

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 9085 / December 11, 2009

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61153 / December 11, 2009

Admin. Proc. File No. 3-12829

In the Matter of
GUY P. RIORDAN

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Respondent, a former associated person of a registered broker-dealer, violated antifraud provisions by making secret cash payments to state treasurer in return for state securities business. *Held*, it is in the public interest to bar Respondent from associating with any broker or dealer, impose a cease-and-desist order, require disgorgement of \$938,353.78, plus prejudgment interest, and assess a \$500,000 third-tier civil money penalty.

APPEARANCES:

Michael K. Wolensky, Ethan H. Cohen, and Tammy A. Bouchelle, of Schiff Hardin LLP, *Robert J. Gorence*, of Gorence & Oliveros, P.C., and *Timothy M. Padilla*, of Padilla & Associates, for Guy P. Riordan.

Nancy J. Gegenheimer, Elizabeth E. Krupa, and Allison H. Lee, for the Division of Enforcement.

Appeal filed: August 18, 2008
Last brief filed: November 28, 2008
Oral Argument: November 2, 2009

I.

Guy P. Riordan ("Riordan"), a former registered representative associated with Wachovia Securities, LLC ("Wachovia"), previously known as First Union Securities, Inc. ("First Union"), appeals from an administrative law judge's decision.¹ The law judge found that, from around 1996 through December 2002 (the "relevant period"), Riordan engaged in a scheme to defraud and course of business that operated as a fraud or deceit on citizens of the State of New Mexico (the "State") by making secret cash payments to Michael Montoya, the former New Mexico State Treasurer (the "Treasurer"), in exchange for obtaining agency securities transactions from the New Mexico State Treasurer's Office (the "NMSTO"), in willful violation of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5.² The law judge barred Riordan from association with any broker or dealer; entered a cease-and-desist order; required disgorgement plus prejudgment interest; and assessed third-tier civil money penalties of \$500,000. We base our findings on an independent review of the record, except with respect to findings not challenged on appeal.³

II.

This case involves corruption in the NMSTO in connection with its investment of State funds in agency securities⁴ by private broker-dealers between 1996 and 2002. Montoya was the Treasurer throughout this period and provided extensive testimony before the law judge that he

¹ *Guy P. Riordan*, Initial Decision Rel. No. 353 (July 28, 2008), 93 SEC Docket 8408. Before First Union, Riordan's firm was known as Everen Securities.

² 15 U.S.C. §§ 77q(a), 78j(b), & 17 C.F.R. § 240.10b-5.

³ 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 Aguilar and Paredes conducted the required review.

⁴ "Agency securities" include securities issued or guaranteed by the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, and Federal Home Loan Banks ("FHLB").

received secret cash kickbacks⁵ from registered representatives in exchange for agency securities transactions from the NMSTO. Testimony was also provided by another former NMSTO employee who admitted to manipulating the NMSTO's bidding process, at Montoya's request, in order to award NMSTO agency securities transactions to Riordan. NMSTO bid records, which showed the various ways in which Montoya rigged the bidding process in Riordan's favor, further confirmed the existence of the kickback scheme.

A. The Kickback Scheme.

1. The beginning of the scheme.

Montoya first met Riordan, an Albuquerque-based registered representative, when he ran for, and lost, the Democratic primary for Treasurer in 1990. Montoya asked Riordan, who was an active member of the Democratic Party, to support him in the next election for Treasurer in 1994. Riordan agreed and helped Montoya raise campaign funds and votes. Montoya won the election and took office in January 1995. He was reelected to a second term in 1998 and served until December 31, 2002.⁶

As Treasurer, Montoya was responsible for safeguarding the State's money and investing it in various instruments, including agency securities. Montoya learned early on that certain brokers, including Riordan and Trent Tucker,⁷ formerly of Southwest Securities, Inc., were

⁵ A "kickback," in comparison to other forms of corrupt payments, is generally defined as a "return of a portion of a monetary sum received, especially as a result of coercion or a secret agreement." *Black's Law Dictionary* 874 (7th ed. 1999).

⁶ State term limits prevented Montoya from seeking a third term.

⁷ At the hearing, Tucker, also an Albuquerque-based registered representative, admitted that he paid cash to Montoya in exchange for obtaining NMSTO agency securities transactions during the period from 1998 to 2002. Tucker would meet Montoya in restaurants where Montoya would ask him for "help" or for a charitable donation, and Tucker would give him \$300 or \$500 in cash. Tucker entered into a settlement with the Commission in which he was ordered to cease and desist from committing or causing any violations and any future violations of the antifraud provisions of the Securities Act and Exchange Act, and barred from associating with any broker or dealer. No civil penalties were assessed, and disgorgement of \$290,000, plus prejudgment interest, was waived based on an inability to pay. *Trent L. Tucker*, Securities Exchange Act Rel. No. 56524 (Sept. 25, 2007), 2007 WL 2778641.

Montoya identified Robert Sanchez as a third registered representative who paid him kickbacks in return for NMSTO agency securities transactions. Riordan listed Sanchez as a witness who would "disprov[e] facts alleged in [the] Order Instituting Proceedings," but did not

(continued...)

willing to "help [him] out," meaning that they would give him cash kickbacks in exchange for obtaining agency securities transactions from the NMSTO.

Montoya testified that Riordan started paying him kickbacks "probably [in] late 1995 or early 1996." Montoya would ask Riordan to "help [him] out," and they developed a pattern where, after Riordan participated in a transaction with the NMSTO, Montoya would meet Riordan in person,⁸ frequently at a restaurant for lunch. At some point during the meal, they would retreat to the restroom and Riordan would pay Montoya the money. Montoya did not have a set formula for the amount that Riordan should pay. Montoya stated that they "worked out a deal" that, for any transaction Riordan received from the NMSTO, Montoya would get a portion of the commissions Riordan earned on the transaction.⁹ The payments ranged from \$300 to \$500 per transaction, with \$2,500 or \$3,000 as the highest amount that Montoya received from Riordan on any one transaction. Riordan initially paid Montoya by check so that the payments appeared as campaign contributions, but later, they switched to cash in order to "disguise . . . that [Montoya] was getting money."¹⁰

While Montoya testified that Riordan did not pay him kickbacks on sales transactions, he qualified this testimony by stating that it was his "best guess" and that he was "confused." Montoya thought that most of Riordan's transactions on behalf of the NMSTO were purchases, and he did not know whether Riordan earned commissions on the sales. However, eight of Riordan's eighteen transactions with the NMSTO between January 2001 and October 2002 were sales, and Riordan admitted that he earned commissions on sales, as well as purchases. Montoya testified that he generally was paid after each transaction, and that he could not recall a single instance in which he did not receive a kickback from Riordan after Riordan had won a

⁷ (...continued)

call him to testify at the hearing after Sanchez notified all counsel that he would assert the Fifth Amendment if called.

⁸ Montoya testified that he obtained kickbacks from Riordan in person, rather than through an intermediary, because he felt "very comfortable" with Riordan. By contrast, Montoya testified that he would use Leo Sandoval, an NMSTO employee, as an intermediary to collect kickbacks from certain California-based investment advisers in connection with the NMSTO's investment in repurchase agreements because he "really didn't know [them] that well" and "felt an extra layer of protection would be better." *See infra* note 36.

⁹ Montoya testified that he and Riordan "never talked about" their payment arrangement because "we both knew what I wanted or what he should pay." The FBI could not find that Montoya kept any records of the kickback money he received from Riordan. Because payments were in cash, Montoya testified that he spent it "fast," essentially "throwing it away."

¹⁰ No cancelled checks were offered into evidence for this early period.

transaction.¹¹ According to Montoya, he would not award another transaction to Riordan until he had been paid on the last transaction. Montoya also testified that Riordan knew that, if he did not pay a kickback, he would not receive preferential treatment from Montoya on future transactions. As discussed below, the evidence indicated that Riordan received preferential treatment in the bidding process for sales transactions and that he, in fact, paid kickbacks on the sales, as well as purchases.

2. The mechanics of the scheme.

Montoya was obligated to follow the State's Investment Policy, which required "all securities purchases/sales [to be transacted] only through a formal and competitive process" with the consideration of at least three bids: one from "the successful firm in the immediately preceding transaction"; one from a broker "physically located in the State"; and one from a "primary reporting dealer."¹² The Investment Policy also required the State to accept purchase bids which "provide[d] the highest rate of return within the maturity required" and to accept sale bids which "generate[d] the highest sales price." The Investment Policy stated that "[s]ecurities broker/dealers with offices in New Mexico [would] be given priority when possible over out-of-state dealers."¹³ The Investment Policy further required that brokers be on a list that had been approved by the State Board of Finance before they could participate in the bidding process. First Union (Riordan) and Southwest Securities (Tucker) were the only in-state brokers of twelve brokers on the approved list in 2001 and 2002.

Montoya testified that the NMSTO was not subject to "thorough oversight" and that the State Auditor's Office "didn't know much about investment paper." As a result, Montoya was able to award transactions to Riordan for kickbacks and disguise the bidding to make it appear

¹¹ Montoya testified that there might have been a few times when he did not receive a kickback from Riordan because Riordan claimed he did not make any money on a transaction, but that such a situation was "very rare."

¹² The term "primary reporting dealer" is not defined by the Investment Policy. The term "primary dealer" is defined by the Federal Reserve Bank of New York as select "banks and securities broker-dealers that trade in U.S. Government securities with the Federal Reserve System" and "report weekly on their trading activities." Federal Reserve Bank of New York, Fedpoint "Primary Dealers," *available at*: <http://www.newyorkfed.org/aboutthefed/fedpoint/fed02.html>. Although Riordan testified that First Union and Wachovia were "primary issuers," the record does not establish that they met the definition of "primary dealer." Neither First Union nor Wachovia appears on any "primary dealer" list published by the Federal Reserve Bank of New York since 1999. *See* http://www.newyorkfed.org/markets/pridealers_listing.html.

¹³ The Investment Policy did not explain what was meant by giving local firms "priority when possible." *See infra* note 64 and accompanying text.

that Riordan had legitimately won bids through a formal, competitive process.¹⁴ Montoya stated that, in the beginning, he had difficulty directing business to Riordan because his then Chief Investment Officer, David Abbey, was not willing to manipulate the bidding process. Indeed, Abbey testified that, while he was Chief Investment Officer, Riordan was not generally successful on competitive bids. However, Abbey left the NMSTO in 1996.

In late 1996, Montoya placed Leo Sandoval, a childhood friend, in charge of awarding NMSTO bids on agency securities transactions because he trusted Sandoval to "do what [he] wanted." Montoya's practice was to tell Sandoval who he wanted to win the bid and to ensure that the person won.

Montoya testified that there were various ways to rig the bidding process and make it appear to the State Auditor's Office that his awarding of bids on NMSTO securities transactions was in compliance with the Investment Policy's requirements.¹⁵ On some occasions, Montoya testified, he would instruct Sandoval to give Riordan the "last look," meaning to tell Riordan what other brokers were bidding so that Riordan could submit a bid with a better rate.

On other occasions, Montoya would allow Riordan to have a longer settlement date, or quote agency securities with a longer maturity date, than the other brokers. A longer maturity date would command a higher yield so Riordan's bid would appear to have a higher rate of return, and thus appear to be the best bid.¹⁶ Montoya also would permit Riordan to bid much later than other bidders, which enabled Riordan to adjust his bid and obtain the "best rate," after the market had improved. Montoya knew that his actions were "dishonest" and that he was not being "fair" to the other brokers because they were not bidding on the "same type of paper" or given the "same chance" as Riordan.

