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	:	ALJ Carol Fox Foelak
ANASTASIOS "TOMMY" BELESIS,	:	
Respondents.	:	

RESPONDENTS JOHN THOMAS CAPITAL MANAGMENT LLC d/b/a PATRIOT28 LLC'S AND GEORGE R. JARKESY, JR.'S TRIAL BRIEF

Respondents John Thomas Capital Management LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. ("Jarkesy") (collectively, "Respondents"), submit this, their Trial Brief, and respectfully show as follows:

I. INTRODUCTION

On or about March 22, 2013, the Securities and Exchange Commission (the "Commission") issued the Order Instituting Proceedings (the "OIP") naming JTCM and Jarkesy, amongst others, as Respondents in this proceeding. The Commission alleges that the Respondents violated several securities laws, including: (1) Section 17(a) of the Securities Act of 1933 (the "Securities Act"); (2) Section 10(b) of the Exchange Act of 1934 (and Rule 10(b)-5 promulgated thereunder) (the "Exchange Act"); and (3) Section 206 (subsections 1, 2, and 4) of the Advisers Act of 1940 (and Rule 206(4)-8 promulgated thereunder) (the "Advisers Act"). To substantiate these claims, the Commission included numerous statements in the OIP about JTCM

and Jarkesy that are impertinent, scandalous, and otherwise have no reasonable basis in law or fact. At the conclusion of this hearing, your Honor will be left with no choice but to dismiss the claims against JTCM and Jarkesy for lack of evidence.

II. OBJECTION

Respondents object to submitting this filing at this time because they have been denied their Brady right to disclosure of exculpatory or impeachment evidence, and have been denied their right to due process through the production of voluminous evidence and the lack of adequate time to prepare a defense.

III. ARGUMENT AND AUTHORITIES

A. Claims.

1. Section 17(a) of the Securities Act.

The OIP alleges that Respondents have violated Section 17(a) of the Securities Act, which provides that:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security- based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
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> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q (2013).

To establish a violation under Section 17(a)(1), (2), or (3), the Division of Enforcement ("Division") must 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 security." *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. Spence & Greene Chemical Co.*, 612 F.2d 896, 903 (5th Cir. 1980). Additionally, for a claim under Section 17(a)(1), the Division must 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.

2. Section 10(b) of the Exchange Act and Rule 10(b)-5.

The Division also advances claims for alleged violation(s) of Section 10(b) of the Exchange Act and Rule 10(b)-5 promulgated thereunder. Section 10(b) and the corresponding Rule 10(b)-5 read as follows:

> Section 10: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— ...
>
> b. to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
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> Rule 10(b)-5: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> a. to employ any device, scheme, or artifice to defraud,
> b. to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the

> light of the circumstances under which they were made, not misleading, or
>
> c. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

15 U.S.C. § 78j (2013); 17 C.F.R. § 240.10b-5 (2013).

As withSection 17(a) of the Securities Act, to establish a violation of Section 10(b), the Division must 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 Morgan Keegan & Co.*, 678 F.3d at 1244; *Merch Capital, LLC*, 483 F.3d at 766; *see also SEC v. Gann*, 565 F.3d 932, 936 (5th Cir. 2009).

3. Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8.

Additionally, the Division advances claims for violations of subsections 1, 2, and 4, of Section 206 of the Advisers Act—titled "Prohibited Transactions by Registered Investment Advisers"—and Rule 206(4)-8 promulgated thereunder. The pertinent subsections of Section 206 and Rule 206(4)-8 read as follows:

> Section 206 – Prohibited Transactions by Registered Investment Advisers: It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; ... or
>
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

> Rule 206(4)-8 Pooled Investment Vehicles:
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> (a) Prohibition. It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser to a pooled investment vehicle to:
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> (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or
>
> (2) Otherwise engage in any act, practice, or course of business that is

> fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.
>
> (b) Definition. For purposes of this section "pooled investment vehicle" means any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)).

15 U.S.C. § 80b-6 (2013); 17 C.F.R. § 275.206(4)-8 (2013).

Like Sections 17(a) of the Securities Act and 10(b) of the Exchange Act, Section 206 of the Advisers Act 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). The Advisers Act is specific to investment advisers. *See id.* 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).

4. Aiding and abetting liability 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).

B. Respondents' Defenses to the Division's Claims.

In response to the aforementioned claims of the Division, Respondents allege the following defenses:

1. The claims set forth in the OIP are barred by the applicable statute of limitations.

The statute of limitations for an action for civil fine or penalty is five years. *See Johnson v. SEC*, 87 F.3d 484, (D.C. Cir. 1996) (five-year limitations period applies to censure and suspension proceedings); *see also* 28 U.S.C. § 2462 (2013) (five-year limitations period for any action "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise"). The Commission initiated the OIP on March 22, 2013. Any action taken by Respondents on or before March 22, 2008 is outside the limitations period prescribed by law for which the Division may seek civil penalties.

2. The claims set forth in the OIP are barred by the doctrine of laches.

The equitable defense of laches requires the asserting party show "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *See Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012), *quoting Costello v. United States*, 365 U.S. 265, 282 (1961); *see also U.S. v. City of Loveland, Ohio*, 621 F.3d 465, 473 (6th Cir. 2010). Relevant evidence has been lost or is no longer available due to the passage of time, which has prejudiced Respondents.

