INITIAL DECISION RELEASE NO. 348
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12386

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
WARREN LAMMERT,	:	INITIAL DECISION
LARS SODERBERG, and	:	April 28, 2008
LANCE NEWCOMB	:	

APPEARANCES: Thomas J. Krysa, Polly A. Atkinson, and Jeffrey Oraker for the Division of Enforcement, Securities and Exchange Commission

Graeme W. Bush, Alexandra W. Miller, and Jill Dash of Zuckerman Spaeder, LLP for Respondent Warren Lammert

Richard M. Beckler, Joseph Walker, and Kyle Cohen of Howrey LLP for Respondent Lars Soderberg

Mark B. Dorfman, Ellen Wheeler, and Jodie Fredericksen of Foley & Lardner LLP for Respondent Lance Newcomb

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision dismisses charges brought against Lance Newcomb (Newcomb) and imposes cease-and-desist orders against Warren Lammert (Lammert) and Lars Soderberg (Soderberg) (collectively, Respondents). The charges concerned Respondents' roles in "market timing" transactions in mutual funds managed by their employer, investment adviser Janus Capital Management LLC (Janus).

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) against Lammert, Soderberg, and Newcomb on July 31, 2006, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of

the Securities Exchange Act of 1934 (Exchange Act), 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). Lammert, Soderberg, and Newcomb filed timely Answers.

The undersigned held a ten-day hearing in Denver, Colorado, on October 10 through 17, 2007, and Washington, D.C., on November 13, 14, and 16, 2007. The Division of Enforcement (Division) called eleven witnesses from whom testimony was taken, including Respondents and one expert witness. Respondents called an additional six witnesses, including three expert witnesses. Numerous exhibits were admitted into evidence.[1]

The findings and conclusions in this Initial Decision are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the parties' December 7, 2007, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Briefs; and (2) their December 14, 2007, Replies. All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

B. Allegations and Arguments of the Parties

This proceeding concerns Respondents' roles in "market timing" transactions in mutual funds managed by Janus, with which Respondents were associated. The transactions at issue were arranged by two broker-dealers, Trautman Wasserman & Co., Inc. (TWCO), and Brean Murray & Co., Inc. (Brean Murray) in furtherance of concealed "late trading" schemes. The OIP alleges that the funds' prospectuses prohibited market timing transactions and charges that Respondents' roles in facilitating the transactions violated the antifraud provisions of the securities laws.[2] The Division requests: (1) cease-and-desist orders against Respondents; (2)

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[1] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division and Respondents will be noted as "Ex. __." Exhibits offered by the Division are numbered >0 <999; by Lammert, >1000 <1999; by Soderberg, >2000 <2999; and by Newcomb, >3000.

[2] Specifically, the OIP alleges: (1) Lammert (i) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, willfully aided and abetted and caused Janus's violations of these provisions, and (ii) willfully aided and abetted and caused Janus's violations of Section 206(1) and 206(2) of the Advisers Act and of Section 34(b) of the Investment Company Act; (2) Soderberg (i) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, willfully aided and abetted and caused Janus's violations of these provisions, and (ii) willfully aided and abetted and caused Janus's violations of Section 206(1) and 206(2) of the Advisers Act and of Section 34(b) of the Investment Company Act; and (3) Newcomb (i) willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, willfully aided and abetted and caused Janus's violations of these provisions, (ii) willfully aided and abetted and caused Janus's violations of

third-tier civil penalties of $240,000 each against Lammert and Soderberg and of $120,000 against Newcomb; and (3) investment adviser and investment company bars against Respondents and broker-dealer bars against Soderberg and Newcomb.

Respondents argue that the transactions at issue were not prohibited by the prospectuses, and, in any event, their roles in the transactions did not violate the securities laws.

II. FINDINGS OF FACT

A. Definitions

"Market timing" is commonly understood to refer to buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing and often involves frequent trading in and out of funds. SEC v. Pimco Advisors Fund Mgmt., 341 F.Supp.2d 454 (S.D.N.Y. 2004); SEC v. Gann, 2006 WL 616005 (N.D. Tex. 2006). Market timing is not in itself illegal but may be prohibited by a fund's prospectus. In re Mutual Fund Investment, 384 F. Supp. 2d 845, 856 (D. Md. Aug. 25, 2005). "Late trading" is the practice of placing orders to buy or sell mutual fund shares after the time as of which the fund has calculated its net asset value (NAV) (usually as of the close of trading at 4:00 p.m. ET) but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market-moving information that occurs after 4:00 p.m. and is not reflected in that day's price. Late trading violates Investment Company Act Rule 22c-1(a) (17 C.F.R. § 270.22c-1(a)).

B. Relevant Individuals and Entities

1. Janus and Respondents

Janus is an investment adviser that offers products to retail investors and institutions, directly and through financial intermediaries. Tr. 161. There are three Janus mutual fund trusts: the Janus Investment Fund (JIF), the Janus Adviser Fund (JAD), and the Janus Aspen Series (JAS). Tr. 162. Each of these mutual fund families is organized as a separate business trust; Janus was selected by the common Board of Trustees to act as the investment adviser of the Janus mutual funds. Tr. 162, 1900-01. There are five products at issue in this proceeding: the Mercury, Enterprise, Global Value, Adviser Worldwide, and Adviser International (later, International Growth) Funds. These funds were sold in the JIF and JAD Series of Funds. [3]

Sections 206(1) and 206(2) of the Advisers Act, and (iii) willfully aided and abetted and caused Janus's violations of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder.

[3] The Mercury Fund, the Enterprise Fund, and the Global Value Funds were in the JIF Series, and Adviser Worldwide Fund and Adviser International Fund were in the JAD Series. See Exs. 484-8, -13, -14, -17, -19, -21, -23, -25.

Lammert, 45, a Massachusetts resident, was the Executive Vice President and Portfolio Manager of the Mercury Fund during most of the relevant period.[4] Tr. 753; Lammert Answer ¶4. Lammert holds a Bachelor of Arts degree in Economics from Yale University and a Master of Science degree in Economic History from the London School of Economics. Ex. 484-8 at 82. In approximately 1993, Lammert established, and was the initial Portfolio Manager for, the Mercury Fund. Tr. 753. Lammert was an officer of Janus. Tr. 752. Lammert left Janus and the Mercury Fund in late February 2003. Tr. 753.

Soderberg, 48, of Denver, Colorado, was an Executive Vice President of Institutional Services at Janus from 2002 until he resigned from Janus in July 2004. Tr. 929-30; Soderberg Answer ¶5. From 1995 until he became Executive Vice President, Institutional Services, Soderberg was a vice president and director of defined contributions at Janus. Tr. 929. Prior to working at Janus, Soderberg worked for Fidelity Investments for thirteen years. Tr. 926-27. At all relevant times, Soderberg was a registered representative associated with Janus Distributors, Inc., a broker-dealer registered with the Commission. Soderberg Answer ¶5.

Newcomb, of Castle Rock, Colorado, was an Assistant Vice President and Regional Sales Director for Janus. Tr. 413-17. He has a bachelor's degree from the University of Northern Colorado. Tr. 413. Newcomb joined Janus in 1992 as an investor service representative. Tr. 414. In 1998 he joined the institutional sales division where he stayed until he left the company in August 2003. Tr. 415-17; Newcomb Answer ¶6. Newcomb was one of several salesmen in Janus's registered investment adviser (RIA) sales channel. Tr. 1481; Ex. 3210A. He served as the point of contact for RIAs, answering questions, arranging meetings or contacts with portfolio managers, forwarding literature to clients, and performing other similar administrative functions. Tr. 417-18. Newcomb was never an officer, director, or principal of Janus. Tr. 1478. At all relevant times, Newcomb was a registered representative associated with Janus Distributors, Inc., a broker-dealer registered with the Commission. Newcomb Answer ¶6. Newcomb was the least senior of the Respondents; he was several levels below Lammert and Soderberg on Janus's organizational chart, and his compensation was a fraction of theirs. Exs. 3204, 3210A , 3210B.

2. TWCO and Brean Murray

During the time at issue TWCO was a registered broker-dealer. Gregory Trautman (Trautman) was a principal of TWCO. Scott Christian (Christian) and James Wilson (Wilson) operated TWCO's late-trading and market-timing scheme in Janus and other fund families.[5] Tr.

[4] The relevant period is November 2001 through September 2003.

[5] TWCO's late trading scheme violated the antifraud and other provisions of the securities laws; its broker-dealer registration was revoked, and it was ordered to pay disgorgement and penalties. See Trautman Wasserman & Co., Inc., Exchange Act Release No. 57493 (Mar. 13, 2008) declaring final Initial Decision Release No. 340 (Jan. 14, 2008) (ID No. 340) as to TWCO. Trautman has petitioned for review of ID No. 340 concerning its adverse findings as to him. Wilson entered a settlement of the proceeding against him. Trautman Wasserman & Co., Inc., Securities Act Release No. 8895 (Feb. 14, 2008). Christian settled a proceeding against him that

1119-21. As discussed below, Respondents and other Janus employees were unaware that TWCO was engaged in late trading, which was accomplished through intermediaries.[6]

During the time at issue Brean Murray was a registered broker-dealer. Michael Grady (Grady) and Ryan Goldberg (Goldberg) negotiated timing capacity with mutual funds on behalf of Brean Murray clients that wished to time. Tr. 627-36. As with TWCO, the transactions that resulted were invariably late trading, unbeknownst to Respondents and other Janus employees.[7] Tr. 692.