¹⁴ Montoya testified that, "for the most part when we would [solicit bids], everybody was calling in on the same paper. So it's pretty much left to us who we're going to pick that morning. There [were] variations of a basis point or two. . . . [W]e came to learn that the State's Auditor's office -- we didn't have any oversight on anybody's part in seeing what we were doing. So after a couple of years nobody was watching us, so we were just giving basically paper to whoever [sic] we wanted to."

¹⁵ Montoya revealed that "[i]t wasn't that hard to get three bids and to change the documents around or just to do what we wanted. I mean it became very easy to do what we wanted."

¹⁶ Montoya explained that "any variation of the [agency] paper that you're asking for carries different investment rates so any -- with one little change, it changes the entire paper from one to two to three basis points, and as long as you're one basis point higher, you have better paper." A "basis point" is one-hundredth of a percentage point (0.01%).

Sandoval testified that Montoya directed him to contact Riordan on "many, many" occasions and give Riordan the "last look," confirming Montoya's testimony that he used the term to indicate that Sandoval was to do "[w]hatever it took" to ensure that Riordan won the transaction. Sandoval stated that the number of times that Montoya directed him to give Riordan the "last look" was "too many to count." Sandoval affirmed that, for every purchase or sale of agency securities, he was told to contact "either Mr. Riordan or Mr. Tucker, but for the most part Mr. Riordan."

In 2000, the NMSTO was audited and one of the audit exceptions was the failure to maintain records of the bidding for securities transactions, as required by the Investment Policy. Following the audit, Montoya instructed Sandoval to keep records of all the bids and require brokers to confirm oral bids by facsimile transmission. Sandoval began keeping bid records in 2001, but testified that he would alter them by removing the facsimile lines, which showed the dates and times that the bids were submitted to the NMSTO, in order to disguise the fact that Riordan's bids frequently came in last.¹⁷

Sandoval, like Montoya, knew that telling Riordan "what the other two bids were" was unfair because he did not contact Riordan's competitors and give them the same information. As Sandoval stated, if he had given this information to all the bidders, then the State could have received a better price because it would have been more "like an auction." Sandoval acknowledged that, "in this case, the other two bidders weren't given that opportunity."

Sandoval also testified that, during his employment at the NMSTO, Montoya told him that he, Montoya, was receiving money from Riordan in exchange "for giving [Riordan] the last look and for [Riordan] winning the bids." However, Sandoval testified that he never witnessed Riordan giving any money to Montoya.¹⁸

3. Riordan's secret tape recordings of Montoya's requests for cash.

In his testimony, Riordan confirmed that Montoya asked him for kickbacks and that, on occasion, he gave money to Montoya. However, Riordan denied that the payments were kickbacks for NMSTO business, and denied that he was ever given a "last look" by the

¹⁷ Sandoval kept the bid records for 2001 and 2002 in two binders, which he turned over to law enforcement authorities in December 2003.

¹⁸ Sandoval entered into an immunity agreement with the U.S. Attorney's Office in which it agreed not to prosecute him provided he cooperated and gave truthful testimony. The State indicted Sandoval (who subsequently received a suspended sentence and was placed on supervised probation for three years, *see State v. Sandoval*, D-101-CR-200600265 (Santa Fe D. Ct. June 30, 2009)), but gave him use immunity regarding the testimony that he gave in this administrative proceeding. Sandoval had no immunity agreements with the Commission.

NMSTO.¹⁹ Rather, Riordan asserted that, to the extent he gave money to Montoya, he did so lawfully in the form of political campaign contributions, which he typically paid to Montoya at fundraising events.²⁰

In late 1997, Riordan secretly tape recorded three months of conversations with Montoya and other NMSTO employees, including Ron Beserra, Montoya's then Deputy Treasurer.²¹ According to Riordan, he made the recordings because he became upset when Montoya said that he did not want a bottle of Dom Perignon champagne that Riordan gave to his large customers over the holidays, but a "green tree,"²² which Riordan understood to mean cash. Riordan stated that the request made him concerned about Montoya's business practices and prompted him to record their conversations in case he "needed to bring it to the authorities." Riordan claimed that he told Montoya that he was "not going to play his game," but this statement did not appear on the tape.

In one taped conversation, Montoya expressed an interest in using Riordan to purchase a four-year bond with a two-year call provision.²³ As the two men discussed the possible transaction, Montoya casually asked Riordan to meet him and for payment of a "green tree":

¹⁹ Through a forensic accounting expert, Riordan attempted to show that he did not have access to sufficient cash in his bank accounts in 2001 and 2002 to pay kickbacks. However, during the expert's testimony, it was discovered that Riordan had failed to inform the expert of his wife's \$100,000 line of credit, \$96,430.39 of which had been drawn by September 2001.

²⁰ From 1995 to 1999, Riordan and others sponsored an annual golf tournament that each raised between \$14,000 and \$18,000 for Montoya's campaign. Riordan testified that the money -- checks and cash -- "[u]sually . . . would be turned over [to Montoya] at the golf tournament." Riordan added, somewhat ambiguously, that "there may have been some occasion where . . . I'd say . . . 'I've got to give you this [money].'" Wouldn't tell him what it was or what it was for. That was in the '90s during these golf -- everything was related, absolutely, to those golf tournaments."

²¹ Although covered by a July 2007 subpoena, Riordan did not produce the tape recordings and accompanying transcript until two weeks before the December 2007 hearing. When questioned at the hearing, Riordan gave two different explanations for why he did not timely produce the tape recordings and transcript in response to the July 2007 subpoena: (1) he forgot he made the tapes, and (2) he remembered taping Montoya, but he did not know where the tapes were.

²² Riordan's testimony indicates that Montoya first mentioned his preference for a "green tree" in an earlier conversation that Riordan did not record.

²³ A call provision, set forth in the indenture of a bond, allows an issuer to "call," or redeem, the bond before its maturity date.

Montoya: And this would be a four year, two [purchase]?

Riordan: Four year, two.

Montoya: And what time is a good time this afternoon [to meet]?

Riordan: Oh, I think I can meet you about 2 o'clock.

Montoya: 2 o'clock at –

Riordan: You can stop by. I've got to go over to Kelly's [liquor store in Albuquerque].

Montoya: Where at? No, no, no. I don't want no Kelly's.

Riordan: I'm getting you a nice bottle of champagne, dude.

Montoya: No, no, no. I don't drink that stuff. Please no, no, no. I'd like a green tree. Hey, how about 2 o'clock [at Bennigan's restaurant]?

Riordan: That's fine.

Riordan testified that he was "disgusted" by Montoya's request for cash, but such a reaction was not evident in his tone of voice on the tape nor by his willingness to meet Montoya at Bennigan's. The conversation continued for a short time period with Montoya indicating a commitment by the NMSTO to invest with Riordan in the four-year bond with the two-year call provision.²⁴

Riordan testified that, when he met Montoya at Bennigan's, "I brought him a bottle of Dom Perignon [champagne] and I had a discussion with him – [a] rather harsh discussion that . . . I was upset" with him for requesting cash.²⁵ Riordan, however, admitted that he did not record this conversation or any other conversation in which he purportedly told Montoya that he would not pay cash in exchange for NMSTO business.²⁶

²⁴ In the middle of another taped conversation concerning a purchase transaction, Montoya told Riordan, "We need some help," and Riordan replied, "I always help."

²⁵ At the hearing, Montoya did not remember Riordan having a harsh discussion with him over his request for a cash kickback. In explaining why he turned down Riordan's offer of champagne, Montoya testified that Riordan "was always coming up with wanting to take me to Las Vegas or buying me champagne or taking me to the Kings basketball games or St. Louis for Mark McGuire, and other things. And I really didn't want any of that. I wanted him to know I don't want any of that. All I want is money."

²⁶ Riordan's secret tape recorded conversations reflected that Riordan knew how to record an in-person conversation if he wanted to do so. During one conversation, then Deputy Treasurer Beserra told Riordan about the pressures of working with Montoya because he "didn't play." Riordan advised Beserra to "wear a jacket" and tape his conversations with Montoya. Although Riordan listed Beserra as a witness who would "disprov[e] facts alleged in [the] Order Instituting Proceedings," he did not call Beserra to testify at the hearing.

After Montoya asked for a "green tree" in 1997, Riordan testified that he "suspected [Montoya] was crooked." Nonetheless, Riordan did not take his tape recordings to the authorities because, based on his conversation with Montoya at Bennigan's, he "[t]hought [he] had Montoya in check and . . . had him towing [sic] the line."²⁷ Riordan continued doing substantial securities business with Montoya on behalf of the NMSTO, engaged in political fundraising for Montoya's reelection campaign in 1998, and paid for a Las Vegas, Nevada, hotel room for Montoya on February 23, 1999.²⁸

4. The end of the scheme.

Montoya testified that his kickback arrangement with Riordan continued until the end of his term in office. In October 2002, Montoya awarded Riordan the last five agency securities transactions of his term as Treasurer. The five transactions were valued at \$150 million and consisted of four sales and one purchase of agency securities, as follows: (1) a purchase of \$50 million; (2) a sale for \$20 million; (3) a sale for \$20 million; (4) a sale for \$35 million; and (5) a sale for \$25 million.

According to Montoya, Riordan was slow to pay the kickbacks for these transactions. Montoya surmised that Riordan knew that his time in office was ending and he could no longer help Riordan obtain NMSTO transactions. Montoya called Riordan repeatedly for the kickbacks but Riordan would not return his calls. Frustrated, Montoya left "threatening" voice messages on Riordan's telephones, stating, "Guy, you know you owe me this money, what do you want me to do? I'm not going to go anywhere until I get paid." Montoya testified that Riordan eventually returned his calls in mid-December 2002 and agreed to meet him at a Kicks 66 gas station near Montoya's home. According to Montoya, when he arrived at the gas station, "I got into [Riordan's] car. He threw the \$500 or \$700 [in kickbacks] and told me never to call him back again and never to threaten him again. And that's the last time I ever talked to him." Montoya acknowledged that these were the last payments he received from Riordan.

Riordan's testimony confirmed that Montoya had left him threatening voice messages. Riordan admitted that Montoya was "very, very mad" at him and was demanding kickbacks for the October 2002 transactions. Riordan also admitted that, in response to the threatening

²⁷ Riordan claimed that Montoya "never stepped over that line" with him again until October 2002 when Montoya called and demanded money because Riordan had completed five agency securities transactions (four sales and one purchase) with the NMSTO.

²⁸ At the hearing, Riordan denied that he "bought a [hotel] room" for Montoya. Rather, Riordan claimed that February 23, 1999, fell on Super Bowl weekend, and that he merely helped Montoya reserve a room. The record showed that the 1999 Super Bowl, in fact, occurred on January 31, 1999. Moreover, hotel receipts dated February 23, 1999, showed Riordan's name and signature on a room for "Montoya, Michael" and that Riordan himself stayed in a separate room that night.

messages, he willingly agreed to meet Montoya at the Kicks 66 gas station. The two men sat in Riordan's vehicle, where, by Riordan's account, Montoya again demanded money, complaining that Riordan was raising money for other politicians, but not for him. Riordan claimed that they had "an exchange of words," but denied that he paid Montoya kickbacks for the October 2002 transactions. Riordan agreed with Montoya that it was the last time they spoke.

