SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES ACT OF 1933
Rel. No.8345A / December 11, 2003

SECURITIES EXCHANGE ACT OF 1934
Rel. No.48904A / December 11, 2003

INVESTMENT COMPANY ACT OF 1940
Rel. No.26289A / December 11, 2003

INVESTMENT ADVISERS ACT OF 1940
Rel. No.2200A / December 11, 2003

Admin. Proc. File No. 3-10659

In the Matter of

ZION CAPITAL MANAGEMENT LLC

and

RICKY A. LANG
c/o Robert T. McAllister, P.C.
455 Sherman Street, Suite 310
Denver, Colorado 80203

OPINION OF THE COMMISSION

INVESTMENT COMPANY PROCEEDING
INVESTMENT ADVISER PROCEEDING
CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Fraud in the Offer and Sale of Securities

Conflicts of Interest

Recordkeeping Violations

Former registered investment adviser and adviser's president and sole owner favored an account in which owner had an interest over that of an advisory client in the allocation of securities trades, made material misrepresentations and omitted material facts in hedge fund disclosure documents and marketing materials and in a Form ADV submitted to the Commission, and failed to keep and maintain required records. Held, it is in the public interest to bar owner from association with an investment company or investment adviser; to order Respondents to cease and desist from committing or causing any violations or future violations of the applicable securities laws; to order Respondents to pay, jointly and severally, a civil money penalty of $220,000; and to order the Respondents to disgorge, jointly and severally, $211,821, plus prejudgment interest.

APPEARANCES

Robert T. McAllister, for Zion Capital Management and Ricky A. Lang.

Robert M. Fusfeld and Leslie Hendrickson-Hughes, for the Division of Enforcement.

Appeal filed: February 20, 2003
Last brief received: April 22, 2003

I.

Zion Capital Management LLC ("Zion"), formerly a registered investment adviser, and Ricky A. Lang, Zion's president and sole owner, appeal from an initial decision by an administrative law judge. The law judge found that the Respondents willfully violated Section 17(a) of the Securities Act of 1933, 1/ Section 10(b) of the Securities Exchange Act of 1934 2/ and Exchange Act

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1/ 15 U.S.C. § 77q(a).

2/ 15 U.S.C. § 78j(b).

Rule 10b-5, 3/ and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940, 4/ by favoring an account in which Lang had a financial interest over Zion's advisory client, a hedge fund, in the allocation of securities trades, contrary to representations that any conflicts that occurred in the future would be resolved in a manner fair to all interests. The law judge further found that the Respondents willfully violated Section 207 of the Advisers Act 5/ by making, in Zion's Form ADV filed with the Commission, material misrepresentations and omissions regarding the existence of an actual conflict of interest and that Lang willfully aided and abetted and was a cause of Zion's violations of Advisers Act Section 204 and Advisers Act Rules 204-2(a)(3) and 204-2(a)(7) 6/ by failing to maintain copies of memoranda of orders given by the adviser for the purchase or sale of a security and all written communications relating to the execution of securities trades.

The law judge barred Lang from association with any investment adviser or investment company, 7/ ordered Respondents, jointly and severally, to pay a $220,000 civil money penalty, ordered Respondents to disgorge, jointly and severally, $211,827, with prejudgment interest, and imposed cease-and-desist orders. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 8/

3/ 17 C.F.R. § 240.10b-5.

4/ 15 U.S.C. §§ 80b-6(1) and 80b-6(2).

5/ 15 U.S.C. § 80b-7.

6/ 15 U.S.C. § 80b-4; 17 C.F.R. §§ 275.204-2(a)(3) and 275.204-2(a)(7).

7/ The law judge did not revoke Zion's registration, finding that Zion was no longer registered with the Commission as an investment adviser. The Division did not appeal that determination.

8/ The Division of Enforcement initially moved for summary affirmance of the law judge's Initial Decision although it

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II.

Dominion Asset Management ("DAM")

In April 1996, Lang, Jay Glickman, Doug Mallach, Terry Vickery, and David Dambro formed Jayhead Investments LLC to trade capital contributed by Glickman, Mallach, Vickery, and Dambro. Although Lang did not contribute capital to Jayhead, as did the other participants, he received an equity interest, initially set at 9-11/12%. 9/

Jayhead maintained an account at Salomon Smith Barney ("Smith Barney"), identified by Lang as the "master account." The master account had several sub-accounts. 10/ Shortly after the formation of Jayhead, Lang organized Dominion Asset Management ("DAM"), a subchapter S corporation. Lang was DAM's sole owner. Through DAM, Lang traded one of the Jayhead sub-accounts, entitled "Jayhead Investments LLC/Dominion Asset Management" ("DAM sub-account"). Pursuant to an oral agreement, Jayhead promised to pay Lang each month 50% of the trading profits that Lang generated in the DAM sub-account, but Lang would be responsible for 100% of the trading losses. For example, if Lang profited in April, but lost money in May, he would not be paid again until his trading recouped the May losses. Jayhead paid Lang's share of the trading profits to DAM.

