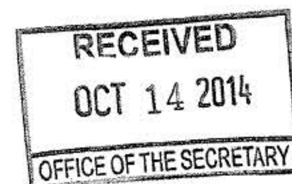


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

Admin. File No. 3-15858

STANLEY JONATHAN FORTENBERRY (A/K/A S.J. FORTENBERRY, JOHN FORTENBERRY,AND JOHNNY FORTENBERRY,

Respondent.

RESPONDENT'S PREHEARING BRIEF AND MOTION IN LIMINE

INTRODUCTION

With respect to the matters raised in the Order Instituting Proceedings ("OIP"), Mr. Fortenberry's position is as follows:

1. The OIP is barred for reasons outlined by Mr. Fortenberry's "Jurisdictional Objections" in his Verified Answer (pages 8 – 17).
2. Mr. Fortenberry is entitled to a trial by jury at the final hearing in this matter.
3. Mr. Fortenberry requests the sequestration of witnesses at the final hearing.
4. Mr. Fortenberry objects to evidence outside the scope of the OIP, and in the event it is determined the Investment Advisor Act of 1940 ("IAA") is inapplicable to these proceedings (see below), further objects to any evidence of alleged misconduct after the offer and sale of Premier securities.
5. The IAA and rule allegations, which seek to reach alleged post-investment sale conduct by Mr. Fortenberry, are inapplicable because Mr. Fortenberry was never an "investment advisor". Assuming Mr. Fortenberry was an investment advisor, Mr. Fortenberry did not violate the IAA. Assuming the OIP allegations re: violations of the IAA and rule thereunder are true, such

conduct was immaterial and hence not actionable under the IAA. Where applicable Mr. Fortenberry lacked scienter.

6. MOTION IN LIMINE: Mr. Fortenberry hereby requests the ALJ to enter an order requiring, prior to the Division proffering testimony or exhibits pertaining to Mr. Fortenberry's alleged violations under the IAA (generally post-investment sale transgressions), the Division to make a prima facia case that Mr. Fortenberry was at all relevant times an "investment advisor". See investment advisor elements on pages 4 – 12 infra.
7. Mr. Fortenberry (under the Securities Act of 1933, The Securities and Exchange Act of 1934, and Rule 10b-5 under the '34 Act) did not make any material misrepresentations or omissions in the offer and sale of Premier securities to the 2 Premier investors. Even if he had, such alleged misconduct as set forth in the OIP was immaterial and hence not actionable. Where applicable Mr. Fortenberry lacked scienter.

JURISDICTIONAL OBJECTIONS

For the record Mr. Fortenberry hereby renews the Jurisdictional Objections he raised in his Verified Answer (pages 8 – 17) and for the reasons argued therein requests the ALJ to dismiss the OIP against him with prejudice. By proceeding with the final hearing in this matter Mr. Fortenberry does not thereby waive his Jurisdictional Objections, and hereby reserves those for administrative and judicial appeal.

JURY TRIAL DEMAND

Mr. Fortenberry is aware of the SEC v. Rind, 991 F.2d 1486, 1493 (9th Cir.), cert. denied, 114 S.Ct. 439, 126 L.Ed.2d 372 (1993) holding that jury trials are not required in administrative proceedings before the Commission, even when monetary penalties are sought. Notwithstanding in light

of Tull v. U.S., 481 U.S. 412 (1987), Mr. Fortenberry argues Rind was decided wrongly, Mr. Fortenberry is entitled under the United States Constitution to a trial by jury, and hereby demands a trial by a jury of his peers. Mr. Fortenberry does not waive his right to a jury trial in this matter if the ALJ does not grant Mr. Fortenberry a jury, and Mr. Fortenberry then proceeds with the final hearing in this matter without a jury. Mr. Fortenberry reserves the right to raise on administrative and judicial appeal any failure to accord him a trial by jury. Further if a jury trial is not provided to the Mr. Fortenberry during these administrative proceedings, Mr. Fortenberry hereby objects to any collateral estoppel or res judicata application of any adverse decision herein against him in future administrative, civil or criminal proceedings.

SEQUESTRATION OF WITNESSES

Sequestration of witnesses rules provide witnesses may not tailor their testimony to that of other witnesses, and thereby ensures more credible witnesses testimony. In the context of investigations, a sequestration rule applies to witnesses. 17 C.F.R. 203.7(b). No such rule exists with respect to enforcement hearings; however, ordering sequestration of witnesses is within the discretion of the ALJ. Accordingly Mr. Fortenberry hereby requests witnesses be sequestered during the final hearing in this matter.

MATTERS OUTSIDE THE SCOPE OF THE OIP

Generally, arguments and factual matters falling outside the scope of the order instituting proceedings are considered only for limited purposes, such as background. Int'l S'holders Servs. Corp., 46 S.E.C. 378, 386 n.19 (1976) ("The range of inquiry is broad. But it is not limitless."); see also Russell W. Stein, 79 SEC Docket 3098, 3114 n.34 (Mar. 14, 2003) (rejecting argument outside scope of order instituting proceedings). The OIP alleges specific facts with respect to Mr. Fortenberry's offer

and sale of Premier securities to two investors. Under the IAA the OIP also alleges post-sale misconduct by Mr. Fortenberry with respect to the only two Premier investors. This is the scope of the OIP. Evidence outside the scope of the OIP (e.g., non-Premier business entities, non-Premier business between Mr. Fortenberry and the two Premier investors, etc.) is hereby objected to. In the event it is determined the IAA is inapplicable to these proceedings, Mr. Fortenbery further objects to any evidence of alleged misconduct after the offer and sale of Premier securities.

