INITIAL DECISION RELEASE NO. 332
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12436

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
BRENDAN E. MURRAY	:	July 10, 2007
	:	
	:	

APPEARANCES: James McGovern and Susannah Dunn for the Division of Enforcement, Securities and Exchange Commission

Brendan E. Murray, pro se

BEFORE: James T. Kelly, Administrative Law Judge

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on September 26, 2006, pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (Advisers Act) and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (Investment Company Act).

The OIP alleges that from November 2001 through February 2002 (the relevant period), Respondent Brendan E. Murray (Murray), a managing director of Cornerstone Equity Advisors, Inc. (Cornerstone Advisors), engaged in a scheme to defraud the Cornerstone Funds, a family of mutual funds registered with the Commission and the advisory client of Cornerstone Advisors. Specifically, the OIP alleges that Murray and another person associated with Cornerstone Advisors doctored invoices submitted to the Funds by service providers to request payments in excess of the amounts actually due.[1] They then instructed the Funds' administrator to pay a related entity rather than pay the providers directly. When the inflated payments reached the

[1] James A. DeMatteo (DeMatteo), the other associated person referenced in the OIP, consented to orders: (1) requiring him to cease and desist from committing or causing any violations or future violations of Advisers Act Sections 206(1) and 206(2) and Investment Company Act Section 37; and (2) barring him from association with any investment adviser and prohibiting him from serving or acting in certain capacities with an investment company. The Commission waived payment of disgorgement, prejudgment interest, and a civil penalty, based on DeMatteo's financial condition. James A. DeMatteo, 88 SEC Docket 3362 (Sept. 26, 2006).

bank account of the related entity, it paid the service providers the actual amounts they were owed and it used the excess amounts to pay increased salaries, meals, and credit card expenses, among other things.

The OIP alleges that, as a result of this conduct, Murray willfully aided and abetted and caused Cornerstone Advisors to violate Sections 206(1) and 206(2) of the Advisers Act, and that Murray willfully violated Section 37 of the Investment Company Act.

As sanctions for the alleged misconduct, the Division of Enforcement (Division) seeks to bar Murray from association with any investment adviser and from working for an investment company. It also requests a cease-and-desist order, disgorgement, prejudgment interest, and a civil penalty. Murray maintains that all charges should be dismissed.

I held five days of public hearings in New York, N.Y., during January 2007.[2] The parties then filed proposed findings of fact, proposed conclusions of law, and supporting briefs.[3]

FINDINGS OF FACT

I base my findings and conclusions on the entire record and on the demeanor of the witnesses who testified at the hearing. I applied "preponderance of the evidence" as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). I have considered and rejected all arguments, proposed findings, and proposed conclusions that are not discussed in this Initial Decision.

Background: Respondent and Related Entities

Cornerstone Advisors, a Nevada corporation, was registered with the Commission as an investment adviser from October 1998 until March 2002, when it withdrew its registration. (Tr. 172; DX 1-3.) It was the investment adviser to the Cornerstone Funds from September 1998 through February 2002. (Tr. 56, 172-84; DX 5, 6, 10-14, 87.) It served as interim adviser from September 1998 until March 1999, when it entered into written investment advisory agreements with the Cornerstone Funds. (Tr. 177-80; DX 10-14, 87.) Pursuant to these agreements, Cornerstone Advisors was responsible for providing Cornerstone Funds with investment advice, supervising and managing all aspects of the Funds' operations, and providing, obtaining, and

[2] The hearing transcript, as corrected by my Order of March 6, 2007, will be cited as "Tr. __." The Division's exhibits and Murray's exhibits will be cited as "DX __" and "RX __," respectively. Murray's Answer will be cited as "Answer __."

[3] The Division's Proposed Findings of Fact and Conclusions of Law and the Division's Post-Hearing Brief will be cited as "Div. Prop. Find. __" and "Div. Br. __," respectively. Murray's Proposed Findings of Fact and Conclusions of Law and Murray's Post-Hearing Brief will be cited as "Resp. Prop. Find. __," and "Resp. Br. __," respectively. The Division's Post-Hearing Reply Brief will be cited as "Div. Reply Br. __."

supervising administrative services to the Funds. (Tr. 176-81; DX 10-14.) It also provided officers to the Cornerstone Funds at no cost. (Tr. 182; DX 10-14.)

Although the written advisory agreements expired in March 2001, Cornerstone Advisors continued to serve as the Funds' investment adviser and perform the same services it had when the agreements were in effect.[4] (Tr. 183-84, 191-92; DX 10-14.) All portfolio management, administrative, and other services that Cornerstone Advisors performed for the Cornerstone Funds were covered by Cornerstone Advisors' advisory fees.[5] (Tr. 192-95; DX 10-14, 102, 103.) Cornerstone Advisors filed for liquidation under Chapter 7 of the United States Bankruptcy Code in October 2002. (Tr. 175, 217; DX 17.)

Stephen Leslie (Leslie) and DeMatteo founded Cornerstone Advisors in 1997. Leslie was its chief executive officer and DeMatteo was its president through February 2002. They collectively owned more than fifty percent of its stock. (Tr. 172-75, 184; DX 1, 3.) Leslie also served as president of the Cornerstone Funds. (Tr. 176.)

The **Cornerstone Funds** consisted of: (1) the Cornerstone Funds, Inc.—New York Muni Fund series; (2) the Cornerstone California Muni Fund; and (3) the Cornerstone Fixed-Income Funds. The Cornerstone Fixed-Income Funds consisted of three series: the High-Yield Municipal Bond Series; the Tax-Free Money Market Series; and the Cornerstone U.S. Government Income Fund Series. (Tr. 56, 172-180; DX 5-9, 10-14, 87.) The Cornerstone Funds were registered investment companies under the Investment Company Act during the relevant period. (Tr. 414; DX 7-9.) However, they ceased offering shares to the public in April 2000, when the Funds' auditors refused to certify the Funds' 1999 financial statements. They were ultimately liquidated, beginning in February 2002. (Tr. 58, 256; DX 87.)

Murray is a forty-five-year-old resident of Island Park, N.Y. (Answer at 1; Tr. 3, 238.) He has worked in the securities industry since 1983, primarily in a back-office capacity, and has known DeMatteo since 1987, when they both worked at Drexel Burnham Lambert, Inc. (Tr. 308, 379-82, 480, 633.) Murray joined Cornerstone Advisors in September 1998 as a managing director and held that position until April 2002.[6] (Tr. 187, 380-83, 479-81; DX 81, 99, 118; RX 2.)

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[4] Leslie suggested that new advisory agreements, with identical terms as the originals, were executed. No such agreements were entered as exhibits. (Tr. 183-84, 198.)

[5] These fees were calculated as a percentage of assets under management and paid to Cornerstone Advisors on a monthly basis. (Tr. 176-77; 182-84; DX 10-14.)

[6] Murray testified that his formal employment arrangement with Cornerstone Advisors ended in late 2000. (Tr. 361, 483.) This assertion, if true, elevates form over substance. Murray continued to hold himself out as managing director and continued to perform the same duties he had previously performed until February 2002. (Tr. 383-85; DX 99; RX 2.) He also took on additional duties, as set forth infra.

