INITIAL DECISION RELEASE NO. 350
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12753

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
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PRITCHARD CAPITAL PARTNERS, LLC, THOMAS WARD PRITCHARD, JOSEPH JOHN VANCOOK, AND ELIZABETH ANN McMAHON	:	INITIAL DECISION AS TO JOSEPH JOHN VANCOOK July 10, 2008

APPEARANCES: William P. Hicks, Robert K. Gordon, and Yolanda L. Ross for the Division of Enforcement, Securities and Exchange Commission

Lewis D. Lowenfels of the Law Offices of Tolins & Lowenfels and Michael J. Sullivan of Coughlin Duffy LLP for Respondent Joseph John VanCook

BEFORE: Robert G. Mahony, Administrative Law Judge

I. INTRODUCTION

The Securities and Exchange Commission (SEC or Commission) initiated this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on September 7, 2007, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act) and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (ICA).[1] Respondent Joseph John VanCook (VanCook) filed a timely Answer.

The OIP alleges that from approximately November 2001 through July 2003, Pritchard Capital Partners, LLC (Pritchard Capital), allowed some of its hedge fund clients to late trade mutual funds. The OIP further alleges that VanCook, during his tenure as a sales representative in Pritchard Capital's New York office, committed violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder by facilitating his clients' late trading and by soliciting business based on Pritchard Capital's ability to enter mutual fund trades late. Additionally, the OIP alleges that VanCook aided and abetted and caused Pritchard Capital's clearing broker's violation of ICA

[1] Respondents Pritchard Capital Partners, LLC, Thomas Ward Pritchard, and Elizabeth Ann McMahon entered into settlement agreements with the Division of Enforcement, which the Commission accepted. Pritchard Capital Partners, LLC, Exchange Act Release No. 57704; ICA Release No. 28251 (Apr. 23, 2008).

Rule 22c-1 by entering mutual fund trades received after the 4:00 p.m.[2] cutoff for placing such trades. Finally, the OIP alleges that VanCook aided and abetted and caused Pritchard Capital's violations of Section 17(a)(1) of the Exchange Act and Rule 17a-3(a)(6) thereunder because he failed to record the times at which his clients placed their final mutual fund trades.

The Division of Enforcement (Division) requests that VanCook be subject to a cease-and-desist order and barred from associating with any broker or dealer, or investment adviser. The Division also requests that VanCook be ordered to disgorge ill-gotten gains in the amount of $538,565.70, plus prejudgment interest, and pay a civil monetary penalty equal to the amount requested for disgorgement. VanCook argues that his actions did not violate the securities laws. He requests that the allegations against him be dismissed.

The undersigned held a three-day hearing in New York City on April 28-30, 2008. The Division called seven witnesses from whom testimony was taken. The findings and conclusions in this Initial Decision are based on the hearing record.[3] Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981.) All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

II. FINDINGS OF FACT

A. Definitions

The share price of mutual funds is based on their net asset value (NAV). The NAV is generally calculated at 4:00 p.m. by using the closing prices of their portfolio securities on the exchange or market on which the securities principally trade. DH2, Inc. v. SEC, 422 F.3d 591, 592 (7th Cir. 2005); Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, Securities Act Release Number 8343, 2003 SEC LEXIS 2937 at* 5-9 (Dec. 11, 2003) (Disclosure Regarding Market Timing.)

"Late trading" is the practice of placing orders to buy or sell mutual fund shares after the time when the fund has calculated its NAV, 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 ICA Rule 22c-1. 17 C.F.R. § 270.22c-1(a).

"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. Market timing itself is not illegal. 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

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[2] All references are made to time in the Eastern Time Zone.

[3] References in this Initial Decision to the hearing transcript are noted as "Tr. ___." References to the Division's Exhibits and Respondent's Exhibits are noted as "DX ___" and "RX ___," respectively. The stipulated facts are identified as "Jt. Stip. ___ ".

timing may be prohibited by a fund's prospectus. In re Mutual Fund Inv. Litig., 384 F. Supp. 2d 845, 856 (D. Md. 2005).

B. Relevant Individuals and Entities

1. Thomas Ward Pritchard and Pritchard Capital

Thomas Ward Pritchard (Pritchard) founded Pritchard Capital in 2000 as a brokerage firm that catered to institutional investors. Pritchard received his broker's license in 1985, and since that time has worked for several brokers including Drexel Burnham and Bear Stearns. He remains the managing director of Pritchard Capital, owning seventy percent of the firm. (Tr. 354-55.)

Pritchard Capital is a Louisiana limited liability company that has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since March 2000. It is headquartered in Mandeville, Louisiana, with satellite offices in Atlanta, Georgia, and New York City. (VanCook Answer at 1.) Before opening the New York office, the firm provided energy industry research and brokerage services. (Tr. 37, 354-55.) It is described as an "introducing broker" because it did not have dealer agreements, which allow broker-dealers to purchase mutual fund shares from mutual fund companies. (Tr. 56-57.)

In order to place mutual fund trades, Pritchard Capital had to go through a "clearing broker" who had dealer agreements with the mutual funds. (Tr. 56-57.) In late 2001, Pritchard Capital replaced Bear Stearns as its clearing broker with Banc of America Securities (Banc of America). (Tr. 74, 76.) When placing orders through Bear Stearns, mutual funds trades had to be faxed to its trading desk by 4:00 p.m. in order to receive that day's NAV. (Tr. 417.) Once Pritchard Capital changed to Banc of America, the firm was given order entry terminals that were linked into Banc of America's Mutual Fund Routing System (MFRS). Using MFRS, employees of Pritchard Capital could enter mutual funds trades until 5:30 p.m., and still receive that day's NAV. (Tr. 76-77; Jt. Stip. 3.) Banc of America provided a "Mutual Funds Processing" guide (Processing Guide) to Pritchard Capital. (Tr. 79; DX 66.) In addition to providing instructions on entering trades into the MFRS, the Processing Guide stated, "All orders should be received and time stamped by the close of the NYSE, 4 P.M. EST. The MFRS system allows orders that have been entered prior to 4 P.M. EST to be review [sic] until 5:15 P.M. EST." (DX 66.)

In November 2001, during the change in clearing brokers, a Banc of America representative sent an email to the personnel at Pritchard Capital recapping a recent meeting and discussions with Pritchard Capital. (Tr. 92-96, 417; DX 82.) One of the points made in the email states, "All mutual fund trade tickets need to be time stamped before 4 p.m." (DX 82.) According to Pritchard, he understood that Banc of America allowed the extra time for error correction. To him, an order entry in MFRS indicated that the order had been received prior to 4:00 p.m. (Tr. 405.) Pritchard Capital received copies of mutual fund prospectuses and maintained them in a file in the New York office. (Tr. 110-11, 114; DX 65.) These prospectuses generally described how, and when, the NAVs for the fund shares were calculated. (DX 65, DX 104.)

