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 RESPONSE TO MALOUF'S POST-HEARING BRIEF

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I. OVERVIEW

Respondent Dennis Malouf's Post-Hearing Brief ("Brief") continues his false theme that all the allegations against him are a result of a vendetta Joe Kopczynski launched against him because he divorced Kopczynski's daughter. Malouf blames Kopczynski and others for not disclosing the fact that Malouf engaged in conduct that he himself acknowledges was a clear conflict of interest. What his brief does not do, and what he could not refute at the hearing, was that (1) between January 2008 and May 2011, he received $1,068,054 in payments from Lamonde that were directly based upon his decision to execute bond trades through his old Raymond James Financial Services ("RJFS") brokerage branch and (2) he did not disclose his arrangement with Lamonde to UASNM's clients. Those two facts establish Malouf's liability on all the Division's claims.

Whether Kopczynski dislikes Malouf does not materially change the evidence against Malouf. In any case, Malouf's vendetta claim is simply not supported by the evidence. There is a litany of reasons Malouf was ousted from his leadership role at UASNM, none of which limits his liability in this case in any way. Those reasons included Malouf's false representation of a college degree on UASNM's Forms ADV; charging excessive commissions on bond trades; opposing UASNM's efforts to make full disclosure of his conflict of interest; misuse of over $400,000 in UASNM funds; and engaging in an affair with a subordinate.[1]

Likewise, Malouf's claim that Kopczynski "exerted significant influence and de facto control over the company"[2] does not change the evidence against him and is similarly unsupported. Kopczynski owned 1% of UASNM compared to Malouf's 59.5% and Malouf himself called

[1] Ex. 34 at 8-9.
[2] (Brief at 1)

Kopczynski a "figurehead."[3] Malouf also acknowledged that as President, CEO, and majority shareholder at UASNM, he was "top dog" and Kopczynski and Hudson worked for him.[4] Under those circumstances, Malouf's attempts to blame the failure to disclose his own conflict of interest on employees who worked for him and had significantly less knowledge of the concealed conflict must fail.

Malouf's Brief also claims, without support, that the SEC's investigation and determination of wrongdoing came "at no cost" to Kopczynski, Hudson or UASNM.[5] This too does not absolve Malouf and is contradicted by the evidence. Mr. Kopczynski described the cost to UASNM as including "a $100,000 fine, ongoing consulting fees for a minimum period of two years, and the additional scrutiny, if you will, that's applied to us," as well as the company being required to send its customers the "consent order outlin[ing] violations by the corporation" of the securities laws.[6]

The Division thus has not "unfairly singled out Malouf for cumulative punishment."[7] He is being held accountable for a conflict of interest he created, failed to disclose, and attempted to justify with a sham Purchase of Practice Agreement.

II. ARGUMENTS AND AUTHORITIES[8]

A. Malouf's Employees' Awareness of Some Payments from Lamonde Does Not Negate His Fraud.

Malouf's Post-Hearing Brief contends that the "keystone of the Division's claims is a

[3] FOF 114; Malouf Trial Tr. 11/20/2014 at 1018:12. "FOF" and "COL" are from the Court's January 8, 2015 Order on Stipulations and Transcript Corrections; "PFOF" and "PCOL" are from the Division's Proposed Additional Findings of Fact and Conclusions of Law filed January 12, 2015; "Malouf's PFOF" and "Malouf's PCOL" are from Malouf's Supplemented Proposed Findings of Fact and Conclusions of Law filed on January 20, 2015.
[4] FOF 197.
[5] Brief at 2.
[6] Malouf Trial Tr. 11/21/2014 at 1379:6-1380:9.
[7] *Cf.* Brief at 3.
[8] The Division takes issue with several statements in Malouf's Factual Summary in his Brief in its Response to his Proposed Findings of Fact and Conclusions of Law, which is also filed today.

purported 'Secret Oral Agreement' with LaMonde" and if the agreement were written and not secret, the Division's fraud claim would fail.[9] But this argument is without basis. First, as pointed out repeatedly at the hearing and in the Division's Post-Hearing Brief ("Div. Brief"), every single witness other than Malouf testified that until 2010 at the earliest they were unaware of the details surrounding Malouf's sale of his Raymond James branch to Lamonde or that Malouf was paid from trades he routed through that branch.[10] Second, even if Malouf's argument is credited and we assume everyone at UASNM, RJFS, and ACA Consulting knew all about the agreement and the source of payments, that would not excuse Malouf's fraud. The Court has already concluded that "[i]nvestment advisors 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."[11] Malouf's receipt of payments from Lamonde created a conflict of interest.[12] And the conflict created by Malouf's receipt of payments from Lamonde was not disclosed on UASNM's ADVs between 2008 and 2011 or on its website.[13] Thus, regardless of what Hudson, Kopczynski, Keller, Bell, or Ciambor knew, UASNM's customers were not told about Malouf's conflict of interest and thus, Malouf committed fraud.