INVESTMENT ADVISORS ACT OF 1940

The OIP alleges Mr. Fortenberry violated the Investment Advisors Act of 1940 ("IAA") and rules thereunder. Inclusion of alleged IAA violations is an attempt by the Division of Enforcement to expand the scope of the OIP from alleged misconduct in the offer and sale of securities (under '33 and '34 Acts), to alleged post-offering transgressions by Mr. Fortenberry (misuse of proceeds, inaccurate "reports" to investors; failure to keep accurate books and records, etc.). Mr. Fortenberry argues the IAA does not apply under the facts because Mr. Fortenberry was never an "investment advisor". While state law claims may be available for investors with respect to Mr. Fortenberry's purported post-offering activities (e.g., common law or state statutory breach of fiduciary duty), under the facts such claims are not cognizable under the IAA.

Text of Pertinent Provisions of IAA and Rules Cited in OIP

IAA Sections 206(1)(2)and(4): 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

•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 for any investment adviser to a pooled investment vehicle to:

•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

•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.

•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 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 .

Mr. Fortenberry Was Not An Investment Advisor

For the IAA to apply, Mr. Fortenberry must be an "investment advisor". Sec. 202(a)(11) of the IAA defines an investment advisor as "any person who, for **compensation**, engages in the **business** of **advising others**, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities . . . " Accordingly whether a person is an investment advisor depends on whether such person (1) provides **advice** or issues reports or analyses, regarding securities; (2) is in the **business** of providing such services; and (3) provides such services for **compensation**. These 3 factors are seen in Abrahamson v. Fleschner, 568 F.2d 862, 870 (2nd Cir. 1977). Therein general partners of an investment limited partnership, where the general partners had sole discretion in managing the partnership's investments, were nonetheless

held to be investment advisors because, as cited in Abrahamson: (1) **Advice:** "The general partners' compensation depended in part upon the firm's net profits and capital gains. These in turn were affected by the size of the total funds under their control. . . . In deciding whether or not to withdraw their funds from the pool, the limited partners necessarily relied heavily on the reports they received from the general partners."; (2) **Business**: The monthly reports were an integral part of the general partners' business of managing the limited partners' funds."; and (3) **Compensation**: "the general partners received substantial compensation for managing the limited partners' investments".

Mr. Fortenberry's role as general partner of Premier Investment Fund, LP ("Premier") is different than in Abrahamson. Excluding Mr. Fortenberry there were only two investors in Premier. All executed a subscription and limited partnership agreements ("subscription agreements") in purchasing Premier limited partnership units. One investor executed two subscription agreements (dated 9/13/10 and 11/12/10—each for $100,000 for a total of $200,000), and another investor a subscription agreement on 8/3/10 (for $100,000). The total investment proceeds from the two investors was $300,000. The subscription agreements contain identical language, except the 8/3/10 investor's subscription agreement provided for installment payments in making his purchase. Pertinent subscription agreement language includes the following:

1.G. The general partner shall manage the partnership business and have exclusive control over the partnership business, including the power to sign deeds, notes, mortgages, deeds of trust, contracts, leases, and direction of business operations and investments.
1. H. The purpose of the Company is any lawful business purpose, with its primary though nonexclusive focus being to invest in the entertainment industry. Such investment may take the form of equity, debt, investment contracts, or any other investment form deemed by the general partner to be in the best interest of the Company.
1. I. The general partner is hereby authorized to make the aforesaid investments in the entertainment industry in his sole discretion for the benefit of the Company. The general partner is also authorized to make investments outside of the entertainment industry in his sole discretion for the benefit of the Company. Said investments may but need not be in publicly traded securities.

1.J. In the sole discretion of the general partner profits of the partnership may either be reinvested, or distributed to partners.
1.N. The general partner shall advise limited partners as to all investments made by the Company at the time of making such investments, and annually before January 31st shall inform the limited partners as to the profit or loss with respect to each investment and the Company as a whole. The Undersigned acknowledges receipt of disclosure by the Company of all investments of the Company as of the date of his investment in the Company (if any). Beyond these disclosures limited partners shall only have access to Company information by requesting same of the general partner, and then only for an articulated proper purpose as determined by the general partner in his sole discretion.
12. Restrictions on Transfer. To comply with the exemptions cited above, the undersigned understands and agrees that the Securities purchased pursuant to this Agreement may not be offered, sold, transferred, pledged or otherwise disposed of except pursuant to (i) an effective registration statement under the Securities Act of 1933, as amended, and any applicable state securities law; (ii) an exemption from registration under such acts and such laws which, in the opinion of counsel for the holder of such Securities, which counsel and opinion are reasonably satisfactory to counsel for the Company, is available; or with respect to foreign investors (iii) in accordance with the provisions of Regulation S and applicable holding periods of the undersigned's nation. The undersigned agrees and understands that any certificates, if any, issued by the Company evidencing the Securities will therefore bear an appropriate legend restricting transferability.
13. The undersigned intends to acquire and hold the Securities for his own account, for investment purposes only, and not with a view to, or for resale in connection with, the distribution thereof within the meaning of the Securities Act of 1933, as amended.
16.I. Use of proceeds is completely within the discretion of the general partner as set forth in Section 1.L.

With respect to Mr. Fortenberry the 3 investment advisor factors will be analyzed in turn:

1. **Advice**: As in Abrahamson Mr. Fortenberry had sole discretion with respect to the limited partnership's investments. However, in Abrahamson "in deciding whether or not to withdraw their funds from the pool, the limited partners necessarily **relied** heavily on the reports they received from the general partners." Premier securities being "restricted" as described in the subscription agreement, and further there being no public market for the Premier securities, any reports provided by Mr. Fortenberry to Premier investors were **only informative**, and **could not as a practical matter be relied upon** by investors in deciding to hold or sell their Premier

securities (the investors being legally restricted and practically unable from selling or disposing of their Premier LP units). While there are many examples of general partners of limited partnership investment companies being found to be investment advisors, each of those cases included some factor indicating possible or actual reliance by limited partners on reports provided by the general partners. Respondent was unable to find a single case finding a general partner to be an investment advisor where no actual or possible reliance on reports by limited partners was present. Merely providing information or other ministerial duties does not constitute advisory activities; there needs to be a judgmental element to the activity. See nonexclusively Wang v. Gordon, 715 F.2d 1187 (7th Cir. 1983)—where the general partner had sole discretion with respect to buying & selling investments in the form of real estate and securities and was not therefore deemed an investment advisor. This factor weighs against Mr. Fortenberry being found to be an investment advisor.

