UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of

DENNIS J. MALOUF,

Respondent.

DIVISION OF ENFORCEMENT'S ADDITIONAL PROPOSED STIPULATIONS

Under the Court's November 28, 2014 Post-Hearing Order, the Division of Enforcement files the following Additional Findings of Fact and Conclusions of Law that it believes should be stipulated to.

I. Proposed Additional Findings of Fact

	Mr. Malouf's involvement in UASNM bond trading
1	Kirk Hudson testified that Malouf handled 90-plus percent of UASNM bond trades.
	Q [McKenna] How about yourself? Did you ever engage in any bond trades for clients at UASNM? A [Hudson] I typically didn't. If I had a bond trade to do, I would send it to Mr. Malouf to do. If he were gone, I might, but he handled the trades. The only times that I know of that Mr. Malouf wasn't in charge of that would be when, you know, Matt Keller had a couple of clients that had specific SL allocations, we send those out for bid. And you know, small things that Mr. Malouf is not interested in, $25,000 liquidation, or a $50,000 liquidation. But he handled 90-plus percent of the bond trades. 96:25-97:11[1]; *see also* proposed Finding of Fact #4 (1656:11-21) ("FOF"), below.
2	Matt Keller testified that Malouf executed 80 to 90 percent of UASNM's bond trades.

[1] The line and page numbers are referenced herein as, e.g. 96:25-97:11. The transcripts are consecutively page numbered as follows: 11/17/14 is pages 1-270, 11/18/14 is pages 272-573, 11/19/14 is pages 575-889, 11/20/14 is pages 891-1231, 11/21/14 is pages 1233-1569, 11/24 /14 is pages 1571-1907, 11/25/14 is pages 1909-2065.

	JUDGE PATIL: And I think what the question is, if you can give an estimate, a percentage or a range, do so. But if you're just guessing, then don't just guess or speculate, because that wouldn't be helpful to anyone. THE WITNESS [Keller]: I know that Mr. Hudson would occasionally buy individual bonds, based on what he's told me in the past. Even during, you know, '08, '09, 2010, there were some occasions where he might buy one. But I would estimate that Mr. Malouf executed 80 to 90 percent of our trades on a long-term basis. He picked that one time frame, where, maybe, in a given, you know, year, I did 5 million of the 35 million. But I would estimate that I was 5 million in a particular year. And Mr. Hudson, I'm thinking, did a lot less than that, because he didn't have the same sort of institutional client that required it. Big numbers. 1206:22-1207:13.
3	Malouf would at times assist Hudson and Keller with bond trades they made on behalf of their clients.
	At times Hudson would approach Malouf and tell him the block of bonds that were necessary and Malouf would do the transaction. FOF #172 (1853:24-25). Q [McKenna] And why would you go to Mr. Malouf if you had a bond trade that you wanted to execute on behalf of one of your clients? A [Hudson] Because he held them. He was the bond expert at the firm. I don't have a trading background, never did any kind of activity like that. Certainly not a negotiated trade. 97:12-18. Q [McKenna] You had said that Mr. Hudson would sometimes come to you and ask you to help him make a bond trade. Fair? A [Malouf] Yes. 934:7-10. Q [McKenna] So you and Mr. Hudson would cooperate – A [Malouf] On larger trades for sure. 1143:10-11. Q [McKenna] Could we look at Exhibit 540, please. And do you recognize this e-mail?

	A [Keller] Yes, I do. .... Q Okay. Did Mr. Malouf assist you with this bond trade? A Yes, he did. 1167:2-14. Q [King] So, this is in 2008. You've now been trading bonds under the tutelage of Mr. Malouf for four or so years. Right? A [Keller] Yes. Q And you knew that you could go directly to Mr. Malouf, you don't have to – or, directly to Mr. Lamonde by that point, you don't have to go through Mr. Malouf? A Correct. Q Why would you go to Mr. Malouf if Mr. Lamonde is right there in the office with you? A Dennis and I had – we had a relationship, and I wasn't into excluding him from the process. If Mr. Lamonde was there, I might use him, but if Mr. Malouf is in there too. I would sit down with him and do it. 1195:22-1196:12.
4	Kirk Hudson evaluated UASNM trading data and bond binders and determined that Malouf picked the broker for at least 90% of UASNM's bond trades from 2008 to May 2011, and that during that time the broker chosen for UASNM bond trades 90% of the time was Raymond James.
	Q [McKenna] And what do you base that testimony on? Your testimony that he [ ] picked the broker 90 percent of the time? A [Hudson] Well, in this entire process from the litigation through the exams through the enforcement action, a number of times I've had to produce or look at that kind of data. And in evaluating that and looking at the individual bond trades, about 90 percent of them were the kinds of bond trades that Mr. Malouf did or would have done. And you know, when you also look at the bond binder and you back out the specific trades done by other people, that still leaves you in that 90-plus percentile.