Murray performed a broad range of services for the Cornerstone Funds during his employment with Cornerstone Advisors. (Tr. 148, 187-88, 282-83, 382-83.) For example, he was responsible for operations and administration, handled mutual fund clearing, processing, and sales, and assisted in resolving issues concerning the Fall Street Faire property, an illiquid fund asset located in upstate New York. (Tr. 187-88, 360, 382-84; RX 2.) Murray also communicated with the Cornerstone Funds' administrator to resolve issues, and briefly provided portfolio management services. (Tr. 147-48, 162-64, 275-76, 305-09, 384, 519, 555-56; DX 99, 122; RX 6.) Lastly, Murray served as compliance officer for Cornerstone Advisors from January 2001 through February 2002. (Tr. 185-87, 385; DX 1.)

Murray also served as secretary to the Cornerstone Funds during the relevant period. (Tr. 182, 187, 244, 361-62; DX 62; RX 14.) In this capacity, he attended board meetings and drafted minutes of such meetings. (Tr. 554-64, 645.)

Voyager Institutional Services, LLC (Voyager), was formed in 1999 by Leslie and DeMatteo, who were its only principals. (Tr. 58, 190, 558; DX 84, 87.) Because Voyager was under common control with Cornerstone Advisors at all relevant times, it was an affiliate of Cornerstone Advisors. Voyager provided Web site maintenance and small administrative services to the Cornerstone Funds, under a client servicing agreement approved by the Cornerstone Funds' boards of directors in 2000. (Tr. 57, 202, 506; DX 84, 87.) Voyager shared office space with Cornerstone Advisors. (Tr. 190, 305.) Murray served Voyager as a consultant beginning in late 2000. (Tr. 203, 483.)

Invoice Processing by Cornerstone Until Leslie's Stroke

Until November 2001, Leslie was solely responsible for managing the portfolios of the Cornerstone Funds on behalf of Cornerstone Advisors. (Tr. 148, 184.) He also was solely responsible for reviewing and approving all invoices submitted by third-party vendors for services performed for the Cornerstone Funds.[7] (Tr. 176, 181-82, 188-90, 245, 383; DX 10-14.) This procedure worked as follows.

Leslie reviewed an incoming invoice for accuracy and, if acceptable, forwarded it to Orbitex Fund Services, Inc. (Orbitex), the Cornerstone Funds' administrator. Orbitex then sent Leslie an expense authorization form that detailed the proposed amount of payment, name of the vendor, and the services provided. Leslie signed and returned that form to Orbitex, which then forwarded it to the Union Bank of California (UBC), the custodian for the Cornerstone Funds. UBC paid the third-party vendors directly. (Tr. 188-92, 245-46.)

On or about October 31, 2001, Leslie suffered a stroke, resulting in his hospitalization until June 2002. He resumed performing some work in January 2002 from the hospital but never returned to Cornerstone Advisors' offices. (Tr. 174-75, 197-98.)

[7] The processing of invoices was part of Cornerstone Advisors' duties under its agreements with the Cornerstone Funds. (Tr. 176.)

Invoice Inflation Scheme

By the time Leslie fell ill, Murray and DeMatteo were aware that the Cornerstone Funds were facing imminent liquidation.[8] (Tr. 655; DX 118; RX 20.) Within a week or two of Leslie's incapacitation, Murray and DeMatteo hatched a billing scheme to skim money from the Cornerstone Funds. (Tr. 247-51.)

First, the invoice payment procedures for third-party vendors changed. Murray assumed responsibility for approving payment of vendor invoices and for signing expense authorizations. (Tr. 245-51, 287-88, 383-84, 449; RX 2.) Additionally, Voyager inserted itself in the payment chain, between UBC and the vendor. (Tr. 246-48, 332-33; DX 62.) Thus, instead of UBC paying the vendors directly, UBC was instructed to send the payment to Voyager, which would then pay the vendors from Voyager's bank account. (Tr. 246-52.) As a result, the expense authorization forms returned to Orbitex listed Voyager as the vendor to be paid. (Tr. 246-47; DX 51, 54, 55, 59, 62.) However, not all vendors had payment of their invoices routed through Voyager. Major law firms, major accounting firms, and the directors of the Cornerstone Funds continued to receive payment directly from UBC.[9] (Tr. 271, 332-35.)

Once these new procedures were set, Murray created, approved, and submitted to Orbitex falsely inflated invoices and expense authorizations for vendors that had payments routed through Voyager.[10] (Tr. 240-53, 375-77.) The false invoices created by Murray sought payment for amounts far greater than the amount actually billed by the vendors. The inflated payments were sent to Voyager's bank account, per Murray's instructions, and Voyager then paid the vendor with a check from its account for the amount the vendor actually billed.[11] Voyager pocketed the difference. (Tr. 240-53, 272-77, 375-77; DX 23, 26, 29, 30, 32, 35, 36, 44-49, 53-56.)

Inflated Invoices for Jay Sanders

Jay Sanders (Sanders) is a certified public accountant based in New York City. (Tr. 55-57.) He performed various tax and bookkeeping services for Cornerstone Advisors and Voyager from 2000 onward. (Tr. 56-59, 86, 92-95.) He also assisted the Cornerstone Funds from 2000 onward in setting up a trust for their liquidation and in addressing issues concerning the Fall

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[8] Murray began seeking a new job in the summer of 2001. (RX 9, 20.)

[9] On one occasion, payment to a law firm was mistakenly routed to Voyager. Upon discovering this error, Murray and DeMatteo immediately reversed the transaction and had the firm paid directly by UBC. (Tr. 276-77, 347; DX 66.)

[10] Murray defends on the grounds that he was merely following DeMatteo's express directions and orders in inflating the vendor invoices identified in this decision. (Tr. 238, 646; Resp. Prop. Find. ¶ 29.) This argument will be addressed infra.

[11] DeMatteo signed the checks from Voyager to the vendors. (DX 53, 57.)

Street Faire property in Niagara Falls, N.Y. (Tr. 57-59.) Prior to October 2001, Sanders submitted bills for his services for the Cornerstone Funds to Cornerstone Advisors. (Tr. 58-59; DX 25.) In November 2001, however, DeMatteo asked Sanders to submit his bills to Voyager. (Tr. 59-60; DX 100.)

On November 12, 2001, Sanders submitted an invoice in the amount of $5,000 for services rendered during October 2001. (Tr. 59-61; DX 25.) Murray created a phony Sanders invoice in the amount of $17,500 covering the same time period and using the same date and description of services as the original. (Tr. 63-64, 238-48, 261-62; DX 27, 105.) He made the invoice appear as if it were on Sanders' letterhead, but misspelled his name by typing "Samders" instead of "Sanders." (Tr. 63, 238-39; DX 27, 105.) Murray then approved and submitted the phony invoice and expense authorization to Orbitex with instructions that payment be made to Voyager. (Tr. 238-48, 262; DX 62, 105.) UBC paid the full amount of the expense authorization, $17,500, to Voyager. (Tr. 244-47; DX 62, 68.) Voyager, in turn, paid $5,000 to Sanders and retained the $12,500 difference. (Tr. 61-63, 419-21; DX 26, 95.)

