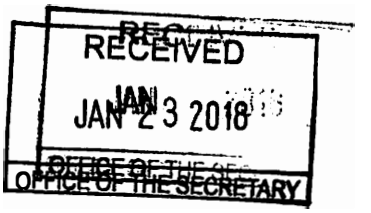
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of **WARREN D. NADEL** Respondent	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS — FILE NO. 3-17883 PURSUANT TO SECTION 15(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

Warren D. Nadel
[redacted]
Upper Brookville, NY [redacted]
[redacted]

January 5, 2018

The Respondent ("NADEL"), due to financial circumstance is acting in the capacity as his own counsel. Every effort is being made to be in compliance with the format and content as prescribed by law and expected by the Court. A copy of the request for any new evidence submission is attached to which NADEL is responding.

There are actually three issues that, while being submitted individually, are very much interrelated and inextricably linked. Those issues are:

(a) Legalities associated with the SEC Enforcement Division representatives having an audience with the Court in the absence of the Respondent and without the Respondent being afforded this consideration.

(b) The issue associated with the clam of NADEL demonstrating "scienter" with regard to his regulatory infractions.

(c) The issue of NADEL's lack of remorse and acknowledgement associated with his regulatory infractions.

Firstly, it was understood (realizing that no legal background exists) that any appearance and discussion by either side of this litigation before the Court required the attendance by both parties and that submissions and responses be provided in the form of briefs. I would welcome the opportunity to be able to speak with the Court and was unaware that this was an option especially on the issues of scienter and remorse. While there are writers who have demonstrated the ability to express themselves with the written word, NADEL feels that any prior briefs were lacking in expounding upon these issues and have placed NADEL in a poor light which a physical presence and a face-to-face discussion of these emotional issues might have provided the Court with a considerably different perspective as to these highly charged aspects of this case.

Second, and pertaining to the issue of scienter, by virtue of a proposal previously submitted (**"Response to the SEC's Request for an Order Instituting Administrative Proceedings"** – attached with various exhibits) and referred to in the Court's initial decision, this issue is truly null and void as the possibility of repeating any aspect of NADEL's prior regulatory violations is not only no longer possible (no longer being registered and NADEL's willingness to never attempt to become registered in the future) but precludes the possibility of any future violations. Additionally, there is again

virtually no possibility that NADEL would ever do anything to jeopardize the conclusion of this proceeding and subject himself and, more importantly, his family, yet again, to the horrific aspects of a conflict with the SECURITIES AND EXCHANGE COMMISSION's Division of Enforcement emotionally, physically and monetarily. Further and with regard to a lifetime industry bar for NADEL acting to protect the investing public from further risk and to serve as a deterrent to others in the investment industry, nothing could accomplish this more than what has already been accomplished by this agency, that is to say the complete destruction of NADEL's personal and professional life and reputation, as it had been, reducing NADEL to an impoverished state knowing that the likelihood of ever being able to provide for his family has literally been negated. This situation further lead to NADEL's personal depravity of [redacted], the specifics of which will be provided upon the Court's request to do so, further exemplifies that there is truly no need for the further punishment of a bar from further employment in the investment industry as the teeth of the likelihood of any further infraction have been already pulled. NADEL's [redacted] recovery has shared in a philosophy that he has tried to impart to all aspects of his life. This can best be revealed in a poem given to him by his daughter, "Don't Quit" by John Greenleaf Whittier (attached).

Finally, with regard to a feeling of remorse, guidance, both legal and personal, with respect to briefs previously submitted may have been less than on point in NADEL's attempts in addressing these highly emotional issues. Here too, the written word pales in comparison to NADEL's personal feelings on these issues, which is why, given an

opportunity for an audience with the Court, might serve to clarify and expound upon this far better than that of any briefs previously and currently being submitted that tend to be rather a submission of facts and case law not lending itself to the idea of a more emotional and actual state of remorse.

While the SECURITIES AND EXCHANGE COMMISSION's Division of Enforcement will undoubtedly find fault with what has been said here, NADEL's willingness to express his feelings of remorse and desire to make amends for his actions should provide a new prospective for the Court's consideration. NADEL wishes to express his gratitude for the indulgence on the part of the Court here and hopes that he is provided an opportunity to express himself in the presence of the Court in the further hope that the Court may find the profound sincerity of what is attempted to be said here can be fully realized and that what NADEL believes to be potential misimpressions on the part of this and a prior Court may be rectified showing that the reconsideration of which NADEL speaks may be granted.

Respectfully Submitted for the Court's Review and Consideration,

Warren D. Nadel

Enclosures

Cc: ✓ Brenda P. Murray
Chief Administrative Law Judge

Brent J. Fields, Secretary
Office of the Secretary

Richard G. Primoff
Senior Trial Counsel

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5330 / December 7, 2017

Administrative Proceeding
File Nos. 3-17883

In the Matters of **Warren D. Nadel**	**Notice to the Parties and Order Following Remand**

The parties are notified of the Securities and Exchange Commission's order issued November 30, 2017. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10440, 2017 SEC LEXIS 3724, https://www.sec.gov/litigation/opinions/2017/33-10440.pdf. In that order, the Commission ratified the appointment of its administrative law judges and directed each judge to reconsider the record, including all substantive and procedural actions, in pending proceedings for which no initial decision has been issued and in those that are pending before the Commission following an initial decision.

I issued an initial decision in this matter on August 4, 2017. This proceeding has been remanded by the Commission's order. Each party may submit, by January 5, 2018, any new evidence it deems relevant to reexamination of the record. Each party may also submit a brief explaining the relevance of its new evidence and identifying any challenged rulings, findings, or conclusions. If any party chooses to submit a brief by January 5, all other parties will have until January 16, 2018, to file a responsive brief.

By February 16, 2018, I will issue an order upon reconsideration setting forth whether all prior actions taken by me are ratified or revised in any respect.

Cameron Elliot
Administrative Law Judge

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of WARREN D. NADEL, Respondent	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS — FILE NO. 3-17883 PURSUANT TO SECTION 15(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

Warren D. Nadel
[redacted]
Upper Brookville, NY [redacted]
[redacted]

July 7, 2017

The Respondent ("NADEL"), due to financial circumstance is acting in the capacity as his own counsel. Every effort is being made to be in compliance with the format and content as prescribed by law and expected by the Court. A copy of the request for this administrative proceeding is included here (**Exhibit I** - Division of Enforcement Memorandum of Law).

It should be noted at the outset that the Securities and Exchange Commission ("SEC") has made some statements that are either misleading or incorrect.

For administrative purposes and purposes of clarification the counsel for the SEC Division of Enforcement continues to copy NADEL's former counsel on all their submissions. To clarify, this should in no way be misconstrued by the Court as in any way indicating that the

former counsel is anything but this, former, and that they are in no way involved with NADEL's current and ongoing legal defense.

NADEL having stated previously that it was his desire to re-enter the securities industry workforce in some capacity should be viewed as merely a desire and nothing more. If granted by the Court, not to be barred from working in this industry, it would be NADEL's "intention" to apply for work in this industry. Applying for work and the intention of doing so should not be considered in any way that NADEL controls his ability to or the assurance that he will be successful at obtaining employment just because it is his intention to apply.

Numerous issues have been put forth by the SEC's submission to the Court and they will be addressed. Some of the responses to these issues will be utilizing excerpts from **Exhibit II** - Answer to SEC Request for an Order Instituting Administrative Proceeding.

The prospective monetary punishment provided for by the SEC in the attached document (**Exhibit III** - Notice of Collection Issued by the SEC) was only received by NADEL on June 30, 2017 (sent by regular US mail service) while dated March 20, 2017 when it was sent to NADEL's former legal representation (the fallacy in continuing to recognize former counsel as more than that has been address previously). Clearly this counsel did not consider a document of this importance worth his time or see fit to forward it to NADEL's attention as it is believed should have been the case. In light of the magnitude of this punishment afforded the SEC by the Court, the fact remains that due the current and foreseeable financial circumstances of NADEL, it seems highly unlikely that any monetary reward could be paid. NADEL is willing to complete and provide the SEC with whatever information they require in this regard and is willing to swear to the accuracy and completeness of this document to be provided. Additionally, a

previously submitted document in response to the monetary punishment has been attached (**Exhibit IV** - Defendant's Objection to Report and Recommendation).

The SEC's has put forth various allegations that were made previously during the Federal Court damages hearing of July 2015 and have already been adjudicated by the Court and several were determined not to have been proven to the Court (**Exhibit V** - Report and Recommendations of A. Kathleen Tomlinson, Magistrate Judge Re Nadel) dated February 11, 2016. Further, there was a stipulation document (**Exhibit VI** - Stipulation and Order of Partial Dismissal) mutually agreed upon by both the SEC and NADEL dismissing various allegations presented by the SEC (**Exhibit I** - Division of Enforcement Memorandum of Law).

Additionally, a Letter to Richard Primoff (**Exhibit VII** - Letter to Richard Primoff_20170415) dated April 15, 2017 has been submitted in the spirit of completeness that, as the name implies, consists of a letter submitted directly to the SEC prosecuting attorney and Senior trial Counsel, Richard Primoff by NADEL that was sent in an attempt to allow for the resolution to the issues in consideration of the Court's time and in the interest of a fair compromise that would lead to a more expeditious conclusion of this matter and that was elaborated upon in **Exhibit II** - Answer to SEC Request for an order Instituting Administrative Proceeding.

At this juncture, and having made reference to a time aspect of this action taken against NADEL, it seems appropriate to provide some detail.

The SEC audit began in the beginning of September 2009 and continued in NADEL's offices, with two or more auditors (one representing the broker/dealer aspect of the securities industry and the other representing the registered investment advisory

aspect and the occasional visit and/or conference call from their respective supervisors) virtually every day through November of that year (3 months). NADEL was 59 years old at this time. By the second quarter of 2010, NADEL's firm's securities clearing relationships were terminated by those vendors providing that service. It was discovered that this was as a result of the notification by the SEC of their audit and investigation of Warren D. Nadel & Company being disseminated to all compliance departments of all securities firms. Consequently, this firm was no longer in a position to conduct business as there were no securities firms willing to establish a clearing relationship. NADEL too was unable to conduct business for the same reason. This inability to work within the securities industry continues to this day.

From that point forward it is understood that this audit/investigation continued through the following year with additional and continual requests for information. In April 2010, a deposition was held at the New York offices of the SEC Division of Enforcement from 9:00am through 5:30pm of that day during which a one time 10 to 15 minute break was granted. It should be noted that NADEL's first legal representation's services were discontinued after this deposition when it was revealed that NADEL had not been prepared for his deposition at all. NADEL had never before been deposed and had no idea as to how a deposition could be and had no idea as to what might be expected.

Subsequently, in January 2011, the SEC Division of Enforcement filed suit against NADEL.

An extended period of time then transpired (during which time a second deposition of NADEL was conducted) and there were numerous additional documents

requested. These requests were satisfied that, in total, amounted to tens of thousands of pages as was related by the then counsel for NADEL during the period June 2010 through July 2015 when a hearing took place in the Federal Supreme Court Building located in Central Islip with Magistrate Judge, The Honorable A. Kathleen Tomlinson presiding. Ultimately, this lead to the Federal Court's determination and final decree being issued by United States District Judge William F Kuntz, II (**Exhibit VIII** - Decision and Order William F Kuntz Re Nadel).

Today, an additional two years later, now July 2017, the Administrative Law Judge, The Honorable Cameron Elliot is considering this action. NADEL is now 67 years of age.

This action has been active for very nearly eight years now, during which time many things have changed personally, monetarily and professionally for NADEL's family and for NADEL himself. The Honorable A. Kathleen Tomlinson in the rendering of the Court's determination of the hearing in July 2015 made mention of some very disturbing aspects of the hearing as the Court perceived them. The following are some of her observations and what might be considered an explanation of these observations and possible misinterpretations of them that are believed to have been made.

It was the Court's determination that NADEL's responses and comments seemed to be "cavalier" demonstrating a poor attitude on his part and lacking in sincerity and having a high degree of scienter (paraphrasing is being done here for expeditious purposes).

In response to this perspective on the part of Magistrate Judge Tomlinson, it is obvious that no time was spent with NADEL. That is to say that the Court did not know him as a person

or as a professional. While this would be deemed inappropriate and there is procedurally no requirement that this be done, it could have explained or at the very least provided some insight as to why this perspective of this individual may have occurred. NADEL, never having had so much as any complaint filed against him as a professional in his nearly 35 years as an investment professional, had never been in court, for any reason, before this hearing in July 2015. NADEL's two firms, Warren D. Nadel & Company and Registered Investment Advisers LLC, had been audited by both FINRA and the NFA every 3 to 4 years during the nearly 25 years of existence, without anything more than the routine requests for some administrative adjustment to firm procedures. NADEL was understandably nervous, intimidated and simply scared at the prospect of being the focus of a governmental suit and was frankly afraid of this process. This was a highly emotional "powder keg" for him as he was fighting against what he perceived to be, and as he still does today, an insurmountable force with comparatively limitless resources, often adversarial in nature, fighting for his professional life and all the ramifications both personal and professional that this represented. Therefore, for NADEL not to be "himself" and, in fact, be significantly affected by all of that which has already been pointed to is very much to be expected. The prospect that this process could, quite reasonably, affect his testimony, and seemingly his attitude, is a very real likelihood and is what is believed to have been misinterpreted by the Court as being his intent. Nadel has conferred with several people who were present in the court for the four days of hearings and if he were to have had an attitude issue in the presence of Magistrate Judge Tomlinson, it would have been revealed to him by them at that time and discontinued immediately.

There were also comments by the Court as to NADEL's seeming lack of remorse during his testimony. At no time was there an opportunity to make any statement or expression of

regret or the like during NADEL's testimony. Recollection seems to be just to the contrary and that whenever any personal expression was attempted; NADEL was immediately prevented from doing so as it did not pertain to the response sought to a specific question. At no time was this question of remorse or regret by neither counsel nor the Court ever asked. This fact seems to infer a lack of interest in this matter on anyone's part which was thought by NADEL to be odd in retrospect. As can be readily seen in both the answer submitted to the Court (**Exhibit II** - Answer to SEC Request for an Order Instituting Administrative Proceeding) dated May 8, 2017 and the letter sent to SEC Senior Trial Counsel, Richard Primoff (**Exhibit VII** - Letter to Richard Primoff_20170415) dated April 15, 2017, when NADEL was given the opportunity to do so, expressions of regret and remorse by NADEL were forthcoming and on various levels.

The federal judicial system in no small part has condemned NADEL due to its determination that there was a perception of "backpedaling" with the seeming inconsistency of prior testimony and a demonstration of "indifference" and a "cavalier" attitude as to the magnitude of the situation being considered now and previously. While the issue of attitude has been address previously, the question of backpedaling is a misconception of a simple passing of time, more than 6 years at the time of the hearing, and the reasonable expectation of the fading of memories and a lack of the consistency and precision of a response previously given years earlier. As such, it is believed that these perceptions may have served to be as damning to NADEL in the eyes of the Court as NADEL's actions themselves. Here too, these perceptions may have added to the resulting severity of the Court's determination.

NADEL had not intended to attempt the mounting of a legal defense against the charges that the SEC brought before the Court. It was believed that this would have been a waste of the

Court's time to do so, especially in light of the fact that these issues had already been adjudicated at a prior hearing in July 2015, two years ago. But, as the SEC has done so first with **Exhibit IX** - SEC Request for an Order Instituting Administrative Proceeding and now, with the submission of **Exhibit I** - Division of Enforcement Memorandum of Law, it is apparent that there is little alternative but to respond to the best of defense's ability here.

As was indicated previously, NADEL does not possess the legal expertise to attempt to refute any of these findings. What is being attempted at this time is the shedding of some light on some of the issues raised by the SEC Division of Enforcement as it pertains to violations and on the human factor and that in fact remorse and regret are very much a keen aspect of disclosures and have been throughout the past 8 years and, in fact, are not simply being revealed at this late date. It is believed that former counsel could have and perhaps should have attempted to make the Court intensely aware of NADEL's prospective on these very much related issues. It may have been ill conceived to allow NADEL's legal representation to insist on the proper course of action that would best serve the objectives of their client(s) and in retrospect should have insisted on bringing out certain factors, and this human factor being one of them, during NADEL's hearing and prior depositions as is being attempted now.

The Court indicated that it was their belief that there was a real risk of loss due to NADEL's misconduct. NADEL contends that the attention that was paid to the market and portfolio management detail along with his nearly 40 years as a preferred stock trader trained at Lehman Brother where he established and ran their preferred stock trading operation from 1973 through 1978, and doing the same for Oppenheimer & Company (1978-1982), Jefferies & Company (1982-1987) leading to the formation of his own firm Warren D. Nadel & Company (1987-2010) where he employed the same strategy that we are discussing today, made him a

client's best choice for real profitability in the highly specialized market of utility preferred stocks. Further, it would be hard to believe that these many years of positive client portfolio performance and satisfaction were a fluke and that his knowledge and expertise in this market established results with this strategy that were simply lucky added to which this was a period of great interest rate volatility and extreme credit crisis being the greatest factors influencing this strategy's value. NADEL had clients, over his years as a portfolio manager, that had previously left the strategy due to a need for their corporate funds and that later came back to invest in this strategy again, the true measure of client satisfaction. NADEL is recognized, within the industry, as being the first to establish a hedged preferred stock portfolio management strategy – "Preferred Stock Dividend Capture Strategy". It is further clear that there was the real probability of a client's profitability as well (**Exhibit X** - Expert Report of Ronald I Miller, PhD_20111110, **Exhibit XI** - Rebuttal Report of Ronald I Miller, PhD_20111219 and **Exhibit XII** - Sur-Rebuttal Report of Ronald I Miller, PhD_20120224).

The prosecution has stated that:

> "NADEL did not object to any of the report's findings or recommendations (as provided by Magistrate Judge Tomlinson) ..."

This speaks volumes to the contention that NADEL's prior legal counsel, while probably conferring with NADEL, misguidedly convinced him that counsel's approach in formulating a response to the Court was what would be best. NADEL's perspective has changed markedly since then and, in fact, NADEL makes the very personal admission as to his having had a personal issue of an [redacted] nature that began subsequent to the filing of the SEC's lawsuit. While this situation, (after considerable efforts) is currently resolved, it was very much not the case during the hearing that took place in July 2015. This is an extremely difficult issue to bring up at this time but would further serve to explain a number of issues not the least of which were

a general sense of having an attitude as perceived by the Court and the appearance to the Court of "backpedaling" while in reality affecting NADEL's capability of accurate recollection and generally affect his ability to be as knowledgeable as he could have been. As the SEC Division of Enforcement has forced the issue of violations, it is now deemed appropriate to respond to several by way of some clarification.

The defense now objects to the following:

Consent to Cross Trading - This was clearly stated on all confirmations when these trades took place. The potential of this occurrence was revealed to all clients in the client account forms and by word during all conference calls and every face to face presentation where in depth discussions about the strategy took place, without exception. In March 2008, RBC CORRESPONDENT SERVICES ("RBC"), the clearing firm for Warren D. Nadel & Company, changed their computer system. One change in particular was brought to the attention of NADEL and that was that the numeric code that had here-to-fore appeared on the all trade confirmations denoting if and when Warren D. Nadel & Company was "acting as agent for both buyer and seller" was now missing. NADEL spoke with the then head of RBC's back office operation and was told that this code had been eliminated without providing a reason but that this was alright and that this really should be of no concern. NADEL further inquired as to whether there was some other way in which some notation could be made to provide this now missing information and was told that there was not. NADEL's concerns ultimately

seemed to be allayed as it was his belief that he had revealed to the clients, in several ways, the real likelihood of these trades being performed in their accounts and that these accounts had been with his firm prior to this computer and confirmation content change and thus were familiar with these transactions and their likelihood of being performed in this way by NADEL for their accounts. Further, as RBC had what NADEL believed to be a great responsibility to clients, for which assets were held in safe keeping and execution clearance was being performed, these concerns were further put to rest. Quite simply the transactions being executed for the client portfolios were being performed in much the same manor as they had been done previously. NADEL believed that he had done his due diligence and was satisfied that he had done so based upon these previous discussions. When the SEC advised NADEL, during their audit, as to the nature and severity of the omission of this information on the transaction confirmation, he was told by RBC that such a notation could now be added and was in fact added to the confirmations immediately and from this point forward.

The SEC, at this time, pointed out additionally that consent must be obtained from a client when cross trading was being performed in their account despite his being granted full discretion as it related to all client investment activity. NADEL immediately contacted an independent compliance firm and obtained the proper documentation to be obtained from, and provided to, clients for this purpose. While NADEL's clients' reaction was generally the same with these new requirements, wondering why this was necessary in light of NADEL having been granted full discretion on their portfolio management to include all

transactions performed, they, nonetheless all complied with these requests and Warren D. Nadel & Company and NADEL were once again in compliance.

Disgorgement and Other Financial Penalties - It is believed that this too was addressed by former counsel in **Exhibit IV** - Defendants Objection to Report and Recommendation.

High Degree of His (NADEL) Scienter - It is believed that this primarily relates to and is fully discussed in the prior discussion concerning the issue of NADEL's attitude.

Appreciation of His (NADEL's) Wrongdoing - Hereto, it is believed that this related to the attitude issue previously discussed and is in no way true or unappreciated on the part of NADEL and in no way should be considered an attitude of being dismissive as to his involvement, these actions or their ramifications.

The Likelihood that He (NADEL) Would Violate the Law in the Future - It is believed that this relates to the discussion and submission of a settlement proposal that would eliminate the prospect of this ever recurring in the future as well as NADEL's willingness to sign a statement not to violate any security laws now or in the future.

Principal Transactions - While these trades were improperly executed and improperly reported on client transaction confirmations, it was the contention by opposing counsel that NADEL profited substantially from these transactions. This is a falsehood as when viewed in total, there were both profitable principal trades that took place and unprofitable trades as well which show a sum/net total

of $236,230.17 in capital losses (**Exhibit XIII** - Principal Trades Capital Gain/Loss Analysis) on the part of Warren D. Nadel & Company to its detriment and to the benefit of the clients. This should in no way imply that this fact condones the impropriety of these transactions but does serve as a point to further mitigate a portion of the financial penalties and provide further clarification.

In no way should any of that which has been stated be misconstrued as NADEL's attempt at minimizing any of these issues nor of trivialize the role that NADEL played or to make excuses but rather as an attempt to clarify the perspective of the situation at that point in time.

The proposal which follows is an excerpt from **Exhibit II** - Answer to SEC Request for an Order Instituting Administrative Proceeding previously submitted to the Court and is in response to the SEC's request of the Court to impose a permanent injunction for NADEL in which he would no longer be allowed to have any association with any broker, dealer or investment advisor of the securities industry.

> "It is understood that the purpose of a lifetime bar is to primarily protect the investing public from a potential negative influence that has the prospect of causing them (financial) harm. This can be accomplished in a somewhat different way and still allow NADEL to be penalized in this way and yet have the ability to work in the investment industry while protecting the investing public in much the same way. If a person has no license to practice in this industry they are precluded from affecting any transactions for clients or the firm for which they work. They are also precluded from speaking with any prospective or existing investors in a sales capacity. Expectedly, they would be subjected to supervisory oversight and could be designated as someone to be given heightened supervisory oversight by a firm's compliance effort. They would be precluded from corresponding in any form with any existing or prospective client. In fact, they would be precluded from any activity that the SEC and the Court would find to place the investing public at any risk as this person's influence to effect any aspect of investing would be outside their purview of authority."
>
> "It is further believed that these restrictions accomplish and achieve the spirit of that which the SEC and the Court seek without eliminating the individual's ability

> to attempt to gain employment in the only industry in which they have any knowledge. Clearly, NADEL will no longer be able to pursue employment in the area of securities trading, money management and sales for which NADEL is being fined and punished. Further, as a result of these restrictions being placed upon NADEL and while working with a securities firm having a compliance effort, there would be no realistic likelihood of any recurrence of any future violations by NADEL. Additionally, NADEL will also promise to never violate any of the rules and regulations of the securities industry."

The Court expressed their prospective that NADEL's actions, having occurred once, increases chances as to a "recurrence (being) more likely". This would actually and literally be an impossibility by virtue of a lack of licensing and the prospects for licensing in the future (NADEL is now 67 years old). The potential of having "a reasonable expectation of continued violations" again appears to be extremely remote as licensing is nonexistent.

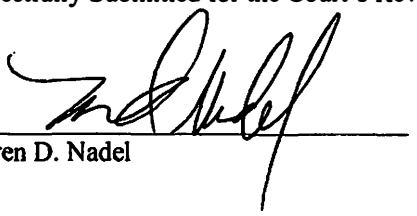
While this proposal may be considered by some to be unconventional, originality should not be condemned just on the basis of it not fitting into some preconceived and established mold. Rather, here it does and is clearly fulfilling what the SEC desires and still serves as a potent discouragement to anyone who reviews it.

It is fervently hoped that the Court will see fit to favorably consider all that has been recorded above in conjunction with a proposal that has been previously submitted and resubmitted here too for favorable consideration. It is believed that the spirit of the law would be served, accomplished and satisfied while providing a humanitarian consideration for the RESPONDENT and his family (over the past 8 years) who, though not named here specifically, is viewed as very much a factor in any decision rendered by the Court. In more recent times this might have been viewed by some less humane and draconian sources as "collateral damage", but most certainly not so by this defense.

IN CONCLUSION

A number of the issues were addressed and clarified and, what is believed to be, a reasonable proposal resubmitted for the Courts consideration. This process, in its entirety, has been ongoing for very nearly 8 years (NADEL was 59 years of age at the start and is now 67 years old) during which time NADEL has not been employed in the securities industry or any other industry due to the stigma overshadowing him all this time. Aside from the personal issues that have been raised and discussed effecting both family and NADEL himself, it is believed that a significant punishment has already been inflicted. NADEL's personal suffering; physically, emotionally, mentally and financially have been great and are likely to be irreparable. The proposed settlement would seem to solve the problems envisioned by the SEC Division of Enforcement as NADEL could no longer pose the threat to the investing public that seems to be their paramount concern nor would NADEL be assured in any way that it is a certainty that any relationship with a firm within the securities industry is anything but what could be considered wishful thinking, but he is asking for the ability to try. While he does not know in what capacity he could function within the securities industry, Nadel is asking for the ability to try. It is hoped that the Court will grant NADEL, having learned a most painful lesson, the ability to try.

Respectfully Submitted for the Court's Review and Consideration,



Warren D. Nadel

Enclosures

Cc: Brenda P. Murray
Chief Administrative Law Judge

Brent J. Fields, Secretary
Office of the Secretary

Richard G. Primoff
Senior Trial Counsel

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-17883

In the Matter of	
Warren D. Nadel	
Respondent.	

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT WARREN D. NADEL

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June 16, 2017

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PRELIMINARY STATEMENT

Pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement ("Division") respectfully submits this memorandum of law in support of its motion for summary disposition against respondent Warren D. Nadel ("Nadel"), for an Order permanently barring Nadel from association with any broker, dealer or investment adviser.

The Division's motion is based on the permanent injunctions entered against Nadel on January 20, 2017, in *SEC v. Nadel, et al.*, No. 11-cv-215 (E.D.N.Y.) (WFK) (the "Civil Action"), after the Court found Nadel to have willfully violated, and permanently enjoined him from future violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (2009) (the "Securities Act"), Section 10(b) of the Securities Exchange of 1934, 15 U.S.C. § 78j(b) (2009) (the "Exchange Act") and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and Sections 206(1), 206(2) and 206(3) of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-6(1), 80b-6(2), 80b-6(3) (2009) (the "Advisers Act"), and also found Nadel to have willfully aided and abetted violations, and permanently enjoined him from aiding and abetting future violations, of Section 10(b) of the Exchange Act and Rule 10b-10 thereunder, 17 C.F.R. § 240.10b-10.

STATEMENT OF UNDISPUTED FACTS

I. The Commission's Allegations in the Civil Action

On August 25, 2011, the Commission filed an Amended Complaint in the Civil Action against Nadel, the broker-dealer he owned and controlled, Warren D. Nadel & Co. ("WDNC"), the registered investment adviser firm he also owned and controlled, Registered Investment Advisers, LLC ("RIA"), as well as against Relief Defendant Katherine Nadel. Ex. 1.[1] The Amended Complaint (as had the original Complaint before it) alleged that from the beginning of

[1] "Ex." refers to the exhibits annexed to the accompanying Declaration of Jorge Tenreiro, dated June 16, 2017.

2007 through 2009 (the "Relevant Period"), Nadel fraudulently induced clients of RIA to invest tens of millions of dollars in what Nadel falsely described as a liquid, cash management investment program in which RIA clients would buy and sell preferred utility securities in the open market (using WDNC as the broker-dealer), and hold them for short periods of time in order to generate either dividend income or capital appreciation (the "Strategy"). In exchange, defendants' clients paid millions of dollars in trading commissions and investment management fees. Ex. 1 at ¶¶ 1-3, 14-17. *See also* Order Instituting Proceedings ("OIP") ¶ 3. To further induce investors to join and stay in the Strategy, Nadel also knowingly overstated the amount of RIA's assets under management ("AUM"), falsely claiming that he had more than $400 million when in fact he managed less than a third of that during the Relevant Period. Ex. 1 at ¶ 37.

Contrary to Nadel's representations, however, the vast majority of the transactions in the Strategy consisted of cross-trades that Nadel secretly made between his clients' accounts, at inflated prices he also made up unilaterally. By misleading his clients in this fashion, Nadel knowingly created the false impression that there was a liquid market for these securities and that their market prices were consistent with the inflated values Nadel reported to his RIA clients. *Id.* at ¶¶ 18-36. Nadel received millions of dollars in advisory fees and commissions through this fraudulent conduct – while his clients, the Commission alleged, sustained substantial losses in what Nadel had represented was a liquid, cash management program. *Id.* at ¶ 3.

II. The District Court Concludes That Nadel Defrauded His Clients In Violation of the Securities Laws

On March 31, 2015, Judge William F. Kuntz, II of the United States District Court for the Eastern District of New York, granted the Commission's motion for partial summary judgment on its claims that Nadel (and his two entities, RIA and WDNC), violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 17(a) of the Securities Act, Sections 206(1),

206(2) and 206(3) of the Advisers Act, and aided and abetted WDNC's violations of Section 10(b) of the Exchange Act and Rule 10b-10 thereunder. *See SEC v. Nadel*, 97 F. Supp. 3d 117 (E.D.N.Y. 2015) ("*Nadel I*"). Ex. 2.

The Court concluded that Nadel violated these anti-fraud provisions by knowingly misrepresenting RIA's AUM to clients and prospective clients in marketing materials and thousands of email communications. Nadel, the Court found, claimed to have AUM in excess of $300 or $400 million – overstating his actual AUM by approximately 300% to 400%. *Id.* at 122-26.[2] The Court similarly concluded that Nadel and his companies violated Section 206(3) of the Advisers Act and Rule 10b-10 of the Exchange Act by (a) conducting thousands of cross-trades (the vast majority of all the trades he executed) between his clients, and engaging in principal transactions with client accounts, without providing the required notice and obtaining the required consent for such transactions, and (b) by providing false trade confirmations with respect to those trades. *Id.* at 126-30.

Judge Kuntz directed Magistrate Judge Tomlinson to hold a hearing to determine "the appropriate relief or damages including but not limited to the determination of a permanent injunction, disgorgement, pre-judgment interest, and any civil penalties." *Id.* at 130.

III. Magistrate Judge Tomlinson Recommends Permanent Injunctions, Disgorgement, Prejudgment Interest, and a Civil Money Penalty Against Nadel

After a four-day evidentiary hearing in July 2015, at which Nadel testified extensively, as did five of his former clients, Magistrate Judge Tomlinson issued a Report and Recommendation dated February 11, 2016 (the "Report"), *see SEC v. Nadel*, No. 11-cv-215 (WFK) (AFT), 2016

[2] The Court noted that there was no dispute that Nadel had acted with scienter with respect to his AUM misrepresentations, *id.* at 122, and that "any reasonable investor would consider the accurate amount of assets under management to be a material fact to consider before investing." *Id.* at 123.

WL 639063 (E.D.N.Y. Feb. 11, 2016) ("*Nadel II*"). Ex. 3. The Report, among other things, recommended (1) that the Commission's request for permanent anti-fraud injunctions against Nadel be granted; (2) that Nadel be ordered (jointly and severally with RIA and WDNC) to pay $10,776,687.62 in disgorgement, plus pre-judgment interest; and (3) that Nadel be ordered to pay a civil money penalty in the amount of $1,000,000. *Id.* at *30.

A. Permanent Injunctions

In recommending that an injunction against Nadel be issued, Magistrate Judge Tomlinson, relying on, *inter alia*, *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978) and *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996), considered the following factors: (1) whether Nadel had been found liable for illegal conduct; (2) the degree of scienter involved; (3) whether the infraction was an isolated occurrence; (4) whether Nadel continues to maintain that his past conduct was blameless; and (5) whether, because of his professional occupation, Nadel may be in a position where future violations could be anticipated. *Nadel II*, 2016 WL 639063 at *5. Magistrate Judge Tomlinson first noted that it was undisputed that Judge Kuntz had already determined that Nadel had violated the anti-fraud provisions of the securities laws, *id.* at *6, and then made the following findings and conclusions.

1. Degree of Scienter

Magistrate Judge Tomlinson concluded that Nadel had acted with "a high degree of scienter." *Id.* at *6. The Court concluded, first, that "for more than 18 months, Nadel . . . failed to provide accurate trading confirmations" to clients, and did not disclose that WDNC had acted as agent for both sides to the transactions, notwithstanding that being aware the confirmations were inaccurate. *Id.* Second, the Court, citing the testimony of Nadel's clients – and Nadel's continuing invocation of his Fifth Amendment privilege on this subject – observed that "the

magnitude, duration and persistent and ongoing misrepresentation concerning the amount of the [AUM], coupled with the importance placed upon that figure by Defendants' clients, further supports a finding that Defendants acted with a high degree of scienter." *Id.* at *7.

The Court emphasized in particular that Nadel persisted in his knowingly false AUM communications from January 2007 until March 2010, and he even did so for months *after* he learned that the Commission was investigating those very misrepresentations. Indeed, the Court observed, Nadel's false and misleading statements were also made to the Commission during that investigation, specifically when Nadel told the Commission (1) that he did not correspond with existing or prospective clients through email, when in fact he routinely did so; and (2) that "the claim as to [AUM] was noted and deleted" from Nadel's website, a statement that was "at best, disingenuous in as much as Defendants continued to disseminate emails misrepresenting the amount of AUM and sending these emails to prospective clients." *Id.* at *7-8, n.9.

Finally, the Court recognized that the overall scope and duration of Nadel's violations of Section 206(3) and Rule 10b-10 "evidenced a knowing disregard for Defendants' fiduciary obligations to their clients," which "further illustrates Defendants' high degree of scienter." *Id.* at *8. The Court observed that Nadel offered "evasive and conflicting testimony on this point," *id.* at 8, which nonetheless established that he understood he could only execute his Strategy by conducting 90% or more of the trades as cross-trades, and affirmatively chose not to disclose these facts to his clients. *Id.* at *8-9. For all the foregoing reasons, the Court concluded, this factor weighed in favor of granting injunctive relief. *Id.* at *9.

2. Recurring Nature of Conduct

The Court observed that (1) Defendants' unlawful cross-trading ran from at least January 1, 2007 through December 31, 2009; (2) their material misrepresentations concerning AUM ran

from January 1, 2007 through April 2010; and (3) their knowing dissemination of false trade confirmations continued from March 2008 through at least December 2009. As a result, the Court concluded that Nadel's misconduct did not involve a single isolated instance of wrongdoing, and that this factor thus weighed in favor of granting injunctive relief. *Id.*

3. **Lack of Appreciation of Wrongdoing**

The Court found that Defendants displayed "little appreciation of the wrongdoing in which they have been found to have engaged." *Id.* The Court noted that he "showed both indifference and a somewhat cavalier attitude regarding the underlying violations." *Id.* For example, with respect to his violation of Section 206(3), Nadel "appeared dismissive, stating simply that he 'felt comfortable enough with the disclosure documents' and the 'blanket expression' concerning the possibility of cross-trades," and with respect to his knowing violations of Rule 10b-10, "Nadel presented a similar lackluster attitude." *Id.* Indeed, the Court noted, Nadel initially testified that he did not review the confirmations, but then "back-pedaled" when presented with prior inconsistent testimony. *Id.*

4. **Opportunity to Commit Future Violations**

The Court, finally, noted Nadel's "long history with, and entrenchment in, the financial industry during the past 35+ years," which it recognized makes "recurrence more likely, especially since institutional investing encompasses Nadel's primary area of expertise." *Id.* at *10 (citing *SEC v. Univ. Major Indus. Corp.*, 546 F.2d 1004,1048 (2d Cir.1976) and *SEC v. Platinum Inv. Corp.*, No. 02-cv-6093, 2006 WL 2707319, at *4 (S.D.N.Y. Sept. 20, 2006)). In addition, the Court recognized, Nadel's "'fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations.'" *Id.* (quoting *SEC v. Tannenbaum*, No. 99-cv-6050, 2007 WL 2089326, at *3 (E.D.N.Y. Jul. 19, 2007) (quoting *Platinum*, 2006 WL 2707319, at *4)).

B. Civil Money Penalties

Magistrate Judge Tomlinson also recommended Nadel be ordered to pay a third-tier civil penalty of $1,000,000, based upon an analysis of the following factors: (1) the egregiousness of Nadel's conduct; (2) the degree of Nadel's scienter; (3) whether Nadel's conduct created substantial losses or the risk of substantial losses; (4) whether Nadel's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to Nadel's demonstrated current and future financial condition. *Id.* at *22.

The Court referenced its findings regarding injunctive relief and noted that the "scope and protracted nature of Defendants' misconduct strongly supports the conclusion that the Defendants' conduct was egregious and was executed with a high degree of scienter" – and thus that factors (1), (2) and (4) weighed in favor of imposing third-tier civil penalties. *Id.*

Magistrate Judge Tomlinson concluded, furthermore, that "not only was there a real risk of loss based upon Defendants' misconduct, but also that investors incurred actual losses." *Id.* Each of these investors learned, when exiting Nadel's strategy, that in the open market, they could sell the positions Nadel had placed them only at a substantial loss, and the Court concluded that "[t]he risk and/or actual loss was thus directly related to and resulted from each investor's reliance on Defendants' investment strategy, components of which were found to violate the securities laws." *See Id.* at *23-24.

Magistrate Judge Tomlinson ultimately concluded that Nadel's conduct was "egregious, deliberate, and resulted in the risk of significant losses and continued for a span of several years," that "'the seriousness of [his] wrongdoing justifies a serious punitive response,'" *id.* at *26 (citation omitted), and recommended a $1 million civil penalty. *Id.* at *27.[3]

[3] The Court also concluded that while Nadel's financial condition did not appear to be "robust," there were "gaps" in his presentation of inability to pay, as well as "otherwise fairly

IV. Judge Kuntz Rejects Nadel's Objections, Adopts The Report and Permanently Enjoins Nadel From Violating the Anti-Fraud Provisions of the Securities Laws

Nadel filed objections to the Report pursuant to Fed. R. Civ. P. 72. Nadel did not object to any of the Report's findings or recommendations regarding the high degree of his scienter, the recurring nature of his misconduct, his lack of appreciation for his wrongdoing, the likelihood that he would violate the law in the future, or the substantial losses his misconduct caused his clients. Nor did Nadel object to the entry of permanent injunctions, or the imposition of a third-tier civil money penalty in the amount of $1 million. *See SEC v. Nadel*, 206 F. Supp. 3d 782, 785 (E.D.N.Y. 2016) ("*Nadel III*"). Ex. 4. Nadel's objections focused on the amount of disgorgement, and the Relief Defendant objected to the recommendations the Report made with respect to her. Judge Kuntz rejected all of those objections, and adopted the Report's recommendations in their entirety. *Id.* at 789.

