UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261

In the Matter of

ADAM MATTESSICH,

Respondent.

MEMORANDUM OF LAW OF THE DIVISION OF ENFORCEMENT IN SUPPORT OF THE DIVISION'S MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division") respectfully submits this memorandum of law in support of the Division's motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice ("Rules") against Respondent Adam Mattessich ("Mattessich").

PRELIMINARY STATEMENT

In this follow-on proceeding, the Division seeks collateral and penny stock bars, with rights to re-apply after no less than two years, based on the undisputed facts. After a five-day trial, a federal jury rendered its verdict that Mattessich aided and abetted his employer's violations of Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78q(a), and Rule 17a-3(a)(19) thereunder (the "Compensation Record Rule"), which requires broker-dealers to make and keep accurate records of commission compensation for brokerage firm employees. The district court later issued a remedies opinion making additional findings and permanently enjoining Mattessich from violating these provisions, among other remedies.

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The district court's uncontestable findings against Mattessich, who was the head of the international equities desk at Cantor Fitzgerald & Co. ("Cantor"), satisfy the Commission's standards for collateral and penny stock bars and make clear that such relief is warranted to protect investors. After Mattessich sought—but was not granted—permission to receive a portion of his subordinates' brokerage commissions for their work facilitating securities transactions for Cantor's customers, he took matters into his own hands and obtained the money anyway. He had a broker he supervised pay him a portion of their commissions through personal checks, outside of Cantor's system of books and records for commissions—a system he was tasked with helping to administer—and thereby aided and abetted Cantor's Compensation Record Rule violations. The district court found that Mattessich acted with a "high degree of scienter," maintained his scheme for over a decade despite knowing it was wrong, gave "disingenuous at best" sworn testimony to regulators about his compensation and that of his subordinate, and has continued to work (or seek employment) in the securities industry. Accordingly, the district court found that Mattessich posed a risk of future violations of the Compensation Record Rule and entered a permanent injunction against him. These same factors weigh in favor of the Commission imposing collateral and penny stock bars, with rights to re-apply after no less than two years, in this proceeding.

STATEMENT OF UNDISPUTED FACTS

I. Mattesich's Commission Splitting Scheme

Mattessich was employed by Cantor, a broker-dealer registed with the Commission, from October 2001 to February 2018. (Div. Ex. 1 (OIP) at 1; Div. Ex. 2 (Mattessich Answer) at 1.) By 2004, Mattessich was a Cantor supervisor, which included serving as the head of the firm's international equities desk from 2004 to 2013. (Div. Ex. 3 ("Remedies Opinion") at 2.) In that role, Mattessich supervised a trader named Joseph Ludovico ("Ludovico") among others. (*Id.* at

2–3.) Mattessich held Series 3, 7, 24, 55, and 63 licenses while he worked at Cantor. (Div. Ex. 1 at 1; Div. Ex. 2 at OIP at 1.) The Series 24 license enabled Mattessich to supervise other registered employees such as Ludovico and required Mattessich to be knowledgeable about applicable securities laws and regulations so that he could ensure that employees under his supervision complied with them. (Remedies Opinion at 2–3, 15.)

During Mattessich's employment, Cantor used a system of account executive ("AE") codes to apportion and track broker commissions, which he understood were books and records Cantor was required to keep. (*Id.* at 3, 14–15.) Specifically, Cantor used AE codes to track which traders worked on transactions and, accordingly, the persons to whom commissions should be paid for those transactions. (*Id.*) Mattessich helped administer this AE code system by approving changes to the AE codes assigned to customer accounts and, thus, changes to the Cantor employees who would receive a portion of the commissions generated by those accounts. (*Id.*) Mattessich was also aware that he had to follow Cantor's Written Supervisory Procedures, which prohibited employees from receiving commissions from any person other than Cantor. (*Id.* at 4, 15.)

Nevertheless, Mattessich engaged in a scheme whereby Ludovico paid a portion of the commissions he received from Cantor to Mattessich outside of the AE code system, off the firm's books, and using personal checks. (*Id.* at 3–4.) Mattessich received monthly checks from Ludovico for approximately ten years; in 2013 alone, Ludovico gave Mattessich twelve checks totaling $58,200. (*Id.* at 3, 18–20.) Because only Ludovico's AE code was assigned to these customer accounts, "Ludovico's off-book payments to Defendant were—by definition if not by design—not reflected in the AE code system; instead, the system indicated that Ludovico alone was receiving these commissions." (*Id.* at 4.) Accordingly, Mattessich knew that these payments were not reflected in Cantor's books and records. (*Id.* at 15.)

Mattessich never received approval from Cantor for his commission-splitting arrangement with Ludovico and never received approval from Cantor to receive off-book commissions at all. (*Id.* at 5, 15.) In fact, years before his arrangement with Ludovico, Mattessich sought—but did not receive—permission to receive commissions through his AE code. (*Id*. at 5.) In late 2013, Cantor learned of Mattessich's arrangement with Ludovico when Ludovico disclosed it and instructed Mattessich to end it. (*Id.* at 6.) During this conversation, Mattessich did not disclose that he had received other similar unrecorded commissions from other Cantor traders. (*Id.* at 5–6.) Mattessich also hid the unrecorded commissions he received from Ludovico by not declaring them on his tax returns and by lying during sworn testimony before the Financial Industry Regulatory Authority ("FINRA"). (*Id.* at 5–6, 16.) During that testimony, Mattessich falsely testified that (1) he did not service customer accounts at Cantor (when he did); (2) he did not receive compensation for servicing accounts (when Ludovico was paying him commissions by personal check); and (3) he did not have information about Ludovico's compensation (when he did). (*Id.* at 6, 16.)

II. District Court Litigation

The Complaint against Mattessich and Ludovico was filed on June 29, 2018, alleging that each aided and abetted Cantor's violations of the Compensation Record Rule. (Div. Ex. 4 (Complaint) at 3, 10–11.) The same day, the Commission issued an order in which it accepted Cantor's offer of settlement for its violations of the Compensation Record Rule and ordered Cantor to pay a civil penalty of $1.25 million. (Div. Ex. 5 (Cantor OIP) at 4.)

After the district court denied the defendants' motions to dismiss, the Commission accepted Ludovico's offer of settlement, pursuant to which (1) the district court entered judgment against Ludovico enjoining him from future violations of the Compensation Record Rule and ordering him to pay a civil penalty of $25,000 (Div. Ex. 6 (Ludovico Final Judgment) at 1–2); and (2) pursuant

to Exchange Act Section 15(b)(6), the Commission suspended Ludovico from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in any penny stock offering, for 12 months (Div. Ex. 7 (Ludovico OIP) at 2).

On March 1, 2021, the district court granted in part the Commission's motion for summary judgment against Mattessich, holding that the Commission had established Cantor's primary violation of the Compensation Record Rule by virtue of the unrecorded commission payments by Ludovico to Mattessich, but that genuine issues of material fact remained regarding Mattessich's knowledge and substantial assistance of the violation. (Div. Ex. 8 (Summary Judgment Opinion) at 18–29.) On February 16, 2022, after a five-day jury trial, the jury returned a verdict in favor of the Commission finding that Mattessich aided and abetted Cantor's violation of the Compensation Record Rule. (Div. Ex. 9 (Jury Verdict) at 2.)

After post-trial briefing, the district court permanently enjoined Mattessich from future violations of the Compensation Record Rule and imposed a civil penalty of $180,000. (Remedies Opinion at 1.) In imposing an injunction, the district court found that (1) Mattessich acted with a "high degree of scienter," explaining that "the evidence at trial demonstrated that Defendant knew that his off-book commission-splitting arrangements were wrong" (*id.* at 14); (2) Mattessich's conduct was not an isolated occurrence but rather took place over the course of a decade, "involved monthly violations of the securities laws, and embroiled other Cantor employees" (*id.* at 18–20); (3) Mattessich continued to maintain that his past conduct was blameless, including after he was found liable in his post-trial submission, in which he "continues to deflect blame for his conduct by pursuing arguments that failed at trial" (*id.* at 14, 17); and (4) Mattessich's post-Cantor employment weighed in favor of an injunction because he continued to work in the securities

industry after leaving Cantor, including as head of trading at one Commission-registered investment adviser and head of trading operations at an affiliate of another, and Mattessich did not disclaim his desire to continue to do so in the future (*id.* at 21–24). For many of these same reasons, the district court imposed a civil penalty of $180,000, which represented 12 second-tier violations. (*Id.* at 26–33.)

III. Follow-On Administrative Proceeding

The *Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing* ("OIP"), dated December 22, 2022, deems this proceeding a 120-day proceeding under Rule 360(a)(2)(i). (Div. Ex. 1 at 3.) Mattessich was served with the OIP on December 23, 2022. (Div. Ex. 10 (Service Declaration) at 2.) In his answer to the OIP filed on February 2, 2023,[1] Mattessich admitted each of the factual allegations of the OIP, added additional factual commentary, raised various defenses, and requested "that this matter be decided by Motion for Summary Disposition pursuant to Rule 250 on a briefing schedule to be set by the Commission." (Div. Ex. 2 at 1–3.) The parties conducted a prehearing conference on January 23, 2023. (Div. Ex. 11 (Prehearing Conference Statement) at 1.) Both the Division and Mattessich agree that the Division has met its discovery obligations under Rule 230 by virtue of the discovery responses and document productions made to Mattessich during discovery in the district court litigation.

ARGUMENT

Under Rule 250(b), a motion for summary disposition may be granted if "there is no genuine issue with regard to any material fact and . . . the movant is entitled to a summary

[1] According to Mattessich's counsel, counsel initially attempted to file this answer on January 12, 2023, but the filing was rejected. (Div. Ex. 10 at 2.)

disposition as a matter of law." 17 C.F.R. § 201.250(b). Here, there are no issues of material fact to be decided. Mattessich admits the allegations in the OIP, albeit with additional commentary, and both the jury verdict and civil injunction entered by the district court that are the bases for this proceeding cannot be challenged. *See*, *e.g.*, *Application of Robert J. Escobio for Rev. of Action Taken by FINRA*, Exch. Act Rel. No. 83501, 2018 WL 3090840, at *4 (June 22, 2018) (quoting *Eric J. Weiss*, Exch. Act Rel. No. 69177, 2013 WL 1122496, at *5 (Mar. 19, 2013)) ("[W]e have long 'held that principles of collateral estoppel dictate that a respondent must not be permitted to retry the merits of a proceeding that results in conviction or an injunction.'").

Exchange Act Section 15(b)(6) authorizes the Commission to impose collateral bar and penny stock bars (1) if Mattessich was associated with a broker or dealer at the time of the misconduct (among other alternative criteria); (2) if he was *either* found to have willfully aided and abetted a violation of Exchange Act rules *or* enjoined from any conduct in connection with the purchase or sale of securities (or both); and (3) if the bars are "in the public interest." 15 U.S.C. §§ 78o(b)(4)(C) and (E), (6)(A)(i) and (iii).

With respect to the first two factors, Mattessich was associated with a broker-dealer (Cantor) at the time of his misconduct (Div. Ex. 1 at ¶ 1; Div. Ex. 2 at ¶ 1), the jury found that he knowingly or recklessly (and therefore willfully)[2] aided and abetted Cantor's violation of the

[2] "Willfully," for purposes of imposing relief under the Exchange Act "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)); *see also Deloitte Touche Tohmatsu Certified Pub. Accts., LLP*, Exch. Act Rel. No. 4342, 2022 WL 4597407, at *8 n. 16 (Sept. 29, 2022) (utilizing *Wonsover* standard).

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Compensation Record Rule (Div. Ex. 1 at ¶ 2; Div. Ex. 2 at ¶ 2), and he was enjoined from future violations of the rule (Div. Ex. 1 at ¶ 3; Div. Ex. 2 at ¶ 3).[3]

As for the third factor, the public interest also supports a bar based on the jury verdict, the findings in the district court's remedies opinion, and the factors in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). These factors are:

> [1] the egregiousness of the defendant's actions, [2] the isolated or recurrent nature of the infraction, [3] the degree of scienter involved, [4] the sincerity of the defendant's assurances against future violations, [5] the defendant's recognition of the wrongful nature of his conduct, and [6] the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140.

In its opinion imposing a permanent injunction and a $180,000 civil penalty against Mattessich, the district court analyzed four of the six factors, and its findings cannot be relitigated here:

- Regarding the second factor, Mattessich's conduct was recurrent, taking place on a monthly basis over the course of ten years (Remedies Opinion at 18–21);
- Regarding the third factor, Mattessich acted with a high degree of scienter (*id.* at 14–18);
- Regarding the fifth factor, Mattessich has not recognized the wrongful nature of his conduct, even continuing to "deflect blame for his conduct by pursuing arguments that failed at trial" in his post-trial submission (*id.*); and
- Regarding the sixth factor, Mattessich has continued to work in the securities industry since leaving Cantor and "there is nothing (other than

[3] The Division relies only on Mattessich's conduct after July 22, 2010, in seeking the collateral bars. *See Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017) (holding that a collateral bar cannot be imposed when the violative conduct on which a follow-on proceeding was based ended before the July 22, 2010, effective date of the Dodd-Frank Act). Indeed, the Division's proof at trial focused on Mattessich's conduct during 2013. (Remedies Opinion at 3, 26–27, 30.)

> this litigation) stopping him from seeking future employment with a broker-dealer or renewing his [securities] licenses" (*id.* at 22–24).

The remaining two *Steadman* factors also weigh in favor of imposing bars based on the undisputed facts. With respect to the first *Steadman* factor, Mattessich's conduct was egregious. Mattessich was a specially licensed supervisor at Cantor entrusted with various supervisory tasks, including compliance with applicable books-and-records rules and administering the very system of AE codes that Cantor used to comply with those rules, and yet he circumvented these rules with a subordinate he was supposed to be supervising for his own personal benefit. (*Id.* at 2–6.) Mattessich never sought approval to receive commission payments from Ludovico and he worked diligently to keep his scheme hidden, including by giving false sworn testimony to FINRA about matters that touched on his arrangement with Ludovico. (*Id.* at 5–6, 14–18.) The Commission often considers such cover-up attempts to be egregious. *See*, *e.g.*, *Fid. Transfer Servs., Inc. & Ruben Sanchez*, Exch. Act Rel. No. 34548, 2022 WL 969898, at *6 (Mar. 29, 2022) (citing *Phlo Corp., James B. Hovis, & Anne P. Hovis*, Exch. Act Rel. No. 55562, 2007 WL 966943, at *12 (Mar. 30, 2007) (characterizing as egregious transfer agent's failure to comply with staff's record request in a complete and timely manner); *vFinance Investments, Inc. & Richard Campanella*, Exchange Act Release No. 62448, 2010 WL 2674858, at *15 (July 2, 2010) (finding "egregious" conduct where broker-dealer engaged in "dilatory tactics stalling production"); *Schield Mgmt. Co. & Marshall Schield*, Exch. Act Rel. No. 53201, 2006 WL 231642, at *8–9 (Jan. 31, 2006) (finding conduct of an investment advisory firm that failed to produce documents requested as part of an examination egregious).

Finally, with respect to the second factor, to the extent Mattessich asserts that he will not commit future violations, many of the district court's findings concerning the other factors undermine such a contention. The district court found that Mattessich violated the securities laws

on a monthly basis for a decade ("one-third of his career"), that he acted with a high degree of scienter, that he attempted to hide conduct that he knew was wrong, that he has shifted blame to others throughout the course of the protracted civil litigation, and that he has continued to seek employment in the securities industry, all of which "raises a risk of future violations." (Remedies Opinion at 14–24.) *See also Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004) ("[U]nder Commission precedent, the existence of a violation raises an inference that it will be repeated.").

Indeed, Mattessich's conduct tracks closely with that in *vFinance*, where the Commission imposed a bar against an officer who aided and abetted and attempted to cover up a regulated entitiy's books-and-records violations. *vFinance*, 2010 WL 2674858, at *16. The Commission barred the officer from association with a broker-dealer with a right to re-apply after two years because the conduct, especially the cover-up, was egregious; the conduct took place over several years; and the respondent did not recognize the wrongfulness of his conduct and instead continued to shift blame to the firm. *Id.* at 15–16. This analysis is equally true, if not more so, for Mattessich.

Just as the district court, using a similar analysis, found that an injunction was warranted, the *Steadman* factors support the conclusion that collateral and penny stock bars are in the public interest and indeed necessary to protect the investing public.

CONCLUSION

For the foregoing reasons, the Commission should grant the Division's motion for summary disposition and impose against Mattessich collateral and penny stock bars, with rights to re-apply after no less than two years.

Dated: Washington, DC
March 3, 2023

Respectfully submitted,

/s/ Jason Schall

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Certificate of Service

I hereby certify that copies of the Division's Memorandum of Law and Declaration of Jason Schall, and Exhibits 1-11, were sent by the method indicated:

To the Office of the Secretary:
By eFAP

To the Respondent:
By email (ngreenspan@talkinlaw.com and dkelleher@talkinlaw.com)

/s/ Jason Schall
Jason Schall, Counsel for the Division of Enforcement

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261

In the Matter of

ADAM MATTESSICH,

Respondent.

DECLATATION OF JASON SCHALL IN SUPPORT OF THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT ADAM MATTESSICH

I, Jason Schall, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Trial Counsel in the Division of Enforcement and an attorney of record in this proceeding. As such, I have personal knowledge regarding the documents listed herein. I submit this Declaration in support of the Division's Motion for Summary Disposition against Adam Mattessich.
2. Attached hereto is a list of Division Exhibits ("Div. Ex.") that are referenced in the Division's accompanying memorandum of law.

Dated: March 3, 2023
Washington, D.C.

/s/ Jason Schall
Jason Schall

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DIVISION EXHIBIT # 	DESCRIPTION
1	Order Instituting Proceedings, *In the Matter of Adam Mattessich*, File No. 3-21261
2	Respondent's Answer, *In the Matter of Adam Mattessich*, File No. 3-21261
3	Opinion and Order, *SEC v. Mattessich*, 18 Civ. 5884 (KPF) (S.D.N.Y. Nov. 15, 2022)
4	Complaint, *SEC v. Mattessich and Ludovico*, 18 Civ. 5884 (KPF) (S.D.N.Y. June 29, 2018)
5	Order Instituting Proceedings, *In the Matter of Cantor Fitzgerald & Co.*, File No. 3-18560
6	Final Judgment as to Joseph Ludovico, *SEC v. Mattessich and Ludovico*, 18 Civ. 5884 (KPF) (S.D.N.Y. Dec. 18, 2019)
7	Order Instituting Proceedings, *In the Matter of Joseph Ludovico*, File No. 3-19625
8	Summary Judgment Opinion, *SEC v. Mattessich*, 18 Civ. 5884 (KPF) (S.D.N.Y. Mar. 1, 2021)
9	Jury Verdict, *SEC v. Mattessich*, 18 Civ. 5884 (KPF) (S.D.N.Y. Feb. 16, 2022)
10	Service Declaration, *In the Matter of Adam Mattessich*, File No. 3-21261
11	Prehearing Conference Statement, *In the Matter of Adam Mattessich*, File No. 3-21261

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EXHIBIT 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96576 / December 22, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-21261

In the Matter of **ADAM MATTESSICH,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Adam Mattessich ("Respondent" or "Mattessich").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From in or about October 2001 until in or about Feruary 2018, Mattessich was associated with Cantor Fitzgerald & Co. ("Cantor"), a broker-dealer registered with the Commission. During his tenure at Cantor, Mattessich held Series 3, 7, 24, 55, and 63 licenses and had various supervisory positions, including as global co-head of equities. Since his departure from Cantor to the present, Mattessich has been employed as either head of trading by an investment adviser or as head of trading operations at an affiliate of an investment adviser.

B. JURY VERDICT AND ENTRY OF THE INJUNCTION

2. On February 16, 2022, a jury found Mattessich liable for aiding and abetting Cantor's violation of Exchange Act Section 17(a) [15 U.S.C. § 78q(a)] and Rule 17a-3(a)(19) thereunder [17 C.F.R. § 240.17a-3(a)(19)] (the "Compensation Record Rule") in the civil action

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entitled Securities and Exchange Commission v. Mattessich, 18 Civ. 5884 (KPF), in the United States District Court for the Southern District of New York.