Thereafter, Sanders submitted to Murray and DeMatteo invoices for his services to the Cornerstone Funds in the following amounts and for the following periods: $28,275 for November 2001; $41,650 for December 2001; and $30,400 for January 2002. (Tr. 62-77, 125-26, 262-63; DX 31, 34, 100.) Murray prepared falsely inflated invoices to Voyager for each of these periods, using phony Sanders letterhead and the same description of services in Sanders' original invoices. He also created similarly inflated invoices to the Cornerstone Funds using Voyager letterhead. Murray approved and submitted the fake invoices and expense authorizations to Orbitex, with instructions that payment be made to Voyager. The inflated invoices and expense authorizations were as follows: $53,275 for November 2001; $65,650 for December 2001; and $55,400 for January 2002. (Tr. 73-84, 262-279; DX 30, 33, 36, 63, 64, 66, 106.)

In each instance, UBC paid to Voyager the full amount of the inflated invoices and expense authorizations. Voyager then paid Sanders the amount that he originally invoiced, and retained the difference. Cumulatively, the Cornerstone Funds paid Voyager $86,500 more than what Sanders had invoiced and received. (Tr. 61-79, 419-25; DX 26, 29, 31, 32, 34, 35, 68-70, 100, 107.)

Fictitious Invoice for the PR Group

The PR Group is a small, home-based company located in Niagara Falls. (Tr. 39-40.) From early 2000 to June 2001, the PR Group managed the Fall Street Faire property for the Cornerstone Funds. (Tr. 41-42.) In return, it received $350 per week. (Tr. 43.) All billing and invoice questions were handled by either Murray or Leslie. (Tr. 43-44, 54.)

The PR Group was not paid for its services from January through May 2001. (Tr. 44.) In total, the Cornerstone Funds owed it about $7,000. (Tr. 44.) Murray received an invoice for that amount in June 2001 but refused to pay it. Murray offered to settle the matter for $1,000. For the future, Murray offered to retain the PR Group for $250 per week on an as-needed basis. The PR Group agreed to these terms. Shortly thereafter, the PR Group sent Murray its files relating

to the Fall Street Faire property, but did not charge for this service. It performed no other work on behalf of the Cornerstone Funds or any of its related entities or affiliates, nor did it submit any additional invoices to the Cornerstone Funds. (Tr. 44-51, 278; DX 39.)

In late November 2001, Murray prepared a fictitious $4,000 invoice on PR Group letterhead for services it purportedly rendered. (Tr. 48-50, 278-82; DX 41.) He also prepared a corresponding invoice for the same amount on Voyager letterhead and directed to the Cornerstone Funds, with instructions to remit payment to Voyager. (Tr. 279-82; DX 40.) Both invoices described the services rendered by the PR Group as including maintenance of the Fall Street Faire property. (DX 40, 41.) Prior to creating the invoices, Murray believed that the PR Group had performed no services since June 2001. He did nothing to confirm that any services had been rendered. (Tr. 278-84.) Nevertheless, Murray approved and submitted to Orbitex for payment this invoice and the expense authorization form. (Tr. 282-84; DX 40, 41, 62.) UBC, in turn, paid Voyager $4,000. The PR Group received no payment related to this invoice. (Tr. 48-50, 433; DX 62, 68.)

Inflated Invoice for Edward Rabson

Edward Rabson (Rabson) is an experienced municipal bond analyst. (Tr. 139-42.) In the summer of 2001, he met with Leslie and DeMatteo about joining Cornerstone Advisors. Although there was mutual interest, nothing developed until Leslie's stroke. (Tr. 141-44.) At that time, DeMatteo asked Rabson to assist in managing the Cornerstone Funds' portfolios. Rabson accepted and he and DeMatteo, representing Voyager, signed a contract for Rabson's services, dated December 3, 2001, that set Rabson's compensation at $1,000 per month.[12] Murray prepared this contract. (Tr. 142-49, 275-76, 307-11; DX 43.) At the same time, Murray also prepared a second contract between Rabson and Voyager. (Tr. 308-11; DX 42.) This second contract set Rabson's compensation at $5,000 per month; however, unlike the first contract, this agreement was not executed by Rabson or by DeMatteo. (DX 42.) Rabson and DeMatteo never even discussed increasing Rabson's compensation to $5,000 per month until January 2002. (Tr. 154, 306-14, 340-41; DX 42, 43.)

Murray then created, approved, and submitted for payment three inflated invoices and expense authorizations concerning Rabson's portfolio management services. The three invoices were each for $5,412.50 and dated November 9 and November 29, 2001, and January 4, 2002, respectively. (Tr. 307-18, 339-40, 393-94; DX 44, 46, 48, 62, 64, 86.) In reality, Rabson did not submit bills or invoices for his services. He received monthly payments of $1,000, $1,500, and $1,500, respectively, from Voyager.[13] (Tr. 148-53, 155; DX 45, 47, 49.)

Before Murray prepared the first invoice for Rabson's services, DeMatteo provided Murray with the unexecuted $5,000-per-month contract as support for the invoice. DeMatteo informed Murray that it was the contract in effect. Murray never inquired why the second

[12] The contract was between Voyager and Rabson. (Tr. 146; DX 43.)

[13] The extra $500 in the latter two payments was on account of "work well done." (Tr. 151-52.)

contract was not executed or what had happened to the $1,000-per-month contract that he had prepared.

Inflated Invoice for Harry Peterson

Rabson ceased working as portfolio manager in January 2002, after which Murray took over that role. (Tr. 162-64, 276, 308-09; DX 122.) Murray alerted Orbitex about Rabson's departure on January 29, 2002, and informed it that an "intensive search for [Rabson's] replacement has been mounted." (DX 122.) The next day, Murray prepared and approved an invoice on Voyager letterhead in the amount of $8,118.75 for portfolio management services purportedly rendered by Harry Peterson (Peterson) "under the terms of [an] agreement" with Peterson. (Tr. 674-76; DX 59.) The day after that, January 31, 2002, Murray approved an expense authorization for the same amount, with instructions that payment be made to Voyager. (Tr. 342-44; DX 59.) In fact, Peterson received only one payment from Voyager, dated February 14, 2002, in the amount of $500. (Tr. 193-94, 433; DX 60, 71, 84.)

Murray did nothing to confirm the extent of Peterson's services to the Cornerstone Funds prior to submitting the invoice and expense authorization. He also never confirmed the existence of an agreement with Peterson. Rather, he relied on DeMatteo's representation that Peterson was retained for $7,500 per month. DeMatteo made this representation after Murray alerted Orbitex about the search for a new portfolio manager and before the invoice was prepared. (Tr. 674-76.)

It is not believable that the Cornerstone Funds would retain Peterson for more than $8,000 for a few days of service, when the prior portfolio manager had been paid $1,000 to $1,500 per month. I also find questionable the timing of DeMatteo's supposed representation concerning Peterson's retention. In fact, Peterson had no contract with Voyager and was not an employee. Prior to Leslie's illness, Peterson assisted Leslie in marketing pension advisory services and had no responsibilities at Cornerstone Advisors. (Tr. 193-94.) He was not retained to manage the Funds' portfolios immediately after Leslie's illness. (Tr. 193-95, 342-47.)

