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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING File No. 3-15967

In the Matter of **LAWRENCE M. LABINE,** **Respondent.**	**CHIEF ADMINSTRATIVE LAW JUDGE BRENDA P. MURRAY**

Pursuant to SEC Rule of Practice 340 and the Post-Hearing Order in this matter, the Division of Enforcement ("Division") respectfully submits its Post - Hearing Brief.

I. PROPOSED FINDINGS OF FACT

A. Respondent

1. Respondent Lawrence M. LaBine ("LaBine"), age 54, resides in Fountain Hills, Arizona. Tr. 660.[1] LaBine has been a Registered Investment Adviser Representative ("RIA") and/or Registered Representative ("RR") associated with a broker-dealer with six different firms since 1986. Tr. 703-06; Div. Ex. 59 at 14-15.. LaBine is licensed to do business in six states including Arizona and California.

2. LaBine is currently affiliated with Newbridge Securities as a dual registrant

[1] The transcript of the hearing conducted in this matter will be cited as "Tr. _." Exhibits introduced into evidence at the hearing will be cited as "Div. Ex.__" and "Resp. Ex. _" respectively. Bates numbers will be used for citations to specific pages of an exhibit, leaving off the prefix and generally referring to only the last three pages, unless it is necessary to give additional digits for clarity. Where an exhibit lacks Bates numbers, original pagination will be used. The Parties' Final Stipulations of Fact, filed July 31, 2015, will be cited as "Stipulations."

at a branch office that he operates in Scottsdale, Arizona. Tr. 660. He is a Chartered Financial Consultant and has completed the Series 7 and Series 24 examinations administered by FINRA. He has BA degrees in economics and psychology. Tr. 660-61.

3. LaBine has been terminated or asked to leave by three of the firms he was associated with based on allegations that he violated the securities laws and regulations, defrauded clients, breached his fiduciary duties to clients, made unsuitable recommendations, violated internal policies and violated industry standards of conduct. Tr. 709-14: Div. Ex. 59 at 19, 92-93; Div. Ex. 48.1 at 326-33.

4. LaBine also has been investigated and/or sanctioned by securities industry regulatory authorities. In November 2005, the NASD suspended LaBine for 15 business days, fined him $25,000 and required him to requalify as a general securities representative for making and effectuating unsuitable recommendations to five customers. Tr. 709-11; Div. Ex. 59 at 86-87. Among LaBine's other sanctions was a 2007 fine by the State of Illinois and consent order of withdrawal of his state registration as a salesperson, with no application for re-registration for eighteen months, and a requirement that he participate in an enhanced and heightened supervision program for one year. Div. Ex. 59 at 88.

5. LaBine is currently the subject of an enforcement action by FINRA which alleges that LaBine violated the federal securities laws in recommending and selling Domin-8 Series D debentures and other alternative investment products. Tr. 720-22; Div. Ex. 125.

6. From June 2007 to October, 2010, LaBine was affiliated with DeWaay Advisory LLC ("DA") as an RIA and with DeWaay Financial Network, Inc. ("DFN") as

an RR. Div. Ex. 59 at 15.[2] LaBine was attracted to join DeWaay because it specialized in alternative investments such as direct participation programs, investments in land and other "private equity type investments." Tr. 1076.

7. In January 2008, LaBine decided to transition many of his clients' investment portfolios away from publicly traded securities and towards alternative investments like real estate investment trusts ("REITs"). Tr. 739-40; 1074-76.

8. DeWaay terminated LaBine's association in October 2010 on the stated basis of allegations that LaBine had defrauded clients, violated securities regulations and violated industry standards of conduct. Tr. 709, 1031-32; Div. Ex. 59 at 92-93. DeWaay had paid LaBine's clients significant amounts of money to settle allegations of improper conduct by LaBine. Tr. 1032-33; Div. Ex. 59 at 92-93.

9. LaBine asserts that his firing was part of an attempt by DeWaay's founder and principal owner to steal LaBine's clients and abscond with sales commissions to which LaBine was entitled. Tr. 1030-33, 1145-48; 1189-90; Div. Ex. 47 at 27-30. During his association with DeWaay, LaBine was subject to a heightened supervision plan but had his own employee, Steven Swanson, serve as his immediate "supervisor." Tr. 1092-94, 1188-89; Resp. Ex. 10.[3]

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[2] DA and DFN were both affiliated with "DeWaay Financial Network," which was headquartered in Iowa. Stipulations ¶ 1. DA and DFN will be referred to collectively herein as "DeWaay" unless the context requires separate treatment.

[3] Swanson was also associated with DeWaay. Although Swanson was the representative of record for some Domin-8 Series D debenture sales, LaBine has stipulated that those sales were made to LaBine's clients on LaBine's behalf and that LaBine asked to receive commissions and warrants based on Swanson's sales. Stipulations, ¶¶ 17-21 and Table 2.

B. LaBine's Clientele

10. As of 2008, LaBine's clientele predominantly consisted of senior citizens with whom he had long-term relationships. Tr. 675-76. LaBine had approximately 500 "core clients" for whom he managed important aspects of their financial interests. Tr. 665, 674-77.

11. LaBine marketed himself as a financial planner and leveraged relationships developed with clients in that capacity to provide investment advisory and brokerage services. Tr. 674-77. Specifically, LaBine used a firm that he owns in the Phoenix, Arizona area called Financial & Estate Planning International ("FEPI") and another firm that he owns in Torrance, California called Pinnacle Wealth Management ("Pinnacle") as marketing vehicles to attract and service seniors. LaBine touted FEPI as "one of the largest financial and estate planning practices in the Southwest" offering a variety of financial planning services including "investment analysis and planning," "retirement planning needs," "guidance in reaching financial and wealth transfer milestones," "revocable living trusts" and "asset protection." Tr. 669-70; Div. Ex. 44 at 2. LaBine regularly invited his FEPI and Pinnacle clients to seminars on financial planning topics such as his "Tax Vacation" seminar on ways to reduce income and estate taxes. Tr. 666-70; Div. Ex. 44.

12. By offering seniors "a whole package" of financial and estate planning services, LaBine was able to interest clients in receiving his "investment advice." Tr. 670-73; Div. Ex. 47 at 67-68. For example, Earl Gilbert (then age 91) who made a $100,000 purchase of Domin-8 Series D debentures in March 2009 on LaBine's recommendation had been his client for 15 to 20 years since attending LaBine's "living

trust seminar." Tr. 692-701. LaBine set up Mr. Gilbert's estate plan, living trust, living wills, Power of Attorney and estate planning documents. Tr. 692. LaBine has stated that clients like Mr. Gilbert "hired me to vet out investments and give them investment advice." Tr. 695-698; Div. Ex. 48.1 at 189-90.

13. LaBine encouraged clients to think of him as their personal "financial planner" rather than identifying with the advisory and brokerage firms with which he was affiliated. Tr. 863. When LaBine moved to DeWaay in June 2007, for example, he used a business card that prominently identified himself as a Chartered Financial Consultant at FEPI and that contained much smaller print noting "[s]ecurities offered through [DFN], advisory services offered through [DA]." Div. Ex. 44 at 2. LaBine used FEPI staff to assist him in servicing advisory clients and brokerage customers. Tr. 682. FEPI personnel performed such tasks as setting up appointments for LaBine to discuss their investments, maintaining records of contacts with clients and transmitting prospectuses and other materials to clients. LaBine's clients typically followed him as he moved from one financial services firm to another over the years. Tr. 691-92.

14. LaBine maintained a single file for each of his FEPI and Pinnacle clients and did not create separate files that distinguished advisory accounts from brokerage accounts. Tr. 740-41. Clients did have separate accounts with LaBine at his advisory and brokerage firms but he managed both types of accounts as one for purposes of asset allocation and diversification. Tr. 740-41. When recommending a particular security that could only be purchased or held in a brokerage account, LaBine asserts that he considered a client's

overall investment portfolio and objectives. *Id.*[4]

15. In addition to attracting seniors through FEPI and Pinnacle, LaBine obtained clients through referrals from estate planning lawyers who he financed for that purpose. Tr. 1030. For example, LaBine provided $20,000 - $30,000 in seed money for a California-based trusts and estates lawyer to acquire his law practice. Div. Ex. 47 at 69-73. LaBine also paid $60,000 - $70,000 of that lawyer's payroll expenses. LaBine never required the lawyer to repay the money. LaBine was motivated by his desire to receive referrals. Div. Ex. 20 [4/08/10 email from LaBine to D. DeWaay re Alternative Investments Restriction, stating: "I'm also sure you're aware that the majority of my clients are in that 75 to 85 age group. That was the purpose of lending money and managing the large estate plan law firm in LA."] LaBine would refer his FEPI and Pinnacle clients back to trusts and estates lawyers to handle any legal work necessary to implement his financial planning advice. Tr. 1030; Div. Ex. 47 at 62-70.[5]

C. Domin-8 and the Series D Debenture Offering

16. Domin-8 was a privately held, start-up company that offered software and related services to the property management industry in the United States and Canada. Stipulations ¶ 2; Tr. 95-100. From late 2005 to mid-2007, Domin-8 attempted to become a

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[4] LaBine did not charge FEPI and Pinnacle clients for financial planning services but instead received compensation in the form of management fees on advisory accounts opened with whatever financial services firm LaBine was affiliated with at the time and sales commissions on brokerage transactions. Tr. 674.

[5] Similarly, LaBine provided $135,000 in funding to "acquire" the law practice of a recently deceased trust and estates lawyer in Phoenix who had approximately 3,000 clients. LaBine arranged for another lawyer to handle the law practice and to make referrals to LaBine. Div. Ex. 47 at 76-83, 256-59. LaBine did not require direct monetary repayment but did get approximately 150 new clients through such referrals. Div. Ex. 47 at 83-84. As LaBine has stated, "I would get referrals from those clients [and] make my money on investments." Div. Ex. 47 at 257. Another lawyer with whom LaBine had a referral arrangement was also a Registered Representative. LaBine shared brokerage commissions with that lawyer/RR "from the business that his law firm generated." Div. Ex. 48.1 at 38; see also id at 36-40, 281.

dominant provider in this market through an aggressive acquisition strategy that included its planned purchase of eight other companies. Stipulations, ¶ 3; Tr. 95-100. At the end of 2007, Domin-8 had debt of approximately $14.7 million including over $6.8 million in so-called "Seller Notes," some of which carried a first security interest in company assets. Tr. 102-04; Div. Ex. 56.2 at 158, 183. Although Domin-8 had marketable products and services, a significant customer base and a plausible business plan, its revenues were woefully insufficient to service its debt and fund operations. Tr. 102-03. In fact, Domin-8 had "[s]ubstantially negative cash flow." Tr. 109-110. By the end of 2008, Domin-8's total debt had increased to over $28 million as compared with cash on hand of only approximately $416,000 and assets of less than $10 million book value. Tr. 114-15, 121-23; Div. Ex. 56.1 at 20 and appended Consolidated Financial Statements. Domin-8 had net losses of approximately $11.2 million in 2006, $14.5 million in 2007 and $16.5 million in 2008. Stipulations, ¶ 3; Div. Ex. 56.1 at 20.

17. In 2007, Domin-8 sought the assistance of an investment bank named GunnAllen Financial ("GAF"). Working with GAF, Domin-8 offered preferred stock and began a series of debt offerings with the objective of paying off the Seller Notes funding daily operations. Tr. 104-09. The company raised $19.6 million in these offerings, which sold debentures denominated as "Series A," "Series B," and "Series C." Div. Ex. 56.2 at 189-91. The Series C debenture offering was not fully subscribed, however, and Domin-8 did not meet its funding objectives. Tr. 104-09.

18. In June 2008, Domin-8 asked GAF to lead another round of debt financing, which became the "Series D" debenture offering. Stipulations, ¶¶ 7-8; Tr. 117-19. Domin-8 initially hoped to raise $12 million from the Series D debenture offering but

later increased its goal to $20 million. Div. Ex. 56.2 at 139; Div. Ex. 56.8 at 13568; Div. Ex. 56.12 at 12236. The Series D offering was structured as an exempt offering intended to comply with Section 4(a)(2) of the Securities Act and Regulation D thereunder. Div. Ex. 56.2 at 140. The Series D debentures initially offered a 10% per annum interest rate, with interest-only payments for 35 months and interest plus amortization of principal beginning in month 36 on a 60 month payment schedule. Div. Ex. 56.2 at 144-49, 198-204. The Series D debentures also gave purchasers the right to receive a warrant to purchase Domin-8 common stock at a preset price. *Id.* Purchasers also received a security interest in Domin-8's assets that was senior to the Series A, B, and C debentures but subordinate to the "Seller Notes" that Domin-8 had previously issued to fund its acquisitions. *Id.*

19. The Series D debentures were offered via a private placement memorandum ("PPM") dated June 30, 2008. Div. Ex. 56.2. The PPM identified GAF as the Placement Agent for the offering. Although the PPM was supplemented eight times from August 22, 2008 to June 15, 2009, GAF was the only Placement Agent ever identified. Div. Exs. 56.5 - 56.12.

1. Domin-8's Grant of Stock Warrants to GAF as the Placement Agent

20. Domin-8 granted GAF the right to receive extra incentive compensation in the form of a warrant to purchase shares of Domin-8 common stock at a preset strike price. Div. Ex. 56.2 at 140. The amount of shares that GAF could acquire by exercising its warrant rights was determined by its sales of Series D debentures pursuant to a formula set forth in the PPM. *Id.* The warrant grant was in addition to GAF's right to receive a 10% commission on its sales of the debentures. Div. Ex. 56.2 at 140, 148-49, 205, 207-08.

Domin-8 believed that offering warrants would incentivize GAF's representatives to sell the debentures. Tr. 127-33; Div. Ex. 69 at 253-55. Domin-8 subsequently revised the warrant grant several times to make the terms more favorable, including in December 2008 when the company decreased the strike price of the warrants and increased the number of warrant shares to which GAF would be entitled. Div. Ex. 56.6 at 2.

2. LaBine's Knowledge of DFN's Right to Most of GAF's Warrants Pursuant to the Selling Agreement

21. Although GAF was the Placement Agent for the Series D debenture offering, it needed the assistance of other financial services firms, and access to a fresh set of potential investors, in order to get the offering off the ground. GAF turned to DeWaay for assistance. Stipulations, ¶¶ 7-8; Tr. 119. On July 15, 2008, GAF and DFN entered into a "Selling Agreement" by which DFN became a Sales Agent for the Series D offering. Stipulations, ¶ 8. Under the terms of the Selling Agreement, DFN was entitled to receive 80% of the commissions generated on sales of Series D debentures by its registered representatives. Div. Ex. 16 at 008. GAF also assigned its right to receive warrants to purchase Domin-8 stock based on DFN's sales. *Id.* Thus, DFN was to receive 80% of the warrants that Domin-8 would otherwise have issued to GAF as incentive compensation based on DFN's sales. *Id.*

22. LaBine was aware of the existence of the Selling Agreement from the time he starting recommending and selling Series D debentures to his clients. Tr. 747. LaBine knew that DFN would be entitled to most of the commissions and warrants that accrued to GFA based on DFN's sales. Tr. 747-48.

D. LaBine's Expectation of Personally Receiving Warrants as Extra Incentive Compensation

23. From at least August 2008 to mid-August 2009, LaBine recommended and sold approximately $7,125,113 worth of Domin-8 Series D debentures to his clients at FEPI and Pinnacle. Stipulations, ¶¶ 10, 13. LaBine's sales compared with total sales of only approximately $3,251,500 by GAF and all other representatives combined. Stipulations, ¶ 13; Div. Ex. 60.01. Along with sales commissions, the prospect of receiving warrants to purchase Domin-8 common stock at a preset strike price was a significant incentive for LaBine to recommend the debentures to his clients.

24. LaBine always believed his sales would entitle him to receive warrants to purchase a substantial amount of Domin-8 common stock. As previously noted, LaBine was aware that DFN was contractually entitled to receive most of the commissions and most of the warrants attributable to its representatives' sales. Tr. 747-48. LaBine did not have a written agreement with DFN until June 2010 but always expected, in accordance with standard practice in the industry, to receive at least 90% of brokerage commissions payable to DFN based on his sales of the Series D debentures. Tr. 748-50; Div. Ex. 47 at 157-58; Div. Ex. 110.[6] Similarly, on November 25, 2009, LaBine asked top management at DeWaay to remit a like percentage of the warrant shares that were accruing to DFN based on his sales. Div. Ex. 17; Stipulations, p. 3, ¶ 20. Ninety percent of the warrants ultimately due to DFN based on LaBine's sales would have entitled LaBine to purchase 260,852 shares of Domin-8 common stock at the preset strike price. Stipulations, ¶ 25.

25. The prospect of receiving warrants on top of sales commissions was a

[6] LaBine subsequently did receive commissions in the amount of at least $524,408. Stipulations, p. 3, ¶ 14.

significant incentive for LaBine to recommend the Series D debentures. The potential value of a warrant is not fixed but instead is determined by its strike price in relation to the stock price at the time of exercise. Div. Ex. 130, ¶¶ 9-13, 22-24. LaBine believed, however, that the Domin-8 warrants could have substantial value. Tr. 757. Indeed, LaBine thought at the time that the underlying business could be worth at least $300 million. Tr. 778-79.[7] That is why LaBine stated in his November 25, 2009 email that the Domin-8 warrants could be worth "a substantial sum" if the company could perform as expected. Div. Ex. 17.

26. LaBine has asserted that he never received a response from DeWaay about the warrants and believed that DeWaay's founder was untrusthworthy and wanted to keep the warrants for himself. Tr. 754-57. Whether or not LaBine's assertion is true, the lack of a response would not negate the evidence of LaBine's *expectation* of receiving warrants. LaBine had asked about the "split" of warrants as between DFN and himself, not whether he would receive *any* warrants. Div. Ex. 17. LaBine also stated that he wanted to know about the split *before* he raised more money and LaBine subsequently did raise millions of dollars more for Domin-8.

27. Moreover, on or about November 26, 2009, Domin-8 CEO Greg McGrath told DeWaay executives that he wanted "to make sure that as much [of DFN's warrants] as is allowed is passed through to Larry [LaBine] for all the work and support he has provided the company." Div. Ex. 17. On November 26, 2008, McGrath told LaBine directly that "I spoke with the folks at DeWaay regarding the commissions and they agreed that it made sense to have them go directly to you." Resp. Ex. 17. While the text of McGrath's message

[7] LaBine has put the figure as high as $900 million, though he now insists (implausibly) that he really meant the company's value after its bankruptcy. *Compare* Div. Ex. 47 at 116, 190 and Div. Ex. 48.1 and 206-07 *with* Tr. 775-80.

referred only to "commissions," its subject was "warrants," and a reasonable inference is that LaBine and McGrath had discussed warrants and that LaBine expected to receive warrants.