2. **Business**: In Abrahamson "the **monthly reports** were an integral part of the general partners' business of managing the limited partners' funds." Under Sec. 1.N. of the Premier subscription agreements, Premier was to advise limited partners "as to all investments made by the Company at the time of making such investments, and annually before January 31st shall inform the limited partners as to the profit or loss with respect to each investment and the Company as a whole." Limited partners were to be advised annually, and whenever Premier made a new investment. This is less frequent than in Abrahamson and, for reasons already argued were not as in Abrahamson "an integral part of the general partners' business of managing the limited partners' funds." but instead inconsequential and not able to be relied upon. Investment Advisors Act Release No. 1092 (Oct. 8, 1987) states "The staff considers a person to be 'in the business' of

providing advice if the person (i) holds himself as an investment advisor or as one who provides investment advice; (ii) receives any separate or additional compensation that represents a clearly definable charge for providing advice about securities, regardless of whether the compensation is separate from or included within any overall compensation, or receives transaction based compensation if the client implements the investment advice; and (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice." These factors will be analyzed in turn:

A. Holding Out: The concept of "holding out" is essentially a concept of voluntary action (that is, a person voluntarily presents himself to the public as providing advisory services). In several no-action letters, the SEC staff has broadly defined when an individual will be considered to have held himself out as an investment advisor. Factors evidencing that an individual has done so include public advertising seeking advisory clients (for example in the yellow pages, professional listings, news-papers, etc.); designating himself as an investment advisor on business stationary or on a business card; etc. See nonexclusively Division of Investment Management's Staff Legal Bulletin No. 11 (Sept. 19, 2000) (hereafter "Staff Bulletin No. 11") @ note 18 and accompanying text. There is no evidence Mr. Fortenberry engaged in any of these "holding out" activities. The Premier offering was "private" under SEC Reg. D, Rule 506 (prior to the adoption of Rule 506(c) allowing for general solicitations to accredited investors). Further in the context of IAA Rule 275.203(b)(3)-1(c), the Commission has stated "you shall not be deemed to be holding yourself out to the public as an investment advisor, within the meaning of 203(b)(3) of the Act, solely because you participate in a non-public offering of interests in a limited

partnership under the Securities Act of 1933." The facts weigh against Mr. Fortenberry having held himself out as an investment advisor.

B. Special or Additional Compensation: "Special or additional compensation" is clearly established by a separate fee charged for investment advice. Also, if the facts show that a "clearly definable" element of a single fee is being charged for investment advice, this would satisfy the compensation element. The concept of special or additional compensation has been addressed at length in SEC staff no-action letters mostly in the context of broker-dealers' provision of advisory services. In short, the key element is whether the facts show that the fee, though charged for a collection of services for a non-advisory service, varies according to whether investment advice is provided. The compensation received need not be paid by the client, but could be paid by a third party. See nonexclusively Staff Bulletin No. 11 @ notes 3, 20-22, and accompanying texts. The facts of this case do not support Mr. Fortenberry having received any special or additional compensation for securities advice.

C. Regularity of Investment Advice: The staff has stated that the provision of advice only occasionally, as an accommodation to clients, will generally not be seen as providing advice with "regularity". See nonexclusively Staff Bulletin No. 11 @ notes 3, 26 – 27, and accompanying texts. The facts of this case do not support the regularity of Mr. Fortenberry's provision of investment advice.

For the foregoing reasons the "Business" factor is not supported by the facts of this case.

3. **Compensation**: The facts demonstrate Mr. Fortenberry was compensated for managing Premier. While there was no demarcation between compensation for preparing "reports" and other managerial services (as required under "Business" supra.), it would appear under Abrahamson that only this factor would weigh in favor of investment advisor status.

Of the three factors to be considered in determining investment advisor status (advice, business, and compensation), only the third factor weighs against Mr. Fortenberry. Even with respect to the compensation factor, as seen in the analysis under "Business" such compensation was not "special or additional compensation", but rather part of Mr. Fortenberry's overall compensation as general partner of Premier. When applying the facts to the factors enumerated in IAA
Mr. Fortenberry does not fit the definition of an investment advisor.

IAA Sec. 202(a)(11) provides a number of exclusions from the definition of investment advisor, even if the definitional factors are otherwise met. The final exclusion is for "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations and order." While the SEC has not adopted any rules or regulations under this exclusion, it has issued several orders finding certain persons not to be investment advisors. Trustees, subsidiaries of bank holding companies only advising affiliated banks, and small/private corporations only advising their shareholders were held not to be investment advisors as they were not engaged in "advising others". In re: Roosevelt & Son, 29 S.E.C. 879 (1949); In re: Pitcaim Co., 29 S.E.C. 186 (1949); In re: Augustus P. Loring, Jr., 11 S.E.C. 885 (1942); In re: Donner Estates, Inc., 10 S.E.C. 400 (1941); and In re: First Serv. Corp., 8 S.E.C. 152 (1940). The situation with Premier and its general partner Mr. Fortenberry (where there were only 2 investors, the general partner had unfettered control, reports were merely informative and infrequently provided, no opportunity for reliance on such reports by

limited partners, etc.) are more like these orders than the large limited partnership (where limited partners were free to sell their interests, where regular monthly reports were provided by the partnership, where limited partners relied on the reports, etc.) in Abrahamson. Scholarly opinions go even further in arguing that general partners of a limited partnership should not be found to be investment advisors under the IAA, being analogous to trustees. See nonexclusively C. David Zoba, The Investment Advisers Act of 1940: Is a General Partner of a Limited Partnership an Investment Adviser? 29 CASE W. RES. L. REV. 634 (1979).

