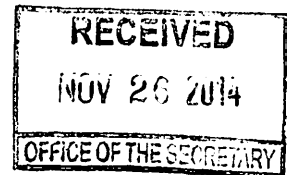


UNITED STATES OF
AMERICA BEFORE THE
SECURITIES AND EXCHANGE
COMMISSION Washington, D.C.

HARD COPY

ADMINISTRATIVE
PROCEEDING File No. 3-15858

In the Matter of :
:
STANLEY JONATHAN :
FORTENBERRY (A/K/A S.J. :
FORTENBERRY, JOHN :
FORTENBERRY, AND :
JOHNNY FORTENBERRY :



POST-HEARING BRIEF OF STANLEY JONATHAN FORTENBERRY

COMES NOW STANLEY JONATHAN FORTENBERRY and files this Post-Hearing Brief and would respectfully show the Court as follows:

1. **FAILURE TO COMPLY WITH 15 USC 78d-5(a)** This proceeding should be dismissed because Respondent has proved his affirmative defense of limitations. The Order Instituting Proceedings ("OIP") was filed more than 180 days after the enforcement division provided Respondent a Wells Notice. The case was not sufficiently complex to justify an extension. This failure violates 15 USC 78d-5(a).

Timeline of Case

The timeline is not disputed:

| Date | Action |
|---------------------|--|
| September 24, 2010: | Order Directing Private Investigation and Designating Officers to Take Testimony (<i>In The Matter of Breadstreet.com, Inc.</i> , H0 11450) |
| July 30, 2013: | Oral Wells Notice provided to Respondent (nearly 3 years after commencement of the formal investigation). |
| August 5, 2013: | Written Wells Notice provided to Respondent. |
| August 29, 2013: | Respondent's Wells Submission/Response to Wells Notice |
| November 22, 2013: | Enforcement division sends proposed draft Complaint for filing in US Dist. Ct., to the Respondent. |
| April 28, 2014: | OIP filing date. |
| April 29, 2014: | OIP Service Date. |

¹ 15 U.S.C. 78d-5. Deadline for completing enforcement investigations and compliance examinations and inspections (a) Enforcement investigations (1) In general. Not later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action. (2) Exceptions for certain complex actions. Notwithstanding paragraph (1), if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period. If after the additional 180-day period the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the additional 180-day period, the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to and receiving approval of the Commission, extend such deadline as needed for one or more additional successive 180-day periods.

Petitioner dragged the proceedings on for 266 days after the Wells Notice and missed the filing deadline for the OIP by 86 days, in violation of the congressional mandate to either file an OIP or give the Director a notice of "intent not to file." Petitioner neither complied with the jurisdictional bar or provided any reasonable excuse for its failure to do so, and now should not be heard that the mandatory language of the law somehow grants discretion to the commission staff to decide whether it will comply with the 180 day deadline. The April 28, 2014 OPI was a mirror of the November 22, 2013 draft federal court complaint. The "Wells notice" was preceded by a nearly three year investigation of the Respondent, and Commission staff controlled "when the clock started" by determining in its sole discretion if and when to send the Respondent the Wells notice. Nothing in the proceedings require that the case be classified as "sufficiently complex" to warrant an extension, and even if one was made, it would be patently unwarranted.

Adverse Decision in Montford

Respondent is aware of the Commissioners' May 2, 2014 adverse ruling in *Montford Company* (Ret. No. 3829), and other cases cited therein, essentially relying upon *Brock v. Pierce County*, 475 U.S. 253 (1985). Respondent is mindful that, absent specified consequences, deadlines in statutes and other rules to complete legal actions "are at best precatory rather than mandatory," and are read "as a spur to prompt action, not as a bar to tardy completion." *Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1328, 1377 (Fed. Cir. 2002). *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 172 (2003).