28. LaBine's ensuing course of action is also consistent with him either having received a response from DeWaay that he found satisfactory or otherwise believing that he would eventually receive a significant allocation of the warrants. As discussed in Section E below, LaBine's sales of the debentures significantly increased after November 2008. LaBine also made specific fund raising commitments to Domin-8's Board of Directors and increased his own sales goals in direct response to news that the terms of the warrant grant were being enhanced.

29. Specifically, in late April 2009, LaBine had a dinner meeting with Domin-8 CFO Dan Buettin during which LaBine expressed the view that the strike price of the warrants should be reduced. Tr. 165-69. Domin-8 had wanted to re-price warrants being issued to company management and GAF wanted the price reduction to be made applicable to warrants accruing to its representatives in order "to incent their brokers to contribute to [Domin-8's] survival plans." Tr. 165-69 and Resp. Ex. 34 at 2. LaBine told Buettin that he, too, wanted the warrants to be re-priced. Tr. 165-69, 929-30 and Resp. Ex. 34 at 2. LaBine also "specifically and directly asked for more warrants." Tr. 138. Shortly thereafter, LaBine received an email from his principal contact at GAF, Roger Overby, reporting that "Domin-8 is going to reduce warrant price from $2.95 to around $1.50" which should "make [LaBine's] warrants worth a lot more." Tr. 921-27; Div. Ex. 19.

30. Before receiving Overby's report, LaBine's previous goal had been to achieve $250,000 in Series D debenture sales each week. Tr. 926-27. But on the same

day LaBine received Overby's report, LaBine told Overby that he would "go for it this weekend and work this Saturday" and that he "will try to hit $500K sold by Saturday." Div. Ex. 19. LaBine has admitted that his immediate *doubling* of his weekly sales goal was prompted by the news of Domin-8's agreement to reduce the warrant strike price. Tr. 926-27.

31. LaBine's request for warrant sweeteners also encompassed their expiration date. In May 2009, LaBine told Buettin that the Board should extend the life of the warrants from five years to ten years. Tr. 193-96; Div. Ex. 34 at 2; Div. Ex. 43 at 52528; Div. Ex. 63 at 35652. LaBine first made this request during a dinner meeting with Buettin in early May 2009 to prepare for a meeting of Domin-8's Board the following week. LaBine was scheduled to participate in the meeting by telephone. As Buettin memorialized his pre-meeting with LaBine over dinner, among the issues the two men discussed was LaBine's request that the Board "adjust the life of the broker warrants for Series D to 10 years from 5 years." Domin-8's Board acquiesced to LaBine's request by increasing the warrant exercise period to seven years and also enhancing the warrant offer in other respects. Tr. 197-200; Div. Ex. 56.12 at 12237.

32. Domin-8 filed for Chapter 11 bankruptcy protection on September 17, 2009, and LaBine never received the warrants he had expected to receive. LaBine now denies that he ever expected to receive warrants and asserts that the possibility of receiving them therefore did not incentivize him. Tr. 751-59. But LaBine's testimony is not credible in view of his purposeful course of action before Domin-8's bankruptcy as discussed above. If LaBine did not care about the warrants, it would have made no sense for him:

- To ask DFN about the split of warrants as between them,

- To demand an answer before raising more money,
- To request that Domin-8 sweeten the terms of the warrant grant and
- To immediately double his sales goal for the Series D debentures in response to news of the reduction in the strike price of the warrants.

33. Furthermore, LaBine's course of action after Domin-8 filed for bankruptcy also undermines his litigation position. LaBine participated, along with members of Domin-8's management and DeWaay's founder, in a so-called "stalking horse" bid to acquire Domin-8's assets after its bankruptcy filing. LaBine was named to the Board of Directors and granted a 20% equity stake in the acquisition vehicle, aptly named "D8 Acquisitions Corporation." Tr. 1021-23; Div. Ex. 106 at 103, 124, 128. LaBine believed that Domin-8's business plan was still fundamentally sound and that its contractual rights and intellectual property were valuable. Tr. 1012-13. Just as LaBine had believed that the warrants for selling Series D debentures stood to be worth "a substantial sum," he believed his 20% equity stake in D8 Acquisitions could be very remunerative to him. Tr. 1027. LaBine's participation in the attempt to obtain control of Domin-8's business, though ultimately unsuccessful, is further evidence of his state of mind and supports the conclusion that the prospect of receiving warrants had been an incentive for him to recommend the Series D debentures.

E. LaBine's Fundraising Commitments to Domin-8 in 2009 and his Efforts to Fulfill them

34. LaBine made major fundraising commitments to Domin-8 premised on his ability to make substantial sales of Series D debentures to his clients at FEPI and Pinnacle each month. LaBine even promised to get the entire Series D offering fully subscribed on

his own if necessary. LaBine first made specific funding commitments in January 2009 and they remained in effect until LaBine finally ceased his sales efforts in mid-August of that year.

35. In late January 2009, LaBine told Domin-8's CFO that he was committed to personally raising $500,000 for the company by the end of the week. Tr. 144-49, 872-73; Div. Ex. 69 at 1306. LaBine also provided Domin-8 with documentation of his ability to deliver on that commitment. Div. Ex. 69 at 1306; Div. Ex. 62. LaBine had already raised approximately $3.5 million through sales of the debentures, but Domin-8's Board was nonetheless discouraged because other producers were not selling enough to get the offering fully subscribed. Stipulations at Table 1; Div. 41; Div. Ex. 69 at 1306; Tr. 144-49, 872. New funding commitments from LaBine and others in January 2009 convinced the Board to continue with the Series D offering rather than terminate it immediately and file for bankruptcy. Tr. 144-49; Div. Ex. 69 at 1306. LaBine fulfilled his commitment by delivering $550,000 in Series D debenture sales that month. Tr. 149-51; Div. Ex. 62.

36. On February 12, 2009, LaBine told Domin-8 that he was increasing his fundraising commitment to $1 million per month and that he could get the entire offering funded on his own if necessary. Tr. 876-77. As memorialized in the minutes of Domin-8's Board meeting on that date, LaBine dialed into the meeting and "committed to raise $250K a week for the next few months to help bridge the gap and indicated that he had the capacity to raise the entire Series D Debenture Offering if necessary." Div. Ex. 69 at 1316; Tr. 152-53. LaBine's commitment was all that kept Domin-8 from terminating the Series D offering at that time. Tr. 176-77.

37. LaBine did not make his fund raising commitments lightly. LaBine was not

contractually obligated to meet his commitments but nonetheless made and repeatedly reaffirmed them before Domin-8's officers and directors, bankruptcy counsel and counsel for the company's independent directors. Tr. 153-54. Domin-8's CFO repeatedly wrote to LaBine regarding his "promises" to deliver specific levels of funding, and LaBine never denied having made such promises. Tr. 169-71; Resp. Ex. 34 at 1. To the contrary, LaBine made substantial efforts to meet his commitments or at least come as close as he possibly could. Immediately after telling Domin-8 that he would raise $1 million dollars each month, for example, LaBine galvanized his staff at FEPI to fulfill the commitment, instructing that he needed to "raise $250,000 a week, every week, for about the next two months for dominate [sic]" and that "each week we need to look at having some dominate [sic] paperwork ready to go and sold for clients." Div. Ex. 2; Tr. 877. LaBine's state of mind is also revealed by his staff's regular transmission of sales update reports directly to Domin-8. Div. Exs. 46, 70.1–70.10; Tr. 154-64, 879-80. Furthermore, although LaBine did not raise a full $1 million in February 2009, he did raise $830,000 towards that target. Stipulations, Table 1.

38. LaBine was well aware of his singular importance to the company. Tr. 183-90, 901-22; Div. Exs. 3, 7, 18, 19, 30, 40, 45 and 80.[8] In an April 3, 2009 email, for example, GAF's Overby told LaBine that "Domin-8 will not make it without your $250,000 per week to close on." Div. Ex. 30. Overby followed up with LaBine a few days later, stressing in an April 7, 2009 email that "Domin-8's "cash needs are reaching a critical point" and "[w]e have to close on $1.5mil minimum this month to make up last 60 days

[8] LaBine was also instrumental in obtaining pledges of support for Domin-8 from other producers but by the spring of 2009, it was becoming increasingly clear that they would not come through with substantial additional funding. Div. Ex. 42; Tr. 904. Domin-8 had become almost completely dependent on LaBine's personal fund raising efforts. Tr. 171:76, 941-43.

shortfall." Div. Ex. 3. Overby was even more explicit the following day, telling LaBine that "Domin-8 is still very short on cash, still very fragile and will not survive without your support." Div. Ex. 45. LaBine also received pleas for help directly from Domin-8, such as CFO Buettin's April 28, 2009 email stating that "[w]e are out of cash" and need "at least $400,000 in cash to the escrow within days...." Div. Ex. 7; Tr. 171-73.

39. LaBine responded to those pleas by ramping up his sales efforts and scheduling more sales calls with his clients. Tr. 913-21, 930-32; Div. Exs. 4, 6, 12, 58.6 and 79. On April 8, 2009, for example, LaBine emailed his staff at FEPI stating that "we have to concentrate on Domin-8 for the next 30 days." Tr. 911-16; Div. Ex. 4. The e-mail listed four DeWaay advisory clients with whom he wanted scheduled appointments immediately and requested that the assistant have the necessary subscription paperwork ready for execution. *Id.* And as previously discussed in Section D above, LaBine also responded to Overby's report of the reduction in the strike price of the warrants that he expected to receive from Domin-8 by doubling his weekly sales goal. Tr. 921-27; Div. Ex. 19.

40. LaBine continued to reassure Domin-8 that he would deliver the necessary funds by getting his clients to buy $1 million in Series D debentures each month. During a dinner meeting with Buettin on April 20, 2009, for example, LaBine pledged that he would raise $1.5 million dollars within the next six weeks. Tr. 929-32; Resp. Ex. 34 at 2. LaBine also reaffirmed his "promise" to get the entire Series D offering funded on his own if necessary and told Buettin that he could sell a total of up to $15 million dollars of the debentures. Tr. 184-86; Div. Ex. 40 at 2. LaBine also ramped up his sales efforts once again. Div. Ex. 12; Tr. 918-19. On May 1, 2009, LaBine told his staff to prepare a list showing which clients had not already bought Series D debentures and to "let every

employee know that the month of May, we must raise $1.5M for Domin-8 .... Larry [LaBine] will be attacking the list, and everyone in the office will be helping to schedule and close and sell people on the list that have not made it to Domin-8 yet."

41. LaBine was unable to raise the full $1 million in April 2009, but did deliver over $740,000. Stipulations, Table 1. Moreover, on or about May 18, 2009, LaBine provided further assurances to the Board consistent with his $1 million dollars a month fund raising commitment:

> Mr. LaBine estimated that he would raise approximately $1 million per month going forward under the Series D Debenture Offering. Mr. LaBine indicated that he would likely sell $10-12 million of the Series D Debenture Offering.... Resp. Ex. 89 at 1; Tr. 186-88.

42. As events unfolded, LaBine was only able to fully meet his initial commitment of $500,000 in sales during a single week in January 2009 and fell at least $100,000 short of his $1 million per month goal from February through May, 2009. LaBine's sales began to decline beginning in June 2009 and he ceased his fund raising efforts altogether in mid-August, 2009. Up to that point, however, LaBine made substantial efforts to close as many sales as possible as quickly as possible – just as he had promised Domin-8 but not disclosed to his clients.

F. LaBine's Conduct in Recommending and Selling the Debentures

1. The Seniors Who LaBine Targeted Were Mostly His Regular Advisory Clients

43. LaBine convinced a total of 100 investors to purchase Domin-8 Series D debentures in amounts ranging from $50,000 to $200,000. Stipulations, ¶ 13 and Table 1. Approximately 86% of LaBine's investors were age 60 or older at the time of purchase and more than half were at least age 70. Div. Ex. 86. Many invested with LaBine for their

retirement and/or trust accounts. Stipulations, ¶ 33 and Table 4. Many had been LaBine clients at FEPI or Pinnacle for years before accepting LaBine's recommendation to buy the debentures. Tr. 675-77.

44. LaBine asserts that his recommendation of the Series D debentures was part of a strategy that considered the needs and objectives of each client's overall investment portfolio. Tr.741-43. LaBine typically recommended that clients purchase several alternative investments at the same time, including Domin-8 Series D debentures, and sell other investments. Tr. 744. LaBine asserts that he recommended alternative investments because there was significant uncertainty in the capital markets due to the Financial Crisis. Tr. 1074-75. LaBine has also cited diversification as a reason why he recommended alternative investments. Tr.743, 1074-75.

45. Eighty-two of the 100 debenture investors were LaBine's regular advisory clients at DA who paid annual management fees for his services. Tr. 1059-69, 1408-10; Div. Ex. 21 at 1-2; Div. Ex. 22 at 2-3, Div. Exs. 86, 88 and 93. Many of LaBine's clients liquidated other assets held in advisory accounts to fund their purchases of the Series D debentures. Stipulations, ¶ 33 and Table 4; Div. Exs. 58.5g; 58.8a; 86; Tr. 1068-69, 1400-07. In doing so, LaBine's clients were typically acting on his advice regarding coordinated adjustments to their investment portfolios. Tr. 1407-08; Div. Exs. 87 and 129. LaBine often told investors which specific assets to liquidate in order to fund their purchases. Tr. 745, 851-52, 977-78 and Div. Ex. 13.

46. Clients who did not want to take physical custody of the debentures were

required to have a brokerage account into which they could be deposited. Tr. 1068.[9] Some of LaBine's advisory clients already had brokerage accounts with him and others opened brokerage accounts for the first time in order to hold the debentures. Stipulations, ¶ 33 and Table 3; Div. Ex. 129 (see the HBN new account forms for Brabender, Budzowski, Foley, Godo Kiss, Kelly, Long, Saraiya, Schult, and Scovel). The purchase money was routed through the brokerage account into which the debentures would be deposited. Tr. 1400-02; Div. Ex. 87. The client's advisory account however, was often the actual source of the purchase money. Tr. 1398-1408; Div. Exs. 86 and 87. Indeed, LaBine sometimes directed his staff at FEPI to make accounting journal entries in order to route monies from an advisory account through a brokerage account before payment was transmitted to Domin-8. Tr. 1407-08; Div. Ex. 87.

47. Eighteen of the 100 investors who accepted LaBine's recommendation to buy Series D debentures did not have advisory accounts with him at the time but instead had only brokerage accounts. Tr. 1408-10; Div. Exs. 86 and 88. But virtually all of them were LaBine's clients at FEPI or Pinnacle. Tr. 673. As with advisory clients, LaBine acted as a financial planner for brokerage customers, regularly invited them to his investment seminars and recommended the Series D debentures in consideration of the customers' overall investment portfolios. Tr. 662-80.

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[9] All of LaBine's advisory clients had opened their advisory accounts using one of two standard DA forms. Tr. 732-34; Div. Exs. 21 and 22. The "Investment Advisory Agreement" form gave the advisor discretion to select the broker to execute transactions and to seek competitive commission rates for such executions. Div. Ex. 22 at pp. 3-5, § 9 ("Account Transaction Procedures/Broker-Dealer Selection"). The "Agreement for Investment Management Services" form stated that transactions requiring the payment of a sales commission to a broker could not be processed inside the advisory account. *Id.* at p. 1, § 3 ("Services by DFN"). Regardless of which form was used, clients were not charged both management fees and sales commissions on direct purchase investments like the Series D debentures that would be held by the client directly or in a brokerage account. Tr. 1068-69.

2. LaBine's Recommendations and Sales in 2008

(a) LaBine's Testimony Concerning His Failure to Disclose His Expectation of Receiving Warrants Despite Recognizing a Duty

48. LaBine testified that he typically talked to clients for 45 minutes to an hour when recommending the Domin-8 Series D debentures in 2008. Tr. 761-68. LaBine did not have any prepared talking points and did not memorialize his presentations. Tr. 760. However, LaBine's staff typically followed up his meetings by sending letters to clients reiterating that LaBine was "recommending" the debentures and enclosing the PPM and other paperwork. Div. Ex. 81; Tr. 845-50.

49. LaBine asserted that his oral recommendations focused on Domin-8's history and business plan, its competition, prior debt financing to which the Series D debentures would have a senior security interest in the company's assets and the 10% per annum interest rate being offered. Tr. 761-68, 1080-81. LaBine testified that in 2008, he discussed risk to the extent of drawing attention to the senior security interest that the Series D debentures carried. Tr. 791-96, 810-11. LaBine likened the debentures to a loan collateralized by business assets worth significantly more than the loan; he also used the analogy of a loan against a "Picasso" masterpiece. Tr. 810-11.

50. LaBine admitted that by the time he affiliated with DeWaay, he understood that investment advisers have fiduciary duties to their clients including a duty to eliminate or at least to disclose actual or potential material conflicts of interest. Tr. 723-24, 830-31. While LaBine asserted that he could not recall his actual thought process, LaBine also admitted that he understood the concept that an RR also has a duty to disclose material conflicts when recommending securities transactions. Tr. 735-39, 868-70. Most notably,

LaBine knew that an expectation of receiving compensation from the issuer of a security that he or she is recommending is exactly the type of conflict of interest that must be disclosed to clients. Tr. 724.

51. LaBine also admitted that he did not orally inform any client of the possibility that he would receive Domin-8 stock warrants as extra incentive compensation. Tr. 725-26, 773-75, 837-38, 889, 894-95, 995, 1005. LaBine asserted that the pre-printed subscription material for the Series D debentures disclosed his possible receipt of warrants. Tr. 725-26, 837-38. As discussed in Section I below, however, the subscription materials cannot be read to make such disclosure nor did any of the clients to whom LaBine recommended and sold the debentures testify that they understood the materials to make such disclosure.

52. LaBine denied that he ever believed he had a duty to inform clients that DFN was a Selling Agent for Domin-8. Tr. 728-31. According to LaBine, such disclosure would be unnecessary because investors would know that a broker-dealer must have a selling agreement in order to execute purchases and sales of a security. *Id.* Despite professing to have believed he was under no duty, LaBine initially maintained that he could not recall whether or not he told clients about the Selling Agreement until being forced to expressly admit that he did not. Tr.774-75. LaBine did not assert that he told clients anything about DFN's entitlement to receive warrants under the Selling Agreement.

53. Finally, LaBine did not claim to have orally told any advisory client that the fact that the Series D debentures would be held in a brokerage account meant that he was not acting as their investment adviser. LaBine initially asserted that he *may* have said that to one longtime client named Earl Mealins but eventually conceded that he did not actually remember that. Tr. 829-33 and 838-44. As noted below, LaBine called Mealins to testify at

the hearing but Mealins denied that LaBine told him about switching hats from investment adviser to broker. Tr. 1496-97.

