UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
JOHN THOMAS CAPITAL MANAGMENT GROUP LLC d/b/a PATRIOT28 LLC, GEORGE R. JARKESY, JR., JOHN THOMAS FINANCIAL, INC., and ANASTASIOS "TOMMY" BELESIS,	:	File No. 3-15255
	:	
Respondents.	:	
	:	

RESPONDENTS' REPLY TO DIVISION'S RESPONSE TO OBJECTIONS TO ADMINISTRATIVE PROCEEDING

Respondents John Thomas Capital Management LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. ("Jarkesy") (collectively "Respondents"), hereby submit this Reply to the Division's Response to Respondents' Objections ("Objections") to Administrative Proceeding ("AP") to assert and preserve all objections and previously-perfected appeal points to this AP, and respectfully show the following:

On November 9, 2018, a Scheduling Order was issued setting a deadline for submission of Respondents' written objections in this matter to preserve them for the record. Although Respondents' objections incorporated ***all*** prior objections, certain supplemental pleadings were not attached to Respondents' Objections. Out of an abundance of caution to preserve all objections and avoid any inadvertent waiver, Respondents hereby incorporate by reference those previously-filed pleadings, which are summarized below. Specifically, Respondents incorporate fully herein: 1) Respondents' Submission in Response to Commission's November 30, 2017 Order Asserting Ratification of a Prior Appointment of Administrative Law Judges, and exhibits thereto, dated

EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
JOHN THOMAS CAPITAL MANAGMENT GROUP LLC d/b/a PATRIOT28 LLC,	:	File No. 3-15255
	:	
GEORGE R. JARKESY, JR.,	:	
	:	
JOHN THOMAS FINANCIAL, INC., and	:	
	:	
ANASTASIOS "TOMMY" BELESIS,	:	
	:	
Respondents.	:	

RESPONDENTS' SUBMISSION IN RESPONSE TO COMMISSION'S NOVEMBER 30, 2017 ORDER ASSERTING RATIFICATION OF A PRIOR APPOINTMENT OF ADMINISTRATIVE LAW JUDGES

Karen Cook, Esq.
KAREN COOK, PLLC
E-mail: karen@karencooklaw.com
Phone: 214.593.6429
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

S. Michael McColloch, Esq.
S. MICHAEL MCCOLLOCH, PLLC
E-mail: smm@mccolloch-law.com
Phone: 214.593.6415
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

Counsel for:
John Thomas Capital Management Group d/b/a Patriot28 LLC and George Jarkesy, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Authority

Administrative Decisions

Statutes

Rules and Regulations

January 5, 2018, and 2) Respondents' Response to Administrative Proceedings Order, dated March 14, 2018.

Fifth Amendment Due Process: Failure to Follow Agency's Own Rules of Practice

The SEC's reinstituted AP violates its own rules of practice and their mandatory deadlines. If an agency disregards rules governing its behavior, this deprives an affected party of constitutionally guaranteed "due process." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). These principles, often referred to generally as the "*Accardi* doctrine," are so fundamental that an agency's disregard even of rules that "afford greater procedural protections" upon parties will void agency action without a showing of prejudice. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959).

The Commission had to commence its hearing within 60 days from the issuance of the Order Instituting Proceedings ("OIP"), as required by 15 U.S.C. §§ 78u-3(b), 80b-3(k). The 60-day commencement was also required by the Commission's rules of practice. 17 C.F.R. § 201.360(a)(2)(ii). Moreover, a properly-appointed administrative law judge ("ALJ") was required to issue a decision no later than 120 days after the hearing. 17 C.F.R. § 201.360(a)(2)(i). The *Accardi* doctrine requires adherence to these deadlines. But today, more than five years after the OIP was issued, there has never been a proper hearing before an ALJ, and there has been no proper decision on the merits. The OIP is, in essence, statutorily and constitutionally expired by its own terms. This voids the SEC's action against Respondents regardless of prejudice to them. *See Vitarelli*, 359 U.S. at 539.

Respondents Object to Commission Remand Order: There is No Valid Hearing Officer to Entertain New Evidence on Remand

On November 29, 2017, the Commission confessed, for the first time publicly, that it had never validly appointed its ALJs consistent with the structural constitutional requirement

embodied in the Appointments Clause.[1] Indeed, the Commission made this admission directly to the United States Supreme Court, through its own legal counsel, the Solicitor General of the United States.[2] The following day, however, the Commission issued an order purporting to "ratif[y] the agency's prior appointment" of its invalid ALJs and directing those invalid ALJs to "reconsider the record, including all substantive and procedural actions taken" before the entry of the Initial Decision.[3] Whatever the intent of the Commission's action, the Remand Order vests no more constitutional authority in the purported ALJs than existed prior to its entry.

The Remand Order cannot be legally, constitutionally, or logically reconciled with the Commission's prior admission that its APs were never assigned or delegated to a duly-appointed hearing officer in the first place. Thus, there is nothing to "ratify," the Commission having forfeited its own authority to assert anything to the contrary. The Commission indeed appears to concede that Respondents at minimum are "entitled to a *hearing* before a properly appointed [ALJ]."[4] Having never properly appointed its ALJs, the Commission now seeks to subject Respondents another void hearing.

Separation of Powers: Dual For-Cause Removal Protection

The dual for-cause limitations on removal of inferior officers, such as the SEC's ALJs, contravenes the U.S. Constitution's separation of powers. SEC ALJs may only be removed for good cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a),

---

[1] *See Lucia, et al., v. S.E.C.*, No. 17-130, United States Supreme Court, Brief for Respondent, at 10.

[2] The Division of Enforcement had earlier admitted that the purported ALJ who presided over Respondents' administrative proceeding had never been appointed by the Commission, as the Commission now admits the Constitution requires. *See, Tilton v. SEC*, No. 15-cv-2472-RA, May 11, 2015.

[3] Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10440, at 1 (Nov. 30, 2017).

[4] *See, Ryder v. United States*, 515 U.S. 177, 188 (1995); *see also, United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

whose members themselves can only be removed by the President for good cause. 5 U.S.C. § 1202(d). SEC Commissioners, who have powers of appointment over ALJs, cannot act without approval from MSPB and themselves enjoy for-cause protection against removal. MFS Sec. Corp. v. SEC, 380 F. 3d 611, 619-20 (2d Cir. 2004). These multiple layers of tenure protection violate the constitutional separation of powers and Art. II of the Constitution. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

The Sanctions Ordered Against Respondents Exceed the SEC's Authority

The sanctions ordered in the Initial Decision exceed statutory penalty caps. The Supreme Court recently evaluated the nature of SEC disgorgement in *Kokesh v. SEC*, ---U.S.----, 137 S.Ct. 1635 (2017), and determined that disgorgement, as sought by the SEC, constitutes an "action, suit or proceeding for the enforcement of a civil fine, penalty, or forfeiture, pecuniary or otherwise," as opposed to the equitable remedy the SEC usually claims. *See id.* At 1639. The Court determined that disgorgement is a remedy for breaking public laws against the United States—not specifically harming an individual. *Id.* At 1643. "When the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Id.* (quoting Brief for United States 22). The Court then noted that because the SEC focuses on the deterrent nature of disgorgement, it employs disgorgement as a penalty. *Id.* Finally, the *Kokesh* Court determined that the remedy of disgorgement was punitive because as employed by the SEC, disgorgement is not compensatory—the profits are paid to the United States Treasury, not necessarily returned to the aggrieved investors. *Id.* At 1644 (quoting *Fischbach Corp.*, 133 F.3d at 171).

The sanctions ordered in the Initial Decision exceed those penalties allowed by statute for violations occurring between March 4, 2009 and March 5, 2013. Federal Securities laws cap the amount of civil penalties that may be levied for violations of federal securities laws, capping civil penalties at $150,000 per violation. *See* 15 U.S.C. 77h-1(g)(2) ("Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person"); 15 U.S.C. 78u-2(b) ("Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person"); 15 U.S.C. 80b-3(i)(2)("Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person"); 15 U.S.C. 80a-9(d)(2)(" Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person.

Respondents are entitled to credit for settlements paid to investors. In 2013, after the AP was initiated and mirroring the allegations in the OIP, investors in both of Respondents' partnerships brought suit against Respondents and others in Harris County, Texas ("Investor Suit"). Between July 20, 2015 and October 1, 2015, Respondents settled the Investor Suit for $2,050,000, of which $500,000 was contributed by Respondents. Subsequently, on February 3, 2017 after hearing, the Texas Court signed orders (1) giving final approval of the settlement; (2) establishing a Settlement Fund and distribution procedures for the Settlement Proceeds; and (3) dismissing the Investor Suit. Respondents are entitled to credit for the funds paid in resolution of that matter.

Respectfully Submitted,

By: _____

Karen Cook, Esq.
Karen Cook, PLLC
E-mail: karen@karencooklaw.com

Phone: 214.593.6429
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

S. Michael McColloch, Esq.
S. Michael McColloch, PLLC
E-mail: smm@mccolloch-law.com
Phone: 214.593.6415
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

Counsel for John Thomas Capital Management Group d/b/a Patriot28 LLC and George Jarkesy, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 17, 2018, the foregoing document was served on the parties below and in the manner indicated.

By: _____
Karen Cook, Esq.

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 3628
Washington, DC 20549
VIA FEDERAL EXPRESS

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 6553
Washington, DC 20549
VIA FEDERAL EXPRESS

Todd D. Brody
Senior Trial Counsel
Securities and Exchange Commission
New York Regional Office
200 Vesey Street, 4th Floor
New York, NY 10281-1022
VIA FEDERAL EXPRESS

Alix Biel
Senior Staff Attorney
Securities and Exchange Commission
New York Regional Office
200 Vesey Street, 4th Floor
New York, NY 10281-1022
VIA FEDERAL EXPRESS

Respondents John Thomas Capital Management d/b/a Patriot28 LLC ("JTCM") and George Jarkesy ("Jarkesy") (collectively "Respondents") submit this Response to Commission's November 30, 2017 Order Asserting Ratification of a Prior Appointment of Administrative Law Judges ("Remand Order"), and respectfully show as follows:

I. Respondents Object to Commission Remand Order

A. There is No Valid Hearing Officer to Entertain New Evidence on Remand

On November 29, 2017, the Commission confessed, for the first time publicly, that it had never validly appointed its administrative law judges ("ALJs") consistent with the structural constitutional requirement embodied in the Appointments Clause.[1] Indeed, the Commission made this admission directly to the United States Supreme Court, through its own legal counsel, the Solicitor General of the United States.[2] The following day, however, the Commission issued an order purporting to "ratif[y] the agency's prior appointment" of its invalid ALJs and directing those invalid ALJs to "reconsider the record, including all substantive and procedural actions taken" before the entry of the Initial Decision.[3] Whatever the intent of the Commission's action, the Remand Order vests no more constitutional authority in the purported ALJ than existed prior to its entry.

The Remand Order cannot be legally, constitutionally, or logically reconciled with the Commission's prior admission that its administrative enforcement proceedings

---

[1] *See Lucia, et al., v. S.E.C.*, No. 17-130, United States Supreme Court, Brief for Respondent, at 10 ("Gov't Br.").

[2] The Division of Enforcement had earlier admitted that the purported ALJ who presided over Respondents' administrative proceeding had never been appointed by the Commission, as the Commission now admits the Constitution requires. *See, Tilton v. SEC*, No. 15-cv-2472-RA, May 11, 2015.

[3] Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10440, at 1 (Nov. 30, 2017).

were never assigned or delegated to a duly-appointed hearing officer in the first place. Thus, there is nothing to "ratify," the Commission having forfeited its own authority to assert anything to the contrary. The Commission indeed appears to concede that Respondents at minimum are "entitled to a *hearing* before a properly appointed [ALJ]."[4] *See, Ryder v. United States*, 515 U.S. 177, 188 (1995); *see also, United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

"The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political." *Freytag v. C.I.R.*, 501 U.S. 868, 878 (1991). The Appointments Clause "is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" *Ryder*, at 182, quoting *Freytag*, 501 U.S at 878. "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag*, at 878. "[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to ... appointments." *Ryder*, at 182-83. A party is not required to show direct injury for entitlement to Appointment Clause remedy. *Landry v. FDIC*, 204 F.3d 1125, 1130 (D.C. Cir. 2000) (Supreme Court "uses the term 'structural' for a set of errors for which no direct injury is necessary").[5]

---

[4] Gov't Br. at 20-21 (emphasis supplied).

[5] The Supreme Court has long held that a litigant tried before one biased judge must receive an entirely new trial before an impartial adjudicator. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). The

The Remand Order instead purports to "ratif[y] the agency's prior appointment" of five identified "ALJs." But there undisputedly was no prior agency "appointment" to ratify because, as the Commission now acknowledges, it "did not play any role in the selection" of those ALJs.[6] Rather, as "employ[ee]s" of the Commission, the agency's ALJs had been "hired"—not appointed—by the SEC's Chief ALJ from a list prepared by the Office of Personnel Management, with few exceptions.[7] The "ratification" of a void, unconstitutional procedure is itself a nullity.

This result follows directly from the "principles of agency law" that "presumptively" govern ratification. *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Ratification operates only to grant retroactive effect to an unauthorized act "as though authority to do the act had been previously given." *Cook v. Tullis*, 85 U.S. 332, 338 (1874). Because the Appointments Clause barred the Commission from giving the Chief ALJ authority to "hire" other ALJs in the first place, the Commission has no power to ratify that "hiring" retroactively. *NRA Political Victory Fund,* at 98 ("it is essential that the party ratifying should be able ... to do the act ratified ... at the time the ratification was made" (quoting *Cook*, 85 U.S. at 338)). SEC ALJs must be appointed by the Commission itself—and this Order does not do that. Indeed, Respondents are aware of no "evidence of an appointment," such as the signature and delivery of a commission to the Commission's ALJs. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803); *see*

Court has vacated the judgment of a panel with a single ineligible member, even though the remaining panel members provided "a quorum of judges competent to consider the appeal." *Nguyen v. United States*, 539 U.S. 69, 82 (2003).

[6] Gov't Br. at 19.

[7] *Id.* at 3.

U.S. CONST. art. II, § 3 (requiring "all the officers of the United States" to receive a commission).

The case law makes clear that the Commission cannot simply wave a magic "ratification" wand and reinstate any of the findings or conclusions made by the ALJ in this case. To allow the Commission to confess structural error, thus rendering the prior proceedings void, then waive the magic wand and pretend that the proceedings were not void after all, would make a mockery of the Supreme Court's Appointments Clause jurisprudence. Because the Appointments Clause violation is a "structural" error—*and the Commission has still not appointed any ALJs*—the Commission's only options are to dismiss the proceedings against Respondents or start over from scratch by initiating a new proceeding consistent with constitutional requirements: before itself or an Article III tribunal—a federal district judge.[8] Remanding the proceeding to an ALJ who has no constitutional authority to preside over the proceeding is a nullity, a waste of time, and a continuing violation of the Appointments Clause and Respondents' due process rights to a timely adjudication. The Remand Order is thus void on its face, and Respondents object to the Remand Order, the subsequent Orders issues by purported Chief ALJ Murray and purported ALJ Foelak, and all proceedings on "remand."

[8] The Commission may not simply assign the administrative proceeding to another ALJ because it has *still* not "appointed" any ALJs as the Constitution requires. But even if the Commission were to abandon the current strategy and appoint some ALJs itself, any attempt to start a new administrative proceeding against Respondents would be constitutionally doomed. As Respondents have explained repeatedly and at length, the administrative action against Respondents violates the Seventh Amendment right to trial by jury, the Constitutional separation of powers, the Due Process Clause for prejudgment of the case against Respondents by the Commission, and other defects. *See* Respondents' Opening Brief 3-15255 (January 13, 2015).

B. Rubber Stamping a Previous Constitutionally-Infirm Decision Does Not Remedy an Appointments Clause Violation

A review of proceedings is not sufficient to remedy an Appointments Clause violation pertaining to an improperly seated judge. *See Landry*, 204 F.3d at 1132 ("If the process of final *de novo* review could cleanse the violation of its harmful impact, then all such arrangements would escape judicial review... [r]ecognition of this problem may well explain the [Supreme] Court's statement in *United States v. L.A. Tucker Truck Lines* that a defect in the appointment of an 'examiner' (precursor of today's ALJ) was, if properly raised, 'an irregularity which would invalidate a resulting order'") (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952)); *see also Ryder*, 515 U.S. 188 (Respondents are "entitled to a hearing before a properly appointed panel").

The Commission by way of the Remand Order sought to remedy the constitutional infirmity by remanding all cases pending on appeal back to the respective ALJ's—but without actually appointing them in conformity with the Constitution. On remand, each ALJ has approximately 6 weeks (from January 5, 2018, to February 16, 2018) to completely review the record of ***all*** cases remanded and issue orders "ratifying" their previous decisions. Further, the order did not suspend or otherwise stall the current caseload of the SEC ALJs. The initial decision in Respondents' matter took months to formulate. The twelve-day hearing ended on March 14, 2014, and the Initial Decision was issued on October 17, 2014. It took almost three weeks for an order to be issued notifying Respondents of the remand and the additional submissions. *Compare* the November 30, 2017, Order requiring each ALJ to issue orders in each remanded case for additional submissions by January 5, 2018 *with* the December 19, 2017 Order notifying Respondents of such remand. If it takes three weeks to simply comply with drafting an

order notifying Respondents of the remand—a review of the entire record and resulting determination and order certainly is not feasible in less than 6 weeks, unless the purpose of this action is simply to "rubber-stamp" the previous determination. Put simply, the previous proceeding is void, and Respondents are entitled to a new, fair proceeding before a constitutionally-appointed adjudicator. Rubber stamping a previous determination by an unconstitutionally-appointed adjudicator does not comport with the Supreme Court's idea of appropriate relief for a structural Constitutional violation as explained in *Ryder*; at a minimum Respondents "are entitled to a hearing before a properly appointed" administrative law judge. *See Ryder*, 515 U.S. at 188.

C. The Commission Has Failed to Rule on Respondents' Pending Motion for Dismissal Pursuant to the Appointments Clause, Despite Confessing Error on the Sole Ground for Dismissal in the Motion

On June 30, 2015, Respondents filed a Motion to Adduce Additional Evidence and Conduct Further Discovery, asserting, *inter alia,* that ALJ Carol Fox Foelak was hired in violation of the Appointments Clause and that the proceedings conducted by her were therefore void. On August 3, 2015, the Commission ordered supplemental briefing on the Appointments Clause issue. Both parties filed supplemental briefs. Despite the passage of more than two years, the Commission has yet to rule on Respondents' motion.

The Commission has now admitted that Respondents' arguments that ALJ Foelak presided without the required constitutional appointment is correct. Any remand to ALJ Foelak is therefore not only void for the reasons addressed above, but is premature in light of the pending motion—a motion to which the Commission is now in agreement. The Commission should therefore rule on Respondents' motion and dismiss the proceedings against Respondents.

II. New Issues on "Remand"

A. Relevant Factual Background

The SEC initiated this proceeding on March 22, 2013. *See* Order Instituting Proceedings ("OIP"). After limited discovery and hearing, ALJ Foelak presiding in violation of Article II of the United States Constitution, issued her initial decision on October 17, 2014, finding Respondents violated the antifraud provisions of federal securities laws, ordered Respondents to disgorge $1,278,597 plus prejudgment interest and to pay a third-tier civil penalty of $450,000, and barred Jarkesy for life from serving as an officer or director of any public company and from working in the securities industry.

Subsequent to the Commission's initiation of the administrative proceeding ("AP") against Respondents, on September 16, 2013, Paul F. Rodney, derivatively on behalf of the limited partners of Patriot Bridge and Opportunity Fund LP I, and later Edwin Debus, derivatively on behalf of the limited partners of Patriot Bridge and Opportunity Fund LP II, brought suit against Respondents amongst others in Harris County, Texas—Cause No. 2013-54408 (the "Related Investor Action"). Plaintiffs in the Related Investor Action alleged facts and claims that mirror those advanced by the Division in this enforcement. The plaintiffs also brought claims of (1) breach of fiduciary duty, (2) waste, (3) negligence, (4) breach of contract, and specifically sought restitution and disgorgement of all monies paid on behalf of investors.

Between July 20, 2015 and October 1, 2015, the parties settled the Related Investor Action for $2,050,000, of which $500,000 was contributed by Respondents.

Subsequently, on February 3, 2017 after hearing, the Texas Court signed orders (1) giving final approval of the settlement; (2) establishing a Settlement Fund and distribution procedures for the Settlement Proceeds; and (3) dismissing the Related Investor Action.

B. The Penalties Levelled in the Initial Decision Exceed Those Penalties Allowed by Statute

1. Federal Securities Laws Specifically Enumerate the Amount of Penalties that May Be Awarded in Administrative Proceedings

Federal Securities laws cap the amount of civil penalties that may be levied for violations of federal securities laws, capping civil penalties at $150,000 per violations. *See* 15 U.S.C. 77h-1(g)(2) ("Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person"); 15 U.S.C. 78u-2(b) ("Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person"); 15 U.S.C. 80b-3(i)(2)("Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person"); 15 U.S.C. 80a-9(d)(2)(" Maximum Amount of Penalty...(C) Third Tier ... the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person").[9]

2. SEC Disgorgement Is a Civil Monetary Penalty

Recently, the Supreme Court evaluated the nature of SEC disgorgement in *Kokesh v. SEC*, ---U.S.----, 137 S.Ct. 1635 (2017). Specifically, the *Kokesh* Court determined that disgorgement, as sought by the SEC, is subject to a 5-year statute of limitations

[9] The referenced caps applied to violations occurring between March 4, 2009 and March 5, 2013.

because in the context of the SEC an action for disgorgement constitutes an "action, suit or proceeding for the enforcement of a civil fine, penalty, or forfeiture, pecuniary or otherwise," as opposed to the equitable remedy the SEC usually claims. *See id.* At 1639.

The *Kokesh* Court began it analysis by questioning whether disgorgement as sought by the SEC was punitive in nature. The Court began its analysis determining that disgorgement is a remedy for breaking public laws against the United States—not specifically harming an individual. *Id.* At 1643. "When the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Id.* (quoting Brief for United States 22). The Court then noted that because the SEC focuses on the deterrent nature of disgorgement, it employs disgorgement as a penalty. *Id.* Finally, the *Kokesh* Court determined that the remedy of disgorgement was punitive because as employed by the SEC, disgorgement is not compensatory—the profits are paid to the Courts, not necessarily returned to the aggrieved investors. *Id.* (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 176 (2d Cir. 1997) for the proposition that compensating aggrieved investors "is a distinctly secondary goal" of the SEC's use of disgorgement as a remedy). The Court further notes disgorgement remedies obtained by the SEC where the United States Treasury kept "disgorged" funds because "no party before the court was entitled to the funds and ... the persons who might have equitable claims were too dispersed for feasible identification and payment." *Id.* At 1644 (quoting *Fischbach Corp.*, 133 F.3d at 171).

Further, in response to the SEC's argument that its use of disgorgement is "remedial" rather than "punitive," the Court noted that the SEC's use of the remedy is without regard of the effect on the wrongdoer—often the SEC seeks disgorgement "not

only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." *Id.* At 1644-45 (quoting *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014)). Other examples include instances where individuals who provided confidential information have been ordered to "disgorge" the profits of the parties to whom they provided the information—even though they did not profit from the transaction. *Id.* (citing *Contorinis*; *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990). Further, the *Kokesh* Court notes the SEC's use of disgorgement is without regard to the actual expenses of the wrongdoer—that is the disgorgement order is often for an amount more than the wrongdoer's actual profit. *Id.* At 1645.

The findings of the *Kokesh* Court dictate that the remedy of disgorgement as employed by the SEC is a legal remedy—that is a civil penalty. First, the nature of the judgment is legal as the SEC seeks personal liability for monetary payment. *See Edmonson v. Lincoln Nat. Life Ins. Co.*, 777 F. Supp. 2d 869, 891-92 (E.D. Penn. 2011) ("the purpose of equitable restitution is 'not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.'") (quoting *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 2014, 214 (2002)). The SEC does not trace investor monies to identifiable funds in the wrongdoer's possession for which they can seek an equitable lien or constructive trust—they just seek a lump sum disgorgement judgment for the amount paid. *See Edmonson*, 777 F. Supp. 2d at 891 ("Disgorgement is a legal remedy where the plaintiff cannot assert title or right to possessing particular property"); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 457, n. 3 (3d Cir. 2003) (disgorgement likely a remedy at law because "there are no funds

readily traceable to [the plaintiff] over which a constructive trust or other equitable remedy may be imposed"). The SEC does not take into account profit made by the wrongdoer or the expenses paid by the wrongdoer in determining the amount of funds to be returned. The SEC seeks to hold the alleged wrongdoer accountable for funds frequently not in the wrongdoer's possession and in some cases, never even attributable to the wrongdoer. Further, at the heart of a claim of equity is a compensatory goal to the party aggrieved. The SEC seeks disgorgement whether it can identify the aggrieved parties or not—without regard to whether restitution will even occur. *See Goettsch v. Goettsch*, 29 F. Supp. 3d 1231, 1241-42 (N.D. Iowa 2014) ("that their requested relief is ... "disgorgement of profits" ... is not supported by the facts. *Great-West* makes it clear that for money damages to lie in equity, the money must be 'identified as belonging in good conscience to the plaintiff [and] c[an] clearly be traced to particular funds ... in the defendant's possession .... [and] the action generally must seek not to impose personal liability on the defendant....'") (quoting *Great-West*, 534 U.S. at 213).

3. The Award of Disgorgement and Civil Penalties in this Matter Exceeds the Amount Allowable by Statute

In the Initial Decision, ALJ Foelak found that a civil monetary penalty was appropriate in this matter, that three courses of action by Respondents warranted civil monetary penalties, such penalties should be third-tier, and the total amount of such penalties should be the maximum allowed—$150,000 per violation—totaling $450,000 levied against Respondents jointly and severally. *See* Initial Decision, at pps. 32-33. In addition to the civil monetary penalties, ALJ Foelak also ordered disgorgement in the amount of $1,278,597. *See Id.*, at pps. 31-32.

ALJ Foelak levied the disgorgement award in a punitive manner (1) without regard of the effect on Respondents; (2) without regard for whether the monies subject to disgorgement were kept by Respondents or forwarded to third parties—including the Respondents previously released from this action; (3) without regard to the expenses of Respondents; (4) holding Respondents personally, jointly, and severally liable for the disgorgement; (5) holding Respondents liable for gross funds paid and not profits accrued from fees; (6) and without regard whether such monies would be returned to the allegedly aggrieved investors. Such award as dictated by *Kokesh* can only be punitive in nature. Thus, per *Kokesh*, disgorgement is a civil monetary penalty, which is subject to the maximum caps imposed by statute. The order of disgorgement exceeds the statutory caps, is duplicative of the penalty separately ordered in the Initial Decision, and must be dismissed.

C. Any Disgorgement Levelled Against Respondents Must be Reduced by an Amount Equal to Settlements in Related Investor Actions

Even if the Commission finds that it has authority to order disgorgement in addition to a penalty, in spite of the Supreme Court's finding in *Kokesh*, the disgorgement amount must be reduced by the settlement amount in resolving the Related Investor Action. "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *SEC v. Coldicutt*, No. 13-01865-RGK, 2014 WL 12561072, slip op. at 6 (C.D. Cal. Aug. 8, 2014) (quoting *SEC v. JT Wallenbrock Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006)); *see also Grossman*, SEC Release No. 4543, 2016 WL 5571616, at *16 (Sept. 30, 2016); *Timbervest, LLC*, SEC Release No. 4492, 2016 WL 4426915, at *2 (Aug. 22, 2016); *Malouf*, 2015 WL 1534396, at *40; *Disraeli*, SEC Release No. 8880, 2007 WL 4481515,

at *17 (Dec. 21, 2007). The paramount purpose of disgorgement is to deprive a wrongdoer of ill-gotten profits. *Peterson*, 2017 WL 1397544, at *3; *Timbervest, LLC*, 2016 WL 4426915, at *2. Any calculation of disgorgement must account for all monies returned to investors. *Peterson*, 2017 WL 1397544, at *9; *Springsteen-Abbott*, SEC Release No. 80360, 2017 WL 1206062, at *7 (Mar. 31, 2017) ("[b]ecause the amount of disgorgement that may be ordered is limited to a reasonable approximation of unjust enrichment at the time of the order, a reasonable approximation of disgorgement necessarily accounts for evidence of amounts already returned"). Disgorgement of all proceeds without taking into consideration offsets "constitutes a penalty assessment and goes beyond the restitutionary purpose of the disgorgement doctrine." *SEC v. Bronson*, No. 12-cv-6421 (KMK), 2017 WL 1169660, --- F. Supp. 3d ----, at *13 (S.D.N.Y. Mar. 27, 2017) (quoting *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.* 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990)).

Offset of a disgorgement award is proper where monies have been returned to investors. *See Disraeli v. SEC,* No. 08-1037, 334 Fed. App'x 334, at *1 (D.C. Cir. June 19, 2009) (disgorgement obligation properly reduced by amounts returned); *SEC v. Palmisano*, 1354 F.3d 860, 863 (2d. Cir. 1998) (disgorgement award properly accounts for any restitution made); *SEC v. United Energy Partners, Inc.*, No. 02-10850, 88 Fed. App'x 744, at 747 (5th Cir. Feb. 18, 2004) (recognizing disgorgement calculation properly takes monies paid back to investors into consideration); *Sec v. Coldicutt*, No. 13-01865-RGK, 2014 WL 12561072, slip op. at 6 (C.D. Cal. Aug. 8, 2014) (calculation reducing liability by monies already returned or disgorged is appropriate "because failing to deduct these amounts could lead the Court to order total disgorgement in excess of the

total gross proceeds from the scheme"); *SEC v. Evolution Capital Advisors, LLC*, No. H-11-2945, 2013 WL 5670835, at *3 (S.D. Tex. Oct. 16, 2013) (disgorgement liability should be reduced by funds repaid to investors); *SEC v. Graulich*, No. 2:09-cv-04355 (WJM), 2013 WL 3146862, at *7 (D.N.J. June 19, 2013) (disgorgement award properly calculated as money raised minus returned monies to investors); *SEC vs. Rockwell Energy of Texas, LLC*, No. H-09-4080, 2012 WL 360191, at *5 (S.D. Tex. Feb. 1, 2012) (Disgorgement in suit by SEC against Respondents properly calculated as total amount raised less amounts paid back to investors); *see also Daspin*, SEC Release No. 1051, 2016 WL 4437545, at *21 (Aug. 23, 2016) (Disgorgement calculation properly accounts for monies paid back to investors); *Malouf*, 2015 WL 1534396, at *41 (Apr. 7, 2015) (Disgorgement calculation properly accounts for previous settlements to reimburse investors); *Brown*, SEC Release No. 3376, 2012 WL 625874, at *15 (Feb. 27, 2012) (Disgorgement award should be offset by any restitution already paid).

Offset to disgorgement properly extends to settlements and awards in related investor actions and private litigation. *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (noting district court properly gave offset for settlement in related investor action against disgorgement award in SEC action); *In re. Mutual Funds Inv. Litig.*, 681 F. Supp. 2d 622, 626 (D. Md. 2010) (offset against disgorgement award proper for amounts paid in private suits where private suits were based on substantially same facts); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Penn. 1976) (noting that any settlement payment in a related investor action properly "serve[s] to offset part or all of a judgment for disgorgement"); *see also Timbervest, LLC*, 2016 WL 4426915, at *2 (offset to disgorgement for private settlement applicable where "suit was premised on the same

underlying 'misconduct [that] ... was recently the subject of [respondents'] administrative enforcement action before the United States Securities and Exchange Commission').

After ALJ Foelak rendered the initial decision, the Related Investor Action was settled for approximately $2,050,000 paid back to the investors and resolving completely all liability related to the Funds at issue in this AP. Thus, any award for disgorgement in this action should at a minimum be reduced by the settlement amounts in the Related Investor Action.[10]

III. Numerous Defects Compel Dismissal of This Proceeding

Respondents have challenged this proceeding on numerous constitutional grounds and procedural defects, the latest of which is the Commission's attempt to ratify its Appointments-Clause violation that rendered this proceeding invalid from the start. This is another of the many examples during the course of this proceeding of the Commission manipulating its own procedures—and inventing some new ones—to influence the outcome in the Commission's favor. This repeated manipulation of procedures demonstrates that this agency cannot fairly adjudicate its own accusations.

The numerous constitutional and procedural defects raised by Respondents have been briefed and preserved for appeal, and Respondents re-assert each and every previously-submitted appeal point again here. Without waiving any points or issues previously raised, Respondents summarize certain of the most egregious grounds.

[10] By requesting that the disgorgement award be reduced by the amount of the Settlement Proceeds, Respondents are not conceding that the disgorgement award in the initial decision properly took into consideration all factors of a valid disgorgement award.

A. Respondents' Constitutional Rights Were—and Continue to Be—Violated

1. Denial of Respondents' Rights to Equal Protection—Arbitrary Selection of AP Forum

The SEC arbitrarily chose to litigate the claims against Plaintiffs in an administrative proceeding instead of filing suit on the same claims in federal court, and by its action contravened Respondents' equal protection rights in two ways. First, the Commission's arbitrary decision constituted invidious discrimination against Respondents in violation of their rights to equal protection under the law, since by their decision the Commission deprived Respondents of a fundamental right, to wit: their right to jury trial as guaranteed by the Seventh Amendment—subjecting the discrimination to strict scrutiny analysis. Second, by intentionally, arbitrarily and malevolently casting Respondents into the administrative process, effectively stripping Respondents of most of their due process rights, their jury trial rights and all of the procedural protections of the federal rules of evidence and procedure, while selecting federal court to pursue identical statutory claims against other similarly-situated defendants, the Commission has contravened Respondents' equal protection rights guaranteed by the Due Process Clause of the Fifth Amendment pursuant to the equal protection "class of one" doctrine. Respondents have been placed into a forum where statistical analysis reveals that *very* few respondents are successful, instead of the courtroom where the SEC enjoys a much more modest success rate.[11] The adverse effect is palpable.

[11] Analysis of publicly available AP records covering the last three years reveals that the Division has enjoyed a success rate in similar actions approaching 100%, while according to a recent study by *The New York Times*, in FY 2011 the SEC was successful in only 63% of its enforcement actions in federal court. See "At the S.E.C., a Question of Home-Court Edge," *The New York Times*, 10/5/13, at http://www nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html.

Respondents have identified a number of similarly situated parties—individuals and entities currently charged with precisely the same securities fraud violations—under the *same sections* of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940—who were likewise not registered with the SEC and who could have been charged by OIP and thrust into the administrative process but who were instead allowed to defend themselves in federal court. These similarly-situated parties—called "comparators" in equal protection parlance—are easily identified from public records. These much more fortunate defendants are identical to Respondents in all material respects. *See* Exhibit A to Respondents Opening Brief, January 13, 2015.

2. The Selection of the AP Forum Denied Respondents' Equal Protection and Seventh Amendment Right to a Jury Trial

Perhaps the gravest of the consequences of the Commission's actions irrationally placing Plaintiffs into the very disadvantageous AP setting is the effective denial of Plaintiffs' Seventh Amendment right to trial by jury. [12] Despite much scholarly criticism[13] the Supreme Court has long permitted Congress to designate certain categories of government claims for litigation exclusively in an administrative forum, where the expertise of a regulatory agency with specialized, esoteric expertise and knowledge of a particular industry is deemed an acceptable justification for keeping these cases out of Article III courts, effectively eliminating the citizen's Seventh Amendment rights. *See Granfinanciera, S.A., v. Nordberg*, 109 S.Ct. 2782 (1989); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 97 S. Ct. 1261 (1977); *NLRB v. Jones &*

[12] The Seventh Amendment provides that "In suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."
[13] *See, e.g.*, Redish and LaFave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL OF RIGHTS J. 407 (1995).

Laughlin Steel Corp., 57 S.Ct. 615 (1937). But the Seventh Amendment applies with full vigor to securities fraud enforcement actions in Article III courts where the SEC seeks monetary penalties.[14]

The Seventh Amendment should be recognized as a fundamental right, at least for purposes of equal protection analysis under the Fifth Amendment due process clause. [15] It is clear that "[t]he [Seventh Amendment] right to trial by jury 'is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care.'" *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 565 110 S.Ct. 1339, 1344-45 (1990) (quoting *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935)). Even so, the Seventh Amendment's status as a "fundamental" right has yet to be established under modern Fourteenth Amendment equal protection jurisprudence, the Court having last considered the issue in 1931[16] at a time well before the Court had even established the contemporary mode of analysis for equal protection incorporation.[17] The Seventh Amendment remains unincorporated largely as a result of the fact that forty-eight of the fifty states have their own constitutional versions of a right to jury trial in civil cases (the other two have statutorily based protections of the right), and the subtle differences among them have led

---

[14] In *Feltner v. Columbia Pictures Television, Inc.*, 118 S.Ct. 1279, 1287-88 (1998), the Court expanded the Seventh Amendment jury trial right beyond determination of liability to the assessment of penalties as well: "[I]f a party so demands, a jury must determine the actual amount of statutory damages . . . in order "to preserve 'the substance of the common-law right of trial by jury.' " *SEC v. Lipson,* 278 F.3d 656 (7th Cir. 2002) (Seventh Amendment jury trial right applies where SEC seeks civil penalties for securities fraud).

[15] While the Equal Protection Clause of the Fourteenth Amendment by its terms applies exclusively to the states, the Supreme Court has found a comparable equal protection component applying to the federal government in the Fifth Amendment's Due Process Clause. *See, e.g., Bolling v. Sharpe,* 347 U.S. 497 (1954).

[16] *See Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.,* 284 U.S. 151, 158 (1931), where the Court declined, without discussion, to glean a jury trial right from the Fourteenth Amendment's *Due Process* Clause.

[17] The controlling standard for such incorporation is whether the right in question is "fundamental." *See, e.g., Duncan v. Louisiana,* 391 U.S. 145, 149 (1968).

the Supreme Court to avoid preempting the states' ability to implement those differences.[18]

Whether the Seventh Amendment right to trial in civil cases is a "fundamental right" triggering strict scrutiny analysis in federal enforcement actions under modern equal protection jurisprudence appears to be a question of first impression,[19] but even a cursory examination of the history and purpose of the Seventh Amendment compels the conclusion that it is. The Declaration of Independence lists as one of the grievances against the English "depriving us in many cases, of the benefits of Trial by Jury." Thomas Jefferson wrote: "I consider [trial by jury] as the only anchor imagined by man, by which a government can be held to the principles of its constitution." 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861).

Justice Black once wrote that "[t]he founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty." *Galloway v. United States,* 63 S. Ct. 1077, 1090 (1943) (Black, J., dissenting). Then-Justice Rehnquist reminded us that "[i]t is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England." *Parklane Hosiery Co., Inc. v. Shore,* 99 S. Ct. 645, 656 (1979) (Rehnquist, J., dissenting). Rehnquist admonished that "[t]he founders of our Nation considered the right of trial by jury in civil cases an important

---

[18] Uniform state protection of the right to jury trial strongly suggests that the right is fundamental.

[19] The Court has recited the 1931 *Hardware Dealers* conclusion in more recent cases but without substantively revisiting the issue. *See Curtis v. Loethar*, 94 S. Ct. 1005 (1974). In none has the Court addressed the Seventh Amendment's status as a fundamental right for Fifth Amendment equal protection purposes in the context of federal enforcement actions. *See also, In re Japanese Elec. Prods. Antitrust Lit.*, 631 F.2d 1069, 1085 (3rd Cir. 1980).

bulwark against tyranny and corruption, a safeguard far too precious to be left to the whim of the sovereign...." 439 U.S. at 657-58 (footnote omitted). Historians have documented the centrality of the Seventh Amendment to the Bill of Rights. Indeed, the Framers saw the right to a jury in civil cases as so fundamental to ordered liberty that even before the delegates to the Constitutional Convention had left Philadelphia, plans were under way to attack the proposed Constitution on the ground that it failed to contain a guarantee of civil jury trial in the new federal courts. *Id.* at 657. *See also* Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 662 (1973).

Of equal importance is the well-understood purpose of the right. It has been noted that "the civil jury is a cornerstone of democratic government, a protection against incompetent or oppressive judges, and a way for the people to have an active role in the process of justice." Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence,* 68 GEO. WASH. L. REV. 183, 183 (2000), citing Gunther, *The Jury in America,* xiii-xviii (1988). *See also* Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial,* 53 OHIO ST. L.J. 1005, 1032 (1992) ("In 1789 there was a shared perception that guaranteeing the right to civil jury trials was important. Without an impartial jury, the individual citizen had no ability to check of the power of the sovereign in a civil courtroom."). *See also id.* at 1034 ("The principle captured in the amendment is that this specter of unchecked authority [in the courtroom] was unacceptable.").

To be clear, Respondents do not here complain that *Congress* had no right to separate them from their Seventh Amendment rights by designating securities fraud enforcement actions for adjudication in an administrative forum. Respondents instead

challenge the unguided, unlimited discretion exercised by the SEC to determine, by itself, which cases and which defendants—including those identically situated—are to be adjudicated with full Seventh Amendment protections and ones which are not. Because the discrimination against Plaintiffs in the exercise of this fundamental right cannot survive strict scrutiny, the SEC's actions run afoul of Respondents' equal protection rights under the Due Process Clause of the Fifth Amendment.

To justify the power vested in Congress to designate certain categories of government claims for litigation exclusively in an administrative forum, the Supreme Court has deferred to the legislative branch and its judgment that the specialized expertise of regulatory agencies was necessary for the administration of the modern bureaucratic state. *See Granfinanciera,* 109 S.Ct. at 2782; *Atlas Roofing Co.*, 97 S. Ct. at 1261. This deference to Congress allows it to "adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme." *Thomas v. Union Carbide Agric. Prod. Co.*, 105 S. Ct. 3325, 3340 (1985). The Supreme Court has thus essentially determined that Congress can be trusted with the power to decide in its legislative wisdom which categories of regulated parties would be stripped of the Seventh Amendment right to trial by jury.

But central to the Court's entrusting this circumscribed constitutional-deprivation power to the legislative branch are two underlying premises that Congress disregarded through its piecemeal additions to the SEC's enforcement authority. The first is that Congress's relegation of such classes of disputes to administrative adjudication is to be "exclusive." The Court has repeatedly stressed that "when Congress creates procedures "designed to permit agency expertise to be brought to bear on particular problems," those

procedures "are to be exclusive." *Free Enterprise v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138 (2010); *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 85 S. Ct. 551, 557 (1965). The second premise is that the matters consigned to administrative adjudication involve "issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion." *Whitney Nat'l Bank, supra,* 85 S.Ct. at 558. As the Court rationalized long ago, "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances *underlying legal issues to agencies that are better equipped than courts* by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 574-575, 72 S.Ct. 492, 494 (1952) (emphasis supplied).

Neither of those premises applies to the power Congress has now vested in the SEC to decide how to prosecute enforcement actions for securities law violations. Apparently overlooked by Congress is that the AP process at the SEC is *not* exclusive, and that the agency is no better equipped than federal courts to adjudicate securities fraud allegations—federal courts do this all the time, and have done so—with juries—since the statutory violations were first defined in 1933, 1934, and 1940.

Moreover, the Supreme Court has never allowed this unique legislative prerogative—the constitutional power to relegate certain classes of controversies to non-Seventh Amendment treatment—to be delegated yet again by Congress to the executive branch, much less to the very agency filing the enforcement action. The agency "power creep" afforded by haphazard legislative amendments—what the D.C. Circuit once called

"legislation by potpourri"[20]—has vested the SEC with what the Supreme Court characterizes as a uniquely legislative function that includes the unbridled and unguided power to decide who gets a Seventh Amendment right and when they get it.

But the "'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,"' for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.' " *Bowsher* [*v. Synar*, 478 U.S. 714], at 736, 106 S.Ct. 3181; *Free Enterprise,* 130 S.Ct. at 3155. Moreover, the separation of powers does not depend on whether "the encroached-upon branch approves the encroachment," *New York v. United States,* 505 U.S. 144, 182, 112 S.Ct. 2408 (1992).

That Congress may not delegate legislative power to the executive branch is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark,* 12 S. Ct. 495, 504 (1892). The unconstitutional delegation doctrine derives its constitutional underpinning from Article I's vesting of "all legislative powers" with Congress, the idea that each branch of the federal government has its own independence. *Mistretta v. United States,* 109 S. Ct. 647, 654 (1989). Congress's ability to endow a coordinate branch of government with a measure of discretion is circumscribed by the requirement that it must "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States,* 48 S.Ct. 348, 352 (1928).

The Court has manifested increasing scrutiny of the boundaries of such delegations. As Justice Scalia recently wrote for the Court in *F.C.C. v. Fox Television*

[20] *Five Flags Pipe Line Co. v. Department of Transp.*, 854 F.2d 1438, 1441 (1988).

Stations, Inc.:

> If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances. To that end the Constitution requires that Congress' delegation of lawmaking power to an agency must be "specific and detailed." *Mistretta v. United States,* 488 U.S. 361, 374, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Congress must "clearly delineat[e] the general policy" an agency is to achieve and must specify the "boundaries of [the] delegated authority." *Id.,* at 372–373, 109 S.Ct. 647. Congress must "'lay down by legislative act an intelligible principle,' " and the agency must follow it. *Id.,* at 372, 109 S.Ct. 647 (quoting ***537** *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)).

129 S. Ct. 1800, 1823-24 (2009). [21]

As a result of serial amendments in Sarbanes-Oxley and Dodd-Frank,[22] the SEC has been left with the very "unbridled discretion" condemned by the *Fox Television* Court as offending the separation of powers. Congress delegated this vast and unreviewable authority while providing none of the necessary "specific and detailed" policy boundaries or "extensive procedural safeguards" to guide the Commission's charging decisions. This delegated authority to eradicate citizens' Seventh Amendment rights is unaided by any legislative directive, guide, instruction, or even general principles. Congress having left the Commission with nothing "intelligible" to direct this crucial decision, the SEC's authority is unconstitutional. The continued and knowing exercise of this unconstitutional authority is firmly against public policy, and thus this AP must be dismissed as to Respondents.

3. Respondents' Rights to Due Process Were Denied

By its deliberate actions—approved by the ALJ and ratified by the

---

[21] *See* Stewart & Sunstein, Public Programs and Private Rights, 95 HARV. L.REV. 1193, 1248 (1982) (the APA was a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards").

[22] Sarbanes-Oxley Act of 2002, Pub.L. 107–204, 116 Stat. 745; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub.L. 111–203, 124 Stat. 1376.

Commission—the Division of Enforcement ("Division") prevented Respondents from accessing the relevant evidence by effectively hiding it in a 700 gb "document dump" and providing no effective means of identifying the contents. Producing millions of documents incapable of being searched reliably is no better than refusing to produce documents at all. Federal courts thus routinely hold that large, haphazard document productions violate the Federal Rules of Civil Procedure. *See, e.g., Residential Contractors, LLC v. Ace Prop. & Cas. Ins. Co.*, No. 2:05-cv-01318-BES-GWF, 2006 U.S. Dist. LEXIS 36943, at *7 (D.Nev. 2006) ("The Court does not endorse a method of document production that merely gives the requesting party access to a 'document dump,' with an instruction to 'go fish ....'"); *Mizner Grand Condo. Ass 'n v. Travelers Prop. Cas. Co. of Am.*, 270 F.R.D. 698, 700-01 (S.D. Fla. 2010) (granting defendants' motion to compel after plaintiff offered for inspection approximately 10,000 unsegregated and uncategorized documents that essentially required defendants to "examine and sort through each individual file folder.").

The SEC has been admonished in the past for using such tactics. In *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 413 (S.D.N.Y. 2009), the court required the Commission to produce 175 file folders created by its litigation attorneys. In reasoning applicable here, the court stated, "While the responsive documents exist somewhere in the ten million pages produced by the SEC, the production does not respond to the straightforward request to identify documents that support the allegations in the Complaint, documents [defendant] clearly must review to prepare his defense." *Id.* at 410. In *United States v. Skilling*, the court explained the proper procedure for making evidence accessible to parties faced with massive government data dumps:

> There is little case law on whether a voluminous open file can itself violate *Brady*, and the outcomes of these cases seem to turn on what the government does in addition to allowing access to a voluminous open file. *See, e.g., United States v. Ferguson*, 478 F. Supp. 2d 220, 241–42 (D. Conn. 2007); *United States v. Hsia*, 24 F. Supp. 2d 14, 29–30 (D.D.C. 1998); *Emmett v. Ricketts*, 397 F. Supp. 1025, 1043 (N.D. Ga. 1975). In the present case, the government did much more than drop several hundred million pages on Skilling's doorstep. The open file was electronic and searchable. The government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to Skilling's defense. The government created indices to these and other documents. The government also provided Skilling with access to various databases concerning prior Enron litigation. . . . But considering the additional steps the government took beyond merely providing Skilling with the open file . . . we hold that the government's use of the open file did not violate Brady.

554 F.3d 529, 577 (5th Cir. 2009) *aff'd in part, vacated in part, and remanded on other grounds*, 130 S. Ct. 2896 (2010). Here, the Division took *none* of the additional steps present in *Skilling*; the multiple databases and files produced are searchable, but only individually, meaning that several different databases and PDF files must be searched seriatim, adding to the monstrous chore of reviewing the data. No lists of "hot documents" were provided, nor were indices provided, and the file directories were mislabeled. If there is *Brady* material in the data the Division provided, it would likely take *years* for Respondents to find it.[23] Such a procedure does not comport with due process (or for that matter a meaningful disclosure of *Brady* material).

Subsequent to *Skilling*, a district court required the government to identify the *Brady* material in a multi-gigabyte, multi-million-page production. *United States v. Salyer*, Cr. No. S–10–0061 LKK (GGH), 2010 WL 3036444 at *4 (E.D. Ca. Aug. 2,

[23] The Division argued that there are many duplicate documents and emails; however, the only way to determine whether a document or email is a duplicate of another is to manually review and carefully compare each document.

2010). In response to the government's argument that a *Brady* review would be an "impossible" burden, the court reasoned:

> During the course of the years long investigation in this case, the government personnel seemed to be able to segregate that evidence which would be useful in the prosecution in terms of guilt, but apparently made no efforts to segregate that evidence which runs counter to the charges. Assuming for the moment that some *Brady/Giglio* evidence, as the court has defined it below, exists, the reviewing personnel apparently made no note of the evidence, or merely having noted it, "stuck it back" in the ever-increasing pile to be an inevitably hidden part of the mass disclosure. The obligations imposed by *Brady et al.* have been well established for years, and should be anticipated in every case during the investigation phase. **If the government argues that it is now "impossible" to comply with the burden of reviewing evidence for identification purposes, the government more or less made its own bed in this matter by making it impossible.**

Salyer, 2010 WL 3036444 at 4 (emphasis added).

Putting Respondents to trial with the opportunity to only review a miniscule percentage of the evidence that supported the issuance of the OIP is manifestly unfair and violates Respondents' rights to due process.

B. The AP is Void Because the Commission Prejudged the Case Against Respondents

The fundamental precept of due process—fully applicable to agency adjudications—is a fair hearing before a fair tribunal. By numerous actions, the Commission has stripped the AP process of minimum standards of fairness, thereby eliminating all possibility of a fair hearing. Then, by publishing its extensive findings and conclusions against Respondents, including finding that Respondents violated a specific statute—*in advance of the adjudication and without considering any evidence or defenses*—the Commission removed all doubt about its ability to serve as a fair tribunal. The Commission flouted the Administrative Procedure Act and the Supreme Court's

exhortation that, in agency administrative proceedings, due process "requires an absence of actual bias in the trial of cases."

Several reported cases address the effect of pre-hearing statements by federal agency decision-makers who reveal a position on the facts or law that reflects a prejudgment of the case and bias against the individual subject of the proceeding. *The cases are consistent in holding that fundamental due process protections are offended by such bias, resulting uniformly in the nullification of the agency proceedings.*

In short, the remarkably uniform case authority establishes that federal commission proceedings are wholly invalidated where these factors are present:

(1) One or more commissioners issue a statement commenting on the case and indicating that the accused individual or entity is in fact culpable;

(2) The statement is made prior to the commission hearing or final decision; and

(3) The accused individual or entity preserves the bias/prejudgment complaint by addressing the issue with the commission prior to final disposition.

The seminal modern case on agency prejudgment is *Antoniu v. S.E.C.*, 877 F.2d 721 (8th Cir. 1989), *cert. denied,* 110 S. Ct. 1296 (1990), where a single SEC commissioner made published pre-hearing statements indicating what he thought of Mr. Antoniu—who had recently been convicted of securities fraud—and commenting favorably on the Commission's position in the administrative proceeding. That commissioner, Charles C. Cox, delivered a speech in Denver after the OIP was issued and while the respondent's statutory disqualification hearing was pending. The Commission was seeking a lifetime ban from securities-related employment. The entirety of Commissioner Cox's statements:

> Mr. Antoniu, on the other hand, can be appropriately termed a violator, for he pled guilty to criminal violations of the federal securities laws. In his positions at Morgan Stanley and Kuehn [sic], Loeb and Company, he provided inside

> information on several occasions to accomplices who traded while in possession of that information. Although he was prosecuted for this conduct, Mr. Antoniu recently applied to become associated with a broker-dealer. Apparently, Mr. Antoniu believed that, since his rehabilitation was complete, there was no further reason to prevent his future dealings in the securities industry. In that case, the Commission responded by denying Mr. Antoniu's request for association.
>
> One issue that frequently arises with respect to individuals whom I call "indifferent violators" is the length of time that a Commission remedy should remain in effect. This may come up when originally structuring the settlement of an injunction or an administrative proceeding, or in later applications for relief from an injunction or Commission order. * * * *In the case of Mr. Antoniu, his bar from association with a broker-dealer was made permanent.*

877 F.2d at 723 (emphasis in original). The text of the speech was printed and distributed by the Commission. Mr. Antoniu moved for the disqualification of the entire Commission based on the pre-decision bias evident from the published comments in the speech. His motion was denied, and Commissioner Cox initially refused to recuse himself from further involvement in the case. *Id.* Some eighteen months later—the day the Commission issued its decision affirming the ALJ's initial decision granting a lifetime ban—Commissioner Cox recused himself, presumably from the final deliberation and Commission vote.[24] *Id.*

The court, however, was resolute in finding that the proceeding against Mr. Antoniu was devoid of due process. Noting first "the fundamental premise that principles of due process apply to administrative adjudications," *see Amos Treat & Co. v. SEC,* 306 F.2d 260, 264 (D.C. Cir. 1962), the court recited the Supreme Court's description of the minimal rudiments of due process from *In re Murchison,* 349 U.S. 133, 136 (1955): "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."

---

[24] The Commission thought so little of Antoniu's prejudgment complaint that the opinion and order did not even acknowledge or discuss it. *See In the Matter of Adrian Antoniu,* 48 S.E.C. 909, Admin. Proc. File No. 3-6566 (1987).

Most importantly, the *Antoniu* court pointed out, the Supreme Court has demanded not only a fair proceeding, but also that "justice must satisfy the appearance of justice." *Murchison, at 136, citing Offutt v. United States,* 75 S. Ct. 11, 13 (1954). So the relevant inquiry was "whether Commissioner Cox's post-speech participation in the . . . proceedings comported with the appearance of justice." The court thus concluded:

> After reviewing the statements made by Commissioner Cox, we can come to no conclusion other than that Cox had "in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Gilligan, Will & Co. v. SEC,* 267 F.2d 461, 469 (2d Cir.), *cert. denied,* 361 U.S. 896, 80 S.Ct. 200, 4 L.Ed.2d 152 (1959). Even though Cox recused himself prior to the filing of the SEC's final decision, there is no way of knowing how Cox's participation affected the Commissioner's deliberations. Accordingly, **we nullify all Commission proceedings** (including the Commission's rejection of Antoniu's proposed settlement) in which Commissioner Cox participated occurring after Commissioner Cox's speech was given and remand the case to the Commission with directions to make a de novo review of the evidence, without any participation by Commissioner Cox. It is so ordered.

877 F.2d at 726 (emphasis supplied).

In contrast to the instant case, the court in *Antoniu* was confronted with only a single commissioner who had "adjudged the facts as well as the law of a particular case in advance of hearing it." The court thus had available the option of remanding the matter back to the Commission with orders to start over and exclude the biased commissioner from any involvement in the case. In Respondents' case, the *entire Commission* has "adjudged the law as well as the facts" in great depth, in advance of even the hearing before the administrative law judge. It is therefore impossible to fashion a remand procedure that can meet the most rudimentary demands of due process: "a fair trial in a fair tribunal." Neither the Constitution nor the APA provide for an alternative process for administrative adjudication when the agency's own actions disqualify it.

Significantly, only two other reported cases—both D.C. Circuit opinions—address a preserved complaint about commissioner prejudgment of a federal agency decision. Both were cited by the *Antoniu* court, and both reached exactly the same conclusion. In *Texaco, Inc. v. Fed. Trade Comm'n,* Texaco and B.F. Goodrich were facing an administrative hearing on charges that they violated the Federal Trade Commission Act by effectively coercing Texaco dealers to distribute Goodrich products through a commission agreement between the two companies, to the disadvantage of competing rubber product companies. 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds,* 85 S. Ct. 1798 (1965). Just as in *Antoniu*, a commissioner—new FTC Chairman Dixon—delivered a speech in Denver, in which he expressed the Federal Trade Commission's intent to crack down on anti-competitive practices. The relevant comments, which were likewise distributed in a press release, were made to a convention of petroleum retailers:

> We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases. You know the practices- price fixing, price discrimination, and overriding commissions on [tires, batteries and accessories]. You know the companies- Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone. Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry.

Id. at 759. Stating the obvious—that a disinterested observer could conclude that the commissioner had "in some measure" prejudged the specific case before it, stripping from the proceedings the "very appearance of complete fairness"—the D.C. Circuit summarily ruled that the commissioner's "participation in the hearing amounted in the

circumstances to a denial of due process which invalidated the order under review." *Id.*, at 760.

The D.C. Circuit confronted a similar complaint in *Cinderella Career & Finishing Schools, Inc. v. Fed. Trade Comm'n.*, a deceptive advertising case where the commissioner publicly denounced the respondents in a pending administrative proceeding although without naming them or even referring to the specific case. 425 F.2d 583 (D.C. Cir. 1970). The court contrasted the Commission's general authority to comment publicly on pending cases and the "reason to believe" that alleged violations have occurred:

> This does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record. There is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has 'reason to believe' that there have been violations, and statements by a Commissioner after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves. While these two situations—Commission press releases and a Commissioner's pre-decision public statements—are similar in appearance, they are obviously of a different order of merit.

Id. at 590. The court invalidated the Commission's proceedings while noting that it was of no moment that the public statements did not specifically refer to the respondents: "the reasonable inference a disinterested observer would give these remarks would connect them inextricably with this case." Id. at 592, n. 10.

The premature and improper findings in this case are broad enough to establish liability under each of the statutes charged and, thus, give rise to each of the sanctions

and remedies the Division seeks. The Commission misconduct here goes far beyond a single comment by a lone Commissioner in a public statement or an overly-aggressive press release. Instead, the *entire Commission* issued a public Order that makes extensive findings of fact that recite or summarize virtually all of the Division's unproven allegations in the OIP as true and correct, and adjudged the Adviser (Jarkesy) and Manager (JTCM) to have violated the law as charged. The verdict was pronounced before the trial started.

The Commission's pre-hearing verdict requires recusal of the Commissioners and nullifies the AP proceedings against Respondents. Because there is now no Commission to oversee and review the findings of the ALJ, and no legally-valid final Commission order from which to appeal to a circuit court, the entire administrative adjudicatory structure fashioned by Congress in the APA has been annihilated. Tellingly, the Division revealed (in a footnote to its opposition brief) that the finding of a primary violation by Respondents was necessary to give legal effect to the settlement of aiding and abetting charges against Belesis and JTF.

The Division and Commission argue that the footnote in the Settlement Order that reads, "the findings herein . . . are not binding on any other person or entity in this or any other proceeding," saves the Commission from the claim of prejudgment. But this does not change the fact that the Commission has decided Plaintiffs' guilt. Moreover, the footnote only disclaims the binding of "other" persons and entities; that the findings bind the Commission itself is a reality left undisturbed. It is the *Commission's* prejudgment that nullifies the AP. For this reason and many others explained below, the Commission has rendered the AP against Respondents a nullity, and it should be dismissed.

C. The AP is Void Because the Commission Failed to Follow its Own Rules of Practice

It is axiomatic as a matter of Due Process that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency. *United States ex rel. Accardi v. Shaughnessy,* 74 S. Ct. 499 (1954); *Columbia Broad. Sys., Inc. v. United States,* 62 S. Ct. 1194, 1202-03 (1942). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz,* 94 S. Ct. 1055, 1074 (1974).

In the course of Plaintiffs' AP, the SEC's Division has deliberately hidden *Brady* material—both in the withheld witness notes and the jumbled 700gb "document dump." In an isolated nod to discovery precepts, the SEC's Rules of Practice require the Division to comply with the *Brady* doctrine. *See* 17 C.F.R.§ 201.230(b)(2). [25] On interlocutory appeal, the Commission published an opinion using mischaracterized factual assertions and bizarre logic in a tortured attempt to discount the *Brady* violations, ultimately rejecting Plaintiffs' *Brady* complaints on the grounds that Plaintiff Jarkesy had failed to demonstrate that the withheld evidence would tend to impeach *himself.* The history in this case firmly establishes that the SEC does not follow the strict dictates of its own Rules of Practice. Without the *Brady* information, the Plaintiffs cannot defend themselves on the merits of the Division's claims and cannot appeal the *Brady* error, since the relevant material will not be in the case record.

The Court observed in *United States v. Caceres* that "[a] court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by

[25] The Division's *Brady* obligation also encompasses impeachment material covered by *Giglio v. U.S.*, 92 S. Ct. 763 (1972), such as witnesses' criminal records, information reflecting on witness competence and credibility, agreements made with the witness, and information that casts doubt on a witness's statement.

the Constitution or federal law." 99 S. Ct. 1465, 1470 (1979). In response, the courts have generally required stricter compliance with regulations borne of statutory or constitutional rights. *See Battle v. FAA,* 393 F.3d 1330, 1336 (D.C.Cir. 2005) ("[A] court's duty to enforce an agency regulation [, while] most evident when compliance with the regulation is mandated by the Constitution or federal law, embraces as well agency regulations that are not so required.") (citations omitted). The *Brady* discovery rule embodied in the SEC's Rules of Practice 230(b)(2) is a regulation borne of the due process requirement of fundamental fairness in agency adjudicatory proceedings. Given that this Rule was violated in multiple ways against Respondents, the AP is invalidated and should be dismissed.

D. The AP Should Be Dismissed Due to Improper *Ex Parte* Communications with the Division of Enforcement Prior to the Hearing

Persons involved in the investigation and prosecution of the AP also participated in the settlement discussions and recommendation of the settlement to the Commission. This participation and recommendation constitutes improper *ex parte* communications.

The OIP issued by the Commission in this case states:

> In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice.

The communications between the Division staff and the Commission in resolving the claims as to the Settling Respondents without first procuring a waiver or providing notice and an opportunity to be heard by Respondents, violates the Commission's own admonition in the OIP, as well as the Rules of Practice and the APA.

The Commission's Enforcement Manual of 2013 ("Manual") specifically permits the

Division staff assigned to investigate and prosecute a case to also engage in settlement negotiations and make settlement recommendations to the Commission. This long-standing practice is memorialized in numerous places in the Manual. Some examples are:

- Division staff is instructed .to report settlement discussions in required Quarterly Reviews of Investigations and Status Updates. (Section 2.1.2; pg. 8)
- Division staff may engage in appropriate settlement discussions with the recipient of the Wells notice. (Section 2.4; pg. 25)
- The Commission considers and votes on some of the Division's recommendations in closed meetings. Generally, recommendations that are eligible to be considered at closed meetings include recommendations to institute, modify, or settle an enforcement action or to consider an offer of settlement or other proposed disposition of an enforcement action. (Section 2.5.2.1, pg. 26)
- At a closed meeting, Division staff orally presents a recommendation to the Commission and answers any questions before the Commission votes on the recommendation. Except in unusual circumstances, the Commissioners receive a copy of the Division's recommendation prior to the closed meeting. Division staff should be prepared to answer the questions that are likely to be asked by the Commissioners and should contact the Commissioners' offices prior to the meeting to learn of any particular concerns or questions about the recommendation. (Section 2.5.2.1; pg. 27)
- The Manual instructs the Division staff to obtain an executed Certification as to Completeness when recommending a settlement offer from an entity or individual. In the Certification, the settling party acknowledges that the Commission has relied upon, among other things, the completeness of his production. (Section 3.2.6.2.6; pgs. 58-59)
- In entering into a cooperation agreement, the cooperating individual or company acknowledges that, although the Division has discretion to make enforcement recommendations, only the Commission has the authority to approve enforcement dispositions and accept settlement offers. (Section 6.2.2; pg. 126)
- Where cooperation credit is being recommended to or has been authorized by the Commission in settlements, Division staff should include standard language relating to cooperation in the related Offers or Consents, unless such disclosure would not advance the goals of the Commission's cooperation program or would adversely affect related ongoing investigations or proceedings. Modifications to this standard language should not be made without first consulting with staff in the Office of Chief Counsel or the Chief Litigation Counsel. (Section 6.2.2; pg. 127)
- As discussed in Section 6.2.2 of the Manual, where cooperation credit is being recommended to or has been authorized by the Commission in settlements, the staff should include standard language relating to cooperation in Offers, Consents, or other dispositions and reference the individual or company's cooperation in the

> supporting paragraphs of the related litigation and/or press releases, unless such disclosure would not advance the goals of the Commission's cooperation program or would adversely affect related ongoing investigations or proceedings. (Section 6.3; pg. 134)

By Commission practice and published procedures, the memorandum to recommend the settlement to the Commission, along with Settling Respondents' written offer of settlement ("Offer") and the Order are routinely—and necessarily—prepared by persons involved in the investigation and/or prosecution of the case. The recommendation memorandum is a one-sided communication that discusses the relative culpability of the settling respondents to the non-settling respondents, and thus is by definition a prohibited extrajudicial communication—at least if presented without first obtaining a waiver or in a proceeding without notice to all relevant parties.

Here, regardless of who actually prepared these documents, the Order reveals that persons involved in the investigation and prosecution of the case-directly or indirectly-contributed to the substance of the Order. The Order reflects updated circumstances stances as to the Belesis and JTF (subsequent to the issuance of the OIP) and that the Commission made determinations of the disgorgement amount, the penalty amounts, and consent by Belesis to lesser charges than in the OIP, all of which required the input of the investigating and prosecuting staff. This conduct violates the Commission's own OIP and the APA.

The Commission justifies its violative conduct by citing an exception it has created for itself, relying on its own "unbroken line of decisions" as its authority. These internal orders violate the plain language of the APA, as well as the OIP issued in this

case.[26]

E. The Division Failed to Prove Violations of the Anti-Fraud Provisions of the Securities Act and Exchange Act

The Division failed to prove all of the elements necessary to establish Respondents' liability under either Section 10(b) of the Exchange Act of 1934 or Section 179A) of the Securities Act of 1933. In short, the Division failed to introduce evidence that the statements in the Private Placement Memoranda ("PPM") and Limited Partnership Agreements were false or misleading at the time they were issued, failed to prove that Respondents were responsible for, or aware of, any false or misleading statements made by others—especially JTF—in connection with the offer and sale of partnership interests in the Funds, and failed to prove that any marketing materials which may have been drafted at some unspecified points by Respondents were indeed shown to or relied upon by investors in connection with the offer or sale of partnership interests in the Funds.

To establish a violation of Section 10(b), the Division was required to prove "(1) a material misrepresentation or materially misleading omission, (2) in connection with the purchase or sale of a security, (3) made with scienter." *See SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012); *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007); *see also SEC v. Gann*, 565 F.3d 932, 936 (5th Cir. 2009). To establish a violation under Section 17(a)(1), (2), or (3), the Division had to first prove that JTCM and Jarkesy each made "a material misrepresentation or materially misleading omission," and such misrepresentation and/or omission was "in the offer or sale of a

[26] The Commission's affinity for its own decisional decrees—despite contrary and binding case authority from Article III courts—contrasts with the Division's resort to federal case law when that alternative seems helpful to its case against Respondents.

security." *See SEC v. Morgan Keegan & Co.*, 678 F.3d at 1244; *SEC v. Merch Capital, LLC*, 483 F.3d at 766; *see also SEC v. Spence & Greene Chem. Co.*, 612 F.2d 896, 903 (5th Cir. 1980). Additionally for a claim under Section 17(a)(1), the Division was required to prove that the accused party made the material misrepresentation and/or omission with scienter. *See Morgan Keegan & Co.*, 678 F.3d at 1244; *Merch Capital, LLC*, 483 F.3d at 766. For purposes of securities law, the U.S. Supreme Court has defined "scienter" as "a mental state embracing intent to deceive, manipulate, or defraud." *See Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 194, n. 12, 96 S. Ct. 1375, 1380, 47 L. Ed. 2d 668, 676 (1976); *see also Aaron v. SEC*, 446 U.S. 680, n. 5, 100 S.Ct. 1945, 64 L. Ed. 2d 611 (1980) (applying *Ernst* definition of scienter to Section 17(a)) For violations of Section 17(a)(2) and (3), the Division must prove that the accused party negligently made such material misrepresentations and/or omissions. *See Morgan Keegan & Co.*, 678 F.3d at 1244; *Merch Capital, LLC*, 483 F.3d at 766.

Throughout its Post-Hearing Memorandum, the Division consistently cites statements—in documents and testimony—out of context and omits material information from those sources which define, limit, qualify, or undermine their meaning. Resort to such cherry-picking, while ignoring contravening evidence, allows the Division to paint a materially false or misleading picture of the facts actually adduced at the hearing, eerily similar to the very elements of deceptive conduct the Division has wrongly alleged against Respondents. This is particularly so with the Division's arguments surrounding the PPM and the Limited Partnership Agreements. The offering documents were prepared by qualified securities counsel, and there was *no evidence* introduced at the hearing that the statements made in the offering memoranda were not true at the time the offering

documents were prepared. Moreover, the investments in the Funds were sold by an SEC-registered broker-dealer—not Respondent Jarkesy or JTCM. It was JTF that owed a duty to each of the investors in the offer and sale of the investments in the Funds.

In any event, the claimed "misrepresentations" in the PPM and subscription agreements must be disregarded in their entirety, since *the Division produced no testimonial or documentary evidence that any of the investors even read the document.* Indeed, and incredibly, all of the Division's investor witnesses testified that they never actually read the PPM prior to purchasing interests in the Funds.[27] Thus all of the Division's arguments about the validity of certain PPM statements, materiality, and the applicability of *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011), are inapposite to the analysis of the evidence and must be disregarded. No statements in the PPM or subscription agreements can form the basis for any liability of the Respondents.

The Division places lesser reliance on the "marketing materials" that repeat some of the statements in the PPM, perhaps recognizing that it failed to prove either the provenance of these materials, the timing of their claimed publication, or that any of these documents were actually read by investors prior to their investments in the Funds. The Division has not pointed to any evidence in the record which would support a finding that an actual investor, prior to investing in the Funds, actually read any of these materials, or that the complained-of representations were knowingly—or even negligently—passed on to an investor by another party as a result of the statements in these materials.

---

[27] This implausible testimony—including by one investor who is a securities industry professional—would seem to belie the Division's extravagant claim that all of its witnesses testified "credibly and believably."

F. The Division Failed to Prove Violations of the Anti-Fraud Provisions of the Advisors Act

Like Sections 17(a) of the Securities Act and 10(b) of the Exchange Act, Section 206 of the Advisers Act, 15 U.S.C. § 80b-6 (2013); 17 C.F.R. § 275.206(4)-8 (2013), prohibits "employing any device, scheme, or artifice to defraud clients or engage in any transaction, practice, or course of business that defrauds clients," but with several differences. *See SEC v. Lauer*, No. 03-80612-CIV, 2008 WL 4372896, at *24 (S.D. Fla. Sept. 24, 2008). First, the Advisers Act is specific to investment advisers. *See id.* Second, Section 206 of the Advisers Act does not require that the alleged violative action occur "in the offer or sale of any" security or "in connection with the purchase or sale of any security." *See id.* (discussing Section 206(1) and (2)); *SEC v. Quan*, No. 11-723 ADM/JSM, 2013 WL 5566252, at *16 (D. Minn. Oct. 8, 2013) (discussing Section 206(4) and Rule 206(4)-8). To establish a violation under Section 206(1), the Division must prove scienter. *See Lauer*, 2008 WL 4372896, at *24, *citing Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979), *aff'd on other grounds*, 101 S.Ct. 999 (1981); *see also Stan D. Kieffer & Assocs.*, Release No. 2023, 77 SEC Docket 679, 2002 WL 442026, at *2 (Mar. 22, 2002). To establish claims under 206(2) and 206(4), the Division must prove negligence at a minimum. *See SEC v. Yorkville Advisors, LLC,* No. 12 Civ. 7728(GBD), 2013 WL 3989054, at *3 (S.D.N.Y. Aug. 2, 2013), *citing SEC v. Moran*, 922 F. Supp. 867, 897 (S.D.N.Y.1996).

In its Post-Hearing Memorandum the Division asserts that the primary "violative conduct" against the proscriptions of the Advisors Act "was Respondents' fraudulent valuation of the Funds' holdings." Yet the Division produced no evidence at the hearing that established that any published valuations, under the valuation discretion conferred

upon the fund Manager, were false. Remarkably, and tellingly, the Division neither designated nor proferred any expert witness who would testify that the valuations in the Spectrum financial statements were false or inflated. None of the Division's lay witnesses were able to supply the missing testimony either. There was no testimony that Respondents misvalued the positions of the Funds in the portfolio companies, and the valuations of the life settlement policies—at a 12% discount rate instead of the Division's preferred 15%—was within the range permitted *according to the Division's own witnesses* and consistent with the considerable discretion afforded to the Manager in the offering documents. There is not one shred of evidence to prove that these valuations were objectively unreasonable. The Division's bootstrapping complaint that the claimed offering fraud—which it failed to prove—also constitutes a violation of the Advisors Act, is creative, but ultimately unavailing.

The Division finally resorts to its unsupported postulation that Respondents violated the Advisors Act by "repeatedly favoring Belesis's and JTF's pecuniary interests over those of the Funds." The only evidence the Division identifies in support of this theory involves the Respondents' alleged "negotiation and/or approving investment banking agreements that paid JTF excessive fees and fees for performing no services." But the evidence adduced at the hearing proved just the opposite: that the fees were consistent with market rates for securing financing for struggling enterprises in the dire financial predicaments faced by the portfolio companies. Once again, the Division was not able to produce any expert in the securities industry who could testify that the fees paid to Belesis were "excessive" under the circumstances faced by the portfolio companies. The Division's *own witnesses* established that JTF was the only brokerage

firm which would—for any price—attempt to raise the financing those companies so desperately needed. The evidence also demonstrated amply that Respondent Jarkesy "favored" Belesis to the extent necessary to maintain the relationship among the Funds, the portfolio companies, and JTF, all *for the benefit of the Funds*. There was no evidence introduced to controvert Jarkesy's testimony that all of the measures taken to placate Belesis were intended to, and did, benefit the Funds by keeping the portfolio companies afloat.

The Division cannot prove *scienter*. Investing his life savings into the venture not only gave Mr. Jarkesy "skin in the game," it negates any inference of *scienter*. When considering the Division's theory of *scienter* and the applicable standard of proof, it is impossible to conclude that—with so much "skin in the game"—someone would invest his life savings into a venture and then engage in severely reckless or event negligent conduct. Other evidence refutes a finding of *scienter*. No one would invest their life savings into a venture and then withhold his best judgment and efforts. At all times, Respondents acted in good faith to make the Funds succeed. If the business plan became impossible to achieve due to the market crash, that does not constitute fraud. The Division wholly failed to prove a violation of the Advisors Act.

G. The Division Failed to Prove Aiding and Abetting Liability for Respondents Under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10(b)-5

In addition to claiming primary liability under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, the Division asserts aiding and abetting liability against both Respondents. To establish aiding and abetting liability, the Division must prove "(1) the existence of a securities law violation by the primary (as opposed to the

aiding and abetting) party; (2) knowledge of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *SEC v. Apuzzo*, 689 F.3d 204, 211 (2d Cir. 2012) (discussing aiding and abetting claims under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10(b)-5); *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009) (same).

As discussed above, the offering documents were prepared by qualified securities counsel, and there was *no evidence* introduced at the hearing that the statements made in the offering memoranda were not true at the time the offering documents were prepared. The Offering documents adequately disclosed the terms of the offering, risks and contingencies. The Division failed to prove that the provisions of the offering document were false at the time they were made. The offering documents permitted flexibility in changing the business plan because of the need to adjust to unexpected circumstances. For example, the economic downturn—or market crash—of 2008 and 2009 was impossible to predict, and caused a need to adjust the strategy just to survive. Penalizing a fund manager for adjusting a business plan in the wake of an economic crash is both inequitable and against public policy. Moreover, the investments in the Funds were sold by an SEC-registered broker-dealer—not Respondents. Each of the investors called by the Division was a client of JTF and received most of their information through JTF. It was JTF that owed a duty to each of the investors in the offer and sale of the investments in the Funds.

Because the Division failed to prove the existence of a securities law violation by the primary (the Funds), the Division cannot establish the remaining two elements for aiding and abetting liability.

IV. Conclusion

Numerous constitutional infirmities and the Commission's own actions have rendered this proceeding void and it should be dismissed. After rushing the case to hearing, the Commission has failed to consider Respondents' petition for review for *four years*. Respondents move the Commission to dismiss this proceeding promptly. In the event the Commission's blindness continues as to the serious defects raised in this proceeding and as to SEC administrative proceedings in general, Respondents move the Commission to finalize this proceeding promptly so that Respondents can proceed with their rights to appeal in federal court.

Respectfully Submitted,

By: */s/ Karen Cook*

Karen Cook, Esq.
Karen Cook, PLLC
E-mail: karen@karencooklaw.com
Phone: 214.593.6429
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

S. Michael McColloch, Esq.
S. Michael McColloch, PLLC
E-mail: smm@mccolloch-law.com
Phone: 214.593.6415
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

Counsel for John Thomas Capital Management Group d/b/a Patriot28 LLC and George Jarkesy, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 5, 2018, the foregoing document was served on the parties below and in the manner indicated.

By: *s/ Karen Cook*
Karen Cook, Esq.

Brent Murphy, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 3628
Washington, DC 20549
VIA FACSIMILE: 202.772.9324
VIA FEDERAL EXPRESS

The Honorable Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington, DC 20549
VIA U.S. MAIL
VIA E-MAIL: alj@sec.gov

Todd D. Brody
Senior Trial Counsel
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, 4th Floor
New York, NY 10281-1022
VIA U.S. MAIL
VIA E-MAIL: brodyt@sec.gov

Alix Biel
Senior Staff Attorney
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, 4th Floor
New York, NY 10281-1022
VIA U.S. MAIL
VIA E-MAIL: biela@sec.gov

APPENDIX

EXHIBIT 1

CAUSE NO. 2013-54408

PAUL F. RODNEY, derivatively on behalf of PATRIOT BRIDGE AND OPPORTUNITY FUND LP I, and EDWIN DEBUS, derivatively on behalf of PATRIOT BRIDGE AND OPPORTUNITY FUND LP II, Plaintiffs, vs. JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, n/k/a PATRIOT28 LLC, GEORGE R. JARKESY JR., JOHN THOMAS FINANCIAL, INC., ANASTASIOS "TOMMY" BELESIS, ATB HOLDING LLC, MFR, P.C., also known as MFR GROUP, INC., DOEREN MAYHEW & CO., P.C., DOEREN MAYHEW TEXAS, PLLC, SOUTH PADRE VENTURES 2, LLC, successors to MFR, P.C., and JUAN PADILLA, Defendants, PATRIOT BRIDGE AND OPPORTUNITY FUND LP I, and PATRIOT BRIDGE AND OPPORTUNITY FUND LP II, as nominal Defendants.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 189th JUDICIAL DISTRICT

NOTICE OF PROPOSED PARTIAL SETTLEMENT OF DERIVATIVE LITIGATION, HEARING THEREON, AND RIGHT TO APPEAR

TO: ALL LIMITED PARTNERS OF PATRIOT BRIDGE AND OPPORTUNITY FUND L.P. I (A/K/A THE JOHN THOMAS BRIDGE AND OPPORTUNITY FUND, L.P.) ("FUND I"), AND PATRIOT BRIDGE AND OPPORTUNITY FUND L.P. II (A/K/A OR JOHN THOMAS BRIDGE AND OPPORTUNITY FUND, L.P. II)T"FUND II") (COLLECTIVELY, THE "FUNDS")T

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. THIS NOTICE RELATES TO A PROPOSED PARTIAL SETTLEMENT AND DISMISSAL OF LITIGATION AND CONTAINS IMPORTANT INFORMATION REGARDING YOUR RIGHTS. YOUR RIGHTS MAY BE AFFECTED BY THESE LEGAL PROCEEDINGS. IF THE COURT APPROVES THE SETTLEMENT, YOU WILL BE FOREVER BARRED FROM CONTESTING THE APPROVAL OF THE PROPOSED PARTIAL SETTLEMENT.

THE COURT HAS MADE NO FINDINGS OR DETERMINATIONS CONCERNING THE MERITS OF THE ACTION. THE RECITATION OF THE BACKGROUND AND CIRCUMSTANCES OF THE SETTLEMENT CONTAINED HEREIN DO NOT CONSTITUTE THE FINDINGS OF THE COURT. IT IS BASED ON REPRESENTATIONS MADE TO THE COURT BY COUNSEL FOR THE SETTLING PARTIES.

Notice is hereby provided to you of the proposed partial settlements (the "Settlements") in the above-captioned derivative lawsuit (the "Action"). This Notice is provided by order of the 189th Judicial District Court, for Harris County, Texas (the "Court"). It is not an expression of any opinion by the Court. It is to notify you of the terms of the proposed partial Settlements of the Action.

I. WHY YOU HAVE RECEIVED THIS NOTICE

1.e This Notice provides information regarding the partial Settlement of the shareholdere derivative Action. Plaintiffs Paul Rodney and Ed Debus have brought the Actione derivatively on behalf of Fund I and Fund II ("Plaintiffs"). Plaintiffs and Defendante George R. Jarkesy, Jr. ("Jarkesy") and John Thomas Capital Management LLCe (a/k/a Patriot28 LLC), and Defendant MFR Group, Inc., formerly known as MFR, P.C.e ("MFR") (together, the "Settling Parties") have agreed upon terms to settle the Actione and have signed written Stipulations of Settlements (the "Stipulations") setting forthe those settlement terms. Unless otherwise set forth in this Notice, capitalized terms ine this Notice shall have the same meaning as set forth in the Stipulations.e

2.e On December 4, 2015, at 9:00 a.m., the Court will hold a hearing (the "Settlemente Hearing") in the District Court for Harris County, Texas, 189th Judicial District,e 201 Caroline Street, Houston, Texas 77002 before the Honorable William Burke.e The purpose of the Settlement Hearing is to determine whether: (i) the Settlements ofe the Action upon the terms and subject to the conditions set forth in the Stipulations aree fair, reasonable, and adequate and should be approved by the Court, includinge $1,750,000 in cash plus interest in exchange for releases of the Funds' claims againste Jarkesy and JTCM, and MFR; (ii) whether the Plaintiffs' proposed plan of allocation to the Limited Partners of the Settlement is fair, adequate and reasonable; (iii) the Actione against Jarkesy and JTCM, and MFR should be dismissed with prejudice; ande (iv) whether the Court should approve Plaintiffs' Counsel's motion for attorneys' feese and reimbursement of litigation expenses, and motion for award to Plaintiffs.e

II. SUMMARY OF THE LITIGATION

3.e This Action was filed on September 16, 2013, and on March 10, 2015, Plaintiffs filede the Second Amended Petition ("Petition"). The Petition alleges breach of fiduciarye duty (Count I) and aiding and abetting breach of fiduciary duty (Count II), wastee (Count III), professional negligence (Count IV), civil conspiracy (Count V), and breache of contract (Counts VI and VII) against various defendants.e

4.e After litigating their respective claims and/or defenses over the course of several years,e counsel for the Settling Parties engaged in arm's-length negotiations concerning the termse and conditions of a potential resolution of the Action, including hotly contested mediatione before a neutral mediator, Trey Bergman of Bergman ADR Group (the "Mediator").e Following the mediation and negotiations, Plaintiffs and Jarkesy and JTCM reached ane agreement providing for the settlement of the Action as documented by Settlemente Agreement dated July 20, 2015 ("Jarkesy Stipulation of Settlement"). Plaintiffs and MFRe reached an agreement providing for the settlement of the Action as documented bye Settlement Agreement dated July 24, 2015 ("MFR Stipulation of Settlement").e

5. The Settling Parties recognize the time and expense that would be incurred by furthere litigation in the Action and the uncertainties inherent in such litigation and that thee interests of the Settling Parties would best be served by a settlement of the Action.e Plaintiffs and their counsel have preliminarily determined that the settlement of thee Action, upon the terms outlined in the Stipulation and summarized herein, is fair,e reasonable, adequate, and in the best interest of the Funds and its limited partners.e

6.e Each of the Settling Parties denies having committed any violation of law or breach ofe duty. Jarkesy and JTCM entered into the Jarkesy Stipulation of Settlement solelye because they contend and believe that the settlement of the Action, as outlined in thee Jarkesy Stipulation of Settlement, would eliminate the burden, risk, and expense ofe further litigation.e

7.e Similarly, MFR entered into the MFR Stipulation of Settlement solely because ite contends and believes that the settlement of the Action, as outlined in the MFRe Stipulation of Settlement, would eliminate the burden, risk, and expense of furthere litigation. There has been no admission or finding of facts or liability by or against anye party, and nothing herein should be construed as such.e

THE SUMMARY OF LITIGATION PROVIDED HEREIN DOES NOT CONSTITUTE FINDINGS OF THE COURT. IT IS BASED ON STATEMENTS OF THE SETTLING PARTIES AND SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES RAISED BY ANY OF THE SETTLING PARTIES. A COPY OF PLAINTIFFS' PLEADINGS IS PUBLICLY AVAILABLE IN THE COURT'S FILE.

III.e SUMMARY OF THE SETTLEMENTe

8.e The principal terms, conditions, and other matters that are part of the Settlements,e which are subject to approval by the Court, are summarized below. This summarye should be read in conjunction with, and is qualified in its entirety by reference to, thee text of the MFR Stipulation of Settlement and the Jarkesy Stipulation of Settlement,e which have been filed with the Court and are available for your inspection as discussede below under the heading, "How to Obtain Additional Information." Capitalized termse used herein and not otherwise defined are deemed to have the same meaning ascribede to them in the Settlements.e

9. In summary, as a result of the foregoing and the negotiations between counsel for the Settling Parties, the Settling Parties to the Action have agreed to separate Settlements, which will be effective only upon final approval by the Court. Pursuant to the Settlement, the Funds will receive $500,000 in cash in exchange for releases of claims against Jarkesy and JTCM. Further, Pursuant to the Settlement, the Funds will receive $1,250,000 in cash in exchange for releases of claims against MFR.

10. The MFR Stipulation of Settlement releases any and all claims, debts, demands, rights, causes of action or liabilities of every nature and description whatsoever (including, but not limited to, claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses, or liability whatsoever), whether based in law or equity, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, matured or not matured, pursuant to federal, state, local, statutory or common law, or any other law, rule or regulation, including both known claims and Unknown Claims, that have been or could have been asserted in any forum by the Funds, or any of them, or the successors or assigns of any of them, against any of the Released Parties, which arise out of, are based on, or relate in any way to, directly or indirectly, any of the allegations, acts, transactions, facts, events, matters, occurrences, acts, representations or omissions involved, set forth, alleged or referred to, in the Petition, or which could have been alleged based upon the facts alleged in the Petition, and which arise out of, are based upon or are related in any way, directly or indirectly, to MFR's engagements by the Funds.

11. The Jarkesy Stipulation of Settlement releases any and all claims, debts, demands, rights, causes of action or liabilities of every nature and description whatsoever (including, but not limited to, claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses, or liability whatsoever), whether based in law or equity, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, matured or not matured, pursuant to federal, state, local, statutory or common law, or any other law, rule or regulation, including both known claims and Unknown Claims, that have been or could have been asserted in any forum by the Funds, or any of them, or the successors or assigns of any of them, against any of the Released Parties, which arise out of, are based on, or relate in any way to, directly or indirectly, any of the allegations, acts, transactions, facts, events, matters, occurrences, acts, representations or omissions involved, set forth, alleged or referred to, in the Petition, or which could have been alleged based upon the facts alleged in the Petition, and which arise out of, are based upon or are related in any way, directly or indirectly, to claims alleged in the Petition against Jarkesy and JTCM by the Funds.

THE COURT HAS NOT DETERMINED THE MERITS OF ANY OF THE CLAIMS MADE BY THE PLAINTIFFS AGAINST, OR THE DEFENSES OF, JARKESY AND JTCM, OR MFR. THIS NOTICE DOES NOT IMPLY THAT THERE HAS BEEN OR WOULD BE ANY FINDING OF VIOLATION OF ANY LAW OR THAT RELIEF IN ANY FORM OR RECOVERY IN ANY AMOUNT COULD BE HAD IF THE ACTION WERE NOT SETTLED.

IV. PLAN OF ALLOCATION – WHAT CAN YOU EXPECT TO RECEIVE UNDER THE PROPOSED SETTLEMENT

12. The proposed Settlements calls for the creation of a "Settlement Fund" from the Cash Settlement Amount, totaling $1,750,000 in cash plus interest. The Settlement will not become effective unless it is approved by the Court. Subject to the Court's approval, a portion of the Settlement Fund will be used to pay Plaintiffs' Counsel's attorneys' fees and reasonable litigation expenses and an award to the Plaintiffs. A portion of the Settlement Fund will also be used to pay taxes due on interest earned by the Settlement Fund, if necessary, and any notice costs and claims administration expenses incurred in the Action. After these deductions from the Settlement Fund have been made, the amount remaining (the "Net Settlement Fund") will be distributed to the Limited Partners as described further below.

13. If you are a Limited Partner, your share of the Net Settlement Fund will depend on the value of your investments in the Funds, the particular Fund in which you invested, the amount of administrative costs, including costs of notice, and the amount awarded by the Court to Plaintiffs' Counsel for attorneys' fees, costs, and expenses, and to the Plaintiffs.

14. The Settlement Administrator will allocate the Net Settlement Fund to the Funds in the following proportions ("Fund Split Percentage"):

Fund	Fund Split Percentage
Fund I	76%
Fund II	24%
	100%

15. The Fund Split Percentage is based upon the Funds' pro rata distribution of shares of Radiant Oil and Gas, Inc. common stock in 2013 ("2013 Distribution"). Plaintiffs obtained data regarding the 2013 distribution from the Funds' independent administrator, Unkar Systems Inc.

16. After applying the Fund Split Percentage to the Net Settlement Fund, the Settlement Administrator will then allocate the Net Settlement Fund to the Limited Partners on a pro rata basis. Each Limited Partner's pro rata share of the Net Settlement Fund is based upon the 2013 Distribution. THERE IS NO NEED TO FILE A CLAIM FORM.

17. The Court has not made any finding that Jarkesy or JTCM, or MFR is liable to the Funds or that the Funds have suffered any compensable damages, nor has the Court made any finding that the payments allowed under this Plan of Allocation are an accurate measure of damages.

V. THE LAWYERS REPRESENTING THE FUNDS

18. Plaintiffs' Counsel (Kaplan Fox & Kilsheimer LLP and Gruber Hurst Elrod Johansene Hail Shank LLP) have expended considerable time litigating this action on a contingent fee basis, and have paid for the expenses of the litigation themselves. As is customarye in this type of litigation, they did so with the expectation that if they were successful ine recovering money for the Funds, they would receive attorneys' fees and be reimbursed for their litigation expenses from the Settlement Fund.e

19. Plaintiffs will file a motion asking the Court to make a payment of attorneys' fees in ane amount not to exceed 33⅓% of the Net Settlement Fund, and for reimbursement ofe their already paid or incurred litigation expenses not to exceed $275,000. The Courte may award less than these amounts. Any amounts awarded by the Court will come oute of the Settlement Fund.e

20. Plaintiffs' Counsel also intends to ask the Court to grant the Plaintiffs up to $10,000e each. These requests are in the range of fees and awards granted to counsel ande plaintiffs, respectively, in other cases of this type. The Court may award less than thesee amounts. Any amounts awarded by the Court will come out of the Settlement Fund.e

VI. THE SETTLEMENT HEARING

21. The Court will hold a Settlement Hearing on December 4, 2015, at 9:00 a.m. before thee Honorable William Burke, District Court of Harris County, Texas, 189th Judiciale District, 201 Caroline, Houston, Texas 77002, for the purpose of determining whether:e (i) the Settlement of the Action upon the terms and subject to the conditions set forth in the Stipulation is fair, reasonable, and adequate and should be approved by the Court, including $1,750,000 in cash plus interest in exchange for releases of claims against Jarkesy and JTCM, and MFR; (ii) the Plaintiffs' proposed plan of allocation of thee Settlement is fair, adequate and reasonable; (iii) the Action against Jarkesy and JTCM,e and MFR should be dismissed with prejudice; and (iv) the Court should approve Plaintiffs' Counsel's motion for attorneys' fees and reimbursement of litigation expenses, and award to Plaintiffs.e

VII. RIGHT TO APPEAR AT THE SETTLEMENT HEARING

22. Any Limited Partner of the Funds may, but is not required to, appear in person at thee Settlement Hearing. If you want to be heard at the Settlement Hearing, then you must first comply with the procedures for objecting, which are set forth below. The Courte has the right to change the hearing dates or times without further notice. Thus, if youe are planning to attend the Settlement Hearing, you should confirm the date and time before going to the Court.e

VIII. RIGHT TO OBJECT AT THE SETTLEMENT HEARING AND PROCEDURES FOR DOING SO

23. Pursuant to the Court's Preliminary Approval Order, Plaintiffs' Counsel will file papers in support of the Settlements, and in support of Plaintiffs' Counsel's motion fore attorneys' fees and reimbursement of litigation expenses, and award to Plaintiffs, on ore before November 4, 2015, and any reply shall be filed on or before November 27, 2015.e

24. Any Limited Partner of the Funds may object and/or appear and show cause, if he, she, or it has any concern why the Settlements should not be approved as fair, reasonable, and adequate, or why the Plaintiffs' proposed plan of allocation of the Settlements is fair, adequate and reasonable, or why the Court should approve Plaintiffs' Counsel's motion for attorneys' fees and reimbursement of litigation expenses, and for award to Plaintiffs, or why other provision(s) of the Settlement contemplated by the Stipulation should or should not be approved; ***provided however***, unless otherwise ordered by the Court, no Limited Partner of the Funds shall be heard unless ***on or before twenty-one (21) calendar days prior to the Settlement Hearing*** (November 13, 2015) that Limited Partner of the Funds has: (1) filed with the Clerk of the Court a written objection to the settlement setting forth: (a) such person's name, legal address, and telephone number; (b) a detailed statement of each objection being made and the grounds for each objection; (c) proof of ownership of any limited partner interest in the Funds, including the amount of any investment and the date of purchase; and (d) any documentation in support of such objection; and (2) if a Limited Partner of the Funds intends to appear and requests to be heard at the Settlement Hearing, such Limited Partner must have, in addition to the requirements of (1) above, filed with the Clerk of the Court: (a) a written notice of such Limited Partner's intention to appear; (b) a statement that indicates the basis for such appearance; (c) the identities of any witnesses the Limited Partner intends to call at the Settlement Hearing and a statement as to the subject of their testimony; and (d) copies of any papers such person intends to attempt to introduce before the Court. If a Limited Partner of the Funds files a written objection and/or written notice of intent to appear, such Limited Partner must also simultaneously serve copies of such notice, proof, statement, and documentation, together with copies of any other papers or briefs such Limited Partner files with the Court (either by hand delivery or by first class mail) upon each of the following:

Clerk of the Court
189th District Court
201 Caroline, Houston, Texas 77002

25. On or before the same date, such person shall also serve a copy of such notice by hand or by first class mail, postage pre-paid, on all counsel of record, at the following addresses:

KAPLAN FOX & KILSHEIMER LLP
Jeffrey P. Campisi
850 Third Avenue
14th Floor
New York, NY 10022

Attorneys for Paul F. Rodney and Edwin Debus derivatively on behalf of the Funds

EDISON, MCDOWELL & HETHERINGTON LLP
Andrew Edison
3200 Southwest Freeway
Ste. 2100
Houston, Texas 77027

Counsel for Defendants Jarkesy and JTCM

FORREST MCELROY, PC
Frank L. McElroy
One Greenway Plaza, Suite 1003
Houston, TX 77046

Counsel for Defendant MFR Group, Inc.

26. The Court may not consider any objection that is not timely filed with the Court or note timely delivered to the above-listed counsel for the Settling Parties. Any Limitede Partner of the Funds who does not make his, her, or its objection in the mannere provided herein shall be deemed to have waived such objection and shall forever bee foreclosed from making any objection to the fairness, reasonableness, or adequacy ofe the Settlements as set forth in the Stipulations, unless otherwise ordered by the Court,e but shall otherwise be bound by the Judgment to be entered and the releases toe be given.e

IX. HOW TO OBTAIN ADDITIONAL INFORMATION

27. This Notice summarizes the Settlements. It is not a complete statement of the eventse underlying or surrounding the Action or the Settlements. Although the Settling Partiese believe that the descriptions about the Settlements that are contained in the Notice ise accurate in all material respects, in the event of any inconsistencies between thee descriptions in the Notice and the Settlements, the Settlements will control.e

28. You may inspect the Settlements and other papers filed in the Action at thee Harris County District Clerk's office. However, you must appear in person to inspecte these documents. The Clerk's office cannot mail copies to you. Further,e Plaintiffs' Counsel shall, at the time Notice is mailed to the Limited Partners, post thee copies of the Notice and Stipulations with Exhibits on its website:e http://www.kaplanfox.com/practiceareas/securitieslitigation/cases/932-johnthomas.html.e You may refer to this website for the complete copies of these documents. You maye contact Plaintiffs' counsel by phone at 1-800-290-1952.e

29. Further, you may contact the Settlement Administrator by mail at *Rodney v. John Thomas Capital Management* Settlement, KCC Class Action Services, P.O. Box 40008,e College Station, TX 77842-4008 or by email at PatriotBridgeSettlement@kccllc.com.e

30. PLEASE DO NOT CALL, WRITE, OR OTHERWISE DIRECT QUESTIONS TOe EITHER THE COURT OR THE CLERK'S OFFICE. Any questions you have aboute matters in this Notice should be directed by telephone or in writing to Plaintiffs'e Counsel, Kaplan Fox & Kilsheimer LLP (Jeffrey P. Campisi, Esq.) at the phone numbere and/or address set forth above.e

BY ORDER OF THE 189th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS

EXHIBIT 2

CAUSE NO. 2013-54408

PAUL F. RODNEY, derivatively on behalf of PATRIOT BRIDGE AND OPPORTUNITY FUND LP I, and EDWIN DEBUS, derivatively on behalf of PATRIOT BRIDGE AND OPPORTUNITY FUND LP II, Plaintiffs, vs. JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, n/k/a PATRIOT28 LLC, GEORGE R. JARKESY JR., JOHN THOMAS FINANCIAL, INC., ANASTASIOS "TOMMY" BELESIS, ATB HOLDING LLC, MFR, P.C., also known as MFR GROUP, INC., DOEREN MAYHEW & CO., P.C., DOEREN MAYHEW TEXAS, PLLC, SOUTH PADRE VENTURES 2, LLC, successors to MFR, P.C., and JUAN PADILLA, Defendants, PATRIOT BRIDGE AND OPPORTUNITY FUND LP I, and PATRIOT BRIDGE AND OPPORTUNITY FUND LP II, as nominal Defendants.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 189th JUDICIAL DISTRICT

NOTICE OF PENDENCY AND SETTLMENT OF DERIVATIVE LITIGATION HEARING THEREON, AND RIGHT TO APPEAR

TO: ALL LIMITED PARTNERS OF PATRIOT BRIDGE AND OPPORTUNITY FUND L.P. II (A/K/A THE JOHN THOMAS BRIDGE AND OPPORTUNITY FUND, L.P. II) ("FUND II")

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. THIS NOTICE RELATES TO A PROPOSED SETTLEMENT AND DISMISSAL OF LITIGATION AND CONTAINS IMPORTANT INFORMATION REGARDING YOUR RIGHTS. YOUR RIGHTS MAY BE AFFECTED BY THESE LEGAL PROCEEDINGS. IF THE COURT APPROVES DISMISSAL, YOU WILL BE FOREVER BARRED FROM CONTESTING THE APPROVAL OF THE PROPOSED PARTIAL SETTLEMENT.

THE COURT HAS MADE NO FINDINGS OR DETERMINATIONS CONCERNING THE MERITS OF THE ACTION. THE RECITATION OF THE BACKGROUND AND CIRCUMSTANCES OF THE DISMISSAL CONTAINED HEREIN DO NOT CONSTITUTE THE FINDINGS OF THE COURT. IT IS BASED ON REPRESENTATIONS MADE TO THE COURT BY COUNSEL FOR THE SETTLING PARTIES.

Notice is hereby provided to you of the proposed settlement and dismissal (the "Settlement") in the above-captioned derivative lawsuit (the "Action"). This Notice is provided by order of the 189th Judicial District Court, for Harris County, Texas (the "Court"). It is not an expression of any opinion by the Court. It is to notify you of the terms of the proposed Settlement and Dismissal of the Action.

I. WHY YOU HAVE RECEIVED THIS NOTICE

This Notice provides information regarding the Settlement of a shareholder derivative Action. Plaintiff Ed Debus ("Plaintiff") has brought the Action derivatively on behalf of Fund II. Plaintiff and Defendants and

John Thomas Financial, Inc. ("JTF"), Anastasios "Tommy" Belesis ("Belesis"), ATB Holding LLC ("ATB") (together, the "Settling Parties") have agreed upon terms to settle the Action and have signed written Stipulation of Settlement (the "Stipulation") setting forth those settlement terms.

On April 22, 2016, at 11 a.m., the Court will hold a hearing (the "Settlement Hearing") in the District Court for Harris County, Texas, 189th Judicial District, 201 Caroline Street, Houston, Texas 77002 before the Honorable William Burke. The purpose of the Settlement Hearing is to determine whether: (i) the Settlement of the Action upon the terms and subject to the conditions set forth in the Stipulation are fair, reasonable, and adequate and should be approved by the Court, including $300,000 in cash plus interest in exchange for releases of the Fund II's claims against JTF, Belesis, ATB; (ii) whether the Plaintiff's proposed plan of allocation to the Limited Partners of Fund II of the Settlement is fair, adequate and reasonable; (iii) the Action against JTF, Belesis, ATB should be dismissed with prejudice; and (iv) whether the Court should approve Plaintiff's Counsel's motion for attorneys' fees and reimbursement of litigation expenses, and any motion for an incentive award to Plaintiff.

II. SUMMARY OF THE LITIGATION

This Action was filed on September 16, 2013, and on March 10, 2015, Plaintiff's filed the Second Amended Petition ("Petition"). The Petition alleges breach of fiduciary duty (Count I) and aiding and abetting breach of fiduciary duty (Count II), waste (Count III), professional negligence (Count IV), civil conspiracy (Count V), and breach of contract (Counts VI and VII) against various defendants.

After litigating their respective claims and/or defenses over the course of several years, counsel for the Settling Parties engaged in arm's-length negotiations concerning the terms and conditions of a potential resolution of the Action, including hotly contested mediation before a neutral mediator, Trey Bergman of Bergman ADR Group (the "Mediator"). Following the mediation and further negotiations, Plaintiff and JTF, Belesis, ATB reached an agreement providing for the settlement of the Action as documented by the Settlement Agreement dated October 1, 2015 ("Stipulation of Settlement").

The Settling Parties recognize the time and expense that would be incurred by further litigation in the Action and the uncertainties inherent in such litigation and that the interests of the Settling Parties would best be served by a settlement of the Action. Plaintiff and his counsel have preliminarily determined that the settlement of the Action, upon the terms outlined in the Stipulation and summarized herein, is fair, reasonable, adequate, and in the best interest of Fund II and its limited partners.

Each of the Settling Parties denies having committed any violation of law or breach of duty. JTF, Belesis, ATB entered into the Stipulation of Settlement solely because they contend and believe that the settlement of the Action, as outlined in the Stipulation of Settlement, would eliminate the burden, risk, and expense of further litigation.

THE SUMMARY OF LITIGATION PROVIDED HEREIN DOES NOT CONSTITUTE FINDINGS OF THE COURT. IT IS BASED ON STATEMENTS OF THE SETTLING PARTIES AND SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES RAISED BY ANY OF THE SETTLING PARTIES. A COPY OF PLAINTIFF'S PLEADINGS IS PUBLICLY AVAILABLE IN THE COURT'S FILE.

III.o SUMMARY OF THE SETTLEMENTo

The principal terms, conditions, and other matters that are part of the Settlement, which are subject to approval by the Court, are summarized below. This summary should be read in conjunction with, and is qualified in its entirety by reference to, the text of the Stipulation of Settlement, which are available for your inspection as discussed below under the heading, "How to Obtain Additional Information." Capitalized terms used herein and not otherwise defined are deemed to have the same meaning ascribed to them in the Stipulation of Settlement.

In summary, as a result of the foregoing and the negotiations between counsel for the Settling Parties, the Settling Parties to the Action have agreed to the Settlement, which will be effective only upon final approval by the Court. Pursuant to the Settlement, Fund II will receive $300,000 in cash to be paid on or before October 15, 2016 in exchange for releases of claims against JTF, Belesis, ATB. The payment is secured by a Judgment by Confession signed and sworn to by Mr. Belesis.

The Stipulation of Settlement releases any and all claims, debts, demands, rights, causes of action or liabilities of every nature and description whatsoever (including, but not limited to, claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses, or liability whatsoever), whether based in law or equity, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, matured or not matured, pursuant to federal, state, local, statutory or common law, or any other law, rule or regulation, including both known claims and Unknown Claims, that have been or could have been asserted in any forum by Fund II, or any of them, or the successors or assigns of any of them, against any of the Released Party, which arise out of, are based on, or relate in any way to, directly or indirectly, any of the allegations, acts, transactions, facts, events, matters, occurrences, acts, representations or omissions involved, set forth, alleged or referred to, in the Petition, or which could have been alleged based upon the facts alleged in the Petition, and which arise out of, are based upon or are related in any way, directly or

indirectly, to claims alleged in the Petition against Belesis, JTF or ATB by Fund II.

THE COURT HAS NOT DETERMINED THE MERITS OF ANY OF THE CLAIMS MADE BY THE PLAINTIFF AGAINST, OR THE DEFENSES OF, JTF, BELESIS, OR ATB. THIS NOTICE DOES NOT IMPLY THAT THERE HAS BEEN OR WOULD BE ANY FINDING OF VIOLATION OF ANY LAW OR THAT RELIEF IN ANY FORM OR RECOVERY IN ANY AMOUNT COULD BE HAD IF THE ACTION WERE NOT SETTLED.

IV.o PLAN OF ALLOCATION – WHAT CAN YOU EXPECT TO RECEIVE UNDER THEo PROPOSED SETTLEMENTo

The proposed Settlement calls for the creation of a "Settlement Fund" from the Cash Settlement Amount, totaling $300,000 in cash plus interest earned by the Settlement Fund. The Settlement Amount will be paid on or before October 15, 2016.

The Settlement will not become effective unless it is approved by the Court. Subject to the Court's approval, a portion of the Settlement Fund will be used to pay Plaintiff's Counsel's attorneys' fees and reasonable litigation expenses and an award to the Plaintiff. A portion of the Settlement Fund will also be used to pay taxes due on interest earned by the Settlement Fund, if necessary, and any notice costs and claims administration expenses incurred in the Action. After these deductions from the Settlement Fund have been made, the amount remaining (the "Net Settlement Fund") will be distributed to the Limited Partners as described further below.

If you are a Limited Partner, your share of the Net Settlement Fund will depend on the value of your investment in Fund II, the amount of administrative costs, including costs of notice, and the amount awarded by the Court to Plaintiff's Counsel for attorneys' fees, costs, and expenses, and to the Plaintiff.

The Settlement Administrator will distribute the Net Settlement Fund on a pro rata basis that is based upon Fund II's distribution of shares of Radiant Oil and Gas, Inc. common stock in 2013 ("2013 Distribution"). Plaintiff's Counsel obtained data regarding the 2013 Distribution from Fund II's independent administrator, Unkar Systems Inc.

The Court has not made any finding that Belesis, ATB or JTF is liable to Fund II or that Fund II has suffered any compensable damages, nor has the Court made any finding that the payments allowed under this Plan of Allocation are an accurate measure of damages.

V.o THE LAWYERS REPRESENTING FUND IIo

Plaintiff's Counsel (Kaplan Fox & Kilsheimer LLP and Gruber Hurst Elrod Johansen Hail Shanko LLP) have expended considerable time litigating this action on a contingent fee basis, and have paid for the expenses of the litigation themselves. As is customary in this type of litigation, they did so with the expectation that if they were successful in recovering money for Fund II, they would receive attorneys' fees and be reimbursed for their litigation expenses from the Settlement Fund.

Plaintiff's will file a motion asking the Court to make a payment of attorneys' fees in an amount not to exceed 33⅓% of the Net Settlement Fund, and for reimbursement of their already paid or incurred litigation expenses not to exceed $25,000. The Court may award less than these amounts. Any amounts awarded by the Court will come out of the Settlement Fund.

Plaintiffs' Counsel also intends to ask the Court to grant the Plaintiff of up to $5,000. This requests is in the range of fees and awards granted to counsel and plaintiffs, respectively, in other cases of this type. The Court may award less than these amounts. Any amounts awarded by the Court will come out of the Settlement Fund.

VI. THE SETTLEMENT HEARING

The Court will hold a Settlement Hearing on April 22, 2016, at 11 a.m. before the Honorable William Burke, District Court of Harris County, Texas, 189th Judicial District, 201 Caroline, Houston, Texas 77002, for the purpose of determining whether: (i) the Settlement of the Action upon the terms and subject to the conditions set forth in the Stipulation is fair, reasonable, and adequate and should be approved by the Court, including $300,000 in cash plus interest earned by the Settlement Fund in exchange for releases of claims against JTF, Belesis and ATB; (ii) whether the Plaintiff's proposed plan of allocation of the Settlement is fair, adequate and reasonable; (iii) the Action against JTF, Belesis and ATB should be dismissed with prejudice; and (iv) whether the Court should approve Plaintiff's Counsel's motion for attorneys' fees and reimbursement ofditigation expenses, and award to Plaintiff.

VII. RIGHT TO APPEAR AT THE SETTLEMENT HEARING

Any Limited Partner of Fund II may, but is not required to, appear in person at the Settlement Hearing. If you want to be heard at the Settlement Hearing, then you must first comply with the procedures for objecting, which are set forth below. The Court has the right to change the hearing dates or times without further notice. Thus, if you are planning to attend the Settlement Hearing, you should confirm the date and time before going to the Court.

VIII. RIGHT TO OBJECT AT THE SETTLEMENT HEARING AND PROCEDURES FOR DOING SO

Pursuant to the Court's Preliminary Approval Order, Plaintiffs' Counsel will file papers in support of the Settlements, and in support of Plaintiff's Counsel's motion for attorneys' fees and reimbursement ofditigation expenses, and award to Plaintiffs, on or before March 23, 2016, and any reply shall be filed on or before April 15, 2016.

Any Limited Partner of Fund II may object and/or appear and show cause, if he, she, or it has any concern why the Settlement should not be approved as fair, reasonable, and adequate, or why the Plaintiff's proposed plan of allocation of the Settlement is fair, adequate and reasonable, or why the Court should approve Plaintiff's Counsel's motion for attorneys' fees and reimbursement of litigation expenses, and for award to Plaintiff, or why other provision(s) of the Settlement contemplated by the Stipulation should or should not be approved; ***provided however***, unless otherwise ordered by the Court, no Limited Partner of Fund II shall be heard unless ***on or before 21 calendar days prior to the Settlement Hearing*** or April 1, 2016 that Limited Partner of Fund II has: (1) filed with the Clerk of the Court a written objection to the settlement setting forth: (a)esuch person's name, legal address, and telephone number; (b) a detailed statement of each objection being made and the grounds for each objection; (c) proof of ownership of any limited partner interest in Fund II, including the amount of any investment and the date of purchase; and (e) any documentation in support of such objection; and (2) if a Limited Partner of Fund II intends to appear and requests to be heard at the Settlement Hearing, such Limited Partner must have, in addition to the requirements of (1) above, filed with the Clerk of the Court: (a) a written notice of such Limited Partner's intention to appear; (b) a statement that indicates thee basis for such appearance; (c) the identities of any witnesses the Limited Partner intends to call at thee Settlement Hearing and a statement as to the subject of their testimony; and (d) copies of any papers suche person intends to attempt to introduce before the Court. If a Limited Partner of Fund II files a writtene objection and/or written notice of intent to appear, such Limited Partner must also simultaneously serve copies of such notice, proof, statement, and documentation, together with copies of any other papers or briefs suche Limited Partner files with the Court (either by hand delivery or by first class mail) upon each of the following:e

Clerk of the Court
189th District Court
201 Caroline,
Houston, Texas 77002

On or before the same date, such person shall also serve a copy of such notice by hand or by first class mail, postage pre-paid, on all counsel of record, at the following addresses:

Kaplan Fox & Kilsheimer LLP
Jeffrey P. Campisi
850 Third Avenue
14th Floor
New York, NY 10022
Attorneys for Edwin Debus derivatively on behalf of Fund II

Troy Tindal, Esq.
Tindal Law Firm
17225 El Camino Real, Suite 190
Houston, Texas 77058
Counsel for Defendants JTF, Belesis and ATB

The Court may not consider any objection that is not timely filed with the Court or not timely delivered to the above-listed counsel for the Settling Parties. Any Limited Partner of Fund II who does not make his, her, or its objection in the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the Settlement as set forth in the Stipulation, unless otherwise ordered by the Court, but shall otherwise be bound by the Judgment to be entered and the releases to be given.

IX.e HOW TO OBTAIN ADDITIONAL INFORMATIONe

This Notice summarizes the Settlement. It is not a complete statement of the events underlying or surrounding the Action or the Settlement. Although the Settling Parties believe that the descriptions about the Settlement that are contained in the Notice is accurate in all material respects, in the event of any inconsistencies between the descriptions in the Notice and the Stipulation of Settlement, the Stipulation of Settlement will control.

You may inspect the filings in the Action at the Harris County District Clerk's office. However, you must appear in person to inspect these documents. The Clerk's office cannot mail copies to you. Further, Plaintiffs' Counsel shall, at the time Notice is mailed to the Limited Partners, post the copies of the Notice and Stipulation with Exhibits on its website: www.kaplanfox.com. You may refer to this website for the complete copies of these documents.

PLEASE DO NOT CALL, WRITE, OR OTHERWISE DIRECT QUESTIONS TO EITHER THE COURT OR THE CLERK'S OFFICE. Any questions you have about matters in this Notice should be directed by telephone or in writing to Plaintiff's Counsel, Kaplan Fox & Kilsheimer LLP (Jeffrey P. Campisi, Esq.) at the address set forth above, or at 1-800-290-1952, or (212) 687-1980.

BY ORDER OF THE 189th JUDICIAL DISTRICT COURT, HARRIS COUNTY, TEXAS

EXHIBIT 3

CAUSE NO. 2013-54408

PAUL F. RODNEY, derivatively on behalf of PATRIOT BRIDGE AND OPPORTUNITY FUND LP I, and EDWIN DEBUS, derivatively on behalf of PATRIOT BRIDGE AND OPPORTUNITY FUND LP II, Plaintiffs, vs. JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC, n/k/a PATRIOT28 LLC, GEORGE R. JARKESY JR., JOHN THOMAS FINANCIAL, INC., ANASTASIOS "TOMMY" BELESIS, ATB HOLDING LLC, MFR, P.C., also known as MFR GROUP, INC., DOEREN MAYHEW & CO., P.C., DOEREN MAYHEW TEXAS, PLLC, SOUTH PADRE VENTURES 2, LLC, successors to MFR, P.C., and JUAN PADILLA, Defendants, PATRIOT BRIDGE AND OPPORTUNITY FUND LP I, and PATRIOT BRIDGE AND OPPORTUNITY FUND LP II, as nominal Defendants.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 189th JUDICIAL DISTRICT

ORDER OF FINAL JUDGMENT AND DISMISSAL AS TO GEORGE R. JARKESY, JR. AND JOHN THOMAS CAPITAL MANAGEMENT LLC

WHEREAS, the Court has been informed that the Plaintiffs in the above-captioned action ("Action"), PAUL F. RODNEY and EDWIN DEBUS, by their attorneys, on behalf of Patriot Bridge and Opportunity Fund LP I ("Fund I") and Patriot Bridge and Opportunity Fund LP II ("Fund II") ("Plaintiffs"), and Defendants George R. Jarkesy, Jr. ("Jarkesy") and

John Thomas Capital Management LLC (a/k/a Patriot28 LLC) ("Defendants") have reached a mutually agreeable settlement of this Action and have entered into a Joint Stipulation of Dismissal With Prejudice;

WHEREAS, for good cause shown, and upon due consideration of the Joint Stipulation of Dismissal with Prejudice and Final Order of Dismissal;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Order incorporates by reference the definitions in the Stipulation of Settlement between Plaintiffs and Defendant dated July 20, 2015, and all capitalized terms used herein shall have the same meanings as set forth in the Stipulation of Settlement.

2. This Court has the requisite jurisdiction to consider and enter this Order.

3. This Court hereby dismisses the Action in its entirety with prejudice and without costs (except as otherwise provided in the Stipulation).

4. The Court finds that the distribution of the Notice: (i) was implemented in accordance with the Preliminary Approval Order; (ii) constituted the best notice reasonably practicable under the circumstances; (iii) constituted notice that was reasonably calculated, under the circumstances, to apprise Limited Partners of Fund I and Fund II of the pendency of the Action; of the effect of the Settlement; of Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of expenses; of their right to object to the Settlement, the Plan of Allocation, Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of expenses; and of their right to appear at the Settlement Hearing; (iv) constituted due, adequate, and sufficient notice to all persons or entities entitled to receive notice of the proposed Settlement; and (v) satisfied the requirements the United States Constitution (including the Due Process Clause), and all other applicable law and rules.

5.e This Court hereby fully and finally approves the Settlement set forth in thee Stipulation in all respects (including, without limitation, the amount of the Settlement, the releases provided for therein, including the release of the Released Claims as against the Released Parties, and the dismissal with prejudice of claims against the Defendants), and finds that the Settlement is, in all respects, fair, reasonable and adequate to the Parties and is in the best interests of Plaintiffs and Fund I and Fund II's limited partners. The Court further finds that the Settlement set forth in the Stipulation is the result of arm's-length negotiations between experienced counsel representing the interests of the Parties. Accordingly, the Settlemente embodied in the Stipulation is hereby finally approved in all respects. The Parties are hereby directed to implement, perform and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation.

6.e The mutual releases as set forth in the Stipulation, together with thee definitions relating thereto, are expressly incorporated herein in all respects. Accordingly, as of the Effective Date:

a.e Plaintiffs, on behalf of the Funds, their successors and assigns, and any other person or entity claiming (now or in the future) through or on behalf of Plaintiffs, shall bee deemed to have, and by operation of this Order of Final Judgment and Dismissal shall have,e fully, finally, and forever released, relinquished, and discharged all Released Claims againste Defendant and shall have covenanted not to sue Defendant with respect to all such Releasede Claims, and shall be permanently barred and enjoined from instituting, commencing, or prosecuting any such Released Claims against Defendant.

b.e Defendants shall be deemed to have, and by operation of this Bar Order of Finale Judgment and Dismissal shall have, fully, finally and forever released, relinquished and

discharged Plaintiffs from all Settling Parties' Claims, except to enforce the releases and other terms and conditions contained in the Stipulation.

7.e All persons or entities are hereby permanently enjoined, barred ande restrained from commencing, prosecuting or asserting any action, for contribution, indemnity or otherwise, against Defendants seeking, as damages or otherwise, the recovery of all or any part of any liability or any settlement which they pay or are obligated to pay or agree to pay to Plaintiffs, as a result of such persons' or entities' participation in any acts, facts, statements or omissions that were or could have been alleged in the Action as claims, cross-claims, counterclaims, third-party claims or otherwise, whether asserted in the Action in this Court or in any federal or state court or any other court, arbitration proceeding, administrative agency ore other forum in the United States or elsewhere.

8.e Upon the Effective Date, all obligations of Defendants to Plaintiffs arisinge out of, based upon, or otherwise related to the transactions and occurrences that were alleged, ore could have been alleged, on behalf of Plaintiffs in the Petition in the Action shall be fully, finally, and forever discharged, and all persons and entities shall be permanently barred and enjoined from instituting, prosecuting, pursuing or litigating in any manner (regardless of whether such persons or entities purport to act individually, representatively, or in any othere capacity and regardless of whether such persons or entities purport to allege direct claims, claims for contribution, indemnification, or reimbursement, or any other claims) any such obligations.

9. This Order of Final Judgment and Dismissal is a final judgment in the Action as to all claims against Defendants, on the one hand, and Plaintiffs, on the other. This Court finds that there is no just reason for delay and expressly directs entry of judgment as set forth herein.

10. This Court retains continuing jurisdiction over all proceedings related to the implementation and enforcement of the terms of the Stipulation.

11. This Court hereby finds that Plaintiffs and Defendants and their respective counsel have complied with the requirement of Rule 13 of the Texas Rules of Civil Procedure as to all complaints, responsive pleadings, and dispositive motions related to the Released Claims, and that insofar as it relates to the Released Claims, the Action was not brought for any improper purpose and is not unwarranted by existing law or legally frivolous.

12. In the event that this Order of Final Judgment and Dismissal is reversed on appeal, the provisions of Paragraph III.F of the Stipulation of Settlement shall apply.

13. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation of Settlement.

14. By the entry of this Final Judgment, the Court's prior judgments in this cause dated December 5, 2015, and May 13, 2016, are also made final as all parties and claims have been disposed of and the judgments are final for purposes of appeal.

IT IS SO ORDERED.

DATED: _____

Signed: 2/3/2017

_____
THE HONORABLE WILLIAM BURKE

EXHIBIT B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
JOHN THOMAS CAPITAL MANAGMENT GROUP LLC d/b/a PATRIOT28 LLC,	:	File No. 3-15255
	:	
GEORGE R. JARKESY, JR.,	:	
	:	
JOHN THOMAS FINANCIAL, INC., and	:	
	:	
ANASTASIOS "TOMMY" BELESIS,	:	
	:	
Respondents.	:	

RESPONDENTS' RESPONSE TO ADMINISTRATIVE PROCEEDINGS ORDER DATED MARCH 14, 2018

Karen Cook, Esq.
Karen Cook, PLLC
E-mail: karen@karencooklaw.com
Phone: 214.593.6429
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

S. Michael McColloch, Esq.
S. Michael McColloch, PLLC
E-mail: smm@mccolloch-law.com
Phone: 214.593.6415
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

Counsel for:
John Thomas Capital Management Group d/b/a Patriot28 LLC and George Jarkesy, Jr

Respondents John Thomas Capital Management d/b/a Patriot28 LLC ("JTCM") and George Jarkesy ("Jarkesy") (collectively "Respondents"), submit this, their Response to Administrative Proceedings Order Dated March 14, 2018 ("Order"), requesting additional evidence and argument regarding offset, and respectfully show as follows:

Preliminary Statement

Subsequent to the Commission's initiation of the administrative proceeding against Respondents, on September 16, 2013, Paul F. Rodney, derivatively on behalf of the limited partners of Patriot Bridge and Opportunity Fund LP I, and later Edwin Debus, derivatively on behalf of the limited partners of Patriot Bridge and Opportunity Fund LP II, brought suit against Respondents amongst others in Harris County, Texas—Cause No. 2013-54408 (the "Related Investor Action").[1] Plaintiffs in the Related Investor Action alleged facts and claims that mirror those advanced by the Division in this enforcement. The plaintiffs also brought claims not available to the Commission of (1) breach of fiduciary duty, (2) waste, (3) negligence, (4) breach of contract, and specifically sought restitution and disgorgement of all monies paid on behalf of investors.

Between July 20, 2015, and October 1, 2015, the parties settled the Related Investor Action for $2,050,000, of which $500,000 was contributed by Respondents. Subsequently, on February 3, 2017, after hearing, the Texas court signed orders (1) giving final approval of the settlement; (2) establishing a Settlement Fund and distribution procedures for the Settlement Proceeds; and (3) dismissing the Related Investor Action.

[1] A Copy of the Second Amended Petition filed in the Related Investor Action (the "RIA Petition") is attached to the Division of Enforcement's Opposition to Respondents' January 5, 2018 Submission Opposing Ratification, dated January 19, 2018.

In their Response to the Commission's November 30, 2017, Order Asserting Ratification of Prior Appointment of Administrative Law Judges, Respondents argued their entitlement to offset of the disgorgement award ordered by Administrative Law Judge ("ALJ") Foelak in this action. In the resulting Order ALJ Foelak requested additional submissions regarding (1) why Respondents should be credited for settlement payments made by MFR or JTF/Belesis; (2) more detail concerning the basis of the related investor lawsuit leading to the settlement for which Respondents seek offset; (3) "the extent to which the settlement amount is attributable to the misconduct underlying the [undersigned's] disgorgement order; and (4) whether settlement payments have been made.

Arguments and Authorities

A. Disgorgement is Subject to Penalty Limits

The Commission can no longer seek disgorgement and penalty as separate remedies in excess of penalty limits, based upon the decision of the U.S. Supreme Court in *Kokesh v. S.E.C.*, *SEC*, 137 S. Ct. 1635 (2017). Although—as the Division points out—the federal securities statutes authorize seeking disgorgement as a separate remedy from a penalty in administrative proceedings, the Supreme Court has now determined—upon analyzing the Commission's practices and the arguments of its counsel—that the way the *SEC* uses disgorgement, *it is a penalty*. Because the SEC does not use disgorgement awards as restitution to compensate those harmed by the respective securities violators, the Supreme Court's determination that SEC disgorgement is a penalty now subjects that remedy to the statutory limits on penalty awards.

The Order recites the ALJ's penalty award from the Initial Decision:

> "a third-tier civil penalty of $450,000 imposed jointly and severally on JTCM and Jarkesy, as authorized by Sections 8A of the Securities Act, 21B of the Exchange Act, 203(i) of the Advisers Act, and 9(d) of the Investment Company Act. *Id.* at *93-97. The applicable maximum third-tier penalty for each violative act or omission was $150,000; in calculating the $450,000 penalty, the [Initial Decision] considered the violations as three courses of action..."

(Order, pg. 3). The maximum third-tier penalty for the "three units of violation" found in the Initial Decision, at the statutory limit, is $450,000. *See* 17 C.F.R. § 201.1001 (maximum third-tier penalty is $150,000 for natural persons per unit of violation for each unit occurring between March 4, 2009 and March 5, 2013); *accord In re. John Thomas Cap. Mgmt. Grp. LLC*, Initial Decision Rel. No. 693, 2014 WL 5304908, at *31 (Oct. 17, 2014). Neither the ALJ nor the Commission can impose a penalty in excess of that amount by adding on an additional penalty with another name. Presumably the Commission could allocate an award between "penalty" and "disgorgement" within the statutory limits, but monetary awards cannot exceed the statutory limits for penalties.

The limits on disgorgement dictated by the Supreme Court and the limits on penalties dictated by Congress are dispositive and preclude the imposition of any monetary remedy in excess of $450,000 jointly or severally against the Respondents, by whatever name they are called.

B. Respondents Must Be Credited for Their Contributions to Settle the Related Investor Action.

The basis of the Related Investor Action is the same as this proceeding. ALJ Foelak identified the following as the basis for the disgorgement award: "[t]he violations occurred through material misstatements and omissions including as to diversification of investments, funds set aside to pay insurance premiums, the true relationship between JTCM/Jarkesy and JTF/Belesis, and valuation of Fund assets." Order, at p.2.

In the RIA Petition, plaintiffs brought claims of (1) breach of fiduciary duty, (2) waste, (3) negligence, (4) breach of contract, and specifically sought restitution and disgorgement of all monies paid on behalf of investors. *See* RIA Petition, at pps. 64-70. The Related Investor Action claims allege the same underlying conduct at issue in this proceeding, the exact same set of operative facts and the same theories of fraud. The following is a list of facts asserted and claims made in the RIA Petition as they relate to the underlying conduct for which disgorgement and penalties were awarded in this action:

1. **RIA Petition Alleged Facts and Claims Related to Material Misstatements and Omissions as to Diversification of Investments and funds set aside to pay insurance premiums.**

- "Jarkesy and JTCM breached their agreement with the limited partners by ignoring the investment guidelines that governed the funds." RIA Petition at ¶ 29.

- Jarkesy's and JTCM's misrepresentations included incorrect valuation of the Funds' equity positions in certain companies, incorrect valuations of the Funds' short-term notes provided to other companies, and overstating the value of at least two of the Funds' life settlement policies." *Id.* at ¶ 47.

- "None of the promissory notes issued after November 2010 was secured, violating Defendants Jarkesy and JTCM representations that the bridge loans would be 'collateralized.'" *Id.* at ¶ 67.

- The Funds raised more than $24 million in aggregate capital contributions, and thus would have been required to commit $12 million toward life settlement policies had they abided by Jarkesy's representations and statements in marketing materials he drafted. Had Jarkesy set aside the approximately $8.135 million that they represented

they represented they would, there would have been sufficient funds to pay the premiums for all of the policies purchased.... The money was not set aside to pay premiums..." *Id.* at ¶ 110.

- "[T]here were long periods of time in 2008 when Jarkesy and JTCM failed to acquire and maintain policies with a total face value of 117% of the investors' capital contributions in the Funds." *Id.* at ¶ 111.

- "[I]n 2009, Jarkesy and JTCM fell short of the insurance coverage they promised investors." *Id.* at ¶ 112.

- "Because Jarkesy and JTCM did not purchase any additional policies after May 2009 but continued to raise capital through at least 2010, the Funds were not in compliance with the 117% requirement at any time from December 31, 2009 forward." *Id.* at ¶ 113.

- "Respondents continued to falsely represent that they had 117% face value." *Id.* at ¶ 114 (citation omitted).

2. RIA Petition Alleged Facts and Claims Related to Material Misstatements and Omissions as to the true relationship between JTCM/Jarkesy and JTF/Belesis.

- "Jarkesy and JTCM intentionally, willfully or with at least gross negligence, elevated the interests of JTF, Belesis and ATB Holding those of the Funds..." *Id.* at ¶ 29; *see also id.* at ¶ 34, 164-171.

- "Jarkesy and JTCM breach their fiduciary duties by: ... ii) failing to disclose to the Funds' limited partners JTCM's and Jarkesy's repeated favoring of the pecuniary interests of Belesis, ATB Holding and JTF." *See Id.* at ¶ 30; *see also* ¶¶ 138-153.

- "While they shared the same brand name, JTCM (the advisor) purported to be wholly independent of JTF (the placement agent).... JTCM's purported indepednance from JTF was a sham designed to enrich Belesis at the expense of the Funds, and to insulate him from future accusations of wrongdoing." *Id.* at ¶¶ 31, 32.

- "Jarkesy and JTCM abandoned their fiduciary duty to the Funds by negotiating arrangements whereby borrowing companies would divert large fees to JTF and Belesis using proceeds received from the Funds." *Id.* at ¶ 33.

- "JTCM – acting through Jarkesy, its manager – represented that it was solely responsible for managing the funds.... In reality, Belesis frequently sought to intervene in the Funds' business decisions. In fact, the Fund copied Belesis as well as JTF's Chief Compliance Officer Castellano and other JTF employees on certain monthly account statements to investors." *Id.* at ¶¶ 127, 130; *see also* ¶¶ 128-129, 131-137.

3. RIA Petition Alleged Facts and Claims Related to Material Misstatements and Omissions as to the valuation of Fund assets.

- "Jarkesy and JTCM breach their fiduciary duties by: i) recording arbitrary valuations without any reasonable basis for certain of the Funds' largest holdings, thus causing the Funds' performance figures to be materially overstated and materially false and misleading; ... and iii) misrepresenting the value of the limited partners' respective capital accounts, and thereby artificially inflating JTCM's and Jarkesy's management fees and expenses." *Id.* at ¶ 30.

- "The Annual Financial Statements JTCM provided to investors ... stated that JTCM "records its investments at fair value" and adopted Financial Accounting Standard 157 for purposes of valuation of the Funds' holdings, although JTCM has no records of its pricing analysis to support its valuation." *Id.* at ¶ 36.

- "At the end of 2011, Jarkesy valued Fund I at approximately $18 million to $20 million and Fund II at approximately $10 million.... According to Jarkesy's testimony in the SEC Action, the Funds' limited partner interests today are almost worthless." *Id.* at ¶ 39 (citation and note omitted).

- "Jarkesy and JTCM wrongfully inflated the value of the Funds' assets under management." *Id.* at ¶ 45.

- "Jarkesy and JTCM misrepresented the value of limited partners' investments in the Funds..." *Id.* at ¶ 47.

- "Defendants Jarkesy and JTCM arbitrarily and inconsistently valued the shares [of Galaxy Media and Marketing Corp.] without any reasonable basis." *Id.* at ¶ 62; *see also id.*, at ¶¶ 63-68, 70.

- "Jarkesy should not have taken advantage of the higher price [of the America West stock] at the end of the year because he knew it to be a temporary boost that he orchestrated by loaning money from the Funds to America West to finance a stock promotion campaign." *Id.* at ¶ 93; *see also id.*, at ¶¶ 94-105.

The conduct underlying the disgorgement award in the instant action is the same alleged conduct underlying the claims in the Related Investor Action. The RIA Petition complains of the misstatements and omissions forming the basis of the disgorgement award.

C. The Settlement Amount in the Related Investor Action Is Attributable to the Same Conduct Underlying the Disgorgement Order in this Matter.

As noted above, the conduct complained of in the Related Investor Action Petition is the same conduct for which the disgorgement award was granted. While the precise state causes of action pursued by the investors are not identical those brought by

the Commission (*i.e.* the related investor action claims of breach of fiduciary duty, waste, negligence, and breach of contract vs. the Commission claims for violations of specific securities laws), the underlying conduct and the substantive fraud allegations forming the crux of the claims in both instances is the same. Based on those substantively-identical claims, the aggrieved investors—all of them—sought the remedy of disgorgement. *See* IRA Petition at 70 (plaintiffs sought "disgorgement of all profits, benefits, and other compensation" of Respondents).

Where the underlying conduct forming the basis of the claims is the same, offset for settlement in the Related Investor Action is necessary. *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996); *In re. Mutual Funds Inv. Litig.*, 681 F. Supp. 2d 622, 626 (D. Md. 2010) (offset against disgorgement award proper for amounts paid in private suits where private suits were based on substantially same facts); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Penn. 1976) (noting that any settlement payment in a related investor action properly "serve[s] to offset part or all of a judgment for disgorgement"); *see also In re. Timbervest, LLC*, SEC Release No. 4492, 2016 WL 4426915, at *2 (Aug. 22, 2016) (offset to disgorgement for private settlement applicable where "suit was premised on the same underlying 'misconduct [that] ... was recently the subject of [respondents'] administrative enforcement action before the United States Securities and Exchange Commission').

First Jersey mirrors the facts set forth here. The SEC brought claims (in federal district court as opposed to an administrative proceeding) against the defendants for various violations of securities laws. *See id.*, 101 F.3d at 1456-61. The district court found in favor of the SEC and awarded disgorgement of $27 million. *Id.* Defendants

brought to the district court's attention the $5 million settlement in the related investor class action suit and the district court reduced the disgorgement amount by the amount of the settlement. *Id.* This reduction was upheld on appeal, the Second Circuit holding that offset in the total amount of the settlement was required because the settlement reimbursed the plaintiffs for the same conduct in the SEC action. *See Id.*; *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Penn. 1976) (disgorgement award should be offset for any restitution previously paid by settlement or otherwise); *see also Timbervest, LLC,* 2016 WL 4426915, at *2 (settlement offset appropriate where the private suit is based on the same "misconduct" as administrative enforcement proceeding).

However, any payment back to investors, regardless of the nature of the payment, would reduce the amount by which the party was unjustly enriched.

D. Settlement Payments in the Related Investor Action Have Been Made.

Plaintiffs' counsel in the Related Investor Action have confirmed that Respondents paid the full settlement amount. A copy of the email confirmation is attached as Exhibit 1. *See e.g., In re. Timbervest*, LLC, 2016 WL 4426915, at *2 (Letter from Plaintiff in related investor action sufficient to demonstrate settlement for purposes of offset).[2]

Conclusion

Based upon the arguments and authorities above, the disgorgement award in the Initial Decision should be vacated or, in the alternative, credit should be given for the amount Respondents paid toward the settlement.

[2] Respondents continue to assert that the Initial Decision improperly failed to give credit for legitimate business expenses, such as legal fees and accounting costs, and improperly failed to give credit for the personal loss of $600,000 of untainted funds invested by Mr. Jarkesy into the venture.

Respectfully Submitted,

By: 

Karen Cook, Esq.
Karen Cook, PLLC
E-mail: karen@karencooklaw.com
Phone: 214.593.6429
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

S. Michael McColloch, Esq.
S. Michael McColloch, PLLC
E-mail: smm@mccolloch-law.com
Phone: 214.593.6415
1717 McKinney Avenue, Suite 700
Dallas, Texas 75202
Fax: 214.593.6410

Counsel for John Thomas Capital Management Group d/b/a Patriot28 LLC and George Jarkesy, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 13, 2018, the foregoing document was served on the parties below and in the manner indicated.

By: 
Karen Cook, Esq.

Brent Murphy, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 3628
Washington, DC 20549
VIA FACSIMILE: 202.772.9324
VIA FEDERAL EXPRESS

The Honorable Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 2557
Washington, DC 20549
VIA U.S. MAIL
VIA E-MAIL: alj@sec.gov

Todd D. Brody
Senior Trial Counsel
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, 4th Floor
New York, NY 10281-1022
VIA U.S. MAIL
VIA E-MAIL: brodyt@sec.gov

Alix Biel
Senior Staff Attorney
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, 4th Floor
New York, NY 10281-1022
VIA U.S. MAIL
VIA E-MAIL: biela@sec.gov

Subject: FW: Paul Rodney v. JTCMG, LLC Cause # 201354408
Date: Friday, April 13, 2018 at 12:34:11 PM Central Daylight Time
From: Jeff Campisi <jcampisi@kaplanfox.com>
To: Karen Cook <karen@karencooklaw.com>

Karen, Mr. Jarkesy paid the $500,000 settlement. I would think your client has records of the wire transfers to the settlement fund that he could submit.

Jeff Campisi
Kaplan Fox

From: Michael K. Hurst [mailto:MHurst@lynnllp.com]
Sent: Thursday, April 12, 2018 3:44 PM
To: Jeff Campisi <jcampisi@kaplanfox.com>
Cc: Jonathan R. Childers <JChilders@lynnllp.com>
Subject: Fwd: Paul Rodney v. JTCMG, LLC Cause # 201354408

MICHAEL K. HURST | Partner
Board Certified – Civil Trial Law
Texas Board of Legal Specialization

LynnPinkerCoxHurst
Direct 214 981 3838
Main 214 981 3800
Fax 214 981 3839
mhurst@lynnllp.com

2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
www.lynnllp.com

Begin forwarded message:

> **From:** Karen Cook <karen@karencooklaw.com>
> **Date:** April 12, 2018 at 2:35:26 PM CDT
> **To:** "mhurst@lynnllp.com" <mhurst@lynnllp.com>, "jchilders@lynnllp.com"

<jchilders@lynnllp.com>
Cc: "S. Michael McColloch" <smm@mccolloch-law.com>
Subject: Paul Rodney v. JTCMG, LLC Cause # 201354408

Good afternoon, Gentlemen:

I represent defendants George Jarkesy and JTCM in an SEC enforcement action against them. The administrative law judge in that case has asked for some information related to the above-referenced lawsuit. I have reached out to Andrew Edison, who represented Mr. Jarkesy and JTCM, but he has since been appointed a US Magistrate Judge in the Southern District and does not have access to the case records any longer.

I would appreciate your confirming (by email is fine) that Mr. Jarkesy and JTCM paid the $500,000 that was their portion of the settlement of the plaintiff's claims.

Please do not hesitate to contact me on my cell phone if you wish to discuss this matter. Thank you.

Regards,

Karen Cook

1717 McKinney Avenue
Suite 700
Dallas, TX 75202
214.593.6429 office
[redacted] cell
214.593.6410 fax

KAREN COOK, PLLC
www.karencooklaw.com