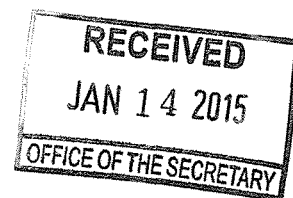


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of
DENNIS J. MALOUF

**DIVISION OF ENFORCEMENT'S POST-
HEARING BRIEF**

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Federal Agency bond trades by directing his client bond trades to RJFS without obtaining competing bids from other broker-dealers. Malouf admitted at the hearing that “[o]ne of the reasons Malouf chose to trade through Raymond James was because then he got paid.” FOF #176. As a result, UASNM’s clients paid higher markups and markdowns than could reasonably have been obtained for those trades.

In May 2011, the minority owners of UASNM voted to terminate Malouf based upon various misconduct.² During the ensuing litigation between UASNM and Malouf, UASNM discovered the circumstances behind Malouf’s receipt of significant ongoing payments from Lamonde that were generated in large part through Malouf’s bond trading. In September 2011, UASNM and Malouf settled the litigation. Malouf was paid \$1.1 million for his interest in UASNM. \$350,000 was paid directly and \$850,000 was held back in an account in order to compensate UASNM clients potentially harmed by Malouf’s misconduct and to pay any regulatory fines. UASNM then self-reported to the Commission in October 2011. Following an investigation that confirmed the conduct set forth above, the Commission instituted this proceeding on June 9, 2014. A hearing was held in Albuquerque, New Mexico from November 17, 2014 to November 25, 2014, before the Honorable Judge Patil. On January 5, 2014, the Division filed 393 agreed to findings of fact and 28 agreed to conclusions of law (“COL”), which Judge Patil incorporated into his January 8, 2015 Order on Stipulations and Transcript Corrections. The Division is also filing additional proposed findings of fact (“PFOF”) and conclusions of law (“PCOL”).

² UASNM’s complaint’s allegations included that Malouf: represented on UASNM ADV forms that he had a college degree when he did not; allowed excessive commissions to be charged for bond sales; opposed UASNM efforts to make full disclosure through its compliance audit firm; misused his UASNM credit card and funds for over \$400,000; and engaged in an affair with a subordinate. *See Ex. 34.*

II. RESPONDENT AND RELATED PARTIES

A. **Respondent, Dennis J. Malouf**, age 55, was the chief executive officer, president, and majority owner of UASNM from September 2004 until May 13, 2011, when he was terminated. FOF #1, 14. He is currently the sole owner and president of New Mexico Wealth Management, LLC, an investment adviser registered with the State of New Mexico with approximately \$26 million in assets under management. FOF #194. Malouf was a registered representative associated with RJFS from February 1999 through December 2007. *Id.*

B. Related Parties

1. **UASNM, Inc.** is a New Mexico corporation located in Albuquerque, New Mexico that registered as an investment adviser with the Commission on September 4, 2004. FOF #2. UASNM, also known as “Universal Advisory Services,” provides discretionary advisory services primarily to individuals, charitable organizations, and employee benefit plans. UASNM’s most recent Form ADV, dated March 31, 2014, reported approximately \$275 million in assets under management. *Id.*

2. **Raymond James Financial Services, Inc.** is a Florida corporation formed in 1999. FOF #15. RJFS, through a predecessor, has been registered with the Commission as a broker-dealer since 1974, and is a member of FINRA. *Id.* RJFS was also registered with the Commission as an investment adviser until December 2009. *Id.*

3. **Maurice Lamonde** was a registered representative associated with RJFS from March 2000 until August 2011, and, from January 2008 through August 2011, he was a branch manager of an Albuquerque office of RJFS. *Id.* He died unexpectedly on April 4, 2014 at age 65. *Id.*

4. **Joseph Kopczynski**, age 65, is currently the chairman of UASNM's board of directors, and its CCO. FOF #16. He started the UASNM business, and sold the firm to Malouf (his then son-in-law) and Kirk Hudson in September 2004, but maintained a 1% ownership interest. *Id.* Kopczynski was UASNM's chief compliance officer ("CCO") from 2004 to 2010, relinquished that position to Malouf in December 2010, and resumed the CCO position in June 2011 after Malouf was terminated. *Id.*

5. **Kirk Hudson**, age 52, held a minority ownership interest in UASNM from 2008-2011 and is currently UASNM's Chief Financial Officer and Chief Investment Officer. FOF #17.

III. FACTS

A. Background

1. **The relationship between investment adviser UASNM and a branch office of broker-dealer RJFS**

In 2004, Malouf purchased a majority interest in UASNM from Kopczynski. FOF #18. At that time, Malouf also owned a branch office affiliated with RJFS and was a registered representative for RJFS. *Id.* UASNM and the RJFS branch owned by Malouf were located in the same physical office space, with the RJFS branch renting a few cubicles in one section of the office. *Id.*

In 2007, RJFS became concerned about potential conflicts and supervision risks arising from Malouf's work at UASNM, and asked him to choose between associating with UASNM or RJFS. FOF #19. Malouf decided to continue his advisory work at UASNM and to stop working as a registered representative for RJFS. *Id.* As a result, at the end of 2007 Malouf terminated his registration with RJFS and he transferred his RJFS customers either to UASNM or to the new owner of the RJFS branch, Lamonde. *Id.* Lamonde continued to operate the RJFS office within

UASNM's office space until June 2011, when UASNM required Lamonde to find a new office location as a result of his involvement in Malouf's misconduct. *Id.*

B. Lamonde Secretly Paid Malouf Substantially All of the Commissions Earned on UASNM Client Bond Trades Executed Through RJFS.

1. The secret oral agreement between Malouf and Lamonde

Lamonde admitted during testimony that at the end of 2007, he entered into a secret oral agreement to pay Malouf substantially all of his commissions from UASNM bond trades for at least three years. Proposed Finding of Fact ("PFOF") ## 64-73. Specifically, Lamonde testified that he "passed along all or almost all of the commissions that Mr. Malouf made from RJFS bond trading on behalf of UASNM back to Malouf." PFOF #6. Lamonde's payments to Malouf are generally consistent with the oral agreement he described. FOF #20, Exh. 203. From January 2008 through May 2011, Lamonde earned \$1,074,454 in commissions from RJFS on UASNM bond trades. FOF #20. Lamonde paid nearly all of that, \$1,068,084, to Malouf. *Id.*

Lamonde has testified that Malouf would often demand payment from him shortly after executing a bond trade with him. FOF #21. Others also recall Malouf demanding payments from Lamonde. *Id.* That conduct, along with Lamonde's payment of nearly all commissions on UASNM trades to Malouf, is inconsistent with Malouf's claim that he was paid pursuant to a purchase of practice agreement he and Lamonde signed in early 2008 calling for monthly payments of 40% of branch revenue. PFOF #60.

2. Malouf directed UASNM's bond trades to Lamonde and RJFS in order to receive payments under their secret oral agreement.

UASNM had discretionary authority over client accounts, and therefore determined to make bond trades on behalf of its clients and selected the broker-dealer for trade execution. FOF #22. Malouf was primarily the person at UASNM who identified which bonds should be

purchased for UASNM customers and would usually select the broker dealer through which bond trades were executed. FOF #22. Various witnesses estimated that Malouf placed between 60% and 95% of UASNM's bond trades from 2008 to 2011. FOF #76. And while others at UASNM, including Hudson and Keller made occasional bond trades, they often sought Malouf's assistance in the trades they made. FOF ##172, 316.

