

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19740

<p style="text-align:center">In the Matter of</p> <p style="text-align:center">DONALD J. FOWLER,</p> <p style="text-align:center">Respondent.</p>
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**MEMORANDUM OF LAW OF THE DIVISION OF ENFORCEMENT (1) IN
OPPOSITION TO RESPONDENT’S MOTION FOR A STAY, AND (2) IN SUPPORT OF
THE DIVISION’S MOTION FOR SUMMARY DISPOSITION**

The Division of Enforcement respectfully submits this memorandum of law in opposition to the motion for a stay filed on June 8, 2020 (“Resp. Mot.”), by Respondent Donald J. Fowler, and in support of the Division’s motion for summary disposition pursuant to Rule 250 of the Commission’s Rules of Practice.

PRELIMINARY STATEMENT

In this follow-on proceeding arising from a jury verdict and antifraud injunction against Fowler, the Division seeks full collateral and penny stock bars.¹ Such relief is clearly appropriate: based on evidence that the District Court called “powerful,” “persuasive” and “damning,”² the jury found that Fowler, with scienter, defrauded thirteen of his retail customers

¹ Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 (“Exchange Act”), Fowler should be:
—Barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
—Barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

² Div. Ex. 1 at 3. The Division Exhibits cited herein are attached to the Declaration of David Stoelting dated June 15, 2020.

and caused substantial losses by recommending an unsuitable investment strategy, making material misrepresentations and omissions, and engaging in unauthorized trades. The Court, finding a “high degree of scienter,” imposed a third-tier civil penalty of nearly \$2 million, ordered disgorgement of commissions earned plus prejudgment interest, and enjoined Fowler from future violations of the antifraud provisions of the federal securities laws. Div. Ex. 1 at 9-11.

Seeking to delay the imposition of the bar, Fowler now argues that this proceeding should be stayed pending the outcome of his appeal of the District Court judgment. The Commission, however, has repeatedly declined to stay follow-on proceedings seeking remedial measures merely because the underlying injunction is being appealed. The stay request should be denied and the Division’s motion for summary disposition should be granted for the reasons set forth below.

STATEMENT OF FACTS

Fowler’s Securities Industry Experience

Fowler passed the Series 7 and 63 exams in 2005, and the Series 24 exam in 2008. Div. Ex. 8 at 6. He was associated with a broker-dealer in Wantagh, NY, from 2005-2007; with JD Nicholas & Co., Inc., in Syosset, NY, from 2007-2014; and with Worden Capital Management LLC from 2014-2019. Div. Ex. 5 at 1-2. The Form U-5 filed by Worden Capital in August 2019 states that Fowler was terminated for cause due to the jury’s liability findings. Div. Ex. 10.

Fowler developed customer leads from “[h]undreds of cold-calls . . . made from his office each day.” Div. Exs. 1 at 3; *see also* Div. Ex. 5 at 3. The in-and-out trading strategy that Fowler implemented in the 13 accounts—using borrowed funds, which

greatly increased buying power—resulted in an “outrageously high” cost-to-equity ratio of 142% (10% was considered high) and turnover of 116 (4 was considered high). Div. Exs. 1 at 5; 6; 5 at 2, 7. Fowler determined the amount of commissions, and the high level of costs drove down the losses and made any chance of a profit virtually impossible. *See* Div. Exs. 5 at 6; 7. Customer losses in the 13 accounts totaled \$467,627, while Fowler received \$132,076.40. Div. Exs. 1 at 11; 6.

Fowler knew that he was required to follow the suitability rules (Div. Exs. 1 at 10; 5 at 2) but he nevertheless “implemented a trading strategy that flagrantly violated them.” Div. Ex. 1 at 10. The Court found that “[Fowler’s] strategies were unsuitable to any investor.” *Id.* at 11.

The District Court Litigation

The Complaint against Defendants Fowler and Gregory T. Dean was filed on January 9, 2017, and the Amended Complaint on April 21, 2017. Div. Ex. 2. After Dean’s settlement, in which he admitted his wrongdoing,³ the jury trial against Fowler began on June 10, 2019. Div. Ex. 1 at 2. At the trial, the jury heard “emotional testimony of several of Mr. Fowler’s victims recounting their losses, and how they were injured as a result of Mr. Fowler’s breach of their trust.” Div. Ex. 1 at 3. Fowler’s trial testimony showed “a profound lack of empathy regarding the impact of the strategies that he recommended to his customers.” *Id.* at 5.

On June 20, 2019, the jury returned a unanimous verdict finding that Fowler, with scienter, violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) and Section

³ The final judgment as to Dean, which the Court entered on the first day of the trial, included a permanent injunction against future violations of the antifraud provisions, disgorgement of \$253,881.98 plus prejudgment interest of \$50,521.70, and a civil penalty of \$253,881.98. Div. Exs. 1 at 2. In his Consent, Dean admitted that he “knowingly or recklessly made trade recommendations to customers with no reasonable basis”; “made material misrepresentations and omissions to customers”; and “engaged in unauthorized trading in customer accounts.” *Id.*; *see also SEC v. Fowler, et al.*, 17-cv-139 (S.D.N.Y.) (Docket Nos. 168, 199-1). Dean also consented to a Commission Order imposing full collateral and penny stock bars. *Gregory T. Dean*, Rel. No. 86196, 2009 WL 2617172 (June 26, 2019).

10(b) of the Exchange Act and Rule 10b-5 thereunder by recommending an unsuitable investment strategy with no reasonable basis, making material misrepresentations and omissions, and engaging in unauthorized trading. Div. Ex. 3. Following post-trial briefing on remedies, the Court issued a Memorandum Opinion and Order on February 25, 2020 (Div. Ex. 1) and, on February 28, 2020, the *Final Judgment as to Defendant Donald J. Fowler* (Div. Ex. 4).

Finding that Fowler “presents a continuing risk to customers” as well as “a danger to future customers,” Div. Ex. 1 at 11, the Court enjoined Fowler from future violations of the Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Div. Exs. 1 at 9-11; 4 at 2. The Court also imposed a third-tier civil penalty of \$150,000 for each of Fowler’s 13 customers, for a total civil penalty of \$1,950,000, and ordered disgorgement of \$132,076.40, representing the commissions received by Fowler during the period of the fraud, plus prejudgment interest of \$35,195.04. Div. Ex. 4 at 3.

The Follow-On Administrative Proceeding

The *Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing* (“OIP”), dated March 31, 2020, deems this a 75-day proceeding under Rule 360(a)(2). Fowler was served with the OIP on April 9, 2020.

On April 17, 2020, the Division notified Fowler that all documents required to be made available under Rule 230(a) had been produced to Fowler’s counsel in the District Court action. Div. Ex. 11.

On May 6, 2020, the Commission issued an *Order Granting Extension of Time* extending “the time for filing an answer to the OIP” to June 12, 2020.

The parties conducted a telephonic pre-hearing conference on May 28, 2020.

On June 8, 2020, Fowler filed a *Motion and Brief for Stay and General Denial* (“Resp. Mot.”). The General Denial is “pursuant to SEC Rule of Practice 220,” and is “a general denial of each and every allegation” in the OIP. Resp. Mot. at 2.

ARGUMENT

I. The Motion for a Stay Should be Denied

“As we have repeatedly held ... the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related ‘follow-on’ administrative proceedings.” *Thomas D. Melvin*, Exch. Act Rel. No. 75844, 2015 WL 5172974, at *7 n.52 (Sept. 4, 2015). *See also Conrad P. Seghers*, Rel. No. 2656, 91 S.E.C. Docket 1945, 2007 WL 2790633, at *3 (Sept. 26, 2007) (collecting cases) (“It is well established that the existence of an appeal of the District Court’s decision does not affect the injunction’s status as a basis for administrative action”); *Richard L. Goble*, Adv. Act Rel. No. 678, 2011 WL 10845972, at *1 (July 21, 2011) (collecting cases) (“[T]he Commission has often ruled that the pending appeal of an underlying judgment does not prevent the Commission from exercising its jurisdiction in a follow-on administrative proceeding.”).

As this well-established Commission precedent requires, Fowler’s stay request based on his pending Second Circuit appeal should be denied. Fowler offers no justification for departing from this rule apart from asserting that he will not seek to reenter the securities industry for the time being “absent a successful appeal.” Resp. Mot. at 1. This representation fails to justify a stay and should be given no weight. *See Nicholas D. Skaltsounis*, Initial Dec. Rel. No. 729, 2014 WL 7407487, at *6 (Dec. 31, 2014) (imposing full collateral bar despite Respondent’s claim “that he has no intention to re-enter the securities industry”).

II. The Motion for Summary Disposition Should be Granted and Collateral and Penny Stock Bars Imposed

If the Commission denies Fowler’s stay motion, then the Division’s motion for summary disposition should be decided.⁴ Under Rule 250(b), a motion for summary disposition may be granted if “there is no genuine issue with regard to any material fact and ... the movant is entitled to a summary disposition as a matter of law.” 17 C.F.R. § 201.250(b) (2019). Here, there are no issues of material fact to be decided. Although Fowler’s answer denies the allegations in the OIP, the civil injunction entered by the District Court that is the basis of this proceeding cannot be challenged. *See, e.g., Gary M. Kornman*, Exch. Act Rel. No. 59403, 2009 WL 367635, at *8 (Feb. 13, 2009) (“The doctrine of collateral estoppel prevents relitigating the factual findings or the legal conclusions of an underlying criminal proceeding in a follow-on administrative proceeding.”).

Section 15(b)(6) of the Exchange Act authorizes the Commission to impose collateral and penny stock bars if Fowler was associated with a broker or dealer at the time of the misconduct; if he has been enjoined from any conduct in connection with the purchase or sale of securities; and if the bars are “in the public interest.” 15 U.S.C. § 78o(b)(4)(C), (6)(A)(iii). The first two factors are satisfied: Fowler was associated with a broker-dealer at the time of his misconduct (Div. Exs. 1 at 6; 5 at 1; 8) and he has been

⁴ Fowler’s General Denial constitutes an answer that triggers the Division’s right under Rule 250(b) to file a motion for summary disposition. The General Denial states that it is “pursuant to” Rule 220, the rule governing answers, and he “reserves the right to amend this General Denial pursuant to Rule 220(e),” the rule allowing amendment of answers. Resp. Mot. at 2. It also denies “each and every allegation” in the OIP, which is consistent with Rule 220(b). *Id. See also Nicholas D. Skaltsounis*, 2014 WL 7407487, at *1 (Dec. 31, 2014) (Initial Decision) (construing letter from Respondent “as his Answer and a general denial of the allegations in the OIP”).

enjoined (Div. Ex. 4 at 1-3).

“[A]n antifraud injunction ‘ordinarily’ warrants barring participation in the securities industry.” *Chris G. Gunderson*, Exch. Act Rel. No. 61234, 2009 WL 4981617, at *5 (Dec. 23, 2009) (citation omitted). The public interest factors in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981), are also satisfied and weigh heavily in favor of the bars.

First, Fowler’s conduct was “egregious . . . Fowler took advantage of the relative lack of sophistication of some of his clients to bilk them.” Div. Ex. 1 at 9. He engaged in “abusive investment strategies” that were “unsuitable to any investor,” *id.* at 11, made misrepresentations and omissions, and engaged in unauthorized trading. Div. Exs. 3; 6; 7; 9.

Second, the conduct was recurrent: “Fowler’s offenses here were not isolated. He was proven to have engaged in this course of misconduct with 13 clients over the course of three years.” Div. Ex. 1 at 10.

Third, “Fowler acted with a high degree of scienter.” *Id.* “In all instances in which the jury was asked the question, Mr. Fowler was found to have engaged in his misconduct with scienter.” *Id.* at 3.

Fourth, Fowler has not acknowledged the wrongfulness of his conduct. On the contrary, at trial Fowler asserted “that his conduct was blameless.” *Id.* at 10. Fowler also was “alternatively dismissive, or fundamentally ignorant of, the problematic nature of the trading strategy that he implemented.” *Id.* at 4. Even in the face of customer complaints (Div. Ex. 8 at 20-30) and after being placed on special supervision, Fowler “did nothing to change his own investment strategy.” Div. Ex. 1 at 5.

Fifth, he offers no assurances against future violations of the securities laws, despite the

fact that Fowler stipulated that he “intends to continue being a broker.” Div. Ex. 5 at 2. Due to the seriousness of his violations, combined with “Fowler’s apparent lack of interest in learning from past mistakes,” the Court found that “there is a substantial likelihood that Mr. Fowler will again violate the securities laws.” Div. Ex. 1 at 11; *see also id.* at 10-11 (Fowler presents “a substantial risk of future injury to his customers” and is “a danger to future customers”). In addition, Fowler’s past fraudulent conduct is relevant to the likelihood that he will be a repeat offender because “under Commission precedent, the existence of a violation raises an inference that it will be repeated.” *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004).

Finally, imposing the bars “will serve the Commission’s interest in deterring others from engaging in similar misconduct.” *Sean P. Finn and M. Dwyer LLC*, Rel. No. 1306, 2020 WL 927453, at *7 (Feb. 18, 2020) (Initial Decision).

In sum, the *Steadman* factors require full collateral and penny stock bars. A jury found that Fowler committed securities fraud, and the Court found that all relevant factors “weigh heavily in favor of the entry of a permanent injunction.” Div. Ex 1 at 11. Under these circumstances, Fowler is unfit to be associated in any manner with the securities industry.

“[C]onduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws.” *Vladimir Boris Bugarski*, Exch. Act Rel. No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012) (*quoting Marshall E. Melton*, Adv. Act. Rel. 2151, 2003 WL 21729839, at *9 (July 25, 2003)). “Absent extraordinary mitigating circumstances,” a person like Fowler that has been found to have committed fraud “cannot be permitted to remain in the securities

industry.” *John S. Brownson*, Exch. Act Rel. No. 46161, 2002 WL 1438186, at *2 (July 3, 2002).

CONCLUSION

For the foregoing reasons, the Commission should deny Respondent’s motion for a stay, grant the Division’s motion for summary disposition, and impose full industry bars and penny stock bars against Fowler.

Dated: June 15, 2020
New York, NY

Respectfully submitted,

DIVISION OF ENFORCEMENT

/s David Stoelting

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Certificate of Service

In accordance with the Commission Order in *In re: Pending Administrative Proceedings* dated March 18, 2020, and the *Joint Stipulation Regarding Extension of Time for Respondent to File Answer and Notice of Parties' Agreement on Service of Papers* dated April 30, 2020, I hereby certify that copies of the Division's Memorandum of Law and Declaration of David Stoelting, and Exhibits 1 – 11, were sent by the method indicated:

To the Office of the Secretary:
By email (apfilings@sec.gov)

To the Respondent:
By email (jdellaportas@emmetmarvin.com and bkhinchuk@emmetmarvin.com)

/s

David Stoelting, Counsel for the Division of Enforcement

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19740

<p>In the Matter of</p> <p>DONALD J. FOWLER,</p> <p>Respondent.</p>
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**DECLARATION OF DAVID STOELTING IN SUPPORT OF
THE DIVISION OF ENFORCEMENT’S MOTION FOR
SUMMARY DISPOSITION AGAINST RESPONDENT DONALD J. FOWLER**

I, David Stoelting, pursuant to 28 U.S.C. § 1746, declare as follow:

1. I am a Senior Trial Counsel in the Division of Enforcement, New York Regional Office, and an attorney of record in this proceeding. As such, I have personal knowledge regarding the documents listed herein. I submit this Declaration in support of the Division’s Motion for Summary Disposition against Donald J. Fowler.
2. Attached hereto is a list of Division Exhibits (“Div. Ex.”) that are referenced in the Division’s accompanying memorandum of law.
3. Documents with a “Trial Exhibit #” were admitted into evidence by the Court during the jury trial that took place in the United States District Court for the Southern District of New York from June 10 - 20, 2019, in *SEC v. Fowler*, 17-cv-139 (S.D.N.Y.).

Dated: June 15, 2020
New York, NY

/s David Stoelting

David Stoelting

DIVISION EXHIBIT #	DESCRIPTION	TRIAL EXHIBIT #
1	Memorandum Opinion and Order dated Feb 25, 2020, issued by the United States District Court (Hon. Gregory H. Woods), <i>SEC v. Fowler</i> , 2020 WL 906182, —F. Supp.3d—(S.D.N.Y. 2020)	
2	Amended Complaint filed April 21, 2017	
3	Verdict Sheet filed June 21, 2019	
4	Final Judgment as to Defendant Donald J. Fowler filed February 28, 2020	
5	Joint Stipulations of Facts dated June 17, 2019	JX 6
6	Summary of Accounts	PX 1A
7	Summary of Profit (Loss) Before and After Costs	PX 1C
8	Fowler BrokerCheck	PX 3
9	Summary of Trades in Customer Accounts That Were Not Preceded by a Phone Call	PX 28A
10	Form U-5	
11	Letter from David Stoelting to Donald J. Fowler dated April 17, 2020	

Division Exhibit 1

2020 WL 906182

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

SECURITIES AND EXCHANGE
COMMISSION, Plaintiff,

v.

Donald J. FOWLER, Defendant.

1:17-cv-139-GHW

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Signed 02/25/2020

Synopsis

Background: Securities and Exchange Commission (SEC) brought civil enforcement action against broker alleging securities fraud for allegedly engaging in excessive trading in customers' accounts and driving up transaction fees and costs on customers' accounts to unconscionable levels. Following jury verdict in favor of SEC, it moved for disgorgement, prejudgment interest, civil penalties, and a permanent injunction.

Holdings: The District Court, Gregory H. Woods, J., held that:

disgorgement in the amount of \$132,076.40 was warranted for amount of commissions and postage fees he extracted from his customers;

award of prejudgment interest against broker was warranted for amount of commissions and postage fees he extracted from his customers;

disgorgement was not warranted against broker for his portions of commissions from his partner's accounts who were not the subject of the trial;

tier III civil penalties in amount of \$150,000 for each of broker's 13 victims, for total of \$1,950,000, was appropriate for engaging in securities fraud;

broker presented continuing risk of future securities violations, and thus, entry of SEC permanent injunction was warranted.

Ordered accordingly.

Attorneys and Law Firms

Elizabeth Reilly Goody, Kristin McNamara Pauley, Jorge Gerardo Tenreiro, Thomas Peter Smith, David Stoelting, Judith Ann Weinstock, U.S. Securities and Exchange Commission, New York, NY, for Plaintiff.