Pursuant to the Court's decision, on January 20, 2017, Judge Kuntz entered final judgment against Nadel (and RIA, WDNC, and the Relief Defendant), (1) permanently enjoining him from future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, Exchange Act Rules 10b-5 and 10b-10, and Sections 206(1), 206(2) and 206(3) of the Advisers Act, and from aiding and abetting future violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-10; (2) ordering him (jointly and severally with RIA and WDNC) to pay disgorgement in the amount of $10,776,687.62 plus pre-judgment interest of $2,293,701.57; and (3) ordering him to pay a civil money penalty in the amount of $1,000,000. *See* Judgment, *SEC v. Nadel*, No. 11-cv-215 (WFK) (E.D.N.Y. Jan. 20, 2017). Ex. 5.

V. The Instant Administrative Proceeding

The Commission issued the OIP in this matter on March 16, 2017, on the basis of the

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sizable amounts of income which have thus far been unexplained." The Court found that this factor weighed "narrowly in favor of the imposition of third-tier civil penalties." *Id.* at *26.

final judgment and permanent injunctions against Nadel, pursuant to Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b) (2009), and Section 203(f) of the Advisers Act, 15 U.S.C. § 80b-3(f) (2009). The OIP alleges that, during the relevant period, Nadel was an investment adviser, was associated with WDNC, a broker-dealer, owned and controlled RIA, a registered investment adviser, *see id.* ¶ 1, and that the District Court found that Nadel willfully violated Sections 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 17(a) of the Securities Act, and Sections 206(1), 206(2) and 206(3) of the Advisers Act, and willfully aided and abetted WDNC's violations of Exchange Act Rule 10b-10, and permanently enjoined him from violating, or aiding and abetting violations of, those anti-fraud provisions. *Id.* ¶ 2.

Nadel sent a letter dated April 15, 2017 to the Division in which he, *inter alia*, continued to insist that his conduct with respect to cross-trades and false trade confirmations "were [not] the result of an attempt to defraud a client," Ex. 6 at 1, and stating his intent and hope that he could be again employed in the securities industry. *Id.* at 2. On May 8, 2017, Nadel filed an Answer to the allegations in the OIP ("Answer") (Ex. 7), in which he did not dispute any of the factual allegations of the OIP, and continued to express his desire and intention to "work in the investment industry." *See* Ex. 7 at 1.

ARGUMENT

To protect the public interest, the Division respectfully requests that the Court permanently bar Nadel from association with any broker, dealer or investment adviser. The District Court has already found that Nadel reaped more than $10 million from his clients on the basis of egregious, repetitive, fraudulent conduct (while causing substantial losses to his clients), violations over which he expressed no remorse at all before judgment was entered against him, and which even now he has attempted to minimize.

I. Summary Disposition Standard

Rule 250(a) permits a party to move for summary disposition of the OIP's allegations, and provides that such a motion should be granted if there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(a). Summary disposition is particularly appropriate where, as here, the pertinent facts already have been litigated and determined in a prior judicial proceeding. *See, e.g.*, *Joseph P. Galluzzi*, Rel. No. 34-46405, 2002 WL 1941502 (Aug. 23, 2002) (Commission upheld ALJ's grant of Division's motion for summary disposition where facts were determined in earlier injunctive action and criminal conviction).

No genuine dispute of material fact exists regarding the Division's requested relief. Nadel's injunction for his violations is a matter of public record, and is in any event undisputed by Nadel. Thus, the Court should grant the Division summary disposition.

II. Nadel's Violations and the Permanent Injunctions Establish the Basis for Administrative Relief

As noted above, no genuine dispute exists that Nadel was found to have willfully violated and was enjoined from future violations of the anti-fraud provisions of the federal securities laws, within the meaning of Sections 15(b)(4)(C), 15(b)(4)(D), 15(b)(4)(E), and 15(b)(6)(A)(i) and (iii) of the Exchange Act, 15 U.S.C. §§ 78o(b)(4)(C), 78o(b)(4)(D), 78o(b)(4)(E), 78o(b)(6)(A)(i) and (iii), and of Sections 203(e)(4), (5) and (6), and 203(f) of the Advisers Act, *id.* §§ 80b-3(e)(4), 80b-3(e)(5), 80b-3(e)(6), and 80b-3(f) . Indeed, in his Answer, Nadel admitted (as he must) the existence of the injunctions, and did not dispute any factual allegation in the OIP. Ex. 7. Moreover, it is undisputed that at the time of the conduct at issue Nadel: (1) was an investment adviser, and was associated with RIA, which he owned and controlled, pursuant to Sections 203(e) and 203(f) of the Advisers Act, *id.* §§ 80b-3(e), 80b-3(f) ; and (2)

was associated with WDNC, his broker-dealer, as required for a bar under Section 15(b)(6)(A) of the Exchange Act, *id.* § 78o(b)(6)(A).

Accordingly, each individual provision that Nadel was enjoined from violating, or from aiding and abetting future violations of, alone is a sufficient basis upon which the Commission may impose remedial sanctions in this case, because each violation (1) "involves the purchase or sale of any security" and/or "arises out of the conduct of the business of a broker [or] dealer." 15 U.S.C. § 78o(b)(4)(C); and/or (2) arises out of his violations of Sections 206(1), (2) and (3) of the Advisers Act. *See* Sections 203(e)(4), 203(e)(5), 203(e)(6) and 203(f) of the Advisers Act, §§ 80b-3(e)(4), 80b-3(e)(5), 80b-3(e)(6), and 80b-3(f).[4]

III. The Public Interest Requires that Nadel Be Permanently Barred from Association with a Broker, Dealer, or Investment Adviser

In determining what sanction to impose, the Court should be guided by the following factors, which overlap with the factors considered in the Report:

> (a) the egregiousness of the defendant's actions; (b) the isolated or recurrent nature of the infraction; (c) the degree of scienter involved; (d) the sincerity of the defendant's assurances against future violations; (e) the defendant's recognition of the wrongful nature of his conduct; and, (f) the likelihood that the defendant's occupation will present opportunities for future violations.

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[4] Collateral estoppel would bar any attempt by Nadel to attack either the legal or factual basis for the injunctions entered against him. *See John W. Lawton*, Rel. No. 3513, 2012 WL 6208750, at *5 (Dec. 13, 2012) (holding that respondent could not collaterally attack allegations in the Commission's federal complaint against him where he had consented to the entry of an injunction) *vacated in part on other grounds by John W. Lawton*, Rel. No. 4402, 2016 WL 3030847 (May 27, 2016); *Phillip J. Milligan*, Rel. No. 61790, 2010 WL 1143088, at *4 (Mar. 26, 2010) (affirming initial decision imposing a permanent bar on a respondent who had been enjoined from future violations of the securities laws: "We have repeatedly held that a respondent in a follow-on proceeding may not challenge the findings made by the court in the underlying proceeding and we consider those findings in determining the appropriate sanction."); *Michael Pattison*, Rel. No. 67900, 2012 WL 4320146, *7, nn. 38-39 (Sept. 20, 2012) (affirming initial decision imposing a bar under Rule 102(e) and noting that "[c]ourts have repeatedly upheld [the] principle" that a respondent charged under Exchange Act Section 15(b)(6)(A) is "not permitted to collaterally attack the underlying injunction or findings of the court" and collecting cases).

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), (citing *SEC v. Blatt*, 583 F.2d 1325, 1223 n.29 (5th Cir. 1978) (internal quotations omitted)). The *Steadman* factors should be used to determine whether a bar is appropriate. *See Lawton*, 2012 WL 6208750 at *10-13; *see also Tzemach David Netzer Korem*, Rel. No. 70044, 2013 WL 3864511, at *7, nn. 56-57 (July 26, 2013) (reiterating *Lawton*); *Alfred Clay Ludlum, III*, Rel. No. 3628, 2013 WL 3479060, at *5, n. 49 (July 11, 2013) (same).

Here, no genuine dispute can exist that the *Steadman* factors weigh heavily in favor of permanent bars, because Magistrate Tomlinson considered the same factors to determine that a permanent injunction and third-tier civil penalties were warranted, and these findings were not challenged by Nadel, and were adopted in their entirety by Judge Kuntz. *See David A. Zwick*, I.D. Rel. No. 336, 2007 WL 3119764, at *3 (Oct. 25, 2007) ("The District Court's conclusions following consideration of factors almost identical to those in *Steadman* are persuasive") (imposing bar).

First, the Report concluded that Nadel's conduct was egregious, and in particular that while Nadel was reaping millions of dollars in trading commissions and advisory fees through his deceit, he risked his clients' money, and caused them substantial losses when they sought to liquidate their holdings in the market. *Nadel II*, 2016 WL 639063 at *22-24. *Second*, the Report concluded that Nadel's conduct recurred over a period of more than three years and over thousands of communications and thousands of cross trades, *id.* at *8-9, 26. *See Richard J. Daniello*, 50 S.E.C. 42, 46 (1989) (four months of misappropriating employer's funds was not isolated). *Third*, the Report concluded that Nadel acted with a "high degree of scienter" both with respect to his lies about AUM but also with respect to the violative cross-trades and the false trade confirmations. *Nadel II*, 2016 WL 639063, *6-8.

Fourth, having observed Nadel's demeanor throughout his testimony, Magistrate Tomlinson concluded that Nadel "showed both indifference and a somewhat cavalier attitude regarding the underlying violations," *id.* at *9, "appeared dismissive," *id.*, "presented a similar lackluster attitude," and "back-pedaled" with respect to his prior sworn testimony. *Id.* at *10. Moreover, it is apparent even as late at the instant proceeding that Nadel continues to seek to minimize his egregious conduct, insisting, for example, that he did not intend to defraud his clients with respect to his unlawful cross-trading, *see* Ex. 6 at 2, despite the Report's conclusions to the contrary. *Nadel II*, 2016 WL 639063 at *6-9.

Fifth, the Report concluded that Nadel would be presented with an opportunity to repeat his misdeeds given his long history of involvement with the securities industry. *See id.* at *10. Indeed, given that Nadel has vowed in this proceeding to reenter the securities industry, Ex. 6 at 2; Ex. 7 at 1, it is clear that there is a danger that he will repeat his violations. This danger is particularly acute in the instant matter, given the belated, grudging and incomplete acknowledgment by Nadel of his wrongdoing, and his demonstrated willingness to attempt to deceive the Commission itself when acting in its regulatory oversight role: Nadel, after all, did not merely engage in a years-long fraud against his clients and prospective clients, but, as the Report also expressly found, sought to conceal his fraud, and its ongoing nature, from the Commissioner's examiners. *Nadel II*, 2016 WL 639063, at *7.

The securities industry presents many opportunities for abuse and overreaching, and its survival depends upon the integrity of its participants. The public interest is therefore best served by permanently barring from association with a broker, dealer or investment adviser those individuals whose honesty and integrity have been seriously impugned. In *Milligan*, for example, the Commission affirmed the ALJ's Initial Decision to enter permanent bars against a

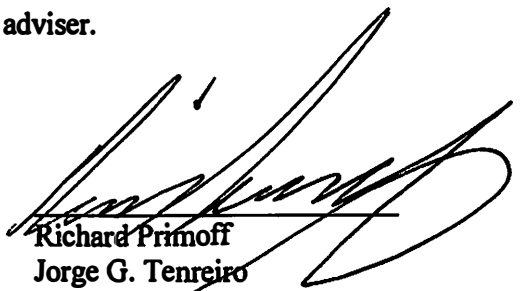
respondent, based in part on a Magistrate Judge's Report and Recommendation that made "strongly negative credibility findings with respect to Milligan's overall testimony based on the magistrate judge's personal observation of Milligan," 2010 WL 1143088 at *3, and concluded that "fidelity to the public interest requires a severe sanction when a respondent's misconduct involves fraud because the securities business is one in which opportunities for dishonesty recur constantly." *Id.* at *5 (internal quotation marks and citations omitted); *see also Ahmed M. Soliman*, Rel. No. 34-35609, 1995 WL 237220 (Apr. 17, 1995).

The same result is warranted here. Nadel's willful violation of the anti-fraud provisions of the securities laws reflects strongly against his fitness to associate again with a broker, dealer or investment adviser, and a bar against him is necessary to protect the investing public. Because no genuine dispute of fact exists regarding this matter, summary disposition is proper.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that its motion for summary disposition be granted and that the Court issue an order permanently barring Nadel from association with any broker, dealer or investment adviser.

Dated: June 16, 2017
New York, New York



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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **WARREN D. NADEL,** **Respondent**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING**

The Respondent ("NADEL"), due to financial circumstance is acting in the capacity as his own counsel. Every effort is being made to be in compliance with the format and content as prescribed by law and expected by the Court. A copy of the request for this administrative proceeding is included here.

IN ANSWER, the following is in response to a permanent injunction for NADEL not to be employed by a member of the securities industry -

It is understood that the purpose of a lifetime bar is to primarily protect the investing public from a potential negative influence that has the prospect of causing them harm. This can be accomplished in a somewhat different way and still allow NADEL to be penalized in this way and yet have the ability to work in the investment industry while protecting the investing public in much the same way. If a person has no license to practice in this industry they are precluded from effecting any transactions for clients or the firm for which they work. They are also precluded from speaking with any prospective or existing investors in a sales capacity. Expectedly they would be subjected to supervisory oversight and could be designated as someone to be given heightened supervisory oversight by a firm's compliance effort. They would be precluded from corresponding in any form with any existing or prospective client. In fact, they would be precluded from any activity that the SEC and the Court would find to place the investing public at any risk as this person's influence to effect any aspect of investing would be outside their purview of authority.

It is further believed that these restrictions accomplishes and achieves the spirit of that which the SEC and the Court seek without eliminating the individual's ability to attempt to gain employment in the only industry in which they have any knowledge. Clearly, NADEL will no longer be able to pursue employment in the area of securities trading, money management and sales for which NADEL is being fined and punished. Further, as a result of these restrictions being placed upon NADEL and while working with a securities firm having a compliance effort, there would be no realistic likelihood of any

recurrence of any future violations by NADEL. Additionally, NADEL will also promise to never violate any of the rules and regulations of the securities industry.

IN ANSWER, the following is in response to the prospective monetary punishment provided for the SEC in the document of judgment as provided by the Honorable William F. Kuntz, II (Decision & Order Re Nadel) -

In light of the magnitude of this punishment afforded the SEC by the Court, the fact remains that due the current and foreseeable financial circumstances of NADEL, it seems highly unlikely that any monetary reward could be paid. NADEL is willing to complete and provide the SEC with whatever information they require in this regard and is willing to swear to the accuracy and completeness of this document to be provided.

IN ANSWER, the following is in response to the SEC allegations as to their further consideration by the Court -

Various allegations were made previously during the Federal Court damages hearing of July 2015 and have already been adjudicated by the Court and were determined not to have been proven to the Court (Report and Recommendations of A. Kathleen Tomlinson, Magistrate Judge dated February 11, 2016).

Additionally, a Letter to Richard Primoff dated April 15, 2017 has been submitted in the spirit of completeness that, as the name implies, consists of a letter submitted directly to the SEC Prosecuting Attorney Richard Primoff by NADEL that was sent in an attempt to allow for the resolution to the issues in consideration of the Court's time and in the interest of a fair compromise that would lead to a more expeditious conclusion of this matter.

Respectfully submitted by the Respondent,

Warren D. Nadel

Enclosures

Cc: Brenda P. Murray
Chief Administrative Law Judge

Brent J. Fields, Secretary
Office of the Secretary

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E-mail: graubardj@sec.gov

June 27, 2017

Mr. Warren D. Nadel
[redacted]
Upper Brookville, NY [redacted]

Re: *Securities and Exchange Commission v. Warren D. Nadel, et al.*, 2:11-cv-00215-WFK-AKT (E.D.N.Y.); Letter of March 20, 2017

Dear Mr. Nadel:

On March 20, 2017, the Securities and Exchange Commission sent you three letters, care of your counsel, Samuel J. Lieberman, Esq., seeking collection on the Final Judgments entered against you, Warren D. Nadel & Co. ("WDNC") and Registered Investment Advisers, LLC ("RIA"), on January 20, 2017. Copies of the March 20 letters are enclosed.

The Commission was not aware at the time that it sent those letters that you had a pending bankruptcy case, *Warren Douglas Nadel*, 8:16-bk-74145-AST (E.D.N.Y.), because you did not name the Commission as a creditor in this action, and it therefore did not receive any notice that it had been filed.

Since the automatic stay was in effect on March 20 and it remains in effect, the Commission is withdrawing its March 20 letter directed to you individually. The letters to WDNC and RIA (and to Katherine Nadel) remain in effect, as they have not filed for relief under the Bankruptcy Code.

Very truly yours,

John J. Graubard
Senior Trial Counsel

Enclosures

cc: Marc A. Pergament, Esq.
Stan Yang, Esq.
Robert L. Pryor, Esq.
Samuel J. Lieberman, Esq.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
200 Vesey Street, Brookfield Place, Room 400
New York, New York 10281-1022

John J. Graubard
Senior Trial Counsel

Phone: 212-336-0084
E-mail: graubardj@sec.gov

March 20, 2017

Mr. Warren D. Nadel
c/o Samuel Jay Lieberman
Sadis & Goldberg LLP
551 Fifth Avenue, 21st Floor
New York, NY 10176

Re: Past due amount: $14,070,389.19 (plus additional interest, late payment penalties, and collection fees as allowed by law).
Date amount became past due: February 6, 2017
Securities and Exchange Commission v. Warren D. Nadel, Warren D. Nadel & Co., Registered Investment Advisers, LLC and Katherine Nadel
Case No. 11 CV 215 (WFK)(AKT) EDNY

REPLY DATE: May 19, 2017

Dear Mr. Nadel:

You have not paid the amounts ordered in the above-captioned proceedings. A copy of the order or judgment entered against you in the proceedings is enclosed. If you do not pay the required amounts, or if you do not take other action described in this letter before the Reply Date given above, the Commission may seek to collect the amounts you owe by taking any or all of the measures described in this notice.

Providing you with this notice does not prevent the Commission from seeking to collect the amounts you owe by using any other means permitted by law. We will continue to add interest, late payment penalties and collection fees to unpaid amounts, as allowed by law. Should your debt be transferred to the U.S. Department of the Treasury (U.S. Treasury) or the Department of Justice for collection or to a private collection agency or attorneys, the amount that you owe will increase substantially.

TREASURY OFFSET PROGRAM

The Securities and Exchange Commission intends to seek collection of the debt described above through the Treasury Offset Program (TOP).

- Once the amounts you owe are submitted to TOP, the U.S. Treasury will reduce any Federal, State, or other eligible payments due to you up to the total amount owed. This process, known as "offset," is authorized by the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996. The U.S. Treasury is not required to send you any further notice before a payment is offset.

Payments eligible for offset include any amounts due to you in the form of:

- income tax refunds;
- Federal salary, including military pay;
- Federal retirement payments, including military retirement pay;
- contractor/vendor payments;
- certain Federal benefit payments, such as Social Security, Railroad Retirement (other than tier 2), and Black Lung (part B) benefits (as permitted by law); and
- any Federal, State, or other payment that is not exempt from offset.

A. NOTICE OF RIGHTS PRIOR TO TOP

Before we submit the amounts you owe to TOP:

- You may pay the amounts owed in full. To pay:
  - send a letter identifying the case title, action number, and your name, along with a check or money order payable to Securities and Exchange Commission for the full amount that you owe to: Office of Financial Management, Securities and Exchange Commission, Enterprise Services Center HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; or
  - if the attached order or judgment requires payment to a payee other than the Securities and Exchange Commission, send a check or money order to that payee as directed by the order.

  Send a copy of your check or money order to the undersigned.
  - you may also transmit payment electronically to the Securities and Exchange Commission directly from a bank account via pay.gov through the SEC website at Http://www.sec.gov/about/offices/ofm.htm.
- You may agree to a payment plan: If you are unable to pay the amounts you owe in full, you may contact the Office of Collections, Division of Enforcement, at (202) 551-4923, agree to a payment plan acceptable to the Commission, and make payments required by the payment plan.
- You may request a review of the amounts owed:

- You may obtain a copy of documents in the possession of the Commission that show payments recorded in connection with the amounts owed.

- You may request that the Commission review the amounts owed if you believe that all or any portion of the amount we intend to submit to TOP has been paid or that the amounts have been otherwise discharged (e.g., as the result of bankruptcy proceedings). However, no attempts to reargue or collaterally attack the findings that resulted in the order will be considered.

- You may be entitled to an oral hearing as part of the review, but only if the Commission decides, within its discretion, that a determination of the validity of the amounts we intend to submit to TOP cannot be resolved by review of the documentary evidence.

- You must request a review, and provide evidence you believe relevant to a determination, by the Reply Date stated in this letter. If you do not do so, the Commission will proceed to seek collection through TOP. However, this letter does not prevent the Commission from taking action to effect an offset sooner, to the extent permitted by law.

Any request for a review must be submitted in writing to: Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549, with a copy to the undersigned.

B. ADDITIONAL TOP INFORMATION

IF YOU ARE A FEDERAL EMPLOYEE:

- Your current net disposable pay is subject to offset if you do not pay your debt or take other action described above. Under TOP, the U.S. Treasury will deduct up to 15% of your disposable net pay beginning in the pay period that your debt is submitted to TOP, and continuing every pay period until your debt, including interest, penalties and other costs, is paid in full.

- If you wish to petition for a waiver or hearing to dispute the existence or amount of the debt, or the amount of the payroll deduction, you must file a written request for a hearing no later than 15 days from the date of this letter. The timely filing of a petition for hearing will stay the commencement of offset proceedings. A final decision on the hearing (if one is requested) will be issued no later than 60 days after the filing of a petition requesting the hearing (unless extended by the hearing official).

IF YOU FILE A JOINT INCOME TAX RETURN: If you file a joint income tax return, you should contact the Internal Revenue Service before filing your return regarding the steps to take to protect the share of the income tax refund that may be payable to your spouse, if your spouse does not also owe delinquent amounts to the U.S. Government.

SUPPLEMENTAL INFORMATION

IF YOU ARE EMPLOYED BY A NON-FEDERAL EMPLOYER: The Commission, or the Department of the Treasury acting on behalf of the Commission, may issue an administrative wage garnishment order that will require your employer to withhold up to 15% of your disposable pay. You will receive additional notification if the Commission or Treasury determines to seek wage garnishment.

BANKRUPTCY: If you filed for bankruptcy, you are not subject to offset while the automatic bankruptcy stay is in effect. Please notify us of the stay by sending evidence concerning the bankruptcy to Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C., 20549.

DISCLOSURE TO CREDIT BUREAUS: The Commission may disclose to consumer reporting agencies: information necessary to establish your identity, including: your name, address and social security number; the amount, status and history of the debt; and the law enforcement program under which the debt arose. Disclosure may be made after the reply date stated above unless you pay the debt in full, enter into a payment agreement acceptable to the Commission, or present evidence that all or any portion of the debt has been paid or otherwise discharged as described in the Notice of Rights Prior to TOP set forth above.

TRANSFER TO THE DEPARTMENT OF THE TREASURY OR THE DEPARTMENT OF JUSTICE FOR COLLECTION, AND TO PRIVATE COLLECTION AGENCIES OR ATTORNEYS: Delinquent debts may be transferred to the Department of the Treasury's Financial Management Service for appropriate collection action, including assignment to private collection agencies. Debts may be referred to the Department of Justice for litigation or other collection action. The Commission may also refer debts to private collection agencies or private attorneys for collection.

INTEREST, PENALTIES AND FEES: Unpaid amounts imposed in the Commission's civil actions may be increased by interest authorized by 28 U.S.C. § 1961. Unpaid amounts imposed in the Commission's administrative proceedings may be increased by interest authorized by 17 C.F.R. § 201.600, or, if a civil penalty is imposed, as authorized by 31 U.S.C. § 3717. When a debt is referred to the Department of the Treasury for collection though TOP, or transferred to Treasury, Justice, a private collection agency or a private attorney for collection, additional fees and late payment penalties may be imposed as authorized by law.

IRS REPORTING OF FORGIVEN DEBTS: If the Commission determines that all or any portion of a debt is uncollectible, or enters into an agreement with you to accept less than the full amount in satisfaction of the debt, the unpaid portion of the debt may be reported to the IRS as taxable income to you.

REFUNDS: Unless prohibited by law or contract, we will promptly refund to you any amounts paid by you or deducted from federal payments due to you which are later waived or found not owed to the United States.

FALSE STATEMENTS: If you make or provide any knowingly false or frivolous statements, representations, or evidence, you may be liable for criminal penalties under 18 U.S.C. §§ 1001, and 1002, or other applicable statutes. and, if you are a federal employee, you may be subject to disciplinary actions for such statements, representations or evidence.

If you have any questions about this letter or your rights, you should contact the Office of Collections, Division of Enforcement, at (202) 551-4923 immediately.

Very truly yours,

John J. Graubard
Senior Trial Counsel

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	
-against-	
	11 Civ. 0215 (WFK) (AKT)
WARREN D. NADEL, WARREN D. NADEL & CO., and REGISTERED INVESTMENT ADVISERS, LLC	ECF Case
Defendants	
-and-	
KATHERINE NADEL,	
Relief Defendant.	

~~[PROPOSED]~~ FINAL JUDGMENT AS TO WARREN D. NADEL

WHEREAS, on March 31, 2015, the Court issued a Decision and Order [DE 100], granting Plaintiff Securities and Exchange Commission ("Plaintiff or "Commission") partial summary judgment against defendant Warren D. Nadel ("Defendant"), holding him liable for violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rules 10b-5 and 10b-10 thereunder, Section 17(a) of the Securities Act of 1933, and Sections 206(1), 206(2) and 206(3) of the Investment Advisors Act of 1940 [DE 71]; and directing U.S. Magistrate Judge A. Kathleen Tomlinson to hold a hearing on relief consistent with its Decision and Order ("2015 Order"); and

WHEREAS, on February 11, 2016, after a hearing (held July 20-23, 2015), Judge Tomlinson issued a Report and Recommendation [DE 128] (the "Report"), recommending that the Court order against Defendant (1) permanent injunctive relief; (2) $10,776,687.62 in

disgorgement, jointly and severally with Defendants Warren D. Nadel & Co. and Registered Investment Advisers, LLC; (3) prejudgment interest, jointly and severally with Defendants Warren D. Nadel & Co. and Registered Investment Advisers, LLC (to be recalculated based upon the deduction of $183,026.68 from the disgorgement amount, for the reasons stated in the Report); and (4) a $1,000,000 third-tier civil penalty; and

WHEREAS on September 9, 2016, the Court issued a Decision and Order [DE 133] (the "2016 Order"), adopting the Report in its entirety and directing Plaintiff to submit a revised prejudgment interest calculation (as set forth in the Report); and

WHEREAS on September 15, 2016, Plaintiff filed with the Court its revised calculation of prejudgment interest (of $2,293,701.57) [DE 134], which the Court endorsed on September 23, 2016 [DE 135] ("Endorsement"); and

WHEREAS the 2015 Order, Report, 2016 Order and Endorsement are incorporated by reference into this judgment as if fully set forth herein,

NOW THEREFORE

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Sections 206(1), 206(2) or 206(3) of the Investment Advisors Act of 1940 [15 U.S.C. §§ 80b-6(1), (2) and (3)], by using the mails or any means or instrumentality of interstate commerce, while engaged in the business of advising others for compensation as to the advisability of investing in, purchasing or selling securities:

(a) to employ any device, scheme, or artifice to defraud any client or prospective client; or

(b) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; or

(c) acting as a principal for his own account; knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who

receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from aiding and abetting any violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-10 [17 C.F.R. § 240.10b-10], thereunder by, by using the mails or any means or instrumentality of interstate commerce, knowingly or recklessly providing substantial assistance to any broker or dealer who effects for or with an account of a customer any transaction in, or induces the purchase or sale by such customer of, any security (other than U.S. Savings Bonds or municipal securities) without providing the information required under Rule 10b-10(a)(1) and (2).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $10,776,687.62, jointly and severally with Defendants Warren D. Nadel & Co. and Registered Investment Advisers, LLC, representing profits gained as a result of the conduct alleged in the Amended Complaint, together with prejudgment interest thereon in the amount of $2,293,701.57, for a total of $13,070,389.19. Defendant shall satisfy this obligation

by paying $13,070,389.19 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Warren D. Nadel as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment

interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay a civil penalty in the amount of $1,000,000 to the Securities and Exchange Commission pursuant to Section 20(d) of the Securities Act, Section 21(d) of the Exchange Act and Section 209(e) of the Advisors Act. Defendant shall make this payment within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Warren Nadel as a Defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part

of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Defendant shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the allegations in the Complaint are deemed true as to Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: 1/20, 2017

s/WFK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **-against-** **WARREN D. NADEL,** **WARREN D. NADEL & CO., and** **REGISTERED INVESTMENT ADVISERS, LLC,** **Defendants.** **-and-** **KATHERINE NADEL,** **Relief Defendant.**	**No. 11-CV-0215 (WFK)(AKT)** **ORAL ARGUMENT REQUESTED**

DEFENDANTS' OBJECTIONS TO THE REPORT AND RECOMMENDATION REGARDING REMEDIES

SADIS & GOLDBERG LLP
Samuel J. Lieberman
551 Fifth Avenue, 21st Floor
New York, NY 10176

Counsel for Defendants Warren D. Nadel, Warren D. Nadel & Co., Registered Investment Advisers, LLC and Relief Defendant Katherine Nadel

March 8, 2016

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PRELIMINARY STATEMENT

Defendants object to the Magistrate Judge's Proposed Report and Recommendation (the "Report") for incorrectly calculating disgorgement against the Defendants and the innocent Relief Defendant, Ms. Nadel. In particular:

- The Report incorrectly refuses to subtract $2,256,544.54 in principal trading losses in calculating disgorgement. It incorrectly concludes that "principal trades" resulting in losses "were not charged against defendants in the first instance, nor were they factored into the Commission's calculation of disgorgement." (Report at 28.) But these losses are from *the exact same trades* Plaintiff included as ill-gotten gains in calculating disgorgement. Plaintiff's own witness admitted this, as do its Exhibits 4 through 7.

- Because the $2,256,544.54 of principal trading losses are from the exact same trades included in the Report's disgorgement calculation, they should be subtracted as "part and parcel of the same scheme." *S.E.C. v. McCaskey*, 2002 WL 850001, at *4 (S.D.N.Y., Mar. 26, 2002). Indeed, these trades occurred during the same time period – and often the same day – as the principal trading gains the Report included in disgorgement. Thus, refusing to subtract the $2,256,544.54 in losses is improper cherry-picking.

- The Report incorrectly finds that $2,885,269 of broker's commissions paid to three other brokers (not Defendants) should be included in disgorgement. These are transaction-based fees paid to other brokers for serving as clients' financial advisers. The Report ignores clear authority in this Circuit holding that commissions paid out "to third-party brokers" should "be deducted from any ... commissions disgorged as profit." *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990).

- The Report errs in failing to subtract $553,063.37 that Defendants repaid Polycom. Polycom admitted this amount was "paid back" by the Defendants. (Hrg. Tr. at 341:7-23.) This repayment necessarily reduced the ill-gotten gains Defendants received from the alleged wrongdoing. Thus, including it in disgorgement would be tantamount to improperly requiring Defendants to pay this amount twice.

- The Court should exercise its discretion to reject disgorgement against Relief Defendant Ms. Nadel, because she has a legitimate claim to her salary and other income based on significant work as Chief Operating Officer of WDNCO, and for RIA. The total disgorgement of $807,346.10 is equivalent to reasonable and legitimate annual compensation of $269,115 from 2007-09. At the very least, disgorgement should be subtracted by Ms. Nadel's total WDNCO base salary of $141,666 for this period.

The $5,813,052.13 trading losses, commissions, transaction costs and repayments identified herein were not kept as profit. Thus, they should be subtracted from disgorgement.

LEGAL STANDARDS

A district court reviewing a Report and Recommendation from a Magistrate Judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636. The "de novo review of the record," includes both "the Magistrate Judge's findings of fact and conclusions of law." *Golden Pac. Bancorp v. F.D.I.C.*, 1997 WL 626374, at *1 (S.D.N.Y. Oct. 7, 1997) (rejecting Magistrate Judge's report and referring for further findings). As the Supreme Court has held, Congress has "provided that the magistrate's proposed findings and recommendations shall be subjected to a de novo determination." *U.S. v. Raddatz*, 447 U.S. 667, 681-82 (1980).

Disgorgement "is an equitable remedy," which requires a defendant to give up *only* "the amount by which he was unjustly enriched." *S.E.C. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014). Because disgorgement is equitable, "the disgorgement amount may not exceed the amount obtained through the wrongdoing." *Id.*

"Courts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs, such as brokerage commissions," and clearing charges, which "plainly reduce the wrongdoer's actual profit." *S.E.C. v. McCaskey*, 2002 WL 850001, at *4 (S.D.N.Y. March 26, 2002); *accord S.E.C. v. E. Delta Res. Corp.*, 2012 WL 3903478, at *6 (E.D.N.Y. Aug. 31, 2012) ("subtracting broker commissions"). Disgorgement should be reduced by trading losses "incurred incidental to, and as part and parcel of, the intended scheme." *McCaskey*, 2012 WL 850001, at *7. Also, disgorgement should be "offset" by amounts a defendant "has repaid" to victims. *Disraeli v. S.E.C.*, 334 F. App'x 334, 335 (D.C. Cir. 2009) (citing *S.E.C. v. Palmisano*, 135 F.3d 860, 864 (2d Cir. 1998)).

ARGUMENT

I. DISGORGEMENT SHOULD BE REDUCED BY $2,256,644.54 IN LOSSES FROM PRINCIPAL TRADES THAT PLAINTIFF'S OWN WITNESS AND EXHIBITS INCLUDE AS PART OF THE DISGORGEMENT CALCULATION

The Report's disgorgement amount should be reduced by $2,256,644.54 in Defendants' losses from principal trades that are part of Plaintiff's disgorgement calculation. Importantly, Plaintiff's disgorgement calculation (and thus, the Report's) expressly includes allegedly ill-gotten gains from these *exact same principal trades*. And these same trades are included as part of the same scheme of alleged wrongdoing as the set of trades involving $2,143,129.75 of principal trading gains that the Report includes as disgorgement. (*See* Report at 23; Pl.'s Exs. 4-7.) Thus, the Report's finding that the losing "principal trades were not charged against defendants in the first instance, nor were they factored into the Commission's calculation of disgorgement" (at 28) is incorrect.

First, Plaintiff's witness Mr. Fioribello admitted that the losing trades are included in Plaintiff's disgorgement calculation. Plaintiff included disgorgement of *all* commissions received from *all* principal trades, including those involving $2,256,644.54 in trading losses. Mr. Fioribello admitted Plaintiff's Exhibits ("PX") 4 and 5 seek disgorgement of all commissions from *all principal trades* executed by Defendants during the relevant time period:

> "Q Let's come back. Just to be clear. On Exhibit 4, let's go back, at the bottom -- if we go at the bottom of the chart. Okay? You totaled up all the commissions on all the principal trades. Is that correct?
>
> A Yes.
>
> Q But you did not total up all the profit and loss on all the principal trades. Isn't that correct?
>
> A Correct.

Q And on Exhibit 5, the same thing. You totaled up all the commissions for the principal trades.

A Yes.

Q And, again, you did not total up the profit and losses on all the principal trades.

A Correct.

Q Isn't it true that if you had done so, sir, if you had done so, the total profit loss on the principal trades you considered would have been a total loss? Isn't that true?

A I believe by looking at the stipulation, stipulated numbers, the losses were slightly larger than the profitable trades, principal trades.

Q So the answer to my question is yes, if you added up all the profit and loss on all the principal trades and you put them all together you would end up with a total loss. Isn't that correct?

A Correct." (Hrg. Tr. at 227:10-228:11.)

Accordingly, the Report's conclusion that the losing principal trades were not "factored into the Commission's calculation of disgorgement" (Report at 28) is incorrect and should be rejected. Plaintiff did include all of the principal trades by Defendant in its disgorgement calculation – including those involving $2,256,644.54 in trading losses. But Plaintiff only included the losing trades for purposes of *adding the commissions* earned on them *without subtracting the trading losses from the exact same trades.*

As Mr. Fioribello admitted when asked point-blank whether he included commissions on the groups of losing principal trades in his disgorgement figure:

"Q Just to be clear. You did include those commissions in this disgorgement. They are a subset of what you included is this report?

A Just to be clear, I have included them once...." (Hrg. Tr. at 229:19-22)

Mr. Fioribello admitted this again, just a few lines later:

"Q So you included the commissions on all of the principal transactions once?

A Yes.

Q And you -- and on zero times did you include the losses on the principal transactions. You never did. You never included that?

A Correct. I wasn't instructed to do so."[1] (Hrg. Tr. at 230:3-7.)

Notably, Mr. Fioribello admitted there was no basis for excluding the principal trades involving $2,256,644.54 in trading losses from his calculation of principal trading profits, "besides just the fact that there was a loss." (Hrg. Tr. at 224:14-17.) This proves that Plaintiff is trying to have its cake and eat it too. Plaintiff seeks to include the losing principal trades where it would increase disgorgement (through commissions), while excluding the exact same trades where it would reduce disgorgement (through trading losses). The Report proposes letting Plaintiff do that. This is improper, and the Report's refusal to subtract disgorgement by $2,256,644.54 in trading losses should be rejected.

Second, the Report's refusal to subtract $2,256,644.54 in principal trading losses is particularly misguided because Defendants' principal trading losses were part of the same scheme – and occurred at the same time – as the profitable principal trades. The principal trades involving $2,256,644.54 in trading losses occurred during the same period, January 1, 2007 through December 31, 2009, as the profitable principal trades

[1] The Court can further confirm this from a brief review of Plaintiff's Exhibits. Exhibit 4 includes 62 groups of principal trades for purposes of calculating disgorgement of commissions from principal trades from January 1, 2007 through February 29, 2008. (PX4.) Yet Plaintiff's Exhibit 6, which analyzes "Mark-Ups/Mark-Downs on Principal Trades" for the same time period, includes only 20 groups of principal trades – the same 20 identified as groups 1-20 in Exhibit 4. (PX6.) Similarly, Plaintiff's Exhibit 5 includes 97 groups of principal trades for purposes of calculating disgorgement of commissions from principal trades from March 1, 2008 through December 31, 2009. (PX5.) Yet Plaintiff's Exhibit 7, which analyzes "Mark-Up/Mark-Downs on Principal Trades" for the same time period, includes only 47 groups of principal trades – the same groups identified as nos. 1-47 on Plaintiff's Exhibit 5. (PX7.) The right-hand column of Plaintiff's Exhibits 4-7 shows why: Plaintiff included in its commissions disgorgement - but excluded from its profit-loss disgorgement – those principal trades where there was a negative "Difference in Average Price of Buys and Sells," *i.e.*, the principal trades on which there was a loss. (PX4-7.)

included in the Report's proposed disgorgement. (Report at 23; PX4-7.) Indeed, many of the profitable and losing principal trades occurred *on the same day.*

Specifically, as shown in note 1 above, the profitable groups of principal trades can be identified on Plaintiff's Exhibits 4 and 5 as the groups of trades with a positive value for the right-hand column "Difference in Average Price of Buys and Sells." (PX4-1-2 (groups 1-20); PX5-1-5 (groups 1-47).) And the losing principal trades are the groups of trades with a negative value for the same column. (PX4-2-5 (groups 21-62); PX5-5-9 (groups 48-97).) Using this approach, it is plain that many of the losing principal trading that the Report excluded from disgorgement occurred on the same day as profitable principal trades that were included.

For example, Plaintiff included in its disgorgement calculation principal trading profits from at least 10 groups of trades that occurred on June 18, 2007. (*Compare* PX 4-1-2 (groups 1, 3-5, 7-10, 12, 17-18), *with* PX6-1-2 (principal trading profit chart including same groups).). But Plaintiff excluded principal trading losses from *at least nine* groups of Defendants' principal trading that occurred on the same day, June 18, 2007. (*Compare* PX4-3-6 (groups 36, 42, 51, 54, 57, 59- 62), *with* PX6 (excluding all of these groups).) Similarly, Plaintiff included principal trading profits in its disgorgement calculation for at least one group of trades on September 18, 2007. (*Compare* PX4-2 (group 15), *with* PX6-2 (same).) Yet Plaintiff excluded principal trading losses from at least 10 groups of principal trades on September 18, 2007. (*Compare* PX4-2-5 (groups 23, 27-29, 31, 33-34, 37, 47, 52), *with* PX6 (not including these groups).)