	Q In doing this work and looking at bond binders and the like in connection with the litigation or this investigation, were you also able to reach a determination of what percentage of the bond trades that UASNM did were done through the Raymond James branch as opposed to Schwab or Fidelity or another broker? A Yes. And it's the same number, about 90 percent. 100:15-101:11.
5	Hudson studied the bond trades done through brokers other than Raymond James and determined that those were primarily done by Matt Keller and Austin McDaniel, and that Malouf might have been involved with only one of those non-Raymond James trades.
	Q [McKenna] Well, have you studied these [non-]RJ bond trades in connection with this investigation and the New Mexico litigation? A [Hudson] Yes. Q And did you make any determinations about what investment advisers at UAS were or were not involved in these non-Raymond James bond trades? A These were primarily done by Matt Keller, Austin, and I think in terms of the adviser, myself or Joe are related to a couple of them, but to the smaller trades. I don't believe -- Mr. Malouf may have been involved in one of these. I can't see the entire screen here, but there was one trade that he did with UDS. I think that's on this list. 106:2-15. Q [McKenna] Okay. So, thank you. In the four and almost a half pages of these non-Raymond James bond trades that we just looked at in Exhibit 30, how many again do you think Mr. Malouf may have been involved with? A [Hudson] Maybe one. 107:20-24.
6	Kirk Hudson compiled the trades reflected in Exhibit 30 from UASNM's account system, Portfolio Technologies.
	Q [McKenna] -- in August of '04. And this list of bond trades that UAS engaged in, where was this data pulled from?

	A [Hudson] This came out of our account system, which was a Portfolio Technologies. It's a Schwab company. And it's where we do our -- we would produce our own account statements; we would produce our performance statements, where we create our billing statements from too. So the custodians download the data, the transactional data into this system. There's a reconciliation function, and those are reconciled daily by Schwab. They also provide that service. This is a pretty -- a lot of integrity in that system. 102:17-103:5.
7	Exhibit 339 is an April 7, 2008 e-mail from Monica Pineda to Kirk Hudson, copying Dennis Malouf, Moe Lamonde, and Austin McDaniel that reflects a $3 million bond purchase that was allocated to 60 different individual accounts.
	Q [McKenna] Okay. And can you tell us what this e-mail is referring to? A [Hudson] Sure. What this is Sarah, at National Advisors Trust, when I mentioned receiving -- receiving broker, she is the person that works on receiving trade aways at National Advisors Trust. So, this is after a trade has been placed, and she is writing – she is indicating to Monica that the allocation for this big $3 million bond purchase went into 60 different individual accounts, and that she did not receive that allocation apparently in time to get them entered prior to cutoff. So the account – so what she's saying, the last sentence says, 'These will not be settled until tomorrow.' It means since the receiving broker didn't get the information put in their system in time, they couldn't clear that trade that day. So this is a situation that happened fairly frequently, where a bond purchase was made, and then we were asked to do an allocation afterwards. 113:17-114:11. Exhibit 339.
8	Mr. Malouf was the only investment advisor at UASNM that made the type of large aggregate bond purchases reflected in Exhibit 339 that then had to be subsequently allocated among UASNM clients.
	Q [McKenna] And excuse me. Mr. Hudson, can you tell if Mr. Malouf was involved in this bond trade in any way?

	A [Hudson] Yes, this was a $3 million bond purchase of one bond to be allocated out. I don't know of any bond purchase that size that was subsequently allocated that he wasn't subsequently involved in negotiating the price for. Q You say a bond trade that was 'subsequently allocated.' Did any other investment trader ever make large bond trades without having an allocation among UASNM customers in mind before they made the trade? A No. Q Just Mr. Malouf? A Right. I'm not sure he didn't have an allocation in mind. Just wasn't documented on a piece of paper and sent to the receiving broker. 114:24-115:14.
9	The loan reflected in Exhibit 339 was a federal agency loan with about a four-year maturity.
	Q [McKenna] What type of bond is this, Mr. Hudson? A [Hudson] It's a Federal Home Loan Bank, which is a government federal agency. And its, you know, maturity at the time would have been about four-year maturity. 119:19-22.
10	A commission of approximately 1% was paid to the Raymond James branch on the $3 million federal agency loan reflected in Exhibit 339.
	Q [McKenna] And can you tell us what that entry is, the one that's not redacted? A [Hudson] Yes. So, this would be the same bond, and if you look at the gross, the column that says gross commission, which would be four or five from the right. $30,300. So approximately 1 percent. 120:12-17.
11	Exhibit 553 is a July 2, 2008 e-mail from Monica Pineda to Matt Keller and Kirk Hudson reflecting one bond purchase of at least $1,000,000 and another of $522,825 that Mr. Malouf was involved with.