Ian J. Frimet, Wexler Burkhart Hirschberg & Unger, LLP, Garden City, NY, Liam O'Brien, McCormick & O'Brien L.L.P., Beth Claire Khinchuk, John Dellaportas, Emmet, Marvin & Martin LLP, New York, NY, for Defendant.

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

*1 Defendant Donald J. Fowler misused his position as a broker to recommend a series of investments that were unsuitable to any investor. He implemented trades in his customers' accounts without their consent. His customers lost thousands, while Mr. Fowler profited from the substantial commissions that his trades generated. A jury unanimously found Mr. Fowler liable with respect to the charges mounted against him by the Securities and Exchange Commission in this case. Because the Court finds that there is a substantial likelihood that Mr. Fowler will again violate the securities laws, the Court will enter a permanent injunction to protect the public from future violations by Mr. Fowler. The Court also orders Mr. Fowler to disgorge his ill-gotten gains, and to pay Tier III penalties for each of his violations.

I. BACKGROUND

A. The Investigation and Resulting Complaint Against Fowler and Dean

This case developed out of an investigation of J.D. Nicolas, Inc. ("J.D. Nicolas") by the Securities and Exchange Commission (the "SEC"). The investigation began in 2014. Plaintiff's 56.1 Statement, Dkt. No. 70 ("P's 56.1 Statement"), ¶ 137. At the time of the investigation, Defendants Donald Fowler and Gregory Dean were brokers at the firm. *Id.* The SEC focused its investigation on Mr. Fowler and Mr. Dean, among others. *Id.* ¶¶ 136, 138. In April 2014, the SEC asked J.D. Nicolas to retain documents "created, modified, or accessed" by Messrs. Dean and Fowler. *Id.* ¶ 138. And in

November of the same year, Mr. Fowler and Mr. Dean both provided investigative testimony to the SEC. *Id.* ¶ 138.

In March 2016—approximately a year and a half after his investigative testimony—Mr. Fowler entered into his first tolling agreement with the SEC. Declaration of Jorge G. Tenreiro, Dkt. No. 190 (“Tenreiro Decl.”), Ex. X. The SEC and Mr. Fowler entered into another tolling agreement in August 2016. *Id.* Ex. Y. The Court is unaware of what transpired between the 2014 investigation and the 2016 tolling agreements. For purposes of this motion, what is significant is that, notwithstanding any conclusions reached as a result of the investigation, the SEC did not seek to enjoin Mr. Fowler from further conduct that would violate the securities laws, potentially harming his current and prospective customers. No request for injunctive relief was made by the SEC until after the close of trial in this matter.

But the SEC's investigation had unearthed something of great concern—the unsuitable investment strategies implemented by Messrs. Dean and Fowler in their customers' accounts. In January 2017, the SEC commenced this action against Mr. Fowler and Mr. Dean. Dkt. No. 1. The SEC alleged that Mr. Fowler and Mr. Dean “recommended to customers a high-cost trading strategy consisting of the excessive buying and selling of stocks.” *Id.* at 1. The allegations targeted a series of trades allegedly implemented by Mr. Fowler and Mr. Dean in 27 customer accounts at J.D. Nicolas. *Id.* at 2. By the time that the complaint was filed, J.D. Nicolas had gone out of business. *Id.* at 4.

*2 The complaint alleged that Mr. Fowler and Mr. Dean engaged in excessive trading in their customers' accounts, driving up transaction fees and costs on their customers' accounts to unconscionable levels. “Many of the accounts had cost-to-equity ratios in excess of 100%, with a couple over 200%, and one at 463.65%. The average annualized cost-to-equity ratio for these accounts was 110.90%, meaning that the customers, on average, had to realize 110.90% in profits just to break even.” *Id.* at 8.

The complaint also contained allegations that Mr. Fowler and Mr. Dean churned several of their customers' accounts. *Id.* at 9. For example, the complaint focused on the trading in the account of one of Mr. Fowler's customers—Customer 24. “The average equity in Customer 24's account was only \$54,739, but Fowler made a total of \$1,709,242 in purchases, and each investment was held for an average of 10.9 days.” *Id.* at 10.

On the basis of these allegations, the SEC claimed that Mr. Fowler and Mr. Dean violated Section 17(a) of the Securities Act of 1933 (the “Securities Act”), 17 U.S.C. § 77q(a), and Section 10(b) of the 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.

B. The Litigation Through Mr. Dean's Settlement on the Eve of Trial

After the complaint was filed, this case proceeded in the ordinary manner. The parties engaged in an extended period of discovery. Following the completion of discovery, the SEC and the defendants filed cross-motions for summary judgment. *See* Dkt. Nos. 52, 68. The Court denied both motions, Dkt. No. 91, and later scheduled trial to begin on June 10, 2019. Throughout the litigation, Mr. Dean and Mr. Fowler were represented by the same counsel—Liam O'Brien.

On the morning of June 10, 2019, while awaiting the arrival of the venire, the Court was informed that the SEC and Mr. Dean had agreed to resolve the SEC's claims against him. The Court entered a final judgment as to Mr. Dean later that day, implementing the resolution that had been agreed upon by the SEC and Mr. Dean. Dkt. No. 168.

That final judgment included, among other things, a permanent injunction, prohibiting Mr. Dean from violating the Securities Act or the Exchange Act. *Id.* at 1. The judgment also ordered that Mr. Dean pay disgorgement of “\$253,881.98, representing profits gained as a result of the conduct alleged in the Complaint ... and a civil penalty in the amount of \$253,881.98.” *Id.* at 3. Mr. Dean expressly consented to the relief entered by the Court. Dkt. No. 159-1, at 1. In addition, Mr. Dean admitted certain of the facts that led to his conclusion that he had violated the securities laws, namely that he “from 2011 through 2014: (a) knowingly or recklessly made trade recommendations to customers with no reasonable basis; (b) made material misrepresentations and omissions to customers; and (c) engaged in unauthorized trading in customer accounts.” *Id.* at 7.

C. The Trial

1. The Verdict

In the wake of Mr. Dean's settlement, trial proceeded against Mr. Fowler alone. The evidence presented by the SEC against Mr. Fowler over the course of the following days was powerful, and ultimately persuasive. The SEC's case focused on the accounts of 13 of Mr. Fowler's clients. The jury unanimously found Mr. Fowler liable with respect to all of the SEC's six causes of action. The jury found that Mr. Fowler *with scienter* did “employ any device, scheme or artifice to defraud, or engage in any act ... which would operate as a fraud or deceit on any person” in violation of identified sections of the Exchange Act. Verdict Sheet, Dkt. No. 169 (emphasis added). The jury also concluded that Mr. Fowler did “*with scienter* make any untrue statement or a material fact, or any omission of a material fact, in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5(b).” *Id.* (emphasis added). He also “negligently obtain[ed] money or property by means of an[] untrue statement of a material fact, or by an[] omission of a material fact” in violation of Section 17(a)(2) of the Securities Act, *id.*, and negligently engaged in a transaction, practice, or course of business which operated or would operate as a fraud or deceit on the purchaser of a security, in violation of Section 17(a)(3) of the Securities Act. *Id.*

*3 The jury specifically found that Mr. Fowler “with scienter recommend[ed] an investment strategy with no reasonable basis to believe the strategy was suitable for any customer, in violation of Section 10(b) of the Exchange Act.” *Id.* And, moreover, the jury found that Mr. Fowler, again, acting with scienter, made unauthorized trades in the accounts of 12 of the 13 customer accounts that were the focus of the litigation.¹ *Id.*

These ultimate conclusions are dry, but damning. The Court will not recount the emotional testimony of several of Mr. Fowler's victims recounting their losses, and how they were injured as a result of Mr. Fowler's breach of their trust. The jury's conclusion says it all.

Not all of Mr. Fowler's 13 customers at issue in the trial testified, either live or by deposition designation, but the testimony presented a consistent picture of Mr. Fowler's management of their accounts—describing substantial trading volume beyond their expectations, resulting in excessive costs. *See, e.g.* Trial Transcript (“Tr.”) 173:14-16 (“Q: Was that in-and-out rapid trading activity, was that something that you were asking for? A: No, but I, I apparently let it happen.”). There was also substantial evidence that Mr. Fowler disregarded the wishes of his

customers, driving them to the strategies that the jury found to have been unsuitable. For example, after one of his customers wrote that his investment goal was “current income,” through conversation, Mr. Fowler got the customer to “what he truly wanted.” *Id.* 687:25-688:3; *see also id.* 688:8-14 (“He did want to have some level of income at one point or another, I'm not denying that, we had that conversation but for what he was doing in that ... account ..., he wanted speculation and I know that he wrote current income, but the conversation that him and I had were not accurate to just write in current income and that's it.”); *id.* 690:6-10 (“Q: So, Mr. Weather said I don't use margin, right? A: He said that, yeah. Q: But he did use margin in your account. You had him sign a margin agreement, correct? A: He also used margin accounts, yes.”).

Ultimately, the jury found that Mr. Fowler engaged in unsuitable trading in all of the customer accounts that were examined and engaged in unauthorized trading in 12 of 13 of his customers' accounts. The consequences of this conduct was significant, resulting in substantial losses for Mr. Fowler's clients, many of whom were not wealthy, and were ill-suited to suffer the consequences of Mr. Fowler's misconduct. In all instances in which the jury was asked the question, Mr. Fowler was found to have engaged in his misconduct with scienter.

2. Fowler's Background and Investment Strategy

Mr. Fowler testified at length. He explained that he had worked substantially his entire career in stock brokerage firms, starting with the predecessor firm for J.D. Nicolas in 2007. *Id.* 624:9-10. Mr. Fowler never graduated from college; he left SUNY Farmingdale after an illness, deciding to focus on building his “book of business.” *Id.* 808:1-8. Mr. Fowler had limited instruction in finance and investment outside of his on-the-job training.

Early in his career, Mr. Fowler made cold-calls to find customers for the brokerage, but by 2011 he had graduated to pursuing leads generated by his junior, cold-calling colleagues. *Id.* 643:1-645:25. Hundreds of cold-calls were made from his office each day, working to identify prospects. *Id.* 645:11-21. Once a prospect was identified, he or she was handed over to a broker, such as Mr. Fowler, who then worked to persuade them to invest through his firm. After 2011, he did very little cold calling. *Id.* 810:11-12. By then, his role had evolved, such that junior brokers would do the cold-calling and pass on leads to him. Mr. Fowler followed up

on those leads to try to develop the leads into customers. *Id.* 810:23-811:10. By the time that he was managing the 13 accounts that were the focus of the trial, Mr. Fowler had developed his book of business to include nearly 100 individual customers at a time; and approximately 400 over the course of the years at issue. *Id.* 811:15-24.

*4 Over the course of his years in the industry, Mr. Fowler obtained a number of licenses, including Series 7, Series 63, and Series 24. *Id.* 648:17-650:1. In order to obtain those licenses, Mr. Fowler had to pass a number of exams and was required to take continuing education classes regarding the responsibilities of brokers to their clients. *Id.* Mr. Fowler was aware of the rules and obligations imposed on him by FINRA, and, in particular the concepts of reasonable basis suitability—broadly, the requirement that a broker have a reasonable basis to believe that an investment is suitable for his customer, *id.* 650:7-651:22—and the concept of customer-specific suitability, which, broadly, requires that a trading strategy recommended for a customer must be suitable for a given customer, *id.* 652:10-21. He was also aware that he was prohibited from placing his own interests ahead of those of his clients. *Id.* 652:1-6.

It was in his role as a broker that Mr. Fowler invested assets in his customers' accounts—implementing trading ideas that he developed. He had limited formal education in business or investment. He took business classes at college before dropping out. *Id.* 808:2-4. Apart from that, he learned to invest on the job, through on the job training and his own reading. He has “read lots and lots of books throughout the years, a lot of webinars, stuff like that.” *Id.* 808:13-15. He testified that he was particularly influenced by four books, “Investing in Stocks,” “Event Trading,” “One Good Trade,” and “Trading Catalysts” “which was a very good book in regard to how an event-trading strategy works. I read that a few times.” *Id.* 809:8-14. He also read a number of periodicals in the financial industry.

During his testimony, Mr. Fowler described the methodology that he used to develop ideas for the “event driven strategy” that he implemented for many of the customers who were the subject of this case. Mr. Fowler testified that he found his ideas in public documents. *Id.* 847:13-23 (“Q: With respect to your stock-specific recommendations, how did you come up with those recommendations? A: So, I’m constantly reading all the time. In regards to financial news, I would read different financial websites, research reports, different publications, 10-Q filings, anything I could get my hands

on stock specific. I would read that. Q: What publications during that time period did you read regularly? A: Wall Street Journal I read regularly. Investor[']s Business Daily, those are probably the most.”) Once he had an idea, Mr. Fowler did additional research. *Id.* 848:10-21 (“I would then typically look at the financials on a company. How big the company was, their float, that's the amount of shares that are actually out on the market trading. I'd look at insiders' buys and sales to see sentiment from an insider's standpoint. I would look at recent news, I would look at recent upgrades and downgrades by other research analysts that had coverage on the company. I would then essentially look at the chart and the history of the chart. I'd get an idea of the direction on where I thought the stock was going to trade. And then at that point in time, if it passed—if it passed through everything and got to the bottom, then I would make a recommendation.”). Mr. Fowler did not describe any financial analysis associated with his proposed trades. Indeed, Mr. Fowler testified that he did not know the performance associated with his recommended strategies. *Id.* 696:24-697:10 (“Q: You are talking about hundreds of accounts; what was your performance? A: Again, I can point out plenty of accounts that have made plenty of money throughout the years. With that said, I have never done an analysis where I have taken all of my customer accounts and put it into a spreadsheet.”).

From the Court's perspective, Mr. Fowler's testimony showed him to be alternatively dismissive, or fundamentally ignorant of, the problematic nature of the trading strategy that he implemented. Again, this is ultimately captured by the jury's verdict, but some excerpts from Mr. Fowler's testimony are illustrative. Mr. Fowler explained his view of the turnover ratio in his clients' accounts. He testified that “I don't view—and I testified to this earlier—turnover as the sole indicator of risk. You can look at turnover, and it can be indicative of higher risk due to the commissions that are tied to turnover. But turnover, in and of itself, you know, I don't view as indicative of anything really.” *Id.* 670:15-20. Similarly, Mr. Fowler discredited the value of measuring the commission-to-equity ratio—a ratio that is broadly used in the industry and one that his own firm's supervisory manual recommended. *See id.* 751:15-752:15 (A: “[The cost-equity-ratio] is a totally distorted number and that's all I have to say about that. It is a distorted number that you cannot just look at commission equity and then figure out how much money this account needs in order to break even.”).

*5 Mr. Fowler may have felt obliged to express such disdain for those commonly used financial metrics because

those of his customers dramatically exceeded the benchmarks established by his own firm for even its most risk-seeking customers. A high cost-equity ratio was considered to be 10%; but for the 13 customers of Mr. Fowler examined at trial, it was 142%. *Id.* 755:2-3, 25-756:3. And a turnover ratio of 4 was considered by Mr. Fowler's firm to be high; the turnover ratio for the 13 customers examined at trial was 116. *Id.* 756:9-14.

Mr. Fowler was subject to “special supervision” while at J.D. Nicolas. *Id.* 319:15-320:9. While he was on special supervision, a supervisor would call three to five of his customers a month to 394:14-21. Mr. Fowler also received a substantial number of complaints regarding unsuitable recommendations and unauthorized trades while at J.D. Nicolas. *See, e.g., id.* 703-4-709:10. He was aware that a number of his clients were unhappy with what he was doing with their money. *Id.* 698:15-20. He testified that he did nothing to change his strategy as a result of the complaints or the fact that he had been placed under special supervision as a result. *Id.*; *see also id.* 699:2-12 (Q: You acknowledged, in August of 2012, that you were placed under special supervision at J.D. Nicolas; right? A: Yes. Q: But nothing changed about how you were trading in your clients[] accounts after this, did it Mr. Fowler? A: The trading strategies essentially remained the same.... The strategy in and of itself did not change. Q: And the costs and the level of costs that you were implementing did not change, right? A: Correct.”).

Rather than using the complaints to influence his manner of handling his customers' accounts, Mr. Fowler described the complaints about his strategy and the associated losses in a self-focused way—articulating his apparent view that such complaints are principally designed to support asset recovery efforts against him. In the Court's view, Mr. Fowler expressed a profound lack of empathy regarding the impact of the strategies that he recommended to his customers, coupled with an inability or unwillingness to learn from his past mistakes. *See, e.g. id.* 703:21-704-6 (“When people lose money in the stock market, it is a business decision to file a complaint for them and ultimately there are kitchen sink claims that are often the same exact thing where they'll allege an unsuitable or an unauthorized transaction and, frankly, it puts the burden on me to prove that that was not the case in some sort of an arbitration proceeding. So, this, as far as customer filing complaints when there is an actual business around asset recovery for stock market losses, usually it's 80 percent of these complaints are from the same asset recovery

firm, it is the same exact thing every time.”); *see also id.* 706:9-16 (“Q: Why didn't you, to protect yourself from this business of filing complaints against brokers, do something? A: Well, I tried. Like I said, I tried. It didn't work. And, frankly, it wouldn't have changed anything. They would still say they were unauthorized. Even if you could prove that they were unauthorized they would still say unsuitable. It would still be the same kitchen sink claims.”) Rather than considering that the complaints may have been the same every time because his conduct was inappropriate in the same way, Mr. Fowler discredited the complaints as routine and “kitchen sink.” And he did nothing to change his own investment strategy in spite of the expressed concerns of certain of his customers, even after he was placed on special supervision.

*6 In reaching its verdict, the jury must have concluded that Mr. Fowler's testimony was not credible. The Court did not find him to be credible either. For example, the jury found that Mr. Fowler executed unauthorized trades in 12 of his customers' accounts. However, Mr. Fowler testified that he spoke with his customers about each of his trades in advance. *See, e.g. id.* 764:19-21 (Q: And if there is [sic] 1,200 trades[,] your testimony is there is [sic] 1,200 phone calls? A: That's correct.”). Similarly, Mr. Fowler testified that he spoke about his commissions with each of his clients on a “recommendation-by-recommendation” basis. *Id.* 817:3-20. But the phone records introduced by the SEC did not show evidence of phone calls regarding Mr. Fowler's customers' trades—and the jury reasonably concluded that Mr. Fowler's sworn version of events at trial was false. Similarly, in finding that Mr. Fowler acted with scienter, the jury concluded that Mr. Fowler's testimony regarding his asserted beliefs with respect to the reasonableness of his strategy was not credible.

