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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 ADMINISTRATIVE LAW JUDGE BRENDA P. MURRAY

THE DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF

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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 Reply Brief.

I. INTRODUCTION

The Division's Post-Hearing Brief anticipated most of the arguments that Respondent Lawrence M. LaBine ("LaBine") made in his opening submission.[1] In particular, the Division already demonstrated the total fallacy of LaBine's position that the record is insufficient to determine the capacity in which he acted or the impropriety of his conduct in recommending and selling "Series D" debentures offered by Domin-8 Enterprise Solutions, Inc. ("Domini-8"). The Division also showed that LaBine cannot excuse his conduct by blaming his investors for failing to intuit the existence of his material conflicts of interest or to reject his representation that the debentures were both a potential windfall and completely safe because they conferred a senior security interest. Moreover, the Division showed that LaBine's professed belief that the

[1] The Division relies upon its Proposed Findings of Fact and Conclusions of Law as its counterstatement to LaBine's Proposed Findings of Fact and Conclusions of Law.

debentures were a good investment opportunity even for seniors is beside the point since the Division did not bring a suitability case and since his professed good faith does not negate his scienter with respect to the charges that the Division has asserted. In this Reply Brief, the Division addresses LaBine's variations on his prior arguments as well as his Constitutional challenge to this Administrative Proceeding.[2]

II. ARGUMENT

A. LaBine Breached His Duty to Investors by Failing to Disclose His Expectation of Receiving Domin-8 Stock Warrants as Extra Incentive Compensation

The Division has already addressed LaBine's principal arguments regarding the material conflict of interest presented by his undisclosed expectation of receiving Domin-8 warrants.[3]

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[2] LaBine's Post-Hearing Brief will be cited herein as "Resp. Br." The Division's Post-Hearing Brief will be cited as "Div. Br." As in the Division's Post-Hearing Brief, the hearing transcript 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."

[3] LaBine has asserted the following arguments which the Division has already addressed:

- LaBine argues that investors knew or should have known about his prospect of receiving warrants because the PPM for the Domin-8 debenture offering disclosed that the Placement Agent, Gunn Allen Financial, would receive warrants and because the subscription package disclosed that LaBine could receive compensation including but not limited to a sales commission that would be deducted from the purchaser's investment. Resp. Br. 43-45. The Division has already demonstrated that the text of the "disclosures" upon which LaBine relies cannot bear the weight of his argument. Div. Br. 48-49, 75-76.

- LaBine argues that he was not responsible for any inadequacies in the PPM's disclosures because he did not draft or approve them. Res. Br. 47. But as the Division has already shown, LaBine has admitted that it was his personal responsibility to disclose material conflicts to his clients and customers. Tr. 1200. Domin-8 did not assume responsibility for LaBine's required disclosures to his clients and customers. Div. Br. 79-80 and Tr. 418-20.

- LaBine argues that that he had no conflict because he was not guaranteed to receive warrants. Resp. Br. 47. The Division has already shown that LaBine nonetheless asked to receive warrants and that the prospect of receiving warrants incentivized him to make sales of the debentures. Div. Br. 12-19, 71-73.

- LaBine argues that the expert report Professor Bates shows that the potential value of the warrants

LaBine now makes the additional argument that he could not possibly have expected to receive warrants before November 25, 2008, when he sent an email (Div. Ex. 17) to senior management at DeWaay Financial Network, Inc. ("DFN") in which he explicitly asked whether he and the firm were splitting the warrants that were accruing based on has sales. Resp. Br. 46. LaBine's argument fails, however, because the record fully supports finding that he always expected to receive warrants throughout the entire time period when he was recommending and selling the Domin-8 debentures. LaBine had no written agreement with DFN until 2010 but nonetheless always fully expected DFN to pass through a high percentage of the sales commissions to him. Tr. 750. According to LaBine, splitting sales commissions in this manner was standard industry practice. Tr. 748-50; Div. Ex. 47 at 157-58, 160-61; Div. Ex. 110. Tr. 748-50; Div. Ex. 47 at 157-58, 160-61; Div. Ex. 110. LaBine knew that warrants were also accruing to DFN based on his sales. Tr. 748. It is, therefore, reasonable to infer that LaBine always expected DFN to eventually pass through a high percentage of the warrants to him just as he always expected DFN to pass through a high percentage of the sales commissions. In fact, even LaBine describes his request to split the warrants with DFN on the same basis as commissions as "nothing more than the *typical give and take* between a registered representative and firm about the allocation of warrants" and as "entirely consistent with his *normal payout* at DFN." Resp. Br. 46, 47 (emphasis supplied).