RJFS' Trade Blotter (Ex. 29) shows that from January 2008 to May 2011, UASNM traded \$140,819,708.15 in bonds through RJFS. FOF #23. UASNM's trade blotter (Ex. 30) shows that between January 2008 and May 2011, it traded only \$16,789,390.30 in bonds through other brokers. PFOF #44. Thus 89% of UASNM's bond trades were made through RJFS during the relevant period. *Id.* Moreover, Kirk Hudson studied the bond trades done through brokers other than Raymond James and determined that those trades were done primarily by Matt Keller and Austin McDaniel, and not by Malouf. FOF #317. Thus, Malouf made the vast majority of UASNM bond trades through RJFS. PFOF #42; FOF #173.

Malouf testified that from 2008 to 2011, he did not solicit bids from other broker-dealers, but selected Lamonde and RJFS to execute his UASNM client bond transactions. PFOF #39; FOF #38. He used RJFS almost exclusively for his bond trades because then Lamonde was paid a commission and had money to pay Malouf. FOF ## 173, 175. Malouf chose to trade through RJFS because then he got paid. FOF #176.

3. Lamonde and Malouf attempted to conceal their arrangement by belatedly executing a sham Purchase of Practice Agreement.

Malouf disputes the existence of the oral agreement with Lamonde, and instead claims that he entered into a written "Purchase of Practice Agreement" ("PPA") with Lamonde at the end of 2007 whereby he sold his branch and certain brokerage customer accounts to Lamonde. FOF #26. The PPA stated in relevant part that Malouf was transferring to Lamonde the "exclusive right to

provide investment advice and services ... to all of Seller's accounts." *Id.* The PPA further purported to attach "Exhibit A," which was to "contain the names of all of his/her existing clients." *Id.* Under the PPA, "[i]n consideration of the Seller's assignment of the assigned accounts, Buyer agrees to pay Seller 40% of all commissions and securities related fees received by Buyer during the production period beginning January 2, 2008, through and including December 31, 2012." *Id.*

Malouf, however, was unable to produce a copy of the Purchaser of Practice Agreement from 2008. PFOF ##60, 61. Nor can he produce the critical Exhibit A to the PPA from any date that purports to identify the clients whose portfolios would provide the basis for continuing payments to Malouf. PFOF #65. Absent Exhibit A, the PPA provides no basis for Lamonde's payments to Malouf. In fact, there is no contract.

Malouf's counsel pointed to a January 2008 e-mail from Raymond James that purported to attach spreadsheets of accounts to be moved to Malouf's IAD (Investment Advisor Division) account and others to be moved to Lamonde's new account (Ex. 515). While this document and Kirk Bell's testimony indicate that certain of Malouf's accounts were in fact transferred in early 2008, it does not provide any evidence that a written Purchase of Practice existed at that time, and Bell testified that the account transfer could have occurred without Lamonde or Malouf providing a list of accounts. PFOF #115.

Malouf relies upon a PPA that was signed and notarized on June 11, 2010, two and a half years after he sold his branch to Lamonde. FOF #227. That written agreement surfaced only after RJFS had made repeated requests to Lamonde for a copy of the agreement in connection with its oversight of the branch. FOF #225. Emails throughout 2009 evidence Lamonde repeatedly brushing off requests by RJFS for a copy of a sales agreement with Malouf, evidencing that the agreement did not exist at the time. *Id.* In a May 15, 2009 e-mail from Lamonde to his supervisor

at RJFS, Kirk Bell, Lamonde wrote in response to a request for the agreement: "I am working on the purchase agreement and will have Sarah take a look at it to make sure it's okay." *Id.* On June 4, 2009, Lamonde wrote to Bell "I am still working on the agreement and will send it as soon as we finish it." *Id.* Bell testified that he understood that had been no sale or agreement in 2009 when he was asking for a purchase of practice agreement. *Id.* It was not until June 10, 2010, following Raymond James' discovery of Lamonde's payments to Malouf, that a written PPA was finally produced. FOF #227.

Regardless of when Malouf and Lamonde executed the PPA, their arrangement *never* followed its terms, further evidencing that it did not exist until 2010 and was a sham agreement. Under the terms of the PPA, Lamonde would pay Malouf 40% of all commissions received on the assigned accounts during the production period of Jan 2, 2008 through 2012. FOF #26. However, Lamonde's actual payments to Malouf from January 2008 through April 2011 represented approximately 73% of the total branch revenue. PFOF #67. There is no way to determine what percentage of revenue it represented for customers Malouf transferred to Lamonde because Malouf cannot produce Exhibit A and thus cannot identify which accounts were assigned, but clearly it would be an even higher percentage of revenue from only his customers. *See* PFOF #65. Lamonde admitted in testimony that he and Malouf did not follow the terms of the PPA and that he paid Malouf more than the terms of the PPA required. PFOF #68. In fact, the 73% of branch revenue that Lamonde paid Malouf is nearly double the 40% called for by the PPA. Lamonde also testified that Malouf repeatedly demanded immediate cash payments for the entire commission that had been earned from particular UASNM bond trades (which was contrary to the terms of the agreement that provided for monthly payments) forcing him to seek at least 13 cash advances from

RJFS to pay Malouf. PFOF ##69, 70, FOF #214. Lamonde ended up making payments to Malouf up to four times a month. FOF #323.

Malouf argues that Lamonde was voluntarily pre-paying what he owed for the branch. But this defies logic given that Lamonde was borrowing against a life insurance policy, taking money from his father-in-law's bank account and running up new credit card debt without telling his wife in order to meet Malouf's demands for payment. PFOF #71. He was in no position to be voluntarily pre-paying tens of thousands of dollars to Malouf on a monthly basis. *Id.*

This failure to follow the terms of the PPA is further evidence that the written agreement was a sham. Regardless, however, the PPA provides no defense to Malouf because it is undisputed that he was paid transaction-based compensation from commissions generated by his trading and those payments were not disclosed to UASNM clients. PFOF ##17, 72-75, FOF ##8, 307.

4. Malouf failed to disclose his receipt of commissions from Lamonde and the resulting conflicts of interest in directing client bond trades to RJFS.

a. UASNM's Forms ADV

Malouf admits that UASNM's Forms ADV filed from February 2008 through March 2011 failed to disclose his arrangement with Lamonde and the resulting conflicts of interest. FOF ## 8, 178, 307. Certain relevant disclosures in UASNM's Forms ADV Part II and Part 2A include:

- Item 12 of UASNM's Form ADV Part II, dated April 12, 2010, affirmatively represented that "employees of UASNM are not registered representatives of Schwab, RJFS or Fidelity, and do not receive any commissions or fees from recommending these services." FOF #10. Given Malouf's receipt of transaction based compensation from Lamonde for executing bond trades through RJFS, this statement was misleading. PFOF #28.
- Item 12 of UASNM's Forms ADV from February 2008 through March 2011 all made disclosures relating to its best execution process by suggesting that numerous factors were being considered in selecting a broker and that the broker chosen was not based "upon any arrangement between the recommended broker and UAS[NM]." *See* FOF #9. These disclosures were materially misleading because, in reality, Malouf was using RJFS to execute the overwhelming majority of UASNM's bond trades, thereby profiting from his secret agreement with Lamonde. PFOF ## 27, 29.

- Items 8 and 9 of UASNM Forms ADV Part II, dated February 4, 2008, August 20, 2008, and December 1, 2008, disclosed that *employee(s)* of UASNM were or may be registered representatives of RJFS and could receive commissions. FOF #29 (emphasis added). However, these disclosures related to UASNM advisory representative(s) other than Malouf, who was no longer a registered representative of RJFS. PFOF ##96, 97. UASNM made no disclosure that Malouf had sold his RJFS branch to Lamonde, or that Malouf was receiving continuing payments of any kind from Lamonde. FOF #8. Therefore, UASNM clients were not advised of the conflict of interest in Malouf executing their bond trades through Lamonde and RJFS. PFOF #26.
- Items 8 and 9 of UASNM's Forms ADV Part II, dated October 1, 2009, January 1, 2010, and April 12, 2010, removed the prior disclosure regarding the UASNM employee's status as a registered representative of RJFS but were otherwise the same as the prior versions, *i.e.*, made no disclosures regarding Malouf's arrangement with Lamonde. FOF #30.
- Items 10 and 12 of UASNM's Form ADV Part 2A, dated March 2011, finally disclosed that Malouf had sold his interest in a RJFS branch in exchange for a series of payments, and that an incentive may exist for UASNM to utilize RJFS to generate revenue that may be utilized make payments to Malouf. FOF #9. However, even this disclosure was inadequate in that it generally referenced revenue generation for RJFS, rather than Malouf's receipt of substantially all of the *commissions* from UASNM's client bond trading. PFOF #96.

b. Malouf concealed his arrangement with Lamonde from others at UASNM.