Plain Meaning

However, where consequences are specified, as they are in 15 USC 78d-5(a) (Sec. 929U of the Dodd-Frank Act), it is not within the Court's power to change the plain meaning of the statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms"), quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

The "plain meaning" of 15 USC 78d-5(a) (Sec. 929U of the Dodd-Frank Act) is that the SEC must either (1) file an action, OR, (2) notify the Commission that it is not filing an action. Where the language is couched in terms of performing an affirmative act or in the alternative electing to not file, then the meaning is plain. If "proceed" is not elected, then Petitioner has made an election through its inaction to "stop." A failure to timely proceed is essentially an election of termination or dismissal of the proceedings. The statute is not ambiguous and none of the Brock issues are implicated. The failure to observe the deadline has consequences—either file or give notice of intent not to file. No jurisdiction to proceed with this case exists. *Bustamonte v. Napolitano*, 582 F.3d 403 (2d Cir. 2009).

Montford/Dodd-Frank is Different than Brock

Even if the statute is construed to be ambiguous, then Brock and other cases relied on by the SEC in Montford and in this case are not controlling for a number of reasons.

First, the word “shall” that was used in the statute construed in Brock –without nothing more— was interpreted to mean a “spur to action,” rather than a part of a statute of limitations.

Second, because the Court found the statute to be ambiguous and looked at the legislative history, the legislative history did not support a finding that the statute was a limitations statute.

Third, there were “less drastic remedies” available to the aggrieved parties than dismissal of the case.

Fourth, the law’s mandate in the statute construed in Brock was to “resolve” complaints--- more burdensome than a mere requirement to “file” an action.

Finally, it was unclear if the statute in Brock, which had a “resolve” mandate, was designed to protect complainants, or those accused of a violation.

Dodd-Frank and CETA Legislative Histories Are Different

The corroborating legislative history of *Dodd-Frank* states as follows: “Sec. 209. Deadline for completing examinations, inspections, and enforcement actions. This section generally requires the SEC to complete enforcement investigations within 180 days after staff provides a written Wells notice to any person. (Emphasis added). The section contains exceptions for complex actions to permit 180-day extensions after notice to the Chairman for the initial extension and after notice to and approval by the Commission for subsequent sections.” *Dec. 16, 2010 Report of the House Committee on Financial Services (Rept. 111-687) with respect to the Investor Protection Act of 2009 (p. 78).* Nothing in the dissenting section of the House report mentioned anything to the

contrary. Respondent's counsel was unable to find any further legislative history beyond the House report.

Less Drastic Remedies Are Not Available

Brock at 253 - 254 and footnote seven argued the availability of "less drastic remedies" versus compelling an agency to dismiss an untimely action, that is. One less drastic remedy that was suggested was the filing by an aggrieved party in a U.S. District Court under the Administrative Procedures Act (5 U.S.C. 701-706, the "APA") to compel agency dismissal. However, even at that time such remedies were not available in light of the "exhaustion of administrative remedies" doctrine. See nonexclusively *CETA v. City of New York*, 617 F.2d 926 (1980). Since Brock courts have increasingly imposed the "exhaustion of administrative remedies" requirement as a condition precedent to invoking the APA, this has effectively removed the "less drastic remedy" referenced in Brock. In general, "a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir.2003) (citation and internal quotation marks omitted). "This requirement serves numerous purposes, including protecting the authority of administrative agencies, limiting interference in agency affairs, and promoting judicial efficiency by resolving potential issues and developing the factual record. *Id.* Where such exhaustion requirements are the creatures of statute, they are mandatory; where they are judicially imposed, they usually are discretionary and may therefore be subject to exceptions. *Id.* at 56-57."

The same is true with respect to SEC enforcement proceedings. See nonexclusively

17 CFR 201.430(c). There is no “less drastic remedy” other than dismissal available for the failure of the enforcement staff to comply with 15 USC 78d-5(a). This factor therefore weighs in favor of dismissal for late filed actions.

CETA Involved a Burdensome “Resolve Complaints” Requirement

Whereas *Dodd-Frank* merely requires the “filing” of an OIP, Brock at 261 stated, “Section 106(b) by contrast does not merely command the Secretary to file a complaint within the specified time, but requires him to resolve the dispute within that time. This is a more substantial risk than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control. There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline.” This factor weighs in favor of construing *Dodd-Frank* as a statute of limitations, not a mere guideline.

