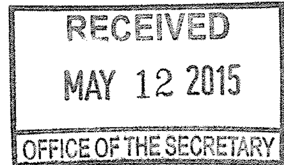

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15842

ORIGINAL

In the Matter of TOTAL WEALTH MANAGEMENT, INC., JACOB KEITH COOPER, NATHAN MCNAMEE, AND DOUGLAS DAVID SHOEMAKER, Respondents.	THE DIVISION OF ENFORCEMENT'S INITIAL POST-HEARING BRIEF

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I. INTRODUCTION

The Division of Enforcement ("Division") brought this case against respondent Jacob Keith Cooper ("Cooper"), the sole owner and CEO of San Diego-based registered investment adviser Total Wealth Management, Inc. ("Total Wealth"), for violations of the antifraud and other provisions of the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act"), and the Investment Advisers Act of 1940 ("Advisers Act"). The evidence elicited at the four-day hearing in March and April 2015 established that Cooper violated his fiduciary duty to his advisory clients and committed fraud that enriched him personally, while causing substantial harm to his clients and investors.

After touting his expertise in "alternative investments" on the radio and in promotional materials to attract advisory clients, Cooper used Total Wealth's discretionary authority to invest the vast majority of client funds into a hodgepodge of investment vehicles – such as, coffee shops, restaurants, lenders of last resort, and at least one proven Ponzi scheme – all of which caused substantial losses to investors. Cooper and Total Wealth never disclosed to clients, however, that these investment funds were paying revenue sharing fees to Cooper and entities under his control, and that in time, those fees amounted to a seven-figure financial windfall to Cooper. Moreover, Cooper and Total Wealth's representations to clients and potential clients that he would perform rigorous due diligence into these investments prior to investing were also false, and part and parcel of the fraud. Last, Cooper admitted at trial that Total Wealth had custody of client funds and securities, and that it had violated the Custody Rule. Cooper's fraudulent conduct evinces a complete disregard for his fiduciary obligations to safeguard the investments of his clients, and to put their interests ahead of his own.

The Division accordingly seeks an order requiring Cooper to cease and desist from his violations, imposing an industry bar, ordering him to disgorge ill-gotten revenue sharing fees in the amount of $1,815,992.99, and imposing a civil penalty against Cooper in the amount of $28,830,000.00, representing a third-tier statutory penalty of $150,000 for each client harmed by Cooper's misconduct and a first-tier penalty for each of his regulatory violations.

II. STATEMENT OF FACTS

A. Cooper's Background

Jacob Cooper attended college for one year at the Berklee College of Music, from September 1995 to May 1996. (Tr. (Cooper) 668.) Cooper does not have an undergraduate degree from any institution. (*Id.* 668-69.) Cooper also does not have any postgraduate degrees (Tr. (Cooper) 669), but he told investors in written publications that he has a "master's level academic certificate in Executive Financial Planning from San Diego State University." (Tr. (Cooper) 669.)

From March 2001 to April 2002, Cooper was a registered representative affiliated with WMA Securities, where he obtained Series 6 and 63 licenses. (Tr. (Cooper) 680-81.) Cooper was then affiliated with World Group Securities as a registered representative from April 2002 to March 2004. (Tr. (Cooper) 682.) Following that, from March 2004 to September 2005, Cooper worked for a financial planning firm named Financial Solutions. (Tr. (Cooper) 682-63.) Throughout the period from March 2001 to September 2005, Cooper held his Series 6 and 63 licenses (Tr. (Cooper) 682-83), until September 2005 when Cooper left Financial Solutions, and his licenses were terminated. (Tr. (Cooper) 683-84.) Cooper has not held any securities licenses since September 2005. (Tr. (Cooper) 684.)

In 2007, the NASD contacted Cooper relating to a customer complaint filed in 2007. (Tr. (Cooper) 722-23.)[1] The customer alleged an unsuitable sale of a variable life insurance policy and forgery on certain documents in the insurance paperwork. (Tr. (Cooper) 687-88.)

In various correspondence introduced into evidence, Cooper included a series of initials after his name showing professional designations: "CFP CWPP CAPP." (*See, e.g.*, Exhibits 5, 10, 18, 20, 22, 23, 28, 29, 50, 63, 64, 72, 78, 85, 94, 95, 112.) The letters "CFP" stand for Certified Financial Planner, which designation Cooper used from 2004 through 2014, when the CFP board contacted him and asked him to stop using the designation. (Tr. (Cooper) 670-72.) Cooper understood that as a CFP, he provided financial planning services as a fiduciary and the CFP Rules of Conduct required him to put his client's interests ahead of his own at all times. (Tr. (Cooper) 674-76.) The letters "CWPP" stand for Certified Wealth Preservation Planner, and Cooper also stopped using that designation in 2014. (Tr. (Cooper) 676.) The letters "CAPP" stand for Certified Asset Protection Planner, and Cooper stopped using that designation in 2014. (Tr. (Cooper) 676-77.)

Cooper was also the sole owner and employee of an entity named Pinnacle Wealth Group, Inc., which was a corporation formed in 2005. (Tr. (Cooper) 704-05.)

B. Cooper Controlled Total Wealth

Cooper formed Total Wealth Management, LLC in 2005 with Douglas Shoemaker. (Tr. (Cooper) 688-89.) Cooper was the chief executive officer of Total Wealth Management, LLC, from the outset. (Tr. (Cooper) 691.) Total Wealth Management, LLC began by selling life

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[1] At the hearing, Cooper purported to correct his prior testimony that the complaint was filed in 2007, and testified that the complaint was filed in 2006. (Tr. (Cooper) 687-88.) The Division produced documents that confirmed that the complaint was filed in 2007, and Cooper then confirmed his prior testimony. (Tr. (Cooper) 722-23.)

insurance in 2005. (Tr. (Cooper) 691.) In 2006, Total Wealth Management, LLC became a California state-registered investment adviser. (Tr. (Cooper) 692.)

In 2008, Cooper formed Total Wealth Management, Inc. (the Respondent referred to herein as "Total Wealth") as a successor to Total Wealth Management, LLC. (Tr. (Cooper) 689-90.) At that time, Shoemaker no longer wanted to be a partner in Total Wealth Management, LLC. (Tr. (Cooper) 690.) Cooper was the owner and chief executive officer of Total Wealth from its inception until it was placed into receivership in February 2015. (Tr. (Cooper) 689.) Thus, from 2005 when Total Wealth Management was originally formed as an LLC, to February 2015 when Total Wealth was placed into receivership, Cooper was the chief executive officer of the Total Wealth entities. (Tr. (Cooper) 691-92.) A 2009 organization chart shows Cooper as chief executive officer. (Exhibit 125.) Similarly, an organization chart appended to Total Wealth's 2011 Policies and Procedures Manual puts Cooper at the top of the organization as "CEO" and "owner." (Exhibit 99 at 107.)

Two other individuals played prominent roles: co-respondents Douglas Shoemaker and Nathan McNamee.[2] Shoemaker was a part-owner of Total Wealth from 2005 through 2009, and then became an independent contractor affiliated with Total Wealth as an investment adviser until December 31, 2014. (Tr. (Cooper) 709-710.) Shoemaker was the chief compliance officer of Total Wealth from June 2009 until 2011. (Tr. (Cooper) 713.) Shoemaker appears on the 2009 organization chart as chief compliance officer and associate planner (Exhibit 125) with a circular reporting relationship to Cooper, but in the 2011 organization chart he appears in a subordinate role at the bottom of the organizational chart. (Exhibit 99 at 107.)

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[2] Shoemaker and McNamee agreed to settle the charges against them before the hearing in this matter.

McNamee joined Total Wealth in late 2009 and withdrew in December 2013. (Tr. (Cooper) 709-711.) McNamee was named president of Total Wealth in mid-2011, and became its chief compliance officer. (Tr. (Cooper) 711-713.) McNamee does not appear on the 2009 organization chart for Total Wealth (Exhibit 125), and in the 2011 organization chart he has a direct reporting relationship to Cooper. (Exhibit 99 at 107.)

Cooper was the signatory, with Shoemaker, on the bank accounts of Total Wealth for several years, until they stopped using the LLC in around 2008 or 2009, when Cooper became the sole signatory on the bank accounts of Total Wealth. (Tr. (Cooper) 740-41.) Cooper was the sole signatory for bank accounts of Altus Capital Management. (Tr. (Cooper) 740.)

Cooper's income from Total Wealth was substantial. From inception to February 4, 2015, Total Wealth's general ledger showed that Cooper received a total of $1,884,735.58 in payroll. (Exhibit 350.)

C. Total Wealth Was a Registered Investment Adviser That Owed a Fiduciary Duty To Its Clients

Total Wealth began operations as a state-registered investment adviser in 2006. (Tr. (Cooper) 692.) In November 2009, Total Wealth registered as an investment adviser with the SEC. (Tr. (Cooper) 692.) Total Wealth claimed that it "specializes in asset management for wealthy families and institutional clients. TWM offers an array of financial services and products, including advice concerning investments in equity, fixed income, fund of funds vehicles, private investment funds and private transactions." (Exhibit 22 at 3.) In its marketing brochure, Total Wealth described itself as "an advanced financial planning and advisory firm with clients coast to coast. As an independent Registered Investment Advisor, TWM has no agenda other than what our clients bring to the table as their agenda." (Exhibit 123 at 1.)

Total Wealth also advertised itself as an expert in "alternative investments," which it described as "anything that is not a traditional investment (i.e. stocks/equities, bonds or cash). Alternative investments encompass a wide range of investments that differ greatly in their composition and scope." (Exhibit 123 at 4.) Cooper and Total Wealth held themselves out to their clients as experts in alternative investments. (Tr. (Bryant) 379.)

Total Wealth also had, and exercised, discretionary authority over its clients' accounts. Total Wealth's form "Investment Advisory Agreement" expressly provided that clients gave Total Wealth "Discretionary Authority" to "invest and reinvest the assets held in the Client's Account in those investments and strategies provided by TWM as outlined in its Form ADV Part II." (Exhibit 325.) Consistent with the Total Wealth advisory agreement, clients understood that Cooper had discretionary authority over their accounts and would make sound investments consistent with their goals and objectives. (Tr. (Smith) 98, Tr. (Howard) 161.)

Cooper understood that as a person affiliated with Total Wealth, he was a fiduciary, and he further testified that in the operation of Total Wealth "we always try to put [clients'] interests first." (Tr. (Cooper) 679, 719.) In fact, Total Wealth's "Policies and Procedures" manual dated June 30, 2009, explicitly stated that Total Wealth was a "fiduciary" that "owes its clients/investors the highest duty of loyalty and relies on each employee to avoid conduct that is or may be inconsistent with that duty." Employees were cautioned to avoid conduct that would not just create an actual conflict, but that "may have the appearance of impropriety." Under the term "basic principals [sic]," the Code of Ethics provided:

> This Code is based on a few basic principles that should pervade all investment related activities of all employees, personal as well as professional: (1) the interests of the Adviser's clients/investors come before the Adviser's or any employee's interests; (2) each employee's professional activities and personal investment activities must be consistent with this Code and avoid any actual or potential conflict between the interests of clients/investors and those of the Adviser or the employee; and (3) those activities

> must be conducted in a way that avoids any abuse of an employee's position of trust with and responsibility to the Adviser and its clients/investors, including taking inappropriate advantage of that position.

(Exhibit 127 at 17/72.) Cooper testified that these were the policies and procedures adopted by Total Wealth. (Tr. (Cooper) 716-17.)

Total Wealth's Code of Ethics, revised in 2011, contained similar standards in a section titled, "Fiduciary Obligations, Ethical Principles and Standards of Business Conduct," which stated in part: "The Firm and its Access Persons [defined to include all officers, directors, and employees of Total Wealth] have an ongoing fiduciary responsibility to the Firm's clients and must ensure that the needs of the clients always come first." The Code of Ethics stated further: "Because the firm is a fiduciary to its clients, Access Persons must avoid actual and potential conflicts of interest with the Firm's clients." It explicitly stated: "At all times, the interests of clients will be placed ahead of the Firm's or any employee's own investment interests." (Exhibit 99 at 80-81; *see also* Exhibit 87 at 2-3.) Cooper testified that this Code of Ethics, which was part of the Policies and Procedures Manual, was in effect as of October 2011. (Tr. (Cooper) at 719-20.)[3]

The SEC introduced expert testimony that it is well-recognized in the investment adviser industry that an investment adviser is a fiduciary with "an obligation to puts its clients' interests ahead of its own, to avoid conflicts of interest with its clients, and should exercise reasonable and prudent practices to safeguard their clients' assets." (Exhibit 271 at 5; *see generally* Exhibit 271 at 4-6.) In addition, an adviser exercising "discretionary authority must ensure that making an

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[3] Exhibit 87 is a document titled "Code of Ethics – Revised June 15, 2011." Cooper testified that this document "may have been" adopted. (Tr. (Cooper) at 717-18.) In fact, Exhibit 87 is part of Exhibit 99.

investment is in the best interest of a client, and avoid situations where the adviser or its employee could be conflicted by obtaining some personal benefit from the exercise of such discretion. Moreover, the adviser must satisfy himself, through appropriate due diligence that is adequately documented, that the investment is in the best interests of the client before purchasing it on its clients' behalf or recommending it to a client." (Exhibit 271 at 6.)

D. The Altus Entities

Altus Capital Management, LLC is a limited liability company created in 2009. (Tr. (Cooper) 693.) Total Wealth was the managing member of Altus Capital Management, and Cooper effectively controlled Altus Capital Management as the chief executive officer of its managing member. (Tr. (Cooper) 693-95.) Altus Capital Management did not have any employees or independent contractors. (Tr. (Cooper) 695.)

In December 2009, Cooper created the ACOF fund. (Tr. (Cooper) 699, 759.) Altus Capital Management was the general partner of ACOF. (Tr. (Cooper) 695, Exhibit 22.) As the chief executive officer of Altus Capital Management, Cooper was effectively the person who managed ACOF. (Tr. (Cooper) 696-97.) As stated in the ACOF private placement memorandum, or "PPM": "TWM, acting as Managing Partner of the General Partner, will be responsible for investment decisions as well as certain marketing and administrative functions." (Exhibit 22 at 3.)

In 2011, Cooper formed six additional funds under the "Portfolio Series" name: (1) Altus Conservative Portfolio Series, LP; (2) Altus Focused Growth Portfolio Series, LP; (3) Altus Income Portfolio Series, LP; (4) Altus Moderate Growth Portfolio Series, LP; (5) Altus Moderate Portfolio Series, LP; and (6) Altus Growth Portfolio Series, LP. (Tr. (Cooper) 700-

01.)[4] Each of the Portfolio Series funds was managed by Altus Capital Management, and was advised by Total Wealth. (Tr. (Cooper) 701-02.)

Cooper admitted that he made "some" of the investment decisions for ACOF and for the Portfolio Series funds. (Tr. (Cooper) 702-03.) According to Cooper, to the extent a client was advised by Mr. Shoemaker or Mr. McNamee, then they would have been involved in the investment decision. (Tr. (Cooper) 703.) However, there was a pool of approved funds that could be selected for ACOF or Portfolio Series investments, and that pool of approved funds was approved by Cooper, as the managing member of the general partner of the funds. (Tr. (Cooper) 703-04.) Shoemaker testified that Cooper made "the ultimate decision" on whether clients would be placed into approved alternative investments. (Tr. 144-49; Exhibit 357 (Shoemaker Tr.) 79.) As of December 31, 2010, ACOF had total assets under management of $37,603,402. (Exhibit 68.) At its high point at the end of 2012 or the beginning of 2013, Cooper testified that Total Wealth had a little over 500 accounts, with customers from coast to coast, and nearly $130 million in assets under management. (Tr. (Cooper) 753.) At the time the receiver was appointed on February 10, 2015, the funds (ACOF and the Portfolio Series) listed total assets of $38,698,288. (Exhibit 310.)