Malouf, Kopczynski, Hudson, and an outside compliance consultant ("ACA") each were involved to varying degrees in preparing UASNM's Forms ADV from 2008 through May 2011. FOF ## 33, 35, 58. Malouf focused on the disclosures relating to himself and RJFS. FOF #33; PFOF #99. Malouf, as CEO, president, and majority shareholder of UASNM had final and ultimate responsibility for UASNM's Form ADVs between 2006 and the end of 2010. PFOF #98. Moreover, as the architect of the arrangement with Lamonde and recipient of the payments, he bore primary responsibility to either prepare UASNM's disclosures regarding his conflict, or to ensure that others at the firm had sufficient knowledge to prepare such disclosures. PFOF #99. He did neither.

Malouf attempts to deflect responsibility by arguing that he delegated the Form ADV preparation and review work to Kopczynski, Hudson, and ACA, and that each was fully aware of his arrangement with Lamonde. However, Kopczynski, Hudson, and ACA each deny this. PFOF ##79, 82, 83. So does Matt Keller. PFOF #79. And Paula Calhoun, the UASNM employee who kept Malouf's books, testified that Malouf instructed her over and over never to tell others at UASNM about the work she was doing for him, and threatened to fire her if she did. PFOF ##80, 81.

In 2008, Kopczynski and Hudson understood that Malouf had sold his RJFS branch to Lamonde, but they were not aware of the specific terms of that sale. FOF #34. Hudson learned in 2008 or 2009 that Malouf was receiving ongoing payments from Lamonde, but he assumed that such payments were being made in connection with some type of financing or pre-arranged installment payment schedule. FOF #34. Hudson and Kopczynski testified that they did not suspect that Malouf was receiving *ongoing transaction-based compensation* from Lamonde until sometime in late 2010. PFOF ##79, 87. Hudson became concerned about Malouf's receipt of payments in the fall of 2010 when he learned that Malouf had questioned RJFS' decision to write down the commission charged on a \$3 million bond trade from 1% to 0.5%.³ PFOF #87. Hudson thought it was odd that Malouf would be concerned about a commission write down because that money was Lamonde's. PFOF #88.

Finally, Michael Ciambor of ACA testified that Malouf concealed his receipt of ongoing payments from Lamonde until at least June 2010. PFOF ##82-84. Each year, ACA performed an on-site exam of UASNM, and used that process to recommend potential updates or changes to UASNM's Form ADV. FOF #35. Malouf told Ciambor during the June 2008 on site review that

³ A September 17, 2010 e-mail exchange between Kirk Bell and Eva Skibicki at RJFS reflects that a 1 point commission on a \$3.8 million bond trade was reduced to half a point per a discussion between Bell and Skibicki. PFOF #86.

Malouf had sold his Raymond branch. FOF #149. However, during the 2008 and 2009 on site reviews, Malouf did not tell Ciambor that he was receiving payments from Lamonde based on commissions earned on trades he made through Lamonde's Raymond James branch. PFOF #83. In those discussions, Malouf assured Ciambor that he had *no* ongoing relationship with RJFS, and that he had effectively severed all ties. PFOF #82. When asked if Malouf told him when he interviewed Malouf in June of 2009, that he had received in the last year and a half over 40 payments from Lamonde totaling over half a million dollars based upon trades that had been run through Malouf's former Raymond James branch, Ciambor testified "absolutely not," but he should have. FOF #136. It was not until the June 2010 examination that Malouf finally told Ciambor about the payments. FOF #151. Ciambor believes that the financial incentive for UASNM to route trades through RJ, that was ultimately made in March 2011, created a best execution issue and should have been disclosed in all Form ADVs ever since Malouf's arrangement with Lamonde began in 2008. FOF #153-154. Ciambor testified that based upon what he knows now he thinks Malouf lied to him. PFOF #84.

In summary, from January 2008 until at least June 2010, Malouf failed to disclose to UASNM clients, UASNM employees, and UASNM's outside compliance consultant the details of his arrangement with Lamonde to be paid for trades executed through Lamonde's Raymond James branch. PFOF #114.

5. Malouf caused UASNM to distribute advertisements that included misleading representations regarding the firm's independence.

Between 2008 and 2011, UASNM's website made the following statements:

- "Uncompromised Objectivity Through Independence: UAS[NM] is not owned by any 'product' company nor compensated by any commissions. This allows us to provide investment advice void of conflicts of interest. UAS[NM] may place trades through multiple sources, ensuring that best cost/service/execution mix is met for clients." FOF #12.

- “We do not accept commissions and we vigorously maintain our independence to ensure absolute objectivity drives our decisions in managing our clients’ portfolios.” *Id.*

Given Malouf’s agreement with Lamonde whereby Malouf was paid from commissions earned on UASNM client bond trades made through RJFS, these statements were materially false or misleading because UASNM’s purported independence was compromised by Malouf’s undisclosed incentives to place trades through RJFS. FOF ## 175-176. Moreover, Malouf had in fact accepted commissions/transaction based compensation through Lamonde. PFOF #17. Malouf caused UASNM’s deceptive advertising because he was the lead salesman for the firm, FOF #13; was familiar with the contents of the website in the 2008, 2009, and 2010 time frame, FOF #189; and testified that he had “probably read” statements on UASNM’s website in 2008 about UASNM being independent and not charging commissions, FOF #191. Moreover, as head of the firm’s marketing efforts and its CEO, Malouf had responsibility for ensuring that the information on the website was accurate. PFOF #106. Malouf admits that he was the “top dog” at UASNM and Kopczynski, his chief compliance officer, and Hudson worked for him. FOF #197.

6. Malouf acted as an unregistered broker-dealer.

Between 2008 and 2011, Malouf was not registered as a broker-dealer or associated with a registered broker-dealer. FOF #19. However, during that time, he was involved in virtually every aspect of effecting bond transactions on behalf of UASNM clients. FOF #37. Malouf solicited and met with clients and made investment recommendations. *Id.* He was a member of UASNM’s Investment Committee that evaluated clients’ investment options. *Id.* Pursuant to UASNM’s discretionary authority, Malouf made the majority of decisions regarding at least his specific clients’ bond transactions. *Id.* The evidence presented at the hearing showed that from 2008 to 2011, Malouf regularly participated in securities transactions at key points in the chain of

distribution. PFOF #2. And as described above, pursuant to his secret agreement with Lamonde, Malouf received substantially all of the transaction-based compensation generated by the UASNM client trades placed through RJFS. PFOF #17.

7. Malouf failed to seek best execution on bond trades.

In various communications from 2008 through 2011, Malouf told Hudson, Kopczynski, and ACA that he often obtained three competing bids in order to determine the best price prior to making bond trades. PFOF #37. Obtaining competing bids from more than one broker dealer is generally how an investment advisor seeks best execution. PFOF #35. An investment advisor's fiduciary duty of best execution is different than a broker-dealer's lesser duty. PFOF #36. Thus, Malouf cannot rely solely on a broker's trading platform, such as BondDesk, to fulfill his fiduciary duty of best execution. PFOF #33. Simply trading through a broker like Raymond James does not satisfy an investment advisor's fiduciary duty of best execution. PFOF #34. Alan Wolper's (Mr. Malouf's expert) opinion that an investment advisor need not shop amongst competing brokers should be afforded little to no weight because Mr. Wolper has no investment adviser expertise and conflates an investment advisor's fiduciary duty of best execution with a broker-dealer's lesser duty. PFOF #45.