3. The Impact of Fowler's Misconduct

In the aggregate, the 13 customers at issue in the trial suffered total losses of \$467,627 during the period in which Mr. Fowler was servicing their accounts. Tenreiro Decl. Ex. C (PX-1A). All of those customers lost money. *Id.* The substantial losses of Mr. Fowler's customers came during a period in which the S & P 500 Index maintained substantial growth.

Much of the customers' losses was the result of the very high amount of commissions that Fowler charged his clients. Mr. Fowler's sole source of income from J.D. Nicolas was the receipt of commissions generated by his customers' trades. Tr. 614:14-16. As a result, Mr. Fowler had substantial personal

motivation to engage in the misconduct found by the jury. From the commissions paid, twenty percent went to J.D. Nicolas, Mr. Fowler's firm. The remainder of the commissions for each of the 13 of Mr. Fowler's customers at issue in trial were shared 50/50 by Mr. Fowler, and his partner, Mr. Dean. *Id.* 614:22-24.

For the 13 customers at issue in the trial, the aggregate commissions charged by J.D. Nicolas between 2011 and 2014 were as shown in the following table. Tenreiro Decl. Ex. D (PX-1G). Of these sums, Mr. Fowler personally received 40% of the commissions generated. The SEC seeks disgorgement of those amounts.

<u>Account Name</u>	<u>Aggregate Commissions</u>	<u>Fowler's Take</u>
██████ ██████	\$13,537	\$5,414.80
████ ██████	\$9,445	\$3,778.00
████ ██████ ██████	\$23,292	\$9,316.80
████ ██████ ██████	\$20,993	\$8,397.20
████ ██████ ██████	\$24,912	\$9,964.80
████ ██████	\$16,097	\$6,438.80
████ ██████	\$8,493	\$8,493.00
████ ██████ ██████	\$20,437	\$8,174.80
████ ██████	\$13,870	\$5,548.00
████ ██████	\$13,097	\$5,238.80
████ ██████ ██████ ██████	\$33,805	\$13,522.00
████ ██████ ██████	\$27,755	\$11,102.00
████ ██████ ██████ ██████	\$35,735	\$14,294.00
<u>Total</u>	<u>\$261,466</u>	<u>\$104,568.40</u>

In addition, Mr. Fowler received half of the “postage fees” charged to his customers; the other half was paid to his partner, Mr. Dean. Tenreiro Decl. Ex. I (PX-234), at 9. In the aggregate, the 13 customers at issue during the trial paid \$54,996 in postage fees, of which Mr. Fowler received \$27,498. PX-1G.

The SEC also presented evidence regarding the commissions paid by a number of Mr. Dean's customers during the same period. Those commissions summed up to \$508,672 across the period. *Id.* The evidence presented at trial supports the conclusion that 40% of Mr. Dean's customer's commissions (totaling approximately \$203,469) were shared with Mr. Fowler. Mr. Dean's customers also paid a substantial amount of “postage fees” that were split with Mr. Fowler. The SEC

requests that the Court order disgorgement of those amounts by Mr. Fowler as well.

II. ANALYSIS

A. Disgorgement

1. Legal Standard²

“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.” *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (quotation omitted). Disgorgement “consists

of factfinding by a district court to determine the amount of money acquired through wrongdoing ... and an order compelling the wrongdoer to pay that amount plus interest to the court.” *SEC v. Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006). Unlike other remedies, disgorgement is not designed to compensate victims or to punish wrongdoers, *id.* at 116 n. 25, 117, but is instead meant to deter wrongdoing by “forcing a defendant to give up the amount he was unjustly enriched,” *id.* at 117 (quotation omitted).

*7 To determine the amount of money acquired through wrongdoing, courts apply a two-part burden shifting framework. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011); *see also SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996). First, the agency seeking disgorgement must “show that its calculations reasonably approximate[] the amount of the defendants' unjust gains.” *Bronson Partners*, 654 F.3d at 368 (brackets and quotation omitted). Once the agency has met that burden, “defendants [can attempt] to show that [the agency's] figures [are] inaccurate,” *id.* (quotation omitted), or that some of the gains were not the result of wrongdoing, *Razmilovic*, 738 F.3d at 31. A defendant's burden is high, however. If the agency has made a reasonable approximation, “the risk of uncertainty falls on the wrongdoer whose illegal conduct created the uncertainty.” *Bronson Partners*, 654 F.3d at 368 (quotation omitted); *see also Razmilovic*, 738 F.3d at 31 (holding that the risk of uncertainty falls on the wrongdoer as long as the agency's “measure of disgorgement is reasonable”).

In making the disgorgement calculation, the proper focus is revenues, not profits. *See Bronson Partners*, 654 F.3d at 375 (“[W]here the profits from fraud and the defendant's ill-gotten gains diverge, the district court may award the larger sum.”). Defendants “are not entitled to deduct costs associated with committing their illegal acts.” *Id.* (quotation omitted). Nevertheless, courts should deduct any money that a defendant returns or has returned to her or his victims. *See id.* at 369; *cf. SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (approving a district court's decision to credit defendants for money they had already paid to victims as part of a private settlement). Defendants are “only required to give back the proceeds of [their] securities fraud once.” *SEC v. Palmisano*, 135 F.3d 860, 863 (2d Cir. 1998) (quotation omitted).

As part of the disgorgement judgment, a court may order a defendant to pay prejudgment interest to “prevent [the] defendant from obtaining the benefit of what amounts to an

interest free loan.” *SEC v. Moran*, 944 F. Supp. 286, 295 (S.D.N.Y. 1996); *see also SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009) (noting that prejudgment interest is designed to take account of “inflation and the power of money to earn an economic return”). A district court has discretion both in deciding whether to require prejudgment interest and in setting the appropriate interest rate. *See First Jersey Secs.*, 101 F.3d at 1476. “The personal wrongdoing of a defendant should be considered in determining that an award of interest is in accord with doctrines of fundamental fairness. In the context of Section 10(b) and Rule 10b–5 actions, proof of scienter is sufficient to justify an award of prejudgment interest.” *S.E.C. v. Musella*, 748 F. Supp. 1028, 1042–43 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir. 1990) (citations omitted).

2. Application

The SEC argues that Mr. Fowler should disgorge the full amount of the commissions and “postage fees” that he received from the 13 clients who were the subject of the trial. The SEC also asks that the Court order disgorgement of his portions of commissions on Mr. Dean's accounts. The Court takes up the question of whether the SEC has satisfied its burden to show the amount of Mr. Fowler's gains with respect to each of these two categories in turn.

The SEC has clearly met its burden to prove the amount of the commissions and “postage fees” extracted by Mr. Fowler from his 13 customers. The SEC presented evidence at trial regarding each of the 13 accounts, including the trading history in each of the accounts and the commissions and “postage fees” paid. The jury found that Mr. Fowler's strategy with respect to each of the accounts was unsuitable. Of those commission amounts, however, Mr. Fowler personally received only 40% of the total because a 20% fee was first paid to J.D. Nicolas, and he shared the remaining 80% with his partner, Mr. Dean. Therefore, the Court concludes that Mr. Fowler was unjustly enriched by \$104,568.40 in commissions as a result of his fraud on his 13 customers. He also received \$27,498 in “postage fees” from those clients. Mr. Fowler has presented no argument to rebut the SEC's proof with respect to these amounts. Consequently, the Court will order disgorgement in the amount of \$132,076.40. Because Mr. Fowler acted with scienter, an award of prejudgment interest is warranted. The Court will apply prejudgment interest at the underpayment rate established for the Internal Revenue Service pursuant to 26 U.S.C. § 6621.

*8 The Court concludes that the SEC has not met its burden with respect to Mr. Dean's customers who were not the subject of the trial. It is worthwhile to flash back to the procedural history of the case. On the morning of the trial, the SEC was planning to present a case against both Mr. Fowler and Mr. Dean. When Mr. Dean settled with the SEC, the SEC culled its case and limited the direct evidence of fraud to the 13 customers who were principally serviced by Mr. Fowler. As a result, there was relatively little evidence presented regarding the management of Mr. Dean's accounts. The trial included evidence of the aggregate losses in Mr. Dean's accounts, and the costs associated with them. But the SEC, understandably, did not focus its proof at trial on the management of those accounts.

Instead, as evidence of fraudulent conduct with respect to those accounts, the SEC asks the Court to rely on the admission provided by Mr. Dean in connection with the consent order of judgment entered against him. In it, as noted above, Mr. Dean admitted that he “from 2011 through 2014: (a) knowingly or recklessly made trade recommendations to customers with no reasonable basis; (b) made material misrepresentations and omissions to customers; and (c) engaged in unauthorized trading in customer accounts.” Dkt No. 159-1, at 7. And he agreed, as part of the judgment to pay “\$253,881.98, representing profits gained as a result of the conduct alleged in the Complaint” *Id.* at 3.

On this record, the Court declines to infer that the commissions on Mr. Dean's accounts were necessarily the product of fraud. The language of Mr. Dean's admission does not tie to the specific accounts to which the SEC now points. Without more detail to link each account to Mr. Dean's admitted misconduct, the Court is left to take an inferential leap to conclude that the accounts identified by the SEC were the affected ones.³

The Court is also conscientious of the fact that the information that links Mr. Dean's accounts to fraudulent conduct was not presented at trial, and that Mr. Fowler did not have the opportunity to challenge it as evidence of an obligation on his part to pay any amount as disgorgement. While both Mr. Dean and Mr. Fowler were represented by the same lawyer, the Court is mindful that, ultimately, these were admissions of Mr. Dean only. Therefore, the Court will not order that Mr. Fowler disgorge the amount of commissions that he received from Mr. Dean's customers' accounts.

B. Civil Penalties

1. Legal Standard

In addition to disgorgement, federal statutes authorize three increasing tiers of civil fines for violations of the securities laws. *See* 15 U.S.C. §§ 77t(d)(2) (Securities Act), 78u(d)(3)(B) (Exchange Act), 80b9(e)(2)(IAA). For any violation, a court may impose Tier I penalties—fines of up to the higher of (1) \$5,000 for each violation by a natural person or \$50,000 for each violation by “any other person,” such as a corporation; or (2) the defendant's “gross amount of pecuniary gain.” *See* 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i), 80b9(e)(2)(A). If a violation “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,” a court may instead impose Tier II penalties—fines of up to the higher of (1) \$50,000 for each violation by a natural person or \$250,000 for each violation by “any other person”; or (2) the defendant's “gross amount of pecuniary gain.” 15 U.S.C. §§ 77t(d)(2)(B), 78u(d)(3)(B)(ii), 80b–9(e)(2)(B). If a violation “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,” and “directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons,” a court may instead impose Tier III penalties—fines of up to the higher of (1) \$100,000 for each violation by a natural person or \$500,000 for each violation by “any other person”; or (2) the defendant's “gross amount of pecuniary gain.” 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii), 80b–9(e)(2)(C).⁴

*9 A defendant's gross amount of pecuniary gain is similar to that defendant's disgorgement amount, but with three differences. First, gross pecuniary gain, unlike disgorgement, may consider gains only from frauds occurring within the five-year statute of limitations for civil penalties. *See Gabelli v. SEC*, 568 U.S. 442, 447–448, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (interpreting 28 U.S.C. § 2462). Second, because the civil penalties statutes focus on the gross amount of pecuniary gain—as opposed to disgorgement, which is focused on simple gains—defendants are not entitled to deduct money returned to victims. Otherwise, a defendant who paid back all gains before judgment could practically nullify the statutory penalty. Third, disgorgement can be awarded jointly and severally, but civil penalties cannot. *See S.E.C. v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287–88 (2d Cir. 2013). Nevertheless, where multiple defendants mutually benefitted from the same gains, the best calculation

of a single defendant's gain may be the total gains obtained by the group through that defendant's violations. *See SEC v. Great Am. Techs., Inc.*, No. 07 Civ. 10694 (DC), 2010 WL 1416121, at *2 (S.D.N.Y. Apr. 8, 2010) (in a case where a corporate defendant gained \$2.3 million and an individual defendant personally diverted \$1 million of that sum, fining the individual defendant based on the full \$2.3 million gain), *aff'd sub nom. SEC v. Setteducate*, 419 F. App'x 23 (2d Cir. 2011). Hence, there may be some overlap among defendants' gains, and the gains attributed to each defendant may add up to over one hundred percent of total gains.

“Beyond setting maximum penalties, the statutes leave the actual amount of the penalty ... up to the discretion of the district court.” *Razmilovic*, 738 F.3d at 38 (quotation omitted); *see also* 15 U.S.C. §§ 77t(d)(2)(A) (“The amount of the penalty shall be determined by the court in light of the facts and circumstances.”), 78u(d)(3)(B)(i) (same), 80b–9(e)(2)(A) (same). “In exercising this discretion, courts weigh (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.” *SEC v. Tourre*, 4 F. Supp. 3d 579, 593 (S.D.N.Y. 2014) (quotation omitted).

The penalty provisions of the relevant securities laws do not define “violation,” 15 U.S.C. §§ 77t(d), 78u(d)(3), 80b–9(e). As a result, courts have determined the number of violations using a variety of methods. *See In re Reserve Fund Secs. and Derivative Litig.*, Nos. 09 MD 2011, 09 Civ. 4346 (PGG), 2013 WL 5432334, at *20 (S.D.N.Y. Sept. 30, 2013). For example, a court can look to the number of investors defrauded or the number of fraudulent transactions to determine the number of violations. *Id.* (citing *Pentagon Capital Mgmt. PLC*, 725 F.3d at 288 n.7) (approving district court's methodology of counting each trade as a separate violation); *SEC v. Elliot*, No. 09 Civ. 7594 (KBF), 2012 WL 2161647, at *11 (S.D.N.Y. June 12, 2012) (counting each transaction as a separate violation); *SEC v. Glantz*, No. 94 Civ. 5737(LAP), 2009 WL 3335340, at *6 (S.D.N.Y. Oct. 13, 2009) (assessing one violation for each victim); *SEC v. Milan Capital Grp., Inc.*, No. 00 Civ. 108 (DLC), 2001 WL 921169, at *3 (S.D.N.Y. Aug. 14, 2001) (same); *SEC v. Kenton Capital Ltd.*, 69 F.Supp.2d 1, 17 n.15 (D.D.C. 1998) (same)). In the alternative, a court may consider the number of statutes that each defendant violated, or whether

the violations were all part of a single scheme. *Id.* (citing *SEC v. Shehyn*, No. 04 Civ. 2003 (LAP), 2010 WL 3290977, at *8 (S.D.N.Y. Aug. 9, 2010) (assessing penalty for each statute violated); *SEC v. Johnson*, No. 03 Civ. 177(JFK), 2006 WL 2053379, at *10 (S.D.N.Y. July 24, 2006) (assessing penalty for each statutory violation found by jury); *SEC v. Rabinovich & Assocs., LP*, No. 07 Civ. 10547(GEL), 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008) (finding one violation where defendant's conduct was part of “single scheme or plan”).

2. Application

Tier III penalties are clearly appropriate for Mr. Fowler. The jury found him liable of several counts of securities fraud. As a result, there is no doubt that his conduct “involved fraud.” His conduct was egregious. Many of Mr. Fowler's clients were relatively unsophisticated. And the Court believes that the evidence at trial established that Mr. Fowler took advantage of the relative lack of sophistication of some of his clients to bilk them. As described above, and as found by the jury, the strategy employed by Mr. Fowler was unsuitable for anyone. Mr. Fowler disregarded the outrageously high cost-to-equity and turnover ratios of his customers' accounts, which exceeded his firm's guidance for risk-seeking customers by many multiples. And he traded in 12 of their accounts without authorization.

*10 Mr. Fowler was found by the jury to have acted with scienter. And as described above, he was aware that customers had complained about his investment strategy. In response to those known complaints, Mr. Fowler chose to do nothing to change his strategy. Mr. Fowler's conduct resulted in substantial losses in his customers' accounts—thousands of dollars that some could ill afford to lose. And his conduct was recurrent—he applied the strategy again and again to the 13 customers at issue in the trial. The Court acknowledges that the 13 customers at issue were a fraction of his 400 accounts over the relevant period. But the number of affected customers was substantial, and the evidence revealed a repeated pattern of misconduct by Mr. Fowler. Mr. Fowler has presented no evidence or argument regarding his inability to pay a penalty assessed by the Court.

The Court will impose a third-tier penalty on Mr. Fowler of \$150,000 with respect to each of the 13 customers whose accounts were the focus of the trial. While Mr. Fowler implemented the same unsuitable strategy for each of the 13 accounts, the Court does not believe that penalties should

be assessed as if this was a single scheme. It was not, for example, a scheme derived from a single offering. *See e.g., SEC v. Riel*, 282 F. Supp. 3d 499, 529 (N.D.N.Y. 2017); *SEC v. Locke Capital Mgmt., Inc.*, 794 F. Supp. 2d 355, 370-71 (D.R.I. 2011). Instead, as Mr. Fowler argued throughout the trial, he approached each of his customers individually. The 13 customers at issue in his trial were only a subset of his entire customer base. Mr. Fowler selected his victims for this conduct individually; therefore, treating his treatment of each of his defrauded customers as a separate violation best effectuates the purposes of the statute. While the Court has the authority to impose penalties for each of the trades in those customers' accounts, the Court declines to do so for two reasons: first, because each set of trades within a given defrauded customer's account could be considered to be part of a single scheme to defraud that individual; and, second simply because the resulting award would be so substantial that the Court does not believe that Mr. Fowler would reasonably be capable of satisfying the award. Therefore, the Court will impose a third-tier penalty of \$150,000 for each of Mr. Fowler's 13 victims—for a total of \$1,950,000.

C. Permanent Injunction

1. Legal Standard

The SEC may seek permanent injunctive relief for violations of the Securities Act, and the Exchange Act. *See* 15 U.S.C. §§ 77t(b) (Securities Act); 78u(d)(1) (Exchange Act). To obtain such relief, “[t]he SEC must demonstrate that there is a substantial likelihood of future violations of illegal securities conduct.” *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998); *see also SEC v. Gabelli*, 653 F.3d 49, 61 (2d Cir. 2011) (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)), *rev'd on other grounds sub nom. Gabelli v. SEC*, 568 U.S. 442, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (requiring a showing of a “reasonable likelihood that the wrong will be repeated.”); *Sec. & Exch. Comm'n v. Gentile*, 939 F.3d 549, 556 (3d Cir. 2019) (“Unless the agency shows a real threat of future harm, ‘there is in fact no lawful purpose to be served’ by a preventive injunction.” (quoting *SEC v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937))).