Inflated Invoice for Richardson Management

Voyager engaged Richardson Management in December 2001 to manage the Fall Street Faire property. (Tr. 289-90; DX 50.) DeMatteo, on behalf of Voyager, entered into a contract dated December 10, 2001, pursuant to which Voyager was to pay Richardson Management $2,500 per month for its services, plus reasonable out-of-pocket expenditures. (Tr. 293; DX 50.)

Murray prepared an invoice, dated November 29, 2001, and purportedly on Richardson Management letterhead, which sought payment in the amount of $7,500. (Tr. 294; DX 51, 52.) Murray also prepared, approved, and submitted a corresponding $7,500 invoice on Voyager letterhead, with instructions to remit payment to Voyager. (Tr. 290-92; DX 51.) He then approved and submitted to Orbitex an expense authorization for $7,500, again with instructions that payment be made to Voyager. (Tr. 290-98; DX 51, 63.)

Subsequently, Murray created, approved, and submitted the following two invoices and expense authorizations related to Richardson Management's services: $7,500 on or about

January 4, 2002; and $7,500 on or about January 31, 2002. (Tr. 290-304; DX 54, 55, 65, 66, 81.) Both payments were to be made to Voyager. (DX 54, 55, 65, 66.)

The three invoices that Murray prepared were fictitious and sought inflated payments.[14] Richardson Management received only the following payments from Voyager: $2,500 dated December 13, 2001; $2,840.20 dated January 11, 2002; $2,500 dated February 12, 2002; $2,660 dated March 16, 2002; and $115 dated March 16, 2002. (Tr. 426-32; DX 49, 53, 56-58, 70-72, 107.) These payments are consistent with the terms of the contract. (DX 50.)

Murray testified that he prepared each invoice for the amounts and with the description of services that DeMatteo provided. (Tr. 290-304.) He assumed the amounts were accurate, and conducted no inquiry to verify the amounts actually due or the accuracy of DeMatteo's figure. Nor did he take any steps to determine whether any services had in fact been performed. (Tr. 290-304.) I do not credit Murray's attempt to characterize himself as merely a scrivener for DeMatteo. He previously created fake invoices for other vendors, knowing that inflated payments were sought. In fact, Murray created the Richardson Management invoices from scratch. (Tr. 290-304.) Moreover, Richardson Management's invoices were routed through Voyager. Murray knew that only invoices routed through Voyager would be inflated. (Tr. 246-49.) Accordingly, Murray could not merely assume that DeMatteo provided accurate information.

Murray Double-Billed the Cornerstone Funds
for Investment Advisory Services

Orbitex calculated the advisory fee due to Cornerstone Advisors each month, and then forwarded the expense authorization to Cornerstone Advisors for review and approval. The advisory fees covered all administrative and portfolio management services provided to the Cornerstone Funds by Cornerstone Advisors. (Tr. 190-95, 391; DX 10-14, 102, 103.) See pp. 2-3, supra.

After Leslie's stroke, Murray approved and submitted for payment to Orbitex the following advisory fees: $13,916.87 for November 2001; $12,192.82 for December 2001; and $12,069.52 for January 2002. (Tr. 391-92; DX 102.) These advisory fees should have been used to compensate those who performed portfolio management services for the Cornerstone Funds, including Rabson and Peterson. (Tr. 190-95, 391-95; DX 10-14.) Nevertheless, Murray billed the Cornerstone Funds separately for their services, often referring to them as "consultants." (DX 44, 46, 48, 59.)

[14] The first invoice was prepared and approved for payment prior to execution of the contract, which occurred on December 10, 2001. (DX 50.) This suggests that the $7,500 invoice amount may have been the actual fee, rather than a fee inflated from $2,500. However, the contract required Voyager to make payment on or before the tenth day of the month that payment is due. (DX 50.) I find that the first invoice related to Richardson Management's services for December 2001. I further find that this invoice amount was inflated. Murray conceded as much in his post-hearing pleadings. (Resp. Prop. Find. ¶ 55.)

White Star Management, Inc.

In December 2001, Murray formed White Star Management, Inc. (White Star), later known as White Star Capital, Inc. White Star was an investment adviser and Murray was its chief executive officer. (Tr. 347-49; DX 92, 101.)

On his own initiative, Murray, through White Star, performed a study of the services that the independent auditors had provided for the Cornerstone Funds. He did so to provide support in negotiating a lower payment than the auditors claimed was actually owed. No one had authorized Murray or White Star to conduct this study. (Tr. 350-53, 662-68.)

Murray prepared a ten-page report, dated December 28, 2001, on White Star letterhead that summarized his review of the independent auditors' activities. (Tr. 654; DX 119.) Murray prepared an invoice in the amount of $37,650 for White Star's services in late January or early February 2002. (Tr. 350-53; DX 120.) The invoice described White Star's services in one sentence. It did not identify the number of hours worked or the hourly fee charged. (Tr. 668-69; DX 120.) Although Murray addressed this invoice to DeMatteo at Voyager, Murray never actually provided it to DeMatteo. (Tr. 350-53, 663; DX 120.)

Murray also created a corresponding invoice for White Star's services on Voyager letterhead, with instructions to remit payment to Voyager. (DX 120.) He addressed this invoice to Leslie, who was hospitalized at the time. Murray never sent the invoice to Leslie. (Tr. 662; DX 120.) Instead, Murray approved his own invoice for payment. (Tr. 350-53.) Murray submitted to Orbitex an expense payment authorization form, which instructed that payment be made to Voyager. (Tr. 350-53, 661-64; DX 120.)

Murray soon realized he had erred in having the payment routed through Voyager, because its bank account was controlled by DeMatteo, who would eventually become aware of Murray's invoice. (Tr. 352-53, 661-68; DX 120, 121.) To fix his error, Murray informed Orbitex by letter and on the expense authorization form that payment should be made directly to White Star, instead of Voyager. (Tr. 664-68; DX 121.) That same day, Orbitex's general counsel sent a letter to counsel to the Cornerstone Funds, alerting him to the invoices Murray had submitted for Voyager's and White Star's services. (Tr. 83-84; DX 24A.)

Outside Counsel Halts the Invoice Scheme

Within a week, a meeting was held at the offices of counsel to the Cornerstone Funds and Cornerstone Advisors to discuss the Orbitex letter. Murray and DeMatteo, among others, attended. (Tr. 83-86, 115-19.) Murray's and DeMatteo's invoice inflation scheme was revealed at the meeting, and counsel ordered them to cease the practice. (Tr. 83-85, 117-18, 250, 354-57, 652, 672.) Murray also returned the $37,650 payment that White Star had received. (Tr. 353-54, 653-57.)

The Cornerstone Funds commenced liquidation in February 2002. (DX 87.) In March 2002, the boards of the Cornerstone Funds approved an agreement with Voyager, pursuant to

which Voyager would manage the Fall Street Faire property for a monthly fee of $55,000, until that property could be sold. (Tr. 359-71; DX 87.) Voyager, through DeMatteo, terminated Murray's consulting arrangements in April 2002 and paid him $5,000 as severance. (Tr. 359-62, 586-87; DX 84, 112, 118; RX 20.)