C. TWCO's and Brean Murray's Trading at Janus

1. TWCO Begins Trading at Janus

In April 2001, Lammert was introduced to Trautman by a professor at New York University School of Medicine. Each had a family member with a serious medical condition and together, with others, they engaged in philanthropic work to benefit similarly situated families and in plans to raise funds for research into promising therapies for the medical condition. Tr. 1399-1400. Lammert and Trautman's relationship at times involved daily communication concerning these matters. Tr. 786-87, 1405.

Trautman soon used his relationship with Lammert for financial gain. Shortly after they met, Trautman approached Lammert about the possibility of TWCO's trading in Janus Funds. Tr. 756-57; Ex. 434. Trautman informed Lammert that TWCO's client had an asset allocation model of trading, but did not specify the exact number of trades that TWCO intended to make. Lammert understood this to mean that "the use of this model . . . could result in movements in or out of the fund." Tr. 757-58. Lammert agreed to allow Trautman to invest $100 million in the Mercury Fund. Tr. 757-58. As of April 30, 2001, the Mercury Fund had over $11 billion under management. Ex. 484-8 at 87. On November 12, 2001, Trautman e-mailed Lammert, informing him that "we also allocated the first $20 million of client money into your fund last week and I have a few comments to make sure we follow proper protocol as we increase that to $100 million." Ex. 33. Two days later, on November 14, 2001, Trautman sent Lammert a more

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was based on his involvement in the TWCO late trading scheme. Scott A. Christian, 85 SEC Docket 4345 (July 29, 2005).

[6] TWCO traded through Banc of America Securities (BofA) as its clearing broker. Tr. 1120-1123. Since processing of mutual fund purchase and redemption orders received before 4:00 p.m. ET took several hours, Janus had no way of knowing if the 4:00 p.m. ET trading deadline had been violated and had to rely on BofA to enforce it. Tr. 358-59. BofA allowed TWCO to place late trades after 4:00 p.m. ET. Tr. 1120-23.

[7] Brean Murray settled a proceeding against it based on its late trading scheme in, inter alia, Janus funds. Brean Murray & Co., Inc., 84 SEC Docket 3394 (Feb. 17, 2005). Grady and Goldberg settled a proceeding based on their involvement in Brean Murray's late trading scheme. Ryan D. Goldberg, Exchange Act Release No. 56518 (Sept. 25, 2007).

formal e-mail, with copies to Wilson and Christian, again telling Lammert that TWCO had purchased $20 million of the Mercury Fund with the possibility that they would allocate up to $100 million in the fund. Ex. 34. Trautman also stated, "our intention would be to have a long-standing active relationship, with your fund." Ex. 34. Newcomb was assigned to be the day-to-day contact with TWCO. Tr. 425-26. He received regular updates from TWCO when it traded in Janus. Tr. 429-36. Most of TWCO's trading was on behalf of its client Ritchie Capital Management L.L.C. (Ritchie Capital).[8] Tr. 1128-31.

On January 8, 2002, Janus employee Faye Banks sent BofA, TWCO's clearing firm, a letter instructing it to stop TWCO's exchanges in Janus funds due to excessive trading. Tr. 453-55; Ex. 400. On receiving a copy of the letter, Wilson asked Newcomb to "please handle this matter and let that department know, so this doesn't happen again." Ex. 400. Newcomb did not believe that Janus or Lammert wanted TWCO to receive a stop trading letter. Tr. 454. Newcomb called the institutional operations group and explained that TWCO's trading was pursuant to an approved relationship; he asked that TWCO not be sent stop trading letters. Tr. 455. Lammert did not, and had no responsibility to, keep track of TWCO's trading in the Mercury Fund. Tr. 807-08. In May 2002, he was asked to supply trade amount thresholds as dollar or percentage amounts for which he would like to be notified. Tr. 361-62; Ex. 1015. Lammert selected two percent of the Mercury Fund's portfolio as the threshold for large trade reports he would receive. Ex. 1015. At the time, assets under management were approximately $5 billion; TWCO's trading was under the two percent ($100 million) threshold. Tr. 361-64.

2. TWCO Expands into Other Janus Products

Following receipt of the stop trading letter, TWCO was allowed to continue trading in the Mercury Fund. In early 2002, TWCO began looking into other Janus Funds. In March 2002, Trautman approached Lammert about the possibility of expanding TWCO's trading into international funds, and Lammert and Mark Whiston,[9] Soderberg's boss, asked Soderberg to speak to TWCO. Tr. 950-53; Ex. 37. Soderberg contacted Trautman and explained that "while [Janus] didn't have any explicit trading limits in our international products, there was a point in time in our business where we had lots and lots of people trading and timing international products, so we were asking everyone to control their trading and abide by those general guidelines [four round trips]." Tr. 954-55, 960-61.

TWCO continued to pursue trading in international funds at Janus. On April 16, 2002, Trautman e-mailed Lammert, stating that TWCO would like to target $200 million in the Janus fund family by year end. Tr. 785-86; Ex. 40. In April 18 and 19, 2002, e-mails, Wilson told Lammert that he would like to meet with several Janus Portfolio Managers of international

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[8] Ritchie Capital and its principals settled a proceeding arising out of its TWCO late trading; the sanctions included various undertakings, $30 million in disgorgement, and $2.5 million in penalties. Ritchie Capital Mgmt. L.L.C., Securities Act Release No. 8890 (Feb. 5, 2008).

[9] Whiston had worked with Soderberg at Fidelity prior to working at Janus and helped recruit him to Janus. Tr. 926-28. Whiston became the CEO of Janus. Tr. 872.

funds, including Jason Yee (Yee), Laurence Chang (Chang), and Sandy Rufenacht (Rufenacht). Ex. 221. Lammert asked Soderberg to coordinate; ultimately Newcomb coordinated the May 2, 2002, meeting. Ex. 221. Soderberg did not attend the meeting. Tr. 957.

Trautman, Wilson, and representatives from Ritchie Capital attended the May 2, 2002, meeting on behalf of TWCO, and Lammert, Newcomb, Chang, and Rufenacht attended the meeting on behalf of Janus. Tr. 464-68, 794-95, 1146. Following the meeting, Christian e-mailed Newcomb, stating that TWCO would like to invest a total of $100 million in Janus's international products – $70 million in the Adviser Worldwide Fund (JWGRX) and $30 million in the International Growth Fund (JIGRX). Ex. 68. Christian also informed Newcomb that $57.6 million was already invested in JIGRX and JWGRX. Ex. 68. In response, Newcomb explained that "[t]he only thing that I'm trying to avoid is to have all $70 [million] or all $30 [million] coming in or out on one day. That is what really raises eyebrows around here." Ex. 68.

TWCO did not trade for long in the international funds before concerns were raised about the frequency of its trading. On July 2, 2002, Soderberg e-mailed John Mari (Mari), Director of Institutional Operations at Janus,[10] expressing concern about market timing activity in the Adviser international funds; he asked Mari to help determine what accounts were timing those funds. Ex. 285. Mari responded, "[t]he majority of this timing is due to Trautman/Wasserman." Ex. 285. Some at Janus became concerned about the number of trades TWCO was doing in the international products. On July 17, 2002, Soderberg e-mailed Newcomb and George Hagerman (Hagerman)[11] a document detailing TWCO's trading, saying "[i]n case you need this for Trautman when shutting them down in the international products. This is certainly not the 8-10 times a year we were led to believe." Tr. 500-02; Ex. 70. On the same day, Hagerman e-mailed Newcomb "since they [TWCO have] exceeded the 14 trades we agreed upon you have to shut them down unless they don't trade for the remainder of the year. Lars just doesn't want to be bothered with the market timing activity." Ex. 71.

Following this exchange, Newcomb shut down TWCO's trading in international funds. However, as Newcomb expected, Trautman wanted to speak to Soderberg directly. Tr. 500-02; Ex. 70. On July 19, 2002, Trautman also approached Lammert about TWCO's being excluded from trading in the international funds, telling him that "the recent market conditions have created an unusually bad environment as each time it appears that the market may be stabilizing it reverses. This has created unusually high activity in even our most conservative accounts." Ex. 109. Trautman claimed that he was not asking Lammert to get involved in the situation, but

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[10] Mari began working at Janus in July 1990 as a "phone rep." He moved into management in 1992 and became the director of Institutional Operations in 1997. Tr. 157-59. Institutional Operations provided back office support for the distribution of Janus fund shares. Tr. 159. This group also dealt with financial intermediaries by setting up the relationships in the transfer agency system, taking trades from the intermediaries, facilitating settlements of trades, and coordinating between the back offices of the intermediaries and Janus. Tr. 161-162.

[11] Hagerman was Soderberg's subordinate and Newcomb's boss. He was also in charge of the institutional money market fund. Tr. 577-78. Hagerman approved the market timing relationship with TWCO. Tr. 230, 310.

that he wanted to find a "win/win path." Ex. 109. Shortly after this e-mail exchange, Soderberg spoke with Trautman about TWCO's trading. Trautman asserted that the trading "patterns that he experienced recently were highly unusual, the anomalies in the market had caused their allocation system to move a little more than usual." Tr. 986. Trautman convinced Soderberg that TWCO would have a much more conservative profile going forward, and Soderberg allowed TWCO to resume trading in international accounts. Tr. 987. Following this interaction, Soderberg asked Hagerman to manage the relationship. Tr. 993. Lammert did not intervene in the discussions about TWCO's continued trading in the international funds. Tr. 993. Lammert learned that this issue had been handled by Soderberg and Newcomb, whom he believed to be competent to address it. Tr. 803-04. Shortly after Soderberg allowed TWCO to continue trading, Marci Weidemeier (Weidemeier), an operations employee, sent Soderberg and Newcomb an e-mail stating "Lars said no more than 6 exchanges in International funds, they have hit that in 2 weeks. Now what!!!" Tr. 998-1002; Ex. 73. Newcomb responded that "[w]e asked them to move in and out in smaller amounts. So, it looked to me like they had moved into equity and then moved out with some of the money. I look at that as one move." Ex. 73. Soderberg did not contact Trautman in response to this e-mail exchange. Tr. 1001-02.