Malouf's effort to push off the duty of disclosure onto Kopczynski, Hudson, and Ciambor should fail because (1) he was "top dog" at UASNM, its CEO, President, and majority shareholder, and in charge of its bond trading;[14] (2) the agreement and conflict were his, requiring that he ensure disclosure; and (3) the evidence showed that Malouf was not candid with these individuals, telling

[9] Brief at 8.
[10] PFOF 79, 82, 83; Paula Calhoun testified that she knew Malouf was receiving "commissions" but did not know other details of his deal with Lamonde and that Malouf told her over and over not to discuss his personal business with others and threatened to fire her if she did. PFOF 80, 81.
[11] COL 10.
[12] FOF 178.
[13] FOF 8; PFOF 26, 105-111.

them that his ties with RJFS had been severed, when they had not.[15] Moreover, the Court has already concluded that "Malouf had an obligation to disclose conflicts of interest that existed at UASNM that [he was] aware of."[16]

1. Malouf Now Concedes, at least Implicitly, that any Agreement with Lamonde Was Not Reduced to Writing until June 2010.

Malouf has contended for four years that he and Lamonde signed a written agreement in late 2007/early 2008.[17] He stipulated that his contention is "that he and Lamonde signed a written Purchase of Practice Agreement (Ex. 57) in the two weeks prior to January 2, 2008."[18] At the hearing, however, Malouf was unable to produce any credible evidence that this agreement was signed in 2007 or 2008. Now he changes his story in his Brief. Malouf claims that whether the agreement was actually signed in 2007/2008 or 2010 does not matter because "[t]he existence of an actual agreement, *regardless of when it was reduced to writing*, is evidenced by the fact that LaMonde took ownership of Branch 4GE and began making periodic payments to Malouf."[19] His new story is that the sale agreement "was signed sometime between December 2007 and June 2010."[20] By abandoning his previously asserted position that the agreement was signed at the onset of Malouf's agreement with Lamonde, he essentially concedes that the agreement was not "bona fide" as required by IM-2420-2 or written as required by RJFS.[21]

Malouf writes that "he would not give [his RJFS branch] up without an agreement.[22] This argument now tellingly leaving out the word "written." What he actually testified to was:

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[14] FOF 197; 6.
[15] PFOF 79, 82.
[16] COL 25.
[17] FOF 26.
[18] FOF 164.
[19] Brief at 9 (emphasis added).
[20] *Id.*
[21] PCOL 3; FOF 222.

Q [King] Now, would you have considered selling the branch to Mr. Lamonde without a written agreement?
A [Malouf] No.
Q Why not?
A It just wouldn't happen.
Q Why not?
A Because it's just not the way you do business. And number two, it wouldn't be a bona fide contract, maintained the ability to receive commissions.[23]

Thus his claim that the "date the agreement was reduced to writing is irrelevant"[24] is directly contradicted by his own testimony, which also directly contradicts his expert's opinion that a *bona fide* contract is not required to be written.[25] Furthermore, RJFS required Lamonde to provide a written agreement, which he did not do, and there is no evidence of the terms of any *bona fide* contract that would have satisfied the requirements of IM-2420-2 in 2008.

2. Malouf Did Not Show that There Were No Secrets About the Sale, Payments, or Bond Trading.

At the hearing, Malouf could not support his claim that there were no secrets about the sale of the RJFS branch or the payments he received as a result of his bond trading. First, as noted above, it is undisputed that UASNM clients were not told of Malouf's arrangement with Lamonde until March 2011. What others at UASNM, RJFS, or ACA may have known is thus largely irrelevant. Moreover, Malouf's claim that because others may have known of the sale of the branch and that a sale is usually made in exchange for payment does not excuse Malouf from telling his Chief Compliance Officer ("CCO") and ACA, at least, of his conflict of interest.

The evidence Malouf cites for how others knew all about his arrangement in fact shows the opposite. Malouf claims that he "freely told people about the payments when asked, such as

[22] Brief at 18.
[23] Malouf Trial Tr. 11/20/2014 at 1048:17-1049:1.
[24] Brief at 18.
[25] *Id.*

Ciambor and Kopczynski in 2010, and Keller in 2008."[26] But telling one's outside compliance consultant and CCO about an obvious conflict of interest over two years after the fact hardly establishes the lack of any secrets. And Keller only testified that he knew about the sale and that Malouf "was receiving payments of some kind from Mr. Lamonde," not that Malouf was paid from Lamonde's commissions.[27] Malouf's claim "that RJFS actually reviewed [Lamonde's] checking account records by September 2, 2008, and would have known about the payments at that time" is not supported by the cited evidence.[28] Moreover it completely ignores Bell's testimony that Lamonde's checking account records were not available in 2008:

> Q [Bliss] If we go to the second page and look at number 4 [of Exhibit 85 the May 8, 2008 Branch 4GE examination report], it says, "The branch operational checking account was not available for review during the examination. In the future, please ensure that the account is accessible at the time of the examination." What's your understanding of that issue?
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> A [Bell] Well, during each year we like to review the operational checking account for the business, just to look for any – any nuances or payments that maybe shouldn't occur. In this case, that checking account – or, the ledger for the checking account was not available. And therefore they marked it as a deficiency.[29]

And his claim that "[n]obody testified that Malouf ever lied about or concealed payments" (Brief at 10) is flatly contradicted by Ciambor's testimony:

> Q [McKenna] Based upon what you know now – I mean, bottom line, do you think Mr. Malouf lied to you about his agreement with Lamonde.
>
> A [Ciambor] Yes, I do.[30]

Thus, even if others' awareness of the sale and payments to Malouf were a legally adequate excuse for his nondisclosure to UASNM clients, which it is not, Malouf was unable to show that he

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[26] Brief at 9-10.
[27] *See* Malouf PFOF 57.
[28] *See* Response to Malouf's PFOF 16.
[29] Malouf Trial Tr. 11/19/2014 at 637:12-24.

was forthcoming with the actual arrangement he had with Lamonde at or around the time it was made.

3. Malouf's Argument that Lamonde Was Required to Only Pay 40% of Branch Revenues but Chose Instead to Pre-pay Tens of Thousands of Dollars Every Month Defies Common Sense and Is Not Supported by the Evidence.