To evaluate whether there is a substantial likelihood of future violations of the securities laws, courts look to the following factors: (1) the fact that a defendant has been found liable for illegal conduct; (2) the degree of scienter involved; (3) whether the infraction is an isolated occurrence; (4) whether

the defendant continues to maintain that his past conduct was blameless; and (5) whether the defendant might be in a position where future violations could be anticipated. *Cavanagh*, 155 F.3d at 135 (citation omitted). Ultimately, “in deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts. Accordingly, the adverse effect of an injunction upon defendants is a factor to be considered by the district court in exercising its discretion.” *Manor Nursing Centers, Inc.*, 458 F.2d at 1102.

2. Application

*11 The entry of a permanent injunction against Mr. Fowler is warranted here. As described above, Mr. Fowler was found liable for securities fraud with respect to 13 of his customers' accounts. He made unauthorized trades in 12 of those customers' accounts. Mr. Fowler acted with a high degree of scienter. The jury found that he engaged in that misconduct with scienter. Mr. Fowler testified that he was aware of the FINRA's suitability rules, but he implemented a trading strategy that flagrantly violated them. He did so despite the fact that he had received complaints from other customers regarding the suitability of his strategies, and was placed on special supervision as a result. Those complaints put Mr. Fowler on notice regarding the potential impropriety of his conduct, yet he engaged in the conduct charged in this case.

Mr. Fowler's offenses here were not isolated. He was proven to have engaged in this course of misconduct with 13 clients over the course of three years. And, as just noted, the evidence of prior complaints involving Mr. Fowler suggests that he may have engaged in similar practices with other customers not examined during the course of this trial.

Mr. Fowler continues to assert that his conduct was blameless. Mr. Fowler had every right to defend himself vigorously in this case and the Court does not hold the fact that he did so against him in any way. However, Mr. Fowler's testimony regarding his views on investments generally, and the propriety of his conduct show him to present a substantial risk of future injury to his customers. As described above, Mr. Fowler discredited standard industry metrics designed to measure the risk of his strategies. Mr. Fowler did not analyze the performance of his recommended strategies, or even, according to his testimony, conduct financial analysis

of his recommended trades. Mr. Fowler's professed disdain of commonplace financial metrics suggests that he presents a continuing risk to customers.

So too does Mr. Fowler's apparent lack of interest in learning from past mistakes. Confronted with customer complaints regarding the unsuitability of his trading strategy, Mr. Fowler did nothing to reconsider his strategy. Instead, he belittled the complaints as "kitchen sink" and blustered forward with his approach, disregarding client feedback, and, in the case of these 13 customers, the clear data showing that his strategies were unsuitable to any investor. No one excerpt from the trial testimony can capture what the Court observed over the course of Mr. Fowler's days of testimony: he presented himself disdainful of his customers' concerns, and unjustifiably satisfied with his performance in the face of concrete evidence of his malfeasance and data showing the terrible investment returns for all the 13 clients examined at trial. Mr. Fowler's overconfidence may make him a good salesman, but it also makes him a danger to future customers.

Mr. Fowler continues to work in the securities industry. He has worked in the industry since he left college, so the likelihood that he will be in a position to commit further violations is very high.

All of the factors laid out in *Cavanagh* weigh heavily in favor of the entry of a permanent injunction against Mr. Fowler. Mr. Fowler argues that an injunction is not warranted because of the long delay between the commission of his misconduct and the trial. He argues that the SEC's failure to pursue an injunction earlier supports the conclusion that no injunction is necessary. He also points to the absence of evidence of similar misconduct by Mr. Fowler in the period after 2014. The Court appreciates the argument that the SEC might have taken more prompt action to protect Mr. Fowler's customers from similar misconduct. But ultimately, it is the Court, not the SEC, that must determine whether the entry of an injunction is warranted. The SEC's delay in seeking an injunction does not bear significant weight in the Court's analysis given the substantial evidence supporting the need for entry of injunctive relief against Mr. Fowler.

*12 The Court has considered Mr. Fowler's argument that the events at issue in the trial are now dated. However, the evidence of the events proven at trial amply support the Court's conclusion that an injunction is warranted. The Court has little assurance that Mr. Fowler's conduct has changed in the intervening years: to the Court's knowledge, the SEC did

not examine those years. The Court is hesitant to rely on the word of Mr. Fowler, given the jury's conclusion that, contrary to his sworn testimony, he engaged in unauthorized trades. Moreover, Mr. Fowler's testimony at trial in 2019 reflected his continued belief in the propriety of his abusive investment strategies and his disregard for financial metrics commonly used to measure the risk of investment strategies. Mr. Fowler's testimony dates from 2019, not 2014, and supports the Court's conclusion that injunctive relief remains necessary here.

The Court is very mindful of the potential impact of this type of injunctive relief on Mr. Fowler and the stigma that it places on him in the industry. The Court has weighed that harm. But ultimately, "the public interest, when in conflict with private interest, is paramount." *SEC v. Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). The Court finds that Mr. Fowler presents a continuing substantial risk of future securities violations, and will enter an injunction requiring him to fully comply with those laws in the future.

III. conclusion

For the reasons stated above, the SEC's motion is GRANTED. Mr. Fowler is ordered to disgorge \$132,076.40, plus prejudgment interest at the underpayment rate established for the Internal Revenue Service pursuant to 26 U.S.C. § 6621. Mr. Fowler is further ordered to pay civil penalties in the amount of \$1,950,000. The Court will also permanently enjoin Mr. Fowler from further violations of the securities laws.

The SEC is directed to submit an appropriate proposed permanent injunction and form of judgment within 14 days of the entry of this Memorandum Opinion and Order. The SEC is also directed to submit to the Court a letter by the same date, setting forth its calculation of prejudgment interest, attaching an Excel spreadsheet to show its calculations. The spreadsheet should also be submitted in native format to the Court's chambers email account, copying counsel for the defendant.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 189.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 906182

Footnotes

- 1 The jury did not find that Mr. Fowler engaged in unauthorized trading in the account of Clay B. Miller.
- 2 The legal analysis in this and subsequent sections of this opinion is drawn with appreciation from the accurate description of the applicable legal principles in *S.E.C. v. Amerindo Inv. Advisors Inc.*, No. 05 CIV. 5231 RJS, 2014 WL 2112032 (S.D.N.Y. May 6, 2014) (Sullivan, J.), *aff'd sub nom. S.E.C. v. Amerindo Inv. Advisors*, 639 F. App'x 752 (2d Cir. 2016).
- 3 This is a gap that the SEC might readily have filled with a more detailed set of admissions from Mr. Dean.
- 4 The amount of these statutory penalties are adjusted by the SEC by regulation. See 17 C.F.R. § 201.1001. For the period from March 4, 2009 to March 5, 2013, which embraces most of the period at issue here, the maximum Tier III penalty was \$150,000 for each violation by a natural person. *Id.* The maximum penalty was \$160,000 thereafter. *Id.*

End of Document

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Division Exhibit 2

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	17-CV-139 (GHW)
	:	
-against-	:	Jury Trial Demanded
	:	
GREGORY T. DEAN and	:	
DONALD J. FOWLER,	:	
	:	
Defendants.	:	

AMENDED COMPLAINT

Plaintiff Securities and Exchange Commission (the “Commission”), for its amended complaint against defendants Gregory T. Dean (“Dean”) and Donald J. Fowler (“Fowler,” and together with Dean, “Defendants”), alleges as follows:

SUMMARY

1. While acting as registered representatives at J.D. Nicholas & Associates, Inc. (“J.D. Nicholas”), a now-defunct broker-dealer based in Syosset, NY, Dean and Fowler violated the antifraud provisions of the federal securities laws. As securities brokers, Dean and Fowler had a duty to make sure that they had a reasonable basis for any investment strategy they

recommended to customers. Dean and Fowler, however, recommended a trading strategy to 27 customers without any reasonable basis to believe that the strategy was suitable for anyone. Their investment strategy was not complex: purchase a security, sell it about 9 days later, and charge the customer commissions and other fees. However, they knew or recklessly disregarded that the strategy they knowingly recommended – a high-cost strategy of excessive in-and-out trading – was bound to lose money and was not suitable for their customers.

2. In addition, Dean and Fowler engaged in churning with regard to at least 3 of the 27 customer accounts. The trading in these accounts was excessive; Dean and Fowler exercised *de facto* control over the trading in the accounts; and they acted with intent to defraud or with willful and reckless disregard for the customers' interests.

3. Through these violations, Dean and Fowler received approximately \$800,000, which they split between them. Their 27 customers, however, many of whom were investors of modest means, ended up with substantial losses in excess of \$1.3 million.

VIOLATIONS

4. By virtue of the conduct alleged herein, the Defendants, directly or indirectly, singly or in concert, violated and are otherwise liable for violations of Section 17(a)(1), (2) and (3) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)(1), (2) and (3)], Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

5. Unless the Defendants, who continue to be employed as registered representatives associated with a broker-dealer, are permanently restrained and enjoined, they will again engage in the acts, practices, transactions, and courses of business set forth in this amended complaint and in acts, practices, transactions, and courses of business of similar type and object.

JURISDICTION AND VENUE

6. The Commission brings this action pursuant to authority conferred by Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)], seeking a final judgment: (1) restraining and permanently enjoining each of the Defendants from engaging in the acts, practices and courses of business alleged against them herein; (b) ordering each of the Defendants to disgorge all ill-gotten gains and to pay prejudgment interest on those amounts; and (c) imposing civil money penalties on each of the Defendants pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331, Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa]. The Defendants, either directly or indirectly, have made use of the means or instrumentalities of interstate commerce, of the mails, of the facilities of national securities exchanges, and/or the means or instruments of transportation or communication in interstate commerce in connection with the acts, practices, and courses of business alleged herein.

8. Venue lies in the Southern District of New York pursuant to 28 U.S.C. §1391(b)(2), Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the acts, practices, transactions, and courses of business alleged in this amended complaint occurred within the Southern District of New York, including trades on exchanges based in the Southern District of New York, and were effected, directly or indirectly, by making use of means or instrumentalities of transportation or communication in interstate commerce, or the mails, or the facilities of a national securities

exchange.

DEFENDANTS

9. **Dean**, age 36, is a resident of Seaford, NY.

10. **Fowler**, age 31, is a resident of Massapequa, NY.

11. Dean and Fowler were employed by J.D. Nicholas from January 2007 through November 2014. Dean and Fowler hold Series 7, 24 and 63 licenses. Dean also holds a Series 6 license.

12. Both Dean and Fowler have disciplinary histories. Ten of Dean's customers filed Financial Industry Regulatory Authority (FINRA) arbitrations or complaints against him. Four arbitrations are pending and six claims were settled through payments to the customers.

13. Ten of Fowler's customers filed FINRA arbitrations or complaints against him. Except for two arbitrations, which are pending, the arbitrations and complaints were settled through payments to the customers.

RELATED ENTITY

14. **J.D. Nicholas** – known until January 2011 as A&F Financial Securities Inc. – was incorporated under Florida law in 1997, and maintained its offices in Syosset, NY. It was registered with the Commission as a broker-dealer from December 1997 through July 2015.

15. In 2010, 2011 and 2015, J.D. Nicholas entered into three Letters of Acceptance, Waiver and Consent (AWC) with FINRA. In the 2010 AWC, FINRA found, among other things, that J.D. Nicholas failed to implement its supervisory procedures regarding excessive trading and churning. The 2011 AWC found that J.D. Nicholas "improperly and inaccurately" described a per-transaction \$65 customer charge as a "handling fee" when this fee "was effectively the same as a commission to the firm." And the 2015 AWC made findings critical of

J.D. Nicholas's telemarketing activities. FINRA also imposed fines of \$27,500 (2010), \$125,500 (2011), and \$35,000 (2015), and censures.

16. J.D. Nicholas entered into consent orders with state regulators in Connecticut (2011), Arkansas (2013) and New Hampshire (2013 and 2015). Similar to the FINRA AWCs, these consent orders made findings critical of J.D. Nicholas's imposition of a "per transaction fee" and its telemarketing practices, and imposed fines of \$20,000 (CT), \$17,500 (AK), \$40,000 and \$10,000 (NH).

FACTS

17. Dean and Fowler owed a duty to their customers to have a reasonable basis for any investment strategy they recommended. This meant that, at a minimum, they needed to understand whether the costs associated with the strategy – repeated short-term buying and selling of securities – would outstrip any potential gains. Dean and Fowler, however, did almost no due diligence on their strategy apart from superficial monitoring of business news. As a result, they had no basis to believe that the strategy was suitable for any customer, regardless of age, experience, investment objective or risk tolerance.

18. Dean and Fowler intentionally used the same basic strategy in the 27 customer accounts: the purchase of a stock followed by the sale of that stock within an average of 9 days, with the customer paying transaction-based commissions and fees. This pattern of buys followed by sales repeated itself over and over in the customers' accounts. Defendants knew or recklessly disregarded the fact that, given its extremely high costs, their strategy would not outperform the market, as they told investors. The inevitable result was that Dean and Fowler received exorbitant commissions at their customers' expense.

Dean and Fowler Operated as Partners

19. Although Dean and Fowler for the most part serviced different customers, they considered themselves partners in all respects. Their customers' accounts were assigned the same "rep codes," internal tracking numbers used at J.D. Nicholas to attribute customers to brokers.

20. Dean and Fowler split all commission revenue 50/50. As a result, Dean received half of the commissions that were paid by Fowler's customers, and Fowler received half of the commissions from Dean's customers. Dean and Fowler created a limited liability company, Outermost Intuition LLC, for the purpose of paying expenses incurred by their brokerage business, discussed and shared investment ideas, sat at adjoining desks, and answered each other's telephones.

21. Dean solicited, determined the strategy for, and recommended trades to 12 customers, identified in the Attachment as customers 8, 10-12, 14, 16-18, 20, 22-23, and 26.

22. Fowler solicited, determined the strategy for, and recommended trades to 11 customers, identified in the Attachments as customers 1, 4-7, 9, 19, 21, 24-25, 27.

23. Dean and/or Fowler solicited, determined the strategy for, and recommended trades to customers 2-3, 13, and 15.

Finding Customers and Opening New Accounts

24. Dean and Fowler obtained leads from telemarketing databases generated by marketing companies and cold-called potential customers across the country.

25. During their initial calls, Dean and Fowler told the customers that they used a short-term investment strategy; they were experienced and savvy stock pickers; and their strategy would outperform the market. Dean and Fowler made little or no mention of fees and costs, and

the customers believed that any risk arising from Dean's and Fowler's strategy would be more than offset by the possibility of a significant profit. In fact, Dean's and Fowler's strategy, with its substantial cost component, was virtually certain to end with customer losses.

26. The customers received new account forms pre-filled by J.D. Nicholas personnel to show that the customers' investment goal was "speculation" and time horizon was "short term – less than 1 yr." J.D. Nicholas highlighted the portions of the form where the customers needed to sign and any biographical information that had not yet been obtained. Dean and Fowler instructed the customers to simply sign and return the forms to J.D. Nicholas.

27. Dean and Fowler also made sure that the customers signed margin agreements, which allowed Dean and Fowler to make stock purchases with borrowed money. In addition to increasing the purchasing power, the use of margin increased the risk to the customers because of the increased leverage.

28. Dean and Fowler placed only a few trades in the first weeks or months that the accounts were open. After this initial period, Dean and Fowler began rapid buying and selling, which continued in each account until the customer closed the account, usually within two years.

29. As the 27 customer accounts were non-discretionary, Dean and Fowler were required to obtain authorization from the customer before any purchase or sale. A comparison of J.D. Nicholas's telephone and trading records, however, indicates that Dean and Fowler frequently placed trades without the customer's authorization, including, for example, in the accounts of customers 2, 5-8, 18, 22, and 27. Selected examples of unauthorized trades placed in these accounts include the following:

- a. Dean or Fowler placed 105 trades in nearly two dozen different securities in customer 2's account from February 14 to March 7, 2013, a time during

which J.D. Nicholas's telephone records reflect one call with customer 2 on February 13, 2013, which lasted only 17 seconds.

- b. Fowler placed six trades in three different securities in customer 5's account from July to September, 2012, a time during which J.D. Nicholas's telephone records reflect no calls with customer 5.
- c. Fowler placed 25 trades in 15 different securities in customer 6's account from January to mid-February 2014, a time during which J.D. Nicholas's telephone records reflect no calls with customer 6.
- d. Fowler placed 163 trades in more than two dozen different securities in customer 7's account from February 20 to April 8, 2014, a time during which J.D. Nicholas's telephone records reflect one call with customer 7 on February 20, 2014, which lasted three minutes, and one call with customer 7 on March 31, 2014, which lasted 17 minutes.
- e. Dean placed 77 trades in dozens of different securities in customer 8's account from October 17, 2012 to April 16, 2013, a time during which J.D. Nicholas's telephone records reflect no calls with customer 8.
- f. Dean placed 57 trades in more than one dozen different securities in customer 18's account from August 2012 to September 2013, a time during which J.D. Nicholas's telephone records reflect no calls with customer 18.
- g. Dean placed 17 trades in seven different securities in customer 22's account from August to October 2012, a time during which J.D. Nicholas's telephone records reflect no calls with customer 22.

- h. Fowler placed 160 trades in more than three dozen different securities in customer 27's account from July 2013 to November 2014, a time during which J.D. Nicholas's telephone records reflect only one telephone call with customer 27, which lasted four minutes.

The Significant Cost Structure of the Strategy

30. The primary customer expense was a per-trade fee of up to 3½% of the amount of the purchase or sale. Dean or Fowler decided the amount of the commissions. These fees, which were charged on both purchases and sales, are considered "commissions" when the firm acts as agent on the trade and "markups" or "markdowns" when the firm acts as a principal.

31. As Dean and Fowler knew, customers were also charged a mandatory "firm commission" of \$65 per trade (before November 1, 2011) or \$49.95 per trade (after November 1, 2011).