Thus, LaBine's assertion that his conflict of interest did not arise before November 25,

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was *de minimis*, and that his prospect of receiving warrants, therefore, was immaterial. The Division has already exposed the unreliability of the Bates report as detailed in the rebuttal report of Eugene Canjels. Div. Br. 57-60. Most importantly, the Division has already shown that LaBine's state of mind when recommending and selling the debentures was that the warrants could be worth a "substantial sum." Div. Br. 12-19, 72-73.

2008, while convenient to him, is contrary both to logic and the record. And even if LaBine is not found to have had an expectation of receiving Domin-8 warrants before that date, he clearly did thereafter and breached his duty of disclosure to many investors to whom he subsequently sold Domin-8 debentures. *See* Stipulations, Table 1.

B. LaBine Breached His Duty to Investors by Failing to Disclose His Fundraising Commitments

LaBine asserts that the Division's "primary allegation [is] that LaBine failed to disclose that he was the primary fundraiser for Series D," but he does not address that allegation at all beyond noting that it involves conduct in 2009. Resp. Br. 43. LaBine's silence concerning the Division's contentions speaks volumes. LaBine has offered no defense because he has none in view of the admissions that he made during his testimony at the hearing. LaBine admitted that he told Domin-8's Board of Directors that, beginning in January 2009, he would raise $1 million dollars each month through sales of the debentures and would even provide enough purchasers to get the entire Series D offering funded completely on his own if necessary. Div. Br. 19-22, 73-74. LaBine admitted that he knew he had a duty to disclose his fundraising commitments to advisory clients and brokerage customers alike, yet failed to do so. *Id* at 26-34, 75-77, 83. The Division has acknowledged that this particular violation pertains only to LaBine's sales in 2009. Div. Br. 32-35. However, while that limitation could conceivably be relevant to the calculation of the amount of ill-gotten gains that LaBine should be ordered to disgorge, it has absolutely no relevance to whether LaBine breached his duty to disclose this material conflict of interest. *See* Div. Br., 72 (citing *Feeley & Wilcox Asset Mgmt. Corp.*, Admin. Proc. File No. 3-9571, Advisers Act Release No. 2143, 80 SEC Docket 1730, 2003 WL 22680907 (an investment advisor has a duty to disclose if he "is serving two masters or only one, especially if one of the master happens to be economic self-interest") (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 196 (1963)). By his own admission, LaBine clearly did breach his duty of disclosure.

C. LaBine's Challenge to the Reliability of Investor Testimony Concerning His Misrepresentation of Safety Is Speculative and Contrary to His Own Admissions

By his own admission, LaBine told "just about every client I talked to" that Domin-8's bankruptcy could be result in them owing a company that he analogized to a Picasso masterpiece. Div. Ex. 47 at 187, 193. He also made explicit representations to at least some investors (Pettit, Brabender, Sheen and Spade) to the effect that they would get all of their purchase money back whatever happened. Div. Br. 35-43, 44-46. LaBine's brief essentially ignores the first of these misrepresentations and is unpersuasive in its attempt to refute the Division's contentions concerning his other misrepresentations.

Cross examination of the investor witnesses called by the Division did not result in any admissions or inconsistencies that would call into question the accuracy of their recollections of what LaBine did and did not say to them about the debenture offering. To the contrary, these witnesses all exhibited testimonial competence and confidence in their recollections. For example, Eileen Brabender testified that she was "crystal clear" in her recollection that LaBine told her that the debentures were "safe." Tr. 1217, 1222-24. LaBine nonetheless argues that these investors must have been misremembering because their testimony is at odds with that of investors he called to the stand. Resp. Br. 39-40. LaBine's argument should be rejected because it is pure conjecture. LaBine's argument also defies logic because he admittedly had no standard script for his sales pitch for the Domin-8 debentures (Tr. 760), and in any event, the Division is not required to show that he made the exact same misrepresentations to each and every investor. LaBine would have had no need to provide assurances of safety to investors like Steve Cohen who were comfortable with the debentures' risk profile. On the other hand, LaBine did need to allay the concerns expressed about the safety of the debentures by other investors like Jack and Marjorie Sheen in order to close the sale. That is the most logical explanation for differences in the testimony of different witnesses.