2. Joseph John VanCook

VanCook is a resident of Rye, New York. He graduated from St. John's University in 1990 and has worked in the securities industry in New York since 1995. He obtained Series 7 and 63 licenses in 1996. VanCook began his employment at Pritchard Capital in March 2001. He had previous experience working at other broker-dealers. (Tr. 32-36.) For about a year before joining Pritchard Capital, he had worked developing business among institutional investors who market timed in mutual funds. (Tr. 60.)

Pritchard hired VanCook to open a New York office for Pritchard Capital. VanCook began as a sales representative, and his compensation derived from a share of fees generated by his sales. He kept one-half of the wrap fees for the accounts on which he was the representative, and Pritchard Capital kept the remainder. (Tr. 355-56.) In 2003, VanCook joined the partnership, ultimately obtaining a twenty percent equity interest. (Tr. 44-45.) He was an attractive hire for Pritchard because he had relationships with institutional money managers, such as hedge funds, that market timed mutual funds. (Tr. 360-62.) VanCook represented to Pritchard that his hedge fund clients used mutual funds in their arbitrage trading. (Tr. 361.)

Mutual fund market timing opened up a new line of brokerage business for Pritchard Capital. (Tr. 360-61.) VanCook's job concentrated on developing client relationships, as opposed to the day-to-day mechanics of trading, though he did sometimes enter trades into the MFRS. (Tr. 59-60, 90, 419.) His primary role was working as a business development agent, bringing in new market timing accounts and prompting existing clients to increase the volume of their transactions. (Tr. 70.) The services VanCook provided included negotiating "capacity" with mutual funds for market timing by his hedge fund clients. (Tr. 262-63.) VanCook describes "negotiated capacity" as having two parts: the first is the dollar amount that the mutual fund will allow a client to trade, and the second is the frequency of trading permitted by the mutual fund. (Tr. 190.) Over time, Pritchard Capital developed negotiated capacity with six or seven fund families. (Tr. 198-99.) Though VanCook talked to mutual funds to determine the size and frequency that his clients could trade, he was not involved in developing market timing trading strategies his clients sought to execute. The trading strategies were proprietary information to the hedge funds and they would not disclose them. (Tr. 64-66, 183-84.) Except for negotiating capacity for trading on behalf of his clients, the activities undertaken by VanCook were typical functions that an introducing broker performed to get trades to the clearing broker for its clients. (Tr. 262-266.)

VanCook was involved in selecting Banc of America to replace Bear Stearns as Pritchard Capital's clearing broker for mutual fund trading. He does not recall that Bear Stearns required orders to be received by 4:00 p.m. (Tr. 72-73.) After interviewing potential replacements, VanCook recommended to Pritchard that he select Banc of America to be the firm's clearing broker. (Tr. 74-75.) VanCook claims to have been unfamiliar with the Banc of America Processing Guide for the MFRS. He maintains that he thought it was an instruction manual on how to work the MFRS, and that he never inspected it beyond looking at the pictures to learn how to enter trades. (Tr. 77-81; DX 66.) Nor does VanCook remember any representative from

Banc of America telling him that mutual fund trade tickets received by Pritchard Capital had to be time stamped by 4:00 p.m. (Tr. 92, 94.)

VanCook asserts that during the relevant time period, he was never a party to any discussion about a trading strategy based on an aftermarket arbitrage opportunity created when a fund is priced at a point in time, and a trade is executed after the fund share price was determined. (Tr. 183-84, 189-90.) He claims that during the time he was soliciting trades from hedge funds that were market timing mutual funds, he had no understanding of attempted time arbitrage trading in mutual funds. (Tr. 67-70.) VanCook says that he thought his hedge fund clients were merely trying to predict broader market trends with their models, and trading mutual funds to take advantage of those trends. (Tr. 61-62.) According to VanCook, he took comfort from the fact that Banc of America and Bear Stearns had a desk for mutual fund traders operating separate from their mutual fund department. In his mind, these separate operations added legitimacy to the trading strategies employed by his clients. (Tr. 205-06.) Ultimately, VanCook never gave much thought to the strategies used by his clients. (Tr. 65, 69-70.)

VanCook claims to have known very little, if anything, about the way mutual funds priced their shares. He acknowledges that he had access to mutual funds' prospectuses, but he never did more than flip through them. He understood that mutual funds calculated the NAV of their shares once a day. Ultimately, the calculation of mutual fund shares' NAVs were of no concern to VanCook. (Tr. 99-100, 111-15, 182-84). He testified that when he arrived at the office in the morning, he would check the MFRS system to ascertain the status of trades entered the day before: whether the orders were filled, the number of shares, and the price at which the order was filled. He understood that price data represented the NAVs from the previous day. (Tr. 86-87, 227.)

VanCook always abided by any kick-out letters sent to Pritchard Capital concerning his clients' trading activities. (Tr. 193-94.) He never attempted to manipulate or skirt the mutual funds' trading policies by rotating tax identification numbers, changing trading account numbers, or batching trades. (Tr. 191-92.) He also maintains that he never used Pritchard Capital's ability to place trades with Banc of America until 5:30 p.m., and still receive the 4:00 p.m. NAV, as a marketing tool with his hedge fund clients. (Tr. 109.) However, he does agree that he told hedge fund clients, including Robert Simpson of Simpson Capital, that Pritchard Capital had the ability to place trades after 4:00 p.m., although he cannot recall specifically who else he told. (Tr. 163-65.) In his final year at Pritchard Capital, VanCook's total compensation was approximately $800,000 compared to $180,000 from his first year. His increased compensation was primarily attributable to his mutual fund market timing business. (Tr. 47-48.)

3. Elizabeth McMahon

Elizabeth McMahon (McMahon) is a resident of Long Beach, New York. She obtained a bachelor's degree from the University of Buffalo in 1990. She joined the New York office of Pritchard Capital in March 2001, where she was employed until January 2004. Prior to joining the firm, McMahon worked at Robertson Stevens with VanCook's wife, Susan VanCook. (Tr. 409-11.) VanCook introduced McMahon to Pritchard, and they explained that she was to be VanCook's assistant and sit for the Series 24 license. She was a salaried employee, with an

incentive of up to $2,000 per month based on the New York office's success. (Tr. 358-60, 411-12). McMahon reported to VanCook, and assisted him in servicing his mutual fund market timing clients. (Tr. 359, 416.)

Both McMahon and VanCook entered trades in the MFRS. (Tr. 419.) Hedge fund clients would send McMahon trade sheets listing possible trades for the day by 4:00 p.m. (Tr. 418-20.) When McMahon received a trade sheet during the day, she worked with the client to reconcile the sheet to the actual positions then held by the client, and to ensure that the potential trades matched the right account numbers, and that the accounts had cash for the trades. (Tr. 428-29.) VanCook informed McMahon which hedge fund clients could call and confirm trades after 4:00 p.m. (Tr. 425-26.)