E. Total Wealth's Fee Structure

TWM, as a registered investment adviser, charged a management fee based on the value of a client's account, which ranged from 1% to 1.4% per annum on the aggregate account balance. (Exhibit 123 at 11.)

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[4] The receiver reported finding a bank account for a seventh fund named the Altus Focused Growth Portfolio Series, LP, which was not identified in the OIP. This fund had only $41,647 in assets as of the date of the receivership in February 2015. (*See* Exhibit 310.)

According to the ACOF offering memorandum, investors in ACOF paid up to a 1.4% management fee to the general partner, Altus Capital Management. (Exhibit 22 at 7.) Documents and testimony established, however, that each investor in ACOF paid a different management fee which was dictated by Cooper. (Tr. (Horrell) 63-64, Exhibit 23.) The management fees paid to Altus Capital Management by ACOF were ultimately paid to Total Wealth. (Tr. (Horrell) 27, 49, 53; (Cooper) 733.)

For the period from January 9, 2009 through December 2013, Total Wealth received revenue from advisory fees of $3,588,235.71. (Tr. (Cooper) 732, Exhibit 1.) The advisory fees were debited from the accounts of individuals who were clients of Total Wealth, or were debited from the ACOF and Portfolio Series funds as management fees paid to Altus Capital Management, and then turned over to Total Wealth. (Tr. (Cooper) 733, 737-38, 740, Exhibit 26.)

F. Cooper's and Total Wealth's Solicitation of Investors for the Altus Funds

Cooper and Total Wealth located potential new clients, among other ways, through paid weekly radio broadcasts. (Tr. (Howard) 154; (Bryant) 376-77, (Cooper) 747-48.) Potential clients were also provided with brochures extolling Total Wealth's expertise in "alternative" investments. (Tr. (Bryant) 376-377, Exhibits 3, 122, 123.) Total Wealth marketed itself as an expert in alternative investments that were "non-correlated" to the stock market. (Tr. (Bryant) 376-78; (Cooper) 747.) Cooper admitted that prior to the formation of Total Wealth, he did not have any experience either investing in or recommending investments in alternative funds. (Tr. (Cooper) 749.)

Cooper supervised the creation of a brochure in 2010 or 2011 for Total Wealth, which he approved to use to market Total Wealth to investors. (Tr. (Cooper) 749-51, Exhibit 123.) The purpose of the brochure was to convey information to potential clients and educate them about Total Wealth's processes and how they approached things. (Tr. (Cooper) 751.)

Cooper also supervised the creation of an "executive summary" for ACOF in 2010. (Tr. (Cooper) 751-52, Exhibit 122.) In January 2010, Cooper declared the content for the ACOF executive summary finalized. (Tr. (Cooper) 758, Exhibit 20.) Investors were provided with an executive summary for the ACOF fund, which was created and approved by Cooper. (Tr. (Cooper) 751-52, Exhibit 122, Exhibit 3.)

Starting in 2010, Total Wealth clients invested in the Altus Funds. (Tr. 144-49; Exhibit 357 (Shoemaker Tr.) 114-115, 141)[5]. Clients invested in ACOF or a Portfolio Series fund received statements from TWM or ACOF or the Portfolio Series funds that were designed by Cooper. (Tr. (Horrell) 39.)

G. Cooper's and Total Wealth's Revenue Sharing or Management Agreements

Total Wealth entered into revenue sharing agreements with many of the underlying funds in which Total Wealth and Cooper advised clients to invest. Revenue sharing fees are monies paid to Total Wealth based on a client's investment in a fund with which Total Wealth has a fee-sharing arrangement. (Tr. (Cooper) 759-60.) Revenue sharing means that there is a management fee that the underlying fund is charging, and a portion was then shared with Total Wealth under the revenue sharing agreements. (Tr. (Cooper) 761-62.) Total Wealth only received revenue sharing if clients invested in the underlying funds, either directly or through ACOF or the Portfolio Series funds. (Tr. (Cooper) 762.) The amount of the revenue sharing was generally a percentage of the current value of the client's assets invested in the underlying private fund. (Tr. (Cooper) 762.)

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[5] Shoemaker was subpoenaed and appeared at the hearing, but refused to answer any substantive questions on the basis of his Fifth Amendment privilege. (Tr. (Shoemaker) 142-143.) The hearing officer then admitted Shoemaker's investigative testimony transcript as Exhibit 357.

Total Wealth had revenue sharing agreements with Private Placement Capital Notes II, LLC ("PPCN II"), Aegis Atlantic, LLC ("Aegis Atlantic"), Aegis Retail Group, LLC ("Aegis Retail"), Metropolitan Coffee and Concession, LLC ("Metro Coffee"); Rainmaker Capital, Inc. ("Rainmaker"), LJL Funding, LLC ("LJL"), Prime Meridian Income Fund, Moneta Macro Fund and the Moneta Income Fund (collectively "Moneta"), and Luminary Commodities Future Fund (which Cooper stated was "part of Rainmaker"). (Tr. (Cooper) 760-61.) In addition, Cooper had revenue sharing arrangements through his company Pinnacle with JOMAC, LLC, which was affiliated with Life's Good S.T.A.B.L. Mortgage Fund ("Life's Good") (Tr. (Cooper) 982-84, Exhibits 352, 353, 354); Denver Financial Group, which was affiliated with PPCN II and Private Placement Capital Notes, LLC ("PPCN") (Tr. (Cooper) 935-36); and with Dynamic Sales paid through Novus Financial, both of which were associated with Don Davis, who was in turn affiliated with Rainmaker, Moneta, Aegis, Metropolitan Coffee, and Luminary – all funds that Total Wealth recommended and in which it invested its clients' funds. (Tr. (Cooper) 981-82.)

Cooper acknowledged that he could have refused to enter into any of the revenue sharing agreements, but claimed that it would not have made any difference to the client because the client would still be paying fees to the underlying funds. (Tr. (Cooper) 824.) As discussed below, Cooper claimed that they disclosed the revenue sharing agreements orally prior to 2010, and then disclosed the revenue sharing agreements in the Form ADV. (Tr. (Cooper) 809-11.) Cooper's claim that revenue sharing agreements were "verbally" disclosed to clients is contradicted by Shoemaker, who testified that he did not know of any place other than the Form ADV which would have disclosed the revenue sharing agreements. (Tr. 144-149; Exhibit 357 (Shoemaker Tr.) 88:9-16.) Shoemaker also testified that Total Wealth did not provide clients

with any documents showing the amount of revenue sharing fees received by Total Wealth from funds invested in by clients. (Tr. 144-149; Exhibit 357 (Shoemaker Tr.) 86:17-24.)

The money generated from the various agreements with the funds into which Cooper and Total Wealth placed their clients' assets was substantial. A Profit and Loss Statement produced by Total Wealth for the period January 2009 to December 2013 shows Total Wealth earned "fee sharing" revenue of $1,225,200.79 during that period. (Exhibit 1.) Cooper testified that was fee sharing revenue, although he claimed that some advisory fees were "classified" as fee sharing, even though he also claimed accountants might classify things differently. (Tr. (Cooper) 733-34.) An SEC accountant reviewed Total Wealth's general ledger and found $982,057.72 in fee sharing payments for the period from October 2009 to February 2014. (Exhibit 272B.) In addition, from October 2009 through May 2013, Cooper received another $833,935.27 in purported consulting fees through his entity Pinnacle, which received money from entities associated with the majority of investments made by Total Wealth and Altus Capital Opportunity Fund, L.P. ("ACOF"). (Exhibit 272A.) The total fee sharing revenue realized by Cooper during the period from October 2009 to February 2014 was $1,815,992.99. (Exhbit 272A.)

1. Revenue sharing with Tony Hartman, PPCN, and PPCN II

Beginning in 2007, Cooper entered into a series of agreements with Tony Hartman, who was the principal of an entity called Denver Financial Group and the principal of two offerings named PPCN and PPCN II. Cooper entered into these agreements through his company Pinnacle, and then finally through Total Wealth.

a. Oral agreement beginning in 2007

Starting in 2007, Cooper and Total Wealth recommended that Total Wealth clients invest in PPCN as a result of an oral agreement Cooper had with Hartman. (Tr. (Cooper) 844-45.)

According to a document produced by Denver Financial Group, it paid $12,985 to Pinnacle in 2007 and another $46,656.85 in 2008. (Exhibit 55, Tr. (Cooper) 844-45.)

b. "Letter of Understanding" dated January 6, 2009

Cooper and Hartman entered into a written agreement dated January 6, 2009 – although the signatures are not dated – captioned "Letter of Understanding," which provided that Pinnacle would provide certain consulting services at the rate of $150 an hour. (Exhibit 56.) Cooper was the only person from Pinnacle who provided any consulting services to Denver Financial Group. (Tr. (Cooper) 848.)

c. Amendment to Letter of Understanding dated October 1, 2009

Later in 2009, Cooper and Hartman entered into an amendment dated October 1, 2009 to the "Letter of Understanding," which changed the compensation from $150 an hour to $36,000 a month, which could be renegotiated quarterly. (Exhibit 57.) At this point in 2009, Cooper and Total Wealth had advised their clients to invest in the PPCN offering managed by Hartman. (Tr. (Cooper) 850.) Under this amendment, Denver Financial Group made three $36,000 payments to Pinnacle in October, November, and December 2009. (Exhibit 108, Tr. (Cooper) 853-54.) Denver Financial Group reported that it paid a total of $156,015.68 to Pinnacle and Cooper in 2009. (Exhibit 55.)

Cooper and Hartman renegotiated the payment for January 2010 and increased the amount to $60,000 per month. (Tr. (Cooper) 854-55, Exhibit 108.) While Cooper was receiving these payments through Pinnacle, he recommended that Total Wealth clients invest in PPCN. (Tr. (Cooper) 855.) Cooper believed that Hartman began the PPCN II offering in late 2009. (Tr. (Cooper) 856.) Cooper advised Total Wealth clients to buy PPCN II notes, and advised ACOF to purchase PPCN II notes, while he was getting these payments from Denver Financial Group. (Tr. (Cooper) 856-57.) In 2010, some of the $60,000 monthly payments were made to Pinnacle

by Tony Hartman, as opposed to from Denver Financial Group. (Exhibit 108, Tr. (Cooper) 855-58.) From time to time, Cooper then transferred the money he received from Denver Financial Group and Tony Hartman to his personal bank account, where he used it to pay his personal expenses. (Tr. (Cooper) 853-54, 857-58.)

d. Management Agreement dated June 2010

In June 2010, Total Wealth entered into a "Management Agreement" with PPCN II, signed by Tony Hartman for PPCN II and by Cooper, as CEO of Total Wealth. (Exhibit 60, Tr. (Cooper) 858-59.) This management agreement lists the services to be performed by Total Wealth as items A through P, and those services include recommendations as to investments, communicating with investors, coordinating the amounts available for distribution to investors, and disbursing payments of distributions. (Exhibit 60, Tr. (Cooper) 861-62.) Under the terms of this "Management Agreement," Total Wealth was to be paid "in an annual amount equal to 1.45 percent (1.5%)[6] of the aggregate capital accrued. Aggregate capital accrued shall include investors [sic] initial capital investment, plus interest accrued to the investors' capital accounts as it accrues." (Exhibit 60.) Cooper understood that the management fee that was going to be paid to Total Wealth under this agreement was based on the amount of money that Total Wealth advised its clients (including ACOF and the Portfolio Series fund) to invest in PPCN II. (Tr. (Cooper) 863.) Total Wealth received payments under this agreement for moneys that were invested by Total Wealth clients and ACOF and the Portfolio Series funds. (Tr. (Cooper) 863, 891-92, Exhibit 62.)

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[6] Cooper stated that Total Wealth was paid 1.5%, and the term 1.45 percent was a typo. (Tr. (Cooper) 890.)

2. Referral arrangement with LJL Funding, LLC

Total Wealth entered into a "referral arrangement" with LJL Funding, LLC, in February 2008, which was memorialized in writing sometime in 2010. (Tr. (Cooper) 779-82.) The written agreement states that it is "effective" on February 6, 2008, but the date the document was signed was left blank by Cooper for Total Wealth, and by the fund manager, whenever the document was signed. (Exhibit 15.) Cooper negotiated the terms on behalf of Total Wealth. (Tr. (Cooper) 786.) Under the terms of the written arrangement, Total Wealth was paid 1% of the amount introduced into the LJL fund on a quarterly basis, which was decreased to 0.5% of the amount invested for the second year and each year thereafter. (Tr. (Cooper) 784-85, Exhibit 15.) While the arrangement could be terminated at any time, the payments were to be made perpetually so long as referred investors remained in the fund. (Tr. (Cooper) 785, Exhibit 15.)

Cooper and Total Wealth entered into this arrangement at or near the time that he first learned about LJL Funding. During his investigative testimony, Cooper testified that he first became aware of LJL "in the early part of 2008." (Tr. (Cooper) at 787.) At the evidentiary hearing, Cooper recalled that he learned about LJL in the fourth quarter of 2007. (Tr. (Cooper) at 786, 787, 788.)

At the time that Cooper and Total Wealth entered into the "referral arrangement" with LJL Funding, he could not recall if he had advised any Total Wealth clients to invest in the LJL fund. (Tr. (Cooper) 788-89.) Cooper admitted that after Total Wealth entered into the referral arrangement, Cooper placed Total Wealth clients and ACOF assets into the LJL fund. (Tr. (Cooper) 789.) From that point until sometime in 2013 when LJL developed problems and revenue sharing was suspended, Total Wealth received payments from LJL for the assets of its clients that were placed with LJL. (Tr. (Cooper) 789.)

According to Total Wealth's general ledger, from April 27, 2010 to June 4, 2012, LJL paid at least $106,000 to Total Wealth under the referral arrangement. (Ex. 349, Tr. (Cooper) 790-91.) Cooper believed that payments were made beginning in 2008, but could not explain why they did not appear on the general ledger of Total Wealth. (Tr. (Cooper) 791.) In addition, in 2010, when Cooper purchased his home in Utah, LJL loaned him the money to buy the house. (Tr. (Cooper) 792.)

3. "Selling Agreement" with Rainmaker Capital, Inc.

Cooper met and developed a relationship with an individual named Don Davis, who was the manager of Rainmaker Capital, Inc., in 2009. (Tr. (Cooper) 794.) During 2009-2011, Total Wealth entered into a series of agreements with Rainmaker that paid Total Wealth fees for client funds invested in Rainmaker.

a. March 2, 2009 "Selling Agreement"

On or about March 2, 2009, Total Wealth entered into a "Selling Agreement" with Rainmaker Capital. (Tr. (Cooper) 792-93, Exhibit 141.) Cooper did not know how much money, if any, Total Wealth clients had invested in Rainmaker funds as of the date of the "Selling Agreement," (Tr. (Cooper) 795), although Cooper recalled that he put less than $5 million of clients' assets into Rainmaker. (Tr. (Cooper) 800-01.)

The "Selling Agreement" with Rainmaker provided for a two-tiered payment to Total Wealth for amounts clients of Total Wealth invested with Rainmaker: (1) a 10% incentive fee, paid quarterly, which was part of the 20% incentive fee that Rainmaker would receive based on the "high water" mark of net asset value; and (2) a 1% annual management fee, paid regardless of whether the Rainmaker fund was profitable. (Exhibit 141.)