3. The claims set forth in the OIP are barred because they were not timely filed following Respondents' Wells notice.

Any action must be commenced within 180 after the Commission staff provides a written Wells notice. 15 U.S.C. § 78d-5 (2013). Prior to the instant action, the Wells notice to Respondents was issued on or about April 4, 2012. This action was commenced on or about March 22, 2013. As shown by the dates, significantly more than 180 days passed between the issuance of the Wells Notice and the issuance of the Order Instituting Proceedings.

4. The claims set forth in the OIP fail to state claims for relief or remedial action under the statutes identified in the OIP.

The Division has made allegations that are untrue, failed to allege sufficient facts, and will fail at the hearing to prove sufficient facts to sustain the Division's claims. For these reasons, the Division fails to state claims for relief or remedial action under the statutes identified in the OIP for violations of the Advisers Act, Section 206, Prohibited Transactions by Registered Investment Advisers.

5. The claims set forth in the OIP fail to allege which facts purportedly support which statutory claims.

The OIP is written in narrative form with no identification of what facts support which claims. As all the claims in the OIP allege securities fraud, such claims must be pled with particularity and specificity. F.R.C.P. 9(b); *ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d. Cir. 2007).

6. The claims set forth in the OIP are barred, in whole or in part, because the statutory amendments enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act may not be applied retroactively.

The Dodd-Frank Wall Street Reform and Consumer Protection Act purportedly allows the Commission to seek penalties in administrative hearing. Dodd Frank's effective date was July 21, 2010. *See Weller v. HSBC Mort. Servs., Inc.*, --- F. Supp. 2d ---, 2013 WL 4882758, at

* 3 (D. Colo. Sept. 11, 2013). Many of the actions taken by Respondents of which the Division complains, and seeks penalties, happened prior to the effective date of Dodd-Frank which may not be applied retroactively. *See Henning v. Wachovia Mortg.*, --- F. Supp. 2d ----, 2013 WL 5229837, at * 5 (D. Mass. Sept. 17, 2013) (providing a list of cases ruling that the provisions of Dodd-Frank do not provide for retroactive application).

7. The claims set forth in the OIP are barred, in whole or in part, because the conduct charged is outside the scope of the Investment Adviser's Act of 1940.

The Division has made allegations that are untrue, failed to allege sufficient facts, and will fail at the hearing to prove sufficient facts to sustain the Division's claims of violations of the Investment Adviser's Act of 1940.

8. The claims set forth in the OIP are barred, in whole or in part, because the conduct charged is outside the scope of the Securities Exchange Act of 1934 and Rule 10b-5.

The Division has made allegations that are untrue, failed to allege sufficient facts, and will fail at the hearing to prove sufficient facts to sustain the Division's claims of violations of the Securities Exchange Act of 1934.

9. The claims set forth in the OIP are barred, in whole or in part, because the conduct charged is outside the scope of the Securities Act of 1933.

The Division has made allegations that are untrue, failed to allege sufficient facts, and will fail at the hearing to prove sufficient facts to sustain the Division's claims of violations of the Securities Act of 1933.

10. The claims set forth in the OIP are barred because the risks of investing in the funds were adequately disclosed in the offering memoranda.

Pursuant to the Private Placement Memoranda for each of the funds discussed in the OIP, the risks associated with each fund where adequately disclosed. Further, all actions taken by Respondents with regard to the funds were in accordance with the risks and disclosures

contained within the Private Placement Memoranda. To Respondents' knowledge, every member received a Private Placement Memorandum for each fund prior to making any investment or purchase.

11. The claims set forth in the OIP are barred, in whole or in part, because this proceeding violates Respondents' right to a jury trial in a case seeking a civil penalty, which right existed at the time of the conduct charged in the OIP.

The Seventh Amendment to the Constitution of the United States provides Respondents' a right to a trial by jury. *See SEC v. Solow*, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) ("In a civil case, 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.' A civil penalty has been held to be legal, as opposed to equitable, in nature. *Tull v. United States*, 481 U.S. 412, 422, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir.2002). Accordingly, it was Mr. Solow's constitutional right to have a jury determine his liability, with this Court thereafter determining the amount of penalty, if any. *See Tull*, 481 U.S. at 427, 107 S.Ct. 1831); *see also SEC v. Gowrish*, 510 F. App'x 588, 590 (9th Cir. 2013) ("Gowrish did not waive his Seventh Amendment argument that his civil fine should have been submitted to the jury. *See Solis v. County of Los Angeles*, 514 F.3d 946, 953 (9th Cir. 2008). Gowrish's agreement that the judge would impose the civil fine is consistent with his argument that the judge can only impose a fine based on facts found by the jury"); *SEC v. Kopsky*, 537 F. Supp. 2d 1023 (E.D. Mo. 2008). A subsequently-enacted statute cannot be applied retroactively to deprive Respondents of the right to a jury trial.

12. The claims set forth in the OIP are barred, in whole or in part, because this proceeding violates Respondents' right to a jury trial in a case seeking penalties that are criminal in nature.

Imposition of penalties that are criminal in nature without a jury finding are violative of the Sixth Amendment's right to a trial by jury. Despite past jurisprudence regarding civil penalties, the trier of fact will determine the facts that will determine the level of penalty, if any. Here, the Commission seeks to deprive Respondents of their right to a trial by jury because they seek penalties which are criminal in nature.

IV. CONCLUSION

For the foregoing reasons, Respondents request that your Honor find in Respondents' favor on all claims advanced by the Division, Order the dismissal of all claims, and award Respondents all further relief to which they me be entitled at law.

Respectfully Submitted,

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