4. Pritchard Capital's Market Timing Clients

a. Andrew Goodwin with Goodwin Trading

Andrew Goodwin (Goodwin) testified as a Division witness. Goodwin graduated from Harvard University and obtained a master's degree in business administration from Columbia University. At age 23, he formed Goodwin Trading Corp., and through it, bought a seat on the New York Futures Exchange. (Tr. 235, 257.) His work experience includes a brief period with Bankers Trust and Deutsche Bank in 2000. He then worked for Hartz Mountain, LLC, (Hartz) as a vice president and later as a senior portfolio manager. Hartz later changed its name to Canary Capital, LLC (Canary). (Tr. 233-34.) Goodwin left Canary in December 2001. Then, until September 2003, he "took on" managed money and opened brokerage accounts to execute strategies similar to his work at Canary, operating under multiple limited liability corporations (collectively, Goodwin Trading). (Tr. 234-35.) He is currently self-employed. (Tr. 232-33.)

Goodwin's job at Canary included building technical and statistical models to help market time mutual funds and to develop other strategies and execute trades so he could do arbitrage trading on international mutual funds. These funds invest in foreign equities and do arbitrage trading which involves buying an asset in different countries, such as in Europe and then the United States, in order to take advantage of a pricing lag due to the time difference. The trading models were based on "statistical pattern recognition." (Tr. 234-36, 257-58.)

While at Canary, near the end of 2000, he first learned of the ability to place mutual fund trades after 4:00 p.m. He knew from previous experience that mutual fund trades could be executed until the close of the New York Stock Exchange (NYSE) at 4:00 p.m. Goodwin learned of brokers in Florida who had a large number of clients who would aggregate trades and submit them after 4:00 p.m. He thought the clearing firm needed the extra time due to the large number of orders. The procedure permitted trades to be cancelled, replaced, or created after 4:00 p.m. (Tr. 236-38.) Goodwin began submitting possible mutual fund trades prior to 4:00 p.m., and confirming or cancelling those trades after 4:00 p.m. (Tr. 239.)

While working at Canary, Goodwin met VanCook sometime in 2001. VanCook suggested that Goodwin open accounts for mutual fund trading at Pritchard Capital. Goodwin intended to continue to place orders before 4:00 p.m. and confirm or cancel them after the

NYSE's 4:00 p.m. close. (Tr. 239.) He discussed with VanCook how the procedures for trading would work. Goodwin worked previously with Banc of America, and knew it could handle orders from correspondent brokers placed after 4:00 p.m. (Tr. 239-40.) He never had a discussion about the legality of this trading practice with anyone at Pritchard Capital, including VanCook. (Tr. 249, 266-67.) Goodwin did not believe that the late trading was illegal, but he had ethical concerns about it, although he did not discuss his concerns with VanCook. (Tr. 267-68.) He came to realize by September 2003 that the late trading strategy could create an unfair advantage. (Tr. 268, 271-72.) The Commission has never brought charges for late trading against Goodwin. (Tr. 273.)

When Goodwin began trading at Pritchard Capital, VanCook handled his trades including those after 4:00 p.m. However, VanCook never made trading decisions for Goodwin and never had a problem with the way Goodwin traded. There was nothing to suggest that Goodwin had an improper trading strategy. (Tr. 204, 249, 261-62, 266-67.) Indeed, VanCook made comments to Goodwin expressing dismay over a client who could not perceive a way to make money following a trading strategy similar to the one employed by Goodwin. (Tr. 251-52.) Goodwin never discussed the post-4:00 p.m. trading practice with Pritchard. (Tr. 255.) VanCook drew comfort about the propriety of the late trading strategy used by Goodwin, knowing Goodwin's education and experience. (Tr. 200-01.)

b. Kovan Pillai

Kovan Pillai (Pillai) testified as a witness for the Division. Pillai lives in New York and has several advanced degrees including a Ph.D in statistics from New York University, which he earned in 1994. (Tr. 274.) Beginning in 1994, he worked as a mathematical analyst analyzing stock movements and setting up trading models for the traders at Thales Financial Group, where he worked for two years. (Tr. 275.) He then worked at Jemmco Capital for three years, from 1997 to 2000, where he learned about market timing and set up statistical arbitrage trading models called "international mutual fund trading strategies." (Tr. 275-77.) He worked at home for about one year and then joined Millennium Partners (Millennium), a hedge fund, where he worked from April 2001 to December 2005. (Tr. 275) Pillai was a portfolio manager and market timed mutual funds managing, on average, $200-400 million dollars. (Tr. 276-78.)

In the summer of 2002, Pillai met VanCook and advised him that he timed mutual funds. Thereafter, Pillai began trading some accounts with Pritchard Capital. Pillai did business with Pritchard Capital from the summer of 2002 until trading stopped in January 2003. (Tr. 279-80.) He had no more than fifty million dollars invested with Pritchard Capital at any one time, and that money was spread over several accounts. (Tr. 281.) Initially, Pillai gave his orders to Pritchard Capital by 3:30 p.m., and was not trading past the 4:00 p.m. market close. (Tr. 282.)

By October 2002, Pillai's market timing business traded through Pritchard Capital was lagging. Pillai's order fill rate with other brokers was seventy to eighty percent; with Pritchard Capital it was approximately fifty percent. (Tr. 286, 325.) Because of this, Millennium began to take capital away from Pritchard Capital, as it believed the business was dying. (Tr. 286, 325.)

In late October 2002, VanCook approached Pillai and told him about business that his other clients were doing that proved to be extremely profitable. (Tr. 286, 322-23.) Pillai met alone with VanCook at his office where VanCook told him that he could submit orders during the day as he had been doing, but he would have until just after 5:00 p.m. to cancel the trade if, for example, he learned of adverse news after he submitted his order. (Tr. 286-87.) VanCook also advised that the orders would get that day's NAV as though the orders were placed before 4:00 p.m. Pillai viewed the conversation as an attempt by VanCook to keep his business. (Tr. 287.)

Pillai began late trading in mid-November 2002 following the procedure VanCook discussed with him. (Tr. 289.) Prior to doing so, Millennium tested this trading method and was satisfied that the trades could be profitable, but was concerned that Pritchard Capital would have trouble filling the orders. (Tr. 288.) VanCook assured Pillai that the Banc of America trading desk was aware of these kinds of trades, and they would work to ensure Pillai's orders were filled. (Tr. 288-89.) Pillai assumed this trading strategy was legal. (Tr. 289.) Because of a family matter that kept him home quite often, Pillai delegated most of the work involving Pritchard Capital to his assistant, Scott Murray (Murray). (Tr. 290-91.) Pillai's background, and the asset size of Millennium, impressed VanCook. (Tr. 211-12.) These factors gave him comfort that "everything was good, all these people were continuing to trade basically with the same strategies." (Tr. 212.)