TWCO's trading raised issues again at the end of July when TWCO began trading in the Global Value Fund, a small fund managed by Yee. Ex. 196. Yee wanted the trading stopped because it was disruptive to his management of the fund owing to its small size. Ex. 196. Soderberg reacted quickly and contacted Newcomb and told him, "if Trautman is in Global Value, let's have him either stop trading or move to a bigger fund and trade only 6 or so times a year." Ex. 196. Newcomb told Soderberg that it was "[a]ll taken care of. They said no problem." Ex. 196.

3. Brean Murray Begins Timing Janus Funds

In September 2002 Grady and Goldberg were randomly calling portfolio managers and other executives at mutual funds in an attempt to negotiate market timing capacity for their clients. They reached Lammert, who referred them to Newcomb. Tr. 630-32, 1304-06. After talking to Grady and Goldberg, Newcomb sent Lammert an e-mail outlining Brean Murray's trading proposal. Brean Murray wanted to "trade the Mercury Fund more than we would generally allow (3 times a month)." Ex. 75. Brean Murray wanted to start with $50 million. Newcomb told Lammert that "if this will not negatively effect managing the fund, we can let them do it. It's your call." Ex. 75. In response, Lammert wrote, "I am willing to bet they cannot time the market successfully and so would welcome the business. But can you track how much they do trade and how big they are so that we can be sure this does not get out of hand? $50 million or 1% of assets seems like a manageable number relative to frequent trading." Ex. 75. After he received approval from Lammert, Newcomb informed Brean Murray that it could trade in the Mercury Fund. Brean Murray began trading in late 2002. Tr. 567-68. Brean Murray negotiated timing capacity on behalf of Eddie Stern of Canary Capital, who also operated as Hartz Trading. Tr. 1304-09. Newcomb told Lammert he would keep a close eye on Brean Murray's trading. Tr. 814.

Lammert allowed Brean Murray to trade more than Janus would typically allow in the Mercury Fund because, based on his understanding of academic literature and his own experience, he did not think it was possible to successfully time the market. Tr. 1418-19.

Brean Murray invested $25 million in a money market fund, in addition to the $50 million timing capacity. Tr. 1535. At the hearing, both Grady and Goldberg testified that the $25 million "sticky" or "static" asset investment was a requirement in exchange for timing capacity in the Mercury Fund. Tr. 643, 1306-07. Additionally, when its timing capacity was reduced, Brean Murray reduced its investment in the money market fund proportionately. Tr. 1539-40; Ex. 474. Newcomb testified, however, that the $25 million investment in the money market fund was not dependent on the $50 million timing capacity and was merely the result of cross-selling. Tr. 574-75, 1483-84.

In light of the evidence of record and the Division's burden of proof, it is not found that Brean Murray's investment in the money market fund was a static asset provided in exchange for timing capacity. In May 2003, a Brean Murray employee assisting Grady and Goldberg created a document listing companies at which they had market timing capacity for their clients. Tr. 674-78; Ex. 3164. This document contains details about each fund, including the fund company name, the trading platform used, and the ticket size. Ex. 3164. For some of the funds, the details also include a list of sticky assets associated with each account. Janus is listed in this document, but no sticky assets are listed as being associated with Janus. Ex. 3164. Finally, Newcomb's position at Janus was such that he did not have independent authority to approve market timing relationships or to impose requirements on investors. Tr. 310-11, 1413, 1480-81. In fact, Mari stated that it was not his "understanding that Mr. Newcomb had the authority to approve market timing relationships." Tr. 311. Moreover, had Newcomb, in 2002, requested that accommodations be made for market timing, Mari would not have followed Newcomb's request. Tr. 311. There is no evidence in the record that suggests he was ordered to require static assets by anyone else at Janus.

4. Market Timing Raises Concerns

When Brean Murray began trading in the Mercury Fund, the fund's cash position was about $500-600 million. Tr. 816-17. By November 2002, the cash position in the Mercury Fund had fallen to $100-150 million. Tr. 816-17. This caused Lammert to notice large trades that previously would not have caused him concern. Tr. 816-17. On October 31, 2002, Lammert e-mailed Jeff Rood (Rood), a Janus employee, stating "[b]ig inflow today after huge outflow two days ago and a huge inflow the day before that. Would it be possible to get some more data on the nature of these big flows in and out of Mercury?" Ex. 466. Lammert was concerned about the potential of these trades to cause disruption in the future. Tr. 817. Rood responded that these trades were an approximately $25 million exchange purchase on October 28, 2002, followed by an approximately $50 million exchange redemption on October 29, 2002, followed by another approximately $50 million exchange purchase on October 31, 2002. Ex. 466. Lammert was told that these trades were done by Hagerman's group. Ex. 466.

Lammert contacted Hagerman to determine who was behind these frequent and large trades. Hagerman told Lammert that it was TWCO, and asked if he would like to shut down

TWCO's trading in the Mercury Fund. Ex. 466. Lammert responded by asking Hagerman what the general policy on these types of exchanges was because he is "inclined to set a tighter limit for these guys . . . maybe $10 mil but I also am a little concerned about really frequent trading generally." Ex. 466. Hagerman responded that the "current Janus policy prohibits more than four roundtrip trades per year so they are in only because of your approval. You call the shots on any exceptions." Ex. 466. Lammert told Hagerman that they should abide by the same rules as everyone else. Tr. 815-21; Ex. 466.

On November 14, 2002, Lammert e-mailed Trautman, explaining that there were approximately $50 million in trades into and out of the Mercury Fund that occurred over a one-week period. He further explained that his cash position was in the $100 million range and that swings of this type were problematic. He explained that Janus "appreciate[d] the $200 mil but may have to cool the size and frequency of trades." Tr. 821-24; Ex. 406. Trautman responded that "as always we want to make sure that the size and frequency of trades do not cause you any concern or issues." Ex. 47. That same day, Trautman sent Lammert another e-mail explaining that he checked TWCO's activity, and that since the October time frame, they had no activity of any substance. Despite their lack of trading, Trautman asked Christian to "instruct the clients to reduce the amount and timing of the activity pending further notice so that there isn't a repeat of the Oct activity." Ex. 48. Lammert informed Trautman that there was a general policy limiting trading to four round trip trades a year, but Janus had some flexibility as to that restriction. Ex. 48.

The trading that Lammert had been told was TWCO's was actually Brean Murray's, and on November 14, 2002, Newcomb advised Lammert of this. Ex. 53. Newcomb explained that he "always know[s] how much these two [TWCO and Brean Murray] are trading because they let me know about them via email." Ex. 54. Newcomb called Brean Murray on November 14, 2002, and asked it to stop trading. Ex. 53.

After Newcomb stopped Brean Murray's trading, Lammert spoke with Brean Murray and reduced its trading limit to $5 million from the original $50 million.[12] Tr. 841-42; Exs. 463, 464. He also asked Newcomb if they were "in fact helping or hurting us with their trades." Tr. 842; Ex. 463. Lammert wanted to know "whether there are obvious costs to us of these guys moving in and out in small size. If they are somehow able to time successfully, there would be. If not, they are helping the other shareholders and giving us some free assets besides." Ex. 464. Lammert asked Newcomb to "take a look at that question and are there other costs I am not considering." Ex. 464. Lammert later learned that Brean Murray in fact lost money on these trades. Tr. 843. On November 18, 2002, Newcomb sent Lammert an e-mail stating "[t]hese trades cost us virtually nothing. It's all electronic. Ultimately, I believe that their activity ends up being neutral to our performance. As long as they are not forcing you to sell stock to meet their redemption." Ex. 56. Lammert never took any action that he would not otherwise have

[12] Prior to Lammert informing Newcomb that Brean Murray was allowed to continue trading in the Mercury Fund, Newcomb sent Lammert an e-mail explaining "I called [Brean Murray] before getting your message and asked them not to go back into the fund. They have moved in and out WAY more than we want to see. I'd like to stick to that if it [sic] ok with you." Ex. 464.

taken as a result of TWCO and Brean Murray's trading during the period 2001 to 2003. Tr. 1408-09.

Despite the concern that arose during this November 2002 time period, both Brean Murray and TWCO were allowed to continue to frequently trade in Janus shares. Tr. 293, 548-50. Both TWCO and Brean Murray were late trading Janus funds; however, no one at Janus knew this. Tr. 358-59, 692, 1171.

D. The Redemption Fee Report

During the relevant period, some in Janus management were trying to keep market timing money out of Janus funds. TWCO was the first approved market timer in any Janus Fund. Mari was surprised when he discovered that TWCO was allowed to frequently trade Janus Funds because "we [Janus] were trying to stop all the activity in our Aspen Series. We had a significant, what I would call international arbitrage, going on in the international series and international portfolios, so we were trying to work with the insurance companies to stop that, and we were pretty aggressive about that." Tr. 180.

