SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2809 / November 21, 2008

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28519 / November 21, 2008

Admin. Proc. File No. 3-12436

In the Matter of

BRENDAN E. MURRAY

OPINION OF THE COMMISSION

INVESTMENT COMPANY PROCEEDING

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Aiding and Abetting Fraudulent Conduct by Investment Adviser

Conversion of Assets of Registered Investment Company

Managing director of investment adviser who also served as secretary to client investment companies engaged in scheme to defraud investment companies by preparing and submitting to investment companies' administrator for payment inflated invoices purportedly showing services provided to investment companies by third parties.

Held, it is in the public interest to bar managing director from association with an investment company or investment adviser, to impose a cease-and-desist order and civil money penalty, and to order disgorgement and payment of prejudgment interest.

APPEARANCES:

Brendan E. Murray, pro se.

James McGovern and Susannah M. Dunn, for the Division of Enforcement.

Appeal filed: August 20, 2007
Last brief received: November 13, 2007
Oral argument: September 8, 2008

I.

Brendan E. Murray ("Murray" or "Petitioner"), formerly a managing director of registered investment adviser Cornerstone Equity Advisers, Inc. ("Cornerstone") and secretary to Cornerstone's advisory clients the Cornerstone Funds, Inc. (the "Funds"), registered investment companies under the Investment Company Act of 1940, appeals from the decision of an administrative law judge. The law judge found that Murray willfully aided and abetted and caused Cornerstone to violate antifraud provisions of the Investment Advisers Act of 1940, and that Murray converted assets of the Funds in violation of the Investment Company Act. The law judge barred Murray from associating with any investment adviser and from working for any registered investment company, assessed a civil money penalty of $60,000, imposed a cease-and-desist order, and ordered disgorgement in the amount of $27,200. 1/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 2/

II.

A. Background

From September 1998 until February 2002, Cornerstone, as the Funds' investment adviser, provided the Funds with investment advice; supervised and managed all aspects of the Funds' operations; and provided, obtained, and supervised administrative services to the Funds. The Funds paid advisory fees to Cornerstone for these services based on assets under management. Cornerstone also provided officers to the Funds at no cost. The Funds ceased offering shares to the public on approximately April 30, 2000, when their auditors refused to certify their 1999 financial statements.

1/ The law judge also ordered the payment of prejudgment interest.

2/ Commission Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of a proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioners Casey and Walter conducted the required review.

Murray joined Cornerstone as a managing director in September 1998 and became Cornerstone's compliance officer in January 2001. While employed at Cornerstone, Murray performed a variety of services for the Funds: he was responsible for operations and administration and handled mutual fund clearing, processing, and sales. As secretary to the Funds, Murray attended board meetings and drafted minutes. Murray also provided some portfolio management services beginning in November 2001.

Stephen Leslie and James A. DeMatteo were Cornerstone's chief executive officer and president respectively. 3/ Leslie also served as president of the Funds. Together, Leslie and DeMatteo owned more than fifty percent of Cornerstone's stock. They were the only principals of Voyager Institutional Services, LLC ("Voyager"), which provided website maintenance and certain administrative services to the Funds.

Until November 2001, Leslie managed the Funds' portfolios. He reviewed and approved all third-party invoices for services performed for the Funds, and forwarded each invoice to the Funds' administrator, Orbitex Fund Services, Inc. ("Orbitex"). Orbitex would then prepare an expense authorization for Leslie's approval. Leslie would return the approved expense authorization to Orbitex. When Orbitex notified Union Bank of California ("UBC"), the custodian for the Funds, that the expense was authorized, UBC paid the vendor directly.

B. The Invoice Inflation Scheme

Around October 31, 2001, Leslie was incapacitated by a stroke. Beginning in mid-November 2001, Murray assumed Leslie's responsibilities for invoice processing. By this time, it was clear to Murray that the Funds were facing liquidation. In his new capacity, Murray, together with DeMatteo, embarked on a scheme to falsify certain vendor invoices for submission to Orbitex. This scheme resulted in Voyager's receipt of a total of $122,241 of Fund monies in excess of amounts that the Funds actually owed to the vendors.

Although it is unclear from the record the precise extent of DeMatteo's involvement, and how much Murray was acting at DeMatteo's direction, the record is clear that Murray engaged in multiple deceptive acts in furtherance of the scheme. Between November 2001 and February 2002, Murray prepared, approved, and submitted to Orbitex for payment twelve invoices from

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3/ In a separate administrative proceeding, DeMatteo consented to an order (1) that he cease and desist from committing or causing any violations or future violations of Advisers Act Sections 206(1) and 206(2), 15 U.S.C. §§ 80b-6(1) and 80b-6(2), and Investment Company Act Section 37, 15 U.S.C. § 80a-36, and (2) barring him from association with any investment adviser and prohibiting him from serving or acting in certain capacities with an investment company. DeMatteo was also ordered to pay disgorgement and prejudgment interest, but the Commission waived payment thereof, and declined, based on DeMatteo's financial circumstances, to impose a civil penalty. James A. DeMatteo, Investment Advisers Act Rel. No. 2556 (Sept. 26, 2006), 88 SEC Docket 3362.

five third-party vendors that purportedly provided services to the Funds. In some cases, Murray requested a payment that was in excess of the amount billed by the vendor; in others, Murray simply prepared an invoice in an amount dictated to him by DeMatteo, although no services had been provided to the Funds. The expense authorizations approved by Murray and returned to Orbitex directed UBC to send the monies owing under these invoices to Voyager, not to the vendors directly. Voyager then paid any money actually owed to the vendors, and kept the difference.