However, in January of 2003, Pillai began to question the legality of the late trading strategy. (Tr. 291-92.) In discussions with Millennium's in-house counsel, Pillai was informed that he needed waiver letters from the clearing broker or each of the mutual funds he was late trading. He relied on VanCook's representation that Banc of America knew about this trading practice, but that did not assuage his in-house counsel's concerns. (Tr. 292-93.) Pillai immediately discontinued the trading program with Pritchard Capital, and informed VanCook of his in-house counsel's opinion. (Tr. 293.) VanCook's rejoinder was to assure Pillai that the late trading strategy was legal, and that Millennium's in-house counsel was being overly cautious. (Tr. 294.) Pillai ultimately moved all of Millennium's money out of Pritchard Capital. (Tr. 297.) Pillai was charged by the Commission for his involvement with the late trading scheme, and settled the proceeding brought against him.[4] (Tr. 298.)

c. Scott Murray

Murray resides in Woodbridge, New Jersey. He has an undergraduate degree from Swarthmore College and is currently pursuing his doctoral degree in finance at Baruch College. He worked as an assistant portfolio manager for Millennium from June 2001 until April 2006. Pillai was his supervisor. (Tr. 314-17.)

Murray placed trades through Pritchard Capital starting in 2002. He dealt with VanCook as the account representative. (Tr. 321-22, 328.) In a meeting with Pillai, VanCook and Murray, VanCook asserted that he could provide a platform to trade domestic mutual funds after the

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[4] Millennium Capital Partners, L.P., Investment Advisers Act Release No. 2453 (Dec. 1, 2005).

market had closed by posting or cancelling trades past 5:00 p.m. (Tr. 324-25.) No other brokers made any such "pitches" with Murray present, and no other brokers would allow daily cancellation of trades. (Tr. 348-49.)

Millennium began executing this strategy in November 2002. The strategy was based on a computer model developed by Pillai. VanCook had no input in the development of the model. (Tr. 331, 338.) The strategy was discontinued in February 2003 because Millennium's in-house counsel would not approve it. Pillai told Murray that Millennium's in-house counsel indicated that an occasional occurrence of cancelling a trade after 4:00 p.m. did not trouble him, but that he would not approve a strategy based on post-4:00 p.m. trading decisions. (Tr. 331-32, 340-41.) Murray did not believe he was breaking the law when executing the trading strategies. (Tr. 339.)

C. Market Timing and Late Trading at Pritchard Capital

1. Processing Late Trades

Typically, clients emailed or faxed trade sheets to Pritchard Capital listing all possible trades for the day. (Tr. 117-18.) VanCook instructed his clients to have the trade sheets at Pritchard Capital by 4:00 p.m., although trade sheets received after 4:00 p.m. were still processed. (Tr. 122-23, 244, 250, 418-20.) The trade sheets were time stamped when received. (Tr. 121, 128.) Pritchard Capital then worked with the clients over the course of the day, to ensure that the clients understood their current holdings and cash positions. (Tr. 119-20, 428-29.) A final list of possible trades was ready, and in possession of Pritchard Capital's representatives, by the end of the day. (Tr. 118, 120.)

The clients would then call between 3:30 and 5:30 p.m. to confirm the trades they wanted placed. (Tr. 424.) Both VanCook and McMahon took these calls. (Tr. 123, 424.) No objection would have been raised if the customer wished to add trades to the sheet. (Tr. 124.) Certain clients would always call prior to 4:00 p.m., but some clients, such as Goodwin Trading and Simpson Capital, understood the MFRS's capability and always called to confirm trades after 4:00 p.m. (Tr. 160-61.) Once the confirming call came in, McMahon or another Pritchard Capital employee entered the trades in the MFRS. (Tr. 424-25). According to McMahon, ninety-eight percent of the calls were received after 4:00 p.m., but she never documented the exact time the confirmation calls were received. (Tr. 422, 424.)

Pritchard Capital never created a document to reflect the time at which the customers made their final trading decisions. (Tr. 129, 131-32, 422.) The time of entry in the MFRS was known, but the MFRS did not contain information when the final orders had been actually received at Pritchard Capital. VanCook does not recall anyone from Banc of America asking him to confirm that all the trade orders were received before 4:00 p.m. (Tr. 132-34, 155-56.) VanCook never instructed McMahon to hide these practices from the SEC during an audit. (Tr. 431-33).

As an example, VanCook instructed Goodwin prepared a trade sheet of proposed trades and transmitted it to Pritchard Capital by email or otherwise prior to 4:00 p.m. The proposed orders would be confirmed or cancelled as late as 5:00 to 5:15 p.m. that day. (Tr. 240-41, 250,

253-55; DX 29, 54, 55, 77.) His trade sheet would have two sets of trades, one to be placed if the market went up and another if it went down.[5] At the end of the day, including after 4:00 p.m., Goodwin would choose to have one or the other executed. Under Pritchard Capital's system he would get the NAV that was established on the day of the trade, even if the trade was finalized after 4:00 p.m. (Tr. 244-46.) Over ninety per cent of his orders were placed after 4:00 p.m. He engaged in this trading practice at Pritchard Capital two or three times a week from early 2002 until September 2003, working up to about fifty trades per day. (Tr. 247.)

2. Discussions Regarding Late Trading Practices

In May 2003, VanCook advised Pritchard that he wanted to set up a conference call with Pritchard, Pritchard Capital's attorney Jay Seale (Seale), VanCook's customer Kamal Solokoglu (Solokoglu) of Nettcorp and his client, Jacob Goldfield (Goldfield) from the Soros Fund to discuss ICA Rule 22c-1. VanCook advised Pritchard that the clients wanted Seale's input on an interpretation of the rule. (Tr. 377-79, 401-02; DX 49.) If VanCook could bring these trading accounts into Pritchard Capital, he stood to make a two million dollar commission. (Tr. 144.) Pritchard and VanCook were passive participants in the call, while Solokoglu, Goldfield and Seale discussed the legality of confirming or cancelling mutual fund trades after 4:00 p.m. Solokoglu stated that ICA Rule 22c-1 applied to mutual fund companies and not brokers, while Goldfield said he expected the SEC would view any work by brokers as aiding and abetting a violation of the rule. (Tr. 380-81.)

However, VanCook does not recall whether Solokoglu and Goldfield informed him that they had advice from counsel that placing mutual fund trades after 4:00 p.m. was illegal, although he does not dispute that the rule was discussed during the call. (Tr. 144-48.) VanCook remembers the call as involving multiple subjects while Pritchard believed the call mostly focused on ICA Rule 22c-1's application. (Tr. 146, 401; DX 49.) Seale did not give a formal legal opinion on the application of ICA Rule 22c-1. He was noncommittal about the rule during the call, but once Solokoglu and Goldfield were off the call, he advised VanCook and Pritchard to maintain 4:00 p.m. as the firm cutoff for orders for mutual funds. (Tr. 382-83; 402-04.) VanCook claims that he did not learn until August or September 2003 that ICA Rule 22c-1 had something to do with when mutual funds set their prices and when funds would be traded. (Tr. 149.)