Cooper testified that Rainmaker charged a 2% annual management fee, so under this agreement Total Wealth received half of the management fee Rainmaker charged. (Tr. (Cooper)

807.) For example, if a Total Wealth client had an agreement to pay Total Wealth a 1% management fee and invested a million dollars, and Total Wealth then invested that client's million dollars with Rainmaker, Total Wealth would collect its 1% fee directly from the client's account, and then would receive an additional 1% from Rainmaker. (Tr. (Cooper) 808.) In effect, then, the "Selling Agreement" allowed Total Wealth to collect 2% rather than the 1% or so management fee it disclosed to clients, on clients' assets invested in Rainmaker. Cooper testified that the "Selling Agreement" such as the one with Rainmaker, therefore provided a financial incentive for Total Wealth, "and then, ultimately, to me," to put clients into funds that paid referral fees, as opposed to funds that did not. (Tr. (Cooper) 811.)

b. October 1, 2010 "Selling Agreement"

On or about February 2011, Total Wealth and Rainmaker entered into another "Selling Agreement" with an effective date of October 1, 2010. (Exhibit 142.) Under the terms of this new agreement, Total Wealth now received 1.5% as a management fee – or 75% of the management fee charged by Rainmaker, while the incentive compensation decreased. (Tr. (Cooper) 827-28.) According to Cooper, if the Rainmaker fund "wasn't performing well, fine." (Tr. (Cooper) 830.) Cooper wanted the manager, Don Davis, to benefit from the incentive fee to "incentivize Mr. Davis more." (Tr. (Cooper) 828-30.) In fact, during 2010 Rainmaker was not profitable and incurred a $700,000 net investment loss for the year, (Exhibit 182), in which case Total Wealth would likely not have made any money on the incentive portion of the prior selling arrangement.

c. Two agreements dated January 1, 2011

On or about February 2011, Total Wealth and Rainmaker entered into two different selling agreements with effective dates of January 1, 2011. (Exhibits 143, 144.) In one agreement, Total Wealth received 0% incentive fee when the average quarterly balance of their

clients' funds was below $4 million (Exhibit 143), while in the other agreement Total Wealth received a 10% incentive fee when the average quarterly balance of their clients' funds was over $4 million. (Exhibit 144; Tr. (Cooper) at 832-35.) In both cases, Total Wealth received a 2% management fee on its clients' assets – in other words, the entire management fee that Rainmaker was charging. (Tr. (Cooper) 836.) Both agreements were in effect at the same time. (Tr. (Cooper) 835.) This meant that Total Wealth was effectively earning a 3% total fee on its clients' assets invested in Rainmaker, and Total Wealth was earning up to 3.4% on ACOF assets invested in Rainmaker. (Tr. (Cooper) 837-38, 839, 842.)

4. Split-fee arrangement with Moneta Capital Management, LLC

In early June 2009, Cooper and Total Wealth entered into a "Split-Fee Arrangement" with another fund associated with Don Davis called Moneta Capital Management, LLC. (Tr. (Cooper) 822-23, Exhibit 140.) This agreement was entered into only a few months after Total Wealth entered into its first agreement with Davis' Rainmaker fund. The Moneta agreement provided for a 5% incentive fee and a 0.5% management fee to be paid to Total Wealth for the assets of its clients invested with Moneta. (Tr. (Cooper) 823-24, Exhibit 140.)

Cooper did not know if he had put any clients' funds into Moneta at the time he entered into the "Split-Fee Arrangement" with Moneta. He did admit, however, that he put clients into Moneta afterwards and he knew that for every client he put into Moneta, he would benefit from the "Split-Fee Arrangement." (Tr. (Cooper) 827.)

5. Arrangement with Don Davis, Novus, and Dynamic Sales

Beginning in or about October 2009, Cooper began receiving payments to his company Pinnacle from Don Davis, through an entity named Novus Investments ("Novus"), which continued through at least April 2011. (*See, e.g.*, Exhibit 261A at 34, 40.) In total, Cooper received $307,664.58 from Davis over this period of time.

Cooper identified Novus as a client of Pinnacle during his investigative testimony, and identified Davis as the owner of Novus. (Tr. (Cooper) 1042-43.) At the evidentiary hearing, Cooper testified that the arrangement was with an entity named Dynamic Sales, which he thought "may be a dba for Novus." (Tr. (Cooper) 1042.) There was no written agreement between Pinnacle and Cooper on the one hand, and Davis or Novus on the other, concerning the services that Cooper was going to provide in return for the payments received. (Tr. (Cooper) 1043.) No written work product was produced by Cooper under this agreement. (Tr. (Cooper) 1045.)

Davis introduced Cooper to the Metro Coffee offering in 2009. (Tr. (Cooper) 1045.) Davis was also the individual who introduced Aegis to Cooper. (Tr. (Cooper) 981.) Davis was the manager of Rainmaker and Moneta, and made payments to Cooper in connection with amounts invested in those funds by Total Wealth's clients (including ACOF and the Portfolio Series funds.) (*See, e.g.*, Exhibit 145, Exhibit 147, Tr. (Cooper) 1057-59.)

6. Agreement with JOMAC, LLC

In or about March 1, 2010, Cooper entered into a "Memorandum of Understanding" with an entity named JOMAC, LLC, for Cooper to serve as a consultant to JOMAC, although the document was not signed by representatives of JOMAC. (Exhibit 352, Tr. (Cooper) 994.)[7] The principals of JOMAC who were to be signatories to the agreement with Cooper – Michael [redacted] and John [redacted] – were identified as members of the management team of Life's Good fund in a brochure provided to Cooper. (Exhibit 354 at 5.)

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[7] Cooper's agreement with JOMAC was located after the receiver was appointed in February 2015 on Cooper's personal computer, and provided by the receiver to the Division. (Tr. (Janulewicz) 571.)

Under the terms of the agreement with JOMAC, Cooper was to be paid an initial retainer by March 15, 2010, and then $12,500 per month thereafter. (Tr. (Cooper) 995, Exhibit 352.) In addition to the payments specified by the agreement, on April 7, 2010, Pinnacle received $16,884 from JOMAC, which Cooper testified was for the same or substantially similar consulting services. (Tr. (Cooper) 1013-15, Exhibit 261 at A-00013.) Cooper's first face-to-face meeting with management of Life's Good was on April 20, 2010, and so Cooper had been paid over $30,000 before his first face-to-face meeting with his purported clients. (Tr. (Cooper) 1015.) Cooper received his last payment from JOMAC on June 29, 2010, one day before he was contacted by the Philadelphia office of the SEC and informed that the Life's Good fund was a Ponzi scheme. (Tr. (Cooper) 1020-21.) During that conversation, Cooper did not tell the SEC that he had been receiving payments from JOMAC, including a payment the prior day. (Tr. (Cooper) 1021-22.).

In total, between March and June 2010, Cooper received a total of $69,384 from JOMAC over a four month period. (Tr. (Cooper) 1208.) As discussed below, during that period of time, Cooper and Total Wealth invested approximately $2.4 million of their clients' funds with Life's Good, all of which was subsequently wiped out at Cooper's direction when the Ponzi scheme was revealed. (Tr. (Horrell) 81.) In fact, Cooper's agreement with JOMAC entitled him to $150,000 in fees on an annual basis. The $150,000 is exactly 6% of $2.5 million, about the same amount of client funds that Cooper funneled to Life's Good before it was revealed to be a Ponzi scheme. (Tr. (Cooper) 1022-23.)

7. "Management Agreement" with Aegis Retail, Aegis Atlantic, and Metro Coffee

In early 2011, Total Wealth entered into a written "Management Agreement" with Aegis Retail, Aegis Atlantic, and Metro Coffee. (Exhibit 139, (Tr. (Cooper) 1055-56.) Under the

terms of this management agreement, Total Wealth was to provide a lengthy list of management services. (Exhibit 139 at 1-3.) In return, Total Wealth was to be paid 2.25% of the aggregate capital invested by clients of Total Wealth, directly or through ACOF or the Portfolio Series funds, in any of the Aegis offerings and the Metro Coffee offering. (Exhibit 139, Tr. (Cooper) 1056.)

Total Wealth invested approximately $18 million in Aegis Retail and Aegis Atlantic offerings. Those investments were written down to zero in two entries made in May and July of 2014. (Tr. (Janulewicz) 553-54.) In addition, at the time the receiver was appointed, three different categories of investments in Metro Coffee, carried at a total value of $3,289,274, were on Total Wealth's books. (Exhibit 310 at 27.) The receiver reported that Metro Coffee, was insolvent since inception, had been placed in bankruptcy in 2014, and investors were likely to recover very little of the $3.2 million left in Metro Coffee. (Exhibit 310 at 3.)

During the period from October 2009 through February 2014, according to Total Wealth's general ledger, Total Wealth received $190,691.48 in fee sharing payments from Aegis Atlantic, another $123,064.48 in fee sharing from Aegis Retail, and $72,298.59 in fee sharing payments from Metro Coffee. (Exhibit 272B.)

H. Cooper's Failures to Disclose the Revenue Sharing Fees and the Resulting Conflict of Interest

1. A compliance consultant informed Total Wealth in 2009 that revenue sharing agreements create a conflict of interest and must be disclosed

Total Wealth hired a compliance consultant to perform an inspection of its compliance program, which began its inspection effective January 1, 2009. (Tr. (Groves) 459-60.) Jeffrey Groves, an experienced compliance consultant associated with a company named ComplianceWorks Inc., inspected Total Wealth's operations in January 2009 and found that even

though Total Wealth had been in business for several years, it had no compliance manual, a completely insufficient Form ADV, and virtually no documentation. (Tr. (Groves) 464.)

Groves produced a report that he provided to Total Wealth. (Exhibit 126.) Groves conducted his onsite investigation on January 27, 2009, and spoke to Cooper and Shoemaker. (Exhibit 126 at 4.) During this inspection, Groves was not informed that Total Wealth or its principals had revenue sharing arrangements with anybody. (Tr. (Groves) 472-73.) Groves would have expected to have been informed of such agreements during his inspection. (Tr. (Groves) 483-84.)

Groves' testimony is corroborated by his inspection report, which at item 5.1.9 on page 13 checks the box "N/A" for written agreements with solicitors. (Exhibit 126 at 13, Tr. (Groves) 472-73.) Indeed, a Form ADV, Part II, dated March 17, 2008, attached to Groves' report shows that Total Wealth was disclosing in Item 13, Additional Compensation, that it did not have any agreements for additional compensation for client referrals. (Exhibit 126 at 53.) Groves learned during his inspection that there were entities named Pinnacle and Financial Council that were related to Cooper and Shoemaker, but was told that these were mortgage companies of some sort. (Tr. (Groves) 474-75.) Accordingly, Groves noted in his inspection report, at item 6.8.3, that Total Wealth had not adequately disclosed its material relationships in its Form ADV. (Exhibit 126 at 19, Tr. (Groves) 474-75.)

According to Groves, Cooper and Shoemaker seemed unaware of their obligation to deliver a Form ADV to clients, and did not have any log whatsoever of which clients had been provided with a Form ADV. (Tr. (Groves) 478-79.) There was no documentation that Total Wealth had been providing Form ADV, Schedule F to its clients, as it was required to do as a state-registered investment adviser. (Tr. (Groves) 476.) Groves provided to Total Wealth a form

letter for transmitting a Form ADV to clients, but does not know if that letter was ever used. (Tr. (Groves) 479, Exhibit 129.) In February and March 2009, Groves worked with Shoemaker to revise Total Wealth's Form ADV, however, during that period, no revenue sharing agreements were disclosed to Groves. (Tr. (Groves) 487.) Groves also provided Total Wealth with a draft policies and procedures manual in 2009. (Tr. (Groves) 503, Exhibit 127.)

Groves testified that he first learned about any revenue sharing agreements in August or September 2009 from Shoemaker, and Groves informed Shoemaker that revenue sharing agreements need to be disclosed because it is "a significant conflict of interest." (Tr. (Groves 489-90.) Shoemaker informed Groves that investment products which paid referral fees were extensively used in client portfolios. (Tr. (Groves) 493.) Groves instructed Total Wealth that the revenue sharing agreements needed to be disclosed to inform clients and quantify the conflict, and to inform clients of steps taken to mitigate the conflict of interest. (Tr. (Groves) 489-90.) Groves instructed Total Wealth that disclosure of revenue sharing agreements was "absolutely crucial." (Tr. (Groves) 490.)

In two drafts of Forms ADV that Groves helped prepare, Groves recommended language disclosing the existence of revenue sharing agreements, the conflict of interest, and how it is managed:

> The Advisor has entered into solicitation agreements with the firms offering the investment product and as a result of placing a client in those investment products, the Advisor may receive a percentage of the advisory fees charged by the firm offering the security. The percentage of the investment advisory fees may be up to 50% of the management fee and performance fee (as applicable) charged by the limited partnership fund. The amount of the management fee charged to a client is not affected by the referral fee. However, a conflict of interest arises as a split of investment advisory fees creates a financial incentive to purchase securities from funds that customarily provide for the Adviser to share in the investment advisory fees. This conflict is managed by the supervision by officers of the Advisor of all security purchases on behalf of clients to ensure the security is within the parameters set for the portfolio and by the Adviser's Code of Ethics and fiduciary responsibility to each client.

(Exhibit 131 at 1-2. *See also* Exhibit 128 at 1-2.[8]) According to Groves, the disclosure needed to say that Total Wealth "has" entered into solicitation agreements because agreements were already in place, and Total Wealth had in fact received payments. (Tr. (Groves) 491, 494-95.)

Groves' proposed disclosures in the September and October 2009 drafts of Total Wealth's Form ADV were never filed with the SEC, and these disclosures were not on file or record in any public forum. (Tr. (Groves) 502.)

Groves testified that the deficiencies he found at Total Wealth were "glaring weaknesses" in their compliance program. (Tr. (Groves) 504.) In Groves' view, Cooper was not receptive to suggestions to change Total Wealth's compliance program and was sometimes irritated by suggestions that Groves made for improvement. (Tr. (Groves) 506.) Groves described Cooper as setting the tone from the top on compliance issues, and characterized the tone set by Cooper as, "kind of indifference ... very much indifferent that, you know, there's any lack of understanding ... of his firm's compliance obligations or what's needed to become an investment advisor." (Tr. (Groves) 507.)

Total Wealth terminated Groves at the end of 2009. (Tr. (Groves) 508).

2. Total Wealth's Forms ADV filed with the SEC did not contain adequate disclosures of the revenue sharing agreements

After Total Wealth discharged Groves, it filed Forms ADV Part II with the SEC that failed to disclose the actual existence of the revenue sharing arrangements as Groves had suggested. Instead, the Forms only disclosed that Total Wealth "may" have agreements to receive revenue sharing fees, even though Cooper and Total Wealth knew that they actually had

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[8] Exhibit 128, dated September 2009, has slightly different language and refers to a split of 20% of the management fee. (*See* Exhibit 128 at 1.) Exhibit 131 is dated October 2009 and more accurately refers to a split of up to 50% of the fees. (*See* Exhibit 131 at 1.)

agreements in place with numerous fund managers and were receiving substantial compensation as a result. Total Wealth's May 24, 2010 Form ADV, Schedule F, disclosed only that "[t]he Adviser may have arrangements with certain Independent Managers whereby the Adviser receives a percentage of the fees charged by such Independent Managers." (Exhibit 136 at p. 8.) There is no question that such arrangements existed at the time the Form ADV was drafted, so disclosing that such agreements "may" exist was misleading. When asked to review this language, Groves opined that Total Wealth "had gone backwards" in its disclosures," and that this disclosure was not adequate on two counts, because it uses "may" as opposed to "is" when there were already existing agreements, and there was no explicit statement of the conflict of interest and/or how that conflict of interest was mitigated. (Tr. (Groves) 497-98.)

Total Wealth continued to use the term "may" in its Forms ADV, Part II, filed subsequent to May 2010. Specifically, Total Wealth's Forms ADV filed March 28, 2011 (Exhibit 120), August 23, 2011 (Exhibit 218), April 2, 2012 (Exhibit 220), and April 5, 2013 (Exhibit 224) were false when filed.