	Q [McKenna] And then can you explain why you think Mr. Malouf would be involved in this bond transaction? A [Hudson] Well, because knowing these accounts, you know, he bought – I know he bought these bonds. I follow this account here, I know, pretty closely. And I never, you know, bought it, done any kind of trade away with Raymond James for that account. And nobody else would because it's not their client. 122:12-19.
12	A $5,500 commission was paid on the $522,825 bond trade (1.052%) reflected in Exhibit 553 and the other trade was for $1,537,829 and involved a $15,212.90 commission (0.99%).
	Ex. 29 at RJFS-Malouf-000159.
13	Lamonde did not make payments to Malouf on a monthly basis as provided for in the Purchase of Practice Agreement.
	The payments to be made from Buyer to Seller referred to herein shall be made by Buyer to Seller monthly, on account of each month's commissions and securities related fees received by Buyer. Such payments shall be received by Seller by the fifteenth (15^{th}) day of each month. Ex. 57, page 2, paragraph 8.a. In performing Malouf's personal bookkeeping, Ms. Calhoun received checks for deposit approximately twice a month from Maurice Lamonde. FOF #258 (1882:5) *See also* proposed FOF #14 (1688:4-25), below.
14	The number of checks Malouf received from Lamonde between January 2008 and May 11, 2011 varied from between zero to four a month.
	Ex. 201 (0 in March 2008; 4 in November 2010).
	Don Miller
15	Don Miller was Mr. Malouf's accountant and prepared draft tax returns for Mr. Malouf for the years 2005, 2006, 2007, 2008, and 2009.
	Q [Jamieson] Do you provide accounting services for UASNM? A [Miller] I do.

	Q Have you also provided accounting services for Mr. Malouf? A Yes. 1576:1-5.
16	Mr. Miller did not know precisely what Mr. Malouf was doing in 2008 or 2009 that would enable him to deduct business expenses for the Raymond James branch he sold to Mr. Lamonde at the beginning of 2008.
	Q [McKenna] Okay. And if you look on line 28, you can see that Mr. Malouf is deducting almost $46,000 in expenses -- or, let me strike that question. If you look at line 28, you can see that this draft Schedule C reflects a deduction of almost $46,000 in expenses for the year after -- excuse me, for – I guess that's right. For 2009. Do you see that? A [Miller] Yes, sir. Q And for instance, let's just take a look at line 27, "other expenses," 19,699. Do you see that? A Yes. Q And that's the -- itemized on the next page. If we can go to that next page. MR. McKENNA: And blow up the bottom half of that page, please, Tim. Q And it looks like $7,805 for telephone. Do you see that? A Yes. Q Do you have any idea why Mr. Malouf would be deducting $7,805 for telephone expenses on a Raymond James investment brokerage Schedule C in 2009? A I don't know precisely what he was doing in 2009. I know that we had a note to follow up with him on what -- you know, what were the nature of the business that he was conducting at that point to generate these expenses. So, if he was still doing something in the investment advisory world or some other kind of venture, it could potentially be a deduction. But at that point, it was on his accounting records, so we put it on the draft return to be followed up with later. Q Okay. And you said you didn't know if [he] was doing something

	with the investment advisory. This is, you would agree with me, for an investment brokerage, or a broker; correct? A Okay. Some type of investment services that he was rendering. Q Okay. And how about the "miscellaneous" for $10,210? Any idea what that could possibly relate to, again, related to this form which is for investment broker Raymond James in 2009? A I'm not sure what that is without looking at the details. 1587:4-1588:21.
17	Mr. Miller first saw a copy of the written Purchase of Practice Agreement in May of 2011.
	JUDGE PATIL: Excuse me. I've got a few questions. Please object if you feel that they're inappropriate. I have a few questions related to the agreement for the sale of his business. Do you want to ask a question on these first? I just have some open-ended questions. They are not leading in any way. With respect to that agreement, when -- and I say -- when I mean "when," I mean month and year. To the best of your knowledge, did you see the agreement you testified to concerning the sale of his branch business? THE WITNESS [Miller]: Yes, sir. I recall the work papers were dated May 2011, when we started working on that tax return. 1584:9-22.
18	Mr. Miller never had an understanding that $1.1 million was an agreed upon value for the Raymond James branch that Mr. Malouf sold to Mr. Lamonde.
	Q [McKenna] -- let me finish. My question was whether you ever had an understanding where the 1.1 million was an agreed-upon value for the Raymond James branch that Mr. Malouf sold to Mr. Lamonde. A [Miller] No, sir, I never heard that. 1590:8-13.
19	Mr. Miller estimated that Mr. Malouf owes the IRS between $300,000 and $500,000 in back taxes.
	Q [McKenna] Okay. Do you have any idea how much Mr. Malouf's outstanding tax liability is, if there is one?