Malouf admitted that he did not obtain multiple bids for bond trades. PFOF #39. Instead, between 2008 and 2011, Malouf simply used Lamonde's branch of RJFS to execute bond trades on behalf of UASNM clients. PFOF #42, 43. Malouf did not shop around for bids from competing brokers when executing bond trades on behalf of UASNM clients. PFOF #39. Malouf's own expert witness, Mr. Wolper, acknowledges that Malouf's practice was not to obtain competitive quotes when placing bond trades through Raymond James. PFOF #38. At the hearing, Malouf acknowledged that the reason he used RJFS was "because then he got paid." FOF #176. He

further admitted, in the state court lawsuit with UASNM, that had he shopped around among brokers for lower bids on bond sales he probably could have gotten a lower bid for his clients. PFOF #40. Moreover, evidence was presented at the hearing showing that another UASNM investment adviser, Matt Keller, in seeking bids for a bond trade was able, in at least one instance, to receive a better price from Schwab than the price RJFS offered. FOF #204. Because Malouf failed to obtain competing bids, Malouf violated his fiduciary duty to seek best execution. As a result, UASNM clients often paid higher commissions than were necessary on bond trades.

The Division's expert in this matter, Dr. Gary Gibbons, identified 81 trades in Treasury and Federal Agency bonds during the period in question. FOF #39. Dr. Gibbons excluded municipal bond trades to focus on only the most liquid and marketable bonds. *Id.* Malouf directed the majority (between 60% and 95%) of the bond trades identified by Dr. Gibbons. PFOF #48. The 81 bond trades represented \$95,954,806 in principal amount and generated \$833,798 in commissions which, on a dollar weighted average basis, is 87.28 basis points or 0.8728%. FOF #39. Dr. Gibbons utilized his experience and other sources to opine that Treasury and Agency bond trades such as these should have been subject to commissions in the range of 10 to 70 basis points. *Id.* By comparing what was actually paid in commissions to a range of reasonable commissions, Dr. Gibbons calculated that UASNM clients paid between \$442,106 and \$693,804 in excess commissions.⁴ PFOF #55.

Steven McGinnis is a consultant to Capital Forensics that was hired by UASNM in its lawsuit against Malouf to evaluate the evidence related to Malouf's bond trading and opine as to what would be the compliance response to UASNM. FOF #40. Dr. Gibbons' findings regarding

⁴ Dr. Gibbons has also opined that Malouf engaged in several repetitive short term bond trades that lost money for his clients. PFOF #58. This non-standard industry practice is further evidence of Malouf's scheme to put his interests ahead of his clients and the conflict of interest that led him to execute bond trades through RJFS even where this may not have been in the best interests of UASNM clients.

excessive commissions are consistent with the findings of Mr. McGinnis, who recommended that UASNMM self-report to the SEC based on the charging of excessive commissions. PFOF #56. Mr. McGinnis testified that in his 44 years in the securities industry, he has “never seen a million dollars conflict of interest like this before.” PFOF #57.

Malouf’s own designated expert, Jerry DeNigris, found that UASNMM customers’ bond trades incurred an average commission of 81.8 basis points, similar to Dr. Gibbons’ 87.28 basis points figure. FOF #41. Unlike Dr. Gibbons and Mr. McGinnis, however, Mr. DeNigris, who is admittedly not an expert in investment advisor regulations, offers no opinion as to what a reasonable commission would be on the bond trades at issue or whether UASNMM customers paid excessive commissions. FOF ## 247-248. Malouf offers no expert to opine that the commissions he charged were reasonable. FOF #248. He also offers no expert testimony on what a reasonable range of commissions would be on the trades analyzed by Dr. Gibbons. PFOF #54.

Malouf and Lamonde also both testified that they would never charge more than 100 basis points on a bond trade. FOF #43, 184. Malouf testified that for a \$1 million treasury bond an appropriate commission would be one percent, would drop to 0.5 percent above that then goes down from there. FOF #186. Yet, the evidence showed that bond trades made through RJFS were subject to commissions in excess of 1%. Malouf’s own proffered expert, DeNigris, includes multiple bond trades made through RJFS that exceeded this purported one percent limit in his Tab 1, including three trades with commissions of approximately 50% more than that amount. FOF #43. The evidence also showed many bond trades in excess of \$1 million that charged commissions in excess of the 0.5 percent Malouf testified was reasonable for trades of that size. PFOF #59.

IV. ARGUMENT

A. **Malouf Acted as an Unregistered Broker-Dealer and Violated Section 15(a)(1) and 15C(a)(1)(A) of the Exchange Act.**

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 security⁵ ...) unless such broker or dealer is registered with the Commission in accordance with Section 15(b) of the Exchange Act. Scienter is not required for a violation of this provision. Similarly, 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. COL #1.

1. **Malouf Acted as a Broker⁶**

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.”⁷ The phrase “engaged in the business” connotes “a certain regularity of participation in securities transactions at key points in the chain of distribution.” 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). COL #2.

⁵ *I.e.* a government security.

⁶ While an individual can be both an investment advisor and a broker, the two roles have different duties and assuming both roles can create conflicts of interest; this is why in 2007, RJFS asked Malouf to choose between his broker duties for them and his investment adviser duties for UASNM.

⁷ It is not disputed that the bond trades at issue were securities and that Treasury bonds are government securities. FOF ##281-283. The use of interstate commerce is also not disputed. FOF #285.

In this case, Malouf was engaged in significant aspects of the business of effecting transactions in securities, including the bond transactions described above, for the accounts of UASNM clients. *See, e.g.*, PFOF #2. Malouf’s regular business involved meeting with and actively soliciting clients and providing advice to investors as to the merits of securities. FOF #43-2. Malouf also received substantially all of the transaction-based compensation generated by UASNM client bond trades executed through RJFS. PFOF #6. Malouf has stipulated to most of this broker conduct. *See* FOF ## 284-291. He claims in his defense only that he did not receive “commissions” because the commissions on the bond trades he made were paid to him through Lamonde. But even if this defense is credited, which it should not be, the Division’s other evidence overwhelmingly demonstrated that Malouf acted as an unregistered broker. *See Bandimere*, Initial Decision Release No. 507, Administrative Proceeding File No. 3-15124 (October 8, 2013)⁸ at 53 (finding that “[e]ven assuming [Respondent] did not receive transaction based compensation, the evidence that he acted as an unregistered broker is overwhelming”). Transaction based compensation is not a prerequisite to finding liability for acting as an unregistered broker-dealer. PCOL #2.

While the Division can establish that Malouf acted as a broker without evidence that he received commissions, the evidence is strong that he did. Beyond the undisputed fact that Lamonde was paying Malouf from the commissions he received from RJFS is evidence that: (1) Lamonde referred to the payments he made to Malouf as “commissions” on his 2008, 2009, and 2010 tax returns (FOF #44); (2) Lamonde provided Malouf with IRS Form 1099s for the payments just as Malouf had provided his brokers with Form 1099s prior to selling the branch to Lamonde (FOF ##44, 48); (3) Malouf’s draft tax returns for 2008 and 2009 continued to state that Malouf

⁸ www.sec.gov/alj/aljdec/2013/id507ce.pdf

was operating as an “investment broker” for Raymond James (the same as his draft 2005-2007 tax returns) and continued to deduct a variety of expenses relating to Malouf’s brokerage business including car, telephone, dues, and legal expenses (FOF #47)⁹; (4) payments from Lamonde roughly equaled Lamonde’s payments from RJFS (FOF #7); and (5) Malouf repeatedly demanded to receive commission payments for particular trades (FOF ##196, 214, PFOF #69).