8/ (...continued)
thereafter filed its brief on the merits. We determine that, in this case, further consideration of the proceeding is warranted and therefore deny the motion.

9/ The record does not indicate why Lang received an equity interest. Lang's equity interest increased to 12.3% after Dambro left Jayhead.

10/ Various persons, including Lang, had the authority to trade different portions of Jayhead's assets through these separate sub-accounts. Each trader could trade only in the sub-account assigned to that trader. At any given period, two to five individuals, including Lang, were trading for Jayhead sub-accounts.

Lang testified that his trading strategy for the DAM sub-account involved short-term trading of mostly Nasdaq-listed equities and their derivatives. He stated that he sought to make small and frequent trades throughout the day, and to carry, on average, less than 20% of the account's positions overnight.

According to the Smith Barney account statement for the DAM sub-account in March 1998, the sub-account's starting balance was $220,241. However, Lang asserted that Jayhead made available to him $500,000 in trading capital and the margin of the Jayhead master account.

Zion and the Dominion Fund

In 1998, Lang organized Zion to be the investment adviser and general partner of the Dominion Fund II L.P. ("Dominion Fund"), a hedge fund organized as a limited partnership. The Dominion Fund was Zion's only advisory client. Lang, the president and sole owner of Zion, was responsible for Zion's investment decisions. 11/

Lang retained Jim Hicks and his partner Brian McGuane of J. Edgar Capital to solicit investors for the Dominion Fund. 12/

11/ Zion was to receive a management fee from the Dominion Fund, calculated and payable quarterly, as well as incentive compensation of 25% of any profits after losses were recouped, calculated and payable at the end of each year. Although the law judge found (and the parties do not contest) that the management fee was .0375% of net trading profits, the Form ADV listed the fee as .375%, and Lang testified and stated in the Dominion Fund's marketing materials that the fee was 1.5%.

Due to Dominion Fund's losses through December 1998, Zion ultimately took no management fees, and Lang relinquished the 1.2% ownership in the Dominion Fund that he had taken in lieu of organization expenses.

12/ Initially, Mallach, Dambro, and Vickery were going to own the general partner of the Dominion Fund and participate in the offer and sale of Dominion Fund's limited partnership

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Lang, on Zion's behalf, prepared and provided Hicks and McGuane with marketing materials, an "Investment Summary" dated August 1997, an updated "Investment Summary" dated January 1998, 13/ and an "Offering Circular."

The Offering Circular included Zion's Form ADV filed with the Commission. Although an adviser must disclose conflicts of interest that would render such adviser not disinterested, none of the disclosure documents explained that Lang was an owner of and would continue to trade for the DAM sub-account and share in the profits and losses of the DAM sub-account. Indeed, the Form ADV represented that Lang's association with DAM had ended in December 1997. 14/

Although Lang continued to trade for DAM, the Offering Circular stated merely that Zion "is or may in the future

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12/ (...continued)
interests. However, because of then-pending proceedings brought against them by the Commission and the Federal Trade Commission, which later resulted in settlement and the imposition of sanctions, they withdrew from the offering. See S.E.C. v. Technigen Corp., et al., No. 98-S-933 (D. Colo. July 24, 2000) (final judgment of permanent injunction and other relief against defendants David J. Dambro and Douglas E. Mallach); F.T.C. v. Digital Interactive Associates, Inc., et al., No. 95-Z-754 (D. Colo. June 14, 1999) (stipulated final order for permanent injunction and settlement of claims as to defendants Terry K. Vickery and David Dambro).

13/ The Investment Summaries described the management and the investment objectives of the Dominion Fund. The Investment Summaries described DAM's investment and trading strategy and represented that the Dominion Fund would employ the same strategy.

14/ The Investment Summaries, which were dated August 1997 and January 1998, stated that from 1996 to "present" Lang had been portfolio manager and trader for DAM and Jayhead. The Investment Summaries did not state whether Lang had left DAM and Jayhead unlike the Form ADV.

sponsor, manage or participate in other securities investment activities and programs unrelated to the Partnership's business" and "[t]he other activities of [Zion] may create conflicts of interest with the [Dominion Fund]." (emphasis added) The Respondents further represented in the Offering Circular that Zion "will attempt to resolve all such conflicts in a manner that is fair to all such interests."