32. Another cost to the customer was margin interest which accrued for purchases made on margin.

33. Dean and Fowler knew or were reckless in not knowing that these costs that their customers were made to pay, including commissions, markups, markdowns, "firm commissions," and margin interest, would likely exceed any valuation gains attributable to the securities in customer accounts during the short period between the purchase and the sale.

Dean and Fowler Had No Reasonable Basis for their Strategy

34. Dean and Fowler pursued their high-cost, in-and-out trading strategy without having a reasonable basis for believing that this strategy was suitable for anyone. Since the customers incurred costs with every transaction, making a profit depended upon the price of the security increasing during the brief period the security was held in the customer accounts. The

increase in price had to exceed the combined purchase/sale costs for even a minimal profit to be realized.

35. The uniform trading strategy followed by Dean and Fowler in the 27 customer accounts, as summarized in the Attachment, shows that the impact of the costs that arose from the excessive trading doomed any possibility of even a minimal profit. Dean and Fowler knew, or were reckless in not knowing, that repeated short-term buying and selling of securities was not suitable for their customers because the transaction costs, which were determined by Dean and Fowler, would almost certainly outstrip any potential gains in the accounts.

36. Dean and Fowler purportedly relied on general interest news publications, investment periodicals, and the internet to generate trade recommendations. These resources, however, provided information on issuers and market conditions rather than the probability of generating returns from a high-cost, in-and-out trading strategy.

37. Dean and Fowler knew that generating even a minimal profit from their trading strategy depended on price increases of the stocks greater than the commissions and fees that they were charging the customers. Since the stocks were only held for an average of 9 days before being sold, any price increases were almost always negated by the accompanying costs. Frequently, moreover, the stocks declined in value during the brief holding period. These buy-high, sell-low trades of Dean and Fowler occurred repeatedly in all 27 customer accounts.

38. The real risk to the 27 customers arose not from poor stock picks or market conditions but from the strategy that was knowingly recommended and implemented by Dean and Fowler. Instead of performing due diligence on their high-cost, in-and-out trading strategy, Dean and Fowler did almost nothing to determine whether their own strategy, with its substantial cost component, could ever realize even a minimal profit.

The Trading Was Excessive and the Costs Were Enormous

39. Turnover and cost-to-equity ratios are used to evaluate activity in brokerage accounts. Turnover is the number of times per year a customer's securities are replaced by new securities. The cost-to-equity ratio, also referred to as the break-even ratio, measures the amount an account has to appreciate annually just to cover commissions and other expenses.

40. A turnover of 6, or a cost-to-equity ratio in excess of 20%, is considered to be indicative of excessive trading.

41. The Attachment lists the turnover, cost-to-equity ratios, and other data regarding the 27 customer accounts. The turnover numbers are extremely high, ranging from 20.73 to 451.92, with rates for 9 accounts exceeding 100. The average turnover for the 27 customer accounts was 105.00.

42. All but four of the accounts had cost-to-equity ratios in excess of 100%, with a couple over 200% and one at 463.65%. The average annualized cost-to-equity ratio for these accounts was 110.90%, meaning that the customers, on average, had to realize 110.90% in profits just to break even.

43. Dean and Fowler, on average, held each investment for only 9 days.

44. The customers paid high amounts in commissions and fees – an average of \$37,039 in commissions and fees, which exceeded the average equity in the accounts of \$26,289. Despite the low average equity, Dean and Fowler made an average of \$3.5 million in purchases in each account. The total costs to all the accounts (\$1,000,044) exceeded the total average equity for the 27 customer accounts (\$709,815).

45. All 27 accounts ended up with substantial losses totaling \$1,374,202.

46. Of the \$1,000,044 in total costs incurred by the 27 customer accounts, Dean and

Fowler received approximately \$800,000.

Dean and Fowler Also Churned Three Customers' Accounts

47. Dean churned the account of Customer 10, age 60, a resident of North Carolina, who retired from the Army in 1995 after 21 years of service. Fowler churned the accounts of two customers: Customer 5, age 74, a retiree in Pennsylvania, and Customer 24, age 70, who lives in Texas, and is retired from his career as an aerospace engineer when he became disabled nearly 30 years ago.

48. Dean and Fowler churned the accounts of Customers 5, 10, and 24 by engaging in excessive trading in disregard of their customers' trading objectives and risk tolerance for the purpose of generating commissions.

49. Dean made the decisions concerning the investments and the strategy and exercised *de facto* control over Customer 10's account. Customer 10 relied on Dean to make investment recommendations, never researching or rejecting any of Dean's recommendations. Customer 10 was an inexperienced investor. He had two accounts with other full-service brokerage firms at the time. Both accounts had small balances and minimal trading in equity and fixed income securities, as well as money market funds. Neither account used an in-and-out trading strategy. Dean also executed trades in Customer 10's account without prior approval.

50. Fowler made the decisions concerning the investments and strategy and exercised *de facto* control over the accounts of Customers 5 and 24. Customers 5 and 24 relied on Fowler to make investment recommendations, never making any of their own. Customers 5 and 24 did not ask Fowler to explain any of his recommendations or to furnish any of his research or analysis. The majority of Customer 5's savings was invested conservatively in mutual funds selected for him by a financial advisor. Customer 24 also relied on brokers to make investment

decisions for his other brokerage accounts.

51. The turnover in Customer 10's account was 52.89, and the cost-to-equity ratio was 150.48%. Although the average equity in Customer 10's account was only \$11,361, Dean made a total of \$701,323 in purchases, and each investment was held for an average of 10.8 days.

52. The turnover ratio in Customer 5's account was 20.73, and the cost-to-equity ratio was 67.51%. Although the average equity in Customer 5's account was only \$34,452, Fowler made a total of \$833,646 in purchases, and each investment was held for an average of 25.6 days.

53. The turnover ratio in Customer 24's account was 43.50, and the cost-to-equity ratio was 90.88%. The average equity in Customer 24's account was only \$54,739, but Fowler made a total of \$1,709,242 in purchases, and each investment was held for an average of 10.9 days.

54. Dean and Fowler knew, or were reckless in not knowing, that the repeated short-term buying and selling of securities was not in the best interests of Customers 5, 10, and 24 because the commissions and fees would exceed any potential gains in the accounts. Dean's and Fowler's scienter is further demonstrated by the fact that their churning earned them each substantial financial gain. Dean and Fowler received a total of approximately \$67,000 in ill-gotten gains in connection with these three customer accounts, while Customers 5, 10, and 24 suffered aggregate losses of \$105,400, largely depleting their accounts.

FIRST CLAIM FOR RELIEF
Violations of Section 17(a)(1), (2) and (3) of the Securities Act
(Both Defendants)

55. The Commission realleges and incorporates by reference herein each and every

allegation contained in paragraphs 1 through 54, as if fully set forth herein.

56. The Defendants, directly or indirectly, singly or in concert, in the offer or sale of securities and by the use of the means or instruments of transportation or communication in interstate commerce or by use of the mails, have: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of untrue statements of a material fact or omissions of a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon purchasers of securities and upon other persons.

57. By reason of the foregoing, the Defendants, directly or indirectly, singly or in concert, have violated, and unless enjoined, will again violate Section 17(a)(1), (2) and (3) of the Securities Act [15 U.S.C. § 77q(a)(1), (2) and (3)].

SECOND CLAIM FOR RELIEF
Violation of Section 10(b) of the Exchange Act and Rule 10b-5
(Both Defendants)

58. The Commission realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 54, as if fully set forth herein.

59. The Defendants, directly or indirectly, singly or in concert, in connection with the purchase or sale of securities and by the use of the means or instrumentalities of interstate commerce or of the mails, or of the facilities of a national securities exchange, have: (a) employed devices, schemes, or artifices to defraud; (b) made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in acts, transactions, practices, or courses of business which operated or would operate as a fraud or

deceit upon other persons.

60. By reason of the foregoing, the Defendants, directly or indirectly, singly or in concert, have violated, and unless enjoined, will again violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court enter a Final Judgment:

I.

Permanently enjoining each of the Defendants from committing, aiding and abetting or otherwise engaging in conduct that would make them liable for the violations of the federal securities laws alleged in this amended complaint.

II.

Ordering each of the Defendants to disgorge any ill-gotten gains and to pay prejudgment interest on those amounts, jointly and severally.

III.

Ordering each of the Defendants to pay civil monetary penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

IV.

Granting such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

Dated: New York, New York
April 21, 2017

Respectfully submitted,

By:  _____

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Tel: (212) 336-0174 (Stoelting)

Attachment to Amended Complaint filed April 21, 2017
SEC v. Gregory T. Dean and Donald J. Fowler, 17-cv-139-GHW (S.D.N.Y.)

Customer	Annualized Cost-to-Equity Ratio	Annualized Turnover	Average Equity ¹	Total Purchases	Total Costs to Customer ²	Total Loss	Weighted Days Held ³	Account Period
1	463.65%	354.98	\$4,927	\$1,303,355	\$17,023	(\$32,994)	2.0	6/1/14 - 2/28/15
2	98.55%	156.41	\$256,407	\$39,995,011	\$252,003	(\$474,958)	3.7	5/1/12 - 4/30/13
3	105.20%	65.73	\$21,366	\$2,924,378	\$46,800	(\$28,840)	12.3	8/1/12 - 8/31/14
4	158.85%	79.54	\$5,866	\$578,743	\$11,565	(\$18,516)	4.7	2/1/13 - 4/30/14
5	67.51%	20.73	\$34,452	\$833,646	\$27,147	(\$38,745)	25.6	9/1/11 - 10/31/12
6	137.60%	92.35	\$14,817	\$1,925,589	\$28,710	(\$22,835)	6.9	2/1/13 - 6/30/14
7	173.08%	451.92	\$17,798	\$8,698,471	\$33,338	(\$60,573)	1.0	1/1/14 - 1/31/15
8	125.30%	80.85	\$24,040	\$2,751,243	\$42,665	(\$70,420)	7.6	5/1/12 - 9/30/13
9	184.54%	131.71	\$14,932	\$1,476,392	\$20,685	(\$15,222)	5.2	3/1/13 - 11/30/13
10	150.48%	52.89	\$11,361	\$701,323	\$19,954	(\$41,115)	10.8	3/1/11 - 4/30/12
11	147.11%	145.99	\$49,352	\$11,401,829	\$114,970	(\$40,498)	5.0	5/1/13 - 11/30/14
12	125.05%	46.66	\$14,882	\$462,297	\$12,389	(\$36,243)	14.7	12/1/11 - 7/31/12
13	147.48%	176.25	\$16,368	\$1,446,372	\$12,103	(\$22,709)	4.6	7/1/13 - 12/31/13
14	252.15%	192.20	\$20,240	\$4,206,924	\$55,229	(\$84,320)	2.9	10/1/12 - 10/31/13
15	159.94%	68.10	\$11,674	\$1,056,375	\$24,810	(\$69,708)	7.5	1/1/12 - 4/30/13
16	163.91%	83.93	\$8,667	\$1,452,902	\$28,373	(\$5,039)	6.8	3/1/12 - 2/28/14
17	103.81%	33.43	\$13,353	\$482,767	\$15,001	(\$5,777)	17.6	1/1/13 - 1/31/14
18	71.01%	38.35	\$25,722	\$1,397,053	\$25,871	(\$51,641)	18.6	5/1/12 - 9/30/13

¹ "Average Equity" is an average of the net portfolio value amounts listed in the monthly account statements received by the customers.

² "Total Costs" includes commissions, markups, markdowns, margin interest, the firm commission, and other account fees.

³ Weighted for investment size.

Attachment to Amended Complaint filed April 21, 2017
SEC v. Gregory T. Dean and Donald J. Fowler, 17-cv-139-GHW (S.D.N.Y.)

Customer	Annualized Cost-to-Equity Ratio	Annualized Turnover	Average Equity ¹	Total Purchases	Total Costs to Customer ²	Total Loss	Weighted Days Held ³	Account Period
19	220.56%	134.47	\$7,830	\$963,474	\$15,803	(\$18,881)	2.7	10/1/12 - 8/31/13
20	155.14%	82.80	\$15,628	\$754,836	\$16,142	(\$49,192)	8.5	10/1/11 - 5/31/12
21	114.77%	131.20	\$12,448	\$2,170,174	\$18,984	(\$19,396)	3.4	12/1/12 - 3/31/14
22	100.97%	24.27	\$6,115	\$272,627	\$11,351	(\$8,641)	17.3	3/1/11 - 12/31/12
23	100.46%	39.09	\$13,958	\$727,955	\$18,708	(\$8,148)	17.6	10/1/12 - 1/31/14
24	90.88%	43.50	\$54,739	\$1,709,242	\$37,479	(\$25,541)	10.9	5/1/11 - 1/31/12
25	193.51%	98.97	\$12,115	\$1,800,143	\$35,197	(\$49,608)	7.5	3/1/12 - 8/31/13
26	176.83%	58.13	\$3,664	\$408,131	\$12,425	(\$1,637)	10.1	12/1/11 - 10/31/13
27	113.71%	69.93	\$17,094	\$2,786,866	\$45,320	(\$73,005)	7.5	9/1/12 - 12/31/14
Totals:			\$709,815	\$94,688,119	\$1,000,044	(\$1,374,202)		
Averages:	110.90%	105.00	\$26,289	\$3,506,967	\$37,039	(\$50,896)	9.0	

Division Exhibit 3

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/21/2019

Verdict Sheet
Ch. Ex 9
6/20/19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

SECURITIES AND EXCHANGE
COMMISSION,

1:17-cv-139-GHW

Plaintiff,

-against-

DONALD J. FOWLER,

Defendant.

----- X

VERDICT SHEET

Please indicate each of your verdicts with a check mark (✓).

1. Did the Defendant with scienter employ any device, scheme, or artifice to defraud, or engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person, in violation of **Section 10(b)** of the Securities Exchange Act (the "Exchange Act"), **Exchange Act Rules 10b-5(a) or 10b-5(c)**, or **Section 17(a)(1)** of the Securities Act?

Yes ✓ No _____

2. Did the Defendant with scienter make any untrue statement of a material fact, or any omission of a material fact, in violation of **Section 10(b)** of the Exchange Act and **Exchange Act Rule 10b-5(b)**?

Yes ✓ No _____

3. Did the Defendant negligently obtain money or property by means of any untrue statement of a material fact, or by any omission of a material fact, in violation of **Section 17(a)(2)** of the Securities Act?

Yes ✓ No _____

4. Did the Defendant negligently engage in any transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser of a security, in violation of **Section 17(a)(3)** of the Securities Act?

Yes No


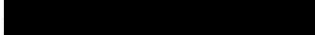
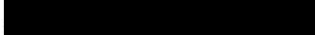
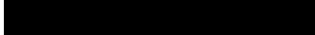
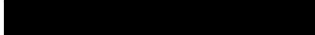
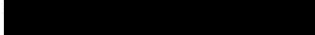
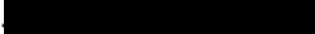
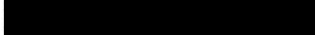
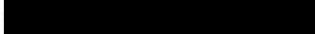
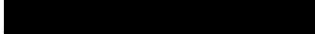
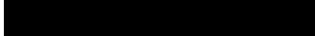
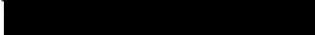
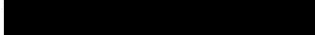
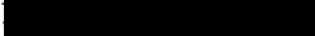
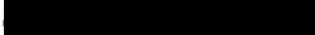
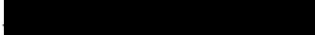
5. Did the Defendant with scienter recommend an investment strategy with no reasonable basis to believe the strategy was suitable for any customer, in violation of **Section 10(b)** of the Exchange Act?

Yes No

If Yes: **Do not answer** question 6. If No: **Answer** question 6.

6. Did the Defendant with scienter recommend an investment strategy to any of the following customers with no reasonable basis to believe the strategy was suitable for that customer, in violation of **Section 10(b)** of the Exchange Act?

Answer "Yes" or "No" as to each customer.

	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
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	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>
	Yes <input type="checkbox"/>	No <input type="checkbox"/>

7. Did the Defendant with scienter make any unauthorized trade in the account of any of the following customers, in violation of Section 10(b) of the Exchange Act?

Answer: "Yes" or "No" as to each customer.



Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
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Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>

SO SAY WE ALL



Signature of Foreperson



Name of Foreperson

Division Exhibit 4

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 2/28/2020

	:	
SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	17-CV-139 (GHW)
	:	ECF Case
DONALD J. FOWLER,	:	
	:	
Defendant.	:	
	:	

FINAL JUDGMENT AS TO DEFENDANT DONALD J. FOWLER

Plaintiff Securities and Exchange Commission (“Plaintiff” or “Commission”) having filed a Complaint and a jury trial having been held between June 10 and June 19, 2019, as to the Commission’s claims against Defendant Donald J. Fowler (“Defendant”) and the jury having returned a verdict for Plaintiff as to all claims against the Defendant on June 20, 2019:

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 Judgment by personal service or otherwise: (a) Defendant's 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 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 Judgment by personal service or otherwise: (a) Defendant's 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 FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay disgorgement of \$132,085.20, prejudgment interest thereon of \$35,195.04, and a civil penalty in the amount of \$1,950,000, for a total of \$2,117,280.24.

Defendant shall satisfy his obligations to pay the foregoing amounts of disgorgement, prejudgment interest, and civil penalties ordered pursuant to this paragraph by paying the amounts ordered to the Securities and Exchange Commission within fourteen (14) days after entry of the relevant order.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may then 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; Defendant as a defendant in this action; and specifying that payment is made pursuant to this Judgment and any order regarding disgorgement, prejudgment interest, and/or civil penalties.

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 will relinquish all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

IV.

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, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this 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).

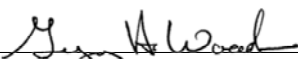
V.

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 Judgment.

VI.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

Dated: February 28, 2020



HONORABLE GREGORY H. WOODS
UNITED STATES DISTRICT JUDGE

Division Exhibit 5

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	17-CV-139 (GHW)
	:	ECF Case
DONALD J. FOWLER,	:	
	:	
Defendants.	:	

JOINT STIPULATIONS OF FACT

The following facts set forth herein have been stipulated to by all parties to this action and require no proof.

