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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16836

In the Matter of

STEVEN J. MUEHLER, ALTERNATIVE SECURITIES MARKETS GROUP CORP., AND BLUE COAST SECURITIES CORP., dba GLOBALCROWDTV, INC., AND BLUE COAST BANC,

Respondents.

THE DIVISION OF ENFORCEMENT'S PREHEARING BRIEF

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I. INTRODUCTION

The Division of Enforcement ("Division") brings this case against Steven J. Muehler ("Muehler") and his companies, Alternative Securities Markets Group Corp. ("ASMG") and Blue Coast Securities Corp. ("Blue Coast") (collectively, "Respondents"), for violations of Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 ("Exchange Act").

The evidence will show that Respondents made material misrepresentations and omissions to, and schemed to defraud potential and actual clients whom Respondents promised they would help with capital raising efforts. The evidence will also show that Respondents unlawfully acted as unregistered broker-dealers.

Specifically, through public listing and offering agreements, Respondents obtained contractual rights to shares of their clients' common stock as payment for Respondents' alleged marketing services. The evidence will show that to induce small businesses owners to enter into those arrangements, Respondents falsely claimed that they had previously helped customers raise millions of dollars from investors; falsely claimed that they worked with securities counsel to ensure the offerings were lawful; falsely claimed they were established financial services providers with sufficient assets to make loans and purchase securities; falsely stated that fees they charged were Securities and Exchange Commission ("Commission") filing fees; and failed to disclose sanctions previously imposed against Muehler by state securities regulators for acting as an unregistered broker-dealer and defrauding small business owners in past iterations of his fraudulent scheme. As a result of their misrepresentations and omissions, Respondents signed more than 30 small businesses as customers, and collected fees and vested rights to acquire common stock from their customers as compensation.

The evidence will also show that Respondents acted as broker-dealers because they offered an Internet-based securities listing service by which small businesses could purportedly raise new capital, primarily in initial public offerings under Regulation A, as well as a secondary market for

trading of those securities after their initial offering.[1] Yet none of the Respondents ever registered as a broker-dealer, and Muehler was never associated with a registered broker-dealer.

At the administrative hearing on this matter, the Division will prove by a preponderance of the evidence[2] that through their actions, Respondents violated the antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and the broker-dealer registration provisions of Section 15(a) of the Exchange Act. The Division will further show that the public interest requires the imposition of significant sanctions against Respondents for their violations. The Division seeks a cease-and-desist order, disgorgement plus prejudgment interest, and civil penalties against each Respondent. (*See, generally,* the Commission's Order Instituting Proceedings dated September 28, 2015 ("OIP")).

II. STATEMENT OF FACTS

A. Respondents

ASMG is a California corporation located in Marina Del Rey, California. It never registered with the Commission in any capacity and was owned, operated, and controlled by Muehler at all relevant times. Although ASMG was incorporated in October 2014, Muehler began using the name to do business as early as April 2014.

Blue Coast is a California corporation located in Marina Del Rey, California. It never registered with the Commission in any capacity and was owned, operated, and controlled by Muehler at all relevant times. It began operations at least as early as April 2013. At times,

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[1] Regulation A provides a limited exemption from registration for certain offerings of up to $50 million in a twelve-month period. To offer securities under Regulation A, an issuer must file a Form 1-A offering statement with the Commission and may not sell securities until the offering statement is qualified. The Division of Corporation Finance reviews Form 1-A offering statements and has delegated authority to declare an offering statement qualified by a "notice of qualification," which is analogous to a notice of effectiveness in registered offerings.

[2] Proof by a preponderance of the evidence is the standard in administrative proceedings. *In the Matter of Sandra K. Simpson*, 55 S.E.C. 766, 2002 SEC LEXIS 3419, *57 (Comm. Op., May 14, 2002); *SEC v. Steadman*, 450 U.S. 91, 102-03 (1981).

Muehler used the names "GlobalCrowdTV, Inc." and "Blue Coast Banc" when conducting Blue Coast business.

Muehler is the principal of ASMG and Blue Coast and was fully responsible for their operations at all relevant times. Muehler never registered with the Commission in any capacity and was never associated with a registered broker-dealer. In April 2009, the Minnesota Department of Commerce issued a Cease and Desist Order against Muehler and a Muehler-controlled company, ordering them to cease and desist from offering securities in Minnesota. The order states that Muehler offered to solicit investors for clients who were attempting to start new businesses; offered unregistered securities to investors; acted as an unregistered broker-dealer; and "engaged in fraudulent and deceptive practices by failing to return advance fees that were obtained from clients under the premise that the fees were refundable." In August 2010, the California Department of Corporations concluded that Muehler and another Muehler-controlled entity had offered unregistered securities in California and ordered them to desist and refrain from doing so.

B. Respondents Offered Broker-Dealer Services To Small Businesses

1. Identification and Solicitation Of Customers

The evidence will show that Muehler began offering broker-dealer services under the name Blue Coast in April 2013. In April 2014, he began marketing the same services using the ASMG name. Muehler identified potential customers on crowdfunding websites and sent unsolicited emails offering to help them raise money from investors. Respondents also marketed themselves to prospective issuer customers through posts on investment-related websites, web-based press releases, and websites they control, such as www.alternativesecuritiesmarket.com (the "Website"). The Website described the "Alternative Securities Market" as the "First Primary and Secondary Market for Regulation A, Regulation S and Regulation D Securities," and Muehler used it to advertise "financial services" that ASMG offered to issuers and investors, including "Initial Public Offerings" and "ASM Listing Broker" services. Muehler has admitted that the Website's primary purpose is to attract issuers "to come in and list their securities ... on the Alternative Securities

Marketplace," which he advertised was open to "ALL INVESTORS, not just the wealthiest 3% of Americans." The Division will present the testimony of a representative sample of small business owners who responded to Respondents' solicitations and received marketing materials and follow-up calls from Muehler.

