SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3057 / July 23, 2010

Admin. Proc. File No. 3-13579

In the Matter of

JAMES C. DAWSON
c/o Michael Martinez
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violations of the federal securities laws. *Held*, it is in the public interest to bar respondent from association with any investment adviser.

APPEARANCES:

Michael Martinez and *Adam C. Ford*, of Kramer Levin Naftalis & Frankel LLP, for James C. Dawson.

Richard G. Primoff and *Charles D. Riely*, for the Division of Enforcement.

Appeal filed: January 8, 2010
Last brief received: March 29, 2010

I.

James C. Dawson, an investment adviser and sole general partner of, and investment adviser to, Victoria Investors, LP ("Victoria"), a hedge fund, appeals from an initial decision of an administrative law judge. The law judge found that Dawson had been enjoined from violating antifraud provisions of the securities laws. Based on that injunction and the factual allegations underlying it, the law judge barred Dawson from associating with any investment adviser. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

In 2008, the Commission filed a complaint ("Complaint") in an injunctive action ("Injunctive Action")[1] alleging that Dawson engaged in violations of Section 10(b) of the Securities Exchange Act of 1934,[2] and Rule 10b-5 thereunder,[3] and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940.[4] On March 20, 2009, Dawson consented to the entry of an injunction ("Consent Agreement"). He agreed that he would not contest the factual allegations of the Complaint, and agreed that the Commission could use those allegations against him in an administrative proceeding. On July 24, 2009, the district court, acting pursuant to the Consent Agreement, which it incorporated by reference, permanently enjoined Dawson and imposed $303,472 of disgorgement, $102,975 of pre-judgment interest, and a $100,000 civil penalty. We summarize the relevant facts from the Complaint below.

Dawson formed Victoria in 1982 and has been its only investment adviser and general partner. As Victoria's investment adviser, Dawson was entitled to receive 20 percent of the limited partners' annual profits as compensation. As of June 2006, Victoria had approximately twenty individual and institutional investors, all of whom were Dawson's limited partners, and approximately $13 million in assets. Dawson also had three individual advisory clients with approximately $2.8 million under management.

Between April 2003 and November 2005 (the "Relevant Period"), Dawson "acted to profit himself at the expense of his advisory clients" by unfairly allocating to himself, or "cherry picking," profitable trades he made, rather than to Victoria or his individual clients. Dawson opened a personal account for himself in April 2003 at the same clearing broker he used for trading on behalf of Victoria and his individual clients. During the Relevant Period, Dawson

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[1] *SEC v. Dawson*, No 08-CV-7841 (S.D.N.Y. Sep. 9, 2008).

[2] 15 U.S.C. § 78j(b).

[3] 17 C.F.R. § 240.10b-5.

[4] 15 U.S.C. §§ 80b-6(1) and (2).

traded throughout the day for his clients and himself using a single "suspense account" but did not allocate his trades among his clients' accounts and his personal account until as late as 7 p.m.[5] The delayed allocation enabled Dawson to identify profitable trades and allowed him to "disproportionately allocate[] profitable trades to his personal account to the detriment of his individual clients and [Victoria] his hedge fund client."

Of the 400 trades Dawson allocated to his personal account during the Relevant Period, 98.3 percent were profitable. Only 51.7 percent of the 2,880 trades allocated to his clients over the same period were profitable (52.6 percent of the trades allocated to the Victoria limited partners, and 40.7 percent of the trades allocated to Dawson's individual clients made a profit). Neither the size of the trades, nor differing trading strategy, nor any factor other than profitability explained Dawson's allocations. Dawson's cherry picking generated $303,472 in ill-gotten gains. The Complaint alleged that Dawson never disclosed his cherry-picking scheme or the conflicts of interest arising from it to his clients or the Victoria limited partners.

The clearing broker closed Dawson's personal account in November 2005 and directed him to move all of his client accounts to another broker by the end of that calendar year. Dawson complied. The new clearing broker required Dawson to allocate trades when he placed them, which precluded further cherry picking.

Dawson also used Victoria's funds to pay non-business personal expenses, such as car service for family travel and family mobile phone bills. Dawson did not reimburse Victoria for any of these non-business charges. Dawson never disclosed these payments to the Victoria limited partners.

Shortly after the district court enjoined Dawson, we commenced this proceeding. In his answer, Dawson admitted only that he had been enjoined.[6] The Division of Enforcement filed a motion for summary disposition, which the administrative law judge granted.[7] Based on Dawson's admission and the allegations of the Complaint, the law judge found that Dawson could be sanctioned and that his conduct was egregious, recurrent, and characterized by the

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[5] The broker established this trade-allocation deadline.