	A [Miller] I don't know it precisely. I know it's significant. I believe it's significant. Q Six figures? A Yes, sir. Q Seven? A No, I don't believe it's seven figures. Q Okay. So, in the hundred or -- A If I had to provide a guess or an estimate, I would guess 3 to $500,000. 1585:25-1586:10.
	Judith Owens and Dan Moriarty
20	Mr. Malouf met with Ms. Owens but did not tell her that he would receive payments related to bond trades placed through Raymond James.
	Q [Bliss] Did Mr. Malouf tell you that he would receive payments related to bond trades placed through Raymond James? A [Owens] No, he did not. 898:17-20. Malouf further testified that when he used Raymond James' bond desk to purchase bonds Lamonde was paid a commission and then had money to pay Malouf under their agreement. FOF #175 (1857:5-6). Malouf further testified that when he used Raymond James' bond desk to purchase bonds Lamonde was paid a commission and then had money to pay Malouf under their agreement. FOF #176 (1857:5-6).
21	Ms. Owens would have wanted to know that Mr. Malouf would receive payments related to bond trades placed through Raymond James.
	Q [Bliss] Would you have wanted to know that information? A [Owens] Absolutely

	Q Why? A Because that would have gone against the one percent – I believe it was one percent of the total amount that the commission was for the investment we had. 898:25-899:7.
22	Mr. Malouf did not tell Mr. Moriarty that he would receive payments related to bond trades placed through Raymond James.
	Q [Bliss] Did Mr. Malouf tell you that he would receive payments from Raymond James for making bond trades through them? A [Moriarty] No. 595:25-596:3.
23	Mr. Moriarty would have wanted to know that Mr. Malouf would receive payments related to bond trades placed through Raymond James.
	Q [Bliss] Is that information you would have wanted to know? A [Moriarty] Well, yes. I had no idea that there was another company involved with Universal. 596:8-11.
24	Mr. Moriarty was disappointed when he learned that Dennis Malouf was receiving payments from Raymond James for the commission on the bond investments.
	Q [Bliss] And what is that? A [Moriarty] That Dennis Malouf was receiving payments from Raymond James for the commission on the bond investments. Q How did you feel when you learned that information? A Really disappointed. Q Why? A Because I had no idea that – that Raymond James was involved in – in any of the transactions. 596:23-597:7.

	Alan Wolper
25	Broker dealers do not have to charge a commission that is consistent with the general market.
	Q [Bliss] Then the next sentence I want to ask you about, Mr. DeNigris opined, "The broker-dealer is not required to charge a commission in concert with the general market." Do you agree with that? A [Wolper] Right. The obligation that a broker-dealer has is to charge a fair and reasonable commission, not to, you know, collude with his competitors and charge some other number. So, as long as -- Q Understood. A -- as long as the commission is fair and reasonable, it's irrelevant whether that is -- I don't know what it means to say "in concert with," but whether it's consistent with the remainder of the market or not. How's that? 1458:9-23.
26	Malouf's expert witness, Alan Wolper, did not rely on the SEC No-Action Letter to SIFMA (Exhibit 235) stating that continuing commissions policy requires retiring from the securities industry and not being an investment advisor or FINRA guidance (Exhibit 166) stating that the arrangement may not permit the retiring registered representative to solicit new business, open new accounts or service the accounts generating the continuing commission payments.
	Q [Bliss] Are you familiar with a no-action letter interpreting this section [2420-2] that was resultant from a SIFMA letter? A [Wolper] Maybe. Q All right. First of all, I take it from reading your biography that you know what SIFMA is? A I do. Like I said, I'm a member of SIFMA CL. Q All right. Let's look at Exhibit 235. Do you recognize this as a no-action letter from the SEC? And why don't we scroll down so we can see the text below. A I do recognize this to be a no-action letter.

Q Are you familiar with this particular no-action letter?

A It's possible, Mr. Bliss, that I've seen it before. I just -- sitting here today, under oath, I don't specifically recall that.

Q You didn't rely on this no-action letter in forming your opinions regarding a continuing commission's policy; right?

A Correct. Let me see what it says. Hold on. Doesn't say very much, does it?

Q Well, there is a letter attached to it, and that's what I'm going to ask you about. It is a bit of a long letter. If you'd like to read the whole thing, I'd welcome you to do it. If we want to do that, it might make sense, when we take a break, to provide that paper to you, as opposed to just flashing it up on the screen.

A Do I have to decide now?

Q You don't -- if you'd like to sit here and read it right now, that's fine.

A No, no. I'll wait to see what you show me.

Q All right. But I would like to show you another document, Exhibit 166. If we could expand the top header there. Are you familiar with this FINRA guidance?

A Again, it's possible that I've come across this guidance, or this advisory or interpretive opinion from the office of general counsel for FINRA, because I read these things as part of my business, but I don't rec -- I can't tell you sitting here today that I've looked at it before. It's possible.

Q You didn't rely on this particular guidance in your opinion on continuing commissions; right?

A Can you scroll down so I can see what this says?

Q Absolutely.

A You know, I can't say that I specifically relied on it. But this is -- it's ringing vague bells here.