2. Respondents Held Themselves Out As Broker-Dealers

The evidence will show that, although none of the Respondents ever registered as a broker-dealer or as a securities exchange, and Muehler was never associated with a registered broker-dealer, Respondents held themselves out as operating a combination broker-dealer and securities exchange. They claimed they could assist small business owners in raising investor capital through "direct public offerings," and provided a secondary market for the securities issued in those offerings through two proprietary securities exchanges called "Alternative Securities Market" and "BlueCoastBanc.com." To assist customers in raising capital from investors, they offered to:

- list securities for sale on ASMG and BlueCoast's two proprietary securities exchanges, "Alternative Securities Market" and "BlueCoastBanc.com;"
- structure the terms of the proposed offerings;
- prepare offering memoranda and registration statements;
- help issuers qualify to sell securities under Regulation A;
- market the offered securities to potential investors, including venture capitalists;
- identify and screen potential investors;
- provide an online portal for investors to purchase securities;
- ensure the proposed offerings were "in compliance with all applicable International, Federal, State, and Local Laws, Rules, and Regulations regarding Private and Public Equity Investments" and that "all necessary documents would be filed" by Respondents;
- handle investor payments and stock certificates;
- purchase securities not sold to investors; and

- provide a secondary market for their customers' securities.

These online marketing efforts were successful; Muehler has admitted that he received numerous unsolicited inquiries from small business owners.

3. Respondents Provided Broker-Dealer Services

At the hearing, the Division will prove that Respondents actually provided broker-dealer services to their customers as well. Respondents helped their customers structure the terms of proposed offerings, marketed their securities, and solicited investors for them.

First, Respondents offered their customers several alternatives for structuring their stock offerings. Generally speaking, all of the offerings offered the Preferred Stock of the Respondents' customers. Respondents offered four different "tiers" of services with various terms and conditions for the offerings including such terms as the size of the offering, the type of investor, whether offered under Regulation A, D, or S, or whether the stock was restricted.

Second, Respondents marketed their customers' offerings through the Website and web-based press releases. For example, the evidence will show that in July 2014, Muehler circulated a press release on the Internet that listed twenty-seven "IPOs" scheduled for the Alternative Securities Market in August 2014. The release stated that ASMG "expects the securities of Companies listed on the Alternative Securities Market to become quoted on the OTCQB, OTCQX or the NASDAQ Capital Markets within approximately one to four years of IPO or Listing on the Alternative Securities Market." The version of the Website available to the public in July 2014, which Muehler marketed to investors using online press releases, provided a webpage for each issuer customer with the terms of the proposed offering, a link to the issuer's offering statement, and an "INVEST" button that led to an investor login page that required a username and password to proceed further. As of June 2015, the Website listed eighteen companies purportedly available for "trading" on the Alternative Securities Market. The Respondents also marketed customer securities in promotional videos made available to the public on the Website and YouTube. In the videos, Muehler touts the issuers and directs investors to visit the Website in order to invest.

Third, Respondents solicited potential investors to participate on the Alternative Securities Market. In a promotional video for the Alternative Securities Market, for instance, Muehler explained to potential investors that they could trade securities through ASMG "just like you do at e*trade." Muehler has admitted that these efforts generated responses; he estimated that as of August 2014, a hundred potential investors had expressed interest in participating on the Alternative Securities Market, either by signing up on the Website and contacting ASMG via email. Although Muehler also admitted that Respondents never actually registered or screened any investors, the Division will show that they solicited and received accreditation information from at least ten potential investors, all of whom expressed interest in receiving information about investments listed by the Respondents.

C. Respondents Contracted to Buy and Sell Securities

The Division will also present evidence to show that Respondents contracted with their customers to both buy and sell securities. Through "Listing & Direct Public Offering And Marketing Agreements" with customers ("Issuer Agreements"), the Respondents offered to market securities of their customers – generally, their customers' Preferred Stock – allegedly, in order to help their customers raise capital.

In return for this service, under the terms of the Issuer Agreements, the Respondents were to receive up-front fees, monthly fees and a percentage of the funds raised. Most importantly, the agreements also called for the Respondents to receive an equity stake in the issuer in the form of common stock, in exchange for their services. In some instances, the Respondents acquired a vested right to stock upon signing the Issuer Agreement, along with the right to receive more stock if the offering was successful. Respondents also contracted to buy stock by agreeing to purchase any securities not sold to investors in the offerings.

D. Respondents Defrauded Their Clients In Connection with the Purchase and Sale of Securities

In order to encourage small business owners to enter into Issuer Agreements, by which

Respondents acquired an ownership interest in the clients' current issued and outstanding common stock, Respondents made material misrepresentations and omissions, and engaged in various deceptive practices. Muehler made many of these misrepresentations personally in telephone conversations and emails. For example:

- Muehler sent emails falsely stating that Respondents have helped customers raise millions of dollars from investors;
- Muehler falsely stated that Respondents were working with securities counsel to ensure the lawfulness of the proposed offerings;
- Muehler used the email "Legal@asmmarketsgroup.com" and referred to ASMG's "Legal Dept." to create the false impression that ASMG had in-house legal counsel;
- Muehler falsely described ASMG as an established financial services company with the ability to make multi-million-dollar loans;
- Respondents offered to use investment funds controlled by Muehler to purchase unsold issuer securities without disclosing that Respondents had no reasonable expectation of having assets to satisfy the guarantees;
- Respondents falsely stated that fees they charged their customer were Commission filing fees and that that the Commission planned to increase such fees dramatically in the near future (there are no Commission fees for Regulation A offerings); and
- Muehler falsely assured customers that Regulation A qualification for their offerings was forthcoming from the Commission despite being on notice of significant, uncured deficiencies in the offering statements on file.