Finally, LaBine also conveniently overlooks the fact that he himself repeatedly described his thought process as being that investors "couldn't lose money" before he realized that the Division intended to charge him for making such misrepresentations. Div. Ex. 47 at 136, 187; Div. Ex. 48.1 at 176, 207, 260-62; Div. Ex. 48.2 at 329. And it bears emphasis that LaBine has also admitted that he told just about every client that Domin-8's bankruptcy could be a very positive development because they could end up owning the company. Tr. 807-15; Div. Ex. 47 at 193; Div. Ex. 48.1 at 267.

D. LaBine's Omissions and Affirmative Misrepresentations Are Not Rendered Immaterial by the PPM's Disclosures

LaBine is simply wrong in arguing that disclosures in the PPM render his omissions and misrepresentations immaterial. Resp. Br. 35-36. As LaBine has admitted, the PPM and its supplements do not even contain any disclosures touching on his fundraising commitments. Div. Br. 48-49; Tr. 985, 991; Div. Ex. 47 at 150-51, 153. Similarly, the PPM is devoid of any disclosure concerning LaBine's prospect of receiving warrants that he deemed to be potentially worth a substantial sum. Div. Br. 48-49. The PPM does disclose Domin-8's precarious financial condition, but the Division's misrepresentation claim is not based on concealment of Domin-8's financial condition or its possible bankruptcy. Rather, the Division's contention is that LaBine gave assurances for which he had no reasonable basis concerning the value of the security interest that Series D debenture purchasers would receive. Div. Br. 83-85. LaBine routinely analogized

Domin-8 to an undiscovered "Picasso" masterpiece and told prospective purchasers that the company's bankruptcy could be a windfall for them because of the security interest that the debentures provided. Tr. 807-15: Div. Ex. 47 at 193; Div. Ex. 48.1 at 269. LaBine also assured at least some clients that they could not lose money because of that security interest. Div. Br. 35-43, 44-46. The disclosures upon which LaBine seeks to rely (Resp. Brief 10-14) do not address the potential value of purchasers' security interest, and therefore, cannot render his misrepresentations about the security interest immaterial.[4]

E. LaBine's Omissions and Misrepresentations Were Material Even If Some Investors Would Have Declined to Purchase the Debentures Had They Read the PPM's Disclosures Regarding Domin-8's Financial Condition

LaBine argues that his omissions and misrepresentations were immaterial at least with respect to investors who testified that they would not have invested in the Domin-8 debentures had they read the disclosures contained in the PPM concerning the company's poor financial condition. Resp. Br. 36-37, 40. LaBine proceeds from a false premise, however, because the Division is not required to show reliance, much less reasonable reliance.[5] Nor is the Division

[4] The Amended and Restated PPM does state that "[a]n investment in the [Series D] Units should only be considered by persons financially able to maintain their investment indefinitely and who can afford a loss of a substantial part or all of such investment." However, that was general disclaimer and did not address the value of purchasers' security interest. "[A] blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371-72 (3rd Cir. 1993). Moreover, even if the PPM did contain discussion of the value of the security interest, which it did not, that would not render LaBine's oral misrepresentations immaterial as a matter of law because LaBine did not direct investors' attention to the PPM. *See SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1252 (11th Cir. 2012). Several investors testified that LaBine did not review the PPM with them or encourage them to review it on their own. Tr. 546, 571, 597 (Bose); Tr. 441, 444-46, 463-67, 493-94, 499 (Pettit); Tr. 1304-05 (Sheen).

[5] *See Charles K. Seavey*, Admin. Proc. File No. 3-10336, Advisers Act Release No. 2119, 56 SEC 357, 2003 WL 1561440, at *5 n. 20 (Mar. 27, 2003) (the Division "need not show reliance by investors to find a violation of Sections 206(1) and (2)" and "proof of injury by the fraudulent practice" is not "a necessary element of the violation")(citations omitted); *see also SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012)("Justifiable reliance ... is not an element of an SEC enforcement action because Congress designated the SEC as the primary enforcer of the securities laws, and a private plaintiff's 'reliance' does not bear on the determination of whether the securities laws were violated, only on whether that private plaintiff may recover damages"); *Graham v.*

required to prove that LaBine's omissions and misrepresentations were the proximate cause of investor loss.[6] The materiality of LaBine's conflicts of interest must be determined based on an objective standard.[7]