In late 2002, Whiston, who had become Chief Executive Officer at Janus, asked Robin Beery (Beery), Janus's Chief Marketing Officer, to examine the possibility of redemption fees for certain Janus products.[13] Tr. 854-56, 872, 888. In doing so, Beery learned, for the first time, that Janus had approved market timing relationships and that TWCO was an approved timer. Tr. 857-58. John Leuthold, a member of Beery's team also working on the report, received an e-mail from Jeb Avery who told him that he "should also mention that some PMs have actually made agreements with the sales guys to let certain timing clients into their funds." Tr. 857-58; Ex. 231. Avery identified TWCO as the only approved market timer. According to Avery, TWCO "times between the Institutional Money Market, Adviser I Money Market, Mercury, Enterprise, Adviser I Worldwide, and Adviser I International." Tr. 858; Ex. 231.

Beery included reference to the approved timing relationships in her report, entitled "Addressing Market Timing at Janus." Tr. 862; Ex. 92. Two different sections mentioned the approved relationships. First, the report stated, "we do think there are timers that are slipping through because . . . they are Janus-approved timers and thus, not being monitored and policed." Ex. 92. Later, in a section dealing with proposed solutions to Janus's market timing problem, the report stated, "This includes policing the one-off agreements between Sales and PMs that allow certain known timers into our funds." Ex. 92. The market timing report recommended that Janus add redemption fees to certain international funds in order to control market timing in those funds. Ex. 92.

Beery provided Whiston a copy of the market timing report in November 2002. Tr. 872-73. Whiston reviewed the market timing report; in a November 12, 2002, e-mail, he described

[13] Beery worked for Janus from 1994 to at least the date of her testimony at the hearing. She began her career in marketing, and in 2002 she was promoted to Chief Marketing Officer. Tr. 853-54.

the report as excellent, suggested changes, and approved the recommendation for adding redemption fees. Tr. 872-74; Ex. 1028. The final market timing report was circulated to several people within Janus: Kelley Howes[14] and Bonnie Howe[15] in the legal department, and Mari, head of Institutional Operations, among others. Tr. 876-77; Ex 1029.

The recommendation for adding redemption fees had to be approved by Janus's Board of Trustees (Board), which met on December 9-10, 2002. Tr. 875, 1039; Ex. 1036. In advance of the meeting, Kelley Howes provided the Board with a summary of materials, which included an action item to discuss redemption fees. Tr. 1046-47; Ex. 1127. The background information on market timing that related to the redemption fees section of the summary included a document that was similar to the report that Beery created. However, neither that document nor any other material provided to the Board mentioned the approved market timers. At the meeting, no one told the Board about approved market timers at Janus. Tr. 1049-50. Ultimately, the Board voted to approve redemption fees. Tr. 1042; Ex. 1036. None of the Respondents was present at this meeting. Ex. 1036.

Dennis Mullen (Mullen), a trustee since 1971, first learned about the allegations that Janus was allowing market timing in September 2003 from a news item he received via e-mail. Tr. 1027-29. When Mullen first learned about the allegations, he was "dismayed, disappointed if it was true." Tr. 1028. At that time, he believed that Janus's prospectuses did not allow market timing. Tr. 1028-29. Mullen believed that the compliance department, legal department, or marketing department should have told him that Janus was allowing approved timing relationships. Tr. 1029-30. He did not mention any of the Respondents as being responsible for informing the Board about Janus's policy. Tr. 1030. Nor did any of the Respondents have regular contact with the Board. In fact, Mullen did not recall ever meeting Newcomb.[16] Tr. 1111-12.

E. Prospectus Language Dealing with Market Timing and Frequent Trading

As discussed above, TWCO and Brean Murray traded in five funds: the Mercury Fund, the Enterprise Fund, the Global Value Fund, the Adviser International Fund, and the Adviser Worldwide Fund. Each fund had a prospectus that was updated on a regular basis and that

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[14] At the time of hearing Kelley Howes was Janus's general counsel. Tr. 1228.

[15] Bonnie Howe worked at Janus from 1995 through 2006. Tr. 1212. She began as an associate counsel and was eventually promoted to vice-president and assistant general counsel. Tr. 1212-13. She worked on drafting the prospectuses for the Janus Adviser Series and the Janus Aspen Series. Tr. 1225.

[16] Lammert and Soderberg had more contact with the Board due to their positions; however, it was not regular contact. Soderberg, in his eight or nine years at Janus, went to three or four Board meetings. Tr. 933-34. Mullen did not recall whether the Trustees met with the portfolio managers on a yearly basis during the relevant period, although, at some point, they met with the portfolio managers to discuss "their feeling of the market and where they think their portfolios are going, things of that nature, all related to their investments." Tr. 1024-27.

included language that discussed frequent trading and market timing. These prospectuses were provided to investors and prospective investors and were filed with the Commission. See e.g., Ex. 484-8.

TWCO's trading began in 2001 in the Mercury Fund. At that time, the Mercury Fund had one prospectus. In the section titled "Exchange Policies," the prospectus stated, "You may make four exchanges out of the Fund during a calendar year (exclusive of Systematic Exchange). Exchanges in excess of this limit are considered excessive trading and may be subject to an exchange fee or may result in termination of the exchange privilege or the right to make future purchases of Fund shares." Ex. 484-8 at 73-74. However, in another section of the same prospectus, titled "Excessive Trading," the prospectus discussed several ways that market timing may make it difficult to manage a fund. This section also claimed, "The Fund does not permit excessive trading or market timing." Ex. 484-8 at 74. Despite this language, the prospectus went on to say, "[i]f the Fund allows a market timer to trade Fund shares, it may in the future require the market timer to enter into a written agreement to follow certain procedures and limitations." Ex. 484-8 at 73-4.

Brean Murray's trading in Janus funds began in 2002. From 2002 to 2003 TWCO and Brean Murray expanded their market timing or frequent trading into other funds in the JIF Series and the JAD series of funds. Ex. 33, 75, 113, 479, 480. In addition to the Mercury Fund, Brean Murray and TWCO traded in the Enterprise Fund, the Global Value Fund, the Adviser International Fund, and the Adviser Worldwide Fund. The JIF series of funds were typically sold directly to retail investors but could also be sold to retail investors who invested through intermediaries. Tr. 1279. Accordingly, these funds had two different prospectuses: a prospectus for retail customers and a prospectus for trading through intermediaries. Tr. 1280. Intermediaries were obligated to provide the retail prospectus to the underlying retail investors. Tr. 1297.

1. Retail Prospectus

The retail prospectuses for all of the JIF Series of funds, including the Mercury Fund, the Enterprise Fund, and the Global Value Fund, all contained an express limit on the number of exchanges a retail customer could make. Each of the JIF Funds' retail prospectuses stated, "You may make four exchanges out of a Janus fund (exclusive of systematic Exchanges) per calendar year.[17] These limits are designed to deter short-term trading." Ex. 484-11 at 158, -12 at 296, 329, -16 at 91, 275, 386. Each prospectus continued:

> Frequent trades in your account or accounts controlled by you can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders. The Fund is not intended for market timing or excessive trading. To deter these activities, the Fund and its agents may temporarily or permanently suspend or terminate exchange privileges of any investor who makes more than

[17] The "per calendar year" language was changed to "per 12 month period" in the 2003 prospectuses. Ex. 484-16.

> four exchanges out of the Fund in a calendar year and bar future purchases into the Fund by such investor.

Ex. 484-11 at 158, -12 at 296, 329, -16 at 91, 276, 386. The language found in the 2001 Mercury prospectus that stated what the Fund would do if it allowed market timing was removed from later prospectuses.

2. Intermediary Prospectus

All funds, with the exception of the 2001 Mercury Prospectus, had an intermediary prospectus. Intermediary prospectuses did not contain an explicit limit on the number of exchanges that were allowed. Despite this, each prospectus contained language that prohibited market timing or frequent trading. In a section entitled "Exchanges," the intermediary prospectus stated that "[t]he exchange privilege is not intended as a vehicle for short-term or excessive trading. The Fund does not permit frequent trading or market timing. Excessive exchanges of Fund shares disrupt portfolio management and drive Fund expenses higher." Ex. 484-13 at 123, -14 at 339, 379, -17 at 66, 203, 284, -19 at 196, 222,-21 at 260, 294, -23 at 253, 286, -25 at 230, 435. The intermediary prospectuses also contained a section entitled "Excessive Trading Policy," which stated:

> Frequent trades into or out of the Fund can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders, including long-term shareholders who do not generate these costs. The Fund is not intended for market timing or excessive trading. The Fund and its agents may reject any purchase request . . . by any investor or group of investors indefinitely if it believes that any combination of trading activity is attributable to market timing or is otherwise excessive or potentially disruptive to the Fund. The Fund may refuse purchase orders . . . for any reason without prior notice, particularly orders that the Fund believes are made on behalf of market timers.

Ex. 484-13 at 123, -14 at 340, 380, -17 at 67, 204, 285, -19 at 196, 222,-21 at 261-62, 295,-23 at 254-55, 287,-25 at 231, 437.

Despite the language in the prospectuses, the overriding opinion at Janus was that the prospectuses allowed market timing so long as it was not disruptive to the fund.[18] For example, Bonnie Howe believed that the prospectus was drafted so that the Funds could "have the right to reject any of those practices [market timing, excessive trading, frequent trading] that were disruptive to the fund." Tr. 1214. She went on to explain that disruption was "[a]nything that . . . caused problems for the fund portfolio manager in managing the fund or anything that could have diluted shareholder value for current shareholders in the fund." Tr. 1214. Mari also testified that limits on market timing were based on disruptive trading. Mari believed that TWCO's trading relationship did not violate the prospectus language. Tr. 388-89.