Q If we go back to the top, we see the header says, "A member firm may pay continuing commissions to a former registered representative

	who is no longer in the securities business provided the conditions of NASD IM-2420-2 are satisfied"? Now, Mr. Malouf was still in the securities business from 2008 to 2011; correct? A I guess it would depend how one defines "securities business." 1474:10-1476:20. Ex. 235 at 4 of 5: "The retiring representative must sever association with the Firm and with any ... investment adviser or investment company affiliates ... and is not permitted to be associated with any other broker, dealer, municipal securities dealer, government securities dealer, investment adviser or investment company, during the term of his or her agreement." Ex. 166 at 1 of 2: "The arrangement may not permit RR to solicit new business, open new accounts or service the accounts generating the continuing commission payments."
27	Malouf's expert witness, Alan Wolper, recognizes that SEC No-Action Letters provide guidance on the interpretation of FINRA rules and are relied upon in the securities industry.
	Q [Bliss] Would you agree that SEC no-action letters provide guidance to the interpretation of FINRA rules? A [Wolper] Yes. Q And would you agree that they are relied on in the industry? A Sure. 1498:7-12.
	Miscellaneous
28	Malouf acknowledged that during the 2008-2011 time period he should have gotten multiple bids from different brokers to seek best execution on bond trades.
	Q [McKenna] Now, would you acknowledge that, in fact, during this time period, you should have gotten multiple bids from different brokers to seek best execution on these bond trades? A [Malouf] Yes.

	935:13-17.
29	At times between 2008 and May 2011, UASNM's Forms ADV and website stated that Mr. Malouf had a Bachelor of Science in Finance degree from the University of Northern Colorado at Greeley.
	Ex. 24 at 12 "Dennis J. Malouf, ... Education University of Northern Colorado, Greeley, CO – Bachelor of Science, Finance." *See also,* Ex. 215 at 12, Ex. 216 at 18, Ex. 218 at 18, Ex. 25 at 12, and Ex. 26 at 18. Q [King] All right. And then it [Exhibit 23] goes on to say, "For example, every time Mr. Malouf looked at, or as President and CEO or Compliance Officer, approved a Form ADV, saw a college degree that he knew he did not have, and failed to disclose it, he certainly opposed the compliance efforts of UASNM." Right? A [Kopczynski] That's what it says. Q And that information was provided for these interrogatories by you; correct? A I was a participant in it, yes. Q And you don't disagree that that was your view at the time; right? A I do not disagree. Q "By allowing this misrepresentation to remain posted on the company's website even more than a year after he (falsely) claims to have disclosed this fact to the firm not only shows how implausible this sworn statement is, but it demonstrates active resistance to compliance as the firm's leader and compliance officer." Do you see that? A I do. 1328:1-22.
30	Mr. Malouf did not receive a Bachelor of Science in Finance degree from the University of Northern Colorado.
	Q [McKenna] Thank you. And Mr. Malouf, where did you go to college? A [Malouf] University of Northern Colorado.

	Q What did you study? A Finance, at the end. Q And did you earn a degree? A No. 912:6-12.
31	No witness other than Malouf claimed to have seen a written Purchase of Practice Agreement prior to January of 2010.
	Prior to 2010, Hudson, Kopczynski, and Keller had not seen a written PPA regarding Malouf's sale of his RJ branch to Lamonde. FOF #126 (1840:4-14). Mr. Miller, Mr. Malouf's accountant, first saw a copy of the written Purchase of Practice Agreement in May of 2011. Proposed FOF #17, above. Q [McKenna] And was it Mr. Malouf that told you he sold his Raymond James branch? A [Ciambor] Yes, I believe, during the 2008 on-site review. Q And that would have been May or June of 2008? A Correct. Q And did he tell you who he sold the branch to? A Mr. Lamonde. Q Did he provide you with a copy of the sales agreement? A No, he did not. 736:9-20. Ciambor discovered that Malouf had been receiving payments from Lamonde for the sale of his RJ branch no later than the June 2010 on site review. FOF #150 (1849:1-5). Q [Bliss] Was June 2010 the first time that you knew that Mr. Lamonde was making payments to Mr. Malouf? A [Bell] Yes.

	654:10-12.
32	Malouf has been unable to produce any copy of Exhibit A to the Purchase of Practice Agreement, which purportedly set forth the clients Malouf was transferring to Lamonde.
	The Purchase of Practice Agreement Provides: 1. Seller assigns to Buyer the sole and exclusive right to provide investment advice and services, including the sale of securities and insurance products, to all of the Seller's client accounts. Attached as Exhibit A is a list of such accounts, which hereinafter will be referred to as "the assigned accounts." Seller represents Exhibit A contains the names of all of his/her existing clients. Ex. 57, p. 1. Q [McKenna] Now, again, I'm going to give you my understanding, and correct me if I'm wrong, but your contention is that when you signed this agreement there was an Exhibit A to the agreement that listed the client accounts you were actually transferring to Mr. Lamonde; is that right? A [Malouf] Yes. Q And would you – would you acknowledge that, in connection with the SEC investigation as well as the UAS litigation, you have not been able to locate a copy of that Exhibit A? A Correct. 921:25-922:11. In connection with the SEC's investigation, UASNM looked through its files to see if it had a copy of the PPA or Exhibit A anywhere in its files and it did not find one. FOF #128 (1840:15-23).
33	UASNM clients were purchasers of securities.
	Exhibit 29 is the payroll report or commission report for account 44Y5 at Raymond James' branch 4GE for the period January 24, 2008 to April 29, 2011, that reflects commissions earned on bond trades made through that account. FOF #123 (1837:5-6). Q [McKenna] Does this Exhibit 29 relate to Exhibit 30 we were just