Finally Selzer v. Bank of Bermuda, Ltd., 385 F. Supp. 415 (S.D.N.Y. 1974) held that the IAA was not applicable to a trustee of a private trust that was created to invest in securities. Therein the court opined "The trustee does not advise the trust corpus, which then takes action pursuant to his advice; rather the trustee acts himself as principal. While there may be public policy reasons for holding a trustee who deals in securities for its trust to the standards of the Investment Advisers Act, neither the common sense meaning of the word 'adviser' nor a comparison with other situations to which the 1940 Act has been held applicable militates in favor of doing so. The Court therefore finds that the Investment Advisers Act is not available in a suit against a trustee in these circumstances." According to the Selzer court, there cannot be advisory activities where the trustee has sole discretion, as the beneficiaries have no right to rely and act upon such "advice". The situation is analogous to an investment limited partnership where the general partner has unfettered investment discretion. Selzer has not been overturned by any U.S. Circuit.

For the foregoing nonexclusive reasons Mr. Fortenberry was not at any relevant time an investment advisor. As such the IAA and rules thereunder cited in the OIP are inapplicable. Only Mr. Fortenberry's activities with respect to the two investors cited in the OIP, in the context of the offer and

sale of Premier securities, are relevant. Alleged post-investment misconduct by Mr. Fortenberry is not cognizable under the IAA or rules promulgated thereunder.

Mr. Fortenberry Denies Any Post-Investment Allegations of Misconduct

Assuming arguendo Mr. Fortenberry is found to be an investment advisor, and the IAA applies, Mr. Fortenberry maintains his denial that any conduct after the procurement of the two investors in Premier was improper. Assuming arguendo any post-offering misconduct, such conduct was immaterial.

Materiality in General

For purposes of the federal securities laws " The question of materiality ... is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor" Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S.Ct. 1184 (2013). The Supreme Court has held that a fact is material if there is "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Industries v. Northway, Inc., 426 U.S. 438, 449 (1976). See also Basic, Inc. v. Levinson, 485 U.S. 224 (1988). In other words, a material fact is a statement or omission that a reasonable investor would have considered significant in making an investment decision. Unlike in private securities litigation, in an enforcement action by the Commission, the Commission need not prove actual reliance by any particular investor on the provision or omission of any material misrepresentation. See nonexclusively SEC v. Morgan Keegan & Company, Inc., No. 11-13992 (11th Cir. opinion May 2, 2012). However, reasonable reliance by a reasonable investor is required for purposes of materiality. Some, but not all, of the theories pled in the OIP require proof of "scienter"; however, scienter can be inferred when a defendant makes misstatements about matters that his position

suggests he should know. See Merck & Co. v. Reynolds, 130 S. Ct. 1784 (2010); and Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011). "Sufficiently public" information renders nondisclosure of such information as non-material. See nonexclusively In re: Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 272 F. Supp. 2d 243 (S.D.N.Y. 2003). Par. 15 of the Premier subscription agreement clearly shows that Mr. Fortenberry provided full access to any information prospective investors deemed relevant and material pertaining to himself and Premier prior to the investors' investing in Premier, and that each investor had acknowledged " he has reviewed any and all information of public record, inclusive of official or reliable information posted on the internet, about the Company and the general partner John Fortenberry (Stanley Jonathan Fortenberry/Stanley J. Fortenberry), and that such information has not changed his mind with respect to an investment in the securities offered hereby." While materiality concepts are overall objective in nature (e.g., "reasonable investor", "reasonable reliance", etc.), subjective components—i.e., the facts of each case, are probative evidence with respect to these objective standards. For example materiality, scienter, etc. should be judged in light of the Premier "open book policy", and given investors' representations of having reviewed all information of public record "actually available public information."

Materiality Under the IAA

"Sections 206(1) and 206(2) of the Advisers Act also impose on advisers an affirmative duty of good faith with respect to their clients and a duty of full and fair disclosure of all facts that are material to the advisory relationship with their clients. See Release No. 470, supra n.9 (whether Sections 206(1) and (2) require disclosure of specific facts about a transaction depends on the 'materiality of such facts in each situation and upon the degree of the client's trust and confidence in and reliance on the adviser with respect to the transaction.'. " See Release No. IA-1732, Note 11 (July 17, 1988). IAA 206(4)

authorizes the adoption of rules. Rule 206(4)—8 specifically includes the language "material". However, Rule 206(4)-8 unlike other securities fraud statutes does not have a scienter requirement, meaning that negligent conduct may be reachable (if material). For misconduct to be a violation of Sections 206(1), 206(2), or 206(4) of the IAA and Rule 206(4)-8 thereunder, such violations must be "material", not merely technical.

<u>Any Post-Investment/IAA Violations by Mr. Fortenberry Were Not Material</u>

The '33 and '34 Act OPI claims reach only alleged misconduct by Mr. Fortenberry in the offer and sale of Premier securities. The IAA claims attempt to reach alleged misconduct after the securities were sold. Assuming Mr. Fortenberry was an investment advisor, and further assuming he made post-sale material omissions or misstatements, such transgressions were immaterial. Immaterial post-investment sales alleged OIP transgressions by Mr. Fortenberry include:

1. <u>Mr. Fortenberry as general partner of Premier allegedly did not keep accurate books and records for Premier in accordance with generally accepted accounting principles ("GAAP"), or make required tax filings</u>: Section 1.F. of the subscription agreement provides "The Company shall use generally accepted accounting principles, as amended from time to time, in keeping its books and records, and its fiscal year shall be a calendar year. The general partner shall make any tax election necessary for completion of the partnership tax return." However, Section 1.N. of the subscription agreement goes on to explain that "The general partner shall advise limited partners as to all investments made by the Company at the time of making such investments, and annually before January 31st shall inform the limited partners as to the profit or loss with respect to each investment and the Company as a whole. The Undersigned acknowledges receipt of disclosure by the Company of all investments of the Company as of the date of his investment in

the Company (if any). Beyond these disclosures limited partners shall only have access to Company information by requesting same of the general partner, and then only for an articulated proper purpose as determined by the general partner in his sole discretion." The GAAP books and records according to Par. 28 of the OIP "consist of a balance sheet, income statement, statement of comprehensive income, statement of cash flows, and accompanying footnotes to the financial statements." Under Sec. 1.N. of the subscription agreement limited partners were not entitled to these GAAP financial statements, or copies of Premier tax returns except possibly to individual K-1 statements. Under the subscription agreement there is no deadlines set forth for the general partner's preparation of GAAP financial statements. Neither investor ever requested copies of Premier GAAP financial statements or tax returns. Finally as discussed supra., even if the 2 Premier investors were able to obtain Premier GAAP financial statements and tax returns, practical and legal restrictions on their transfer would prevent them from disposing of their securities in reliance thereon. As such the non-preparation of GAAP financial statements and tax returns was immaterial with respect to the Premier investors.

2. Alleged failure of Mr. Fortenberry to Annually Advise Limited Partners on the Profit and Loss of Premier Investments and Premier in General: The requirement to do this is found in Section 1.N. of the subscription agreement (quoted supra.). Unlike company financial statements, there is no requirement for this annual advice to be in accordance with GAAP. Neither is there a requirement these updates be written. Mr. Fortenberry will testify at the hearing that he did provide annual updates to investors during the time Premier was in business. Assuming arguendo Mr. Fortenberry did not provide these annual profit and loss (for Premier and Premier investments) advisements, such non-provision was immaterial in that the 2 investors could not

rely on such information (their securities being restricted, and there being no public market for the securities) in disposing of their Premier holdings.

3. Mr. Fortenberry Allegedly Made False and Misleading Statements to 1 Investor During That Investor's Installment Payment Period: The 8/3/10 investor's subscription agreement provided for installment payments in making his aggregate $100,000 purchase of Premier securities upon the following terms and conditions: 8/3/10 $35,000/.35 LP Units; September 2010 $10,000/1 Unit; October 2010 $10,000/1 Unit; November 2010 $10,000/1 Unit; December 2010 $10,000/1 Unit; January 2011 $10,000/1 Unit; February 2011 $10,000/1 Unit; March 2011 $5,000/.5 Units. According to the OIP Mr. Fortenberry provided false written statements to this investor during the above payment period regarding Premier's profitability, Premier's investments, and the profitability of Premier investments. Assuming Mr. Fortenberry made such statements to this single investor, and assuming the statements were false, for purposes of the IAA these statements were immaterial in that the investor had already legally bound himself on 8/3/10 to purchasing the Premier securities during the installment period, was legally and practically restricted at all relevant times from disposing of the securities, and hence any reliance on such statements was not reasonable or possible.

4. Mr. Fortenberry Allegedly Misused Offering Proceeds: According to the OIP of the $300,000 in investment proceeds, $68,000 was paid to Mr. Fortenberry as general partner in "management fees". $151,500 was invested by Premier. Mr. Fortenberry does not dispute these figures. The OIP goes on to characterize the remaining $79,950 as "personal expenses and cash withdrawals". Logically under the IRS Code and regulations proceeds under the facts may only be (a) compensation to the general partner; (b) Premier business expenses (in the

form of credits or deductions); and (c) Investments made by Premier. With respect to the $79,950, Mr. Fortenberry would argue that much of this amount was not compensation to Mr. Fortenberry, but deductible Premier business expenses. Mr. Fortenberry would also argue he provided cash funding himself to Premier (directly and/or through his personal payment of Premier business expenses), which should be deducted in this matter from his alleged compensation. Assuming arguendo $148,500 ($68,550 plus $79,950) of the $300,000 was compensation to Mr. Fortenberry, such was neither unreasonable nor unanticipated. The ratio of expenses to investments made in the early stages of a venture like Premier would be expected to be higher at the beginning. In addition to provisions quoted earlier, the subscription agreement provides as follows:

Sec. 1.L. The Undersigned acknowledges that without limitation a portion of the proceeds from the sale of Units of the Company, as well as profits from the Company's investments, shall be allocated to reasonable administrative expenses in connection with the Unit offering and the day to day affairs of the Company, including but not limited to salaries—inclusive of the general partner, office space, office equipment, travel, legal, accounting costs, and any other expense recognized by the Internal Revenue Code and regulations as a business deduction or credit. In addition to the foregoing the Undersigned also acknowledges that existing Unit holders, excluding the general partner, may receive finder fees pursuant to Section 20. Subject to generally accepted accounting principles and the Internal Revenue Code and regulations, the foregoing shall constitute business expenses of the Company, deductible from gross profits, in calculating the net after tax profits of the Company.

16.I. Use of proceeds is completely within the discretion of the general partner as set forth in Section 1.L.

16.E. There is no minimum escrow provision for the offering. Investment in this offering is nonrefundable. Failure of the Company to sell all of the securities in its offering could cause results to differ materially from those in the Company's disclosure documents, and/or a loss of the Undersigned's investment in the securities subscribed for hereby.

Unfettered discretion was provided to the general partner under the subscription agreement with respect to use of proceeds. Therefore assuming the truth of the arithmetic breakdown and characterizations of the OIP, any sloppy bookkeeping, and Mr. Fortenberry's alleged non-advisement of the 2 investors of the foregoing, all were immaterial (both for reasons of the impossibility of reliance on same in light of the practical and legally restricted nature of the securities, and the initial disclosures in the subscription agreement of unfettered discretion by Mr. Fortenberry in the use of proceeds).

IAA Conclusion

Mr. Fortenberry argues that the IAA and rules thereunder do not apply under the facts because he was not an investment advisor. If the IAA does not apply any alleged post-investment sales transgressions by Mr. Fortenberry pled in the OIP are not cognizable. Assuming the IAA applies, any alleged post-investment sales transgressions by Mr. Fortenberry were immaterial and hence not actionable by the Enforcement Division.