Over the course of the relevant period, Riordan's transactions with the NMSTO generated substantial income for him.²⁹ He bid successfully on over one hundred agency and corporate bond transactions with the NMSTO.³⁰ In 2001 and 2002, when Sandoval kept bid records, Riordan won eighteen of twenty-nine bids submitted to the NMSTO for a 62% success rate.³¹ For these years, his winning bids amounted to 43% of the total value of NMSTO awards -- \$630 million of approximately \$1.45 billion.³² Riordan earned \$1,017,278.78 in total commissions from 1996 through 2002, including bonuses for 2001 and 2002, on agency and corporate bond transactions with the NMSTO.³³ In 2001 and 2002 alone, Riordan's earnings on NMSTO agency and corporate bond transactions amounted to \$401,540.50, which constituted 71% of \$564,099.10, his total earnings with Wachovia.³⁴

²⁹ Riordan testified that he chose not to do business with the NMSTO, and did not submit any bids, during the eighteen-month period from June 1999 until January 2001 because interest rates were rising.

³⁰ As reflected in Riordan's Wachovia commission reports, his most productive year, in terms of number, was 1998 -- the year after he secretly tape recorded his conversations with Montoya -- when he was awarded forty-one agency securities transactions, earning him approximately \$351,916 in commissions.

³¹ Riordan notes that, in 2001, the NMSTO only awarded him one bid to purchase agency securities. However, Riordan, in fact, won five of the eight times that he bid on the total number of purchase and sales transactions that year.

³² Montoya testified that he generally awarded the larger dollar volume transactions to Riordan and Tucker. The NMSTO's records showed that, in 2001 and 2002, Riordan and Tucker together won 82% of the dollar volume of transactions, with the remaining 18% spread out among the eleven other brokers on the NMSTO's approved broker list.

³³ The \$1,017,278.78 consisted of \$615,738.28 in commissions for the years 1996 through 2000, and \$401,540.50 in commissions, including bonuses, for the years 2001 and 2002. Riordan earned a total of \$57,677 in bonuses between 2001 and 2002. Neither Riordan nor Wachovia provided bonus information for the period prior to 2001.

³⁴ The Division's expert witness, James McKinney, found it "pretty extraordinary" that, in a two-year period, Riordan earned over \$400,000 from just one account.

5. Montoya's arrest and conviction.

Sandoval remained employed at the NMSTO after Montoya left office. In 2003, the U.S. Secret Service raided the NMSTO as part of a counterfeiting investigation involving Sandoval. Sandoval then disclosed the corruption in the NMSTO involving Montoya and Robert Vigil, who served as Montoya's Deputy Treasurer during his second term in office and succeeded him as Treasurer. Sandoval's disclosures led the Secret Service to transfer the investigation to the Federal Bureau of Investigation ("FBI").³⁵

In late 2003, the FBI began an investigation into an unrelated kickback scheme during Montoya's and Vigil's administrations involving investment advisors and repurchase agreements.³⁶ The FBI's investigation led to the arrest of Montoya, Vigil, and others. On the day of his arrest in September 2005, Montoya admitted his guilt with respect to the repurchase agreement scheme, which involved over a million dollars in kickbacks.³⁷ He also confessed to

³⁵ Sandoval and Angelo Garcia, another individual who acted as an intermediary for Montoya and collected kickbacks, cooperated with the federal government and became FBI informants. Both Sandoval and Garcia secretly recorded conversations with Montoya for the FBI before Montoya's arrest.

In December 2003 and April 2005, Sandoval gave statements to the FBI that Riordan received preferential treatment from the NMSTO in return for his payment of cash to Montoya. In March 2004 and August 2004, Garcia gave statements to the FBI implicating Riordan in "kickbacks and illegal securities activity."

Riordan listed Sandoval and Garcia as witnesses who would "disprov[e] facts alleged in [the] Order Instituting Proceedings." However, Riordan did not call Garcia to testify at the hearing, and Sandoval testified for the Division.

³⁶ A "repurchase agreement" is an "agreement between a seller and a buyer, usually of U.S. Government securities, whereby the seller agrees to repurchase the securities at an agreed upon price and, usually, at a stated time." Barron's Dictionary of Finance and Investment Terms, 476 (4th ed. 1995). The repurchase agreements were the subject of a separate scheme, not at issue here, that was charged in a criminal indictment against Montoya. Thus, Riordan's claims that he was not implicated in Montoya's criminal action and was not approved to bid on repurchase agreements are irrelevant here.

³⁷ Montoya pleaded guilty to one count of extortion, in violation of 18 U.S.C. § 1951, and was sentenced to forty months in prison. *See United States v. Montoya*, 1:05-CR-02050-001 JP (D.N.M. Sept. 27, 2007). As part of his plea agreement, Montoya agreed to testify against Vigil. Based on Montoya's cooperation and assistance, the prosecution sought a reduced
(continued...)

his participation in a smaller kickback scheme involving agency securities transactions and implicated Riordan in that scheme.

B. NMSTO's Records and Expert Testimony.

1. The NMSTO's records confirmed that the bidding was rigged and that Riordan received preferential treatment in the bidding.

The NMSTO's records confirmed that Montoya and Sandoval rigged the bidding process and concealed the kickback scheme. As Sandoval described, the bid documents often had the facsimile transmission lines removed to disguise the fact that Riordan's bids were submitted last, after Sandoval disclosed to Riordan the competing bids. When Sandoval neglected to remove the facsimile transmission lines, the bid documents showed that Riordan's bids came in last, often much later than the other bids. For example, on December 11, 2001, Montoya awarded Riordan a \$25 million sale of FHLB securities. Riordan's bid was submitted several hours after the bids of the other two brokers, Paine Webber and Dain Rauscher, and after an announcement by the Federal Reserve Bank that caused bond prices to spike upward.³⁸ The Division's expert witness, James McKinney, opined that the NMSTO did not consider three competitive bids because "[i]t [was] inconceivable that any quote, hours earlier, would still be relevant." McKinney concluded that Riordan was advantaged by bidding near the close of the market and knowing of the Federal Reserve Bank's announcement. Riordan's expert witness, Guy Perrone, did not refute McKinney's conclusion that the bidding process was unfair to Riordan's competitors. Rather, Perrone suggested that the NMSTO's decision to accept a late bid from Riordan was "possibly" "[a] lapse in policy."

Consistent with Montoya's testimony, the bid documents reflected that the NMSTO allowed Riordan to quote agency securities with longer investment maturities than his competitors so that Riordan would appear to have better rates of return. For example, on

³⁷ (...continued)

sentence. The sentencing judge, who had observed Montoya testify against Vigil, stated that he was "highly impressed by [Montoya's] candor."

Vigil was convicted of attempted extortion, in violation of 18 U.S.C. § 1951, and sentenced to thirty-seven months in prison. *See United States v. Vigil*, 1:05-CR-02051-001 JB (D.N.M. Feb. 22, 2007), *aff'd*, 523 F.3d 1258 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 281 (2008). Vigil, who was not charged with any involvement in the scheme at issue here, was in prison when the law judge conducted the hearing in this proceeding.

³⁸ *See* Press Release, Federal Reserve (Dec. 11, 2001), *available at* <http://www.federalreserve.gov/boarddocs/press/general/2001/20011211/default.htm> (Federal Reserve Bank announcement that it was cutting the federal funds rate by twenty-five basis points).

August 15, 2002, Montoya awarded Riordan a \$75 million purchase of FHLB securities. Riordan bid on securities with a three-year, four-month maturity, while his two closest competitors, Dain Rauscher and Banc of America Securities, bid on securities with a three-year maturity. The three-year, four-month security had another advantage because it was issued at a time when the yield curve was sloping upward. Perrone agreed with McKinney that the type of securities differed, stating that "they're not three of the same bids." Perrone also opined that, to obtain the best yield, it appeared that the NMSTO "bent Investment Policy rules by extending their maximum maturity by three months."

On October 1, 2002, Montoya awarded Riordan a \$50 million purchase of FHLB securities. Again, Riordan was allowed to quote different terms compared to the other brokers. As submitted, Riordan quoted a 3.26% yield on a three-year, three-month bond.³⁹ In contrast, his two competitors, Bear Stearns and Dain Rauscher, submitted almost identical bids on a three-year bond and quoted yields of 3.125% and 3.130%. McKinney stated that, although Riordan's bid rendered the highest yield of the three bids, the bidding was not competitive because Riordan was "not bidding on the same paper" and was given a "significant yield advantage" by virtue of extending the maturity date. Perrone effectively agreed, stating that, "[o]nce again[,] the NMSTO's office bent their o[w]n rules to seek out the best yields."

2. The experts agreed that the bidding was noncompetitive and that Riordan was favored in the bidding.

As discussed, the Investment Policy required a "formal and competitive process" to award bids on securities transactions. McKinney found that the NMSTO's bidding process was "rigged." He opined that the NMSTO's bid records were "full of inaccuracies" and assembled "after the fact, and . . . in some cases weeks later . . . to try to feather a file . . . [and] make it look like there was a real competitive situation." Although disagreeing with some of McKinney's conclusions, Perrone reviewed McKinney's report and stated that, "overall," he thought that McKinney's analysis of the trades was "reasonable and correct." Perrone found evidence that some brokers were given a "second look," or allowed to submit a second bid, and he considered that to be "inappropriate." Perrone agreed that Riordan was given preference in the bidding process.

According to McKinney, in a truly competitive situation, the NMSTO would have placed a deadline on the time for submitting bids, which would have caused bids to be submitted by brokers "seconds" apart. By contrast, in this case, the bidding process remained open for a long time with no firm bids. McKinney considered the "last look" given to Riordan to be inappropriate because trading in agency securities is rapid. McKinney stated that bids are good for about a maximum of thirty seconds because the market moves so quickly. McKinney testified, "No one is going to leave a trade out for three to four hours." The fact that Riordan was

³⁹ The facsimile transmission time was also cut off on the NMSTO's copy of Riordan's bid.

permitted to place a winning bid several hours after the other brokers had bid, and after the market had moved, was, in McKinney's view, a "no brainer" indicating that the NMSTO's bidding process was not competitive.⁴⁰

McKinney also noted that many of the NMSTO's transactions awarded to Riordan had long settlement dates. Indeed, Riordan's bids had the highest average number of days between the trade date and settlement date.⁴¹ McKinney referred to this technique as forward delivery, where the dealer offered a new issue security that settled in the future, rather than next-day settlement, the standard settlement date in U.S. Treasury and agency securities transactions. McKinney explained that the use of the forward-delivery technique "on the surface made an offer higher yielding and *appear* to be better," when, in fact, it resulted in comparing bids of "apples and oranges." (emphasis in original). For example, the \$30 million purchase of FHLB securities with a trade date of April 22, 2002, and a settlement date of June 3, 2002, awarded to Riordan, whose bid was the highest by seventeen basis points, did not indicate that the NMSTO took the best bid. According to McKinney, if the NMSTO had allowed Riordan's competitors to also submit bids with a "30, 40"-day settlement period, rather than the standard next-day settlement, their bids would have been more competitive with Riordan's bid. Perrone agreed that the bids were dissimilar, stating that "an extra two months might buy an extra 10 or 15 basis points."

McKinney opined, and the NMSTO's records reflected, that Riordan won the four sales transactions awarded to him in October 2002 even though they were the "worst" bids. As the NMSTO's records showed, Riordan's bids had the highest yields of the three bids placed on each of the four transactions. McKinney testified that the price of a bond has an inverse relationship with the bond's yield: the higher the yield, the lower the price of the bond.⁴² Thus, by having the highest yields on all four sales, Riordan's bids brought in the lowest prices for the State. Perrone agreed and stated that Riordan "won all four items despite being the lowest bidder." In seeking

⁴⁰ McKinney found it unusual, considering the highly competitive firms on the NMSTO's list of approved brokers, that First Union could have been "so consistently successful if the [bidding] process was truly fair and transparent." McKinney also found it unusual for a buyer of the NMSTO's magnitude to deal so frequently with a retail salesman, as he characterized Riordan, rather than an institutional salesperson.

