

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**BRENDA SMITH, BROAD REACH
CAPITAL, LP, BROAD REACH
PARTNERS, LLC, and BRISTOL
ADVISORS, LLC, et al.,**

Defendants.

C.A. No. 2:19-cv-17213 (MCA)

Motion Day: April 18, 2022

**MOTION BY INDUSTRIAL AND COMMERCIAL BANK OF
CHINA FINANCIAL SERVICES LLC IN OPPOSITION TO THE FIRST OMNIBUS
MOTION OF RECEIVER, KEVIN DOOLEY KENT, FOR ORDER RESOLVING
DISPUTED NON-INVESTOR CREDITOR CLAIMS**

Dated: May 3, 2023

SCHULTE ROTH & ZABEL LLP

By: /s/ Tara S. Lederer

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Industrial and Commercial Bank of China Financial Services LLC (“ICBCFS”), through its undersigned counsel, hereby submits this opposition to the First Omnibus Motion of Receiver, Kevin Dooley Kent, For Order Resolving Disputed Non-Investor Creditor Claims (ECF. 232) (the “Motion”).

PRELIMINARY STATEMENT

ICBCFS is a clearing agent that performs clearing and back office services for broker-dealers. ICBCFS and CV Brokerage Inc. (“CV Brokerage”) were parties to a Fully Disclosed Clearing Agreement dated as of March 18, 2013 (as amended, supplemented or otherwise modified, the “Clearing Agreement”). Under the clear and unambiguous terms of the agreement, CV Brokerage agreed to indemnify ICBCFS for defending against any claims caused by CV Brokerage’s or any of its employee’s negligent, reckless, dishonest, fraudulent, or criminal acts or omissions. In connection with the Clearing Agreement, CV Brokerage maintained certain deposit accounts at ICBCFS (the “Accounts”).

Unbeknownst to ICBCFS, the principal of CV Brokerage, Brenda Smith (“Smith”), was running a Ponzi scheme. When Smith’s conduct was exposed, all entities affiliated with Smith, including CV Brokerage, were put into a receivership, which is pending before the Court, and Kevin D. Kent, Esq. was appointed as the receiver (the “Receiver”).

The Receiver set forth a process for parties to submit claims against CV Brokerage. ICBCFS timely filed claims for liquidated and unliquidated indemnities stemming from legal fees and expenses incurred, and to be incurred, in defending against actions stemming from Smith’s fraud. Despite the clear and unambiguous terms of the Clearing Agreement, the Receiver filed the Motion seeking to deny ICBCFS’s claims.

The Receiver argues that the indemnity provisions of the Clearing Agreement are invalid solely because certain customers of CV Brokerage (with whom ICBCFS had no relationship and

to whom ICBCFS did not owe any duties) have alleged—without any judicial finding regarding same—that ICBCFS acted intentionally or was fraudulently involved in the misconduct (it did not and was not). This contravenes established case law, which provides that an indemnity is valid unless and until there are factual findings by a court of intentional or fraudulent conduct that voids an indemnification agreement. Moreover, as discussed herein, the allegations on which the Receiver relies do not come anywhere close to proving that ICBCFS had knowledge that Smith was running a Ponzi scheme or otherwise acted intentionally or fraudulently. Indeed, although a New York judge ruled that he could not throw out the claims on a motion to dismiss, he expressed skepticism about the merits of CV Brokerage’s customers’ claims. Furthermore, there is a large body of New York law that stands for the proposition that a clearing agent that is merely performing its duties is not liable for the tortious conduct of a broker-dealer for which such clearing agent clears transactions. Indeed, clearing agents often win such claims such as those asserted against ICBCFS on summary judgment.

Finally, as security for its indemnification claim, ICBCFS has a perfected lien in the cash on deposit in the Accounts at ICBCFS. A perfected security interest provides a secured creditor with a constitutionally protected property right in its collateral. In addition, applicable law and the Clearing Agreement each dictate that ICBCFS is entitled to set off the cash on deposit at ICBCFS against ICBCFS’s claim, should it be allowed by this Court. ICBCFS reserves all of its rights regarding its cash collateral and its right of setoff, provided that ICBCFS will continue to hold off on any dispositions of those monies pending a further order by the Court. ICBCFS further respectfully requests the Court set a hearing and permit it to be heard on the issues herein.

STATEMENT OF FACTS

ICBCFS and CV Brokerage were parties to the Clearing Agreement. (A true and correct copy of the Clearing Agreement is attached hereto as Exhibit 1.) Under the Clearing Agreement,

CV Brokerage agreed to indemnify, defend and hold harmless ICBCFS and any controlling person of ICBCFS from and against “all claims, demands, proceedings, suits, actions, and all liabilities, expenses, and reasonable attorney’s fees (including fees and costs incurred in enforcing ICBCFS’s right to indemnification), and costs in connection therewith arising out of one or more of [CV Brokerage’s] or any employee’s negligent, reckless, dishonest, fraudulent, or criminal act or omission.” Clearing Agreement, § 19.2.1. Furthermore, in connection with the Clearing Agreement, CV Brokerage maintained the Accounts at ICBCFS.

Smith operated CV Brokerage. Unbeknownst to ICBCFS, Smith was using CV Brokerage as part of a Ponzi scheme. When Smith’s fraudulent conduct was exposed, all entities affiliated with Smith, including CV Brokerage, were put into a receivership, which is pending before the Court, and the Receiver was appointed.

At the time the receivership was commenced, there was \$488,213.08 on deposit in the Accounts (the “Balance”).

Upon appointment, the Receiver notified ICBCFS of the entry of the Order Appointing Receiver (ECF. 22) (the “Receivership Order”), which required that all funds on deposit in accounts subject to the receivership be turned over to the Receiver. This purported to include the Balance in the Accounts. ICBCFS notified the Receiver that it had indemnification claims against CV Brokerage under the Clearing Agreement, and that the claims were secured by a security interest in the Balance in the Accounts. ICBCFS’s security interest was perfected by its possession and control of the funds on deposit in the Accounts. ICBCFS further notified the Receiver of ICBCFS’s right of setoff against the Balance to satisfy its claim against CV Brokerage, which it had not exercised due to the Receivership Order.

Ultimately, the Receiver and CV Brokerage entered into that certain Stipulation Between the Receiver, Industrial and Commercial Bank of China Financial Services LLC, and the Securities and Exchange Commission to Resolve Motion to Amend the Amended Order Appointing Receiver dated September 8, 2020 (ECF 30) (the “Stipulation”), under which ICBCFS was “entitled to maintain possession and control of the Balance in the Accounts until such time as (i) the amount and priority of the ICBCFS Claim, (ii) the validity and priority of ICBCFS’s lien on the Balance and (iii) ICBCFS’s right to set off the Balance against the allowed ICBCFS’s claim are determined by entry of a final order of the Court.” Stipulation, ¶ 3.

ICBCFS has abided, and continues to abide, by the terms of the Stipulation at all times. In response to the establishment of April 25, 2022 as the deadline for asserting claims against the receivership, ICBCFS timely submitted a proof of claim (the “Proof of Claim”) to the Receiver for its indemnification claims.

I. ICBCFS’s Basis for Claims

ICBCFS has incurred—and continues to incur—fees and expenses in defending against multiple legal proceedings that spawned out of CV Brokerage’s misconduct. ICBCFS is entitled to indemnification for fees and expenses incurred in defending those actions pursuant to the Clearing Agreement.

These actions include the following: *Jeffrey Bydalek v. CV Brokerage, Inc., Industrial and Commercial Bank of China Financial Services LLC and Brenda A. Smith* (FINRA Arbitration No. 18-03955) (the “Bydalek Claim”); *Alpha Capital Trading Group, LLC v. CV Brokerage, Inc. et al* (FINRA Arbitration No. 19-03157) (the “Alpha Capital Claim”); *SureFire Dividend Capture, LP v. Industrial and Commercial Bank of China Financial Services LLC*, Docket No. 652507/2021 (N.Y. Sup Ct. Apr. 15, 2021) (the “SureFire Litigation”); and, *Alpha Fund LP and Alpha Capital Partners, LP, v. Industrial and Commercial Bank of China Financial Services LLC*, Docket No.

652446/2022 (N.Y. Sup Ct. July 14, 2022) (the “A Funds Litigation”,¹ and collectively with the Bydalek Claim, the Alpha Capital Claim, and the SureFire Litigation the “CV Brokerage Related Actions”). Additionally, ICBCFS incurred fees and expenses with respect to reviewing and responding to governmental investigations relating to Smith.

Significant progress has been made in each of these legal proceedings, and where the legal proceeding has concluded, the claims against ICBCFS have been resolved without any finding that ICBCFS engaged in wrongful conduct and without ascribing any liability to ICBCFS. Accordingly, ICBCFS’s claim for indemnity is proper in such matter and ICBCFS should be indemnified for its expenses relating thereto.

A. The Bydalek Claim

Jeffrey Bydalek, an investor in a fund operated by Smith, had brought claims for fraud, breach of fiduciary duty, breach of contract, fraudulent transfers and unlawful conversion against Smith and CV Brokerage. ICBCFS was initially named as a relief respondent, and was later named as a respondent in the amended statement of claim. Bydalek alleged that ICBCFS aided and abetted Smith and CV Brokerage’s aforementioned fraud and breach of fiduciary duty.

The Bydalek Claim resolved on January 26, 2023 without any finding of liability or any payment by ICBCFS to Bydalek (or anyone else). (A true and correct copy of the notice of dismissal is attached hereto as Exhibit 2.)

B. The Alpha Capital Claim

Alpha Capital Trading Group, LLC (“Alpha”) alleged that respondents failed to protect its investments in Broad Reach Capital, LP (“Broad Reach”), a fund operated by Smith, from her

¹ The A Funds Litigation was initiated after ICBCFS submitted its Proof of Claim to the Receiver.

fraud. Alpha alleged that ICBCFS should have investigated suspicious activities in Broad Reach. The Alpha Capital Claim is stayed pending the Receivership.

C. The SureFire Litigation

SureFire filed suit against ICBCFS in New York state court, alleging two aiding and abetting claims (of fraud and breach of fiduciary duty) in connection with ICBCFS's provision of clearing services for Broad Reach. Significant progress has been made in the SureFire Litigation and the Court dismissed the bulk of the alleged damages.

On June 2, 2022, Justice Ostrager held a hearing on ICBCFS's motion to dismiss in *Surefire Dividend Capture, LP v. ICBCFS*, Index No. 652507/2021, in the Supreme Court of New York, New York County. During that hearing, Justice Ostrager stated that there was a "serious issue as to whether a claim against the [clearing] agent is appropriate," and expressed skepticism as to the merits of the claim, but was not prepared to rule as a matter of law that the case could not proceed on a motion to dismiss. (A true and correct copy of the transcript on the motion to dismiss is attached as Exhibit 3.)

Justice Ostrager also dismissed the vast majority of SureFire Dividend Capture, LP's claims against ICBCFS, limiting the value of the case from the \$46 million alleged to \$4.5 million. *See Surefire Dividend Capture, LP v. ICBCFS*, Index No. 652507/2021, NYSCEF 106 at p. 3. The motion to dismiss is currently subject to appeal in *SureFire Dividend Capture, LP v. Industrial and Commercial Bank of China Financial Services LLC*, CASE NO. 2022-02867.

The lawsuit is proceeding and expected that the case might be disposed of in 24 months.

D. The A Funds Litigation

Aalii Fund, LP and Alpha Capital Partners, LP² filed suit against ICBCFS in New York state court, alleging two aiding and abetting claims (of fraud and breach of fiduciary duty) in connection with ICBCFS's provision of clearing services for Broad Reach. These allegations are substantially similar to the allegations in the SureFire Litigation. As with the SureFire Litigation, ICBCFS moved to dismiss the case for failure to state a claim and for lack of damages. While Justice Ostrager expressed skepticism as to whether the A Funds suffered any damages, he did not make a determination at the pre-answer stage as a matter of law and allowed the claims to proceed. Accordingly, ICBCFS expects the case may be consolidated with the SureFire Litigation for purposes of discovery and may be disposed of in 24 months.

As a result of defending the CV Brokerage Related Actions, ICBCFS has incurred costs and expenses subject to the indemnification under the Clearing Agreement.

E. The Government Investigation

In addition to the CV Brokerage Related Actions, ICBCFS incurred costs and expenses in responding to government subpoenas. ICBCFS received multiple regulatory requests relating to CV Brokerage and Smith. For example, on May 2, 2022, the United States Securities and Exchange Commission (the "SEC") issued a subpoena to ICBCFS. These requests caused ICBCFS to incur costs and expenses subject to the indemnification under the Clearing Agreement of \$320,776.74.

² The entities involved in the A Funds Litigation are distinct and unrelated entities from Alpha, the entity involved in the Alpha Capital Claim.

II. Liquidated Indemnity Claim

On April 15, 2022, ICBCFS submitted to the Receiver a liquidated and non-contingent indemnity claims against CV Brokerage for legal fees and expenses already incurred in the amount of \$1,429,174 (the “Liquidated Indemnity Claim”).

Since the filing of the Proof of Claim, ICBCFS has incurred additional indemnifiable fees and expenses in the amount of \$1,765,423.45, bringing the aggregate amount of its liquidated claim to \$3,194,597.45.

III. Unliquidated Indemnity Claim

ICBCFS also submitted unliquidated indemnity claims relating to legal fees and expenses not yet incurred at the time ICBCFS filed its Proof of Claim.

Because the CV Brokerage Related Actions have not yet been resolved, ICBCFS is still not able to fully liquidate the amount of its claim and therefore, continues to assert an unliquidated claim for future legal fees and expenses incurred by ICBCFS in connection with the CV Brokerage Related Actions as well as any new indemnifiable action that might be commenced after the date hereof.

IV. Security Interest and Setoff Right

Under the Clearing Agreement, CV Brokerage granted ICBCFS a “lien upon, and right of offset as to the Account, the Balance, and all money, securities, financial assets and other investment property, and rights with respect to such Account and Balance and all proceeds thereof and accommodations thereto, now or thereafter held by, deposited with, or otherwise within the possession or control (whether credited to the Account or otherwise) of ICBC[FS], its agents, or affiliated persons.” Clearing Agreement, § 9.1. The Accounts hold a collective Balance in the amount of \$444,213.08. ICBCFS’s lien on the Accounts and the Balance is perfected by ICBCFS’s possession and control of the Accounts, which are maintained at ICBCFS.

Pursuant to the Stipulation, ICBCFS has maintained the Balance in the Accounts since the commencement of the receivership subject to its right to set off the Balance against the Indemnity Claim, which right of setoff is expressly provided for in the Brokerage Agreement. Section 8.5 of the Clearing Agreement provides that when a payment obligation of CV Brokerage “in favor of ICBC[FS] arises, whether pursuant to an indemnity or otherwise, ICBC[FS] shall be entitled to apply against such Reimbursement Obligation or other obligation all or any part of the Balance.”

On May 25, 2022, the Receiver sent counsel for ICBCFS a letter acknowledging receipt of the trade creditor claim form and stating his objections to the claim.

ICBCFS timely replied to the Receiver on June 8, 2022 informing the Receiver that ICBCFS disputed his contentions.

On March 14, 2023, the Receiver filed the Motion which seeks, among other things, the disallowance of ICBCFS’s claims based on the following:

The Receiver cannot accept claims for unknown future defense costs that might be incurred in connection with existing or litigation that may arise in the future on the basis that the Court ordered that “All claims or demands against the Receivership that are not submitted to the Receiver on or before The Claims Bar Date shall be barred from recovery.” (Motion at 49, citing Feb. 22, 2022 Order at ¶ 2.)³

With respect to the Liquidated Indemnity Claim, the Receiver claimed that because ICBCFS is alleged to have engaged in intentional conduct that caused injury to the Plaintiff/Claimant that, if proven, would also demonstrate injuries to CV Brokerage which would make the indemnification agreement unenforceable under New York law. (*Id.* at 50-51.) At no

³ “Claims Bar Date” is defined in the Receiver’s Motion for Order Setting Claims Bar Date, Establishing Claims Procedure and Approving Notification Process. (ECF. No. 160). In practice, the Claims Bar Date was April 25, 2022.

point did the Receiver claim that there has been any sort of factual determination that ICBCFS actually engaged in this conduct. (*See generally id.*). Indeed, ICBCFS has not.

Finally, the Receiver argued that ICBCFS could not “exercise a right of self-help” to seize the Accounts. (*Id.* at 51.) The Receiver noted that it has not yet recommended a distribution plan and that, to the extent this Court recognizes ICBCFS’s liquidated claim, such recognition of the claim does not grant ICBCFS a right to “sweep” the Accounts ICBCFS currently maintains to satisfy such claim. (*Id.* at 51-52.)

ARGUMENT

I. ICBCFS Has A Right To Indemnification.

The Clearing Agreement is a valid and binding agreement and the indemnification provision therein is clear and unambiguous. The Receiver has not disputed same. As such, the Clearing Agreement is a valid contract and its terms, including the indemnification provision, must be enforced. The Receiver’s sole contention that the indemnification provision is void as a matter of public policy is based on the unproven allegations made by the plaintiffs in the CV Brokerage Related Actions. However, ICBCFS is plainly entitled to indemnification unless and until there is a judgment finding that ICBCFS acted intentionally or fraudulently. No such judgment exists.

“New York courts have held that so long as the indemnity contract’s terms would apply to intentional conduct, an indemnified party is entitled to legal defense fees in cases alleging intentional or fraudulent wrongdoing until the indemnified party is found by the finder of fact to have acted intentionally or fraudulently.” *CBS Corp. v. Eaton Corp.*, No. 07 CIV. 11344 (LBS), 2010 WL 1375169, at *2 (S.D.N.Y. Mar. 30, 2010). As a result, there is no basis for voiding the indemnification agreement absent a determination that ICBCFS was intentionally or frequently involved in the wrongdoing.

The Receiver relies on *Gibbs-Alfano v. Burton*, which he misapprehends to suggest that that indemnification agreements are void if there are mere *allegations* of intentional or fraudulent conduct. 281 F. 3d 12 (2d Cir. 2002). Not so.

In *Gibbs-Alfano*, the defendants sought to invalidate an indemnification agreement between parties where a litigation was settled without an admission of liability. *Id.* While the court in *Gibbs-Alfano* recognized that intentional conduct of the indemnitee could render an indemnification agreement unenforceable that was not the finding there. *Id.* The court in *Gibbs-Alfano* held that because “[d]efendants have not cited any case, and we found none, where a New York court declined to enforce an otherwise valid indemnification agreement between parties where the party seeking indemnification settled, without admitting liability, claims against it alleging intentional wrongdoing. . . in the absence of a judgment of intentional conduct . . . we do not find any reason under New York public policy to hold the Indemnification Clause unenforceable.” *Id.* at 21; *see also CBS Corp.*, 2010 WL 1375169, at *2 (granting summary judgment to plaintiff on its claim for contractual indemnification against a non-insurer because it “was never found liable of intentional misconduct and was never assessed punitive damages”). This Court has applied New York law to reach the same conclusion. *See NXIVM Corp. v. Sutton*, No. 06-1051 (KSH) (CLW), 2019 WL 4010859, at *10 (D.N.J. Aug. 26, 2019) citing *Gibbs-Alfano*, 281 F. 3d at 21 (finding that, “in the absence of a judgment of intentional conduct,” there was no basis under New York public policy to invalidate an indemnification clause in a contract between two non-insurers).

