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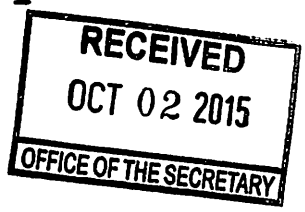

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of DENNIS J. MALOUF

DIVISION OF ENFORCEMENT'S BRIEF IN SUPPORT OF ITS CROSS-PETITION FOR REVIEW AND IN RESPONSE TO RESPONDENT'S BRIEF IN SUPPORT OF HIS PETITION FOR REVIEW

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I. SUMMARY[1]

This proceeding concerned, and after a seven-day hearing the hearing officer found, fraud and other misconduct in bond trading by Dennis Malouf, the former president and majority owner of a Commission-registered investment adviser, UASNM, Inc. ("UASNM"). Namely, between January 2008 and May 2011, Malouf directed the majority of UASNM client bond trades to a Raymond James Financial Services, Inc. ("RJFS" or "RJ") branch from which he had been forced to disassociate. The new owner of that branch, Malouf's friend and former co-worker Maurice Lamonde, would then forward Malouf almost all of the commissions from that bond trading, which amounted to $1,068,084 in payments to Malouf from January 2008 through May 2011. Stipulated FOF No. 20.[2] Malouf chose to trade through RJFS "because then he got paid." Stipulated FOF No. 176.

Critically, Malouf does not dispute that his arrangement with Lamonde created a "clear conflict of interest." Stipulated FOF No. 178; *see also* No. 151 (stipulating that when UASNM's outside compliance consultant learned of the arrangement in June 2010 he considered it a "clear conflict of interest"). Nor does he dispute that the conflict was not disclosed on UASNM's Forms ADV from 2008 to March 2011, to UASNM's clients, or on UASNM's website. Stipulated FOF Nos. 8, 10-12, 85-87, 328-331, Div. Exs. 66, 68-69. Rather than disclose the conflict, UASNM's website made statements about impartial investment advice, best execution, and commissions, and its Form ADVs claimed that broker recommendations were not "based upon any arrangement between the recommended broker and UASNM." *See id.* These statements were false and misleading in light of Malouf's arrangement with Lamonde, violating the antifraud provisions of

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[1] A timeline of key events is attached as Exhibit A.

[2] The Division will use the same citation convention used by the hearing officer. *See* Initial Decision ("I.D.") at 2, n.1.

the Securities Act of 1933 ("Securities Act"), Securities Exchange Act of 1934 ("Exchange Act"), and Investment Advisor's Act of 1940 ("Advisers Act"). "'Without a doubt,' disclosure regarding the ongoing payments Malouf was receiving from Lamonde should have been in all the relevant ADV disclosures." Stipulated FOF No. 193. Yet, UASNM failed to disclose Malouf's conflict of interest. Stipulated FOF No. 8, 10-12.

Malouf disclaims any responsibility for these failures to disclose, instead trying to shift the blame to his chief compliance officer, Joseph Kopczynski, chief financial and investment officer, Kirk Hudson, and UASNM's outside compliance consultant, Adviser Compliance Associates, LLC ("ACA"). But Malouf admitted at the hearing that "[w]hen he was CEO of UASNM he was 'top dog' and Mr. Kopczynski and Mr. Hudson worked for him." Stipulated FOF No. 197. And UASNM's outside compliance consultant, ACA, only learned of the payments Malouf was receiving from Lamonde and resulting conflict of interest two-and-a-half years after the payments began, in June of 2010. Stipulated FOF No. 151.

Malouf also violated his fiduciary duty to UASNM clients by failing to seek best execution on certain U.S. Treasury and federal agency bond trades; instead simply 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." Stipulated FOF No. 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 aspects of his misconduct.[3] Litigation ensued between UASNM and Malouf. In

[3] UASNM'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* Div. Ex. 34.

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. Stipulated FOF No. 371. 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 17-25, 2014, before Administrative Law Judge Jason S. Patil. On April 7, 2015, the hearing officer issued his Initial Decision, finding that Malouf's failure to disclose his known conflict of interest violated Sections 206(1) and 206(2) of the Advisers Act, violated Sections 17(a)(1) and 17(a)(3) of the Securities Act, and Section 10(b) of the Exchange Act and Rules 10b-5(a) and 10b-5(c) thereunder. I.D. at 28-32. The hearing officer also found that Malouf aided and abetted and caused violations of Sections 206(4) and 207 of the Advisers Act and Rule 206(4)-1(a)(5) of the Advisers Act. I.D. at 36-38. Judge Patil further found that Malouf's trading through RJFS "because then he got paid" was a failure to seek best execution, violated Sections 206 of the Advisers Act, and resulted in at least $265,263.60 of unnecessary cost and expense to customers of his former advisory firm, UASNM. I.D. at 33, 36.

Based on his finding of fraud and failure to seek best execution, Judge Patil barred Malouf from the securities industry for seven-and-one-half years, entered a C&D order, ordered disgorgement of $265,263.60 (which was offset by a $506,083.74 compensatory payment made to investors as an undertaking in a separate, administrative proceeding against UASNM), and ordered a civil penalty of $75,000. On April 27, 2015, Malouf filed a Petition for Review challenging the hearing officer's findings against him. On May 7, 2015, the Division filed a Cross-Petition for

Review challenging the imposition of a time-limited bar under Section 203(f) of the Advisers Act and the hearing officer's failure to order disgorgement of the $1,068,084 Malouf received through his undisclosed, fraudulent scheme with Lamonde.

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. Stipulated FOF Nos. 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 $25-26 million in assets under management. Stipulated FOF Nos. 14, 194. Malouf was a registered representative associated with RJFS from 2004 through December 2007, when he sold his brokerage branch to Lamonde. Stipulated FOF Nos. 3, 293. Between 2008 and 2011, Malouf used Lamonde's branch of RJFS to execute bond trades on behalf of UASNM clients. Stipulated FOF No. 38.

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. Stipulated FOF No. 2. UASNM, also known as "Universal Advisory Services," provides discretionary advisory services primarily to individuals, charitable organizations, and employee benefit plans. UASNM's 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. Stipulated FOF No. 15. RJFS, through a predecessor, has been registered with the Commission as a broker-dealer since 1974, and is a member of FINRA. *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 he purchased from Malouf. *Id.* He died unexpectedly [redacted]. *Id.*

4. **Joseph Kopczynski**, is currently the chairman of UASNM's board of directors, and its chief compliance officer ("CCO"). Stipulated FOF No. 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 CCO from 2004 to 2010, relinquished that position to Malouf in January 2011, and resumed the CCO position in June 2011, after Malouf was terminated. *Id.*

5. **Kirk Hudson**, held a minority ownership interest in UASNM from 2004-2011 and is currently UASNM's Chief Financial Officer and Chief Investment Officer. Stipulated FOF No. 17.

6. **Matthew Keller** is a minority shareholder in UASNM. Stipulated FOF No. 90. During 2008 through 2011, Keller was an investment adviser with UASNM. Stipulated FOF No. 296.

7. **Adviser Compliance Associates, LLC** is a compliance consulting firm UASNM engaged at various times beginning in 2002 through 2011. Stipulated FOF Nos. 139, 303. **Michael Ciambor** was a consultant at ACA from 2006 to 2009 and a principal consultant from 2009 to 2012. Stipulated FOF No. 392. Ciambor took over the lead role with respect to ACA's annual examinations of UASNM in or around 2006. Stipulated FOF Nos. 144.

III. BACKGROUND

A. 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. Stipulated FOF No. 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. Stipulated FOF No. 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 paid Malouf substantially all of the commissions earned on UASNM client bond trades executed through RJFS and Malouf directed UASNM's bond trades to Lamonde and RJFS in order to receive payments.

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." Div. Ex. 239, Lamonde Tr. at 204:16-205:24. From January 2008 through May 2011, Lamonde earned $1,074,454 in commissions from RJFS on UASNM bond trades. Stipulated FOF No. 20. Lamonde paid nearly all of that, $1,068,084, to Malouf. *Id.*

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. Stipulated FOF No. 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. *Id.* Various witnesses estimated that Malouf placed between 60% and 95% of UASNM's bond trades. Stipulated FOF No.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. Stipulated FOF No. 172, 316.

RJFS' Trade Blotter (Div. Ex. 29) shows that from January 2008 to May 2011, UASNM traded $140,819,708.15 in bonds through RJFS. Stipulated FOF No. 23. UASNM's trade blotter (Div. Ex. 30) shows that between January 2008 and May 2011, it traded only $16,789,390.30 in bonds through other brokers. Ex. 207 at 2. 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 another UASNM investment adviser, Austin McDaniel, and not by Malouf. Stipulated FOF No. 317. Thus, Malouf made the majority of UASNM bond trades through RJFS, because then Lamonde was paid a commission and had money to pay Malouf. Stipulated FOF No.173, 175, 176.

IV. LEGAL ARGUMENT

A. Standard of review

"The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a). "Review of an initial decision shall be limited to the issues specified in the petition

for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 450(a)." 17 C.F.R. § 201.411(d).