⁴¹ During 2001 and 2002, Riordan averaged thirty-two days between trade and settlement dates. All other registered representatives, besides Tucker, who purchased agency securities averaged a combined fourteen days for their transactions. In one example, Riordan took fifty days to settle the transaction, after the NMSTO awarded him a \$50 million sales transaction on May 29, 2002.

⁴² See Frank J. Fabozzi, *Bond Markets, Analysis and Strategies* 22 (1996) ("A fundamental property of a bond is that its price changes in the opposite direction from the change in the required yield As the required yield increases, the present value of the cash flow decreases; hence the price decreases. The opposite is true when the required yield decreases.").

to explain why Riordan was awarded the four sales transactions when his bids were the worst, Perrone speculated that "the person excepting [sic] the bids may have been confuse [sic] and awarded the sales to the highest yield." Perrone added, "I can't give a better explanation."

III.

The antifraud provisions of the federal securities laws, Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, prohibit, among other things, employing a scheme to defraud and any act, practice, or course of business which operates as a fraud or deceit in connection with the offer, sale, or purchase of securities.⁴³ Federal courts and the Commission have uniformly held that kickback schemes violate these antifraud provisions.⁴⁴

⁴³ See 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5. The Division has not argued, and therefore we do not address, Riordan's antifraud liability under a theory of material misrepresentations or omissions.

⁴⁴ See, e.g., *SEC v. Washington County Util. Dist.*, 676 F.2d 218, 224-27 (6th Cir. 1982) (undisclosed kickback scheme between underwriter and official of municipal securities issuer violated the federal securities laws); *SEC v. Zwick*, No. 03-Civ-2742, 2007 WL 831812, at *16-17 (S.D.N.Y. Mar. 16, 2007) (kickback scheme violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5), *aff'd*, 317 Fed. Appx. 34 (2d Cir. 2008) (unpublished); *SEC v. Savino*, No. 01-CV-2438, 2006 WL 375074, at *1 & *12-13 (S.D.N.Y. Feb. 16, 2006) (secret kickback agreements "constitut[ed] an illegal scheme to defraud" under Exchange Act Rule 10b-5), *aff'd in relevant part*, 208 Fed. Appx. 18 (2d Cir. 2006) (unpublished); *SEC v. Santos*, 355 F. Supp. 2d 917, 919 (N.D. Ill. 2003) (SEC complaint alleging that defendants participated in kickback scheme stated securities fraud claim under Exchange Act Rule 10b-5); *SEC v. Feminella*, 947 F. Supp. 722, 731-32 (S.D.N.Y. 1996) (SEC stated claim for illegal kickback scheme under Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5); *United States v. Rudi*, 902 F. Supp. 452, 456-57 (S.D.N.Y. 1995) (undisclosed scheme by which financial adviser to local government authority received kickbacks from lead underwriter of bond issue for government authority constituted fraud "in connection with" sale of bonds under Exchange Act Section 10(b) and Exchange Act Rule 10b-5); *Stephens Inc.*, Exchange Act Rel. No. 40699 (Nov. 23, 1998), 68 SEC Docket 1854, 1863 (settled proceeding) (respondent's payment of secret kickbacks to public officials to obtain municipal securities business violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5); *First Fid. Sec. Group*, Exchange Act Rel. No. 36694 (Jan. 9, 1996), 61 SEC Docket 68, 75 (settled proceeding) (kickback scheme violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5).

A. Riordan is Liable for Violating the Antifraud Provisions.

The preponderance of the evidence⁴⁵ established that, over a seven-year period, Riordan made secret cash payments to Montoya in exchange for Montoya selecting Riordan's bids for the NMSTO's purchases and sales of agency securities.⁴⁶ Riordan began making secret cash payments to Montoya in approximately 1996, and he continued to do so through the end of Montoya's term in December 2002. During Montoya's tenure, the State's Investment Policy required that securities transactions be conducted through a "formal and competitive" bidding process with an evaluation of at least three bids. The Investment Policy required that purchase transactions be awarded to the bid resulting in the highest return "within the maturity required," and that successful sale bids generate "the highest sale price." In violation of the Investment Policy, Montoya rigged the bidding process to make it appear that Riordan had been awarded transactions through a competitive bidding process in order to obtain cash kickbacks.

Montoya caused the NMSTO to obtain bids from other brokers first, then notify Riordan of the terms of the other bids, enabling Riordan to provide a bid with a better rate. Montoya also permitted Riordan to bid substantially later than other bidders, and to bid using bonds with longer maturity dates. As a result of the bid rigging, Riordan won eighteen of twenty-nine bids submitted to the NMSTO between 2001 and 2002, for a 62% success rate, which was substantially higher than any other bidder on the State's list of approved brokers. Between 2001 and 2002, Riordan's winning bids amounted to 43% of the total value of successful bids, or \$630 million of approximately \$1.45 billion.

⁴⁵ See *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (applying preponderance of the evidence standard in Commission administrative proceedings).

⁴⁶ Riordan's secret kickback payments to Montoya constituted material information because, at a minimum, such an arrangement could cause a reasonable investor, in this case, the State, to question the quality of NMSTO's management and integrity of its bidding process for securities transactions. See, e.g., *Washington County*, 676 F.2d at 225 (stating that failure to disclose kickback payments received as part of illegal kickback scheme involving district bonds was material because "an investor, had he known of the payments, could have reasonably concluded that investment in the . . . bonds was unwise because the kickbacks increased the costs of the offering"; stating further that "an investor could have concluded that the . . . bonds were a poor investment because the quality of the [d]istrict's management was suspect"); *Savino*, 2006 WL 375074, at *14 (finding that a reasonable investor would consider the payment of kickbacks an important fact in the decision to buy or sell securities); *Stephens Inc.*, 68 SEC Docket at 1864 (stating that secret kickback arrangements are material because "they are always corrupting"); *First Fid.*, 61 SEC Docket at 76 (stating that secret payments to agent pursuant to kickback scheme were material "because such arrangements and payments could compromise the independence and judgment of these agents and distort the underwriter selection process").

The evidence also established that Riordan acted with scienter,⁴⁷ described as "a mental state embracing intent to deceive, manipulate, or defraud."⁴⁸ Riordan intentionally made efforts to conceal the kickback scheme and avoid detection by authorities. For example, Riordan paid Montoya kickbacks in response to code words, such as "help me out" and "green tree"; Riordan met Montoya surreptitiously, often in restaurant restrooms, to pay kickbacks; Riordan used cash as the method of payment; and Riordan never spoke about the kickbacks or his secret payment arrangement with Montoya. In addition, Riordan personally benefitted from the kickback scheme, earning hundreds of thousands of dollars in commissions and bonuses from NMSTO business during the relevant period. Riordan thus had a pecuniary motive for engaging in the kickback scheme, further circumstantial evidence of his scienter.⁴⁹

We therefore conclude that Riordan's secret cash payments to Montoya in exchange for NMSTO securities transactions constituted a scheme to defraud and course of business that operated as a fraud or deceit on the State and other participants in the NMSTO's bidding process.⁵⁰ As a result of this conduct, we find that Riordan willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5.⁵¹

⁴⁷ See *Aaron v. SEC*, 446 U.S. 680, 685, 697 & 701-02 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter is not required to prove a violation of Securities Act Sections 17(a)(2) and 17(a)(3); instead, a showing of negligence is sufficient. *Aaron*, 446 U.S. at 697 & 701-02; *SEC v. Wolfson*, 539 F.3d 1249, 1256-57 (10th Cir. 2008); *Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006).

⁴⁸ *Ernst & Ernst*, 425 U.S. at 193 n.12. Proof of scienter may be demonstrated by circumstantial evidence. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983); *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62, 65 (2d Cir. 1999).

⁴⁹ See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) (stating that "motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference").

⁵⁰ See, e.g., *Savino*, 2006 WL 375074, at *13 (securities sales representative engaged in scheme to defraud insurance company by giving kickbacks to bond trader in exchange for business and favorable bond trades); *Santos*, 355 F. Supp. 2d at 919 (allegations that registered representatives participated in city treasurer's illegal scheme to offer city's investment business in exchange for cash payments and campaign donations stated cause of action under Exchange Act Rule 10b-5).

⁵¹ A willful violation of the securities laws means the intentional commission of an act that constitutes the violation; there is no requirement that the actor must be aware that he is violating any statutes or regulations. See *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

B. Riordan Raises Numerous Arguments Against Antifraud Liability.**1. Montoya fabricated his story that Riordan paid him kickbacks.**

Riordan argues that, upon Montoya's arrest in September 2005, Montoya fabricated a story that Riordan secretly paid him kickbacks in exchange for NMSTO securities transactions. Law enforcement authorities first learned of kickback schemes and corruption in the NMSTO in December 2003, not through Montoya, but through Sandoval. By April 2005, five months before Montoya knew that he was under investigation, Sandoval had told the FBI that Montoya had informed Sandoval, while they were both working at the NMSTO, that he was receiving cash payments from Riordan in return for NMSTO securities transactions. As the FBI investigation continued, in August 2004, Garcia implicated Riordan in "kickbacks and illegal securities activity." The various kickback schemes did not become public until at least September 2005 when Montoya was arrested. Montoya mentioned the kickback scheme with Riordan upon his arrest and in his first interview with the FBI in September 2005. Montoya's account to the FBI in 2005 was consistent with Sandoval's and Garcia's earlier statements to the FBI.

Riordan offers no explanation for how Montoya could have fabricated a story that, unbeknownst to Montoya, informants Sandoval and Garcia had already told to the FBI. Riordan does not claim that Sandoval and Garcia fabricated their stories to the FBI, nor does he claim or provide any evidence of coordination among Montoya, Sandoval, and Garcia related to the FBI's investigation.⁵²

2. The law judge should not have believed Montoya's testimony.

a. Riordan accuses the law judge of accepting Montoya's hearing testimony and FBI statements as "gospel, sorting through his various inconsistent renditions of the kickback story" and "obvious lies" "to find 'facts' to support this conclusion." In her initial decision, the law judge stated, in relevant part, "Based on my observation of his demeanor, how he responded to questions, and comparing his testimony with the other evidence in the record, I find Montoya to be credible. He was confused or lacking in information on some details, but, in my judgment, he was consistent and candid in his responses." As we have stated previously, a law judge's credibility findings "are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor."⁵³ Those findings may be

⁵² As noted previously, both Sandoval and Garcia, as part of their cooperation with the FBI, were taping conversations that they had with Montoya before Montoya's arrest.

⁵³ *Schild Mgmt. Co.*, Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 861 n.42; *see also Dolphin and Bradbury, Inc.*, Exchange Act Rel. No. 54143 (July 13, 2006), 88 SEC Docket 1298, 1308 n.33, *aff'd*, 512 F.3d 634 (D.C. Cir. 2008).

overcome only when there is substantial evidence in the record for doing so.⁵⁴ Riordan has not shown, nor do we find, substantial evidence contradicting the law judge's credibility findings in favor of Montoya.

b. Riordan argues that Montoya "provided conflicting statements to the FBI and equivocal, inconsistent testimony at the hearing regarding the nature, manner, and amounts of the purported kickbacks." Montoya's entire story has remained consistent and unequivocal since his arrest. Montoya recounted the same version of events over the course of four FBI interviews between September 2005 and February 2006, Vigil's two criminal trials in 2006, and the December 2007 hearing in this administrative proceeding. At no time did Montoya change his story that Riordan paid him secret cash kickbacks in exchange for agency securities transactions from the NMSTO. Moreover, Montoya's version of the relevant events was consistent with, and corroborated by, the other evidence at the hearing, including Riordan's own tape recorded conversations wherein Montoya demanded kickbacks from Riordan and, in response, Riordan agreed to meet with him.

c. Riordan argues that "[t]he only testimony Montoya gave that was consistent -- that he never got kickbacks from Mr. Riordan on sales by the State -- was rejected by the [law judge] who imagined that, because he was so greedy, Montoya must have gotten kickbacks on all the business."⁵⁵ As discussed, Montoya's testimony that he did not receive kickbacks from Riordan on sales transactions was equivocal. Montoya qualified that portion of his testimony by stating that it was his "best guess" and that he was "confused." In addition, that portion of Montoya's testimony was contradicted by other evidence showing that Riordan received preferential treatment on his sales bids and, in fact, paid kickbacks on sales transactions. For example, in October 2002, Montoya awarded Riordan four sales transactions when Riordan had the worst bids. In exchange for the award of those sales (and one purchase), Riordan met Montoya at the Kicks 66 gas station and paid him kickbacks.