None of the courts before which the CV Brokerage Related Actions are pending or resolved have made any determination that ICBCFS engaged in any wrongdoing whatsoever. Furthermore, those courts are best positioned to resolve that factual questions because the Clearing Agreement

is governed by New York law and those cases are already far along in their respective litigations. The Clearing Agreement states that “[t]his Agreement shall be governed by and construed in accordance with the internal laws of the State of New York, without giving effect to the conflicts of laws or principles thereof.” Clearing Agreement, § 29.6. This Court should not rely on the Receiver’s characterization of *allegations* in other litigations rather than those courts’ reasoned decisions in those actions. The CV Brokerage Related Actions have already been subject to significant litigation and, where issues have been fully resolved, they have already been resolved in ICBCFS’s favor.

As of January 26, 2023, Bydalek dismissed the Bydalek Claim without any finding of liability of ICBCFS or any payment by ICBCFS. The vast majority of damages alleged in the SureFire litigation were dismissed at the pleading phase. The New York Supreme Court ruled on the face of the pleadings that the maximum amount of that plaintiff’s actual damages is limited to only a \$4.5 million of the \$46 million alleged. *See Surefire Dividend Capture, LP v. ICBCFS*, Index No. 652507/2021, NYSCEF 106 at p. 3, attached hereto as Exhibit 4. While that decision is subject to an appeal, the judge nevertheless expressed skepticism about the merits of the underlying claim against ICBCFS, regardless of the amount of damages. Exhibit 3, 12:15-16 (“express[ing] skepticism as to whether or not a claim can be asserted against the transfer agent.”).

The A Funds Litigation is based on substantially similar allegations as the SureFire Litigation, and the same judge expressed skepticism regarding whether the A Funds had suffered any damages. Specifically, Justice Ostrager opined, “[w]hile there may be merit to [ICBCFS’s] claim that [the A Funds] were compensated for the transfer, the motion to dismiss for lack of standing must be denied. Liberally construing plaintiffs’ Complaint as true, the Court cannot, at the pre-answer motion to dismiss stage, make any determination as a matter of law regarding

damages.” Decision + Order on Motion, *Aalii Fund, LP, et al. v. ICBCFS*, Index No. 652446/2022, NYSCEF 35 at p. 4, attached hereto as Exhibit 5.

As a result, case law does not support invalidating an indemnification right on public policy grounds absent a final judgment on that issue.

As such, ICBCFS is entitled to the full benefit of the indemnification provision in the Clearing Agreement and the Court should reject the Receiver’s request to disallow ICBCFS’s indemnification claim. As the Receiver recognizes, the factual question about whether ICBCFS engaged in tortious conduct and therefore is not entitled to indemnification is best suited to be evaluated by other courts in the pending CV Brokerage Related Actions. *See* Motion at p. 51 (“At most, the Receiver should be required to recognize ICBCFS’s liquidated claim as contingent, pending the outcome of the cases against it.”).

II. ICBCFS Has a Perfected Security Interest in the Monies in the CV Brokerage Accounts.

The Clearing Agreement clearly and unambiguously grants ICBCFS a lien on amounts in the Accounts. Under the Clearing Agreement, CV Brokerage agreed to give ICBCFS a lien on “all money, securities, financial assets and other investment property, and rights with respect to such Account and Balance and all proceeds thereof and accommodations thereto, now or thereafter held by, deposited with, or otherwise within the possession or control (whether credited to the Account or otherwise) of ICBCFS, its agents, or affiliated persons.” Clearing Agreement, § 9.1.

ICBCFS has perfected its lien on the Balance in the Accounts by virtue of its possession and control of them. Under the Uniform Commercial Code, “a security interest in a deposit account may be perfected only by control.” § 9-312(b)(1). Perfection of Security Interests in Chattel Paper, Deposit Accounts, Documents, Goods Covered by Documents, Instruments, Investment Property, Letter-of-Credit Rights, and Money; Perfection by Permissive Filing;

Temporary Perfection Without Filing or Transfer of Possession., U.C.C. Text § 9-312. Furthermore, “[a] secured party has control of a deposit account if: (1) the secured party is the bank with which the deposit account is maintained.” § 9-104. Control of Deposit Account., U.C.C. Text § 9-104. Likewise, “a security interest in money may be perfected only by the secured party’s taking possession” U.C.C. Text § 9-312(b)(3).

The same standard is applied under New York law. In New York, “[p]erfection by possession or delivery” is available for a secured party to “perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral.” N.Y. U.C.C. Law § 9-313 (McKinney 2014). Courts have routinely found that possession and control over monies in an account perfected a security interest. *See Friedman v. Fein*, 46 A.D. 2d 886, 887, 361 N.Y.S. d 397, 398 (1974) (actual possession of stock “properly perfect[ed] their security interests”); *Berkowitz v. Chavo Int’l, Inc.*, 144 A.D. 2d 263, 264, 533 N.Y.S. 2d 865, 866 (1988), *aff’d*, 74 N.Y.2d 144, 542 N. E. 2d 1086 (1989) (a security interest in an instrument can be perfected only by the secured party’s taking possession). Consequently, ICBCFS has a perfected security interest in the Balance as collateral for its claim against CV Brokerage.

To be clear, however, ICBCFS has not and will not actually take this money on its own initiative. ICBCFS will possess the Balance until it receives a court order to exercise its constitutionally protected property interest in the Balance as collateral for its claim against CV Brokerage.

III. ICBCFS Should Be Entitled to Maintain its Unliquidated Claims Pending Their Liquidation By Resolution of the CV Brokerage Related Actions.

ICBCFS’s unliquidated claims were timely filed by the Claim Bar Date of April 25, 2022. *See S.E.C. v. One Equity Corp.*, No. 2:08-CV-667, 2010 WL 4878993, at *6 (S.D. Ohio Nov. 23,

2010) (an informal proof of claim that signaled “an intent to hold the receivership liable for the unliquidated claim amount” sufficient to state a proof of claim). “The practice of entering an interlocutory order limiting the time within which claims of creditors must be presented has developed as an aid to convenient administration; it does not preclude the court from permitting a creditor whose claim is thereafter presented to share in the distribution of assets still on hand, as has been often explained.” *Chicago Title & Tr. Co. v. Fox Theatres Corp.*, 91 F.2d 907, 911 (2d Cir. 1937) (allowing contingent claims post-bar date).

The claim put the Receiver on notice of the claim and provided as much information as was available as of the Claim Bar Date. ICBCFS has further updated the claim amount in this filing, which should assist the Receiver in determining the aggregate amount of claims against the receivership. The liquidation of a known, unliquidated claim is not the same thing as a creditor asserting a “new claim or supplemental claim.” Motion at 49. As such, the Receiver has failed to allege a proper basis to disallow the unliquidated portion of the Claim.⁴

The Receiver notes in its Motion that “he has not yet recommended a distribution plan to the Court.” Motion at 51. As such, there is no prejudice to the Receiver or any creditor of the Receivership Entities, to allow the additional time for the unliquidated amount of the ICBCFS claim to become liquidated. There is no need (at this time) for the Receiver to “maintain sufficient funds to cover future claims that may arise.” Motion at 49. As such, it is premature for the Receiver to seek to bar any increase to the liquidated amount of the ICBCFS claim as its indemnity claim may increase from time to time. Nor has the Receiver cited any case authority that it is appropriate to disallow a claim simply because it is unliquidated. Indeed, common sense—and

⁴ ICBCFS offered to provide the Receiver with updates on any new indemnifiable claims or actions asserted against ICBCFS in its Proof of Claim upon the Receiver’s request. Proof of Claim ¶ 5. ICBCFS remains willing to provide periodic updates to the Receiver if he would find that helpful.

analogous bankruptcy precedent—dispels any notion that the mere fact of a claim being unliquidated renders it disallowable.

CONCLUSION

For the foregoing reasons, ICBCFS respectfully requests the Court deny to portions of the Motion applicable to ICBCFS.

Dated: May 3, 2023

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**BRENDA SMITH, BROAD REACH
CAPITAL, LP, BROAD REACH
PARTNERS, LLC, and BRISTOL
ADVISORS, LLC, et al.,**

Defendants.

C.A. No. 2:19-cv-17213 (MCA)

CERTIFICATE OF SERVICE

Tara S. Lederer, of full age, on his oath, hereby certifies and says:

1. On May 3, 2023, I caused (i) the Motion By Industrial And Commercial Bank Of China Financial Services LLC In Opposition To The First Omnibus Motion Of Receiver, Kevin Dooley Kent, For Order Resolving Disputed Non-Investor Creditor Claims and (ii) this Certificate of Service to be served on Plaintiff's counsel of record in the above-captioned action.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: May 3, 2023

SCHULTE ROTH & ZABEL LLP

By: /s/ Tara S. Lederer

Tara S. Lederer

Gayle R. Klein (pro hac vice admission
forthcoming)

Abbey Walsh (pro hac vice admission
forthcoming)

Benjamin Lewson (pro hac vice admission
forthcoming)

919 Third Avenue

New York, NY 10022

Telephone: 212.756.2000

*Attorneys for Industrial and Commercial Bank of
China Financial Services LLC*

EXHIBIT 1



Industrial and Commercial Bank of China Financial Services, LLC.
1633 Broadway, 28th Floor
New York, NY 10019
Straight Through Processing – CLEARANCE>CUSTODY>FINANCING

FULLY DISCLOSED CLEARING AGREEMENT

THIS AGREEMENT is made and entered into this 18th day of March, 2013 by and between Industrial and Commercial Bank of China Financial Services LLC (“ICBC”), a Limited Liability Company, and CV Brokerage, Inc. (“Broker”), a Corporation.

1.0 APPROVAL

This Agreement shall be subject to approval by the Financial Industry Regulatory Authority (“FINRA”) and by any other self-regulatory organization vested with the authority to review or approve it. ICBC shall submit this Agreement to the FINRA and Broker shall submit the Agreement to any other such organization from which Broker is required to obtain approval. In the event of disapproval, the parties shall bargain in good faith to achieve the requisite approval.

2.0 AGREEMENT

From the date of this Agreement until the termination of this Agreement as provided in Section 24 hereof, ICBC shall carry the proprietary accounts of Broker and the cash and margin accounts of the customers of Broker introduced by Broker to ICBC, and accepted by ICBC, and shall clear transactions on a fully disclosed basis for such accounts, in the manner and to the extent set forth in this Agreement.

ICBC shall also provide the processing and servicing of Broker’s customer accounts opened on the ICBC platform, communication and content services, access to account and financial information and other incidental or related technology services, as set forth under this Agreement (the “Services”), to Broker only to the extent explicitly required by specific provisions contained in this Agreement, including any applicable amendments, schedules or statements of work hereto, (collectively, this “Agreement”) and shall not be responsible for any duties or obligations not specifically allocated to ICBC pursuant to this Agreement.

3.0 ALLOCATION OF RESPONSIBILITY

3.1 Responsibilities of the Parties.

Pursuant to FINRA Rule 4311, responsibility for compliance with applicable federal and state laws, rules and regulations of the Securities and Exchange Commission (“SEC”), FINRA and any other regulatory or self-regulatory agency or organization (collectively the “Rules”) shall be allocated between ICBC and Broker as set forth in this Agreement. Also, in compliance with the Rules, Broker agrees to be responsible for processing and verifying all customer account change of address information. To the extent that a particular function is allocated to one party under this Agreement, the other party shall supply that party with any necessary or required information in its possession pertinent to the performance and supervision of such function.

3.2 Provision of Reports and Exception Reports

Beginning on or before the effective date of this Agreement and before July 31 of each calendar year thereafter, ICBC shall provide to Broker, pursuant to FINRA Rule 4311, and any successor FINRA rule, a list of all reports (e.g. exception-type reports) it offers to Broker. Broker shall promptly advise ICBC, in writing, of those specific reports it elects to receive. ICBC and Broker each represent that their

obligations relative to exception reports, pursuant to FINRA Rule 4311 or any successor FINRA rule, have been completed.

3.3 Relationship with Customers.

3.3.1 Broker shall enter into appropriate contractual arrangements with its customers on its own behalf, and such arrangements shall make Broker, and not ICBC, responsible to its customers for the provision of services. Broker shall not be deemed to be an agent of ICBC for any purpose, nor shall ICBC be deemed to have a fiduciary relationship with the Broker or any of Broker's customers. Broker acknowledges that ICBC is not responsible for the control or supervision of the business or operations of Broker.

3.3.2 SIPA; Rule 15c3-3. All introduced customers are the customers of Broker except as provided under the Securities Investor Protection Act ("SIPA") and SEC financial responsibility rules where the customers shall be considered customers of ICBC. Nothing in this section will otherwise change or affect the provisions of this Agreement which provide that the customer account remains Broker's customer account for all other purposes, including but not limited to, supervision, suitability, privacy notifications and indemnification.

3.4 Execution Away from ICBC

Broker may either direct ICBC to place Broker's customers' orders for execution with firms other than ICBC or may place such orders directly with other firms itself to the extent Broker determines that such action is necessary to meet Broker's duty to obtain best execution for customer orders. ICBC will have no responsibility for the execution of any such orders directed away from ICBC, including any obligation to provide best execution. Further, ICBC will have no responsibility for the transmission of those orders placed directly with firms other than ICBC. Broker agrees to assume full responsibility for resolving any disputes and for bearing any and all losses resulting from transactions with firms with which Broker executes, giving up ICBC for clearance. Broker also agrees that, with respect to any such orders, it will report executions promptly to ICBC for clearance in accordance with ICBC's procedures. ICBC also agrees that, with respect to any such orders reported to ICBC, it will act in good faith to provide custody service for such transactions, if requested by Broker and to the extent possible, clear and settle such transactions.

4.0 REPRESENTATIONS AND WARRANTIES

4.1 Broker. Broker represents and warrants that:

4.1.1 Limited Liability Company. Broker is a limited liability company duly organized, validly existing, and in good standing under the laws of the state of its filing and organization. ~~Or~~ Corporation Duly Organized. Broker is a corporation duly organized, validly existing, and in good standing under the laws of the state of its incorporation.

4.1.2 Registration. Broker is duly registered and in good standing as a broker-dealer with the SEC and member firm is in good standing with FINRA or other such regulatory entities or Exchanges.

4.1.3 Authority to Enter Agreement. Broker has all requisite authority, whether arising under applicable federal or state law or the rules and regulations of any regulatory or self-regulatory organization to which Broker is subject, to enter into this Agreement and to retain the services of ICBC in accordance with the terms of this Agreement.

- 4.1.4 Material Compliance with Rules and Regulations. Broker and each of its employees is in material compliance with, and during the term of this Agreement shall remain in material compliance with, the registration, qualification, capital, financial reporting, customer protection, and other requirements of every self-regulatory organization of which Broker is a member, of the SEC, and of every state to the extent that Broker or any of its employees is subject to the jurisdiction of that state.
- 4.1.5 Broker Responsibility. Broker shall be responsible for all internal operations related to its business including without limitation (i) all accounting, bookkeeping, record-keeping, cashiering, commodity transactions, or any other transactions not involving securities; or any matter not contemplated by the Agreement; (ii) preparation of Broker's payroll records, financial statements, or any analysis thereof; (iii) preparation or issuance of checks in payment of Broker's expenses, other than expenses incurred by ICBC on behalf of Broker pursuant to this Agreement; and (iv) payment of commissions to Broker's sales personnel.
- 4.1.6 No Pending Action, Suit, Investigation, or Inquiry. Broker has disclosed to ICBC every material action, suit, investigation, inquiry, or proceeding (formal or informal) pending or threatened against or affecting Broker, any of its affiliates, or any officer, director, or general securities principal or financial and operations principal of Broker, or their respective property or assets, by or before any court or other tribunal, any arbitrator, any governmental authority, or any self-regulatory organization of which any of them is a member. Broker shall notify ICBC promptly, of the initiation of any such action, suit, investigation, inquiry, or proceeding that may have a material impact on the capital of Broker.
- 4.1.7 Broker shall ensure that all such money, securities, and documents are (as appropriate) genuine, in good deliverable form, free of liens, charges, and unencumbered by any rights, claims or interests of any third person except the rights of Broker's customer in securities that ICBC shall hold by entering same on its books in a segregated account pursuant to instructions from Broker;
- 4.1.8 Broker shall ensure that all instructions or information to be passed to ICBC, customers or third parties in relation to transactions or the services are complete and accurate and not misleading and passed on promptly. The Broker shall also obtain ICBC's prior written consent to any communication relating to ICBC and its performance of the services;
- 4.1.9 Broker shall on a reasonably regular basis verify the status of instructions passed to ICBC by the Broker on behalf of any of Broker's customer and notify ICBC immediately on becoming aware of any failure or delay on its part or the part of any customer in effecting execution or settlement (as the case may be) pursuant to any such instructions or any actual or suspected error or fraud in or affecting the sending or receiving of any such instructions and shall use its best endeavors to assist in any steps ICBC may propose to remedy the same;
- 4.1.10 Broker shall promptly review all confirmations, reports, and advice provided to the Broker by ICBC and advise ICBC of any error, omission or inaccuracy in the transactions positions or other information reported to the Broker. Unless the Broker notifies ICBC within a reasonable time of all mistakes or discrepancies in the above described reports and information, ICBC shall not be liable under any circumstances for any expense, claim, loss or damage suffered by the Broker, customer or any third person arising out of or caused by any errors, failures or omissions that shall have been reported by ICBC in reports, statements or other advice to the Broker, which errors, failures or omissions the Broker shall not have promptly advised ICBC to remedy or correct.

4.2 ICBC. ICBC represents and warrants that:

4.2.1 Duly Organized. ICBC is a Limited Liability Company duly organized, validly existing, and in good standing under the laws of the state of Delaware.

4.2.2 Registration. ICBC is duly registered and in good standing as a broker-dealer with the SEC and is a member firm in good standing of the FINRA.

4.2.3 Authority to Enter Agreement. ICBC has all requisite authority, whether arising under applicable federal or state law, or the rules and regulations of any regulatory or self-regulatory organization to which ICBC is subject, to enter into this Agreement and to provide services in accordance with the terms of this Agreement.

4.2.4 Compliance with Registration. ICBC and each of its employees is in material compliance with, and during the term of this Agreement shall remain in material compliance with the registration, qualification, capital, financial reporting, customer protection, and other requirements of every self-regulatory organization of which ICBC is a member, of the Securities and Exchange Commission ("SEC"), and every state if required.

5.0 ESTABLISHING AND ACCEPTING NEW ACCOUNTS

5.1 Acceptance of New Accounts.

Broker shall be responsible for opening, monitoring, and approving new accounts in compliance with the Rules.

5.1.1 ICBC reserves the right to reject any account that the Broker may forward to ICBC as a potential new account. ICBC also reserves the right to terminate any account previously accepted by it as a new account.

5.1.2 At the time of the opening of any new account, the Broker must obtain sufficient information from its customer to satisfy itself as to the identity of its client and the source of its funds to satisfy itself that opening the account would not violate the provisions of various Executive Orders and regulations issued thereunder by the Office of Foreign Assets Control (OFAC), which enforces economic and trade sanctions against foreign countries and their agents, terrorism sponsoring agencies and organizations and international narcotics traffickers.

5.2 Maintenance of Account Information.

ICBC may rely without inquiry on the validity of all customer information furnished to it by Broker. Possession of any such documents or information, however provided, concerning Broker's customers does not create a duty on the part of ICBC to review or understand the content of those documents.