	looking at? A [Hudson] Yes, this exhibit, the bonds -- it's the same bonds. So this would show bonds that transacted through Raymond James. This is only going to have the bonds that we purchased there. I believe everything else that's redacted on this list are just things that weren't bond trades at UAS. So this would be their entire commission run, and the black box is stuff that are not related to us. Everything else would be bond trades that were done by this branch and delivered to UAS clients. 111:10-21.
34	UASNM clients were people, clients, and/or prospective clients
	Judith Owens invested money through UASNM beginning in or about September 2008 after Malouf was recommended to her. FOF #217 (1872:5-6). Daniel Moriarty invested money through UASNM beginning in 1998 and began dealing with Malouf in 2008 or 2009. FOF #215 (1870:19-21).
	Additional Proposed Findings from Division's Pre-Hearing Brief
35	Malouf contends that his payments from Lamonde do not subject him to unregistered broker dealer liability because he complied with FINRA (then NASD) IM-2420-2.
	Ex. 579, Wolper Report at 9: Accordingly, if there was a 'bone [sic] fide contract' between Mr. Malouf and Mr. Lamonde for the sale of Mr. Malouf's Raymond James branch office and Mr. Malouf's former customers, whether written or oral (as IM-2420-2 makes no distinction between written and oral contracts), then it would not have been improper for Mr. Lamonde to pay commissions to Mr. Malouf even after Mr. Malouf left Raymond James.
36	Mr. Malouf's reliance on IM-24420-2 is based on the written Purchase of Practice Agreement, not any oral contract.
	Malouf contends that he and Lamonde signed a written Purchase of Practice Agreement (Ex. 57) in the two weeks prior to January 2, 2008. FOF #164 (1852:2-3).
37	IM-2420-2 provides that "payment of compensation to registered representatives after they cease to be employed by a member of the Association – or payment to their widows or other beneficiaries – will not be deemed in violation of Association Rules provided

	bona fide contracts call for such payment," provided also that the unregistered representative does not solicit new business or open new accounts.
	Ex. 234 at 4: However, payment of compensation to registered representatives after they cease to be employed by a member of the Association – or payment to their widows or other beneficiaries – will not be deemed in violation of Association Rules provided bona fide contracts call for such payment. .... An arrangement for the payment of continuing commissions shall not under any circumstances be deemed to permit the solicitation of new business or the opening of new accounts by persons who are not registered. Any arrangement for payment of continuing commissions must, of course, conform with any applicable laws or regulations. This policy recognizes the validity of contracts entered into in good faith between employers and employees at the time the employees are registered representatives of the employing members. Such a contract may vest in an employee the right to receive continuing compensation on business done in the event the employee retires and the right to designate such payments to his widow or other beneficiary.
38	Malouf did not annually certify to Raymond James that he adhered to the conditions of the Purchase of Practice Agreement.
	Q [Bliss] Was June 2010 the first time that you knew that Mr. Lamonde was making payments to Mr. Malouf? A [Bell] Yes. 654:10-12.

II. Proposed Additional Conclusions of Law

1	Section 15(a)(1) of the Exchange Act makes it "unlawful for any [unregistered or unaffiliated] broker or dealer ... to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security ...) unless such broker or dealer is registered with the Commission in accordance with Section 15(b) of the Exchange Act.
	15 U.S.C. § 78o(a)(1).
2	Scienter is not required for a violation of Section 15 of the Exchange Act.
	SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).
3	Section 15C(a)(1)(A) of the Exchange Act makes it unlawful for any unregistered broker to effect any transaction in any government security and does not require scienter.
	15 U.S.C. § 78oC(a)(1)(A).
4	Section 3(a)(4) of the Exchange Act defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others."
	15 U.S.C. § 78c(a)(4)
5	The phrase "engaged in the business" connotes "a certain regularity of participation in securities transactions at key points in the chain of distribution."
	Massachusetts Fin. Serv., Inc. v. Sec. Investor Prot. Corp., 411 F. Supp. 411, 415 (D. Mass. 1976); *see also SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011).
6	Broker activity can be evidenced by such things as regular participation in securities transactions, receiving transaction-based compensation or commissions (as opposed to salary), a history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors.
	See, e.g., SEC v. George, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998).
7	Transaction based compensation is not a prerequisite to finding liability for acting as an unregistered broker-dealer.
	Bandimere, ID Release No. 507, 2013 WL 5553898, at *52, 82 (October 8, 2013) (finding that "[e]ven assuming [Respondent] did not receive transaction based compensation, the evidence that he acted as an unregistered broker is overwhelming").