Indeed, Plaintiff followed the same improper cherry-picking approach for the large majority of its principal trading profit disgorgement calculation, including on multiple groups of trades on July 10, 2007; November 5, 2007; March 24, 2008; June 24, 2008; December 29, 2008;

April 24, 2009; May 18, 2009; August 24, 2009; and October 15, 2009.[2] This is the type of blatant cherry-picking that was rejected as forbidden in *S.E.C. v. McCaskey*, 2002 WL 850001, at *4 (S.D.N.Y., Mar. 26, 2002).

In *McCaskey*, the Court rejected an almost identical argument from the S.E.C. that disgorgement should include only *profits* from "sixteen days" of wrongful trading out of a "more than six-month manipulation scheme." *Id.* at *7-*8. The Court held it was improper to include the sixteen days of improper trading profits without offsetting profits against *losses* on other days during the six month period of the alleged "unitary scheme." *Id.* Importantly, the Court held that it "would ignore reality to arbitrarily separate the [losing] trades from the sixteen days of [profitable] sales." *Id.; see also S.E.C. v. Shah*, 1993 WL 288285, at *5 (S.D.N.Y. July 28, 1998) (subtracting costs "consistent with the view...that disgorgement is not a penalty..., but merely a means of divesting a wrongdoer of ill-gotten gains.")

This case is even more egregious than *McCaskey*, because here the S.E.C. is attempting to include principal trading profits in disgorgement without even offsetting those profits against trading losses *on the same day*. As in *McCaskey*, it "would ignore reality to arbitrarily separate the [losing] trades" from profitable principal trading on the same relevant period and, in many cases, the same day. 2002 WL 850001, at *7-*8. *McCaskey* should govern. Strikingly, the

[2] For July 10, 2007, *compare* PX4-1-2 (groups 2, 14) *and* PX6 (including same), *with* PX4-3-5 (groups 35, 41, 58) *and* PX6 (excluding the same groups). For November 5, 2007, *compare* PX4-1-2 (groups 16, 19) *and* PX6 (including same), *with* PX4-2 (groups 22, 44, 48) *and* PX6 (excluding the same groups). For March 24, 2008, *compare* PX5-3-4 (group 18, 30) *and* PX7 (including same), *with* PX5-6-7 (groups 64-65, 77, 80) *and* PX7 (excluding the same groups). For June 24, 2007, *compare* PX5-2 (groups 8, 12) *and* PX7 (including same), *with* PX5-7, 5-9 (groups 67, 90, 92), *and* PX7 (excluding the same groups). For December 29, 2008, *compare* PX5-2, 5-4 (groups 7, 32) *and* PX7 (including same), *with* PX5-6, 5-9 (groups 60, 93) *and* PX6 (excluding the same groups). For April 24, 2009, *compare* PX5-1, 5-5 (groups 1, 40) *and* PX7 (including same), *with* PX5-9 (group 97) *and* PX6 (excluding the same group). For May 18, 2009, *compare* PX5-2, 5-4 (groups 15, 19, 21-22) *and* PX7 (including same), *with* PX5-6-9 (groups 62, 73-74, 85, 89) *and* PX6 (excluding the same groups). For August 24, 2009, *compare* PX5-1, 5-4 (groups 5, 13) *and* PX7 (including same), *with* PX5-8 (group 81) *and* PX6 (excluding the same group). And for October 15, 2009, *compare* PX5-1 (group 3) *and* PX7 (including same), *with* PX5-9 (group 96) *and* PX6 (excluding the same group).

Report fails to cite a single case supporting its position to the contrary. Thus, the Report's conclusion lacks both factual and legal support.

Third, the Report's refusal to subtract principal trading losses is incorrect because it is undisputed that Defendants had larger total principal trading losses than gains. In fact, Plaintiff stipulated to this fact. (July 17, 2015 Stip. of Facts ¶ 4 (stipulating to $2,256,644.54 in principal trading losses, and just $2,143,129.75 in principal trading profits).) And Plaintiff's witness, Mr. Fioribello, admitted this fact as well. (Hrg. Tr. at 227:10-228:1.)

Accordingly, Defendants' principal trading challenged in this case was thus not a source of trading gains for him – and thus should not be the subject of disgorgement. The Report's refusal to subtract Defendants' $2,256,644.54 in principal trading losses should be rejected.

II. DISGORGEMENT SHOULD BE REDUCED BY AT LEAST $2,885,269 IN COMMISSIONS PAID TO OTHER BROKERS WHO ALSO SERVED AS FINANCIAL ADVISERS TO CERTAIN CLIENTS

The Report incorrectly concludes (at 29-32 & n. 13) that $2,885,269 of broker's commissions paid to three other brokers besides Defendants should be included in disgorgement. These payments were transaction-based commissions to other brokers for serving as financial advisers to clients. It is undisputed that these commissions were not kept by Defendants, but instead were paid to other brokers, including Hal Pasetsky, Nate Allen of Deutsche Bank, and Joe Saxton of Brookstreet and JP Turner & Co. (July 17, 2015 Stip. of Facts ¶ 5 (Pasetsky paid $2,666,486.25 as a percentage of commissions and advisory fees); DX103 at NADEL 453563, 453575-80; 453666-78 (N. Allen and J. Saxton commissions totaling $218,783.33).) Thus, such broker's commissions should be subtracted because they are not Defendants' ill-gotten gains.

Indeed, it is well-established that transaction costs such as brokerage commissions and clearing charges should be reduced from any disgorgement award. *McCaskey*, 2002 WL

850001, at *4. In particular, "Courts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs, such as brokerage commissions, that plainly reduce the wrongdoer's actual profit." *S.E.C. v. East Delta Res. Corp.*, 2012 WL 3903478, at *6 (E.D.N.Y. Aug. 31, 2012).[3] Courts outside this Circuit apply the same approach. *See, e.g., S.E.C. v. Berlacher*, 2010 WL 33566790, at *15 (E.D. Pa., Sept. 13, 2010) (subtracting disgorgement profit by "premiums paid" on options transactions because it "most accurately represent[s] the amount by which [defendant] was unjustly enriched").

In *East Delta Resources*, this Court rejected the S.E.C.'s request to add "brokerage commissions to the award of disgorgement," and instead calculated disgorgement "[a]fter subtracting broker commissions." 2012 WL 3903478, at *6. The Court reasoned that subtracting broker commissions from disgorgement is proper because they are paid incidental to transactions, and otherwise the defendant would effectively be paying the commission twice. *Id.; S.E.C. v. Shah*, 1993 WL 288285, at *5 (S.D.N.Y. July 28, 1998) (subtracting broker commissions "consistent with the view ... that disgorgement is not a penalty ..., but merely a means of divesting a wrongdoer of ill-gotten gains.")

Accordingly, *East Delta Resources*, *McCaskey* and the many cases subtracting broker's commissions weigh strongly in favor of the Court rejecting the Report's refusal to subtract $2,885,269 of broker's commissions paid to three other brokers besides Defendants. In contrast,

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[3] *Accord S.E.C. v. Universal Express*, 646 F.Supp.2d 552, 564 (S.D.N.Y.) (same); *McCaskey*, 2002 WL 85001, at *4 (same); *S.E.C. v. Rosenfeld*, 2001 WL 118612 at *2 (S.D.N.Y. Jan. 9, 2001) (court should "deduct from the defendant's gross profits expenses incurred ... including ... transaction costs such as brokerage commissions"); *C.F.T.C. v. Avco Fin. Corp.*, 1998 WL 524901, at *1 (S.D.N.Y. Aug. 21, 1998) (subtracting costs including "large amounts of money in advertising, as well as substantial overhead costs for rent, utilities, telephone systems, postage, etc."); *Shah*, 1993 WL 288285, at *5 (offsetting "broker's commissions"); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 734 F. Supp. 1071, 1077 (S.D.N.Y.1990) ("[T]ransaction costs such as brokerage commissions incurred ...in executing trades in ... securities should be deducted from any fees and commissions disgorged as profit."); *S.E.C. v. Thomas James Assocs.*, 738 F. Supp. 88, 92 (W.D.N.Y. 1990) (subtracting "expenses includ[ing], for example, commissions, telephone charges, underwriting expenses and a proportionate share of overhead."); *S.E.C. v. World Gambling Corp.*, 555 F. Supp. 930, 934-35 (S.D.N.Y. 1983) (subtracting "transfer taxes").

the Report is misguided in proposing that the commissions should not be subtracted because they involved "third-party" brokers who did not execute the transactions at issue. (Report at 31-32.) But the heavy weight of case law requiring subtraction of broker's commissions does not rely who executed a transaction. Rather, these cases rely on the commissions being paid incidental to transactions, and on the fact that subtracting the commissions from disgorgement is necessary to avoid penalizing a defendant by forcing him to effectively pay the same commission twice. *See, East Delta Resources*, 2012 WL 3903478, at *6.

Indeed, the Report's proposal not to subtract third-party broker commissions is directly contradicted by *Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb Inc.*, which held that commissions paid out "to third-party brokers" should "be deducted from any ... commissions disgorged as profit." 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990). In *Litton*, the defendants "earned $42,181.29 in fees and commissions from the purchase and sale of Itek securities" in violation of securities laws. *Id.* But the Court held that amount should be reduced because the defendants "paid $16,294.02 in commissions to third-party brokers." *Id.* The Court reasoned that "[t]o require disgorgement of all fees and commissions without permitting a reduction for associated expenses and costs constitutes a penalty assessment and goes beyond the restitutionary purpose of the disgorgement doctrine." *Id.*

Litton is directly on point and should govern. Just like in *Litton*, the Defendants here earned the advisory fees and broker's commissions at issue. But, just like in *Litton*, Defendants had to pay out a percentage of those fees and commissions (here $2,885,269) to "third-party brokers" as a percentage of transactions and advisory fees as "associated expenses and costs" of the commissions. *Id.* Accordingly, just like in *Litton*, Defendants' commissions paid to "third-

party brokers" should reduce disgorgement to avoid "a penalty assessment" that "goes beyond the restitutionary purpose of the disgorgement doctrine." *Id.*

Further, the overwhelming evidence shows these commissions paid to Messrs. Pasetsky, Allen and Saxton were broker's commissions. Each broker was identified as a broker for a number of Defendants' clients. (*See* PX186-1-3, 5-15, 33 (trade confirmations identifying "Hal Pasetsky" as "Your Financial Consultant"); Hrg. Tr. at 240:1-4 (identifying "Nathan Allen from Deutsche Bank" as a financial advisor related to the investment); DX103 at NADEL 453563, 453575-80; 453666-78 (records of commissions to N. Allen and J. Saxton, Brookstreet/JPTurner totaling $218,783.33).) And each broker was paid transaction-based fees based on a percentage of broker's commissions and advisory fees received by Defendants. (July 17, 2015 Stip. of Facts ¶ 5 (Pasetsky); DX103 at NADEL 453563, 453575-80; 453666-78 (same for Allen and Saxton).)[4] Thus, their broker's fees are indistinguishable from the "third-party brokers" fees and commissions required to be subtracted in *Litton*. 734 F. Supp. at 1077.

Moreover, any suggestion otherwise by Plaintiff is litigation-driven, since it is contradicted by Plaintiff's own ruling *In the Matter of Ranieri P'ers*, Adm. Pro. File No. 3-15234, 2013 WL 873219, at *1-*3 (S.E.C., Mar. 8, 2013), *available at* https://www.sec.gov/litigation/admin/2013/34-69091.pdf. In *Ranieri Partners*, the S.E.C. held that a person who solicited investments in a fund for a commission of "1% of all capital commitments made to the [] Fund[]" by investors he introduced, was "engaged in the business of effecting transactions in securities . . . as a broker or dealer." *Id.* at *1, *3. The S.E.C. held that the "1%" commission was "transaction-based compensation" that required the person to register

[4] *See also* Hrg. Tr. at 753:17-762:16 (testimony that these payments were broker's commissions); DX100 at NADEL207-42 (calculations of monthly Pasetsky commissions); DX101 at 9"4, 12:19-13:21(Pasetsky testimony that he was a licensed securities broker and paid a "commission" of "35 percent of both the management fee and commissions generated," and such commissions were separate from his salary); Hrg. Tr. at 726:2-728:8 (same).

"as a broker or dealer," and imposed a penalty for failing to do so. *Id.* at *1-*2, *6. Under *Ranieri Partners*, the third-party broker's commissions charged by Messrs. Pasetksy, Allen and Saxton plainly fit within *Plaintiff's own definition* of broker's commissions.

Accordingly, the $2,885,269 in third-party broker's commissions paid by Defendants should be subtracted from the Report's calculation of disgorgement.[5]

III. DISGORGEMENT SHOULD BE REDUCED BY $553,067 THAT DEFENDANTS REPAID TO POLYCOM, BECAUSE THIS REPAYMENT PLAINLY REDUCED ANY ILL-GOTTEN GAINS AND IT IS PUNITIVE TO MAKE DEFENDANTS PAY THIS AMOUNT TWICE

Next, the Report (at 36-37) incorrectly concludes that Defendants' disgorgement should not be reduced by $553,063.37 that Defendants repaid its largest client, Polycom. (DX 63 at SECNADEL 33876 (produced by Polycom at POLY-WDN 9408).) The Report notes that this repayment also involved a prior dispute with Polycom, but incorrectly ignores that these repayments plainly reduced Defendants' ill-gotten gains from cross-trading and management fees in Polycom's account. (*See* PX15 (Table 8 amended ($1,149,188.50 in management fees), PX9-10 ($1,845,219.60 in commissions).) Accordingly, the repaid $553,063.37 was not part of the ill-gotten gains that Defendants retained, and it would be a penalty to require Defendants to pay the $553,063.37 as second time as disgorgement.

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[5] Plaintiff is misguided in suggesting Mr. Pasetsky's commissions should be treated as overhead under *S.E.C. v. U.S. Envtl., Inc.*, 2003 WL 21697891 (S.D.N.Y. July 21, 2003), because in that case, the Court only refused to subtract the third-party payment since the S.E.C.'s request for disgorgement had "already been reduced by the [money] previously paid" to the third party for "his portion of the profits." *Id.* at *29. Further, that case did not involve broker's commissions, but rather profit-sharing with a third party who "received no salary," *id.* at 28, unlike Mr. Pasetsky here, DX101 at 13:6-7. Moreover, Plaintiff is similarly misguided in relying on *S.E.C. v. Hedgelender, LLC*, 786 F. Supp. 2d 1365 (S.D. Ohio 2011), because that case relied on an out-of-circuit standard that "that intentional wrongdoers are generally denied any offsets." *Id.* at 1370. This standard does not apply in the Second Circuit, where courts consistently require offsets of disgorgement against intentional wrongdoers. *See, e.g., East Delta Res. Corp.*, 2012 WL 3903478, at *1, *7 ("subtracting brokers' commissions" from disgorgement in case involving violations of § 10(b) and Rule 10b-5); *McCaskey*, 2002 WL 85001, at *4 (offsetting disgorgement in case involving intentional market manipulation); *Shah*, 1993 WL 288285, at *5 (S.D.N.Y. July 28, 1998) (subtracting commissions in insider trading case). Further, Mr. Pasetsky hardly "shared" his commissions, because he is not a blood-relative of any Defendant (DX101 at 12:5), but rather a broker who kept his commissions for himself.

Polycom itself understood the $553,063.37 to be a repayment from Defendants. As Polycom's Walt Boileau testified, the $553,063.37 amount was "paid back to you by Registered Investment Advisors? A: That was my understanding." (Hrg. Tr. at 341.21:7-23.) The Second and D.C. Circuits hold that, where a defendant "can establish that he has repaid" alleged ill-gotten gains to an investor, "such payments will offset his disgorgement obligation." *Disraeli v. S.E.C.*, 334 F. App'x 334, 335 (D.C. Cir. 2009) (citing *S.E.C. v. Palmisano*, 135 F.3d 860, 864 (2d Cir. 1998)). Under this line of cases, a repayment should be subtracted from disgorgement so long as the defendant did not retain the ill-gotten gains and the "proceeds [] flowed ... back to [victim]." *S.E.C. v. Levine*, 517 F. Supp. 2d 121, 139-40 (D.D.C. 2007); *FTC v. Transnet Wireless Corp.*, 506 F.Supp.2d 1247, 1271 (S.D.Fla.2007) (reducing disgorgement by customer refunds). Here, Defendants did not retain this amount, and it was repaid to Polycom.

Accordingly, the $553,063.37 repaid to Polycom should be subtracted from disgorgement. In contrast, the Report is misguided in asserting that the $553,063.37 repayment should not be subtracted because it arguably relates to a prior dispute. Rather, disgorgement principles require subtracting a repayment of ill-gotten gains to the source of those gains regardless of the specific reason for the repayment. The *Levine* court "reduce[d]" disgorgement by the amount of ill-gotten "proceeds that flowed . . . back to" the victim of the ill-gotten gains – even though this amount was "(perhaps illegally) loaned" back to the victim, but was not paid as restitution. 517 F. Supp. 2d at 139-40. *Levine* is directly on point and should govern, and the Court should thus subtract the $553,063.37 repayment from disgorgement.

Notably, the Report fails to identify a single case holding that a repayment to the source of ill-gotten gains should not be subtracted from disgorgement. (Report at 36-37.) This lack of legal support is because there is no good reason to make Defendants pay the $553,063.37 a

second time, after already repaying Polycom this amount. A second $553,063.37 payment would serve no purpose other than to penalize Defendants, which is an improper basis for disgorgement. *See Litton*, 734 F. Supp. at 1077 ("a penalty assessment" would "go[] beyond the restitutionary purpose of the disgorgement doctrine"). The Court should reject the Report's refusal to subtract the $553,063.37 repayment.

IV. THE COURT SHOULD REJECT DISGORGEMENT AGAINST KATHERINE NADEL, WHO HAS A LEGITIMATE CLAIM TO HER SALARY AND OTHER INCOME BASED ON SIGNIFICANT WORK PERFORMED, OR AT THE VERY LEAST THE COURT SHOULD REDUCE HER DISGORGEMENT BY $141,666 BASED ON A FAIR CALCULATION OF HER BASE SALARY

The Court should reject the Report's proposal to impose $807,346.10 of disgorgement against Relief Defendant Katherine Nadel, because she has a plausible legitimate basis for these amounts based on her work for the WDNCO and RIA entities, and because fairness warrants avoiding severe disgorgement against an innocent spouse not involved in the wrongdoing. Ms. Nadel has a legitimate claim to the money she received based on working as an employee and providing significant services to WDNCO and RIA. In addition, this Court has discretion to decline to impose disgorgement on a relief defendant, *Contorinis*, 743 F.3d at 304 n.4, regardless of whether there is a legitimate claim to assets, as part of its broad equitable discretion to refuse to impose sanctions that would be "overkill." *In the Matter of Judy Wolfe*, Ad. Pro. No. 3-16195 at 22 (S.E.C., Aug. 5, 2015), *available at*, http://www.sec.gov/alj/aljdec/2015/id851ce.pdf.

First, a district court "may only require disgorgement of the assets of a relief defendant upon a finding that she lacks a 'legitimate claim" to the assets. *C.F.T.C. v. Walsh*, 618 F.3d 218, 226 (2d Cir. 2006). As the Second Circuit has concluded, the "[r]eceipt of funds as payment for services rendered to any employer" provides a legitimate claim that "would preclude proceeding against the holder of the funds as a [relief] defendant." *Id.* (quoting *C.F.T.C. v. Kimberlynn*

Creek Ranch, 276 F.3d 192 (4th Cir. 2002)). "[R]elief defendants who have provided *some form* of valuable consideration in good faith in return for proceeds of fraud are beyond the reach of the district court's disgorgement remedy." *Id.* (emphasis added); *Janvey v. Adams*, 588 F.3d 831, 834-35 (5th Cir. 2009) (rejecting disgorgement from relief defendants of a loan repayment).

Here, Ms. Nadel testified that she provided some form of valuable consideration in return for her WDNCO salary and RIA payments. In particular, she performed the following functions:

- Working as "COO" [Chief Operating Officer] "and corporate secretary" of WDNCO (Hrg. Tr. at 601:12-13);
- Being "responsible for the written procedure manuals" and "for the written supervisory procedures" of "both firms, the RIA and the WDNCO," (*id.* at 601:19-602:3);
- "keeping up with the publications" of industry organizations such as "FINRA, the futures, the NFA, and the SEC" to keep policy and procedure manuals up to date and to help WDNCO and RIA stay compliant with laws and regulations, (*id.* at 601:25-603:2);
- "human resources as far as the tax papers, W4s, payroll" and "health insurance," and filing FINRA Form "U4s. The U5s," and monitoring "Vacation time," (*id*; *accord id.* at 605:18-20);
- Supervising "personnel" at the office of WDNCO, (*id.* at 603:16-9);
- "anti-money laundering training" under "new guidelines" and ensuring that each employee was trained and had reviewed the guidelines, (*id.* at 603:18-605:17);
- "As corporate secretary I had to keep the minutes book up to date and make sure that all the minutes were correct and always filed," for both "Warren D. Nadel & Company" and "Registered Investment Advisers," (*id.* at 606:21-607:2);
- Monitoring "the physical plants, . . . Snow removal. Parking. Supplies. Contracts. Service contracts. Materials. Repairs," and "keeping the service contract up to date on the equipment, on the elevator," in the building, (*id.* at 606:1-4);
- Representing WDNCO in the business community, including the "Glen Cove Chamber of Commerce" and "Glen Cove Youth Board," (*id.* at 607:3-6); and
- Resolving disputes between employees over credit for business from different regions of the country, (*id.* at 607:10-609:4).

From 2007-2009, Ms. Nadel's role working for RIA, and as COO and Corporate Secretary of WDNCO was "a full time" job, involving "35 hours" of work each week. (*Id.* at 609:5-10.) And in return for her work, Ms. Nadel was provided total compensation that was not dramatically out of line with her job responsibilities: $807,346.10 in total compensation over three years – an annual average of $269,000. Such compensation is not far-fetched for a COO of an investment adviser generating roughly $11 million in profits over a three-year span. Thus, Ms. Nadel has a plausible legitimate claim to such compensation in exchange for her significant work for the WDNCO and RIA entities. *Walsh*, 618 F.3d at 226 ("Receipt of funds as payment for services rendered to any employer" provides a legitimate claim that "would preclude proceeding against the holder of the funds as a [relief] defendant.").

The Report's skepticism about inconsistencies between Ms. Nadel's deposition and hearing testimony about her job responsibilities is not a basis to deny all of her legitimate claim her compensation. Ms. Nadel gave a plausible explanation that she froze up because it was her first deposition. (Hrg. Tr. at 620:8-621:2.) She explained that she "couldn't even think ... I never was in any kind of situation like this before. It is horrifying. It is very difficult to think." (*Id.* at 620:23-621:2.) Further, the Report's concerns (at 63) about Ms. Nadel's inability to explain why she warranted total compensation of $435,800 in 2007 alone (which may just reflect her humility) is not a basis to impose disgorgement of the entire $807,346.10 amount. At the very least, Ms. Nadel set forth a persuasive case that she put in sufficient hard work for Defendants that warranted her based salary of "$49,999.92" in 2008 and "$41,666.60" in 2009. (Report at 62.) The [redacted] annual base salary, when also applied to 2007 (when she was paid a total of [redacted] for work at defendant WDNCO), adds up to a total amount of base salary from 2007-2009 of [redacted] Although Defendants seek to eliminate all of Ms.

Nadel's disgorgement, this minimal amount of [redacted] in base salary, at the very least, should be subtracted from the Report's $807,346.10 disgorgement proposal.

Second, an independent basis to reject the Report's entire disgorgement proposal for Ms. Nadel is that this Court has discretion to disgorgement – regardless of a legitimate claim – because such a remedy is "elective rather than mandatory," particularly where, as here, the relief defendant "may have been unaware of any wrongdoing." *Contorinis*, 743 F.3d at 304 n.4. Here, there is no evidence that Ms. Nadel knew of the wrongdoing. She is merely collateral damage to her husband's wrongdoing. She should not be punished for the sins of her husband.

V. AN ADDITIONAL $118,175.22 OF CLEARING CHARGES PAID TO MAN FINANCIAL AND MF GLOBAL SHOULD BE SUBTRACTED FROM DISGORGEMENT, BECAUSE THESE CHARGES REDUCED THE PROFITS DEFENDANTS RECEIVED FROM THEIR ADVISORY FEES

Finally, the Report incorrectly concludes that $118,175.22 of the stipulated $301,201.90 in clearing charges that Defendants incurred in executing their investment strategy should not be subtracted from disgorgement. (Report at 32-36.) Although the Report correctly subtracted $183,026.68 in clearing charges as direct transaction costs, it found the remaining $118,175.22 should not be subtracted because it was for clearing charges on futures used to hedge against the cross-trading of Preferred Stock – and thus not related to a cross-trading securities violation. (*Id.*) This is incorrect, because $118,175.22 in futures clearing charges are direct transaction costs of Defendants' advisory fees, which are subject to disgorgement. (Report at 23.)

The Report overlooks that the disgorgement calculation includes, all of Defendants' advisory fees from 2007-2009 – not just Defendants' brokerage commission on cross trades. (*Id.*) The advisory fees portion of disgorgement is due to different securities law violation than cross-trading, *i.e.*, the misrepresentation of assets under management. As the Report admits, the clearing charges for trading on futures "'hedging'" did in fact "constitute[] a portion of

Defendants' investment strategy." (*Id.* at 35.) The investment strategy generated the advisory fees subject to disgorgement, and the $118,175.22 in futures clearing charges were thus direct transaction costs of carrying out the investment strategy. *McCaskey*, 2002 WL 850001, at *4.

In fact, it is undisputed that such clearing fees are basic securities transaction costs, and, as Mr. Nadel testified, charged as "a per-transaction fee." (Trial Tr. at 751:10-13.) And Defendants made a significant showing that they incurred and paid those charges on a per-transaction basis from 2007-2009. (*See, e.g.*, DX 90 at 3 (Row 28 for "Clearance Charges"); Note 1, *supra.*) Moreover, Defendants' contemporaneous investment strategy documents show that futures hedging was an integral part of Defendants' Dividend Capture strategy, from which the advisory fee disgorgement is derived. (*E.g.*, DX1 at BLYTH 182 ("Because preferred stocks act like bonds and are interest rate sensitive, the manager hedges against potential price movements through the use of the treasury bond futures option market"); PX145-7 (containing numerous futures positions in portfolio)).

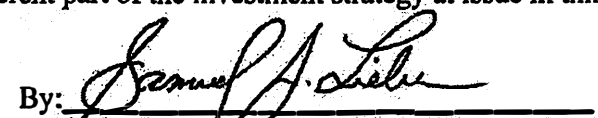
Accordingly, such clearing charges are "direct transaction costs" that should be subtracted from disgorgement because they "plainly reduce the wrongdoer's profit." *McCaskey*, 2002 WL 850001, at *4. Since the Report proposes disgorging all advisory fees, Defendants' clearing charges for carrying out their investment strategy, including the $118,175.22 in clearing charges, should be subtracted from disgorgement.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court reject the parts of the Report identified above, and reduce disgorgement by subtracting (i) $2,256,544.54 in principal trading losses from the exact same trades already included in the Report's disgorgement calculation; (ii) $2,885,269 in transaction-based broker's commissions paid to third-party brokers; (iii) $553,063.37 for money repaid by Defendants to their client, Polycom;

(iv) all of Relief Defendant Katherine Nadel's personal disgorgement of $807,346.10 because she has a legitimate claim through work performed for defendants, or at least subtract an amount reflecting a total base salary from 2007-09 of $141,666; and (v) $118,175.22 in clearing charges from for futures trades that were an inherent part of the investment strategy at issue in this case.

Dated: March 8, 2016
New York, New York

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2016, I served a copy of the Defendants' Objections to the Report and Recommendation Regarding Remedies upon Plaintiff, the Securities and Exchange Commission, in accordance with Local Rule 5.2, by electronic mail and first class mail to the following address:

Richard Primoff
Securities and Exchange Commission
New York Regional Office
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New York, NY 10281
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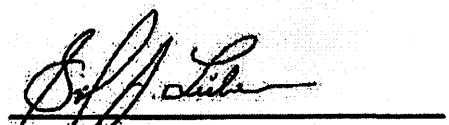

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

REPORT AND RECOMMENDATION

CV 11-0215 (WFK) (AKT)

- against-

WARREN D. NADEL, WARREN D. NADEL & CO., and REGISTERED INVESTMENT ADVISERS, LLC,

Defendants,

-and-

KATHERINE NADEL,

Relief Defendant.
----------X

A. KATHLEEN TOMLINSON, Magistrate Judge:

I. PRELIMINARY STATEMENT

Plaintiff Securities and Exchange Commission ("Plaintiff" or "the Commission"), brought this civil enforcement action against Defendants Warren D. Nadel ("Nadel"), Warren D. Nadel& Co. ("WDNC") and Registered Investment Advisers, LLC ("RIA") (collectively, "the Defendants"), and Relief Defendant Katherine Nadel, seeking damages and injunctive relief for alleged violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 204, 206(1), (2) and (3) and 207 of the Investment Advisers Act of 1940 ("Advisers Act") as well as the applicable rules promulgated thereunder. *See generally* Amended Complaint ("Amend. Compl.") [DE 11].

On March 31, 2015, Judge Kuntz issued a Decision and Order granting Plaintiff's motion for partial summary judgment and denying Defendants' cross-motion for summary judgment. *See* DE 100. In rendering his decision, Judge Kuntz further directed this Court to "hold a hearing to determine the appropriate relief or damages including but not limited to the determination of a permanent injunction, disgorgement, pre-judgment interest, and any civil penalties." *Id.* at 21.

In accordance with Judge Kuntz's directive, this Court conducted an evidentiary hearing on the issue of damages over four days, from July 20, 2015 through July 23, 2015. *See* DE 102. The Findings of Fact and Conclusions of Law, set forth below and as required by Rule 52(a) of the Federal Rules of Civil Procedure, constitute this Court's Report and Recommendation to Judge Kuntz.

II. BACKGROUND

A. Judge Kuntz's Summary Judgment Decision

1. Violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act

In his decision, Judge Kuntz first addressed Plaintiff's claims that Defendants' violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and Section 17(a) of the Securities Act which focused on whether "Defendants misrepresented to clients and to prospective clients the amount of assets they had under management." *See S.E.C. v. Nadel*, 97 F. Supp. 3d 117, 122 (E.D.N.Y. 2015).[1] In that regard, Judge Kuntz enumerated the requisite elements giving rise to

[1] For purposes of this Report and Recommendation, the Court presumes the reader's familiarity with Judge Kuntz's Summary Judgment Decision and Order, which includes a detailed statement of the underlying facts of this case. *See* DE 100. As such, this Court will dispense with a detailed account of the underlying facts. The Court further points out that citations to Judge Kuntz's Decision and Order are made pursuant to the version published in the Federal Supplement.

these violations, namely, that a defendant "(1) made a material misrepresentation or a material 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." *Id.* (internal quotations and citation omitted). Judge Kuntz further pointed out that these same elements "suffice to establish a violation under sections 17(a)(1)-(3) of the [Securities] Act, with the exception that scienter is not required to enjoin violations under subsections (a)(2) or (a)(3)." *Id.* (alteration in original).

Turning to the second element ("scienter") and the third element ("in connection with the purchase or sale of securities"), Judge Kuntz found that "the SEC has produced sufficient evidence to establish that both elements have been met." *Id.* Specifically, Judge Kuntz held that "no triable of issue of fact [existed] as to the[se] two elements" since "Defendants neither dispute that they acted (1) with scienter and (2) in connection with the purchase or sale of securities, nor do Defendants provide any evidence to establish they did not act(1) with scienter and (2) in connection with the purchase or sale of securities." *Id.*

Having found no triable issue of fact with respect to elements (2) and (3), Judge Kuntz next focused on whether a triable issue of fact existed regarding the first element — *i.e.*, whether Defendants' misrepresentations were material. *Id.* In this regard, Judge Kuntz determined that no triable issue of fact existed and that

> [s]ummary judgment is appropriate in this case for several reasons. First, as established above, any reasonable investor would consider the accurate amount of assets under management to be a material fact to consider before investing. This is so because any reasonable investor would need accurate disclosures about assets under management to correctly evaluate an asset manager's performance. Without such information, an investor would have no baseline to determine the risk for his or her investment. Moreover, Defendants themselves have demonstrated the importance they attached to the information by not only admitting they sent marketing materials containing such misstatements, but also by

> highlighting the fact they managed upwards of $300 million in assets under management in the marketing materials.
>
> ***
>
> Second, summary judgment is also warranted because the evidence in the record establishes Defendants' clients believed the misstatements about assets under management to be material.

Nadel, 97 F. Supp. 3d at 123-25 (internal citation omitted). In light of these findings, Judge Kuntz determined that "the misrepresentations about the amount of assets under management were so obviously important to investors that reasonable minds could not differ on the question of their importance. As a result, summary judgment is appropriate" with respect to those claims. *Id.* at 126.

2. Violation of Sections 206(1) and 206(2) of the Advisers Act

Similar to their claims under Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and Section 17(a) of the Securities Act, Plaintiff also sought to "hold Defendants liable for their misrepresentations about the amount of assets under management under Sections 206(1) and (2) of the Advisers Act." *Id.* After reviewing the language of the controlling section of the Advisers Act, Judge Kuntz noted that "[i]t has been established that '[f]acts showing a violation [of] Section 17(a) or 10(b) by an investment adviser will also support a showing of a Section 206 violation.'" *Id.* (internal citation omitted) (second alteration in original). As such, Judge Kuntz determined that "because the Court has found summary judgment to be appropriate on the SEC's claims that Defendants violated Section 10(b) and 17(a), it follows that summary judgment is also appropriate on the SEC's claims that Defendants violated Sections 206(1) and (2) of the Advisers Act." *Id.*

3. Violation of Section 206(3) of the Advisers Act

Judge Kuntz next addressed the Commission's allegation that "Nadel and RIA violated Section 206(3) of the Advisers Act[2] by conducting thousands of cross-trades among their clients and engaging in principal transactions with client accounts without providing required notice and obtaining client consent prior to each transaction." *Id.* at 126. Since neither party disputed the fact that "Defendants engaged in cross-trades" in the first instance, Judge Kuntz determined that the only issues before the Court were "(1) whether Nadel can be considered a broker within the meaning of Section 206(3), and (2) whether a general or blanket consent is sufficient to satisfy the conditions of Section 206(3)." *Id.* at 127.

Turning to the first issue of whether Nadel could be considered a broker within the meaning of Section 206(3), Judge Kuntz pointed out Defendants' "conflicting testimony on whether or not Nadel should not be considered a broker for purposes of Section 206(3) liability." Coupled with the fact that Defendants did not provide "any other evidence to suggest Nadel was not acting as a broker within the meaning of Section 206(3) of the Advisers Act," Judge Kuntz did not agree that "Nadel was not acting as a broker." *Id.* at 128. Further, Judge Kuntz determined that the Commission

> produced sufficient evidence to suggest that Nadel was acting as a broker for purposes of Section 206(3) liability. For example, the evidence suggests that Defendants' brokerage fees were not

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[2] Section 206(3) of the Advisers Act, codified at 15 U.S.C. § 80b-6, provides, in pertinent part, that "[i]t shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction[.]"

> comprised of commissions but rather based on a "percentage of assets under management." As such, Nadel's fees cannot be considered "advisory fees" because they would not be based off commissions, but rather based off a percentage of assets under management.

Id. Based upon Defendants' conflicting testimony and Nadel's own lack of evidence in light of the Commission's affirmative evidence, Judge Kuntz concluded that "Nadel was acting as a broker for purposes of Section 206(3) liability." *Id.*

The next issue addressed by Judge Kuntz was whether the Defendants' obtaining blanket consents prior to engaging in cross-trading was sufficient for compliance with Section 206(3) of the Advisers Act. *Id.* Relying on the Commission's interpretation of Section 206(3) — an interpretation which was "controlling for purposes of this motion" — Judge Kuntz found that "general consents are not sufficient as a matter of law under the SEC's Interpretation of Section 206(3)" and, consequently, "Defendants cannot escape liability for violating Section 206(3) by relying on blanket and general consents." *Id.* 128-29. Despite this finding, Defendants asserted that "because the SEC has allowed global consents in certain situations to satisfy Section 206(3), the use of global consents in this case would not violate Section 206(3)." *Id.* Although recognizing that the Commission's "Interpretation of Section 206(3) provides that 17 C.F.R. § 275.206(3)-2 is a *non-exclusive* safe harbor for certain . . . transactions," *id.* at 129 (emphasis and ellipses in original), Defendants did not present any evidence establishing that they met the criteria needed to take advantage of the safe harbor provision. *Id.*

In light of the above information, Judge Kuntz determined that "summary judgment is appropriate on the SEC's claims that Defendants violated Section 206(3) of the Advisers Act." *Id.*

4. Violation of Rule 10b-10 of the Exchange Act

The Commission also sought summary judgment on its claim that Nadel and WDNC violated Rule 10b-10[3] of the Exchange Act based upon "falsely disclosing the capacity in which WDNC was acting." *Id.* Specifically, the Commission claimed that "Nadel and WDNC violated Rule 10b–10 of the 1934 Exchange Act for the period of March 1, 2008 to December 31, 2009 by 'falsely stat[ing] that WDNC had acted as agent solely for the client in an over-the-counter market transaction—they did not disclose either that WDNC had acted as agent for both sides to the transaction, or as principal in some of the transactions[.]'" *Id.* at 130. (internal citation omitted) (alterations in original). In enumerating the criteria necessary to satisfy Rule 10b-10, Judge Kuntz noted that "Defendants may either disclose this information directly to the customers, or may 'rely on the fund prospectuses and other documents *publicly* filed with the SEC to satisfy their Rule 10b–10 disclosure obligations.'" *Id.* (internal citation omitted) (emphasis in original).

In finding that summary judgment was appropriate on the Rule 10b-10 violation, Judge Kuntz found that "the SEC has presented sufficient evidence to establish that WDNC failed to disclose it was acting as either an agent for both sides to the transaction or as a principal in some of the transactions as required by Rule 10b–10." *Id.* Further, Judge Kuntz pointed out that Defendants never disputed the fact that "trade confirmations during this period failed to acknowledge that WDNC acted as either an agent [f]or both sides to the transaction or as a

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[3] Rule 10b-10 "requires broker-dealers to disclose specified information in writing to customers at or before completion of a transaction. The requirements under this section that particular information be disclosed is not determinative of a broker-dealer's obligation under the general antifraud provisions of the federal securities laws to disclose additional information to a customer at the time of the customer's investment decision." 17 C.F.R. § 240.10b-10.

principal in some of the transactions" and that, as a result, "no genuine issue of material fact exists." *Id.*

B. Relevant Procedural History

Following Judge Kuntz's decision, which granted Plaintiff's motion for partial summary judgment, and which further directed this Court to hold a hearing on damages, *see* DE 100, this Court scheduled a telephone conference for April 10, 2015 in order to set a date for the damages hearing. *See* April 6, 2015 Electronic Order. During the re-scheduled conference, the Court set the damages hearing for the week of July 20, 2015. *See* DE 102.

The hearing was conducted over four days, from July 20-23 2015. The Court heard testimony from the following witnesses: (1) Richard Anderson; (2) William Hedges; (3) Michael Fioribello; (4) Jane Casey; (5) Walter Boilieu; (6) Patricia Canning; (7) Warren Nadel; and (8) Katherine Nadel. At the conclusion of the hearing, the Court set a schedule for post-hearing briefs. *See* DE 124; DE 126.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission seeks to "deter future violations of the securities laws, and to deprive Defendants of the illicit proceeds of their fraud. To that end, the Commission seeks: (1) permanent injunctions; (2) disgorgement and prejudgment interest, jointly and severally, on Defendants' ill-gotten gains; and (3) third-tier civil penalties." *See* Plaintiff Securities and Exchange Commission's Pre-Hearing Brief on Remedies ("Pl.'s Pre-Hearing Br.") [DE 107], at 2. The Court will address each of these forms of relief in turn.