[18] All of the Respondents testified that they had similar beliefs that the prospectuses allowed market timing so long as it did not disrupt the fund. Tr. 809, 811, 970, 985-86, 990, 1480-1481.

In 2003, Richard Garland (Garland) took over Hagerman's position. Tr. 422. Garland wanted to attract new investments in numerous new funds to increase their assets under management. Tr. 335-37. In order to accomplish this, Garland opened "the floodgates" on market timing. Tr. 311. Janus even maintained lists of approved market timers. For example in July 2003, an employee at Janus circulated a list of approved market timers, the title of the document was "Approved Timers." Ex. 64. In an e-mail discussing market timing, Bonnie Howe wrote:

> By stating we can reject a market timing trade at any time (rather than only after 4 exchanges) we are able to set our internal policies on what constitutes market timing for a particular client/trade based on history and size of a particular client rather than a one size fits all approach. If clients feel this isn't clear, you could have internal guidelines setting forth dollar amounts and exchange frequency and communicate these to institutional clients that are particularly problematic. Then you could change these internal guidelines as you wanted . . . if they weren't working, without amending the prospectus language.

Ex. 3171.

Later, when asked, "can we legally approve certain timers, while stating in the prospectus to the contrary," Bonnie Howe responded, "[l]egally we can set our market timing however we want. However, we shouldn't make so many exceptions that it is disruptive to the fund and its other shareholders without revising our prospectus language." Ex. 3183. Again, this discussion confirms the belief at Janus that disruption to the fund and its shareholders was the deciding factor in allowing market timing.

Janus's legal department, not the respondents, had the responsibility for drafting the prospectuses, and they were approved by the Board. Tr. 1280-81, 1283-84. While Respondents may have received drafts of the prospectuses or were provided new prospectuses when they were issued, there was no evidence that any of the Respondents had responsibility for the language in the prospectuses.[19] Tr. 849-51, 1226.

F. Expert Testimony[20]

Russ Wermers, Ph.D. (Wermers), testified for the Division. He was accepted as an expert in investment theory and mutual funds. Tr. 1574. Wermers is a tenured associate professor of Finance at the University of Maryland, where he teaches investment theory. Tr. 1563, 1566. Wermers received degrees in engineering from the University of Idaho in 1981 and

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[19] Lammert received copies of the prospectuses; however, he did not read the language that prohibited market timing at any time between February 2002 and February 2003. Tr. 849-51; 1406-08. Nor did Lammert review the prospectuses that were sent to him, even though he did recall that copies were provided to him. Tr. 1406.

[20] To the extent that the experts' evidence does not lead to findings of fact, it will be summarized here and referred to as appropriate in the Conclusions of Law section of this Initial Decision.

a Master's in Business Administration in 1989 and a Ph.D. in Finance in 1995 from the University of California Los Angeles. Tr. 1565. Wermers was "asked to analyze the trading records of [TWCO and Brean Murray] during the period November 7, 2001, to September 2, 2003 (inclusive) with respect to trades of several Janus mutual funds in order to opine on whether long term shareholders in Janus funds were harmed by the frequent trading conducted through the brokerages, and, if so, the magnitude of any such harms." Ex. 478 at 1.

Wermers concluded that both TWCO and Brean Murray caused both direct (dilution) and indirect (disruption of portfolio management) harm. Ex. 478. Wermers did not differentiate between harm caused by TWCO's and Brean Murray's late trading and harm caused by market timing. Tr. 1647. Wermers concluded in his expert report that trading by TWCO clients caused, based on his most precise model of fair value, an estimated $10,627,257 in direct dilution harm. Ex. 478. Wermers "conclude[d] that the direct dilution harms of trades by [Brean Murray] are not reliably different from zero." Ex 478 at 3.

Wermers also concluded that there was substantial indirect harm resulting from TWCO's and Brean Murray's frequent trading. Wermers states that several sources of indirect harm include: (1) increased portfolio-level transaction costs caused by frequent trading flows into and out of each Janus Fund, (2) increased capital gains realization resulting from these increased transactions, (3) increased levels of cash holding necessitated by these flows to avoid portfolio transactions, and (4) administrative costs of handling the frequent trading. Wermers estimates the harm due to portfolio-level transactions to be $13,729,086 for TWCO and $1,912,295 for Brean Murray. Ex. 478 at 3-4. However, in fact, administrative costs were minimal and Lammert's portfolio management of the Mercury Fund was unaffected by the market timing so that items (1), (2), and (3) did not occur as a result of TWCO's and Brean Murray's timing that fund.

Gregory K. Bell, Ph.D (Bell), testified for the Respondents. He was accepted as an expert in statistical analysis, economic modeling, and calculation of damages and harm. Tr. 1779. Bell is an executive vice president at CRA International, a global management and economics consulting firm. Tr. 1777. Bell graduated with a Bachelor's degree from Simon Fraser University, an MBA from Harvard Business School, and a Ph.D. in business economics from Harvard University. Tr. 1777. Bell opines that the opinions set forth in Wermers' report are "unreasonable, speculative and unreliable." Ex. 1078 at 2. Bell's expert report lists several reasons why Wermers' report fails to provide the "basis for any conclusion regarding alleged harm suffered by the long-term shareholders," both for direct and indirect harms. Ex. 1078 at 2.

Jonathan Macey (Macey) testified for the Respondents. He was accepted as an expert in the custom and practice of the mutual fund industry as to the purpose of the disclosure documents and the regulatory framework for mutual funds. Tr. 1696-1699. Macey is the Sam Harris Professor of Corporate Law, Corporate Finance and Securities Law at Yale Law School and is also a professor in the Yale School of Management. Tr. 1690. Macey received a Bachelor of Arts in Economics in 1977 from Harvard College and a Juris Doctor degree from Yale Law School in 1982. Ex. 1079 at 2. Macey testified that: (1) looking at the custom and practice in the industry, as well as the specific disclosures made by the mutual funds in this case, there were no strict rules prohibiting the practice of market timing; (2) the purpose of the disclosure,

consistent with custom and practice at the time, was to put prospective investors on notice that the mutual fund had the authority to curtail or to restrict or prohibit trading practices that it deemed to be harmful to investors or disruptive of the conduct of the fund; and (3) Janus's disclosures in their prospectuses were consistent, generally speaking, with what were widely regarded as appropriate custom and practices in the industry. Tr. 1700-01.

Finally, Geoffrey Bobroff (Bobroff) testified for Newcomb. He was accepted as an expert in mutual funds, mutual funds governance and prospectuses, and the structure and operations of mutual fund complexes. Tr. 1894. Bobroff received a degree in Accounting from the University of Miami in 1966 and a Juris Doctor degree from the University of Miami, School of Law, in 1969. Tr. 1883. Bobroff founded and became president of Bobroff Consulting, Inc., an East Greenwich, Rhode Island, consulting company that provides consulting services to the investment management industry. Ex. 3205 at 2. Bobroff opined that the "2001, 2002, and 2003 prospectus disclosures would not lead a reasonable investor to expect that any Janus Fund would regulate market timing in any particular way." Ex. 3205 at 7. Because of this, Newcomb did not act recklessly or unreasonably by believing "approved market timing relationships at Janus were consistent with or at least did not violate the language in the prospectus disclosures." Ex. 3205 at 8. Bobroff went on to opine that Newcomb: (1) lacked decision-making authority with respect to the approved market timing relationships; (2) did not have a duty to notify fund shareholders that Janus was permitting certain customers to market time and frequently trade the funds; and (3) did not have a duty to notify the Board that Janus was permitting certain customers to market time and frequently trade the funds. Ex. 3205 at 8-9.

III. CONCLUSIONS OF LAW

In this section it is concluded that Respondents Lammert and Soderberg caused violations by Janus of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Section 206(2) of the Advisers Act, and Section 34(b) of the Investment Company Act within the meaning of Section 8A of the Securities Act, Section 203(k) of the Advisers Act, and Section 9(f) of the Investment Company Act, respectively. It is further concluded that all other violations alleged in the OIP are unproven.

A. Antifraud Provisions

All Respondents are charged with primary violations of the antifraud provisions of the Securities and Exchange Acts – Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 – which prohibit essentially the same type of conduct. United States v. Naftalin, 441 U.S. 768, 773 n.4 & 778 (1979); SEC v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 469 (S.D.N.Y. 2004).

Section 17(a) of the Securities Act makes it unlawful "in the offer or sale of" securities, by jurisdictional means, to:

1) employ any device, scheme, or artifice to defraud;

2) obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statement made not misleading; or

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

Similar proscriptions are contained in Exchange Act Section 10(b) and Rule 10b-5, as well as in Advisers Act Sections 206(1) and 206(2). Likewise, Section 34(b) of the Investment Company Act makes it unlawful for any person to make material misstatements and omissions in documents filed, transmitted, or required to be kept under the Investment Company Act.

Scienter is required to establish violations of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5, as well as of Advisers Act Section 206(1). SEC v. Steadman, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). It is "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); see also Aaron v. SEC, 446 U.S. 680, 686 n.5, 695-97 (1980); SEC v. Steadman, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. See David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997); see also SEC v.Steadman, 967 F.2d at 641-42; Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990). Reckless conduct is conduct which is "'highly unreasonable' and . . . represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillion & Co., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)).