It has been held that a finder of fact is "free to believe part of [a witness's] testimony and to reject other parts."⁵⁶ In light of Montoya's confusion and the countervailing evidence, the law

⁵⁴ See, e.g., *Laurie Jones Canady*, 54 S.E.C. 65, 78 (1999), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000); *Anthony Tricarico*, 51 S.E.C. 457, 460 (1993).

⁵⁵ Riordan accuses the law judge of imagining that Montoya received kickbacks on all transactions because she found him to be "so greedy." During his testimony, Montoya readily admitted, "I was greedy."

⁵⁶ *Vector Pipelines, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 953 (N.D. Ill. 2001) (internal quotations and citation omitted); see also, e.g., *Tricarico*, 51 S.E.C. at 461 (upholding credibility determination despite alleged inconsistencies in witness's testimony). As one court of appeals has observed, "[a]nyone who has ever tried a case or presided as a judge at a

(continued...)

judge properly could reject Montoya's testimony that Riordan did not pay him kickbacks on sales, while accepting the rest of his testimony as true. Our independent review of the facts supports the finding that Riordan paid Montoya kickbacks on both sales and purchases of agency securities.⁵⁷

d. In Riordan's brief on appeal and at oral argument, Riordan's counsel seemed to concede that Riordan was given a "last look," but argued that this practice was not prohibited by the Investment Policy and that "there was nothing improper about" the practice. While the Investment Policy may not have expressly prohibited the use of a "last look," the evidence established that it was a bid rigging device that Montoya used to ensure that Riordan won bids. As Montoya testified, the term "last look" was merely a shorthand description of his instructions to Sandoval to award transactions to Riordan, in return for illegal kickbacks, by whatever means necessary. As such, the use of a "last look" was inconsistent with the competitive bidding process mandated by the Investment Policy. Even Riordan's expert considered the use of a "last look" to be "inappropriate."

e. Riordan argues that Montoya's description of the kickback scheme with Riordan did not fit Montoya's usual mode of operation regarding kickbacks. For example, Riordan claims that Montoya typically used Sandoval and Garcia as intermediaries to collect kickbacks, but that "neither Sandoval nor Garcia ever collected money from" him. Tucker's testimony refutes this argument and indicates that Montoya's kickback scheme with Tucker operated in a similar way to Montoya's kickback scheme with Riordan. As noted previously, Tucker testified that he paid cash kickbacks to Montoya after Montoya would ask Tucker to "help [him] out"; Tucker was awarded NMSTO agency securities transactions in exchange for cash; Montoya would meet Tucker in person at restaurants to collect the payment,⁵⁸ and Tucker would give Montoya approximately \$300 or \$500 per transaction.

⁵⁶ (...continued)

trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment." *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007).

⁵⁷ Assuming that Riordan paid cash kickbacks only on purchases, and not on sales, Riordan's liability would remain unchanged. Under the antifraud provisions, it was sufficient for the Division to demonstrate that Riordan, acting with scienter, engaged in a deceptive scheme to make secret cash payments to Montoya in exchange for securities transactions generally from the NMSTO. Riordan has not pointed to any cases, and we have found none, requiring the Division to link each kickback to a specific securities transaction.

⁵⁸ Montoya testified that, like Riordan, he felt comfortable with Tucker, so he did not need an intermediary to collect kickbacks from Tucker. According to Tucker, on one occasion, he paid a kickback to Sandoval, rather than to Montoya, because Montoya "did not want to be met." However, Tucker stated that he told Montoya that he would never do that again.

3. The law judge should have believed Riordan's testimony.

a. Riordan argues that the law judge erred when she stated that "[t]he only evidence that kickbacks did not occur [was] Riordan's denial, and Riordan [was] not credible." Apart from his own self-serving denial in this proceeding, Riordan failed to contradict the evidence that he was awarded NMSTO agency securities transactions through a rigged bidding process and paid secret cash kickbacks to Montoya in exchange for those transactions. As noted previously, Riordan listed Beserra, Garcia, Sandoval, and Sanchez as witnesses with first-hand knowledge of the relevant facts. However, Riordan did not call any of these witnesses at the hearing to support his version of events.⁵⁹

Moreover, Riordan's tape recordings of his conversations with Montoya demonstrated that he knew how, and had the means, to document his own innocence by taping himself telling Montoya that he would not pay kickbacks in exchange for NMSTO securities transactions. However, Riordan admitted that he never taped himself saying those words.

The tape recordings also demonstrated that Riordan knew, at least since 1997, when the recordings were made, that Montoya was a corrupt public official who demanded the payment of kickbacks in exchange for securities transactions from the NMSTO. Despite this knowledge, Riordan continued to meet with Montoya, engaged in substantial NMSTO business with him for several years, and made hundreds of thousands of dollars in commissions from that business. As late as December 2002, Riordan admitted that he willingly agreed to meet Montoya at a gas station, even though he knew that Montoya was "very, very mad" at him and was demanding payment for the October 2002 transactions. While Riordan claimed that nothing more than an "exchange of words" took place, the law judge credited Montoya's testimony that Riordan paid him kickbacks for the five October 2002 transactions.

Riordan's conduct in continuing to do business with Montoya, despite his knowledge that Montoya was, in his words, "crooked," and in failing to notify the appropriate authorities of the kickback scheme and corruption in the NMSTO, is further evidence that Riordan, acting with scienter, paid Montoya secret cash kickbacks in exchange for NMSTO securities transactions.

b. Riordan argues that "the [initial decision] claims that Mr. Riordan is not credible, but the reasons it gives are without merit." The law judge stated that she based her adverse credibility finding on the "many discrepancies" in the record. For example, the law judge found

⁵⁹ At oral argument, Riordan's counsel cited the absence of any cancelled checks in the record as support for his contention that the Division's case was weak. Riordan conceded, however, that he made payments to Montoya, whether in cash or by check, as political contributions early in their relationship. Neither side introduced any checks. We do not consider the absence of such checks significant. Montoya's credited testimony was that, for most of the period at issue, the improper payments were in cash.

that, at the hearing, Riordan gave "two completely different explanations as to why he had not produced the tape recorded conversations in response to a July 2007 Division subpoena." Riordan does not dispute that his two explanations were contradictory.

The law judge also found that "Riordan's explanation of obtaining a Las Vegas hotel room for Montoya because Las Vegas was crowded due to the Super Bowl was false because the Super Bowl occurred" almost a month earlier.⁶⁰ Indeed, when confronted with the actual date of the Super Bowl on cross-examination, Riordan admitted that he "made a wrong assumption." In an attempt to minimize this damaging evidence, Riordan argues that his "faulty assumption on an irrelevant issue is not the type of testimony that should carry any weight." Riordan's explanation for the hotel room payment was relevant information because it bore upon his credibility.

The law judge further found that Riordan did not inform his forensic accounting expert, who reviewed his finances, of his wife's \$100,000 line of credit, and that he failed to reveal to Division staff a 2002 land sale for \$1.3 million.⁶¹ At the hearing, Riordan admitted that he failed to inform his forensic accounting expert about the \$100,000 line of credit. Riordan also admitted that he failed to inform Division staff of the 2002 land sale during his investigative testimony.⁶²

4. The law judge should have believed Riordan's expert and not the Division's expert.

a. Riordan argues that Division expert McKinney's opinion of the NMSTO's bidding process was entitled to no weight.⁶³ Riordan offers no support for this argument and no evidence to contradict McKinney's testimony. McKinney opined that the NMSTO's bidding process was not competitive. He analyzed thirteen NMSTO transactions with Riordan in 2001 and 2002, highlighting examples of noncompetitive bids. As noted above, Perrone did not disagree with

⁶⁰ See *supra* note 28.

⁶¹ In 2002, Riordan sold real estate he and others purchased for \$225,000 to the Pueblo of Sandia (a Native American tribe located in central New Mexico) for \$1.3 million (and a \$1.8 million charitable contribution to the Pueblo).

⁶² Riordan testified that he did not inform Division staff of the 2002 land sale because he did not think it was "pertinent."

⁶³ We have stated that, "[w]hile an expert's testimony may properly be given substantial weight by the Commission, it has the duty to make its independent analyses and findings." *West Penn Elect. Co.*, 29 S.E.C. 685, 693 n.7 (1949). In resolving the issues raised in this case, "we have appraised and given such weight to the expert testimony as we consider is indicated by the relevant facts in the record." *Ira Weiss*, Securities Act Rel. No. 8641 (Dec. 2, 2005), 86 SEC Docket 2588, 2597 n.21, *petition denied*, 468 F.3d 849 (D.C. Cir. 2006).

McKinney's analysis, stating that it was "reasonable and correct." In fact, Perrone admitted that he, too, found irregularities in the bidding.

b. Riordan complains that McKinney focused only on transactions in 2001 and 2002. Riordan gives no reason why the time frame considered by McKinney should be viewed as affecting the validity of his opinion. Further, Sandoval testified that this was the only period during which records were kept.

c. Riordan complains that McKinney did not read the Investment Policy or Order Instituting Proceedings, but fails to explain how this affected the validity of McKinney's opinion. McKinney's opinion assumed that competitive bidding was required. That requirement was set forth in the Investment Policy, which stated that all securities transactions were to be conducted pursuant to a "formal and competitive" process. McKinney's opinion that the bidding was not competitive, but rigged, was supported by ample evidence, which Riordan has not contradicted.

d. Riordan complains that the law judge erred in crediting McKinney's statement that it was unlikely that First Union and Riordan would have been so consistently successful absent the existence of the kickback scheme. Riordan argues that, if McKinney had read the Investment Policy, which stated that "[s]ecurities broker/dealers with offices in New Mexico [would] be given priority when possible over out-of-state dealers," he would have expected a firm like Riordan's to be "consistently successful" in the bidding process for NMSTO securities transactions. While it is true that Riordan, as a local broker, was entitled to "priority when possible," the evidence established that Montoya gave Riordan an unfair advantage by, among other things, telling him what his competitors had bid so he could better his own bid, allowing him to place bids on securities with longer settlement or maturity dates than his competitors, and awarding him transactions when his bids were not the best bids.⁶⁴

e. Riordan argues that Perrone disagreed with McKinney and that the law judge erroneously concluded that Perrone did not. The law judge specifically questioned Perrone on the issue of whether he disagreed with McKinney. Perrone testified that, although he thought that "some of [McKinney's] beliefs" were "wrong,"⁶⁵ he could not conclude that McKinney's analysis of the trades was wrong. Based on our independent review, we accord substantial weight to McKinney's analysis, as it comports with the evidence in the record.

⁶⁴ As stated earlier, Abbey testified that, during his employment at the NMSTO, Riordan generally was not successful on competitive bids even though he was a local broker entitled to a "priority."