For example, accountant Jay Sanders performed various tax, bookkeeping, and other services for Cornerstone, Voyager, and the Funds. On November 12, 2001, Sanders submitted an invoice in the amount of $5,000 for enumerated services. Murray used this invoice as a model to forge an invoice that appeared to be on Sanders's letterhead (except that "Sanders" was misspelled as "Samders") for the same services but in the amount of $17,500. Murray submitted this (and a corresponding invoice on Voyager letterhead) to Orbitex and authorized its payment to Voyager. Voyager paid Sanders the $5,000 he had billed the Funds, and retained the remaining $12,500. Murray repeated this pattern with respect to invoices submitted by Sanders in the amounts of $28,275, $41,650, and $30,400, which Murray inflated to $53,275, $65,650, and $55,400 respectively.

Murray similarly falsified bills from two property management groups. In November 2001, Murray billed the Funds $4,000 for services allegedly provided by the PR Group ("PR Group" or the "Group"). Murray forged the PR Group's letterhead in preparing the phony invoice. The Group had not rendered any significant services to the Funds since June 2001. Murray had reason to know that the Group had not rendered services to the Funds that would justify a $4,000 payment. Murray had negotiated the June 2001 settlement of a bill from the Group, after which he told the Group that any future services would be requested on an "as-needed" basis. The Group received no money from the bill Murray submitted to the Funds in November 2001.

Murray prepared, submitted, and approved three invoices, each in the amount of $7,500, for services allegedly rendered by Richardson Management ("Richardson"). Murray forged Richardson letterhead for one of these invoices. Richardson's contract provided for payments of only $2,500 per month. Murray testified that he prepared the invoices based on information provided to him by DeMatteo. However, Murray took no steps to determine whether Richardson had performed any services to the Funds. The law judge did not credit Murray's testimony that he acted as a mere scrivener for DeMatteo. UBC sent Voyager $22,500 in satisfaction of the three invoices, of which Richardson received only $10,615.20.

Murray also submitted inflated invoices for purported portfolio management services from several individuals. 4/ Edward Rabson is an experienced bond analyst. Murray had prepared two versions of a contract for Rabson's services. One required Voyager to pay Rabson $1,000 per month; the other allotted Rabson $5,000 per month. Only the contract for $1,000 was executed by Rabson and Voyager. DeMatteo gave Murray the unexecuted $5,000 contract when he told Murray to prepare the first Rabson invoice, and he told Murray that the $5,000 contract was in effect. Murray did not ask why the contract was unexecuted, or what had happened to the $1,000 contract. However, Murray submitted three invoices for Rabson's services, each in the amount of $5,412.50 (including sales tax). Rabson received only $4,000 from the more than $16,000 that UBC paid to Voyager for his services.

Murray also billed the Funds $8,118.75 for services purportedly rendered by Rabson's apparent replacement, Harry Peterson. However, Peterson received only $500. In preparing Peterson's invoice, Murray relied solely on DeMatteo's representation that Peterson should be paid $7,500 per month (plus sales tax). Murray did not confirm that Peterson performed services for the Funds. In fact, the invoice was dated only one day after Murray informed Orbitex that Rabson had stopped providing portfolio management services to the Funds and that a search for his replacement was underway.

At the hearing, Murray admitted his involvement in preparing, approving, and submitting the twelve invoices at issue. He knew some invoices were inflated and admitted that, with respect to other invoices, he failed to inquire into whether the payments were based on actual agreements or were justified by services actually performed. Moreover, Murray admitted that he knew that the purpose of submitting inflated invoices to Orbitex was to prevent Orbitex from determining how much money was being retained by Voyager.

C. Counsel Learns of the Inflated Invoices

In December 2001, Murray formed a corporation known as White Star Capital or White Star Management ("White Star"), and became its chief executive officer. He subsequently filed Form ADV with the Commission to register White Star as an investment adviser. Without consulting anyone at Cornerstone or the Funds, Murray, acting through White Star, prepared a ten-page report reviewing certain work done by accounting firms used by the Funds. In late January or early February 2002, Murray prepared, approved, and submitted a single-sentence invoice in the amount of $37,650 for White Star's services in preparing the report. The invoice neither specified an hourly rate for Murray's services nor indicated how many hours were

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4/ Murray also approved expense authorizations for a total of $47,179.21 in advisory fees payable to Cornerstone for November 2001 through January 2002, which were supposed to compensate Cornerstone for providing investment advice, among other things. The record is unclear as to whether the individuals for whom Murray submitted invoices should have been compensated by Cornerstone out of the money it received for portfolio management rather than by the Funds.

involved in preparing the report. Although the invoice was addressed to DeMatteo, Murray did not provide DeMatteo with a copy. Murray also approved an expense authorization for the invoice and submitted the authorization to Orbitex, directing that payment be made to Voyager. Almost immediately after authorizing payment, Murray revised the payment instructions, directing via a letter to Orbitex and on the expense authorization form that payment should be made to White Star directly and not to Voyager (to prevent DeMatteo from becoming aware of the payment).

On February 14, 2002, Orbitex's general counsel sent a letter to an attorney representing the Funds, stating that Orbitex had

> become aware of fees recently billed to the Cornerstone Funds for consulting services rendered by WhiteStar [sic] Management Inc. and Voyager Institutional Services, Inc. It has also come to our attention that Brendan Murray is a principal of both WhiteStar Management Inc. and Voyager Institutional Services, Inc. We wanted to insure that you're aware of the existence and purpose of the consulting arrangements referenced above.

Murray, DeMatteo, and Sanders met with counsel that day to discuss matters raised by the letter, and counsel instructed DeMatteo and Murray to stop submitting inflated third-party invoices. After a discussion with counsel, Murray returned the $37,650 payment.

Voyager paid Murray an average of $2,014.29 per month between January 19 and September 19, 2001, but between November 19, 2001 and February 17, 2002 paid him an average of $14,066.67 per month.

D. Murray's Termination and Subsequent Actions

In February 2002, the Funds' Trustees and Directors voted to liquidate the assets of the Funds and dissolve the Funds as soon as practicable. In March 2002, they voted to establish liquidating trusts to receive the remaining assets of the Funds (the "Liquidating Trusts").