3. On November 15, 2022, the court presiding over the above matter, among other things, enjoined Mattessich from future violations of the Compensation Record Rule.

4. The Commission's complaint alleged that Mattessich failed to comply with the firm's established procedures for splitting commission payments among registered employees. Specifically, the complaint alleged that after his requests to receive commission compensation through ordinary channels was denied, Mattessich arranged with a subordinate to split commissions off-the-books. Mattessich and the subordinate agreed that certain accounts would be transferred to the subordinate and that the subordinate would split his commissions with Mattessich using personal checks.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondent shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

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If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Mattessich by any means permitted by the Commission's Rules of Practice.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to service of paper copies, service to the Division of Enforcement of all opinions, orders, and decisions described in Rule 141, 17 C.F.R. § 201.141, and all papers described in Rule 150(a), 17 C.F.R. § 201.150(a), in these proceedings shall be by email to the attorneys who enter an appearance on behalf of the Division, and not by paper service.

Attention is called to Rule 151(a), (b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(a), (b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed electronically in administrative proceedings using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system access through the Commission's website, www.sec.gov, at http://www.sec.gov/eFAP. Respondent also must serve and accept service of documents electronically. All motions, objections, or applications will be decided by the Commission.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 120-day timeframe specified in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) The completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) The completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) The determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

For the Commission, by its Secretary, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

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EXHIBIT 2

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261

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In the matter of

ANSWER TO ORDER INSTUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

ADAM MATTESSICH

Respondent.

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Pursuant to Securities and Exchange Commission (the "Commission") Rule of Practice 220, Defendant Adam Mattessich ("Mattessich"), by his counsel, Talkin, Muccigrosso & Roberts, LLP, answers the Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing ("OIP"), dated December 22, 2022, as follows:[1]

1. Mattessich admits the allegations in Paragraph 1 of the OIP, except adds that he has been unemployed for long periods of time since 2018 and therefore denies any potential implication from the allegations in Paragraph 1 that Mattessich has been continuously employed in the two roles listed. Moreover, while Mattessich admits that he held the titles alleged in Paragraph 1—"head of trading" and "head of trading operations"—Mattessich contends that these titles should be capitalized as they do not completely and accurately describe his actual job functions.

2. Mattessich admits the allegations contained in Paragraph 2 of the OIP.

[1] Respondent has answered Section II of the OIP, the only section in which allegations are made. Mattessich reserves the right to amend and address other Sections, should a response to another portion of the OIP be necessary.

3. Mattessich admits the allegations contained in Paragraph 3 of the OIP.

4. Mattessich admits the allegations contained in Paragraph 4 of the OIP to the Extent that they summarize some of the key allegations contained in the Complaint in the federal court case, *Securities and Exchange Commission v. Mattessich*, 18 Civ. 5884 (KPF) ("District Court Case").

DEFENSES

While it is the Division of Enforcement's burden to establish that any further relief is in the public interest pursuant to Section 15(b) of the Exchange Act, which burden Mattessich does not assume hereby, Mattessich states the following:

1. By Opinion and Order in the District Court Case, the Court imposed a civil money penalty of $180,000 and permanently enjoined Mattessich from future violations of the "Compensation Record Rule," Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), and Rule 17a-3(a)(19).

2. In combination with Respondent's conduct as proved at trial in the District Court Case, the Division of Enforcement cannot prove that it is in the public interest to permanently disqualify Mattessich from appearing and practicing before the Commission, the remedial action the Division of Enforcement stated it planned seek during the District Court Case.

3. The Division of Enforcement cannot demonstrate it is in the public interest to impose a permanent bar against Respondent for multiple reasons, including because:

a. The violations involved do not involve fraudulent statements and misrepresentations;

b. There is no evidence that any customer or counterparty was harmed by the violations;

c. No forfeiture was requested by the Division of Enforcement because no party suffered a demonstrable loss as a result of the violations;

d. Mattessich has no prior disciplinary history;

e. The violative conduct ceased ten years ago, and there is no indication that Mattessich has engaged in any additional misconduct;

f. In addition to the sanctions imposed by the Court, Mattessich has also suffered substantial collateral consequences from his actions, including the loss of his career as a broker, expiration of his securities licenses, and the loss of substantial deferred compensation from his previous employer.

Mattessich reserves the right to supplement the above-enumerated list with additional factors weighing against a permanent bar. Mattessich requests that this matter be decided by Motion for Summary Disposition pursuant to Rule 250 on a briefing schedule to be set by the Commission.

Dated: New York, NY
January 12, 2023

Respectfully submitted,

[redacted]

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EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -v.- ADAM MATTESSICH, Defendant.	18 Civ. 5884 (KPF) **OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

Following a five-day jury trial, Adam Mattessich ("Defendant") was found liable for aiding and abetting violations of Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), and Rule 17a-3(a)(19) (the "Compensation Record Rule") promulgated thereunder. The United States Securities and Exchange Commission ("Plaintiff") now seeks a permanent injunction against Defendant for future violations of the Compensation Record Rule, as well as a civil penalty of $240,000. For the reasons stated in the remainder of this Opinion, the Court grants in part Plaintiff's motion for post-trial remedies, permanently enjoins Defendant from future violations of the Compensation Record Rule, and imposes a civil penalty of $180,000.

BACKGROUND[1]

A. Factual Background

1. Defendant's Role at Cantor Fitzgerald, His Supervision of Traders, and His Receipt of Off-Book Commission Payments

The Court recounts only the facts relevant to the instant motion for post-trial remedies. Defendant rejoined Cantor Fitzgerald & Co. ("Cantor") in 2001 following a brief hiatus from the company. (Tr. 393:2-8). Thereafter, Defendant took the Series 24 exam, passed it, and became a supervisor at Cantor. (*Id.* at 393:14-394:25).[2] By 2004, Defendant was promoted to head of the international equities desk; in that position, he oversaw Joseph Ludovico ("Ludovico") and other Cantor employees. (*Id.* at 444:9-14). At Cantor, registered employees like Ludovico were supervised by superiors who had Series 24 licenses, like Defendant. (*Id.* at 89:17-90:13). By dint of passing the Series 24 exam, these licensees were knowledgeable of the applicable securities

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1 The facts set forth in this Opinion are principally drawn from the trial record in this case. ("Tr."). The Court sources additional facts from the Declaration of Philip A. Fortino and its attached exhibits (Dkt. #135 ("Fortino Decl.")) and the Declaration of Adam Mattessich (Dkt. #137 ("Mattessich Decl.")).

For ease of reference, the Court refers to Plaintiff's memorandum of law in support of its motion for post-trial remedies as "Pl. Br." (Dkt. #134); Defendant's memorandum of law in opposition as "Def. Opp." (Dkt. #136); and Plaintiff's reply memorandum of law as "Pl. Reply" (Dkt. #138).

2 According to the Financial Regulatory Authority, or "FINRA," which administers the exam, the Series 24 General Principal Securities Exam

> qualifies a candidate as a general securities principal for FINRA only. By passing the Series 24, the candidate can supervise all areas of the member's investment banking and securities business, such as underwriting, trading and market making, advertising, or overall compliance with financial responsibilities.

SERIES 24 – GENERAL SECURITIES PRINCIPAL EXAM, https://www.finra.org/registration-exams-ce/qualification-exams/series24 (last accessed Nov. 14, 2022).

rules and regulations, and could ensure that employees complied with such rules. (*Id.* at 90:1-10, 91:10-92:2, 101:14-20).

Defendant continued supervising Ludovico through 2013. (Tr. 385:3-11). That year, Ludovico cut checks directly to Defendant to remit a portion of the commissions Ludovico received from Cantor. (*Id.* at 385:14-23). Defendant received twelve such checks from Ludovico in 2013, totaling $58,200. (*Id.* at 386:25-387:3; *see also* Fortino Decl., Ex. 1 (Trial Exhibit PX-1 ("PX-1") (summary of checks))). But 2013 was not the only year in which Defendant received such checks from Ludovico; rather, Ludovico sent Defendant monthly checks handing over a portion of his commissions for some ten years, from approximately 2003 through 2013. (Tr. 387:5-23; *see also id.* at 388:2-389:24 (discussing 2011 and 2012 payments from Ludovico to Defendant)).

Defendant was aware that Cantor was required to keep records of commissions paid to its registered representatives. (Tr. 400:11-401:12). Cantor did so through the use of account executive ("AE") codes, which tracked the traders who worked on transactions and the persons to whom commissions should be paid for such transactions. (*Id.* at 424:15-24). Defendant helped administer these codes, and could approve changes to them, including changes to which employees would receive commissions on customer accounts. (*Id.* at 244:14-245:14, 256:12-18, 271:13-24, 452:7-453:9, 455:16-19). Accordingly, Defendant or Ludovico could have requested that accounts be split such that their AE codes would reflect commission payment splits between Ludovico and Defendant. (*Id.* at 456:10-24). However, only Ludovico's AE code was assigned

to the customer accounts that both he and Defendant covered. (*Id.* at 441:12-442:18 (accounts referred to at trial as the "Canadian accounts"), 442:19-443:10 (additional accounts), 444:9-20 (accounts following Defendant's promotion to Ludovico's supervisor)).[3] Ludovico's off-book payments to Defendant were — by definition if not by design — not reflected in the AE code system; instead, the system indicated that Ludovico alone was receiving these commissions. (*Id.* at 447:23-450:9).

Defendant was also aware that he was bound by Cantor's Written Supervisory Procedures ("WSPs"). (Tr. 407:3-408:11). One of the rules included in the WSPs noted:

> I agree that I will not take, accept or receive directly or indirectly from any person, firm, corporation or association, other than Cantor Fitzgerald, compensation of any nature, as a bonus, commission, fee, gratuity, or other consideration, in connection with any security or commodities, transaction or transactions, except with the prior written consent of Cantor Fitzgerald.

(*Id.* at 408:16-409:3). Defendant testified as to his belief that his arrangement with Ludovico did not run afoul of this rule, because Ludovico received his commissions from Cantor, and thus Defendant also received his commission payments from the company, albeit indirectly. (*Id.* at 543:8-22).

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[3] Defendant offered evidence at trial that, because of an administrative snafu, his own AE code was assessed extensive, but erroneous fees. (*See, e.g.*, Tr. 505:15-24 (testifying that the "fee issue" associated with Defendant's AE code affected accounts Defendant covered with Ludovico, including the Canadian accounts)). Once Cantor learned of Defendant's arrangement with Ludovico in late 2013, Defendant initiated a conversation with Ron Wexler. (*Id.* at 527:12-25). After this conversation, the "administrative fee issue" associated with Defendant's AE code was resolved, and Defendant began receiving commission compensation from Cantor through his regular monthly paycheck. (*Id.* at 528:1-10; *see also id.* at 575:7-13 (same)).

Further, Defendant testified at trial that he had a conversation with Cantor's then-CEO Phil Marber in December 2001 or January 2002 about requesting permission to have Defendant's AE code receive commissions from certain Cantor customers, like Smith Capital. (Tr. 431:6-24; *see also id.* at 433:10-19). Defendant did not receive such permission; instead, he was told that the compensation issue would be sorted out later. (*Id.* at 433:22-436:13). Following this conversation, the AE code for Jacob Schrader, a sales trader on Cantor's international desk, was assigned to the Smith Capital account. (*Id.* at 436:14-22). Defendant and Schrader then agreed that Schrader would pay over to Defendant a portion of the commissions on the account by check. (*Id.* at 436:23-438:21). At trial, Defendant testified that he was entitled to compensation for accounts like Smith Capital, but that there were administrative issues associated with his receiving commissions for such work. (*Id.* at 497:4-9, 498:2-4, 505:6-14 (testifying that the "fee issue" existed in 2002 and continued to exist in 2013)).

Defendant likewise did not receive approval for his commission-splitting arrangement with Ludovico. (Tr. 445:18-25, 450:14-23). When Defendant did disclose to certain superiors that he was receiving commissions from Ludovico, he did not disclose that the commissions were off the books and paid through personal check. (*Id.* at 450:10-451:3 (disclosing fact of commission split to Elon Spar, but failing to disclose that Defendant had not received permission to split commissions or that payments were not reflected by AE codes)). Nor did Defendant report the payments he received from Ludovico and other Cantor

employees on his tax returns. (*Id.* at 447:8-22). In sworn testimony before FINRA, Defendant stated that he did not receive compensation for servicing certain accounts, despite the fact that Ludovico was paying commissions to Defendant by personal check. (*Id.* at 467:18-468:24).[4] Defendant also stated that he did not have information about Ludovico's compensation, even though Ludovico made commission payments to him and Defendant received information about Ludovico's compensation as part of Ludovico's year-end review. (*Id.* at 471:1-23).

By the end of 2013, Cantor became aware of Defendant's arrangement with Ludovico after the latter disclosed it, and Cantor notified Defendant that the payments had to stop. (Tr. 471:24-472:24). Following this disclosure, Defendant was asked about the payments he received from Ludovico. (*Id.* at 472:11-22). During this conversation, Defendant did not inform Cantor of payments he received from other traders, like Schrader. (*Id.* at 472:25-473:2; *see also id.* at 474:14-480:2 (failing to disclose that others at Cantor, including Schrader, were making off-book commission payments, when asked by Plaintiff during deposition)).

At trial, Defendant testified that prior to 2014, he was not aware of the fact that off-book commission splitting arrangements were prohibited at Cantor. (Tr. 546:13-547:7). Other witnesses similarly testified that they did

[4] Defendant disputes certain representations Plaintiff makes about Defendant's FINRA testimony. (Def. Opp. 16 n.3 ("[T]he SEC asserts that [Defendant] lied during FINRA testimony in 2013, though a close examination of the transcript demonstrates that he was never asked whether he was splitting commissions and his answers to the questions asked were entirely truthful[.]")).

not believe that such arrangements violated any regulatory requirements, and that Cantor announced a new policy prohibiting such arrangements only in 2014. (*See, e.g.*, *id.* at 698:15-700:19). Still other witnesses at trial, including Schrader (*id.* at 234:2-7), Ludovico (*id.* at 366:5-11), and David Pennella (*id.* at 738:4-10), testified that off-book commission splitting via checks occurred out in the open at Cantor, and that no one perceived a need to hide such arrangements.

2. The Jury Verdict

At trial, the jury concluded that Defendant aided and abetted Cantor's violations of the Compensation Record Rule. (Tr. 894:14-19; *see also* Dkt. #116 (Jury Verdict)). Prior to the jury's verdict, this Court charged the jury, and explained the elements of an aiding and abetting claim under Section 20(e) of the Exchange Act. (Dkt. #115 at 19). In particular, the Court instructed the jury that in order to find Defendant liable for aiding and abetting, Plaintiff must prove three elements by a preponderance of the evidence:

> *First*, that a person or entity other than [Defendant] — here, Cantor Fitzgerald — violated the Compensation Record Rule. *Second*, that [Defendant] knew of, or recklessly disregarded, Cantor Fitzgerald's violation of the Compensation Record Rule. This element is sometimes called the scienter element. *Third*, that [Defendant] provided substantial assistance to Cantor Fitzgerald in connection with that violation.

(*Id.*). The Court also provided detailed instructions to the jury on how Plaintiff could prove each element, including scienter. (*Id.* at 20-23).

3. Defendant's Post-Cantor Experience

Since leaving Cantor, Defendant has worked for both Hondius Capital Management ("Hondius") and Domain Money. (Fortino Decl., Ex. 4 at 24:4-26:8; Ex. 5 at 18). Hondius is a registered investment adviser founded by former Cantor employees. (Fortino Decl., Ex. 4 at 24:4-26:8; Mattessich Decl. ¶ 9). Although Defendant avers that he "worked primarily as a market researcher and mentor to junior analysts" while at Hondius (Mattessich Decl. ¶ 10), and "had no discretion to buy or sell any security" at the firm (*id.*), Defendant was promoted to Head of Trading at some point during his tenure at the company (Fortino Decl., Ex. 5 at 18). Defendant left Hondius in October 2020, citing "the negative publicity generated by this case[.]" (Mattessich Decl. ¶¶ 9, 11). In December 2021, Defendant joined Domain Money. (*Id.* at ¶ 14). There, Defendant "act[s] as the central operational contact and source of market knowledge" for various employees at the company. (*Id.* at ¶ 17). Although Domain Money owns a separate legal entity that operates as a registered investment adviser, Defendant claims that he has no involvement with that entity. (*Id.* at ¶ 16).

Despite securing positions at both Hondius and Domain Money, Defendant laments that it has been difficult to find steady employment. (Mattessich Decl. ¶¶ 6-7). For example, Defendant alleges that, since February 2018, he has been unemployed for at least twenty-six months, and has applied for over 615 positions, many of which are outside of the securities industry. (*Id.*). Further, Defendant states that "there is no current prospect that [he] will

ever again attain a position at an investment advisor, even in a non-registered role"; indeed, as a result of his lack of registration, Defendant's securities licenses expired over two years ago. (*Id.* at ¶¶ 11, 13).

Defendant also claims to have suffered various personal hardships. He claims that Cantor allegedly owes him approximately $900,000 in deferred compensation, which money the company refuses to pay. (Mattessich Decl. ¶ 18). Defendant has also incurred legal fees in the six-figure range defending himself in this case. (*Id.* at ¶ 19). And he has suffered from various health-related issues. (*Id.* at ¶¶ 20-23).

B. Procedural Background

This case was initiated on June 29, 2018, when Plaintiff filed a complaint against Defendant and Ludovico, alleging that both Defendants had aided and abetted Cantor's violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(19). (Dkt. #1). On August 30, 2018, the Court held a pre-motion conference, at which Defendants discussed their intentions to move to dismiss the complaint against them. (Dkt. #32; August 30, 2022 Minute Entry). Following the submission of the parties' briefing on the motion to dismiss (Dkt. #36, 39, 40), this Court denied Defendants' motion (Dkt. #41 (Opinion and Order of September 6, 2019)). *See S.E.C.* v. *Mattessich*, 407 F. Supp. 3d 264 (S.D.N.Y. 2019).[5]

[5] Given the many different ways in which Plaintiff is identified in various opinions, the Court adopts the abbreviation "S.E.C." for its citations in this Opinion.

Thereafter, Ludovico settled with Plaintiff (Dkt. #57), and this Court entered a final judgment as to him on December 18, 2019 (Dkt. #58). By its terms, the final judgment permanently enjoins Ludovico from violating Section 17(a) of the Exchange Act and Rule 17a-3(a)(19). (*Id.* at 1). Ludovico was also ordered to pay a civil penalty of $25,000. (*Id.* at 2).

Following the close of fact discovery, Plaintiff indicated that it wished to move for summary judgment against Defendant. (Dkt. #62). On March 18, 2020, the Court held a pre-motion conference at which the parties discussed Plaintiff's contemplated motion for summary judgment, and the Court set a briefing schedule. (March 18, 2020 Minute Entry). Plaintiff filed its motion for summary judgment and supporting papers on the issue of Defendant's liability on May 1, 2020. (Dkt. #64-67). Defendant filed his opposition papers on June 19, 2020. (Dkt. #68-70). And Plaintiff filed its reply papers on July 7, 2020. (Dkt. #71-72). In its reply memorandum of law, Plaintiff requested that the Court strike portions of an affidavit from Ron Wexler, a former Cantor senior executive. (Dkt. #71 at 2-4). On July 9, 2020, Defendant requested leave to file a sur-reply brief, responding to Plaintiff's request to strike portions of the affidavit. (Dkt. #73). The Court granted this request (Dkt. #74), and Defendant filed his sur-reply brief on July 10, 2020 (Dkt. #75).

On March 1, 2021, the Court denied Plaintiff's motion to strike portions of the Wexler affidavit (Dkt. #76 at 10-14), and granted in part and denied in part Plaintiff's motion for summary judgment (*id.* at 14). *See S.E.C.* v. *Mattessich*, No. 18 Civ. 5884 (KPF), 2021 WL 797669 (S.D.N.Y. Mar. 1, 2021).

In particular, the Court found that Plaintiff established a primary violation of the Compensation Record Rule (Dkt. #76 at 18-21); that a disputed issue of material fact existed as to Defendant's knowledge of the violation (*id.* at 21-24); and that a disputed issue of material fact existed as to whether Defendant substantially assisted in Cantor's primary violation (*id.* at 24-29).