(b) Investor Testimony

54. As discussed below, 3 of the 10 investors who testified at the hearing made their purchases of Domin-8 debentures in 2008. The 2 advisory clients called by LaBine (Mealins and Peck) and the brokerage customer called by the Division (Bose) all testified that LaBine had not disclosed his possible receipt of warrants. Mealins and Peck also testified that they had understood LaBine to be acting as their advisor in recommending the debentures. Mrs. Bose testified that she regarded LaBine as her financial adviser and trusted that his recommendations were made in her best interest. She also testified that she and her now-deceased husband had emphasized to LaBine their desire for safe investments and understood him to represent that the Domin-8 debentures were safe. Mrs. Bose further testified to the effect that LaBine's prospect of receiving warrants would have been significant to her and her husband in evaluating LaBine's recommendation.

(i) [redacted] Mealins

55. [redacted] Mealins, age 75, resides in Torrance, Ca. Tr. 1473. Mealins is retired and was formerly the president of a [redacted] Tr. 1473. He made a $100,000 purchase of Domin-8 Series D debentures on August 19, 2008 based on LaBine's recommendation. Stipulations, ¶ 16 and Table 1. Mealins began working with LaBine in 2006 on the recommendation of his trust attorney. Tr. 1475. After LaBine joined DeWaay in July 2007, Mealins opened new advisory and brokerage accounts with LaBine at DeWaay. Tr. 1477, 1492. LaBine had discretion over Mealins's brokerage account. Tr. 1491. LaBine never told Mealins that there would be times he did not have a duty to act in

Mealins's best interest in recommending investments. Tr. 1494.

56. In recommending the Series debentures, LaBine told Mealins that the investment "was going to grow for [Mealins] and [he] would make money on it." Tr. 1482. LaBine did not disclose that he could receive Domin-8 warrants as incentive compensation. Tr. 1497. Mealins authorized a $96,000 journal transaction from his advisory account to his brokerage account to pay for his investment. Div. Ex. 58.7i. However, Mealins understood that LaBine was "providing an investment for [Mealins], not selling [him] a product as such." Tr. 1485. LaBine did not tell Mealins that he was recommending the Series D debentures only in his capacity as Mealins' broker, not as his investment advisor. Tr. 1496. To the contrary, Mealins understood that in making the recommendation, LaBine was acting as his investment advisor. Tr. 1496. The parties have stipulated that Mealins was LaBine's advisory client. Stipulations, ¶ 33 and Table 3.

(ii) [redacted] Peck

57. [redacted] Peck, age 70, is a retired firefighter living in Huntington Beach, CA. Tr. 1557-58. He has been a client of LaBine's for approximately 20 years. Tr. 1559. The parties have stipulated that he was an advisory client of LaBine's with an Agreement for Investment Management Services in place in September 2008 when he purchased $100,000 of the Series D debentures. Stipulations, ¶¶ 16 and 33 and Tables 1 and 3. Peck paid for his investment with money from his advisory account. Tr. 1572. Peck understood that in recommending the Series D debentures, LaBine was acting as Peck's investment advisor. Tr. 1572. LaBine did not tell Peck that with respect to this investment, LaBine did not have a duty to act in Peck's best interest. Tr. 1573. LaBine did not disclose the possibility that he might receive warrants, and he did not disclose the existence of DeWaay's selling

agreement. Tr. 1574-75.

(iii) [redacted] Bose

58. [redacted] Bose, age 76, is a retired teacher in the Inglewood, California school district. Tr. 517, 590-91. She is the widow of Herman Bose, who died in August 2012. Tr. 518. Acting on LaBine's recommendation, the Boses made a $50,000 purchase of Domin-8 Series D debentures on October 12, 2008. Stipulations, ¶ 16 and Table 1.

59. The Boses were introduced to LaBine in approximately 2008 by their trusts and estates attorney, with whom LaBine shared an office. Tr. 520-22. The Boses transferred all of their assets, including their retirement funds, bank CDs, mutual funds and insurance policies, to be managed by LaBine as their financial adviser. Tr. 522-23, 527, 539-40, Div. Ex. 58.2e. Among the accounts the Boses opened with LaBine was an IRA brokerage account titled in the name of Herman Bose. Div. Ex. 58.2b, 58.2e. Jackie Bose was present when her husband's IRA account was established, Tr. 528, and for all discussions related to that account because they were always together for their meetings with LaBine. Tr. 518, 532. They managed their finances jointly and made investment decisions together, even if an account was titled in one of their names individually. Tr. 518-20, 528-30, 537.

60. The Boses told LaBine that they wanted him to recommend low risk investments for them and trusted that he would follow their request. Tr. 533, 539, 571. They believed that LaBine was acting "to the best of our interest to protect our interest." Tr. 527.[10] LaBine recommended the Boses reallocate the money in their CDs and bank

[10] The Boses attended numerous lunch or dinner seminars hosted by LaBine. Div. Exs. 58.2f, 58.2g, Tr. 558-61. Some of these dinner seminars were intended to sell the Boses new investments, but the Boses were primarily interested in the free meal and meeting people. Tr. 581-82. LaBine also used their attendance at

investments, which they had transferred to him to manage, into other types of investments. Tr. 569. LaBine recommended the Boses invest in approximately seven investments, including REITS and DPPs. Div. Ex. 58.8e, Tr. 524. The Boses always followed LaBine's investment recommendations because they relied on him to make appropriate recommendations based on the investment objectives and risk tolerances they expressed to him. Tr. 538-39. LaBine never told the Boses that they were responsible for doing their own due diligence to determine whether the investments he recommended were appropriate for them. Tr. 538.

61. On October 1, 2008, the Boses had a meeting with LaBine where he recommended that they purchase $50,000 worth of Series D Senior Subordinated Debentures issued by Domin-8 in Herman Bose's IRA brokerage account. Div. Ex. 58.2c, Tr. 543-44, 547. At this meeting, as was the custom whenever LaBine would make an investment recommendation to them, LaBine presented the Boses pre-filled subscription forms and directed them to sign or initial them. Tr. 529, 536, 544. The Boses did not read the offering memorandum or other documents that accompanied the subscription forms, nor did LaBine discuss these documents with the Boses. Tr. 546, 571, 597. The Boses "gave the keys to LaBine," Tr. 572, and trusted that "he was doing what we had requested and was putting our money in safe places as he said it was safe." Tr. at 571; *see also* Tr. 597.

62. LaBine did not discuss with the Boses the possibility of Domin-8 going into bankruptcy, which would have been a red flag for them. Tr. 548, 597-98. LaBine did not tell the Boses that the Domin-8 investment could lose money. Tr. 596. Rather, LaBine

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the dinners to hold the Boses out to the other guests as satisfied customers. Tr. 560-61. By 2010, however, the Boses terminated their relationship with LaBine because Jackie Bose came to believe that she had "been cheated" by LaBine and "that he took our money and did just the opposite of what we intended or what we had requested him to do." Tr. 562.

described the Domin-8 investment, like all the investments he recommended to the Boses, as "safe," and not a risky investment that might lose money but that might also pay high reward. Tr. 548-49.

63. LaBine also did not tell the Boses about the compensation he expected to receive in connection with the Domin-8 Series D offering. Tr. 550. LaBine did not disclose that his firm was entitled to receive compensation or any extra financial benefit from Domin-8 if he could convince his clients to buy debentures in the offering. Tr. 554. The Boses trusted that if LaBine had a conflict of interest, or a reason not to act in their best interests, that he would disclose that to them. Tr. 602. Jackie Bose testified that she would not have retained LaBine to act as her financial adviser if she knew of a conflict of interest in the advice he was giving, and knowing of a conflict of interest would factor into her decision whether to accept LaBine's investment recommendations. Tr. 603.

3. LaBine's Recommendations and Sales in 2009

(a) LaBine's Testimony concerning his Failure to Disclose his Expectation of Receiving Warrants or his Fundraising Commitments and concerning his Misrepresentations of Safety

64. LaBine's testimony about what he did and did not tell clients in 2008 applies equally to 2009. One example is LaBine's admission that, as in 2008, he did not tell clients who purchased in 2009 anything about his possible receipt of Domin-8 warrants. Tr. 948, 963-64, 982, 992-93, 995, 1005. But LaBine also gave testimony about new developments in 2009 and his state of mind about them. Much of that testimony lacks credibility and LaBine was forced to admit critical facts that support the OIP's allegations.

65. Beginning in January 2009, LaBine made specific, monthly fund raising commitments to Domin-8 as discussed in Section E above. At the hearing, LaBine initially

admitted that he *did not* tell clients anything about those commitments. Tr. 937-43. LaBine attempted to change his testimony a few minutes later and asserted that he *did* tell clients about his commitments. Tr. 943. When pressed, however, LaBine could only speculate that he "could have" or "may have" disclosed his fund raising commitments to Craig Pettit and Lawrence Ngou. Tr. 947-48, 964-65. Pettit was a witness at the hearing and testified with specificity that LaBine made no such disclosure to him. Tr. 479. As discussed in Section G below, Ngou is deceased, but before his passing demanded arbitration against LaBine based on his conduct in recommending and selling the Domin-8 debentures. And as discussed in Subsection 3(b) below, Donna Hughes, Eileen Brabender, Jack Sheen, Roger Andries and David Spaid all testified that LaBine did not disclose his fund raising commitments to them. Tr. 1521, 1524-25 (Hughes); Tr. 1232-33 (Brabender); Tr. 1326 (Sheen); Tr. 1601-02 (Andries); Tr. 633-34 (Spaid).

66. LaBine also testified that he told clients that he was a primary fundraiser in the Series D debenture offering. Tr. 937-43, 980, 982, 993-94, 1000-01.[11] LaBine could not say whether he would have explained what he meant by "primary fundraiser," but suggested that the remark might have been in the context of his telling clients that they "could end up owning or controlling the company" if Domin-8 went bankrupt. Tr. 939-40, 980. No investor who testified at the hearing corroborated LaBine's assertion that he described himself as a primary fundraiser, and as discussed below, the investors who were specifically asked (Donna Hughes, Steve Cohen and Roger Andries) recalled no such description. LaBine's shifting claims about what (if anything) he told investors about his

[11]LaBine did not use the term "primary fundraiser" in his investigative testimony but the term is used in the expert report of Arthur B. Laby which the Division submitted in this case as pertinent to the standard of care in the securities industry. Div. Ex. 101.01.

role in raising money for Domin-8 are not credible.

67. Notwithstanding LaBine's lack of credibility, he should be held to the critical admissions that he made in the course of attempting to rationalize his inconsistencies. LaBine was forced to admit that, if he had made it a point to tell clients that he was a primary fundraiser, he must have known that he had a *duty* to explain his role in raising money for Domin-8. Tr. 940. LaBine eventually even admitted that his state of mind was that his duty extended to disclosure of his *specific fund raising commitments* to Domin-8. Tr. 941-43.

68. Another major development in 2009 was the significant deterioration in Domin-8's already dire financial condition. LaBine admitted that told "the latter clients" in 2009 that Domin-8's bankruptcy "could" be the best thing that could happen to them and that he analogized Domin-8 to a Picasso masterpiece. Tr. 807-15; Div. Ex. 47 at 193; Div. Ex. 48.1 at 267. LaBine testified that he told clients that they "should" not lose money because of the Series D debentures had a security interest in Domin-8's assets that was second only to the Seller Notes. *Id.*

69. LaBine sought to place the responsibility for his investors' ensuing losses of over $2.6 million on the investors themselves, repeatedly stating that they should have read the PPM more carefully. Tr. 806, 1070-71, 1087. LaBine also denied making statements to the effect that clients "couldn't lose money," that they'd get back "all their money" or "100 cents on the dollar," or that they "wouldn't lose a penny," even though that is exactly how LaBine had described his thought process in prior sworn testimony. Tr. 791-806; Div. Ex. 47 at 136, 187; Div. Ex. 48.1 at 176, 207, 260-62; Div. Ex. 48.2 at 329. LaBine's denial is at odds with the testimony of at least two investors (David Spaid and Jack Sheen) who

testified at the hearing as discussed below. But regardless of whether LaBine told clients that they "would" or "should" get back all their money, LaBine acknowledged facts which establish that he had no reasonable basis for his representations. LaBine admitted that no guarantor stood behind Domin-8's obligation to repay principal, that the company's tangible assets were worth far less than the over $7.1 million of funding that LaBine had his clients provide and that the D8 Acquisitions vehicle did not exist even in concept when LaBine was making his representations to clients. Tr. 816-17. The absence of any such guarantees had been previously established by the testimony of Domin-8's former CFO (Buettin). Tr. 120-23.

(b) Investor Testimony

70. Seven of the 10 investors who testified at the hearing made their purchases of Domin-8 debentures in 2009. As discussed below, the 4 advisory clients called by the Division (Pettit, Brabender, Sheen and Spaid) and 3 brokerage customers called by LaBine (Hughes, Cohen and Andries) all testified that LaBine did not disclose his possible receipt of warrants or his fundraising commitments to Domin-8. The 4 advisory clients further testified to the effect that such disclosure would have been important to them in evaluating LaBine's recommendation to purchase the debentures. In addition, the advisory clients recalled LaBine making statements to the effect that the debentures were safe. Mr. Sheen and Mr. Spaid specifically recalled LaBine making statement to the effect that they could not lose money on the debentures.

(i) Craig Pettit

71, [redacted] Pettit, age 66, is a retired engineer who resides in Gilbert, Arizona. Pettit was LaBine's advisory client and made a $50,000 purchase of Domin-8 Series D debentures on April 14, 2009 based on LaBine's recommendation. Stipulations, ¶¶ 16 and 32 and Tables 1 and 3. Pettit had retained LaBine in October 2008 for advice on investing his retirement pension in low-risk investments. Tr. 433-35.

72. LaBine advised Pettit to open two accounts at DeWaay, an IRA investment advisory account over which LaBine was given discretionary trading authority, and an IRA brokerage account. Div. Ex. 58.8b; Div. Ex. 58.8c; Tr. 442. LaBine was responsible for selecting the investments in both accounts and decided when to buy or sell securities and how much to allocate to different investments. Tr. 441, 446. Every investment made in Pettit's two accounts was solicited by LaBine. Tr. 451. LaBine never discussed with Pettit the differences between the two accounts, or disclosed that his role or obligations to the client would differ when acting in the advisory account versus the brokerage account. Tr. 448-49. Accordingly, Pettit did not understand that LaBine could "switch hats" between investment adviser and broker; he thought LaBine's roles over the advisory account and brokerage account were "one and the same." Tr. 449. Given the totality of their relationship, Pettit believed LaBine "was an adviser all the time," Tr. 476-77.

73. LaBine solicited Pettit to make a $50,000 investment in Domin-8 Series D debentures in April 2009. Tr. 453-55, 458. LaBine did not disclose to Pettit whether he was acting in a fiduciary capacity or not with respect to the Domin-8 investment recommendation. Tr. 475-77. At the time LaBine recommended the investment to Pettit, he did not discuss the possibility of Domin-8 entering bankruptcy. Tr. 455. Instead, LaBine portrayed Domin-8 as "a company that was making money," Tr. 456, and that even in the event of bankruptcy Pettit would get "most of [his] money back," Tr. 507. On LaBine's recommendation, Pettit transferred cash or proceeds of money market securities held in his

DeWaay advisory account to the DeWaay brokerage account in order to purchase one unit of the Domin-8 Series D offering. Div. Ex. 58.8e; Tr. 458-6.

74. LaBine provided Pettit with the PPM at or after the time he completed the Domin-8 subscription forms. Tr. 462-63; *but see* Tr. 505-06. Pettit did not review the PPM prior to executing the subscription documents because he was relying on LaBine's recommendation and his investment expertise. Tr. 441, 444-46, 463, 493-94, 499. LaBine also never discussed with Pettit the risks associated with the investment or the compensation LaBine would receive if Pettit purchased the Domin-8 securities. Tr. 464-68, 475-77. Instead, LaBine directed Pettit to simply sign and initial the subscription forms in the places he had indicated with a yellow highlighter. Tr. 464-67.

75. LaBine did not disclose that he stood to receive warrants from Domin-8. Tr. 471-72, 483-84, 513-15. Nor did LaBine disclose that DFN had a Selling Agreement with Domin-8. Tr. 468. That information would have been important to Pettit in deciding whether to invest in the Domin-8 Series D offering because it was a conflict of interest that Pettit would have evaluated to determine whether LaBine "was looking out for me or he was trying to sell me something so he could make money on." Tr. 474-75. Likewise, LaBine did not disclose to Pettit that he had committed to Domin-8 to sell certain amounts of Series D dentures to his clients each month. Tr. 477-78. That information also would have been significant to Pettit to analyze whether LaBine was acting in his best interests. Tr. 478.

(ii) [redacted] Hughes

76. [redacted] Hughes, age 75, is a retired former teacher and office administrator. Tr. 1509. Ms. Hughes was a brokerage client of LaBine's and purchased $100,000 of the Series D debentures on May 18, 2009. Stipulations, ¶¶ 16 and 33 and Tables 1 and 3.

Hughes believed that in recommending the Series D debentures, LaBine was "giving us the best advice that he knew how to give." Tr. 1530. Before Hughes made her investment, LaBine did not explain how he would be compensated or disclose his possible receipt of warrants to purchase Domin-8 stock. Tr. 1524. LaBine also did not disclose the existence of DFN's Selling Agreement with GAF. Tr. 1524. Moreover, LaBine did not disclose that he had committed to Domin-8's Board of Directors to raise from his clients a specific amount of money for the company. Tr. 1524. LaBine did not even say that he was a "primary fundraiser" for Domin-8. Tr. 1525. [12]

(iii) [redacted] Brabender

77. [redacted] Brabender, age 80, is a retired management consultant and college instructor who resides in Los Angeles, California with her husband of 39 years, William Brabender. Tr. 1210-12. The Brabenders have made investment decisions as a team over the years. Tr. 1212-13. They were LaBine's advisory clients and made a $50,000 purchase of Domin-8 Series D debentures on June 5, 2009 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Table 1 and 3. The Brabenders had been LaBine's clients at Pinnacle since 2001 and regarded him as their financial planner. Tr. 1213-14, 1236. LaBine made recommendations on how the Brabenders should manage their finances and handled the purchase and sale of their investments. *Id.* The Brabenders were also LaBine's clients at the investment advisory and brokerage firms to which he had been attached since 2001 and they followed him as he moved from one firm to another. Tr. 1214.

[12] On May 7, 2009, LaBine dictated notes to himself about raising money for Domin-8. Div. Ex. 57.6m. Those notes appear to contain a list of LaBine's clients, including Ms. Hughes, to whom LaBine planned to sell the Series D debentures and reflect that LaBine believed he needed "to put about one and a half million into Domin-8 in May, pay off all vendors and get back on track." Div. Ex. 57.6m.