A. Injunctive Relief

1. Applicable Law

Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), Section 21(d)(1) of the Exchange Act, 15 U.S.C. § 78u(d)(1), and Section 209(d) of the Advisers Act, 15 U.S.C. § 80b-9(d), authorize injunctive relief for violations of the securities laws. Specifically, Section 20(b) of the Securities Act provides that

> [w]henever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 77t(b). Section 21(d) of the Exchange Act similarly provides that

> [w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u(d)(1). Likewise, Section 209(d) of the Adviser's Act states that

> [w]henever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice

> constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond

15 U.S.C. § 80b-9.

"The Supreme Court has viewed injunctive relief as necessary in [securities] actions for the basic protection of the investing public." *S.E.C. v. Bonastia,* 614 F.2d 908, 913 (3d Cir. 1980); *see S.E.C. v. China Energy Sav. Tech., Inc.*, No. 06-CV-6402, 2008 WL 6572372, at *7 (E.D.N.Y. Mar. 28, 2008). In addition, in an "action involving 'remedial statutes,' such as the federal securities laws, a district court has broad discretion to enjoin future violations of law where past violations have been shown." *S.E.C. v. U.S. Environmental, Inc.*, No. 94 Civ. 6608, 2003 WL 21697891, at *24 (S.D.N.Y. Jul. 21, 2003).

In determining whether injunctive relief is warranted in a particular case, courts must make a determination whether there exists "a substantial likelihood of future violations of illegal securities conduct." *S.E.C. v. Tavella*, 77 F. Supp. 3d 353, 359 (S.D.N.Y. 2015); *S.E.C. v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998) ("*Cavanagh I*") (recognizing that injunctive relief is appropriate where the "SEC makes a substantial showing of likelihood of success as to both a current violation and the risk of repetition"); *but see U.S. Environmental, Inc.*, 2003 WL 21697891, at *24 (finding injunctive relief warranted upon a showing of "reasonable likelihood

of future violations"); *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *7 (recognizing that "[i]njunctive relief is appropriate when there is a 'realistic likelihood of recurrence' of the violations") (internal citation omitted). In order to make a finding of "substantial likelihood of future violations," courts consider the following factors: (1) that the defendant has been found liable for illegal conduct; (2) the degree of scienter involved; (3) whether the infraction is an isolated occurrence; (4) whether defendant continues to maintain that his past conduct was blameless; and (5) whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated. *Tavella*, 77 F. Supp. 3d at 359; *S.E.C. v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978); *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *7; *S.E.C. v. Wyly*, 56 F. Supp. 3d 394, 407 (S.D.N.Y. 2014). Further, a permanent injunction is "particularly within the court's discretion where a violation was founded on systematic wrongdoing rather than an isolated recurrence." *S.E.C. v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996) ("*First Jersey* ") (internal quotations omitted); *Tavella*, 77 F. Supp. 3d at 359; *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *8.

2. Application to the Facts

i. Liability for Illegal Conduct

There is no dispute that Judge Kuntz found the Defendants violated the securities laws. Specifically, Judge Kuntz determined that Defendants violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, Section 17(a) of the Securities Act, Sections 206(1), 206(2) and 206(3) of the Advisers Act and Rule 10b-10 of the Exchange Act. *See Nadel*, 97 F. Supp. 3d at 117. As such, this factor weighs in favor of granting injunctive relief.

ii. Degree of Scienter

Defendants acted with scienter. At the summary judgment phase of this case, Judge Kuntz noted that Defendants "neither dispute[d] that they acted [] with scienter . . . nor [did they] provide any evidence to establish they did not act [] with scienter." *Nadel*, 97 F. Supp. 3d at 122. Although Judge Kuntz did not make a finding as to the degree of scienter involved, the Court finds for the reasons which follow that Defendants acted with a high degree of scienter.

First, for more than 18 months, Nadel and WDNC failed to provide accurate trading confirmations. *Id.* at 130. They did not disclose that WDNC had acted as agent for both sides to the transaction or as principal in some of the transactions. *Id.* The fact that they did so, notwithstanding their awareness of the inaccuracy, illustrates that the Defendants acted with a high degree of scienter.[4] Nadel testified at the hearing that despite the change in the format of trade confirmations as of March 1, 2008 (which ceased to include transaction codes reflecting that Nadel was acting as the agent for both the buyer and the seller), Nadel nevertheless failed to alert his clients as to the inaccuracy. *See* Testimony of Warren Nadel at July 2015 Damages Hearing at 558:17-559:1.[5] Indeed, when asked whether it was important to "look at the capacity in which the trade confirmation was report[ed]," Nadel answered "no." *Id.* at 570:3-6. The testimony further demonstrates that Nadel's failure to alert his clients to the inaccuracy of these confirmations continued for an extended period of time and was never corrected. For example, Nadel testified:

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[4] Judge Kuntz found that Defendants' failure to provide trading confirmations which correctly denoted whether the broker or dealer was acting in a principal or agency capacity violated Rule 10b-10 of the Exchange Act. *See Nadel*, 97 F. Supp. 3d at 130.

[5] All subsequent references to the record of the July 2015 Damages Hearing are designated "Hrg. Tr. at ____."

> Q: [Y]ou also knew for an extended period of time, from March 2008 to at least September of 2009 or perhaps later, you actually knew the trade confirmations that were going out were incorrectly reporting your capacity in which you were acting on behalf of your clients, correct?
>
> A: Yes.
>
> Q: And you never alerted your advisory clients to that fact, right?
>
> A: No.

Hrg. Tr. at 570:7-16. Nadel also testified that after an audit was performed by the Commission in late 2009, he got a call from the back office people at RBC and was provided with an "alpha code" that would enable him "to correct the situation by creating the information in English on the front of the confirm," which Nadel says he "implemented immediately." *Id.* at 565. However, when asked whether he was "aware of any trade confirmation that has th[e] correction that [he] referred to for any date prior to late March 2010," Nadel was unable to provide a direct response, stating only that "well, *I have no idea* when it actually was implemented." When pressed further, Nadel simply stated "I have no recollection as to when it was [implemented.] *Id.* at 565:25-566:7 (emphasis added).

Second, the magnitude, duration and persistent and ongoing misrepresentation concerning the amount of the Assets Under Management ("AUM"), coupled with the importance placed upon that figure by Defendants' clients, further supports a finding that Defendants' acted with a high degree of scienter.[6] Testimony from Defendants' clients revealed that the amount of AUM was an important criterion in determining whether to invest in Defendants' investment

[6] Judge Kuntz found that Defendants' misrepresentation to both clients and prospective clients concerning the amount of assets they had under management violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *See Nadel*, 97 F. Supp. 3d at 122.

strategy. For example, Richard Anderson, former Treasurer of the Continental Grain Company ("CGC"), testified that AUM was an important benchmark because he "wanted to get an idea of the size of the firm . . . so that [he] didn't have to worry about [his company's] investment . . . [constituting] 25 percent of [Defendants'] assets under management." Hrg. Tr. at 45:18-21. Similarly, Jane Casey, Chief Financial Officer of Blyth, Inc., testified that the total amount of Defendants' AUM was an important investment consideration because that AUM figure would directly impact how much her company would have invested with Defendants. *Id.* at 248:4-10. According to Casey, if the AUM figure was "significantly less" than the amount Defendants represented, she would have been concerned in light of her company's $10 million investment. *Id.* at 248:2-10. Likewise, Patricia Canning, Assistant Vice President and Senior Portfolio Manager of the Louisiana Worker's Compensation Corporation ("LWCC"), testified that based upon the $370 million AUM figure proffered by Defendants, she "thought it would be an acceptable type of strategy for LWCC" to invest in. *Id.* at 364: 7-16.

Although Nadel refused to answer any questions during the hearing pertaining to AUM — instead invoking his rights under the Fifth Amendment — *id.* at 532:5-7; 585;12-13, a description of Defendants' investment strategy, as provided to Blyth, Inc. in 2007, highlights that Defendants were touting their AUM to be $404.93 million.[7] *Id.* at 532:5-7; 585:12-13; Pl.'s Hrg. Ex. 22 at 17[8]; Hrg. Tr. at 241:23-24 (noting that Blyth, Inc. invested with Defendants in September 2007). Moreover, these same inflated AUM claims were made to other potential

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[7] Judge Kuntz stated in his summary judgment decision that "Part I filings with the SEC revealed that Defendants overstated the actual amount of assets under management. Specifically, RIA's assets under management were only $147.28 million in January 2007; $147.37 million in January 2008; $127.63 million in January 2009; and $54.84 million in January 2010—not the over $400 million that RIA claimed in its marketing materials, a fact undisputed by Defendants." *Nadel*, 97 F. Supp. 3d at 120.

[8] All page references are made pursuant to PDF page numbers.

clients via email during this same time period. *See* Pl.'s Hrg. Ex. 111 at 37 (Defendants' investment strategy brochure provided by email to Oregon Mutual Insurance Company ("Oregon Mutual") in 2007 highlighting AUM as $404.93 Million); Pl.'s Hrg. Ex. 112 at 1-2 (additional marketing materials provided by Defendants to Oregon Mutual by email in late 2007 identifying AUM as $411.63; million); Pl.'s Hrg. Ex. 113 at 1-2 (marketing materials sent to Oregon Mutual in early 2008 identifying the amount of AUM as $414.79 million); *see also* Hrg. Tr. at 109:20-113:12 (William Hedges testimony).

Even an investigatory inquiry by the Commission on October 28, 2009 — which sought substantiation for the statement on Defendants' website claiming that Defendant WDNC was managing over $400 million — did not dissuade Defendants from continuing to misrepresent AUM to clients.[9] *See* Pl.'s Hrg. Ex. 35 (investigatory inquiry from the Commission regarding Defendants' AUM representation); Pl.'s Hrg. Ex. 25 at 1-3 (email dated January 22, 2010 from Nadel to Hal Pasetsky and Adam Feldman concerning a revised brochure containing an AUM figure of $308.70 million); Pl.'s Hrg. Ex. 36 (email dated February 3, 2010 from WDNC to Brandon Dees at Goldman Sachs representing AUM at "[o]ver $300 Million"); Hrg.Tr. at 585:18-589:20; Pl.'s Hrg. Ex. 19 (chart denoting numerous emails misrepresenting Defendants' AUM after October 2009); Pl.'s Hrg. Ex. 135 (underlying emails referenced in Pl.'s Hrg. Ex. 19).

Further, despite the numerous emails sent by Defendants to clients and prospective clients between January 2007 and March 2010 misrepresenting Defendants' AUM, *see* Pl.'s Hrg.

[9] Nadel's response to the Commission's inquiry was that "[a]s a result of my review of our firm's web site in connection with the commencement of this audit, the claim as to assets under management was noted and deleted." Pl.'s Hrg. Ex. 35. Although the AUM claim may have been deleted from Defendants' website, the record demonstrates that this statement was, at best, disingenuous in as much as Defendants continued to disseminate emails misrepresenting the amount of AUM and sending these emails to prospective clients. *See* Pl.'s Hrg. Exs. 19; 135.

Ex. 19, Nadel was not truthful in written correspondence to the Commission dated September 14, 2009 in which he stated

> [t]his is to serve as my written confirmation that the above firm does not correspond via email to any existing or prospective clients. Correspondence of this nature occurs via telephone conversations or face-to-face meetings or in writing. In the event that there is any business related email correspondence, the firm policy is to print a copy and retain in a designated file if deemed to be of significance of to be deleted if determined to be otherwise.

Pl.'s Hrg. Ex. 161; Hrg. Tr. at 581:21-582:8. During the hearing, when confronted with this correspondence, Nadel confirmed that he did in fact routinely communicate with existing and prospective clients via email and when pressed as to why he made this false statement, his only response was that he had no recollection as to his reasoning. *See* Hrg. Tr. at 583:21-23; 584:15-17.

Third, the overall scope and duration of Defendants' failure to provide proper transaction-by-transaction notice and consent with respect to the cross-trading of client accounts evidenced a knowing disregard for Defendants' fiduciary obligations to their clients. This factor further illustrates Defendants' high degree of scienter.[10] Nadel's testimony at the hearing establishes that at least as of 2007, executing 90 percent or more of trades as cross-trades between client accounts was necessary to the functioning of Nadel's investment strategy. However, despite this fact, Defendants never properly apprised clients, through transaction-by-transaction notice and consent, that cross-trading would encompass the primary means of

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[10] Judge Kuntz found that Defendants' failure to obtain transaction-by-transaction notice and consent before engaging in principal transactions and by conducting cross-trading violated Section 206(3) of the Advisers Act. In addition, Judge Kuntz determined that "[a]lthough Defendants claim that certain trade confirmations sent to clients advised them that 90% of transactions were cross-trades, this is simply not the case . . . Nothing in the documents suggests that 90% of the transactions were cross-trades." *See Nadel*, 97 F. Supp. 3d at 129.

investment execution. For instance, the following portion of the hearing transcript illustrates these facts:

> Q: Did there come no point during th[e] period from January 1, 2007, to February 29, 2008, when you were aware that [cross-trading] had been the mainstay of your strategy for a period of time?
>
> A: I realized we were doing a predominant amount of our trading amongst clients. Yes.

Hrg. Tr., at 527:3-8.

***

> Q: Don't you think the switch in your strategy from the 2005-2006 period, from executing trades in the marketplace to executing 90 percent or more of them only between your clients at prices you set, was a significant-enough change to include in your account disclosure forms, your program packages, your brochures, or your form ADV Part 2?
>
> A: I believe I felt comfortable enough with the disclosure in the documents, themselves that indicated that there was a distinct possibility that there would be cross-trading amongst clients, and it was a blanket expression to that effect. I did not specify a percentage in that statement that was signed off on by each client.

Id. at 522:21-523:8. In addition, although Nadel stated that engaging in such rampant cross-trading provided "a better alternative than other options that were available . . . in the marketplace," he had no recollection as to why this information was not included in any brochures distributed to prospective clients. *Id.* at 523:23-524:6. Indeed, even when Nadel testified that he alone was engaging in the cross-trading, *see id.* at 527:7-11; 536:5-7, he refused to concede that as of March 2009 more than 90 percent of the trades executed were cross-trades, despite having agreed in a Stipulation dated July 17, 2015 to that overall figure. *See id.* at 535:23-536:11; July 17, 2015 Stipulation at ¶ 2; Hrg. Tr. at 3:24-5:13 (parties verbally enter the

Stipulation into the record). Nadel offered only evasive and conflicting testimony on this point, claiming simply that he knew "it was over 50 percent" and contradicting his prior sworn testimony where he testified to the "over 90 percent" figure. *See* Hrg. Tr. at 536:8-17; Pl.'s Hrg. Ex. 140, at 40 (sworn investigatory testimony of Warren Nadel before the Commission on March 23, 2010).

Further, Defendants' clients Anderson, Hedges, Casey, Boilieu and Canning indicated at the hearing that the overall amount of cross-trades conducted constituted an important figure which would have determined, in part, whether they would have invested assets with the Defendants. *See* Hrg. Tr. at 47:16-48:6; 115:19-116:24; 245:9-246:3; 330:12-23; 366:6-367:18. Despite this testimony, when Nadel was asked "[w]ell isn't it a fact, sir, that you knew that if you disclosed to clients [the amount of cross-trades] before they invested, that they never would have invested with you," he responded "[n]ot really." *Id.* at 524:7-10.

In light of the foregoing information, the Court finds that Defendants acted with a high degree of scienter. This factor weighs in favor of granting injunctive relief.

iii. Recurring Nature of Conduct

The evidence offered at the damages hearing establishes that: (1) Defendants' cross-trading occurred at least from January 1, 2007 through December 31, 2009, *see id.* at 180:14-181:7 (Michael Fioribello testimony); Pl.'s Hrg. Ex. 9 (summary of Defendants' cross-trading activity from January 1, 2007 to February 29, 2008; Pl.'s Hrg. Ex. 10 (summary of Defendants' cross-trading activity from March 1, 2008 through December 31, 2008); (2) Defendants' material misrepresentations concerning their overall AUM occurred from January 2007 through April 2010, *see* Pl.'s Hrg. Exs. 19, 135; and (3) from March 2008 to at least December 2009 Defendants knew that the trade confirmations being sent to clients were inaccurate, but failed to

alert clients or correct the inaccuracy. *See* Hrg. Tr. at 570:7-16. As such, the Court finds that Defendants' misconduct was ongoing and did not involve a single isolated incident. Consequently, this factor also weighs in favor of injunctive relief.

iv. Appreciation of Wrongdoing

Based upon the testimony and evidence adduced at the hearing, the Court finds that Defendants have little appreciation of the wrongdoing in which they have been found to have engaged. During his testimony, Nadel showed both indifference and a somewhat cavalier attitude regarding the underlying violations. For example, with respect to his failure to provide clients with transaction-by-transaction notification and consent to engage in cross-trades, Nadel appeared dismissive, stating simply that he "felt comfortable enough with the disclosure documents" and the "blanket expression" concerning the possibility of cross-trades — despite the fact that this approach failed to comply with Section 206(3) of the Advisers Act. As to the inaccurate trading confirmations, Nadel presented a similar lackluster attitude. Indeed, Nadel testified that he did not alert clients to the inaccuracy of the confirmations. *See* Hrg. Tr. at 567: 3-7. And although he initially testified that he "did not review the confirm[ations]" because his assistant completed this job, *id.* at 567:12-13, when he was presented with his prior sworn testimony, *see* Pl.'s Hrg. Ex. 140, which showed that he did in fact review the trading confirmations, Nadel back-pedaled, stating that he "didn't look at the codes" because he "was under the assumption that the codes were reflecting that [the broker was acting as agent for both sides of the transaction]." *See* Hrg. Tr. at 569:25-570:1. Moreover, when presented with the false statement made to the Commission that the Defendants did not communicate with clients via email, *id.* at 581:21-582:8 — despite acknowledging that there "seem to be quite a few emails," *id.* at 583:21-23 — Nadel had no recollection as to why he made the false statement. In

any event, he continued to send out numerous emails to prospective clients containing inflated AUM claims. *See id.* at 584:15-17; 586:8-17; Pl.'s Hrg. Ex. 19.

v. Opportunity to Commit Future Violations

Nadel has a Bachelor of Science degree in Administrative and Management Sciences from Carnegie-Mellon University and a Masters in Business Administration from New York University. Pl.'s Hrg. Ex. 22 at 27. He has worked in the financial industry over 35 years — since 1977. *Id.* at 15. Prior to starting WDNC and RIA he worked for firms such as Lehman Bros., Oppenheimer & Company and Jefferies & Company. *Id.* This long history with, and entrenchment in, the financial industry during the past 35+ years makes recurrence more likely, especially since institutional investing encompasses Nadel's primary area of expertise. *See S.E.C. v. Univ. Major Indus. Corp.*, 546 F.2d 1004, 1048 (2d Cir. 1976) (recognizing as a factor the "likelihood, because of defendant's professional occupation, that future violations might occur"); *S.E.C. v. Platinum Inv. Corp.*, No. 02 CV 6093, 2006 WL 2707319, at *4 (S.D.N.Y. Sept. 20, 2006) (same). In addition, Nadel's "fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations." *S.E.C. v. Tannenbaum*, No. 99-CV-6050, 2007 WL 2089326, at *3 (E.D.N.Y. Jul. 19, 2007 (quoting *Platinum Inv. Corp.*, 2006 WL 2707319, at *4); *see First Jersey*, 101 F.3d at 1477. As such, the Court finds that this factor also weighs in favor of granting injunctive relief.

In light of the above findings, the Court respectfully recommends to Judge Kuntz that the Commission's request for permanent injunctive relief against the Defendants be GRANTED.

B. Disgorgement

1. Applicable Law

"Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits." *First Jersey*, 101 F.3d at 1474; *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *10. Disgorgement thus functions as an equitable remedy, imposed to "forc[e] a defendant to give up the amount by which he was unjustly enriched." *FTC v. Bronson Partners*, 654 F.3d 359, 372 (2d Cir. 2011) (quoting *S.E.C. v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)). To that end, disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct. *See S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *see S.E.C. v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) ("The paramount purpose of enforcing the prohibition against insider trading by ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing."); *see also S.E.C. v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."). As such, by forcing wrongdoers to give back the fruits of their illegal conduct, disgorgement also "has the effect of deterring subsequent fraud." *S.E.C. v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) ("*Cavanagh II*"); *First Jersey*, 101 F.3d at 1474. Indeed, without the availability of this equitable enforcement mechanism, "the deterrent effect of an SEC enforcement action would be greatly undermined[.]" *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *10 (quoting *Manor Nursing Ctrs., Inc.*, 458 F.2d at 1104).

"The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *First Jersey*, 101 F.3d at

1474–75; *see S.E.C. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 531 (2015); *see also S.E.C. v. Posner*, 16 F.3d 520, 522 (2d Cir. 1994) (affirming district court's order of disgorgement since "[t]he [district] court has broad discretion to tailor the sanction to the wrongful conduct involved"). Such a calculation "need only be a reasonable approximation of profits causally connected to the violation . . . any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty." *First Jersey*, 101 F.3d at 1475 (quoting *S.E.C. v. Patel*, 61 F.3d 137, 139–40 (2d Cir. 1995)) (alteration in original); *see Tavella*, 77 F. Supp. 3d at 359; *S.E.C. v. McCaskey*, 98 Civ. 6153, 2002 WL 850001, at *4 (S.D.N.Y. Mar. 26, 2002); *S.E.C. v. Haligiannis*, 470 F. Supp. 2d 373, 384 (S.D.N.Y. 2007) ("The amount of disgorgement ordered by a court for violation of the securities laws need not be an exact calculation of the defendant's profits, but only "a reasonable approximation of profits causally connected to the violation."); *see also Cavanagh II*, 445 F.3d at 116 & n. 25 (noting that since disgorgement "is remedial rather than punitive, the court may not order disgorgement above" "the amount of money acquired through wrongdoing . . . plus interest"). "Thus, once the Commission shows the existence of a fraudulent scheme in violation of federal securities laws, the burden shifts to the defendant to 'demonstrat[e] that he received less than the full amount allegedly misappropriated and sought to be disgorged.'" *S.E.C. v. Rosenfeld*, No. 97 CIV.1467, 2001 WL 118612, at *2 (S.D.N.Y. Jan. 9, 2001) (quoting *S.E.C. v. Benson,* 657 F. Supp. 1122, 1133 (S.D.N.Y. 1987)); *S.E.C. v. Grossman*, 87 Civ. 1031, 1997 WL 231167, at *8 (S.D.N.Y. May 6, 1997) ("The SEC bears the burden of persuasion that its proposed disgorgement figure reasonably approximates the amount of unjust enrichment . . . once the SEC has established that the proposed amount is reasonable, the burden shifts to the

defendant to demonstrate that the amount requested is not a reasonable approximation of the unlawfully obtained profits."), *aff'd, in part, vacated, in part*, 173 F.3d 846 (2d Cir. 1999).

2. Application to the Facts

i. The Commission's Disgorgement Figure Represents a Reasonable Approximation of Defendants' Profits

The Commission seeks to disgorge a total of $10,959,714.30 in illicit profits which the Commission claims are causally connected to Defendants' violations. Pl.'s Hrg. Ex. 213 at 1. Specifically, the Commission seeks to have Defendants disgorge the following streams of income received by them from January 1, 2007 through December 31, 2009: (1) $3,432,140.85 in advisory fees charged by Defendants to clients to participate in Defendants' investment strategy, *see* Pl.'s Hrg. Ex. 213 at 1; 15 (Table 8 Amended showing the breakdown of advisory fees charged to Defendants' clients from 2007 through 2009); Hrg. Tr. at 202:17-20; (2) $5,384,443.70 constituting trading commissions paid on 5,615 unlawful cross-trades, *see* Pl.'s Hrg. Ex. 213 at 1, 9, 10[11]; and (3) $2,143,129.75 representing profits from the 71 groups of unlawful principal trades. *See* Pl.'s Hrg. Ex. 213 at 1.

In addition to the hearing testimony elicited from Michael Fioribello, the Commission's Senior Specialized Examiner, *see* Hrg. Tr. at 179:23-24, and the exhibits introduced by the Commission substantiating the amounts noted above, the parties also entered into a Stipulation

[11] Plaintiff's Exhibits 9 and 10 illustrate summary data for Defendants' 11 Corporate Advisory Clients. Exhibit 9 encompasses the date range January 1, 2007 through February 29, 2008, while Exhibit 10 encompasses the dates of March 1, 2008 through December 31, 2009. When Column 5, "Commission on Crosses" in Exhibit 9 is added together with Column 5 in Exhibit 10, the total Commissions on Crosses is $5,404,849.40. However during his hearing testimony, Michael Fioribello, the Commission's examiner, stated that due to a miscalculation "the commissions on crosses [in Exhibit 10] was approximately, after the change, $20,000 less than the number that is stated [in Exhibit 10]." Hrg. Tr. at 183:15-184:16. This accounts for the difference in the total "Commissions on Crosses" contained when summing up Column 5 in Exhibits 9 and 10 and the amount the Commission is seeking as part of Defendants' profits in conjunction with the illicit cross-trading.

confirming the above referenced amounts of advisory fees, commissions and profits received from Defendants' illicit activities between January 1, 2007 and December 31, 2009. *See* Hrg. Tr. at 3:7-5:7. The language of the Stipulation also provided that during this same period, the Defendants "executed 120 other groups of principal trades against their Corporate Advisory Clients on which they incurred $2,256,644.54 in losses." *Id.* at 4:24-5:2.

In light of the Defendants' underlying violations, as determined by Judge Kuntz, *see* Section 2. A. *supra*, along with the fact that the Commission's calculations concerning Defendants' profits appear to reasonably approximate those profits causally connected to Defendants' underlying violations, *see First Jersey*, 101 F.3d at 1475, the Court finds that disgorgement in the amount of $10,959,714.30 is warranted since that figure reasonably approximates the amount of Defendants' unjust enrichment. *See Grossman*, 1997 WL 231167, at *8.

ii. Defendants' Entitlement to Deductions

Although the Court finds that the Commission's figure of $10,959,714.30 constitutes a reasonable approximation of the Defendants' illicit profits, Defendants have asserted that this amount should be offset by: (1) trading losses incurred; (2) payments made to Hal Pasetsky and two other outside individuals; (3) payment of clearing charges; and (4) payment made to Polycom. *See* Defendants' Post-Hearing Memorandum Regarding Damages ("Defs.' Post-Hearing Mem.") at 1. "Because the [Commission's] disgorgement calculation is 'reasonable,' the burden shifts to [Defendants] to demonstrate that they received less than the full amount sought to be disgorged." *S.E.C. v. Svoboda*, 409 F. Supp. 2d 331, 344-45 (S.D.N.Y. 2006). The Court will address each category in turn to determine if Defendants have met their burden.

1. Trading Losses

Defendants claim that "the $2,256,644.54 in principal trading losses should be used to offset any disgorgement in this action, because such losses 'were incurred incidental to, and as part and parcel of, the intended scheme.'" Defs.' Post-Hearing Mem. at 4 (quoting *McCaskey*, 2002 WL 850001, at *8). For the reasons that follow, the Court finds that Defendants have not met their burden and thus have failed to establish that any perceived trading losses should be deducted from the total amount of disgorgement.

With respect to the 71 groups of principal trades[12] for which the Commission is seeking the profits, the record establishes that any losses actually incurred by Defendants in executing these trades were already accounted for — the Commission netted the profitable and unprofitable individual transactions which occurred within each group of the 71 groups of principal trades. This calculation is illustrated in Michael Fioribello's testimony where he explains the purpose behind "grouping" the trades comprising each principal trading transaction and the internal as well as overall calculation regarding each principal group of trades. For example, when asked why the trades were grouped together, Michael Fioribello stated:

> A: All of the trades are grouped together in one group to give a complete picture of all of the pieces of this principal trade example; the proprietary account and the corporate advisory account, in this case.

Hrg. Tr. at 191:1-4. In addition, when describing the mechanics of principal trade number 16 (which resulted in a net profit) on Plaintiff's Hearing Exhibit 4 (chart showing commissions on principal trades from 1/1/2007 – 2/29/2008), the testimony demonstrates that internal losses within this trading group were netted out and therefore already accounted for when determining

[12] A principal trade is "an example of [Defendants'] proprietary account, both buying and selling the same security on the same date but at a different price." *See* Hrg. Tr. at 185:4-6 (Fioribello testimony).

whether the trade represented an overall profit or loss. The following testimony is illustrative of this point as it concerns principal trade number 16:

> Q: So did the proprietary account make or lose money on those two buys?
>
> A: The proprietary account lost money on those two buys.
>
> Q: And over on the right you show a positive difference of 35 cents in the average price of the buys and sells.
>
> A: Yes.
>
> Q: Does that reflect that overall for that group the Nadel accounts made money on that example?
>
> A: Yes.
>
> Q: Okay. Does that number take into account that on the last two buys in that example Mr. Nadel lost money?
>
> A: Yes.
>
> Q: And how so?
>
> A: For this group, for this example, regardless of whether any individual made or lost money with respect to the proprietary account, I took a straight weighted average buy price and a straight weighted average sell price, and I took the difference between those prices.

Id. at 193:19-194:13.

In addition, as to those groups of principal trades which resulted in an overall *net loss*, the Commission is not seeking disgorgement of any of the profitable internal individual transactions and has therefore not included that profit in any of its disgorgement calculations. As such, offsetting these amounts from the overall disgorgement figure would be improper since these internal profits were never accounted for in the first instance. Michael Fioribello illustrated this point during his hearing testimony when he was asked:

Q: Can you look at Exhibit 4 please. And specifically the top of page 3. And Example No. 26. Do you see that Mr. Fioribello?

A: Yes.

Q: And you see, over on the right, the difference in average price of buy and sells and that is in red?

A: Yes.

Q: So in that example, did Mr. Nadel's proprietary account make money or lose money?

A: Lose money.

Q: And were there any transactions within that group on which Mr. Nadel made money?

A: Yes.

Q: Can you explain that?

A: With respect to the bottom three rows each for Warren D Nadel & Company proprietary account, there is one sell only at 90.625. There is each a buy at 90.45 and a buy at $90.8125. One of those two trades is the buy, at $90.45, was lower than the sell at a price of 90.625 so that particular buy resulted in a profit to the proprietary account.

Q: And did you include that profit in any of the disgorgement figures that were calculated in your other tables?

A: No.

Q: Why not?

A: I based disgorgement on examples where the weighted average price and the weighted sell to the Warren D Nadel & Company proprietary account was net positive or profit.

Q: So is it fair to say there that that profit was netted out against the other transactions in this group that were losses.

A: Yes.

Id. at 225:14-226:22.

In light of the evidence presented at the hearing, it is evident that Defendants' reliance on *S.E.C. v. McCaskey* is misplaced. In *McCaskey*, the court rejected the Commission's disgorgement theory which was "based solely on McCaskey's sales on sixteen days, ignoring all other transactions during the more than six-month manipulation scheme." *McCaskey*, 2002 WL 850001, at *7. On that basis, the Court in *McCaskey* determined that losses during the balance of the manipulation period "should be considered in determining whether to order disgorgement." *Id.* However, in deciding that issue, the court was careful to highlight that the rejection of the Commission's theory was based solely on the "Particular *Facts of this Case*." *Id.* at *6 (emphasis in original). Unlike *McCaskey* — where the Commission ignored transactions during the manipulation period that resulted in losses and otherwise did not take those into account in calculating the overall amount of disgorgement — in the case at bar, the Commission expressly considered all principal trades that occurred from January 1, 2007 through December 31, 2009. However, as explained above, the Commission only calculated the amount of disgorgement based upon the 71 groups of principal trades that resulted in an overall net profit. Therefore, any principal trades which included an internal profit but resulted in an overall net loss were not charged against Defendants in the first instance, nor were they factored into the Commission's calculation of disgorgement. Consequently, such losses were netted out and in that sense were already credited to Defendants and thus should not be double-counted by offsetting these losses from the overall disgorgement figure.

In light of the above analysis, the Court respectfully recommends to Judge Kuntz that Defendants are not entitled to an offset of the $2,256,644.54 in trading losses.

2. Payments to Hal Pasetsky

Defendants also seek an offset from the total disgorgement figure for payments which Defendants characterize as "brokerage commissions" paid to Hal Pasetsky ("Pasetsky") in the amount of $2,666,486.25. *See* Defs.' Post-Hearing Mem. at 5. The hearing testimony establishes that Hal Pasetsky worked at WDNC, purportedly as a broker, and was paid "a percentage of brokerage commissions." *See* Hrg. Tr. at 726:2-727:2. Specifically, Pasetsky was paid "35 percent of commissions on a transaction-by-transaction basis and a percentage, 35 percent of the management fee." *Id.* at 727:10-12. In order to determine Pasetsky's monthly payment, Nadel "would add up all the commissions on each transaction and for each client, and then [Nadel] would add up the management fees upon receipt, and the summation of all of those numbers would be multiplied by 35 percent, and that was his monthly brokerage commission to be received." *Id.* at 727:4-8. In addition, the trading confirmations received by clients listed Pasetsky as the financial consultant. *Id.* at 735:12-738:15. Nadel testified that the confirmations also contained "the brokerage commission portion that was due to Mr. Pasetsky." *Id.* at 739:2-3.

Despite Nadel's direct testimony at the hearing concerning Pasetsky's role as a broker, Nadel testified on cross-examination that only he and RBC Correspondent Services were involved in executing the cross-trades and that it was RBC which ultimately executed, processed and cleared the transactions. *Id.* at 726:21-23; 783:21-784:11. When questioned concerning Pasetsky's actual role in the execution of the cross-trades, Nadel testified as follows:

> Q: Was Mr. Pasetsky involved in any of the steps you described in the execution of the cross-trades?
>
> A: Of the actual transactions, no.
>
> Q: He didn't negotiate any of those trades?

A: No.

Q: He didn't broker any of the cross-trades, did he?

A: No.

Q: Well, what happened is you were getting the commission income from RBC, and then at some point you would break out his share of that as well as his share of the management fees from RIA, and then he would be paid. Is that fair to say?

A: As is typical of a managed account at any broker firm in the country.

Id. at 785:6-19.

Based upon the testimony and evidence adduced at the damages hearing, the Court is not convinced that any of the payments made by Nadel to Pasetsky should be deducted from the total amount of disgorgement. It is true that "a court may, in its discretion, deduct from the disgorgement amount any direct transactions costs, such as brokerage commissions." *S.E.C. v. Univ. Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009); *see Svoboda*, 409 F. Supp. 2d at 345. However, courts have also "taken care to distinguish such costs from 'general business expenses, such as overhead expenses, which should not reduce the disgorgement amount.'" *Univ. Express, Inc.*, 646 F. Supp. 2d at 564 (quoting *McCaskey*, 2002 WL 850001, at *4 n. 6); *see S.E.C. v. U.S. Envt'l, Inc.*, No. 94 Civ. 6608, 2003 WL 21697891, at *28 (S.D.N.Y. Jul. 21, 2003); *Svoboda*, 409 F. Supp. 2d at 345. Further, where courts have deducted brokerage commissions, the deduction is generally based upon the direct execution of trades and the expenses incurred as a result of such trade executions. *See Litton Inuds., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990) ("[T]ransaction costs such as brokerage commissions incurred by [defendant] in *executing* trades in [the company's] securities

should be deducted from any fees and commissions disgorged as profit.") (emphasis added); *S.E.C. v. East Delta Res. Corp.*, No. 10-CV-310, 2012 WL 3903478, at *7 (E.D.N.Y. 2012).

Although Defendants attempt to characterize Pasetsky's payments as brokerage commissions in the traditional sense, the testimony instead establishes that these payments were not made to Pasetsky for executing the cross-trades on behalf of Defendants since Nadel was solely responsible for trade execution. *See* Hrg. Tr. at 527:9-11; 536:4-7. The testimony further shows that Nadel himself executed the trades, received the commission income from the trades and then parsed out Pasetsky's share based upon the fee arrangement which was in place. *See* Hrg. Tr. at 785:6-19. Considering these facts, it would be illogical and contrary to the purpose behind the remedy of disgorgement to permit Defendants to offset the payments made to Pasetsky which are closer to a general business expense than a direct transaction cost. In short, any payments made to Pasetsky, which were more akin to a profit-sharing arrangement, were at best ancillary to Defendants' violations — as opposed to constituting a direct transaction cost derived from Defendants' wrongdoing. Such payments, therefore, should not be deducted. *See McCaskey*, 2002 WL 850001, at *8 (noting that expenses which are "ancillary to the fraudulent scheme" should not serve to reduce the overall amount of disgorgement).

Furthermore, "it is irrelevant for disgorgement purposes, how the defendant chose to dispose of the ill-gotten gains . . . [and therefore] payment[s] to co-conspirators are not deductible from the gross profits subject to disgorgement." *Univ. Express, Inc.*, 646 F. Supp. 2d at 564 (internal quotations and citation omitted); *see Rosenfeld*, 2001 WL 118612, at *2; *S.E.C. v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) ("The manner in which [defendant] chose to spend his misappropriations is irrelevant as to his objection to disgorge. Whether he chose to use this money to enhance his social standing through charitable contributions, to travel around

the world, or to keep his co-conspirators happy is his own business."). The testimony demonstrates that Defendants opted to funnel payments to affiliates such as Pasetsky. That Defendants chose to do so is their own business. However, having made that choice, they cannot now seek to offset such ancillary payments — which do not constitute direct transaction costs — in order to reduce the overall amount of disgorgement. Thus, it is of no moment that the funds may have been procured for a third-party. *See Contorinis*, 743 F.3d at 307 (recognizing that "when third parties have benefitted from illegal activity, it is possible to seek disgorgement from the violator, even if that violator never controlled the funds."). Indeed, labeling someone a broker and categorizing such payments as direct transaction costs does not make them so.

Based upon the foregoing, this Court respectfully recommends to Judge Kuntz that the $2,666,486.25 in payments made to Hal Pasetsky *not* be deducted from the total amount of disgorgement.[13]

3. Clearing Charges

The Defendants next seek to offset the "$301,201.90[14] in clearing charges that Defendants paid to RBC and MF Global for clearing trades in executing the transactions at issue." Defs.' Post-Hearing Mem. at 8. Defendants again cite *S.E.C. v. McCaskey* for the proposition that these clearing charges are "'direct transaction costs' that should be reduced from

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[13] For the reasons stated in this section, the payments totaling $218,783.33 that were made to Nat Allen and Joe Saxton, Hrg. Tr. at 751:14-763:14, likewise do not constitute direct transaction costs and should therefore not be applied to reduce the Defendants' total amount of disgorgement.

[14] The parties stipulated on the record that "the clearance charges are as stated on the front of [Defendants'] Exhibit 103. . . ." Hrg. Tr. at 771:20-772:3. *See* Defendant's Hearing Exhibit ("Defs.' Hrg. Ex.") 103 at 1 (noting the total amount of clearing charges incurred from 2007-2009 as $301,201.90).

disgorgement because they 'plainly reduce the wrongdoer's profit.'" *Id.* at 8 (quoting *McCaskey*, 2002 WL 850001, at *4).

With respect to the clearing charges, Nadel testified these were "charges for processing transactions associated with RBC with any trades that were performed." Hrg. Tr. at 751:1-2. In addition to clearing trades processed through RBC, Nadel testified that Defendants "utilized MF Global for hedging purposes of the preferred portfolio which utilized treasury bonds, futures and put options." *Id.* at 767:24-768:1. Specifically, Nadel stated that MF Global was the clearing firm used with respect to the options portion of Defendants' investment strategy. *Id.* at 751:4-7.

As noted above, the parties have stipulated that the total amount of clearing charges paid by Defendants from 2007 through 2009 is $301,201.90. *See* Defs.' Hrg. Ex. 103 at 1. The hearing testimony discloses that Defendants did indeed pay this amount to their clearing brokers. The amounts were allocated as follows: $183,026.68 to RBC, $76,411.90 to Man Financial and $41,763.32 to MF Global. *Id.*; *see* Hrg. Tr. at 765:16-767:25.

"Courts in this circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs, such as brokerage commissions, that plainly reduce the wrongdoer's actual profit." *McCaskey*, 2002 WL 850001, at *4 (citing cases); *Svoboda*, 409 F. Supp. 2d at 345; *Univ. Express*, 634 F. Supp. 2d at 564; *but see Bronson Partners, LLC*, 654 F.3d at 375 ("[I]t is well established that defendants in a disgorgement action are "not entitled to deduct costs associated with committing their illegal acts."); *S.E.C. v. Cavanagh*, No. 98 CIV. 1818, 2004 WL 1594818, at *30 (S.D.N.Y. July 16, 2004), *aff'd on other grounds*, 445 F.3d 105 (2d Cir. 2006) ("Defendants are not entitled to deduct costs associated with committing their illegal acts."); *S.E.C. v. Amerindo Inv. Advisors Inc.*, No. 05 CIV. 5231, 2014 WL 2112032, at *5 (S.D.N.Y. May 6, 2014) (same).