⁶⁵ For example, Perrone testified that McKinney was wrong in stating that "all trades [were] done in 30 seconds."

5. The law judge relied on hearsay evidence.

Riordan argues that the law judge erred in relying on hearsay statements made by Sandoval and Garcia in FBI 302s.⁶⁶ Hearsay evidence is admissible in our administrative proceedings and "can provide the basis for findings of violation, regardless of whether the declarants testify."⁶⁷ In addition, "hearsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact."⁶⁸ In evaluating the probative value and reliability of hearsay evidence, as well as the fairness of its use, we consider a number of factors, including "the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral, or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated."⁶⁹

The hearsay statements made by Sandoval and Garcia in the FBI 302s satisfied a number of these factors. The evidence was probative because it related to Riordan's involvement in the kickback scheme. The evidence also appeared to be reliable, as there was no evidence that Sandoval and Garcia were biased or had an incentive to falsify their statements. Both Sandoval and Garcia were on Riordan's witness list, but Riordan did not call them as witnesses in his case-in-chief. Sandoval, but not Garcia, testified at the hearing as a Division witness, and Riordan had the opportunity to cross-examine Sandoval. Sandoval's statements in the FBI 302s were, in all material respects, consistent with his testimony, and he confirmed their contents at the hearing.⁷⁰ Furthermore, Sandoval's and Garcia's statements, although not signed or sworn to, were identified by Agent Marcus McCaskill, one of the two lead agents in the FBI's NMSTO investigation, who was also subject to cross-examination by Riordan, and were corroborated by other, nonhearsay evidence. Riordan did not present any evidence to contradict Sandoval's and Garcia's statements, apart from his own discredited testimony.

We conclude that the law judge did not err in admitting Sandoval's and Garcia's hearsay statements in the FBI 302s. Moreover, even if the admission of this evidence constituted error, it

⁶⁶ "An FBI 302 is a form routinely used to memorialize an FBI interview of a witness." *United States v. Nathan*, 816 F.2d 230, 232 n.1 (6th Cir. 1987).

⁶⁷ *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13853-54, *appeal filed*, No. 09-1550 (3d Cir. Feb. 24, 2009).

⁶⁸ *Id.* (internal quotations and citation omitted).

⁶⁹ *Id.*

⁷⁰ *See Carlton Wade Fleming, Jr.*, 52 S.E.C. 409, 411 n.8 (1995) (finding hearsay evidence to be sufficiently reliable and probative where it was consistent with other nonhearsay evidence).

was harmless.⁷¹ As demonstrated, there was ample evidence in the record, independent of the FBI 302s, to support our findings of antifraud violations.⁷²

6. The law judge impermissibly restricted Riordan's proof.

a. Riordan argues that the law judge erred in precluding him from cross-examining Montoya (and testifying in his own defense) about the NMSTO's investment in certain mutual fund transactions which would have paid Montoya kickbacks after Montoya left office. According to Riordan, Montoya was angry with him because he (purportedly) advised Montoya's successor, Vigil, to cancel those post-term mutual fund transactions, and falsely named him in the kickback scheme at issue here involving agency securities transactions.

Our Rule of Practice 320 provides that "the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious."⁷³ We have stated that law judges have "broad discretion" in determining whether to admit or exclude evidence.⁷⁴

The law judge refused to allow questioning into the post-term mutual fund transactions because those transactions involved a different scheme from the scheme charged in the Order Instituting Proceedings, and so were irrelevant to the allegations against Riordan. In addition,

⁷¹ See *U.S. Assocs., Inc.*, 51 S.E.C. 805, 812 & n.24 (1993) (noting that finding of harmless error may overcome procedural objections).

⁷² Riordan argues that the law judge relied on "gross hearsay," referring to Division Exhibits 29 (documents from the State Legislature's Legislative Finance Committee), 30 (budget analyses of the NMSTO prepared by that Committee), and 84 (an October 2002 Albuquerque Journal article reporting that a State Board of Finance member was concerned that, between February and September 2002, First Union (Riordan) and Southwest Securities (Tucker) received 90% of commissions for buying bonds issued by federal government agencies for the NMSTO).

As discussed, hearsay evidence is admissible in our administrative proceedings. Division Exhibits 29 and 30 bore upon the preferential treatment accorded to Riordan (and Tucker) and appeared to be reliable, having been corroborated by Abbey's testimony at the hearing. Riordan did not object to the admission of Division Exhibit 84 before the law judge, and therefore waived his argument regarding this exhibit on appeal. In all events, our independent review of the record confirms that Riordan received an unfair advantage in the NMSTO bidding process.

⁷³ 17 C.F.R. § 201.320.

⁷⁴ *Scott G. Monson*, Investment Company Act Rel. No. 28323 (June 30, 2008), 93 SEC Docket 7517, 7526 n.27 (internal quotations and citation omitted).

Montoya testified that he had no knowledge of Riordan's purported role in unraveling the post-term mutual fund transactions. As discussed above, the FBI was aware of the kickback scheme involving agency securities transactions before it arrested and interviewed Montoya, thereby undermining Riordan's claim that Montoya fabricated his testimony. Furthermore, FBI Agent McCaskill testified that Riordan's name was never mentioned in connection with the scheme involving post-term mutual fund transactions. We conclude that the law judge did not abuse her discretion in precluding this line of questioning, nor was Riordan prejudiced thereby. There was sufficient evidence in the record establishing Riordan's participation in the kickback scheme involving agency securities transactions.

b. Riordan argues that the law judge erred in refusing to allow Gary Bland, who served as New Mexico State Investment Officer beginning in 2003, to testify as a witness in his defense. In a prehearing submission, Riordan explained that, among other topics, Bland would testify with respect to the NMSTO's investment requirements, "the legality of a 'last look' . . . and why this did not violate any law, regulation or rule of the State of New Mexico nor the SEC," and Montoya's "inappropriate purchase of mutual funds" at the end of his term.

The Division objected to Bland testifying because he was, in effect, being offered to give expert testimony, and because Riordan did not file an expert report, as required by the law judge's scheduling order. In his brief on appeal, Riordan argues that Bland was not offered as an expert, but that his testimony would explain "industry practices, the State of New Mexico's practices" and relate to "Montoya's motive and bias against Mr. Riordan when Mr. Riordan single-handedly caused Mr. Montoya's successor [Vigil] to sell ill-advised mutual funds, which had the consequence of denying a future stream of illegal kickback funds accruing to Mr. Montoya after he left office."

At the hearing, the law judge excluded Bland's testimony because she found that it amounted to expert testimony involving "his expertise about industry practice, the State of New Mexico's practices," and because Riordan failed to file an expert report, in contravention of her scheduling order. The law judge also found that, to the extent that Bland would testify about Montoya's "motive and bias against Mr. Riordan" for Riordan's alleged role in unraveling the post-term kickback scheme involving mutual funds, such testimony was irrelevant.

We find that the law judge acted within her discretion in excluding Bland's testimony. Riordan failed to comply with the law judge's scheduling order for filing expert reports. While Riordan appears now to argue that Bland was offered merely as a fact witness, the record shows that Bland did not become employed by the NMSTO until 2003, which was after the relevant period. As a result, the law judge did not err in determining that Bland's testimony regarding any factual matters would be irrelevant.⁷⁵ As discussed above, the law judge's determination to

⁷⁵ See 17 C.F.R. § 201.320 (authorizing hearing officers to "exclude all evidence that is irrelevant, immaterial or unduly repetitious").

exclude testimony regarding an alleged post-term kickback scheme involving mutual funds was proper.

c. Riordan argues that the law judge erred when she "took into account [his] invocation of his Fifth Amendment privilege [against self-incrimination] in reaching her decision." Riordan invoked the Fifth Amendment during investigative testimony and refused to answer questions about Montoya, Vigil, transactions with the NMSTO, and why either Montoya or Sandoval might have been motivated to lie about Riordan's involvement in the kickback scheme. The Division moved *in limine* to preclude Riordan from testifying at the hearing due to his invocation of the Fifth Amendment during its investigation of this matter. The law judge denied the Division's motion and allowed Riordan to take the stand.

Our proceedings are civil in nature, and an adverse inference may be drawn in such proceedings from a respondent's invocation of his Fifth Amendment privilege against self-incrimination.⁷⁶ The fact finder has discretion in determining whether an adverse inference is proper.⁷⁷ "Due consideration should be given to 'the nature of the proceeding, how and when the privilege was invoked, and the potential harm or prejudice to opposing parties.'" ⁷⁸ Because the assertion of the Fifth Amendment is an effective way to hinder discovery, the fact finder "must be especially alert to the danger that the litigant might have invoked the privilege primarily to . . .

⁷⁶ *Strathmore Sec., Inc.*, 43 S.E.C. 575, 590 (1967); *see, e.g., SEC v. DiBella*, Civ. No. 3:04 CV 1342(EBB), 2007 WL 1395105, at *3 (D. Conn. May 8, 2007) (allowing adverse inference instruction to jury based on defendant's invocation of Fifth Amendment privilege during three SEC investigative interviews; stating that an SEC investigative interview "is not a criminal proceeding, [and] an adverse inference is admissible evidence so long as it is not substantially outweighed by the danger of unfair prejudice"); *SEC v. Herman*, No. 00 Civ. 5575, , 2004 WL 964104, at *7 (S.D.N.Y. May 5, 2004) (drawing negative inference where defendants invoked Fifth Amendment privilege during investigative testimony but later testified during deposition); *SEC v. Cassano*, No. 99 Civ. 3822, 2000 WL 1512617, at *2 n.1 (S.D.N.Y. Oct. 11, 2004) (finding adverse inference appropriate where defendants asserted Fifth Amendment privilege during investigative testimony but later waived privilege).

⁷⁷ *Int'l Union (UAW) v. NLRB.*, 459 F.2d 1329, 1339 (D.C. Cir. 1972); *SEC v. Gilbert*, 79 F.R.D. 683, 685 n.3 (S.D.N.Y. 1978); *see, e.g., Daniel R. Lehl*, 55 S.E.C. 843, 861 n.33 (2002) (stating that "[a] trier of fact in a civil proceeding may draw adverse inferences from a respondent's refusal to testify," and that, "where appropriate," the Commission may draw such inferences).

⁷⁸ *DiBella*, 2007 WL 1395105, at *3 (quoting *United States v. Certain Real Prop. And Premises Known as: 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78, 84 (2d Cir. 1995)).

gain an unfair strategic advantage over opposing parties."⁷⁹ A litigant may be barred from testifying later about matters previously hidden from discovery through improper invocation of the Fifth Amendment.⁸⁰

While, at the hearing, the law judge observed that she found "relevant" Riordan's invocation of the Fifth Amendment and considered it permissible to draw an adverse inference against Riordan, her findings against Riordan do not appear to have been based on any such inference. Although the law judge noted in her decision that Riordan had invoked the privilege during the investigation that led to this proceeding, she also acknowledged Riordan's argument that no adverse inference should be drawn from his assertion of the privilege because he believed at the time that he was a target of a criminal investigation as a result of his political party affiliation. The law judge made no other mention of Riordan's Fifth Amendment invocation in her decision. A fair reading of her decision suggests that the law judge determined that it was unnecessary to draw an adverse inference to support her findings, given what she described as the "persuasive" evidence against Riordan. We also consider the evidence against Riordan to be persuasive and more than sufficient to support findings of violations, without regard to any adverse inference.

d. Riordan further argues that the law judge took a "get even approach" to the case and tried to "get" him because he "escaped criminal prosecution" for "paying kickbacks . . . that resulted in criminal convictions for [Montoya]." Riordan seems to be claiming that the law judge was biased against him. Our review of the record discloses no bias or other improper conduct. The fact that the law judge did not rule in Riordan's favor does not support a finding of bias. As we have stated previously, "adverse rulings, by themselves, generally do not establish improper bias."⁸¹ In any event, we have considered all of the relevant evidence and made an independent judgment of liability based on that evidence. Our *de novo* review cures whatever bias, if any, may have existed.⁸²

⁷⁹ *Id.*

⁸⁰ *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 855 (S.D.N.Y. 1997).

