary or otherwise" because such bars are "not based on a need to 'punish the respondent for past misconduct'" but to protect investors by restricting the respondent's access to other areas of the industry to prevent future harm); *In the Matter of Joseph P. Doxey*, AP File No. 3-15619, 2014 SEC LEXIS 1668, at *65 (May 15, 2014) ("Disgorgement does not serve a punitive function, but is designed to force wrongdoers to return the fruits of illegal conduct"); *In the Matter of Barclays Bank PLC*, Docket No. IN08-8-000, 2013 WL 3962269, at *40 n. 365 (July 16, 2013) ("[T]he Supreme Court recently held that the SEC's civil penalty provisions are subject to the general federal statute of limitations, leaving intact the lower court holding that disgorgement is not so limited"); *Geswein*, 2 F. Supp. 3d at 1084 (declining to revisit pre-*Gabelli* holding that 28 U.S.C. § 2462 did not apply to disgorgement); *SEC v. Syndicated Food Serv. Int'l, Inc.*, Case No. 04-cv-1303, 2014 U.S. Dist. LEXIS 42532, at *59 (E.D.N.Y. Feb. 14, 2014) (noting *Gabelli* does not apply to equitable claims for injunctive relief or disgorgement); *SEC v. Amerindo Investment Advisors, Inc.*, Case No. 05-cv-5231, 2014 U.S. Dist. LEXIS 15696, at *26 (S.D.N.Y. Feb. 3, 2014) ("[T]he statute of limitations at issue in *Gabelli* applies only to civil penalties, and does not prevent a finding of liability or an awarding of other kinds of remedies"); *CFTC v. Reisinger*, Case No. 11-cv-8567, 2013 U.S. Dist. LEXIS 100960, at *22 (N.D. Ill. July 18, 2013) ("Section 2462, however, applies only to suits seeking civil penalties").

Second, *Gabelli* did not change the longstanding precedent the Commission, Law Judges and district courts routinely have followed in enforcement proceedings that holds equitable claims, including disgorgement and cease-and-desist orders, are not subject to 28 U.S.C. § 2462.[17]

Third, disgorgement is not punitive. In support of his position to the contrary, Grossman raises three arguments the Law Judge considered, and properly rejected, including (i) an alleged lack of a causal connection between the disgorgement award and the violations; (ii) that any disgorgement should be limited just to the referral and consulting fees Grossman received from Battoo for the particular Sovereign clients who testified at the Final Hearing; and (iii) the Law Judge erred in not offsetting the income tax liability Grossman paid to the IRS from the disgorgement award. (Initial Brief, at 17-19.) In response, the Division notes Grossman waived his right to present these arguments on appeal because he failed to enumerate them as errors in his Petition for Review. *See In the Matter of Ross Mandell*, AP File No. 3-14981, 2014 SEC LEXIS 849, at *5 n.6 (Mar. 7, 2014) ("Under Commission Rule of Practice 410(b), [the Commission] deem[s] any exception to the initial decision not stated in [the] petition for review waived.")

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[17] *See, e.g., In the Matter of Prime Capital Services, Inc.*, AP File No. 3-13532, 2010 SEC LEXIS 2086, at *9 (June 25, 2010) (disgorgement and cease-and-desist orders are not subject to 28 U.S.C. § 2462); *In the Matter of Guy P. Riordan*, AP File No. 3-12829, 2009 SEC LEXIS 4166, at *94 (Dec. 11, 2009) (disgorgement and cease-and-desist orders not subject to 28 U.S.C. § 2462); *In the Matter of John A. Carley et al.*, AP File No. 3-11626, 2008 SEC LEXIS 222, at *87 (Jan. 31, 2008) (cease-and-desist orders and disgorgement not subject to the limitations period in 28 U.S.C. § 2462 because they are not "punitive measures"); *In the Matter of Moskowitz*, AP File No. 3-9435, 2002 SEC LEXIS 693, at *45 (Mar. 21, 2002) (industry and associational bars are not subject to 28 U.S.C. § 2462); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014) ("Disgorgement is an equitable remedy intended to prevent unjust enrichment."); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (disgorgement is remedial, not punitive, and not subject to 28 U.S.C. § 2462); *SEC v. Wyly*, 950 F. Supp. 2d 547 (S.D.N.Y. 2013) (primary purpose of injunctive relief is not to penalize but to protect against future harm); *SEC v. Wall Street Commn's, Inc.*, No. 09-cv-1046, 2010 U.S. Dist. LEXIS 80337, at *16 (M.D. Fla. Aug. 10, 2010) (equitable remedies not governed by 28 U.S.C. § 2462); *SEC v. Des Champs*, Case No. 08-cv-01279, 2009 U.S. Dist. LEXIS 92801, at *5 (D. Nev. Sept. 21, 2009) (equitable claims such as injunctive relief, disgorgement and officer and director bars are not subject to 28 U.S.C. § 2462); *SEC v. Schiffer*, Case No. 97-cv-5853, 1998 U.S. Dist. LEXIS 6339, at *8-9 (S.D.N.Y. May 5, 1998) (industry and associational bars are not subject to 28 U.S.C. § 2462).