A jury trial commenced on February 9, 2022. (February 9, 2022 Minute Entry). The trial continued over five days (Minute Entries for February 9-15, 2022), and on February 16, 2022, the jury rendered its verdict finding that Defendant had aided and abetted Cantor's violation of the Compensation Record Rule (Dkt. #116).

On February 28, 2022, the parties submitted a joint letter to the Court to propose a briefing schedule on the issue of post-trial remedies. (Dkt. #131; *see also* Dkt. #132 (endorsement of schedule)). On March 28, 2022, Plaintiff filed its motion for post-trial remedies and supporting papers. (Dkt. #133-35). On April 18, 2022, Defendant filed his opposition memorandum of law and supporting declaration. (Dkt. #136-137). And on April 29, 2022, Plaintiff filed its reply memorandum of law. (Dkt. #138).

DISCUSSION

A. Civil Remedies for a Federal Securities Law Violation

"Once [a] district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies[.]" *S.E.C.* v. *First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). Such remedies may include civil penalties and injunctive relief. *S.E.C.* v. *Frohling*, 851 F.3d 132, 138 (2d

Cir. 2016). In this case, Plaintiff requests that the Court enter a permanent injunction against Defendant and assess second-tier civil penalties totaling $240,000. (Pl. Br. 1).

B. The Court Permanently Enjoins Defendant from Future Violations of the Compensation Record Rule[6]

1. Applicable Law

"Injunctive relief is expressly authorized by Congress to proscribe future violations of federal securities laws." *S.E.C.* v. *Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998) (citing 15 U.S.C. § 78u(d)). "Such relief is warranted if there is a reasonable likelihood that [a] defendant[] will commit future violations of the securities laws." *S.E.C.* v. *Am. Growth Funding II, LLC*, No. 16 Civ. 828 (KMW), 2019 WL 4623504, at *1 (S.D.N.Y. Sept. 24, 2019) (citing *S.E.C.* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978)). Indeed, "[t]o award such relief, a court must look beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence"; "[a] jury's liability findings do not by themselves provide an adequate basis for granting permanent injunctive relief[.]" *In re Rsrv. Fund Sec. & Derivative Litig.*, No. 09

[6] In its opening brief, Plaintiff notes that it is seeking to permanently enjoin Defendant from "future violations of Section 17(a) of the Securities Exchange Act of 1934 … and Rule 17a-3(a)(19) (the 'Compensation Record Rule')[.]" (Pl. Br. 1). At other points in its briefing, Plaintiff only refers to seeking a permanent injunction as to future violations of the Compensation Record Rule. (*See, e.g.*, *id.* at 3; *id.* at 12). In his opposition brief, Defendant highlights this lack of clarity as to Plaintiff's requested relief. (Def. Opp. 8 n.1 (noting Plaintiff's inconsistent requests for relief, and stating that "[f]or purposes of this opposition, [Defendant] assumes that the requested injunction relates only to violation of the Compensation Record Rule")). Despite Defendant calling attention to this inconsistency, Plaintiff's reply offers no clarity on the requested injunctive relief. Accordingly, the Court construes Plaintiff's requested permanent injunction to pertain only to future violations of the Compensation Record Rule.

Civ. 4346 (PGG), 2013 WL 5432334, at *22 (S.D.N.Y. Sept. 30, 2013) (internal quotation marks and citations omitted).

In assessing the propriety of an injunction, courts within the Second Circuit balance the following factors:

> [i] the fact that [the] defendant has been found liable for illegal conduct; [ii] the degree of scienter involved; [iii] whether the infraction is an "isolated occurrence;" [iv] whether [the] defendant continues to maintain that his past conduct was blameless; and [v] whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

Commonwealth Chem. Sec., Inc., 574 F.2d at 100 (internal citation omitted); *see also Cavanagh*, 155 F.3d at 135 (citing these factors). Further, "'in assessing the strength of the showing concerning likelihood of future violations, the [C]ourt should consider the specific nature of the injunctive relief sought.'" *S.E.C.* v. *Bronson*, 246 F. Supp. 3d 956, 974 (S.D.N.Y. 2017) (quoting *S.E.C.* v. *Lipkin*, No. 99 Civ. 7357 (VVP), 2006 WL 435035, at *1 (E.D.N.Y. Jan. 9, 2006)), *aff'd*, 756 F. App'x 38 (2d Cir. 2018) (summary order), *as amended* (Nov. 20, 2018).

2. Analysis

Plaintiff argues that each of the five factors discussed in *Commonwealth Chemical Securities* weighs in favor of a permanent injunction in this case. In particular, Plaintiff notes that Defendant: (i) was found liable of aiding and abetting Cantor's violations of the Compensation Record Rule at trial (Pl. Br. 3); (ii) acted with a "*high* degree of scienter" as demonstrated by the jury's finding at trial, Defendant's knowledge that off-book commission payments resulted in

Cantor having inaccurate records, and Defendant's attempts to conceal his conduct (*id.* at 3-4); (iii) engaged in that conduct as "part of a long-running, illegal scheme," rather than an isolated episode (*id.* at 4-5); (iv) has failed to acknowledge that his conduct was wrongful (*id.* at 5-6); and (v) has been employed post-Cantor in positions where future violations can be expected (*id.* at 6-7). Defendant does not dispute that he was found liable at trial, but argues that the record does not support Plaintiff's views on the other factors the Court should consider. (Def. Opp. 1-3). Defendant further argues that Plaintiff's request for a permanent injunction is an impermissible attempt at punishing him, rather than a prophylactic measure to protect the investing public. (*Id.* at 14-15).

a. Defendant's Scienter and Continued Protestations That His Conduct Was Blameless Counsel in Favor of the Requested Injunctive Relief

The record at trial evinces Defendant's high degree of scienter, while the broader record of this case reflects Defendant's continued protestations that his conduct was blameless. At a minimum, the jury found that Defendant acted knowingly or recklessly, an element of the aiding and abetting violation that Plaintiff was required to prove by a preponderance of the evidence at trial. (Pl. Br. 3 (citing Dkt. #115 at 19-22 (Jury Charge) (explaining the scienter element))). And the evidence at trial demonstrated that Defendant knew that his off-book commission-splitting arrangements were wrong.

Among other facts proven at trial, Defendant knew that Cantor was required to keep accurate records of commissions (Tr. 400:11-401:12), and that

the company used AE codes to discharge that requirement (*id.* at 424:15-24). Indeed, Defendant helped administer the AE codes at Cantor. (*Id.* at 244:14-245:14, 256:12-18, 271:13-24, 452:7-453:9). When Defendant received off-book commission payments from employees like Ludovico, he knew that such payments were not reflected in Cantor's books and records, as the AE codes did not capture them. (*Id.* at 447:23-450:9). As a supervisor, Defendant was required to remain knowledgeable of applicable securities rules and regulations, and it was incumbent upon him to make sure that other employees complied with such regulations. (*Id.* at 90:1-10, 91:10-92:2, 101:14-20). Instead, Defendant assisted in perpetuating a culture at Cantor of off-book commission payments that violated the Compensation Record Rule.

On this point, the Court finds neither the culture at Cantor — which, to be clear, was exacerbated by Defendant's own conduct in this case — nor the fact that off-book commission-splitting took place in the open, to be a mitigating factor. Instead, such evidence merely suggests that others were also committing securities violations, and that supervisors like Defendant did nothing to redress the issue. The trial evidence makes plain that Cantor's WSPs prohibited receipt of commissions from any source other than Cantor itself. (Tr. 408:16-409:3). Although Defendant testified that he believed his payment arrangements with the other traders did not run afoul of this rule (*id.* at 543:8-22), he also studiously avoided confirming that belief. As noted, Defendant never received permission to receive off-book payments. (*Id.* at 445:18-25, 450:14-23; *see also id.* at 437:19-438:23). And when Defendant

did disclose the fact that he was receiving commissions, he failed to disclose that they were paid off the books. (*Id.* at 450:10-451:3). Defendant had ample opportunity to seek clarity as to whether his off-book commission payments were allowed at Cantor, or whether they constituted securities violations. He also could have sought to resolve the "fee issue" associated with his receiving commissions. (*Id.* at 505:6-24). Instead, Defendant appears to have either been willfully blind, or to have taken advantage of the proclaimed lack of clarity at Cantor. (*See, e.g.*, *id.* at 433:22-436:12 (testifying regarding a conversation with Phil Marber, in which Defendant was told that his compensation would be sorted out later)).

Further, the Court echoes the jury's conclusion that Defendant's explanations regarding his failure to disclose his off-book commission payments as income on his taxes or in his FINRA testimony were unsatisfactory. (*See* Def. Opp. 16 n.3 (noting that failure to disclose payments on his tax returns was "an honest mistake" and that his answers before FINRA were "entirely truthful")). Defendant did not testify at trial that his failure to report his off-book commission payments on his taxes was a mistake. (Pl. Reply 3-4 n.2). And while asserting that his FINRA testimony was truthful, Defendant admitted at trial that he told FINRA he did not cover any accounts, when in fact he was doing so with Ludovico. (Tr. 467:18-468:24). Further, Defendant's statements to FINRA as to whether he knew about Ludovico's compensation were at best disingenuous, given the commission-splitting arrangement Defendant maintained with Ludovico. (*See id.* at 470:8-471:23).

To be clear, the Court does not hold Defendant's legal defenses at trial against him. (*See* Def. Opp. 15-18). But even in his post-trial submission, Defendant continues to deflect blame for his conduct by pursuing arguments that failed at trial; these include, among other things, harping on the administrative issues associated with his AE code, and the fact that others at Cantor engaged in off-book commission splitting arrangements in the open, as well as re-litigating issues associated with his tax returns and FINRA testimony. *See, e.g.*, *S.E.C.* v. *Lorin*, 76 F.3d 458, 461 (2d Cir. 1996) ("We have also noted that the court may properly view a culpable defendant's continued protestations of innocence as an indication that injunctive relief is advisable." (citing *S.E.C.* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972))); *Frohling*, 851 F.3d at 139 (finding district court did not abuse its discretion in ordering relief given defendant's "continued manifestation of a lack of concern for his responsibilities under the federal securities laws"); *Am. Growth Funding II, LLC*, 2019 WL 4623504, at *1 ("As [d]efendants' opposition to the requested relief demonstrates, they continue to dispute their blame for the illegal conduct."). To the extent that Defendant attempts to distinguish these cases, such attempts are unavailing. (*See* Def. Opp. 17). That the cases may involve "deception and investor injury" does nothing to assuage the Court's concern that, even today, Defendant does not appreciate the wrongfulness of his Compensation Record Rule violations. (*See id.*). Plaintiff does not seek an injunction against Defendant as to other securities laws; it seeks an injunction as to violations of the Compensation Record Rule, precisely

the violation that Defendant continues to dispute today. (*See* Pl. Reply 3). *See also Am. Growth Funding II, LLC*, 2019 WL 4623504, at *1 ("[T]he injunction is not onerous because it merely requires [d]efendants not to break the law." (citing *Bronson*, 246 F. Supp. 3d at 974)).

b. The Fact That Defendant's Conduct Was Not an Isolated Incident Counsels in Favor of the Requested Injunctive Relief

There is no dispute that Defendant received off-book commission payments on more than one occasion. (*See, e.g.*, Pl. Br. 4 (citing PX-1)). Nor is there any dispute that Defendant received off-book commission payments from Cantor employees for at least ten years. (*See id.* (citing Tr. 387:5-23, 440:7-13, 444:9-20) (testimony that Defendant received approximately one check per month from 2003 to 2013)). However, Defendant asks the Court to view his conduct as "a single episode because it involved a single arrangement to divide commission dollars," and because the finding at trial was his "first and only securities law violation." (Def. Opp. 12-13). The Court declines the invitation.

Defendant's conduct took place over a period of years, involved monthly violations of the securities laws, and embroiled other Cantor employees. *See, e.g.*, *Lorin*, 76 F.3d at 461 ("When the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct." (quoting *United States* v. *Carson*, 52 F.3d 1173, 1184 (2d Cir. 1995) (internal quotation marks omitted))); *Am. Growth Funding II, LLC*, 2019 WL 4623504, at *1 ("The violations continued over a period of years, and were not simply an isolated occurrence of bad judgment."); *S.E.C.* v.

Opulentica, LLC, 479 F. Supp. 2d 319, 329 (S.D.N.Y. 2007) ("[Defendant's] behavior did not arise from a single, isolated incident, but rather represented a continuing course of wrongful conduct of more than eighteen months."). Although Defendant seeks to distinguish Plaintiff's cases on the basis that they involve insider trading, market manipulation, and other fraudulent conduct (Def. Opp. 13 & n.2), he concedes that his "commission-splitting arrangement lasted a number of years" (*id.* at 13).

Once again, as it relates to the Compensation Record Rule — future violations of which Plaintiff seeks to permanently enjoin now — Plaintiff's cited cases shed light on whether the Court should view Defendant's conduct as isolated or long-running. Accepting Defendant's contention that his conduct was isolated because it was different in kind, even though it was in fact repeated, would suggest that no one could be permanently enjoined from violating the Compensation Record Rule. The Court finds no reason to create such a precedent.

Instead, the Court finds Defendant's proffered cases to be readily distinguishable. *See In re Rsrv. Fund Sec. & Derivative Litig.*, 2013 WL 5432334, at *23 (finding that defendant's conduct was isolated because it "took place over a period of less than 36 hours[,]" and because "the SEC has not offered proof of other violations committed by" defendant); *S.E.C.* v. *Ingoldsby*, No. Civ. A. 88 1001 MA, 1990 WL 120731, at *2 (D. Mass. May 15, 1990) ("The mere fact of a single past violation by the defendant does not demonstrate a realistic likelihood of recurrence."). Defendant's conduct took place over the

course of *years*, not hours. And while the jury's finding represents the first securities law violation for which Defendant was found liable, this may merely be a result of the fact that it took years for his conduct to come to light, and for Plaintiff to initiate an enforcement action. It is true that Defendant has worked in the securities industry for nearly thirty years (Def. Opp. 14); it is also true that he engaged in conduct violative of the securities laws for one-third of his career.

As a final effort to convince the Court that a permanent injunction is unnecessary because his conduct was an isolated occurrence, Defendant argues that nine years have passed since the relevant violations. (Def. Opp. 14). While it is true that such passage of time militates against a permanent injunction, *see, e.g.*, *S.E.C.* v. *Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007) ("The Court also notes that several years have passed since [d]efendants' alleged misconduct apparently without incident. This fact further undercuts the Commission's assertion that [d]efendants pose a continuing risk to the public."); *S.E.C.* v. *Dibella*, No. 04 Civ. 1342 (EBB), 2008 WL 6965807, at *13 (D. Conn. Mar. 13, 2008) ("[T]he passage of nearly 10 years without another violation weighs heavily against an injunction."), *aff'd*, 587 F.3d 553 (2d Cir. 2009), the passage of time "is just one factor among several to be weighed" by the Court, *Lorin*, 76 F.3d at 461 (citing *S.E.C.* v. *Universal Major Industries Corp.*, 546 F.2d 1044, 1048 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977)). In light of the facts that Defendant's conduct spanned a decade and involved recurring securities violations throughout that period, the Court

remains concerned that Defendant may violate the Compensation Record Rule in the future. Indeed, half of the nine-year period to which Defendant points has been spent litigating this case, during which time Defendant maintained his blamelessness and minimized his conduct. *See supra* Section B.2.a.

c. Defendant's Post-Cantor Work Experience Counsels in Favor of the Requested Injunctive Relief

The parties disagree as to whether Defendant's post-Cantor experience heightens the risk of further violations of the Compensation Record Rule. Plaintiff argues that Defendant has continued to work in the securities industry since leaving Cantor, and thus "his continued role … puts him in a position where future violations could be anticipated." (Pl. Br. 7). For example, over the last four years, Defendant has worked for Hondius and Domain Money. (Fortino Decl., Ex. 4 at 24:4-26:8; Ex. 5 at 18). And at some point during his time at Hondius, a registered investment adviser, Defendant was promoted to Head of Trading. (*Id.*, Ex. 5 at 18). Defendant contends that Plaintiff's picture of his post-Cantor experience is inaccurate. He argues that he spent most of his time at Hondius in a lower-level position, at which he "had no discretion to buy or sell any security." (Mattessich Decl. ¶ 10). And he notes that he left Hondius in October 2020 due to the negative publicity of this case. (*Id.* at ¶¶ 9, 11). Further, while Plaintiff claims that Domain Money is a registered investment adviser and that Defendant works in a trading-related capacity at the company (Pl. Br. 7), Defendant avers that he does not work for Domain Money's registered investment adviser (Mattessich Decl. ¶ 16). Finally, Defendant points to the difficulties he has faced in finding steady employment

since leaving Cantor (*id.* at ¶¶ 6-7), and the fact that he has applied for over 615 positions since leaving the company, many of which are outside of the securities industry (*id.*). As a result, his securities licenses expired over two years ago. (*Id.* at ¶¶ 11, 13).

The record is thus mixed as to Defendant's post-Cantor work in the securities industry. The Court agrees with Defendant that many of the cases Plaintiff cites with respect to this factor are not directly on point, insofar as Defendant claims that he does not currently work in a position where he trades securities and his licenses have lapsed. (*See* Def. Opp. 10-11). *See S.E.C.* v. *Savino,* No. 01 Civ. 2438 (GBD), 2006 WL 375074, at *17 (S.D.N.Y. Feb. 16, 2006) (finding defendant was "in a position to engage in further fraudulent conduct" in part due to "his current occupation as a licensed securities professional trading bonds for a broker-dealer"), *aff'd in part, remanded in part*, 208 F. App'x 18 (2d Cir. 2006) (summary order); *S.E.C.* v. *U.S. Env't, Inc.*, No. 94 Civ. 6608 (PKL) (AJP), 2003 WL 21697891, at *25 (S.D.N.Y. July 21, 2003) ("[I]n light of the fact that [individual defendant] continues to operate [corporate defendant] as a registered broker-dealer, and the fact that [corporate defendant's] website claims that [it] will continue to underwrite public offerings of securities, it is clear that [corporate defendant] and [individual defendant] will have several opportunities to commit future securities violations."), *aff'd*, 114 F. App'x 426 (2d Cir. 2004) (summary order).

Yet Defendant has, at a minimum, worked in the securities industry since leaving Cantor. And, as Plaintiff notes, Defendant has not disclaimed any

desire or intent to continue working in that industry. (*See* Pl. Reply 4). Although Defendant has found it difficult to find employment in the industry since leaving Cantor, he has continued to find such work. (*Id.* at 4-5). While at Hondius, Defendant ascended to the position of Head of Trading. (Fortino Decl., Ex. 5 at 18). Further, even taking as true Defendant's representations about his employment at Domain Money, his job title is Head of *Trading* Operations. (*Id.*). Defendant has thus continued to work in the securities industry and to seek promotions within that industry. Although he represents to the Court that his securities licenses are "unlikely to ever be renewed," and that he has not had an impact on Hondius's or Domain Money's obligations under the Compensation Record Rule (Def. Opp. 10-11), there is nothing (other than this litigation) stopping him from seeking future employment with a broker-dealer or renewing his licenses. Defendant is thus differently situated than the defendants in the cases on which he relies to make his point that a permanent injunction is unnecessary. *See In re Rsrv. Fund Sec. & Derivative Litig.*, 2013 WL 5432334, at *23 (considering facts that corporate entities were now "defunct" and that individual defendant left the securities industry and now worked in patent licensing); *Dibella*, 2008 WL 6965807, at *13 (observing that defendant was "not regularly employed in the securities industry" and violation arose from political and lobbying work).