B. The Initial Decision erred in imposing a time-limited bar under Section 203(f) of the Advisers Act.

The time-limited collateral bar imposed by the Initial Decision is not permitted under Advisers Act Section 203(f), the basis on which that bar was entered. Section 203(f) provides the Commission with authority to impose either a time-limited suspension of up to 12 months or a bar that is permanent – it does not provide for time-limited sanctions of greater than 12 months. The Initial Decision appears to conflate the Commission's authority under Section 203(f) with its authority under Investment Company Act Section 9(b), which allows the Commission to prohibit investment company-related activities "for such period of time" as the Commission deems appropriate. As described in detail below, the seven-and-one half year collateral bar imposed by the Initial Decision is contrary to the language of the statute and the Commission's longstanding view – accepted by the courts – that a bar is a permanent sanction that prevents future association with a regulated entity absent prior Commission consent. For these reasons, and because the record in this case fully supports a bar from association, the Commission should impose an unqualified collateral bar on the Respondent under Advisers Act Section 203(f).[4]

1. The Initial Decision improperly disregarded the differences between the Commission's statutory authority under Advisers Act § 203(f) and Investment Company Act § 9(b).

The Initial Decision imposed on Malouf a combined, time-limited collateral and Investment Company Act bar of seven-and-one-half years. Specifically, the decision stated:

> I FURTHER ORDER that, pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act:

[4] The seven-and-one-half year prohibition against investment company-related activities is authorized under the language of Section 9(b) of the Investment Company Act and thus appropriate.

> Dennis J. Malouf is barred for a period of seven-and-one-half years from [1] association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and [2] from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

Initial Decision ("I.D.") at 47-48 (bracketed numbers added). In so doing, the Initial Decision apparently relied on Section 203(f) for authority to impose clause [1] of the bar and Investment Company Act Section 9(b) for authority to impose clause [2] of the bar. This articulation impermissibly disregards the differences in the Commission's authority under the two statutes.

Section 203(f) provides in relevant part:

> The Commission, by order, *shall censure or place limitations on the activities of* any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, *or suspend for a period not exceeding 12 months or bar* any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), (8), or (9) of subsection (e)....

Investment Advisers Act § 203(f), 15 U.S.C. § 80b-3(f) (emphasis added). This provision authorizes the Commission to impose four distinct sanctions, ranging in severity from (1) a censure or (2) a placing of limitations, neither of which prevents a person from being associated with a regulated entity, to (3) a suspension from associating with such entities for a period of up to twelve months or (4) a bar from association. As reflected by the plain language of the statute, in the case of a suspension, the Commission has authority to specify the duration of the suspension for any period of time up to 12 months. A bar, in contrast, is not similarly adjustable. If the Commission determines that a respondent's misconduct warrants a prohibition on association of more than twelve months, then imposing a bar is the only option provided by the statute.

In contrast, Investment Company Act Section 9(b) grants the Commission greater flexibility, providing in relevant part:

> The Commission may, after notice and opportunity for hearing, by order *prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest*, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if such person... has willfully violated any provision [of the federal securities laws] or of any rule or regulation under any such statutes; [or] has willfully aided [or] abetted ...the violation by any other person [of the federal securities laws] or any rule or regulation under any of such statutes....

Investment Company Act § 9(b)(2) & (3), 15 U.S.C. § 80a-9(b)(2) & (3) (emphasis added). Rather than providing the alternatives of either a suspension of up to 12 months or a bar, Section 9(b) empowers the Commission to more precisely tailor the duration of a sanction by prohibiting a person from serving or acting in the specified investment company-related capacities for "such period of time as in its discretion" the Commission determines is warranted under the circumstances. As a result, the hearing officer's order preventing Malouf from engaging in investment company-related activities for seven-and-one-half years was completely consistent with the Commission's authority under Section 9(b). The Initial Decision's error was in treating the Commission's authority to impose a collateral bar under Section 203(f) as equally flexible as its authority to impose a time-limited investment company prohibition under Section 9(b).

2. The Commission and the courts have long regarded associational bars as permanent.

Associational bars under the Advisers Act and the Exchange Act[5] long have been viewed by the Commission as permanent sanctions that do not expire with the passage of time.[6] This view

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[5] Exchange Act section 15(b)(6) authorizes an almost identical range of sanctions to those under Advisers Act section 203(f), including censures, placing of limitations on activities, and suspension from association for up to twelve months or bar from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating

has been accepted by courts[7] and is re-enforced by statute.[8] Indeed, under both the Advisers Act and the Exchange Act, it is unlawful for a barred individual to be or become associated with a

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organization. In addition, Section 15(b)(6) also authorizes a suspension for up to twelve months or bar from participation in an offering of penny stock.

[6] *See, e.g., John R. Brick d/b/a John R. Brick & Co.*, Admin. Proc. File No. 3-3167, Rel. No. 483, 1975 WL 160409, n.38 (Oct. 24, 1975) (referring to a bar from association with any broker or dealer as a "lifetime bar," and explaining that "a lifetime bar need not be for life" because the Commission may consent to an application for re-entry into the securities business, rendering "so called lifetime bars...actually bars of indefinite duration."); Final Rule Release, *Applications by Barred Individuals for Consent to Associate with a Registered Broker, Dealer, Municipal Securities Dealer, Investment Adviser or Investment Company*, Rel. No. 903, 1984 WL 547096, *2 (Mar. 16, 1984) ("Once an individual is barred by a Commission order from the securities business or some aspect thereof, it is unlawful for him or her to become associated with a registered entity without the consent of the Commission.") (footnote omitted); *Victor Teicher*, Admin. Proc. No. 3-8394, Release No. 2799, 2008 WL 4587535, *2 (Oct. 15, 2008) (Order Denying Motion to Modify Bar Order) ("[W]e have made clear that, when an unqualified bar [*i.e.*, one without an explicit right to reapply for association after the expiration of a specified period] has been imposed... this 'evidences [our] conclusion that the public interest is served by permanently excluding the barred person from the securities industry ....'") (emphasis in original) (quoting SEC Release No. 34720, 1994 WL 544424 (Sept. 26, 1994)).

[7] *See, e.g., Siris v. SEC*, 773 F.3d 89, 95 (D.C. Cir. 2014) (in a follow-on proceeding under Exchange Act § 15(b)(6) and Advisers Act § 203(f), in which the Commission imposed a collateral bar on respondent Siris, on a petition for review of the Commission's order, holding that "the Commission did not abuse its discretion in imposing on Siris a lifetime bar"); *Kornman v. SEC*, 592 F.3d 173, 180 (D.C. Cir. 2010) (in opinion denying a petition for review of the Commission's order barring respondent Kornman from association with an investment adviser, characterizing the Commission's order as "permanently" barring Kornman); *Gibson v. SEC*, 561 F.3d 548, 555 (6th Cir. 2009) (in opinion denying a petition for review of Commission's order barring respondent Gibson from association with any broker or dealer or investment adviser, concluding "that the Commission did not grossly abuse its discretion in determining that Gibson's lifetime bar was necessary to serve the public interest").

[8] The legislative history of the Securities Acts Amendments of 1964, which for the first time provided the Commission authority to bar an individual from association with a regulated entity, also suggests that Congress viewed a bar as a permanent sanction, comparable to revoking the registration of a broker or dealer entity. Prior to 1964, the Commission could file an administrative proceeding against a broker-dealer to deny or revoke its registration, but could not compel a controlled person to become a party to such proceedings. *See Wallach v. SEC*, 202 F.2d 462-64 & n.1 (D.C. Cir. 1953). The 1964 Amendments expanded the Commission's authority with respect to broker-dealers by, among other things, adding the "intermediate sanctions" of censure and suspension of registration for up to twelve months. *SEC Legis., 1963: Hearings on S. 1642 Before the Subcomm. on Secs. of the S. Comm. on Banking and Currency*, 88th Cong. 47 (1963) (statement of William L. Cary, SEC Chairman) ("The report of the special study pointed out the rigidity and artificiality of the present statutory scheme for disciplining violators, in neither providing for direct action against individual wrongdoers, nor expressly authorizing useful intermediate sanctions against a firm short of revoking registration. Section 6(b) of the bill would add needed flexibility to the Commission's disciplinary powers to overcome these limitations."); *see also* S. Rep. No. 88-379, at 45 (1963) ("In order to avoid the all-or-none choice between revocation or no sanction, it is proposed to permit the Commission to suspend registration for an

regulated entity without Commission consent, no matter how long ago a bar was imposed.[9] Moreover, the Commission has explained that the nature of a bar is such that even when the Commission provides its consent by granting an application to associate with a regulated entity, the bar remains in effect.[10] Consequently, if the terms and conditions of the applicant's association change – for instance, because the applicant wishes to change employers or simply take on new responsibilities at the same employer – Commission consent must be sought once again.[11]

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appropriate period not to exceed 12 months or to issue a formal censure."). The 1964 Amendments also for the first time explicitly authorized the Commission to bring administrative proceedings against individuals, and provided a similar range of possible sanctions, including censure, suspension from association for up to twelve months, and bar from association. *See* Securities Acts Amendments of 1964, Pub. Law No. 88-467, § 6(b), 78 Stat. 565, 572 (Aug. 20, 1964). The Commission received similar authority to discipline investment advisers in the Investment Company Amendments Act of 1970. *See* Investment Company Amendments Act of 1970, Pub. Law No. 91-547, § 24(d) and (e), 84 Stat. 1413, 1431-32 (Dec. 14, 1970); S. Rep. No. 91-184, at 44 (1969) (explaining that one of the purposes of the proposed amendments was to "strengthen existing disciplinary controls over registered investment advisers by making them more comparable to the provisions of section 15(b) of the Exchange Act relating to broker-dealers in securities"); H. Rep. No. 91-1382, at 13 (1970) (same). The Investment Company Amendments Act of 1970 also added Section 9(b) to the Investment Company Act. *See* Investment Company Amendments Act of 1970, Pub. Law No. 91-547, § 4(b), 84 Stat. 1413, 1415-16 (Dec. 14, 1970).