6.0 SUPERVISION OF ORDERS AND ACCOUNTS

6.1 Responsibility for Compliance.

Broker shall be solely responsible for compliance with suitability, "Know Your Customer" rules, and other requirements of federal and state law and regulatory and self-regulatory rules and regulations governing transactions and accounts. Possession by ICBC of surveillance records, exception reports, or other similar data shall not obligate ICBC to review or be aware of their contents. ICBC shall not be required to make any investigation into the facts surrounding any transaction that it may execute or clear for Broker or any customer of Broker.

6.2 Compliance Procedures.

Broker agrees to supervise compliance with Rules. Broker shall review transactions and accounts to assure compliance with prohibitions against manipulative practices, insider trading, market timing and late trading of mutual fund shares and other requirements of federal and state law and applicable regulatory and self-regulatory rules and regulations to which Broker or its customer are subject. Without limiting the above, Broker shall be responsible for compliance with the supervisory requirements in Section 15(b)(4) of the Securities Exchange Act of 1934, as amended, NASD Rule 3010, FINRA incorporated Rules 324, 351 and 431, and similar rules adopted by any of these or other regulatory or self-regulatory agency or organization, to the extent applicable.

6.3 Knowledge of Customer's Financial Resources and Investment Objectives.

Broker shall comply with FINRA Rule 2090 or other comparable requirements of similar rules of any other regulatory or self-regulatory organization to which Broker is subject. Broker shall obtain all essential facts relating to each customer, each cash and margin account, each order, and each person holding a power of attorney over any account, in order to assess the suitability of transactions (when required by applicable rules), the authenticity of orders, signatures, endorsements, certificates, or other documentation, and the frequency of trading. Broker warrants that, to the best of its knowledge, Broker will not open or maintain accounts for persons who are minors or who are otherwise legally incompetent and that Broker will comply with FINRA Rule 2090 or other laws, rules, or regulations that govern the manner and circumstances in which accounts may be opened or transactions authorized.

6.4 Furnishing of Investment Advice.

Broker shall be solely responsible for any recommendation or advice it may offer to its customers.

6.5 Discretionary Accounts.

Broker shall be solely responsible for obtaining customer approval for and supervising discretionary accounts.

6.6 Obligations Regarding Certain Disclosures.

Broker shall make any disclosures and obtain any agreements or consents from its customers which are required by applicable law or regulation, including, without limitation, any disclosures or agreements required for margin, listed options, IPO's, mutual funds, penny stocks, derivative securities, account transfers or conversions. The cost of making such disclosures or obtaining such agreements or consents shall be borne by Broker.

7.0 EXTENSION OF CREDIT

7.1 Presumption of Cash Account.

ICBC may, but is not required to, permit customers of Broker to purchase securities on margin, but all transactions for a customer will be deemed to be cash transactions, and payment for those transactions will be required in the manner applicable to cash transactions, unless, on or prior to settlement, broker has furnished ICBC with an executed margin agreement and consent to loan of securities.

7.2 Margin Requirements.

Margin accounts introduced by Broker shall be subject to ICBC's margin requirements as in effect from time to time. ICBC reserves the right to refuse to accept any transaction in a margin account without the actual receipt of the necessary margin and to impose a higher margin requirement for a particular account when, in ICBC's discretion, the past history or nature of the account or other factors or the securities held in it warrant such action. In all instances, Broker may require higher margin than imposed by ICBC for any particular account, group of accounts or all accounts introduced by Broker to ICBC. In any case where Broker requests ICBC to extend credit upon control or restricted securities, pursuant to Rule 144 under the Securities Act of 1933, as amended ("Rule 144"), or otherwise, Broker shall submit to ICBC such documentation, agreements and information as shall be reasonably required by ICBC to decide to extend such credit. Any extension of credit so approved shall be subject to ICBC's credit policies as shall be in effect from time to time.

7.3 Margin Maintenance and Compliance with Regulation T and SEC Rule 15c3-3(m).

7.3.1 Margin Calls. After the initial margin for a transaction has been received, subsequent margin calls may be made by ICBC at its discretion. ICBC shall calculate the maintenance requirement and notify Broker of any amounts due. Broker shall be responsible for forwarding the margin call to its customer and obtaining the amount due directly from Broker's customer. If Broker fails to take the appropriate action, ICBC reserves the right to collect the amount due directly from Broker's customer. Broker agrees to cooperate with ICBC in complying with and obtaining margin in response to such calls.

7.3.2 Actions upon Failure to Meet Margin Calls or Deliver Securities. In the event that satisfactory margin is not provided within the time specified by ICBC, or securities sold are not delivered as required, ICBC may take such actions as ICBC deems appropriate, including, but not limited to, entering orders to buy-in or sell-out. Broker shall cooperate with ICBC by entering orders to buy-in or sell-out securities. Compliance with a request to withhold or delay action shall not be deemed a waiver by ICBC of any of its rights under this Agreement.

7.3.3 Actions Upon Failure to Meet Underlying Collateral Calls or Deliver Securities. In the event that satisfactory underlying collateral is not provided within the time specified by ICBC, or securities sold are not delivered as required, ICBC may take such actions as ICBC deems appropriate, including, but not limited to, entering orders to buy-in or sell-out. Broker shall cooperate with ICBC by entering orders to buy-in or sell-out securities. Compliance with a request to withhold action shall not be deemed a waiver by ICBC of any of its rights under the Agreement.

7.3.4 Charging of Interest and Disclosures Pursuant to Rule 10b-16 and FINRA Rule 2264. Interest charged by ICBC to Broker's clients with respect to debit balances in customers' accounts shall be determined in accordance with Schedule A attached to this Agreement. Broker shall send each margin customer a written Margin Disclosure Statement and other written disclosures, in a form acceptable to ICBC, at the time of the opening of a margin account as required by SEC Rule 10b-16 and FINRA Rule 2264. If not already delivered to each margin customer by ICBC in connection with the delivery of the written new account disclosure statement in accordance with

FINRA-incorporated NYSE Rule 382, Broker agrees to deliver a written disclosure statement to its customer as required by SEC Rule 10b-16.

7.3.5 Unsecured Debits or Unsecured Short Positions. ICBC shall charge against the account of Broker an amount equal to the value of any unsecured debit or short position (on a "mark to market" basis) in a customer account if that position has not been promptly resolved by payment or delivery. Any remaining debits will be charged against Broker.

8.0 THE ACCOUNT

8.1 ICBC shall open an account in its books in the name of the Broker (the "Account") to which there shall be credited:

- a) An Initial Security Deposit and, where appropriate, on demand from ICBC any further amounts notified by ICBC to the Broker as being required to ensure that the amount of money in the Account is not less than the capital charges as calculated by SEC rule 15c3-1 which would result from transactions for capital adequacy purposes;
- b) Any cash balance resulting from clearance activity or money transfers;
- c) On demand from ICBC such other amounts as represent ICBC's total financial exposure in relation to transactions outside any dealing limit or other limit or consent; and
- d) From time to time, such other amounts (if any) as may be agreed between ICBC and the Broker.

Any balance standing to the credit of the Account at any relevant time, including any interest credited thereto in accordance with clause 7.2, is herein called the "Balance". The Account and the Balance shall secure the obligations to ICBC, as described below. The Account shall not represent an ownership interest by Broker in ICBC.

8.2 Interest will be credited to the Account at the ICBC account rate.

8.3 The Account and the Balance shall be available only for the purposes described in clauses 7 and 8 and not for any other purpose. The Initial Security Deposit in clause 8.1(a) of the Account shall not be capable of being withdrawn or assigned or otherwise dealt with or encumbered by the Broker, except as specified in clauses 7 and clause 8.

8.4 It is acknowledged that, without prejudice to the obligations of any of Broker's customers, the Broker is required, on each occasion on which ICBC is to settle any transaction, or incur any expenditure in relation to the services, or suffers any losses, debts or liabilities in relation to the services, to reimburse ICBC for the relevant amount paid or to be paid by ICBC, or for the losses, debts or liabilities incurred by ICBC if not previously reimbursed by Broker's customer. As between ICBC and the Broker, each such reimbursement obligation on the part of the Broker (a "Reimbursement Obligation") shall be considered to be a primary obligation.

8.5 As and when a Reimbursement Obligation arises, or any other payment obligation of the Broker in favor of ICBC arises, whether pursuant to an indemnity or otherwise, ICBC shall be entitled to apply against such Reimbursement Obligation or other obligation all or any part of the Balance.

8.6 ICBC shall take reasonable steps to recover any amounts payable by any of Broker's customer to ICBC in respect of which a Reimbursement Obligation may arise provided that the Broker shall, to the

extent not reasonably recoverable from any customer, Broker or other third party, pay any costs incurred by ICBC in taking such reasonable steps.

8.7 It is acknowledged that the Balance may be increased from time to time by receipt into the Account of sums from a Brokers customer in respect of which a Reimbursement Obligation has arisen and been settled in accordance with clause 8.5.

8.8 Within thirty (30) days of termination of this Agreement, ICBC shall pay and deliver to Broker, the funds and securities in the Account, less any amounts to which it is entitled under Paragraph 8.4: provided, however that ICBC may: (i) retain the Account for such period of time until transfer of all customer and proprietary accounts of Broker has been completed and (ii) retain in the account such amount for such period as it deems appropriate for its protection from any claim or proceeding of any type, then pending or threatened, until final determination of such claim or proceeding is made. If threatened claim or proceeding is resolved or if a legal action or proceeding is not instituted within a reasonable time after the termination of this Agreement, any amount retained with respect to such claim, proceeding, or action shall be paid or delivered to Broker.

8.9 With reference to clause 8.1, ICBC shall agree to the return of part of the Balance to the Broker if the remainder of the Balance at such time (the "Relevant Date") is at least equal to the aggregate of:

- (a) The amount equal to the aggregate of 8.1(a), (c) and (d), or such other amount as may then have been agreed between ICBC and the Broker;
- (b) Any additional amount required on the Relevant Date to ensure that the amount of money in the Account is not less than the financial exposure on all unsettled transactions.

8.10 ICBC shall keep a record of all deductions and additions to the Account and shall supply the Broker with a statement of account of any such transactions following the end of the month in which any such transactions occur.

9. GRANT OF SECURITY INTEREST AND USE OF COLLATERAL

9.1 To secure the timely discharge of all the Broker's obligations to ICBC, the Broker grants to ICBC a security interest in, lien upon, and right of offset as to the Account, the Balance, and all money, securities, financial assets and other investment property, and rights with respect to such Account and Balance and all proceeds thereof and accommodations thereto, now or thereafter held by, deposited with, or otherwise within the possession or control (whether credited to the Account or otherwise) of ICBC, its agents, or affiliated persons (as defined by the Securities Exchange Act of 1934, as amended) ("Collateral"); provided, however, that the security interest and lien granted hereunder shall not extend to securities as long as they are carried on ICBC's books, pursuant to Broker's instructions, in a safekeeping or segregation account for securities to be held free from ICBC's lien.

9.2 ICBC need not release any Collateral from the lien of ICBC, including by transferring such collateral to an account free from ICBC's lien or by effecting the delivery of such collateral free of payment, if after giving effect to such instructions, ICBC would deem itself less than adequately secured or the Broker or any of its customers would not be in compliance with ICBC's Margin Requirements then in effect.

9.3 ICBC shall have the right to dispose of Collateral in any manner permitted under the New York Uniform Commercial Code or other applicable law. Disposition of the Collateral will be deemed to be in a commercially reasonable manner if ICBC

- a) Retains the services of a "broker's broker" or other broker or securities dealer,
- b) Sells the Collateral for settlement on the same business day as the day of sale or next business day after sale (cash sale).
- c) ICBC or its affiliates may purchase the Collateral at any sale at the publicly quoted ask price on the date of sale or at the publicly quoted ask price at the open of business on the next business day if the sale is not held during business hours.

9.4 Regarding Collateral in ICBC's possession or control, ICBC shall use reasonable care in the custody and preservation of such Collateral, but need not take any steps necessary to preserve rights against prior parties, unless instructed by the Broker and then only at the Broker's expense.

9.5 ICBC may grant a security interest in, pledge, re-pledge, hypothecate, re-hypothecate, enter into, and perform repurchase and reverse repurchase agreements and securities loan and securities borrow agreements with the Collateral, separate or together with Collateral of other Brokers, without retaining possession or control of a like amount of Collateral and without notice to the Broker. ICBC may use and deal with the Collateral and bear the risk and benefit thereof; ICBC's only obligation being to return the Collateral upon the Broker's satisfaction in full of its obligations to ICBC or the deposit with ICBC of Collateral satisfactory to ICBC in substitution for the Collateral being returned or a combination of the foregoing.

9.6 At such time as ICBC deems itself unsecured with respect to the Broker's ability to perform its obligations, ICBC may request and the Broker shall promptly deliver additional Collateral to ICBC in an amount satisfactory to ICBC. As to the additional Collateral, ICBC shall have all the same rights as to additional Collateral as are granted it with respect to the Collateral in clauses 8.1 through 8.5 above.

9.7 The Broker specifically agrees that

- a) To promptly honor all appropriate demands for payment of funds
 - i. Fulfilled not later than 6:00 p.m. New York time if such request is made before 10:00 a.m. New York Time or on the business day immediately following request if such request is made after 10:00 a.m. New York time. All demands made hereunder may be made orally if promptly confirmed in writing.
 - ii. In immediately available funds;
- b) Securities deposited by the Broker as Collateral in which the Broker makes a market or has a significant position be valued at a discount (which may be significant), as determined by ICBC in its sole discretion; and

All demands made hereunder may be made orally if promptly confirmed in writing.

10.0 MAINTENANCE OF BOOKS AND RECORDS

10.1 Stock Records.

ICBC shall maintain stock records and other prescribed books and records of all transactions executed or cleared through it. Unless otherwise required by law, ICBC shall have no obligation to maintain, or make available to Broker, such books and records after termination of this Agreement. If,

however, ICBC does make such books and records available to Broker after the termination of this Agreement, Broker shall reimburse ICBC for its costs and expenses in retrieving such books and records.

10.2 Regulatory Reports and Records.

Broker shall prepare, submit, and maintain copies of all reports, records, and regulatory filings required of Broker by any entity that regulates it, including, but not limited to, copies of all account agreements and similar documentation obtained pursuant to Paragraph 5 of this Agreement and any reports and records required to be made or kept under the Currency and Foreign Transactions Reporting Act of 1970, (the "Bank Secrecy Act"), and any rules and regulations promulgated pursuant thereto.

10.3 ANTI-MONEY LAUNDERING, OFFICE OF FOREIGN ASSETS CONTROL, AND ANTI-TERRORIST FINANCING OBLIGATIONS

Broker and ICBC wish to assure each other that each party to this Agreement is performing its anti-money laundering obligations as required by law and regulation and otherwise set forth the responsibilities that each party will undertake to prevent money laundering and terrorist financing as contemplated by the USA PATRIOT Act and other laws and regulations.

At the time of the opening of any new account, the Broker must obtain sufficient information from its customer to satisfy itself as to the identity of its client and the source of its funds as more fully set forth in this Paragraph 9.3.

Broker acknowledges it has the primary relationship with the customer which Broker introduces to ICBC and therefore Broker is in the best position to know: (1) the client's identity; (2) the client's source of funds; (3) the client's intention for those funds; and (4) whether any particular transaction is unusual or suspicious for that particular client based on Broker's interaction with the client.

ICBC acknowledges it: (1) will use all reasonable efforts to combat money laundering and terrorist financing; (2) cooperate as necessary with Broker to detect money laundering and terrorist financing.

10.3.1 Broker's Responsibilities:

- a) Anti-Money Laundering Obligations. Broker hereby agrees and acknowledges that it is obligated to and hereby represents and warrants that it now does and will continue to comply with anti-money laundering law and regulations, including any future obligations that may be imposed on Broker by law or regulation, to know its customers, their source and use of funds, and to monitor for and identify suspicious activity.
- b) Anti-Money Laundering Program. Broker has established and maintains an anti-money laundering program, consisting of, at a minimum, written internal policies, procedures and controls including a means for monitoring and identifying suspicious activity, the designation of an anti-money laundering compliance officer (whose identity shall be made known to ICBC and to the FINRA), an ongoing employee training program, an independent audit function to test such programs annually, and any additional requirements set forth in the rules of any self-regulatory organization of which Broker is a member. Broker will allow ICBC access to such information as ICBC deems necessary in order for ICBC to test Broker's adherence to Broker's anti-money laundering program.
- c) USA PATRIOT ACT. Broker hereby agrees and acknowledges that it is obligated to and hereby represents and warrants that it now does and will continue to comply with applicable

requirements of the USA PATRIOT ACT and the rules promulgated thereunder including, but not limited to §§ 312, 313, and 319.

- d) “Travel” Rule. Broker hereby agrees and acknowledges that it is obligated to and hereby represents and warrants that it now does and will continue to comply with applicable requirements of the Bank Secrecy Act Rule 31 CFR 103.33(g) — the so called “Travel” rule.

10.3.2 Broker to File CTRs and Provide Copies to ICBC. Broker is responsible for filing currency transaction reports (“CTRs”) and will provide a copy of all such reports to ICBC at the same time as they are filed in accordance with applicable regulations.

- a) Suspicious Activity Reports. Broker shall be primarily responsible for filing suspicious activity reports on Form SAR-SF and shall coordinate such filing with ICBC. Broker shall, as soon as practical after identifying a suspicious activity and in any event prior to filing a suspicious activity report on SAR-SF, notify ICBC’s Anti-Money Laundering Compliance Officer and shall, provided Broker and ICBC have made the filings contemplated by Paragraph 9.3.5 hereof, communicate with ICBC about the transaction for purposes of sharing information about the transaction and determining whether Broker or ICBC shall file the SAR-SF, unless such sharing of information is prohibited by law. Broker will provide ICBC with copies of all SAR-SFs and other communications it files with respect to accounts held at ICBC, unless prohibited by law. In addition, Broker shall promptly notify ICBC regarding any account activity Broker reasonably believes to be suspicious, not legitimate, not having a reasonably apparent explanation, or could support the filing of a Form SAR-SF.
- b) Other Transaction Reports. Prior to filing any report with the Treasury Department, the IRS, the U.S. Customs Service or any regulatory body or organization relating to the reporting of currency transactions or the transfer of currency or monetary instruments into or outside of the United States, including, but not limited to, CTRs, CMIRs and SAR-SFs, Broker shall notify ICBC’s Anti-Money Laundering Compliance Officer (unless such notification is prohibited by law) and cooperate with ICBC as ICBC may deem appropriate. Broker will provide ICBC with copies of all reports and other communications with respect to accounts held at ICBC that Broker files with the Treasury Department, the IRS, the U.S. Customs Service, or any regulatory body or organization relating to the reporting of currency transactions, the transfer of currency or monetary instruments into or outside of the United States, or in regard to any suspicious activity, including, but not limited to, CTRs, CMIRs and SAR-SFs, unless the provision of such reports or communications is prohibited by law.
- c) Reports by ICBC. ICBC reserves the right to make and file such suspicious activity or other reports as listed in Paragraph 10.3.2 when it deems it necessary or appropriate; and Broker recognizes that when ICBC does so, ICBC does not thereby assume any responsibility for making and filing reports on behalf of Broker and/or relieve Broker of its own responsibility for making and filing reports as necessary under U.S. or other laws and regulations. ICBC will provide Broker a copy of any such report that relates to an account for the Broker or a customer of the Broker, unless prohibited by law from doing so.
- d) Restrictions and Conditions on Certain Accounts. Broker hereby agrees and acknowledges that it is obligated to comply with restrictions and conditions on opening and accepting certain accounts, including but not limited to, the following:
 - (i) Know Your Customer and Government List Obligations, Including OFAC. At the time of the opening of any new account, Broker must obtain sufficient information from its customer to satisfy itself as to the identity of its client and the source of the client’s funds. Broker also must satisfy itself that opening the account would not violate the provisions of various Executive Orders and regulations administered by the U.S.