The Division offered expert testimony that Total Wealth's disclosures concerning their revenue sharing agreements were incomplete and misleading. (Exhibit 271 at 6-11.) The Division's expert, Steven Behnke, opined that as a fiduciary, an investment adviser should seek to avoid any activity that creates a conflict of interest with its clients, and should eliminate all conflicts of interest that might cause the adviser to render advice that is not in the best interests of its clients. (Exhibit 271 at 6.) Behnke opined that if it is not possible for an adviser to avoid a conflict of interest with a client, then the adviser must make full and fair disclosure of that conflict. Otherwise, the adviser is effectively using a client's assets for their own benefit and to the client's detriment, without the client's consent. Behnke opined that "it is fraudulent for an

adviser to use a client's assets to obtain benefit, financial or otherwise, and not disclose doing so to the client." (Exhibit 271 at 6.)

Behnke stated that the requirement to fully disclose all important facts about any conflict of interest is explicit in the adviser registration requirements of Form ADV. Specifically, the instructions to Form ADV, Part 2, which were revised and adopted in 2010, contain explicit instructions concerning the obligations of investment advisers to avoid conflicts of interest. (Exhibit 271 at 7.) Behnke cited General Instruction number 3, "Disclosure Obligations as a Fiduciary," which states in part: "As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. *This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage*, and can give informed consent to such conflicts or reject them." (Exhibit 271 at 7 (emphasis added in report).) Behnke also pointed to the instructions for Item 5, concerning compensation, and Item 14. (Exhibit 271 at 7.) Behnke explained that the purpose of requiring full and complete disclosure of conflicts of interest, including compensation from third parties, is so clients of an investment adviser can assess whether they can rely on their adviser's objectivity in selection of investment products, which could be compromised if there was a financial incentive for the adviser to recommend one investment over another. (Exhibit 271 at 7.)

Behnke opined that it was Total Wealth's business practice to primarily recommend to its clients – including ACOF and the Portfolio Series funds – private funds that were paying Total Wealth and Cooper fees for such recommendations. Behnke opined that, "[t]his is a clear conflict of interest, and it needed to be disclosed, in full detail." (Exhibit 271 at 8.) Although

placing clients into private funds that offered extra compensation to Total Wealth and Cooper was part of Total Wealth's basic business plan, Behnke opined that important information was not disclosed to clients in any meaningful way.

Total Wealth's Form ADV Part II filed in 2011, 2012, and 2013 only disclosed in Items 5 and 14 that Total Wealth "may" receive revenue sharing from funds. Because Total Wealth was, in fact, already receiving revenue from a majority of funds in which it placed investor monies, Total Wealth and Cooper owed a duty to their clients to disclose that fact and the conflict of interest it created between Total Wealth and Cooper on the one hand, and their clients on the other hand. (Exhibit 271 at 7-8.) Behnke opined that this information would have been important to clients in deciding whether to invest with Total Wealth. (Exhibit 271 at 8.)

3. The ACOF PPM did not adequately disclose the revenue sharing agreements

For many of the same reasons, the PPM for ACOF also did not adequately disclose the revenue sharing agreements because the disclosures were only that such agreements "may" exist, and did not disclose that they were in fact in place and Total Wealth and Cooper were receiving substantial payments under the various revenue sharing agreements.

The ACOF PPM stated: "Some Private Funds *may* pay the General Partner or its affiliates a referral fee or a portion of the management fee paid by the Private fund to its general partner or investment adviser, including a portion of any incentive allocation." (Exhibit 135 at 66 (emphasis added).) As with the disclosure in the Form ADV, this was misleading in view of the fact that Total Wealth had already entered into numerous such agreements, was being paid under those agreements, and obtaining compensation through such revenue sharing agreements was a substantial part of its business plan.

4. Clients were not informed of the material information concerning Total Wealth's conflicts of interest created by revenue sharing agreements

Regardless of the adequacy of the purported disclosures made in the Forms ADV or the ACOF PPM, those documents were not provided to all clients, and in fact other documentary evidence supports the conclusion that Total Wealth and Cooper intentionally did not disclose the revenue sharing arrangements to their clients.

Carol [redacted] entrusted Cooper and Total Wealth with approximately $183,000 to manage, including $75,000 she had saved over 14 years while a schoolteacher, another $60,000 she received at the time of her mother's death, and $48,000 for her husband's life insurance. (Tr. [redacted]) 85, 86, 90.) [redacted] told Cooper that she wanted her money invested and kept safe so that she could use it for her children's education. (Tr. ([redacted]) 90-91.) Cooper told her that her money was going to be invested in an equity index account. (Tr. (Smith) 100.) [redacted] testified that after meeting with Cooper, it never occurred to her that he would have any conflict with her interests: "He was representing me." (Tr. [redacted]) 93.) Cooper never disclosed to [redacted] that he had revenue sharing agreements with the funds into which he put the bulk of her money (Life's Good and Aegis). (Tr. ([redacted] 120, 130-31.) [redacted] testified that if she had known about such revenue sharing arrangements, she might not have hired Cooper as an adviser. (Tr. ([redacted] 132-32.) As [redacted] put it, if Cooper is getting money from someone else, then he is doing what is best for him as opposed to what was best for Ms [redacted], it creates a conflict of interest, and "it's certainly something he should have told me." (Tr. ([redacted]) 130-31.).

Michael [redacted] entrusted Cooper and Total Wealth with his entire federal thrift saving plan retirement fund of about $520,000, plus another $100,000 from his wife. (Tr. [redacted] 151.) [redacted] served three years in the military and then became a federal agent for the U.S. Customs and Border Protection service, and the $520,000 represented his accumulated savings

over 26 years of government service. (Tr. 151.) Cooper became his financial adviser in June 2010, and told Cooper that he wanted his money to remain safe, and not to invest in anything risky. (Tr. 153.) told Cooper it was his life savings and he wanted to be put only in safe investments, and Cooper "said he would." (Tr. 155-56.)

first heard of ACOF in January 2012, but had no recollection of ever receiving a PPM for ACOF. (Tr. 162.) also did not recall getting a Form ADV or firm brochure from Total Wealth before 2014. (Tr. 169.) Howard never heard that Total Wealth or Cooper had any revenue sharing arrangements with the funds that he invested funds in, which included Aegis. (Tr. 188.) When asked about such agreements, testified that they created a "conflict of interest" and "his [Cooper's] interest is more in putting our money in there so he can capitalize on a revenue sharing. If I knew he was making decisions on that kind of thing, I would have never gone with Jacob [Cooper]." (Tr. (188.)

Christopher testified that Cooper had been his financial adviser since 2010, and that he had invested $500,000 over multiple accounts. (Tr. 376.) nderstood that Cooper held himself out as an expert in the alternative investment niche. (Tr .) Bryant told Cooper that he wanted a diversified, conservative, non-correlated portfolio. (Tr.) 391.) However, in 2012, learned that about $400,000 of his funds were in PPCN II and Aegis investments, which was contrary to the instructions he had given to Cooper. (Tr. 397.) was never told that Total Wealth or Cooper had any actual conflict of interest with his interests. (Tr. 407.) did not remember ever receiving a Form ADV for Total Wealth. (Tr. 423.) was also never told that funds in which his money was put were paying Total Wealth or Cooper a revenue sharing fee, which

referred to as "backdoor arrangements." (Tr. [redacted] 424-25.) [redacted] testified that disclosure of the possibility of a revenue sharing agreement was not the same thing to him as the disclosure that such agreements exist, and if revenue sharing agreements had been disclosed, then he would have never invested a dollar with Cooper or Total Wealth. (Tr. [redacted] 426-27.)

Contemporaneous documents corroborate that Total Wealth and Cooper did not disclose revenue sharing agreements and their conflict of interest to clients. For example, Total Wealth's Investment Advisory Agreement specifically informed clients that Total Wealth did not receive any revenue sharing:

> *Other Fees*. Client may also incur certain fees and charges that are imposed by third parties, not TWM. These fees and charges are separate and distinct from the fees and charges stated above and may include, but not be limited to: management and/or performance fees charged by managers of certain private investment vehicles;....*TWM is not responsible for and does not receive any of these fees and charges.*

Exhibit 325 at 2 (emphasis added). Cooper agreed that in this part of the Investment Advisory Agreement that defined the relationship with the client, Total Wealth was disclosing that a client of Total Wealth may also be charged a fee by the managers of private investment vehicles that Total Wealth might recommend. (Tr. (Cooper) 730.) Cooper acknowledged that the statement in the Investment Advisory Agreement "might not have been" true because "in certain cases" Total Wealth did receive portions of the management and performance fees charged by managers of private investment veh[redacted]les. (Tr. (Cooper) 731.) In short, the statement in the Investment Advisory Agreement explicitly disclosed that Total Wealth and Cooper did not have any revenue sharing agreements. As Cooper admitted, this was not true.

5. Other written communications from Cooper failed to disclose the revenue sharing agreements

In 2010, when the Life's Good fund was revealed to be a Ponzi scheme only three months after Cooper had entered into an arrangement to get paid to put clients into Life's Good,

Cooper sent a letter to investors informing them of the scam. (Exhibit 346.) While Cooper informed investors of the purported due diligence performed by Total Wealth, claimed to be cooperating with the SEC (which had actually subpoenaed him for documents), and told investors that he had lost money in Life's Good, Cooper did not disclose to investors his personal arrangement with JOMAC that made his Life's Good investment profitable, despite the losses suffered by his investors. In three months, Cooper made over $60,000 on his initial investment of $8,000; in contrast, in less than two months, $50,000 of Ms [redacted] money had disappeared with no corresponding benefit to her. (Tr. [redacted] 111.) Cooper's statement to investors that he lost money in Life's Good, despite his overall gain, is, at best, disingenuous.

The extent of the deception perpetrated by Cooper is evident in his March 4, 2014 letter to Total Wealth and Altus investors informing them that the Aegis Atlantic and Metro Coffee investments were in trouble. (Exhibit 328.) Although Cooper claims that he made adequate disclosures to investors concerning the revenue sharing arrangements, this letter contradicts that assertion. After informing investors that Total Wealth had "growing major concerns" about the operations of Aegis, Cooper said it had replaced the CEO and manager of all Aegis entities and was only now taking an active role in the management of the various entities. (Exhibit 328 at p. 1.) In the letter, Cooper reported:

> While a conflict of interest can exist with Altus being closely involved in the management of the various entities, it is important to note that neither Altus, TWM, nor any of their officers or employees, *have any economic interest in the Aegis entities or are receiving any form of compensation.*

(Exhibit 328 at p. 2 (emphasis added).) In fact, Total Wealth had in place at the time of the letter the 2011 "Management Agreement" with Aegis Retail, Aegis Atlantic, and Metro Coffee that paid Total Wealth a management fee of 2.25% of all funds invested by Total Wealth clients. Under this agreement, Total Wealth had been paid over $386,000 by the various Aegis entities

and Metro Coffee. (Exhibit 272B.) Notably, Cooper's letter omits any mention of this long-standing relationship and the revenue sharing agreement.

Total Wealth similarly failed to disclose their business practice of directing investors to funds that paid them substantial referral fees in their various brochures used to lure clients to their firm. For example, in a Total Wealth brochure approved by Cooper, Total Wealth disclosed its "Fee Structure" in which it touted that it used a "tiered" fee structure that results in lower fees than the "laddered" fee structure used by other firms; however, there is no discussion of the fact that Total Wealth augmented those lower fees through extensive revenue sharing. (Exhibit 123.) Similarly, in a brochure for ACOF, Cooper similarly touted that the fees charged were lower than the "industry standard," while omitting that those fees were augmented by revenue sharing agreements: "Fees. The Fund typically charges a fee of 1.4% of asset under management. This is considerably less than the industry standard of private funds of 2% of asset under management plus 20% of fund profits, presenting a more efficient fee structure for investors than a typical private fund." (Exhibit 122 at 14.) A similar statement is made in the ACOF Executive Summary. (Exhibit 3 at 7.) Again, there was no disclosure that agreements were in place to augment those purportedly lower fees through revenue sharing.

I. Cooper's and Total Wealth's Failure Perform Adequate Due Diligence on Funds that Paid Referral Fees

Total Wealth and Cooper told investors that they engaged in rigorous due diligence and matched clients' investments with the clients' goals, but the evidence shows that Cooper did not perform any meaningful due diligence and instead gave his clients' funds to managers who were willing to pay Cooper and Total Wealth revenue sharing or consulting fees for access to the money of Total Wealth's clients. Indeed, in correspondence with one client who was upset after Cooper lost a substantial amount of her money in the Aegis offering, Cooper's response was:

"I'm sorry if you didn't read the paperwork carefully." (Exhibit 315, Tr. [redacted] 125-27.) The Division's expert opined that Total Wealth breached its duty to its clients in connection with "quantitative due diligence" it claims to have performed. (Exhibit 271 at 15-18.) The Division's expert also opined that Total Wealth breached its duty to its clients in connection with "qualitative due diligence" it claims to have performed. (Exhibit 271 at 18-25.)

1. Cooper and Total Wealth touted their due diligence

In brochures, face-to-face meetings, and Forms ADV, Total Wealth and Cooper touted the "rigorous" due diligence that was performed on the alternative investments in which Cooper and Total Wealth claimed expertise. At least one client testified that Cooper held himself out as an expert in the alternative investment niche, and that Cooper told him that their due diligence was very rigorous. (Tr. [redacted]) 379.) The ACOF executive summary that Cooper provided to that client claimed that the "leadership team" "conducts regular reviews of all Fund investments including on-site manager visits and in-depth qualitative and quantitative due diligence." According to a client, the statements about due diligence were "absolutely imperative." (Exhibit 3, Tr. ([redacted] 385. *See also* Exhibit 122 at 14 (making same claim concerning "in-depth qualitative and quantitative due diligence").) Similarly, Cooper told another investor that due diligence was something he took great pride in and he was very thorough in making sure that money was invested consistent with a client's goals. (Tr. (Smith) 115.) Another client, who although retired flew planes in Afghanistan to aid the U.S. effort there, was told that Cooper would have his best interests in mind and could be trusted to be "on top of it." (Tr. (Howard) 173.)

Indeed, Total Wealth's Form ADV also touted its extensive due diligence, although this document was not provided to investors. In the May 2010 Form ADV, Total Wealth made this disclosure about its due diligence:

> TWM may invest its clients' assets with third-party managers that pursue investment approaches that are diversified among multiple strategies, asset classes, regions, industry sectors and securities. In selecting Independent Managers and allocating assets among them, TWM considers both quantitative and qualitative factors including, but not limited to, an Independent Manager's performance during various periods of time and market cycles; an Independent Manager's reputation, experience and training; its articulation of, and adherence to, its investment philosophy; the presence and deemed effectiveness of an Independent Manager's risk management discipline; the structure of an Independent Manager's portfolio and the types of securities and other instruments held; its fee structure; on-site interviews of an Independent Manager's personnel; the quality and stability of an Independent Manager's organization, including internal and external professional staff; and whether an Independent Manager has a substantial personal investment in the investment program it pursues.

(Exhibit 136 at 12; *see also* Exhibit 120 at 12 (listing same factors).)

2. Cooper and Total Wealth had a fiduciary duty to perform adequate due diligence

The Division offered expert opinion testimony that Cooper and Total Wealth had a fiduciary duty to perform adequate due diligence on the investments into which they were putting their clients' money. As the expert explained, proper due diligence requires an investment adviser to gather and analyze sufficient information to make an informed decision about whether a particular investment is in a client's best interests. It is also imperative that an adviser document the due diligence process. This involves gathering and analyzing sufficient information to determine whether a particular investment meets a client's investment objectives and is consistent with the investment strategies and principles that were disclosed to the client. An important part of a due diligence investigation is documenting the information received and analysis performed so that it can be reviewed and analyzed in the context of making a recommendation to a client and as a benchmark to measure against future changes in the performance of an investment. In general, advisers perform "quantitative" and "qualitative" due diligence on prospective investments for their clients, and document the process. (Exhibit 271 at 11-12.)