[9] *See* Investment Advisers Act § 203(f), 15 U.S.C. § 80b-3(f), and Exchange Act § 15(b)(6)(B), 15 U.S.C. § 78o(b)(6)(B).

[10] Final Rule Release, *Applications by Barred Individuals for Consent to Associate with a Registered Broker, Dealer, Municipal Securities Dealer, Investment Adviser or Investment Company*, Rel. No. 903, 1984 WL 547096, *2 (Mar. 16, 1984) ("Commission approval of an application for consent to associate, however, does not modify or vacate the Commission order nor does it remove or lift the bar; the order and bar remain in effect.") (footnote omitted).

[11] *Id.* at n.21 ("Commission approval of an application is limited to association in a specified capacity with a particular registered entity and is subject to specific terms and conditions. If any of the individual's duties or responsibilities vary materially from the terms and conditions under which the application was approved, or if he or she seeks to become associated with another registered entity, a new application must be submitted."); *Applications for Relief from Disqualification,* Rel. No. 438, 1975 WL 160468, n.2 (Feb. 26, 1975) ("[I]n the case of a disqualified individual seeking to become employed by a broker or dealer, once such relief from disqualification has been granted by the Commission the bar is removed only so long as the individual applicant remains in the employ of the firm in the capacity and under the supervision specified in the application. In the event the firm thereafter seeks to change either the nature of such employment or the degree of supervision the firm must obtain further Commission approval. Moreover, if the individual seeks employment with another broker or dealer, both the individual and the new firm employer must submit a new application and again obtain Commission approval of such new employment prior to the individual assuming any responsibilities.").

When the Commission bars a respondent from association, it may also grant the respondent an explicit right to reapply for association after a specified period of time – for example, a bar with a right to reapply for association after five years.[12] Consistent with this practice, the Commission has had in place for more than 40 years processes for submission and evaluation of such applications by the Commission and/or the relevant self-regulatory organization.[13] This practice reflects the Commission's recognition that at some point in the future, with proper safeguards in place, it may be consistent with the public interest to allow a barred individual to resume work in the securities industry.[14] Although such "qualified" bars are sometimes informally (and inaccurately) referred to as if they are time-limited – for example, a "five-year bar" – these bars do not expire at the end of the specified time period. Rather, the requirement that the respondent submit a detailed application for association addressing a range of mandatory questions enables the Commission to retain strict control over whether, and the circumstances in which, a barred

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[12] For example, in these litigated proceedings, the Commission issued opinions imposing associational bars with a right to reapply after five years: *Thomas C. Bridge*, Admin. Proc. File No. 3-12626, Rel. No. 9068 (Sept. 29, 2009), *Robert Radano*, Admin. Proc. File No. 3-12084, Rel. No. 2750 (June 30, 2008), and *Richard J. Puccio*, Admin. Proc. File No. 3-8438, Rel. No. 37849 (Oct. 22, 1996).

[13] *See, e.g.*, Final Rules Release, *Rules of Practice*, Rel. No. 35833, 1995 WL 368865, *39 (June 9, 1995); Final Rule Release, *Applications by Barred Individuals for Consent to Associate with a Registered Broker, Dealer, Municipal Securities Dealer, Investment Adviser or Investment Company*, Rel. No. 903, 1984 WL 547096 (Mar. 16, 1984); *Applications for Relief from Disqualification*, Rel. No. 438, 1975 WL 160468 (Feb. 26, 1975). *See also* Final Rule Release, *Notice by Self-Regulatory Organizations of Proposed Admission to, or Continuance In, Membership or Participation of Certain Persons Subject to Statutory Disqualifications*, Rel. No. 18278, 1981 WL 375804 (Nov. 20, 1981); Final Rule Release, *Provision for Notices by Self-Regulatory Organizations of Disciplinary Sanctions; Stays of Such Actions; Appeals; and Admissions to Membership or Association of Disqualified Persons*, Rel. No. 13726, 1977 WL 176035 (July 8, 1977).

[14] *See Applications for Relief from Disqualification*, Rel. No. 438, 1975 WL 160468, *1 (Feb. 26, 1975) ("The Commission recognizes that situations may exist where, in light of changed circumstances and after the passage of a period of time, it may appear appropriate to the Commission, in its discretion, to permit a disqualified individual or firm to have the disqualification lifted if, in general, the applicant can make a showing satisfactory to the Commission that re-entry into the securities business would be consistent with the public interest.") (footnote omitted).

individual may return to the securities industry, even long after the specified time period has passed.

The seven-and-one-half year collateral bar the Initial Decision imposed on Malouf stands in stark contrast to the qualified bars often imposed by the Commission. If the Commission affirms this sanction, by its terms, the bar – like a suspension – will expire in seven-and-one-half years, leaving the Commission with no ability to assess or shape the terms of Malouf's return to the securities industry or to evaluate its impact on the public interest.[15] Such an outcome would be unsupported by the applicable statutory language, which makes no mention of bars of varying durations, and is entirely inconsistent with the Commission's and the courts' fundamental conception of a bar as a lifetime sanction. Accordingly, it should not be permitted.

C. The Commission should impose an unqualified collateral bar on Malouf under Advisers Act § 203(f).

The Initial Decision correctly determined that Malouf's misconduct warrants the imposition of a collateral bar under Section 203(f). The Commission may bar a person associated with an investment adviser if it finds the person committed a willful violation of the federal securities laws, which the hearing officer so found (I.D. at 38) and that a bar is in the public interest. *See* 15 U.S.C. § 80b-3(f). In determining the appropriate sanction in 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

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[15] *Cf. Victor Teicher*, Admin. Proc. No. 3-8394, Release No. 2799, 2008 WL 4587535, *2 (Oct. 15, 2008) (Order Denying Motion to Modify Bar Order) ("This exercise of caution before modifying or lifting administrative bars 'ensures that the Commission, in furtherance of the public interest and investor protection, retains its continuing control over such barred individuals' activities.'") (footnote omitted).

and the marketplace resulting from the violation, and, in conjunction with other factors, the extent to which the sanction will have a deterrent effect. *Gary M. Kornman,* Admin. Proc. No. 3-12716, Rel. No. 2840, 2009 WL 367635, at *6 (Feb. 13, 2009) (citing *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981)). "Fraud is 'especially serious and subject to the severest of sanctions under the securities laws.'" *Conrad P. Seghers*, Admin. Proc. No.3-12433, Rel. No. 2656, 2007 WL 2790633, at *7 (Sept. 26, 2007) (footnote omitted). The "'inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive.'" *Kornman,* 2009 WL 367635, at *6 (quoting *David Henry Disraeli,* Admin. Proc. No. 3-12288, Rel. No. 8880, 2007 WL 4481515, at *15 (Dec. 21, 2007)).

It is in the public interest for the Commission to bar Malouf from association with entities engaged in securities-related businesses. 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 provided any assurances against future misconduct or acknowledged the wrongful nature of his conduct. Although, as the Initial Decision noted, the precise events surrounding Malouf's sale of his RJFS branch are unlikely to recur, the underlying principles – the need to be vigilant for material conflicts of interest and disclose any that arise and the requirement to seek best execution for clients – may be implicated in any number of ways in the operation of an investment advisory business. Malouf's continued role as an investment adviser, with many years remaining in his career, provides ample opportunities for future violations.

Accordingly, the Commission should bar Malouf from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization under Investment Advisers Act Section 203(f), and, as ordered by the Initial Decision, prohibit Malouf for seven-and-one-half years from serving or

acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter under Investment Company Act Section 9(b).

D. The ALJ should have ordered Malouf to disgorge the $1,068,084 in payments he received from January 2008 through May 2011 and failed to disclose to UASNM clients.