Treasury Department's Office of Foreign Assets Control ("OFAC") or be subject to other restriction based on such relevant government lists as may be published from time to time. Broker will immediately inform ICBC of the existence of any account subject to an OFAC or government list restriction.

(ii) Non-Resident Alien Accounts Carried Directly or Through an Investment Advisor. For any account opened for a non-resident alien, Broker must record the customer's passport number and obtain a copy of the government document used to verify the individual's identity at the time the account is opened. Broker must also obtain a copy of a passport or other governmental identification for any of the following: the grantor/settlor of a foreign trust; and any beneficial owner of an offshore corporate account if: (1) the account is a personal holding company or private investment company; or (2) the beneficial owner of the entity which maintains the account holds more than a 10% interest in the entity. Broker may not open any introduced account for a personal holding company or private investment company if one or more beneficial owners are U.S. persons. With respect to those accounts involving investment advisers, Broker will conduct a sufficient inquiry to obtain and record information as outlined above about the adviser's customer, including ascertaining the identity of each beneficial owner, of any such account prior to opening the account.

- e) Restrictions on Numbered Accounts. Broker will not establish or maintain specially coded or numbered accounts.
- f) Source and Use of Funds. Broker shall undertake reasonable efforts to ascertain that the customer is not engaged in unlawful activities, the assets being invested have been legitimately obtained, and any disbursements to a customer or third party are for legitimate purposes.
- g) Transaction Reports and Transaction Monitoring Systems. In order to detect suspicious activity, Broker shall avail itself of the transaction reports and transaction monitoring systems provided by ICBC or shall otherwise perform its own transaction monitoring in order to detect suspicious activity.
- h) CIP. In order to induce reasonable reliance by ICBC on Broker with respect to Broker's customer identification program ("CIP"), Broker represents and warrants: (1) it has a written CIP consistent with Section 326 of the USA PATRIOT Act and the rules thereunder; (2) it is subject to a rule implementing 31 U.S.C. 5318(h); (3) it is regulated by a federal functional regulator as that term is defined under 31.C.F.R. § 103.120(a)(2); and (4) it will certify annually to ICBC that it has implemented an anti-money laundering program and will perform the requirements set forth in Broker's written CIP.

10.3.3 ICBC's Responsibilities:

- a) Anti-Money Laundering Obligations. ICBC hereby agrees and acknowledges that it is obligated to comply with anti-money laundering law and regulation, including any future obligations that may be imposed on ICBC, and that it is responsible to combat money laundering and terrorist financing. ICBC shall (1) make available to Broker such information as it may from time to time recognize as potentially useful through use of ICBC's various interdiction monitoring tools to help Broker detect possible money laundering and terrorist financing schemes, and (2) conduct various manual and systematic screenings to assist Broker in order to detect suspicious activity and OFAC and other government list violations. The actual systems and tools used for these purposes may vary from time to time, at ICBC's discretion.
- b) Anti-Money Laundering Program. ICBC has established and will continue to maintain an anti-money laundering compliance program in accordance with § 352 of the USA PATRIOT Act as well as FINRA rules. ICBC further represents and warrants: (1) it has written anti-money laundering policies and procedures consistent with its role as a clearing broker; (2) it has a

designated Anti-Money Laundering Compliance Officer (whose identity has been made known to Broker and the FINRA); (3) it provides continuous anti-money laundering training to its employees; and (4) its anti-money laundering program is independently audited on an annual basis.

- c) Transaction Reports. ICBC shall make available to Broker anti-money laundering and other useful activity reports which can be used to detect suspicious activity in order to assist Broker to meet its obligations. ICBC will offer training in the use of such reports. ICBC will also, upon request, provide Broker with relevant information in ICBC's possession that the Broker needs in order to file various required reports, including Forms CTR, CMIR, and SAR-SF and will provide such further assistance as may be reasonably required in the filing of such reports.
- d) Notification if ICBC Detects Prima Facie Suspicious Activity. Through its trained employees and automated systems, ICBC may detect suspicious activity. In such circumstances, ICBC will contact Broker about the transaction for purposes of sharing information about the transaction, unless ICBC believes that Broker itself may be engaged in suspicious activity and/or ICBC would be prohibited by law from sharing with Broker information about the suspicious transaction. Nothing in this Paragraph is to be read to prohibit ICBC from filing its own suspicious activity and other reports, as it believes necessary or appropriate. Broker shall take such steps as ICBC may reasonably request in connection with any potential suspicious activity in an account, including closing the account.
- e) Incoming FedWires. For all incoming federal fund wires ("FedWires"), ICBC or ICBC's clearing institution shall initially scan relevant information, including the remitter's name, address, and account number, and the originating bank's name and address (to the extent provided on an incoming wire) to detect possible OFAC restrictions.
- f) Outgoing FedWires for Third Parties. As a general rule, ICBC will not process third party wires for the Broker. If requested in writing by the Broker, third-party wires are processed by ICBC on an exception basis. When allowed, for outgoing FedWires ordered to the delivery of a person or entity other than the account holder, ICBC shall review relevant information, including the payee's name, address, purpose, and account number, and the recipient bank's name and address, to detect possible violations of OFAC restrictions.
- g) Incoming Securities. For Securities received, ICBC shall review the names of the specified holder of the securities to detect possible violations of OFAC restrictions in those circumstances when the registration on the security received is different than the name on the account into which the securities are deposited.
- h) Systematic Daily Screening, Government Lists Including OFAC. On a daily basis, Broker shall compare all new accounts opened on its systems and all substantial changes made to account data resident on its systems to determine if any such new or changed account may be subject to an OFAC or other designated government list. In addition, Broker shall compare its existing customer database to added restrictions as may be published by the Federal Government from time to time. Further, periodically Broker shall compare its existing customer database to the existing OFAC government lists. In the event that Broker's comparisons indicate that an account may be subject to an OFAC or government list restriction, Broker will notify ICBC if it believes there is a match. ICBC shall cooperate fully with Broker to determine whether, in fact, the account is subject to any such restriction. ICBC will cooperate fully with Broker in implementing any such action as may be determined by Broker to be necessary or appropriate.
- i) Electronic Funds Transfer. ICBC represents it has systems designed to comply with the Electronic Funds Transfer rule when processing disbursements on behalf of Broker. ICBC shall comply with the Electronic Funds Transfer rule based on information provided by Broker.
- j) USA PATRIOT ACT. ICBC hereby agrees and acknowledges that it is obligated to and hereby represents and warrants that it now does and will continue to comply with applicable requirements of the USA PATRIOT ACT and the rules promulgated thereunder including, but not limited to §§ 312, 313, and 319.

- k) “Travel” Rule. Broker hereby agrees and acknowledges that it is obligated to and hereby represents and warrants that it now does and will continue to comply with applicable requirements of the Bank Secrecy Act Rule 31 CFR 103.33(g) — the so called “Travel” rule.
- 10.3.4 Bulletins and Other Informational Memoranda. ICBC may from time to time issue Bulletins or other informational memoranda to Broker setting forth ICBC’s policies and procedures regarding anti-money laundering and terrorist financing. Broker agrees to become familiar with such Bulletins and informational memoranda and to abide by them.
- 10.3.5 Cooperation. Broker and ICBC shall cooperate with each other and exchange information to assist each other in detecting money laundering and terrorist financing. ICBC and Broker agree to consult with each other from time to time on the allocation of anti-money laundering responsibilities between them.
- 10.3.6 No Party to Cause Violation by the Other. Neither party to this Agreement shall knowingly take any action to cause the other party to be in violation of any anti-money laundering laws or regulations.
- 11.0 RECEIPT AND DELIVERY OF FUNDS AND SECURITIES
- 11.1 Receipt and Delivery of Funds and Securities.
- 11.1.1 Cashiering Functions. ICBC shall perform cashiering functions for accounts introduced by Broker. These functions shall include receipt, delivery and transfer of securities purchased, sold, borrowed and loaned; receipt and payment of funds owed by or to customers; provision of custody and safekeeping for securities, funds and cash so received; handling of margin accounts; receipt and distribution of dividends and other distributions; and the processing of exchange offers, rights offerings, warrants, tender offers and redemptions. Broker shall provide ICBC with the data and documents that are necessary or appropriate to permit ICBC to perform its obligations under this Section 10.1.1, including but not limited to copies of records documenting receipt of customers’ funds and securities received directly by Broker in accordance with the Rules.
- 11.1.2 Purchases and sales. Broker shall be responsible for purchases and sales (including transactions on a “when issued” basis) made for customers until actual and complete payment has been received by ICBC. Broker shall not introduce accounts requiring settlement on a “delivery versus payment” or “receive versus payment” basis unless such account utilizes the facilities of a securities depository or qualified vendor as defined in FINRA Rule 11860, for all depository eligible transactions. Broker shall be responsible for sales (including those on a “when issued” basis), until ICBC has received, in acceptable form, the securities involved in the transaction. If ICBC does not receive delivery of securities in an acceptable form, ICBC may buy-in all or part of the securities.
- 11.1.3 Failure to Settle or Pay. In the event of a failure to timely deposit required funds or securities, ICBC may take appropriate remedial action. Without waiving or otherwise limiting its right to take other remedial action, ICBC may at its option charge interest at rates as agreed in Schedule A (“Fully Disclosed Pricing Schedule”) to this Agreement. Broker may pass such charges on to its customers but Broker remains responsible therefor until actually paid.
- 11.1.4 Check Writing Authority. ICBC does not offer any check writing facilities and services.

11.1.5 Restricted and Control Stock Requirements. Broker shall be responsible for determining whether any securities held in Broker's or its customer accounts are restricted or control securities as defined by applicable laws, rules, or regulations. Broker is responsible for assuring that orders and other transactions executed for such securities comply with such laws, rules, and regulations.

11.1.6 Corporate Action Requests/Soliciting Dealer Agreements. Broker requests and authorizes ICBC to execute as Broker's agent-in-fact any and all Soliciting Dealer Agreements for corporate actions involving securities or other interests held by Broker's customers on the books of ICBC. ICBC agrees to provide notice of the pending corporate action to Broker at its designated locations. ICBC further agrees to collect and submit corporate action requests from Broker and submit them to the soliciting party in accordance with the instructions received from the soliciting party. ICBC agrees to use its best efforts to communicate corporate action information to Broker and, where applicable, Broker's customers, but shall not be liable for a) any delays in the communication of corporate action information or b) delays in the transmission of collected corporate action requests to the soliciting party unless caused by ICBC's gross negligence. All fees received from the soliciting party will be credited to Broker. In consideration of providing this service to Broker, Broker agrees to indemnify and hold harmless ICBC, its affiliates, officers, agents and employees from all claims, suits, investigations, damages and defense costs (including reasonable attorney's fees) that arise in connection with this Paragraph.

12.0 SAFEGUARDING OF FUNDS AND SECURITIES

Except as otherwise provided in this Agreement, ICBC shall be responsible for the safekeeping of all money and securities received by it pursuant to this Agreement. However, ICBC will not be responsible for any funds or securities delivered by a customer to Broker until such funds or securities are actually received by ICBC or deposited in bank accounts maintained by ICBC. From time to time ICBC utilizes various sub-custodians around the world to custody securities on behalf of itself and its clients and their customers. ICBC shall not be held liable for any misfeasance or malfeasance of such custodian, including the loss of securities or the inability to buy or sell or obtain securities in the event of such sub-custodian's insolvency, unless ICBC has not exercised commercially reasonable judgment in selecting such sub-custodian. As required by the Securities Exchange Commission, a reserve account for the exclusive benefit of customers has been set up for the purpose of safeguarding customer funds.

13.0 CONFIRMATIONS AND STATEMENTS

13.1 Preparation and Transmission of Confirmations and Statements.

ICBC shall prepare confirmations and summary periodic statements and shall, to the extent required by the Rules, transmit them to customers and Broker in a timely fashion except to the extent the parties agree in writing that Broker may transmit confirmations to customers. Confirmations and statements shall be prepared on forms disclosing that the account is carried on a fully-disclosed basis for the Broker in accordance with applicable rules, regulations, and interpretations. Broker will have the ultimate regulatory responsibility for compliance with the prospectus delivery requirements of the Securities Act of 1933, as amended, regardless of its retention of a prospectus fulfillment service to perform delivery of same.

13.2 Examination and Notification of Errors.

Broker shall examine all confirmations, statements, and other reports in whatever medium provided to Broker by ICBC. Broker must notify ICBC of any error claimed by Broker in any account; as

to purchase and sales transactions prior to settlement date and as to all other transactions within the time in which ICBC is able to, without violating applicable law, reverse the transaction. If Broker fails to do so, Broker shall be deemed to have waived its right to make any claim against ICBC with respect to such error.

14.0 ACCEPTANCE OF EXECUTED TRANSACTIONS

14.1 Responsibility to Accept or Reject Trades.

ICBC shall settle transactions in customers' accounts and release or deposit money or securities to or for accounts only upon Broker's instructions.

14.2 Responsibility for Errors in Execution.

Broker shall be responsible for transmission to ICBC of all orders and for any errors in the Broker's recording or transmission of such orders.

15.0 OTHER OBLIGATIONS AND RESPONSIBILITIES OF BROKER

15.1 Other Clearing Agreements.

During the term of this Agreement, Broker shall not enter into any other similar agreement or obtain the services contemplated by this Agreement from any other party or supply the services contemplated by the Agreement without prior written consent of ICBC.

15.2 Provision of Financial Information.

Broker shall furnish ICBC copies of FOCUS Reports, financial statements for the current fiscal year, the executed Forms X-17a-5 (Parts I and IIA) filed with the SEC, any amendments to Broker's Form BD, and any other regulatory or financial reports ICBC may from time to time require. Broker shall provide such reports to ICBC at the time Broker files such reports with its primary examining authority.

15.3 Disciplinary Action, Suspension, or Restriction.

If Broker or any of its affiliates, or any officer, director, or general securities principal or financial and operational principal of Broker, becomes subject to disciplinary action, suspension, or restriction by a federal or state agency, stock exchange, or regulatory or self-regulatory organization having jurisdiction over Broker or Broker's securities or commodities business, Broker shall give notice to ICBC immediately, orally and in writing, and provide ICBC a copy of any decision relating to such action, suspension, or restriction. ICBC may take any action it reasonably deems to be necessary (i) to assure that it will continue to comply with all applicable legal, regulatory, and self-regulatory requirements, notwithstanding such action, suspension, or restriction; and (ii) to comply with any requests, directives, or demands made upon ICBC by any such federal or state agency, stock exchange, or regulatory or self-regulatory organization.

15.4 Executing Brokers.

If Broker wishes to act as an "Executing Broker" as such term is understood in that certain letter dated January 25, 1994, from the Division of Market Regulation of the Securities and Exchange Commission, as the same may be amended, modified or supplemented from time to time (the "No-Action

Letter”), then all terms herein shall have the same meaning as ascribed thereto either in the Agreement or in the No-Action Letter as the sense thereof shall require. Broker may, from time to time, execute trades for Prime Brokerage Accounts in compliance with the requirements of the No-Action Letter. (The No-Action Letter requires, inter alia, that a contract be executed between ICBC and Prime Broker and between Broker and Prime Brokerage Customer prior to the transaction of any business hereunder.) Broker shall promptly notify ICBC, but in no event later than 5:00 p.m. New York time, of trade date in a mutually acceptable fashion, of such trades in sufficient detail for ICBC to be able to report and transfer any trade executed by Broker on behalf of a Prime Brokerage Account to the relevant Prime Broker. Broker understands and agrees that if Prime Broker shall disaffirm or “dk” any trade executed by Broker on behalf of a Prime Brokerage Account, Broker shall open an account for such Prime Brokerage Account in its range of accounts and shall transfer or deliver the trade to such account at the risk and expense of Broker to the same extent as for any account introduced by Broker pursuant to this Agreement. Broker understands and agrees that all Prime Brokerage Accounts shall be conducted in accordance with the requirements of the No-Action Letter and any relevant agreement between Broker and a Prime Brokerage Customer or between ICBC and relevant Prime Broker. Broker further agrees to supply ICBC with such documents, papers and things, which from time to time are reasonably required by ICBC to carry out the intention of this Paragraph. Broker agrees that it shall know its customer, obtain appropriate documentation, including new account form, conduct its own credit check and determine the availability of shares as required for processing of any short sales. Broker shall maintain facilities to clear any disaffirmed trades.

15.5 Currency Fluctuation.

If Broker directs ICBC to enter into any transaction to be effected on any securities exchange or in any market on which transactions are settled in a foreign currency, (i) any profit or loss arising as a result of a fluctuation in the rate of exchange between such currency and the United States Dollar shall be entirely for Broker’s account and risk, (ii) all initial and maintenance margin deposits required or requested by ICBC shall be in the currency required by the applicable marketplace or clearing agency in such amounts as ICBC in its sole discretion may require, and (iii) ICBC is authorized to convert funds in the Account into and from such foreign currency at rates of exchange prevailing at the banking or other institutions with which ICBC normally does business.

15.6 Protection of Intellectual Property.

Broker shall use all reasonable efforts to preserve and protect ICBC’s and its affiliates’ patent, trade secret, copyright and other proprietary rights in ICBC’s or its affiliates’ products, services, trademarks and tradenames, at least to the same extent used by Broker to preserve and protect its own proprietary data or information and to notify ICBC of any action by any third party known by Broker to constitute an infringement of ICBC’s or any of its affiliates’ proprietary rights and to cooperate with ICBC in protecting such rights. Without limiting the foregoing, and subject to the permission required by Paragraph 20 hereof, Broker shall note ICBC’s or its affiliates’ patent, trade secret, copyrights, trademarks and trade names when Broker makes reference to or distributes products or services provided by ICBC or its affiliates, as applicable.

15.7 Mutual Fund Shares.

Broker shall be responsible for obtaining and executing dealer agreements with any principal underwriter for mutual funds from which Broker seeks to purchase mutual fund shares for its customers’ accounts. Broker shall provide copies of such agreements to ICBC upon ICBC’s request.

15.8 Customer Address Changes.

Broker shall be responsible for customer change of address verification and updating such information on ICBC's new account records. Broker shall perform all written verification of address changes.

16.0 TRANSMISSION OF ORDERS TO ICBC AS PRIME BROKER

16.1 General Broker Functions.

Broker may, from time to time, collect and transmit to ICBC orders and other instructions to ICBC from Broker's prime brokerage customers ("Prime Brokerage Orders") and provide ICBC with such reports, data and services as ICBC requires in order to act as prime broker with respect to such Prime Brokerage Orders, consistent with the SEC No-Action Letter dated January 25, 1994 ("No-Action Letter") and applicable rules and regulations.

16.2 Trading Activity Functions.

Broker shall perform the following functions as introducing firm for its prime brokerage customers:

- a) Report all trading activity for the accounts of Broker's prime brokerage customers (whether executing with ICBC or away) to ICBC via ICBC Systems, as defined in Section 23 herein (or other agreed upon method) on trade date by a time to be determined by ICBC and Broker from time to time.
- b) Assure access to the ICBC System is limited to authorized persons only.
- c) Accept, via electronic mail (or telephone) on T+1, information regarding all trade breaks and respond to the ICBC regarding resolution of such trade breaks by 12:00 noon (NYC time) on T+1.
- d) Obtain pre-approval from ICBC for any short sales directed by Broker's prime brokerage customers.
- e) Provide all information to ICBC related to the eligibility of any of Broker's customers to receive or to continue to receive prime brokerage services.