As is clear from the Court's discussion, consideration of whether an injunction is warranted is fact-intensive, and does not lend itself to bright-line rules. In highlighting that he does not currently work in a registered capacity

and that he has not received commission compensation since leaving Cantor, Defendant argues that such facts are sufficient to deny the requested injunction. (Def. Opp. 10). The caselaw says otherwise. *See, e.g.*, *In re Rsrv. Fund Sec. & Derivative Litig.*, 2013 WL 5432334, at *23 (considering totality of the circumstances when weighing whether injunctive relief was necessary, and finding that defendant's conduct was "merely negligent," that it was isolated, that it took place over the course of only 36 hours, and that defendant no longer worked in securities); *S.E.C.* v. *Dang*, No. 20 Civ. 01353 (JAM), 2021 WL 1550593, at *6 (D. Conn. Apr. 19, 2021) ("[W]hile [defendant] has failed to appear in this matter and it is unclear whether [defendant] continues to work as an investment adviser, [his] egregious conduct is sufficient to weigh in favor of granting a permanent injunction[.]"). The Court finds that Defendant's continued employment in the securities industry, in addition to the other factors the Court has discussed, raises a risk of future violations, and thus militates in favor of a permanent injunction here.

d. A Permanent Injunction in This Case Is Not an Impermissible Attempt at Punishment

Although not one of the *Commonwealth Chemical Securities* factors, Defendant argues that a permanent injunction here is an impermissible attempt at punishing him, rather than a prophylactic measure to protect the investing public. (Def. Opp. 14-15). *See Jones*, 476 F. Supp. 2d at 384 ("[T]he absence of a similar showing [that the defendants are likely to violate the securities laws in the future] would indicate that the requested injunction is not aimed at protecting the public from future harm, but more likely aimed at

punishing [d]efendants."). As discussed throughout this Opinion, the Court disagrees. The Court has weighed the factors discussed in *Commonwealth Chemical Securities*, applied them to the facts of this case, and determined that a permanent injunction is necessary to guard against future violations of the Compensation Record Rule. Such a finding necessarily means that a permanent injunction here is not designed to merely punish, but to protect the investing public.

Defendant's argument on this point appears to rest on the fact that Plaintiff intends to seek further relief in a follow-on administrative proceeding. (Def. Opp. 15). Plaintiff does not hide this intention, and notes that it will pursue an associational bar. (*See* Pl. Br. 7 n.3; Pl. Reply 1-2). While the Court's permanent injunction may provide a predicate for an associational bar, it is not a necessary prerequisite. (Pl. Reply 2). *See, e.g.*, *VanCook* v. *S.E.C.*, 653 F.3d 130, 142 (2d Cir. 2011) (affirming sanctions, including associational bar, imposed by the SEC for Exchange Act violations of aiding and abetting failure to keep accurate books and records, among others).

The Court is aware that "the potential collateral consequences of a permanent injunction are quite serious." *Jones*, 476 F. Supp. 2d at 385 (citations omitted). Assuming Plaintiff moves forward with a follow-on proceeding, Defendant will have an opportunity to contest further relief. (Pl. Br. 7 n.3). But before the Court now is a request for a permanent injunction to prevent Defendant from further violations of the Compensation Record Rule, not a permanent associational bar. On the facts before the Court, such

injunction is warranted. Again, the Court finds that certain of the statements in Defendant's submission do not reflect the seriousness of this case, and instead continue to minimize his role and his blameworthiness. (*See, e.g.*, Def. Opp. 15 ("The SEC has not cited a single case relating solely to a books and records violation, let alone a violation of the Compensation Record Rule, nor has the SEC made any attempt to explain why it should be enabled to permanently bar [Defendant] and end his career over the conduct at []issue.")). As such, the Court does not view a permanent injunction to be an attempt to merely punish Defendant, but rather as a protection against future violations.

C. The Court Imposes a Civil Penalty in the Amount of $180,000

1. Applicable Law

The Exchange Act also expressly authorizes courts to impose civil penalties for a violation of the Act or rules promulgated thereunder. 15 U.S.C. § 78u(d)(3). In particular, the Exchange Act authorizes three "tiers" of penalties depending on the facts of the violation:

> a first-tier penalty may be imposed for any violation; a second-tier penalty may be imposed if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; a third-tier penalty may be imposed when, in addition to meeting the requirements of the second tier, the "violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons[.]"

S.E.C. v. *Razmilovic*, 738 F.3d 14, 38 (2d Cir. 2013), *as amended* (Nov. 26, 2013) (citations omitted). The parties agree that Plaintiff may seek second-tier penalties based upon the jury's verdict. (Pl. Br. 8; Def. Opp. 18-19). 2013 is

the relevant year for the conduct in this case. The maximum allowable penalty is $75,000 for each second-tier violation committed before March 5, 2013, and $80,000 for each violation committed after March 5, 2013. *See* 17 C.F.R. § 201.1001; INFLATION ADJUSTMENTS TO THE CIVIL MONETARY PENALTIES ADMINISTERED BY THE SECURITIES AND EXCHANGE COMMISSION (AS OF JANUARY 15, 2022), https://www.sec.gov/enforce/civil-penalties-inflation-adjustments (last accessed Nov. 14, 2022).

"Civil penalties are designed to punish the individual violator and deter future violations of the securities laws." *S.E.C.* v. *Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007) (citing *S.E.C.* v. *Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996)). While the applicable penalty tier sets forth the maximum allowable penalty, "the actual amount of the penalty [is] left up to the discretion of the district court." *S.E.C.* v. *Kern*, 425 F.3d 143, 153 (2d Cir. 2005). A sister court in this District has explained that

> In determining whether civil penalties should be imposed, and the amount of the fine, courts look to a number of factors, including [i] the egregiousness of the defendant's conduct; [ii] the degree of the defendant's scienter; [iii] whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; [iv] whether the defendant's conduct was isolated or recurrent; and [v] whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

Haligiannis, 470 F. Supp. 2d at 386 (citing *S.E.C.* v. *Coates*, 137 F. Supp. 2d 413, 429 (S.D.N.Y.2001)); *see also S.E.C.* v. *Tavella*, 77 F. Supp. 3d 353, 362-63 (S.D.N.Y. 2015) (same). That said, the *Haligiannis* factors "are not to be

taken as talismanic." *S.E.C.* v. *Rajaratnam*, 918 F.3d 36, 45 (2d Cir. 2019). It is appropriate to consider other factors as well, such as a defendant's cooperation and honesty with authorities versus a defendant's failure to admit wrongdoing. *S.E.C.* v. *Alt. Green Techs., Inc.*, No. 11 Civ. 9056 (SAS), 2014 WL 7146032, at *4 (S.D.N.Y. Dec. 15, 2014).

In determining the appropriate penalty, the Court must first consider the threshold issue of the number of violations arising from Defendant's conduct. The Exchange Act does not define what constitutes a violation, and courts within the Second Circuit have adopted different approaches to determine the number of violations. For example, some courts have simply counted the number of offending transactions. *See, e.g.*, *S.E.C.* v. *Pentagon Cap. Mgmt. PLC*, 725 F.3d 279, 288 n.7 (2d Cir. 2013) ("Although we vacate the civil penalty award, we find no error in the district court's methodology for calculating the maximum penalty by counting each late trade as a separate violation."); *S.E.C.* v. *Alpine Sec. Corp.*, 413 F. Supp. 3d 235, 245 (S.D.N.Y. 2019) ("[T]he SEC met its burden to prove on summary judgment 2,720 separate violations[.]"), *aff'd*, 982 F.3d 68 (2d Cir. 2020). Other courts have considered whether multiple violations occurred within the context of a single scheme, and thus whether a single penalty is appropriate. *See, e.g.*, *S.E.C.* v. *Rabinovich & Assocs., LP*, No. 07 Civ. 10547 (GEL), 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008) (finding single penalty appropriate because repeated violations "arose from a single scheme or plan"); *In re Rsrv. Fund Sec. &*

Derivative Litig., 2013 WL 5432334, at *20 (same) (collecting cases surveying courts' varying approaches).

2. Analysis

Plaintiff seeks a civil penalty in this case in the amount of $240,000 — $20,000 per each violation of the Compensation Record Rule during 2013. (Pl. Br. 1, 9). In support, Plaintiff cites many of the same reasons it offered in support of its request for a permanent injunction. (*Id.* at 1-2). *See also Am. Growth Funding II, LLC*, 2019 WL 4623504, at *4 (finding that the court's consideration of the egregiousness of the defendant's conduct, defendant's scienter, and whether the conduct was isolated or recurrent "largely overlap with the permanent injunction factors" and also "weigh in favor of imposing significant penalties"). Plaintiff concedes that there was no evidence at trial that Cantor customers suffered losses as a result of Defendant's violations (Pl. Br. 11), but maintains nonetheless that the Compensation Record Rule "plays an important role in protecting investors" (*id.*). Plaintiff further argues that Defendant "appears to have substantial assets." (*Id.*).

Defendant counters that a civil penalty is not warranted here, or in the alternative that the Court should impose a fine not in excess of $58,200, the amount of commissions Defendant received from Ludovico in 2013. (Def. Opp. 24). To support this argument, Defendant notes that there was no actual investor loss or risk of loss from Defendant's conduct (*id.* at 20); that Defendant has already suffered as a result of this case (*id.* at 21-22); that

Defendant's conduct was not egregious (*id.* at 22-24); and that his conduct amounts to a single violation (*id.* at 14).

First, the Court will not re-hash its analyses as to Defendant's scienter, the egregious nature of his conduct, or whether the conduct was isolated or recurrent, given its extensive discussion of these factors in the context of whether a permanent injunction is warranted. In their briefing, the parties essentially treat these factors as overlapping, and the Court has already addressed and rejected Defendant's arguments that he did not act with a high degree of scienter. (*See* Def. Opp. 22-24).

Second, the Court agrees with Plaintiff that the proper number of violations in this case is twelve, and not one as Defendant contends. Although Defendant points the Court to cases in which sister courts have found that violations arising from a "single scheme or plan" may be treated as a single violation (Def. Opp. 24), it is undisputed that Defendant received and deposited twelve checks from Ludovico in 2013 (Pl. Br. 9; PX-1). The twelve checks received by Defendant in 2013 only reflect the Compensation Record Rule violations for a single year, and do not include his arrangements with other traders or his other violations over the course of a decade. (Pl. Br. 8-9). Other than merely pointing the Court to caselaw suggesting that this Court *may* consider his conduct to constitute a single violation, Defendant makes no meaningful argument as to why the Court *should*. (*See* Def. Opp. 24).

Third, the Court acknowledges that the absence of losses to investors cuts in Defendant's favor. (Def. Opp. 20-21). That said, it agrees with Plaintiff

that the Compensation Record Rule is designed, at least in part, to protect the investing public. (*See* Tr. 639:7-13, 645:13-646:1). Indeed, civil penalties are not meant simply to punish, but also to deter. *See, e.g.*, *Haligiannis*, 470 F. Supp. 2d at 386. Thus, the fact that no investor actually lost money does not mean that the Court should not impose a civil penalty.

Fourth, Defendant has, without a doubt, suffered as a result of this case. As the Court previously discussed, Defendant avers that he lost his job at Cantor, that his career has been damaged, that he has lost over one million dollars between legal fees and Cantor's withholding of his deferred compensation, and that his mental and physical health have deteriorated. (Def. Opp. 21). Plaintiff does not dispute these facts, but instead points out that Defendant has not identified any cases in which a court took into account a defendant's legal fees or lost compensation when determining whether to reduce a requested civil penalty. (Pl. Reply 5).[7] Of perhaps greater significance to the Court, Defendant has not claimed that he is unable to pay a penalty; indeed, Plaintiff has submitted documentary evidence suggesting otherwise. (*See* Fortino Decl., Ex. 7 (2016 W-2), Ex. 8 (2017 Bank Account Statement)). Defendant has also not stated that he has "relinquished his claim" to his

[7] Plaintiff further notes that it is not aware of any cases in which a court reduced a civil penalty in light of a defendant's legal fees. At a minimum, the Court finds that it should take Defendant's legal fees into account when considering his financial position. *See, e.g.*, *S.E.C.* v. *Neurotech Dev. Corp.*, No. 04 Civ. 4667 (TCP) (WDW), 2011 WL 1113705, at *5 (E.D.N.Y. Feb. 28, 2011) (considering defendant's and wife's liabilities, including legal fees, in determining proper amount of civil penalty), *report and recommendation adopted*, No. 04 Civ. 4667 (TCP), 2011 WL 1099864 (E.D.N.Y. Mar. 23, 2011).

withheld deferred compensation. (Pl. Reply 5-6). After reviewing all of this evidence, the Court does not believe that a reduction in any civil penalty is warranted based on Defendant's financial condition.

The Court now decides the appropriate civil penalty in this case.[8] Plaintiff arrived at its requested amount of $240,000 by determining that $20,000 per violation was an appropriate sanction. (Pl. Br. 9-10). Beyond discussing the general appropriateness of a penalty, however, Plaintiff does not explain how it arrived at the $20,000 figure. Defendant requests that, if the Court finds a penalty is warranted, it not exceed $58,200, the total amount of commissions he received from Ludovico in 2013. (Def. Opp. 24).

At the outset, the Court rejects the notion that a penalty of $58,200 — essentially amounting to an interest-free loan on the proceeds from Defendant's Compensation Record Rule violations in 2013 — serves a sufficient deterrent or punitive effect here. To the contrary, such a penalty would have the perverse effect of incentivizing these types of violations. More broadly, the Court finds that neither of the parties' proposed amounts properly balances the relevant factors. Instead, the Court will impose a civil penalty of $15,000 per violation, for a total of $180,000, which — while remaining substantially below the maximum penalty authorized for this conduct — better addresses the length of time of Defendant's violative conduct, his multifaceted effort to cover up that conduct, and the total amount of his ill-gotten gains. (*See* Trial Exhibits PX-1

[8] Although Defendant complains that Plaintiff's requested penalty is "almost ten times that which it agreed to with Ludovico," he does not explain why the Court should reduce any penalty based on this fact. (Def. Opp. 19-20).

to PX-6). *See S.E.C.* v. *One Wall St., Inc.*, No. 06 Civ. 4217 (NGG) (ARL), 2008 WL 5082294, at *9 (E.D.N.Y. Nov. 26, 2008) (observing that a "review of the relevant case law indicates that the amount of the regulatory penalty assessed should have some relationship to the amount of ill-gotten gains"); *see also, e.g.*, *S.E.C.* v. *Murray*, No. 05 Civ. 4643 (MKB), 2013 WL 839840, at *6 (E.D.N.Y. Mar. 6, 2013) (declining to impose a maximum penalty, and finding that "imposition of sanctions equal to [d]efendant's ill-gotten gains" was appropriate).

To review, a civil penalty is not only meant to punish, but also to deter violations of the securities laws. A civil penalty of $180,000 here serves Congress' goals of deterring future violations of the securities laws and punishing Defendant for his past conduct. By contrast, Defendant's proposal for *de facto* disgorgement of only the money he made during 2013 reflects a myopic view of Defendant's actions and their consequences. *See, e.g.*, *S.E.C.* v. *Milligan*, No. Civ. 7357 (NG) (VVP), 2007 WL 9724904, at *8 n.6 (E.D.N.Y. June 5, 2007) (noting that "disgorgement serves a purpose (remediation) different from that of a civil penalty (punishment)[,]" and that the "penalty imposed should carry its own distinct message of deterrence" (internal citation omitted), *report and recommendation adopted sub nom. S.E.C.* v. *Curtis*, No. 99 Civ. 7357 (NG) (VVP), 2007 WL 9724905 (E.D.N.Y. Oct. 2, 2007)).

CONCLUSION

For the reasons stated in this Opinion, the Court permanently enjoins Defendant from future violations of the Compensation Record Rule, and imposes a civil penalty of $180,000. The Clerk of Court is directed to terminate the pending motion at docket entry 133, and to enter judgment in accordance with this Opinion.

SO ORDERED.

Dated: November 15, 2022
New York, New York

KATHERINE POLK FAILLA
United States District Judge

EXHIBIT 4

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	**18 Civ. _____ ( )**
	:	
Plaintiff,	:	**ECF CASE**
	:	
- against -	:	**COMPLAINT**
	:	
ADAM MATTESSICH AND	:	**JURY TRIAL**
JOSEPH (A/K/A JAY) LUDOVICO,	:	**DEMANDED**
	:	
Defendants.	:	
	:	

Plaintiff Securities and Exchange Commission (the "Commission"), for its Complaint against Defendants Adam Mattessich ("Mattessich") and Joseph (a/k/a Jay) Ludovico ("Ludovico"), alleges as follows:

SUMMARY OF THE ALLEGATIONS

1. This matter concerns a scheme by Defendants, both registered representatives (*i.e.*, brokers) formerly employed by Cantor Fitzgerald & Co. ("Cantor"), to bypass the firm's compensation-related procedures designed to comply with various tax and regulatory requirements.

2. In or about 2002, Mattessich, then a senior execution trader at Cantor, requested, but was denied permission from his supervisor to receive, commission compensation on certain customer accounts he serviced.

3. Refusing to accept his supervisor's decision, Mattessich schemed with Ludovico and another junior sales trader (the "Junior Sales Trader") on Cantor's international equities trading desk (the "Desk") to circumvent Mattessich's supervisor's decision and the firm's established procedures for the paying and recording of commissions. Under the scheme, Mattessich would officially transfer the accounts to Ludovico and the Junior Sales Trader, who were eligible to receive commission compensation under the firm's policies. Then, Ludovico and the Junior Sales Trader would pay a portion of the net commissions they received to Mattessich via personal check.

4. The mutually beneficial scheme resulted in widespread violations of Rule 17a-3(a)(19) under the Securities Exchange Act of 1934 (the "Exchange Act"), which requires registered broker-dealers like Cantor to, among other things, make and keep accurate records of each security transaction attributable, for compensation purposes, to each associated person, including the amount of compensation received by the associated person, or, alternatively, to produce this information upon request by a securities regulator. This rule promotes the supervisory processes of broker-dealers by making transparent which persons have direct financial interests in which transactions.

5. In or about 2004, Cantor promoted Mattessich to head the Desk, at which point he began supervising Ludovico and the Junior Sales Trader. Notwithstanding his promotion, Mattessich continued to receive unrecorded commission payments from both subordinates for many years.

6. In or about 2011, Mattessich also arranged for another subordinate on the Desk (the "Junior Execution Trader") to begin receiving off-the-books commissions from Ludovico and the Junior Sales Trader.

7. As a result of the scheme, Mattessich had an undisclosed conflict of interest with respect to his subordinates, including Ludovico, who were splitting commissions with him.

8. From January to December 2013 (the "Relevant Period"), Ludovico paid Mattessich a total of at least $58,200 in unrecorded commission compensation and paid the Junior Execution Trader a total of at least $32,500 in unrecorded commission compensation. In addition, the Junior Sales Trader paid the Junior Execution Trader a total of at least $44,263.50 in unrecorded commission compensation during the Relevant Period.

9. Mattessich and Ludovico's secret commission-splitting scheme violated the federal securities laws and, by risking compromising Mattessich's supervision, posed a risk of harm to Cantor's customers and counterparties. Here, the Commission is seeking, among other relief, an injunction prohibiting Defendants from engaging in similar violations in the future.

VIOLATIONS

10. As a result of the foregoing conduct and as alleged further herein, Defendants aided and abetted Cantor's violations of Section 17(a)(1) of the Exchange Act [15 U.S.C. § 78q(a)(1)] and Rule 17a-3(a)(19) thereunder [17 C.F.R. § 240.17a-3(a)(19)].

11. Unless Defendants are permanently restrained and enjoined, they will again engage in the acts, practices, transactions, and courses of business set forth in this Complaint and in acts, practices, transactions, and courses of business of similar type and object.

JURISDICTION AND VENUE

12. The Commission brings this action pursuant to authority conferred by Sections 21(d)(1) and 20(e) of the Exchange Act [15 U.S.C. §§ 78u(d)(1) and 78t(e)] and seeks a final judgment: (a) permanently restraining and enjoining Defendants from engaging in the acts, practices, and courses of business alleged against them herein; (b) imposing civil money penalties on Defendants pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]; and (c) such other and further relief as the Court may deem just and appropriate.

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

14. In connection with the conduct alleged in this Complaint, Defendants have, directly or indirectly, singly or in concert, made use of the mails, or the means or instrumentalities of interstate commerce.

15. Venue is proper in this District under Section 27 of the Exchange Act [15 U.S.C. § 78aa] because acts and transactions constituting violations alleged in this Complaint occurred in this District. For example, a significant amount of the conduct alleged herein took place at Cantor's offices in New York, New York, where Defendants worked during the Relevant Period. In addition, upon information and belief, Mattessich currently resides in this District, and resided in this District for some or all of the Relevant Period.