⁸¹ *Mitchell M. Maynard*, Investment Advisers Act Rel. No. 2875 (May 15, 2009), 95 SEC Docket 16844, 16856 (internal quotations and citation omitted).

⁸² *See, e.g., Robert Bruce Orkin*, 51 S.E.C. 336, 344 (1993) (stating that "our *de novo* review of this matter cures whatever bias or disregard of precedent or evidence, if any, that may have existed below"), *aff'd*, 31 F.3d 1056 (11th Cir. 1994).

7. Riordan's "after-the-fact payments" were not "in connection with" his legitimate securities transactions with the NMSTO.

Exchange Act Section 10(b) requires that the fraud be "in connection with" the purchase or sale of securities.⁸³ In *SEC v. Zandford*,⁸⁴ the U.S. Supreme Court held that the "in connection with" requirement is met if the "fraudulent scheme" and securities transaction "coincide."⁸⁵

Riordan argues that "the [initial decision] has not explained how after-the-fact payments by Mr. Riordan in whatever amount he chose could have been 'in connection with' the legitimate securities transactions that had already been completed." The Supreme Court rejected a similar argument in *Zandford*. There, the respondent allegedly sold securities belonging to a client for the purpose of transferring the proceeds to an account that he controlled.⁸⁶ The respondent claimed that, since the securities sales were completely lawful and the alleged fraud took place after the securities were sold, the fraud was separate from and independent of the securities sales.⁸⁷ The Supreme Court disagreed, finding that, even though the securities sales were lawful, they were made to effectuate the fraud.⁸⁸ The fraud coincided with the securities sales, and thus was "in connection with" the securities sales.⁸⁹ Consistent with *Zandford*, Riordan's payment of secret cash kickbacks clearly "coincided" with, and were a condition of his receiving orders for, the NMSTO's purchases and sales of agency securities, and therefore satisfied the "in connection with" requirement.⁹⁰

⁸³ The Supreme Court has adopted a broad reading of Exchange Act Section 10(b)'s "in connection with" requirement. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006); *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

⁸⁴ 535 U.S. 819 (2002).

⁸⁵ *Id.* at 819 & 825; *see also, e.g., Santos*, 355 F. Supp. 2d at 920.

⁸⁶ 535 U.S. at 815-16.

⁸⁷ *Id.* at 820.

⁸⁸ *Id.*

⁸⁹ *Id.* at 825.

⁹⁰ *See, e.g., Santos*, 355 F. Supp. 2d at 920 (alleged scheme by which registered representatives gave city treasurer cash payments and campaign donations in exchange for city's investment business was "in connection with" the purchase or sale of securities); *Rudi*, 902 F. Supp. at 456-57 (undisclosed scheme through which financial adviser to local government

(continued...)

8. There was no proof of actual harm.

Riordan suggests, without citation to any authority, that the fraudulent scheme had to result in "actual harm to the entity on the other side of the transaction." Riordan's argument misstates the law because, unlike a plaintiff in a private damages action, the Division need not demonstrate actual harm or losses to investors.⁹¹ Riordan's argument also misstates the facts because the record showed that, contrary to the Investment Policy, Riordan was awarded NMSTO agency securities transactions when he did not have the best bids. A prime example involved the four sale transactions that Riordan won in October 2002 when his bids were the worst bids among his competitors. Riordan cannot reasonably claim an absence of harm to the citizens of New Mexico in view of the evidence that the NMSTO engaged in agency securities transactions which did not have the most favorable economic terms for the State. Nor can he reasonably claim an absence of harm to other market participants given the evidence that his competitors' bids were routinely denied through a rigged bidding process.

IV.

A. Statute Of Limitations.

Riordan argues that the five-year statute of limitations set forth in 28 U.S.C. § 2462 bars the proceeding and the sanctions imposed against him.⁹² Section 2462 provides, in pertinent part, that "any proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," must be commenced "within five years from the date when the claim first accrued."⁹³ The violations in this case occurred from approximately 1996 through December 2002. The Commission instituted this administrative proceeding on September 25, 2007. Five of Riordan's approximately eighty agency securities transactions with the NMSTO occurred in October 2002, and therefore fell within the five-year period before the institution of this proceeding.

⁹⁰ (...continued)
authority received kickbacks from lead underwriter of bond issue for government authority constituted fraud "in connection with" the sale of bonds).

⁹¹ See, e.g., *Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4 (9th Cir. 1993); *Schellenbach v. SEC*, 989 F.2d 907, 913 (7th Cir. 1993); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985); *Savino*, 2006 WL 375074, at *15.

⁹² See *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996) (holding that five-year statute of limitation period in 28 U.S.C. § 2462 applied to certain Commission administrative proceedings).

⁹³ 28 U.S.C. § 2462.

Accordingly, Riordan committed willful violations within the limitations period, and this proceeding is not time-barred.

We may consider conduct occurring before September 25, 2002, to establish such matters as Riordan's course of conduct, motive, intent, or knowledge in committing violations that are within the limitations period.⁹⁴ We may also consider such conduct in deciding whether to impose a cease-and-desist or disgorgement order because such an order operates prospectively and is not subject to Section 2462.⁹⁵

We need not consider Riordan's conduct occurring before September 25, 2002, in determining whether to impose a bar or civil money penalties. Rather, we have based those sanctions exclusively on Riordan's conduct occurring during the five-year period preceding the OIP's issuance.⁹⁶

B. Bar From Association.

Exchange Act Section 15(b)(6) authorizes us to censure, place limitations on, suspend, or bar a person associated with a broker or dealer if we determine that the person has, among other things, willfully violated the federal securities laws and it is in the public interest to do so.⁹⁷ In determining what sanction is in the public interest, we consider the factors in *Steadman v. SEC*,⁹⁸ which include the egregiousness of a respondent's actions, the degree of scienter involved, the

⁹⁴ See, e.g., *Joseph J. Barbato*, 53 S.E.C. 1259, 1278 & n.26 (1999); *Sharon M. Graham*, 53 S.E.C. 1072, 1089 n.47 (1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000); *Terry T. Steen*, 53 S.E.C. 618, 624 (1998).

⁹⁵ See *Terence Michael Coxon*, 56 S.E.C. 934, 966 n.60 (2003) (stating, "[b]ecause a cease and desist order is forward-looking, . . . Section 2462 does not apply"; noting that such an order "requires only that Respondents obey the law, which they must do in any event, and is designed to ameliorate the risk of similar violations occurring in the future"), *aff'd*, 137 Fed Appx. 975 (9th Cir. 2005) (unpublished).

⁹⁶ Had we chosen to do so, we could, for example, have considered Riordan's pre-September 25, 2002, conduct pursuant to the fraudulent concealment doctrine. We find that, due to the self-concealing nature of Riordan's kickback scheme, the fraudulent concealment doctrine applied and equitably tolled the statute of limitations period until no earlier than September 2005 when Montoya's arrest became public. See, e.g., *SEC v. Koenig*, 557 F.3d 736, 739-40 (7th Cir. 2009) (fraudulent concealment doctrine applied in Commission enforcement proceeding to equitably toll 28 U.S.C. § 2462's five-year statute of limitations period).

⁹⁷ 15 U.S.C. § 78o(b)(6).

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

isolated or recurrent nature of the infraction, the recognition of the wrongful nature of the conduct, the sincerity of any assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for future violations.⁹⁹ "[N]o one factor is dispositive."¹⁰⁰ As we have previously recognized, "conduct [that] violates the antifraud provisions is especially serious and subject to the severest sanctions."¹⁰¹

Riordan challenges the law judge's determination to bar him from associating with any broker or dealer. He argues that the sanction of a bar is "unwarranted and unjust" and "reflect[s] the [law judge]'s blind acceptance of, at best, flimsy and contradictory evidence." We find, as did the law judge, that the public interest factors weigh in favor of barring Riordan. Riordan's actions in paying kickbacks to Montoya in exchange for agency securities transactions from the NMSTO were egregious. We have stated that kickback arrangements are "always corrupting."¹⁰² Riordan's payment of kickbacks to Montoya contributed to the corruption of a public official. Furthermore, the kickback agreement "cast doubt on the integrity of the [NMSTO's bidding] process."¹⁰³

Riordan acted with a high degree of scienter. Riordan knew that Montoya demanded kickbacks in exchange for securities transactions from the NMSTO. Riordan also knew that if he paid kickbacks to Montoya he would obtain a stream of securities transactions from the NMSTO. Riordan further knew to conceal his fraudulent arrangement with Montoya and avoid detection by law enforcement authorities.

Riordan's post-September 2002 conduct involved five transactions, including four where he submitted the worst bids. He has not offered assurances against future violations, nor has he recognized that he committed serious antifraud violations.¹⁰⁴ While Riordan contends that his retirement from Wachovia in 2007 renders a bar inappropriate, he has not given assurances that he

⁹⁹ *Id.*

¹⁰⁰ *Conrad P. Seghers*, Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298, *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

¹⁰¹ *Marshall E. Melton*, 56 S.E.C. 695, 713 (2003).

¹⁰² *Stephens Inc.*, 68 SEC Docket at 1864 (quoting *Mosser v. Darrow*, 341 U.S. 267, 271 (1951)).

¹⁰³ *First Fid.*, 61 SEC Docket at 77.

¹⁰⁴ Contrary to Riordan's suggestion, his lack of a prior disciplinary history is not a mitigating factor because "securities professionals should not be rewarded for complying with the securities laws." *Maynard*, 95 SEC Docket at 16860 & n.39.

will not seek to reenter the securities industry.¹⁰⁵ Given the seriousness of his violations, we agree with the law judge that there was a "high likelihood" that Riordan would commit future violations if allowed to continue as an associated person.

Riordan argues that there is no need to impose a bar for deterrence purposes because there are already "numerous federal and state laws prohibiting paying kickbacks to government officials that serve as a deterrent." As this opinion illustrates, however, those laws did not deter him from paying illegal kickbacks to Montoya from 1996 to 2002.

We conclude that a bar serves the public interest and is remedial.¹⁰⁶ A bar also serves the goal of general deterrence and should act as a warning to others in the securities industry who might be tempted to pay kickbacks to public officials in return for securities business.¹⁰⁷

C. Cease-And-Desist Order.

Securities Act Section 8A(a) and Exchange Act Section 21C authorize us to impose a cease-and-desist order if we find that any person has violated the federal securities laws or rules thereunder.¹⁰⁸ In determining whether a cease-and-desist order is appropriate, we look to whether

¹⁰⁵ See, e.g., *William C. Piontek*, 57 S.E.C. 79, 96 (2003) (finding that a bar was in the public interest, even though the respondent was not currently in the securities industry, because it would require him to seek permission from a self-regulatory organization before reentering the industry, and because that organization would have the opportunity to examine any proposed employment to determine whether it was appropriate to impose necessary procedures or limitations on him); *Robert Bruce Lohmann*, 56 S.E.C. 573, 583 (2003) (finding that a bar and cease-and-desist orders were in the public interest, even though the respondent was not currently employed in the securities industry, because there were no assurances that he would not try to reenter the industry, and thereafter have the opportunity to commit future violations).