In July 2003, then-New York Attorney General, Eliot Spitzer announced his investigation into mutual fund market timing. Pritchard questioned VanCook about his practices, and VanCook assured Pritchard that he did not make mutual fund trades after 4:00 p.m. McMahon confirmed VanCook's assertion when questioned by Pritchard. (Tr. 385-87, 389-90.) In the course of an internal investigation at Pritchard Capital, Pritchard learned that the process whereby trading sheets are submitted prior to 4:00 p.m. and then confirmed after that time was common among hedge funds that were market timing mutual funds. (Tr. 395.) Nothing uncovered by the internal investigation indicated that VanCook or McMahon believed they were

[5] Pillai's trading practices followed the same pattern, submitting two trading strategies to be executed based on the direction that the market took. (Tr. 290-91.)

doing anything wrong by not stamping the trade sheets when post-4:00 p.m. order confirmation or cancellation calls came in from clients. (Tr. 397-99.)

DISCUSSION AND CONCLUSIONS OF LAW

1. Late Trading of Mutual Fund Shares

Section 22 of the ICA regulates the pricing, distribution, and redemption of redeemable securities, including mutual fund shares. ICA Section 22(c) gives the Commission the power to regulate the pricing of redeemable securities, including the power to promulgate rules for computing the price that a shareholder will receive upon redemption. The Commission has consistently stated that ICA Rule 22c-1 is designed to eliminate or reduce any dilution of the value of outstanding fund shares that may occur through the practice of backward pricing, which involves selling and redeeming fund shares at a price based on a previously determined NAV. Another purpose of the rule is to prevent speculative traders from engaging in short-term trades based on the knowledge that the value of a mutual fund's portfolio securities is not yet reflected in the fund's NAV. Adoption of Rule 22c-1 under the Investment Company Act of 1940 Prescribing the Time of Pricing Redeemable Securities for Distribution, Redemption, and Repurchase, and Amendment of Rule 17a-3(a)(7) under the Securities Exchange Act of 1934 Requiring Dealers to Time-Stamp Orders, Investment Company Act Release No. 5519, 1968 SEC LEXIS 171 at *1-4 (Oct. 16, 1968) (Adoption of ICA Rule 22c-1).

ICA Rule 22c-1(a), also known as the "forward pricing" rule, requires mutual funds, their principal underwriters, dealers, and any person designated in the fund's prospectus as authorized to consummate transactions in the fund's securities, to sell and redeem fund shares at a price based on the NAV next computed after receipt of an order to buy or redeem. 17 C.F.R. 22c-1(a). The time of receipt of an investor's order by a designee or by an intermediary, rather than the time of receipt by the fund or the underwriter, is the time for determining the price the order will receive. See Adoption of ICA Rule 22c-1, 1968 SEC LEXIS at *5-7. In sum, ICA Rule 22c-1 is intended to reduce the risk of short-term trading in mutual funds by eliminating the ability to use late-breaking news to take advantage of NAVs fixed before that news was released to the markets. See United States v. Nat'l Ass'n. of Sec. Dealers, Inc., 422 U.S. 694, 710 n.19 (1975); DH2, 422 F.3d at 593.

Rule 22c-1(b) generally requires mutual funds to compute their NAVs at least once daily, Monday through Friday, at a specific time or times as set by their boards of directors. 17 C.F.R. 22c-1(b). Thus, an investor's order must be priced based on the mutual fund's NAV that is next computed after the intermediary receives that order. See 17 C.F.R. 22c-1(a). Therefore, customer orders placed before 4:00 p.m. to buy or redeem shares of mutual funds that calculate their NAVs at or "as of" 4:00 p.m. must receive that day's NAV, but orders placed after 4:00 p.m., as those at issue in this proceeding, must be priced at the NAV that is calculated the following day.

Respondent VanCook, a salesman and equity partner at Pritchard Capital, is charged with fraudulent conduct that facilitated the "late trading" of mutual fund shares and thereby violated Exchange Act Section 10(b) and Rule 10b-5 thereunder. As discussed above, "late trading"

refers to the practice of placing orders to buy or redeem mutual fund shares after a mutual fund has calculated its NAV, but receiving the price based on the previously calculated NAV instead of the next calculated NAV after the orders were placed. Disclosure Regarding Market Timing, 2003 SEC LEXIS at *5-9.

Exchange Act Section 10(b) and Rule 10b-5 thereunder proscribe anyone from employing a fraudulent scheme or making material misrepresentations or omissions in connection with the purchase or sale of securities. To establish a violation of Section 10(b) and Rule 10b-5, the Division must prove by a preponderance of the evidence that, using jurisdictional means, the respondent: (1) made misrepresentations or omissions of material fact, or other fraudulent devices; (2) in connection with the purchase or sale of securities; and (3) that the respondent acted with scienter. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1467 (2d Cir. 1996).

Courts have interpreted broadly the requirement of Exchange Act Section 10(b) and Rule 10b-5 that violations must occur "in connection with" the purchase or sale of a security. See SEC v. Zandford, 535 U.S. 813, 819-25 (2002); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971); In re Ames Dep't Stores, Inc., Stock Litig., 991 F.2d 953, 964-65 (2d Cir. 1993). "Any statement that is reasonably calculated to influence the average investor satisfies the 'in connection with' requirement of Rule 10b-5." SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992).

The jurisdictional clauses under the antifraud provisions are also given broad interpretation and are satisfied by intrastate telephone calls, incidental use of the mails, or by use of any national securities exchange. See 15 U.S.C § 78(j); McDaniel v. United States, 343 F.2d 785, 787-88 (5th Cir. 1965); see also Reube v. Pharmacodynamics, Inc., 348 F. Supp. 900, 912 (E.D. Pa. 1972) (holding intrastate telephone calls sufficient to invoke jurisdiction); Ingraffia v. Belle Meade Hosp., Inc., 319 F. Supp. 537, 538 (E.D. La. 1970) (same).

A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision and would view disclosure of the omitted fact as having significantly altered the total mix of information made available. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

Scienter is defined as "a mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). It may be established by a showing of recklessness. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990); David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997). Recklessness is defined as "an extreme departure from the standards of ordinary care . . . presenting a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it." Sundstrand Corp. v. Sun Chem. Corp. 553 F.2d 1033, 1045 (7th Cir. 1977) (citations omitted), cert. denied, 434 U.S. 875 (1977). Proof of scienter can be demonstrated by circumstantial evidence. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

2. VanCook Violated Exchange Act Section 10(b) and Rule 10b-5

Late trading mutual fund shares is a scheme that defrauds both mutual fund companies and mutual fund shareholders. Mutual Funds Inv. Litig., 384 F. Supp. 2d at 856; In re Paul A. Flynn, 88 S.E.C. Docket 2146, 2174 (Aug. 2, 2006) (A.L.J.). Knowledge of, and participation in, a fraudulent scheme are sufficient to support a finding of a primary violation of the securities laws. First Jersey Sec., 101 F.3d at 1471.