DEFENDANTS

16. **Mattessich**, age 47, resides in New York, New York. He has been a broker since February 1991 and was associated with Cantor from in or about October 2001 until in or about February 2018, when he was permitted to resign from the firm as a result of the conduct described herein. During his tenure at Cantor, Mattessich held Series 3, 7, 24, 55, and 63

licenses and various supervisory positions, including most recently as the firm's global co-head of equities.

17. **Ludovico**, age 41, resides in Brooklyn, New York. He has been a broker since October 1998 and was associated with Cantor from in or about October 1998 until in or about February 2018, when he was permitted to resign from the firm as a result of the conduct described herein. During his tenure at Cantor, Ludovico held Series 7, 24, 55, and 63 licenses and was a sales trader on the Desk. In December 2015, Ludovico was suspended for two months and fined $25,000 by the Financial Industry Regulatory Authority ("FINRA") based on his role in the sale of billions of unregistered shares of microcap issuers on behalf of Cantor's customers.

RELEVANT ENTITY

18. **Cantor** is a broker-dealer with its principal place of business in New York, New York. Cantor provides equity research, sales and trading, and investment-banking services to its customers. Cantor has been registered with the Commission since December 1947. Today, the Commission instituted settled administrative and cease-and-desist proceedings against Cantor related to the conduct alleged herein.

FACTS

Cantor's Policies and Procedures Concerning the Payment and Recording of Commission Compensation

19. During the Relevant Period, Cantor paid its brokers commissions for securities transactions they brokered (*i.e.*, arranged) on behalf of Cantor's customers.

20. From at least 2002 to the present, Cantor has used a system of account executive or "AE" codes to apportion and track commission compensation for its brokers. Every brokerage transaction is associated with an AE code. The particular AE code associated with a transaction dictates which Cantor employee or employees will receive the commission generated

by the transaction. Some AE codes are associated with a single employee, but other AE codes apportion the commission generated by a transaction among more than one employee or trading desk, according to specific percentages or "splits."

21. When Cantor pays commissions pursuant to the AE codes, it deducts and withholds from its payments to the employees firm overhead, taxes, and deferred compensation (the "Deferred Compensation"). The employees receive the remaining commissions net of these amounts (the "Net Commissions") from Cantor by check or direct deposit.

22. Cantor relies upon this system to ensure compliance with various regulatory and tax obligations, including Exchange Act Rule 17a-3(a)(19)(i) [17 C.F.R. § 240.17a-3(a)(19)(i)] (the "Compensation Record Rule"). The Compensation Record Rule became effective in May 2003 and was thus in effect during the Relevant Period. The Compensation Record Rule requires that registered broker-dealers make and keep a record:

> As to each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person. The record shall include the amount of compensation if monetary and a description of the compensation if non-monetary. In lieu of making this record, a member, broker or dealer may elect to produce the required information promptly upon request of a representative of a securities regulatory authority.

23. Since at least 2006, Cantor's Written Supervisory Procedures (the "WSPs") expressly prohibited off-book commission-splitting. For example, Section 2.1 of the WSPs, which includes a subsection titled "Business Conduct of Cantor Fitzgerald Registered Representatives," includes the specific attestation: "I will not rebate, directly or indirectly to any person, firm or corporation any part of the compensation I receive as a registered employee, and I will not pay such compensation or any part thereof, directly or indirectly, to any person, firm,

or corporation, as a bonus, commission, fee or other consideration for business sought or procured for me."

24. All brokers at Cantor, including Mattessich and Ludovico, were required to certify their compliance with the firm's WSPs, including the provision expressly banning sharing compensation, on an annual basis and during the Relevant Period.

25. Since at least 2007, the annual certifications that Mattessich and Ludovico signed advised them that they were required to know and follow Cantor's WSPs because those procedures allowed the firm to comply with applicable securities laws and regulations.

Mattessich and Ludovico Scheme to Circumvent Cantor's Procedures for Paying and Recording Commissions

26. Sales traders at Cantor were primarily responsible for interacting with customers and taking orders, whereas execution traders like Mattessich were primarily responsible for routing and fulfilling orders.

27. In or about 2002, Mattessich, then a senior execution trader at Cantor, requested that the firm pay him commissions on transactions in customer accounts he serviced. Mattessich's supervisor denied the request and instructed him to transfer the accounts to more junior sales traders for coverage.

28. Following the denial of his request to receive commission compensation, Mattessich separately approached Ludovico and the Junior Sales Trader and proposed an arrangement that would circumvent the firm's established procedures for paying and recording commissions. Both Ludovico and the Junior Sales Trader were sales traders and were entitled under the firm's policies to receive commissions on accounts linked to their AE codes.

29. Ludovico was familiar with the firm's established procedures for splitting and recording commissions. Beginning in at least February 2012, Ludovico had multiple AE codes

assigned to him by Cantor, which reflected commission splits between Ludovico and other trading desks and employees.

30. Mattessich proposed that certain accounts he serviced be reassigned to Ludovico's and the Junior Sales Trader's AE codes so that they would receive the commissions generated by those accounts from Cantor and then remit some of the Net Commissions they received to Mattessich. Ludovico and the Junior Sales Traders agreed to the scheme and began paying Mattessich a portion of their Net Commissions.

31. The plan financially benefitted Ludovico as well as Mattessich. By taking on the additional accounts Mattessich transferred to him, Ludovico received additional compensation. Ludovico generally retained the full amount of the Deferred Compensation attributable to the commissions generated by the transferred accounts. In addition, Ludovico retained approximately 50 percent of the additional Net Commissions he received from Cantor as a result of the scheme.

32. Both Ludovico and the Junior Sales Trader generally made payments to Mattessich on a monthly basis from approximately 2002 to 2010, and Ludovico continued the practice until December 2013. Typically, Ludovico and the Junior Sales Trader would make the payments to Mattessich by personal check, writing these checks and handing them to Mattessich on the trading desk.

33. In or about 2004, Mattessich was promoted to head of the Desk and assumed supervisory responsibility over Ludovico and the Junior Sales Trader. Despite Mattessich's promotion, the commission-splitting scheme continued unabated, and Mattessich continued to receive checks from his subordinates.

34. During the Relevant Period, Ludovico gave Mattessich personal checks totaling at least $58,200 in connection with their commission-splitting arrangement. In addition to failing to report his receipt of these commissions to Cantor, Mattessich failed to report them as income to any taxing authorities.

35. The commission-splitting scheme created an undisclosed conflict of interest for Mattessich, who was responsible for supervising trading activity by the very subordinates (including Ludovico) who were making the payments to him.

The Commission-Splitting Scheme Expands on the Desk

36. After Mattessich's arrangement with Ludovico and the Junior Sales Trader was established, in or about 2011, another one of Mattessich's subordinates, the Junior Execution Trader, asked Mattessich whether he could receive commission compensation on certain accounts. Mattessich suggested that the Junior Execution Trader enter into an arrangement similar to the one he had with Ludovico and the Junior Sales Trader, specifically referring him to the Junior Sales Trader. Ludovico and the Junior Sales Trader thereafter began making commission payments to the Junior Execution Trader in the same manner as they had been making payments to Mattessich—by personal check.

37. During the Relevant Period, Ludovico gave the Junior Execution Trader checks totaling at least $32,500 in connection with their commission-splitting arrangement, and the Junior Sales Trader gave the Junior Execution Trader checks totaling at least $44,263.50.

The Commission-Splitting Scheme Is Discovered by Cantor Legal and Compliance

38. When the Desk's commission-splitting scheme was brought to the attention of legal and compliance personnel at Cantor, Cantor's chief compliance officer sent an email to all equities personnel on January 14, 2014, reaffirming the firm's prohibition on unrecorded

commission-splitting: "It is not permissible for one employee to pay another employee directly in connection with any Cantor activity. Any such arrangement should be arranged and documented through [the Chief Operating Officer] so that [it] is compliant with regulatory and tax regulations."

39. In February 2018, Defendants were permitted to voluntarily resign from Cantor as a result of the conduct described herein.

The Commission-Splitting Scheme Caused Cantor to Have Deficient Books and Records

40. None of the participants in the commission-splitting scheme kept records of the commission compensation paid to Mattessich or the Junior Execution Trader for the purchases and sales of securities that generated the commissions, or provided any information to Cantor from which Cantor could have created such records. As a result, Cantor did not make and keep records of the compensation that Mattessich or the Junior Execution Trader received through the scheme and did not have information about such compensation available to provide to regulators when requested.

41. Upon information and belief, Defendants are continuing to seek employment in the securities industry.

CLAIM FOR RELIEF

Aiding and Abetting Violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(19) Thereunder

42. The Commission realleges and incorporates by reference herein each and every allegation contained in paragraphs 1-41.

43. Defendants knowingly, or at least recklessly, aided and abetted Cantor's failures, while operating as a broker-dealer, to make and keep current, accurate books and records relating to its business, to wit, records as to Defendants listing each purchase and sale of a security

attributable, for compensation purposes, to Defendants, or in lieu of making such records, to produce the required information promptly upon request of a representative of a securities regulatory authority.

44. By virtue of the foregoing, Defendants violated, and unless restrained and enjoined, will continue violating, Section 17(a) of the Exchange Act [15 U.S.C. § 78q(a)] and Rule 17a-3(a)(19) thereunder [17 C.F.R. § 240.17a-3(a)(19)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests a Final Judgment:

I.

Permanently enjoining Defendants, their respective agents, servants, employees, and attorneys, and all persons in active concert or participation with them, who receive actual notice of the injunction by personal service or otherwise, and each of them, from future violations of Section 17(a) of the Exchange Act [15 U.S.C. § 78q(a)] and Rule 17a-3(a)(19) thereunder [17 C.F.R. § 240.17a-3(a)(19)];

II.

Ordering Defendants to pay civil monetary penalties pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)][1]; and

III.

Granting such other and further relief as the Court may deem just and proper.

[1] Defendants have executed tolling agreements in this matter, in which they have agreed to toll the five-year statute of limitations applicable to seeking civil money penalties for the period December 20, 2017, through June 20, 2018.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands that this case be tried to a jury.

Dated: New York, New York
June 29, 2018

By: s/ Marc P. Berger

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EXHIBIT 5

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83565 / June 29, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18560

In the Matter of **CANTOR FITZGERALD & CO.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b), and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Cantor Fitzgerald & Co. ("Cantor" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Respondent

1. Cantor is a Delaware corporation with its principal place of business in New York, New York that is registered with the Commission as a broker-dealer since 1947 and previously was dually registered as a broker-dealer and investment adviser at various times between 1994 and 2007.

Other Relevant Parties

2. Adam Robert Mattessich became an associated person of Cantor in or about 1997. He briefly left Cantor in the summer of 2001 and rejoined the firm in or about October 2001. In February 2018, he was permitted to resign from the firm as a result of the conduct described herein. During his tenure with Cantor, Mattessich held Series 3, 7, 24, 55, and 63 licenses and had various supervisory positions, including global co-head of equities.

3. Joseph "Jay" Ludovico was an associated person of Cantor from in or about October 1998 through in or about February 2018, when he was permitted to resign from the firm as a result of the conduct described herein. During his tenure with Cantor, Ludovico held Series 7, 24, 55, and 63 licenses and was a sales trader on the international equities desk.

Background

4. From at least 2001 to the present, Cantor utilized a system of account executive or "AE" codes to monitor trading activity and apportion and track commission compensation for its associated persons. Each AE code was associated with at least one employee and indicated, for each employee, the percentage of commission to be received by such employee.

5. At the beginning of his second tenure at Cantor, Mattessich was an execution trader and, although he had an assigned AE code, he did not earn commissions on the accounts he serviced.

6. In or about 2002, Mattessich requested that the firm pay him commissions on transactions in accounts he serviced. Mattessich's superior denied the request and instructed him to transfer the accounts to more junior sales traders for coverage.

7. Following the denial of his request to receive commission compensation, Mattessich approached two of the sales traders on his desk, including Ludovico, and proposed an arrangement that would circumvent the firm's established procedures for

[1] The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

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paying and recording commissions. The two sales traders were entitled under the firm's policies to receive commissions on accounts linked to their AE codes. Mattessich proposed that certain accounts he serviced be reassigned to the sales traders' AE codes so that they could receive commissions on them. In exchange, the sales traders would pay Mattessich a portion of the net commissions they received from the firm.

8. Ludovico and the other sales trader agreed to the plan and began paying Mattessich a portion of their net commissions by personal check. At the time, both sales traders were familiar with the firm's procedures for splitting and recording commissions because they shared certain AE codes with other employees.

9. Both sales traders gave personal checks to Mattessich on a monthly basis from approximately 2002 to 2010, and Ludovico continued the practice until December 2013. Typically, the sales traders would write these checks and hand them to Mattessich on the trading desk, without making any effort to conceal this activity from the other traders and desk head who sat in close proximity to them.

10. In or about 2004, Mattessich assumed supervisory responsibility over both of the individuals making payments to him and continued to receive payments from them in the same manner.

11. After Mattessich's arrangement with the two subordinates was established, in or about 2011, Mattessich also arranged for a junior execution trader to receive off-the-books commissions from the same subordinates who had been paying him. These payments to the junior execution trader were made in the same manner that Mattessich received his payments.

12. From May 2012 to December 2013, Ludovico gave Mattessich personal checks totaling $105,800 in connection with the arrangement, and the junior execution trader received $97,385.50 in unrecorded commissions. In addition to failing to report his receipt of these commissions to Cantor, Mattessich failed to report them as income to any taxing authorities.

13. The commission-sharing arrangement created a potential conflict of interest for Mattessich, who was responsible for supervising trading activity by the very subordinates who were making the payments to him.

14. During the timeframe in which the payments were occurring, Ludovico, acting on behalf of the firm's customers, engaged in numerous unregistered securities transactions, for which he was suspended for two months and fined $25,000 by the Financial Industry Regulatory Authority ("FINRA") in December 2015.

15. None of the participants in the commission-sharing arrangement kept records of the compensation paid to Mattessich or the junior sales trader for the purchases and sales of securities that generated the commissions or provided any information to Cantor from which Cantor could have created such records. As a result, Cantor did not make records of the compensation that Mattessich or the junior execution trader received

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through the arrangement and did not have information about such compensation available to provide to regulators if requested.

16. In late 2013 or early 2014, Mattessich and Ludovico's arrangement came to the attention of Cantor's legal and compliance personnel in connection with the FINRA regulatory matter described above. Once the arrangement came to light, the firm's chief compliance officer issued a memo stating that it was not permissible for one employee to pay another employee in connection with any trading activity. The memo also directed that all such arrangements be reported to the firm for regulatory and tax reasons. The firm did not, however, take any other remedial steps. Neither Mattessich nor Ludovico was disciplined for the conduct, and they were also subsequently promoted.

17. Near the conclusion of the Commission staff's investigation leading to this proceeding, Cantor gave Mattessich and Ludovico the option to resign from the firm or be terminated, based upon the conduct described herein.

18. As a result of the conduct described above, from at least May 2012 to December 2013, Cantor willfully[2] violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(19) thereunder, which requires registered broker-dealers to make and keep current a record as to each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person, and the amount of the compensation received or, alternatively, to produce the required information promptly if requested by a representative of a securities regulatory authority.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Cantor shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(19) thereunder.

B. Respondent Cantor is censured.

[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

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C. Respondent Cantor shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $1,250,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Cantor as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sanjay Wadhwa, Senior Associate Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more

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investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ADAM MATTESSICH AND JOSEPH (A/K/A JAY) LUDOVICO, Defendants.	18 Civ. 5884 (KPF)

FINAL JUDGMENT AS TO DEFENDANT JOSEPH (A/K/A JAY) LUDOVICO

The Securities and Exchange Commission having filed a Complaint and Defendant Jospeh Ludovico ("Defendant or "Ludovico") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction and except as otherwise provided herein in paragraph IV); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 17(a)(1) of the Exchange Act [15 U.S.C. § 78q(a)(1)] and Rule 17a-3(a)(19) thereunder [17 C.F.R. § 240.17a-3(a)(19)], by knowingly or recklessly providing substantial assistance to a broker-dealer that failes to make and keep current, accurate books and records relating to its business.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay a civil penalty in the amount of $25,000.00 to the Securities and Exchange Commission pursuant to Section 21(d)(3) of the Exchange Act. Defendant shall make this payment pursuant to the terms of the payment schedule set forth in paragraph III, below.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Ludovico as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case

identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Defendant shall pay post-judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

III.

Ludovico shall pay the total penalty due of $5,000.00 in five installments to the Commission according to the following schedule: (1) $5,000.00 within 10 days of entry of this Final Judgment; (2) $5,000.00 within 90 days of entry of this Final Judgment; (3) $5,000.00 within 180 days of entry of this Final Judgment; and (4) $5,000.00 within 270 days of entry of this Final Judgment; and (5) $5,000.00 within 360 days of entry of this Final Judgment. Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post judgment interest, which accrues pursuant to 28 U.S.C. § 1961 on any unpaid amounts due after 30 days of the entry of Final Judgment. Prior to making the final payment set forth herein, Joseph Ludovico shall contact the staff of the Commission for the amount due for the final payment.

If Ludovico fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Final Judgment, including post-judgment interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Court.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: December 18, 2019

[redacted]

KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

EXHIBIT 7

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 87805 / December 19, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19625

In the Matter of **Joseph (a/k/a Jay) Ludovico,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Joseph (a/k/a "Jay") Ludovico ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in paragraph III.2, below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Ludovico, age 43, resides in Brooklyn, New York. He was a sales trader employed by Cantor Fitzgerald & Co. ("Cantor"), a registered broker-dealer, from October 1998 until in or about February 2018. During this period, Ludovico held Series 7, 24, 55, and 63 licenses.

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2. On December 18, 2019, a final judgment was entered by consent against Ludovico, permanently enjoining him from future violations of Section 17(a)(1) of the Exchange Act and Rule 17a-3(a)(19) thereunder, in the civil action entitled Securities and Exchange Commission v. Adam Mattessich, et al., Civil Action Number 18 Civ. 5884, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that Ludovico failed to comply with the firm's established procedures for splitting commission payments among registered employees and, without advising the firm, paid a portion of his commission compensation to two colleagues by personal check. According to the complaint, he thereby knowingly, or at least recklessly, aided and abetted the firm's failures, while operating as a broker-dealer, to make, and keep current, accurate books and records relating to its business, to wit, records listing each purchase and sale of a security attributable, for compensation purposes, to each of its associated persons.

Undertakings

Respondent undertakes to provide to the Commission, within 30 days after the end of the twelve month suspension periods described below, an affidavit that he has complied fully with the sanctions described in Section IV.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Ludovico's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Ludovico be, and hereby is, suspended from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization for a period of twelve months, effective upon the entry of this Order; and

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Ludovico be, and hereby is suspended from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock for a period of twelve months, effective upon the entry of this Order.

By the Commission.

Vanessa A. Countryman
Secretary

OS Received 03/03/2023

EXHIBIT 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -v.- ADAM MATTESSICH, Defendant.	18 Civ. 5884 (KPF) **OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

Plaintiff Securities and Exchange Commission (the "SEC") brought this civil enforcement action against Defendants Adam Mattessich and Joseph Ludovico, two securities brokers formerly employed by Cantor Fitzgerald & Co. ("Cantor").[1] Plaintiff alleges that Mattessich and Ludovico schemed to circumvent Cantor's established procedures for paying and recording commission payments to its brokers for the time period between January and December 2013 (the "Relevant Period"). Plaintiff contends that, in so doing, Defendants aided and abetted Cantor's violations of Rule 17a-3(a)(19), 17 C.F.R. § 240.17a-3(a)(19), which was promulgated under the Securities Exchange Act of 1934 (the "Exchange Act"), Pub. L. 73-291, 48 Stat. 881, and which requires registered broker-dealers to make and keep accurate records of each securities transaction attributable, for compensation purposes, to each broker.

[1] References in this Opinion to "Defendants" pertain to both Mattessich and Ludovico, while references to "Defendant" pertain to Mattessich alone.

By Order dated September 9, 2019 (Dkt. #41), the Court denied Defendants' motion to dismiss, and on December 18, 2019, the Court entered a final judgment as to Defendant Ludovico on consent (Dkt. #58). Plaintiff now moves for summary judgment as to liability against Defendant Mattessich, the only remaining Defendant in this case. Plaintiff also moves to strike portions of an affidavit Defendant submitted in opposition to the instant motion for summary judgment. For the reasons set forth in the remainder of this Opinion, the Court denies Plaintiff's motion to strike, and grants in part and denies in part Plaintiff's motion for summary judgment.