[6] Dawson declined to admit or deny the other allegations in the Order Instituting Proceedings.

[7] The motion was filed under Rule of Practice 250, 17 C.F.R. § 201.250, which provides that "[a]fter a respondent's answer has been filed . . . the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent." 17 C.F.R. § 201.250(a). The hearing officer "may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b).

highest degree of scienter. The law judge also found that Dawson had not expressed remorse or given assurances against future violations and barred him from association with any investment adviser. This appeal followed.

III.

Dawson does not dispute that, during the Relevant Period, he was an investment adviser and that he was enjoined with respect to his conduct in connection with the purchase or sale of securities. We find, therefore, that the requirements of Advisers Act Section 203(f)[8] for the imposition of sanctions have been satisfied.

In assessing the need for sanctions in the public interest, we consider the following factors: the 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 or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[9] No single factor is dispositive.[10]

We find that an application of these factors supports the imposition of a bar. Dawson's conduct was egregious. He defrauded his investment advisory clients and his limited partners in Victoria. Investment advisers are fiduciaries with respect to their clients.[11] As a fiduciary, Dawson owed "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' clients."[12] He also owed a duty to act "in a manner consistent with the best interest of

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[8] 15 U.S.C. § 80b-3(f).

[9] *Scott B. Gann*, Securities Exchange Act Rel. No. 59729 (Apr. 8, 2009), 95 SEC Docket 15818, 15823 (citing *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)), *aff'd*, No. 09-60435 (5th Cir. 2010) (*per curiam*).

[10] *Id*.

[11] *SEC v. Washington Inv. Network*, 475 F.3d 392, 404 (D.C. Cir. 2007) (stating that investment advisers act "as fiduciaries" to their clients). The general partner of a hedge fund is an investment adviser who owes a duty to his or her limited partners. *See Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1976) (finding that "the general partners as persons who manage the funds of others for compensation are 'investment advisers' within the meaning of the [Advisers] Act").

[12] *Michael Batterman*, 57 S.E.C. 1031, 1043 (2004) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963)), *aff'd*, 121 Fed. Appx. 410 (2d Cir. 2005).

[his] client and . . . not subrogate client interests to [his] own."[13] Moreover, as an investment adviser, Dawson had a duty to limit his compensation for his advisory services to the terms agreed with his clients: "a fiduciary . . . [is] not entitled to benefit from the fiduciary relationship except to the extent provided for by fees and compensation the client expressly consents to pay."[14] Disregarding his fiduciary duties, Dawson exploited his position of trust and, for two and one-half years, consistently allocated profitable trades to himself and losing trades to his clients and limited partners, thereby benefitting himself by over $300,000 directly to the detriment of his clients. Dawson's misconduct undercuts the trust that is the foundation of the investment advisory relationship,[15] and demonstrates a lack of fitness to serve as a fiduciary, supporting the remedy of barring Dawson from such a position.[16]

Dawson's principal challenge to the imposition of a bar is that his conduct was not egregious. Dawson contends that his conduct was not egregious because his Victoria limited partners were not harmed. Dawson claims that he voluntarily reduced his Victoria compensation in 2003, 2004, and 2005 by a total of $252,403, and that these reductions made his client Victoria and its investors whole. He argues that the law judge failed to recognize that, had the trades been properly allocated, Dawson would have been entitled to his 20 percent compensation from Victoria's net profits which makes the actual loss to Victoria caused by his cherry-picking closer to the amount of his "voluntary" reductions.

We reject this contention. As explained above, our finding that Dawson's conduct was egregious is based on the nature of the violation itself, not solely on any calculation of financial harm to his clients. Dawson's dishonesty in defrauding his clients breached the trust that is the underpinning of the fiduciary relationship, regardless of whether there was any net loss of money to his clients. Moreover, Dawson's contention contradicts the factual assertions in the Complaint that he "advantaged his own account at the expense of his advisory clients accounts" and that he "disproportionately allocated profitable trades to his personal account to the detriment of his individual clients and [Victoria] his hedge fund client." Dawson is bound by the terms of the Consent Agreement not to challenge the assertions in the Complaint.

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[13] *Proxy Voting By Investment Advisers*, Investment Adviser Rel. No. IA-2106 (Jan. 31, 2003), 79 SEC Docket 2149, 2150.

[14] *Feeley & Willcox Asset Mgmt Corp.*, 56 S.E.C. 616, 640 (2003).

[15] *Id.* at 639 n.39 (holding that "an adviser's recommendations bespeak trust, not caution, because the adviser acts as a fiduciary to his or her client").