In light of the fact that there is some disagreement within this Circuit as to whether the direct costs associated with a defendant's illegal acts should be deducted from the overall amount of disgorgement, it is necessary to briefly review the purpose behind this remedy. "[D]isgorgement is an equitable remedy that prevents unjust enrichment" and is therefore unlike a criminal forfeiture which constitutes "a statutory legal penalty imposed as punishment." *Contorinis*, 743 F.3d at 306. As such, "disgorgement is designed to equitably deprive those who have obtained ill-gotten *gains* of enrichment. . . [and thus operates] not to punish, but to ensure illegal actions do not yield unwarranted enrichment. . . ." *Id.* at 306-07. (emphasis added); *see S.E.C. v. Lorin*, 869 F. Supp. 1117, 1121 (S.D.N.Y. 1994) (noting that the court would "not label disgorgement as a fine, penalty, or forfeiture in light of the operation of disgorgement, which merely deprives one of wrongfully obtained proceeds") (internal quotations and citation omitted).

Since the over-arching purpose of disgorgement is the prevention of a defendant's unjust enrichment by requiring the relinquishment of his "ill-gotten gains," this Court finds the cases holding that direct transaction costs may, in the court's discretion, be deducted from the total amount of disgorgement represent the correct approach since such direct costs do not constitute "gains" to a defendant. Factoring such direct costs into a disgorgement calculation would operate as a penalty, thus failing to achieve disgorgement's ultimate purpose and intent. *See S.E.C. v. Shah*, No. 92 Civ. 1952, 1993 WL 288285, at *5 (S.D.N.Y. Jul. 28, 1993); *Litton Indus., Inc.*, 734 F. Supp. at 1077.

In this case, the Commission is seeking to have Defendants disgorge, in part, $5,384,443.70 in commissions which Defendants received by engaging in 5,615 illicit cross-trades. *See* Hrg. Tr. at 4:8-15 (Stipulation). These cross-trades, which encompassed only the

preferred utility stocks, were cleared solely by RBC. *See* Hrg. Tr. at 751:1-3. As such, the direct costs associated with Defendants clearing these cross-trades *i.e.* — $183,026.68, Defs.' Hrg. Ex. 103 at 1 — should be deducted from the total amount of disgorgement sought since these charges constituted direct expenses associated with the wrongdoing which reduced Defendants' actual profit. *See Univ. Express*, 634 F. Supp. 2d at 564; *Svoboda*, 409 F. Supp. 2d at 345. However, the $76,411.90 paid to Man Financial and the $41,763.32 paid to MF Global should not be deducted from the overall amount of disgorgement. *See* Defs.' Hrg. Ex. 103 at 1. The rationale is that although "hedging" may have constituted a portion of the Defendants' investment strategy, none of these "hedging" trades — consisting of treasury bonds, future or put options — involved conduct that was found to have violated the securities laws. *See* Hrg. Tr. at 767:25-768:1. Therefore, any profits Defendants may have made from these separate trades is not otherwise included in the $5,384,443.70 disgorgement total for the cross-trading commissions received. A deduction for clearing charges incurred on these trades, then, would be is improper since any profits garnered on such trades would not have been illegal in the first instance since the underlying trades themselves did not violate the law. *See Rosenfeld*, 2001 WL 118612, at *2 ("A court may in its discretion, deduct from the defendant's gross profits certain expenses incurred while garnering the *illegal profits* . . . .") (emphasis added); *S.E.C. v. Thomas James Associates, Inc.*, 738 F. Supp. 88, 94 (W.D.N.Y. 1990) ("In determining the proper amount of restitution, a Court may consider as an offset the sums which a defendant paid to effect a *fraudulent transaction*.") (emphasis added).

For these reasons, this Court respectfully recommends to Judge Kuntz that (1) Defendants be permitted a deduction solely for the $183,026.68 in clearing charges paid to RBC

to effectuate the illicit cross-trades but (2) Defendants not be permitted a deduction for the clearing charges incurred in executing the "hedging" trades.

4. Payment to Polycom

Defendants next assert that the $553,063.37 payment made by them to Polycom, one of Defendants' investors, should serve as an offset to the total amount to be disgorged. Defendants maintain that "where a defendant 'can establish that he has repaid' alleged ill-gotten gains to an investor, 'such payments will offset his disgorgement obligation.'" Defs.' Post-Hearing Mem. at 8 (quoting *Disraeli v. S.E.C.*, 334 F. App'x 334, 335 (D.C. Cir. 1998)).

The evidence introduced at the damages hearing established that a payment of $553,063.37 was in fact made by RIA to Polycom. *See* Hrg. Tr. at 341.21:7-23 (Boilieu testimony); Defs.' Hrg. Ex. 63. Further evidence established that with respect to Polycom's investment,

> in the September 2008 time frame we became aware that the portfolio was -- the Nadel portfolio was out of compliance with Polycom's investment policy, and due to that noncompliance, there was approximately -- and that's probably a rounded number, but there was approximately $1.5 million worth of loss that was on those instruments due to the fact that they were out of compliance. And by out of compliance, as to duration, meaning they had no longer the 90 days, and as to quality of instrument.

See Pl.'s Hrg. Ex. 209, October 28, 2011 Michael Kourey [CFO of Polycom] Deposition Transcript ("Kourey Dep."), at 45-46; Hrg. Tr. at 321:22-323:5. The testimony supplied by Walter Boilieu at the hearing corroborated Michael Kourey's rationale concerning the promissory note issued by RIA. When asked "what was the purpose of the note, again?," Boilieu responded that to his recollection "it had something to do with losses [Polycom] incurred to get the portfolio back into compliance with [Polycom's] investment policy, and I guess we extracted

a note from [Nadel] to make us whole for some of those losses." Hrg. Tr. at 341.11:14-20 (Boilieu testimony).

In light of this evidence, the Court finds that the promissory note issued by Defendants to Polycom for approximately $1.5 million, of which $553,063.37 was repaid, was entered into as a result of Defendants' non-compliance with Polycom's investment policy — not due to losses incurred by Polycom directly relating to or resulting from Defendants' underlying misconduct which was found by Judge Kuntz to have violated the securities laws. Thus, Defendants' attempts to characterize these funds as a repayment of an "ill-gotten gain" rings hollow.

The two cases cited by Defendants are inapposite since neither one reflects the scenario encountered here. For example, in *Disraeli*, the court specifically limited its holding to those funds which the petitioner "transferred from Lifeplan's bank account to his own" — in other words, ill-gotten gains — and determined that in such instance, these "payments will offset his disgorgement obligation." *Disraeli*, 334 F. App'x at 335. Further, the Second Circuit case cited by *Disraeli* (and noted in Defendants' Post-Hearing Memorandum) dealt with a circumstances in which the court determined that "to the extent that [defendant] pays or has paid *restitution* as ordered in the criminal judgment, such payments will offset his disgorgement obligation under the present judgment." *S.E.C. v. Palmisano*, 135 F.3d 860, 864 (2d Cir. 1998) (emphasis added). Neither of these decisions is on-point. Since Defendants' repayment to Polycom pursuant to the promissory note did not involve repayment of ill-gotten gains — but rather repayment due to non-compliance with Polycom's investment parameters — a deduction of this payment from the total disgorgement amount is not warranted.

C. Prejudgment Interest

1. Applicable Law

Whether prejudgment interest should be awarded in a case involving violation of the securities laws is "confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion." *Contorinis*, 743 F.3d at 307 (quoting *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1071–72 (2d Cir. 1995)); *see First Jersey*, 101 F.3d at 1476; *Tavella*, 77 F. Supp. 3d at 360; *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *12. Thus, the decision whether to award prejudgment interest is "governed by the equities, reflecting 'considerations of fairness' rather than 'a rigid theory of compensation . . . and [] the failure of securities law violators to enjoy a profit 'does not standing alone, make it inequitable to compel them to pay interest.'" *Contorinis*, 743 F.3d at 308 (internal citations omitted).

The primary purpose behind awarding prejudgment interest is "to deprive the wrongdoer of the benefit of holding the illicit gains over time by reasonably approximating the cost of borrowing such gain from the government." *Id.*; *see First Jersey*, 101 F.3d at 1476; *Tavella*, 77 F. Supp. 3d at 360. Therefore "[r]equiring the payment of interest prevents a defendant from obtaining the benefit of what amounts to an interest free loan procured as a result of illegal activity." *S.E.C. v. Moran*, 944 F. Supp. 286, 295 (S.D.N.Y. 1996); *see China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *12.

In determining whether to award prejudgment interest, courts consider the following factors "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court.

First Jersey, 101 F.3d at 1476; *see China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *13; *U.S. Envt'l, Inc.*, 2003 WL 21697891, at *30. "In an enforcement action brought by a regulatory agency, the remedial purpose of the statute takes on special importance." *First Jersey*, 101 F.3d at 1476; *see U.S. Envt'l, Inc.*, 2003 WL 21697891, at *30; *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *13. Notwithstanding the four factors enumerated above, "the amount on which a violator must pay prejudgment interest usually tracks the amount the party is ordered to disgorge [and] [w]hether or not a party personally enjoyed the gains from the illegal action does not alter this principle." *Contorinis*, 743 F.3d at 308.

In calculating the rate of prejudgment interest to be awarded, "the Second Circuit has approved the calculation . . . at the [Internal Revenue Service] underpayment rate, which 'reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its [illegal conduct].'" *Tavella*, 77 F. Supp. 3d at 360 (quoting *First Jersey*, 101 F.3d at 1476); *see U.S. Envt'l, Inc.*, 2003 WL 21697891, at *30 ("The district court generally calculates prejudgment interest by using the IRS rates for underpayment of taxes under 26 U.S.C. § 6621(a)(1)"); *S.E.C. v. Spongetech Del. Sys., Inc.*, No. 10-CV-2031, 2015 WL 5793303, at *9 (E.D.N.Y. Sept. 30, 2015) (noting that the Second Circuit has "approved" the use of the IRS underpayment rate when calculating a prejudgment interest award).

2. Application to the Facts

The evidence presented at the hearing illustrated that throughout the duration of the wrongdoing, which lasted for at least two years, Defendants acted with a high degree of scienter. *See* Hrg. Tr. at 3:24-5:7 (Stipulation); Section III. A. 2., *supra* (discussing Defendants' degree of scienter in the context of awarding injunctive relief); *see also Svoboda*, 409 F. Supp. 2d 331

(noting that "courts have routinely awarded prejudgment interest in SEC enforcement actions where the defendant's scheme evidences a high degree of scienter"); *S.E.C. v. Musella*, 748 F. Supp. 1028, 1042-43 (S.D.N.Y. 1989); *S.E.C. v. Sekhri*, No. 98 Civ. 2320, 2002 WL 31100823, at *18 (S.D.N.Y. Jul. 22, 2002); *Shah*, 1993 WL 288285, at *6. There is another factor to be considered in addition to the duration of the wrongdoing and high degree of intent involved in the underlying violations. Because this action has been brought by the Commission — a regulatory agency — "the remedial purpose of the statute takes on special importance" and this fact, therefore, weighs in favor of awarding prejudgment interest. *Svoboda*, 409 F. Supp. 2d at 346. Likewise, Defendants enjoyed the use of the illicit funds for the period between the wrongdoing and the entry of judgment, and, as a result, it would be inappropriate to effectively reward Defendants with "an interest free loan procured as a result of [their] illegal activity." *S.E.C. v. Stone*, No. 06 CIV 6258, 2009 WL 82661, at *6 (S.D.N.Y. Jan. 13, 2009); *see S.E.C. v. Roor*, No. 99 Civ. 3372, 2004 WL 1933578, at *10 (S.D.N.Y. Aug. 30, 2004); *Univ. Express*, 646 F. Supp. 2d at 566-67 ("Because a defendant has use of the unlawful profits from the time of the wrongdoing until entry of judgment, prejudgment interest is necessary to capture the full measure of defendant's ill-gotten gains."). For these reasons, the Court, in its discretion, finds that the award of prejudgment interest is warranted.

The S.E.C.'s examiner, Michael Fioribello, testified that in calculating the amount of prejudgment interest, the Commission "uses the IRS underpayment rate." Hrg. Tr. at 205:8. "The Second Circuit has endorsed the use of the IRS underpayment rate in actions brought before the SEC" since the rate "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant[s] derived from [their] fraud." *Svoboda*, 409 F. Supp. at 346 (citing *First Jersey*, 101 F.3d at 1476). As

such, the Court finds that the Commission's use of the IRS underpayment rate in calculating the total amount of prejudgment interest is proper.

The total amount of prejudgment interest sought by the Commission is $2,372,401.11. *See* Pl.'s Hrg. Ex. 213 at 1; Hrg. Tr. at 205:1. This sum was calculated "by using the [Commission's] prejudgment interest calculator . . . [which requires the user to] input the disgorgement amount and the begin and end dates of the prejudgment interest period." Hrg. Tr. at 205:3-6. In addition to Fioribello's testimony, the evidence produced by the Commission demonstrates that prejudgment interest was calculated on a categorical basis which was further broken down by "Quarter Range," "Annual Rate," "Period Rate," "Quarter Interest," and "Principal + Interest." Pl.'s Hrg. Ex. 213 at 2-5 (illustrating the breakdown, by category, of the Commission's prejudgment interest calculation). The Court takes no issue with the Commission's raw calculations. However, because the Commission based its overall calculations on a total disgorgement amount of $10,959,714.30, and since the Court has determined that Defendants' clearing charges paid to RBC in the amount of $183,026.68 should be deducted from the total amount of disgorgement, the Commission's prejudgment interest figure will need to be revised to reflect that deduction. *See* Defs.' Hrg. Ex. 103 at 1; *East Delta Res. Corp.*, 2012 WL 3903478, at *7 (requiring the Commission to recalculate the amount of prejudgment interest to be awarded based upon the Court's deduction of broker's commissions from total amount of disgorgement).

The Court therefore respectfully recommends to Judge Kuntz that: (1) an award of prejudgment interest is appropriate in this case; and (2) the Commission should be required to submit a revised prejudgment interest calculation based upon the deduction of $183,026.68 in

clearing charges paid by Defendants to RBC to execute the cross-trades during the period January 1, 2007 through December 31, 2009.

D. Joint & Several Liability

1. Applicable Law

"Courts have held that joint-and-several liability is appropriate in securities cases when two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct." *S.E.C. v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997) (citing *First Jersey*, 101 F.3d at 1475); *Sekhri*, 2002 WL 31100823, at *17 (citing cases). The burden falls upon the wrongdoer to "establish that the liability is capable of being apportioned." *Hughes Capital Corp.*, 124 F.3d at 455 (citing *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992)). In this regard, the district court has wide latitude in levying disgorgement on a joint-and-several basis. *Hughes Capital Corp.*, 124 F.3d at 455; *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *14. Indeed, the imposition of this burden upon the defendant is appropriate since

> [a]lthough in some cases, a court may be able easily to identify the recipient of ill-gotten profits and apportionment is practical, that is not usually the case. Generally, apportionment is difficult or even practically impossible because defendants have engaged in complex and heavily disguised transactions. Very often defendants move funds through various accounts to avoid detection, use several nominees to hold securities or improperly deprived profits, or intentionally fail to keep accurate records and refuse to cooperate with investigators in identifying the illegal profits. Hence, the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.

Hughes Capital Corp., 124 F.3d at 455 (internal quotations and citations omitted); *see also S.E.C. v. Boock*, No. 09 CV 8261, 2012 WL 3133638, at *3 (S.D.N.Y. Aug. 2, 2012) (finding that joint and several liability is "particularly appropriate" when apportionment between defendants "is difficult or even practically impossible because . . . defendants have engaged in

complex and heavily disguised transactions in an effort to conceal their fraud") (internal quotations and citation omitted)). In this regard, "[t]he SEC is not required to trace every dollar of proceeds or identify misappropriated monies which have been commingled." *Spongetech Del. Sys., Inc.*, 2015 WL 5793303, at *8.

2. Application to the Facts

The evidence presented at the hearing illustrates that Nadel acted as President and Chief Executive Officer of both WDNC, his broker-dealer, and RIA, his investment advising affiliate. *See* Pl.'s Hrg. Ex. 111 at 18, 49 (biographical data of Warren D. Nadel noting that Nadel "[f]ounded the firm, a securities Broker-Dealer and Registered Investment Advisor. . . ."). In addition, during her hearing testimony, Relief Defendant Katherine Nadel, who purportedly worked for WDNC and RIA, was asked whether "Warren D. Nadel & Company and Registered Investment Advisers . . . work[ed] together at all ?" — to which Katherine Nadel answered "[y]es." Hrg. Tr. at 601:2-5 (Katherine Nadel testimony). Later in her testimony, Katherine Nadel confirmed that WDNC and RIA functioned as a unitary enterprise by claiming to be responsible for the "written supervisory procedures of both firms, the RIA and the WDNC[]" and that she kept "[m]inutes of both the IRA [*sic*] and Warren D. Na[d]el Company." *Id.* at 602:2-3; 606:21-607:2. Moreover, Judge Kuntz noted in his summary judgment decision that: (1) Defendants themselves, in arguing against a finding of liability predicated upon Section 206(3) of the Advisers Act, asserted that "WDNC and RIA were acting as one business enterprise [and that] the management and brokerage functions were not separate;" and (2) Defendants represented "in the Program Package that WDNC and RIA were acting as one business enterprise by stating the Company has 'not separated the management and brokerage functions.'" *Nadel*, 97 F. Supp. 3d at 127 (internal citation omitted).

In light of these facts, the Court finds that imposition of joint-and-several liability upon all Defendants is warranted since it is clear that a close relationship existed among Nadel, WDNC and RIA in engaging in the illegal conduct. *See Hughes Capital Corp.*, 124 F.3d at 455 (citing *First Jersey*, 101 F.3d at 1475); *Sekhri*, 2002 WL 31100823, at *17; *Spongetech Del. Sys., Inc.*, 2015 WL 5793303, at *8. Likewise, Defendants have not shown through testimony at the damages hearing or otherwise that the amounts are capable of being apportioned. *See Hughes Capital Corp.*, 124 F.3d at 455 (citing *Alcan Aluminum Corp.*, 964 F.2d at 269); *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *14 (recognizing that the burden is on the tortfeasor to establish that liability is capable of being apportioned and finding imposition of joint-and-several liability to be appropriate where "[d]efendants have not refuted the SEC's allegations as to the relationship between them") .

Based on these factors, the Court respectfully recommends to Judge Kuntz that Defendants be found jointly-and-severally liable for the total amount of disgorgement and prejudgment interest to be awarded.

E. Civil Penalties

1. Applicable Law

Pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d); Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d); and Section 209(e) of the Advisers Act, 15 U.S.C. § 80b-9(e), the Commission is empowered to pursue civil monetary penalties in addition to an award of disgorgement. The imposition of civil monetary penalties is designed "to punish the individual violator and deter future violations of the securities law." *S.E.C. v. Neurotech Dev. Corp*, No. CV 04-4667, 2011 WL 1113705, at *3 (E.D.N.Y. Feb. 28, 2011) (quoting *Tannenbaum*, 2007

WL 2089326, at *6); *see Moran*, 944 F. Supp. at 296 (noting that the primary purpose behind civil monetary penalties are punishment of the violator and deterrence from future violations).

Courts are empowered to impose a monetary penalty "not to exceed the greater of (1) the gross pecuniary gain to the defendant as a result of a violation, or (2) a specified amount per violation. . . ." *Neurotech Dev. Corp*, 2011 WL 1113705, at *4; *see Tavella*, 77 F. Supp. 3d at 362. Where the Court relies upon a specified amount per violation, the maximum amount of the monetary penalty to be imposed for each distinct violation is set forth by each governing statute[15] which structures the penalty into three tiers — the third tier being the most serious. *See* Section 20(d)(2)(A)-(C) of the Securities Act, 15 U.S.C. § 77t(d)(2)(A)-(C); Section 21(d)(3) (B)(i)-(iii) of the Exchange Act, 15 U.S.C. § 78u(d)(3)(B)(i)-(iii); and Section 209(e)(2)(A)-(C) of the Advisers Act, 15 U.S.C. § 80b-9(e)(2)(A)-(C); *Tavella*, 77 F. Supp. 3d at 362; *Tannenbaum*, 2007 WL 2089326, at *6. Under each of these statutes,

> a first-tier penalty may be imposed for any violation; a second-tier penalty may be imposed if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; a third-tier penalty may be imposed when, in addition to meeting the requirements of the second tier, the "violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons,"

S.E.C. v. Razmilovic, 738 F.3d 14, 38 (2d Cir. 2013); *see China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *15. The maximum penalty per violation — which is periodically adjusted for inflation — for both an individual as well as a corporate entity in each tier for individual violations occurring through March 3, 2009 are: (1) First tier, $6,500 for an individual or $65,000 for a corporate entity per violation; (2) Second tier, $65,000 for an individual or

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[15] The maximum statutory amounts are periodically adjusted for inflation. *See Tavella*, 77 F. Supp. 3d at 362; *China Energy Sav. Tech., Inc.*, 2008 WL 6572372, at *15. The inflationary adjustments are set forth in 17 C.F.R. §§ 201.1001-201.1005.

$325,000 for a corporate entity per violation; (3) Third tier, $130,000 for an individual or $650,000 for a corporate entity per violation. *See* 17 C.F.R. § 201.1003, Table III. Additionally, for violations occurring after March 3, 2009 but prior to March 5, 2013, the applicable rates are as follows: $7,500 and $75,000 for first-tier violations; $75,000 and $375,000 for second-tier violations; and $150,000 and $725,000 for third-tier violations. *See id.* at § 201.1004, Table IV. Therefore, "[s]ubject only to the applicable maximum, [t]he amount of the penalty shall be determined by the court in light of the facts and [c]ircumstances." *Tavella*, 77 F. Supp. 3d at 362 (internal quotations and citation omitted) (first alteration in original). In that regard, [b]eyond setting maximum penalties, the statutes leave "the actual amount of the penalty . . . up to the discretion of the district court." *Razmilovic*, 738 F.3d 14, 38 (quoting *S.E.C. v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005)).

In determining whether to impose civil penalties, and if so, what the appropriate amount should be, a court should consider the following factors, including:

> (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

Tavella, 77 F. Supp. 3d at 362-63; *see Haligiannis*, 470 F. Supp. 2d at 386; *Neurotech Dev. Corp*, 2011 WL 1113705, at *4; *Tannenbaum*, 2007 WL 2089326, at *6. Despite the usefulness of these factors in "characterizing a particular defendant's actions, the civil penalty framework is of a 'discretionary nature' and each case 'has its own particular facts and circumstances which determine the appropriate penalty to be imposed.'" *S.E.C. v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (quoting *Moran*, 944 F. Supp. at 296-97); *Tavella*, 77 F. Supp. 3d at 363.

2. Appropriateness of Third-Tier Civil Penalties

The Commission seeks the imposition of "maximum third tier civil [monetary] penalties" based on Defendants' violation of the securities laws. Plaintiff's Opening Statement, Hrg. Tr. at 8:9-12. In response, Defendants assert that they have provided "strong evidence of their inability to pay a civil penalty" and thus, such penalties should therefore be "waiv[ed] or significantly reduc[ed]." Defs.' Post-Hearing Mem., at 10.

i. Egregious / Recurrent Nature of Conduct and Degree of Scienter

The evidence adduced at the damages hearing, which illustrated the overall scope and protracted nature of Defendants' misconduct, strongly supports the conclusion that the Defendants' conduct was egregious and was executed with a high degree of scienter. The Court's previous analysis of Defendants' conduct, *see* Section III. A. 2. *supra*, is thus equally applicable in this context, and for those reasons, the Court finds that each of these factors weigh in favor of imposing third-tier civil penalties in this case. *See Tannenbaum*, 2007 WL 2089326, at *6 (finding Defendants' conduct encompassed a high degree of scienter, was egregious and recurrent based upon prior discussion of these factors).

ii. Defendant's Conduct Resulted in the Risk of Substantial Losses

Testimony at the damages hearing from Defendants' investors establishes that not only was there a real risk of loss based upon Defendants' misconduct, but also that investors incurred actual losses. For example, Richard Anderson of the CGC stated that upon terminating his company's relationship with Defendants in September 2009, CGC incurred an overall loss when trying to liquidate its portfolio of preferred utility stocks in the open market. *See* Hrg. Tr. at 81:6-86:8 (Anderson testimony). Specifically, when asked whether CGC made or lost money on the "last batch of securities that Mr. Nadel purchased," Anderson stated that CGC "lost

money." Anderson further stated that of the approximately $5.1 million held in preferred utility stocks at the time CGC exited Defendants' strategy, only about $4.7 million was able to be recouped from selling the portfolio on the open market. *See id.* at 84:14-86:8; Pl.'s Hrg. Exs. 44 at 10 and 46 at 3.

William Hedges of Oregon Mutual testified that during the fourth quarter of 2008, his company's board of directors decided to terminate Oregon Mutual's relationship with Defendants and directed Hedges to "liquidate the portfolio" which was managed by Defendants. Hrg. Tr. at 127:21-128:6 (Hedges testimony). At that point, although Defendants "took back one issue [that was sold to Oregon Mutual] it was nevertheless "sold as a loss." *Id.* at 128:5-10. Additionally, because Defendants were not able to timely liquidate Oregon Mutual's holdings and expressed that "little is being accomplished," *see* Pl.'s Hrg. Ex. 120 (email from Nadel to Hedges expressing depressed nature of market and inability to liquidate the portfolio), Oregon Mutual sought to liquidate its position in the open market. However, Hedges testified that after conferring with an independent money manager, *see* Hrg. Tr. at 129:10-17, Oregon Mutual decided not to liquidate its holdings since "it would have generated a *significant loss*." *Id.* at 131:10-19; *see also* Pl.'s Hrg. Ex. 121 (email from Douglas Clark to Hedges containing matrix summarizing current positions and probable liquidation prices on a per-share basis).

Jane Casey of Blyth testified that in "June 2008, [Blyth] requested an order of liquidation of the portfolio" and after Defendants were unable to timely liquidate Blyth's holdings at or near cost, Casey stated that Blyth "took custody of the portfolio . . . in December 2008." Hrg. Tr. at 261:19-262:13 (Casey testimony). Casey noted that Blyth was not interested in liquidating "at a price well below the cost [of the securities]" and therefore Blyth approached Deutsche Bank to determine if they would be able to liquidate Blyth's portfolio "at any price 95 percent or greater

than cost." *Id.* at 265:5-9; 268:24-25. Casey stated that it took Deutsche Bank until "sometime in 2012 to liquidate the entire portfolio [because] [t]hey couldn't find buyers at 95 percent of cost or higher" and, therefore, had the securities been sold in 2009, Blyth would have incurred a loss. *Id.* at 269:3-16. In addition, even while liquidating the portfolio, Casey stated that because the liquidation was "generally in the range of 95 percent or greater of cost [] we were generating capital losses at that point." *Id.* at 300:20-25. Furthermore, Casey testified that there existed the ongoing risk of sustaining an actual loss based upon the "capital value of the securities, and . . . [the] potential depreciation of the value based on interest rates." *Id.* at 307:5-12.

Walter Boilieu of Polycom testified that the process of liquidating the portfolio which Polycom held with Defendants began during the fourth quarter of 2009. Hrg. Tr. at 341.5:22-23.[16] On April 6, 2010, Polycom terminated its relationship with Defendants, *see* Pl.'s Hrg. Ex. 30, and "over the life of the portfolio [determined that they sustained] a cash loss of a million 7 on the original 50 million invested." Hrg. Tr. at 341.10:17-23; Pl.'s Hrg. Ex. 30. In addition, when asked whether Polycom incurred a "cash loss on the last set of securities that Mr. Nadel purchased" Boilieu stated:

> [y]es. Back to the amount we had written it down to, the FTID value of $6.5 million, we only were able to recover $700,000 more than that to make us whole. So we were still short the 5.7 million that would have taken us back to the cost on the Nadel portfolio as of March 2010.

Hrg. Tr., at 341.16, at 10-17; Pl.'s Hrg. Ex. 106. On cross-examination, Boilieu did state that he could not be sure whether the promissory note payment and dividends received were calculated into the $48.3 million total cash withdrawn and thus, conceded that the overall loss could have been approximately $800,000. Hrg. Tr. at 342:25-343:12.

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[16] The citation format used to refer to certain portions of Walter Boilieu's testimony differs from the overall citation format due to an alteration in the pagination of the hearing transcript.

Patricia Canning of LWCC testified that Defendants' services were terminated in May or June of 2009 and that LWCC took control of its portfolio in "late September or October of 2009." Hrg. Tr. at 371:12-15 (Canning testimony). Canning stated that if LWCC had sold its holdings as of September 30, 2009 — shortly after ending their relationship with Defendants — they would have sustained an approximate $3 million loss. *See id.* at 409:7-20. In addition, Canning highlighted the fact that LWCC incurred a $2.8 million loss on liquidation trades made from October 1, 2009 through December 31, 2009. *Id.* at 410:21-22. However, Canning clarified that "as of the date of liquidation of the portfolio in total, the amount of dollars in, received, versus the amount of dollars that was expended, turned out to be very close. About break even." *Id.* at 412:12-15; *see* Pl.'s Hrg. Ex. 93.

Each of the above investors testified at the damages hearing that their investments with Defendants were either placed at risk of sustaining substantial losses or in fact did sustain substantial losses on their initial investment. The risk and / or actual loss was thus directly related to and resulted from each investor's reliance on Defendants' investment strategy, components of which were found to violate the securities laws. As such, based upon the foregoing evidence, the Court finds that at a minimum, there existed a clear and substantial risk of loss to Defendants' investors based upon the underlying statutory violations. Therefore, this factor weighs in favor of imposing third-tier civil penalties.

iii. Defendants' Financial Condition

Nadel testified at the damages hearing that he is not employed at the present, has not worked for the past five years and has no viable source of income at present. *See* Hrg. Tr. at 669:4-9. In terms of his monthly expenses, Nadel stated that these total $8,700, including $2,150 in insurance premiums and $2,200 in medical expenses. *See id.* at 673:13-674:10; Defs.'

Hrg. Ex. 89. According to Nadel, he currently has total assets of $4.4 million and total liabilities of $5,376,057, for a total net worth of negative $975,197. *See id.* at 669:688:15-17. These figures were also included on a chart prepared by Nadel in which he "listed assets and liabilities for [him]self, [his] family and any corporate entity that [he] owned." *Id.* at 688:5-9; Defs.' Hrg. Ex. 99 at 10. Further, Nadel testified that for tax years 2011, 2012 and 2013, for which he filed jointly with his wife, he earned zero taxable income and was projected to earn zero taxable income for tax year 2014. *See id.* at 677:15-680:23; Defs.' Hrg. Ex. 99 at 2841 (Nadel's joint tax return for 2012), 2981 (Nadel's joint tax return for 2013).

Tax return information was also provided with respect to Nadel's three corporate entities — RIA, WDNC and Emancipation Corporation. The testimony and exhibits presented illustrated that with respect to RIA, for calendar years, 2012 and 2013, no gross receipts were recorded and losses of $15,000 and $123,655 were sustained for these years respectively. *See id.* at 682:8-683:19; Defs.' Hrg. Ex. 99 at 2499, 2536. For calendar year 2011, RIA earned $146,504 in total income but sustained an ordinary business loss of $-70,086. *See id.* at 683:20-684:6; Defs.' Hrg. Ex. 99 at 2433. Similarly, for calendar years 2011, 2012 and 2013, WDNC earned zero dollars in gross receipts and sustained an overall operating loss of $446,786, $135,851 and $38,479 in each year respectively. *See id.* at 684:20-686:16; Defs.' Hrg. Ex. 99 at 3106, 3144, 3179. With respect to Emancipation Corporation, Nadel stated that for tax year 2013, Emancipation Corporation incurred a loss of $162,919. Moreover, he expected that income would not exceed losses during calendar year 2014. *See id.* at 687:9-20; Defs.' Hrg. Ex. 99 at 2338.

With respect to his real estate holdings, Nadel testified that he currently has "approximately $4.1 million" in outstanding mortgage loans. *Id.* at 698:18-21. Nadel personally

owns two residential properties in New York and New Jersey while his corporate entity, Emancipation Corporation, owns two properties in New York (one residential and one commercial) and one vacation property on the island of Turks and Caicos. *Id.* at 692:24-693:694:7. With respect to the two residential properties personally owned by Nadel in New York and New Jersey, the evidence established that significant mortgage liabilities exist on each property that are past due. Specifically, Nadel owes at least $748,941.83 on his New York residence. On his New Jersey residence, he owes $968,485.99 on his second mortgage and $354,824.32 on his first mortgage, along with $48,467.41 in unpaid escrow funds. *Id.* at 699:5-704:12; Defs.' Hrg. Ex. 99 at 216-217, 220. Although Nadel's two personally held residential properties have significant mortgage balances, the properties held by Emancipation Corporation are "all current" with respect to any mortgage liability.[17] *Id.* at 707:15-19. Nadel presented no documentary evidence of the outstanding mortgage on the Turks and Caicos property, *see id.* at 710:6-16, but he did present cancelled checks made out to "Tamarro TC LTD" in the amount of $10,193.00 which Nadel claimed were "monthly mortgage payments for the property in Turks and Caicos." *Id.* at 712:25-713:3; 714:19-24; Defs.' Hrg. Ex. 99 at 17.

In addition to the above debt, Nadel claims to owe $142,977 in credit card debt. *See* Defs.' Hrg. Ex. 99 at 10. However, at the time of the hearing, Nadel produced only a statement with respect to his corporate American Express account for which he owes $7,977.39. *See id.* at 3. Further, although he claims to owe over $200,000 in "professional services," Nadel did not provide receipts substantiating the vast majority of these expenses.

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[17] Nadel also testified that the property owned by Emancipation Corporation which was located in Brentwood, New York, has since been sold and therefore "that would reduce the item *asset real estate Emancipation New York* from $520,900 to $260,900." Hrg. Tr. at 722:17-21 (emphasis in original).

With respect to tax liabilities, Nadel provided evidence that he owes approximately $249,826.84 to the Internal Revenue Service and $80,787.20 to the New York State Division of Taxation and Finance. *Id.* at 718:719:15; Defs.' Hrg. Ex. 99 at 201, 222. Nadel also provided evidence that he owes $222,034.63 to Navient for unpaid student loans. *Id.* at 721:6-722:16; Defs.' Hrg. Ex. 112.

Despite his seemingly bleak financial picture, there was evidence presented that Nadel may not be quite so destitute. First, the evidence shows that Nadel withdrew over $2 million from individual retirement accounts between 2010-2012, *see* Defs.' Hrg. Ex. 99 at 1126-1139 ($1.9 million withdrawal in 2010); 1212-1218 ($146,000 withdrawal in 2011); 1226-1232 ($82,000 withdrawal in 2012). As of 2012, both Nadel and his wife held over $500,000 in assets in multiple brokerage and / or retirement accounts. *Id.* at 1246 ($141,546.83 held at TD Ameritrade in Acct. ending 807191), 1420 ($55,715.62 held at TD Ameritrade in Acct. ending 698796), 1600 ($223,829.10 held at TD Ameritrade in Acct. ending 913748), 1776 ($59,240.82 held at TD Ameritrade in Acct. ending in 730456), 1975 ($68,860.28 held at TD Ameritrade in Acct. ending 698545). During the hearing, Nadel did not address these particular funds or otherwise produce records establishing the whereabouts of this money at the present time. However, when pressed regarding IRA withdrawals in general, Nadel stated "I don't consider taking money out of an IRA [and] putting it into a firm [and] paying myself necessarily a stream of income. . . ." Hrg. Tr. at 841:22-25.

Moreover, when questioned regarding certain bank account transfer activity, Nadel was vague and somewhat evasive in his responses. For example, when questioned concerning a $214,937.47 deposit into his joint checking account and an immediate withdrawal on the same date of $200,000 into two unidentified savings accounts, Nadel responded:

Q: What does [the $214,937.47] correspond to? Or why did you receive that amount?

A: I don't specifically recall

Q: Do you see the entry below dated the same date? Do you see that?

A: Yes, I see the $200,000 withdrawal.

Q: You see two withdrawals of 100[,000]?

A: Actually, transfer to savings account.

Q: The first one is to savings 5580. Is that the one that you believe may be your daughter's savings account, sir?

A: I honestly don't remember.

Q: What about the savings 7357? Does that refresh your memory as to whose savings account that is?

A: No.

Id. at 805:14-806:6. Despite the above testimony and Nadel's seeming inability to recollect whether the first $100,000 transfer to a savings account ending in 5580 was an account held by his daughter, Nadel had nevertheless previously testified that he believed the account ending in 5580 was, in fact, his daughter's account. *See id.* at 801:12-17.

Another area which Nadel neglected to fully explain during his testimony involved the receipt of a significant amount of rental income on the properties held by Emancipation Corporation between 2011 and 2013.[18] For example, although Nadel highlighted the fact that in 2013 Emancipation Corporation had no gross receipts or sales and operated at a loss of -$162,919, *see id.* at 687:9-16, he neglected to identify or explain the $531,095 in rental income that Emancipation Corporation received in tax year 2013. *See* Defs.' Hrg. Ex. 99 at 2338, 2345.

[18] Nadel confirmed that he was the owner of Emancipation Corporation. Hrg. Tr. at 818:10-11.

Similarly, Nadel did not address or explain the $543,291 in rental income received in 2012 nor the $569,162 received in 2011. *See id.* at 2275, 2283, 2218. When confronted with this information, Nadel disavowed the receipt of rental income, claiming instead that rental income "goes right into Emancipation Corporation and [] is paid out to mortgage payments. It was not income that I would sit there and wait with my bushel basket to pick up." Hrg. Tr. at 818:6-9. However, since Nadel is the owner of Emancipation Corporation, *see id.* at 818:10-11, these payments would have effectively been made to him in any event. Nevertheless, Nadel could not account for the receipt of these funds other than to suggest that the funds were used to pay mortgage payments. *See id.* at 818:4-15.

Nadel was also unable to produce rental statements or any other documentation for any of the three properties currently held by Emancipation Corporation. *Id.* at 818:10-11819:4-11. Moreover, certain deposits credited to Emancipation Corporation's corporate bank accounts, along with wire transfers from the Caribbean (where his property in Turks and Caicos is located), belie the notion that he is unable to properly account for these as well as other sums. *See, e.g.*, Defs.' Hrg. Ex. 99 at 3520 (wire transfer in the amount of $23,916.59 made on January 1, 2014 from the Grace Bay Club[19] into Acct. ending 9876); 3624 (deposit in the amount of $50,000 made on March 23, 2015 from Acct. ending 6075).

Although Nadel's present and future financial condition, as presented through hearing testimony and documentary evidence, does not appear to be robust, there are some gaps and otherwise fairly sizable amounts of income which have thus far been unexplained. As such, the Court finds that this factor weighs narrowly in favor of the imposition of third-tier civil penalties.

[19] The Grace Bay Club is the name of the residential complex located on Turks and Caicos where Nadel owns a villa. Hrg. Tr. at 694:4-12.

3. Imposition and Amount of Penalty

After considering all of the above factors in conjunction with the unique factual circumstances which exist in this case, the Court finds that the imposition of a third-tier penalty is appropriate. *See Opulentica*, 479 F. Supp. 2d at 331 (quoting *Moran*, 944 F. Supp. at 296-97); *Tavella*, 77 F. Supp. 3d at 363; *see also Neurotech*, 2011 WL 1113705, at *4 (imposition of third-tier penalty appropriate where defendants made misleading statements and engaged in reckless conduct); *East Delta Resources*, 2012 WL 3903478, at *9. As such, having determined that imposition of a third-tier penalty is appropriate, the remaining issue is the proper amount to be imposed.