3. Cooper and Total Wealth did not document their due diligence

Cooper admitted that in 2010 the due diligence files maintained by Total Wealth were "lacking." (Tr. (Cooper) 757.) According to Cooper, after he learned of the Life's Good Ponzi scheme in June 2010, Total Wealth realized that their due diligence system needed to be "enhanced," and "that's even where the on-site manager visits came from." (Tr. (Cooper) 755-56.) According to Cooper, if someone looked at Total Wealth's due diligence files in 2010, they would have found "much better due diligence files." (Tr. (Cooper) 757.) Other than trying to assuage investors,[9] there is no evidence that Cooper and Total Wealth took any meaningful steps to improve their due diligence in 2010, or thereafter.

In fact, the only audit of ACOF, for the calendar year ended December 31, 2010, noted as a "material weakness" the due diligence procedures employed by Total Wealth as manager of ACOF. On March 21, 2012, the auditor sent an SAS 115 letter to Cooper, care of Total Wealth Management, identifying deficiencies in internal control identified during the audit that were significant deficiencies or material weaknesses. The auditor identified a "material weakness regarding documentation of initial and ongoing alternative investments due diligence procedures." (Exhibit 45 at 2; Tr. (Ogbomo) 272-76.) According to the auditor, Total Wealth did not dispute the finding or tell the auditor that he was wrong. (Tr. (Ogbomo) 276-77.)

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[9] After Life's Good was exposed, Cooper contacted managers of the funds with which he had revenue sharing arrangements to set up a call with his investors to "assure investors of the legitimacy of the fund and the program you run." Cooper explained that he was trying "to prevent a domino effect where investors attempt to liquidate all their holdings with us, which would highly affect many of the programs or funds they have with your firm." (Exhibit 174.) Cooper recalled that he sent this email to Tony Hartman, the manager of PPCN II; Don Davis, the manager of Rainmaker, Moneta, and selling agent for Aegis; and Johan de Villiers, the manager of LJL Funding. (Tr. (Cooper) 1031-32.)

In addition, the Division retained an expert that reviewed Total Wealth's due diligence files, which were prepared and submitted to the SEC by counsel for Total Wealth and Cooper. (Exhibit 271 at 14-15.) The Division's expert reported that he did not find the type of evidence and documentation that would show that Total Wealth performed due diligence on the private fund investments it was recommending to its clients. The due diligence files contained copies of monthly statements that provided little information about the decision-making process involved in determining to recommend a particular private fund as an investment. In his review of Total Wealth's due diligence files, the Division's expert did not find due diligence checklists, documentation showing quantitative analysis of historical returns, notes of analyses of private fund offering documents, or memoranda or documentation of any qualitative due diligence of the various private funds. (Exhibit 271 at 14-15.)

4. Cooper and Total Wealth failed to perform proper due diligence on Life's Good

The evidence shows Cooper performed no real due diligence on the Life's Good investment before rushing to invest over $2.4 million of his clients' money with Life's Good, which generated over $69,000 in additional money for Cooper in just a few months. The Division's expert reviewed Cooper's testimony and available documents, and opined that Total Wealth and Cooper failed to perform adequate due diligence on Life's Good.[10] (Exhibit 271 at 21-22.)

[10] The Division's expert relied on Cooper's investigative testimony, which Cooper attempted to modify at trial. In addition, because it was never produced by Total Wealth to the SEC, the Division's expert did not have the benefit of Cooper's purported telephone notes of his February 22, 2010 conversation with individuals involved in selling Life's Good, Exhibit 362.

Cooper testified that he learned about Life's Good from a prospective client around the end of 2009. (Tr. (Cooper) 991.) The client found Life's Good on the Internet, and Cooper instructed McNamee to contact them. Total Wealth was then contacted by Brentwood Equity out of Colorado. (Tr. (Cooper) 992.) According to Cooper, Brentwood Equity was a selling agent or wholesaler for Life's Good, and Brentwood Equity then provided Total Wealth with an offering memorandum (Exhibit 353), a sales brochure (Exhibit 354), a Morningstar report (Exhibit 271, Exhibit M), some Barclay's rankings and 2008 audited financial statements.[11] (Tr. (Cooper) 992.) It was Cooper who led Total Wealth's due diligence of Life's Good. (Exhibit 357 (Shoemaker Tr.) 160, 165-66.)

On February 18, 2010, Cooper reported to his prospective client that he had performed his due diligence on Life's Good and he was "impressed" with it. Although the prospective client was mystified by the Morningstar Five-Star rating, Cooper explained it was "impressive." (Exhibit 355, Tr. (Cooper) 997-99.)

Then, on February 22, 2010, Cooper had a telephone call with Bob Stinson, who is identified in the Life's Good Fund documents as CEO of the fund. Cooper's notes show that Michael McNamara of Brentwood Equity was on the call, and the brochure that had been provided to Cooper also identified McNamara as a member of the Life's Good management team. (Exhibit 354, Exhibit 362.) During the call, Cooper learned that the auditor for the Life's Good had resigned and they could not find a new auditor because it was tax season. Cooper suggested an audit firm for them to use. (Exhibit 362, Tr. (Cooper) 102.) During this call, Cooper also discussed a consulting arrangement with Brentwood Equity and JOMAC, LLC,

[11] Cooper did not produce the 2008 audited financial statements for Life's Good to the Division during its investigation, and did not introduce them as an exhibit at the hearing.

although this is not reflected in his notes. (Tr. (Cooper) 1003.) At this point in time, Cooper had no prior experience with Brentwood Equity or JOMAC (Tr. (Cooper) 991), and had not visited their offices in Denver. (Tr. (Cooper) 982.)

The very next day, Cooper started putting Total Wealth clients into the Life's Good.[12] In an email dated February 23, 2010, Cooper allocated a new client's funds so that $88,000 – the largest single allocation, went to Life's Good. (Exhibit 356, Tr. (Cooper) 1006-07.)

By March 1, 2010, Cooper had signed an agreement with JOMAC, to be signed by McNamara and John Staiano, to perform consulting services for them. (Exhibit 352.) As was McNamara, Staiano was also identified as a member of the management team of Life's Good. (Exhibit 354.) Ten days later, on March 10, 2010, Cooper received $15,000 from JOMAC deposited into his Pinnacle account. (Tr. (Cooper) 1012.) On April 7, 2010, Cooper received an additional payment of $16,884 from JOMAC deposited into his Pinnacle account. (Tr. (Cooper) 1013-14.)

Cooper did not meet face-to-face with anyone from Life's Good until April 20, 2010, when Messrs. Stinson, McNamara, and John Staiano came to Cooper's offices in San Diego. Cooper characterized this as an "ongoing" due diligence meeting. (Tr. (Cooper) 1011.) According to Cooper's notes, Life's Good told him that they had found a new auditor and financial statements would be ready "mid-year." (Exhibit 363, Tr. (Cooper) 1016-17.)

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[12] When investing in Life's Good, Cooper and Total Wealth did not follow their own disclosed due diligence procedures. Cooper performed no on-site interview of Life's Good and knew that the fund had no external professional auditing staff at the time of investment. In contrast, Total Wealth's Form ADV described "on-site interviews of an Independent Manager's personnel" and "the quality and stability of an Independent Manager's organization, including internal and external professional staff" as important factors to be investigated in the course of due diligence. (Exhibit 136 at 12.)

Thus, Cooper and Total Wealth's entire due diligence involved relying on documents provided to Cooper by persons who were involved in selling Life's Good and who also had agreed to pay Cooper a "consulting fee" that on an annual basis would be approximately $150,000, or about 6% of $2.5 million – which was approximately the amount of client funds that Cooper sent to Life's Good between February 23, 2010 and its demise on June 29, 2010. (Tr. (Cooper) 1022-23.) Cooper admitted that the amount he was paid under his consulting agreement with JOMAC was tied to the amount of client funds invested by Total Wealth. (Tr. (Cooper) 1022-23.) Cooper had actual knowledge that Life's Good did not have an auditor and did not have audited financial statements for 2009, but nevertheless placed his clients' money at risk because he stood to profit personally from the deal.

5. Cooper and Total Wealth failed to perform proper due diligence on PPCN II

Because Cooper had invested Total Wealth clients' assets in the first PPCN offering, he knew about the performance of PPCN manager Tony Hartman, and specifically, that the PPCN offering was unable to pay back the investors in a timely fashion and needed to be bailed out with a loan from PPCN II, and ultimately merged into PPCN II. Nonetheless, Cooper invested over $16 million of his clients' funds in PPCN II by the end of 2010. (Exhibit 68.) [13]

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[13] Cooper's decision to place investor funds in PPCN and PPCN II despite knowing that PPCN was losing interest income, unable to meet its loan obligations, and that it ultimately merged into PPCN II in order to extinguish a $600,000 debt PPCN owed to PPCN II – cannot be reconciled with the statements in Total Wealth's Form ADV describing due diligence based on quantitative and qualitative factors which included, "performance during various periods of time and market cycles," "the presence and deemed effectiveness of an Independent Manager's risk management discipline," and "the quality and stability of an Independent Manager's organization." (Exhibit 136 at 12.)

Cooper received the 2009 audited financial statements for PPCN in 2010. (Tr. (Cooper) 894.) Total Wealth was also provided draft financial statements of PPCN for 2009 because Cooper was "certainly harping on him [Tony Hartman] to get them done." (Tr. (Cooper) 909, Exhibit 361.) The financial statements showed that PPCN had $8,000 cash on hand at the end of 2009 and took ownership of three properties that were collateral for loans, thus PPCN went from being able to rely on the borrower to repay a loan to having to liquidate the property itself to get repaid, plus losing interest income in the interim. (Exhbit 192, Tr. (Cooper) 895, 897-99.) Moreover, PPCN borrowed more than $600,000 from PPCN II – although Cooper claimed not to understand the portion of the financial statement reporting this loan. (Exhibit 192, Tr. (Cooper) 906.) The financial statements also report that PPCN was going to merge into PPCN II as of June 30, 2010 – which was about the same time that Total Wealth entered into its "Management Agreement" with PPCN II. (Exhibit 192, Tr. (Cooper) 907.)

Moreover, the PPCN II private placement memorandum provided that the manager – Cooper's business associate Tony Hartman – had wide discretion in selecting investment opportunities. (Exhibit 53, Tr. (Cooper) 916.) The terms of the PPCN II offering disclosed in the PPM stated that investors had no guarantee that they would receive their principal back, and that the failure of a single bridge loan could "significantly impair the company's cash flow and its ability to repay notes and/or to pay interest owed to noteholders." (Exhibit 53, Tr. (Cooper) 917-19.) In fact, PPCN II was a "lender of last resort" who financed high risk borrowers that could not get loans elsewhere. (Exhibit 53, Tr. (Cooper) 923-24.) Moreover, while Cooper relied on the promise that investors would earn their 12.5% annual return, the PPCN II PPM disclosed that the interest payment was not guaranteed and could be as low as 1% a year, or zero, depending on PPCN II's ability to earn origination fees and interest payments from bridge loans.

(Exhibit 53, Tr. (Cooper) 925-26.) Finally, PPCN II disclosed that it was a "speculative" investment with no revenue history. (Exhibit 53, Tr. (Cooper) 926-27.) Total Wealth clients generally did not receive documents such as the PPCN II PPM, and so did not have this information about how their money was being invested.

Despite the highly speculative nature of PPCN II, Cooper put funds from investors who wanted a conservative and low risk portfolio into PPCN II. For example, one of Cooper's clients who asked for a conservative portfolio had a large amount of his portfolio put into PPCN II. (Tr. (Bryant) 397.) Similarly, a retired government worker who asked Cooper to safeguard his nest egg had a large portion of his money invested in PPCN II. (Tr. (Howard) 165, Exhibit 326.)

6. Cooper and Total Wealth failed to perform proper due diligence on the Don Davis associated funds (Rainmaker, Moneta, Aegis Retail, Aegis Atlantic, Metro Coffee)

Total Wealth and Cooper invested clients' funds in a number of funds associated with Don Davis, and Cooper and Total Wealth entered into a number of revenue sharing agreements with those entities, agreements which included Cooper's "consulting" relationship with Davis that paid him through Pinnacle, as well as revenue sharing agreements with Rainmaker, Moneta, Aegis Retail, Aegis Atlantic, and Metro Coffee. In total, Cooper and Total Wealth were paid over $693,719.12 by the various Davis associated entities,[14] while investors lost at least $20 million just in the Aegis and Metro Coffee investments sold by Davis.

The Division's expert reviewed the due diligence files and testimony of Cooper, and opined that Total Wealth did not perform adequate due diligence on the Rainmaker fund.

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[14] Cooper received $307,664.58 from Davis through Pinnacle (Exhibit 272C), and Total Wealth received $190,691.48 from Aegis Atlantic, $123,064.47 from Aegis Retail, and $72,298.59 from Metro Coffee. (Exhibit 272B.)

(Exhibit 271 at 23-24.) Cooper testified at the evidentiary hearing that his due diligence on Rainmaker consisted of reviewing some publicly available documents about potential managers to be used by Rainmaker, but that no other financial documents were available. (Tr. (Cooper) 796-97.) In addition, Cooper testified that he had "many conversations with Don Davis about him, his operations, and how he runs." (Tr. (Cooper) 798.) But Cooper did not know if there were any restrictions on the type of investment that Rainmaker could make. (Tr. (Cooper) 802.) Davis had the ability to remove any manager from Rainmaker, yet Cooper did not know the criteria that Davis used. (Tr. (Cooper) 804.)[15] So to the extent Cooper looked at publicly available information on supposed managers to be used by Rainmaker and Davis, he had no guarantee that Davis would hire any of those managers. (Tr. (Cooper) 804-05.) In short, Cooper and Total Wealth could not adequately perform due diligence on Rainmaker because it was an ill-defined and completely discretionary investment that could change at any time.

Similarly, Cooper performed inadequate due diligence on Metro Coffee. Cooper claimed to have reviewed the offering memorandum and marketing reports, and pictures of locations. (Tr. (Cooper) 1046.) Cooper determined that the Metro Coffee debt offering provided a predictable rate of return of 12.5% interest, and Cooper therefore classified the "market risk" of Metro Coffee as "very low." (Tr. (Cooper) 1048.) To Cooper, market risk meant movement in price or value of the investment. (Tr. (Cooper) 1049.) Cooper concluded that the risk of movement in value was low despite the fact that the Metro Coffee PPM cautioned investors that they could lose all of their money. (Tr. (Cooper) 1049, Ex. 193, Exhibit 271 at 17.) However,

[15] Cooper's decision to invest in Rainmaker, a fund with no articulated investment strategy other than Don Davis's whim, is also inconsistent with the due diligence guidelines described by Total Wealth in its Form ADV. (Exhibit 136 at 12) (quantitative and qualitative diligence factors include the fund manager's "articulation of, and adherence to, its investment philosophy").

the successful repayment of the debt depended on the successful business operations of the coffee stands being developed, and Cooper completely ignored the business risk of the venture failing. (Tr. (Cooper) 1050-51.) Cooper also claimed to use "quantitative due diligence" on Metro Coffee, but because Metro Coffee had no operations and was a debt offering, Cooper's claim to have relied on "Sharpe ratio" and "standard deviation" to evaluate the risk of the Metro Coffee offering (Tr. (Cooper) 1048-49) is unconvincing. Such ratios are meaningless in the context of a debt offering with no historical data. (Exhibit 271 at 15-18.) As the expert stated: "Thus, to the extent TWM and Cooper claimed to rely on standard deviation and Sharpe ratios in performing due diligence on the [Metro Coffee offering], in my opinion such information was meaningless and provided no information of value." (Exhibit 271 at 18.)