BACKGROUND[2]

A. Factual Background

The Court has previously expounded on the history of this case in the course of resolving Defendants' motion to dismiss. *Sec. & Exch. Comm'n* v.

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[2] The facts alleged herein are drawn from Plaintiff's Local Rule 56.1 Statement in Support of Its Motion for Summary Judgment ("Pl. 56.1" (Dkt. #66)); Defendant's Rule 56.1 Counter Statement of Undisputed Facts ("Def. 56.1" (Dkt. #69)), which comprises both responses to Plaintiff's assertions of material facts not in dispute and material facts ostensibly in dispute; and Plaintiff's Reply to Defendant's Rule 56.1 Statement of Undisputed Material Facts ("Pl. Reply 56.1" (Dkt. #72)). The Court also draws facts from the Declaration of Lee A. Greenwood in Support of Plaintiff's Motion for Summary Judgment ("Greenwood Decl." (Dkt. #67)); the Declaration of Noam Greenspan in Opposition to Plaintiff's Motion for Summary Judgment ("Greenspan Decl." (Dkt. #70)); and certain exhibits attached to these declarations, including the Stipulation of the Parties as to Certain Factual Matters ("Joint Stip." (Greenwood Decl., Ex. A)), and the affidavit of Ron Wexler ("Wexler Aff." (Greenspan Decl., Ex. A)). Further, certain facts are drawn from the transcript of the deposition of Adam Mattessich ("Mattessich Dep." (Greenwood Decl., Ex. 3)); the transcript of the investigative testimony of Adam Mattessich ("Mattessich Inv." (*id.*, Ex. 4)); the transcript of the deposition of Lauren Bradley, as representative of Cantor pursuant to Fed. R. Civ. P. 30(b)(6) ("Bradley Dep." (*id.*, Ex. 8)); the transcript of the deposition of Gary Distell ("Distell Dep." (*id.*, Ex. 9); and the Complaint ("Compl." (Dkt. #1)).

Citations to a party's Rule 56.1 Statement incorporate by reference the documents and testimony cited therein. Where a fact stated in a movant's Rule 56.1 Statement is supported by evidence and denied with merely a conclusory statement by the non-movant, the Court finds such fact to be true. *See* Local Civil Rule 56.1(c) ("Each

Mattessich, 407 F. Supp. 3d 264, 266-68 (S.D.N.Y. 2019) ("*Mattessich I*"). It therefore mentions here only what is relevant to the instant motion.

1. Cantor's Policies and Procedures Concerning the Payment and Recording of Commission Compensation

Cantor has been a registered broker-dealer with the SEC since December 1947. (Pl. 56.1 ¶ 2). From at least 2001 to the present, Cantor has used a system of account executive (or "AE") codes linked to customer accounts to apportion and track commission compensation for its brokers for securities transactions related to those accounts. (*Id.* at ¶¶ 13, 15). Cantor assigns an individual AE code to each employee with responsibility for sales and trading, and each brokerage transaction is associated with an AE code that dictates which Cantor employee or employees will receive the commission generated by the associated transaction. (*Id.* at ¶¶ 14, 16). Some AE codes are associated with a single employee, but other AE codes apportion the commission generated by a transaction among more than one employee or trading desk, according to specific percentages or splits. (Def. 56.1 ¶ 16). AE codes are also

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numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be submitted by the opposing party."); *id.* at 56.1(d) ("Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).").

For convenience, Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment is referred to as "Pl. Br." (Dkt. #65); Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment is referred to as "Def. Opp." (Dkt. #68); Plaintiff's Reply Memorandum of Law in Further Support of Its Motion for Summary Judgment is referred to as "Pl. Reply" (Dkt. #71); and Defendant's Sur-Reply in Further Opposition to Plaintiff's Motion for Summary Judgment is referred to as "Def. Sur-Reply" (Dkt. #75).

used to track at least some transactions that do not generate commissions. (*Id.* at ¶ 13).

As the Court explained in *Mattessich I*, "Cantor relies on the AE system to ensure compliance with various regulatory and tax obligations, including Exchange Act Rule 17a-3(a)(19)(i), 17 C.F.R. § 240.17a-3(a)(19)(i) (the 'Compensation Record Rule'), which became effective in May 2003." *Mattessich I*, 407 F. Supp. 3d at 267. (*See also* Bradley Dep. 38:24-25; Distell Dep. 37:20-38:9, 45:7-48:24). The Compensation Record Rule requires registered broker-dealers to make and keep accurate records of each securities transaction attributable, for compensation purposes, to each broker. *Mattessich I*, 407 F. Supp. 3d at 267 (citing 17 C.F.R. § 240.17a-3(a)(19)(i)). All Cantor registered representatives were required to certify their compliance with Cantor's policies and procedures, including Cantor's written supervisory procedures ("WSPs") — which specifically prohibited making or receiving off-book commission payments — on an annual basis, though the language of these certifications changed over time. (Pl. 56.1 ¶ 24; Pl. Reply 56.1 ¶¶ 96, 98; Bradley Dep. 60:15-61:5; Distell Dep. 59:8-61:23; *see also* Def. 56.1 ¶ 23 (noting that the language of compliance certifications changed between 2007 and 2013)).

2. Defendant's Employment at Cantor

Defendant was employed by Cantor from October 15, 2001, to February 16, 2018. (Joint Stip. ¶ 1). From approximately 2004 until mid-2013, Defendant served as the head of Cantor's International Equities Desk,

and from the middle of 2013 through December 2015, he was the global head of equity trading at Cantor. (Pl. 56.1 ¶¶ 7, 11).[3] From approximately 2002 through the Relevant Period, the only compensation Defendant received directly from Cantor comprised a salary and a discretionary bonus. (Joint Stip. ¶ 5). Since at least 2001, Cantor had assigned Defendant an AE code. (*Id.* at 6). Defendant certified his compliance with Cantor's policies and procedures every year from 2007 through 2013. (Pl. 56.1 ¶ 23).

Beginning in at least July 2012, Defendant was one of three or four people who could provide a required approval for changes to the AE codes assigned to a customer account. (Def. 56.1 ¶ 17). In this capacity, Defendant reviewed and approved requests to change AE codes associated with different customer accounts. (Pl. 56.1 ¶¶ 18-20). In so doing, Defendant "would review these requests, discuss them with either the relevant traders or their managers, ensure that all parties agreed on the requested change or resolve any disputes," and "remind[] other Cantor employees to comply with this [AE code] approval process." (*Id.* at ¶¶ 19, 22). In February 2018, Cantor terminated Defendant's employment with the firm due to his involvement in the commission-splitting arrangement with Ludovico that was the subject of

[3] From at least 1991 until the termination of his employment with Cantor, including throughout the Relevant Period, Defendant held a General Securities Representative, or Series 7, license from the Financial Industry Regulatory Authority ("FINRA"). (Joint Stip. ¶ 3). From at least 2004 until the termination of his employment with Cantor, including throughout the Relevant Period, Defendant held a General Securities Principal, or Series 24, license from FINRA. (*Id.* at ¶ 4).

Plaintiff's investigation. (*Id.* at ¶ 12). That arrangement is described in greater detail below.

3. The Commission-Splitting Scheme

In or about 2002, Defendant — then a senior execution trader at Cantor — requested permission from his supervisor to receive commission compensation on certain customer accounts that he serviced. (Pl. 56.1 ¶ 28). The parties dispute the scope of Defendant's request, and the extent to which that request was denied. Plaintiff alleges that Defendant requested "authoriz[ation] to receive commission compensation directly from Cantor" and that the request was denied in full (*see* Pl. Reply 56.1 ¶ 55), while Defendant claims that he was told by Cantor's CEO that he could service at least one of the accounts in question and receive a commission, but that he was instructed to "put the AE into a sales trader's AE" and they would "sort it out" later (Def. 56.1 ¶ 57). Defendant further alleges that his inability to receive compensation through his AE code was due to an "administrative issue" (*see* Wexler Aff. ¶ 15; *see also* Def. 56.1 ¶¶ 58, 69), which allegation Plaintiff disputes (*see* Pl. Reply 56.1 ¶ 69). Plaintiff argues that to the extent Defendant was given permission by Cantor to receive commission compensation for servicing any of the relevant client accounts, the firm did not authorize him to receive payments via personal check. (*See id.* at ¶ 100).

Thereafter, as relevant to the instant motion, Defendant entered into a commission-splitting arrangement with Ludovico in or around 2004, whereby Ludovico received from Cantor the commission compensation generated from

customer accounts serviced by Defendant through Ludovico's AE code. (Joint Stip. ¶ 8; Pl. 56.1 ¶ 32; Mattessich Inv. 168:10-22, 209:25-211:8). Once Ludovico received the net commission from Cantor, he would remit some portion of it to Defendant via personal check. (Pl. 56.1 ¶ 35). Ludovico made payments to Defendant pursuant to their arrangement from approximately 2004 through December 2013. (*Id.* at ¶ 36).[4] From 2004 through the Relevant Period, Defendant also served as Ludovico's direct supervisor. (*Id.* at ¶ 10). As noted above, the parties dispute the extent to which Defendant had permission from his superiors to assign commission compensation from accounts he serviced to other traders' AE accounts and to receive compensation directly from those other traders by personal check. (*Compare id.* at ¶¶ 29, 34, *with* Def. 56.1 ¶¶ 29, 34). There was no predetermined amount or percentage that Ludovico would pay Defendant, but typically Ludovico paid Defendant fifty percent of the commission compensation he received. (Def. 56.1 ¶¶ 79-80). During the Relevant Period, Ludovico paid Mattessich at least $58,200 of the commission compensation he received from Cantor via 12 personal checks. (Joint Stip. ¶ 9). Cantor neither recorded, nor maintained a record of, the commission compensation paid by Ludovico to Defendant via personal check — either using the AE code system or through any other means. (*See* Pl. 56.1

[4] From approximately 2002 through 2004, Defendant entered into a similar arrangement with at least one other trader who remitted a portion of the commission compensation he received from Cantor via the AE code system for accounts serviced by Defendant. (*See* Pl. 56.1 ¶¶ 30-31). Ludovico entered into a similar arrangement with at least one other Cantor employee, and paid that employee a portion of the commission compensation that he received in 2012 and 2013. (*Id.* at ¶ 40).

¶¶ 32-33, 43; *see also* Bradley Dep. 39:14-20, 55:12-18, 61:11-13, 80:21-81:4; Distell Dep. 45:7-48:24).[5]

In or about 2013, Ludovico disclosed the commission-splitting scheme in the process of giving testimony in a separate FINRA matter. (Def. 56.1 ¶ 89). When Gary Distell, Cantor's chief compliance officer at the time, learned of the commission-splitting arrangement, he sent an email dated January 14, 2014, to all employees of Cantor's equities group stating:

> Any compensation arrangement between employees whether formal or informal should be discussed with [chief operating officer] Ron Wexler. It is not permissible for one employee to pay another employee directly in connection with any Cantor activity. Any such arrangement should be arranged and documented through Ron so that [it] is compliant with regulatory and tax regulations. There is no grandfather provision so please call even if the arrangement is existing and longstanding.

(Greenwood Decl., Ex. 13; Pl. 56.1 ¶ 48). After receiving this email, Ludovico stopped making payments of commission compensation to Defendant. (Pl. 56.1 ¶ 49). Plaintiff argues that Distell's email "reiterat[d] … firm[] policy that all

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[5] Defendant's objection to Paragraph 43 of Plaintiff's Rule 56.1 Statement argues that "[t]he statement does not define which documents are referred to as 'compensation records,' nor does it cite to any specific 'compensation record.'" (Def. 56.1 ¶ 43). While Defendant challenges the definition of compensation record in this paragraph, Defendant fails to undermine the underlying factual assertion: that Cantor maintained or possessed no record of any kind regarding the payment of commission compensation by Ludovico to Defendant. For example, Defendant's objection fails to rebut testimony cited in Plaintiff's Rule 56.1 Statement from Cantor's Rule 30(b)(6) representative that Cantor did not record this compensation using AE codes or by collecting copies of the personal checks Ludovico used to pay Defendant. (Pl. 56.1 ¶ 43). The only specific evidence Defendant offers in rebuttal is that one type of document cited in Plaintiff's Rule 56.1 Statement — a worksheet used to allocate commissions — is not a compensation record and does not come from the relevant period. (Def. 56.1 ¶ 43). While this may be true, it fails to create a disputed issue of material fact because Plaintiff cites to other admissible evidence to establish that Cantor did not record this commission using AE codes or other methods. (Pl. 56.1 ¶ 43).

compensation arrangements between employees must be documented using AE [c]odes." (*Id.* at ¶ 48; *see also* Distell Dep. 55:4-17, 56:22-57:17). Defendant disputes this interpretation, and contends that some employees of Cantor's Equities Group understood Distell's email either to announce a new policy or to clarify that commission-splitting arrangements like Defendants' were not against Cantor policy prior to that point. (*See* Def. 56.1 ¶¶ 48, 96). On June 29, 2018, contemporaneous with the filing of this action, the SEC settled administrative cease-and-desist proceedings against Cantor regarding books and records violations. (Compl. ¶ 18).

B. Procedural Background

The SEC filed the Complaint in this action on June 29, 2018. (Dkt. #1). On July 31, 2018, Ludovico requested leave to file a motion to dismiss (Dkt. #26), and on September 21, 2018, Mattessich notified the Court that he would join in any motion to dismiss filed by Ludovico (Dkt. #34). On September 9, 2019, the Court denied Defendants' motion to dismiss. (Dkt. #41). On December 18, 2019, Plaintiff and Ludovico reached a settlement and the Court entered final judgment as to Ludovico. (Dkt. #58).

At a conference on March 18, 2020, the Court set a briefing schedule for Plaintiff's anticipated motion for summary judgment. (*See* Minute Entry for March 18, 2020). Plaintiff filed its motion for summary judgment and supporting papers on May 1, 2020 (Dkt. #64-67); Defendant filed his opposition papers on June 19, 2020 (Dkt. #68-70); and Plaintiff filed its reply on July 7, 2020 (Dkt. #71-72). On July 9, 2020, Defendant sought permission

to file a sur-reply in further opposition to Plaintiff's motion for summary judgment to address Plaintiff's argument, raised for the first time in its reply brief, that the Court should disregard certain evidence proffered by Defendant in opposition to the instant motion. (*See* Dkt. #73). The Court granted Defendant's request the next day (Dkt. #74), and this motion became fully briefed and ripe for decision on July 10, 2020, when Defendant submitted his sur-reply (Dkt. #75).

DISCUSSION

A. Plaintiff's Motion to Strike Is Denied

At the outset, the Court addresses the request made in Plaintiff's reply briefing that the Court disregard portions of the Affidavit of Ron Wexler, Cantor's chief operating officer during the Relevant Period, as well as the corresponding portions of Defendant's Rule 56.1 Statement. (*See* Pl. Reply 2-4). Plaintiff argues that these portions of the Wexler Affidavit "are inadmissible hearsay or unsupported speculation" made with the intent to create disputed issues of material fact. (*Id.* at 3). Defendant retorts that the disputed portions of the affidavit are based on Wexler's personal knowledge and experience and that the affidavit is therefore admissible in its entirety. (*See generally* Def. Sur-Reply). As discussed in greater detail below, the Court denies Plaintiff's motion to strike.

Specifically, Plaintiff challenges three portions of the affidavit. *First*, Plaintiff argues that the portion of the affidavit wherein Wexler discusses an administrative issue with Defendant's AE code (Wexler Aff. ¶¶ 15-23) — which

issue ostensibly prevented Defendant from receiving commission compensation through his AE code — is based primarily on a conversation Wexler had with other individuals and has no non-hearsay foundation. (Pl. Reply 3). *Second*, Plaintiff argues that Wexler's description of several examples of commission-pooling arrangements among other Cantor employees (Wexler Aff. ¶¶ 24-27) also lacks a non-hearsay foundation because "Wexler could have learned of these arrangements only by speaking with one or more people, reviewing documents, or both" (Pl. Reply 3-4). *Third*, Plaintiff argues that the Court should disregard statements in the Wexler Affidavit to the effect that Cantor could have fixed its commission compensation records — after the fact — using copies of personal checks and other information provided by Defendants. (Wexler Aff. ¶¶ 34-36). Plaintiff argues that these statements are entirely speculative because Wexler lacks any personal knowledge of: (i) Cantor's commission records concerning Defendants' commission-splitting arrangement, and/or (ii) the records Defendants maintained themselves regarding their arrangement. (Pl. Reply 4).

"Whether or not a motion to strike is filed, '[o]n a motion for summary judgment, a district court may rely only on material that would be admissible at trial.'" *Seife* v. *Food & Drug Admin.*, No. 17 Civ. 3960 (JMF), 2019 WL 1382724, at *1 (S.D.N.Y. Mar. 27, 2019) (quoting *Rubens* v. *Mason*, 387 F.3d 183, 189 (2d Cir. 2004)). A court may rely on an affidavit when deciding a motion for summary judgment only if it is "made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or

declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4); *see also Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009); Fed. R. Evid. 602. In deciding an evidentiary question, a court may "strike portions of an affidavit that are not based upon the affiant's personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements." *Hollander* v. *Am. Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir. 1999), *abrogated on other grounds by Schnabel* v. *Abramson*, 232 F.3d 83 (2d Cir. 2000). Alternatively, it may, without granting a motion to strike, simply "decline[ ] to consider evidence" from the inadmissible declarations. *Fabrication Enters., Inc.* v. *Hygenic Corp.*, 64 F.3d 53, 59 n.5 (2d Cir. 1995).

Applying these standards, the Court declines to strike portions of the Wexler Affidavit. Wexler testified that he personally conducted an investigation into the administrative issue with Defendant's AE code. (*See* Wexler Aff. ¶ 16). Thus, regardless of whether Wexler learned about some individual elements of the administrative issue from other employees, the Court finds that Wexler's personal investigation provides a sufficient basis to find that Wexler had "personal knowledge" of the AE code administrative issue. *See* Fed. R. Evid. 602. The Court agrees with Defendant that to the extent Wexler's description of his investigation into this issue is vague or poorly substantiated, such shortcomings go to Wexler's credibility and not the admissibility of his testimony. (*See* Def. Sur-Reply 3).

As to Wexler's description of other commission-splitting arrangements, the Court accepts Defendant's representation that the testimony is offered "for the fact that such conversations occurred, not for the truth of any matters asserted," and therefore agrees that is not hearsay. (Def. Sur-Reply 4 n.2). Additionally, the Court finds that Wexler's claim that he personally knows of these arrangements because, for example, he investigated and/or discussed such arrangements in his role overseeing the payment of commission compensation (Wexler Aff. ¶¶ 5, 25), is sufficient foundation to establish personal knowledge for admissibility purposes, even if a factfinder were later to discredit this testimony.

Finally, Wexler states that it was theoretically possible, in 2013 or 2014, for Cantor to "recreate the records using copies of the checks and existing commission reports and payroll records." (Wexler Aff. ¶ 34). The Court agrees with Defendant that Wexler has sufficiently established personal knowledge of how Cantor created certain commission compensation records through his statement that he oversaw commission compensation payments to Cantor employees and worked with the accounting department to produce some relevant documentation. (*Id.* at ¶ 5). But that conclusion comes with two provisos: To the extent Wexler's testimony on this subject discusses the mechanics of Cantor's hypothetical ability to create certain types of documentation of transactions on a *post hoc* basis, his testimony is admissible. To the extent Wexler claims that any such *post hoc* documentation could actually be created in this specific instance, or that any such documentation

might satisfy the Compensation Record Rule, these are questions for the factfinder and the Court.

Thus, the Court has evaluated whether the disputed portions the Wexler Affidavit are based on "'personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements,'" *Searles* v. *First Fortis Life Ins. Co.*, 98 F. Supp. 2d 456, 461 (S.D.N.Y. 2000) (quoting *Hollander*, 172 F.3d at 198), and it has concluded that these portions are admissible. Plaintiff's motion to strike is denied.