Despite the hearing officer's multiple findings of fraud, and Malouf's receipt of over a million dollars in undisclosed payments under his agreement with Lamonde, the hearing officer did not order Malouf to disgorge the full amount of these ill-gotten gains. The hearing officer acknowledged that it is "proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains" (I.D. at 43 (quoting *SEC v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993))), but nonetheless found that "the monies constituting fair value for the sale of Branch 4GE are clearly identifiable as *legal* profits, and should not be the subject of disgorgement." *Id.* (emphasis added). He then found that only "the monies received from excessive commissions, attributable to Malouf, should be disgorged." *Id.* This finding erroneously conditions disgorgement on investor losses based on excessive commissions, as opposed to Malouf's ill-gotten gains. Due to his pervasive fraud, Malouf had no legal profits; all of Malouf's profits were ill-gotten gains subject to 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. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *SEC v. Happ*, 295 F. Supp. 2d 189, 197 (D. Mass. 2003). 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. *See SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985).

The hearing officer calculated purported illegal profits as best execution losses by multiplying the low end of the Division's expert, Dr. Gibbons, estimate of between $442,106 and $693,804 in excess commissions, by the low end of the percentage of trades directed by Malouf – 60-95% – thus arriving at $265,263.60 (60% of $442,106) "of unnecessary cost and expense to UASNM customers[,]" which the hearing officer characterized as the appropriate amount of disgorgement. I.D. at 36. The hearing officer then found that "as the Division agreed that any disgorgement awarded may be 'offset by the $506,083.74 already reimbursed to investors from [Malouf's] settlement with UASNM[,]' my order will not require Malouf to pay any additional money for disgorgement purposes." I.D. at 43-44.

The hearing officer's disgorgement calculation is fundamentally flawed because it does not take into account that *all* of Malouf's profits were obtained from two distinct but concurrent illegal activities: (1) Malouf failed to disclose that his "agreement with Lamonde created a conflict of interest for Malouf because Malouf was incentivized to send UASNM bond transactions through Branch 4GE so that Lamonde would be able to pay what he owed for the business" (I.D. at 30); and (2) "Malouf violated his fiduciary duty by failing to seek best execution for UASNM's clients with regard to the majority of U.S. Treasury and federal agency bond trades routed through RJFS between 2008 and 2011" (I.D. at 32).

Malouf's failure to disclose his conflict of interest and failure to seek best execution (not merely his failure to obtain best execution resulting in excessive fees) mean that *all* of his gains while conducting these illegal activities were ill-gotten. In other words, Malouf obtained all of his

commissions while in violation of the law by hiding them from his clients and by failing to seek best execution for his clients, making them subject to disgorgement. *See Bilzerian*, 814 F. Supp. at 121. It was stipulated that Malouf was paid $1,068,084 by Lamonde and that these payments were made from commissions on trades Malouf and others made through the RJFS branch he sold to Lamonde. Stipulated FOF Nos. 20 and 7. Because the hearing officer found that these payments to Malouf were made pursuant to his fraudulent activities, they should have been considered ill-gotten gains in their entirety and ordered disgorged. Thus, the Division respectfully asks the Commission to impose full disgorgement of Malouf's $1,068,084 in ill-gotten gains.[16]

E. Response to Malouf's Brief In Support of His Petition for Review ("Brief")

Malouf has stipulated that: (1) Malouf's receipt of payments from Lamonde on his bond trades was "a clear conflict of interest ever since he entered into the arrangement with Lamonde in early 2008" (Stipulated FOF No. 178); (2) "'[w]ithout a doubt,' disclosure regarding the ongoing payments Malouf was receiving from Lamonde should have been in all the relevant ADV disclosures" (Stipulated FOF No. 193); and (3) the conflict created by Malouf's receipt of payments from Lamonde was not disclosed on UASNM's ADVs between 2008 and 2011, to UASNM investors, or on UASNM's website (Stipulated FOF Nos. 8-12, 85-87, 154, 328-331, Div. Exs. 66, 68-69). Malouf's sole defense to his orchestration of this scheme to defraud is that he bore no responsibility for disclosing his conflict—the blame rests solely with his employees. As shown below, however, Malouf's claim does not withstand even casual scrutiny.

Malouf's challenge to the finding that he failed to seek best execution is also undermined by his own testimony and stipulations. Malouf agreed that "UASNM's process with regard to best execution was to utilize a three bid process where they would get if they could three bids on any

[16] The Division would not object having the $506,083.74 already reimbursed to investors offset from this amount.

security." Stipulated FOF No. 133. Yet Malouf, as well as his own expert (who is now his current counsel), testified that he did not do that. Stipulated FOF No. 334; Tr. 935:13-937:16; Resp. Ex. 579 at 8, ¶ 19.

Malouf's egregious violations of the securities laws fully justify an injunction from future violations and bar from the securities industry to protect investors, disgorgement of the full amount of his ill-gotten gains, and a significant penalty.

1. Malouf cannot deny responsibility for UASNM's Forms ADV or the content of its website.

Malouf's claim that because Kopczynski and others also may have borne some responsibility for UASNM's disclosures he bore none is factually and legally unsupported. The hearing officer, after hearing testimony from Malouf and others and being shown documentary evidence, found that Malouf, "as CEO, president and majority shareholder of UASNM, had final and ultimate responsibility for UASNM's Forms ADV between 2006 and the end of 2010." I.D. at 12. That finding was based on Malouf's own sworn testimony: at the hearing where he admitted that he was "partially responsible [for the Forms ADV], for sure, as a CEO" and had even greater responsibility with regard to disclosures that related to him personally; and in investigative testimony where he testified that with regard to ultimate responsibility for Forms ADV, "The buck stops with me, there's no doubt, as the president and CEO and the majority shareholder." Tr. at 993:12-995:12. Malouf stipulated that he "performed at least a cursory review of some Form ADVs focusing on disclosures relating to himself and RJFS." Stipulated FOF No. 33. The hearing officer also found that Kopczynski, Hudson, and ACA "each were involved to varying degrees in preparing or reviewing UASNM's Forms ADV from 2008 through May 2011" (I.D. at 12), but

that does not mean that Malouf was not ultimately responsible.[17] Malouf admits that "[w]hen Malouf was CEO at UASNM he was 'top dog' and Mr. Kopczynski and Mr. Hudson worked for him." Stipulated FOF 197.

Malouf would have the Commission absolve him of any and all responsibility for the Forms ADV because Kopczynski, the chief compliance officer, may also bear some responsibility for the accuracy of the Forms ADV, and Hudson, who signed the forms, also should have disclosed Malouf's conflict. The problem with this argument is two-fold. First, even if Kopczynski and/or Hudson should have disclosed Malouf's conflict, that would not absolve Malouf from his own lack of disclosure. As noted by the hearing officer, "even if all the relevant officials at UASNM, RJFS, and ACA knew all about Lamonde and Malouf's agreement, and the payments, it would not excuse Malouf's recklessness." I.D. at 31. Second, Kopczynski and Hudson provided unrefuted testimony that while they understood Malouf sold the branch to Lamonde and was being paid, they "were not aware of the specific terms of that sale."[18] Thus, Malouf should be held accountable for *his* failure to disclose *his* conflict.

The evidence at trial also established that Malouf bore responsibility for statements on UASNM's website. "Malouf was the lead salesman for UASNM, and he was familiar with at least some of the contents of its website." Stipulated FOF No. 13. Malouf testified that "[w]hile he may not have read every word of UASNM's website, he was familiar with its contents in the 2008, 2009, and 2010 time frame." Stipulated FOF No. 189. Malouf provided sworn investigative testimony that he "probably read" statements on UASNM's website in 2008 about UASNM being independent and not charging commissions. Stipulated FOF No. 191. In

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[17] Malouf's claim that the Division alleged that he "was solely responsible for any omissions" (Brief at 13) mischaracterizes the allegations. The Division need not show that Malouf was "solely responsible," only that he bore responsibility.

[18] Stipulated FOF No. 34.

response to direct examination by his own counsel, Malouf acknowledge that he "was part of the creative part of [the website]." Tr. at 1137:25-1138:12. And Hudson testified that Malouf was involved in the website, and "the website was something that he took the lead on developing." Tr. at 157:3-16. Thus the hearing officer was absolutely correct in finding that "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 was reckless in allowing material omissions on the Forms ADV and misrepresentations on the website." I.D. at 31.

2. Malouf cannot rely on UASNM's outside compliance consultant because he failed to disclose his conflict to them.

For Malouf to claim that he relied on his outside compliance consultant as an excuse for his failure to disclose requires that he show that he made full disclosure to the consultant.[19] But Malouf stipulated that his outside compliance consultant, Michael Ciambor, only learned in June 2010 – two-and-a-half years after the fact – that he was receiving payments from Lamonde as a result of UASNM bond trades through the RJFS branch he sold to Lamonde in early 2008. Stipulated FOF No. 151. And Ciambor testified that Malouf told him in May or June of 2008 that "his relationship from that point forward with Raymond James had been effectively severed." Tr. 736:9-737:6. Malouf's reliance on outside compliance consultant defense thus has no basis in the record.