Malouf was not registered with the Commission as a broker or dealer between 2008 and 2011. FOF #5. Accordingly, he acted as an unregistered broker of securities and government securities. Malouf’s unregistered brokerage activities resulted in him receiving illegal transaction-based compensation from Lamonde of \$1,068,084. FOF #20.

2. Malouf’s purported written agreement with Lamonde is no safe haven.

Malouf claims to have entered into a written Purchase of Practice Agreement with Lamonde on January 2, 2008 that insulates him from Section 15 liability. FOF #16, PFOF ##78. But that is not the case. First, the evidence overwhelmingly refutes Malouf’s claim that he and Lamonde entered into a written agreement in 2008 under which Lamonde would pay Malouf 40% of commissions. PFOF #60. No other witness attested to the existence of such an agreement. PFOF #63. There is no contemporaneous documentary evidence in the files of Lamonde, Malouf, UASNM, RJFS, or ACA evidencing such an agreement. PFOF #60. No Exhibit A has ever been found. PFOF #65. And Lamonde himself, when confronted with e-mails and other evidence indicating that the agreement was not completed until June 2010, acknowledged that there was no signed agreement until that time. PFOF #64. The agreement that was finally produced, after repeated requests from RJFS, reflects that it was notarized in June of 2010, and was back-dated by Malouf and Lamonde. FOF #227.

⁹ The last tax return Malouf filed was 2004. FOF #181.

Moreover, even if the PPA that was finally produced in 2010 had been signed in 2008, as Malouf claims, and provided for Lamonde's payments to Malouf, it would not excuse Malouf's broker activities. Malouf appears to intend to rely on FINRA interpretive memo 2420-2, Continuing Commissions Policy ("IM-2420-2") to avoid unregistered broker-dealer liability. *See* Malouf's Pre-Hearing Brief at 17. 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. PCOL #5.¹⁰

In November 2008, the Securities Industry and Financial Markets Association ("SIFMA"), an organization representing hundreds of securities firms, banks, and asset managers, requested guidance re NASD IM-2420-2.¹¹ Ex. 235. In the no-action request, SIFMA "suggest[ed] that the term 'retiring representative' include not only those who retire from a member firm but also those who die unexpectedly, become totally disabled or leave the securities industry." *Id.* at 2 n.2.¹² SIFMA further sought to clarify guidance found in three prior letters and "describe the terms under which a Firm may pay compensation" to a retiring representative. *Id.* at 2-3. Those terms included, among other things:

- The Firm must establish parameters for a reasonable period of time, not to exceed five years, following retirement and a percentage scale regarding the sharing of commissions;

¹⁰ Respondent's expert Alan Wolper testified that an oral contract may be a bona fide contract under IM-2420-2. While the Division disputes this, it is irrelevant because Malouf testified that the agreement he is relying on with regard to his sale of the RJFS branch to Lamonde is the written agreement, Exhibit 97, and that a written agreement was required by RJFS. *See* FOF ##164, 222

¹¹ FINRA was then called NASD.

¹² Retiring Representative is a term that arose from the various requests for relief from liability for acting as an unregistered broker upon a registered representative ceasing to act as a broker dealer.

- The shared commissions be limited to commissions derived from accounts held for continuing customers of the retiring representative;
- The retiring representative must comply with applicable federal and state securities statutes and regulations;
- “The retiring representative must sever association with the Firm and with any ... investment adviser ... and is not permitted to be associated with any other broker, dealer, ... investment adviser or investment company, during the term of his or her agreement.”
- “The retiring representative must certify at least annually to the Firm that he/she has adhered to the requirements and conditions of the agreement.”

Id. at 4-5. No-action relief was granted and the SIFMA letter was published shortly after Malouf’s sale of his branch to Lamonde and was in effect as interpretive guidance of IM-2420-2 during the period of time Malouf was receiving ongoing payments from Lamonde. *Id.* at 1. Moreover, the 2008 SIFMA no-action letter explicitly references three prior no-action letters issued in 1993, 1994 and 1998 respectively, prior to Malouf’s sale of the RJFS branch, that contain requirements similar to those in the SIFMA letter, most notably the requirement that the retiring representative sever association with any broker, dealer, or investment adviser. PCOL #4.¹³ This requirement is designed to prevent precisely the type of self-dealing Malouf engaged in here. Malouf’s own expert, Alan Wolper, has acknowledged that letters such as these provide interpretive guidance of FINRA rules and are relied upon in the securities industry. PFOF #76.

Malouf cannot point to a bona fide contract that might help provide a safe haven under IM-2420-2. Even if he could, his failure to retire, failure to comply with the terms of that contract, failure to seek best execution, continued involvement in broker dealer activities, association with an investment advisor, and failure to annual certify to Raymond James that he adhered to the

¹³ FINRA Interpretive Letters prior to Malouf’s sale of the RJFS branch to Malouf also instructed selling brokers that they could not “solicit new business, open new accounts, or service the accounts generating the continuing commission payments.” PCOL #5.

conditions of the agreement, prevent his reliance on IM-2420-2. Nor could Malouf have reasonably believed that he could rely on IM-2420-2.

B. Malouf Violated Sections 206(1) and (2) of the Advisers Act.

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. COL 8. Scienter may be established by showing extreme recklessness. PCOL #6.

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. COL #9. Investment advisers have a duty “to eliminate, or at least expose, all conflicts of interest which might incline [them] – consciously or unconsciously – to render advice which was not disinterested.” COL #10. Information is “material” if there is a substantial likelihood that a reasonable person would consider the information important. COL #11. Specifically, the existence of a conflict of interest is a material fact which an investment adviser, as a fiduciary, must disclose to a client. COL #12.

Malouf was the CEO and President of UASNM, a registered investment advisor, and he was an advisory representative for UASNM. FOF #286. As such, he was an investment advisor as defined by Section 202(a)(11) of the Advisers Act (an investment adviser is 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 ...”) and was, accordingly, bound by Section 206.

1. Failure to Disclose Malouf's Secret Commission Arrangement with Lamonde.

As noted in Section III.B.4 and 5, above, Malouf failed to disclose his secret, transaction-based compensation agreement with Lamonde in both UASNM's website and its Forms ADV. The website's statements about independence, commissions, conflicts of interest, and best execution, and the lack of disclosure of Malouf's continuing relationship with the RJFS branch on UASNM's Forms ADV were materially misleading to UASNM clients. The April 2010 Form ADV affirmatively misrepresented that "employees of UASNM are not registered representatives of Schwab, RJFS or Fidelity, and do not receive any commissions or fees from recommending these services." FOF #10. All Forms ADV distributed between 2008 and 2011 were materially misleading by failing to disclose Malouf's arrangement with Lamonde.

As CEO and majority owner of UASNM and the sole person at UASNM aware of the scheme, Malouf had a responsibility to ensure that this potential conflict was disclosed in UASNM's Form ADV and on its website, but he failed to do so. *See* PFOF ##85, 98, 102-104. He did not tell anyone at UASNM or ACA the details his agreement to receive payments from Lamonde, and he admits that the RJFS disclosures (particularly those relating to him) were his responsibility. PFOF ##79-83, 99. Finally, the numerous actions described above demonstrate that Malouf acted with scienter by deliberately misleading others regarding his agreement with Lamonde and his best execution process for bond trades. *See e.g.* PFOF ##60-78.

2. Failure to Seek Best Execution

Malouf failed to seek best execution for UASNM's clients with regard to certain U.S. Treasury and Federal Agency bond trades between 2008 and 2011. One of an investment adviser's "basic duties" under Section 206 is to ensure that its clients' transactions are executed "in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the

circumstances.” PCOL #7. Failure to seek best execution or to conduct best execution review constitutes a violation of Section 206(2) and 207 of the Advisers Act. PCOL #8. 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. PCOL #9.