16.3 Other Prime Brokerage Functions.

Broker shall perform the following additional functions as introducing firm for its brokerage customers:

- a) Obtain and deliver to ICBC an executed Prime Brokerage Client Agreement in substantially the form provided by ICBC to Broker, for each prime brokerage customer of Broker.
- b) Obtain and deliver to ICBC an executed Prime Brokerage Investment Advisor Agreement in substantially the form provided by ICBC to Broker, for any investment advisor with discretion over an account of a prime brokerage customer of Broker (the "Investment Advisor").
- c) Deliver to ICBC for acceptance or rejection the name of, and any information requested by ICBC regarding, each Executing Broker that Broker proposes to utilize to execute prime brokerage trades. Broker acknowledges that ICBC does not select any Executing Broker.
- d) Perform any other functions reasonably requested by ICBC to facilitate ICBC's performance of the prime brokerage services hereunder and as contemplated by the No-Action Letter.

16.4 Broker Acknowledgements Regarding Prime Brokerage.

Broker acknowledges that ICBC may disaffirm or DK transactions of any prime brokerage customers of broker. Broker will be responsible for resolving all unmatched items, and advising ICBC of their status in a timely manner. Broker acknowledges that ICBC shall monitor the net equity of accounts of Broker's prime brokerage customers carried by ICBC, and shall notify Broker who in turn shall notify the relevant prime brokerage customers on Broker's letterhead whenever such customers net equity falls below the minimum required by ICBC. If an account falls below the minimum net equity set by ICBC, the account will not be permitted to place any further Prime Brokerage Orders until the new equity is increased to the level required by ICBC. Broker agrees to provide access to its personnel and records, and submits to the supervision of ICBC for the purpose of complying with ICBC's obligations as Prime Broker under the No-Action Letter and applicable laws, rules and regulations in relation to the provision of the prime brokerage services.

16.5 Compensation.

In consideration of ICBC acting as Prime Broker, Broker agrees to pay the amounts set forth in Schedule A hereto.

16.6 Limitation of Liability for Prime Brokerage Orders.

In addition to the provisions of Section 24 of this Agreement and not in limitation thereof, Broker acknowledges and agrees that:

- a) ICBC accepts no responsibility for the Prime Brokerage Orders received from the Broker via ICBC Systems (or other agreed upon method) except in the event of gross neglect or willful misconduct by ICBC or its employees
- b) ICBC accepts no responsibility and disclaims all liability for any communication linkage failure associated with the transmittal of Prime Brokerage Orders except in the event of gross negligence or willful misconduct by ICBC or its employees.
- c) ICBC is not responsible for fraudulent or unauthorized access to ICBC Systems that may cause any loss, damage or liability to Broker, ICBC, Broker's prime brokerage customers or a third party.
- d) Any notice by ICBC hereunder or as required to perform prime brokerage services to prime brokerage customers of Broker shall be made to broker, whether on Broker's behalf or on behalf of such customers. Any notice made to Broker shall be deemed to be made to, or done for, Broker's prime brokerage customers, as applicable. Broker shall be responsible for all communication with Broker's prime brokerage customers regarding all services to be performed hereunder. ICBC is not responsible for communication failure between Broker and Broker's prime brokerage customers.
- e) In connection with this section 16.6, ICBC disclaims liability not only for direct damages to the Broker, ICBC, Broker's prime brokerage customers or a third party, but in addition disclaims any and all liability for special, indirect or consequential or incidental damages whether in tort or in contract even if ICBC has been advised of the possibility of such damage except in the event of gross negligence or willful misconduct by ICBC or its employees.

16.7 Representations and Warranties.

In addition to, and in no way in limitation of, Broker's representations and warranties as contained elsewhere in this Agreement, Broker represents and warrants that:

- a) Broker has been duly appointed and authorized by Broker's prime brokerage customers to transmit Prime Brokerage Orders to ICBC; and

- b) All Broker's customers whose accounts will participate in prime brokerage activities have been advised, via client agreements or otherwise, that their accounts will engage in prime brokerage activities, ICBC will act as Prime Broker for their accounts, and said customers or the Investment Advisor thereof may place orders for the execution of trades for their accounts at Executing Brokers, all in conformity with applicable provisions of the No-Action Letter.

17.0 OTHER OBLIGATIONS AND RESPONSIBILITIES OF ICBC

17.1 Use of Third-Party Services.

Subject to Paragraph 19.1 hereof, ICBC may, at its reasonable option, and consistent with common industry practice, retain one or more independent data processing or other service bureaus to perform functions (including, but not necessarily limited to, pricing services or proxy mailing services) assigned to ICBC under this Agreement.

17.2 Tax Withholding.

Broker hereby agrees to take necessary measures to comply with the income tax withholding requirements of Section 3406 and Sections 1441 through 1446 (the nonresident alien withholding requirements) of the Internal Revenue Code of 1986, as amended ("IRC") with respect to its customer accounts. Broker agrees to furnish to ICBC any tax information, e.g., taxpayer identification numbers and certifications provided by the customer on IRS Forms W-8, W-8BEN, W-8IMY, W-8EXP, W-8ECI, W-9, or any acceptable substitute in its possession relating to each customer account transferred to ICBC and to each future customer account opened. Broker acknowledges that ICBC will rely on such information for purposes of determining ICBC's obligation to withhold federal income tax pursuant to Sections 1441 through 1446 and 3406 of the Internal Revenue code. Broker hereby authorizes ICBC to employ any procedures permitted under applicable law or regulation to achieve compliance with its withholding obligations under federal income tax law.

18.0 DAMAGES

As between the parties, neither party shall be liable for special, indirect, incidental, consequential or punitive damages, whether such damages are incurred or experienced as a result of entering into or relying on this Agreement or otherwise, even if the parties have been advised of the possibility of such damages. Broker and ICBC each agree not to assert any claim for punitive damages against the other.

19.0 LIABILITY

19.1 Liability of ICBC

19.1.1 ICBC Indemnification. In addition to any other obligations it may possess under other provisions of this Agreement, ICBC shall indemnify, defend, and hold harmless Broker from and against all claims, demands, proceedings, suits, actions, liabilities, expenses, and reasonable attorney's fees, and costs in connection therewith arising out of any grossly negligent, reckless, dishonest, fraudulent, or criminal act or omission on the part of any of ICBC's officers or employees with respect to the services provided by ICBC under this Agreement.

19.1.2 ICBC shall not be liable for any expense, claim, loss or damage that the Broker, Broker's customer, or any third person may suffer by reason of any delay the Broker or ICBC may experience in obtaining:

- a) Securities from any clearing agent, transfer agent, Federal Reserve book entry system, issuer, broker, dealer, Broker or third person; or
 - b) Moneys from Broker's customer, bank, clearing agent, the Federal Reserve wire transfer system or third person.
- 19.1.3 ICBC shall not be liable for any expense, claim, loss or damage suffered by the Broker, Broker's customer, or any third person due to ICBC's failure to follow any special terms or conditions on receipts from or deliveries to one or more persons imposed by the Broker at its discretion from time to time.
- 19.1.4 ICBC shall not be liable for any expense, claim, loss or damage the Broker, Broker's customer, or any third person may suffer because any security received or delivered by ICBC shall be invalid or fraudulent by reason of
- a) Any failure of signature by an unauthorized person on a written instrument;
 - b) Forgery or wrongful alteration of a written instrument; or
 - c) Inaccuracy, incompleteness or falsity of data transmitted by computer tape, terminal or other computer facilities or in a written instrument
 - d) If ICBC shall have had reason to believe that such instrument, instruction or data was for the account or benefit of the Broker or that the writing was signed by or the data or computer tape was transmitted by an appropriately authorized person.
- 19.1.5 ICBC may act on oral instructions from a person ICBC reasonably believes to be authorised to give such instructions, and the Broker will be so bound except as to instructions given after the opening of business on the second Business Day after receipt by ICBC of a signed written notice from the Broker that such person is not so authorized. ICBC shall not be liable for any expense, claim loss or damage the Broker, Broker's customer, or any third person may suffer by reason of ICBC acting upon any instructions (whether written or oral or via computer facilities) or any notice, request, waiver, consent receipt or other document which ICBC reasonably believes to be genuine or transmitted by authorized persons.
- 19.1.6 In performing its obligations pursuant to this Agreement, ICBC may use such agents, clearing agents, correspondents, custodians, and securities depositories as ICBC, in its discretion, deems necessary, appropriate or desirable, including, but not limited to
- a) DTC,
 - b) Midwest Securities Trust Corporation,
 - c) National Securities Clearing Corporation,
 - d) International Securities Clearing Corporation,
 - e) Fixed Income Clearing Corporation,
 - f) Clearstream,
 - g) Euroclear, and
 - h) Federal Reserve Book Entry System.

ICBC shall not be liable for any expense, claim, loss or damage the Broker, Broker's customer, or any third person may suffer by reason of any action or omission to act on the part of such agents, clearing agents, correspondents, custodians or securities depositories except that ICBC shall pay the Broker an allocable portion of any recovery by ICBC from such agents, clearing agents, correspondents, custodians or securities depositories with respect to such action or omission to act.

19.1.7 ICBC shall not be liable to the Broker for any loss of profits or other consequential damages for any reason.

19.1.8 All releases and indemnities provided for in this Section 19 shall survive termination of this Agreement. This shall remain the case notwithstanding any notification by the Broker, Broker or any third person to ICBC of any such loss, injury or damage.

19.1.9 ICBC's liability (whether in contract, tort or otherwise) to the Broker for any failure, delay or error shall in no circumstances exceed the sum of:

- (a) Any interest the Broker may fail to earn or any interest the Broker may incur as a result of such failure, delay or error; and
- (b) The Clearing Fee payable in respect of the relevant transaction less any fee or interest received by the Broker which the Broker would not have been entitled to receive if the failure, delay or error had not occurred.

19.1.10 ICBC shall be under no obligation to pay, on behalf of the Broker, any taxes or governmental charges that may be assessed against the Broker in connection with the sale, transfer or exchange of any security or other assets, or any withholding taxes imposed by law upon the sale of any security or other assets held by ICBC under this Agreement unless the Broker shall have advanced to ICBC funds sufficient for any such payment and unless the Broker shall have delivered to ICBC written instructions to make such payment.

19.1.11 No claim may be made under this Agreement against ICBC unless notice of such claim, giving reasonable details thereof, shall have been received by ICBC within three months after the act or omission giving rise to such claim.

19.1.12 The parties acknowledge that the exclusions and limitations contained in this Section 19 are fair and reasonable having regard to all the circumstances of this Agreement.

19.2 Liability of Broker

19.2.1 Broker Indemnification. In addition to any other obligations it may possess under other provisions of this Agreement, Broker shall indemnify, defend, and hold harmless ICBC and any controlling person of ICBC from and against all claims, demands, proceedings, suits, actions, and all liabilities, expenses, and reasonable attorney's fees (including fees and costs incurred in enforcing ICBC's right to indemnification), and costs in connection therewith arising out of one or more of Broker's or any employee's negligent, reckless, dishonest, fraudulent, or criminal, act or omission or any of the following:

19.2.2 Broker's Failure to Perform. Failure of Broker to perform any duty, obligation, or responsibility with respect to customer accounts as set forth in this Agreement. Broker's indemnification obligation under this subparagraph shall not be affected by the participation of ICBC or any person controlling it or controlled by it within the meaning of the Securities Exchange Act of 1934, as amended, in any transaction giving rise to such an obligation, unless such participation constitutes recklessness, fraud, or criminal conduct.

19.2.3 Improper Conduct by Agents. Any negligent, dishonest, fraudulent, or criminal act or omission on the part of any of Broker's officers, directors, employees, or agents.

- 19.2.4 **Failure of a Customer to Perform Obligations.** Any failure by any of Broker's customers to perform any commitment or obligation with respect to a transaction carried by ICBC under this Agreement, whether or not such failure was under the control of Broker.
- 19.2.5 **Customer Claims and Disputes.** Any claim or dispute between Broker and a customer with respect to services provided under this Agreement, including, but not limited to, any claim or dispute concerning the validity of a customer order in the form the order was transmitted to ICBC by Broker and any claim arising in connection with ICBC's guarantee of any signature of any customer of Broker or at the request of Broker.
- 19.2.6 **Warranties.** Any adverse claim with respect to any security delivered or cleared by ICBC, including a claim of a defect in title with respect to securities that are alleged to have been forged, counterfeited, raised or otherwise altered, or if they are alleged to have been lost or stolen. The parties agree that ICBC shall be deemed to be an intermediary between Broker and customer and shall be deemed to make no warranties other than as provided in Section 8-108 of the Uniform Commercial Code.
- 19.2.7 **Default of Third-Party Broker.** Any default by a third-party broker with whom the Broker deals on a principal or agency basis in a transaction either not executed by ICBC or not cleared by ICBC even if permitted by ICBC as provided herein.
- 19.2.8 **Prior Self-Clearing Arrangements.** Any guarantee, indemnification, or hold harmless agreement in connection with Broker's business or customers that ICBC may provide to the National Securities Clearing Corporation, the Depository Trust Company, or any other clearing, depository, or self-regulatory organization with respect to transactions self-cleared by Broker prior to transfer of such functions to ICBC.
- 19.2.9 **Breach of Warranty by Broker.** Any breach by Broker of any representation or warranty made by it under this Agreement.
- 19.2.10 **Assets Not Held in Brokerage Account.** Any claim asserted against ICBC alleging the inaccuracy of any information appearing on Broker's customer brokerage account statements with respect to assets not held in the brokerage account, regardless of whether such information was provided by Broker, customer or a third-party.
- 19.2.11 **Infringement of Intellectual Property Rights.** Any act or omission of Broker, its agents, employees or customers which infringes on any patent, trade secret, copyright, trademark, or other intellectual property right of ICBC or any violation of the terms set forth in paragraph 15.6 hereof.
- 19.2.12 **Systems and Software and Unauthorized Access.** Broker expressly agrees that Broker's use of ICBC's Services, including the systems and software products is at Broker's sole risk. The Broker must use due care and not misuse, lose or allow unauthorized access to the systems and software products provided to Broker.
- 19.2.13 **Injunctive Relief.** In the event of a breach or threatened breach of any of the provisions of this Agreement by Broker or any employee or representative of Broker, Broker acknowledges that ICBC shall be entitled to seek preliminary and permanent injunctive relief to enforce the provisions hereof. In addition, Broker acknowledges that a breach of the terms regarding confidentiality of information and ownership of ICBC's intellectual property would cause

irreparable and incalculable damage to ICBC. Nothing herein shall preclude the parties from pursuing any action or other remedy for any breach or threatened breach of this Agreement, all of which shall be cumulative.

20.0 FEES AND SETTLEMENTS FOR SECURITIES TRANSACTIONS

20.1 Commissions.

ICBC shall charge each of Broker's customers the commission, mark-up and any other charge or expense that Broker instructs it to charge for each transaction. If instructions are not received with respect to a transaction in the time period required by ICBC to implement those instructions, ICBC shall charge the customer the commission, mark-up or other charge or expense prescribed in the basic commission schedule delivered to ICBC by Broker. This basic schedule may be amended from time to time by Broker by written instructions delivered to ICBC. ICBC shall only be required to implement such amendments to the operations systems and only within such reasonable time limitations as ICBC may deem necessary to avoid disruption of its normal operating capabilities.

20.2 Fees for Clearing Services.

As compensation for services provided pursuant to this Agreement, ICBC shall deduct from the commissions, mark-up, mark-down, or fees charged Broker's customers the amounts set forth in the fully-disclosed pricing schedule attached hereto as Schedule A.

20.3 Miscellaneous Charges.

Broker agrees to pay ICBC the fees and charges described in Schedule A hereto. Notwithstanding the foregoing, Broker may instruct ICBC to pass through such fees to Broker's customers. Broker further agrees to notify its customers of all fees and charges in accordance with the Rules.

21.0 DEPOSIT ACCOUNT

21.1 Establishment of Deposit Account.

To further assure the Brokers performance of its obligations under this Agreement, including but not limited to its indemnification obligations hereunder, Broker shall, on or before the execution of this Agreement, establish an account at ICBC to be designated as the Broker's deposit account (the "Deposit Account"). The Deposit Account shall not represent an ownership interest by Broker in ICBC. The Deposit Account shall at all times contain cash, securities, or a combination of both, having a market value of at least the amount set forth in Schedule A. The securities placed in the Deposit Account shall consist only of direct obligations issued by or guaranteed as to the principal and interest by the United States Government. In the event of a substantial change in the nature and extent of broker's business operations, ICBC may require that an additional amount be deposited promptly in the Deposit Account. If such a deposit is not made in the amount specified, whether or not the Broker agrees that the amount is justified, ICBC may terminate this Agreement forthwith.

21.2 ICBC's Right to Offset.

If (i) ICBC shall have any claim against Broker or a customer of Broker which has not been resolved within five business days after ICBC presents such claim to broker; or (ii) if ICBC shall suffer any loss or incur any expense for which it is entitled to be indemnified pursuant to this Agreement, and Broker shall fail to make such indemnification within five business days after being requested to do so, ICBC may deduct the amount of such claim, loss or expense from any account of broker. ICBC may withdraw cash or securities (or both) having the market value equal to the amount of such claimed deficiency. If those funds are withdrawn from the Deposit Account, then the Broker shall be obligated to make an immediate deposit in the Deposit Account of cash or securities sufficient to bring the Deposit Account back to a value of at least the amount required by Schedule A.

21.3 Termination of Deposit Account.

Within thirty (30) days of termination of this Agreement, which, for Broker's net capital purposes such 30 day period shall commence five (5) business days after the date of the initial transfer of Broker's customer accounts out of ICBC after termination, ICBC shall pay and deliver to Broker, the funds and securities in the Deposit Account, less any amounts to which it is entitled under the preceding section; provided; however, that ICBC may: (i) retain the Deposit Account for such period of time until transfer of all customer and proprietary accounts of broker has been completed and (ii) retain in the Deposit Account such amount for such period as it deems appropriate for its protection from any claim or proceeding of any type, then pending or threatened, until the final determination of such claim or proceeding is made. If a threatened claim or proceeding is not resolved or if legal action or proceeding is not instituted within a reasonable time after the termination of this Agreement, any amount retained with respect to such claim, proceeding, or action shall be paid or delivered to Broker.

22.0 PROPRIETARY ACCOUNTS OF INTRODUCING BROKERS AND DEALERS (PAIB)

22.1 ICBC shall establish a separate reserve account for proprietary assets held by Broker so that Broker can treat these assets as allowable assets under SEC Rule 15c3-1. ICBC agrees to perform the required computation on behalf of Broker in accordance with the following provisions, procedures, and interpretations set forth in the SEC's No-Action Letter regarding Proprietary Accounts of Introducing Brokers and Dealers (PAIB) dated November 3, 1998:

22.2 ICBC will perform a separate computation for PAIB assets (PAIB reserve computation) of Broker in accordance with the customer reserve computation set forth in SEC Rule 15c3-3 (customer reserve formula) with the following modifications:

- a) Any credit (including a credit applied to reduce a debit) that is included in the customer reserve formula will not be included as a credit in the PAIB reserve computation;
- b) Note E(3) to Rule 15c3-3a, which reduces debit balances by one percent under the basic method and subparagraph (a)(1)(ii)(A) of Rule 15c3-1, which reduces debit balances by three percent under the alternative method will not apply; and
- c) Neither Note E(I) to Rule 15c3-3a nor NYSE Interpretation /04 to Item 10 of Rule 15c3-3a regarding securities concentration charges is applicable to the PAIB reserve computation.