3. Malouf's own testimony belies his claim that he believed his conflict had been disclosed.

Malouf claims that he first learned that his conflict was not disclosed in the Form ADV only after he became chief compliance officer in January 2011, when he began working with ACA

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[19] *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"); *SEC v. Huff*, 758 F. Supp. 2d 1288, 1351-52 (S.D. Fla. 2010) (defendant's reliance on others defense failed because Huff never disclosed critical facts to his accountant).

on a new form ADV. Brief at 11-12. But this self-serving claim is belied by Malouf's own testimony. Malouf testified that he was familiar with the disclosures regarding UASNM's relationship with RJFS being removed from the Form ADVs after 2008: "My recollection is that they were removed and added back and removed in 2010." Tr. 1001:19-1002:10. Malouf further stipulated that "[w]hen Ciambor learned *in June of 2010* that Malouf was receiving payments from Lamonde as a result of UASNM bond trades through the RJ branch he believed that was a clear conflict of interest" and "recommended that UASNM add language to its Form ADV Part II disclosing the potential conflict of interest." Stipulated FOF Nos. 151-152 (emphasis added).[20] Thus Malouf's claim in his brief that he "continued to believe that the RJFS disclosure was contained in the Firm's Form ADV, until January 2011" (Brief at 18) cannot be credited. Similarly, his claim that "he recalled seeing language in the Form ADV he reviewed right after the sale occurred to the effect that he would receive payments from RJFS over a period of time" (*id.*) finds no support in his cited testimony. *See* Tr. 1133:20-21; 1124:20-22.

4. The "dangerous precedent" would be overturning the hearing officer's finding of fraud.

Malouf asks the Commission to reverse the hearing officer's findings and enter an order that Kopczynski, and not Malouf, was responsible for UASNM's failure to properly disclose Malouf's conflict of interest. Brief at 19. As noted above, however, Malouf cannot shirk his failure to disclose by shifting it onto Kopczynski, even if Kopczynski may also bear some responsibility for the failure as chief compliance officer. Kopczynski testified that Malouf told him his relationship with Raymond James was over with in early 2008 (Tr. 1376:4-12) and that he

[20] Ciambor testified that when he interviewed Malouf in June of 2009 as part of ACA's compliance review Malouf did not tell him that he had received in the last year and a half over forty payments from Lamonde totaling over half a million dollars based upon trades that had been run through Malouf's former Raymond James branch, but absolutely should have. Stipulated FOF No. 157. Knowing what he now knows, Ciambor believes Malouf lied to him about his agreement with Lamonde. Tr. 852:21-25.

first became aware that Lamonde was making payments to Malouf years later, in late 2010 (Tr. at 1332:24-1333:1). Malouf stipulated that Kopczynski and Hudson were aware of his sale of the RJFS branch to Lamonde, but were not aware of the specific terms of the sale. Stipulated FOF No. 34. Thus, as with UASNM's outside compliance consultant, Malouf kept the details of his arrangement with Lamonde secret from his chief compliance officer. What would be dangerous would be to excuse Malouf – the acknowledged "top dog" at UASNM – for his failure to ensure that his own conflict was disclosed by claiming that his chief compliance officer, a part-time employee, and/or others should have discovered and disclosed his conflict.

5. Malouf, UASNM's CEO, President, and head of marketing, had responsibility for website content.

Malouf misstates the record in claiming that the hearing officer found him "not responsible for [UASNM's] website." Brief at 20. The hearing officer found that Kopczynski, as chief compliance officer, had "primary compliance responsibility for the website," but he also specifically found evidence, including Malouf's own testimony and stipulations, that Malouf bore responsibility as well. I.D. at 14. Malouf testified that he was familiar with the contents of UASNM's website in the 2008, 2009, and 2010 time frame. Stipulated FOF No. 189. He also stipulated that he knew he had a clear conflict of interest that needed to be disclosed. Stipulated FOF No. 178, COL No. 12. Based upon this evidence, and the evidence that "Malouf was the only one who knew the details of his conflict of interest," the hearing officer found "Malouf's failure to disclose, for years, any details of the payments, to be extremely reckless." I.D. at 31-32. Whether Kopczynski shared responsibility or failed to make other suggested modifications to UASNM's website is immaterial.

F. Malouf's Own Testimony Shows that He Failed to Seek Best Execution.

1. Malouf transacted the majority of bond trades for UASNM clients, including certain specific trades identified at the hearing.

Malouf claims that the Division "fail[ed] to present any evidence whatsoever that Mr. Malouf directed even a single bond trade" and that there was "zero evidentiary support for this [60% minimum] percentage." Brief at 22 and n.11. This is nonsense. Malouf stipulated that "[v]arious witnesses have estimated that Malouf placed between 60% and 95% of the bond trades" made by UASNM. Stipulated FOF No. 76. It was further stipulated that from 2008-2011, Malouf did the majority of his bond trades on behalf of UASNM clients through RJFS. Stipulated FOF No. 173. Even Malouf's own self-serving testimony put the percentage of UASNM bond trades he made through RJFS at 60-70%. Stipulated FOF No. 171.[21] The hearing officer thus properly found that the evidence supported a finding that Malouf made the majority of bond trades at issue.

Moreover, both Malouf and the hearing officer are mistaken in their statements that there was no evidence that Malouf executed a particular bond trade. The hearing officer cites Stipulated FOF No. 38 for his statement that "The evidence shows only that from 2008 to 2011, Malouf directed certain bond trades for UASNM clients to RJFS but no evidence indicated which bond trades he directed there." I.D. at 35. But the Division only stipulated to the first half of that sentence: "Between 2008 and 2011 Malouf used Lamonde's branch of RJFS to execute bond

[21] Malouf claims that his percentage of bond trades was placed at "approximately 60%" by the hearing officer (Brief at 22, n.11), but that is not true. Only Malouf put the percentage that low, and even then that was the low end of his 60-70% range. Kirk Hudson estimated that Malouf was responsible for "90-plus percent of the bond trades." Tr. 96:25-97:11. And Hudson's estimate is not based on speculation, he actually reviewed binders of UASNM bond trades to come up with that estimate. Tr. 100:15-101:11. Matt Keller testified that Mr. Malouf was generally responsible for bond trading at UASNM and "executed 80 to 90 percent of our trades on a long-term basis." Tr. at1162:17-21; 1206:22-1207:13. In using the minimum 60% figure to calculate excessive commissions, the hearing officer simply gave Malouf the full benefit of any doubt.

trades on behalf of UASNM clients." Stipulated FOF No. 38. That is because there was evidence Malouf made particular bond trades, including trades with excessive commissions.

Exhibit 553 is a July 2, 2008 e-mail from UASNM employee Monica Pineda to Matt Keller and Kirk Hudson reflecting one 6/25/2008 bond purchase of at least $1,000,000 and another $522,825 trade on 6/26/2008 for Hudson's client Harley. Resp. Ex. 553; Tr. 122:12-19. Hudson testified that he knew these bonds and he knew Malouf bought them.

> Q And then can you explain why you think Mr. Malouf would be involved in this bond transaction?
>
> A Well, because knowing these accounts, you know, he bought – I know he bought these bonds. I follow this account here, I know, pretty closely. And I never, you know, bought it, done any kind of trade away with Raymond James for that account. And nobody else would because it's not their client.

Tr. 122:12-19. The evidence further showed that a $5,500 commission was paid on the 6/26/2008 $522,825 bond trade (1.052%) reflected in Exhibit 553 and that the 6/25/2008 trade was for $1,537,829 and involved a $15,212.90 commission (0.99%). Stipulated FOF No. 322. These commissions are excessive under the analysis of the Division's expert and Malouf's own testimony. *See* Div. Ex. 243 at 26, Figure 3; Stipulated FOF No. 186.

Malouf also stipulated that he assisted Keller with the bond purchase reflected in Exhibit 540. Stipulated FOF No. 199.

Further, as noted by the hearing officer, "Malouf was often the principal investment adviser on large-scale institutional trades." I.D. at 35. This finding was based on Hudson's testimony that Malouf was UASNM's bond expert and placed its large, $1,000,000 or more, bond trades. Tr. 97:12-98:14. The Division's expert on best execution, Dr. Gary Gibbons, examined 81 trades in Treasury and federal agency bonds representing $95,954,806 in principal amount. Stipulated FOF No. 39. The trades Dr. Gibbons examined for best execution, and found wanting, thus averaged

out to over $1,000,000 per trade, the very type of large bond trades the evidence showed that Malouf handled for UASNM.

2. Malouf's claim that the Division failed to show that his trades carried higher commissions (and were thus excessive) is without merit.

Malouf begins this section of his brief with the demonstrably false claim that "the Division [did not] present evidence showing that Mr. Malouf was responsible for a certain percentage of the Firm's trades." *See* Brief at 23. Malouf stipulated that "[v]arious witnesses have estimated that Malouf placed between 60% and 95% of the bond trades" at issue. Stipulated FOF No. 76. And he further stipulated that his own testimony was that he made 60-70% of UASNM's bond trades through Raymond James. Stipulated FOF No. 171.

Malouf then claims that there was no evidence that his trades carried the excessive commissions. Brief at 23. But, given Malouf's own testimony that he made 60-70% of UASNM's bond trades through Raymond James, and the testimony of all others that he made a much higher percentage than that, it is *not* at least equally likely that Mr. Hudson or Mr. Keller made the trades subject to excessive commissions in question (*cf. id.*) – especially where Malouf acknowledges that Keller took bonds to different brokers, got bids, and chose the broker with the lowest price, which on at least one trade was Schwab over RJFS. *See* Stipulated FOF Nos. 203 and 204.

