UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL SERRICCHIO,	:	
Plaintiff/Counterclaim-Defendant,	:	No. 3:05-CV-1761 (JBA)
v.	:	
WACHOVIA SECURITIES, LLC,	:	
Defendant/Counterclaim-Plaintiff,	:	September 16, 2008
and PRUDENTIAL SECURITIES, INC.,	:	
Defendant.	:	

DEFENDANT'S PRE-TRIAL MEMORANDUM OF LAW CONCERNING DAMAGES

SEYFARTH SHAW LLP
David B. Ross (ct 26960)
Gerald Pauling II (*pro hac vice*)
Devjani Mishra (ct 26688)
Brian D. Murphy (*pro hac vice*)
620 Eighth Avenue
New York, New York 10018-1405
Telephone: (212) 218-5500
Facsimile: (212) 218-5526

Attorneys for Defendant Wachovia Securities

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Wachovia submits this pre-trial memorandum in advance of the damages trial in this matter, scheduled to begin on October 2, 2008.

PRELIMINARY STATEMENT

Having told the jury that he could not make a living from the reemployment that Wachovia offered on March 31, 2004, Mr. Serricchio will now explain that he decided instead to become a self-employed investor in a risky startup tanning salon business. By his own account, he has earned almost no income from this business over the past five years, yet has continued to invest substantial sums in this enterprise. Further, Mr. Serricchio has conceded that he made no attempt whatsoever to secure alternative work in the interim – work for which he was well qualified by education, training and experience – even though this work would have wholly offset the damages he now claims.

Notwithstanding his claim before the jury that he could not have earned a living at Wachovia, Mr. Serricchio and his expert witness will tell a wholly different story during this phase of the trial. Specifically, Mr. Serricchio will now claim not only that he could have rebuilt his business at Wachovia after all, but that he would have attained astounding heights of profitability. In this regard, he projects fictional and unprecedented "but for" revenue gains on one hand, while on the other, claims nearly zero interim earnings offset from his startup venture. Because Mr. Serricchio wholly failed to seek alternative employment or revive his business with Wachovia, he has failed to mitigate his damages, and is not entitled to either backpay or front pay. That Mr. Serricchio rejected Wachovia's offer which would have provided him with a minimum of $24,000/year in favor a job which allegedly netted him on $400 of income in the past five years, conclusively illustrates the unreasonableness of his decision. Quite simply, Wachovia cannot be held accountable for damages which Mr. Serricchio chose to waive by his self-employment in a speculative tanning salon business – and Mr. Serricchio's exaggerated

notions of "what might have been" at Wachovia merely underscore the inadequacy of his interim self-employment as an effort to mitigate damages.

Wachovia intends to present evidence at the damages hearing that will establish alternative, reasonable calculations of backpay, showing that Mr. Serricchio could have offset in whole or large part, his expected earnings "but for" his military leave, whether by remaining at Wachovia or seeking other work for which he was qualified. Given the highly speculative nature of front pay in this case, the length of the backpay period and Mr. Serricchio's failure to mitigate at any time since leaving Wachovia, no front pay is warranted. Nevertheless, Wachovia will present an analysis showing that even if front pay were warranted for a limited period, it would be offset in large part by reasonable mitigation.

Finally, Wachovia submits that liquidated damages are not appropriate in this case of first impression. Given divergent but reasonable interpretations of USERRA, and absent applicable regulations or case law defining "like seniority, status and pay" in the context of an entrepreneurial draw and "commission-only" business, the question of what "pay" Wachovia was obligated to offer Mr. Serricchio on March 31, 2004, is at best a thorny one. Indeed, this Court itself has already noted that Wachovia was not obliged to provide a guaranteed salaried position where Mr. Serricchio was paid on a draw and commission-only basis. That Wachovia navigated this issue by reasonably interpreting reemployment to require reinstatement to the same "rate of pay" plus the same opportunity to rebuild his business, falls far short of the standard of willfulness for liquidated damages under USERRA.

ARGUMENT

I. MR. SERRICCHIO IS NOT ENTITLED TO RECOVER ANY BACK PAY BECAUSE HE FAILED TO MITIGATE HIS ALLEGED DAMAGES

Mr. Serricchio seeks back pay through October 15, 2008, but admits that he failed to take any steps to mitigate his damages during this prolonged back pay period, or even to explore the

options available to him. Specifically, Mr. Serricchio left Wachovia on March 31, 2004, rejecting any attempt to revive his business there. He then neglected to seek any appropriate alternative employment in the financial services industry for which he was qualified through education and past experience. Nor did he seek employment in any other field for which he was qualified by education or experience. Instead, Mr. Serricchio opted for self-employment by investing in the tanning salon business, a risky startup venture in which he had no prior experience, but only began with his wife a few months before his release from active duty. Under well-settled Second Circuit and Connecticut law, Mr. Serricchio's lack of effort to mitigate his damages precludes him from recovering any back pay.

A. Mr. Serricchio Failed to Mitigate his Damages by Choosing not to Seek Alternative Employment for Which he was Qualified

The duty to mitigate damages is "rooted in an ancient principle of law." Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982). "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." Id., 458 U.S. at 232 n.15 (quoting C. McCormick, Law of Damages 127 (1935)). The duty to mitigate is well settled in employment law, including in USERRA cases, and precludes recovery of back pay for any period of time during which the plaintiff failed to mitigate damages. See Carpenter v. Tyler Indep. Sch. Dist., 226 Fed. Appx. 400, 401 (5th Cir. 2007); Graham v. Hall-McMillen Co., 925 F. Supp. 437, 446 (N.D. Miss. 1996) (discussing duty of mitigation under Veterans Reemployment Rights Act); Thomas v. Juneau, 638 F. Supp. 303, 306 (D. Alaska 1986) (same); Micalone v. Long Island R.R. Co., 582 F. Supp. 973, 979 (S.D.N.Y. 1983) (same).

An employer normally bears the burden of demonstrating that a plaintiff failed to mitigate damages by proving that (i) suitable work existed; and (ii) the employee did not make a

reasonable effort to obtain it. See Graham, 925 F. Supp. at 446. However, the Second Circuit has explicitly relieved employers from the burden of establishing that comparable employment existed where the employee made no reasonable effort to seek such employment, as in this case. See Picinich v. UPS, 236 Fed. Appx. 663, 665 (2d Cir. 2007) (discussing exception with regard to Americans with Disabilities Act claim); see also Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998) ("[A]n employer should not be saddled by a requirement that it show other suitable employment in fact existed . . . when the employee, who is capable of finding replacement work, failed to pursue employment at all."); Bayon v. SUNY at Buffalo, No. 98-CV-0578E (SR), 2006 WL 1007616, at *8 (W.D.N.Y. Apr. 13, 2006) (applying exception)[1]; Paluh v. HSBC Bank USA, 409 F. Supp. 2d 178, 204 (W.D.N.Y. 2006) (same); Carcano v. William J. Kline & Son, Inc., No. 97-CV-1178, 1998 WL 690867, at *2 (N.D.N.Y. Oct. 1, 1998) (same).

Here, Mr. Serricchio concedes that he failed to seek other employment for which he was qualified or to otherwise mitigate his damages after March 31, 2004. (June 11 Tr. at 170:15-20). Although Mr. Serricchio had held brokerage, insurance and commodities licenses, he did not even consider a conventional job search in the financial services field, either as an advisor or an accountant (a position he formerly held); instead, he plunged into the start-up tanning salon business, opting for risky self-employment in a field in which he had never worked. (June 11 Tr. at 50:2-7; June 12 Tr. at 359:12-24). Under such circumstances, he cannot recover back pay. See, e.g., Hine v. Mineta, 238 F. Supp. 2d 497, 500 (E.D.N.Y. 2003) (declining to award back pay where plaintiff abandoned position as an air-traffic controller with defendant, never returned, and never again sought work in the industry).

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[1] For the Court's convenience, copies of unreported cases cited herein are provided in the accompanying Compendium of Unreported Decisions Cited in Defendant's Pre-Trial Memorandum of Law Concerning Damages.

Having made no effort to seek comparable employment, Mr. Serricchio could not use self-employment to satisfy his duty to mitigate or require Wachovia to pay the price for his choice to do so without first exercising reasonable diligence to secure alternative employment. See Tuszynski v. Innovative Servs., Inc., No. 01-CV-6302, 2005 WL 221234, at *6 (W.D.N.Y. Jan. 29, 2005) ("Plaintiff is not entitled to have defendant subsidize his reduced barber income for years after he decided to change careers."); Miller v. Swissre Holding, Inc., 771 F. Supp. 56, 60-61 (S.D.N.Y. 1991) (declining to award back pay for period during which plaintiff "did not seek comparable employment . . . but instead attempted to launch a business of his own"); Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1215 (D.D.C. 1990) (declining to hold defendant liable "for the lost back pay that accumulated as a result of [plaintiff's] personal decision to assume the risks and benefits of a solo business without making any reasonable effort even to consider alternatives by seriously seeking to obtain high-paying employment in her field"), aff'd, 920 F.2d 967 (D.C. Cir. 1990); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1468 (5th Cir. 1989) (finding plaintiff failed to mitigate damages by starting up a flea market business without looking for alternative employment); Washington v. Davis, No. Civ. A. 01-1863, 2002 WL 1798764, at *3 (E.D. La. Aug. 5, 2002) ("A claimant may not make use of her wrongful termination to effect a career change and expect to be compensated for it."); Williams v. Imperial Eastman Acquisition Corp., 994 F. Supp. 926, 932 (N.D. Ill. 1998) (plaintiff's self-employment as cattle farmer was unreasonable and failed to satisfy duty to mitigate where plaintiff formerly had been a quality assurance inspector and had no experience with cattle); Clarke v. Whitney, 975 F. Supp. 754, 760 (E.D. Pa. 1997); Coleman v. Lane, 949 F. Supp. 604, 612 (N.D. Ill. 1996).