22.3 PAIB reserve computation will include all the proprietary accounts of Broker. All PAIB assets will be kept separate and distinct from customer assets under the customer reserve computation set forth in SEC Rule 15c3-3.

22.4 PAIB reserve computation will be prepared within the same time frames as those prescribed by Rule 15c3-3 for the customer reserve formula.

22.5 ICBC will establish and maintain a separate "Special Reserve Account for the Exclusive Benefit of PAIB Customers" with a bank in conformity with the standards of Rule 15c3-3(f) (PAIB Reserve Account). Cash and/or qualified securities as defined in the Rule will be maintained in the PAIB Reserve Account in an amount equal to the PAIB reserve requirement.

22.6 If the PAIB reserve computation results in a deposit requirement, the requirement can be satisfied to the extent of any excess debit in the customer reserve formula of the same date. However, a deposit requirement resulting from the customer reserve formula cannot be satisfied with excess debits from the PAIB reserve computation.

22.7 Within two business days of entering into this Agreement, Broker must notify its designated examining authority ("DEA") in writing that it has entered into a PAIB agreement with its clearing broker-dealer.

22.8 Upon discovery that any deposit made to the PAIB Reserve Account did not satisfy its deposit requirement, ICBC will immediately notify its DEA and the SEC. Unless a corrective plan is found to be acceptable by the SEC and the DEA, ICBC will provide written notification within five business days of the date of discovery to Broker that PAIB assets held by ICBC will not be deemed allowable assets for net capital purposes.

22.9 To the extent applicable, commissions receivable and other receivables of Broker from ICBC (excluding clearing deposits) that are otherwise allowable assets under the net capital rule are not to be included in the PAIB reserve computation, provided the amounts have been clearly identified as receivables on the books and records of the Broker and as payables on the books of ICBC.

22.10 ICBC does not have guaranteed subsidiaries.

23.0 COMMUNICATION

23.1 Notice to Customers.

Broker shall, upon the opening of an account pursuant to Paragraph 5 of this Agreement, mail to each customer a copy of the notice to customers required by FINRA Rule 4311(d).

23.2 Customer Complaint Reporting and Customer Notification.

Broker authorizes and instructs ICBC to forward promptly any written customer complaint received by ICBC regarding Broker and/or its associated persons relating to functions and responsibilities allocated to Broker under this Agreement to a) Broker and b) Broker's DEA designated under Section 17 of the Securities and Exchange Act of 1934, as amended, or, if none, to Broker's appropriate regulatory agency or authority. Further, Broker authorizes ICBC to notify the customer, in writing, that ICBC has received the complaint, and the complaint has been forwarded to Broker's DEA, or, if none, to the appropriate regulatory agency).

23.3 Restriction on Advertising.

Neither ICBC nor Broker shall utilize the name of the other in any way without the other's prior written consent except to disclose the relationship between the parties. Neither party shall employ the other's name in such a manner as to create the impression that the relationship between them is anything other than that of clearing broker and introducing broker.

23.4 Linking Between Sites.

Without express written authorization, neither party may provide or allow an electronic hyperlink directly from its service or site on the Internet or another site over which that party has control to the service or site on the Internet of the other party.

24.0 TERMINATION OF AGREEMENT

This Agreement shall have a contract term as detailed in Schedule A and continue until terminated as hereinafter provided:

24.1 Termination upon 90-Day Notice.

This Agreement may be terminated by either party without cause upon ninety days prior notice.

24.2 Immediate Termination.

This Agreement may be terminated by ICBC or Broker immediately in the event that (a) the other party is enjoined, disabled, suspended, prohibited, or otherwise becomes unable to engage in the securities business or any part of it by operation of law or as a result of any administrative or judicial proceeding or action by the SEC, any state securities law administrator, or any regulatory or self-regulatory organization having jurisdiction over such party or (b) the other party (i) becomes or is declared insolvent; (ii) voluntarily files or is the subject of, a petition commencing a case under any chapter of Title 11 of the United States Code; (iii) makes a general assignment for the benefit of its creditors; (iv) admits in writing its inability to pay its debts as they mature; (v) sells or enters into negotiations to sell all or substantially all of its assets; (vi) files an application or consents to the appointment of, or there is appointed, any receiver, or a permanent or interim trustee of that party or any of its subsidiaries, as the case may be, or all or any portion of its property, including, without limitation, the appointment or authorization of a trustee, receiver or agent under applicable law or under a contract to take charge of its property for the purpose of enforcing a lien against such property or for the purpose of general administration of such property for the benefit of its creditors; (vii) files a petition seeking a reorganization of its financial affairs or to take advantage of any bankruptcy, reorganization, insolvency, readjustment of debt, dissolution or liquidation law or statute or files an answer admitting the material allegations of a petition filed against it in any proceeding under any such law or statute; or (viii) takes any corporate action for the purpose of effecting any of the foregoing.

24.3 Early Termination.

The Broker shall be responsible for all costs and expenses incurred by ICBC as a result of Termination of services and any necessary consequent services provided by ICBC. If Termination occurs, the Broker shall pay an amount equal to three times the monthly minimum fee.

24.4 Default.

If either party defaults in the performance of its obligations under this Agreement, or otherwise violates the provisions of this Agreement, the non-defaulting party may terminate this Agreement by delivering Notice to the defaulting party (i) specifying the nature of the default; and (ii) notifying the

defaulting party that unless the default is cured within a period of ten days from receipt of the Notice, this Agreement will be terminated without further proceedings by the non-defaulting party.

24.5 Conversion of Accounts.

In the event that this Agreement is terminated for any reason, Broker shall arrange for the conversion of Broker's and its customer accounts to another clearing broker or to Broker if it becomes self-clearing. Broker shall give ICBC Notice (the "Conversion Notice") of: (i) the name of the broker that will assume responsibility for clearing services for Customers and Broker; (ii) the date on which such broker will commence providing such services; (iii) Broker's undertaking, in form and substance satisfactory to ICBC, that Broker's agreement with such clearing broker provides that such clearing broker will accept on conversion all Broker and customer accounts then maintained by ICBC; and (iv) the name of an individual or individuals within new clearing broker's organization whom ICBC may contact to coordinate the conversion. The Conversion Notice shall accompany Broker's notice of termination given pursuant to this Paragraph.

24.6 Survival.

Termination of this Agreement in any manner shall not release Broker or ICBC from any liability or responsibility with respect to any representation or warranty or transaction effected on the books of ICBC.

25.0 CONFIDENTIALITY

25.1 "Confidential Information" of a party shall mean all data and information submitted to the other party or obtained by the other party in connection with the services, including information relating to a party's customers (which includes, without limitation, Non-Public Personal Information as that term is defined in Securities and Exchange Commission Regulation S-P), technology, operations, facilities, consumer markets, products, capacities, systems, procedures, security practices, research, development, business affairs, ideas, concepts, innovations, inventions, designs, business methodologies, improvements, trade secrets, copyrightable subject matter and other proprietary information.

25.2 All Confidential Information relating to a party shall be held in confidence by the other party to the same extent and in at least the same manner as such party protects its own confidential or proprietary information. Neither party shall disclose, publish, release, transfer or otherwise make available Confidential Information of the other party in any form to, or for the use or benefit of, any person or entity without the other party's consent. Each party shall, however, be permitted to disclose relevant aspects of the other party's Confidential Information to its officers, agents, subcontractors and employees to the extent such disclosure is reasonably necessary for the performance of its duties and obligations under this Agreement and such disclosure is not prohibited by Gramm-Leach-Bliley Act of 1999 ("GLBA"), which amends the Securities and Exchange Act of 1934, as it may be amended from time to time, the regulations promulgated by the Securities and Exchange Commission thereunder or other applicable law; provided, however, that such party shall take all reasonable measures to ensure that Confidential Information of the other party is not disclosed or duplicated in contravention of the provisions of this Agreement by such officers, agents, subcontractors and employees. The obligations in this Paragraph shall not restrict any disclosure by either party pursuant to any applicable law, or by order of any court or government agency (provided that the disclosing party shall give prompt notice to the non-disclosing party of such order) and shall not apply with respect to information which (i) is developed by the other party without violating the disclosing party's proprietary rights; (ii) is or becomes publicly known (other than through unauthorized disclosure); (iii) is disclosed by the owner of such information to a third party free of any obligation of confidentiality; (iv) is already known by such party without an

obligation of confidentiality other than pursuant to this Agreement or any confidentiality agreements entered into between the parties before the effective date of this Agreement; or (v) is rightfully received by a party free of any obligation of confidentiality. If the GLBA, the regulations promulgated by the Securities and Exchange Commission thereunder or other applicable law now or hereafter in effect imposes a higher standard of confidentiality to the Confidential Information, such standard shall prevail over the provisions of this Paragraph.

25.3 Paragraphs 22.1 through 22.2 shall survive the termination of this Agreement.

26.0 ACTION AGAINST CUSTOMERS BY ICBC

ICBC may, in its sole discretion and at its own expense and, upon written notice to Broker, institute and prosecute in its name any action or proceeding against any of Broker's customers in relation to any controversy or claim arising out of ICBC's transactions with Broker or with Broker's customers. Nothing contained in this Agreement shall be deemed either (a) to require ICBC to institute or prosecute such an action or proceeding; or (b) to impair or prejudice its right to do so, should it so elect, nor shall the institution or prosecution of any such action or proceeding relieve Broker of any liability or responsibility which Broker would otherwise have had under this Agreement. Broker assigns to ICBC its rights against its customer as necessary to effectuate the provisions of this Paragraph.

27.0 NOTICES

Any Notice required or permitted to be given under this Agreement shall be sufficient only if it is in writing and sent by hand or by certified mail, return receipt requested, to the parties at the following address:

BROKER:

CV Brokerage, Inc.
300 Conshohocken State Road, Suite 200
West Conshohocken, PA 19428
Attn: Chief Compliance Officer

ICBC:

Industrial and Commercial Bank of China Financial Services LLC
1633 Broadway
New York, NY 10019
Attn: Chief Compliance Officer

28.0 ARBITRATION

28.1 Arbitration Requirement.

Any dispute between Broker and ICBC that cannot be settled shall be taken to arbitration as set forth in Paragraph 28.3 below.

28.2 ARBITRATION DISCLOSURE.

- ARBITRATION IS FINAL AND BINDING ON THE PARTIES.
- THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.

- PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS.
- THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.
- THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.

28.3 ARBITRATION AGREEMENT.

ANY CONTROVERSY BETWEEN US ARISING OUT OF YOUR BUSINESS OR THIS AGREEMENT SHALL BE SUBMITTED TO ARBITRATION CONDUCTED BEFORE FINRA REGULATION INC. (OR THEIR SUCCESSOR FIRMS), AND IN ACCORDANCE WITH THE THEN RULES OBTAINING OF THE SELECTED ORGANIZATION AND SHALL BE CONDUCTED AS A BROKER TO BROKER OR MEMBER VS MEMBER DISPUTE. ARBITRATION MUST BE COMMENCED BY SERVICE UPON THE OTHER PARTY OF A WRITTEN DEMAND FOR ARBITRATION OR A WRITTEN NOTICE OF INTENTION TO ARBITRATE, THEREIN ELECTING THE ARBITRATION TRIBUNAL.

NO PERSON SHALL BRING A PUTATIVE OR CERTIFIED CLASS ACTION TO ARBITRATION, NOR SEEK TO ENFORCE ANY PRE-DISPUTE ARBITRATION AGREEMENT AGAINST ANY PERSON WHO HAS INITIATED IN COURT A PUTATIVE CLASS ACTION AND WHO IS A MEMBER OF A PUTATIVE CLASS AND WHO HAS NOT OPTED OUT OF THE CLASS WITH RESPECT TO ANY CLAIMS ENCOMPASSED BY THE PUTATIVE CLASS ACTION UNTIL: (i) THE CLASS CERTIFICATION IS DENIED; (ii) THE CLASS IS DECERTIFIED; OR (iii) THE CUSTOMER IS EXCLUDED FROM THE CLASS BY THE COURT. SUCH FORBEARANCE TO ENFORCE AN AGREEMENT TO ARBITRATE SHALL NOT CONSTITUTE A WAIVER OF ANY RIGHTS UNDER THIS AGREEMENT EXCEPT TO THE EXTENT STATED HEREIN.

29.0 GENERAL PROVISIONS

29.1 Successors and Assigns.

This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of Broker and ICBC. No assignment of this Agreement or any rights, including those to indemnification hereunder by Broker shall be effective unless ICBC's written consent shall be first obtained.

29.2 Severability.

If any provision of this Agreement shall be held to be invalid or unenforceable, the validity or enforceability of the remaining provisions and conditions shall not be affected thereby.

29.3 Counterparts.

This Agreement may be executed in one or more counterparts, all of which taken together shall constitute a single agreement.

29.4 Entire Agreement Amendments and Duties Not Specifically Enumerated Herein.

This Agreement represents the entire agreement between the parties with respect to the subject matter contained herein and all prior discussions, agreements, and promises, written or oral, are merged herein. This Agreement may not be changed orally, but only by an agreement in writing signed by the parties. ICBC shall not be responsible or liable for failure to perform any duties not specifically enumerated herein.

29.5 Captions.

Captions herein are for convenience only and are not of substantive effect.

29.6 Choice of Law.

This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York, without giving effect to the conflicts of laws or principles thereof. This Agreement shall not be governed by the United Nations Convention on the International Sale of Goods.

29.7 Citations.

Any reference to the rules or regulations of the SEC, FINRA, the NYSE, or any other regulatory or self-regulatory organization are current citations. Any changes in the citations (whether or not there are any changes in the text of such rules or regulations) shall be automatically incorporated herein.

29.8 Construction of Agreement.

Neither this Agreement nor the performance of the services hereunder shall be considered to create a joint venture or partnership between ICBC and Broker or between Broker and other brokers for whom ICBC may perform the same or similar services.

29.9 Third-Parties.

This Agreement is between the parties hereto and is not intended to confer any benefits on third-parties including, but not limited to, customers of Broker.

29.10 Non-Exclusivity of Remedies.

The enumeration herein of specific remedies shall not be exclusive of any other remedies. Any delay or failure by a party to this Agreement to exercise any right, power, remedy, or privilege herein contained, or now or hereafter existing under any applicable statute or law, shall not be construed to be a waiver of such right, power, remedy, or privilege. No single, partial, or other exercise of any such right, power, remedy, or privilege shall preclude the further exercise thereof or the exercise of any other right, power, remedy, or privilege.

29.11 SEC Release 34-31511 Provision.

Pursuant to the interpretation of Introducing Accounts on a Fully-Disclosed Basis contained in SEC Release 34-31511, it is hereby agreed between Broker and ICBC that, insofar as the "financial responsibility rules" of the SEC and Securities Investor Protection Act only are applicable, the accounts Broker introduces to ICBC on a fully-disclosed basis shall be considered to be accounts of ICBC and not

Broker's accounts. Nothing in this Paragraph will otherwise change or affect the provisions of this Agreement which provide that the customer account remains Broker's customer account for all other purposes, including but not limited to, supervision, suitability and indemnification.

29.12 Provision of Reports and Exception Reports.

On or before the effective date of this Agreement and annually thereafter, ICBC shall provide to Broker, pursuant to FINRA Rule 4311(h), a list of all reports it offers to Broker. Broker shall promptly advise ICBC, in writing, of those specific reports it elects to receive. ICBC and Broker each represent that their obligations relative to exception reports, pursuant to FINRA Rule 4311(h) have been completed.

29.13 Force Majeure.

Neither party shall be liable for any loss caused, directly or indirectly, resulting from any circumstances beyond its reasonable control, including without limitation, labor disputes, riots, sabotage, insurrection, fires, flood, storm, explosions, earthquakes, electrical power failures, acts of God or nature, war, both declared or undeclared, or acts of terrorism.


29.14 Audio Taping of Telephone Conversations.

Each party understands that for quality control, dispute resolution or other business purposes, the parties may record some or all telephone conversations between them. Each party hereby consents to such recording and will inform its employees, representatives and agents of this practice. It is further understood that all such conversations are deemed to be solely for business purposes.

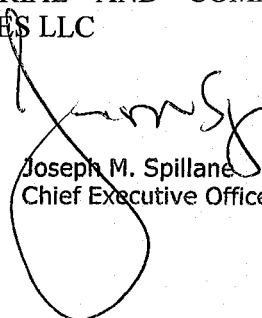
IN WITNESS WHEREOF the parties have hereto affixed their hands and seals by their duly authorized officers on the day and date first above written.

This Agreement contains a pre-dispute arbitration clause in Paragraph 28. The parties acknowledge receiving a copy of this Agreement.

CV BROKERAGE INC

By: 
Title: *President & CEO*

INDUSTRIAL AND COMMERCIAL BANK OF CHINA FINANCIAL SERVICES LLC

By: 
Title: Joseph M. Spillane
Chief Executive Officer


Yi Lu
Deputy Chief Executive Officer

Industrial and Commercial Bank of China Financial Services, LLC.
 1633 Broadway, 28th Floor
 New York, NY 10019
 Straight Through Processing – CLEARANCE>CUSTODY>FINANCING

CV Brokerage Inc.
 Fee Schedule A
 March 18, 2013

For services to be performed under the Fully Disclosed Clearing Agreement effective, "Date" by and between Industrial and Commercial Bank of China Financial Services, LLC. ("Clearing Broker") and CV Brokerage Inc. ("Introducing Broker"). Introducing Broker agrees to pay Clearing Broker in accordance with the schedule of fees set forth below.

Clearing Services

US Equities & Options – Domestic¹	
Customer	\$10.00/Ticket
Firm	\$8.00/Ticket
Average Price trades	No Charge
US Options	
Customer	\$10.00/Ticket
CMTA ³	\$.10/Contract
US Fixed Income	
Customer –	
Muni's, Corporates, Govie's -	\$15.00/Ticket
Mortgage Backed, CMO's -	\$20.00/Ticket
Principal –	
All Bonds	\$10.00/Ticket
Global Securities (Non-US)⁴	
Customer	\$25.00/Ticket
Firm	\$25.00/Ticket
FX Trades	\$25.00/Ticket
Mutual Funds	\$20.00/Ticket

¹ Compressed Street-side by Symbol, Side & Broker

² Accounts will be held in separate range within Introducing Broker and reviewed/approved by ICBCFS.

³ CMTA charges are for "Inbound" options only.

⁴ Agent Bank Fees Passed Through (See Schedule C)

Execution Services

US Equities –Direct Routing	
SmartRoute	\$.0008/Share
SuperTiers ¹	\$.0008/Share
Algorithms	\$.0020/Share
US Options –Direct Routing	
SmartRoute	\$.10/Contract
SmartRoute 360 ²	\$.20/Contract
Designated Exchange ³	\$.25/Contract
Index Options	\$.20/Contract
Buy Rights	\$.015/Share

¹ Rebates/Charges will be credited/charged to Introducing Broker. Applicable Exchange fees will be passed through to Introducing Broker. Current Rebates and Charges are listed below and are subject to change from each Market.

	<u>Rebate(Provide Liquidity)</u>	<u>Charge(Take Liquidity)</u>
NASDAQ	0.0029	0.0030
ARCA	0.0029	0.0030
EDGX	0.0032	0.0030
BATS	0.0027	0.0029

² Rebates/Charges will be credited/charged to Introducing Broker and can be estimated upon request.
³ Applicable Exchange fees will be passed through to Introducing Broker.