Malouf argues that it "defies common sense" to "accept that LaMonde was secretly passing all the commissions earned on UASNM trades to Malouf," thereby "tak[ing] on the extra burden and risk of operating branch 4GE for no personal benefit."[31] But in the next breath he concedes a benefit by stating that Lamonde was "expecting to benefit from future income once the purchase price was paid."[32] Malouf's claim that his arrangement with Lamonde "was no different than LaMonde repaying a bank loan using the revenues from Branch 4GE"[33] completely ignores the critical fact that a bank would not have been responsible for the generating the commissions from which its loan was repaid. Malouf, on the other hand, routed trades through the branch "because then he got paid."[34]

Malouf further argues that because the payments to Malouf did not directly track the commissions earned on bond trades they could not have been based upon them.[35] But the evidence showed that the payments, while not precisely tracking commissions, were much closer to the commissions than the 40% of branch revenue called for by the sham Purchase of Practice Agreement.[36] Malouf's own Exhibit A to his Brief shows that payments to Malouf were within 5% of Lamonde's commissions for the first six months of the agreement.[37] The total payments from

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[30] Division's PFOF 84.
[31] Brief at 10.
[32] *Id.* at 10-11.
[33] *Id.* at 11.
[34] FOF 176.
[35] Brief at 11-12.
[36] FOF 20; PFOF 67.
[37] Brief, Ex. A.

2008 to 2011 were nearly double 40% of branch revenue.[38]

Malouf's story here simply does not add up. He claims that he and Lamonde agreed that the price for the branch would be two times trailing revenue of approximately $500,000 to $550,000, or approximately $1.1 million.[39] He also claims the agreement was to receive 40% of revenue for four years.[40] 40% of $500,000 to $550,000 for 4 years is $800,000 to $880,000, not $1.1 million.[41]

As the Division showed at the hearing, it makes no sense that a cash-strapped Lamonde would be paying Malouf tens of thousands of dollars a month more than he was required to.[42] Malouf claims that his argument is supported by the "much larger payments made from 1Q 2008 to 2Q 2009, and smaller payments thereafter as Lamonde sought to true up accounting."[43] But here Malouf simply misstates the evidence. Lamonde paid Malouf $48,668 in 2Q 2009, and *well over twice* that amount in each of the next three quarters: $146,640 in 3Q 2009; $113,051 in 4Q 2009; and $121,181 in 1Q 2010.[44] Malouf is thus also wrong when he states that immediately after Lamonde's wife complained about their financial situation, in May 2009, "the amount of payments decreased drastically."[45]

4. Malouf Is the Unreliable Source Here.

Malouf next claims that the Divisions' witnesses were unreliable sources.[46] He claims that Hudson and Ciambor lied at the hearing because "[t]hey know that to admit knowledge of the payments would subject them to potential liability for their role in preparing UASNM's Forms ADV

[38] PFOF 67.
[39] Malouf's PFOF 73.
[40] FOF 166.
[41] Thus Malouf's claim that "extrapolating payments versus commissions over a fourth year approximates the 40% of branch revenue in the PPA" (Brief at 12) is demonstrably wrong.
[42] PFOF 71.
[43] Brief at 12.
[44] PFOF 16.
[45] Brief at 12.

and marketing materials, and for reviewing UASNM's trading practices."[47] First, this argument concedes that Malouf – who is the only individual subject to charges, had knowledge of Lamonde's payments to him, and had a role in preparing UASNM's Forms ADV and marketing materials – is subject to liability for not disclosing the payments. Second, Malouf claims that Kopczynski, Hudson, and Ciambor did not explicitly recant prior testimony, but rather "did offer testimony that contradicted their prior claims that indicated that they knew about Malouf's agreement with Lamonde."[48] But he cites to no evidence to support this claim with regard to Ciambor and no evidence that Kopczynski or Hudson knew about the nature of the payments, *i.e.* that they were generated by Malouf's trades. All three, as well as Keller and Bell, have denied knowing about the nature of the payments until at least 2010.[49]

Malouf's argument that Lamonde's prior sworn testimony "is unreliable and should be disregarded in its entirety" has already been rejected.[50] Moreover, the evidence showed that Mr. Lamonde's testimony was contradictory only in that he initially told the story he and Malouf concocted about their agreement being memorialized in early 2008 by a signed Purchase of Practice Agreement, but came clean and told the truth after being confronted with the e-mails and other evidence that disproved that claim.[51] Malouf's claim that "it is fair to assume that upon further cross-examination by Malouf's counsel [Lamonde's] testimony would have changed again, or been severely discredited" has no basis.[52] Lamonde's testimony changed after being shown evidence that

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[46] Brief at 13.
[47] *Id.*
[48] Brief at 13.
[49] PFOF 79, 82, 83; FOF 225, 226.
[50] Sept. 23, 2014 Order Granting Motion to Admit Prior Sworn Statement.
[51] PFOF 64.
[52] Brief at 14.

there was no written agreement in 2009 and 2010, Malouf can point to no similar evidence showing that there was a written agreement.