The disclosure documents also stated that Zion's personnel would refrain from trading a security for personal accounts for a period of one day after any transaction in that same security had been made for a Zion client account. Lang testified that he thought this restriction applied to trading only for an account of an individual person and did not restrict his trading for the DAM sub-account because DAM was a separate entity. 15/

The Investment Summaries described Lang's previous trading strategy for DAM, stated that this strategy had produced an 88% return since inception, and included a chart that illustrated how DAM outperformed the Dow Jones Industrial Average and the Standard and Poors Index. 16/ The Investment Summaries represented that Zion and Lang would pursue the same strategy for the Dominion Fund, claiming that the strategy "has been tested in real time market conditions" and "can be duplicated and actually improved upon with a larger capital base," for the Dominion Fund.

Although Lang wanted to raise $20 million for the Dominion Fund, and at least $5 million before he started trading for it, only three individuals invested in the Dominion Fund: James

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15/ Zion's Form ADV contained other false statements. The Form ADV stated that Lang was not employed for a period of one month in 1991. However, Lang had been unemployed for more than one year. The Form ADV also stated that Lang had been employed as a trader for Rockmont Value Investors for a six-month period in 1996. Although Lang had sought employment with Rockmont, he never traded for and received no compensation from Rockmont.

16/ The Investment Summaries described DAM as an investment partnership.

Robert Anderson invested $962,611; Patrick L. Tigue invested $150,000; and Alan Westman invested $57,053. 17/

17/ These investors ultimately lost the majority of their investment. Upon Dominion Fund's dissolution in late 1999, Anderson had lost $712,611, Tigue had lost $142,000 to $143,000; and Westman had lost $53,053 to $54,053.

Lang's Trading for DAM and the Dominion Fund

From April 1998 through December 1998, Lang traded securities for both the Dominion Fund and the DAM sub-account. Lang opened an omnibus account at Smith Barney. The omnibus account allowed Lang to buy shares of a security in a single transaction and allocate shares of that security between the DAM sub-account and the Dominion Fund, instead of entering two separate buy orders.

Lang traded for both DAM and the Dominion Fund through several broker-dealers. All of these trades, however, cleared through Smith Barney. A majority of the trades (68%) were executed through Market Wise Securities, Inc. ("Market Wise"), and its predecessor. 18/ Market Wise assigned Zion separate computer terminal log-on identifications to place trades for the Dominion Fund and DAM. However, Lang often placed trades for both entities while logged onto DAM's Market Wise account. He claimed this was easier than having to log on and off while trading for the two accounts.

Lang testified that he kept records throughout the day of which trades were for the DAM sub-account and which were for the Dominion Fund. At the end of each trading day, Lang prepared from these contemporaneous notes a handwritten summary of the trades. Lang would aggregate the trades that he made in a given security. For example, if he made five separate purchases of a security at various prices, he would record these orders as a single purchase and compute an average price. At the end of the day, Lang provided instructions to Smith Barney to allocate the securities cleared through the omnibus account between the DAM sub-account and the Dominion Fund.

Respondents did not keep the contemporaneous handwritten notes that Lang made while trading for the DAM sub-account and the Dominion Fund 19/ or the written allocation instructions sent

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18/ Market Wise was named Tiger Investment Group, Inc. prior to August 1998.

19/ Lang testified that, when he gave these notes to his

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to Smith Barney. Respondents could not produce the trade blotter for DAM and produced only a photocopy of the Dominion Fund's trade blotter. Comparing this Dominion Fund trade blotter to

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19/ (...continued)
secretary, he made no effort to retain them; he surmised that the notes must have been thrown away.

Smith Barney account statements shows that Dominion Fund's trade blotter was incomplete and inaccurate. 20/

Lang produced profit-and-loss reports for the Dominion Fund and for DAM that he claimed reflected every trade he made. These reports show securities purchased and sold in a given month as well as the amount paid for the purchases and the amount received for the sales. There is no indication on the face of the reports when they were created. When compared against the Smith Barney account statements, they do not include all of the trades made on behalf of the two entities. 21/ The reports show positions only on an aggregated basis and do not show the time of each transaction. Moreover, the reports do not show which transactions offset previously held positions in a given stock. 22/

20/ For example, the July 13, 1998, trade blotter does not record a buy order of 1,000 shares of Nordstrom stock nor a buy order of 200 shares of Tel-Save Holdings, Inc. stock, both of which appear on the July 1998 Smith Barney statement. The July 29 trade blotter does not record a short sale of 1,000 shares of Turbodyne Technologies, Inc. stock, which is listed on the Smith Barney account statement.

21/ For example, the July 1998 profit and loss report for the Dominion Fund did not include two short sales of Actel Corp. made on July 7 and two short sales of Platinum Software Corp. made on July 20.