The Respondents also misled prospective customers about their experience raising millions of dollars for small businesses through exempt offerings. For example, the Respondents told the CEO of one prospective customer that they had helped several small businesses raise millions of dollars each, including $5 million under Regulation S. They told other prospective customers that they had helped a certain small business raise over $1 million under Regulation A. Respondents promised to do the same for these new customers, without mentioning that Muehler had in fact been previously disciplined by both Minnesota and California securities regulators for promoting

unregistered securities and, in the Minnesota order, for defrauding the issuers of securities. Muehler has admitted that it was not his practice to disclose his disciplinary history when soliciting customers. Indeed, when asked about the Minnesota Order by one prospective customer who saw a reference to it on the Internet, Muehler falsely stated that Minnesota had only entered the order because it does not approve of Regulation A offerings.[3] Respondents' customers will testify that they would not have done business with the Respondents had they known about Muehler's disciplinary history.

Finally, Respondents misled issuer customers about the status of their offerings. For example, in April 2014, Muehler drafted and filed twelve Regulation A offering statements with the Commission on behalf of Respondents' customers. The Division of Corporation Finance identified significant deficiencies in all of these offering statements, which it called to Muehler's attention. In response, Muehler filed some amendments, but generally failed to address the deficiencies. He failed to inform Respondents' customers of the deficiencies, instead falsely assuring them that qualification was forthcoming; and that Respondents would begin "taking ... Investor monies into escrow starting immediately after Reg A Qualification with the Commission and marketing and advertising like mad where-ever [sic] we can," all while blaming the Commission for the "unexpected" delays. Respondents continued to solicit issuer customers and file deficient offering statements up to the date of this enforcement action. As of July 21, 2015, Muehler had filed Regulation A offering statements on behalf of thirty-two prospective issuers, eleven of which appear to be Muehler-controlled entities.

[3] This statement is strong evidence of Muehler's scienter. *SEC v. Musella*, 748 F. Supp. 1028, 1039-40 (S.D.N.Y. 1989) (false exculpatory statement properly considered as evidence of scienter).

III. LEGAL ARGUMENT – LIABILITY

By engaging in the conduct described above, Respondents violated Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

A. Respondents Engaged in Transactions Involving Securities

To begin, Respondents engaged in transactions involving securities. Both the Preferred Stock that Respondents offered to sell on behalf of their clients and the common stock they acquired as compensation were "securities" under Section 3(a)(10) of the Exchange Act, which defines "security" to include "stock" and "any interest or instrument commonly known as a security." *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 687 & n.2 (1985) (holding common stock to be within definition and noting that preferred stock could also satisfy definition); *Briggs v. Sterner*, 529 F. Supp. 1155, 1166 (S.D. Iowa 1981) (holding that debentures that were convertible to common stock were securities because they were akin to an option or entitlement to purchase shares). In addition, Muehler himself described both the Preferred Stock and the common stock as "securities" in the Regulation A offering statements he filed with the Commission.

In his answer, Muehler contends the Commission has no jurisdiction over his activities because he never purchased or sold securities. *See, e.g.,* Amended Response to OIP, ¶¶ 51, 65, 71. But that is not true. The contracts that Respondents signed with their issuer clients were, in fact, a purchase and sale of securities under the Exchange Act. The Supreme Court has consistently held that the Exchange Act and other federal securities statutes are to be "construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *SEC v. Zandford*, 535 U.S. 813, 819, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002) (citations omitted). Section 3(a)(13) of the Exchange Act defines a "purchase" of securities to include "any contract to buy, purchase, or otherwise acquire" securities. 15 U.S.C. § 78c(a)(13). The contractual commitment between Respondents and their customers to transfer common stock to Respondents

was therefore a purchase under the Exchange Act. *See Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2d Cir. 1972) (holding that a purchase occurs at "the time when the parties to the transaction are committed to one another"); *In re Alliance Pharm. Corp. Secs. Lit.*, 279 F. Supp. 2d 171, 186-87 (S.D.N.Y. 2003) (following the holding in *Radiation Dynamics* with respect to the timing of a contract of sale). A securities purchase occurs even if the parties have not performed all of their obligations under the relevant agreement. *In re Schoemann*, Admin. Proc. File No. 3-12943, 2009 SEC LEXIS 3939 at *35 (October 23, 2009) citing *Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582, 587 (7th Cir. 1984) ("Neither delivery of nor the passing of title to the contracted-for security is required for the transaction to be considered a "sale" for purposes of the . . . securities laws."). In addition, under the Exchange Act, acquisitions of contractual rights to receive stock in the future are to be included in the definition of "purchases." *In re Schoemann*, SEC LEXIS 3939 at *35, citing *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). Therefore, neither the receipt of payment by the seller nor the receipt of a share certificate by the purchaser is required to establish that a purchase has occurred. *In re Schoemann*, 2009 SEC LEXIS 3939 at *35; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750-51 (1975) ("contract to purchase or sell securities is expressly defined by § 3(a) of the 1934 Act ... as a purchase or sale of securities for the purposes of that Act."); *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 594-95 (2001) (contractual right to acquire stock was a "security" for purposes of Rule 10b-5); *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1265 (11th Cir. 2006) (physical possession of stock not required). Moreover, the term "contract" as used in the Section 3(a) of the Exchange Act in defining a purchase or sale of a security should be given broad, liberal interpretation, and not limited to technical common law purchases or sales. *Cohen v. Block*, No. 78 Civ. 3909 (RWS), 1981 U.S. Dist. LEXIS 16594 (S.D.N.Y. Dec. 18, 1981) citing *Mt. Clemens Industries, Inc. v. Bell*, 464 F2d 339, 346 n.12 (9th Cir. 1972).

Here, the Issuer Agreements that Respondents induced their customers to sign entitled the Respondents to acquire their customer's common stock in three different ways. First, in at least two instances, ASMG acquired a vested right to a portion of the issuer's common stock upon the execution of the contract itself, regardless of the offering's success. Second, Respondents often acquired a contractual right to common stock based on the success of the proposed offerings. Finally, with respect to several other issuers, Respondents assumed the obligation to purchase any issuer common stock not sold to investors within a specified period of time.

In connection with all of those transactions, Respondents made materially false claims and omissions to their customers. These misrepresentations and omissions were all made to induce customers to sign agreements under which Respondents were compensated, in part, with customer common stock. Therefore, the evidence will show that the Respondents' illegal conduct was all "in connection with" the purchase or sale of securities.

B. Respondents Violated the Antifraud Provisions of Section 10(b) and Rule 10b-5(b) Through False Statements and Omissions

Section 10(b) of the Exchange Act and Rule 10b-5(b) prohibit any person from making any untrue statement of material fact or misleading omissions in connection with the purchase or sale of any security. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. Respondents violated those provisions by using false statements and misleading omissions to acquire common stock and other compensation from their customers.

1. Respondents Made Misrepresentations and Omissions "In Connection With" the Purchase or Sale of Securities

The evidence will show that the Respondents made several false statements and omissions to their customers. Specifically, Respondents falsely represented that they had successfully raised millions of dollars for customers in the past, that they had securities counsel to vet the lawfulness of their offerings, that customer funds were being used to pay Commission fees rather than compensate Respondents, and they were a well-established financial services

firm with the assets to make million dollar loans and purchase stock. They also failed to disclose Muehler's prior disciplinary history. These misrepresentations and omissions were all made to induce customers to sign agreements under which Respondents were compensated, in part, with customer common stock.

2. Respondents' Misrepresentations and Omissions Were Material

The Division will also prove that Respondents' misrepresentations and omissions were material. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (to be actionable under the antifraud provisions of the Exchange Act, misrepresentations and omissions must be material). For purposes of the antifraud provisions, a fact is material if there is a substantial likelihood that a reasonable person would consider it important in making a decision because the fact would significantly alter the "total mix" of available information. *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988); *see also Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (to be actionable, a false statement or omission must be more than incomplete, it must "affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists"). "The question of materiality . . . is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, __U.S.__, 133 S. Ct. 1184, 1195-96 (2013) *citing TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976).

Respondents' misrepresentations and omissions were material because they went to the heart of the Respondents' ability to do what they promised to do for their customers. Respondents induced customers to give them securities based on their representations that they could, in fact, help their customers issue and sell Preferred Stock. Thus, Respondents' misrepresentations about past success raising investor funds were material because they suggested that Respondents would succeed in raising funds for new customers going forward. Misrepresentations that Respondents were working with legal counsel, particularly when

combined with representations that the Respondents had determined the proposed offerings to be lawful under all applicable securities laws, were material because they suggested that the offerings were lawful and would become effective within a reasonable time. Misrepresentations about Respondents' ability to make multi-million-dollar loans suggested that Respondents were financially sound; not merely a fly-by-night scheme. Misrepresentations about Commission filing fees were material because they misled customers about the use of their funds, and a reasonable person would want to know how his money was being used. Promises to use ASMG-controlled funds to purchase any securities not sold to investors, without disclosing the lack of sufficient assets to do so, were material because they misled customers into believing that they were guaranteed to raise funds and that Respondents had skin in the game.

Finally, Respondents' failure to disclose the California and Minnesota Orders was material because that omission concealed Muehler's history of misconduct in similar offerings, including a scheme in which he was found to have defrauded other small business owners and unlawfully engaged in unregistered broker-dealer activity. A reasonable person would want to know that the person he was entrusting to take his company public and compensating with an equity stake in his company had previously been disciplined for misconduct in connection with that very service.

The Division anticipates that Muehler will argue that he had no obligation to affirmatively disclose his disciplinary history. Mtn for Summ. Dispo. at ¶ 33. The anti-fraud provisions of the federal securities laws, however, impose a duty to speak when there has been an affirmative statement that will be rendered materially misleading by the failure to provide the necessary additional information. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *United States v. Yeaman*, 987 F. Supp. 373, 379-380 (E.D. Pa. 1997). Here, Respondents affirmatively represented that they had successfully raised money for customers in the past and that they were doing "in compliance with all applicable... laws." The fact that Muehler had been disciplined for a substantially similar scheme to the one he offered through Blue Coast and ASMG should

have been disclosed in order to render Respondents' affirmative statements not misleading. *Texas Gulf Sulphur*, 401 F.2d at 860-61(when a corporation or person does make a disclosure – whether it be voluntary or required – there is a duty to make it complete and accurate). Respondents' failure to disclose the California and Minnesota Orders prevented Respondents' customers from learning of Muehler's history of misconduct in similar offerings. In addition, the Division will present evidence from Respondents' customers that these false statements and omissions were important to their decision to do business with the Respondents, and that they would not have signed the Issuer Agreements had they known the true state of affairs.

3. Respondents Acted With Scienter

Violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) require a showing of scienter. *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). In the Ninth Circuit, scienter may be established by proof of intent or knowledge. *In re VeriFone Holdings, Inc. Securities Litig.*, 704 F.3d 694, 702 (9th Cir. 2012). Scienter may also be established by a showing of recklessness, which the Ninth Circuit has defined as "an extreme departure from the standards of ordinary care, and 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." *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569-70 (9th Cir. 1990) (en banc). The Ninth Circuit further clarified the "reckless" standard in *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010), where it held that scienter requires either "deliberate recklessness" or "conscious recklessness" – a "form of intent rather than a greater degree of negligence." As their founder and sole operator, Muehler's scienter is imputed to Blue Coast and ASMG. *See, e.g., SEC v. Manor Nursing Centers*, Inc., 458 F.2d 1082, 1089 n.3 (2d Cir. 1972); *In the Matter of Ponder Indus., Inc. et al.*, Exchange Act Rel. No. 34-38858, *6 (Settled Admin. Proc. July 22, 1997).

The evidence will show that Muehler – and, thus, Blue Coast and ASMG – acted with a high degree of scienter by repeatedly making material misrepresentations while knowing that the statements were not true. *Dobina v. Weatherford Intern. Ltd.*, 909 F. Supp. 2d 228, 245-46

(S.D.N.Y. 2012) (defendant acts with scienter by making statement while knowing he has no reasonable basis for making it). Muehler knew he had not helped customers raise capital in the past. He knew Respondents were not working with legal counsel. He knew ASMG was not an established enterprise with the ability to make multi-million-dollar loans – indeed, he has admitted that the loan business described on the Website never existed. Since the Commission does not charge Regulation A filing fees, he had no reasonable basis for representing otherwise to his customers – indeed, when confronted about the fees by one potential customer, Muehler admitted that he simply used the threat of increased Commission filing fees to pressure new customers to sign up for his services. Muehler also knew about the Minnesota and California Orders while soliciting customers, and he knew, or was reckless in not knowing, that issuers would want to know about his prior misconduct involving offerings similar to those that he proposed to facilitate for them. *In re VeriFone Holdings, Inc. Securities Litig.*, 704 F.3d at 702; *see also In re Elan Corp. Securities Litig.*, 543 F. Supp. 2d 187, 221 (S.D.N.Y. 2008) (evidence of similar schemes properly considered proof of unlawful intent); *SEC v. Kimmes*, 799 F. Supp. 852, 858 (N.D. Ill. 1992), *aff'd* 997 F.2d 287 (7th Cir. 1993).

C. Respondents Violated Section 10(b) and Rules 10b-5(a) and (c) Through A Scheme To Defraud

Respondents also engaged in a fraudulent scheme under Section 10(b) of the Exchange Act. Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder make it unlawful for any person, in connection with the purchase or sale of securities, to employ any device, scheme or artifice to defraud, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. Courts have explained that a "'scheme to defraud' is merely a plan or means to obtain something of value by trick or deceit." *Kimmes*, 799 F. Supp. at 858. Proof of scienter is required to establish this violation. *Aaron*, 446 U.S. at 701-02. To be liable as a primary violator for a scheme to defraud, the defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in

furtherance of the scheme." *In re Dennis J. Malouf*, Initial Decisions Rel. No. 766, 2015 SEC LEXIS 1251 (Apr. 7, 2015) (quoting *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds sub nom. Avis Budget Group Inc. v. Cal State Teachers' Ret. System*, 552 U.S. 1162 (2008)). As discussed above, Muehler is directly responsible for the false statements and other fraudulent conduct.

At the hearing, the Division will show that Respondents engaged in a fraudulent scheme to solicit issuer customers, charge fees, and acquire issuer common stock through the misrepresentations and omissions discussed in Section B above.[4] They also employed deceptive devices, acts, and practices, including (i) using email addresses like legal@asmmarketsgroup.com and legal@bluecoastsecurities.com (along with references to ASMG's "Legal Dept.") to falsely suggest that Respondents had an in-house legal team working on the Regulation A filings; (ii) directing prospective customers to the Website and other marketing materials designed by Muehler to create the misimpression that the Respondents are established and sophisticated players in the securities industry with a stable of ready investors; and (iii) assuring customers that they would soon qualify under Regulation A despite notice of uncured deficiencies in the offering statements. These false assurances were an integral part of Respondents' scheme to defraud and are properly considered as evidence of the scheme and their scienter. *See, e.g., SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982) (court entitled to consider lulling activities "because they were evidence of a scheme which, viewed as a whole, was sufficiently closely connected to the sale and was relevant to the question of intent"); *United States v. Kelley*, 551 F.3d 171, 172 (2d Cir. 2009) (court can properly consider lulling activities as evidence of unlawful intent). Respondents are thus liable under Section 10(b) and Rules 10b-5(a) and (c).

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[4] The Commission has taken the position that Rules 10b-5(a), (b), and (c) are mutually supporting rather than mutually exclusive. *In Re Lorenzo,* Admin. Proc. File No. 3-15211, Exchange Act Rel. No. 74836 (April 29, 2015); *citing In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 913 (1961).

D. Respondents Violated Section 15(a) of the Exchange Act

Section 15(a) of the Exchange Act requires broker-dealers who "effect any transaction in, or induce or attempt to induce the purchase or sale of," any security using interstate commerce to be registered with the Commission or, if the broker-dealer is a natural person, to be associated with a registered broker-dealer that is not a natural person. 15 U.S.C. § 78o(a); *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003), *aff'd*, 94 F. App'x 871 (2d Cir. 2004). To establish liability under Section 15(a), the Division must establish Respondents acted as broker-dealers using interstate commerce without being registered as a broker-dealer (or, in Muehler's case, not being associated with a registered broker-dealer) and without qualifying for an exemption or safe harbor from registration.[5] *Id.* Scienter is not an element of a Section 15(a) violation. *See SEC v. Interlink Data Network*, 1993 U.S. Dist. LEXIS 20163 at *46 (C.D. Cal. Nov. 15, 1993); *Martino*, 255 F. Supp. 2d at 283.

1. Respondents Acted As Unregistered Broker-Dealers

Respondents acted as unregistered broker-dealers when they contracted to issue and sell their customers' Preferred Stock. Section 3(a)(4) of the Exchange Act defines a "broker" as any person "engaged in the business of effecting transactions in securities for the accounts of others." 15 U.S.C. § 78c(a)(4). A person "effects transactions in securities" if he or she participates in transactions at key points in the chain of distribution. *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976); *see also SEC v. Nat'l Exec.*

[5] Muehler may argue that he attempted to register. The evidence will show that any such attempt was well after the conduct alleged here. Muehler has identified proposed exhibits that appear to be completed FINRA forms and a Form ADV. Resp. Exhs. 57-59, 73. In addition, he has identified a printout of a single page of a Form ADV1 for ASMG that appears to have been printed from FINRA's website. Resp. Exh. 71. There is no evidence that Exhibits 57-59, and 73 were actually filed with FINRA, but even if they were, they reflect only that Muehler may have belatedly attempted to register July and August of 2015. To the extent he intends to use these documents to demonstrate that he complied, or attempted to comply, with Section 15(a), they are irrelevant. Even if they were filed, such belated registration attempts in mid-2015, which do not appear to have ever gone effective, cannot cure Respondents' failure to register before that date, and are in fact admissions that they were not previously registered.

Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980). Respondents agreed to effect transactions in shares of Preferred Stock that they offered to help customers issue and sell to investors.

Further, although the Exchange Act does not define "engaged in the business," courts have interpreted the phrase to require "a certain regularity of participation in securities transactions." *SEC v. Hansen*, 1984 U.S. Dist. LEXIS 17835, at *25 (S.D.N.Y. Apr. 6, 1984) (quoting *Mass. Fin. Servs., Inc.*, 411 F. Supp. at 415). Holding oneself out as a broker-dealer may be sufficient to establish that a person has engaged in the business with regularity. *SEC v. Schmidt*, 1971 U.S. Dist. LEXIS 11884 at *2-4 (S.D.N.Y. Aug. 26, 1971).[6] Other factors indicating that a person is engaged in the business include, receiving transaction-based compensation, soliciting securities transactions, advertising for customers, and possessing customer funds and securities, all of which Respondents have done here.[7]

The Commission has explained that "solicitation" includes efforts to induce a single transaction or to develop an ongoing securities business relationship. *See Registration Requirements for Foreign Broker-Dealers*, Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, 30017-18 (July 18, 1989). A broker "solicits" securities transactions by, among other

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[6] *See also David A. Lipton*, Broker-Dealer Registration § 1:5 (updated 2014) ("merely holding oneself out as willing to engage in securities transactions will satisfy the need for regularity"); *Strengthening the Commission's Requirements Regarding Auditor Independence*, Securities Act Release No. 47265, n.82 (Jan. 28, 2003) (a person may be "engaged in the business" by "holding itself out as a broker-dealer").

[7] *See In re Kemprowski*, Exchange Act Release No. 35058 (Dec. 8, 1994) ("A number of factors are relevant in determining whether a person was acting as a broker, including whether the person: 1) actively solicited investors; 2) advised investors as to the merits of an investment; 3) acted with a 'certain regularity of participation in securities transactions'; and 4) received commission or transaction-based remuneration.") (citations omitted); *SEC v. Margolin*, 1992 U.S. Dist. LEXIS 14872 (S.D.N.Y. Sept. 30, 1992) (indicating that "receiving transaction-based compensation, advertising for clients, and possessing client funds and securities" are "evidence of brokerage activity"); *SEC v. Century Investment Transfer Corporation*, 1971 WL 297 (S.D.N.Y. Oct. 5, 1971) (finding that soliciting customers through ads in the *Wall Street Journal* meant a firm engaged in "the broker-dealer business").

things, "advertising one's function as a broker or market maker" and "recommending the purchase or sale of particular securities with the anticipation that the customer will execute the transaction through the broker-dealer." *Id.*; *see also Pinter v Dahl,* 486 U.S. 622, 646 (1988) ("The solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage of a traditional securities sale to involve the buyer, and it is directed at producing the sale.").

Muehler argues that he did not violate and securities laws because he did not actually sell any securities. Amended Response to OIP, ¶¶ 51, 65, 71. But Section 15(a) applies to those who "attempt to induce the purchase or sale" of securities, the solicitation of investors and issuers to buy and sell securities can constitute broker activity even if no transactions are consummated. *See* 15 U.S.C. § 78o (induce or attempt to induce purchase or sale of security); *In the Matter of Salvani and MainStreet IPO.com, Inc.*, Exchange Act Release No. 44590 (July 26, 2001); *accord ABC & S, Inc. v. MacFarlane Group, Inc.*, 2015 U.S. Dist. LEXIS 7384, at *7 (N.D. Ill. Jan. 22, 2015) (promise to help issuer raise money from investors was "attempt to induce the purchase or sale" of securities in violation of Section 15(a)). In *Salvani*, the respondents solicited issuers and investors for initial public offerings on MainStreetIPO.com, which they advertised as a source of "hot" IPOs for the average investor. *Id.* at 2-4. They marketed their services to potential issuer customers, signed agreements with issuers to offer securities, and marketed MainStreetIPO.com to potential investors. *Id.* In a settled proceeding, the Commission concluded that the respondents had violated Section 15(a), even though they ultimately did not sell any securities, because they attempted to induce securities transactions without registering as brokers. *Id.*

The hearing record will establish that Respondents engaged in the business of a broker-dealer by holding themselves out as broker-dealers and by offering and providing broker-dealer services with the expectation of receiving transaction-based compensation. They did so with regularity by soliciting numerous issuers to offer securities, signing agreements with customers to offer securities, advertising the proposed offerings, and soliciting investors. Muehler personally provided many of these services, as the principal of Blue Coast and ASMG, and by touting issuer

offerings in promotional videos. Like the respondents in *Salvani*, Respondents solicited issuers and investors to participate in securities transactions that they proposed to effect over the Internet. *Salvani*, Exchange Act Release No. 44590 at *2-4; *accord ABC & S, Inc.*, 2015 U.S. Dist. LEXIS 7384 at *7. And Muehler's attempts to induce securities transactions in his earlier schemes are additional evidence that he has engaged in the business of a broker-dealer with regularity. Thus, Respondents' attempts to effect securities transactions for the accounts of others, using interstate commerce, and without registering as broker-dealers, are sufficient to establish liability under Section 15(a).[8]

2. Respondents' Intent Is Irrelevant

Respondents may present evidence or argument that they lack formal training in the securities industry and did not intend to operate as broker-dealers, but that Muehler instead meant to operate a "CrowdFunding Portal." Mtn for Summ. Dispo. at ¶¶ 19-20. Such evidence is irrelevant and cannot establish a defense for three reasons.

First, Respondents' intent is irrelevant because scienter is not an element of a Section 15(a) claim. 15 U.S.C. § 78o(a); *Interlink Data Network*, 1993 U.S. Dist. LEXIS 20163, at *46; *Martino*, 255 F. Supp. 2d at 283.

Second, there is no exemption from broker-dealer registration for intermediaries acting as "Crowdfunding portals." The concept of such portals was codified into law by Exchange Act Section 3(h), which was added by Title III of the Jumpstart Our Businesses Act (JOBS Act), however, the Commission has not yet adopted any rules providing an exemption from broker-dealer registration for such intermediaries.

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[8] The Respondents used interstate commerce to solicit securities transactions by, among other things, advertising on the Website and in web-based press releases; soliciting issuers via email; and accepting payments from customers through PayPal. They acted for the accounts of others by soliciting third-party issuers and investors for securities transactions. *See In re Anthony Fields*, Securities Act Rel. No. 9727, 2015 SEC LEXIS 66, at *20 (Feb. 20. 2015) (use of the Internet, such as making postings on a website, is *per se* sufficient to satisfy the interstate jurisdictional element of the securities laws).

Finally, the evidence will show that not only did Respondents hold themselves out as offering broker-dealer services and attempt to induce securities transactions, they actually described themselves as broker-dealers. In July 2014, for instance, the Website explained that "Companies seeking a listing for Initial Public Offering (IPO) on the Alternative Securities Market need to identify and appoint an ASM Listing Broker who will help the company come to market." The Website included a link for contacting an "ASM Listing Broker" and described "ASM Listing Brokers" as "highly experienced in guiding companies through the SEC registration ... and qualification process, as well as the process of 'going public' on one of the Alternative Securities Market Tiers and Market Segments." In a promotional video made available to the public on YouTube during the same period of time, Muehler described ASMG as "e*trade" for alternative securities. As of June 2015, the Website described ASMG as a registered broker-dealer firm and directed those interested in offering securities through ASMG to refer to the "Broker-Dealer" section of the Website "for additional information about the Firm's Broker-Dealer Division."

Accordingly, the Respondents are liable under Section 15(a).

IV. LEGAL ARGUMENT – RELIEF

The Division seeks three forms of relief in this case: a cease-and-desist order; an order that Respondents disgorge their ill-gotten gains; and imposition of a civil penalty.

The guiding principle in imposing sanctions against a respondent is the public interest. *See, e.g., In re Vladimir Boris Bugarski*, Exchange Act Rel. No. 66842, 2012 SEC LEXIS 1267 at *10-11 (Apr. 20, 2012) (Comm. op.); *In re Joseph P. Doxey*, Initial Decision Rel. No. 598, 2014 SEC LEXIS 1668, at *58 (May 15, 2014). In determining whether an administrative sanction is in the public interest, the Commission generally focuses on the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979): (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present

opportunities for future violations. *Steadman*, 603 F.2d at 1140; *see also In re Gary M. Kornman*, Exchange Act Rel. No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009) (applying *Steadman*); *Doxey*, 2014 SEC LEXIS 1668, at *58-59 (same).

In addition, the Commission considers whether sanctions will have a deterrent effect. *See In re Schield Mgmt. Co.*, 58 S.E.C. 1197, Exchange Act Rel. No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006) (Comm. op.); *In re Bandimere*, Initial Decision Rel. No. 507, 2013 SEC LEXIS 3142, at *228-29 (Oct. 8, 2013).

"The appropriate sanction depends on the facts and circumstances of each case." *Schield Mgmt.*, 2006 SEC LEXIS, at * 35. Thus, the "inquiry into the appropriate sanction to protect the public interest is a flexible one and no one factor is dispositive." *Kornman*, 2009 SEC LEXIS 367, at *22; *see also In re Toby G. Scammell*, Advisers Act Rel. No. 3961, 2014 SEC LEXIS 4193, at * 23 (Oct. 29, 2014) (Comm. op.).

When determining the scope of sanctions, the Commission "consistently [has] held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *In re Kent M. Houston*, Exchange Act Rel. No. 71589, 2014 SEC LEXIS 614, at *33, n.60 (Feb. 20, 2014). Therefore, "the Commission is not obligated to make its sanctions uniform," and it is not necessary to compare the sanction under the specific facts and circumstances of a particular case "to those imposed in previous cases." *Kornman v. SEC*, 592 F.3d 173, 188 (D.D.C. 2010); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

The evidence will show that the facts and circumstances support the requested sanctions against Respondents.

A. Issuance of a Cease-and-Desist Order is Appropriate

At the close of the hearing, the Division will seek a cease-and-desist order against each of the Respondents. Section 15(b)(6) of the Exchange Act authorizes the Commission to sanction any person associated with a broker or dealer if it is in the public interest and the Commission finds that the adviser has willfully violated any provision of the federal securities laws. In addition, Section 21C (a) of the Exchange Act authorizes that Respondents be ordered to cease and desist from committing violations of the Exchange Act. *See* 15 U.S.C. U.S.C. § 78u-3(a). In *KPMG Peat Marwick*, the Commission determined that there must be "some" likelihood of future violations whenever a cease-and-desist order is issued. 2001 SEC LEXIS 98 at *101. The Commission explained that:

> Though "some" risk is necessary, it need not be great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation. To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist.

Id. at *102-103. The Commission based this conclusion on the statutory language, which allows it to impose a cease-and-desist order on a person who "has violated" the securities laws, in contrast with the Commission's authority to seek injunctive relief in those instances when a person "is engaged or about to engage" in violative conduct. *Id.* at *103.