In April 2002, Murray wrote a letter to counsel for the Cornerstone Funds' independent directors. Murray enclosed his December 28, 2001, report and again requested payment of the $37,650 fee to White Star. (Tr. 653-56; DX 118.) The board rejected this request. (Tr. 357.)

The Liquidating Trusts, successors to the Cornerstone Funds, filed a civil lawsuit against Voyager, DeMatteo, Leslie, Murray, and White Star in November 2002. (Tr. 212-13, 672; DX 15.) The allegations in the complaint concerned the improper inflation of vendor invoices and misappropriation of monies from the Cornerstone Funds. (Tr. 357-59; DX 15.) The parties settled the lawsuit in November 2003 for $130,000. This payment included Murray's contribution of $15,000, an insurer's contribution of $75,000, and a professional liability policy contribution of $40,000. (DX 16.)

Voyager and Murray Received Extra Money

Voyager received a total of $122,241 from the invoice inflation scheme perpetrated by Murray and DeMatteo. (Tr. 437-38, DX 107.) The misappropriated money was commingled with the other money in Voyager's account, including legitimate deposits and payments. (DX 73, 110, 111.) DeMatteo controlled Voyager's bank account. (Tr. 246, 270, 288.)

From February through October 2001, Voyager paid Murray an average of approximately $1,455 per month, a total of $13,100. (DX 109.) From November 2001 through February 2002, however, Murray's monthly income increased dramatically. During that period, he received $42,200 in total, or an average of $10,550 per month.[15] (DX 108.)

Murray's Extortion Attempt

In April 2002, shortly after his termination, Murray sent several letters to DeMatteo, Leslie, and outside counsel in which he threatened to disclose DeMatteo's and Leslie's alleged misconduct in managing the Cornerstone Funds and other indiscretions. (Tr. 361-74.) For example, Murray accused DeMatteo and Leslie of overbilling the Cornerstone Funds prior to Leslie's stroke. (Tr. 506, 638-39.) In return for his silence on these matters, Murray demanded that the Liquidating Trusts retain White Star to perform services concerning the Fall Street Faire property for $7,500 per month. Otherwise, Murray stated that he would report his evidence to the Funds' boards and the appropriate authorities, and Voyager would lose its $55,000 monthly

[15] Murray's starting salary was $85,000 per year. (Tr. 589-90.) DeMatteo reduced Murray's salary to $75,000 per year in January 2000. (Tr. 586; RX 20.) By 2001, Voyager paid Murray only sporadically. (Tr. 384; RX 20.) In computing Murray's income for 2001-02, I have given greater weight to DX 109 and DX 111 than to DX 83. I have also given greater weight to the transcript and RX 20 than to Murray's Wells submission. (DX 89.)

fee. (Tr. 213-14, 361-74; DX 112-117.) White Star was not retained. Leslie swore out a complaint for attempted extortion, and New York criminal authorities executed a search warrant at Murray's home. (Tr. 214, 362-63, 374.) Although no charges were ever filed, Murray admitted to his conduct and apologized for it at the hearing. (Tr. 362-63, 367.)

Murray's Post-Cornerstone Activities

Beginning in 2003, Murray, acting through White Star, provided market-timing consulting services to high net worth clients of Ehrenkrantz King Nussbaum, Inc. (EKN). (Tr. 396-408; DX 92.) EKN, a registered broker and dealer, is headquartered in Garden City, Long Island, N.Y. (DX 91.) In September 2005, the Commission filed a complaint against Murray and EKN relating to their market-timing activities. That action is pending. (Tr. 403-04; DX 91.)

Murray is currently involved in the securities industry. He provides consulting services to Ehrenkrantz Growth Fund, a registered investment company, and to Ehrenkrantz Asset Management Group, a registered investment adviser. Both of these entities are related to EKN. (Tr. 395-97.)

CONCLUSIONS OF LAW

The OIP alleges that Cornerstone Advisors willfully violated Sections 206(1) and 206(2) of the Advisers Act, and that Murray willfully aided and abetted and caused Cornerstone Advisors' violations. Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor also be aware that he is violating any statutes or regulations. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976).

Section 206 of the Advisers Act establishes "federal fiduciary standards" to govern the conduct of investment advisers. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16-17 (1979) (collecting cases). Section 206(1) makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client. Section 206(2) makes it unlawful for an investment adviser to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client.

Proof of scienter is required to establish a violation of Section 206(1). SEC v. Steadman, 967 F.2d 636, 641-43 & n.3 (D.C. Cir. 1992); Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Proof of scienter is not required under Section 206(2). See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195-96 (1963); Steadman, 967 F.2d at 643 n.5.

The misappropriation of client funds violates Section 206(1) and 206(2) of the Advisers Act. See SEC v. Batterman, 2002 U.S. Dist. LEXIS 18556, at *25 (S.D.N.Y. Sept. 30, 2002). Cornerstone Advisors was responsible for processing vendor invoices on the Funds' behalf. Instead of discharging that duty faithfully, Cornerstone Advisors knowingly inflated several vendor invoices and charged the Funds those inflated amounts. It then directed the Funds' custodian to wire the payments for the inflated amounts to Voyager, which paid the vendors the

actual amounts due and kept the difference. In his posthearing brief, Murray does not challenge the evidence establishing a primary violation. I conclude that, by misappropriating money from the Funds, Cornerstone Advisors willfully violated Sections 206(1) and 206(2) of the Advisers Act.

Section 206 of the Advisers Act proscribes fraudulent conduct by an investment adviser (here, Cornerstone Advisors). The OIP has charged Murray as an aider and abetter and a cause of Cornerstone Advisors' violations. To show that a respondent willfully aided and abetted the violation of another, the Division must establish three elements: (1) another person committed a securities law violation; (2) the accused aider and abetter has a general awareness that his or her role was part of an overall activity that was improper or illegal; and (3) the accused aider and abetter knowingly and substantially assisted the principal violation. Abraham & Sons Capital, Inc., 55 S.E.C. 252, 266-67 & n.24 (2001).

Irrespective of the level of proof required to establish the primary violation, the Commission has made clear that the accused aider and abetter must have acted with scienter. See Kingsley, Jennison, McNulty & Morse, Inc., 51 S.E.C. 904, 911 & n.28 (1993) (holding a registered investment adviser liable for willful violations of Section 206(2) of the Advisers Act, but ruling that good faith by the firm's officer "preclude[s] a finding of scienter necessary to hold that . . . [the officer] aided and abetted [the firm's] various violations"); Donald T. Sheldon, 51 S.E.C. 59, 66-67 (1992) (holding the president of a firm liable as an aider and abetter because he "acted with the requisite knowledge," i.e., recklessly, even though the underlying misconduct by the firm involved the net capital rule, a non-scienter violation), aff'd, 45 F.3d 1515 (11th Cir. 1995).