Defendant Donald J. Fowler

1. Defendant Donald J. Fowler, age 31, is a resident of Massapequa, NY.
2. Fowler attended Hofstra University for one semester in 2004, and SUNY Farmingdale from 2005-2008, majoring in Business Administration, but did not graduate.
3. Fowler passed the Series 7 and 63 examinations in 2005. Fowler also passed the Series 24 examination in 2008.
4. Fowler was a registered representative at J.D. Nicholas & Associates, Inc. (J.D. Nicholas”), or its predecessor A&F Financial Securities, Inc., from January 2007 to November 2014.
5. Prior to J.D. Nicholas, Fowler was registered with American Capital Partners, LLC, from September 2005 to February 2007.

Div. Ex. 5 - 1

**JOINT
EXHIBIT 6**

6. From November 2014 to the present, Fowler has since been broker at Worden Capital Management LLC.

7. Fowler intends to continue being a broker for the foreseeable future.

8. In August of 2012, Fowler was placed on special supervision by J.D. Nicholas.

**Fowler Knew and Understood his
Reasonable Basis and Customer-Specific Suitability Duties**

9. Suitability is a critically important duty of all brokers.

10. Fowler was tested on the suitability duties of brokers as part of the qualifying exam to become a broker, and received training and instruction on his suitability duties at J.D. Nicholas.

11. The turnover ratio is the number of times in a year that the securities in an account have been replaced with new securities.

12. The use of margin, or buying securities with borrowed money, raises risks for the customer in conjunction with the potential for increased rewards. The cost of margin must also be considered, since this cost must also be recouped in order to realize a return.

13. If a broker determines that the recommended security or strategy satisfies the “reasonable basis” test, which requires that the security or strategy be suitable for at least some customers, the broker must also consider customer-specific suitability. This duty requires the broker to have a reasonable basis to believe that a recommendation of a security or investment strategy is suitable for the particular customer based on the customer’s investment profile.

14. Fowler was required to only make recommendations that were suitable for his customers. Fowler was also prohibited from placing his own interests ahead of his customer’s interests.

Div. Ex. 5 - 2

Fowler Made Recommendations to the Customers

15. While at J.D. Nicholas, Fowler recommended trades and a trading strategy to the following customers: Kenneth Bayer, Lane Clizbe, Louis Dellorfanio, Allen Deuschle, Steve Dimercurio, Bob Kreuger, Jeffrey Funk, Al Riedstra, Peter Skrna, Robert Weathers, Gary Wendorff, and Donald Womeldorph Jr.

16. The customers listed in the preceding paragraphs, with the addition of Clay Miller, are referred to as the “Customers.”

17. Each of the Customers opened an account following a cold call from someone at J.D. Nicholas.

18. Fowler understood that a trade described as “solicited” meant that the trade took place as a result of a broker’s recommendation.

19. A total of 1,202 trades occurred in the Customers’ accounts.

20. Of the 1,202 trades, a total of 1,159 –96.4% – were solicited by Fowler.

Fowler’s Customer Marketing and Intake

21. Fowler, or brokers acting on Fowler’s behalf, made many cold calls per day looking for customers.

22. Fowler purchased leads from many different sources, including Dun & Bradstreet, Salesleads.tv and Integrated Systems.

23. All of the Customers lived hundreds of miles from Fowler’s offices at J.D. Nicholas.

24. When opening an account with a new customer, Fowler used a “speed sheet” to compile the data needed to open the new account.

25. An “Investment Account Application” form was filled in by a sales assistant at J.D. Nicholas for the Customers’ signature.

26. Each of the 13 Customers signed an Investment Account Application.

27. The Investment Account Application for the all 13 Customers show an Investment Objective of “Speculation,” a “Speculative” Risk Exposure, and an “Excellent” Investment Knowledge.

28. Each of the 13 Customers signed a “Margin Account Agreement” containing disclosures regarding the costs and risks associated with trading on Margin. At least four of the customers ([REDACTED] signed a margin risk disclosure questionnaire.

29. Ten of the Customers – [REDACTED] signed an “Option Account Agreement”. All ten customers signed a form in which they acknowledged receipt of a booklet entitled Characteristics and Risks of Standardized Options.

30. Additionally, [REDACTED] signed an Options Risk Disclosure form.

31. Seven of the customers – [REDACTED] and [REDACTED] signed “Intent to Maintain Active Account” documents, generated by J.D. Nicholas’ compliance department. [REDACTED] each signed two “Intent to Maintain Active Account” letters. An “Intent to Maintain Active Account” form sent to [REDACTED] and maintained in J.D. Nicholas’s files contained the handwritten notation: “Asked for Intent 4/30/13 (Account lost most equity in May 2013) Client did not return.”

32. Five of the customers – [REDACTED] – signed “Day Trading Risk Disclosures,” generated by J.D. Nicholas’ compliance department. Dimercurio and Funk and signed two “Day Trading Risk Disclosures” each.

Div. Ex. 5 - 4

33. Seven of the customers – [REDACTED] – were sent “Account Activity Letters” from supervisors at J.D. Nicholas regarding their trading. Deuschle was sent two.

34. Wendorff also received and signed a “penny stock disclosure letter.”

35. Fowler did not make the decision to generate or send the Intent to Maintain Active Account letters or the Account Activity Letters.

Fowler Determined the Commissions and Markups/Markdowns

36. When J.D. Nicholas acted as an “agent” on a trade, in other words, when J.D. Nicholas bought or sold the stock on the open market, the fee charged to the customer is called a “commission.”

37. When J.D. Nicholas acted as a “principal” on a trade, the customer was charged a “markup” or “markdown.”

38. The “commissions” charged on agency trades and the “markups” or “markdowns” charged on principal trades are referred to herein as “Commissions.”

39. Fowler had the discretion to charge a per-trade fee of up to 3.5% of the amount of each purchase or sale.

40. Fowler knew that the Customers were also charged a mandatory “firm commission” of \$65 per trade (before November 1, 2011) or \$49.95 per trade (after November 1, 2011).

41. Fowler had access to the information needed to calculate the cost-to-equity and turnover ratios for the Customers’ accounts.

Prior Customer Authorization For Trades Was Required

42. Fowler was required to obtain customer authorization before placing a trade.

43. Fowler knew that he was prohibited from placing a trade without express prior approval from the customer.

44. When communicating with customers, Fowler's practice was to use his J.D. Nicholas desk phone, but at times he also used his cellphones.

45. Fowler did not communicate with customers using his home phones.

46. Fowler did not communicate with customers using email.

47. Cablevision (also known as Altice, Optimum, Lightpath, and CSC Holdings) was a phone service provider for J.D. Nicholas during 2011 to 2014.

48. AT&T was the cell phone provider for the cell phones used by Fowler during 2011 – 2014.

Fowler's Compensation

49. The sole source of Fowler's income at J.D. Nicholas was Commissions from the trades in his customers' accounts.

50. Of the Commissions customers paid, 20% went to J.D. Nicholas, and 80% went to individual brokers (including Fowler), such that of every dollar of Commissions generated, J.D. Nicholas kept \$0.20, and the individual brokers shared the rest.

51. Fowler and his partner Gregory Dean ("Dean") split all Commission revenue that they personally received from the thirteen Customers 50/50.

52. In addition to the Commissions described above, Fowler's Customers were charged a "firm commission" on every trade of \$49.95, and Fowler received \$5 of this fee. **Div. Ex. 5 - 6**

53. Fowler received \$6,101 of the "firm commission" paid by the Customers, derived by multiplying the total number of trades (1,202), times the \$5 he received from each trade.

54. Fowler and Dean set up a partnership called Outermost Intuition, LLC, of which there are the only two partners, to pay expenses of their brokerage operation, and which received Fowler's compensation from J.D. Nicholas.

The foregoing stipulations have been entered into by the parties as of this 17th day of June, 2019
Plaintiff SECURITIES AND EXCHANGE COMMISSION

By: 
David Stoelting

Defendant DONALD J. FOWLER

By: 
Liam O'Brien

Div. Ex. 5 - 7

Division Exhibit 6

SUMMARY OF ACCOUNTS

Count	Account Number & Name	Gain (Loss)	Annual Cost / Equity Ratio	Annual Equity Turnover	Average Equity	Purchases	Total Costs	Wtd Days Held	Account		Acct Days
									Beg	End	
1	XXXX5809 ██████████	(32,888)	466.5%	357.2	6,253	1,303,355	17,023	2.0	06/01/14	12/31/14	213
2	XXXX5266 ██████████	(18,516)	167.7%	83.9	5,555	578,743	11,565	4.7	02/01/13	04/30/14	453
3	XXXX1375 ██████████	(38,745)	64.3%	19.7	36,167	833,646	27,147	25.6	09/01/11	10/31/12	426
4	XXXX0434 ██████████	(22,835)	137.9%	92.5	14,784	1,925,589	28,710	6.9	02/01/13	06/30/14	514
5	XXXX8769 ██████████	(60,573)	142.1%	370.8	23,521	8,698,471	33,338	1.0	01/01/14	12/31/14	364
6	XXXX3063 ██████████	(15,222)	183.3%	130.8	15,033	1,476,392	20,685	5.2	03/01/13	11/30/13	274
7	XXXX2748 ██████████	(22,709)	147.8%	175.2	16,466	1,446,372	12,203	4.6	07/01/13	12/31/13	183
8	XXXX1746 ██████████	(69,708)	142.7%	60.8	13,085	1,056,375	24,810	7.5	01/01/12	04/30/13	485
9	XXXX8082 ██████████	(18,881)	167.0%	101.8	10,339	963,474	15,803	2.7	10/01/12	08/31/13	334
10	XXXX4069 ██████████	(19,396)	105.6%	120.7	13,534	2,170,174	18,984	3.4	12/01/12	03/31/14	485
11	XXXX9634 ██████████	(25,541)	89.9%	41.0	55,353	1,709,242	37,479	10.9	05/01/11	01/31/12	275
12	XXXX5893 ██████████	(49,608)	191.9%	98.1	12,219	1,800,143	35,197	7.5	03/01/12	08/31/13	548
13	XXXX1096 ██████████	(73,005)	105.8%	65.0	18,376	2,786,866	45,320	7.5	09/01/12	12/31/14	851
Report Total:		(467,627)	142.6%	116.2	62,682	26,748,843	328,264	5.0	05/01/11	12/31/14	1,340

Division Exhibit 7

SUMMARY OF PROFIT/(LOSS) BEFORE AND AFTER COSTS

Count	Name	Account	Profit/(Loss) Before Costs	Total Costs	Profit/(Loss) After Costs
1	[REDACTED]	XXXX-5809	(15,865)	17,023	(32,888)
2	[REDACTED]	XXXX-5266	(6,951)	11,565	(18,516)
3	[REDACTED]	XXXX-1375	(11,598)	27,147	(38,745)
4	[REDACTED]	XXXX-0434	5,875	28,710	(22,835)
5	[REDACTED]	XXXX-8769	(27,235)	33,338	(60,573)
6	[REDACTED]	XXXX-3063	5,463	20,685	(15,222)
7	[REDACTED]	XXXX-2748	(10,506)	12,203	(22,709)
8	[REDACTED]	XXXX-1746	(44,898)	24,810	(69,708)
9	[REDACTED]	XXXX-8082	(3,078)	15,803	(18,881)
10	[REDACTED]	XXXX-4069	(412)	18,984	(19,396)
11	[REDACTED]	XXXX-9634	11,938	37,479	(25,541)
12	[REDACTED]	XXXX-5893	(14,411)	35,197	(49,608)
13	[REDACTED]	XXXX-1096	(27,685)	45,320	(73,005)
Report Total:			(139,363)	328,264	(467,627)

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TRIAL EXHIBIT

PX-1C

Division Exhibit 8

BrokerCheck Report

DONALD JOSEPH FOWLER

CRD# 4989632

<u>Section Title</u>	<u>Page(s)</u>
Report Summary	1
Broker Qualifications	2 - 4
Registration and Employment History	5
Disclosure Events	6

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TRIAL EXHIBIT
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About BrokerCheck®



BrokerCheck offers information on all current, and many former, registered securities brokers, and all current and former registered securities firms. FINRA strongly encourages investors to use BrokerCheck to check the background of securities brokers and brokerage firms before deciding to conduct, or continue to conduct, business with them.

- What is included in a BrokerCheck report?
 - BrokerCheck reports for individual brokers include information such as employment history, professional qualifications, disciplinary actions, criminal convictions, civil judgments and arbitration awards. BrokerCheck reports for brokerage firms include information on a firm's profile, history, and operations, as well as many of the same disclosure events mentioned above.
 - Please note that the information contained in a BrokerCheck report may include pending actions or allegations that may be contested, unresolved or unproven. In the end, these actions or allegations may be resolved in favor of the broker or brokerage firm, or concluded through a negotiated settlement with no admission or finding of wrongdoing.
- Where did this information come from?
 - The information contained in BrokerCheck comes from FINRA's Central Registration Depository, or CRD® and is a combination of:
 - o information FINRA and/or the Securities and Exchange Commission (SEC) require brokers and brokerage firms to submit as part of the registration and licensing process, and
 - o information that regulators report regarding disciplinary actions or allegations against firms or brokers.
- How current is this information?
 - Generally, active brokerage firms and brokers are required to update their professional and disciplinary information in CRD within 30 days. Under most circumstances, information reported by brokerage firms, brokers and regulators is available in BrokerCheck the next business day.
- What if I want to check the background of an investment adviser firm or investment adviser representative?
 - To check the background of an investment adviser firm or representative, you can search for the firm or individual in BrokerCheck. If your search is successful, click on the link provided to view the available licensing and registration information in the SEC's Investment Adviser Public Disclosure (IAPD) website at <https://www.adviserinfo.sec.gov>. In the alternative, you may search the IAPD website directly or contact your state securities regulator at <http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/P455414>.
- Are there other resources I can use to check the background of investment professionals?
 - FINRA recommends that you learn as much as possible about an investment professional before deciding to work with them. Your state securities regulator can help you research brokers and investment adviser representatives doing business in your state.



Using this site/information means that you accept the FINRA BrokerCheck Terms and Conditions. A complete list of Terms and Conditions can be found at brokercheck.finra.org



For additional information about the contents of this report, please refer to the User Guidance or www.finra.org/brokercheck. It provides a glossary of terms and a list of frequently asked questions, as well as additional resources. [For more information about FINRA, visit www.finra.org.](http://www.finra.org)

Thank you for using FINRA BrokerCheck.

DONALD J. FOWLER

CRD# 4989632

Currently employed by and registered with the following Firm(s):

WORDEN CAPITAL MANAGEMENT LLC
100 RING ROAD WEST
SUITE 210
GARDEN CITY, NY 11530
CRD# 148366
Registered with this firm since: 11/21/2014

WORDEN CAPITAL MANAGEMENT LLC
100 RING ROAD WEST
SUITE 210
GARDEN CITY, NY 11530
CRD# 148366
Registered with this firm since: 11/21/2014

WORDEN CAPITAL MANAGEMENT LLC
200 Sunrise Highway
3rd Floor
Rockville Ctr., NY 11570
CRD# 148366
Registered with this firm since: 11/21/2014

Report Summary for this Broker



This report summary provides an overview of the broker's professional background and conduct. Additional information can be found in the detailed report.

Broker Qualifications

This broker is registered with:

- 1 Self-Regulatory Organization
- 26 U.S. states and territories

This broker has passed:

- 1 Principal/Supervisory Exam
- 2 General Industry/Product Exams
- 1 State Securities Law Exam

Registration History

This broker was previously registered with the following securities firm(s):

J.D. NICHOLAS & ASSOCIATES, INC.
CRD# 44791
SYOSSET, NY
01/2007 - 11/2014

AMERICAN CAPITAL PARTNERS, LLC
CRD# 119249
WANTAGH, NY
09/2005 - 02/2007

Disclosure Events

All individuals registered to sell securities or provide investment advice are required to disclose customer complaints and arbitrations, regulatory actions, employment terminations, bankruptcy filings, and criminal or civil judicial proceedings.

Are there events disclosed about this broker? **Yes**

The following types of disclosures have been reported:

Type	Count
Civil Event	1
Customer Dispute	11

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Broker Qualifications

Registrations

This section provides the self-regulatory organizations (SROs) and U.S. states/territories the broker is currently registered and licensed with, the category of each license, and the date on which it became effective. This section also provides, for every brokerage firm with which the broker is currently employed, the address of each branch where the broker works.

This individual is currently registered with 1 SRO and is licensed in 26 U.S. states and territories through his or her employer.

Employment 1 of 1

Firm Name: WORDEN CAPITAL MANAGEMENT LLC

Main Office Address: 100 RING ROAD WEST
SUITE 210
GARDEN CITY, NY 11530

Firm CRD#: 148366

SRO	Category	Status	Date
FINRA	General Securities Principal	APPROVED	11/21/2014
FINRA	General Securities Representative	APPROVED	11/21/2014
FINRA	Operations Professional	APPROVED	11/21/2014

U.S. State/ Territory	Category	Status	Date	U.S. State/ Territory	Category	Status	Date
Alabama	Agent	APPROVED	01/13/2015	Iowa	Agent	APPROVED	12/03/2014
Arizona	Agent	APPROVED	07/20/2015	Kansas	Agent	APPROVED	01/02/2015
California	Agent	APPROVED	12/19/2014	Louisiana	Agent	APPROVED	03/10/2015
Connecticut	Agent	APPROVED	11/24/2014	Michigan	Agent	APPROVED	12/18/2014
District of Columbia	Agent	APPROVED	12/09/2014	Minnesota	Agent	APPROVED	03/03/2015
Florida	Agent	APPROVED	12/08/2014	Nevada	Agent	APPROVED	12/15/2014
Georgia	Agent	APPROVED	11/24/2014	New Mexico	Agent	APPROVED	03/06/2015
Idaho	Agent	APPROVED	11/24/2014	New York	Agent	APPROVED	12/02/2014
Illinois	Agent	APPROVED	11/24/2014	North Carolina	Agent	APPROVED	01/23/2015
Indiana	Agent	APPROVED	12/22/2014	Oklahoma	Agent	APPROVED	12/03/2014
				Pennsylvania	Agent	APPROVED	12/23/2014

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Broker Qualifications

Employment 1 of 1, continued

U.S. State/ Territory	Category	Status	Date
South Carolina	Agent	APPROVED	01/15/2015
Texas	Agent	APPROVED	01/26/2015
Virginia	Agent	APPROVED	12/04/2014
Washington	Agent	APPROVED	04/29/2015
Wyoming	Agent	APPROVED	03/16/2015

Branch Office Locations

WORDEN CAPITAL MANAGEMENT LLC
200 Sunrise Highway
3rd Floor
Rockville Ctre., NY 11570

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Broker Qualifications

Industry Exams this Broker has Passed

This section includes all securities industry exams that the broker has passed. Under limited circumstances, a broker may attain a registration after receiving an exam waiver based on exams the broker has passed and/or qualifying work experience. Any exam waivers that the broker has received are not included below.