'33 & '34 ACTS

Text of Pertinent Provisions of '33 Act, '34 Act, and Rule Cited in OIP

'33 Act Sec. 77(a): Use of interstate commerce for purpose of fraud or deceit
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 78c (a)(78) [1] of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(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.

'34 Act Sec. 10(b): 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 . . . 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.

Rule 10b-5 Under '34 Act: Employment of manipulative and deceptive devices.
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.

Materiality Under the "33 and '34 Act

Materiality in general has already been discussed in the IAA section of this brief (pages 13 and 14). In the case of '33 Act violations, Mr. Fortenberry would have had to have failed to provide material information to those to whom he offered or sold Premier securities, or have been found to have provided false material information. The '34 Act (10b-5) is similar, except it only applies to sales (not offers), and a "scienter" (fraudulent intent) requirement is present. Scienter may either be in the form of willingness or recklessness (though various circuits have applied either a "should have known" or "must have known" standard in defining "recklessness"). See nonexclusively Aaron v. SEC, 446 US 680 (1980); Ernst and Ernst v. Hochfelder, 425 US 185 (1976); and Sanders v. John Nuveen, 554 F.2d 790 (7th Cir. 1977).

Alleged Provision of Materially False Information, and Alleged Omission of Material Information, to the 2 Premier Investors During Offer & Sale

1. Mr. Fortenberry allegedly failed to disclose previous 2004 cease and desist findings and orders against him from Texas and Pennsylvania securities agencies: In Par. 15 of the Premier subscription agreement both investors admitted they have "reviewed any and all information of public record, inclusive of official or reliable information posted on the internet, about the Company and the general partner John Fortenberry (Stanley Jonathan Fortenberry/Stanley J. Fortenberry), and that such information has not changed his mind with respect to an investment in the securities offered hereby.". Even if in light of this subscription agreement language a "sufficiently public" requirement still remains, Par. 14 of the OIP admits the Texas and Pennsylvania orders "are readily available on the internet." Both because investors represented they had made internet searches of Mr. Fortenberry, and because the OIP admits such searches would have revealed the 2004 Texas and Pennsylvania orders, Mr. Fortenberry cannot be found to have failed to have disclosed those orders.
2. Mr. Fortenberry allegedly used the first name "John" instead of his exact legal name to confuse and mislead investors: The problem with this allegation is Mr. Fortenberry included his exact legal name (Stanley Jonathan Fortenberry) in Par. 15 of the subscription agreement. No misrepresentation or misdirection occurred here.
3. Mr. Fortenberry allegedly failed to disclose a 1990 felony conviction, and 1992 and 1994 bankruptcy filings (both dismissed by the bankruptcy trustee): Under Commission guidelines like Regulation S-K, the disclosure period for these types of matters is 10 years. The Premier securities sales did not occur until 2010—more than 10 years after these events. Assuming

arguendo their materiality, the OIP admits in Par. 10 that these matters are contained in the Texas 2004 findings and order. Mr. Fortenberry cannot be found to have failed to disclose the conviction or bankruptcy filings, or to have been required to have disclosed them (each being in 2010 more than 10 years old).

Before discussing more alleged material omissions and misstatements during the offer and sale, additional subscription agreement language needs to be cited:

"1.A. The undersigned acknowledges that in consideration for his pre-formation and formation activities for the benefit of the Company John Fortenberry received hereby at the time of the Company's formation 100 Units of the Company, and was hereby appointed general partner of the Company."

"1. D After tax net income, net loss, and voting power of the Company shall be allocated as follows: 1. 50 percent to the general partner. 2. 50 percent to the limited partners, allocated according to their percentage of the total limited partnership capital accounts".

" 1. H The purpose of the Company is any lawful business purpose, with its primary though nonexclusive focus being to invest in the entertainment industry. Such investment may take the form of equity, debt, investment contracts, or any other investment form deemed by the general partner to be in the best interest of the Company."

"1.I. The general partner is hereby authorized to make the aforesaid investments in the entertainment industry in his sole discretion for the benefit of the Company. The general partner is also authorized to make investments outside of the entertainment industry in his sole discretion for the benefit of the Company. Said investments may but need not be in publicly traded securities."

"1.J. In the sole discretion of the general partner profits of the partnership may either be reinvested, or distributed to partners."

"1.L. The Undersigned acknowledges that without limitation a portion of the proceeds from the sale of Units of the Company, as well as profits from the Company's investments, shall be allocated to reasonable administrative expenses in connection with the Unit offering and the day to day affairs of the Company, including but not limited to salaries—inclusive of the general partner, office space, office equipment, travel, legal, accounting costs, and any other expense recognized by the Internal Revenue Code and regulations as a business deduction or credit. In addition to the foregoing the Undersigned also acknowledges that existing Unit holders, excluding the general partner, may receive finder fees pursuant to Section 20. Subject to generally accepted accounting principles and the Internal Revenue Code and regulations, the foregoing shall constitute business expenses of the Company, deductible from gross profits, in calculating the net after tax profits of the Company." "

15. <u>Access to Information</u>. The undersigned acknowledges he has been afforded an opportunity to examine and copy at the Company's expense all books, records, agreements and other documents relevant to the Company and this investment, and has been given an opportunity to ask questions and