The Commission has determined that a showing of recklessness will satisfy the "substantial assistance" prong of the aiding and abetting test. See Sharon M. Graham, 53 S.E.C. 1072, 1084-85 & n.33 (1998), aff'd, 222 F.3d 994, 1004-06 (D.C. Cir. 2000); Russo Sec., Inc., 53 S.E.C. 271, 278 (1997). One who aids and abets a primary violation is necessarily a cause of the violation. Graham, 53 S.E.C. at 1085 n.35; Adrian C. Havill, 53 S.E.C. 1060, 1070 n.26 (1998).

Murray does not seriously challenge the evidence showing that he played a central role in the fraudulent scheme. Among other things, he created false invoices that inflated the amounts due to vendors, authorized payment of the invoices, submitted fraudulent invoices to the Funds' custodian for payment, and ensured that Voyager received the fraudulent payments. I reject Murray's claim that he was a mere typist. Murray managed all aspects of the invoice processing at Voyager. He was also Secretary to the Funds, a managing director of Cornerstone Advisors, and Cornerstone Advisors' compliance officer.

The Division's proof satisfies the scienter requirement. With the Funds heading toward liquidation, Murray participated in a scheme to enrich himself and DeMatteo at the Funds' expense. Murray knew that the whole point in routing invoices through the Voyager account was to enable DeMatteo and Murray to inflate them and keep the difference between the amount actually billed by the vendors and the amount Murray billed the Funds. Murray knowingly forged documents, an inherently deceptive act. Moreover, Murray admitted that the purpose of

submitting fictitious documents was to deceive. Murray also submitted the $37,650 unauthorized White Star invoice without anyone at Cornerstone Advisors or the Funds knowing about it. I reject as incredible Murray's claim that he relied on the fact that Sanders did not tell him to stop creating fictitious invoices. I also reject Murray's defense that he merely followed DeMatteo's instructions and accepted DeMatteo's explanation as to the reason for the scheme. See SEC v. Hughes Capital Corp., 124 F.3d 449, 454-55 (3d Cir. 1997) (rejecting the "good soldier" defense where the fraudulent nature of transactions was obvious); SEC v. Antar, 15 F. Supp. 2d 477, 523-24 (D.N.J. 1998) (holding that a defendant who was aware of the fraudulent nature of transactions was not a mere "dupe" and could not rely on a defense that he was just following orders). At the very least, Murray's conduct was extremely reckless. I therefore conclude that Murray willfully aided and abetted and caused Cornerstone Advisors' violations of Sections 206(1) and 206(2) of the Advisers Act.

The OIP also alleges that Murray willfully violated Section 37 of the Investment Company Act. That provision makes it a crime to steal, embezzle, or convert funds or assets of a registered investment company to one's own use or to the use of another. Although Section 37 is plainly criminal in nature, the courts have determined that the Commission may bring an injunctive action to enforce the provision under its broad powers to compel compliance with the securities laws. See SEC v. Durgarian, 477 F. Supp. 2d 342, 359 (D. Mass. 2007); SEC v. Lawbaugh, 359 F. Supp. 2d 418, 423 (D. Md. 2005) (default); SEC v. Commonwealth Chem. Sec., Inc., 410 F. Supp. 1002, 1018 (S.D.N.Y. 1976), aff'd in part and modified in part, 574 F.2d 90 (2d Cir. 1978). Moreover, the Commission has asserted, in dictum and in settled proceedings, that it has the authority to bring an administrative action for a violation of Section 37. See Int'l Research & Mgmt. Corp., 46 S.E.C. 1167, 1170 & n.9 (1978) (dictum); Melvin L. Hirsch, 57 SEC Docket 1822, 1827 (Sept. 19, 1994) (settlement); see also Richard O. Bertoli, 1979 SEC LEXIS 2450, at *26-28 (ALJ) (June 18, 1979) (finding no violation of Section 37).

Under Section 37, a willful conversion encompasses more than just larceny and embezzlement. It also "may include misuse or abuse of property . . .[or] use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." See Brown v. Bullock, 294 F.2d 415, 419 (2d Cir. 1961) (quoting Morissette v. United States, 342 U.S. 246, 271-72 (1952) (interpreting the term "conversion" in another statute)). "The willful misapplication of corporate funds by fiduciaries constitutes a conversion." Brown v. Bullock, 194 F. Supp. 207, 229 (S.D.N.Y. 1961), aff'd, 294 F.2d 415 (2d Cir. 1961); see also Tanzer v. Huffines, 314 F. Supp. 189, 193-94 (D. Del. 1970). Murray's conduct falls within the scope of Section 37 because he was a fiduciary who intentionally over-billed the Cornerstone Funds, directed the money to be deposited in the Voyager account, and subsequently received some of the proceeds of the fraudulent billing scheme. While it is true that Murray did not control the Voyager account, he participated in converting a substantial amount "to the use of another," namely, DeMatteo.

SANCTIONS

To protect the public interest, the Division seeks a cease-and-desist order, as well as an order barring Murray from association with any investment adviser and from employment with

any investment company. It also seeks an order requiring Murray to disgorge $111,741 in ill-gotten gains, plus prejudgment interest, and to pay a civil penalty of $60,000.

As to cease-and-desist orders and associational bars, the public interest analysis requires that several factors be considered: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infractions; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. Steadman, 603 F.2d at 1140. The severity of sanctions depends on the facts of each case and the value of the sanctions in preventing a recurrence of the violative conduct. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963). Sanctions should demonstrate to the particular respondent, the industry, and the public generally that egregious conduct elicits a harsh response. Arthur Lipper Corp., 547 F.2d at 184. Associational sanctions are not intended to punish a respondent, but to protect the public from future harm. See Leo Glassman, 46 S.E.C. 209, 211-12 & n.16 (1975).

Cease-and-Desist Order

In relevant part, Section 203(k)(1) of the Advisers Act authorizes the Commission to impose a cease-and-desist order on any person who "is, was, or would be a cause of [a] violation" of any provision of the Advisers Act due to an act or omission the person "knew or should have known would contribute to such violation." Section 9(f)(1) of the Investment Company Act similarly authorizes the Commission to enter a cease-and-desist order based on violations of the Investment Company Act.

In KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-92 (2001), recon. denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002), the Commission addressed the standard for issuing cease-and-desist relief. It concluded that it would consider the Steadman factors in light of the entire record, noting that no one factor is dispositive. It explained that the Division must show some risk of future violations. However, it also ruled that such a showing should be "significantly less than" that required for an injunction and that, "absent evidence to the contrary," a single past violation ordinarily suffices to establish that the violator will engage in the same type of misconduct in the future. Id. at 1185, 1191. The Commission also considers whether the violation was 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 proceeding. Id. The Commission weighs these factors in light of the entire record, and no one factor is dispositive.

The appellate courts have insisted that the Commission adhere to the standards it announced in KPMG. See Monetta Fin. Serv., Inc. v. SEC, 390 F.3d 952, 957-58 (7th Cir. 2004); WHX Corp. v. SEC, 362 F.3d 854, 859-60 (D.C. Cir. 2004) (rejecting the Commission's explanation of the risk of future violations and vacating a cease-and-desist order).