This individual has passed 1 principal/supervisory exam, 2 general industry/product exams, and 1 state securities law exam.

Principal/Supervisory Exams

Exam	Category	Date
General Securities Principal Examination	Series 24	05/24/2008

General Industry/Product Exams

Exam	Category	Date
Securities Industry Essentials Examination	SIE	10/01/2018
General Securities Representative Examination	Series 7	09/06/2005

State Securities Law Exams

Exam	Category	Date
Uniform Securities Agent State Law Examination	Series 63	09/21/2005

Additional information about the above exams or other exams FINRA administers to brokers and other securities professionals can be found at www.finra.org/brokerqualifications/registeredrep/.

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Registration and Employment History

Registration History

The broker previously was registered with the following firms:

Registration Dates	Firm Name	CRD#	Branch Location
01/2007 - 11/2014	J.D. NICHOLAS & ASSOCIATES, INC.	44791	SYOSSET, NY
09/2005 - 02/2007	AMERICAN CAPITAL PARTNERS, LLC	119249	WANTAGH, NY

Employment History

This section provides up to 10 years of an individual broker's employment history as reported by the individual broker on the most recently filed Form U4.

Please note that the broker is required to provide this information only while registered with FINRA or a national securities exchange and the information is not updated via Form U4 after the broker ceases to be registered. Therefore, an employment end date of "Present" may not reflect the broker's current employment status.

Employment Dates	Employer Name	Employer Location
01/2007 - Present	A&F FINANCIAL SECURITIES, INC.	SYOSSET, NY

Other Business Activities

This section includes information, if any, as provided by the broker regarding other business activities the broker is currently engaged in either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise. This section does not include non-investment related activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.

1. Don Fowler, Inc.; 34 Morton Ave, Massapequa, NY 11758; holding company used to pay bills; owner since June 1, 2018; 0 hours pr month devoted to business and 0 hours during trading hours
2. Grand Restaurant & Bar Supply; 651 Grand Ave., Deer Park, NY 11792; consulting member beginning October ; 20 hours per month, none during trading hours; non-investment related

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Disclosure Events

What you should know about reported disclosure events:

1. All individuals registered to sell securities or provide investment advice are required to disclose customer complaints and arbitrations, regulatory actions, employment terminations, bankruptcy filings, and criminal or civil judicial proceedings.
2. Certain thresholds must be met before an event is reported to CRD, for example:
 - o A law enforcement agency must file formal charges before a broker is required to disclose a particular criminal event.
 - o A customer dispute must involve allegations that a broker engaged in activity that violates certain rules or conduct governing the industry and that the activity resulted in damages of at least \$5,000.
 - o
3. Disclosure events in BrokerCheck reports come from different sources:
 - o As mentioned at the beginning of this report, information contained in BrokerCheck comes from brokers, brokerage firms and regulators. When more than one of these sources reports information for the same disclosure event, all versions of the event will appear in the BrokerCheck report. The different versions will be separated by a solid line with the reporting source labeled.
 - o
4. There are different statuses and dispositions for disclosure events:
 - o A disclosure event may have a status of *pending*, *on appeal*, or *final*.
 - § A "pending" event involves allegations that have not been proven or formally adjudicated.
 - § An event that is "on appeal" involves allegations that have been adjudicated but are currently being appealed.
 - § A "final" event has been concluded and its resolution is not subject to change.
 - o A final event generally has a disposition of *adjudicated*, *settled* or *otherwise resolved*.
 - § An "adjudicated" matter includes a disposition by (1) a court of law in a criminal or civil matter, or (2) an administrative panel in an action brought by a regulator that is contested by the party charged with some alleged wrongdoing.
 - § A "settled" matter generally involves an agreement by the parties to resolve the matter. Please note that brokers and brokerage firms may choose to settle customer disputes or regulatory matters for business or other reasons.
 - § A "resolved" matter usually involves no payment to the customer and no finding of wrongdoing on the part of the individual broker. Such matters generally involve customer disputes.

REDACTED

Div. Ex. 8 - 8

PX 3 - 8



REDACTED

Div. Ex. 8 - 9

PX 3 - 9



Disclosure Event Details

When evaluating this information, please keep in mind that a disclosure event may be pending or involve allegations that are contested and have not been resolved or proven. The matter may, in the end, be withdrawn, dismissed, resolved in favor of the broker, or concluded through a negotiated settlement for certain business reasons (e.g., to maintain customer relationships or to limit the litigation costs associated with disputing the allegations) with no admission or finding of wrongdoing.

This report provides the information exactly as it was reported to CRD and therefore some of the specific data fields contained in the report may be blank if the information was not provided to CRD.

REDACTED

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REDACTED

Div. Ex. 8 - 11

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REDACTED

Div. Ex. 8 - 12

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REDACTED

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REDACTED

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REDACTED

Div. Ex. 8 - 15

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REDACTED

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REDACTED

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REDACTED

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REDACTED

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REDACTED

Disclosure 5 of 10

Reporting Source:	Firm
Employing firm when activities occurred which led to the complaint:	J.D. NICHOLAS & ASSOCIATES, INC.
Allegations:	ALLEGED CLAIMS INVOLVE CHURNING, NEGLIGENCE, UNSUITABILITY, OVERCONCENTRATION, AND FAILURE TO SUPERVISE.
Product Type:	Equity-OTC Equity Listed (Common & Preferred Stock) Options
Alleged Damages:	\$344,948.00
Is this an oral complaint?	No
Is this a written complaint?	Yes
Is this an arbitration/CFTC reparation or civil litigation?	No

Customer Complaint Information

Date Complaint Received:	10/24/2014
Complaint Pending?	No
Status:	Evolved into Arbitration/CFTC reparation (the individual is a named party)
Status Date:	12/31/2014
Settlement Amount:	
Individual Contribution Amount:	

Arbitration Information

Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.):	FINRA
Docket/Case #:	14-03697
Date Notice/Process Served:	12/31/2014

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Arbitration Pending? Yes

Reporting Source: Broker

Employing firm when activities occurred which led to the complaint: J.D. NICHOLAS & ASSOCIATES, INC.

Allegations: ALLEGED CLAIMS INVOLVE CHURNING, NEGLIGENCE, UNSUITABILITY, OVERCONCENTRATION, AND FAILURE TO SUPERVISE.

Product Type: Equity-OTC
Equity Listed (Common & Preferred Stock)
Options

Alleged Damages: \$344,948.00

Is this an oral complaint? No

Is this a written complaint? Yes

Is this an arbitration/CFTC reparation or civil litigation? No

Customer Complaint Information

Date Complaint Received: 10/24/2014

Complaint Pending? No

Status: Evolved into Arbitration/CFTC reparation (the individual is a named party)

Status Date: 12/31/2014

Settlement Amount:

Individual Contribution Amount:

Arbitration Information

Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.): FINRA

Docket/Case #: 14-03697

Date Notice/Process Served: 12/31/2014

Arbitration Pending? No

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Disposition:	Settled
Disposition Date:	05/02/2016
Monetary Compensation Amount:	\$350,000.00
Individual Contribution Amount:	\$0.00



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Reporting Source: Firm

Employing firm when activities occurred which led to the complaint: J.D.NICHOLAS & ASSOCIATES, INC.

Allegations: PURCHASING AND SELLING SECURITIES ON MARGIN OUTSIDE THE SCOPE OF THE CLIENT'S RISK TOLERANCE. ACTIVITY PERIOD MARCH 2012 TO AUGUST 2013.

Product Type: Equity-OTC
Equity Listed (Common & Preferred Stock)
Options

Alleged Damages: \$48,000.00

Is this an oral complaint? No

Is this a written complaint? Yes

Is this an arbitration/CFTC reparation or civil litigation? Yes

Arbitration/Reparation forum or court name and location: FINRA

Docket/Case #: 14-00878

Filing date of arbitration/CFTC reparation or civil litigation: 03/27/2014

Customer Complaint Information

Date Complaint Received: 03/31/2014

Complaint Pending? No

Status: Evolved into Arbitration/CFTC reparation (the individual is a named party)

Status Date: 05/06/2015

Settlement Amount: \$12,000.00

Individual Contribution Amount: \$12,000.00

Arbitration Information

Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.): FINRA

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Docket/Case #: 14-00878
 Date Notice/Process Served: 03/31/2014
 Arbitration Pending? No
 Disposition: Settled
 Disposition Date: 05/06/2015
 Monetary Compensation Amount: \$12,000.00
 Individual Contribution Amount: \$12,000.00

Reporting Source: Broker
 Employing firm when activities occurred which led to the complaint: J.D.NICHOLAS & ASSOCIATES, INC.

Allegations: PURCHASING AND SELLING SECURITIES ON MARGIN OUTSIDE THE SCOPE OF THE CLIENT'S RISK TOLERANCE. ACTIVITY PERIOD MARCH 2012 TO AUGUST 2013.

Product Type: Equity-OTC
 Equity Listed (Common & Preferred Stock)
 Options

Alleged Damages: \$48,000.00

Is this an oral complaint? No

Is this a written complaint? Yes

Is this an arbitration/CFTC reparation or civil litigation? Yes

Arbitration/Reparation forum or court name and location: FINRA

Docket/Case #: 14-00878

Filing date of arbitration/CFTC reparation or civil litigation: 03/27/2014

Customer Complaint Information

Date Complaint Received: 03/31/2014

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Complaint Pending?	No
Status:	Evolved into Arbitration/CFTC reparation (the individual is a named party)
Status Date:	03/31/2014
Settlement Amount:	
Individual Contribution Amount:	
Arbitration Information	
Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.):	FINRA
Docket/Case #:	14-00878
Date Notice/Process Served:	03/31/2014
Arbitration Pending?	No
Disposition:	Settled
Disposition Date:	05/05/2015
Monetary Compensation Amount:	\$12,000.00
Individual Contribution Amount:	\$12,000.00

Disclosure 8 of 10

Reporting Source:	Broker
Employing firm when activities occurred which led to the complaint:	J.D. NICHOLAS & ASSOCIATES, INC.
Allegations:	BREACH OF FIDUCIARY DUTY, NEGLIGENCE, NEGLIGENT MISREPRESENTATION, CHURNING
Product Type:	Equity-OTC Equity Listed (Common & Preferred Stock) Options
Alleged Damages:	\$21,365.00
Is this an oral complaint?	No
Is this a written complaint?	Yes

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Is this an arbitration/CFTC reparation or civil litigation? Yes

Arbitration/Reparation forum or court name and location: FINRA SIMPLIFIED ARBITRATION

Docket/Case #: 12-03016

Filing date of arbitration/CFTC reparation or civil litigation: 08/17/2012

Customer Complaint Information

Date Complaint Received: 08/29/2012

Complaint Pending? No

Status: Evolved into Arbitration/CFTC reparation (the individual is a named party)

Status Date: 08/29/2012

Settlement Amount:

Individual Contribution Amount:

Arbitration Information

Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.): FINRA SIMPLIFIED ARBITRATION

Docket/Case #: 12-03016

Date Notice/Process Served: 08/29/2012

Arbitration Pending? No

Disposition: Settled

Disposition Date: 10/29/2012

Monetary Compensation Amount: \$14,500.00

Individual Contribution Amount: \$14,500.00

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Disclosure 9 of 10

Reporting Source: Broker

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Employing firm when activities occurred which led to the complaint:	A&F FINANCIAL SECURITES, INC
Allegations:	UNSUITABILITY AND IMPROPER USE OF MARGIN
Product Type:	Equity-OTC Equity Listed (Common & Preferred Stock)
Alleged Damages:	\$487,285.64
Is this an oral complaint?	No
Is this a written complaint?	Yes
Is this an arbitration/CFTC reparation or civil litigation?	No

Customer Complaint Information

Date Complaint Received:	08/02/2011
Complaint Pending?	No
Status:	Settled
Status Date:	12/30/2011
Settlement Amount:	\$178,500.00
Individual Contribution Amount:	\$50,000.00

Disclosure 10 of 10

Reporting Source:	Broker
Employing firm when activities occurred which led to the complaint:	A&F FINANCIAL SECURITIES, INC.
Allegations:	CLIENT ALLEGES UNAUTHORIZED TRADE ON MAY 4, 2011 OF SHORT-TERM APPLE CALL OPTIONS THAT EXPIRED WORTHLESS.
Product Type:	Options
Alleged Damages:	\$23,865.00
Is this an oral complaint?	No
Is this a written complaint?	Yes

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Is this an arbitration/CFTC
reparation or civil litigation? No

Customer Complaint Information

Date Complaint Received: 05/06/2011

Complaint Pending? No

Status: Evolved into Arbitration/CFTC reparation (the individual is a named party)

Status Date: 10/04/2011

Settlement Amount:

Individual Contribution
Amount:

Arbitration Information

Arbitration/CFTC reparation
claim filed with (FINRA, AAA,
CFTC, etc.): FINRA

Docket/Case #: 11-03655

Date Notice/Process Served: 10/04/2011

Arbitration Pending? No

Disposition: Settled

Disposition Date: 11/25/2011

Monetary Compensation
Amount: \$35,000.00

Individual Contribution
Amount: \$35,000.00

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Customer Dispute - Closed-No Action / Withdrawn / Dismissed / Denied

This type of disclosure event involves (1) a consumer-initiated, investment-related arbitration or civil suit containing allegations of sales practice violations against the individual broker that was dismissed, withdrawn, or denied; or (2) a consumer-initiated, investment-related written complaint containing allegations that the broker engaged in sales practice violations resulting in compensatory damages of at least \$5,000, forgery, theft, or misappropriation, or conversion of funds or securities, which was closed without action, withdrawn, or denied.

Disclosure 1 of 1

Reporting Source:	Broker
Employing firm when activities occurred which led to the complaint:	J.D. NICHOLAS & ASSOCIATES, INC.
Allegations:	UNSUITABLE RECOMMENDATIONS, UNAUTHORIZED TRANSACTIONS
Product Type:	Equity-OTC Equity Listed (Common & Preferred Stock) Options
Alleged Damages:	\$81,000.00
Is this an oral complaint?	No
Is this a written complaint?	Yes
Is this an arbitration/CFTC reparation or civil litigation?	No

Customer Complaint Information

Date Complaint Received:	07/31/2012
Complaint Pending?	No
Status:	Closed/No Action
Status Date:	06/04/2014
Settlement Amount:	
Individual Contribution Amount:	
Broker Statement	THE CLIENT SUBMITTED A COMPLAINT ONLINE DIRECTLY TO FINRA WITHOUT PRIOR NOTIFICATION TO THE FIRM.

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PX 3 - 29

End of Report



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Div. Ex. 8 - 30

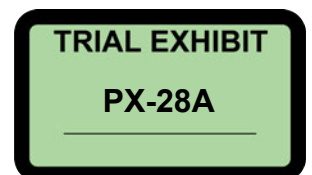
PX 3 - 30

Division Exhibit 9

28A: Summary of Trades in Customer Accounts That Were Not
Preceded by a Phone Call

Customer	Trades	Trades with No Communication	% of Trades with No Communication
[REDACTED]	77	53	69%
[REDACTED]	36	29	81%
[REDACTED]	55	17	31%
[REDACTED]	138	109	79%
[REDACTED]	163	67	41%
[REDACTED]	76	45	59%
[REDACTED]	68	32	47%
[REDACTED]	81	31	38%
[REDACTED]	32	25	78%
[REDACTED]	115	66	57%
[REDACTED]	47	17	36%
[REDACTED]	136	62	46%
[REDACTED]	178	148	83%
Total	1202	701	58%

Div. Ex. 9 - 1



Division Exhibit 10

WORDEN CAPITAL MANAGEMENT LLC(148366)**Rev. Form U5 (05/2009)****Individual Name: FOWLER, DONALD JOSEPH (4989632)****U5 Full - Filing ID: 52184770****Filing Date: 08/01/2019****NOTICE TO THE INDIVIDUAL WHO IS THE SUBJECT OF THIS FILING**

Even if you are no longer registered you continue to be subject to the jurisdiction of regulators for at least two years after your registration is terminated and may have to provide information about your activities while associated with this firm. Therefore, you must forward any residential address changes for two years following your termination date or last Form U5 amendment to: CRD Address Changes, P.O. Box 9495, Gaithersburg, MD 20898-9495.

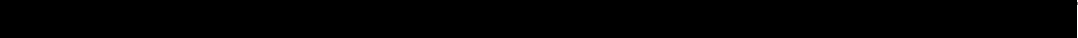
1. General Information

First Name:	Middle Name:	Last Name:	Suffix:
DONALD	JOSEPH	FOWLER	
Firm CRD #:	Firm Name:	Firm NFA #:	
148366	WORDEN CAPITAL MANAGEMENT LLC		
Individual CRD #:	Individual SSN:	Individual NFA #:	Firm Billing Code:
4989632	XXX-XX-XXXX		

Office of Employment Address:

CRD Branch #	NYSE Branch Code #	Firm Billing Code	Address	Private Residence	Type of Office	Start Date	End Date
BD Main			100 RING ROAD WEST SUITE 210 GARDEN CITY, NY 11530 USA	No	Supervised From	11/21/2014	07/25/2019
399044			100 RING ROAD WEST SUITE 210 GARDEN CITY, NY 11530 United States	No	Supervised From	11/21/2014	07/25/2019
575308			200 Sunrise Highway 3rd Floor Rockville Ctre., NY 11570 United States	No	Located At	12/18/2014	07/25/2019

2. Current Residential Address

From	To	Street Address
11/2013	PRESENT	 MASSAPEQUA, NY 11758 United States

3. Full Termination**Is this a FULL TERMINATION?** Yes NoNote: A "Yes" response will terminate ALL registrations with all SROs and all *jurisdictions*.**Reason for Termination:** Permitted to Resign**Div. Ex. 10 - 1**

Termination Explanation:

If the Reason for Termination entered above is Permitted to Resign, Discharged or Other, provide an explanation below:

RR was found liable for 10b-5 violations due to activity conducted while employed at another broker/dealer.