B. Malouf Acted as an Unregistered Broker.

Malouf's claim that he did not act as an unregistered broker is based on the contradictory claims that (1) he did not receive transaction-based compensation or commissions and (2) payments were made pursuant to NASD Rule 2420, NASD's "Continuing Commissions" policy.[53] He states that "[t]ransaction-based compensation is 'compensation tied to the successful completion of a securities transaction'"[54] and also acknowledges 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."[55] It is difficult to see how he can claim that this is not "compensation tied to the successful completion of a securities transaction."[56]

The payments Malouf received from Lamonde were tied to the commissions earned on the UASNM bond trades Malouf made through Lamonde's Raymond James branch.[57] Thus, even if the Purchase of Practice Agreement were not a sham, Malouf received transaction-based compensation.[58] Malouf's reliance on draft tax returns that were not created until June 2011, after Malouf had been sued by UASNM and his payments from Lamonde had been exposed, are not

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[53] Brief at 14-17; PFOF 78.
[54] (Brief at 14)
[55] FOF 175.
[56] Malouf citation to Persons Deemed Not To Be Brokers, Exchange Act Release No. 22172 (June 27, 1985) (providing a safe harbor for certain individuals selling securities on behalf of an issuer) and disclaimer of an incentive to use high pressure sales tactics is no help. It has already been established that Malouf had an undisclosed incentive to trade through RJFS, "because then he got paid." FOF 176.
[57] PFOF 72.
[58] Malouf's claim that "[t]he plain language of the PPA states that payment was based upon the entire branch's revenues" (Brief at 15 n.4) leaves off the beginning of the language it quotes from the PPA that reflects that payments relate to "assigned accounts," not total branch revenue. *See* FOF 26 ("In consideration of the Seller's assignment of the assigned accounts, Buyer agrees to pay Seller . . ."). Further RJFS employee Kirk Bell's understanding and the ordinary practice in the brokerage industry was for continuing commissions to apply only to purchased accounts, not all branch revenue. *See* FOF 228.

exculpatory. Rather, they are inculpatory with regard to whether Malouf acted as a broker as they reflect a principal business or profession of "INVESTMENT BROKER" at the business name "RAYMOND JAMES."[59]

Malouf claims that "the Division cannot identify any specific trades he directed and therefore cannot show he received payments as a result of those trades.[60] But the Division did tie Malouf to specific trades.[61] Moreover, it was established that Malouf was involved in the majority, likely the vast majority, of bond trades at UASNM.[62,63] It was also established that when Malouf traded bonds through Raymond James, which he used for the majority of his bond trades, the commission provided the money Lamonde paid Malouf under their agreement.[64]

1. Payments to Malouf Were Not Made Pursuant to NASD Rule 2420.

The Division's Post-Hearing Brief cited a host of reasons why Malouf cannot rely on the "continuing commissions" policy of NASD IM 2420-2 to insulate him from his unregistered broker activities.[65] They will not be reiterated here. To prove a Section 15 violation the Division need not prove scienter. Thus, even if Malouf had shown that he reasonably relied on 2420-2 – which given the lack of a bona fide contract, his continued solicitation of new clients, and his failure to retire, among other things, he could not – it would not matter.

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[59] FOF 182.
[60] Brief at 16.
[61] FOF 199; PFOF 51; *see also* PFOF 87, 88 (reflecting Hudson's concern over why Malouf was questioning a write down on a trade because Malouf, or at least his client, should have been pleased if the commission on one of his trades was reduced); PFOF 70 (showing that Lamonde sought payroll advances on specific commissions to pay Malouf).
[62] FOF 6, 76.
[63] Malouf's bald claim that the bases for the witnesses' estimates of the extent of Malouf's bond trading are unknown (Brief at 16 n.5) is false. Hudson testified that he studied bond trade data in connection with the UASNM litigation against Malouf. FOF 277, 317; *see also* Malouf Trial Tr. 11/17/2014 at 100:15-101:11. And Hudson and Keller worked in the small UASNM office and served on the investment committee with Malouf for years, obviously they had knowledge of who made the most bond trades at the company.
[64] FOF 173, 175.
[65] *See* Div. Brief at 19-22.

2. The Purchase of Practice Agreement Produced Two and a Half Years after the Sale Is Not a Bona Fide Agreement under IM-2420-2.

The Division has shown that the Purchase of Practice Agreement that was finally given to RJFS on June 10, 2010 after multiple requests spanning over a year was not signed by Malouf and Lamonde in late 2007/early 2008, as Malouf claims. As noted above, Malouf is now revising that claim and arguing – contrary to his hearing testimony, common sense, and RJFS policy that a contract must be written to be "bona fide" under IM 2420-2 – that it does not matter when the agreement was signed. Nor, according to Malouf, does it matter that key terms of the agreement – *e.g.*, the amount and timing of payments thereunder – were not remotely followed. He argues that he and Lamonde simply orally modified their written contract.[66] The Division does not contend that Malouf and Lamonde could not alter their agreement or that Lamonde could not pre-pay. Rather it contends that paying Malouf substantially all commissions generated on his trades instead of the 40% called for in the agreement, and paying Malouf multiple times a month instead of once a month as specified in the agreement, often shortly after a trade and/or using a cash advance received from RJFS on a trade, is strong evidence that the agreement was not what Malouf claims it was. As is the fact that the mysterious Exhibit A has never been located.

3. Malouf's Solicitation of New Business

Malouf contends that because he did not specifically solicit new business for his old RJFS brokerage branch he complied with IM-2420-2.[67] But in fact he did by soliciting new UASNM clients and then trading bonds on their behalf through RJFS. Moreover, IM 2420-2 is not so limited. It states broadly that unregistered representatives receiving continuing commissions may not solicit new business or open new accounts, period:

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[66] Brief at 18.
[67] Brief at 18-19.