78. On May 12, 2009, LaBine recommended the Domin-8 Series D debentures to the Brabenders during an annual review of the investment portfolio that he managed for them. Tr. 1215-16. The Series D debentures were one of four alternative investment products that LaBine recommended to the Brabenders that day. Tr. 1217. LaBine first mentioned the debentures towards the end of the meeting and did not spend much time explaining the offering. Tr. 1217. However, LaBine did state that debentures were "safe" and that their risk was no more than a growth and income mutual fund. Tr. 1217, 1222-24. Ms. Brabender testified that her recollection of the meeting was "crystal clear ... because I felt so good about what we had done in terms of moving investments into safer investments with the volatility of the marketplace. I'm just very clear about how that day went and how I felt about it." Tr. 1217.

79. The Brabenders believed that LaBine was acting as their investment adviser in recommending the debentures to them. Tr. 1229. LaBine advised the couple to open a brokerage account in order to hold the Domin-8 debentures and the other alternative investments that he was recommending. Tr. 1229. But LaBine did not tell them he thought he was only acting as their broker and was not acting as their investment adviser. They would have liked to have known if that's what he thought. Tr. 1230-31.

80. LaBine did not tell the Brabenders anything about the Selling Agreement or his possible receipt of Domin-8 warrants based on his recommendation and sale of the debentures to them. Tr. 1231-32. Ms. Brabender testified that had LaBine made such disclosure, "it would lead both of us to question his motivations. Again, we may have pursued a dialogue about that. It didn't happen and so we just continued to rely on his trusted recommendations." Tr. 1232. Ms. Brabender also testified that LaBine did not tell

them anything about the fund raising commitments that he had made to Domin-8. Tr. 1232-33. Had LaBine made such disclosure, the Brabenders "would have not purchased Domin-8 with Mr. LaBine. Our faith and trust in him would have been shaken. What is his motivation? It sounds at that point like it's in his best interest, not ours." Tr. 1233.

81. The Brabenders received a copy of the PPM for the debentures but did not read it because it seemed like "legalese and boilerplate" and because at the time, they believed that "LaBine was our financial adviser. We trusted him and we trusted his knowledge and experience and recommendation and that he had our best interest at heart." Tr. 1218. Shown the PPM at the hearing, Ms. Brabender testified that the appearance of DFN's name as found below GAF's name on at the bottom of the cover page would not have alerted them to the possibility that LaBine might be expecting to receive warrants as additional incentive compensation. Tr. 1234-35. Ms. Brabender was also asked about the portion of the subscription package which stated that "I/we understand that this investment has or may have front-end cost that will be deducted from my initial investment, including but not limited to a commission to my rep/adviser." She did not have an understanding of what that language was supposed to mean and LaBine did not provide any explanation during the May 18, 2009 meeting. Tr. 1226-27.

(iv) [redacted] Cohen

82. [redacted] Cohen, age 67, has a master's degree in economics and finance. Tr. 1532. Cohen is an experienced, accredited investor. *Id.* Cohen made a $100,000 purchase of Domin-8 Series D debentures on June 9, 2009 based on LaBine's recommendation. Stipulations, ¶ 16 and Table 1. At the time when Cohen made his purchase, he did not have an advisory account with LaBine and instead he had only a brokerage account. Tr. 1535-36;

Div. Ex. 58.4a-e. As reflected in LaBine's contact report for Cohen, however, LaBine had developed an extensive plan for managing Cohen's investments, including liquidating certain investments and using the proceeds to make new investments. Div. Ex. 58.4c. Before Cohen made his investment in Domin-8, LaBine did not disclose that he was the primary fundraiser for Domin-8 or that other fundraisers had stopped raising money for the company. Tr. 1547-48. When Cohen asked how LaBine would be compensated for selling the Series D debentures, LaBine told him he would receive a commission and did not mention any other form of possible compensation. Tr. 1548-49.

(v) [redacted] Sheen

83. Jack [redacted] age 92, is a retired Air Force Lieutenant Colonel residing in Phoenix, Arizona. Tr. 1283-84; Div. Ex. 58.10f. Mr. Sheen was LaBine's advisory client and made a $100,000 purchase of Domin-8 Series D debentures on July 24, 2009 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Tables 1 and 3.

84. Mr. Sheen first met LaBine at a dinner seminar that LaBine co-hosted with a trust and estates lawyer in 2007. Tr. 1289. At the time, Mr. Sheen was not interested in LaBine's services, but he attended a second seminar hosted by LaBine in 2009, and on July 24, 2009, he and his wife opened an advisory account in the name of their family trust with DA, with LaBine as their advisor. Tr. 1291-95; Div. Ex. 58.10h. They did not create a brokerage account with DeWaay or LaBine at that time. Tr. 1307. As Mr. Sheen understood his relationship to LaBine, LaBine was to have "full control of [their] account and manage [their] investments for [them]." Tr. 1309; *see also* Tr. 1311 (LaBine "was going to manage everything for [the Sheens]").

85. LaBine solicited the Sheens to purchase the Series D debentures on the day

they opened their advisory account or shortly thereafter. Tr. 1295; Div. Ex. 58.10b.[13] During that meeting, LaBine told them about the company's business plan and that the debentures paid 10%. Tr. 1296. The Sheens stressed that the safety of any investment was their priority, and Mr. Sheen thought that the Domin-8 investment sounded "too good to be true," but LaBine assured them "that if they should go bankrupt, we'd get all our money back because we were – would be senior bondholders, secured bondholders." Tr. 1296-97.[14] LaBine told them only about the positive aspects of the Domin-8 investment and omitted any negative information about the company. Tr. 1300.

86. The Sheens purchased $100,000 of the Series D debentures, but they did not finalize that investment until the week after it was first presented to them. Tr. 1301.[15] LaBine did not give them the PPM to review in the interim. Tr. 1301. They received the PPM to take with them after they signed the subscription documents and were "getting ready to leave." Tr. 1304. Mr. Sheen did not carefully review the subscription documents before signing them because LaBine told him "[i]t's not that important." Tr. 1304-05. The Sheens paid for their purchase of the debentures with a check from a personal bank account. Tr. 1307.

87. Before the Sheens purchased the Series D debentures, LaBine did not discuss

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[13] The Sheens met with LaBine several times in late July and early August 2009. Mr. Sheen cannot recall the specific date of each conversation he had with LaBine relating to Domin-8, but he is confident of the sequence of events. Tr. 1321.

[14] Sheen similarly testified during the Division's investigation that LaBine told him and his wife that they would get back 100 percent of their investment if the company went bankrupt. Resp. Ex. 134. He testified at the hearing consistent with his investigative testimony and affirmed that his investigative testimony was accurate. Tr. 1299-30.

[15] The paperwork associated with the Sheen's investment is uniformly dated July 29, 2009, although both LaBine's records and the Sheens' personal calendar indicate that they actually met on July 27, 2009. *Compare* Div. Ex. 58.10i *with* Div. Ex. 58.10b and Div. Ex. 58.10j.

with them his compensation for their investment. Tr. 1306-07. He did not disclose the existence of the Selling Agreement or that he might receive warrants to purchase Domin-8 stock. Tr. 1325. He did not tell them that he had committed to raise $1,000,000 per month for Domin-8 through his clients' investments or that he was Domin-8's primary fundraiser and had sold more of the Series D debentures than all others combined. Tr. 1326-27. He did not tell them that the company would most likely be going into bankruptcy. Tr. 1297. He never told them anything to the effect that he was not acting as their investment advisor or in their best interest in recommending their purchase. Tr. 1323-24. Mr. Sheen would have wanted to know each of these pieces of information and would have considered them significant in deciding whether to follow LaBine's recommendation. Tr. 1324-29.

(vi) [redacted] Andries

88. [redacted] Andries, age 71, was a brokerage client of LaBine's who purchased $100,000 of the Series D debentures in August 2009. Stipulations, ¶¶16 and 33 and Tables 1 and 3; Tr. 1587. He paid for his investment with two $50,000 checks. Tr. 1587. Before he made his investment, Mr. Andries received multiple copies of the PPM for the Domin-8 Series D debentures in the mail. Tr. 1587. Mr. Andries's wife, Barbara Andries, is a CPA and a retired regional vice president of finance for Time Warner Cable. Tr. 1588. She reviewed the PPM before the Andries invested. Tr. 1588.

89. Mr. and Mrs. Andries discussed the Domin-8 investment with LaBine over a series of conversations in April, May and June 2009. Tr. 1590. Contrary to LaBine's assertion in his testimony at the hearing in this matter, however, LaBine did not tell Mr. and Mrs. Andries that he was the "primary fundraiser" for Domin-8. Tr. 1601. LaBine did not tell them that other Domin-8 fundraisers had stopped selling the Series D debentures and

that he was the only one still selling that product. Tr. 1601-02. LaBine did not discuss his compensation for their investment, including the possibility that he might receive warrants that could be worth a substantial sum. Tr. 1602-03. LaBine did not disclose the existence or terms of DeWaay's selling agreement. Tr. 1602. Finally, LaBine did not disclose that he had committed to Domin-8's board that he would get his clients to purchase $1,000,000 of Series D debentures each month. Tr. 1603.

(vii) [redacted] Spaid

90. [redacted] Spaid is a retired teacher living in Torrance, CA. Tr. 607. Mr. Spaid was LaBine's advisory client and made a $50,000 purchase of Domin-8 Series D debentures on August 7, 2009 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Tables 1 and 3. Mr. Spaid was the last investor to purchase Series D debentures through LaBine. *Id.*

91. In July 2007, Mr. Spaid and his wife opened an advisory account with DeWaay in the name of their family trust, naming LaBine as their advisor. Tr. 612-13, Div. Ex. 58.11c. They signed an advisory agreement with DeWaay in August 2007. Tr. 616. The Spaids never had a brokerage account with DeWaay. Tr. 615-16. Mr. Spaid understood the difference between an investment advisor and a broker and understood LaBine to be his advisor, with a duty to act in their best interest. Tr. 610-11.

92. Mr. Spaid remembers LaBine first presenting Domin-8 during an in-person meeting in May 2009. Tr. 619, 654.[16] At that meeting, LaBine told the Spaids that their

[16] LaBine's records indicate that he first presented the Domin-8 Series D debenture investment to the Spaids in September 2008 during a "phone appointment." Tr. 654; Div. Ex. 58.11a. His records further indicate that he mailed the Spaids a copy of the prospectus following that phone conversation. Tr. 643-44, Div. Ex. 58.11b. Mr. Spaid does not recall that phone presentation, Tr. 654-55, and although he does not dispute that he may have received the prospectus in September 2008, he did not read it. Tr. 644-45.

investment in the Series D debentures would be "riskless" that "[they] might not necessarily make money from it but [they] couldn't lose." Tr. 619, 649, 655-56. LaBine did not tell the Spaids that Domin-8 was in danger of entering bankruptcy, and Mr. Spaid believes the PPM was mailed to him after he and his wife had signed the paperwork for their investment. Tr. 622-23. Mr. Spaid understood that he and his wife would receive information about Domin-8, but they invested before receiving that information because "[they] had listened to the explanation about it and that sounded very good, and [they] took [LaBine's] word for it." Tr. 623. LaBine's representation that their investment was "riskless" was what Mr. Spaid "liked most" about the opportunity to invest in Domin-8. Tr. 626. The Spaids signed paperwork to purchase $50,000 of the Series D debentures through their family trust on May 19, 2009. Tr. 618; Div. Ex. 58.11i. They paid for their investment with a transfer from their DeWaay advisory account. Tr. 626; Div. Ex. 58.11i.

93. Before the Spaids purchased the Series D debentures, LaBine did not discuss his compensation for securing their investment, including his expectation of receiving warrants that he believed would be worth a substantial sum. Tr. 626, 632. He did not disclose the existence of DFN's Selling Agreement related to the Series D debentures. Tr. 631-32. LaBine also did not disclose that he had committed to Domin-8's Board of Directors that his clients would buy $250,000 per week of Series D debentures or that Domin-8 needed money from Series D investors to continue its operations. Tr. 634. Nor did LaBine indicate that he was not acting as the Spaids' investment advisor or that he did not believe he had a duty to act in their best interest. Tr. 630-31.

94. Although the Spaids signed paperwork to purchase the Series D debentures in

May 2009, their purchase was not finalized until August 7, 2009 because the Spaids were reluctant to provide a complete copy of their trust document, which Domin-8 required to process the sale. Tr. 627-28. The Spaids eventually brought a complete copy of their trust document to a quarterly meeting with LaBine. Tr. 628. At that meeting, LaBine again did not disclose that Domin-8 was in danger of going into bankruptcy. Tr. 628-29. He did not tell the Spaids that they were putting their money at risk by completing their purchase of the Series D debentures. Tr. 629.

95. Mr. Spaid would have liked to have known and would have considered it important to his investment decision that the investment was not "riskless," as LaBine characterized it. Tr. 634-35. He also would have liked to have known and would have considered important that:

- DeWaay had a selling agreement entitling it to receive extra compensation for selling the Series D debentures,
- LaBine expected to receive warrants he thought were worth a substantial sum for securing his clients' investments in the Series D debentures,
- LaBine had committed to Domin-8's board that his clients would purchase $250,000 of Series D debentures per week. Tr. 633-34.

Any one of those pieces of information would have "raise[d] the red light. 'Don't go there.'" Tr. 634.

G. Other Allegations concerning LaBine's Conduct in Recommending and Selling the Debentures

96. In April 2015, FINRA's Department of Enforcement instituted a disciplinary proceeding complaint against LaBine arising from his recommendation and sale of Domin-8

Series D debentures and other alternative investments. Div. Ex. 125; Tr. 975. Among the allegations averred in that complaint are that LaBine failed to inform clients about his personal financial incentives for recommending the debentures. The case is pending.

97. In addition to the FINRA action, a number of LaBine's former clients have brought court cases or arbitrations against LaBine based, at least in substantial part, on his recommendation and sale of the Domin-8 debentures to them.

- [redacted] **Stevens** had been LaBine's advisory client since 2002 and was age 74 when she invested $50,000 in Series D on September 17, 2008 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Tables 1 and 3. Stevens later demanded arbitration. Her allegations included that LaBine had made material misrepresentations and omitted material facts when recommending the Domin-8 debentures to her. Tr. 853-60; Div. Ex. 59 at 77-79. Stevens ultimately received a settled arbitration award of $310,000. *Id.* LaBine did not pay anything towards the settlement. Tr. 860.

- [redacted] **Greene** was an advisory client who invested $50,000 in Series D debentures on November 4, 2008. Stipulations, ¶¶16 and 32 and Tables 1 and 3. Greene later demanded arbitration based on LaBine's conduct in recommending the Domin-8 debentures and ultimately received a settled award of $80,000. Tr. 968-71; Div. Ex. 59 at 43.

- [redacted] **Frick** was an advisory client who was in his mid-70's when he invested $100,000 in Domin-8 debentures on February 4, 2009 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Tables 1 and 3. LaBine not only recommended the purchase but also advised Frick to sell annuities in order to fund the purchase. Tr. 882. Frick later demanded arbitration against LaBine. Tr. 880-86; Div. Ex. 59 at 51. Frick's allegations included that LaBine had made material misrepresentations about the debentures. *Id.* Frick ultimately received a settled arbitration award of $175,000. Although LaBine did not make a monetary contribution towards the settlement, he has admitted that he did not disclose his possible receipt of Domin-8 warrants to Frick. Tr. 884-86.

- [redacted] **Gilbert** was an advisory client who was 91 years old when he invested $100,000 in the Series D debenture on March 1, 2009 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Tables 1 and 3. Gilbert is deceased but his family asserted claims against LaBine related to his sale of the debentures. Div. Ex. 58.13c at 370. The Gilbert Family Trust received a settled arbitration award of $99,877.80. Tr. 887-92. Before selling the debentures to Gilbert, LaBine did not disclose his possible receipt of warrants. Tr. 894-95.

- [redacted] **Ngou** was an advisory client who invested $100,000 in Series D debentures on May 18, 2009 based on LaBine's recommendation. Stipulations, ¶¶16 and 32 and Tables 1 and 3. Ngou later demanded arbitration against LaBine alleging that he had misrepresented the safety of the debentures. Tr. 967-68; Div. Ex. 59 at 37-39. After an evidentiary hearing, Ngou (now deceased) was awarded $100,000 in compensatory damages for Domin-8 and other alternative investments. *Id.* LaBine did not disclose his expectation of receiving warrants to Ngou. Tr. 963-66.

98. LaBine has also had other arbitration complaints asserted against him by investors to whom he recommended and sold other alternative investments besides Domin-8 debentures. Div. Ex. 59 at 21, 25, 29, 45, 53, 65 and 69.

H. LaBine's Conflicts were not Disclosed in the PPM Materials or the Subscription Forms

99. The PPM for the Series D debentures did not contain any direct or indirect reference to LaBine's fundraising commitments to Domin-8 or to the possibility of LaBine receiving a warrant to purchase the company's stock as additional incentive compensation for recommending and selling the debentures. Div. Ex. 56.2. Nor do the PPM's supplements or the Amended and Restated PPM contain any such references. Div. Ex. 56.1 and 56.3-56.12. LaBine has admitted that none of the PPM materials contain disclosure of his fundraising commitments or his possible receipt of warrants. Tr. 985, 991; Div. Ex 47 at 150-51, 153.[17] LaBine also has admitted that he did not orally disclose to clients his

[17] In June 2009, Domin-8's general counsel instructed that references to "incenting the placement agents" be removed from a draft of PPM Supplements No. 8 because "[t]he supplement should describe placement agent comp, nothing more." Resp. Ex. 46. LaBine apparently urges the Chief Law Judge to draw the conclusion that Domin-8 is thus responsible for the nondisclosure of his conflicts. Tr. 308-14. But Domin-8 did not purport to assume any responsibility to ensure the proper disclosure of LaBine's conflicts to his clients. Tr. 418-19. In any event, the Division is not aware of legal authority to support the proposition that an RIA representative or an RR can shift responsibility for disclosing conflicts to the issuer of a security that he or she recommends to clients.

expectation of receiving warrants. Tr. 727. While LaBine does apparently contend that the appearance of DFN's name on the cover page of the PPM below GAF's name was sufficient to alert clients that DFN was a Domin-8 Selling Agent, that interpretation is unsupported by any investor testimony or any expert testimony. The only investor witness (Eileen Brabender) who was specifically asked confirmed that she did not share the interpretation that LaBine now urges. Tr. 1235.

100. The subscription form that Series D debenture purchasers were required to sign also contained no disclosure of LaBine's conflicts. Div. Ex. 1 at 395. The form required clients to initial in various places to indicate that they understood things such as "Risk Factors (risk/loss of principal, liquidity)"; that they met the suitability requirements in the Prospectus; and that the investment program was long-term. *Id.* The form also required purchasers to initial indicating they understood that "this investment has or may have front-end costs that will be deducted from my initial investment, including but <u>not limited</u> to a commission to my rep/advisor." *Id.* The form did not mention warrants. While the form did indicate that other "front-end costs" besides commissions could be deducted from the initial investment, the warrants that LaBine expected to receive would not have been a *deduction* from the investor's purchase money but rather constituted a separate incentive granted by the issuer. Furthermore, not even LaBine contends that the form contained any disclosure regarding his fund raising commitments to Domin-8.