8	Sections 206(1) and 206(2) of the Advisers Act prohibit an investment adviser from using instruments of interstate commerce to employ any device, scheme, or artifice to defraud, or to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Section 206(1) requires scienter; Section 206(2) does not.
	Steadman v. SEC, 603 F.2d 1126, 1134-35 (5th Cir. 1979).
9	Section 206 establishes a federal fiduciary standard for investment advisers, including the obligations to exercise the utmost good faith in dealing with their clients, to disclose to their clients all material facts, and to employ reasonable care to avoid misleading their clients.
	SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). "Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment adviser to be, to establish all the elements required in a suit against a party to an arm's-length transaction. Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading his clients."
10	Investment advisers have a duty "to eliminate, or at least to expose, all conflicts of interest which might incline [them] – consciously or unconsciously – to render advice which was not disinterested."
	SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-2 (1963). "The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline as investment adviser— consciously or unconsciously—to render advice which was not disinterested."
11	Information is "material" if there is a substantial likelihood that a reasonable person would consider the information important.
	Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).
12	The existence of a conflict of interest is a material fact which an investment adviser, as a fiduciary, must disclose to a client.
	Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003). "It is indisputable that potential conflicts of interest are "material" facts with respect to clients and the Commission."

13	Failure to seek best execution or to conduct best execution review constitutes a violation of Section 206(2) and 207 of the Advisers Act.
	Jamison, Eaton & Wood, Inc., Rel. No. IA-2129, 2003 WL 21099127, at *1 (May 15, 2003) (settled). "By failing to disclose its potential conflict of interest and other brokerage options, and by failing to seek to obtain best execution, Jamison violated Sections 206(2) and 207 of the Advisers Act."
14	An adviser's failure to seek best execution for clients can be established by showing that clients paid higher commissions with no apparent corresponding benefit.
	Jamison, Eaton & Wood, Inc., Rel. No. IA-2129, 2003 WL 21099127, at *6 (May 15, 2003) (settled). "Taking into consideration the higher commissions paid by some of Jamison's clients, and the lack of any apparent corresponding benefit such as better trading prices, Jamison failed to seek to obtain best execution for these clients."
15	Section 17(a) of the Securities Act prohibits employing a fraudulent scheme, obtaining money or property through material misrepresentations or omissions, or engaging in a course of conduct that acts as a fraud or deceit in the offer or sale of a security.
	15 U.S.C. § 77q(a).
16	Scienter need not be demonstrated to establish a violation of Section 17(a)(2) or Section 17(a)(3) of the Securities Act.
	Aaron v. SEC, 446 U.S. 680, 702 (1980).
17	Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit any person from employing a fraudulent scheme, making misstatements or omissions of material fact, or engaging in any practice or course of business that operates as a fraud upon any person in connection with the purchase or sale of a security.
	15 U.S.C. § 78j(b) and 17 CFR § 240.10b-5.
18	"To be liable for a scheme to defraud, a defendant must have 'committed a manipulative or deceptive act in furtherance of the scheme.'"
	SEC v. Fraser, 2010 U.S. Dist. LEXIS 7038, at *23 (D. Ariz. Jan. 28, 2010), *quoting Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997).
19	The defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme."

	Simpson v. AOL Time Warner, Inc., 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds by Simpson v. Homestore.com*, 519 F.3d 1041, 1041-42 (9th Cir. 2008). "We hold that to be liable as a primary violator of § 10(b) for participation in a "scheme to defraud," the defendant must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme."
20	Section 207 of the Advisers Act makes it unlawful for any person willfully to make any untrue statement of a material fact or omit to state any material fact required to be stated in a report filed with the Commission, including Form ADV.
	Vernazza v. SEC, 327 F.3d 851, 858 (9th Cir. 2003). "Advisers Act § 207 criminalizes willfully making false statements of material fact, or material omissions, in applications or reports to the Commission, such as a Form ADV."
21	The materiality standard for Section 207 claims is essentially the same as for violations of Section 206.
	Vernazza v. SEC, 327 F.3d 851, 858 (9th Cir. 2003). "Although scienter is required for some of these violations, the element of a materially false statement is satisfied by essentially the same conduct for all of the statutes in question."
22	Section 207 does not require a showing of scienter.
	Jamison, Release No. IA-2129, 2003 WL 21099127, at *6.
23	An investment adviser can violate Section 207 by failing to adequately disclose the factors considered in selecting a broker or by misstating that it would seek to obtain best execution.
	Jamison, Release No. IA-2129, 2003 WL 21099127, at *6. "Eventually, as new business practices evolved, Jamison failed to disclose that other brokerage arrangements (which may have provided better execution) were available, and Jamison thereby failed to seek to obtain best execution for these clients. By failing to seek to obtain best execution, Jamison willfully violated Section 206(2) of the Advisers Act (see fn. 4)."
24	Advisers Act Section 206(4) prohibits a registered investment adviser from engaging "in any act, practice, or course of business which is fraudulent, deceptive, or manipulative[,]" including those defined by the Commission.