receive answers from the officers and directors of the Company, this investment, and any other matters relevant and material to this investment. The undersigned has utilized the opportunity to his satisfaction to verify the accuracy and completeness of all the information he has received and to obtain any other relevant information which he may have sought and which may influence his investment decision. The undersigned is fully satisfied with the response to such questions he has asked and such responses for information he has made. THE UNDERSIGNED SPECIFICALLY REPRESENTS HIS PERSONAL RECEIPT AND REVIEW OF THE CURRENT COMPANY BUSINESS PLAN (collectively "DISCLOSURE DOCUMENTS"). The undersigned acknowledges he has reviewed any and all information of public record, inclusive of official or reliable information posted on the internet, about the Company and the general partner John Fortenberry (Stanley Jonathan Fortenberry/Stanley J. Fortenberry), and that such information has not changed his mind with respect to an investment in the securities offered hereby. The information in the disclosure documents as of the date thereof is subject to change, completion or amendment without notice. The Company makes no representation that there has been no change in the information set forth in the disclosure documents or the affairs of the Company since the date thereof. In the event of a conflict or inconsistency between the disclosure documents and this Agreement, the terms of this Agreement shall control and inconsistent or conflicting information shall be disregarded and of no effect. In the event of a conflict or inconsistency between oral or written information provided to the undersigned by the company or its agents and the disclosure documents, the disclosure documents shall control and inconsistent or conflicting information shall be disregarded and of no effect. Although the disclosure documents attempt to provide all "material" information pertaining to an investment in the Securities, the disclosure documents are only current as of the date thereof and under no circumstances does the Company imply that there has been no change in its affairs since the date thereof, or that the information contained therein is correct as of the date of this Agreement. The disclosure documents contain numerous forward looking statements made under the safe harbor provisions of the Private Securities Reform Act of 1995. Any such statements are subject to risks and uncertainties that could cause actual results to differ materially from those anticipated in such forward looking statements. The Company believes it has disclosed all underlying assumptions and identified all important factors that could cause actual results to differ, whether such disclosure has been directly made and/or through the context in which the statement has been made. Prospective investors are urged to exercise their right to receive additional information relative to forward looking statements."

16. Risk Factors, Additional Disclosures, Investor Representations: The Undersigned understands, acknowledges, represents and warrants the following:

A. This investment is speculative, involves a risk of loss by the Undersigned of the Undersigned's entire investment in the Company which the Undersigned is able to financially bear.
B. The Company is in the developmental stage and will likely operate at a loss for the foreseeable future.
C. Any projections and predictions that may have been made available to investors are based on estimates, assumptions and forecasts that may prove to be incorrect, and no assurance is given that actual results will correspond with the results contemplated by various projections.
D. The Undersigned is financially responsible, has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of this investment, is able to meet all obligations hereunder and acknowledges that this

investment will be long term and is by nature speculative. The Undersigned is capable of bearing the risks of this venture including, but not limited to, the possibility of complete loss of investment nonexclusively in light of the present lack of a public market for the Securities.

E. There is no minimum escrow provision for the offering. Investment in this offering is nonrefundable. Failure of the Company to sell all of the securities in its offering could cause results to differ materially from those in the Company's disclosure documents, and/or a loss of the Undersigned's investment in the securities subscribed for hereby.

F. The Undersigned shall indemnify and hold harmless (inclusive of attorney fees and costs) the Company, its principals, and agents from any misrepresentation or misstatement of facts or omission to represent or state facts made by the Undersigned herein.

G. Information pertaining to this offering and the Company is "confidential" and may only be reviewed by the Undersigned, his/her spouse, or financial advisor(s).

H. The activities and business plans of the Company are highly dependent upon the services, expertise, and relationships established and to be established by the General Partner. The loss of the general partner would materially harm the Company.

I. Use of proceeds is completely within the discretion of the general partner as set forth in Section 1.L.

J. Any representations or statements made by persons affiliated in any way with specific investments in which the general partner is contemplating an investment on behalf of the Company, including entities issuing or selling said investments, may not be relied upon by the Undersigned. Such persons and entities are not agents or promoters of the Company."

4. Mr. Fortenberry allegedly represented he would only be paid through the profitability of his "equity" in Premier, and not receive a salary or other personal remuneration: As discussed under the IAA section, and as cited in the subscription agreement above, Mr. Fortenberry disclosed his receipt of Premier equity for forming Premier and developing its business model, would receive his pro rata percentage of profits or losses, and also receive salary and other remuneration as general partner of Premier. No misrepresentations on this point were made. Whatever either investor recalls being verbally told by Mr. Fortenberry, such verbal statements

if made were to be disregarded if in contravention of the plain language of the subscription agreement.

5. Mr. Fortenberry allegedly misrepresented investors would receive a 12% ROI on Premier LP units, and allegedly misrepresented the profitability of Premier investments (e.g., "Company A"): Again any such verbal or written statement have to be construed in light of their being forward looking statements made under the safe harbor provisions of the Private Securities Reform Act of 1995 (cited in subscription agreement), and other subscription agreement language pertaining to the possibility of investors losing their entire investment. No firm promises were made regarding Premier's or Premier investment's profitability, and as such no misrepresentations in connection therewith were made.

6. Mr. Fortenberry misrepresented in the offer and sale of Premier securities he would keep accurate GAAP financial statements, and make timely tax filings: The evidence will show Mr. Fortenberry intended to prepare financial statements, make tax filings, etc. for Premier, but because of the commencement of the Enforcement Division's investigation of Premier was unable to do so (the investigation retarding Premier's ability to raise capital, to pay for an accountant to prepare financials and tax returns, etc.—see nonexclusively Page 43 of Mr. Fortenberry's Verified Answer). In any event as discussed under the IAA section the failure to do so was immaterial.

7. Mr. Fortenberry allegedly provided false "updates" to one investor ("Victim 2"): As these updates occurred after the sale of Premier shares (i.e., after the date of this investor's subscription agreement), such updates did not occur as part of the offer and sale of Premier

securities, and hence even if untrue are not cognizable under the '33 and '34 Acts. In any event as discussed under the IAA any false updates were immaterial.

8. Fortenberry allegedly utilized false information about a Premier investment ("Company A") in selling Premier securities without the consent of Company A: The evidence will show that Company A signed several agreements with Premier to enable Premier to invest in Company A. The documents and circumstances demonstrate Company A new Premier would be obtaining capital for Company A through selling Premier securities, then investing some of the proceeds in Company A (as well as other investments). Company A was at all times aware Premier utilized Company A information to sell Premier securities, and both explicitly and implicitly authorized this. Company A information presented to actual and prospective Premier investors, in light of the qualifying language of the Premier subscription agreement (see #5 supra.), was correct.