Despite Malouf's claim, it is not "undisputed that Mr. Malouf and Mr. LaMonde had an agreement that Mr. Malouf's trades would never be charged a commission higher than 100 bps."[22] Brief at 23. The testimony about the 100 bps (or 1%) maximum commission was not limited to Malouf's trades. The parties stipulated that "Malouf and Lamonde also both testified that they would never charge more than a hundred basis points on a bond trade, yet evidence will show that some bond trades run through RJFS were subject to commissions in excess of one percent."

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[22] "bps" stands for "basis point." One basis point is one hundredth of one percent, i.e. 100 bps = 1%.

Stipulated FOF No. 43. Thus the fact that Lamonde charged commissions in excess of 100 bps on multiple occasions does not mean those trades were not Malouf's.

It was further shown at trial that Malouf was involved with at least one bond trade with a commission that exceeded 100 bps. *See* Section F.1. above (discussing Exhibits 553 and trades reflected therein). Regardless, however, the Division's best execution claims are based on Malouf's failure to *seek* best execution, *i.e.* his failure to properly determine whether brokers other than RJFS would charge a lower commission, which is a violation of Sections 206 and 207 of the Adviser's Act. *Jamison, Eaton & Wood, Inc.*, Rel. No. IA-2129, 2003 WL 21099127, at *1 (May 15, 2003) (settled) ("By failing to disclose its potential conflict of interest and other brokerage options, and by failing to seek to obtain best execution, Jamison violated Sections 206(2) and 207 of the Advisers Act.").[23] Whether Malouf *achieved* best execution is a separate question. *Id.*, at *6 (finding that higher commissions without any corresponding benefit can establish a failure to seek best execution); *see also In re Kidder, Peabody & Co., Inc.*, Rel. No. 34-8426, 43 SEC 911, 915 (Oct. 16, 1968) (settled) (finding that 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").

3. The excessive commission calculations in the Initial Decision were not "unfair" and Malouf was given every inference in his favor.

Malouf argues that the acceptable range of commissions on Treasury and federal agency bond trades set forth by Dr. Gibbons is unfounded; and in effect, that there can thus be no such thing as an unreasonable commission. Brief at 24. But this ignores Malouf's own testimony that "for a $1 million treasury bond an appropriate commission would be one percent, would drop to

[23] As noted by the hearing officer, the Division proposed this conclusion of law and Respondent did not dispute it. I.D. at 33, n.27.

0.5 percent above that then goes down from there." Stipulated FOF No. 186. It also ignores the detailed analysis Dr. Gibbons set forth in his report, explaining how he relied upon various sources in establishing reasonable commission ranges, specifically (1) extensive personal experience in trading the same type of bonds Malouf traded; (2) the opinion of Steven McGinnis, who came up with a similar, but lower commission range than Dr. Gibbons did; (3) the cease and desist settlement Malouf entered into with UASNM; (4) primary research involving retrieving the bid-ask spreads on a sample of federal agency bonds traded by Malouf during the study period; and (5) tertiary research involving third-party sources including Federal Reserve data and an article in the Journal of Finance. Div. Ex. 243 at 26-28. Finally, Malouf's argument ignores the hearing officer's reliance on *Mark David Anderson*, crediting an expert's testimony that markups and markdowns on highly liquid AAA securities – such as those at issue here – would be between twenty-five and fifty bps. Exchange Act Release No. 48352, 2003 WL 21953883, at *4 (Aug. 15, 2003). Neither of Malouf's proffered expert witnesses provided contrary testimony. "Wolper des not offer [an] opinion on appropriate commission range or whether particular commissions are reasonable." Stipulated FOF No. 241. Jerry DeNigris, similarly "does not offer an opinion as to whether the commissions charged on the bond trades at issue are reasonable." Stipulated FOF No. 248.

Malouf's second argument – that the "only factor considered in the Initial Decision was the amount charged" – fairs no better. "As Dr. Gibbons explained, for U.S. Treasury and agency bond trades – the ones at issue here – the other factors are largely irrelevant due to the highly liquid and transparent nature of the bonds and other factors." I.D. at 33-34 (citing Tr. 553-54; Div. Ex. 243 at 16, 18, 30; Tr. 476-77, 532). The hearing officer thus considered other factors,

but discounted them given expert testimony that those factors were largely irrelevant for the Treasury and agency bonds at issue.

In finding that the failure to seek best execution resulted in an actual cost to UASNM customers of at least $442,106, and that Malouf is culpable for at least 60% of that – or $265,263.60 – the hearing officer used the high end of Dr. Gibbons' acceptable commissions range, which was the highest of the several ranges available, and the very lowest estimate of Malouf's responsibility for the trades at issue. Had he instead used the low end of Dr. Gibbons' acceptable commissions range – finding that investors were charged excessive commissions of $693,804 – and the higher estimate of Malouf's trading responsibility testified to all witness other than Malouf – 90% – the excessive commission figure attributable to Malouf would have been over two times higher, $624,423.

4. Malouf's own testimony – and that of others – proves that he did not seek best execution.

The Division does not dispute that an investment advisor's best execution obligation in purchasing securities is not always determined by the lowest possible commission costs. But Malouf cannot dispute that with highly liquid, transparent, AAA-rated federal Treasury and agency bonds such as those at issue, the commission is the most salient factor. *See* Div. Ex. 243 at 19-29. Nor can he dispute that the proper procedure for seeking best price was to shop bond trades amongst different brokers. "UASNM's process with regard to best execution was to utilize a three bid process where they would get if they could three bids on any security." Stipulated FOF No. 133. "Malouf acknowledged that during the 2008-2011 time period he should have gotten multiple bids from different brokers to seek best execution on bond trades." Stipulated FOF No. 334. Yet Malouf and his own expert testified that he did not do that. In investigative testimony Malouf testified: "[i]t wasn't a situation where I got three bids, like I should have done. Okay?" and "I

wish I could say I had the bid ask, but I just didn't. I didn't send it out for a bid or a quote, if that's where you're headed." Tr. 935:13-937:16. Alan Wolper, Malouf's expert witness at the hearing and current counsel, testified that "Mr. Malouf admitted that he did not obtain competitive quotes from three different broker-dealers each time he placed an order for execution with Raymond James...." Resp. Ex. 579 at 8, ¶ 19.

Instead of following UASNM's best execution policy of seeking multiple bids, Malouf simply used Lamonde's branch of RJFS to execute bond trades on behalf of UASNM clients. *See* Stipulated FOF No. 173. "One of the reasons Malouf chose to trade through Raymond James was because then he got paid." Stipulated FOF No. 176. Malouf further admitted that had he shopped around among brokers for lower bids on bond sales he probably could have gotten a lower bid for his clients. Stipulated FOF No. 174.

Malouf's claim that he "frequently obtained outside bids on the bond transactions" is unsupported by the evidence he cites. *See* Brief at 26. Resp. Ex. 540 predates the relevant time period and reflects only that Keller sough multiple bids. Resp. Ex. 541 again shows Keller seeking comparison pricing and shows only that Malouf opened accounts at Morgan Stanley and Smith Barney, not that he actively sought bids there. Malouf's claim that Keller testified that "Malouf sought bids on 'every trade' they did together" (Brief at 26) finds no support in either Stipulated FOF No. 316 or page 1201 of the transcript. Similarly the transcript at 263:1-12 and Stipulated FOF No. 335 do not support Malouf's claim that Hudson testified in support of his claim. Keller testified that while Malouf "said he [shopped for best price.] And looking backwards, I don't think he did." Tr. 1203:2-6.

Malouf's reliance on Raymond James and BondDesk to provide best execution is inadequate. First, reliance on a single broker "because then [I] got paid" did not comply with

UASNM and Malouf's acknowledged best execution practice of seeking multiple bids. Second, Raymond James is a broker and has a different, lesser, duty to seek best execution. Div. Ex. 243 at 20, *see also* discussion in Sections 3A and 3B on pages 20-23. Malouf himself "understands that there is a different best execution duty for a broker-dealer than there is for an investment adviser." Stipulated FOF No. 200. Malouf's expert witness and current counsel, Wolper, admits that Raymond James satisfying its duty of best execution does not mean that Malouf satisfied his. Stipulated FOF No. 243. And Malouf's other expert witness, Jerry Denigris, admits that Malouf is not governed by Raymond James's markup/markdown policy. Stipulated FOF No. 252.

5. Malouf's claim that there is no requirement that investment advisers solicit multiple bids is contrary to the evidence.

As detailed above, evidence from UASNM, the Division's expert, and Malouf himself established that as a general matter investment advisers should seek multiple bids on bond trades to seek and achieve best execution. The fact that best execution also requires periodic and systematic reviews to ensure compliance does not alter that requirement. *See* Ex. 243 at 19-29.