VanCook orchestrated a fraudulent scheme to permit, and even encourage, his hedge fund clients, Simpson Capital, Goodwin Trading, and Millennium, to late trade mutual fund shares. VanCook's scheme allowed his customers to place mutual fund trades up to 5:30 p.m. and get the same day's NAV. He engaged in this pattern of undisclosed illegal late trading over an extended period to advantage his hedge fund clients.

The Banc of America Processing Guide that explained the MFRS system clearly spelled out the clearing broker's expectations regarding mutual fund trading orders. The Processing Guide directed: "All orders should be received and time stamped by the close of the NYSE, 4PM EST." The MFRS system "allows orders that have been entered prior to 4 PM EST to be review (sic) until 5:15 PM EST." (DX 66, p. 2.) In other words, the MFRS system recorded when the trades were entered into the system, but it did not require confirmation of when the final trade was received by Pritchard Capital.

The Processing Guide makes clear that the post-4:00 p.m. review was provided so that errors could be corrected, but was not an additional period to submit new trades after the market closed. Additionally, early communications with Banc of America personnel reiterated that mutual fund trades needed to be time stamped before 4:00 p.m. (DX 82.) Indeed, Pritchard understood that if orders were placed until 5:30 p.m., it implied that the orders were received by Pritchard Capital before 4:00 p.m. and Pritchard Capital was verifying the 4:00 p.m. time to Banc of America. (Tr. 405.) Therefore, submitting mutual fund trades after 4:00 p.m. constitutes a materially false representation that the trades were finalized before 4:00 p.m., if the trades receive the same day's NAV as they did here.

In contrast to the plain language in the Processing Guide, VanCook testified that "we never thought about [the 4:00 p.m. order deadline in the manual.] This book to us was an instruction book of how to work MFRS and the system." (Tr. 80-81.) Therefore, VanCook intentionally ignored the MFRS trading times. He used the failure of the MFRS system to capture the final trade times at Pritchard Capital to permit his customers to trade through the MFRS after 4:00 p.m. VanCook enabled the hedge funds, allowing them to trade on after-market information and still get the same day's NAV, which is precisely what ICA Rule 22c-1 is intended to prevent.

The mutual fund late trading scheme perpetrated by VanCook meant that material information was intentionally withheld by VanCook from Banc of America and its mutual fund clients. There is a substantial likelihood that a mutual fund investor would consider it important to know whether or not the daily NAV of a particular mutual fund was diluted by late trading.

See In re Mutual Fund Inv. Litig., 437 F. Supp. 2d 439-42 (D. Md. 2006) (discussing the potential dilutive effects of mutual fund late trading on NAVs).

Finally, I find VanCook acted with scienter. VanCook's testimony about what he knew or did not know about late trading or ICA Rule 22c-1 during the relevant period was deliberately vague. For example, VanCook did not recall telling potential market timing clients that it would be an advantage to trade with him because trades could be concluded after 4:00 p.m. Thus, I credit the testimony of Goodwin, Pillai, and Murray regarding VanCook's understanding of late trading. Goodwin testified that VanCook discussed with him that making trading decisions with a post-5:00 p.m. cutoff provided a trading advantage. (Tr. 252.) Pillai testified that when he began removing Millennium's capital from Pritchard Capital, VanCook approached him with the scheme for late trading mutual funds by confirming orders after 4:00 p.m. Murray corroborated Pillai's testimony, testifying that VanCook emphasized Pritchard Capital's ability to enter domestic mutual fund orders past 5:00 p.m.

Further, VanCook was privy to several conversations that informed him the late trading scheme was illegal. Pillai informed him that Millennium's counsel had instructed Pillai to discontinue late trading through Pritchard Capital. VanCook chose to ignore this warning, and attempted to persuade Pillai that the attorney was simply being too conservative. Again, in May 2003, VanCook arranged and participated in a conference call with Seale, Pritchard, and some potential customers that, to some extent, focused on the legality of the late trading of mutual funds. Seale advised VanCook to maintain 4:00 p.m. as a "hard cutoff" for taking mutual fund orders. Despite warnings from two attorneys, VanCook still engaged in late trading.

VanCook had a different recollection of the conference call. He did not recall asking that the call be set up to discuss Rule 22c-1. Rather it was to discuss "a bunch of things in particular that we wanted to talk about [including] a trading strategy." (Tr. 146.) VanCook did not remember if the trading strategy involved placing mutual fund orders after 4:00 p.m. Pritchard, on the other hand, testified that the call was entirely about ICA Rule 22c-1, not a complicated trading strategy. His contemporaneous notes reflect that the rule was discussed. VanCook also does not recall Pritchard Capital's attorney telling him that 4:00 p.m. should be treated as a "hard close" for confirming mutual fund orders. VanCook's testimony about the May 2003 call and his testimony that he did not learn until August or September 2003 that ICA Rule 22c-1 had something to do with when mutual funds set their prices and when the funds would be traded are additional examples of evasive testimony that I do not credit. (Tr. 149, 377-39, 401-02; DX 49.)

Additional evidence that I credit to establish that VanCook did not testify truthfully about his knowledge of late trading rules was his experience in the securities industry. Prior to joining Pritchard Capital, VanCook had worked in the brokerage industry since 1995, and, for about one year, provided brokerage services to mutual fund market timing clients. Because of his experience, VanCook was hired by Pritchard to establish Pritchard Capital's New York office and to develop mutual fund market timing accounts. When Bear Stearns was the clearing broker, VanCook installed procedures that required the hedge funds to have their final trade decision submitted by 4:00 p.m. He changed that procedure for select customers after Banc of America became the clearing broker, and the MFRS was installed. He also had access to mutual fund prospectuses that clearly stated the mutual funds computed their NAVs as of 4:00 p.m. Yet,

VanCook could not recall whether he read fund prospectuses and learned that the mutual funds calculated their NAVs at or as of 4:00 p.m., or that Bear Stearns required the trades to be received by 4:00 p.m. Again, I do not credit his testimony that he did not know about the 4:00 p.m. trading cutoff.

Given his experience in the securities industry with market timing mutual funds, it is simply incredible that he did not know when the mutual funds' NAVs were calculated or that he did not fully understand the application of ICA Rule 22c-1 pricing requirements to mutual fund trades. Indeed, VanCook admitted that he knew by the following morning, when the prices were available to Pritchard Capital from the previous day's trades, that all trades, including the late trades, received the previous day's NAV.