The fact that some investors may not have purchased the debentures had they read the PPM does not negate the conclusion that they would have deemed LaBine's conflicts to be important and/or to alter the total mix of information available to them. Indeed, these investors testified to that effect at the hearing. Div. Br. 35-46, 74. Moreover, a reasonable investor who had read the PPM would still want to know about LaBine's incentives for recommending the debentures despite Domin-8's financial problems. Similarly, a reasonable investor would attach importance to LaBine's representation that the debentures' security interest made them a safe and potentially very lucrative investment despite the company's financial problems. This is especially true as to investors like David Spaid who testified that LaBine told him that the debentures were "riskless" but did not say anything about his conflicts of interest. Div. Br. 45. Reasonable investors left in the dark about LaBine's conflicts may have deferred to his professional judgment even if they had carefully read the PPM. But reasonable investors may not have been so trusting had they been informed about LaBine's conflicts.

SEC, 222 F.3d 994, 1001 n. 15 (D.C. Cir. 2000) ("[U]nlike a plaintiff in a private damages action, the SEC need not prove actual harm").

[6] *Cf. Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 717 (2d Cir. 2010) (in order to properly allege that undisclosed information was material, "it is not necessary to assert that the investor would have acted *differently* if an accurate disclosure was made") (emphasis supplied).

[7] *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 Release 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). The test is whether a reasonable investor would have considered LaBine's omissions and misrepresentations to be important or to alter the total mix of information. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

F. LaBine Acted With a High Degree of Scienter and Should Be Barred from the Securities Industry

LaBine argues that he cannot found to have acted with scienter because he supposedly did not engage in intentional misconduct and because the PPM for the debenture offering and its supplements disclosed Domin-8's precarious financial condition. Resp. Br. 41-43. In making this argument, LaBine vaguely alludes to the Division's charge based on his affirmative misrepresentations of potential windfall returns and safety but does not address the charges based on his failure to disclose material conflicts. The Division contends that LaBine acted with scienter in making affirmative misrepresentations and that neither his apparently genuine belief in Domin-8 nor the PPM disclosures negate his scienter. LaBine's "Picasso masterpiece" line was not casual or isolated over-exuberance but a central element of his otherwise unscripted sales pitch. Div. Br. 34-35. And LaBine's pat assurances to investors who expressed concerns about the safety of the debentures were obviously designed to be taken as guarantees even though LaBine knew he had no reasonable basis for them. *Id.*

Even if LaBine could be found to have acted with a mere "white heart/empty head" (Resp. Br. 41) as to his misrepresentations, his own specific admissions compel the conclusion that he acted with a high degree of scienter in failing to disclose his material conflicts. LaBine admitted having known that advisers have a duty to disclose compensation which they expect to receive from the issuer of securities they are recommending, as well as a duty to disclose fundraising commitments to an issuer. Div. Br. 27, 34, 77. These critical admissions are consistent with the evidence showing that full and explicit disclosure of actual or potential conflicts (including incentive compensation and fundraising commitments) was the industry standard of care both for advisers and for brokers making securities recommendations. Div. Ex. 101.01 and 101.02.[8] LaBine's failure to disclose his material conflicts *despite* his recognition of his duty to do so was, at a minimum, an extreme departure from that standard. Div. Br. 78 n. 41 and citations therein.

Moreover, while recklessness suffices to establish scienter, the record also supports the inference that LaBine made a conscious decision not to disclose his conflicts because he wanted to accumulate warrant rights and to deliver on his commitments to Domin-8 without having to explain away his conflicts and risk losing sales. That is the most reasonable inference to be drawn from LaBine's failure to disclose his conflicts even though he admittedly knew better. LaBine's consistent nondisclosure of material information he knew he should disclose cannot be explained as mere inadvertence or happenstance given that it happened 100 times with each of the 100 different investors to whom he recommended and sold the debentures over a period of more than one year. LaBine's enthusiasm about Domin-8's prospects for becoming the dominant player in its industry – far from negating his scienter – provided a powerful motive for his nondisclosure. LaBine believed that if he could get Domin-8 through its liquidity crisis, the company's eventual success could make the warrants he hoped to receive based on his sales worth "a substantial sum."