Between 2008 and 2011, as a matter of course, Malouf selected Lamonde’s branch of RJFS to execute bond trades on behalf of UASNM clients, and failed to obtain any competing bids. PFOF ##38, 39, 43. As a result, Malouf did not seek best execution for client bond trades. Malouf’s failure to obtain competing bids caused UASNM’s clients to pay markups/markdowns that were significantly higher than industry norms on dozens of U.S. Treasury and federal agency bond trades. PFOF ##53, 55. Dr. Gary Gibbons, the Division’s outside expert, has concluded that UASNM failed to seek best execution for its U.S. Treasury and federal agency bond trades, and has estimated that UASNM’s failures to seek best execution for bond trades caused UASNM clients to pay between \$442,106 and \$693,804 in excess commissions. PFOF #55.

Malouf’s claim that he *always* obtained best execution through RJFS is belied by his own testimony that if he had shopped around among brokers for lower bids on bond sales he probably could have gotten a lower bid for his clients. PFOF #40. It is also belied by his expert’s testimony that RJFS satisfying its duty of best execution does not mean that Malouf satisfied his. FOF #243. Finally, it is also belied by evidence that another UASNM advisor, Matthew Keller, was able to get lower bond prices from other brokers or have RJFS lower its price to meet prices offered by other brokers. FOF #204, PFOF #41, 41-2.

C. Malouf Violated Section 17(a)(1) and 17(a)(3) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(a) and 10b-5(c) thereunder.

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. COL #13. 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. PCOL #10. Scienter need not be demonstrated to establish a violation of Section 17(a)(2) or Section 17(a)(3) of the Securities Act. COL #14.

“To be liable for a scheme to defraud, a defendant must have ‘committed a manipulative or deceptive act in furtherance of the scheme.’” PCOL #11. 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.” PCOL #12.

Malouf is liable as a primary violator under a theory of scheme liability in connection with UASNM clients’ purchases and sales of various bonds. The scheme and fraudulent course of business was Malouf’s undisclosed secret agreement with Lamonde to receive substantially all the commissions from UASNM’s bond trading executed through Malouf’s former RJFS branch. UASNM’s clients would have considered the secret agreement material because it resulted in a significant conflict of interest impacting Malouf’s choice of a broker-dealer to execute client bond trades, and it caused UASNM clients (*i.e.*, the purchasers and sellers) to pay additional markups/markdowns in connection with their purchases and sales of those bonds. Malouf’s manipulative or deceptive acts in furtherance of the scheme included receipt of over 70 different commission payments from Lamonde between 2008 and 2011 totaling over a million dollars and misleading other members of UASNM management, as well as UASNM’s compliance consultant, about:

- The actual terms of his agreement with Lamonde;

- The legitimacy of the purported PPA and its execution date; and
- His purported three-bid process for bond trades.

D. Malouf Violated Section 207 of the Advisers Act.

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. PCOL #13. The materiality standard for Section 207 claims is essentially the same as for violations of Section 206. PCOL #14. Section 207 does not require a showing of scienter. PCOL #15. Item 12.B of Form ADV Part II (and Item 12.A of the new Part 2A) requires an investment adviser to disclose the factors considered in selecting brokers and determining the reasonableness of their commissions. PFOF #112. 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. PCOL #16.

In this case, as outlined above in Section III.B.4.a, the disclosures in UASNM's Forms ADV between 2008 and 2011, for which Malouf admits ultimate responsibility, were materially misleading or false with respect to broker selection and trading commissions.

E. UASNM Violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, and Malouf Aided and Abetted and Caused that Violation.

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. PCOL #17. Neither scienter nor proof of client harm is required. PCOL #18. 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. PCOL #19. A website can be considered an advertisement for purposes of the rule. PCOL #20. UASNM violated Rule 206(4)-1(a)(5) by

making statements about independence, commissions, conflicts of interest, and best execution which were false or misleading as a result of Malouf's secret commission agreement with Lamonde.

To establish aiding and abetting liability, the Commission must show: "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." PCOL #21. The Tenth Circuit applies a "recklessness" standard for aiding and abetting liability and the D.C. Circuit requires a showing that the aider and abettor acted with "extreme recklessness." PCOL #22.

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. PCOL #23.

Here, Malouf aided and abetted and caused UASNM's false and misleading website statements by failing to disclose his receipt of payments from Lamonde, as detailed above.

F. In the Alternative, Malouf Aided and Abetted and Caused UASNM's Violations of Sections 206(1), 206(2) and 207 of the Advisers Act.

In the alternative to primary liability for violating Sections 206(1), 206(2) and 207 of the Advisers Act, Malouf may also be found liable for aiding and abetting UASNM's violations of those sections. Malouf clearly had knowledge of the ADV disclosures, substantially assisted with their preparation, and was reckless and/or extremely reckless in not disclosing his secret agreement with Lamonde, as detailed above.

V. RELIEF REQUESTED AGAINST MALOUF

A. The Division's Claims Are Not Barred by any Statute of Limitations

Malouf's Pre-Hearing Brief asserted the five year statute of limitations set forth in 28 U.S.C.A. § 2462 as an affirmative defense. Malouf's Pre-Hearing Brief at 19. But the Division's

equitable and remedial claims are not barred by that or any other applicable statute of limitations. By its express wording, Section 2462 applies only where the SEC seeks relief that a court deems punitive – “any civil fine, penalty, or forfeiture, pecuniary or otherwise.” PCOL #30. Section 2462 does not limit the time for the SEC to file claims seeking equitable or remedial relief such as disgorgement, permanent injunctions, or officer and director bars. PCOL #31. With regard to the Division’s penalty claim, the statute of limitations is tolled by the continuing violation doctrine. That doctrine provides that an action is timely filed if it is filed within the required limitations period measured from the date the unlawful conduct stopped. PCOL #32. Malouf’s misconduct continued into May of 2011, when he received his last payment from Lamonde. This action was instituted three years and one month later, on June 9, 2014.

B. Cease and Desist Order

The Division requests findings of liability for the violations alleged and an order to cease and desist from violating Section 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), (2), and (4) and 207 of the Advisers Act. Section 21C of the Exchange Act provides that, if the Commission finds that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation to cease and desist from causing any future violation of the same provision, rule, or regulation. PCOL #33.

In deciding whether to issue a cease-and-desist order, the court must consider whether there is a reasonable likelihood of future securities violations. PCOL #34. In the ordinary course, a past violation suffices to establish a risk of future violations. PCOL #35. The showing necessary to demonstrate the likelihood of future violations is “significantly less than that required for an injunction.” PCOL #36.

In deciding whether to issue a cease-and-desist order, the court may consider several factors including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the respondent's opportunity to commit future violations, 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. PCOL #37. This inquiry is a flexible one and no one factor is dispositive. PCOL #38. It is undertaken not to determine whether there is a "reasonable likelihood" of future violations but to guide the court's discretion. PCOL #39.

Malouf's conduct was egregious. Steven McGinnis testified that in his 44 years in the securities industry, he has "never seen a million dollars conflict of interest like this before." PFOF #57. Malouf's conduct was also repetitive and long-lasting. Over three plus years, Malouf received 74 payments from Lamonde based upon UASNM trades executed through the Raymond James branch he sold to Lamonde, totaling \$1,068,084. FOF #20. Malouf also acted with a high degree of scienter. Despite acknowledging that his agreement with Lamonde was a serious conflict of interest that should have been disclosed, Malouf continues to claim that he did nothing wrong. He also continues to claim that he and Lamonde signed a written purchase of practice agreement in late 2007 or early 2008, despite all evidence to the contrary. Malouf has not recognized the wrongful nature of his conduct or made any assurances against future violations. In fact, he is currently operating as an investment advisor with over \$25 million in client funds under his management.