Malouf's claim that the Division's expert "agreed that there is no obligation that investment advisers seek multiple bids, real-time, on each trade" mischaracterizes the testimony. Brief at 28. Dr. Gibbons' opinion and testimony was that investment advisers should generally seek multiple bids for bond transactions, but he acknowledged that if an investment adviser were tracking bond prices on a real time basis and saw someone selling a bond at a very low price within the bid-ask spread he might buy that bond without seeking multiple bids. Tr. 548:19-549:15.

Malouf's expert and present counsel, Alan Wolper, opined that multiple bids are unnecessary. But, Wolper has "never provided legal advice to investment adviser[s] on [a] best execution issue;" "never provided expert opinions regarding best execution for investment advisers;" "does not hold any securities license;" "never worked as a regulator of an investment

adviser;" "never worked as an investment advisor;" "never traded bonds for a client;" and "never managed a bond fund." Stipulated FOF Nos. 233-239. Moreover, Wolper, contrary to both Dr. Gibbons and his own client Malouf, "does not believe that there is a difference between the fiduciary duty applied to broker dealers versus investment advisors as to best execution." Stipulated FOF No. 242. Yet even Wolper admits that "Raymond James satisfying its duty of best execution does not mean that Malouf satisfied his." Stipulated FOF No. 243.

As with its review of the Forms ADV, ACA's review of UASNM's best execution practices cannot absolve Malouf's failures because ACA was not told the whole story. ACA's review of UASNM's written policies and its interviews with firm personnel left it with the impression that UASNM requested multiple bids from multiple broker dealers in trading bonds. Stipulated FOF No. 145, 147. Yet, Ciambor and ACA did not learn until June of 2010 that Malouf was receiving payments from Lamonde for routing trades through his former Raymond James branch. Stipulated FOF No. 151. And these payments "and incentive to execute bond trades through RJ created a best execution issue in Ciambor's mind." Stipulated FOF No. 153.

6. All the testimony elicited at trial – including Malouf's – concurred that a one percent commission on a U.S. Treasury or agency bond trade over $1,000,000 was excessive.

Malouf and Lamonde both testified that they would never charge more than 100 basis points on a bond trade. Stipulated FOF Nos. 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. Stipulated FOF No. 186. Yet, the evidence showed that bond trades made through RJFS were often 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 [report's] Tab 1, including three trades with commissions of

approximately 50% more than that amount." Stipulated FOF No. 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 were reasonable for trades of that size. *See e.g.,* Stipulated FOF No. 321 (1% commission on $3 million trade); Ex. 582, Tab 1, pages 1-2 (0.975% commission on $2.982 million trade; 1.002% on $2.002 million trade; 1.001% on %1.151 million trade; 1.00% on $2.089 million trade; 0.958% on $1.560 million trade; 0.922% on $1.456 million trade; 1% on $4.270 million trade; 1.5% on $1.141 million trade; 1.099% on $4.417 million trade; 1% on $4.099 million trade, 1.474% on $2.2 million trade, 1% on $1.479 million trade, .867% on $2.099 million trade).

As noted above, Dr. Gibbons calculated an acceptable commission range utilizing numerous sources, including his extensive experience trading similar bonds. As noted in the Initial Decision, Dr. Gibbons' range was consistent with the testimony of Malouf and Lamonde, as well as the testimony of Steven McGinnis, who advised UASNM that it had a best execution problem because there were excessive markups on its bond trades. Stipulated FOF No. 137.

For his part, Malouf offered no competing expert or range of acceptable commissions. Wolper and Denigris were unable to offer an opinion on an appropriate commission range or whether particular commissions charged were reasonable. Stipulated FOF Nos. 241 and 248. Malouf's citation to NASD IM-2440-1 "Mark Up Policy" suffers from the same flaw as Wolper's opinion about best execution; it conflates the fiduciary duty of an investment advisor with the lesser duties of brokers.

Malouf's argument is essentially that because the Commission does not set out a bright-line rule of what commissions are reasonable and unreasonable in all circumstances there can be no excessive commissions. That is clearly not the law. *See In the Matter of Anderson,* Release No.

48352, 2003 WL 21953883, at *4 (SEC August 15, 2003) (crediting expert testimony 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% and 0.5%).

G. Malouf's failure to disclose his known conflict of interest was reckless.

In arguing that the Commission should reverse the hearing officer's finding that Malouf was extremely reckless in failing to disclose his own, known conflict, Malouf largely rehashes his argument that others are to blame. For the reasons already addressed, this argument is without merit.

1. Malouf's argument that Kopczynski and Hudson ignored an obligation to disclose other potential conflicts is immaterial.

Malouf argues that Kopczynski and Hudson failed to disclose other potential conflicts of interest, but fails to state why that excuses his failure to disclose his own, acknowledged and important, conflict. Brief at 32-33. Regarding the "void of conflicts of interest language" on UASNM's website, while that could have been potentially misleading in light of what Kopczynski, Hudson, and Ciambor knew in 2009, Malouf has admitted it was misleading in view of what *he* knew. Thus, regardless of the failure of others to disclose potential conflicts, Malouf's failure to disclose his own conflict was reckless. This is especially true regarding the RJFS sublease agreement, which even if it was a conflict bearing disclosure – which is doubtful – pales in comparison to Malouf's $1,068,084 in commission kick-backs.

2. Malouf's disclosure of his conflict in March 2011, at least nine months after it had been discovered by ACA and others, is no panacea.

Malouf claims that he "learned for the first time" in January of 2011 when he became COO about the lack of disclosure of his conflict and "immediately updated the Form ADV to make

disclosures." Brief at 33. But this is not true because Malouf stipulated that the Form ADV's were first amended to disclose his conflict in March of 2011, which is not "immediate" disclosure. *See* Stipulated FOF No. 11. Moreover, Malouf's claim that he did not learn of the lack of disclosure until January of 2011 cannot be credited. Malouf stipulated that he "was at least partially responsible for the accuracy of UASNM's ADV disclosures" and "performed at least a cursory review of some Form ADVs focusing on disclosures relating to himself and RJFS." Stipulated FOF Nos. 192 and 33. Given that he reviewed Form ADVs and focused on disclosures relating to himself and RJFS, he had to be aware that his conflict, precipitated by his January 2008 agreement with Lamonde, was not disclosed prior to January 2011. Further, Malouf told ACA about his continuing payments in June 2010, and at that point ACA recommended that UASNM add language to its Form ADV Part II disclosing the conflict of interest. Stipulated FOF Nos. 36, 150-152. Thus Malouf knew about the lack of disclosure no later than June of 2010. A delay of at least nine-months in correcting the lack of disclosure hardly supports Malouf's claim that his "immediate update[] [to] the Form ADV to make disclosure" should preclude a finding of recklessness.

3. A handful of e-mails sent by Malouf three years after his conflict arose do not preclude finding recklessness in his failure to disclose.

For the reasons stated above, Malouf was extremely reckless in failing to disclose his known conflict of interest in receiving payments from Lamonde on bond trades routed through RJFS from January 2008 to March 2011. The fact that Malouf sent a handful of e-mails to UASNM employees in January, February, and March of 2011 addressing various compliance issues does nothing to alter that conclusion. By the time those e-mails were sent, Malouf's conflict had been exposed to ACA and ACA had directed that corrective disclosure be made. Neither

Malouf's disclosure of his conflict in the March 2011 Form ADV, nor his e-mails addressing other compliance issues, demonstrate a lack of recklessness.

H. The sanctions awarded were neither excessive nor unjustified.

1. The evidence fully supported a finding that Malouf acted willfully and recklessly.

Malouf's argument that he did not act willfully is based upon the same arguments he makes that he was not reckless and did not commit fraud. Namely, (1) Malouf had no responsibility for Forms ADV or the website; (2) Malouf reasonably believed Kopczynski was executing his compliance duties and Malouf thus had no such duties; and (3) Malouf reasonably believed that disclosure had been made, despite bearing partial responsibility for and having reviewed Forms ADV, focusing on disclosures relating to himself and RJFS. *See* Brief at 35-36. For the reasons set forth above, this argument fails.

2. The sanctions awarded do not rely on excluded expert testimony.

In imposing a cease-and-desist order, the hearing officer found that (1) Malouf's "violations were relatively serious and lasted for more than three years;" (2) "Malouf was extremely reckless, and has provided little meaningful assurance against future violations or recognition of wrongdoing; in fact he mostly places blame for his misconduct on others;" (3) "to the extent Malouf is not barred from practice as an investment adviser, there is a decided opportunity to commit future violations;" and (4) "where Malouf's failure to seek best execution, that was apparently borne out of the conflict of interest, my calculation establishes a loss of more than a quarter-million dollars to investors." I.D. at 41. The hearing officer also noted Steven McGinnis' testimony that in his forty-four years in the securities industry, he had "never seen a million dollars conflict of interest like this before." *Id.* But contrary to Malouf's claim that this

was the sole basis for the sanctions against him, it was just one piece in a mountain of evidence introduced against him.

Malouf misstates the record when he states that "Mr. McGinnis' testimony ... was not presented live in this action but, instead, was testimony presented in a separate state court proceeding between Mr. Malouf and Mr. Kopczynski." Brief at 36. The Division called McGinnis as a live witness at the hearing, and Malouf was given a full opportunity to cross-examine him, which he took. Tr. 394-471. The testimony quoted by the hearing officer in his Initial Decision came directly from McGinnis' live testimony. Tr. 423:13-22.