Along with the risk of future violations, the Commission considers "our traditional factors," including the factors listed in *Steadman*, and, in addition, "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Id.* at *116. This inquiry is a flexible one, and no one factor is dispositive. This inquiry is undertaken not to determine whether there is a "reasonable likelihood" of future violations, but to guide the Commission's discretion. *Id.*

The Respondents' violations of Sections 10(b) and 15(a) of the Exchange Act set forth above will evidence their conscious and repeated disregard of their responsibilities under the

federal securities laws. Therefore, the Division will be requesting orders requiring the Respondents to cease and desist from violating these provisions of the Exchange Act.

B. An Order of Disgorgement is Appropriate

The Division will also be seeking disgorgement. Sections 21B(e) and 21C(e) of the Exchange Act authorize disgorgement in administrative or cease-and-desist proceedings, including reasonable interest. *See* 15 U.S.C. § 77h-1(e); 15 U.S.C. § 78u-2(e), § 78u-3(e).

The goal of disgorgement is two-fold: "'to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.'" *SEC v. Platforms Wireless*, 617 F.3d 1072, 1096 (9th Cir. 2010), *quoting SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). Therefore, "the amount of disgorgement should include all gains flowing from the illegal activities." *Id.*, *see also In re Donald L. Koch*, Exchange Act Rel. No. 72179, 2014 SEC LEXIS 1684, at * 90 (May 16, 2014) (Comm. op.) (*citing SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006)).

When seeking disgorgement, the Division only needs to present evidence of a "reasonable approximation" of the ill-gotten gains. *See Platforms Wireless*, *Koch* and *JT Wallenbrock*, *supra.* Once the Division has made that showing, the burden shifts to the respondent "clearly to demonstrate that the disgorgement figure was not a reasonable approximation," and any "risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989); *see also Koch,* 2014 SEC LEXIS 1684, at *90-91 & n. 233; *In re S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *3 (Dec. 5, 2014) (Comm. op.).

Here, the Division will seek disgorgement, with prejudgment interest, from each of the Respondents, in the amounts that they were unjustly enriched through their violations. These amounts will be determined at the hearing and set forth in detail in the Division's post-hearing briefing. The Division anticipates asking the Hearing Officer to order the Respondents, jointly and severally, to disgorge any compensation they received from their defrauded customers.

C. An Order Imposing a Civil Penalty is Appropriate

Finally, the Division will be seeking civil penalties. Section 21B(a) of the Exchange Act authorizes the Commission to seek penalties in administrative proceedings. *See* 15 U.S.C. § 78u-2(a). Penalties should be imposed when they serve the public interest, and are meant to deter future violators. *See, e.g., In re Raymond James Fin. Servs., Inc.*, et al., Initial Decision Rel. No. 296, 2005 SEC LEXIS 2368, at *197 (Sep. 15, 2005). In determining whether a penalty is in the public interest, the statute provides several factors to consider: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm to other persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need to deter the respondent and other persons; and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c). "'Not all factors may be relevant in a given case, and the factors need not all carry equal weight.'" *Bandimere*, 2013 SEC LEXIS 3142, at *249-50 (citations and quotations omitted).

As for the amount of the penalty, "a three-tier system establishes the maximum civil money penalty that may be imposed for each violation if found in the public interest." *Doxey*, 2014 SEC LEXIS 1668 at *67-68. This matter involves allegations of fraud. Accordingly, imposition of a second tier penalty of a maximum of $80,000 for a natural person or $400,000 for any other person or a third-tier penalty amount is $160,000 for a natural person and $775,000 for any other person for *each* act or omission in violation of the federal securities laws is warranted. *See In the Matter of Mark David Anderson*, 56 S.E.C. 840, 863 (Comm. Op., Aug. 15, 2003) (imposing a civil penalty for each of the respondent's ninety-six violations); Rule 201.1005 and Table V to Subpart E, Adjustment of civil monetary penalties – 2013, 17 C.F.R. Part 201.1005 and Table V. The Division therefore requests that second or third-tier penalties be ordered against the Respondents for each of their violations.

While the statutory tier system sets forth the maximum penalty, it is up to the hearing officer to determine the amount of the penalty to be imposed within the tier. *See Martin* at *80, *citing In re Brendan E. Murray*, Advisers Act Rel. No. 2809, 2008 SEC LEXIS 2924 (Nov. 21,

2008). In making that assessment, courts have considered the following factors established in *SEC v. Lybrand*:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd on other grounds*, 425 F.3d 143 (2d Cir. 2005); *see also Bandimere*, 2013 SEC LEXIS 3142, at *251-52. Although these factors provide guidance, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed." *Martin* at *80, *quoting SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007).

Moreover, the size of a civil penalty is "not limited to the amount of profits derived from the violation." *Martin* at *81, *citing In re Ronald S. Bloomfield*, Exchange Act Rel. No. 71632, 2014 SEC LEXIS 698, at *91 (Feb. 27, 2014) (Comm. op.). Thus, the civil penalty imposed against Respondents may far exceed any personal gain they made, since civil penalties can be imposed "without regard to defendants' pecuniary gain." *Id.* (finding that penalty for one respondent that was 27 times larger than his pecuniary gain was proper).

Here, the evidence will show that civil penalties are more than justified. Respondents' conduct involved fraud and a deliberate or reckless disregard of the federal securities laws, and their fraud harmed their own customers. A large penalty is needed to deter others from committing the kind of fraud that the Respondents have carried out.

V. CONCLUSION

The Division respectfully submits that the evidence at the hearing will establish that the Respondents are liable and thus should face severe sanctions, in the form and amounts to be specified by the Division in its post-hearing briefing.

DATED: February 8, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 8, 2016, I caused the foregoing to be served on the following persons by the method of delivery indicated below.

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