Scienter is not required to establish a violation of Sections 17(a)(2) or 17(a)(3) of the Securities Act or of Section 206(2) of the Advisers Act; a showing of negligence is adequate. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); SEC v.Steadman, 967 F.2d at 643 & n.5; Steadman v. SEC, 603 F.2d 1126, 1132-34 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Likewise, scienter is not required to establish a violation of Section 34(b) of the Investment Company Act. Fundamental Portfolio Advisors, Inc., 56 S.E.C. 651, 670 (2003), recon., 85 SEC Docket 1754 (May 23, 2005).

Material misrepresentations and omissions violate Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, Advisers Act Sections 206(1) and 206(2), and Investment Company Act Section 34(b). The standard of materiality is whether or not a reasonable investor or prospective investor would have considered the information important in deciding whether or not to invest. See SEC v. Steadman, 967 F.2d at 643; Basic Inc. v. Levinson, 485 U.S. 224, 231-32, 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

An investment adviser is a fiduciary. Capital Gains Research Bureau, Inc., 375 U.S. at 191-92, 194, 201; Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979). Section 206 of the Advisers Act establishes "a statutory fiduciary duty for [investment advisers] to act for the benefit of their clients, requiring advisers to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." SEC v. DiBella, Slip Copy, 2007 WL 2904211 (D.Conn. 2007) (citing SEC

v. Moran, 922 F.Supp. 867, 895-96 (S.D.N.Y. 1996)); see also Capital Gains Research Bureau, Inc., 375 U.S. at 194. Potential conflicts of interest are always material. Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003).

1. Aiding and Abetting; Causing

In addition to charging that they "willfully violated" the antifraud provisions of the federal securities laws, the OIP charges that Respondents "willfully aided and abetted" and "caused" Janus's violations of those provisions and of Sections 206(1) and 206(2) of the Advisers Act and that Lammert and Soderberg "willfully aided and abetted" and "caused" Janus's violations of Section 34(b) of the Investment Company Act. For "aiding and abetting" liability under the federal securities laws, three elements must be established: (1) a primary or independent securities law violation committed by another party; (2) awareness or knowledge by the aider and abettor that his or her role was part of an overall activity that was improper; also conceptualized as scienter in aiding and abetting antifraud violations; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation. See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000); Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1009 (11th Cir. 1985); Investors Research Corp. v. SEC, 628 F.2d 168, 178 (D.C. Cir. 1980); IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94-97 (5th Cir. 1975); SEC v. Coffey, 493 F.2d 1304, 1316-17 (6th Cir. 1974); Russo Sec. Inc., 53 S.E.C. 271, 278 & n.16 (1997); Donald T. Sheldon, 51 S.E.C. 59, 66 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995); William R. Carter, 47 S.E.C. 471, 502-03 (1981). A person cannot escape aiding and abetting liability by claiming ignorance of the securities laws. See Sharon M. Graham, 53 S.E.C. 1072, 1084 n.33 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000). The knowledge or awareness requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or active participant. See Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990); Cornfeld, 619 F.2d at 923, 925; Rolf, 570 F.2d at 47-48; Woodward, 522 F.2d at 97. That is, it must be established that a respondent either acted with knowledge or that he "encountered 'red flags' or 'suspicious events creating reason for doubt' that should have alerted him to the improper conduct of the primary violator," or if there was a danger so obvious that he must have been aware of it. Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004).

For "causing" liability, three elements must be established: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. Robert M. Fuller, 56 S.E.C. 976, 984 (2003), pet. denied, No. 03-1334 (D.C. Cir. 2004). A respondent who aids and abets a violation also is a cause of the violation under the federal securities laws. See Graham, 53 S.E.C. at 1085 n.35. Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. See KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1175 (2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002), reh'g en banc denied, 2002 U.S. App. Lexis 14543 (July 16, 2002). It is assumed that scienter is required to establish secondary liability for causing a primary violation that requires scienter. Id.

B. Antifraud Violations

The alleged antifraud violations are based on the alleged inconsistency between prospectus statements about frequent trading/excessive trading/market timing and the actual trading arrangements of TWCO and Brean Murray. Market timing is not in itself illegal.[21]

In order to prove a primary violation of Section 17(a)(1) and Section 10(b) and Rule 10b-5 thereunder, the Division must establish that Respondents: (1) made misrepresentations or omissions of material fact, or other fraudulent devices; (2) made in connection with the offer, sale, or purchase of securities; and (3) acted with scienter. Aaron v. SEC, 446 U.S. at 695; Ernst & Ernst, 425 U.S. at 196. Scienter is not required to prove a violation of Section 17(a)(2) and (a)(3) of the Securities Act; instead negligence is a sufficient showing. Aaron v. SEC, 446 U.S. at 701-702; SEC v. Solucorp Indus. Ltd., 274 F. Supp. 2d 379, 419 (S.D.N.Y. 2003)

1. Misrepresentation or Omission of Material Fact or Other Fraudulent Device

In order to establish the first element of a primary violation, the Division must establish that Respondents (1) made an untrue statement of material fact; (2) omitted a fact that made a statement misleading; or (3) committed a deceptive or manipulative act as part of a scheme to defraud. SEC v. Tambone, 417 F. Supp. 2d 127, 132 (D. Mass. 2006). The Division must establish that the Respondents personally made the untrue statements or omissions. Id. If the Division cannot establish that the Respondents made an untrue statement, "anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger primary liability under Section 10(b)." Id. (citing Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998); see also Pimco Advisors Fund Mgmt., 341 F.Supp.2d at 466. Additionally, someone who was "involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements" could be held primarily liable. Scholastic Corp. Sec. Litig., 252 F.3d 63, 75-76 (2d cir. 2001). A statement or omission is material if "there is a substantial likelihood that a reasonable investor would consider it important in making investment decisions." Basic Inc., 485 U.S. at 231-32.

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[21] After scandals surfaced in 2003 regarding market timing and other abuses in the mutual fund industry, the Commission amended its rules to require mutual funds to make specific disclosures regarding market timing. Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 69 Fed. Reg. 22300 (Apr. 23, 2004). The Commission found that the risks that market timing may present for other shareholders of a fund include dilution in the value of fund shares held by long-term shareholders as well as what Respondents and other Janus personnel described as disruption – interference with the efficient management of the fund's portfolio and increased brokerage and administrative costs. Id., 69 Fed. Reg. at 22301-02. The new requirements include requiring a fund to describe in its prospectus these risks and any procedures to deter market timing and to describe in its State of Additional Information any arrangements with timers. Id.

To the extent that the prospectus language contained a material misstatement or omission, it cannot be attributed to any of the Respondents. No Respondent had any responsibility for drafting the prospectuses. While Lammert and Soderberg received copies of the prospectuses, there is no evidence that they had input into the drafting of the language or that they were asked to comment on the language. To the contrary, the evidence establishes that Janus's legal department had responsibility for drafting the prospectus language. By at least 2002, with the drafting of the Beery Report, the evidence shows that Janus's legal counsel knew of the approved market timing relationships, but believed that the language was drafted with sufficient flexibility to allow for those relationships to continue. As such, the Division is unable to establish that any of the respondents "personally made the untrue statements or omissions."

The Division further argues that Respondents violated fiduciary duties to the Board and to investors by failing to disclose the market timing relationships. The Division argues that this breach of fiduciary duty coupled with nondisclosure or deception can support liability for the antifraud provisions. This argument fails, however, because the Division has failed to establish that any of the Respondents acted with deception or nondisclosure.

The evidence establishes that none of the Respondents made any attempt to hide the presence of the approved market timing relationships at Janus. Nor did the Division establish that any of the Respondents knew what the Board understood or believed about the prospectus language. None of the Respondents had regular contact with the Board. When discussing who at Janus would have an obligation to inform the Board, Trustee Mullen listed the compliance department, the legal department, the marketing department, and the accounting department. He did not mention any of the Respondents. Additionally, the Beery Report mentioned the existence of approved market timing relationships. This information was not passed on to the Board in the final presentation to the Board on redemption fees. None of the Respondents attempted to hide the existence of these approved market timing relationships from inclusion in the Beery Report, and none of the Respondents was responsible for what was communicated to the Board at that meeting. In summary, the Division has failed to establish that any of the Respondents acted deceptively or that they failed to disclose the existence of market timing. Accordingly, no violations of Securities Act Section 17(a) or Exchange Act Section 10(b) and Rule 10b-5 by Respondents were proven.

2. Scienter

As indicated above, scienter is an element of violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, of "causing" violations of these provisions and Advisers Act Section 206(1), and of "aiding and abetting" any violations. None of the Respondents had scienter as to the primary or secondary violations charged against him. Thus, the allegations that Respondents violated and caused violations of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(1) of the Advisers Act, and aided and abetted violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, and that Lammert and Soderberg aided and abetted violations of Section 34(b) of the Investment Company Act are unproven.