I. Investor Losses

101. The elderly investors who purchased Series D debentures based on LaBine's recommendation collectively lost over $2.6 million or approximately 35% of their principal. Stipulations, ¶ 29. As noted above, some of the investors who testified at the hearing had

stressed to LaBine their desire for safety and LaBine's stated rationale for moving his clients into alternative investments had been to diversify their portfolios during the Financial Crisis. Most of those investors deemed their losses to have had a significant impact on them. Tr. 480-81 (Pettit), 556 (Bose), 636 (Spaid), 1242-43 (Brabender), 1321-22 (Sheen).

102. While LaBine has compared his investors' 35% loss to the overall decline in the stock market during the Financial Crisis, equity investors who did not liquidate their holdings realized no losses and indeed have enjoyed substantial gains as the capital markets rebounded. In contrast, Domin-8's bankruptcy turned what LaBine had portrayed as a safe long-term investment into an immediate 35% loss. Furthermore, many investors had found the money to purchase the debentures not by liquidating stocks or mutual funds but by cashing out annuities at LaBine's specific recommendation. Tr. 1184-86. LaBine testified that some annuities are subject to market risk but acknowledged that investors would have suffered no losses had they held onto their annuities as the market recovered from the financial crisis. *Id. See also* Div. Ex. 102 at 9. LaBine also acknowledged the obvious fact that investors who used cash to purchase the debentures obviously would not have lost any money. *Id.*

J. Expert Testimony

1. Professor Arthur Laby

103. The Division submitted the report of Professor Arthur Laby as a standard of care expert. Div. Exs. 101.01 and 101.02. Laby is a law professor at Rutgers University and teaches courses on securities regulation and related topics. Div. Ex. 101.01 at 3-7. Laby's opinions in this case are based not only on his understanding of the applicable legal standards but also on his experience with industry custom and practice. *Id.* at 7. As Laby's

report explains:

> There is a symbiotic relationship between legal standards and industry standards of conduct. Best practices and guidelines followed by responsible investment advisers may inform courts and regulatory authorities. They also inform industry participants on how to comply with the law and satisfy obligations to clients. Div. Ex. 101.01 at 9.

104. Laby's experience regarding investment advisory and brokerage practices includes interaction with industry during his work in the SEC's General Counsel's office and Investment Management Division, as well as industry associations such as the Board of Directors of the Certified Financial Planner Board of Standards and the Philadelphia Compliance Roundtable. Div. Ex. 101.01 at 3-7.

105. Based upon Laby's extensive review of the record, Laby summarized his opinions in this case as follows:

- LaBine acted as an investment adviser representative for the majority of his client accounts; for a smaller number of client accounts he acted as a broker-dealer representative
- LaBine owed significant duties to his investment advisory and brokerage clients
- LaBine failed to act consistently with industry customs and practices when investing client funds in Domin-8 in several respects:
    - He failed to disclose his expected receipt of warrants to purchase Domin-8 stock
    - He failed to disclose that DeWaay was a selling agent for Domin-8 and that he was the primary fundraiser for the Series D Debentures and critical to Domin-8's solvency
    - He made assurances to clients that they could not lose money by investing in the Series D Debentures
    - He made assurances to clients that Domin-8's bankruptcy would result in his clients owning an undervalued company

- He acted to meet the needs of Domin-8, and therefore his own needs, and not the needs of clients.

Div. Ex. 101.01 at 3.

106. Laby's report contains extensive discussion of these conclusions and his bases for them. Div. Ex. 101.01 at 22-40. For example, Laby explained that "[a]cting as the primary fundraiser for an issuer is the kind of disclosure that advisers and brokers would typically make to their clients and customer, who would consider it important ...[for] several reasons [including] the fact that LaBine was the primary fundraiser for Domin-8 gave him significant additional incentive to sell the Debentures." *Id.* at 33. Based upon the record, Laby's overall opinion is that "LaBine did not act consistently with the customs and practices of investment advisers and broker-dealers when advising clients to purchase the Domin-8 Debentures." *Id.* at 39.

107. Laby also prepared a second report in rebuttal to parts of four separate reports prepared by LaBine's three experts. Div. Ex. 102. Laby's rebuttal opinions will be discussed below in the subsections of this brief which address the reports submitted by LaBine's experts. As pertinent here, the cross examination of Laby encompassed both his initial and rebuttal reports but did not reveal any biases, unfounded assumptions, errors or other matters that would undermine any of Laby's opinions. Tr. 1410-62.

2. <u>Professor Jill Gross</u>

108. LaBine submitted a letter from Professor Jill Gross as expert opinion on the subject of whether he was acting as an RIA or only an RR when recommending the Domin-8 debentures. Resp. Ex. 202. Gross is a law professor at Pace University and acknowledges having had no actual experience in the securities industry. Tr. 1351. Gross did not rely on

or even mention industry custom and practice in her opinion letter. Tr. 1351-53. "[W]hat [Gross] expressed was the law – what [she] believe[s] the law is…." Tr. 1366-67; 1377-78.

109. To the extent that Gross's letter is considered despite merely purporting to state the law, the propositions it states should be rejected because they are fundamentally flawed both methodologically and substantively. Gross reviewed only a small set of selected record materials before stating her legal opinions. Tr. 1355-57, 1365-67; Resp. Ex. 202 at 2. Gross did not review LaBine's "contact notes" even though she acknowledged that they would provide insight regarding the nature and extent of LaBine's relationships with individual investors. *Id.* Gross was also unaware of the summary evidence submitted by the Division concerning LaBine's relationships with investors and the sources of their purchase money for the Series D debentures. Tr. 1385-86.[18]

110. Gross opined that LaBine's recommendation and sale of Series D debentures could be categorized into six different types of transactions, that LaBine would be acting only as an RR in transactions falling into three of those categories and that more information would be needed to determine his capacity in transactions falling into other categories. Resp. Ex. 202 at 2-3; Tr. 1354-55, 1363-64. Gross did not attempt to place any individual investor into a category because she deemed such an exercise to be beyond the scope of her engagement. Tr. 1355, 1364-68. According to Gross, such an exercise would require what essentially would be a mini-trial concerning LaBine's relationship with each individual investor. Tr. 1381-82, 1386.[19] Gross was unaware that LaBine had already stipulated that

[18] Gross's perfunctory approach and lack of preparation was perhaps best illustrated by her mistaking a draft of her letter for the final version that LaBine's counsel later submitted on her behalf. Tr. 1357-61.

[19] Gross asserted that she did review the investigative testimony of two individual investors but was still unable to determine whether the law would regard them as LaBine's advisory clients or only as his brokerage

82 of his 100 investors for the debentures were advisory clients. Tr. 1369. Gross also gave no consideration to whether LaBine's recommendation of the debentures was part of a broader set of recommendations about clients' overall investment portfolios. Tr. 1370-71. Similarly, she was unaware of LaBine's use of FEPI to attract and service his clients. Tr. 1375-76.

111. Laby's rebuttal report identifies fatal flaws in Gross's analysis including her flat misstatement of the broker-dealer exclusion[20] and her misstatement of SEC Release 1092 as purported support for assertion that a transaction-by-transaction approach is necessary to determine the capacity in which LaBine was acting in recommending and selling the debentures. Div. Ex. 102 at 3-8. In particular, Laby points out that Gross's reliance on SEC Release 1092 is misplaced given that its text refers to the need to consider all relevant facts and circumstances and not a need to conduct a transaction-by-transaction analysis. *Id.* at 5-6. Laby also refutes Gross's assertion that the record is insufficient to determine LaBine's capacity. *Id.* at 6-8. Moreover, Laby's summary witness testimony and summary exhibits demonstrate that the information which Gross believed was missing was actually readily available. Tr. 1394-1464; Div. Ex. 86-89.

112. In the course of attempting to defend her "analysis," Gross made a critical concession in response to hypothetical questions that closely mirror the facts concerning many of LaBine's investors. Gross conceded that LaBine was acting as an RIA for clients

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customers. Tr. 1384-85.

[20] Gross wrongly stated that the broker-dealer exclusion to the definition of "Investment Adviser" in Section 202(a)(11) of the Advisers Act applies if LaBine received no special compensation for his advice "and" if the advice was not solely incidental to his provision of brokerage services. Resp. Ex. 202 at 6. But as Laby pointed out, Gross's use of the conjunctive connector "and" is incorrect because the broker-dealer exclusion used the disjunctive "or" in stating the two prongs of its test. Div. Ex. 102 at 4.

who had paid management fees on money that was transferred from their advisory accounts with LaBine into their brokerage accounts with him, in order to fund their purchase of Series D debentures pursuant to LaBine's recommendation. Tr. 1379-80, 1383. The summary evidence of which Gross was unaware, as well as the testimony of individual investors, establishes that many investors did get their purchase money from advisory accounts with LaBine. Div. Exs. 86 and 87; Tr. 1400-08; Tr. 460 (Pettit), 672 (Spaid) and 1498-99 (Mealins). Thus, according to LaBine's own expert, LaBine was acting as an RIA in recommending and selling the debentures to many of his advisory clients.

113. Gross submitted a second letter in rebuttal to Laby's opinions, but it is no more substantive or reliable than her initial letter. Resp. Ex. 203. Gross asserted that Laby had ignored the broker-dealer exclusion, Resp. Ex. 203 at 1, but later conceded that she had misstated its terms. Tr. 1384. Gross conceded that her critique of Laby's opinion that dual registrants must affirmatively disclose an intention to "switch hats" was not informed by industry custom and practice. Tr. 1388. And, as with her initial opinion letter, Gross's rebuttal letter merely purported to state the law and did not even do that correctly.[21]

3. Professor Thomas W. Bates

114. LaBine submitted the expert report by Thomas W. Bates. Resp. Ex. 198. Bates is an Associate Professor of Finance and Department Chair at the W.P. Carey School of Business, Arizona State University. Bates's report contains five purported opinions:

- In Section 1, Bates opines that speculative grade debt, like the Series D debentures, are "a common element of many investors' portfolios," and that the Series D debentures were a "risky investment" that offered investors "substantial compensation in exchange for this risk." Resp. Ex. 198 at 2.

[21] Gross expressly disclaims any intention to state opinions as to whether LaBine's conduct as an RR violated his duties under the Securities Act or the Exchange Act. Resp. Ex. 202 at 3, n. 2.

- In Section 2, Bates opines that "the experience of investors in Domin-8's Series D debentures in 2009 was not unusual relative to other investors in speculative grade bonds." Resp. Ex. 198 at 3.

- In Section 3, Bates opines that any investor who read the PPM for the Series D debentures would have known that the company was in financial distress. Resp. Ex. 198, 4-5. He further opines that the company was able to raise over $10 million through sales of the Series D debentures because of "the relatively high interest rate tied to the offering, and the presence of warrant sweeteners," and because "the risk associated with a potential Domin-8 default was substantially muted for an investor in the Series D debentures." Resp. Ex. 198 at 5.

- In Section 4, Bates opines that "the market value of Domin-8 assets is approximately $145 million today." Resp. Ex. 198 at 8.

- In Section 5, Bates opines that "even under the most wildly optimistic economic assumptions, the economic value of the Domin-8 warrants compensation to the selling agents, even under the terms as modified in December 2008 or 2009, was negligible." Resp. Ex. 198 at 14. Bates calculates that warrants issued under the June 2008 PPM were worth $.01. Resp. Ex. 198 at 11. He calculates that warrants issued under the terms of Supplement #4 to the PPM, dated December 19, 2008, were worth $.07. Resp. Ex. 198 at 13. And he calculates that warrants issued under the terms of Supplement #8 to the PPM, dated June 15, 2009, were worth $.18. Resp. Ex. 198 at 13.

115. Bates's opinions in Sections 1-4 of his report are not relevant to the Division's claims against LaBine. Whether speculative-grade debt is a common element of investors' portfolios or whether LaBine's clients lost more or less than other investors in speculative-grade debt in 2008 or 2009 is irrelevant to whether LaBine breached his duties to his clients by failing to disclose that he expected to receive warrants to purchase Domin-8 stock in exchange for his sales of the Series D debentures. Those opinions also have no bearing on whether LaBine had an undisclosed conflict of interest in recommending the Series D debentures because he had assured Domin-8's board and management that he would raise $1 million a month for the company. Similarly, the Division does not allege that LaBine failed to disclose the risk of bankruptcy to his clients but rather that he misrepresented to many clients what would happen to their investment in

the event of a bankruptcy. Disclosures in the PPM about the company's financial condition did not warn investors like the Sheens and the Spaids that LaBine's assertion that they could not lose money investing in the Series D debentures—even if the company filed for bankruptcy—was false. Finally, Bates's valuation of Domin-8's assets today reveals nothing about whether LaBine had undisclosed conflicts of interest or made material misrepresentations in 2008 and 2009.

116. The only Section of Bates's report that is relevant to this proceeding is his valuation of warrants LaBine expected to receive as compensation for selling the Series D debentures. But that valuation is flawed in multiple ways, as demonstrated in the report of the Division rebuttal expert, Eugene Canjels.

4. Eugene Canjels

117. Eugene Canjels is a Supervisory Financial Economist in the SEC's Division of Economic and Risk Analysis. He holds a Ph.D. in Economics from Northwestern University and was previously an assistant professor at the New School in New York, where he taught mathematics, statistics, and microeconomics.

118. Canjels explains that Bates used unsupported assumptions in making his valuation. More specifically, Bates's assumptions about volatility, the price of Domin-8 stock, and the proper time to expiration, are not supported by Domin-8's own disclosures. Div. Ex. 130 at 3, 9-13. Had Bates used Domin-8's contemporaneous estimates for these assumptions, he would have calculated significantly higher values for the warrants. Canjel's report therefore discredits not only Section 5 of Bates's report but also the entirety of Bates's rebuttal report, which is premised on his flawed calculations.

119. First, as to volatility, in the PPM for the Series D debentures, Domin-8 assumed a stock price volatility of 127%, whereas Bates assumed a "substantially lower" volatility of 70%.

Div. Ex. 130 at 9. Bates does not explain why he used a volatility of 70%. Resp. Ex. 198 at 10-11. Canjels explains that by adjusting this assumption to use Domin-8's own estimate, the value of the warrants "more than doubles." Div. Ex. 130 at 9.

120. Second, as to stock price, Bates does not explain why he assumed the price of Domin-8's stock was $1.50, when it appears that in June 2008, "the company itself valued its equity just above $3 per share." Div. Ex. 130 at 10.[22] Canjels further reasons that Domin-8's stock price declined proportionately with the reduction of the exercise price of the warrants and therefore concludes that the stock price eventually fell below Bates's assumed $1.50 stock price. Div. Ex. 130 at 10. Depending on when one valued the warrants, therefore, Bates's assumption regarding the stock price would either skew the valuation too low or too high. Div. Ex. 130 at 11.

121. Third and finally, Canjels criticizes Bates for using a "time to expiration" of one year. Bates chose one year because "only one year actually passed between the original distribution of the Series D debentures in 2008, and the firm's entering bankruptcy protection in 2009." Resp. Ex. 198 at 12. Canjels explains that this *ex post* basis for using one year is inappropriate because investors likely did not expect *ex ante* for the company to enter bankruptcy within one year. Div. Ex. 130 at 11-12. Canjels determines the expiration date of the warrants by looking to the offering documents for the Series D debentures, which initially set the time to expiration at 5 years and, in June 2009, extended it to 7 years. Div. Ex. 130 at 12. By adjusting just this assumption, the value of the warrants "dramatically increases." Div. Ex. 130 at 13.

122. For each of these three factors, Bates either offers no support for his assumptions, or he offers a *post hoc* rationale that sheds no light on the value of the warrants in 2008 or 2009.

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[22] In June 2008, Domin-8's shareholders approved a compensation plan that allowed the company to grant stock options with an exercise price equal to the fair value of the underlying common stock on the day of the grant. Div. Ex. 130 at 10; Div. Ex. 56.6 at 13579. Domin-8's financial statements as of September 2008 show that the average exercise price for options granted in 2008 was $3.13. Div. Ex. 130 at 10.

Using Domin-8's own figures, on the other hand, is reasonable because it reflects a contemporaneous assessment of these factors by professionals closest to the company at the time.

123. After adjusting all three of Bates's flawed assumptions simultaneously, Canjels calculates the value of warrants issued under the original PPM, under Supplement #4 to the PPM, and under Supplement #8 to the PPM. Div. Ex. 130, Table 3. He reports that, whereas Bates calculated that a warrant issued under the original PPM would be worth only $.01, a valuation using Domin-8's own assumptions yields a value of $2.33. Div. Ex. 130, Table 3. Similarly, Bates calculated the value of a warrant under Supplement #4 to the PPM at $.07, but adjusting the three assumptions yields a value of $.94. Div. Ex. 130, Table 3. Finally, Bates calculated a value of a warrant issued under Supplement #8 at $.18, whereas Canjels's calculations using Domin-8's assumptions yield a value of $.68. Div. Ex. 130, Table 3. Using these more reasonable valuations, Canjels calculates that the value of the warrants LaBine would have received "due to his sales in the entire offering, ranged from $174,475 to $250,848." Div. Ex. 130 at 14 and Table 5. Far from being of negligible value, as Bates asserts, the warrants were therefore worth a "substantial sum," just as LaBine believed at the time.

5. **John T. Foster**

124. LaBine submitted two expert reports by John T. Foster, a financial securities industry practitioner with Bedford and Main Financial Consulting, Inc. Foster submitted one report opining that DFN conducted the necessary due diligence for a broker-dealer to offer an alternative investment product like the Domin-8 Series D debentures in compliance with industry norms. Resp. Ex. 200 ("Due Diligence Report"). Foster's other report opined that DFN was knowledgeable about FINRA requirements for placing an RR under heightened supervision, should have been aware of LaBine's daily activities in selling the

debentures, approved and supported his activities and thereby bore responsibility for LaBine's conduct. Resp. Ex. 201 ("Heightened Supervision Report").

125. Foster's Due Diligence Report does not appear to address a contested issue in this case. The Division has not alleged that it was contrary to industry norms to offer the Domin-8 debentures in a private placement to accredited investors. Nor has the Division alleged that LaBine made unsuitable recommendations to his brokerage customers.[23] Moreover, in neither the Due Diligence Report nor the Heightened Supervision Report does Foster purport to express an opinion regarding LaBine's failure to disclose material conflicts of interest, his affirmative misrepresentations or his fiduciary duties as an RIA.