4. Date of Termination

Date Terminated (MM/DD/YYYY): 07/25/2019

A complete date of termination is required for *full termination*. This date represents the date the *firm* terminated the individual's association with the *firm* in a capacity for which registration is required.

For *partial termination*, the date of termination is only applicable to post-dated termination requests during the renewal period.

Notes: For *full termination*, this date is used by *jurisdictions*/SROs to determine whether an individual is required to requalify by examination or obtain an appropriate waiver upon reassociating with another *firm*.

The *SRO/jurisdiction* determines the effective date of termination of registration.

6. Affiliated Firm Termination

Is this a *multiple termination* with one or more *firms affiliated* with the *filing firm*?

If "yes" to the above question and the termination requests for the *filing firm* are identical to the termination requests of each *affiliated firm*, then mark the same termination request for each affiliate.

If the termination requests of the *affiliated firm(s)* differ from those of the *filing firm*, complete the *SRO* and/or *jurisdiction* sections for each *affiliated firm*.

Yes No

7. Disclosure Questions

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IN SECTION 7 IS 'YES', COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S). IF THE INFORMATION IN SECTION 7 HAS ALREADY BEEN REPORTED ON FORM U4 OR FORM U5, DO NOT RESUBMIT DRPs FOR THESE ITEMS. REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U5 INSTRUCTIONS FOR EXPLANATION OF ITALICIZED WORDS.

Disclosure Certification Checkbox (optional):

By selecting the Disclosure Certification Checkbox, the *firm* certifies that (1) there is no additional information to be reported at this time; (2) details relating to Questions 7A, 7C, 7D and 7E have been previously reported on behalf of the individual via Form U4 and/or amendments to Form U4 (if applicable); and (3) updated information will be provided, if needed, as it becomes available to the *firm*. Note: Use of "Disclosure Certification Checkbox" is optional

Investigation Disclosure

Yes No

7A. Currently is, or at termination was, the individual the subject of an *investigation* or *proceeding* by a domestic or foreign governmental body or *self-regulatory organization* with jurisdiction over *investment-related* businesses? (Note: Provide details of an *investigation* on an Investigation

Yes No

Disclosure Reporting Page and details regarding a *proceeding* on a Regulatory Action Disclosure Reporting Page.)

Internal Review Disclosure

- | | Yes | No |
|--|-----------------------|----------------------------------|
| 7B. Currently is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating <i>investment-related</i> statutes, regulations, rules or industry standards of conduct? | <input type="radio"/> | <input checked="" type="radio"/> |

Criminal Disclosure

- | | Yes | No |
|---|-----------------------|----------------------------------|
| 7C. While employed by or associated with your <i>firm</i> , or in connection with events that occurred while the individual was employed by or associated with your <i>firm</i> , was the individual: | | |
| 1. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any <i>felony</i> ? | <input type="radio"/> | <input checked="" type="radio"/> |
| 2. <i>charged</i> with any <i>felony</i> ? | <input type="radio"/> | <input checked="" type="radio"/> |
| 3. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a <i>misdemeanor involving</i> : investments or an <i>investment-related</i> business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? | <input type="radio"/> | <input checked="" type="radio"/> |
| 4. <i>charged</i> with a <i>misdemeanor</i> specified in 7(C)(3)? | <input type="radio"/> | <input checked="" type="radio"/> |

Regulatory Action Disclosure

- | | Yes | No |
|--|-----------------------|----------------------------------|
| 7D. While employed by or associated with your <i>firm</i> , or in connection with events that occurred while the individual was employed by or associated with your <i>firm</i> , was the individual <i>involved</i> in any <i>disciplinary action</i> by a domestic or foreign governmental body or <i>self-regulatory organization</i> (other than those designated as a " <i>minor rule violation</i> " under a plan approved by the U.S. Securities and Exchange Commission) with jurisdiction over the <i>investment-related</i> businesses? | <input type="radio"/> | <input checked="" type="radio"/> |

Customer Complaint/Arbitration/Civil Litigation Disclosure

- | | Yes | No |
|---|----------------------------------|----------------------------------|
| 7E. 1. In connection with events that occurred while the individual was employed by or associated with your <i>firm</i> , was the individual named as a respondent/defendant in an <i>investment-related</i> , consumer-initiated arbitration or civil litigation which alleged that the individual was <i>involved</i> in one or more <i>sales practice violations</i> and which: | | |
| (a) is still pending, or; | <input checked="" type="radio"/> | <input type="radio"/> |
| (b) resulted in an arbitration award or civil judgment against the individual, regardless of amount, or; | <input type="radio"/> | <input checked="" type="radio"/> |
| (c) was settled, prior to 05/18/2009, for an amount of \$10,000 or more, or; | <input type="radio"/> | <input checked="" type="radio"/> |
| (d) was settled, on or after 05/18/2009, for an amount of \$15,000 or more? | <input type="radio"/> | <input checked="" type="radio"/> |
| 2. In connection with events that occurred while the individual was employed by or associated with your <i>firm</i> , was the individual the subject of an <i>investment-related</i> , consumer-initiated (written or oral) complaint, which alleged that the individual was <i>involved</i> in one or more <i>sales practice violations</i> , and which | | |
| (a) was settled, prior to 05/18/2009, for an amount of \$10,000 or more, or; | <input type="radio"/> | <input checked="" type="radio"/> |
| (b) was settled, on or after 05/18/2009, for an amount of \$15,000 or more? | <input type="radio"/> | <input checked="" type="radio"/> |

3. In connection with events that occurred while the individual was employed by or associated with your *firm*, was the individual the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under questions 7(E)(2) above, which:

- (a) would be reportable under question 14I(3)(a) on Form U4, if the individual were still employed by your *firm*, but which has not previously been reported on the individual's Form U4 by your *firm*; or
- (b) would be reportable under question 14I(3)(b) on Form U4, if the individual were still employed by your *firm*, but which has not previously been reported on the individual's Form U4 by your *firm*.

Answer questions (4) and (5) below only for arbitration claims or civil litigation filed on or after 05/18/2009

4. In connection with events that occurred while the individual was employed by or associated with your *firm*, was the individual the subject of an *investment-related*, consumer-initiated, arbitration claim or civil litigation which alleged that the individual was *involved* in one or more *sales practice violations*, and which:

- (a) was settled for an amount of \$15,000 or more, or;
- (b) resulted in an arbitration award of civil judgment against any named respondent(s)/defendant(s), regardless of amount?

5. In connection with events that occurred while the individual was employed by or associated with your *firm*, was the individual the subject of an investment-related, consumer-initiated, arbitration claim or civil litigation not otherwise reported under question 7E(4) above, which:

- (a) would be reportable under question 14I(5)(a) on Form U4, if the individual were still employed by your *firm*, but which has not previously been reported on the individual's Form U4 by your *firm*; or
- (b) would be reportable under question 14I(5)(b) on Form U4, if the individual were still employed by your *firm*, but which has not previously been reported on the individual's Form U4 by your *firm*.

Termination Disclosure

7F. Did the individual voluntarily *resign* from your *firm*, or was the individual discharged or permitted to *resign* from your *firm*, after allegations were made that accused the individual of:

1. violating *investment-related* statutes, regulations, rules or industry standards of conduct?
2. fraud or the wrongful taking of property?
3. failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct?

Yes No

8. Signature

Please Read Carefully

All signatures required on this Form U5 filing must be made in this section.

A "Signature" includes a manual signature or an electronically transmitted equivalent. For purposes of an electronic form filing, a signature is effected by typing a name in the designated signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature.

8A. FIRM ACKNOWLEDGMENT

This section must be completed on all U5 form filings submitted by the *firm*.

8B. INDIVIDUAL ACKNOWLEDGMENT AND CONSENT

This section must be completed on amendment U5 form filings where the individual is submitting changes to Part II of the INTERNAL REVIEW DRP or changes to Section 2 (CURRENT RESIDENTIAL ADDRESS).

8A. FIRM ACKNOWLEDGMENT

I VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS FORM.

Person to contact for further information

JERRY BILESKI

Telephone # of person to contact

516-439-4192

Signature of Appropriate Signatory

JERRY BILESKI

Date (MM/DD/YYYY)

08/01/2019

Signature _____**Criminal DRP**

No Information Filed

Customer Complaint DRP

This Disclosure Reporting Page is an **INITIAL** or **AMENDED** response to report details for affirmative response(s) to Question 14I on Form U4

Check the question(s) you are responding to, regardless of whether you are answering the question(s) "yes" or amending the answer(s) to "no":

Customer Complaint/Arbitration/Civil Litigation

Rev. DRP (05/2009)

 7E(1)(a) 7E(2)(a) 7E(3)(a) 7E(4)(a) 7E(5)(a) 7E(1)(b) 7E(2)(b) 7E(3)(b) 7E(4)(b) 7E(5)(b) 7E(1)(c) 7E(1)(d)[Click here to view question text](#)

One matter may result in more than one affirmative answer to the above items. Use a single DRP to report details relating to a particular matter (i.e., a customer complaint/arbitration/CFTC reparation/civil litigation). Use a separate DRP for each matter.

DRP Instructions:

- Complete items 1-6 for all matters (i.e., customer complaints, arbitrations/CFTC reparations and civil litigation in which a customer alleges that the individual was *involved* in *sales practice violations* and the individual is not named as a party, as well as arbitrations/CFTC reparations and civil litigation in which the individual is named as a party).
- If the matter involves a customer complaint, or an arbitration/CFTC reparation or civil litigation in which a customer alleges that the individual was *salesinvolved* in *sales practice violations* and the individual is not named as a party, complete items 7-11 as appropriate.
- If a customer complaint has evolved into an arbitration/CFTC reparation or civil litigation, amend the existing DRP by completing items 9 and 10.

- If the matter involves an arbitration/CFTC reparation in which the individual is a named party, complete items 12-16, as appropriate.
- If the matter involves a civil litigation in which the individual is a named party, complete items 17-23.
- Item 24 is an optional field and applies to all event types (i.e., customer complaint, arbitration/CFTC reparation, civil litigation).

Complete items 1-6 for all matters (i.e., customer complaints, arbitrations/CFTC reparations, civil litigation).

1. Customer Name(s):

Kolesar Revocable Living Trust, et al.

2. A. Customer(s) State of Residence (select "not on list" when the customer's residence is a foreign address):
California

B. Other state(s) of residence/detail:

3. Employing *Firm* when activities occurred which led to the customer complaint, arbitration, CFTC reparation or civil litigation:

Worden Capital Management LLC

4. Allegation(s) and a brief summary of events related to the allegation(s) including dates when activities leading to the allegation(s) occurred:

Negligence, unsuitability, breach of fiduciary duty, breach of contract, negligent misrepresentation and omissions.

5. Product Type(s): (select all that apply)

- | | | |
|--|--|--|
| <input type="checkbox"/> No Product | <input type="checkbox"/> Derivative | <input type="checkbox"/> Mutual Fund |
| <input type="checkbox"/> Annuity-Charitable | <input type="checkbox"/> Direct Investment-DPP & LP Interests | <input type="checkbox"/> Oil & Gas |
| <input type="checkbox"/> Annuity-Fixed | <input type="checkbox"/> Equipment Leasing | <input type="checkbox"/> Options |
| <input type="checkbox"/> Annuity-Variable | <input checked="" type="checkbox"/> Equity Listed (Common & Preferred Stock) | <input type="checkbox"/> Penny Stock |
| <input type="checkbox"/> Banking Products (other than CDs) | <input checked="" type="checkbox"/> Equity-OTC | <input type="checkbox"/> Prime Bank Instrument |
| <input type="checkbox"/> CD | <input type="checkbox"/> Futures Commodity | <input type="checkbox"/> Promissory Note |
| <input type="checkbox"/> Commodity Option | <input type="checkbox"/> Futures-Financial | <input type="checkbox"/> Real Estate Security |
| <input type="checkbox"/> Debt-Asset Backed | <input type="checkbox"/> Index Option | <input type="checkbox"/> Security Futures |
| <input type="checkbox"/> Debt-Corporate | <input type="checkbox"/> Insurance | <input type="checkbox"/> Unit Investment Trust |
| <input type="checkbox"/> Debt-Government | <input type="checkbox"/> Investment Contract | <input type="checkbox"/> Viatical Settlement |
| <input type="checkbox"/> Debt-Municipal | <input type="checkbox"/> Money Market Fund | <input type="checkbox"/> Other: |

6. Alleged Compensatory Damage Amount:

\$ 29,036.00

- Exact Explanation (If no damage amount is alleged, the complaint must be reported unless the *firm* has made a good faith determination that the damages from the alleged conduct would be less than \$5,000): This is a multi-customer, multi-RR claim involving 11 clients and 12 registered representatives, with claims totaling \$559,293.00. The amount noted is what is attributed to the RR within the Statement of Claim.

If the matter involves a customer complaint, arbitration/CFTC reparation or civil litigation in which a customer alleges that the individual was *involved in sales practice violations* and the individual is not named as a party, complete items 7-11 as appropriate.

Note: Report in Items 12-16, or 17-23, as appropriate, only arbitrations/CFTC reparations or civil litigation in which the individual is named as a party.

7. A. Is this an oral complaint?

Yes No

B. Is this a written complaint?

Yes No

C. Is this an arbitration/CFTC reparation or civil litigation?

Yes No

If yes, provide:

i. Arbitration/reparation forum or court name and location:

ii. Docket/Case#:

iii. Filing date of arbitration/CFTC reparation or civil litigation (MM/DD/YYYY):

D. Date received by/served on *firm* (MM/DD/YYYY):

Exact Explanation

If not exact, provide explanation:

8. Is the complaint, arbitration/CFTC reparation or civil litigation pending?

Yes No

If "No", complete item 9.

9. If the complaint, arbitration/CFTC reparation or civil litigation is not pending, provide status:

Closed/No Action

Withdrawn

Denied

Settled

Arbitration Award/Monetary Judgment (for claimants/plaintiffs)

Arbitration Award/Monetary Judgment (for respondents/defendants)

Evolved into Arbitration/CFTC reparation (you are a named party)

Evolved into Civil litigation (you are a named party)

If status is arbitration/CFTC reparation in which the individual is not a named party, provide details in item 7C.

If status is arbitration/CFTC reparation in which the individual is a named party, complete items 12-16.

If status is civil litigation in which the individual is a named party, complete items 17-23.

10. Status Date (MM/DD/YYYY):

Exact Explanation

If not exact, provide explanation:

11. Settlement/Award/Monetary Judgment:

A. Settlement/Award/Monetary Judgment amount:

\$

B. Individual Contribution Amount:

\$

If the matter involves arbitration or CFTC reparation in which the individual is a named respondent, complete items 12-16, as appropriate.

12. A. Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.):

FINRA

B. Docket/Case#:

19-01580

C. Date notice/process was served (MM/DD/YYYY):

07/01/2019 Exact Explanation

If not exact, provide explanation:

13. Is arbitration/ CFTC reparation pending?

Yes No

If "No", complete item 14.

14. If the arbitration/CFTC reparation is not pending, what was the disposition?

Award to Applicant (Agent/Representative) Award to Customer Denied

Judgment (other than monetary) No Action Settled

Other :

Dismissed

Withdrawn

15. Disposition Date (MM/DD/YYYY):

Exact Explanation

If not exact, provide explanation:

16. Monetary Compensation Details (award, settlement, reparation amount):

A. Total Amount:

\$

B. Individual Contribution Amount:

\$

If the matter involves a civil litigation in which the individual is a defendant, complete items 17-23.

17. Court in which case was filed:

Federal Court State Court Foreign Court Military Court Other :

A. Name of Court:

B. Location of Court (City or County and State or Country):

C. Docket/Case#:

18. Date notice/process was served (MM/DD/YYYY):

Exact Explanation

If not exact, provide explanation:

19. Is the civil litigation pending?

Yes No

If "No", complete item 20.

20. If the civil litigation is not pending, what was the disposition?

Denied Dismissed

Monetary Judgment to Applicant (Agent/Representative)

No Action Settled

Other :

Judgment (other than monetary)

Monetary Judgment to Customer

Withdrawn

21. Disposition Date (MM/DD/YYYY):

Exact Explanation

If not exact, provide explanation:

22. Monetary Compensation Details (judgment, restitution, settlement amount):

A. Total Amount:

\$

B. Individual Contribution Amount:

\$

23. If action is currently on appeal:

A. Enter date appeal filed (MM/DD/YYYY):

Exact Explanation

If not exact, provide explanation:

B. Court appeal filed in:

Federal Court State Court Foreign Court Military Court Other :

i. Name of Court:

ii. Location of Court (City or County and State or Country):

iii. Docket/Case#:

24. Comment (Optional). You may use this field to provide a brief summary of the circumstances leading to the customer complaint, arbitration/CFTC reparation and/or civil litigation as well as the current status or final disposition(s). Your information must fit within the space provided.

This claim has been brought via a third party non-attorney representative (NAR), which has known ties to an individual who has been barred from the securities industry by FINRA. The claim is without merit and may have been filed without the actual consent of the client. The allegations will be defended vigorously from this slanderous attempt to coerce a settlement by the NAR.

Internal Review DRP

No Information Filed

Investigation DRP

No Information Filed

Regulatory Action DRP

No Information Filed

Termination DRP

No Information Filed

Division Exhibit 11



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

New York Regional Office
Brookfield Place, 200 Vesey St.
New York, NY 10281-1022

**DIVISION OF
ENFORCEMENT**

David Stoelting
Senior Trial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

April 17, 2020

By UPS and Email (donsre@gmail.com)

Donald J. Fowler

[REDACTED]
Massapequa, NY 11758

Re: *Matter of Donald J. Fowler, File No. 3-19740*

Dear Mr. Fowler:

Rule of Practice 230(a) requires the Division of Enforcement to make available for inspection and copying “documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.”

During discovery in the federal court action, *SEC v. Donald J. Fowler and Gregory Dean*, 17-cv-139 (S.D.N.Y.), the SEC produced to your counsel the entirety of the pre-Complaint investigative file, except for privileged material, that led to the Division’s recommendation to institute proceedings, as well as all documents and materials obtained during discovery in the federal court action required to be produced under the Federal Rules of Civil Procedure.

Accordingly, the Division has fulfilled its production obligations under Rule 230(a). In the event that the Division becomes aware of documents within the scope of Rule 230(a) that have not previously been produced, we will promptly produce those documents.

Very truly yours,

/s David Stoelting
David Stoelting