CETA was ambiguous as to whether it protected claimants or those accused of violations; Dodd-Frank is clearly intended to protect those who are the subject of an investigation

The CETA mandate to “resolve” could be interpreted to be for the benefit of those complaining of CETA violations (to provide them speedy relief), or to protect those being accused of CETA violations (to provide them prompt resolution and repose). By contrast, *Dodd-Frank* cannot reasonably be interpreted as a provision designed to protect both the commission and the targets of the commission's actions. It clearly was designed to protect those accused of securities law violations. The filing deadlines are

clearly designed to benefit those who are the subject of an investigation. On this point it is noteworthy that under CETA the clock begins running when the agency receives a complaint (an event the agency does not control). However, under the Commission's investigation and Wells process, the enforcement staff determines if and when to send out a Wells Notice (an event the agency controls). Under *Dodd-Frank* the agency starts the clock, not a third party as in CETA. This important distinction weighs in favor of *Dodd-Frank* being designed for the benefit of Respondent.

Alleged Violations Securities Act of 1933 and 1934

In the case of 1933 Act violations, the Petitioner was required to prove that Respondent failed to provide material information to those to whom he offered or sold Premier securities, or that he provided false material information regarding those securities. The SEC has wholly failed to prove that Mr. Fortenberry withheld or failed to provide material information, nor has Petitioner proved that he provided any false material information.


"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, 49 (1976). See also *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

The "Terms and Conditions" of the Premier web site (premier investment

fund.com) and initial written communications to prospective investors (not commenced through the web-site) contained in pertinent part the following language:

"Participation in the Company's offering is strictly limited those having a 30 day substantive preexisting relationship with the Company, its agents, or those in privity of contract with the Company as of March 27, 2010 and residing in, citizens of, and domiciles of the following countries: US accredited investors as defined by SEC Reg. D Rule 501 collectively "QUALIFIED INVESTORS". If you are not a qualified investor this communication is neither an offer to sell the Company's securities, nor the solicitation of an offer to buy the Company's securities, and you must leave this web-page or delete this message immediately. You agree and understand that by clicking any of the e-mail and/or URL links in this communication or contacting us that you are thereby requesting Company information and representing yourself to be a qualified investor. If you are not a qualified investor, you are not authorized to request Company information. By requesting Company information you further consent to the Company contacting you about the offering within the next year, and will keep this promotion and the offering confidential meaning it may only be reviewed by you, your spouse, or financial advisor(s). By clicking any of the links in this communication you represent you are financially responsible, have such knowledge and experience in financial and business matters that you are capable of evaluating the merits and risks of this investment, you acknowledges that this investment will be long term and is by nature speculative, and that you are 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. Statements made in this communication and in the Company's disclosure and investment documents contain forward looking statements under the safe harbor provisions of the US Securities and Reform Act of 1995, which are subject to assumptions and factors identified and discussed in the Company's disclosure and investment documents, and the further terms and conditions of the Company's subscription agreement."

The above, and all oral and written communications made by Mr. Fortenberry to prospective purchasers of Premier Investment Fund limited partnership units, were subject to the terms and conditions of the Premier Subscription and Limited Partnership Agreement which provides in pertinent part in Section 15 (Access to Information):



“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."

The Subscription and Limited Partnership Agreement took precedence over any inconsistent or contrary statements made in disclosure documents and other oral or written information provided to prospective investors; similarly any inconsistent or

contrary oral statements were superseded by non-agreement written materials. All public information about Premier and Mr. Fortenberry was incorporated by reference. Each investor had access to publicly known information about Mr. Fortenberry by doing a simple search with an internet search engine. Petitioner makes much of prior Cease and Desist orders in state proceedings. These proceedings are all public records, available to all who cared to look. All publicly available information was incorporated by reference in the subscription agreement. Finally Premier and Mr. Fortenberry accorded to prospective investors the opportunity to request and review any further information they may have deemed important to making an investment in Premier.