With regard to the Aegis Retail and Aegis Atlantic offerings, Cooper was told that each of those offerings was going to use capital from investors to make interest payments to investors. (Tr. (Cooper) 1056-57.) Moreover, Aegis Atlantic was going to invest in a restaurant in New York City, which was a very risky undertaking. Indeed, none of the investors who testified at the hearing contemplated that their funds would be used to invest in such a risky venture as a restaurant, which was entirely contrary to their stated investment objectives. (Tr. (Smith) 122; (Howard) 177-78; (Bryant) 398.) The Division's expert opined that Cooper's purported reliance on quantitative due diligence for the Aegis Atlantic and Aegis Retail offerings was meaningless. (Exhibit 271 at 15-18.) Aegis Retail's Form D stated that it had no revenues, so Cooper's testimony that he calculated standard deviation, and Sharpe and Sortino ratios, makes no sense because there were no historical returns to use on this debt and equity offering. (Exhibit 271 at 17.) Like the Metro Coffee offering, the Aegis Retail offering with no prior operating history and no performance history "has a high degree of risk in terms of recovering capital if the

business does not succeed." (Exhibit 271 at 17.) Cooper's qualitative due diligence on Aegis Retail was also deficient. (Exhibit 271 at 24-25.)

J. Total Wealth Violated the Custody Rule, and Cooper Aided and Abetted and Caused its Violation

Total Wealth is the managing member of Altus Management. (Tr. (Cooper) 694.) Altus Management is the general partner to the Altus series of funds. (Tr. (Cooper) 695.) Accordingly, Total Wealth had custody of client funds and securities – for clients invested in Altus – and was required to comply with the requirements of the Custody Rule, Rule 206(4)-2 under the Advisers Act, 17 C.F.R. §275.206(4)-2. (Exhibit 120 at 25-26; Exhibit 218 at 25-26; Exhibit 220 at 25-26; Exhibit 224 at 24-25.)

The Custody Rule includes, among other things, an "independent verification requirement" under which an investment adviser with custody must undergo an annual surprise inspection by an independent public accountant. 17 C.F.R. § 275.206(4)-2(a)(4); (Exhibit 120 at 26; Exhibit 218 at 26; Exhibit 220 at 26; Exhibit 224 at 25.) If, however, the investment adviser with custody of client funds or securities satisfies the "audit exception" in subsection (b)(4) of the Custody Rule, it will be deemed to have complied with the "independent verification requirement" of subsection (a)(4) of the Rule. Total Wealth acknowledged these Custody Rule obligations in its Forms ADV. (*See* Exhibit 120 at 26; Exhibit 218 at 26; Exhibit 220 at 26; Exhibit 224 at 25.)

Cooper admitted that Total Wealth violated the custody rule in 2010, 2011, 2012, and 2013. (Tr. (Cooper) 968-969, 1075.) Specifically, Total Wealth's independent public accountant was Ogbomo CPA, LLC ("Ogbomo CPA"). (Exhibit 119 at 30-31; Exhibit 217 at 30-31; Exhibit 221 at 66-68; Exhibit 222 at 66-68; Exhibit 223 at 67-69; Exhibit 225 at 67-69.) Ogbomo CPA was never engaged to perform an annual surprise inspection of Total Wealth.

(Exhibit 42; Exhibit 134.) According to Total Wealth's Forms ADV Part 2A in 2010, 2011, 2012, and 2013, however, Total Wealth purportedly met the independent verification requirement by satisfying the "audit exception." (Exhibit 120 at 26; Exhibit 218 at 26; Exhibit 220 at 26; Exhibit 224 at 25.) This representation was false.

Ogbomo CPA was not subject to regular inspection by the PCAOB. (Tr. (Ogbomo) 210-11.) Ogbomo therefore could not perform a custody rule audit of the ACOF or Portfolio Series funds sufficient to satisfy the audit exception to the Custody Rule. (Tr. (Ogbomo) 217.) Total Wealth also failed to distribute ACOF's audited financial statements within 120 days of the end of the fiscal year. Ogbomo CPA only completed one audit of ACOF for the fiscal year 2010, and that audit was not completed until February 24, 2012, long after the required 120-day period had elapsed. (Tr. (Ogbomo) 225.) Ogbomo CPA was not an "independent" public accountant under the Rule because the firm was auditing financial statements that it had also prepared. (Tr. (Ogbomo) 226.)

III. LEGAL ARGUMENT

The evidence established by a preponderance of the evidence that Cooper violated Sections 206(1), 206(2), 206(4), and 207 of the Advisers Act, 15 U.S.C. §§ 80b-6(1), (2), & (4) and 80b-7, and Rule 206(4)-8 thereunder, 17 C.F.R. § 275.206(4)-8, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and that he aided, abetted, and caused Total Wealth's violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder and Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, 17 C.F.R. § 275.206(4)-2. *See In re Sandra K. Simpson*, Exchange Act Rel. No. 45923, 55 S.E.C. 766, 2002 SEC Lexis 3419, at *57 (May 14, 2002) (preponderance of evidence is standard of proof in an administrative proceeding); *Steadman v. SEC*, 450 U.S. 91, 102-03 (1981) (same).

A. By Failing To Make Adequate Disclosures Regarding The Revenue Sharing Agreements And Misrepresenting Due Diligence Efforts, Cooper Violated Sections 206(1) And 206(2) Of The Advisers Act

Section 206(1) of the Advisers Act prohibits any investment adviser from, directly or indirectly, employing any device, scheme, or artifice to defraud any client or prospective client. Section 206(2) of the Advisers Act prohibits any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. No scienter is required for Section 206(2) violations. Cooper violated these provisions of the Advisers Act by failing to make adequate disclosures regarding the revenue sharing agreements and by misrepresenting the due diligence efforts regarding investments in which he put client monies.

1. Total Wealth and Cooper are investment advisers

Total Wealth was a registered investment adviser during all times relevant to this proceeding and Cooper also met the definition of investment adviser under Section 202(a)(11) of the Advisers Act. Section 202(a)(11) of the Advisers Act defines an "investment adviser" as 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 . . . ." 15 U.S.C. § 80b-2(a)(11). Cooper made all of the investment decisions and recommendations for Total Wealth clients. The clients paid for this advice based on the amount of assets that were being managed. At all times, Cooper was the CEO and owner of Total Wealth, and directly benefited from the fees it received. *See In the Matter of John J. Kenny and Nicholson/Kenny Capital Management, Inc.*, Advisers Act Release No. 2128 (May 14, 2003); *see also SEC v. Berger*, 244 F. Supp. 2d 180 (S.D.N.Y. 2001) (person who effectively controlled investment adviser company and its decision making also was an investment adviser). The Commission has authorized direct charges of Sections 206(1) and (2) against individuals. *In the Matter of Barr M. Rosenberg*, Advisers Act Release No. 3285, 2011 SEC LEXIS 3285 (Sept. 22, 2011); *In the*

Matter of David W. Baldt, Advisers Act Release No. 3024, 2010 SEC LEXIS 1595 (May 11, 2010), *In the Matter of Gualario & Co., LLC, et al.*, Advisers Act Release No. 3186, 2011 SEC LEXIS 1298 (Apr. 8, 2011); *In the Matter of Delta Global Advisors, Inc., et al.*, Advisers Act Release No. 3185, 2011 SEC LEXIS 1216 (Apr. 7, 2011).

There is no question that Total Wealth was a registered investment adviser, and that Cooper may be directly liable through his association with Total Wealth for violations of Sections 206(1) and 206(2).

2. Cooper operated a fraud or deceit upon his and Total Wealth's clients

a. Cooper owed a fiduciary duty to his clients

Section 206 of the Advisers Act establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979).

When "'the characteristics of an adviser-client relationship [are] present'" between the investment adviser to the fund and the individual investors in the fund, the investment adviser may owe a fiduciary duty to the individuals. *United States v. Lay*, 612 F.3d 440, 446 (6th Cir. 2010) (citing *United States v. Lay*, 566 F. Supp. 2d 652, 670 (N.D. Ohio 2008)). In particular, when there is a preexisting, direct investment advisory relationship between the hedge fund adviser and the individual investor, then there is a fiduciary relationship between the investment fund's adviser and the individual investor as well as the fund. *Id.* at 445-446 (*citing Lay*, 566 F. Supp. 2d at 668-71).

Here, the evidence showed that there was an adviser-client relationship between Cooper and clients of Total Wealth, including ACOF and the Portfolio Series funds. ACOF and the Portfolio Series funds were managed by Total Wealth and Cooper through Altus Capital Management, and paid advisory fees to Total Wealth. The evidence establishes that Cooper

owed a fiduciary duty to the Total Wealth clients, to ACOF and its investors, and to the Portfolio Series funds and their investors.

b. Cooper's failure to make a full disclosure of his conflicts of interest violated his fiduciary duty

Cooper breached his fiduciary duty by failing to disclose his receipt of revenue sharing fees from funds that he invested in with the money his clients gave him to manage. An adviser's fiduciary duties include "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-94 (1963). Materiality under the Advisers Act is defined by the same standard used under the antifraud provisions of the Securities Act and the Exchange Act. *Steadman v. SEC*, 603 F.2d 1126, 1130 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Moreover, an investment adviser has a duty under Section 206 to disclose to clients all material information that might incline the adviser, consciously or unconsciously, to render advice that is not disinterested. *Capital Gains*, 375 U.S. at 191-92; *see also In re Renaissance Cap. Advisors, Inc.*, Investment Advisers Act Rel. No. 1688, 1997 WL 794479, at *3 (Dec. 22, 1997).

Financial conflicts of interest are, in general, material to investors. *See Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) (holding that it is "indisputable" that potential financial conflicts of interest are material facts with respect to clients.). Here, investors testified that they considered Cooper's economic conflict from the receipt of revenue sharing fees to be an undisclosed conflict of interest and that they would not have invested if they had known of Cooper's conflict of interest. There is no evidence that Cooper adequately and completely disclosed this actual conflict. Indeed, there is no evidence that the Forms ADV were even provided to clients, and investors testified that they never received the Forms ADV, and that Cooper never disclosed the existence of any revenue sharing agreements to them. In the documents that were provided to clients, such as the marketing

brochure that Cooper approved and the investment advisory agreements, there are no disclosures at all of any revenue sharing agreement. Moreover, the March 4, 2014 letter to investors falsely represented that neither TWM nor its officers or employees had any economic interest in the Aegis entities or was receiving any compensation from them.

Each of the investors who testified at the hearing confirmed that Cooper's failure to disclose his conflict of interest was material to them. Howard testified that the revenue sharing agreements created a conflict of interest, and that "if I knew that he was making decisions on that kind of thing, I would have never gone with [Cooper]." (Tr. ([redacted] 188.) [redacted] testified that the revenue sharing agreements led Cooper to do what was best for him, and not what was best for her, and that "it's certainly something he should have told me," and that she might not have hired Cooper as an investment adviser if Cooper had disclosed the existence of the agreements. (Tr. (Smith) 130-32.) Bryant testified that if the existence of the revenue sharing agreements had been disclosed to him, he "never would have invested a dollar" with Cooper or Total Wealth. (Tr. (Bryant) 426-27.)

To the extent Cooper seeks to rely on the Forms ADV to meet his fiduciary and disclosure obligations, the Forms ADV did not disclose the existence of the revenue sharing agreements and the payments being made under those agreements. By his own admission, Cooper only disclosed in Total Wealth's Forms ADV that it "may" enter into such arrangements, which is substantially different than the actual situation that existed, where agreements were in place and money was being received. *See, e.g.*, *Vernazza*, 327 F.3d at 859 (investment adviser had material economic conflict of interest because payments to the adviser were contingent on his clients investing a minimum amount of money in investment fund); *Capital Gains Research*, 375 U.S. at 196 (an investor seeking the advice of a registered investment adviser must be permitted to evaluate the

adviser's overlapping motivations, especially if one of the motivations "happens to be economic self-interest").

The disclosure only that Total Wealth "may" enter into revenue sharing agreements, when, in fact, the firm actually did have numerous revenue sharing arrangements, was materially false and misleading. "Cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired." *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004). Therefore, merely disclosing that Cooper and the firm might have these conflicts of interest is not sufficient disclosure. *See, e.g.*, *Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (defendant's "cautionary language only disclosed a risk that tenants *might* leave [office] – not his knowledge that [a tenant] *actually planned* to do so in the near future"); *see also In re Prudential Secs. Inc. L.P.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("bespeaks caution" doctrine "provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away"); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir.1981), *rev'd in part on other grounds*, 459 U.S. 375 (1983) (finding that there was sufficient evidence of fraud for jury where disclosures stated that construction costs might be understated when defendants "already knew that the cost of construction was understated," and holding that "[t]o warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.")

Cooper's persistent and pervasive practice of recommending and making investments in underlying funds that paid revenue sharing fees created actual and direct conflicts of interest that Cooper had a duty to disclose. Because the conflicts involved Cooper's financial self-interest,

complete disclosure was vital for potential clients to have been able to make an informed investment decision. *See Capital Gains*, 375 U.S. at 196-97. Cooper's failure to disclose this material information about existing and actual conflicts of interest violated Sections 206(1) and 206(2). *See, e.g., SEC v. Wall Street Publ'g Inst., Inc.*, 591 F. Supp. 1070, 1084 (D.D.C. 1984) (failure to disclose an economic self-interest constitutes a breach of an investment adviser's fiduciary duty under Section 206); *In the Matter of Valentine Capital Asset Mgmt., Inc.*, Advisers Act Release No. 3090, 2010 SEC LEXIS 3210 (Sept. 29, 2010) (settled action finding a violation of Advisers Act Section 206(2) when adviser failed to disclose fully and adequately a material conflict of interest relating to the commissions received as a result of an investment recommendation).

c. Cooper's misrepresentations regarding due diligence violated his fiduciary duties

Cooper violated the antifraud provisions by making material misrepresentations to clients about the due diligence that was conducted by Total Wealth. When an investment adviser makes a specific representation about the due diligence that it conducts, it owes its clients a duty to conduct due diligence as represented. *See In the Matter of Hennessee Group LLC*, Advisers Act Release No. 2871, 2009 SEC LEXIS 1365 (Apr. 22, 2009). As discussed above, Total Wealth's promotional materials stated that it conducted "regular reviews of all Fund investments including on-site manager visits and in-depth qualitative and quantitative due diligence." In face-to-face meetings, Cooper represented to clients and Altus investors that he conducted meaningful due diligence.

The evidence showed that Total Wealth and Cooper did very little, if any, due diligence. Cooper relied on information fed to him by the fund managers who paid him revenue sharing and consulting fees for letting them have his clients' money. Cooper ignored risk (all the funds),

lack of performance history (Metro Coffee, Aegis Retail, Aegis Atlantic, Rainmaker, Moneta, PPCN II), lack of knowledge of the persons managing the offering (Life's Good), and many other criteria that Total Wealth claimed to use in, for example, their Form ADV. *In the Matter of Alfred C. Rizzo*, Advisors Act Rel. No. 897, 1984 WL 470013, at *3 (Jan. 11, 1984) (finding investment adviser in violation of Section 206 when he failed to independently verify information received from management, and therefore had no reasonable basis for his advice).

Investors testified that Cooper's statements about due diligence were material to their decisions to trust their money to Total Wealth. Misrepresentations about due diligence are material to a reasonable investor because they go to the heart of the integrity of their investments. *See SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1 (D.D.C. 1998) (failure to disclose lack of due diligence is a material omission). Because Cooper materially misrepresented the actual level of due diligence, he violated Sections 206(1) and 206(2). *See Capital Gains Research*, 375 U.S. at 198-99 (investment adviser's failure to disclose material facts – *i.e.*, his practice of scalping – was a violation of the Investment Advisers Act); *SEC v. Bolla*, 401 F. Supp. 2d 43 (D.D.C. 2005) (investment adviser's failure to disclose a material fact – *i.e.*, that a principal had been barred by SEC – was a violation of the Investment Advisers Act).