> 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.[68]

Further, an SEC No Action letter issued in November 2008 – and three others issued in 1993, 1994, and 1998 – all explicitly require that a retiring representative wishing to rely on IM 2420-2 must sever all association with any broker, dealer, or investment adviser.[69] The import of this guidance is clear, a retiring representative must retire, he cannot continue to work in the securities industry after removing himself from the oversight of his regulator. Malouf's own expert recognizes that SEC No-Action Letters, while not legal conclusions, provide guidance on the interpretation of FINRA rules and are relied upon in the securities industry.[70]

4. Malouf Did Engage in Other Broker Conduct.

Malouf's argument here is that because certain of his conduct – *e.g.*, soliciting clients, recommending investments, and effecting securities transactions – may be legitimate investment advisor activity they cannot also be broker activity. But that does not follow. They can be and are both. That the respondents in *Bandimere* were not affiliated with a registered investment advisor is not the point. The point is that if one engages in broker activities, and especially if one receives transaction-based compensation as Malouf did, one is acting as a broker. And if one is unregistered, as Malouf was, one violates Section 15.

C. Malouf Violated Sections 206(1) and (2) of the Advisors Act.

Malouf argues that "[t]he essence of the Division's argument is an alleged failure to disclose the potential conflict of interest arising from Malouf's receipt of payments from LaMonde while

[68] Ex. 234 at 4.
[69] *See* Div. Brief at 21, PCOL 4.
[70] PFOF 76.

UASNM was directing bond trades to Branch 4GE."[71] If one removes the word "potential," because Malouf has already admitted that his receipt of payments was "a clear conflict of interest ever since he entered into the arrangement with Lamonde in early 2008,"[72] that is one basis for the Division's Section 206 claim. The other is his failure to seek best execution.

1. Malouf Is Responsible for the Failure to Disclose.

As he did in the hearing, Malouf attempts to shirk his responsibility as UASNM's CEO, President, majority shareholder, chief bond trader, and self-proclaimed "top dog" and blame the failure to disclose *his* acknowledged conflict of interest on his former employees. He should not be allowed to do so.

Kopczynski, Hudson, Keller, and Ciambor all worked for Malouf.[73] Malouf knew of the conflict and he knew disclosure of that conflict was not on UASNM's website or in its Forms ADV. Therefore, if Kopczynski, Hudson and Ciambor also knew this, and did nothing, Malouf could have and should have told them to make the disclosure and fired them if they did not. That was one of his roles as CEO.

Moreover, Malouf's reliance-on-others defense requires him to show that he made full disclosure to those upon whom he relied.[74] Here, where Malouf failed to inform Kopczynski, Hudson, Raymond James, or ACA about the true nature of his agreement with Lamonde, he cannot claim reliance on any of them to excuse his fraudulent conduct.

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[71] Brief at 21.
[72] FOF 178.
[73] FOF 197.
[74] *See Provenz v. Miller*, 102 F.3d 1478, 1491 (9th Cir. 1006), *citing C.E. Carlson, Inc. v. SEC*. 859 F.2d 1429, 1436 (10th Cir. 1988) (finding that "[i]f 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"). Malouf's own reliance on *SEC v. Huff*, 758 F. Supp. 2d 1288, 1351-52 (S.D. Fla. 2010) (*see* Malouf's Pre-Hearing Brief at 19) fails to address the fact that Huff's reliance-on-others defense failed because Huff never disclosed critical facts to his accountant.

Malouf claims, without support, that "Kopczynski was aware or should have been aware of the nature of the sale of Branch 4GE."[75] But the Court has already found that Kopczynski and Hudson "were not aware of the specific terms of that sale."[76] And the claim that Kopczynski should have been aware is not a defense to Malouf's failure to disclose. Likewise, his claimed reliance on UASNM's outside consultant is misplaced where he failed to disclose his payments from Lamonde for over two years and misrepresented that he had severed all ties with RJFS.

2. Malouf Is Responsible for His Failure to Seek Best Execution.

Malouf claims that the Division's best execution claim should fail because the Division did not show a specific trade that Malouf was responsible for where best execution was not achieved. This argument confuses the failure to seek best execution with a failure to achieve it.

a. Malouf has admitted that he did not seek best execution, because he got paid when he traded through RJFS.

Multiple witnesses, including Hudson, Keller, Ciambor, Gibbons, McGinnis, and even Malouf himself, testified that in seeking best execution an investment advisor should shop trades to multiple brokers.[77] Malouf has admitted that he did not do that.[78] It is thus irrelevant whether a specific trade with an excessive commission is traceable to Malouf. Malouf ran UASNM, and the fact that its records did not clearly reflect which advisor directed which bond trade cannot excuse his admitted failure to fulfill his fiduciary duty.

Malouf claims that the 81 trades analyzed by Dr. Gibbons "are the trades upon which the Division primarily relies to establish a failure to achieve best execution."[79] Not so. As noted above,

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[75] Brief at 22.
[76] FOF 34.
[77] PFOF 35, 36.
[78] PFOF 38, 39.
[79] Brief at 24-25.

the Division's failure to *seek* best execution claim is proven by Malouf's own admissions about his bond trading practices in general.

Moreover, Malouf's claim that the Division failed to identify a single trade Malouf was involved with that exceeded 70 bps is not true.[80] Further, while it is possible that some of the 81 bond trades were done without Malouf's involvement, it is not likely. The trades analyzed were Treasury and agency bond trades made through RJFS. Malouf admitted he used RJFS nearly exclusively to make his bond trades and the evidence showed that he directed 60 to 95% of UASNM's bond trades. Hudson testified that he made very few such trades.[81] And Keller testified that his practice was to shop trades amongst multiple brokers and buy or sell through the one that gave the best price.[82] Thus it is unlikely that Keller was responsible for the trades with excessive commissions.

b. Dr. Gibbons report and the multiple bond trades identified that exceeded what Malouf himself testified were reasonable commissions show that best execution was not achieved.