Nadel's conduct was egregious, deliberate, and resulted in the risk of significant losses and continued for a span of several years. As such "the seriousness of [Defendants'] wrongdoing justifies a serious punitive response." *Spongetech Del. Sys., Inc.*, 2015 WL 5793303, at *11. In addition, Nadel's failure to acknowledge his wrongdoing must also be taken into consideration in calculating the total amount of the penalty to be levied. *See McCaskey*, 2002 WL 850001, at *14; *S.E.C. v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001); *Moran*, 944 F. Supp. at 297. However, the Court is also mindful that "despite the severity of [Defendants'] violations and the extent to which those violations should be punished . . . the Court also considers the extent to which other aspects of the relief and/or judgment issued in this matter will have the desired punitive effect." *Univ. Express, Inc.*, 646 F. Supp. 2d at 568. In addition, although gaps admittedly exist in Defendants' overall financial picture, the Court cannot ignore the documentary evidence presented — including tax returns for the individual and corporate Defendants, tax liability notices, mortgage lien notices, student loan accounting and at least some bank account statements — evidencing Defendants' distressed financial condition which lends

some credence to the assertions of their inability to pay a maximum monetary penalty on top of an award of disgorgement and prejudgment interest.

In light of the above, and mindful of the fact that "to withhold the remedy of [a civil] penalty simply because a swindler claims that she has already spent all the loot and cannot pay would not serve the purposes of the securities laws," *S.E.C. v. Inorganic Recycling Corp.*, No. 99 Civ. 10159, 2002 WL 1968341, at *4 (S.D.N.Y. Aug. 23, 2002), the Court finds that the imposition of a third-tier civil penalty in the amount of $1,000,000 is appropriate. *See Univ. Express, Inc.*, 646 F. Supp. 2d at 568 (levying a monetary penalty of $1,000,000 and noting that this amount was appropriate since defendant would already be required to pay $13 million in disgorgement and prejudgment interest and had been permanently enjoined from participating in trading stock); *Svoboda*, 409 F. Supp. 2d at 348 (viewing defendant's financial submissions "with skepticism" but determining that imposition of over $3 million in civil penalties on top of $2.2 million "already imposed . . . and the $300,000 fine assessed . . . goes too far" and instead imposing a lesser penalty amount); *Neurotech*, 2011 WL 1113705, at *6 (finding that defendant's "current situation and the other remedies awarded against him . . . [warrant] a reduced penalty [which] would serve the purpose of deterring future conduct"); *but see Spongetech Del. Sys., Inc.*, 2015 WL 5793303, at *11 (imposing maximum third-tier civil penalties but noting that despite defendant's submission of a financial affidavit in support of his inability to pay a penalty, "he failed to make any showing regarding his actual financial condition . . . [and] has not supported his claims with any documentation. . . .").

Based upon the foregoing assessment, the Court respectfully recommends to Judge Kuntz that a third-tier civil penalty be imposed upon Defendants in the amount of $1,000,000.

F. Liability of Relief Defendant

1. Applicable Law

"Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds. *Cavanagh I*, 155 F.3d at 136; *see Contorinis*, 743 F.3d at 307-08 (noting that since "disgorgement is designed to equitably deprive those who have obtained ill-gotten gains of enrichment, it may be imposed upon innocent third parties who have received such ill-gotten funds and have no legitimate claim to them."); *Commodity Futures Trading Comm'n v. Walsh*, 618 F.3d 218, 226 (2d Cir. 2010) ("District courts may only require disgorgement of the assets of a relief defendant upon a finding that she lacks a 'legitimate claim.'"). Thus, "[w]hen there has been no consideration given for the receipt of the ill-gotten gains, there is no legitimate claim to the funds and a relief defendant must return the proceeds." *S.E.C. v. Aimsi Techs., Inc.*, 650 F. Supp. 2d 296, 304 (S.D.N.Y. 2009).

2. Application to the Facts

The Commission seeks to disgorge from Relief Defendant, Katherine Nadel, the sum of $807,346.51 in ill-gotten gains in addition to $156,033.03 in prejudgment interest calculated on that amount. *See* Plaintiff Securities and Exchange Commission's Post-Hearing Brief on Remedies ("Pl.'s Post Hearing Br.") at 19. As such, the total amount sought to be disgorged from the Relief Defendant is $963,379.85. *See* Pl.'s Hrg. Ex. 208. The Commission provided underlying support for the principal amount of disgorgement in the form of a Declaration from Warren D. Nadel as well as Schedule K-1 forms showing distributions made to Katherine Nadel from RIA. Based upon these submissions, the Court finds that the principal amount is adequately substantiated. *See* Pl.'s Hrg. Ex. 138 at ¶ 20 (showing chart prepared by Warren D.

Nadel outlining direct compensation amounts paid by WDNC to third-parties for calendar years 2007-2009); Pl.'s Hrg. Exs. 20 at 2, 4; 173 at 18 (Schedule K-1 forms for Katherine Nadel showing distributions made from RIA).[20] In addition, the Commission's examiner Fioribello stated during the damages hearing that the amount of prejudgment interest was calculated using the Commission's prejudgment interest calculator, which itself uses the Internal Revenue Service underpayment rate. *See* Hrg. Tr. at 205:16-206:2; Pl.'s Hrg. Ex. 208. The Court therefore finds an adequate factual basis substantiating the amount of prejudgment interest sought.

In light of the fact that the Relief Defendant received a total of $807,346.51 from RIA and WDNC between calendar years 2007 and 2009 — which encompassed the violations period in this case — the Court finds that these funds constituted ill-gotten gains to the Relief Defendant.[21] Therefore, the sole issue for the Court to determine is whether the Relief Defendant had a legitimate claim to these funds. *See Cavanagh I*, 155 F.3d at 136; *Contorinis*, 743 F.3d at 307-08.

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[20] In a footnote in their post-hearing brief, Defendants allege that "the Schedule K-1 Instructions make clear that one should 'not include the amount of property distributions included in the partner's income.'" Def.'s Post-Hearing Br. at 14 n. 8 (citing I.R.S. 2014 Instructions for Schedule K-1 at 2). However, Defendants have not provided any case law supporting this proposition, nor has this issue been properly put before the Court in Defendants' post-hearing brief. As such, the Court declines to consider the issue and notes that in any event, even if the distributions are not treated as "income" from a taxation perspective, the Schedule K-1 clearly shows that a distribution was made in cash to the Relief Defendant and thus there is at least a strong inference that the Relief Defendant took custody of these funds.

[21] The Court notes that in their post-hearing brief, Defendants did not argue against the assertion by the Commission that the Relief Defendant received ill-gotten funds, other than with respect to the perfunctory argument made by Defendants in note 8 of their brief which the Court has previously addressed. *See* n. 20 *supra*.

At the damages hearing, the Relief Defendant testified concerning the duration and scope of her employment with WDNC and RIA. In addition, Plaintiff introduced the Relief Defendant's earlier deposition testimony taken on August 3, 2011. *See* Pl.'s Hrg. Ex. 176.[22]

During her deposition, the Relief Defendant testified that she was trained as a registered nurse and that apart from a few credits taken at Mercy College in the field of psychology, she had no other post-high school education and did not hold any other professional licenses. Pl.'s Hrg. Ex. 176, 10:6-11:6. After working in the field of nursing for approximately 13 years, and following a period of unemployment, the Relief Defendant went to work for her husband, Warren Nadel, in 2000. *Id.* at 11:13-25. With respect to her duties at WDNC, the Relief Defendant stated she performed primarily "secretarial kind of work" which included decorating the office, ordering supplies and keeping the office and facility clean. *Id.* at 12:4-14. Relief Defendant stated that her official title was Chief Operating Officer because she oversaw operation of the facility, but she stated that she had no training and held no licenses in the securities industry. *Id.* at 16:10-24. In addition, Katherine Nadel testified that she did not work full time, that her hours varied on a daily basis and she estimated her hours worked per week as "[s]ometimes 15, sometimes 50." *Id.* at 17:15-25. Further, when asked whether she "ha[d] any responsibilities at any time at [WDNC] for the operation of the business itself," she responded "No." *Id.* at 20:9-12. Katherine Nadel also stated that although she acted as WDNC's corporate secretary, *see id.* at 16:25-17:9, she had no responsibilities for maintaining the books and records. *Id.* at 21:7-9.

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[22] During the Commission's case-in-chief, it sought leave to admit the August 3, 2011 deposition testimony of Katherine Nadel in lieu of calling her as a witness at the hearing. *See* Hrg. Tr. at 593:3-6. There being no objection from Defendants' counsel, the Court admitted the deposition testimony. *See* Hrg. Tr. at 593:16-22; Pl.'s Hrg. Ex. 190.

With respect to RIA, the Relief Defendant stated in her deposition that she was a partner, but nevertheless could not clarify whether she actually owned any part of the business or whether she received distributions, stating only that "I may have been paid a salary from there, but I don't know." *Id.* at 21:10-22:4. Her primary knowledge concerning her partnership role at RIA seemed to be the fact that she signed RIA's tax returns. *Id.* at 24:3-9. In addition, Relief Defendant stated that she could not identify a distinction between the businesses of WDNC and RIA, that she had no role in running or operating RIA and contributed no capital to the RIA partnership. *Id.* at 30:5-14.

Notwithstanding this earlier deposition, the testimony provided by the Relief Defendant at the damages hearing differed considerably with respect to the duration of her employment and the range of her responsibilities at WDNC and RIA. For instance, during the hearing, Relief Defendant testified that she had worked at WDNC since 1987 as Chief Operating Officer and Corporate Secretary and had varied roles, including: responsibility for written supervisory procedures for both WDNC and RIA, for human resources and for keeping current with publications. Hrg. Tr. at 601:9-602:3. Specifically, Relief Defendant stated that she was "in charge of personnel," *id.* at 603:18, was responsible for the "physical plants,"[23] *id.* at 605:24-606:17, kept track of the books and corporate meeting minutes, represented the company in the community and otherwise held a supervisory role which included mediating territorial disputes among the brokers. *Id.* at 606:19-609:4. In addition, Relief Defendant stated that she worked a total of approximately 35 hours per week between 2007 and 2009 and considered her work to be full-time. *Id.* at 609:5-10.

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[23] Despite testifying that the physical structure housing RIA and WDNC was owned by Emancipation Corporation, Relief Defendant testified that she did not work for Emancipation Corporation and did not perform the facilities work on its behalf. Hrg. Tr. at 636:25-637:17.

In addition to the discrepancies between the Relief Defendant's deposition and hearing testimony, the facts demonstrate that payments from WDNC and RIA to her were altogether inconsistent. For example, of the total $807,346.52 that the Commission seeks to disgorge, Relief Defendant received $435,800 in 2007 alone. *See* Pl.'s Hrg. Ex. 20 at 2 (Distribution of $210,800 from RIA); Pl.'s Hrg. Ex. 138 ¶ 20 (receipt of $225,000 from WDNC). However, in calendar years 2008 and 2009, the Relief Defendant's combined payments from RIA and WDNC totaled $235,559.92 and $135,986.60 respectively. *See* Pl.'s Hrg. Exs. 20 at 2, 4; 173 at 18; 138 ¶ 20. Further, when Relief Defendant's compensation is broken out separately, the difference in amounts between 2007 and 2009 are even more apparent. For instance, with regard to payments from WDNC, Relief Defendant purportedly received $225,000 in 2007, $49,999.92 in 2008 and $41,666.60 in 2009. *See* Pl.'s Hrg. Ex. 138 ¶ 20. As to payments from RIA, in which Relief Defendant had no role and otherwise made no capital contribution, *see* Pl.'s Hrg. Ex. 176 at 30:9-14, she nevertheless received $210,800 in 2007, $185,560 in 2008 and $94,320 in 2009. *See* Pl.'s Hrg. Exs. 20 at 2, 4; 173 at 18.

When confronted at her deposition about the lopsided payments from WDNC between 2007 and 2009, Relief Defendant's only answer was that she "must have been doing less work." Pl.'s Hrg. Ex. 176 at 36:2:37:2. Further, comparing Relief Defendant's payments from WDNC to those of Warren Nadel's executive assistant, Ethel Waldron, for the same period lends credence to the assertion that Relief Defendant's payments had little if any relationship with the scope and duration of her duties. *See* Pl.'s Hrg. Ex. 138 ¶ 20 (noting both Relief Defendant's and Ethel Waldron's payments from WDNC for 2007-2009 and confirming the linear nature of Ethel Waldron's payments when compared to Relief Defendant's payments).

After considering the Relief Defendant's deposition transcript and hearing testimony as well as the evidence presented concerning the overall amount of payments received by her from both WDNC and RIA for what she asserts were services rendered, the Court finds that Relief Defendant does not possess a legitimate claim to the funds. Most troubling to the Court, in addition to the Relief Defendant's contradictory testimony, is the overall disjointed amounts of compensation she received, for which she provided no plausible explanation. In addition, whatever her ultimate role may have been, the Court is hard pressed to find plausible the fact that in 2007 alone, Relief Defendant's contributions, in the form of services performed, warranted a total gross payment from WDNC and RIA of $435,800 — especially when compared to payments made in 2008 and 2009. In addition, the fact that Ethel Waldron's payments remained altogether consistent during this same time period further belies the notion that the payments made to Relief Defendant were in consideration of the services she performed.

In light of the above information, the Court finds that the Relief Defendant remained in possession of ill-gotten gains to which she had no rightful claim. Thus, disgorgement is appropriate here. Indeed, in a case such as this, "the broad equitable powers of the federal courts can be employed to recover ill[-]gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong." *S.E.C. v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) (alteration added). *See U.S. Commodity Futures Trading Comm'n v. EJS Capital Mgmt., LLC*, No. 14 CV 3107, 2015 WL 5679688, at *4 (S.D.N.Y. Sept. 24, 2015) (noting that disgorgement from a relief or nominal defendant is appropriate where relief defendant is "in possession of funds to which they have no rightful claim, such as money that has been fraudulently transferred by the defendant in the underlying securities or commodity futures enforcement action"); *S.E.C. v. China Energy Sav.*

Tech., Inc., 636 F. Supp. 2d 199, 204 (E.D.N.Y. 2009) ("District courts are authorized to order disgorgement from parties who, though not directly involved, profit from a fraud and have no just claim to their profits."); *see also S.E.C. v. Egan,* 856 F. Supp. 401, 402 (N.D. Ill. 1993) ("To be sure, Relief Defendants may not have been directly culpable in the securities violations, but what the SEC seeks to have them disgorge are the benefits that they derived from the violations by the culpable defendants."); *S.E.C. v. Ross*, 504 F.3d 1130, 1142–44 (9th Cir. 2007) (suggesting that a "mere puppet" or "empty vessel into which the true wrongdoers funneled their proceeds" would be a nominal defendant).

The Court respectfully recommends to Judge Kuntz that disgorgement in the amount of $807,346.52, coupled with prejudgment interest in the amount of $156,033.03, for a total overall amount of $963,379.85, be awarded to the Commission.

IV. CONCLUSION

For the foregoing reasons, the Court respectfully recommends to Judge Kuntz that:

(1) the Commission's request for permanent injunctive relief against Defendants be granted;

(2) the Commission be awarded disgorgement in the amount of $10,776,687.62;

(3) the Commission be required to submit a revised prejudgment interest calculation based upon the deduction of $183,026.68 from total disgorgement, this amount representing clearing charges paid by Defendants to RBC to execute the cross-trades during the period January 1, 2007 through December 31, 2009;

(4) Defendants be found jointly-and-severally liable for the total amount of disgorgement and prejudgment interest to be awarded;

(5) a third-tier civil penalty be imposed upon Defendants in the amount of $1,000,000; and

(6) Relief Defendant be ordered to disgorge $807,346.52, coupled with prejudgment interest in the amount of $156,033.03, for a total overall amount of $963,379.85.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. *See also* FED. R. CIV. P. 6(a), (e). Such objections by an attorney of record shall be filed with the Clerk of the Court via ECF. **A courtesy copy of any objections filed is to be sent to the Chambers of the Honorable William F. Kuntz, and to the Chambers of the undersigned. Any requests for an extension of time for filing objections must be directed to Judge Kuntz prior to the expiration of the fourteen (14) day period for filing objections.** Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Beverly v. Walker*, 118 F.3d 900, 901 (2d Cir. 1997), *cert. denied*, 522 U.S. 883 (1997); *Savoie v. MerchantsBank*, 84 F.3d 52, 60 (2d Cir. 1996).

SO ORDERED.

Dated: Central Islip, New York
February 11, 2016

/s/ A. Kathleen Tomlinson
A. KATHLEEN TOMLINSON
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- WARREN D. NADEL, WARREN D. NADEL & CO., and REGISTERED INVESTMENT ADVISERS, LLC Defendants -and- KATHERINE NADEL, Relief Defendant.	11 Civ. 0215 (WFK) (AKT) ECF Case STIPULATION AND ORDER OF PARTIAL DISMISSAL

IT IS NOW STIPULATED AND AGREED, pursuant to Fed. R. Civ. P. 41, by and between the undersigned counsel, that the claims alleged by plaintiff Securities and Exchange Commission against Defendants for violations of Section 207 of the Investment Advisers Act of 1940 (the "Advisers Act") (Fifth Claim for Relief), violations of Section 204 of the Advisers Act and Rule 204-2 thereunder (Seventh Claim for Relief), and violations of and aiding and abetting violations of Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-4 thereunder (Eighth Claim for Relief), are hereby dismissed in their entirety, with prejudice and without costs or fees to any party.

Dated: New York, New York
January 11, 2017

SADIS & GOLDBERG LLP

By: _____
Sam Lieberman

551 Fifth Ave., 21st Floor
New York, NY 10176
(212) 573-8164
Attorneys for Defendants and Relief Defendants

SECURITIES AND EXCHANGE COMMISSION

By: _____
Richard G. Primoff
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-0148
Attorneys for Plaintiff

So Ordered:

_____
U.S. D.J.

Warren D. Nadel
[redacted]
Upper Brookville, NY [redacted]
[redacted]

April 15, 2017

Mr. Richard G. Primoff, Esq.
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022

Mr. Primoff:

I am reaching out to you at this time and for a number of reasons that have necessitated my doing so. First and foremost, I am no longer in a position to afford legal representation in my required dealings with the Securities and Exchange Commission (the "SEC") as I have been out of work for over seven years despite numerous attempts to obtain gainful employment. I feel that in terms of any legal procedural activities that I will be facing, I am hoping that your office might be willing to give me some direction as I am truly out of my element. It is my belief that my qualifications are rather narrowly focused in the securities industry, my ongoing situation with the SEC and my 67 years of age have contributed to my inability to obtain employment thus far. Over the past seven years a number of changes in my family's and my life have necessitated the liquidation of my assets accumulated over my lifetime of work. [redacted] and [redacted] I am continuing to seek employment as I have little [redacted].

I am not looking to make excuses for the inappropriate action that I took but rather trying to give you some feeling for me as an individual and a financial professional now and previously. Frankly, there is no excuse for inflating assets under management and misinforming those considering the use of my investment strategy and services. I cannot apologize more strenuously than I am attempting to do so here. As for the other violations, none of them were the result of an attempt to defraud a client but, rather, the result of my lack of a knowledgeable compliance staff, internally or outsourced. Perhaps requiring small independent firms to have a compliance aspect to their business should be imposed in an attempt to avoid situations like this in the future. It would have been well worth the expense to me.

Since the SEC audit began in September 2009, I lost all my clients, the last leaving in March 2010. I no longer have the ability to attract new clients as a result of the requirement to disclose

that there was an ongoing SEC investigation. Even my clearing firms determined to end our relationship due to the ongoing SEC investigation. Consequently, I was forced to close my broker-dealer and registered investment advisory firms in December 2011 after nearly 25 years of operations as a result of the financial strain on my professional and personal life. Shortly thereafter, I was forced to allow my various personal registrations to laps as no firm would consider housing them under any circumstance.

The bar that the SEC is seeking has truly and literally been in effect for this time period as my ability to practice my profession terminated with the beginning of this investigation back in September 2009. Restoring my ability to work in my profession seems to be what is likely to be the key to getting my personal life restored, not to what it was, as I understand that to be unlikely, but to a degree that makes my life seem somewhat vital. At this point, I hope only that a finality to this litigation would end with a limited bar and that I might then be able to try to see if a firm would engage me, having learned a most painful and powerful lesson as to my ability to work in the securities industry on my own. My desire to operate independently, though generated by a desire to serve my clients, has had an overwhelming effect on every aspect of my family's and my life. Aside from being spurned by some family and by a number of friends of long standing, it has been my family who has suffered the most and totally without cause as I feel that they have done nothing wrong. My level of guilt in this regard has been beyond anything I would have ever thought possible.

My home in New Jersey, since 1991, now is in contract for a short sale as it is totally upside down with respect to its value versus indebtedness. [redacted] on to help friends buy their first home when I was in a position to be of assistance are substantial and far exceed any remaining assets that I possess.

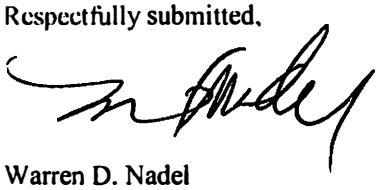
It is my hope that you will determine that the punishment I and my family have experienced is sufficient and has been effective and that there is no need for more than a minimal bar or monetary penalty that I can ill afford. I understand and appreciate that what I did was wrong and I am willing to subject myself to the supervision of compliance professionals at every step in an effort to eliminate any possibility of future violations of any kind if I am given the opportunity to reenter the job market in the securities industry. Without any licenses, my ability to work in the area of investments would be severely restricted. I am desperate to regain my family's life and mine. I am 67 years old and, with my firms being closed, my only hope is to work for another firm, which may not be possible given the damage this action has done to my reputation. Despite the size of the challenge, I would like to try to be employed in my chosen field and am anxious to work toward that end. Before this SEC audit, I never had a serious compliance or regulatory issue, having been audited by FINRA and the NFA every 2 to 3 years since 1987 without any substantive mishaps or warnings.

My mistake was my belief that I could serve my clients best as an independent broker. I was foolish to inflate the amount of funds under management when soliciting clients. I am truly sorry for my errors and would gladly abide by whatever punishment the SEC judicial system deems appropriate. I am asking that your determination not be a lifetime bar from my industry that I loved participating in and that I have been a part of for my entire professional life, giving

me a second chance to employ the strategy that has benefited so many and that could benefit so many more in a suitably supervised environment. Mr. Primoff, it is my fervent hope, and that of my family, that you will consider and grant my request.

Feel free to share this with Administrative Law Judge Cameron Elliot who I believe has been assigned my case if you think it to be appropriate.

Respectfully submitted,



Warren D. Nadel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	
-against-	
	11 Civ. 0215 (WFK) (AKT)
WARREN D. NADEL, WARREN D. NADEL & CO., and REGISTERED INVESTMENT ADVISERS, LLC	ECF Case
Defendants	
-and-	
KATHERINE NADEL,	
Relief Defendant.	

[~~PROPOSED~~] FINAL JUDGMENT AS TO WARREN D. NADEL

WHEREAS, on March 31, 2015, the Court issued a Decision and Order [DE 100], granting Plaintiff Securities and Exchange Commission ("Plaintiff or "Commission") partial summary judgment against defendant Warren D. Nadel ("Defendant"), holding him liable for violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rules 10b-5 and 10b-10 thereunder, Section 17(a) of the Securities Act of 1933, and Sections 206(1), 206(2) and 206(3) of the Investment Advisors Act of 1940 [DE 71]; and directing U.S. Magistrate Judge A. Kathleen Tomlinson to hold a hearing on relief consistent with its Decision and Order ("2015 Order"); and

WHEREAS, on February 11, 2016, after a hearing (held July 20-23, 2015), Judge Tomlinson issued a Report and Recommendation [DE 128] (the "Report"), recommending that the Court order against Defendant (1) permanent injunctive relief; (2) $10,776,687.62 in

disgorgement, jointly and severally with Defendants Warren D. Nadel & Co. and Registered Investment Advisers, LLC; (3) prejudgment interest, jointly and severally with Defendants Warren D. Nadel & Co. and Registered Investment Advisers, LLC (to be recalculated based upon the deduction of $183,026.68 from the disgorgement amount, for the reasons stated in the Report); and (4) a $1,000,000 third-tier civil penalty; and

WHEREAS on September 9, 2016, the Court issued a Decision and Order [DE 133] (the "2016 Order"), adopting the Report in its entirety and directing Plaintiff to submit a revised prejudgment interest calculation (as set forth in the Report); and

WHEREAS on September 15, 2016, Plaintiff filed with the Court its revised calculation of prejudgment interest (of $2,293,701.57) [DE 134], which the Court endorsed on September 23, 2016 [DE 135] ("Endorsement"); and

WHEREAS the 2015 Order, Report, 2016 Order and Endorsement are incorporated by reference into this judgment as if fully set forth herein,

NOW THEREFORE

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Sections 206(1), 206(2) or 206(3) of the Investment Advisors Act of 1940 [15 U.S.C. §§ 80b-6(1), (2) and (3)], by using the mails or any means or instrumentality of interstate commerce, while engaged in the business of advising others for compensation as to the advisability of investing in, purchasing or selling securities:

(a) to employ any device, scheme, or artifice to defraud any client or prospective client; or

(b) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; or

(c) acting as a principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who

receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from aiding and abetting any violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-10 [17 C.F.R. § 240.10b-10], thereunder by, by using the mails or any means or instrumentality of interstate commerce, knowingly or recklessly providing substantial assistance to any broker or dealer who effects for or with an account of a customer any transaction in, or induces the purchase or sale by such customer of, any security (other than U.S. Savings Bonds or municipal securities) without providing the information required under Rule 10b-10(a)(1) and (2).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $10,776,687.62, jointly and severally with Defendants Warren D. Nadel & Co. and Registered Investment Advisers, LLC, representing profits gained as a result of the conduct alleged in the Amended Complaint, together with prejudgment interest thereon in the amount of $2,293,701.57, for a total of $13,070,389.19. Defendant shall satisfy this obligation

by paying $13,070,389.19 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Warren D. Nadel as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment

interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay a civil penalty in the amount of $1,000,000 to the Securities and Exchange Commission pursuant to Section 20(d) of the Securities Act, Section 21(d) of the Exchange Act and Section 209(e) of the Advisors Act. Defendant shall make this payment within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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6500 South MacArthur Boulevard
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and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Warren Nadel as a Defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part

of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Defendant shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the allegations in the Complaint are deemed true as to Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: 1/20, 2017

s/WFK

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

INVESTMENT ADVISERS ACT OF 1940
Release No.

ADMINISTRATIVE PROCEEDING
File No.

In the Matter of **WARREN D. NADEL,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Warren D. Nadel ("Respondent" or "Nadel").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Nadel, age 66, is a resident of Upper Brookville, New York and from at least the beginning of 2007 through 2009 (the "Relevant Period") controlled a broker-dealer then reistereed with FINRA, Warren D. Nadel & Co. ("WDNC"), and an investment adviser then

registered with the Commission, Registered Investment Advisers, LLC ("RIA"). During the Relevant Period, Nadel was an investment adviser, held Series 1, 3, 7, 24 and 63 licenses, and was at all relevant times the president, chief executive officer and chief compliance officer of WDNC, and the president of RIA. The registrations of both WDNC and RIA were terminated in 2011.

B. ENTRY OF THE INJUNCTIONS

2. On January 20, 2017 a final judgment was entered against Nadel, permanently enjoining him (1) from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(3) of the Advisers Act, and (2) from aiding and abetting any violations of Section 10(b) of the Exchange Act and Rule 10b-10 thereunder, in the civil action entitled Securities and Exchange Commission v. Warren D. Nadel, et al., Civil Action Number 2:11-CV-0215, in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged that during the Relevant Period, Nadel fraudulently induced clients of RIA to invest tens of millions of dollars in what he falsely represented as a liquid, cash management investment program in which RIA clients would buy and sell preferred utility securities in the open market and hold them for short periods of time in order to generate either dividend income or capital appreciation (the "Strategy"). In reality, however, and contrary to Nadel's representations to clients, the Complaint alleged, the vast majority of the transactions in the Strategy consisted of cross-trades Nadel made between the advisory client accounts he controlled, at inflated prices Nadel made up himself. The Complaint alleged that through this fraudulent conduct, Nadel created the false impression that there was a liquid market for these securities and that the market prices for the securities were consistent with the inflated values that Nadel reported to RIA clients. The Complaint also alleged that in addition to the foregoing misrepesentations, Nadel also induced investors to join and stay in the Strategy by deliberately and materially overstating the amount of assets that RIA had under management. Through this fraudulent conduct, the Complaint alleged, Nadel obtained more than $8 million in commissions and advisory fees in the Relevant Period alone – and his clients, meanwhile, suffered substantial losses on what Defendants had falsely represented to be a liquid cash management program.

4. On March 31, 2015, the Court granted the Commission's motion for partial summary judgment against Nadel, WDNC and RIA on its claims that they violated Section 10(b) of the Exchange Act and Rules 10b-5 and 10b-10 thereunder, Section 17(a) of the Securities Act, and Sections 206(1), 206(2) and 206(3) of the Advisers Act, and referred the question of remedies to the Magistrate Judge. On February 11, 2016, the Magistrate Judge, after having held a four-day hearing in July 2015, issued a Report and Recommendation recommending that (1) the Court order permanent injunctive relief against Nadel, WDNC and RIA, (2) the Court award disgorgement against them in the amount of $10,776,687.62, jointly and severally; (3) the the Court impose a third-tier civil penalty in the amount of $1,000,000 against Nadel; and (4) that the Commission submit a revised prejudgment interest calculation. On September 9, 2016, the Court, over Defendants' objections, adopted the Magistrate Judge's Report and Recommendation. After approving the Commission's revised prejudgment interest calculation on September 23, 2016, the

Court entered final judgments against Nadel, WDNC and RIA on January 20, 2017. In addition to the permanent injunctive relief described above in paragraph 2, *supra*, the Court also ordered: (1) a third-tier civil monetary penalty in the amount of $1,000,000 against Nadel; and (2) disgorgement against Nadel, WDNC and RIA, jointly and severally, in the amount of $10,776,687.62, plus prejudgment interest in the amount of $2,293,701.57, for a total of $13,070,389.19.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act; and

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.360(a)(2), the Administrative Law Judge shall issue an initial decision no later than [75] days from the occurrence of one of the following events: (A) The completion of post-hearing briefing in a proceeding where the hearing has been completed; (B) Where the

hearing officer has determined that no hearing is necessary, upon completion of briefing on a motion pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250; or (C) The determination by the hearing officer that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155 and no hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	11 Civ. 0215 (WFK) (AKT)
WARREN D. NADEL,	:	
WARREN D. NADEL & CO., and	:	
REGISTERED INVESTMENT ADVISERS, LLC	:	
	:	
Defendants,	:	
	:	
-and-	:	
KATHERINE NADEL,	:	
	:	
Relief Defendant.	:	

EXPERT REPORT OF RONALD I. MILLER, PH.D.

November 10, 2011

I. QUALIFICATIONS

I am a Vice President at NERA Economic Consulting, where I provide consulting and expert services involving securities and financial markets. My areas of focus include securities litigation and the impact of the recent financial crisis on the securities markets. I have developed expertise in these areas through significant work on securities litigation, various published articles, and my experience as a Professor and Ph.D. in Economics.

I have worked on numerous securities litigation cases. This has included analyses of damages, market response and efficiency. I have also provided expert analysis of trading strategies. I have been qualified as an expert in finance and/or economics both in court and in arbitration.

I have published papers analyzing developments in securities litigation and the financial crisis. I have also published work addressing financial-sector public policy and epidemiology, and I have presented on these and related topics, at numerous professional conferences and seminars. In addition, I have published academic work in peer-reviewed journals in areas including macroeconometrics, game theory and economic history.

Before joining NERA, I was an Assistant Professor of Economics at Columbia University. I have also taught economics courses at Princeton University and New York University. Subjects which I have taught include econometrics, macroeconomics, and financial economics. Some of my courses have included analysis of financial crises in general, and the recent credit crisis in particular. I have also lectured on theories of assets pricing and behavioural finance. I have a Ph.D. and an M.A. in economics from Princeton University. Before graduate school, I obtained a B.Sc. from the University of Toronto in mathematics and economics.

Attachment I to this Report contains my curriculum vitae, a list of papers and publications in the last ten years, a list of testimony within the last four years, and my compensation for this matter. Attachment II lists additional documents that I have considered, besides those relied upon explicitly below.

II. SCOPE OF ASSIGNMENT

I was asked by counsel for the Defendants to analyze 1) whether the dividend capture strategy, the type of strategy used by Mr. Nadel's investment advisory firm (Registered Investment Advisers, LLC ("RIA")), is a legitimate trading strategy that can benefit investors, and 2) whether the severe financial crisis of 2008 impacted the liquidity of the market for preferred stock.

III. ANALYSIS

A. The Dividend Capture Strategy Is Well-Known in the Industry, and Can be Particularly Beneficial for Investors with Specific Tax Needs.

The type of investment strategy offered by Mr. Nadel and RIA, dividend capture, is a legitimate strategy well-known in the industry, and one that offers particular tax benefits for certain investors such as corporations. In Mr. Nadel's deposition testimony and in marketing materials prepared by his company, Mr. Nadel described his company as specializing in a so-called "dividend capture" strategy.[1] Under this general rubric, Mr. Nadel described three specific strategies. The first was the "balanced portfolio" or "tax-advantaged dividend income" strategy. The second was described as generating capital gains in a low risk manner in order to offset capital losses. The third strategy was described as "conversion of capital gains into tax advantaged dividend income."

Mr. Nadel's firm focused on using utility company non-convertible preferred stock for these strategies. All three strategies are largely tax-motivated. Which of the three would be favorable for a particular investor would depend on the tax position of that investor. Mr. Nadel also described the strategy as using Treasury futures to hedge interest rate risk. The balanced

[1] Deposition of Warren D. Nadel, September 15, 2011, pp 61-66. Presentation titled "Dividend Capture Strategy" (undated) SECNADEL-000057691-000057700.

portfolio approach was described as combining investments in depreciating and appreciating preferred stocks to produce stable principal and dividend income.[2]

The strategies as described by Mr. Nadel are reasonable and legitimate investment strategies, especially for investors with specific tax needs. For many years, various sorts of dividend capture strategies have been popular among investors trading in preferred stocks.[3] Such strategies are sufficiently popular with investors that there are even on-line tools available to assist with their execution.[4] There is also at least one mutual fund that is focused on the dividend capture strategy, including dividend capture with preferred stock.[5]

The first, balanced portfolio, approach is essentially designed to mimic a short-term bond investment, but to produce income in the form of dividends rather than as interest payments or capital gains. Obtaining such dividend income can be particularly beneficial for large corporations, which typically have a 35% marginal tax rate for regular income but can deduct 70% of their qualified dividend income.[6] Indeed, Mr. Nadel and RIA sought out corporations to invest in their dividend capture strategy, and in fact the large majority of their clients were corporations.

The second strategy, buying preferred stock and selling before the ex-dividend day, allows an investor to have generally reliable capital gains while taking on a limited amount of risk, especially when interest rate risk has been hedged. Such capital gains may have desirable tax properties if the investor has previously incurred capital losses. Taxpayers are allowed to "carry forward" certain prior capital losses to offset subsequent capital gains for tax purposes.

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[2] Preferred stock will generally appreciate before its ex-dividend day as the expected value of the dividend is incorporated into its price, and then depreciate on the ex-dividend date.

[3] See, for example, Stickel, S.E. (1991), "The ex-dividend behavior of nonconvertible preferred stock returns and trading volume," *Journal of Financial and Quantitative Analysis*, Vol. 26, pp. 45-61. Financial economists have been writing about dividend capture strategies since at least the 1970s.

[4] See http://www.preferred-stock.com/tracker.php for an example of one commercial product designed to assist with dividend capture strategies for investors trading in preferred stock.

[5] This is the Huntington Dividend Capture Fund (HDCAX). It currently has more than $100 million in assets under management.

[6] See, for example, Internal Revenue Service, Publication 542, pg. 11.

Thus, an investor with prior capital losses may be able to use this second strategy to obtain capital gains not subject to taxes. Alternatively, by generating capital gains immediately, this allows the investor to use the capital losses in the current tax year, which increases the present value of the tax benefit (i.e., the offset of capital gain income) provided by those losses.

With the third strategy, buying a preferred stock before the ex-dividend day and selling after provides an investor with a capital loss and a dividend payment. This would allow an investor with other capital gains to offset those with the capital loss from the dividend capture strategy while gaining dividend income. If the investor has a lower tax rate for dividends than for capital gains, this may be a useful investment strategy.[7]

B. The Market for Preferred Stocks Was Roiled in Unforeseen Ways by the Credit Crisis from Late 2008 into 2009

As is well-known, 2008 saw the beginning of a credit crisis unprecedented in recent decades. The credit crisis affected liquidity and credit availability across many different markets, especially following the bankruptcy of Lehman Brothers Holdings Inc., declared on September 15, 2008. In late 2008, and into 2009, the credit crisis also significantly affected the market for preferred stocks, which behave much like bonds in some respects.

Market observers have noted that there was a liquidity crunch in the preferred stock market by October 2008.[8] The market for preferred stock may have been particularly affected by the troubles of Fannie Mae and Freddie Mac, which were major issuers of preferred shares. The credit crisis took its toll on the market for preferred stock first in the form of substantial price declines.

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[7] Note that if some investors are looking for capital gains and others for capital losses, there will be natural trading opportunities across them. The investor looking for capital gains will want to sell before the ex-dividend day while the investor looking for capital losses will want to buy at such a time.

[8] See for example, "Preferred shares find favor," ETF Investing, Nov. 9, 2008: "As the credit crunch gained steam, there was a liquidity crunch in preferred shares...." See also "In Trying Times, Think Preferred Stocks," TheStreet.com, September 30, 2008: "Well before the market's dramatic plunge Monday, a liquidity crisis existed in preferred stocks. ... Preferred shares have been hammered this year."

First, in the wake of the credit crisis there were substantial price declines in the market for preferred stocks. As of the beginning of 2007, Standard and Poor's index of preferred stock (SPPREF) stood at 1023. By the end of 2008 it stood at 572, and so had lost more than 40% of its value. The index declined further in early 2009, reaching lows in March 2009. [9] Losses in the utility shares on which Mr. Nadel's firm focused may not have been as large as for the preferred shares of battered financial firms that make up a large fraction of the market for preferred stock. The timing of price movements for the utility preferred shares traded by Mr. Nadel may have also been different, but we have not been able to locate commercially available indices for preferred stock apart from the overall S&P index cited above.[10] However, a sample of stocks traded by Mr. Nadel's firm showed consistent price declines in late 2008.[11]

Second, the substantial price declines were followed by other problems in the market. Market observers have also noted that the issuance of new shares of preferred stock declined dramatically in 2008, with one commentator citing data from Dealogic that new share sales were only $4 billion in 2008 as compared to $75 billion in 2007.[12] Issuance of new shares provides liquidity to the overall market. This reduction in new issuance reflects the general state of turmoil in the preferred market.

Many of the securities traded by Mr. Nadel for his clients traded in OTC markets that could have limited liquidity, a fact that Mr. Nadel warned about in the Program Package for his products.[13] General liquidity problems, such as arose during the credit crisis, may have

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[9] The market recovered substantially in the latter half of 2009.

[10] There are also several ETFs for preferred shares, but these also have a large component of shares issued by financial firms.

[11] We downloaded price data from Bloomberg for the securities listed in trade confirmations for the account of Continental Grain Company, as produced for this matter (Defs.' Ex. 14, CGC-SEC 00001866-2062). All of these securities for which there was sufficient trading data showed declines over this period.

[12] "Seeking Yield, Investors Look to Preferreds," Editors of Dow Jones Newswires, September 14, 2010.

[13] Warren D. Nadel & Company Program Package, undated: "Many such stocks are thinly traded. That is, many such stocks are not abundantly available in the over-the-counter markets where they trade and, as a consequence relatively small changes in supply or demand can cause disproportionately large changes in then available bid and offer prices for such stocks....No assurance can be given that at any time the optimal preferred stocks will be available on any market at an optimal price or in sufficient quantities. Further, no assurance can be given that once such stocks have been purchased they can be readily sold." (Defs.' Ex. 13 at SECNADEL22532.)

generated more severe illiquidity in markets that were illiquid to begin with such as OTC preferred share markets. Given the liquidity risks already inherent in the dividend capture strategy, the substantial price declines and the general liquidity problems brought on by the financial crisis of 2008-09 would have made it difficult for Mr. Nadel and RIA to liquidate positions at the optimal price investors often demanded.