3. Cooper acted with scienter

Scienter is required for violations of Section 206(1), but not for Section 206(2). *See Steadman*, 603 F.2d at 1134; *see also Capital Gains*, 375 U.S. at 184 & 191-92. Recklessness satisfies the scienter requirement of Section 206(1). *See Vernazza*, 327 F.3d at 860. Cooper knew, or was reckless in not knowing, that he and Total Wealth misrepresented or omitted material facts regarding Total Wealth's payment of revenue sharing fees and level of due diligence. As described above, Cooper made all the decisions for Total Wealth. He devised the investment strategy that drove the firm's culture, he wrote and approved all of the firm's

marketing materials, he personally met with clients, he approved the investment recommendations presented to clients, he made all the investment decisions for ACOF and the Portfolio Series funds, and he negotiated and signed the revenue sharing fee agreements. Cooper was well aware that he was placing clients' money with managers who were paying him to do so. Cooper misled clients regarding the due diligence that he claimed to have performed because he focused on the revenue sharing fees that he would receive instead of the substantial investment risks and whether the investments into which he placed clients' savings were consistent with clients' goals.

B. Cooper Violated Section 17(a) Of The Securities Act And Section 10(b) Of The Exchange Act And Rule 10b-5 Thereunder

1. Cooper violated Section 17(a)(2) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder by making material misrepresentations and omissions regarding revenue sharing fees and due diligence efforts

Section 10(b) of the Exchange Act and Rule 10b-5 make it unlawful to employ a device, scheme, or artifice to defraud; to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(a)-(c). Rule 10b-5(b) prohibits any person "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," in connection with the purchase or sale of a security. Therefore to establish a violation of Section 10(b) and Rule 10b-5(b), the Division must show that Cooper, in connection with the purchase or sale of a security: (1) made an untrue statement or omitted to state a material fact, (2) with scienter. *See* 17 C.F.R. § 240.10b-5(b). To

establish a violation of Section 17(a)(2), the Division must prove, in connection with the offer, purchase, or sale of a security: (1) a material false statement or omission; (2) made with the requisite state of mind, which is negligence for Section 17(a)(2). *See, e.g., SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001).

Here, the evidence established that Cooper violated Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, and Section 17(a)(2) of the Securities Act, through means of the same material misstatements and omissions of material facts described above.

a. Cooper's misrepresentations and omissions regarding the revenue sharing agreements and due diligence efforts were material

A statement or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Information about a company's financial condition is considered material. *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980). Anyone who "makes" a misleading statement or omission, or who has "ultimate authority over" it, can be liable under Rule 10b-5. *See Janus Capital Group, Inc. v. First Derivative Traders,* 131 S. Ct. 2296, 2302 (2011).

Courts specifically have recognized an investment adviser's duty to disclose potential conflicts of interest. "For the purpose of Rule 10b-5, an investment adviser is a fiduciary and therefore has an affirmative duty of utmost good faith to avoid misleading clients. This duty includes disclosure of all material facts and all possible conflicts of interest." *Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 833-34 (5th Cir. 1990) (*citing SEC v. Blavin*, 760 F.2d 706 (6th Cir. 1985) and *Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979)). The Commission has held that if an investment adviser "chooses to assume a role in which she is motivated by conflicting interests," she must make full disclosure. *In the Matter of Arleen W. Hughes*, Release No. 34-

4048, 1948 WL 29537 (Feb 18, 1948) (Commission opinion affirming the finding of willful violations of, among other provisions, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder) (cited with approval in *In the Matter of Marc N. Geman*, Release No. 34-43963, 2001 WL 124847 (Feb. 14, 2001), *aff'd, Geman v. SEC*, 334 F.3d 1183 (10th Cir. 2003)). As the Ninth Circuit has observed, reasonable investors would consider important the motivations, especially financial motivations, of a person who is recommending a security. *Zweig*, 594 F.2d at 1266 (holding that financial reporter's failure to disclose his ownership of stock that he recommended in his article was material, and thus his failure to disclose it violated Rule 10b-5).

Cooper violated Section 17(a)(2) and Section 10(b) of the Exchange Act and Rule 10b-5(b) when he omitted material facts about the revenue sharing fees that he collected and made material misrepresentations about the respondents' due diligence efforts in connection with the purchase and sale of securities. Cooper's misrepresentations and omissions were material to investors because: (1) the revenue sharing fees generated undisclosed conflicts of interest between the respondents' desire to earn those fees and the interest of investors to be placed in the best investments, and (2) Cooper's failure to conduct any meaningful due diligence entirely disregarded the integrity of the investments and the reliability of the valuations Cooper and Total Wealth presented to clients and investors. In essence, Cooper concealed the true basis for his decisions about what to invest his clients in – his own financial interests in the revenue sharing agreements – by misrepresenting his due diligence efforts and omitting mention of the revenue sharing agreements.

b. Cooper acted with scienter

Scienter may be shown through "either 'deliberate recklessness' or 'conscious recklessness'—a 'form of intent rather than a greater degree of negligence.'" *In re Verifone*

Holdings, Inc. Sec. Litig., 704 F.3d 694, 702 (9th Cir. 2012) (*quoting SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010)); *SEC v. Steadman*, 967 F.2d at 641; *see also Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc). "[T]he ultimate question is whether the defendant knew his or her statements were false, or was consciously reckless as to their truth or falsity." *Gebhart v. SEC*, 595 F.3d 1034, 1042 (9th Cir. 2010). Proof of recklessness may be inferred from circumstantial evidence. *SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987).

Cooper acted with scienter in making the misrepresentations and omissions regarding the revenue sharing agreements and due diligence efforts and in operating his scheme to defraud his clients. Cooper had control, sole ownership, and complete authority over Total Wealth. Cooper made all the decisions for Total Wealth. Among other things, he wrote and approved the firm's marketing materials, he personally met with clients and approved the investment recommendations presented to them, he made all the investment decisions for ACOF and the Portfolio Series funds, and he negotiated and signed the revenue sharing fee agreements. Cooper's deep level of involvement in the objectionable conduct means he knew or was reckless in not knowing that his actions violated the securities laws. *See, e.g., In re Beacon Associates Litig.*, 745 F.Supp.2d 386, 413 (S.D.N.Y. 2010) (when defendants previously had represented that they would conduct due diligence, the court found that their failure to disclose to investors that they subsequently relieved the due diligence providers of their obligation to do so was "strong circumstantial evidence of conscious misbehavior or recklessness") (citations omitted). Indeed, Cooper lied to clients regarding the due diligence that he claimed to have performed because he was motivated by the substantial revenue sharing fees that he would receive for placing client savings in the investments instead of focusing on his clients' interests.

2. Cooper violated Section 17(a)(1) and (3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) thereunder

The antifraud provisions of the federal securities laws encompass any wrongdoing by any person that rises to the level of a deceptive practice. *See Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 10 (1971). For purposes of the securities laws, a "'scheme to defraud' is merely a plan or means to obtain something of value by trick or deceit." *SEC v. Kimmes*, 799 F. Supp. 852, 858 (N.D. Ill. 1992), *aff'd*, 997 F.2d 287 (7th Cir. 1993). To establish such a violation, the Division must show that Cooper engaged in fraudulent conduct in connection with the purchase or sale of securities with scienter, and/or that Cooper engaged in a transaction, practice or course of business that would "operate as a fraud" in connection with the purchase or sale of securities, either intentionally or negligently. *See, e.g., Dain Rauscher*, 254 F.3d at 856; *In the Matter of John P. Flannery*, Advisers Act Rel. No. 3981, 2014 SEC LEXIS 4981, at *31 (Dec. 15, 2014). Scheme liability can arise from "allegations stemming from the same set of facts [as the misrepresentation], as long as the SEC [proves] that the defendant[ ] undertook a deceptive scheme or course of conduct that went beyond the misrepresentations." *Stoker*, 873 F. Supp. 2d at 614 (citation and quotation marks omitted) (denying motion for summary judgment against claim under Section 17(a)(3)); *see also Flannery*, 2014 SEC Lexis 4981, at *29-30, *64 (declining to read subsections of Rule 10b-5 and Section 17(a) as "mutually exclusive"; liability can lie where "as a result of the defendant's negligent conduct, investors receive misleading information about the nature of an investment or an issuer's financial condition").

The evidence established that Cooper deliberately engaged in a scheme to defraud by enticing investors with promises of low fees, while failing to disclose his business practice of recommending investments in funds that paid him, either personally or through Total Wealth,

additional fees based on his clients' investment. As discussed above, Cooper perpetrated this scheme with a high level of scienter. This scheme to defraud Total Wealth clients violated Sections 17(a)(1) and 17(a)(3) of the Securities Act, and Section 10(b) of the Exchange Act and Rules 10b-5(a) and 10b-5(c) promulgated thereunder.

3. Cooper's misrepresentations and omissions and his scheme to defraud were made in connection with the purchase or sale of securities

Cooper's scheme to defraud and his misrepresentations and omissions regarding the revenue sharing fee agreements and the respondents' due diligence efforts were "in connection" with the purchase or sale of securities. Cooper's conduct related to Cooper's and Total Wealth's recommendations to clients and their discretionary purchases of securities, as well as their efforts to sell ACOF and the Portfolio Series funds to investors. Section 10(b) and Rule 10b-5 prohibit fraudulent conduct "in connection with the purchase or sale" of a security, and Section 17(a) prohibits fraudulent conduct "in the offer or sale" of a security. In an expansive ruling, the Supreme Court held that when a scheme to defraud "coincides" with the securities transaction, it satisfies the "in connection" requirement of Section 10(b) and Rule 10b-5. *See SEC v. Zandford*, 535 U.S. 813, 822 (2002) (holding the broker liable when he misappropriated the proceeds after selling his client's securities).

C. Cooper Willfully Aided, Abetted And Caused Total Wealth's Violations Of Section 10(b) And Rule 10b-5(b)

To prove aiding and abetting liability, the SEC must show: (1) a primary violation; (2) the respondent's substantial assistance in that violation; and (3) the respondent knowing of, or recklessly disregarding, the wrongdoing and his role in furthering it. *See In the Matter of Joseph John VanCook*, Exchange Act Rel. No. 61039A, 2009 SEC LEXIS 3872, at *55 (Nov. 20, 2009) (Comm. op.); *see also SEC v. e-Smart Techs., Inc.*, No. 11-895, 2014 WL 945816 (D.D.C. Mar. 12, 2014) (*quoting Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000) ("As articulated by the

D.C. Circuit, 'three principal elements are required to establish liability for aiding and abetting' a securities violation: '(1) that a principal committed a primary violation; (2) that the aider and abettor provided substantial assistance to the primary violator; and (3) that the aider and abettor had the necessary 'scienter'— *i.e.*, that she rendered such assistance knowingly or recklessly.'")).

Total Wealth violated Section 10(b) and Rule 10b-5(b). Cooper engaged in fraud both with respect to the failure to disclose the revenue sharing agreements and the misrepresentations regarding the due diligence on the investments. As the sole owner and CEO of Total Wealth, Cooper's scienter, detailed above, is attributable to Total Wealth. *See*, *e.g.*, *In the Matter of Montford & Co.*, Advisers Act Rel. No. 3829, 2014 SEC Lexis 1529, at *57 n.109 (May 2, 2014) (Comm. op.).

Cooper substantially assisted in Total Wealth's violations. Without his involvement, neither the revenue sharing fraud nor the due diligence fraud would have been possible. To satisfy the "substantial assistance" element, the Division need only show that Cooper "'in some sort associated himself with the venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed.'" *SEC v. Subaye, Inc.*, No. 13 Civ. 3114, 2014 WL 448414, at *9 (S.D.N.Y. Feb. 4, 2014) (*citing SEC v. Apuzzo*, 689 F.3d 204, 206 (2d Cir. 2012)). As set forth above, Cooper's level of involvement in overstating and misleading investors about Total Wealth's due diligence efforts (or lack thereof), revenue sharing agreements, and approval of materials provided to clients and investors demonstrate his knowledge or reckless disregard of the misrepresentations and omissions. Cooper controlled Total Wealth and his actions substantially assisted Total Wealth's violations.

D. Cooper Violated Section 206(4) Of The Advisers Act And Rule 206(4)-8 Thereunder

Section 206(4) of the Advisers Act prohibits an investment adviser from directly or indirectly engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative. Scienter is not required in order to establish liability for violating Section 206(4). *See SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992); *SEC v. C.R. Richmond & Co.*, 565 F.2d 1101, 1105 (9th Cir. 1977) (citing *Capital Gains Research*, 375 U.S. at 195) (scienter is not an element of a violation of the rules under Section 206(4)).

Rule 206(4)-8(a)(1) provides that an investment adviser to a "pooled investment vehicle" is prohibited from making any untrue statement of material fact or omitting "to state a material fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading to any investor . . . in the pooled vehicle." 17 C.F.R. § 275.206(4)-8. Rule 206(4)-8(a)(2) provides that it is a fraudulent practice for an investment adviser to a pooled investment vehicle to engage in "fraudulent, deceptive, or manipulative" conduct with respect to any investor or prospective investor in the pooled vehicle. *Id.*; *Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles*, Advisers Act Release No. 2628, 2007 SEC LEXIS 1736 (Aug. 3, 2007). As described above, Cooper made direct misrepresentations and omissions to Altus investors, and the ACOF and Portfolio Series funds are pooled investment vehicles.

E. Total Wealth Violated Section 206(4) Of The Advisers Act And Rule 206(4)-2 Thereunder, And Cooper Aided, Abetted And Caused Those Violations

Rule 206(4)-2, the Custody Rule, imposes certain requirements on investment advisers registered or required to be registered under the Advisers Act that have custody of client securities or funds. Only negligence is required to establish violations of the Custody Rule. *C.R. Richmond*, 565 F.2d at 1105. The Custody Rule defines custody to include any capacity (such as

general partner, managing member, or a comparable position to a pooled vehicle) that gives the investment adviser access to client funds. 17 C.F.R. § 275.206(4)-2(d)(2)(iii).

As the managing member of Altus Management, which is the general partner of the Altus Funds, Total Wealth had custody of the funds and securities of its clients, the Altus Funds, as well as of the funds and securities of the investors in those funds who were Total Wealth clients. (Exhibit 120 at 25-26; Exhibit 218 at 25-26; Exhibit 220 at 25-26; Exhibit 224 at 24-25). Total Wealth was therefore required to comply with the requirements of the Custody Rule, 17 C.F.R. § 275.206(4)-2.

Total Wealth had to meet the "independent verification requirement" of subsection (a)(4) of the Rule – *e.g.*, an annual surprise examination by an independent public accountant to verify client funds and securities (17 C.F.R. § 275.206(4)-2(a)(4) – or failing that, Total Wealth had to satisfy the "audit exception" provided for in subsection (b)(4) of the Rule. 17 C.F.R. § 275.206(4)-2(b)(4). To meet the "audit exception," the Custody Rule required Total Wealth to: (i) have the Altus Funds audited annually by an independent public accountant who was registered with, and subject to regular inspection by, the PCAOB; and (ii) distribute audited financial statements prepared in accordance with GAAP to the Altus investors no later than 120 days after the end of the fiscal year.

Total Wealth violated the Custody Rule because it did not meet the "independent verification requirement" and did it satisfy the "áudit exception." At trial, Cooper admitted this fact without reservation. (Tr. (Cooper) 968-69, 1075).

In addition, the evidence showed that Total Wealth falsely claimed that the Altus Funds were audited annually in ADV filings beginning March 2011, but only ACOF was audited, and it was only audited once in 2010. The audit was not completed until 2012, and therefore did not

satisfy the audit exception by having audited financial statements distributed within 120 days of fiscal year end. Moreover, Ogbomo CPA was not subject to regular inspection by the PCAOB, as required by the Custody Rule. *See* 17 C.F.R. § 275.206(4)-2(b)(4)(ii). Finally, Ogbomo CPA failed to satisfy the standards of independence described in Rule 2-01 of Regulation S-X. *See* 17 C.F.R. § 275.206(4)-2(d)(3) (independent public accountant must meet standards of Regulation S-X). Ogbomo CPA could not have been considered independent because its principal helped prepare the very financial statements that he proceeded to audit for the Altus Fund. *See* Rule 2-01(c)(4)(i) of Regulation S-X, 17 C.F.R. § 210.2-01(c)(4)(i) (accountant is not independent if he provides certain bookkeeping or other services, unless it is reasonable to conclude that the results of those services will not be subject to audit procedures).