Even if these issues had not been waived, however, they are still substantively without merit. Indeed, contrary to Grossman's position, the Division alleged quite clearly in the OIP, and introduced supporting evidence at the Final Hearing, that Grossman failed to properly disclose to Sovereign clients the fees he received from Battoo. (*See* OIP ¶¶ 27-32; *see also* ID at 17-18.) Moreover, the Division's forensic accountant, Kathleen Strandell, testified at the hearing that she included in her disgorgement calculation only those amounts that Battoo paid to Sovereign's account at the Danish bank. (Tr. Vol. II at 612-13, 617:5-8; DX 153; DX 154; DX 75.) Grossman himself testified at the hearing the account was used for no purpose other than receiving the fees. (Tr. Vol. II at 376:21-25; 377:1-2.)

In addition, it was not necessary, as Grossman contends, for the Division to call as witnesses every single Sovereign client who invested in the Battoo Funds and PIWM. Grossman's citation to *Barbato* on this point is distinguishable.[18] There, the evidence was client-specific – *i.e.*, whether the respondent churned a particular client's account and whether the respondent even traded in a particular client's account. *Barbato*, 1999 SEC LEXIS at *44. In this case, on the other hand, the fraud at issue was not client-specific, but applied to all Sovereign clients equally. Indeed, the fees and compensation under the agreements with Battoo were not disclosed in Sovereign's Form ADVs, IAA, the funds' private placement memoranda, or in any other manner to Sovereign clients. Even Grossman's own investor witness, C.W. Gilluly, testified Grossman never disclosed the agreements to him. (Tr. Vol. II at 554:4-23.)[19] Thus, unlike *Barbato*, the manner of the fraud in this case applied evenly to all Sovereign clients.

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[18] Notably, *Barbato* rejected the respondent's argument that 28 U.S.C. § 2462 applied to the Division's disgorgement claim. *Barbato*, 1999 SEC LEXIS at *43.

[19] Grossman's citation to Gilluly's testimony on this issue is misplaced. Gilluly noted at the hearing Grossman made him aware of the fees investors would have to pay for investing in the Battoo Funds. But Gilluly conceded this was par-for-the-course for hedge funds – obviously, investors pay fees in order to

And with respect to tax liability, the law is clear that under no circumstances can a respondent offset a disgorgement award by any such liability owed to the IRS. *SEC v. U.S. Pension Trust Corp.*, 444 F. App'x. 435, 437 (11th Cir. 2011); *SEC v. Razmilovic*, 822 F. Supp. 2d 234, 277 (E.D.N.Y. 2011), *rev'd on other grounds*, 738 F.3d 14 (2d Cir. 2013); *SEC v. Koenig*, 532 F. Supp. 2d 987, 994 (N.D. Ill. 2007).

Fourth, Grossman overlooks Congress' role in creating statutory provisions. In interpreting § 2462, the Eleventh Circuit has recognized two "well-established" principles: "[A]ny statute of limitations sought to be applied against the United States must receive a strict construction in favor of the Government"; and "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *United States v. Banks*, 115 F.3d 916, 918-19 (11th Cir. 1997). "A corollary of this rule is that when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous." *BP America Production Co. v. Burton*, 549 U.S. 84, 96 (2006). *Graham* violated these principles by applying § 2462 to bar relief not limited by the statute. Indeed, if Congress had intended § 2462's catch-all to extend beyond claims for a "civil fine, penalty, or forfeiture" to also include disgorgement, cease-and-desist orders and associational bars, it would have included those additional terms in the statute.[20] This is in keeping with the theme of congressional intent: "[W]here the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must

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invest in the funds. What Gilluly was not told, however, was that the hedge funds he was investing in (the Battoo Funds) were then turning around and repaying those fees to Grossman. (Tr. Vol. II at 551-54.)