Trading Systems

ICBCFS OMS

User Fee	\$500/User/Month
Routing Fee	\$.0005/Share
Fix Connections	\$150/Month/Connection
OATS	\$200/Month

¹ Charged only if not executed through source outlined under Execution Services section above.

Financing

Debit Balances¹ - On margin debit balances, interest is charged at the Fed Funds rate plus 100 basis points.

Credit Balances - On free credit balances, interest is paid at the Fed Funds rate less 50 basis points.

Short Interest Rebate – Short Credit Rebate will be credited to Introducing Broker at Fed Funds less 50 basis point and adjusted for Hard to Borrow Securities

¹Debits above \$10 million must be approved by ICBCFS.

Other Items

DK Interest (Domestic)	Fed Funds plus 200 bps
DK and Fail Interest (Foreign)	Determined by each agent bank
Cancel and Corrects (Post S/D)	\$8.00
Wire Fees	\$10 per wire
Legal Transfers	\$50 per issue plus pass through
Conversions	\$50 per item plus ticket charges
DWAC	\$60 per item
IRA Trustee Fees ¹	\$50/Account/Year
Opening Fee	No Charge
Closing Fee	\$75/Account
End Client Web Access	\$10 per user ID per month
Escrow deposit	\$250,000
Minimum Clearing Charge ²	\$8,000/Month

¹ Other fees may apply for additional services.

²Minimum fee will be waived for the first 6 months.

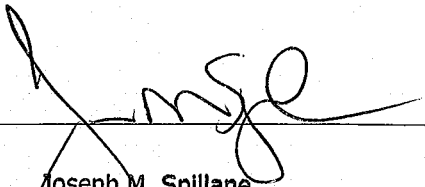
Signatures

Introducing Broker hereby acknowledges that, under certain circumstances, additional costs and expenses for clearing services may be incurred by Clearing Broker on behalf of Introducing Broker, which are not included in the fee schedule set forth above. These fees may include, but are not limited to; FINRA Trade Activity Fee, NSCC Illiquid Security Fees and other such fees. Clearing Broker will use its best efforts to advise Introducing Broker of these additional costs and expenses as soon as possible after Clearing Broker becomes aware of them.

CV Brokerage Inc

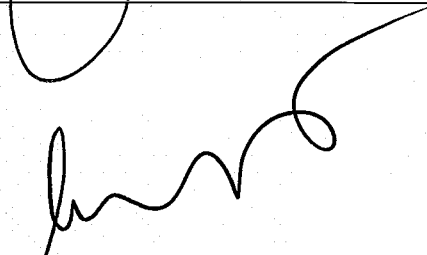
Industrial and Commercial Bank of China
Financial Services, LLC.

By: Brenda Davis

By: 

Date: 3-18-13

Joseph M. Spillane
Chief Executive Officer

Date: 

Yi Lu
Deputy Chief Executive Officer

FULLY DISCLOSED CLEARING AGREEMENT

This Amendment to Fully Disclosed Clearing Agreement (the "Amendment") is entered into this 1st day of November, 2016 by and between Industrial and Commercial Bank of China Financial Services LLC ("ICBC"), and CV Brokerage, Inc. ("Broker").

WHEREAS, the parties entered into that certain Fully Disclosed Clearing Agreement on March 18, 2013 (the "Agreement"); and

WHEREAS, the parties wish to amend the existing terms and conditions of the Agreement.


Now, THEREFORE, it is agreed by and between the parties hereto as follows:

1. Add the following paragraph 14.6 to section 14.0 OTHER OBLIGATIONS AND RESPONSIBILITIES OF BROKER as follows:

14.6 FINRA Rule 4210 (Margin Requirements) to Establish Margin Requirements for Covered Agency Transactions: If Broker engages in Covered Agency Transactions, as defined in FINRA Rule 4210, it will be the sole responsibility of the Broker to make all margin calls and inform its customer to send the required margin directly to ICBC. In accordance with Rule 4210, if the Broker fails to collect required margin as defined by Rule 4210 the Broker, not ICBC, will be required to take all required capital charges. In accordance with the Brokers instruction, ICBC will maintain the margin deposit on behalf of the Brokers customer.

ACKNOWLEDGED AND AGREED TO:

Industrial and Commercial Bank of China Financial Services LLC:

By:  Industrial & Commercial Bank of China

Financial Services LLC

Its: Alan B. Levy

Broker: CV Brokerage Inc Managing Director

By: Blende Davis

Its: CEO

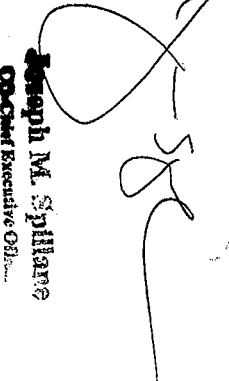

Joseph M. Spillane
CO-CHIEF EXECUTIVE OFFICER

EXHIBIT 2

Attorneys for Jeffrey Bydalek

Matthew Faranda-Diedrich, Esquire
Julie M. Latsko, Esquire
ROYER COOPER COHEN BRAUNFELD LLC
Two Logan Square
100 North 18th Street, Suite 710
Philadelphia, PA 19103
267-546-0274 (phone)
484-362-2630 (fax)
Attorneys for Claimant, Jeffrey Bydalek

FINANCIAL INDUSTRY REGULATORY AUTHORITY

JEFFREY BYDALEK,	:	
Claimant,	:	
	:	
v.	:	
	:	
BRENDA SMITH and CV	:	ARBITRATION NO. 18-03955
BROKERAGE, INC.,	:	
	:	
and	:	
	:	
INDUSTRIAL AND COMMERCIAL	:	
BANK OF CHINA FINANCIAL	:	
SERVICES LLC,	:	
Respondents.	:	

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused to be served a true and correct copy of the above
Notice of Dismissal via electronic mail and FINRA Portal filing on the individuals listed below:

Ms. Gayle R. Klein
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
Gayle.Klein@srz.com
Laurent.Abergel@srz.com
Elizabeth.Curran@srz.com

Counsel for ICBCFS

I further certify that on this date, I caused to be served a true and correct copy of the above
Notice of Dismissal via first-class mail on the parties listed below:

Brenda Smith
CV Brokerage, Inc.
Essex County Correctional Facility
J.2019.12346 (CCIS 307-571432)
Housing Block E@-Cell 224
Newark, NJ, New Jersey 07105

Appearing Pro Se

Dated: January 26, 2023

/s/ Julie M. Latsko

Julie M. Latsko, Esq.

EXHIBIT 3

1 SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : CIVIL TERM : PART 61
 2 -----X Index No. 652507/2021
 SUREFIRE DIVIDEND CAPTURE, LP,

3
 4 Plaintiff,

5 -against- **PROCEEDINGS**

6 INDUSTRIAL AND COMMERCIAL BANK OF CHINA
 FINANCIAL SERVICES, LLC

7 Defendant.

8 -----X
 Microsoft Teams Videoconference
 June 2, 2022

9
 10 B E F O R E:
 HONORABLE BARRY OSTRAGER
 Supreme Court Justice

11
 12 A P P E A R A N C E S:

13 OVED & OVED LLP
 Attorneys for Plaintiff
 401 Greenwich Street
 14 New York, New York 10013
 By: GLEN LENIHAN, ESQ.

15
 16 NYSTROM BECKMAN & PARIS LLP
 Attorneys for Plaintiff
 17 One Marina Park Drive - 15th Floor
 Boston, Massachusetts 02210
 18 By: NINA S. HIRSCH, ESQ.

19
 20 SCHULTE ROTH & ZABEL LLP
 Attorneys for Defendant
 919 Third Avenue
 21 New York, New York 10022
 By: LAURENT M. ABERGEL, ESQ.
 22 GAYLE R. KLEIN, ESQ.
 ELIZABETH V. CURRAN, ESQ.

23
 24 ALSO PRESENT: NAN LING
 ROBERT VIRGILIO

MARY BENCI, RPR
 Official Court Reporter
 mb

Proceedings

1 THE COURT: I've read the papers in connection with
2 the pre-answer motion to dismiss the complaint, and the only
3 issue that I want to hear oral argument on is the standing
4 argument, so let me hear from the movant.

5 MS. KLEIN: Very good, your Honor.

6 My name is Gayle Klein. I am joined today by my
7 colleagues Elizabeth Curran and Laurent Abergel, and
8 Mr. Abergel is one of our midlevel associates, and I have
9 given him this argument to do.

10 So with that, Mr. Abergel, if you will lead us off
11 on the standing.

12 MR. ABERGEL: That would be my pleasure.

13 Good morning, your Honor. May it please the Court,
14 my name is Laurent Abergel, and I'll be arguing on behalf of
15 defendant ICBCFS on a threshold issue of standing in this
16 case.

17 It is our position that SureFire lacks standing to
18 obtain the full relief it seeks on its two aiding and
19 abetting fraud claims. Here SureFire alleges that it was
20 assigned both of its fraud claims from its predecessors in
21 interest, the A Funds, via an in-kind subscription
22 agreement. But this in-kind subscription agreement which
23 SureFire originally filed as Exhibit 1 to its initial motion
24 to dismiss in which it referenced in its amended complaint
25 fails to actually demonstrate any intent by the A Funds to

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Proceedings

1 transfer their fraud claims as required under New York law.
2 If possible, I would like to share just a couple of slides
3 we've prepared.

4 THE COURT: Mr. Abergel, just try and speak slowly
5 and a little louder. Both the court reporter and I are
6 having trouble picking up what you're saying.

7 MR. ABERGEL: Okay. Please let me know if you can
8 see the screen.

9 Your Honor, what we've created here are a couple of
10 slides representing the actual language of the agreement
11 which we have attached as Exhibit B to our motion to dismiss
12 the amended complaint in which SureFire relies on in their
13 -- and references in their amended complaint. As you can
14 see, the plain language does not transfer any claims at all,
15 let alone any fraud claims. The agreement as written only
16 transfers the full balance of the A Funds' interest in
17 Broad Reach.

18 This language is plainly insufficient under
19 New York which requires a plaintiff alleging it was assigned
20 fraud claims to show that there was some express language in
21 the agreement that reflects an intent to transfer such
22 rights. As I've highlighted here on the right side,
23 New York courts have consistently denied the validity of
24 assignments which only broadly transfer all rights or all
25 interest in an investment. As you can see the language in

mb

Proceedings

1 the subscription agreement bears no material difference to
2 the language found insufficient in these prior cases.

3 Also, your Honor, looking further at the agreement,
4 it's clear that only the balance is being transferred. The
5 agreement explicitly states that the in-kind subscription
6 is in the amount of the February 28th, 2019 balance. The
7 agreement transfers the A Funds' financial interests in
8 Broad Reach to another entity. Nothing else. This in-kind
9 subscription agreement is nothing more than a financial
10 transfer of the A Funds' financial interest in Broad Reach.

11 Now, SureFire doesn't even address this language in
12 its opposition papers. Rather, to avoid dismissal, SureFire
13 has inserted language about contract fraud and tort claims
14 being transferred. That is nowhere to be found within the
15 plain language of the agreement. But when a document is
16 referred to in a complaint, such as the case here, we have
17 to refer to that document and rely only on the language of
18 the document. And as you could see, this agreement does not
19 have any of the language that SureFire references. The
20 agreement itself very clearly only transfers a financial
21 interest.

22 Your Honor, I'd also like to point out that the
23 agreement itself does not identify SureFire as the entity to
24 which the financial interests are being transferred. The
25 plaintiff in this matter is SureFire Dividend Capture, LP,

mb

Proceedings

1 as you can see from the case caption, but the entity
2 receiving this assignment is SureFire Dividend Capture SPV5,
3 a completely distinct entity.

4 Your Honor, I did want to note that to the extent
5 SureFire argues that this Court should ignore the explicit
6 language of the agreement because of the nature of the
7 in-kind subscription agreement implicitly transferred fraud
8 claims, that argument must be rejected. This same argument
9 was raised in the case before the New York Court of Appeals
10 which we cited in our motion to dismiss papers. The case is
11 *Commonwealth of Pennsylvania Public Schools Employees'*
12 *Retirement System v. Morgan Stanley & Company,*
13 25 N.Y.3d 543. In that case the New York Court of Appeals
14 denied plaintiff's argument that the nature of a generic
15 note assignment implicitly intended to transfer fraud claims
16 that plaintiffs had not otherwise discussed nor even aware
17 of potentially existing at the time of the sale.

18 Similarly here, SureFire cannot rely on an
19 unsubstantiated implicit transfer of claims it had no
20 discussion about, nor even any idea existed at the time of
21 the sale.

22 Your Honor, this agreement is not vague. There is
23 no question that this agreement does not properly assign
24 fraud claims. Notably, this has a very significant impact
25 on our case. Of SureFire's \$46 million demand, \$41 million

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Proceedings

1 stems from the redemption and subsequent transfer made by
2 the A Funds. SureFire's lack of standing in this case
3 changes this case from a \$46 million case to a \$5 million
4 case made up only of SureFire's own investments. We ask
5 that your Honor find that SureFire lacks standing to bring
6 any claims on behalf of the A Funds' investments.

7 Thank you.

8 MR. LENIHAN: Your Honor, may I respond?

9 THE COURT: If that's the conclusion of the
10 movant's argument, of course.

11 MR. LENIHAN: Thank you, your Honor.

12 So I'm Glen Lenihan with Oved & Oved. With me is
13 Nina Hirsch of Nystrom Beckman & Paris. We are counsel for
14 plaintiff.

15 The plaintiff in this action clearly has standing.
16 The case that they're relying on that they just cited to
17 you, the New York Court of Appeals case from 2015,
18 *Commonwealth of Pennsylvania Public School Employees'*
19 *Retirement Systems v. Morgan Stanley*, was a summary judgment
20 case, not a pre-answer motion to dismiss case. And in that
21 case the Court of Appeals confirmed that one of the
22 defendants has failed to present any evidence of a
23 communicated intent by the assignor to assign to the
24 assignee the right to sue for fraud.

25 Here, in connection with the defendant's first

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Proceedings

1 motion to dismiss, which was withdrawn, we submitted an
2 affidavit from the assignor expressly saying that the intent
3 was to transfer, among other things, fraud and tort claims
4 to the plaintiff. The agreement itself specifically
5 references that this was going to be done through an in-kind
6 transfer; meaning they were going to step into the rights of
7 the limited partners fully, not just their investments, but
8 any claims that they could have.

9 At a minimum, discovery is required to determine
10 what the intent of the parties was and whether there was an
11 intent to actually transfer the rights to sue for fraud.
12 That was the issue in *Commonwealth*. That was the issue that
13 on summary judgment they couldn't provide any evidence of a
14 communicated intent.

15 Here, we've already provided that evidence. It was
16 then put into our amended complaint. It's set forth clearly
17 at paragraph 122 along with 125. We make the allegation,
18 and that's sufficient at this point to allow us to proceed
19 forward.

20 If discovery somehow reveals that the affidavit
21 that we've already provided is incorrect or false, then they
22 can move for summary judgment later on. But right now we've
23 got an affidavit that was filed at Docket Number 31, along
24 with the allegations in the amended complaint that basically
25 incorporate what the affidavit said and included in the

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Proceedings

1 amended complaint, showing that the full intent was an
2 in-kind subscription in order to transfer legal title to all
3 rights and claims, including potential claims arising from
4 any tort. That's alleged in the complaint. And just by
5 looking --

6 THE COURT: That's what the complaint alleges.
7 That's not what the assignment agreement says.

8 MR. LENIHAN: Well, your Honor, respectfully, I
9 disagree, because it says the transfer is made for the
10 purposes of facilitating an in-kind subscription to the
11 fund. And what the assignor said in his affidavit was the
12 purpose of this, the intent of that language, was to put
13 them fully in the shoes of the limited partners including
14 all rights to sue under tort claims.

15 So even if there's a question about the intent
16 under this agreement or if it's -- if the Court were to find
17 it were to be ambiguous, we would then need to look at the
18 parties' intent. We have submitted an affidavit from the
19 assignor as to what the intent is. The defendant had no
20 knowledge at this point of what the intent could be other
21 than what the affidavit says and what's been incorporated
22 into this complaint.

23 Respectfully, on a pre-answer motion to dismiss, we
24 believe we've met our burden to show that we have standing
25 to sue for the entire amount sued under the complaint, not

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Proceedings

1 only an amount related to what the actual plaintiff later
2 invested after this assignment. We believe that at this
3 stage we've met our burden at a minimum to proceed to
4 discovery.

5 And again, just for the record, I just want to
6 point out one more time that the commerce case that they're
7 relying on was a summary judgment motion made after full
8 discovery was made. The Court of Appeals in that case
9 specifically said that there's no magic language that you
10 need to use. It doesn't require any specific words, only
11 some explicit language evidencing the parties' intent to
12 transfer broad and unlimited rights and claims.

13 Here, the language evincing an in-kind -- transfer
14 of an in-kind subscription is exactly that language
15 evidencing the parties' intent to transfer broad and
16 unlimited rights and claims. And if someone needs to know
17 what the parties meant by an in-kind subscription, we have
18 the affidavit at Docket 31 from the assignor expressly
19 saying that it intended to, among other things, transfer
20 tort claims.

21 So we believe at this stage that we've met the
22 burden necessary to prove that we have standing. At a
23 minimum we've alleged it sufficiently to show that discovery
24 should proceed forward as to what the intent of the parties
25 was, given that the Court of Appeals has held there's no

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Proceedings

1 magic language that needs to be provided in there, only
2 language evidencing an intent to transfer broad and
3 unlimited rights and claims.

4 THE COURT: Anything further from the movant?

5 MR. ABERGEL: Yeah, your Honor, if I may quickly
6 respond. First, to the extent SureFire is now relying on
7 that affidavit, it did not reattach that affidavit to its
8 opposition to the motion to dismiss the amended complaint.
9 We would find its reliance improper.

10 Second, I would say that to the extent SureFire
11 believes that *Commonwealth* was decided on summary judgment
12 and that prevents its current use, plenty of cases have
13 ruled on the language within *Commonwealth of Pennsylvania*
14 and have relied on its actual legal argument for precedent,
15 so we would say that it still applies.

16 We would also point out that the case itself did
17 have declarations from the predecessors in that case. And
18 those declarations made exactly the same type of arguments
19 that Glen is now making that Brian Shevland made in his
20 affidavit, declarations essentially saying that their
21 agreement intended to transfer all rights and all rights to
22 fraud claims. But that is not the issue here.

23 Here, the language of the agreement is clear and we
24 can't look outside that document. The language does not
25 transfer anything other than financial interests. And any

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1 declaration isn't going to supplement the plain language of
2 that agreement. So it is our position that discovery is not
3 necessary.

4 And as opposing counsel has referenced repeatedly,
5 there aren't magic words required, but you do need some
6 language evincing an intent to actually transfer claims.
7 There is no language evincing intent in the agreement. It's
8 merely transferring the full balance.

9 Thank you, your Honor.

10 THE COURT: All right. I'm going to grant the
11 motion to dismiss. I find this case falls squarely under
12 the *Morgan Stanley* decision from the First Department,
13 135 A.D.3d 497. The law in New York is well established
14 that for an assignor to transfer fraud claims there has to
15 be language in the assignment that clearly evinces an intent
16 to transfer fraud claims. Here, the language of the
17 assignment does nothing more than transfer a financial
18 interest, and for that reason the motion must be granted.