Late 2008 and early 2009 was a period of exceptional volatility for a wide range of financial markets, including the market for preferred securities.[14] Higher volatility means that there will be periods with large price changes. If there are large price drops there will be more times at which liquidating a security could lead to substantial losses. This would make liquidating a portfolio at attractive prices more difficult.

Despite the difficulties in the market for preferred stock during this period, Mr. Nadel was still able to provide liquidity for his clients. In January of 2009 one client thanked Mr. Nadel for helping his company meet its liquidity goals.[15] The same client, later in 2009, noted that Mr. Nadel had liquidated a greater amount of assets than had been the goal.[16]

Although Mr. Nadel achieved such successes in trading for some clients, the financial crisis that began in late 2008 was likely to have had a significant affect on Mr. Nadel's ability to liquidate client portfolios. Because at least some of his clients only wanted liquidation at prices close to their original costs, the decline in prices would have made it difficult for Mr. Nadel to liquidate client portfolios. For example, one client specified that it did not want to trade at below 95% of cost.[17] Such prices were not obtainable in early-2009, at least for some shares. Another client stated that their first baseline for deciding whether to liquidate a holding at a particular

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[14] This conclusion is based on the S&P preferred stock index.

[15] Defs.' Ex. 18, E-mail from Richard Anderson to Warren Nadel, dated 01/05/2009 (CGC-SEC00001423): "Thank you for continuing to work with us to achieve Conti's liquidity goals in these tumultuous times."

[16] Defs.' Ex. 19, E-mail from Richard Anderson to Warren Nadel, dated 04/07/2009 (CGC-SEC00001509).

[17] See, for example, Def. Ex. 40 (BLYTH5919 noting Blyth's strategy to liquidate its portfolio "at 95% of cost or higher"). Blyth's treasurer, Jane Casey, clarified Blyths's position in her deposition. When asked the reasoning behind the 95% or higher strategy, she answered "We're attempting to liquidate as close to cost as possible." (Deposition of Jane F. Casey, October 17, 2011, pg. 80)

price was the current book value of the security.[18] The book value of the security would not necessarily reflect a current market value of that security. If there had been rapid drops in the market price, the book value might be substantially higher, thus making an investor reluctant to sell and take a loss relative to book.

The global credit crisis was not generally foreseen by either markets or policy makers and thus Mr. Nadel could not have been reasonably expected to forecast any ensuing liquidity problems for his clients. The deterioration in financial market and economic conditions that began in the week of September 15th was unexpected. Conclusions of policy makers reflect the suddenness of the change:

> In the wake of the mid-September failure of Lehman Brothers, global financial markets seized up and entered a new and deeper state of crisis. ... The ensuing sell-off affected all but the safest assets and left key parts of the global financial system dysfunctional. ...[19]
>
> BIS Quarterly Review, December 2008

The fact that asset prices and interest rates changed sharply beginning in late 2008 demonstrates that market participants were also surprised by the change in financial market and economic conditions. Had the crisis been foreseen, its effects would have already been incorporated into asset prices and interest rates and then would have remained relatively stable. For example, two closely watched interest rate spreads shot up in September 2008. The TED spread and the spread between the London inter-bank offered rate (LIBOR) and the overnight index swap rate (OIS) signaled market uncertainty about counterparty risk and future interest rates.

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[18] Deposition of Walter Boileau, October 28, 2011, pg.79: "Q. Okay. And what were -- what -- what would you do in evaluating whether to sell at a certain price or not? A. Well, our – our first baseline was simply what is the current book value that we have of the asset, which was already a written down number."; see also Deposition of Michael Kourey, October 28, 2011, pp. 68-69 (noting that Polycom had typically liquidated positions "at or near cost basis"); Defs' Ex. 87 (noting desire for liquidation by Mr. Nadel "at something close to what we paid").

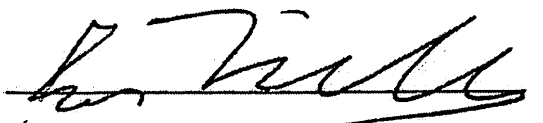
[19] Bank of International Settlements, BIS Quarterly Review, December 2008, p. 1.

- The TED spread is the difference in the dollar rate for three-month inter-bank borrowing and the US Treasury's three-month borrowing costs. From 133 basis points on September 12th, the TED spread reached a high of 457 basis points on October 10, 2008.

- From 87 basis points on September 12th, the LIBOR-OIS spread reached a high of 364 basis points on October 10, 2008.

These dramatic developments help to demonstrate that the turmoil in the preferred stock market in late 2008 and 2009 was deeper than could have been reasonably foreseeable by investment advisors before the crisis.

In summary, Mr. Nadel and RIA would not be unusual in failing to predict the financial crisis or its significant impact on securities markets, when market participants and policy makers generally failed to predict the depth of the financial crisis in advance.



November 10, 2011

NERA
Economic Consulting

Ronald I. Miller
Vice President

National Economic Research Associates, Inc.
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New York, New York 10036
+1 212 345 3000 Fax +1 212 345 4650
Direct dial: +1 212 345 3141
ronald.miller@nera.com
www.nera.com

Attachment 1

RONALD I. MILLER, PH.D.
VICE PRESIDENT

Education

Princeton University
Ph.D., Economics, 1994
M.A., Economics, 1989

University of Toronto
B.Sc., Mathematics and Economics, 1987

Professional Experience

	NERA Economic Consulting
2007-	Vice President Provide consulting and expert services in the areas of securities and finance.
2001-2007	Senior Consultant
	New York University
2008, 2010	Adjunct Professor of Economics Taught macroeconomics at masters level.
	Columbia University
1994-2001	Assistant Professor of Economics Taught graduate and undergraduate courses in macroeconomics, econometrics, and international finance. Advised doctoral students.
2000	Acting Director, Program in Economic Policy Management Managed and coordinated all of the activities of a masters program at Columbia's School of International and Public Affairs.

Princeton University
1996 Adjunct Professor of Economics
Taught development economics at the Ph.D. level.

Paper and Publications in the Last Ten Years

"Economists' Views: New Playbook for a Financial Crisis," (with Elaine Buckberg), NERA brief, October 2008.

"The Paulson Proposal: An Update on Economists' Views," (with Elaine Buckberg), NERA Brief, October 2008.

"The Paulson Proposal: Economists' Views," (with others), NERA Brief, September 2008.

"Recent Trends in Shareholder Class Action Litigation: Filings Stay Low and Average Settlements Stay High – But Are These Trends Reversing?" (with others), NERA publication, September 2007.

"Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar," (with Todd S. Foster and Stephanie Plancich), NERA publication, January 2007.

"Where Are Mesothelioma Claims Heading?" (with Fred Dunbar, Paul Hinton and Faten Sabry), NERA publication, December 2006.

"Recent Trends in Shareholder Class Action Litigation: Beyond the Mega-Settlements, is Stabilization Ahead," (with Todd Foster and Elaine Buckberg), NERA publication, April 2006.

"Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?" (with Elaine Buckberg and Todd S. Foster), NERA publication, July 2005.

"Costs of Asbestos Litigation and Benefits of Reform," (with Denise Martin, Faten Sabry, Paul Hinton and Stephanie Plancich), NERA publication, April 2005.

"Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements," (with Elaine Buckberg, Todd Foster and Stephanie Plancich), NERA publication, February 2005.

"Determinants of Long-Term Growth: A Bayesian Averaging of Classical Estimates (BACE) Approach," (with Gernot Doppelhofer and Xavier Sala-i-Martin), *American Economic Review*, Vol. 94, No. 4, September 2004.

"Recent Trends in Securities Class Action Litigation: Will Enron and Sarbanes-Oxley Change the Tides?" (with Elaine Buckberg, Todd S. Foster, and Adam Werner), NERA publication, July 2003. Also published in *Securities Litigation and Enforcement Institute 2003*, Practising Law Institute.

Testimony in the Last Four Years

Expert Report, in the matter of Michael Frank Plaintiff and Farlie, Turner & Co., LLC, Bayshore Partners, LLC, R. Patrick Caldwell, Stephen Giordanella, Larry Moeller, Neil E. Schwartzman, Jason A. Williams, Brian L. Stafford, Henry H. Shelton, Frank E. Jaumot, Keith J. Engel, Richard P. Torykian, Sr., Charles E. Peters, Jr., and Deon Vaughan, Ontario Superior Court of Justice, Canada, 2011.

Expert Report, Rebuttal Report, Deposition and Testimony, *John Paul Reddam, v. Commissioner of Internal Revenue*, on the economic substance of a complex options strategy, 2010.

Testimony before the Ontario Securities Commission, *In the Matter of the Securities Act R.S.O. 1990, c. S. 5, as amended, and In the Matter of Biovail Corporation, Eugene N. Melnyk, Brian H. Crombie, John R. Miszuk and Kenneth G. Howling*, 2009.

Testimony, In the Matter of an Arbitration under the United Nations Commission on International Trade Law Rules, *European Media Ventures S.A. v. The Czech Republic*, 2008.

Testimony before the American Arbitration Association on a confidential matter, New York City, 2007.

Deposition Testimony, In the United States District Court for the Central District of California in *Federal Trade Commission v. Dennis Connelly, Homeland Financial Services, et al.*, 2007.

Compensation

My time in this matter is billed at $530 per hour.

NERA
Economic Consulting

Ronald I. Miller
Vice President

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Attachment 2

Additional Documents Considered

I. Deposition Transcripts:

a. Katherine Nadel

b. Ethel Waldron

c. Richard Anderson, Continental Grain

d. Jane Casey, Blyth

e. Walt Boileau, Polycom

f. Michael Kourey, Polycom

g. William Hedges, Oregon Mutual Insurance [oral account from counsel]

II. Other Documents:

a. Plaintiffs' Ex. 27

b. Defs' Ex. 3-27

c. Defs.' Ex. 34

d. Defs' Exs. 37-41

e. Defs.' Ex. 48-51

f. Defs.' Ex. 56-58

g. Canning Exs. 42, 44, 47-48

h. Defs.' Ex. 76

i. Defs.' Ex. 87

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	11 Civ. 0215 (WFK) (AKT)
WARREN D. NADEL,	:	
WARREN D. NADEL & CO., and	:	
REGISTERED INVESTMENT ADVISERS, LLC	:	
	:	
Defendants,	:	
	:	
-and-	:	
KATHERINE NADEL,	:	
	:	
Relief Defendant.	:	

REBUTTAL REPORT OF RONALD I. MILLER, PH.D.

December 19, 2011

I. QUALIFICATIONS

I hereby incorporate the statement of qualifications in my initial report submitted on November 10, 2011 in this matter, which details my education and experience including significant work on securities litigation, analysis of the impact of the recent financial crisis on securities markets, various published articles, and my experience as a Professor and Ph.D. in Economics.

In addition, my work in the securities area has included analyses of damages, market response and efficiency, and trading strategies. I have been qualified as an expert in finance and/or economics both in court and in arbitration.

I have published papers analyzing developments in securities litigation and the financial crisis. I have also published work addressing financial-sector public policy and epidemiology, and I have presented on these and related topics, at numerous professional conferences and seminars.

Before joining NERA, I was an Assistant Professor of Economics at Columbia University. I have also taught economics courses at Princeton University and New York University. Subjects which I have taught include econometrics, macroeconomics, and financial economics. Some of my courses have included analysis of financial crises in general, and the recent credit crisis in particular. I have also lectured on theories of assets pricing and behavioural finance. I have a Ph.D. and an M.A. in economics from Princeton University. Before graduate school, I obtained a B.Sc. from the University of Toronto in mathematics and economics.

Attachment I to this Report contains my curriculum vitae, a list of papers and publications in the last ten years, a list of testimony within the last four years, and my compensation for this matter. Attachment II lists additional documents that I have considered, besides those relied upon explicitly below.

II. SCOPE OF ASSIGNMENT

I was asked by counsel for the Defendants to comment on the Expert Report of Robert B. Porter, filed November 10, 2011 ("the Porter Report") and to provide rebuttal analysis.

III. ANALYSIS

A. The Porter Report overstates the supposed deviations from market prices in Mr. Nadel's transactions because of its reliance on "stale" prices, dealer quotes, and prices on small transactions as benchmarks

1. The Porter Report relies on the erroneous assumption that the market for the relevant securities was declining in most of the relevant period

The Porter Report relies on price index data that are not very informative about the securities at issue, and using these data incorrectly concludes that the market for the relevant securities was declining during most quarters of the relevant period of this case. The Porter Report presents analysis of the differences between prices at which Mr. Nadel's clients transacted purchases or sales of their securities and its measure of the market price of the relevant security. Many of these Nadel transactions involved a purchase and a sale of the security by two different clients of Mr. Nadel.[1] The Porter Report's measure of the market price is the high/low range for days with non-zero volume; and the midpoint of the closing bid and ask price quotes for that day and the previous day on days when there is zero volume.[2] For some of the data series used in the Porter Report, the bid and ask quotes are repeated from the previous day on at least some occasions.[3]

The Porter Report presents analysis that it says, "suggests that the Defendants' price deviations I observed are not the result of 'stale' market data."[4] This analysis critically depends on the assumption that, "the prices of preferred securities were generally falling during the

[1] This is my understanding based on the Deposition of Warren D. Nadel, September 15, 2011. Dr. Porter also reports that this is his understanding (Porter Report, pg. 4.)

[2] Porter Report, pg. 4.

[3] Porter Report, pg. 5.

[4] Porter Report, pg. 6.

relevant period, while the prevalence and magnitude of *positive* broker price deviations grew." To support its analysis, the Porter Report relies heavily on a quarterly analysis of the S&P US Preferred Stock Index.

Although the Porter Report correctly points out that if market prices are falling during most quarters of the relevant period, then "stale" prices should lead to negative "broker price deviations," the assumption that prices in the relevant market were declining during most quarters from 2007 to 2009 is simply incorrect. [5] In fact, there were more rising quarters than falling quarters during the relevant period for the type of securities Mr. Nadel dealt in. As noted in the Miller Report, there *was* a decline in the market for utility preferred stocks in late 2008. [6] However, there were also substantial upward movements within the relevant period. In fact, on a quarterly basis, the market for utility preferred stocks was rising more often than it was falling.

The Porter Report reaches an incorrect conclusion regarding the overall movements of the relevant markets for the securities traded by Mr. Nadel on his clients' behalf because it relies on the S&P US Preferred Stock Index. As noted in the Miller Report, the preferred stocks used in Mr. Nadel's strategies were utility company stocks, not the financial company stocks that make up the majority of the S&P index and indeed of the overall market for preferred securities.[7] Indeed, as of September 2011, securities of financial corporations made up 82.9% of the S&P index, while utility securities were only 3.5% of the index.[8] As further noted in the Miller Report, most securities of financial firms were heavily and disproportionately battered during this period as the world went through the most severe credit crisis since the Great Depression.

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[5] This is Porter Report's term for the difference between Nadel transaction prices and its measure of market prices.

[6] Expert Report of Ronald Miller, November 10, 2011 ("Miller Report"), pg. 5.

[7] Miller Report, pg. 5. The Miller Report also relies on the S&P index, as the only commercially available preferred stock index, but only to establish that there were price drops in late 2008 as was confirmed by examination of the prices of individual securities traded by Mr. Nadel and by the more detailed analysis in the present report.

[8] S&P US Preferred Stock Index Fact Sheet, September 2011.

Exhibit 1 contains a comparison the S&P US Preferred Stock Index and an index of stocks actually traded by Mr. Nadel.[9] The two indices clearly behave quite differently, illustrating how the use of the S&P index could lead to misleading conclusions concerning the behavior of the preferred stocks of utility companies. Exhibit 2 contains a summary of the quarterly movements of the S&P US Preferred Stock Index, taken directly from Table 3 in the Porter Report. Indeed, the S&P US Preferred Index shows a generally declining market over the period, with eight out of eleven quarterly changes indicating average declines. In the next column we provide analogous quarterly average prices for our index of stocks traded by Mr. Nadel as opposed to the financial-focused stocks of the S&P index. This more appropriate index paints a very different picture of the overall market for utility preferred securities.

Apart from a weak patch in late 2008 and early 2009, the market was generally rising, and strongly so in the latter half of 2009. Of the eleven quarterly changes in average price, seven were increases and only four were declines. As such, while there was one major weak period in the market for utility preferred securities, rather than being in a generally declining market over the full 2007-2009 period, the securities traded by Mr. Nadel were rising more often than falling, over that period.

With the correct data on the general movements of the market over the relevant period, the appropriate logic used in the Porter Report leads to the opposite conclusion reached in that Report. "Stale" pricing used as a benchmark to compare to Mr. Nadel's transaction prices tends to lead to *positive* deviations, which would make it appear as if Mr. Nadel's transactions prices were high, even if they were precisely at market prices.

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[9] We used the sample of trades on which the Porter Report relied to identify securities that were traded by Mr. Nadel. Using the "Nadeldata.xlsx" file turned over as part of the backup to the Porter Report, we identified 109 unique securities. Of the 109, we found pricing information for 102 of these securities using NASDAQ.com, Bloomberg, L.P., and FactSet Research Systems, Inc. When trading volume is zero, the closing price reported by NASDAQ or FactSet is given as the closing price on the previous trading day. We used the same method with the Bloomberg price data to create a daily price series. To create an equally-weighted price index, we calculated daily percent returns for each of the 102 securities and took the average of the returns of the securities that were listed on each day. There were between 92 and 99 securities listed on any given day between 2006 and 2010. The index is pegged to a value of 1,000 on 1/3/2006, and the daily return of the index through 12/31/2010 is the average of the daily returns of the available securities. In essence, this index emulates the performance of a portfolio with an equal dollar amount invested in each of the securities available on each day.

In the light of the movements of the market for the *actual* securities at issue here, *utility preferred stocks*, the results in Table 2 of the Porter Report are in fact consistent with transaction prices that faithfully tracked market value. For the sample of Nadel transactions that are analyzed in the Porter Report, the more "stale" the benchmark price data used to calculate the "broker price deviation" the more positive that deviation.[10] Again, this will be the natural result when market prices are generally rising during most quarters – the "stale" benchmark price will be below the rising market price. These results do not provide evidence that Mr. Nadel's pricing was inappropriate.

The Porter Report goes on to present an analysis of the correlation between the level of the S&P US Preferred Stock Index and the average "broker price deviation" asserting that there is a negative correlation between the two.[11] Apart from the potentially serious statistical problems with such an analysis, the S&P index does not accurately reflect the market for the utility preferred securities actually traded by Mr. Nadel.[12] As such, this analysis cannot provide any accurate conclusions.

2. The Porter Report relies on dealer quote data and data on small volume transactions that may be of limited relevance

Given that the market for the securities traded by Mr. Nadel was generally rising, all of the Porter Report's analysis that uses benchmarks involving "stale" prices is unreliable and are biased toward finding positive "broker price deviations." To the extent that the Porter Report provides viable evidence of systematically positive "broker price deviations," it is in the smaller deviations that the Report finds for transactions for which there is same day pricing data.

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[10] This can be seen by looking at the median column of the Porter Report's Table 2 (Porter Report, pg. 8.) The reported values for the "broker price deviation" are higher as the staleness of the price increases, with the exception of a small drop in the last row, representing prices more than 360 days old.

[11] Porter Report, pg. 9.

However, even the transactions for which the Porter Report identifies same day pricing data may not contain pricing data that is relevant for the sort of transactions in which Mr. Nadel engaged. There are two reasons for this. First, it appears that the large majority of the price observations used in the Porter Report reflect dealer price quotes, not transaction price data. Second, even for the observations for which there is actual transaction data, the transactions are frequently of far smaller volume than the trades typically executed by Mr. Nadel. Below, we examine each of these two problems in turn.

The Porter Report identifies contemporaneous pricing data (that with category N=0 in the language of the Porter Report) by either an actual transaction price, with positive trading volume, or a change in the bid or ask quotes in the absence of any actual transactions.[13] So, for many of these transactions, no actual transaction prices are used as a benchmark. Quotes may not contain the same quality of information as actual transaction prices in the Over the Counter ("OTC") markets on which most of the securities traded by Mr. Nadel appeared. We have not been able to locate any information as to how the underlying data sources used by the Porter Report collect their quote data in the OTC preferred stock markets. Quotes appearing in the data may not reflect actually available prices as they do not necessarily reflect binding offers of prices. Thus, in the relevant markets, the quote data may not provide the same data quality as actual transaction prices.

For most of the dates on which the Porter Report uses actual transaction prices, these prices are based on total volume far lower than that in a single one of Mr. Nadel's typical trades. The median total measured market volume on days with contemporaneous pricing data in the

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[12] The potential statistical problems arise from the fact that it is not clear that the S&P price index is a so-called stationary process. Prices of common stock, for example, generally are non-stationary processes, following the so-called "random-walk theory" of stock pricing. This is a standard implication of elementary financial theory. (See, for example, Campbell, John Y, Andrew W. Lo and A Craig MacKinlay, *The Econometrics of Financial Markets*, Princeton University Press, 1997, Ch. 2.1.) However, correlations calculated with non-stationary data may lead to spurious results. (See for example, Hamilton, James D., *Time Series Analysis*, Princeton University Press, 1994, Ch. 18.3.)

[13] Porter Report, pg. 5.

Porter Report and non-zero volumes was 510 shares.[14] By way of comparison, the median volume in the Nadel transactions with contemporaneous pricing data, considered in the Porter Report, was 8295 shares. Thus the market transactions being used as a benchmark are much smaller in size than Mr. Nadel's transactions. In markets with designated market makers, the expected liquidity effect of a large trade would be to increase the price for a buy and to decrease the price for a sale.[15] However, in a market without designated market makers, a high volume transaction involves a matching of a large buyer and a large seller the price may be different from the price in a small transaction. For these reasons, market prices based on large transactions are likely to provide a better benchmark for Mr. Nadel's transactions than are the small transactions more typically seen in the relevant markets. If the relevance of market price data did not vary with the reported volume on the day, then one would expect to reach similar conclusions using just the high volume days as opposed to looking at other days.

To evaluate the importance of these two issues, we examined the Porter Report's estimated "broker price deviations" for transactions in which there was contemporaneous market price data and for which the market volume on the day was at least as large as the 10th percentile of the volume represented among the Nadel transactions. This means that 90% of Nadel transactions were as big or bigger than this threshold of 1,814 shares of volume. Thus, we are

[14] As of the date of this Report, Plaintiff's counsel has declined to provide information as to which "market prices" were based on dealer quotes and which were based on actual transaction prices. We may update this analysis as such information becomes available. For the transactions with contemporaneous pricing data, our analysis of market volume data indicates that 74% relied on dealer quote data – not on actual transaction prices. We have downloaded the underlying price and volume data for the securities listed in the backup files for the Porter Report and used those to establish which benchmarks were based on transaction prices and which on quotes. For one of the Porter Report's 98 total securities (for which the Porter Report indicates having found data), we have not as yet been able to locate underlying price data and for one other security we do not have volume data. While there are six securities for which we have located data, but for which the Porter Report indicates not having found data, for this analysis we have only used observations for which the Porter Report calculates "broker price deviations." Also note that the Porter Report does not address transactions associated with the account of Domenico and Eleanor DeSole.

[15] See, for example, Kyle, Albert S., "Continuous Auctions and Insider Trading," *Econometrica*, **53**, No. 6 (Nov., 1985), pp. 1315-1335.

not restricting to days on which the volume was as large as for a typical Nadel transaction, but only to days having volume that is not much smaller than most of the Nadel transactions.[16]

For transactions with contemporaneous transaction price data based on transaction volumes broadly comparable to the size of Mr. Nadel's transactions, the median "broker-price deviation," as calculated in the Porter Report, is just 3.76%. This is substantially lower than the 6.9% for all transactions with contemporaneous pricing data, as reported in Table 2 of the Porter Report.[17] Thus, for days on which the most reliable pricing data is available the estimated "broker-price deviation" is substantially lower than for other transactions examined in the Porter Report. This suggests that a good deal of the Porter Report's finding of positive "broker-price deviations" is the result of poor quality data used for the benchmarks.

B. The fact that Mr. Nadel's strategy performed reasonably well for clients, even through the period of alleged wrongdoing, also supports his pricing

The Porter Report argues that Mr. Nadel conducted transactions across his clients' accounts that were at prices above market prices for the relevant securities. As discussed in the previous section, the Porter Report substantially overstates the evidence for this proposition. In addition, another way to address the claim that Mr. Nadel's transaction prices did not reflect market prices is to directly evaluate any possible impact on his clients' portfolios. When we examine the performance of the accounts of Mr. Nadel's clients we find that they generally performed reasonably well. Only two of his twelve clients during the relevant period realized cash losses from their investments over the course of their relationship with Mr. Nadel and these were far exceeded by the gains experienced by the other clients. His clients also did reasonably

[16] Although this threshold is modest with respect to the size of Nadel transactions, it leaves only 168 observations as compared to the 2,538 transactions with contemporaneous pricing data examined in the Porter Report. This underscores the degree to which the benchmark prices used in the Porter Report depend on data that may have limited relevance to the Nadel transactions.

[17] A Kolmogorov-Smirnov test, a standard statistical procedure for testing if two distributions differ from each other, finds that the distribution of "broker-price deviations" on days with volume greater than 1,814 is statistically significantly different, from the distribution on all days with contemporaneous pricing information at any conventional significance level.

well during the 2007-2009 period of alleged wrongdoing, even though this was a challenging period for many markets, with the S&P 500 index of common stocks falling from 1418 to 1115.

1. Realized Cash Performance from investments with Mr. Nadel

Exhibit 3 contains a summary of the performance of the portfolios of the twelve relevant clients of Mr. Nadel's, through the entire course of their investment-management relationships with Mr. Nadel, as well as any additional time that they held securities purchased through Mr. Nadel.[18] This represents a basic cash flow summary – how much cash did each client put into management with Mr. Nadel and how much cash did each take out, net of management fees. For some of the clients, management fees were taken directly out of their accounts, so for those there is not a separate line item for management fees. The bottom line figure answers a simple question; did clients end up with more cash than they started with? For ten of the twelve clients the answer to that question is "yes." Importantly, the cash gains for those ten clients far exceed the cash losses for the remaining two: the net cash gains for the twelve clients collectively were $12.3 million based on a total of $173 million of total cash investment.

The allegedly high transaction prices were largely for transactions involving pairs of Mr. Nadel's clients. If the transactions prices were indeed high, one client, the seller, would be getting a windfall gain and another would be taking a loss, relative to market prices. If such a practice were severe, one would expect to find some substantial losers, relative to the overall gains, but here there are no such losers. But there are instead just two clients with moderate losses relative to the size of their portfolios and for each of these there are special circumstances, discussed below.

The first of the clients that experienced cash losses is Oregon Mutual. Oregon Mutual had a cash loss of approximately $75,000, or about 3% of their total cash investment. Oregon Mutual's loss appears be consistent with a simple case of bad timing. They initiated their investment in June of 2008, and asked to exit in October 2008, during the worst of the credit

[18] For one of those clients, Biomet, we have treated the estimated market value of Biomet's portfolio on January 1, 2004 as a cash inflow from the point of view of the calculation on Exhibit 3. The market value on that date is based on the valuation provided by RBC, which was the custodian for the account.

crisis.[19] During the period of Oregon Mutual's investment, the S&P 500 index fell from 1386 to below 1200. Further, the majority of Oregon Mutual's position was liquidated in just two months in the fall of 2010, without the assistance of Mr. Nadel. That independent sale of illiquid securities may also have contributed to the loss.

The second client to have cash losses was Polycom. In this case the losses amounted to $1.147 million, or 2.3% of the total cash invested. This is net of a $553 thousand note payment from Mr. Nadel's company, Registered Investment Advisors, LLC ("RIA").[20] It is my understanding that this payment was intended to be part of a series of note payments from RIA to Polycom. The total note value was $1.5 million, plus interest.[21] The rest of the note payments were never paid as a result of the termination of Polycom's relationship with RIA.[22] It is my understanding that the note was intended as compensation to Polycom as a result of alleged violations of Polycom's investment policies in Polycom's portfolio with RIA.[23] The securities alleged to involve investment policy violations were then sold quickly, which may have resulted in additional losses because of the illiquid nature of these securities. Executives at Polycom appear to have estimated that the forced sale related to the note was associated with a $2,434,577.22 loss to its portfolio.[24]

Had Polycom not terminated their relationship with RIA, they would have been able to collect approximately $1 million more from RIA, through the note. As such, since that loss of approximately $1 million was the result of Polycom's decision, not the result of any decision of Mr. Nadel's, it is not clear whether that $1 million loss should be included in the calculation of Polycom's final cash position. In Exhibit 3, we have included that loss. If we did not include it, then Polycom's cash loss would have been less than $150,000 on a cash investment of $50 million, or less than 0.3%.

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[19] Defendants' Ex. 82; Defendants' Ex. 72 at OMI 2591-92.

[20] SECNADEL 000033876.

[21] POLY-WDN013832.

[22] POLY-WDN013832.

[23] POLY-WDN010503.

Further, Polycom liquidated its large positions (more than $30 million in total) in comparatively illiquid assets over a relatively brief period of time following its termination of its relationship with RIA.[25] To the extent that the full value of the securities was not realized because of the speed of the sales, this should not be counted as a component of Mr. Nadel's asset management as it occurred after Polycom had terminated the relationship. Indeed, Mr. Nadel himself specifically warned Polycom of the potential costs of rapid liquidation.[26]

It is important to note that the calculations of overall net cash gains presented in Exhibit 3 do not take into account any tax gains that accrued to Mr. Nadel's clients. This is significant, because, as discussed in the Miller Report, one of the principal goals of Mr. Nadel's strategies was tax efficiency for companies with existing capital gains or losses. The tax gains associated with Mr. Nadel's management are likely to have been substantial, as tax benefits were central to the strategy, but their careful estimation goes beyond the scope of this report.

While there are some moderately complicated details involved in the calculation of the figures in Exhibit 3, there is one particularly noteworthy issue. There are three clients who are still holding securities that were purchased through Mr. Nadel: Applied Micro Circuits, Blythe and McDATA. For these three clients, we have removed those securities from consideration; that is to say, we have subtracted their purchase cost from cash deposits and have not attempted to value them as part of the cash withdrawals. This is consistent with the cash basis evaluation we are using and avoids issues with the appropriate valuation of these securities.[27]

2. Performance starting in 2007 based on neutral valuation sources

According to the complaint in this matter, the period of alleged wrongdoing was from 2007 through 2009, while the foregoing cash gains analysis was based on the whole period of

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[24] POLY-WDN010508.

[25] POLY-WDN013832. The majority of Polycom's portfolio was sold during four months in 2010.

[26] POLY-WDN002004-05.

[27] If we instead left the cost of these securities as a component of cash deposits and took the most current available valuations for the remaining securities, using valuations provided by the clients' own advisors or custodians, the net cash gains would be as follow: Applied Micro Circuits, $1,357,930.96; Blythe, $265,209.07; and McDATA, $5,802,057.12.

Mr. Nadel's management of his clients' portfolios. While an analysis of investment performance starting in 2007 bears more directly on the allegations in this matter, it also raises difficult questions concerning the appropriate valuation of the relatively illiquid securities at issue. All but four of the twelve clients had substantial positions under Mr. Nadel's management by the start of 2007 and these portfolios need to be evaluated to analyze investment performance starting in 2007. For this reason we presented the overall results first.

Exhibit 4 contains an analysis of the clients' gains or losses starting from their initial positions in 2007.[28] The initial portfolios have been valued primarily using RBC's "market price" valuations, as presented in the Nadel client account statements issued by RBC, when these were available.[29] We have used these valuations because the valuations provided by Mr. Nadel are in dispute in this matter. While we do not comment on the methodology of the RBC valuations and as such do not comment on their validity, they provide a neutral basis on which to evaluate returns.[30]

While we do not have any specific information concerning the methods that RBC used to calculate its valuations, they are likely to be matrix valuations of some kind for most of the securities involved. It is unlikely that RBC performed its own market analysis for such illiquid and low-volume securities. As such, there may be inaccuracies of unknown size in these valuations. As with the calculations in Exhibit 3, the figures in Exhibit 4 do not include any

[28] This analysis examines returns after accounting for management fees. If the goal were simply to evaluate the reasonableness of pricing of the initial portfolios, then management fees would not be removed.

[29] RBC was the custodian for most of Mr. Nadel's clients. For several of Mr. Nadel's clients we needed to use other sources. For Oglethorpe Power Corporation, we built a valuation by looking up contemporaneous RBC valuations for the securities in their portfolio, using the RBC statements of the other clients as well as Northern Trust valuations. For Applied Micro Circuits we have used RBC and Northern Trust valuations as well as downloaded price data. For LWCC we have used valuations from Northern Trust, its custodian.

[30] Mr. Nadel's valuations of the preferred stocks in his clients' portfolios generally tended to be higher than those provided by RBC, and thus would be generally likely to lead to lower estimates than those presented in Exhibit 4. But since his pricing is contested in this matter, we have used third-party pricing to evaluate performance, without addressing its reliability as compared to Mr. Nadel's pricing.

measure of tax advantages gained by Mr. Nadel's clients.[31] As described in the Miller Report, tax considerations were central to the strategies used by Mr. Nadel.

Using the cash return measures described above, eight of the twelve clients had net gains starting from their 2007 portfolio positions. For the clients as a whole, the overall net gains were $9.46 million. As with the preceding analysis there were no individual clients who suffered large percentage losses in their portfolios – the greatest loss was 4.2%. While this was a difficult period for many markets, as it included the worst phase of the credit crisis, as a whole Mr. Nadel's clients made money, and no individual clients lost large fractions of the value of their invested funds.

3. The performance of the portfolios of Mr. Nadel's clients compared reasonably to that of 90 day T-Bills, even without accounting for the tax advantages of the strategy

Exhibit 5 contains a summary of the performance of the portfolios of Mr. Nadel's clients, compared to the performance of a continually rolled-over portfolio of 90-day Treasury Bills as measured by the Citigroup Index 3-Month Treasury Bill Index. This was a benchmark that had been used by Mr. Nadel in the marketing materials for his company.[32] For this purpose, as opposed to the cash-in/cash-out analysis above, we have weighted the clients' investment dollars based on the duration of the investment, thus the return figures in Exhibit 5 differ from those in Exhibit 3 and 4.[33] There are different methods available for calculating investment-weighted returns. For simplicity, we have used the method that Mr. Nadel used in calculating average returns for his clients.[34]

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[31] For the estimation of performance from 2007 onwards, we have not netted out securities still held at the present date. Because we are already using estimated values for the starting positions, we are also using custodian-estimated positions for those clients still holding securities.

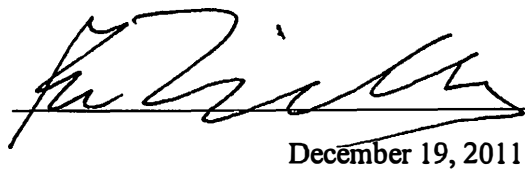
[32] See, for example, Presentation titled "Dividend Capture Strategy," SECNADEL-000057690.

[33] The returns for McDATA are especially high because of the timing of their withdrawals.

[34] This method is to calculate the number of days over the relevant period that different amounts of cash were invested and use these numbers of days to calculate a weighted average cash investment. That weighted average investment is then used as a denominator for the investment return calculation.

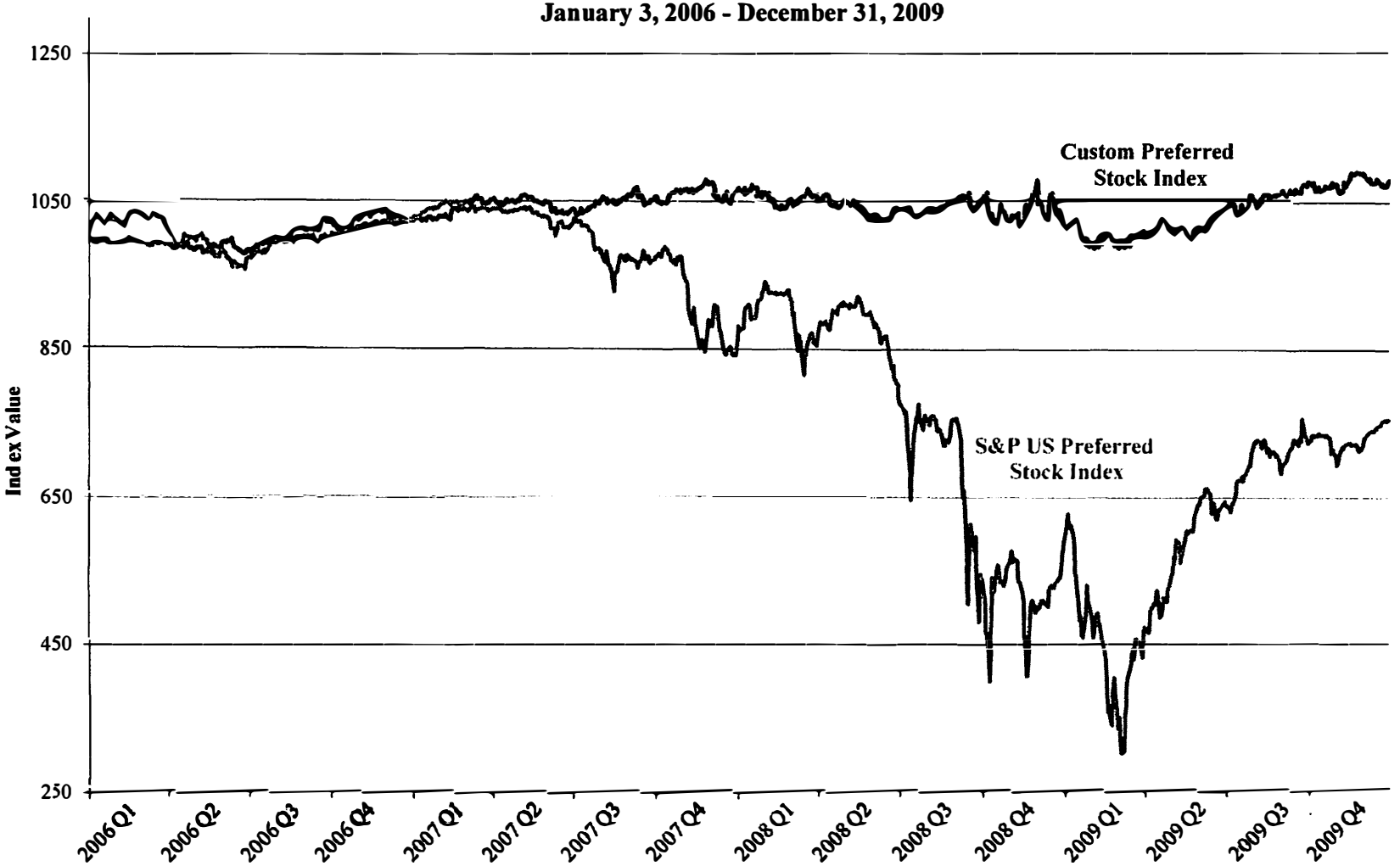
Six of the twelve clients had returns that beat the T-Bill return over the duration of their relationship with Mr. Nadel. Thus, half of Mr. Nadel's clients beat the benchmark and half did not. Again, recall that this does not include the significant tax benefits that Mr. Nadel's strategies were designed to produce.

For the 2007 and onwards period, the basic results are similar: five of Mr. Nadel's clients 12 beat the benchmark, without taking into account tax advantages.



December 19, 2011

Exhibit 1
Warren D. Nadel & Company
S&P US Preferred and Custom Preferred Stock Price Indices[1]
January 3, 2006 - December 31, 2009



Notes and Sources:
Data obtained from NASDAQ.com, Bloomberg, L.P., and FactSet Research Systems, Inc.
[1] Of the 109 unique securities traded between 2007 and 2009 identified in the Porter Report (with the adjustments described within), data for 102 were found and used in the custom index. The custom index (pegged to 1000 on 1/3/06) is calculated using the average daily returns of the underlying securities trading on any given day. If trading volume was 0 when the security was listed, the last reported closing price was used to calculate the daily return.