B. Summary Judgment Is Granted in Part and Denied in Part

1. Applicable Law

a. Summary Judgment Under Federal Rule of Civil Procedure 56

Under Federal Rule of Civil Procedure 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).[6] A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477

[6] The 2010 Amendments to the Federal Rules of Civil Procedure revised the summary judgment standard from a genuine "issue" of material fact to a genuine "dispute" of material fact. *See* Fed. R. Civ. P. 56, advisory comm. notes (2010 Amendments) (noting that the amendment to "[s]ubdivision (a) … chang[es] only one word — genuine 'issue' becomes genuine 'dispute.' 'Dispute' better reflects the focus of a summary-judgment determination."). This Court uses the post-amendment standard, but continues to be guided by pre-amendment Supreme Court and Second Circuit precedent that refer to "genuine issues of material fact."

U.S. 242, 248 (1986); *see also Jeffreys* v. *City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*).

"It is the movant's burden to show that no genuine factual dispute exists" and a court "must resolve all ambiguities and draw all reasonable inferences in the non-movant's favor." *Vt. Teddy Bear Co., Inc.* v. *1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004). If the movant has met its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts" and, toward that end, "must come forward with specific facts showing that there is a *genuine issue for trial*." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal citations and quotation marks omitted). The nonmoving party may not rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight* v. *U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986). Furthermore, "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks* v. *Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher* v. *Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (internal quotation marks and citations omitted)).

b. The Compensation Record Rule and Section 20(e) of the Securities Exchange Act

Section 17(a) of the Exchange Act provides that "[e]very … registered broker or dealer … shall make and keep for prescribed periods such records … as the Commission, by rule, prescribes as necessary or appropriate[.]" 15 U.S.C. § 78q(a)(1). Pursuant to Section 17(a), the SEC enacted the

Compensation Record Rule, which became effective on May 2, 2003. As noted, the Rule requires broker-dealers to make and keep current:

> [a] record: (i) As to each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person. The record shall include the amount of compensation if monetary and a description of the compensation if non-monetary. In lieu of making this record, a member, broker or dealer may elect to produce the required information promptly upon request of a representative of a securities regulatory authority.

17 C.F.R. § 240.17a-3(a)(19)(i).[7] "By its terms, the Compensation Record Rule requires broker-dealers, such as Cantor, to record the amount of monetary compensation attributable to each associated person (*i.e.*, broker) for each purchase and sale of a security." *Mattessich I*, 407 F. Supp. 3d at 270. "Compensation is 'attributable' to an employee if it is earned or accrued in favor of such employee." *Id.*; *see also Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934*, 76 S.E.C. Docket 343, Release No. 34-44992, 2001 WL 1327088, at sec. III(E) (Oct. 26, 2001) (hereinafter, "*Books and Records Requirements*") ("Under this requirement, firms must make records of all commissions, concessions, overrides, and other compensation to the extent they are *earned or accrued for transactions*." (emphasis added)).

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[7] As noted in *Mattessich I*, to the Court's (and parties') knowledge, no court has previously interpreted the Compensation Record Rule and this is the first litigated case addressing it. *Sec. & Exch. Comm'n* v. *Mattessich*, 407 F. Supp. 3d 264, 270 n.5 (S.D.N.Y. 2019) ("*Mattessich I*"). The Court has been made aware of only one settled administrative consent order under the Rule. *See Matter of Legend Sec., Inc.*, SEC Rel. 34-64502, 2011 WL 1847051 (May 16, 2011).

Plaintiff argues that Defendant aided and abetted Cantor in its violation of the Compensation Record Rule. Section 20(e) of the Securities Exchange Act establishes liability for those who aid and abet others in securities violations. 15 U.S.C. § 78t(e). It provides that:

> [a]ny person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

Id. To state a claim for aiding and abetting, the SEC must establish three elements: "[i] the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; [ii] knowledge of this violation on the part of the aider and abettor; and [iii] substantial assistance by the aider and abettor in the achievement of the primary violation." *Sec. & Exch. Comm'n* v. *Apuzzo*, 689 F.3d 204, 211 (2d Cir. 2012) (internal quotation marks omitted) (quoting *Sec. & Exch. Comm'n* v. *DiBella*, 587 F.3d 553, 566 (2d Cir. 2009)).

2. Analysis

Defendant argues that Plaintiff fails to establish all three elements of a Section 20(e) violation. Specifically, Defendant contends that Plaintiff fails to establish a primary violation of the Compensation Record Rule by Cantor because Plaintiff fails to point to any specific record that is inaccurate. (Def. Opp. 16-18). Defendant also argues that he did not have the requisite knowledge of any such violation by Cantor. (*Id.* at 18-23). Finally, Defendant disputes that he substantially assisted Cantor's violation, and further contends that his actions were not "primarily responsible" for Cantor's alleged breach of

the Compensation Record Rule. (*Id.* at 24-25). Plaintiff counters that Defendant fails to dispute any of the facts material to the Court's denial of Defendants' motion to dismiss in *Mattessich I*, and therefore that summary judgment is appropriate. (*See generally* Pl. Br; Pl. Reply). For the reasons discussed herein, the Court finds that Plaintiff has established the first element of a Section 20(e) violation as a matter of law, but agrees with Defendant that disputed issues of material fact remain as to the second and third elements.

a. Plaintiff Has Established a Primary Violation of the Compensation Record Rule

As noted above, the Compensation Record Rule requires, in relevant part, broker-dealers to make and keep current records:

> [a]s to each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person. The record shall include the amount of compensation if monetary and a description of the compensation if non-monetary.

17 C.F.R. § 240.17a-3(a)(19)(i). The parties do not dispute that any commission compensation paid by Cantor to Ludovico and then paid by Ludovico to Defendant qualifies as compensation for the purposes of the Compensation Record Rule. (*See generally* Def. Opp. 16-18). *See also Mattessich I*, 407 F. Supp. 3d at 270-71 (holding that the commission compensation Ludovico paid Defendant qualified as compensation within the meaning of the Compensation Record Rule). Instead, Defendant argues that Plaintiff "has failed entirely to produce or cite to a single Cantor record, or other document that it alleges to be inaccurate." (Def. Opp. 16). Plaintiff responds that such records are created using Cantor's AE code system and

that the AE code system contained no documentation of Defendant's off-the-books commission payments; and that in any event, the undisputed factual record establishes that Cantor failed to document the commission Ludovico paid Defendant in any way during the Relevant Period. (*See* Pl. Reply 4-5).

Defendant argues that the AE code system did not create Cantor's definitive record of commission compensation because (i) not all commission compensation was tracked and/or paid out via the AE code system, and (ii) AE codes were used by Cantor to track transactions that did not generate commissions. (*See* Def. 56.1 ¶ 13). But the record demonstrates that Cantor *did* use the AE code system to "make sure that its books and records were complete[.]" (Bradley Dep. 38:24-25; *see also* Distell Dep. 45:7-48:24). Furthermore — even accepting Defendant's argument that AE codes were not the definitive recordkeeping device Cantor employed to track commission compensation — the record clearly establishes that Cantor failed to record the commission remitted to Defendant by Ludovico pursuant to their commission-splitting scheme, whether via the AE code system or any other method. (*See* Pl. 56.1 ¶¶ 32-33, 43; *see also* Bradley Dep. 39:14-20, 61:11-13, 80:21-81:4; Distell Dep. 45:7-48:24). Defendant offers no evidence that Cantor relied on anything other than the AE code system to track commissions for compliance with the Compensation Record Rule (*see* Def. Opp. 16-18), and evidence in the record establishes that Cantor used no system other than the AE code system to track sales coverage on any particular transaction (Bradley Dep. 39:14-20).

Defendant suggests that the AE code system was not used for compliance with the Compensation Record Rule because there were other traders who purportedly split commissions in a manner that was not captured by the AE system. (*See* Def. 56.1 ¶¶ 110, 120-22). However, even if other traders engaged in commission-splitting schemes that were not captured by the AE code system, as Wexler suggests in his affidavit (*see* Wexler Aff. ¶¶ 24, 27), this fact would still fail to undermine the evidence that Cantor relied on the AE code system to comply with the Compensation Record Rule. Instead, it just suggests that Cantor violated the Compensation Record Rule by allowing other traders to engage commission-splitting schemes that were only partially documented by Cantor's payroll system.[8]

Thus, even if Cantor did not rely on AE codes to comply with the Compensation Record Rule — as Defendant now argues without citing any evidence — it is undisputed that Cantor had no record whatsoever of the commission paid to Defendant by Ludovico during the Relevant Period. Consequently, it necessarily violated the Compensation Record Rule by failing to "make and keep current" records as to "each associated person listing each

[8] Defendant offers Wexler's testimony describing these other commission-splitting schemes only to establish "the fact that such conversations occurred, not for the truth of any matters asserted[.]" (Def. Sur-Reply 4). For this reason, the Court is wary of crediting any of Wexler's detailed descriptions of how these schemes allegedly operated. However, the Court notes that every scheme Wexler describes involved *Cantor's* payment of pooled commissions to traders, and not schemes in which individual Cantor employees paid commissions to other employees, by personal check or otherwise. (*See* Wexler Aff. ¶ 24). As such, every scheme Wexler describes would be at least partially recorded by Cantor's payroll system, whereas Defendant's commission-splitting scheme with Ludovico went completely undocumented by Cantor.

purchase and sale of a security attributable, for compensation purposes, to that associated person." 17 C.F.R. § 240.17a-3(a)(19)(i).

b. There Is a Disputed Issue of Material Fact as to Defendant's Knowledge of the Primary Violation

The parties dispute the scienter required to establish the second element of an aiding and abetting violation pursuant to Section 20(e). Defendant argues that Plaintiff must prove that Defendant "'consciously assisted the commission of the specific' rule violation charged" (Def. Opp. 19 (quoting *DiBella*, 587 F.3d at 566)), and "'understood the *consequences* of [his] actions,'" (*id.* (quoting *Sec. & Exch. Comm'n* v. *Falstaff Brewing Corp.*, 629 F.2d 62, 77 (D.C. Cir. 1980))). Defendant further argues that the factual allegations in the Complaint that the Court relied on in denying the motion to dismiss have since been refuted. (*Id.*). Plaintiff rejoins that "a defendant's knowledge of the circumstances that constitute the primary violation satisfies the knowledge element of an aiding-and-abetting claim under Exchange Act Section 20(e)" (Pl. Reply 6 (citing *Mattessich I*, 407 F. Supp. 3d at 272)), and that knowledge of the consequences or of the act's "wrongfulness" is not required to establish a Section 20(e) violation (*id.* at 7). Plaintiff further contends that to the extent facts cited in *Mattessich I* have been refuted, any such facts are immaterial to establishing Defendant's knowledge of Cantor's primary violation. (*Id.* at 6-7).

At this procedural juncture, Defendant has the better of the dispute. Even accepting Plaintiff's argument regarding the scienter necessary to satisfy this element, the Court believes that a triable issue of fact exists as to Defendant's knowledge of the circumstances that constituted the primary

violation as well as his knowledge that Cantor's records were inaccurate. As noted above, the record clearly establishes that Cantor maintained no records of Ludovico's payments to Defendant during the Relevant Period. However, the record does not clearly establish that Defendant knew that Cantor kept no records of these payments. Rather Plaintiff offers evidence from which a factfinder can — but need not — conclude that Defendant had this knowledge. (*See* Pl. 56.1 ¶¶ 18-22 (discussing Defendant's responsibility for reviewing and approving requests for changes to commission payments via the AE code system)). And while the record demonstrates that Defendant was aware of, or should have been aware of, Cantor's policies and procedures that prohibited the payment of undisclosed and/or off-the-book commission compensation (*see* Pl. 56.1 ¶¶ 23-24; Pl. Reply 56.1 ¶¶ 96, 98; *see also* Bradley Dep. 60:15-61:5; Distell Dep. 59:8-61:23), the record does not conclusively establish that Defendant knew that his particular arrangement ran afoul of these prohibitions, given Defendant's proffer of evidence that he was granted permission to receive commission compensation for the trades in question due to an administrative issue with his AE code. (*See* Def. 56.1 ¶¶ 57-59, 69-77).

In *Mattessich I*, the Court found dispositive the allegation that "both [Defendant and Ludovico] were aware of Cantor's AE code system, which [Cantor] used to apportion and record commission payments, and that [Defendant and Ludovico] secretly agreed to split commissions that were paid to Ludovico by Cantor, circumventing the AE code system." 407 F. Supp. 3d at 272 (internal citations omitted). However, on summary judgment, Defendant

has proffered uncontested evidence that Defendant's implementation of the scheme was not in fact secretive in any way. (*See* Def. 56.1 ¶¶ 61-62). Additionally, Defendant's claim that he reasonably believed that Cantor's CEO gave him permission to engage in the commission-splitting scheme due to an administrative issue with his AE code raises a disputed issue of fact as to Defendant's scienter. (*See id.* at ¶¶ 57-59, 69-77). Had Defendant received Cantor's blessing to engage in the commission-splitting scheme, a jury could reasonably conclude that Defendant did not have the requisite knowledge of the circumstances that constitute the primary violation. *Cf. Falstaff Brewing Corp.*, 629 F.2d at 77 ("A knowledge of what one is doing and the consequences of those actions suffices. We therefore hold that because [defendant] knew the nature and consequences of his actions, he acted with scienter.").

"[T]he Second Circuit has left no doubt that scienter issues are seldom appropriate for resolution at the summary judgment stage." *Sec. & Exch. Comm'n* v. *Cole*, No. 12 Civ. 8167 (RJS), 2015 WL 5737275, at *5 (S.D.N.Y. Sept. 19, 2015) (collecting cases in the context of Section 10(b) and Rule 10b-5 claims). Accordingly, and "resolv[ing] all ambiguities and draw[ing] all reasonable inferences in the non-movant's favor," *Vt. Teddy Bear Co.*, 373 F.3d at 244, as the Court must on a motion for summary judgment, the Court concludes that Defendant has raised a disputed issue of material fact as to whether he had the requisite knowledge to satisfy the second element of a Section 20(e) violation, because he has proffered evidence that he believed he

had been given permission by Cantor to engage in the commission-splitting scheme with Ludovico.

c. There Is a Disputed Issue of Material Fact as to Whether Defendant Substantially Assisted in Cantor's Primary Violation

To satisfy the substantial assistance component of an aiding and abetting violation, Plaintiff must show that a defendant "in some sort associated himself with the venture, that he participated in it as in something that he wished to bring about, and that he sought by his action to make it succeed." *Apuzzo*, 689 F.3d at 206 (internal quotation marks and alterations omitted) (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). Plaintiff is not required to plead that the aider and abettor proximately caused the primary securities law violation. *Id.* at 213. "Section 20(e) of the Exchange Act states one can be held liable for aiding and abetting if that person 'knowingly or recklessly provides substantial assistance.'" *Mattessich I*, 407 F. Supp. 3d at 273 (quoting 15 U.S.C. § 78t(e)). "Thus, the SEC can allege either knowledge or recklessness; it need not allege both." *Id.*

The Second Circuit has repeatedly explained that — in the context of a Section 20(e) violation — "'there may be a nexus between the degree of knowledge and the requirement that the alleged aider and abettor render substantial assistance.'" *Apuzzo*, 689 F.3d at 214 (quoting *DiBella*, 587 F.3d at 566); *see also IIT* v. *Cornfeld*, 619 F.2d 909, 922 (2d Cir. 1980) ("Satisfaction of the scienter requirement will, for example, depend on the theory of primary liability and ... there may be a nexus between the degree of scienter and the

requirement that the alleged aider and abettor render 'substantial assistance'"), *abrogated on other ground by Morrison* v. *Nat'l Austr. Bank Ltd.*, 561 U.S. 247 (2010). Indeed, the Second Circuit observed that

> [w]hen determining whether a defendant sought by his actions to make the primary violation succeed, if a jury were convinced that the defendant had a high degree of actual knowledge about the steps he was taking and the role those steps played in the primary violation, they would be well justified in concluding that the defendant's actions, which perhaps could be viewed innocently in some contexts, were taken with the goal of helping the fraud succeed.

Apuzzo, 689 F.3d at 215. Here, as noted *supra*, Defendant has raised a disputed issue of fact as to whether he had "a high degree of actual knowledge" about "the steps he was taking" or "the role those steps played in the primary violation." *Id.* For example, Defendant has raised a factual dispute as to whether he received (or believed he received) permission from Cantor's CEO to engage in off-the-books commission-splitting (*see* Def. 56.1 ¶¶ 57-59), even if such schemes were prohibited by Cantor's WSPs and even if Defendant certified his compliance with Cantor's policies (*see* Pl. 56.1 ¶ 24; Pl. Reply 56.1 ¶¶ 96, 98). A jury could conclude that Defendant did not act with recklessness or knowledge if Defendant received permission from Cantor's CEO to engage in the commission-splitting scheme. *Cf. Apuzzo*, 689 F.3d at 214 (explaining that the SEC sufficiently pleaded the substantial assistance element by alleging that defendant "*knew* ... that the three-party transaction was *designed* to" facilitate improper conduct (alteration in original)).

After reviewing the record, the Court cannot conclude as a matter of law that Defendant had a "very high degree of knowledge of the fraud," and therefore the Court is hesitant to find that his "actions, which perhaps could be viewed innocently in some contexts, were taken with the goal of helping the fraud succeed" in this context. *Apuzzo*, 689 F.3d at 215. Here, as explained above, Defendant has offered evidence to support a plausible alternative: that he believed that he had received permission to pursue the scheme, creating a disputed issue of material fact as to whether Defendant's contribution to Cantor's violation was knowing or reckless.

Defendant also argues, with less success, that a disputed issue of material fact exists as to the substantial assistance element because Cantor hypothetically could have retroactively created records documenting Ludovico's off-the-books payments to Defendant, which it ultimately failed to do. (Def. Opp. 25). Defendant specifically cites the clause of the Compensation Record Rule that provides that registered broker-dealers may "elect to produce the required information *promptly upon request* of a representative of a securities regulator authority[.]" 17 C.F.R. § 240.17a-3(a)(19)(i) (emphasis added). Defendant reasons that, as a result, he is not primarily responsible for Cantor's breach of its regulatory obligations because Cantor caused the breach when it failed to take steps to "produce the required information" — presumably by recreating the records on a *post hoc* basis — after the SEC requested the records. (*Id.*). Putting aside whether Cantor's *post hoc* creation and subsequent production of these records would in fact excuse Defendant's

liability, the Court does not believe the Compensation Record Rule allows broker-dealers to avoid their recordkeeping obligations simply by reverse-engineering the records upon request. Although the interplay between the two clauses of the Compensation Record Rule is a question of first impression, the text of the Rule and the SEC's commentary contemporaneous with its creation both suggest that Defendant's interpretation is incorrect.

The text of the Compensation Record Rule gives registered broker-dealers two options to comply with their obligations under the Rule. They may either: (i) "*make and keep current*" "records … as to each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person[,]" or (ii) "elect to *produce the required information promptly* upon request of a representative of a securities regulator authority." 17 C.F.R. § 240.17a-3(a)(19)(i) (emphases added). Under Defendant's reading, broker-dealers could completely ignore the recordkeeping requirement as long as they were able to reverse-engineer records after receiving a request from a regulator. Such an expansive reading would render the first clause of the Rule completely superfluous. See *Cap. Ventures Int'l* v. *Rep. of Argentina*, 552 F.3d 289, 294 (2d Cir. 2009) (dispreferring construction of statute that rendered one or more provisions superfluous (citation omitted)). The Court understands the second clause not to free broker-dealers from any obligation to record commission compensation data, but rather to excuse broker-dealers from the cost of constantly updating (*i.e.*, keeping current) their records, and allowing them instead to maintain documentation that, "upon request … of a securities

regulator," may be, *inter alia*, updated, compiled, collated, analyzed, searched, filtered, and/or finalized, and thereafter "produced … promptly upon request[.]" 17 C.F.R. § 240.17a-3(a)(19)(i).

The Court's reading is reinforced by the SEC's own contemporaneous commentary. The SEC explained, with respect to the timing of the creation of records under the Compensation Record Rule, that "*the list of transactions* for which each associated person will be compensated can be created at the time of an examination." *Books and Records Requirements*, 2001 WL 1327088, at sec. VIII(C) (emphasis added). While this means that Cantor could run a series of reports to analyze data or information it already has to generate a "list of transaction" — *i.e.*, a record that establishes compliance with the Compensation Record Rule — this does not authorize Cantor to decline to keep any records or documentation relating to compensation until and unless the SEC requests such records. Indeed, Defendant must have some records or documentation that it can use to create such a list of transactions. Thus, the Court understands that the Rule allows a broker-dealer to produce or create the records in question "promptly" during an examination, with information and data already on-hand or that is readily accessible.