	15 U.S.C. § 80b-6(4).
25	Neither scienter nor proof of client harm is required under Adviser's Act Section 206(4).
	SEC v. C.R. Richmond & Co., 565 F.2d 1101, 1105 (9th Cir. 1977), citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963). "The court there also held that the Commission does not have to show, in injunctive actions, that an investment adviser's activities injured his clients or were intended to harm clients or prospective clients."
26	Rule 206(4)-1(a)(5) prohibits a registered investment adviser from publishing, circulating, or distributing advertisements containing untrue statements of material facts, or that are otherwise false or misleading.
	17 CFR § 206(4)-1(a)(5).
27	A website can be considered an advertisement for purposes of violations of Rule 206 and Section 17(a).
	Fields, Release No. 474, 2012 WL 6042354, at *12 (Dec. 5, 2012). "Fields's misrepresentations on Platinum's website violated Securities Act Section 17(a), and his misrepresentations on the AFA website and in AFA's Form ADV and brochure violated Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-1(a)(5)."
28	Negligence is sufficient to establish liability for causing a violation when a person is alleged to have caused a primary violation that does not require scienter.
	KPMG Peat Marwick, Release No. 34-43862, 2001 WL 34138819 (Jan. 19, 2001), *aff'd, KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002). "ORDERED that KPMG LLP (formerly known as KPMG Peat Marwick LLP) cease and desist from committing any violation or future violation of Rule 2-02(b) of Regulation S-X, or from being a cause of any violation or future violation of Section 13(a) of the Securities Exchange Act of 1934 or Rule 13a-1 thereunder due to an act or omission KPMG LLP knows or should know will contribute to such violation, by having any transactions, interests, or relationships that would impair its independence under Rule 2-01 of Rugulation (sic) S-X or under Generally Accepted Auditing Standards (GAAS)."
29	"While it is unnecessary to show that an aider and abettor knew he was participating in or contributing to a securities law violation, there must be sufficient evidence to establish 'conscious involvement in impropriety."
	SEC v. Slocum, Gordon & Co., 334 F. Supp. 2d at 184. Respondent's Pre-Hearing Brief at 16.

30	"This involvement may be demonstrated by proof that the aider or abettor 'had general awareness that his role was part of an overall activity that [was] improper."
	SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974); Respondent's Pre-Hearing Brief at 16.
31	In order to establish the element of willfulness, the Division must show that Malouf merely intended to engage in the action alleged regardless of his knowledge that the act constituted a violation of the securities law.
	SEC v. Moran, 922 F. Supp. 867, 900 (S.D.N.Y. 1996); Respondent's Pre-Hearing Brief at 15.
32	To establish its claim for aiding and abetting a violation of §§206(1), 206(2), and 207, the Division must show: (1) a primary or independent securities law violation; (2) the aider and abettor's knowing and substantial assistance in the primary violation; and (3) awareness or knowledge by the aider and abettor that his role was part of an activity that was improper.
	SEC v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 184 (D.R.I. 2004). Respondent's Pre-Hearing Brief at 18.
33	The element of substantial assistance is met when, based upon all the circumstances surrounding the conduct in question, a defendant's actions are a 'substantial causal factor' in bringing about the primary violation.
	SEC v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2007); Respondent's Pre-Hearing Brief at 18.
34	"Reckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."
	Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978); Respondent's Pre-Hearing Brief at 19.
35	To establish a defense of reliance on others Malouf must show that he did not withhold any material information from the professional on whom he purports to rely.
	Provenz v. Miller, 102 F.3d 1478, 1491 (9th Cir. 1996), *citing C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988). "If it is true that defendants withheld material information from their accountants, defendants will not be able to rely on their accountant's advice as proof of good faith. *See*

	C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1436 (10th Cir.1988) (stating that full disclosure to professional must be established to support the defense of reliance on expert opinion)."
36	While the Hearing Officer must limit disgorgement to "ill-gotten gains," he has broad discretion and may consider all of a defendant's wrongful conduct in violation of the securities laws in ordering disgorgement and calculating the amount to be disgorged.
	SEC v. Huff, 758 F. Supp. 2d 1288, 1358 (S.D. Fla. 2010). "While the Court must limit any disgorgement remedy to "ill-gotten gain," the rationale behind the equitable remedy of disgorgement allows for broad consideration of all of a defendant's wrongful conduct in connection with the violation of the securities laws. In this regard, district courts enjoy discretion extending not only to determining whether to order disgorgement but also to calculating any amount to be ordered disgorged."
37	The measure of disgorgement need not be tied to losses suffered by defrauded investors.
	SEC v. Huff, 758 F. Supp. 2d 1288, 1358 (S.D. Fla. 2010). "The measure of disgorgement need not be tied, for example, to losses suffered by defrauded investors."

Respectfully submitted this 18th day of December, 2014.

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