LaBine's principal arguments on remedies focus on disgorgement and monetary penalties and do not provide a justification (other than professed good faith) for his not being barred from the securities industry with no right to apply for readmission. Resp. Br. 48-52. The Division's initial brief explained the reasons why such an industry bar is appropriate. Div. Br. 87-89. The Division will not repeat its previous discussion beyond reiterating that LaBine has shown absolutely no recognition of the wrongfulness of his conduct and remains defiant in refusing to

[8] LaBine also ignores the Commission's holding in *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 Release No. 3829, 2014 WL 1744130 (May 2, 2014) or *Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003), which squarely address an adviser's duty to disclose compensation.

acknowledge his fiduciary duty to his clientele of vulnerable seniors. LaBine's refusal to provide credible assurances against repetition of his wrongful conduct in the future, as well as his attempted witness tampering in this case, stands in stark contrast to other cases in which a sanction less than an industry bar with no right to apply for readmission has been imposed. *See, e.g., In the Matter of Edgar Lee Giovanetti,* Admin. Proc. File No. 3-16344, Initial Decision Release No. 914 (Nov. 6, 2015). As to monetary remedies, LaBine argues that any sanctions should be based only on the commissions he received on sales to the particular investors who the Commission called as hearing witnesses and/or only his sales after April 2009. The Division's initial brief anticipated LaBine's argument on the supposed need for 100 mini-trials in order to create a record upon which full relief could be granted; that discussion will not be repeated here. The Division does note, however, that LaBine's additional argument that monetary remedies should only be assessed as to his sales after April 2009 is also unpersuasive. LaBine's conflicts were not rendered immaterial before April 2009 simply because other producers were also trying to raise money for Domin-8 until then. [9]

[9] SEC Rule of Practice 630 permits a law judge to consider the respondent's financial circumstances in determining whether disgorgement, interest or a penalty would be in the public interest, and if so, the appropriate amounts. However, the determination must also be informed by the remedial and deterrent purposes of the securities laws. *See generally, Scott M. Stephan*, Admin. Proc. File No. 3-16312, Initial Decision Release No. 888, 2015 WL 5637557 (Sept. 25, 2015), *quoting Robert L. Burns,* Admin. Proc. File No. 3-12978, Advisers Act Release No. 3260, 2011 SEC LEXIS 2722, at *39 (Aug. 5, 2011) ("even when a respondent demonstrates an inability to pay, the Commission has discretion not to waive the penalty, disgorgement, or prejudgment interest, "particularly when the misconduct is sufficiently egregious"). While ability to pay may also be considered in determining disgorgement, it should be given less weight than when determining civil penalties because disgorgement is designed to reverse unjust enrichment, and giving ability to pay significant weight in the disgorgement context would create a perverse incentive for securities law violators to spend ill-gotten gains quickly and without restraint. *See SEC v. First Jersey Secs., Inc.,* 101 F.3d 1450, 1474 (2d Cir. 1996) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits"). (citations omitted)).

G. The Appointment and Removal of Commission ALJs is Not Unconstitutional

LaBine mistakenly contends that this proceeding violates the Appointments Clause of Article II of the U.S. Constitution because the Chief Law Judge was not properly appointed and is subject to two tiers of tenure protection. Resp. Br. 2-5. ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *Raymond J. Lucia Cos., Inc.*, Admin. Proc. File No. 3-15006, Advisers Act Release No. 4190, 2015 WL 5172953, at *21 (Sept. 3, 2015); *Timbervest, LLC,* Admin. Proc. File No. 3-15519, Advisers Act Release No. 4197, 2015 WL 5472520, at *23-26 (Sept. 17, 2015); *David F. Bandimere*, Admin. Proc. File No. 3-15124, Securities Act Release No. 9972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015). Moreover, even if Commission ALJs were "considered officers," the "nature of their duties differs so dramatically from those of the PCAOB"—whose two-tier removal was found unconstitutional in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010)—"as to obviate any potential concerns about the removal limitations." *Timbervest*, 2015 WL 5472520, at *27.

III. CONCLUSION

Based on the foregoing, the Division respectfully requests that the Chief Administrative

Law Judge make findings of fact with regard to the misconduct discussed above and that the requested sanctions be imposed on the Respondent.

Dated: November 17, 2015

Respectfully submitted,

/s/ Duane K. Thompson

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CERTIFICATE OF SERVICE

Pursuant to SEC Rule of Practice 151(d), the undersigned hereby certifies that a true and correct copy of the Division of Enforcement's Post-hearing Reply Brief was served upon Respondent Lawrence M. LaBine this 17th day of November 2015 via electronic mail addressed to his counsel, Alan Baskin, Esq. and David Wood, Esq. at alan@baskinrichards.com. and dwood@baskinrichards.com.

s/Duane K. Thompson

Duane K. Thompson