The Division acknowledges that best execution with regard to all securities in general involves several factors, including commission rate. As Dr. Gibbons explained, however, for Treasury and agency bond trades the other factors are largely irrelevant due to the highly liquid and transparent nature of the bonds and other factors. Thus Dr. Gibbons was able to calculate a reasonable commission range for the trades he analyzed – a range Malouf did not counter – and

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[80] PFOF 51, 52.
[81] Malouf Trial Tr. 11/17/2014 at 96:24-974 (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. ....).
[82] FOF 203.

determine that the commissions paid on those trades were excessive by between $442,106 and $693,804.[83]

Malouf claims that the Division has failed to provide evidence that UASNM could have achieved better execution through RJFS or any other broker-dealer on any particular trade "[84] But Malouf admitted that if he had shopped around he probably could have gotten a lower bid for his clients.[85] And he also admits that "the evidence showed that from time to time another broker-dealer offered a better price and the trade was done at that broker dealer, or RJFS offered to match the price.[86] Because Malouf simply traded through RJFS because then he got paid, this, coupled with Dr. Gibbons' report, establishes that he paid excessive commissions. This conclusion is bolstered by Mr. McGinnis' recommendation that UASNM self-report to the SEC because it was charging excess commissions.[87]

The fact that UASNM and Keller employed a multi-bid process (Brief at 27) would only be helpful to Malouf's case if he followed that process (Brief at 27) would only be helpful to Malouf's case if he followed that process. He did not.[88] And ACA again can't be the scapegoat because Malouf misled them about this as well.[89]

The Division is not arguing that the mere volume of sales placed through RJFS is proof that best execution was not achieved.[90] What the evidence showed was that 90% of UASNM's bond trades went through RJFS, that Malouf made the vast majority of UASNM's bond trades, and that

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[83] PFOF 55.
[84] Brief at 26.
[85] PFOF 40.
[86] Brief at 26.
[87] PFOF 56.
[88] *See* PFOF 38-43.
[89] PFOF 37.
[90] *Cf* Brief at 28.

Malouf used RJFS "because then he got paid"[91] rather than seeking competitive bids and best execution.

c. The Division has established excessive markups.

The Division need not prove excessive markups to prove its failure to seek best execution claim. That claim is established by Malouf's failure to get bids or asks from multiple brokers. Because it does prove excessive commissions, however, that also establishes his failure. Here Dr. Gibbons and Mr. McGinnis both found that commissions charged on UASNM bond trades were excessive. That they did not both arrive at identical reasonable commission ranges does not establish that there is no such thing. Dr. Gibbons' range – 10-70 bps – was slightly broader than Mr. McGinnis's range – 25-50 bps – but both have an average of 40 bps.[92]

Malouf claims that "the Division has not and cannot cite to any administrative decision where commissions similar to those at issue in this case have been found to be excessive or unreasonable."[93] But this claim ignores his own reference to the decision in *In the Matter of Anderson* in his closing argument. In that case an expert testifying regarding trades in Treasury securities noted, as Dr. Gibbons did here, that markups and markdowns on such securities are "driven by th[e] bid-ask spread."[94] That expert further testified that after "doubling what was custom and practice in the industry," an appropriate commission on the Treasury Notes at issue, which as here were extremely liquid and carried an implied rating of AAA, would be between .25%

[91] PFOF 44; FOF 76, 176.
[92] FOF 39; Ex. 5 to Ex. 44.
[93] Brief at 29.
[94] *In the Matter of Anderson*, Release No. 48352, 2003 WL 21953883, at *4 (SEC August 15, 2003) (alteration in original) (quoting *Investment Planning Inc.*, 51 SEC 592, 596 (1993).

and 0.5%.[95] This range coincides with the ranges set forth by Dr. Gibbons and Mr. McGinnis. In *Anderson*, the Commission found that:

> The Division introduced expert testimony which supported its contention that Anderson's pricing was "well above what professionals in the business would generally charge for the transactions in question" and not warranted by any extraordinary circumstances.[96]

The Division introduced such expert testimony at Malouf's hearing as well. And Malouf offered no expert opinion to the contrary.[97]

D. Malouf Violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Malouf claims that "[t]he Division has not offered sufficient evidence to establish whether the Forms ADV introduced at the hearing were final or were drafts that were never filed with the SEC or disseminated to clients."[98] But it is Malouf's claim that is unsupported. The Division established at the hearing that:

> UASNM did not update its Form ADV to specifically reflect the payments by Lamonde to Malouf for the sale of the RJFS branch until March 2011.[99]

and

> At least some of UASNM's ADVs between 2008 and 2011 did not disclose that Mr. Malouf sold his Raymond James Financial Services (RJFS) branch to Mr. Lamonde and was receiving ongoing payments from Mr. Lamonde in connection with that sale.[100]

and

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[95] *Id.*
[96] *Id.* at *7.
[97] PFOF 54.
[98] Brief at 30.
[99] FOF 307.
[100] FOF 9.