C. Collateral Bar

Section 15(b)(6) of the Exchange Act provides that the Commission shall censure, limit, suspend, or bar any associated person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds that such censure, limitation, suspension, or bar is in the public interest. PCOL #32.

In determining the public interest the Commission has considered the following factors: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the likelihood that the respondent's occupation will present opportunities for future violations, the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and, in conjunction with other factors, the extent to which the sanction will have a deterrent effect. PCOL #33. The “inquiry into the appropriate sanction to protect the public interest is a flexible one and no one factor is dispositive.” PCOL #34.

It is in the public interest to bar Malouf from association in the securities industry. Malouf's violations were egregious, his conduct was recurrent and recent, and he acted with a high degree of scienter – both in his violations and during this proceeding. He has not made any assurances against future conduct or acknowledged the wrongful nature of his conduct. His continued role as an investment adviser provides ripe opportunities for future violations.

D. Disgorgement and Prejudgment Interest

Section 21B(e) of the Exchange Act provides that, in any proceeding in which a penalty may be imposed, disgorgement may also be ordered. PCOL #35. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. PCOL #36. Because of the difficulty in many cases to separate “legal from illegal profit ... it is proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains.” PCOL #37.

Based on the violations and conduct set forth above, Respondent should be ordered to disgorge the \$1,068,084 in payments received from Lamonde pursuant to his undisclosed commission agreement. This amount may be offset by the \$506,083.74 already reimbursed to investors from Respondent’s settlement with UASNM.

He should also be ordered to pay prejudgment interest. Prejudgment interest represents the amount of money the wrongdoer made or could have made by investing monies wrongfully obtained. PCOL #38. An award of prejudgment interest is not a punitive award but rather is compensatory in nature. PCOL #39. While an award of prejudgment interest is within the Court’s discretion, courts have routinely ordered the payment of prejudgment interest where disgorgement is also awarded. PCOL #40. The prejudgment interest rate used by the Commission is the same rate used by the Internal Revenue Service to calculate underpayment penalties. PCOL #41. That rate is defined as the Federal short term rate (also known as the period rate) plus three percentage points (also known as the annual rate). PCOL #42. Courts have upheld the use of this rate in Commission enforcement actions. PCOL #43.

Prejudgment interest on \$1,068,084 from September 1, 2009 (the approximate mid-point of Malouf's misconduct) to March 31, 2015 (the approximate date the initial order will issue) is \$209,613.07. *See* Exhibit B.

E. Civil Penalties

Based on the willful violations and conduct set forth above, Respondent should be ordered to pay a civil penalty pursuant to Section 8A of the Securities Act, Section 21B of the Exchange Act, and/or Section 203(i) of the Advisers Act. The Remedies Act added provisions to the Securities Act, the Securities Exchange Act, the Investment Company Act, and the Investment Advisers Act, authorizing imposition of penalties in civil actions. *See* Securities Act Section 20(d), Securities Exchange Act Section 21(d)(3), Investment Company Act Section 42(e), and Investment Advisers Act Section 209(e). The Commission was also authorized to impose penalties in its administrative proceedings against regulated entities and their associated persons. *See* Securities Exchange Act Section 21B; Investment Company Act Section 9(d); and Investment Advisers Act Section 203(i).

In determining whether a civil penalty should be imposed against an individual, and the amount of the penalty, if one is appropriate, courts look to a number of factors, including:

- the egregiousness of the defendant's conduct;
- the degree of the defendant's scienter;
- whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons;
- whether the defendant's conduct was isolated or recurrent; and
- whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

PCOL #44.

Significant penalties are appropriate here because Malouf's conduct was egregious, his scienter level was high, he caused substantial losses, his conduct was recurrent, and he has demonstrated no remorse. He also made no showing of a financial situation that would necessitate a reduced penalty.

A three-tier penalty structure established by the Securities Act, Exchange Act, and Advisors Act provide that a third-tier penalty is appropriate where (A) the act or omission involved a deliberate or reckless disregard of a regulatory requirement; and (B) such act or omission directly or indirectly created a significant risk of substantial losses to other persons. PCOL #45. The maximum third-tier penalty for conduct occurring after March 3, 2009 and on or before March 5, 2013 is \$150,000 per violation. PCOL #46. For conduct occurring on or before March 3, 2009, the maximum penalty is \$130,000 per violation. *Id.*

Third-tier penalties are appropriate because Malouf deliberately disregarded his fiduciary duties and disclosure requirements and thereby created a significant risk of substantial losses to his advisory clients. Dr. Gibbons calculated those losses, at a minimum, as between \$442,106 and \$693,804. Each of the 74 commission payments Malouf received from Lamonde was a separate violation, as was each misleading disclosure on UASNM's Forms ADV and website.

F. Fair Fund

Finally, the Administrative Law Judge should order the creation of a Fair Fund for the benefit of defrauded investors pursuant to Section 308 of the Sarbanes-Oxley Act to provide for the distribution to affected investors of all disgorgement, prejudgment interest, and civil penalty payments.

V. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Administrative Law Judge: (a) conclude that the allegations set forth in the Order Instituting Proceedings are true; (b) order the relief requested above.

Respectfully submitted this 12th day of January, 2015.



Stephen C. McKenna
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[REDACTED]
[REDACTED]
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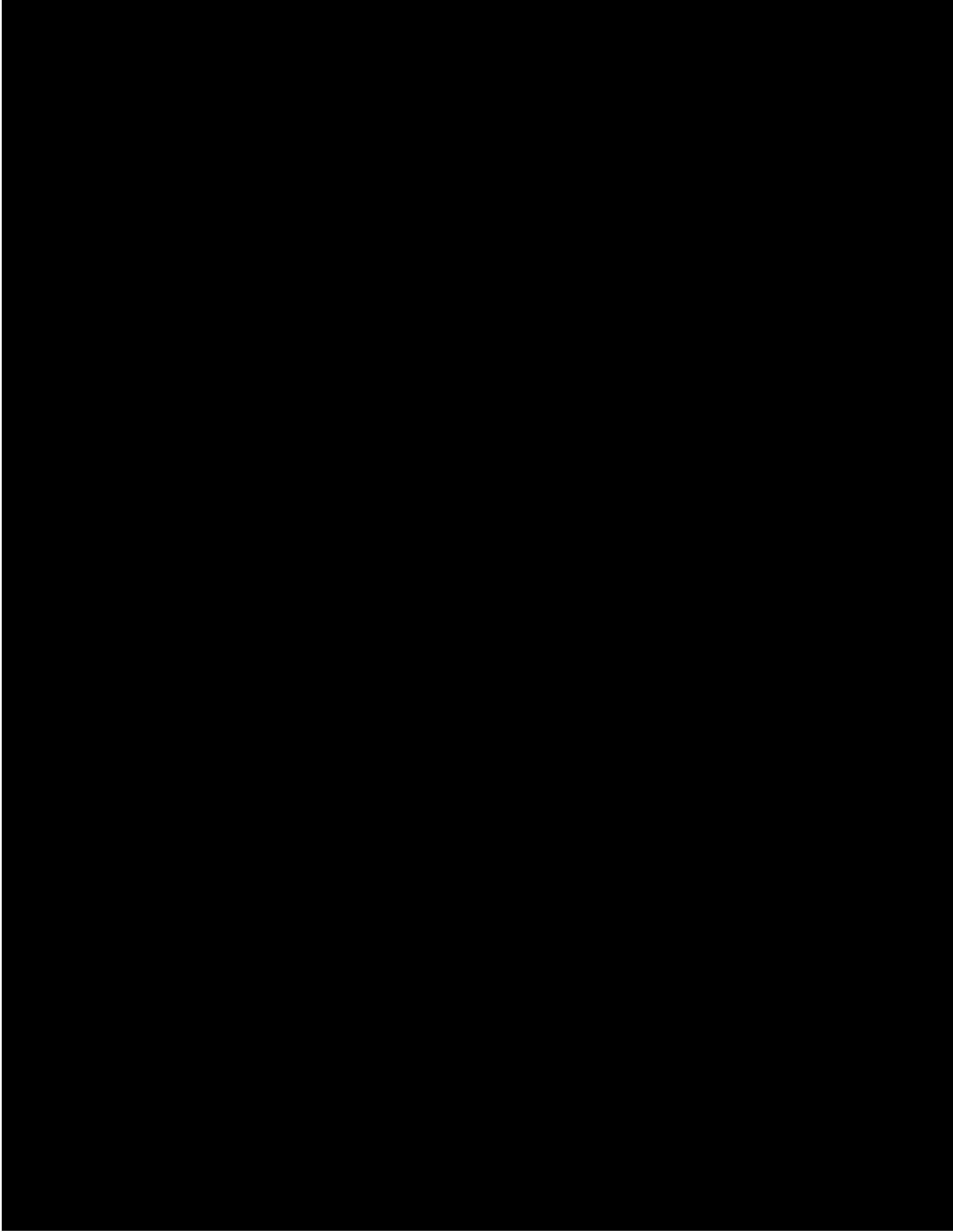