22/ For example, on July 16, the Dominion Fund bought 5,000 shares of Omnipoint at 27.56. On July 21, the Dominion Fund sold a total of 6,000 shares of Onmipoint. It is not possible from the report to determine whether on July 21 the Dominion Fund (a) opened the day by selling its original 5,000 share position and later bought and sold an additional 1,000 shares; (b) began by shorting 1,000 shares which it subsequently covered and later sold the initial 5,000 share position; or (c) bought an additional 1,000 shares and subsequently sold all 6,000 shares.

Despite Lang's representations that he would pursue the same trading strategy for the Dominion Fund that he had used in the past for the DAM sub-account and that he would resolve any conflicts of interest fairly, the result of his contemporaneous trading for both entities was quite different. An analysis of Lang's trading and allocations for both accounts for the period April to December 1998 showed that, for day trades (in which Lang opened and closed a position in the same day by buying and selling a like amount of the same security in one day), 197 of the profitable day trades were allocated to the DAM account and only 39 to the Dominion Fund account. For so-called "partial day trades" (in which Lang opened and then closed a portion of a position in the same day), while approximately half of the 181 partial day trades were allocated to each entity, the allocations resulted in a net gain of $75,307 for DAM and a net loss of $103,997 for the Dominion Fund. With respect to positions that were opened and not offset the same day, Lang allocated $67,789 in net unrealized gains from 347 trades to DAM and allocated $510,652 in net unrealized losing trades from 458 transactions to the Dominion Fund. As of December 31, 1998, the DAM account achieved profits of $236,411 23/ while the Dominion Fund suffered losses of $699,180. 24/ The staff, while conducting its routine examination of Zion as a registered investment adviser, discovered this allocation scheme.

From April 1, 1998, through December 31, 1998, Lang received $138,498.08 in compensation from DAM, his 50% share of DAM's trading profits. Jayhead was dissolved on March 31, 2000. Although Jayhead had approximately $600,000 in assets at the time of its dissolution and Lang had an ownership in the dissolved entity, Lang did not receive a distribution of assets at dissolution.

23/ This figure represents the March 1998 balance in the DAM sub-account--$220,241--less $104,820, the sum of the ending value of the DAM account, plus the $351,832 which had been withdrawn from the account in the interim.

24/ This figure represents the starting value of the Dominion Fund account--$1,169,665--less $456,277, the ending value of the Dominion Fund account, and the $14,208 withdrawn for expenses.

III.

A. Antifraud Violations

Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 prohibit fraudulent and deceptive acts and practices in connection with the offer, purchase, or sale of a security, including making a material misrepresentation or omission. Advisers Act Section 206(1) prohibits an investment adviser from employing "any device, scheme, or artifice to defraud any client or prospective client."

Advisers Act Section 206(2) further prohibits an investment adviser from engaging in a course of business that operates as a fraud or deceit. The Supreme Court has held that this provision establishes "'the delicate fiduciary nature of an investment advisory relationship.'" The Court found that Section 206(2) requires an investment adviser "to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser -- consciously or unconsciously -- to render advice which was not disinterested." 25/ Thus, an investment adviser has "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." 26/

The Respondents misrepresented and omitted material facts with respect to the conflicts of interest in Lang's involvement with the Dominion Fund and the DAM sub-account. 27/ They did not disclose that Lang continued to trade for the DAM sub-account, that he had an interest in the sub-account, and that Lang's trading created an actual conflict of interest between the

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25/ S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92 (1963), citation omitted.

26/ 375 U.S. at 194, citation omitted.

27/ The fact that the Dominion Fund was unregistered does not affect the scope of the antifraud provisions of the securities laws in protecting the Dominion Fund, its investors, and prospective investors.

Dominion Fund and DAM. Instead, the Investment Summaries and the Offering Circular, including the Form ADV attached to the Offering Circular, discussed only potential conflicts of interest. Zion's Form ADV represented that Lang ceased working for DAM in December 1997.

Zion and Lang further represented that they would employ a trading strategy for the Dominion Fund similar to that Lang had purportedly employed for DAM in the past. In fact, Lang continued to trade for DAM and used different trading strategies for DAM and the Dominion Fund. Lang repeatedly assigned better

trades to DAM and worse trades to the Dominion Fund. Thus, the Dominion Fund received only 39 of the 197 profitable day trades. 28/ Lang also assigned most of the unrealized losses to the Dominion Fund.

Lang's favoring of the DAM account is especially telling given the differences in how his compensation was determined for each account. The fact that Lang received from DAM 50% of the trading profits payable on a monthly basis (rather than 25% of the trading profits payable on an annual basis from the Dominion Fund) created an incentive for Lang to favor DAM over the Dominion Fund.

The Respondents further represented that Lang would engage in quick in-and-out trades and that he would not expose more than 20% of capital, on average, to overnight risk. However, Lang admitted that he held positions much longer in the Dominion Fund.

28/ Lang argues that the Division's classification of his trading misstates profits and losses in both accounts. He claims that some of trades identified as day trades, for example, were not day trades because the particular stock at issue was actually held in inventory. Thus, calculating whether a particular trade was profitable required a determination as to whether the security at issue was held in inventory and the acquisition price of that security.

However, the Respondents did not proffer evidence identifying which particular shares of any security were held in inventory and these securities' initial prices to support this assertion. See text accompanying n.20 supra. See also Donald T. Sheldon, 51 S.E.C. 59, 77 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995) (finding that once the Division presented prima facie evidence of fraudulent pricing of securities, the burden of producing evidence shifted to respondents). See also 5 U.S.C. § 556(d) (placing the burden of presenting evidence on the proponent of an issue). In any event, Lang's own profit and loss calculations show that overall, the results of the Dominion Fund and DAM's trading were similar to that calculated by the Division.

By the end of 1998, he had subjected much more than 20% of the Dominion Fund's capital to overnight risk. 29/

The Respondents represented that Zion personnel would refrain from effecting a trade of a security in any personal account for at least one day after that security was traded in the Dominion Fund account. In fact, Lang effected trades for securities in the DAM sub-account on the same days that he effected trades in those securities for the Dominion Fund. Lang claims that he thought the Form ADV language that prohibited same day trading referred to his "personal" account, not DAM. However, Lang admitted that he was DAM's sole owner and that DAM was organized to receive his profits from trading the DAM sub-account. 30/

Although, under Advisers Act Section 206(2), the Respondents had an obligation to eliminate or, at a minimum, to disclose conflicts between DAM and the Dominion Fund, the Respondents' method of trading for DAM and the Dominion Fund aggravated and disguised these conflicts. Lang generally used a single computer account at Market Wise to trade for both accounts. 31/ These

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29/ Some of the positions had been held from the spring or the summer of 1998 until November 1998. In fact, Lang admitted that he undertook a strategy different from that he had described, claiming that, "I was attempting to improve upon my performance by increasing the holding period of the positions." By holding longer-term positions, Lang did not have to recognize his losses.

30/ These matters would be material because there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). A reasonable investor would want to know about the actual conflicts, Respondents' allocations, and Respondents' deviations in trading strategies.

31/ Lang did not consider this practice to be problematic. He asserted that, if he had placed orders by telephone, he

(continued...)

commingled trades were sent to a single Smith Barney omnibus account. Zion failed to keep either Lang's trading records or their allocation instructions to Smith Barney. 32/

As a result of Lang's trading allocations, during the eight months that Lang traded for both the Dominion Fund and the DAM sub-account, the sub-account was profitable for six months of the period. Even by Lang's reckoning, the Dominion Fund was profitable in only two months, April and September 1998.

The Respondents claim that they did not favor DAM in their allocations. Instead, they assert that "market factors" resulted in the disparate results between the Dominion Fund and the DAM sub-account. Like the law judge, we find this claim to be "unpersuasive." The Respondents contend that volatile and illiquid markets affected DAM and the Dominion Fund differently because of the position size and holding period. However, during this period, DAM and the Dominion Fund generally engaged in similarly sized trades in similar and often in the same securities. 33/

31/ (...continued)
would not need separate phone lines to trade for two different accounts.

32/ Lang also asserts that the three investors did not rely on the disclosure documents in determining to invest in the Dominion Fund. However, we have consistently held that the Commission does not have to demonstrate reliance of investors to prove a violation of the antifraud provisions. See, e.g., S.E.C. v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985) and Martin R. Kaiden, Exchange Act Rel. No. 41629 (July 20, 1999), 70 SEC Docket 439, 451 n.34.

33/ Moreover, as discussed above, the Respondents had represented that the Dominion Fund would generally engage in in-and-out trading and limit the percentage of the Fund's capital exposed to overnight risk. The Respondents had also represented that the Dominion Fund's trading would mirror DAM's prior trading.

The Respondents further suggest that the difference in the size of DAM and the Dominion Fund accounts for the different trading outcomes. The Respondents do not explain why the difference between $220,241 versus $1,169,665 (the value of the DAM sub-account and the Dominion Fund at the beginning of the trading period at issue) was significant to their trading. Moreover, Lang asserted repeatedly that the DAM sub-account had access to $500,000 of Jayhead's capital. Thus, the alleged disparity in the sizes of the accounts appears less than the Respondents now claim. We also note that Lang had represented that his strategy for the DAM sub-account would be even more successful with greater capital.

The Respondents also assert that changes in NASD's rules governing the Small Order Execution System ("SOES") reducing the size of transactions that could be effected through SOES hampered Lang's ability to liquidate positions after October 1998. However, the average size of sale trades for the Dominion Fund account in fact increased slightly after the rule change -- from 3,668 shares in July 1998 to 4,137 in November 1998. We conclude that SOES policies do not explain the different outcomes of the two accounts.

Lang, as president and sole owner of Zion, controlled Zion. 34/ We find that Respondents willfully violated Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Sections 206(1) and 206(2).

34/ While Lang did not dispute that he was properly charged as primarily liable under Advisers Act Section 206(1) and (2), we do not need to reach the question whether Lang waived this issue. The courts have found that an associated person is liable under Advisers Act Section 206 where the investment adviser is controlled by the associated person. See, e.g., S.E.C. v. Berger, 244 F.Supp.2d 180, 192 (S.D.N.Y. 2001) (finding associated person liable under Sections 206(1) and (2) based on control of investment adviser), aff'd on other grounds, 2003 U.S. App. LEXIS 3562 (2d Cir. Feb. 27, 2003). See also John J. Kenny, Securities Act Rel. No. 8234 (May 14, 2003), 80 SEC Docket 564, ___ n.54, appeal pending, No. 03-2327 (8th Cir.).

Section 207 of the Advisers Act

Advisers Act Section 207 makes it unlawful for any person willfully to make material misstatements or omissions in registration applications or reports, such as the Form ADV, filed with the Commission. In Zion's Form ADV, Respondents omitted disclosure of the actual conflicts of interest between DAM and the Dominion Fund. Moreover, Respondents represented that Lang had ceased his association with DAM in 1997. The Respondents represented that any potential conflicts of interest would be resolved fairly. They misstated that Lang had been employed by Rockmont and misrepresented that in 1991 he had been unemployed for one month, when in fact, he had been unemployed for one year. By making these material misstatements in Zion's Form ADV, the Respondents willfully violated Advisers Act Section 207.

B. Books and Records Violations

Section 204 of the Advisers Act requires that investment advisers "make and keep" appropriate records in the course of conducting their business. Advisers Act Rule 204-2(a)(3) requires investment advisers to keep "[a] memorandum of each order given by the investment adviser for the purchase or sale of any security," and Advisers Act Rule 204-2(a)(7) requires investment advisers to maintain originals of all written communications received and sent by the investment adviser relating to the placement or execution of any order to purchase or sell any security.

Zion did not maintain memoranda of the orders made on behalf of the Dominion Fund or Lang's allocation instructions. Neither the Dominion Fund's "trade blotter" nor Lang's profit and loss reports records every trade Lang made on behalf of the Dominion Fund. We find that Zion's failure to maintain these records constituted willful violations of Advisers Act Section 204 and Rules 204-2(a)(3) and 204-2(a)(7) thereunder.

Lang willfully aided and abetted these violations. 35/ Lang concedes that he did not retain his contemporaneous trading notes that purportedly memorialized the trades he placed on behalf of the Dominion Fund. Lang also concedes that Zion did not retain copies of the written communications sent to Smith Barney directing the allocation of trades in the omnibus account to the DAM and the Dominion Fund brokerage accounts. Lang's failure to comply with these important legal requirements was at least reckless. Lang continued to assert before us that these violations are merely "technical" and that the trading notes he discarded--the only complete record of the orders placed--were "not essential for any record keeping purpose." We disagree. His failure to keep these records disguised his fraudulent allocations. Because we find Lang aided and abetted these recordkeeping violations, he necessarily was a cause of the violations. 36/

IV.

A. Bar and Cease-and Desist Orders

In order to determine appropriate sanctions, we consider factors such as: the egregiousness of the violations, the isolated or recurrent nature of the violations, the degree of scienter involved, the sincerity of the respondents' assurances against future violations, the respondents' recognition of the wrongful nature of their conduct, and the respondents' opportunity to commit future violations. In determining whether

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35/ To establish that Lang aided and abetted the violations, we must find that: (1) Zion committed a violation; (2) Lang had a general awareness or reckless disregard that his actions were part of an overall course of conduct that was improper; and (3) Lang substantially assisted the conduct that constituted the violation. See Sharon M. Graham v. S.E.C., 222 F.3d 994, 1000 (D.C. Cir. 2000); Robert L. McCook, Exchange Act Rel. No. 47572 (Mar. 26, 2003), 79 SEC Docket 3421, 3425.

36/ Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998).

to impose cease-and-desist orders, we also consider the risk of future violations. 37/

The Respondents made material misrepresentations and omissions about the Dominion Fund and Lang's relationship with the DAM sub-account. They repeatedly favored the DAM sub-account over their client, the Dominion Fund, in the allocation of securities trades. The Respondents harmed the Dominion Fund investors, who incurred substantial losses. Their conduct was egregious, took place over several months, and occurred with scienter. Accordingly, pursuant to Section 9(b) of the Investment Company Act and Section 203(f) of the Advisers Act, 38/ we find that it is in the public interest to bar Lang from association with any investment adviser or investment company.

We also find that, because of the nature of the Respondents' conduct and because the Respondents are in a position to commit such violations in the future, there is a risk that they will engage in violations in the future. We therefore order them to cease and desist from committing or causing any violations or future violations of Exchange Act Section 10(b) and Rule 10b-5, Securities Act Section 17(a), and Advisers Act Sections 204, 206(1), 206(2), 207 and Rules 204-2(a)(3) and 204-2(a)(7).

B. Disgorgement

37/ In addition to the factors discussed above, in determining whether to impose a cease-and-desist order, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. KPMG Peat Marwick LLP, Exchange Act Rel. No. 43862 (Jan. 19, 2001), 74 SEC Docket 384, 436, reh'g denied, Exchange Act Rel. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, petition denied, 289 F.3d 109 (D.C. Cir. 2002).

38/ 15 U.S.C. 80a-9(b) and 15 U.S.C. 80b-3(f).

Disgorgement is an equitable remedy designed to deprive wrongdoers of unjust enrichment and to deter others from violating the securities laws. 39/ The Respondents' failure to maintain complete and accurate trading records makes the task of determining an appropriate amount of disgorgement difficult. Particularly since the uncertainty of the disgorgement amount was caused by the Respondents' illegal conduct, the amount of

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39/ S.E.C. v. First City Financial Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989); S.E.C. v. Robert Johnston and Fiduciary Planning, Inc., 143 F.3d 260, 263 (6th Cir. 1998); John J. Kenny, Exchange Act Rel. No. 47847 (May 14, 2003), 80 SEC Docket 564, 595, appeal pending, No. 03-2327 (8th Cir.).

disgorgement "need only be a reasonable approximation of profits causally connected to the violation." 40/

The law judge denied the Division's request for disgorgement of all of the Dominion Fund's losses and all of Lang and DAM's profits. Based on Lang's representation that he would use the same investment strategy for the Dominion Fund and DAM, the law judge determined that it was appropriate to allocate the sum of DAM's profits and Dominion Fund's profits in proportion to their starting values in March 1998. 41/ The law judge therefore ordered the Respondents to disgorge $211,827, the sum of (1) $138,498, Lang's 50% share of DAM's trading profits for the relevant period, plus (2) $73,329, an apportionment of the net of Dominion's losses and DAM's profits.

We believe that the law judge's calculation is a reasonable approximation of Respondents' unjust enrichment. Lang's allocations of profitable trades to the DAM sub-account ensured that Lang received monthly compensation from DAM. Lang also avoided having to recoup losses before he could receive a share in further trading profits. We believe the law judge's formula was a reasonable effort to undo Lang's allocations. If Lang had not made the allocations and had, as he represented, traded the accounts using the same strategy, the profits or losses should have been roughly proportional. Adding this amount to his trading profits from DAM approximates his total benefit from both his share of the trading profits and his avoiding having to make up the trading losses in the DAM sub-account.

Respondents claim that there "is no mathematical or factual basis" for this calculation of disgorgement. They, however, bear

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40/ S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996), cert. denied, 522 U.S. 812 (1997), quoting, S.E.C. v. Patel, 61 F.3d 137, 139 (2d Cir. 1995).

41/ The law judge added the total starting values of the Dominion Fund to that for DAM ($1,169,665 + $220,241 = $1,389,906). DAM's starting value was 15.85% of that total. The law judge then allocated 15.85% of the net of Dominion Fund's losses and DAM's profits, which was $462,769, or $73,329 as the losses.

the burden of demonstrating why that figure is not a reasonable approximation. 42/ Other than Lang's testimony that he did not make allocations that favored the DAM sub-account, they have not produced any evidence to support their assertion. Accordingly, we order Respondents to pay, jointly and severally, disgorgement in the amount of $211,821.

C. Civil Money Penalty

Investment Company Act Section 9(d) and Advisers Act Section 203(i) 43/ authorize the Commission to impose a civil money penalty when such penalty is in the public interest. Once a public interest determination is made, Investment Company Act Section 9(d)(2) and Advisers Act Section 203(i)(2) 44/ establish a three-tier system for assessing the amount of the penalty to be imposed. 45/ The third tier provides for a maximum of $110,000 for each act or omission by a natural person ($550,000 for any other person) if the conduct (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and (b) resulted in, or created a significant risk of, substantial loss to others or resulted in substantial pecuniary gain to the person who committed the act or omission.

As set forth in this opinion, we find that the Respondents' conduct involved fraud, deceit, and a deliberate or reckless disregard of the antifraud provisions of the securities laws, and

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42/ SEC v. First City Fin. Corp., 890 F.2d at 1231.

43/ 15 U.S.C. §§ 80a-9(d) and 80b-3(i).

44/ 15 U.S.C. §§ 80a-9(d)(2) and 80b-3(i)(2). The maximum amounts of these civil money penalties were adjusted for inflation for violations occurring after December 9, 1996, and before February 2, 2001, by 17 C.F.R. § 201.1001.

45/ The first tier provides for a maximum of $5,500 for each act or omission by a natural person ($55,000 for any other person). The second tier provides for a maximum of $55,000 for each act or omission by a natural person ($275,000 for any other person) if the conduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

the conduct caused substantial loss to the three Dominion Fund investors. Lang was the sole owner of Zion and used it as a vehicle for his violations. We therefore find that the third-tier joint and several penalty of $220,000 imposed by the law judge is appropriate in the public interest.

Section 308(a) of the Sarbanes-Oxley Act permits the Commission to direct that a civil money penalty be added to a disgorgement fund for the benefit of the victims of violations of the securities laws. 46/ We deem it appropriate that the funds paid to satisfy the civil money penalty be added to the

46/ 15 U.S.C. § 7246.

disgorgement fund to be distributed to victims of the Respondents' fraud, pursuant to Section 308 (Fair Funds for Investors) of the Sarbanes-Oxley Act of 2002. 47/

An appropriate order shall issue. 48/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

47/ Although these proceedings were brought before the passage of the Sarbanes-Oxley Act (the "Act"), we are applying the Fair Funds provision. Payment of these sanctions to a "fair fund" does not infringe on the rights of the Respondents. The amount of the sanctions is not affected by the Act. Rather, the Act merely allows that civil penalties be paid to the investors who suffered losses rather than to the U.S. Treasury. The Commission has ordered such sanctions be distributed to victims pursuant to Section 308 in numerous settled proceedings initially brought before the passage of the Act. See, e.g., S.E.C. v. WorldCom, Inc., Litigation Rel. No. 18277 (Aug. 7, 2003), 2003 SEC LEXIS 1879.

48/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES ACT OF 1933
Rel. No. 8345A / December 11, 2003
SECURITIES EXCHANGE ACT OF 1934
Rel. No. 48904A / December 11, 2003
INVESTMENT COMPANY ACT OF 1940
Rel. No. 26289A / December 11, 2003
INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2200A / December 11,2003

Admin. Proc. File No. 3-10659

In the Matter of

ZION CAPITAL MANAGEMENT LLC

and

RICKY A. LANG
c/o Robert T. McAllister, P.C.
455 Sherman Street, Suite 310
Denver, Colorado 80203

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Ricky A. Lang be, and he hereby is, barred from association with any investment adviser or investment company; and it is further

ORDERED that Ricky A. Lang and Zion Capital Management LLC cease and desist from committing or causing any violations or any future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, Section 17(a) of the Securities Act of 1993, and Sections 204, 206(1), 206(2), and

207 of the Investment Advisers Act of 1940 and Rules 204-2(a)(3) and 204-2(a)(7); and it is further

ORDERED that Ricky A. Lang and Zion Capital Management LLC, jointly and severally, pay disgorgement in the amount of $211,821, together with prejudgment interest, as described in 17 C.F.R. § 201.600(b), from December 31, 1998, which the Commission deems to be the date of the violative conduct, through the last day of the month preceding the month in which disgorgement is made; and it is further

ORDERED that Ricky A. Lang and Zion Capital Management LLC, jointly and severally, pay a civil monetary penalty of $220,000, which shall be added to and become part of the disgorgement fund for the benefit of the victims of the violations, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002; and it is further

ORDERED that the Division of Enforcement submit a plan of disgorgement in accordance with Rule 610 of the Rules of Practice, 17 C.F.R. § 201.610, within 60 days of the date of this order; and is further

ORDERED that Ricky A. Lang and Zion Capital Management LLC shall, within 21 days of the entry of the Order, pay the civil money penalties and the disgorgement. Payment shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (iv) submitted under cover letter which identifies the particular respondents in this proceeding and the file number of this proceeding making payment. A copy of this cover letter and check shall be sent to Robert M. Fusfeld, Counsel for the Division of Enforcement, Securities and Exchange Commission, Central Regional Office, 1801 California Street, Suite 4800, Denver, Colorado 80202-2648.

By the Commission.

Jonathan G. Katz
Secretary