A cease-and-desist order is appropriate here. Murray's conduct was egregious and involved a high degree of scienter. The violations continued for more than four months. Murray abused his position of trust to misappropriate money from the Cornerstone Funds in blatant

disregard of his fiduciary duties and the antifraud provisions of the federal securities laws. Murray not only participated in the invoice inflation scheme, but also tried to take more by submitting the White Star invoice just weeks before the Funds entered liquidation. He did not cease his fraudulent conduct until he was caught. Murray has not recognized the wrongful nature of his conduct or provided assurances against future violations. He is forty-five years of age and continues to work in the securities industry. Absent a cease-and-desist order, there is a high risk of future violations.[16]

Associational Bar

In relevant part, Section 203(f) of the Advisers Act empowers the Commission to impose a sanction against a person associated with an investment adviser if such a person has willfully aided and abetted a violation of the Advisers Act or has willfully violated any provision of the Investment Company Act. Specifically, the Commission may censure, place limitations on the activities of such a person, suspend that person for a period not exceeding twelve months, or bar that person from being associated with an investment adviser if the Commission finds, on the record and after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest.

Under Section 9(b) of the Investment Company Act, the Commission may prohibit, either permanently or temporarily, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if such person has willfully violated any provision of the Investment Company Act or has willfully aided and abetted any violation of the Advisers Act.

The public interest analysis under both sections requires consideration of the Steadman factors, discussed above. I therefore incorporate by reference my prior Steadman analysis, and conclude that associational bars are also in the public interest. See supra pp. 15-16.

Disgorgement

Section 203(j) of the Advisers Act and Section 9(e) of the Investment Company Act provide that the Commission may enter an order requiring disgorgement, including reasonable

[16] After Murray was terminated by Cornerstone Advisors and Voyager, he was involved in two other law enforcement matters, neither of which was identified in the OIP. The first involved Murray's attempted extortion of Leslie and DeMatteo. As noted, no criminal charges were ever filed. See supra pp. 11-12. The second involved alleged antifraud violations of the federal securities laws in connection with market timing activities at EKN. The Commission's injunctive action is pending. See supra p. 12. Although these matters provide additional evidence of the need for strong sanctions, see Robert Bruce Lohmann, 56 S.E.C. 573, 583 n.20 (2003), I conclude that Murray's conduct at Cornerstone Advisors and Voyager, standing alone, fully warrants all the sanctions imposed in this Initial Decision. Murray's post-Cornerstone activities demonstrate that milder sanctions will not suffice to protect the public interest.

interest, in any proceeding in which a civil monetary penalty could be imposed. Disgorgement seeks to deprive the wrongdoer of his ill-gotten gains. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). It returns the violator to where he would have been absent the violation. An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violation. Id. at 1231.

Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden of going forward shifts to the respondent to demonstrate clearly that the Division's disgorgement figure is not a reasonable approximation. SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). Any risk of uncertainty as to the disgorgement amount falls on the wrongdoer whose illegal conduct created that uncertainty. First City, 890 F.2d at 1232.

The Division argues that Murray should be held jointly and severally liable with DeMatteo for the disgorgement of $111,741—all of the illicit proceeds flowing into the Voyager account from the inflated invoice scheme ($122,241, as shown on DX 107), plus what appears to be another $4,500 (double-billing to Cornerstone Advisors for work done by Rabson and Peterson), minus $15,000 that Murray paid to settle the litigation commenced by the Liquidating Trust relating to the same invoice fraud.

The cases imposing joint-and-several liability for disgorgement of ill-gotten gains involved circumstances that are not present here. In Hughes Capital, 124 F.3d at 456, joint-and-several liability for disgorgement was held to be appropriate because there was no documentary evidence to contradict the clear evidence that the individual defendants benefited substantially from the unlawful scheme. In SEC v. First Pac. Bancorp., 142 F.3d 1186, 1191-92 (9th Cir. 1998), the "close relationship" that warranted joint-and-several liability existed because the individual defendant was chairman of the board, chief executive officer, and majority shareholder of the corporate co-defendants. In SEC v. Calvo, 378 F.3d 1211, 1215-16 (11th Cir. 2004), the individual defendant and his family were the founders of the corporate co-defendant, and held a 50% ownership interest in the corporate co-defendant. In Cambridge Group, Inc., 50 S.E.C. 752, 754 & n.4 (1991), aff'd in part and rev'd in part sub nom. Hateley v. SEC, 8 F.3d 653, 656 (9th Cir. 1993), the Commission stated that the NASD's imposition of joint-and-several liability "does not seem unfair" as to a husband and wife and their family-held corporation.

In Hughes Capital, 124 F.3d at 456, on which the Division principally relies, the Third Circuit recognized that "the division of liability is an intensely factual determination." The court also stated: "[I]n some cases, a court may be able easily to identify the recipient of ill-gotten profits and apportionment is practical, [although] that is not usually the case." Id. at 455. It is inappropriate simply to assume that the amount of unjust enrichment cannot be reasonably approximated and measured as to each individual participant in a scheme; rather, it is necessary for the fact-finder to determine the issue of impossibility on a case-by-case basis after a hearing. Cf. CFTC v. Am. Metals Exch. Corp., 991 F.2d 71, 77-78 (3d Cir. 1993) ("Without holding a hearing, . . . the district court . . . had no basis upon which to conclude that it would be inordinately difficult to measure unlawful profits."). At the hearing in this proceeding, the Division's summary witness prepared detailed exhibits showing the disposition of the funds received into the Voyager account. (DX 107, 110, 111.) The present proceeding is thus

distinguishable from Calvo, 378 F.3d at 1217-18, where apportionment was impracticable because of inadequate documentation and complex and heavily-disguised transactions. In these circumstances, the Division's request to give the broadest possible reading to the cases imposing joint-and-several liability for disgorgement cannot be granted.

The imposition of joint-and-several liability for $111,741 would be unreasonable and inequitable as to Murray. Unlike Leslie and DeMatteo, Murray did not own Cornerstone Advisors or Voyager. During the relevant period, DeMatteo alone controlled the Voyager checking account, signed the checks, and received the monthly statements at his home. Moreover, there is competent evidence that DeMatteo and Murray did not divide equally the proceeds of the inflated invoice scheme. The illicit proceeds to DeMatteo were substantial ($69,670), and other questionable payments went directly from Voyager to Lisa Robello (Robello), Leslie's wife ($38,000). (Tr. 88, 276; DX 111.) There is no evidence that Murray benefited in any way from these payments to DeMatteo and Robello.

The Division speculates that Murray might have benefited indirectly from payments that Voyager made to third parties (Div. Br. at 35). However, most of these payments went to legitimate vendors, including Aetna/U.S. Healthcare, for the employer's share of health insurance benefits; and Degi/Schlang, for the monthly rent on the office suite at 67 Wall Street. The Division demonstrated that Voyager also made occasional payments to Captain's Ketch, a nearby restaurant where Cornerstone Advisors kept a tab, and Elite Limousine. Although the Division questioned Murray at length, it did not ask Murray if he personally benefited from these payments. It would have been a simple matter for the Division to do so. The Division cannot fail to develop the hearing record, then take the position in its posthearing pleadings that it is "impracticable" to unscramble the payments, and that therefore, it is appropriate to infer that these payments probably also benefited Murray. In fact, the limousine payments were the subject of Murray's unsigned letter to DeMatteo and Leslie in April 2002. (DX 116.) ("Your company paid for cars, car insurance, limo trips for girlfriends. . . .")