[16] *See Steadman*, 603 F.2d at 1142 (indicating that, in determining appropriate sanction, Commission may consider "violations occurring in the context of a fiduciary relationship to be more serious than they otherwise might be").

In any event, Dawson's claim does not address the financial loss to his individual clients, or the amount of funds misappropriated from Victoria for his personal expenses, neither of which he claims to have repaid in any way. In addition, Dawson does not even claim that the reduction was intended to compensate his clients for the profitable trades he took from them. Rather, he claims the reduction was intended to redress the amount by which the fund lost money in 2002.

Moreover, we question Dawson's assertions about the nature of the reductions to his compensation. The Fund's audited financial statement for 2003 explains that, during each of 2001, 2002, and 2003, Dawson took advances "against his estimated allocation of net profits," and that his estimates were overly optimistic, resulting in an overpayment to Dawson in an amount recorded as a receivable balance in the statement's assets. The statement adds that the receivable balance will be reduced "utilizing incentive allocations credited to [Dawson's] account as of December 31, 2003."[17] A similar note to the audited financial statement for 2004 explains that there were further advances against estimated allocations of net profits in 2004 that would be similarly reduced by utilizing amounts from Dawson's incentive allocations. The financial statements for these years show reductions to the receivable balance approximately equal to the amount by which Dawson claims to have voluntarily reduced his compensation for those years.[18] Given the financial statement notes that Dawson's debt from the overpayments of estimated allocations would be reduced from his compensation account, we can only conclude that this happened, and that therefore the reductions in his compensation were for the purpose of paying down the advances he had received from the fund.

Dawson additionally claims that the benign reaction of eleven of his clients to his conduct, as evidenced in letters from the clients to the law judge, shows that his conduct was not egregious. First, we note that there are no letters of support for Dawson from as many as nine limited partners or from any of the three individual advisory clients.[19] It is also not clear from the

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[17] The amount in the "incentive allocations" account reflects Dawson's compensation for the year.

[18] There is no audited financial statement for 2005 in the record. Victoria's tax return for 2005 indicates a further reduction of $10,000 in the net balance to the receivable, significantly less than the $70,843 reduction Dawson claims to have made "voluntarily" that year. However, the record does not indicate whether Dawson continued the pattern, begun in at least 2001, of taking additional advances against anticipated profits, resulting in further "overpayments" being added to the net balance of the receivables.

[19] There were approximately twenty Victoria limited partners at the time of the fraud. Only eleven limited partners, all of them characterized as "current" investors, submitted letters supporting Dawson.

letters that all of these clients fully comprehend the gravamen of the misconduct at issue.[20] Moreover, as we have held, we look beyond the interests of particular investors in assessing the need for sanctions, to the protection of investors generally.[21]

Dawson also states that "not all conduct engaged in while acting in a fiduciary capacity is egregious." We agree. As our cases cited above make clear, however, we have consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary, such as the fraud committed by Dawson on his clients, as egregious. The cases Dawson cites in support are inapposite because they do not involve breaches of fiduciary duty.[22]

The remaining public interest factors also support the imposition of a bar. Dawson contends that, in the context of his long and previously unblemished career, the current episode is not recurrent, but rather an aberration. Dawson's cherry-picking scheme, however, ran for two and one-half years and involved thousands of allocation decisions and all of his advisory clients.[23] Dawson stopped cherry picking only when Victoria's clearing broker closed Dawson's

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[20] For example, Mr. Stein, whose letter is found at Tab 9 of the record, remarked with respect to Dawson's actions that during his time as an investor in Victoria he found "all of Mr. Dawson's reports to be highly satisfactory. They were always received on a timely basis and had a clear definition of what his investment objectives were." Ms. Dawson (Tab 6) stated that "[Dawson] did not fraud his partners as accused." Mr. Jacobsen (Tab 2) noted that "I believe [Dawson] made some innocent mistakes . . . ." Mr. Marvin (Tab 4) found that from his experience "there are many conflicts that may appear to favor a principal over his clients. I personally would give [Dawson] the benefit of the doubt . . . ."

[21] *Christopher A. Lowry*, 55 S.E.C. 1133, 1145 (2003) (stating that public interest analysis extends beyond interests of particular group of investors), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, 46 S.E.C. 78, 100 (1975) (stating that "we must weigh the effect of our action or inaction on the welfare of investors as a class and on standards of conduct in the securities business generally"). In any event, ratifications of fraudulent conduct do not limit our ability to sanction that conduct. *Wilshire Discount Secs.*, 51 S.E.C. 547, 551 n.15 (1993) ("[E]ven assuming that certain investors ratified or endorsed [respondent']s action, that would not alter the objective fact that [respondent] fraudulently departed from the . . . stated use of proceeds.").