3. Sanctions are justified under the *Steadman* factors.

The *Steadman* factors counsel for the imposition of harsh sanctions here. Malouf's conduct was egregious, took place for over three years, and involved numerous Forms ADV, the UASNM website, and dozens of failures to seek best execution. Rather than recognizing the wrongful nature of his conduct and making sincere assurances against future violations, Malouf has denied all wrongdoing, fought these allegations at every turn, and attempted to shirk his responsibilities and shift them to others. As the current owner and operator of another investment advisory firm, Malouf has ample opportunity to commit future violations.

Malouf's claim that there is no likelihood of future violations because UASNM's Form ADV was revised in March of 2011 (Brief at 38) ignores both the woeful tardiness of that revision and the findings that he failed to seek best execution for his advisory clients. His claim that customers were not harmed (*id.*) is directly contrary to the evidence and findings. Failure to seek best execution is harm in and of itself, as is fraud. Moreover, Dr. Gibbons testified that investors paid excessive commissions of "$442,106 on the low side to $693,804 on the high side." Div. Ex. 243 at 4. And in attributing the very lowest estimate of excessive commissions charged and the

percentage of bond trades made by Malouf, the hearing officer still found "a loss of more than a quarter-million dollars to investors." I.D. at 41.

I. The Initial Decision properly considered Malouf's ability to pay.

The ALJ properly considered Malouf's ability to pay, based his examination on evidence submitted both during the hearing and afterwards, and recognized that ability to pay is only one discretionary factor in determining appropriate civil penalties. I.D. at 44-45. Malouf's arguments to the contrary thus fail. Malouf further submitted contradictory assertions of his assets and liabilities to the ALJ, *see* Division's Position on Respondent's Ability to Pay, filed February 27, 2015; I.D. at 45, 46, n. 38, so his claim of inability to pay should not be taken as credible in any case.[24] Thus, Malouf's attempt to reduce his liability by claiming an inability to pay should be rejected. *See SEC v. Metcalf*, 2012 WL 5519358, at *8, (S.D.N.Y. Nov. 13, 2012) (declining to reduce penalty where defendant failed to make adequate showing of inability to pay).

1. The ALJ did not overvalue NM Wealth Management.

Malouf first complains that the ALJ overvalued his current business, NM Wealth Management. Incredibly, in his Brief, Malouf now claims a new third, different valuation for his business, again without support. Malouf simply claims that "the value of NM Wealth Management would be an estimated $7,500...." Brief at 39. But, Malouf initially claimed that the business had no value, *see* Exhibit B to Malouf's Post-Hearing Brief, sworn to on January 12, 2015, then six

[24] Malouf's assertion of inability to pay is incredible on its face. While working for UASNM from 2005 to May 2011, Malouf's salary was at least $86,000 a year. He supplemented this with earnings from his RJFS branch to the tune of $110,000 to $450,000 a year. In September 2011, Malouf was paid $1.1 million for his interest in UASNM, with $350,000 paid directly to Malouf and the rest held back. Malouf testified that after leaving UASNM he started NM Wealth Management, which he owns and operates and has approximately $26 million under management. Malouf charges his NM Wealth Management clients on a quarterly basis an annual fee of 1.20% on assets under management ("AUM") of up to $1,000,000; 1.00% on AUM of between $1,000,000 and $2,000,000; and 0.75% on AUM over $2,000,000. Additionally, Malouf uses the NM Wealth Management US Bank account and the debit card related thereto for his personal expenses. Yet, despite these rich remunerations, Malouf claims that he has virtually no assets. *See* Division's Position on Respondent's Ability to Pay, filed February 27, 2015.

weeks later claimed it had a value of $100,000, *see* Malouf's February 25, 2015 Sworn Financial Statement; I.D. at 46. Malouf's contradictory assertions of value should be given no weight.

Furthermore, the ALJ valued NM Wealth Management in the precise way that the evidence at the hearing established that these types of businesses are valued: at twice their annual trailing revenue. I.D. at 46. Using this formula, and a conservative estimation of assets under management (the ALJ's valuation would have doubled based on a non-conservative estimate), the ALJ determined the value of NM Wealth Management to be $292,500. I.D. at 46 n.39. This evidence shows that Malouf's assertion that if he were barred from the profession, his business would be essentially valueless is flawed: he could simply sell the business as has been done in the past, valued at twice its annual trailing revenue. I.D. at 46. Thus, the ALJ did not overvalue NM Wealth Management.

2. The ALJ properly considered Malouf's ability to pay in assessing a civil penalty.

The ALJ ultimately determined that Malouf's liabilities exceed his assets by only $6,649.29, based on the valuation of Malouf's assets (including the conservative valuation of his business), and discounting Malouf's tax liabilities, because Malouf's "failure to file and pay taxes is his fault...." I.D. at 46. The ALJ considered numerous factors in determining the appropriate civil penalty, including Malouf's ability to pay – as one discretionary factor – as well as the public interest, the deterrent and punitive effect of the penalty, the fact that Malouf's funds were used to pay UASNM's $100,000 civil penalty, and Malouf's ability to earn money in another profession subsequent to his industry bar. *Id.* at 45-47.

Thus, the ALJ properly weighed Malouf's ability to pay along with other appropriate factors to arrive at a penalty amount of $75,000.

3. The ALJ properly considered Malouf's prior payment of restitution.

Malouf argues that "the ALJ failed to take into account the fact that Mr. Malouf has already paid investors $506,083 in restitution. . . ." Brief at 40. Yet the ALJ explicitly did take this into consideration in making his disgorgement award. I.D. at 43. Malouf complains that this amount was not deducted or otherwise used to lower or eliminate Malouf's civil penalty. But the punitive purpose of civil penalties is completely distinct from the purpose of disgorgement, which "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Thus, Malouf's payment of restitution or disgorgement should in no way reduce his civil penalty.

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 1st day of October, 2015.

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SERVICE LIST

On October 1, 2015, the foregoing **DIVISION OF ENFORCEMENT'S BRIEF IN SUPPORT OF ITS CROSS-PETITION FOR REVIEW AND IN RESPONSE TO RESPONDENT'S BRIEF IN SUPPORT OF HIS PETITION FOR REVIEW** was sent to the following parties and other persons entitled to notice:

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Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Honorable Jason S. Patil
Administrative Law Judge
Securities and Exchange Commission
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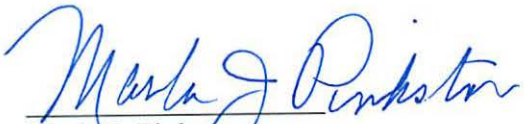

Marla J. Pinkston
Paralegal Specialist

CERTIFICATION

I, Stephen McKenna, counsel for the Division, hereby certify that I ran Microsoft "Word Count" on this brief, inclusive of footnotes, but exclusive of caption, table of contents, table of authorities, signature block, and certificate of service, and the brief contains 13,826 words.

Stephen McKenna

EXHIBIT A

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

Sep 2004 - May 2011

From September 2004 to May 2011 Malouf was paid based on commissions from trades run through a Raymond James broker-dealer branch. Malouf traded through Raymond James "because then he got paid." Stipulated FOF Nos. 175, 176

2008 - March 2011

From 2008 to March 2011, UASNM's marketing materials (website and Forms ADV) declared its "uncompromised objectivity through independence"; that it "may place trades through multiple sources ensuring that the best cost/service/execution mix is met for its clients"; and "we do not accept commissions and we vigorously maintain our independence to ensure absolute objectivity drives our decisions in managing our clients' portfolios." Stipulated FOF Nos. 12, 131, see also Stipulated FOF Nos. 9-10. No disclosure of Malouf's ongoing relationship with his former RJ branch was made. Stipulated FOF No. 8

Jan 2008

January 2008 - Malouf sells Raymond James branch to Lamonde

Jun 2010

June 2010 - Malouf tells Ciambor that he has been receiving payments from Lamonde. Stipulated FOF Nos. 150-151

March 2011

March 2011 - UASNM Form ADV for the first time discloses that Malouf was receiving ongoing payments from Lamonde. Stipulated FOF No. 31.

Jul 2004 | Jan 2008 | Apr 2008 | Jul 2008 | Oct 2008 | Jan 2009 | Apr 2009 | Jul 2009 | Oct 2009 | Jan 2010 | Apr 2010 | Jul 2010 | Oct 2010 | Jan 2011 | Apr 2011

Sep 2004

September 2004 - Malouf and Hudson purchase UAS from Kopczynski, rename it UASNM. Stipulated FOF No. 3

Jun 2008

June 2008 - Ciambor interviews Malouf in connection with ACA compliance review - no mention of payments from Lamonde. Stipulated FOF Nos. 149-151

Jun 2009

June 2009 - Ciambor interviews Malouf in connection with ACA compliance review - no mention of payments from Lamonde. Stipulated FOF No. 156

May 11, 2011

May 11, 2011 - Malouf is terminated by UASNM board. Stipulated FOF No. 1