126. Foster's Heightened Supervision Report does suggest (but does not actually state) that LaBine is entitled to rely on DFN's failure to ensure his disclosure of conflicts and avoidance of affirmative misrepresentations. Resp. Ex. 201 at 9 (DFN "placed themselves in a position of accountability and responsibility for the actions of LaBine"). To the extent that Foster means to assert such a proposition, Laby's rebuttal report addresses its fallacies. Div. Ex. 102 at 10-14. Most notably, Laby explains that LaBine continued to have a fiduciary duty to his advisory clients and a duty of fair dealing to his brokerage customers regardless of his being subject to heightened supervision. Whether or not DFN faithfully discharged its duties, there is no "reliance on compliance" defense available to LaBine. *Id.* at 13. Even if such a defense were available, Foster fails to address LaBine's testimony about his professed belief that Don DeWaay simply wanted to appropriate LaBine's Domin-8 warrants and clients for himself. Tr.1101-03, 1147-48. LaBine's professed state of mind about DeWaay's true motives would not be consistent with his

[23] FINRA has asserted both fraud and suitability claims against LaBine. Div. Ex. 125, ¶¶ 23-100. .

having had a good faith belief that he could rely on DFN's "supervision." Finally, LaBine was forced to admit that he understood that it was *his* responsibility and not DFN's to disclose his conflicts of interest. Tr. 1200.

K. LaBine's Attempted Witness Tampering, Lack of Credibility and Failure to Recognize the Wrongfulness of his Past Conduct or Provide Credible Assurances against Future Repetition

127. LaBine's conduct both subsequent to the OIP's filing and during the hearing itself bears on his unfitness to continue acting as a securities industry professional. Two investor witnesses (Bose and Pettit) testified to LaBine's unseemly attempt to secure their agreement to feign illness rather than give their testimony at the hearing. Tr. 487, 563-65; Div. Exs. 112, 115 and 117-18. LaBine offered meals and entertainment in his attempt to convince these former clients not to testify after their names appeared on the Division's list of hearing witnesses. *Id.*[24] LaBine admitted that the transcriptions of these contacts were accurate yet insisted (implausibly) that he was not really trying to induce these witnesses not to testify. Tr. 861, 944. LaBine's tactic with another witness, Jack Sheen, age 92, was to threaten that "his high-priced lawyer would make a fool of me on the stand if I chose to testify." Tr. 1329-30. LaBine's tamp down efforts failed but they evidence his weak ethics and readiness to manipulate seniors.

128. The substance of LaBine's testimony at the hearing, and his lack of credibility as he attempted to rationalize his contradictions, also has a direct bearing on

[24] In 2014, LaBine left a voicemail message for Jackie Bose in which he asked her to "call so we can discuss if you're going to be a witness, or if you're going to be sick that [day], or if you told them you're not going to do it [] that's all fine" and offered to take her out for lunch or dinner. Div. Ex. 117, 112, Tr. 563-565. Also in 2014, LaBine left a voicemail message on Craig Pettit's home phone offering to take Pettit out to a "steak dinner" to "clarify some things about Domin-8" before Pettit testified before this Court. Div. Ex. 115, 118. LaBine suggested that Pettit could pretend to be sick rather than speak further with attorneys from the Division. *Id.* Pettit regarded as LaBine's voicemail as "unethical," and an attempt at "witness tampering," if not "a bribe." Tr. 487.

his unfitness to act as a securities industry professional with a clientele that consists of mostly seniors. Rather than acknowledge his role as a fiduciary, LaBine repeatedly blamed *his investors* for not carefully reading the risk disclosures in the PPM for the Domin-8 Series D debentures (which in any event would not have revealed his conflicts of interest). Tr. 806, 1070-71, 1087. LaBine maintained that he had acted only as an RR and would not accept that he had a fiduciary duty even to his regular advisory clients to whom he recommended and sold debentures. Tr. 696-99. LaBine would not acknowledge that he acted as an adviser even to clients like Earl Gilbert, who LaBine stipulated was an advisory client and had previously admitted "hired me to be their financial planner.... [t]hey hired me to vet out investments and give them financial advice." Tr. 695-700; Div. Ex. 48.1 at 189-90. LaBine testified that he thought of himself as mostly a "financial planner" and broker rather than a "financial adviser." [25] LaBine glibly asserted that if his advisory agreements with clients led them to regard him as their financial adviser, "[t]hat was their idea." Tr. 697-99. Moreover, LaBine's position (as far as can be gleaned from Foster's Heightened Supervision Report) appears to be that DFN's involvement in the Series D debenture offering obviated his personal responsibility to clients even as an RR.

[25] LaBine himself appeared confused by his distinction between a "financial adviser" and a "financial planner," which was situational depending on the question he was being asked and who was doing the asking. LaBine testified in response to his own counsel's questions that: "Financial adviser is handling fiduciary. Investments advisers is [sic] fee-based – sorry. *I'm thinking of financial planner.* Financial adviser means you can do anything from life insurance to discuss long-term care insurance to discuss mutual funds." Tr. 1056-57 (emphasis supplied). LaBine then testified that many brokers call themselves "financial adviser" even if they are not RIAs. *Id.* LaBine had also testified that: "The terms financial planner and so forth are interrelated to people's idea. Some people would call me a broker. Some would call me an insurance agent. Some would call me an investment adviser. They give you all kinds of names, the public, whatever they want. If the phone rings in the middle of a meeting, they can say *adviser* if they want to." Tr. 662 (emphasis supplied). Similarly, LaBine testified that "I'd rather they call me a financial planner, but I can't control what the public says at any moment what they call the person who gives *financial advice* to them." Tr. 863 (emphasis supplied).

129. Notwithstanding LaBine's testimony that he perceived a meaningful distinction between his roles as "financial adviser" and "financial planner," it bears emphasis that LaBine has admitted that he understood that both *RIAs and RRs* have a duty to act in their clients' best interest and to disclose actual or potential material conflicts of interest. Tr. 723-24, 735-39, 829-30, 868-70. As more fully discussed in Section F.3(a) above, LaBine has specifically admitted knowing that an expectation of receiving compensation from the issuer of a security that he or she is recommending is exactly the type of conflict of interest that must be disclosed to clients. Tr. 724. LaBine also admitted having known that DFF's supervision of him did not extinguish his personal responsibility to disclose conflicts. Tr. 1200. Given these admissions about his state of mind, LaBine's attempted parsing of the terms "financial adviser" and "financial planner" is pointless.

130. Finally, given the opportunity to say whether he would do anything differently today, what LaBine said was that he would videotape his meetings with clients. Tr. 1191-92. LaBine also said that he "would stick to the clients that are 40 and 50 years old and wealthy and younger clients for one." Tr. 1192.[26] There is no small irony in LaBine's assertion that he would shift his business model to a younger clientele given his testimony that, in the present day, he continues to act as a dual registrant to a clientele that is overwhelmingly comprised of seniors like those he tried to convince not to give their testimony in this case. Tr. 1033-34, 1192-93. LaBine also acknowledged that his business model is still to use FEPI and Pinnacle to attract and service seniors. Tr. 1033.

[26] Later prompted by his counsel's leading questions, LaBine asserted that he would make additional disclosures. Tr. 1193-94.

LaBine estimated that he has approximately $200 million dollars in assets under management. Tr. 1034. While LaBine made the self-serving assertion that he currently provides only brokerage services and relies on others in his firm to provide investment advisory services, Tr. 706, all of the investors who LaBine called as witnesses at the hearing testified that they regard LaBine as their adviser. Tr. 1496, 1502 (Mealins); Tr. 1520, 1530 (Hughes); Tr. 1549 (Cohen); Tr. 1572 (Peck); Tr. 1582, 1595-97 (Andries).

II. PROPOSED CONCLUSIONS OF LAW

A. Advisers Act Violations

1. The Advisers Act Applies to LaBine's Recommendations and Sales to his Advisory Clients

131. As a threshold matter, the Advisers Act clearly applies to LaBine's material omissions and misrepresentations to the 82 Domin-8 Series D debenture investors who were his regular advisory clients. LaBine has *stipulated* that these investors were his regular advisory clients and admitted that he "recommended" the debentures to them. Stipulations, ¶ 32 and Table 3; Tr. 701-02, 744-46. Thus, the Broker-Dealer Exclusion found in Section 202(a)(11)(C) of the Advisers Act does not apply to LaBine's dealings with these 82 advisory clients.[27]

132. The Broker-Dealer Exclusion applies to "brokers or dealers" who provide

[27] Section 202(a)(11) of the Advisers Act provides in relevant part: "'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities...but does not include...(C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor...." LaBine has the burden of proof with respect to the exclusion's potential applicability. *See generally, SEC v. Wall Street Pub. Institute,* 591 F. Supp. 1070, 1078-79 (D.D.C. 1984) (defendant has burden of proving that it falls within the publisher's exclusion from the definition of investment adviser and citing this as a rule of general applicability). Moreover, LaBine must show that both prongs of the exclusion (solely incidental to brokerage business and no special compensation received) apply to the transactions. *Thomas v. Metropolitan Life Ins. Co., et al.,* 631 F.3d 1153 (10th Cir. 2011).

investment advice that is merely "incidental" to brokerage transactions and for which they receive no special compensation. It does not apply to dual registrants like LaBine who make investment recommendations to their regular advisory clients and have them use brokerage accounts to act on the recommendations. As stated in *Thomas v. Metropolitan Life Ins. Co., et al.*, 631 F.3d 1153, 1164 (10th Cir. 2011), persons "whose primary business consists of giving advice – do not meet the first prong of the broker-dealer exemption." Accordingly, the Commission has not allowed dual representatives whose primary business is giving investment advice to escape their fiduciary duties to advisory clients merely because the adviser is also an RR. *See, e.g., In the Matter of Marc Geman*, Admin. Proc. File No. 3-9032, Exch. Act Rel. 43963, Advisers Act Rel. 1924 (Feb. 14, 2001), *aff'd, Geman v. SEC*, 334 F.3d 1183 (10th Cir. 2003) (finding dually registered investment adviser/registered representative liable under Advisers Act and Exchange Act). *See also Valentine Capital Asset Management,* IA Rel. No. 3090 (Sept. 29, 2010) (settled) (principal of registered investment adviser/broker who provided investment advice with respect to clients' brokerage accounts violated the Advisers Act for not fully disclosing his compensation).

133. The record establishes that investment advice was the heart of LaBine's recommendation and sale of Domin-8 debentures to his 82 advisory clients rather than having been merely "incidental" to processing brokerage transactions. LaBine told these advisory clients that his recommendation of the debentures was based on the need to adjust their overall investment portfolios in light of the Financial Crisis and consistent with their personalized needs and objectives. Tr. 741-44. He recommended the Domin-8 debentures as part of a coordinated shift away from assets classes that he said were subject to market risk and towards alternative investments that would supposedly provide diversification. Tr.

740-44. It is, therefore, unsurprising that most of the advisory clients who testified at the hearing (Mealins, Peck, Pettit, Brabender, Sheen and Spaid) understood LaBine to have been acting as their adviser in recommending the debentures. To be sure, LaBine had a hidden agenda to raise as much money for Domin-8 as he possibly could as quickly as he could. But what matters for purposes of determining the capacity in which he was (purportedly) acting – as trusted adviser – is what he told his clients.

134. Furthermore, many of LaBine's 82 advisory clients got the money to purchase the Domin-8 debentures by taking cash or securities from advisory accounts that LaBine managed. In fact, LaBine advised those clients to draw on their advisory accounts in order to act on his recommendation to purchase the debentures. Tr. 745, 851-52, 977-78, 1407-08; Div. Exs. 13, 87 and 129. LaBine had already taken annual management fees on such monies. Tr. 1059-69, 1408-10; Div. Ex. 21 at 1-2; Div. Ex. 22 at 2-3, 86, 88 and 93. And LaBine's staff at FEPI sometimes made a simple journal entry to transfer purchase money from an advisory account into a brokerage account that would be the repository for the debentures. Tr. 949. On facts like these, even LaBine's own expert (Professor Gross) had to concede that LaBine was acting as an adviser. Tr. 1380; *see also* Div. Ex. 102 at 3-8.[28]

135. A further basis to conclude that the Broker-Dealer Exclusion is inapplicable here is that LaBine, despite his initial waffling at the hearing, finally admitted that he did

[28] Except as discussed in text above, Professor Gross's testimony otherwise should be disregarded. Although the Division did not seek to exclude Gross's opinion letters before the hearing, she admitted at the hearing that her opinions merely purport to state what the law is and that she neither relied on custom and practice nor conducted anything more than a cursory review of selected record materials. Tr. 1351-58. An expert obviously may not simply state legal conclusions. *Mukhtar v. Cal. State Univ., Hayward,* 299 F.3d 1053, 1066 n. 10 (9th Cir.2002) ("an expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law"). Gross apparently did not intend to state legal "conclusions" as such but merely intended to explain the applicable legal principles. Her letters still should be ignored because the Chief Law Judge does not need legal instruction from LaBine's expert.

nothing to alert his advisory clients that he intended to "switch hats" on them or otherwise step outside of his role as their fiduciary. Tr. 702, 829-33, 838-44, 1496-97.[29] The mere fact that LaBine had clients use commission-based brokerage accounts to hold the Domin-8 debentures did not alert clients that LaBine was suddenly purporting to act as something other than their adviser. Tr. 447-49, 523, 537-39, 630-31, 1229-30, 1322-24. If LaBine wanted to be held to less than a fiduciary standard, he should have expressly told his advisory clients that he was not making his recommendation as their adviser. That would have at least alerted LaBine's advisory clients to ask more questions or seek a second opinion rather than simply follow LaBine's advice. Having lulled clients into a false sense of security, LaBine cannot invoke the Broker-Dealer Exclusion now.

136. Finally, LaBine's reliance on a purported distinction between "financial planners" and "financial advisers" is misguided. LaBine's status as a "financial planner" does not assist him because financial planners *do not* qualify for the Broker-Dealer Exclusion. *See* SEC Release No. IA-1092 (Oct. 8, 1987) at 13 (registered representative who "provides advice independent of, or separate from, his broker-dealer employer such as establishing a separate financial planning practice" does not fall within the Broker-Dealer Exclusion). Moreover, all or virtually all of LaBine's advisory clients at DA were also his clients for estate and financial planning advice through FEPI or Pinnacle. That is unsurprising because LaBine used those entities to funnel investors toward his advisory business. Tr. 673-77, 1030.

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[29] *See* SEC Release No. IA-1092 (Oct. 8, 1987) at 16-17 (Dual representative "must disclose to his advisory clients that his advisory activities are independent from his employment with the broker or dealer" and "the nature and extent of any interest the investment adviser has in such recommendation, including compensation the investment adviser would receive from his employer in connection with the transaction").

2. <u>LaBine Breached his Fiduciary Duty to Fully Disclose Conflicts</u>

137. The elements of the Division's claim for securities fraud are familiar. [30] Under Section 206 of the Investment Advisers Act, the Division must show that a respondent employed a "device, scheme, or artifice to defraud" their clients, or engaged in a "transaction, practice, or course of business which operate[d] as a fraud or deceit upon any client or prospective client" or "which [was] fraudulent, deceptive, or manipulative." 15 U.S.C. §§ 80b-6(1), (2), and (4). Scienter is required to establish a violation of Advisers Act Section 206(1) but is not a required element of Section 206(2) of the Advisers Act. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 184 & 191-92 (1963); *Aaron v. SEC*, 446 U.S. 680, 691-97, 701-02 (1980); *SEC v. DiBella*, 587 F.3d 553, 569 (2d Cir. 2009). A showing of negligence suffices to establish violations of Advisers Act Section 206(2). *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001).

138. Scienter means an intent to deceive and can be proven by knowing or reckless conduct; proof of subjective intent to defraud is not needed. *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998); *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45 (2d Cir. 1978); *SEC v. Falstaff Brewing Co.*, 629 F.2d 62, 77 (D.C. Cir. 1980). In the Ninth Circuit where LaBine resides, a showing of recklessness can satisfy the scienter requirement of Section 206(1). *Vernazza v. SEC,* 327 F.3d 851, 860 (9th Cir. 2003). Recklessness is defined as an

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[30] LaBine is liable as a direct violator of Sections 206(1) and (2) of the Advisers Act. While LaBine meets the statutory definition of "person associated with an investment adviser" under Section 202(a)(17) of the Act, he also meets the definition of an investment adviser under Section 202(a)(11) of the Act because he is in the business of providing investment advice to his clients for compensation. The Commission has held that an associated person "may be charged as a primary violator under Section 206 where the activities of the associated person cause him or her to meet the broad definition of 'investment adviser.'" *John J. Kenny*, IA Rel. No. 2128 (May 14, 2003). *See also Matter of David W. Baldt*, IA Rel. No. 3209 (May 20, 2011); *SEC v. Justin M. Scott and Omid Kamshad*, Civ. Action No. 03-12082-EFH (D. Mass. 2003), Lit Rel. Nos. 20141 (June 4, 2007) and 18428 (Oct. 28, 2003) (direct violations of Advisers Act against portfolio managers/managing directors of advisory firm).

"extreme departure from the standards of ordinary care ... which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *SEC v. Rubera*, 350 F. 3d 1084, 1094 (9th Cir. 2003).

139. As an investment adviser representative, LaBine owed a fiduciary duty to his clients pursuant to Section 206 of the Advisers Act. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 191. LaBine had "an affirmative duty of utmost good faith," including a duty to disclose to clients all material information in order to "eliminate, or at least expose, all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested." *Id.* at 191-92. An adviser violates his fiduciary duty by failing to disclose his actual or potential conflicts of interest. *See, e.g., Capital Gains*, 375 U.S. at 196-97; *SEC v. Wall Street Publishing Institute, Inc.*, 591 F. Supp. 1070, 1084 (D.D.C. 1984), *aff'd on other grounds*, 851 F. 2d 365 (D.C. Cir. 1988); *In the Matter of Feeley & Willcox Asset Management Corp. et al.*, Advisers Act Rel. No. 2143 (July 10, 2003) (Commission opinion) ("It is the client, not the adviser, who is entitled to make the determination whether to waive the adviser's conflict. Of course, if the adviser does not disclose the conflict, the client has no opportunity to evaluate, much less waive, the conflict.").[31] Advisers must eliminate or disclose a conflict of interest even if the adviser believes the conflict will not result in harm. *See Monetta Financial Services, Inc. v.*

[31] As stated in *Capital Gains*, "[t]he Investment Advisers Act of 1940 ... reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.... An investor seeking the advice of a registered investment adviser must, if the legislative purpose is to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving 'two masters' ... 'especially if one of the masters happens to be economic self-interest.'" 375 U.S. at 191-92, 196.

SEC, 390 F.3d 952, 955-56 (7th Cir. 2004). Applying these standards, LaBine's failure to disclose his many conflicts of interest clearly constitutes a serious violation of his fiduciary duty to advisory clients.