[22] *See SEC v. Todd*, 2007 WL 1574756 (S.D. Cal. 2007) (finding no fraud of any kind, only recordkeeping violations); *SEC v. Johnson*, 595 F. Supp. 2d 40 (D.D.C. 2009) (victims of fraud not clients of defendants); *SEC v. Stanard*, 2009 U.S. Dist. LEXIS 6068 (S.D.N.Y. 2009) (same).

[23] *See Jeffrey L. Gibson*, Exchange Act Rel. No. 57266 (Feb. 4, 2008) 92 SEC Docket 2104, 2108-09, *petition denied*, 561 F.3d 548 (6th Cir. 2009).

personal account and demanded that he transfer to another clearing broker. The new clearing broker required immediate allocations, ending Dawson's scheme.

Dawson's actions evince a high degree of scienter. Dawson's scheme required specific preparation and the deliberate allocation of a disproportionate number of profitable trades to his own account. Dawson's use of Victoria funds to pay the non-business expenses of his family, without reimbursement or disclosure, was a further calculated abuse of his position. His level of scienter, in our view, exacerbates the egregiousness of his misconduct.

Dawson argues that he had no scienter because he had no intention "to permanently deprive his customers" of any funds. This argument contradicts the allegations in the Complaint, however, that Dawson engaged in scienter-based offenses, and Dawson is precluded by the terms of the Consent Agreement from making such a claim. He urges that his cessation of his misconduct and reduction of his compensation before our investigation began demonstrate his lack of scienter. We have addressed these arguments above, and, for the reasons discussed there, we find them unpersuasive here.

With respect to his recognition of the wrongfulness of his conduct, Dawson's arguments that no one was harmed by his actions and that he lacked scienter are troubling indications of a failure to appreciate the seriousness of his violation of his fiduciary duty. In addition, Dawson has provided no reliable assurance that he will not repeat his misconduct. Dawson asserts that the circumstances of his case (particularly his long career with a heretofore clean disciplinary record) establish a "marked unlikelihood" of future violations. Dawson maintains that his settlement of the Injunctive Action and consequent waiver of trial and payment of monetary sanctions "prove the sincerity of his assurances against future wrongdoing and his recognition of the wrongful nature of his conduct."[24] Parties settle injunctive actions for a variety of reasons, not all of them evincing a consciousness of misconduct.[25] Moreover, even if we accept Dawson's remorse as sincere, such sincerity does not preclude the imposition of a bar.[26] Nor do we consider Dawson's clean prior disciplinary record determinative.[27] Securities professionals have

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[24] In his reply, Dawson states in this regard that "actions speak louder than words." We note that Dawson's actions in settling the Injunctive Action and reducing his compensation are, at best, ambiguous, and, as noted, the assurances to which Dawson refers do not appear in the record before us.

[25] *Gibson*, 92 SEC Docket at 2108.

[26] *Id*.

[27] *Marshall E. Melton*, 56 S.E.C. 695, 708 (2003) (imposing bar based on antifraud injunction despite clean disciplinary record); *Martin R. Kaiden*, 54 S.E.C. 194, 209 (1998)

(continued...)

an obligation to obey the law.[28] We believe that Dawson's nearly thirty-year career in the securities industry, professional credentials, and his continuing operation of Victoria establish that Dawson would, if permitted, continue to work as an investment adviser and that, in doing so, he would be presented with further opportunities to engage in misconduct.[29] We find that all these reasons create a heightened likelihood of recurrence.

Our precedent has consistently held that antifraud injunctions merit the most stringent sanctions and that "[o]ur foremost consideration must . . . be whether [the] sanction protects the trading public from further harm."[30] Antifraud injunctions have especially serious implications for the public interest[31] because the "securities business is one in which opportunities for dishonesty recur constantly."[32] We have held that "an antifraud injunction can . . . indicate the appropriateness in the public interest"[33] of a bar from participation in the securities industry and that "ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to . . . suspend or bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions."[34] Accordingly, we conclude that Dawson's injunction, based on allegations that he had defrauded his advisory clients of more than $300,000 over more than two years in a manner designed to avoid detection, raises significant doubts about his integrity and his fitness to remain in the securities industry. In our view, Dawson's continued

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[27] (...continued)
(same); *see also Robert Bruce Lohman*, 56 S.E.C. 573, 582 (2003) (imposing bar in insider-trading proceeding despite clean disciplinary record).