This understanding is further confirmed by the SEC's stated purpose for the Rule, which is "to allow securities regulators to quickly identify compensation trends and focus examinations," *see Books and Records Requirements*, 2001 WL 1327088, at sec. III(E), not to allow broker-dealers to reverse-engineer records only when they are under scrutiny. As it happens,

Cantor had no records whatsoever of the commission compensation that Defendant received from Ludovico, and thus could not have reverse-engineered the missing records even had it attempted to do so once the SEC requested the records. And to the extent Defendant argues that Cantor's failure to take steps to remediate the violation is an intervening cause — for example, because Cantor failed to request that Defendant supply it with copies of the personal checks Ludovico sent him in 2013 after Ludovico disclosed the scheme — that argument fails because it is well established that Plaintiff need not demonstrate that Defendant proximately caused Cantor's violation. *See Apuzzo*, 689 F.3d at 213.

The Court concludes that there remains a disputed issue of material fact as to whether Defendant substantially assisted in Cantor's violation of the Compensation Record Rule. However, the Court rejects Defendant's argument that Cantor could have remedied the violation if only it had reverse-engineered the records, thus excusing Defendant from aiding and abetting liability.

CONCLUSION

For the reasons stated in this Opinion, Plaintiff's motion to strike is denied, and Plaintiff's motion for summary judgment is granted in part and denied in part. The Clerk of Court is directed to terminate the motion at docket entry 64. The parties are directed to submit a joint status letter regarding proposed next steps within 30 days from the date of this Opinion.

SO ORDERED.

Dated: March 1, 2021
New York, New York

KATHERINE POLK FAILLA
United States District Judge

EXHIBIT 9

 Ct. Ex 11
2/16/22
10:43 am

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v.-

ADAM MATTESSICH,

Defendant.

18 Civ. 5884 (KPF)

VERDICT FORM
February 15, 2022

1. Has the plaintiff, the Securities and Exchange Commission, proved by a preponderance of the evidence that the defendant, Adam Mattessich, aided and abetted Cantor Fitzgerald's violation of the Compensation Record Rule?

YES ✓ NO ____

(*Please proceed to the next page.*)

Your deliberations are finished. This form should be signed, dated, and given to the Marshal.

1. [redacted] 2/16/22
Foreperson

2. [redacted] 2/16/22
Juror

3. [redacted] 2/16/22
Juror

4. [redacted] 2/16/22
Juror

5. [redacted] 2/16/22
Juror

6. [redacted] 2/16/2022
Juror

7. [redacted] 2/16/22
Juror

8. [redacted] 2/16/2022
Juror

9. [redacted] 2/16/2022
Juror

10. [redacted] 2/16/2022
Juror

EXHIBIT 10

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261

In the Matter of
ADAM MATTESSICH,
Respondent.

DECLARATION TO ASSIST WITH RECORD OF SERVICE

I, Jason Schall, declare and state as follows:

1. I am a Trial Counsel with the Trial Unit, Division of Enforcement ("Division"), of the Securities and Exchange Commission ("Commission"), and I am Division counsel assigned to the above-captioned administrative proceeding.

2. I submit this Declaration to assist the Commission's Secretary in maintaining a record of service on the Respondent in these proceedings, pursuant to Commission Rule of Practice ("Rule") 141(a)(3).

3. On December 22, 2022, the Commission issued its Order Instituting Proceedings (the "OIP") in this matter.

4. The Office of the Secretary served a copy of the OIP on both Respondent and his counsel by United States Postal Service ("USPS") Certified Mail. A copy of the receipt for this service is attached as Exhibit 1. According to USPS tracking information, these mailings were delivered to Respondent and his counsel on December 27, 2022 at 8:06 a.m.

5. On January 12, 2023, counsel to Respondent, Noam Greenspan of Talkin, Muccigrosso & Roberts LLP, sent an email to Lee A. Greenword, my co-counsel on this case, stating that he filed a Notice of Appearance and Answer for Respondent and attaching the documents he claimed to have filed to his email. A copy of this email is attached as Exhibit 2.

6. On February 2, 2022, Mr. Greenspan informed Division counsel that his filings on January 12, 2023, had been rejected by the eFAP system. A copy of this email is attached as Exhibit 3.

7. Later that day, Denis Kelleher, Mr. Greenspan's co-counsel in this matter, informed Division counsel that they had re-filed the Notice of Appearance and Answer on the eFAP system.

8. For the above reasons, the Division contends that service on Mattessich of the OIP and the Secretary's Letter was completed by December 23, 2023, pursuant to Rule 141(a)(2), and Mattessich has answered the OIP, pursuant to Rule 220.

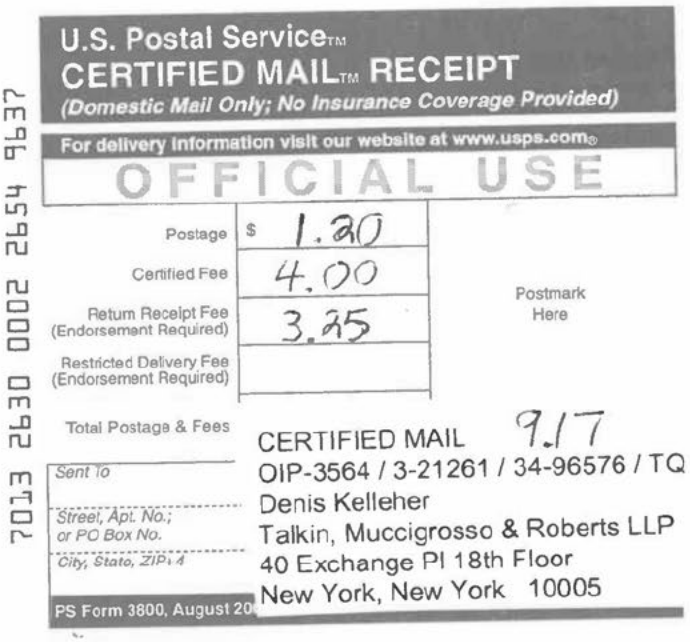
Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on February 7, 2023

/s/ Jason Schall
Jason Schall
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-3977
(202) 551-6270
schallj@sec.gov

COUNSEL FOR THE DIVISION OF ENFORCEMENT

EXHIBIT 1



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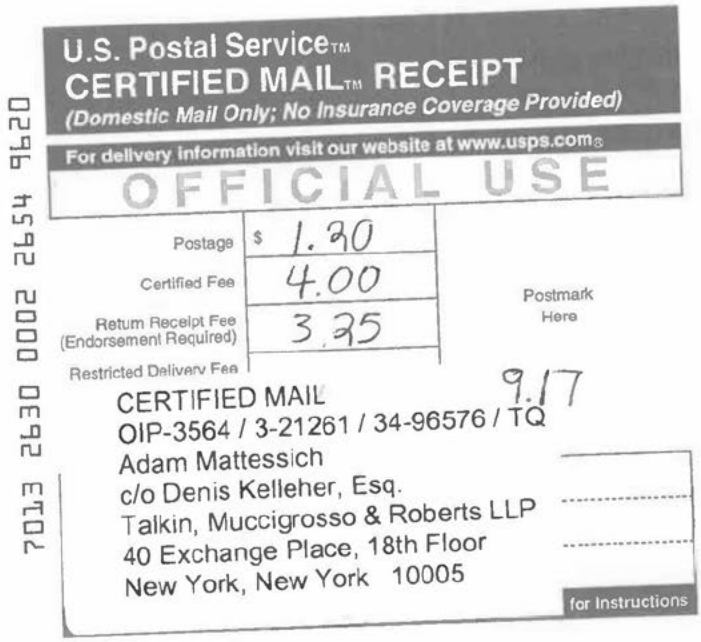
Denis Kelleher
Talkin, Muccigrosso & Roberts LLP
40 Exchange Pl 18th Floor
New York, New York 10005

PS Form 3800, August 20



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CERTIFIED MAIL
OIP-3564 / 3-21261 / 34-96576 / TQ
Adam Mattessich
c/o Denis Kelleher, Esq.
Talkin, Muccigrosso & Roberts LLP
40 Exchange Place, 18th Floor
New York, New York 10005

for Instructions

EXHIBIT 2

From: Noam Greenspan
To: Greenwood, Lee
Cc: Fortino, Philip A; Denis Kelleher; Krishnamurthy, Preethi
Subject: RE: Adam Mattessich, AP File No. 3-21261
Date: Thursday, January 12, 2023 5:05:57 PM
Attachments: Mattessich OIP Answer.pdf
Notice of Appearance.pdf

Lee,

Attached are our Notice of Appearance and Answer, both of which were just filed using the SEC's eFAP system.

Regards,

Noam Greenspan
Talkin, Muccigrosso & Roberts LLP
40 Exchange Place, 18th Floor
New York, New York 10005
(212) 482-0007 (office) | (212) 584-0150 (direct)
ngreenspan@talkinlaw.com

From: Greenwood, Lee <greenwoodl@SEC.GOV>
Sent: Friday, December 23, 2022 12:19 PM
To: Denis Kelleher <dkelleher@talkinlaw.com>; Noam Greenspan <ngreenspan@talkinlaw.com>
Cc: Fortino, Philip A <fortinop@SEC.GOV>
Subject: RE: Adam Mattessich, AP File No. 3-21261

Attached is the notice of appearance we just filed.

From: Greenwood, Lee
Sent: Friday, December 23, 2022 11:04 AM
To: Denis Kelleher <dkelleher@talkinlaw.com>; Noam Greenspan <ngreenspan@talkinlaw.com> <ngreenspan@talkinlaw.com>
Cc: Fortino, Philip A <fortinop@SEC.GOV>
Subject: Adam Mattessich, AP File No. 3-21261

Denis and Noam,

You should have received service of the follow-on AP from the Office of the Secretary already, but we've attached a copy of for reference. Your answer is due within 20 days, or January 12, 2023. You should also file a notice of appearance using the SEC's "eFAP" system, which is referenced on the

third page of the order. Let us know if you have questions.

Lee A. Greenwood
Division of Enforcement
U.S. Securities and Exchange Commission
100 Pearl Street, Suite 20-100
New York, NY 10004
(212) 336-1060
GreenwoodL@sec.gov

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261

----------x

In the matter of

ANSWER TO ORDER INSTUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

ADAM MATTESSICH

Respondent.

----------x

Pursuant to Securities and Exchange Commission (the "Commission") Rule of Practice 220, Defendant Adam Mattessich ("Mattessich"), by his counsel, Talkin, Muccigrosso & Roberts, LLP, answers the Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing ("OIP"), dated December 22, 2022, as follows:[1]

1. Mattessich admits the allegations in Paragraph 1 of the OIP, except adds that he has been unemployed for long periods of time since 2018 and therefore denies any potential implication from the allegations in Paragraph 1 that Mattessich has been continuously employed in the two roles listed. Moreover, while Mattessich admits that he held the titles alleged in Paragraph 1—"head of trading" and "head of trading operations"—Mattessich contends that these titles should be capitalized as they do not completely and accurately describe his actual job functions.

2. Mattessich admits the allegations contained in Paragraph 2 of the OIP.

[1] Respondent has answered Section II of the OIP, the only section in which allegations are made. Mattessich reserves the right to amend and address other Sections, should a response to another portion of the OIP be necessary.

3. Mattessich admits the allegations contained in Paragraph 3 of the OIP.

4. Mattessich admits the allegations contained in Paragraph 4 of the OIP to the Extent that they summarize some of the key allegations contained in the Complaint in the federal court case, *Securities and Exchange Commission v. Mattessich*, 18 Civ. 5884 (KPF) ("District Court Case").

DEFENSES

While it is the Division of Enforcement's burden to establish that any further relief is in the public interest pursuant to Section 15(b) of the Exchange Act, which burden Mattessich does not assume hereby, Mattessich states the following:

1. By Opinion and Order in the District Court Case, the Court imposed a civil money penalty of $180,000 and permanently enjoined Mattessich from future violations of the "Compensation Record Rule," Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), and Rule 17a-3(a)(19).

2. In combination with Respondent's conduct as proved at trial in the District Court Case, the Division of Enforcement cannot prove that it is in the public interest to permanently disqualify Mattessich from appearing and practicing before the Commission, the remedial action the Division of Enforcement stated it planned seek during the District Court Case.

3. The Division of Enforcement cannot demonstrate it is in the public interest to impose a permanent bar against Respondent for multiple reasons, including because:

a. The violations involved do not involve fraudulent statements and misrepresentations;

b. There is no evidence that any customer or counterparty was harmed by the violations;

c. No forfeiture was requested by the Division of Enforcement because no party suffered a demonstrable loss as a result of the violations;

d. Mattessich has no prior disciplinary history;

e. The violative conduct ceased ten years ago, and there is no indication that Mattessich has engaged in any additional misconduct;

f. In addition to the sanctions imposed by the Court, Mattessich has also suffered substantial collateral consequences from his actions, including the loss of his career as a broker, expiration of his securities licenses, and the loss of substantial deferred compensation from his previous employer.

Mattessich reserves the right to supplement the above-enumerated list with additional factors weighing against a permanent bar. Mattessich requests that this matter be decided by Motion for Summary Disposition pursuant to Rule 250 on a briefing schedule to be set by the Commission.

Dated: New York, NY
January 12, 2023

Respectfully submitted,

___/s/_____
Denis Patrick Kelleher, Esq.
Noam Greenspan
Attorneys for Adam Mattessich
Talkin, Muccigrosso & Roberts LLP
40 Exchange Place, 18th Floor
New York, NY 10005

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261
----------x
In the matter of

NOTICE OF APPEARANCE

ADAM MATTESSICH

Respondent.
----------x

The following attorneys are members in good standing of the bar of New York and hereby enter their appearance as counsel for Respondent Adam Mattessich. Please direct all hard copy correspondence to Denis Patrick Kelleher. Please provide electronic copies to all attorneys listed below:

Denis Patrick Kelleher
Talkin, Muccigrosso & Roberts, LLP
40 Exchange Place, 18th Floor
New York, NY 10005
(212) 482-0007
dkelleher@talkinlaw.com

Noam Greenspan
Talkin, Muccigrosso & Roberts, LLP
40 Exchange Place, 18th Floor
New York, NY 10005
(212) 482-0007
ngreesnpan@talkinlaw.com

Dated: January 12, 2023

Respectfully submitted,

/s/ Denis Patrick Kelleher

Denis Patrick Kelleher, Esq.
Noam Greenspan, Esq.
Talkin, Muccigrosso & Roberts LLP
40 Exchange Place, 18th Floor
New York, NY 10005

Attorneys for Adam Mattessich

EXHIBIT 3

From: Noam Greenspan
To: Greenwood, Lee; Schall, Jason
Cc: Denis Kelleher
Subject: Re: In the Matter of Mattessich
Date: Thursday, February 2, 2023 9:43:27 AM

Jason and Lee,

It seems that our submissions were rejected by the filing system and that the notification went to my personal email address and into a spam filter (for some reason the eFAP system seems to be the same login that I used for my Global Entry application, which is why it is connected to my personal email). The rejection included the following statement:

This submission is being rejected by the Office of the Secretary. Please resubmit replacement documents adhering to the Rules of Practice, which permits a filing with a "/s/" signature notation, however, the attorney whose signature appears on the doc must use their own login credentials to file that document into eFAP. A paralegal can use their login credentials to file on behalf of an attorney only if the filing is signed by an attorney by either wet written signature or digital signature

It seems that the Office of the Secretary rejected the submission for some unspecified reason purportedly somewhere in the Rules of Practice, and perhaps thinks that I am a paralegal even though my name and information are on the Notice of Appearance. I tried to call them about five minutes ago at the number included on the rejection email, but no one answered. We will resign with a wet written signature and resubmit.

Thanks,
Noam

From: Noam Greenspan <ngreenspan@talkinlaw.com>
Sent: Wednesday, February 1, 2023 8:46 PM
To: Denis Kelleher <dkelleher@talkinlaw.com>; Greenwood, Lee <greenwoodl@SEC.GOV>
Cc: Schall, Jason <SchallJ@SEC.GOV>
Subject: Re: In the Matter of Mattessich

I do not believe we were served with yesterday's order prior to your email. I am currently in the middle of a trial, but I will try to call the office of the secretary during a break tomorrow.

From: Denis Kelleher <dkelleher@talkinlaw.com>
Sent: Wednesday, February 1, 2023 5:31 PM

To: Greenwood, Lee <greenwoodl@sec.gov>
Cc: Schall, Jason <SchallJ@sec.gov>; Noam Greenspan <ngreenspan@talkinlaw.com>
Subject: Re: In the Matter of Mattessich

We will double check.

Sent from my iPhone

> On Feb 1, 2023, at 5:29 PM, Greenwood, Lee <greenwoodl@sec.gov> wrote:
>
> Are y out sure you guys filed your answer and notice of appearance properly? The order suggests that the office of the secretary has no record of it.
>
> > On Feb 1, 2023, at 5:26 PM, Schall, Jason <SchallJ@sec.gov> wrote:
> >
> > We plan to submit a declaration of service that we believe will resolve the issue.
> >
> > ---
> >
> > **From:** Denis Kelleher <dkelleher@talkinlaw.com>
> > **Sent:** Wednesday, February 1, 2023 5:21 PM
> > **To:** Schall, Jason <SchallJ@SEC.GOV>
> > **Cc:** Noam Greenspan <ngreenspan@talkinlaw.com>; Greenwood, Lee <greenwoodl@SEC.GOV>
> > **Subject:** Re: In the Matter of Mattessich
> >
> >
> >
> > We saw. What's your plan?
> >
> > Denis Patrick Kelleher, Esq.
> > Talkin, Muccigrosso & Roberts LLP
> > 40 Exchange Place 18th Floor
> > New York, NY 10005
> > 212-482-0007(work)
> > 212-542-3105 (direct)
> > 212-482-1303 (fax)
> > 917-364-9484 (cell)
> > Sent from my iPad

On Feb 1, 2023, at 2:27 PM, Schall, Jason <SchallJ@sec.gov> wrote:

Dear Counsel:

In case you haven't received it, attached please find yesterday's Commission order in our matter. We are working to resolve the seeming misunderstanding of the posture.

Thanks,

Jason Schall
U.S. Securities & Exchange Commission
Division of Enforcement
100 F Street, NE
Washington, DC 20549
(202) 551-6270
(202) 294-3784
schallj@sec.gov

<34-96780.pdf>

EXHIBIT 11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21261

In the Matter of **ADAM MATTESSICH,** **Respondent.**	**PREHEARING CONFERENCE STATEMENT**

The Division of Enforcement (the "Division") and Respondent Adam Mattessich ("Respondent") respectfully submit this statement pursuant to Section IV of the order instituting these administrative proceedings to advise the Securities and Exchange Commission (the "Commission") that the Division and Respondent conducted a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice on January 23, 2023. During the prehearing conference, the Division and Respondent agreed to the following briefing schedule for the Division's motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice: (a) the Division will file its Rule 250 motion on or before **March 3, 2023**; (b) Respondent will file any opposition on or before **April 3, 2023**; and (c) the Division will file any reply papers on or before **April 18, 2023**.

The Division and Respondent also respectfully advise the Commission that the parties agree that the Division has met its discovery obligations under Rule 230 of the Commission's Rules of Practice by virtue of the discovery responses and document productions made to Respondent during discovery in the civil injunctive action preceding these administrative proceedings, *Securities Exchange Commission v. Mattessich*, 18 Civ. 5884 (KPF) (S.D.N.Y.).

Dated: January 24, 2023

Respectfully submitted,

/s/ Jason Schall

Jason Schall
Lee A. Greenwood
Division of Enforcement
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(202) 551-6270
SchallJ@sec.gov

For the Division

/s/ Denis Kelleher

Denis Kelleher
Noam Greenspan
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40 Exchange Place, 18th Floor
New York, NY 10005
(212) 482-0007
DKelleher@talkinlaw.com

For Respondent