As an alternative to joint-and-several liability, the Division presented evidence of a lesser amount of compensation accruing to Murray individually. The Division demonstrated that Murray received checks and wires for $42,200 during the period from November 2001 through February 2002. (DX 108, 111.) Murray insists that he performed legitimate services and provided real value to Voyager and Cornerstone Advisors, and that these sums should not be deemed to be ill-gotten. I conclude that the Division has reasonably approximated Murray's enrichment, and that Murray has not sustained his burden of going forward and proving that the Division's figure of $42,200 is not a reasonable approximation of his ill-gotten gains. In reaching this conclusion, I have given considerable weight to Murray's willingness to lie about his true compensation, so as to maximize his potential unemployment benefits from the State of New York. (RX 20, Murray letter of Aug. 2, 2001, to Kevin McCormack.) ("There is a question of how my former partners will 'cooperate' in reporting my income to the Department of Labor. If they do cooperate then I will be collecting something in the neighborhood of $1,600 per month. If they don't play along, and report only what they have been paying me then it is anyone's guess as to what I will get from the State. . . . I am willing to work off the books for as long as unemployment lasts.")

I conclude that Murray should disgorge $42,200, minus the $15,000 he has already paid to settle the litigation commenced by the Liquidating Trust. The total amount to be disgorged is thus $27,200.

Prejudgment Interest

Section 203(j) of the Advisers Act and Section 9(e) of the Investment Company Act also authorize the Commission to adopt rules and regulations and issue orders concerning rates of interest and periods of accrual. The Commission promulgated Rule 600 of its Rules of Practice, Interest on Sums Disgorged, in 1995.

The Division contends that Murray received his last fraudulent payment on February 11, 2002. On that basis, it argues that prejudgment interest should start to accrue as of March 1, 2002. Murray has not challenged the Division's position. The Division's request is granted.

Civil Monetary Penalty

An order of disgorgement (even with prejudgment interest) merely requires the return of wrongfully obtained profits. Disgorgement does not result in any actual economic penalty or act as a financial disincentive to engage in securities law violations. See SEC v. Moran, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (quoting legislative history). The Division therefore argues that a substantial monetary penalty, in addition to the disgorgement of ill-gotten gains, is necessary to punish Murray and deter others from engaging in securities law violations that otherwise may provide significant financial returns to the violators.

Under Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act, the Commission may assess a civil monetary penalty if the respondent has willfully violated or willfully aided and abetted any violation of the Advisers Act or the Investment Company Act. It must also find that such a penalty is in the public interest. See Section 203(i)(3) of the Advisers Act and Section 9(d)(3) of the Investment Company Act. Six factors are relevant to the public interest determination: (1) fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. Not all factors may be relevant in a given case; and the factors need not all carry equal weight. In its discretion, the Commission may consider evidence of the respondent's ability to pay. See Section 203(i)(4) of the Advisers Act and Section 9(d)(4) of the Investment Company Act.

Section 203(i)(2) of the Advisers Act and Section 9(d)(2) of the Investment Company Act specify a three-tier system identifying the maximum amount of a penalty. For each "act or omission" by a natural person, the maximum amount of a penalty is $6,500 in the first tier; $60,000 in the second tier; and $120,000 in the third tier.[17] A second-tier penalty is permissible

[17] As required by the Debt Collection Improvement Act of 1996, the Commission increased the maximum penalty amounts for violations occurring after December 6, 1996, and, again, for violations occurring after February 2, 2001. See 17 C.F.R. §§ 201.1001, .1002. For purposes of calculating the maximum permissible penalties, I will treat the violations in this proceeding as

if the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

The statutory maximum is not an overall limitation, but a limitation per violation. Thus, each infraction constitutes a separate act or omission. See Mark David Anderson, 56 S.E.C. 840, 863 (2003) (imposing a civil penalty for each of the respondent's ninety-six violations).

I grant the Division's request for a second-tier civil penalty of $60,000. Murray willfully aided and abetted violations of the Advisers Act and willfully violated the Investment Company Act. His misconduct involved fraud, deceit, and the reckless disregard of regulatory requirements. The goal of deterrence would be well served by a significant civil penalty. Shareholders in the Funds were financially harmed by Murray's misconduct, although they were subsequently made whole through the settlement of a lawsuit brought by the Liquidating Trusts. See supra p. 11. There are no prior violations. I am not aware of any other factors that justice requires me to consider.

No Issue of Ability to Pay

Under Section 203(i)(4) of the Advisers Act and Section 9(d)(4) of the Investment Company Act, in any proceeding in which the Commission may impose a civil penalty, a respondent may present evidence of his or her ability to pay the penalty. The Commission may, in its discretion, consider such evidence in determining whether a civil penalty is in the public interest. Such evidence may relate to the extent of the respondent's ability to continue in business and the collectability of the penalty, taking into account any other claims of the United States or third parties upon the respondent's assets and the amount of the respondent's assets.

Although no statutory requirement addresses inability to pay disgorgement or interest, the Commission may also consider evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement and interest. See Rule 630(a) of the Commission's Rules of Practice.

Murray's former attorney detailed Murray's difficult financial and family circumstances in a Wells submission. (DX 89.) Although the representations in that letter are not sworn, I have given them appropriate consideration.

At the first prehearing conference, I advised Murray that, if he intended to claim inability to pay financial sanctions, he would have to submit a sworn financial statement, as well as supporting income tax returns, at the hearing (Prehearing Conference of Nov. 20, 2006, at 14-17; Order of Nov. 20, 2006). See Rule 630(b) of the Commission's Rules of Practice; Terry T. Steen, 53 S.E.C. 618, 626-28 (1998) (holding that an ALJ may require the filing of sworn financial statements). Murray did not provide such evidence, and he has waived the opportunity to do so.

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occurring before February 15, 2005. See 17 C.F.R. § 201.1003. For all other purposes, the Division urges me to treat the violations as ongoing.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on April 13, 2007. The Division's April 27, 2007, letter notes a typographical error in the record index, but this is not the sort of substantive error that warrants a revision of the record index.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT Brendan E. Murray cease and desist from committing or causing any violation or future violation of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 and Section 37 of the Investment Company Act of 1940;

IT IS FURTHER ORDERED THAT Brendan E. Murray is barred from association with any investment adviser, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser, or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

IT IS FURTHER ORDERED THAT Brendan E. Murray shall pay disgorgement of $27,200 plus prejudgment interest computed at the rate set forth in Rule 600(b) of the Commission's Rules of Practice, with prejudgment interest starting to run on March 1, 2002, and continuing to run until the last day of the month preceding the month in which payment is made; and

IT IS FURTHER ORDERED THAT Brendan E. Murray shall pay a civil penalty of $60,000.

Payment of the disgorgement, interest, and civil penalty shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payments, and a cover letter identifying the Respondent and the proceeding designation, should be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter should be sent to the attention of counsel of record for the Commission's Division of Enforcement.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____
James T. Kelly
Administrative Law Judge