Exhibit 2
Warren D. Nadel & Company
Comparison of Daily Averages of Preferred Stock Price Indices by Quarter
2007 - 2009

Year	Quarter	Daily Average of S&P US Preferred Stock Index[1]	Daily Average of Custom Preferred Stock Index[2]	Price Increase from Previous Quarter? S&P US Preferred Stock Index	Price Increase from Previous Quarter? Custom Preferred Stock Index
(1)	(2)	(3)	(4)	(5)	(6)
2007	1	1,039.25	1,037.41		
2007	2	1,030.07	1,046.39	No	Yes
2007	3	981.90	1,048.84	No	Yes
2007	4	914.56	1,060.77	No	Yes
2008	1	897.63	1,056.11	No	No
2008	2	885.37	1,040.87	No	No
2008	3	706.11	1,042.69	No	Yes
2008	4	520.01	1,037.91	No	No
2009	1	458.70	1,001.89	No	No
2009	2	576.23	1,014.26	Yes	Yes
2009	3	699.65	1,052.87	Yes	Yes
2009	4	729.92	1,076.55	Yes	Yes

Notes and Sources:

[1] Data for the Daily Average of S&P US Preferred Stock Index by quarter are from Table 3 of the *Expert Witness Report of Robert B. Porter Ph.D.*, dated November 10, 2011.

[2] Of the 109 unique securities traded between 2007 and 2009 identified in the Porter Report (with the adjustments described within), data for 102 were found and used in the custom index. The custom index (pegged to 1000 on 1/3/06) is calculated using the average daily returns of the underlying securities trading on any given day. If trading volume was 0 when the security was listed, the last reported closing price was used to calculate the daily return.

Exhibit 3
Warren D. Nadel & Company
Summary of Client Net Realized Cash Gains & Losses
Over Total Investment Period

	Client	Deposits	Withdrawals	Management Fees and Other Charges	Net Cash Gain/Loss	Cash Gain/Loss as Percent of Deposits
	(1)	(2)	(3)	(4)	(5) (3) - (2) - (4)	(6) (5) / (2)
1	**Adolfson & Peterson, Inc.** *4/4/2005 - 6/2/2010*	5,000,010.00 [1]	5,231,094.09	N/A	231,084.09	4.62%
2	**Applied Micro Circuits Corp.**[2] *6/7/2004 - 11/22/2011*	16,579,732.14	20,029,756.28	1,130,112.10	2,319,912.04	13.99%
3	**Biomet Investment Corp.** *1/1/2004 - 10/1/2007*	6,941,510.11 [3]	8,076,461.56	177,587.85 [4]	957,363.60	13.79%
4	**Blythe, Inc.**[5] *9/17/2007 - 6/30/2011*	5,224,361.00	6,356,793.47	161,273.40	971,159.07	18.59%
5	**Continental Grain Co.** *4/25/2007 - 10/16/2009*	11,000,000.00	11,033,666.53	N/A	33,666.53	0.31%
6	**Domenico & Eleanor DeSole** *12/27/2004 - 7/25/2007*	3,000,000.00	3,276,118.57	N/A	276,118.57	9.20%
7	**Louisiana Workers' Comp.** *8/15/2005 - 3/31/2010*	23,100,000.00	23,522,831.90	190,816.47	232,015.43	1.00%
8	**McDATA Corp.**[6] *6/23/2003 - 10/28/2011*	26,996,711.23	32,969,617.12	N/A	5,972,905.89	22.12%
9	**Oglethorpe Power Corp.** *2/2/2005 - 4/30/2010*	17,500,000.00	19,467,740.08 [7]	N/A	1,967,740.08	11.24%
10	**Oregon Mutual Insurance Co.** *6/2/2008 - 10/18/2010*	2,513,142.62	2,450,445.85	12,441.17	(75,137.94)	-2.99%
11	**Polycom, Inc.** *12/23/2004 - 8/9/2010*	50,000,000.00	48,300,000.00 [8]	(553,063.37) [9]	(1,146,936.63)	-2.29%
12	**Winston Wade Capital Fund LLC** *1/3/2005 - 6/19/2008*	5,764,900.00	6,410,934.70	70,546.13	575,488.57	9.98%

Notes and Sources:

Data are from client account activity statements provided by counsel.

[1] The 4/5/2005 initial deposit is the sale value of the securities transferred into the brokerage account on this date.

[2] In August 2009, securities were transferred out of the brokerage account. Those sold through 11/22/2011 are valued using the dividend income and sale of these securities. We removed the cost of the unsold securities from the initial deposit. Including the UnionBank market valuation as of 11/22/2011 of these securities as a withdrawal instead leads to a net gain of 5.43%.

[3] The initial deposit on 1/1/2004 is the client account balance of $6,941,510.11 as valued by RBC on that date. The account was opened in January 1998.

[4] The January 2006 Management Fee is estimated as the average of the management fees for February 2006 to April 2006. The management fees for 2005 are unavailable and thus estimated using the cumulative fees as of December 2006 and the estimated January 2006 fee.

[5] In January 2009, securities were transferred out of the brokerage account. Those sold through 6/30/2011 are valued using the dividend income and sale of these securities. We removed the cost of the unsold securities from the initial deposit. Including Blythe's market valuation as of 6/30/2011 of these securities as a withdrawal instead leads to a net gain of 2.65%.

[6] In October 2009, unsold securities remained in the brokerage account. We removed the cost of these securities from the initial deposit. Including the RBC market valuation as of 10/31/2011 instead leads to a net gain of 20.72%.

[7] In November 2008, unsold securities remained in the brokerage account. These securities are valued using the dividend income, interest, and sales through 4/30/2011.

[8] Withdrawals are based on estimates produced by Polycom.

[9] This payment to Polycom represents $500,000 plus interest charges of the $1.5 million note receivable that was paid from Nadel to Polycom prior to termination of services.

Exhibit 4
Warren D. Nadel & Company
Summary of Client Net Cash Gains & Losses
2007 to End of Investment Period

	Client	Deposits[1]	Withdrawals	Management Fees and Other Charges	Net Cash Gain/Loss	Cash Gain/Loss as Percent of Deposits
	(1)	(2)	(3)	(4)	(5) (3) - (2) - (4)	(6) (5) / (2)
1	**Adolfson & Peterson, Inc.** *1 1 2007 - 6 2 2010*	4,700,100.69	5,231,094.09	N/A	530,993.40	11.30%
2	**Applied Micro Circuits Corp.**[2] *1 1 2007 - 11 22 2011*	21,306,357.01	21,388,045.07	497,000.75	(415,312.69)	-1.95%
3	**Biomet Investment Corp.** *1 1 2007 - 10 1 2007*	5,208,927.92	6,076,461.56	18,237.74	849,295.90	16.30%
4	**Blythe, Inc.**[3] *9 17 2007 - 6 30 2011*	10,000,000.00	10,426,482.47	161,273.40	265,209.07	2.65%
5	**Continental Grain Co.** *4 25 2007 - 10 16 2009*	11,000,000.00	11,033,666.53	N/A	33,666.53	0.31%
6	**Domenico & Eleanor DeSole** *1 1 2007 - 7 25 2007*	2,633,374.23	3,276,118.57	N/A	642,744.34	24.41%
7	**Louisiana Workers' Comp.** *1 1 2007 - 3 31 2010*	23,527,514.42	23,522,831.90	11,525.56	(16,208.08)	-0.07%
8	**McDATA Corp.**[4] *1 1 2007 - 10 28 2011*	28,809,360.50	33,802,057.12	N/A	4,992,696.62	17.33%
9	**Oglethorpe Power Corp.** *1 1 2007 - 4 30 2010*	12,757,608.62 [5]	12,467,740.08 [6]	N/A	(289,868.53)	-2.27%
10	**Oregon Mutual Insurance Co.** *6 2 2008 - 10 18 2010*	2,513,142.62	2,450,445.85	12,441.17	(75,137.94)	-2.99%
11	**Polycom, Inc.** *1 1 2007 - 8 9 2010*	46,846,305.00	48,300,000.00 [7]	(553,063.37) [8]	2,006,758.37	4.28%
12	**Winston Wade Capital Fund LLC** *1 1 2007 - 6 19 2008*	3,666,919.75	4,627,320.48	27,521.46 [9]	932,879.27	25.44%

Notes and Sources:

Data are from client account activity statements provided by counsel.

[1] If the client account was active before 1/1/2007, the initial deposit was taken as the RBC estimated value of the account as of 1/1/2007 when available. For Applied Micro Circuits Corp. and Louisiana Workers' Comp., an RBC valuation was not available. For Applied Micro Circuits, RBC and Northern Trust valuations of the account as of 1/1/2007 were used when available; price data from Bloomberg or NASDAQ.com were used otherwise. For Louisiana Workers' Comp., the Northern Trust valuation of the account as of 1/1/2007 was used. Deposits after 1/1/07 are taken at cash value.

[2] In August 2009, securities were transferred out of the brokerage account. Those sold through 11/22/2011 are valued using the dividend income and sale of these securities. The remaining securities are valued using the UnionBank market valuation as of 1/22/2011.

[3] In January 2009, securities were transferred out of the brokerage account. Those sold through 6/30/2011 are valued using the dividend income and sale of these securities. The remaining securities are valued using Blythe's market valuation as of 6/30/2011.

[4] In October 2009, unsold securities remained in the brokerage account. The remaining securities are valued using the RBC market valuation as of 10/31/2011.

[5] The marked value of the account on 1/1/2007 was calculated using either RBC or Northern Trust valuations of the securities held in the account. These valuations are taken from the account statements of other clients of Nadel.

[6] In November 2008, unsold securities remained in the brokerage account. These securities are valued using the dividend income, interest, and sales through 4/30/2011.

[7] Withdrawals are based on estimates produced by Polycom.

[8] This payment to Polycom represents $500,000 plus interest charges of the $1.5 million note receivable that was paid from Nadel to Polycom prior to termination of services.

[9] The January 2008 Management Fee is estimated as the average of the management fees for February 2008 to April 2008. The management fees for 2007 are unavailable and thus estimated using the cumulative fees as of December 2008 and the estimated January 2008 fee.

Exhibit 5
Warren D. Nadel & Company
Client Returns on Weighted Invested Capital[1]
Compared to Total Return of Citigroup 3-Month Treasury Bill Index

	Client	Investment Period	Return for Total Investment Period		Return from 2007 to End of Investment Period	
			Portfolio	3-Month Treasury Bill	Portfolio	3-Month Treasury Bill
	(1)	(2)	(3)	(4)	(5)	(6)
1	Adolfson & Peterson, Inc.	4/4/2005 - 6/2/2010	6.16%	14.63%	13.81%	6.83%
2	Applied Micro Circuits Corp.	6/7/2004 - 11/22/2011	22.48% [2]	16.45%	-2.21%	7.01%
3	Biomet Investment Corp.	1/1/2004 - 10/1/2007	17.18%	13.29%	38.83%	3.71%
4	Blythe, Inc.	9/17/2007 - 6/30/2011	28.67% [3]	3.55%	3.25%	3.55%
5	Continental Grain Co.	4/25/2007 - 10/16/2009	0.39%	5.46%	0.39%	5.46%
6	Domenico & Eleanor DeSole	12/27/2004 - 7/25/2007	9.77%	10.77%	35.06%	2.49%
7	Louisiana Workers' Comp.	8/15/2005 - 3/31/2010	1.58%	13.53%	-0.09%	6.81%
8	McDATA Corp.	6/23/2003 - 10/28/2011	67.69% [4]	17.57%	138.31%	7.01%
9	Oglethorpe Power Corp.	2/2/2005 - 4/30/2010	18.86%	15.06%	-2.90%	6.82%
10	Oregon Mutual Insurance Co.	6/2/2008 - 10/18/2010	-3.37%	1.07%	-3.37%	1.07%
11	Polycom, Inc.	12/23/2004 - 8/9/2010	-2.61%	15.50%	4.41%	6.86%
12	Winston Wade Capital Fund LLC	1/3/2005 - 6/19/2008	15.50%	14.12%	32.59%	5.76%

Notes and Sources:

Client data are from account activity statements provided by counsel. Index data are from Bloomberg, L.P.

[1] Client returns on invested capital are calculated by dividing the net gain/loss by the time-weighted average dollars invested. Cumulative management fees are removed at the end of the given period. When exact date for a deposit or withdrawal was unavailable, the middle of the month was assumed as the date in order to calculate time-weighted average dollars invested.

[2] See Exhibit 3 footnote 2 for explanation of alternate calculations for client's net gain/loss. Using this alternative method leads to a return on weighted invested capital of 7.25% for the total investment period.

[3] See Exhibit 3 footnote 5 for explanation of alternate calculations for client's net gain/loss. Using this alternative method leads to a return on weighted invested capital of 3.25% for the total investment period.

[4] See Exhibit 3 footnote 6 for explanation of alternate calculations for client's net gain/loss. Using this alternative method leads to a return on weighted invested capital of 59.04% for the total investment period.

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Attachment 1

RONALD I. MILLER, PH.D.
VICE PRESIDENT

Education

Princeton University
Ph.D., Economics, 1994
M.A., Economics, 1989

University of Toronto
B.Sc., Mathematics and Economics, 1987

Professional Experience

NERA Economic Consulting

2007- Vice President
Provide consulting and expert services in the areas of securities and finance.

2001-2007 Senior Consultant

New York University

2008, 2010 Adjunct Professor of Economics
Taught macroeconomics at masters level.

Columbia University

1994-2001 Assistant Professor of Economics
Taught graduate and undergraduate courses in macroeconomics, econometrics, and international finance. Advised doctoral students.

2000 Acting Director, Program in Economic Policy Management
Managed and coordinated all of the activities of a masters program at Columbia's School of International and Public Affairs.

Princeton University
1996 Adjunct Professor of Economics
Taught development economics at the Ph.D. level.

Paper and Publications in the Last Ten Years

"Economists' Views: New Playbook for a Financial Crisis," (with Elaine Buckberg), NERA brief, October 2008.

"The Paulson Proposal: An Update on Economists' Views," (with Elaine Buckberg), NERA Brief, October 2008.

"The Paulson Proposal: Economists' Views," (with others), NERA Brief, September 2008.

"Recent Trends in Shareholder Class Action Litigation: Filings Stay Low and Average Settlements Stay High – But Are These Trends Reversing?" (with others), NERA publication, September 2007.

"Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar," (with Todd S. Foster and Stephanie Plancich), NERA publication, January 2007.

"Where Are Mesothelioma Claims Heading?" (with Fred Dunbar, Paul Hinton and Faten Sabry), NERA publication, December 2006.

"Recent Trends in Shareholder Class Action Litigation: Beyond the Mega-Settlements, is Stabilization Ahead," (with Todd Foster and Elaine Buckberg), NERA publication, April 2006.

"Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?" (with Elaine Buckberg and Todd S. Foster), NERA publication, July 2005.

"Costs of Asbestos Litigation and Benefits of Reform," (with Denise Martin, Faten Sabry, Paul Hinton and Stephanie Plancich), NERA publication, April 2005.

"Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements," (with Elaine Buckberg, Todd Foster and Stephanie Plancich), NERA publication, February 2005.

"Determinants of Long-Term Growth: A Bayesian Averaging of Classical Estimates (BACE) Approach," (with Gernot Doppelhofer and Xavier Sala-i-Martin), *American Economic Review*, Vol. 94, No. 4, September 2004.

"Recent Trends in Securities Class Action Litigation: Will Enron and Sarbanes-Oxley Change the Tides?" (with Elaine Buckberg, Todd S. Foster, and Adam Werner), NERA publication, July 2003. Also published in *Securities Litigation and Enforcement Institute 2003*, Practising Law Institute.

Testimony in the Last Four Years

Expert Report, in the matter of Michael Frank Plaintiff and Farlie, Turner & Co., LLC, Bayshore Partners, LLC, R. Patrick Caldwell, Stephen Giordanella, Larry Moeller, Neil E. Schwartzman, Jason A. Williams, Brian L. Stafford, Henry H. Shelton, Frank E. Jaumot, Keith J. Engel, Richard P. Torykian, Sr., Charles E. Peters, Jr., and Deon Vaughan, Ontario Superior Court of Justice, Canada, 2011.

Expert Report, Rebuttal Report, Deposition and Testimony, *John Paul Reddam, v. Commissioner of Internal Revenue*, on the economic substance of a complex options strategy, 2010.

Testimony before the Ontario Securities Commission, *In the Matter of the Securities Act R.S.O. 1990, c. S. 5, as amended, and In the Matter of Biovail Corporation, Eugene N. Melnyk, Brian H. Crombie, John R. Miszuk and Kenneth G. Howling*, 2009.

Testimony, In the Matter of an Arbitration under the United Nations Commission on International Trade Law Rules, *European Media Ventures S.A. v. The Czech Republic*, 2008.

Testimony before the American Arbitration Association on a confidential matter, New York City, 2007.

Deposition Testimony, In the United States District Court for the Central District of California in *Federal Trade Commission v. Dennis Connelly, Homeland Financial Services, et al.*, 2007.

Compensation

My time in this matter is billed at $530 per hour.

NERA
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Attachment 2

Additional Materials Considered in Rebuttal Report

Nadel 427223-34	Nadel135934-47	OPC_000001-418	Nadel 429876-891
Nadel 138356-65	Nadel138425-31	Defs.' Ex. 7	POLYWDN12400-43
RBCN1-12	Nadel 134343	Nadel 137057-143	Nadel 430238-54
Nadel134186-94	Nadel 138965	Nadel 137247-62	Nadel 135702-12
Nadel134203-10	Nadel 136985	Nadel 137285-305	ePolyWDN1511-24
Nadel134348-56	Nadel 7495	Nadel 428119-26	POLYWN10073-308
Nadel134397-404	Biomet RBC Rpts.	Nadel 428071-80	POLY-W 12254-346
Nadel134488-97	1/98, 11/98, 8/00	RBC McData Rpts.,	POLY-W 10388-492
Nadel134642-51	5/02, 9/02, 2/03, 6/03	1/03, 6/04, 4/05, 7/11	ePOLY 972-1005
Nadel134677-84	Nadel 136990-98	12/05, 12/06, 8/10,	Nadel 135948-59
Nadel134339-47	Nadel 427800-13	NADEL 135386-97	ePOLY 276-91
Nadel134685-91	Nadel 427944-52	Nadel 428427-47	NADEL430707-30
AMC000001-133	Nadel 136688-95	Nadel 135442-90	NADEL329717-25
Nadel327804-19	Nadel 136914-22	Nadel 135652-57	NADEL327074-416
Nadel327878-91	Nadel 136999-7015	Nadel 139204-12	
Nadel327746-78	Nadel 137022-35	Nadel 429635-50	
Nadel427446-458	Nadel 137041-56	RBC 10/11 Rpt.	
AM 316	Nadel 137	Defs.' Ex. 82	
AM 323	BLYTH 5916-26	OMI 115-215	
Nadel 427571-82	DX36, BLY2856-64	Defs.' Exs. 70-73	
Nadel 427432-45	Nadel 135244-52	Defs' Can. Ex. 50-53	
Nadel 427490-99	Nadel 135269-97	LWCC 2743-73	
Nadel 428964-73	Nadel 427953-59	Nadel 428293-309	
Nadel 428935-51	Nadel 328184-97	Nadel 328704-21	
LWCC 3400-01	Nadel 328326-39	LWCC 291	
Nadel 134339-48	CGC-SEC 1032	Nadel 137789-97	
Nadel 134920-23	CGC-SEC 3688-742	Nadel 450326-40	
Nadel 427459-74	Defs.' Ex. 23	Nadel 429813-34	
McData 12/06 Rpt.	Defs.' Ex. 21	Nadel 329164-239	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	11 Civ. 0215 (WFK) (AKT)
WARREN D. NADEL,	:	
WARREN D. NADEL & CO., and	:	
REGISTERED INVESTMENT ADVISERS, LLC	:	
	:	
Defendants,	:	
	:	
-and-	:	
KATHERINE NADEL,	:	
	:	
Relief Defendant.	:	

SUR-REBUTTAL REPORT OF RONALD I. MILLER, PH.D.

February 24, 2012

I. QUALIFICATIONS

Details of my qualifications are provided with my initial expert report ("Miller Report") and rebuttal report ("Miller Rebuttal Report".)

II. SCOPE OF ASSIGNMENT

I was asked by counsel for the Defendants to provide comments on a set of four figures and two tables that I understand to have been prepared by Dr. Porter and that are dated 24 January 2012 (the "Porter Supplementary Exhibits.")

III. ANALYSIS

First, the Porter Supplementary Exhibits incorrectly rely on stock indices that are not focused on the specific stocks traded by Mr. Nadel and his firm. Figure 1 from the Porter Supplementary Exhibits contains a comparison of three price index series. The first is the S&P preferred index that was relied upon in the Expert Report of Robert B. Porter, filed November 10, 2011 ("the Porter Report.") In the Miller Rebuttal Report, I noted that this S&P index is largely irrelevant for the present matter, being dominated by the securities of financial firms that experienced very different circumstances from the utility firms whose securities were traded by Mr. Nadel. Figure 1 provides two additional indices, newly calculated by Dr. Porter. The first is an index of all preferred shares from the NYSE TAQ database. Unsurprisingly, this index behaves similarly to the S&P index, and is also dominated by securities of financial companies.

The third series presented in Figure 1 is a value-weighted index of preferred securities that the TAQ database identifies as being issued by utilities ("the new Porter Index.") As can be seen from Figure 1, this newly-constructed index bears little relation to the S&P index relied upon in the Porter Report. By concentrating on the appropriate industry, the new Porter index corrects one problem with using the S&P index for the present matter. But the new Porter index still does not represent the market for the securities actually traded by Mr. Nadel, which is to say, the securities used to calculate the "Broker Price Deviations" in the Porter Report.

In particular, the TAQ data that were provided to us as backup to the Porter Supplementary Exhibits contain price data only on exchange-traded securities. In stark contrast, the large majority of securities traded by Mr. Nadel, and used in the Porter Report's analysis of

Mr. Nadel's pricing, were not exchange-traded: they were traded over-the-counter ("OTC"), as discussed in the Miller Rebuttal Report. Because of this limitation of the TAQ data used to generate Figure 1, only 15 of the 69 securities in the new Porter index were actually traded by Mr. Nadel and used to calculate broker price deviations in the Porter Report.[1] As such, the new index is dominated by securities that are not directly relevant. In contrast, the index calculated in the Miller Rebuttal Report was constructed using only the relevant securities, those actually traded by Mr. Nadel. The OTC securities traded by Mr. Nadel may behave in ways that are systematically different from the exchange-traded securities used in the new Porter index – OTC securities tend to be smaller issues and may be issued by smaller companies. Thus, while the new Porter index may get closer to the relevant market than does the entirely inappropriate S&P index, it still covers an almost completely different set of securities than those actually traded by Mr. Nadel. It is also made up of securities that may behave in systematically different ways from those relevant securities.

Second, the failure to use an appropriate index of the securities Mr. Nadel actually traded also undermines Figure 2 of the Porter Supplementary Exhibits, a purported comparison of the new Porter index to quarterly average broker price deviations. This appears to be a revised version of Figure 1 from the Porter Report, with the new Porter index and the addition of a new line for "Averge (sic) Broker Price Deviation N=0." In the Porter Report, the main point of Figure 1 was an attempt to show a supposed pattern of higher broker price deviations when the market was falling.[2] The same criticisms of this original analysis provided in the Miller Rebuttal Report still hold for the new Figure.[3] The index used is inappropriate, and a correlation analysis of potentially non-stationary series may be statistically misguided.

Third, the next set of exhibits in the Porter Supplementary Exhibits – revised versions of Tables 1 and 2 from the Porter Report – both reveals significant defects in the Porter Report and

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[1] Additionally, the new Porter index excludes some of the securities traded by Mr. Nadel because it excludes securities with NYSE industry code 310A, "Multiservice Utility Companies." It is not clear why these companies were excluded.

[2] See Porter Report, pg. 9.

[3] Miller Rebuttal Report, pp. 5-6.

repeats the Porter Report's flaw of failing to compare Mr. Nadel's trades to trades of a similar size. Revised Tables 1 and 2 purport to show price deviations calculated using only trades with "trading volume." Note that this does not mean that contemporaneous pricing data has been uniformly used, but only that actual trades rather than quote revisions have been used. Because we did not have the data needed to determine which trades analyzed in the Porter Report used trade data and which used quote data, we were unable at that time to quantify the effect of using quote data on the calculations, but instead noted that the quote data may not be as reliable as the trade data.[4] The newly-revised Table 2 provides the answer: the use of quote data may have systematically overstated broker-price deviations in the Porter Report. As can be seen by comparing the medians in the original Table 2 with those in the newly-revised Table 2, the broker price deviations are significantly smaller when only transactions data are used.[5]

Further, Tables 1 and 2 retain the flaw from the Porter report of failing to compare Mr. Nadel's trades with trades of a reasonably similar size. This is an important issue considering the relatively low volumes typical in the OTC markets in which Mr. Nadel traded. Thus, as noted in the Miller Rebuttal Report, a comparison of Mr. Nadel's trades to those of a reasonably similar size reveals significantly smaller so-called "price deviations."[6] This indicates that the Porter Supplementary Exhibits repeat the initial Porter Report's problem of basing its claim of price deviations on potentially poor quality benchmarks.

Fourth, Figures 3 and 4 in the Porter Supplementary Exhibits provide further revisions to Figure 1 from the Porter Report. The same problems described above for Figure 2 of the Porter Supplementary Exhibits, that the index used is inappropriate and that the correlation analysis is potentially misleading, apply equally to Figures 3 and 4.

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[4] Miller Rebuttal Report, pg. 6.

[5] For example, for trades with contemporaneous trading data, the median broker price deviation is reported to be 6.0% using transactions data, as opposed to 6.9% as reported in the Porter Report.

[6] Miller Rebuttal Report, pg. 8.

February 24, 2012

Principal Trades Capital Gain/Loss Analysis

	Principal Transaction Categories			
	Price Averaging	Firm Profits	Firm Losses	Sum / Net Totals
Pre-Conversion Transaction Activity - * [1/2007 - 2/2008]	$ (11,964.15)	$ 615,644.94	$ (738,584.59)	$ (134,903.80)
Post Conversion Transaction Activity - * [3/2008 - 12/2009]	14,242.83	1,405,373.11	(1,520,942.31)	(101,326.37)
Category Totals -	$ 2,278.68	$ 2,021,018.05	$ (2,259,526.90)	**$ (236,230.17)**

* The reference to "Pre-Conversion" and "Post-Conversion" makes reference the the conversion of RBC's back office computer conversion effecting the issuance of transaction confirmations.

Initial Decision Release No. 1158
Administrative Proceeding
File No. 3-17883

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

Warren D. Nadel

Initial Decision
August 4, 2017

Appearances: Richard Primoff and Jorge G. Tenreiro for the Division of Enforcement, Securities and Exchange Commission

Warren D. Nadel, *pro se*

Before: Cameron Elliot, Administrative Law Judge

As market conditions began to tighten in 2007, rather than adjusting his investment strategy, Respondent Warren D. Nadel decided to cross trade among client accounts, without their consent or knowledge, significantly overstating the amount of assets he managed along the way. A federal district court has already permanently enjoined Nadel from violating the federal securities laws, ordered disgorgement of more than ten million dollars, prejudgment interest of more than two million dollars, and a civil penalty of one million dollars. This initial decision imposes the further sanction of barring Nadel from associating with a broker, dealer, or investment adviser.

Procedural Background

On March 16, 2017, the Securities and Exchange Commission issued an order instituting administrative proceedings (OIP) against Nadel, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940. The OIP alleges that on January 20, 2017, the district court in *SEC v. Nadel*, No. 2:11-cv-215 (E.D.N.Y.), permanently enjoined Nadel from future violations of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Exchange Act and Rule 10b-5

thereunder; Section 206(1), (2), and (3) of the Advisers Act; and from aiding and abetting any violations of Exchange Act Section 10(b) and Rule 10b-10 thereunder. OIP at 2.

After Nadel answered the OIP, I held a telephonic prehearing conference and set a briefing schedule for summary disposition. The Division's motion for a permanent bar from associating with a broker, dealer, or investment adviser, filed June 16, 2017, referred to several exhibits, consisting primarily of items from the record in the civil case. Nadel responded on July 7, 2017; many of his exhibits also came from his civil case. The Division replied on July 17, 2017, closing the briefing.

Summary Disposition Standard

Summary disposition is appropriate where there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). A motion for summary disposition is generally proper in "follow-on" proceedings like this one, where the administrative proceeding is based on a civil injunction. *See, e.g.*, *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *10 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

The findings and conclusions in this initial decision are based on the record and on facts officially noticed pursuant to Rule 323, including the proceedings, docket sheet, and record in the civil case, which Nadel is precluded from contesting. *See Daniel Imperato*, Exchange Act Release No. 74596, 2015 WL 1389046, at *4 nn. 23-24, *5 (Mar. 27, 2015) (giving preclusive effect to a district court's factual findings and legal conclusions in the context of a litigated summary judgment motion), *vacated in part on other grounds*, No. 15-11574, 2017 WL 2829066 (11th Cir. June 30, 2017); 17 C.F.R. § 201.323. All filings and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and proposed findings and conclusions that are inconsistent with this initial decision have been considered and rejected.

Findings of Fact

The civil case proceeded against (1) Nadel; (2) Registered Investment Advisers, LLC, a Commission-registered investment adviser of which Nadel was president; (3) Warren D. Nadel & Co., a FINRA-registered broker-dealer of which Nadel was president, CEO, and chief compliance officer; and (4) Nadel's then-wife, as a relief defendant. *See SEC v. Nadel*, 97 F. Supp. 3d 117 (E.D.N.Y. 2015) (*Nadel I*). In its order granting summary judgment, the

district court considered the undisputed facts of Nadel's conduct and construed the facts in the light most favorable to Nadel. *Id.* at 119-21.

The district court found that Nadel pursued a preferred stock dividend capture strategy, "which required a high volume of transactions in preferred utility stocks." *Id.* at 120. The strategy was designed to "generate tax-favored dividend income." *Id.* (quoting Nadel's program package, ECF No. 82-1). In late 2007, Nadel "began conducting cross-trades between [Registered Investment Advisers's] own advisory clients instead of executing trades on the open marketplace," without alerting his clients or obtaining their consent.[1] *Id.* Nadel also represented in marketing materials that Registered Investment Advisers managed more than $400 million in investor assets, despite Commission filings between January 2007 and January 2010 in which he reported no more than $150 million in managed assets. *Id.*

The district court granted the Commission's motion for summary judgment, finding that Nadel violated Exchange Act Section 10(b) and Rules 10b-5 and 10b-10 thereunder, Securities Act Section 17(a), and Advisers Act Section 206(1), (2), and (3), and directed the magistrate judge to hold a hearing to decide the appropriate relief. *Id.* at 130. The evidentiary hearing lasted four days in July 2015. *SEC v. Nadel*, No. 11-215, 2016 WL 639063, at *1 (E.D.N.Y. Feb. 11, 2016) (*Nadel II*). Nadel and his then-wife testified, as did a Commission examiner and five clients of Nadel. *Id.* at *4, 9, 11 n.11.

The magistrate judge made detailed findings regarding the "high degree of scienter" with which Nadel acted. *Id.* at *6-9. She found that Nadel knowingly failed to provide accurate trading confirmations for more than eighteen months and failed to alert his clients to the inaccuracies in the confirmations. *Id.* at *6. She also found that the "magnitude, duration and persistent and ongoing misrepresentation" about the amount of assets under management demonstrated a high degree of scienter. *Id.* at *7. Indeed, "[e]ven an investigatory inquiry by the Commission . . . —which sought substantiation for the statement on Defendants' website claiming that Defendant [Warren D. Nadel & Co.] was managing over $400 million—did not dissuade Defendants from continuing to misrepresent [assets under management] to clients." *Id.* Moreover, Nadel "was not truthful in written correspondence to the Commission," which stated that he did not correspond with clients via email, when in fact he misrepresented assets under

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[1] Cross trading occurs when a broker "fills a customer's order by buying or selling a security from an account in which the broker has an interest." *D'Alessio v. SEC*, 380 F.3d 112, 114 (2d Cir. 2004).

management in numerous client emails. *Id.* at *8. Finally, the magistrate judge found that the "overall scope and duration" of Nadel's failure to provide proper notice and obtain consent to cross trading among client accounts "evidenced a knowing disregard for Defendants' fiduciary obligations to their clients." *Id.*

The magistrate judge also made findings regarding the recurrent nature of Nadel's conduct. She found that the cross trading lasted at least three years; assets under management were misrepresented for more than three years; and Nadel knew for almost two years that the trade confirmations were inaccurate but did not correct them or alert his clients. *Id.* at *9.

Having watched Nadel testify, the magistrate judge found that he displayed "both indifference and a somewhat cavalier attitude regarding the underlying violations." *Id.* He "appeared dismissive" about some of the allegations against him, and evinced a "lackluster attitude" about others. *Id.*

Concluding her analysis, the magistrate judge recommended granting the permanent injunction requested by the Commission. *Id.* at *10. She also recommended ordering disgorgement and prejudgment interest of more than ten million dollars to be imposed on the defendants jointly and severally, and imposing a one-million-dollar third-tier civil penalty on Nadel. *Id.* at *30; *see SEC v. Nadel*, 206 F. Supp. 3d 782, 785 n.1 (E.D.N.Y. 2016) (*Nadel III*).

After the magistrate judge's report issued, Nadel filed objections, but not, notably, to the findings regarding the permanent injunction and civil penalty. *Nadel III*, 206 F. Supp. 3d at 784-85. The district court reviewed the record *de novo* and adopted the magistrate judge's recommendations in full. *Id.* at 784, 789. The district court entered final judgment against Nadel on January 20, 2017. Div. Ex. 5 (ECF No. 145).

Conclusions of Law

Exchange Act Section 15(b)(6) authorizes the Commission to impose a bar on Nadel if: (1) at the time of the alleged misconduct, he was associated with a broker or dealer; (2) he has been enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C); and (3) the sanction is in the public interest. 15 U.S.C. § 78*o*(b)(4)(C), (b)(6)(A)(iii). The Advisers Act gives the Commission similar authority with respect to a person associated

with or seeking to be associated with an investment adviser at the time of the misconduct. 15 U.S.C. § 80b-3(e)(4), (f).[2]

There is no dispute that, at the time of his misconduct, Nadel was associated with an investment adviser, Registered Investment Advisers, which he controlled, and a broker-dealer, Warren D. Nadel & Co., which he also controlled. Nor is there any dispute that Nadel has been found to have willfully violated, and been permanently enjoined from violating, the antifraud provisions of the Exchange Act and Advisers Act, within the meaning of Exchange Act Section 15(b)(4)(C) and Advisers Act Section 203(e)(4).

That leaves the question of whether barring Nadel from acting as or associating with a broker, dealer, or investment adviser is in the public interest. The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in *Steadman v. SEC*, namely: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *5 & n.14 (May 27, 2016); *Gary M. Kornman*, 2009 WL 367635, at *6. This is a "flexible" inquiry, and "no one factor is dispositive." *Kornman*, 2009 WL 367635, at *6. The Commission has also considered the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *8 & n.46 (Jan. 31, 2006); *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 WL 21729839, at *2 (July 25, 2003).

The Commission considers misconduct involving fraud to be particularly egregious and requiring a severe sanction. *See Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013) (stating that the

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[2] The bar extends only to the two capacities in which Nadel was active at the time of his misconduct because that misconduct predates the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized the Commission to impose a bar covering multiple industry capacities based on a respondent's misconduct in only one such capacity. Pub. L. No. 111-203, §§ 4, 925, 124 Stat. 1376, 1390, 1850-51 (2010); *Bartko v. SEC*, 845 F.3d 1217, 1221-26 (D.C. Cir. 2017); *Koch v. SEC*, 793 F.3d 147, 157-58 (D.C. Cir. 2015).

Commission has "repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws" (internal quotation marks omitted)), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). Where a respondent has been enjoined from violating antifraud provisions of the securities laws, the Commission "typically" imposes a permanent bar. *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *8 (Oct. 29, 2014).

In *Ross Mandell*, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and that the law judge's decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (internal quotation marks omitted), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016). After engaging in such an analysis, I have determined that it is appropriate and in the public interest to permanently bar Nadel from associating with a broker, dealer, or investment adviser.

Nadel's conduct was egregious, recurrent, and undertaken with a high degree of scienter, as the magistrate judge found. Nadel engaged in misrepresentations for a period of over three years. Not only did he misrepresent—by more than double—assets under management, he displayed a "knowing disregard" for his fiduciary obligations to his clients. Further, he was untruthful with the Commission. Ultimately, he was ordered, with the codefendants he personally controlled, to disgorge more than ten million dollars and pay a civil penalty of one million dollars. These three factors weigh heavily in favor of a permanent bar.

As to the issue of Nadel's recognition of wrongdoing and assurances against future violations, the magistrate judge variously described Nadel's attitude during his testimony as "indifferent," "cavalier," "dismissive," and "lackluster"—clearly indicating little to no recognition of his wrongdoing at the time. In his response to the motion for summary disposition, Nadel states that he was "understandably nervous, intimidated and simply scared" of the civil proceeding against him. Resp. at 6. He also claims not to have been given an opportunity to express his remorse during his testimony. *Id.* at 6-7.

Although he laments the consequences of the civil case on him, in neither his answer nor his response to the summary disposition motion does he express remorse. However, in a letter to Division counsel, Nadel stated that he "cannot apologize more strenuously" for inflating his assets under

management, and claims to have "learned a most painful and powerful lesson." Div. Ex. 6 at 1-2; *see also id.* at 2 ("I understand and appreciate that what I did was wrong . . . ."); *id.* ("I am truly sorry for my errors and would gladly abide by whatever punishment the SEC judicial system deems appropriate."). Yet, in the same letter he disclaims an "attempt to defraud a client" with regard to the cross trading; instead, he pleads ignorance and the "lack of a knowledgeable compliance staff." *Id.* at 1. As for future violations, in his answer, Nadel offered a "promise to never violate any of the rules and regulations of the securities industry." Answer at 2. He also suggests a sort of settlement, whereby he would forego the ability to obtain licensure in the securities industry, but would not receive a lifetime bar and would be permitted to work within the industry under some sort of supervisory compliance program. *Id.* at 1.

The balance is close, but ultimately, Nadel's statements cannot overcome the inference, raised by the existence of the past violations, that he will repeat his violations. *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *6 n.50 (July 26, 2013) ("[T]he existence of a violation raises an inference that it will be repeated." (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004))).

Finally, as the magistrate judge noted, Nadel's "long history with, and entrenchment in, the financial industry during the past 35+ years" makes future violations more likely. *Nadel II*, 2016 WL 639063, at *10. Indeed, Nadel has on at least three occasions expressed a "desire to re-enter the securities industry workforce in some capacity." Resp. at 2; *see* Answer at 1; Div. Ex. 6.

Weighing all the factors, there is substantial need to protect investors from Nadel and deter others from engaging in similar conduct. Associational bars have long been considered effective deterrence. *See Guy P. Riordan*, Securities Act Release No. 9085, 2009 WL 4731397, at *19 & n.107 (Dec. 11, 2009) (collecting cases), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). A permanent associational bar "will prevent [Nadel] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct." *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *20 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).

Order

It is ORDERED that the Division's motion for summary disposition is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Warren D. Nadel is BARRED from associating with an investment adviser.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Warren D. Nadel is BARRED from associating with a broker or dealer.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360. *See* 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. 17 C.F.R. § 201.360(d). The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occurs, the initial decision shall not become final as to that party.

Cameron Elliot
Administrative Law Judge

Don't Quit

by

John Greenleaf Whittier

[1807 – 1892]

When things go wrong as they sometimes will,
When the road you're trudging seems all up hill,
When the funds are low and the debts are high
And you want to smile, but you have to sigh,
When care is pressing you down a bit,
Rest, if you must, but don't quit.
Life is queer with its twists and turns,
As everyone of us sometimes learns,
And many a failure turns about
When they might have won had they stuck it out,
Don't give up though the pace seems slow,
You may succeed with another blow.
Success is failure turned inside out,
The silver tint of the clouds of doubt,
And you never can tell how close you are,
It may be near when it seems so far,
So stick to the fight when you're hardest hit
It's when things seem worst that you must not quit.
For all the sad words of tongue or pen,
The saddest are these: "It might have been!"