That a plaintiff must exercise reasonable diligence in searching for alternative employment *before* resorting to self-employment is highlighted by cases such as Hawkins v.

1115 Legal Serv. Care, 163 F.3d 684 (2d Cir. 1998) and Watson v. E.S. Sutton, Inc., No. 02-Civ. 2739 (KMW), 2005 WL 2170659 (S.D.N.Y. Sept. 6, 2005), aff'd, 225 Fed. Appx. 3 (2d Cir. 2006), where the courts approved of self-employment as a mitigation measure. In Hawkins, for instance, the Second Circuit found self-employment to be a reasonable mitigation measure only because the plaintiff did, in fact, search for and secure alternative employment following her termination and resorted to self-employment only when working conditions at the interim job became intolerable. See 163 F.3d at 696. Similarly, in Watson, the Court found self-employment sufficient for purposes of mitigation only because the plaintiff had first "embarked on a lengthy and thorough search for employment. . . . [and a]fter an utter lack of success . . . began to do photography work." 2005 WL 2170659, at *16. Here, as Mr. Serricchio admitted, he made no efforts at locating alternative employment and cannot argue such employment was unavailable. (June 12 Tr. at 359:12-24). As such, his decision to enter into the tanning salon business was insufficient to satisfy his duty to mitigate as a matter of law.

Even if Mr. Serricchio had looked for other work for which he was qualified, as he was required to do, it would not have been reasonable for him to elect self-employment unless he was unlikely to secure comparable employment elsewhere. See, e.g., Taylor v. Invacare Corp., 64 Fed. Appx. 516, 523 (6th Cir. 2003) (approving of self-employment where defendant failed to offer evidence that self-employment was unreasonable under the circumstances); Hawkins, 163 F.3d at 696 (noting that self-employment must be a "reasonable alternative to seeking other comparable employment"); EEOC v. Ilona of Hung., 97 F.3d 204, 216 (7th Cir. 1996) (same); Tomasso v. Boeing Co., No. Civ. A. 03-4220, 2007 WL 2458557, at *4 (E.D. Pa. Aug. 24, 2007) (finding self-employment a reasonable alternative only because of "the highly specialized industry in which plaintiff had been employed and the limited number of employment opportunities available").

Unlike the plaintiffs in every reported decision involving mitigation through self-employment, Mr. Serricchio had broad qualifications for a range of jobs as an accountant, financial advisor or other work in the spectrum of financial services industries. He had a college degree in finance and accounting, had worked as an accountant for ICON Capital, held numerous licenses for selling a variety of securities, including insurance and commodities, and had training and work experience at Morgan Stanley Dean Witter and PSI. (June 11 Tr. 48:12-50:11). As Wachovia's damages expert, Paul Marcus, will testify, the financial advisory services industry employs approximately 168,000 people in the New York City area alone and, in fact, regularly hires entry-level college graduates (i.e. individuals with little or no industry experience). With his relevant experience and education, and the sheer abundance of potential job opportunities in the financial services industry during the back pay period, there is simply no way to characterize Mr. Serricchio's election of self-employment, with little earnings potential, as a reasonable course from the standpoint of his legal duty to mitigate damages.

Lastly, Mr. Serricchio's particular course of self-employment – as the owner and operator of a number of tanning salons – falls unreasonably short of mitigating his alleged lost wages from Wachovia, which would have paid him a minimum non-refundable draw of $24,000 and the opportunity for commission earnings well beyond this amount, as demonstrated by his past earnings. Courts have observed that "there comes a point where it is apparent that the new career will not generate income comparable to the previous occupation and a plaintiff has a duty to either seek other employment or give up his right to a back pay award." Tuszynski, 2005 WL 221234, at *6. Here, Mr. Serricchio claims his income from nearly five years of self-employment is near-zero. (Cunitz Aug. 14 Rpt. at 3). Mr. Serricchio's choice to languish in an unprofitable business for nearly five years on the assumption that he ultimately could be rewarded for his risk-taking cannot be considered a good faith effort at mitigation.

B. Mr. Serricchio Failed to Mitigate his Damages by Discontinuing his Employment at Wachovia

Further, Mr. Serricchio neglected his duty to mitigate by discontinuing his employment at Wachovia after March 31, 2004. As a general matter under federal employment law, the duty to mitigate requires an employee to remain employed while seeking redress for the alleged inequities visited upon him by that employer. See, e.g., Brady v. Wal-Mart Stores, Inc., No. CV 03-3843 (JO), 2005 WL 1521407, at *6 (E.D.N.Y. June 21, 2005) (denying back pay award on claim arising under Americans with Disabilities Act where plaintiff failed to mitigate by leaving his employment). Often referred to as the "constructive discharge rule," the principle is based in the idea that "[i]f the losses due to the discrimination experienced by an employee would be reduced by staying on the job, the employee is required to do that, and may not quit and attribute the damages from quitting to the earlier discrimination on the job." Tse v. UBS Fin. Servs., Inc., No. 03 Civ. 6234 (GEL), 2008 WL 463719, at *17 (S.D.N.Y. Feb. 19, 2008); Layman v. Gutierrez, No. Civ. A 05-CV-01890 (EWN) (BNB), 2007 WL 4061971, at *3-4 (D. Colo. Nov. 15, 2007).

Courts do recognize an exception to this rule where an employee has suffered harassment or discrimination, effectively poisoning the working environment so that the employee cannot reasonably continue to work there. See Tse, 2008 WL 463719, at *16-17 (discussing rule and exception); Jurgens v. EEOC, 903 F.2d 386, 389 (5th Cir. 1990) (intolerable conditions were not expected to improve). This is not the case here, since the constructive discharge involves neither harassment nor discrimination but merely the plaintiff's disagreement with the *terms of employment* as they existed at the moment of a reinstatement offer.[2] Here, the allegedly objectionable aspects of Wachovia's re-employment offer were just the pay arrangements

[2] Wachovia does not waive, and fully intends to renew, its motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure on the grounds that the jury's finding as to constructive discharge was not supported by the evidence.

offered at the *moment* of reinstatement, without the hostility or animus justifying application of the constructive discharge rule. Mr. Serricchio's only complaint, reinforced to the jury in the Court's Instruction, was that the offer itself was insufficient and effected his constructive discharge. (Docket No. 172, Instr. at 10). The record shows that Wachovia bore no animosity or hostility to Mr. Serricchio that would have affected Mr. Serricchio's future career at Wachovia. Indeed, Mr. Serricchio abandoned his USERRA discrimination claim, pursued no such allegations at trial, and even now seeks reinstatement.

In fact, notwithstanding Mr. Serricchio's rejection of the reinstatement offer, he projects that he would have earned $155,131 beginning in 2004 and $246,212 by the close of the back pay period in October 2008. (Cunitz Aug. 14 Rpt. Ex. A5). Although the parties sharply disagree as to the amount Mr. Serricchio might have earned "but for" his military leave, both parties agree that Mr. Serricchio's compensation would have improved dramatically and consistently following the date of reinstatement, in sharp contrast to his earnings as a self-employed tanning salon operator. Given that Mr. Serricchio could have mitigated his damages in their entirety without suffering any adverse employment action or animosity, his decision not to do so upends the "ancient principle of law" that a "person wronged cannot recover for any item of damage which could thus have been avoided." Ford Motor Co., 458 U.S. at 231 n.15.

Mr. Serricchio could have avoided the items of damage now claimed by continuing his career at Wachovia, and chose not to, which bars his recovery of any back pay.

II. MR. SERRICCHIO'S LOST EARNINGS DURING THE BACK PAY PERIOD MUST BE OFFSET BY ANY AMOUNTS THAT HE COULD HAVE EARNED WITH REASONABLE EFFORT

Even assuming, *arguendo*, that the Court awards Mr. Serricchio lost wages despite his failure to mitigate such losses, Mr. Serricchio's back pay recovery is far more limited than he suggests. The evidence will show that Mr. Serricchio's estimations of the assets he would have managed and the commissions he would have generated "but for" his military service are highly

speculative and unreasonable. Ultimately, the Court must reduce any back pay award "not only by the amounts actually earned from other employment from the date of discharge until the time of judgment, but also . . . [by] such additional sums the plaintiff could have earned by reasonable effort during the period by seeking new employment." Ferguson v. Lander Co., Inc., No. 3:06-CV-0328 (DEP), 2008 WL 921032, at *21 (N.D.N.Y. Apr. 2, 2008); see also Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134, 144-45 (2d Cir. 1993). As set forth below, the earnings Mr. Serricchio reasonably could have expected had his employment not been interrupted by military service would not have exceeded: (i) the income that Mr. Serricchio could have reasonably earned given his education and age had he sought alternative, comparable employment; or (ii) the income that Mr. Serricchio could have reasonably earned had Mr. Serricchio continued in his employment at Wachovia after March 31, 2004 rather than resigning. For these reasons, Mr. Serricchio cannot recover any back pay.