In rare instances where further information was requested, never was such a request denied. The "total mix" of information made available by Mr. Fortenberry and Premier to actual and prospective investors in Premier was all information. Accordingly under the materiality jurisprudence cited supra., there is no factual basis supportive that Mr. Fortenberry or Premier did not provide material information pertaining to an investment in Premier securities to prospective or actual investors in Premier. There was an "open book policy" regarding the investment process, and there was no evidence of "scienter" regarding the non-provision of material information.

Issues Regarding Materially False Information -- Compensation

With regard to false representations regarding compensation, Section 1.L of the

Subscription and Limited Partnership Agreement expressly stated that "without limitation" a portion of the sales proceeds would be used to pay administrative expenses, salaries and "day to day affairs of the Company." Section 16.1 said that Use of proceeds is completely within the discretion of the general partner as set forth in Section 1.1. Section 16.E. stated that "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."

As discussed *supra.*, the Subscription and Limited Partnership Agreement takes precedence over any other written or oral communications made to actual or prospective investors. That document provides for Mr. Fortenberry to be given a salary as general partner, for the payment of non-investment operating expenses, etc., and that such expenditures are within the sole discretion of the general partner. No specific promises were made to prospective or actual investors regarding Mr. Fortenberry's remuneration as general partner, and as such any remuneration he received as general partner is not a violation of any promise to actual or prospective investors. Further common sense dictates that general operating expenses and salaries take priority over investments to be made in Premier (i.e. without payment of operating expenses the Company would cease to exist and further investment activities would then be impossible). Investors acknowledged such in Sec. 16.E. with respect to the

possibility of undercapitalization and the potential loss of investment.

Equally pertinent is that Premier would not have been undercapitalized but for the SEC having commenced its investigation of Premier. Potential investors, after being contacted by Petitioner, withdrew their support from the business, creating poor liquidity and ability to fund operations. The payments made by Premier to Mr. Fortenberry may either be properly classified as either remuneration or salary to Mr. Fortenberry as general partner, reimbursement to Mr. Fortenberry of expenses he incurred and/or paid for on behalf of Premier, or expenses properly attributable to Premier. While Respondent could have used better judgment in the expenditure of some of the funds, this does not rise to the level of a false representation or a violation of the Premier Subscription and Limited Partnership Agreement.

Reports to Limited Partners

The allegation that Respondent failed in his reporting duties appears to be based on the following provisions of the Subscription and Limited Partnership Agreement:

"1.F. 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....

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."

With respect to 1.F., there was no deadline for the preparation of books and records for Premier. Also 1.F does not require Premier's books and records to be provided to its investors, so tardiness in preparing those, tax returns, etc. was not material to their investment in Premier. With respect to 1.N., investors acknowledged and in fact did receive information at the time of their investment as to the then investments actually made or contemplated by Premier, primarily the investment in Halsey Management Company, LLC. With respect to annual disclosures to be made before January 31 of each year, no specific means of communicating this information is required (e.g., in writing). Premier was formed in 2010. The few investors it had in January 2011 were periodically updated by Mr. Fortenberry----primarily orally----as to the progress and status of Premier---up to and including January 2011. No significant change had occurred in the status of Premier, or its investments, from Premier's formation through January 2011-and investors were so told. After Mr. Fortenberry became aware of the staff's investigation of Premier in March 2011, Mr. Fortenberry so advised the investors. Mr. Fortenberry fulfilled his 1.N. update obligations to Premier investors, and in no case did Mr. Fortenberry ever intend to violate Sec. 1.N. of the Subscription and Limited Partnership Agreement in procuring Premier investors. Finally assuming *arguendo* a violation of Sec. 1.F. or 1.N. of the Subscription and Limited Partnership Agreement, in addition to any such violation not being intentional, a fact finder should find such a misrepresentation (in light of the general partner having sole discretion with respect to investments) was immaterial. Reporting to investors

was advisory only, and did not provide them with any decision making power with respect to their ownership of Premier limited partnership units. Prospective investors were told this in the Subscription and Limited Partnership Agreement) prior to purchasing Premier securities. As such any broken promises after fact regarding reports, books and records, etc. would not have been reasonably relied upon by prospective investors----and hence not a material violation of applicable law.