No Respondent acted with knowledge that his role was part of an overall activity that was improper or encountered red flags that should have alerted him to improper conduct of a primary violator; nor was there a danger so obvious that any Respondent must have been aware of it. As a general matter, Respondents did not conceal the timing relationships with TWCO and Brean Murray, which were widely known at Janus, including to legal department personnel responsible, inter alia, for drafting prospectuses. The general belief at Janus, shared by Respondents, legal department personnel, and others, was that timing that did not disrupt portfolio management of a fund was permissible under its prospectus.

a. Lammert

When Trautman first approached Lammert about trading in the Mercury Fund, Trautman told Lammert that he had an "asset allocation" method and looked forward to an "active" relationship. However, Trautman did not tell Lammert how actively he planned on trading. Trautman informed Lammert that TWCO, on behalf of a client, intended to invest $100 million in the Mercury Fund. Lammert then directed Trautman to the sales department at Janus. Lammert's responsibility to the Mercury Fund was to manage the Fund, not to monitor sales. While Lammert had almost constant contact with Trautman during TWCO's relationship with Janus, the contact was mostly about their philanthropic work, not about business. Additionally, TWCO's volume of trading was below the threshold for large trade reports Lammert received when TWCO began trading.

The first indication Lammert received that suggested TWCO's excessive trading was in a July 19, 2002, e-mail from Trautman complaining that TWCO was being shut out of trading in the international funds, funds Lammert did not manage. Lammert did not respond to this invitation to help Trautman reinstate TWCO's trading ability; he did not intervene. Nor was Lammert responsible for monitoring and policing TWCO's trading, especially in funds he did not manage. Lammert left that responsibility to Soderberg and Newcomb. Lammert learned that this issue had been handled by Soderberg and Newcomb, whom he believed to be competent to address it. This incident was not a sufficient "red flag" to suggest that Janus was a primary violator of the securities laws. Further, the fact that TWCO was ultimately allowed to continue trading in the international funds suggests that it was an allowable practice at Janus.

When Brean Murray began trading at Janus, both Lammert and Newcomb understood that it intended to trade more than Janus would typically allow. Newcomb told Lammert that "if this will not negatively effect managing the fund, we can let them do it. It's your call." This was consistent with the widely held belief at Janus that the prospectus language allowed approved market timing in a fund so long as the trading did not disrupt the management of the fund. The policy was confirmed to Lammert again, when he began looking into large trades into and out of the Mercury Fund in 2002. Consistent with Newcomb's articulation of Janus's policy, that the general policy limited trading, but that Lammert could grant exceptions, Hagerman told him that "current Janus policy prohibits more than four roundtrip trades per year so they are in only because of your approval. You call the shots on any exceptions." Having been told, mistakenly, that TWCO was responsible for the large trades, Lammert then e-mailed Trautman, stating that the trading had become excessive and asking him to limit trading going forward.

Upon learning that the disruptive trading was Brean Murray's, and in accordance with what both Newcomb and Hagerman told him, Lammert took steps to limit Brean Murray's trading to a level that he felt would not be disruptive. He also asked Newcomb to research "whether there are obvious costs to us of these guys moving in and out in small size. If they are somehow able to time successfully, there would be. If not, they are helping other shareholders and giving us free assets besides." Lammert asked Newcomb to "take a look at that question and are there other costs I am not considering." Newcomb responded that "these trades cost us virtually nothing. It's all electronic. Ultimately, I believed that their activity ends up being neutral to our performance. As long as they are not forcing you to sell stock to meet their redemption." Again, this is consistent with Lammert's previous understanding. Lammert never had to sell any stock or otherwise alter his management of the fund to meet redemptions.

It is concluded that Lammert did not act with scienter, knowingly, or recklessly. Accordingly, it is concluded that Lammert is not liable for any scienter-based violation, that is, of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, of causing violations of those provisions or Section 206(1) of the Advisers Act, or of aiding and abetting violations of any of the antifraud provisions of the Securities, Exchange, Advisers, or Investment Company Acts.

b. Soderberg

Soderberg had no contact with Brean Murray; only his conduct in relation to TWCO's trading is at issue. Soderberg believed that market timing was allowed unless it was disruptive to a Portfolio Manager's management of his or her fund. His contact with others at Janus, including the legal department, further conformed to this belief. Soderberg also did not hide the approved timing relationships from anyone at Janus; he had conversations with others in sales as well as the operations groups about TWCO's trading.

Soderberg informed Trautman of the excessive trading guidelines during his first contact with TWCO, in March 2002, made at the request of Whiston and Lammert, to discuss TWCO's interest in international products. Soderberg's next contact with TWCO was in July 2002, when he suspended TWCO's trading in the international funds. Following a conversation with Trautman, in which Trautman claimed that the trading was an anomaly and that going forward TWCO would trade more conservatively, Soderberg allowed TWCO to resume trading. Additionally, Soderberg asked Hagerman to monitor the relationship. Whenever he was told by a Portfolio Manager that TWCO's trading was disruptive, Soderberg stopped TWCO's trading in that fund. This was consistent with his understanding of the prospectus language.

It is concluded that Soderberg did not act with scienter, knowingly, or recklessly. Accordingly, it is concluded that Soderberg is not liable for any scienter-based violation, that is, of Securities Act Section 17(a)(1), Exchange Act Section 10(b) and Rule 10b-5 thereunder, of causing violations of those provisions or Advisers Act Section 206(1), or of aiding and abetting violations of any of the antifraud provisions of the Securities, Exchange, Advisers, or Investment Company Acts.

c. Newcomb

Newcomb was the point of contact at Janus for TWCO and Brean Murray. He received regular information about the extent of their trading. Newcomb, like Lammert and Soderberg, believed that the prospectus language allowed Janus to approve market timing relationships so long as it was not disruptive to fund portfolio management. Newcomb was not reckless in this belief as it was widely shared among employees at Janus and was not thought to be illegal. Newcomb made no attempt to hide the presence of these approved market timing relationships and regularly discussed these relationships with his superiors, including Hagerman and Soderberg.

At Janus, Newcomb was junior to the other Respondents and, as such, had limited control over allowing TWCO and Brean Murray to continue trading in Janus Funds. This is clear from the two times that TWCO's and Brean Murray's trading became problematic. When Newcomb was asked to suspend TWCO's trading in the international funds, he did. It was Soderberg, and not Newcomb, who discussed the resumption of trading with Trautman, and it was Soderberg who made the decision to allow TWCO to continue trading. Likewise, when Lammert raised concerns about Brean Murray's trading in the Mercury Fund, Newcomb suspended the trading and told Lammert that Brean Murray should be barred from trading since it had been trading much more than it originally stated. Again, it was Lammert who allowed Brean Murray to continue trading, at the lower level he specified.

It is concluded that Newcomb did not act with scienter, knowingly, or recklessly. Accordingly, it is concluded that Newcomb is not liable for any scienter-based violation, that is, of Securities Act Section 17(a)(1), Exchange Act Section 10(b) and Rule 10b-5 thereunder, of causing violations of those provisions or Advisers Act Section 206(1), or of aiding and abetting violations of any of the antifraud provisions of the Securities, Exchange, or Advisers Acts.

3. "Causing" Liability

For purposes of this Initial Decision only, it is concluded that Janus committed primary violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Section 206(2) of the Advisers Act, and Section 34(b) of the Investment Company Act through its failure to fully disclose the approved market timing at Janus. The language in each prospectus, with the exception of the 2001 Mercury Prospectus, contained material misstatements or omissions.[22] The prospectuses were provided to investors and prospective investors and were contained in registration statements that Janus filed with the Commission. Each prospectus stated that "[t]he Fund does not permit frequent trading or market timing. Excessive exchanges of Fund shares disrupt

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[22] The 2001 Mercury Fund Prospectus contained a prohibition against market timing and a specific limit on the number of round trip transactions. However, the prospectus was not materially misleading because it expressly disclosed the possibility that Janus might allow market timing to continue in the Fund. By including this disclosure, the Mercury Fund put investors on notice that the Fund could allow market timing. This language was removed from subsequent prospectuses.

portfolio management and drive Fund expenses higher." Despite this language, the funds did, in fact, allow market timing in certain approved relationships. Janus even maintained lists of "Approved Timers." While the language found in the "Excessive Trading" sections of the prospectuses contain language pertaining to what the Funds might or may do, and not what the fund must do, regarding trades they consider to be market timing, it does not contradict the statement that the Fund does not permit market timing. In reading the prospectus language in context, the prospectuses prohibit market timing and discuss several potential ways in which the Funds may deal with market timing. Even a member of Janus's Board thought market timing was prohibited by the prospectuses. Additionally, the retail prospectuses for the Funds in the JIF series of Funds all contain a four exchange limit. This limit was the governing document for trading by retail customers. While it may have been Janus's intention to draft a prospectus that was flexible enough to allow market timing, the prospectuses for 2002 and 2003 failed to do so. The result is that the prospectuses for 2002 and 2003 were materially misleading.

The statements are material because they represent potential conflicts of interest. Market timing may allow some investors to reap rewards at the expense of other investors. Further, the existence of market timing can be harmful to investors in a mutual fund. Market timing can, for example: (1) increase trading and brokerage costs; (2) increase tax liabilities; (3) dilute the value of shareholders' interest; and (4) cause fund managers to manage their funds in a disadvantageous manner. First Lincoln Holdings, Inc. v. The Equitable Life Assurance Soc'y of the United States, 164 F.Supp.2d 383, 390-94 (S.D.N.Y. 2001); Pimco Advisors Fund Mgmt., 341 F. Supp. 2d at 457. As such, the presence of undisclosed approved market timing relationships, despite prospectus language to the contrary, was material.

The existence of approved market timing relationships was widely known no later than the completion of the Beery Report, which was circulated to dozens of Janus employees and executives. This knowledge was never shared with the Board. In the presentation to the Board on the use of redemption fees on market timing the legal department relied heavily on the Beery Report in the preparation of materials for the presentation. However, the final materials provided to the Board did not include any mention of the approved market timing relationships.