(a) LaBine Utilized the Instrumentalities of Interstate Commerce

140. LaBine was licensed as an RIA representative in six states, operated a DA branch office in Arizona, operated FEPI in Arizona, operated Pinnacle in California and recommended and sold the Domin-8 Series D debentures to 82 clients in various states utilizing interstate mail, phone calls and wire transfers. Tr. 660, 896-97. Accordingly, LaBine used jurisdictional means to commit his violations of the Advisers Act. *SEC v. Huff,* 758 F. Supp. 2d 1288, 1353-54 (S.D. Fla. 2010) (telephone calls, facsimiles, interstate wire transfers and the negotiation of checks in other states all sufficient evidence of interstate commerce); *Lopes v. Viera,* 543 F. Supp. 2d 1149, 1175 (E.D. Cal. 2008) (use of telephone sufficient). LaBine declined to stipulate that his recommendations and sales of the Domin-8 Series D debentures were made in interstate commerce but he was nonetheless forced to admit this obvious fact during the hearing. Tr. 896-97.

(b) LaBine had Material Conflicts of Interest

141. The test of materiality is objective. It inquires whether the undisclosed information would have "significantly alter[ed] the 'total mix' of information made available" to a reasonable investor. *See generally In the Matter of Montford Company, Inc., d/b/a Montford Associates, and Ernest V. Montford, Sr.,* Admin. Proc. File No. 3-14536, Advisers Act Rel. No. 3829, 2014 WL 1744130 (May 2, 2014) at *14 (Commission held adviser's pay arrangement was material conflict) *citing Basic v. Levinson,* 485 U.S. 224, 231-32 (1988). In the present case, LaBine had material conflicts of interest both (1)

because the prospect of receiving a warrant to purchase Domin-8 stock was a sales incentive and (2) because he made a commitment to Domin-8 to get his clients to purchase millions of dollars' worth of debentures in order to keep the company from going bankrupt.

142. The record fully supports the Division's allegation that LaBine expected to receive Domin-8 warrants as additional incentive compensation. In fact, LaBine has stipulated that his sales of Series D debentures entitled DFN to receive over 260,000 warrants pursuant to the Selling Agreement and that he expressly asked DFN to give him the lion's share of those warrants. Stipulations, ¶¶ 20-25 and Table 2. LaBine had always expected DFN to give him 90% of the sales commissions attributable to his sales because that was standard industry practice. Tr. 750. In November 2008, LaBine told DFN management that he wanted the same 90/10 split of warrants because he believed they stood to be worth a "substantial sum." Div. Ex. 17. LaBine proceeded to negotiate directly with Domin-8 to make the warrant grant even more valuable. These are objective facts that more than suffice to establish the existence and materiality of LaBine's conflicts under *Capital Gains* and its progeny. As the Commission stated in *Feeley & Willcox Asset Management Corp.*, IA Rel. No. 2143, 80 SEC Docket 1730, 2003 WL 22680907, *quoting Capital Gains Research*, "[a]n investor seeking the advice of a registered investment adviser must, if the legislative purpose [of the Advisers Act] is to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving two masters or only one, especially if one of the masters happens to be economic self-interest."

143. Moreover, an adviser's expectation of receiving incentive compensation for making sales constitutes a material conflict even if the compensation is never actually paid.

Advisers have a duty to disclose not only actual conflicts but *potential* conflicts as well. *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) (*citing SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). As the Ninth Circuit stated in *Vernazza*, "[i]t is indisputable that *potential* conflicts are 'material' facts." 327 F.3d at 859. (Emphasis supplied.) Thus, the Division is not required to establish that LaBine was certain to receive warrants, that they had substantial value or that the prospect of receiving them actually incentivized him or influenced his advice to clients. *Cf. Kingsley, Jennison, McNulty & Morse, Inc.,* Advisers Act Release No. 1396, 1993 SEC LEXIS 3551, at *4 (Dec. 23, 1993)("because of the fiduciary relationship between an adviser and its client, the percentage or absolute amount of commissions involved" is not determinative of whether a conflict should be disclosed). Were it otherwise, advisers could always seek to excuse a conflict's nondisclosure by making the *post hoc* assertion that it did not influence them.[32]

144. The record also fully substantiates the Division's allegation that LaBine made major fund raising commitments to Domin-8. LaBine admits the accuracy of the contemporaneous records that document his commitments and of the testimony of Domin-8's CFO (Buettin) recounting them in detail. LaBine promised Domin-8 that he would

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[32] Although no such showing is required to establish materiality, the record nonetheless does show that LaBine's contemporaneous expectation was that the Domin-8 warrants could be worth a "substantial sum." Div. Ex. 17. The fact that LaBine *doubled* his weekly sales goal for the debentures almost immediately upon learning of a reduction in their strike price is powerful evidence that the prospect of receiving warrants incentivized him to make sales. *See* Tr. 921-27; Div. Ex. 19. LaBine's effort to obtain a substantial equity stake in the D8 Acquisitions vehicle after Domin-8 filed its Chapter 11 bankruptcy petition is further evidence that he believed owning a piece of the company or its assets could have substantial value. Thus, LaBine's current assertion that he never expected to receive warrants is not worthy of belief because it is totally inconsistent with his conduct at the time he was selling the debentures. Nor can the evidence of LaBine's contemporaneous state of mind be negated by his expert's (Bates) *post-hoc* valuation of the warrants, which in any event, is based on unreasonable assumptions designed to achieve a low valuation. The valuation of the warrants presented by the Division's expert (Canjels) is far more reasonable and indicates a potential value of between approximately $174,000 and $250,000. Div. Ex. 130 at 3, 13-14.

deliver one million dollars in sales each month and that he could even get the entire Series D offering subscribed from his client base. *Id.* LaBine's assertion that he could have stopped selling the debentures may be true but does not negate the fact that he made determined efforts to meet his sales commitments and regularly reported his progress to Domin-8.

145. LaBine's undisclosed conflicts clearly would alter the total mix of information about the Domin-8 debenture offering from the perspective of a reasonable investor. A reasonable investor would surely want to know that his or her purchase would boost LaBine's tally of expected warrants and help fulfill his promise to Domin-8 to get his clients to provide all the funds needed to keep the company afloat. Disclosure of those conflicts would have caused a reasonable investor at least to consider whether LaBine's advice about the debenture offering was objective and whether he was recommending a purchase based on the investor's goals or based on the need to fulfill his commitment to Domin-8 and earn warrants. In fact, four of LaBine's advisory clients (Pettit, Brabender, Sheen and Spaid) testified to that effect at the hearing. No advisory client testified that they would *not* have wanted to know about LaBine's undisclosed conflicts. Even if such testimony had been adduced, it would not negate the Division's showing of objective materiality.[33]

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[33] Instructive in this regard is the decision in *United States v. Biesiadecki*, 933 F.2d 539 (7th Cir. 1991). That case involved a criminal defendant charged with wire fraud and other offenses for inducing investors, by means of misrepresentations and material omissions, to engage in commodity futures trading. At trial, the defendant sought to introduce testimony from customers that they had heard the defendant's sales pitch but did not believe that they had been defrauded. *Id.* at 543. The government moved *in limine* to exclude this testimony and the district court granted the motion, finding that whether certain customers heard the sales pitch and did not feel deceived by the pitch was not relevant. *Id.* at 543-44. The Seventh Circuit affirmed the district court's' ruling and held that, "The excluded testimony of the other . . . customers would have improperly shifted the jury's attention away from the knowledge and intent of [defendant] and focused instead on the beliefs of the victims of the alleged scheme to defraud." *Id.* at 544. *Accord United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1995) (defendants charged with mail fraud, conspiracy, and securities fraud proffer of testimony of their "satisfied customers" properly excluded because "[t]he fact that [defendants] avoided wrongdoing in their dealing with five customers not named in the indictment is inconsequential in determining whether both made fraudulent representations to the nineteen victims listed in the indictment....proof of [defendants'] intent to defraud lies in

(c) <u>LaBine did not Disclose his Material Conflicts</u>

146. LaBine has admitted that he did not tell any client about his prospect of receiving Domin-8 warrants or about his fund raising commitments to the company. *See* Tr. 725-26, 773-75, 837-38, 889, 894-95, 937-43, 947-48, 964-65, 995, 1005. Every investor witness who was asked confirmed that LaBine made no such disclosures to them and no investor testified that LaBine did make such disclosures. LaBine has made two assertions pertinent to disclosure but neither is sufficient to negate his admissions.

147. First, LaBine has asserted that he told investors that he was a "primary fundraiser," a term that LaBine no doubt saw in Professor Laby's expert report. That assertion is simply not credible, however, because it was contradicted by *every i*nvestor witness who was asked about such a disclosure. Tr. 1525 (Hughes), 1547-48 (Cohen) and 1601 (Andries). Referring to himself as a primary fundraiser would not constitute disclosure of LaBine's specific promises to Domin-8 in any event, much less his expectation of receiving warrants.

148. Second, LaBine has asserted that his prospect of receiving warrants could have been gleaned from one of the subscription forms for the Series D debenture offering. That assertion is without merit because the statement upon which LaBine relies merely states that "this investment has or may have front-end costs that will be deducted from my initial investment, including <u>but not</u> limited to a commission to my rep/adviser." Resp. Ex. 93. This vague statement makes no reference to warrants whatsoever. The statement does refer to a possible *deduction* from the client's investment and that reference renders it

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the substance of their misrepresentations, not in the cumulative impact of those misrepresentations on all of their customers," because "No amount of testimony from satisfied customers could 'average out' [defendants'] intent to defraud. . . .").

facially inapplicable to LaBine's expectation of receiving warrants. LaBine's warrants would not have a *deduction* from the client's investment but instead would have been a grant from Domin-8 pursuant to the Selling Agreement and DFN's remission of warrants to LaBine. LaBine's investors certainly did not understand the subscription form to hint at his expectation of receiving warrants nor did LaBine make such disclosure orally. *See* Tr. 726-27, 774. Nor was any investor witness otherwise aware that LaBine was expecting to receiving warrants. *See* Tr. 466, 550-54, 624, 1232, 1324, 1498, 1524, 1548-49, 1574-75, 1602-03.

149. LaBine is also misguided in placing reliance on *SEC v. Morgan Keegan,* 678 F.3d 1233 (11th Cir. 2012). *Morgan Keegan* held that *summary judgment* was inappropriate on the element of materiality because the question whether written disclosures rendered oral misstatements immaterial was heavily dependent on the facts. 678 F.3d at 1250. But there has been a 7 day evidentiary hearing in this case, and the only thing that LaBine could point to as supposed written "disclosure" of his material conflicts was the subscription form just discussed above. To the extent that LaBine may also seek to rely on the disclosure of GAF's entitlement to warrants contained in the PPM for the Series D debentures, ample legal authority supports the conclusion that such boilerplate was in no way sufficient to disclose *LaBine's* prospect of receiving warrants or his fundraising commitments to Domin-8.[34]

[34] *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 850-51 (11th Cir. 2004) (boilerplate disclosures that analyst might seek to do business with companies that it was covering were too general and ambiguous to provide a warning that the ratings, recommendations, and target prices in the reports were not based on analyst's unbiased real opinions, but rather deliberate attempts to inflate company's stock price and attract investment banking business); *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 237 (D. Mass. 2004) ("Credit Suisse's boilerplate disclosure of potential conflicts [do not] suffice as a matter of law when [defendants] knew of an actual, more specific conflict."). *In re WorldCom, Inc. Sec. Litig.*, 294 F.Supp.2d

(d) LaBine Acted with Scienter or was atLleastNnegligent in Failing to Disclose his Material Conflicts

150. LaBine's admissions at the hearing establish that he acted with scienter in failing to disclose his material conflicts of interest. LaBine has admitted he understood that advisers have a fiduciary duty to disclose material conflicts, including an expectation of receiving compensation from the issuer of a security he or she is recommending, *see* Tr. 723-24, 830-31. LaBine also has admitted that he understood that he had a duty to tell advisory clients about his role in raising money for Domin-8, including his specific fundraising commitments. *See* Tr. 940-43. Furthermore, even if LaBine somehow had not understood these basic concepts at the time, *Capital Gains Research* and its progeny firmly establish his duty to disclose as discussed above. LaBine's conduct was also an extreme departure from the standards of the advisory industry. As Division's expert Arthur B. Laby explains in his report, RIAs have long recognized and accepted that they owe a fiduciary duty to their clients and therefore must disclose all actual or potential material conflicts. Div. Ex. 101.01 and 101.02. For all these reasons, the record establishes that LaBine's state of mind was reckless at the very least.

151. The Division was not required to establish that LaBine acted with an intention to harm investors. As the Commission stated in *Montford,* the soundness of an adviser's investment advice is irrelevant to his obligation to be truthful with clients and to disclose a

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392, 429-30 (S.D.N.Y. 2003) (boilerplate disclosure in analyst reports that analyst's firm "may from time to time perform investment banking or other services for, or solicit investment banking or other business from, any company mentioned in this report" did not, for purposes of motion to dismiss, provide notice to the public of analyst's conflict of interest). *Cf. Commodity Futures Trading Com'n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1330 (11th Cir. 2002) ("[T]he fact that the Commercial had a general risk disclosure statement does not automatically preclude liability under the [Commodities Exchange Act] where the overall message is clearly and objectively misleading or deceptive.") ("[W]e seriously doubt whether boilerplate risk disclosure language could ever render an earlier material misrepresentation immaterial.").

conflict of interest. 2014 WL 1744130 at *16. Even if an adviser honestly believed he could give objective, unbiased advice despite soliciting compensation from the issuer of the securities he was recommending, that is simply not a determination for the adviser to make unilaterally.[35] As the Commission has held, "it is the client, not the adviser, who is entitled to make the determination whether to waive the adviser's conflict." *Id. See also Vernazza v. SEC*, 327 F.3d 851, 860, n.8 ("The Commission correctly determined that the petitioners had a duty to disclose any potential conflicts of interest accurately and completely, and to recognize that the SSA created such a potential conflict. In this case . . . the Commission was entitled to conclude that any competent investment adviser would have recognized that the SSA created such a potential conflict, and that the petitioners' failure to identify the

[35] As the Supreme Court has explained, a defendant's intent to benefit or not harm investors is irrelevant to scienter:

> [T]he intent which must be established [for fraud] need not be an intent to cause injury to the client . . . [T]he fact that the defendant . . . had the best of motives, and that he thought he was doing the plaintiff a kindness, will not absolve him from liability, so long as he did in fact intend to mislead.

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192 n.39, 84 S. Ct. 275, 283 n.39 (1963). Judge Easterbrook put the point as follows in another SEC case:

> [a defendant's] motive [is] irrelevant; securities fraud is wrongful even if committed in the belief that lies serve . . . investors' interests. The plaintiff in a securities-fraud suit must show intentional deceit; the motive for that deceit is beside the point.

SEC v. Koenig, 557 F.3d 736, 740[redacted](7th Cir. 2009).

The decisions following this fundamental principle are legion. *See Abrahamson v. Fleschner*, 568 F.2d 862, 878 n.27 (2d Cir. 1977) ("Scienter does not require a showing of intent to cause a loss"); *SEC v. Caterinicchia*, 613 F.2d 102, 106 n.7 (5th Cir. 1980) (defendant's assertion that he "did not intend to harm investors, does not negate a finding of scienter"); *U.S. v. Hickey*, 580 F.3d 922, 931 (9th Cir. 2009) ("even if [defendant] genuinely believed his investment scheme would be profitable . . . he would still be guilty of securities fraud . . . if he knowingly lied to investors"); *U.S. v. Benny*, 786 F.2d 1410, 1417 (9th Cir. 1986) ("good-faith belief that the victim will be repaid and will sustain no loss is no defense" to fraud charge). Echoing this principle, the Second Circuit has held in the criminal context that "no amount of honest belief on the part of a defendant that the scheme will ultimately make a profit for the investors, or not cause anyone harm, will excuse fraudulent actions or false representations by him or her." *U.S. v. Ferguson*, 676 F.3d 260, 280 (2d Cir. 2011); *see also U.S. v. Marzo*, 312 Fed. Appx. 356, 358-59 (2d Cir. 2008) (upholding jury charge to same effect where defendant claimed "that even if he did engage in some off-market trades, SocGen did not ultimately suffer any harm because he could make up the trades later").

conflict was either knowingly or recklessly in disregard of their duties.").

152. Moreover, as pertinent to LaBine's liability under 206(2) of the Advisers Act, the Division need only show that LaBine failed to act with reasonable care in order to establish his negligence. *IFG Network Sec.,* Exchange Act Release No. 54127, 2006 SEC LEXIS 1600, at *9-11 (July 11, 2006). Respondents were negligent if "they failed to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *SEC v. True N. Fin. Corp.,* 909 F. Supp. 2d 1073, 1122 (D. Minn. 2012). "Compliance with industry standards is" a non-dispositive factor to consider in determining whether the Respondent was negligent. *Piper Capital Mgmt., Inc.,* Securities Act Release No. 8276, 2003 SEC LEXIS 2047, at *26 (Aug. 26, 2003). The evidence adduced at the hearing clearly showed that LaBine did not act with reasonable care and did not comply with industry standards in failing to disclose his material conflicts of interest.

153. Finally, any suggestion that it was Domin-8's responsibility to ensure disclosure of LaBine's conflicts is specious. Tr. 308-16; Resp. Ex. 46. Domin-8 assumed no such responsibility, Tr. 418-20, and that would not have negated LaBine's scienter or his negligence under the legal authorities cited above. Moreover, LaBine admitted having known that he bore *personal* responsibility to disclose material conflicts to his advisory clients. Tr. 1200. LaBine's admission also shows the irrelevancy of his supposed "supervision" by DFN (whose principal owner wanted to keep the Domin-8 warrants for himself and steal LaBine's clients, according to what LaBine professes to have believed) and by his own employee (Swanson). LaBine's *post hoc* attempt to transfer responsibility for his conduct to others is unavailing in light of his admissions, the applicable legal

standards and industry custom and practice.

B. Violations of the Exchange Act and the Securities Act

154. In his role as a Registered Representative, LaBine violated the anti-fraud provisions of the Exchange Act and the Securities Act by failing to disclose his material conflicts. LaBine breached his duty both with respect to the 18 customers who only had brokerage accounts with him at DFN and to the 82 customers who also had accounts with him at DA. Under Section 10(b) of the Exchange Act, the Division must show that a respondent "(1) made a material misrepresentation or omission as to which [he] had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *See SEC v. Monarch Funding Corp.*, 192 F.3d 296, 308 (2d Cir. 1999).[36] And under Section 17(a) of the Securities Act, the Division must show "essentially the same" elements in the offer or sale (rather than "purchase or sale") of securities, though scienter is required only under Section 17(a)(1); negligence suffices under 17(a)(2) and 17(a)(3). *See Monarch Funding*, 192 F.3d at 308; *SEC v. Hughes Cap. Corp.*, 124 F.3d 449, 454 (3d Cir. 1997).