19 Passing all of that, there's a very serious issue
20 as to whether a claim against a transfer agent is
21 appropriate, and so the complaint is dismissed and that's
22 the decision of the Court. It will be reflected in a short
23 form order which I'll issue today.

24 Thank you.

25 MR. LENIHAN: Your Honor, may I ask for

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Proceedings

1 clarification on one point?

2 THE COURT: Yes.

3 MR. LENIHAN: With respect to the standing issue,
4 it's undisputed and the defendant even agrees that the named
5 plaintiff has made a direct investment into Broad Reach of
6 between four and \$5 million. So even if the -- even if the
7 Court found that the language of the transfer, of the
8 assignment was insufficient, I believe that we would still
9 have the claims for the four to \$5 million that were
10 invested.

11 THE COURT: Yes, you're absolutely correct about
12 that. The motion is directed, as I understood it, to the
13 claims that were transferred from the TA1 funds to SureFire.
14 Any funds that SureFire directly invested of its own remain
15 in the case. I've already expressed skepticism as to
16 whether or not a claim can be asserted against the transfer
17 agent. But for purposes of a pre-answer motion to dismiss,
18 I'm not prepared to rule as a matter of law, but there are
19 no circumstances under which a transfer agent could be held
20 liable, particularly in a case like this where there were
21 multiple red flags, and the like.

22 MR. LENIHAN: Thank you, your Honor, for that
23 clarification.

24 THE COURT: Now, is the correct plaintiff suing
25 here?

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Proceedings

1 MR. LENIHAN: My understanding is yes, your Honor.
2 I'll confer with plaintiff's national counsel, but our
3 understanding is yes, that is the correct entity that ought
4 to be suing.

5 THE COURT: Well, you'll clarify that, but the only
6 claims that I am dismissing with prejudice are the claims
7 that were transferred by assignment from the TA1 hedge fund
8 to SureFire.

9 MS. KLEIN: Point of clarification, your Honor. I
10 believe it's the A Funds transfer, not the TA1 transfer.

11 THE COURT: Yes, yes.

12 All right. Have we sorted everything out to your
13 satisfaction and dissatisfaction?

14 MR. LENIHAN: One or the other, yes, your Honor.

15 THE COURT: All right. I'll issue an appropriate
16 short form order. We'll schedule a conference after the
17 parties complete a preliminary conference order in the form
18 on the Court's website.

19 And in the present posture of the case the parties
20 may consider mediating this dispute before the parties spend
21 a significant percentage of the amount that's presently at
22 issue in this case. I can recommend paid mediators who I
23 believe could resolve this case in a day and a half, which
24 would be quite cost effective in comparison to what
25 litigating this case would involve. I'll give you the names

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Proceedings

1 of these three mediators. You're free to consult with them
2 or not consult with them. They're all very, very
3 experienced individuals with 40 to 50 years of commercial
4 litigation experience.

5 The names of the mediators who you're free to
6 consult or not consult are in no particular order. Former
7 Justice Peter Sherwood who was a Commercial Division justice
8 for 12 years. David Ichel, I-C-H-E-L, is a former partner
9 at Simpson Thacher & Bartlett with 40-plus years of trial
10 experience. And Denis Glazer, G-L-A-Z-E-R, he's a former
11 partner of Davis Polk & Wardwell, with 40-plus years of
12 commercial litigation experience.

13 I'd encourage you to see if you can't consensually
14 resolve this case because it might be more expensive to
15 litigate the case than is warranted under all the
16 circumstances.

17 Have a nice day, everyone.

18 (Continued on the following page.)
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Proceedings

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MR. LENIHAN: Thank you, your Honor. You as well.

MS. KLEIN: Thank you.

MR. ABERGEL: Thank you.

MS. HIRSCH: Thank you, your Honor.

Certified that the foregoing is a true and accurate transcript of the original stenographic minutes in this case.

Mary Benci

MARY BENCI, RPR
Official Court Reporter

SO ORDERED July 20, 2022



BARRY R. OSTRAGER, J.S.C.

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EXHIBIT 4

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X
SUREFIRE DIVIDEND CAPTURE, LP,

Plaintiff,
- v -

INDUSTRIAL AND COMMERCIAL BANK OF CHINA
FINANCIAL SERVICES LLC,
Defendant.

INDEX NO.	652507/2021
MOTION DATE	
MOTION SEQ. NO.	004

DECISION + ORDER ON MOTION

-----X
HON. BARRY R. OSTRAGER

Before the Court is Motion Sequence 004 by defendants to dismiss plaintiff’s Amended Complaint pursuant to CPLR §3211(a)(3) and (7). The Court heard oral argument on the motion on June 2, 2022, via Microsoft Teams. For the reasons reflected on the transcript of proceedings and as further established herein, the motion is resolved as follows.

This action stems from an alleged underlying fraud that was perpetuated by non-party Brenda Smith, who is presently incarcerated. Smith, the owner of CV Brokerage, controlled two separate hedge funds—TA1 and Broad Reach Capital, LP (“Broad Reach”)—that she allegedly used in connection with a Ponzi scheme to defraud people of their investments. Smith has pled guilty for this fraud. Defendant Industrial and Commercial Bank of China Financial Services LLC (“ICBC”) worked with Smith as the clearing broker for both hedge funds and was allegedly the only clearing broker that would execute Smith’s unique options strategy of “dividend capture trades.” *Compl.* ¶26. Plaintiff SureFire Dividend Capture, LP (“SureFire”) alleges it is both a direct investor in Broad Reach and the successor-in-interest of non-parties Aalii Fund, LP and Alpha Capital Partners, LP (collectively, “the A Funds”), which allegedly invested tens of millions of dollars in the Broad Reach fund between September 2016 and May

2018. The A Funds' interest was allegedly assigned to plaintiff SureFire in February 2019.

NYSCEF Doc. No. 85. Plaintiff alleges that defendant ICBC, as clearing broker for Smith's fraudulent hedge funds, aided and abetted Smith's fraud and breach of fiduciary duty.

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, "the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (citations omitted).

To the extent SureFire's Amended Complaint is based on allegations that the A Funds assigned its fraud claims to plaintiff SureFire, those claims are dismissed with prejudice for lack of standing under CPLR § 3211(a)(3). In support of its claim that plaintiff is entitled to over \$46 million in damages, representing both the A Funds' investment in Broad Reach and plaintiff's direct investment, plaintiff relies on an "In-Kind Subscription Agreement" executed on February 27, 2019, in which the A Funds transferred "the full balance of [A Funds] interest in Broad Reach Capital LP to Sure Fire Dividend Capture SPV5 [f]or the purposes of facilitating an in-kind subscription to the Fund" NYSCEF Doc. No. 85.

Plaintiff cannot seek recovery based on alleged misrepresentations and fraud with respect to the A Funds, a non-party in this case, because the A Funds have not assigned such claims to plaintiff. First, "Sure Fire Dividend Capture SPV5," the party to which an assignment was made under the In-Kind Subscription Agreement, is not a named party in this case. The plaintiff is "SureFire Dividend Capture L.P." Second, even if the assignment was made to plaintiff, the plain language of the In-Kind Subscription Agreement is unambiguous and does not contain language that evinces any intent to assign any legal claims to SureFire. *See Commonwealth of Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 25 N.Y.3d 543, 550

(2015), citing *State of Cal. Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427 (2000).

To the extent the Amended Complaint is based on SureFire's direct investment in Broad Reach, the motion to dismiss is denied because plaintiff's facts, as alleged and broadly construed on a pre-answer motion to dismiss, support the causes of action for aiding and abetting fraud/fiduciary duty. Plaintiff's potential damages are limited to the \$4.5 million plaintiff allegedly directly invested. *Cmplt.* ¶121.

To state a claim for aiding and abetting fraud, plaintiff must sufficiently plead (1) the existence of an underlying fraud, (2) knowledge of this fraud on the part of the aider and abettor, and (3) substantial assistance by the aider and abettor in achievement of the fraud. *Stanfield Offshore Leveraged Assets, Ltd. v. Metro Life Ins. Co.*, 64 A.D.3d 472, 476. To state a claim for aiding and abetting breach of fiduciary duty, plaintiff must sufficiently plead (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damages as a result of the breach. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). The existence of the underlying fraud/breach of fiduciary duty is undisputed.

Plaintiff has sufficiently alleged actual knowledge, which need only be alleged generally at the pre-discovery stage of this litigation. *See Oster v. Kirschner*, 77 A.D.3d 51, 55-56 (1st Dept. 2010). CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. *Eurycleia Partners, LP v. Seward & Kissle, LLP*, 12 N.Y.3d 553, 559 (2009). The allegations contained in plaintiff's Amended Complaint are supported by facts and surrounding circumstances giving rise to a reasonable inference that defendant knew about the underlying fraud/breach of fiduciary duty perpetuated by Brenda Smith.

Substantial assistance in aiding and abetting exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated. *Kaufman*, 307 A.D.2d at 126. Where a defendant does not owe a fiduciary duty directly to plaintiff, such as in the clearing firm context, mere inaction cannot constitute substantial assistance; however, when a clearing firm moves beyond performing mere ministerial or routine clearing functions and becomes actively and directly involved, it may be liable for aiding and abetting. *See McDaniel v. Bear Stearns & Co., Inc.*, F. Supp.2d 343, 352-53 (S.D.N.Y. 2002).


Plaintiff's Amended Complaint makes several allegations that defendant's actions went beyond routine clearing functions, including that defendant: gave Smith advanced warning when defendant believed certain transactions would trigger compliance reporting alarms (*Cmplt.* ¶2); manufactured excuses for Smith's violations to allow her to continue her scheme free of regulatory scrutiny (*Cmplt.* ¶41); assisted in concealing Smith's misconduct (*Cmplt.* ¶73-77); processed many fraudulent transfers which raised numerous red flags constituting suspicious activity under FINRA rules and regulations (*Cmplt.* ¶46-77); and that defendant provided plaintiff with a "Comfort Letter" to help induce plaintiff's investment (*Cmplt.* ¶123-24).

Liberal construed and treated as true, as is necessary at the pre-answer motion to dismiss stage, the allegations contained in plaintiff's Amended Complaint would deprive defendant of the benefit of the general rule that a clearing broker cannot be liable for aiding and abetting fraud for performing mere routine clearing functions. *See, e.g., McDaniel*, 196 F.Supp. 2d at 356. It is premature to make a determination as to whether defendant's alleged actions did, in fact, constitute routine clearing functions or if the actions went beyond.

Plaintiff’s allegations of proximate causation are likewise sufficient. While Courts have dismissed claims of aiding and abetting “when a plaintiff cannot show how a conventional business relationship alleged proximate cause,” See In re Agape Litig., 773 F. Supp.2d 298, 325 (E.D.N.Y. 2011), this is not such a case. The issue of proximate causation cannot be decided as a matter of law because there is a dispute as to whether defendant’s actions amounted to routine clearing functions or something more.

Defendant is directed to submit an Answer to plaintiff’s Amended Complaint within twenty days of this Order. A Preliminary Conference is scheduled for July 21, 2022 at 10:00 a.m. The parties are directed to submit a dial-in number for the conference no later than July 6, 2022. To that end, the parties are directed to meet and confer to agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of Issue deadline no later than 22 months from the date of this Order, and e-file it with a request to so Order by July 6, 2022. If the proposed Preliminary Conference Order is acceptable to the Court, it will be So Ordered and no appearance will be necessary on July 21, 2022.

Dated: June 2, 2022


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE:

EXHIBIT 5

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X
AALII FUND, LP and ALPHA CAPITAL PARTNERS, LP,

Plaintiffs,

- v -

INDUSTRIAL AND COMMERCIAL BANK OF CHINA FINANCIAL SERVICES LLC,
Defendant.

INDEX NO.	652446/2022
MOTION DATE	
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

-----X
HON. BARRY R. OSTRAGER

On April 17, 2023, the Court heard oral argument via Microsoft Teams on Motion Sequence 001 by defendant to dismiss plaintiffs’ Complaint pursuant to CPLR §3211(a)(3) and (7). This action is closely related to another action before this Court captioned *SureFire Dividend Capture, LP v. Industrial and Commercial Bank of China Financial Services LLC* (index number 652507/2021) (the “SureFire Action”) and reference to the decision denying a motion to dismiss in the SureFire action is relevant to the disposition of this motion. During the April 17, 2023 appearance, the Court reserved decision on the motion. For the reasons set forth herein, the motion is resolved as follows.

This action (and the SureFire Action) stem from an alleged underlying fraud that was perpetuated by non-party Brenda Smith, who is presently incarcerated in connection with that fraud. Smith, the owner of CV Brokerage, controlled two separate hedge funds—TA1 and Broad Reach Capital, LP (“Broad Reach”)—that she allegedly used in connection with a Ponzi scheme to defraud people of their investments. Smith has pled guilty for this fraud. Defendant Industrial and Commercial Bank of China Financial Services LLC (“ICBCS”) worked with Smith as the clearing broker for both hedge funds and was allegedly the only clearing broker that would

execute Smith’s unique options strategy of “dividend capture trades.” *Cmplt.* ¶¶25–26. Plaintiffs Aalii Fund, LP and Alpha Capital Partners, LP (collectively, “the A Funds”) allegedly invested over \$27 million in the Broad Reach fund between September 2016 and May 2018. In February of 2019, the A Funds transferred their interest in the Broad Reach fund to non-party SureFire Dividend Capture, LP (“SureFire”), via an “In-Kind Subscription Agreement” whereby the value of plaintiffs’ entire limited partnership interest in Broad Reach was transferred to SureFire, and plaintiffs became limited partners in SureFire. The transfer was allegedly recorded on Broad Reach’s books and records as a redemption by plaintiffs and a simultaneous investment by SureFire of approximately \$41,580,190.90 (an amount alleged to represent the value of plaintiffs’ investment at the time of the transfer). *Cmplt.* ¶¶126–28. Plaintiffs claimed on the Transcript of Proceedings of April 17, 2023 that they have not received any money as a result of the transfer, that the agreement between the parties was entered into prior to the fraud being uncovered, and that plaintiffs’ limited partnership interest in SureFire has essentially zero value as a result of the fraud.

On April 15, 2021, non-party SureFire commenced the related SureFire Action on the basis that ICBCS, as clearing broker for non-party Brenda Smith’s fraudulent hedge funds, aided and abetted Smith’s fraud and breach of fiduciary duties owed to SureFire as an investor. SureFire’s Amended Complaint contained allegations including misrepresentations made to the A Funds prior to SureFire’s involvement in the Broad Reach fund. ICBCS moved to dismiss SureFire’s claims. The Court dismissed SureFire’s claims in part based on lack of standing, reasoning that the In-Kind Subscription Agreement (which assigned the A Funds’ interest in the investment to SureFire) did not contain language evincing that the A Funds had any intent to

assign its *legal claims* to SureFire.¹ The Court further held that SureFire’s potential damages were limited to the amount SureFire allegedly directly invested in the Broad Reach fund. Thereafter, the A Funds commenced this action, asserting the same claims asserted in the SureFire Action.

Defendant ICBCS now moves to dismiss plaintiffs’ Complaint for lack of capacity to sue and failure to state a cause of action. Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, “the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (citations omitted).

Defendant ICBCS first moves to dismiss plaintiffs’ claims for lack of standing. Under CPLR § 3211(a)(3), a plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation. *See Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). Plaintiffs allegedly received a limited partnership interest in SureFire equal to the then-current value of plaintiffs’ investment in Broad Reach, which was allegedly represented to be valued at over \$41 million dollars at the time of the transfer. Defendant claims that plaintiffs, having already received more than the full balance of plaintiffs’ investment upon the sale/transfer to SureFire, have not suffered any damages and thus lack standing to assert its claims against defendant. Plaintiffs, on the other hand, argue that no equivalent value was received for the transfer, that the value of the limited partnership interest in SureFire was grossly inflated by reason of the fraud, and that plaintiffs suffered out-of-pocket damages totaling over

¹ In the related action, SureFire appealed the Court’s ruling that the A Funds did not assign their legal claims to SureFire. As of the date of this Decision and Order, no decision on the appeal has been rendered.

\$27 million (representing the amount plaintiffs invested in the Broad Reach fund pursuant to the alleged Ponzi scheme).

While there may be merit to defendant's claim that plaintiffs were compensated for the transfer, the motion to dismiss for lack of standing must be denied. Liberally construing plaintiffs' Complaint as true, the Court cannot, at the pre-answer motion to dismiss stage, make any determination as a matter of law regarding the issue of damages. Whether plaintiffs suffered any damages, and the amount of any such damages, is a question of fact to be determined on a fuller record at a later stage in this litigation.

Defendant next moves to dismiss the first cause of action for aiding and abetting fraud for failure to state a claim. That motion is denied. To state a claim for aiding and abetting fraud, plaintiffs must sufficiently plead (1) the existence of an underlying fraud, (2) knowledge of this fraud on the part of the aider and abettor, and (3) substantial assistance by the aider and abettor in achievement of the fraud. *Stanfield Offshore Leveraged Assets, Ltd. v. Metro Life Ins. Co.*, 64 A.D.3d 472, 476. The existence of the underlying fraud perpetuated by non-party Brenda Smith is undisputed. Plaintiffs have sufficiently alleged the remaining elements.² There are questions of fact as to whether defendant, a clearing firm, moved beyond performing mere ministerial and routine clearing functions such that defendant became actively and directly involved in the fraud perpetuated by non-party Brenda Smith. *See, e.g., McDaniel v. Bear Stearns & Co., Inc.*, F. Supp.2d 343, 352–53 (S.D.N.Y. 2002).

Finally, defendant moves to dismiss the second cause of action for aiding and abetting breach of fiduciary duties. That motion is also denied. To state a claim for aiding and abetting

² Defendant ICBCS presented essentially the same arguments in its motion for dismissal of the aiding and abetting fraud claim in the related SureFire Action that this court previously rejected. *See* 652507/2021 NYSCEF Doc. No. 106.

breach of fiduciary duty, plaintiffs must sufficiently plead (1) a breach by a fiduciary of obligations to another, (2) that defendant knowingly induced or participated in the breach, and (3) that plaintiffs suffered damages as a result of the breach. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). It is undisputed that non-party Brenda Smith owed plaintiffs fiduciary duties prior to the May 2018 transfer of interests to SureFire. Defendant argues that plaintiffs cannot recover for funds lost after the transfer to SureFire because there was no fiduciary duty owed by Smith at that point. However, the Complaint adequately alleges that the losses appear to have occurred *during* plaintiffs’ relationship with Smith. *Cmplt.* ¶93. Just as there exists a question of fact as to whether plaintiffs suffered any damages in this case, there exists a question as to when any such damages were sustained and whether Smith owed a fiduciary duty to plaintiffs at the time of the loss.

Defendant is directed to submit an Answer to the Complaint within twenty days of this Order. A Preliminary Conference is scheduled for July 11, 2023 at 12:00 p.m. via Microsoft Teams. To that end, the parties are directed to meet and confer to agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of Issue deadline no later than 22 months from the date of this Order, and e-file it with a request to so Order by June 30, 2023.

Dated: April 18, 2023


 BARRY R. OSTRAGER, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Danbury CT 06811

I further certify, this 13th day of July, 2023, that I caused to be served a true and correct copy of the foregoing upon the following:

**Industrial and Commercial Bank of China Financial Services
(By Electronic Filing Pursuant to Fed R. Civ. P. 5 (b) and Electronic Mail)**

c/o Schulte Roth & Zabel LLP
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New York, NY 10022

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s/ Robin S. Weiss
Robin S. Weiss, Esq.
Attorney for Receiver, Kevin Dooley Kent