[20] Similarly, if Congress was concerned about the staleness of claims, fading memories and disappearance of witnesses, it would have acted accordingly.

presume that Congress said what it meant and meant what it said." *Huff*, 758 F. Supp. 2d at 1338 (quoting *US v. Browne*, 505 F.3d 1229, 1250 (11th Cir. 2007).

Fifth, as noted above, *Graham* remains an outlier, even among subsequent district court cases. *See, e.g., SEC v. Fujinaga*, Case No. 13-cv-1658, 2014 U.S. Dist. LEXIS 141801, at *14 (D. Nev. Oct. 3, 2014) (rejecting *Graham*); *SEC v. LeCroy*, Case No. 09-cv-2238, 2014 U.S. Dist. LEXIS 126836, at *5 (N.D. Ala. Sept. 5, 2014) (same). Accordingly, *Graham* is not controlling. *See Anthony*, 2015 SEC LEXIS 707, at *237.

And lastly, associational bars are not punitive. Both of the cases Grossman cites in his Initial Brief on this subject are distinguishable. In *SEC v. Microtune, Inc.*, 783 F. Supp. 2d 867 (N.D. Tex. 2011), the district court held equitable claims for injunctive relief and officer-and-director bars[21] can constitute a penalty where the facts show such remedies (i) would have significant collateral consequences on a defendant's profession, (ii) do not address past harm caused by the defendant, and (iii) are not focused on preventing future harm due to the low likelihood the defendant would engage in similar behavior in the future. *Id.* at 885. Similarly, in *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), the court found a censure and suspension of a securities license based on a failure-to-supervise charge to be a penalty, and therefore subject to 28 U.S.C. § 2462, because there was no evidence presented as to the risk the defendant posed to the public or any finding of incompetence directly related to her role as a supervisor. *Id.* at 489.

The facts in this proceeding, however, are readily distinguishable from *Microtune* and *Johnson*. First, by his own admission, Grossman at the present time no longer renders investment advice through his company, SIPS, and acts solely as an IRA administrator. Accordingly, he would suffer no collateral consequences as a result of the associational bar the Law Judge imposed.

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[21] The Division notes that it is not seeking an officer-and-director bar in this proceeding, only an associational bar.

Second, and as a result of the first, the bar is designed to remedy the past harm Grossman caused when he did act as an investment adviser through Sovereign. *See Bartko*, 2014 SEC LEXIS 841, at *33-34 (noting an industry bar does not constitute a "civil fine, penalty, or forfeiture, pecuniary or otherwise" because such bars are designed to protect investors by restricting the respondent's access to other areas of the industry to prevent future harm). And third, despite Grossman's argument to the contrary, the Division's evidence showed Grossman continued to act as an investment adviser for over three years after he sold Sovereign to Adams, and continued to engage in misconduct by promoting the Battoo Funds to Sovereign clients. Accordingly, the associational bar is necessary to prevent him from engaging in such overlapping behavior in the future through his work for SIPS.[22]

In short, simply because the Supreme Court in *Gabelli* elected on its own accord not to decide the issue of whether the five-year limitations period in § 2462 applies to equitable claims does not mean, as Grossman would have us believe, that *Gabelli* "left the door open" on this issue. (Initial Brief, at 1.) Indeed, considering the door was never open in the first place (as evidenced by the wealth of case law cited above that holds equitable claims are not subject to the limitations period), the Supreme Court's decision not to address the subject is just that – a decision not to address the subject. It means nothing more and nothing less. *See Geswein*, 2 F. Supp. 3d at 1084 ("[T]his [c]ourt will not presume to guess what the Supreme Court would hold if those issues were before it for consideration").

IV. CONCLUSION

As a result of Grossman's repeated violations of the Securities Act, the Exchange Act and the Advisers Act, the Law Judge properly sanctioned him by imposing a cease-and-desist order and

[22] Even if *Johnson* were on point with the facts of this case, associational bars, like civil penalties, would be subject to the continuing violations doctrine. *See* Section III.A.1 above.

an industry-wide associational bar, and ordering him to pay disgorgement in the amount of $3,004,180.65 plus prejudgment interest, and a civil money penalty in the amount of $1,550,000. Accordingly, the Commission should affirm the Initial Decision.

Rule 450(d) Certificate of Compliance

The undersigned counsel for the Division of Enforcement certifies the foregoing Brief in Opposition to Respondent Larry C. Grossman's Petition for Review of Initial Decision complies with the length limitations set forth in Rule 450(c) of the Commission's Rules of Practice. The brief contains 13,093 words as calculated by Microsoft Word.

Dated: March 27, 2015

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