A. Mr. Serricchio's Estimated "But For" Commission Earnings During the Back Pay Period

In the retail brokerage business, brokers derive commission earnings from the assets they manage, and both experts premise their damages calculations upon this straightforward and logical premise. Generally, assets under management correlate to earnings. Therefore, to determine Mr. Serricchio's probable commission earnings during the back pay period "but for" his military service, it is necessary to: (i) project the growth of Mr. Serricchio's assets under management during the back pay period; (ii) apply a return-on-asset ("ROA") percentage to determine the gross commissions Mr. Serricchio is likely to have generated; and (iii) apply the applicable commission structure to determine what Mr. Serricchio himself would have earned. As to each step, we address the analysis of Mr. Serricchio's expert and Wachovia's, in turn.

1. Projections of Asset Growth

The first relevant consideration in determining Mr. Serricchio's "but for" earnings during the back pay period is the amount of assets he would have had under management. Mr. Serricchio offers the Court three alternative scenarios in this regard. However, as set forth below, each suffer from a number of flaws that render them unreliable.

First, Mr. Serricchio projects that his assets would have grown at "a million a month" for the entire back pay period based upon a snippet of testimony from Craig Watson, taken out of context, concerning the build up of an initial book of business for a new FA with no prior assets to manage. (June 13 Tr. at 638:19-630:2). In stark contrast to his testimony to the jury that the assets available upon his return were insufficient to make a living, Mr. Serricchio now projects a growth of assets under management far beyond the book of business he had been able to build in the year before his leave. Like the fable of a grain of rice which doubles exponentially every day to reach astounding numbers, Mr. Serricchio projects astronomical and unprecedented growth solely with the passage of time, assuming he would never lose a client or partner and remain immune from the ups and downs of market forces. This projection is divorced from his historical asset performance, which was declining, not increasing, before he went on leave. His analysis based on these assumptions is far fetched and unreasonable on its face and renders this projection entirely inappropriate.

Second, Mr. Serricchio cherrypicks certain aspirational goals from the Financial Advisor Deal Analyzer, a recruiting tool prepared before he began his employment in October 2000, and uses these figures to estimate his expected earnings. However, his actual record as of the start of his leave in October 2001, and the departures of his partners while he was on leave, tell a different story and reveal just how mistaken these pre-hire estimates really were. Although Mr. Serricchio never came close to meeting the targets set forth in the Deal Analyzer, he now uses this document to project that his commissions would have increased at 9% per year throughout

the back pay period and that the assets necessary to support those commissions would therefore have grown at a corresponding rate. (Cunitz July 25 Rpt. Ex. B5). However, Mr. Serricchio never brought half the assets to PSI that his Deal Analyzer projects and his assets under management actually *shrank* during his year of active employment to $4,175,000. Further, the Deal Analyzer did not and could not account for subsequent events, mainly the departure of all his partners, along with most of his assets.[3] This second projection is thus just as unacceptable as the first.

Third, Mr. Serricchio offers the Court a projection which modifies, in unspecified ways, the projection offered by Wachovia's expert. (Cunitz Aug. 14 Rpt. at 3). Mr. Serricchio does not detail the assumptions that "were not appropriate" necessitating his modification and does not offer any explanation of his analysis at all. As a result, it provides no basis upon which to evaluate its projections of asset growth and should be rejected.

None of Mr. Serricchio's projections account for the fact that each of Mr. Serricchio's partners departed during his military leave and took substantial partnership accounts with them. (Def. Exs. 4, 5, 6, 7; June 12 Tr. at 195:7-196:4, 229:2-6, 262:17-263-7, 266:12-20, 318:10-16, 361:9; June 13 Tr. at 533:10-14; 621:6-23). The numbers bear out the devastating impact these departures had on the value of the accounts under Mr. Serricchio's management: in September 2001, when Mr. Serricchio's share of assets under management totaled $4.175 million, 81% of

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[3] The supported timeline reflecting the decrease in Mr. Serricchio's assets under management ("AUM") is as follows: Mr. Serricchio testified at trial that his AUM at Morgan Stanley reached $16 million. (June 11 Tr. 56:3-4). The pre-hire projections in the Deal Analyzer anticipated that he would bring to PSI $15.5 million of these assets, but only $12 million in the first year. (Pl. Ex. 2). Mr. Serricchio's AUM for the twelve months of his employment with PSI prior to October 1, 2001, including his share of partnership assets, appear on Def. Ex. JJJ. Excepting the first two start-up months of his employment, based on Def. Ex. JJJ, his monthly AUM averaged $5,324,458.30, an average that would be even less excluding the months of June and July, when assets from Jack Valente were "parked" in Mr. Serricchio's partnership temporarily, despite the absence of any client relationship between Mr. Valente and Mr. Serricchio. (June 16 Tr. 1108:10-19). His AUM of $4,175,000 at the time his leave commenced on September 30, 2001, only continued to decrease during his leave, dropping markedly after the departures of each of his partners. (Def. Ex. 7).

those assets were attributable to accounts he held in partnership and for which he split commissions.[4] (Def. Ex. 6). Only 19%, or $806,434 in assets, were assets Mr. Serricchio managed independently and for which he did not split commissions. (Def. Ex. 6). In April 2002 and April 2003, Mr. Serricchio's partners, Mr. Wright and Mr. Zinicola, departed PSI and Mr. Zinicola, for one, expressly admitted that he took with him at least $2.7 to 3 million in assets that he held in partnership with Mr. Serricchio. (June 13 Tr. 533:10-14). Mr. Serricchio's projections simply ignore the resultant depletion of assets.

Mr. Serricchio's projections also fail to account for Wachovia's institution of the National Call Center ("NCC"), which limited the pool of assets upon which a broker could earn commissions. In accordance with an industry-wide shift from a transaction based service model, Wachovia created the NCC to assist in the implementation of a fee-based, large account service model. (June 12 Tr. at 318:21-24; 322:2-11). Wachovia's Financial Advisors referred accounts with less than $50,000 in assets to a central processing center for servicing. (June 12 Tr. at 193:18-21; 318:21-24; June 13 Tr. at 626:12-17, 23-25). Financial Advisors did not earn any commissions on the assets of any accounts referred to the NCC. (June 13 Tr. at 627:21-628:10). While this shift in the retail securities paradigm impacted all Wachovia Financial Advisors, it affected Mr. Serricchio in particular given that his business was premised on a high number of low asset accounts. At the time Mr. Serricchio commenced his leave, 123 of his accounts had less than $25,000 in assets and were thus eligible for the NCC. (Def. Ex. 4). Accordingly, the overwhelming bulk of the accounts serviced by Mr. Serricchio would have ceased generating commissions for him during the back pay period.

Given these flaws in Mr. Serricchio's projections and the failure to account for events that demonstrably impacted Mr. Serricchio's assets under management, it is more reasonable to

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[4] Specifically, Mr. Serricchio's share of partnership assets with Joseph Zinicola was $2,362,087 and Mr. Serricchio's share of partnership assets with Kevin Wright and Mr. Zinicola was $1,006,526. (Def. Ex. 6).

premise asset growth assumptions on verifiable information, rather than pre-hire projections. Paul Marcus, Wachovia's expert, projects growth in assets at the same rate as the S&P 500 Index during the period of Mr. Serricchio's military leave, and 12% growth for the balance of the back pay period based upon the most optimistic projections of the Deal Analyzer. This projection is exceedingly favorable to Mr. Serricchio, as his historical performance reveals sharply declining assets rather than increasing assets even during his active employment.

Mr. Marcus' projection assumes that Mr. Serricchio could have adjusted his business model to obtain larger accounts than he ever had, replaced the accounts lost after his partners left, and built his assets back to match the growth in the S&P 500, a common industry benchmark, during his leave and at 12% thereafter. This projection includes asset growth in accordance with the following schedule:

Year End	Assets Under Management
2003	$4,317,989
2004	$4,580,532
2005	$5,130,195
2006	$5,745,819
2007	$6,435,317
2008	$7,207,555

Wachovia submits that this is a reasonable projection of the growth of assets under Mr. Serricchio's management during the back pay period, which gives him every benefit of the doubt.

2. Applicable Return-On-Asset Percentage

The applicable return-on-asset ("ROA") percentage, or gross commissions divided by assets under management, is also a relevant consideration in determining Mr. Serricchio's "but for" earnings during the back pay period. Mr. Serricchio offers the Court different ROA's of 0.9%, 2.03% and 3.73%, depending upon the rate of asset growth. First, Mr. Serricchio suggests that the 0.9% ROA be applied to his asset growth projection based on Mr. Watson's testimony that Mr. Serricchio's assets would grow at "a million a month." (Cunitz Aug. 14 Rpt. at A5).