EXHIBIT A

IN RE MALOUF, AP NO. 3-15918 - DIVISION'S TIMELINE

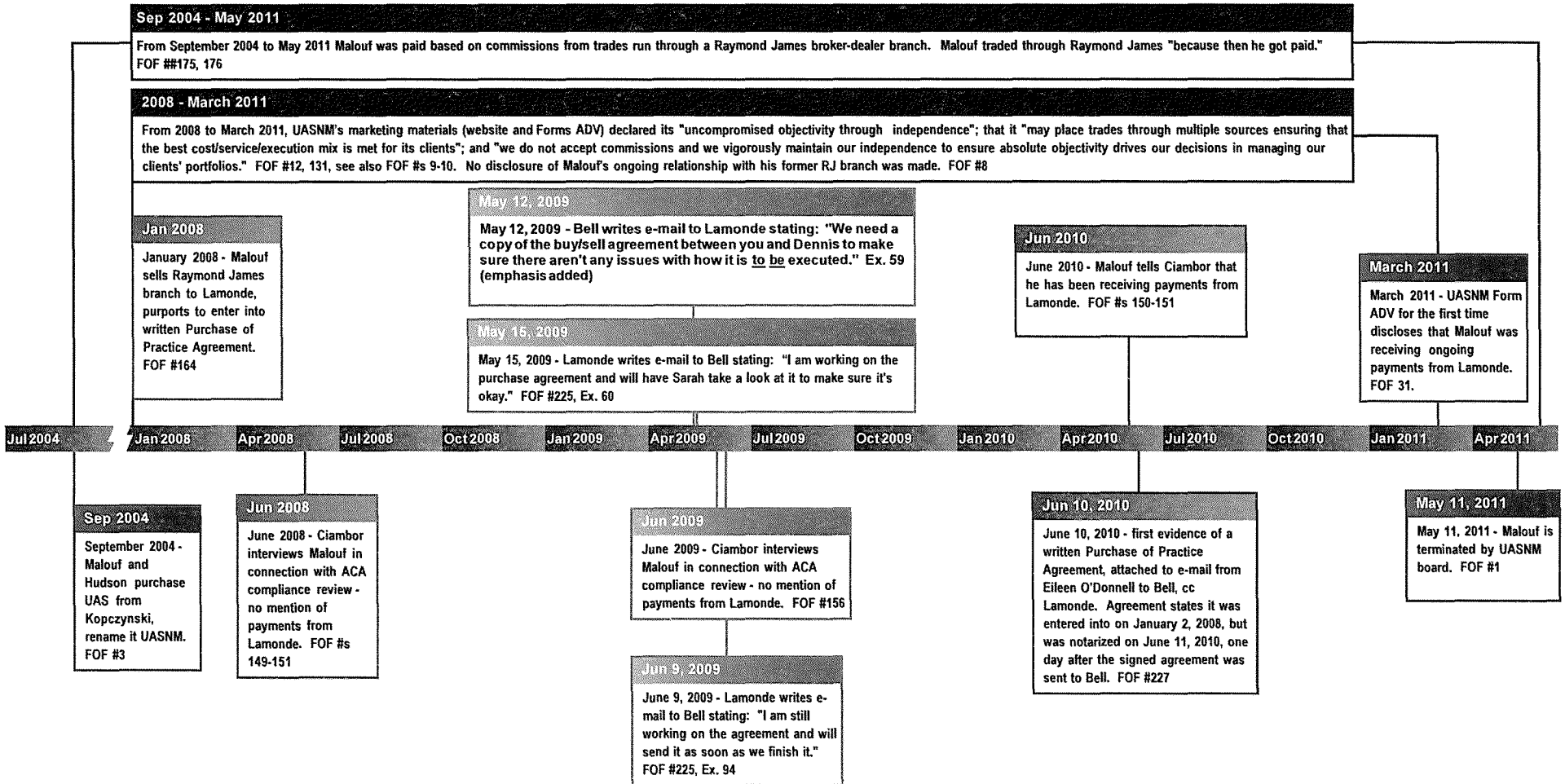


EXHIBIT B**U.S. Securities and Exchange Commission****Division of Enforcement****Prejudgment Interest Report****Malouf Pre-Judgment Interest**

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				\$1,068,084.00
10/01/2009-12/31/2009	4%	1.01%	\$10,768.63	\$1,078,852.63
01/01/2010-03/31/2010	4%	0.99%	\$10,640.74	\$1,089,493.37
04/01/2010-06/30/2010	4%	1%	\$10,865.08	\$1,100,358.45
07/01/2010-09/30/2010	4%	1.01%	\$11,094.02	\$1,111,452.47
10/01/2010-12/31/2010	4%	1.01%	\$11,205.88	\$1,122,658.35
01/01/2011-03/31/2011	3%	0.74%	\$8,304.60	\$1,130,962.95
04/01/2011-06/30/2011	4%	1%	\$11,278.64	\$1,142,241.59
07/01/2011-09/30/2011	4%	1.01%	\$11,516.30	\$1,153,757.89
10/01/2011-12/31/2011	3%	0.76%	\$8,724.31	\$1,162,482.20
01/01/2012-03/31/2012	3%	0.75%	\$8,670.97	\$1,171,153.17
04/01/2012-06/30/2012	3%	0.75%	\$8,735.65	\$1,179,888.82
07/01/2012-09/30/2012	3%	0.75%	\$8,897.52	\$1,188,786.34
10/01/2012-12/31/2012	3%	0.75%	\$8,964.62	\$1,197,750.96
01/01/2013-03/31/2013	3%	0.74%	\$8,860.08	\$1,206,611.04
04/01/2013-06/30/2013	3%	0.75%	\$9,024.79	\$1,215,635.83
07/01/2013-09/30/2013	3%	0.76%	\$9,192.21	\$1,224,828.04
10/01/2013-12/31/2013	3%	0.76%	\$9,261.71	\$1,234,089.75
01/01/2014-03/31/2014	3%	0.74%	\$9,128.88	\$1,243,218.63
04/01/2014-06/30/2014	3%	0.75%	\$9,298.59	\$1,252,517.22
07/01/2014-09/30/2014	3%	0.76%	\$9,471.09	\$1,261,988.31
10/01/2014-12/31/2014	3%	0.76%	\$9,542.71	\$1,271,531.02
01/01/2015-02/28/2015	3%	0.48%	\$6,166.05	\$1,277,697.07
Prejudgment Violation Range			Quarter Interest Total	Prejudgment Total
10/01/2009-02/28/2015			\$209,613.07	\$1,277,697.07