[28] *Guy P. Riordan*, Securities Act Rel. No 9085 (Dec. 11, 2009), 97 SEC Docket 23477 (citing *Mitchell Maynard*, Advisers Act Rel. No. 2875 (May 15, 2009), 95 SEC Docket 16844, 16860 n.39), *appeal filed*, No. 10-1024 (D.C. Cir. Feb. 12, 2010)

[29] *See Charles Phillip Elliott*, 50 S.E.C. 1273, 1276 (1992) (stating that the securities industry is "a business that presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994) (*per curiam*).

[30] *SEC v. McCarthy*, 406 F.3d 179, 188 (2d Cir. 2005).

[31] *See Michael T. Studer*, 57 S.E.C. 890, 898 (2004) (stating that "the fact that a person has been enjoined from violating antifraud provisions 'has especially serious implications for the public interest'").

[32] *Richard C. Spangler, Inc.*, 46 S.E.C. 238, 252 (1976).

[33] *Batterman*, 57 S.E.C. at 1043 (quoting *Melton*, 56 S.E.C. at 709-10).

[34] *Melton*, 56 S.E.C. at 713. *See also Steadman*, 603 F.2d at 1140 (stating that a compelling reason supporting a bar would be that "the nature of the conduct mandates permanent debarment as a deterrent to others in the industry").

functioning as an investment adviser represents a substantial threat to investors and necessitates a bar.[35]

Dawson contends that, here, a bar is excessive because any adviser bar "for more than a minimal period of time would be the functional equivalent of a lifetime bar" and would almost certainly deprive him of his livelihood, destroy Victoria, and deprive Victoria's limited partners of "an investment that . . . has provided reliable returns in often-turbulent markets." He faults the Initial Decision's "mere inclusion of general legal propositions with no application to the individual circumstances of Mr. Dawson's case" which he claims "fails to satisfy *Steadman*'s mandate that the [law judge] actually consider whether a lesser sanction would suffice." Accordingly, Dawson urges that we "either impose no sanction or impose a lesser administrative sanction, such as a bar on Mr. Dawson's ability to acquire additional investors."[36]

We recognize the severity of the sanction. However, we believe that all the specific reasons discussed above demonstrate the remedial purpose to be served by barring an individual with a demonstrated lack of fitness to be in the industry and that a bar is necessary and in the public interest.[37] We reject Dawson's proposed modified bar because of the practical difficulties in enforcing compliance with such a proposal. We also reject his proposal, or any lesser sanction, because of the serious nature of Dawson's misconduct, our concern expressed above about the possibilities any participation by Dawson in the investment advisory industry would present for future violations, and our concern that Dawson's lack of appreciation for the wrongful nature of his conduct increases the likelihood of recurrence.

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[35] *See Gibson*, 92 SEC Docket at 2104 (barring respondent in follow-on case based on antifraud injunction); *Batterman*, 57 S.E.C. at 1042 (same); *Studer*, 83 SEC Docket at 2853 (same); *Nolan Wayne Wade*, 56 S.E.C. 748 (2003) (same); *Christopher A. Lowry*, 55 S.E.C. 1133 (2002) (same).

[36] The cases Dawson cites in support of his interpretation of *Steadman* do not apply the *Steadman* analysis and arise in district courts addressing the propriety of injunctive relief or officer-and-director bars, sanctions not at issue here. *See SEC v. Jones*, 476 F. Supp. 2d 374, 383 (S.D.N.Y. 2007) (injunctive action); *SEC v. Todd*, No. 03 Civ. 2230, 2007 WL 1574756 (S.D. Cal. May 30, 2007) (injunctive action); *SEC v. Robinson*, No. 00 Civ. 7452, 2002 WL 1552049 (S.D.N.Y. July 16, 2002) (officer-and-director bar).

[37] *Cf. Paz Secs.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5131-32, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) (holding that, in affirming bar imposed by a self-regulatory organization, the Commission need not state why a lesser sanction would be insufficient so long as Commission has explained its reasoning sufficiently to show it has given due regard to the public interest and protection of investors).

Accordingly, having found that the public interest factors weigh heavily in favor of a bar and that there are no mitigating circumstances, we find it to be in the public interest that Dawson be barred from association with any investment adviser.

An appropriate order will issue.[38]

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

Elizabeth M. Murphy
Secretary

[38] 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
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INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3057 / July 23, 2010

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In the Matter of

JAMES C. DAWSON
c/o Michael Martinez
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that James C. Dawson be, and he hereby is, barred from association with any investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary