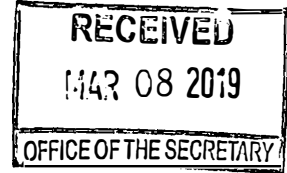


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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, :
:
Respondents. :

File No. 3-15255

**RESPONDENTS' SUBMISSION IN RESPONSE TO COMMISSION'S
FEBRUARY 21, 2019 ORDER REGARDING FURTHER PROCEEDINGS**

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 Jarquesy, Jr.**

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. Issues Briefed to ALJ Post-Appeal to Commission and Post-*Lucia*
Remand 1

 A. The Penalties Ordered in the Initial Decision Exceed Statutory
 Limits 1

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

 2. SEC Disgorgement is a Civil Money Penalty 1

 3. The Award of Disgorgement and Civil Penalties in this
 Matter Exceeds Statutory Limits 4

 B. Alternatively, Disgorgement Against Respondents Must be
 Reduced by Settlements in Related Investor Lawsuits 5

II. Conclusion 7

TABLE OF AUTHORITIES

Judicial Authority

<i>Edmonson v. Lincoln Nat. Life Ins. Co.</i> , 777 F. Supp. 2d 869 (E.D. Penn. 2011).....	3
<i>Goettsch v. Goettsch</i> , 29 F. Supp. 3d 1231 (N.D. Iowa 2014)	4
<i>Great-West Life & Ann. Ins. Co. v. Knudson</i> , 534 U.S. 2014 (2002)	3, 4
<i>Horvath v. Keystone Health Plan E., Inc.</i> , 333 F.3d 457 (3rd Cir. 2003)	3
<i>In re. Mutual Funds Inv. Litig.</i> , 681 F. Supp. 2d 622 (D. Md. 2010)	7
<i>Kokesh v. SEC</i> , 581 U.S. ----, 137 S.Ct. 1635 (2017).....	1, 2, 3, 5
<i>Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.</i> 734 F. Supp. 1071 (S.D.N.Y. 1990)	5
<i>SEC v. Bronson</i> , No. 12-cv-6421 (KMK), 2017 WL 1169660, --- F. Supp. 3d (S.D.N.Y. Mar. 27, 2017)	5
<i>SEC v. Clark</i> , 915 F.2d 439 (9th Cir. 1990).....	3
<i>SEC v. Coldicutt</i> , No. 13-01865-RGK, 2014 WL 12561072, slip op. (C.D. Cal. Aug. 8, 2014).....	6
<i>SEC v. Contorinis</i> , 743 F.3d 296 (2d Cir. 2014)	3
<i>SEC v. Evolution Capital Advisors, LLC</i> , No. H-11-2945, 2013 WL 5670835 (S.D. Tex. Oct. 16, 2013).....	6
<i>SEC v. First Jersey Secs., Inc.</i> , 101 F.3d 1450 (2d Cir. 1996)	7
<i>SEC v. Fischbach Corp.</i> , 133 F.3d 170 (2d Cir. 1997)	2
<i>SEC v. Graulich</i> , No. 2:09-cv-04355 (WJM), 2013 WL 3146862 (D.N.J. June 19, 2013).....	6
<i>SEC v. Palmisano</i> , 1354 F.3d 860 (2d. Cir. 1998).....	6
<i>SEC v. Penn Cent. Co.</i> , 425 F. Supp. 593 (E.D. Penn. 1976)	7
<i>SEC vs. Rockwell Energy of Texas, LLC</i> , No. H-09-4080, 2012 WL 360191 (S.D. Tex. Feb. 1, 2012).....	6
<i>SEC v. United Energy Partners, Inc.</i> , No. 02-10850, 88 Fed. App'x 744 (5th Cir. Feb. 18, 2004).....	6

SEC v. Warde, 151 F.3d 42 (2d Cir. 1998)..... 3

Administrative Decisions

Brown, SEC Release No. 3376, 2012 WL 625874 (Feb. 27, 2012) 6

Daspin, SEC Release No. 1051, 2016 WL 4437545 (Aug. 23, 2016)..... 6

Disraeli, SEC Release No. 8880, 2007 WL 4481515 (Dec. 21, 2007)..... 6

Malouf, Initial Decision Release No. 766, 2015 WL 1534396 (Apr. 7, 2015) 7

Springsteen-Abbott, SEC Release No. 80360, 2017 WL 1206062 (Mar. 31, 2017) 5

Timbervest, LLC, SEC Release No. 4492, 2016 WL 4426915 (Aug. 22, 2016)..... 7

Statutes

15 U.S.C. § 77h-1(g)(2) (2013) 1

15 U.S.C. § 78u-2(b) (2013)..... 1

15 U.S.C. § 80b-3(i)(2) (2013) 1

15 U.S.C. § 80a-9(d)(2) (2013)..... 1

Respondents John Thomas Capital Management d/b/a Patriot28 LLC and George Jarkey (“Jarkey”) (collectively “Respondents”) submit this Response to Commission’s February 21, 2019 Order Regarding Further Proceedings (“Order”), and respectfully show as follows:

I. Issues Briefed to ALJ Post-Appeal to Commission and Post-*Lucia* Remand

A. The Penalties Ordered in the Initial Decision Exceed Statutory Limits

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 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”).¹

2. SEC Disgorgement Is a Civil Monetary Penalty

In 2017, the Supreme Court evaluated the nature of SEC disgorgement in *Kokesh v. SEC*, 581 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 because

¹ The referenced caps applied to violations occurring between March 4, 2009 and March 5, 2013.

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 an equitable remedy. *See id.* at 1639.

The *Kokesh* Court began its analysis by questioning whether disgorgement as sought by the SEC was punitive in nature. 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.* 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 it is not compensatory—the proceeds 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 noted 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 held 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 holdings 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, that such penalties should be third-tier, and that 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 32-33. In addition to these maximum-level civil monetary penalties, ALJ Foelak ordered disgorgement in the amount of \$1,278,597. *See Id.*, at 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; and (6) without regard whether such monies would be returned to the allegedly aggrieved investors. Under *Kokesh*, the 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 therefore be vacated.

B. Alternatively, Disgorgement Against Respondents Must be Reduced by Settlements in Related Investor Lawsuits

Even if *Kokesh* did not mandate the vacatur of the disgorgement order, the amount must be reduced by the settlement amounts paid in resolving the related investor action. 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 orders that disregard offsets “constitute[] a penalty assessment and go beyond the . . . 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 necessary 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. Of this total paid to investors, \$500,000 was personally contributed by Jarkesy. Thus, any award for disgorgement in this action must be reduced by the settlement amounts in the Related Investor Action.²

II. 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 and then ordering expedited Commission review, the Commission has failed to consider

² 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.

Respondents' petition for review for *four years*. Respondents move the Commission to dismiss this proceeding promptly. In the alternative, Respondents again move the Commission to finalize this proceeding promptly so that Respondents can finally proceed with their rights to judicial review.

Respectfully Submitted,

By: 

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

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 7, 2019, 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 U.S. MAIL

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

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

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