Finally, in the summer of 2003, Eliot Spitzer spoke out publicly about late trading schemes that involved various deceptive practices. VanCook falsely assured Pritchard that "he didn't accept trades after four" and had never done so while employed at Pritchard Capital. (Tr. 385-86.) Deceiving his senior partner, Pritchard, is compelling evidence that VanCook orchestrated the late trading scheme and acted with scienter in carrying it out. Therefore, I conclude that VanCook's activity constituted a scheme to defraud Banc of America, and its mutual fund clients and their shareholders, in connection with the purchase or sale of securities within the meaning of Exchange Act Section 10(b) and Rule 10b-5.

3. VanCook Aided and Abetted and Willfully Caused Banc of America's Violation of ICA Rule 22c-1

VanCook is alleged to have aided and abetted and caused a primary violation of ICA Rule 22c-1 by Banc of America during the relevant period by placing late trades in the MFRS, which allowed the hedge funds transactions to improperly receive the same day's NAV.

ICA Rule 22c-1 provides:

> No registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

17 C.F.R. § 270.22c-1(a).

Three principal elements are required to establish liability for aiding and abetting a violation of the federal securities laws: (1) that a principal committed a primary securities law violation; (2) that the aider and abettor provided substantial assistance to the primary violator; and (3) that the aider and abettor rendered such assistance knowingly or recklessly. Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000).

The scheme perpetrated by VanCook, as discussed in the context of Exchange Act Section 10(b) and Rule 10b-5 violation above, resulted in Banc of America improperly giving

the same day NAV for mutual fund shares to the late trades that VanCook placed. The evidence established that VanCook intentionally failed to disclose to Banc of America the fact that many of the trades he placed were post-4:00 p.m. and should not have received the same day's NAV. Therefore, Banc of America willfully violated[6] ICA Rule 22c-1.

VanCook acted with scienter, as fully described above. He also provided substantial assistance for Banc of America's ICA Rule 22c-1 violation by supplying the means by which his customers were allowed to late trade. VanCook directed that customers' calls be taken after 4:00 p.m., and caused the orders to be entered into the MFRS system. I conclude, therefore, that VanCook willfully aided and abetted Banc of America's violation of ICA Rule 22c-1.

Section 21C of the Exchange Act specifies that a respondent is "a cause" of another's violation if the respondent "knew or should have known" that its act or omission would contribute to such violation.

The Commission has determined that causing liability under Section 21C(a) requires findings that: (1) a primary violation occurred; (2) an act or omission by the respondent was a cause of the violation; and (3) the respondent knew, or should have known, that its conduct would contribute to the violation. Gateway Int'l Holdings, Inc., 88 SEC Docket 430, 444-45 (May 31, 2006); Robert M. Fuller, 56 S.E.C. 976, 984 (2003), pet. denied, 2004 U.S. App. LEXIS 12893 (D.C. Cir. Apr. 23, 2004); Erik W. Chan, 55 S.E.C. 715, 724-26 (2002).

Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. Howard v. SEC, 376 F.3d 1136, 1141 (D.C. Cir. 2004); KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1175 (2001), recon. denied, 55 S.E.C. 1, 4 & n.8 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002). In Dominick & Dominick, Inc., 50 S.E.C. 571, 578 n.11 (1991), a settled proceeding, the Commission concluded that one who aids and abets a primary violation is necessarily a cause of the violation. The Commission has subsequently followed that approach in contested cases raising the same issue. See Graham, 53 S.E.C. at 1085 n.35; Adrian C. Havill, 53 S.E.C. 1060, 1070 n.26 (1998). Because I have concluded that VanCook aided and abetted the violation, he is also a cause of the violation.

4. VanCook Aided and Abetted and Willfully Caused Pritchard Capital's Violations of Exchange Act Section 17(a) and Rule 17a-3(a)(6)

Section 17(a)(1) of the Exchange Act requires, in pertinent part, registered brokers or dealers to make and keep for prescribed periods records that the Commission deems necessary or appropriate in the public interest for the protection of investors.

Exchange Act Rule 17a-3(a)(6) requires that every registered broker or dealer make and keep a memorandum of each brokerage order, whether executed or unexecuted, and of any other instruction given or received for the purchase or sale of securities showing the terms and conditions of the order or instructions and of any modification or cancellation thereof and the

[6] A primary violation of ICA Rule 22c-1 does not require proof of scienter. See SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992.)

time the order was received and entered. 17 C.F.R § 240.17a-3(a)(6). The Rule was amended in October 2001 to require a notation of the time the order was received from the customer. Exchange Act Rel. No. 44992 (Oct. 26, 2001). The amendment became effective during the relevant period on May 2, 2003.

As noted above, a primary violation must lie before a finding of aiding and abetting can be made. The evidence establishes that Pritchard Capital, through VanCook or another employee, time-stamped the so-called "possible trade sheets" that the hedge funds submitted during the day. However, the final sheet with the trades submitted to be entered in the MFRS was not time stamped, meaning that Prichard Capital's records did not reflect required information pertaining to customers' transactions. See 17 C.F.R § 240.17a-3(a)(6). Thus, Pritchard Capital violated the time notation requirement of Exchange Act Rule 17a-3(a)(6) from its effective date until it discontinued late trading. There is no evidence that this record defect was ever corrected to show the final trading decisions and the times the trades were placed with Pritchard Capital. Accordingly, I conclude that Pritchard Capital violated Exchange Act Section 17(a)(1) and Rule 17a-3(a)(6) thereunder. I further conclude that VanCook, acted with scienter and, by virtue of his late trading scheme, substantially aided and abetted and caused Pritchard Capital's violations.

SANCTIONS

1. Cease-and-Desist Order and Associational Bar

Section 21C(a) of the Exchange Act, and Section 9(f) of the ICA, authorize the Commission to impose a cease-and-desist order on any person that is, was, or would be a cause of a violation, due to an act or omission the person knew or should have known would contribute to such violation. 15 U.S.C. §§ 78u-3(a), 80a-9(f).

Section 15(b)(6) of the Exchange Act permits the Commission to sanction persons associated with a broker or dealer if it finds that the sanction is in the public interest and such persons have willfully violated or aided and abetted violations of the Exchange Act, or the rules and regulations thereunder. Id. § 78o(b)(6). Specifically, the Commission may censure a broker or associated person, place limitations on the activities or functions of such person, suspend such person for a period not exceeding twelve months, or bar such person from being associated with a broker or dealer. Id. § 78o(b)(6)(A).

Section 9(b) of the ICA authorizes the Commission to prohibit conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company, or affiliated person of such investment adviser, depositor, or principal underwriter, if such person, among other things, willfully violated or willfully aided and abetted violations of the Exchange Act or the ICA. 15 U.S.C. § 80a-9(b).