Apparently, Mr. Serricchio's expert proposes application of this relatively reasonable ROA because application of the 3.73% in the "million a month" scenario would yield figures so outsized that even he could not endorse them. Wachovia does not object to application of a 0.9% ROA in general.

Mr. Serricchio also proposes application of a 3.73% ROA. (Cunitz Aug. 14 Rpt. at Ex. C5). This projection is unreasonable: while Mr. Serricchio did actually enjoy a 3.73% ROA during his limited time at PSI, this occurred during a period of exceptionally high trading activity, and while Mr. Serricchio was earning 50% commissions during the first year of his employment pursuant to his contract.[5] (Pl. Ex. 9). At trial, Carson Coyle and Craig Watson will confirm that a 3.73% ROA would be an unsustainable level of performance. In fact, had it continued, it would have warranted a compliance inquiry because, as Messrs. Coyle and Watson will testify, such a high ROA implies a level of trading activity often inconsistent with the best interests of clients.

The final ROA of 2.03% proposed by Mr. Serricchio's expert is one with which Wachovia can agree were the Court to decline application of the 0.9% ROA. First, 2.03% was the ROA set forth in the Financial Advisor Deal Analyzer generated for Mr. Serricchio when he commenced his employment with PSI in October 2000. (Pl. Ex. 2). Second, the 2.03% ROA is nearly three times higher than that achieved by the top quintile of performers at Wachovia – a level Mr. Serricchio never achieved – and thus gives Mr. Serricchio the benefit of the doubt as to how he would have performed during the back pay period. Accordingly, Wachovia submits that a 2.03% ROA is reasonable and should be applied if the Court declines to apply the 0.9% ROA.

[5] His commission rate was reduced to 39% beginning in his second year.

3. Applicable Commission Structure

The final consideration necessary to determine Mr. Serricchio's "but for" earnings during the back pay period is the applicable commission percentage to be applied to the gross commissions Mr. Serricchio would have generated. The parties agree that, pursuant to Mr. Serricchio's October 2000 Employment Agreement, Mr. Serricchio would receive commissions in the amount of 39% of his gross commissions through 2004 and for the remainder of the back pay period.

B. The Back Pay Award Must be Reduced By Any Amounts Mr. Serricchio Could Have Earned With Reasonable Effort by Seeking New Employment or by Remaining at Wachovia

The Court must reduce any back pay award to Mr. Serricchio by any amounts Mr. Serricchio earned during the back pay period as well as by any amounts Mr. Serricchio could have earned with reasonable effort by seeking alternative employment or by remaining at Wachovia. See, e.g., Saulpaugh, 4 F.3d at 144-45. Here, the Court should adjust Mr. Serricchio's self-reported and self-determined earnings taken out of the tanning salon business by cash flows actually generated, as Mr. Marcus will testify.

Based upon his own analysis, Dr. Cunitz suggests that Mr. Serricchio has earned as little as $400, during the entirety of the back pay period. (Cunitz Aug. 14 Rpt. Ex. A3). Ignoring the incredible proposition that Mr. Serricchio could not have supported himself at Wachovia with a non-refundable draw of $24,000 plus commissions, yet has managed to live on just $400 in income in more than four years, Mr. Serricchio's near-zero earnings assumption is patently unacceptable for several reasons.

Most notably, the facts reveal that Mr. Serricchio's near-zero income was the product of discretionary allocations of what would have otherwise been mitigating income. For instance, Mr. Serricchio purchased a Hummer truck and Silverado pick-up truck "for the business." (June 12 Tr. at 362:14-18; Marcus Oct. 5 Rpt. at 11). In 2006, Mr. Serricchio claimed nearly $17,000

in car and truck expenses and in 2007, $29,581 for the same purpose, further reducing potentially mitigating income. (Marcus Aug. 15 Rpt. at 6). Even if the Court were to accept that these vehicles are necessary to operate a tanning salon, the monies expended in this manner should not operate to reduce the tanning salons' cash flow for purposes of the mitigation analysis.

Similarly, Mr. Serricchio made significant reinvestments into the tanning salon businesses, again discretionarily allocating income that would constitute salary and otherwise offset the damages he now claims. For instance in 2007, Mr. Serricchio and his wife together earned $85,375 in business income, and Mr. Serricchio's share of that amount would have been $42,688. (Cunitz July 25 Rpt. at 6; Cunitz Dep. at 162:9-15). However, Mr. Serricchio claims to have needed to reinvest this entire amount into the tanning salon business, thus reducing his otherwise mitigating income to $0.

Finally, Mr. Serricchio's reliance on this data is misplaced because, as set forth above in Section I, A, supra, he failed to demonstrate that he sought comparable employment prior to becoming self-employed. See Tuszynski, 2005 WL 221234, at *6; Miller, 771 F. Supp. at 60-61; Hansard, 865 F.2d at 1468; Williams, 994 F. Supp. at 932; Clarke, 975 F. Supp. at 760; Coleman, 949 F. Supp. at 612. Mr. Serricchio should not be compensated for losses due to his own professional risk taking.[6]

Wachovia's expert offers a far more reasonable and accurate analysis of Mr. Serricchio's actual earnings during the back pay period. Rather than ignoring Mr. Serricchio's discretionary allocation of funds generated by the tanning salon business, Mr. Marcus will evaluate the cash flow of the business without regard to Mr. Serricchio's choice of how to expend monies earned and explain what monies were actually available for mitigation.

[6] Even if Mr. Serricchio earned only $400 total during the entirety of the back pay period, courts have recognized that "there comes a point where it is apparent that the new career will not generate income comparable to the previous occupation and a plaintiff has a duty to either seek other employment or give up his right to a back pay award." Tuszynski, 2005 WL 221234, at *6.

Any back pay award must also be reduced by any amounts Mr. Serricchio could have earned with reasonable effort had he sought alternative employment. See, e.g., Saulpaugh, 4 F.3d at 144-45. Given Mr. Serricchio's age, education, qualifications and the nature of the financial services industry, using even minimal effort at obtaining alternative employment Mr. Serricchio would have mitigated his claimed damages in whole.

Mr. Serricchio was age 31 at the commencement of the back pay period and will be 36 at the time it closes on approximately October 14, 2008. His education and work experience as an accountant and financial advisor and his numerous licenses credentialed him for a broad range of careers. In determining the amount Mr. Serricchio could have earned with reasonable effort had he sought alternative employment elsewhere, Paul Marcus attributed to Mr. Serricchio "the earnings for a typical college graduate with his demographic characteristics" and provided him with the "median full-time earnings for his age and educational attainment" as reported by the U.S. Census Bureau from the Annual Social and Economic Supplement of the Current Population Survey – without any premium for his extra financial services qualifications. (Marcus Oct. 5 Rpt. at 13). Based upon this data, Mr. Marcus will testify that Mr. Serricchio's earnings, had he sought alternative employment as the duty to mitigate requires, would have progressed during the back pay period as follows:

Year End	**Mitigating Earnings**
2003[7]	$1,990
2004	$50,753
2005	$52,664
2006	$56,850
2007	$60,836
2008[8]	$51,494

The near certainty that Mr. Serricchio could have secured a position somewhere in the financial services industry and earned at least the amounts set forth above is further highlighted

[7] Beginning on December 18, 2003.
[8] Ending on October 15, 2008.

by the sheer number of persons employed in the industry: in 2004, for instance, there were an estimated 168,000 persons so employed and in 2005, an estimated 174,000 in New York City alone. (Marcus Oct. 5 Rpt. at 6). Indeed, common sense dictates that an individual with even minimal experience in financial services could easily secure a job in accounting, insurance, financial management, brokerage or any number of jobs in the industry, which generally hire entry-level college graduates. Specific proof of job availability is unnecessary because Mr. Serricchio never sought such employment. See Picinich, 236 Fed. Appx. at 665. Because of Mr. Serricchio's characteristics and because of the nature of the industry, the estimated mitigating earnings set forth above are reasonable.

Alternatively, the Court may reduce Mr. Serricchio's "but for" earnings by any amounts he would have earned had he remained with Wachovia after March 31, 2004. This analysis reveals that Mr. Serricchio could have mitigated his back pay damages nearly in full. Applying a 2.03% ROA, and assuming that Mr. Serricchio's September 2001 book of business would have grown at the same rate as the S&P 500 index during his leave, both parties agree that Mr. Serricchio would have earned at least $36,264 in 2004, $40,616 in 2005, $45,490 in 2006, $50,948 in 2007 and $45,174 through October 15, 2008. (Compare Marcus Aug. 15 Rpt. Ex. 3A with Cunitz Aug. 14 Rpt. Ex. A5). Mr. Marcus will show at trial that if Mr. Serricchio had remained with Wachovia or sought other reasonable employment rather than becoming self-employed, he would have suffered no loss of wages during the back pay period.

C. Interest Applicable to a Back Pay Award, If Any

A back pay award, if any, must also account for the applicable prejudgment interest rate. "As the Second Circuit has noted, it is within the sound discretion of the trial court whether or not to award prejudgment interest at all, and the same considerations that inform that decision should also inform the choice of interest rate." Sec. Ins. Co. v. Old Dominion Freight Line, Inc., 314 F. Supp. 2d 201, 202 (S.D.N.Y. 2003). In Jones v. UNUM Life Ins. Co. of America, 223

F.3d 130 (2d Cir. 2000), the Second Circuit directed trial courts to evaluate the fairness of an award of prejudgment interest by accounting for "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." See id. at 139 (citation omitted).

Given Mr. Serricchio's failure to mitigate his claimed damages during the back pay period, and given the uncertainties that continue to surround Wachovia's obligations under USERRA with respect to Mr. Serricchio's employment, the equities counsel in favor of the Court exercising its discretion and denying an award of any prejudgment interest. See Jones, 223 F.3d at 139-40.

However, in the event that the Court decides to award prejudgment interest, Wachovia submits that the applicable rate is 2.9%. Most recently, a court within the Second Circuit ruled that the proper rate to be applied in employment cases is "the average annual rate of return on one-year Treasury bills between the time the claim arose and the entry of judgment." Zakre v. Norddeutsche Landesbank Girozentrale, No. 03 Civ. 257, 2008 WL 2557420, at *2 (S.D.N.Y. June 26, 2008). Continuing, the Court stated "[c]alculating interest based on the average annual T-bill rate 'more adequately ensures that the plaintiff is sufficiently, but not overly, compensated' because of the fluctuation in the rate of return over a period of years." Id. (quoting Kuper v. Empire Blue Cross & Blue Shield, No. 99 Civ. 1190 (JSG) (MHD), 2003 U.S. Dist. LEXIS 27728, at *16-17 (S.D.N.Y. Dec. 18, 2003)). As of August 8, 2008, the average one year T-bill rate was 2.9%. (Marcus Aug. 15 Rpt. at 3).

Mr. Serricchio requests that the Court apply a 10% prejudgment interest rate "per statute." While Connecticut law does authorize application of a 10% rate, it does so only with respect to claims arising under state law. See Conn. Gen. Stat. § 37-3a. Even where a judgment

is premised on violations of both state and federal law, Connecticut courts have declined to apply the Connecticut state statutory rate. See, e.g., Pappas v. Watson Wyatt & Co., No. 3:04CV304 (EBB), 2008 WL 45385, at *11 (D. Conn. Jan. 2, 2008). Accordingly, because Mr. Serricchio's claim arose under USERRA, a decidedly federal statute without a state-law counterpart, there is simply no basis for applying a 10% rate.[9]

For each of these reasons, Wachovia submits that the Court should exercise its discretion and decline to award Mr. Serricchio prejudgment interest on any award of back pay. If, however, the Court chooses to award interest, Wachovia submits that it should be applied at the rate of 2.9%.

III. REINSTATEMENT IS IMPRACTICABLE

Having rejected Wachovia's March 2004 reinstatement offer, Mr. Serricchio seeks reinstatement "on fair terms" to his former Financial Advisor position . (June 11 Tr. 171:14-20). Although reinstatement is a permissible remedy under USERRA, 38 U.S.C.§ 4323(d)(1)(A), a court may decline to order it where reinstatement is impracticable, as it is in this case. See Banks v. Travelers Cos., 180 F.3d 358, 365 (2d Cir. 1999); Mody v. Gen. Elec. Co., No. 04-CV-358, 2006 WL 3050834, at *3 (D. Conn. Oct. 25, 2006); Shorter v. Hartford Fin. Servs. Group, Inc., No. 3:03-CV-0149 (WIG), 2005 WL 2234507, at *1 (D. Conn. May 31, 2005); Palma v. Pharmedica Commc'ns, Inc., No. 3:00-CV-1128 (HBF), 2003 WL 22750600, at *5 (D. Conn. Sept. 30, 2003); Shaw v. Greenwich Anesthesiology Assocs., P.C., 200 F. Supp. 2d 110, 114 (D. Conn. 2002).

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[9] Wachovia also notes that some courts have considered the rate of return that a plaintiff would have received had he invested the money in the stock market. See, e.g., Jones, 223 F.3d at 139. Any such consideration here would be entirely inappropriate, however, because Mr. Serricchio was not likely have received any appreciation on any investment since, as Mr. Serricchio admitted, the portion of the $229,000 loan he invested in the market "depreciated." (June 12 Tr. at 361:9).

First, as established at length during the liability phase of these proceedings, the preferred style of business within Wachovia's retail securities business is a fixed-fee model as opposed to the small account, highly transactional model used by Mr. Serricchio during his active employment. (June 13 Tr. at 587:2-11; 679:7-17). After eight years' absence from the business, Mr. Serricchio would have to re-license, find new partners (to the extent other FA's in the branch are seeking one), and change his fundamental approach as an FA in order to be successful and to generate any significant fees. The position to which he might be reinstated continues to be a draw plus commission-only position and requires a minimum production for continued employment, just as formerly required by his original Employment Agreement. (Pl./ Ex. 9).

Second, Mr. Serricchio has indicated that his preference would be to work in a Wachovia Branch in central Massachusetts to be closer to his home, as opposed to Southern Connecticut where he was previously employed. The different locations necessarily carry with them different business potential given their distance from the financial centers of New York City and the affluent Southern Connecticut suburbs.

Third, the unavoidable fact is that the United States economy, and particularly the financial markets, are currently in crisis, with money flowing out of, not into, the equity market – not a favorable time to launch a career in retail securities.

In short, reinstatement under the circumstances is likely to raise false expectations, disappointment, and possibly incur future recriminations, despite the best of intentions and good faith on both sides. The foregoing factors render it impracticable, if not impossible, to design any position to which Mr. Serricchio could be "reinstated" at Wachovia as of October 2008, or to assess the compensation associated with any such position. Accordingly, Wachovia opposes reinstatement as impracticable under the circumstances.

IV. Mr. Serricchio Cannot Recover Any Front Pay, Or, In the Alternative, Front Pay May Only Be Awarded for a Limited Period of Time and Must Be Offset by Anticipated Interim Earnings

Mr. Serricchio seeks a virtually limitless award of front pay, extending through the age of retirement. However, Mr. Serricchio cannot recover such an award because he failed to mitigate his damages, because his backpay period already extends for five years, and because any front pay calculation is unreasonably speculative, in addition to the fact that pay until retirement for a skilled, education and capable person in his 30's is patently ridiculous. Further, even if the Court were to award Mr. Serricchio front pay, given Mr. Serricchio's age, relative health and qualifications, the Court could only provide it for a brief period and would have to offset Mr. Serricchio's potential future earnings against any award.

A. Mr. Serricchio Cannot Recover Any Front Pay

1. Mr. Serricchio Failed to Mitigate his Damages

"[T]he purpose of front pay is to compensate victims . . . who have no reasonable prospect of finding comparable employment." Hill v. Airborne Freight Corp., Nos. 97-CV-7098, 98-CV-6249 (FB), 2003 WL 366641, at *4 (E.D.N.Y. Feb. 20, 2003). Like back pay, front pay must account for a plaintiff's effort – or lack of effort – to mitigate his damages in the future. See Carpenter v. Tyler Indep. Sch. Dist., 429 F. Supp. 2d 848, 852 (E.D. Tex. 2006) (finding award of front pay in USERRA case inappropriate), aff'd, 226 Fed. Appx. 400 (5th Cir. 2007); Greenway, 143 F.3d at 54 (vacating award of front pay where evidence demonstrated that the plaintiff did not medicate his damages); Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1182 (2d Cir. 1996) (affirming district court's limitation of front pay award given plaintiff's failure to mitigate); Paluh, 409 F. Supp. 2d at 204 (granting summary judgment on claim for front pay where there was no evidence that the plaintiff exercised any diligence in seeking alternative employment); Palma, 2003 WL 22750600, at *3 (in Family & Medical Leave Act action, declining to award front pay and stating "[i]n order to qualify for front pay, a plaintiff must have

been diligent in seeking comparable employment"). For a plaintiff to satisfy his duty to mitigate sufficiently to support an award of front pay, he must "use reasonable diligence in finding other suitable employment," or finding a "substantially equivalent job to that of [a] plaintiff's former position." Mody, 2006 WL 3050834, at *3 (quotations omitted).

As set forth in Section I, supra, Mr. Serricchio unreasonably failed to mitigate his losses when he invested in the tanning salon business without first attempting to secure alternative, comparable employment. Wachovia cannot be required to subsidize Mr. Serricchio's choice to remain self-employed at a lower wage level and willfully continue to accrue damages. See Tuszynski, 2005 WL 221234, at *6 (self-employment insufficient to satisfy duty to mitigate where a plaintiff does not first diligently search for alternative comparable employment); Miller, 771 F. Supp. at 60-61 (same); see also Hansard, 865 F.2d at 1468 (same); Washington, 2002 WL 1798764, at *3 (same); Williams, 994 F. Supp. at 932 (same); Clarke, 975 F. Supp. at 760 (same); Coleman, 949 F. Supp. at 612 (same). Mr. Serricchio's continued self-employment disentitles him to front pay. See, e.g., Greenway, 143 F.3d at 54; Rivera v. Baccarat, Inc., 34 F. Supp. 2d 870, 878 (S.D.N.Y. 1999) ("[T]he plaintiff has now worked at Bloomingdale's for two years for significantly lower wages and benefits . . . yet she has presented no evidence that she has made any further efforts to secure more comparable employment. It would therefore be inequitable to grant her additional damages in the form of front pay and future benefits."). Accordingly, Mr. Serricchio cannot recover front pay.

2. Any Award of Front Pay Would be Unduly Speculative

Even ignoring Mr. Serricchio's failure to mitigate his damages, he still cannot recover any front pay because of the speculation that any award would require. Courts in this Circuit do not award front pay where the methods for calculating the award are, as here, necessarily based on "undue speculation." See Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996) (affirming denial of front pay "on the ground that the proposed methods for

calculating the award were too speculative," and noting that front pay is appropriate only where "the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment"); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984); Thomas v. iStar Fin., Inc., 508 F. Supp. 2d 252, 259-60 (S.D.N.Y. 2007) (declining to award front pay where it was unduly speculative to even believe plaintiff would have remained employed with defendant for seven years after the date of his termination); Howell v. New Haven Bd. of Educ., No. 3:02CV736 (JBA), 2005 WL 2179582, at *6 (D. Conn. Sept. 8, 2005) (Arterton, J); Esterquest v. Booz-Allen & Hamilton, Inc., No. 97 Civ. 6957 (LMM), 2003 WL 21673630, at *3 (S.D.N.Y. July 17, 2003) (finding front pay estimate to be unduly speculative where based on assumption of plaintiff's career track which was unreasonable in light of career track of comparators). FAs frequently leave the retail brokerage business within a short period, as the evidence will show, and failure is the rule, not the exception. Mr. Serricchio was a draw plus 100% commission financial advisor who had actively worked in the industry for less than three years prior to taking his military leave. As the evidence will show , there is simply no reasonably accurate manner in which to calculate: (i) Mr. Serricchio's "but for" future earnings; or (ii) Mr. Serricchio's potential future mitigation earnings. Accordingly, an award of front pay is improper.

a. Mr. Serricchio Cannot Provide a Reasonably Reliable Estimation of his Future "But For" Earnings

Here, Mr. Serricchio offers three methodologies for calculating front pay, each yielding astronomical estimates of his future loss, and each replete with speculation that cannot survive even minimal scrutiny. Specifically, Mr. Serricchio offers alternative projections based on: (i) a misinterpretation of Craig Watson's testimony that he would expect a Financial Advisor to grow assets at a rate of one million dollars per month; (ii) the Financial Advisor Deal Analyzer that was prepared for Mr. Serricchio as an estimate, during a bull market and before he even began

working at PSI; and (iii) a projection generated by Paul Marcus in his October 5, 2007 report, with unspecified modifications. For the reasons that follow, none of these methodologies bears the indicia of reliability necessary to support an award of front pay. See Sagendorf-Teal, 100 F.3d at 277.

First, Mr. Serricchio projects asset growth at the rate of one million dollars per month, indefinitely, mistakenly relying on Mr. Watson's testimony taken out of context. (June 13 Tr. at 638:19-630:2). This projection is far fetched and betrays a complete ignorance of industry fundamentals. Mr. Watson nowhere suggested that such performance could continue indefinitely beyond the initial start up of an FA's book of business. Yet illogically, Mr. Serricchio projects consistent increases in his assets under management at one million dollars per month through 2038 assuming, without any evidence, that: (i) an unceasing stream of clients would be willing to invest with him; (ii) that his assets under management, unlike those of every other broker in the financial services industry, would be immune from market forces that decrease assets; and (iii) that he would never lose a client or, if he did, the client would be immediately replaced with one having equivalent assets. (Cunitz Aug. 14 Rpt. Ex. A5). No reasonable analysis would equate success with mere length of service, a fact borne out by the fact that Mr. Serricchio's own assets under management *decreased* dramatically after he left Morgan Stanley and during the time that he worked at PSI, and plummeted even further after the departure of his partners . In short, Mr. Serricchio's projection based upon one sentence of testimony taken out of context is nothing more than fiction.[10]

Mr. Serricchio's estimation based on the Financial Advisor Deal Analyzer also suffers from a number of flawed premises which render it speculative and unhelpful. Specifically, Dr.

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[10] That Mr. Serricchio uses a reasonable ROA of 0.9% rather than the 3.73% ROA he uses in his other analyses does not cure the speculative nature of his first projection because the asset base itself, upon which all commission estimations are generated, is based upon suspect data.

Cunitz projects increases in Mr. Serricchio's commissions at 9% per year through 2008 decreasing to 5% by 2016, and continuing at 5% through 2039 based on the Financial Advisor Deal Analyzer. However, the Deal Analyzer is merely a recruitment tool that PSI employed to estimate Mr. Serricchio's possible five year earnings before he began working with PSI in mid-2000. (Cunitz July 25 Rpt. Ex. B5). In attempting to fit this square peg into a round hole, Dr. Cunitz ignores: (i) the dramatic decline of the stock market following the dot-com "crash" and then September 11, 2001, which radically changed industry projections; (ii) the fact that Mr. Serricchio had only $4.2 million of assets under management at the time of his activation in September 2001, a small fraction of what he was projected to have at the time of his hire and a clear contradiction of one of the Deal Analyzer's basic assumptions; and (iii) that Mr. Serricchio's actual performance while with PSI bore no relationship to the pre-hire estimate in the Deal Analyzer. Again, this analysis is not a reasonable measure of projected lost earnings.

Finally, Mr. Serricchio offers the Court a projection based on Mr. Marcus' data with unspecified revisions. (Cunitz Aug. 14 Rpt. at 3). Though a meaningful response in the absence of any explanation as to what modifications he made to Mr. Marcus' projection is impossible, it is apparent that any projection showing a steady increase in Mr. Serricchio's assets under management and or commissions is inherently speculative given his historical performance and the natural volatility in the market.

A further consideration common to all three analyses conclusively dooms Mr. Serricchio's request for front pay: Dr. Cunitz assumes that Mr. Serricchio had a 100% chance of continuing in the securities business for 31 years (until age 67) with no downturn or even pause in exponential earnings growth, notwithstanding his own deposition testimony that "[l]ess than half succeed in that business as a career that start in on the programs, and I don't know how low it gets, but I don't think it is that high, quite frankly." (Mishra Decl. Ex. A, at 71). Dr. Cunitz

himself acknowledges that is impossible to determine how long Mr. Serricchio would have lasted in the industry or whether Mr. Serricchio would have continued in the business, rendering the estimation of front pay even more speculative.

Though Wachovia's expert also provides a projection of front pay, he does so only assuming, *arguendo*, that front pay is warranted and in rebuttal to Dr. Cunitz, notwithstanding the highly speculative nature of such projections in this case.

b. Mr. Serricchio Cannot Provide a Reasonably Reliable Estimation of his Mitigation Earnings, Rendering an Accurate Determination of Front Pay Impossible

Mr. Serricchio further complicates the issue of front pay in that he cannot provide any reasonable estimate of what his future earnings might be from the tanning salon business. Dr. Cunitz's projections in this area are wildly speculative, given that he concedes that he knows of no data on this industry and that he had never studied this business before or anything like it, had not attempted a valuation of the business, and, in fact, never even visited the premises. (Mishra Decl. Ex. A, at 148-49, 152). Given the faulty premise upon which Mr. Serricchio's front pay estimate proceeds, the result is simply a fiction. See Mody, 2006 WL 3050834, at *5 (refusing to speculate as to plaintiff's potential future entitlement to stock options based on unreliable two-year snapshot of performance); Greenway v. Buffalo Hilton Hotel, 951 F. Supp. 1039, 1063-64 (W.D.N.Y. 1997) ("Front pay 'may properly be awarded where the calculation of plaintiff's likely mitigated earnings . . . do not involve undue speculation.'"), aff'd, 143 F.3d 47 (2d Cir. 1998) (citation omitted).

The flawed nature of this analysis is compounded by the fact that Dr. Cunitz relied on only a snapshot of the tanning salons' performance – taken during its initial start up years – to project the potential earnings derived from the company for a period of more than 30 years. (Marcus Oct. 5 Rpt. at 10). Further, Dr. Cunitz bases his analysis solely on belatedly filed tax returns and hearsay from Mr. Serricchio, rather than audited or reviewed accounting statements,

rendering his analysis even less reliable. (Id. at 11). This limited data simply cannot provide any accurate estimate of Mr. Serricchio's potential mitigating earnings for front pay purposes. Finally, Dr. Cunitz's analysis shows no relationship between capital expenditure and returns on investment, as would be expected in any business model. Indeed, according to Dr. Cunitz's analysis, additional capital investment in the business actually decreases expected returns, a principle in contravention of basic business sense. This analysis appears calculated only to increase Mr. Serricchio's award in this case, rather than to appraise his situation honestly, and therefore should be disregarded.

3. The Court Should Exercise its Discretion and Decline to Award Front Pay Given the Equities in this Case

Even if the Court were ignore Mr. Serricchio's failure to mitigate and the impossibility of arriving at a reliable estimate of his alleged future losses, the Court should still decline to award front pay based on the equities in this case. Under USERRA, whether or not to award front pay is a matter reserved to the discretion of the trial court. See 38 U.S.C. § 4323(e); Carpenter, 429 F. Supp. 2d at 852 (noting in a USERRA case that front pay is a form of equitable relief); see also Thomas, 508 F. Supp. 2d at 259 ("Front pay should . . . not be awarded, unless, in the discretion of the Court, it produces an appropriately equitable result. . . .") (citation omitted); Howell, 2005 WL 2179582, at *7. The equities in this case do not favor front pay for Mr. Serricchio.

Aside from the uncertainties which continue to cloud Wachovia's obligations to Mr. Serricchio under USERRA, the fact remains that "the purpose of front pay is to compensate victims…who have no reasonable prospect of finding comparable employment." Hill, 2003 WL 366641, at *4. See, e.g., Hill, 2003 WL 366641, at *5 (limiting front pay award given plaintiff's education and abilities). His education, training and experience should have enabled Mr. Serricchio to seek more lucrative employment; indeed, Dr. Cunitz himself conceded at his

deposition that there were other occupations that Mr. Serricchio might have pursued given his college degree and background. (Mishra Decl. Ex. A, at 167). See Brady, 2005 WL 1521407, at *7 ("At this early stage of his life, any award of front pay would reflect an unwarranted pessimism about what [plaintiff] can and, I suspect, will accomplish."); Rivera, 34 F. Supp. 2d at 878 ("[T]he plaintiff has now worked at Bloomingdale's for two years for significantly lower wages and benefits . . . yet she has presented no evidence that she has made any further efforts to secure more comparable employment. It would therefore be inequitable to grant her additional damages in the form of front pay and future benefits.").

Further, in the event that the Court awards Mr. Serricchio back pay for the nearly five-year period between the date of his alleged injury and the date of judgment, the Court should exercise its discretion and decline to award him front pay since he would be adequately compensated. Courts in the Second Circuit have not hesitated to refuse an award of front pay where an award of back pay presents adequate relief. See Saulpaugh, 4 F.3d at 145 (holding that it was not an abuse of discretion to deny a front pay award where back pay award adequately compensated the plaintiff); Barbano v. Madison Cy., 922 F.2d 139, 146 (2d Cir. 1990) (affirming denial of front pay award where plaintiff received eight and one-half year back pay award); Quinby v. WestLB AG, No. 04 Civ. 7406 (WHP), 2008 WL 3826695, at *6 (S.D.N.Y. Aug. 15, 2008) (declining to award front pay where back pay made plaintiff whole); Mody, 2006 WL 3050834, at *3) (same); Rivera, 34 F. Supp. 2d at 878 (noting that a plaintiff should not be permitted to recover front pay where back pay fully and reasonably compensates the plaintiff for their loss); Rao v. N.Y.C. Health & Hosp. Corp., 882 F. Supp. 321, 332 (S.D.N.Y. 1995) (same).

For each of these reasons, the Court should exercise its discretion and decline to award Mr. Serricchio front pay.

B. Even if the Court Were To Award Front Pay, The Court Would Have To Limit the Award to a Reasonable Period of Time and Would Have to Offset Potential Future Earnings

Finally, even if the Court were to award front pay despite: (i) Mr. Serricchio's failure to mitigate his damages; (ii) the speculative nature of any such award; and (iii) the balance of equities counseling against any such award, the Court should limit front pay to a reasonably brief period of time. Further, the Court must offset any potential future earnings of Mr. Serricchio in determining the amount of the award.

1. Front Pay May Only Be Awarded for a Reasonable Period of Time

Mr. Serricchio requests front pay through 2039, or until he reaches age 67. Your Honor has held that in determining the length of time for which front pay may be awarded, "there must be some evidence in the record to provide a reasoned basis" to support the period ostensibly covered by the award. Howell, 2005 WL 2179582, at *8. Employing the same reasoning as this Court's in Howell, courts within the Second Circuit have regularly refused to extend front pay awards beyond a short period of time, and then, only upon a showing that a plaintiff tried but failed to secure alternative, comparable employment. See, e.g., Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (affirming award of six months' front pay); Thomas, 508 F. Supp. 2d at 261 (suggesting that one year, or "at the most two years," would be appropriate for front pay award); Hill, 2003 WL 366641, at *5 (awarding one year of front pay given plaintiff's education and abilities); Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc., No. 00-CV-5207 (JCF), 2002 WL 1059117, at *11 (S.D.N.Y. May 28, 2002) (one year).

We have found only one clearly distinguishable case in this Circuit extending a front pay award through retirement age, like Mr. Serricchio requests here. In Padilla v. Metro-North Commuter R.R., 92 F.3d 117, 126 (2d Cir. 1996), the Court approved of a front pay period in excess of 20 years only because that plaintiff, who had attempted to find alternative work, had "no reasonable prospect of obtaining comparable alternative employment," as he possessed only

a high school education and "unique and narrowly focused skills" applicable to the position of a train dispatcher, the only position he had held since age 22. See id. at 126.

In short, there is simply no "reasoned basis" here to support a front pay award covering anything more than a nominal period of time. Howell, 2005 WL 2179582, at *8.

2. The Court Must Offset Any Mitigating Earnings in the Future

Whatever the length of the award, it must be offset Mr. Serricchio's potential future earnings. See, e.g., Thomas, 508 F. Supp. 2d at 261 (reducing front pay award by amount of expected earnings); Greenway, 951 F. Supp. at 1064. Any uncertainty in this area is due to Mr. Serricchio's inability to provide reliable data concerning his tanning salon venture, and should not work to Wachovia's detriment.

a. The Court Should Not Rely on Dr. Cunitz's Estimation of Mr. Serricchio's Mitigating Earnings in Determining Any Front Pay Award

Mr. Serricchio concedes that the Court must use his potential earnings from the tanning salon business to offset his "but for" future earnings, and Dr. Cunitz offers an analysis of the expected cash flow of Mr. Serricchio's tanning salon businesses in an effort to quantify these offsetting earnings. However, Dr. Cunitz's analysis is almost wholly unreliable, as noted in Section IV.A.2.b, *supra*, and should therefore be disregarded. See, e.g., Greenway, 951 F. Supp. at 1063-64 ("Front pay 'may properly be awarded where the calculation of plaintiff's likely mitigation earnings…do not involve 'undue speculation.'").

In addition, Dr. Cunitz's analysis shows no relationship between capital expenditure and returns on investment, as would be expected in any business model. For instance, Dr. Cunitz shows revenue growth for the Amherst store from $63,540 in 2003 to $215,065 in 2004 as a result of $144,269 capital investment. (Id.). Revenues then decreased in 2005 to $193,239 despite an additional capital investment of $99,000. (Id.). Thus, according to Dr. Cunitz's analysis, additional capital investment in the business actually decreases expected returns, a

principle in contravention of basic business sense. Predictably, the analysis yields negligible earnings for offsetting purposes, reaching a maximum of $86,470 *thirty* years from now and thereby belying the argument that this investment constituted proper mitigation. (Cunitz Aug. 14 Rpt. Ex. A4). This analysis appears calculated only to increase Mr. Serricchio's award in this case, rather than to appraise his situation honestly, and therefore should be disregarded.

b. The Court Should Rely on Mr. Marcus' Estimation of Mr. Serricchio's Mitigating Earnings in Determining Any Front Pay Award

Rather than rest upon a limited and speculative pool of data, Wachovia's expert will rely upon Mr. Serricchio's age, education, experience and other demographic characteristics to determine Mr. Serricchio's probable future earnings were he to secure other reasonable employment for which he is qualified. Once such earnings are considered, Wachovia's expert will show that Mr. Serricchio would not incur a loss until 2014, more than five years from now and well beyond any reasonable period of time over which the front pay calculation should project. See Howell, 2005 WL 2179582, at *8 (awarding front pay for five years). Even extending front pay through retirement – a result grossly inconsistent with applicable precedent – Mr. Marcus' analysis reveals that Mr. Serricchio would have suffered a total loss of only $169,946. (Marcus Aug. 15 Rpt. at 3).

V. MR. SERRICCHIO CANNOT RECOVER LIQUIDATED DAMAGES BECAUSE WACHOVIA'S CONDUCT WAS NOT WILLFUL

A. Standard for Awarding Liquidated Damages

USERRA limits a court's ability to award liquidated damages to situations where the court "determines that the employer's failure to comply with the provisions of this chapter was willful." 38 U.S.C. § 4323(d)(1)(C); Woodard v. N.Y. Health & Hosps. Corp., 554 F. Supp. 2d 329, 354 (E.D.N.Y. 2008). Although USERRA itself does not define the term "willful," courts have held an employer's conduct to be willful only if "the employer either knew or showed

reckless disregard for the matter of whether its conduct was prohibited by the law at issue."[11] See Koehler v. PepsiAmericas, Inc., 268 Fed. Appx. 396, 403 (6th Cir. 2008) (quotations omitted); Duarte, 366 F. Supp. 2d at 1048; Fink v. City of New York, 129 F. Supp. 2d 511, 523-24 (E.D.N.Y. 2001) (finding willfulness because of numerous comments of decision-makers evincing an awareness and disregard of the law).

However, "[i]t is not enough to show that the employer knew that the [law] was 'in the picture' or that the employer 'acted without a reasonable basis for believing that it was complying with the statute." See Koehler, 268 Fed. Appx. at 403 (citation omitted); Skalka v. Fernald Envtl. Restoration Mgmt. Corp., 178 F.3d 414, 423 (6th Cir. 1999). As the Supreme Court has observed in another setting, "[i]f an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful…If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then…it should not be…considered willful." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (interpreting the meaning of "willful" under the FLSA). Moreover, if an employer's conduct was reasonable or undertaken in good faith, an award of liquidated damages is not warranted. See Koehler, 268 Fed. Appx. at 403 (citation omitted); Wriggelsworth v. Brumbaugh, 129 F. Supp. 2d 1106, 1111 (W.D. Mich. 2001) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985)) (declining to award liquidated damages where employer's conduct was a reasonable but incorrect interpretation of USERRA); Scully v. Summers, No. 95 Civ. 9091 (PKL), 2000 WL 1234588, at *19-20 (S.D.N.Y. Aug. 30, 2000).

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[11] Every court that has addressed the definition of "willful" under USERRA has adopted the definition afforded the term in cases arising under the Age Discrimination in Employment Act ("ADEA") and the Fair Labor Standards Act ("FLSA"). See, e.g., Duarte v. Agilent Techs., Inc., 366 F. Supp. 2d 1039, 1048 (D. Colo. 2005). Accordingly, we refer to USERRA and ADEA cases for purposes of demonstrating that Wachovia did not willfully violate USERRA.

The burden of proving willfulness rests with Mr. Serricchio. See, e.g., Duarte, 366 F. Supp. 2d at 1048.

B. Mr. Serricchio Cannot Demonstrate that Wachovia Acted Willfully Here

1. The Court May Not Find Willfulness Based Solely on the Jury's Finding of Constructive Discharge

The jury's determination that Wachovia constructively discharged Mr. Serricchio, notwithstanding that Wachovia reinstated him to the same draw plus commission job that he left, without more, is insufficient to support a finding of willfulness or an award of liquidated damages. See Peterson v. Ins. Co. of N. Am., 40 F.3d 26, 32 (2d Cir. 1994) ("[T]he district court erred in holding that a constructive discharge must necessarily constitute a willful violation of the ADEA"). In analyzing the propriety of any liquidated damages award, courts have uniformly held that the underlying violation of a statute itself is insufficient and have required that there be some additional showing of the employer's intent to violate the law. See Jarvis v. Sauer Sundstrand Co., 116 F.3d 321, 324 (8th Cir. 1997) ("[I]n order that the liquidated damages be based on evidence that does not simply duplicate that needed for the compensatory damages, there must be some additional evidence of the employer's reckless disregard."); Hankins v. DataPlex Corp., 77 F.3d 477, 477 (5th Cir. 1995) (same); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 729 (8th Cir. 1992) (same); Wheeler v. McKinley Enter., 937 F.2d 1158 (6th Cir. 1991) (same); Haskell v. Kaman Corp., 743 F.2d 113, 122 (2d Cir. 1984). Any other result would "virtually obliterate any distinction between willful and non-willful violations" and would eliminate the two-tiered scheme designed by Congress in drafting the law. Hazen Paper Co. v. Biggins, 507 U.S. 604, 614-15 (1993).

Although Wachovia did "intentionally" offer reemployment to Serricchio on March 31, 2004 under terms that reinstated his draw/commission-only rate of pay, there were and are no contrary regulations or precedent interpreting USERRA's reemployment obligations in this

context. Given the divergent but reasonable interpretations USERRA's reemployment requirement to a position of "like seniority, status and pay" in the context of a draw plus "commission-only" position, the jury's finding that Wachovia's offer amounted to a constructive discharge is not enough to conclude that Wachovia willfully violated USERRA reemployment obligation.

2. There is No Evidence to Support a Determination of Willfulness

Four years later, and after a five-day jury trial in this case, the DOL's issuance of interpretative regulations and the development of case law under USERRA, it still remains unclear what form Wachovia's reinstatement offer could or should have taken to be compliant with the statute. To the extent that the parties here were "caught between divergent and reasonable interpretations of USERRA," liquidated damages are flatly inappropriate. Wriggelsworth, 129 F. Supp. 2d at 1111. Logically, Wachovia could not have acted with actual knowledge or reckless disregard for its obligations under a law that does not address the manner in which a draw plus commission-only employee is to be reinstated to a position of "like seniority, status and pay." As such, Mr. Serricchio cannot establish that Wachovia acted with the requisite willfulness and cannot recover liquidated damages.

The gravamen of Mr. Serricchio's case in the liability phase was simply that the terms of Wachovia's reemployment offer were insufficient under USERRA. The evidence demonstrated that any diminution in the number and value of his accounts was principally caused by the departure of his partners and the bulk of his assets held in partnership accounts and, to a lesser extent, the transfer of certain small accounts to the NCC. There is no evidence that demonstrates that assets were dissipated through any intentional or reckless mishandling or unlawful action on the part of Wachovia. To the contrary, after the departure of his partners, the level of assets in his accounts, on Wachovia's watch, remained stable. (Def. Ex. 7).

Courts are uniformly loath to impose liquidated damages unless the evidence clearly supports a determination of willfulness. See, e.g., Whitten v. Cross Garage Corp., No. 00 Civ. 5333 (JSM) (FM), 2003 WL 21744088, at *5 (S.D.N.Y. July 9, 2003); Epter v. N.Y. City Transit Auth., 216 F. Supp. 2d 131, 137 (E.D.N.Y. 2002); Doherty v. Crow, No. TH 99-216-C-T/H, 2001 WL 722090, at *17 (S.D. Ind. Apr. 20, 2001); Scully, 2000 WL 1234588, at *19-20. In Duarte v. Agilent Techs., Inc., 366 F. Supp. 2d 1039 (D. Colo. 2005), for instance, the employer terminated a returning veteran within one-year of his reinstatement. See id. at 1048. Although the Court found that the employer violated USERRA, the Court refused to find the violation willful because the employer's decision to terminate employees was a business decision and based on the financial hardship the employer was experiencing. See id. The Court further refused to find willfulness despite the fact that the plaintiff alerted his employer that its actions constituted a violation of USERRA; notice did not automatically suffice to show "willfulness." See id. at 1048-49.

A review of cases in which Second Circuit courts have awarded liquidated damages only emphasizes the impropriety of such an award here. For instance, in Cross v. New York City Transit Auth., 417 F.3d 241 (2d Cir. 2005), the Second Circuit found an award of liquidated damages appropriate under the ADEA because the record was rife with ageist comments and showed that the employer "creat[ed] . . . a calculated subterfuge to support an adverse employment action." Id. at 253. In Stratton v. Dep't for the Aging for City of New York, 132 F.3d 869 (2d Cir. 1997), the Second Circuit found a willful violation of the ADEA because the employer was an agency specifically charged with "protecting the rights of older Americans" and necessarily had detailed knowledge of the ADEA's requirements. See id. at 881. And in Padilla v. Metro-North Commuter R.R., the Second Circuit found willfulness because the decision-maker expressly testified that he was aware of the ADEA's requirements, that the

plaintiff had engaged in protected activity, and that his decision to demote the plaintiff would violate the law, but he did it anyway. See id., 92 F.3d at 124.

Obviously, Wachovia was aware that Mr. Serricchio's return to employment implicated USERRA. However, that Wachovia was aware of the existence of USERRA and its application to the circumstances of Mr. Serricchio's employment does not establish that Wachovia acted willfully to violate USERRA. See Underwood v. Sears, Roebuck & Co., 343 F. Supp. 2d 259, 271 (D. Del. 2004) ("This is tantamount to knowing that the ADEA is 'in the picture,' not a 'willful' violation."). To the contrary, PSI, Wachovia's predecessor, took significant steps beyond what the law required, including providing substantial salary continuation which USERRA does not even contemplate.

Finally even as to the period between December 18, 2003 – when the jury concluded Mr. Serricchio should have been reinstated – and March 31, 2004, the record is bereft of any evidence of willfulness. To the contrary, there was substantial evidence that Wachovia and individual Wachovia managers wanted to facilitate Mr. Serricchio's return, and that Wachovia believed it was engaged in a negotiation to effectuate that return and would have done whatever was necessary to support Mr. Serricchio. (June 13 Tr. at 742:21-745:5; 748:4-17). Mr. Serricchio cannot show that Wachovia "willfully" delayed his re-employment, and therefore cannot meet the standard for liquidated damages as to this portion of the back pay period.

CONCLUSION

As the evidence at trial will show, Mr. Serricchio should not be awarded back pay or front pay damages in this action, based upon his failure to mitigate any loss of wages that he may have suffered.

Dated: September 16, 2008

Respectfully submitted,

SEYFARTH SHAW LLP

By: s/ Devjani Mishra
David B. Ross (ct 26960)
Gerald Pauling II (*pro hac vice*)
Devjani Mishra (ct 26688)
Brian D. Murphy (*pro hac vice*)
620 Eighth Avenue
New York, New York 10018-1405
Telephone: (212) 218-5500
Facsimile: (212) 218-5526
Email: dross@seyfarth.com

Attorneys for Defendant Wachovia Securities