¹⁰⁶ See *Ted Harold Westerfield*, 54 S.E.C. 25, 35 (1999) (imposing permanent bar on former associated person of broker-dealer who was convicted of, and enjoined from, violations arising out of kickback scheme with investment adviser; expressing concern that "there are opportunities to participate in kickback schemes in any capacity in the securities industry").

¹⁰⁷ See, e.g., *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (noting that deterrent value is a relevant factor in deciding sanctions); *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 n.12 (1995) (stating that selection of an appropriate sanction involves a consideration of several elements, including deterrence); *Lester Kuznetz*, 48 S.E.C. 551, 555 (1986) (noting that the sanction of a bar "serves the purpose of general deterrence").

¹⁰⁸ 15 U.S.C. §§ 77A(a), 78u-3.

there is some risk of future violations.¹⁰⁹ The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction.¹¹⁰ A single violation can be sufficient to indicate some risk of future violations.¹¹¹ Our finding that a violation is egregious "raises an inference that it will be repeated."¹¹² We also consider whether other factors demonstrate a risk of future violations, including the seriousness of the violation, 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 recognition of the wrongfulness of the conduct, the opportunity to commit future violations, and the remedial function to be served by a cease-and-desist order in the context of any other sanction sought in the proceeding.¹¹³ This inquiry is flexible, and no single factor is dispositive.¹¹⁴

We find that the risk of future violations is high. Riordan's conduct was serious and recurrent. Riordan engaged in fraudulent conduct spanning a seven-year period and involving a total of approximately eighty transactions. Riordan's violations were egregious and his actions reflected a high degree of scienter. Riordan profited substantially from his involvement in the kickback scheme at the expense of the citizens of New Mexico who were harmed because the State did not always receive the best prices on the agency securities it purchased and sold. In addition, other participants in the NMSTO's bidding process were harmed by Riordan's conduct, as Riordan's kickback payments to Montoya resulted in Montoya giving him preferential treatment in what was supposed to be a competitive bidding process and in selecting his bids even though they often were not the best bids.

As noted, although Riordan retired from Wachovia in 2007, he has given no assurances that he will not seek to reenter the securities industry. Imposing a cease-and-desist order will serve the remedial purpose of encouraging Riordan to take his responsibilities more seriously in the future should he be allowed to reenter the securities industry or act in a capacity that does not

¹⁰⁹ *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185 (2001), *reh'g denied*, 55 S.E.C. 1 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

¹¹⁰ *Id.* at 1191.

¹¹¹ *See Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004).

¹¹² *Id.*

¹¹³ *KPMG Peat Marwick*, 54 S.E.C. at 1192.

¹¹⁴ *Id.*

require registration. We conclude that it is in the public interest to impose a cease-and-desist order against Riordan.¹¹⁵

D. Disgorgement.

Securities Act Section 8A(e), Exchange Act Section 21B(e), and Exchange Act Section 21C(e) authorize disgorgement, including reasonable prejudgment interest, in a cease-and-desist proceeding and a proceeding in which a civil money penalty may be imposed.¹¹⁶ Disgorgement is an equitable remedy designed to deprive wrongdoers of their unjust enrichment and to deter others from similar misconduct.¹¹⁷ When calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task."¹¹⁸ As a result, "disgorgement need only be a reasonable approximation of the profits causally connected to the violation."¹¹⁹ Once the Division has shown that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent, who is "then obliged clearly to demonstrate that the

¹¹⁵ Riordan argues that, by imposing an associational bar, we are precluded from also imposing a cease-and-desist order because there is no risk that he will "engage in similar future conduct" and, therefore, imposition of a cease-and-desist order will be punitive. While Riordan will be permanently barred from associating with a broker or dealer, a cease-and-desist order nonetheless serves a remedial purpose in the event that Riordan becomes involved in the securities industry in a different capacity. *See Brendan E. Murray*, Advisers Act Rel. No. 2809 (Nov. 21, 2008), 94 SEC Docket 11961, 11977 (stating that, "[a]lthough 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").

¹¹⁶ 15 U.S.C. §§ 77h-1(a), 78u-2(e), & 78u-3(e).

¹¹⁷ *Zacharias v. SEC*, 569 F.3d 471-72 (D.C. Cir. 2009) (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) and *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994), among other cases). Riordan's argument that disgorgement is not an equitable remedy and that the law judge has no equitable powers is meritless. The law is well established that disgorgement is an equitable remedy necessary to the Commission to effectuate enforcement of the federal securities laws. *See, e.g., SEC v. Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006); *SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002); *SEC v. Pardue*, 367 F. Supp. 2d 773, 778 (E.D. Pa. 2005).

¹¹⁸ *First City Fin.*, 890 F.2d at 1231.

¹¹⁹ *Id.*

disgorgement figure was not a reasonable approximation."¹²⁰ Where disgorgement cannot be exact, the "well-established principle" is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoer whose illegal conduct created the uncertainty.¹²¹

The Division requested, and the law judge ordered, Riordan to disgorge \$1,017,278.78, plus prejudgment interest, consisting of \$959,601.78 in commissions from 1996 to 2002 and \$57,677 in bonuses from 2001 and 2002. Our review of the Division's disgorgement calculation, which was admitted into evidence as Division Exhibit 95, indicates that the \$959,601.78 includes twenty transactions that do not appear to involve agency securities, but rather corporate bonds. Riordan's corporate bond transactions were not a subject of the Order Instituting Proceedings, and thus should not have been included in the disgorgement calculation. Accordingly, in our discretion, we have subtracted \$78,925, representing the amount of Riordan's commissions on the twenty corporate bond transactions, from the \$959,601.78, resulting in \$880,676.78 in commissions from 1996 to 2002 and \$57,677 in bonuses from 2001 to 2002, for a total of \$938,353.78, plus prejudgment interest.

Riordan does not contest the use of his commission and bonus amounts as a measure of disgorgement, nor does he allege an inability to pay. Instead, Riordan argues that the Division failed to show a causal connection between each securities transaction and the kickback scheme, and therefore requiring him to disgorge his commissions on all of the transactions would be punitive.¹²²

Courts have held that "[i]t is proper to assume that all profits gained while [respondents] were in violation of the law constituted ill-gotten gains."¹²³ The evidence established that Riordan secured a flow of agency securities transactions from the NMSTO as a result of his kickback payments to Montoya. It was not possible to separate out individual transactions awarded to Riordan and conclude that they were not obtained by the kickback scheme simply because they were not linked to specific kickbacks. Given the flow of NMSTO securities transactions directed

¹²⁰ *Id.* at 1232.

¹²¹ *Zacharias*, 569 F.3d at 472; *see also, e.g., SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997); *First City Fin.*, 890 F.2d at 1232.

¹²² Riordan further argues that "[t]he disgorgement amount is the spurious product of the [law judge's] imagined evidence that Mr. Riordan paid kickbacks to Montoya on sales by the [NMSTO], and that each transaction was therefore illegal under the securities laws." Contrary to his argument, and as discussed previously, the evidence supported the finding that Riordan paid secret cash kickbacks to Montoya on sales as well as purchase transactions.

¹²³ *SEC v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993) (citing *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) and *SEC v. First City Fin. Corp.*, 688 F. Supp. 705, 727 (D.D.C. 1988), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989)), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994).

to Riordan in exchange for his payment of kickbacks, Riordan's commissions and bonuses on all of his NMSTO agency securities transactions, both sales and purchases, during the relevant period should be included in the disgorgement calculation.¹²⁴ As noted previously, the record did not contain evidence of Riordan's bonuses prior to 2001.

Ordering disgorgement of Riordan's commissions, including bonuses, will prevent him from reaping substantial financial gain from his violations and deter others from violating the federal securities laws by making illegal conduct unprofitable.¹²⁵ We order disgorgement in the amount of \$938,353.78, plus prejudgment interest¹²⁶ calculated under Section 6621(a)(2) of the Internal Revenue Code,¹²⁷ and compounded quarterly.

E. Civil Penalty.

Exchange Act Section 21B authorizes the Commission to impose a civil money penalty where a respondent has willfully violated any provision of the federal securities laws and a penalty is in the public interest.¹²⁸ Exchange Act Section 21B establishes a three-tiered system of civil penalties, each with a larger maximum penalty amount applicable to increasingly serious misconduct. The factors we consider in assessing the penalty required in the public interest are whether there was fraudulent misconduct, harm to others, or unjust enrichment, whether the respondent had prior violations, and the need for deterrence, as well as such other matters as justice may require.

We find that civil penalties at the third-tier level are appropriate in response to Riordan's misconduct. The Exchange Act provides that we may impose third-tier penalties where the misconduct "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a

¹²⁴ See *Zwick*, 2007 WL 831812, at *23 (where there was a flow of trades bought by continuing bribery scheme, disgorgement calculation properly included gross commissions on all trades that occurred after scheme's inception).

¹²⁵ See, e.g., *SEC v. J.T. Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058 n.4 (10th Cir. 2006); *First City Fin.*, 890 F.2d at 1230; *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988).

¹²⁶ Rule of Practice 600(b), 17 CFR § 201.600(b). "[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims." *Coxon*, 56 S.E.C. at 971.

¹²⁷ 26 U.S.C. § 6621(a)(2).

¹²⁸ 15 U.S.C. § 78u-2.

regulatory requirement," and "resulted in substantial pecuniary gain to the person who committed" the misconduct.¹²⁹ Riordan's conduct in paying kickbacks to a state official was fraudulent, deceitful, and in deliberate disregard of the law, and resulted in his substantial pecuniary gain.

The maximum third-tier penalty for misconduct by a natural person committed after February 2, 2001, but before February 14, 2005, was \$120,000.¹³⁰ In view of the considerable disgorgement and prejudgment interest imposed, we have determined not to impose the maximum civil penalty. Rather, we agree with the law judge that a civil penalty of \$500,000 (\$100,000 for each of the five October 2002 transactions), which is within the maximum allowed under the statute, is warranted here.

F. Fair Fund.

The law judge ordered that the disgorgement and civil penalties be used to create a fund, pursuant to Rule of Practice 1100, for the benefit of the NMSTO, which was harmed by Riordan's violations.¹³¹ "Sarbanes-Oxley's Fair Fund provision provides the [Commission] with the flexibility by permitting it to distribute civil penalties among defrauded investors by adding the civil penalties to the disgorgement fund."¹³² We direct that the civil money penalty and disgorgement amounts ordered in this case be paid into such a fund.

An appropriate order will issue.¹³³

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

Elizabeth M. Murphy
Secretary

¹²⁹ *Id.*

¹³⁰ *See* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-373 (1996) (codified at 28 U.S.C. § 2461 note); 17 C.F.R. § 201.1002.

¹³¹ 17 C.F.R. § 201.1100.

¹³² *Official Comm. of the Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006) (citing Section 308(a) of the Sarbanes-Oxley Act, 15 U.S.C. § 7246(a)).

¹³³ 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

SECURITIES ACT OF 1933

Rel. No. 9085 / December 11, 2009

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 61153 / December 11, 2009

Admin. Proc. File No. 3-12829

In the Matter of
GUY P. RIORDAN

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Guy P. Riordan be, and he hereby is, barred from association with any broker or dealer; and it is further

ORDERED that Guy P. Riordan cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5; and it is further

ORDERED that Guy P. Riordan disgorge \$938,353.78, plus prejudgment interest in the amount of \$459,516.84, such prejudgment interest calculated beginning from November 1, 2002, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Guy P. Riordan pay a civil money penalty in the amount of \$500,000; and it is further

ORDERED that the disgorgement and civil money penalty be used to create a "Fair Fund" for the benefit of the State of New Mexico's Treasurer's Office pursuant to Commission Rules of Practice 1100 through 1106.

By the Commission.

Elizabeth M. Murphy
Secretary