In April 2002, Murray asked the Funds' board of directors to pay White Star the $37,650 fee for his report. The directors rejected this request. That month, Voyager, acting through DeMatteo, terminated Murray's services, paying him $5,000 in severance. Shortly thereafter, Murray sent letters to DeMatteo and an attorney 5/ in which he threatened to release damaging information about DeMatteo and Leslie unless certain conditions were met, including retaining White Star to provide on-call consulting services to Voyager for a monthly fee of $7,500, paying

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5/ The record is unclear as to whom the attorney was representing at the time.

the $37,650 for the White Star report, and continuing medical coverage for Murray and his dependents. 6/ Murray's conditions were not met. 7/

In November 2002, the Liquidating Trusts, as successors in interest to the Funds, filed a civil action against Voyager, DeMatteo, Leslie, Murray, and White Star, alleging, among other things, improper inflation of invoices, charges for services not performed, and the conversion of the Funds' assets for personal use. 8/ The parties settled the action in November 2003 for $130,000, of which Murray contributed $15,000.

Beginning in 2003, Murray provided consulting services to clients of Ehrenkrantz King Nussbaum, Inc. ("EKN"), a registered broker-dealer firm, who wanted to engage in market-timing activities. 9/ At the time of the hearing in this matter, Murray was providing consulting services to Ehrenkrantz Growth Fund, a registered investment company, and Ehrenkrantz Asset Management Group, a registered investment adviser, both of which are related to EKN.

II.

A. Aiding and Abetting Antifraud Violations of the Advisers Act

The Order Instituting Proceedings ("OIP") charged Murray with willfully aiding and abetting and being a cause of Cornerstone's violations of Sections 206(1) and 206(2) of the

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6/ One of Murray's letters warned, "If the information is released the Proper Authorities will move immediately against you. . . . Your friends will loose [sic] their consulting positions. No friends participating in real estate deals. . . . Your political contacts will desert you. . . . No more management fee. No more investment bank. No more Wall Street contacts. . . . If your lawyer was shocked by what he saw imagine what the reaction will be of the press and the authorities. You will loose [sic] everything instantly."

7/ Leslie swore out a complaint for attempted extortion. The New York criminal authorities executed a search warrant at Murray's home, seizing computers and documents; however, no criminal charges were filed against Murray.

8/ Cornerstone filed for liquidation under Chapter 7 of the United States Bankruptcy Code in October 2002.

9/ In September 2005, the Commission filed a complaint in the Eastern District of New York against Murray, EKN, and EKN's then-chief executive officer related to the market-timing activities.

Advisers Act. 10/ Section 206(1) prohibits the employment by an investment adviser of "any device, scheme, or artifice to defraud any client or prospective client," and Section 206(2) proscribes on the part of an investment adviser "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 11/

To establish Murray's aiding and abetting liability, the Division of Enforcement was required to show that (1) Cornerstone violated the provisions charged, (2) Murray substantially assisted the conduct that constituted the violations, and (3) Murray provided that assistance with the requisite scienter. 12/ The scienter requirement may be satisfied by showing that Murray knew of, or recklessly disregarded, the wrongdoing and his role in furthering it. 13/ A finding that a person aided and abetted a violation necessarily makes the person a cause of that violation. 14/

Misappropriation of client funds by an investment adviser violates Sections 206(1) and 206(2). 15/ The record establishes that Cornerstone, a fiduciary to the Funds, knowingly inflated and falsified certain vendor invoices through Voyager and directed Orbitex to pay the inflated amounts, with Fund money, to Voyager. Voyager paid the vendors lesser amounts and kept the overage. This misconduct establishes the primary violations of Section 206(1) and 206(2). Murray does not dispute the primary violations by Cornerstone, and does not argue that Cornerstone's conduct was proper.

Murray admits his involvement in preparing, approving, and submitting inflated and falsified invoices (as well as falsifying letterhead for vendors), knowing that some invoices were

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10/ 15 U.S.C. §§ 80b-6(1), 80b-6(2). The requirement that Murray acted willfully may be satisfied by a showing that he intended to do the acts that constituted the violation. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

11/ 15 U.S.C. §§ 80b-6(1), 80b-6(2).

12/ See Robert J. Prager, Securities Exchange Act Rel. No. 51974 (July 6, 2005), 85 SEC Docket 3413, 3421 & n.17 (citing additional cases).

13/ See, e.g., Monetta Fin. Servs., Inc. v. SEC, 390 F.3d 952, 956 (7th Cir. 2004); Howard v. SEC, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004); Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000).

14/ See, e.g., Zion Capital Mgmt., LLC, 57 S.E.C. 99, 116 (2003) (citing Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000)).

15/ SEC v. Batterman, 2002 U.S. Dist. LEXIS 18556, at *25 (S.D.N.Y. Sept. 30, 2002); SEC v. Tandem Mgmt. Inc., 2001 U.S. Dist. LEXIS 19109, at *33, *38 (S.D.N.Y. Nov. 13, 2001); see also SEC v. Olsen, 243 F. Supp. 338, 339 (S.D.N.Y. 1965) (misappropriation of client funds by investment adviser violated Section 206).

marked up or completely falsified, and failing to inquire as to the basis for others. 16/ Moreover, Murray admits that he knew that the purpose of submitting inflated invoices to Orbitex was to conceal from Orbitex the amount of money retained by Voyager. These facts establish Murray's awareness of the wrongdoing and his substantial assistance to the scheme, as well as his knowing participation in the acts that constituted the violation. We find that Murray acted knowingly, and thus with scienter.

Murray argues that he did not act with scienter because he was merely acting on DeMatteo's instructions. He argues that Voyager was authorized to charge the Funds for its services, and that the amount that Voyager charged was set by DeMatteo. 17/ He testified that "Mr. DeMatteo insisted that this [inflation of invoices] was an acceptable process and that . . .Voyager being an authorized vendor, he could receive those funds, and that was the justification for the payment being made."

Murray is liable for his own participation in the scheme, without regard to whether he was acting on DeMatteo's instructions. 18/ The defense that one was merely following orders is not available where the fraudulent nature of conduct is obvious. 19/ Murray engaged in a series

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16/ Once Murray knew that inflated invoices were being submitted to Voyager, the unquestioning approval and submission of subsequent third-party invoices manifested at least extreme recklessness unless Murray had a reasonable basis to believe an invoice was legitimate. See Howard v. SEC, 376 F.3d at 1143 (scienter established by showing of extreme recklessness where individual "encountered 'red flags' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator, or if there was 'a danger . . . so obvious that the actor must have been aware of' the danger" (citations omitted)).

17/ Murray testified that, in November 2001, an attorney had stated "that since the [Fund] assets had declined to the point where the management fees I guess couldn't cover certain things, that it was all right for Voyager or a third party . . . to bill the [Funds] for services . . . ." However, law firm billing records showed no services rendered by the attorney in question before January 2002. Murray admitted that the attorney did not suggest that third-party invoices could be inflated in order to cover Voyager's expenses.

18/ For this reason, whether (as Murray asserts) DeMatteo testified falsely about his role in the scheme, in the civil litigation or elsewhere, has no effect on Murray's liability. We have relied solely on the record in this proceeding.

19/ See SEC v. Hughes Capital Corp., 124 F.3d 449, 454-55 (3d Cir. 1997) (holding that where undisputed facts established that transactions were so clearly suspicious that bookkeeper was negligent in continuing to complete them, bookkeeper could not avoid liability by arguing "that he was just being a good soldier and following orders"); SEC v.

(continued...)

of deceptive actions: he prepared faked invoices on faked letterhead, and unquestioningly approved and submitted other invoices while knowing that by doing so he was helping to conceal Voyager's profitability from Orbitex. He offers no rationale as to how such deception could be justified. Moreover, Murray appears to have profited from his involvement in the fraudulent scheme.

Murray's assertion that Voyager was authorized to charge the Funds for its services is irrelevant. Voyager was not charging for its services. Rather, Murray both falsely inflated invoices and manufactured other invoices from vendors where no services were rendered (or where the costs of services rendered should perhaps have been covered by routine payments by the Funds to Cornerstone). Murray makes no argument that the inflated amounts he included in the manufactured invoices had any basis in fact or were justified in any way by services actually provided to the Funds, or even that he believed at the time that the amounts were justified.

Murray argues that his preparation of "backup documentation" made no difference because "the presence of the accompanying documentation had no bearing on the amount paid to Voyager, and need not have been created or accompanied the Voyager invoices, because the procedure all along had been to pay the amounts stated on the Voyager invoices." However, the inflated backup invoices that Murray created lent plausibility by corroborating the amounts invoiced by Voyager.

Murray argues in the alternative that he is liable, if at all, only for his conduct between mid-November 2001, when he created, submitted, and authorized payment of the first inflated invoice, and mid-December 2001, when Murray sent Sanders a spreadsheet itemizing a payment to Sanders that Sanders knew to exceed the amount he had billed. Sanders responded to Murray in an email dated December 15, 2001 that he "[c]ouldn't help but notice items for me including the $53M as paid. Shouldn't that be JS $33 and Voyager $20 since JS bills Voyager and the cancelled checks will need to reconcile?" Murray asserts that Sanders "was told exactly what was being done" at a meeting held "within several days of [the] December 15th email" and that

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19/ (...continued)
Antar, 15 F. Supp. 2d 477, 523-24 (D.N.J. 1998) (holding that one who was "more than a mere dupe lacking any awareness of the frauds perpetrated" could not credibly argue that he was "just following orders"). Murray's contentions that DeMatteo took various steps necessary to the success of the scheme (e.g., paying third-party vendors from Voyager bank accounts) are unavailing because we find that Murray's conduct by itself is sufficient to constitute substantial assistance. Similarly, Murray's complaint that DeMatteo and Leslie engaged in similar violations, before and (in the case of DeMatteo) simultaneously with Murray's misconduct, is no defense. See, e.g., James E. Welch, 51 S.E.C. 229, 232 (1992) (finding that registered representative who executed unauthorized options trades in violation of American Stock Exchange Inc. rules would not be exonerated by even truthful allegations that supervisor approved and directed many of the trades and may have benefitted from them).

Sanders "had full knowledge of the markup of his own invoices." Murray testified that he continued the scheme in reliance on Sanders's inaction. In Murray's view Sanders, a certified public accountant, had a "fiduciary" duty "to call matters into question that were improper and direct that they be resolved."

Sanders testified that he did not remember having any meeting about marked-up invoices in the immediate aftermath of his December 15 email. Sanders agreed that he had found one discrepancy between an amount owed to him and a corresponding entry on a spreadsheet. Sanders also testified that (1) he believed the discrepancy to be a typographical error that Murray could easily correct, and (2) the discrepancy was one of a large number of issues related to the Funds that were competing for his attention in the months leading up to the liquidation of the Funds. The law judge, who observed the witnesses testify, "reject[ed] as incredible" Murray's claim that he relied on Sanders's failure to tell him to stop inflating invoices. 20/

Accordingly, we find that Murray willfully aided and abetted and was a cause of Cornerstone's willful violations of Advisers Act Sections 206(1) and 206(2).

B. Conversion

The OIP also charged Murray with a willful violation of Section 37 of the Investment Company Act. Section 37 states that "[w]hoever steals, unlawfully abstracts, [or] unlawfully and willfully converts to his own use or to the use of another . . . any of the moneys, funds . . . property, or assets of any registered investment company shall be deemed guilty of a crime . . . ." 21/ Although the statutory language contemplates the imposition of criminal sanctions, federal courts have recognized the Commission's authority to pursue civil causes of

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20/ Even if Sanders had been aware of Murray's deliberate inflation of invoices and the related actions set forth above and had failed to do anything to stop it, that would not exonerate Murray. Murray cannot rely on the silence of others to absolve himself of liability where the wrongfulness of his actions is so evident. Cf. Dolphin & Bradbury, Inc. v. SEC, 512 F.3d 634, 642 & n.8 (D.C. Cir. Jan. 11, 2008) (underwriter who failed to disclose critically important information to prospective investors "cannot rely on the silence of others to absolve himself from responsibility when non-disclosure presented such an obvious danger of misleading investors").

21/ 15 U.S.C. § 80a-36.

action for violations of Section 37, 22/ and we have held that sanctions based on violations of this section may also be imposed in administrative proceedings before the Commission. 23/

As used in Section 37, conversion includes both "misuse or abuse of property" and "use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." 24/ In particular, "[t]he willful misapplication of corporate funds by fiduciaries constitutes a conversion" under Section 37. 25/ Murray was secretary to the Cornerstone Funds during the period at issue, and accordingly owed a fiduciary duty to the funds. 26/ Despite this fiduciary relationship, he created, submitted, and authorized payment of faked and inflated invoices, which led to the Funds' assets being used in ways that did not benefit the Funds. Thus, Murray's knowing submission of inflated invoices for reimbursement constituted a "willful misapplication of corporate funds" to this account in violation of Section 37.

22/ See SEC v. Durgarian, 477 F. Supp. 2d 342, 359 (D. Mass. 2007) (citing the Commission's "unique role" in enforcing the Investment Company Act); SEC v. Lawbaugh, 359 F. Supp. 2d 418 (D. Md. 2005) (default judgment); SEC v. Carnicle, 1999 U.S. Dist. LEXIS 23379 (N.D. Utah 1999) (summary judgment), aff'd, 2000 U.S. App. LEXIS 14380 (10th Cir. 2000) (table); SEC v. Commonwealth Chem. Sec., Inc., 410 F. Supp. 1002, 1018 (S.D.N.Y. 1976) ("we believe that the SEC may [enforce this statute] under its broad powers to compel compliance with the securities laws"), aff'd in part and modified in part, 574 F.2d 90 (2d Cir. 1978).

23/ See Int'l Research & Mgmt. Corp., 46 S.E.C. 1167, 1170 (1978) ("We see no reason why this Commission should be precluded from taking administrative action based on the extremely serious misconduct to which [Section 37] is addressed."), aff'd, 588 F.2d 821 (3d Cir. 1978).

24/ Tanzer v. Huffines, 314 F. Supp. 189, 194 (D. Del. 1970) (citing Morissette v. United States, 342 U.S. 246, 271-72 (1952)).

25/ Brown v. Bullock, 194 F. Supp. 207, 229 (S.D.N.Y. 1961), aff'd, 294 F.2d 415 (2d Cir. 1961).

26/ See Winfield & Co., 44 S.E.C. 810, 814 (1972) (officers of an investment company "were fiduciaries of [that company]. As such, they were under a duty to act solely in the best interests of [that company] and its shareholders.") (citing Provident Mgmt. Corp., 44 S.E.C. 442, 445 (1970)); see also A.S. Hansen, Inc., 1974 SEC No-Act. LEXIS 2531, at *1 (July 12, 1974) ("Section 36(a) of the Investment Company Act also provides that the officers and directors of, and investment adviser to an investment company have a fiduciary duty to such investment company.").

Accordingly, we find that Murray willfully violated Investment Company Act Section 37.

IV.

Murray argues that he was denied a fair hearing in several respects.

A. Murray complains that the Commission did not secure the computers, records, files, or other papers for Cornerstone, Voyager, or the Funds during its investigation. He contends that DeMatteo and Leslie, among others, testified falsely about events pertaining to this matter and that "[i]f the Commission had acted expediently in securing the computers at Cornerstone's offices in 2001, such lies would have been exposed four years earlier than they were."

Murray does not identify any law that obliges the Commission to secure all the records of an investment adviser or investment company during an investigation and does not complain that the Commission staff withheld from him any record from the staff's investigation that Murray requested. Murray does not identify any particular relevant documents that were lost, destroyed, or damaged during the time between commencement of the Commission's investigation and the hearing. He does not explain how the types of documents he identifies would contribute to his defense or refute testimony. Moreover, the testimony of DeMatteo and Leslie, or others, is not the basis for our decision. As discussed above, Murray admits all the facts on which we have based our findings of his liability. For these reasons, we reject this argument.

B. Murray also argues that deterioration in DeMatteo's condition by the time of the hearing denied Murray a fair hearing. Murray asserts that, during the negotiations resulting in DeMatteo's settlement of our proceeding, 27/ DeMatteo claimed that he was "completely disabled, mentally enfeebled, and unable to participate in his own defense." Murray contends that "any information provided to the Commission by DeMatteo should be discarded, along with any evidence he produced for the Commission at any time in the past." The settlement negotiations to which Murray alludes are not part of the record, and he identifies no other evidence of any disability suffered by DeMatteo. Murray did not subpoena DeMatteo to testify, nor did he explain the potential relevance of any testimony by DeMatteo. He also does not identify any information or evidence provided by DeMatteo that, in his view, should be discarded. In any event, as noted above, our decision is based on facts that Murray admits, not on evidence provided by DeMatteo. We therefore reject Murray's argument.

C. Murray argues that he was denied a fair hearing because third parties to whom subpoenas were addressed failed to respond in a timely fashion. He further contends that the law judge improperly held him responsible for the delay, and that the law judge "refused to delay the start of the hearing, delay the course of the hearing, or provide Respondent with any opportunity to use the information provided by subpoena in the cross examination of witnesses at the hearing."

27/ See note 3 supra.

Most of Murray's contentions are contradicted by the record. Murray did not file his subpoena applications until twelve days after the law judge had advised him of the need to proceed expeditiously; the law judge signed two of the three applications the day Murray filed them. Although Murray waited fifteen days before responding to a motion to quash, the law judge denied the motion within three days of Murray's response.

At a prehearing conference on January 18, 2007, Murray requested postponement of the hearing (which was scheduled to begin on January 22) to allow Murray more time to obtain and review materials. The law judge refused, stating that Murray had not explained what defense he intended to offer, nor how Murray expected his efforts to lead to the introduction of admissible evidence or of documents that could be used to cross-examine witnesses. The law judge also stated that Murray had not been diligent in his preparation: he had failed to inspect the Division's documents for two months after being notified of their availability and had not acted in a timely manner to prepare and submit subpoena applications and to serve subpoenas.

Murray had received all documents responsive to his subpoenas by January 23, 2007, the second day of the hearing. After the Division concluded its case on January 24, the law judge adjourned the hearing until January 30 to give Murray a chance to review the newly produced materials. Murray told the law judge that the postponement was acceptable, and, when the hearing resumed, told the law judge that he "believe[d he had] been able to [examine the materials received in response to the subpoenas thoroughly] in the time I was allotted, yes."

The law judge also allowed Murray to submit additional documents into the record after the close of the hearing. Any such submissions were initially to be made by February 9, 2007, but the law judge extended the deadline twice, until March 2, 2007, at Murray's request. Murray submitted no additional documents from those produced in response to his subpoenas. Murray's failure to identify additional documents useful to his case undermines his argument that he was prejudiced by lack of earlier access to the materials.

As set forth above, Murray was dilatory in obtaining and serving the subpoenas. Once the materials were produced, the law judge continued the hearing to allow Murray to review them; Murray agreed with the length of the continuation, and upon resumption of the hearing, he admitted he had had sufficient time to review the materials. We reject Murray's argument that he was prejudiced by the law judge's actions in this respect.

D. Murray also argues that he was unable to use certain unspecified subpoenaed materials to cross-examine a witness who testified before those materials were introduced, apparently referring to his not having had the December 15 email from Sanders described above while questioning Sanders at the hearing. Murray questioned Sanders about the content of the email, however, even though he did not have a copy of it. Moreover, he could have sought to have Sanders recalled as a witness once he obtained the emails, but he did not. His allegations of prejudice based on the time he obtained the email are therefore unfounded.

E. Murray asserts that "the facts finally produced midway through the hearing, if known to the Commission in a timely manner, would have completely changed the Commission's faith in the charges brought against the Respondent." Our de novo review is based on the entire record in this proceeding, including facts produced midway through the hearing, and these facts do not alter our conclusions.

F. Murray asserts that he was denied a fair hearing because the law judge interpreted his participation in the settlement of the civil litigation brought by the Liquidating Trusts and his payment of $15,000 towards that settlement as an admission of liability. The sole references to Murray's settlement in the Initial Decision are to the fact of the settlement and the offset of Murray's $15,000 payment against the disgorgement ordered in this proceeding. We do not interpret these references to the settlement as a finding that Murray admitted liability in the civil litigation. In any event, our findings of liability in this proceeding are based only on facts adduced at the hearing before the law judge that are not disputed by Murray.

V.

A. Prohibition from Association and Bar

Investment Company Act Section 9(b) and Advisers Act Section 203(f) respectively allow us, among other things, to prohibit any person from serving or acting in certain capacities with respect to an investment company or investment adviser and to bar a person associated with an investment adviser from association with an investment adviser. 28/ We may take such action if we determine that the person in question has willfully violated or aided and abetted a violation of the Investment Company Act or the Advisers Act, and that such action is in the public interest. 29/ In determining whether a sanction is in the public interest, we consider the factors set forth in Steadman v. SEC. 30/ These factors include the egregiousness of the actions at issue, the isolated or recurrent nature of the infraction at issue, the degree of scienter involved, the recognition of the wrongful nature of the conduct and the sincerity of any assurances against future violations, and the likelihood that a respondent's occupation will present opportunities for future violations. 31/

Murray's conduct was egregious. He knew that the Funds were on the verge of liquidation, yet nonetheless engaged in a scheme to misappropriate their funds, to the

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28/ 15 U.S.C. §§ 80a-9, 80b-3(f).

29/ Investment Company Act Section 9(b)(2), 15 U.S.C. § 80a-9(b)(2); Advisers Act Section 203(e)(6), 15 U.S.C. § 80b-3(e)(6).

30/ 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

31/ Id.

disadvantage of the Funds' shareholders and for his own personal benefit. As set forth in our discussion of scienter, the wrongfulness of his conduct was obvious and manifested a high degree of scienter. His violative conduct is compounded by his threatening behavior with respect to his attempts to obtain payment of the $37,650 invoice from White Star and additional consulting fees. 32/

Murray's misconduct was not an isolated instance, involving twelve invoices dated from November 9, 2001 to February 1, 2002. Each payment involved several discrete wrongful acts by Murray, including in some instances preparing false or inflated invoices, approving Voyager invoices for payment, and signing payment authorizations. He stopped only when his misconduct was identified.

Murray knew that his actions were designed to deceive Orbitex and admits that he forged and falsely inflated invoices, yet he continues to deny that his conduct was wrongful and downplays the seriousness of the violative scheme, contending that even when counsel learned of the scheme in February 2002, he and DeMatteo were only told to stop it, not to return any of the money Voyager had retained by virtue of the scheme. 33/ His inability to grasp the wrongful nature of conduct to which he admits suggests a risk of recurrence that requires strong sanctions to protect the public interest. Murray's provision of consulting services to Ehrenkrantz Growth Fund and Ehrenkrantz Asset Management Group presents opportunities for future violations.

Based on our consideration of the Steadman factors as discussed above, we find it in the public interest to bar Murray from associating with any investment adviser and from working for any registered investment company.

B. Cease-and-Desist Orders

Advisers Act Section 203(k)(1) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or any rule or regulation thereunder, or against any person who "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." 34/ Similarly, Investment Company Act Section 9(f)(1)

32/ See Robert Bruce Lohmann, 56 S.E.C. 573, 583 n.20 (2003) (matters not charged in OIP may be considered in determining appropriate sanctions).

33/ Murray's arguments that the Commission should have charged a violation in connection with an additional Voyager invoice, or should have proceeded against other individuals involved in the scheme, are further examples of Murray's efforts to deflect criticism from his own actions.

34/ 15 U.S.C. § 80b-3(k)(1).

authorizes the Commission to impose a cease-and-desist order based on violations of the Investment Company Act. 35/

In determining whether a cease-and-desist order is an appropriate sanction, we analyze the risk of future violations. 36/ The existence of a violation raises an inference that the violation will be repeated, and where the misconduct that results in the violation is egregious, the inference is justified. 37/ We also consider whether other factors demonstrate a risk of future violations. Beyond the seriousness of the violation, these may include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, the opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding. 38/ This inquiry is flexible, and no single factor is dispositive. 39/

We find that the risk of future violations here is high. Murray's violative conduct with respect to Cornerstone raises an inference that the violation will be repeated. As discussed above, the violations at issue in this proceeding were very serious, involving repeated and purposeful deceptions and damaging the Funds, to which Murray owed a fiduciary duty, at a time that they were on the verge of liquidation. Investors were harmed because assets of the Funds were misappropriated and converted. Murray knew that his actions were intended to deceive. He has made no credible assurances against future violations. Although we have determined to bar Murray from association with an investment adviser or investment company, a cease-and-desist order may nonetheless serve a remedial function should Murray become active in the securities industry in another capacity.

We find that the record as a whole, especially the evidence with regard to the seriousness and recurrent nature of the violations, the harm to investors, and the very high degree of scienter, establishes a sufficient risk that Murray would commit future violations to warrant imposition of a cease-and-desist order. Based on all of these factors, we find a cease-and-desist order against Murray to be in the public interest.

35/ 15 U.S.C. § 80a-9(f)(1).

36/ KPMG Peat Marwick, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 55 S.E.C. 1 (2001), petition for review denied, 289 F.3d 109 (D.C. Cir. 2002).

37/ See Geiger v. SEC, 363 F.3d 481, 489 (D.C. Cir. 2004) and cases cited therein.

38/ KPMG Peat Marwick, 54 S.E.C. at 1192.

39/ Id.

C. Civil Penalties

Under Advisers Act Section 203(i)(1)(B), we may impose civil money penalties in a proceeding instituted under Advisers Act Section 203(e) or 203(f) when a respondent has willfully aided and abetted the violation of any provision of the Advisers Act, and such penalties are in the public interest. 40/ In determining whether a penalty is in the public interest, the statute provides that we may consider (1) whether the violation involved fraud, deceit, or manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 41/

If we determine that the imposition of a civil penalty is in the public interest, a three-tier system establishes the maximum civil money penalty that may be imposed for each violation found. 42/ For each act or omission involving fraud or deceit, a second-tier civil penalty may be warranted. 43/ The statutory maximum amount that may be imposed as a second-tier penalty against an individual is $60,000 for each act or omission occurring after February 2, 2001 but before February 15, 2005. 44/ Within this statutory framework, we have discretion in setting the amount of penalty.

The Division requested a second-tier civil penalty, and we find the imposition of such a penalty to be warranted in the public interest. Murray's conduct involved fraud and deceit. Fund shareholders were harmed by the misappropriation and conversion of Fund assets at a time when the Funds were to be liquidated. 45/ Murray was unjustly enriched by his participation in the scheme. The need to deter Murray, who fails to acknowledge the wrongfulness of his conduct, is great; the sanctions imposed on Murray will also have the salutary effect of deterring others from engaging in the same serious misconduct. In the exercise of our discretion, we impose a $60,000 penalty.

40/ 15 U.S.C. § 80b-3(i)(1)(B).

41/ Advisers Act Section 203(i)(3), 15 U.S.C. § 80b-3(i)(3).

42/ Advisers Act Section 203(i)(2), 15 U.S.C. § 80b-3(i)(2).

43/ Advisers Act Section 203(i)(2)(B), 15 U.S.C. § 80b-3(i)(2)(B).

44/ See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, title III, §31001 (1996); 17 C.F.R. § 201.1001.

45/ The misappropriation and conversion were by their nature harmful to shareholders, although the Funds were made whole by the settlement of the litigation brought by the Liquidating Trusts.

D. Disgorgement

Investment Company Act Section 9(e) and Advisers Act Section 203(j) allow the Commission to order disgorgement and the payment of reasonable prejudgment interest in any proceeding in which a civil money penalty could be imposed. 46/ Disgorgement is an equitable remedy designed to deprive wrongdoers of unjust enrichment by returning them to where they would have been absent the violation and to deter others from violating the securities laws. 47/ The amount of disgorgement ordered "need only be a reasonable approximation of profits causally connected to the violation." 48/ Once the Division has shown that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's figure is not a reasonable approximation. 49/ Any risk of uncertainty as to the amount to be disgorged rightly falls on the wrongdoer, whose illegal conduct created the uncertainty. 50/

The law judge ordered disgorgement of $27,200. He found that the Division had reasonably approximated Murray's unjust enrichment by showing that Murray received $42,200 from Cornerstone between November 2001 and February 2002, and that Murray's contention that he performed legitimate services and provided real value to Voyager and Cornerstone during that period did not sustain his burden of proving that the Division's figure was not a reasonable approximation of Murray's ill-gotten gains. The law judge did, however, reduce the Division's disgorgement figure by the $15,000 that Murray paid to settle litigation brought against him by the Liquidation Trusts based on the same misconduct.

We find that Murray was unjustly enriched by his fraudulent misconduct. Voyager bank statements, the corresponding cancelled checks, and a summary exhibit prepared by Murray show that between November 19, 2001 and February 17, 2002 Voyager paid Murray $42,200, an average of $14,066.67 per month, during the period of the fraudulent activity at issue. 51/ DeMatteo, who Murray identifies as having been involved in the fraud, wrote the checks to

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46/ 15 U.S.C. §§ 80a-5, 80b-3(j).

47/ First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989); SEC v. Johnson, 143 F.3d 260, 263 (6th Cir. 1998); IFG Network Sec., Exchange Act Rel. No. 54127 (July 11, 2006), 88 SEC Docket 1374, 1393.

48/ First City Fin. Corp., 890 F.2d at 1231.

49/ SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995).

50/ First City Fin. Corp., 890 F.2d at 1232.

51/ Murray's summary exhibit does not include an April 13, 2001 wire in the amount of $300 that is shown on the Voyager bank statements for the period ending April 17, 2001.

Murray. In contrast, Voyager bank statements, cancelled checks, and Murray's summary exhibit show that for the period between January 19, 2001 and September 19, 2001, Murray received an average of $2,014.29 per month for services he provided to Voyager before he became involved in the fraudulent invoice scheme. 52/ Thus, Murray's compensation after he started participating in the fraud was more than seven times as great as it previously was. We find the increased compensation, in the amount of $12,052.38 per month or a total of $36,157.14, to be attributable to Murray's fraudulent conduct.

Murray attempts to explain the dramatic increase in compensation by asserting that he provided additional services to Voyager and Cornerstone after Leslie's stroke, including portfolio management services. He does not, however, attempt to quantify those services, and record evidence suggests that they were minimal: we note Murray's statement in his reply brief that "there was almost no trading to be done" during his tenure as portfolio manager, and we also note that there was an assistant portfolio manager due to Murray's lack of experience in that area. 53/

52/ Murray's summary exhibit shows that he received $1,000 by draft on March 15, 2001. Although this payment cannot be substantiated by the Voyager bank statement for the period, we give Murray the benefit of the doubt and include the $1,000 in our calculations.

Murray was paid at irregular intervals. The checks written to him before November 2001 are in amounts ranging from $200 to $2,000; those written after November 2001 are in amounts ranging from $500 to $14,000. The Voyager account statements for the periods from July 18 to August 16, 2001 and October 17 to November 19, 2002 do not include copies of cancelled checks, making it impossible to determine Murray's compensation for those periods. In computing Murray's monthly compensation, we excluded those months from our calculations.

53/ The Division introduced an August 2, 2001 letter in which Murray speculates about

> how my former partners will "cooperate" in reporting my income to the Department of Labor. If they do cooperate then I will be collecting something in the neighborhood of $1,600 per month. If they don't play along, and report only what they have been paying me then it's anyone's guess as to what I will get from the State. . . . I am willing to work off the books for as long as unemployment lasts.

This letter reflects Murray's apparent willingness to present false or misleading information about remuneration from employment when doing so would result in financial benefit. This attitude renders less credible Murray's contentions that his work for Voyager and Cornerstone between November 2001 and February 2002 merited the greatly increased remuneration he received.

(continued...)

We thus find that the increase in Murray's compensation during the period of the fraud represents unjust enrichment to Murray. Calculated over the three-month period between mid-November 2001 and mid-February 2002, the unjust enrichment totals $36,157. We reduce this figure by $15,000, based on Murray's payment to settle the Liquidating Trust litigation, and order disgorgement in the amount of $21,157. 54/

Murray argues that the record shows that Voyager disbursed more money between November 2001 and February 2002 than the total amount misappropriated, and that it is therefore mathematically impossible for the $42,200 he received to have derived from the misappropriated money. As we have explained the disgorgement calculation above, this argument is irrelevant. We have not assessed the amount to be disgorged based on the proceeds of the misappropriation scheme, but rather based on the amount by which his co-schemers compensated Murray for his participation in the scheme. Murray's receipt of the $21,157 to be disgorged is therefore adequately connected to his unjust enrichment from the scheme.

An appropriate order will issue. 55/

By the Commission (Chairman COX and Commissioners CASEY, WALTER, AGUILAR and PAREDES).

Florence E. Harmon
Acting Secretary

53/ (...continued)
Murray argues that it is impossible for him to provide evidence of his work efforts in late 2001 and early 2002 "by virtue of the records in this case being lost to him." As noted above, however, Murray identifies no specific records that were allegedly destroyed or damaged between 2002 and the present.

54/ Additionally, prejudgment interest on the disgorgement amount is assessed, beginning March 1, 2002. See Exchange Act Sections 21B(e), 21C(e), 15 U.S.C. §§ 78u-2(e), 78u-3(e) (authorizing Commission to assess "reasonable interest" in connection with order for disgorgement in any proceeding in which a civil money penalty could be imposed or any cease-and-desist proceeding); Commission Rule of Practice 600, 17 C.F.R. § 201.600 (explaining calculation of interest).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2809 / November 21, 2008

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28519 / November 21, 2008

Admin. Proc. File No. 3-12436

In the Matter of
BRENDAN E. MURRAY

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Brendan E. Murray be, and he hereby is, barred from associating with any investment adviser or investment company; and it is further

ORDERED that Brendan E. Murray cease and desist from committing or being a cause of any violations or future violations of Section 37 of the Investment Company Act of 1940 and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940; and it is further

ORDERED that Brendan E. Murray pay a civil money penalty of $60,000; and it is further

ORDERED that Brendan E. Murray disgorge $21,157, plus prejudgment interest of $10,384.65, such prejudgment interest calculated beginning on March 1, 2002, in accordance with Commission Rule of Practice 600(b), and such interest continuing to accrue if payment is not made within twenty-one days after service of this order;

Payment of the amount to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations

Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to James McGovern, counsel for the Division of Enforcement, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

By the Commission.

Florence E. Harmon
Acting Secretary