Negligence is the failure to exercise reasonable care. IFG Network Sec., Inc., 88 SEC Docket 1374, 1389 (July 11, 2006). By at least 2002, Janus's legal department and those responsible for drafting the prospectus had evidence of the existence of the approved market timing relationships. Despite this knowledge, they did not include this information in the prospectus, even while Janus maintained an internal list of "Approved Timers." Instead they continued to believe that the prospectus was drafted with flexibility to allow Janus to set its market timing policy however they wished. By failing to disclose the presence of market timing to investors and the Board of Directors, despite knowledge of its existence, Janus acted at least negligently. Id. The evidence of record does not provide proof of scienter.

Having established that Janus negligently committed primary violations of Securities Act Sections 17(a)(2) and 17(a)(3), Advisers Act Section 206(2), and Investment Company Act Section 34(b) the remaining question is whether the Respondents are liable for causing the violations. As stated above, the remaining elements of "causing" liability are: (1) an act or omission by the respondent that was a cause of the violation; and (2) the respondent knew, or

should have known, that his conduct would contribute to the violation; negligence is sufficient to establish liability for causing liability of these Janus violations.

a. Lammert

Act or Omission As the Portfolio Manager, under Janus's internal policy, Lammert could grant exceptions to Janus's strict prospectus language. Lammert did grant permission to both TWCO and Brean Murray to allow them to trade in the Mercury Fund. It was the presence of approved market timing trading in the Mercury Fund that caused Janus's prospectuses for the Mercury Fund to be materially misleading. Lammert did not cause Janus's primary violations in the international funds. Lammert did not approve the trading in these funds, nor did he manage these funds.

Negligence The evidence establishes that Lammert acted negligently and therefore caused Janus's primary violation of Securities Act Sections 17(a)(2) and 17(a)(3), Advisers Act Section 206(2), and Investment Company Act Section 34(b). Lammert failed to read the prospectus for his own fund, despite the fact that he was regularly sent a copy. Also, Lammert waited until almost a year after TWCO began trading to ask what Janus's market timing policy was. Lammert was told that Janus had an asset allocation model which he understood to mean TWCO "might move funds into or out of the fund." However, Lammert made no attempt to determine how often this trading would occur or whether it would be disruptive to his fund. While Lammert, like other Janus personnel, considered the possible disruptive effect of timers on funds, during the first several months of timing by TWCO and Brean Murray, he did not consider other possible costs of the timers' trading to long term shareholders. Based on these facts, it is concluded that Lammert acted negligently. See IFG, 88 SEC Docket at 1389-91.

b. Soderberg

Act or Omission Soderberg could have stopped TWCO from trading in the Mercury Fund and international funds. However he chose to allow TWCO to continue trading. He could have placed limitations on its trading at that time, but chose not to. As such, Soderberg's acts or omissions caused Janus's prospectuses to be materially misleading.

Negligence The evidence establishes that Soderberg acted negligently and therefore caused Janus's primary violation of Securities Act Sections 17(a)(2) and 17(a)(3), Advisers Act Section 206(2), and Investment Company Act Section 34(b). Like others at Janus, he only considered the possible disruptive effect of timers on funds. Soderberg suspended TWCO from trading in international funds but relented when Trautman represented that trading would be more conservative in the future. Soderberg made little attempt to monitor TWCO's trading going forward to ensure that TWCO was, in fact, trading more conservatively as promised. Even after Wiedermeier informed him that TWCO had passed the trading limits he set within a few weeks, Soderberg did not contact Trautman. Had Soderberg made any attempt to follow up on TWCO's trading he would have learned that TWCO continued to frequently trade in the international funds. As a result of his failure to monitor TWCO's trading, despite TWCO's history of market timing/frequently trading the international products, Soderberg acted negligently.

c. Newcomb

Act or Omission Newcomb's acts or omissions also contributed to Janus's primary violations of Securities Act Sections 17(a)(2) and 17(a)(3) and Advisers Act Section 206(2). (The OIP did not charge Newcomb with secondary liability for violation of Section 34(b) of the Investment Company Act.) While the nexus between Newcomb's conduct and Janus's primary violations is more tenuous, Newcomb's act or omissions contributed to Janus's primary violation because he was the day-to-day contact with TWCO and Brean Murray. However, he had limited control over TWCO's and Brean Murray's trading.

Negligence It is concluded that Newcomb did not act negligently. Although he believed, as was the general consensus at Janus, that market timing was allowed as long as the portfolio manager considered it not disruptive, Newcomb was the most junior Respondent. Twice, in July 2002 and November 2002, Newcomb learned that TWCO's or Brean Murray's trading was potentially disruptive to funds. In both cases, Newcomb did as directed and suspended TWCO's and Brean Murray's trading. Others at Janus, after Newcomb acted, lifted those suspensions and allowed them to continue trading.

C. Section 17(d) and Rule 17d-1 thereunder

Newcomb is charged with aiding and abetting and causing Janus's violation of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder. These sections make it unlawful for:

> Any affiliated person of or principal underwriter for a registered investment company . . . or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe.

Further, Rule 17d-1 makes it unlawful for any affiliated person to participate in any such joint arrangement unless it files an application regarding such joint enterprise or arrangement with the Commission and receives an exemptive order approving the transaction. "The objective of § 17(d) of the Investment Company Act is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies by causing the company to participate on a basis different from or less advantageous than that of such other participants." SEC v. Talley Indus., Inc., 399 F.2d 396, 405 (2d Cir. 1968).

The Division argues that Janus, as an investment adviser to the Janus Funds, violated Section 17(d) and Rule 17d-1 thereunder by entering into a joint venture with Brean Murray in which Newcomb negotiated an arrangement with Brean Murray allowing it to market time Janus funds in exchange for "sticky assets" placed into Janus money market funds. As found above, however, Newcomb did not require Brean Murray to invest "sticky assets" in exchange for allowing it to time. Accordingly he did not render "substantial assistance" that would aid and

abet, or perform an act or omission that would be a cause of, any violation by Janus of Investment Company Act Section 17(d) and Rule 17d-1.

IV. ULTIMATE CONCLUSIONS

It is concluded that Respondents Lammert and Soderberg caused Janus's violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Section 206(2) of the Advisers Act, and Section 34(b) of the Investment Company Act, within the meaning of Section 8A of the Securities Act, Section 203(k) of the Advisers Act, and Section 9(f) of the Investment Company Act, respectively. It is further concluded that all other violations alleged in the OIP are unproven.[23]

V. SANCTIONS

Securities Act Section 8A, Advisers Act Section 203(k), and Investment Company Act Section 9(f) authorize the Commission to impose a cease-and-desist order against any person who "is, was, or would be a cause of [a] violation" due to acts or omissions such person "knew or should have known would contribute to such violations." This is the only available sanction for the proven causing violations by Lammert and Soderberg.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006). The Commission also considers the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). The amount of a sanction depends on the facts of each case and the value of the sanction in

[23] On October 16, 2007, at the conclusion of the fact portion of the proceeding, Respondents moved for summary decision dismissing the charges against them. The undersigned deferred ruling on the motion. In light of the decision herein, Respondents' motions for summary decision are denied.

preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG Peat Marwick LLP, 54 S.E.C. at 1185. Such a showing is "significantly less than that required for an injunction." Id., 54 S.E.C. at 1183-91. In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the recency of the violation, the degree of harm to investors, and the combination of sanctions against the respondent. See id., 54 S.E.C. at 1192. See also WHX Corp. v. SEC, 362 F.3d 854, 859-860 (D.C. Cir. 2004).

B. Sanctions

Since cease-and-desist orders are the only sanctions available against Lammert and Soderberg, no lesser sanction or combination of sanctions may be considered. Any violation – even a negligent violation – of the antifraud provisions is serious, so that, although the violations were less than egregious, they were more than merely technical. Lammert's and Soderberg's violations were recurrent over a period of many months. Scienter was absent. Consistent with a vigorous defense of the charges against them, neither admitted wrongdoing or made assurances against future violations. The evidence of record does not indicate the nature of employment, if any, of Lammert and Soderberg, but, by virtue of his age, education, and experience, each could re-enter the mutual fund industry in the future. The violations are neither recent nor distant in time. In light of the above factors, there is some degree of likelihood of future violation. The harm, if any, from TWCO's and Brean Murray's market timing to investors in Janus funds cannot be established precisely, but the timing relationships allowed them to implement their secret, dishonest, late trading schemes, which were clearly harmful. Further, there is harm to the marketplace when, through secret agreements, one class of investors is given an opportunity that it believes will allow it to make profits at the expense of the remaining, unknowing investors. For these reasons, cease-and-desist orders are appropriate as to both Lammert and Soderberg.

VI. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on April 4, 2008.

VII. ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED that this administrative proceeding IS DISMISSED as to LANCE NEWCOMB.

IT IS FURTHER ORDERED that, pursuant to Sections 8A of the Securities Act of 1933, 203(k) of the Investment Advisers Act of 1940, and 9(f) of the Investment Company Act of 1940,

WARREN LAMMERT CEASE AND DESIST from committing or causing any violations or future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, 206(2) of the Investment Advisers Act of 1940, and 34(b) of the Investment Company Act of 1940; and

LARS SODERBERG CEASE AND DESIST from committing or causing any violations or future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, 206(2) of the Investment Advisers Act of 1940, and 34(b) of the Investment Company Act of 1940.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. 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 the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Carol Fox Foelak
Administrative Law Judge