9. Mr. Fortenberry allegedly preyed on the "sick and the elderly": The OIP argues "Victim 2" (one on the installment payment plan) was not sophisticated, mentally deficient, or otherwise unsuitable for an investment of this type. However, as per Par. 3 of the subscription agreement, this investor (as the other one) represented he was "accredited" as per Reg. D, Rule 501. Under Rule 506 of Reg. D there is no sophistication requirement for accredited investors. The evidence at trial will prove this investor had at all relevant times and continues to hold an FAA commercial pilot license (issued January 2010—6 months prior to investment), that that the requirements of such a license do not allow for diminished mental or physical capacity, drug use, or mental illness. The allegations in Par. 35 – 37 of the OIP regarding the "weakness" of this investor and Mr. Fortenberry thereby "preying" upon this investor are therefore ludicrous. At the final hearing "Victim" 2 will probably be the fittest and most competent person in the room.

CONCLUSION

As discussed in detail above with respect to the matters raised in the OIP, Mr. Fortenberry's position is as follows:

1. The OIP is barred for reasons outlined by Mr. Fortenberry's "Jurisdictional Objections" in his Verified Answer (pages 8 – 17).
2. Mr. Fortenberry is entitled to a trial by jury at the final hearing in this matter.
3. Mr. Fortenberry requests the sequestration of witnesses at the final hearing.
4. Mr. Fortenberry objects to evidence outside the scope of the OIP, and in the event it is determined the Investment Advisor Act of 1940 ("IAA") is inapplicable to these proceedings (see below), further objects to any evidence of alleged misconduct after the offer and sale of Premier securities.
5. The Investment Advisor Act of 1940 ("IAA") and rule allegations, which seek to reach alleged post-investment sale conduct by Mr. Fortenberry, are inapplicable because Mr. Fortenberry was never an "investment advisor". Assuming Mr. Fortenberry was an investment advisor, Mr. Fortenberry did not violate the IAA. Assuming the OIP allegations re: violations of the IAA and rule thereunder are true, such conduct was immaterial and hence not actionable under the IAA. Where applicable Mr. Fortenberry lacked scienter.
6. <u>MOTION IN LIMINE</u>: Mr. Fortenberry hereby requests the ALJ to enter an order requiring, prior to the Division proffering testimony or exhibits pertaining to Mr. Fortenberry's alleged violations under the IAA (generally post-investment sale transgressions), the Division to make a prima facia case that Mr. Fortenberry was at all relevant times an "investment advisor". See investment advisor elements on pages 4 – 12 supra.

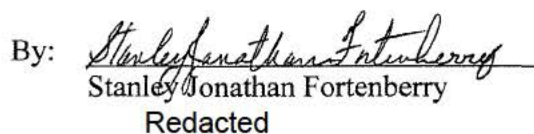
7. Mr. Fortenberry (under the Securities Act of 1933, The Securities and Exchange Act of 1934, and Rule 10b-5 under the '34 Act) did not make any material misrepresentations or omissions in the offer and sale of Premier securities to the 2 Premier investors. Even if he had, such alleged misconduct as set forth in the OIP was immaterial and hence not actionable. Where applicable Mr. Fortenberry lacked scienter.

What is particularly telling is that the OIP does not allege Mr. Fortenberry's sale of Premier securities did not fit under the SEC Reg. D Rule 506 registration exemption (as then presently constituted), or that Mr. Fortenberry engaged in general solicitation or advertising as then prohibited under Rule 506—the two most common reasons for enforcement proceedings in the case of private offerings. The Division's investigation began several years ago of an unrelated company (Breadstreet.com, Inc.), and then through the fishing of loosely connected "affiliates" changed its focus to Premier and Mr. Fortenberry. When it was found Premier had filed a timely Form D as required under Rule 506, and otherwise not engaged in any improper advertising for the offering, the enforcement staff was not satisfied but instead continued with an investigatory "proctology exam" of Mr. Fortenberry and Premier—even to the point of contacting and scaring away potential Premier investors (thereby ensuring Premier's failure)—see p. 43 of Mr. Fortenberry's Verified Answer. Determined to find some wrongdoing by Mr. Fortenberry, the staff issued a Wells notice orally on July 30, 2013, and then in writing on August 5, 2013. Mr. Fortenberry responded, but subsequent settlement discussions fell through. The staff was aware of the 180 deadline to commence proceedings under Dodd-Frank, and did not do so until 266 days after their written Wells notice (272 days after the oral Wells notice). The OIP was filed on April 28, 2014. The decision in Montford (Rel. No. 3829), where the Commissioners ruled in contravention of Dodd-Frank that the Wells notice deadlines were not binding

on the staff, came out on May 2, 2014 (On June 27, 2014 Montford filed his appeal in the DC Circuit—Case No. 14-1126). As outlined in Mr. Fortenberry's Verified Answer the OIP tracks verbatim the settlement documents the staff sent to Mr. Fortenberry previously—rendering incredible any assertion by the staff that the matter was "sufficiently complex' to warrant an extension of the original 180 days. It has yet to be determined (and may never be) whether the staff made the appropriate notification to obtain an extension beyond the original 180 days. Undoubtedly the staff decided to take a "second bite at the apple" when it discovered the Montford ruling was imminent. All of this evidences the staff having an adverse agenda with respect to Mr. Fortenberry. The costs to Mr. Fortenberry (from investigation through this matter, and possibly for further administrative or judicial appeals) have been staggering. The cost to the taxpayers of feeding the staff's insatiable appetite for Mr. Fortenberry's blood, there being only 2 Premier investors and $300,000 in investment proceeds, is grossly disproportionate. Mr. Fortenberry wishes all this to be pointed out to place the matter in context and thereby argue against the credibility of the matters raised against him in the OIP.

Respectfully Submitted,

STANLEY JONATHAN FORTENBERRY,
Respondent,

By: 
Stanley Jonathan Fortenberry
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Stanley Jonathan Fortenberry