> Judith Owens (Owens) signed an investment management services agreement acknowledging that she had received and read Part II of the February 4, 2008 UASNM Form ADV.[101]

and

> All or most of the Form ADVs created between October 1, 2009 and April 12, 2010, portions of which are reflected in Exhibit 193, were provided to UASNM clients.[102]

Malouf argues that because the UASNM website said its advisers were "free of conflicts of interest" before Malouf sold Branch 4GE, when he and others were not free of such conflicts, he cannot be held liable for this and other misstatements on the website during the 2008 to 2011 time period.[103] This simply does not follow. Even if that disclosure was false prior to 2008 and UASNM's CCO knew that, that does not magically make it true after 2008, when basically nothing had changed regarding Malouf's receipt of commissions. Moreover, prior to 2008, the "free of conflicts of interest" language was at least countered by the disclosure that Malouf owned the RJFS branch and that he and other registered representatives might receive compensation for transactions executed through the branch; after that language was removed the "free of conflicts of interest" language and other statements disclaiming compensation from commissions and proclaiming "Uncompromised objectivity through independence" on UASNM's Forms ADV and website were materially misleading.[104]

Similarly, Malouf's argument that Kopczynski's small (<1% to 3%) ownership interests in Secured Partners and NATC[105] was arguably in conflict with the "free of conflicts of interest" language on UASNM's website (but was disclosed on the Form ADV) (Brief at 31) cannot excuse

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[101] FOF 63.
[102] PFOF 100.
[103] Brief at 31.
[104] *See* FOF 12, PFOF 25 and 26.
[105] Malouf Trial Tr. 11/21/2014 at 1383:1-15.

or be equated to Malouf's failure to disclose his receipt of over $1,000,000 as a direct result of routing UASNM client bond trades through his former RJFS branch. Also similarly, Kopczynski, Hudson's, Ciambor's, (and Malouf's) failure to list RJFS as a broker through which UASNM did business in the October 2009 ADV is merely a cumulative error and one that pales in comparison to the failure to disclose Malouf's self-acknowledged conflict of interest.

Malouf finally claims that the "Division has also failed to provide sufficient evidence that the disclosures at issue were material."[106] Initially, Malouf is precluded from making this argument by COL 12: "The existence of a conflict of interest is a material fact which an investment adviser, as a fiduciary, must disclose to clients." It is undisputed that Malouf solicited clients, which would have necessarily included providing them with Forms' ADV, throughout the 2008 to 2011 time period.[107] And it is also undisputed that Malouf's sale of his RJFS branch and continuing receipt of monies related to that sale as a result of routing transactions through that branch was disclosed for the first time on a Form ADV in March 2011.[108]

Ms. Owens and Mr. Moriarty both testified that Malouf failed to tell them that he would receive payments related to bond trades placed through RJFS.[109] Both also testified that this is information they would have wanted to know.[110] Whether Ms. Owens or Mr. Moriarty was provided with a Form ADV in 2008 or earlier that disclosed Malouf's ownership interest and potential conflict, does not excuse the fact that after Malouf sold his branch, but retained the right to receive

[106] Brief at 33.
[107] FOF 37, 287.
[108] FOF 11.
[109] FOF 328, 330.
[110] FOF 329, 331.

transaction-based compensation, he directed that references to RJFS be removed from UASNM's Forms ADV.[111]

E. The Division Proved that Malouf Violated Section 207 of the Advisers Act.[112]

There are two fatal flaws to Malouf's reliance-on-others defense to the false and misleading Forms ADV. First, as noted above, a reliance-on-others defense requires that the relying party make full and complete disclosure to those upon whom he seeks to claim reliance. Here, Malouf did not do that until he was found out in 2010, thus he cannot rely on that doctrine. Second, Malouf admits that he knew his arrangement created a conflict of interest and that it was not disclosed in the Forms ADV. Under those circumstances, to allow him to claim that because Hudson signed the filings and Kopczynski didn't discover his fraud and demand they be changed would be a travesty. Malouf cites to the UASNM Compliance Manual Malouf as placing all responsibility on the COO. But the Manual also states that "employees" including Malouf should bring to the COO's attention disclosures that may require amendment:

> Employees are encouraged to review UASNM's disclosure documents and bring to the CCO's attention any disclosures that may require amendment/updating.[113]:

Rather than bring his known conflict to the attention of Kopczynski and others, Malouf directed that disclosures about his relationship with RJFS be removed from UASNM's Forms ADV.

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[111] *See* FOF 205; Malouf Trial Tr. 11/19/2014 at 751:23-752:4:

> Q [McKenna] Did you have any – did Mr. Malouf have any involvement, though, with regard to the Raymond James disclosures in the Form ADV?
> A [Ciambor] Specifically, I believe that the instruction to remove those disclosures related to his Raymond James relationship during the 2008 review did come from Mr. Malouf.

[112] The Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011), regarding who is a "maker" of statements under Section 10b of the Exchange Act is not applicable to other sections of the securities laws. *SEC v. Daifotis*, 2011 WL 3295139, at *5-6 (N.D. Cal. Aug. 1, 2011) (holding that "Janus was not a touchstone to change myriad laws that happen to use the word 'make' - it was a decision interpreting primary liability under Rule 10b–5").

[113] FOF 55.

Malouf claims that "Kopczynski cannot blame his failings on Malouf."[114] This is ironic given the fact that Malouf was president, CEO, and "top dog" at UASNM and owned nearly 60% of its stock while Kopczynski owned 1%.[115] And Malouf was the architect of the conflict he faults Kopczynski and others for failing to disclose. Malouf testified that "'[w]ithout a doubt,' disclosure regarding the ongoing payments Malouf was receiving from Lamonde should have been in all the relevant ADV disclosures."[116] His awareness of his conflict and awareness that it should have been disclosed should preclude him from shifting the blame to others.[117]

F. Malouf Substantially Assisted the Primary Violations by Creating the Very Conflict that Was Not Disclosed.

Malouf's argument that "his individual conduct is not a substantial causal factor in bringing about any primary violation"[118] cannot stand up to the fact that the undisclosed conflict of interest was a direct result of his individual conduct in entering into the "kick-back" agreement with Lamonde. Regardless of whether the court believes there were failings by Kopczynski, Hudson, or Ciambor, there can be no doubt that Malouf's failings were at the heart of the violations.