Violation of Investment Advisors Act

Mr. Fortenberry had sole discretion in making Premier Investments. He was not an "investment advisor." See *Wang v. Gordon*, 715 F.2d 1187 (7th Cir. 1983) (general partner had sole discretion with respect to buying & selling investments and was not deemed an investment advisor). As Respondent had sole discretion in the making of Premier investments, and as these decisions were not to be made by the limited partners, he was not providing "advice" regarding investments to Premier limited partners and thus was not an "investment advisor." Rather than advising or obtaining the consent of limited partners as to the advisability of specific investments to be made by Premier, Mr. Fortenberry was to merely inform the limited partners of what investment he had determined Premier to make and the status of those investments, among other things. Not being an investment advisor, the provisions of the Investment Advisors Act, and the regulations thereunder, are inapplicable to Mr. Fortenberry.

The alleged failure to provide material information to Premier limited partners, or the allegation that materially false information was made to Premier limited partners (and/or to Premier itself), all involve questions of materiality. Assuming *arguendo*

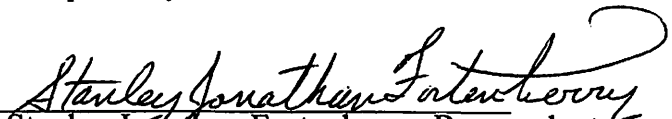
the Investment Advisors Act is applicable to Mr. Fortenberry, then Respondent adopts the same legal argument regarding materiality, discussed earlier. More important, it appears that a "scienter" requirement is applicable to any Investment Advisors Act violations, and Petitioner and the agency have wholly failed to prove intent to defraud, deceive or manipulate by Respondent.

CONCLUSION

For the foregoing reasons, Respondent Stanley Jonathan Fortenberry respectfully asks that this Court to dismiss this proceeding for the failure to meet the deadline in 15 USC 78d-5(a) (Sec. 929U of the Dodd-Frank Act), and further asks the Court to enter findings of fact and conclusions of law that (1) he did not fail to provide material information, (2) he did not provide false material information, and (3) he did not violate any of the securities laws or regulations alleged by Petitioner in this proceeding, and for such other and further relief as may be just and equitable.

Dated: November 21, 2014

Respectfully submitted,


Stanley Jonathan Fortenberry, Respondent

Redacted



CERTIFICATE OF FILING AND SERVICE




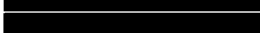

The undersigned hereby certifies that he served the foregoing Post-Hearing Brief of Stanley Jonathan Fortenberry on the 21st day of November, 2014 on the following:

Securities and Exchange
Commission's Secretary
100 F Street NE Mail Stop 1090
Washington, DC 20549
(Original & 3 copies) Via US First Class Mail, Postage Prepaid

Stephan J. Schlegelmilch, Attorney
Securities and Exchange Commission
100 F Street NE Mail Stop 1090
Washington, DC 20549
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James E. Grimes
Administrative Law Judge
100 F Street NE Mail Stop 1090
Washington, DC 20549
Copy Via US First Class Mail, Postage Prepaid

Dated: November 21, 2014


Stanley Jonathan Fortenberry, Respondent





STANLEY JONATHAN FORTENBERRY

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Redacted

Nov. 21, 2014

Stephan J. Schlegelmilch, Attorney
Securities and Exchange Commission
100 F Street NE Mail Stop 1090
Washington, DC 20549



Re: Administrative Proceeding File No. 3-15858, *In the Matter of
Jonathan Stanley Fortenberry*

I enclose

1. Post-Hearing Brief of Stanley Jonathan Fortenberry
2. List of Exhibits of Stanley Jonathan Fortenberry

Thanking you for your kind attention, I am,

Very Truly Yours,

A handwritten signature in blue ink that reads "John Fortenberry". The signature is fluid and cursive.

John Fortenberry