Total Wealth committed independent primary violations of the Custody Rule. Cooper had actual knowledge of these violations or was reckless in assisting in the conduct leading to these violations. (Tr. (Cooper) 968-969, 1075; *see also* Exhibit 137.) Cooper substantially assisted in the accomplishment of Total Wealth's primary violations because he engaged Ogbomo CPA (Exhibit 42), he served as one of Ogbomo CPA's principal contacts at Total Wealth during its audit (Tr. (Ogbomo) 209), he signed the management representation letter to Ogbomo CPA (Exhibit 46), and he received Ogbomo CPA's internal control deficiencies letter (Exhibit 45). Therefore, Cooper willfully aided and abetted those violations. Finally, because a finding that a respondent willfully aided and abetted violations of the securities laws necessarily makes that respondent a "cause" of those violations, Cooper also willfully caused Total Wealth's Custody Rule violation. *See In re Clarke T. Blizard, et al.*, Advisers Act Rel. No. 2253, 2004 SEC LEXIS 1298, at *16 n. 10 (June 23, 2004) (Commission opinion).

F. Cooper Violated Section 207 Of The Advisers Act

Section 207 of the Advisers Act makes it unlawful for any person to make any untrue statement of material fact in any registration application or report filed with the Commission or to willfully omit to state in any such application or report any material fact required to be stated therein.[16] Total Wealth's Forms ADV contained untrue statements of material fact regarding the revenue sharing fees, its custody of client funds, and the annual audits of the Altus Fund and the Altus Portfolio Series.

The evidence showed that Total Wealth made false statements in its Forms ADV for several years. Starting in 2011, Total Wealth's Forms ADV claimed that an independent public accountant audited the pooled investment vehicles (the Altus Fund and, later, the Altus Portfolio Series) annually, but, as described above, the Auditing Firm was not independent and did not audit the funds annually. Also starting in August 2011, Total Wealth began disclosing that it *may* have arrangements with certain fund managers whereby it or an associated person received a percentage of the fees charged by those managers, but it failed to disclose that those arrangements actually existed, that Total Wealth was receiving substantial fees pursuant to those agreements, or that it placed a majority of the Altus Funds' assets with such managers. Therefore, Total Wealth violated Section 207 of the Advisers Act. Moreover, because Cooper signed Total Wealth's Forms ADV in 2011, which included information therein that he knew to be untrue at the time, he also violated Section 207 of the Advisers Act. *In the Matter of Oakwood Counselors, Inc., et al.*, Advisers Act Release No. 1614, 1997 SEC LEXIS 304 (Feb.

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[16] A finding of willfulness does not require intent to violate, but merely intent to do the act which constitutes a violation. *SEC v. K.W. Brown and Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla. 2007), citing *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000); *SEC v. Steadman*, 603 F.2d 1126, 1135 (5th Cir. 1979); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976).

10, 1997) (settled order finding adviser and adviser's president, who signed false Forms ADV, violated Section 207).

G. Substantial Sanctions Are Appropriate

The guiding principle in imposing sanctions against a respondent is the public interest. *See, e.g.*, *In the Matter of Vladimir Boris Bugarski, et al.*, Exchange Act Rel. No. 66842, 2012 SEC LEXIS 1267, at *10-11 (Apr. 20, 2012) (Comm. op.); *In the Matter of Joseph P. Doxey*, Initial Decision Rel. No. 598, 2014 SEC LEXIS 1668, at *58 (May 15, 2014). In determining whether an administrative sanction is in the public interest, the Commission generally focuses on the factors identified in *Steadman v. SEC*: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman*, 603 F.2d at 1140; *see also In the Matter of Gary M. Kornman*, Exchange Act Rel. No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009) (applying *Steadman*); *Doxey*, 2014 SEC Lexis 1668, at *58-59 (same); *In the Matter of John Thomas Capital Management Group LLC*, Initial Decision Rel. No. 693, 2014 SEC LEXIS 4162, at *87 (Oct. 17, 2014) (same). In addition, the Commission considers whether sanctions will have a deterrent effect. *See In the Matter of Schield Mgmt. Co.*, Exchange Act Rel. No. 53201, 58 S.E.C. 1197, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006) (Comm. op.); *In the Matter of David F. Bandimere*, Initial Decision Rel. No. 507, 2013 SEC LEXIS 3142, at *228-29 (Oct. 8, 2013).

"The appropriate sanction depends on the facts and circumstances of each case." *Schield Mgmt.*, 2006 SEC LEXIS, at *35. Thus, the "inquiry into the appropriate sanction to protect the public interest is a flexible one and no one factor is dispositive." *Kornman*, 2009 SEC LEXIS

367, at *22; *see also In the Matter of Toby G. Scammell*, Advisers Act Rel. No. 3961, 2014 SEC LEXIS 4193, at *23 (Oct. 29, 2014) (Comm. op.).

When determining the scope of sanctions, the Commission "consistently [has] held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *In the Matter of Kent M. Houston*, Exchange Act Rel. No. 71589, 2014 SEC LEXIS 614, at *33, n.60 (Feb. 20, 2014). Therefore, "the Commission is not obligated to make its sanctions uniform," and it is not necessary to compare the sanction under the specific facts and circumstances of a particular case "to those imposed in previous cases." *Kornman v. SEC*, 592 F.3d 173, 188 (D.D.C. 2010); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

The evidence shows that every one of the *Steadman* factors supports the strongest sanctions against Cooper. As the sole owner and chief executive officer of Total Wealth, Cooper was responsible for the failure to disclose the revenue sharing agreements and the misrepresentations regarding due diligence. His conduct satisfies all of the key *Steadman* factors—it was egregious, was not isolated and involved a high degree of scienter. The evidence also showed that Cooper has failed to acknowledge his wrongdoing. *See, e.g., In the Matter of KPMG Peat Marwick, LLP*, Exchange Act Rel. No. 43862, 54 S.E.C. 1135, 2001 SEC LEXIS 98, at *102 (Jan. 19, 2001) (Comm. op.), *recon. denied*, 55 S.E.C. 1, *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002) ("a finding of violations raises a sufficient risk of future violation"). Indeed, Cooper recently misappropriated $150,000 in client funds in connection with a tentative

settlement of this proceeding. Such conduct leaves no doubt that Cooper does not recognize the wrongful nature of his conduct and that it is likely that he will commit future violations, if given the opportunity.

1. Cooper's violations warrant an industry bar and a cease-and-desist order against him

Section 203(e) of the Advisers Act authorizes the Commission to sanction any investment adviser if it is in the public interest and the Commission finds that the adviser has willfully violated any provision of the federal securities laws. Section 203(f) of the Advisers Act authorizes the Commission to sanction any person associated with an investment adviser under the same circumstances. Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") authorizes the Commission to sanction any person under the same circumstances. Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act authorize the hearing officer to order Cooper to cease and desist from committing violations of the Securities, Exchange, and Adviser Acts. *See* 15 U.S.C. § 77h-1; 15 U.S.C. § 78u-3, 15 U.S.C. § 80b-3(k).

In assessing whether a cease-and-desist order or other sanctions are appropriate, the Commission considers the *Steadman* factors, as well as "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *KPMG Peat Marwick*, 2001 SEC LEXIS 98, at *116. Moreover, while a likelihood of future violations is one of the *Steadman* factors, the showing for that factor is "significantly less than that required for an injunction." *Id.* at *114. Indeed, it is sufficient to show that there was a violation of the securities laws to demonstrate "a sufficient risk of future violation." *Id.* at *102.

As described above, the evidence demonstrates Cooper's repeated disregard of his responsibilities under the federal securities laws. He violated the federal securities laws on multiple occasions, over an extended period of time, with a high degree of scienter, and has shown no recognition of the wrongfulness of his actions. The evidence shows that a cease-and-desist order is appropriate against Cooper. In addition, after this proceeding was initiated, Cooper committed an additional violation when he "borrowed" $150,000 of investors' funds to pay one of his personal obligations. The evidence shows that there is a strong likelihood that, if permitted, Cooper will engage in additional violations in the future, therefore the Division requests that Cooper be permanently barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

2. Cooper's misconduct warrants substantial monetary sanctions

a. Cooper should be ordered to disgorge all ill-gotten gains from his fraud

The evidence shows that Cooper, personally and through Total Wealth, of which he was the sole owner, received $1,815,992.99 in revenue sharing and consulting fees generated through the revenue sharing agreements. (Exhibit 272A.) Cooper obtained these monies by failing to disclose the revenue sharing agreements to his clients, and by recklessly giving his clients' money to fund managers in return for payments, without any regard for proper due diligence and the safety of the clients' funds.

Section 8A of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, Sections 203(j) and 203(k)(5) of the Advisers Act, and Section 9(e) of the Investment Company Act authorize disgorgement in administrative or cease-and-desist proceedings, including reasonable interest. *See* 15 U.S.C. § 77h-1(e); 15 U.S.C. § 78u-2(e), § 78u-3(e), 80b-3(j) & 80b-3(k)(5), and 80a-9(e).

The goal of disgorgement is two-fold: "'to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.'" *Platforms Wireless*, 617 F.3d at 1096 (*quoting SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999)); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997). Therefore, "the amount of disgorgement should include all gains flowing from the illegal activities." *In the Matter of Donald L. Koch*, Exchange Act Rel. No. 72179, 2014 SEC LEXIS 1684, at *90 (May 16, 2014) (Comm. op.) (*citing SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006)).

When seeking disgorgement, the Division only needs to present evidence of a "reasonable approximation" of the ill-gotten gains. *Id.*; *see also First Jersey*, 101 F.3d at 1474. Once the Division has made that showing, the burden shifts to the respondent to "demonstrate that the disgorgement figure was not a reasonable approximation," and any "risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231-32 (D.C. Cir. 1989); *see also Koch*, 2014 SEC LEXIS 1684, at *90-91; *In the Matter of S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *43 (Dec. 5, 2014) (Comm. op.).

Accordingly, Cooper should be ordered to disgorge $1,815,992.99.

b. Cooper should pay civil penalties

Section 8A(g) of the Securities Act, Sections 21B(a) of the Exchange Act, Section 203(i) of the Advisers Act, and Section 9(d) of the Investment Company Act authorize the Commission to seek civil penalties. *See* 15 U.S.C. §§ 77h-1(g); 78u-2(a); 80b-3(i) & 80a-9(d). Penalties should be imposed when they serve the public interest, and are meant to deter future violators. *See, e.g., In the Matter of Raymond James Fin. Servs., Inc., et al.*, Initial Decision Rel. No. 296, 2005 SEC LEXIS 2368, at *197 (Sept. 15, 2005). The statutes provide several factors to consider: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm to other persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need to deter the respondent and other persons; and (6) such other matters as justice may require. *See* 15 U.S.C. § 78u-2(c). "'Not all factors may be relevant in a given case, and the factors need not all carry equal weight.'" *Bandimere*, 2013 SEC LEXIS 3142, at *249-50 (*citations and quotations omitted*).

As for the amount of the penalty, "a three-tiered statutory framework provides the maximum civil money penalty that may be imposed for each violation if found in the public interest." *Doxey*, 2014 SEC LEXIS 1668 at *7-68. The highest level of penalties, a third-tier penalty, is $150,000 for each violation committed by a natural person. *See* 17 C.F.R. § 201.1004 (2011), Subpart E, Table IV. These penalties are justified if the respondent is found to have engaged in fraud, deceit, or deliberate or reckless disregard of a regulatory requirement, and if that fraud "resulted in substantial losses or created a significant risk of substantial losses to other persons," or "substantial pecuniary gain" to the respondent. 15 U.S.C. § 77h-1(g)(2)(C), 15 U.S.C. § 78u-2(b)(3).

While the statutory tier system sets forth the maximum penalty for each violation, it is up to the hearing officer to determine the amount of the penalty to be imposed within the tier. *See In the Matter of David Mura*, Initial Decision Rel. No. 491, 2013 SEC LEXIS 1700, at *40 (June 14, 2013) (*citing SEC v. Murray*, No. OS-CV-4643 (MKB), 2013 WL 839840, at *3 (E.D.N.Y. Mar. 6, 2013)). In making that assessment, courts have considered the following factors established in *SEC v. Lybrand*:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd on other grounds*, 425 F.3d 143 (2d Cir. 2005); *see also Bandimere*, 2013 SEC LEXIS 3142, at *251-52. 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.'" *Murray*, 2013 WL 839840, at *3 (*quoting SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007)).

Moreover, the size of a civil penalty is "not limited to the amount of profits derived from the violation." *In the Matter of Ronald S. Bloomfield*, Exchange Act Rel. No. 71632, 2014 SEC LEXIS 698, at *91 (Feb. 27, 2014) (Comm. op.). Thus, the civil penalty imposed against Cooper can exceed any personal gain he had, since civil penalties can be imposed "without regard to defendants' pecuniary gain." *Id.* (finding that penalty for one respondent that was 27 times larger than his pecuniary gain was proper).

Here, the evidence established that substantial third-tier penalties are appropriate. Cooper's fraudulent conduct involved undisclosed revenue sharing agreements that enriched him

at the expense of his clients, and his failure to perform adequate due diligence as he turned his clients' funds over to the fund managers who were making the undisclosed payments. Cooper acted with a high level of scienter, as discussed above, and he committed the violations over a period of years. Indeed, the callous nature of his actions is shown by his conduct after the Life's Good debacle, after which Cooper entered into additional agreements and concentrated his clients' money in the Aegis and PPCN II funds – which paid Cooper an annual percentage based on the amount invested under purported "management agreements." Yet Cooper claimed he did nothing under the agreements, even though they specifically gave Total Wealth substantial management responsibilities.

The evidence also establishes that Cooper's conduct has caused substantial losses to investors. Clients lost over $2.4 million in 2010 on Life's Good, lost over $17 million in 2014 when Cooper wrote down Aegis investments to zero, stand to lose almost $3.8 million on Metro Coffee, which is in bankruptcy, and may lose millions more on the $28 million PPCN II investment. Indeed, the receiver reported that Cooper's business associate, Tony Hartman, who manages PPCN II, is unwilling voluntarily to provide necessary information about the assets. Actual investor losses already exceed $20 million and may go substantially higher, while Cooper profited substantially.

Accordingly, an appropriate penalty would take into account the harm to each of the Total Wealth clients, including those who invested in ACOF and the Portfolio Series funds, and who have suffered actual and substantial losses as a result of Cooper's fraudulent conduct. The Division proposes that Cooper be assessed a third-tier penalty of $150,000 for each of the 192 investors in ACOF (Exhibit 310), which would total $28.8 million in civil penalties. This substantial penalty is appropriate and justified by Cooper's callous disregard for his fiduciary

duty and the safety of his clients' funds, and his focus on self-enrichment at the expense of his clients. This penalty approximates the investors' losses, and a substantial penalty would serve a deterrent function.

Finally, the Division requests that Cooper be assessed a first-tier penalty of $7,500 for each year that ACOF violated the custody rule between 2010 and 2014 when this action was filed – that is, for 2010, 2011, 2012, and 2013. Cooper does not dispute that ACOF violated the custody rule, and therefore a penalty for each violation is appropriate.

Thus, the Division requests that a total civil penalty in the amount of $28,830,000 be assessed against Cooper for his violative conduct.

IV. CONCLUSION

The Division respectfully submits that the Administrative Law Judge issue an order finding that Cooper violated the stated provisions of the federal securities laws, and issues the requested sanctions.

Dated: May 8, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT

/s/ David J. Van Havermaat

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In the Matter of Total Wealth Management, Inc., et al.
Administrative Proceeding File No. 3-15842
Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

THE DIVISION OF ENFORCEMENT'S INITIAL POST-HEARING BRIEF

was filed with the Office of the Secretary of the Commission and served by email and UPS Overnight Mail on May 8, 2015, upon the following parties as follows:

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Dated: May 8, 2015

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