G. The Remedies Sought Are Appropriate.

As Malouf acknowledges, "the primary purpose of disgorgement, however, is not to

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[114] Brief at 34.
[115] FOF 114, 197.
[116] FOF 193; Malouf Trial Tr. 11/20/2014 at 1001:12-18 (Q [McKenna] My question to you is not what was filed. My question to you is, do you believe that, without a doubt, disclosures regarding the ongoing payments that you were receiving from Mr. Lamonde should have been in this and all other ADV disclosures? So, all 13 of them. A [Malouf] The answer is yes.)
[117] Malouf's claim that "Kopczynski did not advise UASNM to disclose a conflict even after he knew about the payments, and he would not have advised it to do so if he had known earlier" (Brief at 35) cites not support; and even if true, Kopczynski's failure to advise UASNM to disclose Malouf's conflict would not absolve Malouf because UASNM's outside compliance consultant advised that the conflict needed to be disclosed in June of 2010, when it and Kopczynski learned of it. FOF 151-152.
[118] Brief at 36.

Punish but to prevent unjust enrichment by depriving a wrongdoer of ill-gotten gains."[119]

The amount of Malouf's ill-gotten gains is $1,068,094, plus $209,613.07 in prejudgment interest.[120] While the Division has conceded that the Court may credit Malouf with the $506,083.74 paid to UASNM's clients, as a result of the excessive commissions charged, from funds owing to Malouf, that amount is significantly less than the amount of Malouf's ill-gotten gains.

The reimbursement of Malouf's UASNM clients is otherwise irrelevant to the issue of disgorgement. The purpose of disgorgement is to deter violations of securities laws by depriving violators of their ill-gotten gains and to prevent unjust enrichment—that is, not allowing those who violate securities laws to gain by their illegal conduct.[121] Unlike damages, the primary purpose of disgorgement is not to compensate investors. Accordingly, in seeking disgorgement, the Commission need not establish whether, or to what extent, identifiable private parties have been damaged by a defendant's fraud and the reimbursement of UASNM's clients is of no import.[122]

Malouf's argument that he is entitled to 40% of the branch's commissions is also flawed. Because of concerns about potential conflicts of interest, RJFS asked Malouf to choose between RJFS and UASNM and he chose to continue his advisory work and terminate his association as a registered representative with RJFS.[123] When Malouf continued to receive commissions thereafter

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[119] Brief at 36-37 (citing *SEC v. Bilzerian*, 814 F. Supp. 116, 120 (D.D.C. 1993) and quoting *SEC v. Huff*, 758 F. Supp. 2d 1288, 1358 (S.D. Fla. 010) (noting that disgorgement is a remedial remedy that the court has the power to order up to "the amount with interest by which the defendant [Respondent Malouf] profited from his wrongdoing").

[120] FOF 20; Exhibit B to Division's Post-Hearing Brief.

[121] *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d 1997); *SEC v. Happ*, 295 F. Supp.2d 189, 197 (D. Mass. 2003).

[122] *See SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985).

[123] FOF 4.

under his agreement with Lamonde he did so illegally, by acting as an unregistered broker, committing fraud, and charging excessive commissions.

The Court should summarily deny Malouf's request he be allowed to keep over half a million dollars of ill-gotten gains.

H. Malouf's Ability to Pay Will Be Addressed Separately.

The Court has issued a subpoena ordering Malouf to produce documents relevant to his financial condition on or before February 6, 2015 and has ordered briefing on that issue to be filed on February 27, 2015.[124] Malouf's financial condition will be addressed in those filings.

IV. STATUTE OF LIMITATIONS

Malouf offers no rejoinder to the Commission's argument that the continuing violation doctrine puts all of Malouf's violative conduct squarely within a five-year statute of limitations.[125] Because Malouf does not dispute that the continuing violation doctrine applies, his statute of limitations defense fails.

Malouf also claims that the five-year statute of limitations of 28 U.S.C. § 2462 should apply not only to the Division's penalty claim, but also to its disgorgement and injunction claims. He acknowledges, however, that the decision of the District Court in the Southern District of Florida upon which he relies is an outlier.[126] The express wording of the statute and the vast weight of authority clearly contemplate that the five-year statute of limitations of 28 U.S.C. § 2462 does not apply to the Division's equitable claims for disgorgement and an injunction.[127]

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[124] January 14, 2015 Order on Division of Enforcement's Motion to Strike.

[125] *See* Division's Post-Hearing Brief at 28.

[126] Brief at 40 (noting that "courts have not often applied the statute of limitations to disgorgement and injunctive relief").

[127] *See, e.g., SEC v. Rind,* 991 F.2d 1486, 1493 (9th Cir.1993) (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 570, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990)); *SEC v. Quinlan,* 373 Fed. Appx. 581, 588 (6th Cir. 2010) (affirming district court's conclusion that "the risk to the investing

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Stephen C. McKenna
Dugan Bliss
Attorneys for the Division of Enforcement
Securities and Exchange Commission
Byron G. Rodgers Federal Building
1961 Stout Street, Suite 1700
Denver, CO 80294-1961
Ph. (303) 844-1000
Email: mckennas@sec.gov
Email: blissd@sec.gov

public outweighed the severe collateral consequences of the equitable relief, and, therefore, that the permanent injunction and officer and director bar were remedial rather than punitive."); *Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009) ("[A]n 'order to disgorge is not a punitive measure; it is intended primarily to prevent unjust enrichment.'") (citations omitted); *SEC v. Packetport.com, Inc.*, 2006 WL 2798804, *3 (D. Conn. Sept. 27, 2006) (granting motion to strike statute of limitations affirmative defense because SEC sought only "equitable relief in the form of, inter alia, disgorgement, officer and director bars, and injunctions").