I have already concluded that VanCook willfully violated Section 10(b) of the Exchange Act and Rule 10b-5. I also concluded that he aided and abetted and caused Banc of America's violation of ICA Rule 22c-1 and Pritchard Capital's violations of Exchange Act Section 17(a)

and Rule 17a-3(a)(6). Therefore, I must now determine whether a cease-and-desist order and sanctions under Section 15(b)(6) of the Exchange Act are appropriate.

In making this determination, the Commission considers the following factors:

> [T]he egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that the respondent's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). No one factor controls. See SEC v. Fehn, 97 F.3d 1276, 1295-1296 (9th Cir. 1996).

In addition to the Steadman factors discussed above, in determining whether to impose a cease-and-desist order, the Commission considers whether there is a risk of future violations, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. KPMG Peat Marwick, 54 S.E.C. at 1183-89. The Commission explained that the Division must show some risk of future violations. Id. However, it also ruled that such a showing should be "significantly less than that required for an injunction," and that, "absent evidence to the contrary," a single past violation ordinarily suffices to raise a significant risk of future violations. Id. at 1185, 1191.

The Division contends, and I agree, that VanCook's conduct was egregious. The scheme extended for over two years during which time he knew that the late trading clients were receiving NAVs to which they were not entitled. His actions, done with a high degree of scienter, violated the Exchange Act, the ICA, and the rules and regulations thereunder. These violations certainly caused harm to investors and the market place, especially those on the other side of the late trade transactions.

Equally important, in determining appropriate sanctions, VanCook was evasive in his testimony especially pertaining to his purported lack of knowledge of ICA Rule 22c-1 and how it was to be applied in determining what net asset value trades should receive. I did not believe this testimony. VanCook did not take responsibility for his conduct; rather, in my observation of him, he sought to avoid it. Since he continues to work in the securities industry, the risk of future violations is high. Therefore, it is in the public interest to impose a cease-and-desist order and to bar VanCook from association with any broker or dealer or investment company.

2. Disgorgement

The Commission, pursuant to Section 21B(e) of the Exchange Act and 9(e) of the ICA, may seek an order requiring disgorgement, including prejudgment interest, in administrative proceedings in which the Commission may impose a money penalty. 15 U.S.C. §§ 78u-2(B)(e), 80-9(e). In cease-and-desist proceedings, the Commission may seek a disgorgement order and prejudgment interest pursuant to Section 21C(e) of the Exchange Act and Section 9(f)(5) of the ICA. 15 U.S.C. §§ 78u-2(C)(e), 80-9(f)(5).

As the Division points out, "The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws." First Jersey Sec., 101 F.3d at 1474 (2d Cir. 1996). When calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task." SEC v. First City Fin. Corp. 890 F.2d 1215, 1231 (D.C. Cir. 1989). "[A]ny risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty." First Jersey Sec., 101 F.3d at 1475.

For the period March 2001 through July 2003, the Division calculates the compensation received by VanCook from late trading to be $538,565.70. From Simpson Capital, he received $388,007.59. From Goodwin Trading, he received $53,316.89. The remainder, $97,241.22, came from Millennium. VanCook suggests that if the "causing" of a books and records violation is predicated on negligence as a result of VanCook participating in the May 2003 phone call with Pritchard, Pritchard Capital's attorney, and others, disgorgement, if any, should be calculated only for the months of May, June, and July 2003 in the amount of $74,534.59. However, the instant violations are based on scienter and not negligence, therefore I will order disgorgement in the full amount of $538,565.70, plus prejudgment interest calculated pursuant to Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2) and shall be compounded quarterly. See Commission's Rules of Practice, Rule 600(b); 17 C.F.R. 201.600(b).

3. Civil Monetary Penalty

As a further sanction, the Division seeks a third-tier penalty pursuant to Section 21B of the Exchange Act. 15 U.S.C. § 78-u2(B)(a). Civil monetary penalties may be assessed if the Respondent has violated the Exchange Act or the rules and regulations thereunder. Id. at § 78-u2(B)(a)(1). Imposition of a penalty must be in the public interest. To determine if a civil monetary penalty is in the public interest, the following factors are considered: (1) fraud and deceit and disregard for the regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) other matters that justice may require. Id. at § 78-u2(B)(c). Not all factors may be relevant in a given case, and the factors need not carry equal weight.

Section 21B(b) of the Exchange Act sets out a three tier system to determine the civil monetary penalties. Id. at § 78-u2(B)(b). The maximum amount of a third tier penalty is $100,000 for a natural person. To impose the maximum third-tier penalty, the violations must not only have involved fraud, deceit, manipulation or a deliberate or reckless disregard of a regulatory requirement, but must also have "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. §§ 78-u2(B)(b)(3)(A)-(B). The violations that VanCook committed involve fraud and disregard for the regulatory requirement. They also created a significant risk of substantial loss to other persons and resulted in significant pecuniary gains to VanCook. Therefore, a $100,000 civil monetary penalty is imposed. No evidence has been presented suggesting inability to pay. See id. at § 78-u2(B)(d).

CERTIFICATION OF THE RECORD

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on June 24, 2008.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 21C of the Securities Exchange Act of 1934, Joseph John VanCook shall cease and desist from committing or causing any violations or future violations of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder;

IT IS FURTHER ORDERED THAT, pursuant to Section 9(f) of the Investment Company Act of 1940, Joseph John VanCook shall cease and desist from committing or causing any violations or future violations of Section 22(a) of the Investment Company Act of 1940 and Rule 22c-1 thereunder;

IT IS FURTHER ORDERED THAT, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Joseph John VanCook is barred from association with any broker or dealer;

IT IS FURTHER ORDERED THAT, pursuant to Section 9(b) of the Investment Company Act of 1940 Joseph John VanCook is permanently prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

IT IS FURTHER ORDERED THAT, pursuant to Section 21B(e) the Securities Exchange Act of 1934 and Section 9(e) of the Investment Company Act of 1940, Joseph John VanCook shall pay disgorgement in the amount of FIVE HUNDRED THIRTY EIGHT THOUSAND, FIVE HUNDRED SIXTY FIVE DOLLARS and SEVENTY CENTS ($538,565.70) plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600. Prejudgment interest shall be calculated from the end of the calendar year in which the commissions were paid and shall continue to accrue on all funds owed until they are paid; and

IT IS FURTHER ORDERED THAT, pursuant to Section 21B of the Securities Exchange Act of 1934, Joseph John VanCook shall pay a civil monetary penalty in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000).

Payment of the money penalty and disgorgement shall be made on the first business day following the day this Order becomes effective by certified check, U.S. Postal money order, bank cashier's check, or bank money order payable to the Securities and Exchange Commission. The

check and a cover letter identifying the Respondent and Administrative Proceeding No. 3-12753, should be delivered by hand or courier to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the counsel of record.

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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Robert G. Mahony
Administrative Law Judge