155. The Division's charges against LaBine under the Securities Act and the Exchange Act are based on controlling authority holding that broker-dealers who make recommendations to their customers have a duty to disclose material adverse information, including conflicts of interest. As the Commission held in *Matter of Robert Thomas Clawson*, "[w]hen a securities salesperson recommends a stock to a customer, the salesperson must disclose 'material adverse facts,' including any self-interest that could influence the salesperson's recommendations. If the salesperson fails to disclose extra

[36] The parties have stipulated that the Domin-8 Series D debentures were "securities" for purposes of the federal securities laws. Stipulations, ¶ 11.

compensation that he or she anticipates earning from the sale, the customer cannot weigh whether the salesperson may be recommending the stock for the salesperson's own financial interest, rather than based on the investment value of the security." Sec. Exch. Act Rel. 48143, Admin. Proc. File No. 3-9208 (July 9, 2003) (*quoting Matter of Richard H. Morrow*, 53 S.E.C. 772, 781 (1998)).[37] A broker-dealer's duty to disclose material conflicts applies to non-discretionary as well as discretionary accounts.[38] Moreover, tribunals have found that broker-dealers have a duty to disclose conflicts on facts similar to those involved in this proceeding. For example, in *Chasins v. Smith Barney,* 438 F.2d 1167 (2d Cir. 1978), the Second Circuit upheld a finding that the broker-dealer had violated § 10(b) by failing to disclose that it was a market-maker in a security it recommended to a customer. The broker-

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[37] Among the precedents that the Commission cited was its prior decision in *Richard H. Morrow,* 53 S.E.C. 772 (1998). *Morrow* upheld a finding that a BD had violated Securities Act §§ 17(a)(2) and 17(a)(3) by selling real estate interests through a private placement without disclosing his expectation of receiving commissions and an "equity kicker" from the real estate venture's general partner. The Commission in *Morrow* stated that: "As a securities professional, Morrow had an obligation to disclose facts that he knew or were 'reasonably ascertainable.' When recommending securities to a prospective investor, a securities professional must not only avoid affirmative misstatements but also must disclose 'material adverse facts,' including any self-interest that could influence the salesman's recommendation." 53 S.E.C. at text accompanying n. 16 and 17. *Cf. In the Matter of Richmark Capital Corp.,* Exchange Act Rel. No. 48758 (Nov. 7, 2003) (broker making recommendation must disclose material adverse facts, including adverse interests).

[38] The scope of a broker-dealer's duties is determined by the particular matters entrusted to the BD by the customer. Even with respect to non-discretionary brokerage accounts, a broker-dealer has a duty to make a reasonable investigation of the investment product and to disclose to the customer, with respect to that particular recommendation, all material information related to that product, including negative information and any additional economic incentive the broker receives to sell the investment. *See DeKwiatkowski v. Bear Stearns*, 306 F.3d 1293, 1302 (2d Cir. 2002). ("[o]n a transaction-by-transaction basis, the broker owes duties of diligence and competence in executing the client's trade orders and *is obliged to give honest and complete information when recommending a purchase or sale*.") (emphasis added) *See also Gochnauer v. AG Edwards & Sons*, 810 F.2d 1042, 1049 (11th Cir. 1987) ("[The broker's] fiduciary responsibilities in the one-time 'non-discretionary' decision to [recommend that his customer hire an outside investment adviser with respect to particular investments] . . . were . . . the duty to inform the customer of the risks involved in purchasing or selling a particular security; . . . and the duty to refrain from self-dealing . . . ."); *Merrill Lynch v. Perelle*, 356 Pa. Super. 165, 183 (1986) ("Where the [brokerage] account is a nondiscretionary account, . . . the duties of the broker include . . . the duty to inform the customer of the risks involved in purchasing or selling a particular security [*citing Hanly*] . . . [and] the duty to refrain from self-dealing or refusing to disclose any personal interest the broker may have in a particular recommended security."); *Leib v. Merrill Lynch*, 461 F. Supp. 951, 952-953 (E.D. Mich. 1978) (same).

dealer had disclosed that it was a principal in the transaction, but not that it was a market-maker. The Second Circuit held that, because the broker-dealer knew the customer would rely on its report and recommendations, the "failure to inform the customer fully of its possible conflict of interest ... was an omission of material fact in violation of Rule 10b-5." 438 F.2d at 1172. Similarly, in *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) the court held that a broker-dealer violated § 10(b) and § 17(a) by falsely representing that the broker-dealer would earn no commissions and/or misrepresenting the amount of commissions it would receive. The court stated that "misrepresenting or omitting to disclose a broker's financial or economic incentive in connection with a stock recommendation constitutes a violation of the anti-fraud provisions." *Id.*

156. A further reason that LaBine owed a duty to disclose conflicts even as an RR is that he enjoyed a relationship of trust and confidence with his advisory clients. *See generally U.S. v. Laurienti,* 611 F.3d 530, 540 (9th Cir. 2010) (finding that broker had a duty to disclose receipt of "bonus commissions" in addition to regular commissions "if the broker and the client have a fiduciary relationship or a similar relationship of trust and confidence"); *U.S. v. Skelly,* 442 F.3d 94, 98 (2d Cir. 2006) ("a relationship of trust and confidence does exist between a broker and a customer with respect to matters that have been entrusted to the broker" and such relationship may arise even where the broker-dealer did not have discretionary authority). And like the broker-dealer in *Laurienti,* LaBine should be held accountable for telling "half-truths" by disclosing *part* of his compensation (sales commissions) but not the warrants, thus omitting material information required to make his affirmative statements not misleading. 611 F.3d at 541.Application of these legal authorities to the facts of this case is straightforward. LaBine recommended to each of his

brokerage customers that they purchase the Domin-8 debentures. LaBine therefore had the duty to disclose to them material information about the Domin-8 transactions, including material conflicts of interest. LaBine had material conflicts (as previously discussed) but failed to disclose them to his customers. LaBine knew that broker-dealers must disclose conflicts when making recommendations to their customers. Tr. 735-39, 868-70. He therefore acted with scienter. To the extent LaBine may have actually believed that he had no duty as an RR to disclose his conflicts of interest (and that he was not acting as an RIA), such belief was totally unreasonable, especially given that LaBine had relationships of trust and confidence with the vast majority of his customers. Accordingly, LaBine willfully violated Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. At a minimum, LaBine was negligent in failing to disclose his conflict, and therefore, violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

C. Affirmative Misrepresentations in Violation of Section 206(a) of the Advisers Act, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

157. LaBine violated the antifraud provisions of the securities laws by giving his clients oral assurances that he knew or should have known he had no basis to provide given the extreme risk inherent in the offering. LaBine has admitted that he affirmatively touted Domin-8's potential bankruptcy as the best thing that could happen for his investors. In fact, LaBine admits telling nearly all his clients that Domin-8 was like an undiscovered "Picasso" they could end up owning by virtue of their security interest. Tr. 807-15; Div. Ex. 47 at 193; Div. Ex. 48.1 at 269. LaBine denied making statements to the effect that his clients "couldn't lose money" but his denial was not credible because that is exactly how he described his thought process in prior testimony and because two investors specifically

testified that he made similar statements to them.

158. While LaBine now seeks safe harbor in the written disclosures found in the offering materials for the Series D debentures, the record shows that at least some investors did not read those disclosures carefully or at all. Tr. 463, 493-94, 499, 546, 571, 597, 1218, 1304-05. This should not have come as a surprise to LaBine since he did not review the offering materials with clients and must have known they were relying on him to conduct due diligence. Tr. 463, 493-94, 499, 538, 1218, 1226-27. Furthermore, even though investors could have scrutinized the offering materials, an RIA or RR's oral statements that negate or undermine written disclosures violate the securities laws. *See, e.g., Lester Kuznetz,* 48 SEC 551, 553 (1986) (affirming ALJ sanction against broker for misrepresentations in recommending customers' purchase of speculative securities); *Hanly v. SEC,* 415 F. 2d 589 (2d Cir. 1969) (affirming Commission ruling which found brokers liable for misstatements about stock's potential); *Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003) (affirming Commission sanction against investment adviser for material misrepresentations); *cf. SEC v. Morgan Keegan & Co., Inc.,* 678 F.3d 1233, 1252 (11th Cir. 2012) ("whether written disclosures should trump oral misrepresentations is highly fact-specific and therefore is not amenable to bright-line rules").

159. Although LaBine does not admit intending to mislead his clients, his admission that he gave assurances about Domin-8's potential bankruptcy to "just about every client" is highly probative of his state of mind. Div. Ex. 47 at 187, 193. LaBine's admission shows that he *planned* to give those assurances to every client as an important part of his presentation of the debenture offering. This was no isolated slip of the tongue or indiscretion. LaBine gave assurances because he knew they would put clients' minds at ease

and help sell the product. Any doubt about LaBine's state of mind should be erased by what LaBine told clients during the final days of his sales efforts as Domin-8 lurched closer to bankruptcy. LaBine went so far as to tell some clients, in words or substance, that they could not lose money on the Domin-8 debentures. A reasonable inference is that LaBine was motivated, at least in part, by his desire to earn warrants and fulfill his commitments to Domin-8's Board of Directors. LaBine thus acted with scienter by making knowing or reckless misstatements intended to induce his clients to purchase the debentures.

D. Sanctions for LaBine's Willful Violations

160. The assessment of whether a particular sanction recommended by the Division is in the public interest is derived from the Fifth Circuit's analysis in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), which includes the following elements: the egregiousness of the defendant's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the defendant's assurances against future violations; the defendant's recognition of the wrongful nature of his or her conduct; and the likelihood that the defendant's occupation will present opportunities for future violations. In addition, the Commission has listed three additional factors to be considered in making the public interest determination concerning sanctions: (1) the age of the violation; (2) the degree of harm to investors and the marketplace as a result of the violations (*see In the Matter of Marshall E. Melton, et al.*, 80 S.E.C. Docket 2258, 2003 WL 21729839, at *2 (July 25, 2003)); and (3) the "extent to which the sanction will have a deterrent effect" (*see Schield Management Co. and Marshall L. Schield*, Exchange Act Rel. No. 53201, 2006 WL 231642, at *8 (Jan. 31, 2006)). Based on these factors, this Court should impose the sanctions against LaBine that are recommended below

on account of the violations complained of herein.

1. Cease-and-Desist Order

161. Section 8A of the Securities Act, Section 21C of the Exchange Act and Section 203(k) of the Advisers Act provide, among other things, that the Court may enter an order requiring anyone who has violated any provision of those statutes to cease and desist from committing or causing such violation and any future violation of such provisions. *See* 15 U.S.C. §§ 77h-1, 78u-2; 15 U.S.C. § 80b-3. In considering whether to impose a cease-and-desist order, a Court should consider the *Steadman* factors discussed above. *See In the Matter of Herbert Moskowitz*, 77 S.E.C. Docket 446, 456, 2002 WL 434524, at *8 (Mar. 21, 2002). In addition, although some risk of future violations is necessary, it need not be very great to warrant issuing a cease-and-desist order. *See In the Matter of KPMG Peat Marwick, LLP,* 74 S.E.C. Docket 357, 2001 WL 47245, at *24 (Jan. 19, 2001), *recon. denied*, Rel. No. 34-44050, 2001 WL 223378, at * 6-7 (Mar. 8, 2001), *petition for review denied*, *KPMG, LLP v. SEC*, 289, F.3d 109 (D.C. Cir. May 14, 2002) *reh'g en banc denied*, (July 16, 2002). Absent evidence to the contrary, a finding of past violation raises a significant risk of future violation. *See id.*

162. As discussed above, LaBine willfully violated Sections 206(1) and 206(2) of the Adviser's Act, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. LaBine presents a significant risk of future violation because he continues to provide investment advice to senior citizens and may well continue to recommend alternative investments or other risky investment products. Accordingly, LaBine should be ordered to cease and desist from committing or causing any violations of these provisions.

2. <u>Industry Bar</u>

163. Based on LaBine's willful violations of Section 17(a) of the Securities Act and Sections 203A, 206(1) and 206(2) of the Adviser's Act and Rules 204A-1, 204-2 and 206(4)-7, it is appropriate under Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") to impose a permanent bar on LaBine from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. In addition, Section 15(b)(6) of the Exchange Act [15 U.S.C. § 78o(b)(6)] provides that the Court can, among other things, bar any person from association with any broker or dealer if such person has, pursuant to Section 15(b)(4) of the Exchange Act, willfully violated any provision of the Securities Act or Exchange Act. LaBine should be barred from association with any investment adviser and any broker or dealer.

164. These sanctions are warranted because LaBine's conduct was egregious and created both actual loss and a substantial risk of loss to his advisory clients and brokerage customers. In addition, LaBine's current occupation as a dual registrant and financial planner would afford him ample opportunity to engage in conduct that is violative of the anti-fraud provisions of the federal securities laws in the future. The risk would be substantial in view of LaBine's prior history of adverse regulatory actions, his attempted witness tampering and general lack of credibility in this case and the fact that his current clientele consists mostly of senior citizens. The Commission treats violations occurring within the context of fiduciary relations with particular seriousness and due regard for the relationship of trust and confidence. *James C. Dawson*, 98 SEC Docket 3500, 2010 WL

2886183, at *3 & n.16 (2010); *Don Warner Reinhard*, 2011 SEC LEXIS 158, at n.27 ("[T]he importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or the securities business.") "We look beyond the interests of particular investors in assessing the need for sanctions, to the protection of investors generally." *In the Matter of Sherwin Brown and America Financial, Inc.*, 2011 WL 2433279, at *7; *Dawson,* 2011 WL 2433279 at *4; *see also Christopher A. Lowry,* 55 S.E.C. 1133, 1145 n.26 (2002) (finding that, while former and existing clients testified in support of respondent, conduct established the need for bar to protect public), *aff'd,* 340 F.3d 501 (8th Cir. 2003).

165. As an investment adviser, LaBine owed clients "an affirmative duty of utmost good faith ... as well as an obligation to employ reasonable care to avoid misleading his clients." *Dawson*, 2010 WL 2886183, at *3. The evidence in this case demonstrates that LaBine recklessly deceived clients about his incentives, about his fundraising commitments, and about the safety of the product. LaBine also has a long history of customer complaints, disciplinary actions by his employers and regulatory sanctions based on allegations of fraudulent conduct and/or making unsuitable recommendations. In addition, the sanctions sought herein are appropriate because LaBine has accepted no responsibility for the wrongfulness of his conduct and claims to be unable to satisfy any monetary remedies that may be imposed. Furthermore, the selection of an appropriate sanction includes an assessment of the deterrent effect it will have in upholding and enforcing the standards of conduct in the securities business. *See Schield Mgmt Co.*, 87 SEC Docket 695, 2006 WL 231642 at n.46 (Jan. 31, 2006); *Arthur Lipper Corp.*, 46 SEC 78, 100 (1975).

3. <u>Disgorgement of Ill-Gotten Gains and Assessment of Interest</u>

166. LaBine received $524,408 in sales commissions on clients' purchases of Domin-8 Series D debentures based on his material misrepresentations and failure to disclose material conflicts. LaBine should be ordered to disgorge those commissions because they are the ill-gotten gains of his violation of the anti-fraud provisions of the securities laws. In addition, LaBine should be ordered to pay pre- and post-judgment interest on his ill-gotten gains pursuant to Rule 600 of the SEC Rules of Practice. 17 C.F.R. § 201.600(a).

167. Disgorgement of ill-gotten gains may be ordered in any administrative proceeding in which the Commission may impose a monetary penalty. *See* Exchange Act Section 21B(e); Securities Act Section 8A(e); Investment Company Act Section 9(e); and Advisers Act Section 203(j). The fundamental requirement for obtaining disgorgement is demonstrating a causal connection between the violation and the funds sought to be disgorged. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000). While it is possible that some clients would have purchased the Domin-8 debentures even if LaBine had disclosed his material conflicts and not misrepresented the risk, "'disgorgement need only be a reasonable approximation of profits causally connected to the violation.'" *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir. 2007) (*quoting SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)). "'Exactitude is not a requirement; [s]o long as the measurement of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" *SEC v. Calvo,* 378 F.3d 1211, 1217 (11th Cir. 2004) (*quoting SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998)); *accord SEC v. Patel,* 61 F.3d 137, 140 (2d Cir. 1995). Similarly, whether

the defendant injured others is irrelevant for the purposes of disgorgement because the primary purpose of disgorgement is to deprive the wrongdoer of ill-gotten gains, not to refund others for losses. *See Zacharias v. SEC,* 569 F.3d 458, 471 (D.C. Cir. 2009); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (noting that court did not have to investigate the extent that victims were injured by fraud); *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006).

168. Finally, while LaBine asserts that his present financial circumstances are poor, financial hardship is not a basis for denying disgorgement. *See SEC v. Neurotech Dev. Corp.*, No. CV 04-4667(TCP)(WDW), 2011 WL 1113705, at *3 (E.D.N.Y. Feb. 28, 2011); *SEC v. Universal Express, Inc.*, 646 F. Supp.2d 552, 565 (S.D.N.Y. 2009); *SEC v. Druffner*, 517 F. Supp.2d 502, 512 (D. Mass. 2007), *aff'd sub nom., SEC v. Ficken*, 546 F.3d 45 (1st Cir. 2008).

4. Civil Penalties

169. The Division respectfully requests that the Law Judge order LaBine to pay civil penalties on account of his misconduct as follows. LaBine should be ordered to pay a Third Tier penalty for his willful violation of Sections 206(1) and 206(2) of the Adviser's Act, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Section 8A(g) of the Securities Act [15 U.S.C. § 77h-1(g)] authorizes the Commission to impose a civil penalty upon a finding, with notice and opportunity for a hearing, that any person is violating or has violated any provision, rule or regulation issued under the Securities Act and that such penalty is in the public interest. A Third Tier penalty of a maximum amount of $150,000 for each such act or omission may be imposed against a natural person if:

> (i) The act or omission …(1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and
>
> (ii) Such act or omission directly or indirectly resulted in –
>
>> (I) Substantial losses or created a significant risk of substantial losses to other persons; or
>>
>> (II) Substantial pecuniary gain to the person who committed the act or omission.

170. A single Third Tier penalty for LaBine's violations is in the public interest because these violations created a significant risk of substantial losses to other persons. In accordance with *Steadman v. SEC*, Third Tier penalties are also in the public interest in order to deter LaBine or other persons from perpetrating securities frauds in the future.

Dated: October 30, 2015

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

Pursuant to SEC Rule of Practice 151(d), the undersigned hereby certifies that a true and correct copy of the Division of Enforcement's Proposed Findings of Fact and Conclusions of Law was served upon Respondent Lawrence M. LaBine this 30th day of October 2015 via electronic mail addressed to his counsel, Alan Baskin, Esq. and David Wood, Esq. at alan@baskinrichards.com. and dwood@baskinrichards.com.

Duane K Thompson

Duane K. Thompson